Massachusetts Association of Land Surveyors & Civil Engineers

Fourteenth Annual
Legal Perspectives on Land Surveying

Sponsored by MALSCE Sustaining Members:

Allen & Major Associates, Inc., Beals and Thomas Inc., Bluesky Geospatial Limited, BSC Group, Inc., CHA, Coastal Engineering Co., Crocker Design Group, DGT Associates, Eastern Topographics, Feldman Geospatial, Hancock Associates, Maine Technical Source, Moran Surveying, Inc., Nitsch Engineering, R. J. O'Connell & Associates, Inc., Samiotes Consultants Inc., Spiller's, Topcon Solutions Store, VHB, Inc., WSP

Speakers:
Daniel Bartlett
Denise A. Chicoine
Edward S. Englander
Melanie Kido
Stephen T. LaMonica
Kathleen M. O'Donnell
Michael Pill
Paul Tyrell

Massachusetts Association of Land Surveyors and Civil Engineers Seminar
January 27, 2022
Waltham, MA

Fourteenth Annual
Legal Perspectives on Land Surveying
Agenda

7:30 AM	**Registration & Continental Breakfast**
8:00 AM	**Seminar Begins**
	Stephen LaMonica
	Dan Bartlett
	Ed Englander
	Michael Pill
9:45 AM	**Break**
	Kathleen M. O'Donnell
	Paul Tyrell
	Melanie Kido
12:00 PM	**Lunch**
	Denise Chicoine
2:45 PM	**Break**
	Jeffrey Loeb
4:00 PM	**Seminar Ends**

Fourteenth Annual
Legal Perspectives on Land Surveying
Speaker Biographies

Daniel Bartlett

Mr. Bartlett is a title examiner who has worked in every county of the Commonwealth for over thirty years. He has worked closely with the law firm of Englander & Chicoine to research complex title issues, such as tidal flats, fractional interests in estates, and long-defunct trusts. Mr. Bartlett is a go-to resource on any title problem, large or small, whether it is recorded land or registered land.

Denise A. Chicoine, Esq.

Ms. Chicoine is a partner in the Boston law firm of Englander & Chicoine P.C. Ms. Chicoine has significant experience litigating disputes involving rights in the intertidal zone and beach access claims, easements, zoning matters, and Chapter 91. She also has expertise in employment law. She has handled a number of appeals, including arguing three times in the Supreme Judicial Court on behalf of the prevailing parties.

Ms. Chicoine received her B.A. from Trinity College in Hartford, Connecticut in 1990; J.D. from Boston College Law School 1993; admitted to the Massachusetts bar 1993 and the Connecticut bar in 1994. She is a member of CREW (Commercial Women in Real Estate), REBA (Real Estate Bar Association for Massachusetts), and has been a chair for a zoning panel for MCLE (Massachusetts Continuing Legal Education) for the past six years. She enjoys running, hiking, and skiing.

Edward S. Englander, Esq.

Ed is a partner in the law firm of Englander & Chicoine. The firm concentrates in real estate and general civil law with an emphasis in real estate litigation and employment disputes. Englander & Chicoine has assisted numerous clients with solving their legal problems from title insurance companies, the Boston Redevelopment Authority, shell fishermen, to the single 89 year-old school teacher who faces eviction. Ed served on the Board of Registration for Professional Engineers and Land Surveyors for 6 years. Ed has practiced law for 49 years. He attended the University of Wisconsin and Suffolk Law School.

Melanie E. Kido, Esq.

Melanie E. Kido is Vice President and Massachusetts State Counsel for CATIC in Waltham, Massachusetts. She has worked in the title insurance industry for over 20 years, underwriting both residential and commercial real estate transactions. Prior to joining CATIC, she was Vice President and Regional Underwriting Counsel for Stewart Title Guaranty Company. Prior to her employment with Stewart Title, she was Underwriting Counsel for both First American Title Insurance Company and Land¬America Lawyers Title Insurance Corporation and was in private practice. Ms. Kido is a graduate of the University of California at Irvine and Boston University School of Law. She is a member of both the Massachusetts and California bars, ACP (American Clean Power Association), ICSC (International Council of Shopping Centers), CREW Boston, NNCREW (National Network of Commercial Real Estate Women), the Real Estate Bar Association for Massachusetts (REBA), REBA's Title Insurance and National Affairs Section, New England Land Title Association, the ALTA Title Counsel Work Group, ALTA's State Legislative/Regulatory Action Committee and the American Bar Association. Ms. Kido has published articles and been a panelist for MALSCE, ICSC, ACP, REBA, NELTA, MCLE, and the Massachusetts Bar Association.

Jeffrey B. Loeb, Esq.

Jeff is a shareholder at Rich May, PC in Boston. He is the co-chair of the firm's litigation group and his practice focuses on business and real estate disputes. He has tried cases in all levels of the state and federal courts in MA and has argued appeals in both state and federal court. He is a graduate of Yale College and Boston College Law School. He lives in Ipswich.

Kathleen M. O'Donnell, Esq.

Ms. O'Donnell concentrates her practice in real estate law with a specialty in municipal law including acquisitions of land for open space, affordable housing, and community preservation. Ms. O'Donnell is a past president of the Real Estate Bar for Massachusetts (REBA) and is presently serving as co-chair of the Real Estate Section of the Boston Bar Association. Her professional memberships include the Abstract Club, the Boston Bar Association, REBA, City Solicitors and Town Counsel Association, CREW (Commercial Women in Real Estate), and the Council for Women of Boston College. She is a member of the Steering Committee of the Community Preservation Coalition and the Board of Directors of the Massachusetts Land Trust Coalition. Ms. O'Donnell is the Secretary of the Cohasset Yacht Club. Ms. O'Donnell is the editor of two MCLE publications; Handling Residential Real Estate Transactions in Massachusetts and Massachusetts Real Estate Law Sourcebook & Citator. She is a graduate of Boston College and the University of Miami School of Law.

Stephen T. LaMonica, PE, PLS

Mr. LaMonica joined the Land Court in 2016 as a Survey Engineer and was appointed the Chief Surveyor in 2018. Prior to joining Land Court he worked in the private sector on numerous international projects that include railroads, dams, bridges and roads as a land surveyor and civil engineer for over 40 years. Chief Surveyor LaMonica received a BS degree in civil engineering from Northeastern University and is licensed in multiple states.

Michael Pill, Esq.

Michael Pill is a partner in the law firm of Green Miles Lipton, LLP in Northampton, MA. He focuses on real property rights, land litigation, and land use. He has presented seminars and authored materials for lawyers and land surveyors on surveyor liability, public & private roads, nuisance and trespass, septic systems, land use restrictions, zoning and easements. He is co-author of several legal treatises, including: Volumes 28, 28A & 28B Massachusetts Practice: Real Estate Law with Forms; Chapter 28 on Eminent Domain in Crocker's Notes on Common Forms (9th ed. 2006 & Supps. 2008 & 2010); and Massachusetts Conveyancers and Litigators Guide to Easements and Land Use Restrictions (3rd ed. 2004). A graduate of Grinnell College (1968) and the University of Iowa College of Law (1972), he received an M.A. degree in Urban and Regional Planning from the University of Iowa (1974) and a Ph.D. in economics from the University of Massachusetts (1982).

Paul Tyrell, PE, PLS, LEED AP, DBIA

Paul Tyrell is an accomplished professional engineer licensed in MA, ME, NH, RI, VT, CT, and NY and a professional land surveyor in MA. He's a LEED Accredited and certified Design Build professional with 30 years of experience in Land Surveying, Civil Engineering and Construction Management.

Fourteenth Annual
Legal Perspectives on Land Surveying

Land Court Update

January 27, 2023

Hosted by: MALSCE

Land Court Department
Survey Division

LAND COURT

2006 MANUAL OF INSTRUCTIONS

SURVEY DIVISION

FOR THE SURVEY OF LANDS AND PREPARATION OF PLANS

https://www.mass.gov/doc/land-court-2006-manual-of-instructions-for-the-survey-of-lands-and-preparation-of-plans/download

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

GUIDELINES

ON

REGISTERED LAND

February 27, 2009

https://www.mass.gov/doc/land-court-guidelines-on-registered-land/download

The 2009 Registered Land Guidelines have been supplemented by the Land Court in Registered land memos issued by the Chief Title Examiner. Additionally, registered land forms have been updated. Please refer to the Land Court's website for updated forms and all the Chief Title Examiner memos to ensure you are referencing the latest guidance.

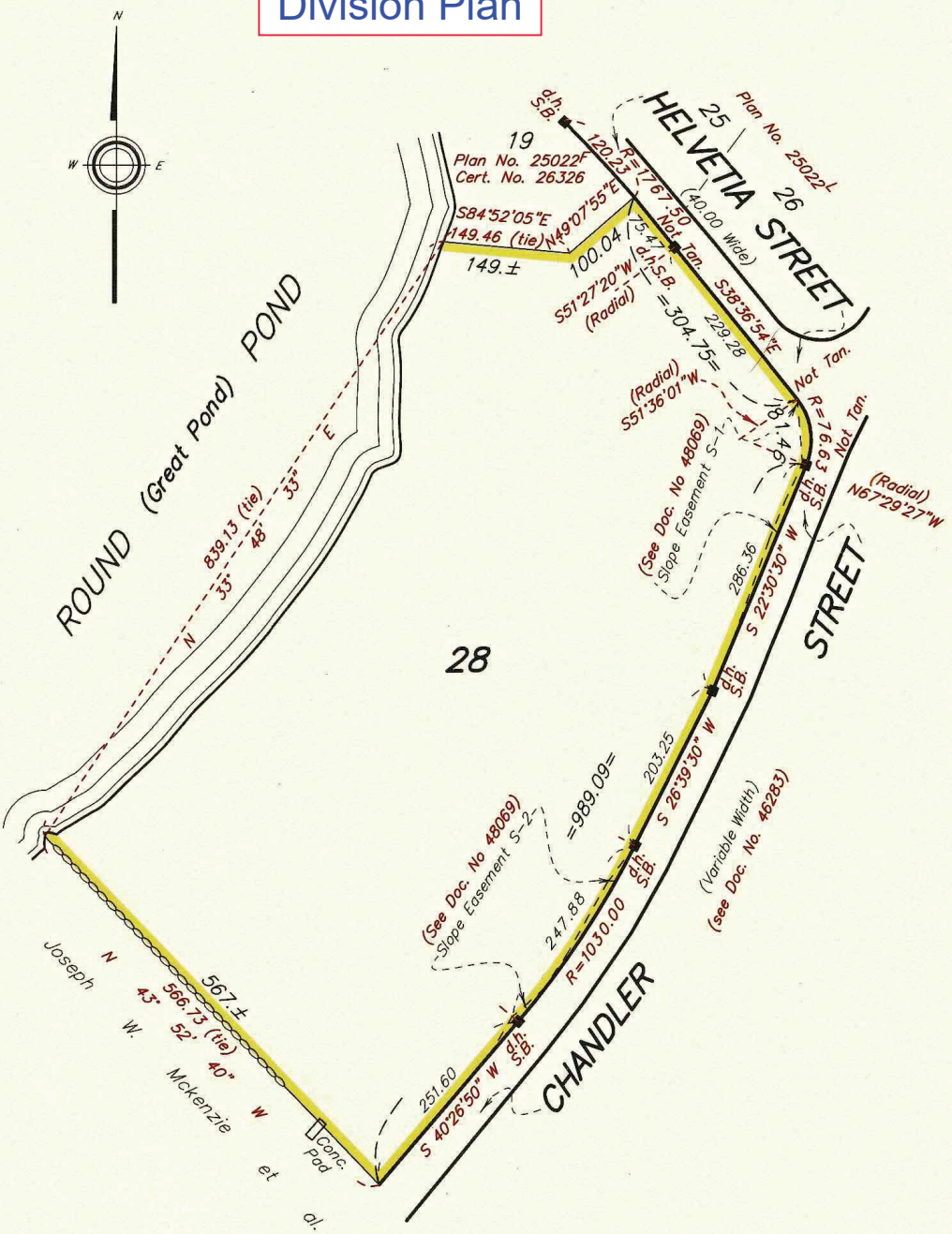
SUBDIVISION PLAN OF LAND IN TEWKSBURY

Allen & Major Associates, Inc. Surveyors

September 15, 2020

25022M

Land Court
Division Plan



Subdivision of Remainder of Lot 13
Shown on Plan 25022-A
Filed with Cert. of Title No. 9898
North Registry District of Middlesex County

Separate certificates of title may be issued for land shown hereon as Lot 28 By the Court.

Deborah J. Patterson
Recorder

May 11, 2021

MGH-ODLV

Abutters are shown as on original decree plan.

Copy of part of plan filed in
LAND REGISTRATION OFFICE
May 11, 2021
Scale of this plan 150 feet to an inch
Stephen T. LaMonica, Engineer for Court

LAND COURT DEPARTMENT OF THE TRIAL COURT

NOTICE

PRE-FILE REVIEW OF PROPOSED SUBDIVISIONS OF REGISTERED LAND

The Subdivision Section of the Land Court Survey Division conducts a Pre-File Review for approval of subdivision plans of registered land, submitted by mail, reviewed on a first received basis.

The "**submittal package**" should be complete and consist of the following:

1. Cover letter from the owner or the owner's attorney requesting review for filing including name, address and telephone number of the contact person.

2. Proof of Ownership:
   a] a recently attested complete copy of the certificate of title, or
   b] if the certificate of title has not been written, the deed into the current owner along with the last written certificate of title.

3. Identify any current or pending litigation with any court, including Land Court, that has an impact on the proposed subdivision or provide a statement indicating none.

4. Complete attested copies of documents and plans of takings or easements not shown on prior Land Court Plans.

5. Two prints of the subdivision plan - ***DO NOT SUBMIT ORIGINAL PLAN AT THIS TIME***.

6. Surveyor's Worksheet(s), **signed and sealed** by the surveyor, including field and record coordinate numbers.

7. Surveyor's computations, **originals with each sheet signed and sealed** by the surveyor consisting of:
   a] unbalanced field traverse,
   b] balanced field traverse,
   c] individual lot closures based upon the subdivision plan dimensions,
   d] list of field and record coordinates on the same coordinate system, and
   e] easement closures.

DO NOT SEND ORIGINAL PLAN OR PAYMENT AT THIS TIME

The owner or the owner's attorney should mail the complete "submittal package" to:

PRE-FILE REVIEW
Land Court Survey Division
Three Pemberton Square, 5th Floor
Boston, MA 02108

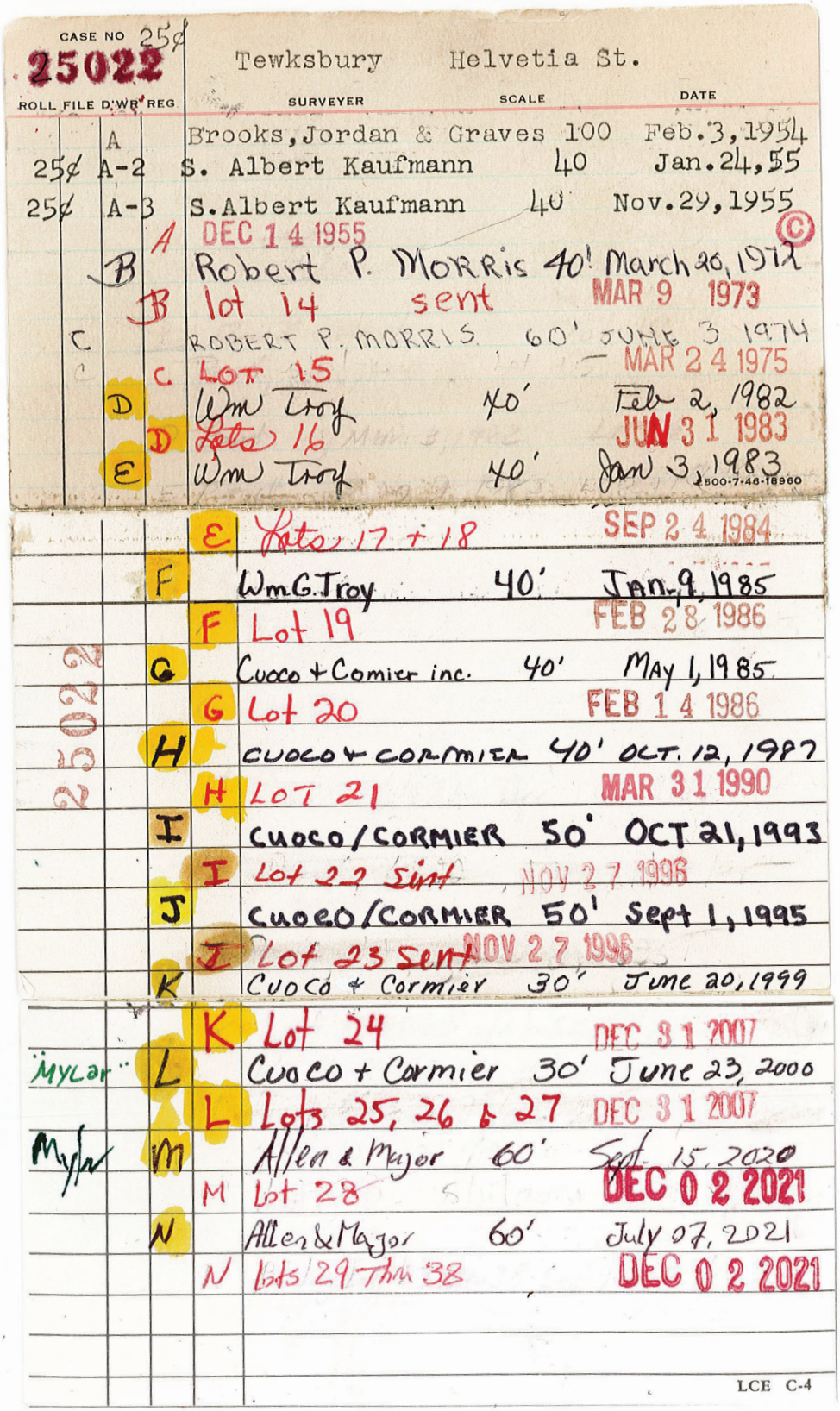
Inquiries can be made by calling (617) 788-7434 between the hours of 8:30 AM and 4:30 PM or email stephen.lamonica@jud.state.ma.us. The caller should have available the "**Pre-File Review**" number or the **Land Court Plan** number.

THE MORE COMPLETE THE PRE-FILE DATA - THE BETTER THE COURT CAN SERVE

https://www.mass.gov/doc/instructions-for-pre-file-review-of-proposed-subdivisions-of-registered-land/download

Stephen T. LaMonica, PLS, PE
Chief Surveyor
March 28, 2018
(Revised November 5, 2019)

Master Index Card



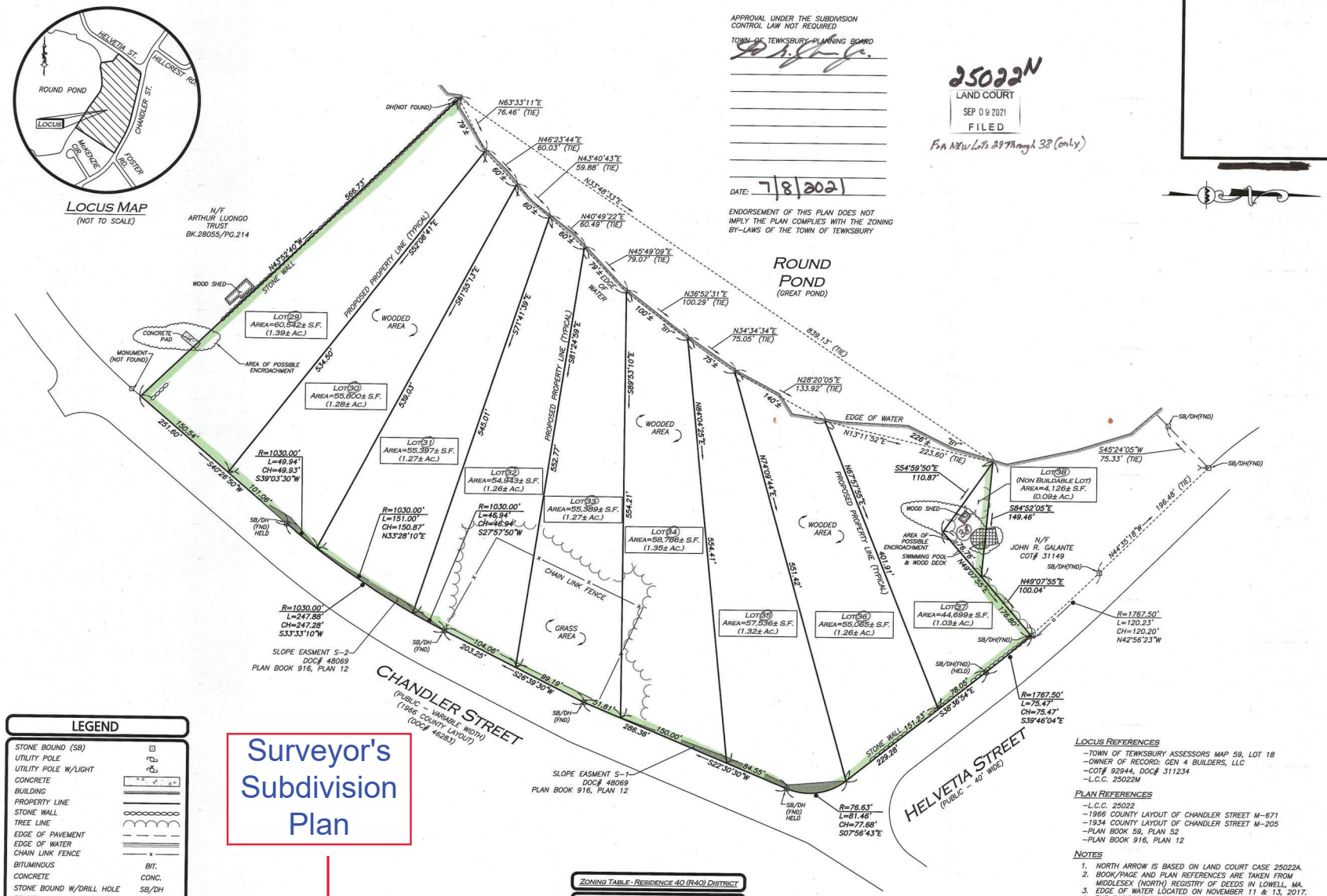
CASE NO 25¢ **25022**

Tewksbury Helvetia St.

ROLL	FILE	D/WR	REG	SURVEYER	SCALE	DATE
		A		Brooks, Jordan & Graves	100	Feb. 3, 1954
25¢		A-2		S. Albert Kaufmann	40	Jan. 24, 55
25¢		A-3		S. Albert Kaufmann	40	Nov. 29, 1955
			A	DEC 14 1955		
		B		Robert P. Morris	40'	March 20, 1972
			B	lot 14 sent		MAR 9 1973
		C		ROBERT P. MORRIS	60'	JUNE 3 1974
			C	LOT 15		MAR 24 1975
		D		Wm Troy	40'	Feb 2, 1982
			D	Lots 16		JUN 31 1983
		E		Wm Troy	40'	Jan 3, 1983
			E	Lots 17 + 18		SEP 24 1984
		F		Wm G. Troy	40'	Jan. 9, 1985
			F	Lot 19		FEB 28 1986
25022		G		Cuoco + Comier inc.	40'	May 1, 1985
			G	Lot 20		FEB 14 1986
		H		CUOCO + CORMIER	40'	OCT. 12, 1987
			H	LOT 21		MAR 31 1990
		I		CUOCO / CORMIER	50'	OCT 21, 1993
			I	Lot 22 sent		NOV 27 1996
		J		CUOCO / CORMIER	50'	Sept 1, 1995
			J	Lot 23 sent		NOV 27 1996
		K		Cuoco + Cormier	30'	June 20, 1999
			K	Lot 24		DEC 31 2007
Mylar		L		Cuoco + Cormier	30'	June 23, 2000
			L	Lots 25, 26 & 27		DEC 31 2007
Mylar		M		Allen & Major	60'	Sept. 15, 2020
			M	Lot 28		DEC 02 2021
		N		Allen & Major	60'	July 07, 2021
			N	Lots 29 Thru 38		DEC 02 2021

LCE C-4

NBC058



APPROVAL UNDER THE SUBDIVISION CONTROL LAW NOT REQUIRED

TOWN OF TEWKSBURY PLANNING BOARD

DATE: 7/8/2021

ENDORSEMENT OF THIS PLAN DOES NOT IMPLY THAT THE PLAN COMPLIES WITH THE ZONING BY-LAWS OF THE TOWN OF TEWKSBURY

25022N
LAND COURT
SEP 09 2021
FILED
For New Lots 29 through 38 (only)

WE HEREBY CERTIFY THAT:

THIS PLAN WAS DRAWN FROM AN ACTUAL SURVEY MADE ON THE GROUND IN ACCORDANCE WITH THE LAND COURT INSTRUCTIONS OF 2006 ON OR BETWEEN NOVEMBER 11, 2017 AND AUGUST 5, 2020. AS OF THE DATE OF THIS SURVEY, THE MONUMENTS CONTROLLING PRIOR PLANS ARE IN THE GROUND AS SHOWN AND DESCRIBED HEREON. I FURTHER CERTIFY THAT ANY ADDITIONAL MONUMENTS SHOWN HEREON HAVE BEEN SET IN ACCORDANCE WITH THE LAND COURT INSTRUCTIONS OF OF 2006 AS OF THE DATE OF THIS SURVEY.

THE PRECISION ERROR OF CLOSURE WAS 1/232,787, THE LINEAR ERROR OF CLOSURE WAS 0.02' AND THE DIRECTIONAL ERROR OF CLOSURE WAS S81°31'46"W. DISTANCES HERE OBSERVED USING A LEICA TS16 TOTAL STATION HAVING A PUBLISHED ACCURACY OF ±1mm AND ±1.5PPM.

ALLEN & MAJOR ASSOCIATES, INC.

July 7, 2021
PROFESSIONAL LAND SURVEYOR FOR ALLEN & MAJOR ASSOCIATES, INC.

COMMONWEALTH OF MASSACHUSETTS
NORMAN L. LIPSITZ
No.28446
REGISTERED PROFESSIONAL LAND SURVEYOR
7/7/21

REV	DATE	DESCRIPTION

APPLICANT\OWNER:
GEN 4 BUILDERS, LLC
627 WHIPPLE ROAD
TEWKSBURY, MA 01876

PROJECT:
527 CHANDLER STREET
TEWKSBURY, MA

PROJECT NO.	2991-01	DATE:	07/07/2021
SCALE:	1" = 60'	DWG. NAME:	SEE BELOW
DRAFTED BY: KEVIN A CAPALDO		CHECKED BY: NORMAN I LIPSITZ	

PREPARED BY:
ALLEN & MAJOR ASSOCIATES, INC.
civil engineering • land surveying
environmental consulting • landscape architecture
www.allenmajor.com
100 COMMERCE WAY
WOBURN MA 01801-8501
TEL: (781) 935-6889
FAX: (781) 935-2896
WOBURN, MA • LAKEVILLE, MA • MANCHESTER, NH

DRAWING TITLE:
APPROVAL NOT REQUIRED
LAND COURT SUBDIVISION

SHEET No. 1

LEGEND

STONE BOUND (SB)	
UTILITY POLE	
UTILITY POLE W/LIGHT	
CONCRETE	
BUILDING	
PROPERTY LINE	
STONE WALL	
TREE LINE	
EDGE OF PAVEMENT	
EDGE OF WATER	
CHAIN LINK FENCE	
BITUMINOUS	BIT.
CONCRETE	CONC.
STONE BOUND W/DRILL HOLE	SB/DH
FOUND	FND
NOW OR FORMERLY	N/F
DOCUMENT	DOC
BOOK	BK.
PAGE	PG.
PLAN BOOK	PB.
PLAN	PL.
CERTIFICATE OF TITLE	COT
LAND COURT CASE	L.C.C.

Surveyor's Subdivision Plan

↓

Pending Plan

ZONING TABLE - RESIDENCE 40 (R40) DISTRICT

ITEM	REQUIRED
LOT AREA (MIN)	1.0 ACRE
LOT FRONTAGE (MIN)	150'
FRONT YARD SETBACK (MIN)	25'
SIDE YARD SETBACK (MIN)	15'
REAR YARD SETBACK (MIN)	15'
BUILDING COVERAGE (MAX)	15%
BUILDING HEIGHT (MAX)	35'
BUILDING HEIGHT (MAX)	2.5 STORIES

LOCUS REFERENCES
- -TOWN OF TEWKSBURY ASSESSORS MAP 59, LOT 18
- -OWNER OF RECORD: GEN 4 BUILDERS, LLC
- -COT# 92944, DOC# 311234
- -L.C.C. 25022M

PLAN REFERENCES
- -L.C.C. 25022
- -1956 COUNTY LAYOUT OF CHANDLER STREET M-671
- -1934 COUNTY LAYOUT OF CHANDLER STREET M-205
- -PLAN BOOK 59, PLAN 52
- -PLAN BOOK 916, PLAN 12

NOTES
1. NORTH ARROW IS BASED ON LAND COURT CASE 25022A.
2. BOOK/PAGE AND PLAN REFERENCES ARE TAKEN FROM MIDDLESEX (NORTH) REGISTRY OF DEEDS IN LOWELL, MA.
3. EDGE OF WATER LOCATED ON NOVEMBER 11 & 13, 2017.
4. THE PURPOSE OF THIS PLAN IS TO SUBDIVIDE LOT 28 FROM LAND COURT CASE 25022M INTO LOTS 29, 30, 31, 32, 33, 34, 35, 36, 37, AND 38 AS SHOWN HEREON. LOT 38 IS TO BE CONSIDERED A NON BUILDABLE LOT.
5. THE PLAN REFERENCES LISTED ABOVE INCLUDE THE MOST RECENT PLANS OF RECORD AND WERE USED TO COMPLETE THE SURVEY SHOWN HEREON.

GRAPHIC SCALE
60 0 30 60 120 240
(IN FEET)
1 inch = 60 ft.

N:\PROJECTS\2991-01\SURVEY\DRAWINGS\CURRENT\S-2991-01-ANR.DWG

NOTICE OF PENDING SUBDIVISION ORDER
This order is subject to modification and/or cancellation by the Survey Division

Registration Case No. 25022
Land in Tewksbury
Affecting Lot 28
On Plan No. 25022 M
filed with certificate of Title No. 9898
An informal note should be made on the margin of the current certificate of Title No 45383 as well as on the Plan itself and no further certificates should be issued for said lot.

Date 9/9/2021

Owner Gen 4 Builders, LLC

This notice may be destroyed after the Court approved plan of these lots reaches the Registry TLG

Lot Cancellation Notice

(Space Above this Line Reserved for Registry of Deeds)

QUITCLAIM DEED

Gen 4 Builders, LLC, a Massachusetts limited liability company, having a mailing address of 623 Whipple Road, Tewksbury, Massachusetts 01876

for consideration paid and in full consideration of _____ Thousand and 00/100 Dollars ($_____.00)

grants to

with Quitclaim Covenants

The land with the buildings thereon situated at ___ Chandler Street, Tewksbury, Middlesex County, Massachusetts, being more particularly described as follows:

SEE EXHIBIT A ATTACHED

The total area of the lot hereby conveyed is 55,397 square feet, more or less, as shown on the plan.

The premises are conveyed subject to an existing Slope Easement as shown on Plan in Plan Book 916, Plan 12, created by Document Number 48069.

For grantor's title see deed dated May 4, 2021, filed with the Land Registration Office of the Land Court in the Essex North District Registry of Deeds as Document No. 00311234, as noted on Certificate of Title No. 45383, Book 230, Page 11.

This is not the conveyance of all or substantially all of the Massachusetts assets of an entity taxed as a corporation in Massachusetts. In addition, no member of the grantor is an entity taxed as a corporation in Massachusetts. This is not homestead property.

This is a conveyance in the ordinary course of business and is not in contravention of the filed Certificate of Organization for the Limited Liability Company, as it may be amended. Neither this

Property Address: Lot 31, Chandler Street, Tewksbury, MA

instrument nor any other record at the Registry of Deeds discloses anything in contravention of the laws of the Commonwealth of Massachusetts as it relates to the grantor company and the grantor limited liability company appears from the records of the Commonwealth of Massachusetts Office of the Secretary of State to exist.

By executing this Certificate, the undersigned further certifies that he is named in the Operating Agreement and Certificate of Organization as one of the persons authorized to execute, acknowledge, deliver and record any recordable instrument purporting to affect an interest in real property on behalf of the limited liability company and such authority has not been amended, modified or revoked; that the Operating Agreement authorizes him to take all steps necessary to convey the premises or interests described above on the terms and conditions contained herein; and that no member of the LLC has filed for bankruptcy protection.

End of Text
Signature Page Follows

Signed as a sealed instrument this _____ day of _____, 202_____.

Gen 4 Builders, LLC

_____

By: John Barry Sullivan
Its: Manager/Authorized RE Signatory

STATE OF _____

_____, ss.

On this _____ day of _____, 202___, before me, the undersigned notary public, personally appeared John Barry Sullivan, as Manager and Authorized Real Estate Signatory of Gen 4 Builders, LLC, who proved to me through satisfactory evidence of identification, which was ☐ photographic identification with signature issued by a federal or state governmental agency, ☐ oath or affirmation of a credible witness, ☐ personal knowledge of the undersigned, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose and has the authority to sign in that capacity, and that the foregoing represents the free act and deed of Gen 4 Builders, LLC.

_____

Name:
Notary Public
My Commission Expires:

Exhibit A

Lot 31 as shown on plan of land entitled, "Approval Not Required Land Court Subdivision, 527 Chandler Street, Tewksbury, MA" Project No. 2991-01, Date: 07/07/2021, Scale: 1"=60', being a division plan of land to divide Tax Map 59, Lot 28 as shown on LC 25022-M creating new Lots numbered 29 through 38, Applicant/Owner: Gen 4 Builders, LLC, prepared by Allen & Major Associates, Inc., which plan is filed as Land Court Plan No. 25022-N and noted on Certificate of Title Number 45383.

LAND COURT, BOSTON. The Land herein described will be shown on our approved plan to follow as Referred To

SEP 09 2021

Plan 25022N Lot 31
(EXAMINED AS DESCRIPTION ONLY)
STL CHIEF SURVEYOR (TTG)

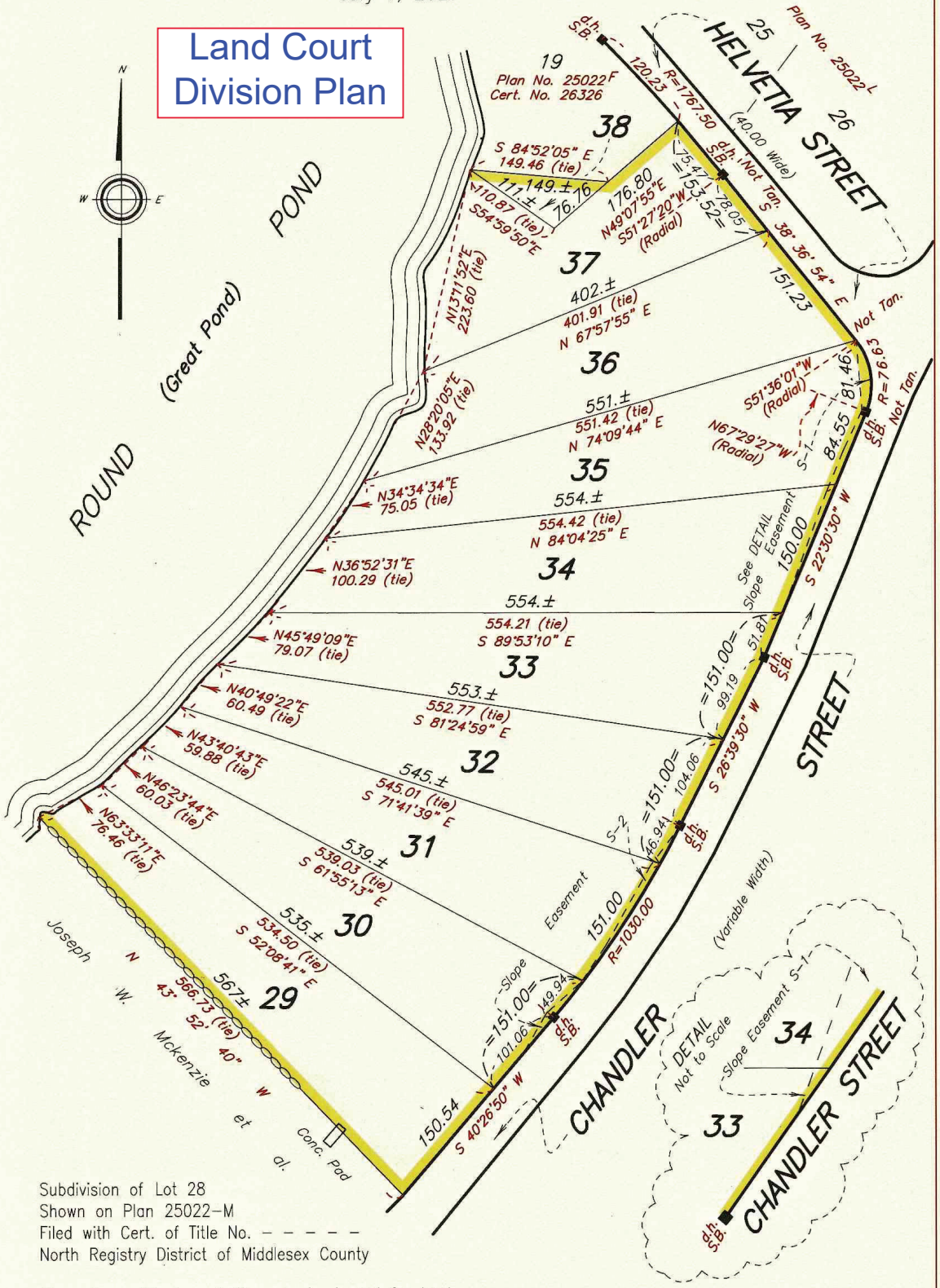
SUBDIVISION PLAN OF LAND IN TEWKSBURY

Allen & Major Associates, Inc., Surveyors

July 7, 2021

25022 N

Land Court Division Plan



Subdivision of Lot 28
Shown on Plan 25022–M
Filed with Cert. of Title No. – – – – –
North Registry District of Middlesex County

Separate certificates of title may be issued for land shown hereon as 29 Through 38 By the Court.

Deborah J. Patterson
Recorder

September 9, 2021

MGH–201T

Abutters are shown as on original decree plan.

Copy of part of plan filed in
LAND REGISTRATION OFFICE
Sept. 9, 2021
Scale of this plan 120 feet to an inch
Stephen T. LaMonica, Engineer for Court

First-Class Postage Required

Post Office will not deliver without proper postage

LAND COURT
Three Pemberton Square, 5th Floor
Boston, MA 02108-1700

ATTN: Survey Department

SUBDIVISION PLAN No. 2340-5 | LAND IN Plymouth | FILED WITH CLERK No. 44589

THE COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

_____ Registry District of Plymouth County

Subdivision plan as above received, and is filed with Certificate of Title No. _____

Oct 26 2022
Date

John R. Buckley Jr.
Assistant Recorder

LCE P-1

Postcard to Land Court

Survey Plan
Cancellation

CANCELLATION CHECKLIST

L.C. Plan No. 1191-16

Land in Sharon

Date Filed January 25, 2022

Registry District of Norfolk County

Cancelled on Sept. 15, 2022

By Attorney **See Letter Dated** Sept. 8, 2022

Status of Plan ☑ **Pending or** ☐ **Sent to Registry**

- ☑ 1. Notation on Master Card **in red**
- ☑ 2. Notation on filed plan over stamp **in green** ("Cancelled with date")
- ☑ 3. Telephone call to Registry (Re: Verify Plan Not Used)
- ☑ 4. Memo sent to Registry (Re: Written notification of cancellation request plan be sent back)
- ☑ 5. Note on yellow Subdivision Order Sheet **in green**
- ☑ 6. Note in LSPMS comments box (Note: Date plan was cancelled)
- ☐ 7. Note in Subdivision Ledger Book (Re: Cancelled with date if plan filed prior to 01-01-22)
- ☑ 8. Erase notations from previous decree plan photo / copies in folders
- ☑ 9. Re-Scan Mylar and attach to LSPMS record. Remove old attachment from LSPMS
- ☑ 10. No Court Plan Made (Status Pending)
- ☑ 11. Create sheet in ACAD stating Plan Cancelled including the Plan No, Town & Date Cancelled
- ☑ 12. Court Plan and/or subdivision notice print returned by Registry of Deeds, if applicable
- ☑ 13. Submit copy of the Cancellation Checklist to Chief Surveyor

Attach PDF Copy of this Cancellation Checklist to LSPMS

File with Yellow Subdivision Order Sheet

CANCELLED

September 15, 2022

Town: Tewksbury

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT - LAND COURT
DEPARTMENT
SUBDIVISION - ORDER SHEET

Plan: 25022-N

PFR No.: 0210804 **PFR Date:** 07/22/2021 **Tentative Date:** 08/30/2021 **ID:** 201T

Date: 09/09/2021

Requested By: Attorney-Kathryn M. Morin

Received By: TIG

Address: P.O. Box 370

Plaistow, NH 03865

Tel.: 1-978-809-3178

Certificates: 45383

Original Returned: No

Owners: Gen 4 Builders, LLC

Copy Filed: Yes

Attested June 14, 2021

Lands Described: Lot 28

Statement of Conditions: No

On Plan: 25022-M

Print for Registry Filed: No

With Cert.:

PD:

Lands Conveyed:

Plan Filed:

24" x 36" Mylar

Planning Board Endorsement:

Not Required

Drawn by: MGH 09/08/2021

Math Check By: STL

11/03/2021

Cancellation Order: 09/09/2021 TIG

STATUTORY FEE
$30.00 plus $5.00 for each lot to be shown.
Check $80.00

Traverse Filed? Yes

Subdivision of: Lot 28

Plan to show total of 10 lot(s)

Shown On Plan: 25022-M

10 lot(s) x $5.00/lot

$50.00

$80.00

Numbered: Lots 29 Through 38

Filed with Cert. of Title No.: _ _ _ _ _ _ _ _ _

Subsequent Petition Filed? No

North Registry District of Middlesex County

Reason for Petition:

Court Order Issued? No **Date:**

Ready for Deed Approvals? Yes

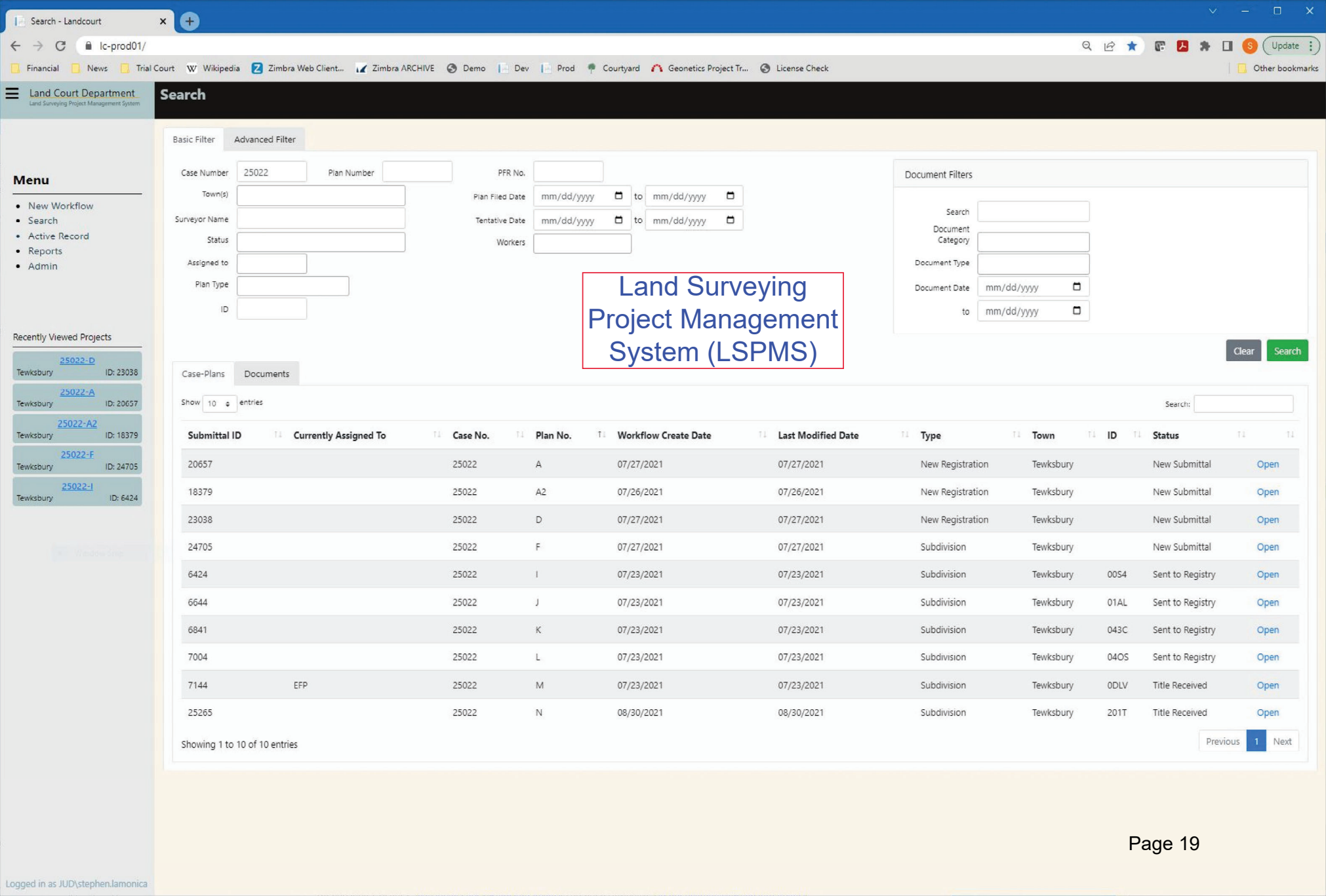
If not ready, list items needed:

Details checked by: EFP 10/06/2021

Approved EFP

11/03/2021 Deputy Engineer

Subdivision Order Sheet


Search - Landcourt
lc-prod01/
Update
Financial
News
Trial Court
Wikipedia
Zimbra Web Client...
Zimbra ARCHIVE
Demo
Dev
Prod
Courtyard
Geonetics Project Tr...
License Check
Other bookmarks
Land Court Department
Land Surveying Project Management System
Search
Menu
New Workflow
Search
Active Record
Reports
Admin
Recently Viewed Projects
25022-D
Tewksbury
ID: 23038
25022-A
Tewksbury
ID: 20657
25022-A2
Tewksbury
ID: 18379
25022-F
Tewksbury
ID: 24705
25022-I
Tewksbury
ID: 6424
Logged in as JUD\stephen.lamonica
Basic Filter
Advanced Filter
Case Number
25022
Plan Number
PFR No.
Town(s)
Plan Filed Date
mm/dd/yyyy
to
mm/dd/yyyy
Surveyor Name
Tentative Date
mm/dd/yyyy
to
mm/dd/yyyy
Status
Workers
Assigned to
Plan Type
ID
Land Surveying Project Management System (LSPMS)
Document Filters
Search
Document Category
Document Type
Document Date
mm/dd/yyyy
to
mm/dd/yyyy
Clear
Search
Case-Plans
Documents
Show 10 entries
Search:
Submittal ID
Currently Assigned To
Case No.
Plan No.
Workflow Create Date
Last Modified Date
Type
Town
ID
Status
20657 25022 A 07/27/2021 07/27/2021 New Registration Tewksbury New Submittal Open
18379 25022 A2 07/26/2021 07/26/2021 New Registration Tewksbury New Submittal Open
23038 25022 D 07/27/2021 07/27/2021 New Registration Tewksbury New Submittal Open
24705 25022 F 07/27/2021 07/27/2021 Subdivision Tewksbury New Submittal Open
6424 25022 I 07/23/2021 07/23/2021 Subdivision Tewksbury 00S4 Sent to Registry Open
6644 25022 J 07/23/2021 07/23/2021 Subdivision Tewksbury 01AL Sent to Registry Open
6841 25022 K 07/23/2021 07/23/2021 Subdivision Tewksbury 043C Sent to Registry Open
7004 25022 L 07/23/2021 07/23/2021 Subdivision Tewksbury 04OS Sent to Registry Open
7144 EFP 25022 M 07/23/2021 07/23/2021 Subdivision Tewksbury 0DLV Title Received Open
25265 25022 N 08/30/2021 08/30/2021 Subdivision Tewksbury 201T Title Received Open
Showing 1 to 10 of 10 entries
Previous
1
Next

Case: 25022

Plan No.: N

Delete Workflow

Submittal ID: 25265

Case | Sheets | GIS | Lots | Surveyor | Case Documents | Order Sheet

Expand All Cards | Collapse All Cards

Menu

- New Workflow
- Search
- Active Record
- Reports
- Admin

Recently Viewed Projects

25022-N — Tewksbury — ID: 25265
25022-M — Tewksbury — ID: 7144
13713-N — Tewksbury — ID: 25708
17933-K — Barnstable — ID: 27522
17933-L — Barnstable — ID: 27523

Standard Info

Case No.:	**25022**
Plan No.:	**N**
Condo No.:	
Plan Type:	**Subdivision**
Plan Date:	**07/07/2021**
Primary City/Town:	**Tewksbury**
Secondary Cities/Towns:	
Multi Town:	**N/A**
Registry District:	**North Registry District of Middlesex County**
Claimant's Name:	**Gen 4 Builders, LLC**
Plaintiff/Owner:	**Owner**

Site Info

Address:	**527 Chandler Street**
Street Names:	**Chandler Street**
Street(s) Bounded As:	
No. of Lots on Linen:	**10**
No. of Linen Sheets:	**1**
Scale of Linen Plan:	**60**
No. of New Lots:	**10**
No. of New Sheets:	**1**
New Lot No.s:	**Lots 29 Through 38**
Body of Water Name:	
Great Pond:	**Yes**
Water Bounded as:	

Petition Info

Canceled/Dismissed:	
Petition:	**No**
Date Petition Requested:	
Type:	
Reason for Petition:	
Disposition:	
Disposition Date:	

Status Info

PFR Date Received:	**07/22/2021**
Pre File Review No.:	**0210804**
PFR Received By:	**STL**
Tentative Date:	**08/30/2021**
Date Plan Filed:	**09/09/2021**
Plan Order Date:	
Plan Approval Date:	**09/09/2021**
Sent to Legal/Registry Date:	**12/02/2021**

Traverse Info

Linear Error of Closure:	
Directional Error of Closure:	
Precision:	
EDM Accuracy:	
Calibration/Comparison:	
Surveyors Worksheet:	
Unadjusted Closed Loop:	
Balanced Closed Loop:	
Perimeter Traverse:	**Yes**
Block Closures:	
Individual Lot Closures:	
Interior Street Closures:	
Side Shots:	
Coordinate List:	
Comparative Inverses:	
Easment Closures:	

Plan Endorsement Info

Plan Endorsement:	**ANR**
Municipal Liens Certificate:	**No**
Assigned Document No.:	
Ch 190 - Acts of 1982:	**N/A**
Statement of Conditions/Covenant:	**No**

Professional/Agent Info

Copy Surv. to Req.

Surveyor

Surveyor's First Name:	**NORMAN**
Surveyor's Last Name:	**LIPSITZ**
Address:	

Process Info

Received By:	**TIG**
Check List Date:	
Judge:	
Assigned Drafting Date:	**09/08/2021**
Drafter:	**MGH**

Subdivision/Modification Info

Owner's Certificate No.:	**45383**
Lands Described:	**Lot 28**
On Plans:	**25022-M**
With Certificate No.:	
Land Conveyed:	

Coordinate List:
Comparative Inverses:
Easment Closures:

Professional/Agent Info

Copy Surv. to Req.

Surveyor

Surveyor's First Name:	**NORMAN**
Surveyor's Last Name:	**LIPSITZ**
Address:	
City:	**WESTFORD**
State:	**MA**
ZIP:	**01886-2910**
Surveyor's Phone:	
Surveyor's Email:	
PLS No.:	**28446**
Current PLS License Status:	

Company

Company Name:	**Allen & Major Associates, Inc.**
Address:	**100 Commerce Way**
City:	**Woburn**
State:	**MA**
ZIP:	**01801-8501**
Company Phone:	**1-781-935-6889**

Requestor

Requested By:	**Kathryn M. Morin**
Title:	**Attorney**
Email:	**kathryn@kathrynmorinlaw.com**
Firm Name:	
Address:	**P.O. Box 370**
City:	**Plaistow**
State:	**NH**
ZIP:	**03865**
Phone:	**1-978-809-3178**

Process Info

Received By:	**TIG**
Check List Date:	
Judge:	
Assigned Drafting Date:	**09/08/2021**
Drafter:	**MGH**
Completed Drafting Date:	**09/08/2021**
Detail Check Start Date:	**10/06/2021**
Detail Checker:	**EFP**
Completed Detail Check Date:	**10/06/2021**
Math Check Start Date:	**11/03/2021**
Math Checker:	**STL**
Completed Math Check Date:	**11/03/2021**
Final Check Start Date:	**11/03/2021**
Final Checker:	**EFP**
Completed Final Check Date:	**11/03/2021**
Cancellation Order Sent Date:	**09/09/2021**
Cancellation Order Sent By:	**TIG**

Subdivision/Modification Info

Owner's Certificate No.:	**45383**
Lands Described:	**Lot 28**
On Plans:	**25022-M**
With Certificate No.:	
Land Conveyed:	
Subdivision of/Modification of:	**Lot 28**
Shown on Plan:	**25022-M**
File w/Certificate of Title No.:	_ _ _ _ _ _ _ _ _
Merger:	

Return Info

Plan Certificate No.:	**45890**
Instrument No.:	
Book:	
Page:	
Plan Book:	
Plan Page:	

Miscellaneous

Certificate Original Returned:	**No**
Certificate Copy Filed:	**Yes**
Statement of Conditions:	**No**
Print for Registry of Deeds:	**No**
Print for Registry of Deeds Amount Paid:	

Comments (0)

Firm Name:
Address: **P.O. Box 370**
City: **Plaistow**
State: **NH**
ZIP: **03865**
Phone: **1-978-809-3178**

Return Info

Plan Certificate No.: **45890**
Instrument No.:
Book:
Page:
Plan Book:
Plan Page:
Plan No.:
Of:
Assignment Date: **04/28/2022**

Miscellaneous

Certificate Original Returned: **No**
Certificate Copy Filed: **Yes**
Statement of Conditions: **No**
Print for Registry of Deeds: **No**
Print for Registry of Deeds Amount Paid:
Surveyor's Sheet Sizes: **24" x 36"**
Planning Board Endorsement: **Not Required**
Statutory Fee Type: **Check**
Statutory Fee Total: **80.00**
Court Order:
Bounded By:
Ready for Deed Approval: **Yes**
Fee - Lot Cost Total: **50.00**
Surveyor's Plan Media: **Mylar**
Decree Plan Scan:
Final Approver: **EFP**
Final Approver Title: **Deputy Engineer**
Engineer for Court of Record: **Stephen T. LaMonica**
Surveyor Data Letter Sent:
Surveyor Data Letter Answer:
Surveyor Data Letter Follow Up:

Comments (0)

Case: 25022

Plan No.: N

Delete Workflow

Submittal ID: 25265

Case | Sheets | GIS | Lots | Surveyor | Case Documents | Order Sheet

Menu

- New Workflow
- Search
- Active Record
- Reports
- Admin

Recently Viewed Projects

- 25022-N — Tewksbury — ID: 25265
- 28312-B — Marshfield — ID: 3263
- 14631-D — Marion — ID: 4478
- 28592-B — Quincy — ID: 27067
- 32819-B — West Newbury — ID: 2648

Show 10 entries

Search:

Actions	Title	File Name	Document Date	Category	Type	Download
Action	25022-N Tewksbury (D).pdf	25022-N Tewksbury (D).pdf	12/02/2021	Plans	Land Court Division Plan	Download
Action	25022-N Tewksbury (S).pdf	25022-N Tewksbury (S).pdf	09/09/2021	Plans	Surveyor's Subdivision Plan	Download
Action	25022-N Tewksbury (W).pdf	25022-N Tewksbury (W).pdf	09/09/2021	Plans	Surveyor's Worksheet	Download
Action	MC-STL 25022-N 211103.pdf	MC-STL 25022-N 211103.pdf	11/03/2021	Calculations	Map Check	Download
Action	Mortgagee's Assent to Subdivision of Land.pdf	Mortgagee's Assent to Subdivision of Land.pdf	09/09/2021	Documents	Release	Download
Action	Quitclaim Deeds for Lots 29 through 38 (Blank).pdf	Quitclaim Deeds for Lots 29 through 38 (Blank).pdf	09/09/2021	Documents	Deed	Download

Showing 1 to 6 of 6 entries

Previous 1 Next

Add Document

Logged in as JUD\stephen.lamonica

Land Court Department
Land Surveying Project Management System

Case: 25022
Plan No.: N

Delete Workflow
Submittal ID: 25265

Case | Sheets | GIS | Lots | Surveyor | Case Documents | Order Sheet

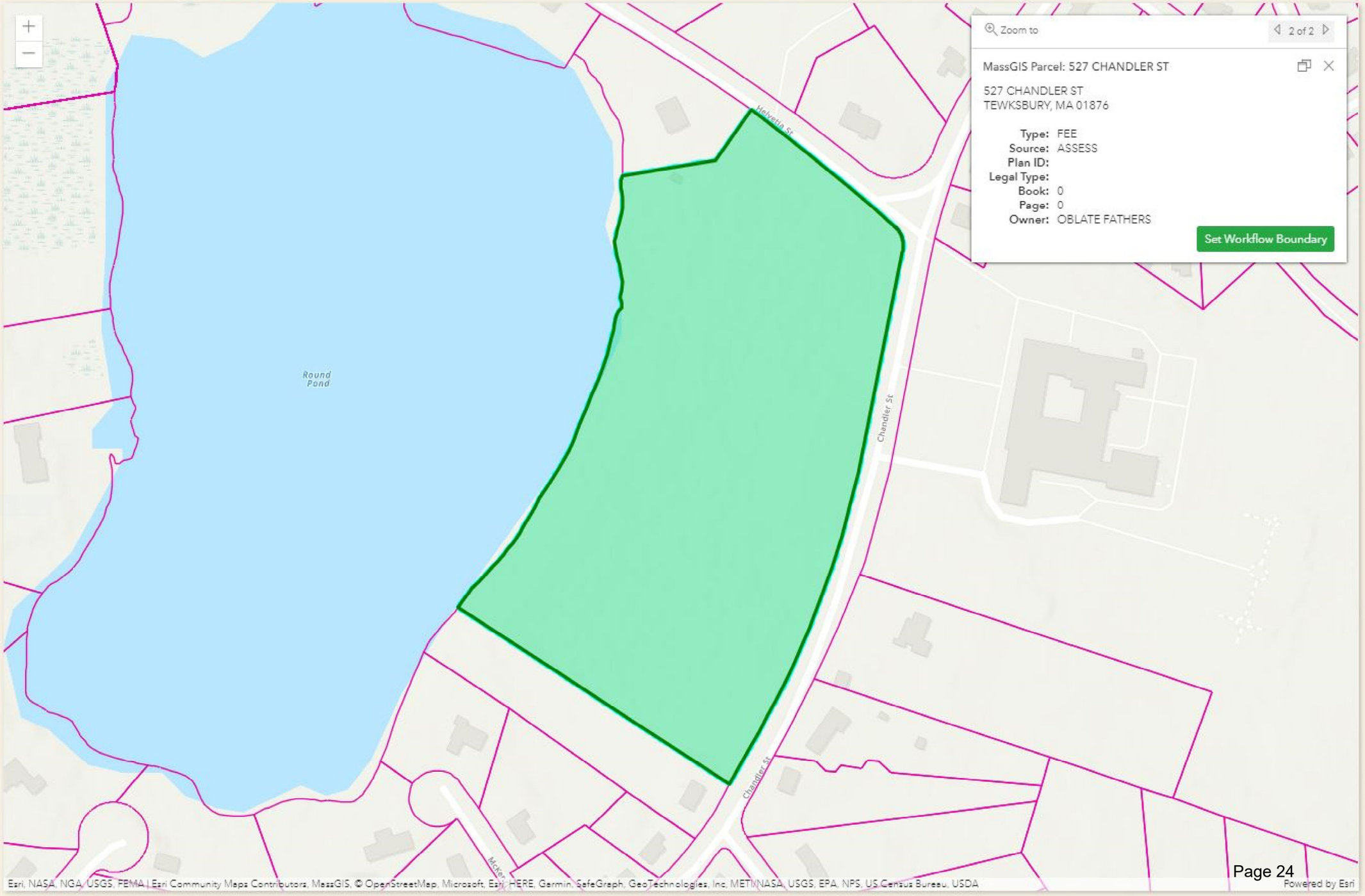
527 Chandler Street, Tewksbury

Menu

- New Workflow
- Search
- Active Record
- Reports
- Admin

Recently Viewed Projects

25022-N	
Tewksbury	ID: 25265
28312-B	
Marshfield	ID: 3263
14631-D	
Marion	ID: 4478
28592-B	
Quincy	ID: 27067
32819-B	
West Newbury	ID: 2648



Logged in as JUD\stephen.lamonica

Land Court Department
Land Surveying Project Management System

Case: 25022

Plan No.: N

Delete Workflow

Submittal ID: 25265

Case | Sheets | GIS | Lots | Surveyor | Case Documents | Order Sheet

Menu

- New Workflow
- Search
- Active Record
- Reports
- Admin

Recently Viewed Projects

- 25022-N — Tewksbury — ID: 25265
- 28312-B — Marshfield — ID: 3263
- 14631-D — Marion — ID: 4478
- 28592-B — Quincy — ID: 27067
- 32819-B — West Newbury — ID: 2648

Logged in as JUD\stephen.lamonica

Selected Surveyor Info

PLS #: **28446**
First Name: **NORMAN**
Middle Initial: **I**
Last Name: **LIPSITZ**
City: **WESTFORD**
State: **MA**
Date Selected: **8/30/2021**
Relevant License Status: **Current**
Current License Status: **Current**
Relevant Exp. Date: **6/30/2022**
Current Exp. Date: **6/30/2024**

Show 10 entries

Search: \b28446\b

License No.	Last Name	First Name	City	State	Issue Date	Expiration Date	Status	Link to Workflow
28446	LIPSITZ	NORMAN	WESTFORD	MA	9/24/1976	6/30/2024	Current	Link

Showing 1 to 1 of 1 entries (filtered from 2,688 total entries)

Previous 1 Next

THE TRIAL COURT OF MASSACHUSETTS
LAND COURT

SURVEY DIVISION
Stephen LaMonica
Chief Surveyor

Three Pemberton Square
Boston, MA 02108
TEL: (617) 788-7470

https://www.mass.gov/doc/order-a-land-court-survey-plan-reproduction/download

PROCEDURE FOR ORDERING REPRODUCTIONS OF SURVEY PLANS

UPDATED: JULY 11, 2022

The Land Court in Boston is the home to many thousands of survey plans associated with registered land throughout Massachusetts. Plans are filed with the court when a complaint for land registration or confirmation is filed, when there are subsequent divisions of registered land, or when registered land is submitted to the Commonwealth's condominium statute. Land Court judgment plans are drawn by the Survey Division in accordance with the court's final Order for Judgment in an original registration or confirmation case. Land Court division plans are also available. All plans on file with the Land Court are public records, and members of the public may request reproductions of plans from the Survey Division by using a court-provided form and following the below procedure.

When requesting plans from the court, the requester should specify whether they are seeking:

1. Surveyor Plans (also known as "Petitioner's Plans" or "Linen Plans");
2. Land Court Plans (also known as "Judgment Plans" or "Decree Plans");
3. Or both.

The fees for Surveyor Plans are $5/sheet and for Land Court Plans are $1/sheet. Payments for reproductions may be made online, by mail, or in-person at the Land Court Recorder's Office. Please follow the procedure below.

PROCEDURE STEPS

Submit a Plan Order Request Form to the Land Court (LandCourt.PlanOrder@jud.state.ma.us)

1. Download the Land Court Survey Division Plan Order Request Form from the court's website.
    a. Fill in your contact information on the form.
    b. Specify the format you are requesting for delivery or pickup (email or print).
    c. Include the plan numbers and plan types requested ("Surveyor," "Land Court," or both), the city/town, and any relevant comments. If requesting more than one plan, list them in numerical order.
    d. Choose how you will pay for the plans: online (convenience fees apply), by mail (check only), or in-person at the Land Court Recorder's Office.
    e. Sign and date the form.
    f. *The gray portions of the form will be completed by the Survey Division.*
2. Email the Plan Order Request Form to: LandCourt.PlanOrder@jud.state.ma.us or Fax to: (617) 788-8954

Survey Division Staff Will Return a Completed Form

3. Survey Division staff will review the request and may contact the requestor for more information, if needed.
4. Survey Division staff will return the Plan Order Request Form to the requestor by email with all portions completed and the "grand total" due for reproducing the plans. A reference number will be included at the top of the form.
5. The requestor must pay for the plans ordered before the Survey Division will prepare the reproductions.

Pay for the Plan Reproductions – 3 Options

6. ***Pay Online*** by credit card or eCheck at www.govhub.com/ma/landcourt/pay
    a. Convenience fees (not retained by the court) apply:
        i. Credit Card: The greater of 2.29% of the total or $0.50 per transaction
        ii. eCheck: $0.40 per transaction
    b. The online payment site will require entry of the "LCPLAN" reference number and the total amount due. The grand total on the Print Order Request Form may be entered as a single payment amount entry.
    c. Once entered, click "Pay Now" to proceed to checkout.
    d. Complete all required contact information.
    e. Enter payment information – either credit card or bank routing/account numbers.
        i. You may save your payment information and create an account for faster checkout in the future.
    f. Complete and confirm all required information, including acknowledgment of the terms of service, then select "Review Payment."
    g. On the final page, click "Confirm Payment." A confirmation number will be generated, and a confirmation receipt will be emailed for your records.
    h. The Land Court Survey Division will receive confirmation that your payment has been received and may begin to process your order.
7. ***Pay by mail*** (check only, payable to "Commonwealth of Massachusetts")
    a. Mail two copies of the completed Print Order Request Form along with a check made out to the "Commonwealth of Massachusetts" to:
        Land Court, Attn: Survey Print Orders
        Three Pemberton Square, 5th Floor,
        Boston, MA 02110
8. ***Pay in-person*** at the Land Court Recorder's Office in Boston (cash, check, or credit card)

Receive the Survey Plan Reproductions

9. Once payment has been received by the court, the plans will be emailed, mailed, or left for pickup at the Land Court Recorder's Office.
10. Contact the Land Court Survey Division at LandCourt.PlanOrder@jud.state.ma.us for any questions or for additional information.

SAVE | PRINT | CLEAR

LAND COURT
SURVEY DIVISION

PLAN ORDER
REQUEST FORM

LandCourt.PlanOrder@jud.state.ma.us

REFERENCE #
LCPLAN-

RECEIPT #

NAME

ADDRESS

PHONE

EMAIL

DESCRIPTION OF REQUEST

PLAN FORMAT REQUESTED

- ☐ ELECTRONIC (PDF) BY EMAIL
- ☐ PRINT COPIES FOR PICKUP
- ☐ PRINT COPIES BY MAIL

PLAN NO(s). in numerical order	PLAN TYPE		CITY/TOWN	COMMENTS/NOTES	FOR COURT USE ONLY		
	SURVEYOR	LAND COURT			SHEET QTY SURV	SHEET QTY LC	TOTAL
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
	☐	☐					
					GRAND TOTAL:		

https://www.mass.gov/doc/survey-division-plan-order-request-form/download

Payment must be received by the court before documents will be provided.

- ☐ Online payment by credit card or electronic check/ACH (convenience fees apply) www.govhub.com/ma/landcourt/pay
- ☐ Payment by mail (check only)
- ☐ In-person payment at Land Court Recorder's Office (check, credit card, or cash)

PLAN COSTS

Surveyor Plan: $5/sheet

Land Court Plan: $1/sheet

Requestor authorizes the court to complete this transaction and agrees to pay the amount due in full.

REQUESTOR SIGNATURE

X

DATE

COMMENTS FROM LAND COURT

PREPARED BY

THANK YOU

Commonwealth of Massachusetts
TRIAL COURT
Land Court Department
Suffolk County Court House
Three Pemberton Square
Boston, MA 02108
(617)788-7470

Stephen T. LaMonica, P.L.S., P.E.
Chief Surveyor
stephen.lamonica@jud.state.ma.us

Cases to be Reviewed by Ed Englander, Esq

Englander and Chicoine, P. C.

BATHING BEACH CASES

Bruce T. Richards, et. al. vs. Paul C. Casassa, Jr.

and

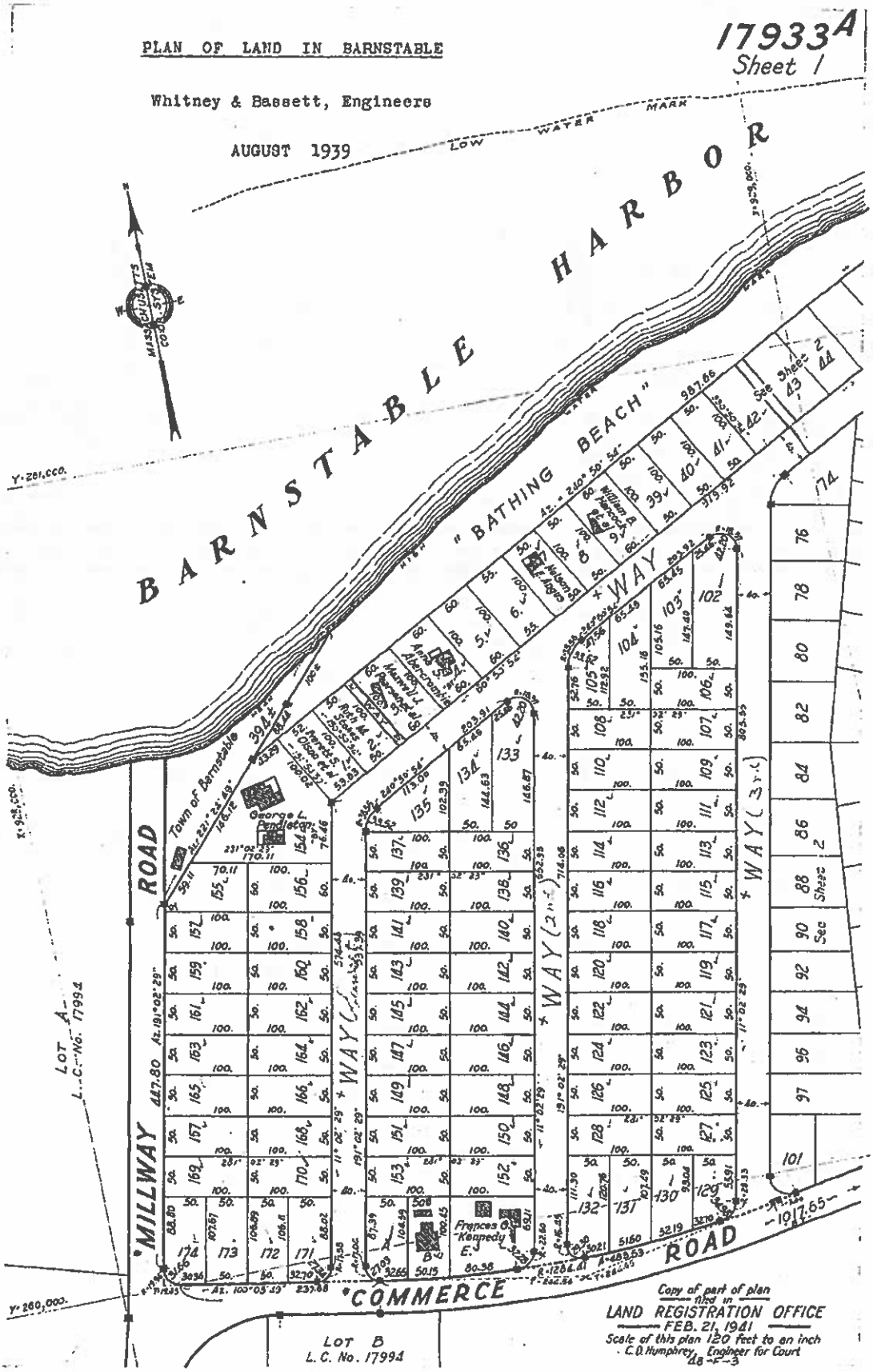
Frederick J. Tirrell, et. al. vs. Mark Scott, et. al.

17933A
Sheet 1

PLAN OF LAND IN BARNSTABLE

Whitney & Bassett, Engineers

AUGUST 1939

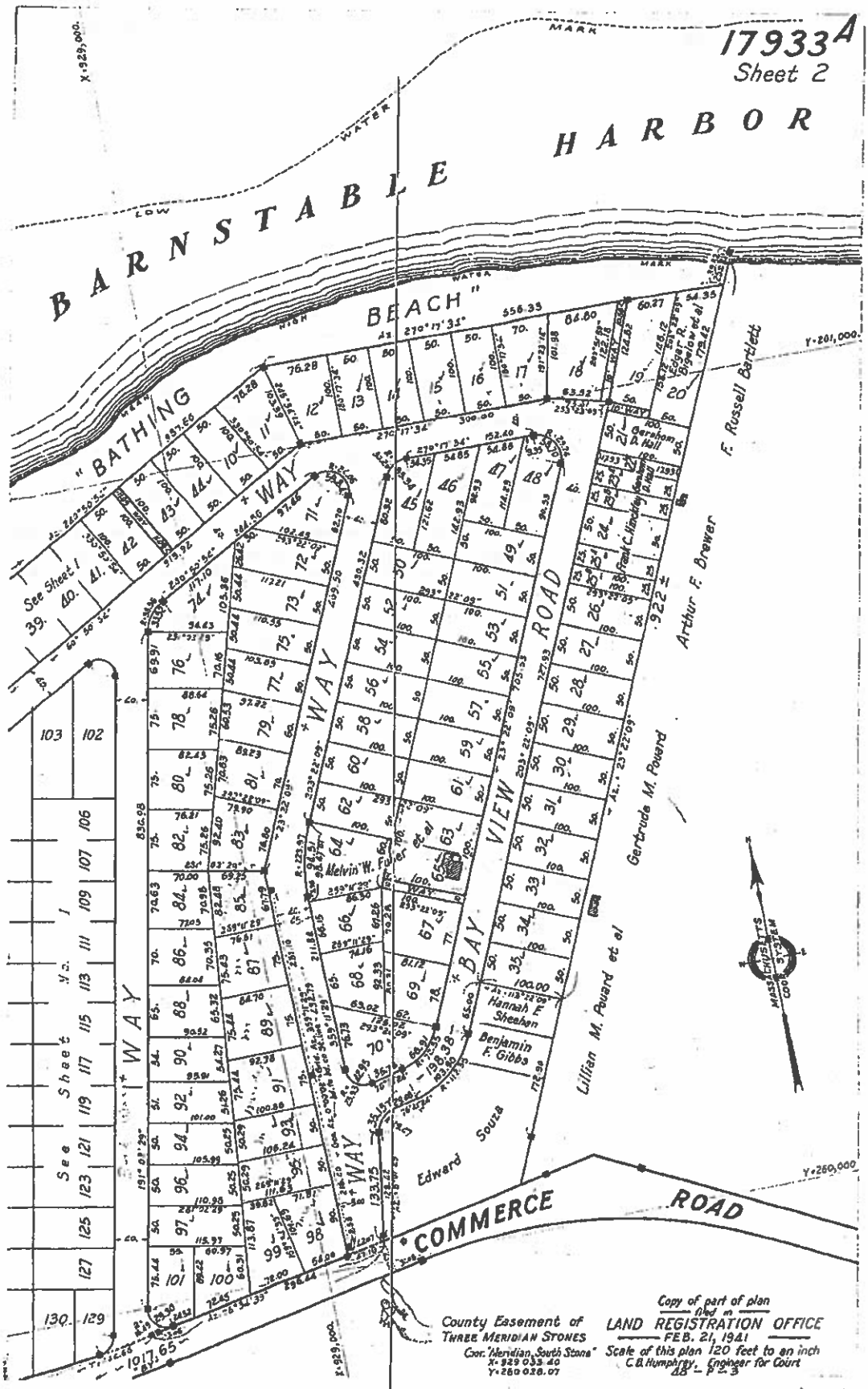


Copy of part of plan filed in
LAND REGISTRATION OFFICE
FEB. 21, 1941
Scale of this plan 120 feet to an inch
C.O. Humphrey, Engineer for Court
Ab-F-3

as to Sheet 1 only

BARNSTABLE COUNTY
REGISTRY OF DEEDS
A TRUE COPY, ATTEST

JOHN F. MEADE, REGISTER



cp to Sheet 2 only

BARNSTABLE COUNTY
REGISTRY OF DEEDS
A TRUE COPY, ATTEST

JOHN F. MEADE, REGISTER

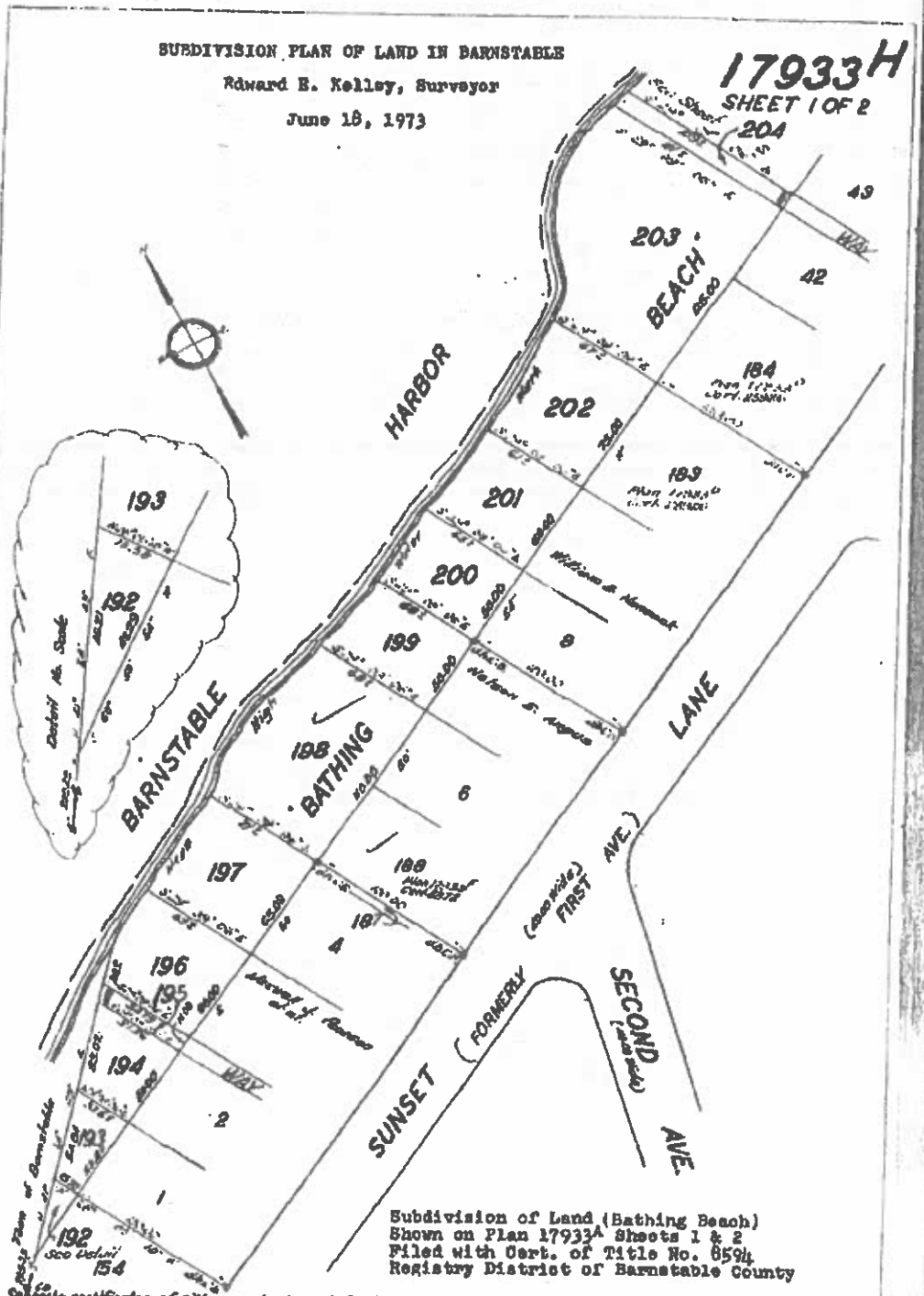
SUBDIVISION PLAN OF LAND IN BARNSTABLE

Edward E. Kelley, Surveyor

June 18, 1973

17933H

SHEET 1 OF 2



Subdivision of Land (Bathing Beach)
Shown on Plan 17933A Sheets 1 & 2
Filed with Cert. of Title No. 85914
Registry District of Barnstable County

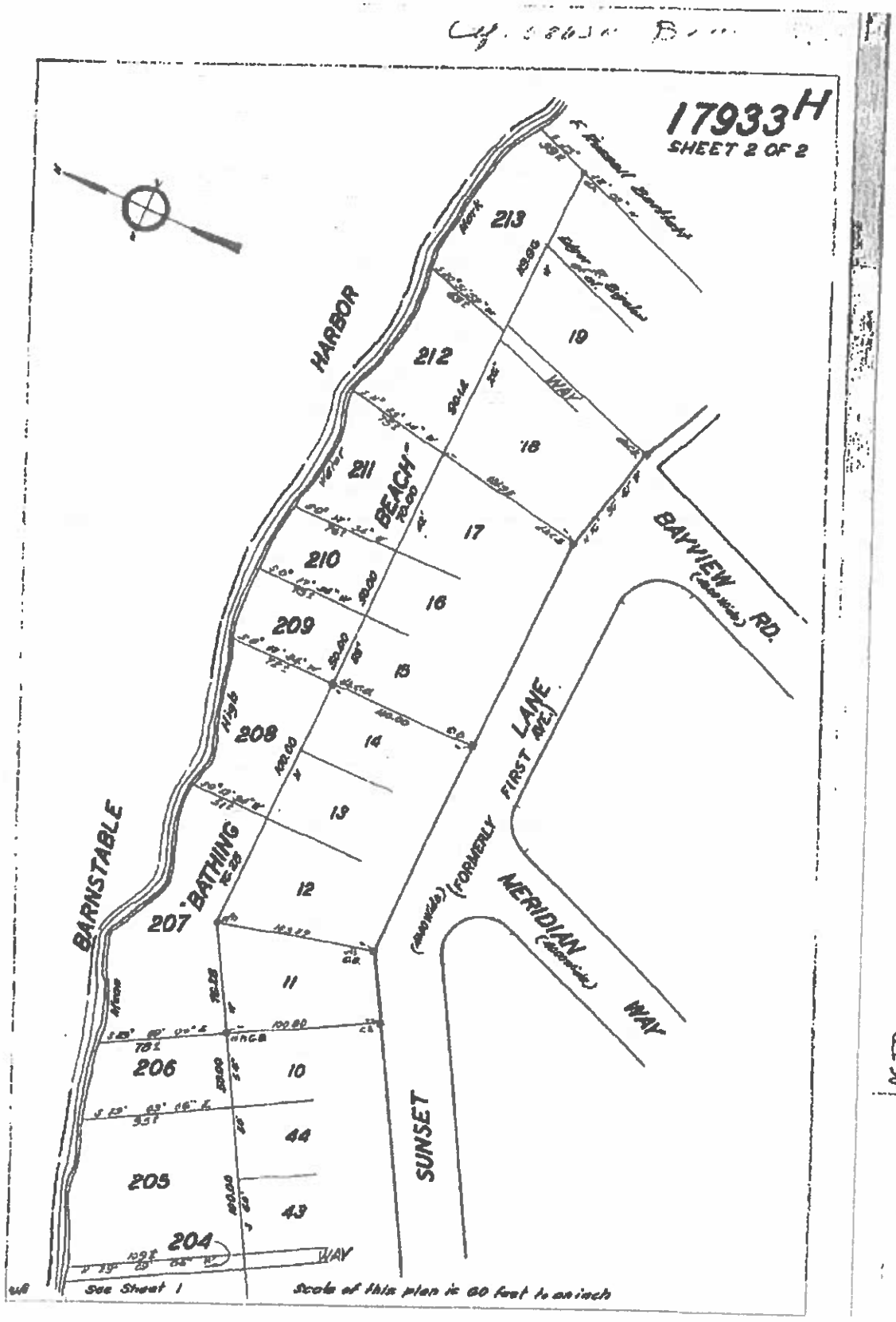
Separate certificates of title may be issued for land shown hereon and on Sheet 2 of this plan.
By the Court.

JULY 25 1973 Margaret M. Daley Recorder

Copy of part of plan filed in LAND REGISTRATION OFFICE
JULY 25, 1973
Scale of this plan 60 feet to an inch
R.L. Westbury, Engineer for Court

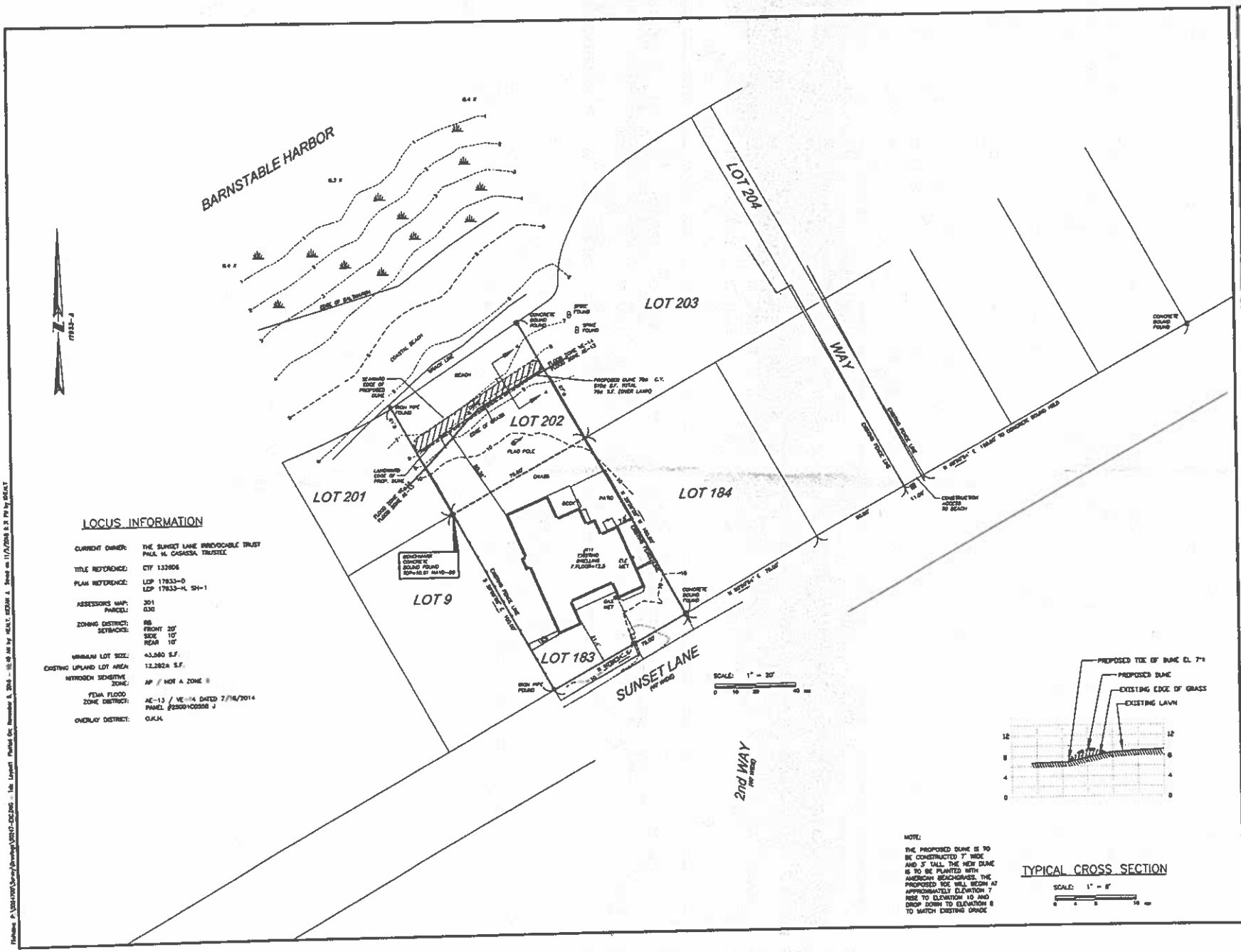
Form LC 5.5.1 (11)

OS TO SHEET 1 ONLY



ASTD
SHEET 2
ONLY

JOHN E. HADE, REGISTER



LOCUS INFORMATION

CURRENT OWNER:	THE SUNSET LANE IRREVOCABLE TRUST PAUL M. CASASSA, TRUSTEE
TITLE REFERENCE:	CTF 132606
PLAN REFERENCE:	LCP 17833-D LCP 17833-H, SH-1
ASSESSORS MAP: PARCEL:	301 030
ZONING DISTRICT: SETBACKS:	RB FRONT 20' SIDE 10' REAR 10'
MINIMUM LOT SIZE:	43,560 S.F.
EXISTING UPLAND LOT AREA	12,282± S.F.
NITROGEN SENSITIVE ZONE:	NP / NOT A ZONE II
FEMA FLOOD ZONE DISTRICT:	AE-13 / VE-14 DATED 7/16/2014 PANEL #25001C0558 J
OVERLAY DISTRICT:	O.V.H.

NOTE:
THE PROPOSED DUNE IS TO BE CONSTRUCTED 7' WIDE AND 3' TALL. THE NEW DUNE IS TO BE PLANTED WITH AMERICAN BEACHGRASS. THE PROPOSED TOE WILL BEGIN AT APPROXIMATELY ELEVATION 7 RISE TO ELEVATION 10 AND DROP DOWN TO ELEVATION 8 TO MATCH EXISTING GRADE

TYPICAL CROSS SECTION
SCALE: 1" = 8'

LOCUS MAP
NOT TO SCALE

CRAIG A. FIELD
PROFESSIONAL LAND SURVEYOR
11/6/18
DATE

PLAN OF LAND

111 SUNSET LANE
IN
BARNSTABLE
MASSACHUSETTS
(BARNSTABLE COUNTY)

DUNE INSTALLATION PLAN

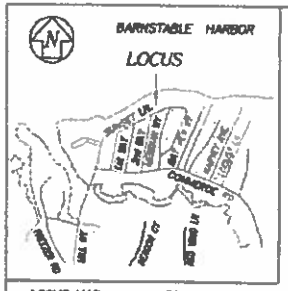
NOVEMBER 6, 2018

REVISIONS: NO.	DATE	DESC.

PREPARED FOR:
PAUL CASASSA
P.O. BOX 615
111 SUNSET LANE
BARNSTABLE, MA 02630-0615

BSC GROUP
349 Route 28, Unit D
W. Yarmouth, Massachusetts
02673
508 778 8919

SCALE: VARIES
FILE:
DWG. NO: 6548-01
JOB. NO: S-0247.00
SHEET 1 OF 1



CURRENT OWNERS:

121 SUNSET LANE
CHARLES V. AND SHEILA C. LEE
121 SUNSET LANE
BARNSTABLE, MA
PARCEL ID: 301/031/
OWNER'S REF: LCC 202096

133 SUNSET LANE
133 SUNSET LN AQUISITION LIMITED
150 ALHAMBRA CIRCLE, SUITE 1200
CORAL CABLES, FLORIDA
PARCEL ID: 319/022/
OWNER'S REF: LCC 211085

ZONE:
RESIDENCE DISTRICT B

PLAN REFERENCES:
1. LCP 17933 A
2. LCP 17933 D
3. LCP 17933 H

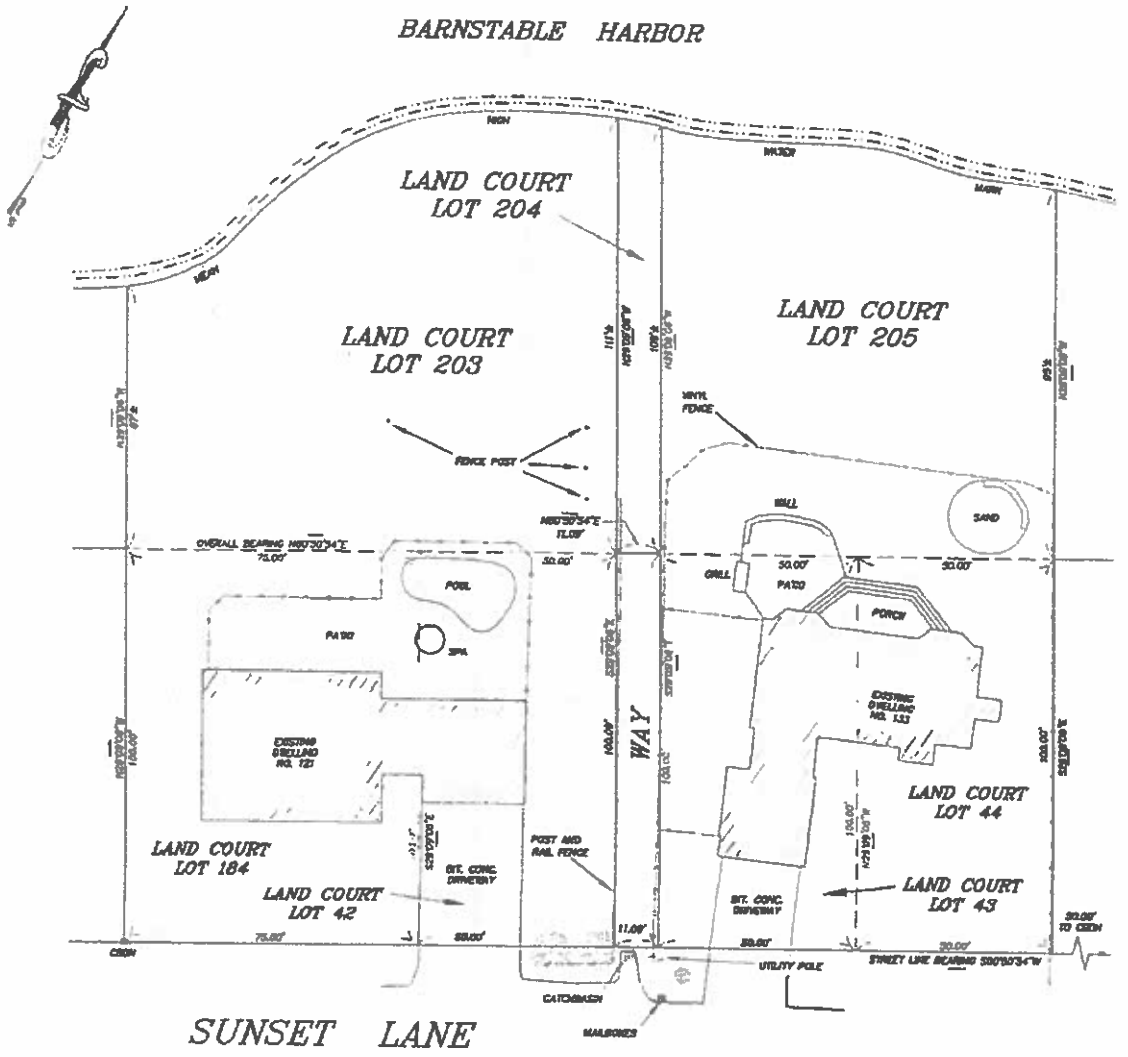
I CERTIFY THAT THIS PLAN IS THE RESULT OF AN ACTUAL ON THE GROUND SURVEY.

PETER G. HOYT P.L.S.

PETER G. HOYT No. 41600 REGISTERED LAND SURVEYOR

PLAN OF LAND
121 AND 133 SUNSET LANE
BARNSTABLE, MA.

SCALE 1" = 20' FEBRUARY 7, 2018



HOYT LAND SURVEYING
1287 WASHINGTON STREET
WEYMOUTH MA.02189
781-682-9192

Scale: 1"= 40'

0 20 40 60 80 100 FEET

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fax 508-362-9880
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down cape engineering, inc.
civil engineers
land surveyors
939 Main Street (Rte 6A)
YARMOUTHPORT MA 02675

DCE #22-281

SKETCH PLAN

IN

BARNSTABLE, MA

#133 SUNSET LANE

PREPARED FOR

ROBERT SKORUPA

SCALE: 1' = 40' DATE: 9-21-2022

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

BARNSTABLE, ss. Case No. 19 MISC 000013 (JSDR)

BRUCE T. RICHARDS, JANICE TREBBI RICHARDS, FREDERICK J. TIRRELL, as Trustee of the Frederick J. Tirrell Living Trust, RICHARD M. SMILEY, BARBARA A. THORNTON, ANN M. DEVLIN, KENNETH J. ROBINSON, LILLA F. ROBINSON, EDWARD VINCENT COSGROVE, ANN MARIE COSGROVE, MARILYN ANGUS QUINN, as Trustee of the Eleven Second Way Realty Trust, SUMMIT BARNSTABLE PARTNERS, LLC, GERALD J. LYONS, NANCY T. LYONS, JOSEPH F. DUGAS, EDITH W. DUGAS, DAVID F. ALBANESE, as Trustee of the David F. Albanese Trust, CHIP WESTHAVER, PATRICIA WESTHAVER, JOHN P. HOLLAND, MAUREEN FOLEY-HOLLAND, STEVE CARBONARO, EVA MARIE CARBONARO, WAYNE D. BASSETT and EVELYN G. BASSETT, as Trustees of Bassett Realty Trust,

Plaintiffs,

v.

PAUL C. CASASSA, JR., as Trustee of The Sunset Lane Irrevocable Trust,

Defendant.

MEMORANDUM OF DECISION ON CASE STATED

INTRODUCTION

Plaintiffs Bruce T. Richards, Janice Trebbi Richards, Frederick J. Tirrell, as Trustee of the Frederick J. Tirrell Living Trust, Richard M. Smiley, Barbara A. Thornton, Ann M. Devlin,

Kenneth J. Robinson, Lilla F. Robinson, Edward Vincent Cosgrove, Ann Marie Cosgrove, Marilyn Angus Quinn, as Trustee of the Eleven Second Way Realty Trust, Summit Barnstable Partners, LLC, Gerald J. Lyons, Nancy T. Lyons, Joseph F. Dugas, Edith W. Dugas, David F. Albanese, as Trustee of the David F. Albanese Trust, Chip Westhaver, Patricia Westhaver, John P. Holland, Maureen Foley-Holland, Steve Carbonaro, Eva Marie Carbonaro, and Wayne D. Bassett and Evelyn G. Bassett, as Trustees of Bassett Realty Trust, (collectively, "the Plaintiffs") all own inland lots in a subdivision, known now or formerly as Cobbs Village, located on the south shore of Barnstable Harbor in Barnstable Village on Cape Cod. Each has the right, as confirmed in their respective certificates of title, to the use of a bathing beach running the length of the subdivision as shown on various plans thereof ("the Bathing Beach"). Defendant Paul C. Casassa, Jr., as Trustee of The Sunset Lane Irrevocable Trust ("Mr. Casassa"), owns one lot that abuts the Bathing Beach and the portion of the Bathing Beach that immediately abuts that lot.

Plaintiffs filed this action on January 4, 2019. Thereafter, Plaintiffs filed an amended complaint on April 24, 2019 in which they sought, in Count II, a declaration that the maintenance of a flagpole and lawn and the proposed construction of an artificial dune within the boundaries of the Bathing Beach by Mr. Casassa and his predecessor interferes with the Plaintiffs' easement rights.[1]

After the close of discovery and the scheduling of a trial date, the parties agreed that the issues raised could be presented to the court on a case stated basis. Accordingly, the parties

[1] Count I asserts a claim for "interference with easement" by virtue of the existence of the flagpole and lawn and the proposed installation of a dune. This is more appropriately asserted as a claim of continuing trespass. See *Melrose Fish and Game Club, Inc. v. Tennessee Gas Pipeline Co.*, 89 Mass. App. Ct. 594, 602-603 (2016) ("Since the club continues to hold an easement over Cheever Avenue, the presence of TGP's facility blocking that easement constitutes a continuing trespass. See *Porter* v. *Clarendon Nat'l Ins. Co.*, 76 Mass. App. Ct. 655, 659, 925 N.E.2d 58 (2010) ('When a trespass is caused by the erection of a permanent structure, that trespass commences on a date certain, and the trespass continues as long as the offending structure remains')."). "The failure to remove the structure 'constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land.' Restatement (Second) of Torts § 161 comment b, at 289 (1965)." *Id.* at 603.

agreed upon the evidentiary record, consisting of 186 exhibits, and submitted briefs in support of their respective positions and in opposition to the opposing party's position. A view was taken on May 16, 2022 and oral arguments were held by videoconference on June 16, 2022. For the reasons set forth below, judgment will enter in favor of Plaintiffs on Count I and, on Count II, will enter declaring that the flagpole, the lawn and the proposed artificial dune interfere with the Plaintiffs' easement rights.

FACTS

The following facts are established in the record agreed to by the parties or are of such a nature that the court takes judicial notice of them.

The Parties' Certificates Of Title

1. Plaintiffs Bruce T. Richards and Janice Trebbi Richards are the owners of lots 115, 117 and 119 as shown on Land Court Plan ("LCP") 17933A and set forth in Certificate of Title ("CT") 110135, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 16.
2. Plaintiff Julie F. Tirrell for her life and plaintiff Frederick J. Tirrell as trustee of the Frederick J. Tirrell Living Trust u/d/t dated April 22, 2016 as to the remainder are the owners of lot 189 as shown on LCP 17933A and set forth in CT 209625, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 17.
3. Plaintiffs Richard M. Smiley and Barbara A. Thornton are the owners of lot 186 as shown on LCP 17933A and set forth in CT 195257, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 18.
4. Plaintiff Ann M. Devlin a/k/a Ann Galvani is the owner of lot 106 as shown on LCP 17933A and set forth in CT 222369 and lot 107 as shown on LCP 17933A and set forth in CT 222550, both of which certificates state that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Ex. 2.[2]
5. Plaintiffs Lilla F. Robinson and Kenneth J. Robinson, as trustees of the Robinson Revocable Trust u/d/t dated June 11, 2007, are the owners of lots 60 and 62 as shown on

[2] The court takes judicial notice of the records available at the Barnstable County Registry of Deeds ("Registry") and the Barnstable County Registry District ("the Registry District") to the extent not proffered by the parties in their joint submission of exhibits, including the two CTs referenced here.

LCP 17933A and set forth in CT 218592, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 20.

6. Plaintiffs Edward Vincent Cosgrove III and Ann Marie Cosgrove are the owners of lots 121 and 123 as shown on LCP 17933A and set forth in CT 79630, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 21.

7. Plaintiff Marilyn Angus Quinn, as trustee of Eleven Second Way Realty Trust u/d/t dated December 10, 2015, is the owner of lots 125 and 127 as shown on LCP 17933A and set forth in CT 208247, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 22.

8. Plaintiff Summit Barnstable Partners, LLC is the owner of lots 118 and 120 as shown on LCP 17933A and Lot 215 as shown on LCP 17933I, all as set forth in CT 216937, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 23.

9. Plaintiffs Gerald J. Lyons and Nancy T. Lyons are the owners of lot 29 as shown on LCP 17933A and lot 181 as shown on LCP 17933C, all as set forth in CT 194526, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 26.

10. Plaintiffs Joseph F. Dugas and Edith W. Dugas are the owners of lots 145 and 147 as shown on LCP 17933A and set forth in CT 114178, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 24.

11. Plaintiff David F. Albanese, trustee of the David F. Albanese Trust u/d/t dated November 21, 2006, is the owner of lots 45 and 46 as shown on LCP 17933A and set forth in CT 208288, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach for bathing purposes only in common with others entitled thereto." Exs. 2, 25.

12. Plaintiffs Chipman Westhaver and Patricia Westhaver are the owners of lots 71, 72, 73, 75, 77, and 79 as shown on LCP 17933A and set forth in CT 172559, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Exs. 2, 27.

13. Plaintiffs John P. Holland and Maureen Foley-Holland are the owners of lot 223 as shown on LCP 17933L and set forth in CT 177830, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Ex. 28.

14. Plaintiffs Stephen Carbonaro and Eva Marie Carbonaro are the owners of lot 150 as shown on LCP 17933A and set forth in CT 189841, which states that "[t]here is

appurtenant to said land … the right to use the bathing beach in common with others entitled thereto." Exs. 2, 29.

15. Plaintiffs Wayne D. Bassett and Evelyn G. Bassett, trustees of Bassett Realty Trust u/d/t dated February 11, 2013 are the owners of lots 94 and 96 and lots 93 and 95, all as shown on LCP 17933A and set forth in CT 199885 and CT 199886 respectively, which state that "[t]here is appurtenant to said land … the right to use the bathing beach in common with others entitled thereto." Exs. 2, 30.

16. Defendant Paul M. Casassa, Jr., as successor trustee of the Sunset Lane Irrevocable Trust u/d/t dated October 10, 1992, is the owner of lot 183 as shown on LCP 17933D and lot 202 as shown on LCP 17933H, as reflected in CT 132606, which states that "Lot 202 is subject to the rights set forth in Certificate of Title No. 10740, so far as in force and applicable." Exs. 3, 31.

The History Of Cobbs Village As Evidenced By Registry and Registry District Records

17. By deed dated November 24, 1928 and recorded in the Registry at Book 460, Page 365, Alfred Crocker conveyed the property owned by him abutting Barnstable Harbor to George Cobb and Elizabeth J. Cobb.

18. Thereafter, George Cobb and Elizabeth J. Cobb executed the following deeds:

    By deed dated September 14, 1929 to Benjamin F. Gibbs, recorded in the Registry at Book 471, Page 69, Ex. 173, lot 37 as shown on a plan entitled "Subdivision of land in Barnstable as surveyed for George Cobb. Sept. 1929" by Newell B. Snow, Engineer "to be filed"[3] ("the 1929 Plan"), which also appears on a plan entitled "Plan of Lots At Barnstable As Surveyed For George Cobb January 1932 Scale 1 inch – 50 feet" by Newell B. Snow, Engineer ("the 1932 Plan") recorded at Plan Book 45, Page 135, including "[t]he right to use the aforesaid land of the Grantors shown on said plan as 'Bathing Beach' for the purpose of bathing and boating;"

    By deed dated September 14, 1929 to Eva J. Bigelow and Edgar R. Bigelow, recorded in the Registry at Book 504, Page 527, Ex. 179, lot 20 on the 1929 Plan, which also appears on the 1932 Plan, including "[t]he right to use the aforesaid land of the Grantors shown on said plan as 'Bathing Beach' for the purpose of bathing and boating;"

    By deed dated September 14, 1929 to Nelson E. Angus, recorded in the Registry at Book 480, Page 585, Ex. 177, lot 7 as shown on the 1929 Plan, including "[t]he right to use the aforesaid land of the Grantors shown on said plan as 'Bathing Beach' for the purpose of bathing and boating;"

    By deed dated September 6, 1930 to Mary E. Emerton and Harry E. Emerton, recorded in the Registry at Book 476, Page 308, Ex. 174, lot E on a plan entitled

[3] There is no online record of the 1929 Plan being recorded at the Registry.

"Plan of lots in Barnstable belonging to George Cobb et al Sept. 1930 Scale 40' = 1", Newell B. Snow, Eng'r" ("the 1930 Plan") recorded in the Registry at Plan Book 42, Page 3, including "[t]he right to use that portion of the Grantors' land which is shown as 'Bathing Beach' [on the 1929 Plan] for the purpose of bathing and boating;"

By deed dated October 20, 1930 to Richard O. Edwards, recorded in the Registry at Book 477, Page 579, Ex. 175, lots A and B as shown on the 1930 Plan, including "[t]he right to use that portion of the Grantors' land which is shown as 'Bathing Beach' [on the 1929 Plan] for the purpose of bathing and boating;"

By deed dated October 25, 1930 to William B. Hancock and Alice H. Hancock, recorded in the Registry at Book 478, Page 36, Ex. 176, lot 9 as shown on the 1929 Plan, including "the right to use the aforesaid land of the Grantor shown on said plan as 'Bathing Beach' for the purpose of bathing and boating;"

By deed dated March 31, 1932 to Hannah Fay Sheehan, recorded in the Registry at Book 488, Page 350, Ex. 178, lot 36 as shown on the 1932 Plan, but without any express easement rights.

19. By deed dated July 20, 1932 and recorded in the Registry at Book 491, Page 36, George Cobb and Elizabeth J. Cobb conveyed to George H. Swift all of the remaining land conveyed to them by Alfred Crocker in 1928, excepting the land conveyed to Benjamin F. Gibbs, Mary E. and Harry E. Emerton, William B. and Alice H. Hancock, Nelson E. Angus, Richard O. Edwards, Eva J. and Edgar P. Bigelow, and Hannah F. Sheehan.

20. Thereafter, George H. Swift executed the following deeds:

By deed dated January 8, 1937 to Elizabeth J. Cobb, recorded in the Registry at Book 523, Page 246, as subsequently corrected by deed dated February 12, 1938 (recorded in the Registry at Book 537, Page 104), lots 34 and 35 as shown on the 1932 Plan, but without any express easement rights;

By deed dated June 26, 1939 to Clarence L. Dupee and Leontine M. Dupee, recorded in the Registry at Book 554, Page 18, the land shown on a plan entitled "Plan Of Land In Barnstable, Mass. Property Of Clarence L. Dupee et. ux. Scale 1 inch – 50 feet June 23, 1929 Whitney & Bassett – Architects & Engineers Hyannis, Mass." and recorded in Plan Book 60, Page 101, including "the right to use that portion of the grantor's land which is shown as 'Bathing Beach' on [the 1932 Plan]" (subsequently conveyed by Leontine M. Dupee[4] to George J. Schuman by deed dated October 19, 1945 and recorded in the Registry at Book 635, Page 20);

[4] One instrument of record names Leontine J. Dupee (see deed recorded at Book 597, Page 218). Four instruments of record identify her as Leontine M. Dupee (see instruments recorded at Book 554, Page 18; Book 554, Page 19 and Book 567, Page 76). The last instrument of record, recorded at Book 635, Page 20, identifies her as Leontine M. Dupee, also known as Leontine J. Dupee.

By deed dated December 30, 1939 to Elizabeth J. Cobb and recorded in the Registry at Book 561, Page 419, all of the remaining land conveyed by George Cobb and Elizabeth J. Cobb to George H. Swift in 1932, excepting the land conveyed to Benjamin F. Gibbs, Mary E. and Harry E. Emerton, William B. and Alice H. Hancock, Nelson E. Angus, Richard O. Edwards, Eva J. and Edgar P. Bigelow, Hannah F. Sheehan, Elizabeth J. Cobb and Clarence L. Dupee and Leontine Dupee.

21. Thereafter, Elizabeth J. Cobb executed the following deeds:

By deed dated March 11, 1940 to Maxwell J. Pearson and Dorothy M. Pearson, recorded in the Registry at Book 563, Page 363, Ex. 180, lot 3 as shown on a plan entitled "Plan of Land in Barnstable, Mass. Scale 1 inch equals 50 feet. August, 1939. Whitney & Bassett, Architects and Engineers, Hyannis, Mass." ("the 1939 Plan") (which appears to be the plan subsequently submitted to this court for registration), including "the right to use the beach, in common with all others entitled thereto;"

By deed dated May 31, 1940 to Clarence L. Dupee and Leontine M. Dupee, recorded in the Registry at Book 567, Page 76, lot 63 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto" (subsequently conveyed by Leontine M. Dupee to George J. Schuman by deed dated October 19, 1945 and recorded in the Registry at Book 635, Page 20);

By deed dated September 10, 1940 to Gershom D. Hall, recorded in the Registry at Book 570, Page 425, lots 21 and 24 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto" (lot 24 was subsequently conveyed by Gershom D. Hall to Frank C. Hinckley by deed dated June 3, 1941 and recorded in the Registry at Book 579, Page 325, together "with the right to use the beach, in common with the grantor and all others entitled thereto").

22. On February 20, 1941, Elizabeth J. Cobb recorded notice in the Registry at Book 576, Page 32, of her February 18, 1941 filing of a petition with the Land Court to register title to the real estate acquired by her from George H. Swift, less those lots previously conveyed.

23. Thereafter, Elizabeth J. Cobb executed the following deeds:

By deed dated September 10, 1942 to George L. Pendleton, recorded in the Registry at Book 595, Page 581, lot 154 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

By deed dated October 17, 1942 to Clarence L. Dupee and Leontine M. Dupee, recorded in the Registry at Book 597, Page 218, lot 64 as shown on the 1939 Plan,

including "the right to use the beach, in common with the grantor and all others entitled thereto" (subsequently conveyed by Leontine M. Dupee to George J. Schuman by deed dated October 19, 1945 and recorded in the Registry at Book 635, Page 20);

By deed dated October 1, 1943 to Anna S. Abercrombie, recorded in the Registry at Book 606, Page 570, lot 4 as shown on the 1939 Plan, including "the right to use the beach in common with the grantor, and all others entitled thereto;"

By deed dated June 29, 1944 to Frank C. Hinckley, recorded in the Registry at Book 620, Page 336, the southerly half of lot 23 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

By deed dated July 20, 1945 to Ruth M. Stokes, recorded at Book 630, Page 505, lot 2 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

By deed dated July 20, 1945 to Everett S. Olson and Lois E. Olson, recorded in the Registry at Book 630, Page 504, lot 1 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

By deed dated October 3, 1945 to Frank C. Hinckley, recorded in the Registry at Book 637, Page 163, the northerly half of lot 25 as shown on the 1939 Plan, but without any express easement rights.

24. By Stipulation filed May 5, 1942, Elizabeth J. Cobb and Edgar R. and Eva J. Bigelow ("the Bigelows"), the owners of lot 20 as shown on LCP 17933A, agreed that the Bigelows should have been named as respondents in the registration petition and that, among other things, the Bigelows were "entitled to the use of certain land on the beach, shown and designated on [the 1929 Plan] as 'Bathing Beach,' included in said petition, for bathing and boating privileges, all as set forth in their deed of ownership from the petitioner." Ex. 4.

25. On November 29, 1946, the Land Court issued a Decree of Registration in the name of Elizabeth J. Cobb, which decree was filed in the Registry District on December 5, 1946 in Registration Book 54, Page 54, and which registered the land shown on the 1939 Plan, now known as LCP 17933A, and filed with the Land Registration Office on February 21, 1941.

26. The Original Certificate Of Title issued in the name of Elizabeth J. Cobb, No. 8594, Ex. 5, contained the following provisions, among others:

    There is excepted and excluded from the operation of this decree lots 1, 2, 3, 4, 7, 9, 20, 21, 22, 23-A, 23-B, 24, 25-A, 63, 64, 65, 154 and E as shown on said plan,

together with the fee in the soil of the ways adjacent thereto to the middle line thereof.

So much of the land hereby registered as is included within the area marked "Bathing Beach", on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same.

There is appurtenant to the land hereby registered the right to use the private ways shown on said plan, and the right to use said "Bathing Beach" in common with others entitled thereto.

27. On November 29, 1946, the Land Court also issued decrees of registration in the names of George L. Pendleton (lot 154, CT 8596), Anna S. Abercrombie (lot 4, CT 8592) and Melvyn W. and Agnes A. Fuller (lot 64, CT 8597), each of which states that "[t]here is appurtenant to the land hereby registered ... the right to use the 'Bathing Beach' shown on said plan [LCP 17933A] in common with all others entitled thereto."

28. LCP 17933A shows a subdivision with 174 numbered lots and three lots designated by the letters A, B and E, abutted on the south by Commerce Road, on the west by Millway Road and land of the town of Barnstable, on the north by Barnstable Harbor and on the east by land of others. Ex. 2.

29. LCP 17933A also contains the names of the then-owners of each lot conveyed out by Elizabeth J. Cobb or George H. Swift prior to registration. Ex. 2.

30. LCP 17933A shows lots 1 through 9, 39 through 44, and 10 through 20 as abutting an area designated as "Bathing Beach" with three ten-foot wide ways between lots 2 and 3, 42 and 43, and 18 and 19 leading from ways within the subdivision to the Bathing Beach. Ex. 2.

31. LCP 17933A shows the Bathing Beach as abutting the mean high water mark of Barnstable Harbor. Ex. 2.

32. By deed dated December 9, 1946 and registered as Document No. 19,214, Elizabeth J. Cobb conveyed all of the land just registered in her name to Russell L. Jenkins, and CT 8607 issued in his name on December 10, 1946.

33. On December 10, 1946, an agreement between Elizabeth J. Cobb and Russell L. Jenkins, Document No. 19,215, was listed on the memorandum of encumbrances of CT 8607 under the terms of which Russell L. Jenkins was to pay Elizabeth J. Cobb 25% of the gross sale price of any property sold by him after deduction of certain expenses.

34. By Document No. 19,242 dated one week later, December 17, 1946, Elizabeth J. Cobb filed a notice of lis pendens regarding the filing of a petition to enjoin Russell L. Jenkins from conveying or encumbering the property described in CT 8607.

35. By deed dated January 16, 1947 and registered as Document No. 19,357, Russell L. Jenkins reconveyed to Elizabeth J. Cobb the property described in CT 8607, excepting also Lots A and B a shown on LCP 17933A.

36. On the same date, CT 8674 issued in the name of Elizabeth J. Cobb, containing the same language regarding the Bathing Beach as was contained in CT 8594.

37. By deed dated January 16, 1947 and registered as Document No. 19,358, Elizabeth J. Cobb conveyed lots 5, 6 and 10 through 15 to Gershom D. Hall, together "with the right to use the area marked 'Bathing Beach' on said plan, in common with others entitled thereto."

38. By deed dated February 14, 1947 and registered as Document No. 19,485, Elizabeth J. Cobb conveyed lot 18 as shown on LCP 17933A to Dorothy Denton, "together also with the use of the Bathing Beach, shown on said plan, in common with others entitled thereto."

39. By deed dated August 2, 1949 and filed with the Registry District as Document No. 24,686, Elizabeth J. Cobb conveyed the remaining land included in CT 8674 to Bowmar's, Inc. with the proviso that "[s]o much of the above described land as is included within the area marked 'Bathing Beach' on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same." Ex. 6.

40. On the same date, CT 10740 issued in the name of Bowmar's, Inc., containing the same language regarding the Bathing Beach as was contained in CT 8594. Ex. 7.

The Severance Of The Bathing Beach From The Remaining Lots

41. By deed dated December 2, 1949 and registered as Document No. 25,801, Bowmar's, Inc. conveyed thirty-nine lots to Louis A. Byrne (lots 8, 102-128, 133-134, 136, 138, 140, 142, 144, 146, 148, 150 and 152) "subject to the rights of all persons lawfully entitled thereto in the bathing beach as shown on said plan" and further providing that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on plan 17933-A (Sheets 1 and 2), and the bathing beach in common with the Grantor and all others now or here after lawfully entitled thereto."

42. On December 8, 1949, CT 11170 issued in the name of Louis A. Byrne with respect to those thirty-nine lots, noting that "[t]here is appurtenant to said lots the right to use the private ways shown on said plan and the right to use the bathing beach in common with others entitled thereto."

43. According to the memorandum of encumbrances to CT 11170, Louis A. Byrne conveyed lots 108 and 110 by Document No. 25,964 and lots 133 and 134 by Document No. 25,965 to U. Frederick Stobbart and Olive H. Stobbart, both on December 30, 1949.

44. The deed of lots 108 and 110 is not available online at the Registry District, but the deed of lots 133 and 134 is available and states that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on Plan

17933A (Sheets 1 and 2) and the 'bathing beach' as shown on said plan in common with the Grantor and all others now or hereafter lawfully entitled thereto. There is also granted as appurtenant to the two above described lots the right to use Lot 8 on Plan 17933A for access to 'bathing beach' and for bathing purposes in common with the Grantor and all others now or hereafter lawfully entitled thereto."

45. By deed dated May 5, 1950 and registered as Document No. 27,445, Bowmar's, Inc. conveyed forty-nine lots to Ellis G. Williams (lots 16-17, 19, 33, 45-49, 51, 53, 66-69, 70, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96-97, 101, 135, 137, 139, 141, 143, 155, 157, 159, 161, 163, 165, 167-169, 170-174) without reference to rights in the Bathing Beach.

46. CT 11775 issued to Ellis G. Williams on June 30, 1950 without reference to rights in the Bathing Beach.

47. By deed dated June 2, 1950 and registered as Document No. 27,186, Louis A. Byrne conveyed the remaining lots on CT 11170 to M. James Sproul and Maizie K. Sproul "subject to the rights of all person lawfully entitled thereto in the bathing beach shown on said plan," and further stating that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on plan 17933-A (Sheets 1 and 2) and the 'bathing beach' as shown on said plan, in common with the Grantor and all others now or hereafter lawfully entitled thereto."

48. By deed dated June 9, 1950 and registered as Document No. 27,363, Bowmar's, Inc. conveyed forty-five lots to M. James Sproul and Maizie K. Sproul (lots 25-29, 30-32, 39, 40-42, 50, 52, 54-59, 60-62, 71-73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 98-100, 129, 130-132, 153), with the provisos that "[s]o much of the above described lots as is included within the area marked 'Bathing Beach' on said plan is subject to the rights of all persons lawfully entitled thereto in and over the same" and that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on Plan 17933A (Sheets 1 and 2) and the 'bathing beach' as shown on said plan in common with the Grantor and all others now or hereafter lawfully entitled thereto."

49. By deed dated June 30, 1950 and registered as Document No. 27,444, Bowmar's, Inc. conveyed ten additional lots to M. James Sproul and Maizie K. Sproul (lots 145, 147, 149, 151, 156, 158, 160, 162, 164, 166), which deed states that "[t]here is appurtenant to the land herein conveyed rights of way over all the ways shown on said plan and the right to use the area marked 'Bathing Beach' in common with others entitled thereto."

50. By deed dated December 30, 1963 and registered as Document No. 87,342, Bowmar's, Inc. conveyed to James A. Mollineaux lots 43 and 44 as shown on LCP 17933A together with "the right to use 'Bathing Beach' in common with others entitled thereto."

51. By instrument of taking dated August 30, 1971 and registered against CT 10740, the town of Barnstable took the Bathing Beach for nonpayment of taxes. Ex. 8.

52. CT 10740 standing in the name of Bowmar's, Inc. remained open until April 10, 1973, when, for $5,000.00, Bowmar's, Inc. conveyed the Bathing Beach to G. Malcolm Hixon, Henry Curtis, J. Arthur Mollineaux, Russell A. Gibson, Edwin L. Rush, Lester Valente and Lester A. Nothnagle, Jr. ("the Hixon Parties") by deed registered as Document No. 174,554, "[s]ubject to encumbrances, easements, and right of way and use of record."

53. CT 58654, reflecting ownership of the Bathing Beach, issued to the Hixon Parties on May 23, 1973.

54. Also on that date, an instrument of redemption of the tax taking was filed as Document No. 174,553 and noted on CT 10740.

55. On July 25, 1973, the Land Court approved LCP 17933H, Ex. 3, being a subdivision of the Bathing Beach into twenty-two lots numbered 192 through 213.

56. LCP 17933H shows all of the lots thereon as abutting the mean high water mark of Barnstable Harbor to the north. Ex. 3.

57. By deeds all dated August 4, 1973, all with reference to lots shown on LCP 17933H, and all stating that "[s]aid land is subject to the rights set forth in Certificate 10740, so far as the same are in force and applicable," the Hixon Parties made the following conveyances, all for recited consideration of "less than one dollar," after which CT 58654 was canceled:

    To Shirley S. Nothnagle, by Document No. 177,759, lot 213;

    To Lester D. and Pauline A. Valente, by Document No. 177,760, lot 212;

    To Edwin L. and Phyllis B. Rush, by Document No. 177,761, lot 211;

    To Sidney R. And Ruth R. Miller, by Document No. 177,762, lot 210;

    To Roger E. and Marjorie Metcalfe, by Document No. 177,763, lot 209;

    To Gordon E. and Barbara C. Trask, by Document No. 177,764, lot 208;

    To Walter B. and Kathleen H. White, by Document No. 177,765, lot 207;

    To William J. and Eleen R. Coursey, by Document No. 177,766, lot 206;

    To J. Arthur and Shirley I. Mollineaux, by Document No. 177,767, lot 205;

    To Henry J. and Ruth Curtis, by Document No. 177,768, lot 204;

    To Henry J. and Ruth P. Curtis, by Document No. 177,769, lot 203;

    To Russell A. and Margaret E. Gibson, by Document No. 177,770, lot 202;

    To George H. Alexander, Jr., by Document No. 177,771, lot 201;

    To Earl S. and Mary Greene, by Document No. 177,772, lot 200;

To James T. and Evelyn A. Cranmer, by Document No. 177,773, lot 199;

To Ervina Sawin Marstin, by Document No. 177,774, lot 198;

To Virginia A. Hixon, by Document No. 177,775, lot 197;

To Maxwell J. and Dorothy Pearson, by Document No. 177,776, lot 196;

To Everett S. and Lois E. Olson and Maxwell J. and Dorothy Pearson, by Document No. 177,777, lot 195;

To Everett S. and Lois E. Olson, by Document No. 177,778, lot 194;

To Everett S. and Lois E. Olson, by Document No. 177,779, lot 193; and

To Hiram E. Smith, by Document No. 177,780, lot 192.

58. Lot 202 is shown on LCP 17933H as bounded northerly by the mean high water mark of Barnstable Harbor, easterly 67 feet +/- by lot 203, southerly 75 feet by lot 183, and westerly 61 feet +/- by lot 201. Ex. 3.

The Proposed Artificial Dune

59. In November 2018, Mr. Matthew Creighton, Sr. Associate/Coastal Scientist for BSC Group, Inc., West Yarmouth, Massachusetts, submitted a Notice Of Intent Application ("NOI") to the town of Barnstable Conservation Commission ("the Commission") on behalf of Mr. Casassa's predecessor to install, plant and maintain a coastal dune along the interface of what was described as "a coastal beach" and the lawn ("the Dune Project"). Ex. 10.

60. According to the project description contained in the NOI:

> The proposed project consists of the installation and maintenance of a Coastal Dune. Portions of the seaward edge of the lawn have eroded away in recent years due to winter storms. To protect the remaining lawn and property from further erosion, the owner is proposing the installation of the dune to cover the eroding edge of lawn and extending over a small section of beach. The proposed dune will be landward of the High Tide Line (HTL) at the property. There are no structures proposed within the aforementioned resource areas. A four-foot-wide path will be created through the middle of the dune to allow walking access from the lawn to the beach. The proposed due will be approximately 3 feet tall on either side of the pathway and 7 feet wide. The dune will be planted with American beachgrass (*Ammophila breviligulata*) upon completion. The proposed dune will cover 75 S.F. of seaward edge of the lawn, and the remaining 435 S.F. will be constructed on top of existing beach. Exs. 10, 11.

61. The Commission issued an order of conditions on December 4, 2018 ("Order Of Conditions"), recorded in the Registry District as Document No. 1,361,001. Ex. 12.

62. The Order Of Conditions approved the Dune Project, subject to conditions. Ex. 12.

63. Among other things, the Order Of Conditions "does not grant any property rights or any exclusive privileges; it does not authorize any injury to private property or invasion of private rights." Ex. 12 at 5.

The Current Condition Of Lot 202

64. The court conducted a view of lot 202 and the surrounding area on June 16, 2022, to which no objections were lodged and which is documented in 14 photographs marked as Ex. 186.

65. At the time of the view, surveyor's stakes delineated the four corners of lot 202 and the proposed location of the artificial dune that Mr. Casassa seeks to construct on lot 202.

66. Lot 183 and lot 202 are visually a single lot, with a split rail fence running in an unbroken line along the easterly and the westerly boundaries of the two lots.

67. As can be approximated from observations made at the view and from a plan in the record entitled "Plan Of Land 111 Sunset Lane in Barnstable Massachusetts Barnstable County Dune Installation Plan November 6, 2018 Prepared For Paul Casassa" ("Dune Installation Plan"), Ex. 9, the house on lot 183 sits roughly 15 feet from the southerly boundary of lot 202.

68. The lawn extends from lot 183 onto lot 202, covering approximately 75% of lot 202 before transitioning, in the final 15 feet or so, to approximately 10 feet of beach grass and then approximately five feet of sand before reaching the mean high water mark.

69. The rack line on the day of the view was southerly of the mean high water mark and ran along the edge of or encroached within the area dominated by beach grass at various points.

70. It appears that site conditions have changed since the creation of the Dune Installation Plan, as the mean high water line, as staked for the view, is closer to the location of the proposed dune than is shown on the Dune Installation Plan.

71. The lawn and an irrigation system were installed prior to Mr. Casassa's parents' acquisition of lot 202 and lot 183 in November 1976, Ex. 1 ¶ 37, and have remained in their current location ever since, leaving aside the lawn erosion described below. Ex. 1 ¶ 38.

72. From photographs in the record, it appears that part of the irrigation system, presumably previously located within the lawn area, is now located on the beach or coastal dune, presumably as a result of erosion of the lawn. Exs. 47-51.

There is a flagpole located on lot 202 approximately 12 feet from its southerly boundary, installed by Mr. Casassa's father shortly after acquiring lot 202 and lot 183, Ex. 1 ¶ 42, and having a footprint of approximately one square foot. Ex. 1 ¶ 43.

STANDARD OF REVIEW

"It is now provided that upon a case stated by agreement of the parties for the decision of the court in any action, any court before which the case may come, either in the first instance or upon review, is at liberty to draw from the facts and documents stated in the case any inferences of fact which might have been drawn therefrom at a trial, unless the parties expressly agree that no inference shall be drawn." Nolan & Henry, Civil Practice § 33.7 (3d ed. 2004), cited by *Town of Ware v. Town of Hardwick*, 67 Mass. App. Ct. 325, 326 (2006); accord *Gates v. Mountain View MHC, LLC*, 99 Mass. App. Ct. 1112, 2021 Mass. App. Unpub. LEXIS 132, at *10 n.9 ("Here, the case was tried by agreement on a 'case stated' basis, permitting the judge to draw inferences and conclusions from the stipulated facts and documents."), citing *Ware*. This standard stands in contrast to that employed with respect to motions for summary judgment, where the court must draw all reasonable inferences in favor of the opposing party. See *Carey v. New England Organ Bank*, 446 Mass. 270, 273-274 (2006) (in evaluating the factual record before it, court must "make all permissible inferences favorable to the nonmoving party ... and resolve any disputes or conflicts in the summary judgment materials in their favor."); *Eaton v. Federal Nat'l Mtge. Ass'n*, 93 Mass. App. Ct. 216, 218 (2018), quoting *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 248 n.4 (2010) (where both parties move for summary judgment, the evidence is viewed "in the light most favorable to the party against whom judgment is to enter.").

DISCUSSION

The issue presented by this case, and by a companion case between landowners in the same subdivision, *Tirrell v. 133 Sunset Ln Acquisition Limited*, Docket No. 20 MISC 000212, is whether the Plaintiffs' easement rights are such as to preclude all but passive uses of the Bathing Beach by its owners so as not to interfere with the Plaintiffs' rights. The law governing the

construction of express easements, as are in issue here, has been repeatedly stated: the goal is to ascertain the presumed intent of the grantor by reference, first and foremost, to the language of the grant and then, if necessary, to then existing circumstances. See *White v. Hartigan*, 464 Mass. 400, 410-411 (2013), quoting *Sheftel v. Lebel*, 44 Mass. App. Ct. 175, 179 (1998) ("The basic principle governing the interpretation of deeds is that their meaning, derived from the presumed intent of the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances."); *Adams v. Planning Bd.*, 64 Mass. App. Ct. 383, 389 (2005), quoting *Boudreau v. Coleman*, 29 Mass. App. Ct. 621, 629 (1990) (to determine the existence and attributes of a right of way, look "to the language of the parties regarding the creation of the easement or right of way, determined from 'the language of the instruments when read in light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.'").

Determining the rights granted to the Plaintiffs "also establish[es] the correlative rights of the owner of the servient estate and hence determine[s] whether a particular use by the servient owner is an inconsistent or materially interfering one." *Western Massachusetts Elec. Co. v. Sambo's of Massachusetts, Inc.*, 8 Mass. App. Ct. 815, 820 (1979). A "servient owner retains the use of this land for all purposes except such as are inconsistent with the right granted to the dominant owner." *Butler v. Haley Greystone Corp.*, 353 Mass. 252, 258 (1967). See also Restatement (Third) of Property: Servitudes § 4.9 (2000) ("Restatement") ("Except as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with the enjoyment of

the servitude.").[5] "In some cases where an easement is silent as to a particular use, the use itself is so clearly inconsistent with the easement that a general proscription evolves." *Western Massachusetts Elec. Co.*, 8 Mass. App. Ct. at 820-821 (collecting cases that preclude placing buildings under high voltage electric lines because of increased danger and difficulty of repair).

The burden of proving the existence, nature and extent of an express easement is on the party asserting the easement, here the Plaintiffs. *Hamouda v. Harris*, 66 Mass. App. Ct. 22, 24 n.1 (2006). However, "a deed is to be construed most strongly against the grantor," *Krinsky v. Hoffman*, 326 Mass. 683, 688 (1951), in this case, Mr. Casassa's predecessors insofar as he is the owner of lot 202. It also bears noting that, as a matter of construction, the common law of Massachusetts has historically favored freedom of land from servitudes. See *Martin v. Simmons Props., LLC,* 467 Mass. 1, 9 (2014) ("restrictions on land 'are disfavored,' *Patterson v. Paul,* [448 Mass. 658, 662 (2007)], and doubts concerning the rights of use of an easement 'are to be resolved in favor of freedom of land from servitude.' *Butler v. Haley Greystone Corp., supra.* "). In contrast, Restatement § 4.1, comment a., states that "[t]he rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often expressed view that servitudes should be narrowly construed to favor the free use of land. It is based in the recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources. The rule is supported by modern case law."

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[5] Restatement § 4.1 states:

> (1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was created.
> (2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred.

Turning first to the language of the grant, each of the Plaintiffs has "the right to use the bathing beach in common with others entitled thereto." See ¶¶ 1-15 *supra*. Mr. Casassa's lot 202 is "subject to the rights set forth in Certificate of Title No. 10740, so far as the same are in force and applicable," see ¶ 16 *supra*, including "the rights of all persons lawfully entitled thereto in and over the same." See ¶¶ 26, 40 *supra*. The grant is broad—"right to use"—but does not otherwise define its scope. In reaching this conclusion, the court rejects Mr. Casassa's argument that the easements at issue here—identical in language to the vast majority of easements granted over the Bathing Beach—are limited to "bathing purposes."[6]

Turning next to then-existing circumstances, the Registry records make clear that, shortly after acquiring Cobbs Village in 1928, George Cobb and his wife, Elizabeth, set out to create a multi-lot subdivision along the shore of Barnstable Harbor that had, as an amenity, a bathing beach. In years prior, a number of similar subdivisions had been created along the shores of Cape Cod.[7] The 1932 Plan expressly designates the area bounded southerly by lots 11 through 20 and northerly by the mean high water mark of Barnstable Harbor as "Bathing Beach." The 1932 Plan further shows a ten foot-wide way between lots 18 and 19 providing access to the Bathing Beach for owners of interior lots. The first seven deeds out from George and Elizabeth Cobb, with the exception of the 1932 deed to Hannah Fay Sheehan of lot 36, included in the conveyances the right to use the Bathing Beach for the purpose of "bathing and boating." See ¶

[6] Six deeds from George and Elizabeth J. Cobb between 1929 and 1930 limited the use of the Bathing Beach to "for purposes of bathing and boating." See ¶ 18 *supra*. One deed in 1949 is a grant "for access to 'bathing beach' and for bathing purposes." See ¶ 44 *supra*. No other grants are so limited.

[7] See e.g. *Hickey v. Pathways Association, Inc.*, 472 Mass. 735 (2015) (217 acre tract along the shore of Cape Cod Bay in Dennis first subdivided into 155 lots in 1917); *Houghton v. Johnson*, 71 Mass. App. Ct. 825 (2008) (111-lot subdivision created in 1924 abutting the high water mark in Eastham); *Cleveland v. Stinson*, 28 LCR 174 (2020) (16-lot subdivision created in or about 1923 abutting the beach in Harwichport) (Long, J.); *Denardo v. Bosworth*, 2015 Mass. LCR LEXIS 125 (2015) (38-lot subdivision created in 1925 along the shore of Cape Cod Bay in Sandwich) (Foster, J.); *Leahy v. Brown*, 16 LCR 586 (2008) (917-lot subdivision created in 1892 along the shore of Lewis Bay, where the developers marketed lots with ads specifically mentioning the beach as a "major selling point") (Sands, J.).

18 *supra*. During the two-year period when George H. Swift owned Cobbs Village, his one deed to a third party included "the right to use that portion of the grantor's land which is shown as 'Bathing Beach' on [the 1932 Plan]." See ¶ 20 *supra*. After George H. Swift reconveyed Cobbs Village to Elizabeth J. Cobb in 1939, every deed out from Elizabeth J. Cobb prior to the issuance of the Decree of Registration in 1946, with the exception of the 1945 deed of the northerly half of lot 25 to Frank C. Hinckley, included "the right to use the beach" in common with others entitled thereto. See ¶¶ 21, 23 *supra*.

Upon registration, Original Certificate of Title 8594 expressly recognized the rights over the Bathing Beach that had previously been granted ("So much of the land hereby registered as is included within the area marked 'Bathing Beach', on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same"), and the rights over the Bathing Beach that were appurtenant to the now-registered land ("There is appurtenant to the land hereby registered … the right to use said 'Bathing Beach' in common with others entitled thereto"). The registration plan, LCP 17933A, shows a multi-lot subdivision with 174 numbered lots and three lots designated by the letters A, B and E. As with the 1932 Plan, none of the lots on the north directly abuts the mean high water mark. Instead, those lots (1-9, 39-44 and 10-20) abut an area designated as "Bathing Beach" which in turns abuts the mean high water mark of Barnstable Harbor. LCP 17933A also shows three ten-foot ways providing access from ways within the subdivision to the Bathing Beach, the previously mentioned way between lots 18 and 19, and two additional ways between lots 2 and 3 and lots 42 and 43.

Leaving aside the conveyances of Cobbs Village back and forth between Elizabeth J. Cobb and Russell L. Jenkins, Elizabeth J. Cobb conveyed nine lots in 1947, all of which included the right to use the Bathing Beach. See ¶¶ 37-38 *supra*. Thereafter, in 1949, Elizabeth J. Cobb

conveyed her remaining land, then reflected on CT 8675, to Bowmar's, Inc., but subject to the rights of others in and over the Bathing Beach. See ¶ 39 *supra*. Bowmar's, Inc. was issued CT 10740, which carried forward the expressly recognized rights over the Bathing Beach that had previously been granted ("So much of the land herein registered as is included within the area marked 'Bathing Beach', on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same") and the rights over the Bathing Beach that were appurtenant to the now-registered land ("There is appurtenant to the land herein registered … the right to use said 'Bathing Beach' in common with others entitled thereto").

Over the course of two years, ending in 1950, see ¶¶ 41-49 *supra*, Bowmar's, Inc. conveyed out all of the land reflected in CT 10740 except (1) lot 43 and lot 44, which it conveyed out in 1963 together with the right to use the Bathing Beach, see ¶ 50 *supra*, and (2) the Bathing Beach, which was taken by the town of Barnstable for non-payment of real estate taxes in 1971. See ¶ 51 *supra*. Up to that time, there is no evidence that the developers of Cobbs Village intended that the Bathing Beach be owned by its abutters. In 1973, however, forty-five years after George Cobb and Elizabeth J. Cobb acquired and began developing Cobbs Villlage, the Hixon Parties bought the Bathing Beach for $5,000.00, created a plan subdividing the Bathing Beach into lots, and conveyed the newly created lots to its abutters for recited consideration of "less than one dollar." See ¶ 43 *supra*.

On this record, there is no doubt that the Plaintiffs have established, at a minimum, an express easement to use the Bathing Beach for customary beach activities. Such activities have variously been described as "bathing, sunbathing, picnicking and all recreational activities for which beach property is seasonally used," see *Ivons-Nispel, Inc. v. Lowe*, 347 Mass. 760, 761 (1964); "lying on blankets, sitting in chairs, sitting on the sand … kicking beach balls around …

[and] general beach activity," *Daley v. Swampscott*, 11 Mass. App. Ct. 822, 825 (1981); "usual beach activities [like] placing ... a beach towel or chair on the sand and sitting thereon to sunbathe or read with friends, building sandcastles, collecting seashells, playing ball games, swimming, boating, and walking," *Houghton v. Johnson*, 14 LCR 442, 443 (2006) (Long, J.), *aff'd*, 71 Mass. App. Ct. 825 (2008); and "swimming, sunbathing, picnicking, exploring rocks, and walking along the rocks," *Bagley v. Senn*, 2011 Mass. LCR LEXIS 7, at *53 (Piper, J.). See also *Holmes v. Zerendow*, 14 LCR 424 (2006) (Long, J.) ("The language 'usual and customary beach rights' can be presumed with reasonable certainty to mean normal beach activities such as swimming, boating and cookouts.").

It is also clear that rights over the Bathing Beach, appurtenant to the lots to be sold in Cobbs Village, were valuable to the developers of that property. See *Murphy v. Olsen*, 63 Mass. App. Ct. 417, 422 (2005) ("That the right to use the beach for their inland parcel was important to the [developers] is obvious, as such rights, or their absence, directly affected the value of their inland land."). Once the lots in Cobbs Village were sold off, however, the Bathing Beach was perceived to have little or no residual value to Bowmar's, Inc., having served its purpose as an amenity offered to prospective purchasers of interior lots. This is demonstrated by the facts (1) that, by 1963, Bowmar's, Inc. had conveyed out everything but the Bathing Beach, (2) that, by 1971, the Bathing Beach was taken by the town for non-payment of taxes, another possible indicator of Bowmar's, Inc.'s assessment of its value, and (3) that Bowmar's, Inc. sold the Bathing Beach to the Hixon Parties for $5,000.00 in 1973 (who then turned around and conveyed the now-subdivided Bathing Beach to the abutters for nominal consideration). For a similar analysis, see *Reagan v. Brissey*, 446 Mass. 452, 461 (2006) ("We also find it significant that, just two years after marketing the ... subdivision and selling individual lots for amounts ranging

approximately between $119 and $291, Luce's bankruptcy trustees sold the parks and avenues for five dollars. This conveyance demonstrates ... that that the parks and avenues were of little market worth as developable land").

Whatever limited value the Bathing Beach might have to Bowmar's, Inc., which no longer owned any other property on CT 10740, it did have value to its abutters, the owners of lots 1 to 9, 39 to 44 and 10 to 20 as shown on LCP 17933A, but not necessarily as land to be further developed in association with their abutting lots. So long as Bowmar's, Inc. (or its successor) owned the Bathing Beach, it could grant additional easements over the Bathing Beach to other parties. See *Cannata v. Berkshire Nat. Res. Council, Inc.*, 73 Mass. App. Ct. 789, 796 (2009), quoting *Deery v. Foster*, 15 Mass. App. Ct. 564, 569 (1983) ("The owner of a way, already subject to an easement, is free to grant additional easements 'so long as any subsequent easements [are] neither inconsistent with nor burden upon the [previously granted] easement.'"). By purchasing the fee in the Bathing Beach, the Hixon Parties prevented the creation of any additional easements over the Bathing Beach except those, if any, granted by them. That acquisition thus served to give the Hixon Parties control over further grants of beach rights on the property immediately adjacent to their lots. Given the encumbrances over it, ownership of the Bathing Beach was not likely to have been perceived as providing other benefits.

The broad language of the grant, in the context of the development of Cobbs Village, could be interpreted to require that the Bathing Beach be left in its natural state for the use of all the landowners within the subdivision. In other words, any use by the servient owners would be so clearly inconsistent with the purpose of the easement that a general proscription is appropriate. See *Western Massachusetts Elec. Co.*, 8 Mass. App. Ct. at 820-821. Such an interpretation is also more in keeping with the Restatement's view that easements should be

interpreted to carry out the intent of the parties, rather than that of Massachusetts common law that supports a narrow construction to foster the freedom of land from servitudes. The Restatement's view, however, has not been adopted in Massachusetts. Accordingly, the court declines to interpret the easements at issue here as resulting in a *per se* ban on any active use of the encumbered land by the servient owner.

There being no *per se* ban on the use of the Bathing Beach by the servient owner, the rights of the parties are governed by "[t]he general principle that, where the parties have not agreed otherwise, the servitude should be interpreted to reach a fair balance of their interests." Restatement § 4.10 comment h. This "leads to the rule that the easement holder may not use it in such a way as to interfere unreasonably with enjoyment of the servient estate." *Id.* An analysis under these principles leads to the same result as a *per se* ban on the facts presented here.

First, the court takes judicial notice of the fact of sea level rise as documented by, among others, the National Oceanic Atmospheric Administration ("NOAA"). See Sea Level Rise – Map Viewer, https://www.climate.gov/maps-data/dataset/sea-level-rise-map-viewer. As sea level rises in Barnstable Harbor, the mean high water mark moves south, shrinking the land area of the Bathing Beach. The assessor's map for the town of Barnstable, which shows significant stretches of the northerly boundary of the Bathing Beach under water, indicates that this may already be happening. *Marhefka v. Zoning Bd. of Appeals of Sutton*, 79 Mass. App. Ct. 515, 516 n.5 (2011) (taking judicial notice of the online database of the assessors for the town). The photographs in the record showing a portion of lot 202's irrigation system now located within the beach, presumably because of erosion of the lawn as referenced in the NOI, is further evidence of this. The view taken by the court confirmed that nearly the entirety of lot 202 has been incorporated into Mr. Casassa's lawn, leaving whatever area of the Bathing Beach that is not so

incorporated under water when the tides are at or above mean high. To allow Mr. Casassa to effectively remove from the Plaintiffs' use most of the southerly portion of the Bathing Beach at lot 202 means that the Bathing Beach is being impinged from both the north and the south at that point, with the result that it has disappeared entirely at certain tides.

Second, Mr. Casassa is not the only owner of a portion of the Bathing Beach to maintain structures within its boundaries. During the view, it was observed that other owners had installed rock rip-rap that appeared to be within the bounds of the Bathing Beach. The maintenance of other structures on other parts of the Bathing Beach further limits the available beach for the Plaintiffs and other easement holders and places more of a burden on owners of the Bathing Beach, if any, that do not do so.

Third, while this case presents a claim that Mr. Casassa has interfered with the Plaintiffs' easement rights by maintaining a flagpole and lawn, and potentially an artificial dune, within the boundaries of the Bathing Beach, the next case may be a claim by Mr. Casassa or one of the other owners of the Bathing Beach that easement holders have exceeded their rights, for example by storing boats and moorings within the boundaries of the Bathing Beach. For a case raising issues similar to those raised in the present case against the owner of the servient estate, see *Johnson v. Bohenko*, 24 LCR 596, 606 (2016) (Piper, J.) (easement allowing owners of lots in subdivision to use a beach "is in jeopardy when physical objects, including watercraft, are left for any length of time along the beach area burdened by the easement."). For examples of cases where the owner of the dominant estate has exceeded its rights, see *Town of Nantucket v. Lerner*, 17 LCR 220, 224 (2009) (Trombly, J.) (easement "for the purposes of bathing and boating" was "not sufficient to construe an intent to convey the right to build structures related to … boating on the servient estate"); *Sullivan v. Dart*, 17 LCR 543, 553 (2009) (Sands, J.) (easement for

"boating, bathing and other recreational facilities" did not include the right to store a dinghy or kayak on the servient estate). This again suggests that the Bathing Beach should be left in its natural state for the benefit of all having an interest in it, with neither the dominant nor the servient owners having the right to do otherwise.

Finally, the fact that all the property here is registered matters. Were that not so, Mr. Casassa and his predecessors are likely to have long since extinguished the Plaintiffs' and others' easement rights over the bulk of lot 202. See Restatement § 7.7 ("To the extent that a use of property violates a servitude burdening the property and the use is maintained adversely to a person entitled to enforce the servitude for the prescriptive period, that person's beneficial interest in the servitude is modified or extinguished."). That is not possible with registered land. *Lasell College v. Leonard*, 32 Mass. App. Ct. 383, 390 (1992) ("a registered easement may not be extinguished by adverse possession"). Similarly, the Plaintiffs would likely have established prescriptive rights over the flats, title to which presumptively followed the upland, here the Bathing Beach lots. See *Loiselle v. Hickey*, 93 Mass. App. Ct. 644, 648 (2018) ("Although title to the upland portion of shoreland property can be severed from the title to the flats, this generally must be done expressly, that is, through the use of 'excluding words.'"). That also is not possible with registered land. As a result, the Plaintiffs' rights over the flats are those reserved by the Colonial Ordinance, an "easement of the public for the purposes of navigation and fishing and fowling, and of passing feely over and through the water without any use of the land underneath, wherever the tide ebbs and flows." *Arno v. Commonwealth*, 457 Mass. 434, 455 (2010). Those rights do not include:

> a right to use for bathing purposes, as these words are commonly understood, that part of the beach or shore above low water mark, where the distance to high water mark does not exceed one hundred rods, whether covered with water or not. It is plain, we think, that under the law of Massachusetts there is no reservation or recognition of bathing on the

> beach as a separate right of property in individuals or the public under the colonial ordinance.

Butler v. Attorney General, 195 Mass. 79, 83-84 (1907). Accord *Town of Wellfleet v. Glaze*, 403 Mass. 79, 85 (1988) ("While the public clearly has the right to take shellfish on tidal flats, there is no general right in the public to pass over the land, or to use it for bathing purposes.") (citations omitted). To allow Mr. Casassa to effectively preclude the Plaintiffs' use of lot 202—and that is what the lawn and proposed artificial dune plainly do—leaves Plaintiffs with only the rights available to the general public over the flats. That is clearly contrary to the original intent of the developers of Cobbs Village.

Based on these factors, this court concludes that the fair balance of the parties' interests is achieved by restoring the Bathing Beach at lot 202, what is left of it, to its natural state.

CONCLUSION

For the reasons set forth above, judgment shall issue on Count I in favor of plaintiffs, the maintenance of the flagpole and lawn on lot 202 constituting a continuing trespass, and on Count II, declaring that the flagpole, the lawn and the proposed artificial dune interfere with the Plaintiffs' easement rights. The court declines to order that the flagpole, the intrusion of which on Plaintiffs' rights is *de minimis*, or the lawn be removed, but will instead order that the lawn no longer be maintained and that it be allowed to return to its natural state and that the flagpole be removed at the end of its useful life.

SO ORDERED.

By the Court (Roberts, J.)
/s/ Jennifer S.D. Roberts

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: October 21, 2022.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

BARNSTABLE, ss.

Case No. 19 MISC 000013 (JSDR)

BRUCE T. RICHARDS, JANICE TREBBI RICHARDS, FREDERICK J. TIRRELL, as Trustee of the Frederick J. Tirrell Living Trust, RICHARD M. SMILEY, BARBARA A. THORNTON, ANN M. DEVLIN, KENNETH J. ROBINSON, LILLA F. ROBINSON, EDWARD VINCENT COSGROVE, ANN MARIE COSGROVE, MARILYN ANGUS QUINN, as Trustee of the Eleven Second Way Realty Trust, SUMMIT BARNSTABLE PARTNERS, LLC, GERALD J. LYONS, NANCY T. LYONS, JOSEPH F. DUGAS, EDITH W. DUGAS, DAVID F. ALBANESE, as Trustee of the David F. Albanese Trust, CHIP WESTHAVER, PATRICIA WESTHAVER, JOHN P. HOLLAND, MAUREEN FOLEY-HOLLAND, STEVE CARBONARO, EVA MARIE CARBONARO, WAYNE D. BASSETT and EVELYN G. BASSETT, as Trustees of Bassett Realty Trust,

Plaintiffs,

v.

PAUL C. CASASSA, JR., as Trustee of The Sunset Lane Irrevocable Trust,

Defendant.

JUDGMENT

Plaintiffs Bruce T. Richards, Janice Trebbi Richards, Frederick J. Tirrell, as Trustee of the Frederick J. Tirrell Living Trust, Richard M. Smiley, Barbara A. Thornton, Ann M. Devlin,

Kenneth J. Robinson, Lilla F. Robinson, Edward Vincent Cosgrove, Ann Marie Cosgrove, Marilyn Angus Quinn, as Trustee of the Eleven Second Way Realty Trust, Summit Barnstable Partners, LLC, Gerald J. Lyons, Nancy T. Lyons, Joseph F. Dugas, Edith W. Dugas, David F. Albanese, as Trustee of the David F. Albanese Trust, Chip Westhaver, Patricia Westhaver, John P. Holland, Maureen Foley-Holland, Steve Carbonaro, Eva Marie Carbonaro, and Wayne D. Bassett and Evelyn G. Bassett, as Trustees of Bassett Realty Trust, (collectively, "the Plaintiffs") all own inland lots in a subdivision, known now or formerly as Cobbs Village, located on the south shore of Barnstable Harbor in Barnstable Village on Cape Cod. Each has the right, as confirmed in their respective certificates of title, to the use of a bathing beach running the length of the subdivision as shown on various plans thereof ("the Bathing Beach"). Defendant Paul C. Casassa, Jr., as Trustee of The Sunset Lane Irrevocable Trust ("Mr. Casassa"), owns one lot that abuts the Bathing Beach and the portion of the Bathing Beach, shown as lot 202 on Land Court Plan 17933H ("Lot 202"), immediately abutting it.

Plaintiffs filed this action on January 4, 2019. Thereafter, Plaintiffs filed an amended complaint on April 24, 2019 ("the Amended Complaint") in which they asserted, in Count I, a claim for interference with their easement rights and sought, in Count II, a declaration that the maintenance of a flagpole and lawn and the proposed construction of an artificial dune within the boundaries of Lot 202 by Mr. Casassa and his predecessor interferes with the Plaintiffs' easement rights. In accordance with the memorandum of decision of even date issued by the court, it is hereby

ORDERED and **ADJUDGED** on Count I of the Amended Complaint that the maintenance of the flagpole and lawn on Lot 202 constitutes a continuing trespass against the Plaintiffs' easement rights;

And it is further

ORDERED, **ADJUDGED** and **DECLARED** on Count II of the Amended Complaint that the flagpole, the lawn and the proposed artificial dune on Lot 202 interfere with the Plaintiffs' easement rights;

And it is further

ORDERED that the lawn on Lot 202 no longer be maintained and that it be allowed to return to its natural state and that the flagpole on Lot 202 no longer be maintained and be removed at the end of its useful life;

And it is further

ORDERED and **ADJUDGED** that this Judgment is a full adjudication of the parties' claims in this case, all claims not addressed in the preceding paragraphs are dismissed with prejudice and all prayers for relief by any party to this action that are not granted in the preceding paragraphs are denied;

And it is further

ORDERED that the Assistant Recorder of the Barnstable County Registry District is to register and note this Judgment on Certificate of Title No. 132606.

SO ORDERED.

By the Court (Roberts, J.)

/s/ Jennifer S.D. Roberts

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: October 21, 2022.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

BARNSTABLE, ss.

Case No. 20 MISC 000212 (JSDR)

FREDERICK J. TIRRELL, BRUCE T. RICHARDS, EDWARD V. COSGROVE, BARBARA A. THORNTON and GERALD LYONS,

Plaintiffs,

v.

133 SUNSET LN ACQUISITION LIMITED and MARK SCOTT, individually,

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs Frederick J. Tirrell, Bruce T. Richards, Edward V. Cosgrove, Barbara A. Thornton and Gerald Lyons (collectively, "the Plaintiffs") all own inland lots in a subdivision, known now or formerly as Cobbs Village, located on the south shore of Barnstable Harbor in Barnstable Village on Cape Cod. Each has the right, as confirmed in their respective certificates of title, to the use of a bathing beach running the length of the subdivision as shown on various plans thereof ("the Bathing Beach"). Defendant 133 Sunset Ln Acquisition Limited ("133 Sunset") owns two lots that abut the Bathing Beach and the portion of the Bathing Beach that abuts those two lots. Defendant Mark S. Scott ("Mr. Scott") is the sole director of 133 Sunset. Plaintiffs filed this action on June 10, 2020, seeking, in Count II, a declaration that the

maintenance of a patio, firepit and vinyl fence within the boundaries of the Bathing Beach by 133 Sunset and Mr. Scott interferes with the Plaintiffs' easement rights.[1]

Plaintiffs filed Plaintiffs' Motion For Summary Judgment ("the Motion") and supporting papers on April 13, 2021, before the close of discovery. 133 Sunset and Mr. Scott filed Defendants' Opposition To Plaintiffs' Motion For Summary Judgment, Defendants' Cross Motion ("the Cross-Motion") and supporting papers on August 2, 2021. A hearing was held on the Motion and on the Cross-Motion on January 5, 2022, after which the parties filed supplemental briefs on February 4, 2022. At the request of 133 Sunset and Mr. Scott, a further hearing was held on May 6, 2022, after which they were given the opportunity to supplement the record with evidence regarding the patio, firepit and vinyl fence. In addition, at the court's request, the record was supplemented with a survey plan on October 12, 2022. For the reasons set forth below, the Motion is DENIED and the Cross-Motion is ALLOWED.

UNDISPUTED FACTS

The following facts established in the record are undisputed or are deemed admitted, or are facts of which the court takes judicial notice.

The Parties' Certificates Of Title

1. Plaintiffs Bruce T. Richards and Janice Trebbi Richards are the owners of lots 115, 117 and 119 as shown on Land Court Plan ("LCP") 17933A and set forth in Certificate of Title ("CT") 110135, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." Appendix of Exhibits With Respect To Plaitiffs' [sic] Motion For Summary Judgment ("P. App."), Exs. A, D.

[1] Count I asserts a claim for "interference with easement" by virtue of the existence of the patio, firepit and vinyl fence. This is more appropriately asserted as a claim of continuing trespass. See *Melrose Fish and Game Club, Inc. v. Tennessee Gas Pipeline Co.*, 89 Mass. App. Ct. 594, 602-603 (2016) ("Since the club continues to hold an easement over Cheever Avenue, the presence of TGP's facility blocking that easement constitutes a continuing trespass. See *Porter* v. *Clarendon Nat'l Ins. Co.*, 76 Mass. App. Ct. 655, 659, 925 N.E.2d 58 (2010) ('When a trespass is caused by the erection of a permanent structure, that trespass commences on a date certain, and the trespass continues as long as the offending structure remains')."). "The failure to remove the structure 'constitutes a continuing trespass for the entire time during which the thing is wrongfully on the land.' Restatement (Second) of Torts § 161 comment b, at 289 (1965)." *Id.* at 603.

2. Plaintiff Julie F. Tirrell for her life and plaintiff Frederick J. Tirrell as trustee of the Frederick J. Tirrell Living Trust u/d/t dated April 22, 2016 as to the remainder are the owners of lot 189 as shown on LCP 17933A and set forth in CT 168415,[2] which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." P. App. Exs. A, C.

3. Plaintiff Barbara A. Thornton is, with her husband, the owner of lot 186 as shown on LCP 17933A and set forth in CT 195257, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." P. App. Exs. A, F.

4. Plaintiffs Edward Vincent Cosgrove III and Ann Marie Cosgrove are the owners of lots 121 and 123 as shown on LCP 17933A and set forth in CT 79630, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." P. App. Exs. A, E.

5. Plaintiffs Gerald J. Lyons and Nancy T. Lyons are the owners of lot 29 as shown on LCP 17933A and lot 181 as shown on LCP 17933C, all as set forth in CT 194526, which states that "[t]here is appurtenant to said land ... the right to use the bathing beach in common with others entitled thereto." P. App. Exs. A, G, K.

6. Defendant 133 Sunset is the owner of lots 43 and 44 as shown on LCP 17933A and lot 205 as shown on LCP 17933H, all as set forth in CT 211085, which states that "[s]aid Lot 205 is subject to the rights set forth in Certificate of Title No. 10740, so far as the same are in force and applicable" ("the 133 Sunset Property"). P. App. Exs. A, B; Defendants' Appendix of Additional Exhibits of Material Fact ("D. App.") pp. 16-21.

The History Of Cobbs Village As Evidenced By Registry and Registry District Records

7. By deed dated November 24, 1928 and recorded in the Registry at Book 460, Page 365, Alfred Crocker conveyed the property owned by him abutting Barnstable Harbor to George Cobb and Elizabeth J. Cobb.

8. Thereafter, George Cobb and Elizabeth J. Cobb executed the following deeds:

   By deed dated September 14, 1929 to Benjamin F. Gibbs, recorded in the Registry at Book 471, Page 69, lot 37 as shown on a plan entitled "Subdivision of land in Barnstable as surveyed for George Cobb. Sept. 1929" by Newell B. Snow, Engineer "to be filed"[3] ("the 1929 Plan"), which also appears on a plan entitled "Plan of Lots At Barnstable As Surveyed For George Cobb January 1932 Scale 1 inch – 50 feet" by Newell B. Snow, Engineer ("the 1932 Plan") recorded at Plan

[2] To the extent not offered by the parties, the court takes judicial notice of the records available at the Barnstable County Registry of Deeds ("the Registry") and the Barnstable County Registry District ("Registry District"). See Mass. G. Evid. § 201. All references to recording information herein are to the records of the Registry or the Registry District.

[3] There is no online record of the 1929 Plan being recorded at the Registry.

Book 45, Page 135, including "[t]he right to use the aforesaid land of the Grantors shown on said plan as 'Bathing Beach' for the purposes of bathing and boating;"

By deed dated September 14, 1929 to Eva J. Bigelow and Edgar R. Bigelow, recorded in the Registry at Book 504, Page 527, lot 20 on the 1929 Plan, which also appears on the 1932 Plan, including "[t]he right to use the aforesaid land of the Grantors shown on said plan as 'Bathing Beach' for the purpose of bathing and boating;"

By deed dated September 14, 1929 to Nelson E. Angus, recorded in the Registry at Book 480, Page 585, lot 7 as shown on the 1929 Plan, including "[t]he right to use the aforesaid land of the Grantors shown on said plan as 'Bathing Beach' for the purpose of bathing and boating;"

By deed dated September 6, 1930 to Mary E. Emerton and Harry E. Emerton, recorded in the Registry at Book 476, Page 308, lot E on a plan entitled "Plan of lots in Barnstable belonging to George Cobb et al Sept. 1930 Scale 40' = 1", Newell B. Snow, Eng'r" ("the 1930 Plan") recorded in the Registry at Plan Book 42, Page 3, including "[t]he right to use that portion of the Grantors' land which is shown as 'Bathing Beach' [on the 1929 Plan] for the purpose of bathing and boating;"

By deed dated October 20, 1930 to Richard O. Edwards, recorded in the Registry at Book 477, Page 579, lots A and B as shown on the 1930 Plan, including "[t]he right to use that portion of the Grantors' land which is shown as 'Bathing Beach' [on the 1929 Plan] for the purpose of bathing and boating;"

By deed dated October 25, 1930 to William B. Hancock and Alice H. Hancock, recorded in the Registry at Book 478, Page 36, lot 9 as shown on the 1929 Plan, including "the right to use the aforesaid land of the Grantor shown on said plan as 'Bathing Beach' for the purpose of bathing and boating;"

By deed dated March 31, 1932 to Hannah Fay Sheehan, recorded in the Registry at Book 488, Page 350, lot 36 as shown on the 1932 Plan, but without any express easement rights.

9. By deed dated July 20, 1932 and recorded in the Registry at Book 491, Page 36, George Cobb and Elizabeth J. Cobb conveyed to George H. Swift all of the remaining land conveyed to them by Alfred Crocker in 1928, excepting the land conveyed to Benjamin F. Gibbs, Mary E. and Harry E. Emerton, William B. and Alice H. Hancock, Nelson E. Angus, Richard O. Edwards, Eva J. and Edgar P. Bigelow, and Hannah F. Sheehan.

10. Thereafter, George H. Swift executed the following deeds:

By deed dated January 8, 1937 to Elizabeth J. Cobb, recorded in the Registry at Book 523, Page 246, as subsequently corrected by deed dated February 12, 1938

(recorded in the Registry at Book 537, Page 104), lots 34 and 35 as shown on the 1932 Plan, but without any express easement rights;

By deed dated June 26, 1939 to Clarence L. Dupee and Leontine M. Dupee, recorded in the Registry at Book 554, Page 18, the land shown on a plan entitled "Plan Of Land In Barnstable, Mass. Property Of Clarence L. Dupee et. ux. Scale 1 inch – 50 feet June 23, 1929 Whitney & Bassett – Architects & Engineers Hyannis, Mass." and recorded in Plan Book 60, Page 101, including "the right to use that portion of the grantor's land which is shown as 'Bathing Beach' on [the 1932 Plan]" (subsequently conveyed by Leontine M. Dupee[4] to George J. Schuman by deed dated October 10, 1945 and recorded in the Registry at Book 635, Page 20);

By deed dated December 30, 1939 to Elizabeth J. Cobb, recorded in the Registry at Book 561, Page 419, all of the remaining land conveyed by George Cobb and Elizabeth J. Cobb to George H. Swift in 1932, excepting the land conveyed to Benjamin F. Gibbs, Mary E. and Harry E. Emerton, William B. and Alice H. Hancock, Nelson E. Angus, Richard O. Edwards, Eva J. and Edgar P. Bigelow, Hannah F. Sheehan, Elizabeth J. Cobb and Clarence L. Dupee and Leontine Dupee.

11. Thereafter, Elizabeth J. Cobb executed the following deeds:

By deed dated March 11, 1940 to Maxwell J. Pearson and Dorothy M. Pearson, recorded in the Registry at Book 563, Page 363, lot 3 as shown on a plan entitled "Plan of Land in Barnstable, Mass. Scale 1 inch equals 50 feet. August, 1939. Whitney & Bassett, Architects and Engineers, Hyannis, Mass." ("the 1939 Plan") (which appears to be the plan subsequently submitted to this court for registration), including "the right to use the beach, in common with all others entitled thereto;"

By deed dated May 31, 1940 to Clarence L. Dupee and Leontine M. Dupee, recorded in the Registry at Book 567, Page 76, lot 63 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto" (subsequently conveyed by Leontine M. Dupee to George J. Schuman by deed dated October 10, 1945 and recorded in the Registry at Book 635, Page 20);

By deed dated September 10, 1940 to Gershom D. Hall, recorded in the Registry at Book 570, Page 425, lots 21 and 24 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto" (lot 24 was subsequently conveyed by Gershom D. Hall to Frank C. Hinckley by

[4] One instrument of record names Leontine J. Dupee (see deed recorded at Book 597, Page 218). Four instruments of record identify her as Leontine M. Dupee (see instruments recorded at Book 554, Page 18; Book 554, Page 19 and Book 567, Page 76). The last instrument of record, recorded at Book 635, Page 20, identifies her as Leontine M. Dupee, also known as Leontine J. Dupee.

deed dated June 3, 1941 and recorded in the Registry at Book 579, Page 325, together "with the right to use the beach, in common with the grantor and all others entitled thereto").

12. On February 20, 1941, Elizabeth J. Cobb recorded notice in the Registry at Book 576, Page 32, of her February 18, 1941 filing of a petition with the Land Court to register title to the real estate acquired by her from George H. Swift, less those lots previously conveyed.

13. Thereafter, Elizabeth J. Cobb executed the following deeds:

    By deed dated September 10, 1942 to George L. Pendleton, recorded in the Registry at Book 595, Page 581, lot 154 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

    By deed dated October 17, 1942 to Clarence L. Dupee and Leontine M. Dupee, recorded in the Registry at Book 597, Page 218, lot 64 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto" (subsequently conveyed by Leontine M. Dupee to George J. Schuman by deed dated October 10, 1945 and recorded in the Registry at Book 635, Page 20);

    By deed dated October 1, 1943 to Anna S. Abercrombie, recorded in the Registry at Book 606, Page 570, lot 4 as shown on the 1939 Plan, including "the right to use the beach in common with the grantor, and all others entitled thereto;"

    By deed dated June 29, 1944 to Frank C. Hinckley, recorded in the Registry at Book 620, Page 336, the southerly half of lot 23 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

    By deed dated July 20, 1945 to Ruth M. Stokes, recorded at Book 630, Page 505, lot 2 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

    By deed dated July 20, 1945 to Everett S. Olson and Lois E. Olson, recorded in the Registry at Book 630, Page 504, lot 1 as shown on the 1939 Plan, including "the right to use the beach, in common with the grantor and all others entitled thereto;"

    By deed dated October 3, 1945 to Frank C. Hinckley, recorded in the Registry at Book 637, Page 163, the northerly half of lot 25 as shown on the 1939 Plan, but without any express easement rights.

14. On November 29, 1946, the Land Court issued a Decree of Registration in the name of Elizabeth J. Cobb, which decree was filed in the Registry District on December 5, 1946

and which registered the land shown on the 1939 Plan, now known as LCP 17933A, and filed with the Land Registration Office on February 20, 1941.

15. The Original Certificate Of Title issued in the name of Elizabeth J. Cobb, No. 8594, contained the following provisions, among others:

> There is excepted and excluded from the operation of this decree lots 1, 2, 3, 4, 7, 9, 20, 21, 22, 23-A, 23-B, 24, 25-A, 63, 64, 65, 154 and E as shown on said plan, together with the fee in the soil of the ways adjacent thereto to the middle line thereof.
>
> So much of the land hereby registered as is included within the area marked "Bathing Beach", on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same.
>
> There is appurtenant to the land hereby registered the right to use the private ways shown on said plan, and the right to use said "Bathing Beach" in common with others entitled thereto.

16. On November 29, 1946, the Land Court also issued decrees of registration in the names of George L. Pendleton (lot 154, CT 8596), Anna S. Abercrombie (lot 4, CT 8592) and Melvyn W. and Agnes A. Fuller (lot 64, CT 8597), each of which states that "[t]here is appurtenant to the land hereby registered ... the right to use the 'Bathing Beach' shown on said plan [LCP 17933A] in common with all others entitled thereto."

17. LCP 17933A shows a subdivision with 174 numbered lots and three lots designated by the letters A, B and E, abutted on the south by Commerce Road, on the west by Millway Road and land of the town of Barnstable, on the north by Barnstable Harbor and on the east by land of others. P. App. Ex. A.

18. LCP 17933A also contains the names of the then-owners of each lot conveyed out by Elizabeth J. Cobb or George H. Swift prior to registration. P. App. Ex. A.

19. LCP 17933A shows lots 1 through 9, 39 through 44, and 10 through 20 as abutting an area designated as "Bathing Beach" with three ten-foot wide ways between lots 2 and 3, 42 and 43, and 18 and 19 leading from ways within the subdivision to the Bathing Beach. P. App. Ex. A.

20. LCP 17933A shows the Bathing Beach as abutting the mean high water mark of Barnstable Harbor. P. App. Ex. A.

21. By deed dated December 9, 1946 and registered as Document No. 19,214, Elizabeth J. Cobb conveyed all of the land just registered in her name to Russell L. Jenkins, and CT 8607 issued in his name on December 10, 1946.

22. On December 10, 1946, an agreement between Elizabeth J. Cobb and Russell L. Jenkins, Document No. 19,215, was listed on the memorandum of encumbrances of CT 8607

under the terms of which Russell L. Jenkins was to pay Elizabeth J. Cobb 25% of the gross sale price of any property sold by him after deduction of certain expenses.

23. By Document No. 19,242 dated one week later, December 17, 1946, Elizabeth J. Cobb filed a notice of lis pendens regarding the filing of a petition to enjoin Russell L. Jenkins from conveying or encumbering the property described in CT 8607.

24. By deed dated January 16, 1947 and registered as Document No. 19,357, Russell L. Jenkins reconveyed to Elizabeth J. Cobb the property described in CT 8607, excepting also Lots A and B as shown on LCP 17933A.

25. On the same date, CT 8674 issued in the name of Elizabeth J. Cobb, containing the same language regarding the Bathing Beach as was contained in CT 8594.

26. By deed dated January 16, 1947 and registered as Document No. 19,358, Elizabeth J. Cobb conveyed lots 5, 6 and 10 through 15 to Gershom D. Hall, together "with the right to use the area marked 'Bathing Beach' on said plan, in common with others entitled thereto."

27. By deed dated February 14, 1947 and registered as Document No. 19,485, Elizabeth J. Cobb conveyed lot 18 as shown on LCP 17933A Plan to Dorothy Denton, "together also with the use of the Bathing Beach, shown on said plan, in common with others entitled thereto."

28. By deed dated August 2, 1949 and filed with the Registry District as Document No. 24,686, Elizabeth J. Cobb conveyed the remaining land included in CT 8674 to Bowmar's, Inc. with the proviso that "[s]o much of the above described land as is included within the area marked 'Bathing Beach' on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same."

29. On the same date, CT 10740 issued in the name of Bowmar's, Inc., containing the same language regarding the Bathing Beach as was contained in CT 8594.

<u>The Severance Of The Bathing Beach From The Remaining Lots</u>

30. By deed dated December 2, 1949 and registered as Document No. 25,801, Bowmar's, Inc. conveyed thirty-nine lots to Louis A. Byrne (lots 8, 102-128, 133-134, 136, 138, 140, 142, 144, 146, 148, 150 and 152) "subject to the rights of all persons lawfully entitled thereto in the bathing beach as shown on said plan" and further providing that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on plan 17933-A (Sheets 1 and 2), and the bathing beach in common with the Grantor and all others now or here after lawfully entitled thereto."

31. On December 8, 1949, CT 11170 issued in the name of Louis A. Byrne with respect to those thirty-nine lots, noting that "[t]here is appurtenant to said lots the right to use the private ways shown on said plan and the right to use the bathing beach in common with others entitled thereto."

32. According to the memorandum of encumbrances to CT 11170, Louis A. Byrne conveyed lots 108 and 110 by Document No. 25,964 and lots 133 and 134 by Document No. 25,965 to U. Frederick Stobbart and Olive H. Stobbart, both on December 30, 1949.

33. The deed of lots 108 and 110 is not available online at the Registry District, but the deed of lots 133 and 134 is available and states that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on Plan 17933A (Sheets 1 and 2) and the 'bathing beach' as shown on said plan in common with the Grantor and all others now or hereafter lawfully entitled thereto. There is also granted as appurtenant to the two above described lots the right to use Lot 8 on Plan 17933A for access to 'bathing beach' and for bathing purposes in common with the Grantor and all others now or hereafter lawfully entitled thereto."

34. By deed dated May 5, 1950 and registered as Document No. 27,445, Bowmar's, Inc. conveyed forty-nine lots to Ellis G. Williams (lots 16-17, 19, 33, 45-49, 51, 53, 66-69, 70, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96-97, 101, 135, 137, 139, 141, 143, 155, 157, 159, 161, 163, 165, 167-169, 170-174) without reference to rights in the Bathing Beach.

35. CT 11775 issued to Ellis G. Williams on June 30, 1950 without reference to rights in the Bathing Beach.

36. By deed dated June 2, 1950 and registered as Document No. 27,186, Louis A. Byrne conveyed the remaining lots on CT 11170 to M. James Sproul and Maizie K. Sproul "subject to the rights of all persons lawfully entitled thereto in the bathing beach shown on said plan," and further stating that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on plan 17933-A (Sheets 1 and 2) and the 'bathing beach', as shown on said plan, in common with the Grantor and all others now or hereafter lawfully entitled thereto."

37. By deed dated June 9, 1950 and registered as Document No. 27,363, Bowmar's, Inc. conveyed forty-five lots to M. James Sproul and Maizie K. Sproul (lots 25-29, 30-32, 39, 40-42, 50, 52, 54-59, 60-62, 71-73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 98-99, 100, 129, 130-132, 153), with the provisos that "[s]o much of the above described lots as is included within the area marked 'Bathing Beach' on said plan is subject to the rights of all persons lawfully entitled thereto in and over the same" and that "[t]here is granted as appurtenant to the above described lots a right of way over Bay View Road and the ways as shown on Plan 17933A (Sheets 1 and 2) and the 'bathing beach' as shown on said plan in common with the Grantor and all others now or hereafter lawfully entitled thereto."

38. By deed dated June 30, 1950 and registered as Document No. 27,444, Bowmar's, Inc. conveyed ten additional lots to M. James Sproul and Maizie K. Sproul (lots 145, 147, 149, 151, 156, 158, 160, 162, 164, 166) which deed states that "[t]here is appurtenant to the land herein conveyed rights of way over all the ways shown on said plan and the right to use the area marked 'Bathing Beach' in common with others entitled thereto."

39. By deed dated December 30, 1963 and registered as Document No. 87,342, Bowmar's, Inc. conveyed to James A. Mollineaux lots 43 and 44 as shown on LCP 17933A together with "the right to use 'Bathing Beach' in common with others entitled thereto."

40. By instrument of taking dated August 30, 1971 and registered as Document No. 151,151 against CT 10740, the town of Barnstable took the Bathing Beach for nonpayment of taxes.

41. CT 10740 standing in the name of Bowmar's, Inc. remained open until April 10, 1973, when, for $5,000.00, Bowmar's, Inc. conveyed the Bathing Beach to G. Malcolm Hixon, Henry Curtis, J. Arthur Mollineaux, Russell A. Gibson, Edwin L. Rush, Lester Valente and Lester A. Nothnagle, Jr. ("the Hixon Parties") by deed registered as Document No. 174,554, "[s]ubject to encumbrances, easements, and right of way and use of record."

42. CT 58654, reflecting ownership of the Bathing Beach, issued to the Hixon Parties on May 23, 1973.

43. Also on that date, an instrument of redemption of the tax taking was filed as Document No. 174,553 and noted on CT 10740.

44. On July 25, 1973, the Land Court approved LCP 17933H, being a subdivision of the Bathing Beach into twenty-two lots numbered 192 through 213. P. App. Ex. B.

45. By deeds all dated August 4, 1973 and all stating that "[s]aid land is subject to the rights set forth in Certificate 10740, so far as the same are in force and applicable," the Hixon Parties made the following conveyances, all for recited consideration of "less than one dollar," after which CT 58654 was canceled:

    To Shirley S. Nothnagle, by Document No. 177,759, lot 213;

    To Lester D. and Pauline A. Valente, by Document No. 177,760, lot 212;

    To Edwin L. and Phyllis B. Rush, by Document No. 177,761, lot 211;

    To Sidney R. And Ruth R. Miller, by Document No. 177,762, lot 210;

    To Roger E. and Marjorie Metcalfe, by Document No. 177,763, lot 209;

    To Gordon E. and Barbara C. Trask, by Document No. 177,764, lot 208;

    To Walter B. and Kathleen H. White, by Document No. 177,765, lot 207;

    To William J. and Eleen R. Coursey, by Document No. 177,766, lot 206;

    To J. Arthur and Shirley I. Mollineaux, by Document No. 177,767, lot 205;

    To Henry J. and Ruth Curtis, by Document No. 177,768, lot 204;

    To Henry J. and Ruth P. Curtis, by Document No. 177,769, lot 203;

    To Russell A. and Margaret E. Gibson, by Document No. 177,770, lot 202;

To George H. Alexander, Jr., by Document No. 177,771, lot 201;

To Earl S. and Mary Greene, by Document No. 177,772, lot 200;

To James T. and Evelyn A. Cranmer, by Document No. 177,773, lot 199;

To Ervina Sawin Marstin, by Document No. 177,774, lot 198;

To Virginia A. Hixon, by Document No. 177,775, lot 197;

To Maxwell J. and Dorothy Pearson, by Document No. 177,776, lot 196;

To Everett S. and Lois E. Olson and Maxwell J. and Dorothy Pearson, by Document No. 177,777, lot 195;

To Everett S. and Lois E. Olson, by Document No. 177,778, lot 194;

To Everett S. and Lois E. Olson, by Document No. 177,779, lot 193; and

To Hiram E. Smith, by Document No. 177,780, lot 192.

46. Lot 205 is shown on LCP 17933H as bounded northerly by the mean high water mark of Barnstable Harbor, easterly 95 feet +/-, southerly 100 feet by lot 44 and lot 43, and westerly 109 feet +/- by a way designated as lot 204. P. App. Ex. B.

47. The record contains a plan entitled "Plan Of Land 121 and 133 Sunset Lane Barnstable, MA. Scale 1" = 20' February 7, 2018 Hoyt Land Surveying 1287 Washington Street Weymouth, MA. 02189 781-682-9191" ("2018 Survey Plan") that shows, among other things, the 133 Sunset Property. P. App. Ex. L.

48. The 2018 Survey Plan shows a portion of a walled patio associated with the house on lots 43 and 44 encroaching on lot 205, as does the entirety of a firepit. P. App. Ex. L.

49. The 2018 Survey Plan further shows a vinyl fence extending along the lot line between lot 43 and the adjacent way, continuing along the lot line between lot 205 and the adjacent way for an unspecified distance before turning right and crossing the width of lot 205. P. App. Ex. L.

50. The vinyl fence serves to close off the southerly portion of lot 205, including that portion containing the walled patio and the firepit. P. App. Ex. L.

51. 133 Sunset acquired the 133 Sunset Property in 2016. Affidavit Of Mark Stanley Scott sworn to on February 4, 2022 ("Scott Aff."), ¶ 1.

52. The vinyl fence, walled patio and firepit pre-existed 133 Sunset's acquisition of the 133 Sunset Property. Scott Aff. ¶ 2.

STANDARD OF REVIEW

Generally, summary judgment may be granted "where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Green Mountain*

Ins. Co. v. Wakelin, 484 Mass. 222, 226 (2020), quoting *Boazova v. Safety Ins. Co.*, 462 Mass. 346, 350 (2012). See Mass. R. Civ. P. 56(c). In evaluating the factual record before it, the court must "make all permissible inferences favorable to the nonmoving party … and resolve any disputes or conflicts in the summary judgment materials in their favor." *Carey v. New England Organ Bank*, 446 Mass. 270, 273-274 (2006). Where both parties have moved for summary judgment, the evidence is viewed "in the light most favorable to the party against whom judgment is to enter." *Eaton v. Federal Nat'l Mtge. Ass'n*, 93 Mass. App. Ct. 216, 218 (2018), quoting *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 248 n.4 (2010). "'Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law' (quotation and citation omitted)." *Aquino v. United Prop. & Cas. Co.*, 483 Mass. 820, 825 (2020), quoting *Surabian Realty Co. v. NGM Ins. Co.*, 462 Mass. 715, 718 (2012).

DISCUSSION

The issue presented by this case, and by a companion case between landowners in the same subdivision, *Richards v. Casassa*, Docket No. 19 MISC 000013, is whether the Plaintiffs' easement rights are such as to preclude all but passive uses of the Bathing Beach by its owners so as not to interfere with the Plaintiffs' rights. The law governing the construction of express easements, as are in issue here, has been repeatedly stated: the goal is to ascertain the presumed intent of the grantor by reference, first and foremost, to the language of the grant and then, if necessary, to then existing circumstances. See *White v. Hartigan*, 464 Mass. 400, 410-411 (2013), quoting *Sheftel v. Lebel*, 44 Mass. App. Ct. 175, 179 (1998) ("The basic principle governing the interpretation of deeds is that their meaning, derived from the presumed intent of

the grantor, is to be ascertained from the words used in the written instrument, construed when necessary in the light of the attendant circumstances."); *Adams v. Planning Bd. of Westwood*, 64 Mass. App. Ct. 383, 389 (2005), quoting *Boudreau v. Coleman*, 29 Mass. App. Ct. 621, 629 (1990) (to determine the existence and attributes of a right of way, look "to the language of the parties regarding the creation of the easement or right of way, determined from 'the language of the instruments when read in light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.'").

Determining the rights granted to the Plaintiffs "also establish[es] the correlative rights of the owner of the servient estate and hence determine[s] whether a particular use by the servient owner is an inconsistent or materially interfering one." *Western Massachusetts Elec. Co. v. Sambo's of Massachusetts, Inc.*, 8 Mass. App. Ct. 815, 820 (1979). A "servient owner retains the use of this land for all purposes except such as are inconsistent with the right granted to the dominant owner." *Butler v. Haley Greystone Corp.*, 352 Mass. 252, 258 (1967). See also Restatement (Third) of Property: Servitudes § 4.9 (2000) ("Restatement") ("Except as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with the enjoyment of the servitude.").[5] "In some cases where an easement is silent as to a particular use, the use itself is so clearly inconsistent with the easement that a general proscription evolves." *Western*

[5] Restatement § 4.1 states:

> (1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding the creation of the servitude, and to carry out the purpose for which it was created.
> (2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred.

Massachusetts Elec. Co., 8 Mass. App. Ct. at 820-821 (collecting cases that preclude placing buildings under high voltage electric lines because of increased danger and difficulty of repair).

The burden of proving the existence, nature and extent of an express easement is on the party asserting the easement, here the Plaintiffs. *Hamouda v. Harris*, 66 Mass. App. Ct. 22, 24 n.1 (2006). However, "a deed is to be construed most strongly against the grantor," *Krinsky v. Hoffman*, 326 Mass. 683, 688 (1951), here, 133 Sunset's predecessors insofar as it is the owner of lot 205. It also bears noting that, as a matter of construction, the common law of Massachusetts has historically favored freedom of land from servitudes. See *Martin v. Simmons Props., LLC*, 467 Mass. 1, 9 (2014) ("restrictions on land 'are disfavored.' *Patterson v. Paul*, [448 Mass. 658, 662 (2007)], and doubts concerning the rights of use of an easement 'are to be resolved in favor of freedom of land from servitude.' *Butler v. Haley Greystone Corp., supra.*"). In contrast, Restatement § 4.1, comment a., states that "[t]he rule that servitudes should be interpreted to carry out the intent of the parties and the purpose of the intended servitude departs from the often expressed view that servitudes should be narrowly construed to favor the free use of land. It is based in the recognition that servitudes are widely used in modern land development and ordinarily play a valuable role in utilization of land resources. The rule is supported by modern case law."

Turning first to the language of the grant, each of the Plaintiffs has "the right to use the bathing beach in common with others entitled thereto." See ¶¶ 1-5 *supra*. 133 Sunset's lot 205 is "subject to the rights set forth in Certificate of Title No. 10740, so far as the same are in force and applicable," including "the rights of all persons lawfully entitled thereto in and over the same." See ¶¶ 6, 15, 29 *supra*. The grant is broad—"right to use"—but does not otherwise define its scope.

Turning next to then-existing circumstances, the Registry records make clear that shortly after acquiring Cobbs Village in 1928, George Cobb and his wife, Elizabeth, set out to create a multi-lot subdivision along the shore of Barnstable Harbor that had, as an amenity, a bathing beach. In years prior, a number of similar subdivisions had been created along the shores of Cape Cod.[6] The 1932 Plan expressly designates the area bounded southerly by lots 11 through 20 and northerly by the mean high water mark of Barnstable Harbor as "Bathing Beach." The 1932 Plan further shows a ten foot-wide way between lots 18 and 19 providing access to the Bathing Beach for owners of interior lots. The first seven deeds out from George and Elizabeth Cobb, with the exception of the 1932 deed to Hannah Fay Sheehan of lot 36, included in the conveyances the right to use the Bathing Beach for the purpose of "bathing and boating." See ¶ 8 *supra*. During the two-year period when George H. Swift owned Cobbs Village, his one deed to a third party included "the right to use that portion of the grantor's land which is shown as 'Bathing Beach' on [the 1932 Plan]." See ¶ 10 *supra*. After George H. Swift reconveyed Cobbs Village to Elizabeth J. Cobb in 1939, every deed out from Elizabeth J. Cobb prior to the issuance of the Decree of Registration in 1946, with the exception of the 1945 deed of the northerly half of lot 25 to Frank C. Hinckley, included "the right to use the beach" in common with others entitled thereto. See ¶¶ 11, 13 *supra*.

Upon registration, Original Certificate of Title 8594 expressly recognized the rights over the Bathing Beach that had previously been granted ("So much of the land hereby registered as is

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[6] See, e.g., *Hickey v. Pathways Association, Inc.*, 472 Mass. 735 (2015) (217 acre tract along the shore of Cape Cod Bay in Dennis first subdivided into 155 lots in 1917); *Houghton v. Johnson*, 71 Mass. App. Ct. 825 (2008) (111-lot subdivision created in 1924 abutting the high water mark in Eastham); *Cleveland v. Stinson*, 28 LCR 174 (2020) (16-lot subdivision created in or about 1923 abutting the beach in Harwichport) (Long, J.); *Denardo v. Bosworth*, 2015 Mass. LCR LEXIS 125 (2015) (38-lot subdivision created in 1925 along the shore of Cape Cod Bay in Sandwich) (Foster, J.); *Leahy v. Brown*, 16 LCR 586 (2008) (917-lot subdivision created in 1892 along the shore of Lewis Bay, where the developers marketed lots with ads specifically mentioning the beach as a "major selling point") (Sands, J.).

included within the area marked 'Bathing Beach', on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same"), and the rights over the Bathing Beach that were appurtenant to the now-registered land ("There is appurtenant to the land hereby registered … the right to use said 'Bathing Beach' in common with others entitled thereto"). The registration plan, LCP 17933A, shows a multi-lot subdivision with 174 numbered lots and three lots designated by the letters A, B and E. As with the 1932 Plan, none of the lots on the northside directly abut the mean high water mark. Instead, those lots (1-9, 39-44 and 10-20) abut an area designated as "Bathing Beach" which in turns abuts the mean high water mark of Barnstable Harbor. LCP 17933A also shows three ten-foot ways providing access from ways within the subdivision to the Bathing Beach, the previously mentioned way between lots 18 and 19, and two additional ways between lots 2 and 3 and lots 42 and 43.

Leaving aside the conveyances of Cobbs Village back and forth between Elizabeth J. Cobb and Russell L. Jenkins, Elizabeth J. Cobb conveyed nine lots in 1947, all of which included the right to use the Bathing Beach. See ¶¶ 26-27 *supra*. Thereafter, in 1949, Elizabeth J. Cobb conveyed her remaining land, then reflected on CT 8675, to Bowmar's, Inc., but subject to the rights of others in and over the Bathing Beach. See ¶ 28 *supra*. Bowmar's, Inc. was issued CT 10740, which carried forward the expressly recognized rights over the Bathing Beach that had previously been granted ("So much of the land herein registered as is included within the area marked 'Bathing Beach', on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same") and the rights over the Bathing Beach that were appurtenant to the now-registered land ("There is appurtenant to the land herein registered … the right to use said 'Bathing Beach' in common with others entitled thereto").

Over the course of two years, ending in 1950, see ¶¶ 30-38 *supra*, Bowmar's, Inc. conveyed out all of the land reflected in CT 10740 except (1) lot 43 and lot 44, which it conveyed out in 1963 together with the right to use the Bathing Beach, see ¶ 39 *supra*, and (2) the Bathing Beach, which was taken by the town of Barnstable for non-payment of real estate taxes in 1971. See ¶ 40 *supra*. Up to that time, there is no evidence that the developers of Cobbs Village intended that the Bathing Beach be owned by its abutters. In 1973, however, forty-five years after George Cobb and Elizabeth J. Cobbacquired and began developing Cobbs Village, the Hixon Parties bought the Bathing Beach for $5,000.00, created a plan subdividing the Bathing Beach into lots, and conveyed the newly created lots to its abutters for recited consideration of "less than one dollar." See ¶¶ 41-45 *supra*.

On this record, there is no doubt that the Plaintiffs have established, at a minimum, an express easement to use the Bathing Beach for customary beach activities. Such activities have variously been described as "bathing, sunbathing, picnicking and all recreational activities for which beach property is seasonally used," see *Ivons-Nispel, Inc. v. Lowe*, 347 Mass. 760, 761 (1964); "lying on blankets, sitting in chairs, sitting on the sand … kicking beach balls around … [and] general beach activity," *Daley v. Swampscott*, 11 Mass. App. Ct. 822, 825 (1981); "usual beach activities [like] placing … a beach towel or chair on the sand and sitting thereon to sunbathe or read with friends, building sandcastles, collecting seashells, playing ball games, swimming, boating, and walking," *Houghton v. Johnson*, 14 LCR 442, 443 (2006) (Long, J.), *aff'd*, 71 Mass. App. Ct. 825 (2008); and "swimming, sunbathing, picnicking, exploring rocks, and walking along the rocks," *Bagley v. Senn*, 2011 Mass. LCR LEXIS 7, at *53 (Piper, J.). See also *Holmes v. Zerendow*, 14 LCR 424, 427 (2006) (Long, J.) ("The language 'usual and

customary beach rights' can be presumed with reasonable certainty to mean normal beach activities such as swimming, boating and cookouts.").

It is also clear that rights over the Bathing Beach, appurtenant to the lots to be sold in Cobbs Village, were valuable to the developers of that property. See *Murphy v. Olsen*, 63 Mass. App. Ct. 417, 422 (2005) ("That the right to use the beach for their inland parcel was important to the [developers] is obvious, as such rights, or their absence, directly affected the value of their inland land."). Once the lots in Cobbs Village were sold off, however, the Bathing Beach was perceived to have little or no residual value to Bowmar's, Inc., having served its purpose as an amenity offered to prospective purchasers of interior lots. This is demonstrated by the facts (1) that, by 1963, Bowmar's, Inc. had conveyed out everything but the Bathing Beach, (2) that, by 1971, the Bathing Beach was taken by the town for non-payment of taxes, another possible indicator of Bowmar's, Inc.'s assessment of its value, and (3) that Bowmar's, Inc. sold the Bathing Beach to the Hixon Parties for $5,000.00 in 1973 (who then turned around and conveyed the now-subdivided Bathing Beach to the abutters for nominal consideration). For a similar analysis, see *Reagan v. Brissey*, 446 Mass. 452, 461 (2006) ("We also find it significant that, just two years after marketing the … subdivision and selling individual lots for amounts ranging approximately between $119 and $291, Luce's bankruptcy trustees sold the parks and avenues for five dollars. This conveyance demonstrates … that the parks and avenues were of little market worth as developable land").

Whatever limited value the Bathing Beach might have to Bowmar's, Inc., which no longer owned any other property on CT 10740, it did have value to its abutters, the owners of lots 1 to 9, 39 to 44 and 10 to 20 as shown on LCP 17933A, but not necessarily as land to be further developed in association with their abutting lots. So long as Bowmar's, Inc. (or its

successor) owned the Bathing Beach, it could grant additional easements over the Bathing Beach to other parties. See *Cannata v. Berkshire Nat. Res. Council, Inc.*, 73 Mass. App. Ct. 789, 796 (2009), quoting *Deery v. Foster*, 15 Mass. App. Ct. 564, 569 (1983) ("The owner of a way, already subject to an easement, is free to grant additional easements 'so long as any subsequent easements [are] neither inconsistent with nor a burden upon the [previously granted] easement.'"). By purchasing the fee in the Bathing Beach, the Hixon Parties prevented the creation of any additional easements over the Bathing Beach except those, if any, granted by them. That acquisition thus served to give the Hixon Parties control over further grants of beach rights on the property immediately adjacent to their lots. Given the encumbrances over it, ownership of the Bathing Beach was not likely to have been perceived as providing other benefits.

The broad language of the grant, in the context of the development of Cobbs Village, could be interpreted to require that the Bathing Beach was to be left in its natural state for the use of all of the landowners within the subdivision. In other words, any use by the servient owners would be so clearly inconsistent with the purpose of the easement that a general proscription is appropriate. See *Western Massachusetts Elec. Co.*, 8 Mass. App. Ct. at 820-821. Such an interpretation is more in keeping with the Restatement's view that easements should be interpreted to carry out the intent of the parties, rather than that of Massachusetts common law that supports a narrow construction to foster the freedom of land from servitudes. The Restatement's view, however, has not been adopted in Massachusetts. Accordingly, the court declines to interpret the easements at issue here as resulting in a *per se* ban on any active use of the encumbered land by the servient owner.

There being no *per se* ban on the use of the Bathing Beach by the servient owner, the rights of the parties are governed by "[t]he general principle that, where the parties have not agreed otherwise, the servitude should be interpreted to reach a fair balance of their interests." Restatement § 4.10 comment h. This principle "leads to the rule that the easement holder may not use it in such a way as to interfere unreasonably with enjoyment of the servient estate." *Id.* An analysis under these principles leads to a different result than that reached in the companion case of *Richards v. Casassa* with respect to lot 202.

The principal distinction between this case and *Richards* is in the amount of Bathing Beach available to the Plaintiffs' use at all tides. Unlike in *Richards*, in which the servient owner had effectively excluded the Plaintiffs from the entirety of the Bathing Beach at lot 202 at certain tides, relegating them to the rights of the general public over the flats, a substantial and apparently growing portion of lot 205 southerly of the mean high water mark, but northerly of the vinyl fence, is still available for the Plaintiffs' use. At the court's request, 133 Sunset had a survey plan prepared[7] that shows accretion in this area, with the side lines of lot 205 now measuring 106 feet, not 95 feet, on the east and 116.4 feet, not 109 feet, on the west. That fact makes all the difference.

That all being said, the observations in *Richards* about the impact of the land registration system on this case are equally applicable here: the Plaintiffs cannot obtain a prescriptive easement over the flats in front of lot 205 and 133 Sunset cannot extinguish the Plaintiffs' and others' rights over lot 205 by prescriptive, adverse use. The balance of the parties' interests

[7] The plan is entitled "Sketch Plan In Barnstable, MA #133 Sunset Lane Prepared For Robert Skorupa Scale: 1' [sic] = 40' Date: 9-21-2022" and, the Plaintiffs registering no objection to it, has been added to the summary judgment record.

drawn by this court today may well be different in the future if lot 205, like lot 202 now, is entirely, or nearly so, unavailable to the Plaintiffs at certain tides.

CONCLUSION

For the reasons set forth above, judgment shall issue dismissing Count I without prejudice to that claim being renewed upon a showing of changed circumstances and declaring, on Count II, that 133 Sunset's maintenance of the walled patio, firepit and vinyl fence do not, based on present circumstances, unreasonably interfere with the Plaintiffs' easement rights.

SO ORDERED.

By the Court (Roberts, J.)

/s/ Jennifer S.D. Roberts

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: October 21, 2022.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

BARNSTABLE, ss.

Case No. 20 MISC 000212 (JSDR)

FREDERICK J. TIRRELL, BRUCE T. RICHARDS, EDWARD V. COSGROVE, BARBARA A. THORNTON and GERALD LYONS,

Plaintiffs,

v.

133 SUNSET LN ACQUISITION LIMITED and MARK SCOTT, individually,

Defendants.

JUDGMENT

Plaintiffs Frederick J. Tirrell, Bruce T. Richards, Edward V. Cosgrove, Barbara A. Thornton and Gerald Lyons (collectively, "the Plaintiffs") all own inland lots in a subdivision, known now or formerly as Cobbs Village, located on the south shore of Barnstable Harbor in Barnstable Village on Cape Cod. Each has the right, as confirmed in their respective certificates of title, to the use of a bathing beach running the length of the subdivision as shown on various plans of the subdivision ("the Bathing Beach"). Defendant 133 Sunset Ln Acquisition Limited ("133 Sunset") owns two lots that abut the Bathing Beach and the portion of the Bathing Beach that immediately abuts those two lots, shown as lot 205 on Land Court Plan 17933H. Defendant Mark S. Scott ("Mr. Scott") is the sole director of 133 Sunset. Plaintiffs filed this action on June 10, 2020, asserting in Count I a claim for interference with their easement rights over lot 205,

and seeking, in Count II, a declaration that the maintenance of a patio, firepit and vinyl fence within the boundaries of lot 205 by 133 Sunset interfered with their easement rights.

Plaintiffs filed Plaintiffs' Motion For Summary Judgment ("the Motion") and 133 Sunset and Mr. Scott filed Defendants' Opposition To Plaintiffs' Motion For Summary Judgment, Defendants' Cross Motion ("the Cross-Motion"). After a hearing on January 5, 2022, the submission of supplemental briefs on February 4, 2022, a further hearing on May 6, 2022, and the supplementation of the summary judgment record, which was completed on October 12, 2022, the court denied the Motion and allowed the Cross-Motion. In accordance with the court's memorandum of decision of even date, it is

ORDERED and **ADJUDGED** that Count I is dismissed without prejudice to that claim being renewed based on changed circumstances; and

It is further

ORDERED, **ADJUDGED** and **DECLARED** on Count II that 133 Sunset's maintenance of the walled patio, firepit and vinyl fence do not, based on present circumstances, unreasonably interfere with the Plaintiffs' easement rights; and

It is further

ORDERED and **ADJUDGED** that this Judgment is a full adjudication of the parties' claims in this case, all claims not addressed in the preceding paragraphs are dismissed with prejudice and all prayers for relief by any party to this action that are not granted in the preceding paragraphs are denied.

SO ORDERED.

By the Court (Roberts, J.)

/s/ Jennifer S.D. Roberts

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson, Recorder

Dated: October 21, 2022.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-v-	GOVERNMENT'S FORFEITURE BILL OF PARTICULARS
MARK S. SCOTT,	S6 17 Cr. 630 (ER)
Defendant.	

Pursuant to *United States* v. *Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980), the Government respectfully gives notice that the property subject to forfeiture as a result of the offense described in Count One of the Superseding Indictment, and as alleged in the Forfeiture Allegation therein, includes the following:

a. $2,455,686.10 held at Iberia Bank (formerly known as Sabadell United Bank) Account Number [redacted]9788 received from or on behalf of Mark. S. Scott and/or related companies, by [redacted];

b. Any and all funds on deposit in Account Number [redacted]1046 in Iberia Bank (formerly known as Sabadell United Bank) received from or on behalf of Mark. S. Scott and/or related companies, by [redacted];

c. Any and all funds on deposit in Account Number 40077102 held in the name of MSS International Consultants (BVI), Ltd., at DMS Bank and Trust Ltd;

d. Any and all funds on deposit in Account Number 40077100 held in the name of MSS International Consultants (BVI), Ltd., at DMS Bank and Trust Ltd;

e. Any and all funds on deposit in Account Number 10462701 held in the name of MSS International Consultants (BVI), Ltd., at First Caribbean International Bank;

f. Any and all funds on deposit in Account Number 10465454 held in the name of DRP Holdings, Ltd., at First Caribbean International Bank;

g. Any and all funds on deposit in Account Number 10465343, held in the name of MSS Marine Group, Ltd., at First Caribbean International Bank;

h. Any and all funds on deposit in Account Number 10463883, held in the name of EGD Investment, Ltd., at First Caribbean International Bank;

i. Any and all funds on deposit in Account Number 10465346, held in the name of Mumbelli Group Holding (Cayman), Ltd., at First Caribbean International Bank;

j. Any and all funds on deposit in Account Number 2450478611, held in the name of HFT Holding Limited, at RBC Dominion Securities Global Ltd.;

k. Any and all funds on deposit in Account Number CH3508565559929606901, held in the name of Mark S. Scott, at Dreyfus Sohne & Cie AG;

l. Any and all funds on deposit in Account Number [redacted]1054, held in the name of Mark S. Scott and [redacted], at Cooperative Bank of Cape Cod;

m. Any and all funds on deposit in Account Number 2840912613, held in the name of Mark S. Scott, at Northern Trust Company;

n. Any and all funds on deposit in Account Number 2840909434, held in the name of Mark S. Scott, at Northern Trust Company;

o. Any and all funds on deposit in Account Number 43-98797, held in the name of Mark S. Scott, at Northern Trust Company;

p. Any and all funds on deposit in Account Number [redacted]0306, held in the name of [redacted], [redacted], and/or [redacted], at Ocean Bank;

q. Any and all funds on deposit in Account Number PWA5493, held in the name of Mark S. Scott, at UBS Financial Services;

r. Any and all funds on deposit in Account Number PWB1979, held in the name of Mark S. Scott, at UBS Financial Services;

s. Any and all funds on deposit in Account Number [redacted]9666, held in the name of Mark S. Scott and [redacted], at UBS Financial Services;

t. Any and all funds on deposit in Account Number 4842-9048, held in the name of Mark S. Scott 2017 Trust, at Wells Fargo Advisors;

u. One 2017 Sunseeker 57 Predator Yacht, seized by the Internal Revenue Service ("IRS") on or about September 5, 2018 (the "2017 Sunseeker");

v. One 2016 White Porsche 911 GT3 RS, bearing Vehicle Identification Number WP0AF2A92GS195089 and containing License Plate Number DVADER3, (the "2016 Porsche");

w. One 2017 Red Porsche 911 4S Turbo, bearing Vehicle Identification Number, WP0CD2A95HS178187 and containing License Plate Number HBNJ81, (the "2017 Porsche");

x. One 2018 White Porsche 911 GT2 RS, bearing Vehicle Identification Number, WP0AE2A91JS185471, (the "2018 White Porsche");

y. All right, title and interest in real Properties located at 31 Dale Avenue, Hyannis Port, Massachusetts owned by MSSI 31 Dale Ave Property Group LLC, with all improvements, appurtenances, and attachments thereon;

z. All right, title and interest in real Properties located at 105 Sunset Lane, Barnstable, Massachusetts 02630 owned by MSSI 105 Sunset Ln Property Group LLC, with all improvements, appurtenances, attachments thereon;

aa. All right, title and interest in real Properties located at 133 Sunset Lane Barnstable, Massachusetts 02630, with all improvements, appurtenances, and attachments thereon;

bb. Any and all items of value seized on or about September 5, 2018, from 133 Sunset Lane Barnstable, Massachusetts 02630 (the "Sunset Lane Items of Value"), including but not limited to the following:

i. One Panerai PAM 582 barometer wall clock;
ii. One Panerai PAM 583 thermometer;
iii. One Panerai PAM 584 hygrometer;
iv. One Panerai PAM 585 wall clock;
v. One Luminor Panerai P068/400 BB1577049;
vi. 3 Purses – One Black Hermes, One Brown/Tan Hermes, and One Green Hermes;
vii. One Ring with stone;

cc. All right, title and interest in real Properties located at 600 Coral Way, Suite/Floor 12, Segovia Tower, Coral Gables, Florida 33134, with all improvements, appurtenances, and attachments thereon;

dd. Any and all items of value seized on or about September 5, 2018, from 600 Coral Way, Suite/Floor 12, Segovia Tower, Coral Gables, Florida 33134 (the "Coral Way Items of Value"), including but not limited to the following:

i. One Black Hermes Birkin Bag;
ii. One Orange Hermes Birkin Bag;
iii. One Heckler & Koch 40 MM gun, Serial No.: 219-004106
iv. One Heckler & Koch 45 MM gun, Serial No.: HKU004967
v. One Desert Eagle SOAE, Serial No.: DK0038257
vi. One Smith and Wesson, Serial No.: DJW0604
vii. One Beretta Shotgun and leather case;

((a) through (dd) the "Specific Property")

Dated: New York, New York
February 22, 2019

Respectfully Submitted,
GEOFFREY S. BERMAN
United States Attorney

By: /s/ Christopher J. DiMase
CHRISTOPHER J. DIMASE
Assistant United States Attorney
Tel: (212) 637-2433

William Balicki, et. at. vs. Warren Ziegler, et. al.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss

MISCELLANEOUS CASE
NO. 18 MISC 000469 (RBF)

WILLIAM BALICKI and EILEEN BALICKI,

Plaintiff,

v.

WARREN H. ZIEGLER and MARY JANE BOYD,

Defendants.

1 of 4

I HEREBY ATTEST AND CERTIFY ON 11/09/2022 THAT THE FOREGOING DOCUMENT IS A FULL ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY
Deborah J. Patterson
DEBORAH J. PATTERSON
RECORDER
LAND COURT
AC

JUDGMENT

Plaintiffs William Balicki and Eileen Balicki (the Balickis) filed their complaint on September 13, 2018, naming as defendants Warren H. Ziegler and Mary Jane Boyd (Ziegler and Boyd). The Answer and Counterclaim of the Defendants Warren H. Ziegler and Mary Jane Boyd (counterclaim) was filed on October 16, 2018. The Answer to Counterclaim was filed on October 19, 2018.

The pretrial conference was held on January 27, 2021. The court took a view on April 20, 2021. Trial was held on April 21, 22, and 29, 2021, by Zoom. The parties filed their post-trial briefs on July 9, 2021. The court heard closing arguments on July 22, 2021, by video conference and took the case under advisement. In a decision of even date, the court (Foster, J.) has made findings of fact and rulings of law.

In accordance with the court's Decision issued today, it is

ORDERED, ADJUDGED and DECLARED on the complaint that the boundary between the property owned by the Balickis and the property owned by Ziegler and Boyd is as shown on the survey plan entitled "Plan of Land 6 Fields Lane Wayland, Massachusetts (Middlesex County)" dated May 12, 2018, a copy of which is attached hereto as Exhibit A (the survey). It is further

ORDERED, ADJUDGED and DECLARED on the complaint that Ziegler and Boyd are permanently enjoined from entering the property owned by the Balickis, as shown on the survey, without permission. It is further

ORDERED AND ADJUDGED on the counterclaim that Ziegler and Boyd are awarded damages against William Balicki in the amount of $300.00. It is further

ORDERED AND ADJUDGED that the counterclaim against Eileen Balicki is DISMISSED with prejudice. It is further

ORDERED, ADJUDGED and DECLARED that upon payment of all required fees, this Judgment or a certified copy of this Judgment and the survey may be recorded at the Middlesex South Registry of Deeds and marginally referenced on all relevant documents.

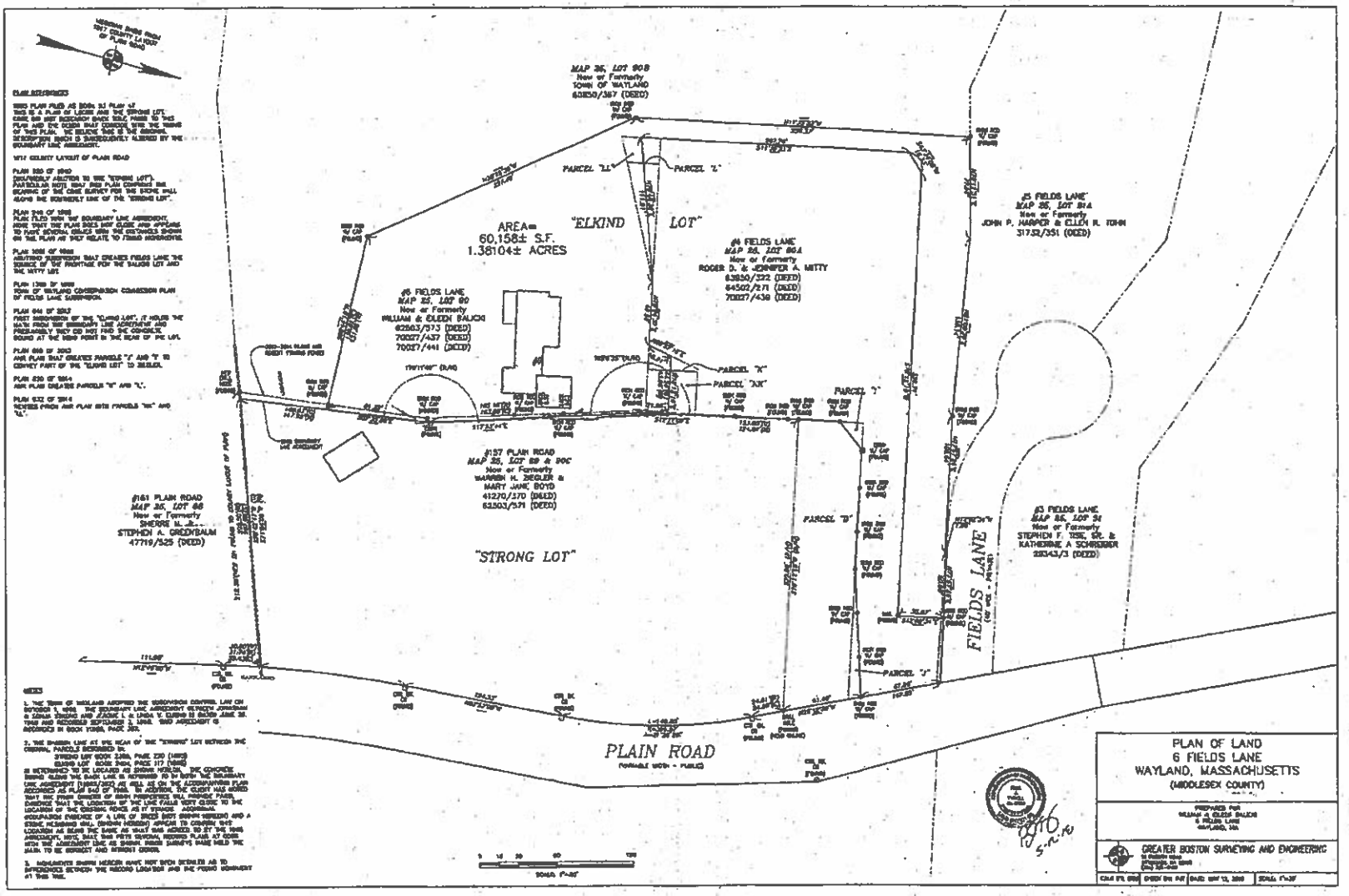
By the Court. (Foster, J). */s/ Robert B. Foster*

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: July 19, 2022.

Exhibit A


MAP 36, LOT 90B
New or Formerly
TOWN OF WAYLAND
63850/367 (DEED)
PARCEL "L"
PARCEL "L"
AREA=
60,158± S.F.
1.38104± ACRES
"ELKIND LOT"
#6 FIELDS LANE
MAP 36, LOT 90A
New or Formerly
ROGER D. & JENNIFER A. MITTY
63850/372 (DEED)
64502/271 (DEED)
70027/439 (DEED)
#5 FIELDS LANE
MAP 36, LOT 90
New or Formerly
WILLIAM & GLEEN BALICKI
62803/373 (DEED)
70027/437 (DEED)
70027/441 (DEED)
#5 FIELDS LANE
MAP 36, LOT 91A
New or Formerly
JOHN P. HARPER & ELLEN R. TOHN
31732/351 (DEED)
PARCEL "K"
PARCEL "JK"
PARCEL "J"
#157 PLAIN ROAD
MAP 36, LOT 89 & 90C
New or Formerly
WARREN H. ZIEGLER &
MARY JANE BOYD
41270/370 (DEED)
62303/371 (DEED)
#161 PLAIN ROAD
MAP 36, LOT 88
New or Formerly
SHERRE M. &
STEPHEN A. GREENBAUM
47719/325 (DEED)
"STRONG LOT"
PARCEL "B"
#3 FIELDS LANE
MAP 36, LOT 91
New or Formerly
STEPHEN F. TISE, SR. &
KATHERINE A SCHREIBER
22343/3 (DEED)
FIELDS LANE
PARCEL "I"
PLAIN ROAD
PLAN OF LAND
6 FIELDS LANE
WAYLAND, MASSACHUSETTS
(MIDDLESEX COUNTY)
GREATER BOSTON SURVEYING AND ENGINEERING

MOVING AN EASEMENT

BOOK 5722 PAGE 146

MASSACHUSETTS QUITCLAIM DEED SHORT FORM (INDIVIDUAL) 881

By this deed,

John Larsen and Florence Marie Larsen, husband and wife, both being

of 2 Kimball Road, in Westborough, Worcester County, Massachusetts,
(and Florence Marie Larsen being sometimes called Florence M. Larsen)
being ~~a~~married, for consideration paid, and in full consideration of less than One Hundred Dollars

grant to Peter R. Bacon and Barbara E. Bacon, husband and wife,

of 4 Kimball Road in said Westborough with quitclaim covenants
an easement for laying and maintaining a sewer line over
the land in said Westborough shown as Lot No. 9 on a plan made May 1956 and recorded with Worcester District Deeds in Plan Book 225, Plan 16, the course of said easement (Description and encumbrances, if any) being described as follows:

Beginning at a point in the northerly line of said Lot No. 9 at a point in the southerly line of Fisher Street, North 72 degrees 10' west 22 feet from the northeasterly corner of said Lot 9;

Thence by a line parallel with and 22 feet distant from the easterly line of said Lot No. 9, South 11 degrees 15' west 86.48 feet to a point in the southerly line of said lot;

Thence along the southerly line of said Lot No. 9 North 79 degrees 26' W approximately 5 feet to the intersection of said lot line with a line parallel with and 5 feet westerly from the first course;

Thence by a course parallel with and 5 feet distant from the first course North 11 degrees 15' east 86.48 feet to the northerly line of said lot and southerly line of Fisher Street aforesaid; and

Thence along said street line and northerly lot line South 72 degrees 10' east 5 feet to the point of beginning.

Said course runs across said Lot No. 9 from an existing sewer connection in the Southerly line of Fisher Street to grantees' land; and for ease of location on the ground, the westerly line of the easement runs about parallel with the easterly line of the existing house on the premises and about 22 feet distant from the most easterly extension of the foundation wall thereof; about 24 feet from the main portion of said foundation wall; and about 12 feet 8 inches from the face of a retaining wall on the southerly portion of said lot.

Together with the privilege and right to enter on said premises as may be reasonably required to repair or replace the sewer pipe line now in the ground within said easement course, said pipe having been installed therein during the year 1975.

Witness our hands and seals this 22 day of May 1975

John Larsen JL

Florence Marie Larsen F.M.L.

The Commonwealth of Massachusetts

Worcester, ss. 22 May 1975

Then personally appeared the above named John Larsen

and acknowledged the foregoing instrument to be his free act and deed, before me

Notary name printed or typed:

Shirley A. Davis

Notary Public

My commission expires May 10, 1979

141 Upton Rd., Westborough

Notary address (Individual—Joint Tenants—Tenants in Common—Tenants by the Entirety.)

CHAPTER 183 SEC. 6 AS AMENDED BY CHAPTER 497 OF 1969

Every deed presented for record shall contain or have endorsed upon it the full name, residence and post office address of the grantee and a recital of the amount of the full consideration thereof in dollars or the nature of the other consideration therefor, if not delivered for a specific monetary sum. The full consideration shall mean the total price for the conveyance without deduction for any liens or encumbrances assumed by the grantee or remaining thereon. All such endorsements and recitals shall be recorded as part of the deed. Failure to comply with this section shall not affect the validity of any deed. No register of deeds shall accept a deed for recording unless it is in compliance with the requirements of this section.

Recorded MAY 29 1975 at 9 h — m. A.M.

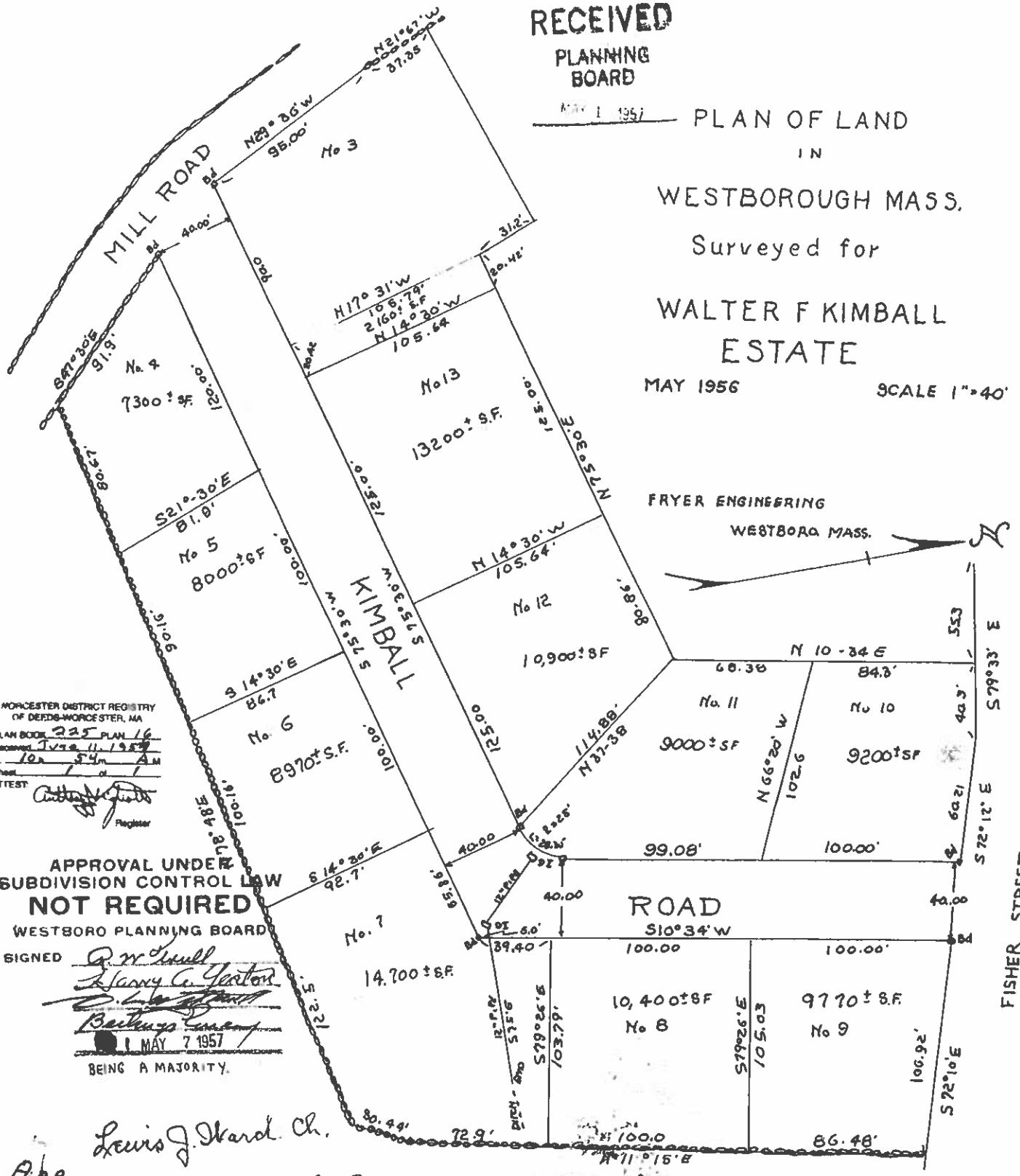
RECEIVED
PLANNING
BOARD
MAY 1 1957

*67

PLAN OF LAND
IN
WESTBOROUGH MASS.
Surveyed for
WALTER F KIMBALL
ESTATE

MAY 1956 SCALE 1"=40'

FRYER ENGINEERING
WESTBORO MASS.



WORCESTER DISTRICT REGISTRY
OF DEEDS-WORCESTER, MA
PLAN BOOK 225 PLAN 16
Received June 11, 1957
10h 54m AM
Sheet 1 of 1
ATTEST:
Register

APPROVAL UNDER
SUBDIVISION CONTROL LAW
NOT REQUIRED
WESTBORO PLANNING BOARD
SIGNED
MAY 7 1957
BEING A MAJORITY.

Lewis J. Ward Ch.
App.
S.T. A Clerk Board of Appeals

4/23/57 T.B.F.

OWNERS OF RECORD:
ANDREW G.H. BRADLEY & CHRISTINE V. BRADLEY

ASSESSORS MAP REFERENCE:
MAP 19 PARCEL 1

DEED REFERENCES:
DEED BOOK 5722 PAGE 146 (PRIVATE SEWER EASEMENT)
DEED BOOK 52408 PAGE 256 (LOCUS DEED)
DEED BOOK 52598 PAGE 791 (ABUTTER #4 DEED)

PLAN REFERENCE:
PLAN BOOK 275 PLAN 16

FIRM REFERENCE:
FLOOD INSURANCE RATE MAP
NUMBER 25027C0644F
EFFECTIVE JULY 16, 2014

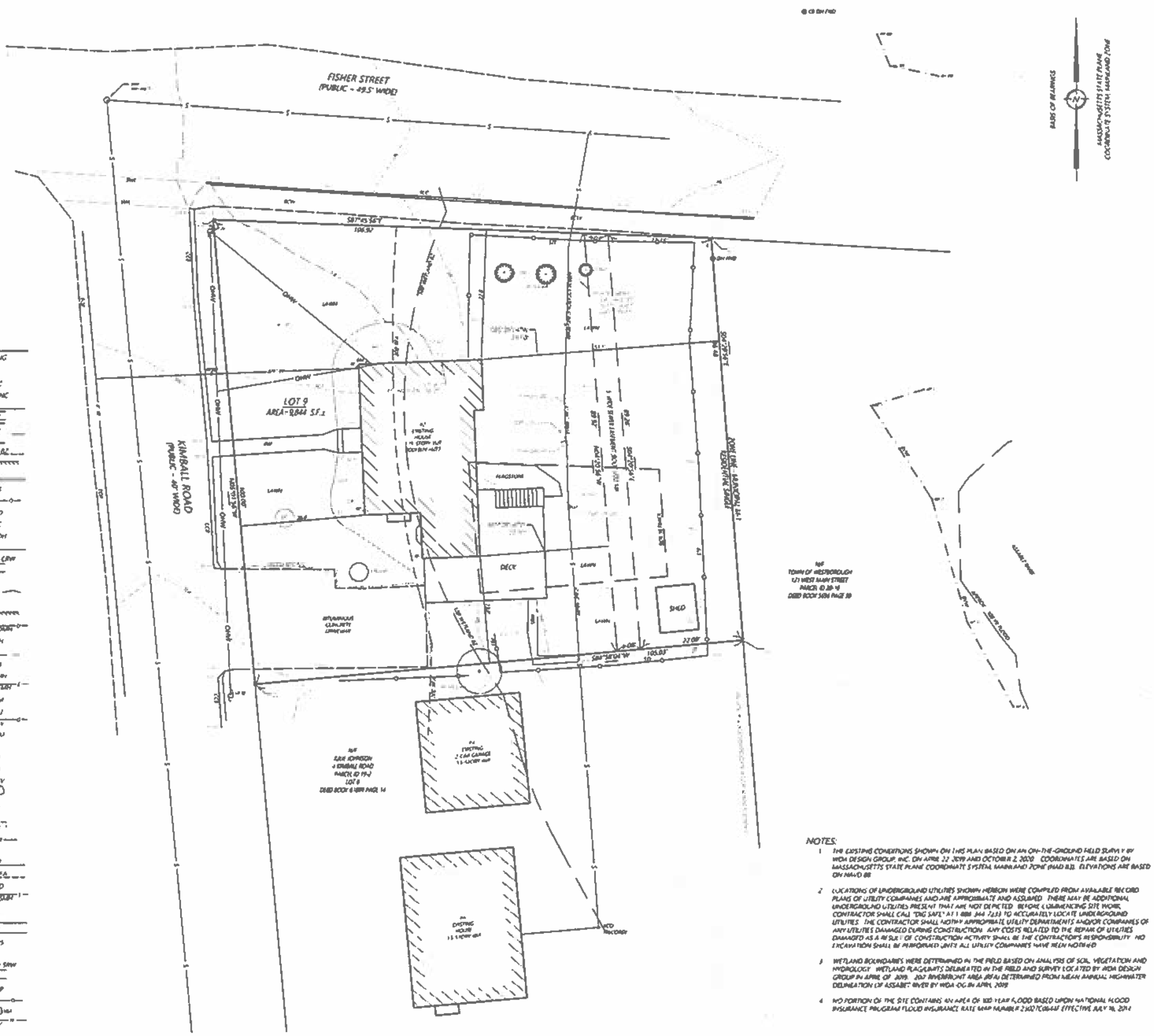
ZONING CLASSIFICATION:
R - SINGLE RESIDENTIAL

MINIMUM LOT AREA	*50,000 S.F.
MINIMUM LOT FRONTAGE	*200 FEET
MINIMUM FRONT YARD	*50 FEET
MINIMUM SIDE YARD	*15 FEET
MINIMUM REAR YARD	*30 FEET
MAXIMUM BUILDING HEIGHT	35 FEET
MAXIMUM BUILDING STORIES	2-1/2
MAXIMUM LOT COVERAGE	30%
MINIMUM OPEN SPACE	40%

*PRE-EXISTING NON-CONFORMING CONDITION

LEGEND:

DESCRIPTION	EXISTING
ACRES	AC
AIR CONDITIONING UNIT	AC
BITUMINOUS CONCRETE	BIT CONC
BITUMINOUS CONCRETE CURB	BCC
BITUMINOUS CONCRETE WALKWAY	BCW
BOUNDARY OF BORDERING VEGETATED WETLAND	BVW
BRICK WALKWAY	BW
BUFFER ZONE	100' BZ
BUILDING	
CAPE COD BERM	CCB
CATCH BASIN	CB
CHAIN LINK FENCE	CLF
CLEANOUT	CO
CONCRETE	CONC
CONCRETE BOUND W/DRILL HOLE	CB/DH
CONCRETE CURB	CC
CONCRETE RETAINING WALL	CRW
CONCRETE WALKWAY	CW
CONIFEROUS TREE	
CONTOUR LINE	150
DECIDUOUS TREE	
DOOR	
DRAIN MANHOLE/DRAIN LINE	DMH
DRILL HOLE	DH
EDGE OF PAVEMENT	EOP
ELECTRIC BOX	EB
ELECTRIC HAND HOLE	EHH
ELECTRIC MANHOLE/ELECTRIC LINE	EMH
ELECTRIC METER	EM
FOUND	(FND)
GAS VALVE/GAS LINE	GV
GAS METER	GM
INVERT	INV
IRON PIPE	IP
IRON ROD	IR
IRRIGATION CONTROL VALVE	ICV
LANDSCAPED AREA	LA
NOT TO SCALE	N.T.S.
NOW OR FORMERLY	N/F
OVERHANG	OH
OVERHEAD WIRE	OHW
PLUS OR MINUS	±
REINFORCED CONCRETE PIPE	RCP
RIVERFRONT AREA	200' RFA
ROOF DRAIN	RD
SEWER MANHOLE/SEWER LINE	SMH
SIGN	S
SINGLE WHITE LINE	SWL
SLOPED GRANITE CURB	SGC
SPOT ELEVATION	x 150.25
SQUARE FEET	S.F.
STONE RETAINING WALL	SRW
STONE WALKWAY	SW
UTILITY POLE	UP
VINYL FENCE	VF
WATER METER	WM
WATER VALVE/WATER LINE	WV
WATER SHUT OFF	WSO



NOTES:

1. THE EXISTING CONDITIONS SHOWN ON THIS PLAN BASED ON AN ON-THE-GROUND FIELD SURVEY BY WDA DESIGN GROUP, INC. ON APRIL 22, 2019 AND OCTOBER 2, 2020. COORDINATES ARE BASED ON MASSACHUSETTS STATE PLANE COORDINATE SYSTEM, MAINLAND ZONE (NAD 83). ELEVATIONS ARE BASED ON NAVD 88.
2. LOCATIONS OF UNDERGROUND UTILITIES SHOWN HEREON WERE COMPILED FROM AVAILABLE RECORD PLANS OF UTILITY COMPANIES AND ARE APPROXIMATE AND ASSUMED. THERE MAY BE ADDITIONAL UNDERGROUND UTILITIES PRESENT THAT ARE NOT DEPICTED. BEFORE COMMENCING SITE WORK, CONTRACTOR SHALL CALL "DIG SAFE" AT 1-888-344-7233 TO ACCURATELY LOCATE UNDERGROUND UTILITIES. THE CONTRACTOR SHALL NOTIFY APPROPRIATE UTILITY DEPARTMENTS AND/OR COMPANIES OF ANY UTILITIES DAMAGED DURING CONSTRUCTION. ANY COSTS RELATED TO THE REPAIR OF UTILITIES DAMAGED AS A RESULT OF CONSTRUCTION ACTIVITY SHALL BE THE CONTRACTOR'S RESPONSIBILITY. NO EXCAVATION SHALL BE PERFORMED UNTIL ALL UTILITY COMPANIES HAVE BEEN NOTIFIED.
3. WETLAND BOUNDARIES WERE DETERMINED IN THE FIELD BASED ON ANALYSIS OF SOIL, VEGETATION AND HYDROLOGY. WETLAND FLAGGING WAS DELINEATED IN THE FIELD AND SURVEY LOCATED BY WDA DESIGN GROUP IN APRIL OF 2019. 200' RIVERFRONT AREA (RFA) DETERMINED FROM MEAN ANNUAL HIGHWATER DELINEATION OF ASSABET RIVER BY WDA-DG IN APRIL 2019.
4. NO PORTION OF THE SITE CONTAINS AN AREA OF 100-YEAR FLOOD BASED UPON NATIONAL FLOOD INSURANCE PROGRAM FLOOD INSURANCE RATE MAP NUMBER 25027C0644F EFFECTIVE JULY 16, 2014.

THIS DRAWING IS NOT TO BE USED FOR CONSTRUCTION PURPOSES UNTIL ISSUED AS A CONSTRUCTION DRAWING BY WDA DESIGN GROUP

LOCUS MAP
N.T.S.

REV	DATE	DESCRIPTION	INIT
B	04/08/21	OFFSITE HOUSE TO SEWER CONN'T	KTS
A		INITIAL ISSUE	

PREPARED BY:
WDA DESIGN GROUP

OWNERS
ANDREW G.H. BRADLEY & CHRISTINE V. BRADLEY
2 Kimball Road
Westborough, MA

PREPARED FOR
ANDREW G.H. BRADLEY & CHRISTINE V. BRADLEY
2 Kimball Road
Westborough, MA

TITLE:
EXISTING CONDITIONS PLAN

2 KIMBALL ROAD
Westborough, MA
(Worcester County)

FOR DISCUSSION WITH TOWN

SCALE 1" = 10'

JOB NO.	1316.01	DATE:	10/07/20
DWN BY	PJS/KTS	SHEET	EC
CHK'D BY	PJS/KTS		

M.P.M. BUILDERS, LLC vs. LESLIE DWYER. [Note 1]

442 Mass. 87

April 8, 2004 - June 15, 2004

Suffolk County

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

Practice, Civil, Summary judgment. Easement. Real Property, Easement.

This court adopted Restatement (Third) of Property (Servitudes) s. 4.8(3) (2000) and concluded that the owner of a servient estate may, at the owner's expense, change the location of an easement without the consent of the easement holder, except where such relocation significantly lessens the utility of the easement, increases the burdens on the easement holder's use and enjoyment of the easement, or frustrates the purpose for which the easement was created. [89-94]

CIVIL ACTION commenced in the Land Court Department on December 5, 2002.

The case was heard by Charles W. Trombly, J., on a motion for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Robert S. Mangiaratti (Judith S. Yogman with him) for the plaintiff.

Edmund J. Brennan, Jr. (Michael J. Polak with him) for the defendant.

The following submitted briefs for amici curiae:

Edward M. Bloom for Real Estate Bar Association for Massachusetts & another.

William V. Hovey, pro se.

Thomas F. Reilly, Attorney General, & Joseph Callanan, Assistant Attorney General, for the Attorney General.

COWIN, J. We are asked to decide whether the owner of a servient estate may change the location of an easement without the

Page 88

consent of the easement holder. [Note 2] We conclude that, subject to certain limitations, described below, the servient estate owner may do so.

1. Facts. The essential facts are not in dispute. The defendant, Leslie Dwyer, owns a parcel of land in Raynham abutting property owned by the plaintiff, M.P.M. Builders, L.L.C. (M.P.M.). Dwyer purchased his parcel in 1941, and, in the deed, he was also conveyed an easement, a "right of way along the cartway to Pine Street," across M.P.M.'s land. The cartway branches so that it provides Dwyer access to his property at three separate points. [Note 3] The deed describes the location of the easement and contains no language concerning its relocation.

In July, 2002, M.P.M. received municipal approval for a plan to subdivide and develop its property into seven house lots. Because Dwyer's easement cuts across and interferes with construction on three of M.P.M.'s planned lots, M.P.M. offered to construct two new access easements to Dwyer's property. The proposed easements would continue to provide unrestricted access from the public street (Pine Street) to Dwyer's parcel in the same general areas as the existing cartway. The relocation of the easement would allow unimpeded construction by M.P.M. on its three house lots. M.P.M. has agreed to clear and construct the new access ways, at its own expense, so "that they are as convenient [for the defendant] as the existing cartway[]." Dwyer objected to the proposed easement relocation, "preferring to maintain [his] right of way in the same place that it has been and has been used by [him] for the past 62 years."

2. Procedural history. M.P.M. sought a declaration, pursuant to G. L. c. 231A, that it has a right unilaterally to relocate Dwyer's easement. When M.P.M. moved for summary judgment, a Land Court judge found that there were no material issues of fact in dispute, denied M.P.M.'s motion for summary judgment,

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entered summary judgment against M.P.M., and dismissed the case.

The judge recognized that this case was "a clear example of an increasingly common situation where a dominant tenant is able to block development on the

servient land because of the common-law rule which . . . may well be the result of unreflective repetition of a misapplied rationale." He noted that the rule conflicts with the "right of a servient tenant to use his land in any lawful manner that does not interfere with the purpose of the easement." Nevertheless, he concluded that under the "settled" common law, once the location of an easement has been fixed it cannot be changed except by agreement of the estate owners. The judge concluded that, unless this court decides "to dispel the uncertainty that now exists and adapt the common law to present-day circumstances," he was bound to apply the law currently in effect. We granted M.P.M.'s application for direct appellate review to decide whether our law should permit the owner of a servient estate to change the location of an easement without the easement holder's consent.

3. Discussion. M.P.M. contends that summary judgment was erroneously entered for Dwyer. Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). See Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 393-394 (2003). "Summary judgment, when appropriate, may be rendered against the moving party." Mass. R. Civ. P. 56 (c). See Perseus of N.E., MA, Inc. v. Commonwealth, 429 Mass. 163, 168 (1999). "An order granting or denying summary judgment will be upheld if the trial judge ruled on undisputed material facts and his ruling was correct as a matter of law." Route One Liquors, Inc. v. Secretary of Admin. & Fin., 439 Mass. 111, 115 (2003), quoting Commonwealth v. One 1987 Mercury Cougar Auto., 413 Mass. 534, 536 (1992).

The parties disagree whether our common law permits the servient estate owner to relocate an easement without the easement holder's consent. Dwyer, citing language in our cases, contends that, once the location of an easement has been

defined, it cannot be changed except by agreement of the parties. See, e.g., Anderson v. DeVries, 326 Mass. 127, 132 (1950); Davis v. Sikes, 254 Mass. 540, 546 (1926); Bannon v. Angier, 2 Allen 128, 129 (1861). On the other hand, relying principally on the Appeals Court's decision in Lowell v. Piper, 31 Mass. App. Ct. 225 (1991), M.P.M. claims that our common law permits the servient estate owner to

relocate an easement as long as such relocation would not materially increase the cost of, or inconvenience to, the easement holder's use of the easement for its intended purpose. M.P.M. urges us to clarify the law by expressly adopting the modern rule proposed by the American Law Institute in the Restatement (Third) of Property (Servitudes) § 4.8 (3) (2000).

This section provides that:

"Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created."

Section 4.8 (3) is a default rule, to apply only in the absence of an express prohibition against relocation in the instrument creating the easement and only to changes made by the servient, not the dominant, estate owner. [Note 4] Id. It "is designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder." Id. at comment f, at 563. Section 4.8 (3) maximizes the over-all property utility by increasing

Page 91

the value of the servient estate without diminishing the value of the dominant estate; minimizes the cost associated with an easement by reducing the risk that the easement will prevent future beneficial development of the servient estate; and encourages the use of easements. See id.; Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1236 (Colo. 2001). Regardless of what heretofore has been the common law, we conclude that § 4.8 (3) of the Restatement is a sensible development in the law and now adopt it as the law of the Commonwealth.

We are persuaded that § 4.8 (3) strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's

rights. The rule permits the servient owner to relocate the easement subject to the stated limitations as a "fair tradeoff for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate." Restatement (Third) of Property (Servitudes), supra at comment f, at 563. Therefore, under § 4.8 (3), the owner of the servient estate is "able to make the fullest use of his or her property allowed by law, subject only to the requirement that he or she not damage other vested rights holders." Roaring Fork Club, L.P. v. St. Jude's Co., supra at 1237.

It is a long-established rule in the Commonwealth that the owner of real estate may make any and all beneficial uses of his property consistent with the easement. See Gerrish v. Shattuck, 132 Mass. 235, 238 (1882); Atkins v. Bordman, 2 Met. 457, 467 (1841); Western Mass. Elec. Co. v. Sambo's of Mass., Inc., 8 Mass. App. Ct. 815, 818 (1979), and cases cited. These cases make clear that the rights of the owner of the easement are protected notwithstanding changes made by the servient estate owner as long as the purpose for which the easement was originally granted is preserved. See VanBuskirk v. Diamond, 316 Mass. 453, 462 (1944); Dunham v. Dodge, 235 Mass. 367, 372 (1920); Johnson v. Kinnicutt, 2 Cush. 153, 157-158 (1848). We conclude that § 4.8 (3) is consistent with these principles in its protection of the interests of the easement holder: a change may not significantly lessen the utility of the easement, increase the burden on the use and enjoyment by the owner of the easement,

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or frustrate the purpose for which the easement was created. The servient owner must bear the entire expense of the changes in the easement. See Lewis v. Young, 92 N.Y.2d 443, 452 (1998).

Dwyer urges us to reject the Restatement approach. He argues that adoption of § 4.8 (3) will devalue easements, create uncertainty in property interests, and lead to an increase in litigation over property rights. [Note 5] Our adoption of § 4.8 (3) will neither devalue easements nor place property interests in an uncertain status. An easement is by definition a limited, nonpossessory interest in realty. See Restatement (Third) of Property (Servitudes) § 1.2 (2000) ("An easement creates a nonpossessory right to enter and use land in the possession of another and

obligates the possessor not to interfere with the uses authorized by the easement"); 3 Powell, Real Property § 405 at 34-13 (P. Rohan ed. 1992) ("The requirement that the easement involve only a *limited* use or enjoyment of the servient tenement is a corollary of the nonpossessory character of the interest" [emphasis in original]). The owner of the servient estate is in possession of the estate burdened by the easement. An easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose.

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The limitations embodied in § 4.8 (3) ensure a relocated easement will continue to serve the purpose for which it was created. So long as the easement continues to serve its intended purpose, reasonably altering the location of the easement does not destroy the value of it. For the same reason, a relocated easement is not any less certain as a property interest. The only uncertainty generated by § 4.8 (3) is in the easement's location. A rule that permits the easement holder to prevent any reasonable changes in the location of an easement would render an access easement virtually a possessory interest rather than what it is, merely a right of way. See Lowell v. Piper, 31 Mass. App. Ct. 225, 229 (1991). Finally, parties retain the freedom to contract for greater certainty as to the easement's location by incorporating consent requirements into their agreement.

"Clearly, the best course is for the [owners] to agree to alterations that would accommodate both parties' use of their respective properties to the fullest extent possible." Roaring Fork Club, L.P. v. St. Jude's Co., supra at 1237. In some cases, the parties will be unable to reach a meeting of the minds on the location of an easement. In the absence of agreement between the owners of the dominant and servient estates concerning the relocation of an easement, the servient estate owner should seek a declaration from the court that the proposed changes meet the criteria in § 4.8 (3). See id. at 1237-1238. Such an action gives the servient owner an opportunity to demonstrate that relocation comports with the Restatement requirements and the dominant owner an opportunity to demonstrate that the proposed alterations will cause damage. Id. at 1238. The servient owner may not resort to self-help remedies, see id. at 1237 (after failing to reach agreement with easement holder, servient owner went forward with construction),

and, as M.P.M. did here, should obtain a declaratory judgment before making any alterations.

Although Dwyer may be correct that increased litigation could result as a consequence of adopting § 4.8 (3), we do not reject desirable developments in the law solely because such developments may result in disputes spurring litigation. Section 4.8 (3) "imposes upon the easement holder the burden and risk of bringing suit against an unreasonable relocation," but this

"far surpasses in utility and fairness the traditional rule that left the servient land owner remediless against an unreasonable easement holder." Roaring Fork Club, L.P. v. St. Jude's Co., supra at 1237, quoting Note, Balancing the Equities: Is Missouri Adopting a Progressive Rule for Relocation of Easements?, 61 Mo. L. Rev. 1039, 1060 (1996). We trust that, over time, uncertainties will diminish and litigation will subside as easement holders realize that in some circumstances unilateral changes to an easement, paid for by the servient estate owner, will be enforced by courts. Dominant and servient estate owners will have an incentive to negotiate a result rather than having a court impose one on them. See Lewis v. Young, supra at 451-452. [Note 6]

We return to the facts of this case. The Land Court judge ruled correctly under existing law. But we conclude that § 4.8 (3) of the Restatement best complies with present-day realities. The deed creating Dwyer's easement does not expressly prohibit relocation. Therefore, M.P.M. may relocate the easement at its own expense if the proposed change in location does not significantly lessen the utility of the easement, increase the burdens on Dwyer's use and enjoyment of the easement, or frustrate the purpose for which the easement was created. M.P.M. shall pay for all the costs of relocating the easement.

Because we cannot determine from the present record whether the proposed relocation of the easement meets the aforementioned criteria, we vacate the judgment and remand the case to the Land Court for further proceedings consistent with this opinion.

So ordered.

FOOTNOTES

[Note 1] We acknowledge the amicus briefs filed by the Attorney General; the Real Estate Bar Association for Massachusetts and The Abstract Club; and William V. Hovey.

[Note 2] A servient estate is an estate burdened by an easement (here M.P.M.'s property). A dominant estate is an estate that benefits from an easement (here Dwyer's property). See Black's Law Dictionary 567, 569 (7th ed. 1999). The owner of the dominant estate is the easement holder.

[Note 3] Although the deed describes the right of way along a single cartway, the judge and the parties characterize the easement as being along the "cartways" or "cartpaths," presumably because the cartway splits into three separate branches. We use the term "cartway," as used in the deed.

[Note 4] We previously have concluded that the dominant estate owner, that is, the easement holder, may not unilaterally relocate an easement. See Kesseler v. Bowditch, 223 Mass. 265, 269-270 (1916); Jennison v. Walker, 11 Gray 423, 426 (1858). According to the Restatement, many jurisdictions have erroneously expanded that sensible restriction into one that prevents the owner of the servient estate from relocating the easement without the consent of the easement holder. Restatement (Third) of Property (Servitudes) § 4.8 (3) comment f, at 563 (2000).

[Note 5] Dwyer correctly states that the majority of jurisdictions require mutual consent to change the location of an easement. See Restatement (Third) of Property (Servitudes), supra at comment f, at 563; Note, The Right of Owners of Servient Estates to Relocate Easements Unilaterally, 109 Harv. L. Rev. 1693, 1694 (1996). However, most of these decisions were issued prior to the publication of the Restatement (Third) of Property (Servitudes) (2000). See, e.g., Davis v. Bruk, 411 A.2d 660 (Me. 1980); Sakansky v. Wein, 86 N.H. 337 (1933); Johnson v. Jaqui, 27 N.J. Eq. 552 (1876); Garraty v. Duffy, 7 R.I. 476 (1863); Moore v. Center, 124 Vt. 277 (1964). Of the State appellate courts that have addressed the issue since § 4.8 (3) was drafted, four have adopted, or referred with approval to, the rule in some form. See Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1236, 1238 (Colo. 2001) (adopting rule but requiring declaratory judgment prior to relocation); Lewis v. Young, 92 N.Y.2d 443, 452 (1998) (adopting rule for easements not expressly defined in grant); Goodwin v. Johnson, 357 S.C. 49, 57-58 (Ct. App. 2003) (adopting Restatement position for easements by necessity); Burkhart v. Lillehaug, 664 N.W.2d 41, 43- 44 (S.D. 2003) (applying Restatement § 4.8 [3] to changes made to easement). We have found only two State appellate courts that have expressly rejected it. See Herren v. Pettengill, 273 Ga. 122, 124 (2000); MacMeekin v. Low Income Hous. Inst., Inc., 111 Wash. App. 188, 207 (2002).

[Note 6] In his amicus brief, the Attorney General asks that, should we adopt § 4.8 (3) of the Restatement, we carve an exception for public easements on a private party's land. We do not address this proposition as it is not an issue in this case.

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THINGS THAT GO BUMP IN YOUR SURVEYS: SURVEYOR LIABILITY TO CLIENTS AND THIRD PARTIES IN MASSACHUSETTS

From ghoulies and ghosties
And long-leggedy beasties
And things that go bump in the night
Good Lord, deliver us!

Source: James Hardy (Ed.), The Denham Tracts (London: Folklore Society 1895) Vol. 2, pp. 76-80.

"But no principle is better established than that ignorance of the law is no excuse for its violation." ***White v. White,*** **105 Mass. 325, 326 (1870)**

Third Edition, January 27, 2023 [Prior editions should be discarded]

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Prepared for Fourteenth Annual Legal Perspective on Land Surveying seminar
Massachusetts Association of Land Surveyors and Civil Engineers (MALSCE)

ACKNOWLEDGMENTS: While errors herein are solely the author's responsibility, the author wishes to thank the following, who kindly reviewed and offered comments on the first edition this work:

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CAVEAT: Nothing in this work is intended or should be construed as formal legal advice for any particular problem or situation. For advice concerning Massachusetts law and its application to specific factual situations, consult an attorney.

MP/csh/L1.MALSCE.January2023

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Introduction: How does a non-lawyer understand American law?

(1) The hierarchy of legal authority.

In the United States, law comes from several sources. State and federal constitutions create legislative, executive and judicial branches of government. Each of those branches in turn creates "law" that people must live by. At the top of the legal hierarchy are state and federal constitutions. "Unconstitutional" laws enacted by congress and a state legislature may be invalidated by the courts. Next comes legislation, followed by court cases (subject to the exception that a court may invalidate legislation if it violates some constitutional provision). In order of precedence, then, the sources of legal authority are the following:

(A) Constitution: creates legislative, judicial and executive branches of government;

(B) Legislature: enacts laws, called "statutes" or "legislation;"

(C) Courts: Issue published decisions, applied by analogy to govern later fact situations. Occasionally, courts invalidate legislation on the grounds that it is unconstitutional.

(D) Administrative Agencies: Implement legislation, promulgating administrative regulations and making "adjudicatory" decisions in individual cases. Adjudicatory decisions include determinations by local planning boards to grant or deny endorsement of an ANR (Approval Not Required under the subdivision control law) plan, or to approve or deny a definitive subdivision plan

(1)(A) Massachusetts Constitution of 1780

The 1780 Constitution of the Commonwealth of Massachusetts, drafted by John Adams, is the world's oldest functioning written constitution. It served as a model for the United States Constitution, which was written in 1787 and became effective in 1789. (The Bill of Rights to the United States Constitution was approved in 1789 and became effective in 1791).

SOURCE: Guide: John Adams and the Massachusetts Constitution https://www.mass.gov/guides/john-adams-the-massachusetts-constitution

The Massachusetts Constitution of 1780, drafted by John Adams, is the oldest written constitution in the world that is still in use. Predating the U.S. Constitution by nearly a decade, it includes a Declaration of Rights that helped provide a model for the federal constitution's Bill of Rights. A brief online history of the Massachusetts Constitution of 1780 will be found at https://www.mass.gov/guides/john-adams-the-massachusetts-constitution. The complete text of the Massachusetts Constitution is online at https://malegislature.gov/Laws/Constitution

(1)(B) Massachusetts Legislature and local legislation (bylaws and ordinances)

The Massachusetts Constitution created the state legislature, called the General Court. Mass. Const., c. 1, § 1, Art. 1. The legislature passes individual "bills" which when passed are called "acts." These acts, published in the order enacted, are codified into the chapters and sections in the Massachusetts General Laws. General Laws, chapter ___, section ___ is abbreviated below as simply "G.L. c. __, § __". Elsewhere you may see it abbreviated as "M.G.L. c. __, § __." For example, the qualifications for a professional land surveyor are set forth as follows in G.L. c. 112, § 81J(2)(a)-(f):

The following shall be considered as minimum evidence satisfactory to the board that an applicant is qualified for registration as a professional engineer or professional land surveyor, respectively, to wit: …

(2) As a professional land surveyor:

(a) A person holding a bachelor of science degree in an approved curriculum and presenting evidence satisfactory to the board that, in addition thereto, he has had at least four years of combined office and field experience in land surveying with a minimum of three years' experience in responsible charge of land surveying projects under the supervision of a registered professional land surveyor and who has passed the oral and written examinations as required by the board.

(b) A person holding two years of formal education in an approved curriculum above high school level with at least sixty semester credit hours passed or equivalent quarter-hours, or the equivalent approved by the board, and presenting evidence satisfactory to the board that in addition thereto he has had at least six years of combined office and field experience in land surveying with a minimum of four years' experience in responsible charge of land surveying projects under the supervision of a registered professional land surveyor and who has passed the oral and written examinations as required by the board.

(c) A person who has a specific record of twelve years or more of lawful practice in surveying work of a character satisfactory to the board and who passes the required written examinations, which shall include questions on laws, procedures and practices pertaining to practices in the commonwealth, and passes an oral examination at the discretion of the board may be granted a certificate of registration to practice surveying provided he is otherwise qualified.

(d) A person holding a certificate of registration to engage in the practice of land surveying issued on comparable qualifications from a state, commonwealth, territory, or possession of the United States, will be given comity consideration. However, he may be asked to take such examinations as the board deems necessary to determine his qualifications, but in any event he shall be required to pass the required written examination of not less than four hours' duration, which shall include questions on laws, procedures and practices pertaining to practice in the commonwealth.

(e) Undergraduate study in a surveying curriculum approved by the board as being of satisfactory standing may be considered as surveying experience on an equivalent full-time basis up to a maximum of two years in computing the number of years of experience in surveying work in clauses (b) and (c) of this subsection.

(f) A person, with a record of at least twenty years of lawful practice in land surveying work, of which at least ten years he has been responsible for major land surveying work, of a grade and character which indicates to the board that the person may be competent to practice land surveying and who has passed an oral or written examination in the principles and practice of land surveying, and is otherwise qualified, shall be registered to practice land surveying in the commonwealth.

The terms “Professional land surveyor” and “Practice of land surveying” are defined this way in G.L. c. 112, § 81D:

> The following words and phrases as used in sections eighty-one D to eighty-one T, inclusive, hereinafter referred to as said sections, shall, unless the context otherwise requires, have the following meanings:-- …
>
> “Professional land surveyor”, a professional specialist in the technique of measuring land, educated in the basic principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence and all requisite to the surveying of real property and engaged in the practice of land surveying.
>
> “Practice of land surveying”, any service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence to the act of measuring and locating lines, angles, elevations, natural and manmade features in the air, on the surface of the earth, within underground workings, and on the beds of bodies of water for the purpose of determining areas and volumes, for the monumenting of property boundaries, for locating or relocating any of the fixed works embraced within the practice of civil engineering, and for the platting, and layout of lands and subdivisions thereof, including the topography, alignment and grades of streets, and for the preparation and perpetuation of maps, record plats, field note records and property descriptions that represent these surveys.
>
> A person shall be construed to practice or to offer to practice land surveying who engages in land surveying, or who by verbal claim, sign, letterhead, card or in any other way represents himself to be a land surveyor, or through the use of some other title implies that he is a land surveyor, or who represents himself as able to perform, or who does perform any land surveying service or work, or any other service designated by the practitioner which is recognized as land surveying.

Local bylaws (enacted by a town meeting) or ordinances (enacted by a city council) also are considered legislation. Some larger municipalities codify their ordinances and bylaws, but most small towns do not do so. Where local legislation is not codified, one must consult local boards (such as a conservation commission to see if the town has a local wetlands bylaw). A record of all local legislation should be available in the office of the city or town clerk. Nowadays, most cities and towns have their local bylaws or ordinances available online.

Analogous to legislation are state administrative regulations and local regulations, discussed below in section 1(D) of this work, entitled "Massachusetts administrative agencies and regulations."

(1)(C) Massachusetts judiciary and court cases: "common law" or "case law"

The courts interpret and apply legislation to specific factual situations. Some court decisions are published, so lawyers can use them as precedent to help decide future cases. The term "common law" or "case law" refers to general legal principles developed over time through a series of individual court decisions. It comes to us from England, from a time when there was little legislation, no administrative regulations, and most legal rulemaking was left to the courts. Bryan A. Garner (Ed.), Black's Law Dictionary (10th Ed. 2014) defines the term "common law" as "The body of law derived from judicial decisions, rather than from statutes or constitutions."

We have what is sometimes called an "Anglo-American" legal system, because of its English origins. The Massachusetts Constitution of 1780, Pt. 2, C. 6, Art. 6 "Continuation of former laws," adopted English colonial law as it existed up to that time, with these words:

> All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.

(1)(C)(i) Where Massachusetts court cases are published in print and online.

In Massachusetts, court cases are published in paper form both by the Commonwealth and by a private company. They are also available online from several sources.

Cases from the Commonwealth's highest court (Supreme Judicial Court, abbreviated SJC) are published in the official Massachusetts reports (abbreviated "Mass."), while cases from the intermediate Appeals Court (established in 1972) are published in the official Massachusetts Appeals Court Reports (abbreviated "Mass. App. Ct.").

Cases decided during the previous two weeks are available free online at the Commonwealth web page https://www.mass.gov/service-details/new-opinions.

SJC cases from 1938 to date, and Appeals Court decisions from the creation of that court in 1972 to date, are online at http://masscases.com/, where they can be accessed by citation, case name, or by subject through a Google search. SJC decisions from 1804-1921 can be accessed at no charge online through https://www.mass.gov/guides/early-massachusetts-reports-volumes-1-238, which provides a link for each of those volumes to where it is actually is online at https://books.google.com.

SJC and Appeals Court decisions appear together in the Northeastern Reporter a private publication originally published by West Publishing Company of St. Paul, Minnesota, now part of a corporate conglomerate called Thomson Reuters. The first series (abbreviated "N.E.") consists of Volumes 1-200 published during the years 1885-1936. After 200 volumes of the Northeastern Reporter were published, numbering began again with the second series. In other words, volume 1 N.E.2d came immediately after volume 200 N.E. The Second Series (abbreviated N.E.2d) consists of 999 volumes published from 1936 to 2014, Volume 999 of N.E.2d was followed by Volume 1 of Northeastern Reporter, Third Series (N.E.3d), which has been published from 2014 to date.

Cases published in the Northeastern Reporter also appear online as part of a very expensive proprietary database called Westlaw. Click on "Westlaw Legal Research" or "Learn About Westlaw" at https://legalsolutions.thomsonreuters.com/law-products/. Westlaw's major competitor is the expensive proprietary database Lexis. Information is available at https://www.lexisnexis.com/en-us/home.page.

Both Westlaw and Lexis can be accessed at no charge at the Massachusetts Trial Court Law Libraries. Information about availability of these databases is at https://www.mass.gov/service-details/lexis-and-westlaw-at-the-law-library. These public law libraries, located around the state, are funded by the Commonwealth. For the location of the one nearest the reader, go to

https://www.mass.gov/node/47501/locations. While the librarians at these libraries cannot give legal advice, they often can provide invaluable assistance in locating legal source material. They also may be able to help library patrons learn how to use online legal databases.

(1)(C)(ii) How court cases are cited – understanding the abbreviations.

With a case citation, anyone can look up a court decision online, in a law school library, or Trial Court Law Library.

Citations to court cases are based on abbreviations. For example, the citation "*Angus v. Miller,* 5 Mass. App. Ct. 470, 363 N.E.2d 1349 (1977)" breaks down this way:

> Angus is the plaintiff,
> Miller is the defendant,
> the decision is by the Appeals Court,
> it is published at Volume 5 of the Massachusetts Appeals Court Reports, starting at page 470;
> the same decision is published in Volume 363 of the Northeastern Reporter, Second Series,
> starting at page 1349,
> the case was decided in the year 1977.

One can distinguish an SJC decision from an Appeals Court case by the official citation ("Mass." instead of "Mass. App. Ct."). An SJC case is cited this way: *Morse v. Benson,* 151 Mass. 440, 24 N.E. 675 (1890). Note that this older case appears in "N.E." which is the Northeastern Reporter, First Series.

The online databases Westlaw and Lexis also have their own parallel citation systems. These are used to cite unpublished Massachusetts court decisions reproduced in online databases, that do not appear either in official case reports (Mass. or Mass. App. Ct.) or in the Thomson Reuters Northeastern Reporter. Published decisions can be found in online databases by using the official (Mass. or Mass. App. Ct.) citations.

(1)(C)(iii) Supreme Judicial Court (SJC) and Appeals Court

The relationship between Massachusetts Appeals Court decisions and those of the SJC is twofold. On the one hand, published decisions of the Appeals Court are binding precedent:

> "It goes without saying that Appeals Court decisions may appropriately be cited as sources of Massachusetts law." *Ford v. Flaherty,* 364 Mass. 382, 388, 305 N.E.2d 112 (1973). "An intermediate court ... is a maker of law in the same sense as the supreme court." Kaplan, Do Intermediate Appellate Courts Have a Lawmaking Function?, 68 Mass.L.Rev. 10, 12 (1985). A town or any other person affected by an Appeals Court decision is governed by the Appeals Court decision until and unless either that court or this court declares otherwise.
>
> Source: *Adamowicz v. Town of Ipswich,* 395 Mass. 757, 759 n. 4, 481 N.E.2d, 1368, 1370 n. 4 (1985).
>
> Note: The above cited decision begins at page 757 of volume 395 of the Massachusetts reports. The quotation appears at page 759, in footnote 4; "759 n. 4" is called the "jump cite."

On the other hand, while the SJC can and sometimes does reverse an Appeals Court decision, the Appeals Court cannot overrule the SJC. *Burke v. Toothaker* 1 Mass. App. Ct. 234, 239, 295 N.E.2d 184, 186-187 (1973) ("This is an 'intermediate appellate court' (G.L. c. 211A, § 1, inserted by St.1972, c. 740, § 1), and we do not regard it as one of our functions to alter established rules of law governing principles of substantive liability.")

(1)(C)(iv) Only published SJC and Appeals Court decisions are binding precedent.

SJC cases are issued by the entire court, consisting of seven justices. A brief online history and description of the SJC appears online at http://www.mass.gov/courts/court-info/about-mass-courts/sjc-hist-gen.html. SJC decisions are binding precedent on all other courts of the Commonwealth. They can be overruled only by the legislature, the SJC itself, or by the U.S. Supreme Court (the latter only on federal constitutional questions; the SJC is the final arbiter of questions arising under the state constitution).

The Appeals Court, which handles most of the appellate case load, consists of twenty-five justices who generally sit in panels of three. See the web page "General Information About the Appeals Court at https://www.mass.gov/service-details/general-information-about-the-appeals-court.

Because of the Appeals Court's large caseload, many of its decisions are not published (meaning they do not appear in the official Mass. App. Ct. reports, although the complete text of unpublished decisions is available on Westlaw and Lexis). Published decisions are reviewed by the entire Appeals Court (not just the three-judge panel that decided the case), and may be cited as precedent binding on the lower (e.g. trial) courts.

Unpublished "Summary dispositions" issued under Appeals Court Rule 23.0 (online at https://www.mass.gov/appeals-court-rules/appeals-court-rule-230-summary-disposition-formerly-known-as-appeals-court-rule-128) "are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case." *Chace v. Curran,* 71 Mass. App. Ct. 258, 260 n. 4, 881 N.E.2d 792, 794 n. 4 (2008). The court in *Chace v. Curran, supra,* stated that "A summary decision pursuant to rule 1:28, issued after the date of this opinion, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent." *Id.* Appeals Court Rule 23(2) "Citation of Summary Dispositions", states as follows:

> If, in a brief or other filing, a party cites to a decision issued under this rule, the party shall cite the case title, a citation to the Appeals Court Reports where issuance of the decision is noted, and a notation that the decision was issued pursuant to this rule (or its predecessor, Appeals Court Rule 1:28). No such decision issued before February 26, 2008, may be cited.

CAVEAT: Some lawyers cite unpublished Appeals Court decisions without plainly identifying them as such. Possibly they are confused, because the Westlaw and Lexis databases include them along with published decisions. In addition to identifying a decision as unpublished, the

person citing it should provide opponents who do not have ready access to Westlaw or Lexis with the complete text, a requirement set forth by the Appeals Court in *Chace v. Curran, supra,* in these words:

> In an effort to ensure that all litigants have equal access to rule 1:28 decisions their adversaries may cite, the court is proposing today a rule requiring, inter alia, inclusion of the rule 1:28 decision in an addendum to the brief in which the decision is cited. Until proceedings on that proposed rule are completed, litigants should include the full text of the decision as an addendum to the brief in which it is cited.

71 Mass. App. Ct. at, 260 n. 4, 881 N.E.2d at 794 n. 4.

(1)(C)(v) Role of SJC and Appeals Court as appellate courts.

As "appellate" courts, the Supreme Judicial Court and Appeals Court both review decisions of trial courts to see if an error was made in the lower court. Such review occurs only when one or more parties files an appeal from the judgment in the trial court, asserting that some error(s) occurred. In Massachusetts, the trial courts include the Superior Court, Land Court, Probate Court, Housing Court, Juvenile Court, District Court and Boston Municipal Court. There is also an Appellate Division of the District Court.

Appellate courts generally to not hear testimony or accept any new evidence that was not placed before the lower court. Especially in civil cases, they most likely will not consider a legal issue that was not raised first before the lower court. The record before an appellate court consists of papers filed with the lower court. If a trial was held, those papers include a transcript of the trial and copies of exhibits admitted into evidence. Based on that record, called the "Record Appendix," the parties prepare legal briefs containing legal arguments based on the Record Appendix. The appellant is the party seeking to reverse the lower court decision. The appellee is the party who won in the court below, who must defend that decision before the appellate court.

(1)(D) Massachusetts administrative agencies and regulations

State administrative agencies are part of the executive branch of government. One example is the Massachusetts Board of Registration of Professional Engineers and Professional Land Surveyors. Administrative regulations promulgated by these and other state agencies appear initially in the Massachusetts Register, published by the office of the Secretary of the Commonwealth. Regulations then are codified by issuing agency and subject matter in the Code of Massachusetts Regulations (C.M.R.). Administrative regulations have the force of law.

Administrative regulations in the C.M.R. are cited by title and chapter or subsection. For example, Title 250 C.M.R. is entitled "Board of Registration of Professional Engineers and Land Surveyors." It consists of the following chapters:

Chapter 1.00: Reserved
Chapter 2.00: Rules for Adopting Administrative Regulations
Chapter 3.00: Application and Examination
Chapter 4.00: Reserved
Chapter 5.00: Standards for Professional Practice
Chapter 6.00: Land Surveying Procedures and Standards
Chapter 7.00: Enforcement and Discipline

Section 2.09 "Definitions" and chapters 5.00 and 6.00 are discussed in more detail below in Section 1.A. of these materials, on the importance of working "by the book." For Massachusetts professional land surveyors, those regulations are part of "the book."

There are also local administrative regulations, such as local subdivision regulations promulgated by the municipal planning board, regulations adopted by a local board of health, or local conservation commission regulations implementing a local wetlands protection bylaw or ordinance. Like bylaws and ordinances, these regulations are often available online, and should be on file at the office of the city or town clerk. Like state regulations, they have the force of law, but cannot override the legislation they are promulgated to implement.

(1)(E) Secondary legal authority: treatises and law reviews

In addition to state & federal constitutions, legislation & administrative regulations, and court cases, lawyers also rely on what is called "secondary authority." Secondary authority consists of books (called "treatises") and articles (published in legal periodicals called "law reviews"), generally written by practicing lawyers, judges or law professors. They are "secondary" sources because they represent the author's opinion or commentary on constitutions, legislation, court decisions, and administrative regulations. They do not have the force of law.

Treatises are particularly helpful for the non-specialist lawyer or non-lawyer. They collect court cases and summarize the law. For a general introduction and basic understanding of an area of the law, they are invaluable.

CAVEAT: BEWARE of summary statements of legal rules found in treatises. All too often, the omission of crucial details can be misleading. Sometimes a treatise author simply makes a mistake, or omits something important. General statements of the law in court cases arise from the facts of that particular case. A court may see things differently if the facts of your case are different. In other words, a general statement of the law appearing in a treatise, even if accurately based on the facts of one or more cases cited by that treatise, may not be applicable to the facts of your particular case.

If one is seeking an authoritative answer to a specific legal question, there is no substitute for detailed reading of governing legislation, applicable administrative regulations, and individual court cases,. Treatise footnotes usually provide citations to court cases. One way to approach a treatise is to review the text in search of material relevant to the issue at hand. If something relevant is found in the text, it is a good idea to review the court case(s) cited in the accompanying footnote(s).

Case citations in treatises may not be exhaustive. Different treatises on the same subject may cite different court cases. The thorough legal researcher will check all available published treatises that may cover a particular subject.

Treatises and law reviews are frequently cited and quoted by judges writing court decisions. The citation format lists author, title, reference to section and page number within the work, and year of publication, as in the following example: Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts, § 576 "Non-damages remedies including money disgorgement" (2nd ed. & Supp. 2017).

For a treatise consisting of multiple volumes, the volume number appears at the beginning of the title. Volume 28A of the Massachusetts Practice Series, entitled "Real Estate Law with Forms", is cited this way: Michael Pill, 28A Massachusetts Practice: Real Estate Law with Forms, § 27:16. Boundary line agreements (4th ed. 2004 & Supp. 2022). The information in parentheses means that the current fourth edition was published in 2004, and that a paper supplement (sometimes inserted inside the back cover of a hard bound main volume, in which case it is called a "pocket part") was published for the year 2022. This treatise is online as a Westlaw database. The online version incorporates all supplements into the body of the text for each section of the treatise, eliminating the need to review both a hardbound volume and a paper supplement.

There are two legal treatises on Massachusetts zoning law, that I urge every surveyor to purchase and keep up to date with supplements as they are published:

(1) **Mark Bobrowski, Handbook of Massachusetts Land Use and Planning Law (5th edition 2022 & annual paper supplements)**

Published by Wolters Kluwer (sales (800) 638-8437). This treatise is available from the publisher at https://law-store.wolterskluwer.com/s/product/handbook-massachusetts-land-use-planning-law-5e-misb/01t4R00000OVdXbQAL.

Be sure to subscribe to annual supplements, which will be sent reliably. I recommend buying only from the publisher, to help make sure you also get a subscription to the annual supplements. <u>There is nothing more dangerous than an outdated legal treatise; if you are going to buy this treatise, you must subscribe to the annual supplements.</u>

One can also purchase this treatise in the form of an online internet subscription, at https://law-store.wolterskluwer.com/s/product/handbook-of-massachusetts-land-use-planning-law3-mo-subvitallaw-3r/01t0f00000J4aETAAZ

This book is written largely from a municipal perspective. Both the table of contents and the index are extremely useful for finding the topic you need.

This treatise has been cited in many published Massachusetts court decisions.

(2) **Martin R. Healy & Michael K. Murray (Editors), Massachusetts Zoning Manual, loose leaf in two volumes (7th Edition 2021), published by Massachusetts Continuing Legal Education, Inc. (MCLE)**

MCLE Product Number 1900236B00; www.mcle.org, Phone (800) 966-6253, email customerservice@mcle.org. Online at https://www.mcle.org/product/catalog/code/1900236B00

Be sure to subscribe to supplements, then contact MCLE every year, because they may fail to send you supplements as issued. Maintaining supplement subscriptions lists has been a chronic problem for MCLE.

This book, like most MCLE treatises, does not have either a table of contents or an index worthy of the name. Finding material relevant to a particular topic is not always easy. I check the Bobrowski treatise cited above first. Once I find the relevant material in Bobrowski, I use the cases he cites to find the corresponding text in the MCLE treatise using the table of cases. In other words, if Bobrowski cites *Smith vs. East Overshoe,* I then look in the MCLE treatise table of cases to see where in the MCLE work that case is cited, then go to those sections.

This treatise can be purchased either as a print book or as an ebook (PDF, MOBI or EPUB). It is also on Westlaw. To bring up the Table of Contents on Westlaw, enter "ZONE MA-CLE Contents" as the Westlaw search phrase, being sure to put that search phrase in quotation marks. From the Table of Contents, one can click on chapter titles to access individual chapters.

Buying these two books and learning to refer to them on a regular basis as reference works will help accomplish the following objectives:

(A) You as a surveyor will become more knowledgeable about the law governing zoning and subdivision matters that you often must address in preparing survey plans for clients.

(B) You will be less dependent upon lawyers. Zoning is a complex legal specialty with which many lawyers are unfamiliar. Even if a lawyer has specialized experience and is knowledgeable about Massachusetts zoning law, you will be better able to formulate questions and understand the answers if you strive to educate yourself by referring to these treatises.

(C) You will have some protection against making errors out of ignorance. If you want additional protection, obtain a written opinion from a lawyer, which shifts professional responsibility to that lawyer.

(D) Being able to look up information for yourself will afford you some protection from being led astray by adversary lawyers whose job, after all, is to be zealous advocates for their clients. A lawyer representing an adverse party is not there to provide you with a free education about the governing law.

If you think the annual investment of several hundred dollars to purchase these books and keep them up to date is expensive, compare that cost to the hundreds of dollars per hour charged by lawyers. My hourly rate is $395; lawyers in big Boston law firms who practice in my land law specialty bill at over $1000 hourly. These books will pay for themselves very quickly, and they are legitimate tax-deductible business expenses.

(2) Lawyers reason by analogy and distinction to apply legal authority to particular facts.

In a legal dispute, the lawyer for each side sifts through legislation, administrative regulations, court decisions, and secondary authority, looking for material that supports his/her client's case. With cases, the attorney then argues that one or more court decisions apply by analogy to the facts at hand. The opposing lawyer's job is to distinguish those cases and show that some other case, leading to a different conclusion, is really more similar and therefore should govern.

For example, legend has it that early in nineteenth century Iowa (the author's home state), the state legislature felt the need to enact a law stating, "No one shall allow livestock to graze or wander loose on the grounds of the state capitol building."

The first person to run afoul of this law was a farmer whose cow wandered onto the capitol lawn and started munching the grass. The court had no trouble determining that a cow was included in the general term "livestock."

The next year, however, a local pioneer came back from a remote jungle with a pet orangutan, which he left outdoors while attending to business in the capitol building. The pioneer's clever lawyer argued that while a domesticated animal like a cow might be considered livestock, an orangutan was a wild animal, in Latin *"ferae naturae."* The court concluded that a wild animal like an orangutan could not properly be considered "livestock". The court noted that if the legislature wanted to extend the law, by replacing the term "livestock" with the broader term "any animal", it could do so.

The third animal to run afoul of the law was a goat. The court first decided that the orangutan case was irrelevant because a goat was not a wild animal. The court then concluded that a goat, like the cow in the first case, was a domesticated animal that fell within the term "livestock". With three decided court cases, there was now a body of case law to aid in interpreting the legislation.

(3) How to read a court decision

Court cases are filled with legal jargon that can make them difficult to understand. The Trial Court Law Libraries have legal dictionaries. The most widely used (but not necessarily the best) legal dictionary is Bryan A. Garner (ed.), Black's Law Dictionary (11th ed. 2019), which is available both in book form and online as a Westlaw database.

If you are reading a court case and find a term you don't understand, take the time and trouble to look up the definition. Failure to do so can mean failure to understand the court's decision. As in many subject areas, a superficial or inaccurate understanding resulting from failure to understand important words can be worse than complete ignorance. I learned this lesson during my first three days of law school, when I was required to read a seventeenth century English case that stated "A servant with a cart ran against another cart wherein was a pipe of sack, overturned the other cart and spoiled the sack; an action lies against the master." We were told to explain what happened in that case, and the legal rule it represented. Out of desperation, I went to the Merriam Webster Unabridged Dictionary in the law school library. Looking up the words servant, cart, pipe and sack, I learned that "pipe" was

an archaic word for "cask" and "sack" was an equally archaic word for "white wine." In other words, when the cart overturned, a cask of white wine was ruined.

But the point of the case had nothing to do with the definition of "pipe" and "sack." Rather, the legal rule for which the case provided precedent was that the master was held liable for the negligence of his servant, a principle still applicable in modern American law. The professor had placed before us new law students a classic "red herring," meaning something distracting or misleading. Learning to separate wheat from chaff in this manner is part of how lawyers are trained. Like a doctor who must sort through a mass of symptoms to make a diagnosis, a lawyer must sift the facts of a particular case in order to distill those facts that are legally relevant, then focus on how to win the case for the client.

Law students are taught to read court cases by making a brief (i.e., outline) of each case read in preparation for class. During my first semester of law school, I prepared a typewritten brief of each and every case I read for every one of my classes. The workload was crushing, but it taught me how to read and understand court cases. It also helped me remember details about a case.

As a law student, I generally used the outline format set forth below to break down a court decision into its component parts. Judges have their own writing styles, so not every element listed below will appear in every court decision. You must learn to use your own judgment and develop your own outline format when reading court cases.

A. Case name, citation (including year), and the court that decided the case.

B. Parties.

One simple but important task here is to get straight in one's mind who was suing whom in the trial court. That is, who are the plaintiffs and who are the defendants in the trial court? The party bringing the appeal (who can be either a plaintiff or a defendant) is called the appellant. The party who prevailed below, and who is defending the appeal, is called the appellee.

C. Summary by the court or by the private publisher.

Summaries may be useful guides, but beware of them because they are not part of the official court decision.

D. Headnotes (for Massachusetts cases, these are found only in the versions of cases published in the Northeastern Reporter or in the private proprietary online databases Westlaw and Lexis).

In the Northeastern Reporter and Westlaw, headnotes are annotations organized by subject matter, according to topics originally developed by the West Publishing Company at the beginning of the twentieth century. Before computerized and online data bases, the West Digest topic system was the most complete indexing system for American case law. It has carried over into the Westlaw database, where it provides an additional method for searching through court cases to find those that are relevant for a particular problem.

CAVEAT: NEVER RELY ON A SUMMARY OR HEADNOTE; READ THE ACTUAL COURT DECISION.

Summaries and headnotes are often useful for focusing on the most relevant part of the court's decision, but they are not part of that decision and should never be quoted or relied upon.

E. Name of the judge who wrote the decision (especially if the judge is someone who is highly regarded.)

For example, I always make a note if a Massachusetts decision was written by Oliver Wendell Holmes before his elevation to the U.S. Supreme Court, or by the great nineteenth century Massachusetts SJC Chief Justice Lemuel Shaw. When I cite decisions of the Massachusetts Land Court, I always include the judge's name because Land Court judges often are recognized specialists in this area of the law.

F. Facts.

What happened? How did this dispute arise? Try to break down the facts using the traditional journalists' outline:

Who,
What
When,
Where
Why and
How.

Facts are often best organized in chronological order; try to understand events as they happened.

G. Claims/contentions/arguments by each side.

What did the plaintiff(s) assert in seeking relief in the trial court?
What defenses and counter-arguments were made by the defendant(s) in the trial court?
These can be broken down as follows:

Plaintiffs' claims
Defendants' defenses
Defendants' counterclaims (if any) and plaintiffs' defenses to the counterclaims.

H. Trial court decision.

(i) What rulings of law were made by the trial judge?

(ii) What were the findings of fact made by the judge or jury?

(iii) Was the case resolved through a trial, with live testimony by witnesses, or by submission of affidavits? Affidavits are used where one side asserts there is no factual dispute; under those circumstances the case may be resolved by a motion for "summary judgment." Rule 56(b) of the Massachusetts Rules of Civil Procedure (cited as Mass.R.Civ.P. 56(b)) states as follows (bold face numbers in brackets added as an aid in parsing the text of the rule):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that
> **[1]** there is no genuine issue as to any material fact and that
> **[2]** the moving party is entitled to a judgment as a matter of law.

I. Error(s) asserted by the appellant(s).

What error does the party bringing the appeal (called the appellant) claim was made in the court below?

An appellate court decides if the trial court was correct or made an error in deciding the case. The appellate court's options include the following:

Affirming the trial court.

Reversing the trial court and ordering entry of a new judgment for the party who lost in the trial court

Reversing the trial court and remanding the case back to the trial court for further proceedings consistent with the appellate court's decision

Affirming in part and reversing in part

J. Key issue(s) or question(s) decided.

How did the court frame the issue or question to be decided?

Sometimes the court simply responds to the contentions of the opposing parties. Alternatively, the court may frame in its own words the issue or question to be decided.

K. What is the court's holding?

The holding of the court is the decision made on the specific factual or legal issues that are presented by the appeal.

As noted above, a trial court decision may be affirmed, reversed, or affirmed in part and reversed in part. The appellate court may remand the case to the trial court for further proceedings in accordance with the appellate court's decision. If the case was remanded, what were the issues to be resolved on remand?

L. Rationale for holding.

What were the reasons for the court's holding on each legal issue?
What facts were decisive?
What legal authority or public policy grounds were relied upon?
Why were the losing side's arguments not persuasive?

M. Are there any dicta?

A dictum (singular) or dicta (plural), represent the court's comments and suggestions for future reference. Dicta go beyond what must be said to decide the immediate question presented by the appeal, so they are given less weight than the holding. When a lawyer is trying to distinguish a case as inapplicable, it helps to be able to say that the court was only speculating about facts not actually before it.

(4) Has a particular court case been followed, distinguished or abrogated by later court decisions?

Before online data bases, legal researchers had to go through books called "Shepard's Citations" to learn how a case had been treated by subsequent decisions. One had to pore over columns of citations, then go the library shelves and read the subsequent decisions, each one usually in a separate volume.

This time-consuming drudgery has been replaced by clicks of the computer mouse. With Westlaw, for example, the citation feature is called "Key Cite." One can click to see a list of subsequent court cases and secondary authority citing a particular court decision. By clicking on the items listed, one can go immediately to see what later cases have to say about the decision. This can be especially useful if a decision is cited by later cases as standing for a proposition not explicitly stated. It is especially important to review later cases identified as distinguishing, abrogating, reversing or limiting the application of the earlier decision.

(5) Conclusion: Ask lawyers for citations to legal authority!

If a lawyer urges a legal argument upon you, ask if the lawyer's position is supported by legislation, court cases, regulations, or at least a secondary source such as a treatise. Ask for specific

citations to statutes, court cases, regulations and treatises, including "jump cite" references to particular interior pages in court cases or treatises.

A lawyer who is dealing straight with you should have no problem providing such supporting information. Beware, if the lawyer starts waffling, or expressing concern that you as a lay person might not understand the legal authority! As a law student I was taught the maxim, "Pound the facts, pound the law, or pound the table!"

A lawyer being paid by a client to obtain a particular result may not quote or cite legal authority in a completely accurate manner. I lost count many years ago of the number of times I have:

(a) read cases that simply did not stand for the proposition for which they were cited; or

(b) checked a quotation only to find that a preceding or subsequent statement refuted the quotation or placed it in a different context. It is always good to read the cited legal authority for yourself, or ask a qualified lawyer to do so for you.

"Cherry-picking" a quotation and taking it out of context is a time-honored legal tradition. If one does not check the quoted legal authority, one has no way of knowing for sure if the cited or quoted legal authority actually supports a lawyer's argument.

Equally important, reviewing the legal authorities cited by an opposing lawyer may lead one to other legal authorities supporting one's own position. A highly competent opposing lawyer may have reviewed many cases on a particular topic, selecting for citation or quotation only the one(s) most favorable to her/his position. That same methodology can be used to develop an opposing argument.

If all this sounds like a lot of work, it is. I was taught the following three rules: "(1) Preparation, (2) Preparation, (3) More preparation." While lawyers thankfully fight only with words rather than blood and steel, in legal conflict as in war, one should thoroughly prepare a battle plan, then be prepared to improvise when events do not unfold as planned.

Never forget that a lawyer is an advocate, hired to obtain the result desired by her/his client. Never assume that a lawyer who does not work for you will advocate for your best interests. Rather, you must ask yourself who is this lawyer's client(s)? What interests are being served by this lawyer in this situation?

Finally, because an attorney is a professional hired advocate, never assume that a position taken on behalf of a client represents a lawyer's personal beliefs or opinions. The fact that a lawyer may be representing someone you consider a scoundrel does not mean the lawyer is a scoundrel. Lawyers are not their clients' keepers.

1. Minimizing exposure to malpractice claims: "An ounce of prevention …."

"An ounce of prevention is worth a pound of cure."
Source: Benjamin Franklin

"The best lawsuit is one you can avoid."
"In litigation, the only sure winners are the lawyers."
"In a world where bad cases sometimes win and good cases sometimes lose, the outcome of litigation is always uncertain."
"There is one certainty when a case goes to a jury: anything at all can happen."
Source: Michael Pill (Standard advice to clients and others.)

No one who has not been involved in civil litigation can fully appreciate the cost in terms of money, time, stress and uncertainty.

Nowadays, tens of thousands of dollars is the minimum cost of a civil lawsuit. Total legal fees and expenses for a single lawsuit easily can exceed one hundred thousand dollars.

Sadly, in our capitalist system, often it is the money rather than the principle. Justice may become a commodity where you get only what you can afford. The winner of a lawsuit that turns into a war of attrition may be the one who can afford to invest more money in the case. If one can settle a claim for an amount equal to or less than the cost of litigation, that may be the cost-efficient course of

action. That means evaluating prospective litigation in the same way that one evaluates a business investment: Is the potential reward or recovery worth the risk?

1.A. Work by the book, but what is "the book"?

1.A.(1) 250 C.M.R. 5.00 "Standards for Professional Practice" & 250 C.M.R. 6.00 "Land Surveying Procedures and Standards"

Working "by the book" means following the rules. For land surveyors, that means always following the administrative regulations codified at 250 C.M.R. 5.00 "Standards for Professional Practice" & 6.00 "Land Surveying Procedures and Standards." Terms used in those chapters are defined by 250 C.M.R. 2.09 "Definitions."

The problem for Massachusetts land surveyors is determining exactly what is "the book"? The opening statement of 250 C.M.R. 6.00 contains what lawyers call a "trap for the unwary," as follows (underlining added for emphasis; italics in original):

> All land surveying work is considered work of a professional nature and shall be performed in conformance with 250 CMR 6.00, commonly accepted standards of care and 250 CMR 5.00: *Professional Practice.*
>
> The provisions of 250 CMR 6.00 shall be the minimum required for all surveys and shall take precedence over the less restrictive standards of other authorities or sources.

What is the meaning of the mandate that "All land surveying work … shall be performed in conformance with … commonly accepted standards of care"? The following presumption is set forth in 260 C.M.R. 6.01 "Elements Common to All Survey Work" (underlining added for emphasis):

> 250 CMR 6.00 describes requirements common to all types of survey work, including but not limited to such surveys as Boundary, topographic, construction layout, title insurance, and mortgage surveys.
>
> (1) Presumptions.
>
> (a) When engaged to provide Work Products, surveyors are presumed to be familiar with other generally accepted standards of care *(e.g., National Map Accuracy Standards, Land Title Survey Standards,* land court standards) associated with that type

> of work and the surveyor's Work Products shall comply with those additional standards to the extent that such standards do not conflict with the provisions of 250 CMR.

The term "Work Products" is defined in 250 C.M.R. 2.09 "Definitions" by a reference to "Instrument of Service" which is defined this way: "Instrument of Service is any document or medium memorializing the professional service or creative work of engineering or land surveying involving the special education, training, and experience of the nature required for registration as a Professional Engineer or Professional Land Surveyor."

The problem for Massachusetts land surveyors is how to define the above quoted terms "commonly accepted standards of care" and "generally accepted standards of care." The abbreviation "e.g" in 250 C.M.R. 6.01(1)(a) is defined as "for example" by the Merriam Webster Unabridged Dictionary (Online edition 2018 http://unabridged.merriam-webster.com/unabridged/eg). The same dictionary defines an "example" as "a particular single item, fact, incident, or aspect that may be taken fairly as typical or representative of all of a group or type." *Id.* at http://unabridged.merriam-webster.com/unabridged/for example.

In other words, the three sets of standards listed above in 250 C.M.R. 6.01(1)(a) ("*National Map Accuracy Standards, Land Title Survey Standards,* land court standards") do not constitute a complete list of the "standards of care" with which Massachusetts land surveyors must comply. That means 250 C.M.R. 6.00 does not clearly spell out or define exactly what are the "commonly/generally accepted standards of care."

In my opinion, Massachusetts land surveyors have been cast adrift, left to shift for themselves when it comes to figuring out exactly what is meant by the phrases "commonly accepted standards of care" and "generally accepted standards of care." Those regulatory phrases require adherence to professional standards and practices that may not have the force of law and may not even be in written form, but are generally accepted and followed by Massachusetts land surveyors. As discussed below in

sections 2.A & 2.B of this work, violation of such standards and practices constitutes evidence of negligence, which is the first step toward establishing a land surveyor's legal liability.

1.A. (2) Defining the surveyor's "generally/commonly accepted standards of care" by expert testimony of another surveyor under the *Daubert/Lanigan* case law standard.

In litigation, phrases like "commonly accepted standards of care" and "generally accepted standards of care" generally are elucidated by engaging a professional land surveyor to express an expert opinion. If I want to claim that a particular surveyor should be held liable for some error or omission, I will hire another surveyor to write a report that first defines the "commonly/generally accepted standards of care" applicable to the defendant surveyor's "Work Products," then explains how the defendant surveyor failed to follow those standards.

Where one is a defendant and the plaintiff has engaged an expert, one should always consider asking the court to hold a hearing on the factors set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 585-595, 113 S.Ct. 2786, 2792-2799, 125 L.Ed.2d 469 (1993), *Commonwealth v. Lanigan,* 419 Mass. 15, 25-26 (1994), and Mass. Guide to Evidence, § 702 (2022 Ed.) ("§702"). The Editors' Notes to § 702 of the Mass. Guide to Evidence set forth the following factors used to determine whether a particular expert's opinion can be admitted into evidence (citations omitted):

> Five Foundation Requirements. The proponent of expert witness testimony has the burden of establishing the five foundation requirements for the admission of such testimony under this section. First, the proponent must establish that the expert witness testimony will assist the trier of fact. Second, the proponent must demonstrate that the witness is qualified as an expert in the relevant area of inquiry. Third, the proponent must demonstrate that the facts or data in the record are sufficient to enable the witness to give an opinion that is not merely speculation. Fourth, the expert opinion must be based on a body of knowledge, a principle, or a method that is reliable. Fifth, the proponent must demonstrate that the expert has applied the body of knowledge, the principle, or the method in a reliable manner to the particular facts of the case.

While many court decision concerning the *Daubert-Lanigan* factors involve trial testimony in criminal cases, the factors listed above are properly applied to a a civil matter. *Borella v. Renfro,* 96 Mass. App. Ct. 617, 630 n. 27, 137 N.E.3d 431, 443 (2019) ("Borella also argues that because the criteria of Mass. G. Evid. § 702 were met, the judge should not have allowed the defendants' motion to strike the affidavit of proposed expert witness Ronald Kramer. In allowing the motion the judge properly applied the factors set forth in Mass. G. Evid. §§ 702, 703.").

The regulations at 250 C.M.R. 5.01 "Scope of Practice" state in section (2) that "Land surveying work may be performed only by Professional Land Surveyor or under the Direct Charge and Supervision of a Professional Land Surveyor as described in 250 CMR 5.04."

Subsection (2)(a) of 250 C.M.R. 504 states that "The delineation of existing or proposed structures, features or Boundaries relative to property lines requires the determination of property lines and therefore must be performed by a Professional Land Surveyor."

The term "Boundaries" is capitalized in the foregoing quoted regulation because 250 C.M.R. 2.09(3), entitled "Land Surveying Definitions," states that a "Boundary is a legal demarcation between real property title or rights and includes but is not limited to proposed or existing property lines, Regulatory Lines, lease lines, easement lines, Jurisdictional Lines."

At least two New York cases hold that a lawyer, for example, is not qualified to express an expert opinion on boundaries. *Bergstrom v. McChesney,* 92 A.D.3d 1125-1126-1127, 938 N.Y.S.2d 663, 665 (Supreme Ct., Appellate Division 2012) ("Defendants also submitted a copy of the Hardenburgh Patent Map, which is referenced in the property description in plaintiff's deed, and which they assert conflicts with plaintiff's survey. However, they provided no surveyor's affidavit or other "professional interpretation" of the claimed conflicts. These deficiencies were not cured by the affidavit of defendants' counsel, who does not claim to possess either an expertise in land surveying or relevant personal knowledge. [Citations omitted.]"); *Lavine v. Town of Lake Luzerne,* 296 A.D.2d 793,

793-794, 745 N.Y.S.2d 345, 346 (Supreme Ct., Appellate Division 2002) (“The opinions in plaintiffs' attorney's affidavit, not based on personal knowledge, have no probative value as he is not an expert in land surveying. Under these circumstances, we conclude that the evidence submitted by plaintiffs is insufficient to raise a material question of fact. [Citations omitted.]“).

These New York cases are consistent with the second Massachusetts Daubert-Lanigan factor, Supreme Judicial Court cases on that factor are summarized by the Court in *Commonwealth v. Burden,* 97 Mass. App. Ct. 1118, 2020 WL 24507569 at *2 (Unpublished Decision 2020):

> While the defendant asserts that the witness could testify as a generalized expert in her field, the foundational requirement necessary to testify is that “the witness is qualified as an expert in the relevant area of inquiry.” Commonwealth v. Barbosa, 457 Mass. 773, 783 (2010). Whether an expert who is qualified in one subject is also qualified in another, related subject depends on the circumstances of the individual case. See Commonwealth v. Crouse, 447 Mass. 558, 569 (2006). A judge must enforce boundaries between areas of expertise within which the expert is qualified, and that which requires different training. See Commonwealth v. Frangipane, 433 Mass. 527, 535 (2001).

Based on the quotation above, the author questions whether a professional engineer would be a proper expert witness for either side in a case against a surveyor; the best, if not the only, expert witness in such a case would be another professional land surveyor.

As stated by the Court in *Commonwealth v. DiCicco,* 470 Mass. 720, 729 (2015), “The expert’s opinion must ‘have a reliable basis in the knowledge and experience of his discipline,’” quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993). An engineer testifying in a case involving a surveyor is claiming expertise in a different discipline than the one in which she/he is licensed.

It is well established in Massachusetts law that a land surveyor is the proper expert concerning boundary location. E.g., *Merecurio v. Smith,* 24 Mass. App. Ct. 329, 330-331 (1987) (“Unfortunately, the Wheelock Plan was inaccurate and expert witnesses (surveyors) for the plaintiff and the defendants agree that the distance shown on the plan between lots 60 and 75 on Lisle Street is underestimated by

about fifteen feet."); *Waltham Resources Corp. v. Kennedy,* 346 Mass. 765, 765 (1963) ("Due to differing interpretations given relevant deeds, the parties dispute the location of the northeasterly boundary of the locus, and the respondents claim title to a portion of the locus. The judge made a careful analysis of the evidence before him consisting of deeds, plans, and testimony including that of surveyors."); *Ellis v. Wingate,* 338 Mass. 481, 487 (1959) ("There was no abuse of discretion in permitting a surveyor to testify to the location of the westerly boundary of parcel A. The surveyor was found by the master to be a registered land surveyor (see G.L. c. 112, §§ 81D–81T, inclusive, as amended) and was permitted to give opinion testimony as an expert.").

1.B. Surveyors are required by 250 C..MR. 6.02(1), (2) & (5) "Survey Work Affecting Property Rights" to know the "Laws of Evidence," defined by 250 C.M.R. 2.09 as "a collection of the general rules and principles regulating the admissibility, relevancy, weight and sufficiency of Evidence in legal proceedings as established either by statutory law or by case law, as they pertain to the practice of land surveying."

The phrase "Laws of Evidence" is defined as follows by 250 C.M.R. 2.09 "Definitions" (underlining in original; bold face type added for emphasis):

> Laws of Evidence is a collection of the **general rules and principles regulating the admissibility, relevancy, weight and sufficiency of Evidence in legal proceedings as established either by statutory law or by case law, as they pertain to the practice of land surveying**. In the practice of land surveying, Rules of Evidence and Boundary Law are often used synonymously with Laws of Evidence.

The potential problem I see in the above definition is that it opens the door to establishing surveyor liability on the grounds that a surveyor was insufficiently familiar with "statutory law" and

"case law" pertaining "to the practice of land surveying." How it might be interpreted and applied by a Massachusetts court is anyone's guess.

The key unanswered question is exactly how much law is a surveyor required to know? The body of law covered by the above quoted definition is potentially vast. For example, in addition to other published treatises, there is available online a Massachusetts Guide to Evidence (2022 Edition) published by the Supreme Judicial Court Advisory Committee on Massachusetts Evidence law (https://www.mass.gov/guides/massachusetts-guide-to-evidence), which can be downloaded in .pdf format at jud-2022-guide-to-evidence-with-index.pdf.

As I parse the above quoted definition of "Laws of Evidence" in 250 C.M.R. 2.09, I see possible good news and possible bad news for Massachusetts land surveyors. The potential bad news lies in the breadth of the phrase "admissibility, relevancy, weight and sufficiency of Evidence in legal proceedings." The potential good news is that that very broad phrase is limited by the immediately following words "as they pertain to the practice of land surveying." The practice of land surveying is defined this way in G.L. c. 112, § 81D:

> "Practice of land surveying", any service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence to the act of measuring and locating lines, angles, elevations, natural and manmade features in the air, on the surface of the earth, within underground workings, and on the beds of bodies of water for the purpose of determining areas and volumes, for the monumenting of property boundaries, for locating or relocating any of the fixed works embraced within the practice of civil engineering, and for the platting, and layout of lands and subdivisions thereof, including the topography, alignment and grades of streets, and for the preparation and perpetuation of maps, record plats, field note records and property descriptions that represent these surveys.

In litigation, I expect that a lawyer representing a plaintiff suing a surveyor would want the surveyor's obligation to know the law to be interpreted as broadly as possible, while the surveyor's defense counsel would advocate for the narrowest possible interpretation. We must wait and see what happens if and when this issue is presented to a Massachusetts court.

For reference, the phrase "Laws of Evidence" appears in the following provisions of 250 C.M.R. 6.02 "Survey Work Affecting Property Rights:"

(1) Precedence. To the extent that 250 CMR 6.02 may reiterate key aspects of the Laws of Evidence, the intent of 250 CMR 6.02 is to emphasize those aspects of the law, not to create a new standard that would modify or supersede the Laws of Evidence.

(2) Presumptions.

(a) Surveyors are presumed to know the Laws of Evidence pertaining to the location of lines and are presumed to follow the Laws of Evidence when reproducing lines or creating new lines.

(b) Based upon equivalent bodies of Evidence and equivalent treatment of that Evidence, that Evidence should lead each surveyor to substantially equivalent determinations.

(c) When a surveyor agrees to locate a written conveyance, the surveyor also agrees to locate the conveyance in accordance with the laws regulating the interpretations of written conveyances.

(d) When new lines are being defined, those lines are presumed to be tied to Original Lines and/or original monuments authenticated in accordance with the Laws of Evidence.

* * * * *

(5) Computations and Analysis. In performing the analysis of the record and physical Evidence, the surveyor shall:

(a) Make interpretations of the record and physical Evidence and draw conclusions based upon the Laws of Evidence.

(b) Evaluate and use the Evidence based upon the original creating units of measurement, not in terms of modern units of measurements, unless a contrary intent is indicated by the Laws of Evidence.

* * * * *

(d) Test the mathematical integrity of record Evidence and use the results in a manner consistent with the Laws of Evidence.

1.C. Never, ever, allow yourself to be led astray into behavior that is questionable legally or morally; as a licensed professional, your good name and reputation are all you have.

In real life situations, it is easy for any licensed professional to be led astray. One wants to be helpful and please the customer. Especially difficult are situations where a customer may be a friend

or a relative. The better or longer you have known someone, the harder it can be to say "No." Money can be the most dangerous temptation, especially if one is in financial difficulty, or the amount of a potential fee is very large, or both.

One should be especially wary of lawyers, who can be very persuasive. We are after all professional persuaders. I was involved in one Massachusetts case where a surveyor was cajoled by a lawyer into preparing an ANR (Approval Not Required under the subdivision control law) plan dividing a parcel of land into two lots, without doing the field work required by 250 C.M.R. 6.02(4) "Fieldwork." The surveyor prepared a plan showing a boundary that turned out be so close to a house on the property that the eave of the roof encroached on the newly created second lot, and the location of the house so close to the new boundary violated zoning setback requirements. When this problem came to light, the surveyor's signature and seal on the plan placed professional responsibility for these problems solely on the surveyor. The lawyer had been careful to make the request orally, with no witnesses present, thereby preserving for himself "plausible deniability." He set up the surveyor to take the fall.

It is all too human to be swayed by sympathy or a desire to help someone, but a licensed professional must have the self-discipline to say "No, I am required by law to do my work 'by the book.'" On the one hand, that may cost you a client and a fee. On the other hand, clients like that you don't need. A licensed professional must focus on the much greater monetary cost, emotional stress, and loss of professional reputation (and possible loss of professional license) that may result from a malpractice claim like the litigation nightmare discussed below in section 1.H of this work.

As a licensed professional, your good name and reputation are your most valuable assets. You must protect them at all costs!

When pressed to do something objectionable, I have in the past written letters to clients stating my professional conduct is limited by the Massachusetts Rules of Professional Conduct promulgated

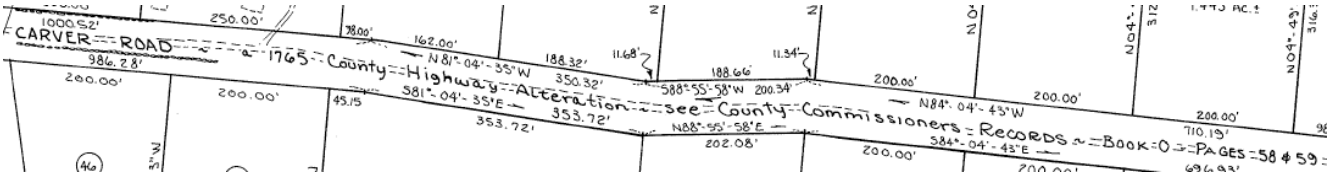
by the SJC and by the bounds of personal morality as I define it. There is something to be said for the maxim that appears in both Mark 8:36 ("For what shall it profit a man, if he shall gain the whole world, and lose his own soul?") and Matthew 16:26 ("For what is a man profited, if he shall gain the whole world, and lose his own soul? or what shall a man give in exchange for his soul?") (Both quotations from the King James Version). In this situation, ancient morality and good business both lead to the same conclusion. ***It's not worth the price!***

1.D. Be careful what you write on a plan; Factual statements can be qualified.

Because clients may want their survey done as inexpensively as possible, a surveyor may lack the resources for research and fieldwork necessary to determine all relevant facts. Unless a statement is within the scope of your engagement, and you can back it up with research and field work, add a qualifying note to your plan.

For example, what is the status of the road abutting the property being surveyed? If a road is believed to be a public way (e.g. it is paved, graded or otherwise maintained by the municipality, or it is included on a list of public ways maintained by the municipality) then one can describe it on a plan as "East Overshoe Road -- said to be a public way." BUT, unless one has conclusively determined the status of a particular road (such as by tracking down the town meeting vote and determining the layout's location on the ground), a careful surveyor will add the phrase "status not determined by this survey." The complete description of the road appearing on the plan would be "East Overshoe Road: said to be a public way; status not determined by this survey." As discussed below in section 3.A of this work, an unqualified factual misrepresentation, even an innocent one, on a survey plan can expose a surveyor to claims for damages notwithstanding compliance with 250 C.M.R. 5.00 "Standards for Professional Practice" & 6.00 "Land Surveying Procedures and Standards."

I successfully sued a surveyor for misrepresentation based on a recorded ANR plan with the statement "Carver Road – a 1765 County Highway Alteration, see County Commissioners Records Book 0 Pages 58 & 59":



There was an anomaly, in that an 1894 deed for the land divided into lots by the above ANR plan identified the road shown on that plan as "the abandoned town road through the Carver farm."

The surveyor who prepared the above plan assumed mistakenly that he could rely on the official Franklin County Highway records on file at the County Commissioners Office, based on a compilation and series of county highway maps prepared by a surveyor during the 1920's. It turned out that the road shown on the plan really was a discontinued town way, which meant the lots shown on the plan had no zoning frontage and so were not buildable. But it took weeks of investigation by the Franklin County Engineer, an amateur local historian, and myself to find the documentary proof. The original 18th century survey plan proving the highway in question was actually located in a neighboring town was found in the records of the Hampshire County Commissioners, where it was mis-indexed. I found it only by going through the book of 18th century plans page by page.

The point of the foregoing story is that determining whether a particular road is in fact a public way can be a major historical research project and may also require litigation. I described the issue this way in Michael Pill, 28A Mass. Practice: Real Estate Law with Forms, § 18.14 "Distinguishing public ways and private ways" (4th ed. & Supp. 2022):

> **(1) <u>Evidence required to prove a road is a public way.</u>**
>
> The status of a road is governed by the rule stated in *Fenn v. Town of Middleborough,* 7 Mass. App. Ct. 80, 83–84, 386 N.E.2d 740, 742 (1979), which held that there are only three methods to establish a road as a city or town public way,[1] in these words:
>
> > In general, it may be said that an existing way in a city or town in this

> Commonwealth is not a "public" way that is, one which a city or town has a duty to maintain free from defects (see G.L. c. 84, §§ 1, 15, 22; First Nat. Bank v. City of Woburn, 192 Mass. 220, 222–223, 78 N.E. 307 (1906)) unless it has become public in character in one of three ways:
>
> (1) a laying out by public authority in the manner prescribed by statute (see G.L. c. 82, §§ 1 to 32);
>
> (2) prescription; and
>
> (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal (see *Longley v. Worcester,* 304 Mass. at 587–589, 24 N.E.2d 533; Uliasz v. Gillette, 357 Mass. at 104, 256 N.E.2d 290), coupled with an express or implied acceptance by the public.
>
> Because the 1846 statute put an end to the creation thereafter of public ways by dedication and acceptance (*Loriol v. Keene,* 343 Mass. 358, 361, 179 N.E.2d 223 (1961)), it has only been possible since that time to create a public way by a laying out in the statutory manner or by prescription.

With dedication and acceptance abolished in 1846,[2] it would be very difficult, if not impossible, to establish the facts necessary to use that method to prove a road is a public way.

(1)(a) <u>Proving that a road was laid out as a public way according to law.</u>

Anyone who claims that a road in a town was laid out according to law as a municipal public way[3] should produce certified copies of both the appropriate town meeting warrant and the minutes or results showing what action was taken on the warrant article to accept the road as a public way. For a road in a city to be established as a public way, there must be a record of an adjudication by the city council or aldermen unless the city charter provides otherwise.[4] A city or town clerk's certificate is prima facie evidence that a way is public, but it is not conclusive.[5] Other municipal records (such as a list maintained by the city or town clerk, department of public works, or other municipal agency) should be treated with skepticism unless they cite (or are based on) town meeting votes or city council adjudications.

Unless the town meeting vote or city council adjudication so clearly locates the way on the ground that the issue is undisputed, anyone claiming that a road was laid out as a public way should have a report from a surveyor documenting that the layout produced is indeed for the road located on the ground.[6]

The burden of establishing a public way has grown greater over the years.[7] Contrary to what appears to be a popular myth, the fact that a municipality claimed a road was public for purposes of obtaining state financial aid is not probative.[8]

(1)(b) <u>Proving that a road has become public by prescription.</u>

Establishing a public way by prescription is extraordinarily difficult: to meet his or her burden of proof a claimant must show not only that the use of the way was open, continuous, and notorious for twenty years, but also that the use was nonpermissive and by the public

generally—not simply by users who may have gained their own prescriptive rights but whose use did not constitute a "public" use. See Rivers v. Town of Warwick, 37 Mass. App. Ct. 593, 641 N.E.2d 1062 (1994).

The public adverse use must constitute the corporate action of the municipality, which usually takes the form of some kind of ratification, expenditure of public funds for improvement, or other corporate acknowledgment that the way in question is public. See Cerel v. Town of Framingham, 342 Mass. 17, 21, 171 N.E.2d 840, 842 (1961); Teague v. City of Boston, 278 Mass. 305, 179 N.E. 806 (1932) (maintenance of utilities within the way); Reed v. Inhabitants of Northfield, 30 Mass. (13 Pick.) 94 (1832) (maintenance and repair of the way). "That a highway may be proved by long and continued use and enjoyment by the public, on the ground that a conclusive presumption arises from such use that it had been originally laid out or established by competent authority, is well settled in the Commonwealth." Com. v. Coupe, 128 Mass. 63, 64, 1880 WL 10601 (1880).

Source: Rebecca B. Lapham and F. Sydney Smithers IV, "Streets and Ways, Chapter 23, § 23.5.3 "Adverse Possession/Prescription" in James B. Lampke & Joseph P. J. Vrabel (editors) 2 Massachusetts Municipal Law (2002), published by Massachusetts Continuing Legal Education, Inc. (MCLE).

Establishment of a public way by prescription requires proof of two elements: First, there must be use by the general public for twenty years or more; neither permissive use, nor use by persons having a private easement right to use the road if it is not a public way (e.g., persons going to or from their land abutting the road), is considered adverse.[9] Second, a public way can be established by prescription only where a municipality has repaired and maintained a road continuously for twenty years or more; corporate municipal action is required to establish an easement for public travel, not just use by the general public.[10]

(2) <u>Status of a way may be determined by declaratory judgment.</u>

Declaratory judgment lies under M.G.L. c. 231A to determine the status of a way as public or private; plaintiff need not exhaust administrative remedies.[11]

(3) <u>Showing that a road existed in the past is not sufficient to prove its legal status as a public way.</u>

Old maps or plans showing that a road existed in its present location in the past are not sufficient to prove it is a public way. The problem with such documents is that none of them proves a road's legal status as a public way. The Massachusetts court has expressly rejected the notion that a public way can be proved by use of maps which do not clearly distinguish between public and private ways.[12]

(4) <u>Public way or statutory private way?</u>

A review of the modern statutory framework for laying out town ways (M.G.L. c. 82, §§ 21 to 24) demonstrates that the procedures for creating a public way and a statutory private way are virtually identical. The difference is that a statutory private way is a private way open to the

public, generally constructed and maintained at private expense, which provides access for a particular land owner but does not provide road frontage under a zoning bylaw.[13]

Finding a town meeting vote and locating it on the ground is still not enough to establish that a road is a public way which must be maintained and repaired by the municipality, which satisfies the frontage requirement of a local zoning bylaw, and not a statutory private way.[14]

(5) <u>The party asserting that a road is a public way has the burden of proof on that issue.</u>

The Massachusetts courts have stated repeatedly that the burden of proof lies initially on the party asserting that a road is a public way.[15]

(6) <u>Prior ANR plan endorsements or issuance of building permits does not constitute binding precedent and does not work an estoppel against a municipality.</u>

The fact that ANR (Approval under subdivision control law Not Required) plans may have been endorsed by the local planning board for land abutting a particular road, in a possibly mistaken belief that the road was a public way, does not constitute legally binding precedent.[16]

Similarly, the fact that building permits may have been issued for land on a particular road does not provide precedent. The *Goldman* decision quoted above is consistent with the general rule that upon discovering an error, any public agency engaged in the enforcement of laws designed for protection of the public health, safety and welfare, may correct that mistake.[17]

At the heart of the legal authority supporting the right of public officials to correct a mistake is an exception for public agencies to the legal doctrine of "estoppel."[18] The underlying public policy is that public officials must be able to correct their mistakes.[19]

The rule protecting public officials from the estoppel doctrine has been applied consistently to municipal officials acting in a land use context.[20]

In conclusion, "Estoppel is not applied to government acts where to do so would frustrate a policy intended to protect the public interest." LaBarge v. Chief Administrative Justice of Trial Court, 402 Mass. 462, 468, 524 N.E.2d 59, 63 (1988).

A surveyor's expert testimony is generally essential to proving that a particular road is a public way. I explain the surveyor's role as follows in Footnote 6 to the above quoted treatise section:

> Without a surveyed plan showing the road, or at least a metes and bounds description specifying courses and distances for each road segment and identifying presently recognizable monuments, locating a particular layout on the ground can be a difficult (and expensive) task.
>
> The surveyor may have to reconstruct land ownership patterns for a large portion of a municipality at the time the road was established as a public way, in order to determine where a particular layout was located on the ground. This is necessary because the surveyor must first determine which of several vaguely worded layouts is the correct one, and then be able to show the necessary correlation between the selected layout and the location of the road on

the ground. For example, if a 1756 East Overshoe town meeting vote reads something like the following, there is no way one can locate it on the ground without extensive historical research by a surveyor:

> Voted to lay out a town way, beginning at the westerly side of the county highway by the meeting house, thence past Frog Hollow to Ichabod Crane's orchard, then along the southerly side of Ebeneezer Snodgrass's mill pond and ending at the existing town way leading to West Overshoe.

Questions to be resolved by a surveyor would include the following:

> (1) What were the county highways in East Overshoe in 1756 and where were they located?
> (2) What meeting houses (churches) existed in 1756 and where were they located?
> (3) What and where was Frog Hollow in 1756?
> (4) What land in town was owned by Ichabod Crane in 1756, and where was it located?
> (5) Where was Ebeneezer Snodgrass's mill pond?
> (6) Where was the town way leading to West Overshoe?

Beware of shifting municipal boundaries! If the portion of a municipality where a road is located was once part of another municipality, or was part of a plantation or district prior to incorporation as a city or town, the relevant records may not be in the possession of the municipality where the road is now located. A complete list of municipal annexations will be found in chapter 32 of this volume, entitled "Historical Data Relating to Counties, Cities and Towns of Massachusetts."

The foregoing tale of travail concerning the legal status of roads is only one example of how a surveyor can get into trouble by making unqualified statements of fact on a plan. Any unqualified factual statement can expose you to legal liability if it turns out to be incorrect.

1.E. Professional malpractice liability insurance for errors and omissions; if you cannot afford liability insurance with adequate coverage limits, then you cannot afford to be in business, unless you enjoy risking everything you own every time you sign and seal a plan.

Human beings are imperfect; we make mistakes. Bad things sometimes happen to good people through no fault of their own. We insure our motor vehicles and our homes to protect ourselves against such possibilities. Businesses carry commercial liability insurance for the same reason.

Surveyors who practice their profession without adequate professional liability insurance coverage for errors and omissions are gambling. They risk their life savings and everything else they own every time they sign and place their seal on a survey plan. They also leave their clients unprotected, with no recourse other than to seek compensation from the surveyor's own assets and future income. Without liability insurance (or if the insurance coverage limit proves to be inadequate), a court judgment for money damages can force a surveyor into bankruptcy.

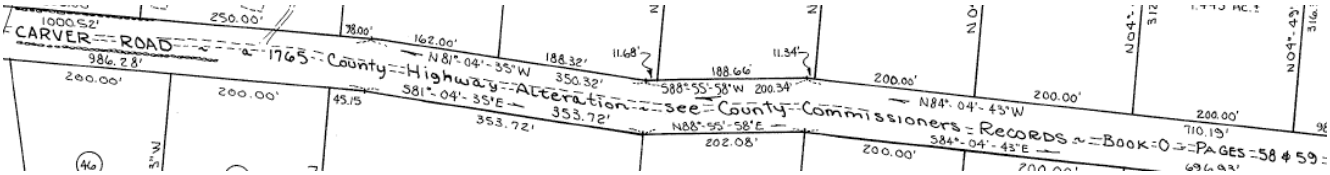
CAVEAT: As a licensed professional, you are NOT protected by doing business through a corporation. You sign and seal plans and reports individually, thereby making you personally liable.

Errors and omissions liability insurance coverage generally provides both indemnification for damages and payment of legal defense costs (such as attorney fees and expert witness fees) after an initial deductible amount is paid by the insured party. If you have no insurance, defending a lawsuit can cost a hundred thousand dollars or even more in legal fees, expert witness fees, and other expenses such as transcription of testimony at pretrial depositions and trial. That is in addition to paying any court judgment against you, or having to file for bankruptcy.

In the opinion of this writer, any surveyor who cannot afford errors and omissions liability insurance coverage, with realistic (e.g. high) coverage limits, cannot afford to be in business.

For claims based on misrepresentation (discussed below in section 3 of this work), the only protection is malpractice insurance because a factual misrepresentation, even an innocent one, can expose a surveyor to claims for damages notwithstanding compliance with the applicable standards of practice that include but are not limited to the regulations codified at 250 C.M.R. 5.00 "Standards for Professional Practice" & 6.00 "Land Surveying Procedures and Standards."

As discussed above, I successfully sued one surveyor who stated on a recorded plan that a road was a current county highway when in fact it was a discontinued town way. The mistake was in the county highway records, which the surveyor copied onto his plan, as follows:



The surveyor who prepared the above plan assumed mistakenly that he could rely on the official Franklin County Highway records on file at the County Commissioners Office, based on a compilation and series of county highway maps prepared by a surveyor during the 1920's. It turned out that the road shown on the plan really was a discontinued town way, which meant the lots shown on the plan had no zoning frontage and so were not buildable. But it took weeks of investigation by the Franklin County Engineer, an amateur local historian, and myself to find the documentary proof.

Because the surveyor merely copied a reference to official records that he reasonably believed to be correct, and proving the error required investigation that no reasonable surveyor could be expected to do, there was no negligence. By "no negligence" I mean that there was no breach of a duty of reasonable care because the surveyor had complied fully both with the former Procedural and Technical Standards for the Practice of Land Surveying, 250 C.M.R. 6.00 (superseded in 2013 by the present 250 C.M.R. 6.00), and (according to the professional land surveyor I engaged as an expert witness in the case) he also complied with the standards and practices generally followed by surveyors when the plan was prepared.

Unfortunately for that surveyor defendant, Massachusetts law of fraud is very broad, including even an innocent (e.g. unintentional or mistaken) misrepresentation of fact, as discussed below in section 3 of this work. Fortunately, this surveyor had adequate errors and omissions insurance. His insurance carrier defended the lawsuit and paid a settlement to homeowners who had purchased a lot created by the surveyor's ANR plan, then built a house on the lot, only to find themselves without any public road access to their property. The surveyor's insurance company also funded a subsequent lawsuit to establish a private easement for that homeowner over the road that had been mistakenly believed to be a public way.

A claim for factual misrepresentation may also arise from a surveyor's incorrect placement of stakes or pins on the ground, even if the plan is accurate. This can occur, for example, where a surveyor's plan is correct, but the surveyor places stakes for construction in incorrect locations. This was the situation in *Craig v. Everett M. Brooks Co.,* 351 Mass. 497, 500, 222 N.E.2d 752, 754 (1967), a case alleging both negligence and misrepresentation, where the court's decision described the surveyor's errors in these words:

> We now consider the issue of negligence in the placing of stakes. These were 'offset stakes,' which were to provide starting points for stakes to be set out by the contractor in connection with the prosecution of the work. The principal respects in which there was evidence tending to prove negligent placing of stakes are these. Two catch basins were designated by the defendant's employees in wrong locations and had to be rebuilt by the plaintiff. Rogers Road was staked out eight feet away from its proper location, necessitating the rebuilding of the road once the error was discovered.

Errors and omissions insurance may be the only real protection for surveyors who prepare mortgage inspection plans (also called mortgage plot plans). Given the low market price for such plans, it may be difficult to comply fully with the "Land Surveying Procedures and Standards" of 250 C.M.R. 6.00. Plot plans are discussed below in section 1.G of this work.

1.F. Contract clauses limiting liability to amount of insurance coverage

This section is inspired by a paper entitled "Contract Clauses – Limitation of Liability" (2004, available in .pdf format from the author of these materials) by Knud E. Hermansen, P.L.S., P.E., Ph.D., Esq., an attorney and professional land surveyor. He writes:

> There are several contract clauses that will help reduce or eliminate surveyor liability. One contract clause often employed in written contracts is the limitation of liability clause.
>
> The limitation of liability clause is a clear and unequivocal expression of the intent by the client to cap or limit the surveyor's liability. The clause pegs the limit of damages that the client can collect in the event the surveyor is found liable to the client in a civil action.

Hermansen's paper suggests two alternative contract clauses, as follows:

> Limitation of Liability: The Client agrees to limit the Surveyor's liability for damages to the client to the sum of $__ or the fee charged for the surveying services, whichever is greater. This limitation of liability shall apply regardless of the cause of action or legal theory pled or asserted by the Client. Should this limitation be unacceptable to the Client, the Client will notify the Surveyor in writing and pay the Surveyor an additional $__ for every $1,000 increase in liability. The written notice increasing the limitation must be sent to the Surveyor before services start and the additional money must be paid to the Surveyor before completion of the services.
>
> Limitation of Liability: The Client agrees to limit the Surveyor's liability for damages to the client to the sum of $__ or the fee charged for the surveying services, whichever is greater. This limitation of liability was agreed upon after discussing the risks of the surveying services and the difficulty of providing services within both the limitations imposed by the Client and the price cap sought by the Client. Client's initials indicate the Client has read and agrees to this clause _____

What dollar amount should be inserted in the above clauses as the limit of liability? Hermansen suggests that "a limitation on liability equal to the limit of an errors and omission insurance policy appears both logical and reasonable and allows the court to give credence to the clause." In addition, "pegging the limit of the liability to the amount of insurance coverage gives the surveyor some relief that their personal assets will have some protection under the clause."

CAVEAT: A limitation of liability clause is no substitute for adequate insurance policy coverage limits. Hermansen's paper concludes with a warning that contractual limitation of liability protects the surveyor only from the client who is a party to the contract: "[T]he clause offers no protection where the source of liability is from a person not a party to the contract. Accordingly, neighbors, successors-in-title, and others are not bound by the clause and may seek damages that exceed the limit set by the clause."

In cases of ordinary negligence, not involving claims against licensed professionals such as surveyors, contract clauses limiting liability have been upheld in Massachusetts. The underlying public policy is that if one is mentally competent and understands the English language, then one is bound by contract terms, regardless of whether they are actually read and understood prior to signing the agreement. *Polonsky v. Union Federal Savings & Loan Assoc.,* 334 Mass. 697, 701, 138 N.E.2d 115,

117, 60 A.L.R.2d 702 (1956) ("Where what is given to a person purports on its face to set forth the terms of a contract, the person, whether he reads it or not, by accepting it assents to its terms, and is bound by any limitation of liability therein contained, in the absence of fraud."), citing *Kergald v. Armstrong Transfer Express Co.,* 330 Mass. 254, 255, 113 N.E.2d 53 (1953). The court put it this way in *Cormier v. Central Mass. Chapter of National Safety Council,* 416 Mass. 286, 288-289, 620 N.E.2d 784, 786 (1993), where a beginner motorcyclist signed a waiver before starting a class in motorcycle operation, but then was injured in an accident during the class:

> "In this Commonwealth a right which has not yet arisen may be made the subject of a covenant not to sue or may be released. *MacFarlane's Case,* 330 Mass. 573, 576 [115 N.E.2d 925] [1953], and cases cited. Further '[t]here is no rule of general application that a person cannot contract for exemption from liability for his own negligence and that of his agents and servants.' *Clarke v. Ames,* 267 Mass. 44, 47 [165 N.E. 696] [1929]. Thus [the defendant] could validly exempt itself from liability which it might subsequently incur as a result of its own negligence. *Ortolano v. U-Dryvit Auto Rental Co. Inc.,* 296 Mass. 439 [6 N.E.2d 346] [1937]. *Barrett v. Conragan,* 302 Mass. 33 [18 N.E.2d 369] [1938]. *Schell v. Ford Motor Co.,* 270 F.2d 384, 386 (1st Cir. [1959])." *Lee v. Allied Sports Assocs.,* 349 Mass. 544, 550, 209 N.E.2d 329 (1965). While any doubts about the interpretation of the release must be resolved in the plaintiff's favor, see *Lechmere Tire & Sales Co. v. Burwick,* 360 Mass. 718, 721, 277 N.E.2d 503 (1972), the release here is unambiguous and comprehensive ("any and all liability, loss, damage, costs, claims and/or causes of action, including but not limited to all bodily injuries"). This language obviously is sufficient to bar a claim in negligence without specifically mentioning that word. There is nothing to show that the release was procured by deceit or fraud or under duress. Requiring the plaintiff to sign the release before taking the *289 course does not make the release unconscionable. The plaintiff's decision to take the course was voluntary.

As with most legal doctrines, there are exceptions. A Massachusetts licensed professional may not be allowed to invoke a contractual limitation of liability. The following cautionary note appears in a case invalidating such a provision in a state contract with an architect:

> The parties have not briefed, and we do not decide, whether in Massachusetts a person licensed by the State to practice a profession may limit prospectively his liability for errors and omissions. Attempts by physicians and hospitals to limit their liability for negligence have been defeated on the ground that exculpatory provisions may stand only if the duties concerned do not involve the public interest. *Tunkl v. Regents of Univ. of California*, 60 Cal.2d 92, 96, 32 Cal.Rptr. 33, 383 P.2d 441 (1963); *Belshaw v. Feinstein,* 258 Cal.App.2d 711, 725-727, 65

> Cal.Rptr. 788 (1968); Olson v. Molzen, 558 S.W.2d 429, 431-432 (Tenn.1977). Sometimes the inability of a physician to avoid liability for negligent conduct has simply been assumed as obvious. See *Kozan v. Comstock,* 270 F.2d 839, 845 (5th Cir. 1959). See Annot., 6 A.L.R.3d 704 (1963). See generally 15 Williston, Contracts §1751 (3d ed. 1972) concerning provisions avoiding liability where status of a party imposes greater responsibility upon him than upon an ordinary person. For a case comparing the professional responsibility of an architect to that of a physician, see *Coombs v. Beede,* 89 Me. 187, 188, 36 A. 104 (1896).

White Construction Co., Inc. v. Commonwealth, 11 Mass. App. Ct. 640, 649 n. 15, 418 N.E.2d 357, 362 n. 15 (1981), *affirmed,* 385 Mass. 1005, 432 N.E.2d 104 (1982). The court was understandably reluctant to see a licensed professional avoid liability for compliance with the standards applicable to her/his profession:

> There is no point in calling upon the architect to make weekly site visits to inspect the progress and quality of construction, to report periodically to the Bureau and to rule on change orders if, reading Article XIII literally, the architect may, without incurring any liability, do that work incompetently or not at all.

11 Mass. App. Ct. at 646, 418 N.E.2d at 361.

At least one later unpublished Appeals Court decision suggests that the validity of contractual liability limitations by a licensed professional is still unresolved in Massachusetts. *Cunha v. Mulligan,* 68 Mass. App. Ct. 1110, 862 N.E.2d 77, 2007 WL 609838 at *2 n. 5 (2007) (Unpublished decision.) ("[T]he plaintiffs do not argue on appeal, and we do not consider, whether a licensed professional may limit liability for errors and omissions prospectively by contract. See *White Constr. Co. v. Commonwealth,* 11 Mass.App.Ct. 640, 649 n. 15 (1981).").

Assuming *arguendo* (meaning for purposes of discussion only) that a licensed professional such as a surveyor could successfully invoke a contractual liability limitation, it probably would not afford any protection from a violation of law, such as 250 C.M.R. 5.00 "Standards for Professional Practice" & 6.00 "Land Surveying Procedures and Standards." In *Vallone v. Donna,* 49 Mass. App. Ct. 330, 331, 729 N.E.2d 648, 649 (2000), the court stated the doctrine in these words:

> "As a general proposition, releases of liability for ordinary negligence are valid." *Gonsalves v.*

> *Commonwealth,* 27 Mass. App. Ct. 606, 608 & n. 2, 541 N.E.2d 366 (1989). See *Cormier v. Central Mass. Chapter of the Natl. Safety Council,* 416 Mass. 286, 288, 620 N.E.2d 784 (1993). However, a release may not shield a defendant from responsibility for violation of a statutory duty. *Henry v. Mansfield Beauty Academy, Inc.,* 353 Mass. 507, 511, 233 N.E.2d 22 (1968). *Gonsalves v. Commonwealth, supra* at 609 n. 2, 541 N.E.2d 366. In this case, the plaintiff argues that the release does not bar his action because the defendants had a statutory duty under the State Building Code (code) to maintain the ice skating rink in a safe condition, 780 Code Mass. Regs. § 104.1 (1990), and the release is void as against public policy.

In *Vallone v. Donna, supra,* 49 Mass. App. Ct. at 332-333, 729 N.E.2d at 649, the court reasoned as follows in allowing the defendant owner of an ice rink to rely on a contractual liability clause:

> [W]e do not believe that the regulation applies to the circumstances of this case. The intent of the [State Building] code is to "insure public safety, health and welfare insofar as they are affected by building construction through structural strength, adequate egress facilities, sanitary conditions, equipment, light and ventilation and fire safety...." 780 Code Mass. Regs. § 100.4 (1990). In this case, the plaintiff claims that his injury was due to a soft spot in the ice surface which we view as unrelated to the structural components of the rink and outside the scope of the code's enumerated objectives. Consequently, the defendants are not precluded from relying upon the waiver to shield them from liability, for the waiver does not "do violence to the public policy underlying the [code's] enactment." *Canal Elec. Co. v. Westinghouse Elec. Corp.,* 406 Mass. 369, 378, 548 N.E.2d 182 (1990), quoting from *Spence v. Reeder,* 382 Mass. 398, 413, 416 N.E.2d 914 (1981). See *Matteo v. Livingstone,* 40 Mass. App. Ct. 658, 661, 666 N.E.2d 1309 (1996) ("violation of a [building code] regulation is relevant to the question of negligence only if the risk that materialized was within the contemplation of the regulation").

For surveyors, I suspect that 250 C.M.R. 5.00 "Standards for Professional Practice" & 6.00 "Land Surveying Procedures and Standards" are sufficiently detailed and broad in scope so as to make it difficult to assert a claim against a surveyor that would not be "within the contemplation of the regulation."

A liability limitation clause is more likely to be upheld if it is negotiated between two commercial entities rather than simply being imposed on a consumer as part of a standard form "contract of adhesion," a principle set forth by the court in these words in *Canal Electric Co. v. Westinghouse Electric Corp.,* 406 Mass. 369, 374, 548 N.E.2d 182, 185 (1990):

> [T]he consensual allocation of risk is not contrary to public policy. *Minassian v. Ogden Suffolk Downs, Inc.,* 400 Mass. 490, 493, 509 N.E.2d 1190 (1987). Recently, we enforced a contract clause excluding the recovery of consequential damages even when those damages exceeded the total contract price, as Canal alleges they do in this case. See *Deerskin Trading Post, Inc. v. Spencer Press, Inc.,* 398 Mass. 118, 495 N.E.2d 303 (1986). "Limiting damages to a refund of the purchase price in the circumstances of this case, where the two parties are sophisticated business entities, and where consequential damages in the event of a problem could be extensive, is a reasonable business practice...." *Id.* at 124, 495 N.E.2d 303. Like the contractual provisions in *Deerskin Trading Post,* the consequential damages disclaimer in the Canal–Westinghouse contract was a reasonable accommodation between two commercially sophisticated parties. See *American Elec. Power Co. v. Westinghouse Elec. Corp.,* 418 F.Supp. 435, 458 (S.D.N.Y.1976) ("the contract here in issue is not of the type entered into by the average consumer, but a commercial agreement painstakingly negotiated between industrial giants").

A contractual limit on liability will protect a defendant only from the consequences of her/his ordinary negligence (described below in section 2 of this work). It does not afford any protection against intentional misconduct or gross negligence. The court explained it this way in *Sharon v. City of Newton,* 437 Mass. 99, 110 n. 12, 769 N.E.2d 738, 748 n. 12 (2002):

> Our holding is …limited to the claims before us-and those claims concern ordinary negligence. The city specifically disavows any contention that the release here would relieve it from liability for gross negligence or reckless or intentional conduct. See *Zavras v. Capeway Rovers Motorcycle Club, Inc.,* 44 Mass. App. Ct. 17, 18-19, 687 N.E.2d 1263 (1997), citing *Gillespie v. Papale,* 541 F.Supp. 1042, 1046 (D.Mass.1982) (releases effective against liability for ordinary negligence but substantial outside authority holds same not true for gross negligence). Commentators have readily distinguished the public policy implications of exculpatory releases whose only effect is relief from ordinary negligence from those intended to relieve a party from gross negligence, or reckless or intentional conduct. See Restatement (Second) of Contracts § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"); 6A A. Corbin, Contracts § 1472, at 596-597 (1962) ("such an exemption [from liability] is always invalid if it applies to harm wilfully inflicted or caused by gross or wanton negligence"); W.L. Prosser & W.P. Keeton, Torts § 68, at 484 (5th ed.1984) ("such agreements generally are not construed to cover the more extreme forms of negligence, described as willful, wanton, reckless or gross").

The difference between ordinary negligence, gross negligence and intentional conduct has been explained by the court in *Zavras v. Capeway Rovers Motorcycle Club, Inc.,*44 Mass. App. Ct. 17, 19-20 & n. 4, 687 N.E.2d 1263, 1265-1266 & n. 4 (1997):

> The distinction between ordinary negligence and gross negligence as applicable in Massachusetts was defined and explained in *Altman v. Aronson,* 231 Mass. 588, 591-592, 121 N.E. 505 (1919), and is set forth in the margin.[FN4] Basically, it "is very great negligence, or the absence of slight diligence, or the want of even scant care." *Id.* at 591, 121 N.E. 505.
>
> > FN4. "Negligence, without qualification and in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought which, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances. It is a want of diligence commensurate with the requirement of the duty at the moment imposed by the law.
> >
> > "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.... It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injury."

In a case alleging malpractice by a land surveyor, I believe a court could rule either way on the validity of a contract clause limiting the liability of a licensed professional such as a surveyor. Much depends on the facts and circumstances of a particular case. In the real world, if it appears the surveyor is a scoundrel, an incompetent, or both, such a clause is more likely to be invalidated than if it appears an honest and competent surveyor made an unintentional mistake.

Most likely, the worst that can happen legally is that such a clause may be invalidated, leaving the surveyor no worse off than he/she would be without it. From a strictly legal perspective, the author's likely advice to a surveyor client would be that there is no harm in trying.

But from a customer relations business perspective, does a liability limitation clause inspire confidence? A licensed professional may prefer to take the position that "I stand behind my work 100%," while maintaining errors and omissions liability insurance policy limits high enough to cover any likely claim. Every surveyor must answer this question for her/himself. If use of such contract clauses is widespread, you can point out to a potential client that while others try to limit their liability, you take full responsibility for your work and have adequate liability insurance just in case there is a problem.

Personally, I would never do business with any licensed professional who tried to get me to sign a contract limiting liability. If I must engage a licensed professional, I want one who is ready and willing to stand behind his/her work.

1.G. Mortgage plot plans

Mortgage plot plans, also called mortgage inspection plans, may be required by mortgage lenders and title insurance carriers The plot/inspection plan is the basis for removal of a survey exception from the title insurance policy issued to the mortgage lender. Title insurers understandably want to be assured that:

(a) all structures are in fact located on the mortgaged land and do not trespass onto neighboring property;

(b) there are no encroachments into the mortgaged land; and,

(c) the dwelling or other primary structure either complied with zoning setback requirements at the time it was constructed or is exempt by the passage of time from zoning enforcement proceedings under G.L. c. 40A, § 7.

The first sentence of 250 C.M.R. 6.01 "Elements Common to All Survey Work" states categorically (underlining added): "250 CMR 6.00 describes requirements common to all types of survey work, including but not limited to such surveys as Boundary, topographic, construction layout, title insurance, and mortgage surveys."

Notwithstanding disclosures by the surveyor, which always should appear **CONSPICUOUSLY** on the plot plan itself, many home buyers do not understand the difference between a mortgage plot plan and either a recordable full instrument survey plan or a certified plot plan prepared to accompany a building permit application. They often see the plot plan for the first time as one of a large collection of documents received at a real estate closing. Many times in the author's law practice, clients have claimed they have a "survey" of their property, which turns out to be only a mortgage plot plan.

While a plot plan cannot be recorded as a survey plan in the registry of deeds plan books, it can be appended to a deed recorded in the registry's deed books. The Massachusetts Registers and Assistant Registers of Deeds Association "Massachusetts Deed Indexing Standards 2018" (January 1, 2008) (online at https://www.sec.state.ma.us/rod/rodpdf/Index-Standards-2018.pdf), state as follows in section 20-4 "Plan attached to document":

> A copy of a plan that is to be recorded as an attachment to another document must be on white paper that is no smaller than 8.5 inches by 11 inches and no larger than 8.5 inches by 14 inches. Plans recorded in accordance with this section are exempt from the registry's plan regulations. A document with a plan attached shall not be considered to be a "multiple document" for the calculation of the recording fee for that document.

Yet mortgage inspection plans may contain statements like the following examples, which appear not to recognize the above-described distinction:

> "This plan was not made for recording purposes, for use in preparing deed descriptions or for construction."
>
> "This plan must NOT be used for recording purposes or for use in preparing deed descriptions and must NOT be used for variance or building plan purposes."

"This is merely a mortgage inspection and is not to be recorded."

The "Land Surveying Procedures and Standards" in 250 C.M.R. 6.00 do not expressly authorize the practice of using tape measurements for mortgage inspection plans, although the following provisions of 250 C.M..R 6.01(2) "Measurements" appear to provide sufficient leeway for that method:

> (a) Linear measurements shall be expressed in terms of the US Survey Foot or the Meter.
>
> (b) The intended purpose of a Work Product shall dictate the accuracy and precision of the field measurements, the measuring equipment used and the manner of its use.
>
> (c) Appropriate corrections shall be applied to measurements to minimize or eliminate systematic errors.

The author's understanding is that tape measurements may be accurate only to within 2-3 feet. Some mortgage inspection plans disclose the fact that tape measurements were used, or at least state that all measurements are only approximate, with phrases like these:

> "The declarations made above are on the basis of my knowledge, information and belief as the result of a mortgage inspection tape survey, not the result of an instrument survey made to the normal standard of care of registered land surveyors practicing in Massachusetts. … Verifications of property line dimensions, building offsets, or lot configuration may be accomplished by an accurate instrument survey."
>
> "This plan was prepared from a tape survey and is intended for mortgage purposes only. Offsets shown on or scaled from this plan, are approximate only and should not be used to determine property lines."
>
> "The structures shown on this plot plan are approximately only. An actual survey is necessary for a precise determination of the building location and encroachments, if any, either way across property lines. … This plan must NOT be used for locating property lines. Verification of building locations, property line dimensions, fences or lot configuration can only be accomplished by an accurate instrument survey which may reflect different information from that shown here on."
>
> "Property lines are not established by mechanical property survey and no guarantees are made as to title or ownership lines, and nothing hereon should be used to determine property lines."
>
> "This is a mortgage inspection plan; not an instrument survey. Do not use to erect fences, other boundary structures, or to plant shrubs."

I have seen at least one Massachusetts mortgage plot plan stating "The land as shown is based on client furnished information only or assessor's map & occupation and may be subject to further out-sales, takings, easements and rights of way." The foregoing statement appeared in small print at the bottom of a plot plan (I believe it should be in large or bold face type, or both):

> PLEASE NOTE: This inspection is not the result of an instrument survey. The structures as shown are approximate only. An instrument survey would be required for an accurate determination of building locations, encroachments, property line dimensions, fences and lot configuration and may reflect different information from that shown here. he land as shown is based on client furnished information only or assessor's map & occupation and may be subject to further out-sales, takings, easements and rights of way. No responsibility is extended to the landowner or surveyor, or occupant. This is merely a mortgage inspection and is not to be recorded.

A mortgage plot plan is generally addressed only to the mortgage lender and to the title insurance carrier as in the following example:

"This certification is made to and limited to the parties listed below:"

I believe statements like the following are <u>not</u> adequate to protect the surveyor from claims by parties other than the mortgage lender or title insurance company:

"No responsibility is assumed herein to the land owner or occupant."

"No responsibility is extended to the landowner, or surveyor, or occupant."

I recommend including in every mortgage plot plan a conspicuous (meaning large bold face type) statement along the following lines:

> **"This mortgage inspection plan was prepared solely for the information of the mortgage lender and title insurance carrier listed hereon. All certifications are made only to them. This plan and certifications are not to be relied upon for any purpose by any other person or entity."**

In conclusion, to minimize liability based on mortgage plot/inspection plans, I recommend that the careful surveyor consider doing the following:

(a) Strive to prepare such plans "by the book" (recognizing it may not be clear exactly what is "the book" for mortgage plot plans):

(b) Specify in a conspicuous statement that the plan is directed only to, and prepared solely for the information of, the specified mortgage lender and title insurance carrier, and that no other person or entity is to rely upon it;

(c) State that the plot plan is based only on tape measurements and on record data, with the result that all measurements and features shown on the plan are approximate and are not to be relied upon for any purpose other than granting a mortgage and issuing a title insurance policy;

(d) State that the plan was not made for recording purposes, preparing deed descriptions, or construction, specifying that it should <u>not</u> be used to determine the location of:

(i) property lines or setbacks from property lines, or

(ii) boundary fences, pools, other boundary structures, or plantings;

(e) State that accurate location of boundaries, structures and other physical features requires a full instrument survey, suitable for recording in the registry of deeds, which can be provided by the surveyor on request at additional cost.

1.H. 250 C.M.R. 5.04 entitled "Direct Charge and Supervision": your employee's mistake is <u>your</u> mistake!

First and foremost, READ THE REGULATION! 250 C.M.R. 5.04, entitled "Direct Charge and Supervision," states as follows (underlining added for emphasis):

> A Registrant must exercise Direct Charge and Supervision over those persons assisting in the preparation of Instruments of Service. <u>Direct Charge and Supervision requires at a minimum that:</u>
>
> (1) the Registrant exercised unambiguous decision-making authority with respect to the preparation of the Instruments of Service he or she sealed and signed, without interference or undue influence from any other individual or entity;
>
> (2) the persons assisting in the preparation of the Instruments of Service were subordinates

reporting directly to the Registrant rather than through some other person or entity capable of subverting the Registrant's direction;

(3) the Registrant had the freedom and authority to assign personnel, and to employ appropriate technologies and equipment for the preparation of Instruments of Service;

(4) the Registrant exercised due care in assigning tasks to persons assisting in the preparation of Instruments of Service based upon the Registrant's knowledge of each person's expertise, knowledge and skill levels;

(5) the Registrant has a verifiable written record establishing that contributing work provided by unlicensed individuals was subject to regular and continuing Direct Charge and Supervision throughout the development process;

(6) the work performed by unlicensed individuals does not include approval of final designs or decisions; and

(7) the persons assisting the Registrant preparing the Instruments of Service had continuous access to and guidance from the Registrant throughout the development process.

"Instrument of Service" is defined by 250 C.M.R. 2.09 "Definitions" as "any document or medium memorializing the professional service or creative work of engineering or land surveying involving the special education, training, and experience of the nature required for registration as a Professional Engineer or Professional Land Surveyor."

"Registrant" is defined by 250 C.M.R. 2.09 "Definitions" as "a person who has, to the satisfaction of the Board, met the minimum requirements to practice engineering or land surveying in the Commonwealth of Massachusetts, who has been added to the Commonwealth's roster of Professional Engineers or Professional Land Surveyors and who holds a current Certificate of Registration. Registrant is used interchangeably with the word Licensee." In other words, anyone licensed to write "P.L.S." or "P.E." after her/his name is a "Registrant."

Under 540 C.M.R. 5.04(5), a surveyor must not only comply with the supervision requirements of 5.04, but must create and maintain a "verifiable written record" documenting such compliance. Subsection (5) quoted above is underlined because if I was suing a surveyor, I would serve a formal request for production of documents under Rule 34 of the Massachusetts Rules of Civil Procedure (Mass.R.Civ.P. 34) demanding that the surveyor hand over her/his "verifiable written record

establishing that contributing work provided by unlicensed individuals was subject to regular and continuing Direct Charge and Supervision throughout the development process." If the surveyor does not have written records documenting compliance with 250 C.M.R. 5.04(5), that could be valuable evidence supporting my client's claim against the surveyor. Any claim by the surveyor that proper supervision was in fact exercised would be undermined if the surveyor cannot produce the "verifiable written record" required by the regulation.

In plain English, you as a licensed professional are responsible for errors and omissions by your employees. No excuses, no "ifs, ands or buts." As far as the law is concerned, you are responsible and therefore legally liable for your unlicensed employee's errors and omissions. As described in detail in the next section of this work, an employee's inaccurate statement to a client (in that case that she could build an addition to her house within the bounds of an electric transmission line easement) can both destroy your professional reputation and bankrupt you.

In legalese, the doctrine "respondeat superior" is translated by Black's Law Dictionary (11th Ed. 2019) as "Law Latin 'let the superior make answer.'" According to the Massachusetts Supreme Judicial Court, "Broadly speaking, respondeat superior is the proposition that an employer, or master, should be held vicariously liable for the torts of its employee, or servant, committed within the scope of employment." *Dias v. Brigham Medical Associates, Inc.* 438 Mass. 317, 319-320, 780 N.E.2d 447, 449 (2002). Stated another way, "Pursuant to the theory of respondeat superior, a corporation is responsible for both the acts and omissions of any one of its employees. This is the case whether those acts are intentional, negligent, wanton, or reckless. [Citation omitted.]" *Commonwealth v. Life Care Centers of America, Inc.,* 456 Mass. 826, 832, 926 N.E.2d 206, 211 (2010).

Do not blithely assume that doing business through a corporate form (i.e., one with a name ending in Inc., Corp. or LLC) will immunize a surveyor from individual personal liability. 250 C.M.R. 5.04 imposes responsibility for direct supervision squarely upon the "Registrant", meaning the

individual licensed professional. A plaintiff's lawyer should name both the individual licensed surveyor in charge and the surveyor's company as defendants, along with the subordinate employee(s) who committed the actual error or omission.

1.I. A Surveyor's Worst Nightmare: How a plot plan for which the surveyor was paid $650 led to eight years of litigation resulting in a $73,811.82 court judgment (as of January, 2023, with interest continuing to accrue at a 12% annual rate).

In *Synakowski v. Christopher Costa and Associates, Inc.,* 101 Mass. App. Ct. 1104, 2022 WL 1653698 (Unpublished decision 2022), the plaintiff Theresa Synakowski engaged the firm of Christopher Costa & Associates, Inc. to prepare a plot plan for an addition to her house. The plot plan, signed and stamped by Massachusetts licensed surveyor Christopher Costa, P.L.S., showed the proposed addition encroaching on an "Electric Transmission Lines Easement" encumbering Ms. Synakowski's lot. The court decision states in part as follows (2022 WL 1653698 at *2):

> The certified plot plan showed that a portion of the proposed addition was located within the easement for the overhead powerlines that ran across Synakowski's property. The plan did not contain a warning about the easement. Christopher knew that the easement holder had "an exclusive right over the property," and that Synakowski could not occupy the easement area without permission from the holder. When Synakowski went to pick up the plan, French reviewed it with her and twice assured her she could build in the easement area.

The individual named "French" referred to above, was described in the court decision (2022 WL 1653698 at *1) as the corporate defendant's "employee and general manager … who holds no professional licenses and was untrained by [the corporate defendant] in easements…." According to the Court decision (2022 WL 1653698 at *2), "French testified that the stamp meant the project 'was good to go.'" The Court noted (2022 WL 1653698 at *2 n. 9) "The easement gave the holder many rights, including the right to demolish and remove any structure from the easement area." After

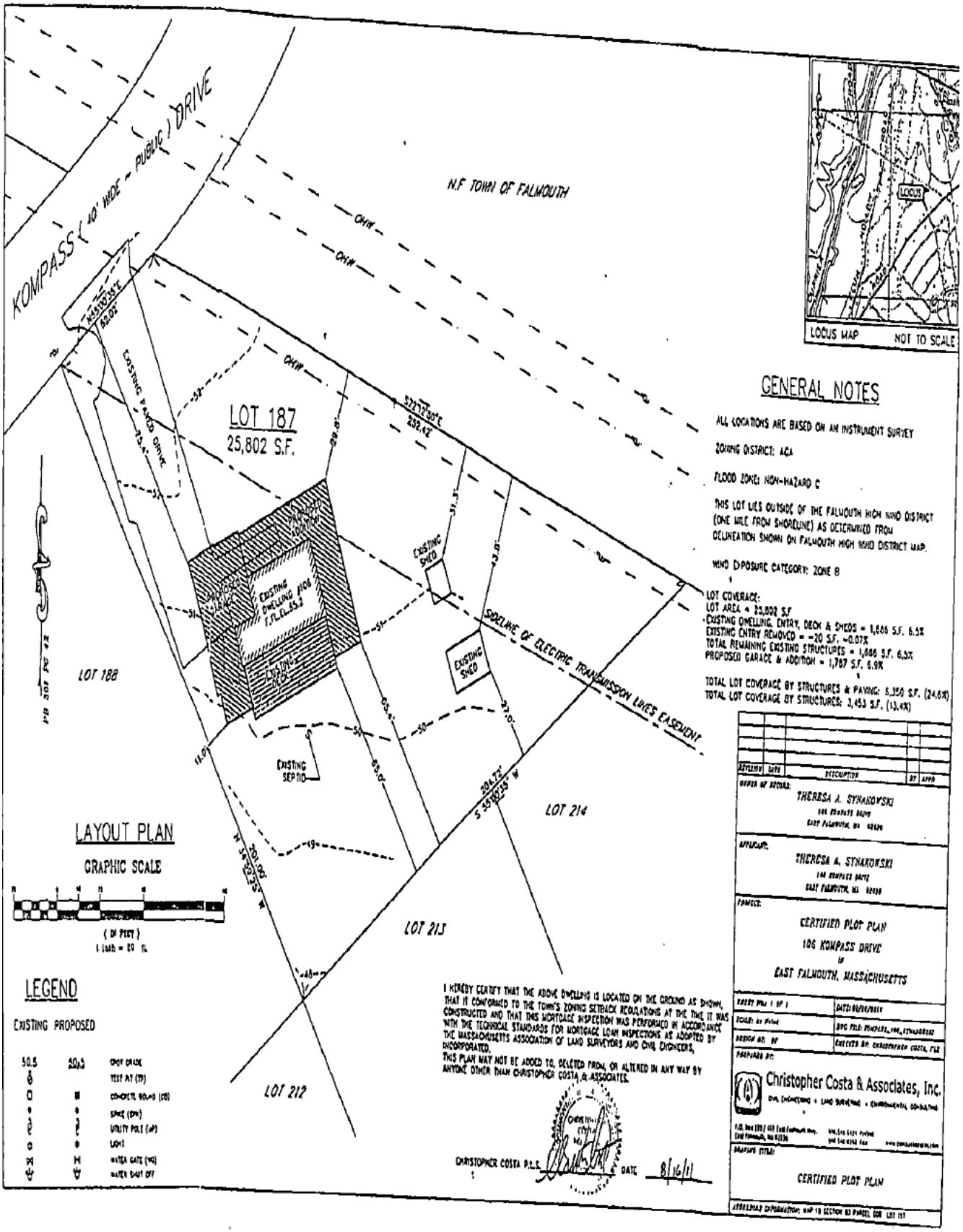
construction of the house addition was well underway, the electric utility company holding the easement, "NSTAR served Synakowski in hand with a cease and desist letter, demanding that she stop all construction and remove the partial structure encroaching upon its easement." *Id.* As a result, "Work on the project halted. Thereafter, NSTAR refused Synakowski's request to allow the addition to remain as constructed in the easement area. As of October 2015, Dalpe [plaintiff Synkowski's building contractor] estimated that the cost to correct the encroachment was $52,812." *Id.*

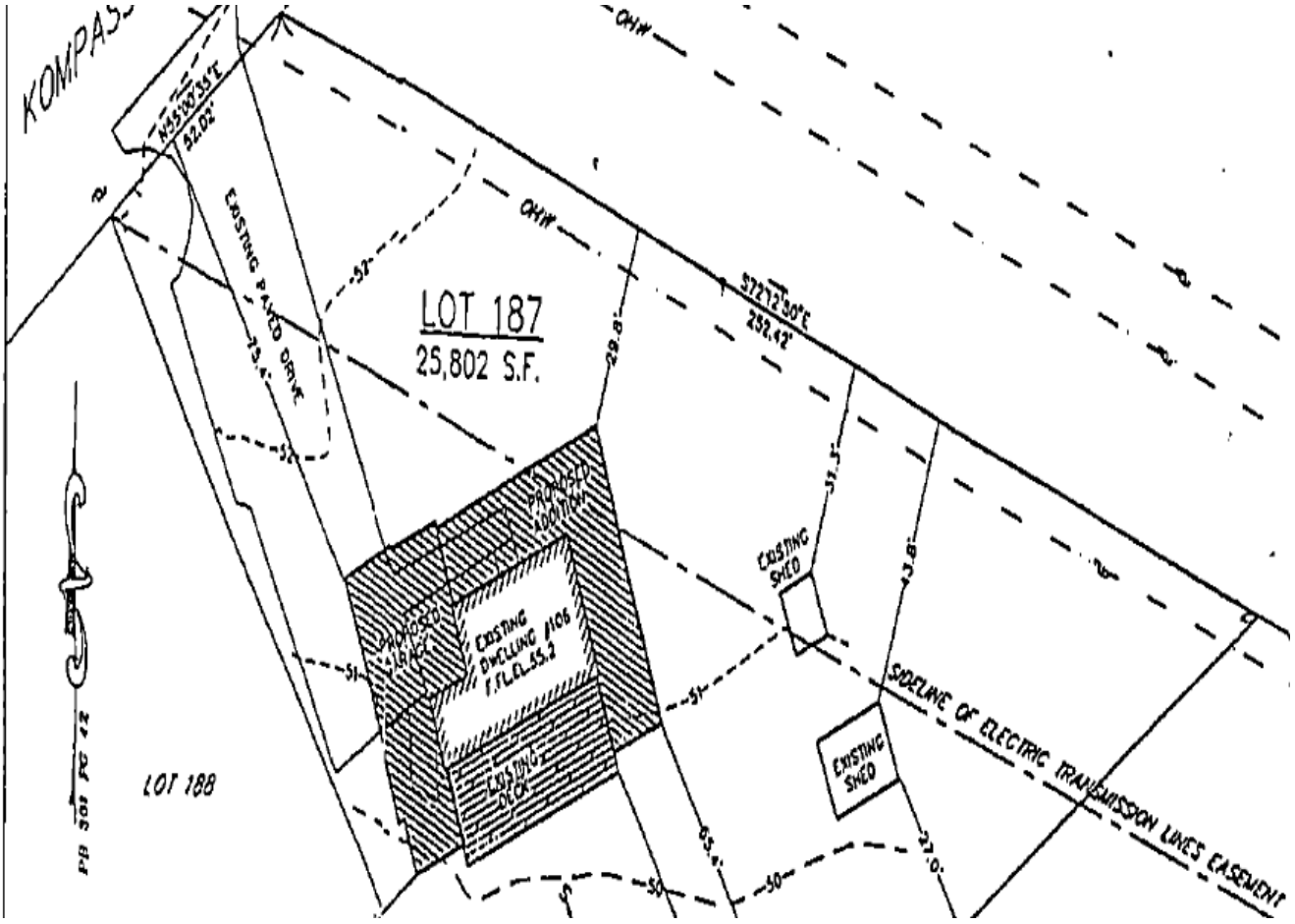
In the author's opinion, the surveyor responded to this crisis in the worst way imaginable, described by the Court in these words (2022 WL 1653698 at *2 - *3):

> Synakowski went to CCAI's office and asked for Christopher; the secretary directed her to Matthew. Synakowski explained that NSTAR's attorney suggested she talk to Christopher and ask him to file an insurance claim. Matthew replied, "It's not our problem." Acting on behalf of CCAI, Matthew subsequently wrote to her, disclaiming all liability for the situation. CCAI ceased operations in 2013. When Matthew and Christopher cleaned out the office, they threw out most of the paperwork and records; at that time Synakowski had not yet filed suit.

According to the case docket for Barnstable Superior Courtt Civil Action No. 1472CV00359, *Synakowski v. Christopher Costa & Associates, Inc.* (online at https://www.masscourts.org/eservices/home.page.2), Ms. Synkowski filed suit on July 18, 2014, resulting in a Superior Court judgment in her favor entered January 7, 2020. The defendants pursued an appeal, decided by the intermediate Massachusetts Appeals Court on May 25, 2022. The Supreme Judicial Court denied further appellate review on July 29, 2022 (490 Mass. 1104). By the author's calculation, with post-judgment interest at the 12% annual rate provided by law, as of January, 2023, the defendants owe Ms. Synkowski $73,811.82. The surveyor received $650 for the plot plan.

The plot plan is reproduced on the following page, followed on the next page after that by an enlarged reproduction of the portion of the plot plan showing the proposed addition to the plaintiff's house within the "Electric Transmission Lines Easement." This plot plan was attached to a filed court document. Image quality is due to the scanning of the paper document by the court.


KOMPASS (40' WIDE - PUBLIC) DRIVE
N.F. TOWN OF FALMOUTH
OHW
LOT 187
25,802 S.F.
EXISTING GRAVEL DRIVE
EXISTING DWELLING FIRST FLOOR ELEV. 55.2
EXISTING SHED
EXISTING SEPTIC
SIDELINE OF ELECTRIC TRANSMISSION LINES EASEMENT
LOT 188
LOT 214
LOT 213
LOT 212
S22°39'30"E 232.42'
S 55°30'35" W 204.27'
N 34°29'25" W 208.00'
LOCUS
LOCUS MAP NOT TO SCALE
GENERAL NOTES
ALL LOCATIONS ARE BASED ON AN INSTRUMENT SURVEY
ZONING DISTRICT: ACA
FLOOD ZONE: NON-HAZARD C
THIS LOT LIES OUTSIDE OF THE FALMOUTH HIGH WIND DISTRICT (ONE MILE FROM SHORELINE) AS DETERMINED FROM DELINEATION SHOWN ON FALMOUTH HIGH WIND DISTRICT MAP.
WIND EXPOSURE CATEGORY: ZONE B
LOT COVERAGE:
LOT AREA = 25,802 S.F.
EXISTING DWELLING, ENTRY, DECK & SHEDS = 1,686 S.F. 6.5%
EXISTING ENTRY REMOVED = -20 S.F. -0.07%
TOTAL REMAINING EXISTING STRUCTURES = 1,666 S.F. 6.5%
PROPOSED GARAGE & ADDITION = 1,767 S.F. 6.9%
TOTAL LOT COVERAGE BY STRUCTURES & PAVING: 5,350 S.F. (24.6%)
TOTAL LOT COVERAGE BY STRUCTURES: 3,453 S.F. (13.4%)
LAYOUT PLAN
GRAPHIC SCALE
(IN FEET)
1 inch = 20 ft.
LEGEND
EXISTING PROPOSED
I HEREBY CERTIFY THAT THE ABOVE DWELLING IS LOCATED ON THE GROUND AS SHOWN, THAT IT CONFORMED TO THE TOWN'S ZONING SETBACK REGULATIONS AT THE TIME IT WAS CONSTRUCTED AND THAT THIS MORTGAGE INSPECTION WAS PERFORMED IN ACCORDANCE WITH THE TECHNICAL STANDARDS FOR MORTGAGE LOAN INSPECTIONS AS ADOPTED BY THE MASSACHUSETTS ASSOCIATION OF LAND SURVEYORS AND CIVIL ENGINEERS, INCORPORATED.
THIS PLAN MAY NOT BE ADDED TO, DELETED FROM, OR ALTERED IN ANY WAY BY ANYONE OTHER THAN CHRISTOPHER COSTA & ASSOCIATES.
CHRISTOPHER COSTA P.L.S.
DATE 8/16/11
OWNER OF RECORD:
THERESA A. SYNAKOWSKI
APPLICANT:
THERESA A. SYNAKOWSKI
PROJECT:
CERTIFIED PLOT PLAN
106 KOMPASS DRIVE
IN
EAST FALMOUTH, MASSACHUSETTS
PREPARED BY:
Christopher Costa & Associates, Inc.
DRAWING TITLE:
CERTIFIED PLOT PLAN



In addition to the financial cost, time and stress of litigation, the damage to one's professional reputation may be difficult to calculate. In the *Synakowski* case, all documents are public records. One Matthew Costa, P.L.S., was not a party to the litigation, but his deposition was taken in the Superior Court case and his name is mentioned in the Appeals Court decision. Mr. Costa had to have an attorney write a letter on his behalf to the Town of Mashpee Planning Board after plaintiff Synakowski incorrectly represented to the Planning Board that he had been a party. That letter, reproduced beginning on the following page, was attached to the minutes of the planning board meeting, making it a matter of public record.

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February 15, 2019

Mary Waygan, Chairman
Mashpee Planning Board
16 Great Neck Road North
Mashpee, MA 02649

BY HAND DELIVERY

Re: Public Hearing on Cape and Islands Engineering for the Stopped Bus, LLC for shared driveway

Dear Ms. Waygan:

At the request of Matthew Costa, I listed to a portion of the video of the session of the Town of Mashpee Planning Board held on Feb. 6, 2019, pertaining to the above-referenced public hearing and in particular, to the statement made by Ms. Theresa Synakowski.

Ms. Synakowski's statement referenced a civil action which she identified as "2014 0359." Her statement referred to a "judgment against Matthew [Costa] and his company."

This office represents Mr. Christopher Costa and a company known as Christopher Costa & Associates, Inc., in a case currently pending in the Barnstable Superior Court known as *Theresa Synakowski v .Christopher Costa & Associates, et al,* Civil Action No. 1472CV00359. This is clearly the case to which Ms. Synakowski referred in her statement to you.

Matthew Costa is **not** a party in this case. Cape and Islands Engineering is also **not a party.** The Complaint filed my Ms. Synakowski and her attorneys, which commenced this action, did not raise any claims against Matthew Costa or Cape and Islands Engineering.

A trial was held in this case in October, 2018 and the jury returned a verdict. On Jan. 3, 2019, the Superior Court held a hearing on the defendants' post-trial motion for judgment notwithstanding the verdict. At the close of the hearing, the Court (Gildea, J.) took the motion under advisement and as of today, has not yet issued a ruling. No judgment has entered in this case.

Because Matthew Costa is not a party in the case, no judgment can possibly be entered against him in this case. Similarly, no judgment can possibly be entered in this case against Cape & Island Engineering, Inc.

If you have any questions or seek any further information about this case or would like copies of any of the pleadings filed in this case, please let me know. My mailing address, email address and telephone number are listed above in the letterhead.

Sincerely yours,

Michael J. Markoff

enc.
cc: Mr. Matthew Costa

1.J. Keep your signature and seal under your personal control at all times; delegation without adequate supervision can be dangerous!

Several years ago, one of my law partners took the deposition of a retired surveyor who was still licensed. The poor man, while obviously still mentally competent, testified under oath that he could not swear to the current location of his professional seal. Worse, he testified that he had allowed his signature to be made into a rubber stamp, the present location of which he claimed also was unknown to him. His seal and signature stamp had come into the possession of an unlicensed person who proceeded to prepare and record survey plans under the surveyor's name, allegedly (according to the surveyor) without his consent.

In the Synakowski case describe above in the preceding section of this work, I am left wondering whether the surveyor whose signature and seal appears on the plot plan reproduced above ever actually saw the document. I find it difficult to believe the substantial encroachment of the proposed house addition into an electrical transmission line easement would not have been a "red flag" for any competent surveyor.

There is nothing wrong with a surveyor signing and stamping a plan prepared by another, so long as the plan is prepared under the surveyor's direct supervision in accordance with 250 C.M.R. 5.04 (discussed above in section 1.H of this work), and the surveyor understands she/he thereby becomes fully responsible and legally liable for everything shown on that plan. While my paralegal prepares documents that are sent out over my signature, I review and approve each and every such document because any error or omission on her part is legally my error or omission. Any licensed professional should exercise the same degree of control.

2. Surveyor Liability to client for negligence

> The term negligence has been subjected to multifarious definitions. It has been defined as an act or omission in violation of duty, a failure to conform to the standard of the reasonably prudent man, and conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. Whatever the definition, all negligence consists of four elements: (1) duty; (2) breach of duty; (3) damage; (4) causal relation between breach of duty and damage.

Joseph R. Nolan & Laurie J. Sartorio, 37 Massachusetts Practice: Tort Law, § 11.1 "Negligence--Elements" (3rd ed. & Supp. 2022). That treatise was cited by *Jupin v. Kask,* 447 Mass. 141, 146 849 N.E.2d 829, 834-835 (2006), where the court explained that existence of a legal duty is a question of law, while the other elements of negligence are questions of fact:

> To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the **835 breach of the duty and the damage. See J.R. Nolan & L.J. Sartorio, Tort Law § 11.1 (3d ed.2005). We generally consider the latter three questions—whether a defendant exercised reasonable care, the extent of the damage caused, and whether the defendant's breach and the damage were causally related—to be the special province of the jury. See *Mullins v. Pine Manor College,* 389 Mass. 47, 57–58, 449 N.E.2d 331 (1983) (*Pine Manor*). However, the existence of a duty is a question of law, and is thus an appropriate subject of summary judgment. See, e.g., *Remy v. MacDonald,* 440 Mass. 675, 677, 801 N.E.2d 260 (2004) ("If no such duty exists, a claim of negligence cannot be brought").

A plaintiff who presents sufficient admissible evidence on all four elements listed above has made out a "*prima facie* case," which is defined as "A party's production of enough evidence to allow the fact-trier [e.g. the jury, or in a jury-waived case the judge] to infer the fact at issue and rule in the party's favor." Bryan A. Garner (Ed.), Blacks Law Dictionary (11th ed. 2019).

The term "*prima facie*" means "Sufficient to establish a fact or raise a presumption unless disproved or rebutted; … ." *Id.* A plaintiff who establishes a *prima facie* case can stop there. The burden shifts to the defendant to rebut the presumption thereby established.

In *Synakowski v. Christopher Costa and Associates, Inc.,* 101 Mass. App. Ct. 1104, 2022 WL 1653698 at *5 (Unpublished decision 2022), discussed above in section 1.I of this work, "[t]he jury found that Christopher and CCAI owed a duty of care to Synakowski in providing professional services to her; they breached the duty of care in providing those services; and the breach of duty was a proximate cause of damages to Synakowski. These findings were amply supported by the evidence."

2.A. Duty of reasonable care

Fortunately for surveyors, there are not many published appellate court decisions dealing with surveyor liability, at least not compared to the many cases in which doctors and lawyers are sued for malpractice. In such a situation, courts turn to cases from other jurisdictions to find relevant precedents. The Supreme Judicial Court of Maine, relying on cases from other states, has defined the surveyor's duty of care this way in *Graves v. S.E. Downey Registered Land Surveyor, P.A.* 885 A.2d 779, 782 (Me. 2005):

> The duty of care that the Superior Court imposed in this case required the Graveses to demonstrate that S.E. Downey's work on the survey was below that of an ordinarily and reasonably competent land surveyor in like circumstances. Courts in other jurisdictions have articulated the duty of care of land surveyors in similar ways. For example, in West Virginia a surveyor is held to the standard of care that a "reasonably prudent surveyor" would have applied with regard to the same project. *Capper v. Gates,* 193 W.Va. 9, 454 S.E.2d 54, 60-61 (1994). Both Maryland and North Carolina state that a surveyor must "exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar

circumstances." *Reighard v. Downs,* 261 Md. 26, 273 A.2d 109, 112 (1971); *Associated Ind. Contractors, Inc. v. Fleming Eng'g, Inc.,* 162 N.C.App. 405, 590 S.E.2d 866, 870 (2004) (providing nearly identical language). We agree with the Superior Court that the duty of care a land surveyor is obligated to provide is that degree of care that an ordinarily competent surveyor would exercise in like circumstances.

The principle was stated more succinctly in *Highland Lakes Country Club and Community Assoc. v. Nicastro,* 406 N.J.Super. 145, 151, 966 A.2d 1102, 1106 (2005):

> Surveyors are not insurers of the correctness of their findings but may be held liable for damages caused by breach of their duty to perform a survey with the care, skill, knowledge and diligence expected of a professional surveyor. Mark S. Dennison, Annotation, *Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property,* 117 *A.L.R.* 5th 23, 38 (2004); *see Commonwealth Land Title Ins. Co. v. Conklin Assocs.,* 152 *N.J.Super.* 1, 9, 377 *A.*2d 740 (Law Div.1977), *aff'd o.b. sub nom.,* *152*Commonwealth Land Title Ins. Co. v. Topping,* 167 *N.J.Super.* 392, 400 *A.*2d 1208 (App.Div.), *certif. denied,* 81 *N.J.* 285, 405 *A.*2d 830 (1979).

Quoted below in this section is the Restatement (Second) of Torts (1965 & Supp. 2017) (abbreviated Rest. (2d) Torts), a treatise cited by the courts of Massachusetts and other states. Before quoting from that treatise however, the author believes it is best to explain exactly what is a "tort." It should not be confused with a sweet dessert whose name is spelled "torte." The legal term "tort" is defined this way by Bryan A. Garner (ed.), Black's Law Dictionary (11th ed. 2019):

> **1.** A civil wrong, other than breach of contract, for which a remedy may be obtained, usu.[usually] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another • Tortious conduct is typically one of four types:
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> (1) a culpable or intentional act resulting in harm;
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> (2) an act involving culpable and unlawful conduct causing unintentional harm;
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> (3) a culpable act of inadvertence involving an unreasonable risk of harm; and
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> (4) a nonculpable act resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability despite the absence of fault.
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> **2.** (*pl.*)The branch of law dealing with such wrongs.
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> "To ask concerning any occurrence 'Is this a crime or is it a tort?' is — to borrow Sir James Stephen's apt illustration — no wiser than it would be to ask concerning a man 'Is he a father or a son?' For he may well be both." J.W. Cecil Turner, *Kenny's Outlines of Criminal Law* 543 (16th ed. 1952).

> "We may … define a tort as a civil wrong for which the remedy is a common-law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation." R.F.V. Heuston, *Salmond on the Law of Torts* 13 (17th ed. 1977).

Unlike the law of contracts, where the rights and obligations of each party are defined by their agreement, the tort duty of care is imposed by law, regardless of whether one likes it or not. No agreement is required. Like so many areas of law, this seemingly simple distinction can become complicated, as explained by Joseph R. Nolan & Laurie J. Sartorio, 37A Massachusetts Practice: Tort Law, § 1.2 "Torts and contracts—Their difference" (3rd ed. 2005 & Supp. 2022) (footnotes omitted):

> Tort liability arises from a breach of duty owed by one person to another apart from any pre-existing or consensual relationship. A may not unlawfully touch B and escape liability for assault and battery on the ground that A never agreed to refrain from touching B. B, as a person, is owed the duty and protection to be free from unlawful contact with A. However, A may contract with B and agree to furnish protection to him as a nurse or bodyguard. A may be liable in contract for failing to protect B or for striking B in breach of his contract. Liability in this instance arises because of the breach of the pre-existing and consensual relationship.[1] This constitutes liability in contract, though there may also be liability in tort.
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> A claim in tort may arise from a contractual relationship and be available to persons who are not parties to the contract. A party under contractual obligation is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation. Where a contractual relationship creates a duty of care to third parties, the duty rests in tort, not contract, and therefore a breach is committed only by the negligent performance of that duty, not by a mere contractual breach.[1.50]
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> In general, the theory of damages in tort differs from that of contract although it has been stated that the "measure of damages is the same".[2] Tort damages are essentially restitutional. They are designed to restore the plaintiff to the position in which he found himself immediately prior to the tortfeasor's act.
>
> The aggrieved party in a contract action seeks damages which will place him in the position in which he would have been if the defendant had performed the contract. In this sense, contract damages are prospective, in contrast to the restitutional nature of tort damages. However, this approach to understanding the difference between torts and contracts has, at least, one deficiency. A party to a contract which is breached may elect to sue "off the contract" and recover restitutional damages. He may seek to be restored to the position which he enjoyed just prior to entering the contract. In fact, under the theory of implied in law contracts (they are not contracts at all), he may be required to accept restitutional damages because no contract ever existed between him and the defendant.[3] An implied in law contract is simply a device which

the law (with an assist from equity) uses to avoid unjust enrichment or an inequitable result by imposing tort-like or restitutional damages.[4]

The Restatement (2d) Torts, §299A, "Undertaking in Profession or Trade" (1965 & Supp. 2022) defines the following tort standard of care for licensed professionals (including but not limited to professional land surveyors), followed by a series of "Comments" intended to help explain the standard (bold face type in original):

> **Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.**
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> **Comment:**
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> *a.* Skill, as the word is used in this Section, is something more than the mere minimum competence required of any person who does an act, under the rule stated in § 299 [which states that "An act may be negligent if it is done without the competence which a reasonable man in the position of the actor would recognize as necessary to prevent it from creating an unreasonable risk of harm to another."]. It is that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience. All professions, and most trades, are necessarily skilled, and the word is used to refer to the special competence which they require.
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> *b. Profession or trade.* This Section is thus a special application of the rule stated in § 299. It applies to any person who undertakes to render services to another in the practice of a profession, such as that of physician or surgeon, dentist, pharmacist, oculist, attorney, accountant, or engineer. It applies also to any person who undertakes to render services to others in the practice of a skilled trade, such as that of airplane pilot, precision machinist, electrician, carpenter, blacksmith, or plumber. This Section states the minimum skill and knowledge which the actor undertakes to exercise, and therefore to have. If he has in fact greater skill than that common to the profession or trade, he is required to exercise that skill, as stated in § 299, Comment *e*.
>
> *c. Undertaking.* In the ordinary case, the undertaking of one who renders services in the practice of a profession or trade is a matter of contract between the parties, and the terms of the undertaking are either stated expressly, or implied as a matter of understanding. The rule here stated does not, however, depend upon the existence of an enforceable contract between the parties. It applies equally where professional services are rendered gratuitously, as in the case of a physician treating a charity patient, or without any definite understanding, as in the case of one who renders services to a patient who is unconscious, in an emergency. The basis of the rule is the undertaking of the defendant, which may arise apart from contract.

This undertaking is not necessarily a matter of the requirements of the particular task undertaken, although that task will of course have its bearing upon what is understood. A highly skilled individual, as for example, a certified public accountant, may undertake to perform services which normally require little skill, as for example to do ordinary bookkeeping, and in performing those services he may, or may not, undertake to exercise his unusually high skill. On the other hand a bookkeeper with little or no accounting skill may undertake to do work which would normally call for a certified public accountant, and he may, or may not, undertake in doing it to exercise the skill of such an accountant. It is a matter of the skill which he represents himself to have, or is understood to undertake to have, rather than of the skill which he actually possesses, or which the task requires.

d. Special representation. An actor undertaking to render services may represent that he has superior skill or knowledge, beyond that common to his profession or trade. In that event he incurs an obligation to the person to whom he makes such a representation, to have, and to exercise, the skill and knowledge which he represents himself to have. Thus a physician who holds himself out as a specialist in certain types of practice is required to have the skill and knowledge common to other specialists. On the other hand the actor may make it clear that he has less than the minimum of skill common to the profession or trade; and in that case he is required to exercise only the skill which he represents that he has. Thus a layman who attempts to perform a surgical operation in an emergency, in the absence of any surgeon, and who makes it clear that he does not have the skill or knowledge of a surgeon, is not required to exercise such skill or knowledge. The rule stated in this Section applies only where there is no such special representation.

e. Standard normally required. In the absence of any such special representation, the standard of skill and knowledge required of the actor who practices a profession or trade is that which is commonly possessed by members of that profession or trade in good standing. It is not that of the most highly skilled, nor is it that of the average member of the profession or trade, since those who have less than median or average skill may still be competent and qualified. Half of the physicians of America do not automatically become negligent in practicing medicine at all, merely because their skill is less than the professional average. On the other hand, the standard is not that of the charlatan, the quack, the unqualified or incompetent individual who has succeeded in entering the profession or trade. It is that common to those who are recognized in the profession or trade itself as qualified, and competent to engage in it.

f. Schools of thought. Where there are different schools of thought in a profession, or different methods are followed by different groups engaged in a trade, the actor is to be judged by the professional standards of the group to which he belongs. The law cannot undertake to decide technical questions of proper practice over which experts reasonably disagree, or to declare that those who do not accept particular controversial doctrines are necessarily negligent in failing to do so. There may be, however, minimum requirements of skill applicable to all persons, of whatever school of thought, who engage in any profession or trade. Thus any person who holds himself out as competent to treat human ailments must have a minimum skill in diagnosis, and a minimum knowledge of possible methods of treatment. Licensing statutes, or those requiring

a basic knowledge of science for the practice of a profession, may provide such a minimum standard.

g. Type of community. Allowance must be made also for the type of community in which the actor carries on his practice. A country doctor cannot be expected to have the equipment, facilities, experience, knowledge or opportunity to obtain it, afforded him by a large city. The standard is not, however, that of the particular locality. If there are only three physicians in a small town, and all three are highly incompetent, they cannot be permitted to set a standard of utter inferiority for a fourth who comes to town. The standard is rather that of persons engaged in similar practice in similar localities, considering geographical location, size, and the character of the community in general.

Such allowance for the type of community is most frequently made in professions or trades where there is a considerable degree of variation in the skill and knowledge possessed by those practicing it in different localities. It has commonly been made in the cases of physicians or surgeons, because of the difference in the medical skill commonly found in different parts of the United States, or in different types of communities. In other professions, such as that of the attorney, such variations either do not exist or are not as significant, and allowance for them has seldom been made. A particular profession may be so uniform, in different localities, as to the skill and knowledge of its members, that the court will not feel required to instruct the jury that it must make such allowance.

In Lawson v. Thomas Winemiller & Associates, 1995 WL 301429 at *2-*3 (Ohio Ct. App. 1995), the court properly distinguished a mere disagreement between surveyors from actionable negligence with these words:

> We note that a mere difference of professional opinion does not establish professional negligence. Moreover, professional negligence is not established by proving that a professional opinion turned out to be erroneous. Rather, to recover for professional negligence based on an incorrect professional opinion, one must establish that the professional fell below the standard of skill and knowledge commonly possessed and utilized by members within the profession when rendering his opinion. See, Restatement of the Law (Second), Torts (1965), Section 299A.

In my opinion, the above quoted standard from the Restatement (Second) of Torts provides that a Massachusetts registered professional land surveyor "is required to exercise the skill and knowledge normally possessed by members of" the surveying profession in this Commonwealth. Expert testimony by a surveyor generally would be required to provide evidence of the average level of skill and knowledge among Massachusetts surveyors at the time a plan or report was prepared. The

requirements for admission into evidence of such expert testimony are discussed above in section 1.A.(2) of this work, entitled "Defining the surveyor's "generally/commonly accepted standards of care" by expert testimony of another surveyor under the *Daubert/Lanigan* case law standard."

Note the importance of the word "average" in the preceding paragraph. That was driven home to me years ago, during cross-examination in a trial where I was testifying as an expert witness against a real estate lawyer accused of malpractice. The clever defense attorney representing that lawyer flattered me, reviewing my specialized expertise and publications in the field of land law. He was trying to show that my expert opinion was irrelevant because I was exceptional, not average. In response, I tried to focus on what in my opinion any reasonably competent real estate conveyancing attorney should have done in the circumstances of that case. Always remember that, if called upon to defend yourself in a malpractice case, you are nobody special – just an average Jane or Joe land surveyor.

Timing can be crucial when it comes to defining a land surveyor's duty of care in a particular case, because both formal regulations and unwritten but accepted standards of professional practice change over time. For example, if a plan or report was prepared before November 22, 2013, when the current 250 C.M.R. 5.00 & 6.00 went into effect, those current regulations are inapplicable. The surveyor's work must be judged by the prior superseded 250 C.M.R. 6.00 entitled "Procedural and Technical Standards for the Practice of Land Surveying." This issue arose, but was not resolved in *Synakowski v. Christopher Costa and Associates, Inc.,* 101 Mass. App. Ct. 1104, 2022 WL 1653698 at *6 n. 14 (Unpublished decision 2022), where the court made the following observation:

> [250 C.M.R.] Section 5.04was inserted into the regulations in 2013, which is after the events at issue here. There was some dispute at trial as to whether the substance of this regulation was in the prior version of the regulations adopted in 1993. Given our resolution, we need not address the issue.

Generally, the "undertaking" by a surveyor, discussed in the Restatement (Second) of Torts *comment c* above, is preparation of a plan or report, or placement on the ground of stakes or pins, regardless of whether or not the surveyor charges for his/her services.

In the author's opinion, for a surveyor an "undertaking" includes any "Instrument of Service" which is defined this way by 250 C.M.R 2.09 "Definitions: "Instrument of Service is any document or medium memorializing the professional service or creative work of engineering or land surveying involving the special education, training, and experience of the nature required for registration as a Professional Engineer or Professional Land Surveyor."

No written contract with the surveyor is required, but a written agreement may help avoid later misunderstanding or conflict concerning the scope of work and the surveyor's obligations.

2.B. Breach of duty

> Having demonstrated that the defendant owed him a duty of care, the plaintiff is then bound to show that the defendant violated that duty or failed to meet the demands of that duty. A person violates this duty by failing to conform his conduct to the standard of care required in the circumstances.

Joseph R. Nolan & Laurie J. Sartorio, 37A Massachusetts Practice: Tort Law, § 11.4 "Breach of duty" (3rd ed. 2005 & Supp. 2022).

Violation of 250 C.M.R. 5.00 or 6.00 (or, if applicable to a particular surveyor's plan or report, other standards listed in those regulations as binding on Massachusetts land surveyors) is evidence of negligence because it supports a conclusion that the surveyor breached the duty of care established by those regulations or standards. For an ALTA (American Land Title Association)/NSPS (National Society of Professional Surveyors) survey, evidence of negligence may be established by proving a violation of the "Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys (Effective February 23, 2021)," available online at https://www.nsps.us.com/page/2021ALTA.

Howard J. Alperin, 14D Mass. Practice: Summary of Basic Law, § 16.76 “Violation of law” (5th ed & Supp. 2022), summarizes the legal principles this way, with citations to Massachusetts cases:

> Under Massachusetts law the defendant's violation of a penal statute, ordinance, or administrative regulation[5] is evidence of the defendant's negligence as to all consequences that the statute, ordinance or regulation was intended to prevent.[6] There is no requirement, in order for a jury to consider the violation of a statute or regulation as evidence of negligence, that a witness testify that the statute or regulation was violated.[7]
>
> If the risk that in fact materialized was not within contemplation of the statute or regulation, it is not admissible on the question of negligence.[8] And, a statutory or regulatory violation cannot give rise to a negligence claim unless the plaintiff establishes that the defendant owed a duty of care to him,[9] because tort liability depends on the violation of a duty of care to the person injured by the defendant's wrongful conduct.[10]
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> Moreover, it is still necessary for the plaintiff to show that the defendant's violation of law was causally connected to his injury.[11] For example, in one case it was held that a physician's failure to renew his license to practice medicine prior to the time he treated the plaintiff was not causally related to the harm suffered by the plaintiff, because the treatment would have been the same had he been licensed, and therefore evidence of the violation of the licensing statute was properly excluded.[12]
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> Thus, under Massachusetts law, the violation of a statute or regulation that is designed to protect a class of persons of which the plaintiff is a part against the type of harm that occurred does not give rise to a cause of action,[13] and is not conclusive on the issue of negligence[14]—it is only evidence of negligence.[15] The Masachusetts Court has said:
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> The Commonwealth does not follow the doctrine of negligence per se, whereby the standard of lawful conduct in a criminal statute also sets a standard of care for tort actions and thus violation of a statute, without more, may establish a breach of duty. … ‘Rather, violation of a statute … is only ‘some evidence’ of the defendant's negligence as to all consequences the statute was intended to prevent.’[16]
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> The rule that violation of a statute or regulation is evidence of negligence as to all consequences it was intended to prevent is commonly applied in the following circumstances: (1) dram shop cases, where violation of a statute prohibiting sale of liquor to an intoxicated person or a minor is evidence of negligence on the part of the vendor sued by a third person injured by the intoxicated person's or minor's acts;[17] (2) building and health laws, where failure to comply with a statute or regulation designed to protect people's safety and health is evidence of negligence;[18] and (3) motor vehicle laws, where failure to conform to standards for safe operation results in injury to others.[19]
>
> Also, it is open to a defendant to demonstrate lack of negligence by his compliance with a relevant statute or regulation; again, this is some, but not conclusive, evidence on the issue.[20]
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> **[Footnotes:]**

5 It has also been held that an employee's violation of his employer's rules, intended to protect the safety of third persons, is evidence of the employee's negligence, for which the employer may be held liable. Com. v. Angelo Todesca Corp., 446 Mass. 128, 138, 842 N.E.2d 930, 940 (2006).

6 Berish v. Bornstein, 437 Mass. 252, 273, 770 N.E.2d 961, 979 (2002) ("Although violations of a statute or regulations do not constitute negligence per se, they may provide evidence of negligence.").

See Perry v. Medeiros, 369 Mass. 836, 343 N.E.2d 859, 862 (1976) (violation of city building code prohibiting exit door opening onto flight of stairs without landing should have been admitted as evidence of negligence).

Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 11, 453 N.E.2d 430, 433 (1983) (sale of liquor to minor in violation of statute is evidence of negligence).

Ford v. Boston Housing Authority, 55 Mass. App. Ct. 623, 625, 773 N.E.2d 471, 473 (2002) (violation of state building code is evidence of negligence as to consequences code and its regulations were intended to prevent).

7 Campbell v. Cape & Islands Healthcare Services, Inc., 81 Mass. App. Ct. 252, 255, 961 N.E.2d 1096, 1099 (2012).

8 Matteo v. Livingstone, 40 Mass. App. Ct. 658, 660-661, 666 N.E.2d 1309, 1311-1312 (1996) (violation of regulation requiring railings on porches over 30 inches above ground was not evidence of negligence with respect to bicycle rider who rode off porch without railing and was injured, since such regulations was designed to prevent accidental falls, not bicycle acrobatics).

9 Juliano v. Simpson, 461 Mass. 527, 532, 962 N.E.2d 175, 179-180 (2012).

MacKenzie v. Flagstar Bank, FSB, 738 F.3d 486, 495-496 (1st Cir. 2013) (where an independent duty of care exists, violation of a statute or regulation can provide evidence of breach of that duty, even if the statute or regulation itself does not create a private right of action, but in absence of an independent duty, plaintiff cannot proceed with a negligence claim based solely on a statutory or regulatory violation).

10 MacKenzie v. Flagstar Bank, FSB, 738 F.3d 486, 495 (1st Cir. 2013) (applying Mass. law).

See Dobbs, Hayden, and Bublick, Hornbook on Torts, 2d ed. (2016), § 11.2, quoting Cuyler v. U.S., 362 F.3d 949, 952 (7th Cir. 2004).

Almeida v. Pinto, 94 Mass. App. Ct. 540, 545, 115 N.E.3d 574, 579 (2018), review denied, 481 Mass. 1103, 120 N.E.3d 723 (2019) (although regulations do not in and of themselves impose a duty, they are evidence of the standard of care with respect to consequences they were intended to prevent).

11 Kralik v. Le Clair, 315 Mass. 323, 326, 52 N.E.2d 562, 564 (1943); Falvey v. Hamelburg, 347 Mass. 430, 435, 198 N.E.2d 400, 402 (1964); Jenkins v. Uniroyal, Inc., 668 F. Supp. 56, 61 (D. Mass. 1987) (applying Mass. law).

See Roberts v. Southwick, 415 Mass. 465, 477, 614 N.E.2d 659, 665 (1993) (O'Connor,J., concurring) ("This court has never held that safety statutes, ordinances, or regulations are admissible to prove causation. Negligence and causation are separate matters.").

Sheridan v. U.S., 969 F.2d 72, 75 (4th Cir. 1992) ("Under Maryland law, violation of a statute or regulation does not constitute negligence per se, but is only evidence of negligence. … Proof that the statutory or regulatory violation was a proximate cause of the injury sustained is necessary.").

Campbell v. Cape & Islands Healthcare Services, Inc., 81 Mass. App. Ct. 252, 258-259, 961 N.E.2d 1096, 1101-1102 (2012) (in trial of patient's action against blood collection facility and its medical director, alleging negligence in conducting three-hour glucose tolerance test after which patient suffered from hypoglycemia and after leaving facility was seriously injured in car accident in which he struck utility pole while in hypoglycemic condition, regulation [105 C.M.R. § 180.042(A)(3)] governing operation of blood collection stations was admissible and much evidence was admitted on issue whether facility's procedures complied with regulation, but judge erred in not giving instruction as requested as to significance of finding by jury of failure to comply with regulation; verdict finding no negligence reversed).

12 McCarthy v. Boston City Hospital, 358 Mass. 639, 646-647, 266 N.E.2d 292, 296-297 (1971).

13 Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 667, 246 N.E.2d 798, 799 (1969) (overruled in part on other grounds by, Lindsey v. Massios, 372 Mass. 79, 360 N.E.2d 631 (1977)).

There are some exceptions where the legislative intent to create a cause of action appears by express language or clear implication. Harsha v. Bowles, 314 Mass. 738, 741, 51 N.E.2d 454, 455 (1943). For example, M.G.L. c. 143, § 51 provides that the owner of certain buildings, such as theatres and factories, who does not comply with the provisions of the state building code is strictly liable to a person injured as a result of such violation. However, the statute does not apply to a single-family house [Com. v. Eakin, 427 Mass. 590, 592, 696 N.E.2d 499, 500 (1998)] or to an owner-occupied two-family home in which the owner rents one unit to a tenant [Banushi v. Dorfman, 438 Mass. 242, 245, 780 N.E.2d 20, 23 (2002)].

See Sheehan v. Weaver, 467 Mass. 734, 741-745, 7 N.E.3d 459, 466-468 (2014) (where building in question had chiropractor's office on first floor and residential apartments on second and third floors accessed by separate staircases and entrances, and residential tenant was injured when he ascended exterior staircase leading to second floor landing

and leaned against staircase guardrail which broke, causing him to fall to pavement below, residential portion of structure was not used as place for large number of people to gather, and hence did not qualify as a "building" under M.G.L. c. 143, § 51, notwithstanding that structure had some commercial characteristics; landlords not strictly liable under § 51).

14 Guinan v. Famous Players-Lasky Corporation, 267 Mass. 501, 516, 167 N.E. 235, 242 (1929).

Campbell v. Cape & Islands Healthcare Services, Inc., 81 Mass. App. Ct. 252, 255, 961 N.E.2d 1096, 1099 (2012) (evidence of violation of statute is some evidence of negligence but it does not constitute negligence per se).

15 LaClair v. Silberline Mfg. Co., Inc., 379 Mass. 21, 28, 393 N.E.2d 867, 871 (1979); Rice v. James Hanrahan & Sons, 20 Mass. App. Ct. 701, 708, 482 N.E.2d 833, 839, Prod. Liab. Rep. (CCH) P 10698, 41 U.C.C. Rep. Serv. 1641 (1985); Bennett v. Eagle Brook Country Store, Inc., 408 Mass. 355, 358-359, 557 N.E.2d 1166, 1168-1169 (1990); St. Germaine v. Pendergast, 411 Mass. 615, 620, 584 N.E.2d 611, 614 (1992).

16 Juliano v. Simpson, 461 Mass. 527, 532, 962 N.E.2d 175, 179-180 (2012). [Citation omitted.]

17 Illustrative cases are: Cimino v. Milford Keg, Inc., 385 Mass. 323, 326-327, 431 N.E.2d 920, 923 (1982) (sale to intoxicated person); Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 10, 453 N.E.2d 430, 433 (1983) (sale to minor).

18 Illustrative cases are: Perry v. Medeiros, 369 Mass. 836, 840-841, 343 N.E.2d 859, 862 (1976) (violation of city building code requiring exit door to open onto landing); Lindsey v. Massios, 372 Mass. 79, 83-84, 360 N.E.2d 631, 634 (1977) (violation of tenement house law requiring lighting in common passageway); Morris v. Holt, 380 Mass. 133, 135-136, 401 N.E.2d 851, 853 (1980) (violation of state sanitary code regarding construction of building near cesspool); Williams v. Fontes, 383 Mass. 95, 98, 417 N.E.2d 963, 964 (1981) (statute required each story of building to be supplied with fire extinguishers); Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 358-359, 648 N.E.2d 757, 766-767 (1995) (violation by electric utility company of its own internal standards and water and sewer commission's conditions for installation of underground power line); Ford v. Boston Housing Authority, 55 Mass. App. Ct. 623, 625, 773 N.E.2d 471, 473 (2002) (housing authority's violation of state building code requirement of two means of egress from building was admissible in action brought by plaintiff injured while fleeing from fire in apartment building owned by housing authority).

19 Montone v. James, 4 Mass. App. Ct. 857, 357 N.E.2d 29 (1976) (speeding and failure to grant right of way was evidence of decedent's contributory negligence); Scott v. Thompson, 5 Mass. App. Ct. 372, 375, 363 N.E.2d 295, 296 (1977) (violation of school safety regulation prohibiting bus driver from leaving bus unattended with children

aboard); Reese v. McGinn Bus Co., Inc., 6 Mass. App. Ct. 916, 917, 379 N.E.2d 1119, 1120 (1978) (bus driver obliged by statute to slow vehicle as it proceeded downhill with child plainly in view); Picard v. Thomas, 60 Mass. App. Ct. 362, 368, 802 N.E.2d 581, 586 (2004) (if licensed driver knowingly permitted driver with learner's permit to operate car in violation of law and operator's violation was causally related to accident, licensed driver could be liable for negligence).

20 MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 140, 475 N.E.2d 65, 71 (1985).

Even if a surveyor complies with 250 C.M.R. 5.00 & 6.00 and the other published standards cited therein, expert testimony by another surveyor may be used to show that the defendant surveyor's "work on the survey was below that of an ordinarily and reasonably competent land surveyor in like circumstances." *Graves v. S.E. Downey Registered Land Surveyor, P.A.,* 885 A.2d 779, 782 (2005). In other words, there may be standards and practices (which may be informal and unwritten) normally followed by surveyors that are not included in 250 C.M.R. 5.00 & 6.00. In *Graves v. S.E. Downey Registered Land Surveyor, P.A., supra,* 885 A.2d at 780, the expert witness had this to say about the defendant surveyor's work:

> The court heard from an expert witness who testified that S.E. Downey did not "exercise the skill, care and diligence required of members of the surveying profession" and did not "meet the standards of local practice exercised by reasonably prudent practitioners providing land surveying services in the Hancock County area." The expert listed deficiencies in the S.E. Downey survey including "[r]eliance on extrinsic evidence to the exclusion of the direct record evidence of the boundary." The expert also testified that he was baffled at S.E. Downey's conclusion that there was a gap between the southerly boundary of the Graveses' land and the northerly boundary of MDI High School when every deed in the chain of title stated they were contiguous. The expert concluded: "The monuments in the Graveses' deed are clear, they're controlling, and the determination reflected by the Downey survey is inconsistent with all of the rules of evidence and rules of construction as far as I can determine."

As discussed above in section 1.A of this work ("Work by the book, but what is 'the book'?"), the opening statement of 250 C.M.R. 6.00 makes it clear that a surveyor can be held liable for negligence by failing to follow even undefined standards, as follows (underlining added for emphasis):

> All land surveying work is considered work of a professional nature and shall be performed in

conformance with 250 CMR 6.00, commonly accepted standards of care and 250 CMR 5.00: *Professional Practice.*

In addition, the following presumption is set forth in 260 C.M.R. 6.01 "Elements Common to All Survey Work" (underlining added for emphasis):

> 250 CMR 6.00 describes requirements common to all types of survey work, including but not limited to such surveys as Boundary, topographic, construction layout, title insurance, and mortgage surveys.
>
> (1) Presumptions.
>
> (a) When engaged to provide Work Products, surveyors are presumed to be familiar with other generally accepted standards of care *(e.g., National Map Accuracy Standards, Land Title Survey Standards,* land court standards) associated with that type of work and the surveyor's Work Products shall comply with those additional standards to the extent that such standards do not conflict with the provisions of 250 CMR.

In litigation against a Massachusetts surveyor, a violation of these undefined "commonly accepted standards of care" or "other generally accepted standards of care" may be shown through expert testimony by another licensed professional land surveyor. Such expert testimony generally is required to provide evidence that both

(a) defines and specifies the required standard of care as it applies to the facts of a particular case, and

(b) explains precisely how the defendant surveyor failed to meet that standard.

I believe the following specimen jury instruction for legal malpractice cases, set forth in David N. Allen & Maureen Mulligan, 2 Massachusetts Superior Court Civil Practice Jury Instructions, §18.9 "Requirement of expert testimony" (3rd ed. 2014 & Supps. 2016 & 2018) (Published by MCLE (Mass. Continuing Legal Education, Inc.) and available on Westlaw), is applicable to surveyors:

> The existence and scope of the relevant standard of care, and whether or not the defendant attorney breached that standard of care, must be based on the expert testimony presented in this case. [FN47]

FN47. *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 566 (1984); *Fall River Sav. Bank v. Callahan*, 18 Mass. App. Ct. 76, 82 (1984); *DiPiero v. Goodman*, 14 Mass. App. Ct. 929, 930 (1982)

Practice Note

Expert testimony is not necessary where the malpractice is so "gross and obvious" that a layperson does not need expert testimony. *Pongonis v. Saab*, 396 Mass. 1005, 1005-06 (1985) (rescript). In practice, this exception is limited to such cases as missed statutes of limitations and title searches where a recorded document is missed. Even in these cases, however, expert testimony is desirable. A plaintiff who wishes to try a legal malpractice case without an expert where there has been no admission of malpractice by the defendant should be prepared to argue that the malpractice is so "gross and obvious" that no expert is needed.

Note that many legal malpractice cases require expert testimony not only on the issue of legal malpractice, but also on an essential issue in the underlying case. For example, the underlying case might require testimony from an engineer, an accountant, a physician, or an economist. The legal expert cannot opine on these issues unless he or she is independently qualified to do so. *See Atlas Tack Corp. v. Donabed*, 47 Mass. App. Ct. 221, 226-27 (1999).

This "gross and obvious" exception to the general requirement of expert testimony in Massachusetts legal malpractice cases is consistent with surveyor malpractice cases from other states holding that there is a "common knowledge" exception to the general requirement that expert testimony is required to prove malpractice. This exception was explained as follows in *Associated Industrial Contractors, Inc. v. Fleming Engineering, Inc.,* 62 N.C.App. 405, 410-412, 590 S.E.2d 866, 870-872 (2004):

> The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit "is to see if this defendant's actions 'lived up' to that standard...." *Little v. Matthewson,* 114 N.C.App. 562, 567, 442 S.E.2d 567, 570 (1994), *aff'd per curiam,* 340 N.C. 102, 455 S.E.2d 160 (1995). Ordinarily, expert testimony is required to establish the standard of care. *Bailey v. Jones,* 112 N.C.App. 380, 387, 435 S.E.2d 787, 792 (1993).
>
> Here, plaintiff did not tender any witnesses as experts. Plaintiff did, however, offer the testimony of Mr. Register, Fleming's surveyor with ten years of surveying experience. Mr. Register described in great detail what Fleming was hired to do and how he and his assistant were supposed to accomplish their responsibilities. He explained how they were supposed to use the electronic transit device; each step that the operator of the device, Mr. Davis, was required to take; what each step was expected to achieve; what they could do to double-check

their results; and what the result should have been if they performed as anticipated. This testimony was sufficient to establish the standard of care. *State v. Linney,* 138 N.C.App. 169, 183, 531 S.E.2d 245, 256 ("whether or not a witness has been formally tendered as an expert is not controlling" if the witness may appropriately be considered an expert based on qualifications), *disc. review dismissed and appeal dismissed,* 352 N.C. 595, 545 S.E.2d 214 (2000). *See also Noell v. Kosanin,* 119 N.C.App. 191, 196, 457 S.E.2d 742, 745 (1995) (holding expert testimony not required to defeat summary judgment**871 in medical malpractice suit because defendant doctor's admissions were sufficient to establish the standard of care).

Moreover, expert testimony " 'is not required ... to establish the standard of care, failure to comply with the standard of care, or proximate*411 cause, in situations where [the trier of fact], based on its common knowledge and experience, is able to decide those issues.' " *Erler v. Aon Risks Servs., Inc.,* 141 N.C.App. 312, 318, 540 S.E.2d 65, 69 (2000) (quoting *Little,* 114 N.C.App. at 567, 442 S.E.2d at 570–71), *disc. review denied,* —— N.C. ——, 548 S.E.2d 738 (2001). Defendant does not argue that complexity precludes application of the common knowledge exception. Instead, defendant urges that the exception should only apply when professional conduct is "grossly negligent." This Court has previously held, however, that the "common knowledge" exception applies either when (1) the professional's conduct is grossly negligent; or (2) the actions are " 'of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation.' " *Little,* 114 N.C.App. at 567–68, 442 S.E.2d at 571 (quoting *Bailey,* 112 N.C.App. at 387, 435 S.E.2d at 792).

While we have not located any North Carolina decisions that present circumstances similar to this case, other jurisdictions confronted with analogous facts have applied the "common knowledge" exception. In a case that mirrors this one, the Supreme Court of Nevada held that expert testimony was not necessary to establish the standard of care required of a surveyor hired to pinpoint the location of caissons that were to form the foundational support for an addition to a hotel. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.,* 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (per curiam). After the caissons were drilled, it was discovered that several had been incorrectly placed and the plaintiff had to reposition them. The Nevada Supreme Court noted that the surveyor was "provided plans and specifications that reflected the location and dimensions of the caissons" and that the survey "emanated from existing, fixed monuments, the accuracy of which is not in doubt." Location of the caissons did not require "complex calculations or necessitate[ ] the reliance upon untrustworthy data such that accuracy could not be expected from performance done in a workmanlike manner." *Id.* at 115, 642 P.2d at 1087. In affirming the trial court's refusal to instruct the jury on expert testimony regarding the standard of care, the appellate court held:

> It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons. Where, as in the instant case, the service rendered does not involve esoteric knowledge or uncertainty that

> calls for the professional's judgment, it is not *412 beyond the knowledge of the jury to determine the adequacy of the performance.

Id. (citation omitted). *See also Paragon Engineering, Inc. v. Rhodes,* 451 So.2d 274 (Ala.1984) (expert testimony not required to establish the standard of care for a surveyor where non-expert testimony at trial was sufficient to assist the jury in deciding whether the site of a retention basin was accurately laid out with stakes by the defendant surveyor).

> In this case, we hold that the nature of Fleming's actions fell within the "common knowledge" exception to the requirement that experts testify as to the requisite standard of care. It is within the common knowledge of a trier of fact that a surveyor hired to pinpoint columns for a rectangular building site that must be precisely square must accurately mark column locations so as to result in two sets of parallel lines connected by four 90° angles. As in *Daniel,* understanding this task "does not involve esoteric knowledge or uncertainty that calls for the professional's judgment" nor is it "beyond the knowledge" of the trier of fact as to whether lines and angles staked by a surveyor were straight and square. 98 Nev. at 115, 642 P.2d at 1087. Given that the survey at the Honda facility started from predetermined,**872 fixed points and the sole task was to define straight lines and 90° angles, this is a case in which "accuracy could ... be expected from performance done in a workmanlike manner." *Id.*

2.C. Proximate cause

In *RMM Consulting, LLC v. Riordan*, 128 Conn. App. 688, 689, 17 A.3d 1106, 1107 (2011) negligence was proven, but not causation:

> [A] jury found that the plaintiff had proven that the defendant, a professional surveyor, negligently had prepared a certified map that was not an accurate depiction of the boundaries of two adjoining properties in which the plaintiff had an interest. The jury also found, however, that the defendant's negligence was not a substantial factor in causing the plaintiff's alleged harms or losses and, for that reason, rendered a verdict in favor of the defendant.

In that case, the surveyor apparently was successful in showing that the plaintiffs' lawyer was the proximate cause of the plaintiff's damage (128 Conn. App. at 690-691, 17 A.3d at 1107-1108):

> The jury reasonably could have found the following facts. As the court noted in its memorandum of decision, the plaintiff, a land developer, hired the defendant, a land surveyor, to provide land surveying services in connection with the plaintiff's plan to purchase and to develop lots 9A and 9B, two adjoining pieces of real property on Sheehan Road in Warren. In accordance with this contract, the defendant staked out the boundary lines of the properties and generated a certified map of the properties that did not indicate any uncertainty about the location of the boundary lines for either lot. In addition, as a result of his investigation, the

> defendant warned the plaintiff, prior to its closing on the purchase of the properties, that there was "a potential issue" because there was no deed for the existing lot 9B and that it would be advisable to get a warranty deed for the purchase of that property.
>
> There was conflicting evidence at trial about the extent of the plaintiff's reliance on the defendant's map. Maureen Morrill, the plaintiff's sole proprietor, testified that she had relied on the map produced by the defendant and that, if she had been aware of a competing title claim to any part of lot 9B, she would not have purchased the property. The defendant testified, however, that, on more than one occasion, Morrill had informed him that she had brought the title issue to the attention of the plaintiff's attorney, Thomas McDermott, and that "it had been taken care of." It is undisputed that McDermott did not obtain title insurance for the plaintiff to ensure the plaintiff's interest in lots 9A and 9B.

The facts summarized above illustrate the importance of stating all problems in the form of qualifying notes directly on the survey plan. In addition to telling the client there was a problem, the surveyor in *RMM Consulting, LLC v. Riordan, supra,* might have avoided litigation by stating on the plan that there was uncertainty about boundary lines and that "there was no deed for the existing lot 9B and that it would be advisable to get a warranty deed for the purchase of that property." I have seen many plans over the years by Massachusetts land surveyors with notes describing uncertainty about a boundary, and concluding with a statement that "A boundary line agreement is recommended."

Massachusetts law governing proximate cause is summarized by the following pattern jury instructions written for use in the Massachusetts Superior Court and published in David N. Allen & Maureen Mulligan, 2 Massachusetts Superior Court Civil Practice Jury Instructions, §18.7 "Causation" (3rd ed. 2014 & Supps. 2016 & 2018) (Published by MCLE (Mass. Continuing Legal Education, Inc. and available on Westlaw) (Bold face type in original; underlining added.):

> **If you decide that the defendant attorney was negligent, you must then consider whether the defendant's negligent conduct [caused/enhanced]** [FN30] **the plaintiff's injuries. Even if you find that the defendant was negligent, the defendant is not liable to the plaintiff unless [his/her] negligence caused the plaintiff's actual loss**. [FN31] **To meet [his/her] burden, the plaintiff need only show that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause**. [FN32] **"But if independently of ... (the attorney's negligence) the plaintiff had no case on the merits, he [or she] has not suffered any loss" caused by the attorney**. [FN33]

§ 18.7.1 But-For Causation

The defendant's conduct was a factual cause of the plaintiff's harm if the harm would not have occurred absent the defendant's negligence. In other words, if the harm would have happened anyway, the defendant is not liable.

Practice Note

This is the standard "but-for," or sine qua non, test. It is suitable for use in the ordinary tort case without the complexity of multiple causes or tortfeasors. *See Matsuyama v. Birnbaum*, 452 Mass. 1, 30-31 (2008). It is often the only test that need be explained to the jury.

§ 18.7.2 Multiple Sufficient Causes or Tortfeasors— Substantial Factor Test

There may be more than one cause present to produce an injury, and more than one person legally responsible for an injury. The plaintiff does not have to prove that the defendant's negligence was the only or even the predominant cause of the injury. If two or more causes operating together contributed to the plaintiff's injury so that, in effect, the damages suffered were inseparable, then it is enough for the plaintiff to prove that the defendant's negligence was a substantial contributing factor in causing the injury.

By "substantial" I mean that the defendant's contribution to the harmful result, i.e., the defendant's negligence, was not an insignificant factor. The defendant's negligence must contribute significantly to the result; it must be a material and important ingredient in causing the harm. If the defendant's negligence was a substantial factor, then it is considered a cause of the plaintiff's injury, and the plaintiff is entitled to recover. If it was not a substantial factor, if the negligence was only slight, insignificant, or tangential to causing the harm, then even though you may have found the defendant negligent, [it/he/she] cannot be held liable to pay damages to the plaintiff on this claim. [FN34]

Practice Note

This is the familiar "substantial contributing factor" test, which the Supreme Judicial Court has noted is "useful in cases in which the damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any individual defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm." *Matsuyama v. Birnbaum*, 452 Mass. 1, 30-31 & n.47 (2008). However, it is worth noting that the substantial factor test, which originated in the first Restatement of Torts, §§ 431-432, and was replicated in the second Restatement of Torts, §§ 431-432, has been abandoned in the third Restatement of Torts, c. 5, § 27. The reason for this is the third Restatement's view that

> [w]ith the sole exception of multiple sufficient causes, ' 'substantial factor' provides nothing of use in determining whether factual cause exists .... The essential requirement, recognized in both Torts Restatements, is that the party's tortious conduct be a necessary condition for the occurrence of the plaintiff's harm: the harm would not have occurred but for the conduct. To the extent that substantial factor is employed instead of the but-

for test, it is undesirably vague. As such, it may lure the factfinder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not 'substantial factors.' Thus, use of substantial factor may unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation.

Restatement (Third) of Torts, c. 26—Reporter's Note, cmt. j.

The rule of the third Restatement in the case of multiple sufficient causes is as follows: "If multiple acts occur, each of which ... would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." The primary illustration given by the third Restatement is this: Suppose two campers are independently camping in a heavily wooded campground. Each camper negligently fails to ensure that his or her fire is put out when they retire for the night. Due to unusually dry conditions and a stiff wind, both campfires escape their sites and begin a forest fire. The two fires, burning out of control, join together and destroy the plaintiff's hunting lodge. Either fire alone would have destroyed the lodge. Each camper's negligent conduct is a factual cause of the harm to the hunting lodge. Restatement (Third) of Torts § 27, cmt. a, illus. 1.

Neither the Supreme Judicial Court nor the Appeals Court has yet indicated whether it would adopt the Restatement's rule on multiple sufficient causes.

§ 18.7.3 Limitations on Scope of Liability— Foreseeability Test

Furthermore, to establish causation, the plaintiff must show that the general type of harm was reasonably foreseeable to someone in the defendant's position at the time of the defendant's negligence. The plaintiff does not have to establish that the defendant foresaw, or should have foreseen, the precise manner in which the harm occurred; but the plaintiff must show that [his/her] harm was a natural and probable consequence of the defendant's negligence. [FN35]

The defendant is liable for those injuries that are a reasonably foreseeable consequence of [his/her/its] negligence. [FN36] **When we say that something is foreseeable, we mean that it is a probable and predictable consequence of the defendant's negligent acts or omissions**. [FN37] **Thus, if the defendant knew or should have realized that [his/her] conduct might cause harm to someone in substantially the manner in which it was brought about, the injury is regarded as the legal consequence, or caused by, the defendant's negligence**. [FN38]

Practice Note

This is a standard formulation of the foreseeability test. The third Restatement uses a somewhat different test, called the "risk standard," to evaluate cases where the actor's conduct may have been a but-for cause of the accident, but liability should not be imposed

because the harm is outside "the risks that made the actor's conduct tortious." Restatement (Third) of Torts, c. 6, § 29, cmt. d. The Supreme Judicial Court utilized the risk standard in upholding dismissal of the plaintiff's claim in *Leavitt v. Brockton Hospital, Inc.*, 454 Mass. 37, 44-46 & n.19 (2009) (plaintiff police officer injured on way to scene of accident involving pedestrian who had just been released by defendant hospital following colonoscopy in a sedated condition without an escort; court held that plaintiff's injury not "caused" by hospital since it fell outside the scope of foreseeable risk arising from any negligent conduct that would make hospital's alleged misconduct tortious). The third Restatement of Torts provides a model instruction when the facts are such that the question should be put to the jury rather than decided as a matter of law, as in *Leavitt*. One version of the suggested model instruction is included in the section below.

§ 18.7.4 Limitations of Scope of Liability— The Risk Standard

On the causation issue, there is one other consideration you must address. A defendant's liability is limited to those harms that result from the risks that made the defendant's conduct negligent. You must decide whether the harm to the plaintiff is within the scope of the defendant's liability. To do that, you must first consider why you found the defendant negligent [or some other basis for tort liability]. You should consider all of the dangers that the defendant should have taken reasonable steps [or other tort obligation] to avoid. The defendant is liable for the plaintiff's harm if you find that the plaintiff's harm arose from the same general type of danger that was one of those that the defendant should have taken reasonable steps [or other tort obligation] to avoid. If the plaintiff's harm, however, did not arise from the same general dangers that the defendant failed to take reasonable steps [or other tort obligation] to avoid, then you must find that the defendant is not liable for the plaintiff's harm.

Practice Note

This is one of the model instructions recommended by Restatement (Third) of Torts, c. 6, § 29, cmt. b. The term "proximate cause" should not be used. [FN39] An instruction on scope of liability, whether under the foreseeability test or the risk standard test, need not be given unless it is a "live issue" in the case.

§ 18.7.5 Comparative Negligence

As a defense to this action, the defendant attorney is claiming that the plaintiff was negligent and that the plaintiff's own negligence caused [[[his/her] injuries. The defendant attorney has the burden of proving by a preponderance of the evidence that the plaintiff was negligent and that this negligence contributed to cause the plaintiff's injury. The instructions you received on causation apply with equal force to the issue of comparative negligence.

If you are convinced by a preponderance of the evidence that the plaintiff was negligent and that this negligence causally contributed to the plaintiff's injuries, you are to compare the plaintiff's negligence with the negligence of the defendant attorney. To do this

comparison, determine the percentage the plaintiff was negligent with the percentage the defendant attorney was negligent. The combined total of the plaintiff's and defendant's negligence must equal 100 percent. [FN40]

Practice Note

Comparative negligence applies to claims against attorneys that are based on a breach of a standard of care regardless of whether the claim is called " "malpractice," "negligence," "breach of contract," or "breach of fiduciary duty." The court has left open the issue of whether the client's negligence is a defense to an intentional breach of fiduciary duty. *Clark v. Rowe*, 428 Mass. 339, 345-46 (1998). The trial judge has discretion as to whether to inform the jury of the consequences of its findings on comparative negligence. If, however, the jury asks about the effect of its answers, the judge must inform them. *Dilaveris v. Rich*, 424 Mass. 9, 15 (1996).

§ 18.7.6 In Pari Delicto

If the plaintiff client and defendant attorney, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot recover damages from the other. [FN41]

[Footnotes:]

FN30. *Simmons v. Monarch Mach. Tool Co.*, 413 Mass. 205, 212 (1992) (liability attaches where defect enhances the injuries a person sustains in an otherwise foreseeable accident).

FN31. *McCann v. Davis, Malm & D'Agostine*, 423 Mass. 558, 559-560 (1996).

FN32. *Mullins v. Pine Manor Coll.*, 389 Mass. 47, 58 (1983) (citing *McLaughlin v. Bernstein*, 356 Mass. 219, 226 (1969)).

FN33. *Siano v. Martinelli*, 12 Mass. App. Ct. 946, 946 (1981).

FN34. *See O'Connor v. Raymark Indus.*, 401 Mass. 586, 591-92 (1988) (asbestos case with several defendant manufacturers); *Welch v. Keene Corp.*, 31 Mass. App. Ct. 157, 162 (1991) (plaintiff "is not required to prove that 'but for' the particular product of each manufacturer, he would not have been harmed; rather, he need only show 'that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm"' (citations omitted)); *Morin v. AutoZone Northeast, Inc.*, 79 Mass. App. Ct. 39, 42-44 (2011) ("substantial contributing factor" is causation standard in asbestos claim).

FN35. *Hill v. Winsor*, 118 Mass. 251, 259 (1875); *Lane v. Atl. Works*, 111 Mass. 136, 139-40 (1872).

FN36. *See DuCharme v. Hyundai Motor Am.*, 45 Mass. App. Ct. 401, 403-05 (1998); *see also Jorgenson v. Mass. Port Auth.*, 905 F.2d 515 (1st Cir. 1990); *Wiska v. St. Stanislaus Soc. Club, Inc.*, 7 Mass. App. Ct. 813 (1979).

FN37. *See Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477, 483 (D.C. Cir. 1970).

FN38. Restatement (Second) of Torts § 435, cmt. b (1965); *Rae v. Air-Speed Inc.*, 386 Mass. 187, 193 (1982). *See Lane v. Atl. Works*, 111 Mass. 136, 139-40 (1872).

FN39. *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 44, n.16 (2009).

FN40. *Clark v. Rowe*, 428 Mass. 339 (1998).

FN41. *Choquette v. Isacoff*, 65 Mass. App. Ct. 1, 3-4 (2005)

The treatise excerpt above illustrates the ancient proverb that "There's many a slip 'twixt the cup and the lip." It is analogous to the military tactic of a fighting retreat, falling back in measured steps from one defensive line to the next. Lawyers do this by arguing in the alternative:

(a) My client owed no duty of care to the plaintiff in this case; but

(b) If he/she did owe a duty of care to the plaintiff, there is no negligence; but

(c) If my client was negligent, that negligence was not the proximate cause of the plaintiff's damages; but

(d) If there was proximate cause, my client can escape through one of the loopholes in the treatise excerpt above; but

(e) If my client is liable for damages, that amount is to be minimized to make the award as affordable as possible for my client; but

(f) If my client cannot afford to pay the award of damages, and either has no insurance or the insurance coverage limit is inadequate, my client will declare bankruptcy, so the plaintiff had better accept what I call a "reasonable" settlement, taking whatever she/he can get.

2.D. Injury or damage

In *Graves v. S.E. Downey Registered Land Surveyor, P.A.,* 885 A.2d 779, 780 (2005), the damages were substantial because the plaintiffs began construction of a house based on an inaccurate survey dividing a parcel of land into three lots:

After the survey was completed, the Graveses' contractor began construction of a house on the

> northern most lot. The construction included improving a road, installing a septic system, drilling a well, and providing power. During construction, a person from the National Park Service informed the Graveses that the house was north of their property line and was located on land of another where the Park had authority to prohibit construction. After unsuccessful negotiations with Park officials, the Graveses moved the house onto land south of the disputed northern boundary at a cost of $110,589.

A building being constructed on the wrong lot (or in the wrong location from which it must be moved), represents an ultimate nightmare for a land surveyor. The underlying reason this can happen is that in our capitalist system there is no private right of eminent domain. That means if one mistakenly erects a building even partly on land owned by another, that landowner is under no obligation to agree to let the building remain there in return for payment of damages. The general rule was summarized as follows in *Ferrone v. Rossi,* 311 Mass. 591, 593, 42 N.E.2d 564, 566 (1942):

> It is the general rule in this Commonwealth that the owner of land is entitled to a mandatory injunction to require the removal of buildings and structures that have been unlawfully placed upon his land, and the fact that the plaintiff has suffered little or no damage on account of the offending buildings or structures, or that the wrongdoer was acting in good faith, or that the cost of removing the building or structure will be greatly disproportionate to the benefit to the plaintiff resulting from their removal is ordinarily no bar to the granting of injunctive relief. [Citations omitted.]

The plaintiffs in *Graves v. S.E. Downey Registered Land Surveyor, P.A., supra,* were entitled to recover from the surveyor the total cost of moving their house because that was the amount required to put them in as good a position as they would have been if the survey showed the correct boundary. This is consistent with the general measure of damages in tort cases, explained this way by Joseph R. Nolan & Laurie J. Sartorio, 37 Massachusetts Practice: Tort Law, § 13.1 "[Damages] In general," (3rd ed. & Supp. 2022) (Footnotes omitted.):

> The traditional rule of tort damages applies to cases of negligence. The plaintiff is entitled to that sum of money which will place him in the position in which he was immediately before the defendant's negligent act or omission. In other words the damages are restitutional in nature. … Nominal damages may not be awarded to vindicate a right. The plaintiff must demonstrate an actual loss as an element of his burden of proof. Otherwise, he has not made out a case of actionable negligence. [Footnotes omitted.]

3. Surveyor liability to client for misrepresentation

> The familiar elements of an action for misrepresentation are that the defendant made a false representation of a material fact for the purpose of inducing the plaintiff to rely upon it, and that the plaintiff did rely upon the representation as true, to his damage. See *Zimmerman v. Kent,* 31 Mass. App. Ct. 72, 77, 575 N.E. 2d 70 (1991). The party making the representation need not know that the statement is false if the fact represented is susceptible of actual knowledge. *Ibid.*

VMark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 617 n. 9, 642 N.E.2d 587, 593 n. 9, 38 A.L.R.5th 799 (1994).

3.A. Misrepresentation of material fact, which may occur by implication or half-truth, and need not be intentional.

There is a misconception, even on the part of some lawyers, that a claim for misrepresentation must be based on a lie; that is, on an *intentional or knowing or at least negligently made* inaccurate statement. The following two cases make it clear that in Massachusetts, a misrepresentation need not be intentional or knowing, or even negligently made, to be actionable:

> To sustain a claim of misrepresentation, a plaintiff must show a false statement of a material fact made to induce the plaintiff to act, together with reliance on the false statement by the plaintiff to the plaintiff's detriment. *Powell v. Rasmussen,* 355 Mass. 117, 118-119, 243 N.E.2d 167 (1969). *Danca v. Taunton Sav. Bank,* 385 Mass. 1, 8, 429 N.E.2d 1129 (1982). *Acushnet Fed. Credit Union v. Roderick,* 26 Mass.App.Ct. 604, 605 & n. 1, 530 N.E.2d 1243 (1988). The speaker need not know "that the statement is false if the truth is reasonably susceptible of actual knowledge, or otherwise expressed, if, through a modicum of diligence, accurate facts are available to the speaker." *Acushnet, supra* at 605, 530 N.E.2d 1243. Where the plaintiff proves "a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge ... it is not necessary to make any further proof of an actual intent to deceive." *Snyder v. Sperry & Hutchinson Co.,* 368 Mass. 433, 444, 333 N.E.2d 421 (1975), quoting from *Powell v. Rasmussen, supra,* 355 Mass. at 118, 243 N.E.2d 167, in turn quoting from *Chatham Furnace Co. v. Moffatt,* 147 Mass. 403, 404, 18 N.E. 168 (1888).
>
> SOURCE: *Zimmerman v. Kent,* 31 Mass. App. Ct. 72, 77, 575 N.E.2d 70, 74 (1991).

> The judge found that the defendants did not know that the assessed valuation had been increased when the information relating to the income and expenses of the property was submitted to the plaintiff. The judge further found that the defendants acted in good faith and had no intention of misleading or deceiving the plaintiff. These findings were supported by evidence and are not plainly wrong. But these findings would not defeat the right to rescind. In this Commonwealth one who has been induced to enter into a contract in reliance upon a false though innocent representation of a material fact susceptible of knowledge which was made as of the party's own knowledge and was stated as a fact and not as matter of opinion**915 is entitled to rescission. *Chatham Furnace Co. v. Moffatt,* 147 Mass. 403, 18 N.E. 168; *Bates v. Cashman,* 230 Mass. 167, 168, 119 N.E. 663; *Rudnick v. Rudnick,* 281 Mass. 205, 208, 183 N.E. 348; *Enterprises, Inc. v. Cardinale,* 331 Mass. 244, 118 N.E.2d 740.
>
> SOURCE: *Yorke v. Taylor,* 332 Mass. 368, 371, 124 N.E.2d 912, 914-915 (1955).

A claim for misrepresentation against a surveyor may be based on representations on a plan of matters such as: property boundary line location; status of a road abutting or leading to the locus (e.g. an unqualified statement that a road is a public way); location of a zoning building envelope or zoning setback distance requirements; ownership of a particular parcel; whether an easement encumbers the property and the location of easement boundaries; land area calculation; physical features of the property (including but not limited to buildings or other structures, fences or walls, boundaries of wetlands and wetland buffer zones); or a certification by the surveyor that the plan is accurate. Cases from other states are collected in Mark S. Dennison, "Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property," 117 A.L.R.[American Law Reports]5th 23 (2004 & Supp. 2022), at §§ 18-22. A misrepresentation claim also may be based on incorrect placement of stakes on the ground for construction purposes, which occurred in *Craig v. Everett M. Brooks Co.,* 351 Mass. 497, 500, 222 N.E.2d 752, 754 (1967).

The surveyor's status as a licensed professional may result in imposition of liability even for a professional opinion. This issue is discussed as follows by a Massachusetts treatise, Howard J. Alperin, 14C Massachusetts Practice: Summary of Basic Law, § 16.247. Fraudulent misrepresentation—False representation of material fact (5th ed. & Supp. 2022):

> *Falsity.* The representation made by the defendant must be false,[1] that is, it must be an assertion

by words or conduct that is not in accordance with the truth.[2] Statements that are true when made are not misrepresentations,[3] but a half-truth[4] may be as misleading as a statement wholly false,[5] and is considered to be a false representation.[6]

Fact or opinion. The representation must not only be false but it must be one of *fact* and not of opinion, expectation, or judgment,[7] nor may it be a statement of conditions to exist in the future or matters promissory in nature.[8] A fact is something susceptible of knowledge,[9] while an opinion is only a belief, without certainty, as to the existence of a fact or a judgment as to quality, value, authenticity or the like.[10]

Nonetheless, the distinction between fact and opinion is not always clear.[11] Generally, a false statement of opinion is not actionable,[12] but a statement of opinion may be actionable where the speaker possesses superior knowledge concerning the subject matter to which the misrepresentation relates[13] or where the opinion is reasonably interpreted by the recipient to imply that the speaker knows facts that justify the opinion.[14] Where the parties stand in a relation of trust and confidence,[15] such as lawyer and client,[16] or principal and agent,[17] an opinion relating to a material fact may constitute a fraudulent misrepresentation.

A statement of law may be intended and understood as either a statement of fact or a statement of opinion.[18] If a defendant makes a misrepresentation of law which includes, expressly or impliedly, a misrepresentation of fact, the plaintiff is justified in relying upon the misrepresentation just as he would be with any other misrepresentation of fact.[19] Thus, a false misrepresentation as to the title of land, although a determination of law is included, is considered a misrepresentation of fact.[20] But if the misrepresentation of law is only an opinion as to the legal consequences of certain facts, generally the recipient is not justified in relying upon it.[21]

A person's representation of his present intention as to a future act is a fact susceptible of proof.[22] Hence a misrepresentation as to one's present intent as to future conduct is a sufficient basis for a fraud action if the statement misrepresents the actual intention of the speaker and was relied upon by the recipient to his damage.[23] This situation often occurs with contractual promises,[24] which are actionable if there is evidence of an intent not to carry out a promise at the time it was made; however, such intent may not be inferred merely from the nonperformance of the promise.[25]

The following two cases make it clear that in Massachusetts a misrepresentation can be made by half-truth or implication:

Although there may be ‘no duty imposed upon one party to a transaction to speak for the information of the other * * * if he does speak with reference to a given point of information, voluntarily or at the other's request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lie within his knowledge. Fragmentary information may be as misleading * * * as active misrepresentation, and half-truths may be as **712

actionable as whole lies * * *.' See Harper & James, Torts, s 7.14. See also Restatement: Torts, s 529; Williston, Contracts (2d ed.) ss 1497-1499.

SOURCE: *Kannavos v. Annino,* 356 Mass. 42, 48, 247 N.E.2d 708, 711-712 (1969).

A fraud, however, may be perpetrated by an implied as well as by an express representation. *Lobdell v. Baker,* 1 Metc. 193, 201, 35 Am.Dec. 358; Hecht v. Batcheller, 147 Mass. 335, 339, 17 N.E. 651, 9 Am. St. Rep. 708; Watson v. Silsby, 168 Mass. 57, 58, 43 N.E. 1117. But whatever form the representation may take, the burden is upon a plaintiff to show that it was made with the intention of inducing him to act upon it.

SOURCE: *Robichaud v. Owens-Illinois Glass Co.,* 313 Mass. 583, 585, 48 N.E.2d 672, 674 (1943)

A misrepresentation must be one of *material* fact. What is a "material" fact? The same treatise quoted above, Howard J. Alperin, 14C Massachusetts Practice: Summary of Basic Law, § 16.247. Fraudulent misrepresentation—False representation of material fact (5th ed. & Supp. 2022), answers the question this way:

Materiality. The false representation of fact must be material.[26] A plaintiff is not justified in relying upon a representation of fact that is not material to the transaction.[27] A fact is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.[28] A fact is also material, although a reasonable person would not attach importance to it, if the maker of the representation knows that the recipient is likely to regard it as important in making his decision whether to enter into the transaction.[29]

The court in *National Car Rental System, Inc. v. Mills Transfer Co.,* 7 Mass. App. Ct. 850, 851, 384 N.E.2d 1263, 1264-1265 (1979), states the material fact requirement in these terms:

A misrepresentation is material if it is shown that the misrepresentation was one of the principal grounds, though not necessarily the sole ground, that caused the plaintiff "to take the particular action that the wrongdoer intended he should take as a result of such representations and that otherwise he would not have taken such action." *National Shawmut Bank v. Johnson,* 317 Mass. 485, 490, 58 N.E.2d 849, 852 (1945). *Kabatchnick v. Hanover-Elm Bldg. Corp.,* 331 Mass. 366, 371, 119 N.E.2d 169 (1954). See **1265 *Levy v. Bendetson,* 6 Mass. App. Ct. --, --,[FNC] 379 N.E.2d 1121 (1978). See also Restatement of Contracts s 476, Comment c (1932).

As the quotation above illustrates, the question of whether a fact is "material" is intertwined with the requirement (discussed in the following section 3.B) that the recipient of a misrepresentation must rely upon it to his/her detriment.

3.B. Reasonable or justifiable reliance on misrepresentation is required, but it need not be the sole or even predominant influence on the recipient

The reliance requirement for misrepresentation claims is summarized as follows in Howard J. Alperin, 14C Massachusetts Practice: Summary of Basic Law, § 16.250 "Fraudulent misrepresentation—Justifiable reliance" (5th ed. & Supp. 2022):

> A plaintiff bringing a tort action for fraudulent misrepresentation must establish that he in fact relied on the defendant's misrepresentation in acting or refraining from acting,[1] and that his reliance was justifiable or reasonable.[2] Absent such reliance, a plaintiff cannot maintain a claim for fraud.[3] A claim of misrepresentation requires a plaintiff to plead reliance with particularity.[4]
>
> A test for whether the plaintiff in fact relied on the defendant's misrepresentation is this: did the plaintiff accord the defendant's statement any substantial weight in arriving at a decision on the course of action he would take.[5]
>
> The plaintiff must not only in fact rely upon the misrepresentation, but his reliance must be justifiable.[6] Generally, the plaintiff's reliance is justifiable if a reasonable man would attach importance to the fact misrepresented in determining his course of action, or if the maker of the misrepresentation knew or had reason to know that the plaintiff regards the fact as important although a reasonable man would not so regard it.[7]
>
> It follows that, for the plaintiff to be justified in relying upon the misrepresentation, it must not be "preposterous or palpably false."[8] A plaintiff is not justified in relying upon the truth of a misrepresentation if he knows that it is false or if its falsity is obvious to him.[9] Similarly, statements that are too general[10] or vague,[11] or indefinite or imprecise,[12] or that amount to seller's puffery[13] may not be relied upon; in such instances, it may be said that the plaintiff's loss is his own responsibility.[14] Clearly conflicting statements should place a plaintiff on notice that he should not rely on either statement.[14.50] Ordinarily whether reliance by the plaintiff is reasonable is a question of fact for the jury,[15] but in an appropriate case it may be found by the court as a matter of law that the plaintiff's reliance was unreasonable.[16]

The question of what constitutes "reasonable" or "justifiable" reliance on a misrepresentation is discussed in more detail by the following two court decisions:

It is true, as KDCC contends, that in *Yorke v. Taylor,* 332 Mass. 368, 374, 124 N.E.2d 912 (1955), this court adopted the rule of the Restatement of Torts § 540 (1938), which states: "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation." The court also noted, however, that "[t]he plaintiff here was not relying on a statement of opinion nor on a representation that was either preposterous or palpably false. *468 See Restatement of Torts § 541." *Id.* Restatement (Second) of Torts §§ 540 and 541 (1977) are similar to their 1938 Restatement counterparts. Restatement (Second) of Torts § 540 states: "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Restatement (Second) of Torts § 541 states: "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." There is thus a distinction between a falsity that could only be uncovered by way of "investigation" and a falsity that was readily apparent or "obvious." Comment a to Restatement (Second) of Torts § 540, *supra,* states that, "if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in § 541."

SOURCE: *Kuwaiti Danish Computer Co. v. Digital Equipment Corp.,* 438 Mass. 459, 467-468, 781 N.E.2d 787, 795 (2003)

The plaintiff's reliance on the defendant's false statement must be reasonable and justifiable under the circumstances. See *Shaw v. Victoria Coach Line, Inc.,* 314 Mass. 262, 266, 267, 50 N.E.2d 27 (1943); Hogan v. Riemer, 35 Mass. App. Ct. 360, 365, 619 N.E.2d 984 (1993); Restatement (Second) of Torts § 537 (1977) ("The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, [a] he relies on the misrepresentation in acting or refraining from action, and [b] his reliance is justifiable"). The person claiming justifiable reliance is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he utilized his opportunity to make a cursory examination or investigation." Restatement (Second) of Torts, *supra* at § 541 comment a. See *Kuwaiti Danish Computer Co. v. Digital Equip. Corp.,* 438 Mass. 459, 468, 781 N.E.2d 787 (2003). Finally, "the question, whether the plaintiff exercised due diligence and was justified in placing confidence in the statement of the defendant or should have known from the beginning that [the statement was false]," is one of fact. *Jekshewitz v. Groswald,* 265 Mass. 413, 417, 164 N.E. 609 (1929). See *Sheffer v. Rudnick,* 291 Mass. 205, 210–211, 196 N.E. 864 (1935).

SOURCE: *Collins v. Huculak,* 57 Mass. App. Ct. 387, 391-392, 783 N.E.2d 834, 839 (2003)

The following two Massachusetts court decisions make it clear that a misrepresentation of material fact "need not be the sole or predominating" influence on the plaintiff, but only that it was

"one of the principal grounds" for his/her reliance upon the misrepresentation.

> One of the issues of liability was what influence, if any, the alleged misstatements of Gordon had upon the plaintiff. We think it was open to the defendants to show that the amount of business and profits which the plaintiff had made during his occupancy of the premises was the real inducement for executing the new lease and not reliance, as the plaintiff contended, upon the alleged misrepresentations. In order to recover it was not necessary for the plaintiff to prove that he relied solely upon the misrepresentations. It was enough if he could prove that they were one of the principal grounds that caused him to execute the new lease or, in other words, that he would not have executed **174 the lease if the false statements had not been made. What it was that actuated him to do so was a question of fact. The evidence was competent as tending to show on what the plaintiff relied. *National Shawmut Bank v. Johnson,* 317 Mass. 485, 490, 58 N.E.2d 849; *Golding v. 108 Longwood Avenue, Inc.,* 325 Mass. 465, 468, 91 N.E.2d 342.
>
> SOURCE: *Kabatchnick v. Hanover-Elm Bldg. Corp.,* 331 Mass. 366, 371, 119 N.E.2d 169, 173-174 (1954)
>
> It is the settled law of this Commonwealth in actions for deceit and in prosecutions for obtaining money under false pretences through false and fraudulent representations that the representations need not be the sole or predominating motive that induced the victim to part with his money or property, but that it is enough if they alone or with other causes materially influenced him to take the particular action that the wrongdoer intended he should take as a result of such representations and that otherwise he would not have taken such action. *Commonwealth v. Drew,* 19 Pick. 179, 183; *Matthews v. Bliss,* 22 Pick. 48, 53; *Safford v. Grout,* 120 Mass. 20, 25; *Commonwealth v. Lee,* 149 Mass. 179, 21 N.E. 299; *Windram v. French,* 151 Mass. 547, 24 N.E. 914, 8 L.R.A. 750; *Burns v. Dockray,* 156 Mass. 135, 138, 30 N.E. 551; *Light v. Jacobs,* 183 Mass. 206, 210, 66 N.E. 799; *Commonwealth v. Farmer,* 218 Mass. 507, 106 N.E. 150; *Duncan v. Doyle,* 243 Mass. 177, 137 N.E. 293; *Commonwealth v. Jacobson,* 260 Mass. 311, 157 N.E. 583; *Baskes v. Cushing,* 270 Mass. 230, 233, 170 N.E. 42; *McGrath v. C. T. Sherer Co.,* 291 Mass. 35, 58, 195 N.E. 913.
>
> SOURCE: *National Shawmut Bank of Boston v. Johnson,* 317 Mass. 485, 490, 58 N.E.2d 849, 852 (1945)

A more recent case, *Reisman v. KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 112, 787 N.E.2d 1060, 1068-1069 (2003), states the requirement this way, using the phrase "substantial factor":

> It has long been the law in Massachusetts that, where reliance on a fraudulent misstatement is a substantial factor in the decision to purchase and/or retain stock, the maker of a false representation is liable for a subsequent loss in the value of stock suffered in reliance on the false representation. See *David v. Belmont,* 291 Mass. at 452, 197 N.E. 83. See also *International Totalizing Sys. v. PepsiCo, Inc.,* 29 Mass.App.Ct. at 432 n. 13, 560 N.E.2d 749. This is also the position adopted in the Restatement (Second) of Torts § 546 (1977):

> "The maker of a fraudulent misrepresentation is subject to liability for pecuniary**1069 loss suffered by one who justifiably relies upon the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss."

3.C. Representation relieves recipient of duty of inquiry

Because surveyors are licensed professionals, the author believes that if a surveyor prepares a plan bearing the his/her signature and seal, or sets stakes or pins in the ground to mark boundaries or sites for construction, lay persons are entitled to rely upon the surveyor's work without the need for further investigation. The foregoing statement applies to surveyors a long-established general rule set forth in the following two Massachusetts court decisions:

> It is true that statements may be found in some of our decisions to the effect that a plaintiff ought not to obtain relief from the consequences of false representations where he has failed to use due care and diligence in protecting his rights. The reasoning of these cases appears to be that the court should exhibit no greater interest in protecting a plaintiff's rights than he himself has shown. *Brown v. Castles,* 11 Cush.348, 350; *Nowlan v. Cain,* 3 Allen, 261, 263-264; *Silver v. Frazier,* 3 Allen, 382; *Mabardy v. McHugh*, 202 Mass. 148, 151, 88 N.E. 894, 23 L.R.A.,N.S., 487. See *Manning v. Albee,* 11 Allen, 520, 522; *Savage v. Stevens,* 126 Mass. 207, 208; *Holst v. Stewart,* 161 Mass. 516, 522, 37 N.E. 755; *Brady v. Finn,* 162 Mass. 260, 266, 38 N.E. 506; *Whiting v. Price,* 172 Mass. 240, 241, 51 N.E. 1084; *Lee v. Tarplin,* 183 Mass. 52, 57, 66 N.E. 431; *373 *Thomson v. Pentecost,* 206 Mass. 505, 512, 92 N.E. 1021. Or, as was said in *Silver v. Frazier,* 'The law will not relieve those who suffer damages by reason of their own negligence or folly'. 3 Allen at page 384. But the trend of modern authority is opposed to this philosophy. Restatement: Torts, § 540; Prosser on Torts, § 88; Harper on Torts, § 224; *Franklin v. Nunnelley,* 242 Ala. 87, 89, 5 So.2d 99; *Halla v. Chicago Title & Trust Co.*, 412 Ill. 39, 46, 104 N.E.2d 790; **916 *Nash Mississippi Valley Motor Co. v. Childress,* 156 Miss. 157, 162-163, 125 So. 708; *Wright v. Noyes,* 80 N.H. 172, 174, 115 A. 273; *Albany City Savings Institution v. Burdick,* 87 N.Y. 40, 49; *Harrell v. Nash,* 192 Okl. 95, 100, 133 P.2d 748; *Crompton v. Beedle,* 83 Vt. 287, 300-302, 75 A. 331, 30 L.R.A., N.S., 748. Certainly where a defendant has wilfully made false representations with intent to deceive he ought not to be relieved of liability because of his victim's lack of diligence, and the authorities just cited are to this effect. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' *Chamberlin v. Fuller,* 59 Vt. 247, 256, 9 A. 832, 836. And support for this view is not lacking in our own decisions. *David v. Park,* 103 Mass. 501; *Commonwealth v. Lee,* 149 Mass. 179, 21 N.E. 299; *Rollins v. Quimby,* 200 Mass. 525, 86 N.E. 350; *Reggio v. Warren,* 207 Mass. 525, 93 N.E. 805, 32 L.R.A.,N.S., 340. In *Rollins v. Quimby* the defendant falsely represented to the plaintiff that certain mortgages which he was offering to the plaintiff

for sale were first mortgages whereas they were second and third mortgages. The defence was that the plaintiff did not use due diligence and could readily have ascertained from the documents themselves and the records that the mortgages were not first mortgages. It was held that this defence did not preclude recovery, the court saying, 200 Mass. at page 163, 86 N.E. 350, 'The law does not attempt to save parties from the consequences of their own improvidence and negligence; but it looks with even less favor upon misrepresentation and fraud. And, accordingly, in later decisions, this court has manifested a disinclination to extend the immunity of vendors for statements or representations made by them beyond the limits already established.' See *Kabatchnick v. Hanover-Elm Building Corp.,* 328 Mass. 341, 103 N.E.2d 692, 30 N.E.2d 918. But whatever our rule has been formerly on the subject*374 of diligence-and it is not easy to reconcile all that has been said-we prefer the rule of the Restatement that 'The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation.' Restatement; Torts, § 540.

We recognize, of course, that the representations of the defendants here were not consciously false. But as pointed out above that does not deprive the injured party of the right to rescind. In this Commonwealth, where the rule is stricter than that in many jurisdictions, a false though innocent representation of a fact made as of one's own knowledge may be the basis of liability. The same legal consequences attach to this type of representation as to one that is deliberately and consciously false. On principle, lack of diligence on the part of the victim ought not to have any better standing as a defence to rescission in the one case than in the other, and we are not disposed to treat these situations differently. The plaintiff here was not relying on a statement of opinion nor on a representation that was either preposterous or palpably false. See Restatement: Torts, § 541. He could reasonably rely on the representation as being a fact within the defendants' knowledge and he was not obliged to go further and ascertain its truth.

SOURCE: *Yorke v. Taylor,* 332 Mass. 368, 372-374, 124 N.E.2d 912, 915-916 (1955)

The seller contends that the buyer had a duty to investigate more fully the scope of the lease amendments. It is true that notice of the existence of a lease ordinarily gives the buyer notice of the content of the lease. *Cunningham v. Pattee,* 99 Mass. 248, 252 (1968); *Hixon v. Starr*,242 Mass. 371, 373, 136 N.E. 186 (1922). But if the seller's representations are such as to induce the buyer not to undertake an independent examination of the pertinent facts, lulling him into placing confidence in the seller's assurances, his failure to ascertain the truth through investigation does not preclude recovery. *Grimes v. Kimball,* 3 Allen 518 (1862); *Rollins v. Quimby,* 200 Mass. 162, 166, 86 N.E. 350 (1908); *York v. Taylor,* 332 Mass. 368, 372-374, 124 N.E.2d 912 (1955). Restatement: Torts, s 540 (1938). This is so even though the seller's representations are not consciously false. *Yorke v. Taylor, supra,* 332 Mass. at 374, 124 N.E.2d 912.

SOURCE: *Snyder v. Sperry & Hutchinson Co.,* 368 Mass. 433, 446, 333 N.E.2d 421, 429 (1975)

Additional legal authorities on the rule that one need not investigate the accuracy of a material factual representation are summarized this way in Howard J. Alperin, 14C Massachusetts Practice: Summary of Basic Law, § 16.250. Fraudulent misrepresentation—Justifiable reliance" (5th ed. & Supp. 2022):

> *Duty to Investigate*. As a general rule, the recipient of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation if he had made an investigation.[17] This rule applies not only when an investigation would involve the expenditure of money and effort out of proportion to the magnitude of the transaction[18] but also when the investigation could be made without considerable trouble or expense.[19] But if the recipient of the fraudulent misrepresentation makes an investigation as to the truth of the defendant's representation and relies upon it and not upon the false representation in deciding to engage in the transaction, he cannot contend that the maker's misrepresentation caused his loss.[20]
>
> Accordingly, a plaintiff's failure to investigate the veracity of statements made to him does not, as a matter of law, bar his recovery for fraudulent misrepresentation.[21] The plaintiff is not required to ascertain the truth or falsity of the defendant's representations by examining public records, such as those in the registry of deeds,[22] assessor's office,[23] or zoning board's office,[24] or by hiring an independent expert.[25] It is only when the falsity of the facts underlying the defendant's representations are obvious or would be revealed by a cursory examination that the plaintiff is required to conduct his own investigation and may not rely upon the defendant's representations.[26]

3.D. Damage resulting from reliance

The measure of damages for misrepresentation may be either "benefit of the bargain" if the misrepresentation was intentional, or restitution of "out of procket expenses" if the misrepresentation was innocent or negligent. Howard J. Alperin, 14C Mass. Practice: Summary of Basic Law, § 16.251 "Fraudulent misrepresentation--Damages" (5th ed & Supp. 2022) explains the difference between these two measures of damages this way:

> Proof of damages resulting from a defendant's fraudulent misrepresentation is essential to recovery.[1] If the plaintiff does not prove that he was damaged by the fraudulent misrepresentation, his action for misrepresentation fails.[2]

The damages sustained by the plaintiff must be actual damages, an allegation of general damages being insufficient.[3] Nominal damages are not recoverable,[4] nor are punitive damages,[5] except that, by statute, one who sells personal property by deceit or fraud is liable to the purchaser in treble the amount of damages sustained by the purchaser.[6]

Massachusetts follows the rule that the maker of a fraudulent representation is subject to liability for pecuniary loss suffered by one who justifiably relied on the truth of the matter misrepresented, if his reliance is a substantial factor in determining the course of conduct that results in his loss.[7] When the defendant's fraudulent misrepresentations induced the plaintiff to enter into a transaction involving the transfer of property, which is usually the case,[8] and the plaintiff suffered pecuniary loss by reason of the misrepresentations, more than one measure of damages possibly applies.[9]

First, the usual rule for determining damages for misrepresentation is that the injured party receive “benefit of the bargain” damages.[10] This gives the plaintiff the difference between the value of what the plaintiff received and the value of what plaintiff would have received if the defendant's representations had been true.[11] Benefit of bargain damages, which closely resembles that for breach of warranty,[12] are usually applied in cases of intentional misrepresentation where the person who was the target of the misrepresentation has actually acquired something in a transaction that is of less value than he was led to believe it was worth when he bargained for it.[13] The rationale for allowing a plaintiff to recover the difference between actual value and promised value is that an intentionally wrongdoing defendant should not have the assurance that his misdeeds will cost him no more than what he receives from his victim.[14]

To illustrate, if a used car dealer sells a car for $10,000 while intentionally misrepresenting the condition and mileage of the car which would be worth $13,000 if the representations were true, and the actual value of the car sold is $7000, the plaintiff could recover $6000 under the benefit of the bargain rule.[15] If the plaintiff can prove these values with reasonable certainty, the benefit of the bargain rule ordinarily will be employed.[16]

Second, benefit of the bargain damages are not applied in all cases,[17] and may be modified or supplemented to prevent injustice.[18] Where benefit of the bargain damages would be grossly disproportionate to the harm actually suffered by a plaintiff or would be so speculative as to meet serious difficulties of proof,[19] “out of pocket” damages may be recovered in order to compensate the plaintiff for the amount he actually lost in the transaction.[20] The measure of out of pocket damages is the difference between what the plaintiff paid in the transaction and the value of what the plaintiff received,[21] This rule compensates the plaintiff for what he lost because of the fraud rather than compensating the plaintiff for what he might have gained.[22]

Thus, in the above illustration where the plaintiff bought a car for $10,000 but worth only $7000 because the dealer's misrepresentations, the plaintiff could recover $3000 as out of pocket loss—the difference between the price he paid and the car's actual value. Ordinarily the plaintiff would prefer benefit of the bargain damages if he can make the requisite proof, unless

he is content with the out of pocket damages or the benefit of bargain damages will actually yield a smaller recovery.[23]

Third, whether the plaintiff's actual loss is measured by the benefit of the bargain or the out of pocket rule, the plaintiff can recover, in addition, *consequential* damages, such as expenses incurred or profits lost by the plaintiff as a proximate result of the misrepresentation.[24]

Most likely, the restitutional measure of damages based on out-of-pocket costs would be the measure of damages applicable to surveyor malpractice. That doctrine is discussed in more detail by the following cases:

It was within the judge's authority to award the Zimmermans damages in an amount representing their "out-of-pocket" expenses in connection with the sale of the property. See *Anzalone v. Strand,* 14 Mass. App. Ct. 45, 49, 436 N.E.2d 960 (1982), citing **77 *Danca v. Taunton Sav. Bank,* 385 Mass. 1, 8-9, 429 N.E.2d 1129 (1982) ("out-of-pocket" measure of damages comports with restitutional nature of tort remedies); Restatement (Second) of Torts § 552B. The purpose of the remedy is to restore the status quo as if the transaction had never occurred. See *Limoli v. Accettullo,* 358 Mass. 381, 385, 265 N.E.2d 92 (1970). We think the decision of the trial judge to order rescission plus out-of-pocket losses was a sound means of restoring the status quo.

SOURCE: *Zimmerman v. Kent,* 31 Mass. App. Ct. 72, 82, 575 N.E.2d 70, 76-77 (1991)

The Massachusetts cases involving misrepresentation which have followed the "benefit of the bargain" rule typically have involved a situation where the misrepresentation was intentional and fraudulent. The cause of action in such cases has sounded in deceit.[FN2] See, e.g., *49 *Stiles v. White,* 11 Met. 356 (1846); *Thomson v. Pentecost,* 210 Mass. 223, 96 N.E. 335 (1911); Lefevre v. Chamberlain, 228 Mass. 294, 117 N.E. 327 (1917); *Rice v. Price,* 340 Mass. 502, 164 N.E.2d 891 (1960). Until recently, no Massachusetts case discussed the applicable measure of damages in actions for negligent misrepresentation. In *Danca v. Taunton Savings Bank,* 385 Mass. 1, 9, 429 N.E.2d 1129 (1982), however, the court concluded that the "benefit of the bargain" rule was not the proper measure of damages where the misrepresentation involved was negligent rather than fraudulent. It adopted instead the rule set forth in s 552B of the Restatement (Second) of Torts. Under s 552B(1), the plaintiff would be entitled to recover damages equal to the difference between the value of what she received and the purchase price, plus any other pecuniary loss suffered as a consequence of her reliance on the misrepresentation. This rule essentially restates the traditional "out of pocket" measure of damages**963 which is more consistent with the restitutional nature of tort remedies. See *Rice v. Price,* 340 Mass. at 507 n.4, 164 N.E.2d 891; *Danca v. Taunton Sav. Bank,* 385 Mass. at 8, 429 N.E.2d 1129; Nolan, Tort Law s 116 (1979). See also Restatement (Second) of Torts s 552B, Comment b, at 141; s 552C, Comment f, at 145 (1977).

In determining that the defendant's misdescription of the square footage of the property was not wilful or knowing, the trial judge effectively concluded that this was not a case of deceit,[Footnote omitted.] but rather involved a negligent or innocent misrepresentation. Therefore, the proper method for assessing damages is to calculate the plaintiff's "out of pocket" losses, i.e., the difference between the purchase price and the actual value of the property.

[Footnote:] FN2. In cases of deceit, there is a public policy rationale for allowing plaintiffs to recover the difference between actual value and promised value, since an intentionally wrongdoing defendant should not have the assurance that his misdeeds will cost him no more than what he receives from his victim. In such cases the measure of recovery closely resembles that for breach of warranty. See *Rice v. Price,* 340 Mass. 502, 507, 164 N.E.2d 891 (1960); Williston, Contracts (3d ed.) ss 1391-1394. It is observed in the Restatement (Second) of Torts that "(t)he considerations of policy that have led the courts to compensate the plaintiff for the loss of his bargain in order to make the deception of a deliberate defrauder unprofitable to him, do not apply when the defendant has had honest intentions but has merely failed to exercise reasonable care in what he says or does." s 552B, Comment b at 141. …

SOURCE: *Anzalone v. Strand,* 14 Mass. App. Ct. 45, 48-49 & n. 2, 436 N.E.2d 960, 962-963 & n. 2 (1982)

4. Surveyor liability to third parties

When a surveyor prepares a plan to be recorded in a registry of deeds, the surveyor knows that plan may be relied upon by title examiners, prospective purchasers and future owners of the property shown on the plan. In other words, it is reasonably foreseeable that third parties will rely on a plan recorded in a registry of deeds. Those people would be reasonably entitled to make claim upon the surveyor for negligence or misrepresentation, provided such a claim is brought within the statute of limitations (discussed below in section 5 of this work).

The same is true when a surveyor sets stakes or pins in the ground to mark boundaries or for construction. Especially on a construction site, while the surveyor may have been engaged by a land owner, real estate developer or engineer, it is to be expected that contractors and subcontractors will rely on the surveyor's work. If a road or building is constructed in the wrong place because the surveyor put stakes in the wrong location, the cost to resolve the problem can be enormous.

Cases from other states are collected in Mark S. Dennison, "Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey or Real Property," 117 A.L.R.[American Law Reports]5th 23 (2004 & Supp. 2022), at §§ 5[a]-5[d], and in Mark S. Dennison, "Surveyor's Liability for Negligent Performance of Land Survey," 59 Am. Jur. P.O.F.[American Jurisprudence Proof of Facts] 375 (2000 & Supp. 2022), at § 8 "Surveyor's liability to third parties." Both of these sources are available on Westlaw.

Cases from other states are not binding precedent in Massachusetts. If there is no binding Massachusetts precedent in the form of a published SJC or Appeals Court case law, a trial court judge must (as lawyers are trained to do) reason from precedent by analogy and distinction to apply rules developed in prior court decisions.

In *Manocchia v. Thomas Land Surveyors & Engineering Consultants, Inc.,* "Memorandum of Decision and Order on (1) Defendant Thomas Land Surveyors & Engineering Consultants, Inc.'s Motion for Summary Judgment and (2) Plaintiffs' Motion for Summary Judgment," Middlesex Superior Court Civil Action No. 2009-1187-A, 2011 WL[WestLaw] 2357444 (March 30, 2011) (Douglas H. Wilkins, J.),[1] the trial judge had to weave together binding Massachusetts precedent with decisions from other states, producing a scholarly exposition worth quoting at length:

> ***2. Negligence***
>
> ***a. Surveyor's Liability [for negligence] to Third Parties***
>
> A land surveyor may be held liable to third parties who rely on errors in a land survey resulting from the surveyor's negligence. See, e.g., *Craig v. Everett M. Brooks Co.,* 351 Mass. 497, 499-500 (1967). In *Craig,* a real estate developer hired a land surveyor to supply development plans and to stake the location of roads that were to be built by the general contractor.[FN6] Id. at 498-499. The surveyor designated two catch basins in the wrong locations and staked a road eight feet away from its proper location, which resulted in the contractor having to rebuild both the catch basins and the road once the errors were discovered. *Id.* at 500. The contractor sued

[1] On May 10, 2011, a jury returned a verdict in favor of the surveyor and a codefendant on all issues ("Special Verdict Questions" 2011 WL 2325637. The Superior Court judgment was affirmed by *Manocchia v. Thomas Land Surveyors & Engineering Consultants, Inc.,* 82 Mass. App. Ct. 1106, 970 N.E.2d 814 (Table), 2012 WL 2726866 (2012) (Unpublished decision.)

the surveyor for deceit and negligence in connection with the surveyor's errors. *Id.* at 498. Although the court found there was insufficient evidence of intentional or reckless misrepresentation, it concluded that it was error for the trial court to direct a verdict in favor of the surveyor on the negligence count. *Id.* at 499, 501. The court explained that making the plans and positioning the stakes was a form of representation which, if erroneous, would subject the surveyor to liability for negligence (specifically, for negligent misrepresentation). *Id.* at 499.

FN6. The plans were originally prepared for the previous owner of the property. *Craig,* 351 Mass. at 499.

Craig is in some respects distinguishable from this case. In assessing whether the surveyor could be held liable to contractor, the court observed that the surveyor knew the contractor's identity and knew that the purpose of staking the property was to assist the contractor in building the roads. *Id.* at 500. In the present case, in contrast, the primary purpose of Thomas Land's survey was to enable Maillet to obtain a special permit for the construction of a new house, not to provide the plaintiffs or other potential buyers with a professional calculation of the total land area.

In a subsequent case, in which the court considered the scope of an accountant's duty of care to third parties, the Supreme Judicial Court refined the *"Craig* principle of foreseeable reliance.*" Nycal Corp. v. KPMG Peat Marwick LLP,* 426 Mass. 491,495, 688 N.E.2d 1368 (1998), quoting *Page v. Frazier,* 388 Mass. 55, 65, 445 N.E.2d 148 (1983). The court considered three common tests for determining the duty of care that a professional owes to nonclients-i.e., the foreseeability test,[FN7] the near-privity test,[FN8] and the test contained in § 552 of the Restatement (Second) of Torts. *Id.* at 493, 445 N.E.2d 578;. After considering the merits of each test, the court concluded that § 552 of the Restatement "properly balances the indeterminate liability of the foreseeability test and the restrictiveness of the near-privity rule." *Id.* at 497, 445 N.E.2d 1482.

FN7. Under the foreseeability test, "an accountant may be held liable to any person whom the accountant could reasonably have foreseen would obtain and rely on the accountant's opinion, including known and unknown investors." *Nycal Corp.,* 426 Mass. at 494. The court rejected this test as too expansive, explaining that it "may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 495, quoting *Ultramares Corp. v. Touche,* 255 N.Y. 170, 179 (1931).

FN8. The near-privity test subjects an accountant to liability to "noncontractual third parties who rely to their detriment on an inaccurate financial report if the accountant was aware that the report was to be used for a particular purpose, in the furtherance of which a known party (or parties) was intended to rely, and if there was some conduct on the part of the accountant creating a link to that party, which evinces the accountant's understanding of the party's reliance." *Nycal Corp.,* 426 Mass. at 494.

Under the Restatement test, "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false

information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Id.* at 495-496, quoting Restatement (Second) of Torts § 552. The contours of this rule, as adopted by the *Nycal* court, are as follows:

> "[L]iability is limited to... 'loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance [the professional] intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.' ...
>
> '[T]he duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect. A user of commercial information cannot reasonably expect its maker to have undertaken to satisfy this obligation unless the terms of the obligation were known to him. Rather, one who relies upon information in connection with a commercial transaction may reasonably expect to hold the maker to a duty of care only in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose.'
>
> [W]ith regard to the requirement that the plaintiff be a member of a 'limited group of persons for whose benefit and guidance' the information is supplied [,] ... '[i]t is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it .... It is sufficient, in other words, insofar as the plaintiffs identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated.'
>
> ....
>
> ... [T]he potential liability of an accountant [is limited] to noncontractual third parties who can demonstrate 'actual knowledge on the part of accountants of the limited - though unnamed - group of potential [third parties] that will rely upon the [report], as well as actual knowledge of the particular financial transaction that such information is designed to influence.' ... The accountant's knowledge is to be measured 'at the moment

the audit [report] is published, not by the foreseeable path of harm envisioned by [litigants] years following an unfortunate business decision.' "

Nycal Corp., 426 Mass. at 496-498 (citations omitted). See also *Reisman,* 57 Mass. App. Ct. at 122 ("[L]iability to third parties attaches only when, at the time an audit report containing negligent misrepresentations is published, the auditor has actual knowledge both of the limited group of potential third parties who will rely on the report and of the particular transaction that such information is designed to influence.").

The *Nycal* case involved alleged errors in the defendant's auditors' report of a corporation then-listed on the New York Stock Exchange. 426 Mass. at 492. The corporation included the auditors' report in its annual report, and it provided a copy of the report to the plaintiff during discussions concerning the plaintiffs' potential investment in the company. *Id.* at 493. Allegedly in reliance on the auditors' report, the plaintiff purchased a substantial interest in the corporation. *Id.* at 491-493. Thereafter, the corporation went bankrupt, and the plaintiff sued the auditor for misrepresenting the financial condition of the corporation in its report. *Id.* at 492-493.

The court held that summary judgment was properly entered for the auditor because it did not breach any duty owed to potential investors. *Id.* at 492. The court explained that, at the time the defendant prepared the report, the plaintiff was an unknown, potential future investor in the company, and the defendant was not aware of the stock purchase agreement between the plaintiff and the corporation. *Id.* at 499. The court further noted that the summary judgment record did not contain evidence that the defendant intended to influence the transaction between the plaintiff and the corporation, or knew that the corporation intended to influence the transaction by use of the audit report. *Id.* The record suggested that the defendant prepared the audit report for use in the annual report, not to assist the company's controlling shareholders in a specific transaction. *Id.* Accordingly, the defendant did not undertake a duty to third parties when it prepared the audit report. *Id.* at 499-500.

In contrast to *Nycal,* the Appeals Court in *Reisman* held that the evidence in the summary judgment record was sufficient to establish an accounting firm's liability to a third party based on the auditors' report, which stated that the company's financial statements did not contain material misstatements. 57 Mass. App. Ct. at 125-125a. In actuality, the company's financial reports grossly overstated its net income by, among other things, masking significant losses by treating several of its subsidiaries as distributors. *Id.* at 103-104. The defendant had also consented to the corporation's inclusion of the auditors' reports in the corporation's Form S-8 Registration Statement, which was filed with the Securities and Exchange Commission. *Id.* at 105-106. Shortly thereafter, the plaintiffs sold their business to the corporation in exchange for the company's stock—a deal that required reviewing the financial statements of the two entities and valuing their respective assets. *Id.* The closing documents for the transaction were sent to the defendant for review and approval, including a Securities Purchase Agreement that represented that the company's financial statements complied with accounting requirements and did not contain any material misstatements or omissions. *Id.* at 106-107.

The Appeals Court distinguished *Nycal* in several respects:

> "There are manifest differences ... between the situation here and in the *Nycal* case. In *Nycal* - unlike here - there was no indication that [the defendant] wore any but an auditor's hat; unlike here, there was no evidence in *Nycal* that [the defendant] had actively participated in the transaction at issue. Nor was there any evidence that its client had a history of transactions akin to the one at issue, that the auditor had a history of actively participating in such transactions, or that it was aware that its audit opinions were relied upon in the transaction at issue."

Id. at 123. Notably, there was evidence that the defendant played an active role in the transaction between the plaintiffs and the corporation, and that the defendant knew that the Form S-8 Registration Statement and other financial documents were provided to the plaintiffs in advance of the closing. *Id.* at 125-125a. The court thus concluded that there was sufficient evidence to establish that the defendant knew both the identity of the plaintiffs and the specific transaction that its report was intended to influence.

Although there does not appear to be any case law in this Commonwealth applying the Restatement test set forth in *Nycal* to a surveyor's liability in negligence to third parties, cases from other jurisdictions lend some guidance. See generally M.S. Dennison, Annotation, Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property, 117 A.L.R. 5th 23 (2004). As with accountant liability, these jurisdictions apply different standards for determining the scope of a surveyor's duty to third parties, consistent with the three tests elucidated by the Supreme Judicial Court in *Nycal.* Compare *Cook Consultants, Inc. v. Larson,* 700 S.W.2d 231, 234-235 (Tex. App. 1985) (applying Restatement test) with *Essex v. Ryan,* 446 N.E.2d 368, 372-373 (Ind. Ct. App. 1983) (rejecting Restatement test and applying near-privity test) and *Hanneman v. Downer,* 110 Nev. 167,179-180,871 P.2d 279,287 (Nev. 1994) (most likely applying foreseeability test). The Restatement test appears to have emerged as the majority view, and is consonant with our decisional law applicable to accountants and other professionals. See *Nycal,* 426 Mass. at 495-496 (noting that the Restatement test "comports most closely with the liability standard [the court has] applied in other professional contexts").

In cases applying the Restatement test, some factual considerations that bear on the court's assessment of whether the surveyor owed a duty to third parties include:

(1) whether the land owner's purpose for requesting the survey was to provide it to. a prospective purchaser, see *Carr Smith & Assocs., Inc. v. Fence Masters, Inc.,* 512 So.2d 1027, 1027-1028 (Fla. Dist. Ct. App. 1987) (reversing partial summary judgment against surveyor as to liability);

(2) the length of time that passed between completion of the survey for a former owner and the third party's purchase of the property, see *Howell v. Betts,* 362 S.W.2d 924, 926 (Tenn. 1962) (affirming dismissal of action against surveyor brought by third party who purchased property twenty-four years after the survey);

(3) whether the surveyor certified on the face of the survey that it was accurate, see *Rozny v. Marnul,* 250 N.E.2d 656, 658-659, 663 (Ill. 1969); *Cook Consultants, Inc.,* 700 S.W.2d at 235;

(4) whether the survey was used to facilitate the third party's purchase of the property by enabling financing, see *Cook Consultants. Inc.,* 700 S.W.2d at 236;

(5) whether the surveyor in fact knew that third parties would use and rely on the survey, see *Rozny,* 250 N.E.2d at 662-663; and

(6) the size of the class of persons to whom the surveyor could potentially be held liable, see *Rozny,* 250 N.E.2d at 662-663; *Cook Consultants, Inc.,* 700 S.W.2d at 236.

In addition, the *Rozny* court identified public policy considerations that weighed in favor of imposing liability, including the benefit of promoting cautionary techniques among surveyors, and the "undesirability of requiring an innocent reliant party to carry the burden of a surveyor's professional mistakes." 250 N.E.2d at 663.

Section 552 of the Restatement (Second) of Torts, under comment h, also provides some illustrative guidance:

> "12. In 1934, A Company, a firm of surveyors, contracts with B to make a survey and description of B's land. A Company is not informed of any intended use of the survey report but knows that survey reports are customarily used in a wide variety of real estate transactions and that it may be relied upon by purchasers, mortgagees, investors and others. The survey is negligently made and misstates the boundaries and extent of the land. In 1958 C, relying upon the report that B exhibits to him, purchases the land from B, and in consequence suffers pecuniary loss. A Company is not liable to C."

Although somewhat analogous, the Restatement illustration differs from the present case at least in terms of (1) the length of time that elapsed between preparation of the survey and the sale of the property, (2) the relationship between the surveyor and the landowner, and (3) the surveyor's awareness of the landowner's intended disposition of the property.

b. Application of Restatement Test to Thomas Land

For the plaintiffs to be able to recover from Thomas Land, they must be within the class of persons for whose guidance Thomas Land either intended to provide the plot plan or knew that Maillet intended to supply it. See *Nycal,* 426 Mass. at 496, quoting Restatement (Second) of Torts § 552(2). In addition, the plaintiffs must demonstrate that Thomas Land intended for the plot plan to influence the sale of the property to the plaintiffs or knew that Maillet intended to use the plot plan in a substantially similar transaction. The court concludes that resolution of these issues rests on disputed issues of material fact, and therefore declines to grant summary judgment in favor of either party.

"A person's knowledge, intent, or any other state of mind is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all the facts and circumstances in the case." *Gupta v. Deputy Director of the Div. of Employment & Training,* 62 Mass. App.

Ct. 579, 584 n.5 (2004). Thus, while there is no direct evidence that Thomas Land knew that Maillet would use the survey to influence the sale of the property to the plaintiffs, there is circumstantial evidence from which such awareness maybe inferred. There is evidence, for example, that Thomas Land had an ongoing business relationship with Maillet, a business that builds and sells homes. Thomas Land knew that Maillet was in the process of applying for a special permit to build the new house on the property and assisted Maillet in obtaining the permit. The resulting survey shows the location of the new structure on the property in relation to, among other things, the Del Vita property. Although the survey does not contain a certification of accuracy of the sort identified by the courts in *Rozny* or *Cook Consultants,* it also does not include any indication that the true location of the boundary line was indeterminate-a fact that was known to Thomas Land at the time it prepared the certified plot plan. A fact-finder could reasonably infer under these circumstances that Thomas Land knew that Maillet would use the plot plan to influence the sale of the property. Subjecting Thomas Land to liability under these circumstances does not expose it to ”liability in an indeterminate amount for an indeterminate time to an indeterminate class” because there would presumably be only a single buyer of the single-family residence and property from Maillet. See *Craig,* 351 Mass. at 500. Because liability turns on disputed issues of fact, summary judgment for either Thomas Land or the plaintiffs must be denied.

A published appellate decision on the issue of professional third-party liability, *Meridian at Windchime, Inc. v. Earth Tech, Inc.,* 81 Mass. App. Ct. 128, 128-129, 132-134, 135, 960 N.E.2d 344, 345, 348-349, 350 (2012) concerned a claim against an engineering firm that required the court to reason by analogy and distinction to apply prior court decisions to the facts of that case, as follows:

*128 The plaintiff, Meridian at Windchime, Inc. (Meridian), the developer of a subdivision in the town of North Attleborough (town) known as Windchime, challenges the allowance of a motion for summary judgment in favor of the defendants (collectively, Earth Tech), an engineering firm hired by the town as a consultant to inspect Meridian’s work, on grounds that Earth Tech was negligent in failing to identify deficiencies ***129** in work performed by Meridian’s contractor that Meridian was forced to correct at a considerable additional cost. Because Meridian’s claim falls outside the scope of the duty in tort of a professional to a third party under the doctrine announced in *Craig v. Everett M. Brooks Co.,* 351 Mass. 497, 222 N.E.2d 752 (1967), we affirm.

* * * * *

b. *Legal duty.* “The existence of a legal duty is a question of law appropriate for resolution by summary judgment.” *Afarian v. Massachusetts Elec. Co.,* 449 Mass. 257, 261, 866 N.E.2d 901 (2007). “If no such duty exists, a claim of negligence cannot be brought.” *Remy v. MacDonald,* 440 Mass. 675, 677, 801 N.E.2d 260 (2004). In Massachusetts, duty is “determined by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.” *Vaughan v. Eastern Edison Co.,* 48 Mass.App.Ct. 225, 229, 719

N.E.2d 520 (1999) (citation omitted). See *Whittaker v. Saraceno,* 418 Mass. 196, 198–199, 635 N.E.2d 1185 (1994); *Jupin v. Kask, supra* at 146–147, 849 N.E.2d 829.

c. *Liability of professional to third party for negligent performance of contract.* In *Craig v. Everett M. Brooks Co.,* 351 Mass. at 498, 500, 222 N.E.2d 752, the defendant civil engineering firm, under contract with a landowner, was tasked to lay down "offset stakes" that it knew would be used by the plaintiff, a third-party contractor, to mark the location and grades of a road the contractor was to build for the landowner. The civil engineering firm knew the identity of the contractor, knew that the purpose of the staking was to enable the contractor to build the road, and knew that the contractor would rely on the "offset stakes" ***133** in grading and locating the road. *Id.* at 500, 222 N.E.2d 752. Notwithstanding the absence of any contractual relationship between the civil engineering firm and the contractor, the Supreme Judicial Court reasoned that to bar recovery simply because there was no contract between them, in circumstances in which the civil engineering firm knew the identity of and the extent of reliance on the only possible plaintiff and where damages were not remote, would be contrary to evolving principles of tort law whereby in the absence of any express agreement, a party is liable to a third party for the foreseeable consequences of the negligent performance of a contractual duty that the third party owed to another. *Id.* at 501, 222 N.E.2d 752. The rule in *Craig* is referred to as "the *Craig* principle of foreseeable reliance." *Page v. Frazier,* 388 Mass. 55, 65, 445 N.E.2d 148 (1983).

In a series of decisions subsequent to *Craig,* the appellate courts have refined the scope of the *Craig* doctrine. Whether a consequence is foreseeable is measured by an objective standard and calls for consideration whether the injured party's reliance on the services performed by the negligent party was reasonable. See *Wilson v. James L. Cooney Ins. Agency,* 66 Mass.App.Ct. 156, 163, 845 N.E.2d 1187 (2006). See also *McDonough v. Whalen,* 1 Mass.App.Ct. 573, 578, 304 N.E.2d 199 (1973), *S.C.,* 365 Mass. 506, 313 N.E.2d 435 (1974) (in order to recover under *Craig,* plaintiff must prove that its reliance on allegedly negligent service performed by one with whom it was not in ****349** privity was justified). "[T]he critical document is the contract" between the negligent party and the party who paid for its services. *Parent v. Stone & Webster Engr. Corp.,* 408 Mass. 108, 113, 556 N.E.2d 1009 (1990).

Under *Craig,* the determination whether the plaintiff's reliance on the services performed by the negligent party was known to that party is not satisfied by evidence that the plaintiff believed that the defendant was aware of its reliance. See *Quigley v. Bay State Graphics, Inc.,* 427 Mass. 455, 461–462, 693 N.E.2d 1368 (1998). The allegedly negligent party must have "actual knowledge" of the plaintiff's reliance on its services. See *Nycal Corp. v. KPMG Peat Marwick LLP,* 426 Mass. 491, 495 n. 4, 688 N.E.2d 1368 (1998).

d. *Application of* Craig *doctrine to undisputed facts.* In *Craig,* the allegedly negligent party knew that the "offset stakes" it was obliged to set down were for the "precise purpose" of allowing ***134** the contractor to build the road. *Craig v. Everett M. Brooks Co.,* 351 Mass. at 500, 222 N.E.2d 752. In the case at bar, on the other hand, the contract between Earth Tech, the allegedly negligent party, and the town provided that Earth Tech shall have no "authority or

responsibility for the methods and procedures of construction selected by the Contractor." Furthermore, and of critical importance, at the outset of the Windchime project, Earth Tech supplied Meridian with a written memorandum in which it informed Meridian that any deviation from the approved subdivision plans in the construction of the infrastructure for Windchime, "without prior approval of Earth Tech, will be performed at the contractor's risk." Finally, and most fundamentally, this case is distinguishable from *Craig* because Meridian hired its own project engineer for Windchime. The fact that the project engineer may have failed to honor its contractual obligations to Meridian does not, standing alone, justify Meridian's reliance on the work performed by Earth Tech. See *Anderson v. Fox Hill Village Homeowners Corp.,* 424 Mass. 365, 368, 676 N.E.2d 821 (1997) ("failure to perform a contractual obligation is not a tort in the absence of a duty to act apart from the promise made").

* * * * *

3. *Conclusion.* Under the *Craig* principle of reasonable reliance, a professional employed by a town to inspect the construction of a subdivision does not owe a duty of care to a developer or its contractor with whom the professional has no contractual relationship unless it was foreseeable and reasonable for the developer or its contractor to rely on the services provided to the town by the professional, and the professional had actual knowledge that the developer or its contractor was relying on the professional's services. Because the record, when viewed in a light most favorable to Meridian, fails to show a genuine issue of material fact that would support the application of the *Craig* principle, the judge's allowance of summary judgment was not error.[9]

In conclusion, exactly how a Massachusetts court would apply the above "foreseeable and reasonable" standard to a recorded survey plan is anyone's guess. Different judges may reach different conclusions, which is one reason why court decisions may be reversed on appeal. For the practicing surveyor, it is safest to expect the worst, meaning one should assume that there exists a broad class of third parties who might make claim based on an error in a recorded plan.

5. Statute of limitations & discovery rule

5.A. Statute of limitations for negligence and misrepresentation claims is "three years next after the cause of action accrues." G.L. c. 260, § 2A

G.L. c. 260, § 2A states that "Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues."

For example, if a plan is dated and given to a client on January 27, 2022, and the client learns of an inaccuracy in the survey on that same day, "the cause of action accrues" on that day. As a result, the statute of limitations expires (meaning any lawsuit based on that inaccuracy must be commenced on or before) Monday, January 26, 2025. Rule 3 of the Rules of Civil Procedure (Mass.R.Civ.P. 3) specifies how a lawsuit is "commenced" in Massachusetts:

> A civil action is commenced by (1) mailing to the clerk of the proper court by certified or registered mail a complaint and an entry fee prescribed by law, or (2) filing such complaint and an entry fee with such clerk. Actions brought pursuant to G.L. c. 185 for registration or confirmation shall be commenced by filing a surveyor's plan and complaint on a form furnished by the Land Court.

Mass.R.Civ.P. 4(j) allows an additional 90 days for service of process:

> If a service of the summons and complaint is not made upon a defendant within 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

The statute of limitations must be raised by a defendant under Mass.R.Civ.P. 8(c), which requires that "In pleading to a preceding pleading, a party shall set forth affirmatively … statute of limitations … and any other matter constituting an avoidance or affirmative defense." This defense can be waived by a failure to raise it. Bixby v. Shepherd, 67 Mass. App. Ct. 1118, 857 N.E.2d 508, 2006 WL 3499304 at *2 (2006) (Unpublished decision.) ("Scott waived the statute of limitations defense by failing to plead it in his answer and by failing to move to amend that pleading at any time thereafter.[6] See Mass.R.Civ.P. 8(c), 365 Mass. 749 (1974); *Sharon v. Newton,* 437 Mass. 99, 102-103 (2002).").

5.B. Discovery rule: a cause of action against a surveyor accrues either:

(1) at the time of the surveyor's negligent act or omission, or at the time a misrepresentation is made; or,

(2) at the time the claimant suffers damage proximately caused by a surveyor's negligence or misrepresentation; or

(3) when the claimant discovers or reasonably should have discovered that he/she has suffered damage and the likely cause of that damage.

Cases from other states on statutes of limitations and the discovery rule, as they affect claims against surveyors, are collected in Mark S. Dennison, "Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey or Real Property," 117 A.L.R.[American Law Reports]5th 23 (2004 & Supp. 2022), at §§ 15-17, and in Mark S. Dennison, "Surveyor's Liability for Negligent Performance of Land Survey," 59 Am. Jur. P.O.F.[American Jurisprudence Proof of Facts] 375 (2000 & Supp. 2022), at §§ 17-18.

Massachusetts cases are cited and discussed below in the following excerpt from Joel Lewin & Eric F. Eisenberg, 57 Massachusetts Practice: Construction Law, § 13.48 "Statues of limitation and repose--discovery rule" (1st ed. & Supp. 2022).

> A cause of action typically accrues at the time the plaintiff suffers an injury.[1] However, the statute of limitation is subject to the discovery rule: if the injury is unknown to the plaintiff, the limitation period begins to run only "when the plaintiff learns, or reasonably should have learned, that he she has been harmed by the defendant's conduct."[2]
>
> In the design and construction context, knowledge of injury does not mean knowledge of every fact necessary to prove a claim against a specific defendant; the limitation period begins to run when the defect or injury is apparent, not when "the cause and cure for" the defect is later determined.[3] Similarly, the limitation period is not tolled simply because the full extent of the damage or injury may not be apparent when the injury is first discovered.[4] The period is not tolled by willful blindness, either; reasonable notice that an act of another may have caused plaintiff's harm "creates a duty of inquiry and starts the running of the statute of limitations."[5] It

is worth noting, however, that if a plaintiff has performed a reasonable investigation and has not discovered the cause of action, the fact that other reasonable methods of investigation may have uncovered the cause of action does not prevent the tolling of the limitation period.[6]

A detailed discussion of the discovery rule by the SJC was set forth as follows in *Passatempo v. McMenimen,* 461 Mass. 279, 293-295, 960 N.E.2d 275, 288-289 (2012):

> We conclude that the plaintiffs' common-law claims are timely under [G.L. c. 260] § 2A as to McMenimen, but not as to the other defendants. The three-year limitations period set forth in § 2A begins to run when a claim accrues.
>
> > "[T]he general rule for tort actions is that an action accrues when the plaintiff is injured.... This court has developed a discovery rule to determine when the statute of limitations begins to run in circumstances where the plaintiff did not know or could not reasonably have known that he or she may have been harmed by the conduct of another.... Under this discovery rule, the statute of limitations starts when the plaintiff [1] discovers, or *294 [2] reasonably should have discovered, 'that [he] has been harmed or may have been harmed by the defendant's conduct.' " (Citations omitted.)
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> *Koe v. Mercer,* 450 Mass. 97, 101, 876 N.E.2d 831 (2007), quoting *Bowen v. Eli Lilly Co.,* 408 Mass. 204, 205–206, 557 N.E.2d 739 (1990).
>
> Under the second prong of the discovery rule, "[r]easonable notice that ... a particular act of another person may **289 have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations." *Koe v. Mercer, supra* at 102, 876 N.E.2d 831, quoting *Bowen v. Eli Lilly & Co., supra* at 210, 557 N.E.2d 739. Here, the jury found that the plaintiffs had sufficient information to have discovered the fraud before July 1, 2001. Because the plaintiffs did not file their action until July 1, 2004, ordinarily their tort claims would be considered time barred.
>
> Our cases, however, leaven the discovery rule where the defendant had a fiduciary relationship with the plaintiff.[17] Pursuant to G.L. c. 260, § 12:
>
> > "If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action."
>
> In *Demoulas v. Demoulas Super Mkts., Inc.,* 424 Mass. 501, 519, 677 N.E.2d 159 (1997), we explained that because a fiduciary owes a duty of full disclosure to his or her principal, the fiduciary's failure to disclose "constitutes fraudulent conduct and is equivalent to fraudulent concealment for purposes of applying § 12." See *295 *Stetson v. French,* 321 Mass. 195, 199, 72 N.E.2d 410 (1947) ("mere failure to reveal may be fraudulent where there is a duty to reveal"). Accordingly, where a fiduciary relationship exists, G.L. c. 260, § 12, tolls the applicable statute of limitations until the plaintiff has actual knowledge of either the harm or

the fiduciary's implicit or explicit repudiation of his or her obligations. See *Demoulas v. Demoulas Super Mkts., Inc., supra* at 518–519, 677 N.E.2d 159.

Here, while the jury found that the plaintiffs should have known of the fraud by July 1, 2001, they found also that the plaintiffs did not have actual knowledge of the fraud until after that date. Further, the jury found that McMenimen fraudulently concealed his actions through July 1, 2001, based on evidence tending to show that McMenimen was a fiduciary of the plaintiffs.[18] Accordingly, the statute of limitations was tolled as to McMenimen through July 1, 2001.

It was error, however, to toll the statute of limitations as to Armstrong. The record is devoid of any evidence that Armstrong himself owed a fiduciary duty to the plaintiffs, or that he otherwise fraudulently concealed the underlying deceit from them.

6. Statute of repose (G.L. c. 260 § 2B) protection for design and construction professionals does not apply to survey plans not connected with improvements to real property.

The six-year statute of repose is set forth as follows G.L. c. 260, § 2B (bold face numbers and letters in brackets and line breaks added as an aid in parsing the statutory language):

[1] Action of tort for damages
- **[a]** arising out of any deficiency or neglect
- **[b]** in the design, planning, construction or general administration
- **[c]** of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven

[2] shall be commenced only within three years next after the cause of action accrues;

[3] provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

[4] Actions of tort for damages
- **[a]** arising out of any deficiency or neglect
- **[b]** in the design, planning, construction, or general administration
- **[c]** of an improvement to real property of a public agency, as defined in said section thirty-nine A

[5] shall be commenced only within three years next after the cause of action accrues;

[6] provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the contractor of a final

> estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

Where the statute of repose applies, claims must be brought both within the three-year statute of limitations and within the six year statute of repose. For example, if negligence is discovered the day of "the opening of the improvement to use," then a lawsuit must be commenced within three years thereafter, notwithstanding the fact that only three years of the six-year statute of repose will have run by that time. For another example, if negligence becomes reasonably discoverable under the statute of limitations discovery rule only on the fourth anniversary of "the opening of the improvement to use," then a lawsuit must be commenced within the two years remaining on the six-year statute of repose, even though the statute of limitations will not run out for another year thereafter.

The statute of repose is not subject to any discovery rule. If negligence becomes reasonably discoverable under the statute of limitations discovery rule only on the seventh anniversary of "the opening of the improvement to use," no claim can be made because the six-year statute of repose has expired.

According to the Massachusetts Supreme Judicial Court (SJC) in *Dighton v. Federal Pacific Electric Co.,* 399 Mass. 687, 694 n. 10, 506 N.E.2d 509, 514 n. 10 (1987), the legislative history of the statute of repose indicates it applies to surveyors, as follows:

> The legislative history of § 2B is replete with references to classes of actors, such as architects, engineers, contractors, and surveyors. See 1967 House Doc. No. 2603; 1967 House Doc. No. 4815; Report of the Legislative Research Council Relative to a Statute of Limitations for Malpractice Against Architects, Engineers and Surveyors, 1968 Senate Doc. No. 1050; 1968 Senate Doc. No. 339. None of these sources refers at all to problems of repose encountered by manufacturers or suppliers of construction components, although the problems anticipated by architects and engineers were understood to result from the decline of the "privity" doctrine. See *Klein [v. Catalano*, 386 Mass. 701] *supra* at 708 n. 7, 437 N.E.2d 514 (1982); 1968 Senate Doc. No. 1050, at 16-17. However, the relevance of these sources is doubtful. "[W]here the language of the statute is plain and unambiguous, ... legislative history is not ordinarily a proper source of construction." *Hoffman v. Howmedica, Inc.,* 373 Mass. 32, 37, 364 N.E.2d 1215

(1977). It is clear from the language of the statute, and our decisions, that § 2B does not apply to materialmen and suppliers. Any ambiguity that may arise in the application of § 2B arises only from the question whether a party acted as a materialman or supplier or as an architect, engineer, contractor, or surveyor.

But in *Raffel v. Perley,* 14 Mass. App. Ct. 242, 437 N.E.2d 1082 (1982), a surveyor prepared an ANR (Approval Not Required under the subdivision control law) plan under G.L. c. 41, § 81P. 14 Mass. App. Ct. at 242, 437 N.E.2d at 1082-1083. The court reasoned as follows in concluding that an ANR plan did not have the protection of the Massachusetts statute of repose:

> New Jersey and Colorado, both of which have similar legislation, have considered the application of their statutes to surveyors' plans. The Supreme Court of New Jersey, although holding the statute inapplicable on other grounds, stated, "There is no reason why ... a surveyor whose professional work is functionally related to and integrated with a building plan or design, ... should not fall within the statute." *E. A. Williams, Inc. v. Russo Dev. Corp.*, 82 N.J. 160, 169–170, 411 A.2d 697 (1980). In that case, the surveyor was hired "to prepare a survey of the premises acquired for the business and to delineate the exact location where a building should be constructed in order that it would be placed in the center of the property." *Id.* at 162, 411 A.2d 697. In *Commonwealth Land Title Ins. Co. v. Conklin Associates*, 167 N.J.Super. 392, 394, 400 A.2d 1208 (1979), affirming 152 N.J.Super. 1, 377 A.2d 740 (1977), the Appellate Division held **FN6** that a survey to effect placement of houses, garages and driveways came within the statute as it relates to the design and planning of an improvement. The court declined to decide whether an original perimeter survey, which was not undertaken to locate a ****1084** building or other improvement, but was performed in connection with the purchase of the tract, was within the statute's protection. See also *Rosenberg v. North Bergen*, 61 N.J. 190, 201, 293 A.2d 662 (1972). In summary, the courts in New Jersey have protected surveyors, but the decisions have all arisen in the context of surveys related to construction projects.
>
> FN6. But see *E. A. Williams, Inc. v. Russo Dev. Corp.*, 82 N.J. at 171–172, 411 A.2d 697, indicating that, for other reasons, the case was wrongly decided.

In *Ciancio v. Serafini*, 40 Colo.App. 168, 170, 574 P.2d 876 (1977), the Colorado Appeals Court refused to rule that a boundary survey alone can constitute an improvement and held that "a survey which is not part of an improvement or building project" is not within the statutory coverage. **FN7** As pointed ***245** out in that decision, mechanics' lien cases, although of limited application to statutes of repose, also generally hold that only those surveys which are part of a construction project fall within mechanics' lien statutes. *Wilkinson v. Rowe*, 266 Ala. 675, 681, 98 So.2d 435 (1957) (preparing maps and placing stakes to mark boundary lines not within lien statute). *Daugherty v. Gunther*, 88 Wash. 378, 378–379, 153 P. 336 (1915) (survey unrelated to subsequent construction not within lien statute), compare *Smith v. Dekraay*, 217 Or. 436, 446, 342 P.2d 784 (1959) (cost of surveying for location of a building within the statute). But see

Nolte v. Smith, 189 Cal.App.2d 140, 147, 11 Cal.Rptr. 261 (1961) (permitting lien for subdivision survey, but California has a statute specifically covering surveys). We are in accord with these authorities and conclude that a survey and plan for the division of land does not constitute an improvement for purposes of G.L. c. 260, § 2B, at least in circumstances where it is not integrated with a building plan, or a design for construction or other change in the topography of the land.

> FN7. In *McClanahan v. American Gilsonite Co.*, 494 F.Supp. 1334, 1346 (D.Colo.1980), one Federal district judge held that Colorado's statute of repose violated the Fourteenth Amendment, but another Federal district judge declined to follow that ruling. *Cudahy Co. v. Ragnar Benson, Inc.*, 514 F.Supp. 1212, 1217 (D.Colo.1981).

This holding is in accord with the usual and natural meaning of the word "improvement". See *Klein v. Catalano*, 386 Mass. at 705, 437 N.E.2d 514. See also *Kallas Millwork Corp. v. Square D Co.*, 66 Wis.2d 382, 386, 225 N.W.2d 454 (1975), adopting the following definition of improvement which appears in Webster's Third New International Dictionary 1138 (1971): "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." See also *Peters v. Stone*, 193 Mass. 179, 185, 79 N.E. 336 (1906).

The legislative history of G.L. c. 260, § 2B, also suggests this result. House Doc. No. 2603 of 1967 (1968 Senate Doc. No. 339), the predecessor to St.1968, c. 612, which inserted G.L. c. 260, § 2B, extended protection to surveyors as well ***246** as to architects and engineers. The report accompanying Bill No. 339 **FN8** pointed out that "the scope of a land surveyor's duties is generally limited to fixing the form and boundaries of a site" and therefore "much of the content of the report" has no application to that occupation.**FN9** 1968 Senate Doc. No. 339, at 13. The report raised a number of specific questions including, "4. Should land surveyors be treated separately?" **FN10** *Id.* at 29. As ****1085** enacted, G.L. c. 260, § 2B, not only does not give surveyors separate treatment, it does not mention them. While consideration and rejection by the Legislature of the provision including surveyors does not "control our decision," the legislative history "lends support" to our conclusion that surveyors' services unrelated to a building plan or design contemplating some physical change in the land do not constitute an improvement within the statute. *Superintendent of Schools of Leominster v. Mayor of Leominster*, 386 Mass. 114, 118 & n.11, 434 N.E.2d 1230 (1982).

> FN8. 1968 Senate Doc. No. 1050, "A Statute of Limitations for Malpractice Against Architects, Engineers and Surveyors."
>
> FN9. We note that a number of the policy reasons discussed in 1968 Sen.Doc. No. 1050 and in *Klein v. Catalano, supra*, for protecting architects and other design professionals do not apply to surveyors. E.g., architects and other design professions should be encouraged to experiment, *Klein*, at 717, 437 N.E.2d 514, 1968 Senate Doc.No. 339, at 19; design professionals (and probably not surveyors) deal in inexact sciences and are

called upon to exercise judgment in order to anticipate factors incapable of precise measurement. *Klein*, at 718, 437 N.E.2d 514, 1968 Senate Doc.No. 339, at 16–19.

FN10. The remaining part of question 4 reads as follows: "A Michigan statute treats liability of land surveyors in a clause separate from that covering architects and engineers, and Hawaii specifically excludes application of its statute of limitations to surveyors for their own errors in boundary surveys." *Id.* at 29.

14 Mass. App. Ct. at 244-246 & nn. 6-10; 427 N.E.2d at 1083-1085 & nn. 6-10. The Appeals Court decision in *Raffel v. Perley, supra,* was cited with apparent approval by the SJC in *Milligan v. Tibbetts Engineering Corp.* 391 Mass. 364, 366, 461 N.E.2d 808, 810 (1984).

7. Surveyors, like other licensed professionals, should use written agreements to avoid misunderstandings and disputes concerning fees and scope of the engagement.

At the law firm of Green Miles Lipton, LLP, in Northampton, where I am a partner, our policy is not to accept payment of a retainer from a client unless we have in hand a written signed agreement defining the scope of the engagement and fee arrangements. If the client "jumps the gun" by paying a retainer first, we generally do not begin work on the case until the signed fee agreement is received.

In my opinion, all licensed professionals, including land surveyors, should do the same for anything more complicated or expensive than a mortgage plot plan ordered by an attorney with whom you deal on a regular basis. One thing the surveyor did right in the Synakowski case (discussed above in section 1.I of this work) was to have a written engagement letter for the plot plan which in that case was ordered by a homeowner.

Without a written fee/engagement agreement, you are a "sitting duck" for the frailties and inconsistencies of human memory, and the wiles of scoundrels.

My understanding is that for an ALTA (American Land Title Association)/NSPS (National of Professional Surveyors) survey, this generally should not be an issue because detailed requirements for

such a survey are set forth in the "Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys (Effective February 23, 2021)," available online at https://www.nsps.us.com/page/2021ALTA. In addition, at the end of those standards will be found "Table A: Optional Survey Responsibilities and Specifications," which opens with the following statement:

> NOTE: Whether any of the nineteen (19) items of Table A are to be selected, and the exact wording of and fee for any selected item, may be negotiated between the surveyor and client. Any additional items negotiated between the surveyor and client must be identified as 20(a), 20(b), etc. Any additional items negotiated between the surveyor and client, and any negotiated changes to the wording of a Table A item, must be explained pursuant to Section 6.D.ii.(g). Notwithstanding Table A Items 5 and 11, if an engineering design survey is desired as part of an ALTA/NSPS Land Title Survey, such services should be negotiated under Table A, Item 20.
>
> If checked, the following optional items are to be included in the ALTA/NSPS LAND TITLE SURVEY, except as otherwise qualified (see note above): …

A legally binding agreement can be short (1-3 pages) and can be written in plain English on the surveyor's letterhead. It should cover, at an absolute minimum, the following topics, and perhaps others as well:

(1) Identify the parties and provide complete contact information for all parties, including mailing address, physical address, phone number(s) and email address. Be sure to state the date of the agreement.

(2) Identify the property to be surveyed. Be specific, identifying parcels to be surveyed by assessors' map/parcel or by recorded deed book/page (and parcel number(s) if the deed conveyed more than one parcel).

(3) State the type of survey to be done and what is to be shown on the survey. For what purpose does the customer intend to use the plan? Is the primary purpose to delineate boundaries? Should physical features should be included, such as buildings, stone walls, lines of occupation if different from record title boundaries, drainage swales? Should topography be shown with

contour lines and if so at what intervals? You may want to identify the standards that govern the work, such as 250 C.M.R. 5.00 & 6.00.

(4) How much are you charging for the work? Is it a fixed or hourly fee? If you are charging by the hour, what is the hourly rate for each level of staff person who will be involved, from P.L.S. down to beginning apprentice? Our law firm fee agreements include the following provision:

> If the Client fails to pay any bill within thirty (30) days of receipt, simple interest will be paid by the Client at the rate of 12% per year on all balances over thirty (30) days old.

Do you want to include a provision for recovery of attorney fees if you have to sue the client to collect your fee? Without such a provision, you would have to pay your own attorney fees. On the other hand, when a licensed professional sues to collect a fee, a counterclaim for malpractice is a likely client response. Such a counterclaim likely would require you to bring into the case your liability insurance carrier. Any licensed professional should think long and hard about filing a lawsuit to collect an unpaid fee. Better practice is to request a substantial retainer whenever possible.

(5) Is there a completion date for the work? If so, it should be stated.

(6) What is needed to gain access to the land to be surveyed?[2]

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[2] If there is likely to be a problem with one or more abutting property owners, be sure to provide the "reasonable notice" required by G.L. c. 266, § 120C, which grants registered professional land surveyors (and "authorized agents or employees" working under their supervision) the following privilege against a claim of trespass:

> Whenever a land surveyor registered under chapter one hundred and twelve deems it reasonably necessary to enter upon adjoining lands to make surveys of any description included under "Practice of land surveying", as defined in section eighty-one D of said chapter one hundred and twelve, for any private person, excluding any public authority, public utility or railroad, the land surveyor or his authorized agents or employees may, after reasonable notice, enter upon lands, waters and premises, not including buildings, in the commonwealth, within a reasonable distance from the property line of the land being surveyed, and such entry shall not be deemed a trespass. Nothing in this act shall relieve a land surveyor of liability for damage caused by entry to adjoining property, by himself or his agents or employees.

(7) What law governs? If the agreement is to be governed by Massachusetts law, that should be stated.

(8) How are disagreements to be resolved? Litigation is expensive, time-consuming and stressful. Arbitration through the American Arbitration Association can be very expensive and cumbersome.

(9) Does the fieldwork documentation and research required for the survey remain the property of the surveyor? If so, that should be stated.

(10) Is there any limitation on the surveyor's liability? If so, it should be stated.

(11) Signature lines should be at the end of the agreement. The name of each person signing should be printed beneath the signature line. If the person is signing for some entity, that should be clearly stated. For example, "XYZ Corp., by Sheila Shmoe, its President." Our law firm fee agreements include the following provisions:

> If any client is a corporation, limited partnership, LLC, LLP or any entity other than a natural person, the person(s) signing below warrant and represent that he/she/they have the legal authority to sign for and bind the client entity to the terms and conditions of this agreement.
>
> By signing below, every natural person signing this agreement personally and individually guarantees payment of bills as set forth above. Natural persons who sign this agreement agree to be jointly and severally liable for all bills, meaning that if one or more clients or client entities fail to pay any bill within 30 days, the other(s) must pay in full.

(12) What else should be included? **The list above is not intended to be exhaustive, but rather to precipitate discussion about what should be included in a written engagement agreement.**

8. Sample contracts for surveying services and article with contract check list.

Set forth below are sample contracts for surveyors and an article by the author of one of those sample agreements.

AUTHOR'S RECOMMENDATION: MALSCE may want to prepare a standard form agreement for Massachusetts land surveyors. That task is beyond the scope of this work.

8.A. "Example Contract for Land Surveying Services" by Lucas & Company, LLC

This one-page agreement was prepared by Jeffrey N. Lucas, a surveyor who also became a lawyer (web site for Lucas & Company, LLC is at https://lucasandcompany.com, contact information is at https://lucasandcompany.com/contact/).

8.B. Agreement by Tennessee Association of Professional Land Surveyors

The four-page Tennessee Association of Professional Surveyors Agreement was downloaded at https://www.taps-inc.com/photos/1_agreement.pdf

8.C. Agreement prepared by legal counsel for North Carolina Society of Surveyors

This much longer sample agreement states that it was prepared for the North Carolina Society of Surveyors by its legal counsel. It is online at https://www.ncsurveyors.com/resources where it can be downloaded by clicking on "Sample Surveying Contract" under the topic heading "Business Support."

8.D. "Contracts for Engineers and Land Surveyors" by Jeffrey N. Lucas, Esq., P.L.S

What appears to be a good source for further reading, entitled "Contracts for Engineers and Land Surveyors," by one Jeffrey N. Lucas who is both a professional land surveyor and an attorney, was downloaded for the 2018 edition of this work from http://c.ymcdn.com/sites/www.njspls.org/resource/resmgr/2016_SurvCon_Handouts/CONTRACTS_Handout.pdf. As of January, 2023 it does not appear to be online. The web site for Lucas & Company, LLC is at https://lucasandcompany.com, and contact information is at https://lucasandcompany.com/contact/.

EXAMPLE CONTRACT FOR
LAND SURVEYING SERVICES
FOR INFORMATIONAL PURPOSES ONLY

February 28, 2019

[Client]

E-MAIL TRANSMISSION: _____
And USPS First Class

RE: Property Identification [Identify Property]
[Brief Description of the Project or Services to be Provided]

Dear [Client]:

This letter shall serve as a Letter of Engagement, whereby _____, hereinafter referred to as Client, engages _____, hereinafter referred to as Surveyor, to perform land surveying services on the above described property (the Property). Execution of this letter will confirm acceptance and shall constitute an Agreement between Client and Surveyor.

Surveyor will provide a Boundary Survey of the Property which will include re-establishment of property corners and boundary lines, location of permanent improvements to the property (i.e. buildings, fences, driveways, etc.), identification of encroachments (if any), determination of acreage, and preparation of a map of survey depicting the results of the survey. Six original survey maps will be provided. The survey will meet all applicable provisions of the State of _____ "Standards of Practice" for property surveys.

It is acknowledged that land surveying is a professional service and not an exact science, therefore our fee for services is estimated at **$_____**, subject to unforeseen circumstances or unexpected difficulties. The survey will be completed within three (3) weeks from the date of receipt of an executed copy of this agreement. Surveyor will make every reasonable effort to meet this schedule; however, this is not a guarantee. All invoices are due and payable within 15-days of receipt. A late fee of 1.50% per month will apply. In the event collection proceeding become necessary, _____ law will apply and Attorney's fees and cost of collection will be reimbursed to Surveyor.

If unforeseen circumstances or unexpected difficulties are encountered, the Client will be consulted before Surveyor proceeds further. If additional services are deemed necessary, Surveyor will perform those services at an hourly rate of $_____ [or lump sum fee]. Surveyor will only perform additional services with Client's written or verbal approval. This offer will expire if not executed within 15 days. Either party may terminate this agreement with or without cause. Upon termination, Surveyor will be reimbursed for services performed. This agreement contains no warranties either expressed or implied. Persons signing below certify that they have legal capacity as the individuals, representatives, and/or agents for the parties to this contract.

FOR SURVEYOR:

_____

Date: _____
Thomas Jefferson, Chief Surveyor

FOR CLIENT:

_____ Date: _____

By: _____
Printed Name and Title

Client Initials_____
Land Surveyor_____

TAPS
TENNESSEE ASSOCIATION OF
PROFESSIONAL SURVEYORS

AGREEMENT

Project No._____

Agreement entered into at _____ on this date of _____, by and between:

Client: _____ Land Surveyor: _____

Name _____ Name _____

Address _____ Address _____

Phone _____ Phone _____

FAX _____ FAX _____

Email _____ Email _____

Client and Land Surveyor agree as follows:

A. Client hires Land Surveyor to perform the following services:

hereinafter called "the Project."

B. Client agrees to compensate Land Surveyor as follows:

C. Client agrees to a schedule for performance of Land Surveyor's services as follows:

D. This agreement is made subject to the provisions contained in paragraphs 1 through 31 herein, and the provisions of the exhibits attached hereto and made a part hereof. (List exhibits below)

Client and Land Surveyor agree as follows:

1. This agreement shall be binding upon the heirs, executors, administrators, successors and assigns of Client and Land Surveyor.

2. This agreement contains the entire agreement between the parties relating to the project. Any prior agreements not expressly set out in this agreement are void. Subsequent modifications to this agreement shall be in writing and signed by both parties.

3. Waiver of any term, condition or covenant set out herein shall not constitute a waiver of any other term, condition or covenant.

4. If any part of this agreement is held by a court of competent jurisdiction to be invalid, the remaining provisions of this agreement shall be valid and binding.

5. This agreement shall be governed by the laws of the State of Tennessee.

6. If the Land Surveyor's scope of services includes services related to applying for or seeking approval of governmental permits (e.g., zoning, planning, subsurface sewage disposal), such services shall not constitute a representation or warranty that such permits will be approved.

7. Client shall deliver, upon Land Surveyor's request, any additional information, documents or funds to pay governmental fees and charges that are necessary for Land Surveyor to perform its services under this agreement.

8. All plats, drawings, reports, plans, specifications, field data and notes and other documents, including all documents on electronic media, prepared by Land Surveyor are instruments of service, and shall remain the property of Land Surveyor and may be used by Land Surveyor without the consent of Client. Upon request and payment of all costs, Client will be furnished a signed and sealed copy of all final plats and other documents required by provisions of the agreement to be prepared by Land Surveyor.

9. Land Surveyor is not responsible for any determination or location of any underground conditions not visible and obvious by inspection of the premises, including, but not limited to, soils, geological conditions, physical devices and facilities, pipelines or buried cables unless specifically included in writing in this agreement, and shall not be responsible for any liability that may arise out of the making of or failure to make such determination or location of any subsurface condition.

10. Land Surveyor has the right to complete all services requested pursuant to this agreement. In the event this agreement is terminated before the completion of all services, unless Land Surveyor is responsible for such termination, Client agrees to release Land Surveyor from all liability for services performed. In the event all or any portion of the services by Land Surveyor are suspended, abandoned, or otherwise terminated, Client shall pay Land Surveyor all fees and charges for services provided prior to termination. If Land Surveyor's services are suspended and restarted, Land Surveyor will be entitled to additional compensation for extra services pursuant to the provisions of paragraph 15 of this agreement. If Land Surveyor's services are terminated for the convenience of Client, Land Surveyor is entitled to reasonable termination costs and expenses, to be paid by Client as extra services pursuant to paragraph 15.

11. Land Surveyor shall be entitled to immediately, and without notice, suspend the performance of any and all of its obligations pursuant to this agreement if Client files a voluntary petition seeking relief under the United States Bankruptcy Code or if there is an involuntary bankruptcy petition filed against Client in the United States Bankruptcy Court, and that petition is not dismissed within fifteen (1 5) days of its filing. Any suspension of services made pursuant to the provisions of this paragraph shall continue until such time as this agreement has been fully and properly assumed in accordance with the applicable provisions of the United States Bankruptcy Code and in compliance with the final order or judgment issued by the Bankruptcy Court. If the suspension of performance of Land Surveyor's obligations pursuant to this agreement continues for a period exceeding ninety (90) days, Land Surveyor shall have the right to terminate all services pursuant to this agreement

12. This agreement shall not be construed to alter, affect or waive any land surveyor's lien, mechanic's or materialman's lien to which Land Surveyor may be entitled for the performance of services pursuant to this agreement. Client agrees to provide Land Surveyor the name and address of the record owner of the property that is the subject of the project.

13. All fees and other charges due Land Surveyor will be billed monthly and shall be due at the time of billing unless specified otherwise in this agreement. If Client fails to pay Land Surveyor within thirty (30) days after invoices are rendered, Land Surveyor shall have the right in its absolute discretion to consider such default in payment a material breach of this agreement, and Land Surveyor's duties under this agreement may be suspended or terminated. In such event, Client shall pay Land Surveyor for all outstanding fees and charges due Land Surveyor at the time of suspension or termination. If Land Surveyor elects to suspend or terminate its services pursuant to the provisions of this paragraph, Land Surveyor is entitled to reasonable suspension or termination costs or expenses.

14. Client agrees to pay a monthly late payment charge, which will be the lesser of one and one-half percent (1 -1 /2%) per month or a monthly charge not to exceed the maximum legal rate, which will be applied to any unpaid balance commencing thirty (30) days after the date of the billing.

15. Client agrees that if it requests services not specified in the scope of services described in this agreement, Client will pay for all such additional services as extra services, in accordance with Land Surveyor's usual and customary billing rates.

16. If any staking or monuments are damaged, removed or destroyed by anyone other than Land Surveyor, the entire cost of new staking or monumentation shall be paid for by Client as extra services in accordance with paragraph 15.

17. Client acknowledges that the services performed pursuant to this agreement are based upon field and other conditions existing at the time these services were performed. Client further acknowledges that field and other conditions may change at any time, and clarification, adjustments, modifications and other changes may be necessary to reflect changed field or other conditions. Such clarifications, adjustments, modifications and other changes shall be paid for by Client as extra services in accordance with paragraph 15.

18. Client shall pay the costs of all inspection fees, zoning and annexation application fees, assessment fees, soils or geotechnical

engineering fees, soils or geotechnical testing fees, aerial topography fees, and all other fees and charges not specifically covered by the provisions of this agreement.

19. Any area or volume computations or estimates will be performed pursuant to generally accepted standards of professional practice in effect at the time of performance and shall not to be considered as irrefutable or unconditional.

20. Land Surveyor makes no warranty, either express of implied, as to its findings, recommendations, opinions, or professional advice except that its services were performed pursuant to generally accepted standards of professional practice in effect at the time of performance.

21. In the event Client agrees to, authorizes, or permits changes in the instruments of service prepared by Land Surveyor, which changes are not consented to in writing by Land Surveyor, or Client does not accept opinions or recommendations of Land Surveyor pursuant to this agreement, Client acknowledges that the unauthorized changes and their effects and the failure of the Client to accept the Land Surveyor's opinions or recommendations are not the responsibility of Land Surveyor.

22. Client agrees not to use or permit any other person to use instruments of service prepared by Land Surveyor which are not final and which are not signed and sealed by Land Surveyor. Client shall be responsible for any such use of non-final instruments of service or other documents not signed and sealed by Land Surveyor. Client hereby waives any claim for liability against Land Surveyor for such use. Client further agrees that final plats, specifications, drawings, reports or other documents are for the exclusive use of Client and may be used by Client only for the project described in this agreement. Such final plats, specifications, drawings, reports or other documents may not be changed or used on a different project without written consent of Land Surveyor.

23. In accepting and utilizing any drawings, reports and data on any form of electronic media generated and furnished by Land Surveyor, Client agrees that all such electronic files are instruments of service of Land Surveyor, who shall be deemed the author, and shall retain all common law, statutory law and other rights, including copyrights. Client agrees not to reuse these electronic files, in whole or in part, for any purpose or project other than the project that is the subject of this agreement.

In addition, Client agrees, to the fullest extent permitted by law, to indemnify and hold harmless Land Surveyor, its officers, directors, employees, agents and subconsultants against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from any changes made by anyone other than Land Surveyor or from any reuse of the electronic files without the prior written consent of Land Surveyor.

24. If Land Surveyor produces plats, specifications, or other documents and/or performs field services, and such plats, specifications, or other documents and/or field services are required by any governmental agency, and such governmental agency changes its ordinances, codes, policies, procedures or requirements after the date of this agreement, any additional services thereby required shall be paid for by Client as extra services in accordance with paragraph 15.

25. Land Surveyor is not responsible for delay caused by activities or factors beyond Land Surveyor's reasonable control, including but not limited to, delays by reason of strikes, lockouts, work slowdowns or stoppages, accidents, inclement weather, acts of God, failure of Client to furnish timely information or approve or disapprove of Land Surveyor's services or instruments of service promptly, faulty performances by Client or other contractors or governmental agencies. When such delays beyond Land Surveyor's reasonable control occur, Land Surveyor shall not be responsible for damages nor shall Land Surveyor be deemed to be in default of this agreement. Further, when such delays occur, Client agrees that, to the extent such delays cause Land Surveyor to perform extra services, such services shall be paid for by Client as extra services in accordance with paragraph 15.

26. Land Surveyor is not responsible for the performance of work by third parties.

27. Client agrees to limit the liability of Land Surveyor, its principals, employees and subconsultants, to Client for any claim or action arising in tort, contract, or strict liability, to the amount of Land Surveyor's fee under this agreement.

28. In the event there is litigation arising from or related to the services provided under this agreement, the prevailing party will be entitled to recover all reasonable costs incurred, including staff time, court costs, attorneys' fees and other related expenses.

29. In the event Land Surveyor institutes litigation to enforce or interpret the provisions of this agreement, such litigation shall be brought and adjudicated in the appropriate court in the county in which the Land Surveyor's place of business is located, and Client waives the right to bring, try or remove such litigation to any other county or judicial district.

30. Land Surveyor shall not be required to sign any documents, no matter by who requested, that would result in Land Surveyor having to certify, guarantee or warrant the existence of conditions whose existence the Land Surveyor cannot ascertain. Client agrees not to make resolution of any dispute with the Land Surveyor or payment of any amount due the Land Surveyor contingent upon the Land Surveyor's signing or agreeing to any such certification.

31. (a) Except as provided in subdivisions (b) and (c), in an effort to resolve any conflicts that arise during the project or following completion of the project, Client and Land Surveyor agree that all disputes between them arising out of or relating to this agreement shall be submitted to nonbinding mediation, unless the parties mutually agree otherwise.

(b) Subdivision (a) shall not preclude or limit Land Surveyor's right to file an action for collection of fees in a court of competent jurisdiction.

(c) Subdivision (a) shall not preclude or limit Land Surveyor's right to perfect or enforce applicable land surveyor's, mechanic's or materialman's liens.

Client Initials_____
Land Surveyor_____

IN WITNESS WHEREOF, the parties hereby execute this agreement upon the terms and conditions stated above.

Client _____

By _____

Name/Title _____

Date Signed _____

Project Number _____

Land Surveyor _____

By _____

Name/Title _____

Date Signed _____

Project Number _____

The following Agreement for Professional Surveying Services ("Agreement") has been prepared at the request of NC Society of Surveyors for the benefit of its members by its legal counsel, Jon P. Carr, Jordan Price Wall Gray Jones & Carlton, with the assistance of comments provided by Justin R. Klein, Klein Agency, LLC. The Agreement is a form that is designed to be modified before any particular use. Before using this form, members should thoroughly read the Agreement and modify it for particular use with the assistance and advice of their own attorneys and counselors. The Agreement is not intended to be legal advice and use of the Agreement by any persons is at their own risk. Use of this form by Society members is entirely voluntary; members may use some or all of the provisions or none at all, all at the individual determination of each member acting independently. Members will note that many of the terms are purposely left blank for members to independently complete if those provisions are desired. It is a violation of anti-trust law for one or more persons to agree to use or not to use the Agreement, or to agree to use or to not use certain terms, provisions, rates, charges, and other terms and conditions in any agreement.

AGREEMENT FOR PROFESSIONAL SURVEYING SERVICES

NC License # _____

THIS AGREEMENT FOR PROFESSIONAL SURVEYING SERVICES ("Agreement"), made this the day of , 20 , by and between a (*Insert State of Organization and Type of Entity)* having its principal business located at ("Surveyor"), and , a (*Insert State of Organization and Type of Entity* having its principal place of business located at ("Client"). Surveyor and Client may be collectively referred to herein as the "Parties". For and in consideration of the following terms, conditions, covenants, and agreements set forth herein, the Parties hereto agree as follows:

1.0 SERVICES TO BE RENDERED.

Surveyor shall perform the following services ("Services") at certain real property located at (*Insert Address of Property at which Services will be Rendered and/or Parcel Identification Number*) ("Project Location"): (*Insert Specific Description of Services to be Rendered*) .

The aforesaid Services at the above-described location shall be referred to as the "Project". Should additional space be needed for a more complete description of Services to be provided in connection with the Project and pursuant to the terms of this Agreement, it shall be attached as **Exhibit A**, the terms of which are incorporated by reference as though fully stated herein. Surveyor shall not be obligated to Client for the provision of any services of any nature whatsoever not specifically set forth in Section 1.0 and **Exhibit A**, if attached.

2.0 OWNER AND PERTINENT NON-PARTIES.

2.1. Client represents that the name and address of the owner of the Project Location is (*Insert Name of Project Property Owner*) , a/an (*Insert Type of Entity or "Individual")* ("Property Owner"). If Client is not the owner of the Project Location, but is obligated to the owner or to some other party dealing with the owner for the services which are the subject of this Agreement, Client identifies, as follows, the names and principal business addresses, respectively, of such other contracting entities and specifies the nature of the contractual relationship of each of the contracting entities to each other:

Owner: _____
General Contractor: _____
First-Tier Subcontractor: _____
Second-Tier Subcontractor: _____

2.2. Should Client retain the services of a contractor(s), subcontractor(s), or consultant(s) ("Other Parties") other than Surveyor for the Project, Surveyor is not responsible in any way whatsoever for the supervision or direction of the work of Other Parties, their employees or agents. Surveyor does not have a right or a duty to stop the work of Other Parties performing services at the Project Location nor shall the presence of Surveyor's field personnel relieve Other Parties of their responsibility to perform their respective obligations.

3.0 DATE OF COMPLETION.

Surveyor shall use its best efforts to complete the Project and any and all Services provided in connection with the Project by or before (*Insert Estimated Date of Completion of Project*) ("Estimated Completion Date"). Client acknowledges that Surveyor may not be able to complete the Project by the Estimated Completion Date for various reasons including, without limitation, unforeseen conditions or occurrences, or force majeure, as further set forth in this Agreement.

4.0 STANDARD OF CARE.

Surveyor's Services shall be conducted with the same level and degree of skill ordinarily exercised by members of its profession operating in a similar locality, at a similar time and under similar conditions and circumstances. Except as provided in this Section, no other warranties, express or implied, are offered or intended by the Surveyor.

5.0 PRICE AND PAYMENT TERMS.

5.1. For and in consideration of the Services to be rendered in connection with the Project, Client shall pay Surveyor the base contract sum of $ .00. If within the scope of Services, Client shall additionally pay Surveyor for the costs of any inspection fees, zoning and annexation application fees, assessment fees, engineering fees, soil testing fees, photogrammetry fees, permit fees, bond premiums, blueprints and reproductions thereof, and any and all other similar fees and charges. In addition, Client shall pay Surveyor for the following itemized expense items: _____.

5.2. Surveyor will submit progress invoices to Client on a monthly basis and provide a final invoice upon completion of the Project. Payment is due within calendar days of the date of invoice. Invoices are considered past due calendar days after the date of invoice at which point past due amounts shall accrue interest at the rate of percent per annum, or the highest amount allowed by applicable law, whichever is greater. Client's obligation to pay Surveyor is not contingent upon Client's receipt of funds from third parties. Client agrees to pay Surveyor for a reasonable attorney's fee (15% of the outstanding amount due and owing) if any attorney is required to collect any past due amount due under this Agreement.

5.3. Surveyor shall also be paid in full for any different or additional Services requested and authorized by Client in excess of those stated in this Agreement. If Client disputes any or all portions of any invoice, Client shall notify Surveyor in writing, stating the reasons for such dispute or objection, within calendar days from the date of invoice, and Client shall pay that portion of the invoice, if any, that is not subject to Client's dispute. If Client does not object in writing

to all or a portion of the invoice within calendar days from the date of invoice, the full amount of the invoice is due and payable and Client waives all objections to the amount invoiced. Without incurring any liability to Client, Surveyor may suspend or terminate this Agreement, and in either case withhold any and all deliverables or Documents if Client fails to pay any undisputed invoiced amounts within _____calendar days of the date of invoice, or if Client states its intention not to pay forthcoming invoices. Such suspension or termination will not waive any other claim Surveyor may have against Client for nonpayment.

6.0 APPROVALS.

Client agrees and acknowledges that the approval process necessary to maintain a project timeline is both unpredictable and outside of the Surveyor's control. Consequently, Surveyor makes no representations as to its ability to timely achieve or obtain, or to obtain, said permits or approvals from any governing authority or outside agency.

7.0 RIGHT OF ENTRY.

Client, at its sole cost and expense, shall furnish Surveyor, its agents, employees, and subcontractors a right-of-entry and any other authorizations or licenses needed for Surveyor to enter the Project Location to perform the Services contemplated by this Agreement. Client agrees and acknowledges that the services provided by Surveyor commonly require certain activities that may disrupt the use of the Property Location and may disturb, alter, or damage the terrain and vegetation thereabout and that Surveyor will not restore the property to its original state.

8.0 REPORTS AND DOCUMENTS.

8.1. In connection with the Services provided by Surveyor, Surveyor may deliver one or more printed, non-electronic and/or electronic surveys, reports, blueprints, or other documents (collectively "Documents") reflective of the Services provided and the results thereof. Any Documents provided to Client by Surveyor in connection with the Project are intended for the sole and exclusive use of Client and its agents and employees, for the Project at the Project Location.

8.2. Surveyor may provide draft documents to Client from time to time for its information. However, Client shall only rely upon Documents provided in printed, non-electronic format, which are duly marked with the original seal of the Surveyor. In the event that a discrepancy exists between Documents provided in electronic format and Documents provided in printed, nonelectronic format, the latter shall govern and control. Documents provided to Client in electronic format are only for the convenience of the parties hereto, and any conclusion or information obtained or derived from such electronic Documents will be at Client's or other user's sole risk.

8.3. Subject to the authorized use of Client and its agents and employees, all Documents originated by Surveyor in the course of its performance of the Services set forth in this Agreement are and shall remain the sole and exclusive property of Surveyor. Such documents are specific to Client, the Project, and the Project Location, and Client shall, to the fullest extent permitted by law, indemnify and hold harmless Surveyor from and against any action, claim, damage (including defense costs), or loss arising out of or in connection with Client's assignment to a third party, re-use, modification, or misuse of Surveyor's Documents without Surveyor's prior written consent.

9.0 EXCLUSIONS FROM SERVICES.

Unless specifically and expressly required by Section 1.0 and **Exhibit A**, if attached, Surveyor shall not be obligated to Client or to any third parties for any of the following activities or services: construction means and methods, including monitoring or inspections of any nature whatsoever; jobsite safety compliance or OSHA compliance of other contractors; compliance with the Americans With Disability Act; project scheduling; project budgeting, quantity opinions, or cost estimates; construction management; permitting of

any nature whatsoever; geotechnical engineering or any other analysis or testing of subsurface conditions, including soils and the location of any utilities or structures not visible from ground surface; environmental site assessments; identification or advice pertaining to any environmentally sensitive areas or hazardous conditions including, without limitation, asbestos, petroleum, radioactive materials, hazardous wastes or other regulated substances or the delineation of wetlands.

10.0 TERMINATION.

10.1. FOR CONVENIENCE. Upon ___ days prior written notice, Client or Surveyor may terminate the performance of any further Services set forth in this Agreement for convenience. Upon the effective date of such termination notice, Surveyor shall cease work on all Services set forth in this Agreement. Within days of such termination, Client shall pay Surveyor in full for all Services (and reimbursable expenses) performed prior to termination at which time Surveyor shall deliver any completed Documents to Client.

10.2. FOR CAUSE. In the event of a material breach of this Agreement, the non-breaching party may terminate this Agreement upon days written notice to the breaching party, which notice must identify the material breach. Upon receipt of such termination notice for cause, the breaching party shall have days in which to cure the breach (the "Cure Period"). Should the breaching party timely cure its material breach of this Agreement, this Agreement may not be terminated for cause. Should the breaching party fail to timely cure its material breach, this Agreement shall be terminated, effective at the end of the Cure Period. Upon the effective date of such termination for cause, Surveyor shall cease work on all Services set forth in this Agreement. Within _____ days of termination, Client shall pay Surveyor in full for all Services (and reimbursable expenses) performed prior to termination at which time Surveyor shall deliver any completed Documents to Client.

10.3. UNFORESEEN CONDITIONS OR OCCURRENCES. If, during the course of performance of Services pursuant to this Agreement, any unforeseen hazardous substance, material, object, element, or other unforeseen conditions or occurrences are encountered which, in Surveyor's judgment, materially affects or may affect the Services to be provided hereunder, the risk involved in providing the Services, or the scope of the Services, Surveyor will notify Client. Subsequent to that notification, Surveyor may: (a) if practicable, in Surveyor's judgment and with Client's approval, complete the original scope of Services in accordance with this Agreement; (b) agree with Client to modify the scope of Services and the estimate of costs to include the previously unforeseen conditions or occurrences, such revision to be in writing and signed by the Parties and incorporated herein; or (c) terminate the Services effective on the date of notification for convenience.

11.0 FORCE MAJEURE.

Neither party shall be deemed in default of this Agreement to the extent that any delay or failure in the performance of an obligation, other than the payment of money, results from any causes beyond its reasonable control and without its fault or negligence. For this purpose, such acts or events shall include, without limitation, storms, floods, unusually severe weather, acts of God, epidemics, protest demonstrations, war, terrorism or terrorist acts, riot, strikes, lockouts or other industrial disturbances or unanticipated site conditions. In the event that such acts or events do occur, both Parties shall attempt to overcome all difficulties arising and to resume as soon as reasonably possible the normal pursuit and schedule of the Services set forth in this Agreement. The time for performance of Services and the Estimated Completion Date set forth in Section 3.0 shall be extended for a period equal to the delay thereof caused by any such act or event that comes within this Subsection.

12.0 INSURANCE. Surveyor shall maintain at its own expense the following insurance:
(1) Worker's Compensation Insurance, in the form and amounts required by statute or other applicable law;

(2) Employer's Liability Insurance with a limit of $_____;

(3) Commercial Automobile Liability Insurance with a combined single limit of $_____

(4) Commercial General Liability Insurance with limits of $_____ per occurrence; and

(5) Professional Liability Insurance with limits of $_____.
Certificates of insurance shall be issued by Surveyor upon Client's written request.

13.0 LIMITATION OF LIABILITY.
Surveyor and client mutually agree that the services provided pursuant to this agreement involve risks of liability which cannot be adequately compensated for solely by the payments client will make pursuant to the terms of this agreement. Thus, the total cumulative professional liability of surveyor, its agents, employees, and subcontractors, whether in contract or tort, including negligence, professional errors or omissions, breach of warranty (express or implied), strict liability, or otherwise, arising out of, connected with or resulting from the services provided pursuant to the terms of this agreement shall be limited to the greater of the total fees paid by client under this agreement or $50,000. Client agrees that payment of the limit of liability amount is the sole remedy to the exclusion of all other remedies available for the total cumulative liability of surveyor, its agents, employees, and subcontractors arising out of, connected with or resulting from the services provided pursuant to the terms of this agreement. Surveyor's consideration to client for this limitation of liability is specifically reflected in surveyor's fees for services under this agreement as such fees are less than surveyor would be paid for services under this agreement without a limitation of liability. Client acknowledges that surveyor has offered to amend this limitation of liability to increase the limitation, provided the client agrees to pay an additional consideration for this amendment and submits its request in writing to surveyor prior to the commencement of services under this agreement.

14.0 IDEMNIFICATIOIN.

To the fullest extent permitted by applicable law and, subject to the Limitation of Liability in Section 13.0, the parties shall indemnify and hold harmless each other, and their respective agents, employees, and subcontractors from and against any and all losses, liabilities, costs, and expenses of any kind, including reasonable attorneys' fees, which one party, its agents, employees, and subcontractors may incur, become legally responsible for, or pay out as a result of bodily injury, including death, to any person, damage to any property, or both, to the extent caused by the other party's negligence or willful misconduct. Surveyor and Client shall not be liable to the other for any special, indirect, incidental or consequential loss or damages including, without limitation, lost profits and loss of use arising from or related to the Services provided by Surveyor pursuant to this Agreement.

15.0 NOTICES. All notices required to be given under this Agreement shall be personally delivered or mailed to the address of the Party included below:

Surveyor's Address	**Client's Address**

16.0 Client designates below, a "Client Contact", who is the person authorized to represent the Client in dealings with Surveyor in respect to all matters involving this Agreement and the Project. The Surveyor shall take exclusive direction from the Client Contact, unless otherwise notified in writing by Client: Client Contact: _____: Phone: Fax: Email: .

17.0 MISCELLANEOUS.
The paragraph captions and headings used throughout this Agreement are for convenience and reference only, and the words contained therein shall in no way be held or deemed to define, limit, describe, modify, or add to the interpretation, construction, or meaning of any provisions of or scope or intent of this Agreement. Should any part, provision, term or condition of this Agreement be declared, decreed or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable as part of a final, non-appealable ruling, the legality, validity or enforceability of the remaining parts, provisions, terms or conditions shall not be affected thereby and the remainder of the Agreement shall be given full force and effect. Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other party, except for an assignment of proceeds for financing purposes. Surveyor may subcontract for the services of others without obtaining Client's consent if Surveyor deems it necessary or desirable to have others perform services necessary to the successful completion of the Project. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Parties hereto. No action or failure to act by Surveyor or Client shall constitute a waiver of any of its rights or remedies that arise out this Agreement, nor shall such action or failure to act constitute approval, acquiescence, or ratification of a breach hereunder, except as may be specifically agreed to in writing or as otherwise provided in this Agreement. Unless otherwise provided in this Agreement, all of the terms, provisions, representations and warranties, and all remedies available to any party, shall survive the expiration or sooner termination of this Agreement. All provisions in this agreement constituting representations, making or limiting warranties, limiting liability, allocating risk, or for indemnification specifically survive this Agreement. This Agreement constitutes the entire agreement and understanding between the Parties relating to the Services and supersedes any and all prior negotiations, discussions, and agreements, whether written or oral, between the Parties regarding same. This Agreement may not be modified or amended in any manner except in writing and signed by the Parties. The validity, interpretation and performance of this Agreement shall be governed by and construed in accordance with the laws of the state in which the Project is located.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the first date written above.

CLIENT SURVEYOR

By:	By:
Name:	Name:
Title:	Title:

EXHIBIT A

(*Additional Description of Services to be Rendered, if necessary*)

CONTRACTS FOR ENGINEERS AND LAND SURVEYORS

BY JEFFERY N. LUCAS
Professional Land Surveyor
Attorney at Law

Comments of Suggestions: LucasAndCompany@bellsouth.net

1 **DISCLAIMER**

I Am Not Your Attorney.

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

2 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

1. KNOW THE LAW THAT GOVERNS YOUR PRACTICE:

"It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."

Wyoming Refining v. United States, 58 Fed.Cl. 409, 414, 416 (U.S. Claims 2003).

3 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

- ⊡ Ignorance of the law is no excuse for the average person.
- ⊡ Even more so the professional service provider.
- ⊡ Regulated by the State and Licensed for the protection of the public.
- ⊡ Expected not only to know the law but to apply it as well.
- ⊡ Torts—a civil wrong.
- ⊡ Crimes and Criminal Prosecution

4 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

2. HAVE A WRITTEN CONTRACT.

Having a contract will help to avoid one of the common denominators of almost all litigation: MISCOMMUNICATION.

5 **CONTRACT BASICS**
INTRODUCTION

- ⊡ Contract – An agreement between two of more persons which creates an obligation to do or not to do something. A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

6 **CONTRACT BASICS**
INTRODUCTION

- ⊡ Contract - A contract establishes the scope of services, overall professional relationship, system of communication, standard of care, and the rights and responsibilities of both parties.

7 **CONTRACT BASICS**
INTRODUCTION

7 **CONTRACT BASICS**
INTRODUCTION

- Contract – Most claims are brought against Land Surveyors and other professional service providers by their Clients. Most of these are due to miscommunication, poor management techniques, and disagreements over fees.

8 **CONTRACT BASICS**
TERMS

- Oral Contract – A contract not in writing, made by verbal agreement.
- Written Contract – Simply, an agreement reduced to writing.
- Contract Under Seal – A formality that can extend the statute of limitations and may eliminate the need for consideration.
- L.S. – The abbreviation for *Locus Sigilli*. Latin for "the place of the seal."

9 **CONTRACT BASICS**
TERMS

- Indemnification – To restore the victim of a loss, in whole or part, by payment, repair, or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him.

10 **CONTRACT BASICS**
TERMS

- Instruments of Service – All reports, plans, specifications, field data, field books, raw data files, and other documents, including all maps and all documents on electronic media, prepared by the land surveyor.

11 **CONTRACT BASICS**
TERMS

- Liquidated Damages – Provision in contract or agreement by which parties agree in advance as to the amount or limit of damages for breach. Usually, it is an amount and not a limit. And the amount can be pretty stiff. Approach with caution.

12 **CONTRACT BASICS**
TERMS

- Under Seal – For centuries before the doctrine of consideration was developed, and long before informal contracts were enforced, contracts under seal were enforced. The sealed instrument required no consideration. The required formalities were: a sufficient writing, and seal, and delivery. Today, the seal may be actual, or impressed on the paper, or merely recited by the word "seal" or "L.S."

13 **CONTRACT BASICS**
TERMS

- *Quantum Meruit* – The measure of recovery under implied contract to pay compensation as reasonable value for services rendered.

14 **CONTRACT BASICS**
TERMS

15

14 **CONTRACT BASICS**

TERMS

- Severability – Admitting of severance or separation; capable of being divided; separable; capable of being severed from other things to which it was joined, and yet maintaining a complete and independent existence.

15 **ELEMENTS OF A CONTRACT**

- Offer and Acceptance - An agreement exists when one party makes an offer and the other party accepts. This is sometimes referred to as a "meeting of the minds."

16 **ELEMENTS OF A CONTRACT**

- Offer – To bring to or before; to present for acceptance or rejection; to hold out for or proffer; to make a proposal to; to exhibit something that may be taken or received or not.

17 **ELEMENTS OF A CONTRACT**

- Acceptance – The taking and receiving of anything in good part, as it were a tacit agreement to a preceding act, which might have been defeated or avoided if it had not been accepted. Compliance by the offeree with the terms and conditions of the offer constitute an "acceptance." The modern trend is to allow acceptance by any means that are reasonable.

18 **ELEMENTS OF A CONTRACT**

- Legal Purpose - A contract must be for a legal purpose. A contract to undertake illegal activity is not enforceable in courts of law.
- With reference to contracts, legal purpose means that the purpose of the contract must not be illegal.

19 **ELEMENTS OF A CONTRACT**

- Subject Matter - The subject, or matter presented for consideration; the thing in dispute; the right which one party claims as against the other.
- Subject matter, or legal form, refers to the contract being enforceable if it is not against public policy.

20 **ELEMENTS OF A CONTRACT**

- Consideration - The inducement of a contact. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. No consideration – no contract.

21 **ELEMENTS OF A CONTRACT**

- Legal Capacity - Capacity refers to one's legal qualification (i.e. legal age), competency, power or fitness to enter into a contract. Mental ability to understand the nature and effects of one's acts, especially with regard to entering into a contract.
-

22 **ELEMENTS OF A CONTRACT**

Execution – With a written contract, both parties sign the contract. Lack of a

23

22 **ELEMENTS OF A CONTRACT**

- ⊡ Execution – With a written contract, both parties sign the contract. Lack of a signature indicates that there has not been a meeting of the minds.
- ⊡

23 **ESSENTIAL ELEMENTS**

- ⊡ Offer and Acceptance (Identify Parties)
- ⊡ Legal Purpose (Surveying Services)
- ⊡ Subject Matter (Scope of Services)
- ⊡ Consideration (Fee for Services)
- ⊡ Legal Capacity (Over 19 & Not Incapacitated)
- ⊡ Execution (Signatures)

24 **ELEMENTS OF A CONTRACT**

Project Identification:

- ⊡ Briefly identify the project, its location and the basic scope of services, in no uncertain terms.

25 **ELEMENTS OF A CONTRACT**

Standard of Care:

- ⊡ Identify what standard is being used for the survey, i.e. "State Minimum Technical Standards," "2011 ALTA/NSPS Minimum Standard Detail Requirements," etc.

26 **ELEMENTS OF A CONTRACT**

Deliverables:

- ⊡ Identify the deliverables that are a part of the contract. Then, anything beyond that will be an extra.

27 **ELEMENTS OF A CONTRACT**

Schedule:

- ⊡ Don't leave the schedule to guesswork. Use a range or approximate completion date, or an approximate number of weeks to complete from the date your contract is fully executed. Never give a date certain even if you think you can set a date certain.

28 **ELEMENTS OF A CONTRACT**

Payment Terms:

- ⊡ Don't leave the payment terms to guesswork either. Specify interest to be added in the event payment is later. Then, bill early and bill often.

29 **ELEMENTS OF A CONTRACT**

Applicable Law:

- ⊡ Specify your state as the applicable jurisdiction in the event there needs to be legal action. You do not want to have to bring an action, defend an action, or hire an attorney in a foreign court.

30 **ELEMENTS OF A CONTRACT**

Attorney's Fees:

31

30 **ELEMENTS OF A CONTRACT**

Attorney's Fees:

- ⊡ Without a clause for attorney's fees, you could be hard-pressed to recover fees and court costs even if you win in court.

31 **ELEMENTS OF A CONTRACT**

Contingency Clause:

- ⊡ In the event of unforeseen circumstances, a contingency clause will allow you to either renegotiate the fee or terminate the contract.

32 **ELEMENTS OF A CONTRACT**

Additional Services:

- ⊡ Make provision for additional services, and make it easy for additional services to be authorized. Include a statement of hourly rates. This could be easy money added to the project.

33 **ELEMENTS OF A CONTRACT**

Offer Expiration Date:

- ⊡ Add a date of time period within which your offer will expire. You do not what open-ended offers floating around with not expiration date.

34 **ELEMENTS OF A CONTRACT**

Termination Clause:

- ⊡ Give yourself the ability to fire the client if necessary and still be able to get paid under the contract.

35 **ELEMENTS OF A CONTRACT**

Statement of Warranties:

- ⊡ This is actually a statement that you are making NO WARRANTIES or guarantees on your work. Professional service providers do no make guarantees or warranties.

36 **OPTIONAL ELEMENTS**

- ⊡ Project Identification
- ⊡ Standard of Care
- ⊡ Deliverables
- ⊡ Schedule
- ⊡ Payment Terms
- ⊡ Applicable Law
- ⊡ Attorney's Fees
- ⊡ Contingency Clause
- ⊡ Additional Services
- ⊡ Offer Expiration Date
- ⊡ Termination Clause
- ⊡ Statement of Warranties

37 **REVIEW ELEMENTS**

1 ESSENTIAL:

37 **REVIEW ELEMENTS**

1 ESSENTIAL:

- ⊡ Offer & Acceptance
- ⊡ Legal Purpose
- ⊡ Subject Matter
- ⊡ Consideration
- ⊡ Legal Capacity
- ⊡ Execution

2 OPTIONAL:

- ⊡ Project Identification
- ⊡ Standard of Care
- ⊡ Deliverables
- ⊡ Schedule
- ⊡ Payment Terms
- ⊡ Applicable Law
- ⊡ Attorney's Fees
- ⊡ Contingency Clause
- ⊡ Additional Services
- ⊡ Offer Expiration Date
- ⊡ Termination Clause
- ⊡ Statement as to Warranties

38 **THE ONE-PAGE CONTRACT**

Letter of Engagement

Offer & Acceptance, Project Identification, and Legal Purpose:

February 2, 2012
Mr. Abram Halfacre
1313 Mockingbird Lane
Meridian, Mississippi 39305
FAX TRANSMISSION: (601) 555-1313
(Or Email Transmission)
RE: Property Identification (Identify Property)
Brief Description of the Project
And Services Being Provided

39 **THE ONE-PAGE CONTRACT**

Letter of Engagement

Offer & Acceptance, Project Identification, and Legal Purpose:

Dear Mr. Halfacre:

This letter shall serve as a Letter of Engagement, whereby Abram Halfacre, hereinafter referred to as Client, engages Acme Surveying Company, LLC, hereinafter referred to as Surveyor, to perform land surveying services on the above described property (the Property). Execution of this letter will confirm acceptance and shall

40

referred to as Surveyor, to perform land surveying services on the above described property (the Property). Execution of this letter will confirm acceptance and shall constitute an agreement between Client and Surveyor.

40 **THE ONE-PAGE CONTRACT**
Letter of Engagement

Subject Matter, Standard of Care, Deliverables:

Surveyor will provide a Boundary Survey of the Property which will include re-establishment of property corners and boundary lines, location of permanent improvements to the property (i.e. buildings, fences, driveways, etc.), identification of encroachments (if any), determination of acreage, and preparation of a map of survey depicting the results of the survey. Six original survey maps will be provided. The survey will meet all applicable provisions of the State of Mississippi's "Standards of Practice" for property surveys.

41 **THE ONE-PAGE CONTRACT**
Letter of Engagement

Consideration, Schedule, Payment Terms, Applicable Law and Attorney's Fees:

It is acknowledged that land surveying is a professional service and not an exact science, therefore our fee for services is estimated at $2,500.00, subject to unforeseen circumstances or unexpected difficulties (see below). The survey will be completed within three (3) weeks from the date of receipt of an executed copy of this agreement. Surveyor will make every reasonable effort to meet this schedule, however, this is not a guarantee. All invoices are due and payable within 15-days of receipt. A late fee of 1.50% per month will apply. In the event collection proceeding become necessary, Mississippi law will apply and Attorney's fees and cost of collection will be reimbursed to Surveyor.

42 **THE ONE-PAGE CONTRACT**
Letter of Engagement

Contingency Clause, Additional Services, Statement of Hourly Rates, Termination Clause and Legal Capacity:

If unforeseen circumstances or unexpected difficulties are encounter, the Client will be consulted before Surveyor proceeds further. If additional services are deemed necessary, Surveyor will perform those services at an hourly rate of $150.00. Surveyor will only perform additional services with Client's written or verbal approval. This offer will expire if not executed within 15 days. Either party may terminate this agreement with or without cause. Upon termination, Surveyor will be reimbursed for services performed. This agreement contains no warranties either expressed or implied. Persons signing below certify that they have legal capacity as the individuals, representatives, and/or agents for the parties to this contract.

43 **THE ONE-PAGE CONTRACT**
Letter of Engagement

43 **THE ONE-PAGE CONTRACT**
Letter of Engagement
Execution:

FOR SURVEYOR:

_____

Date: _____
Thomas Jefferson, Chief Surveyor

44 **THE ONE-PAGE CONTRACT**
Letter of Engagement
Execution:

FOR CLIENT:

_____[signature]_____ Date: _____

By: _____
Printed Name and Title

45 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

- How many of you work under a contract every time your provide professional services?

46 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

Problems with oral contracts:

- What were the terms of the contract?
- Did you make warranties or guarantees?
- How will you enforce the agreement?
- How will you defend against a breach?
- Breeding ground for misunderstanding & miscommunication.

47 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

Miscommunication:

- One common denominator in cases involving land surveyors is a breakdown in the communication between the surveyor and the client.

48 **LAWLER v. HARE**
Alabama Court of Civil Appeals
587 So.2d 387

49

ACME SURVEYING COMPANY, LLC
Post Office Box 15
Meridian, Mississippi 39301
Phone: 601-555-5555 ● Fax: 601-5555-5556

February 2, 2012

Mr. Abram Halfacre
1313 Mockingbird Lane
Meridian, Mississippi 39305

FAX TRANSMISSION: (601) 555-1313
(Or Email Transmission)

RE: Property Identification (Identify Property)
Brief Description of the Project or Services to be Provided

Dear Mr. Halfacre:

This letter shall serve as a Letter of Engagement, whereby Abram Halfacre, hereinafter referred to as Client, engages Acme Surveying Company, LLC, hereinafter referred to as Surveyor, to perform land surveying services on the above described property (the Property). Execution of this letter will confirm acceptance and shall constitute an agreement between Client and Surveyor.

Surveyor will provide a Boundary Survey of the Property which will include re-establishment of property corners and boundary lines, location of permanent improvements to the property (i.e. buildings, fences, driveways, etc.), identification of encroachments (if any), determination of acreage, and preparation of a map of survey depicting the results of the survey. Six original survey maps will be provided. The survey will meet all applicable provisions of the State of Mississippi's "Standards of Practice" for property surveys.

It is acknowledged that land surveying is a professional service and not an exact science, therefore our fee for services is estimated at **$2,500.00**, subject to unforeseen circumstances or unexpected difficulties. The survey will be completed within three (3) weeks from the date of receipt of an executed copy of this agreement. Surveyor will make every reasonable effort to meet this schedule; however, this is not a guarantee. All invoices are due and payable within 15-days of receipt. A late fee of 1.50% per month will apply. In the event collection proceeding become necessary, Mississippi law will apply and Attorney's fees and cost of collection will be reimbursed to Surveyor.

If unforeseen circumstances or unexpected difficulties are encountered, the Client will be consulted before Surveyor proceeds further. If additional services are deemed necessary, Surveyor will perform those services at an hourly rate of $125.00. Surveyor will only perform additional services with Client's written or verbal approval. This offer will expire if not executed within 15 days. Either party may terminate this agreement with or without cause. Upon termination, Surveyor will be reimbursed for services performed. This agreement contains no warranties either expressed or implied. Persons signing below certify that they have legal capacity as the individuals, representatives, and/or agents for the parties to this contract.

FOR SURVEYOR:

_____

Date: _____
Thomas Jefferson, Chief Surveyor

FOR CLIENT:

_____ Date: _____

By: _____
Printed Name and Title

48

Alabama Court of Civil Appeals
587 So.2d 387
August 9, 1991

49 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

"Additionally, I observe that out of a simple fee dispute case, the trial court's judgment, if it stands, may very well establish a new standard that could stifle a professional's effective use of auxiliary personnel. Indeed, as the same pertains to licensed land surveyors, it appears to suggest that the licensee be on one end of the chain."
Lawler v. Hare, 587 So.2d 387 (Ala.App.1991).

50 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

Miscommunication:
⊡ No good deed goes unpunished.

51 **KHLH, Inc. v. WISCONSIN SURVEYORS, Inc.**

Wisconsin Court of Appeals
619 N.W.2d 307
September 19, 2000

52 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

3. PRACTICE DEFENSIVELY.
Conduct your business and your professional practice defensively, as if you will be going to court on every project that you turn out, because you never know where the lawsuit will be coming from.

53 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

⊡ Educate yourself.
⊡ Educate the other professionals who work for you.
⊡ Educate your party chiefs.
⊡ Do not practice outside your areas of expertise.
⊡ Be careful what you sign.
⊡ Avoid litigious clients.

54 **JEFF'S 10 COMMANDMENTS ON LIMITING YOUR LIABILITY**

4. READ ALL CERTIFICATIONS CAREFULLY.
Many certifications will have guarantees and warrantees imbedded in them that will nullify your errors and omissions insurance and expose you to greater liability.

55

nullify your errors and omissions insurance and expose you to greater liability.

55 **COMMONWEALTH**
V.
CJM, P.C.
SUPERIOR COURT OF CONNECTICUT
JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
2008 Conn. Super. LEXIS 2774
November 5, 2008

56 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY
5. UNDERSTAND YOUR POTENTIAL LIABILITY:
As a professional service provider, you are not only liable for your own actions, you are liable for the actions of those who work for you as agents or employees.

57 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY
- ⊡ There is no immunity from prosecution.
- ⊡ Privity of contract is on death's door.
- ⊡ Third party beneficiary doctrine is alive and well.
- ⊡ Liability under implied contract.
- ⊡ Tort liability.
- ⊡ Criminal actions.

58 **ROZNY V. MARNUL**
Supreme Court of Illinois
250 N.E.2d 656
May 26, 1969

59 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY
"The general rule in California is that a professional person may be held liable to third persons who suffer damage proximately caused by the negligence of the professional person as an independent contractor in the performance of his professional duties even though there is *no privity of contract* between the third person and the professional person and even though the client does not complain about the quality of the professional service....The reason for the rule is that the action is *ex delicto*, not *ex contractu*...."

Huber et al v. Moore et al, 67 Cal.App.3rd 278, 301 (1977).

60 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY
"Originally professional persons were exempt from liability to third persons because it

60

ON LIMITING YOUR LIABILITY

"Originally professional persons were exempt from liability to third persons because it was believed that they owed their duty to their clients not to third persons. *In...rejecting the privity of contract requirement* [California] declared that whether or no liability to third persons existed involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury,..."

Huber et al v. Moore et al, 67 Cal.App.3rd 278, 301 (1977).

61 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"...the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. *Foreseeability and proximate cause now supplant the former requirement of privity of contract.*"

Huber et al v. Moore et al, 67 Cal.App.3rd 278, 301 (1977).

62 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

▣ Who are your potential plaintiffs as a professional services provider?

63 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"[T]he courts have eliminated the need for privity between the Land Surveyor and the party seeking relief...that is, the party complaining no longer has to be the party with whom the land surveyor enjoyed a contractual relationship."

Madsen, T.S. and Robert John Munro, *Understanding Your Professional Liability as a Land Surveyor,* Land Surveyors Seminars, Gainsville, Florida (1979), at 66.

64 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"The day of privity of contract between the surveyor and client is over; the surveyor is obligated to disclose, for the possible benefit of third parties, all information that may lead to damages."

Robillard, Walter G., Donald A. Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition,* Page 475.

65 **WATTS**
v.
SHANNON and LEGGINS

Tennessee Court Appeals
2005 Tenn.App. LEXIS 403
April 5, 2005

66

April 5, 2005

66 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

Negligence:

☐ One of many torts that can be committed by the land surveyor.

67 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"The difference between a tort and a contract action is that a breach of contract is a failure of performance of a duty arising under or imposed by agreement, whereas a tort is a violation of a duty imposed by law."

Bender v. Kansas Secured Title, 119 P.3d 670 (Kan. 2005).

68 **ROLLY MARINE**
V.
MCLAUGHLIN ENGINEERING

Florida Court of Appeals, Fourth District
49 So.3d 823
December , 2010

69 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"Surveyors again moved to dismiss. First they argued the new pleading was an improper attempt to circumvent the order dismissing the second amended complaint 'with prejudice.' All claims, they further contended, are barred by the economic loss rule (ELR). Next they contended that surveyors are not 'professionals' within the meaning of the Florida Supreme Court's exemption from the ELR."
Rolly Marine v. McLaughlin Engineering, 49 So.3d 823 (Fla.App.2010).

70 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"In Moransais ... the court held that the ELR may not be applied to 'professionals.' Surveyors argue that, when the surveys were performed and certified, they were not deemed professionals for purposes of application of the ELR."
Rolly Marine v. McLaughlin Engineering, 49 So.3d 823 (Fla.App.2010).

71 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

Slander of Title:

☐ A tort surveyors don't know they can commit.

72 **ZEN BUDDHIST V. NELIDOV**

California Court of Appeals
2006 Cal.Unpub. LEXIS 2766
April 4, 2006

73

72

April 4, 2006

73 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

Other Torts (or crimes):

- ⊡ Slander of title
- ⊡ Trespass (civil & criminal)
- ⊡ Fraud (civil & criminal)
- ⊡ Nuisance (civil & criminal)
- ⊡ Outrage
- ⊡ Bad Faith
- ⊡ Mental Anguish
- ⊡ Conspiracy (civil & criminal)
- ⊡ Respondent Superior/Master-Servant.

74 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

6. DON'T SIGN YOUR CLIENT'S CONTRACT.

Don't sign your Client's contract (if possible). Many clients have contracts that they have developed over the years that are totally inappropriate for the professional service provider. If you must sign your Client's contract have it reviewed by legal counsel for potential pitfalls.

75 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

Client Developed Contracts:

- ⊡ The client developed contract should be avoided when possible. If for no other reasons, it takes valuable time and may require professional help to read and interpret the client developed contract.

76 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

Client Developed Contracts:

- ⊡ Many client developed contracts are written for purposes other than hiring professional service providers.

77 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

Client Developed Contracts:

- ⊡ Many client developed contracts are one-sided arrangements developed in the Client's favor.

78 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

7. OPERATE ABOVE THE STANDARD:

79

78

7. OPERATE ABOVE THE STANDARD:

79 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"It is the duty of a land surveyor in his (her) profession to use that degree of knowledge, skill, and care *ordinarily possessed and used by members of that profession*, and to perform any service undertaken as a land surveyor, in a manner that a reasonably prudent land surveyor would use under the same or similar circumstance."

Alabama Pattern Jury Instructions, Sec. 25.20, Malpractice, Non-Medical Professionals.

80 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"We note that a mere difference of professional opinion does not establish professional negligence. Moreover, professional negligence is not established by proving that a professional opinion turned out to be erroneous. Rather, to recover for professional negligence based on an incorrect professional opinion, one must establish that the professional fell below the standard of *skill and knowledge commonly possessed and utilized by members within the profession when rendering his opinion*."

Lawson v. Winemiller, 1995 Ohio App. LEXIS 2043.

81 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"We have not had the occasion to state the standard of care owed by a land surveyor. Medical and legal malpractice actions are analyzed according to tort law principles instead of contract law, and in those cases liability is predicated on 'deviation from the professional standard of care.' We have said that '*standards for demonstrating the elements of professional negligence do not differ from profession to profession*.'"

Graves v. Downey Land Surveyor, 885 A.2d 779 (Me. 2005)

82 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"The duty of care that the Superior Court imposed in this case required the Graveses to demonstrate that S.E. Downey's work on the survey was below that of an *ordinarily and reasonably competent land surveyor* in like circumstances. Courts in other jurisdictions have articulated the duty of care of land surveyors in similar ways. For example, in West Virginia a surveyor is held to the standard of care that a 'reasonably prudent surveyor' would have applied with regard to the same project."

Graves v. Downey Land Surveyor, 885 A.2d 779 (Me. 2005)

83 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"Both Maryland and North Carolina state that a surveyor must 'exercise that degree of care which a *surveyor of ordinary skill and prudence would exercise under similar*

83

"Both Maryland and North Carolina state that a surveyor must 'exercise that degree of care which a *surveyor of ordinary skill and prudence would exercise under similar circumstances*.' We agree with the Superior Court that the duty of care a land surveyor is obligated to provide is that degree of care that an ordinarily competent surveyor would exercise in like circumstances."

Graves v. Downey Land Surveyor, 885 A.2d 779 (Me. 2005)

84 **APPEAL BY**
JANET REED

Kansas Court of Appeals
243 P.3d 382
December 10, 2010

85 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

8. OPERATE BEHIND A CORPORATE SHIELD.

If possible, operate behind a corporate shield. This is just another layer of protection that you should add to your overall protective armor.

86 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

1 9. BE AN EXPERT EVALUATOR OF EVIDENCE.

Surveyors must be expert measurers: YES. But measurements are the least scrutinized aspect of what we do, when we go to court. Our evaluation of the evidence is what will be scrutinized.

2 "It was only after Milam [Richardsons' surveyor] generated his opinion about the B-to-A fence that the Richardsons claimed they own the land north of that fence. *The question remains whether Milam's analysis is legally correct*."

Larsen v. Richardson, 2011 MT 195 (Mont.2011).

87 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

"The surveyor, having made an evaluation of the evidence, forms an opinion as to where he believes the lines would be located if fully adjudicated in a court of law. The typical modern day surveyor sees himself as an expert evaluator of evidence. He strives to arrive at the same opinion of boundary location regardless of whether he was hired by his client or his client's next door neighbor."

Williams & Onsrud, What Every Lawyer Should Know about Title Surveys, Reprinted in "Land Surveys, A Guide for Lawyers," Real Property and Trust Law Section American Bar Association, 1986.

88 **JEFF'S 10 COMMANDMENTS**
ON LIMITING YOUR LIABILITY

10. YOU HAVE TO WIN AT THE TRIAL COURT LEVEL.

89

88

ON LIMITING YOUR LIABILITY

10. YOU HAVE TO WIN AT THE TRIAL COURT LEVEL.

In this litigious society, it is no longer an option to be wrong in court (lose). The results of you survey should be a well reasoned opinion based on the law and the facts.

89 **HUNTER V. WILSHIRE**

SUPREME COURT OF ALABAMA
2005 Ala. LEXIS 180
October 21, 2005

Left by the Wayside

Discontinued and Abandoned Roads

Kathleen M. O’Donnell, Esq.

Town of Concord v. Rasmussen et al

17 MISC 00605 (HPS) 11/23/22

Issue: Is Estabrook Road a way open to the public?

How the case started:

Increased use of the Road for recreational purposes by members of the public led abutters to install gates across the Road and put up no trespassing signs.

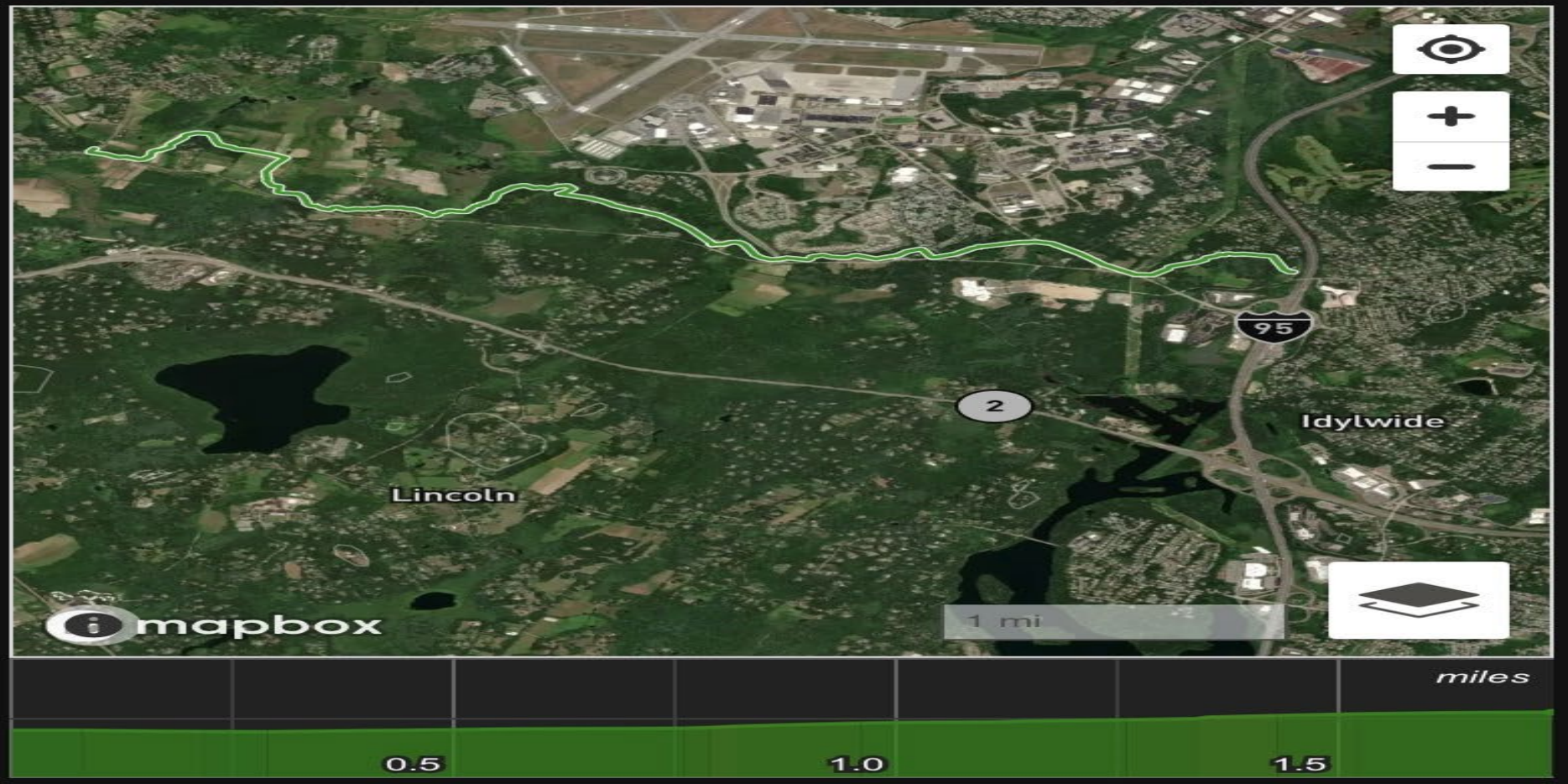
Abutters argued that Road was a private not a public way and, if it was public, it was discontinued in 1932.

Town argued that Road was still public and that the 1932 discontinuance only discontinued maintenance not the public's right of access

Your Rating: ☆ ☆ ☆ ☆ ☆

Your Difficulty:

Your Favorites: Add To-Do · Your List



1.7 Miles

274' High

Discontinuance and/or Abandonment G.L. c. 82

Process for Discontinuance of County Ways – G.L. c. 82 Section 2

1. Petition in writing filed with County Commissioners requesting discontinuance of County highway or discontinuance of maintenance of County highway
2. Finding by County Commissioners that “common convenience and necessity require” the discontinuance
3. Before taking action on petition, the County Commissioners may impose a surety in an amount sufficient to cover all costs and expenses incurred by the Commissioners if the petition is unsuccessful
4. View of site by County Commissioners if deemed “expedient” or when requested by any interest party

County Process continued

5. Fifteen days prior notice delivered to Town Clerk with copy of petition
6. Seven days before view and/or public hearing, notice must be posted in two public places and published in the local newspaper

≡ THE CONCORD BRIDGE

Walking Concord

Decision by County Commissioners

1. If, at the view, the County Commissioners decide that the condition or circumstances indicate that discontinuance or termination of maintenance is “not required”, the petition is dismissed. (G.L. c. 82 Section 4)
2. If the Commissioners decide at the viewing that the highway should be discontinued, they announce that decision at the next meeting and then vote to proceed with the petition. At the required public hearing, the Commissioners then vote to either discontinue the highway or discontinue maintenance
3. Vote must be filed with Town Clerk

Effect of Discontinuance by County

The county highway becomes a town way (G.L. c. 82 Section 5)

Town meeting may then layout the highway as a town way or as a statutory private way

But who owns the fee to the road?

READ the original layout and taking – did the municipality take the fee or limit the taking to an easement for highway purposes?

- Discontinuance of maintenance doesn't terminate the public way, it just terminates the municipality's obligation to maintain it
- Outright discontinuance terminates the way, and if the original layout was only an easement, the public's right to use it is also terminated and the fee resides in the abutters under the Derelict Fee Statute, G.L. c. 183 Section 58

If the layout was a taking in fee, title remains in the town not withstanding the discontinuance of the way

CAVEAT – alteration of a way automatically constitutes a discontinuance of the now unused portion of the former layout

Nylander v. Potter – 432 Mass 158 (1996)

Leading case on the effect of discontinuance of a town way.

The discontinuance terminated the public easement for travelunless the abutter held a private easement by grant, prescription or implication that predated the layout of the way

e.g. subdivision with ways shown on a plan and rights granted in the deed to use the ways for all public purposes – rights survive the town's acceptance of the ways as a town way and its later vote to discontinue

Back to Estabrook Road in Concord

Decision:

1. The northern portion of Estabrook Road was established as a public way in 1763;
2. The southern section is a public way by prescription and through circumstantial evidence of a statutory layout lost;
3. The County Commissioners' order in 1932 "adjudicating" Estabrook Road to be private way did not extinguish the rights of the public to access and use the Road

History

In 1760, landowners looking for better access between the area that would become Carlisle and the center of Concord submitted a request to Town Meeting to layout a new road.

1763 – Court of General Sessions of the County of Middlesex together with the Town laid out Estabrook “provided petitioners give the land for the road through their own land and on no other

1932 – Attorney for abutters asked the Concord Road Commissioners to file a petition with the County Commissioners to close Estabrook Road as a public way because “the road is now almost impassable and is used only by picknickers and is serious fire hazard [and because] there are no houses on this stretch of road in Concord”

Abutters' Response

- The southern section of the Road was never laid out
- The layout of the northern section was ineffective because none of the affected landowners were paid (see Moncy v. Planning Board of Scituate, 50 Mass. App. Ct. 509 (1995)
- Even if the Road was public, it was discontinued by the County in 1932

Town's Response

- The southern portion was established by dedication, prescription or circumstantial evidence (see Fenn v. Town of Middleborough – 7 Mass. App. Ct. 80 (1979)
- The northern portion was properly laid out in 1763 or established by prescription
- The County's discontinuance in 1932 only discontinued maintenance not the rights of the public to use the Road

Under Fenn – public ways are:

1. Laid out – for the southern portion, didn't prove that Road was laid out by Select Board and accepted by Town Meeting – couldn't prove; northern portion has a layout
2. Prescription – has to be more than just mailmen and meter readers – must be actual public use without permission and Town could show regular traffic, commercial use for quarry and lime kiln as well as logging, together with Town maintenance
3. Prior to 1846, dedication and acceptance – Town couldn't show dedication and acceptance
4. Rarely used – factual inference based on evidence lost

What makes this case different?

In Nylander v. Potter – Town used process in Section 21, not Section 32A – under Section 21, there must be an actual vote by the Town to discontinue

Problem that Section 32A is ambiguous – cite F. Sydney Smithers IV

In Rasmussen – Termination of public rights of access requires a town vote but the process used here was Section 32A. This Section doesn't require anything more than the decision of the commissioners to terminate a town's obligation to maintain a road. The decision doesn't reach public access.

“Private Way” doesn’t always mean “private”

First type of private way: laid out as a statutory private way creates a public easement or a right of passage.

“Private way” as it is used in G.L. c. 82 Sections 21-32A connotes a way which was laid out by public authority for the use of the public……and therefor ‘private only in name” Opinion of the Justices to the Senate 313 Mass. 779 (1943)

Second: private way – open and dedicated to the public but not legally public because it was never laid out by the town

Third: private way – wholly private and open to use only with owner’s permission or license

THE CONCORD BRIDGE

Estabrook Road

Estabrook Road defendants intend to appeal court's access decision

CATIC
building partnerships together.

MALSCE

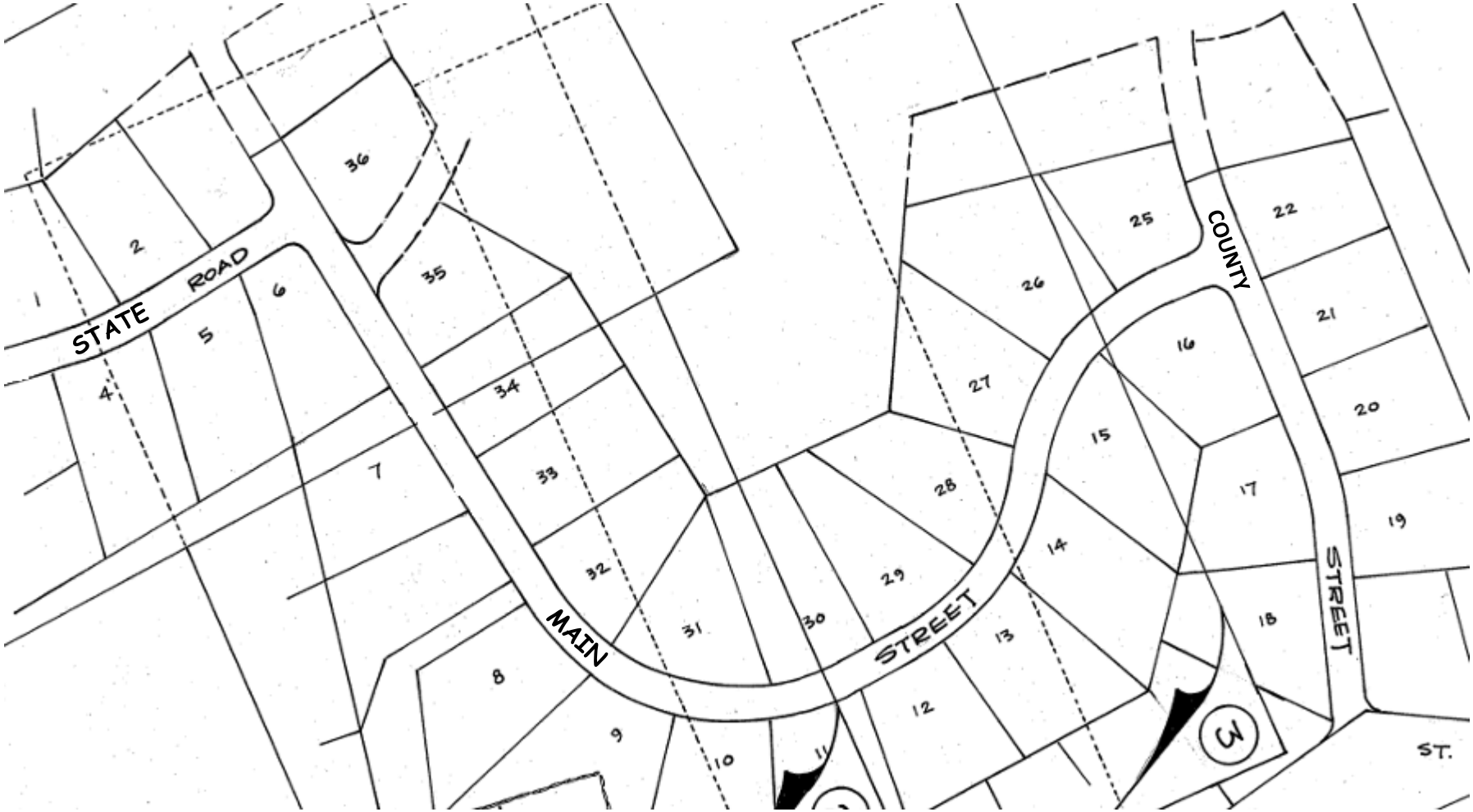
SURVEYS AND TITLE INSURANCE – Who Said Real Estate is Boring?

January 27, 2023

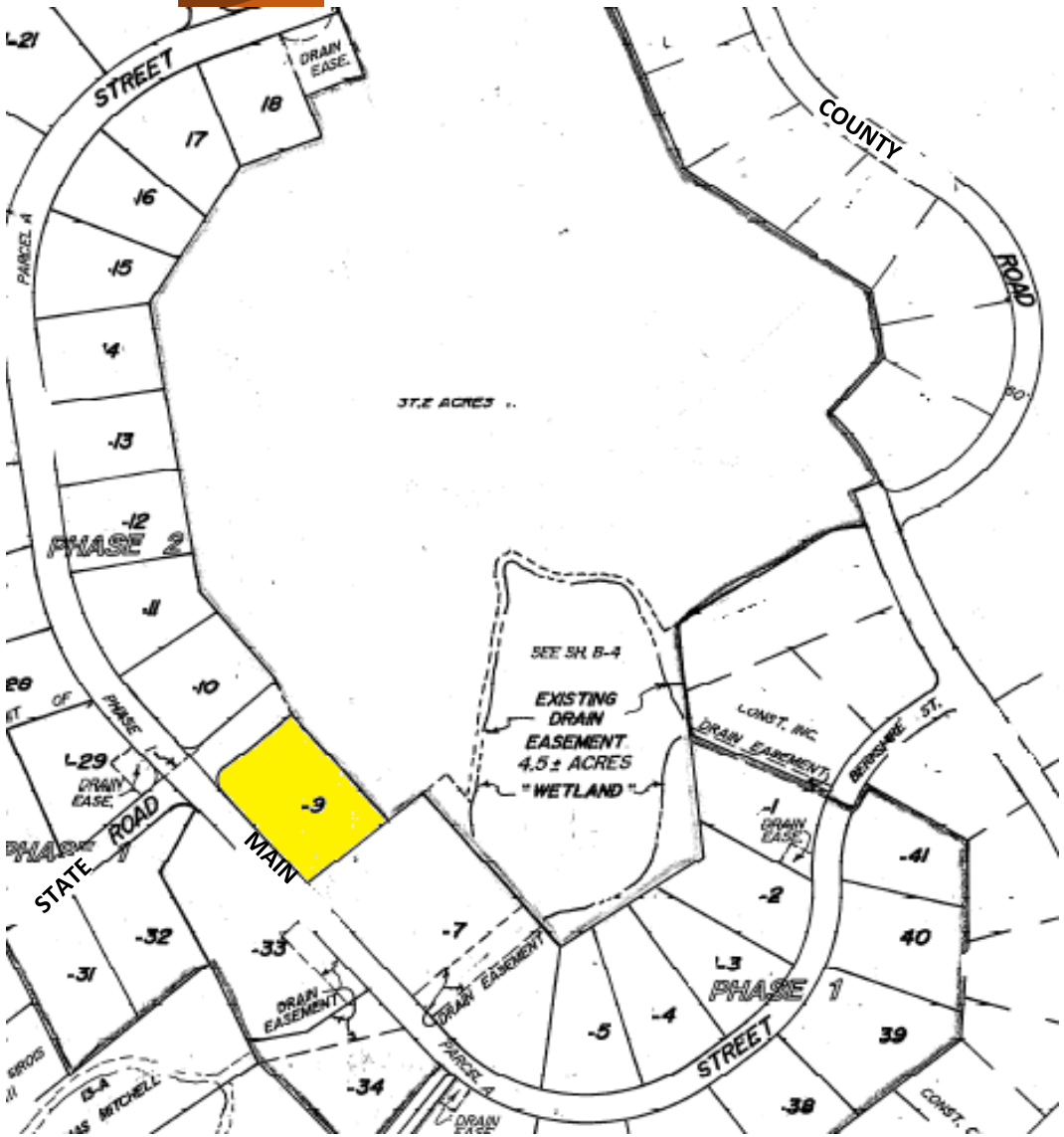
Melanie E. Kido

Vice President and MA State Counsel

1995 DEED – 1980 PLAN



1994 PLAN


STREET
DRAIN EASE.
18
17
16
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PHASE 2
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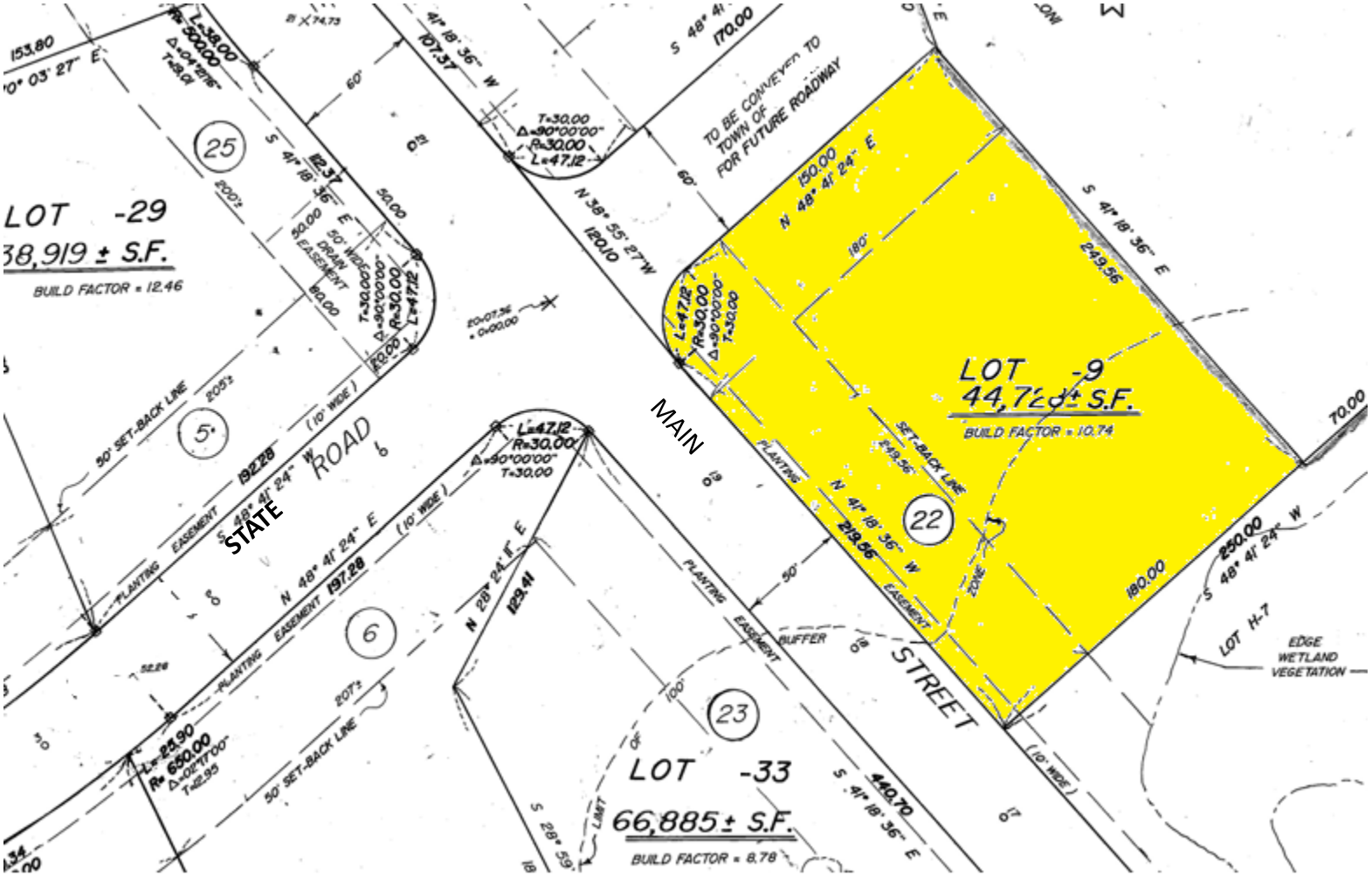
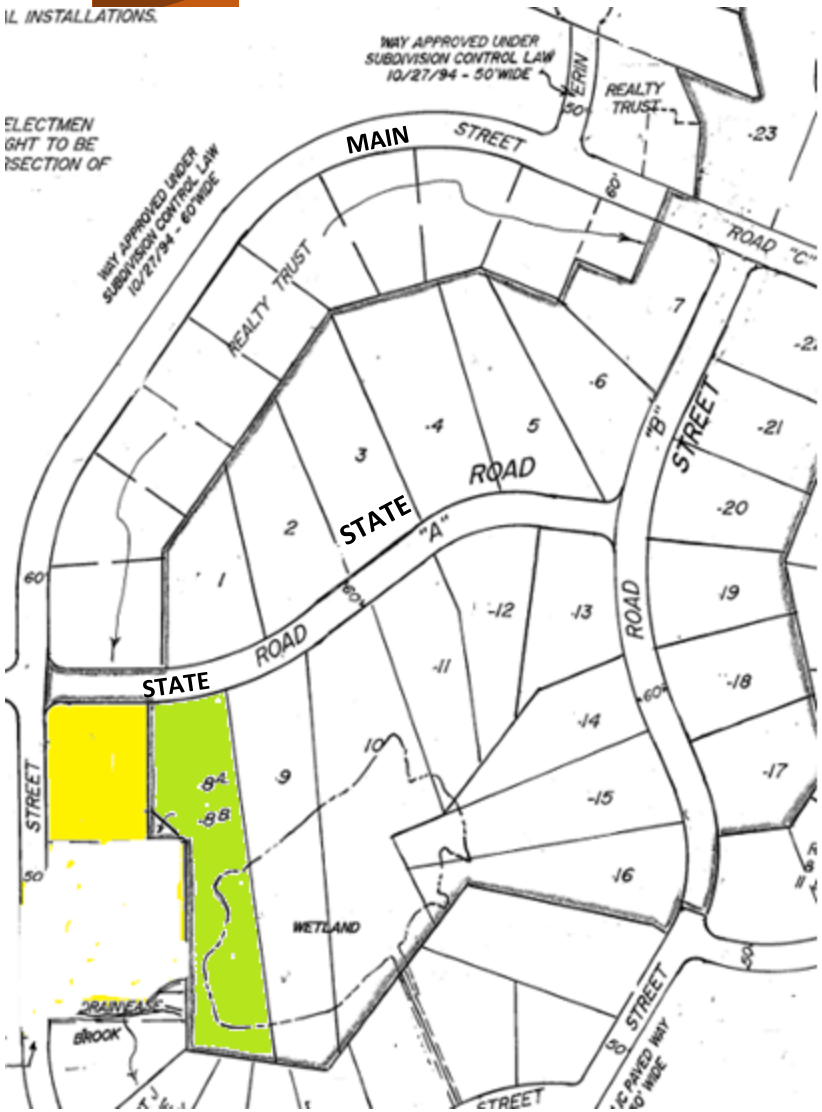
DRAIN EASE.
ROAD
STATE
MAIN
32
31
33
34
DRAIN EASEMENT
7
DRAIN EASEMENT
5
4
PHASE 1
39
38
STREET
PARCEL A
37.2 ACRES ±
SEE SH. B-4
EXISTING DRAIN EASEMENT
4.5 ± ACRES
"WETLAND"
CONST. INC.
DRAIN EASEMENT
BERGAMINE ST.
1
DRAIN EASE.
2
41
40
COUNTY
ROAD

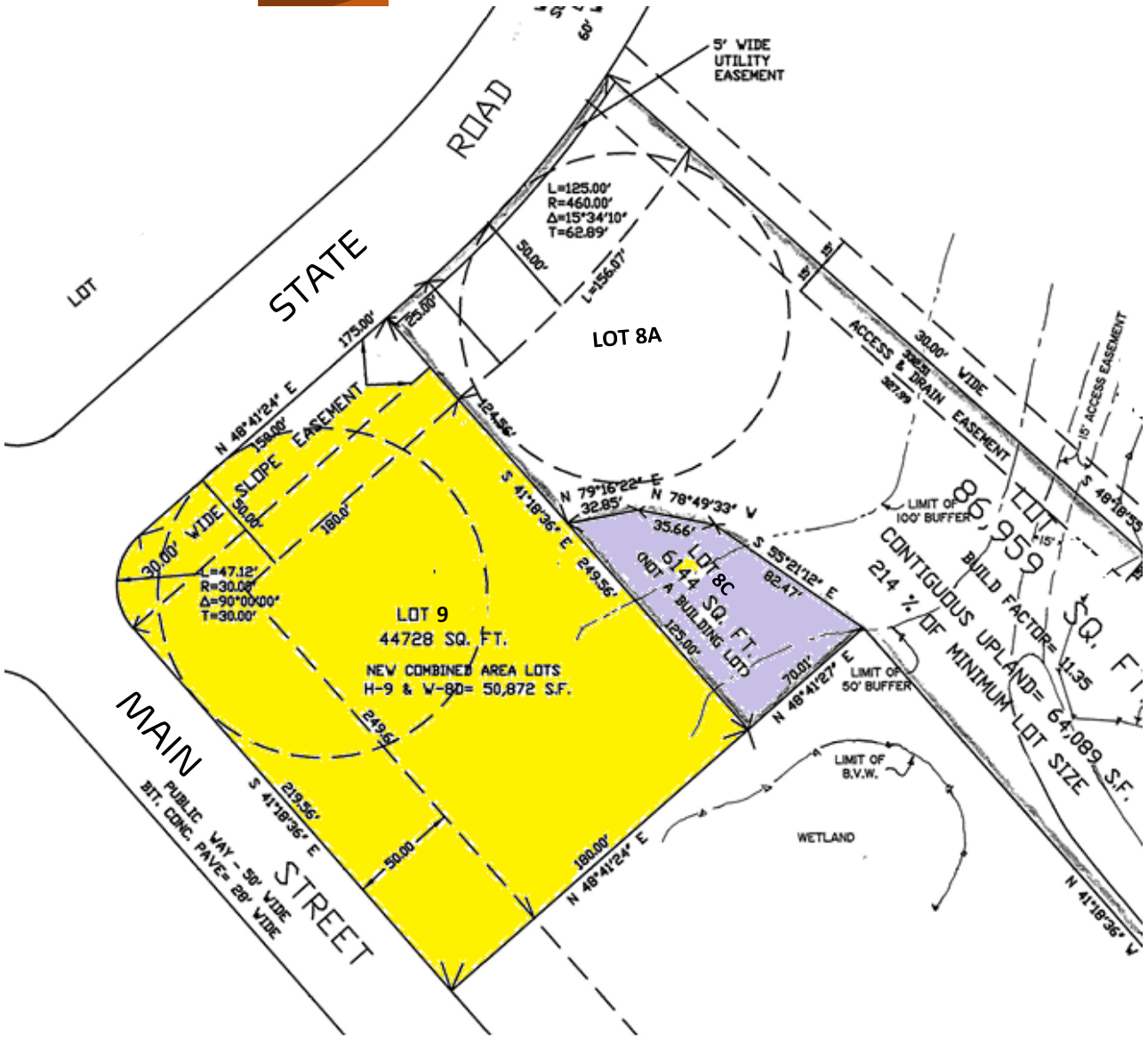
1997 DEED – 1994 PLAN (LOT 9)



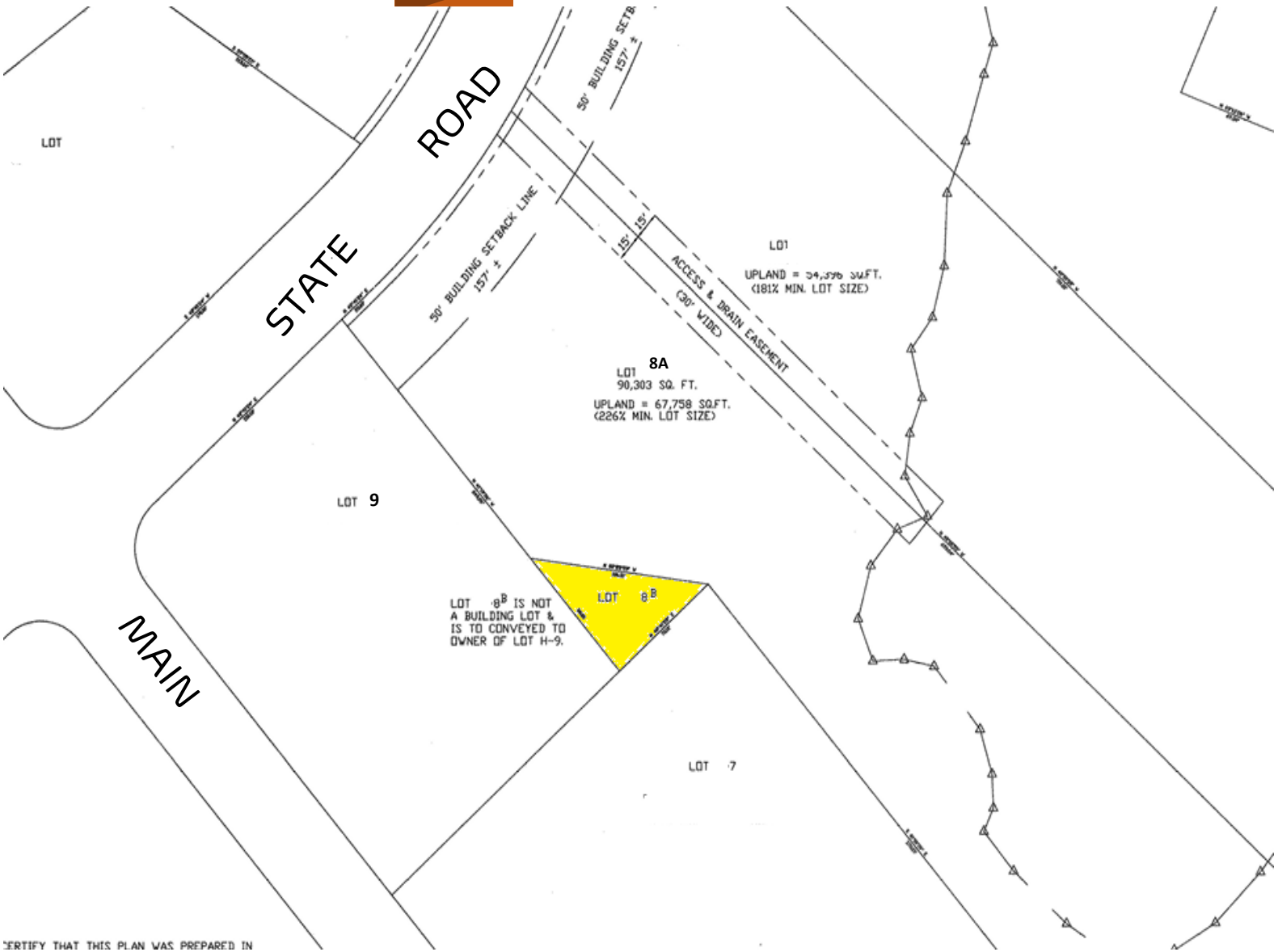
2000 DEED – 2001 PLAN



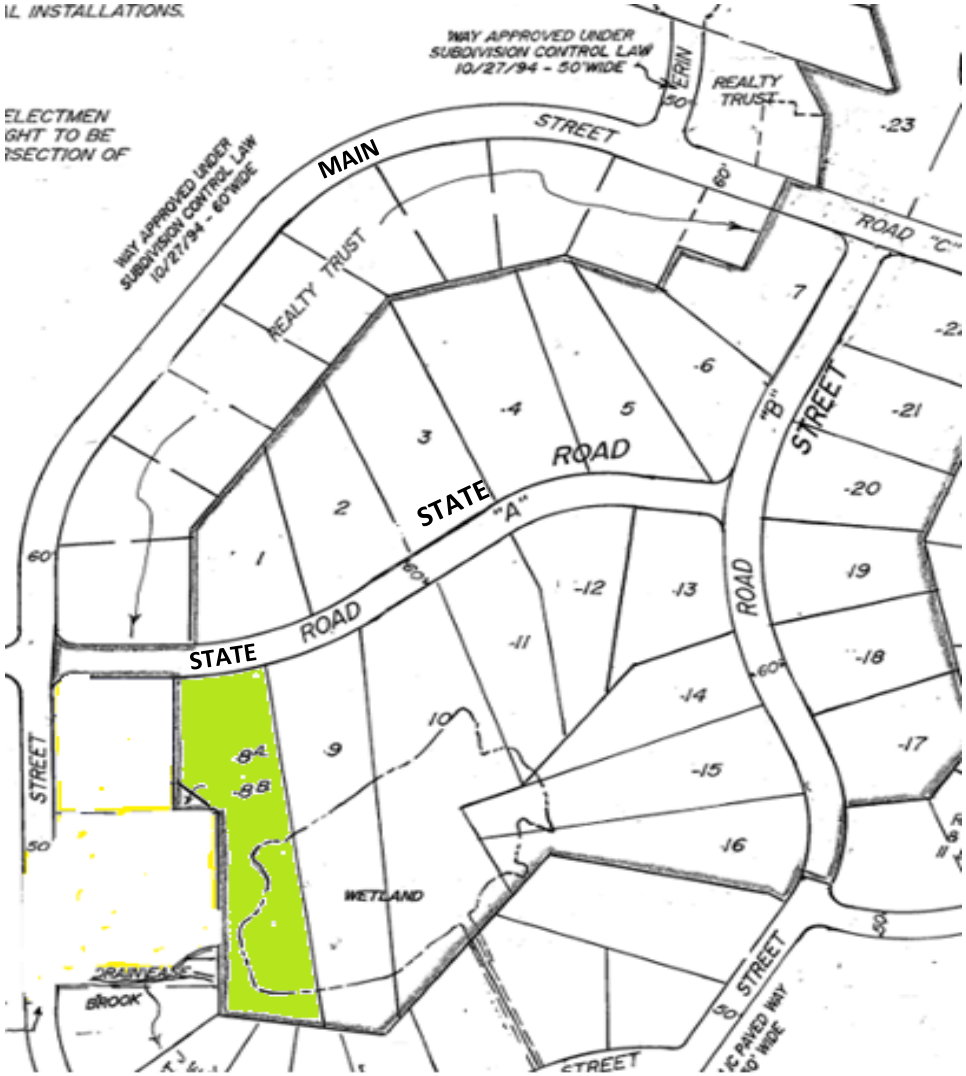
2002 PLAN – 2002 DEED (LOT 8C)



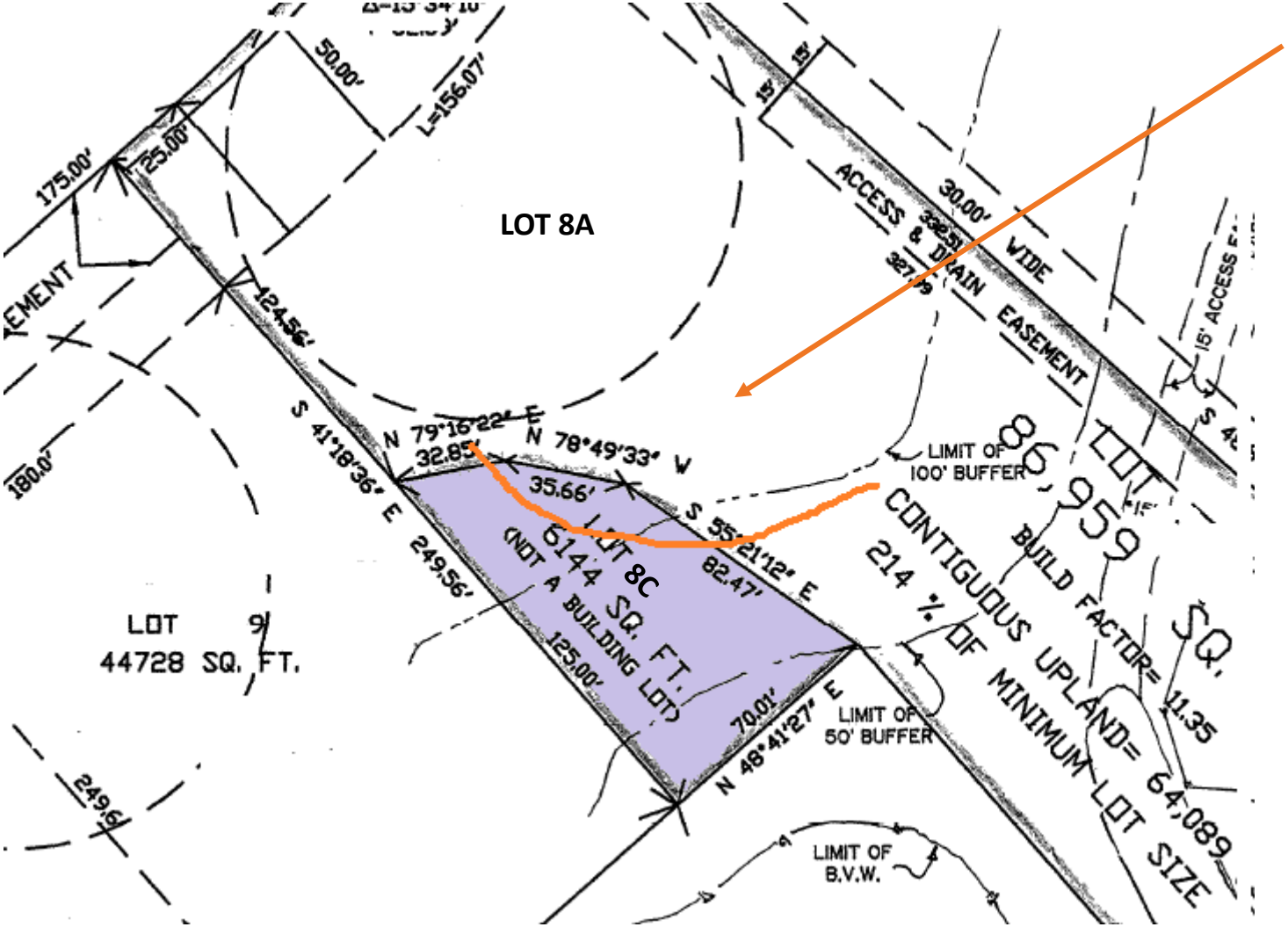
2014 PLAN (LOT 8B)



2018 DEED – 2001 PLAN – (LOT 8A)



CAN'T WE ALL JUST GET ALONG?



POSSESSION IS…

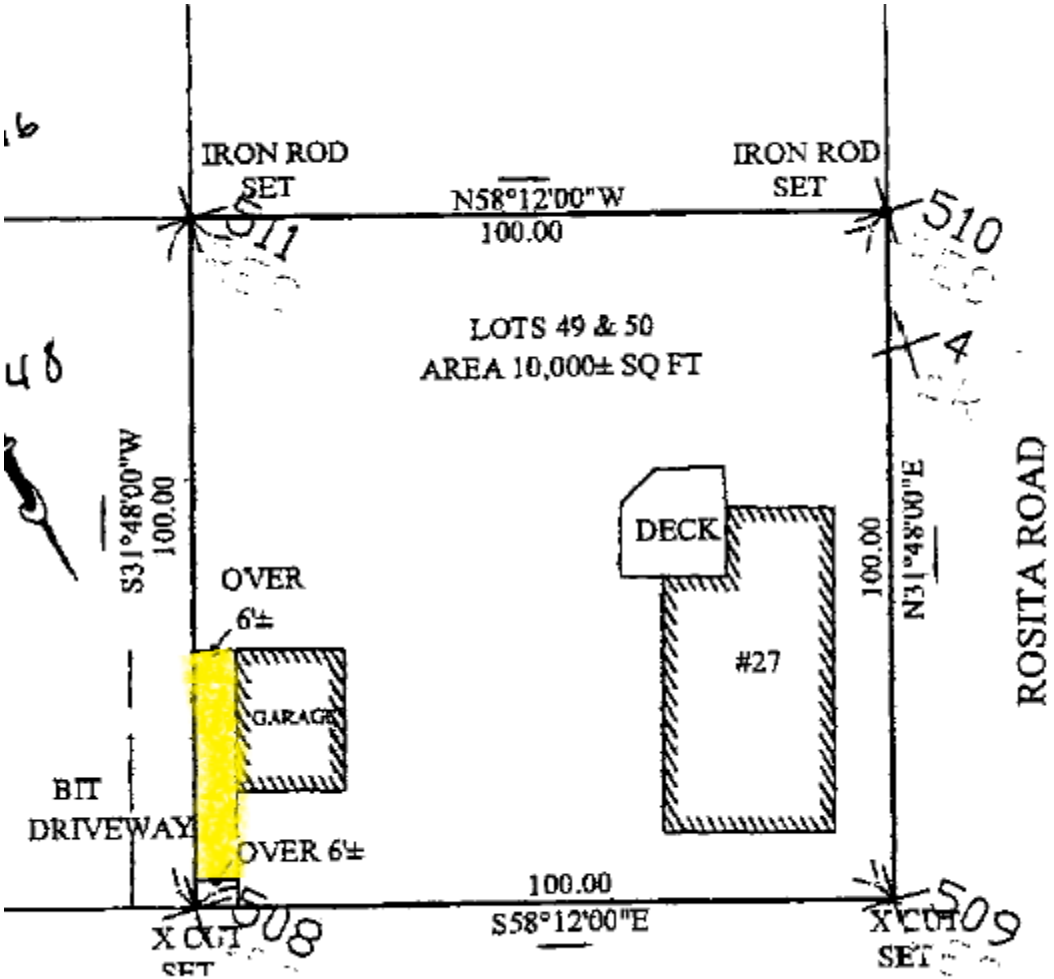
EXCLUSIONS FROM COVERAGE

"The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:…

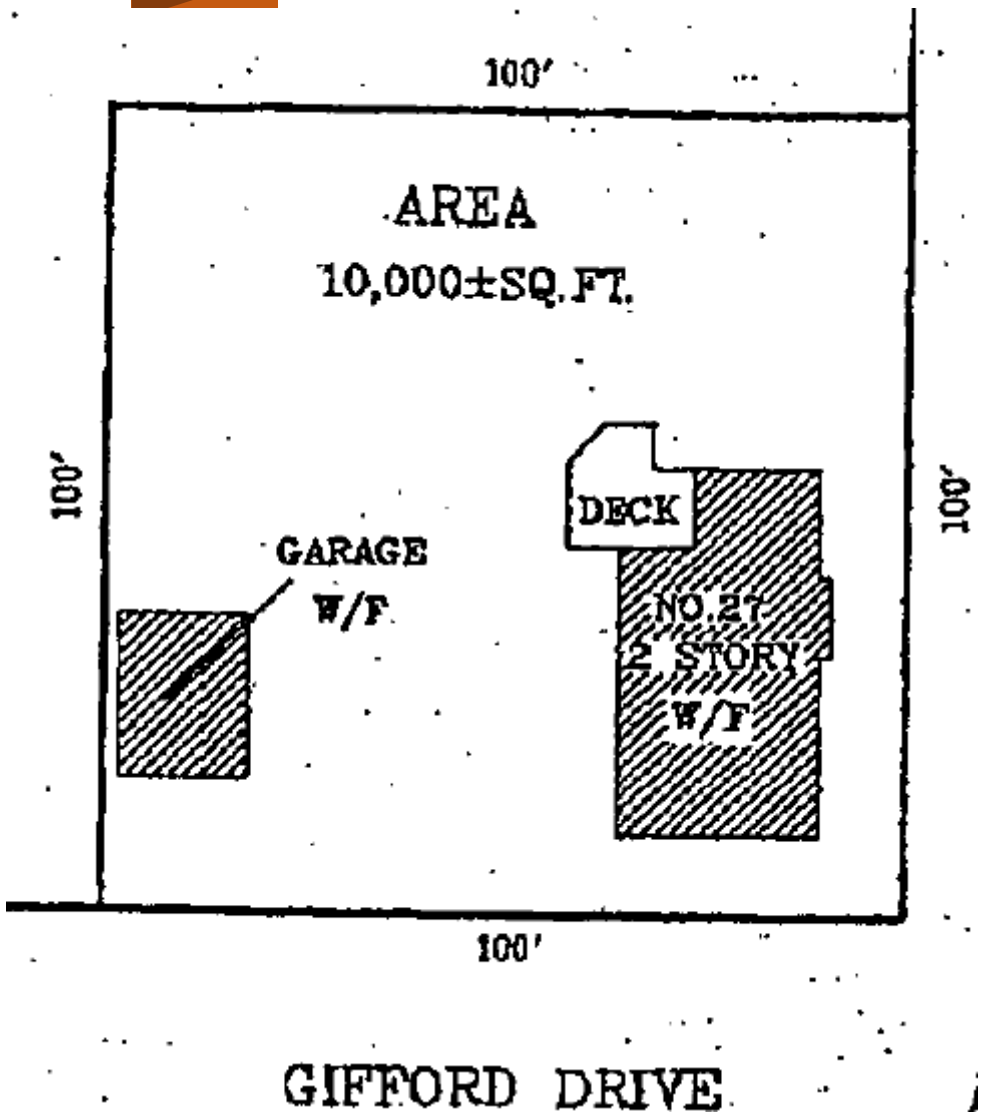
3. Defects, liens, encumbrances, adverse claims, or other matters

1.(a) created, suffered, assumed, or agreed to by the Insured Claimant; …"

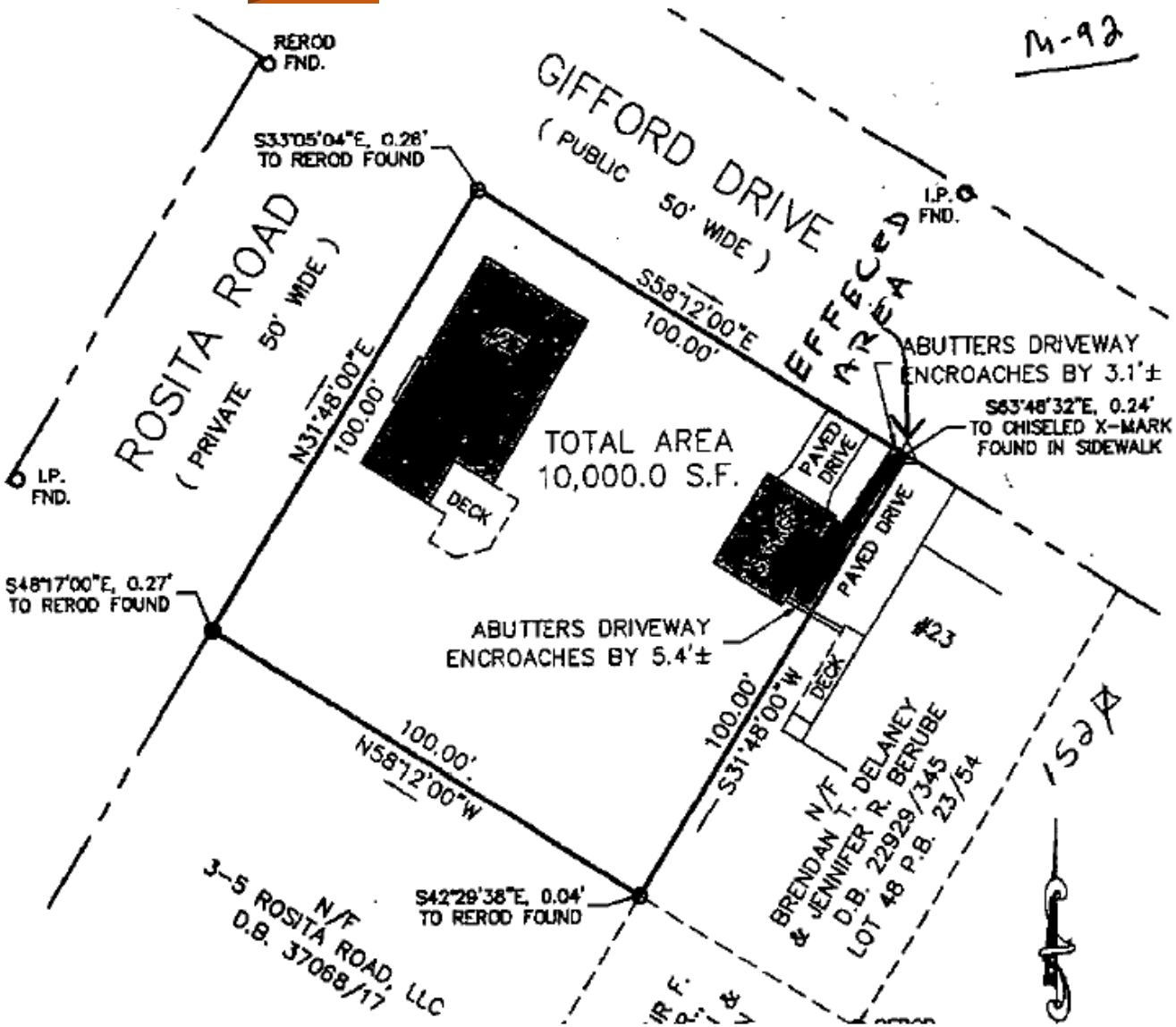
WHAT'S YOURS IS MINE…



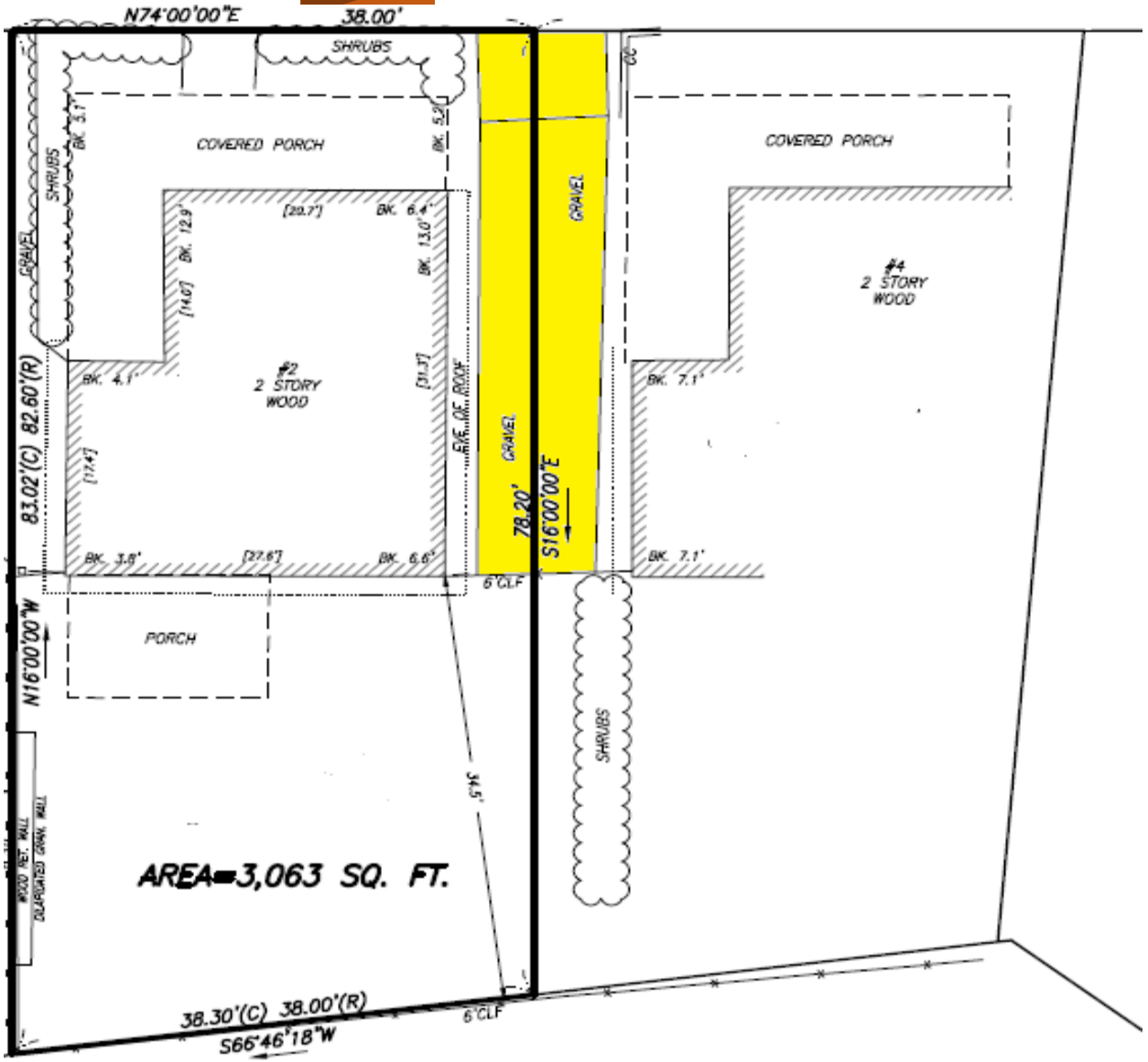
BUYER BEWARE…



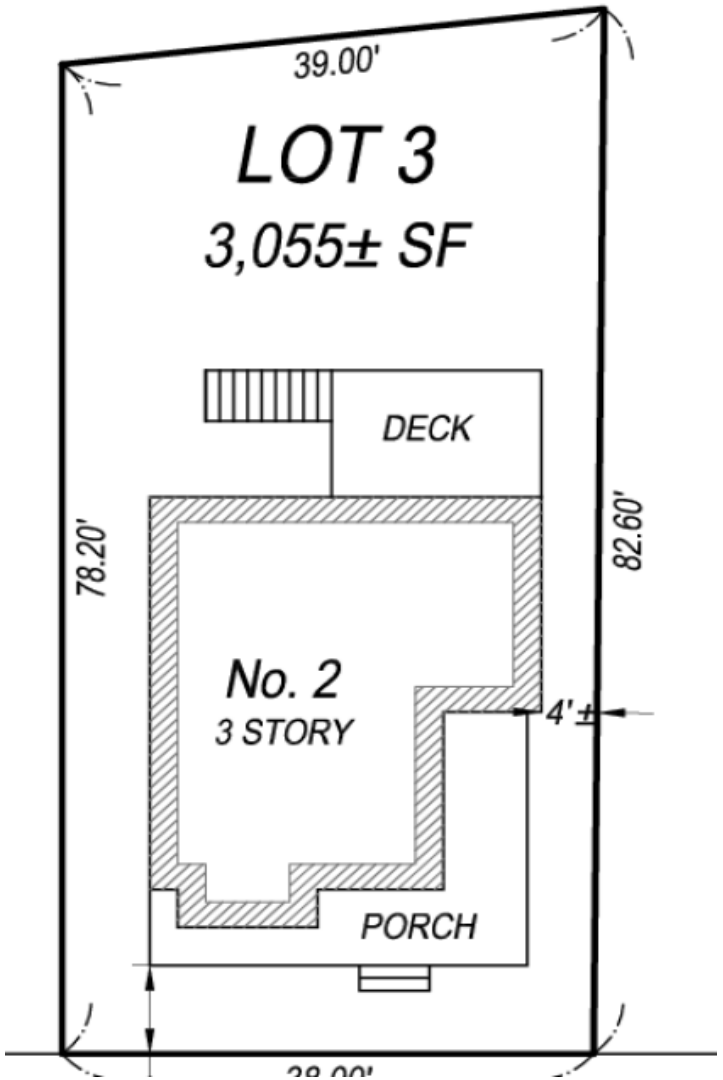
SURVEYS MATTER

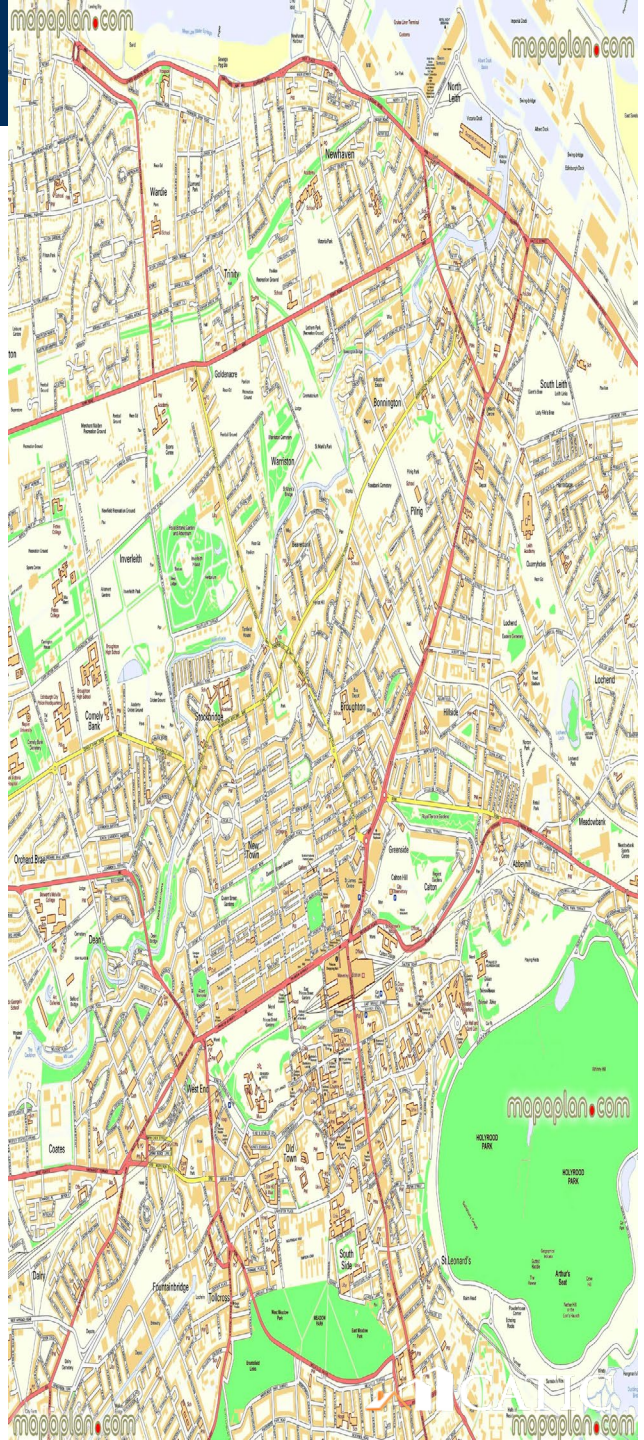


THE “SHARED” DRIVEWAY?



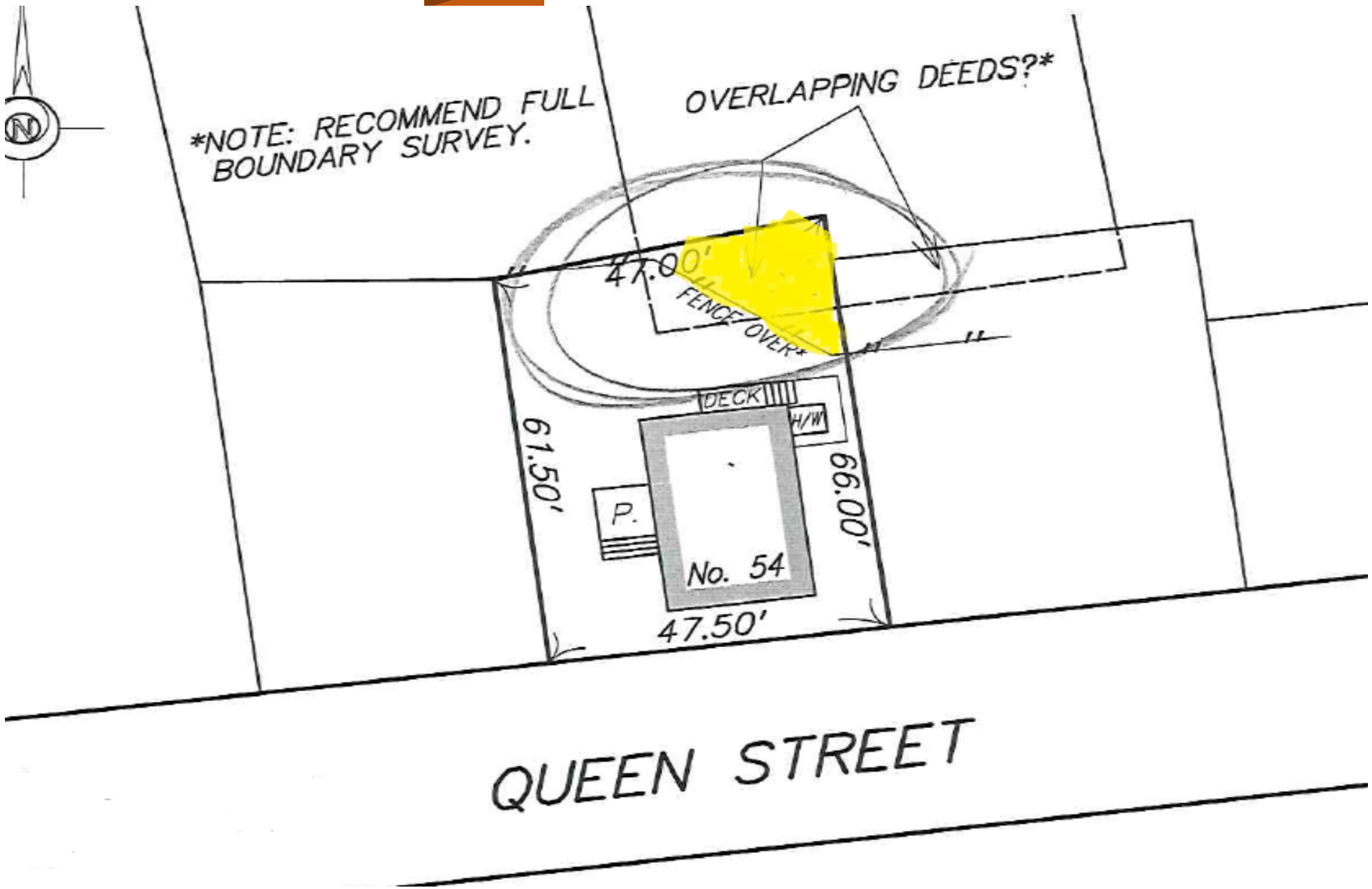
SOMETIMES WHAT YOU SEE IS WHAT YOU GET…



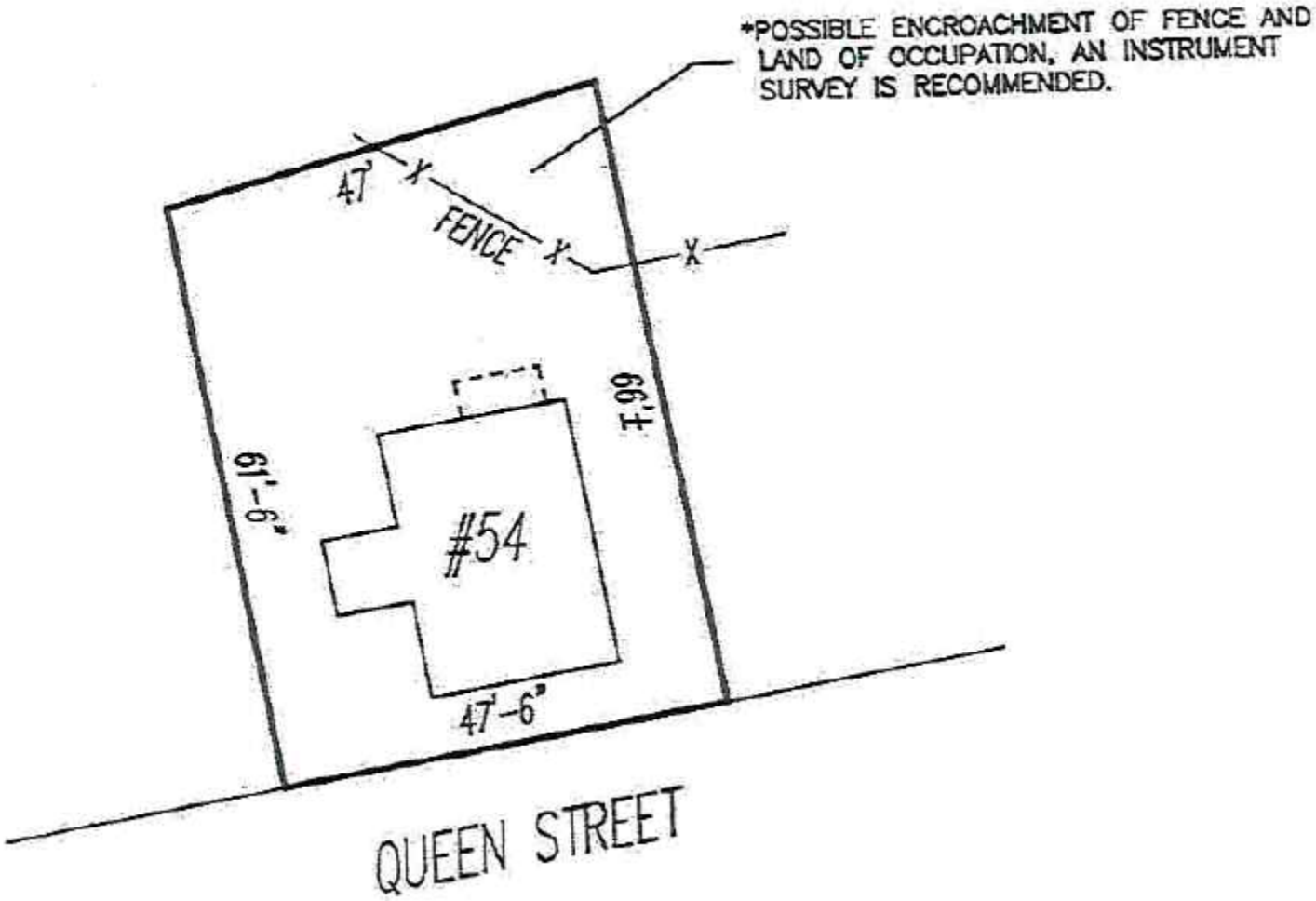


DETAILS MATTER…

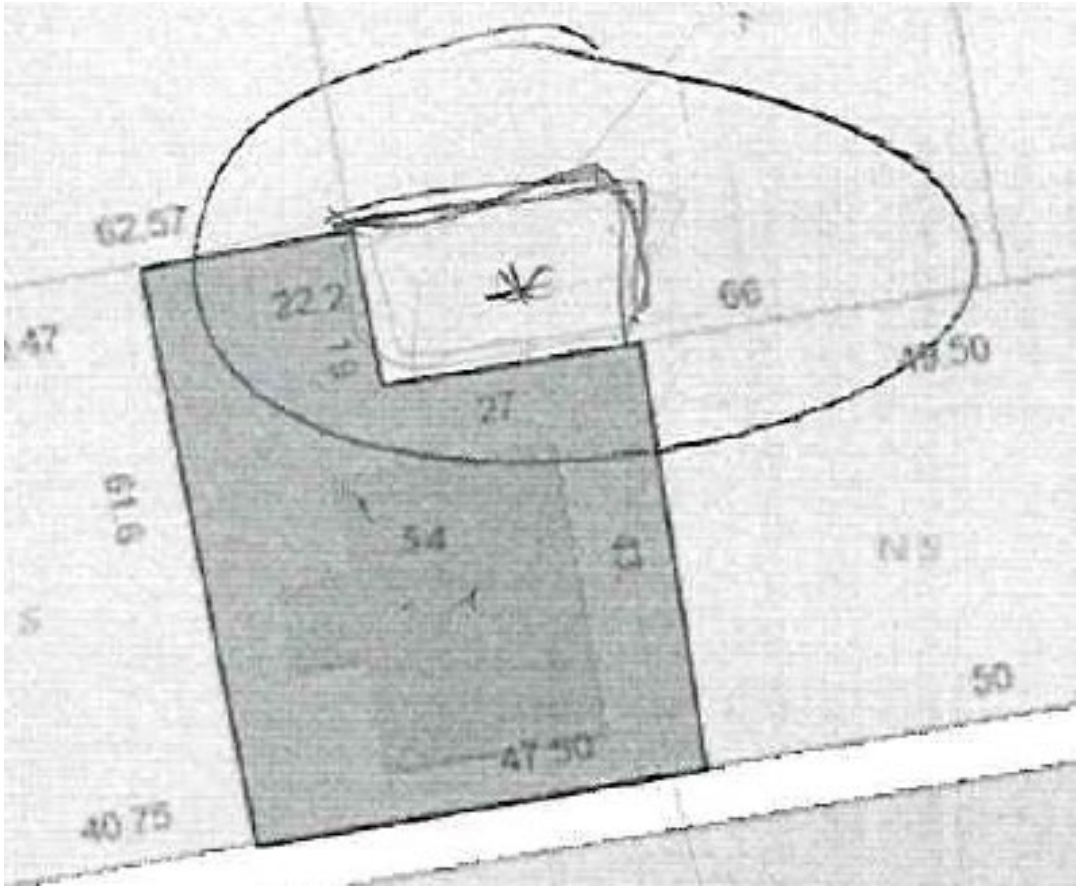
WHO'S ON FIRST?



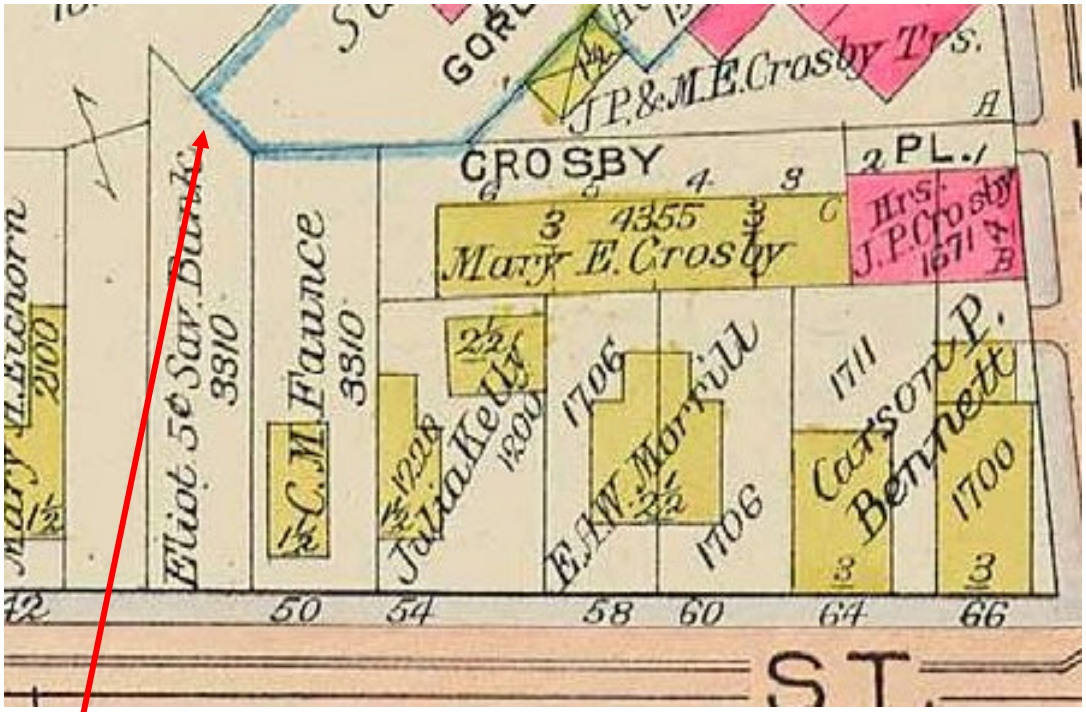
WHAT'S ON SECOND?



WHO OWNS WHAT?



1915 ATLAS


J.P.&M.E.Crosby Trs.
CROSBY
2 PL.
Mrs. J.P.Crosby
Mary E. Crosby
4355
Eliot Sav. Bank
3310
C.M.Faunce
3310
Julia Kelly
1800
1706
E.W. Morrill
1706
1711
Carson & P. Bennett
1700
Mary E. Enchorn
200
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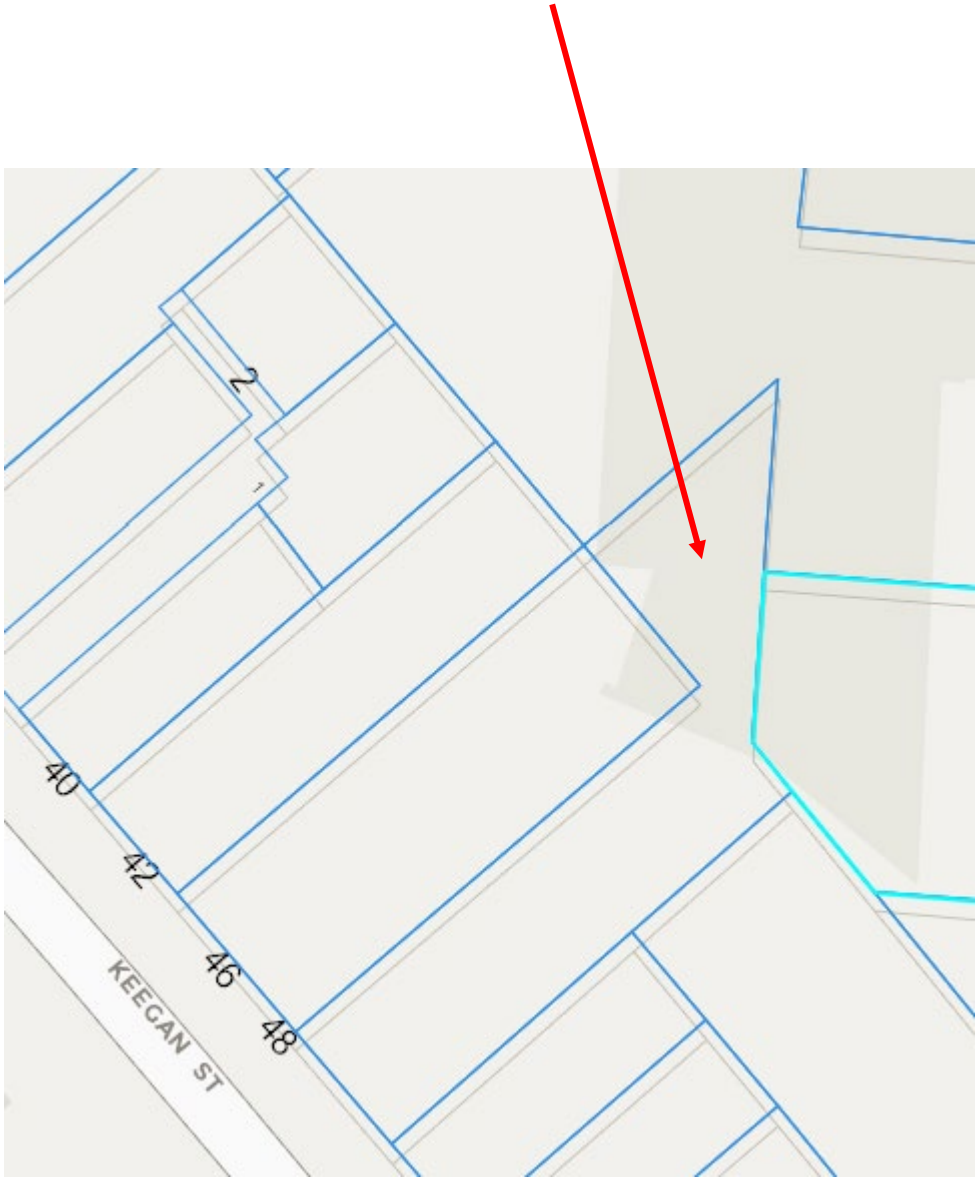
ST.

1932 ASSESSOR'S MAP

CATIC

2020 ASSESSOR'S MAP



SURVEY EXCEPTION

“Discrepancies, conflicts in boundary lines, shortages in area, easements not shown by the Public Records, encroachments, and facts which an accurate survey and inspection of the Land would disclose…”

QUESTIONS?

QUESTIONS?

mkido@catic.com
(781) 703-2990

Caselaw Developments 2022

Denise A. Chicoine
Englander & Chicoine P.C.
One Boston Place, Suite 2600
Boston, MA 02108
(617) 723-7440

Sousa v. Brownell, LC 74, 2022 WL 4282336

Facts
Plaintiffs claim that their property, located off Bark Street in Swansea abuts Vine Street in Somerset

- if true, Defendants lose 30-foot wide strip of their property located at 1345 Vine Street, Somerset
- if not true, Plaintiffs' property landlocked

Sousa v. Brownell

Facts (cont.)

first conveyance of Sousa Property is 1843 Deed with description:

A certain lot of wood land **situated in Swansey**, and bounded as follows, beginning at the northwest corner of said lot, by land belonging to the heirs of Benjamin Slade, thence south nine & a half degrees west by the highway leading from Swansey Village to Dighton, thirteen rods[1] & six tenths to William Slade's land, thence easterly by William Slade's land ninety two rods and eight tenths **to Somerset line**, thence north nine and a half degrees east **by said line** eleven rods and three tenths to land of the heirs of Benjamin Slade, thence north eighty six and one quarter degrees west ninety two rods and eight tenths by said heirs land to the highway and first mentioned corner, containing seven acres and thirty rods be the same more or less.

Sousa v. Brownell

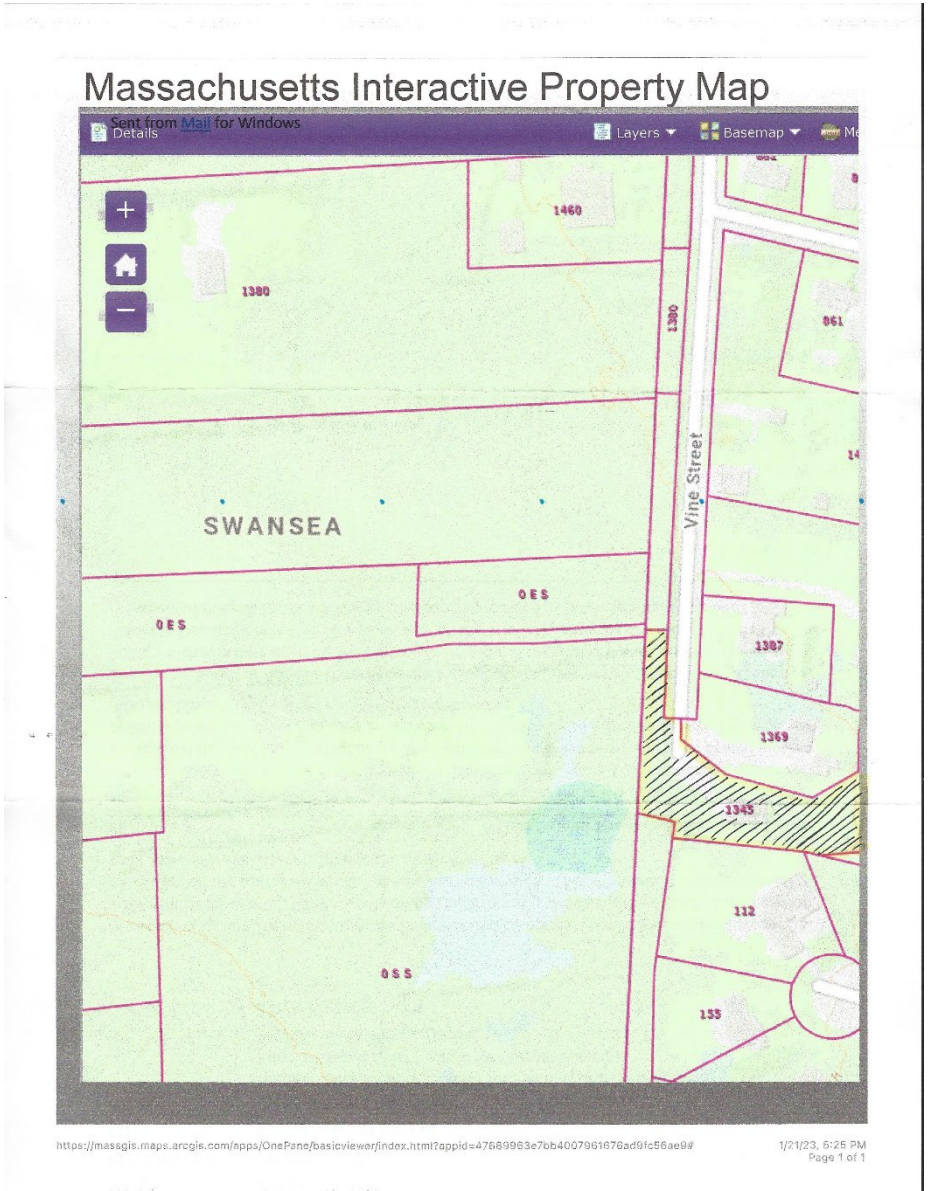
Facts (cont.)

1852 “Map Of Bristol County Massachusetts Based On The Trigonometrical Survey Of The State The Details From Original Surveys Under The Direction Of H.F. Walling C.E. C. & A. Taber”

shows that Swansea/Somerset town line does not follow any road, is abutted by only one house toward its northerly terminus, and appears to be otherwise undeveloped

Sousa v. Brownell

Sousa v. Brownell



Sousa v. Brownell

Facts (cont.)

Extensive historical documents showed no indication since the incorporation of town of Somerset in 1789 that town line between Somerset-Swansea had been altered or relocated

Since 1843, every deed of Sousa Property recites that the land is located “in the town of Swansea” and bounded on its easterly side along a course running to or by “Somerset line”

Sousa v. Brownell

Facts (cont.)

Prior owner of Sousa Property acquired adjoining tract of land in 1910 and combined both lots in 1926 conveyance and going forward (1938, 1947)

1974 Taking by Town of Somerset

shows easterly boundary of Sousa Property as running along a wall for most of its length and the town line as some twenty-nine feet west of the wall

>appeared to be based on confusion in Brownell's chain of title, all in Somerset

Sousa v. Brownell

Facts (cont.)

In reliance on town taking, Plaintiffs prepared a plan in 2013, which divided Sousa Property into two lots:

* Lot 1, with a house and frontage on Bark Street in Swansea containing 4.45 acres; and

* Lot 2, vacant lot containing 10.93 acres, northeast corner of which is shown as having **104.64 feet of frontage on Vine Street in Somerset**

>Plaintiffs conveyed Lot 1, leaving Lot 2 without access to Bark Street and with its only access, if any, on Vine Street

Sousa v. Brownell

Issue

sole issue is boundary location between Sousa Property and Brownell Property

analysis calls for examination of deeds in Plaintiffs' chain of title, with focus on first deed
--first deed establishes what was conveyed: subsequent deeds can convey less, but they cannot convey more

Sousa v. Brownell

Rules of Deed Construction

hierarchy of priorities:
descriptions that refer to monuments control over those that use courses and distances

descriptions that refer to courses and distances control over those that use area

descriptions of area seldom are a controlling factor.

Sousa v. Brownell

Rules of Deed Construction (cont.)

If strict adherence to monuments creates result plainly inconsistent with intention of the parties as expressed by all the terms of the grant, then courses and distances may control

A town line can be a monument

Sousa v. Brownell

Rules of Deed Construction (cont.)

Parol evidence is perfectly competent to fix, identify, or locate any boundary, object, or mark called for by a deed

Sousa v. Brownell

Analysis

Plaintiffs' deeds from 1843 Deed forward, describe the land as situated in Swansea, not Swansea and Somerset, and describe the easterly boundary of that land as the Somerset line

Somerset line is a monument

land here was undeveloped in 1800s such that town line was the only monument

Sousa v. Brownell

Analysis

Somerset line established with the incorporation of Somerset in 1789

physical monuments establishing it are marked back to at least 1825

appears on the 1852 Map and the 1858 Map, which are described as being based on a trigonometrical survey

Sousa v. Brownell

Holding

Plaintiffs cannot own more than was conveyed by original grantor of First Tract

=boundary between Sousa Property and Brownell Property is Swansea-Somerset town line

Lord v. Town of Orange, LC 37, 2022 WL 2072127

Facts

Plaintiff owns over forty (40) acres that straddles the boundary between Orange and Warwick. Land surrounds a pond, called Johnsonian Pond, and is largely undeveloped with woods and fields

Johnsonian Pond Road ("JPR") is the primary means of access to Lord Property

portion of JPR that crosses Lord Property is part of a public "highway" laid out in 1761

Lord v. Town of Orange

Facts (cont.)

JPR crosses Lord Property for a distance north and northwest, until reaching a point close to a northwest corner of the Lord Property. Property's boundary in that area runs east/west and follows the Orange-Warwick town line. At the time of trial, JPR continued to the northwest past the town line, but as JPR approached the town line from the south, and as it continued past the town line, JPR became steadily narrower and more overgrown. At a point north of the town line, JPR became impassable to vehicles

Lord v. Town of Orange

Facts (cont.)

1761 Layout contains 70 courses for JPR from Pequoiag to Winchester. Each course follows written compass bearings and distances. The starting point, however, is “a Beech Tree marked JH:DF:JB:JR:ES,” standing “in Belcher’s farm in the South Line of Winchester.” The 1761 Layout lists only three other monuments over its 70 courses. The road was to be “six rods in width,” which corresponds to 99 feet

Lord v. Town of Orange

Facts (cont.)

1761 Layout's compass bearings are "even," meaning each can vary ± 0.5 degrees; and its distances are to "even" rods, meaning each can vary ± 0.5 rods (that is, 8.25 feet). The lack of monuments, the error range of the 1761 Layout's 70 courses,12 and the varying terrain one finds between Winchester and Athol make it difficult to replicate, 260 years after the fact, the 1761 committee's intended route of the road from Winchester to Pequoiag.

Lord v. Town of Orange

Facts (cont.)

Surveyor nevertheless prepared a “poly line” using the 1761 Layout’s courses and its few fixed monuments. The poly line provides a useful graphic presentation of the shape of the 1761 Layout. That shape corresponds roughly with roads or traces of roads that, by the time of trial, other maps or surveyors had called part of the 1761 Layout or other “discontinued” public ways

Lord v. Town of Orange

Facts (cont.)

Among other historical records JPR appears on two road maps found at the Library of Congress, one dated 1858 and the other 1894. The maps show JPR in its present location on the Lord and Elwood Properties.

Lord v. Town of Orange

Facts (cont.)

Numerous Franklin County maps from 1924 to present show JPR as discontinued

turnpikes were built in 1800 and 1806, creating two roughly parallel roads in Warwick and Orange that were of better quality than JPR

Lord v. Town of Orange

Facts (cont.)

Mr. Lord recalls travelling JPR south from the JPR Junction to the Lord Property as early as the 1960s

At present, at many locations along what the Lords contend is the 1761 Layout, there were ancient stone walls on both sides of the layout. The distance between those walls was, however, considerably less than 99 feet. The width of the walled-in area on the Lord Property, for example, is approximately 50 feet.

Lord v. Town of Orange

Facts (cont.)

Lord wants to improve JPR and lay utilities

Abutter Elwood objects, claiming he owns fee in JPR and it is private way

Lord v. Town of Orange

Issues

whether JPR, which serves as access to the Lord Property, is a county or town public way

if JPR isn't a public way, whether the Lords have an easement over a part of JPR that crosses the Elwood and Johnson properties

Lord v. Town of Orange

Caselaw Rules

burden to prove scope and nature of easement rights rests with party claiming easement

extent of easement arising by prescription is fixed by use through which it was created

right to lay utilities in a way does not arise as a necessary incident to right to pass and repass

Lord v. Town of Orange

Caselaw Rules

Discontinuance of county ways by one of three methods:

- operation of statute
- express decision of a public authority
- alteration: decisions to widen, straighten, or otherwise change existing highway's layout

Lord v. Town of Orange

Caselaw Rules

discontinuation by implication: where a strict application of discontinuance elements would lead to "surviving segments of disconnected road ... serving no apparent remaining use" the entire road may be declared discontinued

When a public road is discontinued owners of directly abutting lands reacquire full ownership interest in the roadbed

Lord v. Town of Orange

Analysis

deeds of parties' predecessors in interest describe JPR as "old road" or "old county road," instead of simply "the county road."

plans admitted at trial of non-party surveyors who studied other parts of the 1761 Layout uniformly conclude (or assume) the 1761 Layout had been discontinued

in each instance where a surveyor concluded that a part of the 1761 Layout had been discontinued, close by there's a long-established, somewhat parallel, public way

Lord v. Town of Orange

Analysis

Franklin County's neglect of JPR has gone on for decades and maps in evidence document the steady decline of JPR

ancient stone walls on either side of the Layout less than prescribed width of 99 feet likely reflect that at some point over the last 260 years, those owning properties along 1761 Layout concluded it had been discontinued and that they were free to build encroaching walls

Lord v. Town of Orange

Holding

JPR has been discontinued as a county way

Lord has established easement by prescription sixteen (16) feet wide

Here, easement by prescription includes right to bring utilities to Lord Property via utility poles that stood along JPR

Lord v. Town of Orange

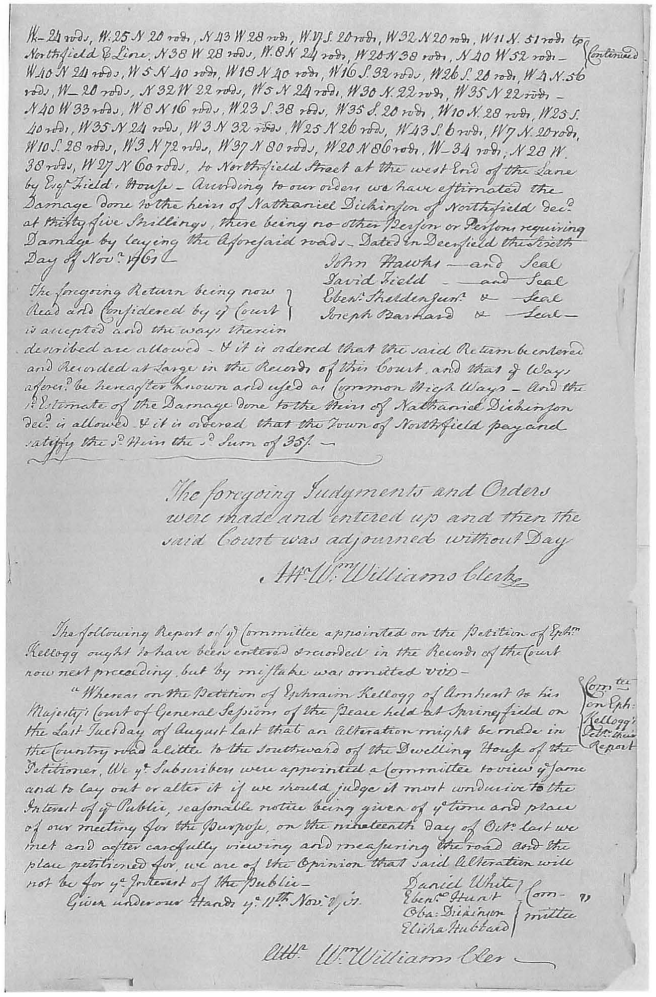
283\. To Daniel Sacket Twenty one Shillings - - - - - - - - - - - £1.1.0 -
given under our Hands and Seals this eleventh day of November 1761 -

Joseph Mirick - and Seal
Ebenr. Hunt - & Seal
Benja. Day - & Seal
John Marganfur. & Seal
Nathl. Clark - & Seal -

The foregoing return was now read
and Considered by the Court and it is
allowed by the Court & it is ordered yt
the same return be entered & recorded
on the Records of this Court and the ways therein described hereafter
known and used as Common High Ways. It is also ordered that ye whole
of the old Country road leading from Suffield Bounds to Northampton
bounds, except so much of the same as is contained and reserved for a
High Way in the foregoing return shall be and hereby is discontinued -
Also ordered that the foregoing estimate of Damages occasioned to ye several
Persons abovenamed by the laying the abovesaid new road be accepted &
that ye Town of Westfield pay and satisfy ye same &ca

High Way from Winchester to Pequoiag — Whereas we the Subscribers were appointed, by the Court of General Sessns
of the Peace at their Session at Springfield on the nineteenth of May 1761,
a Committee to view and lay out a Country road from Pequoiag thro Roxbury
Canada to Winchester, and also from the aforesaid Road into Northfield
if We judged it necessary pursuant to our orders from the said Court of Genl.
Sessions we have viewed and laid the same as follows vizt. We began at
a Beech Tree marked IH: DF: IB: IR: ES: The Tree stands in Belchers
farm in the South Line of Winchester - N:B: The road from Pequoiag to
Width — Winchester is to be Six rods in width - from sd Tree it runs. S: 28: E: 20 rods
then S: 13: E. 60 rods, S: 7: W. 24 rods, S: 18: E. 123 rods, S: 10: W. 32 rods S - 22 rods,
S: 25: E. 24 rods miry brook, S: 29: W. 20 rods, S: 12: W. 20 rods, S: 31: E: 62 rods S:
12: E. 24 rods, S: 40: E: 54 rods, E: 37: S. 40 rods, S: 23: E: 16 rods Goodales House
S: 40: E. 92 rods, S: 43: E. 34 rods, S: 22: E. 26 rods, E: 30: S. 16 rods, E: 40: S. 20 rods,
E. 0 - 38 rods, S: 20: E. 20 rods, E: 26: S. 18 rods, E: 15: S. 30 rods, N: 5: E. 8 rods, E: 18: S.
28 rods, S: 15: E. 42 rods, S: - 76 rods, S: 13: E. 28 rods, S: 28: E. 34 rods, S: 45. E. 10 rods,
S: 18: E. 44 rods S: 20. E. 10 rods, S - 46 rods, S: 28: E. 44 rods, S: 18: E: 38 rods, S: 30 E. 24
rods, S: 16: E: 160 rods, S: 35: E. 62 rods, S: 40. E. 76 rods, S: 20 E. 34 rods, S: 39: E. 40 rods,
S: 22. E: 48 rods, S: 44. E. 52 rods, S: 30. E. 20 rods, S: 34. E. 28 rods, S. 21. E. 26 rods, S: 38. E.
14 rods, S - 18 rods, S: 35: E: 46 rods, E: 28: S. 20 rods, S: 27: E. 44 rods, S: 20: E: 18 rods S.
29: E: 26 rods, S: 18: E: 14 rods, E: 38: S. 26 rods, S: 24: E: 16 rods, S: 38: E: 40 rods, S - 34 rods,
S: 10: E. 42 rods, S: 5: E. 40 rods, S: 25: E. 20 rods, E: 30: S: 22. rods, E: 36: S. 20 rods, S: 27: E
42 rods, S: 15: E. 32 rods, S: 28: E. 42 rods, E: 36: S. 28 rods, E - 22 rods, S: 44 E. 28 rods, E: 25: S.
26 rods, This last Course strikes Pequoiag Line at the Southeast Corner of Roxbury
Canada — In the Road from Pequoiag to Winchester the Cross road begins
High Way from the road afores. to ye Street in Northfield — South of the Causey and Runs W: 30: N: 36 rods to the old Fort in Mr. Evans's fields
then S: 35 W. 110 rods, W: 40: S. 26 rods, W: 15: S. 14 rods, W: 36: S. 32 rods, S. 19: W 26 rods,
S: 24: W. 68 rods, W: 35: N: 30 rods, W: 45: S. 38 rods, to a Rock on the Top of the Hill
north of the Meeting House, The Cross Road is to be four rods in Width from
Width different — the East End to Roxbury Canada meeting House, from Roxbury Canada
meeting House to the foot of Round mountain in Northfield, is to be Six
Rods in width and from thence to Northfield Street is to be four rods in
Width. from sd Rock S: 25: W. 16 rods, W: 38: S. 30. rods, W: 14: S. 34 rods, W: 35. N. 36
rods, W: 30: S: 38 rods, to South End of Little Grass, W. 4: S. 30 rods, W: 40 N. 40 rods,
N 31 W. 32 rods, W: 15. N. 44 rods, W 5 N. 50 rods, W 20 N 49 rods, W 4 N 100 rods, W. 1. N
182 rods, W 15 N. 52 rods, W 45 N 16 rods, W 17 N 44 rods, W 4 N 24 rods, W 10 S. 38 rods, W -

Lord v. Town of Orange



W– 24 rods, W. 25 N 20 rods, N 13 W 28 rods, W 17 S. 20 rods, W 32 N 20 rods, W 11 N. 51 rods to Northfield S. Line, N 38 W 28 rods, W. 8 N 24 rods, W 24 N 30 rods, N 40 W 52 rods – W 40 N 24 rods, W 5 N 40 rods, W 18 N 40 rods, W 16 S 32 rods, W 26 S 28 rods, W 4 N. 56 rods, W– 20 rods, N 32 W 22 rods, W 5 N 24 rods, W 30 N 22 rods, W 35 N 22 rods, – N 40 W 33 rods, W 8 N 16 rods, W 23 S 38 rods, W 35 S. 20 rods, W 10 N 28 rods, W 23 S. 40 rods, W 35 N 24 rods, W 3 N 32 rods, W 25 N 26 rods, W 43 S 6 rods, W 7 N. 20 rods, W 10 S 28 rods, W 3 N 72 rods, W 37 N 80 rods, W 20 N 86 rods, W– 34 rods, N 20 W. 38 rods, W 27 N 60 rods, to Northfield Street at the west End of the Lane by Eq^r Field's House – According to our orders we have estimated the Damage done to the heirs of Nathaniel Dickinson of Northfield dec^d at Fifty five Shillings, there being no other Person or Persons requiring Damage by laying the aforesaid road – Dated in Deerfield this 26th Day of Nov^r 1761 –

John Hawks — and Seal
David Field — and Seal
Eben^r Thelden Just^s & — Seal
Ansel Parshall & — Seal

The foregoing Return being now Read and Considered by y^e Court is accepted and the ways therein described are allowed – & it is ordered that the said Return be entered and Recorded at Large in the Records of this Court, and that y^e Ways aforesaid be hereafter known and used as Common Publick Ways – And the Estimate of the Damage done to the heirs of Nathaniel Dickinson dec^d is allowed & it is ordered that the Town of Northfield pay and satisfy the same the Sum of 35^f –

The foregoing Judgments and Orders were made and entered up and then the said Court was adjourned without Day

Att^d Wm Williams Clerk

The following Report of y^e Committee appointed on the Petition of Eph^m Kellogg ought to have been entered & recorded in the Records of the Court now next preceding but by mistake was omitted viz^t –

Com^tee on Eph^m Kellogg's Petition Report

"Whereas on the Petition of Ephraim Kellogg of Amherst to his Majesty's Court of General Sessions of the Peace held at Springfield on the Last Tuesday of August last that an alteration might be made in the Country road a little to the Southward of the Dwelling House of the Petitioner, We y^e Subscribers were appointed a Committee to view y^e same and to lay out or alter it if we should judge it most conducive to the Interest of y^e Public, reasonable notice being given of y^e time and place of our meeting for the Purpose, on the nineteenth Day of Oct^r last we met and after carefully viewing and measuring the road and the place petitioned for, we are of the Opinion that said Alteration will not be for y^e Interest of the Public –

Given under our Hands y^e 11th Nov^r A^o D^o

Daniel White
Eben^r Hunt
Oba: Dickinson
Elisha Hubbard
} Com-mittee

Att^d Wm Williams Cler

Lord v. Town of Orange

Transcribed Description of Hampshire County Vol. 6, Pg. 283

HighWay from Winchester to Pequoiag [Marginal Reference]

Whereas we the Subscribers were appointed, by the Court of General Sessns of the Peace at their Session at Springfield on the nineteenth of May 1761, a Committee to view and lay out a Country road from Pequoiag thro Roxbury Canada to Winchester, and also from the aforesaid Road into Northfield if We judged it necessary, pursuant to our orders from the said Court of Genl Sessions we have viewed and laid the same as follows viz: We began at a Beech Tree marked JH:DF:JB:JR:ES: The Tree stands in Belcher's farm in the South Line of Winchester _ N:B: The road from Pequoiag to Winchester is to be six rods in width _ from sd. Tree it runs.

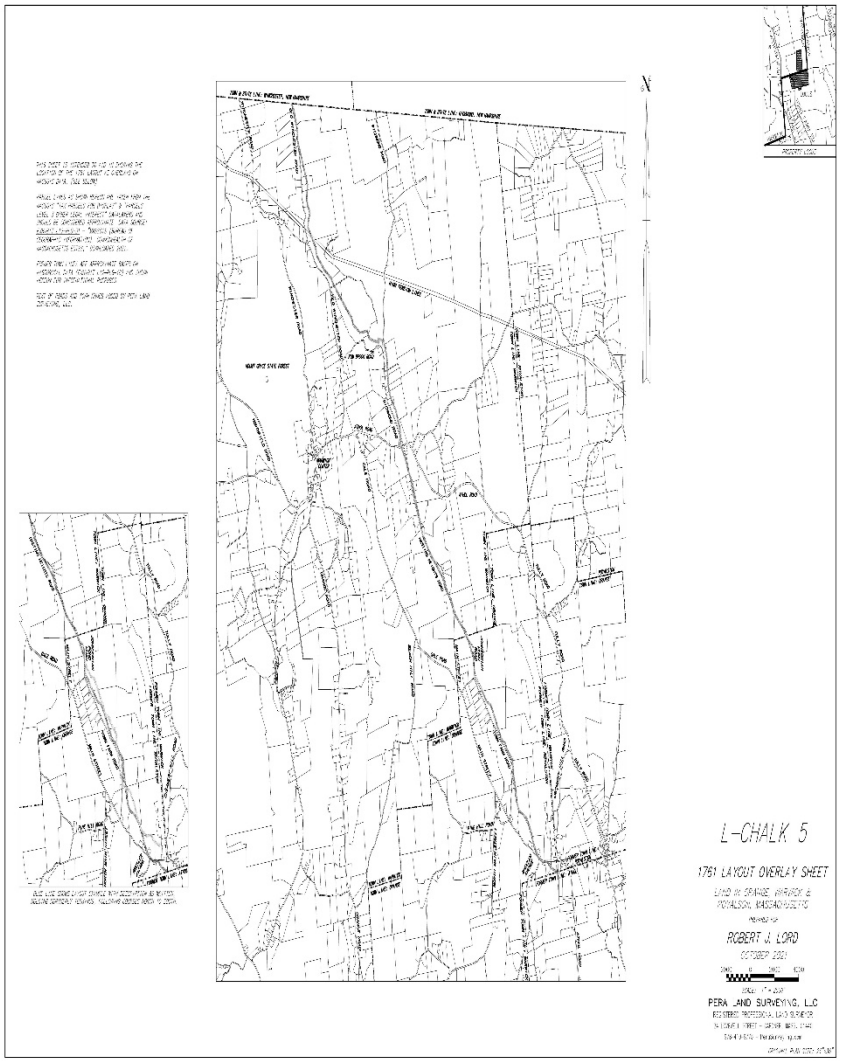
Course No.	Bearing (as transcribed)		Distance (rods) (as transcribed)	Bearing (common)		Distance (feet) (as converted)
(1)	S 28 E	:	20 rods then	S 28 E	:	330'
	S 13 E	:	60 rods,	S 13 E	:	990'
	S 07 W	:	24 rods,	S 07 W	:	396'
	S 18 E	:	123 rods,	S 18 E	:	2029.5'
	S 10 W	:	32 rods,	S 10 W	:	528'
	S	:	22 rods,	S	:	363'
	S 25 E	:	24 rods miry brook	S 25 E	:	396'
	S 29 W	:	20 rods,	S 29 W	:	330'
	S 12 W	:	20 rods,	S 12 W	:	330'
	S 31 E	:	62 rods,	S 31 E	:	1023'
(11)	S 12 E	:	24 rods,	S 12 E	:	396'
	S 40 E	:	54 rods,	S 40 E	:	891'
	E 37 S	:	40 rods,	S 53 E	:	660'
	S 23 E	:	16 rods Goodales House	S 23 E	:	264'
	S 40 E	:	92 rods,	S 40 E	:	1518'
	S 43 E	:	34 rods,	S 43 E	:	561'
	S 22 E	:	26 rods,	S 22 E	:	429'
	E 30 S	:	16 rods,	S 60 E	:	264'
	E 40 S	:	20 rods	S 50 E	:	330'
	E 0	:	38 rods,	E	:	627'
(21)	S 20 E	:	20 rods,	S 20 E	:	330'
	E 26 S	:	18 rods,	S 64 E	:	297'
	E 15 S	:	30 rods,	S 75 E	:	495'
	N 05 E	:	8 rods,	N 05 E	:	132'
	E 18 S	:	28 rods,	S 72 E	:	462'
	S 15 E	:	42 rods,	S 15 E	:	693'
	S	:	76 rods,	S	:	1254'
	S 13 E	:	28 rods,	S 13 E	:	462'
	S 28 E	:	34 rods,	S 28 E	:	561'
	S 45 E	:	10 rods,	S 45 E	:	165'

Lord v. Town of Orange

(31)	S 18 E	:	44 rods,	S 18 E	:	726'
	S 20 E	:	10 rods,	S 20 E	:	165'
	S	:	46 rods,	S	:	759'
	S 28 E	:	44 rods,	S 28 E	:	726'
	S 18 E	:	38 rods,	S 18 E	:	627'
	S 30 E	:	24 rods,	S 30 E	:	396'
	S 16 E	:	160 rods,	S 16 E	:	2640'
	S 35 E	:	62 rods,	S 35 E	:	1023'
	S 40 E	:	76 rods,	S 40 E	:	1254'
	S 20 E	:	34 rods,	S 20 E	:	561'
(41)	S 39 E	:	40 rods,	S 39 E	:	660'
	S 22 E	:	48 rods,	S 22 E	:	792'
	S 44 E	:	52 rods,	S 44 E	:	858'
	S 30 E	:	20 rods,	S 30 E	:	330'
	S 34 E	:	28 rods,	S 34 E	:	462'
	S 21 E	:	26 rods,	S 21 E	:	429'
	S 38 E	:	14 rods,	S 38 E	:	231'
	S	:	18 rods,	S	:	297'
	S 35 E	:	46 rods,	S 35 E	:	759'
	E 28 S	:	20 rods,	S 62 E	:	330'
(51)	S 27 E	:	44 rods,	S 27 E	:	726'
	S 20 E	:	18 rods,	S 20 E	:	297'
	S 29 E	:	26 rods,	S 29 E	:	429'
	S 18 E	:	14 rods,	S 18 E	:	231'
	E 38 S	:	26 rods,	S 52 E	:	429'
	S 24 E	:	16 rods,	S 24 E	:	264'
	S 38 E	:	40 rods,	S 38 E	:	660'
	S	:	34 rods,	S	:	561'
	S 10 E	:	42 rods,	S 10 E	:	693'
	S 05 E	:	40 rods,	S 05 E	:	660'
(61)	S 25 E	:	20 rods,	S 25 E	:	330'
	E 30 S	:	22 rods,	S 60 E	:	363'
	E 36 S	:	20 rods,	S 54 E	:	330'
	S 27 E	:	42 rods,	S 27 E	:	693'
	S 15 E	:	32 rods,	S 15 E	:	528'
	S 28 E	:	42 rods,	S 28 E	:	693'
	E 36 S	:	28 rods,	S 54 E	:	462'
	E	:	22 rods,	E	:	363'
	S 44 E	:	28 rods,	S 44 E	:	462'
(70)	E 25 S	:	26 rods,	S 65 E	:	429'

This last Course strikes Pequoiag Line at the Southeast Corner of Roxbury Canada.

Lord v. Town of Orange



Moriarty v. Resor, 2022 WL 1718802

Facts

properties at issue are subdivided from multi-acre mansion parcel in Lexington

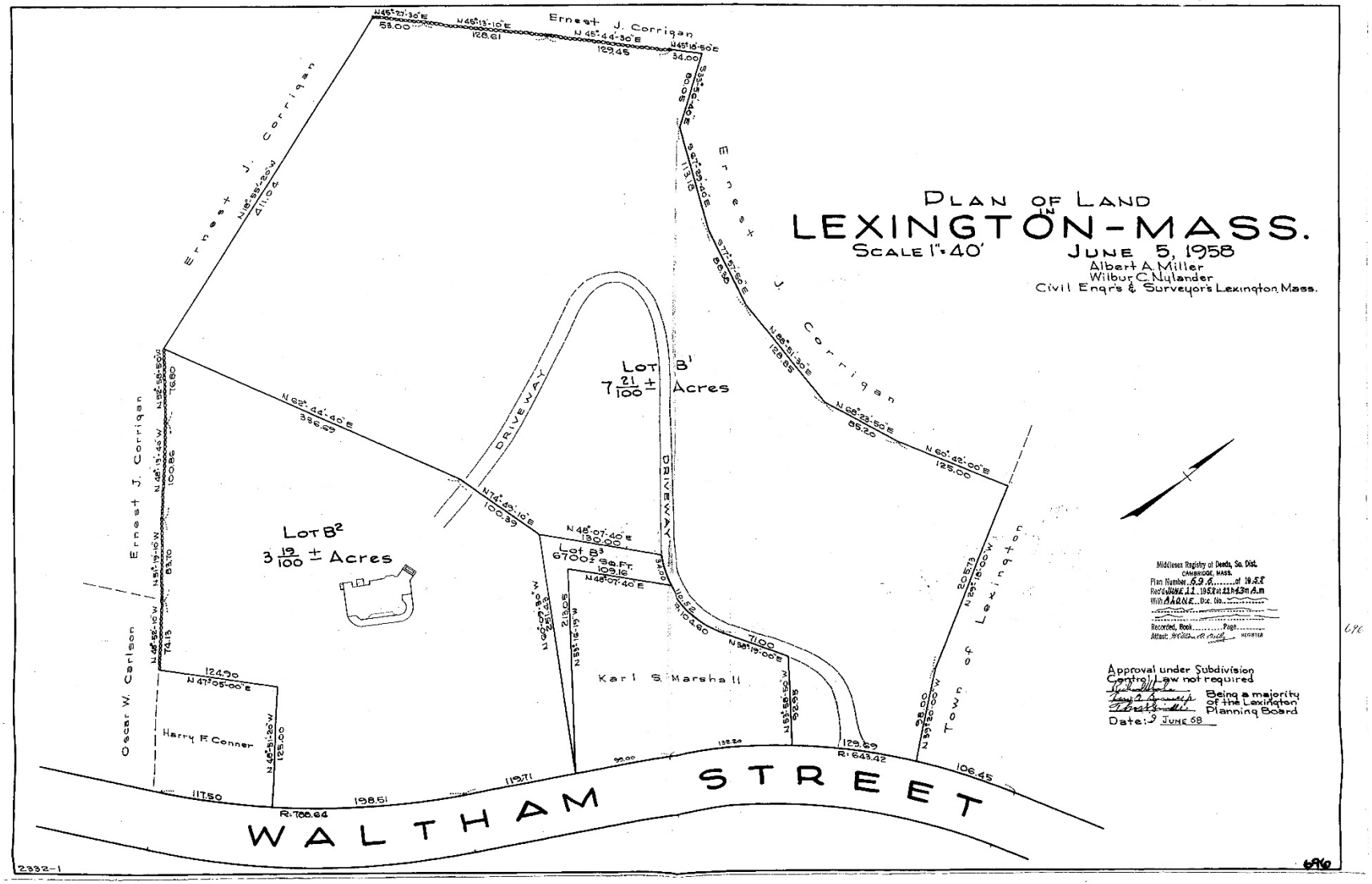
1891 Bushnell mansion can only be reached by a long, winding, uphill driveway

In 1958, the Bushnells created three large lots, one for the mansion and two buildable lots

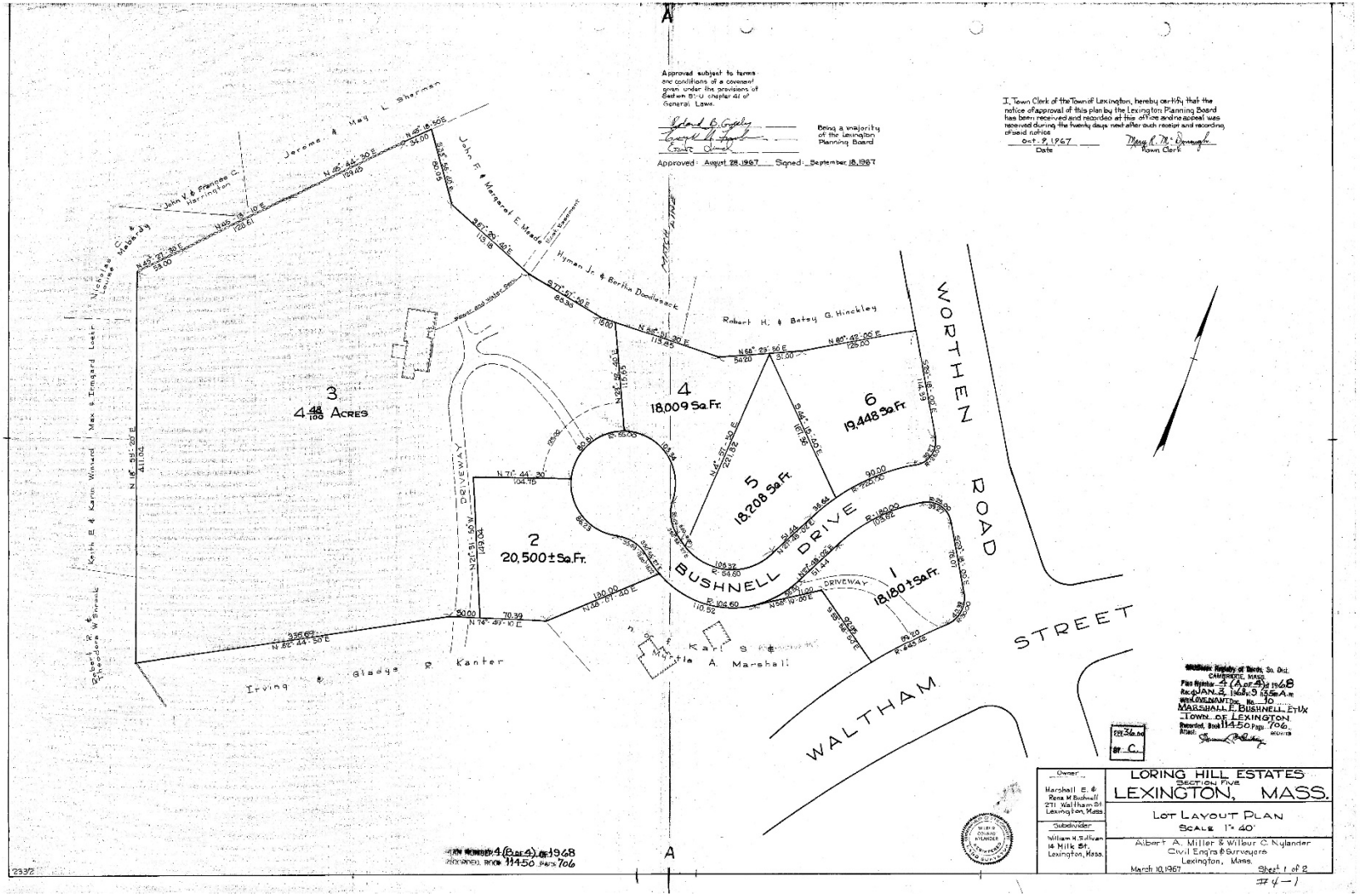
1958 Driveway started on Waltham Street, becames part of the boundary between Lot B1 and Lot B3, winds through Lot B1 and ends within Lot B2, the mansion lot

Moriarty v. Resor

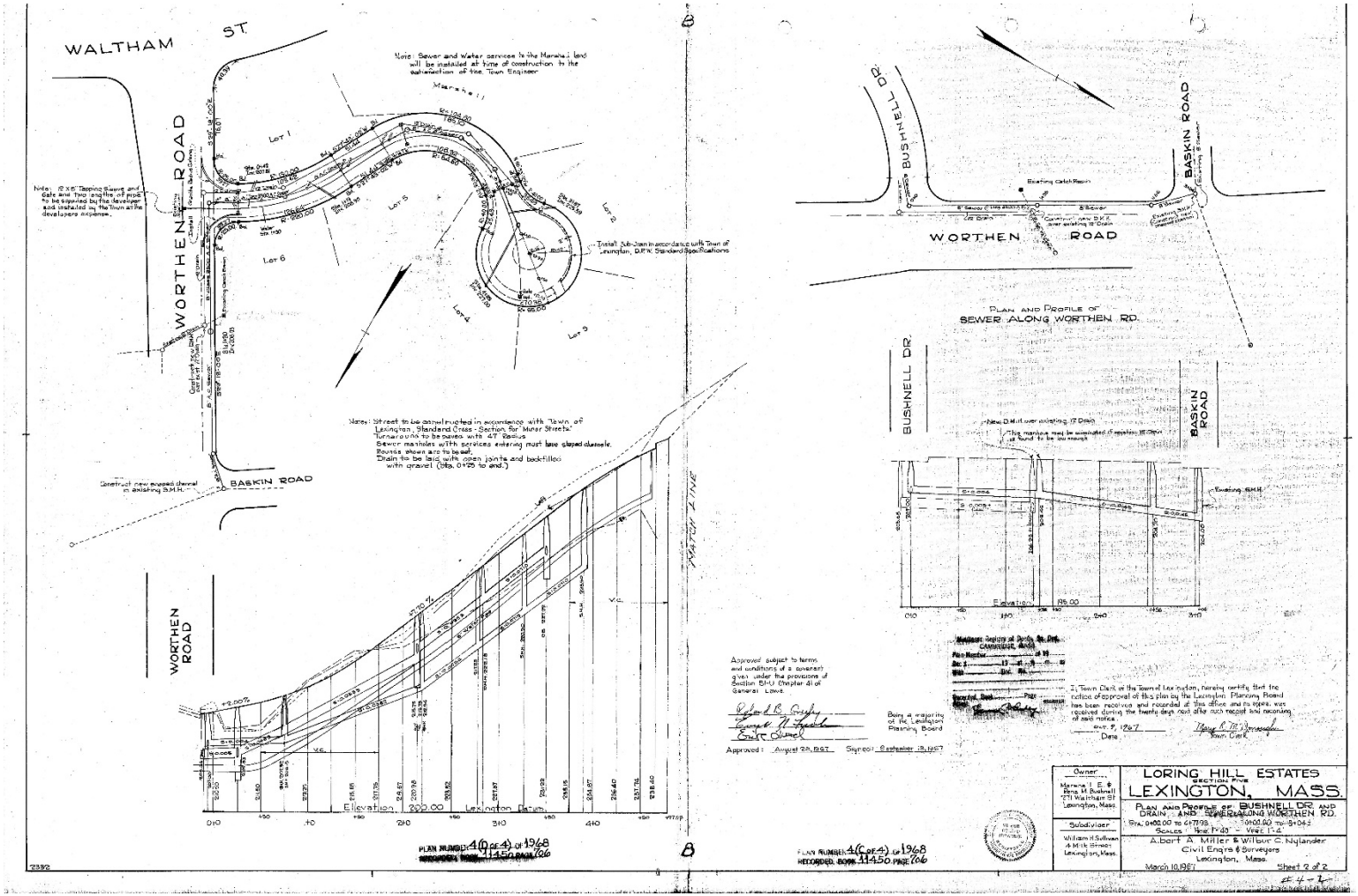
Moriarty v. Resor



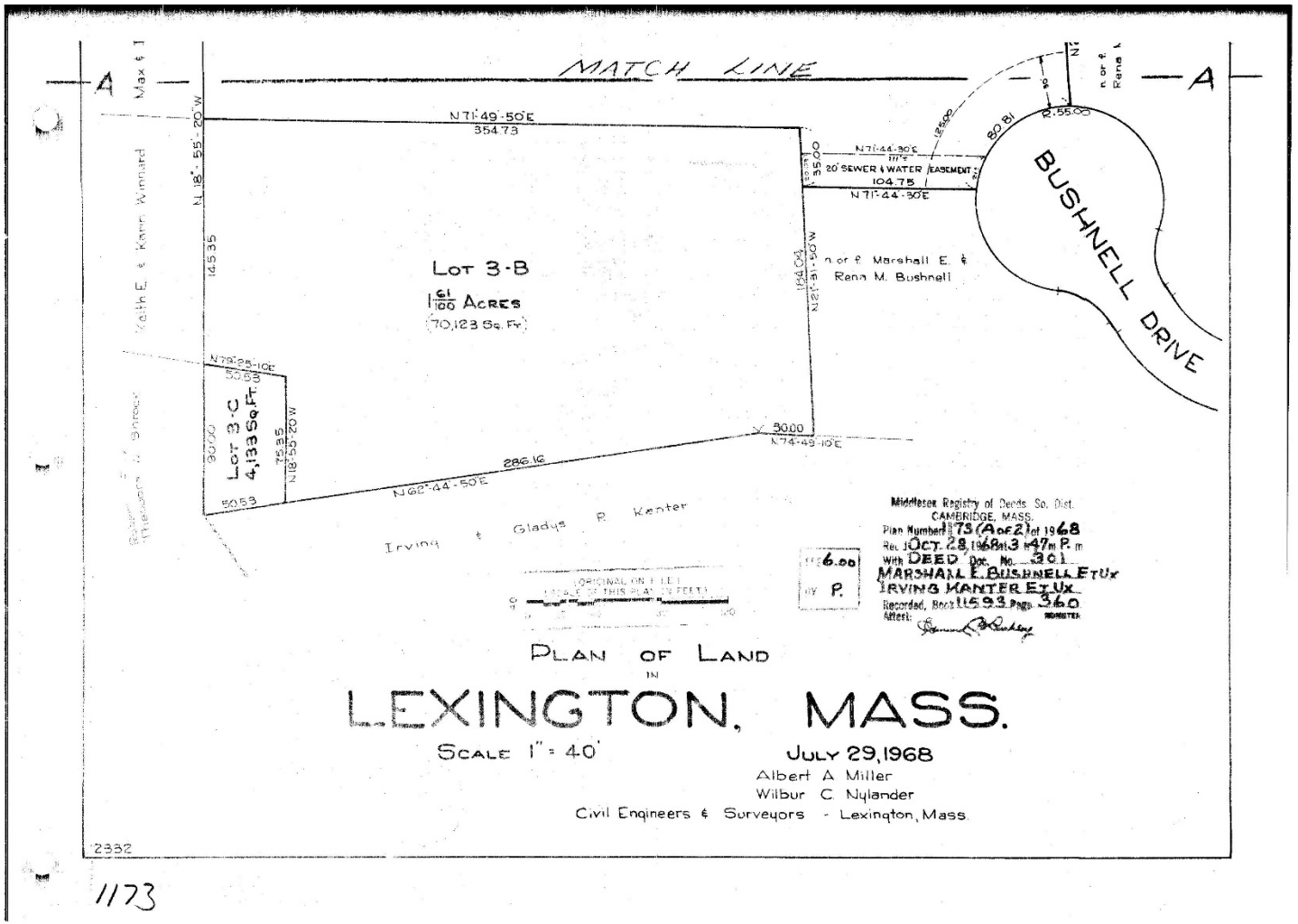
Moriarty v. Resor



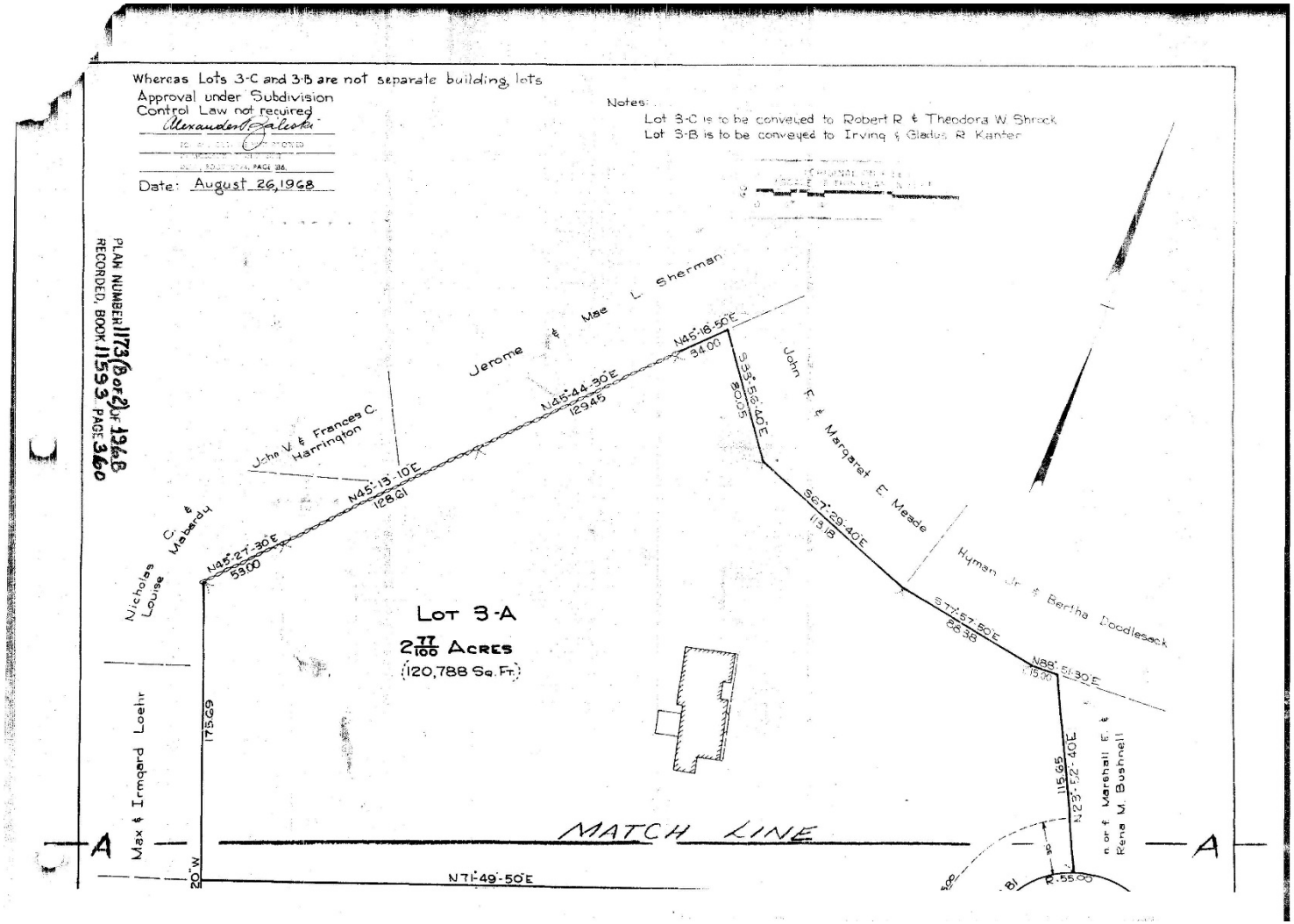
Moriarty v. Resor



Moriarty v. Resor



Moriarty v. Resor



Moriarty v. Resor

Facts (cont.)

In 1960, Lexington took a strip of land along northeastern side of Lot B1 to create Worthen Road, which intersects Waltham Street east of where the 1958 Driveway intersected Waltham Street.

1967 Bushnells subdivided Lot B1 into six lots and created a roadway known as Bushnell Drive

Bushnell Drive followed the 1958 Driveway from Worthen Road to new cul-de-sac, then crossed new Lot 3-B same manner as 1958 Driveway crossed former Lot B1 until the Driveway reaches mansion on Lot B2

Moriarty v. Resor

Facts (cont.)

1968 Bushnells sold one of six new lots, Lot 3-B, to Defendants' predecessor

Lot 3-B deed refers to a plan which shows no frontage for Lot 3-B on Bushnell Drive, and doesn't show any driveways reaching Lot 3-B

Lot 3-B deed nevertheless states that the lot is "conveyed subject to" the grant of the easement for the 1958 Driveway.

none of the plans of record depict or describe the driveway's width

Moriarty v. Resor

Facts (cont.)

existing driveway approximately ten (10) feet wide

Defendants seek to build single-family residence Lot on 3-B using same driveway that currently leads to mansion

Defendants claim driveway doesn't provide easy passage for emergency vehicles to reach the Mansion and want to widen to eighteen (18) feet and change the grade

Plaintiffs oppose the driveway-improvement plans

Moriarty v. Resor

Issues

- location and scope of implied 1968 easement
  --includes right to construct and access single-family residence on Lot 10E?

- whether Plaintiffs have unreasonably interfered with rights under 1968 easement or 1958 Driveway easement

Moriarty v. Resor

Rules

every implied easement arises out of a use existing at the time of severance of the dominant and servient estates

<u>necessary conditions for implied easement</u>

1. dominant and servient estates start in common ownership
2. lot is split and no longer in common ownership
3. a use existed prior to conveyance for the benefit of one lot; and
4. continued similar use is reasonably necessary for dominant estate

Moriarty v. Resor

implied easement arises not so much from necessity alone as from presumed intention of parties

presumed intention

- language of the instruments
- circumstances attending their execution
- physical condition of the premises
- parties' knowledge

Moriarty v. Resor

Analysis

parties agreed at trial that the Current Driveway runs where the 1958 Driveway did, and no one suggested that someone built different driveway between 1958 and 1968

In 1968 original driveway was still crossing Lot 3 and Lot 3 had been using the driveway

when Bushnells severed Lot 3-B from Lot 3, Lot 3-B didn't have any means of access to a public way aside from 1958 Driveway

Moriarty v. Resor

Holding

1968 easement same location as 1958 driveway

1968 implied easement for construction of and access to single-family residence

1958 easement is general in nature, which dominant estate can improve, widen, or change in grade

Moriarty v. Resor

Moriarty v. Resor

Moriarty v. Resor

Surveyors as Expert Witnesses in Litigation

Jeffrey B. Loeb, Esq.

Rich May, PC

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

MIDDLESEX, ss. 20 MISC 000519 (MDV)

KURT M. ROTHSCHILD and
PAULA D. ROTHSCHILD, as trustees of the
51 Edgewood Road Realty Trust,

Plaintiffs/Counterclaim-Defendants,

v.

MELISSA S. WOLF and DAVID WOLF,

Defendants/Counterclaim-Plaintiffs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Rule 52, Mass. R. Civ. P.)

The parties to this dispute – plaintiffs Kurt M. Rothschild and Paula D. Rothschild, as Trustees of the 51 Edgewood Road Realty Trust (the "Rothschilds") and defendants Melissa S. Wolf and David Wolf (the "Wolfs") – own abutting residential properties in Wayland, beside the waters of Lake Cochituate, at 51 and 47 Edgewood Road, respectively. Both properties are the product of a 145-lot subdivision shown on a 1915 plan appropriately titled "Shore Acres Wayland-Framingham."

In 2013-2014, the Wolfs installed a shed on the side of 47 Edgewood Road that's closest to 51 Edgewood Road. While they thought they were building on land they owned, they or their contractors removed fenceposts to make room for the shed – a strong hint that their assumption

about ownership might be incorrect. The Wolfs nevertheless threw caution to the wind and didn't hire a surveyor to confirm their hunch.

The Wolfs' removal of the fenceposts irritated the Rothschilds. They'd replaced the posts in 2004 and earlier in 2013, when one of the Wolfs' contractors had removed them. Mr. Rothschild confronted Mr. Wolf; an argument ensued over who owned what, and seven years later, the Rothschilds sued the Wolfs in this Court. The Rothschilds sought to try and/or quiet their title to 51 Edgewood Road. They also asked for a favorable declaration concerning the location of the record boundary between the parties' properties, and for an injunctions relating to the Wolfs' alleged trespasses onto the Rothschilds' property. The Wolfs counterclaimed for a declaration favorable to them concerning the record boundary's location and, failing that, a declaration that they'd acquired part of 51 Edgewood Road through adverse possession.

On three sunny days in July 2022, the parties appeared for trial. The trial began with an early morning view of the parties' properties. Having accepted the parties' stipulations of fact, having heard their testimony and that of their witnesses, having reviewed the documents admitted into evidence, having considered what the Court saw on its view, and having heard the arguments of counsel, the Court FINDS the facts described above and those enumerated below. The Court HOLDS that the record boundary between the parties' properties is as shown on Trial Exhibit 34, a plan that depicts the boundary as the Wolfs' surveyor located it after the Rothschilds filed suit. The Court HOLDS that the Wolfs have gained no part of 51 Edgewood Road (as the Court has located that property) by adverse possession. The Court further HOLDS that the shed that precipitated this lawsuit is partly on the wrong side of the parties' legal boundary and is trespassing on the Rothschilds' land. The Court will order the shed's removal

and direct the Wolfs to pay for restoration of the fence that was there as of 2012, before the Wolfs or their contractors relocated or removed portions of the fence. The Court will not award the Rothschilds damages.

The Court further FINDS:

1. While 47 and 51 Edgewood Road descend from the Shore Acres plan, neither property corresponds to the lots shown on that plan. According to the Rothschilds' deed, Trial Exhibit 2, 51 Edgewood Road consists of the plan's Lots 51 and 52, plus "the larger portion of [the plan's] Lot 50 . . . ." According to the Wolfs' deed, Trial Exhibit 4, 47 Edgewood Road consists of the plan's Lot 49, the "Northerly portion of [the plan's] Lot 50," and "Lot B" on a plan recorded in 1978, Trial Exhibit 15 (the "1978 Plan").

2. There are three other problems with relying solely on the Shore Acres plan to determine the record boundary between 47 and 51 Edgewood Road. First, the plan doesn't contain precise metes and bounds. Instead, it shows for each of the plan's 145 lots only their front, rear, and side dimensions, plus the lot's area. One can't determine the precise location of each lot's corners or the direction of each lot's boundaries.[1] (Lots 49-52 aren't rectangles, and the plan places each inside a curve on Edgewood Road.) As a note on the Shore Acres plan cryptically warns, "Areas and dimensions are in part approximate only."

3. The second problem with relying solely on the Shore Acres plan is that in 1947, the then-owners of the plan's Lots 50-52, Lawrence L. Jewett and Lucile Jewett, sold the "Northerly portion" of Lot 50 to the then-owners of abutting Lot 49, Russell E. Deane and Dorothy L. Deane. (See Trial Exhibit 12.[2]) The Shore Acres plan (created in 1915) doesn't show where the 1950 division occurred.

4. Third, in 1952, the Town of Wayland took land from the owners of the Shore Acres lots along Edgewood Road, including those included in today's 47 and 51 Edgewood Road, to widen it from twenty feet to 40 feet and make it a public way. The taking thus altered

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[1] While the parties' deeds have what appear to be metes and bounds, many of the directions and courses simply refer to what's shown on the Shore Acres plan. The abutter calls in the parties' deeds similarly aren't controlling except with respect to the land owned by the Commonwealth that abuts both properties. See *Bernier* v. *Fredette*, 85 Mass. App. Ct. 265, 275 (2014) (abutter calls become "monuments" for purposes of construing deeds only if one can locate the abutter's property on the ground).

[2] The Rothschilds agree that when Igor S. Ocheretyanny and Irina Ocheretyanny conveyed 51 Edgewood Road to the Rothschilds individually in 2004, the deed memorializing that conveyance, Trial Exhibit 3, contained two typographical errors in its first "Northwesterly" call. The erroneous call reads (underlines added): "in a line 15 feet distant from and parallel to the common boundary line between Lots 4 and 50 on said plan, 90 feet to a point; thence turning and running still". In the 1997 deed into the Ocheretyannys, Trial Exhibit 6, the call correctly reads (underlines added): "in a line 16 feet distant from and parallel to the common boundary line between Lots 49 and 50 on said plan, 90 feet to a point; thence turning and running still". The Rothschilds' current deed, Trial Exhibit 2, perpetuates Trial Exhibit 3's erroneous Northwesterly call. The Court will enter a judgment correcting Trial Exhibit 2.

the boundary of every Shore Acres property that abuts Edgewood Road. The plan that accompanied the 1952 taking, Trial Exhibit 14, also perpetuated the uncertain boundaries of the lots at issue in this case. The 1952 plan shows one course of 51 Edgewood Road, along Edgewood Road itself, as "51±." It shows one of two courses along the boundary between the parties' properties as "86'±." It shows the areas of both 47 and 51 Edgewood Road as "±." And while the 1952 plan gives distances and bearings for every side boundary for every property on the "Lake Cochituate" side of Edgewood Road, there are two exceptions. Sure enough, the two exceptions are for the north and south sides of 47 Edgewood Road, that latter of which is the parties' disputed boundary.

5. Happily, the parties agree on several crucial facts. They agree on the location of the record "front" boundaries of their properties, along Edgewood Road. They agree on the location of their record "back" boundaries, along land owned by the Commonwealth that surrounds Lake Cochituate. They agree where the properties meet along that back boundary (that is, the southwest corner of 47 Edgewood Road and the far northwest corner of 51 Edgewood Road; hereafter, the "Corner"), and they agree on the location of the northwest corner of 47 Edgewood Road. They dispute the location, however, of the record boundary between 47 and 51 Edgewood Road once it leaves the Corner.

6. The parties hired surveyors to locate, or at least provide an estimated location, of the disputed boundary. Both surveyors started their work by reviewing the Shore Acres plan and the 1952 taking plan. They also reviewed Land Court Plans 33787-A (from 1965) and 39294-A (from 1978). Each plan locates, with references to known monuments, precise distances, and specific compass bearings, parcels along Edgewood Road that are northwest of 47 and 51 Edgewood Road. The surveyors also reviewed the 1978 Plan.

7. The parties' surveyors also reviewed the various deeds out of the developer of Shore Acres, the Cochituate Land Trust, that are in the parties' chains of title. Those deeds include Trial Exhibit 16 (a 1916 deed conveying "Lot 48" on the Shore Acres plan, part of which is now included in 47 Edgewood Road), Trial Exhibit 17 (a 1917 deed conveying "Lot 51" on the Shore Acres plan), Trial Exhibit 18 (a 1918 deed conveying "Lot 50" and "Lot 52" on the Shore Acres plan), and Trial Exhibit 19 (a 1926 deed conveying "Lot 49" on the Shore Acres plan). They also reviewed Trial Exhibit 20, a 1931 deed for "Lot 47" on the Shore Acres plan; Trial Exhibit 12, the deed in which the Jewetts conveyed to the Deanes the "Northerly portion" of Lot 50; and Trial Exhibit 11, a 1950 deed in which the Jewetts sold Lots 51-52, plus the remaining (the deed says "larger") portion of Lot 50, to William A. Marquis.

8. Using the same source materials as the Rothschilds' surveyor, the Wolfs' surveyor, Wayne Jalbert, P.L.S., employed methods and performed analyses that result in a superior estimated location of the boundary between 47 and 51 Edgewood Road. Jalberts' methods and analyses are more in keeping with the Land Court 2006 Manual of Instructions for the Survey of Lands and Preparation of Plans (the "2006 Manual") than the methods and analyses the Rothschilds' surveyor used.[3]

[3] That said, the difference between the surveyors' locations of the disputed boundary is small. As noted earlier, they agree on the location of the Corner. They largely agree on the shape of the intervening boundary too. The Rothschild's surveyor nonetheless puts the Edgewood Road-end of the boundary approximately seven feet

9. Mr. Jalbert's line also corresponds more closely than the Rothschilds' line with two things apparent on the Court's view: a fence post shown on Trial Exhibit 34 (indicated by a red arrow with a 0.10' dimension and a second red arrow with a 28.84' dimension) and a fence post hole shown on Trial Exhibit 34. The Jalbert line is also closer to the "dogleg" of the Rothschilds' front fence (also shown on Trial Exhibit 34) than is the line offered by the Rothschilds' surveyor.

10. Trial Exhibit 34 shows the location of six apple trees planted by the Wolfs around 2011, or less than twenty years prior to the time they counterclaimed in this case for adverse possession.

11. Trial Exhibit 36 depicts a line drawn by Mr. Wolf, on the "Rothschild" side of the property line estimated by surveyor Jalbert, that demarcates the edge of an area Wolf contends he and his wife have gained by adverse possession (the "Disputed Area"). The Wolfs did not prove at trial exclusive possession of the Disputed Area, vis à vis the Rothschilds and their predecessors in interest to 51 Edgewood Road, during any continuous twenty-year period prior to the Wolfs' filing their counterclaims. The Rothschilds and their immediate predecessors in interest, the Ocheretyannys, entered the Disputed Area frequently during the years they owned 51 Edgewood Road. They did so while, among other things, maintaining the Disputed Area and the plants and shrubs within it. Those entries included ones into a space north of the Rothschilds' "dogleg" fence, although the Rothschilds' entries there were not as frequent as their entries into other areas.

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The Court will first resolve the parties' dispute over the record boundary between their properties, then address the Wolfs' adverse-possession claims, then determine the appropriate relief.

A party who seeks a declaratory judgment concerning title bears the burden of proving his or her entitlement to the requested declaration. See *Stop & Shop, Inc.* v. *Ganem*, 347 Mass. 697, 704-705 (1964) (substantive nature of case determines which party bears burden of proof); *Sheriff's Meadow Found., Inc.* v. *Bay-Courte Edgartown, Inc.*, 401 Mass. 267, 269 (1987) (in actions to quiet title, party seeking to establish title bears burden of proof); *Burchell* v. *Marine Lumber Co.*, 12 LCR 314, 320 (2004) (Sands, J.) (party who seeks declaratory judgment concerning its title bears burden of proof). The trouble in this case is that

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closer to the Wolfs' residence. The difference between the parties' surveys is hence a thin triangle, one reminiscent of what a late-night snacker might remove from a slice of leftover Thanksgiving pie so as not to draw suspicion.

both sides seek favorable declarations concerning the location of the boundary between 47 and 51 Edgewood Road. Thus, neither side can prevail on its boundary claims by resting on which of them bears the burden of proof.

The current location of a boundary described in a deed "presents a question of fact, to be decided 'on all the evidence, including various surveys and plans.' 'Any competent evidence may be considered in determining the true boundary line between adjoining owners.'" *Bernier*, 85 Mass. App. Ct. at 268 (citations omitted), quoting *Hurlbut Rogers Mach. Co.* v. *Boston & Maine R.R.*, 235 Mass. 402, 403 (1920), and *Holmes* v. *Barrett*, 269 Mass. 497, 500 (1929). "'[T]he law does not require absolute certainty of proof to determine a boundary line,' but merely a preponderance of the evidence." *Balicki* v. *Ziegler*, 30 LCR 406, 410 (2022) (Foster, J.), quoting *McCarthy* v. *McDermott*, 18 LCR 405, 406 (2010) (Long, J.).

The Court adopts the Jalbert line, shown on Trial Exhibit 34, as the "correct" boundary line between the parties' properties. The Court does so with a small degree of hesitation: the parties' surveyors agreed (and the 1952 taking plan confirms) that the Shore Acres plan is too indefinite for anyone to locate precisely the intended original side-yard boundaries of Lots 48-52. (Recognizing that inherent uncertainty in the boundary, the parties' surveyors advised their clients to just agree where it should be.) And neither side has urged the Court to apply the doctrine of equitable apportionment, one tool that's available when it's impossible to locate a subdivision plan's lots on the ground. See, for example, *Marsters* v. *Alden*, 1990 WL 10093956 (Land Ct.) (Sullivan, C.J.); *Leahy* v. *Glukhovsky*, 20 LCR 429, 435-437 (2012) (Piper, J.).

Since the parties insist that the Court choose one surveyor's result over the other, the Court adopts Mr. Jalbert's, for two reasons. First, he tied his analysis more closely than did the

Rothschilds' surveyor to the requirements of the 2006 Manual and the governing law for interpretation of deeds. The Rothschilds' surveyor places too much emphasis on preserving, for example, the Shore Acres plan's stated area of 51 Edgewood Road. Second, the Jalbert line is closer than the alternative to three "boundary" marks that existed in the field prior to the time the parties' dispute erupted: the fence post, the fence post hole, and the Rothschilds' "dogleg" fence.

Resolving the dispute over the location of the parties' record boundary in the Wolfs' favor reduces the area that's subject to any claim by the Wolfs for adverse possession. To prove they've acquired title to the remaining Disputed Area (see Finding #11) by adverse possession, the Wolfs must show they've made continuous, uninterrupted, exclusive, open, and notorious use of that area, adverse to all other claimants (including the Rothschilds and their predecessors in title), for more than twenty years. See *Lawrence* v. *Town of Concord*, 439 Mass. 416, 421 (2003). The Wolfs' claims fail because they haven't proven exclusive use of the Disputed Area for any continuous twenty-year period. The Court further holds that since the Wolfs' shed is across what the Court holds is the record boundary, and because the Wolfs haven't acquired by adverse possession title to the land beneath the encroaching shed, the Wolfs' shed is trespassing on the Rothschilds' property. See Restatement (Second) of Torts, § 329 (1965); *New England Box. Co.* v. *C&R Constr. Co.*, 313 Mass. 696, 707 (1943).

The Court now turns to remedies. The Court will enter a declaration, as both parties have requested, declaring the location of the boundary between their properties (and further declaring, as the Rothschilds request, that the Wolfs haven't acquired by adverse possession any part of 51 Edgewood Road). To remedy the trespass of the Wolfs' shed, the Rothschilds requested in their first amended complaint four things. The first is an injunction ordering the Wolfs to remove the shed from 51 Edgewood Road. The Court will so order. See *Peters* v. *Archambault*,

361 Mass. 91, 92 (1972) (landowner ordinarily entitled to injunction compelling removal of encroaching structure).[4] The Rothschilds also ask the Court to order the Wolfs to restore the Rothschilds' fence to its pre-2013 condition. The Court will order that too. See *Blood* v. *Cohen*, 330 Mass. 385, 387 (1953) (victim of trespass is entitled to a restoration order or occupation damages, but not both); *Ottavia* v. *Savarese*, 38 Mass. 330, 337 (1959) (restoration order appropriate). Third, the Rothschilds ask for an injunction prohibiting the Wolfs from entering 51 Edgewood Road without the Rothschilds' permission. The Court will order that too. See *Roman Catholic Archbishop of Boston* v. *Rogers*, 88 Mass. App. Ct. 519, 527 (2015) (landowner entitled to injunction against trespasser, to bar further trespasses).

The Wolfs last seek an award of their survey costs. In *Gillespie* v. *Aliot*, 14 LCR 429 (2006) (Long, J.), the court allowed as damages the costs a plaintiff incurred in having his surveyor re-stake an area from which the defendant had removed all prior stakes. The court didn't award the other expenses of the surveyor, however, either as taxable costs or other damages. *Id.* at 430-431. While the Rothschilds cite a contrary holding in *Camuso* v. *Tranxidis*, 2006 WL 2661263 (Mass. Super. Ct.), the court rendered that decision on a motion for entry of a default judgment, and it's not clear if the defaulted defendants contested the ruling. Moreover, while the Rothschilds likely wouldn't have retained a surveyor had the Wolfs not built their shed, and while it's likely that only the retention of the Rothschilds' surveyor caused the Wolfs to hire their own (he too determined that the shed was trespassing), in the end this Court didn't accept

[4] At page 10 of their first amended complaint, the Rothschilds ask that the order "ensure that [the shed's] relocation is outside of the necessary setbacks required by the Wayland Zoning Ordinance." The Court will not order that: the Ordinance isn't in the trial record, and hence there's no evidence that Ordinance contains side-yard setback requirements (let alone ones that apply to the shed). Further, the officials responsible for enforcing the Ordinance aren't parties to this case.

the conclusions of the Rothschilds' surveyor concerning the parties' boundary. General Laws c. 261, § 9 provides:

> If a verdict is rendered for the plaintiff upon one or more counts upon several or distinct claims, and for the defendant upon any others, each party shall recover costs for the travel and attendance of witnesses, for depositions and for other evidence produced, examined or used on the trial of the counts upon which the verdict is in his favor, but shall not recover for the like charges incurred in the trial of the other counts.

Thus, even if the expense of a surveyor were a recoverable cost under c. 261, or could qualify as damages for trespass, the Court declines to award such costs in this case.

Judgment to enter accordingly.

/s/ Michael D. Vhay

Michael D. Vhay, Associate Justice

Dated: November 16, 2022

COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

MIDDLESEX, ss. 20 MISC 000519 (MDV)

KURT M. ROTHSCHILD and
PAULA D. ROTHSCHILD, as trustees of the
51 Edgewood Road Realty Trust,

Plaintiffs/Counterclaim-Defendants,

v.

MELISSA S. WOLF and DAVID WOLF,

Defendants/Counterclaim-Plaintiffs.

AMENDED JUDGMENT

Plaintiffs/counterclaim-defendants Kurt M. Rothschild and Paula D. Rothschild, as trustees of the 51 Edgewood Road Realty Trust (the "Rothschilds"), sued defendants/ counterclaim-plaintiffs Melissa S. Wolf and David Wolf in this Court on November 20, 2020. The Rothschilds filed an amended complaint in January 2021. It contained four counts. In Count I, the Rothschilds sought an order compelling the Wolfs to try their alleged title to a portion of the Rothschilds' property at 51 Edgewood Road in Wayland, Massachusetts. In Count II, the Rothschilds sought a judgment quieting their title to 51 Edgewood Road consistent with a plan their surveyor had prepared. In Count III, the Rothschilds sought a declaration that the boundary between 51 Edgewood Road and the Wolfs' property at 47 Edgewood Road is as shown on the plan prepared by the Rothschilds' surveyor. In Count IV, the Rothschilds accused the Wolfs of trespassing on 51 Edgewood Road. The Rothschilds sought injunctive relief.

In February 2021, the Wolfs answered the amended complaint, denying the Rothschilds' claims. The Wolfs also counterclaimed against the Rothschilds. The Wolfs' counterclaim had two counts. Counterclaim Count I sought a declaration that the boundary between 51 and 47 Edgewood Road is as shown on a plan prepared by the Wolfs' surveyor. Counterclaim Count II sought a declaration that the Wolfs had obtained portions of 51 Edgewood Road by adverse possession. The Rothschilds timely denied the Wolfs' counterclaims.

The parties appeared for trial on all claims and counterclaims in July 2022. For the reasons set forth in the Court's Findings of Fact and Conclusions of Law issued on November 16, 2022, the Court

A. **ORDERS**, **ADJUDGES**, and **DECLARES**, that judgment hereby enters in FAVOR of plaintiffs/counterclaim-defendants Kurt M. Rothschild and Paula D. Rothschild, as trustees of the 51 Edgewood Road Realty Trust (the "Rothschilds"), and AGAINST defendants/counterclaim-plaintiffs Melissa S. Wolf and David Wolf, on Counts I and IV of the Rothschilds' First Amended Complaint, and on Count II of the Wolfs' Counterclaim;

B. **ORDERS**, **ADJUDGES**, and **DECLARES**, that judgment hereby enters in FAVOR of the Wolfs, and AGAINST the Rothschilds, on Counts II and III of the Rothschilds' First Amended Complaint and on Count I of the Wolfs' Counterclaim;

C. **ORDERS**, **ADJUDGES**, and **DECLARES**, that the boundary between (1) the property described in a Quitclaim Deed recorded at the Middlesex South Registry of Deeds (the "Registry") in Book 61196, Page 582 on February 13, 2013 (the "Rothschild Deed") and (2) the property described in a Quitclaim Deed recorded at the Registry in Book 14594, Page 150 on April 28, 1982, is as shown on Exhibit A to this Amended Judgment (labelled "The Boundary");

D. **ORDERS**, **ADJUDGES**, and **DECLARES**, that Exhibit A to the Rothschild Deed is hereby REFORMED by replacing the words "in a line 15 feet distant from and parallel to the common boundary line between Lots 4 and 50 on said plan" with "in a line 16 feet distant from and parallel to the common boundary line between Lots 49 and 50 on said plan";

E. **ORDERS** the Rothschilds, within 45 days of the entry of this Amended Judgment, to record an original or certified copy of this Amended Judgment at the Registry;

F. **ORDERS** each of the Wolfs; his, her, or their agents, servants, employees, and attorneys; and those persons in active concert or participation with the foregoing who receive actual notice of this Amended Judgment not to enter (or cause anything or anyone to enter) the property known as 51 Edgewood Road in Wayland, Massachusetts unless such person (1) has the express permission of the Rothschilds or their successors in interest to 51 Edgewood Road, or (2) is complying with paragraph H below;

G. **ORDERS** the Wolfs, within 45 days of the entry of this Amended Judgment, to confer with the Rothschilds on, and thereafter file with the Court, a proposal (the "Remedial Proposal") for (1) removing from 51 Edgewood Road the "Shed" depicted on Exhibit A to this Amended Judgment; (2) restoring to its condition as of December 31, 2012, a fence approximately in the area labelled "The Former Fence" on Exhibit A to this Amended Judgment; and (3) installing survey monuments on the boundary between 51 and 47 Edgewood Road at the three points labelled "Monument" on Exhibit A to this Amended Judgment; and

H. **ORDERS** the Wolfs, within 30 days of the Court's approval of the Remedial

Proposal (as approved, the "Remedial Actions"), to complete the Remedial Actions.

This Amended Judgment supersedes the Judgment entered in this action on November 16, 2022.

SO ORDERED.

By the Court (Vhay, J.)

/s/ Michael D. Vhay

Attest: */s/ Deborah J. Patterson*

Deborah J. Patterson, Recorder

Dated: December 2, 2022

EXHIBIT 3H

EXHIBIT A

EXHIBIT T5
Rothschild v Wolf
2021SC000519

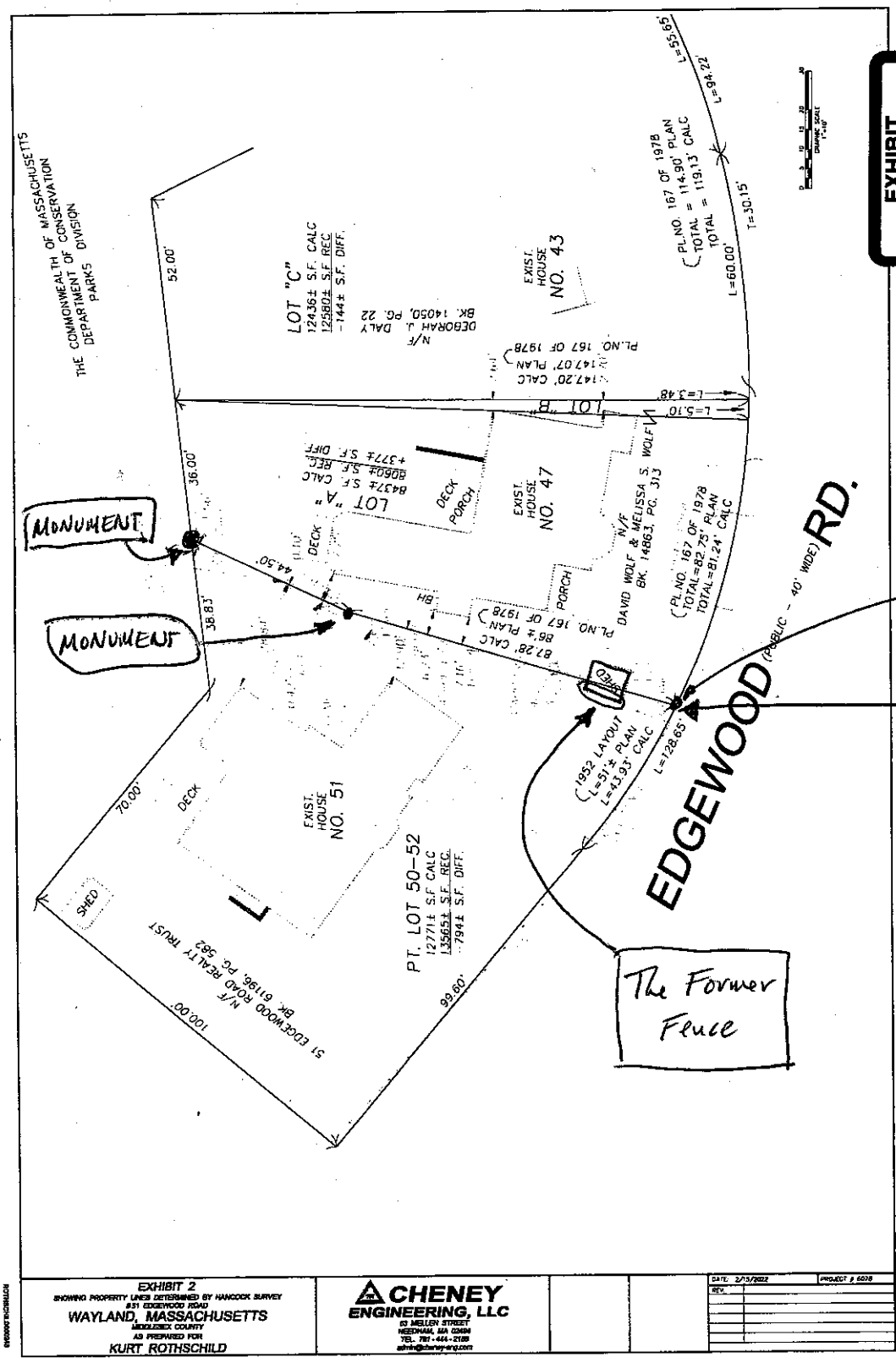

EXHIBIT 2
SHOWING PROPERTY LINES DETERMINED BY HANCOCK SURVEY
#51 EDGEWOOD ROAD
WAYLAND, MASSACHUSETTS
MIDDLESEX COUNTY
AS PREPARED FOR
KURT ROTHSCHILD

CHENEY ENGINEERING, LLC
53 MILLER STREET
NEEDHAM, MA 02494
TEL. 781-444-2188
admin@cheney-eng.com

DATE: 2/15/2022 PROJECT # 6038
REV.:

ROTHSCHILD000019