



BOARD OF APPEAL

RICHARD O. ALDRICH
 DANA T. LOWELL
 F. LESTER FRASER

KATHARINE E. TOY, CLERK
 TELEPHONE
 235-1664

Appeal of Laurence Eliot Bunker
 (Aggrieved)
 Charles E. and Katherine T. Channing

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 8:30 p.m. on February 11, 1971, on the appeal of Laurence Eliot Bunker claiming to be aggrieved by the issuance of a building permit by the Inspector of Buildings to Charles E. and Katherine T. Channing to construct an addition on so-called Building #5, located off 49 Walnut Street on lands owned by them. The appellant contended that the permit appealed from had been issued in violation of Section XXI of the Zoning By-law, because the Inspector of Buildings had included in his calculations for the parking area required under the Zoning By-law the rights-of-way created by deed across the Channing property which provide the only means of access to the appellant's property from Walnut Street. Said appeal was made under the provisions of Section XXIV of the Zoning By-law.

On January 5, 1971, the appellant filed his appeal with this Board and thereafter due notice of the hearing was given by mailing and publication.

The appellant spoke in support of his appeal at the hearing.

RECEIVED
 FEB 12 1971
 TOWN OF WELLESLEY

Leo J. Hession, attorney representing Charles E. and Katherine T. Channing, explained that if this Board is going to exclude the land area of the 15' right-of-way, in its required parking area, including space for maneuvering, then there may not be sufficient vacant land to provide two square feet of parking area for every square foot of building as required by Section XXI (e) of the Zoning By-law. Attorney Hession continued that the so-called 15' right-of-way involved has been used for years as the only access to the existing parking areas, and in his opinion, providing the passageway is not obstructed, the area can, within the scope of the by-law, be calculated as a portion of the space required for parking facilities. It was agreed on behalf of Mr. and Mrs. Channing that the appellant has a right to pass over the 15' passageway. It also appears that there is another 10' right-of-way along the boundary line, but this was not included in the parking space calculations.

A plan was submitted, drawn by MacCarthy Engineering Service, Inc., Natick, Mass., dated July 28, 1970, upon which the Building Inspector calculated his area requirements.

No other persons objected to the granting of the permit, nor did any other persons speak in support of its issuance.

Statement of Facts

The property involved is located within an Industrial "A" District, a District in which by virtue of Section XXI of the Zoning By-law it is

required that there shall be provided and maintained facilities for parking of motor vehicles for every building constructed or placed therein, designed or intended to be used for any business, industrial, educational or commercial purpose, an area of at least two square feet for each square foot of area occupied by the building. This area includes space for the maneuvering of vehicles.

Charles E. and Katherine T. Channing, the owners of the property, filed an application for a permit to construct an addition on the building involved, and on December 28, 1970, the Building Inspector issued a building permit for the proposed construction, there being in his opinion no apparent violation of the Zoning By-law or Building Code.

At the hearing the appellant, Laurence Eliot Bunker, stated his contention, that the area of the 15' right-of-way involved should not be used in calculating the required parking facilities. His property, which adjoins the property involved, is zoned for residential purposes and the right-of-way referred to is the only access he has to Walnut Street. He referred to a Land Court certificate of Title of the land involved, dated December 7, 1921, which described the land as being subject to the rights of the owners and occupants of certain adjoining property now owned by the appellant, " . . . to have a free and open passage way to pass and re-pass with teams and otherwise as it may be necessary across the land hereby registered to Walnut Street, said way to be fifteen feet wide and to be kept a good and convenient way for a loaded team by the owner of said land; and until another equally good and convenient way is furnished by the owner of said land said way is to be in the location as approximately shown on the plan . . ." A plan showing the right-of-way, drawn by A. Stewart Cassidy, Surveyor, dated May 20, 1921, was submitted by the appellant.

As the Board understands the situation presented here, when the title to the land now owned by Mr. and Mrs. Channing was registered under the Land Court Act, the then owners of the fee title in the premises were held to have acquired title subject to two easements or rights-of-way in favor of the adjoining premises which were then owned by a predecessor in title of the appellant.

Appellant's complaint appears to be that the issuance of the building permit appealed from, which would appear to involve an implicit determination by the Building Inspector that the parking area requirements of Section XXI of the Zoning By-law have been met, will represent either some form of legal authorization to the owners of the premises to block up or fill up or park cars on the right-of-way to which the appellant is entitled, or will represent some sort of legal encumbrance or handicap to the appellant as far as his exercise of the rights which he possesses is concerned and his power to convey these rights to others.

However, under Section XXI of the by-law it appears, as previously stated, that the necessary area prescribed for parking facilities "includes space for maneuvering" and it has been indicated insofar as parking is concerned that the owners of the premises do not intend to use or permit the use of the area within the 15' strip over which the appellant claims a right of passage, other than for the maneuvering of vehicles on their way to or from the areas or spaces in which they are parked. Such a use does not appear to be inconsistent with the exercise of the easement claimed by the appellant and in any event, it does not appear that any action in the nature of the granting of a permit by the Building Inspector or the issuance of an order by this Board

JOHN C. FERRELL OFFICE
RECEIVED

on appeal from such a grant could have the effect of extinguishing or limiting an easement of record possessed by the appellant across land registered under the Land Court Act.

Actually, it would appear that what the appellant is entitled to is a right of passage over a right-of-way which is indicated on each of the plans submitted in connection with the hearing, "to pass and re-pass with teams and otherwise as it may be necessary . . . and to be kept a good and convenient way for a loaded team by the owner of said land."

No contention was made by the appellant at the hearing that the roadway or passageway indicated on the plans was not being kept or maintained in suitable condition for passage by "loaded teams" (or such other vehicles as might at the present time fulfill the function formerly carried out by teams), and a view of the area indicates that a roadway is presently maintained in approximately the area indicated on the appellant's plan. Presumably, the owners of the property and/or their tenants would find it difficult to carry on their own businesses if a suitable passageway were not maintained.

Further, it does not appear that any contention was made that the roadway or passageway was being blocked or obstructed by vehicles or otherwise against the appellant's interests or demands. Concededly, if vehicles are being maneuvered, or even loaded or unloaded, in the roadway, this might temporarily obstruct appellant's right of passage, but we do not understand that the temporary obstruction or blocking up of a right-of-way constitutes an unlawful restriction of or interference with another's easement rights, so long as the holder of the easement can promptly and upon demand obtain the removal of the temporary obstruction and enjoy his right of passage. In general, the owner of land subject to an easement has the right to use his land in any way which is not inconsistent with the easement.

Decision

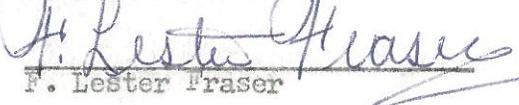
It is, therefore, the opinion of the Board that the issuance of a building permit by the Building Inspector to Charles E. and Katherine T. Channing was lawful and should be sustained by the Board, based upon the representations which were made at the hearing. The Board does believe, however, that the appellant is entitled to some reasonable assurance that when the proposed addition is constructed and occupied and use is being made of the parking facilities, including room for maneuvering, the existence of which is indicated by the issuance of the permit, the appellant's right of passage will not be interfered with as a result of the parking of vehicles by occupants' business visitors or others entering upon the premises. Therefore, the Board will require as a condition of dismissing the appeal that the owners of the property on which the building addition is to be constructed file with this Board an undertaking satisfactory to the Board to the effect that the portion of their premises which constitutes a right-of-way for the appellant will, so far as parking by the owners or their tenants is concerned, be utilized as a means of ingress and egress and maneuvering of vehicles and, where necessary, the loading and unloading of vehicles, and that the appellant's exercise of the right of passage which is reserved in the title certificate submitted to the Board, will not be interfered with.

APPEALS
HEARD
IN
PUBLIC
HEARINGS
OFFICE
RECORDED

Appeal of Laurence Eliot Bunker
(Aggrieved)
Charles E. and Katherine T. Channing

Accordingly, it is the decision of the Board that upon the filing with the Board, in form satisfactory to it, of an undertaking as described above, such undertaking to be kept on file with the Board, the appeal should be dismissed.


Philip H. E. Cahill

Dana T. Lowell

F. Lester Fraser

Filed with Town Clerk _____

RECEIVED
TOWN CLERK'S OFFICE
MAY 23 11 54 AM '11

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
Eq. No. 104548

LAURENCE ELIOT BUNKER

v.

PHILIP H. R. CAHILL, et als

FINDINGS OF FACT, RULINGS AND ORDER FOR DECREE

This is an appeal under the provisions of General Laws, Chapter 40A, Section 21 from a decision of the Board of Appeal of the Town of Wellesley sustaining the action of the Building Inspector of said town in issuing a building permit to the Respondents Charles E. Channing and Katherine T. Channing. The dispute between the parties involves the construction of a provision of the zoning by-laws of the Town of Wellesley.

After hearing, I find the following facts: The Respondents Channing were the owners of a parcel of land with buildings thereon located off 49 Walnut Street, Wellesley. The Channings applied to the Building Inspector for a building permit to construct an addition 40 feet by 30 feet in dimension to an already existing building on the lot owned by them. This lot is located within an industrial "A" district under the zoning by-laws of the town. Under date of December 28, 1970, the Building Inspector issued a building permit for the

proposed construction. A plan of the locus had been drawn up by MacCarthy Engineering Service, Inc. and had been submitted to the Building Inspector.

The Petitioner Laurence Eliot Bunker is the owner of a parcel of land adjoining the land of the Channings. The Petitioner's lot has access to River Street which is a public way. The Petitioner is the owner of an easement of right-of-way across the Channing lot so as to provide access from the rear of the Petitioner's lot to Walnut Street. This right-of-way is described in a Land Court Certificate of Title issued with respect to the Respondent Channings' lot, dated December 7, 1921, as follows: "To have a free and open passageway to pass and repass with teams and otherwise as it may be necessary across the land registered to Walnut Street, said way to be fifteen feet wide and to be kept a good and convenient way for a loaded team by the owner of said land...". This right-of-way is the only direct access from the Petitioner's lot to Walnut Street. The Petitioner objected to the issuance of the building permit on the ground that the construction of the building would violate Section XXI of the town by-law in that the remaining portion of the Channing property not occupied by structures would not provide the minimum area of at least two square feet of land for the parking of motorvehicles for each square foot of area

occupied by the building. The Petitioner duly appealed from the decision of the Building Inspector to the Board of Appeal, claiming to be aggrieved by the issuance of the building permit for the construction of the addition. After hearing, the Board of Appeal sustained the action of the Building Inspector. The Board of Appeal's decision, however, was subject to the condition that "The owners of the property on which the building addition is to be constructed file with this Board an undertaking satisfactory to the Board to the effect that the portion of their premises which constitutes a right-of-way for the appellant (the Petitioner) will, so far as parking by the owners or their tenants is concerned, be utilized as a means of ingress and egress and maneuvering of vehicles and, where necessary, the loading and unloading of vehicles, and that the appellants exercise of the right of passage which is reserved in the title certificate submitted to the Board, will not be interfered with." Pursuant to this decision of the Board, the Channings under date of September 1, 1971 executed a covenant in accordance with the conditions laid down by the Board of Appeal. Subsequently, the Channings conveyed the parcel owned by them to G. Arnold Haynes and Henry L. Nielsen who were added as parties respondent to this proceeding. The Respondents Haynes and Nielsen had offered to execute a covenant in accordance with the conditions laid down by

the Board of Appeal similar to the covenant previously executed by the Channings. After the decision of the Board of Appeal, the Petitioner Bunker instituted this appeal to have the decision set aside as being in excess of the authority of the Board. In connection with the hearing of this appeal, the Court took a view of the premises.

As indicated above, the dispute between the parties relates to the application of Section 21 of the zoning by-law to the property of the Respondents. Section 21 provides in pertinent part that for a building used for an industrial purpose there shall be provided for the parking of motorvehicles an area of at least two square feet for each square foot of area occupied by the building. Section 21 goes on to provide, "The area prescribed above includes space for maneuvering within the parking facilities, which facilities may be located in, on, under or outside a building, shall have adequate means of access, be otherwise adapted to the parking of vehicles, and shall be kept available therefor." The Building Inspector in computing the area available to the Respondent owners for parking facilities included in his computations the land of the Respondents which is subject to the Petitioner's easement of right-of-way. Without the inclusion of the area subject to the right-of-way, the available ground area for parking facilities

would not satisfy the minimum requirements, with respect to parking, of Section 21 of the zoning by-law. The critical question, therefore, is whether it is proper in computing the space available for parking facilities to include the ground area which is subject to the Petitioner's easement. The area within the right-of-way as currently laid out is open and unobstructed. In fact, this area is and was being used as a driveway by the occupants of the buildings now on the locus and by customers and visitors coming to the buildings. The Petitioner does not in fact at the present time make use of the right-of-way. The Petitioner's land adjacent to the Respondents' parcel is vacant and is not being used for any residential, commercial or business purpose at the present time. In fact, the entire area of the Petitioner's land adjacent to the land of the Respondents is swampy in nature and overgrown with wild grass, brush and bushes.

I rule as a matter of law that the Building Inspector and the Board of Appeal acted properly and validly in computing the area of the Petitioner's easement in determining the amount of available parking facilities space on the Respondents' property. Quite properly, the Board of Appeal did not undertake in any way to affect the legal rights of the Petitioner with respect to his easement. It is perfectly obvious that no action

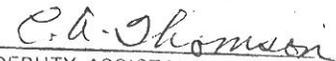
by that Board could diminish ~~for~~ interfere with the Petitioner's rights. However, the Board did nothing more than to hold that it was permissible for the Building Inspector to include in his computation of the area available for parking facilities the land of the Respondents which was subject to the Petitioner's easement of right-of-way. The Board expressly disclaimed any intention to authorize the obstruction of the Petitioner's right-of-way by the parking of vehicles thereon.

I find and rule, therefore, that the decision of the Board of Appeal did not exceed its authority and that it should be affirmed.

Let a decree be entered accordingly.


Cornelius J. Moynihan

A TRUE COPY,

Attest: 
DEPUTY ASSISTANT CLERK

MIDDLESEX COUNTY

NEWTON

CHARLES RIVER

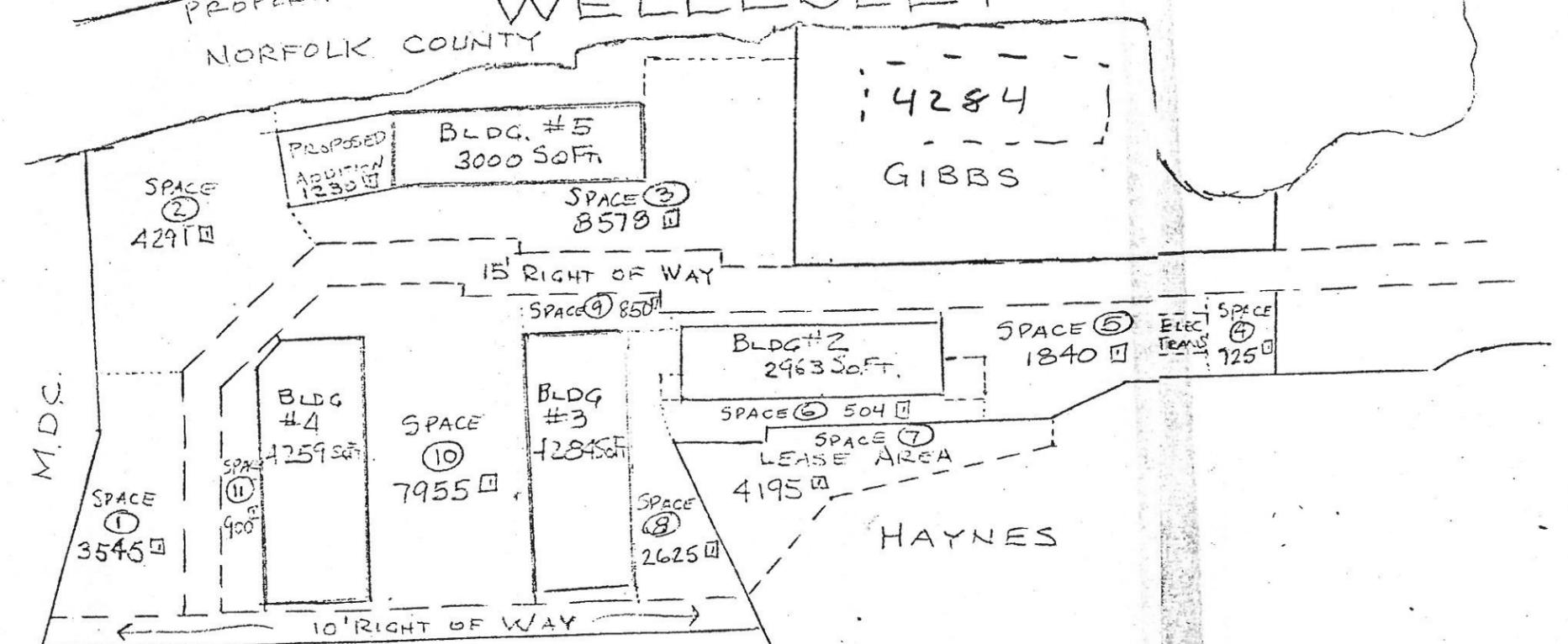
COUNTY AND CITY LINE

TOWN LINE

PROPERTY LINE

WELLESLEY

NORFOLK COUNTY



4284
GIBBS

HAYNES

M.D.C.

AREA 4 BLDGS	14506	□
PROP. ADDITION	1230	□
	<u>15736</u>	□
	x 2	

REQUIRED PARKING AREA 31472 □

PLAN OF LAND
IN
WELLESLEY, MASS.
OWNED BY

CHARLES E. AND KATHERINE T. CHANNING

SCALE 60 FEET TO AN INCH

FEBRUARY 5 1971

JAMES P. DUNE, CIVIL ENGINEER

SPACE NUMBER	AREA	REMARKS
1	3545	
2	4291	
3	8578	
4	725	
5	1840	
6	504	
7	4195	
8	2625	
9	850	
10	7955	
11	900	
TOTAL	<u>35108</u>	

$\frac{35108}{15736} = 2.231$

