



ZONING BOARD OF APPEALS

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ZBA 2014-34
 Petition of Edens
 45 Church Street

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, May 8, 2014, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of EDENS requesting a Special Permit pursuant to the provisions of Section IXC and Section XXV of the Zoning Bylaw for use of the outdoor patio area for service of food and beverages, at 45 CHURCH STREET, which is a use not allowed by right in the Wellesley Square Commercial District but may be authorized after determination by the Special Permit Granting Authority that the proposed use is similar to one or more of the uses specifically authorized in the bylaw.

On April 22, 2014, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing were David Himmelberger, Esq., and Keith Hague, representing Edens, (the "Petitioner").

Mr. Himmelberger said that the request is for a special permit to allow for outdoor patio dining. Mr. Hague displayed an elevation drawing. Mr. Himmelberger said that there is an elevated patio surrounding the Bocado restaurant on two sides on the first floor of the building.

Mr. Himmelberger said that the Applicant had previously gone before the Design Review Board (DRB) for approval of façade changes. He said that they obtained a Common Victuallers (CV) License from the Board of Selectmen (BOS) for the hours of Monday through Thursday from 11:30 am to 10 pm, Friday and Saturday from 11:30 to midnight, and from noon to 9 pm on Sunday. He said that the patio was licensed for CV and alcohol service. He said that they also obtained an entertainment license for the interior space for Thursday through Saturday from 6 pm to 10 pm for cultural shows.

Mr. Himmelberger said that when the Applicant submitted a building permit application, he was advised that it was the Building Inspector's opinion that outdoor dining is not permitted in the Wellesley Square area, despite the fact that the BOS has licensed numerous restaurants for outdoor seating and the fact that there are numerous restaurants that are not licensed but have outdoor seating. He said that the only two restaurants that are legally serving food outdoors are Dunkin Donuts and Boloco because they license a portion of the sidewalk from the town and therefore the dining is not on their lot.

Mr. Himmelberger said that in 1970 the town was concerned about being overrun with car hops. He said that McDonald's was still a relatively new entity. He said that the town was concerned about people

sitting in their cars on the lot eating and throwing their trash out of the window. He said that he included a Planning Board write up regarding that issue and it is clear that it was designed to prevent car hop operations. He said that the Building Inspector interpreted the bylaw as further prohibiting outdoor dining, which in 1970 was a concept that was yet to be embraced.

Mr. Himmelberger said that the bylaw allows for a special permit if the activity for which the special permit is sought is similar to one or more uses authorized by the bylaw. He said that eating outdoors is very similar to eating indoors. He said that the Applicant is seeking a special permit so that they can move ahead with construction and move ahead with opening the restaurant.

Mr. Himmelberger said that the special permit sets forth certain criteria that the Board must consider even if it finds that the use that is sought is similar to a use that is authorized in the bylaw. He said that he addressed the criteria in his submittal letter to the Board. He said that the patio has received approval from the DRB with a condition to add planters. He said they do not believe that there will be any pedestrian safety issues. He said that there will be sidewalk improvements undertaken in connection with the BOS and Depart of Public Works (DPW). He said that there will be no noxious uses caused by the outdoor patio use. He said that there will be no intensity in use that will adversely affect the character of the site or surrounding area. He said that all of the feedback that they have received is that this will be a significant enhancement to this particular area.

Mr. Himmelberger said that the Planning Board recommended approval of the special permit with a condition that limited use of the patio until 9 pm. He said that the Applicant feels that is an overly restrictive use and note further that, implicit within the BOS' granting of the alcohol service license for the exterior space, it needed to make a finding that the public necessity and convenience would be served by a license, and in making that determination, shall consider the effect of the anticipated noise level on neighboring properties. He said that the ZBA is reviewing the project de novo in the context of the special permit. He said that the Applicant is making the assertion that this will not impact abutters. He said that the closest abutter to the patio is 153 feet from the patio corner, which is the property located at 5 Abbott Street. He said that the next closest abutter is at 8 Abbott Street, which is 228 feet away, and the closest residence on Waban Street is 238 feet away.

Mr. Himmelberger said that Abbott Street makes a bend westward so that it would be difficult for sound to travel in a direct line to the houses. He said that the street is behind the portion of the patio that faces out onto Abbott Street. He said that the only people who would be impacted across Abbott Street would be the residents of the cemetery.

Mr. Himmelberger said they are seeking a special permit that will run in conjunction with the hours of the CV and alcohol licenses that have already been approved. He said that there will be no exterior speakers on the patio. He said that there will be 10 seats on Church Street and 20 seats on Abbott Street.

Mr. Himmelberger said that the patio will be located within the lot line.

The Board asked about the location of the light fixtures. The Board said that there was no planometric data submitted that showed how much light will shine down and where. Mr. Hague said that there will be an LED strip fixture behind the wooden architectural feature, tucked up underneath, that will shine down on the awnings for accent lighting. He said that there will be no light spillage beyond the awnings. He

said that the gooseneck fixtures will have cut off shrouds on the outside that will allow them to control the lighting. He said that the swivel arm will allow them to control where the light hits the patio. He said that the intent is to keep the light at the top of the patio for diners to see what they are eating.

The Board said that the plans show that a tree will be removed. Mr. Himmelberger said that the Applicant went before the Natural Resources Commission (NRC) and received permission to remove a tree in conjunction with improvements that the town wanted to the sidewalk. He said that the Applicant will pay into the tree fund. He said that the NRC found that it was a questionable specimen tree that was unlikely to survive more than 5 or 10 years. He said that they tried to find a location on the property for a new tree but were unable to do so. He said that they will have additional planters on the corners of the patio to add greenery. He said that they will be building out onto what is now sidewalk area. He said that there will be some resetting of meters to allow for greater passage on the sidewalk.

The Board asked if the planters will be at the same elevation as the patio deck. Mr. Hague said that he believed that they will be raised 8 inches above the surface floor. The Board said that will create a pinch points.

The Board said that there appears to be encroachment onto the public sidewalk. Mr. Himmelberger said that there is a Memorandum of Agreement with the town to contribute money for the enhancement of the sidewalk and streetscape area, and in accordance with that, will be permitted to maintain less than one foot of encroachment. He said that there are numerous town parking meters on this property further down Church Street. He said that there is some recognition between the BOS, DPW and Edens that a minor encroachment is allowed.

The Board said that it was concerned about the minimum width of the sidewalk in relation to ADA requirements. Mr. Hague said that there is an existing ramp that they will reconstruct so that it will be 4 feet wide instead of the existing 3 feet wide to meet ADA requirements. He said that without the encroachment they would have to get a variance from the Architectural Review Board. He said that the agreement with the town is that the sidewalk will be expanded to an overall width of 8 feet. He said that they will be contributing toward that project and will take on some of that as part of this project. He said that DPW had some concerns about cars coming down Abbott Street the wrong way. He said that expanding the sidewalk at the corner will help to prevent that.

The Board asked about lighting on the ramp and around the corner where the tables are. Mr. Hague said that the awnings will be located between the columns on the building. He said that the gooseneck fixtures will be on the columns. He said that the strip lights will shine onto the awnings and the gooseneck fixtures will shine onto the ramp as well as onto the patio. He said that he believed that the gooseneck fixtures will project less than 3 feet out. He said that the awning lighting will project less than 2 feet out.

Mr. Hague said that all of the patio furniture will be removed and stored off-site during the colder months.

The Board asked if any of the permits from the BOS are reviewable or renewable. Mr. Himmelberger said that the CV, Entertainment and Alcohol Licenses will be renewed annually. The Board said that issues with noise or other problems could be addressed at that time. Mr. Himmelberger said that unless there is an issue, the license renewals are routinely granted. He said that first renewal will be in

December. He said that it was his hope that the Planning Board will sponsor a bylaw amendment that will eliminate the need for a special permit.

The Board asked about the bifold windows. Mr. Hague said that the windows will just be along Abbott Street and will go from column to column. He said that there will be small knee walls so that people cannot walk through. He said that there will be a wait station inside the restaurant where customers will be directed to the patio seating.

The Board said that it was concerned about the hours of operation of the patio. The Board asked who was expected to be out on the patio at midnight on Saturdays. The Board said that it did not have an issue with a 9 pm closing on Sundays because it will be light until 8 pm anyway. The Board said that it was concerned about closing hours at 10 pm during the week and at midnight on Fridays and Saturdays. Mr. Hague said that the purpose of the schedule is for customers who are seated to have the ability to finish their meals. He said that the earlier restrictions would make things difficult because they do not want to have to ask patrons who are eating to leave in the middle of their dinner.

The Board asked if all of the refuse will be handled inside. Mr. Hague said that the wait service will bring all refuse inside the restaurant. He said that there is a trash enclosure on the side of the building that was reviewed and approved by the Board of Health.

The Board asked if they anticipate chaining the tables and chairs. Mr. Hague said that they did not expect to do that. He said that there is a 42 inch railing along the perimeter.

The Board said that it would defer to the BOS approval of the hours of the use. The Board said that it would difficult to have to ask people to leave the patio in the middle of their dinners. The Board said that the only condition will be that the exterior lights be turned off after hours of operation.

Statement of Facts

The Petitioner is requesting a Special Permit pursuant to the provisions of Section IXC and Section XXV of the Zoning Bylaw for use of the outdoor patio area for service of food and beverages, at 45 CHURCH STREET, which is a use not allowed by right in the Wellesley Square Commercial District but may be authorized after determination by the Special Permit Granting Authority that the proposed use is similar to one or more of the uses specifically authorized in the bylaw.

Letter to Zoning Board of Appeals, dated 4/15/14, from David J. Himmelberger, Esq., re: Special Permit for Patio Dining, 45 Church Street, Report of the Planning Board, re: Article 31, Floor Plans 001, dated 1/9/14 and Perspectives, prepared by AMENTA/EMMA, Floor Plan A-1.1, dated 11/14/13, prepared by Jordan O'Connor & Associates, Sidewalk Exhibit, dated 9/18/13, prepared by Bohler Engineering, and photographs were submitted.

On January 24, 2014, the Design Review Board reviewed the application and voted unanimously to approve façade renovations and patio, subject to conditions.

On May 1, 2014, the Planning Board reviewed the petition and recommended that the Special Permit be granted with a condition.

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Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. Use of the outdoor patio area for service of food and beverages, at 45 Church Street is a use not allowed by right in the Wellesley Square Commercial District but may be authorized after determination by the Special Permit Granting Authority that the proposed use is similar to one or more of the uses specifically authorized in the bylaw.

It is the opinion of this Authority that use of the outdoor patio area for service of food and beverages is similar to one or more of the uses specifically authorized in the bylaw in the Wellesley Square Commercial District, and that it shall not increase traffic congestion or accident potential in the area, that Driveways and Vehicle Queuing Lanes issues are inapplicable to the consideration of the proposed use, that the proposed patio is compatible with its surroundings, that associated alterations to the sidewalk and street area will improve pedestrian safety, that there are no deleterious impacts caused by the use of the patio for outdoor dining, and that any increase in the intensity of the use shall not adversely affect the character of the site and its surrounding area.

Therefore, a Special Permit is granted for use of the outdoor patio area for service of food and beverages, subject to the following condition:

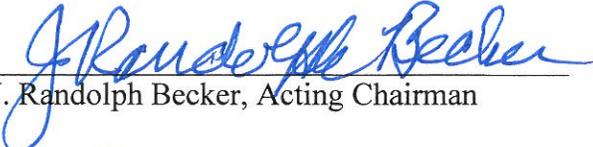
- The exterior lights shall be shut off after hours of operation of the restaurant.

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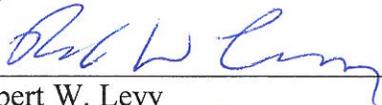
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APPEALS FROM THIS DECISION,
IF ANY, SHALL BE MADE PURSUANT
TO GENERAL LAWS, CHAPTER 40A,
SECTION 17, AND SHALL BE FILED
WITHIN 20 DAYS AFTER THE DATE
OF FILING OF THIS DECISION IN THE
OFFICE OF THE TOWN CLERK.



J. Randolph Becker, Acting Chairman



Robert W. Levy

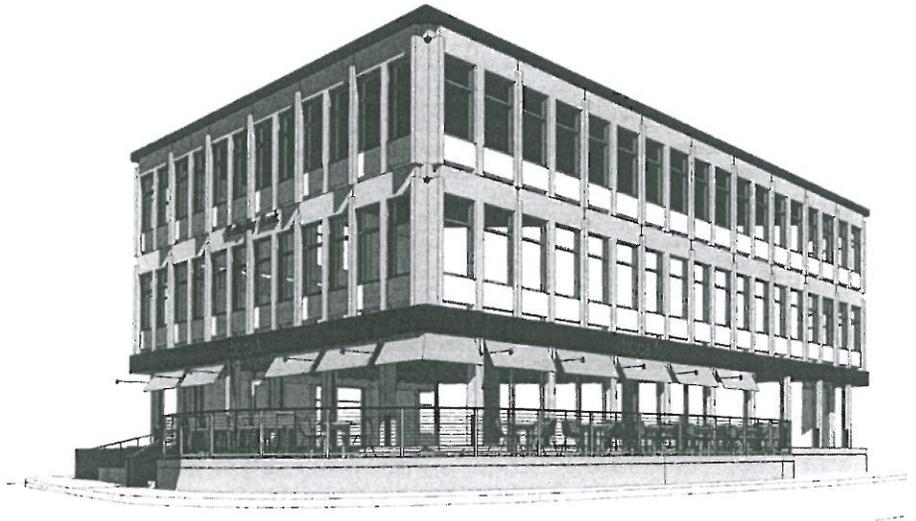
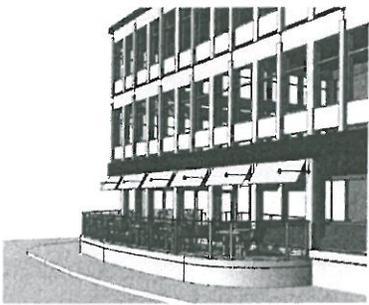
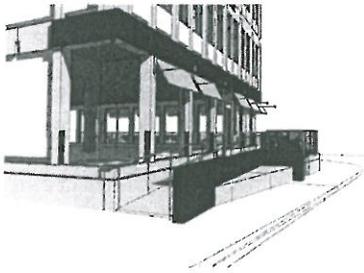


Walter B. Adams

cc: Planning Board
Inspector of Buildings
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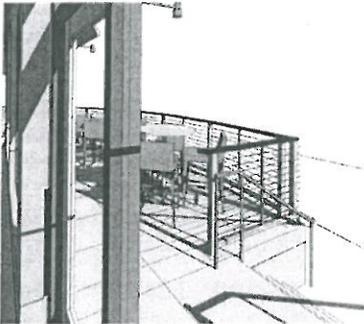
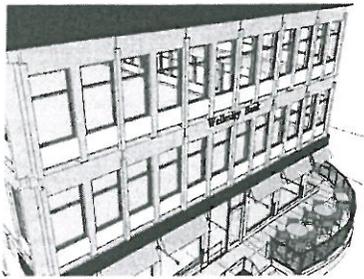
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EDENS: BOCADO RESTAURANT

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EDENS: BOCADO RESTAURANT

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