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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 3 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,¹ 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

¹ 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.
November 7, 2014
Page 4 of 8

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

Bob LeLacheur, Jr.

November 7, 2014

Page 5 of 8

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).

Bob LeLacheur, Jr.
November 7, 2014
Page 6 of 8

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)².

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

² *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).

Bob LeLacheur, Jr.

November 7, 2014

Page 7 of 8

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

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

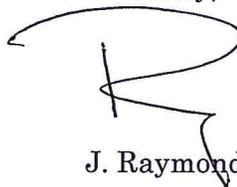
the plaintiff.” 269 F.3d at 838. In general, however, it involves a balance of the benefit to the qualified individual and the harm to the public purpose for which the regulation or practice was adopted in the first place. With respect to the benefit to the individual, the Court of Appeals in *Dadian* 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