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**BOARD OF APPEALS**

Hearing #14-05

**DECISION ON PETITION FOR REVIEW**

A public hearing of the Acton Board of Appeals was held on Monday, June 2, 2014 at 7:00 PM and on Monday, July 7, 2014, in Room 126 of the Acton Town Hall on the petition of Leo Bertolami for a petition to overturn the Zoning Enforcement Officer's decision that a proposed use is not allowed under the Zoning Bylaw, Section 10.1.1, on the premises located at 107-115 Great Road. Map G4/Parcel 28.

Present at the hearings were Ken Kozik, Chairman; Jonathan Wagner, Member; Richard Fallon, Member, Cheryl Frazier, Board of Appeals Secretary and Scott Mutch, Zoning Enforcement Officer and Assistant Town Planner. Also present at the hearings were petitioner Leo Bertolami and his legal representative, Richard A. Nylén of Lynch, DeSimone & Nylén, LLP.

Chairman Kozik opened the hearings, read the contents of the file which included the Zoning Enforcement Officer's decision that the proposed use is not allowed, an IDC from the Town of Acton Planning Department indicating support for the Zoning Enforcement Officer's decision, and plans/supporting materials for the use.

**Petitioner's Presentation**

Mr. Nylén explained to the Board that the petitioner wishes to use the property in question as a commercial education or instruction facility. More specifically, the intended use is to house classic automobiles for educational and instructional purposes, which is allowed under 3.4.11 of the Acton by-laws. Mr. Nylén stressed that the intended use was not for the sale and/or repair of automobiles, a use which is prohibited in the zoning district wherein the property is located.

**Town of Acton By-Laws**

*3.2 General Uses*

*3.4.11 Commercial Education or Instruction – A private, for profit business engaged in providing instruction or training in skills of any kind, including business, data processing, programming, arts and crafts.*

## The Discussion

Asked about his decision, the Zoning Enforcement Officer indicated that the town concluded that the proposed use would include the display, sale and/or repair of automobiles because the petitioner had been before the Town of Acton Board of Selectmen (BOS) requesting one or more internet automotive sales licenses, which were granted by the BOS. Petitioner currently has these one or more licenses.

Asked about automobile sales and/or repair, Mr. Nylen presented information that he asserted proved that only one or two automobile sales would occur annually from this site and that the primary focus would be to charge students for instruction in the proper care and feeding of classic automobiles.

The Board then discussed provisions that might be attached to a decision to overturn the Zoning Enforcement Officer.

Further, the Board unintentionally concluded that a simple majority of the three member Board was needed to overturn the decision of the Zoning Enforcement Officer. This erroneous assumption by the Board was not challenged by any person present at the hearing, including Mr. Bertolami's legal representative.

Subsequent to the vote of the Board, and after discussion with Acton Town Counsel, it was noted that Massachusetts state law requires a unanimous vote of a three member Board to overturn the decision of the Zoning Enforcement Officer. More specifically, MGLA ch 40A, Section 15 states:

*The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a board consisting of five 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.*

## The Finding

The Board of Appeals, after considering the materials submitted with the Petition, together with the information developed at the hearing, finds that:

1. The Petitioner seeks the Board to overturn the Zoning Enforcement Officer's decision that a proposed use is not allowed under the Zoning Bylaw.
2. Automotive sales and/or repairs are not allowed for the site in this district.

Therefore, the Board of Appeals, after reviewing the available materials and based upon the above findings, voted 2-1, subject to conditions, to overturn the Zoning Enforcement Officer's decision. Because the Board of Appeals failed to vote unanimously, as required by state law, the **PETITION IS DENIED** and the **DECISION OF THE ZONING ENFORCEMENT OFFICER IS UPHELD**.

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.

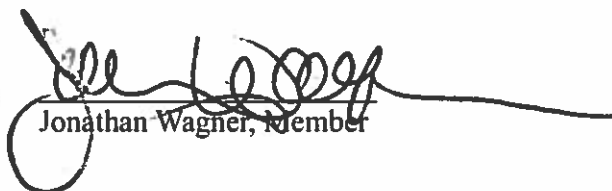
**TOWN OF ACTON BOARD OF APPEALS**



Kenneth Kozik, Chair



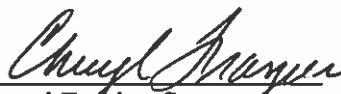
Richard Fallon, Member



Jonathan Wagner, Member

Dated: July 14, 2014

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on July 14, 2014.



Cheryl Frazier, Secretary  
Board of Appeals