

# ANDERSON & KREIGER LLP

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## MEMORANDUM

To: Acton Board of Selectmen

Cc: Scott Mutch, Zoning Enforcement Officer

From: Stephen D. Anderson  
ANDERSON & KREIGER LLP

Re: Acton/Gen Sel - Jacob Abraham (Use Special Permit #10/11/13-445)  
Answers to BOS Questions on Special Permit Application

Date: June 20, 2014

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The Board of Selectmen has asked that I provide brief answers to certain questions that arose at the 5/19/14 session of public hearing on Jacob Abraham's application for a Use Special Permit (#10/11/13-445) under Sections 3.6.3 of the Acton Zoning Bylaw to manufacture firewood at 848 Main Street. This memorandum provides answers to those questions.

### **Property Owner**

Q: The application identifies the property owner as Acton Realty, LLC, 852 Main Street, Acton. Is this the correct owner and if not what does the applicant need to do to correct the application?

A: According to the on-line records in the Middlesex South District Registry of Deeds, by deed recorded at Book 53416, Page 128, Thomas Trudeau, Trustee of the 848 Main Street Nominee Trust, owns the property at 848 Main Street. Thomas Trudeau is also an authorized signatory for Acton Realty, LLC, the owner of the abutting property at 852 Main Street, which may have led to the confusion over the owner in the pending application.

To correct the application, Jacob Abraham should amend his application to correct the name of the owner of the 848 Main Street property (848 Main Street Nominee Trust) and obtain the signature of Thomas Trudeau, Trustee of the Trust, consenting to the application.

## **Special Permit/Site Plan Review**

Q: Can the applicant apply for and obtain a Special Permit for a manufacturing use under Sections 3.6.3 and 10.3 of the Zoning Bylaw without applying for and obtaining at the same time for a required Site Plan Special Permit under Sections 3.6.3 and 10.4 of the Zoning Bylaw?

A: In the District at issue, a manufacturing use under Sections 3.6.3 requires both a Use Special Permit (under Sections 3.6.3 and 10.3) and a Site Plan Special Permit (under Sections 3.6.3 and 10.4). The Board of Selectmen is the issuing authority for both.

In her initial comments dated November 13, 2013, on the application for a special permit for the use, the Assistant Town Planner pointed out that “If the proposed use expands the ground area by 1,200 square feet or more a Site Plan Special Permit should also be submitted in accordance with Zoning Bylaw Section 10.4.1.2.” Counsel for certain neighbors and abutters, Dan Hill, in his November 12, 2013, comment letter made the same point: “As a preliminary matter, we believe the application should be one for ‘Site Plan Special Permit’ under Section 10.4, and not simply a ‘use’ special permit under Section 10.3.”

Jacob Abraham has not applied for a Site Plan Special Permit encompassing the proposed operation to manufacture firewood at 848 Main Street; nor is there an existing site plan approval broad enough to encompass this new manufacturing operation on the site. However, a Site Plan Special Permit Amendment Application has been filed for 848 Main Street by or on behalf of the owner of that property. (The application variously refers to the Owner/Applicant as Acorn Deck House Company, Tom Trudeau, and Acton Realty, LLC. Yet the application includes the deed into Thomas Trudeau, Trustee of the 848 Main Street Nominee Trust, as the owner of the property at 848 Main Street. This apparent oversight as to the owner/applicant should also be corrected.) In addition to Plans showing existing and proposed conditions, the application includes Drainage Calculations and Water Balance Calculations. The Site Plan included with the application shows a proposed 30’ X 100’ Wood Processing Area to the rear (west) of the large manufacturing building on the site. This application describes the existing condition to include a “gravel surface on the northern portion of the site [that] is being used as a processing area for firewood.” This application states that, under the proposed conditions, “The firewood processing area will be relocated to be further away from the abutting properties.”

- **Special Permit for Use**

Section 10.3 of the Zoning Bylaw contains the requirements applicable to the special permit application for the proposed use. The Board cannot issue this special permit unless it finds under § 10.3.5 that the use:

10.3.5.1 Is consistent with the Master Plan.

10.3.5.2 Is in harmony with the purpose and intent of this Bylaw.

10.3.5.3 Will not be detrimental or injurious to the neighborhood in which it is to take place.

10.3.5.4 Is appropriate for the site in question.

10.3.5.5 Complies with all applicable requirements of this Bylaw.

The Board “may impose such conditions, safeguards and limitations as it deems appropriate to protect the neighborhood” (§10.3.6).

- Site Plan Special Permit

Section 10.4 of the Zoning Bylaw contains the requirements applicable to the site plan special permit. Under Section 10.4.5, the Board in considering a site plan “shall find that, to the degree reasonable, the site plan:”

- 10.4.5.1 Is consistent with the Master Plan.
- 10.4.5.2 Protects the neighborhood and the Town against seriously detrimental or offensive USES on the site and against adverse effects on the natural environment.
- 10.4.5.3 Provides for convenient and safe vehicular and pedestrian movement and that the locations of driveway openings are convenient and safe in relation to vehicular and pedestrian traffic circulation, including emergency vehicles, on or adjoining the site.
- 10.4.5.4 Provides an adequate arrangement of parking and loading spaces in relation to the proposed USES of the premises.
- 10.4.5.5 Provides adequate methods of disposal of refuse or other wastes resulting from the USES permitted on the site.
- 10.4.5.6 Will not derogate from the intent of this Bylaw to limit the adverse effects of the USE and development of land on the surface and groundwater resources of the Town of Acton. If a proposed USE has obtained a special permit from the Planning Board under Section 4.3 of this Bylaw, the requirement of this Section shall be deemed to have been met.
- 10.4.5.7 Complies with all applicable requirements of this Bylaw.

In short, to manufacture firewood at 848 Main Street, there must be a special permit for the use which satisfies the requirements in Section 10.3 and a site plan special permit which satisfies the requirements in Section 10.4. Absent both approvals, the site (or a portion of the site) cannot be used to manufacture firewood under Section 3.6.3.

However, the Bylaw does not require that both forms of relief be heard or granted simultaneously. For example, a property owner may obtain a site plan special permit for a shopping plaza containing a mix of retail uses. Subsequently, a tenant may seek a special permit for a restaurant use within the plaza. The restaurant cannot operate without both approvals in place; however, the fact that the approvals are obtained at separate times by the property owner and the tenant is not determinative.

## Applicable Air Pollution Control Regulations

Q: What air pollution control regulations apply to the outdoor manufacturing of firewood?

A: In my email of Mon 5/19/2014 3:19 PM, I addressed the applicable regulations for the control of noise from a facility such as this. See attached.

The Massachusetts Air Pollution Control Regulations, 310 CMR 7.00, also contain the following provisions applicable to dust/emissions from such an operation:

### 310 CMR 7.09: U Dust, Odor, Construction, and Demolition

(1) No person having control of any dust or odor generating operations such as, but not limited to ... wood products plants, ... shall permit emissions therefrom which cause or contribute to a condition of air pollution.

### 310 CMR 7.01: General Regulations to Prevent Air Pollution

(1) No person owning, leasing, or controlling the operation of any air contamination source shall willfully, negligently, or through failure to provide necessary equipment or to take necessary precautions, permit any emission from said air contamination source or sources of such quantities of air contaminants which will cause, by themselves or in conjunction with other air contaminants, a condition of air pollution.

### 310 CMR 7.00: Definitions

**AIR CONTAMINANT** means any substance or man-made physical phenomenon in the ambient air space and includes, but is not limited to, dust, flyash, gas, fume, mist, odor, smoke, vapor, pollen, microorganism, radioactive material, radiation, heat, sound, any combination thereof, or any decay or reaction product thereof.

**AIR POLLUTION** means the presence in the ambient air space of one or more air contaminants or combinations thereof in such concentrations and of such duration as to:

- (a) cause a nuisance;
- (b) be injurious, or be on the basis of current information, potentially injurious to human or animal life, to vegetation, or to property; or
- (c) unreasonably interfere with the comfortable enjoyment of life and property or the conduct of business.

**WOOD PRODUCT** means any product made of wood or a wood composite, including, but not limited to: kitchen cabinets, equipment cabinets, household furniture, and office furniture, but excluding flat wood panels.

As with the noise regulations discussed in my attached email, DEP's regulations governing "Dust, Odor, Construction, and Demolition" provide that "310 CMR 7.09(1) through 7.09(4) and 7.09(6) are subject to the enforcement provisions specified in 310 CMR 7.52." See 310 CMR

7.09(7). As a result, the Town's Board of Health has express authority to enforce DEP's Dust Regulations based on the same reasoning contained in my attached email on DEP's Noise Regulations.

In addition, if DEP determines that the facility "has the likelihood of causing or contributing to a condition of air pollution," DEP can order mitigation measures such as the following:

310 CMR 7.02(7) Mitigation of Air Pollution.

(a) Requirement to Collect Information. When the Department determines that any facility or product manufactured therein has the likelihood of causing or contributing to a condition of air pollution, the Department may require the person owning, leasing or controlling said facility to submit information to document facility emissions, operating parameters of emission control equipment, and standard operating and maintenance procedures. In doing

so, the Department may require any person who owns, operates or controls any facility, or who manufactures emissions control equipment or process equipment to:

1. Establish and maintain records;
2. Make reports;
3. Install, use, and maintain monitoring equipment;
4. Perform audits on monitoring equipment using standard procedures and methods;
5. Quantify emissions in accordance with the procedures, and methods as the Department may prescribe;
6. Keep records on control equipment parameters, production variables, and other indirect data when direct monitoring of emissions is not practical;
7. Conduct stack testing or submit modeling analysis; or
8. Maintain other records and provide any other information as the Department might reasonably require.