ZBA Case No.: 834A

TOWN OF LITTLETON

BOARD OF APPEALS

37 Shattuck Street
P.O. Box 1305
Littleton, MA 01460
Tel: 978-540-2420

APPLICATION FOR PUBLIC HEARING

Pursuant to MGL Chapter 40A, 40B and 41 and the Littleton Zoning Bylaws

TOWN USE ONLY
Received by the Town Clerk Office

TOWN OF LITTLETON RECEIVED AUG 04 2014
Date

The filing is not official until stamped by the Town Clerk

Filing Fee paid: $ 200 75 Check # 1492 1497

Pursuant to the provisions of Chapter 40, §57 of the Massachusetts General Laws as adopted by Town Meeting 2003, this document must be signed by the Tax Collector verifying payment of taxes.

Signature of Tax Collector

The undersigned hereby submits this petition for the following action (check all that apply):

- ☐ Appeal of Decision of Building Inspector or other administrative official(see page 2)
- ☐ Special Permit *(40A)*(see page 2)
- ☒ Variance (see page 3)
- ☐ Comprehensive Permit (40B) **Complete additional application** (see page 2)

PETITIONER: Signature _____ Date: July , 2014

Michael Lelievre and Colleen Lelievre — (978) 621-7714
Print Name — *Phone #*

76 Tahattwan Road — mike@littletonremovalservice.com
Address — *Email Address*

Littleton, MA 01460
Town, State, Zip

Deed Reference: Bk 45525 *Page* 526

PROPERTY OWNER: *include authorization of Owner for Petitioner to represent Owner, if unsigned*

_____ (978) 621-7714
Signature *Date* — *Phone #*

Michael Lelievre
Print Name (if different from petitioner) — *Email*

Address (if different from petitioner)

ASSESSOR MAP & PARCEL NUMBER U33 8A

ZONING DISTRICT: (R) VC B IA IB *(Circle all that apply)*

Check box if applicable
☐ **AQUIFER DISTRICT**
☐ **WATER RESOURCE DISTRICT**

FILING FEES

Residential Property	$200 to Town of Littleton
Commercial Property	$350 to Town of Littleton
Comprehensive Permit	$1000 + $100/unit over 10 units

ADDITIONAL FEES(all applications)

	$ 75 to Comm of Mass-recording fee
	$25 to Town of Littleton-abutter list
	Legal Notice publication fee due prior to opening hearing

ZBA Case 834A

Appeal

Under MGL c. 40A § 8

The undersigned hereby appeals a written order or decision of the Building Commissioner / Zoning Officer or other administrative official alleged to be in violation of the provisions of MGL c. 40A or the Zoning By-laws to the Board of Appeals for the Town of Littleton.

1. From what Town Official or Board is the appeal being sought?
Mandatory: Attach copies of written order or decision under appeal

Administrative Official_____ Date of order / decision_____

2. Which statute or Zoning Bylaw do you rely for your appeal?

MGL c.40A § _____ Zoning Bylaw §_____ Code of Littleton §_____
You may also consider whether you qualify for relief under any other authority of the Board to grant a Special Permit or Variance.

3. ***I hereby certify that I have read the Board of Appeals Instructions for Appellants and that the statements within my appeal and attachments are true and accurate to the best of my knowledge and belief.***

_____ _____
Signature Print name

Special Permit 40A

Under MGL c. 40A § 9

The undersigned hereby petitions the Board of Appeals for the Town of Littleton to grant a Special Permit for the reasons hereinafter set forth and in accordance with the applicable provisions of the Zoning By-law.

1. Special Permits are expressly permitted in the Zoning Bylaws. Which Zoning Bylaw section do you rely for your appeal?

Zoning Bylaw §_____

2. Why are you applying for a Special Permit? Attach a written statement that specifically describes existing conditions and your objectives, along with necessary exhibits as listed in the filing instructions. ***You may also consider whether you qualify for relief under any other authority of the Board to grant a variance.***

3. ***I hereby certify that I have read the Board of Appeals Instructions for petitioners and that the statements within my petition and attachments are true and accurate to the best of my knowledge and belief.***

_____ _____
Signature Print Name

Special Permit 40B

Under MGL c. 40B

See supplemental instructions: Littleton Zoning Board of Appeals Rules for the Issuance of a Comprehensive Permit under M.G.L.c40B

Variance

Under MGL c. 40A §. 10

The undersigned hereby petitions the Board of Appeals for the Town of Littleton to vary, in the manner and for the reasons hereinafter set forth, the applicable provisions of the Zoning By-law.

1. Specifically, from what Zoning bylaw section are you seeking relief? Article IV, Sec. 173-27, Sec. 173-28

2. Why are you seeking relief from a literal enforcement of this Zoning Bylaw?
Attach a written statement that specifically describes existing conditions and your objectives, along with plans, specifications, certified plot plan and any documentation necessary to support your request.

3. Show evidence that you meet the minimum requirements of a variance under section 173-6 B (2) of the Littleton Zoning Bylaws.
Attach a written statement which specifically includes why, owing to conditions (soil, shape, or topography) especially affecting the premises, but not affecting generally the zoning district in which it is located, a literal enforcement of the Zoning By-law would result in a substantial hardship to you. Applicant must clearly demonstrate the lack of alternative remedies.

4. ***I hereby certify that I have read the Board of Appeals Instructions for petitioners and that the statements within my petition and attachments are true and accurate to the best of my knowledge and belief.***

Signature _____ Print name Michael Lelievre

Filing Instructions

1. **IMPORTANT: SEE THE BUILDING COMMISSIONER/ZONING ENFORCEMENT OFFICER BEFORE YOU FILL OUT THIS APPLCATION.** He will assist you with the proper zoning sections and application request(s). His review may save time by preventing delays in the hearing process.
2. Apply for a certified abutters list with the Assessors office (request for certified list of abutters form enclosed)
3. Bring the completed application packet to the Administrative Assistant to the Building Commissioner who will assist you in filing with the Town Clerk.

Necessary Exhibits— provide 14 copies of the following with the completed application:

1. A copy of the most recently recorded plan of land or where no such plan exists, a copy of a plot plan endorsed by a registered engineer or land surveyor. The plan should show;
   - A) metes and bounds of the subject land
   - B) adjacent streets and other names and readily identifiable landmarks and fixed objects
   - C) dimensional layout of all buildings
   - D) distances and setbacks from the various boundaries
   - E) exact dimensions, setbacks and specifications of any new construction, alterations, additions or installations
   - F) direction of North
   - G) the name of each abutting property owner
2. Copy of the latest recorded deed
3. A written statement which details the basis for your petition
4. Pictures, plans, maps, drawings and models are always helpful in explaining the problem
5. In cases pertaining to signs, a scale print of the sign lettering and colors
6. In cases pertaining to subdivisions of land, prints should show the proposed subdivision endorsed by a registered engineer or land surveyor
7. In cases pertaining to Accessory dwellings evidence that the Board of Health has approved the septic system
8. The date of the building construction and the history of ownership are useful in finding facts about the case

Completed applications filed with the Town Clerk by the third Thursday of the month will be considered at the next regularly scheduled Zoning Board of Appeals meeting, held on the third Thursday of the following month.
The Board in its discretion may dismiss an application or petition for failure to comply with any of the foregoing rules

General Information

What authority does the Board of Appeals have?

The Board of Appeals obtains its authority under the Massachusetts General Laws Chapter 40A §14 and the Town of Littleton's Zoning By-law 173-6 to hear and decide ***appeals***, to hear and decide applications for ***Chapter 40A special permits***, and to hear and decide petitions for ***variances***. The Board of Appeals also hears and decides applications for ***special permits for low and moderate income housing*** **under Massachusetts General Laws Chapter 40B Sections 20, 21, 22, and 23.**

What is an Appeal?

Pursuant to Massachusetts General Laws Chapter 40A §8 and Littleton Zoning By-law 173-6 B(3) and 173-6 B(5) the Board of Appeals hears and decides appeals by any person aggrieved by any written order or decision of the Zoning Enforcement Officer or other administrative official in violation of any provision of Massachusetts General Laws Chapter 40A or the Littleton Zoning By-laws. Building permits withheld by the Building Commissioner acting under MGL C. 41, §81Y as a means of enforcing the Subdivision Control Law may also be issued by the Board of Appeals. Action taken by the Building Commissioner acting under the Code of Littleton Chapter 152 will also be heard by the Board of Appeals. *If the Zoning Enforcing Officer or other administrative official does not issue a written order or decision, the Board of Appeals will not hear the appeal.* Appeals from the written decisions of the Zoning Enforcement Officer or other administrative official must be filed with the Office of the Town Clerk pursuant to Massachusetts General Laws Chapter 40A Section 15 within thirty (30) days from the date of the written order or decision which is being appealed. **Failure to file a timely appeal is fatal.**

What is a Chapter 40A Special Permit?

Certain uses of property are permitted as a matter of right. However, the Littleton Zoning By-laws provide that other uses are not allowed in certain zoning districts, and that specific types of uses shall only be permitted in specified zoning districts upon the issuance of a Special Permit from the Board of Appeals pursuant to Massachusetts General Laws Chapter 40A § 9, 9A, and 9B. Special Permits may be issued only for uses which are in harmony with the general purpose and intent of the By-law, and may be subject to general or specific provisions set forth therein, and such permits may also impose conditions, safeguards and limitations on time or use. A Special Permit, unlike a Variance, may be conditioned by limiting its duration to the term of ownership or use by the Applicant. When a Special Permit application is-accompanied by plans or specifications detailing the work to be undertaken, the plans and specifications become conditions of the issuance of the permit. Therefore, once a Special Permit is granted, modification of the plans or specifications require as a prerequisite, modification of the Special Permit through the filing of a successive Special Permit application. No building permit may be issued by the Building Commissioner for a use or structure that requires a Special Permit until **1)** a Special Permit has been granted by the Board of Appeals, **2)** the expiration of the twenty (20) day appeal period pursuant to Massachusetts General Laws Chapter 40A Section 11, and **3)** the Special Permit has been recorded at the Middlesex South District Registry of Deeds. The Building Commissioner shall require proof of recording at the Registry of Deeds from the Town Clerk prior to issuance of a building permit. No party is entitled "as a matter of right" to a Special Permit. The Board of Appeals, in the proper exercise of its discretion, is free to deny a Special Permit even if the facts show that such a permit could be lawfully granted. **Special Permits 40A shall lapse 24 months following the granting unless substantial use or construction has commenced.**

What is a Chapter 40B Special Permit?

Chapter 40B is a state statute, which enables local Boards of Appeals to approve affordable housing developments under flexible rules if at least 25% of the units have long-term affordability restrictions. Also known as the Comprehensive Permit Law, Chapter 40B was enacted in 1969 to help address the shortage of affordable housing statewide by reducing unnecessary barriers created by local approval processes, local zoning, and other restrictions. Its goal is to encourage the production of affordable housing in all communities throughout the Commonwealth. **Special Permits 40B shall lapse 3 years from the date the permit becomes final unless construction authorized by a comprehensive permit has begun, or unless specifically noted otherwise in the permit by the Board of Appeals.**

What is a Variance?

A Variance is a waiver of the zoning rules adopted by the Citizens of Littleton at Town Meeting. A Variance may be granted pursuant to the Littleton Zoning By-laws and Massachusetts General Laws Chapter 40A Section 10. Accordingly, it is only in rare instances and under exceptional circumstances that relaxation of the general restrictions established by the Zoning By-laws are permitted. A Variance is distinguished from a Special Permit. The Variance is used to authorize an otherwise prohibited use or to loosen dimensional requirements otherwise applicable to a structure. No person has a right to a Variance. *Variance of "use" is almost never granted by the Board of Appeals. Variance of "dimensional" requirements is granted in rare occasions.* **The Board of Appeals has no discretion to grant a Variance unless the petitioner provides evidence, and that the Board of Appeals determines that, owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.** Even if the Board of Appeals find that such hardship exists, it may exercise its discretion and not grant a Variance. No building permit may be issued by the Building Commissioner for a use or structure that requires a Variance until **1)** a Variance has been granted by the Board of Appeals, **2)** the expiration of the twenty (20) day appeal period pursuant to Massachusetts General Laws Chapter 40A Section 11, and **3)** the Variance has been recorded at the Middlesex South District Registry of Deeds. The Building Commissioner shall require proof of recording at the Registry of Deeds from the Town Clerk prior to issuance of a building permit. **Rights authorized by a Variance must be exercised within 1 year of granting, or said variance shall lapse.**

Written Statement of Michael and Colleen Lelievre
In Support of Request for Variance

We purchased our home at 76 Tahattawan Road, Littleton on June 30, 2005. At that time our deed and plan showed we had frontage along Tahattawan Road of about 102 feet. A copy of our deed and the plan it referenced are attached.

We are advised that 102 feet of frontage satisfied the Littleton Zoning bylaws when our house was constructed and when we purchased it in 2005.

A mortgage inspection plan obtained for us in June 2005 prior to our purchase also showed 102 feet of frontage. See copy attached. The Littleton Assessor's map also shows 102 feet of frontage. Copy attached.

Research into the Town's building department records shows a permit for construction of our house was issued in 1981 to Bernard Caouette and that final approval and a certificate of occupancy was issued to him on January 9, 1986. See copies attached.

Prior to our purchase of 76 Tahattawan Road, no one ever advised us of any issue with the frontage. No one claimed ownership to the frontage shown on our deed and the plans.

Subsequent to our purchase of 76 Tahattawan Road, our neighbor, Julyann Allen made a claim of ownership of a portion of the property we had purchased, including all of our frontage on Tahattawan Road and the 50 foot wide area where our driveway was located. She brought lawsuits against us in both the Massachusetts Land Court and in the Middlesex County Superior Court over her ownership claim and damage she alleged we did to the area. After a trial in the Land Court, a judgment was rendered in favor of Ms. Allen holding that she owns the fee interest in the land she claimed and that the owner of our property has an easement over the land ten feet wide to be used for residential purposes only and to maintain a pole and related utility lines, water pipes and a mailbox. Copies of the Land court Judgment and two decisions are attached.

After the Land Court Judgment we negotiated a settlement of the remaining claims of Ms. Allen which included the location of the ten foot wide easement along the southerly boundary of the property and the location of utilities underground in the easement area. We also agreed to convey a 3500 square foot area as shown on a plan recently signed by the Planning Board prepared for Ms. Allen by John R. Hamel. A copy of the plan is attached.

We respectfully submit that the circumstances outlined above show that the loss of frontage to our property occurred after our purchase and through no action or fault of our own. We are left with a lot which does not now meet the Town's requirements for dimensions and frontage.

We request a variance to permit us to continue use of our property as a single family residence with the existing ancillary uses and structures – swimming pool, pool house and shed - without frontage on a public way, and with access provided over the ten foot wide easement shown on the John R. Hamel plan dated June 26, 2014 to be recorded at the Middlesex County Registry of Deeds.

We respectfully submit that granting this variance will not adversely affect the residential zoning district. There will be no change in the residential use of the property which has existed for many years. The variance will not be a substantial detriment to the public good and will not nullify or substantially derogate from the intent or purpose of the bylaw.

Failure of the ZBA to grant the requested variance will result in a substantial hardship for us. The lack of frontage without a variance substantially and adversely impacts our use of the property and its value and marketability.

We did not cause the loss of frontage and have no alternative remedy. We are landlocked due to the Land Court's ruling and need the requested variance to establish that we have a

property complaint with the Town's Zoning by-law even though we have no public way road frontage.

Michael Lelievre

Colleen Lelievre

Date: July , 2014

Attachments

1. Deed, Boothby and Kristopherson to Michael and Colleen Lelievre dated June 30, 2005, Book 45525, Page 526

2. Plan dated September 10, 1979, prepared by David W. Perley and recorded Book 13808, Page 272

3. Mortgage Inspection Plan dated June 9, 2005

4. Littleton Assessor's Plan, U-33

5. Littleton Building Inspectors Records of Permits

6. Judgment of Land Court

7. Decision of Land Court on Summary Judgment dated October 5, 2010

8. Decision of Land Court after Trial dated April 6, 2012

9. Plan of Land, 70 Tahattawan Road, prepared by John R. Hamel dated June 26, 2014, to be recorded

EXHIBIT 1

2

PROPERTY ADDRESS: 76 Tahattawan Road, Littleton, Middlesex County, Massachusetts

QUITCLAIM DEED

We, BARBARA E. BOOTHBY and CATHY KRISTOFFERSON, both of Littleton, Massachusetts

IN CONSIDERATION OF FOUR HUNDRED FORTY-SEVEN THOUSAND AND 00/100 DOLLARS ($447,000.00)

GRANT TO MICHAEL LELIEVRE and COLLEEN LELIEVRE, husband and wife as tenants by the entirety, both of 76 Tahattawan Road, Littleton, Middlesex County, Massachusetts

with quitclaim covenants

The land with the buildings thereon in Littleton, Middlesex County, Massachusetts, situated on the east side of Tahattawan Road and being shown as Lot A on "Plan of Land in Littleton, Mass., owned by Jacqueline A. & Leo B. Flannery, Scale 1" = 50', Sept. 10, 1979, David W. Perley Civil Engineer, Concord, Mass.", recorded with Middlesex South District Registry of Deeds, Book 13809, Page 272, and being more particularly bounded and described as on the attached Exhibit "A".

Containing 3.6 acres, more or less as shown on said plan

Being the same premises conveyed to Grantors by Deed recorded with Middlesex South District Registry of Deeds in Book 21955, Page 27.

Executed as a sealed instrument this 30th day of June, 2005.

BARBARA E. BOOTHBY

CATHY KRISTOFFERSON

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF MIDDLESEX DATE: June 30, 2005

On this day, before me, the undersigned notary public, personally appeared BARBARA E. BOOTHBY and CATHY KRISTOFFERSON, proved to me through satisfactory evidence of identification which were valid driver's licenses, to be the persons whose names are signed on the preceding or attached document, and acknowledged to me that he/she/they signed it voluntarily for its stated purpose,

Notary Public: SHERRILL R. GOULD
My Commission Expires: 6/02/06

76 Tahattawan Road, Littleton, MA

PLEASE RETURN TO:
GOULD LAW OFFICES
P.O. BOX 752
311 GREAT ROAD
LITTLETON, MA 01460

2005 00137971
Bk: 45525 Pg: 526 Doc: DEED
Page: 1 of 2 07/01/2005 09:28 AM

MASSACHUSETTS EXCISE TAX
Southern Middlesex District ROD #
Date: 07/01/2005 09:28 AM
Ctrl# 055516 31781 Doc# 00137971
Fee: $2,036.32 Cons: $447,000.00

EXHIBIT A

The land in Littleton, Middlesex County, Massachusetts, situated on the East side of Tahattawan Road and being shown as Lot A on "Plan of Land in Littleton, Mass., owned by Jacqueline A. & Leo R. Flannery, Scale 1" = 50', Sept. 10, 1979, David W. Perley, Civil Engineer, Concord, Mass.", recorded with Middlesex South District Registry of Deeds, Book 13809, Page 272 and more particularly bounded and described as follows:

BEGINNING at an iron pipe on the easterly side of Tahattawan Road and the westerly side of the lot herein conveyed at land of Westby, now or formerly;

THENCE running along a curve having a radius of Twenty-Six and 42/100 (26.42) feet and an arc distance of Thirty-Nine and 28/100 (39.28) feet;

THENCE running South 88° 34' East a distance of One Hundred Seventy-Three and 79/100 (173.79) feet to a point;

THENCE turning and running North 03° 23' West a distance of One Hundred Fifty-Eight and 65/100 (158.65) feet to a stone wall;

All of above boundaries running along land of Westby, now or formerly;

THENCE turning and running along land of Sullivan, now or formerly, South 84° 11' East a distance of Two Hundred Twenty-Eight and 47/100 (228.47) feet along a stone wall to a point as shown on said plan;

THENCE running South 83° 17' East along said stone wall One Hundred Seventy-Nine and 52/100 (179.52) feet to a drill hole in the stone wall;

THENCE running South 83° 17' East along said stone wall One Hundred Thirty-Eight and 74/100 (138.74) feet to a point;

THENCE running South 82° 45' East along said stone wall Two Hundred Thirty-Six and 21/100 (236.21) feet to a point;

THENCE running South 80° 18' East along said stone wall One Hundred Twenty-Two and 3/10 (122.3) feet to a point;

The above five courses running along land of Sullivan, now or formerly;

THENCE turning and running South 04° 45' West along land of Brown, now or formerly, a distance of One Hundred Twenty and 57/100 (120.57) feet to a point;

THENCE turning and running North 88° 34' West along land of Leo R. Flannery and Jacqueline A. Flannery a distance of Eight Hundred Eighty-Six and 97/100 (886.97) feet to a point at the northeasterly corner of land of Shields, now or formerly;

THENCE running along said Shields land, now or formerly, North 88° 34' West a distance of One Hundred Fifty-Nine and 85/100 (159.85) feet, to a point as shown on said plan;

THENCE running along a curve having a radius of Twenty-Five (25.00) feet and an arc to the left for a distance of Forty-One and 25/100 (41.25) feet to a point on Tahattawan Road at the Southwesterly corner of the lot herein conveyed;

THENCE turning and running along Tahattawan Road on a curve having a radius of Six Hundred Thirty-One and 03/100 (631.03) feet and an arc distance of One Hundred Two and no/100 (102.00) feet, more or less, as shown on said plan to the point of beginning;

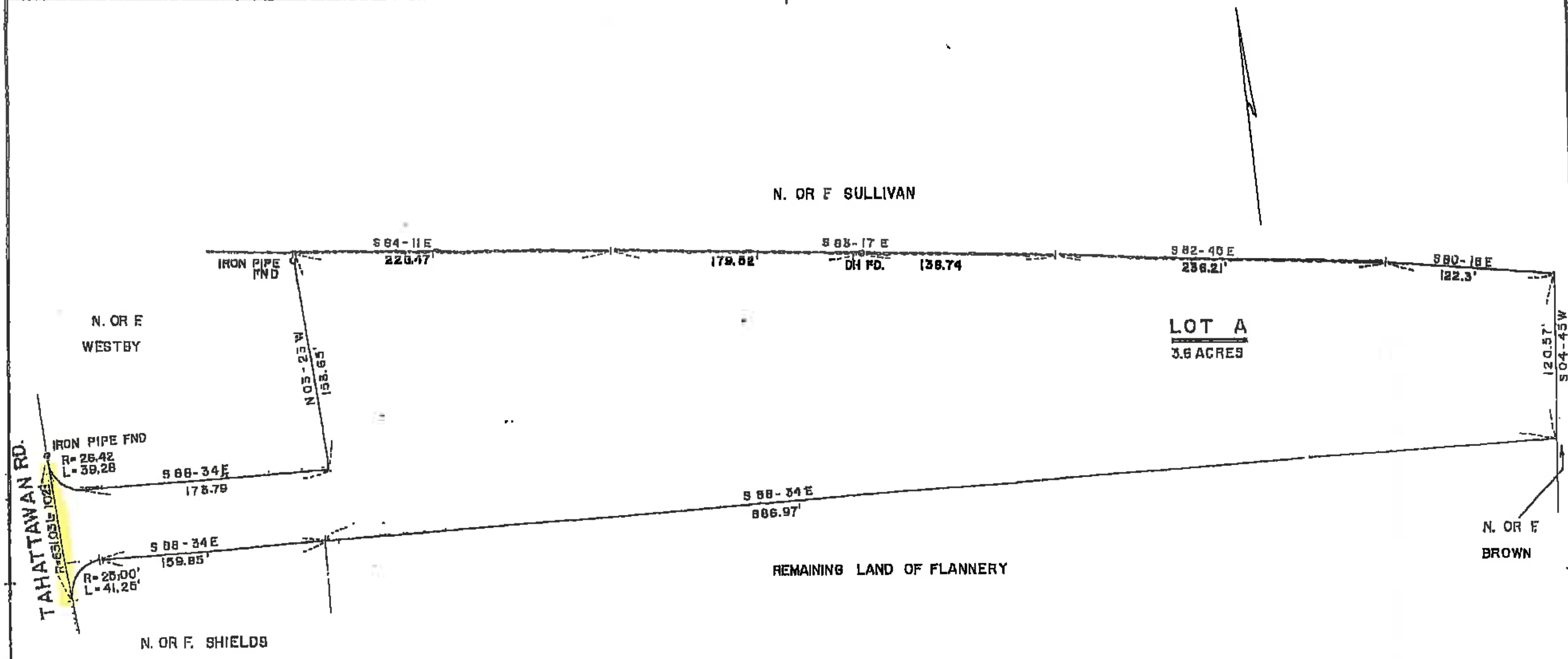
CONTAINING according to said plan Three and 6/10 (3.6) acres and being Lot A as shown on said plan, however otherwise bounded, measured or described.

Subject to a reservation to keep the water pipes as now laid through the said premises hereby conveyed and to enter thereon at any time to make the necessary repairs.

Subject to reservations as set forth in a deed recorded in Middlesex South District Registry of Deeds, Book 13809, Page 272.

REGISTRY OF DEEDS
SOUTHERN DISTRICT
ATTEST:
Eugene C. Byrne
REGISTER

EXHIBIT 2



NOTE: SEE PLAN BY HARLAN TUTTLE DATED FEB. 8, 1956 FOR PERIMETER METES & BOUNDS.

FOR REGISTRY USE ONLY

Middlesex Registry of Deeds, So. Dist.
CAMBRIDGE, MASS.
Plan Number 1218 of 1979
Rec'd Oct. 11 1979 at 9 h 29 m A m
With DEED Doc. No. 35
LEO R. FLANNERY Etux
BERNARDA CADIETTE
Recorded, Book 13809 Page 272
Attest: [signature] Register
FEE [illegible]
RV NL

I CERTIFY THAT THIS PLAN CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS.

0 10 20 30 40 50 100 150 200
SCALE IN FEET

APPROVAL UNDER THE SUBDIVISION CONTROL LAW NOT REQUIRED

LITTLETON PLANNING BOARD

[signature] Sept 18, 1979
Approved as reduced frontage lot
Littleton Planning Board
[signature] Sept 18, 1979
DATE

PLAN OF LAND IN LITTLETON, MASS.

OWNED BY

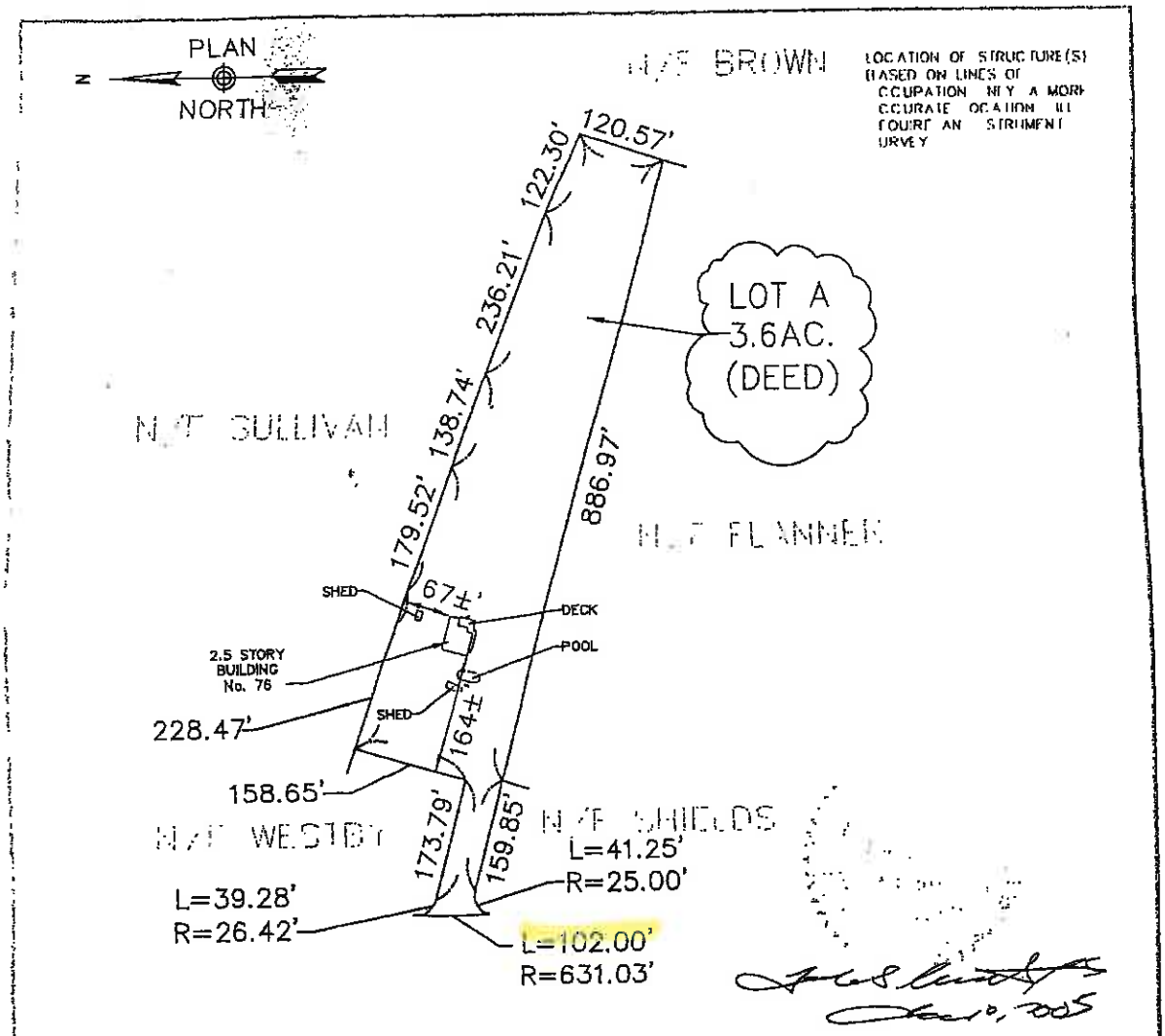
JACQUELINE A. & LEO R. FLANNERY

SCALE: 1"=60'
SEPT. 10, 1979

DAVID W. PERLEY
CIVIL ENGINEER
CONCORD, MASS.

AL0008

EXHIBIT 3



ASC #:	60014507
CLIENT #:	05-5225
FIELDED:	BD
DRAFTED:	MRS
APPROVED:	JSL
DATE:	6/9/05

ADDRESS:

76 TAHATTAWAN ROAD LITTLETON, MA

CERTIFIED TO:

COMMUNITY SOUTH BANK

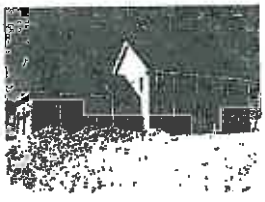
MORTGAGE INSPECTION PLAN

AMERICAN SURVEYING COMPANY of Boston, Inc.

1264 Main Street • Waltham, MA 02451
TEL: 781 893-6477 FAX: 781-893-7091
www.ASCofBoston.com

I, JOHN S. LAUPETAIN, PLS, a Registered Land Surveyor, do hereby certify that the above Mortgage Inspection Plan was prepared for: COMMUNITY SOUTH BANK in connection with a new Mortgage and is NOT intended or represented to be a Land or Property Survey. No corners were set, and it cannot be used for establishing fence, hedge, or building lines. The land shown hereon is based upon client furnished information, and may be subject to further Out-Sales, Takings, Easements and Rights of Way. No responsibility is extended herein to the Land Owner or Occupant. It is not intended to be recorded.

Deed recorded at: MIDDLESEX County
Registry of Deeds Book: 19655 Page: 22
Plan Reference: B 13800 P 57 L. C. Cert. #:
Drawn per Town of Assessor Map #:
Parcel #: Dated:
Address: 76 TAHATTAWAN ROAD LITTLETON, MA
Borrower: MICHALE & COLLEEN LELIEVRE
Client Name: GOULD LAW



The subject DWELLING lies in Flood Zone: X as shown on National Flood Insurance Program Flood Rate Map Dated: 6-15-83 Community Panel: 250000003B

The location of the original dwelling shown hereon either was in compliance with local applicable Zoning Bylaws in effect when constructed (with respect to horizontal dimensional requirements only), or is exempt from violation enforcement action under Mass G.L. Title VII, Chapter 40A Section 7 unless otherwise noted or shown hereon. A confirmatory Instrument Survey is advised when structures are shown less than 1' from property or required Zoning Setback Lines

FOR ALL INQUIRIES CONTACT ASC OF BOSTON AT (781) 893-6477

DATE	REVISION	DATE	REVISION

EXHIBIT 4

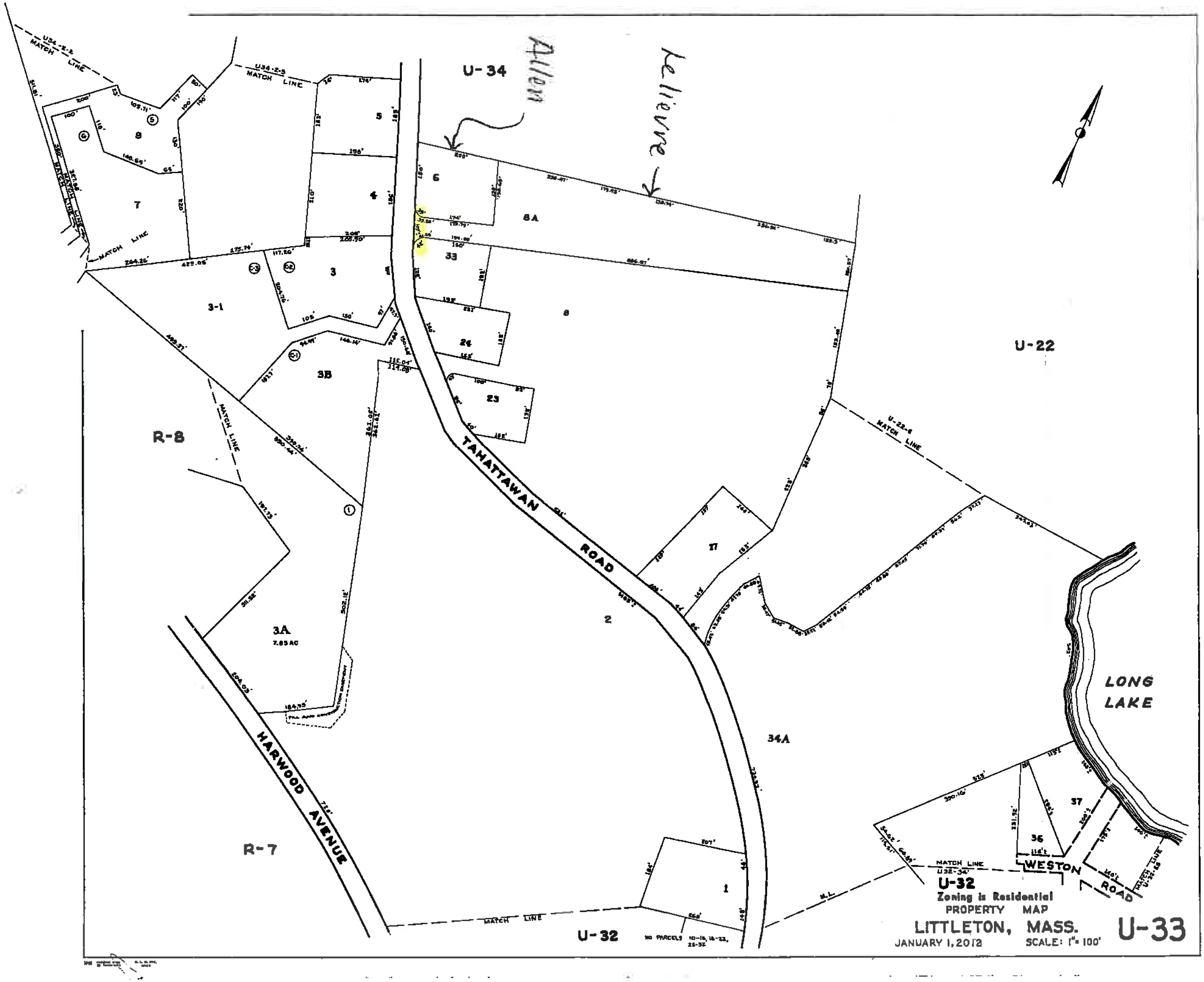

U-33
U-32
Zoning is Residential
PROPERTY MAP
LITTLETON, MASS.
JANUARY 1, 2012
SCALE: 1" = 100'
LONG LAKE
WESTON ROAD
TAHATTAWAN ROAD
HARWOOD AVENUE
U-22
U-34
U-32
R-7
R-8
MATCH LINE
34A
3A
7.85 AC
3B
3-1
8A
Allen
Lelievre

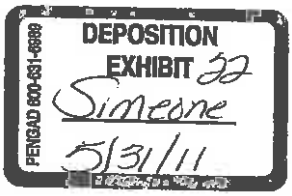
EXHIBIT 5

OFFICE OF THE

BUILDING INSPECTOR

LITTLETON, MASSACHUSETTS 01460

January 9, 1986



Bernard Caouette
Tahattawan Road
Littleton, MA 01460

Dear Mr. Caouette,

Attached is a copy of the signed building permit for the new house located on Tahattawan Road. This letter will serve as your finall approval and Certificate of Occupancy for this residence.

If you have any questions do not hesitate to contact this office at 486-3388.

Very trulyyours,

Roland J. Bernier

ROLAND J. BERNIER,
BuildingCommissioner

RJB:lk

Encl.

The Commonwealth of Massachusetts

TOWN OF LITTLETON

In Accordance with the Massachusetts State Building Code, Section 114.0, this

BUILDING PERMIT

Is issued to BERNARD CAOUETTE
Owner

to BUILD A NEW HOUSE
Build, Alter, Demolish

at TAHATTAWAN ROAD
Address

BOARD OF HEALTH PERMIT REQUIRED yes 4/22/81
Yes No Date issued

CONSTRUCTION TYPE _____

HEIGHT _____
Feet Stories

AREA 1634 square feet
Square Feet

All work shall conform to the approved application and plans.

This permit shall become invalid unless the work has commenced within 6 months, or if work is suspended for a period of one (1) year.

_____
Permit #

March 18, 1981
Date issued

$127.00
Fee

James Hammond
Building Inspector

INSPECTION RECORD

Inspection of	By	Date
Excavation		
Foundation		
Framing for Lathing		10/5/82
Driveway		
Electrical - Rough		9/23/82
Plumbing - Rough		10/22/82

FINAL APPROVALS

Fire Alarm System		8-7-84
BD of Health, If Needed		1/9/86
Plumbing		7/22
Electrical		8/8/84
Occupancy Approved		8 Dec 84
Other		

EXHIBIT 6

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
08 MISC 383555 (AHS)

2012 00113514
Bk: 59238 Pg: 583 Doc: JUD
Page: 1 of 3 06/05/2012 03:21 PM

JULYANN W. ALLEN,
Plaintiff,

vs.

MICHAEL LELIEVRE, COLLEEN LELIEVRE and SHERRILL GOULD,
Defendants.[1]

JUDGMENT

Plaintiff filed her unverified complaint on September 4, 2008, alleging deeded rights and trespass in a right-of-way located off Tahattawan Road in Littleton, Middlesex County, Massachusetts (the "Disputed Area").[2] Plaintiff also sought, pursuant to the provisions of G. L. c. 240, §§6-10, a determination of rights in such way.[3] On September 29, 2008, Defendants (and counter-claimants) Michael Lelievre and Colleen Lelievre (the "Lelievres") filed an Answer and Counterclaim alleging deeded rights, adverse possession, prescriptive rights, and easement rights (including an easement by necessity) in the Disputed Area. Plaintiff filed her Answer to Counterclaim on November 12, 2008. A case management conference was held on November 24, 2008.

On September 25, 2009, Plaintiff filed her Motion for Partial Summary Judgment, together with supporting memorandum, Appendix, and Affidavit of Diane C. Tillotson. The Lelievres filed their Opposition on November 4, 2009, together with supporting memorandum, Appendix and Affidavit of Erica P. Bigelow. A hearing was held on the summary judgment motion on February 8, 2010, and a decision (the "Summary Judgment Decision") was entered on October 5, 2010, in which I found that, as between Plaintiff and the Lelievres, Plaintiff owns the fee interest in the Disputed Area under the Derelict Fee Statute; that the owner of Lot A, as hereinafter defined, does not have a right to use the Disputed Area based on a theory of easement by estoppel; and that the owner of Lot A does not have a right to use the Disputed Area based on a theory of easement by necessity. As a result of the foregoing, I ALLOWED Plaintiff's Motion for Partial Summary Judgment.

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[1] Plaintiff filed a Request to Enter Default against Defendant Sherrill Gould on March 4, 2010, which was allowed on April 20, 2010.

[2] The Disputed Area is shown as the "Former Proposed Street" on a Site Plan created by Snelling & Hammel Associates, Inc., on January 23, 2008 (the "2008 Plan"), and attached to this Decision as Exhibit A. For the purposes of this Decision, the Disputed Area shall be divided into Area 1 (the gravel driveway) and Area 2 (the area between the driveway and Plaintiff Property as indicated on the 2008 Plan), as well as the land south of the driveway extending to the property designated as belonging to Richard Shields (the "Shields Property").

[3] Plaintiff filed her Motion to Amend Complaint on September 15, 2009, adding a count for adverse possession. At a status conference on December 3, 2009, Plaintiff indicated that she had filed a similar claim in Middlesex Superior Court, along with a tree cutting claim. As a result, the Motion to Amend Complaint was not acted on.

SEE PLAN NO. 366 OF 2012

On June 7, 2011, Plaintiff filed a Motion for Preliminary Injunction. A pre-trial conference on the issues of adverse possession and prescriptive rights was held on June 15, 2011, and at that time the parties entered into a Stipulation to resolve the Motion for Preliminary Injunction where they agreed a) not to enter Area 2, b) to let the stockade fence remain in place, and c) that Area 1 could be used by the Lelievres as residential access by three vehicles (a minivan, a dump truck and a pick-up truck). A site view and the first day of trial at the Concord District Court were held on October 4, 2011. The second day of trial was held on October 5, 2011, at the Land Court in Boston.

Testimony at trial was given by the Lelievres' witnesses Jacqueline Guthrie ("Guthrie") (formerly Flannery, and prior owner of Defendant Property)[4], Frances Simeone ("Simeone") (formerly Cauoette and prior owner of Lot A), Barbara Boothby (prior owner of Lot A), Kathy Kristofferson (prior owner of Lot A), and Michael Lelievre (Defendant). Testimony at trial was given by Plaintiff's witness David (husband of Plaintiff). There were forty exhibits submitted into evidence, including the affidavit of Judith Kotanchik (prior owner of the Subdivision Land)[5]. Post-trial briefs were filed on December 14, 2011 and December 16, 2011 by the Lelievres and Plaintiff, respectively. The matter was then taken under advisement. A decision ("Decision 2") of even date has been issued.

In accordance with the Summary Judgment Decision and Decision 2, it is:

ORDERED and ADJUDGED that, as between Plaintiff and the Lelievres, Plaintiff owns the fee interest in the Disputed Area under the Derelict Fee Statute.

ORDERED and ADJUDGED that the owner of Lot A does not have a right to use the Disputed Area based on a theory of easement by estoppel.

ORDERED and ADJUDGED that the owner of Lot A does not have a right to use the Disputed Area based on a theory of easement by necessity.

ORDERED and ADJUDGED that Plaintiff's Motion for Partial Summary Judgment is ALLOWED.

ORDERED and ADJUDGED that the Lelievres and their predecessors in interest did not use Area 1 exclusively for a period of twenty years.

ORDERED and ADJUDGED that the easement over Area 1 is ten feet in width and is to be for residential purposes only.

ORDERED and ADJUDGED that use of the utility pole located in Area 2, (the "Pole"), the related utility lines, the water pipes, and the mailbox (the "Mailbox") were sufficiently

[4] Defendant Property is referred to hereinafter as "Lot A," as it was initially conveyed in 1979.
[5] The "Subdivision Land" comprises that Property initially transferred by the Browns to the Kotanchiks in 1973, including Lot A.

actual, open, and notorious for the purposes of an easement by prescription over those elements of Area 2.[6]

ORDERED and ADJUDGED that the Lelievres have failed to demonstrate a twenty year period during which owners of the Subdivision Land or Lot A utilized the remainder of Area 2 in an open and notorious manner.

ORDERED and ADJUDGED that the Lelievres' use of Area 2 was not exclusive for the requisite twenty year period.

ORDERED and ADJUDGED that the Lelievres have established a prescriptive easement over Area 2, solely limited to the use and maintenance of the Pole, the related utility lines, the water pipes, and the Mailbox.

ORDERED and ADJUDGED that because the Lelievres are unable to establish a valid claim of adverse possession over Area 1 or Area 2, the doctrine of color of title is inapplicable.

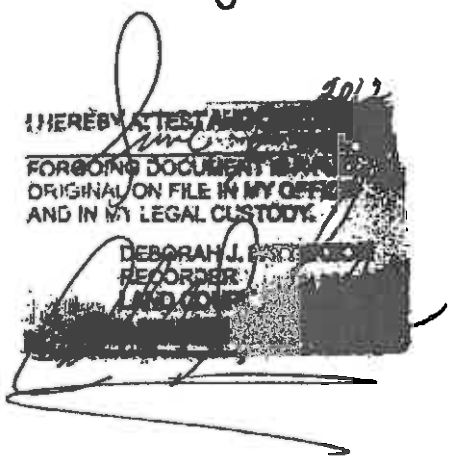
ORDERED and ADJUDGED that the Lelievres shall prepare a recordable plan of Area 1 and Area 2 consistent with this decision, to be recorded within sixty days of the date of this decision, to indicate their prescriptive rights established by this decision.

AHS
By the court. (Sands, J.)

Attest:

Deborah J. Patterson.
Deborah J. Patterson
Recorder

Dated: April 6, 2012



[6] The "Mailbox" refers to the original mailbox installed by the Caouettes in Area 2, as well as any replacement mailboxes that may have been installed in the same location as the original.

EXHIBIT 7

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
08 MISC 383555 (AHS)

JULYANN W. ALLEN,
Plaintiff,

vs.

MICHAEL LELIEVRE, COLLEEN LELIEVRE, and SHERRILL GOULD,
Defendants.

DECISION

Plaintiff filed her unverified complaint on September 4, 2008, alleging deeded rights and trespass in a right-of-way located off Tahattawan Road in Littleton, Middlesex County, Massachusetts (the "ROW"), and seeking, pursuant to the provisions of G. L. c. 240, §§6-10, a determination of rights in such way.[1, 2] On September 29, 2008, Defendants Michael Lelievre and Colleen Lelievre (the "Lelievres") filed an Answer and Counterclaim alleging deeded rights, adverse possession, prescriptive rights, and easement rights (including an easement by necessity) in the ROW. Plaintiff filed her Answer to Counterclaim on November 12, 2008. A case management conference was held on November 24, 2008.

On September 25, 2009, Plaintiff filed her Motion for Partial Summary Judgment, together with supporting memorandum, Appendix, and Affidavit of Diane C. Tillotson. The Lalievres filed their Opposition on November 4, 2009, together with supporting memorandum,

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[1] The ROW consists of approximately 9,700 square feet and is approximately fifty-feet wide by 180 feet long. For reference, the ROW is shown as the Disputed Area on the attached Sketch Plan. The current use and composition of the ROW is not included in the summary judgment record.

[2] Plaintiff filed her Motion to Amend Complaint on September 15, 2009, adding a count for adverse possession (which is not a part of the summary judgment motion). At a status conference on December 3, 2009, Plaintiff indicated that she had filed a similar claim in Middlesex Superior Court, and that a decision would be made as to the status of this claim after the decision on summary judgment.

Appendix, and Affidavit of Erica P. Bigelow. A hearing was held on the summary judgment motion on February 8, 2010, at which time the motion was taken under advisement. Plaintiff filed a Motion to Default Defendant Sherrill Gould on March 4, 2010, which was allowed on April 20, 2010.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. See Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983); Cmty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c).

I find that the following material facts are not in dispute:

1. By deed dated May 2, 1953, and recorded with the Middlesex South District Registry of Deeds (the "Registry") at Book 8088, Page 466, A. Delana Brown and Wilbur M. Brown conveyed property located on the east side of Tahattawan Road to Gordon E. Westby and Janet H. Westby (the "First Westby Lot").[3, 4] The southerly boundary of such lot is described as, "thence running North 86 [degrees] 43' west by land of the grantors two hundred feet to the point of beginning."

2. By deed dated June 12, 1958, and recorded with the Registry at Book 9267, Page 275 (the "Whitcomb Deed"), Wilbur M. Brown and Mary H. Brown (the "Browns") conveyed property located on the east side of Tahattawan Road and containing 26,814 square feet (the

[3] This deed references a plan dated April 27, 1953, which is not included in the summary judgment record. However, the parties do not dispute the ownership lines of the First Westby Lot.

[4] Neither party questions A. Delana Brown and Wilbur M. Brown's initial ownership of all land relevant to this summary judgment motion.

"Whitcomb Lot") to Oliver A. Whitcomb and Margaret L. Whitcomb (the "Whitcombs").[5] The northerly boundary is described as "[t]hence running North 87 [degrees] 58' 30" East by said Brown land one hundred eighty-seven (187) feet to a pipe bound." The Whitcomb Lot was shown as Lot 10 on plan titled "Land in Littleton Owned by Wilbur M. Brown and Mary H. Brown" dated June 21, 1956 and prepared by Harlan E. Tuttle, Surveyor (the "1956 Plan").[6] The 1956 Plan was recorded with the Registry on June 22, 1956, in Book 8750, Page End. The northerly boundary of the Whitcomb Lot abuts the ROW, but the ROW does not appear on the 1956 Plan. On the 1956 Plan, the Browns are listed as the abutter to the north of the Whitcomb Lot.

3. The Browns subdivided their property as shown on plan titled "Land in Littleton Owned by Wilbur M. Brown and Mary H. Brown," dated February 8, 1958, and prepared by Harlan E. Tuttle, Surveyor (the "1958 Plan").[7] The 1958 Plan was recorded with the Registry on February 1, 1960, at Book 9541, Page End.

4. By Agreement with the Town of Littleton dated September 21, 1959, and recorded with the Registry on May 19, 1960, in Book 9597, Page 246 (the "Agreement"), the Browns

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[5] The summary judgment record indicates, but does not include a copy of the deed, that title to the Browns' property was transferred from Wilbur M. Brown and A. Delana Brown to Wilbur M. Brown and Mary H. Brown by deed dated January 7, 1956, and recorded with the Registry at Book 8649, Page 126.

[6] The 1956 Plan was an "approval not required" (ANR) plan as indicated by the signature of the Littleton Planning Board on the plan.

[7] The 1958 Plan was also titled "Tahattawan Park Subdivision Showing Proposed Street lines," and shows subdivision roads throughout the subdivision. The ROW is shown as a part of the subdivision roadway system and is located between the Second Westby Lot, as hereinafter defined, and the Whitcomb Lot.

agreed to construct the subdivision roadways in accordance with the 1958 Plan.[8]

5. By deed dated September 18, 1973, and recorded with the Registry at Book 12528, Page 104 (the "Second Westby Deed"), the Browns conveyed property located on the east side of Tahattawan Road and containing 3,136 square feet, to Janet H. Westby (the "Second Westby Lot"). The Second Westby Deed referenced the 1958 Plan, and the Second Westby Lot was shown on the 1958 Plan as abutting the ROW.[9] The deed contained the language "[s]ubject to and with the benefit of easements, restrictions and agreements of record, if any there be, insofar as the same are now in force and applicable."

6. By deed dated October 15, 1973, and recorded with the Registry at Book 12541, Page 24 (the "Kotanchik Deed"), the Browns conveyed property located on the east side of Tahattawan Road (the "Subdivision Land") to James J. Kotanchik and Judith R. Kotanchik (the "Kotanchiks"). The legal description was as follows:

> Beginning at said road at land now or formerly of Charles N. Tuttle; thence
> EASTERLY on the wall to land formerly of Edward E. Kimball now or late of Harry W. Knights; thence
> SOUTHERLY on said land now or late of Harry W. Knights to an iron pipe in the ground at the cart path; thence

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[8] The Agreement allowed the Browns to construct such roadways incrementally, stating that "before selling or transferring land on the proposed streets shown on [the 1958 Plan, the Browns] will construct and complete, . . . so much of the way leading from an existing public way up to an[d] including the land to be sold . . . ." The subdivision (including its roadways) was never built.

[9] The legal description of the Second Westby Lot was as follows:

> SOUTHERLY by land marked "Edge of Traveled Way", as shown on said plan, one hundred seventy-three and 79/100 (173.79) feet;
> SOUTHWESTERLY by the curved line of Tahattawan Road, as shown on said plan, thirty-nine and 28/100 (39.28) feet;
> NORTHERLY by land now or formerly of Gordon E. Westby, as shown on said plan, two hundred and 00/100 (200.00) feet; and
> EASTERLY by other land of the grantor.

WESTERLY on the Northerly side of said cart path to the road; thence
NORTHERLY on the road to the first mentioned bound.

This deed did not reference the 1958 Plan or the ROW in its legal description, and only referenced the 1958 Plan with respect to excluded parcels that had already been deeded out.[10]

7. By deed dated December 19, 1977, and recorded with the Registry at Book 13356, Page 435 (the "Flannery Deed"), the Kotanchiks deeded the Subdivision Land to Leo R. Flannery and Jacqueline A. Flannery (the "Flannerys"). The Flannery Deed did not reference the 1958 Plan in its legal description except for a reference to parcels that had already been deeded out by the Browns.

8. The Flannerys arranged a plan titled "Plan of Land in Littleton, Mass. Owned by Jacqueline A. & Leo R. Flannery," dated September 10, 1979, prepared by David W. Perley (the "1979 Plan"), and recorded with the Registry on October 11, 1979, as Plan Number 1218 of 1979. The 1979 Plan shows a single lot ("Lot A") which consists of a portion of the Subdivision Land. Lot A included a strip of land that provided access to Tahattawan Road located between the Second Westby Lot and the Whitcomb Lot. This strip is consistent with the location of the ROW, but was not referenced as the ROW on the 1979 Plan.

9. The Flannerys conveyed Lot A to Bernard A. Caouette by deed (the "Caouette Deed") dated October 11, 1979, and recorded with the Registry at Book 13809, Page 272.[11] The

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[10] The deed margin contains the following reference: "See Plan in Record Book 12541 Page 024." Such plan was not in the summary judgment record, and this court requested that the plan be submitted. The Lelievres furnished such plan to this court on October 4, 2010. It is a plan titled "Land in Littleton, Mass. Owned by Wilbur M. Brown and Mary H. Brown" dated October 1, 1973 and prepared by Harlan E. Tuttle, Surveyor. Such plan does not show any area involving the ROW, and there is no reference to any subdivision lots or subdivision roads on such plan.

[11]. The legal description of Lot A in the Caouette Deed does not reference the ROW. This includes the strip of land that provides Lot A access with Tahattawan Road; the northerly boundary of

Caouette Deed referenced the 1979 Plan and reserved a right of way for grantors across Lot A (including the ROW) for access to Tahattawan Road. The reserved right of way stated,

> Said right of way is intended to be used in common with the grantee for all reasonable purposes of ingress and egress, provided, however, that the grantors, their heirs, executors and assigns, shall share equally with the owner of Lot A the cost of all routine maintenance and repairs to keep the right of way in the same condition as when reserved, reasonable wear and tear excepted, including but not limited to snow removal, as long as the reservation of the right of way remains in force and applicable.

10. By deed dated May 15, 1981, and recorded with the Registry at Book 14294, Page 259, the Flannerys conveyed the Subdivision Land (less all conveyances made prior to that time) to Sherrill R. Gould.

11. By deed dated May 12, 1999, Plaintiff obtained title to the First Westby Lot and the Second Westby Lot (property located at 70 Tahattawan Road, Littleton) from Janet H. Westby and recorded with the Registry at Book 30194, Page 450.[12]

12. By deed dated July 1, 2005, and recorded with the Registry at Book 45525, Page 526, Barbara E. Boothby and Cathy Kristofferson deeded Lot A to the Lelievres (property located at 76 Tahattawan Road, Littleton).[13]

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such land is described as "running South 88 [degrees] 34' East a distance of One Hundred Seventy-three and 79/100 (173.79) feet to a point;" and the southerly boundary of such land read, "running along said Shields land, now or formerly, North 88 [degrees] 34' West a distance of One Hundred Fifty-nine and 85/100 (159.85) feet, to a point as shown on said plan."

[12] The summary judgment record is unclear how Janet H. Westby obtained Gordon E. Westby's interest in the First Westby Lot.

[13] Bernard A. Caouette and Frances S. Caouette conveyed Lot A to Barbara E. Boothby and Cathy Kristofferson by deed dated April 17, 1992, and recorded with the Registry at Book 21955, Page 27. The summary judgment record does not disclose how title was transferred from Bernard A. Caouette to Bernard A. Caouette and Frances S. Caouette.

The central issues in Plaintiff's Motion for Partial Summary Judgment are whether Plaintiff owns fee title to any portion of the ROW by operation of G. L. c. 183, § 58 (the "Derelict Fee Statute"), and whether the Lelievres hold deeded rights or an easement by estoppel or necessity in the ROW.[14]

I. Whether Plaintiff Possesses Fee Title to the ROW Pursuant to G. L. c. 183, § 58.

G. L. c. 183, § 58 states that

> [e]very instrument passing title to real estate abutting a way, whether public or private . . . shall be construed to include any fee interest of the grantor in such way . . . , unless (a) the grantor retains other real estate abutting such way . . . , in which case, . . . (ii) if the retained real estate is on the other side of such way . . . , the title conveyed shall be to the center line of such way . . . as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a sideline.

Plaintiff argues that she holds fee title to the ROW by operation of the Derelict Fee Statute. Specifically, Plaintiff claims that when the Browns conveyed the Second Westby Lot in 1973, all of the Browns' rights in the ROW transferred to the owner of the Second Westby Lot because the Browns retained no interest in the land on the south side of the ROW (the Whitcomb Lot). The Lelievres contend that the Derelict Fee Statute does not apply because the subdivision shown in the 1958 Plan was never built out. The Lelievres assert that, while the subdivision was entitled to a zoning freeze pursuant to G. L. c. 40A, § 6, such freeze expired by February 26, 1965, and, thus, the roadways identified on the 1958 Plan were void. The Lelievres conclude that because the Subdivision and its roadways were void, the Second Westby Deed's description that referred to the ROW was for convenience only, and fails to trigger the Derelict Fee Statute.

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[14] The parties' adverse possession and prescriptive rights claims are not part of this summary judgment motion.

The Derelict Fee Statute "sets out an authoritative rule of construction for instruments passing title to real estate abutting a way." Emery v. Crowley, 371 Mass 489, 492 (1976); Rowley v. Massachusetts Electric Co., 438 Mass. 798, 802 (2003). Through the Derelict Fee Statute, the legislature codified common law and "mandate[d] that every deed of real estate abutting a way includes the fee interest of the grantor in the way–to the center line if the grantor retains property on the other side of the way or for the full width if he does not–unless 'the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.'" Tattan v. Kurlan, 32 Mass. App. Ct. 239, 243 (1992).

The essence of the Lelievres' argument concerning the Derelict Fee Statute is that the Second Westby Deed did not convey title to real estate abutting a "way," because such way did not exist. However, the Derelict Fee Statute allows for some flexibility in its application. The Supreme Judicial Court has held that the Derelict Fee Statute applies to "real estate, . . . that in fact abuts a 'public or private [way] . . . or other similar linear monument,' regardless of how it is described in the instrument of its conveyance." Rowley v. Massachusetts Electric Co., 438 Mass. 798, 805 (2003). Moreover, the Derelict Fee Statute applies to a way "whether public or private and whether in existence or merely contemplated (so long as it is sufficiently designated . . . .)." Tattan v. Kurlan, 32 Mass. App. Ct. 239, 242-43 (1992) (emphasis supplied).

The key conveyance at issue in the case at bar is the Second Westby Deed, in which the Browns transferred the Second Westby Lot in September 1973.[15] At that time, while the Browns still owned all of the ROW, they did not have an interest in any land to the south of the ROW, as

[15] The summary judgment record indicates that in 1958 the Browns had not deeded out any of the Subdivision Land which was not bounded by Tahattawan Road.

they had previously conveyed the Whitcomb Lot. Additionally, both the Second Westby Deed and the referenced 1958 Plan indicate the ROW as abutting the Second Westby Lot,[16] and the Agreement discussing the ROW was of record. Moreover, following the creation of the Second Westby Lot, the descriptions of the Whitcomb Lot's northern boundary and the Second Westby Lot's southern boundary account for curb-cutting consistent with the ways shown on the 1958 Plan. Finally, the Browns did not retain any rights in the ROW in the Second Westby Deed. Given that the ROW was contemplated in the Second Westby Deed, pursuant to the Derelict Fee Statute, all of the Browns' interest in the ROW was conveyed to Janet Westby, which was later conveyed to Plaintiff in 1999.[17]

As a result of the foregoing, I find that, as between Plaintiff and the Lelievres, Plaintiff owns the fee interest in the ROW under the Derelict Fee Statute.[18]

II. Whether Lot A Benefits from an Easement by Estoppel or Necessity in the ROW.

The Lelievres claim that in the event that Plaintiff possesses fee title in the ROW, such rights are subject to an easement by estoppel benefitting Lot A. Plaintiff argues that, as a result

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[16] The legal description of the Second Westby Lot's southerly boundary references the "Traveled Way."

[17] The Derelict Fee Statute was effective January 1, 1972, so there is no need to address the retroactive effect of the statute.

[18] Because the current owner of the Whitcomb Lot is not a party to this action, I cannot rule on Plaintiff's rights in the ROW relative to the Whitcomb Lot. That said, a brief review of the Whitcomb Deed is instructive.

When the Whitcomb Lot was deeded out in June 1958, the Browns owned the abutting land to the north, but it does not appear that the ROW had yet been established or contemplated. Neither the Whitcomb Deed nor the 1956 Plan cited in the Whitcomb Deed reference a roadway abutting the Whitcomb Lot to the north. And while the 1958 Plan was prepared in February 1958, such plan was not recorded until February 1, 1960. As such, it is clear that the Whitcomb Deed does not expressly pass tile abutting a way; moreover, under the facts currently before the court, it does not appear that a "way" was contemplated as there was nothing either on the ground or in the Registry to indicate as such.

of the Second Westby Deed, the Browns failed to retain any interest in the ROW and could not convey rights in a way that they did not possess.

Case law reveals two different theories under which a parcel of land may be conferred with rights in a way under the doctrine of easement by estoppel. The first is based on a recorded plan. See Goldstein v. Beal, 317 Mass. 750, 755 (1945) (stating that "where land situated on a street is conveyed according to a recorded plan on which the street is shown, the grantor and those claiming under him are estopped to deny the existence of the street for the entire distance as shown on the plan."). The second theory states that "when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such street or way, and the right thus acquired by the grantee (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way, as it is then laid out or clearly indicated and prescribed." Casella v. Sneierson, 325 Mass. 85, 89 (1949). The Kotanchik Deed, which created the Subdivision Land, does not include a reference to land bounded on the ROW, as shown in the 1958 Plan, or to land that has been subdivided.[19] Moreover, when the Subdivision Land was deeded in October 1973, the subdivision had not been built (and never was). As such, whether Lot A benefits from an easement by estoppel over the ROW depends on whether the Subdivision Land is found to be "situated on a street [and/or] conveyed according to a recorded plan on which the street is shown." Goldstein, 317 Mass. at 755.

It is notable that the Kotanchik Deed conveyed the Subdivision Land through the use of a legal description, and not by reference to a recorded plan. This deed only referenced the 1958

[19] Neither the ROW nor the 1958 Plan were included in the legal description of the Subdivision Land in the deed from the Kotanchiks to the Flannerys.

Plan to except certain lots from conveyance that had already been deeded out. Specifically, the Kotanchik Deed states: "There is excepted from the above described premises so much as has been heretofore conveyed by the following deeds duly recorded with [the Registry]: . . ." This conveyance is contrasted with the Second Westby Deed (dated one month earlier), which referenced both the ROW and the 1958 Plan as a part of the legal description. This court cannot conclude that referring to a plan for the purposes of carving out excluded parcels is the same thing as conveying land according to a recorded plan.

When the Caouette Deed for Lot A was recorded in 1979, together with the 1979 Plan, such deed purported to reserve a right of way across the ROW as access to Tahattawan Road. However, as the Browns retained no rights in the ROW following the Second Westby Deed, they could not convey such rights to the Kotanchiks. Accordingly, the Kotanchiks could not convey rights in the ROW to the Flannerys, who themselves had no basis for granting the rights in the ROW as contained within the Caouette Deed. Moreover, the 1979 Plan did not show the ROW and the legal description in the Caouette Deed (the first deed to separate Lot A from the Subdivision Land) did not reference the ROW.

In conclusion, while the lots comprising Lot A were shown as abutting a subdivision roadway in the 1958 Plan, the Kotanchik Deed did not convey the Subdivision Land accordingly to such plan. Additionally, the Browns failed to retain ownership of the ROW to grant such rights to anyone else. In light of the above, I find that the owner of Lot A does not have a right to use the ROW based on a theory of easement by estoppel.

Plaintiff also argues that Lot A does not benefit from an easement by necessity over the ROW. In their Opposition, the Lelievres do not argue that they have an easement by necessity.

Rather, they reframe their rights in terms of an easement by estoppel, which, as discussed, supra, does not exist.[20]

An easement by necessity may arise "when a common grantor carves out what would otherwise be a landlocked parcel." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 291 (2005) (citing Bedford v. Cerasuolo, 62 Mass. App. Ct. 73, 76-77 (2004)). Typically, such easements "refer to rights-of-way presumed . . . when a landowner conveys a portion of his land but still needs access over the transferred property to reach the property he retained." Bedford, 62 Mass. App. Ct. at 77. An easement by necessity may be found if a court "can fairly conclude that the grantor and grantee, had they considered the matter, would have wanted to create one." Kitras, 64 Mass. App. Ct. at 291. To infer such intent, the record must demonstrate three factors: (1) a unity of title between the dominant and servient estates, (2) which is severed by conveyance, and (3) "necessity aris[es] from that severance, all considered 'with reference to all the facts within the knowledge of the parties respecting the subject of the grant, to the end that their assumed design may be carried into effect.'" Id. (citing Orpin v. Morrison, 230 Mass. 529, 533 (1918)).

While Lot A and the ROW were once held in common ownership by the Browns, the record does not support a finding of necessity as a result of the Second Westby Deed, which, as previously discussed, effectively foreclosed access from Lot A over the ROW to Tahattawan Road. Rather, after the Second Westby Deed, the remaining land of the Browns (which comprised the Subdivision Land following the Kotanchik Deed) had other frontage along

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[20] It should be noted that the Lelievres raised the theory of easement by necessity in their counterclaim.

Tahattawan Road. In light of the above, I find that owner of Lot A does not have a right to use the ROW based on a theory of easement by necessity.

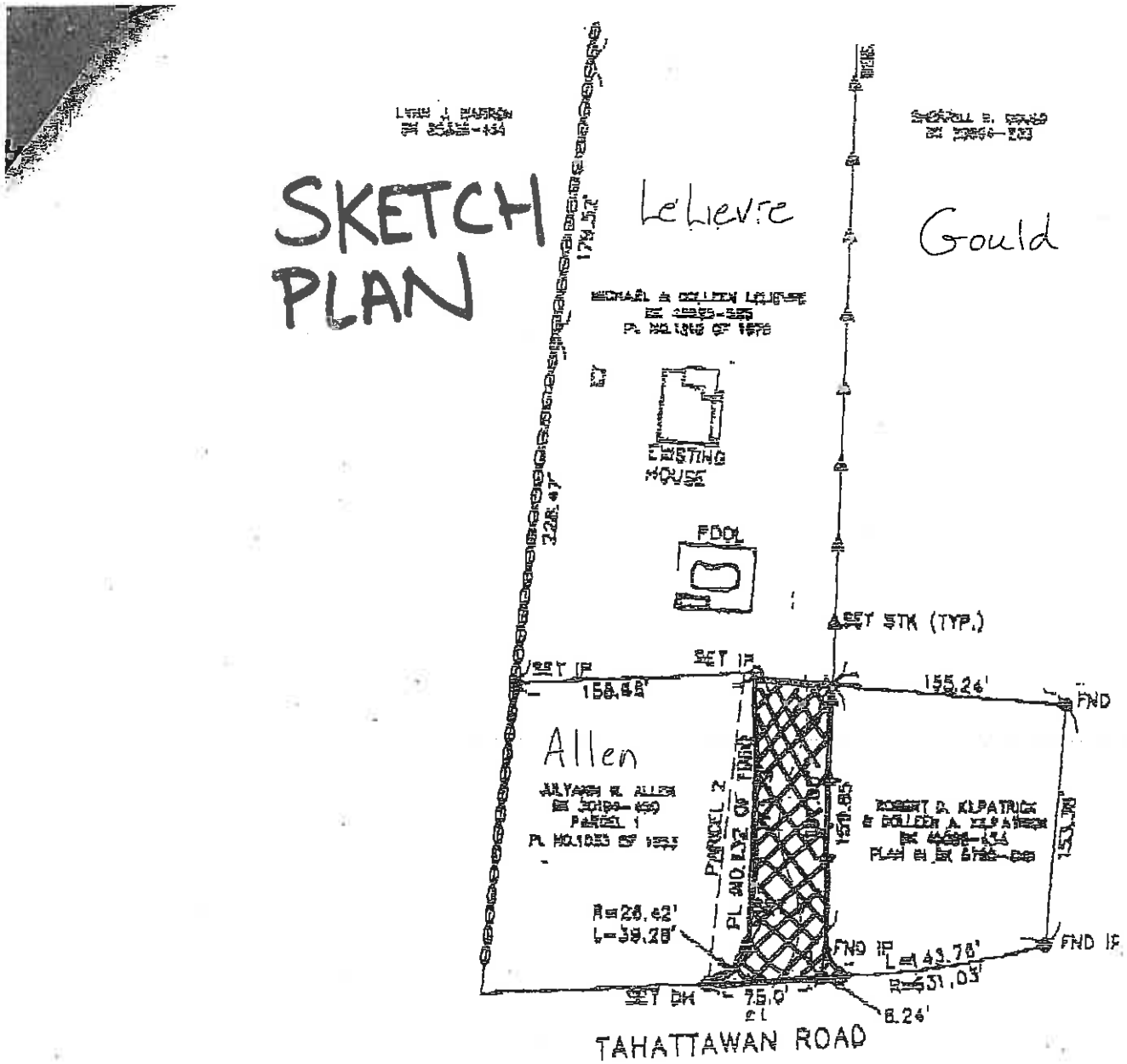
In light of the above, I ALLOW Plaintiff's Motion for Partial Summary Judgment.

As discussed at oral argument on the summary judgment motion, the parties are not addressing their adverse possession and prescriptive rights claims in this motion. The parties shall attend a status conference on Tuesday, November 9, 2010, at 11:00 A.M. to determine how best to proceed with this case.

Judgment shall issue after all issues have been resolved.

Alexander H. Sands, III
Justice

Dated: October 5, 2010



= Disputed Area

EXHIBIT A

SKETCH OF THE DISPUTED PARCEL

SKETCH
PLAN

EXHIBIT 8

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
08 MISC 383555 (AHS)

JULYANN W. ALLEN,
Plaintiff,

vs.

MICHAEL LELIEVRE, COLLEEN LELIEVRE and SHERRILL GOULD,
Defendants.[1]

DECISION

Plaintiff filed her unverified complaint on September 4, 2008, alleging deeded rights and trespass in a right-of-way located off Tahattawan Road in Littleton, Middlesex County, Massachusetts (the "Disputed Area").[2] Plaintiff also sought, pursuant to the provisions of G. L. c. 240, §§6-10, a determination of rights in such way.[3] On September 29, 2008, Defendants (and counter-claimants) Michael Lelievre and Colleen Lelievre (the "Lelievres") filed an Answer and Counterclaim alleging deeded rights, adverse possession, prescriptive rights, and easement rights (including an easement by necessity) in the Disputed Area. Plaintiff filed her Answer to Counterclaim on November 12, 2008. A case management conference was held on November 24, 2008.

On September 25, 2009, Plaintiff filed her Motion for Partial Summary Judgment, together with supporting memorandum, Appendix, and Affidavit of Diane C. Tillotson. The

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[1] Plaintiff filed a Request to Enter Default against Defendant Sherrill Gould on March 4, 2010, which was allowed on April 20, 2010.

[2] The Disputed Area is shown as the "Former Proposed Street" on a Site Plan created by Snelling & Hammel Associates, Inc., on January 23, 2008 (the "2008 Plan"), and attached to this Decision as Exhibit A. For the purposes of this Decision, the Disputed Area shall be divided into Area 1 (the gravel driveway) and Area 2 (the area between the driveway and Plaintiff Property as indicated on the 2008 Plan), as well as the land south of the driveway extending to the property designated as belonging to Richard Shields (the "Shields Property").

[3] Plaintiff filed her Motion to Amend Complaint on September 15, 2009, adding a count for adverse possession. At a status conference on December 3, 2009, Plaintiff indicated that she had filed a similar claim in Middlesex Superior Court, along with a tree cutting claim. As a result, the Motion to Amend Complaint was not acted on.

Lelievres filed their Opposition on November 4, 2009, together with supporting memorandum, Appendix and Affidavit of Erica P. Bigelow. A hearing was held on the summary judgment motion on February 8, 2010, and a decision (the "Summary Judgment Decision") was entered on October 5, 2010, in which I found that, as between Plaintiff and the Lelievres, Plaintiff owns the fee interest in the Disputed Area under the Derelict Fee Statute; that the owner of Lot A, as hereinafter defined, does not have a right to use the Disputed Area based on a theory of easement by estoppel; and that the owner of Lot A does not have a right to use the Disputed Area based on a theory of easement by necessity. As a result of the foregoing, I ALLOWED Plaintiff's Motion for Partial Summary Judgment.

On June 7, 2011, Plaintiff filed a Motion for Preliminary Injunction. A pre-trial conference on the issues of adverse possession and prescriptive rights was held on June 15, 2011, and at that time the parties entered into a Stipulation to resolve the Motion for Preliminary Injunction where they agreed a) not to enter Area 2, b) to let the stockade fence remain in place, and c) that Area 1 could be used by the Lelievres as residential access by three vehicles (a minivan, a dump truck and a pick-up truck). A site view and the first day of trial at the Concord District Court were held on October 4, 2011. The second day of trial was held on October 5, 2011, at the Land Court in Boston.

Testimony at trial was given by the Lelievres' witnesses Jacqueline Guthrie ("Guthrie") (formerly Flannery, and prior owner of Defendant Property)[4], Frances Simeone ("Simeone") (formerly Cauoette and prior owner of Lot A), Barbara Boothby (prior owner of Lot A), Kathy Kristofferson (prior owner of Lot A), and Michael Lelievre (Defendant). Testimony at trial was given by Plaintiff's witness David (husband of Plaintiff). There were forty exhibits submitted

[4] Defendant Property is referred to hereinafter as "Lot A," as it was initially conveyed in 1979.

into evidence, including the affidavit of Judith Kotanchik (prior owner of the Subdivision Land, as hereinafter defined). Post-trial briefs were filed on December 14, 2011 and December 16, 2011 by the Lelievres and Plaintiff, respectively. The matter was then taken under advisement.

Based on the sworn pleadings, the evidence submitted at trial, and the reasonable inferences drawn therefrom, I find the following material facts:[5]

DEEDS

1. By deed dated May 2, 1953, and recorded with the Middlesex South District Registry of Deeds (the "Registry") at Book 8088, Page 466, A. Delana Brown and Wilbur M. Brown (the "Browns") conveyed property located on the east side of Tahattawan Road to Gordon E. Westby and Janet H. Westby (the "First Westby Lot").[6]

2. The Browns subdivided a portion of their property as shown on a Plan titled, "Land in Littleton Owned by Wilbur M. Brown and Mary H. Brown," dated February 8, 1958, and prepared by Harlan E. Tuttle, Surveyor (the "1958 Plan").[7] The 1958 Plan was recorded with the Registry on February 1, 1960, at Book 9541, Page END.

3. By agreement with the Town of Littleton dated September 21, 1959, and recorded with the Registry on May 19, 1960 in Book 9597, Page 246 (the "Agreement"), the Browns agreed to construct the subdivision roadways in accordance with the 1958 Plan.[8]

4. By deed dated September 18, 1973, and recorded with the Registry at Book 12528,

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[5] Those facts from the Summary Judgment Decision that are relevant to the issues at trial are repeated.

[6] This deed references a plan dated April 27, 1953, which is not included in the record. The parties do not dispute the ownership lines of the First Westby Lot, including the initial ownership rights of the Browns to the relevant land in this case.

[7] The 1958 Plan was also titled, "Tahattawan Park Subdivision Showing Proposed Street Lines" and shows subdivision roads throughout the proposed subdivision. The Disputed Area is shown as a part of the subdivision roadway system, and is located between the Second Westby lot as hereinafter defined, and the Shields Property.

[8] The Agreement allowed the Browns to construct such roadways incrementally, stating that "before selling or transferring land on the proposed streets shown on [the 1958 Plan, the Browns] will construct and complete…so much of the way leading from an existing public way up to an[d] including the land to be sold…." Neither the subdivision nor its roadways were ever built.

Page 104 (the "Second Westby Deed"), the Browns conveyed property located on the east side of Tahattawan Road containing 3,136 square feet to Janet H. Westby (the "Second Westby Lot"). The Second Westby Deed referenced the 1958 Plan, and the Second Westby Lot was shown on the 1958 Plan as abutting the northern edge of the Disputed Area. The deed contained the language: "[s]ubject to and with the benefit of easements, restrictions and agreements of record, if any there be, insofar as the same are now in force and applicable."

5. By deed dated October 15, 1973, and recorded with the Registry at Book 12541, Page 024 (the "Kotanchik Deed"), the Browns conveyed property located on the east side of Tahattawan Road (the "Subdivision Land") to James J. Kotanchik and Judith R. Kotanchik (the "Kotanchiks"). The Kotanchik Deed did not reference a recorded plan in conveying the Subdivision Land, instead conveying the property by legal description.[9] No right of way was reserved to the Grantors within the Kotanchik Deed. The Kotanchik Deed did, however, reserve to the Grantors the right to keep water pipes that were on the property at the time of conveyance and to "enter the property at any time to make necessary repairs," to those pipes.

6. By deed dated December 19, 1977, and recorded with the Registry at Book 13356, Page 435 (the "Flannery Deed"), the Kotanchiks deeded the Subdivision Land to Leo R. Flannery and Jacqueline A. Flannery (the "Flannerys"). The Flannery Deed did not reference the 1958 Plan in its legal description except for a reference to parcels that had already been deeded out by the Browns.

7. The Flannerys arranged for the preparation of a plan titled "Plan of Land in Littleton, Mass. Owned by Jacqueline A. & Leo R. Flannery," dated September 10, 1979 and prepared by

[9] The Kotanchik Deed did reference the 1958 Plan, but did so only to except certain lots from conveyance that had already been deeded out.

David W. Perley (the "1979 Plan"). The 1979 Plan was recorded with the Registry on October 11, 1979, as Plan Number 1218 of 1979. The 1979 Plan shows a single lot, Lot A, which consists of a 3.6 acre portion of the Subdivision Land. Lot A included a strip of land that provided access to Tahattawan Road located between the Second Westby Lot and the Shields Property. This strip is consistent with the location of the Disputed Area, but was not separately identified on the 1979 Plan.[10]

8. The Flannerys conveyed Lot A to Bernard A. Caouette by deed (the "Caouette Deed") dated October 11, 1979, and recorded with the Registry at Book 13809, Page 272. The Caouette Deed referenced the 1979 Plan and reserved a right of way for grantors across Lot A (including the Disputed Area) for access to Tahattawan Road. The reserved right of way stated,

> Said right of way is intended to be used in common with the grantee for all reasonable purposes of ingress and egress, provided, however, that the grantors, their heirs, executors and assigns, shall share equally with the owner of Lot A the cost of all routine maintenance and repairs to keep the right of way in the same condition as when reserved, reasonable wear and tear excepted, including but not limited to snow removal, as long as the reservation of the right of way remains in force and applicable.

The Disputed Area was located within the 3.6 acres conveyed by the deed.

9. By deed dated May 15, 1981, and recorded with the Registry at Book 14294, Page 259, the Flannerys conveyed the Subdivision Land (less all conveyances made prior to that time) to Sherrill R. Gould.

10. By deed dated April 17, 1992, and recorded with the Registry at Book 32995, Page 027, Bernard A. Caouette and Frances S. Caouette conveyed Lot A to Barbara E. Boothby and

[10] The 1979 Plan does not distinguish between Area 1 and Area 2, but indicates that the southern boundary is 159.85 feet in length, and that the northern boundary abutting Plaintiff Property is 173.79 feet in length.

Cathy Kristofferson (together, "Boothby/Kristofferson").[11] This deed conveyed Lot A by making specific reference to the 1979 Plan.

11. By deed dated May 12, 1999, Plaintiff obtained title to the First Westby Lot and the Second Westby Lot (together known as 70 Tahattawan Road, Littleton, MA) from Janet H. Westby and recorded with the Registry at Book 30194, Page 450.[12]

12. By deed dated July 1, 2005, and recorded with the Registry at Book 45525, Page 526, Boothby/Kristofferson deeded Lot A to the Lelievres. This deed conveyed Lot A by making specific reference to the 1979 Plan.

USE

13. From 1973 to 1977, the Kotanchiks owned approximately twelve acres of property which comprised the Subdivision Land and was situated, in part, to the east of Plaintiff Property. The Kotanchiks visited the Subdivision Land during this period fewer than ten times. When visiting, the Kotanchiks would access the property by traveling up a dirt "cart path," characterized by two dirt ruts approximately the width of a car's tire with grass between them. This path was located within, and comprised, Area 1. No improvements were made to the path during this period.

14. When the Kotanchiks purchased the Subdivision Land, a row of neglected apple trees stood on each side of Area 1. To the south, the row of trees followed along the southern boundary of the Disputed Area. To the north, the second row of trees stood approximately ten feet south of the Disputed Area's northern boundary. A natural swale lay between the northern row of trees and Area 1. The Kotanchiks had several percolation tests conducted on the

[11] The Summary Judgment Decision incorrectly identified this deed as having been recorded at Book 21955. The record is unclear as to how Frances S. Caouette obtained an interest in Lot A.
[12] The record is unclear as to how Janet H. Westby obtained Gordon E. Westby's interest in the First Westby Lot.

Subdivision Land until they found a suitable location to build a house. They did not use or improve the Subdivision Land in any other way.

15. From 1977 to 1979, the Flannerys used portions of the Subdivision Land to pasture horses and grow crops. The Flannerys would access much of the Subdivision Land, including that portion which would later comprise Lot A, by traversing Area 1 either on foot, horseback, or by motor vehicle (tractor, pick-up truck, or snowmobile). Area 1 was wide enough such that a three-quarter ton pick-up truck could drive up its center from Tahattawan Road with room remaining on each side. The Flannerys added some gravel to Area 1 and plowed during the winter. Mr. Flannery would occasionally cut limbs off of the apple trees located in Area 2 for use in his wood stove. The Flannerys did not use Area 2 for any other purpose.

16. The Caouettes owned Lot A from 1979 to 1992 and built a house (the "House") on Lot A from 1982-1984. Mr. Caouette oversaw the installation of electrical and water service to the House, elements of which lay within both Area 1 and Area 2, prior to receiving the final occupancy permit in August of 1986.[13] The utilities were installed by the Littleton Electric Light & Water Departments and include a utility pole (the "Pole"), underground electrical and water lines, and a transformer (the "Transformer").[14] Installation of the utilities required the Caouettes to clear portions of Area 2. Upon receiving an occupancy permit for the House in 1986, the Caouettes installed a mailbox (the "Mailbox") in Area 2 near the Pole. The Mailbox stands in

[13] Final approval over the electrical systems was granted on August 8, 1984. No evidence of utility easements were admitted into evidence.

[14] The Pole is identified as "Utility Pole with Conduit" in Area 2 on the attached Exhibit A.

the same location, today.[15] The Caouettes maintained and improved Area 1 by adding a significant amount of gravel and plowing fallen snow when necessary. Area 1, described by Simeone as being 1-2 vehicles wide, was used by the Caouettes to provide daily access to the House. In order to keep Area 1 from eroding, the Caouettes planted small bushes in Area 2, along the edge of Area 1. They maintained the bushes while they were the owners of Lot A.

17. Electricity from Tahattawan Road travels above ground to the Pole. The lines then continue underground, traveling through portions of Area 1 and Area 2, to the above-ground Transformer. The Transformer is located on Lot A near the southeast corner of Plaintiff Property. Upon reaching the Transformer, the lines continue underground toward the House. Water lines connected to the town's water system travel on the southern edge of the Disputed Area, passing through portions of Area 1 and Area 2.[16]

18. Boothby/Kristofferson owned Lot A from 1992-2005. They used Area 1 for daily access, and paid to have it plowed when necessary. Boothby/Kristofferson did not replace stones that had comprised Area 1 and were cast off during plowing. On rare occasion, they pruned the "bramble" on either edge of Area 1, but such pruning occurred only to the extent that it kept cars from being scratched when driving by. In so doing, they did not enter Area 2 but rather stood in Area 1 and trimmed the encroaching plants. As a result, Area 2 gradually became overgrown. They did not enter or use Area 2 for any other purpose.

19. The Lelievres have lived at Lot A from 2005 to the present, using Area 1 to access the

[15] References hereinafter to the Mailbox refer to the mailbox that has stood in the same location since its initial installation in 1986, and is identified on Exhibit A. The record is unclear as to whether the Mailbox presently located in Area 2 is the original mailbox, or is a replacement of the original. However, as this court is convinced that a mailbox has stood in the same location since 1986, it refers to any and all replacements of the original mailbox as the Mailbox.

[16] The water lines are primarily situated in Area 2 just north of the Shields Property on Exhibit A.

House on a daily basis.[17] Since their purchase of Lot A, the Lelievres have added gravel to Area 1 when needed, and have plowed when necessary. The Lelievres also added a FIOS internet line in 2006, running the line beneath Area 1. The Lelievres cleared Area 2 by removing trees and bushes and adding soil (to increase its grade). On December 6, 2006, having removed several trees, the Lelievres built a stockade fence (the "Fence") which runs along the northerly boundary of Area 2, as shown on Exhibit A.

20. The Lelievres had a survey plan prepared dated March 28, 2006, by David E. Ross Associates, Inc. The width of the Disputed Area along Tahattawan Road is shown as being approximately 75 feet.[18]

21. Plaintiff's mother (Janet Westby) lived at Plaintiff Property from 1953 to 1997. Plaintiff's husband David Allen ("David") first visited Plaintiff Property in 1968, during which he walked the Disputed Area with his father-in-law. At that time the Disputed Area was an apple orchard, with two rows of apple trees and a dirt path between the two lines of trees. Between 1968 and 1992 (when Plaintiff purchased Plaintiff Property from her mother, and except for the period 1970-1975 when David was teaching in England or New Hampshire), David walked the Disputed Area once or twice a month when visiting his mother-in-law, often with a dog. David's walks continued until 2000.

22. David planted trees and shrubs in Area 2 in the 1970s and the 1980s. When on a walk, David would typically enter Area 2 directly south of the house on Plaintiff Property, later crossing into Area 1 to continue east. David also used Area 2 for playing badminton, as the location for a compost pile, and for planting a garden (1960s-1990s). One of David's dogs is

[17] Initially Michael Lelievre, a landscaper, operated his business from Lot A. He has since moved his business to another lot.

[18] The width of Lot A along Tahattawan Road in the 1979 Plan is shown as 102 feet.

buried beneath a large boulder in Area 2. Since Plaintiff purchased Plaintiff Property in 1992, David has pruned bushes located in Area 2 in order to preserve Plaintiff Property's views.

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In the Summary Judgment Decision, this court established that as between Plaintiff and the Lelievres, Plaintiff is the fee owner of the Disputed Area pursuant to the Derelict Fee Statute.[19] This court then heard testimony at trial as to whether the Lelievres have established rights to the Disputed Area through adverse possession or an easement by prescription. The Lelievres assert that a finding of adverse possession in Area 1 would entitle them to the entire Disputed Area pursuant to their color of title argument. I shall review these issues in turn.

In Massachusetts, an individual may obtain title to the land of another if he exercises actual, open, notorious, exclusive, adverse, and nonpermissive use of the property for a period in excess of twenty years. Ryan v. Starvos, 348 Mass. 251, 262 (1964). "Whether, in a particular case, these elements are sufficiently shown is essentially a question of fact." Brandao v. DoCanto, 80 Mass. App. Ct. 151, 156 (2011) (quoting Kershaw v. Zecchini, 342 Mass. 318, 320 (1961)). A party asserting its acquisition of title through adverse possession bears the burden of proving each of the necessary elements of such possession. Mendonca v. Cities Serv. Oil Co. of PA, 354 Mass. 323, 327 (1968). To satisfy this burden, the party must demonstrate satisfaction of each element by a preponderance of the evidence. Conti v. Cormack, 76 Mass. App. Ct. 1120 (2010) (citing Clevenger v. Haling, 379 Mass. 154, 157-58 (1979)). If any element is left in doubt the claimant cannot prevail. Mendonca, 354 Mass. at 327.

[19] The Summary Judgment Decision did not rule on Plaintiff's rights in the Disputed Area relative to the owner of the Shields Property, as they were not party to the suit.

"The nature and the extent of occupancy required to establish a right by adverse possession vary with the character of the land, the purposes for which it is adapted, and the uses to which it has been put." LaChance v. First Nat'l Bank & Trust Co., 301 Mass. 488, 490 (1938). Use is generally deemed "open" so long as it is "without attempted concealment." Boothroyd v. Bogartz, 68 Mass. App. Ct. 40, 44 (2007). "Notorious use" requires that the use be "sufficiently pronounced so as to be made known, directly or indirectly, to the landowner if he or she maintained a reasonable degree of supervision over the property." Id.

In determining whether use over the property of another constitutes actual use, "[a] judge must examine the nature of the occupancy in relation to the character of the land." Peck v. Bigelow, 34 Mass. App. Ct. 551, 556 (1993) (citing Kendall v. Selvaggio, 413 Mass. 619, 624 (1992). The adverse possessor's acts should demonstrate "control and dominion over the premises as to be readily considered acts similar to those which are usually and ordinarily associated with ownership." LaChance, 301 Mass. at 491. Actual use need not manifest itself through some form of permanent structure, so long as the use is in a manner consistent with that of typical ownership. Hurlbert v. Kidd, 73 Mass. App. Ct. 1104 (2008) (citing LaChance, 301 Mass. at 491).

An easement by prescription requires the asserting party to demonstrate each element of adverse possession, with the exception of exclusive use. Labounty v. Vickers, 352 Mass. 337, 349 (1967). The extent of an easement so obtained is "fixed by the use through which it was created." Stucchi v. Colonna, 9 Mass. App. Ct. 851 (1980) (citing Lawless v. Trumbull, 343 Mass. 561, 562-63 (1962)). An easement may be limited to residential use when commercial use of that property has been, "irregular and sporadic." Stucchi, 9 Mass. App. Ct. at 851.

Area 1

Plaintiff concedes that the Lelievres have acquired prescriptive easement rights over Area 1, though she seeks to limit such easement to residential uses and to an area 8-10 feet in width. In so conceding, Plaintiff admits that the Lelievres and their predecessors-in-interest utilized Area 1 in an open and notorious manner for a period in excess of twenty years and that the use thereof was adverse to Plaintiff's rights. The Lelievres maintain that in addition to having established prescriptive rights over Area 1, they have acquired title to Area 1 via adverse possession. As a result, only the element of exclusive use remains at issue with regard to that claim. The extent of Area 1 also remains at issue.

I. Exclusive Use of Area 1

Use of a property is "exclusive" when the individual exercising its actual use excludes, "not only...[the] owner, but...all third persons to the extent that the owner would have excluded them." Peck, 34 Mass. App. Ct. at 557. "Acts of enclosure or cultivation are evidence of exclusive possession." Id. (quoting Labounty, 352 Mass. at 349). Such enclosures are not necessary, however, so long as third parties are excluded in a manner similar to that in which the owner would have excluded them. See id.

Plaintiff asserts that her husband's purported use of Area 1 operates to defeat the Lelievres' claim of adverse possession. In support of her contention, Plaintiff offered the testimony of her husband, David. During his testimony, David indicated that he first walked in portions of the Disputed Area with his father-in-law in 1968. From that point until 1992, when his wife purchased Plaintiff Property from her mother, David visited Plaintiff Property

monthly.[20] While there, David would walk within the Disputed Area, including Area 1. His walks were often in the company of one of two dogs, and appear to have occurred on some occasions with his son and mother-in-law. David also testified that individuals visiting Plaintiff Property would occasionally use Area 1 as a means of access. Despite his purported use of the Area 1, however, none of the predecessors-in-interest to Lot A ever witnessed David in the Disputed Area.[21]

The Lelievres have failed to demonstrate that the use of Area 1 by their predecessors-in-interest was exclusive. David's testimony described, to this court's satisfaction, several instances in which he utilized Area 1 from 1968-70, and 1976-2000. The Lelievres' predecessors-in-interest, regardless of whether they were aware of David's presence, made no effort to exclude outsiders from utilizing Area 1.[22] No fences were installed.[23] No signs concerning trespass were noted. Nothing stood in the way of David's frequent use of Area 1.

I find that the Lelievres and their predecessors-in-interest did not use Area 1 exclusively for a period of twenty years.

II. Extent of the Area 1 Easement

The record remains ambiguous as to the exact width of Area 1 throughout the requisite twenty year period, due in part to the susceptibility of gravel roads to shift over time. Nonetheless, I find that at no point did Area 1 measure any *less* than ten feet in width. Guthrie

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[20] David's visits stopped during the period of 1970-1975, when he was away, teaching. His walks continued throughout the period 1992-2000, during which his wife owned Plaintiff Property, as well.

[21] Four witnesses for the Lelievres, each of which were predecessors-in-interest to Lot A, testified that they had never seen David, Plaintiff, or the Westbys on their land or in the Disputed Area.

[22] This court finds the testimony of David credible, and that the testimonies of the Leliveres' predecessors-in-interest—while themselves credible—did not demonstrate that David did *not* use the property. Rather, this testimony proved simply that they had not seen his use thereof.

[23] The Lelievres' installation of fencing in 2006 has no effect on the outcome, given the twenty year use requirement.

indicated that during her ownership of the Subdivision Land, she would drive a three-quarter ton pick-up truck with a snowmobile trailer on Area 1. In doing so, Guthrie noted that there was, "still road on both sides if you drove up the middle." Simeone testified that her husband drove a pick-up truck, a backhoe, and other equipment used to build the House in Area 1 without issue. Per Simeone, the driveway was, "wider than one vehicle, but it wasn't two vehicles wide," and during the period 1986-1992, was used for light commercial purposes. Boothby, the subsequent owner of Lot A, testified that Area 1 was "approximately a car and a half width," and that neither she nor Kristofferson ever used the Disputed Area for commercial purposes. Mr. Lelievre later acknowledged that the testimonies of Guthrie, Simeone, and Boothby/Kristofferson indicated that the driveway was approximately one and a half cars wide, or "nine to ten feet."[24]

Testimony by the several witnesses has convinced this court that Area 1 has been at least ten feet wide for the requisite twenty year period. At a width of ten feet, the driveway allows for continued use by the Lelievres in the manner in which it has been used for over twenty years. As it appears that the only period during which Lot A was utilized for commercial purposes was 1986-1992, the easement is limited to residential use.[25] I find that the easement over Area 1 is ten feet in width and is to be for residential purposes only.

Area 2

The Lelievres also request a finding that their use of Area 2, extending from the northern edge of Area 1 to the southern edge of Plaintiff Property, is sufficient for the purposes of adverse

[24] Asked if he heard the "several witnesses describe the width of the driveway as a car and half wide," by Plaintiff's attorney on cross examination, Mr. Lelievre replied in the affirmative. As a follow up, Plaintiff attorney asked, "so the width of a car and a half would be nine to ten feet?" Mr. Lelievre again responded, "[y]es."

[25] This court is cognizant of the fact that Mr. Lelievre often drives his work vehicles to and from the House. This holding should not be read to exclude commercial vehicles from Area 1, but rather *commercial use* of Area 1. Commercial use requires more than simply utilizing a vehicle, however registered, as transportation to and from a residence.

possession or a prescriptive easement.[26] Unlike use of Area 1, Plaintiff challenges each element of the Lelievres' adverse possession claim regarding Area 2, asserting that neither adverse possession nor prescriptive rights are appropriate. Plaintiff has presented no information evidencing a grant of permission for use of Area 2 to the Lelievres or their predecessors-in-interest.

A. Structures: the Pole, underground electrical lines, water lines, and the Mailbox:[27]

The Lelievres have convinced this court that use of the Pole, underground electrical lines, water pipes, and the Mailbox by owners of Lot A was sufficiently actual, open, and notorious for the requisite period of twenty years. These utilities were installed prior to 1984 and remain the only medium through which power and water reach Lot A. The Pole was placed in Area 2 in order to receive final housing approvals and an occupancy permit, and was visible to passers by.[28] Upon reaching the Pole, electricity from Tahattawan Road continues via underground wires to an above-ground transformer near the southeastern corner of Plaintiff Property, running beneath portions of both Areas 1 and 2.[29] At no point did residents of Lot A cease use of these utilities after 1984. At no point were the Pole located within Area 2 or the Transformer located opposite the Pole moved or removed. The Mailbox has stood in the same location within Area 2, near Tahattawan Road, since Lot A first housed residents in 1986.

Having viewed Area 2 at the site view and the several pictures of Area 2 entered into

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[26] Mr. Lelievre indicated that his interest in Area 2 extended beyond the Fence that was erected in 2006 to the southern deeded edge of Plaintiff Property. Though the distance varies, the Fence is installed approximately two feet south of Plaintiff Property's deeded southern boundary.

[27] This court notes Massachusetts General Law 187 § 5 which affords the owner of property abutting a private way, where that owner possesses rights pertaining to ingress or egress upon such private way, "the right by implication to place, install or construct in, on, along, under, and upon said private way" those objects necessary for the provision of utilities. The use of such objects must not interfere with, or be inconsistent with the existing use of others with deeded rights to use of that private way. Id.

[28] Approval of the House's electrical systems was granted on August 8, 1984.

[29] An underground water line likewise runs from Tahattawan Road to the House within portions of Areas 1 and 2.

evidence, this court is convinced that the installation of the above-referenced structures in Area 2 was "sufficiently pronounced," such that Plaintiff would have been aware of their existence had she maintained "a reasonable degree of supervision over the property." Boothroyd, 68 Mass. App. Ct. at 44. The Pole has stood conspicuously in Area 2 for over twenty years and should have alerted Plaintiff as to the existence of an outsider on her property,[30] as well as to the related underground utilities servicing Lot A.[31] David too, having convinced this court that he utilized both Area 1 and Area 2 on a regular basis, should have been aware of the utilities thereon.[32] Plaintiff should likewise have been aware of the Mailbox that stood in the area for over twenty years.

I find that use of the Pole, the related utility lines, the water pipes, and the Mailbox were sufficiently actual, open, and notorious for the purposes of an easement by prescription over those elements of Area 2.

B. The remainder of Area 2

Despite demonstrating twenty continuous years of open and notorious use of the utilities and their related structures, the Lelievres have failed to describe such a period within which owners of Lot A utilized the remainder of Area 2. Mrs. Kotanchik, an owner of the Subdivision

[30] This court notes the recent holding in Commonwealth Elec. Co. v. MacCardell, where the Massachusetts Supreme Judicial Court noted that, "the mere presence of a utility pole does not automatically place a registered landowner on notice that his or her property might be encumbered because the actual owner of a utility pole is not readily ascertainable...." 450 Mass. 48, 54 (2007) The court's holding in MacCardell is distinguishable from the case here in that as an owner of registered land, the Defendant in MacCardell was purchasing her land, "free from all encumbrances except those noted on the [registration] certificate." Id. at 51 (citing Tetreault v. Bruscoe, 398 Mass. 454, 461 (1986). Here, Plaintiff's fee interest in Area 2 was not afforded the protections of registered land, and the Pole and its electrical lines were installed while she maintained fee title to the property.

[31] Though the lines delivering electricity to Lot A were mostly located underground, the Pole receives above-ground electrical wires from the street, and stands opposite the Transformer on Lot A. As such, Plaintiff is on notice of the power lines being located within Area 2.

[32] Because David is not a party to this suit, his knowledge of the open and notorious use of Area 2 by owners of Lot A is not itself dispositive of Plaintiff's knowledge as to the utilities in Area 2. Nevertheless, this court's finding that the utilities were sufficiently open and notorious that David would have recognized them in Area 2 brings with it the implication that the owner of Plaintiff Property, if reasonably supervising her property, should have known of them as well.

Land from 1973-1977, testified that neither she nor her husband ever used Area 2, and that they visited the Subdivision Land no more than ten times during their six year tenure as its owners. Mrs. Kotanchik indicated that even upon their purchase they did not walk the Subdivision Land, and that other than requisitioning several percolation tests, their use of the Subdivision Land was limited to driving a vehicle through Area 1 in order to view the land to the East. None of these actions took place in Area 2. As such, the Kotanchiks' use of Area 2 was not sufficiently open and notorious for the purposes of adverse possession or prescriptive easement.

The Flannerys, title owners of the Subdivision Land from 1977-1979, used the Subdivision Land to pasture horses, store snowmobiles, and grow crops. Testimony at trial indicated that while they owned the Subdivision Land, the Flannerys used Area 2 sparingly, having plowed snow from Area 1 into it and having trimmed limbs from the decrepit apple trees for their wood stove. No additional maintenance of Area 2 appears to have occurred during the period in which the Flannerys owned the Subdivision Land.

The Flannerys use of Area 2, like that of the Kotanchiks, was insufficient to demonstrate open and notorious use of Area 2. The Flannerys did not improve Area 2, not did they maintain or utilize it, having entered the area only to collect fallen branches from apple trees which they would use to build a fire. They did not cut the grass or plant trees in Area 2. They did not erect any structures in Area 2. The Flannerys' infrequent entry into Area 2 to cut and collect branches and as a location for plowed snow during 1977-1979 was insufficiently open and notorious for the purposes of adverse possession or an easement by prescription.

The Caouettes, title owners of Lot A from 1979-1992, made extensive use of Area 2 beginning in 1984. In addition to the installation of the utilities and the Mailbox, activities that would have been evident to any onlookers, the Caouettes expended considerable efforts in

maintaining Area 2. Having added a substantial amount of gravel to Area 1 in 1984, the Caouettes planted several bushes in order to prevent or prolong its erosion. Evidence presented at trial also indicated that the Caouettes maintained the terrain in Area 2, beginning in 1984 and continuing until their sale of the property in 1992. Accordingly, the Caouettes' use of Area 2 from 1984-1992 was sufficiently open and notorious for adverse possession and prescriptive easement purposes.

Upon the sale of Lot A to Boothby/Kristofferson in 1992, Area 2 ceased to be used in an open and notorious manner. Boothby/Kristofferson, the subsequent owners of Lot A, did not enter, improve, or maintain Area 2. Boothby testified that she did not "ever utilize the area between the driveway and the Westby home for any purpose at all," nor was any evidence presented regarding her use of the Disputed Area situated between Area 1 and the Shields Property. Kristofferson similarly testified that she did no planting or other maintenance on "either side" of Area 1, with the exception of limited trimming of bramble that might scratch cars in Area 1. Neither party ever stopped their vehicle in Area 1 and walked either north or south from Area 1. Neither of them improved or maintained Area 2. As a result, Area 2 "got brushier."

As a result of the foregoing, the Lelievres have failed to demonstrate a continuous period of time in which owners of Lot A utilized Area 2 openly and notoriously for a period of twenty years. Neither the Kotanchiks nor the Flannerys, together owning the Subdivision Land between the years 1973-1979, used Area 2 to an extent that could, in this court's opinion, constitute open and notorious use. Open and notorious use of Area 2 began in 1982 when the Caouettes, then owners of Lot A, began building the House that is now situated upon it. From 1982 to 1992, this court is convinced that the Caouettes' used and maintained the whole of Area 2 in an open and

notorious manner. That use, however, ended in 1992 when Boothby/Kristofferson purchased Lot A and ceased *any* use of Area 2, other than use of the utilities and the Mailbox.

I find that the Lelievres have failed to demonstrate a twenty year period during which owners of the Subdivision Land or Lot A utilized the remainder of Area 2 in an open and notorious manner.

Exclusive Use

The Lelievres have likewise failed to demonstrate a consecutive twenty year period during which owners of Lot A utilized Area 2 exclusively. During his walks, David would typically enter Area 1 by traversing Area 2. David's walks, as previously identified, are sufficient in this court's opinion to defeat the Lelievres' claim of exclusive use of Area 1, and are likewise sufficient to frustrate the Lelievres' claim of exclusive use of Area 2. In addition to David's walks, however, Plaintiff undertook significant improvements to Area 2. During the 1970s and 1980s, David planted trees and shrubs in Area 2, intending to increase the level of privacy from the south of Plaintiff Property, and would periodically trim those trees and bushes in order to maintain the views from the house on Plaintiff Property. David also played badminton, installed a compost pile, and maintained a garden between the years 1960-1990 within Area 2. David's dog was buried in Area 2. Plaintiff's use of Area 2 sufficiently precludes any finding of exclusive use of Area 2 by the Lelievres through their predecessors-in-interest. I find that the Lelievres' use of Area 2 was not exclusive for the requisite twenty year period.

As the Lelievres have failed to demonstrate their open and notorious or exclusive use of Area 2 for a continuous twenty year period of time, I withhold an analysis of the remaining elements of adverse possession or easement by prescription. I find that the Lelievres have established a prescriptive easement over Area 2, solely limited to the use and maintenance of the

Pole, the related utility lines, the water pipes, and the Mailbox.

Color of Title

The Lelievres argue that they have obtained fee title to both Area 1 and Area 2 by color of title. When a person enters and occupies a parcel of land pursuant to a color of title, the doctrine of color of title allows such person to extend possession of a portion of that land to the entirety of the property described in the deed. Dow v. Dow, 243 Mass. 587, 590 (1923). A claimant seeking to establish property rights under color of title must: "(1) satisfy the elements of adverse possession; and (2) prove that the claim of ownership is based on a muniment of title." Long v. Wickett, 50 Mass. App. Ct. 380, 382 n.3 (2000). The doctrine applies, "only when there has been an entry of disseizin upon a single parcel of land." Dow, 243 Mass. at 591. Disseisin requires exclusive possession by the claimant. Kershaw, 342 Mass. at 321. The doctrine of color of title is therefore inapplicable in the case of an easement by prescription. See id.

I find that because the Lelievres are unable to establish a valid claim of adverse possession over Area 1 or Area 2, the doctrine of color of title is inapplicable.

The Lelievres shall prepare a recordable plan of Area 1 and Area 2 consistent with this decision, to be recorded within sixty days of the date of this decision, to indicate their prescriptive rights established by this decision.

Judgment to enter accordingly.

Alexander H. Sands, III
Justice

Dated: April 6, 2012

EXHIBIT A

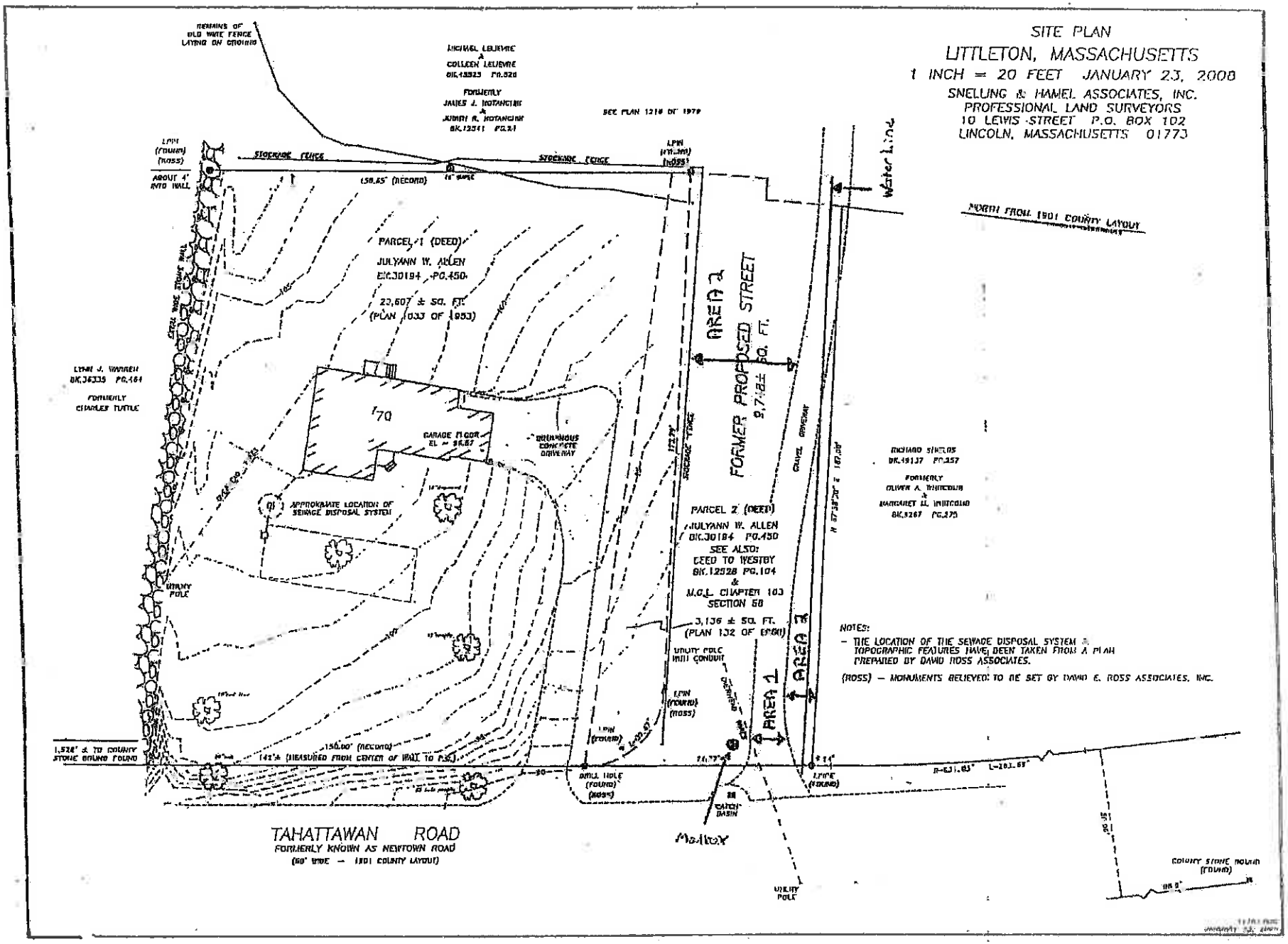
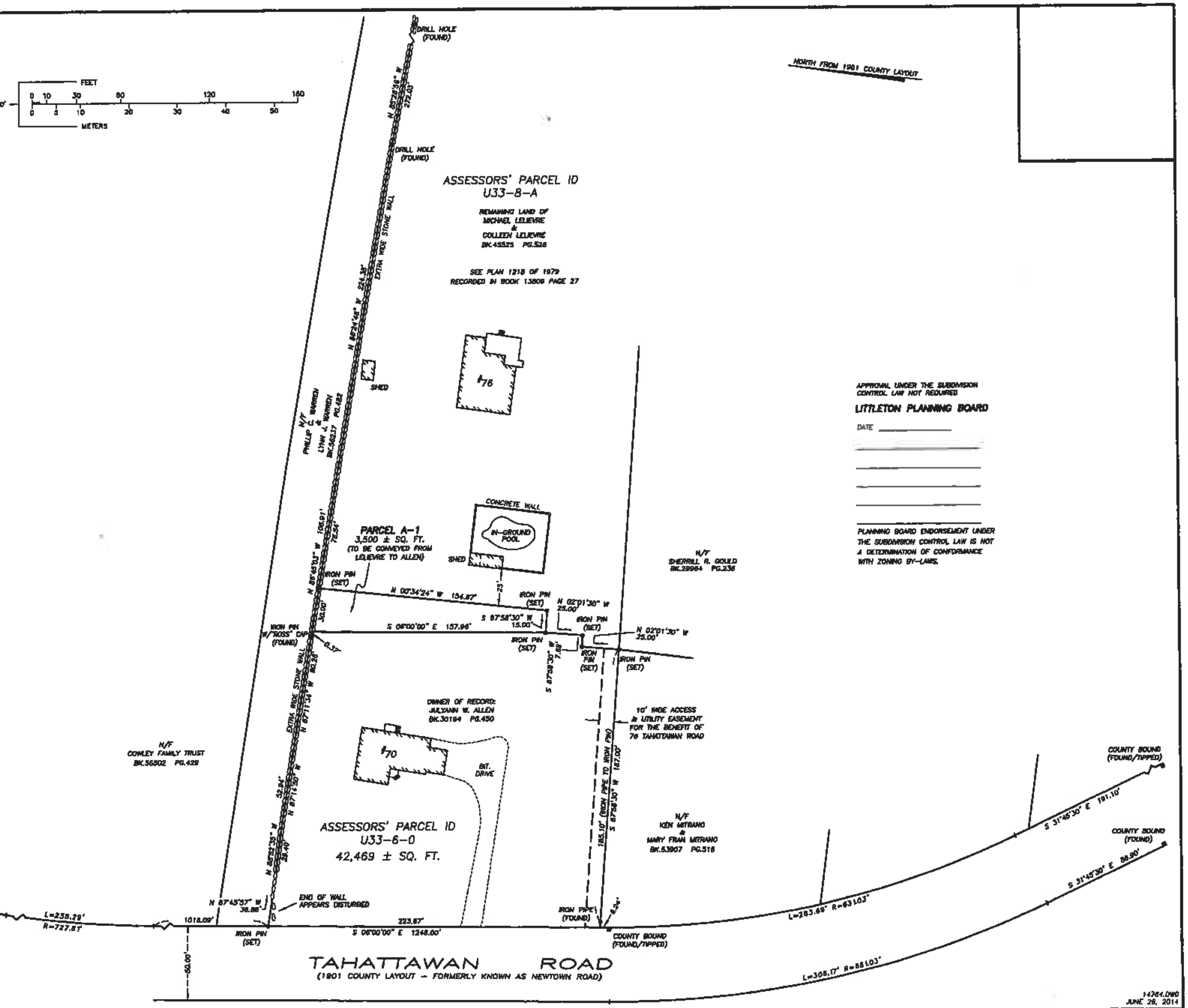


EXHIBIT 9

PLAN OF LAND
70 TAHATTAWAN ROAD
LITTLETON, MASSACHUSETTS
1 INCH = 30 FEET JUNE 26, 2014

SNELLING & HAMEL ASSOCIATES, INC.
PROFESSIONAL LAND SURVEYORS & ENGINEERS
10 LEWIS STREET P.O. BOX 102
LINCOLN, MASSACHUSETTS 01773
(781) 259-0071


1"=30'
FEET
0 10 30 60 120 180
METERS
0 3 10 20 30 40 50
NORTH FROM 1901 COUNTY LAYOUT
DRILL HOLE (FOUND)
N 85°28'56" W 272.03'
EXTRA WIDE STONE WALL
N 86°24'48" W 224.36'
ASSESSORS' PARCEL ID
U33-8-A
REMAINING LAND OF
MICHAEL LELIEVRE
&
COLLEEN LELIEVRE
BK.45525 PG.526
SEE PLAN 1218 OF 1979
RECORDED IN BOOK 13809 PAGE 27
SHED
#76
N/F
PHILLIP C. & WARREN
LYNN J. WARREN
BK.56237 PG.482
N 86°45'03" W 106.91'
76.54'
CONCRETE WALL
IN-GROUND POOL
PARCEL A-1
3,500 ± SQ. FT.
(TO BE CONVEYED FROM LELIEVRE TO ALLEN)
IRON PIN (SET)
N 00°34'24" W 154.87'
S 87°58'30" W 15.00'
N 02°01'30" W 25.00'
S 06°00'00" E 157.96'
IRON PIN W/"ROSS" CAP (FOUND)
S 87°58'30" W 7.85'
N/F
SHERRILL R. GOULD
BK.29964 PG.238
10' WIDE ACCESS & UTILITY EASEMENT FOR THE BENEFIT OF 76 TAHATTAWAN ROAD
OWNER OF RECORD:
JULYANN W. ALLEN
BK.30194 PG.450
#70
BIT. DRIVE
EXTRA WIDE STONE WALL
N 87°11'34" W 80.25'
N 87°14'50" W
N 86°53'35" W 52.94' 28.40'
N/F
COWLEY FAMILY TRUST
BK.56502 PG.429
ASSESSORS' PARCEL ID
U33-6-0
42,469 ± SQ. FT.
185.10' (IRON PIPE TO IRON PIN)
S 87°58'30" W 187.00'
N/F
KEN MITRANO
&
MARY FRAN MITRANO
BK.53907 PG.518
N 87°45'37" W 38.86'
END OF WALL APPEARS DISTURBED
IRON PIN (SET)
IRON PIPE (FOUND)
COUNTY BOUND (FOUND/TIPPED)
1018.09'
223.87'
S 06°00'00" E 1248.00'
50.00'
132.85'
N 28°20'00" E
COUNTY BOUND (FOUND)
L=244.51' R=933.94'
L=238.29' R=727.81'
L=283.69' R=631.03'
L=308.17' R=551.03'
S 31°45'30" E 191.10'
S 31°45'30" E 88.90'
COUNTY BOUND (FOUND/TIPPED)
COUNTY BOUND (FOUND)
TAHATTAWAN ROAD
(1901 COUNTY LAYOUT - FORMERLY KNOWN AS NEWTOWN ROAD)
14264.DWG
JUNE 26, 2014

NOTE:
- PARCEL A-1 IS PART OF LOT A AS SHOWN ON PLAN 1218 OF 1979 RECORDED IN BOOK 13808 ON PAGE 272.
- PARCEL A-1 IS ALSO PART OF LOT 1 AS SHOWN ON PLAN 132 OF 1960 RECORDED IN BOOK 9541 PAGE END
- THE 10' WIDE ACCESS & UTILITY EASEMENT SHOWN IS A RELOCATION OF THE 10' WIDE ACCESS EASEMENT SHOWN ON PLAN 366 OF 2012, & HAS BEEN FURTHER DESCRIBED IN A DRIVEWAY EASEMENT RELOCATION AGREEMENT, TO BE RECORDED.

REFERENCES:
- PLAN NUMBER 1033 OF 1953
- PLAN NUMBER 1020 OF 1956
- PLAN NUMBER 132 OF 1960
- PLAN NUMBER 1218 OF 1979
- PLAN NUMBER 215 OF 1988
- JUDGEMENT RECORDED IN BOOK 58238 ON PAGE 583
- SETTLEMENT AGREEMENT & RELEASE OF CLAIMS, TO BE RECORDED
- DRIVEWAY EASEMENT RELOCATION AGREEMENT, TO BE RECORDED

I CERTIFY THAT THIS PLAN HAS BEEN PREPARED IN CONFORMITY WITH THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS

JOHN R. HAMEL
PROFESSIONAL
LAND SURVEYOR

JUNE 26, 2014
DATE

APPROVAL UNDER THE SUBDIVISION CONTROL LAW NOT REQUIRED

LITTLETON PLANNING BOARD

DATE ____________

PLANNING BOARD ENDORSEMENT UNDER THE SUBDIVISION CONTROL LAW IS NOT A DETERMINATION OF CONFORMANCE WITH ZONING BY-LAWS.