

74-6

TOWN OF WELLESLEY



MASSACHUSETTS

BOARD OF APPEAL

Theodore C. Merlo
RICHARD O. ALDRICH
F. LESTER FRASER
WILLIAM O. HEWETT

KATHARINE E. TOY, CLERK
TELEPHONE
235-1664

Appeal of Walter Arnold, Jr. et al
(W. Leslie Bendslev et al)

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 8:25 p.m. on February 7, 1974, on the appeal of Walter Arnold, Jr. and others, claiming to be aggrieved by the action and/or inaction taken or not taken by the Building Inspector regarding the use of the property at the corner of Forest Street and Washington Street as a moving business. The appellants contend that Section XI of the Zoning By-law does not specifically mention a moving business as a permitted use in a Business District and that said use is not in the best interest of the health, safety, convenience and welfare of Wellesley. They further contend that said property has also been used in violation of Section XVI, subsection B. and C. of the Zoning By-law, since inoperable vehicles have been parked there for approximately a year. Said appeal was made under the provisions of Section XXIV of the Zoning By-law.

Charles W. Dixon, attorney representing a number of neighbors on Laurel Terrace, stated that he opposed the use of the property involved not only as attorney for his clients, but also as a resident of Wellesley. He further outlined in detail the alleged violations claimed by the aggrieved neighbors and submitted arguments in support of his claims.

Walter Arnold, Jr., 10 Laurel Terrace, opposed the use of the property ; in his opinion, such use is in violation of the Zoning By-law and has created a blight in the neighborhood. He felt that the owner of the business should be denied the right to continue and should be required to screen the area to avoid another such situation.

Joan E. Gaughan, 12 Laurel Terrace, spoke in opposition to the present use of the property. She felt that the use of the property had ruined the neighborhood; beautiful trees had been removed and the vans block the view and create a great deal of noise.

Harry J. Palladino, Vice-chairman of the Park and Tree Board of the Town of Wellesley, stated that the trees have been cut down along the boundary line, and he felt that some may have been removed from Town property. He suggested that the Board have it checked.

Franklin Sanders, 32 Skyline Drive, also opposed the present use of the property and felt that the vans have created a traffic problem on Forest Street and have depreciated the area.

Roger Dowd, attorney for Peter Bendslev, owner of the moving business involved, stated that: 1. There are no inoperative trailers on the land; there was one small inoperative van parked on the premises, but this has been removed. 2. There is no storage of furniture on the property, it is either delivered directly to the customer or brought to Jamaica Plain for storage. The business which is in question, he stated, is not new, it

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has been in existence since 1903. These trucks have been parked in the neighborhood for many years. He contended that the business is being conducted legally on the premises and to put Mr. Bendslev out of business now would be arbitrary.

Peter Bendslev, owner of the business involved, reiterated Attorney Dowd's statement that there were no inoperative vehicles on the premises and stated that he could have the van in question in front of the Town Hall in thirty minutes.

Statement of Facts

The property involved is located within a Business "A" District, a District which provides that no 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 purposes authorized in a Business District. Among other uses, an office and the storage or parking of motor vehicles are allowed.

Approximately, a year ago, the owner of a moving business extended the parking lot beyond the Community Theatre parking lot to the edge of the aqueduct, now owned by the Town of Wellesley, from the rear of the Telephone building to Forest Street. Since then he has been parking five or six moving trucks, a trailer, a Greyhound van without a truck body and with a ramp leading up to it, and several automobiles along the newly paved strip.

It is the opinion of the aggrieved parties, stated Attorney Dixon, that such use of the property is not one permitted under the provisions of Section XI, Business Districts, of the Zoning By-law. The reason for their contention is that a, "moving business" is not one specifically enumerated among the allowable uses in said Section. It is their further contention that one of the vans on the property has been kept there continuously during the past year for storage purposes; it is inoperative and in violation of Section XVI B of the Zoning By-law which prohibits the storage of inoperative vehicles without obtaining a permit from the Board of Selectmen.

There has been considerable correspondence during the past year, stated Attorney Dixon, between one of the abutters and the Building Inspector relative to the vehicles parked on the property as well as the conversion of the house on the property from a residential use to a business use. On November 15, 1973, it was stated, a permit was issued by the Building Inspector to convert the first floor of the dwelling into a business office, and the abutters maintain that the permit should not have been issued due to the nature of the business involved. They felt that prior to the issuance of a permit, the question of whether a moving business is an allowable use in the district involved, should have been brought before the Board of Appeal for its determination. If the Building Inspector's reasoning is used, it is felt, that all types of business operations could be conducted within a Business District or Business "A" District; for example, a large construction firm would conduct its business on the property with all kinds of heavy equipment stored on the premises. This, they felt, is not the intent of the Zoning By-law.

The trees have been removed from the boundary line along the aqueduct, it was stated, so that the vans and other vehicles are now visible from the abutting residential area as well as the surrounding area. Although the abutters have repeatedly requested, through the Building Inspector as well as directly to

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the owner, that a fence be erected, no screening of any kind has been provided. This, they feel, has resulted in a downgrading of the neighborhood and a blight on the entire area.

It was also pointed out that the vans create a traffic problem when they move out onto Forest Street and cause a safety hazard as well for the children who are walking to school at the same time. Such use of the property, it was alleged, is in violation of Section XVI, B. and C. of the Zoning By-law, as the abutters find the use offensive and obnoxious due to the noise from the trucks and feel it is injurious to the public health and safety of nearby residents and is depreciating to the properties in the contiguous residential area.

Decision

The Board has made a careful study of the evidence submitted and has taken a view of the locus. In its opinion, the vehicles parked on the property are unsightly and clearly a detriment to the surrounding properties, as well as aesthetically unattractive to those approaching the area either from Washington Street or Forest Street.

One question before the Board is whether the use of the property is an allowable one within a Business District.

There is no question that a "moving business" is not specifically mentioned as an allowable use in a Business District in Section XI of the Zoning By-law.

In part it states:

"In Business 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:

- "1. Any purpose authorized in Single Residence, General Residence or Educational Districts;
2. Residence for more than two families, apartment house, apartment hotel, hotel, or inn.
3. Restaurant, tea room or other eating place for the sale of any food or beverage for consumption off the lot or within a building on the lot.
4. Store, sales room, or showroom for the conduct of retail business;
5. Theatre, hall, club or other place of amusement or assembly;
6. Office, bank or other monetary institution;
7. Public or semi-public building;
8. Public or private garage, storage or parking of motor vehicles, public stable, gasoline filling station, printing plant or telephone exchange.

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9. Veterinary hospital or other medical institution for the care of animals and in connection therewith a boarding kennel and pound, provided that all activities shall be within a building except for exercise runs which may be maintained...
10. Light manufacturing of products, the major portion of which is to be sold at retail on the premises by the manufacturer to the consumer; provided no light manufacturing shall be carried on in a Business District which is prohibited or not authorized in an Industrial District...
11. Such accessory uses as are customary in connection with any of the uses enumerated in clauses...
12. Any additional use for which the Board of Appeal may grant permission in a specific case, as hereinafter provided in Section XXIV, after determination by it that the proposed use is similar to one or more of the uses specifically authorized by this Section."

The question now remains as to the intent of the above-mentioned Section, specifically subparagraph 6. and 8. An "office" is mentioned in subparagraph 6, and, "storage or parking of motor vehicles," is mentioned in subparagraph 8. There is no question in the Board's view that there are limitations to the motor vehicles which may be parked on one's property even incidental to an allowable business.

It has been firmly established by our courts that in interpreting language in statutes and ordinances that the express mentioning of one permitted use excludes by implication other similar matters not specifically mentioned. Foster v. Mayor of Beverly, 315 Mass. 567; Bldg. Inspector of Chelmsford vs. Belleville, 342 Mass. 216. Moreover, the type activity carried on here is provided for in an Industrial Zone, Section XIII-2. Although Section XI 1-11 provides for accessory uses which are customary in connection with any enumerated uses, we find that a moving business is not accessory to any of the enumerated uses. Prett v. Bldg. Insp. of Gloucester, 113 N. E. 2 816.

The Board further finds that the use herein derogates from the purposes of G. L. Chapter 40A, Section 3, in that the parking of these large vehicles does nothing to preserve and increase the amenities of the Town of Wellesley. Board members have consistently observed, almost daily, that a gray van has been parked on the rear of the lot in an inoperable state for at least four months. In checking with the Board of Selectmen, a Board member was advised that at no time was a permit ever requested to allow this van to be parked on the lot in that period of time pursuant to Section XVI-B of the Zoning By-law.

The Board members believe this is an appropriate time to state that property uses must be consistent with the general character of the neighborhood.

In the view of this Board, the storing of any vehicle the size of those on the premises are definitely deleterious to the neighborhood of single detached residences nearby and is neither an accessory use or incidental thereto.

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The Board is empowered to consider the factors of whether a given use is so incidental as to be "accessory" including the extent or degree of use, as well as the kind (See Town of Needham v. Winslow Nurseries 330 Mass., 95, 103 (1953); resulting annoyance to neighbors (Pratt v. Building Inspector of Gloucester, supra). "Accessory use" should be interpreted in the light of the statutory authority given the town to adopt our zoning regulations. The Zoning By-law gives the Board the power to conserve the obvious aspects of safety and health including conserving value of land and buildings; to encourage a more appropriate use of land throughout the Town and to preserve and increase its amenities. Mass. G. L. Chap. 40A, Section 3.

In interpreting the word, "Accessory" as used in Section XI-11, the Board finds that its meaning is anything which accompanies or is joined to another thing, or is connected with it, as an incident, or as subordinate to it. Black's Law Dictionary, Fourth Edition. In Lawrence v. Zoning Board of Appeal of North Branford, 264A² 552, Conn. 1969, the court stated that the word incidental as employed in a definition of accessory uses means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance, incorporating the concept of reasonable relationship with the primary use. The Board finds that the present use of the premises is not within the purview of Section XI. To hold otherwise would allow uses in the zone not contemplated by the Town Meeting.

In Needham v. Winslow (supra) the Mass. Supreme Judicial Court stated that, "an incidental or accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use," and the court held that the sale of tools and garden equipment, the sale of merchandise not grown on the premises and use of the property for a contracting business were not permitted accessory uses to greenhouses and nurseries. See also, Town of Harvard v. Maxant, 275 N.E.² 350. 351.

The Board has referred to Section XVI. of the Zoning By-law which provides, Restrictions Affecting All Districts,

"Any other provision of this by-law notwithstanding, 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, in any part of the Town,

- A. For any purpose which by the emission or discharges of fumes, vapor, smoke, gas, dust, cinders, offensive odors, chemicals, poisonous fluids or substances, refuse, organic matter, or excrement, the causing of noise or vibrations, or by unduly increasing the risk from fire or explosion, or otherwise, would be obnoxious, offensive, dangerous, or injurious to the public health or safety.
- B. For the storage or parking of motor vehicles which are, and for the immediately preceding thirty day period have been, disabled, dismantled or inoperative, unless said vehicles are enclosed within a building or are stored or parked pursuant to a permit issued at the discretion of the Selectmen.
- C. For any purpose which would be for any reason injurious to the health, safety, morals or welfare of the community or harmful to property therein.

It is the opinion of this Board, that under this Section it is

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the intent and purpose of the Zoning By-law, to restrict the size and type of any vehicle parked in any District, which for any of the above-mentioned reasons, would be injurious to the health, safety, morals or welfare of the inhabitants of the Town or harmful or depreciating to surrounding properties. Each case, it is felt, should be determined individually by the Board of Appeal when a question arises.

It is clear to this Board from the evidence submitted by Attorney Dowd, representing Peter Bendslev, owner of the business, that at least one vehicle was not registered on the night of the hearing.

Although the operations of the office were not explained in detail, it would seem to this Board, that the office could be used for usual office procedures, such as taking telephone calls, billing, etc., providing vehicles are not parked on the premises, which would in any way violate the provisions of Section XVI of the Zoning By-law or any other relative provision of the by-law. It was pointed out repeatedly by the aggrieved parties as well as their attorney, that the vehicles have been noisy, a source of concern for the safety of the children in the neighborhood, by the creation of increased traffic as well as a blight to the entire area.

It, therefore, is the unanimous opinion of the Board, to permit the use to continue would further increase congestion at an already busy corner; would further depreciate the values of surrounding properties and would be contrary to the intent and purpose of the Zoning By-law.

Accordingly, the Inspector of Buildings is hereby directed to order the vans, trucks, trailers and Greyhound van, off the premises at once.

Theodore C. Merlo
Theodore C. Merlo
F. Lester Fraser
F. Lester Fraser
William O. Hewett
William O. Hewett

Filed with Town Clerk _____
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BALDWIN, COPELAND & HESSION

Attorneys at Law

WALTER W. BALDWIN
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JOHN A. WEBER, JR.
ALBERT S. ROBINSON

March 18, 1976

47 CHURCH STREET
POST OFFICE BOX 375
WELLESLEY, MASSACHUSETTS 02181
235-1020 AREA CODE 617

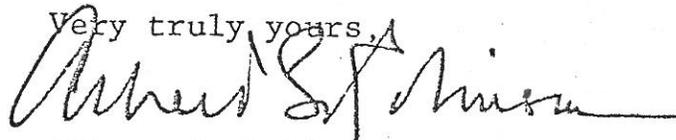
Norfolk Superior Court
Court House
Dedham, Massachusetts 02026

Re: Joseph E. Scammon, as he is the
Building Inspector of the Town
of Wellesley Vs. W. W. Diehl,
Peter C. Bendslev and Janet
Bendslev
Docket No. 117915

Dear Sirs:

Enclosed please find Notice of Voluntary
Dismissal on behalf of the Plaintiff. Would you kindly
file the same.

Very truly yours,



Albert S. Robinson

ASR/dsh
File No. WJ 132
Enclosure

bcc: Joseph Scammon, Building Inspector

TOWN OF WELLESLEY



MASSACHUSETTS

LEO J. HESSION, TOWN COUNSEL

March 18, 1976

P. O. BOX 375
47 CHURCH STREET
WELLESLEY, MASS. 02181
235-1020

Rogert Dowd, Esquire
230 Boylston Street
Boston, Massachusetts 02116

Re: Joseph E. Scammon, as he is the
Building Inspector of the Town
of Wellesley Vs. W. W. Diehl,
Inc., Peter C. Bendslev and Janet
Bendslev

Dear Mr. Dowd:

Regarding the captioned matter, it appears that all of the vehicles and equipment have been removed from the premises at 18 Forest Street, and I understand from you that the removal appears to be permanent. Accordingly, we have dismissed the above captioned law suit.

Of the three defendants, only Mrs. Bendslev was served. By a copy of this letter to her, I am also advising her that the law suit has been dismissed. This will also serve to notify her that my motion for a preliminary injunction, which was to be heard by Suffolk Superior Court this coming Friday, March 19, 1976 will not be presented.

If either you or Mrs. Bendslev has any questions, please feel free to get in touch with me.

Very truly yours,

Leo J. Hession

ASR/dsh
File No. WJ-132

cc: Mrs. Janet Bendslev
65 Grove Street, Unit 149
Wellesley, Massachusetts 02181

TOWN OF WELLESLEY



MASSACHUSETTS

LEO J. HESSION, TOWN COUNSEL

March 11, 1976

P. O. BOX 375
47 CHURCH STREET
WELLESLEY, MASS. 02181
235-1020

Joseph E. Scammon, Building Inspector
Wellesley Town Hall
Wellesley, Massachusetts 02181

Re: W.W. Diehl, et al

Dear Joe:

Following your cease and desist notice to the above firm I commenced an action in Norfolk Superior Court to enforce same. As a result of serving Mrs. Bendslev apparently things moved quickly and I am now advised that all trucks have been removed.

Will you please confirm that everything is to your satisfaction and let me know? I have marked up a motion for a preliminary injunction for March 19th and if you would advise me prior to that date it may save a trip to court.

Sincerely,

Leo J. Hession

Leo J. Hession

LJH/dd

file: WJ-132

cc: Thomas E. Lee, Executive Secretary
Wellesley Board of Selectmen
Town Hall
Wellesley, Massachusetts 02181

W W Diehl Inc. 18 FOREST STREET, WELLESLEY HILLS, MASS. 02181
MOVERS OF FINE FURNITURE SINCE 1903 TELEPHONE (617) 235-0250

agent for Greyhound Van Lines, Inc.

March 1, 1976

Town of Wellesley
Wellesley,
Massachusetts

Attention: Joseph E. Scammon

Receipt as acknowledged your letter of February 25, 1976
notifying the W. W. Diehl, Inc. that the appeal heard before
Judge Dimond on January 5, 1976 was denied.

Efforts are being made to relocate the trucks and equipment
from the parking lot at 18 Forest Street at the earliest
opportunity.

Your office will be notified in writing when this has been
completed.

Sincerely yours,
W. W. DIEHL, INC.



Edgar Gunther
Office Manager

EG:ls