

***Board of Appeals***  
***Town of Acton, Massachusetts***

**In the Matter of:**

**Administrative Appeal**

**Appellant: Walker Realty, LLC**

**Locus: 348-352 Main Street**

**Brief to the Board**

*To the Honorable Board of Appeals of Acton:*

Now comes the Petitioner/ Appellant, Walker Realty, LLC, and respectfully submits this Brief and Request for Findings in support of its Appeal from a zoning determination of the Acton Zoning Enforcement Officer as follows:

**INTRODUCTION**

This Appeal is before the Acton Board of Appeals on behalf of Walker Realty, LLC, owner of residentially zoned premises located at 348, 350 and 352 Main Street in Acton. Walker seeks to redevelop and use the subject premises as a child care facility ("CCF") to be operated by Next Generation Children's Center. The proposed use of land as a CCF, as defined and regulated under Massachusetts law and the Acton Zoning By-law, is subject to certain special zoning status under Section 3 of the Massachusetts Zoning Act as discussed in more detail below. Pursuant to the Acton By-law, the use of the site as a CCF is permitted as a matter of right in the residential zoning district, without any requirement for Site Plan Approval or special permit relief. However, the

proposed facility does not comply with certain dimensional provisions in the Acton By-law, from which the Petitioner seeks relief.

Over the past several months, the Petitioner and its consultants have voluntarily engaged in development review meetings and discussions with the Acton Planning Department, building officials, land use board representatives, DPW and public safety officials. During this review period, Walker has subjected its plans to good faith review and has revised its proposed site plans several times to maximize compliance with the stated concerns of Acton regulatory and planning staff and officials. Further, Petitioner has voluntarily commissioned a traffic study which has confirmed that the existing public ways and intersections are adequate to service its proposed use. Nevertheless, Walker has, upon request of Acton officials, agreed to implement significant traffic and safety improvements to Main Street (Route 27) at its sole expense despite that the use is permitted as of right and despite its special zoning status.

Although the current site plan complies with nearly all applicable dimensional requirements, design standards and parking requirements set forth in the Acton Zoning By-law, the plans do not conform to certain by-law requirements discussed and outlined below. Due to the special status afforded to CCF's under the Massachusetts Zoning Act, G.L. c. 40A, § 3, in the context of this appeal from the determination of the Zoning Officer, the Board of Appeals, applying the legal standards and jurisprudence applicable to "Dover Amendment" protected uses such as religious and educational uses, has authority to approve plans which do not strictly conform to certain By-law provisions. By agreement with Town officials and consultants, Walker has sought and obtained an administrative denial from the Zoning Enforcement Officer. By letter dated March 24, 2009 (**Exhibit 1**), counsel for Walker requested a zoning determination letter for a proposed site plan prepared by Hancock

Associates dated March 15, 2009.<sup>1</sup> By letter dated March 26, 2009, Scott Mutch, Zoning Enforcement Officer, issued a "Zoning Determination Letter" that a building permit could not be issued because the plan failed to comply with the Acton By-law. (Exhibit 2). Pursuant to the Zoning Act and Section 10.1.1 of the Acton Zoning By-law, Walker filed this timely appeal on April 7, 2009 to the Board (Exhibit 3) in order that the relief sought may be obtained for construction of the CCF after full review by the town, the public and other interested parties.

**1. PETITIONER:** Walker Realty, LLC, is a Massachusetts development corporation with offices at 2 Lan Drive, Westford, Massachusetts. Petitioner's principal member is Robert Walker. Petitioner is an experienced owner/developer of diverse commercial properties throughout the Commonwealth. Further, Walker Realty is an experienced owner/developer of CCF's operated by Next Generation Children's Centers ("NEXT GENERATION"). NEXT GENERATION currently operates nine (9) CCF's in Massachusetts and a tenth facility is under construction in Beverly.

Walker is the owner of the premises subject to this appeal, having purchased the premises under three separate deeds in February and March, 2008, which deeds are recorded at Southern Middlesex Registry of Deeds at Book 50746, Page 581, Book 50967, Page 87 and Book 50967 Page 193.

**2. PREMISES.** The 348-352 Main Street Premises proposed for CCF use consists of three contiguous parcels of land which historically contained two small dwellings. The property is shown on the Town of Acton Assessor Map F3 as Parcels 61, 61I and 54. The combined area of the three parcels is 106,188 square feet of land (2.43 acres). The site has over 500 feet of frontage on Main Street and the property includes a portion of Isaac Davis Way, a private way

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<sup>1</sup> The Site Plan dated May 15 is separately attached to the Appeal. A further revised Site Plan addressing some of the comments has been also submitted with revisions through March 31.

located between Main Street and Hayward Road. Attached hereto is an aerial photograph depicting the site in its present condition and showing the two former residences. (Exhibit 4).

Although the site is in the R-2 Residential Zoning District, the site is located in close proximity to many existing commercial and municipal uses. Exhibit 5 is a color coded Acton assessor map F3, together with a listing of properties and representative photographs depicting nearby parcels located along the Main Street corridor which have been historically developed for commercial, institutional and municipal uses in close proximity to the subject property.

Attached as Exhibit 6 is an aerial presentation plan which depicts the premises and the proposed development in relation to abutting properties and the Route 2 corridor. The property is bounded on the South by the Commonwealth-owned Route 2 right of way for a distance of over 450 feet. . In addition, much of the site's frontage is located directly opposite the Route 2 Westbound on/off ramps. Thus the Commonwealth of Massachusetts is the largest abutter of the property and its lands are not subject to zoning regulation. To the immediate South, the site is abutted by the Kennedy Landscaping Company an apparent nonconforming use, which also owns vacant property across Main Street to the East. Finally the site is abutted to the north by a single residential lot of more than two acres of land owned by Matthew and Laura Post.

**3. PROPOSED SITE IMPROVEMENTS.** As set forth on the Site Plan, Petitioner proposes to construct a child care facility together with accessory playground areas, off-street parking facilities, a shed, and landscaping and utilities to service the site. A single access drive to the site is proposed from the portion of the site's northernmost Main Street frontage which coincides with the intersection of Isaac Davis Way. The site is proposed to be serviced by public water supply and on-site septic facilities. The parking area would contain 77

parking spaces. Earlier versions of the site plan had proposed more spaces but the number was reduced to the minimum required by the By-law to accommodate the use in order to maximize environmental and aesthetic considerations and to increase landscaping and open space. The plan also includes some reserve parking spaces on grass pavers to accommodate increased need on special occasions.

The proposed principle structure comprising the CCF would be a two story building occupying a rectangular footprint of approximately 114 X 104 feet, with portions of the building comprising covered areas for use by infant and toddler clientele. The principal building comprising the CCF is proposed to contain a net floor area of 15,260 square feet consisting of classrooms, office space, play areas, bathrooms, stairwells and an elevator. The building would be fully handicapped accessible and equipped with fire protection sprinklers.

Attached hereto as **Exhibit 7** is a Zoning Table which reflects the current dimensional requirements applicable to the use to the dimensions provided on the site plan. The figures highlighted in red demonstrate the extent to which the proposed site improvements comply with (and greatly exceed in most instances) the applicable dimensional requirements of the Acton By-law.<sup>2</sup> Whereas the By-law requires 20,000 square feet of minimum area, the site has 2.5 acres or roughly five times the minimum lot area required. The lot has over three times the length of minimum street frontage required. All required yard area and building and parking area setbacks contained in the by-law have been satisfied. All dimensional requirements applicable to uses in the underlying district have been met.

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<sup>2</sup> It should be noted that the figures provided in Exhibit 7 have been revised from those shown on the site plan since the floor plans for the facility were not finalized and the estimated net floor area and floor area ration had not been calculated in accordance with specific by-law definitions as of the date of first submittal.

**4. PROPOSED USE AS CHILD CARE FACILITY.** As noted above, while the site and its environs are not located in a developed residential neighborhood, the proposed child care center is located in the R-2 (Residential) 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." Section 3 of the Zoning Act (Chapter 40A), 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 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 the Zoning Act, G.L. Chapters 40A, and the Acton By-law recognize that those child care facilities which fall within the sphere of protection 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>3</sup>, as either day care centers or school age child care programs. These 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*

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<sup>3</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.

*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 Next Generation Children's Center is a child care facility as defined by both Chapter 40A Section 3 and the Acton By-law. Next Generation Children's Center currently operates nine centers in Massachusetts such as that proposed in Acton. These Centers are located in Andover, Sudbury, Westford, Walpole, Marlborough, Hopkinton, Westborough, Natick and Franklin. A new facility is under construction in Beverly. A brief description of the NGCC program, its interest in expanding its programs to serve Acton and photographs of its current facilities is attached hereto as **Exhibit 8**.

Each NGCC facility is licensed and regulated by both the Commonwealth's Office of Child Care Services and the Department of Early Education and Care. A specimen license is attached as **Exhibit 9**.

The use proposed by the Petitioner is a use which was legislatively determined to be a high priority need in the Commonwealth. Since 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 which had been applicable to religious and non-profit educational uses to commercial child care facilities. 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).

**5. NONCONFORMITIES OF THE PROPOSED SITE PLAN WITH SECTION 5.3.9 OF THE BY-LAW.**

As illustrated on the site plan and Exhibit 7, and as summarized by the Zoning Enforcement Officer, the property and proposed use meets or exceeds all of the dimensional 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". The proposed facility does not conform to two of these requirements. Section 5.3.9 establishes a 1000 square foot maximum "Net Floor Area" limit. The proposed CCF contains 15,260 square feet. The By-law further establishes a maximum "Floor Area Ratio" of .10 and the FAR proposed is .154. *See Exhibit 7.* Finally, Section 5.3.9 establishes a minimum "Open Space" requirement of 35 percent. The ZEO requested that calculations and shaded plans be furnished to verify compliance and this has been submitted as an exhibit to this appeal, a copy of which is attached as **Exhibit 10**. The plan complies with the minimum open space requirement and preserves 39% of the lot as open space which has been calculated exclusive of all buildings, paved areas, perimeter buffers around the parking lot and the children's play areas on the site, as required by the By-law.

**6. RELIEF MAY BE GRANTED BY THE BOARD.** Unlike conventional uses where variances might be appropriately granted or considered, such is not required in the case of child care facilities. <sup>4</sup> 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. The waiver or "accommodation" was upheld by the Framingham Board of Appeals upon an appeal by an abutters group. The Court affirmed the issuance of the permit despite the fact the project did not conform to the frontage requirement. The Court 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.

#### **7. APPLICATION OF SECTION 3 TO THE PROPOSED USE.**

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*

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<sup>4</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

*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.*, 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

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be improper to require the applicant to apply for a variance.

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 in residential

zoning districts to a Net Floor Area of a mere 1000 square feet. It is hard to imagine any facility being able to practically comply with this floor area limitation. Assuming that the intent of the limit was to ensure that CCF's in residential districts conform in size to residential neighborhood uses, most single family homes substantially exceed this limit and indeed many accessory garages are larger. Strict enforcement of the 1000 square foot limit would effectively limit a single story structure on a minimum size lot to 1/20 lot coverage and in this case, where the lot is 106,000 square feet, it would limit the lot coverage by a principal structure to less than 1% of the entire lot. A footprint limit of 2500 feet, two and one-half times larger than that required by Section 5.3.9 was held to be unreasonable in *Rogers*.

In this case the proposed facility, although admittedly in a residential zone, is not located in the midst of a residential neighborhood in need of the strict application of Section 5.3.9. The lot which is more than five times the minimum required area for lots in the district and is located along a numbered state highway (Route 27) and is abutted by Route 2, a major arterial state highway. Developed commercial and municipal uses are in close proximity to the site. The fact that site is abutted on all sides by highways, businesses and the town public safety building, but is buffered by its only residential abutter to the west establishes that the facility would not detract from any established residential character of the neighborhood thereby eliminating the sole municipal interest in strict enforcement of the By-law. Furthermore, enforcement of the requirements would have the practical effect of prohibiting and/or unduly restricting the use. It is self-evident that it would be practically and economically infeasible to construct, operate and maintain the NGCC if it were limited to a 1000 square foot net floor area limitation of Section 5.3.9. Further, waiver of the .10 net floor area limitation to permit a net floor area of .154 as proposed is not in derogation of the intent of the by-law when applied to this site. Floor Area Ratio is a

dimensional requirement which is intended to limit density and intensity of a use on a lot to prevent overcrowding. As the plan illustrates, the site is not overcrowded since even excluding all required drives, parking and structures, the plan preserves .39 percent of the lot area as open space. The building is only 2 stories in height, in excess of all yard and setback requirements and well within the height limitation of the by-law. The nearest abutting structure is the Post residence which is 150 feet from the proposed building, and will be shielded and buffered by a dense evergreen buffer. On the other hand, forcing the net square floor area to be reduced to at or below .10 FAR would unreasonably impede the use by either reducing the number of classrooms and students which could be served, or limiting the amenities of the program's use such as spacious classrooms, kitchen/laundry facilities, indoor play areas, etc. There is no material gain to the community or to the zoning interest to be achieved by doing so particularly in this neighborhood. The use is not an intense use. The facility does not operate beyond daytime hours, has a specialized and limited regular clientele, and does not generate excessive noise, litter, glare, truck traffic or other noxious effects associated with most typical commercial uses.

### CONCLUSION

Petitioner submits that it has amply demonstrated that enforcement of strict compliance with the two special dimensional requirements of Section 5.3.9 applicable to child care centers in the residential district would be unreasonable as applied to the NGCC and may not be enforced since compliance would substantially diminish or detract from the usefulness of the proposed structure, or impair the character of the applicant's use, without appreciably advancing the municipality's legitimate zoning concerns. The Board of Appeals, on the other hand, as the final local authority on the application of the municipal zoning law, has the authority and jurisdiction to waive strict compliance and accommodate

the use. By doing so, it would not only advance a state priority in fostering and not impeding child care facilities, but would also permit the redevelopment of the site with an attractive, well maintained facility that will benefit the community.

Petitioner,  
By Its Attorneys

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

March 24, 2009

**VIA HAND DELIVERY**

Scott Mutch, Zoning Enforcement Officer  
Town of Acton  
472 Main Street  
Acton, MA 01720

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

Dear Mr. Mutch:

This firm represents Walker Realty, LLC, owner of premises located at 348-352 Main Street in Acton. The premises are shown as Lots 54 and 61 on Map F-3 of the Acton Assessors Maps.

As you know, Walker Realty has proposed the development of the 348-352 Main Street premises for use as a Child Care Center. The most recent Site Plan, prepared by Hancock Associates, 315 Elm Street, Marlborough, MA, dated March 15, 2009, is attached hereto. This plan has evolved from previous site plans which have been discussed with the Acton Planning Department as well as other municipal agency representatives and officials, at various development review meetings.

By correspondence dated November 6, 2008, Walker Realty outlined the nature and protected zoning status of the proposed Next Generation Children's Center as a child care facility subject to G.L. c. 40 §3.

As illustrated by the attached Site Plan, the proposal is to construct a 22,000+ square foot building with accessory playground, parking areas, landscaping and utilities. The proposed use is permitted as of right in the A-2 Zoning District. While the Site Plan demonstrates that most zoning dimensional requirements applicable to the use can be complied with, the Site Plan depicts four dimensional and parking area design requirements which are not in conformity with the Acton By-law. The proposed building exceeds Maximum Floor Area Ratio and Maximum Net Floor Area of Section 5.3.9. Additionally, the Parking design requires waivers relating to cell separation and interior landscaping. The specific by-law requirements and the specifics of the plan are set forth in detail on the site plan.

In prior correspondence, we have requested a determination that strict compliance with the By-law can be waived in accordance with the provisions of Section 3 of the Zoning Act and relevant cases decided thereunder. We have been advised that the Town of Acton has determined, with the advice of Town Counsel, that the appropriate procedure to follow in this case is to seek relief from the Acton Board of Appeals in the context of an appeal from a decision of the Zoning Enforcement Officer.



Scott Mutch, Zoning Enforcement Officer

March 24, 2009

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In order that we may process an appropriate appeal to the Acton Board of Appeals as suggested, Walker Realty, LLC hereby requests that you issue a written determination affirming that you will not issue a building permit for construction of the proposed Next Generation Child Care Facility, due to the plan's failure to conform to the By-law. Naturally, it is recognized that your department fully reserves authority to review compliance with all applicable building code issues in future application for building permit on the premises.

Thank you for your anticipated cooperation.

Very truly yours,

  
James M. Burgoyne  
JMB:pat  
Enclosures

cc: Walker Realty, LLC  
Roland Bartl, Town Planner  
Hancock Associates  
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**Planning Department**

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**ZONING DETERMINATION LETTER**

**To:** Mr. James M. Burgoyne **Date:** March 26, 2009  
**From:** Scott A. Mutch, Zoning Enforcement Officer & Assistant Town Planner  
**Subject:** Proposed Next Generation Children's Center, 348-352 Main Street

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Dear Mr. Burgoyne,

This letter shall serve as your official Zoning Determination Letter as you requested in your correspondence dated March 24, 2009.

The subject property is located at 348-352 Main Street, Acton, MA and is identified as Lots 54, 61 and 61-1 on Map F-3 of the Acton Assessors Map. It is located in an R-2 Residential zoning district. I am in receipt of the most recent Site Plan drawing dated March 15, 2009, prepared by Hancock Associates and consisting of 1 page only. The development proposal consists of a 2-story, 24,085 ft<sup>2</sup> structure with outdoor play areas for enrolled children, a 77 space parking lot and landscaping areas.

Multiple meetings with municipal agencies and input from pertinent disciplines have contributed to the latest site plan submitted as part of this Zoning Determination. It has been discussed and reviewed that the proposed use is subject to special zoning status and protections afforded specifically to child care facilities under Massachusetts General Laws Chapter 40A, Section 3. Documentation in this regard has been received by this office.

However, previous paragraph aside, the Town of Acton's Zoning Bylaw, Section 5.3.9 sets forth zoning standards governing child care facilities located in residential districts that the proposed facility would not meet. Additionally, the proposed site plan as currently designed, does not comply with the Parking Standards set forth in Section 6 of the Town of Acton's Zoning Bylaw. The Town of Acton's Zoning Enforcement Officer is an administrative position. In that position, I may not have the authority to resolve any conflicts which may exist between local zoning and the State Zoning Act, and in doing so to waive the requirements of the Acton Zoning Bylaw. In any event, if I have such authority, I decline to exercise it here.

The zoning violations of the proposed site plan are identified and discussed as follows with the applicable Bylaw sections referenced:

Section 5.3.9 of the Zoning Bylaw specifically sets forth standards for child care facilities that are located in Residential Districts.

Minimum open space (not including outdoor play areas) – The minimum open space required is 35%. The proposed site plan indicates that 39% open space is being provided. However, it is unclear exactly how this number was calculated. The submission of shaded drawings which clearly show which areas are being included and which are not would be extremely helpful in understanding how this number is being calculated.

Maximum Floor Area Ratio (FAR) – The maximum permitted FAR is 0.10. The proposed site plan indicates a 0.23 FAR. The proposed FAR is only listed as a number on the plans at this time. It greatly exceeds the maximum permitted FAR. Complete floor plans should be detailed to reveal an accurate FAR.

Maximum Net Floor Area – The maximum permitted net floor area is 1,000 square feet. The proposed site plan indicates approximately 24,085 square feet. The proposed total square footage is only listed as a number on the plans. It greatly exceeds the maximum permitted net floor area. Complete floor plans should be detailed to reveal an accurate overall net floor area.

In addition to the above identified non-compliant Bylaw requirements, the following are additional dimensional requirements of the Town of Acton's Zoning Bylaw which are not in conformance.

Section 6.7.1 of the Bylaw states that "*parking requirements shall be met by utilization of parking lot cells having a maximum of forty (40) parking spaces per parking lot cell. There shall be a minimum separation distance of thirty (30) feet between parking lot cells*". The submitted site plan does not currently meet or satisfy this requirement.

Section 6.7.7 of the Bylaw states that "*a minimum of ten percent (10%) of the interior area, exclusive of perimeter landscaping, of a parking lot cell containing more than twenty-five (25) parking spaces must be planted as landscape island areas*". The submitted site plan indicates that only 4.5% (1,146 square feet) is being provided. However, it is unclear exactly how this number was calculated. The submission of shaded drawings which clearly show which areas are being included and which are not would be extremely helpful in understanding how this number is being calculated.

The aforesaid violations came as a result of plan changes following discussions with Town staff to achieve compliance with the open space requirements of the bylaw.

Section 6.7.3 of the Bylaw states that "*each lot may have one access driveway through its frontage which shall be 24 feet wide*". The submitted site plan indicates that the entrance access drive at the point where it intersects the property line at Main Street is approximately 50 feet in width. However, a Special Permit Granting Authority could waive this requirement based upon safety considerations.

Section 6.7.4 of the Bylaw states that "*interior driveways shall be 20 feet wide for two-way traffic*". The submitted site plan indicates that the interior driveway weaving around the front of the building is 24 feet wide. Reducing the width will provide additional space for landscaping along Main Street.

As per the table listed in Section 6.6 of the Bylaw, maneuvering isles require a 24 foot width. The maneuvering isle located along the southwestern corner of the parking lot in front of the compact automobile parking spaces does not currently conform with this requirement.

Minimum open space (not including outdoor play areas) – The minimum open space required is 35%. The proposed site plan indicates that 39% open space is being provided. However, it is unclear exactly how this number was calculated. The submission of shaded drawings which clearly show which areas are being included and which are not would be extremely helpful in understanding how this number is being calculated.

Maximum Floor Area Ratio (FAR) – The maximum permitted FAR is 0.10. The proposed site plan indicates a 0.23 FAR. The proposed FAR is only listed as a number on the plans at this time. It greatly exceeds the maximum permitted FAR. Complete floor plans should be detailed to reveal an accurate FAR.

Maximum Net Floor Area – The maximum permitted net floor area is 1,000 square feet. The proposed site plan indicates approximately 24,085 square feet. The proposed total square footage is only listed as a number on the plans. It greatly exceeds the maximum permitted net floor area. Complete floor plans should be detailed to reveal an accurate overall net floor area.

In addition to the above identified non-compliant Bylaw requirements, the following are additional dimensional requirements of the Town of Acton's Zoning Bylaw which are not in conformance.

Section 6.7.1 of the Bylaw states that "*parking requirements shall be met by utilization of parking lot cells having a maximum of forty (40) parking spaces per parking lot cell. There shall be a minimum separation distance of thirty (30) feet between parking lot cells*". The submitted site plan does not currently meet or satisfy this requirement.

Section 6.7.7 of the Bylaw states that "*a minimum of ten percent (10%) of the interior area, exclusive of perimeter landscaping, of a parking lot cell containing more than twenty-five (25) parking spaces must be planted as landscape island areas*". The submitted site plan indicates that only 4.5% (1,146 square feet) is being provided. However, it is unclear exactly how this number was calculated. The submission of shaded drawings which clearly show which areas are being included and which are not would be extremely helpful in understanding how this number is being calculated.

The aforesaid violations came as a result of plan changes following discussions with Town staff to achieve compliance with the open space requirements of the bylaw.

Section 6.7.3 of the Bylaw states that "*each lot may have one access driveway through its frontage which shall be 24 feet wide*". The submitted site plan indicates that the entrance access drive at the point where it intersects the property line at Main Street is approximately 50 feet in width. However, a Special Permit Granting Authority could waive this requirement based upon safety considerations.

Section 6.7.4 of the Bylaw states that "*interior driveways shall be 20 feet wide for two-way traffic*". The submitted site plan indicates that the interior driveway weaving around the front of the building is 24 feet wide. Reducing the width will provide additional space for landscaping along Main Street.

As per the table listed in Section 6.6 of the Bylaw, maneuvering isles require a 24 foot width. The maneuvering isle located along the southwestern corner of the parking lot in front of the compact automobile parking spaces does not currently conform with this requirement.



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

APR 7

April 6, 2009

Eva K. Taylor, Town Clerk  
Town Hall  
472 Main Street  
Acton, MA 01720

Re: Administrative Appeal  
Acton Board of Appeals  
Petitioner: Walker Realty, LLC  
Locus: 348-352 Main street  
Assessor's Map: F-3, Lots 54, 61 and 61.1

Dear Ms. Taylor:

Enclosed herewith please find the following documents in connection with an Appeal to the Acton Board of Appeals filed on behalf of Walker Realty, LLC, from a decision of the Zoning Enforcement Officer dated March 26, 2009:

Seven (7) copies of a Form 1 Petition and Exhibits thereto as follows:

1. Letter dated March 24, 2009 requesting a Zoning Determination for a proposed Child Care Center with attached Site Plan by Hancock Associates dated March 15, 2009;
2. Decision of the Zoning Enforcement Officer entitled "Zoning Determination Letter" dated March 26, 2009;
3. Revised Site Plan by Hancock Associates dated March 15, 2009 with revisions dated March 31, 2009;
4. Open Space Exhibit Plan by Hancock Associates, dated March 31, 2009.
5. Certified List of Abutters.

In addition, enclosed is this Firm's check in the amount of \$100.00 (1-25 abutters) representing the filing fee in accordance with Form 1, and the release form for the Beacon Community Newspaper for legal advertising.

{Client Files\18610\0001\00411859.DOC}

Please direct all correspondence to our Worcester office.



This Appeal is filed pursuant to G.L.c. 40A§8 and pursuant to Section 10.1.1 of the Acton Zoning By-law. Please transmit the enclosed to the Board of Appeals for processing in accordance with the Acton Zoning By-law.

Please feel free to contact the undersigned if there is any further information or documents necessary regarding this appeal.

Thank you for your assistance and cooperation.

A handwritten signature in black ink, appearing to read 'James M. Burgoyne', written in a cursive style.

James M. Burgoyne

Direct phone line: (508) 459-8019

Direct fax line: (508) 459-8319

[JBurgoyne@ftwlaw.com](mailto:JBurgoyne@ftwlaw.com)

cc: Scott Mutch, Zoning Enforcement Officer  
Acton Board of Appeals  
Walker Realty, LLC  
Hancock Associates  
Arthur Kreiger, Esq., Town Clerk



Date Received  
TOWN CLERK

By: \_\_\_\_\_

Date Received  
BOARD OF APPEALS

By: \_\_\_\_\_

TOWN OF ACTON  
MASSACHUSETTS

BOARD OF APPEALS  
(FORM 1)  
PETITION FOR REVIEW

April 6, ~~19~~ 2009  
(See (1) Below)

I/We hereby petition the Board of Appeals for a public hearing under Section ~~10.1.1~~ of the Zoning By-Law. ~~I have refused the Building Commissioner's request to appeal under Section 10.1.1 of the Zoning By-Law to allow the refusal of the Building Commissioner to enforce the provisions of Section 10.1.1 of the Zoning By-Law as follows. (Strike out inapplicable language)~~

SEE ATTACHMENT

Date of Building  
Commissioner's Action \_\_\_\_\_

(1) Petition must be filed within 30 days of refusal date with copy of decision or order attached.

OFFICE USE ONLY	
<del>Four</del> <sup>Seven</sup> copies of petition?	_____
Location map?	_____
Detailed plans?	_____
Additional Briefs?	_____
List of abutters and other interested parties?	_____
Fee - \$100.00/1-25 abutters \$125.00/26+ abutters?	_____
Next Hearing Date? _____ No _____	

Respectfully submitted  
WALKER REALTY, LLC  
Signed Robert A. Walker  
(Petitioner)

Name Robert A. Walker, Member  
Address 2 Lan Drive, Westford, MA 01886

Phone # (978) 692-9450

Signed \_\_\_\_\_  
(Owner of Record)

Name \_\_\_\_\_

Address \_\_\_\_\_

Phone # \_\_\_\_\_

The Board of Appeals has the power and duty to hear and decide appeals (Section 11.1.1) from a decision of the Building Commissioner.

Walker Realty, LLC  
Proposed Next Generation Children's Center  
348-352 Main Street, Acton, Mass.

Attachment to Petition

Walker Realty, LLC, as petitioner and owner of premises located at 348-352 Main Street, Acton, Mass., Assessor's Map F-3, Parcels 54, 61 and 61-1, hereby appeals from a decision of the Acton Zoning Officer dated March 26, 2009, determining that a building permit may not be issued for a proposed child care center to be constructed on the premises at 348-352 Main Street.

Petitioner requests that the Board determine that the proposed use of property as a child care center as defined in G.L. c. 40A§3, may be constructed as proposed by Petitioner as set forth in a Site Plan by Hancock Associates dated March 15, 2009, as revised and that compliance with certain parking lot and dimensional requirements applicable to child care centers may be waived.

2D 3D | Road Aerial Hybrid | Bird's Eye Traffic



eye



Microsoft Virtual Earth

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