

TOWN OF WELLESLEY



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BOARD OF APPEAL

1966 OCT '19 AM 10:26

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Petition of Isidore Minkin and Gladys Minkin

Pursuant to due notice the Board of Appeal held a public hearing in the hearing room on the second floor of the Town Hall at 8:15 p.m. on June 30, 1966, on the petition of Isidore Minkin and Gladys Minkin, requesting permission to construct and use a building at 694 Worcester Street, on land now owned by Frank B. Pietroski and Catherine Pietroski, for the conduct of a medical institution, specifically a convalescent and nursing home, as provided under Section II 8 (d) of the Zoning By-law.

On June 10, 1966, the petitioners requested a hearing before this Board and thereafter due notice of the hearing was given by mailing and publication.

Henry D. White, attorney, represented the petitioners at the hearing.

Joseph P. Grieco, 411 School Street spoke in favor of the request.

A number of nearby residents opposed the petition. All expressed the view that the proposed use of the property would increase the existing dangerous traffic condition on Route 9, that it would increase traffic on Stearns Road, that the proposed nursing home would depreciate the values of properties within the area and because of its proximity to the school playground would not be a healthy environment for either the children or the patients.

Letters opposing the request were received from the following: Roderick H. Turner, M. D., 11 Stearns Road, Dr. and Mrs. Susumu Ito, 16 Stearns Road, Emile Francis and Araxie Le Vin, 683 Worcester Street, Robert Gladwin, 8 Stearns Road, and Charles J. Kotsaftis, 9 Stearns Road.

The Planning Board favored the request in its report.

Statement of Facts

The property involved which contains approximately 2 acres, is located on Worcester Street (Route 9) within a Single-residence District requiring minimum lot areas of 10,000 square feet.

The petitioners seek permission to construct and use a building on said property for the purpose of conducting a medical institution, specifically a convalescent and nursing home. A preliminary plan was submitted, drawn by Joseph A. Donahue, Architect, which showed the design and layout of the proposed building as well as a site plan showing its proposed location, parking area and driveways. It is proposed to construct a two and one-half story brick and concrete building with a parking space for forty-two cars. The building is designed to accommodate approximately 120 beds for patients plus quarters for employees. It will be located approximately 250 feet from the nearest house on the left side and approximately 100 feet from

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the nearest house on the right side.

It was pointed out that the land involved does not lend itself well to development with single-family dwellings. The proposed building and lot will be landscaped and as many as possible of the existing trees will remain. Very little of the building will be in view from the school or the houses on Stearns Road, and in the opinion of the petitioners, the building should be an attractive addition to the neighborhood as well as a desirable addition to the Town's public service facilities.

Decision

While the property involved is located within a Single-residence District, it is on Worcester Street, Route 9, a very heavily traveled thoroughfare which is not a suitable location for single-family dwellings. Provision has been made by the petitioners for off-street parking and ingress and egress which should be adequate to obviate any additional traffic hazard. The proposed nursing and convalescent home should be attractive and a credit to the neighborhood. Moreover, the location of the proposed building, the less than 25% lot coverage, the ample distances from the nearest dwellings and the proposed preservation of natural growth in trees and shrubs, make unlikely any disturbance or annoyance of abutters. The Board is of the opinion that the operation of the proposed nursing and convalescent home would enhance the Town's public service facilities and would not create a nuisance in the neighborhood by way of noise or other objectionable feature.

For these and other reasons, the Board feels that the proposed use of the property will not substantially reduce the value of any property within the district, and will not otherwise be injurious, obnoxious, or offensive to the neighborhood.

Accordingly, the requested permission is granted provided that it may be terminated by the Board in the event that any of the following conditions are not or cease to be complied with:

- (1) That the entrance to Stearns Road shall be closed off and shall remain closed unless and until permission is granted by this Board to open such entrance.
- (2) That the building and improvements shall be and continue to be used exclusively for a convalescent and nursing home and shall not be used wholly or in part for the care of mentally sick persons.
- (3) That additional off-street parking space shall be provided as may be deemed necessary from time to time in the opinion of this Board.
- (4) That the building and other improvements to be constructed upon the property in question shall be substantially in conformity with the plans submitted and on file with this Board, drawn by Joseph A. Donahue, Architect, dated June 10, 1966, with such additional screening of parking as the Board may require.

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- (5) That all State and Federal Requirements of law shall be complied with and all necessary permits and licenses obtained.

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Richard O. Aldrich
Richard O. Aldrich

F. Lester Fraser
F. Lester Fraser

Edward T. Kilmain
Edward T. Kilmain

Filed with Town Clerk _____

FILED OCTOBER 19 1966
BOARD OF APPEAL
MINKIN, ISIDORE and GLADYS

JOSEPH ZARTARIAN & others^{1/} vs. ISADORE MINKIN & others.

KIRK, J. The defendant board of appeal (the board) of Wellesley (the town) granted permission to the defendants Isadore Minkin and his wife to construct and operate, subject to certain conditions, a convalescent and nursing home within a single residence district at 694 Worcester Street (the locus).

Worcester Street is a part of Route 9 as it passes through the town. The plaintiffs, who own and reside at nearby premises, being aggrieved by the board's decision, appealed to the Superior Court under G. L. c. 40A, § 21. The judge heard evidence, took a view, made a report of material facts and entered a final decree that the board's decision was not in excess of its authority and should not be annulled. The plaintiffs' appeal from the final decree brings the case to us.

At the outset the plaintiffs contend that, contrary to the conclusion of the judge, the board's decision was invalid because there was a failure to comply, first, with the provisions of G. L. c. 40A, § 18, and second, with its own rules adopted pursuant to the directive in § 18.^{2/} We examine this contention with special reference to those aspects not particu-

^{1/} Several persons allegedly aggrieved by a decision of the board of appeal.

^{2/} Section 18 requires, inter alia, that "The board shall cause to be made a detailed record of its proceedings, showing the vote of each member upon each question . . . and setting forth clearly the reason or reasons for its decisions, and of its other official actions"

larly dealt with by the judge in his otherwise commendably clear and complete report of material facts.

The locus is in a single residence district. Section II of the town's zoning by-law enumerates the structures which may be erected and the uses to which land may be put in such a district and further provides that a "[h]ospital, sanitarium, or other medical institution" may be constructed and used "if permission is, in each case, obtained from the Board of Appeal, as hereinafter provided." The qualifying proviso reads: "No permission sought under . . . Section II . . . shall be granted unless the Board of Appeal shall, after investigation . . . make a written finding which shall be filed with its records that the proposed use will not substantially reduce the value of any property within the district, and will not otherwise be injurious, obnoxious, or offensive to the neighborhood."

The rule of the board pertinent to the case reads:
"7. At the public hearing the Clerk shall take notes on all important factual information stated; at the executive session, the Clerk shall record the exact vote of the Board and the reasons for either granting or rejecting the appeal or petition. These records shall be incorporated into the 'Decision' which is written by the

Clerk and submitted to the lawyer on the Board for his additions and corrections."

The rules of the board, adopted as required under G. L. c. 40A, § 18, obviously pertain to its internal administrative procedures and are designed to insure a record of compliance with the provisions of G. L. c. 40A including "a detailed record of its proceedings." The board's rule 7 provides that certain of these details occurring at the public hearing be noted by the clerk and also be incorporated in the board's decision. The plaintiffs cannot complain of any deficiency in these respects. The decision on its face gives a synopsis of the petition, a summary of the evidence heard and received in favor of and against the petition, and the names of those who wrote in opposition. The plaintiffs argue, however, that there is neither a record of an executive session nor any evidence to warrant a finding that an executive session was held. The argument is well founded. It does not follow, however, that the decision must be held invalid. The statute does not require an "executive session," nor do the rules. Rule 7 seems to assume that the board, as a deliberative body after a public hearing, in the course of its duty to arrive at a decision will meet for that purpose and thereby provide a record showing "the vote of each member upon

each question." G. L. c. 40A, § 18. An executive session is a distinct step which in our view is altogether desirable because, apart from record purposes, it tends to insure that each member before casting his vote will have had the benefit of an expression of views from his fellows:

In the instant case the evidence before the judge shows that on the night of the public hearing each member of the board reserved his decision, pending another view and consideration of the locus. Subsequently each member of the board by telephone told the clerk that he was in favor of the application whereupon the clerk submitted to the lawyer member of the board a draft decision which after revision was signed by all members of the board and filed.^{3/} The informality of this procedure inevitably raises uncertainties, invites challenges and needlessly leads to litigation. These are the consequences which rule 7 was designed to avoid.

We conclude, nevertheless, as did the judge, that the procedure was not so irregular as to invalidate the action of the board. There was compliance with the statute. In addition to the summary, already noted, of the proceedings at the public hearing, the decision sets out the considerations and reasons relating to public health and safety and to

^{3/} The evidence was that the draft submitted by the clerk to the lawyer member was in the alternative, one denying the petition, the other favoring it. The form denying the petition was struck out, the one favoring the petition was revised, and, as revised, was incorporated in the decision which was signed and filed.

esthetics which entered into the board's determination. There was substantial compliance with the by-law. The decision contains the statement, required by the by-law and warranted by the evidence, that "the proposed use of the property will not substantially reduce the value of any property within the district, and will not otherwise be injurious, obnoxious, or offensive to the neighborhood." The public hearing and the views taken by the board meet the by-law requirement of an "investigation." To the extent that there was a deviation from the board's rules relating to its internal procedures, it could be deemed to have been permissibly and impliedly "waived" as that term is used in Coleman v. Louison, 296 Mass. 210, 213. Cf. Roman Catholic Archbishop of Boston v. Board of Appeal of Boston, 268 Mass. 416, holding that a board cannot waive a rule requiring a definite number of days notice to the public on matters touching the public interest.

In light of the judge's findings we need treat only briefly with other contentions of the plaintiffs. Most of them challenge the legality of certain conditions imposed by the board. The condition (2) that the nursing home "shall not be used wholly or in part for the care of mentally sick persons" is not so vague as to be unenforceable. The conditions (3) that "additional off-street parking space

shall be provided as may be deemed necessary" by the board and (4) that "the building and other improvements . . . constructed . . . shall be substantially in conformity with the plans . . . on file . . . with such additional screening of parking as the Board may require" do not run afoul of our holding in Weld v. Board of Appeals of Gloucester, 345 Mass. 376, 379, where the board issued in effect an advisory opinion on the requisites essential to the granting of a permit in the future. In the case before us the board has granted the permit, subject to termination if the conditions are not met. It did not commit itself to the granting of a permit in the future contingent upon a further determination. Even if, as the plaintiffs further contend, the plans referred to in condition (4) do not show the course of a brook that runs through the locus, it seems that sufficient details appear to enable the board to determine whether the "general or specific rules" for the granting of such permits were complied with. Shoppers' World, Inc. v. Beacon Terrace Realty, Inc. 353 Mass. 63, 70-71, citing Lawrence v. Board of Appeals of Lynn, 336 Mass. 87, 90.

The alleged errors in the judge's rulings on evidence do not merit discussion.

Decree affirmed.