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WELLESLEY, MA 02181

DEC 7 11 00 AM '88

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

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

ZBA 88-96  
Petition of Robert P. DiNapoli  
889 Worcester 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 on the petition of ROBERT P. DINAPOLI, requesting a Special Permit pursuant to the provisions of Section II 8 (h) and Section XXV of the Zoning Bylaw to allow him to use part of his premises at 889 WORCESTER STREET, in a Single Residence District, for a home occupation, namely that of a travel consultant agency, with office hours Monday through Friday from 9 a.m. to 5 p.m. throughout the year.

On October 31, 1988, the petitioner filed a request for a hearing before this Board and thereafter due notice was given by mailing and publication.

Presenting the case at the hearing was June Riddle, Mr. DiNapoli's attorney, and Mr. DiNapoli. Ms. Riddle said that Mr. DiNapoli would meet all of the requirements of Section II 8 (h) for home occupation Special Permits. Mr. DiNapoli is a travel consultant who arranges and conducts casino tours. His business is a travel consultancy through which clients telephone for reservations on casino tours. Tickets are mailed to clients or picked up at the airport. No clients come to the house. The premises will be used as an office and there is ample parking.

Ms. Riddle said that Mr. DiNapoli purchased the property in July, 1988. He had previously leased office space at 51 River Street. At the time of purchase, Mr. DiNapoli informed Ms. Riddle that he was undecided as to whether he would locate the office in his home. Although Ms. Riddle had advised her client to inform her of his intentions regarding the office so that she could check the Zoning Bylaw, Mr. DiNapoli failed to contact her, but opened the office with two full-time employees shortly after occupying the premises.

Mr. DiNapoli was informed on October 14, 1988 by the Building Inspector that the Building Inspector assumed the property at 889 Worcester Street was being used for other than authorized residential use due to the number of motor vehicles seen parked in the driveway daily from after 8 a.m. until after 6 p.m.

In response to inquiries from the Board, Mr. DiNapoli stated that he lives on the premises and that the number of cars seen in the driveway are those of painters, plumbers and carpenters who are doing renovations on the property.

Mr. DiNapoli stated that two full-time employees are necessary to handle the telephone work and other secretarial duties.

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### Statement of Facts

The property in question is located at 889 Worcester Street in a Single Residence District.

The petitioner, Robert B. DiNapoli is requesting a Special Permit for a home occupation, namely that of a travel consulting agency, with two full-time employees, and office hours from 9 a.m. to 5 p.m., Monday through Friday throughout the year. All cars relating to the home occupation will be parked in the driveway which has ample space for 8 automobiles.

The petitioner purchased the property in July, 1988, and opened his travel consulting agency, employing two-full time employees, shortly thereafter without requesting the required Special Permit for a home occupation. Although he had been advised by his attorney, at the time of closing on the property, that if he intended to use the premises for a home occupation, to inform her so that she could investigate any Zoning requirements, he failed to do so.

In a letter dated October 14, 1988, the Building Inspector informed Mr. DiNapoli that, based on the Building Inspector's observations regarding the number of motor vehicles parked on the premises from after 8 a.m. to after 6 p.m. daily, that there was an assumption that the premises were being used for other than an authorized residential use.

Mr. DiNapoli then submitted an application for a Special Permit for a home occupation as described above.

The Planning Board, on November 1, 1988, voted to offer no objection to the Home Occupation Special Permit.

### Decision

This Authority has made a careful study of the evidence presented. The petitioner has requested a Special Permit for a home occupation at his residence at 889 Worcester Street, which he purchased in July, 1988.

Mr. DiNapoli appears to meet all of the requirements of Section II 8 (h) regarding a Special Permit for home occupation. However, it appears to the Board that Mr. DiNapoli purchased the property with the purpose of using it for the operation of a business and, disregarding advice of counsel, immediately instituted the operation of this business without submitting a request for the required Special Permit.

This Board is of the opinion that the requested home occupation, namely that of a travel consultant agency, is not a customary home occupation in a Single Residence District, and would be better located in an Administrative and Professional District or a Business District and that this requested use is not in harmony with the general purpose and intent of the Zoning Bylaw of the Town.

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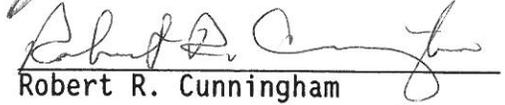
Dec 7 11 00 AM '88

Therefore, the Special Permit requested under Section II 8 (h) of the Zoning Bylaw is denied. The case is hereby dismissed and all operation of said travel consultant agency is to cease and desist immediately.

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

ZBA 88-96  
Petition of Robert P. DiNapoli  
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The petitioner purchased the property in July, 1988, and opened his travel consulting agency, employing two-full time employees, shortly thereafter without requesting the required Special Permit for a home occupation. Although he had been advised by his attorney, at the time of closing on the property, that if he intended to use the premises for a home occupation, to inform her so that she could investigate any Zoning requirements, he failed to do so.

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The Planning Board, on November 1, 1988, voted to offer no objection to the Home Occupation Special Permit.

Decision

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Mr. DiNapoli appears to meet all of the requirements of Section II 8 (h) regarding a Special Permit for home occupation. However, it appears to the Board that Mr. DiNapoli purchased the property with the purpose of using it for the operation of a business and, disregarding advice of counsel, immediately instituted the operation of this business without submitting a request for the required Special Permit.

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7BA 88-96

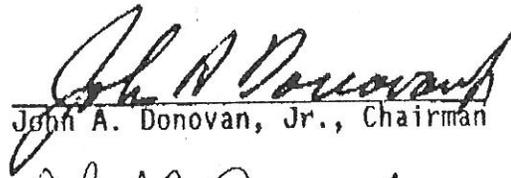
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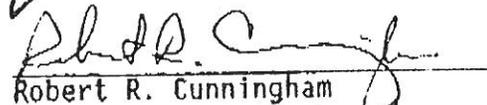
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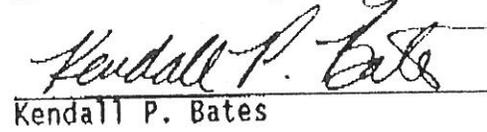
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Therefore, the Special Permit requested under Section II 8 (h) of the Zoning Bylaw is denied. The case is hereby dismissed and all operation of said travel consultant agency is to cease and desist immediately.

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

  
Robert R. Cunningham

  
Kendall P. Bates

cc: Planning Board  
Inspector of Buildings  
edg

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT  
DEPARTMENT OF THE  
TRIAL COURT  
C.A. NO.

\*\*\*\*\*  
 ROBERT P. DINAPOLI, \*  
                   PLAINTIFF \*  
  
 VS. \*  
  
 JOHN A DONOVAN, JR., \*  
 ROBERT R. CUNNINGHAM, \*  
 KENDALL P. BATES AS THEY ARE \*  
 THE DULY APPOINTED MEMBERS OF \*  
 THE ZONING BOARD OF WELLESLEY \*  
 AND ARTHUR LACONTE AS HE IS \*  
 THE ZONING ENFORCEMENT OFFICER \*  
 OF THE TOWN OF WELLESLEY \*  
                   DEFENDANTS \*  
 \*\*\*\*\*

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AFFIDAVIT OF NOTICE

I, June S. Riddle, certify that I have this date complied with the service of process requirements of Mass. General Laws Chapter 40-A, Section 17 by mailing a Notice of Appeal, together with a copy of the Complaint, by certified mail, return receipt requested, to each of the named Defendant members of the Board of Appeals:

John A. Donovan, Jr.  
36 Kimlo Road  
Wellesley, MA 02181

Robert R. Cunningham  
17 Cushing Road  
Wellesley, MA 02181

Kendall P. Bates  
41 Wall Street  
Wellesley, MA 02181

Attorney Albert S. Robinson, 40 Grove Street, Wellesley, MA 02181 as he is counsel to the Wellesley Zoning Board of Appeals;

Building Inspector, Arthur LaConte, 525 Washington Street, Wellesley, MA 02181

and by delivering same in hand to the Town Clerk of the Town of Wellesley.

Sworn to under the pains and penalties of perjury this 14th  
day of December 1988.

June S. Riddle  
June S. Riddle, Esq.

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TYPE OR USE BALL POINT PEN

MASSACHUSETTS TRIAL COURT

SUPERIOR COURT DEPARTMENT

CIVIL ACTION COVER SHEET

(To be filed with each Complaint)

Norfolk, SS.

NO. \_\_\_\_\_

PLAINTIFF(S) Robert P. DiNapoli	DEFENDANT(S) John A. Donovan, Jr., Robert Cunningham, Kendall P. Bates et al.
ATTORNEY(S) (Firm Name, Address, Tel.) June S. Riddle Riddle and White, 838 Mass. Ave., BBO # 419670 Lunenburg, MA 01464	ATTORNEY(S) (If known) Albert S. Robinson 40 Grove St. Wellesley, MA 02181

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Place an  in one box only

ORIGIN

- 1. F01 Complaint
- 2. F02 Removal to Sup. Ct. c.231, s.104
- 3. F03 Retransfer to Sup. Ct. c.231, s.102C
- 4. F04 Dist. Ct. Appeal c.231, s.97
- 5. F05 Reactivated after Rescript; Relief from judgment/order (Mass. R. Civ. P. 60)

Place an  in one box only

NATURE OF ACTION

CONTRACT

- A01 Services, labor and materials
- A02 Goods sold and delivered
- A03 Commercial paper
- A08 Sale or lease of real estate
- A99 Other (specify) \_\_\_\_\_

TORT

- B03 Motor vehicle negligence-personal injury/property damage
- B04 Other negligence-personal injury property damage
- B05 Products liability
- B06 Malpractice-medical
- B07 Malpractice-other (specify) \_\_\_\_\_
- B08 Wrongful death, G.L. c.229, s.2A
- B15 Defamation (libel-slander)
- B99 Other (specify) \_\_\_\_\_

REAL PROPERTY

- C01 Land taking (eminent domain)
- C02 Zoning appeal, G.L. c.40A
- C03 Dispute concerning title
- C04 Foreclosure of mortgage
- C99 Other (specify) \_\_\_\_\_

EQUITABLE REMEDIES

- D01 Specific performance of contract
- D02 Reach and apply, G.L. c.214, s.3(6)-(9)
- D06 Contribution or indemnification
- D07 Imposition of trust
- D08 Minority stockholder's suit
- D10 Accounting
- D12 Dissolution of partnership
- D13 Declaratory judgment, G.L. c.231A
- D99 Other (specify) \_\_\_\_\_

MISCELLANEOUS

- E02 Appeal from administrative agency, G.L. c.30A
- E03 Action against Commonwealth or Municipality, G.L. c.258
- E04 Taxpayer suit, G.L. c.40 s.53
- E05 Confirmation of arbitration awards, G.L. c.251
- E06 Massachusetts Antitrust Act, G.L. c.93
- E08 Appointment of receiver
- E09 General contractor's surety bond, G.L. c.149, ss.29, 29a
- E10 Summary process appeal
- E11 Workman's Compensation
- E12 Small Claims Appeal
- E13 Labor Dispute
- E14 Chapter 123A Petition — SDP
- E15 Abuse Petition, G.L. c.209A
- E16 Auto Surcharge Appeal
- E17 Civil Rights Act, G.L. c.12, ss.11H-1
- E99 Other (specify) Ch. 40-A, Sec 17

IS THIS A JURY CASE?  YES  NO

**SUPERIOR COURT RULE 29.** Requirement of statement as to money damages to prevent the transfer of civil actions to District or Municipal Court Departments.

1. Superior Court Rule 29, as amended requires the statement of money damages on the reverse side be completed.

2. Failure to complete the statement, where appropriate, will result in transfer of this action (Superior Court Rule 29(2)).

SIGNATURE OF ATTORNEY OF RECORD

*June S. Riddle*

DATE: 12/14/88

(OFFICE USE ONLY—DO NOT WRITE BELOW THIS LINE)

DISPOSITION

A. Judgment Entered

- 1. Before jury trial or non-jury hearing
- 2. During jury trial or non-jury hearing
- 3. After jury verdict
- 4. After court finding
- 5. After post trial motion

B. No Judgment Entered

- 6. Transferred to District Court under G.L. c.231, s102C

Disposition date \_\_\_\_\_

RECEIVED

BY:

DATE:

DISP ENTERED

BY:

DATE:

Norfolk, SS

Statement of Damages Pursuant to  
Superior Court Rule 29  
To Prevent Transfer to District or Municipal Court Departments  
(Applicable to Civil Actions)

1. This action is not subject to Rule 29 Remand for the following reason(s): (concise statement as to why this action is not remandable, e.g., party seeking equitable relief, declaratory judgment, action against commonwealth or municipality, etc.) This is an appeal from a decision of the Wellesley Zoning Board of Appeals pursuant to M.G.L. Ch. 40-A, Sec. 17 seeking the annulment of the Board's decision dated December 7, 1988. No money damages are sought.

2. This action is subject to Superior Court Rule 29 and the following detailed statement pursuant to Rule 29 sets forth the facts in full and itemized detail upon which the plaintiff relies as constituting the damages in this action:

(if tort action, for example, specify doctors' bills, hospital bills, out of pocket expenses, etc. that would warrant a reasonable likelihood that recovery will exceed \$15,000. )

(if contract action, state with particularity damages which would warrant a reasonable likelihood that recovery will exceed \$15,000. )

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12/14/88  
.....  
(date)

*James S. Kiddle*  
.....  
(signature of attorney of record or pro se)

8/8/89

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

RECEIVED & FILED  
8-8-89  
CLERK OF THE COURTS  
NORFOLK COUNTY

No. 85-3184  
88-3462

ROBERT P. DI NAPOLI

v.

JOHN A. DONOVAN, JR. & others

JUDGMENT

This civil action came on to be further heard, and was tried without a jury before the Court; and findings of fact and rulings of law have been rendered, it is ORDERED AND ADJUDGED as follows:

1.) The Board of Appeals of the Town of Wellesley did not exceed its authority in denying the plaintiff's application for a special permit.

2.) The Clerk-Magistrate is directed to serve an attested copy of this Judgment, within thirty (30) days of its entry, to the Board of Appeals of the Town of Wellesley and to the Town Clerk of Wellesley.

Elizabeth Bowen Donovan  
Elizabeth Bowen Donovan  
Justice of the Superior Court

Date: August 4, 1989

**A TRUE COPY**

Attest: Robert Moscow  
Deputy Assistant Clerk

*DiNapoli*  
*8/2/89*

NORFOLK, SS

COMMONWEALTH OF MASSACHUSETTS

**RECEIVED & FILED**  
*8-8-89*  
**CLERK OF THE COURTS**  
**NORFOLK COUNTY**

SUPERIOR COURT  
Civil Action No. 88-3462

ROBERT P. DI NAPOLI

v.

JOHN A. DONOVAN, JR. & others <sup>1/</sup>

MEMORANDUM OF DECISION  
(Including Findings of Fact  
and  
Conclusions of Law,  
Pursuant to Mass.R.Civ.P. 52(a))

I. BACKGROUND

This case is before the Court on an appeal pursuant to G.L. c40A, § 17. The plaintiff (DiNapoli) appeals from a decision of the Zoning Board (board) of the Town of Wellesley (town) denying a special permit for the property at 889 Worcester Street, Wellesley (locus).

The case was reached for trial on July 25, 1989. DiNapoli called as witness John Shubow, a private investigator, Arthur LaConte, inspector of buildings for the town, and Ellen Gordon, Executive Secretary for the board. The board recalled the latter two witnesses in its case in chief. The plaintiff did not testify. The parties stipulated to certain facts, and several exhibits were received in evidence. At the conclusion of the evidence, counsel argued orally and submitted proposed findings of fact and requests for rulings of law.

<sup>1/</sup> The others are Robert R. Cunningham, Kendall P. Bates as members of the zoning board of Wellesley and Arthur LaConte, the zoning enforcement officer of the Town of Wellesley.

## II. THE FACTS

Based upon the facts which were stipulated to by the parties, and such other facts as I find from the other evidence, including any inferences which I have considered fair and reasonable, I find the following material facts.

- 1.) In July 1988, the property located at 889 Worcester Street, Wellesley was purchased in the name of D & J Realty Trust. DiNapoli is a trustee of this realty trust.
- 2.) The locus, at all times material, was improved with a single family dwelling.
- 3.) The locus was in the single residence district, as defined in the town's Zoning By-law, Section II.
- 4.) Worcester Street is commonly known as Route 9.
- 5.) The locus is on the southerly side of Route 9, westerly of the Western Road interchange.
- 6.) All of the land westerly of the interchange and southerly of Route 9, for a substantial distance is zoned residential.
- 7.) The town has approximately six (6) miles of frontage on Route 9 and all, but about 1/2 mile, is zoned single family.
- 8.) The dwelling located on the locus contained five rooms. At the time of the inspection by the town on March 1, 1989, two rooms and a vestibule were being used as offices. There was a combination living room/dining room area with a table, couch, desk and computer equipment. There were no conventional beds but rather one room had a

pull out couch with a nightstand and no bureau. The basement contained a deck, file cabinet, and a substantial amount of office materials. The kitchen contained only a minimal amount of food. The dishwasher held only coffee cups. There were no clothes in the closets except for a few in the hall closet.

9.) Commencing on September 19, 1988, the zoning enforcement officer for the town began making observations of the number of cars parked at the locus during different periods of the day.

10.) Generally, there were no cars parked in the driveway before 7:00 A.M. or after 6:00 P.M. However, between those hours the number of cars varied between zero and eight.

11.) No car was registered from the locus.

12.) DiNapoli did not register to vote until the day before his deposition was taken in this matter.

13.) By letter dated October 14, 1988, the zoning enforcement officer wrote DiNapoli that based upon his inspections and observations that the locus was "being used for other than authorized residential use."

14.) DiNapoli's response to the zoning enforcement officer, dated October 19, 1988, stated that he was going to file an application for a home occupation pursuant to Section II A 8 (h) of the town by-laws.

15.) The town received DiNapoli's application for a special permit pursuant to Section II A 8 (h), to operate on a portion of the premise a small travel consulting agency.

16.) The town has permitted 186 home occupations none of which are travel consulting agencies.

17.) Section IA of the Zoning By-laws defines Home Occupation as:

"A non-residential use of a dwelling unit, by the resident or residents, for gainful employment, that is subordinate but compatible to residential use..."

18.) Section II A 8 (h) provides that upon the granting of a special permit that a home occupation may be allowed provided, however, that as the result of the home occupation:

- (1) There shall be no activity, and no equipment or process shall be used, in the conduct or as the result of the conduct of a home occupation, which disrupts or disturbs the customary character of a residential neighborhood;
- (2) There shall be no pickup or delivery of products and/or articles that is not customary in a residential area;
- (3) No sign advertising, or incidental to the home occupation shall be displayed on the property except in accordance with SECTION XXIIA. of this Zoning Bylaw;

- (4) There shall be no outdoor storage of products or materials;
- (5) There shall be no change in the outside appearance of the premises, including buildings and grounds, that is not in keeping with the residential character and appearance;
- (6) There shall be provision for parking on the premises so that no vehicle will be required to park on any street.  
The required parking area shall retain the character of the residential neighborhood. No substantial enlargement of the width of the residential driveway or other alteration of the driveway within the front yard setback shall be allowed in order to meet this requirement.
- (7) There shall not be more than the equivalent of two full-time non-resident employees;

19.) The board held a hearing in DiNapoli's Application on November 17, 1988 and a decision was rendered that evening.

20.) The procedure by which the board reduces to writing its decision is, to request the executive secretary of the board to prepare a draft.

21.) Either the draft, if it is acceptable to the board or a finalized decision is signed by the members of the board and recorded with the town clerk.

22.) The board denied DiNapoli's request for a special permit.

### III DISCUSSION

Two issues must be addressed on this de novo appeal: (1) Whether the use of the locus as both proposed and used comes within the definition of home occupation? (2) Did the board exceed its authority in refusing to grant a special permit?

1. Is the proposed and actual use a home occupation?

DiNapoli, after purchasing the locus, commenced to operate his travel consulting agency on the premises without the benefit of a special permit. DiNapoli did not testify. His story is essentially limited to his application for a special permit, findings of fact by the board and photographs of the premises.

The non-residential use of a dwelling for gainful employment must be subordinate but compatible to residential use. The facts as testified to in this hearing raise a serious doubt that the property was being used for residential purposes at all. No cars during the

hours of 6:00 A.M. and 7:00 A.M., no clothes in the closets per se and a very meager kitchen, would warrant a finding that the residence was not being used as a dwelling as is defined in the zoning by-laws.

Notwithstanding DiNapoli meeting the criteria of Section II A 8 (h), it does not assist him if the business use of the property is not subordinate to the residential use. I find it was not subordinate.

2. Did the board exceed its authority in refusing to grant a special permit?

No person has an absolute right to a special permit.

S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 9 Mass. App.Ct. 477, 481 (1980). The board has discretionary power in acting on special permits and the exercise of that discretion will not be disturbed unless the decision is based on a legally untenable ground or is unreasonable, whimsical, capricious or arbitrary. MacGibbon v. Board of Appeals of Duxbury, 369 Mass 512, 515 (1976). Detailed findings by the board, in general, are not required for the denial of a special permit. *Id.* at 515.

The function of the trial judge is to preside over a hearing de novo, to examine the board's decision to determine whether the plaintiff has demonstrated that the decision was based on a legally untenable ground or was unreasonable, whimsical, capricious or arbitrary. Dowd v. Board of Appeal of Dover, 5 Mass App.Ct. 148, 152 (1977). The judge is not restricted to the evidence introduced before the board. Guiragossian v. Board of Appeals of Watertown, 21 Mass App.Ct. 111, 114 (1985).

Under G.L. C40A, § 17, the trial judge is directed "to determine the facts and upon the facts so determined, annul such decision if it exceeded the authority of the special permit granting authority." The judge does not possess the same discretionary power as does the board. Texstar Construction Corp. v. Board of Appeal of Dedham, 26 Mass.App.Ct. 977, 979 (1988); citing Subaru of New England, Inc. v. Board of Appeal of Canton, 8 Mass.App.Ct. 483, 486 (1979). The board may deny a permit even if the facts showed that a permit could be lawfully granted. Id. 979

However, the board may not base its decision solely on legally untenable grounds such as prior violations of the by-laws. Texstar, supra 979. Notwithstanding the board's reference to DiNapoli operating the business from the locus prior to obtaining a special permit, I find that this was not the sole reason for the denial of the special permit.

After the de novo hearing which has been conducted in this case, and the facts found and the application of the law set forth above, I am unable to conclude that the board based their denial of the special permit on legally untenable grounds or is unreasonable, whimsical, capricious or arbitrary.

The board determined that the travel consultant agency was not a customary home occupation in a single residence district. In addition, the reasonable inference from the facts was that the proposed use did not comport with the definitional requirements of home

occupation. The board determined that the proposed use would be better located in an Administrative and Professional District or a Business District.

IV CONCLUSION

A judgment shall enter affirming the Decision of the board because it did not exceed its authority in denying the special permit.

So ordered

Elizabeth Bowen Donovan  
Elizabeth Bowen Donovan  
Justice of the Superior Court

Dated: August 4, 1989

A TRUE COPY  
Attest: Robert [unclear]  
Deputy Assistant Clerk

Duke  
11/21/91

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CLERK OF THE COURTS  
NORFOLK COUNTY

22-1

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPT.  
OF THE TRIAL COURT  
C. A. NO. 91-125

\_\_\_\_\_  
 JOHN A. DONOVAN, JR., et als., )  
 as they constitute the Zoning )  
 Board of Appeals of the Town )  
 of Wellesley, )  
 Plaintiffs )  
 V. )  
 ROBERT P. DINAPOLI, )  
 Defendant )  
 \_\_\_\_\_

JUDGMENT

This action came on for hearing on the parties' cross motions for summary judgment, Donohue, J., presiding, and the issues having been duly heard, and the Plaintiff's motion for summary judgment having been allowed, the Defendant's motion for summary judgment having been denied and the parties' stipulation having been filed:

It is Ordered and Adjudged,

1. That the Defendant, Robert P. DiNapoli, shall and hereby is, permanently enjoined and restrained from operating a travel consultant agency at the premises located at 889 Worcester Street, Wellesley, Massachusetts; and the prayer for assessment of civil fines is hereby dismissed.
2. That the Defendant's counterclaim shall be and hereby is dismissed.

By the Court: *Joseph Donohue*, Justice

Dated: Nov. 21, 1991

Attest: *Mary K. Healey*  
Assistant Clerk

(0508k)

A TRUE COPY  
Attest: *Mary A. Paek*

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

89-P-1112

ROBERT P. DiNAPOLI

vs.

ZONING BOARD OF APPEALS OF WELLESLEY & another<sup>1/</sup>

MEMORANDUM AND ORDER UNDER RULE 1:28

The plaintiff, Robert P. DiNapoli, trustee of D & J Realty Trust, which owns a house at 889 Worcester Street in the town of Wellesley, applied for a special permit to operate a travel consultant agency in the house. The property, a five-room house, is in a single residence district in which the defendant zoning board of appeals of Wellesley (board) may allow a special permit for a "home occupation." A home occupation is defined in § 1 A of the zoning by-law as "[a] non-residential use of a dwelling unit, by the resident or residents, for gainful employment, that is subordinate but compatible to residential use." Under § II A 8 (h) of the by-law, "as the result of the home occupation:

(1) There shall be no activity, and no equipment or process shall be used, in the conduct or as the result of the conduct of a home occupation, which disrupts or disturbs the customary character of a residential neighborhood;

(2) There shall be no pickup or delivery of products and/or articles that is not customary in a residential area;

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<sup>1/</sup>Building inspector of Wellesley.

(3) No sign advertising, or incidental to the home occupation shall be displayed on the property except in accordance with SECTION XXIIA. of this Zoning Bylaw;

(4) There shall be no outdoor storage of products or materials;

(5) There shall be no change in the outside appearance of the premises, including buildings and grounds, that is not in keeping with the residential character and appearance;

(6) There shall be provision for parking on the premises so that no vehicle will be required to park on any street. The required parking area shall retain the character of the residential neighborhood. No substantial enlargement of the width of the residential driveway or other alteration of the driveway within the front yard setback shall be allowed in order to meet this requirement.

(7) There shall not be more than the equivalent of two full-time non-resident employees . . . ."

The board denied the special permit. On DiNapoli's appeal pursuant to G. L. c. 40A, § 17, a judge of the Superior Court ruled that the board did not exceed its authority in denying the application.

In its decision, the board recited that "Mr. DiNapoli appears to meet all of the requirements of Section II 8(h) regarding a Special Permit for home occupation. However, it appears to the Board that Mr. DiNapoli purchased the property with the purpose of using it for the operation of a business and, disregarding advice of counsel, immediately instituted the operation of this business without submitting a request for the required Special Permit. This Board is of the opinion that the requested home occupation, namely that of a

travel consultant agency, is not a customary home occupation in a Single Residence District, and would be better located in an Administrative and Professional District or a Business District and that this requested use is not in harmony with the general purpose and intent of the Zoning Bylaw of the Town."

The judge ruled that the proposed use did not meet the definitional requirements of § 1A of the zoning by-law. "Notwithstanding DiNapoli meeting the criteria of Section II A 8 (h), it does not assist him if the business use of the property is not subordinate to the residential use. I find it was not subordinate." The judge stated that she was "unable to conclude that the board based [its] denial of the special permit on legally untenable grounds" or that the denial was unreasonable, whimsical, capricious, or arbitrary.

On appeal, DiNapoli argues that the judge erred (1) in allowing the board's motion to strike the photographs and board decisions regarding other properties; (2) in not ruling that the board was precluded from contesting issues admitted in its answer to the complaint; and (3) in concluding that the board did not exceed its authority in refusing to grant the special permit.

1. Evidence regarding prior decisions by the board.

There was no error in allowing the motion to strike the photographs and board decisions regarding special permits for home occupations for other properties. DiNapoli

contends that this evidence was relevant to the issue whether the board's decision was arbitrary, whimsical, and capricious or founded on legally untenable grounds. We disagree. None of the other special permits granted related to property on Worcester Street. None of the other special permits involved a travel consultant agency, nor was there any indication that the number of cars parked at any of the other sites would approach that observed at DiNapoli's property. Compare Colangelo v. Board of Appeals of Lexington, 407 Mass. 242, 245-246 (1990) (board's decision unreasonable, whimsical, capricious, and arbitrary when, within one year of denial of plaintiffs' petition for an exemption because of severe traffic problems, the board approved in the same area projects that added 1,571 vehicle trips daily to the very same streets).

2. Allegations admitted in the board's answer. At no time did DiNapoli call to the attention of the judge that the board admitted in its answer to the complaint that DiNapoli "resides" on the locus. DiNapoli did not object to the introduction of evidence at trial showing that he did not live at the house. This court, therefore, need not consider the question. Wood v. Roy Lapidus, Inc., 10 Mass. App. Ct. 761, 765 (1980). Even if the question of residence was established, we note that the issue that concerned the judge was whether the

home occupation was subordinate to residence. That was not admitted.

3. The propriety of the board's decision. DiNapoli claims that the board denied him a special permit because the members were angry that he had begun using the premises as a travel consultant agency prior to applying for the special permit. The decision notes that "it appears to the Board that Mr. DiNapoli purchased the property with the purpose of using it for the operation of a business" and that he instituted operation of the business without first requesting a special permit. Even if the board considered the failure to first apply for a permit, such consideration was not, as the judge found, the sole reason for rejecting the petition. The apparent purpose of the real estate purchase was to operate a business, not to buy a home where the business purposes would be subordinate to the residence. In addition, the board stated other reasons for rejecting the petition, namely, that the requested home occupation is not a customary home occupation in a single residence district and that the requested use is not in harmony with the general purpose and intent of the zoning by-law.

"There is no question that, if the board had grounded its denial solely upon [the plaintiff's] prior zoning violations, it would have exceeded its legitimate authority. Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148, 157 (1977). 'We think no one has a legal

right to a [special permit]. If a case should come to us in which an owner had been denied a [special permit] solely upon a legally untenable ground and the board should indicate that except for that ground the [special permit] would have been granted, perhaps the court could give relief.' Pendergast v. Board of Appeals of Barnstable, 331 Mass. 555, 559 (1954). But that case is not before us. The board's decision to deny the special permits was not based solely on the ground of [the [plaintiff's] prior zoning violations." Texstar Constr. Corp. v. Board of Appeals of Dedham, 26 Mass. App. Ct. 977, 979 (1988).

Judgment affirmed.

By the Court (Warner, C.J.,  
Perretta & Smith, JJ.),

  
Assistant Clerk

Entered: July 5, 1990.