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BOARD OF APPEALS

Remand Hearing #12-01

**DECISION ON REMAND FROM LAND COURT
CONCERNING 348-364 MAIN STREET (WALKER REALTY LLC)**

A public hearing of the Acton Board of Appeals was held on Monday, March 2, 2015 at 7:00 pm and continued to Monday, March 9, 2015 at 9:00 am, both in the Francis Faulkner Room (Room 204) in Acton Town Hall, to consider the plan presented by the applicant Walker Realty, LLC ("Walker") for construction of a day care center at 348-364 Main Street in Acton (the "Property"). Walker presented this most recent plan to construct a day care at the Property (the "Remand Plan") pursuant to a Decision of the Land Court ordering a remand to the Board of Appeals after trial in *Walker Realty LLC v. Town of Acton, et al.*, Land Ct. 12 MISC 459564 (AHS).

Present at the hearing were Jonathan Wagner, Chairman; Richard Fallon, Member; Adam Hoffman, Member; Cheryl Frazier, Board of Appeals Secretary and Scott Mutch, Zoning Enforcement Officer. Also present at the hearing were the following: Walker's President Robert Walker and its counsel Mark Johnson and Kathleen Heyer, Nina Pickering-Cook from Town Counsel's office, Robert Nagi (the Town's traffic consultant) and members of the public, including abutters.

Chairman Wagner opened the hearing, read a list of the contents of the file, and then described the background of this application and litigation. Chairman Wagner clarified the issues before the Board. Based on the Court's decision, those issues include the size of the building, proposed traffic mitigation and proposed landscaping on the site. The applicant agreed that the Court highlighted those issues for discussion on remand, but asserted that Walker would only describe the reasons for proposing a building with a net floor area of 19,460 sq. ft., rather than "a more appropriately sized building" (Court Decision p. 30). The Board was advised by Ms. Pickering-Cook to also consider and vote on any dimensional changes shown on the Remand Plan that render the proposed facility more noncompliant with the Acton Zoning Bylaw than the 2011 Plan previously reviewed by the Court, namely changes to open space.

Findings:

The Board of Appeals, after presentations by the applicant, the ZEO and Mr. Nagi, questions from the Board and Counsel to the applicant and staff, comments from the public, and other information developed during the course of the hearing, makes the following findings:

1. The Court's Decision required Walker to propose a smaller "more appropriately" sized child care facility to the Board.
2. Walker is steadfastly unwilling to even discuss reducing the size despite the Court's clear directive to consider a smaller facility.
3. With respect to the changes in open space on the Remand Plan, Walker admitted to moving and increasing some playground space, specifically the "Toddler Playground," but claimed that the playgrounds should be treated as open space, despite Section 5.3.9 of the Zoning Bylaw that excludes playgrounds from open space calculations. Walker gave no explanation for the addition of the 200 sq. ft. shed at the rear of the Property that also decreased the available open space. The changes to open space shown on the Remand Plan decrease the already-noncompliant open space percentage from 31% to 21% (a minimum of 35% is required for the Property). Walker refused to reduce the size of the playgrounds to that shown on the 2011 Plan.
4. Walker acknowledges that parking errors apparent on the 2011 Plan are still present, although it had previously represented to the Board that such errors would be corrected. The Remand Plan (like the 2011 Plan) shows one additional space, not counted in the numbers stated on it. Walker has agreed to reduce the parking shown by one space.
5. The landscaping buffering at the property boundary shown on the Remand Plan is an improvement over that on the 2011 Plan. But the Town's Tree Warden, Dean Charter, reviewed the Remand Plan and requested additional information, including (at a minimum) the types of trees or bushes being proposed as the landscape buffer along the property boundary. During the hearing, Walker repeatedly refused to provide any additional information or specifics concerning the proposed landscaping. Mr. Walker claimed that the landscaping shown on the Remand Plan exceeds any requirements in the Zoning Bylaw, and commented that if the Board "[gave] him" the size of building he wanted, he would discuss changes to the proposed landscaping shown on the Remand Plan.
6. Based on the Board members' personal experiences and anecdotal evidence from members of the public, including the owner of the veterinary hospital across from the proposed facility, traffic is an existing problem in this area that would undoubtedly be exacerbated by the proposed facility shown on the Remand Plan.
7. Walker has proposed a dedicated left-hand turning lane for traffic turning into the north driveway of the proposed facility. At the hearing, it declined to provide any explanation to the Board how or to what degree the turning lane would mitigate the traffic impacts from the proposed facility. The Board asked Walker to have its traffic consultants, MDM Consultants, attend the continued hearing to answer traffic-related questions. Walker refused to make MDM available. Walker did submit a brief letter from MDM that stated the turning lane would allow east-bound traffic turning into the site to stack and minimize delays for other traffic traveling east on Main Street. Based on testimony from Mr. Nagi, the Board found that the turning lane would improve the

proposed facility by reducing the traffic impacts in one of the major areas of concern – the traffic turning into the site. The turning lane would not do anything to address the other major area of concern with respect to traffic generated by the proposed facility – traffic attempting to turn left on Main Street when exiting the facility. It would not mitigate the projected wait times for those vehicles and resultant risky behavior. The turning lane may provide some area of protection in the middle of Route 27 (Main Street) if a vehicle pulls out to exit the Property but there is not a sufficient gap to continue into the traffic stream. Regardless, that added protection does not decrease the waiting time for those exiting and may serve to only promote more risky driving behavior. In addition, the proposed turning lane may aid the flow of traffic along Main Street in front of the Project but it would not mitigate the effects of adding more traffic into an already congested area, particularly at the Hayward and Newtown Road intersections.

Vote:

Therefore, the Board of Appeals, after reviewing the available materials and based upon the above findings, voted as follows:

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.

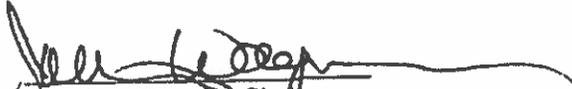
5. Would the Board be willing to waive the net floor area maximum of 2,500 sq. ft. if Walker were to propose a 5,000 sq. ft. child care facility on the Property, with the traffic and landscaping mitigation shown on the Remand Plan?

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.

TOWN OF ACTON BOARD OF APPEALS:


Jonathan Wagner, Chair

Dated: March 19, 2015

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on March 19, 2015.


Cheryl Frazer, Secretary
Board of Appeals