



March 18, 2014

**BY ELECTRONIC MAIL: cjoyce@acton-ma.gov
AND FIRST CLASS MAIL**

Acton Board of Selectmen
Acton Town Hall
472 Main St.
Acton, MA 01720

Re: 848 Main Street, Acton – Special Permit Application

Dear Members of the Board:

As you may recall, this firm represents neighbors and abutters to the proposed wood processing operation located at 848 Main Street in Acton, on land identified as Assessor's Map C5, Parcel 39 (the "Project Site"). An original application for special permit was filed with the Board of Selectmen (the "Board") on October 12, 2013. A hearing on the application was scheduled for November 18, 2013 (after public and abutter notices were made), but was then continued at the request of the applicant, Jacob Abraham (the "Applicant"). We understand that a second submittal was filed on or about February 18, 2014 by Acorn Deck House Company, also covering the Project Site.¹

Based on my conversation with Zoning Enforcement Officer Scott Mutch, it appears that the Board is treating these two submittals as two separate applications – the hearing on the first application is scheduled for March 24, 2014, and the second hearing is scheduled for April 28, 2014. To the extent that the second submittal is being treated as a separate application for a site plan special permit, it remains woefully inadequate, for many of the same reasons the original application was incomplete. However, we question why these submittals are being bifurcated and heard separately.

A. The Zoning Bylaw Provisions

The original application was styled as an "application for special permit" and cited Section 3.6.3 of the Zoning Bylaw. Under that section, "outdoor manufacturing" requires a special permit from the Board of Selectmen. That requirement modifies the Table of Principal Uses (Zoning Bylaw, p. 9), under which "manufacturing" is an allowed use (without the need for

^{1/} Both submittals misidentify the record owner of the Project Site as Acton Realty, Inc. – the actual owner is 848 Main Street Nominee Trust.

a special permit) in the SM zoning district. In the preamble to the Table of Principal Uses (§3.1), if a use is designated “SPS,” meaning that the use requires a special permit from the Board, one must look under the column titled (“Site Plan”) to determine whether the special permit required is a “site plan special permit” under Section 10.4, or merely a “special permit” under Section 10.3. If under the “Site Plan” column, the use is designated “R,” that means that a §10.4 site plan special permit is required. Since Section 3.6.3 states that outdoor manufacturing requires a special permit from the Board, and since special permits under Section 3.6.3 require site plan review under Section 10.4, the special permit for outdoor manufacturing must be a §10.4 site plan special permit.

There is not a separate, independent special permit process for outdoor manufacturing. Special permits in Acton are administered either under Section 10.3 or 10.4. It should be undisputed that Section 10.4 governs the Project Site. Therefore, we don’t understand why there would be separate hearings for the first special permit application and the second submittal dated February 18th. In any event, the original application should be heard either together with, or after the second submittal, since that submittal at least contains a scaled site plan.

B. The Site Plan Special Permit Application is Still Incomplete.

As we noted in our letter of November 12, 2013, an applicant for a site plan special permit must put forth evidence to enable the Board to make a number of findings relative to the use of the property. For example, the site plan must “protect[] the neighborhood and the Town against seriously detrimental or offensive USES on the site and against adverse effects on the natural environment.” §10.4.5.2. The original application was devoid, and the February 18th submittal is still devoid, of any explanation of the nature and extent of the firewood operation, including how wood will be delivered to and from the Site, where raw and finished wood would be stockpiled, how wood waste would be removed, and how environmental impacts such as noise and dust will be controlled.

We recognize that the February 18th submittal does not appear to be limited to the firewood operation component, and contains open space calculation for the entire Project Site. According to Mr. Mutch, the property owner was asked to submit a site plan special permit application to address other work done on the Project Site that was not pre-approved under Section 10.4. Unfortunately, the submittal doesn’t even address those concerns. There is no discussion anywhere in the submittal concerning any of the uses of the Project Site. This obstructs the Board from making any of the findings relative to *uses* under Section 10.4.

C. The Commercial Parking of School Buses on the Project Site is Not Exempt from Regulation under the Zoning Bylaw.

Notably, the February 18th submittal still contains no information of the commercial school bus parking operation on the Project Site. It would be incorrect to assume that the Town cannot regulate the parking of school buses due to provisions of G.L. c. 40A, §3. First, there is a substantial question as to whether the provisions of Section 3 of the Zoning Act, which protects

educational uses from overly-restrictive zoning requirements, even applies here – the property owner has a lease with the Concord Carlisle School District to allow school bus parking on the Project Site, which is clearly not on the same property as any school in Concord or Carlisle.

This question was addressed in a slightly different context by the Land Court in 2010. In *Skydell v. Tobin*, 18 LCR 174 (Land Ct. No. 04 MISC 303324) (Apr. 6, 2010), the Court ruled that the storage of commercial landscaping materials and the parking of equipment and vehicles for a business providing off-site landscaping services is not protected by Section 3, which provides the same level of protection for horticulture, silviculture and floriculture activities as it does for educational activities. The Court (Long, J.) reasoned that Section 3’s protections are “based on the primary activity at issue taking place *on that land* ... and *not* the use of the land as a location for a business whose services are provided *elsewhere*, even if that business uses nursery products grown on site.” The Court noted that the situation would be different for an on-site nursery operation, and in doing so imputed an implied requirement that uses accessory to a protected use must be on the same land as a principal protected use.

It would reasonably follow that the parking of school buses, which serve off-site schools, would not be protected under Section 3. This is consistent with the established law under conventional zoning, requiring accessory uses to be on the same land as the principal use in order to be treated the same under a zoning bylaw. *Town of Harvard v. Maxant*, 360 Mass. 432, 436 (1971).

Importantly, while Section 3, commonly referred to as “the Dover Amendment,” prohibits zoning bylaws that prohibit or unreasonably restrict the use of land for educational and other protected uses, it also authorizes municipalities to apply “reasonable regulations” concerning bulk, dimensions, open space, and parking to educational uses, and in doing so, “seeks to strike a balance between preventing local discrimination against [an educational] use ... and honoring legitimate municipal concerns that typically find expression in local zoning laws.” *Trustees of Tufts College v. Medford*, 415 Mass. 753, 757 (1993).

The Appeals Court and the Land Court have recognized the right of municipalities to regulate Section 3 protected uses through a site plan review process. See, e.g., *Jewish Cemetery Assoc. of Mass., Inc. v. Bd. of Appeals of Wayland*, 2014 Mass. App. Unpub. LEXIS 287 (March 7, 2014) (application of site plan review bylaw to religious use “is consistent with a reasonable reading of the Dover Amendment.”); *Wildstar Farm, LLC v. Westwood Planning Bd.*, 18 LCR 433 (Land Ct. No. 09 PS 40754) (Aug. 13, 2010) (overturned on other grounds) (site plan review bylaw limited in scope consistent with Section 3 may be applied to protected agricultural use). Thus, even if the commercial parking of school buses is protected by Section 3 (which we deny), the Town of Acton can, and should, review these parking arrangements under Section 10.4, and apply its bulk, density, open space and parking requirements to the extent they are reasonable and do not prohibit the use. The parking of school buses generates noise and air pollution, and could realistically interfere with the other manufacturing uses on the Site.

In summary, we respectfully suggest that most of the concerns raised in our November 12, 2013 letter remain, and therefore we request that the Board require the Applicant to provide a complete application, review all of the uses (existing and proposed) on the Site under one application and one public hearing, and engage sound and air quality experts to evaluate the site plan special permit application given the nature of the uses and the proximity of residential abutters.

Very truly yours,


Daniel C. Hill

cc: Scott Mutch, Zoning Enforcement Officer
Clients