

## **The Lot**

The property in question is a 18.56 acre parcel located off of Long Pond Road. It is zoned Rural Residential, requiring a minimum of 120,000 square feet (3 acres) to build. It is located in a Zone 3 Aquifer Protection District, meaning that the runoff on the site contributes to a significant recreational body of water but not directly to the Town's drinking water supply. It is not included in the National Heritage & Endangered Species Program (NHESP) mapping of priority habitat areas, flood hazard zones, or Area of Critical Environmental Concern.

In 2015, the property was approved by the Planning Board for a 5 lot residential subdivision. The developer for that subdivision installed a road, cleared portions of lots, and may have removed sand and gravel from the property without a permit. However, the lots were never sold and no subdivision was built. In 2020, the developer sold the property to New Hope Chapel of Plymouth, Inc. ("New Hope Chapel").

## **The New Hope Chapel Proposal**

In 2021, New Hope Chapel submitted a proposal to the Town for construction of a 53,689 square foot building, which would have required the removal of 276,500 cubic yards of sand and gravel from the site. That proposal was withdrawn in 2022 in light of community opposition to both the size of the structure and the amount of earth removal proposed.

New Hope Chapel is now proposing to build a 26,618 square foot building on an 18.56 acre parcel off of Long Pond Road. The proposed building is to consist of a 787 seat church, classrooms, nursery, youth room, children's worship area, offices, storage, mechanical rooms and bathrooms. Construction of this facility would require the removal of 68,606 cubic yards of sand and gravel from the site. The stated reason for this removal is to lower the building elevation so it is not visible to the neighbors.

## **Special Permit Applications**

New Hope Chapel came before the Planning Board seeking an advisory position (final decision is made by the Zoning Board of Appeals) on three Special Permits as required by the zoning bylaws:

1. To allow removal of approximately 68,606 cubic yards of sand and gravel;
2. To allow slopes on the property greater than a 3:1 ratio; and
3. To allow parking of more than 200 cars and snow storage in a Zone 3 Aquifer Protection District.

No special permit was needed for the size of the proposed building as the total amount of building coverage permitted in a rural residential zone is 15% of the lot and the proposed church covers only 3.3% of the lot.

## **The Applicable Laws**

Because New Hope Chapel is proposing to build a religious/educational building, there are certain laws which give it some exemptions from Town zoning requirements:

- A Massachusetts state law - the Dover Amendment, M.G.L. c. 40A § 3, and
- A federal law - the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc

### **A. Dover Amendment**

The Dover Amendment was adopted in 1950 in response to the enactment of local zoning bylaws that prohibited religious schools within a town's residential neighborhoods. Protections for other types of uses, such as agricultural, came later.

The portion of the Dover Amendment which relates to religious institutions states:

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

Therefore, per State law, New Hope Chapel does **not** need a special permit to build in a residential area.

### **B. RLUIPA**

In the case of regulation of any aspect of a religious use project, the discretion afforded a local authority is limited by the RLUIPA. This statute protects individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws. Its intention is to restrict the ability of municipalities from using their power to regulate land use where such action would prevent the renovation or construction of buildings intended for religious purposes.

The RLUIPA codifies certain aspects of the First and Fourteenth Amendments to the U.S. Constitution. To that end, it provides two different types of limitations on the use of Town zoning bylaws in the regulation of religious buildings.

## 1. General Rules

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). This places greater limits on the level of ‘regulation’ a Town has over construction of a religious building by imposing a ‘strict scrutiny’ standard on the Town’s actions.

In the First Circuit (the federal appeals circuit that includes Massachusetts), a “substantial burden” on religious exercise does not mean just any burden. Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78 (1st Cir. 2013), *citing* Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 348-49 (2d Cir. 2007). However, it also does not mean that it has to be disabling in order to be substantial. Id. (“We do not agree with those courts that have suggested that nothing short of coercion to change or abandon one’s religious beliefs can meet the substantial burden test.”). Instead, the determination as to whether a burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question. “We recognize different types of burdens and that such burdens may cumulate to become substantial.” Id. Accordingly, rather than adopt an abstract test for “substantial burden”, the First Circuit holds that a functional approach based on factors relevant to the specific circumstances be applied, which can include, but are not limited to, effects on use of the property and financial burden.

## 2. Discrimination and Exclusion

Second, municipalities must act as follows with respect to religious use proposals:

### (1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

### (2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

### **(3) Exclusions and limits**

No government shall impose or implement a land use regulation that--

**(A)** totally excludes religious assemblies from a jurisdiction; or

**(B)** unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc(b)(1)-(3). These requirements adopt a comparative approach between the way religious and non-religious uses are treated within a municipality. In considering whether a religious use proposal is receiving equal treatment, the First Circuit has suggested some factors to be reviewed:

- Whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's requests;
- Whether the land use restriction was imposed on the religious institution arbitrarily, capriciously, or unlawfully;
- Whether decisions are based on the objections of a "small but influential" group in the community; and
- Whether there are misunderstandings of legal principles which may result from giving "standardless discretion to nonprofessionals operating without procedural safeguards".

### **Application of Law to New Hope Sand and Gravel Special Permit Application**

While New Hope Chapel is applying for 3 special permits, the one which appears to be most contentious is the request for sand & gravel removal.

The Planning Board voted to recommend both the slope permit request and the parking request subject to the condition that any parking spaces above 200 be constructed using material that allows water to pass through. However, the permit request for sand and gravel removal was the most contentious, and the one subject to the greatest public comment. What was clear from the public statements is that there are a number of legal misconceptions regarding the scope of Town regulation.

1. Earth Removal does not need to be 'necessary and incidental' for a special permit

There were some residents present who asserted to the Planning Board that a special permit cannot be granted unless the requested earth removal is necessary and incidental to the proposed project. **That is incorrect.** Under the zoning bylaw, §203-2(C)(3), if earth removal is

deemed to be necessary and incidental, and meets certain technical requirements, then a special permit is actually **not** required. It is only where either the earth removal is not 'necessary or incidental' or that it doesn't meet the technical requirements that a special permit is needed. In those cases, the minimum requirements for earth removal are set forth in the zoning bylaw, §203-2(C)(4)-(7); and those requirements can be reduced or waived by a special permit by the Zoning Board of Appeals.

2. Not all sand and gravel removal constitutes 'mining'.

Some presenters to the Planning Board argued that the requested no special permit could be granted because the proposed sand and gravel removal constituted "mining" which is prohibited in a residential zone. **Again, this is incorrect.** Under the zoning bylaw use table, Section E. 14, where the principal purpose of a property is earth removal, it is prohibited in a residential zone. However, the zoning bylaw use table, Section E. 13, also says that where earth removal is accessory to another use it is permitted in a residential zone by special permit. The zoning bylaw does not define what constitutes principal versus accessory earth removal. However, Massachusetts case law does.

The courts have held that where the volume, amount of time, and revenue generated by sand and gravel outweigh the other proposed uses for the property, that constitutes a principal use. Old Colony Council-Boy Scouts of Am. v. Zoning Bd. of Appeals of Plymouth, 31 Mass. App. Ct. 46, 49 (1991) (volume of sand and gravel to be removed and sold far exceeded the potential financial gains of operating a cranberry bog, making the removal the primary business). In contrast, if the purpose of the sand and gravel removal is to accomplish another purpose, and is not a separate venture unto itself, it is deemed an accessory use. Henry v. Board of Appeals of Town of Dunstable, 418 Mass. 814, 845 (1994).

3. A special permit cannot be denied based on the alleged unauthorized sand and gravel removal of the prior landowner.

Some members of the public, and their legal counsel, claimed that because the prior property owner may have removed sand and gravel without a permit that precluded the issuance of a special permit recommendation by the Planning Board. **This is also wrong.**

Under state law, G.L. c. 40A, §7, in Plymouth the building inspector, not the Planning Board, has authority to enforce the zoning bylaw. Further, that statute only authorizes the building inspector to withhold a building permit:

for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law; and no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law.

So if the alleged prior sand and gravel removal would result in a new building violating the zoning bylaw, then it could not receive a permit. However, the building and land use proposed by New Hope Chapel would **not** be in violation of the zoning bylaw. To the contrary, the building to be constructed per the special permit applications would meet all of the technical requirements contained in the zoning bylaw for a special permit (with the exception of the 3:1 slope, for which a separate special permit was requested).

### **What Does This Mean?**

This does not mean that the Town has to grant all of the special permit applications. What it does mean is that per the requirements of the Dover Amendment and the RLUIPA, the Town must allow the building of a church in a residential zone. As for the special permit requests, under the law the Planning Board and Zoning Board of Appeals must:

- consider the special permit requests in the same manner as they have considered similar request for non-religious structures,
- impose restrictions only to achieve compelling Town interests, and
- those restrictions must be the least restrictive means possible of achieving those interests.