

**MEMORANDUM**

**To:** Acton Zoning Board of Appeals

**From:** Arthur P. Kreiger, Esq. and Christine M. Griffin, Esq.

**Date:** January 30, 2014

**Subject:** Wetherbee Plaza LLC  
107-115 Great Road  
Petition for Review/Appeal of ZEO decision – Hearing # 14-01

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The Petitioner seeks to establish either a not-for-profit museum or a for-profit educational use at the above location, which is in the East Acton Village (EAV) zoning district. The Petitioner's application for a building permit was denied based on the Zoning Enforcement Officer's conclusion that the Petitioner does not qualify as either of those uses under the Zoning Bylaw. This Memorandum provides guidance to the Board for the Petitioner's appeal of that denial.

**The Proposed Non-Profit Museum**

According to the Petitioner's application, he seeks to establish a museum for the purpose of displaying unique, classic, exotic and specialty vehicles, including farm tractors, as well as vintage and restored automobile memorabilia and reproductions, and collections of old license plates and celebrity license plates. As part of this use, we understand that Petitioner will also occasionally buy and sell these types of automobiles. Because the proposed use includes the purchase and sale of automobiles, it constitutes a car dealership under the Bylaw. That use is prohibited in an EAV zoning district.<sup>1</sup>

The Petitioner argues that he is nevertheless permitted to proceed with the museum under Bylaw Section 3.4.2, which permits certain educational uses in all zoning districts, consistent with the Dover Amendment (G.L. c. 40A, § 3, 2nd par.). That Bylaw section states as follows:

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<sup>1</sup> Car dealership falls under the Bylaw definition of "Vehicle Sale, Rental":

3.5.22 Vehicle Sale, Rental – Facility for the rental, leasing or sale of automobiles, trucks, boats, motorcycles, trailers, recreational vehicles, farm equipment or similar motor vehicles having a maximum gross vehicle weight of 14,000 pounds; including open-air display. The open-air display area shall comply with the standards of Section 6.7 of this Bylaw.

This use is allowed only in the Limited Business (LB) and Powder Mill (PM) Districts.

3.4.2 Educational – USE of land, BUILDINGS and STRUCTURES for providing instruction or education in a general range of subjects, 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 entity. Such USE may include museums**, libraries, auditoria, athletic facilities, dormitories, administrative offices, or similar facilities and activities whose purpose is substantially related to the educational purposes of the owner (emphasis added).

The Petitioner agrees that he does not yet have non-profit status and understands that he must have that status to qualify as an educational use under this section. However, he asserts that he has applied for that status, and argues that he should be permitted to proceed under this section in the meantime.

This section of the Bylaw (and the Dover Amendment) unequivocally requires non-profit status. Until the Petitioner acquires that status, his proposed use is not permitted under this section. *See Kiss v. Bd. of Appeals of Longmeadow*, 371 Mass. 147 (1976) (in the context of a special permit, non-profit status is a legitimate distinction under a zoning bylaw).

If Petitioner obtains non-profit status as an educational institution in the future, his use may well qualify under this section. We will review that issue at that time based on some of the considerations discussed below.

### **The Proposed Commercial Education and Instruction Use**

While he awaits non-profit status, the Petitioner seeks to proceed with his proposed museum as Commercial Education and Instruction under Bylaw Section 3.4.11. That section states:

3.4.11 Commercial Education or Instruction – A private, for-profit business engaged in providing instruction or training in skills of any kind, including business, data processing, programming, arts and crafts.

Such a use is distinct from an “Educational” use under Section 3.4.2 because of its for-profit, commercial nature and its focus on teaching a “skill,” although the two sections obviously overlap. The Petitioner asserts that his proposed use qualifies under this section because, until he acquires non-profit status, he intends to offer, for a fee, training and instruction in automobile mechanics, engine function, engine repair, classic automobile collection, finance, classic automobile maintenance and classic automobile purchase. He proposes to provide the following information:

1. Reliable sources of information for collection,
2. Registration of vehicles,
3. Insuring vehicles and memorabilia,
4. Sources of financing for collections,
5. Sources of appraisals,
6. Investment and tax considerations,
7. Maintenance and storage requirements,

8. Repairs and restoration,
9. Sources for parts, tools and services,
10. Shipping of vehicles - locally and interstate,
11. Securing financing for collections, and
12. Different classes of automobiles.

An on-site location and a website will be maintained that include sources of information and instruction opportunities.

The Supreme Judicial Court has stated that an educational use will be found under zoning when the proposal “will primarily operate in furtherance of educational purposes.” *Regis Coll. v. Town of Weston*, 462 Mass. 280, 281 (2012). Where a proposed use has both educational and commercial or other non-educational aspects, a detailed factual analysis is required to determine its primary purpose.<sup>2</sup>

In this case, the Zoning Enforcement Officer noted that a for-profit use consisting primarily of instruction on the care and maintenance of automobiles would be permitted under this section of the Bylaw. However, he found that the proposed operation does not qualify as an educational use because it is not primarily focused on “providing instruction or training in skills,” but is primarily a museum for displaying automobiles and a location for buying and selling them.

We agree with the Zoning Enforcement Officer that a for-profit use operating primarily for instruction on the care and maintenance of automobiles would be permitted under this section, but that one operating primarily for the display, buying and selling of automobiles would not be. Based on limited facts, we agree that so far Petitioner has not demonstrated that he qualifies under this section of the Bylaw. However, at the public hearing, the Board should elicit further information about the proposed use. This information may include the Petitioner’s business plan, the frequency of the proposed instruction, the number and qualifications of the instructors, the number of anticipated students, the grading or certification system, the number of anticipated non-student visitors, the frequency of anticipated purchases and sales of vehicles or paraphernalia, and the expected revenue from the various activities, among other issues. Based on this information, the Board will be able to determine whether instruction or training in skills is the primary purpose of this use.

cc: Roland Bartl  
Scott Mutch

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<sup>2</sup> We note that, although this case was decided specifically in the context of the Dover Amendment, it sets out a useful standard for the determination of educational use.