

LAW OFFICES
WILSON, ELSER, EDELMAN & DICKER
GRAYBAR BUILDING
420 LEXINGTON AVENUE
NEW YORK, N. Y. 10017
(212) 490-3000

TELEX
WUI 62698
WU 12-7399

TELECOPIER
212-490-3038

3250 WILSHIRE BOULEVARD
LOS ANGELES, CA 90010
(213) 487-3304
WU TELEX 67-3287
TELECOPIER 213-487-7101

1435 "G" STREET N. W.
WASHINGTON, D. C. 20005
(202) 638-3965
WU TELEX 89453
TELECOPIER 202-638-6853

80 CALIFORNIA STREET
SAN FRANCISCO, CA 94111
(415) 433-0990
TELEX WU 34-0572
TELECOPIER 415-434-1370

PLEASE REPLY TO New York

July 10, 1980

C/O City of Lawrence
910 Massachusetts Street
Box 708
Lawrence, Kansas 66044



RE: Assured : City of Lawrence, Kansas
Claimant : Andrew Wilson, et al
Policy : 77050045-UM
Our File : 230.0022251

Dear Mr. Carter:

This will confirm that this office represents Republic Insurance Company which issued a Public Officials Liability policy to you with limits of liability of \$1 million each claim in the aggregate, excess of a deductible of \$2,500. The policy in question was issued for the period May 18, 1977 to May 18, 1980 and bears Policy No. 77050045-UM.

It has been brought to our attention that a suit has been filed against you by Andrew C. Wilson, Valentin E. Romero, Henry P. Wilson, and the East Lawrence Improvement Association in the District Court of Douglas County, Kansas bearing Index No. CV 34127. The complaint is in four counts, basically involving the approval of a site plan submitted by Thomas Hayden to convert certain property in a residential area to be used as a tavern. The four count complaint seeks to recover the following damages from you: compensatory damages in excess of \$10,000; punitive damages; the cost of the action; and reasonable attorney's fees.

In the first count, you and the other defendants are charged with causing damage to Andrew Wilson because of the approval of the site plan in that Mr. Wilson relied on the original denial by the Board of Zoning Appeals and made substantial improvements in his residential property. The second cause of action is brought on behalf of Mr. Wilson and the other defendants wherein it is alleged

that the surrounding residential uses will be damaged by the approval of the site plan by the City Commissioner. The third count charges that the defendants failed to follow the procedure for site plan approval as set forth in the City Code and finally, the fourth count charges that you and the other defendants acted arbitrarily, capriciously and unreasonably in that the site plan does not meet the setback requirements of the zoning district to which it applies.

At the time the original complaint was filed by Mr. Wilson and his co-plaintiffs, they succeeded in securing a temporary restraining order against the City barring the City from issuing a building permit to effect the site plan approval. Since that time, a hearing has been held before the court where the court removed the injunction and allowed the issuance of the building permit. The court also granted the plaintiff's motion to file an amended petition and Mr. Hayden's motion to intervene as a defendant in this case.

In accordance with Underwriters' responsibilities to provide the individual public officials of the City of Lawrence with a defense, Republic Insurance Company has retained the firm of McAnany, Van Cleave & Phillips, P.A., Charles A. Getto attending, to defend your interests. Mr. Getto previously represented you and the members of the Board of Zoning Appeals in the suit brought by Thomas Hayden.

In reviewing the policy wording, in light of the allegations in the complaint, we are of the opinion that it would be appropriate for us to make certain observations with regard to coverage at this time. Without accepting plaintiff's allegations as true, should the plaintiff be successful in establishing that the defendants are liable for punitive damages or that they acted arbitrarily, capriciously and unreasonably, Exclusion 1(b) of the Public Officials Liability policy may be applicable to an award in favor of the plaintiffs against the defendants. In this regard, we refer you to the specific wording of that exclusion which provides as follows:

"The Company shall not be liable to make any payment in connection with any claim made against the Insureds:...

- (b) brought about or contributed to by fraud, dishonesty, or bad faith of an Insured; however, notwithstanding the foregoing, the Insured shall be protected under the terms of this policy as to any claims upon which suit may be brought against them by reason of any alleged fraud or dishonesty on the part of any Insured, unless a judgment or other final adjudication thereof adverse to such Insureds shall establish that acts of active or deliberate dishonesty or fraud committed by such Insured was material to the cause of action so adjudicated;"

In reviewing the amended complaint, we note that there is an indication that the plaintiffs are alleging that their property has been damaged as a result of the granting of the site plan which damage may

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constitute inverse condemnation, adverse possession or dedication by adverse use. If such a determination is made by the court, Exclusion (j) of the policy may be applicable to such an award. In this regard, we wish to advise you that the exclusion provides as follows:

"The Company shall not be liable to make any payment in connection with any claim made against the Insureds:...

(j) for any damages arising from inverse condemnation, adverse possession or dedication by adverse use."

The complaint further requests compensatory damages in excess of \$10,000 without specifying the amount of damages the plaintiffs allege they have suffered. In this regard, it should be noted that should an award be rendered against you in excess of policy limits of \$1 million, Underwriters' liability shall be limited to said limits and that any award in excess thereof would be your sole responsibility or that of any excess insurance policy that may have been issued in your favor.

It should be further noted that there is a \$2,500 deductible that is applicable to the cost of defense and loss. However, since that deductible has been exhausted in connection with the Thomas Hayden litigation, all future costs of defense incurred in connection with this matter, except as may be covered by the above noted exclusions or the limits of liability to herein, will be Underwriters' responsibility.

Should you have any questions with regard to anything contained herein, please do not hesitate to contact this office.

Very truly yours,

WILSON, ELSER, EDELMAN & DICKER


Vincent R. Fontana

VRF:pmk