

SEAL

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
12 MISC 459564 (AHS)

WALKER REALTY, LLC,
Plaintiff,

vs.

TOWN OF ACTON, MASSACHUSETTS; and CARA VOUTSELAS, KENNETH KOZIK, and
MARILYN PETERSON, members of THE BOARD OF APPEALS OF THE TOWN OF
ACTON, MASSACHUSETTS,
Defendants.

DECISION

Plaintiff Walker Realty, LLC (“Walker” or “Plaintiff”), filed its unverified Complaint in 09 MISC 405389 (the “2009 Complaint”) on July 9, 2009, (1) pursuant to G. L. c. 40A, § 17, appealing a decision of Defendant Board of Appeals of the Town of Acton (the “ZBA”) which denied Walker’s development and use of its property located at 348-352 Main Street, Acton, MA (the “Original Parcel”) as a child care facility to be operated by Next Generation Children’s Center (“NGCC”) (the “Project”), and (2) pursuant to G. L. c. 240, § 14A, seeking a declaratory judgment concerning the applicability and enforcement of certain provisions of the Acton Zoning By-law (the “Bylaw”) to the Project, based on G.L. c. 40A, § 3 (the “Dover Amendment”).¹ Defendants Town of Acton (the “Town”) and the ZBA (together, “Defendants”) filed an Answer on September 1, 2009. A case management conference was held on September 22, 2009. A pre-trial conference was held on November 14, 2011. On January 23, 2012, the parties filed a Joint Motion to Reschedule Trial.

Walker filed its unverified Complaint in 12 MISC 459564 (the “2012 Complaint”) on

¹ Walker challenges the applicability of Section 5.3.9 of the Bylaw (relating to FAR, defined, infra) as it relates to the Project.

February 17, 2012, (1) pursuant to G.L. c. 240, § 14A, seeking a declaratory judgment concerning the applicability and enforcement of certain provisions of the Bylaw to a revised version of the Project (the “Amended Project”), based on the Dover Amendment, which proposed a child care facility on the Original Parcel and on an adjoining parcel located at 354-364 Main Street, Acton, MA (the “Kennedy Parcel,” together with the Original Parcel, the “Combined Parcel”), and (2) pursuant to G. L. c. 40A, § 17, appealing a decision of the ZBA denying Walker’s development and use of the Combined Parcel for the Amended Project.² Defendants filed an Answer on March 14, 2012.

On October 1, 2012, Walker filed its Motion for Partial Summary Judgment on Complaint for Declaratory Judgment relative to the Amended Project (12 MISC 459564), together with Statement of Material Facts, Memorandum of Law in Support of Plaintiffs’ Motion for Partial Summary Judgment, Affidavits of Robert Walker and Katie L. Enright, and Appendix of Exhibits.³ On November 6, 2012, Defendants filed Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment, together with Town’s Appendix. On November 21, 2012, Walker filed its Reply. A Summary Judgment hearing was held on February 4, 2013. By decision dated July 10, 2013 (“Land Court Decision 1”), this court found 1) Walker is not entitled to an eight-year zoning freeze relative to the Zoning Amendment (hereinafter defined) as applied to the Michele Circle Plan (hereinafter defined), 2) the Planning Board is still “processing” the Michele Circle Plan and Walker is currently still entitled to a zoning

² Walker challenges the applicability of Section 5.3.9 of the Bylaw (relating to NFA, defined, infra) as it relates to the Project.

³ This motion for partial Summary Judgment addressed only the count relative to G.L. c. 40A, § 17 and other procedural issues, and did not address the count pursuant to G.L. c. 240A, § 14 relative to the Dover Amendment.

process freeze, 3) the 1,000 square foot NFA requirement in the Bylaw applies to the Original Parcel i.e. the land shown on the Isaac Davis Circle Plan (hereinafter defined) and the Michele Circle Plan, provided that the Michele Circle Plan is endorsed by the Planning Board before June 24, 2015, 4) at this juncture, this court offers no opinion regarding the reasonableness of the 1,000 square foot NFA requirement in the pre-Zoning Amendment version of the Bylaw, 5) this court has no jurisdiction to make any ruling relative to the 2012 Site Plan (hereinafter defined), 6) Walker is left with four options in its quest to proceed with the Project or the Amended Project: Walker may proceed in litigating the 2009 ZBA Decision (hereinafter defined), Walker could proceed in litigating the 2012 ZBA Decision (hereinafter defined) relative to the 2011 Site Plan (hereinafter defined), or Walker may accept the 2012 Site Plan as interpreted by the 2012 Zoning Determination (hereinafter defined), or Walker may start from scratch and propose another amended version of the Project, and 7) Walker's Motion for Partial Summary Judgment is DENIED.

A pre-trial conference was held on January 27, 2014. A site view and the first day of trial at the Concord District Court was held on May 21, 2014. At that time the parties filed a Stipulation of Facts. The second and third day of trial were held on May 22 and May 23, 2014, at the Land Court in Boston. Post trial briefs were filed with this court on July 31, 2014, and at that time the matter was taken under advisement.

Testimony for Plaintiff was given by Katie Enright (civil engineer), Donna Kelleher (principal of NGCC) ("Kelleher"), and Robert Michaud (civil engineer-traffic) (includes rebuttal). Testimony for Defendants was given by Terry Szold (civil engineer), Robert Nagi (traffic engineer) (includes rebuttal), and Roland Bartl (Acton Planning Director). There were twenty-two exhibits submitted into evidence.

Based on the sworn pleadings, the evidence submitted at trial, and the reasonable inferences drawn therefrom, I find the following material facts (some facts are taken from Land Court Decision 1.)

1. Walker is a limited liability company with a principal office at 2 LAN Drive, Westford, MA. Walker is a developer of real estate and child care facilities for use by NGCC. NGCC, located in Sudbury, MA, operates ten child care facilities in Massachusetts and each facility is licensed and regulated as a “day care center” by the Commonwealth of Massachusetts Department of Early Education and Care.

2. In 2008, Walker purchased the Original Parcel for its intended use as a NGCC child care center.⁴ The Original Parcel consisted of approximately 2.4 acres. Walker razed the two existing single family homes on the Original Parcel subsequent to its purchase. The Original Parcel is abutted on one side by the Route 2 corridor and is located across the street from the westbound on/off ramp of Route 2.

3. The Original Parcel is located in the residential R-2 Zoning District (“R-2”). The Bylaw provides that a “Child Care Facility” is permitted as of right and is not subject to site plan approval within R-2. Defendants do not contest the Project’s classification as either a day care center or a child care center, which uses benefit from certain protections from zoning under G.L. c. 40A, § 3 (the Dover Amendment).

4. In addition to dimensional requirements applicable to all structures within R-2, the 2009 version of the Bylaw imposed certain other dimensional requirements on child care facilities within

⁴ The Original Parcel was conveyed to Walker by three deeds recorded at the Southern Middlesex Registry of Deeds (the “Registry”) at Book 50746, Page 581 (348 Main Street), Book 50967, Page 87 (350 Main Street), and Book 50967, Page 193 (352 Main Street).

R-2: minimum open space (not including outdoor play area) of thirty-five percent (35%); a maximum floor area ratio (FAR) of .10; and a maximum net floor area (NFA) of 1,000 square feet.⁵ The FAR restriction applies to the entire property and the NFA applies only to the square footage of all floor areas of a building, which is the outline of the total area surrounded by the exterior walls of a building.⁶

5. On March 23, 2009 Walker submitted a site plan and a formal request for a zoning determination to the Town of Acton Zoning Enforcement Officer, Scott Mutch (“Mutch”). The site plan submitted for review was entitled, “Next Generation Children’s Center - Site Plan, dated March 14, 2009,” prepared by Hancock Associates (the “2009 Site Plan”). The 2009 Site Plan proposed a two-story childcare building, a storage shed, a play yard, parking for seventy-seven vehicles, additional handicap parking spaces, pedestrian walkways, landscaped areas, snow storage areas, and an on-site septic system (the Project).

6. By letter dated March 26, 2009 (the “2009 Zoning Determination”), Mutch determined that the 2009 Site Plan was not in compliance with the Bylaw with respect to FAR and NFA. The 2009 Zoning Determination stated that the 2009 Site Plan provided FAR of .23 (greater than the maximum FAR of .10), and NFA of 23,085 square feet (greater than the maximum NFA of 1,000 square feet.⁷

⁵ Under Section 1.3.8 of the Bylaw, NFA is the total square footage of all floor areas of a building including basement and other storage areas, but not including stairways, elevator wells, rest rooms, common hallways and building service areas. Under Section 1.3.9, FAR is the ratio of the sum of the NFA of all buildings on a lot to the developable lot area.

⁶ In this effect, FAR is a quantifiable measure of lot size, whereas NFA is a measure of building size. The NFA of a building includes the square foot measurement of each floor except for bathrooms, stairwells, common hallways, and designated mechanical apparatuses.

⁷ The 2009 Site Plan indicated an open space of 39% (greater than the required 35%).

7. With respect to parking, the 2009 Zoning Determination also indicated that the 2009 Site Plan did not comply with section 6.7.1 of the Bylaw that required a maximum of forty parking spaces per parking lot and a distance of thirty feet between parking cells. The 2009 Site Plan also did not comply with section 6.7.7 of the Bylaw that required a minimum of 10% of the interior parking area consist of landscaped island area. With respect to access, the 2009 Zoning Determination indicated that the 2009 Site Plan did not comply with section 6.7.3 of the Bylaw, which required that “each lot may have one access driveway through its frontage which shall be 24 feet wide.”⁸ The 2009 Site Plan shows the driveway having a width of fifty (50) feet at its intersection with Main Street. Moreover, the 2009 Zoning Determination stated that the 2009 Site Plan, which depicted an interior driveway of twenty-four feet, did not comply with section 6.7.4 of the Bylaw, which stated “interior driveways shall be at least 20 feet wide for two-way traffic.”

8. On April 6, 2009, Walker filed with the Town Clerk an appeal to the ZBA of the 2009 Zoning Determination pursuant to G.L. c. 40A, § 8. Hearings were held before the ZBA on May 4, 2009, and June 1, 2009. On June 25, 2009, the ZBA issued a decision denying Walker’s appeal and upholding in part the 2009 Zoning Determination (the “2009 ZBA Decision”), a certified copy of which was filed with the Town Clerk on June 25, 2009. Walker appealed the 2009 ZBA Decision to the Land Court on July 9, 2009.

9. The 2009 ZBA Decision stated that, as it related to the 2009 Site Plan and the Original Parcel, “the Board found that the four parking and driveway regulations... Sections 6.7.1, 6.7.7, 6.7.3,

⁸ Section 6.7.4 continues, “each LOT may have one ACCESS driveway...which shall be 24 feet wide, unless, in the opinion of the Special Permit Granting Authority (if the parking area is related to a permitted USE for which a site plan or other special permit is required) or the Zoning Enforcement Officer (for other parking areas), a wider and/or greater number of ACCESS driveways is necessary...”

and 6.7.4⁹ - would be unreasonable as applied to the proposed facility.” The 2009 ZBA Decision further stated, “[t]he Board found that the NFA limit of 1,000 square feet 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 2 ½ acres.”¹⁰ However, the ZBA “found that the FAR limit of .10 is reasonable as applied to the proposed facility, which would have an FAR exceeding .20 (or .154, if hallways should be excluded from NFA as Walker Realty asserted)...” The ZBA refused to waive the FAR requirement and found that the FAR limit under the particular circumstances “significantly advances several of the Town’s planning and zoning interests.”^{11/12}

10. On May 21, 2009, Walker filed a preliminary subdivision plan (the “Preliminary Subdivision Application”) of a proposed two-lot subdivision on the Original Parcel entitled Isaac Davis Circle (the “Isaac Davis Circle Plan”). By decision dated June 16, 2009, and filed with the Town Clerk on June 28, 2009, the Acton Planning Board (the “Planning Board”) approved the preliminary Isaac Davis Circle Plan.

⁹ The 2009 ZBA Decision stated that the 2009 Site Plan complied with section 6.7.4 of the Bylaw.

¹⁰This is in comparison to the language of the 2012 ZBA Decision, which stated that “child care facilities should be roughly equivalent in size to the other buildings in the district [roughly 2,500 square feet] . . . Applying the NFA limit thereby preserves the residential appearance and harmony.” However, the 2012 ZBA Decision fails to factor in the sizes of the adjacent commercial buildings, to wit, the Public Safety Facility, Kennedy’s Nursery, and the Animal Hospital, which are of a larger size than the abutting residential buildings. Furthermore, it is unknown to the court as to the square footage of all of these locales.

¹¹ More specifically, the ZBA concluded by a 3-0 vote that the 2009 Zoning Determination should be upheld as it relates to the .10 FAR requirement; however, by the same 3-0 vote, the ZBA overturned the portion of the 2009 Zoning Determination that was based on the Bylaw’s parking and driveway design (sections 6.7.1, 6.7.7, 6.7.3, 6.7.4) and the NFA limit.

¹² On July 9, 2009, Walker filed its Complaint in 09 MISC 405389 challenging the 2009 ZBA Decision and the reasonableness of the .10 FAR as applied to a child care facility on the Original Parcel.

11. In 2009, the Town initiated a proposed amendment to section 5.3.9 of the Bylaw regulating NFA for child care facilities. A public hearing on the proposed zoning amendment was scheduled to be held on June 2, 2009. At a special Town Meeting held on June 23, 2009, the Town voted to amend section 5.3.9 of the Bylaw to increase the maximum NFA for a child care facility from 1,000 square feet to 2,500 square feet (the “Zoning Amendment”).

12. On December 18, 2009 Walker submitted another subdivision plan for the Original Property for a subdivision renamed as Michele Circle (the “Michele Circle Plan”).¹³ By Decision dated July 20, 2010, and filed with the Town Clerk on July 28, 2010, the Planning Board approved the Michele Circle Plan (the “Subdivision Approval”). Section 4 of the Subdivision Approval stated, “Appeals, if any, shall be made pursuant to MGL, Ch. 41, S. 81-BB and shall be filed within 20 days after the date of the filing this Decision with the Town Clerk.” Section 5 of the Subdivision Approval stated, “This document stating the decision of the Board shall serve as the Certificate of the Board’s Action to be filed with the Town Clerk pursuant to MGL, Ch. 41, S. 81-U.”

13. The Subdivision Approval required Walker to make nineteen revisions to the Michele Circle Plan prior to its endorsement. Section 3.4.4 of the Subdivision Approval stated, “[the Subdivision Approval] shall expire if not endorsed on the Plan within 180 days from date that this decision has been filed with the Town Clerk.” The date for endorsement was extended by the Planning Board to June 24, 2011. The Michele Circle Plan has never been endorsed by the Planning Board or recorded at the Registry.

14. In 2011, Walker entered into a contract to buy a 2.25 acre parcel of land directly abutting

¹³Isaac Davis Way is a gated neighborhood behind the Property where the Isaac Davis Plan gets its name from. The Michele Circle Plan refers to the 2009 plan that expanded upon the Isaac Davis Plan and preceded the 2011 Plan. It does not include the Kennedy Parcel.

the Original Parcel (i.e. the Kennedy Parcel). By deed dated September 5, 2012, and recorded with the Registry at Book 59949, Page 358, Walker took title to the Kennedy Parcel. The Kennedy Parcel contains a pre-existing nonconforming commercial use, the Kennedy & Company Landscaping Nursery and Garden Center (“the Kennedy Nursery”).

15. On December 5, 2011, Walker submitted a site plan dated December 2, 2011 (the “2011 Site Plan”) and a formal request for a zoning determination concerning the proposed structures on said plan. The 2011 Site Plan proposed construction of a NGCC child care center on the Combined Parcel consisting of approximately 4.6 acres. The 2011 Site Plan proposed a single-story building consisting of approximately 19,460 square foot NFA (the child care facility) and a second building consisting of 600 square foot NFA (a building to house the landscaping nursery use) (the Amended Project). The open space on the Combined Parcel was calculated to be approximately 30%.¹⁴ The Amended Project would house approximately 262 children. The Combined Parcel would contain three access curb cuts on Main Street, two to access the child care facility and one to access the landscaping nursery building.

16. By letter dated December 20, 2011 (the “2011 Zoning Determination”), Mutch determined that the 2011 Site Plan did not comply with the Bylaw. Specifically, the 2011 Zoning Determination stated that the 2011 Site Plan did not comply with the (newly enacted) 2,500 square foot maximum NFA requirement of the Bylaw, the 35% open space requirement, the twenty-four foot access driveway requirement (section 6.7.3 of the Bylaw), and the 10% island parking landscape

¹⁴ The 2011 Site Plan also proposed four parking cells with a total of 92 parking spaces and two access drives. One of the parking cells will have twenty-six spaces, which triggered section 6.7.7 of the Bylaw requiring a 10% landscaped area, which is not provided on the 2011 Site Plan. Each access driveway as shown on the 2011 Site Plan is also wider than the twenty-four foot maximum mandated by section 6.7.3 of the Bylaw.

requirement (section 6.7.7 of the Bylaw).

17. On December 21, 2011, Walker timely appealed the 2011 Zoning Determination to the ZBA. A hearing was held on January 11, 2012 to discuss the matter. On January 31, 2012, the ZBA issued a decision denying Walker's appeal and upholding in part the 2011 Zoning Determination (the "2012 ZBA Decision"), a certified copy of which was filed with the Town Clerk on or about January 31, 2012. Walker appealed the 2012 ZBA Decision to the Land Court on February 17, 2012.

18. The 2012 ZBA Decision stated that "applying the 24-foot maximum access driveway requirement...to this proposed facility would be unreasonable...The Board also found that it would be unreasonable to apply the minimum open space requirement of 35% once the perimeter buffer area and play areas are included." The 2012 Zoning Decision also stated, "[t]he lot, as proposed, would have...a FAR of .10," which complies with the Bylaw.

19. As it related to the NFA limit of 2,500 square feet, the ZBA found that it was reasonable to apply this requirement to the 2011 Site Plan. In this regard, the 2012 ZBA Decision stated:

Although Walker Realty relied on the state requirement for space per child as an explanation as to why it exceeds the maximum NFA, Walker Realty also stated that it is providing more space per child and amenities than required by state law [a minimum of thirty-five square ft./child] ...Moreover, the Board also found that applying the NFA limit to this facility significantly advances several of the Town's planning and zoning interests.

The planning and zoning interests that the 2012 ZBA Decision refers to are "traffic safety impact," the "aesthetic appearance of the neighborhood," and the belief that the area surrounding the Amended Project is a "gateway to the residential areas and the Acton Center Historic District."

20. On February 13, 2012, Walker submitted a third site plan (the "2012 Site Plan") and a third request for a zoning determination to Mutch. The 2012 Site Plan depicted the exact same two-

story structure, parking, and drive-way layout as the 2009 Site Plan (all on the Original Parcel); however, the 2012 Site Plan contained the additional Kennedy Parcel to satisfy the FAR violation of the 2009 Site Plan. The proposed structures on the 2012 Site Plan were the main day care center building consisting of 18,460 square feet spread throughout two floors, a shed consisting of 576 square feet, and a building on the Kennedy Parcel consisting of 600 square feet. The 2012 Site Plan depicted a FAR of .096, less than the maximum FAR of .10. The 2012 Site Plan complied with all dimensional requirements in the Bylaw except for the NFA requirement.

21. By letter dated May 2, 2012 (the “2012 Zoning Determination”), Mutch determined that the 2012 Site Plan did not comply with the Bylaw. Mutch determined that the 2012 Site Plan violated the parking and access provisions in the Bylaw for the same reasons as he had initially indicated in the 2009 Zoning Determination (see, supra, Fact 6). Mutch also determined that the 2012 Site Plan did not comply with Section 5.3.9 of the Bylaw relative to NFA. Mutch noted that the NFA of approximately 19,741.89 square feet spread throughout two floors, as shown on the 2012 Site Plan, would not comply with either the NFA requirement of 1,000 square feet (pre-Zoning Amendment) or 2,500 square feet (post-Zoning Amendment). Mutch made no observation relative to FAR. Walker never appealed the 2012 Zoning Determination to the ZBA.

22. The Combined Parcel is abutted on two sides by residential properties, but is also bordered by the intersection of Route 2 and Main Street, a more commercialized area. Adjacent to the property is the Kennedy Nursery. On the opposite side of Main Street from the Amended Project is the Acton Animal Hospital (the “Animal Hospital”), and a little further to the east, the Acton Public Safety Facility (the “Public Safety Facility”).

23. The Commonwealth of Massachusetts requires that a child care facility has thirty-five

square feet per child as a minimum. This would allow seventy-one students at minimum square feet per child to meet the NFA requirement under the Bylaw.¹⁵ The 2009, 2011, and 2012 ZBA Zoning Determinations all found that the Project and Amended Project exceeded the state minimum. Additionally, the Amended Project's building plans call for preschool rooms of 805-820 square feet, toddler rooms of roughly 480 square feet, and infant rooms of about 455 square feet, each of which exceed the state minimum by 15%, 52%, and 86% respectively.

24. The Town testified that the NFA meets certain requirements relating to legitimate municipal concerns. Chiefly amongst those concerns is the Town's interest in preserving the zone's role as the "gateway" to the historic district of the Town. The Town firmly believes that the Amended Project will impair the aesthetic quality of the area if it is allowed to proceed in its current form.

25. Both parties agree that the "gateway" concept is a recognized planning concept. A gateway is essentially a line of demarcation between one zoning area and another. However, each party has a conflicting view about whether or not the area where the Amended Project is located is actually a gateway to the residential community. Walker asserts that the area has a commercial character, while the Town asserts that the area constitutes the line of demarcation between commercial and residential zoning.

26. In an R-2 zoning district, the minimum lot size is 20,000 square feet. The Kennedy Parcel contains 2.25 acres, or 98,010 square feet. The Combined Parcel contains 4.6 acres, or 200,376 square feet.

¹⁵The Amended Project, calling for 252 children, would require an NFA of 9,170 square feet to meet the state-mandated minimum of square feet/child.

27. Two separate traffic studies were conducted by Walker, the first in 2008 and the second in 2014 (“the 2008 study” and “the 2014 study,” respectively).¹⁶ The 2008 study looked at the interchange of Main Street and Route 2, the eastbound and westbound interchanges, respectively. The 2014 study expanded upon the first, but delved deeper into preliminary mitigation efforts. Namely, it detailed the composition of the driveway leading to Kennedy Nursery as a right-in, right-out only driveway to alleviate any traffic concerns.¹⁷

Both studies consisted of manual counts at peak commuter hours at both interchanges, and in the vicinity of the site based on the traffic outlook of other comparable businesses on the Route 2 corridor. The studies showed that two-thirds of the trips to and from the Amended Project will be oriented in a southwest direction, with the remaining one-third of trips oriented to the northeast.

28. A computer model was conducted by Walker as a supplement to each study. Both parties agree that the computer model displays the Amended Project operating at level-of-service (“LOS”) F, which equates to egress delays in excess of fifty seconds.¹⁸ However, disagreement exists between the parties as to whether or not the computer model is an accurate reflection of how the Amended Project will actually operate. Namely, Walker believes that the LOS will operate at a level closer to C. Walker’s traffic expert bases this evidence on empirically collected data for delays for left-turn movements along other locations on Route 27 to evaluate whether the computer model accurately

¹⁶The Town did not conduct its own traffic studies.

¹⁷Both parties agree that Massachusetts Department of Transportation (“DOT”) has jurisdiction over the Kennedy driveway and the southern driveway of the Amended Project, subject to a special permitting process.

¹⁸LOS is a quantified level of delay associated with a particular movement, including left, right, and through movements, *inter alia*. LOS A represents delays between zero and five seconds, and LOS F represents delays greater than fifty seconds. Between each designation is a sliding scale between five and fifty seconds, ranging from A-F.

portrays the traffic conditions along the corridor.

29. Walker has not been asked for, and has not provided any traffic mitigation measures for the Amended Project. Specifically, it has not proposed any separate turning lanes, road widening, or any other improvements on Main Street to accommodate the Amended Project.

30. There are several pre-existing nonconforming commercial structures in the vicinity of the Amended Project (The Animal Hospital, Kennedy Nursery, and the Public Safety Facility). Additionally, there is a large commercial zone, Kelly's Corner, within a quarter mile west of the Amended Project. Kelly's Corner consists of medical offices, restaurants, retail stores, and other commercial establishments.

31. The Combined Parcel is located adjacent to a major thoroughfare, Route 2, and traverses a busy main road, Route 27 (Main Street), which connects the center of Acton to Route 2. Thus, the Combined Parcel (and the building, if built) is clearly visible from both Route 2 and Route 27. To access the Amended Project from Route 2 eastbound, a driver must use the exit ramp that feeds directly onto Route 27 and immediately turn left into the parking lot. To access it from Route 2 westbound, a driver must use the exit ramp, turn left onto Route 27, and then turn left into the parking lot.

Plaintiff has chosen to litigate the 2012 ZBA Decision relative to the 2011 Site Plan. The main issue in the case at bar is whether the NFA of 2,500 square feet is reasonable under the Dover Amendment as it relates to safety and aesthetics. However, there are several other issues that Plaintiff argues.

First, Plaintiff proposes that Defendants should be judicially estopped from preventing

Plaintiff from building the Amended Project because they have purportedly contradicted themselves by modifying the Bylaw during the procession of this instant case.

Plaintiff additionally advances the notion that the vicinity surrounding the Amended Project does not act as a “gateway” to the historic town center and residential areas, in conflict with Defendants assertions that it does. Defendants also believe that the aesthetics of the area will be adversely affected, since the Amended Project does not conform to the size or style of the houses in the vicinity.

Moreover, Plaintiff suggests to the court that no dire traffic ramifications will be exacerbated as a proximate result of the construction of the Amended Project. On the contrary, Defendants maintain the position that the Amended Project will provoke many adverse traffic consequences such as increased driver frustration and excess traffic build-ups on the Route 2 ramps.

Finally, Plaintiff argues that the NFA is a uniformity issue because child care facility use is the only R-2 use limited by NFA under the Bylaw. Defendants argue that there is no uniformity issue. I shall examine each issue in turn.

I. Judicial Estoppel

Walker proposes a theory of law, “judicial estoppel,” that purports to preclude the Town from modifying its Bylaw. Namely, Walker is under the impression that the Town has essentially contradicted itself by shifting the NFA limitation from 1,000 square feet to 2,500 square feet during the procession of the instant case. Walker goes so far as to say that the Town did so with the intention of “obtaining [an] unfair advantage in a forum provided for suitors seeking justice.”

Judicial estoppel, or “preclusion of inconsistent positions,” Fay v. Fed. Nat’l Mortg. Ass’n, 419 Mass. 782, 787 (1995), is an equitable doctrine that “precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding.” Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998). It is applied in cases when “intentional self-contradiction is being used as a means of obtaining an unfair advantage in a forum provided for suitors seeking justice.” Patriot Cinemas v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. Mass. 1987).

Walker contends that the Town’s behavior is reflective of the type of self-contradiction that judicial estoppel seeks to preclude. However, whether or not the NFA limitation is 1,000 or 2,500 square feet is immaterial. Even with the increase of 1,500 square feet, the Amended Project still exceeds the maximum NFA nearly eightfold. Notwithstanding the fact that Walker has satisfied the FAR requirement per the Town’s request, it remains in non-compliance with the NFA. Walker alleges that the Town has been “inconsistent” in its application of the Bylaw because it shifted the maximum NFA requirement from 1,000 square feet to 2,500 square feet and still maintains that the Amended Project is not in compliance with the dimensional requirements even though Walker has conformed to the FAR requirement.

Walker is primarily troubled by the fact that the square footage of the Amended Project is nearly double that of the Project and still does not comply with the Bylaw. However, the increase in area from 2.5 acres to 4.7 acres does not change the reasonableness of the NFA limitation as Walker suggests it should. The purchase of an additional 2.2 acres was Walker’s attempt at conforming to the FAR requirement. But they are still in non-compliance with the NFA limitation.

Thus, Walker's insistence that the Town has been contradictory in its application of the Bylaw is inapplicable to the case at bar, and I find that the Town should not be judicially estopped from claiming that the NFA is reasonable.

II. Reasonableness of the NFA

It is a firmly established practice in the law of zoning that each and every case is to be evaluated on a "case-by-case" basis due to their intensive facts. Trustees of Tufts College v. City of Medford, 415 Mass. 753, 759-760 (1993). This case is no anomaly; and it becomes imperative to look closely at the Dover Amendment under G. L. c. 40A, § 3 in order to make a just determination insofar as it pertains to the parties.

G. L. c. 40A, § 3. States as follows:

No zoning . . . bylaw . . . 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 [G.L. c. 15D, § 1A].

The Bylaw states that a child care facility is a use as of right in an R-2 zone, where the Amended Project is located, and thus such use cannot be denied. Consequently, no special permit is required to build a childcare center regardless of whether the property is situated in a residentially zoned area. Notwithstanding this lax requirement found within § 3, construction of childcare centers are subject to, *inter alia*, reasonable regulations concerning bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking, and building coverage requirements.

NFA is the total square footage of all floor areas of a building including basement and other storage areas, but not including stairways, elevator wells, rest rooms, common hallways and building service areas. The purpose of the NFA in the Bylaw is not made explicit, nor is the rationale behind the NFA limit. The Bylaw allows an NFA of 2,500 square feet, an increase of 1,500 square feet from the initial limit of 1,000 square feet. The Amended Project has an NFA of 19,460 square feet. The issue, then, is whether the Bylaw NFA of 2,500 square feet is reasonable, and the burden of proof in that regard is on Walker. It has generally been held that the intent of the statute defining reasonableness is “to strike a balance between preventing local discrimination against a . . . use and honoring legitimate municipal concerns that typically find expression in local zoning laws.” Tufts, 415 Mass. at 757.

The Combined Parcel contains roughly 200,000 square feet, which is ten times the minimum lot size. The Amended Project has no problem meeting the lot coverage area or the FAR requirement. Walker argues that the NFA is unreasonable based on the size of the lot, and the ZBA argues that the NFA is not based on the size of the lot. Both parties cite Rogers v. Town of Norfolk, 432 Mass. 374 (2000), a case with the same legal issue as the case at bar, i.e. whether a NFA of 2,500 sq. ft. was reasonable as applied to a child care facility under the Dover Amendment. Rogers states,

The proper test for determining whether the provision in issue contradicts the purpose of G.L. c. 40A, § 3, third par., is to ask whether the footprint restriction furthers a legitimate municipal interest, and its application rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of child care facilities in the town, and so is unreasonable. The provision is facially valid under this test. The judge properly concluded, on the only evidence before him, that the purpose of the provision was to ensure that the size of child care facilities did not detract from Norfolk’s predominantly residential character by inserting in residential zones particularly large structures. As

both parties acknowledge, preservation of the residential character of neighborhoods is a legitimate municipal purpose to be achieved by local zoning control.

The Town has three primary rationales behind the invocation of a 2,500 square foot NFA limitation. First, they believe that the aesthetic character of the neighborhood adjacent to the Amended Project will be adversely affected. In the 2012 ZBA Decision, the ZBA cites Rogers and states that the aesthetic appearance of the neighborhood will be affected in a manner that the Bylaw was intended to discourage.

Second, they are convinced that the area where the Amended Project is located is a “gateway” to the town’s historic center (located over a half mile from the Amended Project), and that applying the NFA limit will preserve the character of the area as a “gateway.”

Last, they are under the impression that heavy traffic will result if the Amended Project is constructed.

Each of these three concerns are rooted in the belief that imposing an NFA limitation will act as an alleviation measure. In regard to aesthetics, the NFA will prevent Walker from building what the Town believes to be an obtrusive structure in a residential area. As it pertains to the gateway, imposing the NFA limit will disallow Walker from creating a structure that will adversely affect the gateway between commercial and residential zones. Finally, as it relates to traffic, the NFA limit will allow the Town to maintain a reasonable flux of traffic during peak hours.

Although the Supreme Judicial Court (“SJC”) in Rogers found that the Bylaw provision relating to the NFA was facially valid, because it was intended to protect a legitimate municipal interest, i.e. preservation of the residential character of neighborhoods, in the case at bar we must

look to the residential character of the particular neighborhood surrounding the Amended Project. There is a difference between Acton and Norfolk. Whereas the evidence in Rogers showed that Norfolk was 95% residential, the evidence in the case at bar shows that the Amended Project, though in a residential neighborhood, is surrounded by commercial structures and areas nearby, including Kelly's Corner, the Animal Hospital, and the Public Safety Facility. The Town maintains the stance that these structures are more reminiscent of the adjacent residential structures, and thus, the purpose of the NFA is to disallow commercial structures from being constructed that do not conform to the character of the area.

Notwithstanding the fact that the SJC found the bylaw facially valid in Rogers, it also found that the NFA provision was unreasonable as applied to the plaintiff's property. The SJC ultimately held that the cost of compliance with the bylaw would create an undue burden and significantly impede the use of the premises as a childcare facility, while not substantially advancing a valid goal of Norfolk's zoning regulation. *Id.* at 385.

On its face, the presence of the commercial structures in the immediate area of the Amended Project strengthen Walker's argument that the Amended Project is a suitable use—and surely it is, so long as it complies with the reasonable regulations prescribed by the Bylaw. As was discussed, *supra*, the Dover Amendment expressly allows for reasonable regulations of bulk and height. G. L. c. 40A, § 3.

In the case at bar, the Amended Project is in a residential area that conforms to the styles and character of the area. Although the building itself may not completely resemble the adjacent residential structures, the Amended Project is a building that will not be displeasing to the eye considering the commercial character that the area already possesses. The Amended Project is

next to a Route 2 corridor. Kelly's Corner houses grocery stores, retail stores, and restaurants just a quarter of a mile west of the Amended Project. Also of note is the fact that the Combined Parcel is, for lack of a better word, enormous. At over 200,000 square feet, the Amended Project itself will be a fraction of the entire area of the Combined Parcel. As is such, the opportunities for landscaping of the area are boundless—and in doing so, Walker will be able to mitigate some of the aesthetic concerns that the town raises, *infra*.

It is also certain that the owners of NGCC would be unable to operate an economically viable childcare center if they are to keep within the NFA. The primary distinction between the owners in Rogers and the owners of NGCC is that the NGCC owners have a tried and true method on which they base each one of their childcare centers. They have an exemplary reputation within the daycare community and promise to uphold that reputation with the eventual construction of the Amended Project. If they are to conform to the 2,500 square foot limitation that the Town has imposed, they will simply be unable to operate a profitable childcare center. Testimony from Kelleher revealed that, of all of her schools, her smallest one, which includes children of all ages, is 12,000 square feet.¹⁹ She acknowledged that all of her daycare centers operate above the minimum square footage of thirty-five square feet per child, per classroom, so as to accommodate for the distinct needs of each child. For example, infants are cared for in a crib room and older students in separate rooms. This is done in order to separate particular age groups so that the children are meshing with other children of their own age. In addition, while

¹⁹The school in Natick is 12,000 square feet, and is a pre-existing structure. All other NGCC buildings are new developments. In Westford, there are two schools—one 7,000 square feet, and one 12,000 square feet—but the 7,000 square foot building caters only to infants and toddlers.

crib rooms are not required by law, Kelleher believes that they are important to preserve safety and a comfortable environment for younger children.

Of considerable importance in the case at bar is the notion that the thirty-five square feet per child is a state *minimum*, not a state suggestion, of adequate size. Based upon the size of the Combined Parcel and the projected number of children, the state minimum would allow a building size of 9,170 square feet. As Kelleher notes, it is paramount that children in her schooling system receive spacial amenities that transcend the state minimum so that each child's needs are seamlessly accommodated.

At this time, it is inappropriate for this court to set a specific threshold for what constitutes a "reasonable regulation" as it pertains to the Bylaw's NFA without a remand. The Amended Project has complied with all other dimensional requirements after the ZBA found them unreasonable, such as FAR, parking area and driveway requirements, and open space requirements. It will be helpful, however, to proceed with discussion of the three interests (character of the neighborhood, gateway, and traffic) that the Town raises relative to a NFA limitation.

A. Character of the Neighborhood

Under Rogers, character of a neighborhood is a ZBA stated municipal interest. *Id.* at 378. This is evident throughout the Bylaw in various sections, where the character of the neighborhood is oft mentioned as a zoning concern.

In Petrucci v. Board of Appeals, 45 Mass. App. Ct. 818, 822 (1998), the plaintiff sought to convert her two story barn into a childcare center, but due to the 2,500 square foot NFA limit, she could not do so without relocating the barn or making some other structural modification that

would result in a significant financial burden. The Appeals Court ultimately ruled in her favor, stating that the financial burden on the plaintiff outweighed the proposed modifications. *Id.* at 827.

As is evinced by the Petrucci ruling, maintaining the look of the neighborhood is a legitimate town interest. Safety, aesthetics, and privacy would all be negatively affected by the conversion of Petrucci's barn. However, in the present case, the Town has failed to demonstrate that safety and aesthetics will be pejoratively influenced if the Amended Project is constructed.

Walker contends that the character of the area where the Combined Parcel is located bears more resemblance to that of a commercial area, while the Town points out that the pre-existing commercial structures in the area, the Kennedy Nursery, the Public Safety Facility, and the Animal Hospital, resemble houses, have very little visual impact on the area, and pose no traffic concerns during peak hours. In addition, in its 2012 ZBA Decision, the ZBA concluded that the aesthetic appearance would be adversely affected because the Amended Project would resemble a large office building, despite the fact that the Amended Project is a single-story building.

As the Town rightly indicates, Walker has the burden to prove that the Bylaw does not have a rational relationship to the Town's perceived concerns. It has met that burden.

The SJC has previously stated that "the [Dover Amendment] focuses on the fact that child care facilities are commercial enterprises, and thereby have a greater potential than residential uses to disrupt, or detract from, the town's tranquility." Rogers, 432 Mass. at 380. However, it is unequivocal that the mission of a childcare is a noble and necessary cause for the furtherance of the education of today's youth—the very reason that the Dover Amendment exists. This is

evidenced by the fact that the Town even admitted that the NFA limitation was too low in the 2009 ZBA Decision. In addition, NGCC has a very good reputation within the childcare community, and seeks to further that reputation after construction of the Amended Project.

Furthermore, a childcare center is an “of right” building in residential areas. The Town cannot deny the construction of the Amended Project, only subject it to reasonable conditions. Although the Bylaw raises issues with the Amended Project being built in its currently proposed state, a childcare center remains a permissible use under the Dover Amendment regardless of the zoning configuration. Additionally, because Walker has gone to great lengths to attempt to remedy the Town’s concerns by expanding the original lot into a much larger Combined Parcel, they have indicated that they want to make efforts to mitigate any possible disturbances that the Amended Project may provoke. Walker shall continue to propose and go forward with mitigation efforts such as screening in order to address the Town’s aesthetic concerns. Additionally, Walker should consider decreasing the size of the building pursuant to the guidelines set forth, *infra*, in the conclusion.

As a result of the foregoing, it appears that the character of the neighborhood directly adjacent to the Amended Project is more reminiscent of a mixed commercial area rather than a residential area—a more than appropriate venue for the construction of a childcare center.

B. Gateway

Of chief concern to the Town is the preservation of this particular zoning district as a “gateway” to the historic town center. Though the historic center of Acton is a half mile from the proposed building site, the Town is under the impression that the erection of the Amended Project in its currently planned state will tarnish the residential complexion of the area. Whereas

the Kennedy Nursery and the Animal Hospital conform to the Town's conception of a building suitable for the area, they are staunch in their conviction that a roughly 20,000 square foot daycare center will adversely affect their vision of a gateway to the historic town center. To substantiate their point, they have indicated in the 2012 ZBA Decision that applying the NFA limit to the facility preserves the character of Main Street as the gateway to the residential areas and the historic town center.

The Town has not sufficiently demonstrated that the location of the Amended Project is a gateway to the residential areas of Acton because they have failed to distinguish between a traditionally residential area and a residentially zoned area with a commercial character. The Town wrongfully assumes that the building of a non-complying childcare center will "obliterate the demarcation" of the residential and commercial areas alongside Route 2. In reality, the Amended Project is already located in an area that resembles a commercial zone, and as a single-story building, it will not make the area look any more commercial than it already is. The Kennedy Nursery, Animal Hospital, and Public Safety Facility are pre-existing, non-conforming uses that have been located in the area for many years. Moreover, the commercial Route 2 exit ramp leads directly to the Amended Project. Even though the Town has found the existence of the structures in the area to be appropriate, they are nevertheless commercial uses that attest to the fact that the zone is commercial as well as residential.

In regard to the gateway issue, it is unnecessary to make a determination, because there is no explicitly defined area here. Depending on which direction a person drives from, it can be regarded as a gateway to a commercial or a residential zone.

C. Traffic Issue

In addition to the aesthetic concerns that the Town holds, the Town is also troubled by the excess traffic build-up that the Amended Project will create during peak rush hour. The ZBA is primarily concerned with the driver frustration and risky driving that may result if the Amended Project is constructed as proposed. The 2,500 square foot NFA limit is their effort to counter such issues from manifesting.

Citing Rogers, the Town asserts that “a child care facility of larger dimensions will likely generate more traffic and create more noise, all of which may have greater impact on a town composed mainly of single-family homes.” Rogers, 472 Mass. at 380. In contrast to Rogers, the town in the present case, Acton, is not of the same residential make-up as Norfolk, which is comprised of 95% residential housing. Acton, on the contrary, has a much greater concentration of commercial area due to its relative proximity to the Route 2 corridor, a major highway that runs from the Berkshires to Boston. Both parties agree that the computer model of the traffic study displays the Amended Project operating at LOS F, which equates to delays in ingress/egress in excess of fifty seconds. As mentioned above, LOS is a quantified level of delay associated with a particular movement, including left, right, and through movements, *inter alia*. Notwithstanding the agreement between the parties, Walker believes that the computer model over-exaggerates, and that in reality, the location would operate at LOS C during the hours of 7-10 AM and 3-6 PM (“peak hours”), which is a delay of roughly twenty seconds.

While the degree of traffic is unknown in actuality because the LOS measurement is based upon a computer model, Walker’s expert opines that the measured results in both the 2008 study for the eastbound ramp and the 2014 study for the westbound ramp indicate that the actual delays fall below the estimate in the computer model. He bases this evidence on empirically

collected data for delays for left-turn movements among other locations on Route 27 to evaluate whether the model accurately portrays the traffic conditions along the corridor. In this regard, Walker's expert understands the computer model to be less accurate than the existing conditions at adjacent, comparable buildings on Route 27 and Route 2—the likes of which includes retail stores and restaurants. In his opinion, the NGCC driveways will never operate at a LOS greater than C, even during peak hours.

In its 2012 ZBA Decision, the ZBA found that, given the Amended Project's close proximity to the Public Safety Building entrance, safety may be adversely impacted in the area. Meanwhile, with Walker's computer model as evidence, the Town's expert was firm in his belief that drivers taking left-turns both into and out of the main driveway will have to wait up to sixty-three seconds before being able to turn successfully, which would constitute LOS F. He also noted that Walker has not provided any traffic mitigation measures for the Amended Project. Specifically, Walker has not proposed any separate turning lanes, road widening, or any other improvements on the main road to accommodate the facility. However, there is no evidence that would suggest that Walker was even told of the necessity to provide traffic mitigation efforts. Moreover, the Town did not conduct their own traffic study—something that may have helped the Town to ascertain the most accurate insight into this traffic issue—but only critiqued Walker's.

Although it is impossible to anticipate what the traffic situation will look like without the Amended Project actually being erected, I have not heard enough testimony to indicate that a significant traffic problem will exist if mitigation efforts are proposed. A more thorough proposal for traffic alleviation is necessary before any more work is conducted by Walker, but the traffic issue does not ultimately preclude Walker from construction the Amended Project because the

Dover Amendment disallows the Town from forbidding the construction of a childcare center subject to reasonable regulations.

In regard to mitigation efforts, the Town shall confer with Walker about their proposals in relation to traffic matters within their control. DOT has jurisdiction over both the Kennedy driveway and the southern driveway leading to the Amended Project. However, there are ample suggestions that the Town can present to Walker about how to dispose of some of the lingering traffic concerns—road widening, separate turning lanes, police presence during peak hours, and/or the addition of a traffic signal are just a few to name. Certainly, some of these measures may be subject to DOT approval, so it is imperative to do further research before engaging in any affirmative steps. Thus, the parties shall consult among themselves to determine what appropriate steps shall be taken to mitigate any traffic ramifications that may result after the construction of the Amended Project.

III. Uniformity issue

Both parties agreed at the beginning of the trial that the uniformity issue has been disposed of, and thus I will not make a ruling on it.

Conclusion

It is axiomatic that the Dover Amendment allows for the construction of childcare centers in residential zones. Thus, as it applies to this case, 2,500 square feet is unreasonable as it pertains to the Amended Project specifically, considering the character of the area and its relative location to a major commercial area. Based upon the large size of the Combined Parcel, it would be prudent for the Town to consider a NFA comparable to Walker's smaller schools (12,000 sq. ft.). The basis for this recommendation derives from the information presented to this court in

regard to other NGCC schools in operation in other towns. No NGCC building, sans an infant-only school, is under 12,000 square feet. Each of these operations were looked favorably upon by their respective town zoning boards, and all of them exceed the state minimum of thirty-five square feet per child. With such an immense lot size, the Combined Parcel could easily house a building of at least 9,170 square feet (the state minimum). It would be inappropriate to limit Walker to this standard given the NGCC mission of giving children adequate space.

Furthermore, the Town has unsuccessfully swayed this court as to their arguments about the character of the neighborhood and the traffic issues that may arise. They have failed to prove that the area where the Amended Project is being constructed is a “gateway” to the residential area of Acton. Unlike Norfolk in Rogers, Acton is not comprised of 95% residential zoning. In addition, as mentioned prior, the Amended Project is located in an area (the intersection of Route 2 and Main Street) that has been traditionally commercialized notwithstanding its current zoning configuration.

As it relates to the traffic issue, the Town’s study is inconclusive as to the effects that traffic will have in the area surrounding the Amended Project. Although they have produced a computer model that purports to show that the area will operate at LOS F, Walker’s expert uses concrete data from other businesses on the corridor that it will operate at LOS C. This, together with mitigation measures, does not appear to be a substantial enough issue for the Town to prevent an “of right” daycare from being erected in a residential zone.

Because a childcare center is a protected Dover Amendment use subject to reasonable regulations (ie. traffic mitigation, screening), the Town cannot deny the construction of the

Amended Project. Thus, I will remand this matter to the ZBA to have further discussions with Walker about what will be a more appropriately sized building.

I remand this case to the ZBA for further discussion between the parties about an appropriate NFA limitation, taking mitigation matters into account. I shall retain jurisdiction of this matter pending the remand process.

The parties shall inform the court of the date of the ZBA remand hearing and the date of the ZBA decision.

Judgment shall issue after a resolution of the remand.



Alexander H. Sands, III

Justice

Dated: November 25, 2014