



ZONING BOARD OF APPEALS
TOWN HALL WELLESLEY, MA 02181

STEPHEN S. PORTER, Chairman
JOHN A. DONOVAN, JR.
ROBERT R. CUNNINGHAM

MARY ANN McDOUGALL
Executive Secretary
Telephone
~~235-1584~~

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

85-60

Petition of Richard J. & Arlene Levin
136 Benvenue Street

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WELLESLEY, MASS.
NOV 7 9 12 AM '85

Pursuant to due notice, the Permit Granting Authority held a Public Hearing on Thursday, October 17, 1985 at 8 p.m. in Room 17 of the Town Offices at the Phillips Building, 12 Seaward Road, Wellesley Hills on the petition of RICHARD J. & ARLENE LEVIN requesting a variance from the terms of Section XIX and pursuant to Section XXIV-D of the Zoning Bylaws to allow the construction of a deck approximately 28.5' by 16' at 136 BENVENUE STREET at the corner of LATHROP ROAD leaving less than the required rear yard.

On September 30, 1985 the petitioner requested a hearing before this Authority and thereafter notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Richard Levin, who stated that the deck was constructed without a permit. He mistakenly thought the lot line was a natural boundary of pine trees. He feels that the encroachment of 5 feet is a de minimus encroachment.

Present at the hearing in favor of the petition: Stephan Berko, 7 Lathrop Road, abutter to the line encroached upon.

Statement of Facts

The property in question is located at 136 Benvenue Street, at the corner of Lathrop Road, containing 20,083 square feet of land.

The petitioner began construction on a deck approximately 16' by 28.5' at the rear of his house without a building permit. The deck leaves a rear yard of 15 feet, the requirement being 20 feet.

A Plot Plan was submitted, drawn by Robert G. Nelson, Registered Land Surveyor, dated 8/13/85. Construction sketches and photos were also submitted.

The Planning Board, at its regular meeting of October 8, 1985, voted to oppose the granting of the variance, as stated in a letter of October 10, 1985.

Petition of Richard J, & Arlene Levin
136 Benvenue Street

Decision

This Authority has made a careful study of the evidence submitted.

Variations may only be granted by the Permit Granting Authority once they have found any or all of the following (Section XXIV-D 1. as quoted from the Zoning Bylaw):

"1. ...

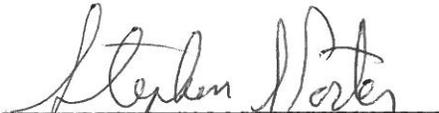
- a. Literal enforcement of the provisions of the Zoning Bylaw would involve substantial hardship, financial or otherwise, to the petitioner or appellant owing to circumstances relating to: i) soil conditions, ii) shape, or iii) topography of such land or structures, especially affecting such land or structures but not generally affecting the zoning district in which it is located; and the hardship shall not have been self-created; and
- b. Desirable relief may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of this Zoning Bylaw."

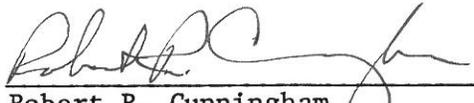
This Authority fails to find "substantial hardship" within the meaning of Section XXIV-D of the Zoning Bylaw.

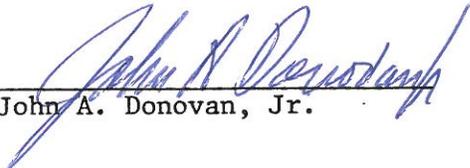
Therefore, it is the unanimous opinion of this Authority that this request for a variance be denied, and this petition is dismissed. The petitioner is hereby ordered to remove the structure that extends further than 20 feet into the rear yard within 30 days of the date of this decision.

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
Building Inspector
mam


Stephen S. Porter, Chairman


Robert R. Cunningham


John A. Donovan, Jr.

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WILLETSLEY MASS.

TOWN OF WELLESLEY



MASSACHUSETTS

JOAN M. REGAN, CMC, TOWN CLERK

November 27, 1985

Mr. Stephen S. Porter, Chairman
Wellesley Zoning Board of Appeals
44 Swarthmore Road
Wellesley, Massachusetts 02181

Re: Richard J. Levin and Arlene Levin vs.
Stephen S. Porter, et als.

Dear Mr. Porter:

Enclosed please find a copy of a Complaint filed
at the Superior Court Department of the Trial Court
Civil Action No. 85-3285.

Very truly yours,

Joan M. Regan

Joan M. Regan, CMC
Town Clerk

Enclosure

cc: J. A. Donovan, Jr.
Robert R. Cunningham
William E. Polletta
Franklin P. Parker
Sumner H. Babcock
Mary Ann McDougall ✓
Albert S. Robinson

FINNEGAN, STANZLER & NADEAU, P.C.

ATTORNEYS AT LAW

THE CLAFLIN BUILDING

TWENTY BEACON STREET

BOSTON, MASSACHUSETTS 02108

(617) 523-2500

TELECOPIER: (617) 523-2502

TWX: 7103210012 BEACON BSN

CABLE: BEACON

RICHARD J. LEVIN

OF COUNSEL

November 25, 1985

BY HAND

Town Clerk
Town of Wellesley
12 Seaward Road
Wellesley, Massachusetts 02181

Re: Richard J. and Arlene Levin
136 Benvenue Street
Wellesley, Massachusetts

RECEIVED
TOWN CLERK'S OFFICE
TOWN OF WELLESLEY, MASS.
NOV 27 1 01 PM '85

Dear Sir/Madam:

Enclosed please find a copy of the Complaint that was filed today in the Norfolk Superior Court. This letter is sent to you pursuant to Massachusetts General Laws Chapter 40A Section 17 which requires that notice be given to the Town Clerk where a petitioner aggrieved by a decision by the Zoning Board of Appeals takes an appeal to the Superior Court.

Kindly acknowledge receipt of this letter with its enclosures by dating and signing at the bottom where indicated, and return same to me.

Very truly yours,


Michael S. Kraft

Received:

DATE


SIGNED *Asst. town Clerk*

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, S.S.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 85-3285

RICHARD J. LEVIN AND ARLENE LEVIN
Petitioners

VS.

STEVEN S. PORTER, JOHN A. DONOVAN, JR.,
ROBERT R. CUNNINGHAM, WILLIAM E. POLLETTA,
FRANKLIN P. PARKER AND SUMNER H. BABCOCK
Respondents

COMPLAINT

1. The Petitioners, Richard J. Levin and Arlene Levin (herein after "The Levins"), reside at 136 Benvenue Street, Wellesley, Norfolk County, Massachusetts.

2. The Respondent, Steven S. Porter, resides at 44 Swarthmore Road, Wellesley, Norfolk County, Massachusetts. The Respondent, John A. Donovan, Jr., resides at 14 Upland Road, Wellesley, Norfolk County, Massachusetts. The Respondent, Robert R. Cunningham, resides at 17 Cushing Road, Wellesley, Norfolk County, Massachusetts. The Respondent, William E. Polletta, resides at 109 Elmwood, Wellesley, Norfolk County, Massachusetts. The Respondent, Franklin P. Parker, resides at 6 Springdale Road, Wellesley, Norfolk County, Massachusetts. The Respondent, Sumner R. Babcock, resides at 113 Abbott Road, Wellesley, Norfolk County, Massachusetts.

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WELLESLEY, MASS.

3. The Respondents, Steven S. Porter, John A. Donovan, Jr., Robert R. Cunningham, William E. Polletta, Franklin P. Parker and Sumner H. Babcock, are all of the members of the Zoning Board of Appeals of the Town of Wellesley, Norfolk County, Massachusetts. The Respondents will be collectively referred to herein as The Board.
4. The property where the Levins reside consists of approximately 20,083 square feet of land located at the northeast corner of the intersection of Lathrop Road and Benvenue Street in Wellesley, Norfolk County, Massachusetts. The Levins' house is a single family residence located as indicated by a survey prepared by Robert G. Nelson, Registered Land Surveyor, and dated August 13, 1985. A copy of the survey is attached to this Complaint and labelled Exhibit A.
5. The property immediately adjacent to the Levins' property along the northern boarder of the Levins' property is owned by Dr. and Mrs. Stephen Berko (hereinafter "The Berkos"). See Exhibit A for the location of the Berkos' land with respect to The Levins' land.
6. Along the southern boundary of the Berkos' property, just north of the Levins' property, there is a stand of trees along the full length of the property line. Exhibit B, attached hereto, indicates the location of the line of trees relative to the property line.

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7. On or about August 1, 1985, The Levins began construction of a deck approximately 16 feet by 28.5 feet at the rear of their home as indicated on the survey, Exhibit A. At the time construction began it was not known by The Levins that a Building Permit was required before beginning construction. Consequently, The Levins neither acquired nor applied for a Building Permit prior to beginning the construction as described.

8. Shortly after commencing construction of the deck, the Levins were made aware of the necessity of a building permit, then obtained a survey and immediately thereafter applied for the permit from the Town of Wellesley Building Department.

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WELLESLEY, MASS.
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9. On or about August 14, 1985, the Building Department notified the Levins that due to the configuration of their house and the proposed deck, the proposed deck, when completed, would be in violation of the setback requirements of Section XIX of the Zoning Bylaws of the Town of Wellesley.

10. Prior to the completion of the instrument survey on August 13, 1985, both The Levins and The Berkos were under the belief that the trees referred to in paragraph 6 marked the approximate boundary between two pieces of property. It was not known by either The Levins or The Berkos that the trees are actually approximately eight to ten feet within the property line of the Berkos. As a consequence, although it appeared to The Levins that the proposed deck would lie more than 20 feet from the lot line, the setback requirement would be violated by between 2 and 5 feet if the deck were built.

11. Due to the configuration of the lot and the location of the house thereon, no deck can reasonably be constructed on the land without a de minimus violation of the setback requirements.
12. The foregoing conditions constitute a hardship within the meaning of Chapter 40A Section 10 of the Massachusetts General Laws. Further, the granting of a variance under these circumstances would not cause substantial detriment to the public good and would not nullify nor substantially derogate from the intent or purpose of the Zoning Bylaws.
13. Following notice from the Building Department, The Levins immediately applied to the Board for a variance to permit them to complete construction of the deck as planned.
14. A hearing was held on October 17, 1985, at which The Levins presented their case to the Zoning Board of Appeals. At the hearing, The Levins demonstrated, pursuant to General Laws Chapter 40A Section 10, that the unique circumstances relating to the shape of the property and the location of the structures thereon would force the Levins to endure a substantial hardship were they not to be granted the variance. They also demonstrated that the granting of a variance would not cause substantial detriment to the public good and would not nullify nor substantially derogate from the intent or purpose of the Zoning Bylaws.

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BUILDING DEPARTMENT
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SHELLEY MASS.

15. Also at the hearing, The Levins testified as to their lack of knowledge with respect to the lot line, and that although the proposed deck would violate the setback requirements, any violation would be de minimus. They also testified that due to the configuration of the house upon the property, that unless a variance was granted, no deck could be reasonably constructed.
16. Steven Berko also testified at the hearing as to his prior belief concerning the property boundary and that the proposed construction would not be detrimental to the use and enjoyment of his property.
17. No testimony was heard in opposition to The Levins' request for variance.
18. On or about November 7, 1985, the Zoning Board of Appeals denied The Levins' petition for a variance. The Board further ordered The Levins to remove the structure to the extent that it had already been constructed in violation of the 20 foot setback requirement of the Zoning Bylaws. *A certified copy of the decision is attached hereto and labeled Exhibit C.*
19. The decision by the Board exceeds the Board's authority, is based on a legally untenable ground, is unreasonable, whimsical, arbitrary and capricious.

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WELLINGTON, MASS.

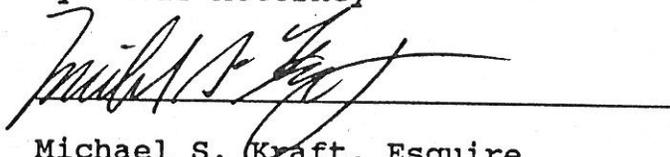
WHEREFORE the petitioners, Richard J. Levin and Arlene Levin, respectfully ask that the decision of the Board be annulled, that the Board be ordered to grant the variance as requested by the petitioner, and that this Court grant such other relief as may be deemed just and reasonable.

Respectfully submitted,

RICHARD J. LEVIN AND ARLENE LEVIN

By Their Attorney

DATED: November 26, 1985



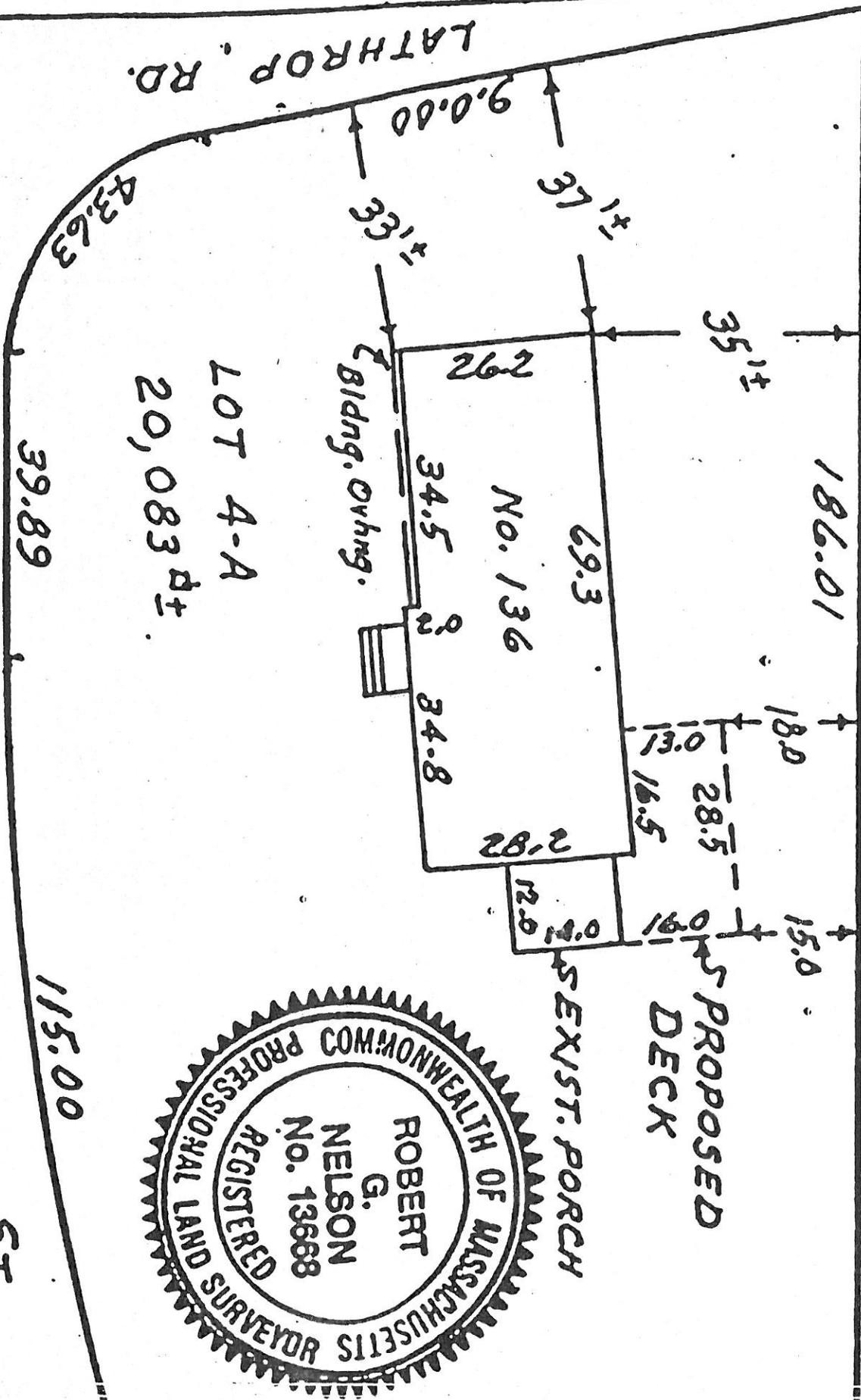
Michael S. Kraft, Esquire
Richard J. Levin, P.C.
Twenty Beacon Street
Boston, Massachusetts 02108
523-2500

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BOSTON, MASS.
NOV 27 1 02 PM '85

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WILLESTLEY MASS.
NOV 27 1 02 PM '85

PLOT PLAN

STEVEN BERKO



BENVENUE ST.
1 IN. = 40 FT.

NOTED
TOWN CLERK'S OFFICE
WELLESLEY, MASS.
Nov 27 1 02 PM '85

LATHROP, RD.

TREE LINE

PLOT PLAN

STEVEN BERKO

186.01

Bldg. Ovhang.

No. 136

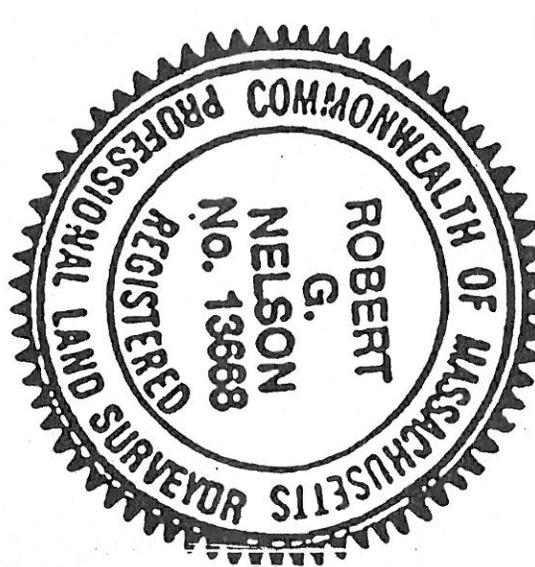
PROPOSED
DECK

EXIST. PORCH

TREE LINE

LOT 4-A
20,083 SF

BENVENUE



39.89

115.00

ST.

1 IN. = 40 FT.

97.18

28.2

12.0

18.0

28.5

16.5

18.0

15.0

35.1±

37.1±

33.3±

26.2

34.5

34.8

69.3

43.63

Attachment C is
the decision letter
from the ZBA to
The Levins dated
11/7/85 and is
on file with the
Town of Uxbridge.

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CLERK'S OFFICE
TOWN OF UXBURY MASS.
NOV 27 1 02 PM '85

Arlene Levins

11/27/85

FINNEGAN, STANZLER & NADEAU, P.C.

ATTORNEYS AT LAW

THE CLAFLIN BUILDING
TWENTY BEACON STREET
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TWX: 7103210012 BEACON BSN
CABLE: BEACON
RICHARD J. LEVIN, P.C., OF COUNSEL

December 22, 1986

Albert S. Robinson, Esquire
Town Counsel
Town of Wellesley
P.O. Box 375
47 Church Street
Wellesley, MA 02181

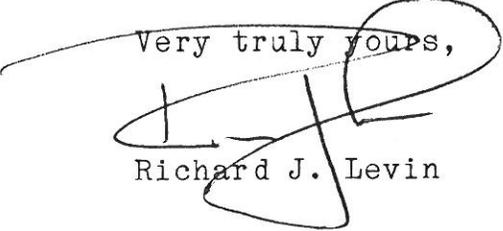
Re: Levin et al v. Stephen S. Porter et al
Norfolk Superior Court
Civil Action No. 85-3285

Dear Mr. Robinson:

My wife and I have torn down the partially built deck in conformance with the ZBA Order. Consequently, we are prepared to drop the matter with a Stipulation of Dismissal without costs, provided that I receive adequate assurances that the matter will be fully settled, without further claim by the Town.

Please call me at your convenience.

Very truly yours,



Richard J. Levin

RJL/sjd

TOWN OF WELLESLEY



MASSACHUSETTS

ALBERT S. ROBINSON, TOWN COUNSEL

P. O. BOX 375
47 CHURCH STREET
WELLESLEY, MASS. 02181
(617) 235-1020

February 17, 1987

Clerk for Civil Business
Norfolk Superior Court
High Street
Dedham, MA 02026

Re: Levin, et al. v. Stephen S. Porter, et al.
Norfolk Superior Court
C.A. No. 85-3285

Dear Sir:

Enclosed for filing in the referenced action is a
Stipulation of Dismissal to complete the matter.

Very truly yours,

Albert S. Robinson

ASR/bb

File: WJ-226

Enclosure

cc: Richard J. Levin, Esquire

cc: Mary Ann McDaougall, Executive Secretary
Zoning Board of Appeals

cc: Thomas E. Lee, Executive Secretary
Board of Selectmen

(00661-6)

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
C.A. NO. 85-3285

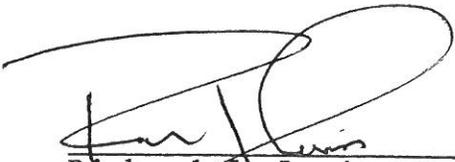
RICHARD J. LEVIN and ARLENE LEVIN,
Plaintiffs

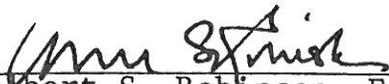
v.

STEVEN S. PORTER, ET AL., As they are ,
Members of the Zoning Board of Appeals
of the Town of Wellesley,
Defendants

STIPULATION OF DISMISSAL

The parties to this action hereby stipulate that the
Complaint shall be, and hereby is, dismissed with prejudice and
without costs.


Richard J. Levin, Esquire
Attorney for the Plaintiffs
The Claflin Building
20 Beacon Street
Boston, MA 02108


Albert S. Robinson, Esquire
Town Counsel for Wellesley
47 Church Street
Wellesley, MA. 02181
617/235-1020

(0008k)