TOWN OF WELLESLEY MASSACHUSETTS

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 X208

WILLIAM E. POLLETTA
FRANKLIN P. PARKER
SUMNER H. BABCOCK

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WELLESLEY, MA 02181

ZBA 93-32
Petition of Harvard Community Health Plan
230 Worcester Street

Pursuant to due notice, the Permit Granting Authority and the Special Permit Granting Authority held a Public Hearing on Thursday, April 22, 1993 at 8 p.m. in the Great Hall at the Town Hall, 525 Washington Street, Wellesley, on the petition of HARVARD COMMUNITY HEALTH PLAN requesting the following Special Permits pursuant to Section XXIIA and Section XXV of the Zoning Bylaw for signage to identify its premises at 230 WORCESTER STREET, in a Business District and a Business District A:

1. To exceed the allowed limit of one wall sign by erecting a second wall sign with an area of 57.68 square feet.

2. To exceed the allowed area of 75 square feet for a wall sign, as the area of one wall sign will be 57.68 square feet and the area of the second wall sign will be 22.5 square feet for a total of 80.18 square feet.

3. To exceed the allowed height of 20 feet for a wall sign by placing the 57.68 square foot wall sign at a height of 25 feet 3 inches.

4. To internally illuminate the 57.68 square foot wall sign.

5. To internally illuminate a three-faced standing sign.

A variance from the terms of Section XXIIA and pursuant to the provisions of Section XXIV-D of the Zoning Bylaw is requested to exceed the allowed number of two colors in an internally illuminated sign, by using three colors for the standing sign.

On April 5, 1993, the petitioner requested 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 Hazel Hopkins, permit specialist; James Zolner, HCHP, Property Manager; Leo Lawless, HCHP Assistant Administrator; and Phil Cuniff, sign project manager. Ms. Hopkins said that Harvard wishes to upgrade its signage by changing the lettering and logo style to better identify the building to non-local patients, as it is now a regional center.

ZBA 93-32
Petition of Harvard Community Health Plan
230 Worcester Street

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Ms. Hopkins said Harvard would like a 57 square foot wall sign on the facade parallel to Route 9. Internal illumination of the sign is requested for identification of the premises at night. A special permit is also requested for the height of the sign due to the architectural design of the building. The sign will be placed between two bands of windows at a height of 25 feet, allowing the sign to be visible to high speed traffic traveling in both directions on Route 9. The Board was of the opinion that the building is not visible to westbound traffic. Ms. Hopkins explained that the second sign consists of a small set of non-illuminated letters, about 22 square feet, to mark the entrance of the building, and would replace the existing sign. This sign is not visible until one approaches the building. The area of the two signs is about 80 square feet, which exceeds the 75 square feet allowed. Mr. Zolner added that if the requested parking lot was approved, the main entrance would receive more use.

Ms. Hopkins stated that Harvard would like to change two faces of the existing internally illuminated three-sided standing sign. The illumination would shine through the lettrs and logo, rather than the entire face of the sign. The sign colors are red and white with a dark bronze background.

Mr. Lawless explained that, as a regional center, the Wellesley center is the only one open on Saturdays, Sundays and holidays for patients from the West Roxbury, Peabody and Braintree centers, and outlined the directions given to out-of-area patients to reach the Wellesley Center. The Board said that to be effective, signage should be located on Route 9 before the Cedar Street exit, as traffic has committed itself long before the proposed wall sign would be visible.

Mr. Zolner said that the logo was difficult to identify with the health center, which was the reason for requesting the special permit for the height. The Board responded that it had no problem with the height, but did not agree that internal illumination of the wall sign was necessary, as back-lighting the sign would create the same effect.

The Board decided that the wall sign over the entrance was unnecessary. A sign on the glass door of the front entrance would serve to identify the entrance to the building, as the wall sign would not be visible to traffic until one was close to the building.

Edith Berman, 63 Hastings Street, said that she had been concerned about the illumination.

## Statement of Fact

The subject property, owned by Harvard Community Health Plan, is located at 230 Worcester Street, in a Business District and a Business District A, and contains a three-story clinic and parking garage. Present signage consists of a three-sided internally illuminated standing sign located 15 feet from Worcester Street and a wall sign above the front entrance to the building. Variances for these signs were granted by the Board of Appeals in 1980 (ZBA 80-20 and 80-21).

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Petition of Harvard Community Health Plan
203 Worcester Street

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The petitioner is now proposing to update and add to the existing signage. Special Permits are requested for a second wall sign with an area of 57.68 square feet, to be located at a height of 25 feet 3 inches and to be internally illuminated. The existing wall sign would be replaced by a 22.5 square foot sign. A Special Permit is requested to exceed the total allowed area of 75 square feet, as the total area of the two signs would be 80.18 square feet.

A Special Permit is also requested to continue to internally illuminate the existing standing sign in which two of the three faces would be changed. A variance is requested to exceed the number of colors allowed for an internally illuminated sign, as the sign will have 3 colors.

A Site Plan drawn by Steffian Bradley Associates Inc.; Elevations of the 3 signs dated 12/1/92, drawn by Advanced Signing, Inc., and photographs were submitted.

On March 25, 1993, the Design Review Board reviewed the signage plan and voted the approve the design and placement of the two wall signs and the standing sign.

On April 13, 1993, the Planning Board reviewed the petition and voted to recommend denial of the second wall sign, but would approve of the height and internal illumination of the large wall sign as a single sign, and the internal illumination of the standing sign.

## Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The petitioner is requesting Special Permits and a variance for signage to identify its premises, as noted in the foregoing Statement of Facts.

This Authority is of the opinion that a second wall sign would be an unnecessary duplication of signage and would set an unfortunate precedent if granted. As the second sign is not allowed, the Special Permit to exceed the allowed total area of wall signage is unnecessary.

On the condition that the existing wall sign located above the front entrance facade is removed and not replaced, the Board is of the opinion that the height of the requested wall sign on the facade parallel to Worcester Street is permissable to increase visibility and is in keeping with the architecture of the building.

It is the opinion of this Authority that the internal illumination of the 57.68 square foot wall sign is unnecessary, as sufficient illumination of the sign can be accomplished by other means, such as back-lighting.

However, the Board is of the opinion that the continued internal illumination of the revised standing sign is necessary in aiding identification of the entrance roadway to the building.

ZBA 93-32
Petition of Harvard Community Health Plan
230 Worcester Street

MAY 5 1 12 PM '93

The Board is of the further opinion that as the existing internally illuminated standing sign has three colors, the continued use of three colors would be permissable.

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The Board unanimously voted as follows:

1. To deny the Special Permit for a second wall sign, rendering moot the request for a Special Permit to exceed the allowed total square footage for wall signage.

2. To grant a Special Permit for the 57.68 square foot wall sign to exceed the allowed height of 20 feet by installing said sign on the facade of the building parallel to Worcester Street at a height of 25 feet 3 inches on the condition that the existing wall sign above the front entrance to the building is removed and not replaced, and that the sign shall be installed in accordance with the elevation drawing submitted.

3. To deny the Special Permit for the internal illumination of the 57.68 square foot wall sign.

4. To grant the Special Permit for the internal illumination of the three-faced standing sign located 15 feet from the Worcester Street property line on the condition that the illuminated sign shall not cast any glare onto any portion of any street, and that the sign be illuminated only while the building is open to provide service to the membership.

5. To grant the variance for said standing internally illuminated sign to contain three colors: namely, red, white and bronze.

The Inspector of Buildings is hereby authorized to issue the necessary sign permits upon his receipt and approval of applications. No signage can be installed or replaced until said permits have been issued.

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.

John A. Donovan, Jr., Chairman

Kendall P. Bates

Robert R. Cunningham

cc: Planning Board
Inspector of Buildings

edg

APR 5 11 24 AM '93
RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY, MA 02181

NORTH ELEVATION
ILLUMINATED LOGO & LOGOTYPE

ONE SET FACE LIT LETTERS & LOGO
FABRICATED ALUMINUM - 4" SIDEWALLS

PLEXIGLAS FACES
WHITE NEON (INTERNAL) ILLUMINATION
WHITE SIDEWALLS
LETTER FACES WHITE
LOGO FACE 185C RED/WHITE FIGURES

LETTERFORMS MTD. ON RACEWAYS
RACEWAYS PAINTED TO MATCH BACKGROUND

Advanced Signing Inc.
4 Industrial Park Road Medway, MA 02053
508 533•9000

| | | |
|---|---|---|
| SCALE: 3/16" = 1'-0" | APPROVED BY | DRAWN BY MT |
| DATE: 12/1/92 | REV. 3/8/93 | CW |

HCHP / WELLESLEY

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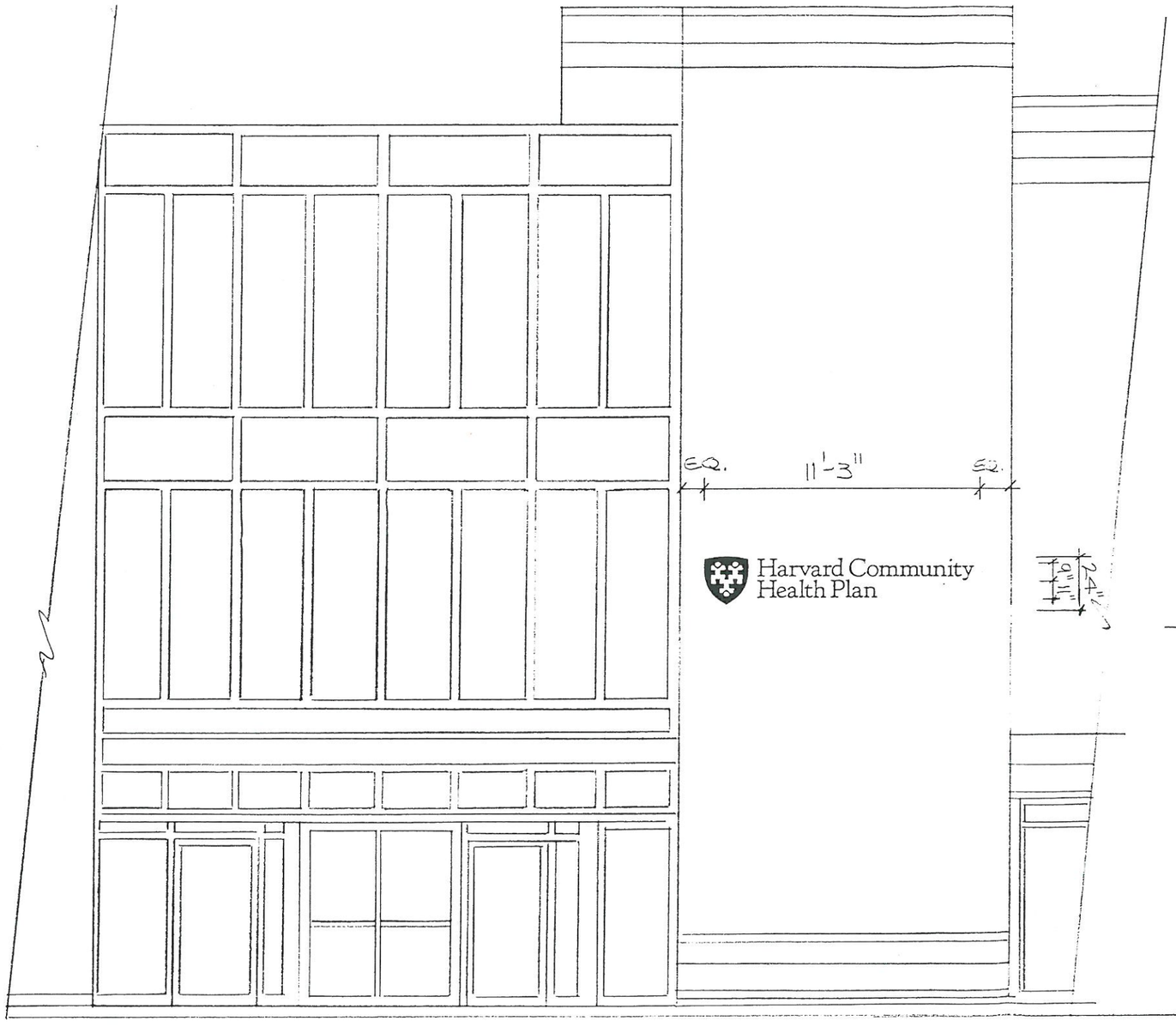
DRAWING NUMBER 5642 A-1

APR 5 11 14 AM '93
RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY, MA 02181




NORTH ELEVATION
MAIN ENTRANCE

1 SET NON-ILLUMINATED
LETTERFORMS & LOGO
FLAT CUT 1/4" THK. PLEXIGLAS
STUD MTD. TO BRICK
LETTERS: PTD. WHITE
SHIELD: 195C RED/WHITE FIGURES

**Advanced Signing Inc.**
4 Industrial Park Road Medway, MA 02053
508 533•9000

| | | |
|---|---|---|
| SCALE: 3/16"=1'-0" | APPROVED BY | DRAWN BY MT |
| DATE: 12/1/92 | REV. 3/23/93 | CJ |

HCHP / WELLESLEY

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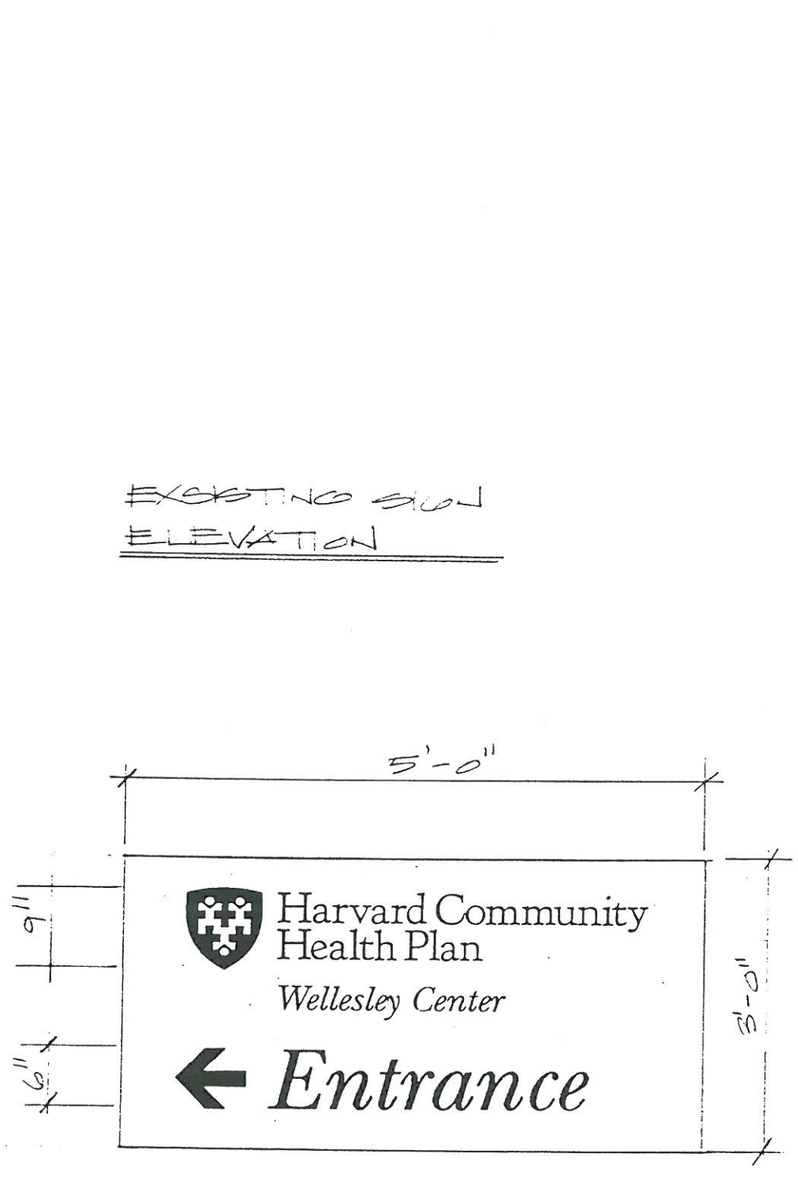
DRAWING NUMBER 5642A

CHARRETTE

APR 5 11 14 AM '93
RECEIVED
TOWN CLERK'S OFFICE
WELLESLEY, MA 02181

EXISTING SIGN
ELEVATION




NOTES:

1. RETROFIT OF EXISTING SIGN
   - INTERNALLY ILLUMINATED
2. GRAPHICS TO BE ROUTED AND BACKED-UP WITH PLEXIGLAS
3. SIGN TO BE MOUNTED ON EXISTING POLE.
4. SIGN FACE TO BE DARK BRONZE ALUMINUM BACKGROUND, TO MATCH EXISTING FRAMEWORK, STENCIL CUT WITH PLEXIGLAS BACK UP. LETTERING TO BE WHITE, LOGO COLOR TO BE RED SHIELD W/ WHITE FIGURES.

**Advanced Signing Inc.**
4 Industrial Park Road Medway, MA 02053
508 533•9000

| | | |
|---|---|---|
| SCALE: 3/4"=1'-0" | APPROVED BY | DRAWN BY JS CJ |
| DATE: 3-22-93 | | |

HCHP WELLESLEY

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DRAWING NUMBER
5042A-3

CHARRETTE

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
Civil Action
No. 93-1389

HARVARD COMMUNITY HEALTH PLAN

vs.

JOHN A. DONOVAN, JR., Chairman, KENDALL P. BATES and ROBERT R. CUNNINGHAM, As They Are Members of The Board of Appeals for the Town of Wellesley

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

Plaintiff Harvard Community Health Plan ("HCHP") filed the present action pursuant to G.L. c.40A, §17 appealing the decision of the Zoning Board of Appeals of the Town of Wellesley ("Zoning Board") denying certain aspects of HCHP's application for special permit for signage at its facility in Wellesley. Following trial on December 8, 1994, the court renders its findings and rulings as follows.

Findings of Fact

HCHP is a non-profit Massachusetts corporation that provides health care services at various sites in the Commonwealth. Among HCHP's facilities is a building located at 230 Worcester Street in Wellesley. HCHP uses that site as a regional health care center, providing services that are not necessarily available at all HCHP centers. As a regional center, the Wellesley HCHP center is also open to provide services, including urgent care, during evening (until at least 9:00 p.m.) and weekend hours when other HCHP facilities are closed.

As a regional center, the Wellesley HCHP facility serves patients who come from other geographic regions and are not familiar with the Wellesley area. These patients, some of them in need of urgent care, will frequently be coming to the Wellesley HCHP facility for the first time.

The facility is accessed via Route 9. Proceeding westbound on Route 9 from the intersection at Interstate 95, the facility can be reached by taking the Cedar Street exit ramp. At the end of the ramp, a sign directs the patient to the HCHP driveway. However, neither the building nor any sign on the building, wherever placed, would be visible from the westbound travel lanes on Route 9 until after the driver was already past the Cedar Street exit.

Coming eastbound on Route 9, a driver in the right lane can see the building and, if it is recognizable as the HCHP facility, still have enough time to get onto the correct exit ramp. If the vehicle were still in the left travel lane at the point when the building first became visible, it would not normally be possible to change lanes in time to get onto the exit ramp.

As a result of the exit configurations in relation to the building, the Wellesley HCHP facility is difficult to locate, especially for patients who are unfamiliar with the Wellesley area. This difficulty is compounded by the fact that such patients are often travelling to the facility at a time when they are not feeling well and not functioning at their best.

In response to patients' concerns about the difficulties encountered in navigating their way to the Wellesley site, HCHP

undertook to upgrade the signage for the facility, including signage that would improve the building's visibility from Route 9. At present, the sign on the front of the building and the free-standing ground sign at the driveway entrance are not visible from Route 9. HCHP would like to erect a sign on the side of the building that faces Route 9, spelling out the name "Harvard Community Health Plan" next to the HCHP logo. HCHP proposes to locate the sign in between the second and third story windows at 25 feet and 3 inches from the ground and to light the sign at night by means of internal illumination of each letter.

The Zoning By-Law for the Town of Wellesley does not allow such wall signage to be placed higher than 20 feet and does not allow internal illumination. As such, HCHP needs a special permit for the proposed wall sign.

On April 4, 1993, HCHP applied for a special permit to exceed the maximum height limit and to illuminate the sign internally.[1] Prior to the application, the HCHP proposal had been reviewed and approved by the Design Review Board of the Town of Wellesley. By letter dated March 31, 1993, the Design Review Board advised the Zoning Board of its approval of the proposed HCHP signage.

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[1] The application also sought to keep the existing sign on the front entrance to the building. A special permit would be required to maintain more than one wall sign on the building. In addition, the combined total area of the two signs would exceed the maximum total size allowed, so a special permit would also be necessary to exceed that total space limitation. Finally, HCHP sought a special permit to alter its present free-standing sign. None of these other aspects of the HCHP application is at issue in the present appeal.

On April 13, 1993, the Town's Planning Board met and considered the HCHP sign proposal. The Planning Board had no objection to the proposed height of the new wall sign and no objection to the proposed internal illumination of the sign.[2] With respect to internal illumination, the Planning Board opined that "the request is appropriate in this instance if identification of the facility is being sought in an urgent manner or for emergency purposes by patients during dusk and evening hours." The views of the Planning Board were communicated to the Zoning Board by letter dated April 20, 1993.

The Zoning Board held a public hearing on HCHP's application on April 22, 1993. Following hearing, the Zoning Board granted that portion of HCHP's application that sought a special permit to exceed the height restriction for the new sign, but denied that portion of the application that sought to use internal illumination of the sign letters.[3] The Zoning Board's stated reason for denying the internal illumination was that internal illumination was

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[2] The Planning Board did object to the use of two wall signs on the building as "an unnecessary proliferation and duplication of wall signs that would set an unfortunate precedent." Thus, while recommending that the facility be limited to a single sign, the Planning Board had no objection to placing that single sign on the wall facing Route 9, higher than the normal height restriction, and with internal illumination.

[3] The Zoning Board also denied the application to maintain two wall signs with a total area above the normal limit. The special permit allowing the height of the new sign was premised on HCHP removing the existing wall sign on the front entrance. HCHP has not appealed the decision disallowing its request to have two wall signs.

"unnecessary, as sufficient illumination of the sign can be accomplished by other means, such as backlighting."

At no point in its decision did the Zoning Board make any findings or even discuss what adverse effect(s) would stem from the proposed internal illumination of the HCHP sign as opposed to the approved backlighting for the sign. In the course of this litigation, the Zoning Board was served with an interrogatory asking it to "state what facts, if any, were found by the Defendant that indicates [sic] that the internal illumination of the subject sign would derrogate [sic] from the purpose and intent of the Wellesley Zoning By-Law and/or Chapter 40A of the General Laws of the Commonwealth." The Zoning Board's only response to that interrogatory was as follows:

> Internal illumination of the subject sign, in and of itself, would derrogate [sic] from the purpose and intent of the Wellesley Zoning By-law and/or Chapter 40A, insofar as such signs are not permitted as a matter of right, but rather require a Special Permit.

At trial before this court, no evidence of any adverse effect or derogation from the purpose of the Zoning By-Law was presented.

HCHP presented unrefuted evidence that the proposed internal illumination of this sign would have no such adverse effect. HCHP presented photographs showing the precise internally illuminated sign it wishes to use and the precise back-lit or "halo" sign that the Zoning Board approved.[4] The only difference between the two signs is that the internally illuminated letters are more legible.

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[4] These photographs are from other HCHP facilities with the same lettering and logo proposed for the Wellesley facility.

For this particular sign, there is no more light, or glare, or any perceptible aesthetic difference between the two lighting alternatives.

Nor would an internally illuminated sign, as opposed to a back-lit sign, have any perceptible impact on the environs of this particular facility. The Wellesley HCHP facility is located between two Route 9 car dealerships, Wellesley Toyota and Silver Lake Dodge. Both of those commercial facilities have signs with internal illumination.[5] Both of those dealerships are strongly lit at night, giving the HCHP signage a considerable amount of ambient light with which its own sign must compete in order to be visible. While much of Route 9 through Wellesley is residential, there are short stretches of commercial facilities at the Interstate 95 cloverleaf, the Cedar Street cloverleaf, and at the town line bordering on Natick. The HCHP facility is part of the Cedar Street cloverleaf commercial area, zoned for business. Across Route 9 from the HCHP facility and the two car dealerships is a wooded area. There is nothing incompatible about this particular sign, in comparison to the approved back-lit sign, as it would be seen from either Route 9 or from the wooded area across Route 9.

The photographs of the two types of signs do show that the internally illuminated sign is more legible. The designer who

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[5] The internal illumination of the car dealer signs was "grandfathered." The Zoning Board has granted those dealers special permits for continued internal illumination when, as part of the proposal, the dealers were reducing the size of their signage. While the size has been reduced, the signs on either side of the HCHP facility are internally illuminated and clearly visible from Route 9.

designed this signage for HCHP credibly explained the advantages of internal illumination. One advantage is that a back-lit sign can not be read unless it is viewed essentially straight ahead. When viewed at an angle, the backlighting does not produce the necessary halo or silhouette effect. By comparison, internally illuminated letters can be read at a very oblique angle. Even when viewed head on, the internally illuminated letters are slightly clearer than the silhouetted letters of the back-lit sign. Since this particular sign needs to be read by persons travelling at considerable speed,[6] and, for travelers going eastbound, must be immediately identifiable at a very oblique angle, internal illumination of this sign is clearly superior to halo lighting.

The Zoning Board did present evidence to try and suggest that the sign itself would not be as useful as HCHP suggests. None of this evidence was directed at the utility of internal illumination (as opposed to some other form of illumination), but rather at the utility of any signage on the Route 9 side of the building. As indicated above, the Zoning Board did show that no sign would be visible to westbound travelers until they had already passed the exit ramp. The Zoning Board did not dispute, however, and the court finds, that identification of the facility at that point is still very useful to the patient trying to navigate his/her way to HCHP, as it lets the driver know immediately just where the

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[6] The parties stipulated that Route 9 is a heavily travelled, high speed, limited access highway through this portion of Wellesley.

facility is so that he/she will seek the first opportunity to get off Route 9 westbound and get back on the highway eastbound.[7]

The court also finds that signage on the Route 9 side of the building will, over time, give the public greater awareness of the location of the HCHP site. Persons travelling on Route 9 for other reasons will, by way of the sign, recognize that location and be able to recall it in future when going to the facility. That recognition increases the likelihood that a patient coming westbound will successfully navigate his/her way to the correct exit ramp on the first try.

For eastbound travellers, the sign would be very useful. For vehicles in the right lane, prompt recognition of the building (seen at a very oblique angle) will allow the driver to take the correct exit. In that direction, the timing would be very tight, and the driver's ability to read the sign instantaneously at that oblique angle would be crucial. The greater legibility of the internally illuminated sign, especially when viewed at this angle, would be particularly beneficial to patients approaching the facility coming eastbound. As with westbound travel, prior awareness and recognition of the building itself will also help the patient find the correct exit.

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[7] Going through Wellesley, reversing direction on Route 9 is very difficult to do. It is nevertheless very useful to a lost motorist to know that he/she has overshot the desired exit so as to be on the lookout for the first opportunity to turn around.

Conclusions of Law

The Zoning Board's decision granting HCHP the special permit to erect the wall sign but denying HCHP a special permit to illuminate the sign internally was arbitrary, capricious, and without justification or basis in fact or law. The sign provisions in the Wellesley Zoning By-Law have the following stated purposes:

> [T]o promote the public safety and convenience of the streets and roads, sidewalks and other pedestrian spaces, public property and private property within public view,
>
> to preserve for the present and future inhabitants the natural, architectural and historical assets and other qualities which distinguish the Town as a highly desirable residential community,
>
> to protect business viability, economic opportunity, property values, educational values, aesthetic integrity, village character, creativity and community appearance by exercising prudent control, and
>
> to encourage compatibility and harmony with surrounding buildings, land and land use.

The proposed sign unquestionably promotes "public safety and convenience." The Zoning Board granted the special permit for the height of the sign "to increase visibility," a desirable objective for the public trying to find a health care facility providing urgent care services. The record is also clear, with no contrary evidence, that internal illumination improves the legibility of the sign and increases the utility of the sign, especially for travellers going eastbound.[8]

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[8] The Planning Board approved the request for internal illumination on account of the public's need to find the facility after dark for urgent or emergency services.

While "public safety and convenience" would be better served by internal illumination of the sign, no facts indicate that internal illumination would be contrary to any of the other stated objectives of the Zoning By-Law. The Zoning Board's only "fact" with respect to this issue, as articulated in its interrogatory answer, is the "fact" that internal illumination requires a special permit. In other words, according to the interrogatory answer, HCHP's application for a special permit was denied because its proposal would require a special permit. The Zoning Board's decision is not based on any facts or on any discretion, but merely on the basis that it will not grant a special permit because a special permit is required. Such circular reasoning, in the absence of any facts, is arbitrary and capricious.

In its decision, the Zoning Board's ostensible reason for denying internal illumination was that it was not "necessary." Necessity, or lack thereof, is not a standard of the Zoning By-law. Furthermore, to the extent that it is relevant, the Zoning Board's theory was that the sign itself was "unnecessary," not that internal illumination was "unnecessary." If the sign was "unnecessary," and if necessity is something that an applicant must demonstrate to get a special permit, there would be no basis for granting HCHP any special permit for this sign. Yet the Zoning Board did grant a special permit, allowing HCHP to exceed height restrictions so as to place the sign on the Route 9 side and thereby "increase visibility." If "increas[ing] visibility" is sufficient justification for placing the sign at that height, it is

also justification for the proposed lighting of the letters. HCHP has demonstrated that the sign is both desirable and necessary, as the Zoning Board apparently agreed in granting the special permit, and that the internal illumination is both desirable and necessary, especially for travellers going eastbound. If necessity is an applicable standard, it has been met.

The Zoning Board argues strenuously that, if its decision is overturned, the court should not order the issuance of a special permit but should remand the case for further consideration of the application. While remand is the relief customarily granted in zoning cases, the Zoning Board has not articulated any facts with respect to this application that need to be considered on remand. In the present case, the Design Review Board approved the proposed internal illumination. The Planning Board approved the proposed internal illumination. To date, despite three opportunities to articulate a basis for its contrary decision to deny a special permit for internal illumination, the Zoning Board has failed to identify any basis for denying the special permit. The Zoning Board's written decision sets forth no basis. Its interrogatory answer sets forth no basis. Its presentation at trial set forth no basis. When pressed, counsel for the Zoning Board suggested in argument that the Zoning Board needed to consider the "glare" of the sign. There is no difference in "glare" between the two lighting alternatives to consider,[9] and the Zoning Board itself has

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[9] Both the Design Review Board and the Planning Board were apparently satisfied that there would be no unsightly "glare."

never indicated that there is a problem of "glare" for this particular sign.

Remand would be appropriate if there were any facts to consider, as the Zoning Board would need to apply its own judgment and discretion to the assessment of those facts in relation to the purposes of the Zoning By-law. Where, as here, there simply are no facts to support the Zoning Board's decision, and where the Zoning Board's repeated failure to articulate any such facts is tantamount to an admission that there are none, there is nothing further that requires the application of the Zoning Board's discretion. Accordingly, this court will order defendants to issue HCHP a special permit allowing the internal illumination of the wall sign.

ORDER

For the foregoing reasons, judgment shall enter in favor of plaintiff Harvard Community Health Plan, ordering defendants John A. Donovan, Jr., Kendall P. Bates and Robert R. Cunningham, as they are members of the Board of Appeals for the Town of Wellesley, to issue a special permit to Harvard Community Health Plan for internal illumination of its wall sign on the facade parallel to Worcester Street.

Martha B. Sosman
Justice of the Superior Court

DATED: December 15, 1994

A TRUE COPY
Attest: Virginia G. Foster
Deputy Assistant Clerk
12/30/94

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

95-P-644

HARVARD COMMUNITY HEALTH PLAN

vs.

BOARD OF APPEALS OF WELLESLEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Superior Court judge ordered the defendant board to issue a special permit to the plaintiff "for internal illumination of its [proposed] wall sign on the facade" of its building located nearby Route 9 in Wellesley (A.207). In her decision, the judge noted that the board "granted that portion of [the plaintiff's] application that sought a special permit to exceed the height restriction for the new sign, but denied that portion of the application that sought to use internal illumination of the sign letters."[1] (A.199). The sign would face Route 9 and spell out "Harvard Community Health Plan." (A.198).

The judge's decision followed a proceeding covered by over one hundred seventy-five pages of transcript and the submission of thirteen exhibits (see A.17). Based on what clearly appears

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[1] In addition, the board denied the request to maintain two wall signs exceeding an area limitation, and conditioned the allowance of the special permit to exceed the height limitation on the removal of an existing sign (A.10,199 & n.3). The board also granted a special permit, with conditions, for the internal illumination of an existing sign standing near an entrance to the building from Worcester Street, as well as a variance allowing the use of three colors on the sign (A.10). None of these matters was contested in the Superior Court, and none is contested in this appeal.

as a careful and thorough analysis of the evidence, the judge found that the "internally illuminated letters are more legible," (A.200) and that "[f]or this particular sign, there is no more light, or glare, or any perceptible aesthetic difference between the two lighting alternatives." The alternatives are the "[proposed] internally illuminated sign," or a "back-lit sign [allowed as of right under the zoning by-law]." (A.201). In concluding that the board's denial of a permit for internal illumination of the sign was "arbitrary, capricious, and without justification or basis in fact or law," the judge noted that in allowing an increase in the height of the sign, the board did so "to increase visibility" (see A.9), conformably with a by-law objective "to promote the public safety and convenience"[2] and that "[t]he record is also clear, with no contrary evidence, that the internal illumination improves the legibility of the sign and increases [its] utility." (A.204). The judge found that evidence presented by the board at the trial was not "directed at the utility of internal illumination (as opposed to some other form of illumination), but rather at the utility of any signage on the Route 9 side of the building." (A.202). Contrary to the board's arguments (D.Br.10,11,12) that the judge's decision impermissibly rests on the absence of facts or findings of the board or on the absence of the board's reasoning, her conclusions clearly are based on independent findings from the record

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[2] While our record does not contain a copy of Wellesley's zoning by-laws, there is no dispute over the judge's quotation of four paragraphs from them (A.204).

evidence. We agree with the judge that the board's decision is arbitrary because it fails to set forth legally sufficient reasons,[3] is not supported by sufficient findings and is based on an untenable ground. See S. Volpe & Co. v. Board of Appeals of Wareham, 4 Mass. App. Ct. 357, 359-360 (1976); Federman v. Board of Appeals of Marblehead, 35 Mass. App. Ct. 727, 730-731 (1994), and cases cited.

The board argues that the record fails to justify the judge's "extraordinary, and possibly unconstitutional, step of ordering the Board to issue a special permit," (D.Br.19) and that the judge should have remanded the case to give the board "the opportunity to make further findings of fact . . . or elaborate on the reasons" for its decision (D.Br.21). The board further asserts that the judge improperly substituted her judgment for the board's discretion in assessing the aesthetic impact of the sign on the environs (D.Br.14-16).[4] The board did not present

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[3] The judge noted that the board in its denial expressed the opinion that the internal illumination "is unnecessary" (see A.9), an opinion not based on any by-law standard (A.205). She also concluded, however, that "[the plaintiff] has demonstrated that the sign is both desirable and necessary, as the Zoning Board apparently agreed in granting the special permit and [that the plaintiff has also demonstrated] that the internal illumination is both desirable and necessary. . . . [I]f necessity is an applicable standard, it has been met." (A.206).

[4] The judge found that both the Wellesley Design Review Board and the Planning Board had approved the internal illumination (A.204 n.8,206 & n.9). The judge also found "no difference in 'glare' between the two lighting alternatives to consider," noting that apparently both the Design Review Board and the Planning Board were "satisfied that there would be no unsightly 'glare'" and, more particularly, that the board of appeals "has never indicated that there is a problem of 'glare' for this particular sign." (A.206-207 & n.9). Moreover, the

any evidence on the issue of aesthetic impact at the trial, nor did it invoke any by-law provision which would indicate to a court that aesthetic impact is an area of discretion reserved for the board.[5] Moreover, the judge's conclusion that the board engaged in legally arbitrary "circular reasoning" in responding to an interrogatory of the plaintiff by stating that "[i]nternal illumination . . . in and of itself, would derogate from the purpose and intent of [the Wellesley zoning by-law and G. L. c. 40A] insofar as such signs . . . require a [s]pecial [p]ermit" (A.15,205), is justified, as is her conclusion that the board also failed in its decision and at trial "to articulate any basis" for its decision (A.206). There is also justification for the judge's further conclusion that "there simply are no facts to support the [board's] decision, and where the [board's] repeated failure to articulate any such facts is tantamount to an admission that there are none, there is nothing further that

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judge found that, at trial, "no evidence of any adverse effect or derogation from the purpose of the Zoning By-Law was presented" (A.200), and she independently considered any impact the proposed sign would have "on the environs." (A.201).

[5] The board noted that the requested sign "is in keeping with the architecture of the building" (A.9), and the board's representative at the trial answered "[n]o" to a question whether anything specifically written in the denial was based on facts related to preservation of the town's "natural, architectural, historical assets and other qualities" which distinguish it "as a highly desirable residential community" (A.163). This is language closely tracking the by-law sections quoted by the judge (A.204). The board's representative also testified that by-law amendments in 1993 were intended to make it "slightly more difficult" to obtain approval of internal illumination, although "the wording had not changed." (A.134-136).

requires the application of [its] discretion." (A.207).

While these conclusions most persuasively support the judge's ultimate conclusion that the case should not be remanded to the board, neither the judge nor the plaintiff cite authority for ordering the board to grant the special permit. We are not aware of any appellate decision which affirms a lower court decision ordering a board of appeals to grant relief which it has denied, except in cases of presenting "a record of consistent obstruction of lawful use." See Newbury Jr. College v. Brookline, 19 Mass. App. Ct. 197, 208 (1985), and cases cited. While the present case bears some resemblance to Cape Ann Land Dev. Corp. v. City Council of Gloucester, 374 Mass. 825, 826 (1978), there it was held proper for a Superior Court judge to order issuance of a special permit only after it was determined that the reasons for denial of a special permit were not legally valid pursuant to a prior decision of the Supreme Judicial Court.

We are mindful of those principles distinguishing the discretionary powers of a reviewing court from that of a board of appeals, and that a board may deny such a permit even where the facts show it lawfully could be granted. See generally Schiffone v. Board of Appeals of Walpole, 28 Mass. App. Ct. 981, 984 (1990), and cases cited. In the Superior Court "[t]he point of departure is the board's decision and the reasons stated therein. S. Volpe & Co. v. Board of Appeals of Wareham, supra at 359-360. While "the refusal to grant a special permit does not require

detailed findings," relevant facts must be stated. MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 515-516 (1976). Accordingly, we remand to the board for additional findings.

So much of the judgment as implicitly annuls the denial of the special permit is affirmed, and the remainder of the judgment ordering the Wellesley board of appeals to issue the special permit is vacated. The Superior Court is to retain jurisdiction, and the case is remanded to the board for further proceedings consistent with this decision.

So ordered.

By the Court (Jacobs, Laurence & Lenk, JJ.)

Nancy Tucon Foley
Clerk

Entered: January 25, 1996

COPY

TOWN OF WELLESLEY MASSACHUSETTS

ALBERT S. ROBINSON, TOWN COUNSEL

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40 GROVE STREET
WELLESLEY, MA 02181

April 17, 1996

Michael J. Portnoy, Esquire
165 Washington Street
Winchester, MA 01890

RE: Harvard Community Health Plan v. Zoning Board of Appeals
No. 95-P-644

Dear Mr. Portnoy:

I just wanted to confirm that the Board of Appeals stands ready to hold a hearing on remand as ordered by the Appeals Court, whenever your client is ready. I understand that there have been discussions between representatives of your client and Ms. Gordon for the Board on this.

Apparently, one of the issues that has been briefly discussed is the prospect for your client wishing a different sign at a different location on the property. If you wish to proceed with that idea, I would think it would take a new application, and not be a subject for a hearing on remand in the old matter.

In any case, I just wanted to confirm that the Town is ready to proceed, and when and if your client wants to do that, let Ms. Gordon know directly or through me, whichever you prefer.

Very truly yours,

Albert S. Robinson

ASR:mp
File: WBA-128
v:\asr\town\bdappls\hchp\portnoy.ltr
c: Ellen Gordon, Executive Secretary
Zoning Board of Appeals

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 93-01389

HARVARD COMMUNITY HEALTH PLAN,
Plaintiff

vs.

JOHN A. DONOVAN, JR., ET ALS., as they are members of the Board of Appeals for the Town of Wellesley,
Defendants

**STIPULATION OF DISMISSAL WITH PREJUDICE**

The parties to this action hereby stipulate that the Complaint shall be, and hereby is, dismissed with prejudice and without costs to either party.

The Defendants,
John A. Donovan, Jr., et als., as they are the Members of the Board of Appeals for the Town of Wellesley
By their Attorney,

Albert S. Robinson, Esquire, Town Counsel
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(617) 235-3300
BBO No. 422820

The Plaintiff,
Harvard Community Health Plan
By its Attorney,

Michael J. Portnoy, Esquire
165 Washington Street
Winchester, MA 01890
(617) 721-5701
BBO No. 403840

Dated:

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