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ZONING BOARD OF APPEALS
TOWN HALL WELLESLEY, MA 02181

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KENDALL P. BATES

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Executive Secretary
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SUMNER H. BABCOCK

ZBA 88-93

Petition of Town of Wellesley (Board of Selectmen)
Wellesley Farms Commuter Parking Lot on Croton Street

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, November 17, 1988 at 8 p.m. in the Great Hall 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 XVIA and Section XXV of the Zoning Bylaw to reconstruct the WELLESLEY FARMS COMMUTER PARKING LOT on CROTON STREET in a Single Residence and a Transportation District. Said Special Permit (ZBA 87-11) was granted on February 24, 1987 and will expire on February 24, 1989 if not extended.

On October 31, 1988, 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 Felix Juliani, Secretary of the Board of Selectmen, who read the letter submitted by the Board of Selectmen stating the reasons the Special Permit had not been acted upon within the required time limit and requesting a six month extension of the Special Permit.

Mr. Juliani said that there has been a misconstruing of what is shown on the original plans and the applicability of the proposed extension. The MBTA is proposing to build a handicap overpass on MBTA property at the Wellesley Farms Station. The plans submitted in 1987 do not show any handicap overpass. Mr. Juliani stated that it is not the intent of the Board of Selectmen to request approval of any plans showing the overpass, but only to request extension of the original Special Permit for site plan approval involving only the plans dealing with reconstruction of the parking lot which were submitted with the original petition. The request for the extension has nothing to do with the handicap overpass.

Mary K. Sullivan, 35 Hundreds Road, presented a copy of the latest set of MBTA plans entitled "25% Submittal Plans", drawn by Louis Berger & Associates, dated June, 1988, showing a proposed handicap overpass to be constructed on MBTA property.

Discussion ensued regarding the handicap overpass and its relation to the proposed Special Permit extension. Sarah Johnson, 30 Eaton Court, said that although she supports the original petition, she fears that the approval of the requested extension will reduce the Town's opportunity to influence the MBTA on the final design of the handicap overpass.

Charles Stifter, 8 Squirrel Road, opposed the granting of the extension as he felt that the parking lot and the proposed handicap overpass should be viewed as one project.

ZBA 88-93

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Carol Fyler, Chairman of the Natural Resources Commission, reiterated Mr. Juliani's position and added that the handicap overpass would be located on MBTA property and could be built without any Town permits. The extension of the Special Permit will allow the State to spend \$700,000.00 to reconstruct the parking lot. Without the extension, the Town will not receive the funds for the project.

David Daly, Precinct D, was opposed to granting the extension as he felt that approval would negate any leverage the Town might have in discussions with the MBTA on the handicap overpass. The Board stated that in its opinion, any leverage would come from negotiations on the leasing arrangement for the parking lot and not from the extension of the Special Permit.

The Board stated that if the Special Permit expired, a new application would have to be submitted, as the Special Permit could not be extended retroactively.

No other persons present had any comment on 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 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 of the Special Permit for Site Plan Approval to reconstruct the commuter rail parking lot is requested. The Special Permit was granted on February 24, 1987 (ZBA 87-11) and is due to expire, if not extended, on February 24, 1989.

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 September 27, 1988, which was submitted with the present petition, Theodore F. Parker, Chairman of the Board of Selectmen, stated that the Special Permit has not been acted upon due to the need for Town Meeting to approve a lease longer than 10 years and coordination of the MBTA construction schedule with that of the Mass. DPW. Town Meeting approved a lease for up to 25 years in April, 1988; and the MBTA and the MDPW plan to go to bid in the spring of 1989 and to complete construction during the summer. As much of the scheduling is not within the control of the Town of Wellesley, a six-month extension of the Special Permit for Site Plan Approval is requested.

ZBA 88-93

Petition of Town of Wellesley (Board of Selectmen)
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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 & 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, at an Emergency Meeting on Friday, November 4, 1988, voted to offer no objection to the granting of the extension based on the plans dated January 19, 1987 which were approved by the Zoning Board of Appeals on February 24, 1987.

Decision

This Authority has made a careful study of the evidence presented. The petitioner is requesting an extension to a Special Permit for Site Plan Approval (ZBA 87-11) granted on February 24, 1988.

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

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

1. That said extension shall expire on September 1, 1988, 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.

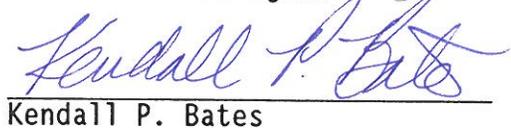
APPEALS FROM THIS DECISION, IF ANY, SHALL BE MADE PURSUANT TO GENERAL LAWS CHAPTER 40A, SECTION 17, AND SHALL BE FILED WITHIN 20 DAYS AFTER THE DATE OF FILING OF THIS DECISION IN THE OFFICE OF THE TOWN CLERK.

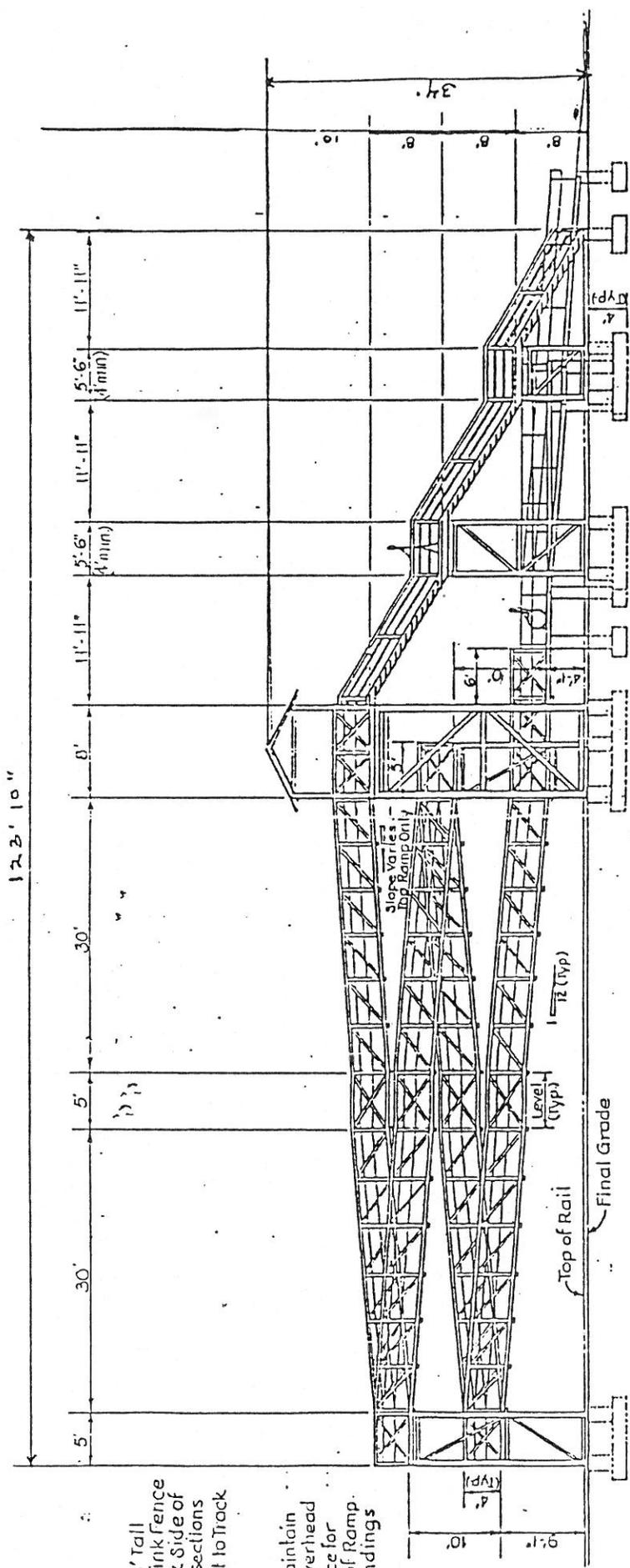
cc: Planning Board
Inspector of Buildings

edg


John A. Donovan, Jr., Chairman


Robert R. Cunningham


Kendall P. Bates



Note: 8' Tall Chain Link Fence in Track Side of Ramp - sections adjacent to track only.

Note: Maintain min. 8' Overhead clearance for length of Ramp and Landings

EAST ELEVATION
N.T.S.

Note: The Wellesley Hills Bridge will not include ramping, and the stairway configuration may be altered.

MOTA TRANSIT PARK RIDE IMPROVEMENT PROGRAM	
PEDESTRIAN BRIDGE SCHEMATIC DESIGN	
LOUIS BERGER & ASSOC. INC. WELLESLEY, MA.	
JUNE, 1980	SHEET 1 OF 5

" C "

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss.

Superior Court Dept.
Civil Action # 88-3517

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. 88-93) of the Zoning Board of Appeals of the Town of Wellesley granting to the Town of Wellesley (Board of Selectmen) an "extension to the Special Permit for Site Plan Approval originally granted on February 24, 1987" 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 88-93 is hereinafter referred to as "the extension" and Decision 87-11, the underlying decision which is the subject of extension, is hereinafter referred to as "the original grant".

2. The funds for such renovation 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 leasing 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 both occasions pertaining hereto (the extension and the original grant) acted through its Board of Selectmen in seeking approvals from the Zoning Board of Appeals.

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 P. Babcock	113	Abbott Road
Kendall P. Bates	11	Chatham Circle
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" and "B" are certified copies of the ZBA decisions covering the extension and the original grant (dated December 7, 1988 and February 24, 1987 respectively).

9. The extension (to expire on September 1, 1989) was sought because the coordinated construction to be done by the MBTA and the Mass. Department of Public Works could not be scheduled so as to commence prior to the original expiration date of the special permit granted (that is, on February 24, 1989).

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, 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 & Associated and dated June 1988) indicated that by the time the 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

hereto as "C". After having been made aware of it at the hearing, the ZBA in its decision granting the extension stated that it "shall apply only to those plans dated January 19, 1987 which were submitted with the original petition".

12. But for the granting of the extension, 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, "A").

Accordingly, Plaintiffs contend that the granting of the extension necessarily operated to re-open all issues pertaining to the validity of the original grant.

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 "B", p. 3). Plaintiffs contend that the original application was not made under the proper section of the Zoning Bylaw and that no basis existed for the ZBA to approve a proposal whereby the lot would be completely re-constructed without compliance with the Town's Off-Street Parking requirements (Sec. XXI) -- a position at odds with that of the Town itself in making the application.

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 the original application indicated that the zoning bylaws were not going to be complied with in the following respects:

- (a) The Town itself is not exempt from having to comply with the Off-Street Parking requirements, and the plans submitted with the original application were not in compliance (undersized stalls resulted from a designation of an excessive percentage of spaces for compact cars, and the two aisles were narrower than the bylaws permitted, the effect of which was to create maneuvering problems). The variance applied for was not given by the ZBA, realizing as it did that "there is nothing in the zoning bylaw that enables us to grant variances for parking lot configurations." However, if no variance was needed because the to-be-reconstructed lot was pre-existing, it is unclear as to why site plan approval itself was needed (especially where the ZBA, in the process of conducting site plan approval, proceeded to "waive" compliance with the design standards set forth for Off-Street Parking in Subpart 3 of Part D. of Sec. XXI).

- (b) Inasmuch as the parking lot is located in a Single Residence District, if it was to be treated as "pre-existing", the application and decision had to be based upon Section XVII of the Zoning Bylaw ("Non-Conforming Uses and Structures") and under that

section the ZBA would be required to make a finding that "such change ... or alteration (shall) not be substantially more detrimental than the existing non-conforming use to the neighborhood". No such finding was sought or obtained; Section XVII was not even mentioned in the decision; and neither the application or the presentations at the hearing provided any basis in the record to support the ZBA's conclusion that the lot was "pre-existing".

17. For the foregoing reasons the decision of the ZBA in approving the site plan submitted with the original application was erroneous and the decision which extended that approval was equally erroneous and exceeded the Board's authority and should be annulled.

WHEREFORE, Plaintiffs request the court to annul the decision which extended an underlying decision which violated the Town's zoning bylaws and for which no proper basis was shown.

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 have those laws properly applied by the ZBA.

WHEREFORE, Plaintiffs request the court to enter a judgment which declares (a) that an extension ought not to

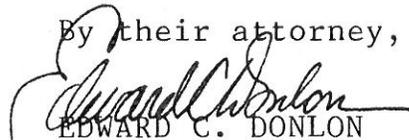
have been given to a decision which authorized a violation of the Town's zoning bylaws, (b) that no basis existed to justify the ZBA's waiver of compliance with the Off-Street Parking section of the zoning bylaws, (c) that, if the parking lot was "pre-existing", that the application and decision had to address the requirements of Section XVII.

COUNT 3 (Mandamus)

19. Plaintiffs incorporate the contents of the foregoing Paragraphs 1 - 17 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.

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 in any way will lead directly to, or be based upon, a violation of the Town's zoning bylaws.

By their attorney,



EDWARD C. DONLON
47 Church Street
Wellesley, MA 02181
(617) 237-2120
BBO# 129520

precise plans submitted and approved, in return for which the Town would commit to retaining the lot as a municipal parking area for a specified period.

3. Paragraph 3 is admitted.

4. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4, and therefore they are denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted.

9. Paragraph 9 is admitted.

10. The allegations in Paragraph 10 are admitted except as to the characterization therein purportedly reflecting "the original intent", for the reason that it is not yet clear that there was any intent at all at the outset regarding access to and from the parking lot to the north side of the tracks; but further answering, the Defendants are generally in accord with the Plaintiffs that the pedestrian overpass now being proposed by the MBTA should be opposed, although the same is not relevant in the issues brought herein by the Plaintiffs.

11. Paragraph 11 is admitted.

12. Paragraph 12 is denied; further answering, the sole issue on the granting of the extension which could be complained of by the Plaintiffs is whether the grant of the extension was for good cause.

13. Answering Paragraph 13, it is admitted that the original petition requested a special permit for Site Plan Approval and a Variance; the remaining allegations are denied.

14. Answering Paragraph 14, the Defendants admit that the Bylaw purposes for Site Plan Approval are, in part, those recited by the Plaintiffs herein but said recitation is not complete; reference is therefore made to the Bylaw for a complete description thereof.

15. Paragraph 15 is prolix and not understandable, and the allegations therein are therefore denied.

16. Paragraph 16 is prolix and not understandable, and the allegations therein are therefore denied.

17. Paragraph 17 is denied.

COUNT II

18. The foregoing answers to Paragraphs 1 - 17 are hereby incorporated by reference. The remaining allegations in Paragraph 18 do not require an answer.

COUNT III

19. The foregoing answers to Paragraphs 1 - 18 are hereby incorporated by reference. The remaining allegations in Paragraph 19 do not require an answer.

FIRST AFFIRMATIVE DEFENSE

The Plaintiffs have failed to comply with the requirements in G.L. c.40A, §17, which are a condition precedent to their prosecution of this action insofar as it represents a zoning appeal pursuant thereto; wherefore the Complaint should be dismissed.

SECOND AFFIRMATIVE DEFENSE

Each and every of the issues by the Plaintiffs in their Complaint were determined by the decision of the Board of Appeals filed with the Town Clerk February 21, 1987, no appeal of which was filed within the ensuing twenty days, which decision, therefore, became final and binding on all persons interested; therefore, the Complaint should be dismissed.

THIRD AFFIRMATIVE DEFENSE

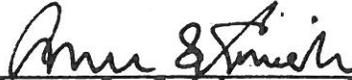
There was just cause for the Board of Appeals to grant the extension of the special permit for Site Plan Approval originally granted on February 24, 1987.

NEXT AFFIRMATIVE DEFENSE

There is neither a justifiable controversy nor are there

conditions present warranting or permitting an Order of Mandamus herein; therefore, the Complaint should be dismissed.

ZONING BOARD OF APPEALS OF THE TOWN
OF WELLESLEY AND THE TOWN OF
WELLESLEY,
By their Attorney:



Albert S. Robinson, Town Counsel
Town of Wellesley
40 Grove Street
Wellesley, MA 02181
(617) 235-3300

Date: 1/20/89.

CERTIFICATE OF SERVICE

I, Albert S. Robinson, Attorney for the Town of Wellesley et al, hereby certify that I today mailed a copy of the foregoing, postage prepaid, directed to: Edward C. Donlon, 47 Church Street, Wellesley, MA 02181.



Albert S. Robinson, Town Counsel
TOWN OF WELLESLEY
40 Grove Street
Wellesley, MA 02181
(617) 235-3300

Date: 1/20/89.

(0340k)