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KATHARINE E. TOY  
Administrative SecretaryTelephone  
235-1664

## ZONING BOARD OF APPEALS

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WILLIAM O. HEWETT  
WILLIAM E. POLLETTA  
WILLIAM F. CULLINANE  
FRANKLIN P. PARKER

Petition of Stephen R. Burt and Stephen S. Porter

Pursuant to due notice the Special Permit Granting Authority held a public hearing in the hearing room on the second floor of the Town Hall at 8:25 p.m. on December 15, 1977, on the petition of Stephen R. Burt and Stephen S. Porter, requesting a special permit under Section IV (5) and Section XXV of the Zoning By-law which will allow the construction of a multi-unit medical office building or institution on the premises located at 496 Washington Street, now owned by the Trustees of Wellesley Post #72 American Legion Trust.

On November 30, 1977, the petitioners filed their request for a hearing before this Board and thereafter due notice of the hearing was given by mailing and publication.

Board members present were: Francis L. Swift, Chairman, William O. Hewett, and William F. Cullinane.

At the hearing William F. Machen, attorney representing the petitioners outlined the applicants' proposal. He stated that the property involved is owned by the American Legion Trust, Post #72, and the building on the premises has been used by the Post as its headquarters since 1922. The Trustees, he stated, have entered into an agreement with the petitioners, pursuant to a long-term ground lease, and subject to the receipt of all necessary zoning and similar approvals, to demolish the existing building and to construct on the site a one-story medical office building with space in the basement for the use of the Legion. The building, if built, will have approximately 5,095 square feet of space on the ground floor for five medical offices and space in the basement for the Legion to use as its headquarters

and other activities, and will also have laboratory facilities for the doctors' use in connection with their practice.

Off-street parking space for thirty cars will be provided at the rear of the building, it was stated, which it is felt, will be ample to accommodate the proposed offices within the building. There will also be a ramp running from the parking area to the building for the convenience of handicapped patients.

It is the opinion of the petitioners that there is a need for more medical facilities in the Town of Wellesley, and it is felt that a building of this type will help to meet this need. The location of the building has a number of advantages, it was stated; it is located on Washington Street, a main street, near Wellesley Square, and across the street from the housing for the elderly project. Although the property is located within a General Residence District, most of the surrounding areas are not used for residential purposes, it was stated; there is a convent on one side of the property and a church on the other side, with a funeral home, police station and elderly housing project across the street. It is felt, therefore, that the proposed use of the building will not change the character of the neighborhood to any degree.

The existing building is badly in need of repair, it was stated, and the Legion is not in financial circumstances to properly repair it or to build a new structure. Therefore, if approved, the proposed building will solve the petitioners' and the Legion's problems as the proposed building will be marketed and sold by the developers as a professional office condominium, with space allocated to the Legion for its activities without payment of a purchase price or rental.

It was explained that in 1922, the late Isaac Sprague gave the property involved to the American Legion in a Trust, to be preserved as a headquarters for the Wellesley Post for so long as the need existed. When

the Trust terminates, the property is to revert to the Town of Wellesley. A petition has been filed in the Probate Court, it was stated, for a determination by the Court as to whether the Trustees of the American Legion Trust have the authority to carry out the proposed demolition of the existing building and the construction of a medical building in its place. It was further stated that the Board of Selectmen and the Town Counsel have viewed the proposal favorably.

Attention was called to the fact that the American Legion is exempt from taxation and if the proposal is approved, it will result in an increase in taxes to the Town.

Attorney Machen stated that, in his opinion, the language in Section XXV B, Specific Powers, does not limit the Board's powers to the uses referred to in that specific section, but that the Board may grant special permits for uses referred to in the Zoning By-law which would be in harmony with the general purpose and intent of the Zoning By-law.

Carl F. Tripp, 17 Cottage Street, Chairman of the Committee which was formed to develop a method of providing new quarters for the Wellesley American Legion Post, explained that the existing Legion building needs extensive maintenance and remodeling, and the Post does not have the funds for any of this work. The Committee, he stated, has developed a solution to the problem and he outlined the proposal to lease the land to a developer who would build a medical building on the site and provide quarters for the Wellesley Post at no cost, plus provide the Post with a monthly income. He also stressed the need for a hall in the Town which, he felt, could be rented to Town committees and other selected groups at reasonable fees, when not being used by the Legion, and he urged the Board to grant the Special Permit requested so that the programs of the Legion and the Legion Auxiliary may continue, otherwise they may become a financial burden.

to the Town.

J. Haller Ramsey, Trustee for the American Legion Post No. 72, also outlined the difficulties involved with the property and felt that, if the proposed building can be constructed, it will be a great addition to the Town.

Miles C. Page, 45 Marshall Road, urged the Board to grant the requested permit so that the many worthwhile projects now carried on by the Legion may continue, especially the children and youth programs, to which the major portion of the funds are directed.

William L. Tibodeau, 20 Atwood Street, abutting property owner at the rear, stated that the Legion building is an eyesore now and while he is not opposed to the proposed medical building, he is definitely opposed to the idea of the Legion renting out its basement space which is within a residential zone.

Royal H. Switzler, 18 Lexington Road, Raymond B. Willcox, 8 Geraldine Drive, Stewart Sproule, Explorer Scout, 60 Washburn Avenue, and Mrs. Carl Tripp, 17 Cottage Street, representing the American Legion Auxiliary, all spoke in favor of the request.

Eugene Annis, 8 Framar Road, recommended that the matter be brought before the Town Meeting instead of the Board of Appeals; in his opinion, it is the Town Meeting which has the power to dispose of Town-owned property and property rights.

Alfred A. Fraser, 5th Commander of the Legion Post No. 72, reviewed the history of the Legion House since it was acquired from Isaac Sprague in 1922. He also felt that to petition the Board of Appeals was not the right thing to do as he strongly felt the request should be brought before the Town Meeting for the citizens of the Town to decide the matter.

The following persons expressed concern relative to the

proposed parking area, the renting of the hall to outside groups, and the danger of children's safety in the area as a result of the increased traffic: Robert G. Burns, 492 Washington Street, John Walsh, 7 Morton Street, and Norman Kelly, 37 Cottonwood Road.

Robert Broder, 2 Middlesex Street, stated that as citizens of the Town, we must be aware of what we would be sacrificing in order to accommodate the proposed medical building with its 30-car blacktop area; and he questioned whether the present building might be worthy of consideration as historical property.

Thomas J. Carens, attorney, questioned the petitioners relative to how the project will be financed and how the petition involved applies under the provisions of Section XXV of the Zoning By-law.

Letters favoring the request were received from Donald J. and Janet C. Conner, 14 Southgate Road and Margaret M. Heckler, Member of the Congress of the United States.

Letters opposing the request were received from Mary S. Bobbitt, 23 Arden Road and Eugene Annis, 8 Framar Road.

The Planning Board in its report reviewed its interpretation of the term, "Medical Institution" and its application in this case with respect to the petition relating to 422 Worcester Street. In its opinion, the term medical institution as applied to the proposal presented in this petition does not qualify for a special permit under the Zoning By-law. It did not feel that the questions surrounding the Isaac Sprague Trust directly concerned it and felt that the condition of the existing building cannot serve as justification for this proposal or that provision for another meeting hall in the Town should be considered as justification for this proposal.

Statement of Facts

The property involved contains 29,275 square feet, and is located within a General Residence District, abutting Single Residence District on the southerly side. There is an existing three-story wooden building on the site which has been used by the American Legion Post #72 for over fifty years, as its headquarters.

The petitioners seek a special permit which will allow the premises involved to be used as a multi-unit medical office building or institution.

The petitioners' attorney outlined in detail the reasons for the request, as stated in this report, and submitted data relative to the petition filed with the Norfolk Probate Court requesting instructions on this matter, as well as a copy of the agreement, between the petitioners and the Wellesley Post #72 American Legion Trust, concerning the development and construction of a professional office building on the premises involved.

A set of plans was submitted, drawn by Robert C. Dean, Architect, dated May 12, 1977, which showed the elevations of the building as well as the proposed floor layouts. A plot plan was also submitted which showed the location of the building on the lot as well as the proposed parking area located on the easterly side of the building. This latter plan was drawn by Robert C. Dean, Architect, dated July 14, 1977, revised November 15, 1977. A landscape plan was also submitted which was drawn by Earle B. Mosher, dated November 18, 1977.

Decision

The petitioners seek to obtain a special permit which would permit the change in use of the property located at 496 Washington Street in a General Residence District, from its present allowed use, to that of an allowed use together with the use of a multi-office medical building. The petition was filed

and a public hearing thereon was held, requesting relief from the Zoning By-law under provisions of Section IV (5) and Section XXV of the Zoning By-law.

The Town of Wellesley accepted zoning regulations, established its Zoning By-law and divided the land within its boundaries into classes of districts as shown on the "Zoning Map of the Town of Wellesley, Massachusetts, prepared under the direction of the Planning Board, March 20, 1925." This Zoning By-law and map have from time to time been amended, repealed, substituted and revised.

The provisions of the Zoning By-law under which the petitioners seek relief are:

Section IV      General Residence Districts

In General Residence Districts, no new building or structure shall be constructed or used in whole or in part, and no building or structure, or part thereof, shall be altered, enlarged, reconstructed or used, and no land shall be used, for any purpose except one or more of the following specified uses:

- (5) Such additional uses as are authorized by Section II, Clause 8 subclauses (b), (c), (d), (e), (f), (g), and (h) upon the applicable conditions stated in Clause 8.

Section II      Single Residence Districts

In single residence districts, no new building or structures shall be constructed or used in whole or in part, and no building or structure or part thereof shall be altered, enlarged, reconstructed or used, and no land shall be used for any purpose except one or more of the following specified uses:

(8) Any of the following additional uses upon the granting of a special permit as provided in Section XXV:

- (d) Hospital, sanitarium, or other medical institution...
- (h) Such accessory uses as are customary in connection with any of the uses enumerated in subclauses (a), (b), (c), (d), (e), (f) and (g) and are incidental thereto:  
(Subclauses (b), (c), (e), (f) and (g) are not herein set forth, as they do not pertain to the instant petition and the petitioners rely on sub-clause (d).)

Section XXV      Special Permit Granting Authority

A.      General Authority and Conditions

This Zoning By-law provides for specific types of uses which shall only be permitted in specified districts upon the granting of a special permit, as provided herein. Special permits may be granted only for uses which are in harmony with the general purpose and intent of this Zoning By-law, and shall be subject to general or specific provisions as set forth herein, and such permits may also impose conditions, safeguards, and limitations on time or use, in order to further the objectives of this Zoning By-law.

B.      Specific Powers

The Special Permit Granting Authority may grant a special permit for uses accessory to activities permitted as a matter of right, whether or not on the same parcel as activities permitted as a matter of right, which activities are necessary in connection with scientific development, research, or related production, provided that the Special Permit Granting Authority finds that the proposed accessory uses do not substantially derogate from the public good. The approval of plans by the Special Permit Granting Authority in accordance with Section III A Paragraph 2, subparagraph (k) Procedure shall constitute the granting of a special permit.

Prior to October 1976, when a Town Meeting, duly called to act on proposed articles affecting the then constituted Zoning By-law, among other matters, there was encompassed in the Wellesley Zoning By-law, Section XXIV entitled "Board of Appeal" whereunder: (1) This Board was constituted, (2) "appeals and other proceedings relating to zoning under the statutes and under this Zoning By-law shall be presented in writing to this Board", and (3) "no permission sought under the provisions of Section II 8,

Section IV 5, Section VII 4 and Section XI 11 shall be granted unless the Board of Appeal shall, after investigation in each case, 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." In addition to the enumerated powers, the Board was granted the power "in specific cases where it finds that a real need exists and that the proposed non-conforming building, structure or use will not substantially reduce the value of any property within the district, or otherwise injure the neighborhood, grant temporary and conditional permits for non-conforming buildings, structures and uses in any district in the Town for a period of not more than one (1) year at a time.

As a consequence of the vote of the Town Meeting in October 1976, the above-referred to Section XXIV of the Zoning By-law was repealed, and a new Section XXIV was voted, and became effective upon the approval of the Attorney General on February 16, 1977. This new amendment, was presented and voted on because of the alleged desirability and suggested requirement to bring the Wellesley Zoning By-law into conformance with the Massachusetts Legislative Acts of 1975, Chapter 808. Section I A, Definition, of the Zoning By-law was also amended by adding thereto the following:

Permit Granting Authority - The Zoning Board of Appeals  
Special Permit Granting Authority - Zoning Board of Appeals except as otherwise designated by the Zoning By-law for the granting of special permits.

Under the new Section XXIV of the Zoning By-law, as voted, adopted and approved, entitled Permit Granting Authority, there are five lettered clauses; Clause A sets forth the constitution of the Zoning Board of Appeals; Clause B sets forth the Powers of said Board, which states:

The Zoning Board of Appeals shall have the following powers:

1. To hear and decide appeals in accordance with Clause C,

Appeals.

2. To hear and decide petitions for variances as set out in Clause D. Variances;
3. To hear and decide applications for special permits upon which the Zoning Board of Appeals is empowered to act as Special Permit Granting Authority under the Zoning By-law under the procedures in Section XXV. In exercising these powers, the Zoning Board of Appeals may make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken and may grant or direct the granting of a permit.  
(Clauses C. D and E are not pertinent to the petition herein. Section XXV has been set forth herein above.)

On February 13, 1922, five citizens of Wellesley entered into a declaration of Trust which was and has been named Wellesley Post #72 American Legion Trust. Also on February 13, 1922, Isaac Sprague conveyed to the Trustees of said Trust a certain parcel of land and buildings thereon, which land and buildings are the subject matter and locus contained in the petitioners' request. Both the Declaration of Trust and the Deed were recorded at Norfolk Registry of Deeds on March 19, 1922. Since that time the building and land have been used solely by the Wellesley Post #72 American Legion in accordance with the terms and purposes of the Trust.

As set forth above, it was not until 1925 that Wellesley adopted the Zoning By-law. Since 1922 the subject property has been owned by the present owners and used by the occupants as the headquarters for the Wellesley Post #72 American Legion.

On June 15, 1977, the Trustees entered into an agreement with the petitioners whereunder, in part, the Trustees are to lease the property to the petitioners or their nominees for a period of ninety-nine years unless otherwise agreed, and the petitioners are to demolish the existing structure and to construct on the property a multi-unit professional office building containing 5095 square feet of professional space divided into

five offices, together with space in the basement to be used by the Legion in connection with its activities and on a limited basis by the other unit owners or tenants and others not necessarily associated with either. Incorporated in the plan as filed with this Board, there is a space designated as laboratory. Further elaboration concerning the use of this space was not made.

Reference to the declaration of trust and the Isaac Sprague Deed and the agreement between the Trustees and the petitioners is made herein, solely to delineate the past, present and contemplated use of the property. This Board is fully aware of questions surrounding the use of the subject property, which are matters over which this Board does not have jurisdiction, is not expressing an opinion or judgment on same, and is consciously avoiding any expression of opinion or judgment thereon. During the course of the public hearing, a variety of expressions concerning these matters were voiced by the citizenry in attendance. In their presentation before this Board, and in written communication, subsequent to the hearing, reference was made to proceedings pending in another forum relating to said matters, by the petitioners.

Stress has been placed on a decision of this Board made in the recent past concerning the substantial issue incorporated in this petition. It is argued, and forcibly so, that the use to which the petitioners propose to put the property comes within the definition, and usage of the term "medical institution," and the grant of a permit by this Board at an earlier time upon a petition based on a similar request as herein made, should entitle these petitioners to similar relief.

The proposal as outlined to this Board, contemplates the use of the newly constructed building by five medical professionals in their pursuit of medical practice and in dispensing their individual services to the public;

at the present time, it is not demonstrated, nor is it stated that in the future it is contemplated, that the occupants of the offices are to be selected on a basis of medical specialty relationship. Upon completion of the new structure, the petitioners expect to market and sell the building as a medical office condominium. It is not shown that the occupancy of these five offices makes up a harmonious unit. Also lacking in this proposal are elements of medical services such as full service x-ray facilities, blood testing units and the like.

The petitioners further anticipate that the space to be allocated to the use of the Wellesley Post #72 will be rented out or leased out to users not related to Legion activity. This use appears to the majority of this Board to be singularly a commercial activity and as such is not harmonious to a general residence zone.

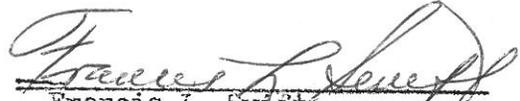
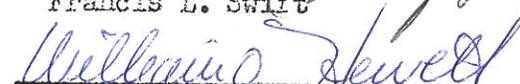
It is argued that the proposed change of use will be beneficial to the Town in that there will be a property tax assessment and collection, will accommodate a need for this type of occupancy, that it would afford a more accessible medical service to the older residents in the vicinity, and will relieve the declining fortunes of the Legion Post. While these factors are not to be dismissed without due consideration, and all have merit in the economic life of those affected, it is the opinion of the majority of this Board that they do not concern the issue of permitted use within the concept of the Zoning By-law, and are not supportive of what is in harmony with the general purpose and intent of the Zoning By-law.

It is the determination of the majority of this Board that the proposed use of the subject premises and the construction of the building and the use to which it is to be put are not sufficiently close to the broad functions of hospitals and sanitariums to warrant the conclusion that it constitutes a medical institution.

It is further determined by a majority of this Board that the general purpose and intent of the Zoning By-law, as it pertains to uses in single residence and general residence districts are set forth in Section II and Section IV of the Zoning By-law.

Therefore, it is the opinion of the majority of this Board, that the petition is not a medical institution within the purpose and intent of the Zoning By-law, and is not in harmony therewith.

The petition is denied.

  
Francis L. Swift  
  
William O. Hewett

Mr. Cullinane does not concur with the decision of the majority of the Board.

Filed with Town Clerk \_\_\_\_\_

  
William F. Cullinane

Copies of the decision and all plans referred to in the decision have been filed with the Planning Board and with the Town Clerk.

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TOWN CLERK'S OFFICE  
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