

BOARD OF APPEALS

Hearing # 09-01

DECISION ON AN APPEAL BY WALKER REALTY, LLC TO OVERTURN A DENIAL BY THE ZONING ENFORCEMENT OFFICER OF A BUILDING PERMIT FOR A CHILD CARE FACILITY AT 348-352 MAIN STREET

Pursuant to Massachusetts General Laws Chapter 40A, Section 15, and Section 10.1.1 of the Acton Zoning Bylaw, Walker Realty, LLC has appealed a decision by the Acton Zoning Enforcement Officer (“ZEO”) denying a building permit for a child care facility at 348-352 Main Street, Town Atlas Map F-3/Parcels 54, 61 and 61-1 (the “Property”).

The Acton Board of Appeals (the “Board”) held duly noticed public hearings on May 4 and June 1, 2009 at the Town Hall. The hearings were attended by Board Chairperson Cara Voutselas and Members Marilyn Peterson and Kenneth Kozik, Planning Director Roland Bartl, ZEO Scott Mutch, Board Secretary Cheryl Frazier and Town Counsel Arthur Kreiger; Robert Walker and Beth Ahearn of Walker Realty, Walker Realty’s counsel James Burgoyne of Fletcher, Tilton & Whipple, P.C., Project Manager Katie Enright of Hancock Associates and traffic engineer Robert Michaud of MDM; and many abutters and Acton residents.

The Property and the Neighborhood

The Property contains 106,188 square feet (2.43 acres) on the northeast side of Route 2 and the northwest side of Main Street (Route 27), opposite the westbound Route 2 off-ramp. It is located in the R-2 Residential Zoning District under the Zoning Bylaw. It currently contains two single-family houses. Residents of Isaac Davis Way, a private way, hold an easement over the northeastern corner of the Property.

Main Street northeast of Route 2 and the Property is largely residential. On the same side of Main Street as the Property are Kennedy & Company Landscaping Nursery and Garden Center (a non-conforming commercial use), Hayward Road and single-family residences. On the opposite side are a parcel owned by Kennedy and used for an agricultural use under the Bylaw, the Acton Animal Hospital (another non-conforming commercial use), and the Town’s Public Safety Building. Farther to the northeast along both sides of Main Street are single-family residences and, approximately one half mile from the Property, the Acton Center Local Historic District. The Kennedy & Company building resembles a house in its scale, and the animal

hospital also appears residential, at least approaching from Route 2. Notwithstanding those commercial uses and the Public Safety Building, the Town considers the northeast side of Route 2 to be residential, in contrast to the commercial nature of the southwest side. The neighborhood is the principal gateway to the historic Town center.

Main Street is an undivided road with two lanes of traffic. It is heavily traveled and subject to significant back-ups, particularly around the Route 2 off-ramps and the Hayward Road intersection.

The Zoning Bylaw and the Proposed Facility

The Bylaw permits child care facilities without site plan review in any zoning district. However, in the R-2 district, it limits child care facilities to 1,000 square feet net floor area (NFA) and 0.10 floor area ratio (FAR), and requires at least 35% open space. The Bylaw does not limit floor area or FAR for residences in the R-2 district. It also establishes the following requirements regarding parking and driveways:

- Section 6.7.1 limits parking lot cells to 40 parking spaces and requires a minimum separation of 30 feet between cells.
- Section 6.7.7 requires that at least 10% of the interior area of a parking lot cell with at least 25 spaces must be landscaped islands.
- Section 6.7.3 requires that each lot have one access driveway 24 feet wide, unless the ZEO concludes that more or wider driveways are necessary for safety.
- Section 6.7.4 requires that interior driveways be at least 20 feet wide.

Walker Realty proposed to demolish the existing single-family houses on the Property and build a two-story facility for approximately 262 children to be operated as a Next Generation Children's Center. Based on the site plan submitted to the ZEO, Walker Realty initially calculated that the proposed building would result in an NFA of 24,085 square feet and an FAR of 0.23. However, during the public hearing, it submitted more detailed plans and recalculated the FAR to 0.154. In that recalculation, Walker Realty excluded "stairways, elevator wells, rest rooms, common hallways and [building] service areas" pursuant to Section 1.3.8 of the Bylaw.

Walker Realty initially proposed open space of 29% (under the Town's interpretation of the Bylaw) and 89 parking spaces. Following discussion with Town staff, it moved the parking lot farther back from Main Street and reduced the number of parking spaces to 77, plus 17 overflow spaces with permeable grass pavers. As a result of those revisions, the facility would have more than 35% open space. However, it also would violate the Bylaw provisions regarding parking lot and driveway design listed above.

Walker Realty also proposed a set of traffic mitigation measures. Most significant, it proposed to install a left-turn lane from Main Street into the facility driveway. In addition, it

also agreed to prohibit facility-related traffic on Isaac Davis Way, install a gate on the way and provide screening for the closest abutter on the way.

Walker Realty's Appeal

On March 24, 2009, Walker Realty submitted a site plan to the ZEO and requested a determination confirming that he would not issue a building permit for this child care facility because of its noncompliance with the Bylaw. On March 26, 2009, the ZEO issued that confirmation, denying a building permit on the grounds that the facility would violate the maximum NFA, maximum FAR and parking and driveway design regulations of the Bylaw. *See* Zoning Determination Letter dated March 26, 2009.

On April 7, 2009, Walker Realty timely appealed that denial to the Board. The Board held duly noticed public hearings on May 4 and June 1, 2009. Walker Realty submitted a "Brief to the Board" with 10 exhibits, along with plans for the facility. No one supported the appeal. Dozens of neighbors, providers of child care services and other residents spoke and submitted letters in opposition to it. Among the comments by Town staff and departments was a memorandum by Police Chief Widmayer dated May 19, 2009, expressing concerns about the traffic on Main Street, even with a left-turn lane into the facility.

At the hearing on June 1, the Town's planning staff explained that the hallways shown in the proposed facility are not "common hallways" excluded from NFA under the Bylaw, and therefore should be added back in to the NFA figure. The staff estimated that adding the hallways back into the NFA raises the FAR for the proposed facility to more than 0.20.

The Zoning Act and Case Law

The Zoning Act provides as follows:

No zoning ... bylaw in any ... 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.

G.L.c. 40A, § 3, 3rd par.¹ An FAR limit is one permissible way to regulate the bulk of a structure. 81 Spooner Road LLC v. Town of Brookline, 452 Mass. 109 (2008).

¹ The cases under this paragraph of the Zoning Act apply the cases under the second paragraph of c. 40A, § 3 (the "Dover Amendment"), which protects religious and non-profit educational uses. *See, e.g., Rogers v. Town of Norfolk*, 432 Mass. 374 (2000); *Petrucci v. Board of Appeals of Westwood*, 45 Mass. App. Ct. 818, 824 n. 9 (1998), *citing Trustees of Tufts College v. Medford*, 415 Mass. 753, 765 (1993), and *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19 (1979). The two paragraphs are very similar, but they differ in at least one respect:

In Rogers v. Town of Norfolk, 432 Mass. 374 (2000), the SJC annulled a bylaw limiting child care facilities to 2,500 square feet as applied to a proposed facility in an existing house, though it upheld that limitation on its face. It noted that Chapter 40A, Section 3 “seeks to strike a balance between preventing local discrimination against child care facilities and respective legitimate municipal concerns.” It framed the legal standards as follows:

[T]he 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.

Id. at 383 (citation omitted; brackets in original).

Under that test, the court annulled the 2,500 square foot limit as applied to the proposed facility because the house was existing; it was screened from neighbors, the lot was nearly 1½ acres, and the property was particularly suitable for such a facility (handicapped accessibility, curb cuts for a circular driveway, etc.). Moreover, compliance with the square footage limit would have required removal of the garage, which would have impaired the structural integrity of the house and served no useful purpose. The court found that Norfolk’s interest in preserving the residential appearance of its neighborhoods was legitimate, but concluded that the use of the house for a child care facility “would not affect the aesthetic appearance of the neighborhood in a manner that the bylaw was intended to discourage.” Because the footprint limit “would significantly impede the use of the premises as a child care facility, while not substantially advancing a valid goal of Norfolk’s zoning regulation”, it was unreasonable. *See also* Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (proposal to renovate a nonconforming barn that violated the side and rear setbacks and height limit; those regulations were unreasonable because denying the child care use would not cure the zoning violations and moving and lowering the barn would impair aesthetics and increase the risk of fire); Cartwright, Trustee v. Town of Braintree, 5 LCR 239 (Land Court 1997) (proposal for a new facility on a 0.9 acre lot in a residential district, where the bylaw limited building coverage to 2,500 square feet, limited height to 2 stories and 35 feet, required a 75’ open space setbacks in every direction and

the Dover Amendment bars bylaws that “prohibit, regulate or restrict” the use of land or structures for religious or educational purposes, while the third paragraph bars bylaws that “prohibit, or require a special permit for” child care facilities. That difference seems significant, particularly where the third paragraph was more recent than and based on the Dover Amendment. Both Rogers and Petrucci addressed bylaw provisions that effectively prohibited any child care use on those properties, making it unnecessary for the courts to address that difference in the statutory language. Here, the Bylaw’s NFA and FAR limits regulate child care use, but they do not effectively prohibit it. Nevertheless, because the case law does not distinguish between the two paragraphs of the statute, the Board does not rely on that distinction.

required 1-acre lots; those requirements were unreasonable because the setback requirements left too little space for the facility).

Analysis and Findings

The Board found that the four parking and driveway regulations listed above – Sections 6.7.1, 6.7.7, 6.7.3 and 6.7.4 – would be unreasonable as applied to the proposed facility. They would “substantially diminish or detract from the usefulness of [this proposed facility] ... without appreciably advancing [Acton’s] legitimate concerns.” *Rogers*. Among other things, they would force Walker Realty to move the parking lot closer to Main Street – having moved it farther back from Main Street pursuant to discussion with the Town’s staff – and make it more visible. In any event, the proposed facility driveway does not violate Section 6.7.4, which requires driveways to be “at least” 20 feet wide.

The Board found that the NFA limit of 1,000 s.f. also would be unreasonable as applied to the proposed facility. It would effectively prohibit any child care at the Property, and is unduly restrictive where the Property is almost 2½ acres.

However, the Board found that the FAR limit of 0.10 is reasonable as applied to the proposed facility, which would have an FAR exceeding 0.20 (or 0.154, if hallways should be excluded from NFA as Walker Realty asserted). Walker Realty has not demonstrated that it cannot comply with the FAR limit at the Property. In fact, it asserted at the hearing that it *can* reduce the FAR substantially without reducing the number of children, by shrinking classrooms and eliminating certain amenities such as the teachers’ lounge. The Board found that the FAR limit does not “substantially diminish or detract from the usefulness of [the] proposed structure.” *Rogers*.

Moreover, the Board also found that applying the FAR limit to this facility significantly advances several of the Town’s planning and zoning interests. It avoids adding to the serious traffic congestion on Main Street, even though Walker Realty has proposed mitigation measures. Some of the concerns about that congestion were described by Police Chief Widmayer. Applying the FAR limit to this facility also preserves the character of this part of Main Street as the gateway to the residential areas and the Town center to the northeast. Finally, applying the FAR limit increases the open space and neighborhood buffer on the Property.

The Board acknowledged the presence of the two non-conforming commercial uses and the Public Safety Building next to or across Main Street from the Property. However, the Kennedy Landscaping building resembles a house in scale, and the Animal Hospital also appears residential from Main Street, at least approaching from Route 2. The proposed facility, by contrast, would resemble a large office building more than a residential building. The Board also concluded that applying the Bylaw’s FAR limit serves the Town’s zoning and planning interests in this area notwithstanding the Public Safety Building. That building is necessarily sited based on safety and access considerations rather than neighborhood conformance, and its siting for those reasons should not deprive the Town of the ability to maintain the residential character of the area otherwise. Finally, Walker Realty’s argument that certain other uses in residential districts may have FARs of 0.20 or even 0.30 is not persuasive. All of those uses – Nursing

Homes, Full Service Retirement Communities and Assisted Living Residences under Sections 5.3.8, 5.3.11 and 5.3.12 – require a special permit. They are not uses allowed as of right. The Special Permit Granting Authority need not grant a special permit for an FAR close to the allowed maximum for such a use if that would be inappropriate for the particular proposal and neighborhood; or, if it were to grant a special permit for such a use, the Special Permit Granting Authority would have the tools and the authority under the special permit to condition such a project appropriately to fit into the neighborhood and mitigate its impacts.

Conclusion

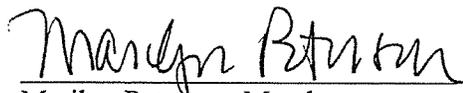
For the reasons stated above, the Board voted 3-0 to UPHOLD the ZEO's denial of a building permit for the child care facility proposed by Walker Realty based on the 0.10 FAR limit under the Bylaw. It voted to OVERTURN that denial insofar as it was based on the By-Law's parking and driveway design regulations and NFA limit.

Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws Chapter 40A, Section 17 within 20 days after this decision is filed with the Acton Town Clerk.

ACTON BOARD OF APPEALS



Cara Voutselas, Chairperson



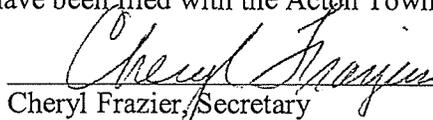
Marilyn Peterson, Member



Kenneth F. Kozik, Member

Dated:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on June 25, 2009.



Cheryl Frazier, Secretary
Board of Appeals