

Richmond Planning Board Meeting
Town Hall
Minutes
September 12, 2022

Members present: Richard Bell, Douglas Bruce, John Hanson (Chairman), Katherine Keenum

Member absent: Peter Lopez

Others present: Jami Grossman, Jeff Morse, town residents

The meeting opened at 6:30 P.M.

1. Mr. Hanson introduced a letter from Elizabeth Goodman, Richmond Town Counsel, to the Massachusetts Attorney General (see Exhibit 1). Ms. Goodman wrote in response to an objection by MassAudubon to the Open Space and Recreation bylaw amendment passed by the voters at Richmond's Annual Town Meeting on May 18, 2022.

At its meeting on July 11, 2022, the Planning Board had referred to the only version of the objection that it had received at that time (KP-#820733-v1-AUDB - LTR_AAG_re_Richmond_Richmond_bylaw_(6_30_2022)). That version was included as an exhibit in the minutes for the July meeting. On August 14, 2022, Mr. Hanson received and distributed the revised version that had actually been submitted to the Attorney General. He wished to include it in tonight's minutes as a matter of record (see Exhibit 2).

Members agreed that the Planning Board minutes of July 11, 2022, correctly reported what had been said then but that Exhibit 2 should be included in the minutes for September 12, 2022, to clarify the record of correspondence. They also agreed that no further discussion or action was required.

From the floor, Mr. Morse asked why no minutes had been posted at the town website since June. Ms. Keenum explained that there had been no August meeting and so the July minutes could not be approved until tonight. She would send them (if approved) to the Town Clerk's office the next day for posting.

2. Mr. Bell moved that the minutes of July 11, 2022, be approved as written. Mr. Bruce seconded. The motion carried unanimously, 4-0.

The meeting adjourned at 6:40 P.M.

Respectfully submitted,
Katherine Keenum, Clerk

Exhibit 1: Letter from Elizabeth Goodman to the Assistant Attorney General

CAIN HIBBARD

Cain Hibbard & Myers PC | Counselors at Law

66 West Street, Pittsfield, Massachusetts 01201 Tel. 413-443-4771 Fax 413-443-7694
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September 2, 2022

BY ELECTRONIC MAIL ONLY Margaret.hurley@state.ma.us

Margaret J. Hurley, Esq.
Assistant Attorney General
Director - Municipal Law Unit
Ten Mechanic Street, Suite 301
Worcester, MA 01208

**Re: Town of Richmond Zoning Bylaw Amendment
Re Attorney General's Review of Article 7 from Richmond May 2022
Annual Town Meeting (case # 10551)**

Dear Margaret:

Thank you for contacting me as Town Counsel for the Town of Richmond regarding comments filed with your office regarding your review of the Town of Richmond's Zoning Bylaw Amendment approved by the voters as Article 7 at the May 2022 Annual Town Meeting (the "Zoning Bylaw Amendment"). As set forth in detail below, the Zoning Bylaw Amendment does not violate the provisions of G.L. c. 40A Section 3 and the Town Board of Selectmen respectfully request that you approve the Zoning Bylaw Amendment.

On July 7, 2022, and again in reply to comments filed by the Berkshire Natural Resources Council ("BNRC"), Attorney Jonathan D. Witten of KP Law filed comments with your office on behalf of the Massachusetts Audubon Society ("Mass Audubon"). Stating that Mass Audubon meets the criteria for protection under the Dover Amendment, (July 7, 2022 comment at 5), Attorney Witten stated the Zoning Bylaw Amendment "amounts to a total prohibition on educational and research facilities and must be disapproved as inconsistent with the Dover Amendment..." (July 7, 2022 KP Law comment letter at 8).

Actually, Mass Audubon is allowed all of its Dover Amendment activities by right under the Zoning Bylaw for the Town of Richmond, and thus the Zoning Bylaw Amendment should not be disapproved by your office. I have attached with this letter the current Town of Richmond Zoning Bylaw. A review of the entire Zoning Bylaw shows that in the Table of Use Regulations, Section 4.8 (4) "[r]eligious or educational use on land

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owned or leased by the Commonwealth or any of its agencies, subdivisions or bodies politic, or by a religious sect or denomination, or by a non-profit educational corporation” is a use allowed by right in all districts. Thus, under this provision, any entity that qualifies for limitations on zoning restrictions under G.L.c. 40A, Section 3 and pursuant to the case law regarding the “Dover Amendment” would be entitled to conduct its operations with no special permit in the Town of Richmond.

The Zoning Bylaw Amendment does not change this by right use. Instead, for entities that do not qualify for Dover Amendment protection, the Zoning Bylaw allows those who choose not to charge for parking and permit public access to their land for conservation, education new principal and accessory uses. This is consistent with the long-standing support for open space shown by the voters and elected officials in the Town. Furthermore, this type of support for individuals who allow access to their land for no charge is part of the law in the Commonwealth. G.L. c. 21 Section 17 C provides a limitation on liability for property owners who allow public access for recreational purposes “without imposing a charge or a fee therefor...” The Zoning Bylaw Amendment is consistent with this concept.

As shown by the vote of 233 to 62, the Zoning Bylaw Amendment has overwhelming support by the voters in the Town. This was an important local decision and we ask your office to support this. In addition, over \$500,000 of public and private funds have been invested in the Town to acquire and preserve open space land for public uses over the last 25 years. The Town of Richmond has preserved some of the most beautiful and environmentally diverse land in the county. The Select Board unanimously supports the Zoning Bylaw Amendment.

I am available at your convenience should you have any additional questions or want clarification of this letter.

Very truly yours,
CAIN HIBBARD & MYERS PC

Elisabeth C. Goodman Enclosures



Exhibit 2: Letter from Jonathan D. Witten to the Assistant Attorney General



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July 7, 2022

Jonathan D. Witten
jdwwitten@k-plaw.com

BY ELECTRONIC MAIL ONLY – (margaret.hurley@state.ma.us)

Margaret J. Hurley, Esq.
Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
Ten Mechanic Street, Suite 301
Worcester, MA 01608

Re: Objection to the Town of Richmond's Zoning Bylaw Amendment – Article 7

Dear Assistant Attorney General Hurley:

Please be advised that this office represents the Massachusetts Audubon Society, Inc. ("Mass Audubon"). Mass Audubon respectfully submits this letter in opposition to the Town of Richmond's vote to amend its Zoning Bylaws pursuant to Article 7 of its 2022 Annual Town Meeting Warrant.

For the reasons set forth below, the amendment to the Zoning Bylaw as proposed and voted through Article 26, facially conflicts with state law and must be disapproved by your office pursuant to G.L. c. 40, § 32.

BACKGROUND

On or about May 18, 2022, by a two-thirds vote of its Annual Town Meeting, the voters of the Town of Richmond approved an amendment to the Zoning Bylaws through Article 7 of its Annual Town Meeting warrant.¹ A copy of the Planning Board Report outlining the amendments to the Zoning Bylaw is attached hereto as Exhibit A. Specifically, the amendment added a new Section 14 governing the recreational, educational, and research use of open space and conservation land, and revising Sections 4.8 (A) and (B) concerning such land.² The new Section 14 reads, in pertinent part, as follows:

Section 14: Recreational, Educational and Research Use of Open Space and Conservation Land

¹ A copy of the warrant is available online, at <https://cms6.revize.com/revize/richmondma/ATM%20Warrant.pdf>.

² The voters had a similar proposed amendment before them under Article 8 of the Annual Town Meeting warrant, as submitted by a citizen's petition, but Article 8 did not pass by the requisite two-thirds majority. See May 18, 2022 Annual Town Meeting minutes, available online at <https://cms6.revize.com/revize/richmondma/ATM%2005-18-22%20certified%20minutes.pdf>.



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Purpose: Provide for the recreational, educational and research use of open space and conservation land

Definitions:

...

Open Space and Conservation Education and Research

The use of Open Space Residential Land, Open Space Agricultural Land, or Conservation Land, open to the public, that may include guided tours, for the observation and study of wildlife, plants, flora, geology, and other natural features.

Parking Lot

The use of land for the construction of a parking lot.

1.0 Parking Lot Requirements for this section

The use of land for a parking lot shall meet the following requirements:

- a) The applicant shall submit an application for site plan approval under Section 6.6 of this By-Law
- b) The application shall include an impact study of expected vehicle traffic, intensity of use, visitors per day and other data relevant to the proper regulation of Parking Lot size and use at the proposed site."

The vote under Article 7 further amended the table of permitted principal uses in Section 4.8(a) and (b) of the Zoning Bylaw by authorizing the use of land under Section 14 for open space and conservation education and research, provided, however, that those educational facilities do not charge a fee. Specifically, a permitted principal use includes: "[t]he use of land, under Section 14, for Open Space and Conservation Education and Research, provided that no fee is charged, and no off-highway motorized vehicles are permitted [emphasis added]." See Section 4.8(A), Subsections 18(a) and (b). Likewise, a permitted accessory use includes "[t]he use of land, under Section 14, for Open Space and Conservation Recreation, provided that no fee is charged." See Section 4.8(B), Subsection 18(a) (emphasis added).

By contrast, if a fee is charged for the operation of an educational and research center, the use is prohibited, because Section 4 of the "Use Regulations" provides that "[e]xcept as provided by law or in this By-Law, ... no building, structure or land, or part thereof, shall be used for any purpose or in any manner other than for one or more of the uses set forth in the accompanying Table of Use Regulations." Thus, where the use is not permitted by the table of use regulations, such as for educational research facilities that charge a fee, it is prohibited.

These restrictions on educational research centers are inconsistent with the protections afforded nonprofit educational institutions, G.L. c. 40A, § 3, and therefore must be disapproved and stricken from the text of the Zoning Bylaw, as set forth below.



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This language is referred to as the “Dover Amendment” because of a Supreme Judicial Court decision in 1951 invalidating a Town of Dover zoning by-law that prohibited sectarian educational uses in residential zoning district. The Court in Attorney General v. Inhabitants of the Town of Dover, 327 Mass. 601 (1951), interpreted the town’s zoning by-law in light of Chapter 325 of the Acts of 1950, which was originally codified at G.L. c. 40, § 25, stating that “[n]o by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid.” Finding that the “statute and ... by-law as amended cannot stand together ... [because a] conflict is apparent,” the Court struck down the by-law as unlawful. Id. at 604.

Massachusetts courts have since had considerable occasion to examine the legislative history of the Dover Amendment, and specifically in the context of educational programs. In so doing, courts have noted that, although the Department of Community Affairs had proposed “that Dover Amendment protection be limited to ‘school[s]’ or analogous ‘place[s] or facilit[ies],’ ” see 1972 House Doc. No. 5009, at 84, the Legislature rejected this language. See McLean Hospital Corporation v. Town of Lincoln, 483 Mass. 215, 226 n.5 (2019). The courts thus opted not to adopt “a statutory test that would limit Dover Amendment protection only to projects similar to ‘schools.’ ” Id. The Dover Amendment also exists, in part, to protect educational institutions from a municipality’s exercise of preferences as to what kind of educational facilities it will welcome, “the very kind of restrictive attitude which the Dover Amendment was intended to foreclose.” Id.

B. What Constitutes a Nonprofit Educational Corporation?

As a threshold matter, unlike when analyzing the use of the land for educational purposes, nothing in G.L. c. 40A, § 3 requires that education be the dominant purpose or primary activity of a nonprofit corporation in order that it may qualify as a “nonprofit educational corporation.” See Gardner–Athol Area Mental Health Ass’n, Inc. v. Zoning Bd. of Appeals of Gardner, 401 Mass. 12, 15-16 (1987). The proper test is whether its articles of organization permit it to engage in educational activities. Id.

For example, in Gardener-Athol, a nonprofit mental health corporation brought action to challenge the decision of a local zoning board of appeals that prohibited the corporation’s use of a premise as a residential care facility for adults with mental disabilities. Id., at 13. The Court determined that “[t]he word educational in the phrase ‘nonprofit educational corporation’ is not made superfluous by our construction of the statute. Not every word in a statute need carry a heavy load. It is enough to say that ‘educational’ in the phrase ‘nonprofit educational corporation’ means that the proposed educational activities must be within the corporate purposes of the nonprofit corporation.” Id., at 15. See also Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer, 22 Mass. App. Ct. 83, 87 (1986) (“all that is required is that the plaintiff be a nonprofit corporation intending to use its land or structures for religious or educational purposes”).

Mass Audubon meets this criterion. Incorporated as a non-profit domestic corporation, the purpose of the Massachusetts Audubon Society, Inc., is as follows:



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To capture the attention of the inquisitive mind, instill an affection for all life, and foster an intelligent understanding of human beings' position in the natural world; to promote harmony between human activities and the natural systems which support humans and all other living species; to support programs which conserve natural resources, educate children, government officials and the public, and advance scientific understanding of environmental issues through research; to preserve a legacy of wildness and natural diversity in order to honor the past by serving the future, and for such other exclusively charitable and educational purposes as are permitted by Section 501 (c) (3) of the Internal Revenue Code of 1986 and M.G.L. c. 180, Section 4, as they may be amended from time to time [emphasis added].³

Because the Dover Amendment does not require that education be the dominant purpose or primary activity of a nonprofit corporation, and Mass Audubon's articles of incorporation permit it to engage in educational activities, Mass Audubon may avail itself of the protections of G.L. c. 40A, § 3 to the extent that a proposed use has an "educational purpose." Accord Gardner-Athol, 401 Mass. at 15.

C. The "Regis Test" – What Constitutes an Educational Purpose?

As Massachusetts Courts have consistently held that the Dover Amendment is not limited to schools or analogous places, there is an abundance of case law interpreting whether uses proposed by nonprofit corporations are entitled to zoning protection. The following is a non-exhaustive list of cases that have interpreted the extent of the educational zoning protections afforded by the Zoning Act:

- Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg, 380 Mass. 869 (1980) (community residence for former mental patients to be trained for independent living);
- LaSalle College v. City of Newton, 1 LCR 80 (Mass. Land Ct. 1993) (elderly housing developed on educational institution's campus with programmatic links to the college), aff'd, 36 Mass. App. Ct. 1122 (1994);
- Radcliffe College v. City of Cambridge, 350 Mass. 613 (1966) (rescript) (parking, feeding, and housing of college personnel);
- Worcester County Christian Communications, Inc. v. Board of Appeals of Spencer, 22 Mass. App. Ct. 83, 87 (1986) (radio station may be educational use);
- Commissioner of Code Inspection of Worcester v. Worcester Dynamy, Inc., 11 Mass. App. Ct. 97 (1980) (dormitory use);
- Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19, 30 (1979) (lights and snack bar at sports field on school campus);
- Harbor Schools, Inc. v. Board of Appeals of Haverhill, 5 Mass. App. Ct. 600 (1977) (residential facility for the education of emotionally disturbed children);
- Gardner-Athol Area Mental Health Ass'n, Inc. v. Zoning Board of Appeals of Gardner, 401 Mass. 12 (1987) (residential care facility for adults with mental disabilities);

³ See Restated Articles of Organization, Massachusetts Corporations Division Filing No. 020500210894, Massachusetts Audubon Society, Inc. (Identification Number: 042104702).



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- Whitinsville Ret. Soc'y, Inc. v. Town of Northbridge, 394 Mass. 757 (1985) (nursing home facility not used for an educational purpose);
- Kurz v. Bd. of Appeals of N. Reading, 341 Mass. 110 (1960) (dance class not an educational use);
- Trustees of Tufts College v. Medford, 515 Mass. 753 (1993) (parking garage on college campus).

In the landmark case of Regis College v. Town of Weston, 426 Mass. 280 (2012), the Supreme Judicial Court articulated a two-prong test to determine whether a proposed use falls within the protection of the Dover Amendment. First, the use must have as its "bona fide goal something that can reasonably be described as 'educationally significant.'" *Id.* at 285, quoting Whitinsville Retirement Soc'y, Inc. v. Northbridge, 394 Mass. 757, 761 n.3 (1985). Second, the educationally significant goal must be the "primary or dominant" purpose for which the land or structures will be used." Regis College, *supra*. The primary or dominant purpose requirement "helps ensure that a party invoking Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute. *Id.*

In Regis College, the Supreme Judicial Court vacated the Land Court's summary judgment decision in which the judge had found that a proposed multi-building residential community for the elderly to be built across the street from the college's main campus was not entitled to Dover Amendment protection, even though it included an educational component (i.e., residents would be required to take courses each semester). The Court noted that while "[e]ducation" is to be given a broad meaning, and the proposed use may have an educational purpose, the educational use must be a "primary or dominant one," and "predominate over residential and recreational components" for the Dover Amendment to apply. *Id.*, at 288.

D. What Local Regulations are Impacted?

The case law regarding Dover protections uniformly maintain that, under the exemptive provisions of G.L. c. 40A, § 3, municipalities may not "prohibit" educational uses, and may not subject them to "unreasonable" regulation. In Trustees of Tufts College v. City of Medford, 415 Mass. 753 (1993), the Supreme Judicial Court delved more deeply into what constitutes a *reasonable* dimensional regulation under the Dover Amendment. There, the Court stated that the institution proposing an educational use:

[Bears the] burden of proving that the local requirements are unreasonable as applied to its proposed project ... by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed [educational] structure [without appreciably advancing the municipality's legitimate concerns], or impair the character of the institution's campus, without appreciably advancing the municipality's legitimate concerns, [or there is an e]xcessive cost of compliance ... without significant gain in terms of municipal concerns. *Id.* at 759-760.



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In Tufts, for example, a fifty-foot setback relative to a multi-level parking garage was held to be reasonable (and hence valid); likewise, parking and loading dock requirements for the library were reasonable since they would not frustrate the project. Id.

In Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19 (1979), the Appeals Court invalidated a zoning bylaw adopted by the Town of Lenox that required, for all new religious and educational uses or changes in such uses, that the applicant obtain a special permit and site plan approval. The bylaw also imposed specific dimensional regulations for all non-municipal educational uses and religious uses. Although the Court found the bulk, off-street loading and other dimensional regulations to be permissible, the special permit and the site plan approval requirements went beyond the reasonable bulk and dimensional regulations that could be imposed under Section 3. Id. at 33.

The special permit and site plan provisions were incompatible with Section 3 because they gave discretion to the local board of appeals to allow educational or religious uses based on extrinsic concerns such as the land use and planning goals of the community. Id. Such a grant of discretion would allow the board to impose restrictions that would nullify or diminish the institution's entitlement to growth and limit the types of education or religious denominations that would be welcome in the community. Id. The court held that it was precisely this type of discretion that was to be eliminated by the Dover Amendment and its progeny.

Thus, while a non-discretionary special permit procedure (assuming *arguendo* that such a procedure exists) may be utilized in narrow circumstances, "the question of reasonableness of a local zoning requirement, as applied to a proposed educational use, will depend on the particular facts of each case." Tufts, *supra* at 759. A municipality may not, however, "through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to 'nullify' the use exemptions permitted to an educational institution." The Bible Speaks, 8 Mass. App. Ct. at 31.

Likewise, in Trustees of Boston College v. Board of Aldermen of Newton, 58 Mass. App. Ct. 794 (2003), the City of Newton required Boston College to obtain a special permit to rebuild a structure on its campus relative to dimensional and density regulations. The Court concluded that City's regulations requiring the College "to seek discretionary relief through a super majority of the Board each time it wants to build any habitable space on the ... campus ... is tantamount to requiring a special permit for the educational use itself, which offends the spirit, if not the letter, of the Dover Amendment." Id., at 801. Strict application of the City's dimensional regulations "would significantly impede an educational use ... without appreciably advancing municipal goals embodied in the local zoning bylaw A local zoning law that improperly restrict an educational use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances." Id. (emphasis added) (internal citations omitted).

III. Application to the Richmond Zoning Bylaw Amendment.

As outlined in the above cases, the Dover Amendment provides that "[n]o zoning ... by-law shall prohibit, regulate or restrict the use of land or structures ... for educational purposes on land



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owned or leased by ... a nonprofit educational corporation” G.L. c. 40A, § 3. “[T]he Dover Amendment represents a specific exception to the general power of municipalities to adopt and enforce zoning regulations and bylaws.” Regis College v. Town of Weston, 462 Mass. 280, 281 (2012).

In this case, the Bylaw is facially invalid under the Dover Amendment on a number of grounds. First, it prohibits any use of land by a nonprofit educational corporation “for Open Space and Conservation Education and Research” that charge any sort of fee or tuition for its educational courses and research. Specifically, Section 4.8(A) of the Zoning Bylaw only permits “[t]he use of land, under Section 14, for Open Space and Conservation Education and Research, provided that no fee is charged” See Section 4.8(A), Subsection 18(b) (emphasis added). See also Section 4.8(A), Subsection 18(a) (permitting use provided that no fee is charged); Subsection 4.8(B), Subsection 18(b) (permitting use provided that no fee is charged). By contrast, if a fee is charged for the operation of an educational and research center, the use is prohibited, as the “Use Regulations” provides that “[e]xcept as provided by law or in this By-Law, ... no building, structure or land, or part thereof, shall be used for any purpose or in any manner other than for one or more of the uses set forth in the accompanying Table of Use Regulations.” See Section 4 of the Zoning Bylaw. Thus, where the use is not permitted by the table of use regulations, such as for educational research facilities that charge a fee, it is prohibited.

This Bylaw amendment amounts to a total prohibition on educational and research facilities, and must be disapproved as inconsistent with the Dover Amendment, which protects nonprofit educational uses regardless of their tuition or fee model. See, e.g., City of Worcester v. New England Inst. & New England Sch. of Acct., Inc., 335 Mass. 486, 493 (1957) (institution still entitled to educational use protraction where it “charges tuition” or fees); McLean Hospital Corp. v. Town of Lincoln, 483 Mass. 215 (2019) (selective “admissions process” which ostensibly includes full or partial payment for the residency and courses, held to be protected educational use).⁴ In fact, with the exception of public schools that are taxpayer funded, most nonprofit educational institutions such as Mass Audubon’s nature centers will be required to charge fees to provide education, research, and courses; it does not render them subject to any less protection under G.L. c. 40A, § 3.

These bylaw amendments plainly conflict with G.L. c. 40A, § 3, which preclude a municipality from enacting a zoning bylaw that “prohibit[s], regulate[s] or restrict[s] the use of land or structures ... for educational purposes on land owned or leased by ... a nonprofit educational corporation.” Indeed, as the courts have held on numerous occasions, “[t]he Dover Amendment ... exists, in part, to protect educational institutions from a municipality’s exercise of preferences as to what kind of educational facilities it will welcome, ‘the very kind of restrictive attitude which the Dover Amendment was intended to foreclose.’” McLean Hospital Corp. v. Town of Lincoln, 483 Mass. 215, 226, n.5 (2019). As such a Bylaw evidences an intent to prohibit altogether a nature educational and research center, so long as it charges a fee or tuition for its courses or membership, the Bylaw must be disapproved and stricken as inconsistent with the Dover Amendment.

⁴ The 3East educational program at issue in the McLean Hospital case costs approximately \$1,500 per day, according to publically-available information available online at <https://www.mcleanhospital.org/treatment/3east>.



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CONCLUSION

Because the amendment to the Zoning Bylaw, voted under Article 7 of the Richmond Annual Town Meeting warrant, is inconsistent with the protections afforded nonprofit educational uses under the Dover Amendment, G.L. c. 40A, § 3, it must be disapproved and deleted by the Attorney General's Office.

Thank you kindly for your attention to this important matter. Please do not hesitate to contact us with any questions.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jonathan D. Witten".

Jonathan D. Witten

A handwritten signature in blue ink, appearing to read "Devan C. Braun".

Devan C. Braun

JDW/DCB

Enc.

cc: Elisabeth C. Goodman, Esq. *(by electronic mail)*
Mass Audubon