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March 27, 2015

BY FAX and MAIL

Jennifer Masello
Session Clerk to the Honorable Alexander H. Sands, III
Land Court
Three Pemberton Square, Room 507
Boston, MA 02108

Re: Walker Realty, LLC v. Town of Acton, et al. - 12 MISC 459564 (AHS)

Dear Ms. Masello

Enclosed please find Walker Realty, LLC's Response to the Town of Acton Zoning Board's Post-Remand Decision and all supporting documentation.

Thank you,

Very truly yours,

JOHNSON & BORENSTEIN, LLC


Kathleen M. Heyer

KMH~klb

cc: Nina Pickering-Cook, Esq. *(by email)*
Arthur Kreiger, Esq. *(by email)*

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

MIDDLESEX, ss.

Case No. 12 MISC 459564 (AHS)

WALKER REALTY, LLC,)
)
Plaintiff,)
v.)
)
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)

PLAINTIFF’S RESPONSE TO DEFENDANTS’ POST-REMAND DECISION

NOW COMES Plaintiff, Walker Realty, LLC (“Walker”), and, in accordance with this Court’s Post-Hearing Order dated March 20, 2015, hereby states as follows in response to the Town of Acton Board of Appeals’ March 19, 2015 Post-Remand Decision.

Facts

By its November 25, 2014 decision (“Decision”), this Court concluded:

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 [as shown in the December 2, 2011 site plan which was the subject of the trial in this matter] specifically, considering the character of the area and its relative location to a major commercial area. Based on 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 . . . 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 . . . Because a childcare center is a protected Dover Amendment use

subject to reasonable regulations (ie. [sic] 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 matter to the ZBA for further discussion between the parties about an appropriate NFA limitation, taking mitigation matters into account.

In compliance with the Decision, Walker submitted a revised site plan to the Defendant Zoning Board of Appeals of the Town of Acton (“Board”). By cover letter dated January 20, 2015, Walker provided the Board with copies of the December 2, 2011 site plan which was the subject of this litigation (the “Site Plan”) and a revised site plan dated January 13, 2015 (the “Revised Site Plan”). See **Exhibit 1** attached hereto. In accordance with the Court’s statement that “Walker should consider decreasing the size of the building pursuant to the guidelines set forth . . . in the conclusion,” Walker did look into reducing the size of the building. After consideration, Walker concluded that it cannot reduce the square footage of the proposed NGCC without rendering the project nonviable. However, the Revised Site Plan proposed traffic improvements in the form of a turning lane and additional screening around the property in the form of trees and shrubs, in an attempt to mitigate some of the Board’s concerns with the project. The Revised Site Plan also slightly altered the open space area by incorporating a playground on the westerly side of the building, and included a small proposed shed at the rear of the property for the storage of toys and other outdoor equipment.

The Board opened the properly-noticed hearing to consider the judge’s directions on remand on March 2, 2015. The Board included one individual who was on the Board at the time of the original application, and two members who had not participated in any of the earlier hearings with respect to the Walker property. The majority of the discussion at the hearing focused on the size of the project, which has not been reduced in the Revised Site Plan for the many reasons which Donna Kelleher testified to at the trial of this matter and which this Court

recognized in its decision. The hearing was continued to March 9, 2015 to give the Town's traffic expert an opportunity to provide his opinion, and for further discussion.

Prior to the March 9, 2015 continuation of the hearing Walker provided the Board with a letter further detailing the reasons behind the proposed NFA and the reasons why Next Generation Children's Centers cannot operate in a smaller building. See **Exhibit 2** attached hereto. Walker also provided the Board with a letter from Walker's transportation expert, Robert Michaud of MDM Transportation Consultants, Inc., in support of the addition of the turning lane as mitigation for the traffic concerns raised by the Board at the trial of this matter. See **Exhibit 3** attached hereto.

At the March 9, 2015 continued hearing, Walker provided the Board with a copy of Donna Kelleher's trial testimony as to the reasons for the requested size. See **Exhibit 4** attached hereto. The Board's transportation expert, Robert Nagi of Vanasse Hangen Brustlin, Inc., appeared to give his opinion of the Revised Site Plan and answer the Board's questions. Mr. Nagi was supportive of the addition of the turning lane as mitigation. The Board closed the public hearing and began deliberations. At least one of the Board members explicitly disregarded this Court's factual findings as to the location, traffic impact, and character of the neighborhood and stated that the Court's decision is "wrong." The Board's voted on the following items:

1. Does the Board accept the Remand Plan as currently proposed with a 19,460 sq. ft. building, proposed traffic mitigation and additional landscape buffering? Vote: 3-0 opposed
2. Is the Board willing to waive the Open Space requirement of 35% for the increased playground area shown on the Remand Plan? Vote: 3-0 in favor.
3. Is the Board willing to waive the Open Space requirement of 35% for the new shed shown on the Remand Plan? Vote: 3-0 opposed
4. Would the Board be willing to waive the net floor area maximum of 2,500 sq. ft. if Walker were to propose a 12,500 sq. ft. child care facility on the Property, with the traffic and landscaping mitigation shown on the Remand Plan? Vote: 2-1 in favor

5. Would the Board be willing to waive the net floor area maximum of 2,500 sq. ft. if Walker were to propose a 5,000 sq. ft. child care facility on the Property, with the traffic and landscaping mitigation shown on the Remand Plan? Vote: 3-0 in favor

6. Would the Board vote to approve any child care facility on the Property of 5,000 sq. ft. or more without the traffic and landscaping mitigation shown on the Remand Plan? Vote: 3-0 opposed.

The parties return so that the Court may enter final judgment in this matter.

Discussion

This Court is aware that the proposed NGCC childcare center has been pending for many years now. The December 2, 2011 Site Plan was proposed after the Board determined a 1,000 square foot NFA limit was unreasonable as applied to an earlier site plan (on a smaller parcel of land), but found the floor-to-area ratio (“FAR”) of .1 was reasonable. Essentially, the Board made an earlier determination that a childcare facility of the size currently proposed was acceptable in the proposed location, provided that the FAR was met. Walker purchased the additional land (the Kennedy Parcel) to comply with the FAR and resubmitted a plan showing the proposed NGCC childcare facility on a lot that was now approximately twice as large, thereby meeting the .1 FAR requirement. However, the NFA limit by that time had been increased to 2,500, and the Board found it reasonable to apply the increased NFA limit to the Site Plan, preventing development of the NGCC childcare center and triggering this appeal by Walker. With respect to the Site Plan, the subject of last May’s three-day trial and this Court’s Decision, Walker has requested a “determination as to the validity of a municipal ordinance, by-law or regulation, passed or adopted under the provisions of chapter forty A . . . ,” G.L. c. 240, § 14A, with respect to the 2,500 square foot NFA limit imposed on the proposed NGCC childcare center by the Town’s Zoning Bylaw, and appealed the Board’s decision to uphold the Zoning Enforcement Officer’s determination at the 2,500 square foot NFA was reasonable as applied to the proposed NGCC childcare facility. G.L. c. 40A, § 17.

I. The Remand Decision

The Court's Decision found that the 2,500 square foot NFA limit was unreasonable as applied to the Site Plan. The Decision went on to suggest that Walker consider reducing the square footage of the proposed NGCC childcare center after discussion with the Town as to what would be a "more appropriately sized building" and "an appropriate NFA limitation, taking mitigation matters into account." Walker did consider whether it would be possible to operate a NGCC childcare facility on the Property at a smaller size, in accordance with the Court's suggestion. Walker also considered whether it was possible to incorporate traffic and screening mitigation to attempt to ameliorate some of the Board's concerns with regard to the size of the proposed NGCC childcare facility. After consideration, Walker reached the conclusion that it was not feasible to reduce the square footage of the proposed childcare center in any appreciable amount. As the trial testimony demonstrated, NGCC has a business model which it has developed through an iterative process based on its experience operating multiple childcare centers for several decades. The size of the proposed NGCC childcare facility in Acton is in keeping (and in fact smaller) than the current NGCC prototype, which has been the model for the most recently-constructed NGCC facilities. For all the reasons set out by Mrs. Kelleher at trial, and explained to the Board again at the remand hearing, NGCC simply cannot reduce the square footage of the proposed facility.

However, Walker did propose screening and traffic mitigation in the Revised Site Plan submitted to the Board in anticipation of the remand hearing. Specifically, Walker proposed the addition of a turning lane in front of the Property to permit traffic turning left into the Property from Route 27 to do so in a more orderly manner, and proposed the addition of a number of trees and shrubs to screen the building from the neighbors and the street.

The Court's decision accurately reflected the testimony by the traffic experts at trial. The Court, having taken a view of the subject property, and after three days of trial, was well-informed as to the location and surrounding area of the property. Both traffic experts agree that the addition of a turning lane is an improvement. The Board approved of the addition of a turning lane. The remainder of the delay concerns applies only to traffic on the Property, as noted by the Town's traffic expert at the remand hearing. The Court stated in its Decision that the traffic concerns raised by the Town are not sufficient to deny Walker the right to construct the childcare center on the subject property.

The landscape buffering shown on the Revised Site Plan incorporates more detail than is required under the Zoning Bylaw. It was more than adequate for the Board to determine whether the proposed screening, which was to be installed in accordance with the Zoning Bylaw's rather vague requirements, mitigates their concerns. *See* Acton Zoning Bylaw § 6.7.8 ("At least one shrub per thirty (30) square feet and one shade tree per two hundred (200) square feet of landscaped area shall be provided . . . Shade trees shall be of a species tolerant to the climatic conditions of Acton and of parking area conditions . . . Shrubs shall be a mix of deciduous and evergreen varieties, tolerant to the climatic conditions of Acton, and be at least eighteen (18) inches in height at time of planting."). At the remand hearing the Board seemed unaware that the Revised Site Plan showing the landscape buffering contained detail in excess of that required under the Zoning Bylaw.

The Board failed to propose an appreciably-larger NFA limit. On remand, the Board was required to review the decision according to the standard provided by the Court. Silva v. Conner, 17 LCR 427, 428 (2009) (internal quotations and citations omitted). The Board neglected to do so here; rather, the Board specifically found that the Court's factual conclusions

were incorrect and proceeded with an analysis based on the Board's unsupported opinions, not the Court's findings. "Although 40A, § 17 contemplates a high degree of deference to the ZBA, no deference is necessary where the issues are questions of law on facts found by a judge." Fitchburg Housing Auth. v. Bd. of Zoning Appeals of Fitchburg, 380 Mass. 869, 871 (1980). At the remand hearing, the Board voted 2-1 that it would approve a hypothetical 12,500 square foot NFA childcare center on the Property if proposed. The Board voted 3-0 that it would approve a hypothetical 5,000 square foot NFA childcare center on the Property if proposed. Since the Board is a three-member board, unanimity is required to approve any proposed items. *See* G.L. c. 40A, §§ 15 ("The concurring vote of all members of the board of appeals consisting of three members . . . shall be necessary to reverse any order or decision of any administrative official under this chapter or to effect any variance in the application of any ordinance or by-law.").

It is illogical and unreasonable to suggest, as the Town does, that a simple majority vote on remand is sufficient to bind the Board – the same standard that applied to the first hearing on Walker's proposal would apply to the second hearing on the Revised Site Plan. To hold otherwise would gut the protections of the Zoning Act and provide an opportunity for an end run around a valid disapproval which was the result of a simple majority vote by requesting a remand after appeal. Moreover, all sections of the Zoning Act which discuss voting procedure by a Board of Appeals direct that the vote of a three-member board must be unanimous. *See, e.g.*, G.L. c. 40A, §§ 9, 9A, 13, 15, and 16. Therefore, the Court must conclude that the Board determined only that a building of 5,000 square feet NFA is appropriate for the site.

Furthermore, the Board made no findings on remand to support their determination of a reasonable limitation on a childcare facility, a Dover Amendment use, on the Property, whether 5,000, 12,500 or, 19,460 square feet. The Decision overruled many of the Board's stated

reasons, including the traffic concerns, for imposing a 2,500 square foot NFA limit on the proposed NGCC childcare center. Nonetheless, the Board based their denial of the proposed NGCC childcare center, with the proposed mitigation measures, on their personal experience with traffic, as well as testimony of an area business owner. There are no findings in the remand decision which supports the Board's conclusion that 5,000 square feet is an appropriate NFA limit. The 5,000 square feet proposal is a random number, unrelated to NGCC's business model, or the information presented at trial, and does not present a valuable contribution to the discussion the Court directed Walker and the Town to have.

II. The Court Should Now Issue Judgment In this Matter

The Court should now issue judgment in this matter consistent with the conclusions of the Court as set out in the Decision. The sole issue before the Court at the trial, and still before the Court by virtue of its retaining jurisdiction over the matter, is whether the NFA of 2,500 square feet is unreasonable as applied to the Original Plan. This Court has already determined that an NFA limit of 2,500 square feet is unreasonable as applied. Decision, pg. 28 ("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."). The Court has limited options in ruling on a G.L. c. 40A, § 17 appeal and a c. 240, § 14A request for a determination. In Pendergast v. Board of Appeals, 331 Mass. 555, 558 (1954), the Court stated:

The statute first quoted is undoubtedly a peculiar one. The court is to "hear all pertinent evidence and determine the facts," and it is to act "upon the facts as so determined." This involves a hearing de novo and a finding of the facts by the court. This is not one of the familiar instances where the court is required to accept to a greater or less extent the findings of the administrative tribunal. But what is the court to do when it has found the facts? First, it is to "annul" the decision of the board, "if found to exceed the authority of such board." This is nothing more than the application of the law to the facts found and is within the

usual functions of a court. Next come the words which have been productive of misunderstanding, "or make such other decree as justice and equity may require." We do not construe these words as opening up to the court the whole area of administrative discretion, contrary to all precedent. We construe them as requiring a decree according to law. Here again we think the court is simply to apply the law to the facts found.

The options under G.L. c. 240, § 14A are similarly limited. Therefore, the Court has two options in issuing its final judgment in a Dover Amendment case: annul the decision of the Board and remand for further proceedings consistent with the judgment, *see, e.g.,* Rogers v. Town of Norfolk, 432 Mass. 374 (2000); Gardner-Athol Area Mental Health Asso. v. Zoning Bd. of Appeals, 401 Mass. 12 (1987); County Comm'rs of Bristol v. Conservation Com. of Dartmouth, 380 Mass. 706 (1980); Petrucci v. Board of Appeals, 45 Mass. App. Ct. 818 (1998); Bible Speaks v. Board of Appeals, 8 Mass. App. Ct. 19 (1979); Bay Farm Montessori Acad., Inc. v. Town of Duxbury, 16 LCR 299, 299 (2008); Campbell v. Town of Weymouth, 6 LCR 276 (1998); Cartwright v. Town of Braintree, 5 LCR 238, 238 (1997), or affirm the decision of the Board. *See, e.g.,* Martin v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 434 Mass. 141 (2001); Sawhney v. Seegel, 11 LCR 352, 352 (2003). The Court may not require Walker to alter or amend his proposal. *Cf.* Strand v. Planning Bd. of Sudbury, 5 Mass. App. Ct. 18, 22-23 (1977) (“[T]he judge's authority under [c. 40A, § 17], to fashion judgments that will do justice and equity is very limited. That section does not give him the power to order modifications of a plan as conditions of his approval of the plan.”). Walker submitted the Revised Site Plan to the Board in a good faith effort to comply with this Court’s decision, proposing a turning lane and screening for discussion which Walker believes is sufficient to address the Town’s traffic and aesthetic concerns as to the size of the building. The Town’s sole contribution to the discussion was to vote,

based on the same factual findings rejected by this Court's Decision, that an NFA of 5,000 square feet is reasonable. Despite the attempt to reach a settlement over the Revised Site Plan, the only plan that the Court may enter judgment on is the December 2, 2011 Site Plan which was the subject of the trial in this matter. Walker appreciates the Court's good intentions in suggesting that the parties attempt to settle the matter; however, having already litigated this matter for over two years, through the entirety of a trial, and with confidence that its proposal is appropriate both for the Property and for Acton, the time for settlement is well past.

While the Court may recommend an appropriate NFA limit for the Town to adopt through the proper procedure for amending the Zoning Bylaw, the application of this Court's opinion as to an appropriate NFA limit is not retroactive. In trying to set the size of the proposed building to a "more appropriately sized building," this Court is attempting to rewrite the Town's Zoning Bylaw to its own satisfaction, an act which crosses the line into impermissible administrative action. Pendergast v. Board of Appeals, 331 Mass. 555, 558-559 (1954) (stating that the proper interpretation of what is now G.L. c. 40A, § 17 "confines the function of the court to its usual and proper function of applying established law to established facts. It does not permit the court to invade the field of administrative discretion."). "The Court . . . may not simply substitute its judgment for that of the local board or authority under the guise of de novo review." Kenyon Oil Co. v. Adams, 2003 Mass. Super. LEXIS 412, 7 (2003).

Conclusion

Therefore, Walker respectfully requests that this Court enter judgment overturning the decision of the Board that the imposition of a 2,500 square foot net floor area to the Site Plan that was the subject of this litigation is unreasonable as applied because of the protections afforded by G.L. c. 40A, § 3.

Respectfully submitted,
Walker Realty, LLC
By their attorneys,



Mark B. Johnson, Esq., BBO #25760
mark@jblclaw.com
Kathleen M. Heyer, Esq., BBO #685380
kathleen.heyer@jblclaw.com
JOHNSON & BORENSTEIN, LLC
12 Chestnut Street
Andover, MA 01810
(978) 475-4488

Date: March 27th, 2015

CERTIFICATE OF SERVICE

I, Kathleen M. Heyer, hereby certify that I have this 27th day of March, 2015, provided a photo-copy of the foregoing, Plaintiff's Response to Defendants' Post-Remand Decision, by email and mail, to:

Arthur P. Kreiger, Esq.
Nina L. Pickering Cook, Esq.
Anderson & Kreiger, LLP
One Canal Park, Suite 200
Cambridge, MA 02141



Kathleen M. Heyer

WALKER REALTY LLC

January 20, 2015

Town of Acton
Zoning Board of Appeals
472 Main Street
Acton, MA 01720

**Re: Remand Hearing- 348, 350, 352, 362 and 364 Main Street, Acton
Land Court Case No. 12 MISC 459564(AHS)**

Dear Members of the Board,

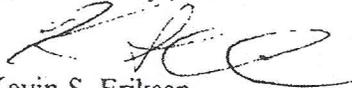
In accordance with the Land Court Decision dated November 25, 2014, Case No. 12 MISC 459564(AHS) please find the following:

- 1) Five Copies of the plan which was the subject of the above referenced litigation dated 12/2/2011 entitled "Next Generation Children's Center & Landscape Center, 348, 350, 352, 362 & 364 Main Street, Acton Massachusetts, 01720, Conceptual Site Plan" prepared for Walker Realty LLC, prepared by Hancock Associates (the "Original Plan");
- 2) Five Copies of the revised plan dated 12/2/2011 with revisions through 1/13/2015 entitled "Next Generation Children's Center & Landscape Center, 348, 350, 352, 362 & 364 Main Street, Acton Massachusetts, 01720, Conceptual Site Plan" prepared for Walker Realty LLC, prepared by Hancock Associates (the "Revised Plan");
- 3) Certified abutters list; and
- 4) Check in the amount of \$149.04 payable to the Town of Acton.¹

The Board will notice that the Revised Plan includes additional landscaping details as well as suggests the addition of a proposed turning lane to help mitigate any traffic concerns associated the with the proposed development. We look forward to meeting with the Board to discuss this proposal in more detail at its next available hearing.

Sincerely,

Walker Realty LLC



Kevin S. Eriksen

¹\$6.48 per abutter, 23 abutters. Please note that the Applicant did not provide postage for repeat entries for property owned by Walker Realty LLC. Kindly send only one notice to the Applicant entity.

WALKER REALTY LLC

March 4, 2015

Zoning Board of Appeals
Town of Acton
472 Main Street
Acton, MA 01720

Dear Members of the Board,

Please allow this letter to serve as a follow up to the remand hearing held at 7:00 p.m. on March 2, 2015 (the "Remand Hearing"). During the course of the Remand Hearing, significant focus was placed on the size of the proposed daycare facility. As noted at the hearing, the Applicant is proposing plan modifications to further mitigate the Town's traffic concerns and landscaping modifications to address the Town's stated concerns pertaining to visual aesthetics. However, as discussed at the Remand Hearing, the Applicant has not proposed to reduce the size of the daycare facility. It was suggested by some members of the Board that it would be appropriate to reduce the facility to a size consistent with the Natick Next Generation facility. Unfortunately, such a reduction is not feasible. Substantial time was spent at the May, 2014 trial of this matter with regards to the multitude of reasons that the Next Generation facility requires the square footage proposed in this site plan. It should also be noted that the Natick facility was the earliest Next Generation facility and its size and style are true outliers in the Next Generation family. Significantly, the Natick facility was an existing structure that Next Generation leased in or around 1993. It was not built from the ground up specifically for Next Generation, as the later facilities have been and despite the fact that an addition has been put on to the Natick facility, the relatively small size has created a less-than-desirable operating situation.

Since Next Generation started operations in 1993, Next Generation's business has grown, the applicable Massachusetts regulations have become more demanding, and its business model has become firmly established. As discussed during trial, Next Generation prides itself on being able to offer comfortable, safe and unique daycare and preschool accommodations with amenities that other similar competitors are unable to meet. Part of that model includes providing space in excess of what the state minimum requirements are for square footage per child, which the judge found commendable. It is important to note that a Next Generation facility is designed to service infants and toddlers, as well as preschoolers. Separate, comfortably sized rooms are provided for each age group. This is designed to provide a unique and safe educational experience for the children and infants. Crib rooms are designated in each facility and classrooms are provided for older students. Play areas are designed to be spacious for both comfort and safety. Separate laundry facilities are available on site which is a necessary amenity for the Next Generation model given its infant and toddler base. Outdoor play areas are commensurate in size with the projected enrollment and again, are designed as much for safety as for comfort. Next Generation must also consider additional costs such as land cost when determining what size a proposed facility will be. Taking all these factors together, Next Generation has determined that the current proposal would not be economically feasible if it is reduced in size. While the Applicant has a stated willingness to make alterations to further

address the Town's stated concerns, unfortunately, for reasons stated above, a reduction in the facility size is not viable for Next Generation.

We are confident that this facility as proposed will be an asset to the Acton community in the same way that Next Generation's ten (10) other facilities have become in their respective communities. Thank you for your time and consideration.

Walker Realty, LLC

A handwritten signature in black ink, appearing to read 'R. Walker', is written over the printed name below.

Robert A. Walker, Manager

PRINCIPALS

Robert J. Michaud, P.E.
Ronald D. Desrosiers, P.E., PTOE
Daniel J. Mills, P.E., PTOE

March 5, 2015

Mr. Robert Walker
Walker Realty, LLC
2 Lan Drive
Westford, MA 01886

Re: Proposed Next Generation Children's Center
Acton, Massachusetts

Dear Robert:

MDM Transportation Consultants, Inc. (MDM) has reviewed a Conceptual Site Plan entitled "*Next Generation Children's Center & Landscape Center, Main Street Acton MA*" dated January 13, 2015 prepared by Hancock Associates ("Conceptual Site Plan") and offers the following opinions relative to access improvements for the property:

1. The Conceptual Site Plan presents a layout, building size and driveway locations that are consistent with assumptions used by MDM to evaluate traffic impacts for the subject property as documented in the Updated Traffic Impact Assessment (TIA) dated March 10, 2014.
2. The MDM March 10, 2014 TIA indicates that ample capacity is provided along Main Street at Site driveways to accommodate projected traffic for the subject property based on existing Main Street roadway width and alignment. The March 10, 2014 TIA specifically indicates that travel delays on Main Street during peak traffic periods are projected to be less than 5 seconds on average with the proposed Site developed ("Build" conditions) assuming single lane approaches to the driveways¹.
3. The Conceptual Site Plan indicates proposed modification of Main Street at the northerly site driveway to accommodate an exclusive eastbound left-turn lane. Provision of an exclusive left-turn lane at this location would allow patrons travelling eastbound to stage turns into the property while waiting for appropriate traffic gaps, thereby further benefiting traffic operations relative to results reported in the March 10, 2014 TIA and minimizing the potential for delays to through travel along Main Street.

¹ Analysis of the southerly (landscaping center) driveway assumes certain driveway restrictions (right-in/right-out) may be imposed by MassDOT based on its immediate proximity to the Route 2 Westbound Ramps.

Mr. Robert Walker

March 5, 2015

Page 2

4. MDM acknowledges that the Site driveway design as presented in the Conceptual Site Plan is illustrative only and subject to refinement to ensure compliance with accepted industry design criteria.

Sincerely,

MDM TRANSPORTATION CONSULTANTS, INC.

A handwritten signature in black ink, appearing to read "R. Michaud", is written over a large, hand-drawn oval scribble.

Robert J. Michaud, P.E.
Managing Principal

MDM

Exhibit 4

---[P 50]---

1-50

- 1 Q And how many child-care facilities does Next
2 Generation currently operate?
- 3 A I run ten schools.
- 4 Q If you could look in the binder on the floor.
- 5 A Okay.
- 6 Q And referring to exhibit C, it is not an agreed
7 exhibit.
- 8 A Okay.
- 9 Q I'd like to ask the witness in general terms what
10 exhibit C consist of?
- 11 A Well, the very first page is all about mascots for
12 our program, so we're very proud of those and we feel
13 that children relate to the mascots in helping them
14 to learn our curriculum.
- 15 The other exhibits are our ten schools,
16 starting with our Natick school that we opened in
17 1993. This is the only existing school that was an
18 existing building. All of our other schools we have
19 developed and built to our specifications and our
20 needs.
- 21 Q And what size is the Natick school, how many square
22 feet?
- 23 A It's 12,000 square feet.
- 24 Q And how many children?
-

---[P 51]---

1-51

1 A I have 137 children in that school.

2 Q What other facilities?

3 A Do you to keep me going?

4 Q Keep going, yes.

5 A This is my Sudbury school, and this is a
6 20,000-square-foot building. It holds 232 children
7 in it. It is right on Route 20, which is a very
8 similar route as Route 27 is.

9 Westford is -- this is a picture of our
10 infant building. We have two buildings in Westford.
11 We have a 12,000-square-foot building and a
12 7,000-square-foot. We were so very inundated with
13 infants and toddlers in Westford, we ended up
14 building our own infant and toddler building just for
15 them.

16 Marlborough is a 16,500-square-foot
17 building. It is in the industrial park in -- right
18 off of Route 20 in Marlborough. It is a one-story
19 building.

20 Westford is a -- Westborough is a
21 16,500-square-foot building, built at the request of
22 the developer, Carruth Capital there. They wanted a
23 day-care facility to accommodate the people in that
24 office park there. Chris Egan was the owner of

---[P 52]---

1-52

1 Carruth Capital, and we built that there for them and
2 to our specifications.

3 Franklin is on Route 140. It is a
4 16,500-square-foot building as well, one story. It
5 holds 232 children.

6 Andover is a 20,000-square-foot building.
7 It is on Route 28, in Acton, Main Street in -- I mean
8 Andover. It holds 262 children in a one-story
9 building.

10 Hopkinton is on "135," again a very main
11 road, but it is 27,000 square feet. It holds
12 approximately 320 children, and it is full.

13 Walpole is, again, 27,500 square feet.
14 Again, holds 320 children, and it's at capacity. It
15 is on Route 109, which, you know, it's a very busy
16 road as well, but has been very well received.

17 Beverly is a 24,000-square-foot building.
18 It is our newest school and our newest prototype.
19 And it holds, I believe 260 children in that school,
20 on Route 22.

21 That's it.

22 MR. JOHNSON: I would introduce what has
23 been marked as "C" for identification as an exhibit.

24 THE COURT: Okay.

---[P 53]---

1-53

1 MR. KREIGER: Your Honor, no objection,
2 except the witness' testimony differed from what's
3 written on these pages.

4 THE COURT: I know what you mean, as far as
5 the number of children?

6 MR. KREIGER: Square footage, number of
7 children. Not by much, but --

8 THE COURT: Yes, I noticed the same thing
9 as you were going through.

10 THE WITNESS: Well, --

11 THE COURT: Are the figures you stated
12 correct or are the ones here correct?

13 THE WITNESS: The square footages, when
14 you --

15 MR. KREIGER: I'm sorry, which?

16 THE WITNESS: Number of children --

17 MR. KREIGER: Square footage is which?

18 THE COURT: That's what I'm asking.

19 THE WITNESS: Whatever's on the -- right,
20 whatever's on the plans.

21 MR. KREIGER: Okay.

22 THE WITNESS: As far as children, we are
23 licensed for "X" amount of children, but because some
24 children only come certain days. So I could have

---[P 54]---

1-54

1 320 children enrolled, but on a given day I'd only
2 have what my license is; license is capacity. But
3 enrolled I might have more children. Does that make
4 sense? Because, you know, Susie comes on Monday,
5 Wednesday --

6 THE COURT: Yes.

7 THE WITNESS: -- and Friday and Charlie
8 comes on Tuesday and Thursday.

9 THE COURT: So you can -- any one day you
10 can never have more than like --

11 THE WITNESS: Exactly.

12 THE COURT: -- 233 from Beverly?

13 THE WITNESS: Exactly; right. That is my
14 license capacity. But I actually have more children
15 enrolled, because they come on different days.

16 MR. KREIGER: Fine.

17 THE WITNESS: Does that make sense?

18 THE COURT: Okay.

19 THE WITNESS: Yeah.

20 THE COURT: But as far as the square
21 footage, we can rely on --

22 THE WITNESS: Yes; yeah.

23 THE COURT: -- what the plan shows?

24 THE WITNESS: Yeah, mm-hmm.

---[P 55]---

1-55

1 THE COURT: So that would be --

2 THE COURT REPORTER: Exhibit 19.

3 THE COURT: Is it 19? Okay.

4 (Exhibit number 19, moved into
5 evidence [formerly exhibit C
6 for ID])

7 Q Now I'd like to show you a blow-up of what's been --
8 a blow-up of what's been marked as exhibit 11.

9 THE COURT REPORTER: Would you like that to
10 be chalk C?

11 MR. JOHNSON: That would be great.

12 (Chalk C, marked; Blow-up of
13 exhibit 11)

14 Q Now is that a rendering of the child-care facility
15 you'd like to put on the site?

16 A It's very similar, yes.

17 Q And is that similar to another child-care facility
18 that you have?

19 A Yes. I would say the last four or five schools that
20 were built, they're all very similar.

21 Q And has your plans for the Next Generation buildings
22 evolved over time?

23 A Well, certainly it has. You know, the -- when
24 regulations change by the state and the needs of the

---[P 56]---

1-56

1 children in our care and our ability to build a
2 better day-care center to our needs, like the heated
3 floors for our infants and the bathrooms in the
4 classrooms, all those things that certainly
5 accommodate to a better environment for our children.

6 Q It's fair to say that Next Generation does not build
7 the state minimum in terms of --

8 A No.

9 Q And the state has certain minimums in terms of -- in
10 terms of what?

11 A In terms of square footage per child, both inside and
12 out. In the state regulations, it's 35 square foot
13 per child within a classroom.

14 Q So if it was a limit of, say, 2500 square feet in a
15 building, that would limit the number of children
16 that you could have enrolled?

17 A Certainly.

18 Q Because you have to divide the 2500 by 35, assuming
19 you have just one large building?

20 A Well, you can't have one large building of
21 2500 square feet per child. Each age group has to be
22 divided into their age groups, so you'd have to
23 divide that 2500 square feet.

24 Q And when you look to design a building, what goes

---[P 57]---

1-57

1 into the design?

2 A Well, we first look at the cost of the land and the
3 building and we look at what we have created as a
4 model for what works for our families. Certainly
5 over 20 years the needs of child care has changed
6 drastically because of the needs of the families.

7 So infants and toddlers being my favorite,
8 I must say, you know, it's like growing your own
9 garden. When you get your babies in, they usually
10 stay with us all the way through kindergarten.

11 So we have created our infant area, which
12 is an infant pod. There's four infant rooms. They
13 have their own little gym.

14 Q What I'd like to do is --

15 A Okay.

16 Q -- I'd like to refer --

17 MR. JOHNSON: And, again, this is a chalk,
18 so if we want to do chalk D.

19 (Chalk D, marked; Blow-up of
20 exhibit 3)

21 MR. JOHNSON: Chalk D is exhibit 3.

22 THE COURT: Chalk D is what?

23 MR. JOHNSON: Exhibit 3.

24 THE WITNESS: Do you want me to point to

---[P 58]---

1-58

1 it?

2 MR. JOHNSON: Yes, if you can -- and if you
3 want to use a pointer?

4 THE WITNESS: I don't know how good I'm at
5 that.

6 MR. JOHNSON: Well, we can practice.

7 THE COURT: Okay; all right. Okay.

8 A So obviously this is the main entrance in. The front
9 door is key coded, so parents are given a code that
10 they can come in. So no one's in the school unless
11 they're a parent or a guardian or someone who is
12 allowing them in. And then they go to the
13 classrooms.

14 This is the infant pod and there is a door
15 here and a door here. And so if a parent has two
16 children, they take the oldest child first and then
17 they come back and bring the baby in to sign them in
18 the infant rooms. That really cuts down on the germs
19 and the soil that comes in.

20 It is a shoeless environment, so parents
21 come in and they actually take off their shoes or
22 cover them with booties, so this area really stays
23 very, very clean all the time.

24 There are four infant rooms, each infant

---[P 59]---

1-59

1 room has its own crib room. The parents bring in
2 their formula and their food and the children are fed
3 and they have sleep on their schedules, according to
4 the parents' request.

5 Q Now the state regulations do not require a crib room?

6 A No. You could actually have a big bullpen, but it's
7 very hard for infants to rest.

8 Our crib room has half walls, so there's
9 complete supervision at all times of the infant
10 sleeping, but this allows the children that are not
11 sleeping to have tummy time or crawling time and so
12 on.

13 Q Now why are crib rooms important to you in the
14 mission of Next Generation?

15 A Well, if you have seven infants in this area and
16 there wasn't a crib room, then the cribs would be
17 just lined up against the wall. And then you have
18 babies who are crawling and pulling themselves up on
19 those cribs, which is a) a safety factor, and b) it
20 doesn't help the children sleeping very much at all.
21 So it's a very nice environment for the children.

22 And they also have their own gym area. All
23 of this is heated floors in this whole area, even the
24 gym. And so when the babies are on the floor, you

---[P 60]---

1-60

- 1 know, it's very nice and warm, comfortable for them.
- 2 Q Is that required by the state regulations?
- 3 A No.
- 4 Q And why do you feel that's important?
- 5 A Because it's important for the comfort of the
- 6 children, for the babies and for teachers sitting on
- 7 the floor with the babies.
- 8 And the teachers actually have their own
- 9 restrooms in there, too, so, you know, they don't
- 10 have to leave the children unattended at any time at
- 11 all.
- 12 Q And how many teachers would be in that area?
- 13 A There'd be two teachers with every group of seven
- 14 children. And there's also one or two -- there's a
- 15 program manager that supervises just this area as
- 16 well; she's in charge of that program. And there's
- 17 also many assistants that come and go during the day
- 18 to help facilitate lunch breaks and so on.
- 19 Q And are those rooms larger than the state minimum?
- 20 A Absolutely.
- 21 Q And why do you need rooms that are larger than the
- 22 state minimum?
- 23 A Because the children need the room. It's not only a
- 24 wonderful environment for the children, but it's a
-

---[P 61]---

1-61

1 wonderful working environment for our staff.

2 So we feel that it allows the rooms to stay
3 clean and it gives the children a lot of room and
4 mobility. If you have seven infants all in different
5 stages of growth, you know, you start having
6 6-year-olds (sic) that are starting to crawl. You
7 might have an 8-year-old (sic) that's starting to
8 pull themselves up. You might have an 8-month -- I
9 mean 8-month-old. You have a 12-month-old that is
10 actually starting to learn to walk, and they need a
11 lot of space to be able to facilitate that. If it
12 was just 35 square feet per child, it would be not a
13 very safe environment for the infants.

14 Q What other areas have you designed that -- actually
15 take us through the building.

16 A Okay, sure.

17 Q We've gone through the front door; we've gone through
18 the infant part.

19 A Okay, we come in through the front door and so on;
20 this is a reception area. We have a full-time office
21 administrator, so if parents have any requests or any
22 needs, they can certainly see her. And if for some
23 reason someone comes to the door that is not a parent
24 and does not have the code, they find out who it is

---[P 62]---

1-62

1 before they are buzzed in to come in.

2 This is our infant storage area. Parents
3 bring in their infant carriers, and they drop their
4 baby off and then put the carrier back down so mom or
5 dad, whoever's picking up, will have the infant
6 carrier, so --

7 Q And is that required by the state regulations?

8 A No.

9 Q Why do you feel it's important to have a room where
10 the carriers can be stored?

11 A Because they have to put them somewhere and that, you
12 know, most parents don't buy two carriers, because
13 one drops off and one picks up. And it's a
14 convenience for the families.

15 Okay, so if you took a left, this is a
16 laundry area. We provide laundry service for our
17 parents. Unless the parents request to take the
18 dirty clothes home, all of the children bring two or
19 three outfits into the school that are labeled. If
20 they get food on them or get dirty or get wet or
21 whatever, the children are changed, the clothes are
22 washed and put back in the cubbies. So parents don't
23 have to be bringing back and forth clothes. So
24 that's one of the services that I put in to our very

---[P 63]---

1-63

1 first school so parents would have clean children to
2 pick up at the end of the day; they're not picking
3 them up covered with spaghetti sauce or whatever.
4 They're nice and clean. So if they have to take them
5 to an appointment or something, they're not worrying
6 about whether they're going to be clean at the end of
7 the day.

8 This is our kitchen. We provide breakfast,
9 lunch and three snacks a day. And certainly it's
10 very important that children are not tired or not
11 hungry. Those are the two things that make babies
12 unhappy.

13 So a lot of children come in at
14 seven o'clock. You know, if you wake up a baby at
15 six o'clock and they're not ready to eat and you
16 bring them in to school, you know, a lot of the
17 toddlers are walking in with Dunkin' Donuts in their
18 hand, so to make sure that they are fed.
19 nutritionally, we provide nutritious breakfast, lunch
20 and three snacks a day because this age group, from
21 young toddlers all the way to kindergarten, are
22 hungry all day long. I mean they snack -- they're
23 grazers more than big-meal eaters. Most children eat
24 lunch in about approximately five minutes and then

---[P 64]---

1-64

1 they're done. Whatever they're going to eat, they're
2 going to consume in about five minutes. So we make
3 sure that they have a very good nutritious meal.

4 We provide special meals for children that
5 have allergies or dietary restrictions, whether
6 through their faith or through their needs
7 physically. And all of those meals are delivered to
8 their classrooms.

9 Q Is that required by the state?

10 A No.

11 Q But that's something that Next Generation believes is
12 important?

13 A It's probably the most important thing to my
14 families. They -- one of the biggest reasons,
15 besides the cleanliness of our schools, parents bring
16 their children to us. Because as a mother of five
17 myself, if I never had to make another lunch for my
18 children, I would have been happy. And that was
19 something that I felt that was very important for our
20 working families, and they love it.

21 Q And this is our toddler classrooms. Toddlers are,
22 again, 15 months, approximately, through 2.9,
23 approximately. Some toddlers are a little bit
24 earlier in that; some children stay a little bit

---[P 65]---

1-65

1 later in toddlers until they go into preschool.

2 These are our indoor gyms, our indoor
3 facility for our children to play in.

4 New England being New England, you know,
5 after especially the last winter we just had, it's
6 terrible, you can't get outside. The state does
7 mandate that children have gross motor time. So on
8 all of our schools, even our smallest one in Natick,
9 I actually took a classroom out so I'd have indoor
10 gym space for our children.

11 Q Is that required by the state regulations?

12 A Absolutely not.

13 So it looks like we have a lot of preschool
14 classrooms, and I'd like to define preschool.
15 Preschool is 2.9 all the way up through kindergarten.
16 So I divide my classrooms. I have 3-year-olds,
17 4-year-olds and 5-year-olds. So it's preschool,
18 pre-k and kindergarten. And all those children are
19 grouped individually.

20 Most day-care centers group their
21 preschoolers all together, 2.9 through 5-year-olds.
22 It's a very difficulty learning environment for them,
23 and it's very difficult for the teachers to teach
24 that large of an age group. So we individualize our

---[P 66]---

1-66

1 curriculum, which we've developed ourselves.

2 Q What other areas do you -- are part of your school?

3 A Well, we have this room here. It shows a classroom
4 here that is actually an art and drama classroom that
5 children can come in and do artwork. We put on
6 shows. They can come in and have gross motor as well
7 in here.

8 Q Now that's noted on the plan as "Room 149,
9 Preschool-9, 800 square feet"?

10 A Correct. Mm-hmm, correct. So it is large enough to
11 accommodate any one of our classroom children.

12 So let's say this classroom here, ten of
13 these children went out to play outside, another
14 ten could come in here and play. So they could group
15 them individually. They could do special lesson
16 classes in that area as well. This classroom is
17 large enough to accommodate any one of my classrooms
18 going in there.

19 Q Now in terms of bathrooms, --

20 A Mm-hmm.

21 Q -- what does the state require in terms of bathrooms?

22 A Every -- it really isn't a requirement. You have to
23 have enough bathrooms to accommodate as many children
24 as you have in your school. It is not required that

---[P 67]---

1-67

1 the classroom -- the bathrooms are in the classroom.

2 You could have bays of bathrooms.

3 But in our long experience when you're
4 potty training nine toddlers or ten preschoolers,
5 it's very difficult for them to wait to get down to a
6 bay of bathrooms to use the toilets.

7 So we have -- from Andover forward, we put
8 our classroom -- our bathrooms in our classrooms.
9 The size of these bathrooms are handicapped
10 accessible as well. That is one of the newer
11 requirements for most towns to have
12 handicapped-accessible bathrooms.

13 Q Now you have a number of rooms --

14 A Mm-hmm.

15 Q -- and a number of classrooms, --

16 A Mm-hmm.

17 Q -- is there a reason why you need so many?

18 A Yes. It's child flow, for lack of a better word.
19 When you open a new school, typically you do get a
20 very large number of infants and toddlers. Most
21 towns there's never enough infant and toddler spaces
22 for child care. So it takes about three years to
23 ramp up one of our schools into full capacity. And
24 we usually open with two or three infant rooms, maybe

---[P 68]---

1-68

1 three or four toddler rooms and maybe one or two
2 preschool classrooms.

3 And going forward it's like growing your
4 own garden, the infants grow to toddlers, toddlers go
5 on to preschool and you end up having capacity.

6 But what we find is by the time our infant
7 parents have toddlers and the toddlers start going
8 off to preschool, into our 3-year-old age group, then
9 mom's having her second or her third.

10 Our school accommodates our parents in that
11 flow of their family so they can not have to go to
12 another school to accommodate their infant when their
13 toddler, actually, or their preschooler goes -- moves
14 on to the next age group.

15 So it's been our philosophy that we really
16 cater to our entire family in our population of the
17 towns that we service.

18 Q Now as you're aware, Acton has a limitation of
19 2500 square feet on the floor area. Could Next
20 Generation build a 2500-square-foot child-care
21 facility?

22 A I would not.

23 Q And why is that?

24 A Because a) it is not our model. It is not going to

---[P 69]---

1-69

1 give me the services and the volume that the towns
2 that we service seems to be able to need.

3 Q Would it have an effect on quality?

4 A Oh, certainly; certainly.

5 Q And what would the effect be?

6 A Because you wouldn't be able to provide the services
7 that we provide and certainly have the mobility for
8 the children in our care.

9 Q Now how would a smaller child-care facility affect
10 the safety of the children at the facility?

11 A Well, I would certainly hope whoever would build that
12 size of a school would build it safe, but, you know,
13 we have -- we have many factors in our school the way
14 we build it. All of our schools are monitored with
15 cameras. There would probably be eight or ten
16 cameras in our school. So at all times, you know, we
17 -- the people at their -- the program managers, the
18 directors and the OA would have a monitor so we could
19 see what was going on in the hallways and in the
20 playgrounds and so on.

21 We feel that space is important for all of
22 the children, but certainly when you get to a toddler
23 stage, nine toddlers in any classroom -- we call them
24 the fight and bite group, and I don't mean that in a

---[P 70]---

1-70

1 bad way -- but they need space. They need to be able
2 to have their areas so the teachers can make sure
3 that they're -- when they're learning it is a safe
4 environment.

5 Q How many infants do you have in each infant room?
6 A There'd be seven infants with two teachers.

7 Q And toddler?
8 A Nine children with two teachers.

9 Q And preschool?
10 A Anywhere from 16, with our 3-year-olds, up to
11 20 children with two teachers.

12 Q And the size of these rooms are larger than the state
13 minimum?
14 A Yes, they are.

15 Q And the reason for that is?
16 A Well, when we set up our each individual classroom
17 that's set up in learning areas, according to our
18 curriculum and flow of the classroom for the children
19 and their ability to have lots of room to move around
20 and go to the learning areas when they need to and a
21 safety factor. So there's plenty of room for the
22 children to move around.

23 Q Now looking at the site plan, --
24 A Okay.
