

Samuel F. Hyland
Attorney at Law

AREA CODE 617
744-4900
744-4901

70 Washington Street
Salem, Massachusetts 01970

March 19, 1975

NOTICE OF APPEAL

Francis H. Whipple
Town Clerk, Town of Hamilton
Town Hall
Hamilton Mass.

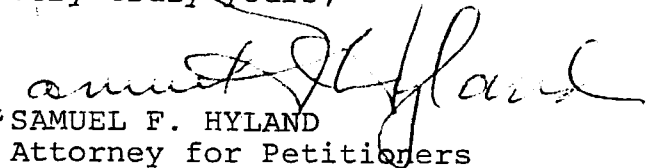
Re: John W. Mc Wane, et als
vs. George G. Beckett, et als

Dear Mr. Whipple:

You are hereby notified in accordance with the provisions of General Laws 40A Section 21, that an Appeal has been filed this date in the Clerk's Office, Essex Superior Court, Salem, Massachusetts, wherein the above named Petitioners appeal from the decision of the Hamilton Board of Appeals granting a special permit and variance to Gordon-Conwell Theological Seminary to erect apartment buildings on Woodbury Street, Hamilton, Massachusetts.

A copy of the Complaint is attached hereto.

Very truly yours,


SAMUEL F. HYLAND
Attorney for Petitioners
70 Washington St.
Salem, Mass. 01970
Tel: 744-4900

SFH:BT

Original Received: March 19, 1975


CLERK, TOWN OF HAMILTON

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT

#12065

JOHN W. MC WANE, 175 Woodbury Street
DONALD W. BEATTIE, 198 Essex Street
SIDNEY K. JONES, 189 Woodbury Street
JAMES W. LA PORTE, 225 Woodbury Street
DENNIS M. WHITE, 233 Woodbury Street
LESTON M. FREEMAN, JR., 12 Martel Road
PAULINE B. MORONEY, 21 Greenbrook Road
LEONARD J. LA CHANCE, 45 Greenbrook Road

all of Hamilton, Essex County, Massachusetts

VS.

GEORGE G. BECKETT, 22 Arlington Street
JOHN E. DAY, 222 Asbury Street
H. GRANT CROWELL, 31 Rust Street

all of Hamilton, Essex County, Massachusetts, as they constitute members of the Board of Appeals of the Town of Hamilton, Massachusetts, and

GORDON-CONWELL THEOLOGICAL SEMINARY, 199 Bridge Street, Hamilton, Massachusetts

BILL OF COMPLAINT

The Petitioners invoke the provisions of G. L. Chapter 40-A, Section 21, as amended, and respectfully represent as follows:

I. The Petitioners are owners of land and buildings adjacent to premises owned by the Respondent Gordon-Conwell Theological Seminary, and are persons aggrieved within the meaning of G. L. Chapter 40-A, Section 21 by the decision of the Board of Appeals of the Town of Hamilton in the granting of a special permit and a variance to the respondent, Gordon-Conwell Theological Seminary.

II. Notice of the decision of the Board of Appeals of the Town of Hamilton was filed in the office of the Town Clerk

Samuel F. Hyland
Attorney at Law
10 Washington St.
Salem, Mass.

01970

Tel: 744-4900

on February 28, 1975, which fact has been certified by the Clerk of said Town of Hamilton on the copy of the decision appended hereto and marked "A".

III. The Petitioners allege that the decision exceeds the authority of the Respondent Board of Appeals, in that the reason for granting of the special permit and variance set forth in said decision, which is quoted in part as follows -

"The foregoing variance is based upon the several statutory requirements for a variance but, in addition, it and the Special Permit itself and approval of the site plan are founded on the proviso set forth in G. L. Chapter 40-A, S.2, that no by-law (or interpretation thereof) which prohibits or limits the use of land for any ... religious purpose or for any educational purpose which is religious ... shall be valid. The Seminary has specifically reserved its rights under this proviso and would be entitled to appeal any decision which it found to be 'limiting'."

does not constitute a decision supported by proper reasons as required by Section 18 of Chapter 40-A.

IV. The Petitioners further allege that the Respondent Board of Appeals, failed to make proper factual findings with respect to the parcel of land owned by Respondent Gordon-Conwell Theological Seminary, whereby a variance

Samuel F. Hyland
Attorney at Law
10 Washington St.
Salem, Mass.

01970

Tel: 744-4900

from the terms of the applicable Zoning By-Law should be granted owing to conditions especially affecting such parcel, but not affecting generally the zoning district in which the land is located, nor has the Respondent Board of Appeals made a finding that the literal enforcement of the provisions of the By-Law would involve a substantial hardship, financial or otherwise, nor have there been submitted factual findings that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the By-Law.

V. The Petitioners have requested that the Respondent, Gordon-Conwell Theological Seminary select another location on its land for such apartments which would not adversely affect the safety and health of the Petitioners and which would not limit the religious or educational purposes of said Respondent.

VI. And your Petitioners further say that the granting of a variance by the Respondent members of the Board of Appeals is therefore in excess of the powers granted to them by G. L., Chapter 40-A and that the granting of the variance does legally derogate from the meaning and intent of the zoning ordinance to the detriment of your Petitioners; and therefore the decision of the Board in granting a variance constitutes a nullity.

Samuel D. Hyland
Attorney at Law
10 Washington St.
Salem, Mass.

01970

Tel: 744-4900

Wherefore the Petitioners pray that this
Honorable Court issue a decree

1. That the decision be annulled.
2. For such other and further relief as to
this Court may seem meet and proper under the circumstances.

By their attorney:

C

O

P

Y

Samuel F. Hyland
Attorney at Law
70 Washington St.
Salem, Mass.

1970

00

TOWN OF HAMILTON - BOARD OF APPEALS

Decision Granting Special Permit, Variances and
Approval of Site Plan - No. 1975-2

Gordon-Conwell Theological Seminary - Woodbury Street

A Special Permit is hereby granted to Gordon-Conwell Theological Seminary authorizing the construction of two apartment-type buildings, each to contain twenty-nine apartments ^{with service and common rooms} and to be used primarily for housing married students and their dependents, on land owned by the Seminary located on the westerly side of Woodbury Street with access by a new road or drive leading southerly from the present entrance road from Woodbury Street, all as shown on a certain site plan entitled "Site Development" by Essex Survey Service, Inc., Drawings SP-2A and SP-2B, dated January 18, 1975, most recent revision (No. 4) dated February 18, 1975, and said site plan (including all subsidiary and related drawings not in conflict therewith, particularly SP-1 Site Development Plan, SP3 Alternate 1-A Galley Chamber Sewage Disposal Plan (passed by Board of Health), and A-1 Elevations) is hereby approved as conforming to the requirements of Section VI-H of the Zoning By-Law, subject to the satisfaction of the Board of Health with results of percolation tests taken at the required time and any other subsequent developments which may be within its jurisdiction. As provided in Section V-A, 10a(4) of the By-Law, all other requirements of this by-law, pertinent building regulations and regulations of the Board of Health must be fully complied with, from the planning stage to completion of the buildings, appurtenant structures, and roads and grounds which are a part of the project.

This Special Permit is granted and said site plan is approved, in part upon authority of Section V-A, Paragraphs 4 and 5 and especially paragraph 10b authorizing special permits for private schools or colleges in accordance with an approved site plan, together with Section V-A8, permitting accessory uses customarily incidental to a permitted main use, since dormitories are incidental to all schools or colleges not limited to day students.

In further support of said Special Permit and site plan approval, the Seminary is hereby granted a variance from the provisions of Section V-A 10a requiring that multi-family dwellings be located in an R-1a Residence District (the locus lying in an R-2a district), and also to the extent that any such be required, variances from the space requirement provisions of said paragraph 10a and any height or setback provisions elsewhere in the By-Law which might conflict with details shown on said site plan, including subsidiary plans.

The foregoing variance is based upon the several statutory requirements for a variance but, in addition, it and the Special Permit itself and approval of the site plan are founded on the proviso set forth in Gen. Laws C. 40A, S.2, that no by-law (or interpretation thereof) which prohibits or limits the use of land for any ... religious purpose or for any educational purpose which is religious ... shall be valid. The Seminary has specifically reserved its rights under this proviso and would be entitled to appeal any decision which it found to be "limiting." It has however submitted the matter to this and the other boards concerned and as a result has agreed to certain changes in its original plans, particularly

in removing the access road from direct entrance on Woodbury Street and in making substantially greater provision for leaching field areas, both primary and reserve. This Board finds that at least as now changed, the plan should meet the reasonable objections of opponents and that to require the Seminary to seek a different location upon its campus would not be justified by the facts or permissible under the statutory proviso above mentioned.

The full decision in this case, of which these paragraphs form the first part, is on file with the Town Clerk and has been sent to officials particularly interested, the applicant, and to two leaders of the opposition. No action under the Conservancy District amendment to the By-Law is called for in this decision and any action which may be taken by the Conservation Commission with regard to the project will be under statutes concerning protection of wetlands, a subject separate from zoning matters although often, as here, closely connected.

The public hearing was held at 8:00 P.M., on Wednesday, February 19, 1975 in the upper chamber of the Town Hall, before regular members Beckett and Crowell and alternate member Day. Mr. LaChance, the third regular member of the Board took no part in the deliberations of the Board or in its decision because of interest, his house lot being one of those in the Greenbrook Road subdivision crossed (in the rear) by Green Brook. Mr. LaChance argued against the proposed location while not opposing the project of providing housing for the married students.

Between 125 and 150 persons substantially filled the hall. Most of the press was represented.

The meeting was opened by some general remarks by the Chairman, attempting to acquaint those present with the scope and effect of the proviso in Section 2 protecting religious educational institutions and pointing out that the Seminary by submitting its plans to the Board of Health and others concerned (particularly the Department of Public Works) was in effect offering to consider alternatives which might be suggested. In fact it appeared that as a result of conferences with these boards and with certain of the objecting neighbors, the Seminary had relocated the access road so as not to enter directly upon Woodbury Street and had considerably increased the provision for leaching field space for sewage disposal.

For the applicant, Dr. Kalland, Vice President and Mr. Clayton Sidell, Controller-Business Manager, explained the history and present operation of the Seminary, the present buildings and their uses and the reasons for the married students' housing project and for the location chosen. Their remarks were also presented in writing, and a copy of each paper is filed with the official copy of this decision.

The Board finds and rules that the project is well within the corporate purposes of the Seminary, which conducts study and grants degrees on the graduate level and that the choice of site and the proposed installations appear initially to be justified. Without attaching significance in our decision, we note Dr. Kalland's statements that over half the gross payroll of \$750,000 for the current academic year is paid to employees residing in Hamilton, that many of these employees are home owners and tax-

payers in town, and that the Seminary intends to pay tuition for each student in the public schools who lives in the campus apartments. In addition, the Seminary has offered a proposal to make an annual gift to the town in lieu of taxes.

Opposition to the desired location was voiced principally by Mr. John McWane, owner of land across Woodbury Street, who showed some recent color slides of the location and nearby areas, and by Mr. Donald Beattie, living at the corner of Woodbury and Essex Streets who claimed to represent 113 neighbors, some abutters, some owners of the far bank of Green Brook, and the majority living beyond to the Southeast on Martel Road, Alan Road and Postgate Road. Certain of these neighbors spoke, all in opposition. Ruling out the attempted raising of the spectre of pollution of the drinking water (which we believe to be without foundation the objections appear to be based on (1) the possibility, apparently feared most by the lowland abutters opposite, and by riparian owners on Green Brook, of inadequacy or failure of the sewage system resulting in pollution of the brook or the land between it and Woodbury Street and (2) a rise in the water table of these lands and lands on the further side of the brook, or even further away, toward Martel, Alan and Postgate Roads, there being some swamp land in the rear of these lots, all this as a result (a) of the increased runoff of surface water (as a result of building and paving most of the site) into the brook where it partly circles the locus before flowing under Woodbury Street to run roughly parallel to the street enroute to Bridge Street and Miles River, and (b) of the discharge of some 8,000 gallons of effluent a day into the

leaching system (from the 16,000 gallon septic tank) which might be expected to drain underground into the brook west of the street or even to seep out from the knoll location either onto the street or under the street into the low land between this site and the brook, now flowing North at varying distances east of the street.

These contentions form the only serious questions for this Board to determine. If there appears to be real risk of danger of pollution or possibly, of simple flooding, such a danger to the public health would be about the only ground (now that highway safety is largely removed as an issue by the new access road) upon which a decision adverse to the applicant might be upheld on appeal to court. (We dismiss as unworthy that this Board, or any board of any municipality, should render a negative decision calculated upon the chance, if it exists, that time or financial pressure might prevent an appeal.)

It seems to us after giving the matter our best consideration that we must follow the Board of Health - admittedly more expert in such matters - and agree that there appears to be no danger of pollution from sewage. This is not a new subject and over the years the state and federal governments, together with other scientists, have evolved certain standards and various technologies to insure attaining such standards. We are told that this is the most modern system, that it has satisfied the state, that the town has added further requirements for a reserve field so that the Seminary cannot be faulted. There is further evidence that there is good absorbent gravel or sand and gravel at the site. We therefore find and rule favorably on the question of pollution, subject of course to the necessity of satisfactory percolation tests in March or April.

It is harder to come to grips with the water table question although here the members of the Board feel more at liberty to decide upon our own reasoning. Perhaps the swampy area in the rear of the three easterly road in fact drains in part into Green Brook. (Certainly a portion near Postgate drains the other way - Southeasterly to Essex Street and beyond as we have seen in plans in other hearings.) We do not recall any opponent expressly making this claim. This does not mean that we do not have sympathy for those who may have flooded leaching fields or wet cellars, as do many persons living near the members sitting on this case. It is, however, most difficult to accept that any amount of water poured onto gravel, or effluent poured into the ground, at this site will affect anyone's installations a few feet removed from the far side of Green Brook, and further downstream.

In the first place the Widen Lot (next beyond the brook on Woodbury Street, and the Beattie lot beyond appear to be substantially higher than the brook. Even if the brook should cease to flow, and flood its banks, it is difficult to see how the water will rise to add to a high water table. However, the brook does flow - on February 24 after two days of melting snow and a day's rain, it was flowing briskly at Woodbury Street without rising over the 18 inch culvert under the street. If the several "dams" found by Chairman Dale of the Board of Health (apparently made by children and perhaps built up by debris) could be kept clear, the drop of some 17 feet in about 3,000 feet between Woodbury Street and Bridge Street should keep the water moving. And if it moves, it will, except in times of spring or other flood, drain the area of its banks. Any high water table remaining after a period of such active flowing would in-

dicade impermeable soils, something not to be blamed on this brook or any discharge into it above Woodbury Street.

As to statements that removing the knoll and its gravel (by the Carmelites, predecessors of applicant) some years ago, changed the character of the low McWane land opposite the locus from grassy meadow to marshy soil with rushes, we believe that poor drainage out of the meadow by the brook, rather than additional water put into it, was the real cause if such a change in fact occurred.

In any event, the Board of Health will have the last word on pollution when the percolation tests are made and, conceivably, the Conservation Commission will have a last word on ground water and drainage when it considers the project. The subject area bounds on a Conservancy District (although the low land to the Northeast across which the access road will pass is not within the District) but no issue under the Conservancy By-Law arises since no structures are planned within that district. Surface drainage and the effect of the road on the wet land mentioned is for the Commission to deal with.

Subject to these considerations of possible decisions, regardless of what we may decide here, this Board feels it is obliged to take a stand. Other boards or officials may "advise" and in so doing may win sympathy from both sides but we have to decide. We therefore, according to our best judgment, hold that so much of the effluent if any as may reach the swamp behind the project and so the brook, plus whatever storm drainage runoff there may be, will not in any circumstances affect the water table of any lands, particularly beyond the brook, which have definite height greater than the high water level of the brook. Naturally the low McWane land near

the brook and any similar low land on either side will flood at times if and when the brook overflows its banks. This condition can be helped by regular clearance of obstructions impeding the flow. If anyone has a septic system any part of which is below the level of the bed of this stream, there may well be trouble for the owner, but it is hard to see how this can be blamed on the brook or on any increase in its flow. We must recall the data brought out by the Board of Health - that 8,000 gallons a day added to the ground by the leaching field (even though this adds up in a year to three million gallons) still is only about one 120th part of the water let down on the site annually by natural precipitation.

As stated in the introductory paragraphs, a variance is granted permitting the buildings in the Residence 2a District (if not permitted as accessory uses to the college already existing and permitted by the special permit and site plan approval) together with incidental further variances in case height or setback or area requirements of the By-Law are not technically satisfied by the details shown on the site plan which we have approved. We find with respect to these variances, aside from the mandate of the proviso in Section 2 of Chapter 40A, that their denial would cause substantial hardship to the applicant and that the relief here granted is desirable and without substantial detriment to the public good and without tending substantially to derogate from or to nullify the intent and purpose of the By-Law. As to the 10,000 square feet of land required for each unit of multiple housing, we are sure that the required amount of land (somewhat over 13 acres) is present and available to be counted, even if not all in the immediate vicinity of the two new buildings. Further, we are not entirely sure that the limitation of multiple housing

to the Residence la District is valid since it is doubtful if any substantial amount of vacant land existed in this district when the provision was adopted. It appears to us to be window dressing, like the inclusion of Wenham Swamp in this district in the original zoning map.

In conclusion, we will touch on the repeated suggestion that the Semina move the site to another location on its 120 acre campus. This Board accepts applicant's position, set forth in the application and maintained at the hearing, that the desired site is the best for the purpose. We can see that construction, particularly of leaching fields which need a certain grade, might be far more expensive if installed at one site suggested by the opposition, or at other steeply sloping sites; also that some, at least of the level area, is occupied by the existing principal leaching fields. We believe that to dictate the location of these buildings at a site other than that here found to be proper, would amount to "limiting" the use of the land under section 2. We believe applicant desires to proceed this season with construction and that the engineering and other work of selecting another site, doing all the field work, and preparing the voluminous plans and drawings required would set the project back many months. The suggestion of changing the site was made by abutters in their meeting prior to the hearing and presumably considered by the Seminary officials. At the hearing, we were formally advised that the Planning Board (apparently four members) favored a different (unspecified) location. In addition, one, if not two, members, both of the Selectmen and of the Board of Health, have registered their feelings of a similar nature.

Upon our initial inspections, some members of this Board had similar misgivings, perhaps the result of failure to visualize the improvements planned to result from the completed project. We place these sentiments in the record in the event the Seminary should be moved to re-examine its position.

Unanimously voted to adopt the foregoing as the decision in this case, the first five paragraphs to constitute the notice to be sent to interested parties.

A true copy, ATTEST:

George G. Beckett
H. Grant Crowell
John H. Day

Clerk

Board of Appeals

*Approved and filed
February 18, 1975
Wanda M. Hester
Town Clerk*