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ZONING BOARD OF APPEALS

Hearing # 12-01

DECISION ON AN APPEAL BY WALKER REALTY, LLC TO OVERTURN A DENIAL BY THE ZONING ENFORCEMENT OFFICER OF A BUILDING PERMIT FOR A CHILD CARE FACILITY AT 348-364 MAIN STREET

Pursuant to Massachusetts General Laws Chapter 40A, Section 15, and Section 10.1.1 of the Acton Zoning Bylaw, Walker Realty, LLC has appealed a decision by the Acton Zoning Enforcement Officer ("ZEO") denying a building permit for a child care facility and garden center at 348-364 Main Street, Town Atlas Map F-3/Parcels 32, 33, 54, 61 and 61-1 (the "Property").

The Acton Board of Appeals (the "Board") held a duly noticed public hearing on January 11, 2012, at the Town Hall. The hearing was attended by Board Chairman Ken Kozik, Member Marilyn Peterson and Alternate Member Adam Hoffman, ZEO and Assistant Town Planner Scott Mutch, Board Secretary Cheryl Frazier and Town Counsel (associate) Nina Pickering Cook; Walker Realty's counsel James Burgoyne of Fletcher, Tilton & Whipple, P.C., representative from Hancock Associates, Elizabeth Ahern of Walker Realty and many abutters and Acton residents.

The Property and the Neighborhood

The Property contains over 4.6 acres in lot area on the northeast side of Route 2 and the northwest side of Main Street (Route 27), opposite the westbound Route 2 off-ramp. It is located in the R-2 Residential Zoning District under the Zoning Bylaw.

Main Street northeast of Route 2 and the Property is largely residential. The Property includes the current location of Kennedy & Company Landscaping Nursery and Garden Center (combination of a prior non-conforming commercial use and use allowed per G.L. c. 40A, § 3) ("Kennedy"). The Property straddles Isaac Davis Way. On the same side of Main Street as the Property are also Hayward Road and single-family residences. On the opposite side of the street are a parcel owned by Kennedy and used for an agricultural use under the Bylaw, the Acton Animal Hospital (another prior non-conforming commercial use), and the Town's Public Safety

Building. Farther to the northeast along both sides of Main Street are single-family residences and, approximately one half mile from the Property, the Acton Center Local Historic District. The Kennedy & Company building resembles a house in its scale, and the animal hospital also appears residential, at least approaching from Route 2. Notwithstanding those commercial uses and the Public Safety Building, the Town considers the northeast side of Route 2 to be residential, in contrast to the commercial nature of the southwest side. Route 2 has long-served as a buffer between these commercial and residential areas. In addition, the neighborhood is the principal gateway to the historic Town center.

Main Street is an undivided road with two lanes of traffic. It is heavily traveled and subject to significant back-ups, particularly around the Route 2 off-ramps and the Hayward Road intersection.

The Zoning Bylaw and the Proposed Facility

The Bylaw permits child care facilities without site plan review in any zoning district. However, in the R-2 district, it limits child care facilities to 2,500 square feet net floor area ("NFA") and 0.10 floor area ratio ("FAR") and requires at least 35% open space. The Bylaw does not limit floor area for residences in the R-2 district. It also establishes the following requirements regarding parking and driveways:

- Section 6.7.3 requires that each lot have one access driveway 24 feet wide, unless the ZEO concludes that more or wider driveways are necessary for safety.

- Section 6.7.7 requires that at least 10% of the interior area of a parking lot cell with at least 25 spaces must be landscaped islands.

Walker Realty proposes to build a one-story facility for approximately 262 children to be operated as a Next Generation Children's Center on the Property. The child care facility would be located on the northeast portion of the lot, with its access drives almost across the street from the Acton Public Safety Building. Based on the site plan submitted to the ZEO, Walker Realty calculated that the proposed child care building would be 19,460 NSF. Walker Realty also proposes to demolish the existing Kennedy building and build a new one-story building of 600 NSF. This building would be located on the lot closest to Route 2. The lot, as proposed, would have approximately 30% open space and a FAR of 0.10.

Walker Realty also proposes four parking cells with a total of 92 parking spaces and two access drives to service the child care facility and one parking cell with 15 spaces and one access drive to service Kennedy's. One of the proposed parking cells has 26 spaces, requiring10% of the interior area of that cell to be landscaped pursuant to Acton Zoning Bylaw Section 6.7.7; that cell does not have any interior landscaping. Finally, each of the access driveways is wider than 24 feet where it intersects Main Street.

Walker Realty's Appeal

On December 5, 2011, Walker Realty submitted a site plan, floor plans and net floor area diagrams to the ZEO and requested a determination of compliance with the Acton Zoning Bylaw. On December 20, 2011, the ZEO issued a determination that the proposed plans did not comply with the Zoning Bylaw on the grounds that the facility would violate the maximum NFA, open space and parking and driveway design regulations of the Bylaw. *See* Zoning Determination Letter dated December 20, 2011.

Walker Realty timely appealed that denial to the Board. The Board held a duly noticed hearing on January 11, 2012. Walker Realty presented a history of the proposed development of this site for a child care facility, dating back to 2009, and the current plans for the facility. No one else spoke in support of the appeal, either in person during the hearing or in writing. Dozens of neighbors and other residents spoke and submitted letters in opposition to it. Among the comments by Town staff and departments were a Planning Department memorandum, a Board of Selectman memorandum and a School System Traffic Director memorandum, all expressing concerns about the impact of the proposed facility, particularly to traffic on Main Street.

During the hearing, Walker Realty's counsel stated that the violation of Section 6.7.7 (parking cell landscaping) was an oversight, as the cell was intended to have only 25 spaces (negating the application of Section 6.7.7). He stated that the plans for the facility would be altered to reflect that intention, eliminating one parking space and thereby eliminating the violation of Section 6.7.7.

The Zoning Act and Case Law

The Zoning Act provides as follows:

> No zoning ... bylaw in any ... town 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 section 1A of chapter 15D.

G.L.c. 40A, § 3, 3rd par.[1] Net floor area is a measure of a building's bulk and size.

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[1] The cases under this paragraph of the Zoning Act apply the cases under the second paragraph of c. 40A, § 3 (the "Dover Amendment"), which protects religious and non-profit educational uses. *See, e.g.*, Rogers v. Town of Norfolk, 432 Mass. 374 (2000); Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 824 n. 9 (1998), *citing* Trustees of Tufts College v. Medford, 415 Mass. 753, 765 (1993), and The Bible Speaks v. Board of Appeals of Lenox, 8 Mass. App. Ct. 19 (1979). The two paragraphs are very similar, but they differ in at least one respect: the Dover Amendment bars bylaws that "prohibit, regulate or restrict" the use of land or structures for religious or educational purposes, while the third paragraph bars bylaws that "prohibit, or require a special permit for" child care

In Rogers v. Town of Norfolk, 432 Mass. 374 (2000), the SJC annulled a bylaw limiting child care facilities to 2,500 square feet as applied to a proposed facility in an existing house, though it upheld that limitation on its face. It noted that Chapter 40A, Section 3 "seeks to strike a balance between preventing local discrimination against child care facilities and respective legitimate municipal concerns." It framed the legal standards as follows:

> [T]he question of the reasonableness of a local zoning requirement, as applied to a proposed [exempt] use, will depend on the particular facts of each case. Because local zoning laws are intended to be uniformly applied, an [applicant] will bear the burden of proving that the local requirements are unreasonable as applied to its proposed project. The [applicant] might do so by demonstrating that compliance would substantially diminish or detract from the usefulness of a proposed structure, or impair the character of the [applicant's property], without appreciably advancing the municipality's legitimate concerns.

Id. at 383 (citation omitted; brackets in original).

Under that test, the court annulled the 2,500 square foot limit as applied to the proposed facility because the house was existing; it was screened from neighbors, the lot was nearly 1½ acres, and the property was particularly suitable for such a facility (handicapped accessibility, curb cuts for a circular driveway, etc.). Moreover, compliance with the square footage limit would have required removal of the garage, which would have impaired the structural integrity of the house and served no useful purpose. The court found that Norfolk's interest in preserving the residential appearance of its neighborhoods was legitimate, but concluded that the use of the house for a child care facility "would not affect the aesthetic appearance of the neighborhood in a manner that the bylaw was intended to discourage." Because the footprint limit "would significantly impede the use of the premises as a child care facility, while not substantially advancing a valid goal of Norfolk's zoning regulation", it was unreasonable. *See also* Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998) (proposal to renovate a nonconforming barn that violated the side and rear setbacks and height limit; those regulations were unreasonable because denying the child care use would not cure the zoning violations and moving and lowering the barn would impair aesthetics and increase the risk of fire); Ellsworth v. Town of Mansfield, 19 LCR 376 (Land Court 2011) (proposal for new 17,000 square foot Montessori school on a large lot that complied with all dimensional requirements except frontage; frontage could be considered despite no specific mention in c. 40A, § 3, para. 3, but where the easement provided sufficient access and spacing, applying frontage requirement was unreasonable); Cartwright, Trustee v. Town of Braintree, 5 LCR 239 (Land Court 1997) (proposal for a new facility on a 0.9 acre lot in a residential district; where the bylaw required

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facilities. That difference seems significant, particularly where the third paragraph was more recent than and based on the Dover Amendment. Both Rogers and Petrucci addressed bylaw provisions that effectively prohibited any child care use on those properties, making it unnecessary for the courts to address that difference in the statutory language. Here, the Bylaw's NFA limit regulates child care use, but does not effectively prohibit it. Nevertheless, because the case law to date does not distinguish between the two paragraphs of the statute, the Board does not rely on that distinction (but reserves its right to do so in the future).

75' open space setbacks in every direction and 1-acre lots, those requirements were unreasonable because the setback requirements left too little space for the facility; the bylaw also limited the building to 2,500 square feet, among other requirements, but the court did not reach that issue).

Analysis and Findings

The Board found that applying the 24-foot maximum access driveway requirement (Section 6.7.3) to this proposed facility would be unreasonable, where the multiple driveways and the flaring of those driveways to more than 24feet would enhance the functioning of the proposed facility. Thus, applying it would "substantially diminish or detract from the usefulness of [this proposed facility] ... without appreciably advancing [Acton's] legitimate concerns." Rogers.

The Board also found that it would be unreasonable to apply the minimum open space requirement of 35% (Section 5.3.9) to the proposed facility where the actual open space is greater than the required 35% once the perimeter buffer area and play areas are included. Although it is proper to exclude them under the Bylaw, the Board found this violation to be *de minimis*. Thus, applying compliance with the open space requirement would "substantially diminish or detract from the usefulness of [this proposed facility] ... without appreciably advancing [Acton's] legitimate concerns." Rogers.

However, the Board found that it is reasonable to apply the maximum NFA limit of 2,500 square feet to the proposed 19,460 square feet child care facility. Although Walker Realty relied on the state requirements 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. Therefore, Walker Realty has not demonstrated that it cannot reduce the NFA without reducing the number of children,.

Moreover, the Board also found that applying the NFA limit to this facility significantly advances several of the Town's planning and zoning interests. First, it avoids adding to the serious traffic congestion on Main Street, as well as any particular traffic safety impact given its close proximity to the Public Safety Building entrance.[2] Some of the concerns about that congestion were described in the communications the Board received from the Board of Selectman and the Planning Department.

Second, applying the NFA limit to this facility also preserves the character of this part of Main Street as the gateway to the residential areas and the Acton Center Historic District to the northeast from the commercial center on the other side of Route 2.

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[2]The Board also concluded that applying the Bylaw's NFA limit serves the Town's zoning and planning interests in this area notwithstanding the Public Safety Building. That building was necessarily sited based on safety and access considerations rather than neighborhood conformance. Its siting for those reasons should not deprive the Town of the ability to maintain the residential character of the district, and this neighborhood in particular, otherwise. Likewise, the few other non-residential buildings in the area (Kennedy and the animal hospital) are pre-existing non-conforming uses.

Third, the Board concludes that allowing a child care facility of this size, in this location would "affect the aesthetic appearance of the neighborhood in a manner that the bylaw was intended to discourage." *See* Rogers, 432 Mass. at 383. The NFA limit in the Acton Zoning Bylaw was amended in 2009, increasing from 1,000 to 2,500 square feet in the R-2 Residential District. This amendment passed after a public hearing and was based on histograms reflecting the size of buildings in this district. In order to maintain the residential character of the district, the Planning Board, and ultimately Town Meeting, found that child care facilities should be roughly equivalent in size to the other buildings in the district (found to be 2,500 square feet). Here, however, the proposed facility would resemble a large office building more than a residential building, and dwarf the residences in the R-2 district, without any significant screening from the neighbors or Main Street. Applying the NFA limit thereby preserves the residential appearance and harmony. Where Walker Realty proposes entirely new construction, it is reasonable to require the applicant to be in proportion with the rest of the district, rather than roughly eight times the size of a typical residence. The Board also found that Walker Realty's description of the neighborhood as containing mostly commercial uses is incorrect. Although there are two prior non-conforming commercial uses and the Public Safety Building on this stretch of Main Street, the Property also used to contain two residences that were demolished by Walker Realty. They cannot now use the absence of those residences to argue to the Board that applying the NFA limit is unreasonable in relation to its surroundings.

Conclusion

For the reasons stated above, the Board voted 3-0 to UPHOLD the ZEO's zoning determination that the child care facility proposed by Walker Realty violated the NFA limit of 2,500 square feet in Section 5.3.9 of the Acton Zoning Bylaw. It voted 3-0 to OVERTURN that denial insofar as it was based on the Bylaw's driveway design regulation and minimum open space requirement.

Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws Chapter 40A, Section 17 within 20 days after this decision is filed with the Acton Town Clerk.

ACTON BOARD OF APPEALS

Kenneth F. Kozik

Kenneth F. Kozik, Chairperson

Marilyn Peterson

Marilyn Peterson, Member

Adam Hoffman, Alternate Member

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Dated: January 31, 2012

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on Jan 31, 2012.

Cheryl Frazier, Secretary
Board of Appeals