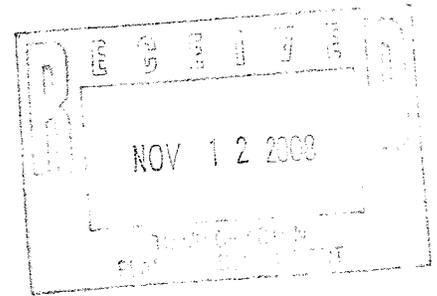




**FLETCHER, TILTON & WHIPPLE, P.C.**  
C O U N S E L O R S   A T   L A W



November 6, 2008

Roland Bartl, Planning Director  
Town of Acton  
472 Main Street  
Acton, MA 01720

**Re: Proposed Next Generation Children's Center – 348-352 Main Street  
Walker Realty, LLC**

Dear Mr. Bartl:

This letter is in furtherance of the matters discussed at the development review meeting held in the Acton Town Hall on October 14 wherein representatives of the town of Acton's Boards and Departments reviewed and commented upon the proposed preliminary plan submitted for review by Robert Walker of Walker Realty, LLC. Walker Realty, LLC, owner of the premises located at 348-352 Main Street, has proposed the redevelopment of the site for the construction of a child care facility to be operated by Next Generation Children's Centers. The most recent preliminary plan, prepared by Hancock Associates of Marlborough, proposes the construction of a two story child care center (24,085 square feet) with accessory playground areas, off-street parking facilities, landscaping and utilities to service the site. The property consists of a 106,188 square foot lot with over 200 feet of frontage on Main Street, Route 27 in Acton. The site is bounded by the Route 2 right of way on its westerly side and much of the lot's frontage is located directly opposite the Route 2 highway interchange with Route 27. Although the site is located in the R-2 Residential Zoning District, the site is located in close proximity to many existing commercial and municipal uses.

Both Robert Walker, as property owner and Walter Kelleher, representative of Next Generation Children's Centers, the proposed operator, wish to thank you and the other staff who participated in the review of the development plans. Their time, effort and valuable comments undoubtedly will result in an improved development plan. Although the nature of the project is such that formal site plan review is not be required under the Zoning By-law, my client agrees that continued informal review, discussion and cooperation with your department and all interested boards and officials will ensure that all regulatory and planning concerns can be addressed to make this Children's Center an asset to the community.

At our meeting, we discussed the fact that the proposed child care facility is a use which is subject to the special zoning status and protections afforded to child care facilities by Section 3

Roland Bartl, Planning Director

November 6, 2008

Page 2



of the Zoning Act, (Massachusetts General Laws Chapter 40A §3, sometimes referred to as the “Dover Amendment”). In order to determine the appropriate process for the issuance of construction authorizations, you have requested that we demonstrate the applicability of Chapter 40A, Section 3 to the project. We are pleased to comply with your request.

As a threshold matter, the proposed child care center is located in the R-2 Zoning District. The Table of Principal Uses, Section 3.2 of the Acton By-law, setting forth a list of uses permitted in the various zoning districts, provides at Section 3.4.6 that “Child Care Facility” is a use of land that is permitted in all zoning districts in Acton as a matter of right without the requirement for Site Plan Review (designated as “NR”). The use category wherein Child Care Facility is listed is within category 3.4 of the Use Table entitled “Government, Institutional & Public Service Uses”. The definitions of the listed uses following the use table provides at Section 3.4.6 that a Child Care Facility is “*A day care or school age child care center or program as defined in MGL, Chapter 40A.*” The use of these terms in the by-law is an apparent reference to Sections 3 and 9C of the Zoning Act, which are the only sections of Chapter 40A which reference the subject of child care facilities.

As you know, Section 3 of the Zoning Act, entitled “Limitations on Subject Matter of Zoning Ordinances,” provides certain restrictions against local regulation of a number of various land uses and subjects which have been legislatively determined to be subject to special zoning protections or exemptions such as agricultural uses, religious and educational uses, public utilities, family day care homes, etc. The relevant portion of Section 3 concerning child care facilities is set forth in paragraph 3 of Section 3. That paragraph of Section 3 provides as follows:

No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; 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. As used in this paragraph, the term "child care facility" shall mean a day care center or a school age child care program, as those terms are defined in section 1A of chapter 15D.

Both G.L. Chapters 40A §§ 3 and 9C and the Acton By-law recognize that those child care facilities that are permissible as of right in all districts in cities and towns are those programs or uses regulated and defined by General Laws Chapter 15D, the statute setting forth the functions and responsibilities of the Department of Early Education and Care<sup>1</sup>, as either day care centers

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<sup>1</sup> Prior to July 31, 2008, the statute defined child care facilities by reference to Chapter 28A §9 pursuant to the statutes and regulations regarding the Office of Child Care Services. Chapter 215 of the Acts of 2008 rewrote G.L. Chapter 15D and correspondingly amended Section 3.



or school age child care programs which are defined, in turn, in Section 1A of the statute as follows:

"Day care center", any facility operated on a regular basis whether known as a day nursery, nursery school, kindergarten, child play school, progressive school, child development center, or pre-school, or known under any other name, which receives children not of common parentage under seven years of age, or under sixteen years of age if such children have special needs, for nonresidential custody and care during part or all of the day separate from their parents. Day care center shall not include: any part of a public school system; any part of a private, organized educational system, unless the services of such system are primarily limited to kindergarten, nursery or related preschool services; a Sunday school conducted by a religious institution; a facility operated by a religious organization where children are cared for during short periods of time while persons responsible for such children are attending religious services; a family day care home; an informal cooperative arrangement among neighbors or relatives; or the occasional care of children with or without compensation therefor.

"School age child care program", any program or facility operated on a regular basis which provides supervised group care for children not of common parentage who are enrolled in kindergarten and are of sufficient age to enter first grade the following year, or an older child who is not more than fourteen years of age, or sixteen years of age if such child has special needs. Such a program may operate before and after school and may also operate during school vacation and holidays. It provides a planned daily program of activities that is attended by children for specifically identified blocks of time during the week, usually over a period of weeks or months. A school age child care program shall not include: any program operated by a public school system; any part of a private, organized educational system, unless the services of such system are primarily limited to a school age day care program; a Sunday school or classes for religious instruction conducted by a religious organization where the children are cared for during short periods of time while persons responsible for such children are attending religious services; a family day care home except as provided under large family day care home; an informal cooperative arrangement among neighbors or relatives; or the occasional care of children with or without compensation therefor.

The proposed use of the subject property as a Next Generation Children's Center, is a child care facility as defined by both Chapter 40A Section 3 and Chapter 15D. The facility would be licensed and regulated by both the Commonwealth's Office of Child Care Services and the Department of Early Education and Care. Next Generation Day Care currently operates nine programs and facilities in Massachusetts such as that proposed in Acton. Attached hereto is a specimen license issued by the Commonwealth for the Child Care



Program operated in Sudbury by Next Generation Children's Center of Sudbury, Inc.<sup>2</sup> The facility is licensed pursuant to Chapter 28A (see attached) for programs serving 245 children between the ages of 1 month to 7 years of age and is also regulated by the Commonwealth's Office of Early Education and Care. As mentioned at our meeting, a similar facility in terms of the number and ages of clientele served was recently established in Hopkinton, Massachusetts. That facility was also developed by Walker Realty, LLC and was the subject of a Land Court Appeal and decision in 2002 (10 LCR 63) wherein Justice Scheier of the Land Court found on summary judgment that the facility proposed by Next Generation was a child care facility pursuant to G.L. c 40A, Section 3. Obviously, since the proposed Acton facility is not yet in existence nor licensed, it is not yet a qualifying child care center. However, it is the intent of the developer to apply for approval as a qualifying child care center and would condition the grant of its permit upon its maintenance of appropriate qualification as a Section 3 facility.

It should be noted in this discussion that the historical legislation known as the "Dover Amendment," is often used in the context of the zoning protections afforded by Section 3 to child care centers. The Dover Amendment refers to legislative precursors to Section 3 which concerned regulation of religious and educational uses exempted by paragraph 2 of Section 3. The history of the Dover Amendment was described in the case of *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct 19 (1979), in part, as follows:

In 1950, St. 1950, c. 325, inserted the following language in *G. L. c. 40, § 25*, a predecessor of the present c. 40A, § 3: "No 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." In *Attorney General v. Dover*, 327 Mass. 601 (1951), the Supreme Judicial Court was called upon to consider the impact of this amendment (which is widely referred to as the Dover Amendment) on the Dover by-law. The court stated that the effect of the by-law, if valid, "would be to prohibit any use of land or buildings in a residential district for sectarian educational purposes" and agreed with the Attorney General's contention that "if the amended [by-laws] was ever valid, it became invalid immediately upon the taking effect of the statute of 1950." *Id. at 603-604.*

However, although the child care facility exemption was inserted in the statute in 1990, courts have consistently held that the effect of the statute was to extend Dover Amendment protections and jurisprudence applicable to religious and educational uses to child care facilities exempted by Paragraph 3. The distinction is important to make, however, since although educational uses protected by paragraph 2 of Section 3 are limited to those which are on land owned either by public entities or non-profit educational corporations, this

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<sup>2</sup> Each of the NGCC programs are separately incorporated.



limitation does not apply to child care facilities by the express terms of the statute. In the case of *Petrucci v. Board of Appeals of Westwood*, 48 Mass. App. Ct. 818 (1998), the Appeals Court, in rejecting an attempt to measure the reasonableness of a regulation by virtue of the commercial nature of the subject day care center, stated that “Such a discrimination on the basis of corporate form would tend to create a significant disincentive for the private sector to address the public purpose of making child care services as widely available as their need requires.” (*Supra*, Note 18).

While it is clear that the proposed use is a child care facility both allowed in the R-2 District and entitled to the protections of Section 3, you have inquired as the procedure for issuing a permit for the facility where the structure or lot fails to conform to one or more of the dimensional regulations applicable to the use. As illustrated on the preliminary plans, the property and proposed use meets or exceeds all of the dimensional, parking and other technical requirements of the Acton Zoning By-law which are applicable to uses and structures in the Residential 2 Zoning District as set forth in the Table of Dimensional Requirements at Section 5 of the By-law. However, Section 5.3.9 establishes three special dimensional requirements applicable to child care facilities located in residential districts which the proposed facility does not conform to. These limitations collectively establish a 1000 square foot maximum “Net Floor Area” limit, a 10% maximum “Floor Area Ratio” and a minimum “Open Space” requirement of 35 percent. In this case, the proposed facility would require a waiver from the applicability of these requirements. We believe that such a waiver is appropriate in this case.<sup>3</sup>

As noted above, Section 3 of the Zoning Act provides that while local by-laws may not prohibit or require a special permit for the use of land for qualifying child care facilities, Section 3 provides that such facilities “...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.”(emphasis supplied). A significant body of case law has emerged concerning the application of local dimensional limitations to Dover Amendment protected uses, as extended to child care facilities by Section 3. In the case of *Rogers v. Town of Norfolk*, 432 Mass. 374 (2000), the Massachusetts Supreme Judicial Court held that a 2500 square foot footprint limitation applicable to child care centers was unreasonable as applied to a proposed child day care center. In *Rogers*, the Court held that the test for whether particular dimensional requirements may be applied and enforced was the same as has evolved in the context of educational uses protected by the Dover Amendment and enunciated in prior decisions as follows:

“Although we have never examined *G. L. c. 40A, § 3*, third par., we have had occasion to interpret analogous language, set forth in *G. L. c. 40A, § 3*, second par.,

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<sup>3</sup> In *Tufts*, supra, at page 760, the Supreme Judicial Court determined that in making a reasonable accommodation to a protected Section 3 use from a dimensional requirement it did not conform to, it would be improper to require the applicant to apply for a variance.



inserted by St. 1975, c. 808, § 3 (Dover Amendment), affording educational and religious institutions protection from local zoning regulation. See *Campbell v. City Council of Lynn*, 415 Mass. 772 (1993); *Trustees of Tufts College v. Medford*, 415 Mass. 753, 616 N.E.2d 433 (1993). In *Trustees of Tufts College v. Medford*, *supra* at 757-758, we held that "local zoning requirements adopted under the proviso [amendment allowing 'reasonable regulations'] to the Dover Amendment which serve legitimate municipal purposes sought to be achieved by local zoning, such as promoting public health or safety, preserving the character of an adjacent neighborhood, or one of the other purposes sought to be achieved by local zoning as enunciated in St. 1975, c. 808, § 2A, see *MacNeil v. Avon*, 386 Mass. 339, 341, 435 N.E.2d 1043 (1982), may be permissibly enforced, consistent with the Dover Amendment, against [a protected] use . . . so long as the provision is shown to be related to a legitimate municipal concern, and its application bears a rational relationship to the perceived concern. On the other hand, a zoning requirement that results in something less than nullification of a proposed educational use may be unreasonable within the meaning of the Dover Amendment." (Citations omitted.) A Dover Amendment type analysis, like that used in the *Tufts* decision and related cases, as encapsulated in the quotation from *Tufts*, formed the basis of the judge's decision. We agree that such an analysis is appropriate here... (Id. At 377-378)... the pertinent language of § 3, third par., seeks to strike a balance between preventing local discrimination against child care facilities and respecting legitimate municipal concerns. See *Trustees of Tufts College v. Medford*, 415 Mass. at 757. "The question of the reasonableness of a local zoning requirement, as applied to a proposed [exempt] use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an [applicant] will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project. The [applicant] might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the [applicant's property], without appreciably advancing the municipality's legitimate concerns. Excessive cost of compliance with a requirement imposed [by the zoning ordinance] . . . without significant gain in terms of municipal concerns, might also qualify as unreasonable regulation of an [exempt] use." 415 Mass. at 759-760. In addition, in determining the reasonableness of a zoning provision, we may inquire whether "the requirement sought to be applied . . . take[s] into account the special characteristics of [the exempt] use." 415 Mass. at 758-759 n.6.

It is significant to note that in *Rogers*, the Court held that a footprint limit of 2500 square feet was unreasonable as applied to a proposed child care facility. In this case, Acton's By-law limits child care facilities to a Net Floor Area of a mere 1000 square feet; two and one-half times less than the limit that was held to be unreasonable in *Rogers*.

Roland Bartl, Planning Director

November 6, 2008

Page 7



In this case the proposed facility, although admittedly in a residential zone, is not located in the midst of a predominantly residential neighborhood. The lot is nearly five times the minimum required area for lots in the district and is located along a numbered highway abutted by Route 2. Developed commercial and municipal uses are in close proximity to the site and the facility would not detract from an established residential character of the neighborhood. On the other hand, enforcement of the requirements would have the practical effect of prohibiting the use since it would be practically and economically infeasible to limit the proposed facility to the size permitted.

In *Whitkin, et al v. Zoning Board of Appeals of Framingham* (15 Land Court Reporter 86 (2007)), the Massachusetts Land Court held that a building permit was properly issued to permit the construction of a proposed 60,000 square foot facility for a Dover Amendment protected adolescent center, despite the fact that the lot did not conform to the minimum frontage requirement of the By-law. The applicant requested and was granted a building permit upon its request to the zoning enforcement officer for a waiver from the frontage requirement, which in turn, was upheld by the Framingham Board of Appeals upon an appeal by an abutters group. The Court, affirming the issuance of the permit despite the fact the project did not conform to the By-law stated as follows:

"local officials may not grant blanket exemptions from the requirements to protected uses." *Campbell v. City Council of Lynn*, 415 Mass. 772, 778 (1993). They may, however, decide that zoning requirements concerning height and dimension should not be applied to a proposed educational use where it would *unreasonably impede* the protected use without appreciably advancing critical municipal goals. (Emphasis added.) See *Trustees of Tufts College*, at 415 Mass. 753 at 757-761.

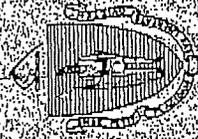
I believe that the foregoing discussion and information is responsive to your request to document the status of the proposed facility as being entitled to the Dover Amendment protections of the Zoning Act as well as the authority of the zoning enforcement officer to issue an appropriate permit to construct the facility. Obviously, I would be happy to provide any additional information or follow-up discussion or materials necessary to assist you in your efforts to review the process for permitting the proposed facility.

Very truly yours,

James M. Burgoyne

JMB:pat

cc: Robert Walker, Walker Realty, LLC  
Walter Kelleher, Next Generation Children's Centers



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF EARLY EDUCATION AND CARE

Deval L. Patrick, Governor

Regular License to Operate a Group Child Care Program

This license is for a Limited SACC program

Program Number: 212672

License Number: 8118255

In accordance with the provisions of Chapter 88A of the General laws, and regulations established by the Department of Early Education and Care, a license is hereby granted to:

License Name: NEXT GENERATION CHILDRENS CENTER OF SUDBURY, INC.  
Program Name: NEXT GENERATION CHILDRENS CENTER OF SUDBURY  
Address: 307 BOSTON POST RD SUDBURY, MA 01776-3001

Capacity Details: Infant: 0, Toddler: 150, Preschool: 0, Mixed Group: 27, TP Mixed: 9

Total Capacity: 245

Children Ages: 0-10 year(s) (1 month(s) to 75 year(s) + 0 month(s))

Condition: Mixed Infant/Toddler grouping allowed with no more than three infants in each group of nine. Infant/toddler group may be converted to infant group as long as group size is reduced to seven. One preschool group may be converted to a mixed toddler/preschool group as long as group size is reduced to nine. Above licensed capacity may include up to 6 school-age children as allowed by current posted Limited School Age License. Ages include all children 5 through 9 years 6 months of age.

Expiration Date: 2/26/2009

*Ann Reale*

License printed on: 3/6/2007  
Revision: 2/6/09

Ann Reale, Commissioner

Please Post Conspicuously

This License is Not Transferable