

Not Reported in N.E.2d, 2010 WL 10010 (Mass.Land Ct.)  
 (Cite as: 2010 WL 10010 (Mass.Land Ct.))

**H**Only the Westlaw citation is currently available.

Massachusetts Land Court.  
 Department of the Trial Court.  
**RegisCOLLEGE**, Plaintiff,

v.

TOWN OF **WESTON**, and Wendy Kaplan Armour,  
 Peter C. Knight, Marc Margulies, Winifred Li, Jane  
 F. Carson, and Elizabeth H. Munroe, as they are  
 members of the Zoning Board of Appeals of the  
 Town of **Weston**, Defendants,  
 and  
 Robert Hedges, Jr., Christie Hedges, Patricia Mo-  
 hiuddin, Ahmed Mohiuddin, Arnold Zenker, and  
 Barbara Zenker, Intervenor-Defendants.

**No. 316097 (AHS).**

Jan. 4, 2010.

#### DECISION

ALEXANDER H. SANDS, III, Justice.

**\*1** On November 25, 2005, Plaintiff **RegisCollege** (“Regis”) filed an unverified Complaint containing six counts. Counts I-IV were brought pursuant to G.L. c. 40A, § 3 (the “Dover Amendment”) and G.L. c. 240, § 14A, seeking a determination that a proposed development of Regis' East Campus (as hereinafter defined) (the “Project”) is an educational use protected under the Dover Amendment and, accordingly, that certain dimensional provisions of the Town of **Weston** (the “Town”) Zoning By-law (the “By-law”) are invalid as applied to the Project. Count V was brought pursuant to G.L. c. 40A, § 17, appealing the denial of certain variances by the Zoning Board of Appeals of the Town of **Weston** (the “ZBA”). Count VI was brought pursuant to Const. Pt. 2, c. 5, § 2 of the Massachusetts Declaration of Rights, seeking declaratory judgments relating to the validity of provisions of the By-law, both in context of the Dover Amendment and as applied to the Project. The Complaint named the Town and members of the ZBA as defendants (hereinafter collectively, “Defendants”).

The Town filed an Answer to Counts I-IV and VI of

the Complaint on February 13, 2006. On February 17, 2006, Stop Regis Overdevelopment, Inc. (“SRO”), Robert Hedges, Christie Hedges, Patricia Mohiuddin, Ahmed Mohiuddin, Arnold Zenker, and Barbara Zenker filed a Motion to Intervene as Parties Defendant, and an Answer to Regis' Complaint. Based on an interpretation of G.L. c. 240, § 14A and Mass. R. Civ. P. 24(a), on March 17, 2006, this court (Lombardi, J.) issued an Order Denying in Part and Allowing in Part the Motion to Intervene determining that SRO could not intervene as it did not have standing, but that intervention was permissible by Robert Hedges, Christie Hedges, Patricia Mohiuddin, Ahmed Mohiuddin, Arnold Zenker, and Barbara Zenker (the “Intervenors”). On April 3, 2006, the Intervenors filed a Revised Answer. On May 5, 2006, all parties to this action executed a Confidentiality Agreement (the “Confidentiality Agreement”) relative to any documents produced and designated as “Confidential.”

On November 27, 2006, the Town filed an Amended Answer and Counterclaim, asserting promissory estoppel. In the Counterclaim, the Town argued that it had reasonably relied upon Regis' specific promises that it would not build an assisted living facility on the East Campus (as hereinafter defined) if permitted to connect to the Massachusetts Water Resources Authority (“MWRA”) sewer system. Regis filed an Answer and Jury Demand to the Town's Counterclaim on December 5, 2006.

On December 17, 2007, and January 7, 2008, Defendants filed Motions to Dismiss the “As-Applied” Zoning Claims Asserted in Counts I-IV of Regis' Complaint under Mass. R. Civ. P. 12(b)(1) and 12(h)(3) (both involving subject matter jurisdiction).<sup>FN1</sup> On February 4, 2008, Regis filed an Opposition to Defendants' Motion to Dismiss, and on March 14, 2008, it filed a Supplement to Opposition to Defendants' Motion to Dismiss.

FN1. Due to Judge Lombardi's pending retirement, Judge Sands took over this case effective January 1, 2008.

**\*2** On March 14, 2008, Regis filed a Motion for Summary Judgment against the Town's Counterclaim

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for Promissory Estoppel and a Motion for Partial Summary Judgment on the Dover Amendment Issues. On the same date, the Intervenor's filed a Motion to Dismiss the "As-Applied" Zoning Claims Asserted in Counts I-IV of Regis' Complaint or, in the alternative, to Bifurcate the Case for Trial.

On April 23, 2008, Regis filed an Opposition to the Intervenor's Motion to Dismiss, and Defendants filed an Opposition to Regis' Motion for Summary Judgment, an Opposition to Regis' Motion for Partial Summary Judgment, and Cross-Motion for Summary Judgment (relative to the Dover Amendment issues). On the same date, the Intervenor's filed an Opposition to Regis' Motion for Summary Judgment and an Opposition to Regis' Motion for Partial Summary Judgment.

On May 19, 2008, Regis filed Replies to Defendants' Oppositions to Regis' Motions for Summary Judgment. Also on this date, the Intervenor's filed a Reply brief in further support of their Motion to Dismiss or bifurcate the case. On June 26, 2008, this court heard all motions and took them under advisement. By Decision dated January 23, 2009, this court found that the Land Court had jurisdiction under G.L. c. 240, § 14A to address the issue of whether the application of certain provisions of the By-law to the Project was reasonable and that Defendants did not meet the test for promissory estoppel, and, as a result, Regis was not estopped from building the Project under such a theory. This court remanded to the ZBA the issue of whether the Project was exempt from compliance with the By-law subject only to reasonable regulations under the Dover Amendment. By decision dated March 18, 2009, the ZBA voted unanimously to find that the Project did not meet the requirements of the Dover Amendment.

Regis filed its First Amended Complaint on April 13, 2009, adding two new counts relative to the application of the Dover Amendment to the Project. Intervenor's filed their Answer on May 12, 2009, and Defendants filed their Answer on May 13, 2009. On May 22, 2009, Defendants filed their Supplementation of Summary Judgment Filings on Dover Amendment Use Issue and Intervenor's filed their Supplemental Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment on the "Dover" Issues, together with Supplemental Statement of Disputed and Undisputed Material Facts and Appendix.<sup>FN2</sup>

Regis filed its Supplement to its Motion for Summary Judgment on "Dover" Issues on May 26, 2009, together with Supplemental Statement of Undisputed Material Facts and Appendix. On May 29, 2009, Regis filed its Motion to Dismiss the Town's Amended Counterclaim, together with supporting memorandum and Appendix.<sup>FN3</sup> The Intervenor's filed their Response to Regis' Supplemental Statement of Undisputed Material Facts on June 16, 2009. Regis filed its Response to the Supplemental Summary Judgment Briefs of Defendants and Intervenor's on June 17, 2009. On July 13, 2009, Regis filed Affidavits of Dr. Mary Jane England, Thomas Pisatorino, Dr. Antoinette Hays, Dr. Paula Harbecke, and Doreen Zankowski. On July 29, 2009, the Intervenor's filed their Motion to Strike Five Supplemental Affidavits and their Motion to Strike Regis' July 13, 2009, Reply to Responses. On August 24, 2009, Regis filed its Opposition to Intervenor's Motions to Strike. A hearing was held on all motions on September 28, 2009, at which time all motions were taken under advisement.

FN2. Intervenor's also filed their Motion to Compel Adequate Expert Disclosures by Plaintiff or, in the alternative, to Preclude Plaintiff from presenting certain Expert Opinion Testimony at Trial. Although this motion was never formally acted upon, it has been mooted by this decision.

FN3. Through a Post Hearing Order dated June 18, 2009, this court allowed Regis' Motion to Dismiss the Town's Amended Counterclaim with respect to promissory estoppel, as this court previously addressed such issue in its decision dated January 23, 2009.

\*3 Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *See Cassesso v. Comm'r of Corr.*, 390 Mass. 419, 422 (1983); *Cnty. Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). In this court's review of the materials accompanying a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *Attorney Gen. v. Bailey*, 386 Mass. 367, 371 (1982) (quoting *Hub Assocs. v. Goode*, 357

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Mass. 449, 451 (1970)).

This court finds that the following facts are not in dispute:<sup>FN4</sup>

FN4. This court also relies on the facts stated in Decision 1 as undisputed facts.

1. The Project proposes eight buildings. Four main buildings contain classrooms (approximately seven children's classrooms, five classrooms for lifelong learning and college uses, one computer lab, and at least one clinical teaching room for 100 students), three libraries, approximately twenty-four faculty or administrative offices, dining areas, a physical fitness center, a child care facility, an adult care and training/educational facility, and a woodworking shop.<sup>FN5</sup> The four other buildings contain 362 living units, which will house the residents of the Project (the "Residents").<sup>FN6</sup> Each of the living units will contain approximately 1,300 square feet and consist of one, two, or three bedroom apartments.<sup>FN7</sup> The Project will also provide parking for 616 vehicles.

FN5. Intervenors question whether this information, submitted by Regis to the ZBA, has been properly submitted for summary judgment purposes. Regis has subsequently submitted the Affidavit of Thomas Pistorino to substantiate this information.

FN6. Of the 766,000 total square feet of building area proposed, living units will comprise approximately 470,000 square feet (as estimated by this court based on the total number of living units and the average square footage per unit).

FN7. Regis has approximately 150 vacant dorm rooms on the West Campus (single and double occupancy). The dorm rooms on the West Campus contain approximately 300 square feet.

2. The Residents, who will average 75 years of age, will be accepted into the Project after an application and interview process; however, there are no minimum academic requirements for acceptance.

3. The Residents will be required to take a minimum

of two academic courses per semester totaling four courses per year. Courses range from the traditional such as foreign languages, philosophy, technology, and literature to nature walks and other recreational activities. The Residents may attend classes in person, online, or by private tutoring. The Residents may take classes with undergraduate or graduate students. If the Residents do not "successfully complete" the required four courses a year, they will have to leave the Project.<sup>FN8, FN9</sup>

FN8. This course requirement is in the Residency Agreement to be executed by each of the Residents upon acceptance into the Project. It is unclear how the Residents will be required to leave the Project.

FN9. The Residency Agreement's provision that Residents "successfully complete" courses entails that each resident will be "required to complete all course requirements to the extent that [he/she is] physically and intellectually capable of doing so." Notably, the Residency Agreement expressly states that this requirement "does not mean that you must pass courses; ..." It is unclear as to how this provision will be enforced.

4. Courses will be offered on either a "pass-excel" grading basis, a traditional letter grade basis, or by audit.<sup>FN10</sup> The Residents will be eligible, but not required, to obtain certificates and degrees upon completion of the courses.

FN10. The summary judgment record is unclear as to what a "pass-excel" grading basis entails. Presumably, such standard would not allow for a Resident to fail. *See supra* note 9.

5. The academic program will be administered by academic professionals, and the individualized course plan for each of the Residents will be subject to approval by the Dean of the East Campus and the Resident's academic advisor.

6. The Residents will have full access to all Regis facilities. The Project proposes a tunnel beneath Wellesley Street to allow access to the West Campus (the "West Campus") (the existing campus for the

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college and graduate students).

\*4 7. Each Resident will pay a one-time entrance fee of approximately \$700,000 to \$1 million. Ninety percent of this entrance fee will be returned to the Resident (or their estate) when the Resident leaves the program. Each Resident will pay a monthly service fee of approximately \$4,000.<sup>FN11, FN12</sup>

FN11. Regis has an existing LLARC program (Lifelong Learning at **RegisCollege**), with approximately 300 participants, ages 50-90. The cost of a course in the LLARC program is approximately \$150.

FN12. Ninety percent of current students at Regis receive financial aid.

8. On March 2, 2009, the ZBA held a public hearing, pursuant to this court's remand order, to determine whether the Project constitutes an exempt educational use under the Dover Amendment. The hearing was continued to March 4, 2009, and March 18, 2009. At the March 18, 2009, hearing, the ZBA voted unanimously ("ZBA Decision 2") to "find that the Regis East project does not constitute an exempt educational use under M.G.L. c. 40A, § 3. The purpose of the Regis East real estate development is financial, and the predominant use is luxury residential dwellings, not education." The ZBA made the following findings:

1. The proposed 362 luxury dwelling units are not integral to furthering the College's goals for intergenerational or life-long learning, as clearly demonstrated by the successful, but non-residential, child care center and LLARC programs presently operated at the College.
2. The Regis East project is fundamentally a residential facility for senior citizens, with physical education, wellness, adult education classes, and cultural/recreational programs being offered as lifestyle amenities for the residents.
3. The primary purpose of the Regis East project is to create a revenue stream for **RegisCollege**.
4. The monthly revenue per unit would far exceed the cost of any educational programs provided, and the

educational service revenues to be derived from the course registration portion of the monthly maintenance fees are almost insignificant.

5. The proposed luxury residential units are not college dormitories; neither are they comparable to dormitories in size, amenities, tenure or cost.
6. The portion of the Regis East project square footage to be devoted to dwelling units is more than twice the square footage to be devoted to non-residential; moreover, a significant portion of the proposed "educational" space appears to be multi-functional space which could be used for numerous purposes associated with the residential units, but not necessarily restricted to educational purposes alone.
7. The amorphous, flexible and vague nature of the "educational" components makes enforcement of any educational requirements for the residents unlikely.
8. The Regis East project is designed for seniors capable of independent living. There are no medical facilities proposed and therefore, the project would not realistically provide educational/internship opportunities for the nursing students at the College.
9. Any intergenerational learning opportunities derived from the Regis East project would depend entirely on the voluntary participation of both the residents and the college students.
10. The proposed two courses per semester/four courses per year requirement for maintaining residency in the project is not significant, especially given the flexible definition of the "courses" and the lack of any formal standards or requirements for those courses-even to the exclusion of any need to actually be in residence while taking the courses.

\*5 As an initial matter, this court must first address the Intervenor's Motions to Strike certain Affidavits submitted by Regis and Regis' July 13, 2009, Reply. In their motion, the Intervenor's argue that the five Affidavits and the July 13, 2009, Reply filed by Regis go beyond the scope that this court provided in its June 18, 2009, Post Hearing Order.<sup>FN13</sup> Regis responds by claiming that such filings do not add any

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new substantive information and do not prejudice the Intervenor or the Town. Despite the fact that the supplemental submissions by Regis, to a certain extent, further bloat an already voluminous summary judgment record, this court agrees that such filings do not add any new substantive information into the record that unduly prejudices the Intervenor or the Town. To the extent that such Affidavits appear to respond to the Intervenor (Regis filed an initial Response to the Intervenor's Supplemental Summary Judgment briefs) this court reads the Affidavits as simply regurgitating information that was already in the record. As such, the Intervenor's Motion to Strike Five Supplemental Affidavits Submitted by Regis on July 13, 2009, in their Entirety and the Intervenor's Motion to Strike Regis' July 13, 2009 "Reply to Responses to Regis' Supplemental Statement of Undisputed Facts" Insofar as it Replies to the Intervenor, is DENIED.

FN13. This order stated that "[r]epplies to the ZBA's Response may be filed until Monday, July 13, 2009. Outside of the foregoing, this court will accept no further briefing relative to whether Plaintiffs' proposed use is subject to the Dover Amendment."

The central issue before the court is whether the proposed use of the Project is an educational purpose as contemplated by the Dover Amendment. Regis argues that the Project is compliant with the Dover Amendment and that ZBA Decision 2 is unreasonable. Defendants argue that ZBA Decision 2 is reasonable. The Intervenor argues that there are material facts at issue and a trial is necessary. It appears to this court, however, that the matters at issue between the parties are not material facts, but primarily the interpretation of these facts.<sup>FN14</sup>

FN14. For example, the Intervenor claim, as a disputed fact, that the Project is primarily an educational facility. However, that is essentially the ultimate legal argument for this court to decide. Additionally, the Intervenor asserts that various components of the Project are disputed. They object to Regis' use of the term "dormitories" or "campus style units" and prefer to describe the units as luxury apartments. This court is not persuaded that such semantics are material disputes of fact that warrant a trial in the case at

bar. Finally, there is no question that the Project has certain elements that are vague. It is unclear how Regis will determine whether a Resident has "successful completed" his or her required course work or how Regis will evict a non-compliant Resident. However, these slight obscurities are not disputed facts such that summary judgment is inappropriate here.

The pertinent provision of the Dover Amendment states:

No zoning ordinance or by law shall ... regulate or restrict the use of land or structures ... for educational purposes on land owned or leased ... by a nonprofit educational corporation; provided, however, that land or structures may be subject to reasonable regulations....

G.L. c. 40A, § 3.<sup>FN15</sup> Long ago, the Supreme Judicial Court ("SJC") characterized the term "education" as

FN15. This court previously found that Regis has been and continues to be a "non-profit educational corporation" within the meaning of G.L. c. 40A, § 3. No party argues otherwise in context of this summary judgment proceeding.

a broad and comprehensive term. It has been defined as 'the process of developing and training the powers and capabilities of human beings.' ... Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all. *Mount Hermon Boys' Sch. v. Gill*, 145 Mass. 139, 146 (1887). The SJC has since limited the effect of the term "educational" in context of the Dover Amendment, stating that such term is conditioned by its plain meaning. *See Whitinsville Retirement Society, Inc. v. Northbridge*, 394 Mass. 757, 760 (1985). Even so, the question of whether a proposed use is educational may be difficult as, "in a broad sense, anything taught might be considered, to a greater or less degree, educational." *Kurz v. Bd. of Appeals of North Reading*, 341 Mass. 110, 113 (1960). As such, "[t]he court must look beyond individual activities, some of which undoubtedly may in isolation constitute educational use, to see whether, in the aggregate, the overall use of the

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structures in question amount to educational use.” *Metrowest YMCA, Inc. v. Hopkinton*, 14 LCR 378, 381 (Misc. Case No. 287240) (2006) (Piper, J.). Whether the Project is protected by the Dover Amendment from the By-law's zoning restrictions turns on whether the dominant purpose of the Project is educational. *See Fitchburg Housing Auth. v. Board of Zoning Appeals of Fitchburg*, 380 Mass. 869, 873-74 (1980); *Whitinsville Retirement Society*, 394 Mass. at 760 (“The judge's findings do not support the conclusion that the primary or dominant purpose of the proposed nursing home facility would be educational.”).<sup>FN16, FN17</sup>

FN16. Regis argues that reliance upon a “primary and dominant” standard for determining educational purpose is misplaced and appears to suggest that zoning protection under the Dover Amendment is warranted if a proposed use has any educational use at all. This court is not convinced by Regis' attempts to unsettle the established decisional law first articulated in *Fitchburg Housing Auth.* and *Whitinsville Retirement Society* as discussed, *supra*. It is noteworthy that in Regis' supplement to its motion for summary judgment, it argues, in part, that “[n]o appellate level court has discussed the primary and dominant test in a Dover case since 1987....” However, this court is bound by appellate cases issued prior to such time.

FN17. *See also Metrowest YMCA*, 14 LCR at 381 (“The question whether under the Dover Amendment a property is exempt from zoning restrictions for educational purposes turns on whether or not the dominant purpose of the structure is educational.”).

\*6 Although a proposed use must be primarily educational, courts have applied the Dover Amendment where the proposed purpose of a facility incorporates some non-traditional educational uses as well. *See e.g., Watros v. Greater Lynn Mental Health and Retardation Ass'n*, 421 Mass. 106, 112 (1995) (finding that a barn used to provide shelter and education for mentally handicapped adults warrants Dover Amendment protection); *Fitchburg Housing Auth.*, 380 Mass. at 869-70 (finding that the Dover Amendment applies to a residential facility for mentally ill that provides training for residents in skills for inde-

pendent living). Similarly, just because a proposed facility includes residential accommodations for adults does not necessarily preclude it from protection under the Dover Amendment. *See id.* 380 Mass. at 874-75 (reasoning that “[i]nculcating a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational process.”).<sup>FN18</sup> However, despite the various facilities that have been given zoning exemptions under the Dover Amendment, an “educational purpose” is not without limits. *See e.g., Whitinsville Retirement Society*, 394 Mass. at 761 (finding that a nursing home focused on crafts, entertainment, and stimulus is not educational); *Kurz*, 341 Mass. at 113 (stating that “the teaching of the various types of dances advertised by the plaintiff, with the possible exception of the classical ballet, can hardly be considered educational use in the ordinary sense.”).<sup>FN19</sup> In order for a facility to be considered an educational use in context of the Dover Amendment, it does not need to fulfill traditional educational goals; it must, however, provide more than “[m]erely an ‘element of education’ ....” *Whitinsville Retirement Society*, 394 Mass. at 760-61.

FN18. *See also Lasell College v. Newton*, 1 LCR 80 (1993) (Misc. Case No. 158253) (Cauchon, J.), *aff'd* 36 Mass.App.Ct. 1122 (1994) (unpublished order issued pursuant to Appeals Court Rule 1:28). Nevertheless, the elderly housing in that case was more narrowly tailored for an educational purpose. Candidates for admission were “required to meet established admissions standards” that included having a high school diploma and agreeing that residency was conditioned upon continued participation in the educational programs. *Id.* at 81. Furthermore, fewer than half the buildings in the complex had sleeping quarters, with the balance devoted to educational activities. *Id.* at 82. In contrast, the evidence with regards to the Project does not demonstrate that the facility will be primarily devoted to providing educational services and “designed to develop and train the powers and capabilities of its senior residents for further activities and usefulness in life.” *Id.* at 81. Accordingly, the facility proposed in *Lasell College v. Newton* was more substantially devoted to educating residents and students than the Project.

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FN19. See also *Julia Ruth House, Inc. v. Board of Appeals of Westwood*, 8 LCR 451, 453 (2000) (Misc. Case No. 262911) (Kilborn, J.) (an adult day care center with “incidental educational components” is not educational under the purview of the Dover Amendment).

In applying these principles to the case at bar, it is necessary to analyze the extent of the educational services that Regis proposes to provide to the Residents through the development of the Project. It is clear that education will play some role in the lifestyle of the Residents. The question then, is whether education is the dominant purpose of the Project as understood in *Fitchburg Housing Auth., Whitinsville Retirement Society*, and their progeny. As part of a program designed to foster healthy aging, Regis proposes to provide educational programming for the Residents that will be guided by a personalized, individual education plan, which will provide Residents with the opportunity to participate in courses of study and other educational programs and events at Regis. Also, undergraduate and graduate students may be able to use the Project as a resource through tutoring, work, and internship opportunities, although the intricacies of such elements of the Project are not entirely clear.

However, when these components are viewed in scope of the Project as a whole, this court cannot conclude that education is the primary purpose of the Project. To begin, the Residents will be required to pay a one-time entrance fee of \$700,000 to \$1,000,000—a substantial deposit for any education.

<sup>FN20</sup> In addition, the cost of the monthly service fee of \$4,000 is far in excess of the cost of similar classes currently used for the elderly through the LLARC program, and the size of the units for the Residents is far in excess of the size of dormitory rooms for college students housed in the West Campus, where there is a significant vacancy rate in the college dormitories. Furthermore, approximately two-thirds of the square footage in the Project will be dedicated to housing.

FN20. The fact that a portion of the fee may be refunded later does not lessen the substantial financial burden a prospective Resident must clear before entering the Project.

\*7 Moreover, the Residents will only be required to take four courses a year, and the courses can range from traditional types of courses, such as history and philosophy to more unconventional courses grounded in recreation. However, the courses are not designed to help the Residents attain independent living, as was the case in *Fitchburg Housing Auth.*, 380 Mass. at 872. or *Campbell v. City Council of Lynn*, 32 Mass.App.Ct. 152, 153 n. 4 (1992), *aff'd. in part, rev. in part on other grounds by* 415 Mass. 772 (1993). Rather, whereas the goal of most educational institutions is to matriculate, if the Residents cannot maintain independent living, they will be required to leave the Project and go into a nursing home or rehabilitation facility. There are no minimum academic requirements for acceptance into the Project, and no degrees will be required as a part of the program. Finally, grading for the courses can be non-traditional, and the Residents will be required to complete the courses only if they are “physically and intellectually capable of doing so.”

While Regis has set lofty goals of having Residents “age in place” by living independently, with a focus on health, wellness, stimulation, and education, that does not mean that the program is primarily an educational facility. In light of the above, the Project's educational component seems subordinate to Regis' desire to provide elderly housing and/or a source of revenue for Regis. Thus, it is this court's conclusion that the dominant purpose of the Project will not be the fulfillment of a significant educational goal. Therefore, I find that the proposed use of the Project is not an educational purpose as contemplated by the Dover Amendment.<sup>FN21</sup>

FN21. It is this court's view that even if inquiry into the Project's dominant educational use were not the appropriate test to determine whether it is protected by the Dover Amendment, the Project's significant residential and financial components dwarf any educational components.

Since this court has determined that the Project does not comply with the Dover Amendment, it is not necessary to address the issue of what reasonable requirements of the By-law will be applicable to the Project.

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As a result of the foregoing, I DENY Regis' Motion for Partial Summary Judgment and ALLOW Defendants' Cross-Motion for Summary Judgment.

Counts V and VI of the Complaint (Counts VII and VIII of the First Amended Complaint) have yet to be addressed.<sup>FN22</sup> The parties shall attend a status conference on Tuesday, February 9, 2010, at 11:00 A.M. to discuss the status of this case.<sup>FN23</sup> Judgment shall issue upon resolution of all of the remaining issues.

FN22. There is an issue of whether Count VI (Count VIII of the First Amended Complaint) is a part of the Dover Amendment analysis, and, if not, whether the Land Court has jurisdiction.

FN23. The import of this decision is not to say that the Project is not commendable, but that it is not a protected educational use under the Dover Amendment. This court hopes that Regis will be able to develop a facility that comports with the zoning requirements of **Weston** while still meeting and exceeding the needs of aging residents.

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