Regis College v. Town of Weston

A missed opportunity for the SJC to provide further guidance on the Dover Amendment

BY DANIEL P. DAIN

In coverage of the Supreme Judicial Court's recent Dover Amendment decision in*Regis College v. Town of Weston*, 462 Mass. 28 (2012), practitioners have expressed general disappointment about the lack of guidance from the court as to the contours of G.L. c. 40A, § 3. In that case, Regis College proposed an eight-building senior housing complex across the street from its main campus in Weston. Residents would be charged a returnable entrance fee of up to $1 million and would pay a monthly fee of approximately $4,000. Residents would be assigned "academic advisors" and be required to enroll in a minimum of two courses per semester.

Dan Dain

Regis College's proposal did not comply with the zoning requirements of the residential district in which the property is located. But wait, Regis said, we are a nonprofit educational corporation protected by the Dover Amendment, G.L. c. 40A, § 3, ¶ 2, which prohibits municipalities from using zoning to "prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by … a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning [certain defined dimensional requirements]." Fine, opponents replied, you are a "nonprofit educational corporation" under the Dover Amendment, but your proposed project is not a structure to be used "for educational purposes." And that was the issue in the case. Regis College is a Dover Amendment-protected institution, but did it really intend to use its senior housing development for educational purposes? The Land Court said no via summary judgment.

On direct appellate review, the Supreme Judicial Court concluded that the record was insufficiently developed at the summary judgment stage, vacated the ruling, and remanded the case for further findings as to the intended use of the proposed senior housing. The SJC tried to provide some guidance as to what use "for educational purposes" means. Looking primarily to non-Dover Amendment case law, particularly tax cases, the SJC directed that the project-proponent (the religious or educational institution) has the burden, on a case-by-case basis, of proving that a project's "primary purpose" is for a Dover-protected use (i.e., religious or educational). And, with that, the SJC left practitioners wondering what the ruling means as a practical matter.

Two aspects of the decision are particularly surprising. First, there is precedent for Regis College's proposal. It looks an awful lot like what Lasell College in Newton proposed – and received Land Court approval for – nearly 20 years ago. True, Lasell College had been moderately more specific than Regis had been in defining the educational component of the proposed senior housing. In Regis College, the SJC noted the Lasell College precedent, but provided no analysis of whether it agreed with the Land Court in that decision or whether the breadth of the educational requirements in the Lasell College plan were something of a floor (and thus a guide) for securing Dover Amendment protection for future planned developments of this nature.

Second, in setting out a vague standard for whether a project proposed by a Dover Amendment-protected institution (religious or educational) can receive the protections of G.L. c. 40A, § 3, the SJC ignored decades of Dover Amendment jurisprudence that could have provided substance to the standard. Of particular note, the SJC never mentioned the seminal *Sisters of the Holy Cross v. Town of Brookline*, 347 Mass. 486 (1964); *The Bible Speaks v. Board of*

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REBA's Condominium Law and Practice Committee meets monthly to discuss recent case law and other issues of interest to the condominium association bar. Recent meeting topics include smoke-free buildings, vexing insurance concerns and secondary mortgage market issues. In September the Committee will host a program, open to all REBA members, on pets in condominium communities with a particular emphasis on service animals. Pictured (left to right): co-chair Diane Rubin, co-chair Clive Martin, Nancy Weissman, REBA president Chris Pitt and Neil Golden.

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Appeal of Lenox, 8 Mass. App. Ct. 19 (1979); the famous footnote 6 of *Trustees of Tufts College v. Medford*, 415 Mass. 753 (1993); or *Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141 (2001). Together, these cases show the unease that courts have had with municipalities becoming overly entangled in land use planning decisions for religious or educational institutions. For example, in *Bible Speaks*, the Appeals Court found that the Dover Amendment protections extended to lighting and a snack bar for a softball diamond on the campus of a non-profit educational institution. The Appeals Court also struck down a site plan review requirement, writing language that I find the most fascinating in all of Dover Amendment jurisprudence: "By reliance on the criteria spelled out in the informational statement, the board is essentially attempting to exercise planning board functions and pursuing its own notions of land use planning, and to the extent that those notions become inconsistent with the presence or expansion of educational institutions within the town, the board will be able to fashion restrictions that subordinate the educational use to the board's planning goals."

This unease with having municipalities (and ultimately courts) decide for Dover Amendment-protected institutions whether specific land use decisions made on their own properties advance a religious or educational purpose reached its greatest expression in *Martin*. That case featured a Superior Court judge consulting Mormon doctrine and history to determine whether the existence and size of a proposed temple steeple could be considered "religious" vs. secular. In reversing, the SJC observed in another great line: "It is not for judges to determine whether the inclusion of a particular architecture feature is 'necessary' for a particular religion. A rose window at Notre Dame Cathedral, a balcony at St. Peter's Basilica; are judges to decide whether these architectural elements are 'necessary' to the faith served by those buildings?"

But there is a big difference between a school making its own land use decision with respect to a snack bar at a softball diamond, and a college proposing an eight building senior housing complex in the middle of suburban Weston. Regis College's broad proposal even left many Dover Amendment advocates troubled. Was the school trying to use the Dover Amendment as a shield for revenue-generating real estate development? Would sanctioning the Regis College proposal open the door to future Dover Amendment abuse?

But even if the criticisms of Regis College's motivations are well-founded, should we be concerned? In these tight economic times, if the revenue generated by such projects (e.g., future senior housing developments) goes to the non-profit educational institution to support the institution's main mission – by helping to pay teachers, staff, other capital needs, keeping tuition lower, etc. – should we question that the mechanism that generates the revenue, on the school's campus, might not be strictly educational itself? And, importantly, who should make these calls – the schools and churches, or the municipalities and courts? One can see the practical difficulty of making the municipality and courts the arbiters of what qualifies as "primarily educational," rather than leaving this within the sound discretion of the schools themselves. The court in *Bible Speaks* was not troubled by a softball diamond, physical education being understood to be a part of the overall educational mission. By this reasoning, it would seem that a small football stadium at a Division 3 school would also qualify as educational. But what about a big stadium proposed by a Division 1 school? This is not an idle question as Umass Amherst makes the jump to Division 1, with its associated requirements for stadium capacity. Is the primary purpose of a big-time football stadium educational or revenue generation? Is this a subjective or objective question (if subjective, would there be depositions of school authorities over their priorities)? Do we want municipalities and courts making these land use decisions? Another important point to keep in mind: whether a proposed structure on a Dover-Amendment protected institution's property is itself entitled to Dover Amendment protection is only the first question of the Dover Amendment analysis (after the question of whether the institution itself qualifies for Dover Amendment protection). As G.L. c. 40A, § 3, ¶ 2 states, such structures are still subject to reasonable dimensional regulation. Isn't that really where Regis College's proposal should be evaluated – whether Weston's residential dimensional requirements can reasonably be applied to the school's proposal – as opposed to whether the proposed use of the structures is primarily educational in the first place?

These are important questions. There are a lot of Dover Amendment-protected institutions who own a lot of land in the commonwealth. By stating a vague standard while ignoring many important precedents, the SJC missed an opportunity to provide content and guidance to the stakeholders in these debates. That is unfortunate. By not providing clear standards, the SJC may have invited a return of this case to the court some years in the future, after the Land Court decides the case on the merits following remand.

Dan Dain is the chairman of the boutique real estate law firm Brennan, Dain, Le Ray, Wiest, Torpy & Garner, P.C. in Boston. He is a litigator with a focus on zoning appeals. He is a member of the REBA Litigation Committee and recently was a speaker on the issue of standing at the REBA Spring Conference. He can be reached at ddain@bdlwtg.com.

'Bad boy' guarantees may be triggered by insolvency

BY ANTHONY B. FIORAVANTI

An appellate court has concluded recently that language used in many non-recourse commercial real estate loan agreements triggers full recourse liability whenever the borrower becomes insolvent. Because guarantees are only called upon when a borrower is insolvent, this holding threatens to transform many non-recourse loans into de facto full recourse loans and to upend the relationships between commercial real estate lenders and borrowers.

Anthony Fioravanti

THE RISE OF NON-RECOURSE LENDING

Most modern commercial real estate loans are now made on a non-recourse basis by which the lender agrees that if the borrower defaults the lender's sole remedy is to foreclose and take back the property. The essential bargain between lender and borrower is that the lender agrees not to pursue recourse liability directly or indirectly against the borrower or its owners, provided that the lender can comfortably rely on the assurance that the financed asset will be "ring-fenced" from all other endeavors, creditors and liens related to the parent of the property owner or affiliates, and from the performance of any asset owned by such parent entity or affiliates. It is not just the isolation of the real property asset, but the isolation of the cash flows coming from the operation of the real property, from which debt service is paid on the mortgage loan and is subsequently distributed to the holders of securities backed by such mortgages.

The lender thereby accepts the risk of a borrower's insolvency, inability to pay or lack of adequate capital after the loan is made. Typically, the lender requires that the borrower be a single purpose entity created to own and manage the one commercial property. This structure prevents the borrower from commingling assets which might reduce its ability to repay the loan and isolates the lender's security from other creditors.

For its part, the borrower also agrees not to engage in "bad boy" conduct, such as making misrepresentations in connection with obtaining the loan, misapplying the rental payments, transferring or encumbering the property securing the loan, filing for bankruptcy, or other deliberate and intentional activities that would threaten the lender's security or interfere with its ability to enforce its collateral.

To help ensure that the borrower does not misbehave, the lender requires a creditworthy guarantor (usual a principal or managing member of the borrower) to provide a guaranty of the borrower's liability. If the borrower engaged in any "bad boy" activities, generally understood to be intentional and deliberate acts, the guarantor would become personally liable for the full amount of the unpaid loan.

A recent appellate court decision from Michigan turns this recourse loan structure on its head.

THE *CHERRYLAND* DECISION

In *Wells Fargo, N.A. v. Cherryland Mall Limited Partnership*, the owner of Cherryland Mall in Traverse City, Michigan, received an $8.7 million nonrecourse mortgage loan. One of the covenants in the loan agreement, which appears as standard language in many loan agreements, was that the borrower would not "fail to remain solvent or pay its own liabilities." A guaranty from a Cherryland principal provided that the loan became fully recourse if the borrower violated any of the "bad boy" covenants.

Because of the economic downturn, the borrower defaulted and became insolvent. Following a foreclosure, there was a deficiency of $2.1 million. Wells Fargo sued the borrower and guarantor, arguing that the guarantor was liable for the deficiency because the borrower breached the covenant requiring it to remain solvent and pay its debts as they became due. The trial court agreed and entered a judgment for the full amount of the deficiency against the guarantor.

On appeal, the guarantor argued that the parties did not intend to make the loan fully recourse as to the guarantor unless the borrower became insolvent as a result of its intentional or willful bad acts. He noted that Cherryland's inability to make its loan payments did not result from any willful or intentional "bad act." The guarantor also warned that allowing the loan to become fully recourse simply because the borrower was insolvent was against public policy and could lead to "economic disaster for the business community."

The appellate court rejected these arguments. The court stated that is must "give effect to every word, phrase, and clause in a contract and avoid an interpretation which would render any part of the contract surplusage or nugatory." The loan documents did not specify that full recourse liability would be imposed only as a result of the borrower's intentional or deliberate act. Instead, the documents stated, "any failure to remain solvent, no matter what the cause, is a violation" of the loan covenants. The court dryly observed that "[i]t is not the job of this Court to save litigants from their bad bargains or their failure to read and understand the terms of a contract."

The court did acknowledge that its construction of the covenant "seems incongruent with the perceived nature of a nonrecourse debt" but rejected the guarantor's public policy argument as well, holding that it was up to the Michigan legislature to address matters of public policy.

The case has been appealed further to the Michigan Supreme Court.

CONCLUSION

The potential impact of the *Cherryland* decision, if upheld on further appeal and adopted by other jurisdictions, is immense. Because most of these loans are part of a commercial mortgage-backed securities pool, very little can likely be done now to amend the language of individual agreements. Nevertheless, lenders, borrowers, and guarantors should review their agreements to determine if they are at risk. For any new loans, borrowers and their counsel need to review any covenants carefully to ensure that they are drafted narrowly to avoid such unintended results.

Anthony Fioravanti is an associate at Yurko, Salvesen & Remz, P.C. and serves as co-counsel in *REBA v. NREIS*, the association's landmark case on the practice of law by non-lawyers. He represents clients in civil litigation in state and federal courts in a wide range of complex business litigation matters. He can be contacted by email at afioravanti@bizlit.com.