TOWN OF WELLESLEY MASSACHUSETTS

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
235-1664

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

85-63

Petition of C.N.J. Realty Trust (Clayton R. Chisholm, Trustee)
868 Worcester Street

Pursuant to due notice, the Special 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 C.N.J. REALTY TRUST (CLAYTON R. CHISHOLM, TRUSTEE) requesting a Special Permit and Site Plan Approval pursuant to Sections XVIA, XI and XXV of the Zoning Bylaws for the construction of a three-story office building containing approximately 10,625 square feet of floor area at 868 WORCESTER STREET at the ramp leading to WESTON ROAD, said lot containing approximately 19,914 square feet of land and located in a Business District and a Single Residence District, and related landscaping and parking for 34 cars.

On September 23, 1985 the petitioner requested a hearing before this Board and thereafter due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Attorney Edward Donlon, representing the petitioner, Clayton R. Chisholm of C.N.J. Realty Trust. Mr. Donlon stated that the petitioner was submitting two plans for consideration: 1)the original plans dated 9/9/85, revised 9/30/85 and 2) alternate plan changing the configuration of the entrance driveway (L 3A). Mr. Donlon stated that the request was a simple Site Plan Approval request, that the plan met all zoning requirements and that no variances were requested. He stated that the access is limited by an existing curb cut which has been there for 50 years. He stated that they had appeared before the Selectmen to request their assistance in changing the curb cut and that the Selectmen agreed to ask John Bezanson, Town Engineer, to draw a new access plan and submit it to the State with a request for a change in the curb cut. Mark Schiffer, architect for the project, was asked his opinion about the entrance and stated that he did not consider the entrance safe. He stated that the entrance width is 22 feet and should be 35 feet wide. Mr. Donlon stated that the existing use for retail businesses is more intense than the proposed office building use. Discussion focused on the safety and access issues of the site and the area nearby.

Present at the hearing and opposed to the petition were: Everett R. Kennedy, 27 Fells Road, Maureen Brennan of the Council on Aging, John Schuler, Vice Chairman of the Wellesley Housing Authority, Adolf Anderson, 6 Regis Road, Paul and Anna Shackford, 12 Fells Road, Tim Davidson, 11 Fells Road, Mary Maguire, 294 Weston Road, Andrew Wu, 14 Regis Road, Richard Chisholm, 13 Fells Road, Jacquelin Miklavic, 5 Regis Road, A. McMurrich, 34 Earle Road. Opposition focused on traffic concerns in the area, particularly on the Route 9 exit ramp and at the Weston Road intersection, concerns about pedestrian safety and parking. Particular concerns focused on the elderly in the area and on school children.

Statement of Facts

The property in question is located at 868 Worcester Street at the ramp leading from Route 9 to Weston Road. The lot contains 19,914 square feet of land. Most of the parcel is in a Business District except for a section running the length of the southerly portion, which is in a Single Residence District. Two buildings exist on the lot, a 2½ story wood frame building formerly housing an antique exchange and a 1½ story concrete block building formerly occupied by an auto parts business.

The petitioner originally submitted an application and plans for a project at 868 Worcester Street (ZBA Case 85-3) on January 27, 1985 and the case was scheduled for a public hearing on February 21, 1985. The petitioner subsequently requested withdrawal of the petition without prejudice and the ZBA voted on February 21, 1985 to allow the petition to be withdrawn without prejeduce.

The petitioner proposes to demolish the existing buildings and to construct a three-story steel frame and brick office building containing 10,625 square feet of floor area. The ground level of the building would contain 513 square feet of floor area and 13 interior parking spaces, Level 1 would contain 3,878 square feet, Level 2, 3,500 square feet, Level 3, 2,734 square feet. A total of 34 parking spaces would be provided on the site, 21 outside spaces and 13 interior spaces. The building and all parking spaces would be located in the Business District section of the lot. The building would be 45 feet high.

The petitioner sought, on April 8, 1985 a widening and relocation of the curb cut from the State but the request was not approved. The proposed building meets the requirements of the Zoning Bylaw and no variances were requested for the original plans submitted.

The following plans were submitted on September 23, 1985: L-1 Site Plan - Existing, 9/9/85 by Howard P. Millard, Professional Land Surveyor; L-2 Site Plan - Details, 9/9/85, L-3 Site Plan 9/9/85; L-4 Landscape Plan 11/4/84 revised 9/9/85; L-5 Sewer Conn. Plan Profile 9/9/85; 1, 9/9/85; 2, Level One Plan, 9/9/85; 3, Level Two Plan, 9/9/85; 4, Level Three Plan, 9/9/85; 5, Elevations, 9/9/85; 6, Cross Section, 9/9/85. All plans were drawn by Joseph J. Schiffer & Associates, Newton, Ma. The following plans were received by the ZBA on 10/8/85: L-3 Site Plan revised 9/30/85; 1, Ground Level Plan, 5, Elevations. Alternate plans were received by the ZBA on 10/16/85: L-3A, revised 10/15/85; L-1 with certification from Howard P. Millard, Professional Land Surveyor, revised 10/9/85.

The Design Review Board held a preliminary site plan review on September 19, 1985 and final review on October 3, 1985 after which the Design Review Board accepted the design plans of the structure with two suggestions outlined in a letter of October 4, 1985. A letter of October 17, 1985 outlined concerns of the Design Review Board re: circulation and vehicular entrance to the site.

Site plans and other submission materials were sent to the Planning Board, Wetlands Protection Committee, Town Engineer, Board of Health and Fire Chief, as required by Section XVIA of the Zoning Bylaw. Written responses from the Planning Board, Town Engineer, Fire Chief and Wetlands Protection Committee were received and are on file at the Board of Appeals office.

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The Board of Selectmen was asked to comment on the petition and responded in a letter of October 1, 1985. Letters opposed to the petition were received from Gina Rogers, 18 Priscilla Circle and Fred W. Krech, 31 Fells Road.

New plans were submitted on December 3, 1985 (L-3 Site Plan dated 9/9/85, revised 9/30/85 and 11/27/85 by Joseph Schiffer & Associates) and indicated a widened entrance to the site, deletion of one parking space, reduction of size of the building by 313 square feet so that Level 3 would have 2,421 square feet instead of 2,734 proposed originally, reversal of the entrance towers, as described in a letter dated December 2, 1985 from Edward C. Donlon. These modified plans were distributed to Town Boards as part of the Site Plan Approval process and comments are on file at the ZBA office.

A Public Hearing was held on Thursday, January 2, 1986 at 8 p.m. in Room 17 of the Town Offices, Phillips Building, 12 Seaward Road, per the request of the petitioner for a continuation of the hearing of October 17, 1985 in order to consider a modification of the original site plans. Due notice of the hearing was given by mailing and publication.

Edward C. Donlon, attorney for the petitioner, explained the new plans which were presented to the Zoning Board on December 3, 1985 and further amended on January 2, 1986 just prior to the hearing. Michael L. Burke, P.E., 5 Wildewood Drive, Canton, Traffic Engineering Consultant, presented a traffic evaluation and report dated January 2, 1986 on file at the ZBA office. Discussion followed about the entrance to the site, specifically the turning radius design at the entrance. Mr. Donlon stated that Mr. Bezanson, Town Engineer, had approved the radius design on the most recent plan, but the ZBA had not received any comments from Mr. Bezanson on that plan. Mr. Bezanson had commented on a previous plan in a letter of December 27, 1985.

The following persons were present and opposed to the request: Arthur Reis, 436 Weston Road, Craig & Evelyn Milner, 452 Weston Road, Everett Kennedy, 27 Fells Road, Joseph Cooney, 15 Russell Road, G. H. Gleason, 292 Weston Road, Paul Shackford, 12 Fells Road, Andrew Wu, 14 Regis Road, Adolf & Carol Anderson, 6 Regis Road, Thelma Wessell, 447 Weston Road, Edwin Donohue, 17 Russell Road. Mr. Wu, Mr. Anderson, and Ms. Wessell presented petitions to the ZBA from neighbors opposed to the project which are on file at the ZBA office. Opposition centered on the size of the building and the number of parking places planned, traffic on the ramp to Route 9 and in the Weston Road area, safety of pedestrians in the area, particularly the elderly and children, and the entrance to the site which was considered to be unsafe.

Decision

This Authority has thoroughly considered petitioner's proposal for a three-story office building. In January, 1985, petitioner withdrew its first application for site plan review at the public hearing when it was clear the plans were not adequate.

In September, 1985, petitioner filed a new proposal and a hearing was held on October 17, 1985. Subsequent to the public hearing, petitioner's attorney requested this Authority to accept a modified plan which this Authority set down for a public hearing on January 2, 1986. On January 2, 1986 petitioner filed still a fourth plan.

This Authority is constrained to deny petitioner's petition for site plan approval because it is of the opinion that the entrance way to the Route 9 ramp simply is not safe. The reason adequate space for the entrance way and driveway leading to the building has not been provided for is apparent. The petitioner has chosen not to reduce sufficiently the size of the building. Were the size of the building so reduced, petitioner would not be faced with the problem of reducing the safe width of the driveway and entrance way to provide the number of parking spaces required for the building as presently designed. Further, the Department of Public Works of the Commonwealth of Massachusetts, which controls the Route 9 ramp, has not indicated it would allow an expanded curb cut to be made for the project and there is no assurance that it would ever approve the expanded curb cut that would be necessary to allow cars to enter and exit simultaneously. The existing curb cut is shown to be 22 feet. Petitioner's architect acknowledged at the October 17, 1985 hearing that 35 feet would be preferable for safety reasons. Channelization of traffic coming off Route 9 was also said to be preferable.

The final plan proposed by petitioner provided for a wider curb cut on the Route 9 ramp but it is this Authority's belief that, as stated in the Town Engineer's letter of December 27, 1985: "The design is an improvement over initial design. However, it does not provide or meet our minimum turning radius design of 15 feet. We also have no assurance of State DPW approval." The Town Engineer did not comment in writing on the last minute plan of January 2, 1986, which reduced part of the entrance curb from a 15 foot radius to a 10 foot radius. While petitioner's attorney indicated that he had spoken with the Town Engineer and that the Town Engineer had approved the curb design with part of it having a 10 foot radius, this Board believes, in any event, that the 15 foot radius is vitally necessary, as well as a greater width of driveway for cars entering and exiting. The 10 foot radius curb was apparently provided to preserve contiguous parking spaces required for the building area as presently designed.

The curb cut is important because of the fact that cars leave Route 9 down the ramp toward Weston Road, often at excessively high speeds, and, if the cars entering the petitioner's premises cannot do so with ease, a dangerous situation, including the possibility of multiple rear end collisions, could be created. Because the curb cut is so close to the exit from Route 9, the entranceway is a potential hazard if not properly designed, even for traffic coming down the ramp at nominal speeds. Without a wider entrance and driveway on the premises itself, cars coming down the Route 9 ramp could possibly not be able to make a safe entrance and might be forced into the outbound lane from the site at the jeopardy of vehicles exiting the premises.

There was sufficient testimony from persons familiar with the area of the Route 9 ramp and Weston Road intersection to strontly indicate that the addition of the traffic flow in and out of the petitioner's proposed project could have significant impact on the congestion, which is great, expecially at rush hours, but also could increase the danger throughout the day to pedestrians in the area, which include elderly living in housing at that intersection, persons using the branch library nearby and the Hardy School students. It is common knowledge that serious accidents involving vehicles and bicycles have occurred at the ramp and Weston Road intersection. As far as traffic congestion and accidents are concerned, this area is one of the worst in the Town of Wellesley.

Petitioner produced a report by Michael L. Burke which was written on January 1, 1986 but dated January 2, 1986 when Mr. Burke did an on-site inspection. The report was based on figures of traffic expected for an average building similar to the petitioner's. There were no traffic counts taken nor any adequate analysis of how the traffic in and out of the petitioner's premises would affect the area from a safety point of view. This Authority therefore attached little weight to Mr. Burke's report which appears to have been hastily put together and to contain no useful analysis of the unique situation presented by petitioner's application.

This Authority believes that, without a substantial reduction in the size of the project, which would provide more space for an adequate driveway and entranceway, the petition would create a dangerous traffic situation. Despite grave concerns expressed to the petitioner, he has failed to produce any solid information or professional analysis to show that the project will not substantially increase the potential for accidents and increased congestion.

This Authority has given every consideration to petitioner to allow him to modify the plans satisfactorily. It has been more than a year since petitioner's first plan was filed. It is this Authority's opinion that, as presently conceived, the instant application must be denied. We believe that only a substantially and materially different proposal, including most likely a building reduced in size, will provide the needed space for a safe entranceway. Also needed is a thorough analysis of the project's impact on vehicular and pedestrian traffic at the Route 9 ramp and Weston Road intersection. Such a study ought to include consideration of the maximum number of vehicles expected at any one time in the area due to this project, where they will be parked, and what the effect will be on safety in the area.

Stephen S. Porter
Stephen S. Porter, Chairman

Robert R. Cunningham

John A. Donovan, Jr.

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

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TOWN OF WELLESLEY MASSACHUSETTS

JOAN M. REGAN, CMC, TOWN CLERK

January 21, 1986

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

Re: Clayton R. Chisholm and Norma Chisholm, Trustees of C.N.J. Realty Trust vs. Stephen S. Porter, et als.

Dear Mr. Porter:

Enclose please find a copy of a Complaint filed at the Superior Court Department of the Trial Court, Norfolk County, Civil Action No. 86-173 for the above referenced.

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

TELEPHONE 237-2120

LAW OFFICES
EDWARD C. DONLON

47 CHURCH STREET — P. O. BOX 3
WELLESLEY, MASS. 02181

January 17, 1986

Joan M. Regan, Town Clerk
Phillips School
Seaward Road
Wellesley Hills, MA 02181

Dear Madam:

You are hereby notified, under G.L. c. 40A, Sec. 17 that an appeal has been taken from the Decision of the Zoning Board of Appeals, filed January 14, 1986, in connection with the Petition of C.N.J. Realty Trust (Clayton R. Chisholm, Trustee (868 Worcester Street) -- 85-63.

A copy of the Complaint brought in the Superior Court Department of the Trial Court, Norfolk County, is enclosed.

Very truly yours,

Edward C. Donlon
EDWARD C. DONLON

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ECD/ns

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss.

Superior Court Dept.
Civil Action No. 86-173

CLAYTON R. CHISHOLM and NORMA CHISHOLM,
Trustees of C.N.J. REALTY TRUST,
Plaintiffs

v.

COMPLAINT

STEPHEN S. PORTER, JOHN A DONOVAN,
ROBERT R. CUNNINGHAM, WILLIAM E.
POLLETTA, FRANKLIN P. PARKER and
SUMNER H. BABCOCK, as they are Members
of the ZONING BOARD OF APPEALS of the
TOWN OF WELLESLEY,
Defendants

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COUNT ONE

1. This complaint is brought under G.L. c. 40A, Section 17 and is an appeal from the denial of a request for Site Plan Approval, which required the issuance of a special permit by Wellesley's Zoning Board of Appeals ("ZBA").

2. Plaintiffs are Clayton R. Chisholm and Norma Chisholm as they are Trustees of C.N.J. Realty Trust, under a Declaration of Trust dated May 3, 1984 and recorded with the Norfolk Registry of Deeds in Book 6390, Page 533. Their

address is: 292 Eliot Street, South Natick, Massachusetts 01760.

3. Defendants Stephen S. Porter, John A. Donovan, Jr., and Robert R. Cunningham are the regular members of the ZBA, and the associate members are William E. Polletta, Franklin P. Parker and Sumner H. Babcock. They reside at the following addresses in the Town of Wellesley (ZIP 02181):

Stephen S. Porter	44 Swarthmore Road
John A. Donovan, Jr.	14 Upland Road
Robert R. Cunningham	14 Cushing Road
William E. Polletta	109 Elmwood Road
Franklin P. Parker	6 Springdale Avenue
Sumner H. Babcock	113 Abbott Road

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4. Plaintiffs are owners in fee simple of the 19,914 sq. ft. parcel located approximately at the corner of Route 9 (Worcester Road) and Weston Road, known as 868 Worcester Street, and shown on the Plan dated February 7, 1962 by Gleason Engineering Company, a copy of which is attached and marked "A". An extract from the Town Engineer's maps shows the relationship of the parcel to nearby properties and streets, and a copy is attached and marked "B".

5. Approximately 17,514 sq. feet of Plaintiffs' arcel is located in a Business District, as defined in Wellesley's Zoning Bylaw, and is hereinafter referred to as "the Premises"; and approximately 2,400 sq. ft. of the parcel is located in a Single Residence District and is not involved in this appeal.

6. Plaintiffs sought to demolish two existing buildings presently on the premises (one wood-frame, the

other cinder-block construction) and to erect a three-story office building (steel frame and brick construction) consisting of approximately 10,312 sq. ft. of floor area -- all on the business-zoned portion of the lot. Plaintiff's application for the special permit met the other zoning requirements set forth in the Bylaw relating to use, area yard, building height, and the providing of off-street parking, and no variances or special permits relating to structures or uses were being sought in connection with their proposed project.

7. Plaintiff's Site Plan showed the entrance/egress to the Premises as leading from a curb-cut on the westerly side of the off-ramp (used by eastbound traffic on Route 9 to get to Weston Road), a cut which has existed over 50 years, over State-owned land to the Premises. As modified, the Site Plan showed a proposed widening in the curb-cut essentially on the northern end from a total length of 22 feet to 37 feet, and alteration of the turning radii on each end to 15 feet, starting the radius out at the ramp and then carrying it across the State-owned land to the point where the Premises were reached, then reducing the norther radius to 10 feet.

The curb-cut widening had been suggested by the Town's Traffic Engineer and the Town Engineer in a drawing produced for the Selectmen (copy attached and marked "C") and Plaintiffs had received the Selectmen's assurance that they would ask the State to approve the curb-cut widening if the ZBA conditioned its approval on Plaintiff obtaining it, and that assurance was communicated to the ZBA.

8. The ZBA denied Plaintiff's application for Site Plan Approval in a Decision filed with the Town Clerk on January 14, 1986 (copy certified by the Town Clerk attached

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and marked "D"), citing various grounds relating to the curb-cut's lack of safety in its present form, the uncertainty of whether the State's approval could be obtained for its proposed widening, and the impact of the project on traffic congestion, danger to pedestrians, and vehicular accidents. The Board concluded that "only a substantially and materially different proposal, including most likely a building reduced in size, will provide the needed space for a safe entranceway", accompanied by an analytical study "of the project's impact on vehicular and pedestrian traffic at the Route 9 ramp and Weston Road intersection" (p. 5 of "D").

9. The Board's Decision and conclusion were arbitrary and capricious because of the lack of relationship between whatever reduction in size the Board had in mind and the safety of the entranceway, and because the Board had never asked for such a study to be conducted by either Plaintiffs or any official or department, (nor, on information and belief, had it ever asked any other applicant to conduct such a study, prior to or following any action taken on a Site Plan Approval submission). Moreover, the Board exceeded its authority in requesting Plaintiffs, after the fact, to scale down the project in some unspecified way from what was authorized by the zoning bylaw. The Board had made no such request to Plaintiff at any time prior to the denial which is the subject of this appeal.

10. As further grounds for its Decision the ZBA criticized Plaintiff for having "failed to produce any solid information or professional analysis to show that the project will not substantially increase the potential for accidents and increased congestion", and, again, the board was acting arbitrarily and capriciously, and in excess of its authority in requiring Plaintiffs to do the impossible by proving a

negative, a negative which is nowhere mentioned in the bylaw and which was never suggested by the ZBA prior to the writing of the Decision.

11. In addition to acting arbitrarily and capriciously in claiming that Plaintiffs were required to meet criteria not contained in the bylaw or previously announced by the Board to Plaintiff, the ZBA misconceived its proper role in the site plan review process as one which authorized it to prohibit, as opposed to regulate, refusing to acknowledge that (a) that the bylaw sets forth no specific factors for the Board to consider in acting upon special permit applications filed for that purpose, (b) that decisional law prevents the Board from claiming that the language in the so-called purposes clause can provide a legal source of standards sufficient to guide the Board (decisional law which was called to the Board's attention by Plaintiffs along with publications the Board receives from the Executive Office of Communities and Development (SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101 (1984); "Land Use Manager", Vol. 2, Editions 1 and 2), and (c) that Subsection B ("Specific Powers") of Section XXIV ("Special Permit Granting Authority") does not authorize the ZBA to turn a project down when conducting Site Plan Approval (no negative word having been used in said Subsection).

12. For the foregoing reasons, the Defendant Board also acted arbitrarily and capriciously, in excess of its authority, and in disregard of decisional law, by denying the Application and turning the project down, instead of imposing such reasonable terms and conditions as may be lawful upon the issuance of the special permit. The Board interpreted the bylaw to permit a neighborhood veto to be cast, adopting

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the suggestion of a spokesman that Applicants be forced to "go to court".

13. Plaintiffs are "persons aggrieved" within the meaning of Section 13 of G.L. c. 40A.

COUNT TWO

14. This count of the Complaint is framed under G.L. c. 231A and seeks declaratory relief concerning the rights of the parties in the controversy set forth in Count One, and Plaintiffs incorporate by reference the provisions of the foregoing Paragraphs 2 through 8 of their Complaint.

15. Plaintiffs herein challenge the substantive validity of Section XVIA ("Site Plan Approval"), in that said section of the Town's Zoning Bylaw would require that all "major construction projects" (defined, among other things, as proposals to construct more than 2,500 sq. ft. of gross floor area in structures other than a "single or two family building") first to receive site plan approval from the ZBA, and, as such, it makes the use proposed by Plaintiff, and all other such uses in a Business District and in all other Districts, dependent upon the grant of a special permit even though a proposal conforms to all other criteria in the zoning bylaw relating to use, area, yard, building height and the providing of off-street parking. Hence, the Site Plan Approval bylaw is inconsistent with Section XI ("Business Districts") and those other zoning bylaws which authorize an owner to proceed as a matter of right once his proposal has met all of the criteria set forth in those other sections. As such, the regulation of uses and structures under Section XVIA is unlawful because that bylaw conflicts with (a) the uniformity and special permit provisions of

Section 4 of G.L. c. 40A, which is based upon the principle of equal treatment and places a limit on municipal zoning power, and with (b) Section 9 of G.L. c., 40A which authorizes the issuance of special permits only for "special types of uses" -- not for all uses other than those which result from the construction of single or two family structures. The bylaw virtually abolishes all uses as a matter of right, other than minor ones or those relating to the residential structures mentioned.

16. Section XVIA ("Site Plan Approval") is also inconsistent with Subsection B ("Specific Powers") of Section XXIV ("Special Permit Granting Authority") in that the former seems to allow the ZBA only to "disapprove the plans" (underscore supplied), whereas the latter section, dealing with the Board's powers, speaks only in terms of review and approval -- setting up a fundamental inconsistency.

WHEREFORE, Plaintiffs request the following Judgments:

Under Count One

1. That the Decision is arbitrary and capricious and in excess of the Board's authority, and is thereby annulled.

2. That Plaintiffs are entitled to receive a building permit in accordance with their Application, or that the case be remanded to the Board to allow for the imposition of such reasonable terms and conditions as might fall within the scope of what the court finds to be lawfully permitted.

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3. That the court grant such other or further relief as may be just and appropriate.

Under Count Two

4. A judgment declaring:

(a) That Section XVIA of the Bylaw ("Site Plan Approval") is invalid insofar as it requires the issuance of a special permit for Plaintiffs' projects; and Plaintiffs are entitled to receive a building permit in accordance with their Application;

(b) That, if valid, neither it nor Section XXIV ("Special Permit Granting Authority") permits the ZBA to prohibit the proposed use, but only to impose such reasonable terms and conditions thereon as may be lawful; hence, the Board's Decision is annulled;

(c) That, if valid, the words "disapprove the plans" which appear in the second paragraph of Subsection C. of Section XVIA does not permit the ZBA to disapprove the project if an applicant has met all of the other requirements of zoning bylaw; hence, the Board's Decision is annulled;

(d) That, if valid, Plaintiffs are nevertheless entitled to receive a building permit in accordance with their

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Application, subject to such reasonable terms and conditions as might be lawfully imposed thereon by the Board; and the case is remanded to the Board for that purpose;

(e) That Plaintiffs are entitled to such other or further relief as the court may deem appropriate.

By their Attorney,

EDWARD C. DONLON
47 Church Street
Wellesley, MA 02181
(617) 237-2120

The undersigned Plaintiff, Clayton R. Chisholm, states under the pains and penalties of perjury that he has read the foregoing complaint and knows the contents therof, and that the facts therein set forth are true to his knowledge, at Wellesley, Mass. this 17th day of January, 1986.

Clayton R. Chisholm

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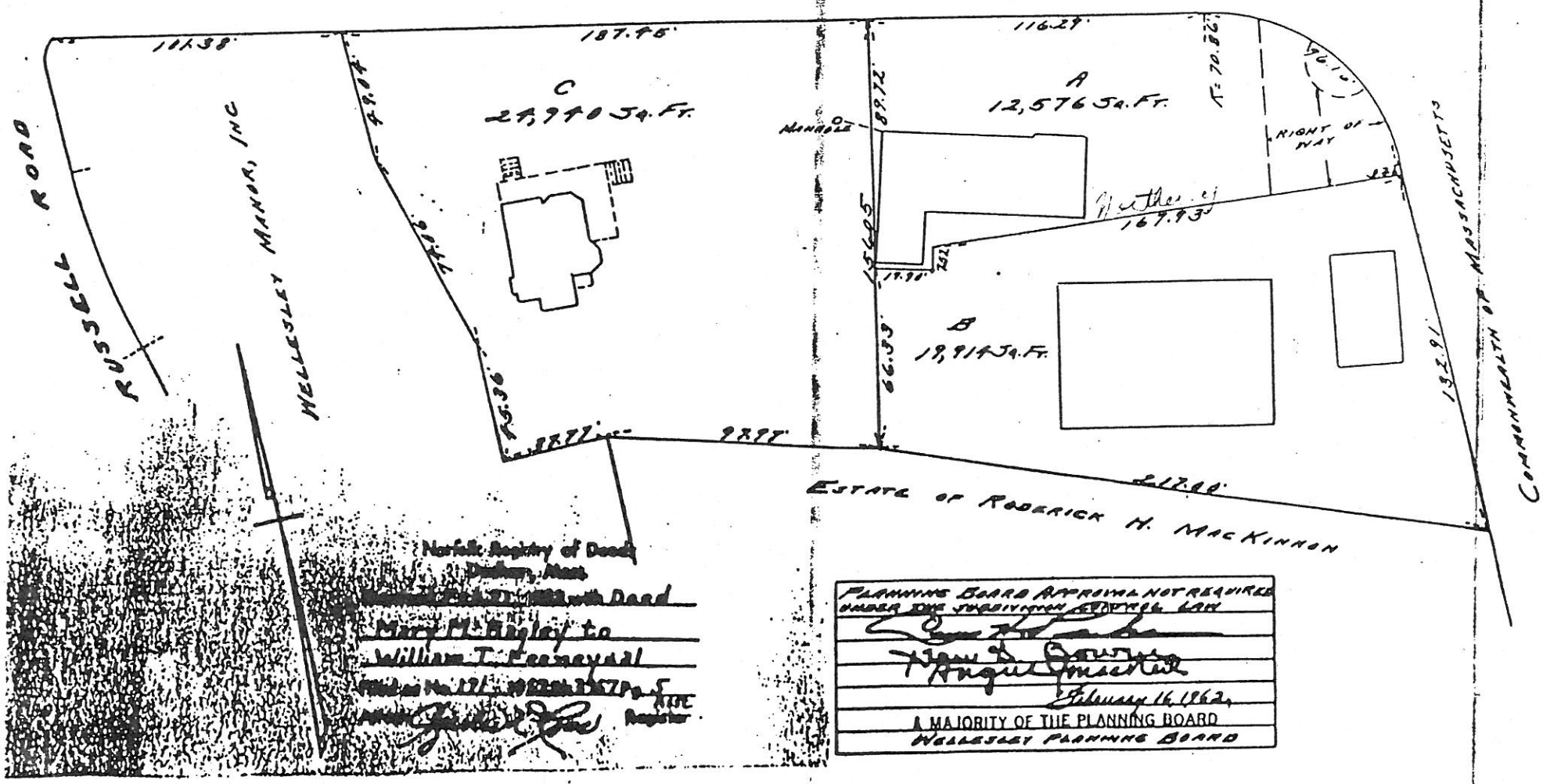
PLAN OF LAND
IN
WELLESLEY, MASS.
OWNED BY
ESTATE OF RODERICK H. MacKINNON
SCALE 40 FEET TO AN INCH
FEBRUARY 7, 1962.
GLEASON ENGINEERING COMPANY



Norfolk Registry of Deeds
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Mary M. Bagley to
William T. Feeneysal
Filed as No. 171 [illegible] Pg. 5
Attest [illegible] Register

PLANNING BOARD APPROVAL NOT REQUIRED
UNDER THE SUBDIVISION CONTROL LAW
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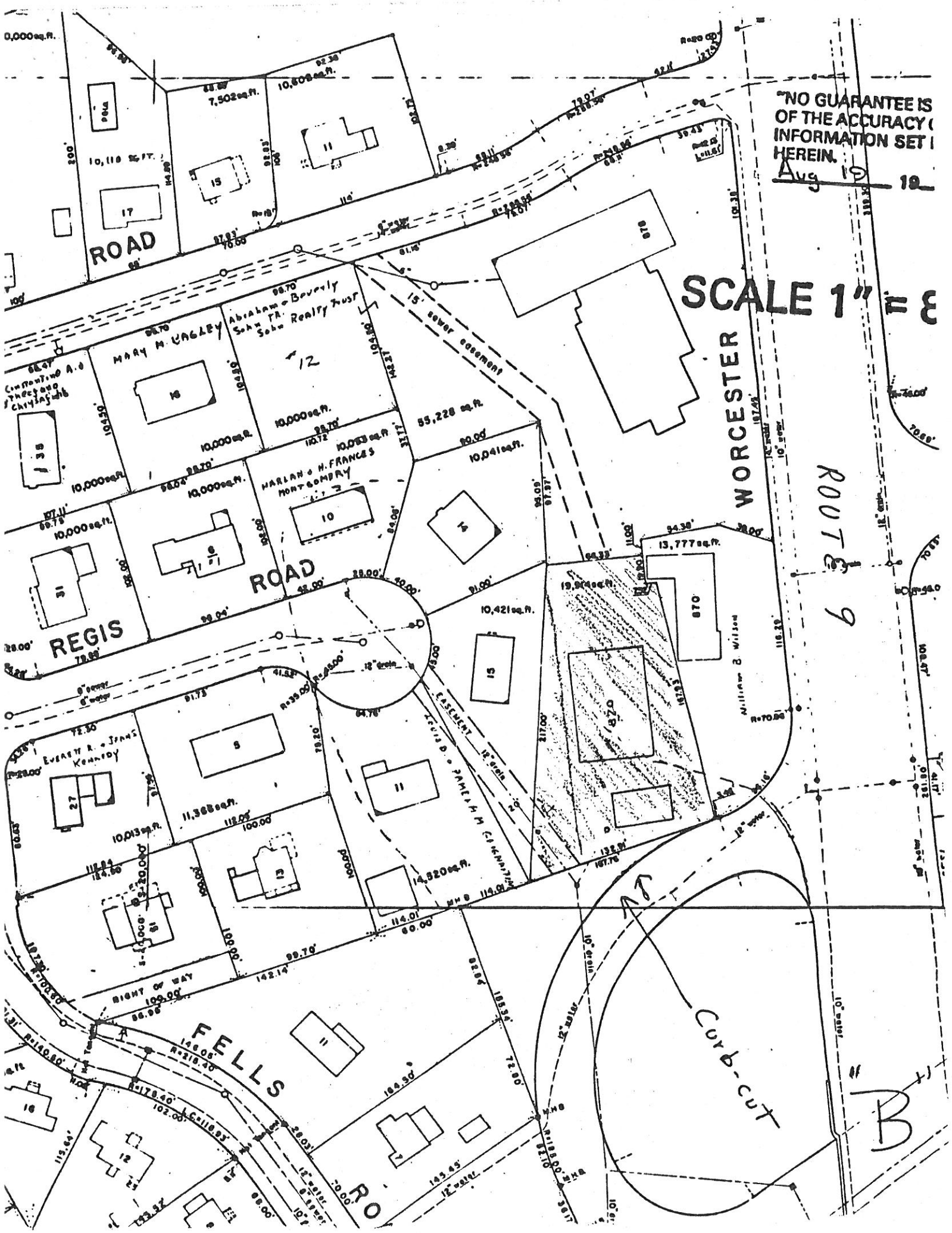
February 16, 1962.
A MAJORITY OF THE PLANNING BOARD
WELLESLEY PLANNING BOARD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HARLAN & H. FRANCES MONTGOMERY
EVERETT R. & JEANS KENNEDY
William B. Wilson
15' sewer easement
EASEMENT
RIGHT OF WAY
Curb-cut
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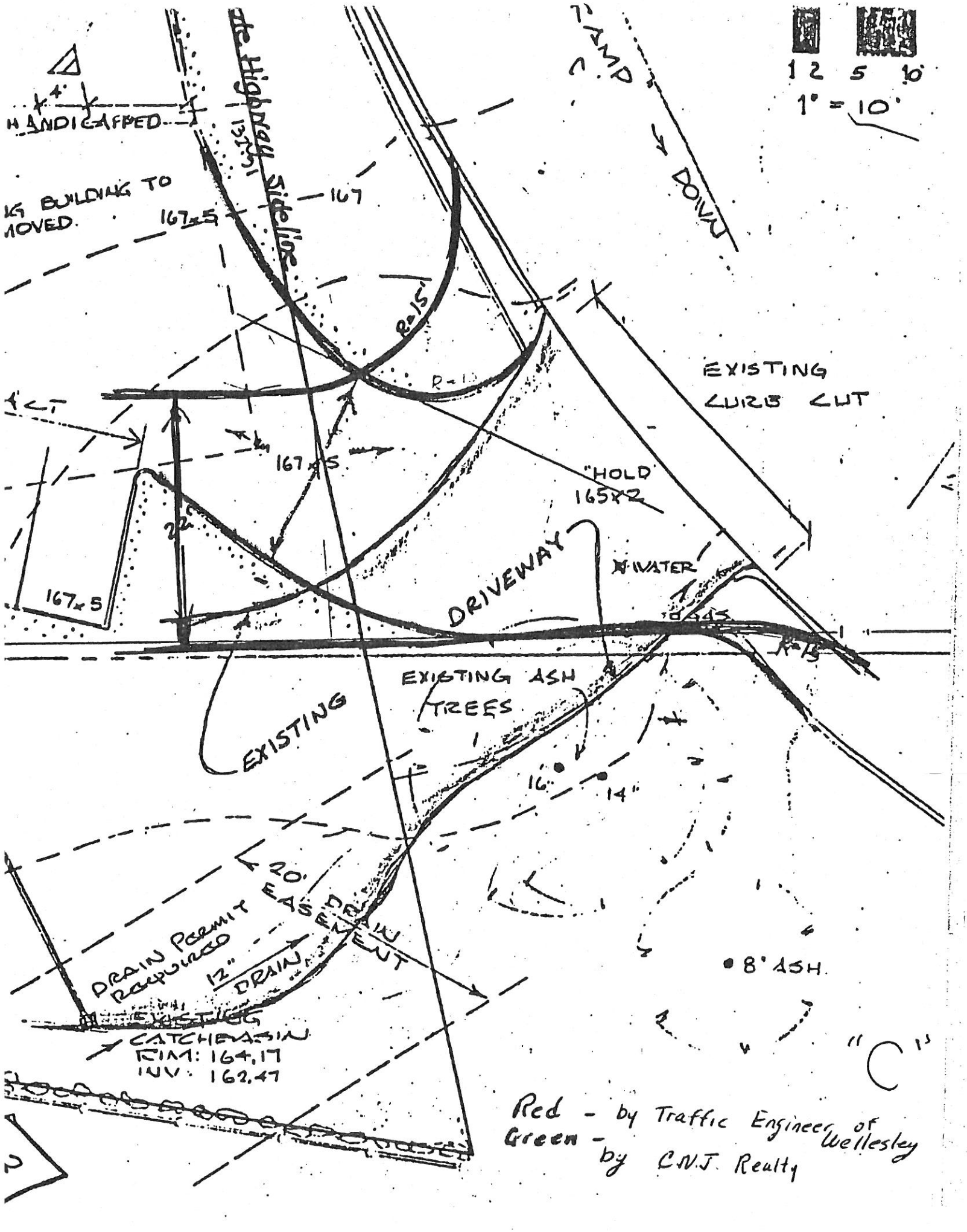

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CATCHBASIN
RIM: 164.17
INV: 162.47
"C"
Red - by Traffic Engineer of Wellesley
Green - by C.N.J. Realty

TOWN OF WELLESLEY MASSACHUSETTS

ALBERT S. ROBINSON, TOWN COUNSEL

40 GROVE STREET
WELLESLEY, MA 02181
(617) 235-3300

December 9, 1987

Ellen Gordon, Executive Secretary
Board of Appeals
Town Hall
Wellesley, MA 02181

Re: Clayton R. Chisholm and Norma Chisholm,
Trustees of C.N.J. Realty Trust v.
Stephen S. Porter, John A. Donovan, Robert R. Cunningham,
William E. Polletta, Franklin P. Parker and Sumner H. Babcock,
as they are Members of the Zoning Board of Appeals of the
Town of Wellesley

Dear Ellen:

As you have correctly pointed out, it was agreed that the referenced zoning appeal would be dismissed when Mr. Chisholm no longer retained control of the property. I have confirmed that the transfer of the property was effected and his attorney has agreed to stipulate to the dismissal with prejudice and without costs. A copy of the Stipulation of Dismissal, the original of which has been filed today, is enclosed.

I am closing the file.

Very truly yours,

Albert S. Robinson

ASR/dmr
File: WJ 229
cc: Thomas E. Lee, Executive Secretary
Board of Selectmen
Enclosure
(02881)

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss.

Superior Court Dept.

Civil Action No. 86-

CLAYTON R. CHISHOLM and NORMA CHISHOLM,
Trustees of C.N.J. REALTY TRUST,

Plaintiffs

v.

STIPULATION OF DISMISSAL

STEPHEN S. PORTER, JOHN A DONOVAN,
ROBERT R. CUNNINGHAM, WILLIAM E.
POLLETTA, FRANKLIN P. PARKER and
SUMNER H. BABCOCK, as they are Members
of the ZONING BOARD OF APPEALS of the
TOWN OF WELLESLEY,

Defendants

Now come the parties and request the court to dismiss the above-captioned matter, with prejudice, and wihtout costs to either party.

EDWARD C. DONLON
Attorney for Plaintiffs
47 Church Street
Wellesley, MA 02181
(617) 237-2120

ALBERT S. ROBINSON
Attorney for Defendants
40 Grove Street
Wellesley, MA 02181
(617) 235-3300