

(SEAL)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

DUKES, ss

MISCELLANEOUS CASE  
NO. 17 MISC 000139 (RBF)

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JOHN J. ZARBA and  
SUSAN L. LEMOIE ZARBA,

Plaintiffs,

v.

KRIS CHVATAL, MICHAEL PERRY,  
JOE RA, ANDREA ROGERS,  
LLEWELLYN ROGERS, GEORGE  
WARREN, and PETER YOARS,  
Members of the Town of Oak Bluffs  
Zoning Board of Appeals,

Defendants.  
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**DECISION**

**Introduction**

In 2015, John J. Zarba and Susan L. Lemoie Zarba (the Zarbas) constructed a guest house on their property in Oak Bluffs. Relying on the endorsed “approval not required” (ANR) plan that created their lot, the Zarbas were careful to locate the guest house a little more than 20 feet from the southern boundary of their lot, where the lot abuts a town cemetery, thus complying with the setback requirement of the Oak Bluffs zoning bylaw. The Zarbas did not obtain a final certificate of occupancy for the guest house, however, because in 2016 the Town of Oak Bluffs commissioned a survey that showed that the southern bound of their lot actually ran at a slight angle to the northeast. The upshot of the survey was that the guest house was not twenty feet

from the southern boundary of their lot, but rather was set back only 17.9 feet. The Town of Oak Bluffs Building Inspector sent the Zarbas an enforcement order, which they appealed to the Town of Oak Bluffs Zoning Board of Appeals (ZBA). The ZBA affirmed the enforcement order on two grounds. First, the ZBA found that the driveway did not conform with the zoning bylaw; second, the ZBA agreed that the guesthouse did not meet the setback requirement.

The Zarbas have appealed the ZBA's decision to this court. On cross-motions for summary judgment, the ZBA's finding with respect to the driveway was reversed, and a separate and final judgment under Mass. R. Civ. P. 54(b) was entered annulling that part of the ZBA's decision. The question of the setback and boundary was tried to me. I find that the southern boundary of the Zarbas' lot is as shown on the ANR plan; i.e., that the ANR plan correctly represented the boundary between the Zarbas' lot and the cemetery to the south. The Zarbas' guesthouse therefore complies with the 20-foot setback requirement of the zoning bylaw. The ZBA's reliance on the Town's survey was erroneous, and its decision affirming the Building Inspector's finding that the guesthouse did not meet the setback requirement was based on a legally untenable ground. The decision will be annulled and the matter remanded to the ZBA with an order that it direct the Building Inspector to issue the Zarbas a certificate of occupancy for the guesthouse.

### **Procedural History**

The Complaint was filed on March 17, 2017. The Plaintiffs' Opposition to Defendants' Cross Motion to Dismiss Parties was filed on July 12, 2017. The Defendants' Cross Motion to Dismiss Parties was filed on July 20, 2017. The Plaintiffs' Opposition to Defendants' Second Cross Motion to Dismiss and Plaintiffs' Motion to Amend Complaint with Attached First Amended Complaint were filed on July 28, 2017. At a hearing on August 1, 2017, the court

denied without prejudice the Plaintiffs' Motion to Amend Complaint, and allowed the Defendants' Cross Motion to Dismiss Parties, dismissing Mark Barbadoro Building Inspector of the Town of Oak Bluffs and the Town of Oak Bluffs as parties.

The Defendant Zoning Board of Appeals' Motion for Summary Judgment, Memorandum in Support of the Zoning Board of Appeals' Motion for Summary Judgment, the Zoning Board of Appeals' Rule 4 Statement of Facts in Support of its Motion for Summary Judgment, Exhibits to the Zoning Board of Appeals' Rule 4 Statement of Facts in Support of its Motion for Summary Judgment, Plaintiffs' Motion for Parking Issue Summary Judgment, Plaintiffs' Memorandum in Support of Parking Motion for Summary Judgment, Plaintiffs' Concise Statement of Material Facts, Affidavit of Susan L. Lemoie-Zarba in Support of Plaintiffs' Parking Summary Judgment, and Plaintiffs' Appendix of Exhibits in Support of Summary Judgment were filed on January 30, 2018. The Letter from Attorney Goldsmith regarding Murphy et al. v. Town of Oak Bluffs et al., 1774-CV-00014 with a copy of Memorandum of Decision and Order allowing in part and denying in part the Zarbas' motion to dismiss was received on February 16, 2018. The Defendant Zoning Board of Appeals' Motion to Strike Certain Portions of the Plaintiffs' Exhibits, Affidavit of Mark Barbadoro, Defendant Zoning Board of Appeals' Response to Plaintiffs' Concise Statement of Material Facts, and Defendant Zoning Board of Appeals' Opposition (and Incorporated Memorandum) to the Plaintiffs' Motion for Partial Summary Judgment were filed on February 28, 2018. The Plaintiffs' Memorandum in Opposition of the Zoning Board of Appeals Motion for Summary Judgment, the Plaintiffs' Rule 4 Statement of Facts in Opposition to Defendants' Partial Motion for Summary Judgment, the Plaintiffs' Rule 4 Opposition to the Defendants' Statement of Facts for Motion for Summary Judgment, and Table of Contents for Exhibits to Plaintiffs' Rule 4 Statement of Facts were filed

on March 1, 2018. The Plaintiffs' Opposition to Defendants' Motion to Strike the Plaintiffs Exhibits, Plaintiffs' Reply Memorandum to Defendants' Summary Judgment Opposition Concerning Parking, Affidavit of John J. Zarba, Affidavit of Sean M. Hegarty, and Appendix were filed on March 21, 2018. The Defendant Zoning Board of Appeals' Motion to Strike Paragraphs in the Affidavit of Susan Lemoie Zarba, Defendant Zoning Board of Appeals' Motion to Strike the Affidavit of Sean M. Hegarty, Defendant Zoning Board of Appeals Motion to Strike Certain Portion of and/or Objections to the Affidavit of Patricia Szucs, Defendants' Response to the Plaintiffs' Rule 4 Statement of Facts in Opposition to Defendants' Partial Motion for Summary Judgment, and Notice of Marking for a Hearing were filed on March 27, 2018. The Plaintiff Opposition to the Defendants' Motion to Strike Certain Portion of the Affidavit of Patricia Szucs, Plaintiff Opposition to the Defendants' Motion to Strike Paragraphs in the Affidavit of Susan L. Lemoie-Zarba, Plaintiff Opposition to Strike Affidavit of Sean M. Hegarty, Affidavit of Susan L. Lemoie-Zarba, and Notice of Marking for a Hearing were filed on March 30, 2018. At a hearing on April 4, 2018, the court heard the filed motions, denied the motions to strike, and denied in part and allowed in part the Municipal Defendants' motion for summary judgment (Summary Judgment Order).

The pretrial conference was held on June 4, 2018. The Plaintiffs' Emergency Motion to Extend the Town of Oak Bluffs, Zarba's Temporary Certificate of Occupancy was filed on October 22, 2018. The Defendants' Response to Plaintiffs' Emergency Motion to Extend the Town of Oak Bluffs Zarba's Temporary Certificate of Occupancy and Plaintiffs' Second Emergency Motion to Extend the Town of Oak Bluffs, Zarba's Temporary Certificate of Occupancy were filed on October 29, 2018. The court denied the motion on November 8, 2018.

A view was taken on November 29, 2018. A trial was held on November 29 & 30, 2018, and January 16, 2019. Exhibits 1-4, 4A, 5-71, 71A, and 72-101 were marked. Testimony was heard from Susan Lemoie Zarba, John Zarba, Charles Gilstad, Douglas Dowling, Martin Loria, and William Austin. The Plaintiffs' Request for Findings of Facts, Plaintiffs' Request for Rulings of Law, and Defendants' Post-Trial Submission were filed on February 19, 2019. The post-trial hearing was held on February 22, 2019, at which time the court took the case under advisement. The Plaintiffs' Motion to Strike All Mention of the "Murphy Case" Noted in the Defendants' Post-Trial Submissions was filed on February 22, 2019. The Defendants' Response to Plaintiffs' Motion to Strike References to the Murphy Brief was filed on February 28, 2019. The Plaintiffs' Answer to Defendants Response to Motion to Strike All Mention of the "Murphy Case" Noted in the Defendants Post-Trial Submissions was filed on March 4, 2019. Separate and Final Judgment Pursuant to Mass. R. Civ. P. 54(b) entered on the Summary Judgment Order on August 16, 2019, and the Amended Separate and Final Judgment Pursuant to Mass. R. Civ. P. 54(b) entered on the Summary Judgment Order on September 24, 2019. This Decision Follows.

### **Facts**

Based on the view,<sup>1</sup> the undisputed facts, the exhibits, the testimony at trial, and my assessment of credibility, I make the following findings of fact.

#### Background and title history

1. The Zarbas acquired lot 2, as shown on a plan entitled "Plan of Land in Oak Bluffs, Massachusetts prepared for John P. Reagan Scale 1"=20' May 25, 2005," endorsed by the Oak Bluffs Planning Board as "Approval under the Subdivision Control Law Is Not Required" on

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<sup>1</sup> A view "inevitably has the effect of evidence, and information properly acquired upon a view may properly be treated as evidence in the case." *Talmo v. Zoning Bd. of Appeals of Framingham*, 93 Mass. App. Ct. 626, 629 n.5 (2018) (internal citations and quotations omitted); see *Martha's Vineyard Land Bank Comm'n v. Taylor*, No. 17-P-1277 (Mass. App. Ct. June 22, 2018) (Rule 1:28 decision).

June 27, 2005 and recorded in the Dukes Country Registry of Deeds (registry) at Plan Book 15, Page 35 (Gilstad plan), by a deed from John P. Reagan and Lisa A. Reagan, trustees of Reagan Realty Trust, dated November 17, 2005 and recorded in the registry at Book 1063, Page 542, on November 18, 2005 (Zarba property). Exhs. 1, 2, 3. The Zarba property has a physical address of 14 and 14R South Street, Oak Bluffs, Massachusetts. Exh. 1. The Gilstad plan is attached as Exhibit A.

2. The relevant title history of the Zarba property is as follows. By a deed dated November 15, 1870, and recorded in the registry at Book 45, Page 299 on January 13, 1871 (Davis deed), Rufus Davis conveyed to the Vineyard Grove Company (VGC) a parcel of land in Oak Bluffs that included what is now the Zarba property (Davis parcel). Tr. 2-104-105; Exh. 24.

3. The Davis parcel became the southwestern corner of a much larger parcel of land owned by VGC in Oak Bluffs. VGC recorded a plan for this larger parcel entitled "Plan of the Highlands, The Property of the No. 2 Vineyard Grove Co. Cottage City Formerly Edgartown Martha's Vineyard Mass." (Highlands 2 plan) in the registry at Plan Book 6, Page 10. The Highlands 2 plan shows this parcel divided into more than 1500 numbered lots and a series of roads. The Davis parcel is shown on the Highlands 2 plan as the area roughly bounded on the east by Simpson Avenue and including lots 665-919. The Davis parcel is bounded on the south by the Oak Grove Cemetery (cemetery), which, while not shown on the Highlands 2 plan, predates the plan. The sketch plan attached to the Davis deed makes reference to a "Grave yard" on its southwest corner. Exhs. 24, 25; Tr. 2-56, 104-106, 3-36-38, 43-44.

4. The Highlands 2 plan, like other plans of the Highlands, was not precisely surveyed. The individual lots are not given dimensions; there is very little survey information on the plan at all. In addition to the lots and ways, the plan included strips of undefined land along its edges,

seemingly to provide a margin for error in the layout of the lots and roads as they were conveyed. Tr. 1-124-125, 2-27-29; Exh. 24.

5. By a deed dated July 11, 1933, and recorded in the registry at Book 186, Page 165, VGC conveyed a portion of the Davis parcel, including what is now the Zarba property, to Ambler Wormley (Wormley deed). The Wormley deed conveyed lots 802-809 and the undefined triangular parcel lying between those lots and the southwest edge of the parcel as shown on the Highlands 2 plan. A version of the Highlands 2 plan, recorded in the registry at Plan Book 13, Page 47, shows the lots that had been sold to date, including the lots and triangular area conveyed in the Wormley deed. Exhs. 26, 27; Tr. 1-141-143; 2-106-108, 111-112.

6. By a Commissioner's Deed dated and recorded in the registry at Book 988, Page 467 on February 12, 2004, Jan W. Whiting, as commissioner, conveyed lots 802-806 and the entire open triangular area described in the Wormley deed (Reagan parcel) to John P. Reagan and Lisa A. Reagan, Trustee [*sic*] of Reagan Realty Trust (Reagan). Exh. 28.

7. Reagan had the Gilstad plan prepared in 2005. The Gilstad plan, prepared by Charles R. Gilstad, showed the Reagan parcel reconfigured into lots 1, 2, and 3. As discussed, after receiving an opinion of counsel, the Oak Bluffs Planning Board endorsed the Gilstad plan as approval not required under the subdivision control law on June 27, 2005, and the plan was recorded in the registry. Exhs. 2, 90; Tr. 1-171.

8. In 2005, Reagan constructed an eight-room, four-bedroom, three-bathroom, single family residence (Zarba residence) on lot 2, the Zarba property. As discussed, Reagan conveyed the Zarba property with the Zarba residence to the Zarbas on November 1, 2005. Exh. 1.

9. As shown on the Gilstad plan, the Zarba property has 12,726 square feet and 85 feet of frontage on South Street. It is in the R-1 zoning district under the Oak Bluffs Zoning Bylaw,

which has a minimum lot size requirement of 10,000 square feet and an 80-foot frontage requirement. Exhs. 1, 2, 13 at Appendix B.

10. In 2015, the Zarbas sought to construct a guest house on the Zarba property. Relying on the Gilstad plan, the Zarbas located the proposed guest house to meet the 20-foot setback requirement of the Oak Bluffs Zoning Bylaw (bylaw) for structures in the R-1 district. The guest house would be precisely 20 feet from the southern boundary of the Zarba property, where the dirt way on the property meets the northern boundary of the cemetery. Exhs. 1, 2, 4A, 13 at Appendix B; Tr. 1-42-43, 46, 60; View.

11. Ms. Zarba designed the guest house and applied for a building permit. On October 13, 2015, Mark Barbadoro, the Building Inspector of the Town of Oak Bluffs (Building Inspector), issued the Zarbas Building Permit No. 2015-0050 to construct a “new 750 sq. ft two-bedroom guest house as per plans.” Exhs. 1, 5; Tr. 1-49-50.

12. The guest house was constructed over eight months, through June 2016. As constructed, it complied with the setback requirements, with a rear setback to the southern boundary of the Zarba property of 21 feet, plus or minus. Exh. 8; Tr. 1-51, 53; View.

13. On June 24, 2016, the Zarbas submitted the Final Certificate of Occupancy application and check to the Oak Bluffs Building Department. Exhs. 1, 7; Tr. 1-52.

14. On June 24, 2016, the Building Inspector performed a final on-site inspection of the Guest House and advised the Zarbas that they could occupy the guest house. He asked for a final as-built plan. Exh. 1; Tr. 1-52-53.

15. On June 24, 2016, the Zarbas submitted an “As Built Plan,” dated June 24, 2016, prepared by Gilstad, depicting the guest house as set back “ +/- 21’ ” from the Zarbas’ rear lot line—the boundary line separating the Zarba property from the cemetery. Exhs. 1, 7.



16. The Building Inspector declined to issue a final Certificate of Occupancy on June 24, 2016. He gave the Zarbas permission to occupy the guest house over the weekend. Exh. 89; Tr. 1-53-54.

17. That Monday, June 27, 2016, Mr. Zarba asked the Building Inspector for the Certificate of Occupancy. The Building Inspector denied the request. Tr. 1-54.

18. On July 13, 2016, the Building Inspector issued the Zarbas a temporary occupancy permit. In his letter issuing the temporary permit, the Building Inspector referred to pending litigation with the Zarbas' neighbors, the O'Neils, and the Town's title research that "indicates that the Town is the owner of the fee in the Way" running along the boundary of the cemetery. Were the Town to in fact own that fee, the Building Inspector said, then the Zarbas would not meet the setback requirement. Exhs. 1, 9; Tr. 1-59.

19. In the summer of 2016, the Town had a title examination and survey conducted to establish the boundary of the Zarba property on the south where it abuts the cemetery. The survey was conducted by William M. Austin, who prepared a plan entitled "Plan of Land in Oak Bluffs, Mass. Prepared for The Town of Oak Bluffs Scale 1" = 20' September 26, 2016" (Austin plan), which Mr. Austin stamped and signed on October 7, 2016. The Austin plan showed the boundary line not as shown on the Gilstad plan, but rather running at an angle from the southwest to the northeast. The result, according to the Austin plan, was that the Zarba property had less square footage and that the guest house was set back 17.9 feet from the boundary line on the Austin plan, less than the 20 feet required under the zoning bylaw. Exhs. 10, 11; Tr. 1-70-71, 92-95, 2-203. The Austin plan is attached as Exhibit B.

20. On November 1, 2016, the Building Inspector sent the Zarbas an enforcement order and a copy of the Austin plan (enforcement order). Based on the Austin plan, the Building Inspector

informed the Zarbas that the guest house is in “violation of the twenty foot minimum setback requirements of section 4.1.3 Appendix A of the Oak Bluffs Zoning Bylaws.” The Building Inspector stated that if the Zarbas had not resolved their setback violation by February 1, 2017, their temporary certificate of occupancy would be revoked. Exhs. 1, 10, 11; Tr. 1-71-72, 74-75.

21. On November 10, 2016, Daniel C. Perry of Law Firm Perry Hicks, New Bedford, MA filed a Town of Oak Bluffs Zoning Board of Appeals request for a hearing on behalf the Zarbas. Exhs. 1, 12, 91; Tr. 1-75-77.

22. The ZBA held the Zarbas’ appeal hearing on February 6, 2017, and it was continued to February 16, 2017. Exh. 1.

23. The ZBA issued a decision dated February 16, 2017, and filed it with the Town Clerk on March 1, 2017, which affirmed the Building Inspector’s enforcement order (the Decision). Exh. 1; Tr. 1-79-80; Complaint Exh. I; Amended Complaint Exh. I.<sup>2</sup>

24. The Zarbas filed this appeal of the Decision on or about March 17, 2017, and gave notice to the Town Clerk on the same day. Exh. 1.

#### The boundary issue

25. The southern bound of the Davis parcel, abutting the cemetery, is described not as a straight line, but as turning at an angle to the northeast. Specifically, starting at the southwest corner, the boundary runs 60 degrees east for a distance of eight rods, or approximately 132.5 feet, and then turns to run 68 degrees east for a distance of 30 rods, 20 links, or approximately 510 feet. This boundary, with the turn or “jog,” is shown on the Highlands 2 plan. Exhs. 24, 25; Tr. 2-105, 107-108.

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<sup>2</sup> The Decision was not marked as an exhibit at trial. I take notice of the Decision, as it was attached as an exhibit to the complaint and the amended complaint, and the parties do not dispute that the Decision was issued by the ZBA and that this action is an appeal of the Decision under G.L. c. 40A, § 17. It is, of course, the better practice in an appeal under G.L. c. 40A, § 17, to introduce the decision at issue as an exhibit at trial.

26. The jog is located to the west of the property conveyed in the Wormley deed that includes what is now the Zarba property. Thus, the jog is not part of the property conveyed in the Wormley deed. Exhs. 25, 26; Tr. 2-109-110.

27. The Gilstad plan shows the southern bound along the Zarba property as a straight line that is part of a longer line running from the southwest corner of the Davis parcel. In other words, the Gilstad plan does not show the jog or a boundary line running at an angle from the jog. The Austin plan, on the other hand, shows the jog, and locates the boundary along the Zarba property at an angle further to the north of the line shown on the Gilstad plan. Exhs. 2, 10, 24.

28. The issue in this case is which of these plans should be credited. I discuss each plan in turn.

29. Charles R. Gilstad prepared, signed, and stamped the Gilstad plan. Gilstad is a registered professional land surveyor. He has been registered since 1991, and has worked as a surveyor since 1978. He has conducted surveys on Martha's Vineyard since 1984, including surveys of the area shown on the Highlands 2 plan, known colloquially as "the Highlands." Tr. 1-121-123, 126; Exh. 2.

30. To prepare his plan, Gilstad undertook title research with the assistance of John Larson, a title examiner. Together, they located previous plans and the deeds in the chain of title for the property shown on the plan, and Mr. Gilstad met with town officials from the cemetery and highway department. Mr. Gilstad and Mr. Larson were unable to find any deeds for or plans of the cemetery or instruments describing the bounds of the cemetery. Tr. 1-126-129, 158-159, 187-188, 2-15, 17-18; Exhs. 26, 49, 94.

31. There are, in fact, some recorded deeds and instruments that refer to the cemetery. A 1785 deed from Elijah Butler to William Butler, recorded in the registry at Book 12, Page 255,

reserved half an acre of land “for a burying place to bury our dead.” The northwest corner of this reserved land is at the southwest corner of the Davis parcel. An 1872 deed from Stephen H. Bradley and Harriet Bradley, recorded in the registry at Book 50, Page 517, conveyed to the Inhabitants of Edgartown a parcel adjacent to the one conveyed in the 1785 deed that also abutted the Davis parcel. Exhs. 29, 40; Tr. 2-113-115, 119.

32. Other deeds in 1870 and 1871 (including one referring to the “Eastville Grave Yard”) conveyed land in the location of the cemetery, and bounded the property on the north along the southern boundary described in the Davis deed. I credit the testimony of Martin Loria that these various deeds convey parcels abutting the Davis parcel and describe the same line that turns at an angle along the southern bound shown on the Highlands 2 plan, although none of these deeds describes the bound at the Zarba property. Exhs. 24, 25, 36, 37, 38; Tr. 2-115-121, 154-155.

33. What remained uncertain was the exact location of this angled boundary on the ground. Gilstad began with the sketch plan attached to the Davis deed. There are no original monuments for the southern boundary described by the Davis deed. As he plotted the sketch plan on the ground, he found that the southern bounds as shown on the sketch plan ran over graves in the cemetery. The Highlands 2 plan and other Highlands plans were difficult to work with because they had little monumentation and were not scaled accurately; in fact, these plans left space along the perimeters that was not part of any lot in an apparent attempt to leave room for errors. He also attempted to plot the boundaries as described in the Wormley deed, but had difficulty plotting those boundaries on the ground. There were further discrepancies in various plans over the width of the layout of South Street and Lawrence Avenue. The few set boundaries he had were of individual lots that were registered; but as expert witness Douglas Dowling, whose testimony I credit, testified, even these boundaries might not be entirely reliable for the purposes

of plotting other lots and monuments. Gilstad attempted to work his way from those lots toward South Street to see if he could locate boundaries there, but had trouble doing so. He was finally able to determine the boundary of the western portion of the Highlands, where Meriton Avenue as shown on the Highlands 2 plan abuts the development to the west, known as "Prospect Heights." Using this boundary, he identified an existing boundary marker at the southwest corner of the Highlands where it meets the cemetery. This is the corner of the unidentified triangle to the south of Davis Avenue as shown on the Highlands 2 plan. Tr. 1-133-136, 139-146, 151-152, 166, 184-185, 188, 190-192, 2-6-7, 30-34, 45-48, 54, 59, 2-170-171, 3-60-63; Exhs. 24, 25, 71, 96; View.

34. At the time Gilstad performed his survey and as late as 2006, there was a two-rail metal fence running along the edge of the cemetery where it meets the dirt way. The fence had been in place for some years—at least since 1978 and, I find, most likely before that. The metal fence lay just to the north of some of the trees along that edge; i.e., between the trees and the edge of the dirt way. The fence was roughly 500 feet long and ran in a straight line to the stone columns at the entrance to the cemetery on Pacific Avenue. The fence is no longer there; a white rail fence runs along the edge of the way but is not in the same location as the metal fence. I did, however, observe remnants of the metal fence at the view, where at least one tree grew around the fence. Tr. 1-95-101, 152-153, 155-157, 2-49-50, 52-53, 204-205, 3-88-89; Exhs. 14, 15, 92, 93, 95; View.

35. This metal fence ran to the bound on the southwest corner of the Highlands identified by Gilstad. Gilstad found this to be confirmation that this bound could be held. There is also a reference to a fence on the northeast corner of the cemetery (that is, the southeast corner of the Davis parcel) in one of the deeds conveying land that is now part of the cemetery. While the deed

does not describe in which direction this fence ran, I find that the reference to the fence is confirmation that there was a fence along the boundary. In any event, I credit Gilstad's testimony and find that this bound represents the southwest corner of the Highlands where it meets the cemetery and the abutting Prospect Heights. Tr. 1-136, 3-79-80; Exh. 36; View.

36. Once Gilstad located the bound, he plotted the southerly bound of the Highlands from that bound running easterly, as described in the Davis deed. The description in the deeds provides that the line jogs at an angle slightly northerly. Plotting this line, Gilstad located it as running not along the metal fence that ran along the edge of the cemetery, but rather as running within the cemetery itself. Tr. 1-145-148, 152, 160, 191-192, 2-9, 12-13, 20-21; Exh. 96. The relevant portion of the sketch plan showing where Gilstad plotted this line is attached as Exhibit C.

37. Gilstad also observed a cut stone in the ground near a juniper tree, some length from the southwest boundary marker. He did not treat this as a bound, but rather as a cut stone that looked like a grave marker. There are several other grave marker stones on a straight line from this cut stone near the juniper tree. Tr. 1-162, 3-51; Exh. 18; View.

38. Gilstad also reviewed a plan entitled "Plan of Land in Oak Bluffs, Mass. Surveyed for Board of Selectmen Town of Oak Bluffs November 23, 1962. Scale 1"=40' Hollis A. Smith., M.S. Reg'd Land Surveyor Vineyard Haven, Mass." (Smith plan). The Smith plan shows the area across Pacific Avenue from the cemetery, namely, the corner of Pacific Avenue and Gabriel Avenue. It shows metal bolt in the pavement at the corner of those two streets, a metal bolt that exists in the road to this day. The line that Gilstad plotted based on the Davis deed description does not end at this bolt, but rather ends 8.9 feet from the bolt. Tr. 2-14-17; Exh. 49; View.

39. Gilstad decided that rather than locating the line so as to cut off part of the cemetery, it was better to locate the line between the Highlands and the cemetery as the line of occupation

between the two set by the metal fence. The fence served as a good indication of possession and ownership, especially in light of the unreasonable bounds of the Davis deed. Tr. 1-133-134, 145, 160, 162-163, 2-21, 59-60, 67-69; Exhs. 2, 96.

40. Sometime after 2006, the metal rail fence was replaced by the existing white split rail fence along the edge of the cemetery. The existing fence makes a jog around the tree that had grown around the metal rail fence. Tr. 1-101-102; Exh. 16; View.

41. As discussed, William M. Austin prepared the Austin plan. Austin is a registered professional land surveyor. He has worked as a surveyor on Martha's Vineyard since 1972. Like Gilstad, he has conducted surveys of the Highlands. Tr. 2-164-168, 3-23.

42. Austin was engaged by the Town to survey the southern bound of the Gilstad plan; there appeared to be discrepancies between that bound and what was described in the Davis deed. Tr. 2-168-170.

43. Austin acknowledged that there are no original monuments for the southern boundary described in the Davis deed. He located and started with the same bound that Gilstad started with-- where Meriton Avenue as shown on the Highlands 2 plan abuts Prospect Heights to the west. Tr. 2-76, 2-174-175, 3-60-63; Exhs. 2, 10.

44. Austin measured 132 feet, or approximately 8 rods, from this bound. He found that the cut stone in the ground by the juniper tree is located 132.64 feet from the bound marking the southwest corner of the Highlands 2 plan, close to the 132.5 feet, or 8 rods, described in the Davis deed. He considered that this stone was in the same style, type, size and condition as the first bound. This led him to conclude that this stone was a boundary marker that marked the point of the jog—that is, the point at which the southern bound in the Davis deed turned at a deflection angle Tr. 2-76-77, 105, 175-176, 189-190, 3-53, 57; Exh. 10; View.

45. Dowling opined that this cut stone was not a boundary marker but rather a grave marker that lines up with headstones marking other graves. Tr. 2-69-75.

46. Having located the cut stone in the ground, Austin drew a line to represent the boundary in the Davis deed after the jog. He knew that based on the distance called in the Davis deed, the line would extend past Pacific Avenue. Reviewing the 1962 Smith plan and the "Plan of Land in Oak Bluffs, Mass. Prepared for The Town of Oak Bluffs," prepared by Schofield, Barbini & Hoehn, Inc., dated December 16, 1997 and recorded in the registry at Plan Book 08, Page 342 (Schofield plan), he identified the iron bolt placed in Pacific Avenue in connection with the Smith plan that is still in the ground. As in the Austin and Gilstad plans, the bolt placed by Smith was not based on any original monuments. Austin laid out the line of the Davis deed so that it ran within a foot of the bolt in Pacific Avenue, and ran it for a distance of 1,668 feet to a bound on a registered parcel on School Street. He drew this line at an angle of 1 degree, 50 minutes, rather than the 8 degrees called for in the Davis deed. Tr. 2-79-82, 94-95, 178-190, 199-203, 3-53, 57, 68-69, 71; Exhs. 10, 49, 50, 59; View.

47. Dowling opined that by drawing the line at that angle rather than at the 8-degree angle called for in the Davis deed, Austin placed the boundary line between the parcel and the cemetery 53 feet out of the position called for by the Davis deed. In holding the bounds described above, Austin acknowledged that he did not match the angle described in the Davis deed. He believed that the bounds provided a more accurate description of where the boundary is. Tr. 2-81-82, 198-199.

48. Because Austin prepared his plan while this case was pending, he did not consult with Gilstad on the discrepancies between the Austin plan and the Gilstad plan in an attempt to reach agreement. Tr. 3-121-122.



49. I find that neither Gilstad's location of the southern bound as described in the Davis deed as running into the cemetery, nor Austin's location of the boundary on the Austin plan, is conclusive. Each is a judgment of the respective surveyor, and each judgment has both its strengths and its flaws. Gilstad found that the stone near the juniper tree was not a bound, even though it seemed to be the correct distance from the first bound, because it would require ignoring the angle of the jog described in the Davis deed. Austin used that stone as a bound, but in doing so changed the angle of the jog that is called for in the Davis deed. Each surveyor's opinion is equally plausible and equally flawed.

### **Discussion**

An appeal of a zoning board of appeals' decision is *de novo*; that is, in an action under G.L. c. 40A, § 17, the "court shall hear all evidence pertinent to the authority of the board . . . and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board . . . or make such other decree as justice and equity may require." G.L. c. 40A, § 17. Generally, a local board's reasonable interpretation of its own zoning bylaw is entitled to judicial deference. *APT Asset Mgmt., Inc. v. Board of Appeals of Melrose*, 50 Mass. App. Ct. 133, 138 (2000). Specifically, the court will defer to a town's interpretation of a bylaw so long as: (1) the board's decision was not based on "a legally untenable ground," meaning that the decision was not based "on a standard, criterion, or consideration not permitted by the applicable statutes or by-laws," and (2) "assuming that the board has drawn on proper criteria and standards . . . whether the board has denied the application by applying those criteria in an unreasonable, whimsical, capricious, or arbitrary manner." *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73-74 (2003). Reasonableness is determined by reading the

bylaw at issue “in complete context” and giving it “a sensible meaning within that context.”

*Board of Selectmen of Hatfield v. Garvey*, 362 Mass. 821, 826 (1973).

The Decision affirmed the Building Inspector’s enforcement order. It did so based on two issues regarding the Zarbas’ guest house: the status of the Zarbas’ driveway, and the setback of the guest house from the southern bound of the Zarba property. The driveway issue was resolved by the Summary Judgment Order and the Amended Separate and Final Judgment Pursuant to Mass. R. Civ. P. 54(b) entered on the Summary Judgment Order on September 24, 2019. The trial that is the subject of this Decision concerns the setback. Relying on the Austin plan, the ZBA agreed with the Building Inspector that the rear setback, from the southern bound of the Zarba property, is 17.9 feet, instead of the 20 to 21 feet claimed by the Zarbas in reliance on the Gilstad plan. The setback issue turns on the location of the southern boundary. The Zarbas contend that the southern boundary of the Zarba property, where it abuts the cemetery, is that which is shown on the Gilstad plan. The ZBA contends that the southern boundary is the one shown on the Austin plan.

The location of a disputed boundary line is a question of fact to be determined “on all the evidence, including the various surveys and plans, and the actual occupation and use[s] by the parties.” *Hurlbut Rogers Mach. Co. v. Boston & Maine R.R.*, 235 Mass. 402, 403 (1920). The parties agree, and I find, that the disputed boundary line is the southern bound of the Davis parcel as described in the Davis deed and the sketch plan attached to the Davis deed.

Construction of the Davis deed is thus part of my analysis.

Rules of deed construction provide a hierarchy of priorities for interpreting descriptions in a deed. Descriptions that refer to monuments control over those that use courses and distances; descriptions that refer to courses and distances control over those that use area; and descriptions by area seldom are a controlling factor. Moreover, when abutter calls are used to describe property, the land of an adjoining property owner is considered to be a monument.

*Paull v. Kelly*, 62 Mass. App. Ct. 673, 680 (2004). “Whenever, in the description of land conveyed by deed, known monuments are referred to as boundaries, they must govern.” *Bernier v. Fredette*, 85 Mass. App. Ct. 265, 269 (2014). Monuments, including a stake and stone, generally govern over distances. *Id.* “The only exception recognized is where, by strict adherence to monuments, the construction is plainly inconsistent with the intention of the parties as expressed by all the terms of the grant.” *Temple v. Benson*, 213 Mass. 128, 132 (1912). “If the monument cannot be found and its location cannot be made certain by evidence, the measurements and other provisions of the deed are controlling.” *Holmes v. Barrett*, 269 Mass. 497, 500 (1929). In general, property descriptions in prior deeds in a deed chain take precedence over inconsistent descriptions of the same land in later deeds, for the simple reason that a grantor cannot convey more than he possesses. See C.M. Brown et al., *Brown’s Boundary Control and Legal Principles* § 2.6 at 32 (4th ed. 1995) (hereafter, *Brown’s Boundary Control*). “A plan referred to in a deed becomes part of the contract so far as may be necessary to aid in the identification of the lots and to determine the rights intended to be conveyed.” *Reagan v. Brissey*, 446 Mass. 452, 458 (2006), quoting *Labounty v. Vickers*, 352 Mass. 337, 339 (1967).

The problem is that the Davis deed, the attached sketch plan, and the subsequent Highlands 2 plan, are utterly vague as to where the location of the southern bound described in the Davis deed is located on the ground. The sketch plan is not a survey, and the Highlands 2 plan, as all the experts acknowledge, is not precisely surveyed either. Tr. 1-124-125, 2-27-29, 76, 170-172, 3-60-63; Exhs. 24, 25. Indeed, the Highlands 2 plan intentionally set forth unassigned buffer property along its perimeter that could be used to absorb any mistakes or uncertainties in its layout of its 1500 lots and its ways. Exh. 25. I thus turn to the expert testimony presented by Messrs. Gilstad, Dowling, Loria, and Austin. “When presented with expert surveying and title

testimony, a court must assess the opinions offered. The court must decide which . . . expert it finds more credible, basing such assessment on the experts' analyses, taking into account the other evidence presented, including the documentary evidence, particularly the deeds and plans that lend support and corroboration to each opinion.” *Lombard v. Cook*, 20 LCR 325, 326 (2012). “No surveyor or court has authority to alter or modify a boundary line once it is created. It can only be interpreted from the evidence of where that boundary is located.” Brown’s Boundary Control § 2.6 at 32. “[T]he law does not require absolute certainty of proof to determine a boundary line,” but merely a preponderance of the evidence. *McCarthy v. McDermott*, 18 LCR 405, 406 (2010), citing M. Brodin and M. Avery, *Handbook of Massachusetts Evidence* § 3.3.2(a), at 67 (8th ed. 2007).

Gilstad and Austin agreed that they could not locate any original monuments—that is, monuments set at the time of the Davis deed. Tr. 1-133-136, 139-146, 151-152, 3-60-63. They each relied on identifying subsequently set monuments, and then applying the courses and distances set forth in the Davis deed. They both agreed on a monument setting the southwest corner of the Davis parcel. From there, they each attempted to plot the southern bound described in the Davis deed, accounting for the jog described in the deed. Here, the two experts differ. Gilstad held the course and distance set forth in the Davis deed—he attempted to locate the line in a way that was consistent with the angle of the jog. This led him to locate the boundary line to the south of the way, into the cemetery and across some graves. Tr. 1-145-148, 152, 160, 191-192, 2-9, 12-13, 20-21; Exh. 96. Austin, on the other hand, located what he believed was a monument—the stone at the juniper tree. He held this as the location of the point of the jog, and laid out a line to other subsequent monuments, including the pin from the Smith plan and the bound of the registered land plan. Tr. 2-76-77, 105, 175-176, 189-190, 3-52, 57; Exh. 10. His

plan accurately reflects the distances of the Davis deed—the stone at the juniper trees reflects the correct distance to the jog described in that deed—but is not consistent with the angle of the jog. Normally, faced with such contrasting plans, the surveyors would confer to see if they could agree on the location of the disputed bound. See 250 Code Mass. Regs. § 6.02(3)(2) (2019). They did not do so here, because Austin prepared his plan while this litigation was pending. Tr. 3-121-122.

I am therefore left to assess their differing plans. I find that each plan is equally plausible and equally flawed. Gilstad held the correct distances and courses, but his line, extending into the cemetery and running some feet from the pin shown on the Smith plan, seems not quite right. Austin, on the other hand, located what may be a bound—the stone by the juniper tree. The problem is that this stone is more likely a marker for grave sites rather than a property bound. Moreover, while Austin’s plan is consistent with the Smith plan, he does not use the correct course—that is, the correct angle for the jog. The descriptions of the northern boundary of the cemetery land in the deeds described by Mr. Loria, while consistent with the description of the southern bound of the Davis deed, offer little help in locating that bound on the ground. In short, I find that the southern bound of the Davis parcel remains uncertain even after hearing the testimony of Gilstad and Austin and reviewing the deeds and plans on which they relied.

If the location of the survey lines are uncertain from lack of control of known fixed monuments, and various surveyors might place the lines in different places, subsequent occupational conduct, such as fences and improvements, is evidence of the original lines and may be indicative of the originally intended grant. *Ryan v. Stavros*, 348 Mass. 251, 260 (1964) (where deed description is doubtful or ambiguous, extrinsic evidence admissible to show construction given to deed by parties and their predecessors through their acts); *Fulgenitti v.*

*Cariddi*, 292 Mass. 321, 325 (1935) (“Acts of adjoining owners showing the practical construction placed by them upon conveyances affecting their properties are often of great weight.”); *Bacon v. Onset Bay Grove Ass'n*, 241 Mass. 417, 423 (1922); *Hurlbut Rogers Mach. Co.*, 235 Mass. at 403; *Abbott v. Walker*, 204 Mass. 71, 73 (1910); see *Brown's Boundary Control* § 11.22 at 273. The evidence must show that the fence or other line is intended to mark the boundary and is not simply used as a barrier or for some other purpose. *Ryan*, 348 Mass. at 261.

The evidence at trial is that there was, for many years, a metal rail fence running the entire length of the cemetery's northern edge and the Davis parcel's southern edge, separating the Davis parcel from the cemetery. It marked the line between the two parcels, and ran along the southern edge of the way. Tr. 1-95-101, 152-153, 155-157, 2-49-50, 52-53, 204-205, 3-88-89; Exhs. 14, 15, 92, 93, 95. The metal rail fence is seen in photographs and its remnants remain in the ground today; I saw them on the view. Tr. 1-101-102; Exhs. 92, 93; View. There is a reference to a fence in at least one of the deeds. Exh. 36. While the deed does not describe in which direction this fence ran, I find that the reference to the fence is confirmation that there was a fence along the boundary. The view made clear to me that, based on the occupation and use of the residential parcels to the north and the cemetery to the south, this metal rail fence was intended to, and did, mark what the various owners of the parcels, including the Town of Oak Bluffs, considered the boundary between the cemetery and the Davis parcel. I find that the line set by the metal rail fence marks the boundary of the southern edge of the Davis parcel and, therefore, the southern edge of the Zarba property.

This is the conclusion that Gilstad reached in his plan. Seeing that his survey placed the southern bound inside the cemetery, he decided that rather than locating the line so as to cut off

part of the cemetery, it was better to locate the line between the Highlands and the cemetery as the line of occupation between the two set by the metal fence. The fence served as a good indication of possession and ownership, especially in light of the unreasonable bounds of the Davis deed. I agree with Gilstad's reasoning and conclusion. I find that it was appropriate for Gilstad to locate the southern bound of the Davis parcel along the line of occupation indicated by the metal fence. In short, I find that the southern boundary of the lots as shown on the Gilstad plan is correct, and a declaration shall enter to that effect.

Because the boundary shown on the Gilstad plan is the correct southern boundary of the Zarba property, the guest house they built is at least 20 feet from that boundary, thus meeting the setback requirement under the bylaw. Exh. 13, Bylaw App. B. It was error for the Building Inspector to find that the setback was 17.9 feet, and it was error for the ZBA to affirm the Building Inspector's determination. The Decision was based on a legally untenable ground, and must be annulled.

There is one final issue to address. The ZBA raised in its opening statement and in examination of Gilstad the question of whether the way along the southern boundary, as shown on the Gilstad plan, is a "street" as that term is defined in the bylaw. Exh. 13, Bylaw § 11.0. If the way constitutes a "street," the ZBA argued, then the setback must be measured from the northern edge of the way, not the southern edge, rendering the guest house well within the required 20-foot setback. Tr. 1-38-40, 174-179. This argument is not found anywhere in the Decision—it is nowhere in the findings and does not form part of the basis for the ZBA's upholding the Building Inspector. The ZBA did not raise this argument at any time before trial. It was not raised in an answer, in any motion for summary judgment, in any of the several pretrial memoranda, or at the pretrial conference. It was raised for the first time at trial in the ZBA's

opening statement and first pursued in the ZBA's cross-examination of Gilstad. The Zarbas object to this issue being raised for the first time at trial. The ZBA argues that the issue can be decided on the record.

I agree with the Zarbas that it was an unfair surprise for the ZBA to raise this issue for the first time at trial. At the time of trial, this case had been pending for two years and had been through a motion to dismiss, a motion for summary judgment, a joint pre-trial memorandum, a pre-trial conference, and a revised joint pre-trial memorandum. At none of these junctures in the case did the ZBA raise this issue. The Zarbas prepared for trial reasonably relying on the ZBA's statement in both pre-trial memoranda of what the issues at trial would be. For the ZBA to raise this issue for the first time in its opening statement is unfair to the Zarbas.

In any event, the argument has no merit. The bylaw defines "street" by incorporating the definition of the kind of way that will provide frontage for the purposes of determining that a division of land does not require subdivision approval under G.L. c. 41, § 81L, the so-called "approval not required" or "ANR" plan. Exh. 13, Bylaw § 11.0. The applicable provision of the bylaw definition thus provides that a "street" is a "way determined by the planning board to have sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon." *Id.*; see G.L. c. 41, § 81L. The Gilstad plan is the ANR plan that created the Zarba property—it is lot 2 on the plan. Exhs. 1, 2, 3. The ZBA argues that the Oak Bluffs Planning Board, in endorsing the Gilstad plan as "approval under the subdivision control law is not required" pursuant to G.L. c. 41, § 81P, had to have found that the way abutting the cemetery met the requirements for a private way for the purposes of frontage. Thus, the ZBA argues, if it was used as frontage for the lot on the Gilstad

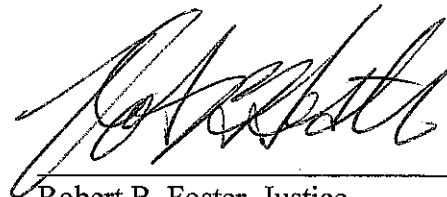


plan, it met the definition of “street” in the bylaw. The flaw in the ZBA’s argument is that the way does not provide the frontage for lot 2, the Zarba property. Lot 2’s frontage is on South Street, a public way abutting the property to the north. Exh. 2. The way was never treated as a street for the purposes of providing frontage for lot 2 and obtaining an ANR endorsement. It does not constitute a “street” as defined in the bylaw.<sup>3</sup>

### **Conclusion**

For the foregoing reasons, I find that the southern boundary of the Zarba property is that shown for lot 2 on the Gilstad plan. Therefore, it was an error of law for the ZBA to affirm the Building Inspector’s order relying on the Austin plan to find that the Zarbas’ guest house was within the setback. Judgment shall enter declaring that the Gilstad plan correctly shows the southern bound of the Zarba property, annulling the Decision, and remanding this matter to the ZBA with an order to reverse the Building Inspector’s determination and order issuance of a certificate of occupancy for the guesthouse.

Judgment accordingly.



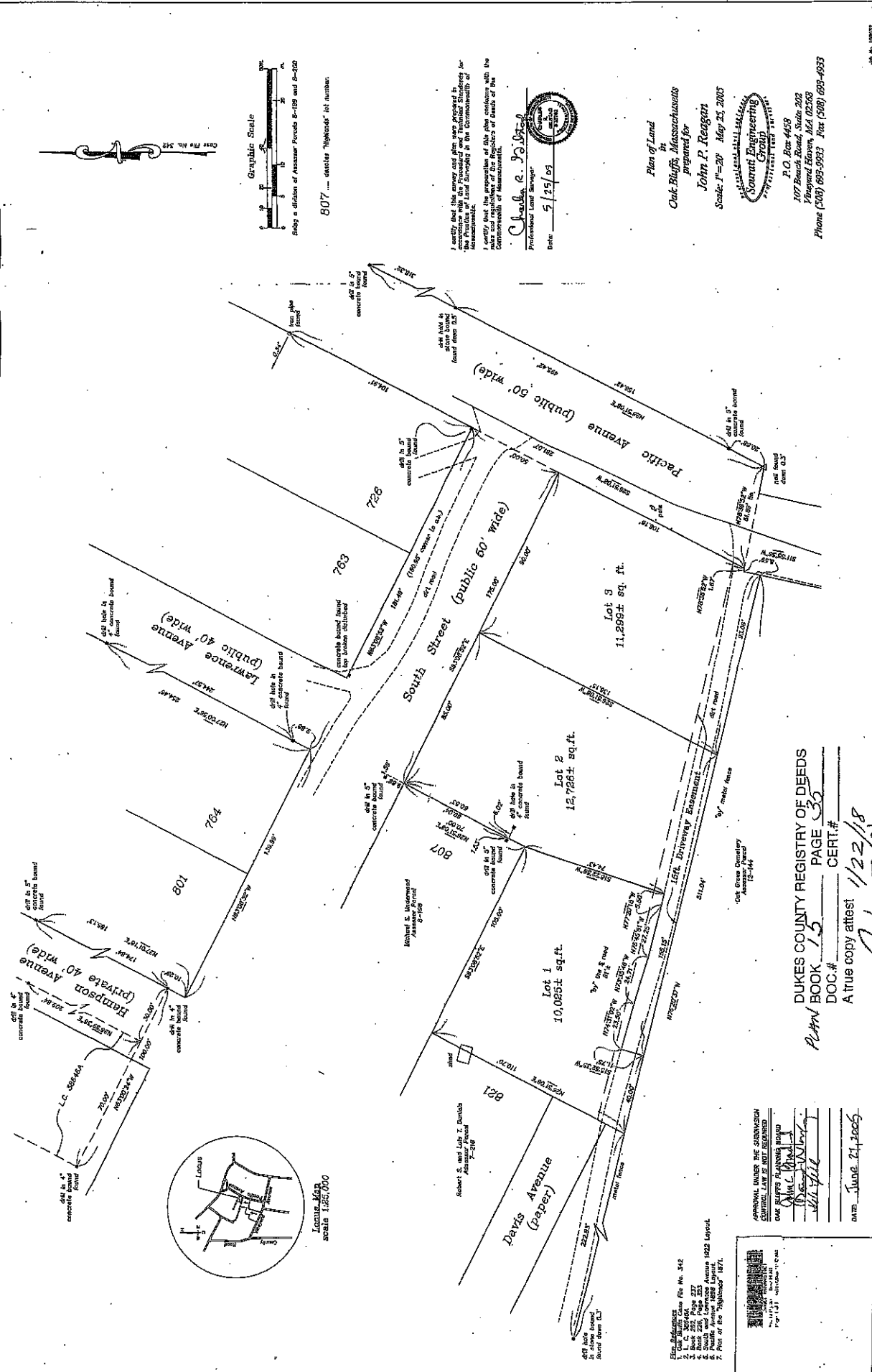
Robert B. Foster, Justice

Dated: December 26, 2019

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<sup>3</sup> In view of my decision, I do not need to address Plaintiffs’ Motion to Strike All Mention of the “Murphy Case” Noted in the Defendants Post-Trial Submissions.





Graphic Scale  
 Being a division of Assessor Parvot 8-189 and 8-200

807 ... denotes "Highway" lot number.

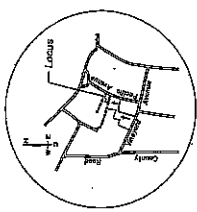
every line, survey and other data appearing hereon are true and correct in accordance with the provisions of the Statutes of the Commonwealth of Massachusetts, and the laws and regulations of the Registrar of Deeds of the Commonwealth of Massachusetts.

Professional Land Surveyor  
 Charles E. P. [Signature]  
 Date: 5/25/09

Plan of Land  
 in  
 Oak Bluffs, Massachusetts  
 prepared for  
 John P. Reagan  
 Scale: 1"=20' May 23, 2009

Seal of the State of Massachusetts  
 Seal of the Registrar of Deeds  
 Seal of the Commonwealth of Massachusetts  
 Seal of the County of Dukes  
 Seal of the Town of Oak Bluffs  
 Seal of the State of Massachusetts  
 Seal of the Registrar of Deeds  
 Seal of the Commonwealth of Massachusetts  
 Seal of the County of Dukes  
 Seal of the Town of Oak Bluffs

P.O. Box 4639  
 107 Beach Road, Suite 202  
 Freetown, MA 02538  
 Phone (508) 695-9933 Fax (508) 699-4993



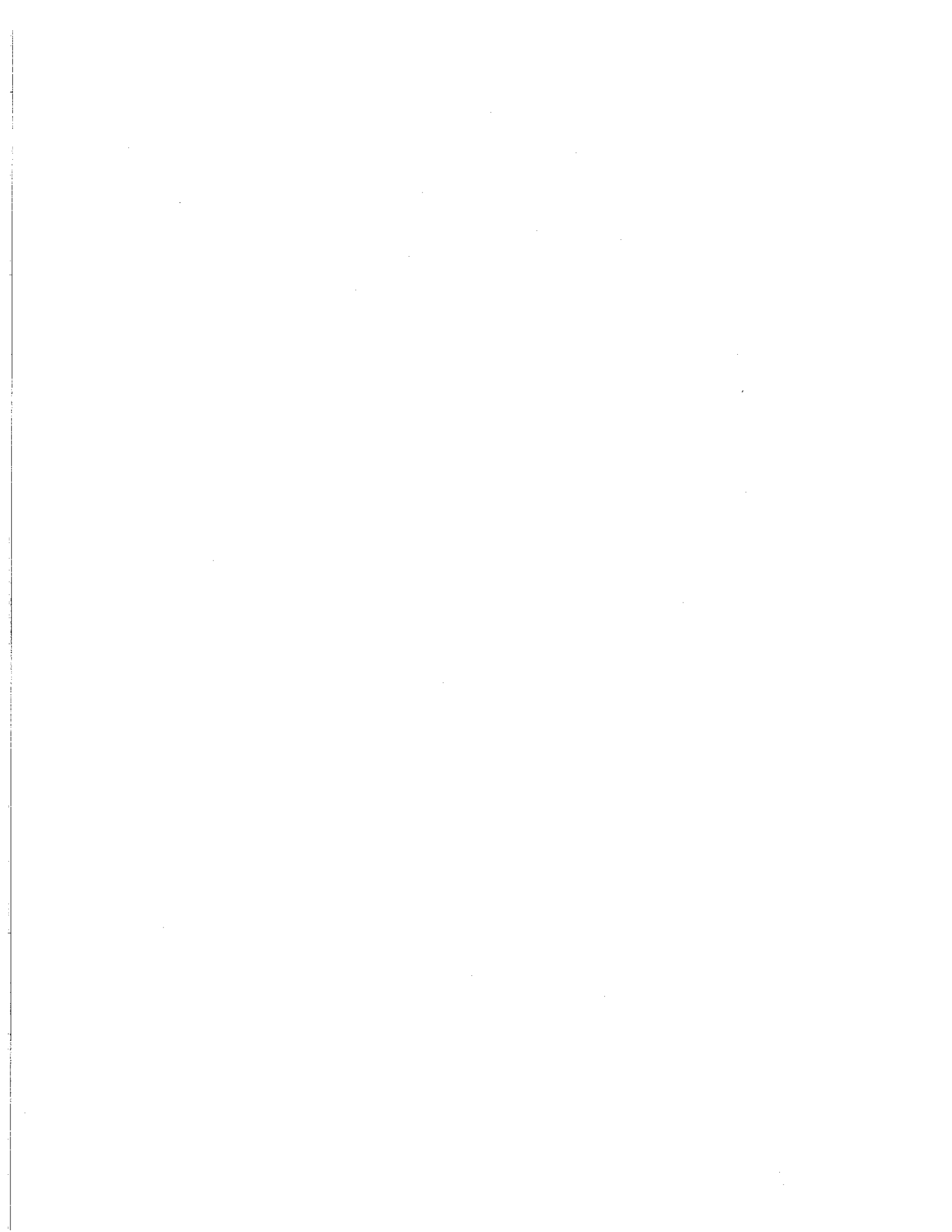
Location Map  
 scale 1:25,000

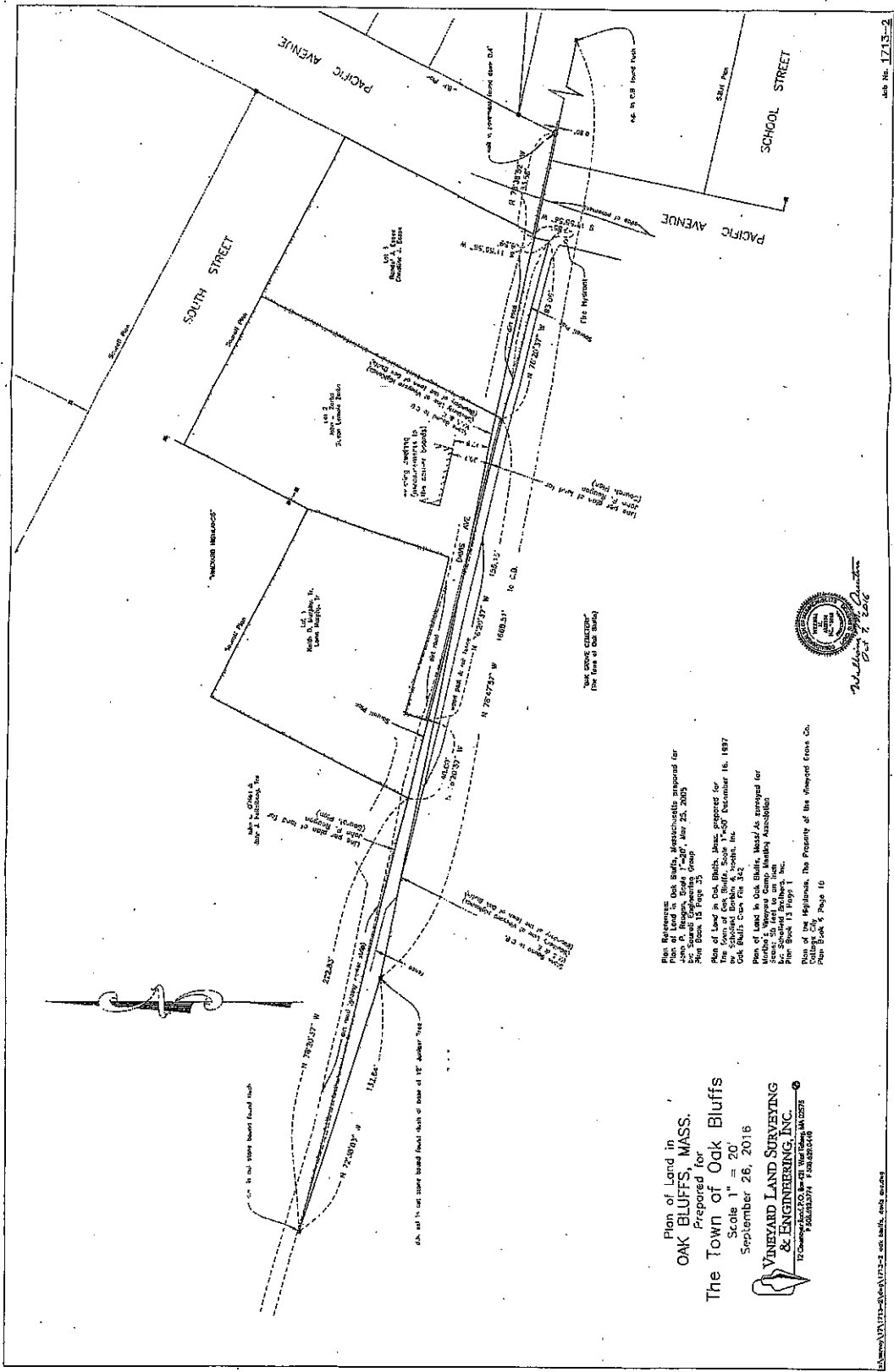
- 1. Plan of Land, File No. 342
- 2. L. C. 2008-041
- 3. Book 220, Page 233
- 4. Book 220, Page 233
- 5. Book 220, Page 233
- 6. Book 220, Page 233
- 7. Plan of the "Highway" 1871.

APPROVAL UNDER THE SUBMISSION  
 CONTINGENT LAW IS NOT REQUIRED  
 DUKES COUNTY PLANNING BOARD  
 [Signature]  
 [Signature]  
 [Signature]  
 DATE: June 24, 2009

DUKES COUNTY REGISTRY OF DEEDS  
 PLAN BOOK 15 PAGE 30  
 DOC.# CERT.#  
 A true copy attested 1/22/18

[Signature]





Job No. 1713-2

Plan of Land in Oak Bluffs, Massachusetts prepared for  
 John P. Morgan, State 1-207, Mar 25, 2013  
 State Book 15 Page 25

Plan of Land in Oak Bluffs, Mass. prepared for  
 The Town of Oak Bluffs, State 1-207 December 16, 1987  
 Oak Bluffs, Mass. 02557, Inc.  
 Oak Bluffs, Mass. 02557, Inc.

Plan of Land in Oak Bluffs, Mass. prepared for  
 North & Vineyard Camp, Inc. 02557, Inc.  
 State Book 13 Page 1

Plan of the Highlands, The Property of the Vineyard Green Co.  
 State Book 9 Page 10

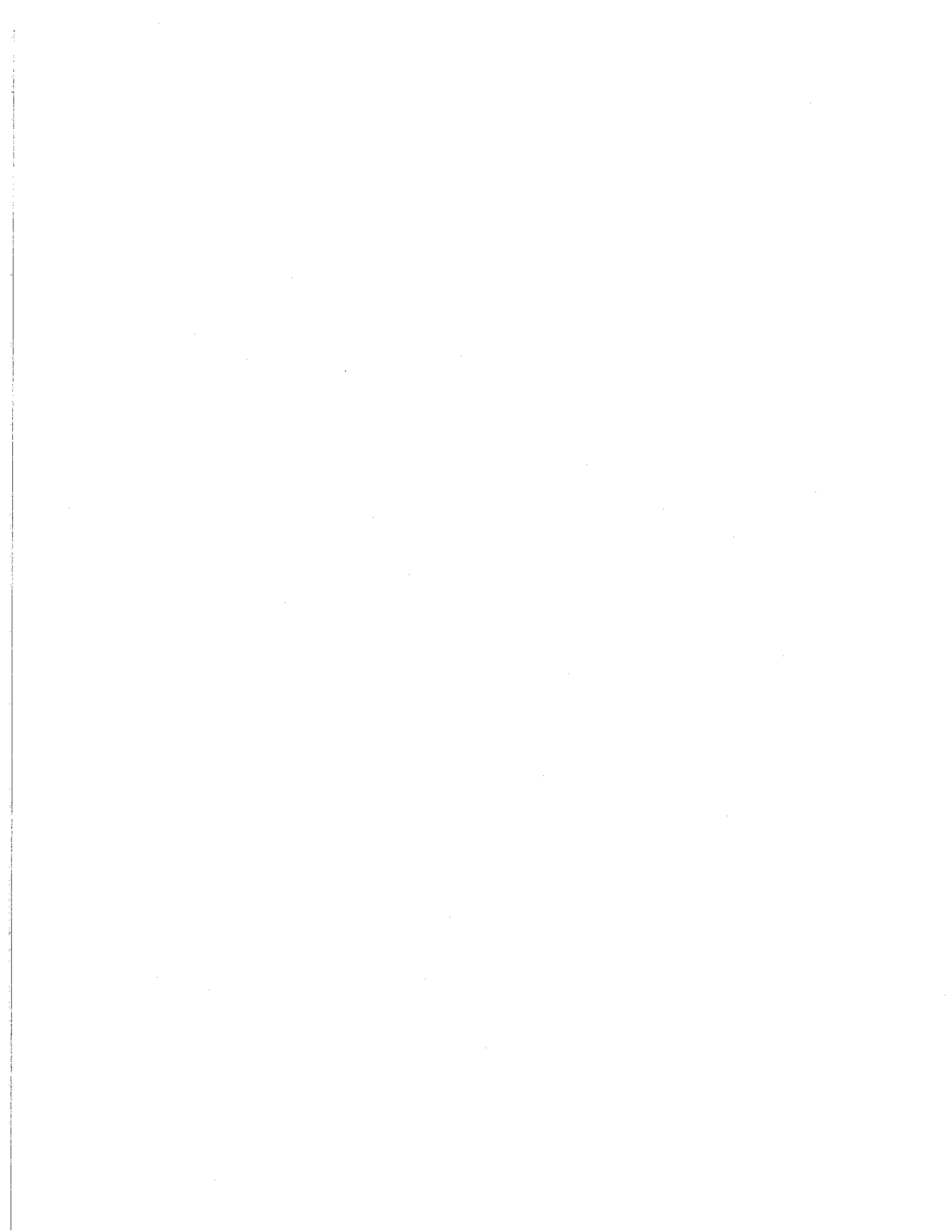
Plan of Land in  
**OAK BLUFFS, MASS.**  
 Prepared for  
**The Town of Oak Bluffs**  
 Scale 1" = 20'  
 September 26, 2016

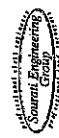
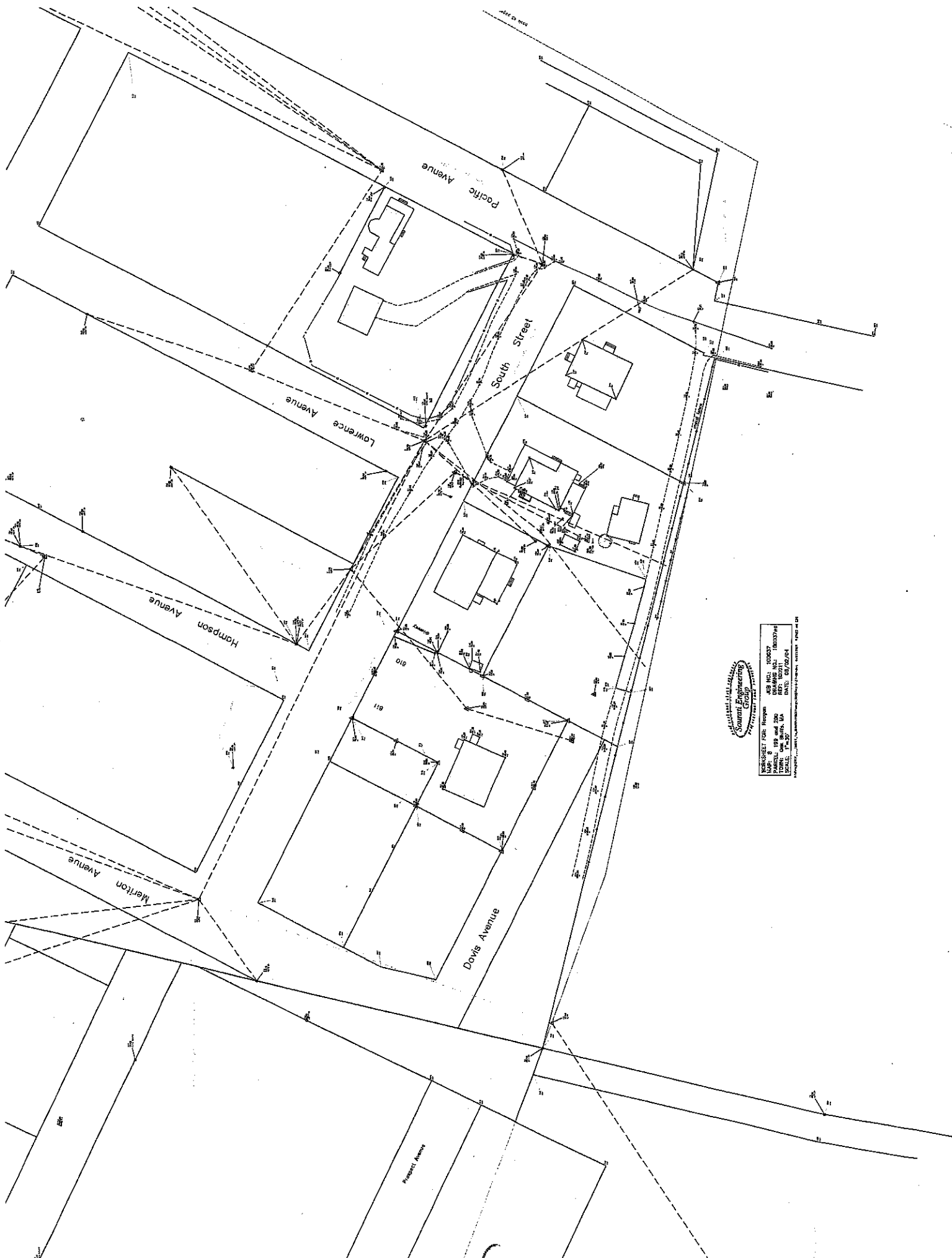
**VINEYARD LAND SURVEYING  
 & ENGINEERING, INC.**  
 12 Commerce Street, Suite 200  
 Westport, MA 02886  
 Telephone: 508-548-1171  
 Fax: 508-548-1172



*William J. Morgan*  
 Surveyor

B





PROJECT FOR: *[illegible]* JOB NO.: 100037  
 MAP: 8 DRAWING NO.: 100037-01  
 TITLE: *[illegible]* DATE: 03/20/04  
 SCALE: 1" = 30'  
 DRAWN BY: *[illegible]* CHECKED BY: *[illegible]*

