

TOWN OF READING

REQUEST FOR CERTIFIED ABUTTERS LIST

SUBJECT PROPERTY:

ADDRESS: 186-190 Summer Ave., Reading, MA

Assessors' Map Number: 15 Lot Number: 294-296

APPLICANT/AGENT:

Name: Kenneth N. Margolin, Attorney for Applicant

Address: 246 Walnut Street, Suite 101, Newton, MA 02460

Telephone: 617-641-9600 Email: margolin@marginlaw.com

Board or Commission for which this request is made (check all that are applicable):

Zoning Board of Appeals:

- Variance
- Special Permit
- Appeal

Community Planning and Development Commission:

- Site Plan Review
- Special Permit
- Subdivision

Conservation Commission:

- Request for Determination
- Abbreviated Notice of Resource Area Delineation
- Notice of Intent
- <sup>Reading</sup> West Street Historic District Commission
- Board of Health
- Other: \_\_\_\_\_

Applicant/Agent Signature: Kenneth N. Margolin Date: \_\_\_\_\_  
Attorney for Applicant

The Assessors' office may require up to three weeks in order to process and approve this request.

Authorized Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
Department of Community Services

**LIST OF DOCUMENTS FOR THE  
TOWN OF READING HISTORIC DISTRICT COMMISSION**

Seven (7) copies each of the following:

1. Application for a Certificate of Non-Applicability, Appropriateness, Hardship
2. Letter of Criterion counsel, Kenneth N. Margolin to HDC Chair, Everett Blodgett, dated August 20, 2015, introducing and summarizing Criterion's application
3. Affidavit of Seller authorizing Robert F. Littleton, Jr., on behalf of Criterion Child Enrichment, Inc. ("Criterion"), to seek all necessary approvals from the HDC
4. Statement of Existing Conditions; Materials List
5. Architect Drawings consisting of 12 pages, prepared by DHK Architects, Boston, MA:

A-00: Existing Site Plan

A-01: South & West Elevations

A-02: North & East Elevations

A-03: Existing Elevation Images

A-04: Existing Elevation Images

A-05: Existing Elevation Images

A-06: Basement Floor Plan

A-07: First Floor Plan

A-08: Second Floor Plan

A-09: Third Floor Plan

A-10: Cupola & Roof Plan

**NB: To the extent that the architect drawings contain details not within the jurisdiction of the HDC, they are presented for informational purposes only. Criterion does not waive any rights nor grant any authority not set forth in applicable statutes, regulations or appellate case law.**

6. Engineering plans, consisting of 3 pages, prepared by Sullivan Engineering Group, LLC, Woburn, MA:

Existing Conditions

Site Plan

Grading Plan

**NB: To the extent that the engineering plans contain details not within the jurisdiction of the HDC, they are presented for informational purposes only. Criterion does not waive any rights nor grant any authority not set forth in applicable statutes, regulations or appellate case law.**

7. Memorandum of Law by Criterion's counsel, regarding the Parker Middle School driveway as not with the definition of "Public Way"
8. Opinion of Reading Town Counsel filed in Criterion's prior application, regarding the applicability of the Dover Amendment, *MGL c. 40A, §3* and the Americans with Disabilities Act to Criterion's project
9. Affidavit of Robert F. Littleton in support of the applicability of the Americans with Disabilities Act to Criterion's project
10. Memorandum of Law by Criterion's counsel, regarding the applicability of the ADA to Criterion's project

# West Street Historic District Commission



## Application for Certificate (Read instructions before completing form)

### Certificate Requested:

- Appropriateness* – for work described herein
- Hardship* – financial or otherwise described herein and does not conflict substantially with the intent and purposes of the bylaw
- Non-Applicability* – for the reason(s) described below. See guidelines for further info.

### General Information:

Property Address 186-190 Summer Ave, Reading, MA  
Date built (age) 1853  
Owner(s) Debra A. Shontz - Stockpole  
Tel (h) 781-944-3113 (w) (fax) \_\_\_\_\_ Email dshontz@comcast.net  
Owner's Address 186 Summer Ave, Reading, MA

Applicant (if not Owner) Robert F. Littleton, Jr. President, Citation Child Enrichment, Inc.  
Tel (h) \_\_\_\_\_ (w) 508-478-2631 (fax) \_\_\_\_\_ Email rlittleton@aol.com  
Applicant's Address Citation 321 Fortune Blvd, Malden, MA 02157  
Applicant's Relationship to Owner Authorized Agent, per Owner's Affidavit

Contractor \_\_\_\_\_  
Tel (h) \_\_\_\_\_ (w) \_\_\_\_\_ (fax) \_\_\_\_\_ Email \_\_\_\_\_

Architect Mickey Krockmalnic AIA DHK Architects  
Tel (h) \_\_\_\_\_ (w) 617-267-6408 (fax) \_\_\_\_\_ Email m.krockmalnic@dhkinc.com

Dates of Anticipated Work: Start \_\_\_\_\_ Completion \_\_\_\_\_

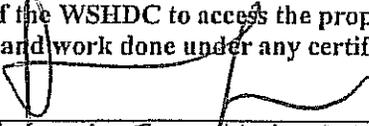
Description of Proposed Work: (attach additional pages as necessary) Please include a description of how the proposed work (if a change or addition) is historically and architecturally compatible with the building and the District as a whole.

Renovation, Repair + Maintenance of Historic House Existing addition and Historic Barn with no (ZERO) change in footprint of structures, and design's changes in exterior ~~features~~ architectural features visible from a public way

**Required Documentation to be Attached:** (see attached instructions) Failure to provide sufficient documentation could delay action upon application.

- Plans/scale drawings
- Existing and proposed site or plot plans
- Existing conditions photographs of structure and areas affected
- Material samples and/or product literature
- Other *Memoranda of Counselor's Counsel; Opinion letter of Town Counsel; request for certified Abutters List*

I have read the attached instructions and, to the best of my knowledge, the information contained in this application is accurate and complete. I also give permission for members of the WSHDC to access the property for the purpose of reviewing this application and work done under any certificate issued to me.

Owners Signature(s): 

Date: *08/20/2015 Robert F. Littleton, Jr., as authorized by Duhal*

**PLEASE SUBMIT:**

- SEVEN (7) COPIES OF COMPLETED APPLICATION

- ONE COPY OF REQUEST FOR CERTIFIED ABUTTERS LIST

**TO THE TOWN PLANNER'S OFFICE, READING TOWN HALL.**

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**FOR COMMISSION USE ONLY**

Application Number: \_\_\_\_\_

Date Received: \_\_\_\_\_

Hearing Date: \_\_\_\_\_

LAW OFFICE OF KENNETH N. MARGOLIN, P.C.

246 WALNUT STREET, SUITE 101  
NEWTON, MASSACHUSETTS 02460

(617) 641-9600

FAX: (617) 641-9606

WEB ADDRESS: [www.margolinlaw.com](http://www.margolinlaw.com) EMAIL: [margolin@margolinlaw.com](mailto:margolin@margolinlaw.com)

August 20, 2015

Everett Blodgett, Chairman  
Town of Reading Historic District Commission  
16 Lowell Street  
Reading, MA 01867

Re: Criterion Child Enrichment, Inc./186-190 Summer Avenue

Dear Mr. Blodgett:

Criterion Child Enrichment, Inc. ("Criterion") submits this letter with its new application for its Early Intervention program to operate at 186-190 Summer Avenue, Reading, to summarize the minor exterior visual changes to be made with the new project. Complete details are contained in the architectural and engineering drawings submitted with the application.

During the Historic District Commission's hearings on Criterion's first application, including its modification which reduced the size of the proposed new addition to the existing historic house, HDC members expressed grave concern over the expanded footprint created by Criterion's proposal. Understanding that the Commission was unlikely to approve any significant change in the footprint of the structures on the property, Criterion withdrew its application after the HDC denied its application for a Certificate of Appropriateness, and before a hearing on its application for a Certificate of Hardship and Americans with Disabilities Act issues. Criterion reserved its right to file a new application, which it has now done.

With its new application, Criterion has heard and responded to all of the HDC's lawful concerns. By changing interior design in the historic house and barn (interior design not being within the HDC's jurisdiction), and utilizing an underground connector between the two structures, Criterion's new application results in no (zero) change in the footprint of the two existing structures, and visual changes that are minimal, improve currently existing unsightly holes or deteriorated sections of the existing structures – even those

small changes and improvements visible only from the Parker Middle School driveway.<sup>1</sup> The visible exterior changes are described below – the complete project is visible in the plans submitted with Criterion's application, and will be described at the Hearing to be scheduled by the HDC:

1. On the East facade of the existing non-historic addition to the historic house, a new entry door will be placed above where there is currently missing siding and rotted wood visible. The new entrance door will not be visible from Summer Avenue or Temple Street, and may be visible from the school driveway.
2. New earth grading will make the currently exposed wood board-covered foundation wall of the existing addition to the historic house, no longer visible. Four exterior HVAC units will be placed along that East facade of the existing addition, and will not be visible from any street or from the school driveway.
3. The hole in the East foundation wall of the existing addition to the house, currently visible from the school driveway, will be made invisible by new earth grading.
4. At the basement level of the barn, a new exit door and two new windows will be placed, all architecturally compatible with existing features. They may be visible from the school driveway, but will not be visible from Summer Avenue or Temple Street.
5. The currently existing large rectangular hole, open to the weather, in the historic barn, will be filled in. The filling in of the hole will be visible from the school driveway to the same extent the existing hole is visible.
6. On the East facade of the barn where there now exists a window frame covered with plywood and TYPAR sheet, a new window will be placed, matching the existing window. The new window will be visible from the school driveway to the same extent that the plywood/TYPAR covered window frame is visible.

All other changes, which are set forth in the plans filed with Criterion's application, and which can be further discussed at the HDC hearing, are either invisible from any public way and invisible from the Middle School driveway, or involve repair and maintenance or replacing rotted or missing exterior elements of the house or barn – any such repair, maintenance or replacement will maintain the existing exterior architectural features.

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<sup>1</sup> It is Criterion's position that the Parker Middle School driveway cannot be considered a "Public Way," which would make all the modest improvements and changes visible from the school driveway, irrelevant to the HDC's consideration.

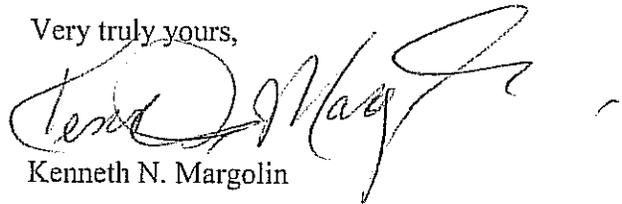
LAW OFFICE OF KENNETH N. MARGOLIN, P.C.

August 18, 2015

Page 3 of 3

We would appreciate the opportunity to have a pre-hearing meeting with the HDC before the hearing so that we can review the project and see if there are any questions or concerns. The changes to the exterior of the existing structures visible from the public way, are so minimal, particularly if Town Counsel and the Commission agree that the Parker Middle School driveway is not a "public way," that a Finding of Non-Applicability would be appropriate. If the Commission determines that it does have jurisdiction, we would expect, after hearing, a prompt approval of Criterion's application for a Certificate of Appropriateness.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Kenneth N. Margolin', written over a faint, larger version of the same signature.

Kenneth N. Margolin

KNM/JF

Cc: J. Raymond Miyares, Esq. (email only)

Affidavit as to Purchase and Sales Agreement

I, DEBRA A. SHONTZ-STACKPOLE ("Seller"), being duly sworn, do hereby depose and say:

1. I am an adult and the owner of property at 186-190 Summer Avenue, Reading, Massachusetts as described in a deed recorded at the Middlesex Registry of Deeds 25168, Page 44 (hereinafter "Property").
2. I have entered into a duly executed and binding Purchase and Sales Agreement to sell my Property to CRITERION CHILD ENRICHMENT, INC. ("Buyer").
3. That this Affidavit is prepared and submitted to the Town of Reading in support of applications of the Buyer for any and all permits and approvals sought for use of the Property as proposed by the Buyer, including but not limited to the application to the Town of Reading Historic District Commission.
4. Specifically, I authorize Robert Littleton Jr. acting for the Buyer to serve as my agent for processing the petition for approval in these proceedings.

Signed under the penalties of perjury this 12th day of August, 2015.

Debra A. Shontz-Stackpole 8/12/15  
DEBRA A. SHONTZ-STACKPOLE

Shelby Haggart  
SHELBY HAGGART, witness

Town of Reading Historic District Commission  
Application of Criterion Child Enrichment, Inc.  
186-190 Summer Avenue

STATEMENT OF EXISTING CONDITIONS  
August 18, 2015

Historic House

The historic house and existing non-historic addition are structurally sound. The house and existing addition are in need of extensive exterior repair, renovation, painting, and replacement of wood trim, siding, flashing, and other portions of the exterior. Repair and replacement, as needed, of the slate roof shingles will be required. The full extent of needed replacement and repair will not be known until work begins.

Lead paint has been found in the exterior materials of the house and existing addition, and remediation will be done in accordance with applicable law. Also incorporated into this Statement of Existing Conditions are the plans submitted by DHK Architects and Sullivan Engineering Group.

In making repair, renovation and replacement on the exterior of the house, Criterion will use materials as set forth in "Exterior Materials to be Used," attached to and incorporated into this Statement of Existing Conditions, and labeled "A."

Historic Barn

The barn has a walkout full basement and a gable roof with asphalt shingles. The basement has a mortared rubble foundation walls and brick top courses on the three sides of the perimeter. The floor is dirt. There are random old tree trunks for posts on the bearing lines that support the main wood carrying beams with floor joists for the main floor. The second floor framing is framed with joist that are supported on the bottom chord of full story height trusses at the third points of the building's length. There is a partial framed third floor. The roof purlins frame to the trusses. The exterior of the building is painted wood clapboards. The exterior framed walls act as shear walls to provide lateral stability for the building under wind and seismic loadings.

All the framing is visible. The barn is generally in poor shape with evidence of major structural distress. Support posts in the basement are rotted and may not have adequate foundations, as evidenced by the observed settlement of the first floor framing. While the foundation walls appear to be stable, the lower floor is dirt and the exterior wood sills may have some rot on the outside that is not discernable without removing exterior siding. The first floor framing is suitable for its present use. The upper floors are sagging badly and are unsafe. The roof shows no evidence of major structural problems, although there is ample evidence of settlement, as the ridge is sagging (evidence of exterior wall movement). The exterior of the barn requires extensive repair and repainting.

In making repair, renovation and replacement on the exterior of the barn, Criterion will use materials as set forth in "Exterior Materials to be Used," attached to and incorporated into this Statement of Existing Conditions, and labeled "A."

# Attachment "A"

## Criterion Reading Historic District Commission Hearing Exterior Materials August 20, 2015

### Existing House

Clapboard siding: Remediate lead paint and selective repair with wood clapboards to match existing, prime and paint

Wood trim, eaves, window casings, painted doors, and porch elements: Remediate lead paint and selective repair with wood trim to match existing, prime and paint (match existing color of white)

Restore and reinstall trim, brackets, handrails and wood details, including cupola: Remediate lead paint and selective repair with wood to match existing, prime and paint (match existing color of white)

Wood Window Sashes, including cupola: Remediate lead paint and selective repair with wood elements to match existing, prime and paint, reglaze with old glass to the extent possible and reputty with non-asbestos glazing putty (match existing color of black)

Wood Storm Windows: remediate lead paint and selective repair with wood elements to match existing, prime and paint, reglaze with old glass to the extent possible and reputty with non-asbestos glazing putty (match existing color of black)

Install new aluminum gutters and downspouts, finish/paint to match wood trim (match existing color of white)

Slate Roof Shingles: reflash existing edges and valleys in aluminum and repair existing slate shingles with matching shingles in color, profile, thickness, texture and edging

Porch Roof: reflash existing edges in aluminum and repair or replace single ply membrane roofing in EDPM to match existing (charcoal color)

Cupola Metal Roof and Siding: repair existing flashing and cladding to match existing detailing, prime and paint to match existing colors

Foundation: repair and repaint to match existing color, material and jointing, use existing granite clapboards if feasible. There will be interior foundation work not visible from any Public Way.

Brick Chimney and Foundation: Repair and repaint to match existing color, material and jointing

## **Existing Barn**

Clapboard siding: Remediate lead paint, complete unfinished sections and selective repair with wood clapboards to match existing, prime and paint (match existing color of gray)

Wood trim, eaves, window casings, porch element: Remediate lead paint and selective repair with wood trim to match existing, prime and paint (match existing color of gray)

Fabricate and install new barn door and trim on rear façade in present opening to allow maintenance access to match existing wood door and trim details in wood to match existing, prime and paint (match existing color of white)

Natural Finish Wood Door: refinish to match existing with spar varnish finish

Restore and reinstall trim, brackets, painted doors and wood details: Remediate lead paint and selective repair with wood to match existing, prime and paint (match existing color of white)

Wood Window Sashes: Remediate lead paint and selective repair with wood elements to match existing, prime and paint, reglaze with old glass to the extent possible and reputty with non-asbestos glazing putty (match existing color of black)

Install new aluminum gutters and downspouts, finish/paint to match wood trim (match existing color of white)

Composite Asphalt Roof Shingles: reflash existing edges and valleys in aluminum and repair existing composite asphalt shingles with matching shingles in color, profile, thickness, texture and edging

Foundation: Repair and repoint to match existing color, material and jointing. There will be internal foundation work not visible from any Public Way.

Town of Reading Historic District Commission  
Application of Criterion Child Enrichment, Inc.  
186-190 Summer Avenue

APPLICANT'S MEMORANDUM OF LAW:  
MIDDLE SCHOOL DRIVEWAY IS NOT A PUBLIC WAY

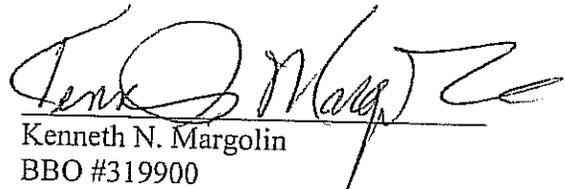
A question arose during the hearing of Criterion Child Enrichment, Inc.'s previous application, now withdrawn, as to whether the Parker Middle School driveway is a "Public Way" pursuant to the Massachusetts Historic District Act, *MGL c. 40C, §1, et seq.*, or the Town of Reading Historic District Bylaw. The Parker Middle School driveway should not be considered a "Public Way." To do so would violate sound principles of statutory construction, and would stretch the scope of the Bylaw and Historic District Act beyond their intended purposes.

The scope of the Historic District Commission's jurisdiction is determined by *MGL c. 40C*, the Historic District Act. Chapter 40C provides that the jurisdiction of historic district commissions extends to the construction or alteration of buildings or structures within a historic district when such construction or alteration "affects exterior architectural features." *MGL c. 40C, §6*. The statute then defines "exterior architectural feature" as "such portion of the exterior of a building or structure as is open to view from a public street, public way, public park or public body of water ...." *MGL c. 40C, §5*. The Town of Reading Bylaw, instead of simply adopting the statutory language verbatim, defines "exterior architectural features" as being the portion of the exterior "open to view from a Public Way or ways" (*Bylaw, §7.3.2.8*), then defines "Public Way," using the statutory definition of "exterior architectural feature," i.e., "public street, public way, public park or public body of water," (though the Bylaw places "Public Way" before the words "public streets").

Given the near-identical language used in the Bylaw to that used in the statute, it appears that the drafters of the Bylaw intended to mimic the statute, even if somewhat clumsily. Since "public way" is not defined in *MGL c. 40C*, it makes sense that the Legislature intended the usual meaning for a "public way," which is a way laid out by a municipality in accordance with *MGL c. 82, §1, et seq.*; *Martin v. Building Inspector of Freetown*, 38 Mass.App.Ct. 509 (1995). All school property is controlled by the School Committee (*MGL c. 43, §33*), giving the school driveway some elements of private property, incompatible with a "public way." The general public may access public ways at will for any lawful purpose (*Newburyport Redevelopment Auth. v. Com.*, 9 Mass.App.Ct. 206, 224-225 (1980)). By way of contrast, the school committee could undoubtedly restrict the use of the driveway to entrance to school property for school-related purposes only.

The sole context in which "public way" has been stretched such that it could include a property such as the school driveway, is in the criminal law, specifically a charge of operating under the influence, pursuant to *MGL c. 94, §24*. That expansive view was driven by the special public safety purpose of the statute (see *Commonwealth v. Brown*, 51 Mass.App.Ct. 702, 713 (2001)). There is no indication in the Historic District Act that

the Legislature intended to stretch the authority of historic district commissions to include the view of the exterior of buildings within a historic district, from a driveway to be used for a restricted purpose. The Town of Reading Bylaw cannot grant to the Historic District Commission, authority beyond the scope of *MGL c. 40C*). See, *Beard v. Town of Salisbury*, 378 Mass. 435 (1979); *Bloom v. City of Worcester*, 363 Mass. 136, 155 (1973). The definition of "Public Way" most consistent with the purpose of the Historic District Act, and sound principles of statutory construction, would not extend to the Parker Middle School driveway.



Kenneth N. Margolin  
BBO #319900  
Attorney for the Applicant  
Law Office of Kenneth N. Margolin, P.C.  
246 Walnut Street, Suite 101  
Newton, MA 02460  
(617) 641-9600

Date: 08/20/2015

# Miyares and Harrington LLP

A private law firm in the public interest

J. Raymond Miyares  
Thomas J. Harrington  
Christopher H. Heep  
Donna M. Brewer

Jennie M. Merrill  
Jonathan E. Simpson  
Magdalene K. Carter  
Ivria Glass Fried  
Eric Reustle

November 7, 2014

Bob LeLacheur, Jr.  
Town Manager  
Town of Reading  
16 Lowell Street  
Reading, MA 01867

Re: Criterion Child Enrichment, Inc.  
186 Summer Ave.

Dear Bob:

Criterion Child Enrichment, Inc. is a nonprofit corporation incorporated under Chapter 180 of the *Massachusetts General Laws* and recognized as tax-exempt pursuant to Section 501(c)(3) of the *Internal Revenue Code*. Specifically, the corporation's purposes include:

[the provision of] human services for persons who have been subjected to physical, environmental or social circumstances which have adversely affected their ability to lead normal lives.... The Corporation shall also educate such persons and their families to deal with the problems associated with such circumstances and engage in any other activities necessary for the effective implementation of the above-listed objectives.

As described on its 2013 I.R.S. Form 990, Return of Organization Exempt from Income Tax (the most recent we could obtain), Criterion's major programs include early intervention services for children from birth to age 3, family support services to young parents emphasizing child development and child care services. Of those programs, early intervention services comprised greater than 80% of program revenues and expenses in FY2013, making early intervention Criterion's most significant program by a substantial margin.

Criterion has entered into a Purchase and Sale Agreement for the purchase of the referenced property, where it intends to operate an early intervention program. By letter dated August 6, 2014, Criterion's attorney, Kenneth Margolin, outlined the corporation's concerns with respect to a proposed Bylaw amendment that would place the property, as well as several neighboring properties, into a new Historic District. Mr. Margolin argues

Bob LeLacheur, Jr.  
November 7, 2014  
Page 2 of 8

that (1) Criterion's proposed use is protected by the Dover Amendment, *M.G.L. c.40A, §3*, and that, as a result, it may not be regulated through creation of a new Historic District; and (2) implementation of the Historic District would constitute a violation of the *Americans with Disabilities Act (ADA)*, 42 U.S.C. §12101, *et seq.*, as it would have a disparate impact on children with disabilities.

Arthur Kreiger, who represents certain proponents of the historic district, provided a response on October 14, 2014, and a supplemental letter on October 30, 2014, arguing that (1) Criterion's proposed use is not protected by the Dover Amendment; (2) Criterion's prospective clients do not qualify for protection under the ADA; and (3) even if the ADA were deemed to be applicable, Criterion has not demonstrated a disparate impact that would violate the ADA. Mr. Margolin provided a supplemental letter on November 5, 2014.

As discussed below, I conclude that Criterion's proposed use is protected under the Dover Amendment, but that the Dover Amendment does not prohibit the creation of a new Historic District, as long as there is legitimate historic-preservation basis for its adoption. I further conclude that the ADA likely does protect certain of Criterion's clients from intentional discrimination or disparate impacts resulting from Town actions, but that implementation of the Historic District alone does not constitute a violation of the ADA. I caution the Town, however, that, in particular circumstances, it may be required to make reasonable accommodations for Criterion's clients, potentially by waiving or modifying requirements imposed pursuant to the Town's Historic District Bylaw.

I. *M.G.L. c.40A, §3*

*M.G.L. c.40A, §3* includes a provision, commonly known as the Dover Amendment, that states, in relevant part:

No zoning ordinance or by-law shall...prohibit, regulate or restrict the use of land or structures...for educational purposes on land owned or leased...by a nonprofit educational corporation.

The amendment thus creates three distinct elements that must be present for its protection to apply: first, the organization in question must be a nonprofit educational corporation; second, the proposed use must be primarily educational; and third, the challenged provision must be a zoning bylaw.

A. Nonprofit Educational Corporation

Criterion is incorporated as a nonprofit corporation pursuant to *M.G.L. c.180*. I conclude that this is sufficient for Criterion to qualify as a nonprofit corporation within the meaning of the Dover Amendment.

Bob LeLacheur, Jr.  
November 7, 2014  
Page 8 of 8

Mr. Kreiger suggested in his October 30 letter that Criterion is not, in fact, a nonprofit corporation, and stated that his clients reserve the right to challenge Criterion's nonprofit status. Mr. Kreiger points to certain transactions between Criterion and a related for-profit corporation,<sup>1</sup> Human Services Management Corporation, Inc. (HSMC), that are reported on Criterion's annual tax returns and audited financial statements. The transactions in question appear to be based on a contract entered into between HSMC and Criterion in 1990 and to have been consistently reported in Criterion's annual filings.

Related-party transactions and the conflicts of interest that may potentially arise therefrom are not, in and of themselves, prohibited. Criterion has a long history of reporting the transactions cited by Mr. Kreiger, and there is no evidence that any action has been taken against Criterion by any oversight agency. I therefore conclude that the mere existence of these transactions is not a sufficient basis for denying Dover Amendment protection to Criterion.

With respect to whether Criterion is a nonprofit educational corporation, the Dover Amendment requires only that the corporation's articles of incorporation authorize it to engage in educational activities. *Gardner-Athol Area Mental Health Ass'n, Inc. v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 15 (1987). There is no requirement that education be a primary or dominant activity of the corporation. *Id.* Rather, a corporation will be considered to be educational where its articles of incorporation allow it to engage in some educational activity. *Id.*

As described above, Criterion's articles of incorporation permit the corporation to "educate [clients] and their families to deal with the problems associated with such circumstances and engage in any other activities necessary for the effective implementation of the above-listed objectives." By the express terms of its articles of incorporation, therefore, Criterion may engage in educational activities and must be considered a nonprofit educational corporation.

#### B. Educational Use

The Supreme Judicial Court has held that, in order to be protected as an educational use under the Dover Amendment, "a landowner must demonstrate that its use of land will have as its primary purpose a goal that can reasonably be described as educationally significant." *Regis Coll. v. Town of Weston*, 462 Mass. 280, 291 (2012). This requires an

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<sup>1</sup> Robert Littleton, Jr., serves as a director and officer of Criterion and is also the sole officer, director and stockholder of HSMC. Although Mr. Kreiger has not specified the legal basis of his challenge, transactions such as these may implicate federal and state laws affecting nonprofit status including laws related to conflicts of interest (*See M.G.L. c.180, §6*), excess benefit transactions (*See I.R.C. §4958*), and the prohibitions against private inurement and private benefit for public charities (*See I.R.C. §501(c)(3) and 26 C.F.R. 1.501-(c)(3)-1(d)(1)(ii)*).

Bob LeLacheur, Jr.  
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analysis of the nature of activities to be conducted on a property and the significance of educational activities relative to non-educational activities.

Massachusetts courts have "long recognized 'education' as a 'broad and comprehensive term.'" *Fitchburg Hous. Auth'y. v. Bd. Of Zoning Appeals of Fitchburg*, 380 Mass. 869, 874 (1980), quoting *Mt. Hermon Boys' School v. Gill*, 145 Mass. 139, 146 (1887). In *Mt. Hermon*, the Supreme Judicial Court took the view that "[e]ducation may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all...." In *Whitinsville Retirement Society, Inc.*, 394 Mass. 757, 760 (1985), the Supreme Judicial Court added the caveat that "educational purposes" ought to be interpreted in light of the "plain meaning" of the statutory term.

In *Whitinsville*, a nursing home without any formal instructional program was found not to be an educational use for the purposes of the Dover Amendment because the education that the residents acquire informally amongst themselves was insufficient to qualify. *Id.* On the other hand, a school for emotionally disturbed children, which included residential facilities, was deemed to be entitled to Dover Amendment protection in *Harbor Schools, Inc. v. Bd. of Appeals of Haverhill*, 5 Mass.App.Ct. 600 (1977). Similarly, a halfway house for mentally disturbed adults was found to be an educational use in *Fitchburg Hous. Auth'y, supra*, 380 Mass. at 874. *But see Kurz v. Bd. of Appeals of North Reading*, 341 Mass. 110, 113 (1960) (a school for dance was not entitled to Dover Amendment protection).

As described in Mr. Margolin's November 5 letter and the accompanying Supplemental Affidavit of Robert F. Littleton, Jr., Criterion will provide group sessions for children and parents in which staff will engage them in activities targeted at developing skill acquisition to facilitate learning. Although some of the skills taught involve motor skills or other areas that are not traditionally deemed to be educational, the goal of all of Criterion's activities is to assist children in developing their ability to learn. In addition, classes will be offered for parents in which they learn how to engage their children at home to stimulate learning. Staff will also be based at the Summer Ave. property, who will travel to provide in-home services similar to those provided on site.

Considering the broad scope of educational uses covered by the Dover Amendment, the purposes underlying the early intervention services provided by Criterion and the significance of these activities, as compared to any non-educational activities that are expected to occur at the property, I conclude that Criterion's proposed use of the Summer Ave. property will be primarily educational.

### C. Zoning Bylaw

The Dover Amendment provides that no zoning bylaw may prohibit, regulate or restrict the use of land or structures for educational purposes on land owned by a nonprofit educational corporation. *M.G.L. c.40A, §3*. The Town's Historic District Bylaw is not a

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zoning bylaw, however, but rather a general bylaw. Mr. Margolin nevertheless has argued that the proposed Historic District is impermissible because it would prohibit or regulate a protected Dover Amendment use. As noted below, I am not persuaded that it would be impossible for Criterion to carry on its educational use in compliance with the requirements of the Town's Historic District Bylaw, as long as the Town provides reasonable accommodations as required by the ADA. However, even if the Bylaw had the effect of preventing Criterion's proposed educational use, it would not necessarily follow that it would be in violation of the Dover Amendment. Specifically, the Dover Amendment, by its terms, applies only to zoning bylaws.

To be sure, municipalities may not use back door methods to avoid the protections created by the Dover Amendment. *See, e.g., Newbury Junior Coll. v. Town of Brookline*, 19 Mass.App.Ct. 197, 205 (1985), relied on by Mr. Margolin in his August 6 letter. In *Newbury Junior College*, the Appeals Court ruled that the Town could not deny a license for a dormitory on the basis of generalized considerations regarding the effect of the dormitory on the surrounding community. 19 Mass.App.Ct. at 205-07. The Court recognized that the Town could deny the use on the basis of factors properly considered pursuant to the relevant licensing statute, but found that the considerations actually utilized by the board were beyond the scope of the licensing statute and were instead the type of factors typically used in determining zoning matters. *Id.*

*Newbury Junior College* stands for the proposition that traditional land use considerations may not be employed under another statutory scheme to achieve what a municipality may not do through its zoning bylaw. It should not be interpreted to mean that a Town is prohibited from regulating activities under a Historic District Bylaw, as long as the criteria employed in such regulation are those properly within the historic preservation purview of the Bylaw. Accordingly, I conclude that the creation and regulation of a Historic District in accordance with the relevant statutory requirements provided in *M.G.L. c.40C* would not violate the Dover Amendment.

## II. Americans with Disabilities Act

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Public entities include counties, cities and towns, 42 U.S.C. §12131(A). Legislation by municipalities may constitute services or programs and enforcement of bylaws or ordinances qualifies as an activity within the meaning of Title II. *See A Helping Hand, LLC v. Baltimore County, Md.*, 515 F.3d 356, 361, fn. 2 (4th Cir. 2008) (citing decisions from the Second, Fourth, Seventh and Ninth Circuits for the proposition that local zoning requirements are subject to Title II).

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A person is a "qualified individual with a disability" under the ADA if s/he has a mental or physical impairment that substantially limits a major life activity. 42 U.S.C. §12101(2). The term "mental or physical impairment" includes learning disabilities. 28 C.F.R. §35.104. The term "major life activity" includes caring for oneself, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. §12102(2). Considering the population served by Criterion, it is reasonable to assume that at least some of Criterion's clients are qualified individuals under the ADA.

The case law under the ADA has recognized three distinct theories under which a claim of discrimination against qualified individuals may be brought: disparate treatment, disparate impact and failure to provide reasonable accommodations. *A Helping Hand*, *supra*, 515 F.3d at 362. Each theory is considered below.

A. Disparate Treatment

As Mr. Margolin has correctly pointed out, disparate treatment of handicapped individuals is prohibited by the ADA. Under the ADA, disparate treatment is interpreted to mean intentional discrimination and occurs whenever a disabled person is treated differently from others because of a disability. *Id.* The federal courts have not been shy about ruling that local enactments constituted intentional discrimination where there is evidence of local opposition to a facility serving handicapped individuals. For example, in *A Helping Hand*, residents opposed a methadone clinic on grounds that clients were regarded as criminals and undesirable. Based on this, and on a local councilman's active participation in the opposition to the facility, the Court found that a zoning ordinance amounted to intentional discrimination and resulted in disparate treatment of the clients of the clinic. *Id.*

Discriminatory intent has been found where evidence showed that a town's insistence on a special permit was based on private biases and was "unsubstantiated by factors properly cognizable in a zoning proceeding." *City of Cleburne, TX v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (neighbors opposed a home for the mentally disabled), and where government officials acted solely in reliance on public distaste for certain activities following a meeting in which the only discussion presented was community opposition. *Marks v. City of Chesapeake*, 883 F.2d 308, 311-12 (4th Cir. 1989) (residents opposed a fortune telling business as being contrary to Christian values)<sup>2</sup>.

Clearly, there exists at least some local opposition to Criterion's proposed activities; and some of the proponents of the Historic District may be seeking to prohibit Criterion entirely from operating on the Summer Ave. property, rather than pursuing a genuine historic preservation objective. In determining whether the Historic District should be

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<sup>2</sup> *Marks* is a civil rights case rather than an ADA case. The same analysis is applicable here, however, as courts analyzing ADA cases frequently look to civil rights cases for precedent in analyzing disparate treatment and disparate impact claims. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003).

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created, however, the Town Meeting should consider only factors relevant to the merits of the District, such as whether the affected buildings are of historical or architectural significance within the community. See M.G.L. c.40C, §3.

B. Disparate Impact

Under a disparate impact theory, a plaintiff must show: "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or policies." *Reg'l Econ. Comty. v. City of Middletown*, 294 F.3d 35, 52-53 (2nd Cir. 2002), quoting *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997) ("For example, a handicapped person might challenge a zoning law that prohibits elevators in residential dwellings. That neutral law might have a disproportionate impact on such a plaintiff and others with similar disabilities, depriving them of an equal opportunity to use and enjoy dwellings there.").

In order to prevail in a claim of disparate impact, a plaintiff must prove actual discriminatory effect and cannot rely on inference. *Gamble*, 104 F.3d at 306. In *Gamble*, for example, the Court rejected the plaintiff's claim of discriminatory impact where the plaintiff argued only that there was a "great need" for the services it proposed to provide and failed to provide concrete evidence that the claimed discriminatory effect occurred or was significant. *Id.*

Thus far, Criterion has offered no evidence of any discriminatory effect that the proposed Historic District would have on its clients who are qualified individuals. Rather, it has merely advanced arguments similar to those that were rejected in *Gamble*. Indeed, it is unclear what evidence Criterion could even possibly produce to show that the creation of the Historic District by itself would have a significantly adverse or disproportionate impact on its operations.

C. Reasonable Accommodations

Municipalities are required to reasonably accommodate disabled persons by modifying policies, practices or services when necessary. *Dadian v. Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001). 28 C.F.R. §35.130(b)(7) states:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

"Whether a particular accommodation is reasonable is highly fact-specific, and determined on a case-by-case basis by balancing the cost to the defendant and the benefit to

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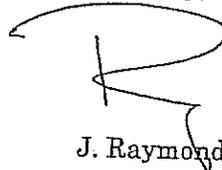
the plaintiff.” 269 F.3d at 838. In general, however, it involves a balance of the benefit to the qualified individual and the harm to the public purpose for which the regulation or practice was adopted in the first place. With respect to the benefit to the individual, the Court of Appeals in *Dadian* stated that, “[w]hether the requested accommodation is necessary requires a ‘showing that the desired accommodation will affirmatively enhance a disabled plaintiff’s quality of life by ameliorating the effects of the disability.’” *Id.*, quoting *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995). With respect to the public purpose of the regulation or practice, the focus should be on “whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.” *Washington v. Indiana High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 850 (7th Cir. 1999).

If the Historic District is adopted and Criterion’s proposed construction activity at the Summer Ave. property is deemed not to comply with its requirements, then Criterion will be entitled to request a reasonable accommodation, in the form of a modification or waiver of the restrictions imposed in the District. Criterion would be entitled to such a reasonable accommodation if its request would not affect a fundamental and unreasonable change to the Historic District.

This does not mean, however, that the Town is prohibited by the ADA from creating the Historic District at all or from imposing appropriate historic preservation requirements on the Summer Ave. property. Rather, if Criterion’s clients who are qualified individuals require a waiver from a specific requirement in a specific circumstance, they may, upon an appropriate showing, be entitled to such a waiver.

If you have any questions or concerns regarding these matters, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Raymond Miyares', written over a large, stylized, handwritten letter 'R'.

J. Raymond Miyares

Affidavit of Robert F. Littleton, Jr.  
in Support of Criterion Child Enrichment, Inc.'s Request  
for a Reasonable Accommodation under the Americans with Disabilities Act

I, Robert F. Littleton, Jr., swear that the following facts are true:

A. Introduction

1. I am the President of Criterion Child Development, Inc. Criterion has signed a Purchase and Sales Agreement with the owner of 186-190 Summer Avenue, in Reading, to purchase the property, and plans to operate on the property, an Early Childhood Intervention program.
2. This Affidavit is submitted in support of Criterion's request for a reasonable accommodation of the rules, policies, and guidelines of the Historic District Commission, pursuant to the Americans with Disabilities Act.
3. I have been involved in the field of early childhood education for forty years. A summary of my educational background and relevant professional experience, is attached to this Affidavit as Exhibit A.
4. As I will elaborate at sections C and D of this Affidavit, Criterion provides important services to children with disabilities in the Reading area – appropriate early education and developmental care – that is far more readily available to children without disabilities, than to children with disabilities. The addition to the existing historic house – the addition will house Criterion's four classrooms – has been designed to the minimum size necessary to accommodate the special needs of the children, necessitated by their disabilities, and to allow Criterion to serve sufficient numbers of children in its classrooms, to allow for a fiscally sound and stable program.

B. The nature of disabilities of the children served by Criterion, and the services provided by Criterion

5. Eligible children are those whose developmental patterns are atypical, or are at serious risk to become atypical through the influence of certain biological and/or environmental factors.
6. The atypical development patterns, or "development delays" significantly impair the children served by Criterion, in a wide range of essential life skills. These include delays in the development of speech, receptive cognition, balance, mobility, gross and fine motor skills, learning; i.e., the acquisition of new abilities, and behaviors. The large majority of children who are deemed "at risk" for exhibiting significant development delay, will in fact develop them within a year of receiving the "at risk" designation.
7. Criterion's Early Intervention programs, including the planned program in Reading, serve children with serious disabilities that impair major life functions.
8. Early intervention services are designed to meet the developmental needs of each child and the needs of the family related to enhancing the child's cognitive, physical and social development. Services are selected in collaboration with families, using an Individualized Family Service Plan. Early Intervention educators, including physical, speech and occupational therapists, and developmental specialists, work with children and their families in home, center and community-based settings.
9. Educational services are provided for academic, recreational and behavioral education needs that may include home visits, parent groups, individual therapies and center-based toddler groups. Services include screening, assessment and individual and small group training.

8. In addition to direct services provided to children, Early Intervention is a training, education and support program for parents and caregivers of eligible children. Within this training, parents and caregivers are taught how to incorporate intervention strategies into their child's daily routines to ensure achievement of developmental outcomes identified in the Individualized Family Service Plan (IFSP).

9. Parent education groups are designed to provide the Early Intervention program an opportunity to inform parents and other interested caregivers about specific topics related to child development such as; early language development, behavior management, feeding issues or sleep problems.

C. The need for Early Intervention programs, and their relatively short supply in contrast to early education and care programs for infants and toddlers without significant disabilities

10. The Individuals with Disabilities Education Act (IDEA), originally known as the Education of All Handicapped Children Act, was enacted by Congress in 1975 to ensure that children with disabilities have the opportunity to receive a free appropriate public education, just as typically developing children do. In the 1986 reauthorization of this law, Congress established Part C of IDEA, the program of early intervention for infants and toddlers with disabilities in recognition of "an urgent and substantial need" to:

enhance the development of infants and toddlers with disabilities to minimize their potential for developmental delay;

minimize the need for special education and related services after infants and toddlers with disabilities reach school age;

minimize the likelihood of institutionalization of individuals with disabilities and maximize the potential for their independent living in society; and

enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities.

11. When the final regulations to Part C of IDEA were published in September 2011, U.S. Secretary of Education, Arne Duncan, highlighted the need for early childhood intervention, stating:

As everyone who works in education understands, one of the most important things we can offer children is a high-quality early learning experience that prepares them for kindergarten,” This is true for all children – but it’s especially important for infants and toddlers with disabilities to have access to high-quality early intervention services that prepare them to successfully transition to preschool and kindergarten. The Part C regulations support the Education Department’s commitment to the goal of preparing more children with high needs with a strong foundation for success in school and beyond.

(U.S. Department of Education, Office of Special Education Programs’ (OSEP’s) Part C of the IDEA website: <http://idea.ed.gov/part-c/search/new>).

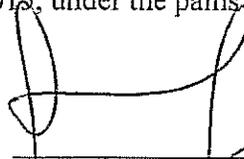
12. A search that I conducted as part of Criterion's previous application, on the website of the Massachusetts Department of Early Education and Care ("EEC"), for non-Early Intervention programs licensed by EEC, that accept infants and toddlers, revealed no fewer than 17 such programs in the Early Intervention catchment area (31), that includes Reading, North Reading, Melrose, Stoneham, and Wakefield. Four of the 17 programs are in Reading, three more in North Reading. In that same catchment area 31, there is only a single Early Intervention program – Criterion's, now in Stoneham, and moving to Summer Avenue, Reading.

13. Criterion's Early Intervention program will serve a critical need in Reading and surrounding communities, for infants and toddlers with developmental disabilities, that will be not be provided if Criterion cannot build and operate its program in Reading.

D. Request for a Reasonable Accommodation

14. In order to allow Criterion's infants and toddlers with disabilities, to have access to a vital service within the Town of Reading, this Historic District Commission is requested, to the extent it may be necessary, to interpret and apply its rules, policies, and guidelines in such a manner: (a) to enable Criterion to make the modest changes as shown on the plans submitted to the Commission; and (b) to refrain from imposing any requirements regarding materials, that would make construction so expensive as to effectively prevent Criterion from building and operating its Early Intervention program at 186-190 Summer Avenue, Reading, Massachusetts.

Signed this 08/20/2015 day of August, 2015, under the pains and penalties of perjury.



Robert F. Littleton, Jr., Ed.D., President  
Criterion Child Enrichment, Inc.

## **Exhibit A**

### Affidavit of Robert F. Littleton, Jr.

#### Summary of Education and Relevant Professional Experience

My educational background includes an M.Ed. from Lesley College, with a major in Severe Special Needs and a minor in Early Childhood Special Education, and an Ed.D from Boston University, with a major in Special Education.

From 1974 through 1982, I was the Associate Director, and then Director of the Kennedy-Donovan Center for Programs in Early Development, Foxboro, Massachusetts. In addition to serving as the President of Criterion Child Development, Inc., I founded, and am the Executive Director of Evergreen Center, Inc., Milford, Massachusetts, a nonprofit corporation providing residential programs and community services for children and adults with developmental disabilities or emotional disturbances. Evergreen Center serves in excess of 260 families in twenty-one locations.

I also founded, and serve as President of BEACON Services, Milford, Massachusetts, a private group of special educators and early childhood professionals experienced in the principals of behavior analysis. I founded, and serve as president Human Services Management Corporation, Inc., Milford, Massachusetts, a corporation that provides shared business services, continuing education and management consulting services for nonprofit and proprietary human service providers.

I have presented and written extensively on special education, early childhood intervention and human service management topics.

LAW OFFICE OF KENNETH N. MARGOLIN, P.C.

246 WALNUT STREET, SUITE 101  
NEWTON, MASSACHUSETTS 02460  
(617) 641-9600

FAX: (617) 641-9606

WEB ADDRESS: [www.margolinlaw.com](http://www.margolinlaw.com) EMAIL: [margolin@margolinlaw.com](mailto:margolin@margolinlaw.com)

To: West Street Historic District Commission  
From: Kenneth N. Margolin, Attorney for Criterion Child Enrichment, Inc.  
Date: August 18, 2015  
Re: 186-190 Summer Avenue, Reading, Massachusetts

Criterion Child Enrichment, Inc.'s Memorandum of Law  
in Support of its Request for a Reasonable Accommodation under the  
Americans with Disabilities Act

Criterion is confident that there are no valid, good faith grounds for denial of its application for a Certificate of Appropriateness. Criterion has listened and heard the HDC and members of the community who believed its proposed new additions would have been too large, and has exercised great expense and ingenuity to come up with a proposal that leaves the footprint of the existing house and barn unchanged, and other than desperately needed repair and renovation, will make only minor, necessary changes to the structures. If for any reason, the Commission denied Criterion's application for a Certificate of Appropriateness, then Criterion requests that this Historical District Commission ("HDC"), make a reasonable accommodation under the Americans with Disabilities Act ("ADA"), to the HDC's rules and/or guidelines, as applied to Criterion's 186-190 Summer Avenue project. Specifically, Criterion requests that the HDC:

1. Apply its rules and guidelines so as to allow the proposed minor exterior architectural changes visible from the Public Way.<sup>1</sup>
2. Apply its rules and guidelines so as not to render Criterion's repair, renovation or replacement of materials on its property, financially prohibitive, which would have the effect of precluding Criterion from providing needed services to children with disabilities.

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<sup>1</sup> Criterion believes that the minor proposed changes will be visible only from the Parker Middle School driveway, which Criterion believes and has argued, is not a "Public Way." If the HDC concludes that the school driveway is not a Public Way, then there will be no exterior architectural changes, other than repair, renovation, and maintenance, visible from the Public Way.

For the following reasons, The ADA requires that Criterion's request for a reasonable accommodation be granted, should the HDC choose not to grant Criterion a Certificate of Appropriateness or a Certificate of Hardship.

Criterion signed its purchase and sale agreement for 186-190 Summer Avenue, long before the West Street Historic District was expanded to include the property. In addition, Criterion, through its application to the Community Preservation and Development Commission, made its intention to use the property for an Early Intervention program for infants and toddlers with serious disabilities, known to Town of Reading officials, long before the property was subject to this HDC. Before the Bylaw expanding the HDC to portions of Summer Avenue was passed by Town Meeting, Criterion had already expended significant resources toward development of the property for its planned use.

As explained in the Affidavit of Criterion's President, Robert F. Littleton, Jr., Ed.D., in support of Criterion's request for a reasonable accommodation, the infants and toddlers served by Criterion's Early Intervention program will have serious developmental disabilities that will burden various major life functions, including "delays in the development of speech, receptive cognition, balance, mobility, gross and fine motor skills, learning; i.e., the acquisition of new abilities, and behaviors." (Affidavit of Robert F. Littleton, Jr., in Support of Criterion Child Enrichment, Inc.'s Request for a Reasonable Accommodation under the Americans with Disabilities Act" – hereafter referred to as "RFL ADA Affidavit," ¶¶ 5-6).

There is no doubt that the infants and toddlers Criterion will serve, meet the broad definition of "disability" established by the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. The ADA was enacted to prevent discrimination against individuals on the basis of handicap, and to aid their integration into all public activities. 42 U.S.C. §12101; Executive Order 13217, June 18, 2001, 66 F.R. 33155. The activities of the Historic District Commission are "services, programs or activities" as set forth in the ADA, 42 U.S.C. §12132. See, *Culvahouse v. City of LaPorte*, 679 F. Supp. 2d 931, 946 (N.D. Ind. 2009), for a discussion of the comprehensive scope of "services, programs or activities" covered by the law. Town Counsel, J. Raymond Miyares, Esq., has acknowledged the ADA's application to activities of the HDC (see letter of Attorney Miyares to Town Manager, Bob LeLacheur, Jr., dated November 7, 2014, page 7). See also, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 (1995): Discrimination covered by the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling."<sup>2</sup>

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<sup>2</sup> Judicial interpretations of the Fair Housing Act and the Americans with Disabilities Act, are essentially the same. (see, for example, *South Middlesex Opportunity Council, Inc.*, 752 F.Supp.2d 85, 114 (D.Mass. 2010), citing, *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573-74 (2d Cir. 2003). As a result of

The ADA was created to establish "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (*Pathways Psychosocial v. Town of Leonardtown, MD*, 133 F.Supp.2d 772, 780 (D.Md. 2001), and to aid their integration into all public activities. 42 U.S.C. §12101; *Executive Order 13217, June 18, 2001*, 66 F.R. 33155. Under the ADA, there are three types of discrimination that can violate the Act: (1) intentional discrimination based on the handicapped status of the victims of the discrimination; (2) "disparate treatment," i.e., treatment that more negatively impacts individuals with handicaps, because of their handicaps, often termed "disparate impact;" and (3) failure to make a reasonable accommodation. Under a disparate impact theory, there does not need to be evidence of discriminatory intent – only the negative impact, on the basis of handicap, by a facially neutral act or policy. *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997).

At this stage, Criterion is not alleging intentional discrimination. The HDC, however, cannot "utilize standards, criteria, or methods of administration" that create a disparate impact on individuals with disabilities. *Smith-Berch, Inc. v. Baltimore City*, 68 F.Supp.2d 602, 621 (D.MD 1999); 42 U.S.C. § 12101(b)(1). Disparate impact occurs when facially neutral rules or policies are applied in a way that affect the protected class of persons with disabilities differently from similar groups without disabilities. *Pathways Psychosocial v. Town of Leonardtown, Md.*, supra, at 788. If this HDC was inclined to deny to Criterion a Certificate of Appropriateness or a Certificate of Hardship, particularly with respect to its proposed addition, then the HDC would exclude infants and toddlers with disabilities from the ability to receive an appropriate education in the Town of Reading, and would burden those children, because of their disabilities, more than children of similar ages, without disabilities.

Criterion is not claiming that disparate impact would result simply because of the great need for Early Intervention services in Reading (see, for example, *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9<sup>th</sup> Cir. 1997), for a requirement of more than an allegation of the need for services). Rather, Criterion has put forth specific information demonstrating that a denial of its project would have a greater negative impact on infants and toddlers with disabilities seeking early education, than on infants and toddlers without disabilities.<sup>3</sup>

In his Affidavit, Dr. Littleton, using a reliable source, notes the far greater availability of early education programs in the Greater Reading area, for infants and toddlers without disabilities, than for those with disabilities (RFL ADA Affidavit, ¶12). Dr. Littleton will

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receipt of federal financial assistance by the Town of Reading, the Rehabilitation Act, 29 U.S.C. §794, et seq., is also implicated.

<sup>3</sup> Criterion has standing to assert rights under the ADA, both on its own behalf, and on behalf of its students and potential students. *MX Grp., Inc. v. City of Convington*, 293 F.3d 326, 335 (6<sup>th</sup> Cir. 2002); *RHJ Med. Ctr. v. City of DuBois*, 754 F.Supp.2d 723, 735 (W.D. Pa. 2010).

be available to answer any additional questions that HDC members may have. Given the context of this case – a municipal hearing – as opposed to a Superior or Federal Court trial, the Affidavit of Dr. Littleton provides ample evidence to support the claim of disparate impact if Criterion's application is denied, or if it is allowed with restrictions that unduly impair the clinical or fiscal soundness of Criterion's program.

Thus, if the HDC was inclined to deny or excessively burden Criterion application, the HDC would have to grant Criterion's request for a reasonable accommodation in order to avoid violating the ADA. The accommodation sought by Criterion is reasonable, in that it costs the Town nothing. It is necessary in order to give infants and toddlers with disabilities, equal access to those without disabilities, to early education in the Town of Reading, and to early education services inside 186-190 Summer Avenue. See, for example, *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7<sup>th</sup> Cir. 2002), for a good discussion of the elements of a reasonable accommodation. It is no answer to the HDC's obligation to make a reasonable accommodation, to suggest that Criterion go elsewhere. First, as noted at the beginning of this memorandum, Criterion already had rights to its property and had invested significant sums in its project, before this HDC came into being. Moreover, due to the Dover Amendment, *MGL c. 40A, §3*, Criterion has the right to operate its program at 186-190 Summer Ave. – it is the location of Criterion's choice. (see, *ReMed Recovery Care Centers v. Twp. of Willistown, Chester Cnty, PA*, 36 F.Supp.2d 676, 685 (E.D. PA 1999).

A municipality can refuse to make a reasonable accommodation if the requested accommodation would "fundamentally alter the nature of the services, program, or activity." 28 C.F.R. §35.130(b)(7). Granting to Criterion, the reasonable accommodation it requests, would in no way fundamentally alter or undermine the Historic District Bylaw, or the work or purpose of the HDC. The changes Criterion will make to the exterior architectural features of the existing house and barn visible from a Public Way, however defined, are minimal, if any. The Historic District Bylaw itself, by giving the HDC the ability to grant Certificates of Hardship, recognizes that sometimes special circumstances require flexibility in the application of the HDC policies, rules, and guidelines. A request for a reasonable accommodation can be found to "not cause a fundamental or unreasonable change to the ordinance ... particularly so because the [plaintiffs] were not requesting a change to the ordinance itself, but application of the hardship exception to their case." *Dadian v. Vill. of Wilmette*, 269 F.3d 839 (7<sup>th</sup> Cir. 2001).

LAW OFFICE OF KENNETH N. MARGOLIN, P.C.

August 18, 2015

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As noted at the beginning of this Memorandum, there are no legitimate grounds to deny Criterion's application for a Certificate of Appropriateness. If the Commission fathomed some ground within its authority for denial, the Commission would then obligated, pursuant to the Americans with Disabilities Act, to grant Criterion's request for a reasonable accommodation.

A handwritten signature in black ink, appearing to read "Kenneth N. Margolin", written over a horizontal line.

Kenneth N. Margolin  
Attorney for Criterion Child  
Enrichment, Inc.

Date: 08/18/2015