

## 'Dover' protections don't extend to hospital program

### Judge: property use primarily therapeutic

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A proposed residential program that would teach coping skills to adolescents with Borderline Personality Disorder was not exempt from the town of Lincoln's zoning laws under the Dover Amendment, a Land Court judge has determined.

The Dover Amendment, G.L.c. 40A, §3, bars cities and towns from blocking the use of land owned by nonprofit entities for educational or religious purposes. The plaintiff, Mc-

on grounds that McLean's program was primarily therapeutic and not educational in nature.

Judge Karyn F. Scheier affirmed, citing the Supreme Judicial Court's warning in its 2011 *Regis v. Town of Weston* decision that the term "educational purposes" should be construed in a way so as to avoid improperly extending the Dover Amendment's protection to situations in which "form has been elevated over substance."

"In this case, the evidence at trial established that the 3East Boys Program is a structured, skill-based curriculum with formal classroom-based sessions in addition to individual therapy sessions



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McLean Hospital planned to use property zoned residential-only to operate its '3East Boys' program.

### The McLean Hospital Corporation v. Town of Lincoln, et al.

**THE ISSUE** Was a proposed residential program that would teach coping skills to adolescents with Borderline Personality Disorder exempt from town zoning laws under the Dover Amendment?

**DECISION** No (Land Court)

**LAWYERS** Diane C. Tillotson of Hemenway & Barnes, Boston (plaintiff)  
Jason R. Talerman of Mead, Talerman & Costa, Millis; Michael C. Fee of Pierce & Mandell, Boston (defense)



"For practitioners looking to fit their client's project into the Dover box, this decision suggests that programs aimed at curing or alleviating psychological disorders or other forms of mental illness won't qualify."

— Donald R. Pinto Jr., Boston

Lean Hospital, planned to use property it owned in Lincoln that was zoned residential-only to operate its "3East Boys" program. The program implements what the hospital describes as a "specialized curriculum" using a dialectical behavior therapy model to teach skills that enable participants to regulate their emotions and return to their families.

Lincoln's Zoning Board of Appeals overturned the town building commissioner's grant of a permit

aimed at providing residents with critical coping skills to mitigate the effects of BPD," Scheier wrote. "But to conclude that the structure of the program essentially transforms a therapeutic program into an educational one ... would, in fact, elevate form over substance."

The 13-page decision is *The McLean Hospital Corporation v. Town of Lincoln, et al.*, Lawyers Weekly No. 14-096-18. The full text of the ruling can be ordered at [masslawyersweekly.com](http://masslawyersweekly.com).

### 'Mixed emotions'

Jason R. Talerman of Millis, who represented the town, said the decision establishes a "firewall" as to how far the Dover Amendment can be extended.

"Factually, there's not a significant educational component, and there's an extremely significant treatment program," he said.

Still, Talerman said, he had "mixed emotions" over the case because the program itself, while not primarily educational in nature, is so valuable.

"McLean performs a fabulous service for its patients, and I sincerely hope this program finds a home elsewhere," he said.

Michael C. Fee of Boston, who represented a group of abutters that intervened in the case as co-defendants, said the decision shows how, in the wake of *Regis*, courts are less willing to expand the scope of Dover protections to novel uses not specifically authorized under prior case law.

Fee also acknowledged McLean's "compelling argument" that its program utilizes tools, worksheets and coaching techniques that are primarily educational in function. However, he said, that does not change the fact that the primary purpose of the program is to treat and cure a serious mental illness.

"Here, the proposed



facility had broad indicia of medical treatment, and that is something that no Massachusetts court has recognized as exempt,” he said.

McLean’s attorney, Diane C. Tillotson of Boston, could not be reached for comment prior to deadline.

Boston real estate litigator Donald R. Pinto Jr. said the ruling clarifies the often-blurry line between uses in which education predominates and those in which it is secondary or incidental.

He added that it is common for project proponents to “push the envelope” in trying to establish a use as educational. After all, he said, getting a project Dover-qualified serves as a “zoning golden ticket” that allows the use to be conducted in any district, subject only to reasonable dimensional regulations.

“For practitioners looking to fit their client’s project into the Dover box, this decision suggests that programs aimed at curing or alleviating psychological disorders or other forms of mental illness won’t qualify,” Pinto said.

Daniel P. Dain of Boston, who also litigates land use cases, found the ruling surprising given the judge’s acknowledgment that the definition of “education” is broad and reaches beyond notions of traditional school settings.

“In that context, the Land Court’s factual findings all seemed to lead to a conclusion of educational use,” he said, particularly as the program had a curriculum and involved teaching in a classroom setting.

“This all sounds within

the boundaries of the cases cited by the court itself,” Dain said. “The case would seem to call for direct appellate review by the [SJC] to provide further guidance on where that Dover line should be drawn.”

Christopher J. Petrini of Framingham, who represents cities and towns, said the decision highlights the importance of a municipal zoning enforcement officer’s proper understanding of the Dover Amendment in evaluating requests for exemptions from zoning requirements in permit applications.

“A municipality’s failure to require full information or conduct a proper analysis can lead to expensive and protracted litigation, which I’ve seen on several occasions in my career,” Petrini said.

### **Residential facility**

In May 2016, McLean purchased a 5.56-acre property in Lincoln located in an R-1 residential zoning district.

The Belmont-based hospital intended to use the property to operate the 3East Boys Program, which would house up to 12 male adolescents diagnosed with BPD or other forms of emotional dysregulation.

The program, which currently operates on McLean’s Belmont campus, utilizes group sessions, worksheets completed by participants as homework, and modeling of behavior conducted by professionals and participants in order to teach participants skills that enable them to lead productive lives.

A typical day in the

program involves roughly four hours of classroom training in addition to homework and athletic exercise.

Before purchasing the land, McLean wrote to the Lincoln building commissioner and Planning Board advising them that it planned to put the property to educational use and asked for a written determination to that effect.

The commissioner agreed, and in September 2016, the Planning Board approved the site plan.

Abutting residents appealed the decision to the ZBA, which voted in November 2016 to overturn the commissioner’s determination on grounds that McLean’s proposed use was not educational within the meaning of the Dover Amendment.

McLean then filed suit in Land Court pursuant to G.L.c. 240, §14A, seeking a determination that its proposed use was, indeed, educational.

### **Therapeutic purpose**

After a four-day bench trial, Scheier found that McLean’s proposed use was not, in fact, educational for the purposes of Dover Amendment protection.

Conceding that Massachusetts courts have interpreted the definition of “education” broadly in the Dover Amendment context to include activities not taught in a classroom and outside the realm of a traditional curriculum, the judge pointed out that educational use must still be the “primary and dominant purpose” of the proposed project in order to qualify.

And though courts have

found residential programs that teach core life skills to be educational under the Dover Amendment, Scheier rejected McLean’s argument that the skills taught through the 3East Boy Program curriculum qualified.

The training recognized in prior decisions as “educational” included core life skills such as cooking, shopping, job-seeking or other skills needed on a daily basis to function in society, she pointed out.

On the other hand, “the skills training offered by the 3East Boys Program targets the ‘emotional dysregulation’ caused by Borderline Personality Disorder and related mental health diagnoses,” Scheier said.

“Rather than educating the participants in daily living skills focused outward — toward assimilation into the community — and which are distinct from the participants’ mental illness — the 3East Boys Program focuses on developing skills which look inward and pointedly address the manifestations of the individual’s diagnosis,” she wrote.

Additionally, the judge said, any educational components of the program were secondary to the therapeutic, curative components.

Meanwhile, labeling a program “educational” based on its structure rather than content would elevate “form over substance,” an approach explicitly disfavored in the Regis College case, Scheier found.

Accordingly, the ZBA’s decision should be affirmed, the judge concluded.