

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

LAND COURT DEPARTMENT
DOCKET NO. 16 MISC 000694 (KFS)

THE McLEAN HOSPITAL
CORPORATION,

Plaintiff

v.

TOWN OF LINCOLN, JOEL
FREEDMAN, DAVID HENKEN,
WILLIAM CHURCHILL, ERIC
SNYDER AND DAVID SUMMER, as
they are Members of the TOWN OF
LINCOLN ZONING BOARD OF
APPEALS, AND JAY GREGORY,
DOUGLAS ELDER AND LISA
ELDER, EDWIN DAVID AND
NANDINI DAVID, BEVERLY
PEIRCE AND DANIEL PEIRCE,
MICHAEL GURRIE AND LISA
GURRIE, AND ARTHUR ANTHONY
AND LARA ANTHONY,

Defendants

and

STEVEN KANNER, LINDA
KANNER, ROBYN LAUKIEN,
DONALD MCCARTHY AND
DANIEL MCCARTHY,

Intervenors/Defendants

JOINT PRETRIAL MEMORANDUM

The central issue in this action is whether the McLean Hospital Corporation's proposed use of the premises at 16-22 Bypass Road, Lincoln, Massachusetts, is educational within the meaning of G.L. c. 40A, § 3 and the Town of Lincoln Zoning Bylaw. By letter dated July 8,

2016, the Town of Lincoln Building Commissioner concluded that McLean's proposed use was educational and exempt from zoning control. Certain abutters appealed, and the Town of Lincoln Zoning Board of Appeals (ZBA) reversed their determination in a decision issued December 9, 2016.

The parties—McLean; the Town of Lincoln (Town), the members of its ZBA, residents that appealed the Building Inspector's determination to the ZBA, and certain intervening abutters—hereby submit this pretrial conference memorandum in connection with the pretrial conference set for July 14, 2017.

I. STATEMENT OF LEGAL ISSUES

1. Whether the proposed use of 16-22 Bypass Road (the premises) is educational as that term is used in G.L. c. 40A, § 3, Lincoln Bylaw § 6.1(g), and case law interpreting the so-called Dover Amendment.

Plaintiff's Position

McLean proposes to use the premises for a residential program for up to 12 male adolescents ages 15 to 21 with Borderline Personality Disorder (BPD). The Program will utilize Dialectic Behavior Therapy (DBT), a learning based educational model that places a primary emphasis on teaching a wide variety of adaptive adjustment skills that will help residents better manage their BPD symptoms thus improving their success and quality of life. To that end, the program focuses on the development of the following skills: (i) mindfulness (so as to increase students' cognitive awareness, cognitive control, and non-judgmental awareness); (ii) emotional regulation (so as to allow students to better understand their emotions, and to increase the recognition of positive emotions and the acceptance of negative emotions); (iii) development and maintenance of interpersonal relationships (so that students may acquire and refine self-esteem

and pro-social skills); and (iv) distress tolerance (so that students can better cope with stressful situations); and (v) behavioral flexibility (so that students may manage and respond to the variety of situations inherent in everyday life).

Any adolescent could benefit from the development of those skills. They are, in many respects, the foundation to learning and social interaction. As expert testimony will establish, individuals afflicted with BPD suffer from an acute deficit of these behavioral skills. The program employs a comprehensive, well-established, and research based education curricula created specifically to address that deficit. The residential program lasts between 60 and 120 days, depending on the student. Each weekday, residents are involved in more than four hours of classroom based learning in at least three different skill areas that are enhanced by 45 minutes of behavioral skills practice; and 45 minutes of mindfulness exercises. In addition to the skills practice and mindfulness exercises, participants are given homework in the form of worksheets. Four out of every five weekdays involve athletic exercise, designed to foster mind-body awareness. For most residents, the DBT skills training is further augmented on a regular basis by additional academic subject tutoring by certified teachers from McLean's Chapter 766 approved Arlington School. In addition, when necessary, medications are prescribed and/or monitored, but a goal of the program is to reduce medication usage where warranted.

The program is administered by qualified professionals who provide classroom instruction on the foundational elements of behavioral skills, the extent to which each skill depends on the other, and the circumstances under which each skill is best put to use. The DBT curriculum requires that participants practice and apply the behavioral skills they have learned in increasingly complex settings. Instructors and fellow participants give encouragement, guidance, and constructive suggestions, as appropriate. Students are assigned homework, asked

to complete worksheets, and encouraged to learn from one another. This type of instructional program is the foundation for all fully adherent DBT approaches that treat BPD by equipping individuals with the skills that they need to more successfully navigate everyday life.

Under longstanding Supreme Judicial Court precedent, the McLean program is educational as that term is used in G.L. c. 40A, § 3 (known as the “Dover Amendment”). As the Court has stated “aid in the restoration of mental health and aid in the rehabilitation of the mental handicapped are clear educational purposes.” *Gardner-Athol Area Mental Health Ass’n v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 16 (1987). That the instruction provided by the program has a therapeutic benefit is unremarkable and certainly does not detract from the educational nature of the facility. In *Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg*, the Court concluded that “a residential facility in which formerly institutionalized but educable adults, with histories of mental difficulties, will live while being trained in skills for independent living, such as self-care, cooking, job seeking, budgeting, and making use of community resources” was educational. 380 Mass. 869, 870–71 (1980). In reaching that conclusion, the Court set forth the analysis that controls here:

[F]or the prospective residents of the proposed facility to learn or relearn such skills is an important step toward developing their powers and capabilities as human beings. Inculcating a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational purpose. That is the dominant purpose of the proposed facility.

Id. at 875.¹

The ZBA's conclusion, pressed here by the Town and the Intervening Abutters, reflects a misunderstanding of the program and the case law. The ZBA determined that the program should not be considered educational because its therapeutic aspects predominate. That is backwards. The program is therapeutic *because* it is educational. Its participants suffer from a unique mental illness that manifests in acute deficiencies of particular behavioral skills. The educational process utilized by the McLean program addresses those deficiencies by teaching new adaptive life management skills. It is this intensive educational process that allows residents the opportunity to achieve their therapeutic objective of being able to lead a positive and productive life.

The Town Defendants' Position

The Town's position is reflected in the Zoning Board of Appeals' underlying decision. As stated by the Board, "[t]he primary and nearly exclusive goal and purpose and objective of the proposed use is curative in nature; it is to provide a treatment and therapy for an identified and serious psychological issue." While the Board recognizes the value and effectiveness of the

¹ See also, e.g., *Campbell v. City Council of Lynn*, 415 Mass. 772 (1993) ("the use of the premises as a group residence for elderly, mentally ill persons is a protected use for an educational purpose within the meaning of [G.L. c. 40A] § 3"); *Harbor Schools, Inc. v. Board of Appeals of Haverhill*, 5 Mass. App. Ct. 600, 604-05 (1977) ("'[E]ducation' and 'rehabilitation' do not denote functions so distinct that [they must be] quantif[ied] relative to each other. They are not mutually exclusive"); *Brockton Coalition for Homeless v. Tonis*, 2004 WL 810296 (Mass. Super. Mar. 5, 2004) (shelter for single mothers that taught families "better ways to cope with family and personal conflicts and domestic violence," "how to more effectively participate in family, social and community group activities and support programs," and how to become "economically and socially independent" was educational); *Congregation of Sisters of St. Joseph of Boston v. Town of Framingham*, 1994 WL 16193868 (Mass. Land Ct. Mar. 31, 1994) (residential facility that, among other things, provided "training for single mothers and their children in basic living skills including housekeeping, nutrition, child care, budgeting, job search and employment, and health care" was educational).

program that McLean provides, nearly all of the purported “educational” attributes of the program are for the primary purpose of treating a psychological condition. The Board found that, in contrast to other educationally oriented group homes, including another McLean facility, the predominant purpose of the subject project is the treatment. Accordingly, the Board found that the proposal was distinguishable from facilities discussed in other *Dover Amendment* cases and was not primarily educational as would be required in order to glean the benefits of G.L. c. 40A, § 3.

Intervening Abutters’ Position

As articulated to the Lincoln Zoning Board of Appeals in its Request for Determination dated June 2, 2016, McLean proposes to utilize a single-family house located in a residential district for purposes of a “transitional living program providing psychoeducational support for young adults struggling with mood disorders, anxiety and depression.” Residents will participate in a “highly-structured, closely supervised, educational therapeutic program that offers a comprehensive, state of the art curriculum integrating behavioral and cognitive skill building experiences to address each resident’s mood, anxiety and related issues.” “The McLean program will employ an approach known as Dialectical Behavior Therapy (DBT) determined as effective in treating wide-range of psychological disorders.

Although characterized as a “psychoeducational” program, it is apparent from McLean’s description and documents that it is proposing a twelve-bed, in-patient psychiatric medical unit, staffed by medical and psychiatric professionals, to treat adolescent males suffering from borderline personality disorder. The program is, by McLean’s own admission, analogous to its

own “ART” and “3East” programs currently administered on McLean’s Belmont campus, which also utilize DBT, and which are fully reimbursable by insurance.²

No Massachusetts court has found psychiatric treatment facilities, whether residential or non-residential, to be an educational use under the Dover Amendment. Indeed, the Supreme Judicial Court, in *Regis College v. Town of Weston*, 462 Mass. 280 (2012), reaffirmed that in order to be considered an educational use under the statute, a program must “have as [its] bona fide goal something that can reasonably be described as ‘educationally significant.’” Further, such “educationally significant goal must be the ‘**primary or dominant**’ purpose for which the land or structures will be used.” *Id.* at 285 (internal citations omitted) (emphasis added). In other words, education must “predominate” over other uses occurring at the property. *Id.* at 288.

McLean argues that the statute is liberally construed, but it is well established that the meaning of “education” cannot be so loosely parsed that it is robbed of its ordinary meaning. “In a broad sense,” the Land Court has stated, quoting the Supreme Judicial Court, “‘anything taught might be considered, to a greater or lesser degree, educational.’” *Metrowest YMCA, Inc., v. Town of Hopkinton*, Nos. 287240, CIV. A. 03-0467, at *7 (Mass. Land Ct. July 10, 2006), quoting *Kurz v. Board of Appeals of North Reading*, 341 Mass. 110, 113 (1960). “But,” the court continued, “*one 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 structures in question amounts to educational use. The educational use must be the “primary or dominant purpose” of the facility.*” *Metrowest YMCA, Inc.*, at *7 (variety of athletic and healthful activities not predominantly educational; no Dover coverage) (emphasis supplied).

² It is axiomatic that there is no educational program that is reimbursable by health insurance, and McLean’s own website proudly declares that the purpose of its analogous programs at ART and 3East are psychiatric treatment first, and education only as an ancillary activity.

Relying on a plethora of cases from the 1980's, McLean suggests that any program that aids in the restoration of mental health, or rehabilitation of the mentally handicapped is "educational" and therefore qualifies for Dover exemption. McLean ignores the fact that after *Regis College* its private pay program is subject to a much more rigorous scrutiny. The law has evolved since the cases relied upon by McLean were decided, and applicants must demonstrate that a proposed facility has "education" as its primary purpose.

While the *Regis* court made it clear that "education" is a broad term, and applies to non-traditional educational settings, nonetheless, in order to prevent abuse by applicants, municipalities may require that the purported educational component also be the primary use of the facility:

The Dover Amendment represents a specific exception to the general power of municipalities to adopt and enforce zoning regulations and by-laws. See *Crall v. Leominster*, 362 Mass. 95, 101-102, 284 N.E.2d 610 (1972). 'The whole of the Dover Amendment . . . 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 (citation omitted). *Trustees of Tufts College v. Medford*, 415 Mass. 753, 757, 616 N.E.2d 433 (1993). As a practical matter, the protection afforded by the Dover Amendment can be financially advantageous to the land owner. Because the statutory purpose of preventing local discrimination against educational uses is only furthered if the intended use of the land is in fact educational, the term 'educational purposes' should be construed so as to minimize the risk that Dover Amendment protection will improperly be extended to situations where form has been elevated over substance. See Rice, Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses, 8 Pace L. Rev. 1, 42 (1988).

Regis Coll. v. Town of Weston, 462 Mass. 280, 291, 968 N.E.2d 347, 356 (2012).

In this case, McLean has strategically branded its otherwise transparent medical treatment program as "psychoeducational" in an effort to gain Dover Amendment protection. This is a

classic example of form over substance which the SJC in *Regis* clearly sought to limit. A thorough review of the proposed use, in the aggregate, reveals that the primary and dominant purpose of the facility is to provide medical treatment, and not education to its patients.

II. FACTUAL ISSUES

Agreed Facts

The Parties

1. Plaintiff The McLean Hospital Corporation (McLean) is a not-for-profit corporation organized under G.L. c. 180. It has a principal business address of 115 Mill Street, Belmont, Massachusetts.
2. Per its Articles of Incorporation, among McLean's purposes are the operation and maintenance of: "(i) a psychiatric hospital in Belmont, Massachusetts, for the care and treatment of the . . . mentally ill; (ii) other health care programs and facilities of any type; and (iii) related programs and facilities, including programs and facilities engaged in education, science, and research." Consistent with these Articles, McLean operates, among many other programs: a residence for individuals transitioning back into the community at 5 Old Cambridge Turnpike in Lincoln, which is recognized by the Town as an educational facility under G.L. c. 40A, § 3; and two Chapter 766 schools.
3. Defendant Town of Lincoln is a duly organized municipality.
4. Defendant Joel Freedman, a resident of Lincoln, is the Co-Chair of the Lincoln Zoning Board of Appeals (ZBA) and participated in the vote on the decision that is challenged by this action.
5. Defendant David Henken, a resident of Lincoln, is the Co-Chair of the ZBA and participated in the vote on the decision that is challenged by this action.

6. Defendant William Churchill, a resident of Lincoln, is a member of the ZBA and participated in the vote on the decision that is challenged by this action.

7. Defendant Eric Snyder, a resident of Lincoln, is a member of the ZBA and participated in the vote on the decision that is challenged by this action.

8. Defendant David Summer, a resident of Lincoln, is a member of the ZBA and participated in the vote on the decision that is challenged by this action.

9. Defendant Jay Gregory, whose residential address is 46 Bypass Road, Lincoln, appealed to the ZBA seeking reversal of the determination of Town of Lincoln Building Commissioner Daniel Walsh (Building Commissioner) that McLean's proposed use of the premises was educational and exempt from zoning control.

10. Defendants Douglas Elder and Lisa Elder, whose residential address is 38 Bypass Road, Lincoln, appealed to the ZBA seeking reversal of the Building Commissioner's determination.

11. Defendants Edwin David and Nadrini David, whose residential address is 5 Smith Hill Road, Lincoln, appealed to the ZBA seeking reversal of the Building Commissioner's determination.

12. Defendants Beverly Peirce and Daniel Peirce, whose residential address is 10 Smith Hill Road, Lincoln, which immediately abuts the premises, appealed to the ZBA seeking reversal of the Building Commissioner's determination.

13. Defendants Michael Gurrie and Lisa Gurrie, whose residential address is 40 Bypass Road, Lincoln, appealed to the ZBA seeking reversal of the Building Commissioner's determination.

14. Defendants Arthur Anthony and Lara Anthony, whose residential address is 35 Brooks Road, Lincoln, appealed to the ZBA seeking reversal of the Building Commissioner's determination. Defendants described in ¶¶ 10-14, *supra*, are collectively referenced as the ZBA Petitioning Defendants.

15. Intervenors Steven Kanner and Linda Kanner, whose residential address is 17 Bypass Road, Lincoln, which immediately abuts the premises, have been allowed to intervene in this case; they also appealed to the ZBA seeking reversal of the Building Commissioner's determination.

16. Intervenor Robyn Laukien, whose residential address is 12 Smith Hill Road, Lincoln, which immediately abuts the premises, has been allowed to intervene in this case; she also appealed to the ZBA seeking reversal of the Building Commissioner's determination.

17. Intervenors Donald McCarthy and Daniel McCarthy, whose residential address is 34 Brooks Road, Lincoln, which immediately abuts the premises, have been allowed to intervene in this case; they also appealed to the ZBA seeking reversal of the Building Commissioner's determination. Intervenors described in ¶¶ 15-17, *supra*, are collectively referenced as the Intervening Abutters.

The Premises

18. On or about May 25, 2016, McLean purchased two residential properties at 16-22 Bypass Road in Lincoln (the "Premises").

19. The properties are situated on two adjoining parcels of land and each parcel contains a single-family residence. Together, the parcels comprise approximately 5.56 acres. Respectively, the residences are 6100 square feet and 2130 square feet.

20. The Premises is located in a residential zoning district, known as R-1 under the Town Bylaw.

The Dialectical Behavior Therapy Program

21. McLean intends to use the premises for a residential program for adolescent boys whose principal diagnosis is BPD. Up to 12 young adults diagnosed with BPD, ages 15 through 21, will participate in the program at any one time.

22. McLean's program will adhere to a Dialectical Behavior Therapy (DBT) approach.

23. The average length of enrollment in the program is expected to be 60 to 120 days.

24. DBT is a behavioral skills development model, originally developed by Marsha Linehan, Ph.D., to assist individuals diagnosed with BPD.

25. The program involves group sessions; worksheets to be completed by the participants; examples and demonstrations, conducted by the qualified professionals and participants alike; and interaction between the participants and qualified professionals and staff.

The Town's Administrative Process

26. Before it purchased the premises, McLean wrote to the Building Commissioner, as well as Lincoln's Director of Land Use and the Planning Board. The letter, dated April 22, 2016, advised its recipients of McLean's proposed use that, in McLean's view, was educational. The letter sought the Town's concurrence that the proposed use would be an educational use permitted as of right pursuant to G.L. c. 40A, § 3 and Lincoln Bylaw § 6.1(g).

27. McLean filed for a site plan review in connection with the proposed use to address landscaping, screening, traffic impacts, drainage, and other issues pursuant to the Town's site plan review bylaw.

28. By decision dated September 13, 2016, the Planning Board approved McLean's site plan subject to certain conditions, including that McLean apply to the Massachusetts Department of Transportation for a new curb cut for the property.

29. By letter dated June 2, 2016, McLean sought a written determination from the Building Commissioner regarding the proposed use.

30. By letter dated July 8, 2016, the Building Commissioner concluded that McLean's use was educational and permitted under the bylaw and G.L. c. 40A, § 3.

31. Intervening Abutters and the ZBA Petitioning Defendants appealed the Building Commissioner's determination to the ZBA pursuant to G.L. c. 40A, § 8.

32. The ZBA held hearings on September 29, 2016 and October 20, 2016, and closed the public hearing on November 3, 2016.

33. On November 3, 2016, the ZBA voted to overturn the Building Commissioner's determination by a vote of 4 to 1.

34. The ZBA issued its written decision on December 9, 2016. The ZBA recognized that while there "are aspects of the methodology used by DBT that look similar to the standard methods of education," they are "not being utilized for the purpose of education, in either the traditional or non-traditional sense. Rather, they are being used as a therapeutic technique (and a recognized and effective one) to address and treat a psychological condition, to cure or ease the effects of BPD on young males." Accordingly, the Board concluded that the "objective of the program is treatment of a mental disease or disorder; the curative aspects of the program predominate."

Disputed Facts

Plaintiff believes the evidence will show the following:

1. The DBT program proposed for the premises is specifically tailored for a subset of individuals who: require significant assistance to develop behavioral and cognitive skills; have demonstrated the readiness and willingness to devote themselves to learning those skills; and do not require inpatient treatment in the form of hospitalization.

2. McLean has developed an admissions process to ensure that applicants to the program fall within this subset.

3. The DBT approach involves the teaching of a broad array of behavioral and life skills.

4. The program will be staffed by qualified professionals with experience in DBT education.

5. The multi-faceted curriculum involves the teaching and development of the following behavioral and cognitive skills:

- a. Mindfulness (so as to increase cognitive awareness, cognitive control, and non-judgmental awareness)
- b. Emotional regulation (so as to: better understand one's emotions; increase facilitation and recognition of positive emotions; and accept negative emotions)
- c. Development and maintenance of interpersonal relationships (focused on the improvement, development, and maintenance of adaptive self-esteem and pro-social skills)
- d. Distress tolerance (so as to better cope with and tolerate distressful experiences and situations).

e. Behavioral flexibility (so as to develop and deploy diverse skill sets that are needed to effectively manage the variety of situations inherent in everyday life).

6. These skills are taught in the following ways;

a. Instructions on how and when to perform a skill; the extent to which it interacts with other skills; and when its use is most constructive.

b. Modeling and demonstration of what the skill is and how it is used, including teacher live demonstration and storytelling.

c. Participant practice of the skill, first in simple situations and increasingly in more complex situations.

d. A feedback process through which qualified professionals observe the students' learning and skill use, give encouragement, instructions, and corrective suggestions, as appropriate.

e. Participants give feedback to, share encouragement with, and discuss the behavioral skills learning process with each other.

f. A generalization process through which participants are increasingly encouraged to practice the repertoire of skills in increasingly challenging, realistic situations.

7. The skills that are the focus of DBT are life skills that a broad array of individuals use on a daily basis. Most individuals, and especially individuals ages 15 through 21, could benefit from greater development of these skills. Program participants, though, have particular deficits in these skills. Consequently, the program is intended to teach the skills intensively and remedially.

8. The average day in the program involves more than four hours of classroom training in at least three different skill areas; 45 minutes of skills practice; and 45 minutes of mindfulness exercises. In addition to the skills practice and mindfulness exercises, participants are given homework in the form of worksheets. In addition, four out of every five weekdays involve athletic exercise, tailored to foster mind-body awareness.

9. A DBT program that is operated by McLean for female participants is licensed by the Department of Early Education and Care, an agency within the Commonwealth's Executive Office of Education.

Intervening Abutters Disputed Facts:

1. The program at the Premises will be overseen by a multi-disciplinary clinical educational staff, including a full-time board certified psychiatrist Medical Director and a licensed full time psychologist Program Director along with other appropriately credentialed educators and behavioral health practitioners.

2. Services provided in this program will be self-paid and not the subject of either third party insurance or public funding. The typical length of enrollment in the program is expected to be a range of 60-120 days.

3. This is the first time that McLean will attempt to treat adolescent boys in a residential setting.

4. McLean operates analogous programs on campus at its Belmont facility called "ART" and "3East."

5. In McLean's "ART" and "3East" programs, treatment is reimbursable by insurance, but only because the treatment is for a shorter time period. Under the Affordable Care Act, there is limit to the number of days insurance will reimburse and because the proposed

program at the Premises is intended to be for a 60-120 day duration, it is not insurance reimbursable.

6. McLean's 3East program utilizes Dialectical Behavior Therapy (DBT) to treat adolescents with "borderline personality disorder and emerging borderline personality disorder" ("BPD") (<http://www.mcleanhospital.org/programs/mclean-3east/overview>).

7. BPD is "characterized by problems with regulating emotions and thoughts, impulsive and reckless behavior and unstable relationships with other people." Moreover, "people with this disorder have high rates of co-occurring disorders, such as depression, anxiety disorders, substance abuse, and eating disorders, along with self-harm, suicidal behaviors, and completed suicides." (National Institute of Mental Health ("NIMH") <http://www.nimh.nih.gov/health/topics/borderline-personality-disorder/index.shtml>).

8. By McLean's own admission, the analogous "ART" and "3East" programs perform treatment first, and education second: "While our first priority is treatment, we recognize the importance of education. Typically, after the initial phase of treatment some residents may be able to manage focusing on schoolwork after the completion of the clinical day. If it is consistent with a resident's ongoing treatment plan, program staff works with the adolescent's school and family to develop a realistic academic plan that may be implemented during treatment. This may involve program staff helping families identify private tutors who can work with their child while at 3East." (<http://www.mcleanhospital.org/programs/mclean-3east/premier-faq>).

9. The estimated number of children to be treated at the Premises will be approximately forty or fifty per year, or approximately 250 over a span of five years.

10. The cost charged by McLean for services delivered at the Premises will exceed \$1,000.00 per patient, per day.

11. Patients on the Premises will also have psycho-pharmaceutical treatment and drugs will be stored on the Premises.

12. The proposed program at the Premises will be completely secured, and patients will have no access to the outdoors unless under supervision.

13. According to the most recently filed Form 990 (Return of Organization Exempt from Income Tax) available online through the Massachusetts Attorney General, McLean self-identifies its organization's mission or most significant activity as a "Psychiatric Hospital."

14. According to its most recent Annual Report, McLean describes its mission as follows:

McLean Hospital is dedicated to improving the lives of people and families affected by psychiatric illness. McLean pursues this mission by:

- Providing the highest quality compassionate, specialized and effective clinical care, in partnership with those whom we serve;
- Conducting state-of-the art scientific investigation to maximize discovery and accelerate translation of findings towards achieving prevention and cures;
- Training the next generation of leaders in psychiatry, mental health and neuroscience;
- Providing public education to facilitate enlightened policy and eliminate stigma.

III. WITNESSES

Plaintiff's Fact Witnesses

1. Alan E. Fruzzetti, Ph.D., McLean Hospital, 115 Mill Street, Belmont, MA 02478. Dr. Fruzzetti is the director of the Boys Residential DBT Program at McLean. Dr. Fruzzetti will testify concerning the DBT program curriculum; the daily and weekly schedules of program participants at the Lincoln premises; and the screening of potential residents for the program.

2. Philip G. Levendusky, Ph.D., ABPP, McLean Hospital, 115 Mill Street, Belmont, MA 02478. Dr. Levendusky is the Senior Vice President, Business Development and Communications, and the Director of the Psychology Department at McLean Hospital. He will testify concerning the factors considered by McLean in determining where to site community based residential programs, including the program in Lincoln, and the considerations McLean reviews in siting such a program. He will testify as to the need for programs such as the DBT program, the general characteristics of the population to be served by the program, and the type of space the program requires.

3. James V. Major, Massachusetts Association of 766 Approved Private Schools, 607 North Avenue, 18 Lakeside Office Park, Wakefield, MA 01880. Mr. Major is the Executive Director at the Massachusetts Association of [Chapter] 766 Approved Private Schools (known as maaps). Mr. Major will testify concerning the curricula of Chapter 766 Schools and types of DBT (or DBT-influenced) teaching methods and skills training that are used in that setting.

4. Plaintiffs reserve the right to supplement their fact witnesses based on who Town Defendants and Intervening Abutters identify and call.

Plaintiff's Expert Witnesses

1. Joseph Gold, M.D., McLean Hospital, 115 Mill Street, Belmont, MA 02478. Dr. Gold is the Chief Medical Officer and Chief of the Simches Division of Child and Adolescent Psychiatry at McLean Hospital. He also is an Assistant Professor of Psychiatry at Harvard Medical School; Director of Community and Child Psychiatry Services, Partners Psychiatry and Mental Health; and Associate Medical Director of the Massachusetts Child Psychiatry Access Project (MCPAP). Dr. Gold will testify concerning the symptoms and manifestations of an individual suffering from BPD and the fact that symptoms of BPD vary greatly from person to person (as does the care required to treat those symptoms). Dr. Gold will testify that a residential setting such as the Lincoln program would not be appropriate for all individuals exhibiting BPD, but is appropriate for other such individuals. He will testify concerning how the screening process is tailored to admit participants likely to benefit from the program. Dr. Gold will testify concerning the accepted classifications of psychiatric and psychosocial disorders. He will testify that the type of anxiety, depression and other disorders experienced by individuals likely to benefit from the program results from an acute skill deficit that prevents these otherwise talented individuals from "doing life" and recognizing their potential. Dr. Gold also will testify regarding the state licensure of the program, and the other state licensure requirements with which various McLean programs must comply. Dr. Gold will also testify concerning the variety of programs run by McLean and the licensure required for each, including the Arlington School, an approved Chapter 766 school located on the McLean campus.

2. Alex Miller, Psy.D., Cognitive & Behavioral Consultants, LLP, 1 North Broadway, Suite 704, White Plains, NY 10601. Dr. Miller is a licensed psychologist in New York and the Clinical Director of Cognitive & Behavioral Consultants, LLP. He also is a

Clinical Professor of Psychiatry and Behavioral Sciences at Albert Einstein College of Medicine. He has more than 22 years of experience in developing, researching, and teaching DBT; he is the co-author of three leading textbooks on DBT. Dr. Miller will testify regarding BPD, its symptoms, and its prevalence in the adolescent community. He will describe the behavioral skills that DBT aims to teach, and describe DBT's fundamentally educational focus as taught by qualified professionals who follow a highly structured curricula with specific lesson plans and homework assignments. Dr. Miller also will testify regarding the use of DBT in public schools, from the elementary through high school levels, where it is used to develop and refine coping skills.

3. S. Paul Reville, Harvard University Graduate School of Education, 13 Appian Way, Longfellow 301, Cambridge, MA 02138. Mr. Reville is the Francis Keppel Professor of Practice and Educational Policy and Administration at the Harvard University Graduate School of Education. From 2008 to 2013, he was the Secretary of Education for the Commonwealth of Massachusetts. Mr. Reville is expected to testify that the effective education of adolescents and young people prepares them to be successful in their careers, in their families, in leadership, in their communities, and in lifelong learning. He is expected to testify that the behavioral skills developed through DBT are integral to an education that prepares young people to be successful. Mr. Reville will describe how secondary education is moving towards a greater focus on social and emotional growth and skills, of the type on which DBT focuses. Elements of DBT are already included in individualized education programs for students with special needs; in the curricula of Chapter 766 schools; and in the curricula of alternative or non-traditional high schools. In addition, such skills are implicit in the curricula of secondary education, an essential component of a successful student experience, and an essential element in preparing students to

be successful going forward. Mr. Reville will testify that DBT is an appropriate and customized intervention especially tailored to provide an intensive focus on behavioral skills for students who have a greater than average deficiency in those skills.

4. Plaintiffs reserve the right to supplement their expert witnesses based on who Town Defendants and Intervening Abutters identify and call.

Town's Fact Witnesses

The Town does not presently intend to call any other fact witnesses but does intend to elicit testimony from the Plaintiff's witnesses to establish a factual basis that supports the Board's decision

Town's Expert Witnesses

The Town and the Intervenors will be availing themselves of the same expert – see below

Intervening Abutters Fact Witnesses

The Intervening Abutters may give rebuttal testimony with respect to statements made, or materials supplied to them by McLean, prior to or during hearings before the Lincoln Zoning Board of Appeals, regarding the nature of the proposed program. The Intervening Abutters reserve the right to supplement their fact witnesses based on who McLean calls.

Intervening Abutters Expert Witnesses

The Intervening Abutters intend to call Elizabeth Simpson, M.D., Director of the Massachusetts Mental Health Center, 75 Fernwood Road, Boston, MA 02115-6103. Dr. Simpson is a graduate of Brown University (A.B. 1976) and Vanderbilt University School of Medicine (M.D. 1985). She has extensive training in DBT and will opine that the proposed program is substantively identical to standard DBT programs practiced throughout the country as therapeutic medical

treatment reimbursable by insurance, and does not, in her opinion constitute a program where the educational component is primary or predominant.

IV. EXHIBITS

Agreed Exhibits

1. Zoning Bylaw of the Town of Lincoln.
2. A site plan of the premises.
3. Assessors plans demonstrating the respective locations of the premises and the properties on which the Intervening Abutters reside.
4. Decision of the ZBA dated December 9, 2016 (determining the proposed use of the premises was not educational as that term is used in G.L. c. 40A, § 3 and the Town bylaw).
5. Letter of the Building Commissioner dated July 8, 2016 (concluding that the proposed use of the premises is educational as that term is used in G.L. c. 40A, § 3 and the Town bylaw).
6. Premises site plan approval.
7. The McLean Hospital Corporation Restated Articles of Incorporation, as filed with the Secretary of the Commonwealth on June 24, 1993.
8. The DBT program materials, including its: schedule; instructional documents; and worksheets.
9. McLean 2016 Annual Report.
10. Screen shots of McLean's website.
11. The Parties reserve the right to supplement this list.

Disputed Exhibits

Plaintiff's Exhibits

1. Email of Town Counsel dated May 2, 2016 (describing his opinion "that the proposed use would qualify as an educational use under the Dover Amendment).

Intervenor's Exhibits

1. Screen shots of McLean's webpage.

V. DISCOVERY STATUS

Intervening Abutters have not yet provided a description of the opinions to be offered by their expert witness nor the basis of any such opinions. Accordingly, McLean reserves the right to seek any discovery related to Intervening Abutters' expert, including, but not limited to, her deposition.

VI. WAIVER OF CLAIMS

All claims asserted by McLean remain pending.

RESPECTFULLY SUBMITTED,

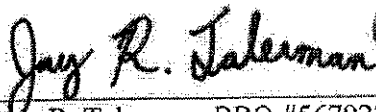
THE MCLEAN HOSPITAL CORPORATION



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WALSH in his capacity as the TOWN
OF LINCOLN BUILDING COMMISSIONER

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Dated: July 10, 2017

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the above
document was served upon the attorney of record
for each other party by mail (by hand) on 07.10.17





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July 10, 2017

BY HAND DELIVERY

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Ryan P. McManus

Re: The McLean Hospital Corporation v. Town of Lincoln, et al.
Land Court Docket No. 16 MISC.000694 (KFS)

Dear Ms. Noonan:

Enclosed for filing in connection with the above-captioned matter is the Joint Pre-Trial Memorandum. The Pre-Trial Conference is scheduled for Friday, July 14, 2017 at 9:30 a.m.

Please do not hesitate to contact me with any questions.

Harry F. Lee

*Sarah M. Waelchli
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Kevin M. Ellis

Donna A. Mizrahi
Nathan N. McConarty
†Paul M. Cathcart, Jr.
**Steven L. Mangold

Sincerely,

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Deborah J. Hall
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Raymond H. Young
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MPM/jam
Enclosure

cc: Jason R. Talerman, Esq. (by electronic mail)
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