COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. No. 22 MISC 000294 (KTS)

MARTHA'S VINEYARD REGIONAL SCHOOL DISTRICT,	)
Plaintiff,	)
v.	)
TOWN OF OAK BLUFFS PLANNING BOARD, *et al.*,	)
Defendants,	)

DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

The Dover Amendment, G. L. c. 40A, § 3, second par., bars local zoning bylaws from prohibiting, regulating, or restricting the use of land or structures for educational purposes, but does allow "such land or structures [to] 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." In this case, the court must decide whether the Dover Amendment bars the application of the water protection regulations of the Oak Bluffs zoning bylaw to an artificial turf playing field that has been proposed by the Martha's Vineyard Regional School District ("MVRSD"). The Town of Oak Bluffs (the "Town") and its planning board (the "Board") oppose the project because they believe that the materials used to construct the artificial turf playing field will, over time, degrade and seep into the groundwater, thereby contaminating the sole source aquifer that serves the entire island of Martha's Vineyard.

In the decision under review, the Board denied a special permit to the MVRSD because the project did not meet the groundwater protection regulations that are applicable to land that is located in the Water Resources Protection Overlay District ("WRPOD") under the Oak Bluffs zoning bylaw. According to the Board, the decision to deny the project was a permissible regulation of "open space" expressly sanctioned by the Dover Amendment.

The MVRSD has moved for partial summary judgment seeking an order that the Dover Amendment bars the Board from applying the groundwater protection regulations to the project. The motion came on for a hearing on July 14, 2023, and I took the matter under advisement. For the reasons set forth in this decision, the motion for partial summary judgment is ALLOWED.

Background

The MVRSD seeks to construct a track and field facility at the Martha's Vineyard Regional High School, which will include an artificial turf playing field. The field will incorporate microplastics and other potential contaminants that, if not properly mitigated, may impact water quality on Martha's Vineyard. The property where the artificial field is proposed is located within the WRPOD. Under the regulations applicable to land in the WRPOD, any use of property that "involves the generation, use of [*sic*] storage of any toxic or hazardous materials in greater quantities than that associated with a normal household use" must go through the special permit process before the Board. Oak Bluffs zoning bylaw, §8.2.6. In particular, §8.2.7(3) of the bylaw sets forth the criteria for a grant of a special permit in the WRPOD as follows:

> Special Permit Criteria. Special Permits shall be granted only where the Planning Board determines, in conjunction with the other town agencies as specified herein, that
>
> a. groundwater quality resulting from on-site waste disposal and other on-site operations will not fall below federal or state standards, if existing groundwater quality is already below those standards on-site disposal will result in no further deterioration.

b. the intent of this by-law, as well as the criteria, has been satisfied, after consideration of the simplicity, reliability, and the feasibility of the control measures proposed and the degree of the threat to water quality which would result if the control measures failed.

c. The Planning Board shall explain any departures from the recommendations of the other town agencies in its decision.

Because the artificial turf field will be comprised of "toxic or hazardous materials in greater quantities than that associated with a normal household use," the Oak Bluffs building inspector directed the MVRSD to apply to the Board for a special permit under the WRPOD bylaw. The MVRSD complied with this directive in December 2021.[1] By a written decision dated May 16, 2022, the Board denied the application. In the decision, the Board found that the proposed project did not meet the criteria set forth in zoning bylaw §8.2. The primary reason for the Board's denial was a finding that the project did not adequately protect the island's groundwater and sole source aquifer from contamination due to the materials that would be used to construct the playing field. The Board acknowledged in its decision that the project is afforded special protection by the Dover Amendment. However, the Board concluded that it could apply the ground water protection regulations to the project under the Dover Amendment exception that allows reasonable regulation of "open space."

The key part of the Board's decision reads as follows:

> In this case, the field in question falls within the definition of open space. The Dover Amendment provides a list of things that "may be subject to reasonable regulations," and that list includes "open space" as well as the words:
>
> - the bulk and height of structures
> - determining yard sizes
> - setbacks
> - parking

[1] The MVRSD notes in its motion papers that it complied with the building inspector's directive to file for a special permit, but maintains that its project should never have been subject to the special permit process due to the protections provided by the Dover Amendment.

- building coverage requirements

* * * * *

> In conclusion, the Planning Board takes the position that it has the authority to regulate the *use* of open space, as provided in the Dover Amendment, and to pursue legitimate goals of protecting the island's drinking water and shellfish. Moreover, the applicant has not demonstrated that changing the field from artificial turf to natural grass "would substantially diminish or detract from the usefulness of a proposed structure. . .without appreciably advancing the municipality's legitimate concerns. (emphasis supplied)

Ex. 6, pp. 26-27, 30.

The MVRSD timely appealed.

Discussion

Standard of Review. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 283 (1997); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991). In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the summary judgment motion. *White v. Univ. of Mass. at Boston*, 410 Mass. 553, 556-557 (1991). To prevail, the moving party must affirmatively demonstrate that there is no triable issue of fact. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989).

In this case, there are no genuine disputes of material fact concerning the narrow question raised by the MVRSD—can the Board apply the ground water protection provisions of the WRPOD to prevent the construction of the artificial turf field under the guise of regulating "open space?" The parties agree that the athletic field project is an educational use which is protected by the Dover Amendment. They part ways, however, over whether the water protection regulations are a reasonable regulation of "open space" permitted by the Dover Amendment.

Thus, whether the Board correctly denied the special permit depends on the meaning of the term "open space" as used in the Dover Amendment, which is a question of law for the court.

The Dover Amendment. The Dover Amendment protects educational uses from the normal application of local zoning bylaws. It provides, in pertinent part:

> No zoning ordinance or by-law shall. . .prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic. . .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*." (emphasis supplied).

G. L. c. 40A, § 3. The Supreme Judicial Court in *Trustees of Tufts College v. Medford*, 415 Mass. 753, 757-758 (1993) construed this section of the Dover Amendment to create a list of limited exceptions to the general rule that local zoning does not apply to an educational use. The court summarized the role of the local board in applying these exceptions as follows:

> The Dover Amendment bars the adoption of a zoning ordinance or by-law that seeks to prohibit or restrict *use* of land for educational purposes. However, a proviso in the statute authorizes a municipality to adopt and apply "reasonable regulations" concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed. The whole of the Dover Amendment, as it presently stands, seeks to strike a balance between preventing local discrimination against an educational use, and honoring legitimate municipal concerns that typically find expression in local zoning laws.

Id. (citations omitted) (emphasis in original); see also *Campbell v. City Council of Lynn*, 415 Mass. 772, 778 (1993). To this end, the Dover Amendment limits the discretionary decision-making function of a local board that is the hallmark of the special permit and variance processes authorized by G. L. c.40A, §§9-10. See *The Bible Speaks v. Bd. of Appeal of Lenox*, 8 Mass.App.Ct. 19, 32-34 (1979) (holding that the local bylaw violated the Dover Amendment because it invested "the board with a considerable measure of discretionary authority over an educational institution's use of its facilities and create[d] 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.").

In the instant case, the Board denied the special permit to the MVRSD because the materials to be used to construct the artificial turf field did not, in the Board's judgment, satisfy the special permit criteria §8.2.7(3) of the WRPOD bylaw. Recognizing that the Dover Amendment limits a local board's power to regulate an educational use, the Board couched its denial as a form of the regulation of "open space" that furthers a legitimate municipal goal—the protection of drinking water. It justified this determination by pointing out that its decision did not nullify the educational use—it just forces the MVRSD to build a new facility with a grass playing field as opposed to an artificial turf field made of potential contaminants.

The MVRSD challenges the legal underpinning of the Board's decision by arguing that the water protection regulations in §8.2.7 are not intended to regulate open space at all. Rather, they regulate the use of land and, in this case, are being used by the Board to nullify an educational use in violation of the Dover Amendment.

The MVRSD urges a literal interpretation of the Dover Amendment, citing the maxim, *expressio unius est exclusio alterius*, that "the expression of one thing in a statute is an implied exclusion of other things not included in the statute." See *Skawski v. Greenfield Invs. Prop. Dev., LLC*, 473 Mass. 580, 588 (2016) (quoting *Bank of Am., N.A. v. Rosa*, 466 Mass. 613, 619 (2013). It suggests that the Dover Amendment is exclusionary by its nature and should be read restrictively. Thus, it argues, the absence of language that identifies ground water or aquifer protection as one of the express exemptions from the Dover Amendment means the Legislature intended to exclude it.

The Town and Board, on the other hand, urge a broad interpretation of the Dover Amendment and its inclusion of "open space" as an exception that would allow for the imposition of the WRPOD regulations to the artificial field project, particularly where the sole source of drinking water for Martha's Vineyard is at stake. They argue that such an interpretation would not undermine the purpose of the Dover Amendment and, at the same time, is consistent with the Board's general power to protect the "health, safety, and general welfare" of the island's inhabitants.[2]

Given the parties' differing interpretations, the court is left with determining what the Legislature intended when it listed "open space" as one of the aspects of an educational use that may be "reasonably regulated" by zoning. In making this determination, the court has at its disposal the several canons of statutory construction that all have as their goal the ascertainment of the Legislature's intent when it chose the language that ultimately made it into the statute in question.

First and foremost, the court must start with the plain language of the statute. *Cavanaugh v. Cavanaugh*, 490 Mass. 398, 405 (2022). A court must look

> to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

Boston Police Patrolmen's Ass'n, Inc. v. Boston, 435 Mass. 718, 719-720 (2002), quoting *O'Brien v. Director of the Div. of Employment Sec.*, 393 Mass. 482, 487-488 (1984). In so doing, the court should look to the language of the statute as a whole and "strive to 'give effect to each word.'" *Commonwealth v. Vigiani*, 488 Mass. 34, 36 (2021), quoting *Ropes & Gray LLP v.*

[2] General Laws c. 40A, § 1A defines "zoning" as "ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the *health, safety and general welfare* of their present and future inhabitants."

Jalbert, 454 Mass. 407, 412 (2009). Where words are grouped together in a statute, they must be read in harmony. *Franklin Office Park Realty Corp. v. Comm'r of the Dept. of Environmental Protection*, 466 Mass. 454, 462 (2013). This means that the court is not free to interpret one word or phrase "in a way that makes it exceptionally broader than its neighbors." *Id.*; see *Commonwealth v. Brooks*, 366 Mass. 423, 428 (1974) ("words in a statute must be considered in light of the other words surrounding them.); *Commonwealth v. John T. Connor Co.*, 222 Mass. 299, 302 (1915) ("the scope of doubtful words may be ascertained by reference to the operation of other associated words").

The term "open space" as used in the Dover Amendment is not defined in any section of the Zoning Act, although G. L. c.40A, §1A defines "*open space* residential development" to include land "kept in an open or natural state and not be built for residential use or developed for accessory uses such as parking or roadway." There is also no helpful legislative history cited by the parties or found by this court that would further elucidate the Legislature's intent when it adopted the proviso language in G. L. c. 40A, § 3 and included "open space" in the list of permissible zoning regulations on an educational use.

Therefore, I start with the language of the Dover Amendment to ascertain the Legislature's intent when it identified the exceptions to the Dover Amendment as they apply to educational uses. The only exceptions to the general rule that local zoning may not prohibit an educational use are listed together: bulk and height of structures, yard sizes, lot area, setbacks, *open space*, parking and building coverage requirements. Other than the term "open space," the other exceptions in this group are dimensional limitations typically found in a local zoning bylaw that control the size, shape, and location of buildings that may be part of an educational use. Because the court must strive to construe this list of exceptions in harmony, it is logical to

conclude that the Legislature included the words "open space" as another *dimensional* limitation that may be imposed on an educational use if it furthers a legitimate municipal purpose. That the Legislature intended "open space" to be used as a dimensional limitation is confirmed by paragraph 8 of the Dover Amendment, which provides special protection to the construction of handicapped access ramps as follows: "No dimensional lot requirement of a zoning ordinance or bylaw, including but not limited to, set back, front yard, side yard, rear yard and *open space* shall apply to handicapped access ramps on private property[.]" (emphasis supplied).

Where a sensible interpretation of the Legislature's intent can be gleaned from the language of the statute itself, the court is not free to reach for definitions contained in other statutes or statutory schemes for assistance. To adopt the broad definition urged by the Town and Board, this court would have to ignore the list of seven other limitations selected by the Legislature for inclusion in the Dover Amendment—all of which are dimensional—and adopt an exceptionally broader interpretation of "open space" that is not limited to the dimensions of the educational use but extends to groundwater protection. I am not persuaded that the inclusion of the term "open space" in the Dover Amendment was intended to be broadly construed to open the door for an educational use to be regulated, and even stopped, by water protection regulations, no matter how important the protection of water resources may be.

Thus, I conclude that the term "open space" as used in the Dover Amendment was intended to allow a local zoning board to use it only as a dimensional limitation on an educational use. This interpretation is consistent with all of the language of the second paragraph of Dover Amendment and furthers its overall purpose of eliminating local discrimination against educational uses as described in *Trustees of Tufts* and the cases that have followed it.

Because I am ruling against the Town and Board, it is appropriate to address their arguments in support of the imposition of the groundwater protection regulations on the artificial field project. They start by citing *The Southern New England Conference Ass'n of Seventh-Day Adventists v. Town of Burlington*, 21 Mass.App.Ct. 701 (1986) and *Prime v. Zoning Bd. of Appeals of Norwell*, 42 Mass.App.Ct. 796 (1997) as examples of other municipal bylaws that have been found to be consistent with the protections of the Dover Amendment. Both cases are distinguishable from the WRPOD bylaw.

In *Seventh-Day Adventists*, the court ruled that a town zoning bylaw that protected wetlands was a permissible regulation of a religious use. The court reasoned that the town's power to regulate wetlands was derived from G. L. c. 131, § 40, the state Wetlands Protection Act, which also confers on any town the power to more stringently control development that threatens wetland areas. *Seventh-Day Adventists*, 21 Mass.App.Ct. at 706. From the language of the Wetlands Protection Act, the court concluded that the Legislature has recognized the substantive validity of any local wetlands regulation, whether framed as a zoning bylaw or a local wetlands regulations, and did not intend the regulation of wetlands by a municipality to be exempt from the Dover Amendment. *Id*. at 706-707. The instant case does not involve wetlands regulations nor are the regulations under the WRPOD authorized by a state statute similar to the Wetlands Protection Act.

The *Prime* case addressed the propriety of a local zoning bylaw that regulated certain agricultural uses in an aquifer protection district. There, the zoning bylaw in question authorized the board to consider the materials to be used in the agricultural proposal as part of a special permit application process. The court ruled that the bylaw was permissible so long as it was not applied to nullify the agricultural use. *Prime*, 42 Mass.App.Ct. at 802. *Prime* is distinguishable

from this case because the protection provided by the Dover Amendment to an agricultural use under paragraph 1, does not include a list of exemptions from zoning—like bulk and height of structures, yard sizes, lot area, setbacks, *open space*, parking and building coverage requirements—as compared to the protection of educational uses called for in paragraph 2. Thus, the protections from zoning afforded an educational use by the Dover Amendment are broader than those afforded an agricultural use.

The Town and Board also point to other chapters of the General Laws where "open space" *is* defined as evidence of the Legislature's intent under the Dover Amendment. In particular, the Town and Board cite G. L. c. 40R, the so-called Smart Growth Zoning and Housing Production statute, and G. L. c. 40Y, the so-called Starter Home statute, both of which define "open space" to include land intended to protect existing and future well fields and aquifers. However, these chapters have as their general purpose the creation of housing which is distinct from the Dover Amendment's purpose of protecting educational uses from discrimination through municipal zoning. See *Moore v. Zoning Bd. of Appeals of Middleborough*, 360 Mass. 630, 634 (1971) (finding that definition of term used in another statute was not controlling where that statute had different purpose or objective than the statute in question).

Conclusion

The ground water protection zoning bylaw in Oak Bluffs is a regulatory scheme whose express purpose is to prevent any use of land in the WRPOD that threatens the water supply on Martha's Vineyard. Section 8.2.6 invests the Board with a considerable measure of discretion over any use in the WRPOD and, by its terms, may prevent an educational use that involves the "generation, use or storage of any toxic or hazardous materials in greater quantities that that

associated with a normal household." In this respect, it is not a dimensional limitation on "open space" that is exempted from the protections of the Dover Amendment. Therefore, the Board acted beyond its authority when it imposed the water protection regulations of the WRPOD on the artificial turf field project.

I recognize that the protection of groundwater is of critical importance to any municipality, particularly when that municipality is on an island in the Atlantic Ocean. But I am constrained by the language of the Dover Amendment and the cases that have construed it. The Legislature has limited the application of local zoning bylaws to an educational use to *dimensional* controls, only. The wisdom of this limitation, under these circumstances, is not for this court to question.[3]

For the reasons set forth in this decision, the MVRSD's motion for partial summary judgment is ALLOWED. The parties are ORDERED to collaborate on a written joint status report to be submitted to the court within thirty days of this decision. The parties are to advise the court, in light of this ruling, whether there are any issues that remain to be tried to the court, each party's readiness for trial, and whether there is a need for further discovery. Upon review of the joint written statement, the court will assign the case for either a status conference or a pretrial conference.

[3] I note that the potential impacts of the project on groundwater and the aquifer were thoroughly vetted, and the project approved by the Martha's Vineyard Commission in its decision of August 27, 2021. Although it appears counterintuitive that the Town of Oak Bluffs and its Planning Board cannot impose a reasonable regulation on something as important as groundwater protection, the fact that there is another public body tasked with reviewing this legitimate concern is significant.

So Ordered.

By the Court. (Smith, J.)

/s/ Kevin T. Smith

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: September 5, 2023