



ZONING BOARD OF APPEALS
TOWN HALL WELLESLEY, MA 02181

JOHN A. DONOVAN, JR., Chairman
ROBERT R. CUNNINGHAM
KENDALL P. BATES

ELLEN D. GORDON
Executive Secretary
Telephone
431-1019

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WELLESLEY, MA 02181

ZBA 89-38
Petition of Town of Wellesley/Board of Selectmen
Wellesley Farms Commuter Parking Lot
Croton Street

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, July 27, 1989 at 8 p.m. in the Selectmen's Meeting Room (Conference Room B) of the Town Hall, 525 Washington Street, Wellesley on the petition of TOWN OF WELLESLEY/BOARD OF SELECTMEN requesting an extension of the Special Permit for Site Plan Approval pursuant to Section XVIIA, Section IVXA and Section XXV of the Zoning Bylaw to reconstruct the WELLESLEY FARMS COMMUTER PARKING LOT on CROTON STREET in a Single Residence District and a Transportation District. Said Special Permit was granted on February 24, 1987, extended on December 7, 1988, and will expire on August 31, 1989 if not extended.

On July 10, 1989, the petitioner filed a request for a hearing before this Board and thereafter due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Theodore Parker, Secretary of the Board of Selectmen. Mr. Parker said that the request was to further extend the Special Permit previously granted to reconstruct the parking lot. The project has been planned and discussed since 1983, and has yet to be completed due to a series of financial and political detours. The project is part of an overall program initiated by the local neighborhood designed to preserve parkland, a waterway, an historic structure and a public convenience which was deteriorating.

Mr. Parker gave a short history of the project and stated that at this time a license agreement has been sent to the MBTA, but no response has been received. If the license and funding can be arranged with the MBTA, the project will commence. If this is not possible, then a request will have to be made at Town Meeting in the spring of 1990 for funds to complete the project. An extension of the Special Permit will be required through that time.

Mr. Parker read a portion of the original decision and said that nothing in the facts or the request that was originally granted has changed. The Selectmen would like the opportunity to have the additional time to complete the financing for the project.

Carol Fyler, Secretary of the Natural Resources Commission, said that NRC has been involved in the project since its inception. She said that three years ago money was requested and appropriated at Town Meeting for dredging Farm Station Pond. It was thought that the dredging would coincide with the reconstruction of the parking lot. However, the pond has been dredged, but the parking lot still does not have oil or grease traps, which is causing the pond to become silted and polluted again. Mrs. Fyler asked that the parking lot be reconstructed as quickly as possible so that the money spent on the pond is not wasted.

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Lois Borgman, a member of the Wetlands Committee, submitted a copy of the Basis for the Decision of the Committee on the Determination of Applicability for parking lot reconstruction, dated April 19, 1989. Mrs. Borgman said that the Committee feels very strongly that the project should continue, as the wetlands will be better off, the drainage will be improved, and the parking lot size be reduced. She added that the parking lot is not considered to be within the 100 Year Flood Plain due to the hydraulics involved.

Felix Juliani, a member of the Board of Selectmen, concurred with all the statements made by Theodore Parker.

Mary Rich, Chairman of the Wellesley Historical Commission, stated that the Commission did not approve all design details, but was not opposed to the extension.

Sarah Johnson, Vice-Chairman of the Board of Selectmen, voiced the minority opinion of opposition to the extension. She believed the initial permit was flawed, as the MBTA has added a handicapped overhead access ramp, the plans for which have not met approval by the Board of Selectmen. A new Special Permit should be sought at a future time.

Bruce Dishman, 50 Elm Street, representing the Wellesley Farms Neighborhood Association, read a statement of opposition into the record and submitted a copy of the statement to the Board of Appeals.

A discussion followed on whether the parking lot is in conformance with the Zoning Bylaw. The Board noted that a variance for the configuration was requested in the original petition, and that the decision stated that a variance was not required.

William Pike, 25 Croton Street, spoke in opposition to the petition, as did Robert Carlson, 6 Elm Street, who felt that as the MBTA has not acted in good faith, a further extension of the special permit is not warranted.

Kathleen Rowan, 48 Hundreds Road, questioned if the Zoning Bylaw determined the number of cars allowed on a parking lot such as Wellesley Farms. The Board responded that the original site plan had been approved for 195 cars, and that the original decision stated that the parking lot complied with the Zoning Bylaw. The Board stated that the legality of that decision has never been questioned. Only the issue of the extension is before the Board at this time.

Bruce Dishman read into the record the letter dated July 7, 1989 from the Planning Board in opposition to granting the extension.

Allister Shepherd, 30 Pine Street, and Bruce Patton, 81 Croton Street, voiced opposition to the petition.

Statement of Facts

The property in question is known as the Wellesley Farms Commuter Parking Lot, owned by the Town of Wellesley, on Croton Street, and is adjacent to the Wellesley Farms
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Railroad Station and Town park land. It is located in a Single Residence District and a Transportation District, and is an existing commuter parking lot.

An extension through June 30, 1990 of the Special Permit for Site Plan Approval to reconstruct the commuter rail parking lot is requested. The original Special Permit was granted on February 24, 1987 (ZBA 87-11) and was extended on December 7, 1988 (ZBA 88-93). This extension is due to expire on August 31, 1989, if not further extended.

The original petition stated that parking spaces would be provided for 195 cars, and that the project would be funded under the MBTA Commuter Rail Program.

Section XXV-C (3) of the Zoning Bylaw reads as follows:

"A special permit shall lapse within two (2) years of the effective date of grant of such special permit, if a substantial use thereof has not sooner commenced except for good cause...."

In a letter dated June 26, 1989, which was submitted with the present petition, Ronald Cloutier, Chairman of the Board of Selectmen, states that due to procedural delays, it seems probable that construction cannot start before September 1, 1989, at which time the extension will expire.

Mr. Cloutier states that the terms of the license agreement are still being worked out between the Board of Selectmen and the MBTA. Due to the exceptional number of agencies involved and the number of permits required for this project, the scheduling is not within the control of the Town of Wellesley. Progress is being made. Given the circumstances, an extension through June 30, 1990 is requested.

The following plans were submitted with the 1987 petition, drawn by Louis Berger & Associates, Inc.: 1) Location plan, Locus Plan, Donald Brian Nicholas, Registered Professional Engineer 1/19/87; 2) Index, General Notes & Symbols; 3) Typical Sections and Details; 4) Construction Plan; 5) Signing, Pavement Marking and Landscaping Plan; 6) Signing Layouts; 7) Construction Details; 8) Construction & Electrical Details; 9) Handicap Platform and Construction Details; 10) Lighting Plan.

The Planning Board, on July 11, 1989, voted to oppose the continuation of the extension of the Special Permit. The Board stated that the design of the parking spaces and maneuvering aisles is not adequate, and the plan should be redesigned to conform to the provisions of the Zoning Bylaw. A new Special Permit should be obtained.

Decision

This Authority has made a careful study of the evidence presented. The petitioner is requesting a further extension to a Special Permit for Site Plan Approval (ZBA 87-11) granted on February 24, 1987 and extended to August 31, 1989 in a decision rendered on December 7, 1988 (ZBA 88-93).

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It is the opinion of this Authority that "good cause" as required by Section XXV-C (3) of the Zoning Bylaw has been shown.

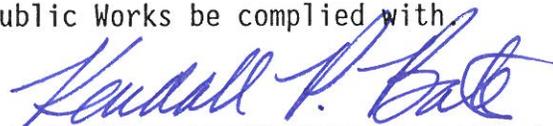
Is the further opinion of this Authority that most of the objections to the extension of the Special Permit, which were raised by opponents at the Public Hearing, can be resolved through the license negotiations between the Board of Selectmen and the MBTA. Denial of the extension would restrict the Selectmen in said negotiations. It is the opinion of this Authority that as "good cause" has been demonstrated, at this time, the Town of Wellesley would not gain by being forced to begin the Site Plan Approval process again.

An extension to the Special Permit for Site Plan Approval, originally granted on February 24, 1987, is hereby granted pursuant to Section XVIIA, Section IVXA and Section XXV of the Zoning Bylaw, subject to the following conditions:

1. That said extension shall expire on June 30, 1990, if not acted upon prior to that date.
2. That said extension shall apply only to those plans, dated January 19, 1987, which were submitted with the original petition, and described in the foregoing Statement of Facts.
3. That all work shall be performed in accordance with said plans submitted and on file with this Authority.
4. That all design and construction must comply with all applicable state codes.
5. That all requirements of the Department of Public Works be complied with.

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.

cc: Planning Board
Inspector of Buildings
edg



Kendall P. Bates, Acting Chairman



William E. Polletta



Sumner H. Babcock

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COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss.

Superior Court Dept.
Civil Action # 89-2412

MARJORIE GLASSMAN -and-
WELLESLEY FARMS NEIGHBORHOOD ASSN.

v.

C O M P L A I N T

ZONING BOARD OF APPEALS OF WELLESLEY,
as it is comprised of Sumner T.
Babcock, Kendall P. Bates, Robert R.
Cunningham, John A. Donovan, Jr.,
Franklin P. Parker and William E.
Polletta -and-

TOWN OF WELLESLEY

COUNT ONE (G.L. c. 40A, Sec. 17)

1. Plaintiffs appeal, pursuant to G.L. c. 40A, Sec. 17, from a decision (No. 89-38) of the Zoning Board of Appeals of the Town of Wellesley granting to the Town of Wellesley (Board of Selectmen) a second and further extension to the Special Permit for Site Plan Approval originally granted on February 24, 1987 and subsequently extended to August 31, 1989 in a decision rendered on December 7, 1988". This and prior proceedings all relate to plans to reconstruct the Wellesley Farms Commuter Parking Lot on Croton Street (hereinafter "the lot") which is located on land owned by the Town and situated in a Single Residence and Transportation District. Decision 89-38 is hereinafter referred to as "the second extension; Decision 88-93 (which is already the subject of an appeal in this

court [C.A. No. 88-3517]) is referred to as "the first extension; and the underlying decision (88-11), which is the subject of both extensions, is hereinafter referred to as "the original grant".

2. The funds for such renovations would be supplied by the Mass. Bay Transit Authority ("MBTA") as part of its Commuter Rail Program, and the Town and the MBTA were contemplating entering into a long-term licensing arrangement concerning the lot, which is located in a single-family residential area lying between the railway tracks and Croton Street.

3. Plaintiff Marjorie Glassman is an individual resident/owner of No. 65 Croton Street, which lies directly across the street from the entrance to the lot.

4. Plaintiff Association ("the Association") is an association of residents of the Town of Wellesley who live and own property in the vicinity of the lot and whose property values may be affected by changes made to the lot and the station.

5. Plaintiffs are "persons aggrieved" within the meaning of Section 13 of G.L. c. 40A.

6. Defendant Town of Wellesley is a municipal corporation which on all three occasions pertaining hereto (the two extensions and the original grant) acted through its Board of Selectmen in seeking approvals from the Zoning Board of Appeals, which it appoints.

7. Defendant Wellesley Zoning Board of Appeals (hereinafter "ZBA") is a board of appeals for zoning matters

and the special permit granting authority of the Town of Wellesley, the individual members of said board residing at the following addresses:

Sumner H. Babcock	113 Abbott Road
Kendall P. Bates	41 Wall Street
Robert R. Cunningham	14 Cushing Road
John A. Donovan, Jr.	14 Upland Road
Franklin P. Parker	6 Springdale Road
William E. Polletta	109 Elmwood Road

8. Attached to the Complaint as "A" is a certified copy of ZBA decision 89-38 dated August 14, 1989, as well as copies of the decisions constituting the first extension dated December 7, 1989 ("B") and the original grant dated February 24, 1987 ("C").

9. The second extension (to expire on June 30, 1990) was sought because of delays attributed to "financial and political detours" in the Board of Selectmen entering into a license arrangement with the MBTA ("A", p. 1).

10. The Site Plan(s) approved under the original grant, prepared by the MBTA, were comprehensive and showed all construction which was planned at the station site, which included the lot and the railroad right of way, zoned transportation District and owned or controlled by the MBTA. The plans submitted did not call for the construction of any pedestrian/handicapped overpass. The original intent was to utilize the nearby Glen Road bridge for access to and from the parking lot to the north side of the tracks, and in the original grant the ZBA set forth the condition (in Addendum A to "C", first item) "That all work shall be performed in accordance with plans submitted and on file with this

Authority" as of the hearing date of February 5, 1987).

11. Plans subsequently circulated by the MBTA (entitled "25% Submittal Plans", drawn by Louis Berger & Associates and dated June 1988) indicated that by the time the first extension was being applied for the MBTA planned to construct an industrial-looking overpass (over the tracks, on its land) of the type shown on the copy of the "Pedestrian Bridge Schematic Design" which is attached as "D". After having been made aware of it at the hearings held on the first and second extensions, the ZBA in both of its decisions stated that they "... shall apply only to those plans dated January 19, 1987 which were submitted with the original petition".

12. But for the granting of the two extensions, the issues concerning the original grant would have become moot.

"The Board (of Selectmen) stated that if the Special Permit expired, a new application would have to be submitted, as the Special Permit could not be extended retroactively." (p. 2, "B").

Accordingly, Plaintiffs contend that the granting of the extensions necessarily operated to re-open all issues pertaining to the validity of the original grant and what it did not contain.

13. The original petition requested (a) Site Plan Approval under Sec. XVIA and (b) a variance from the Town's Off-Street Parking Requirements (Sec. XXI of the Zoning Bylaws). The ZBA, in its original grant, gave the applicant "(a)" and stated that "(b)" was not needed (see attachment "C", p. 3). Only one special permit was applied for in that

original petition (Site Plan Approval), and Plaintiffs further contend that the ZBA, in granting it, was not authorized to disregard the Town's Off-Street Parking requirements (Sec. XXI). Non-compliance in that regard was conceded by the Town itself in the form of its application and was specifically called to the ZBA's attention by the Planning Board in its written submissions to the ZBA in connection with the original grant and both extensions, each of which was part a part of the Board's official record. That the Town itself is bound by its own zoning laws has been ruled upon by Town Counsel in a letter to the ZBA dated November 13, 1985 (copy attached as "E"). Not having exempted itself from compliance with its zoning bylaws, the Town was subject to them and to G.L. c. 40A, Section 6, which sets forth what is required when one seeks to extend or alter a non-conforming use or structure.

14. The purposes underlying Site Plan Approval are set forth in Section XVIA:

"1. Insuring compliance with the Zoning Bylaw of the Town of Wellesley;

6. Insuring compliance with the provisions of Section XXI. OFF-STREET PARKING."

15. Although the ZBA's decision in the original grant was silent as to what language in Sec. XVIA triggered off the need for Site Plan Approval, the third item under the criteria relating to a "Major Construction Project", deals with "grading or regrading of land ... over an area of five thousand (5,000) or more square feet". However, even a so-called "Minor Construction Project" would cover the subject matter in dispute here:

"2. construction, enlargement or alteration of a parking or storage area requiring a parking plan permit."

and exactly what constitutes an alteration is set forth under an asterisked paragraph which immediately follows that second item.

"*Alteration includes installation, removal or relocation of any curbing, landscaping or traffic channelization island, driveway, storm drainage, lighting or similar facilities but does not include resurfacing, striping, or restriping pavement markings on existing parking or storage areas."

With so-called Minor Construction Projects it is the Building Inspector, instead of the ZBA, who provides the zoning check, and here he would have been obliged to turn down the original application because it did not comply with the Town's Off-Street Parking Requirements. That may explain why the Town went directly to the ZBA, asking for a variance.

16. Plaintiffs contend that it was evident from the application made for the original grant that the proposed Site Plan showed undersized stalls resulting from a designation of an excessive percentage of spaces for compact cars and two aisles narrower than the zoning bylaws permitted, creating maneuvering problems. And the ZBA in its original grant conceded that "there is nothing in the zoning bylaws which enables us to grant variances for parking lot configurations" ("C", p. 3). In stating that it was without authority to grant variances for such purposes, the ZBA erroneously assumed that an exemption from compliance was somehow related to the fact that the lot was "pre-existing". The Board in its original grant linked the supposed non-need for a variance to that status, as if it somehow provided an exemption of some sort even though continued use of the residentially-zoned parcel was not an issue. The Board did so without any application having been sought, any argument having been made, or any action having been taken under Section XVII of the Zoning Bylaw ("Non-Conforming Uses and Structures"), which would have required a finding that "such change ... or alteration not be substantially more detrimental than the existing non-conforming use to the neighborhood". No deviation from the development standards set forth in Subpart 3 of Part D. of Sec. XXI "Off-Street Parking Requirements" would be authorized even if the ZBA had acted under Section XVII and had given the special permit required under that Section, which it did not.

17. For the foregoing reasons, the decision of the ZBA was erroneous because it approved a Site Plan which was not in compliance with the zoning bylaws and it did not contain the special permit needed whenever a non-conforming use/structure is being altered, and as such it exceeded the

Board's authority and should be annulled.

WHEREFORE, Plaintiffs request the court to annul the decision which purports to again extend the underlying decision because the underlying decision lacks a requisite special permit and was issued in violation of the Town zoning bylaws (the development standards for Off-Street Parking).

COUNT 2 (G.L. c. 231A)

18. Plaintiffs incorporate the contents of the foregoing Paragraphs 1 - 17 of the Complaint and seek declaratory relief concerning their rights to require the Town to adhere to its own zoning bylaws and to Section 6 of G.L. c. 40A.

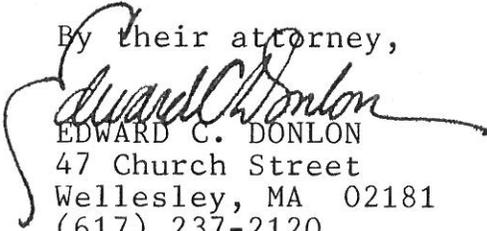
WHEREFORE, Plaintiffs request the court to enter a judgment which declares that a second extension ought not to have been given to a decision which erroneously approved a Site Plan which violated Section XXI of the Town's zoning bylaws and which lacked the special permit required under Section XVII of those laws and under Sec. 6 of G.L. c. 40A.

COUNT 3 (Mandamus)

19. Plaintiffs incorporate the contents of the foregoing Paragraphs of the Complaint and seek relief in the nature of mandamus whereby Defendant Town and its Board of Selectmen be restrained from taking any action, whether alone or in conjunction with the MBTA, which in any way will lead directly to, or be based upon, a violation of the Town's zoning bylaws and Chapter 40A.

WHEREFORE, Plaintiffs request the court to restrain the Defendant Town and its Board of Selectmen from taking any action, whether alone or in conjunction with the MBTA, which will in any way lead directly to, or be based upon, a violation of the Town's zoning bylaws and Chapter 40A.

By their attorney,


EDWARD C. DONLON
47 Church Street
Wellesley, MA 02181
(617) 237-2120

TOWN OF WELLESLEY



MASSACHUSETTS

ALBERT S. ROBINSON, TOWN COUNSEL

December 6, 1989

40 GROVE STREET
WELLESLEY, MA 02181
(617) 235-3300

Ellen D. Gordon, Executive Secretary
Board of Appeals
Town Hall
Wellesley, MA 02181

Re: Glassman and Wellesley Farms Neighborhood Assoc. v.
Zoning Board of Appeals of Wellesley et al.
C.A. No. 88-3517

Dear Ellen:

As you know, the Town has long since been served with two different zoning appeals (additional judicial relief beyond strict zoning relief is also requested) in connection with the Farm Station Parking Lot. The gist of what the plaintiff neighborhood has intended to do by both actions is to preserve whatever legal rights they might have pending disposition of the underlying substantive issues.

I have now received notice of a pre-trial conference in the earlier case, which schedules a conference in Dedham for Wednesday, December 27, 1989. The call of the list requires the development of a pre-trial memorandum.

I have telephoned Mr. Donlon, who represents the neighborhood in both cases, to propose that, rather than attending to the call of the list on this first case, we request that the court assign both cases to the time standards applicable to the later filing. This will hopefully give the Town a further amount of time to successfully resolve the underlying package with the MBTA and other relevant parties, which would then render both legal cases moot. He concurs.

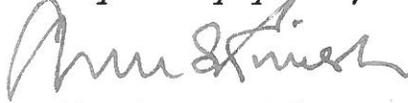
In order to fully advise the court on where things stand in both cases, I am, by a copy of this letter to Mr. Lee, asking him where things stand relative to the presentation of the most recent redraft of the License Agreement to the MBTA. The court will want

Ellen D. Gordon
December 6, 1989
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to be notified as to the likelihood of both cases being resolved extrajudicially. As soon as we know more about where the underlying matter stands, Mr. Donlon and I can confer again with the likelihood of being able to ask the court to position both cases into the later time standard with the attendant relief from having to prepare for trial on the first case at this early stage.

I will confer further directly with Mr. Lee and keep you posted.

Very truly yours,



Albert S. Robinson

ASR/dmr
File: WBA-121
cc: Thomas E. Lee, Executive Secretary
Board of Selectmen
(5647D)