



Planning Department

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MEMORANDUM

To: Board of Appeals **Date:** May 28, 2014
From: Roland Bartl, AICP, Planning Director *R. B.*
Subject: **107-115 Great Rd. (Wetherbee Plaza II)**
Petition for Review/Appeal of ZEO decision – Hearing # 14-05

This is the second petition this year to overturn the ZEO's decision in essentially the same matter (see petition/hearing #14-0; Planning Department comments and Town Counsel comments on that petition are attached for reference and recap).

The proposed museum has transformed into an instruction and training center dealing with automobiles and paraphernalia. The petitioner's arguments essentially remain the same with slightly changed nuances and emphases. Planning Department staff remains unconvinced and agrees with the ZEO's determination that the proposed use constitutes a car dealership and/or car repair facility, which under the guise of education can only be legally established as a not-for-profit (501-c-3) educational institution in accordance with section 3.4.2 of the zoning bylaw and the State Zoning Act's Dover Amendment for educational and religious uses.

Even if the proposed use were to qualify in the EAV zoning district as an allowed Commercial Education or Instruction use under section 3.4.11 of the Zoning Bylaw, the materials and evidence in the matter strongly suggest that the proposed use is also Vehicle Sales (ZBL section 3.5.22) and Vehicle Repair and/or Body Shop (ZBL s. 3.5.20 and 3.5.21), all of which are prohibited uses in the EAV zoning district.

I urge the Board of Appeals, once again, to uphold the ZEO's decision.

cc: Planning Board
Board of Selectmen
Scott Mutch



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To: Board of Appeals **Date:** January 28, 2014
From: Roland Bartl, AICP, Planning Director *R. B.*
Subject: **107-115 Great Rd. (Wetherbee Plaza II)**
Petition for Review/Appeal of ZEO decision – Hearing # 14-01

The Petitioner seeks to establish at the referenced site a museum related to automotive paraphernalia, which would appear to include, as the prominent feature, the display of automobiles. The proposed venture, as I understand it, would involve the occasional purchase and sale of automobiles. This activity requires an automobile dealer license for this location.¹

The site is in the East Acton Village (EAV) zoning district. Zoning for EAV prohibits car dealerships².

In reviewing the matter with the petitioner and with staff in the Planning Department, I agree with the ZEO's determination that under zoning the proposed automotive/automobile museum venture must be a not-for-profit educational institution, which – borrowing in part from the Statue (MGL, Ch. 40A, S. 3) –the zoning bylaw defines as:

“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.” (highlights provided for purposes of this memorandum).

¹ The petitioner has applied for one or more auto dealer licenses for the subject location. It is my understanding, that as of this date he was granted one or two non-display licenses for the location. Such non-display or internet licenses are also granted to other business where car dealerships are not permitted under zoning, for instance to home businesses in residential zoning districts. As long as there is no visible hallmark of a typical dealership or car rental/leasing place (showroom, cars for sale in an outdoor lot, trade-ins, service department, etc), we deem them as being essentially an office use. The petitioner hopes to eventually obtain a display license for this location.

² Car dealership falls under the ZBL use 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

This “Educational” use is one of the Dover Amendment land uses and is allowed in all Acton zoning districts. Museums buy and sell objects to further their mission and purpose. Such objects may be automobiles. The petitioner agrees that Section 3.4.2 – Educational, is an appropriate use category for the proposed museum venture and that a non-profit status would be required for the museum business entity. The petitioner states that the effort to obtain such a status is under way, but that it may take some time to be granted such status.

In the meantime, the petitioner seeks to proceed with the museum plans under a different section of the zoning bylaw: “Commercial Education and Instruction”, defined as:

“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.”

We do not see these two use definitions as interchangeable and disagree with the petitioner’s claim that the proposed museum venture should be allowed under section 3.4.11. Section 3.4.2 (Educational) seeks to broadly accommodate customary educational endeavors specifically including libraries, dormitories, museums, athletic facilities, or similar. Section 3.4.11 (Commercial Education) on the other hand is much more limiting with a narrow focus on instructional activities. It makes no mention of a museum, neither incidental nor primary. If the petitioner’s intent is to provide instruction in the care and maintenance of automobiles, he does not need to display cars in a showroom and he does not need to buy and sell cars. If the zoning bylaw were interpreted as the petitioner pleads, the consequence could be that dormitories, athletic facilities and stadiums would likewise become part of Commercial Education. Having been involved in many rewrites of zoning language over the years, including the sections under review here, I can attest that the separate listing of the two education uses and the distinctions made in the two definitions are deliberate and not accidental. As such, we believe that Town Meeting, when it adopted the definitions as they currently stand, clearly understood the difference: The Acton Children’s Discovery Museum as an example of a private not-for profit educational institution as defined under 3.4.2 – Educational on the one hand, and, say the fairly new-in-Town “Russian School of Mathematics” on the other hand as an example of 3.4.11 – Commercial Education or Instruction, or the wide variety of art classes, computer instructions, music lessons, etc..

For these reasons I urge the Board of Appeals to uphold the ZEO’s decision.

The petitioner further pleads that he should be allowed to proceed with building modifications for the automobile museum venture in anticipation of obtaining the non-profit status in the future. I do not think that the ZEO should make such decisions on anticipated or hoped-for future outcomes. What if the petitioner fails to obtain the required legal non-profit educational status? The renovations and modifications should wait until the business status as a 501-c-3 is approved, and the building permit application for the museum restorations should clearly list such entity as the applicant or owner in charge.

There are related matters that the applicant may present and discuss at the hearing:

1. Various automobile licenses:
Granted, withdrawn, relocated and reissued – hard to keep track of. As stated in footnote 1, it is my understanding that the current licenses on the property are non-display/internet licenses.

2. Since the date of the appeal, the petitioner has filed a separate building permit application for two apartments upstairs in the same building:
The ZEO signed off on this application.
3. Building permit application for garage door in rear-side of the same building:
The ZEO rejected it due to resulting maneuvering aisles becoming insufficient for existing parking spaces and failure to take into account drainage provisions that were part of a prior site plan approval.
4. Sign applications for auto dealer businesses for the same location:
These are under review with decisions pending. The application for one non-display licensed business is, as the applicant tells us, for a space in the building that is still under bankruptcy proceedings on the previous tenant; it is padlocked and cannot be occupied. This may have to wait. The other sign blatantly displays the business as a car leasing operation, which does not seem to match the non-display nature of the business. This sign may have to change its appearance.

cc: Planning Board, Board of Selectmen, Scott Mutch

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

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.¹

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:

¹ 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.²

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

² 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.