



## ZONING BOARD OF APPEALS

TOWN HALL • 525 WASHINGTON STREET • WELLESLEY, MA 02482-5992

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ZBA 2020-37

Petition of Robert & Jennifer Bortnick

9 Leewood Road

Pursuant to due notice, the Special Permit Granting Authority held a Remote Public Hearing on Thursday, August 13, 2020 at 7:30 pm, on the petition of Robert & Jennifer Bortnick requesting a Special Permit pursuant to the provisions of Section 14E, Section 17 and Section 25 of the Zoning Bylaw for enclosure of an existing nonconforming porch with less than required right side yard setbacks, at 9 Leewood Road, in a 10,000 square foot Single Residence District, in a Water Supply Protection District.

On April 10, 2020, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication. In accordance with Chapter 53 of the Acts of 2020, the hearing was scheduled for August 13, 2020.

Present at the public hearing was David Himmelberger, Esq., representing Robert and Jennifer Bortnick, the Petitioner. He said that the request is for a special permit to enclose a pre-existing 26 square foot nonconforming porch that is located in the side yard setback at 12.26 feet. He said that under the Bjorklund Decision, the proposed enclosure may be found to not constitute an intensification of an existing nonconformity and that as a matter of law a special permit should issue. He said that what had been an active use entrance with two lights will be changed. He said that the stairs and lights will be removed and the porch will be enclosed and made into a powder room, which will be a less intense use in the nonconforming setback. He said that the neighbor to the right is in favor of the project. He requested that the Board grant a special permit.

A Board member discussed Mr. Himmelberger's statement in his letter that says that the Applicant is entitled to a special permit and a building permit as a matter of right. Mr. Himmelberger said that he submitted a request for zoning interpretation to Mr. Grant, Building Inspector, and it was Mr. Grant's response that, while Bjorklund might be controlling, the fact that the enclosure is in the setback requires the Board to grant a special permit. He said that based on that response, he submitted the request for a special permit.

A Board member discussed findings under Section 6 of Chapter 40A, M.G.L. Mr. Himmelberger said that because it is a nonconforming structure, the Board has to make a determination as to whether there is any intensification of the existing nonconformity. He said that if there is not, a permit should be granted. He said that under Bjorklund, this is not an intensification. He said that it is a change to a pre-existing nonconforming structure. He said that under Wellesley's Zoning Bylaw and Chapter 40A, Section 6, the Board should go through the process of examining the change that is being sought, and if the conclusion is that there is no intensification of the pre-existing nonconformity, a special permit should be granted. The Board member asked if Mr. Himmelberger would prefer that that Board make an additional finding that the proposed structure will not be substantially more detrimental to the neighborhood than the

existing nonconforming structure. Mr. Himmelberger said that he did not believe that the Board has to go to that level. He read an excerpt from Chapter 40A, Section 6. He said that he was satisfied if the Board wished to base its ruling on the fact that under Bjorklund there is no intensification of the pre-existing nonconformity and, therefore, a special permit issues. He said that he is equally satisfied if the Board wants to get to the finding that the proposed change will not be substantially more detrimental because clearly converting an active use porch into an enclosed powder room is not substantially more detrimental to the neighborhood than the pre-existing nonconformity.

Mr. Himmelberger said that in the last paragraph of Mr. Grant's letter, he talked about the project being subject to appropriate review by the Zoning Board of Appeals, consistent with Section 17 of the Zoning Bylaw and that the proposed enclosure of the porch is likely entitled to a building permit without the further finding that it is not more detrimental to the surrounding neighborhood than the existing structure. He said that it is Mr. Grant's position that because it is within the nonconforming setback, it does require a Board action. He said that Mr. Grant said that if the porch was not within a nonconforming setback, he would have issued a building permit.

The Chairman said that since the porch was already the subject of a special permit, there is a nonconformity but there is no change, no intensification or addition to the nonconformity, which satisfies the first clause of Section 6 of Chapter 40A and Section 17 of the Zoning Bylaw.

There was no member of the public who wished to speak to the petition.

#### Statement of Facts

The subject property is located at 9 Leewood Road, in a 10,000 square foot Single Residence District, in a Water Supply Protection District, with a minimum right side yard setback of 11.3 feet where 20 feet is required.

The Petitioner is requesting a Special Permit pursuant to the provisions of Section 14E, Section 17 and Section 25 of the Zoning Bylaw for enclosure of an existing nonconforming porch with less than required right side yard setbacks, in a 10,000 square foot Single Residence District, in a Water Supply Protection District.

Letters to Zoning Board of Appeals, dated 4/10/20 & 7/15/20, from David J. Himmelberger, Esq., Letter to David H. Himmelberger, dated 4/22/20, from Michael Grant, Inspector of Buildings, a Plot Plan, dated 3/20/20, stamped by John R. Hamel, Professional Land Surveyor, Existing & Proposed Floor Plans and Elevation Drawings, dated 4/07/20, prepared by JacobLilley Architects, and photographs were submitted.

On August 12, 2020, the Planning Board reviewed the petition and recommended that a special permit be approved.

#### Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing. The subject structure does not conform to the current Zoning Bylaw, as noted in the foregoing Statement of Facts.

The Board found that the Design and Operation Standards in Part F are adequately satisfied and not otherwise prohibited in Part D.1, of Section XIVE of the Zoning Bylaw for Water Supply Protection Districts.

It is the opinion of this Authority that enclosure of an existing nonconforming porch with less than required right side yard setbacks will not result in the intensification of existing nonconformities.

Therefore, a Special Permit is granted, as voted unanimously by this Authority at the Public Hearing, for enclosure of an existing nonconforming porch with less than required right side yard setbacks, in accordance with the submitted plot plan and construction drawings.

The Inspector of Buildings is hereby authorized to issue a permit for construction upon receipt and approval of a building application and detailed constructions plans.

If construction has not commenced, except for good cause, the Special Permit shall expire two years after the date time stamped on this decision.

2020 AUG 27 PM 1:46

NOT VALID FOR RECORDING UNTIL CERTIFIED BY TOWN CLERK

In accordance with Section 11 of Chapter 40A of the Massachusetts General Laws, I hereby certify that twenty (20) days have elapsed after the within decision was filed in the office of the Town Clerk for the Town of Wellesley, and that no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied.

Date:

Attest:

\_\_\_\_\_  
Cathryn Jane Kato  
Town Clerk

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.

2020 NOV 27 12:11 PM  
J. Randolph Becker (L.M.)  
J. Randolph Becker, Chairman

Robert W. Levy (L.M.)  
Robert W. Levy

Derek B. Redgate (L.M.)  
Derek B. Redgate

cc: Planning Board  
Inspector of Buildings  
lrm

PERMIT PLAN  
 9 LEEWOOD ROAD  
**WELLESLEY, MASSACHUSETTS**  
 1 INCH = 20 FEET MARCH 20, 2020  
 SNELLING & HAMEL ASSOCIATES, INC.  
 PROFESSIONAL LAND SURVEYORS & ENGINEERS  
 10 LEWIS STREET P.O. BOX 102  
 LINCOLN, MASSACHUSETTS 01773  
 (781) 259-0071

OWNER OF RECORD:  
 ROBERT H. BORTNICK  
 &  
 JENNIFER R. BORTNICK

PLAN REFERENCES:  
 - PLAN 313 OF 1938

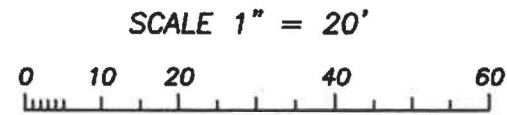
I HEREBY STATE THAT THE LOCATION OF THE FEATURES SHOWN HEREON  
 IS THE RESULT OF A FIELD SURVEY PERFORMED AS OF MARCH 19, 2020  
 WITH THE USE OF A TOPCON TOTAL STATION

*John R. Hamel*

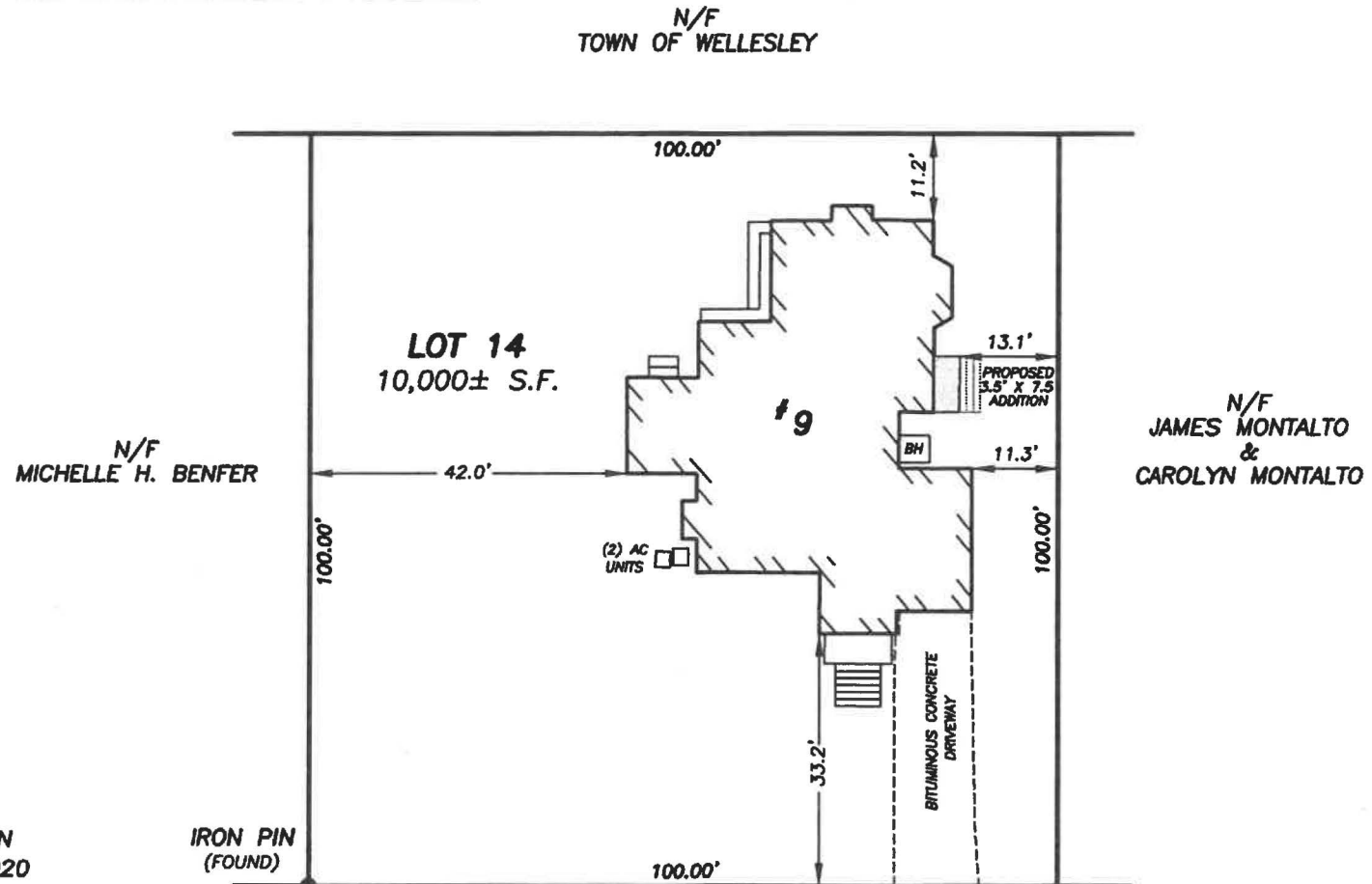
JOHN R. HAMEL  
 PROFESSIONAL  
 LAND SURVEYOR



MARCH 20, 2020  
 DATE:



APPROXIMATE NORTH  
 FROM PLAN 313 OF 1938



LEEWOOD ROAD

(40' WIDE)

16625.DWG  
 MARCH 20, 2020