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THE COMMONWEALTH OF MASSACHUSETTS
TOWN OF LUNENBURG
ZONING BOARD OF APPEALS

February 26, 2014

Special Permit for Dimensional Variation

A Special Permit for Dimensional Variation was granted to David B. & Diane T. Misner, 49 Joslin Street, Lunenburg, MA 01462, under the Lunenburg Protective Zoning By-Law Section 8.3.2.1.b)4. The petitioners were seeking a Special Permit to vary the dimensional requirements (area, frontage) for a previously grandfathered residential building lot. The lot contains 8211 square feet and has eighty five feet of frontage. The subject property is located at **51 Joslin Street, Lunenburg, MA 01462.**

The Board of Appeals of the Town of Lunenburg hereby certifies that a Special Permit for Dimensional Variation has been granted pursuant to the Protective Zoning By-Law of the Town of Lunenburg, Section 8.3.2.1.b)4.

Board Members present: Donald F. Bowen, Chairman, Raymond Beal, James Besarkarski, Alfred Gravelle and David Blatt.

Special Permit for Dimensional Variation has been issued to David B. & Diane T. Misner, 49 Joslin Street, Lunenburg, MA 01462, affecting the rights of the owner with respect to land and buildings **51 Joslin Street, Lunenburg, MA 01462**, Book 6021, Page 92 and dated February 13, 2006 as described in plans submitted with the petition. Assessors Map 97, Lot 4.

And the said Board of Appeals further certifies that the decision attached hereto is a true and correct copy of its decision granting said Special Permit, and that copies of said decision, and all plans referred to in the decision, have been filed with the Planning Board and the Town Clerk.

The Board of Appeals also calls to the attention of the owner or applicant that General Laws, Chapter 40A, Section 11 (last paragraph) provides that no variance or special permit, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the Town Clerk that twenty days have elapsed after the decision has been filed, that it has been dismissed or denied, is recorded in the Registry of Deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The owner or applicant shall pay the fee for such recording or registering.

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Attorney George Watts, 791 Main Street, Fitchburg was representing the Misner's in the petition. Attorney Watts presented a brief history of the property. He told the Board that Attorney Robert L. Rice Jr. prepared the required deed paperwork in 2003 to purchase a parcel of land from the Town of Lunenburg that was available at a public auction of tax titled property. In order to protect and maintain the status of the grandfathered lot he (Attorney Rice) created a trust document so that the newly purchased lot and the house that they currently live in next door would be held in separate ownership. In 2006 the Misner's refinanced their house with the Irwin Mortgage Company. At the time of the closing they signed the deed in 2006 which transferred 49 Joslin Street (their current home) out of the trust and into their names. It was unknown to the petitioners at the time that the credit union that they were using to refinance the property does not allow property to be held in Trust.

Since that time the Misner's put the vacant parcel on the market and had a signed Purchase and Sales agreement with Traditional Concepts, Inc. owned by Carrie Ann & Brian Carlson. Mr. Carlson then followed the steps to obtain a building permit. When the contractor approached the sewer department it was noticed that the proposed building lot was held in common ownership with the house lot, and that parcels 49 and 51 Joslin Street were now together as one, also known in Chapter 40A as the "Common Lot Merger Doctrine". This defect was brought to the attention of the Building Official and therefore, Mr. Sauvageau deemed that the parcel at 51 Joslin Street no longer enjoyed the "Grandfathered" zoning status.

Attorney Watts said that the merger doctrine came in to effect in 2006 and that he had no issue with Mr. Sauvageau rescinding the original determination that it was now an unbuildable lot by zoning and was in fact correct in doing so.

Attorney Watts maintains his position that the merger doctrine came into effect and he is now asking Board to consider the by-law outlined in Section 8.3.2.1.b) 4. and stated that there is nothing in the by-law that would preclude considering a demerger of the properties. He felt the Board had the power under the by-law to grant relief. He told the Board that "You do not have to stand by the strict language of the merger doctrine and that you move away from basis of special permit this lot meets requirement of the bylaw in this specific neighborhood as a buildable lot".

Donald Bowen questioned the legality of this and asked "Where is the power to demerge"? Attorney Watts said that the parcel can demerge by the action of the board, to grant special permit for dimensional variation and that it is a powerful tool that is inferred to in that section regarding Special Permits.

Chairman Bowen said documentation would be required to be maintained and worried that if the request were granted there would be many other people trying to create lots that lack proper frontage, size etc. Donald Bowen felt that it was not what the by-law was intended for and felt that it was out of bounds. Attorney Watts said that the petitioners spent \$81,000.00 to purchase a building lot and that they were losing the value of investment. He felt the by-law section was created to help people and the Zoning Board has the ability to take favorable action.

David Misner, 49 Joslin Street (the petitioner) stated that he and his wife Diane are longtime residents and is looking for favorable decision. Their initial intent was as an investment to purchase the building lot to build a house and the economy took a downward turn. Mr. Misner said that it was a mistake (to undo the Trust) and the intention was not to take it out of "trust" and that it was only an honest mistake.

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Steve DeBettencourt, 200 Pleasant Street, Lunenburg was speaking in favor of the petitioners request. He indicated that he was a member of the Board of Selectmen at the time of the public auction, The Town of Lunenburg was selling the parcel for \$81,000.00 and it would be additional revenues for the town and also support new growth. He felt a favorable decision is a "win win" for Town. He also stated that the area in which the parcel is located is a fitting lot for building and would not be offensive in this neighborhood.

Michael Sauvageau, Building Official was not in favor or in opposition but provided a history of his decision making process. He said that his original letter was favorable and contended that the lot was buildable from a zoning standpoint but subject to approval from all other Town departments. Upon learning the fact that the lots had merged due to the dissolution of the trust, he recanted his original decision and therefore deemed the lot (51 Joslin Street) not buildable.

Alfred Gravelle asked how you go about de-merging the parcels. James Besarkarski had concerns with the municipal sewer system and if betterment fees were paid on the vacant lot. The municipal sewer is currently on Joslin Street and was not assessed a betterment as the lot was deemed non-buildable. If the decision is granted by the Zoning Board the lot would then be assessed a privilege fee after the fact. Mr. Misner said that there was a sewer stub on the plan that he saw when the public auction took place.

Raymond Beal had a plan from 1922 showing the parcels that at the time were five parcels in all. Mr. Beal indicated that most of the lots in the area do not meet current zoning status and what was previously referred to as lot 37 it was five original lots and that all deeds represented have been merged and demerged several times. David Blatt asked the Building Official for clarification of the common lot merger doctrine. Michael Sauvageau explained in detail Chapter 40A of the General Laws that protect zoning. It came into effect in 1975 to take substandard sized lots such as this that had no regulations of zoning. The State determined through Chapter 40A of the Zoning Act that if a lot is in existence when the by-law changes, as long as it had 5000 square feet and 50 feet of frontage it was protected. The new zoning act gave property owners five years from the date of inception to bring parcels as close as possible to compliance prior to merging. The Town of Lunenburg took property by tax title for nonpayment of taxes. Michael Sauvageau contends that both parcels 49 and 51 Joslin would comply if demerged.

David Blatt asked for further clarification of the refinancing of the home at 49 Joslin Street and wants to understand reasoning behind it. Diane Misner said that they attempted to refinance the home at 49 Joslin Street and at that time the credit union would not accept the language on the deed as it had been placed in Trust known as the "49 Joslin Street Trust". The credit union requires that the property must be in the name of the husband and wife (David & Diane Misner). At the time 49 Joslin Street was in the name of the trust and 51 Joslin Street was in the name of Diane Misner. The applicants changed the ownership of 49 Joslin Street in 2006 to secure financing on their newly constructed home and inadvertently voided the protected status of the lot. The petitioners were not aware of that by changing the trust the property lost its protected status.

Mrs. Misner said that her husband has been unemployed for one year, that they had no legal representation at closing in 2006 and that all of their funds were tied up in the lot. If they are unable to sell the parcel they would need to file bankruptcy.

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Alfred Gravelle truly finds that this was a unique situation and has sympathy for the applicants; he is concerned that it would lead to other unique situations and still had questions as to how we demerge the parcels and wondered if the Board should we consult legal counsel?

Donald Bowen did not want to open a Pandora's Box and wondered if the Zoning Board was the proper venue to relieve this issue?

Raymond Beal felt that the by-law language allows the ZBA the power to grant relief; with the sticking point being the long term view of what the purpose of the zoning requirements are. Mr. Beal felt that all of the lots in the area and homes that exist are close together according to the 1922 plan, and in the past the Board has granted special permit for dimensional variations for many things and does not feel uncomfortable at all. He added that variances are nearly impossible to grant that the specific wording does give the power to the Board in the zoning bylaw.

Donald Bowen has compassion for the petitioners but a few of the Board members felt that legal counsel should be sought.

Michael Sauvageau and Steven DeBettencourt said that at the time of the auction the Town Clerk asked if it was a buildable lot and Mr. Sauvageau said yes it was from a zoning standpoint based on Chapter 40A and felt that is why someone would pay \$81,000 for it at the time of sale.

Raymond Beal felt that a granting could be allowed with the contingency that all applicable laws and ordinances are followed as outlined in the language that is standard in our decisions.

MOTION

David Blatt made a motion to grant the Special Permit for Dimensional Variation under section 8.3.2.1.b)4. to recognize the 8,211 square foot lot at 51 Joslin Street as a buildable lot due to the circumstances surrounding and the inadvertent sequence of the recording of the February 12, 2003 deed at Book 6021, Page 92, subject to the transfer of property at 49 Joslin Street from David B. Misner and Diane T. Misner, Trustee of the 49 Joslin Street Trust. Raymond Beal seconded the motion.

FINDINGS

In granting a Special Permit for Dimensional Variation the Board of Appeals specifically found:

- a. The specific site is an appropriate location for such building or alteration.
- b. The proposed building or alteration is compatible with the existing neighborhood with regard to size, location and architecture.
- c. The granting of the special permit for dimensional variation will not adversely affect the neighborhood.
- d. The granting of the special permit for dimensional variation will not unreasonably diminish the available light, air, sunlight and other amenities: and there will be no nuisance or serious hazard to vehicles or pedestrians as outlined in Section 8.3.2.1.

The Special Authorization is granted with the contingency that David B. & Diane T. Misner comply with all licenses, regulations, statues and ordinances of any and all applicable state, local and federal board or agencies with jurisdiction over the premises.

The Special Permit is subject to a periodic review by the permit granting authority (Zoning Board) or the Enforcement Officer, to insure compliance with the enumerated conditions. Non-compliance to these conditions may result in revocation of this permit.

After closing the discussion, the Board acting in its capacity as the Special Permit Granting Authority, granted the Special Permit Dimensional Variation with the above members present and voting as follows with respect to the issuance of the Special Permit.

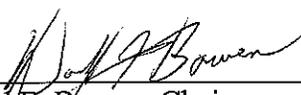
VOTE

Raymond Beal voted in favor of granting the Special Permit Dimensional Variation.
James Besarkarski voted in favor of granting the Special Permit Dimensional Variation.
David Blatt voted in favor of granting the Special Permit Dimensional Variation.
Alfred Gravelle voted in favor of granting the Special Permit Dimensional Variation.

Donald Bowen abstained from voting.

In making this determination, the Board specifically found that the granting of this Special Permit and Dimensional Variation would not contravene the purpose of the Protective Bylaws or the provisions of Chapter 40A of the Massachusetts General Laws.

Voted and executed,



Donald F. Bowen, Chairman 2/26/2014
Date

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Lunenburg Zoning Board of Appeals
Special Permit Granting Authority

REFERENCES
Worcester North
Registry of Deeds:

DEED BOOK 4637, PAGE 57.
 DEED BOOK 1593, PAGE 187.
 PLAN BOOK 33, PAGE 6.

ASSESSOR'S
 MAP 81
 BLOCK 401
 LOT 0
 ZONING: R-A

TOTAL AREA = 8,211 S.F. 100%
 AREA PROP. DWELLING = 864 S.F. 10.5%
 PROPOSED COVERAGE = 864 S.F. 10.7%
 OPEN SPACE = 7,347 S.F. 89.5%

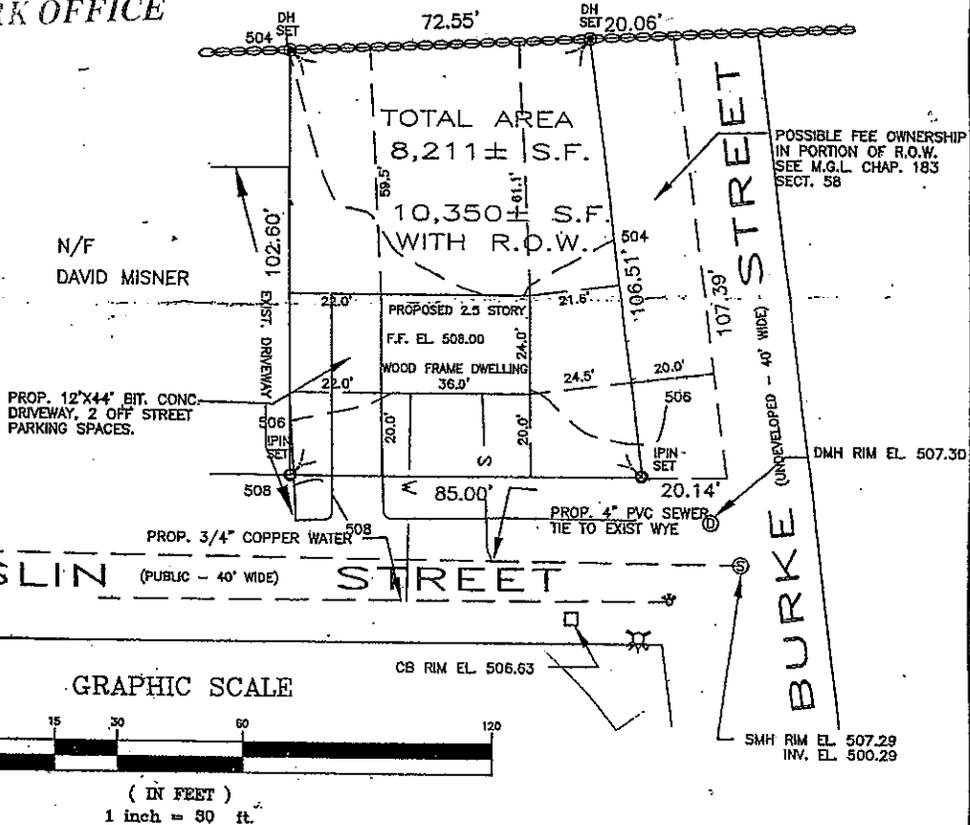
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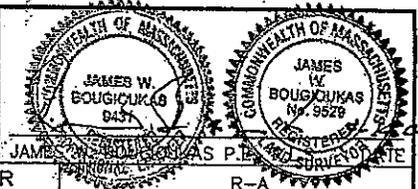
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N/F
 EDGAR R. LETARTE

- NOTES:**
- UTILITIES SHOWN ARE BASED UPON FIELD SURVEY AND RECORD PLANS AND ARE NOT NECESSARILY INDICATIVE OF UNDERGROUND CONDITIONS.
 - THE CONTRACTOR SHALL BE RESPONSIBLE FOR VERIFYING AND DETERMINING THE LOCATION SIZE AND ELEVATION OF ALL EXISTING UTILITIES, SHOWN OR NOT SHOWN ON THESE PLANS, PRIOR TO CONSTRUCTION. THE ENGINEER SHALL BE NOTIFIED IN WRITING OF ANY UTILITIES FOUND INTERFERING WITH THE PROPOSED CONSTRUCTION AND APPROPRIATE REMEDIAL ACTION SHALL BE DETERMINED PRIOR TO PROCEEDING WITH THE WORK.
 - THIS PLAN IS BASED ON THE REFERENCED PLANS AND DEEDS, AND THE RESULTS OF A FIELD SURVEY AS OF THIS DATE. NO CERTIFICATION IS INTENDED AS TO PROPERTY TITLE OR AS TO THE EXISTENCE OF UNWRITTEN OR UNRECORDED EASEMENTS.
 - ALL SEWER AND WATER CONNECTIONS SHALL CONFORM TO THE TOWN OF LUNENBURG WATER AND SEWER COMMISSION RULES AND REGULATIONS.
 - AN EXISTING WYE BRANCH CONNECTION ON THE SEWER MAY BE USED IF LOCATED AND APPROVED BY THE LUNENBURG INSPECTOR.
 - WATER CONNECTIONS SHALL BE IN A SEPARATE TRENCH AT LEAST 10 FEET AWAY FROM ANY SEWER UNLESS OTHERWISE APPROVED BY THE TOWN OF LUNENBURG.
 - IF BATHROOM FIXTURES ARE TO BE INSTALLED IN THE BASEMENT, AN APPROVED BACKFLOW PREVENTOR DEVICE SHALL BE INSTALLED.
 - A DYE TEST SHALL BE PERFORMED BY THE TOWN INSPECTOR BEFORE AN OCCUPANCY PERMIT WILL BE ISSUED.
 - ALL WATER AND SEWER CONNECTIONS MUST BE PERFORMED BY BONDED AND LICENSED DRAIN LAYERS OR PLUMBERS ACCORDING TO THE TOWN OF LUNENBURG REQUIREMENTS.
 - ALL ROAD AND SIDEWALK REPAIRS SHALL BE EQUAL TO OR EXCEED EXISTING CONDITIONS.
 - NOTIFY DIG SAFE 72 HOURS PRIOR TO ANY EXCAVATION.
 - TBM SMH RIM AT INTERSECTION OF JOSLIN AND BURKE, EL. 507.29. ALL GRADES AND ELEVATIONS TO BE VERIFIED BY THE CONTRACTOR IN THE FIELD.



PLAN OF LAND
IN
LUNENBURG, MA.
NO.51(LOTS 18&19)



OWNER/APPLICANT: **DAVID B. MISNER & DIANE P. MISNER**

R-A

FOR PERMIT

BRADFORD ENGINEERING CO.
3 WASHINGTON SQ.
HAVERHILL MA. 01830

SHEET 1 OF 1

REVISIONS BY

DESIGNED: WGC
 DRAWN: WGC
 CHECKED: JWB
 APPROVED: JWB
 SCALE: 1" = 30'
 DATE: APRIL 13, 2006

PHONE: (978) 373-2396 FAX: (978) 373-8021 E-MAIL: bradford.engr@verizon.net
 FILE NAME: PERMIT\LUN43003.DWG FILE NO: 1319005

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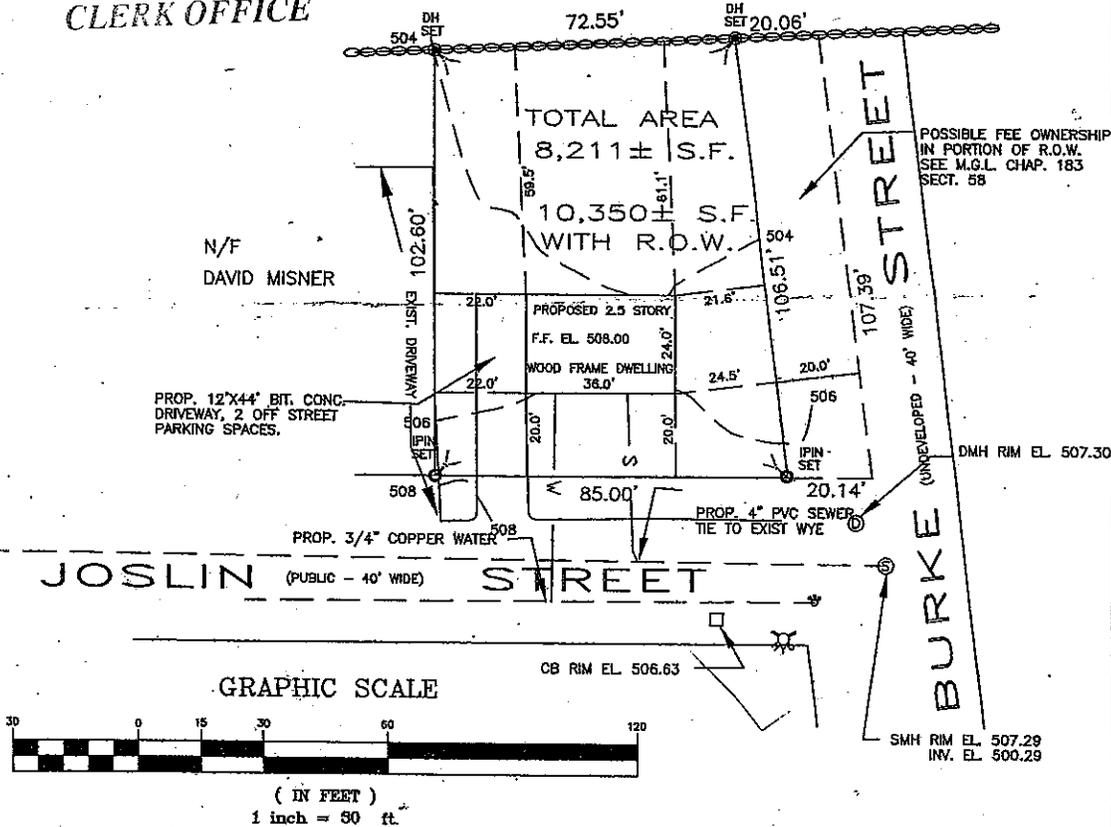
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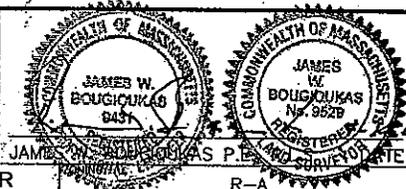
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