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Site Plan Special Permit # 07/10/09-422 (Friedrichs)
Wetherbee Plaza Extension
107-115 Great Road
October 5, 2009

Board of Selectmen

TOWN OF ACTON
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DECISION
#07/10/09-422

107-115 Great Road
(Wetherbee Plaza Extension)

Site Plan Special Permit (Friedrichs)
October 5, 2009

GRANTED with Conditions

A TRUE COPY. ATTEST:
TOWN CLERK, ACTON, MA

Plan No. 10 of 2010
aka Bk 2010 Pg 10

Decision of the Acton Board of Selectmen (hereinafter the Board) on the application of Leo Bertolami, Wetherbee Plaza LLC, 6 Proctor Street, Acton, MA (hereinafter the Applicant) for property located at 107-115 Great Road in Acton, Massachusetts. The applicant owns the property. It is shown on the 2007 Acton Town Atlas; map G-4 as parcel 28, 28-1 & 50 (hereinafter the Site).

This Decision is in response to an application for a site plan special permit, submitted to the Board on July 21, 2009, pursuant to Section 10.4 of the Acton Zoning Bylaw (hereinafter the Bylaw) and the Site Plan Special Permit Rules and Regulations (hereinafter the Rules). The Board held the public hearing on September 14, 2009. Board members Paulina Knibbe (Chair), Peter Berry, Terra Friedrichs, Mike Gowing, and Lauren Rosenzweig attended the hearing. The

http://www.masslandrecords.com/malr/controller?commandflag=searchByNameID&optfla... 1/21/2010

minutes of the hearing and submissions on which this decision is based upon may be referred to in the Town Clerk's office or the office of the Board at the Acton Town Hall.

1 EXHIBITS

Submitted for the Board's deliberation were the following exhibits:

1.1 A "Site Plan Special Permit Application" compiled by Acton Survey & Engineering, Inc. with the following:
- Application cover letter, dated 07/27/09;
- Application form dated 07/20/09;
- Abutters list;
- Project Narrative;
- List of other permits and variances;
- Drainage Calculations;
- Site Plan entitled "Wetherbee Plaza Extension" last revised 07/21/09, prepared by Acton Survey & Engineering, Inc., consisting of 5 sheets.
- Landscape Plan by Randall Clemence Landscape Architect, dated 07/16/09.
- Supplemental letter from Acton Survey & Engineering, Inc., dated 09/11/09.

1.2 Interdepartmental communication was received from:
- Tree Warden & Municipal Properties Director, dated 07/31/09;
- Engineering Department, dated 02/03/09, last revised 08/19/09;
- Corey York, Engineering Department, e-mail to Fire Chief dated 08/19/09;
- Health Department, dated 08/14/09;
- Sidewalk Committee, dated 02/13/09 (resubmitted);
- Fire Chief, dated 08/20/09;
- Planning Department, dated 09/08/09;
- Building Commissioner, dated 08/14/09.
- Paulina Knibbe, e-mail to Scott Mutch with questions, dated 09/14/09.

1.3 Other correspondence and materials:
- Copy of previous Site Plan Special Permit #11/07/03-393.
- Copy of Board Decision #01/23/09-417 (Site Plan Special Permit denied).

Exhibit 1.1 is hereinafter referred to as the Plan.

2 FINDINGS AND CONCLUSIONS

Based upon its review of the exhibits and the record of the proceedings the Board finds and concluded that:

2.1 The Site was in the Limited Business (LB) zoning district until October 2003.

2.2 In October 2003 the Applicant, or an individual on behalf of the Applicant, petitioned for and obtained a zoning change for the Site to the East Acton Village (EAV) zoning district.

2.3 EAV zoning standards and requirements changed in April 2004 as a result of recommendations contained in the East Acton Village Plan.

2.4 For purposes of this decision, EAV zoning standards before April 2004 are referred to as "Old EAV Zoning". EAV zoning standards after April 2004 are referred to as "New EAV Zoning".

2.5 The original Site Plan Special Permit #11/07/03-393 for this Site was issued under "Old EAV Zoning" and protected the Site under "Old EAV Zoning" "provided that the applicant

proceeds diligently to obtain such permit and provided further that the USE or construction is commenced within six (6) months after the issuance of the permit and the expiration of all applicable appeal periods. In cases involving construction, such construction shall be continued through to completion as continuously and expeditiously as is reasonable, provided however that if such construction has ceased for a period of two or more years it shall be considered abandoned pursuant to Section 8.2.4." (ZBL section 8.5).

2.6 Although the Applicant has made slow progress completing the improvements authorized in Site Plan Special Permit #11/07/03-393, the Site for now remains protected under Old EAV Zoning. However, driveways, parking lots, walkways and sidewalks remain unfinished or are installed in deviation of said Site Plan Special Permit.

2.7 Early in 2009, the Applicant filed a new Site Plan Special Permit application #01/23/09-417 seeking approval for existing as-built conditions and additional modifications under "New EAV Zoning". This effort failed due to the location and design of the already erected buildings on the Site that could not be reconciled with "New EAV Zoning". The Board denied the application with a decision issued on May 18, 2009.

2.8 This Decision, Site Plan Special Permit #07/10/09-422, responds to the Applicant's renewed attempt to seek site plan special permit approval for the existing as-built conditions and additional modifications; this time under "Old EAV Zoning". The Board considers the "Old EAV Zoning" still applicable to this effort.

2.9 The Town has not issued a permanent Certificate of Occupancy for the #107 Great Road building on the Site due to the zoning violation[1]. Nevertheless, the Applicant has invited and allowed one business tenant to occupy the rear unit. The Town, for now, has chosen to postpone zoning enforcement action, not to evict the illegal tenant at this time, and to be receptive instead to the Applicant's corrective actions. Currently, the postponement of zoning enforcement expires on October 31, 2009.

2.10 "Old EAV Zoning" protection stems from Site Plan Special Permit #11/07/03-393, nearly six years ago. The protection and postponement of zoning enforcement cannot go on forever. This Decision sets forth a reasonable final deadline for the Applicant to complete the Site in compliance with applicable "Old EAV Zoning" and the conditions of this decision, and for obtaining Certificates of Occupancy for all buildings on the Site. Beyond this final deadline, continued Site protection under "Old EAV Zoning" appears dubious, and the Applicant's due diligence to obtain and act on all required permits and to complete the construction on the Site as continuously and expeditiously as is reasonable (Bylaw, section 8.5) can no longer be assumed or hoped for.

2.11 The Applicant owns the Site as well as the immediately abutting property to the south – the "Car Wash Lot".

2.12 Major items for decision before the Board:

a) Access Driveway:
The as-built width of the access driveway from Great Road exceeds the standard 24-feet set forth in the Bylaw. The Applicant contends that the width was determined by MassHighway in its curb cut permit (Great Road is a State road). Under the Bylaw provisions, the Board can allow a greater width than necessary in order to provide adequate area for safe vehicular turning movements and circulation. Deferring to MassHighway, and due to the unique characteristics of the site/location, the Board

[1] The building #113 Great Road (Carriage House) and the "windmill building" remain vacant. The building #115 Great Road (Ranor House) is legally occupied.

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allows the excessive as-built width in this specific instance only. No further plan change is needed.

b) Parking spaces in front setback at building #115 (relocated Raynor House):
There are three parking spaces at building #115 in front of the front line of the buildings on the Site. The applicant has demonstrated that these spaces have pre-existing non-conforming status. Although the Bylaw encourages Site modifications to achieve zoning compliance (see section 10.4.6), the Board allows the continuance of these non-conforming parking spaces in this instance.
No further Plan change is needed.

c) Walking connection to and from Brabrook Road:
Site Plan Special Permit #11/07/03-393 requires a walkway/sidewalk connection to the property boundary that fronts on Brabrook Road, generally considered the rear of the Site near the "Carriage House". The sidewalk is shown on the Plan. There have been new questions regarding the feasibility of a walkway/sidewalk connection into Brabrook Road.
This Decision affirms the original 2003 site plan requirement. The developer of nearby Ellsworth Village is obligated to construct the connection to the Applicant's property boundary. Construction plans for the walk and boardwalk connection in Brabrook Road are shown on the Planning Board approved plan for Ellsworth Village, endorsed September 8, 2005. Thus, the pedestrian connection is feasible, will eventually be completed, and the Applicant's provision of the sidewalk link to the property line at Brabrook Road will eventually provide practical pedestrian access to the Site.
No further Plan change is needed.

d) Lot line:
Building #107 Great Road was built too close to the existing property line to the "Car Wash Lot". The Applicant proposes to move the lot line to meet the applicable minimum 10-foot setback under "Old EAV Zoning" for building #107. This is an acceptable solution.

e) Parking spaces in front setback at building #107:
The Applicant has pleaded to allow the four as-built parking spaces at building #107, which are located in front of the front line of the buildings on the Site. The Board has no authority under the Bylaw to allow these spaces.

f) New driveway and common driveway with "Car Wash Lot":
The Applicant proposes a new two-way driveway connecting the front of the Site with the "Carriage House" (#113 Great Road) in the rear. As previously approved, the only driveway access to the "Carriage House" would have been via the "Car Wash Lot". The Board approves the new driveway as proposed; subject to the addition of a one-way common driveway connection from the "Car Wash Lot" at approximately 200 feet to the rear of the #107 Great Road building with access from the "Car Wash Lot" to the Carriage House and the front of the Site. This is necessary for improved circulation between the Site and the "Car Wash Lot" and to qualify the new driveway as a common driveway located within the side setback.

g) Sidewalk design:
Site Plan Special Permit #11/07/03-393 required a separate, curbed sidewalk from the parking lot in the front of the Site to the "Carriage House" in the rear of the Site and to the Site frontage on Brabrook Road. The Applicant has requested to allow a sidewalk without a curb at grade level with the driveway that connects the back and front of the Site. This request is granted provided the sidewalk is sufficiently distinguished from the driveway and features a safe, non-slippery walking surface.

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h) Walkway easement on northwest side:
The Applicant proposes a 4-foot wide walking easement within a 7-foot wide construction easement along the entire northwesterly Site boundary. Due to existing grades and the presence of wetlands a walkway in this location would not be feasible.

i) Wind turbine:
Site Plan Special Permit #11/07/03-393 contemplated a wind mill in the middle of the Site. The plan submitted for the 2003 special permit shows a proposed windmill, but there is no further description on the plan or discussion of it in the special permit decision. The Bylaw has a maximum building height of 36 feet and allows appurtenant structures on building to extend to an overall height of 45 feet (Bylaw section 5.3.5.1. Whether the vanes of a windmill qualify for the additional height over 36 feet is not decided here.
Whereas the Board may have understood previous mention of the windmill as decorative in nature, the Applicant now appears to consider a functional wind turbine. The practical and economic feasibility of a wind turbine remains doubtful. The Bylaw requires a special permit from the Board of Appeals for a wind machine serving a principal use on the Site (Bylaw section 3.8.3.1).

j) Driveway to windmill building:
As shown on the Plan, the configuration and dimensions of the driveway from the "Carriage House" to the windmill building and the single parking space at the windmill building do not comply with the Bylaw.

2.13 The Board has received comments from various Town departments, which are listed in Exhibit 1.2 above. These comments were considered by the Board in its deliberations, were made available to the Applicant, and are incorporated into this decision as deemed appropriate by the Board.

2.14 This Site Plan Special Permit and the Plan approved hereunder is consistent with the Master Plan, will not be detrimental or injurious to the neighborhood in which the use is to take place, provides for convenient and safe vehicular and pedestrian movement within and through the site, provides an adequate number of parking spaces, provides adequate methods of refuse and waste removal from the site, and is in harmony with the purpose and intent of the Bylaw.

3 BOARD ACTION

Therefore, the Board voted to GRANT the requested Site Plan Special Permit subject to and with the benefit of the following conditions, Plan modifications, and limitations.

3.1 PLAN MODIFICATIONS

No further work shall be conducted on the Site and the Building Commissioner shall not issue any further Building Permits or Certificates of Occupancy, until and unless the Zoning Enforcement Officer has confirmed that the Plan has been revised in accordance with Site Plan Special Permit #11/07/03-393 and as further amended in compliance with this Decision. The Plan as submitted in the application shall be further amended to include the following additions, corrections, and modifications. Except where otherwise provided, all such additions, corrections, and modifications shall be subject to the approval of the Zoning Enforcement Officer. Where approvals are required from persons or agencies other than the Zoning Enforcement Officer, the Applicant shall be responsible for providing evidence of such approvals to the Zoning Enforcement Officer.

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3.1.1 **Lot line modification:**
Prepare, receive Planning Board endorsement, and file at the Registry of Deeds an 'Approval Not Required' plan consistent with the lot line modification to the "Car Wash Lot" shown on the Plan that ensures compliance of building #107 with "Old EAV Zoning".

3.1.2 **Parking spaces in front setback at building #107:**
Remove the parking spaces at building #107 Great Road that are located in front of the front line of the building. To compensate for the loss of these spaces, parking spaces may be installed immediately behind building #107 in compliance with the Bylaw.

3.1.3 **Common Driveway from "Car Wash Lot":**
Add a one-way common driveway connection from the "Car Wash Lot" onto the site at a location approximately 200 feet to the rear of Building #107 Great Road. The connection shall be designed to allow access to the shops in the front of the Site as well as to the Carriage House in the rear of the Site. If no access to the "Carriage House" is provided, the property line adjacent to the driveway east of the "Car Wash Lot" connection shall be revised to show a minimum 10-foot setback to the driveway. Such a lot line change shall then be shown on the "Approval Not Required" plan specified in paragraph 3.1.1 above.

3.1.4 **Sidewalk design:**
Show the sidewalk along the driveway between the front and the back of the Site, including the associated crosswalks, at grade with the driveway and specify a surface material that distinguishes it in color and texture from the driveway surface. Possible methods to accomplish the different surface are (a) chip seal over bituminous concrete, (b) brick pavers with polymeric sand, (c) concrete surface, (d) brick imprint on color embedded in the top layer of the bituminous concrete, or (e) embedment of 3/8-inch sized grey or brown stone placed in standard bituminous concrete and rolled into the surface.

3.1.5 **Walking easement on northwest side:**
Remove from the Plan the proposed 4-foot walking easement and associated 7-foot construction easement along the northwesterly Site boundary.

3.1.6 **Driveway and parking space for the windmill building:**
Modify the plan to show compliance with the Bylaw of the driveway from the "Carriage House" to the windmill building and the parking space at the windmill building. Alternatively, the driveway and the parking space can be removed. The use of grass pavers to provide a hard surface with turnaround at the windmill building for pedestrian and occasional vehicle use is another option that the Plan could specify.

3.1.7 **Other Plan Modifications:**

a. In the zoning analysis on Plan sheet 2, show the side yard setback dimension for the #107 Great Road building measured from the A/C units of the building rather than from the stairs.

b. Also in the zoning analysis, specify the height of the windmill building as it presently exists, and state that the height of any wind mill or turbine blades or vanes is subject to future approvals by the Board of Selectmen and the Board of Appeals.

c. Show a minimum of 33 parking spaces on the Site that comply with the Bylaw.

d. Modify the parking lot layout between buildings #107 and #115 to show compliance with minimum width requirements of the Bylaw, section 6, for maneuvering aisles and interior driveways. One way to accomplish this is through a relocation or rededication of car - and van-accessible parking spaces.

e. Substitute the "brick patio" between the access driveway and the wheelchair ramp near the front of the #107 building with a curbed planted island. Landscape elements on the island shall be subject to approval by the Tree Warden. Alternatively, this area may be designated for bicycle parking with functional bike racks to be specified on the Plan.

f. Prove to the satisfaction of the Engineering Department that the Site has a functional drainage system and is in compliance with Bylaw requirements pertaining to storm water management and groundwater recharge, specifically sections 4.3.6.2 and 10.4.3.1. Reference is made to the Engineering Department memorandum last revised on August 19, 2009 and listed in Exhibit 1.2 of this Decision. The Applicant shall address and resolve the outstanding issues and questions pertaining to drainage and recharge listed in this memo to the satisfaction of the Engineering Department. Plan changes to resolve these matters are specifically authorized hereunder, provided that the Zoning Enforcement Officers finds that such changes do not substantially alter the Site's appearance from what the Board can reasonably expect after completion of all Site improvements as authorized in this Decision.

g. Specify and mark a 12-inch wide stop line and a crosswalk to be located at the exit from the Site onto Great Road. The stop line shall be placed a minimum of 4 feet (4'-0") in advance of the nearest crosswalk line.

h. Locate the pre-existing MassHighway road bound at the southwesterly corner of the Site and ensure it is in its proper location. If this bound has been lost or moved, specify that it shall be replaced or repositioned in its original location.

i. Specify on the Plan detail sheet that 12 inches of gravel shall be installed under all pavement areas.

j. Determine and label the sight distance for vehicles exiting the Site driveway taking into consideration the maturing of landscaping currently located within the Great Road State highway layout.

k. Identify the purpose of the two granite posts located in the Great Road State highway layout. They cannot be used for a sign without express permission by MassHighway.

3.1.8 In summary, the Plan shall be modified to comply in all respects with the applicable requirements of the Bylaw. Unless directed otherwise by this decision, the Plan shall also be modified to comply with all requirements of the Rules, and to address all departmental comments received by the Board in a manner that resolves any concerns raised therein to the satisfaction of the Board

3.2 CONDITIONS

The following conditions shall be binding on the Applicant and its successors and assigns. Failure to adhere to these conditions shall render this Site Plan Special Permit null and void, without force and effect, and shall constitute grounds for the revocation of this Site Plan Special Permit, and of any building or occupancy permit issued hereunder. The Town of Acton may elect to enforce compliance with this Site Plan Special Permit using any and all powers available to it under the law.

3.2.1 **Deadline for completion and Certificate of Occupancy – May 31, 2010:**
All Site improvements in accordance with Site Plan Special Permit #11/07/03-393 and as further amended with this Decision shall be completed in compliance with "Old EAV Zoning" and as required herein so that all buildings on the Site are eligible for Certificates

of Occupancy no later than May 31, 2010. Proof of compliance shall be demonstrated with an as-built plan stamped by a Massachusetts Registered Professional Engineer, an accompanying letter by said engineer certifying that the site complies with the conditions and requirements of this Decision, and through field inspection as deemed necessary by the Zoning Enforcement Officer.
The May 31, 2010 deadline recognizes the Applicant's need to make Plan changes as required herein and to line up contractors to do the work, and it recognizes the pending winter months, which may hinder outdoor construction activities. In the event that the Applicant should fail to meet this reasonable deadline, it then seems appropriate that the Town initiate rigorous zoning enforcement towards compliance with "New EAV Zoning".

3.2.2 **Landscaping:**
The completion of all site improvements as required in the preceding paragraph shall include letter from the landscape architect certifying that the plantings have been installed in compliance with the approved Plan, were properly planted in accordance with industry standards, and are in good condition.

3.2.3 **Wind Turbine:**
No wind turbine or wind machine shall be authorized under this Decision. The power and authority to allow wind machines lies with the Board of Appeals through a special permit in accordance with section 3.8.3.1 of the Bylaw. The Applicant may pursue the matter with the Board of Appeals. However, no special permit from the Board of Appeals for a wind machine or wind turbine shall be acted upon until and unless the Board has further amended this Decision in its sole discretion to also allow the wind turbine or wind machine.

3.2.4 **Other:**

3.2.4.1 The grass paver area at the "Carriage House" near Brabrook Road shall be kept free of snow, ice and any other obstructions or hazards to ensure use at all times by fire apparatus.

3.2.4.2 The Applicant shall be diligent in complying with the erosion and sediment control plan. The Applicant shall not cause or permit the runoff of water or erosion that result in the flooding or siltation of any street, way or drainage facility owned or maintained by the Town. If such runoff or erosion occurs, the Building Commissioner may order the immediate cessation of any excavation, construction and building activities until the conditions that caused the runoff or erosion have been corrected.

3.2.4.3 All construction activity on the property relating to this Site Plan Special Permit shall be limited to the hours of: Monday – Friday: 7:00am – 5:00pm; Saturday 8:00am – 5:00pm; Sundays & Holidays: No work permitted.

3.2.4.4 All work on the Site shall be conducted in accordance with the terms of this Site Plan Special Permit and shall conform with and be limited to the improvements shown on the Plan as modified herein.

3.2.4.5 Any changes to the Site that are not in conformance with this site plan special permit shall require the approval from the Board.

3.2.4.6 This Decision shall be recorded at the Middlesex South District Registry of Deeds or the Land Court prior to the issuance of any building permit or certificate of occupancy on the Site.

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3.3 LIMITATIONS

The authority granted to the Applicant under this special permit is limited as follows:

3.3.1 The foregoing required modifications and conditions have been stated for the purpose of emphasizing their importance, but are not intended to be all inclusive or to negate the remainder of the Bylaw and the Rules.

3.3.2 This special permit applies only to the Site identified in this decision and to the proposed use and activity as shown on the Plan.

3.3.3 Other approvals or permits required by the Bylaw, other governmental boards, agencies or bodies having jurisdiction shall not be assumed or implied by this decision.

3.3.4 This Site Plan Special Permit shall lapse on May 31, 2010 unless all Site improvements are completed in compliance with this Decision and Certificates of Occupancy can be issued verifying such compliance. At this juncture, the Board is not inclined to grant an extension of this deadline.

3.3.5 The Board hereby reserves its right and power to modify or amend the Plan and the terms and conditions of this special permit with or without a public hearing upon the request of the Applicant, his designees or assigns, or upon its own motion. At this juncture, the Board is not inclined to further amend the Plan or this Decision before May 31, 2010.

4 APPEALS

Appeals, if any, shall be made pursuant to MGL, Ch. 40A, S. 17 and shall be filed within 20 days after the date of filing this decision with the Town Clerk.

The Town of Acton Board of Selectmen

Paulina Knibbe, Chair

This is to certify that the 20-day appeal period on this decision has passed and there have been no appeals made to this office.

Eva Taylor, Town Clerk — Date: December 10, 2009

Copies furnished:

Applicant - certified mail #	Building Commissioner	Health Director
Town Clerk	Engineering Administrator	Municipal Properties Director
Fire Chief	Conservation Administrator	Town Manager
Owner	Police Chief	Acton Water District
Design Review Board	Historical Commission	Assistant Assessor
	Concord Water Department	

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