



THE COMMONWEALTH OF MASSACHUSETTS
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VIA Electronic & First Class Mail

Town of Dudley
Board of Selectmen
71 West Main Street
Dudley, MA 01571

Re: Proposed Use of Land for a Cemetery by the Islamic Society of Greater Worcester

Dear Members of the Board:

Please consider this correspondence from the Office of the Attorney General in response to the requests from the Dudley Board of Selectmen and the Islamic Society of Greater Worcester for guidance regarding the applicability of Chapter 114, Section 34, to the proposed use of land in Dudley by the Islamic Society for a cemetery. As explained below, we believe that a challenge could be made to the application of G.L. c. 114, § 34, to a religious use (such as the cemetery proposed here) because it would permit a wholly discretionary Town Meeting vote to deny the Islamic Society the use of the land as a cemetery, contrary to the purpose of the Dover Amendment, G. L. c. 40A, § 3, ¶ 2.¹

We are aware that this issue is the subject of pending litigation (Islamic Society of Greater Worcester v. Dudley Zoning Board of Appeals, et al, Misc. Case No. 000366 (Land Court Department of the Trial Court)). Although the Attorney General has no formal role in this matter, the parties have requested guidance and the Attorney General has historically been involved in the protection of religious uses from inappropriate local regulation. See Attorney General v. Dover, 327 Mass. 601, 603-604 (1952) (where, pursuant to authority granted by a now-repealed statute (G.L. c. 40, § 30B), the Attorney General requested the court to declare invalid a Dover by-law in light of the Dover amendment, and the court agreed that the effect of the by-law “would be to

¹ “The distinctive characteristic of town government...is the town meeting...in which are vested the traditional powers of the legislative branch of any level of government – the power to make laws (called by-laws in these cases) and the power of the purse.” R. Johnson, Town Meeting Time – A Handbook of Parliamentary Law (2d ed. 1984), p. 1. In general, the vote required to pass a motion is a majority of those present and voting (unless a different quantum of vote is required by statute). Id. at p. 63.



prohibit any use of land or buildings in a residential district for sectarian educational purposes” in conflict with the statute.). Moreover, the issues presented in the pending litigation are of substantial public interest. See Dover at 606 (noting “the interest which the public as a whole, represented by the Attorney General, has in keeping the zoning regulations of municipalities within lawful bounds and in not allowing them to become instruments of discrimination or oppression.”). We submit this letter as requested by the parties in the hope that it will assist the parties in resolving the pending litigation.

I. Relevant Background Facts.

As alleged in the pending litigation, the Islamic Society is a non-profit corporation with purposes “confined to religious, charitable and educational activities in accordance with Islamic teachings.” (Amended Complaint, ¶ 13). The Islamic Society seeks to establish a cemetery in Dudley “which would be devoted to burials of members of the Muslim community in accordance with the teachings of Islam.” (Amended Complaint, ¶ 15). The Islamic Society alleges that its proposed use of the Dudley land for a cemetery is a “use of land...for religious purposes” that is protected by General Laws Chapter 40A, Section 3. That statute provides that, “No zoning ordinance or by-law shall...prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes...provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes lot area, setbacks, open space, parking and building coverage requirements.” G.L. c. 40A, § 3 (commonly referred to as the Dover Amendment). For the purposes of this letter, we assume that a court would agree the Islamic Society’s proposed use of the cemetery is a religious use protected by G.L. c. 40A, §3.

II. Statutory Framework.

A. The Dover Amendment.

The Dover Amendment was first adopted in 1950 in response to a Dover by-law that prohibited educational uses in a residential district. The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 27, n. 10 (1979). Under the current version of the Dover Amendment, G.L. c. 40A, § 3, ¶ 2, a town may not “prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes...[but] such land or structures may be subject to reasonable regulations” in eight categories enumerated in the statute. The statute thus prevents a town from adopting or implementing a zoning by-law that prohibits a religious or educational use of land. Trustees of Tufts College v. Medford, 415 Mass. 753, 757 (1993) (“The Dover Amendment bars the adoption of a zoning ordinance or by-law that seeks to prohibit or restrict the use of land for educational purposes.”) (emphasis in original). Similarly, a town may not require a party pursuing a religious use to obtain a special permit because the special permit process grants “a considerable measure of discretionary authority over a [religious] institution’s use of its facilities and create[s] a scheme of land use regulation for such institutions which is antithetical to the limitations on municipal zoning power in this area prescribed by G.L. c. 40A, § 3.” The Bible Speaks, 8 Mass. App. Ct. at 33. However, a town may adopt reasonable regulations in certain allowable areas (bulk and height of structures and determining yard sizes lot area, setbacks, open space, parking and building coverage). Tufts, 415 Mass. at 757 (“The whole of the Dover

Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination against (religious and educational uses) and honoring legitimate municipal concerns that typically find expression in local zoning laws.”). The reasonableness of a local zoning by-law as applied to a proposed religious use will depend on the facts of each case. But it is clear that, in light of the Dover Amendment, a town may not prohibit a religious use through its zoning by-law, and may not apply otherwise reasonable regulations against a religious use in a way that would nullify the protections of G.L. c. 40A, § 3. *See The Bible Speaks*, 8 Mass. App. Ct. at 33 (invalidating a by-law on the grounds that it “would enable the board to exercise its preferences as to what kind of educational or religious denominations it will welcome, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose.”)

Against this backdrop we examine the applicability of Chapter 114, § 34, to a religious use of land (here, a cemetery).

B. Chapter 114, Section 34.

Chapter 114, Section 34 was first adopted in 1855 and imposes requirements on the use of land for a new cemetery:

Except in the case of the erection or use of a tomb on private land for the exclusive use of the family of the owner, no land, other than that already so used or appropriated, shall be used for burial, unless by permission of the town...but no such permission shall be given until the location of the lands intended for such use has been approved in writing by the board of health of the town where the lands are situated after notice to all persons interested and a hearing[.]

The reference in Section 34 to “permission of the town” has been construed to mean a town meeting vote. *Canton v. Westbourne Cemetery Corp.*, 251 Mass. 128, 130 (1925) (“An examination of [the statute] makes plain that the permission of the town which must be given before land can be used for a new cemetery or extension of an old one is a permission which must result from a vote of the inhabitants of the town in town meeting legally assembled...”). Section 34 provides no guidance to town meeting members regarding acceptable bases for granting or withholding permission to build a cemetery, and we found no other statutes, regulations, or court decisions that provide such guidance regarding a town meeting vote. Nor is there any other statute that limits the discretion of town meeting on a vote such as that required by G.L. c. 114, § 34. The statute thus appears to grant unlimited discretion to town meeting members to deny permission to build any cemetery, including a religious cemetery.

Application of this statute to a religious cemetery could be challenged on the basis of its conflict with the Dover Amendment. In the context of approving a religious cemetery, a town meeting vote “would enable [Town Meeting] to exercise its preferences as to what kind of educational or religious denominations it will welcome, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose.” *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 33 (1979). It is well-established that the Dover Amendment prohibits a town from requiring a discretionary permit process for a religious or educational use. *See id.* (“The Legislature did not intend to impose special permit requirements...on legitimate educational

uses which have been expressly authorized to exist as of right in any zone.”); *see also* Trustees of Tufts College v. Medford, 415 Mass. 753, 765 (1993) (“A local zoning law that improperly restricts an educational [or religious] use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances.”) This invalidity arises from the fact that a special permit process grants unbridled discretion to the board to disapprove the requested use – something a town cannot do under the Dover Amendment. G.L. c. 40A, § 3, ¶ 2 (“No zoning ordinance or by-law shall...prohibit...the use of land or structures for religious purposes...”).

It is true that the plain terms of the Dover Amendment restrict only zoning by-laws or ordinances, not the application of a separate statute. *See* G.L. c. 40A, § 3, ¶ 2. But, if a court were faced with reconciling G.L. c. 114, § 34, with the Dover Amendment, it may well choose to reconcile those statutes by restricting the application of G.L. c. 114, § 34. As the later-enacted statute, a strong argument could be made that the Dover Amendment should govern in the event of a conflict between the two statutes. Wing v. Commissioner of Probation, 473 Mass. 368 (2015). If that were the case, G.L. c. 114, § 34, would not be given full effect. Through the Dover Amendment, the Legislature has more recently expressed its intention that religious uses cannot be subject to a discretionary approval process. *See* The Bible Speaks, 8 Mass. App. at 33 (invalidating a by-law on the basis that it “would enable the board to exercise its preferences as to what kind of educational or religious denominations it will welcome, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose.”). Because application of G.L. c. 114, § 34, to require an entirely discretionary Town Meeting approval of a religious cemetery would nullify the protections afforded to religious uses by the Dover Amendment, a reviewing court may well conclude that the statute may not be applied in this situation. *See* Sisters of the Holy Cross of Massachusetts v. Brookline, 347 Mass. 486, 494 (1964) (“We think it unlikely that the Legislature would exempt religious and educational institutions from local regulations of use and at the same time permit this exemption to be virtually nullified by a requirement that such institutions construct their buildings on dimensions applicable to single family houses.”)

III. Other Considerations.

It could also be argued that requiring a Town Meeting vote on the proposed cemetery would violate the federal Religious Land Use & Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.* (“RLUIPA”), Requiring such a vote could “impose[] a substantial burden on the religious exercise” of the Islamic Society without advancing a compelling governmental interest.² *See, e.g.,* Garu Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006) (county board of supervisors violated RLUIPA in denying religious organization’s application for conditional use permit to build Sikh temple on land that was zoned agricultural). Even if there is a compelling governmental interest at stake, an argument could be made that requiring a Town Meeting vote in this case is not the least restrictive means possible of furthering the town’s interests, particularly in light of the fact that the town has not clearly required a Town Meeting

² In the interest of time and brevity, we do not address other possible violations of RLUIPA throughout the cemetery permitting process, but reserve the right to address these and other constitutional issues in the future, including in connection with the pending litigation.

vote pursuant to G.L. c. 114, § 34, in all other cases,³ and, as set forth above, requiring a Town Meeting vote under these circumstances conflicts with the policies underlying the Dover Amendment. *See, e.g., Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2nd Cir. 2007) (finding RLUIPA violation where village zoning board's denial of special use permit by which private religious day school sought authorization to build classroom building on its campus was arbitrary and did not comply with state law). Thus, in short, we caution that application of G.L. c. 114, § 34, under the circumstances here would also raise significant concerns regarding the town's compliance with RLUIPA.

We hope that the forgoing is helpful. Please do not hesitate to let us know if we can answer any additional questions or concerns.

Very truly yours,



Genevieve C. Nadeau
Chief, Civil Rights Division

cc: Gary S. Brackett, Esq.
John Davis, Esq.

³ It appears that there was a town meeting vote regarding the expansion of the Waldron Cemetery in 2004, but the vote was limited to approving a funding mechanism for the expansion and did not refer to an approval pursuant to G.L. c. 114, § 34.