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## BOARD OF APPEALS

Hearing # 09-02

### **DECISION ON AN APPEAL BY LEARN & PLAY PRESCHOOL TO OVERTURN A DENIAL BY THE ZONING ENFORCEMENT OFFICER OF A BUILDING PERMIT FOR EXPANSION OF A CHILD CARE FACILITY AT 245 MAIN STREET**

Pursuant to Massachusetts General Laws Chapter 40A, Section 15, and Section 10.1.1 of the Acton Zoning Bylaw, Learn & Play Preschool has appealed a decision by the Acton Zoning Enforcement Officer (“ZEO”) denying a building permit for expansion of a child care facility at 245 Main Street, Map G-3/Parcels 22 (the “Property”).

The Acton Board of Appeals (the “Board”) held duly noticed public hearings on June 1 and June 9, 2009 at the Town Hall. The hearings were attended by Board Chairperson Cara Voutselas and Members Marilyn Peterson and Kenneth Kozik, Planning Director Roland Bartl, ZEO Scott Mutch, and Board Secretary Cheryl Frazier. Attending for Learn & Play Preschool were owners Stacey and Brian Regan and project architect Lisa Pecora Ryan of The Office of Michael Rosenfeld, Inc. Town Counsel Arthur Kreiger attended the June 1, but not the June 9 hearing.

#### **The Property and the Neighborhood**

Learn & Play Preschool seeks a building permit to expand its existing child care facility at 245 Main Street. The Property is a 22,500 sq. ft. lot located in the R-2 Zoning District. The property consists of a one story former residence with a full basement and a detached shed. Currently, the first floor of the former residence totaling about 1,000 square feet is used for child care services.

The Property is located at 245 Main Street. While zoned R-2 residential, the Property is one lot away from the commercially zoned Kelly’s Corner Zoning District. To the south of the Property on Main Street are single family homes and across Main Street are condominium buildings. To the north is Kelly’s Corner which contains a number of businesses including a department store, bowling alley, pizza shop and gas station.

### **The Zoning Bylaw and the Proposed Facility**

The Town of Acton Zoning Bylaw (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 1,000 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 or FAR for residences in the R-2 district. The Bylaw contains numerous parking and driveway requirements, including a requirement that each lot have one access driveway 24 feet wide, unless the ZEO concludes that wider or additional driveways are necessary for safety.

Learn & Play Preschool proposes to renovate the basement of the existing building and reconfigure the parking lot. The project adds an additional 1,053 square feet of space for use by the child care facility resulting in a total of 2,340 square feet. The renovation and reconfiguration of the parking lot results in an FAR of .104 and open space of 36%. The proposed project changes the current driveway layout from a single access to two one way access driveways to facilitate traffic flow through the parking lot.

### **Learn & Play Preschool's Appeal**

Learn & Play Preschool submitted a site plan to the ZEO and requested a determination confirming that he would not issue a building permit for the expansion of its child care facility because of its noncompliance with the Bylaw. On May 27, 2009, the ZEO issued that confirmation, denying a building permit on the grounds that the facility would violate the maximum NFA, maximum FAR and parking and driveway design regulations of the Bylaw. The May 27 memo advised that additional information was required of Learn & Play Preschool to verify calculations included in the site plan. After the June 1 hearing Learn & Play Preschool submitted a more complete site plan including revised calculations for FAR and a redesigned parking and driveway layout. Based on this additional information the ZEO denied the building permit on the basis that the Project violated the maximum FAR and NFA. He concluded the Project conformed to all driveway and parking regulations with the exception of section 6.7.3. This section requires one access driveway 24 feet wide unless the ZEO concludes that additional driveways are necessary for safety reasons.

Learn & Play Preschool appealed the ZEO denial of the building permit to the Board of Appeals under section 10.1.1 of the Bylaw. The Board held duly noticed public hearings on June 1 and June 9, 2009. Learn & Play Preschool submitted numerous letters and petitions from neighbors and town citizens in support of the project. There was no opposition to the project either in the form of letters or at the hearing.

At the June 1 hearing town counsel advised the Board that the state Zoning Act provides special protection for child care facilities. He advised that the Town may not prohibit or require a special permit for child care facilities. The Town, however, may impose reasonable regulations as to, among other things, the bulk of the structure and parking requirements. He noted that the intent of the Act is to strike a balance between preventing local discrimination against child care facilities and legitimate municipal concerns. He directed the Board in evaluating the application of the Bylaw to the Project to consider the following legal standard:

[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.

Rogers v. Town of Norfolk, 432 Mass. 374 (2000).

### **Analysis and Findings**

The Board found that Learn & Play Preschool successfully demonstrated that the NFA limit of 1,000 square feet would be unreasonable as applied to the proposed expanded facility. Learn & Play Preschool currently operates two small child care facilities in Acton. The purpose of renovating the basement at 245 Main Street is to combine the two operations in one location. Combining operations creates efficiency and integration of the programs. The Net Floor Area requirement is intended to limit the bulk of a structure and its intensity of use. Here the size of the structure will remain unchanged. While the number of children served will increase, the change is relatively minor and will not result in significant traffic or safety issues. Even with the expansion, Learn & Play Preschool will be one of the smaller child care facilities in Acton.

The Board also found that the Project does not violate the FAR limit of 0.10. The calculations provided by Learn & Play Preschool and corroborated by Town staff result in a FAR of .104. The Board determined that for the purposes of deciding compliance with the Bylaw that the calculation should be carried out to two decimal places. The Project, therefore, has a FAR of .10 and is in compliance.

Finally, the Board found that section 6.7.3 gives the Board discretion to allow more than one access driveway. Section 6.7.3 states that each lot may have one 24' access driveway unless the ZEO determines that a wider or additional access driveways are necessary for safety reasons. At the hearing, the ZEO stated that he believes that the driveway configuration of two one way driveways is appropriate for the Project. Furthermore, staff discussions with the Town Fire Chief resulted in his agreement that such a configuration allows for adequate access for public safety vehicles. For these reasons, the Board found that the Project's driveway configuration is necessary for traffic circulation and therefore meets the Bylaw requirements.

### **Conclusion**

For the reasons stated above, the Board voted 3-0 to OVERTURN the ZEO's denial of a building permit for the expansion of a child care facility proposed by Learn & Play Preschool.

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**

Cara Voutselas  
Cara Voutselas, Chairperson

Marilyn Peterson  
Marilyn Peterson, Member

Kenneth F. Kozik  
Kenneth F. Kozik, Member

Dated:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on 7/15, 2009.

Cheryl Frazier  
Cheryl Frazier, Secretary  
Board of Appeals  
ON BEHALF OF