Request for Zoning Enforcement
401 Main Street, Bolton, Mass.
December 27, 2016

2016 DEC 29 AM 11:48

Pursuant to MGL Chapter 40A, Section 7, we hereby request that appropriate enforcement action be undertaken by you, as the Building Inspector and Zoning Enforcement Officer for the Town of Bolton, in recognition of the following zoning violations at the 401 Main Street property (the "Property"), by its owners, Debra and Edwin Madera, by John Sawyer's Mill and/or Cultivate Counseling, LLC, the entities operating at the Property, or by any other person or entity acting on their respective or collective behalves (together, the "Owner-Operators"):

Violation No. 1: Congregate Living in a Residential Zone. The Schedule of Permitted Uses in Bolton's Zoning Bylaw (the "Zoning Bylaw") (Section 250-12) does not allow for congregate living homes in the Residential zoning district. The Zoning Bylaw restricting congregate living does not target a protected population. It is not facially discriminatory.

While the Fair Housing Act (FHA) may offer certain protection(s) to group homes like John Sawyer's Mill, it does not altogether pre-empt local zoning controls. As described in the Joint Statement of the U.S. Department of Justice and the U.S. Department of Housing and Urban Development" (the "Joint Statement"):

> 'Pre-emption' is a legal term meaning that one level of government has taken over a field and left no room for government at any other level to pass laws or exercise authority in that area. The Fair Housing Act is not a land use or zoning statute; it does not pre-empt local land use and zoning laws. This is an area where state law typically gives local governments primary power. However, if that power is exercised in a specific instance in a way that is inconsistent with a federal law such as the Fair Housing Act, the federal law will control.

Where a person or group believes that the "exercise" of local zoning controls will have a discriminatory effect on persons with disabilities, a request can be made for a "reasonable accommodation." "[T]he Fair Housing Act makes it unlawful to refuse to make 'reasonable accommodations' (modifications or exceptions) to rules, policies, practices, or services, when such accommodations may be necessary to afford persons with disabilities an equal opportunity to use or enjoy a dwelling" (see Joint Statement). But here, NO request WHATSOEVER has been made, to our knowledge, by the Owner-Operators for a reasonable accommodation to the Town's prohibition of congregate living facilities in the Residential zoning district (or to any other provisions of the Zoning Bylaw).

Even if (or when) such a request is made, the Town is NOT without authority to apply its zoning controls in an evenhanded, non-discriminatory manner.

Initially, the Town ought – and, candidly, owes it to its citizenry and, importantly, to those who reside in the neighborhood surrounding the group home – to verify that the facility qualifies for

protection under the law. As advised by the Metropolitan Area Planning Council's (MAPC) on its website entitled "Accessibility for People with Disabilities: Zoning for Group Homes":

> [D]evelopers and providers of housing for people with disabilities must establish that the housing is specifically for people with disabilities. In most instances, this threshold requirement can be met by describing generally the use of the dwelling, such as licensed residential care facility. An applicant seeking a reasonable accommodation is not required to identify the nature or severity of the disabilities of the residents. Typically, the developer/provider is able to present a letter of intent by Massachusetts Department of Mental Health (DMH) or the Massachusetts Department of Developmental Service (DDS). The agency will license the facility when occupied.

We do not believe that any such information has been presented by the Owner-Operators or even requested by the Town, to date.

Additionally, per the above-referenced Policy: "The Fair Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the persons or property of others. Determining whether someone poses such a direct threat must be made on an individualized basis, however, and cannot be based on general assumptions or speculation about the nature of a disability." We know almost nothing about those who occupy the group home at the Property, and we suspect the Town is likewise unaware of who they are.

The website for John Sawyer's Mill is ambiguous in its description of those who reside at the facility, whether intentionally or unintentionally. While the Mill's logo includes the phrase "inclusive structured living," noticeably absent from the group home's website is a description of the class of individuals it serves. "Supportive living" is defined on the website as "serv[ing] as a transitional phase for individuals looking to increase their ability to successfully live and work independently"; but from what these individuals are transitioning, it does not say. The website does reference in its FAQs "clients who recently exited residential mental health and/or detoxification," suggesting that the facility will be for those with mental health and/or substance abuse problems, or a history of them. (That is consistent, in part, with public statements made by the Owner-Operators that the group home will serve those with substance abuse problems.) Whether and to what extent these individuals "present a direct threat to the persons or property of others" are determinations yet to be made by the Town, but which are well within its authority and among its obligations to its residents.

Finally, insofar as the group home qualifies for protection under the FHA, that is not to say its operation can proceed uninhibited. The Town may condition its operation or even exact mitigation if necessary or prudent to protect the health, safety and welfare of the facility's residents or the public generally, or to the same extent as it would do so for any other facility not subject to protection under the Act. Again, the Policy is instructive, if only by way of example:

> [N]eighbors and local government officials may be legitimately concerned that a group home for adults in certain circumstances may create more demand for on-street parking

than would a typical family. It is not a violation of the Fair Housing Act for neighbors or officials to raise this concern and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the application, if another type of facility would ordinarily be denied a permit for such parking problems.

If the denial or conditioning of permission to operate a group home (or refusal in-whole or in-part of a reasonable accommodation) is challenged, it is the owner or operator who must establish a violation of the FHA. "The text of the Fair Housing Act provides no hint that Congress sought to change the normal rule that a plaintiff bears the burden of proving a violation of law by a preponderance of the evidence." Andover Housing Authority v. Shkolnik, 443 Mass. 300, 308 (2005), quoting Elderhaven, Inc. v. Lubbock, 98 F. 3d 175, 178 (5th Cir. 1996).

We, as residents of the Bolton Pan neighborhood, and several of us abutters to the facility, are concerned about the group home's increased impacts to and demands upon the neighborhood of which it is a part. These include not only concerns about the adequacy of parking for staff and guests, but also concerns about the accompanying increase in traffic to and from the Property (both from Main Street and Burnham Road), exterior noise and light generated by so extensive a use of the Property, etc. These are not stereotypical fears or prejudices in any way associated with occupancy of the facility by persons with disabilities. These same concerns would be had if a different facility, not protected by the FHA, were to be proposed for the Property, with a similar intensity of use. The Town, however, has not addressed them or required any mitigation at all by the Owner-Operators of the Property.

Violation No. 2: Multiple Principal Uses Prohibited. The Zoning Bylaw does not permit "Mixed Uses" on the same lot (Section 250-11). Specifically, no business, commercial or industrial use is allowed "on a lot on which a dwelling exists."

While agricultural use is an exception to the above (but see below), the Owner-Operators' outpatient counseling business, Cultivate Counseling, LLC, is not. The counseling business cannot, therefore, be conducted on the same Property as the aforementioned group home.

Violation No. 3: Business Operating in a Residential Zone. The Zoning Bylaw, in its Schedule of Permitted Uses (Section 250-12), does not generally allow for businesses in the Town's Residential zoning district, except as accessory businesses (Section 250-21). (For more on why the counseling business is not accessory, see below.)

We understand that the Owner-Operators' outpatient counseling business is operating at the Property on the basis that it benefits from the agricultural exemption contained in MGL c. 40A, § 3. To qualify for the exemption, though, the outpatient mental health and substance abuse counseling services must either be agricultural themselves – which they clearly are not – or must be accessory or incidental to the principal agricultural use of the Property.

In Henry v. Board of Appeals of Dunstable, 418 Mass. 841 (1994), the Supreme Judicial Court further defined the "common understanding" of agriculture where "incidental" activities might

be considered agricultural:

> Uses which are 'incidental' to a permissible activity on zoned property are permitted as long as the incidental use does not undercut the plain intent of the zoning by-law. 2 E.C. Yokley, Zoning Law and Practice § 8-1 (4th ed. 1978). An accessory or 'incidental' use is permitted as 'necessary, expected or convenient in conjunction with the principal use of the land.' 6 P.J. Rohan, Zoning and Land Use Controls, § 40A.01, at 40 A–3 (1994). Determining whether an activity is an 'incidental' use is a fact-dependent inquiry, which both compares the net effect of the incidental use to that of the primary use and evaluates the reasonableness of the relationship between the incidental and the permissible primary uses. . .
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> The word 'incidental' in zoning by-laws or ordinances incorporates two concepts: 'It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance... But `incidental,' when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of `incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use.' Harvard v. Maxant, 360 Mass. 432, 438 (1971), quoting Lawrence v. Zoning Bd. of Appeals of N. Branford, 158 Conn. 509, 512-513 (1969). . .
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> We think that the plaintiff's case is governed by Old Colony Council-Boy Scouts of Am. v. Zoning Bd. of Appeals of Plymouth, 31 Mass. App. Ct. 46 (1991). . . [where] the Appeals Court stated the plain meaning of 'incidental' to be 'something minor or of lesser importance.' Id. at 48, n. 2, quoting Webster's Third New Int'l Dictionary 1142 (1971) ("subordinate, nonessential, or attendant in position or significance') and American Heritage Dictionary 664 (1976) ('[o]ccurring as a fortuitous or minor concomitant: incidental expenses'). Applying this definition of 'incidental' use, the court then considered the net effect of the proposed activity on the surrounding area.
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> In our view, the Appeals Court in Old Colony Council, supra, correctly considered the 'net effect' that the proposed cranberry bog would have had in the rural residential area and concluded that the effect was so great that the excavation could not be said to be incidental (or attendant or minor) to the cranberry bog. Id. at 49 (given amount of gravel to be excavated, estimated duration of excavation of project, and profit to be made from the excavation, excavation was not incidental to proposed cranberry bog). Interpreting accessory use provisions to require both that an incidental use be minor relative to the principal use and that the incidental use have a reasonable relationship to the primary one is essential to preserve the power and intent of local zoning authorities.

Cultivate Counseling's outpatient counseling business is clearly not subordinate to the agricultural use of the Property:

- Revenue from the counseling business will be well more than 10 times the revenue from any agricultural products in order to sustain the Cultivate Counseling staff and property at 401 Main Street. The business operators clearly state in their website copy that counseling can be and will be delivered without farm animals.

- In all documents filed with the town, such as the building permit, the business is described as a mental health counseling business with an industrial processing plant, not as agriculture.

The net effect on the surrounding community is not insignificant and thus not incidental.

As Bolton's own Town Counsel, Brian Falk, with Mirick O'Connell, acknowledged in an October 14, 2016 e-mail: "I have not identified any cases where outpatient treatment/counseling qualifies as accessory to an agricultural use." Though Attorney Falk then concludes that the business may be protected "if this component of the proposed use is so intertwined with farming activities that it is indistinguishable from agriculture," he heavily caveats such conclusion: "Please note that this interpretation relies on the information I have received to date. If the actual use of the property includes. . . counseling rooms or other components not clearly related or necessary to agricultural operations. . . then the Town may need to reexamine whether Cultivate Counseling's use has a 'primary purpose' of commercial agriculture." Where the "information" upon which Attorney Falk relied was that "provided by Adam Lapin," owner of Cultivate Counseling, we insist that you reevaluate his conclusion in light of the facts above.

Violation No. 4: Accessory Agricultural/Business Use. The Zoning Bylaw does permit an accessory business to agriculture in the Residential zoning district (Section 250-21E). The Owner-Operators' outpatient counseling business does not, however, qualify as such.

First, only select businesses are allowed as accessory to the agricultural use, as specified in Section 250-21E. They include retail sales of farm products, veterinary services, revenue-generating events and wireless communications facilities. They do NOT include mental health or substance abuse counseling.

Second, accessory businesses to agriculture are only allowed by special permit. Even if the counseling business qualified (which it does not), no special permit has been applied for or received by the Owner-Operators. The issuance of a special permit also requires that an owner have "not fewer than 20 acres on one or more contiguous parcels. . . [b]eing actively farmed . . ." The entire Property is only 7.22 acres, according to the Assessor's records.

Third, as noted above, the revenue from the counseling business greatly exceeds the revenue from agricultural operations on the Property. A requirement of the Zoning Bylaw is that the business use "be clearly accessory to the principal use of the premises." Total annual projected sales from the accessory use when fully operational must not exceed total sales derived from agriculture. That is not so.

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Thank you in advance for your consideration of the above violations. Kindly respond within the 14 days specified by MGL c. 40A, § 7, so that, if need be, we can proceed accordingly.

Submitted by:

John E. Tremblay 12/28/2016
John E. Tremblay – 5 Long Hill Rd

Mary D. H. McCarthy 12/28/2016
Mary D. H. McCarthy – 65 Burnham Rd.

Frederick C. Van Bennekom 12/29/16
Frederick Van Bennekom – 421 Main street

Linda Skinner Austin 12/28/16
Linda Skinner Austin – 84 Burnham Rd

All individually and on behalf of other residents of the Bolton Pan neighborhood

cc: Adam J. Costa, Esq. (via e-mail only)