



ZONING BOARD OF APPEALS

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ZBA 98-79

Petition of Steven A. Cohen/CEA Wellesley Trust
981 Worcester Street

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, September 24, 1998 at 8 p.m. in the Great Hall at the Town Hall, 525 Washington Street, Wellesley, on the petition of STEVEN A. COHEN/CEA WELLESLEY TRUST requesting an amendment to the Site Plan Approval (ZBA 98-16) pursuant to the provisions of Section XVIA and Section XXV of the Zoning Bylaw, which allowed construction of a two-story building with a footprint of 13,600 square feet and a floor area of 27,200 square feet on an 113,700 square foot lot of which 93,179 square feet is in a Business District and 20,561 square feet is in a Single Residence District, at 981 WORCESTER STREET, in a Business District, a Single Residence District, a Water Supply Protection District, and a Flood Plain District.

Said amendment requested is to revoke Condition #10 of the decision which requires that "if the existing 10 inch water main at 965 Worcester Street is not already connected to the existing 6 inch water main at 987 Worcester Street, the applicant will be responsible for making the connection".

On September 4, 1998, the petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Steven Cohen, who said that the decision granting Site Plan Approval for construction of the two-story building contained a condition regarding connection of the water mains on Route 9. There is a 10" main which comes from the west on Route 9 and stops at the lot line on Route 9. There is also a 6" main which comes from the east on Route 9 and stops about 225 feet away on an adjacent parcel.

Mr. Cohen said that during the Site Plan Review, the DPW raised the issue of connecting these two mains. At that time, he was operating under misinformation as to the location of the mains, whether they were connected, and the cost of connection. At the hearing, he and his engineer did not object to making the connection because they thought the mains were already connected, and if they were not, they were close together so that during the site work, it would not be a "big deal" to connect them. There was no basis for connection, but in order to help the Town, they would do so. As construction began on the site, the mains were located, and it was discovered they were not connected and were 225 feet apart.

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Mr. Cohen stated that the critical points are, first, that the connection of the two water mains is not at all required for the purpose of the project, as indicated by the DPW in their own letter to the Planning Board in reviewing the project as a Project of Significant Impact (PSI).

The second point is that the project does not have a detrimental impact on the Town's water supply system, as the DPW indicated in its letter to the Planning Board. Therefore, there is no logical connection between the DPW's desire to connect the water mains and this project. Although this may be desirable, it is not the applicant's responsibility. The Town would be overstepping its authority if it required that such an improvement be made to the Town's infrastructure, where there is no connection between the infrastructure issue and the project construction. This raises the constitutional issue that gratuitous infrastructure improvements cannot be required where there is no connection with the project.

Mr. Cohen asked that the Board review the decision and determine that the condition is unnecessary and inappropriate, and should be deleted.

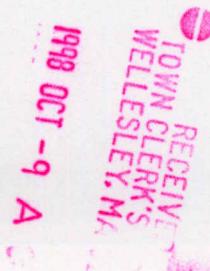
The Board stated that Mr. Cohen's engineer made the error, as he did not thoroughly research the issue. In a letter to Mr. Cohen, dated August 11, 1998, the Director of the DPW, W.T. Bailey, wrote "that the Department of Public Works will continue to recommend to the ZBA that the connection of these water mains remain a requirement of site development".

The Board said that Mr. Cohen is dealing with two dead ends of a water main. There is a sediment problem here.

The Board then called on Joseph Duggan, Water Superintendent, for further information. Mr. Cohen asked if Mr. Duggan would address not only why it would be desirable to connect the water mains, but why it would be necessary for this project.

Mr. Duggan said that the mistake was Mr. Cohen's engineer's mistake. The Town plans do not show a connection. In fact, the Town plans are remarkably close to where the actual mains were found. It was the results of the hydrant flow test that led Mr. Cohen's engineer to believe that the two mains were connected. The DPW did not have any factual information to refute that assumption, but always maintained the probability that they were not connected. However, they granted the engineer his opinion, but in no way misled the petitioner.

Mr. Duggan explained that, in regard to the PSI review, when the DPW said that the system was adequate, those impacts specifically addressed the issue of the sufficiency of water capacity to meet the flow demands of the specific site. The DPW was addressing the conceptual feasibility for that character building being located on that site, and looking at it hydraulically.



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Mr. Duggan continued that their issue was water quality, specifically aesthetic water quality, which is typified at dead ends. Water users are their consideration, which is the reason for having a blow-off system for the town. Dead ends are blown off once every two weeks to maintain that aesthetic quality.

Mr. Duggan said that there is iron and manganese in the water. The Water Department is about to go on line with treatment systems to remove them, but does not expect that the dead ends will suddenly become clear. Corrosion control, which will also be instigated, has negative impacts due to the higher ph, which can cause discoloration of water at dead ends. At the subject site, this would be the primary impact of the adverse characteristics of dead ends. The water main connection would be of benefit to the water users at 981 Worcester Street, whose interests the DPW is trying to protect. When the DPW was reviewing the project for the PSI, it was not the time or place to address the site impact.

The Board asked if there was a possibility of a bacterial build-up at the dead ends that might be transferred into the building. Mr. Duggan said that the bacterial build-up is the cause of the discoloration. The bacteria, not necessary pathogenic bacteria, metabolize iron and manganese, so they can dissolve it into the water, which causes the discoloration, but most coloform are nonpathogenic.

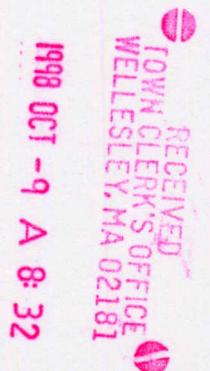
The Board asked if the two separate lines had any effect on the abutters to the site. Mr. Duggan said that the flow tests have shown that the flow is adequate. The connection of the mains can only improve that situation. The abutters being a gas station and a garage are unlikely to complain about the water quality.

Mr. Cohen stated that he believed water quality is an off-site issue which should have addressed under the PSI. The only impacted property is his property. He added that had his engineer not made a mistake, they would have objected to the condition at the outset as unwarranted, illegal and not connected to the site. He would be glad to indemnify the Town in regard to the aesthetic quality of the water, as they have done about potential flooding.

The Board concluded that the condition was accepted at the hearing by the petitioner. If Mr. Cohen had any doubt about the connection or distance of the water mains, he could have brought it up at that time and requested additional time to determine the actual location and connection of the water mains. The request is coming a long time after the fact.

Kimberly Walker, 132 Overbrook Drive, spoke regarding the Conservation Easment.

Lisa Brown, 94 Beechwood Road, felt that the condition should be upheld.



Statement of Facts

The subject property is located at 981 Worcester Street, in a Business District, a Single Residence District, a Water Supply Protection District and a Flood Plain District. On February 26, 1998, the Board of Appeals held a Public Hearing on a petition to grant Site Plan Approval for a two-story building on the site. As part of the Site Plan Approval process, a copy of the submission was sent to the Engineering Department for review. In a letter to the Board dated February 23, 1998, Bill Millett of the Engineering Department wrote:

"A recent fire flow test indicates that the existing 10 inch water main at 965 Worcester Street may already be connected to the existing 6 inch at 987 Worcester Street. If not so, the applicant will make the connection."

At the hearing, the Board indicated that this requirement would be included as a condition in the decision to grant Site Plan Approval. Neither the petitioner, nor his engineer, Rick Moore from Rizzo Associates, Inc., disputed the condition, which became Condition #10 in the decision dated March 16, 1998 (ZBA 98-16). No appeal to this decision was filed.

At the September 24, 1998 Public Hearing, Mr. Cohen stated that the 10 inch main comes from the west and the 6 inch main comes from the east. In fact, the 10 inch main comes from the east and the 6 inch main comes from the west.

The 6 inch main is located at the western end of 981 Worcester Street, while the 10 inch main is located approximately 60 feet to the east of the locus, at a distance of approximately 225 feet from the 6 inch main. Fire flow tests were taken at the 10 inch main and at the 8 inch main at 962 Worcester Street, but not at the 6 inch main.

The petitioner submitted a Watermain Location Plan, drawn by Rizzo Associates, Inc.; with a two page statement, written by the petitioner, stating the reasons for revoking the condition.

A copy of the aforementioned letter from W.T. Bailey to Mr. Cohen, dated August 11, 1998, was also sent to the Board members.

On September 14, 1998, the Planning Board reviewed the petition and voted to offer no comment.

Decision

This Authority has made a careful study of the material submitted and the information presented at the hearing.

This Authority is of the opinion that the mistaken assumption of the petitioner and the

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question, is not grounds for seeking recourse from the Board at this time.

It is the opinion of this Authority that the requirement of the DPW pertains to the site as the connection of the two mains will improve the hydraulic conditions on the site, and therefore is a condition pertaining to the site rather than the town infrastructure. Although the petitioner has offered to indemnify the town regarding the aesthetic quality of the water coming into the site if the connection is not made, the Board is of the opinion that the quality of the water must meet the standards of the Water Department and is not a subject for indemnification.

Therefore, the request for the revocation of Condition #10 is denied, as voted unanimously by this Authority at the Public Hearing, and this petition is dismissed.

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
Joseph Duggan, Water Superintendent
Bill Millett, Engineering Department
edg

Kendall P. Bates, Acting Chairman

William E. Polletta

Sumner H. Babcock

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