MIIA Risk Management

Legal Alert
The Dover Amendment

Municipal officials involved in local zoning and land use planning should keep in mind the provisions of a Massachusetts statute commonly known as the Dover Amendment. M.G.L. c. 40A, § 3. Originally adopted in 1950, the statute mandates that proposed religious and educational land uses be given more favorable treatment than other proposed uses (such as residential, commercial or industrial) under local zoning ordinances and by-laws. The failure of a city or town to accord such favorable treatment may lead to protracted (and expensive) litigation and, in some cases, allegations of unlawful discrimination.

If an owner or developer believes its project is entitled to Dover Amendment protection, its first step is to make a two-part showing to the local building inspector. First, the applicant must demonstrate that the proposed use of the property is for "religious" or "educational" purposes. When it comes to houses of worship or classrooms, this showing will be relatively straightforward. When it comes to a parking garage or half-way house, however, the purpose of the proposed use may not be so easily discerned. In less obvious cases, the building inspector may wish to consult with municipal counsel. Second, the applicant must demonstrate that the proposed use of the property for "religious" or "educational" purposes is not a mere ancillary use but, rather, the dominant or primary one. Again, such a showing may not be immediately evident in all cases.

If the building inspector determines (either with or without legal input) that the applicant has satisfied the requisite two-part showing, then the Dover Amendment applies, and the only zoning ordinances or by-laws that a city or town may enforce against the proposed project are reasonable regulations regarding the bulk and height of structures, yard size, lot area, setbacks, open space, parking and building coverage requirements. Other zoning regulations regarding, for example, density, screening, traffic and signage, are not enforceable as against a Dover-protected project.

In addition, any regulation of the bulk and height of structures, yard size, lot area, etc. (i.e., the permissible subjects for regulating protected uses) must be "reasonable." What a court considers reasonable will depend on the facts in each particular case. While practical nullification of a proposed religious or educational use will likely fail, cities and towns may still apply requirements that are related to legitimate municipal concerns and which bear a rational relationship to those concerns. Notably, the burden will be on the applicant to prove that the regulation of its proposed religious or educational use is unreasonable.

If the building inspector determines that a proposed use is not protected under the Dover Amendment, the applicant may appeal this decision to the local zoning board of appeals within 30 days. M.G.L. c. 40A, §§ 8 & 15. If the ZBA affirms the decision of the building inspector, the applicant may take a further appeal by filing an action in the Land Court, Superior Court or Housing Court within 20 days. M.G.L. c. 40A, § 17.

Finally, while the Dover Amendment represents a firm thumb-on-the-scale for protected uses, it does not apply to non-zoning regulations concerning public health, safety or the environment, such as Board of Health regulations, the State Building Code, the State Plumbing Code, or state or local wetlands protections. Such regulations are still enforceable regardless of an applicant's proposed religious or educational use.