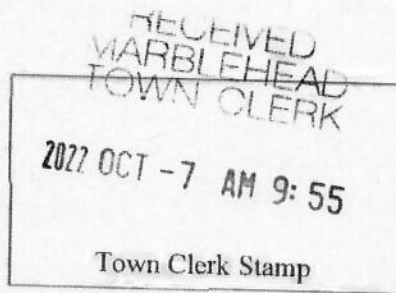




**Town of Marblehead**  
**Zoning Board of Appeals**



**APPEAL FORM**

(Appeal of the Building Commissioner's Action/Inaction Regarding Zoning Enforcement)

Date: October 7, 2022

With respect to the property at (address): 9 & 11 Bartlett Court

Assessor Map Number: 27

Parcel Number: 24 & 23

Pursuant to Chapter 40A, §8 of the General Laws and Chapter 200-2-I of the Marblehead Zoning Bylaw and **Section 7 of the Rules and Regulations of the Board of Zoning Appeals**, I (we) respectfully appeal to the Board of Appeals the following action taken or not taken, or determination made, by the Building Commissioner and/or Local Inspector:

- ☒ (a) the failure to take a requested enforcement action. The written request for enforcement, the written response (if any), and a written statement specifying the grounds for this appeal are attached to this Form
- ☐ (b) the failure to issue a requested building permit. The application for the building permit, the written notice (if any) of the denial of the permit, and a written statement specifying the grounds for this appeal are attached to this Form.
- ☐ (c) an order or decision of the Building Commissioner and/or Local Inspector. The written order or decision (if any) and a written statement specifying the grounds for this appeal are attached to this Form.

Applicant Signature: Marc Kornitsky

Applicant Name Printed: Marc Kornitsky, Esq., on behalf of Stephen P. Rosenthal and Joan F. Rosenthal, Trustees of the Joan F. Rosenthal Revocable Trust and Michael Murphy and Diane P. Philips, Trustees of the Ten Bartlett Street Condominium Trust

Applicant Address: One Essex Green Drive, Peabody, MA 01960

Applicant Phone Number: (Home) \_\_\_\_\_

(Work) (978) 532-5143

(Fax) (978) 532-3789

(Email) marc@barrettkornitsky.com

Form Complete: Town Engineer's Office: L. Lyons

(Signature)

Date: 10-7-22

**Eng. Dept. - MaryAlley Municipal Building, 7 Widger Road, Marblehead, MA 01045**  
**Phone: 781-631-1529**

**Fax: 781-631-2617**

Revision Date: 9/22/2011

**WRITTEN STATEMENT SPECIFYING GROUNDS FOR APPEAL**

**9 & 11 Bartlett Court  
Appeal of Determination declining to enforce Zoning Bylaw**

Steven P. Rosenthal and Joan F. Rosenthal, the Trustees of The Joan F. Rosenthal Revocable Trust, and Michael Murphy and Diane P. Philips, the Trustees of The Ten Bartlett Street Condominium Trust, and hereby submit this statement in support of their Appeal of the Building Commissioner's September 9, 2022 failure to enforce the Marblehead Zoning Bylaw (the "Bylaw") by requiring the owners of 9 and 11 Bartlett Street **to cease use of the structure on 9 Bartlett Street as a single-family dwelling**, because such use created a zoning nonconformity of two principal structures on a lot created by the prior merger of lots 9 and 11 due to 11 Bartlett Street's inadequate frontage.

Michael Murphy and Diane Phillips are the Trustees of the Ten Bartlett Street Condominium Trust, which owns the properties known as 10 and 12 Bartlett Street, Marblehead, Massachusetts (the "Condominium Property"). Steven P. Rosenthal and Joan F. Rosenthal ("Rosenthal") are the Trustees of the Joan F. Rosenthal 1994 Revocable Trust (the "Trust"), which owns the property at 40 Bartlett Court, Marblehead, Massachusetts (the "Rosenthal Property"). The Rosenthals have resided at the Rosenthal Property since 1999.

In 2001 Paul J. Mitchell and Suzanne M. Mitchell (the "Mitchells") purchased four parcels of land in Marblehead, and in 2009 purchased an abutting parcel of land, a portion of which is known as Bartlett Court, a private way. Both the Condominium Property and the Rosenthal Property are accessed by Bartlett Court. In 2010 the Mitchells adjusted their boundary lines (the "2010 Plan" at **Exhibit A**). The Mitchells owned Lots 1, 3, C, B, and A on the 2010 Plan; Lots 1, 3, and C were to be combined. The combination of Lots 1, 3, and C lack the

requisite 100 feet of frontage along Bartlett Court as show on the 2010 Plan. Lot C has a dwelling on it known as 11 Bartlett Court. Lot B on the 2010 Plan had an accessory structure thereon which complied with the dimensional requirements, except for a violation of the side yard setback. The Mitchells conveyed Lot 2 on the 2010 Plan to Rosenthal, which was combined with the abutting land at 40 Bartlett Court, and also granted Rosenthal an undivided half interest in Bartlett Court as shown on the 2010 Plan. As shown on the 2010 Plan, Bartlett Court is approximately 222 feet long, and the pavement of Bartlett Court ends at the boundary of Lot 1. The pavement of Bartlett Court has always ended at what is now the boundary of Lot 1. Bartlett Court as show on the 2010 Plan is approximately 15 feet wide, although it is not paved to the full width.

On February 24, 2014, the Mitchells conveyed Lots 1, 3, A, B, and C on the 2010 Plan along with an undivided half interest in Bartlett Court as shown thereon, to Stephen R. Petersen ("Petersen"), individually, for stated consideration of \$4,150,000.00. Petersen and Gillian Lieberman ("Lieberman") are married. On March 17, 2014, Petersen conveyed Lots 1, 3, A, B, and C on the 2010 Plan along with an undivided half interest in Bartlett Court as shown thereon, to Petersen and Lieberman for nominal consideration. On March 21, 2014, Petersen and Lieberman conveyed Lots 1, 3, A, B, and C on the 2010 Plan along with an undivided half interest in Bartlett Court as shown thereon, to Lieberman individually for nominal consideration. Also on March 21, 2014, Lieberman conveyed Lot B on the 2010 Plan to Petersen individually for nominal consideration. The deed for Lot B from Lieberman to Petersen did not explicitly include rights in Bartlett Court. As a result of these conveyances, Petersen owns Lot B on the 2010 Plan ("Petersen Property"), and Lieberman owns Lots 1, 3, A, and C on the 2010 Plan (the "Lieberman Property").

The Rosenthal Property directly abuts the Lieberman Property and is directly across Bartlett Court from the Petersen Property, and the Condominium Property is directly across Bartlett Court from the Petersen Property and the Lieberman Property. The Rosenthal Property, the Condominium Property, the Petersen Property, and the Lieberman Property are all located in a shoreline single residence zoning district as defined by the Marblehead Zoning Bylaw and Zoning Map. The minimum zoning requirements in the shoreline single residence zoning district are as follows: lot area of 10,000 square feet; frontage of 100 feet, front setback of 20 feet; side setback of 25 feet; rear setback of 15 feet. The subdivision control law became effective in Marblehead on January 14, 1997.

Lot B (known as 9 Bartlett) in 2014 contained an accessory structure known as the cabana/garage. Lot B used to contain a swimming pool as an accessory to the house on Lot C. From at least the 1970's to the present, the structure on Lot B has been an accessory structure to the dwelling on Lot C (known as 11 Bartlett). Until 2017, Lot B was assessed as land use code 106, which is "Accessory Land with Improvement - garage, etc." After Petersen renovated the accessory structure in 2016 pursuant to a building permit authorizing a "[r]emodel interior of cabana/garage to include 2 bedrooms, a kitchen and two bathrooms and a laundry with a staircase to a second-floor addition which includes a half bath and a wet bar and a roof deck in conformance with existing setbacks...", the assessed land use code changed to 101, which is "single family." **No zoning relief was sought for the purported change in use** to a single-family dwelling.

Both Lieberman and Petersen reside in the dwelling on Lot C when they are in Marblehead. Petersen signed building permit applications for Lot B in 2015. He signed the checks for a Notice of Intent filed in Lieberman's name in 2014. A building permit issued for

Lot C in both Petersen's and Lieberman's names, and the Town of Marblehead Assessors Office lists Petersen as the owner of Lot C.

In January 2021 Petersen submitted a zoning application to the Marblehead Board of appeals seeking a special permit for Lot B. The application plans refer to the project as the "Lieberman-Petersen garage addition." That application was later withdrawn. In 2021 Petersen signed and submitted an Approval Not Required plan to the Marblehead Planning Board for endorsement purporting to adjust the lot line between Lots A, B, and C to remedy the side yard setback nonconformity of Lot B ("2021 Plan" at **Exhibit B**). The 2021 Plan states that Lieberman and Peterson are co-owners of the Lieberman Property. **The 2021 Plan also indicates that Lot C1, which has the single-family dwelling on it, has only 59.09 feet of frontage in** contravention of the zoning bylaw's requirement of 100 feet of frontage.

On or about August 16, 2021, Petersen filed an application for Site Plan Special Permit Approval with the Marblehead Planning Board for construction described in the application as an addition to an existing dwelling, but the structure on Lot B has never been a single-family dwelling. The Planning Board granted the special permit by decision dated December 3, 2021 ("Decision"), and the Plaintiffs timely appealed in Massachusetts Land Court Action No. 21 MISC 000630, involving these same parties. This appeal of the denial of the request for performance is limited to the use of the structure on the merged lots. A second single-family dwelling is not permitted on a single lot.

Bartlett Court provides the sole access to the Plaintiffs' properties. The Rosenthals have had difficulty accessing their properties in the past when Petersen and Lieberman have permitted visitors to park on Bartlett Court; indeed, if someone parks on Bartlett Court to visit Petersen and Lieberman, it is impossible for another vehicle to pass it to get to the Rosenthal Property, and the

Rosenthals have been unable to access their property as a result of Petersen/Lieberman's invitees parking on Bartlett Court. Additionally, the construction approved by the Planning Board will block the Condominium Property's view of the ocean.

### **Standard of Review**

Section 7 of the Zoning Act sets forth the zoning enforcement officer's responsibilities with respect to enforcement requests. Section 7 requires the zoning enforcement officer to send the written decision regarding an enforcement request to the party that made the request, not to the landowner. *Balcam v. Town of Hingham*, 41 Mass. App. Ct. 260, 265 (1996). The mechanics of an administrative appeal from an enforcement request are detailed in Section 15 of the Zoning Act. To overturn a decision of the zoning enforcement officer, a concurring vote of four members of a board consisting of five members is needed.

### **Argument**

The Marblehead Building Commissioner improperly denied the enforcement request, in contravention of the Zoning Bylaw, to cease use of the structure on Lot 9 as a single-family dwelling, as Lot 9 merged with Lot 11 for zoning purposes due to Lot 11's lack of adequate frontage. Importantly, this request for enforcement does not challenge the 2016 building permit, but rather the use of the structure as a single-family residence, where such use would result in two single-family dwellings on a single lot in violation of the Zoning Bylaw. The Building Commissioner's Determination to deny the request for zoning enforcement is erroneous and legally untenable because it permits a zoning nonconformity, being two single-family dwellings on a lot created by merger.

Lot B as shown on the 2021 plan conforms with the Zoning Bylaw's dimensional requirements. The abutting Lot C, as shown on the 2021 site plan submitted by Petersen and



Lieberman, does not. It has less than the required 100 feet of frontage. Because Lots B and C were previously held in common ownership, they are, for zoning purposes, a single lot pursuant to the doctrine of merger. Therefore, the present use of the structure on Lot B for a single-family home creates a zoning nonconformity as the Bylaw permits only one principal structure on a lot.

The Bylaw defines "lot frontage" as "[t]hat part of a lot which has an uninterrupted parcel boundary line abutting on a constructed street." Bylaw § 200-7. Lot C has approximately 44 feet of frontage on the constructed portion of Bartlett Court. Even assuming for the purposes of argument that Bartlett Court continues into Lot 1, as the Defendants argue, it is not "constructed" beyond the end of the pavement. "Street" is defined as "Public way or a way which the Clerk of the Town certifies is maintained and used as a public way, or a way shown on a plan therefor approved and endorsed in accordance with the Subdivision Control Law or a way in existence when the Subdivision Control Law became effective, having sufficient width and suitable grades, and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon." Bylaw § 200-7. This language mirrors the subdivision control law. *See* G.L. c. 41, § 81L. However, the Town of Marblehead uses a more substantive test to determine whether a lot has adequate frontage. The addition of the modifier "constructed" to the term "street" requires more than a dirt road, driveway, or paper street. Otherwise, there would be no need for the adjective, and the definition would simply say frontage is "that part of a lot which has an uninterrupted parcel boundary line abutting on a street." The Bylaw clearly intends that the frontage requirement be fulfilled by real streets, actually constructed as such on the ground, not something less. *See* Shea v. Board of Appeals of Lexington, 35 Mass. App. Ct. 519, 520 (1993); Spalke v. Board of Appeals of

Plymouth, 7 Mass. App. Ct. 683, 689-90 (1979) (roadway passable only to four-wheel drive vehicles not a “street” under Town's Zoning By-Law and hence single lot located on that roadway did not have access or required frontage for zoning purposes).

The “meaning of a phrase in a zoning by-law is a question of law, not a question of fact,” Bldg. Com'r of Franklin v. Dispatch Commc'ns of New England, Inc., 48 Mass. App. Ct. 709, 713 (2000), and the usual standards of statutory interpretation apply. “When the meaning of the language is plain and unambiguous, the court enforces the statute according to its plain wording unless a literal construction would yield an absurd or unworkable result.” Filippova, Tr. of Prospect St. Realty Tr. vs. Framingham Zoning Bd. of Appeals, Mass. Land Ct., No. 20 MISC 000073 (HPS) (June 23, 2021). The Bylaw’s terms are read in the context of the Bylaw as a whole and should be given their ordinary meaning, to the extent that that interpretation is consistent with common sense and practicality. Kurz v. Bd. of Appeals of North Reading, 341 Mass. 110, 112-113 (1960). The Zoning Board of Appeals should determine that the term “constructed” imposes an additional requirement on a way which can be used to calculate legal frontage for zoning purposes. Words’ “usual and accepted” meanings are “derived from sources presumably known to the bylaw's enactors, such as their use in other legal contexts and dictionary definitions. *See* Commonwealth v. Zone Brook, Inc., 372 Mass. 366, 369 (1977). There is no evidence that Bartlett Court is “constructed” for the required 100 feet. Petersen and Lieberman may point to a number of old “approval not required” plans that allegedly show Bartlett Court as a longer way. However, “an ANR plan alone cannot establish as a matter of law that the planning board made the determination that the ROW was adequate for frontage under the ordinance.” Corrigan v. Board of Appeals of Brewster, 35 Mass. App. Ct. 514, 518 (1993). Absent specific findings by a planning board determining that Bartlett Court is a “street” that



provides 100 feet of frontage for Lot C, this Board can only conclude that Lot C lacks adequate frontage on a constructed street.

Lots B and C merged for zoning purposes in the ownership of the Mitchells. Though Petersen and Lieberman subsequently attempted to avoid the merger by checkerboarding the various lots, such an attempt is insufficient to avoid application of the doctrine of merger. As shown on the 2010 Plan, Lot C lacks adequate frontage and the accessory structure on Lot B lacks the necessary side yard setback. The Mitchells owned Lot C and the abutting Lot B. Zoning violations arising from nonconformities may be stayed by the doctrine of merger, “which treats adjacent lots currently in common ownership as a single lot ‘for zoning purposes so as to minimize nonconformities.’” Palitz v. Zoning Bd. of Appeals of Tisbury, 470 Mass. 795, 800 (2015). “It is well settled that under the common-law merger doctrine, when adjacent nonconforming lots come into common ownership, they are normally merged and treated as a single lot for zoning purposes. The merger doctrine applies in such circumstances unless clear language in the zoning ordinance states otherwise, as the usual construction of the word “lot” in a zoning context ignores the manner in which the components of a total given area have been assembled and concentrates instead on the question of whether the sum of the components meets the requirements of the by-law.” Bruno v. Zoning Bd. of Appeals of Tisbury, 93 Mass. App. Ct. 48, 53 (2018) (internal quotations and citations omitted). Therefore, Lots C and B became one conforming lot with 144 feet of frontage along the constructed portion of Bartlett Court. The presence of an accessory structure on Lot B does not prevent merger. *See* Palitz v. Zoning Bd. of Appeals of Tisbury, 470 Mass. 795, 804–05 (2015). And though traditionally, “alienation of one of the nonconforming properties will result in realization of the zoning violations by the new owner,” Palitz v. Zoning Bd. of Appeals of Tisbury, 470 Mass. 795, 800 (2015), such is not

the case where the owner(s) engaged in “checkerboarding.” Berg v. Lexington, 68 Mass. App. Ct. 569, 574 (2007) (“The separate ownership of the lots in each parcel was the result of ‘checkerboarding,’ a method sometimes employed to avoid zoning provisions that require lots held in common ownership to be combined for determining area and frontage. Through a series of conveyances a parcel can be divided so that no person named as an owner of a lot holds title to an adjacent lot. Such conveyances are ineffective to defeat lot combination provisions when the lots remain in control of the originator of the scheme.”); see Lee v. Bd. of Appeals of Harwich, 11 Mass. App. Ct. 148, 153 (1981) (“We view the 1968 “checkerboarding” as a transparently ineffective attempt to defeat the lot combination provisions.”); Wright v. Bd. of Appeals of Falmouth, 24 Mass. App. Ct. 409, 411 (1987) (“This type of division of lots adopted by W & J has been described as “checkerboarding” and has been employed in an effort to avoid compliance with zoning or subdivision requirements.”). In determining whether lots have merged, the courts look at whether, “even if title to the lots is held in nominally different form, [] the same owner could have used his adjoining land to avoid or diminish the nonconformity.” Murphy v. Bd. of Appeal of Billerica, 97 Mass. App. Ct. 901, 901 (2020) (internal quotation and citation omitted). “The appellate courts have expanded the doctrine beyond instances of common ownership, to those where there is ‘common control.’” Smith vs. Cole, Mass. Land Ct., No. 18 MISC 000230 (MDV) (May 15, 2019). With respect to married couples, the court have looked at whether there was “evidence of coordination of efforts with respect to the allegedly merged properties.” See Planning Bd. of Norwell v. Serena, 406 Mass. 1008 (1990) (rescript) (lot originally owned by couple as tenants by the entirety, before being conveyed to a trust whose beneficiaries were the couple, merged with couple's remaining adjacent lot); DiStefano, 36 Mass. App. Ct. at 645 (finding common control where (a) husband's corporation conveyed lots to wife

for nominal (and unpaid) consideration; (b) wife acceded to husband's control of corporation; and (c) husband filed subdivision plan for wife's lots without wife's participation); Lee v. Board of Appeals of Harwich, 11 Mass. App. Ct. 148 (1981) (three later-merged lots originally owned by couple; couple later "checkerboarded" ownership of the lots). *Smith* focused on whether "a husband and wife coordinated specific actions affecting their common or individually held properties. That's what establishes "common control" for purposes of the merger doctrine." Smith vs. Cole, Mass. Land Ct., No. 18 MISC 000230 (MDV) (May 15, 2019).

In this matter there is ample evidence that Petersen controls both Lots B and C. A review of the registry records indicates that Lots C and B came out of common ownership on March 21, 2014; the Mitchells conveyed their land to Petersen for consideration, and then there were a series of conveyances amongst Petersen and Lieberman for nominal consideration. Though Petersen no longer owns Lot C of record, he has taken the following actions evidencing control: he submitted building permit applications in his name to the Town; a building permit for Lot C issued in both Petersen and Lieberman's names; Petersen paid for other applications filed nominally in Lieberman's name; Petersen resides in the primary dwelling on Lot C when in Marblehead; and surveys of the Petersen and Lieberman properties done for them indicate that he is an owner of Lot C. Additionally, plans submitted to the Zoning Board with respect to Lot B indicate that Lieberman also has an interest in Lot B as the plans refer to the "Lieberman-Petersen garage addition." These actions, considered together with the quick succession of conveyances for nominal consideration, demonstrates that Petersen controls Lots C and B, and therefore the merger doctrine must apply. Lots B and C have merged for zoning purposes and should be treated as a single lot.

a. *The Use of Lot B as a Single-Family Dwelling Creates a Zoning Nonconformity*

The refusal of the Building Inspector to enjoin the single-family use of Lot B, effectively allows two single-family dwellings on a single merged lot for zoning purposes, resulting in a zoning violation. Single family homes are a permitted use in the underlying zoning district. The Bylaw provides that "Excepting where otherwise specified in this Bylaw, only one principal use shall be permitted on each lot." § 200-11B(1). Two single family homes on the merged lot violates this provision. It was not an issue to have the garage/cabana on Lot B, because accessory structures are permitted by right. *See* Bylaw § 200-13A ("Accessory Uses" is defined as "General provisions. Accessory uses or buildings are allowed as a matter of right provided they are (i) located either on the same lot as the principal use or (ii) on an adjacent lot under the same ownership as the lot where the principal use is located. Accessory uses or buildings (i) shall not alter the character of the premises where the principal and accessory uses are located and (ii) shall be constructed or undertaken in conformance with the dimensional requirements of this bylaw; and (iii) shall be clearly subordinate and incidental to the principal use." ). Petersen and Lieberman did not receive (nor did they seek) approval to have two primary structures on a single lot. The continued use of this unauthorized nonconformity requires enforcement by the Building Commissioner.

Additionally, the Building Commissioner's denial of the request for enforcement was based upon incorrect factual determinations. The Building Commissioner ignores the evidence demonstrating that the structure on Lot B was always an accessory structure to the primary dwelling on Lot C. The structure was used as both a garage for the Mitchell property and a cabana for their pool. The conversion to a guest house, as an accessory structure in 2016, did not change the underlying use to a single-family dwelling. Such a conversion would have required

zoning approval; no such approval was requested or obtained. The permit issued in 2016 for Petersen's renovations state that the original building was a "cabana/garage." The application filed in 2021 referred to the structure as the "Lieberman-Petersen garage." Stephen Rosenthal, who has lived next to Petersen property for over twenty years and has been familiar with it for decades more, has personal knowledge that the structure was always used as accessory to the dwelling at 11 Bartlett Court.

### **Conclusion**

For the reasons set forth above, the Petitioners respectfully request that the Marblehead Zoning Board of Appeals overturn the Building Commissioner's determination refusing to enforce the Bylaw by ceasing use of the second single-family dwelling on the merged lot.

Respectfully submitted,

Petitioners,  
By their attorneys,

/s/ Marc Kornitsky

Marc Kornitsky, Esq., BBO No. 564552  
marc@barrettkornitsky.com  
Barrett Kornitsky LLP  
One Essex Green Drive  
Peabody, MA 01960

Date: October 7, 2022

### CERTIFICATE OF SERVICE

I hereby certify that on this date I filed true copies with the Marblehead Zoning Board of Appeals of the following:

1. Original Appeal Form (and copies of attached documents at number 2) filed and date stamped with the Town Clerk.
2. 12 copies of the Building Commissioner Appeal package containing the following:
  - a. Copy of the completed Petition/Appeal Form
  - b. Copy of the Request for Enforcement
  - c. Copy of the Determination of the Building Commissioner, and
  - d. Memorandum/Written Statement Specifying Grounds for Appeal.
3. \$75 Check payable to the Town of Marblehead
4. Completed form for Payment of Legal Advertisement

I have additionally provided a copy to the following by email:

Town of Marblehead  
Adam J. Costa, Esq.  
Brian J. Winner, Esq.  
Mead, Talerman and Costa, LLC  
30 Green Street  
Newburyport, MA 01950

Stephen R. Petersen, to:  
Paul L. Feldman, Esq.  
Shawn McCormack, Esq.  
Davis Malm and D'Agostine, P.C.  
One Boston Place  
Boston, MA 02108

/s/ Marc Kornitsky  
Marc Kornitsky

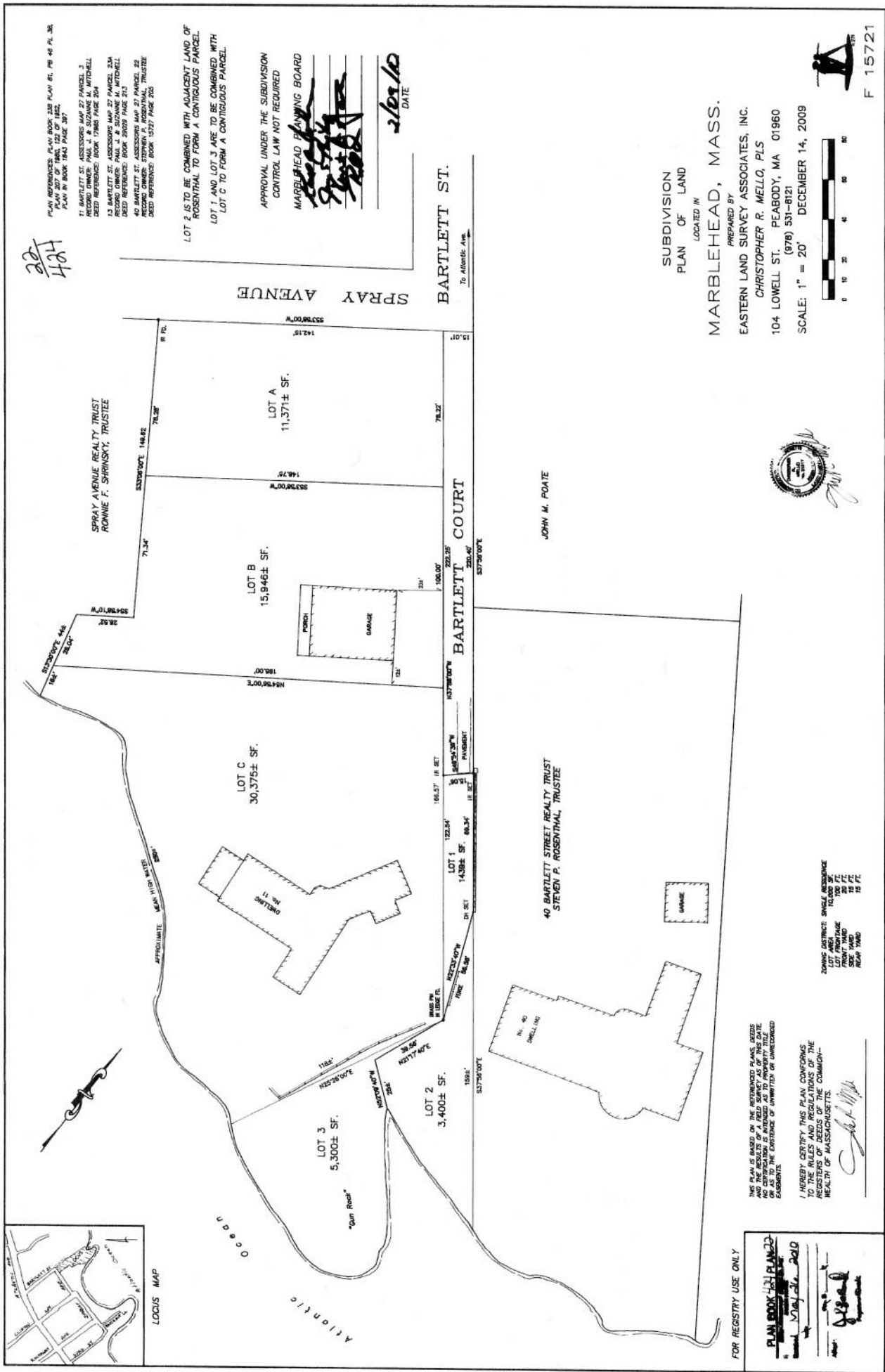
Dated: October 7, 2022



**EXHIBIT A**  
**2010 ANR PLAN**



LOCUS MAP



PLAN REFERENCES: PLAN BOOK 123 PLAN 21, PG 45 PL 38  
PLAN 207 OF 1802, 123 OF 1802,  
PLAN IN BOOK 1843 PAGE 387

71 BARTLETT ST. ASSESSORS MAP 27 PARCEL 3  
RECORD OWNER: PAUL J. & SUZANNE M. MITCHELL  
DEED REFERENCE: BOOK 1780 PAGE 204  
13 BARTLETT ST. ASSESSORS MAP 27 PARCEL 23A  
RECORD OWNER: PAUL J. & SUZANNE M. MITCHELL  
DEED REFERENCE: BOOK 2009 PAGE 213  
40 BARTLETT ST. ASSESSORS MAP 27 PARCEL 23  
RECORD OWNER: STEPHEN P. ROSENTHAL, TRUSTEE  
DEED REFERENCE: BOOK 1577 PAGE 205

LOT 2 IS TO BE COMBINED WITH ADJACENT LAND OF  
ROSENTHAL TO FORM A CONTIGUOUS PARCEL.  
LOT 1 AND LOT 3 ARE TO BE COMBINED WITH  
LOT C TO FORM A CONTIGUOUS PARCEL.

APPROVAL UNDER THE SUBDIVISION  
CONTROL LAW NOT REQUIRED

MARBLEHEAD PLANNING BOARD

*[Signature]*  
*[Signature]*  
*[Signature]*

*1/26/10*  
DATE

SUBDIVISION  
PLAN OF LAND  
LOCATED IN

MARBLEHEAD, MASS.

PREPARED BY

EASTERN LAND SURVEY ASSOCIATES, INC.

CHRISTOPHER R. MELLO, PLS

104 LOWELL ST. PEABODY, MA 01960

(978) 531-8121

SCALE: 1" = 20' DECEMBER 14, 2009



F 15721

FOR REGISTRY USE ONLY

PLAN BOOK 123 PLAN 21

*[Signature]*  
*[Signature]*

THIS PLAN IS BASED ON THE REFERENCED PLANS, DEEDS  
AND RECORDS. THE SURVEYOR HAS CONDUCTED A VISUAL  
EXAMINATION OF THE PROPERTY AND HAS FOUND NO  
EVIDENCE OF UNRECORDED ENCUMBRANCES.

THESE RULES AND REGULATIONS OF THE  
REGISTERED DEEDS OF THE COMMON-  
WEALTH OF MASSACHUSETTS.

ZONING DISTRICT: SINGLE RESIDENCE  
LOT AREA: 15,000 SF  
FRONT YARD: 20 FT  
SIDE YARD: 10 FT  
REAR YARD: 10 FT

**EXHIBIT B**  
**2021 ANR PLAN**

#494 of 10/01/2021  
40341-421

ENDORSEMENT BY THE PLANNING BOARD IS NOT A  
DETERMINATION AS TO CONFORMANCE  
WITH ZONING REGULATIONS.

PLANNING BOARD APPROVAL UNDER  
THE SUBDIVISION CONTROL LAW NOT REQUIRED  
**MARLBOROUGH PLANNING BOARD**

*Edward J. Kelly*  
*Charles J. Kelly*  
*Robert J. Kelly*

MARCY GOMPROW  
BK. 34459 PG 180  
PLAN REC. BK. 2950 PG 34

PLAN OF LAND  
29 SPRAY AVENUE  
9 BARTLETT STREET  
PROPERTY OF  
**MARLBOROUGH**  
**GILLIAN LIEBERMAN**  
**STEPHEN PETERSEN**

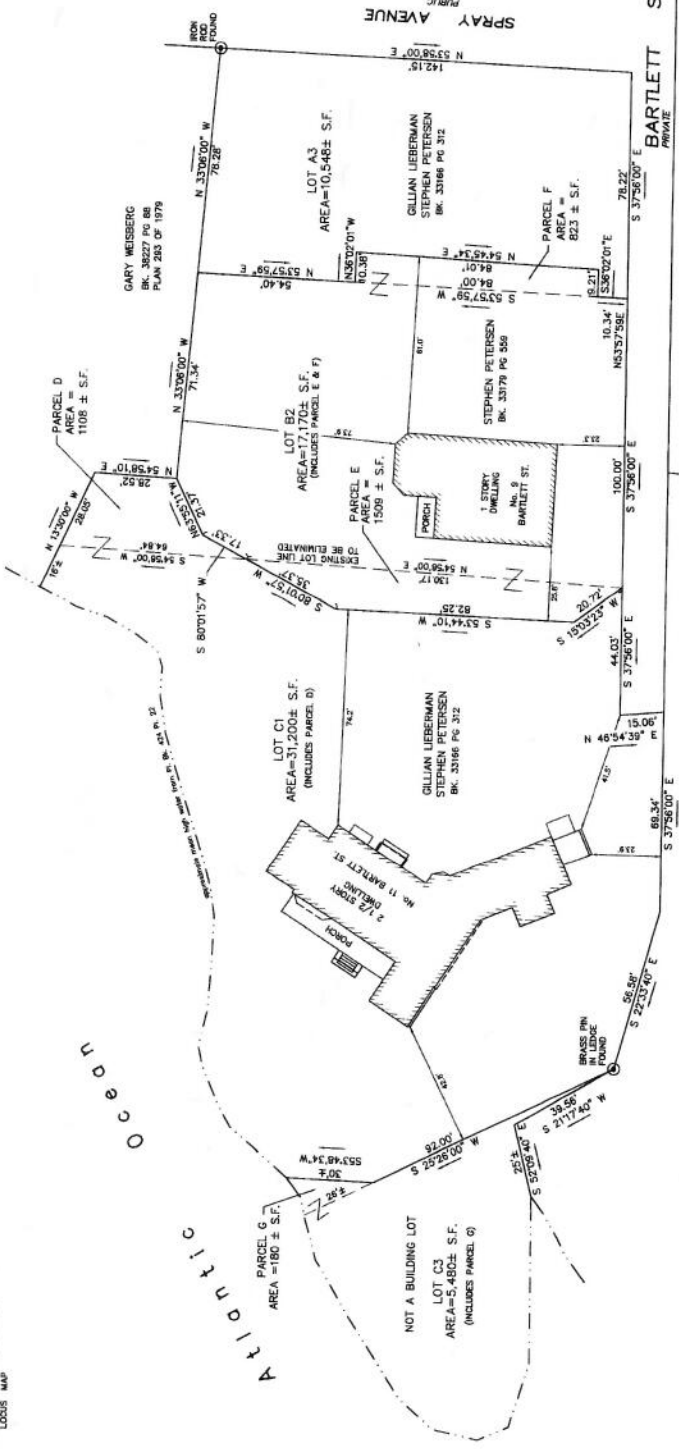
NORTH SHORE SURVEY CORPORATION  
SCALE 1" = 20'  
14 BROWN STREET - BALDWIN, MA  
819-744-4080  
GAIL L. SMITH, PLS #30643  
GRAPHIC SCALE 1" = 20'



0 20 40 60



LOCUS MAP



10 BARTLETT STREET CONDOMINIUM  
BK. 38902 PG 6  
PLAN 207 OF 1980

STEVEN & JOAN ROSENTHAL  
TRUSTEES  
BK. 38902 PG 6  
PLAN 207 OF 1980

NOTES

1. LOCUS IS SHOWN ON ASSESSOR'S MAP 27 LOTS 23, 24 & 25.
2. PLAN REFERENCE: PLAN BOOK 424 PLAN 22.
3. PARCEL D IS CURRENTLY PART OF LOT 5. IT WILL BE CONVEYED TO THE OWNERS OF LOT C AND COMBINED WITH LOT C TO MAKE LOT C1 (ONE CONTIGUOUS LOT) HAVING A TOTAL AREA OF 31,200 ± S.F.
4. PARCEL E IS CURRENTLY PART OF LOT C AND PARCEL E IS CURRENTLY PART OF LOT 3. IT WILL BE CONVEYED TO THE OWNERS OF LOT C AND COMBINED WITH LOT C TO MAKE LOT C2 (ONE CONTIGUOUS LOT) HAVING A TOTAL AREA OF 17,170 ± S.F.
5. PARCEL G IS CURRENTLY PART OF LOT 3. IT WILL BE CONVEYED TO THE OWNERS OF LOT 3 AND COMBINED WITH LOT 3 TO MAKE LOT 3 (ONE CONTIGUOUS LOT) HAVING A TOTAL AREA OF 5480 ± S.F.
6. PARCELS D, E, F, & G ARE NOT BUILDING LOTS.

ZONING DISTRICT -- SHORELINE SINGLE RESIDENCE

LOT AREA	REQUIRED	LOT C1	REQUIRED	LOT B2	REQUIRED	LOT A3	REQUIRED
10000	31,200±	10000	17,170±	10,548±	100	59,09±	100
FRONTAGE	100	59.09±	75	142.15±	75	23.3±	25
FRONT	20	41.5±	20	23.3±	20	25.8±	15
REAR	25	23.9±	15	73.9±	15	73.9±	15

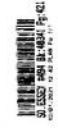
\*±5' SETBACK TO MEAN HIGH WATER

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

4/14/21  
DATE  
PROFESSIONAL LAND SURVEYOR

FOR REGISTRY USE ONLY

#494 of 10/01/2021  
40341-421



## EXHIBIT C

### INFECTIOUS INVALIDITY

#### **§ 12.5.5 Infectious Invalidity**

Even though a lot may appear to comply with all the dimensional requirements of a zoning ordinance or bylaw, including frontage and lot area requirements, it will be deemed nonconforming if it was created by subdividing an existing conforming lot, rendering the remainder of the existing lot nonconforming. The new, conforming lot is viewed as being “infected” by the nonconformity of the remaining lot. *Alley v. Bldg. Inspector of Danvers*, 354 Mass. 6 (1968); *Planning Bd. of Nantucket v. Bd. of Appeals of Nantucket*, 15 Mass. App. Ct. 733, 737-38 (1983); see also *Carabetta v. Bd. of Appeals of Truro*, 73 Mass. App. Ct. 266, 271-72 & n.10 (2008); *Murphy v. Kotlik*, 34 Mass. App. Ct. 410, 411 (1993). *81 Spooner Road LLC v. Zoning Board of Appeals of Brookline*, 78 Mass. App. Ct. 233 (2010), *aff’d on other grounds*, 461 Mass. 692 (2012) involved two lots, 81 Spooner Road and 71 Spooner Road. The plaintiff acquired the lots in June 2004, at which time they comprised a single 22,400-square-foot conforming lot known as 81 Spooner Road. 81 Spooner Road contained a 1910 colonial revival home with six bedrooms and 3,812 square feet of living space. In February 2005, the town's planning board endorsed an ANR subdivision plan allowing the plaintiff to divide 81 Spooner Road into one lot with 10,893 square feet of land and the vintage home, and a second larger vacant lot that came to be known as 71 Spooner Road containing 11,648 square feet of land. It was later determined that the presence of finished attic space in the vintage home at 81 Spooner Road rendered it nonconforming with the bylaw's floor area ratio (FAR) requirements on its newly created 10,893-square-foot lot. In March 2005, the plaintiff sold 81 Spooner Road and retained 71 Spooner Road for development. In April 2005, the plaintiff obtained a building permit authorizing the construction of a single-family home at 71 Spooner Road. The abutters submitted an enforcement request to the town's building commissioner, claiming, among other things, that 81 Spooner Road was out of compliance with FAR requirements and that 71 Spooner Road was infected with this violation. The Appeals Court in *81 Spooner Road LLC* concluded that, because the finished attic space at 81 Spooner Road had not been removed and because that attic space rendered 81 Spooner Road nonconforming with the bylaw's FAR requirements on its newly created smaller lot, this nonconformity infected 71 Spooner Road and rendered it nonconforming as well. That 71 Spooner Road itself conformed to the bylaw's dimensional regulations was insufficient under the doctrine of infectious invalidity, pursuant to which a landowner “may not form a new building lot by dividing an existing conforming lot if as a result the latter is rendered nonconforming by such a division.” *81 Spooner Rd. LLC v. Zoning Bd. of Appeals of Brookline*, 78 Mass. App. Ct. at 247; see also *Patenaude v. Zoning Bd. of Appeals of Dracut*, 82 Mass. App. Ct. 914 (2012) (rescript).

*Patenaude v. Zoning Board of Appeals of Dracut*, 82 Mass. App. Ct. 914 (2012) (rescript) involved the interplay between the doctrine of infectious invalidity and the grandfather protection afforded under G.L. c. 40A, § 6. In 1974, the plaintiff's family conveyed to him a parcel of land by dividing it from a larger tract. The plaintiff's lot complied with the then-applicable dimensional requirements, but the remaining tract with a structure on it did not. This rendered the plaintiff's lot noncompliant by application of the doctrine of infectious invalidity. In 1987, the zoning bylaw was amended, causing the plaintiff's lot to fall below the required minimum lot area. In 2010, the plaintiff applied for a permit to build a single-family dwelling on the lot, contending that

- the failure of the town to bring an enforcement action within the ten-year statute of repose set forth in G.L. c. 40A, § 7 had the effect of curing the nonconformity that resulted from the doctrine of infectious invalidity; and
- under G.L. c. 40A, § 6, the plaintiff's lot was entitled to grandfathering protection from the 1987 bylaw amendment.

The Appeals Court was skeptical of the plaintiff's first argument, noting that the limitations period in G.L. c. 40A, § 7 does not apply to unimproved property and merely bars actions to compel the removal, alteration, or relocation of a structure by reason of an alleged zoning violation, and that if the availability of an enforcement action against a nonconforming structure were a wholly adequate response to an unlawful severance, "there would be no purpose or benefit in the doctrine of infectious invalidity." *Patenaude v. Zoning Bd. of Appeals of Dracut*, 82 Mass. App. Ct. at 914 n.2. The court, however, determined that it was unnecessary to resolve to this issue, because the plaintiff's second argument failed. The expiration of the limitations period in G.L. c. 40A, § 7 does not render an unlawful structure legally conforming; it merely protects that structure from an enforcement action. The court also reasoned that just as *Mendes v. Board of Appeals of Barnstable*, 28 Mass. App. Ct. 527, 531 (1990) recognized that a variance cannot serve as a launching pad for the expansion of a nonconforming use, so too would it be unreasonable to allow an unremedied zoning violation to serve as a launching pad for an expansion pursuant to the grandfather protection afforded under G.L. c. 40A, § 6. *See also Palitz v. Zoning Bd. of Appeals of Tisbury*, 470 Mass. 795 (2015) (division of land pursuant to the Subdivision Control Law's existing structures exemption did not entitle resulting lots to "grandfather" protection against new zoning nonconformities created by the division)

JUDICIAL CONSTRUCTION OF ZONING ORDINANCES AND BYLAWS, ZONE MA-CLE  
12-1



**KATHLEEN HEYER**

100 Summer Street  
Boston, MA 02110

**PH** 617.488.8147  
**FX** 617.824.2020  
khey@pierceatwood.com  
www.pierceatwood.com

*Admitted in:* MA, NH

March 18, 2022

**BY CERTIFIED MAIL**  
**Return Receipt Requested**  
**# 9214 8901 6806 7200 0134 32**

John Albright  
Marblehead Building Commissioner  
Town of Marblehead, Abbot Hall  
188 Washington Street  
Marblehead, MA 01945

**Re: 9 & 11 Bartlett Court / Zoning Enforcement Request**

Dear Commissioner Albright:

I represent the owners of 10 Bartlett Street and 40 Bartlett Street. On their behalf, I write pursuant to G.L. c. 40A, § 7 to request enforcement of the Marblehead Zoning Bylaw ("Bylaw") with respect to the properties known as 9 Bartlett Street and 11 Bartlett Street.

The Marblehead Assessors records list Stephen R. Petersen as the owner of both 9 Bartlett Street and 11 Bartlett Street. Both lots are in the Shoreline Single Residence zoning district. Table 2, Dimensional Regulations, of the Bylaw set a minimum of 100 feet of frontage in that zoning district. The property at 11 Bartlett Street has approximately 59 feet of frontage along Bartlett Street, where 100 feet area required (see attached plan), and has long been improved with a single family home. The property at 9 Bartlett Street has 100 feet of frontage along Bartlett Street (see attached plan), and is improved with a structure which was accessory to the main house on 11 Bartlett Street (originally a garage, and later a pool house). Because 11 Bartlett Street has insufficient frontage, pursuant to the doctrine of merger, which treats adjacent lots in common ownership as a single lot for zoning purposes so as to minimize nonconformities, 11 and 9 Bartlett Street must be considered a single lot for zoning purposes to remedy 11 Bartlett Street's lack of frontage.

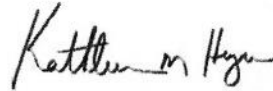
It appears that the structure on 9 Bartlett Street is now being used as, and is assessed as, a single-family dwelling, rather than an accessory structure. Because 9 and 11 Bartlett Street are a single lot for zoning purposes, this means that there are now two single-family dwellings upon one lot in contravention of Section 200-10 and Table 1, Land Use Regulations, of the Zoning Bylaw. Only one principal use is permitted on a lot, Section 200-11(B)(1) ("Excepting where otherwise specified in this Bylaw, only one principal use shall be permitted on each lot."), and only one single-family dwelling is permitted on each lot. Section 200-11(A)(1)(a) ("One-family dwelling: detached dwelling on a separate lot, designed for and occupied by a single family.").

Marblehead Building Commissioner  
March 18, 2022  
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Therefore, on behalf of my clients, I respectfully request that you enforce the Bylaw with respect to 9 and 11 Bartlett Street and direct the owners thereof to cease use of the structure on 9 Bartlett Street as a single-family dwelling.

We look forward to your response within the statutory period.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Kathleen M. Heyer".

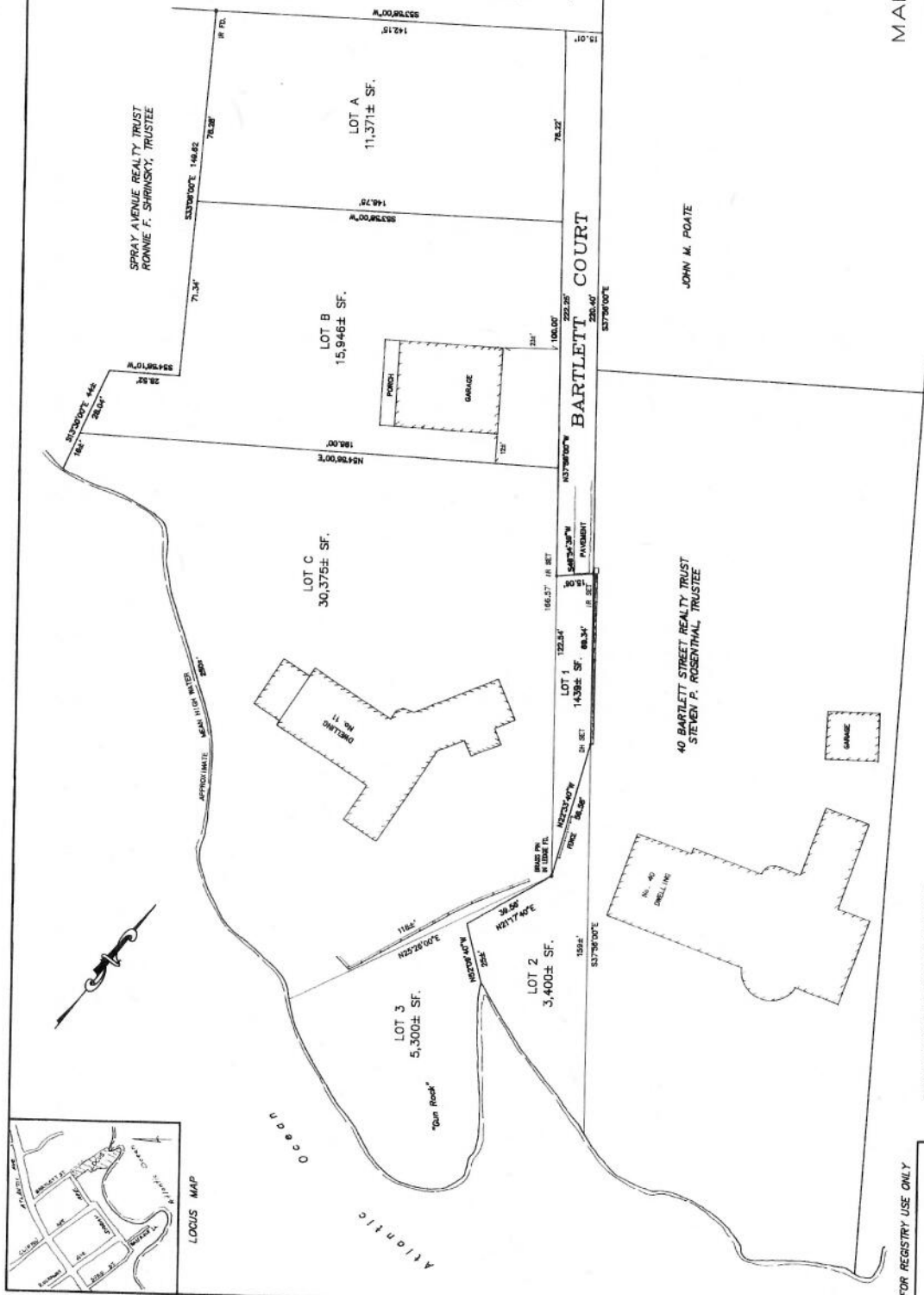
Kathleen M. Heyer

KMH/gmy  
Enclosure

cc: Adam J. Costa, Esq. (by email only)  
Brian J. Winner, Esq. (by email only)



LOCUS MAP



20/424

PLAN REFERENCES: PLAN BOOK 238 PLAN 81, PG 48 PL 38  
PLAN IN BOOK 1841 PAGE 307

LOT 2 IS TO BE COMBINED WITH ADJACENT LAND OF  
ROSENTHAL TO FORM A CONTIGUOUS PARCEL.  
LOT 1 AND LOT 3 ARE TO BE COMBINED WITH  
LOT C TO FORM A CONTIGUOUS PARCEL.

APPROVAL UNDER THE SUBDIVISION  
CONTROL LAW NOT REQUIRED  
MARBLEHEAD PLANNING BOARD  
*[Signature]*  
*[Signature]*  
*[Signature]*

2/28/10  
DATE

BARTLETT ST.  
To Atlantic Ave

JOHN M. POATE

40 BARTLETT STREET REALTY TRUST  
STEVEN P. ROSENTHAL, TRUSTEE

SUBDIVISION  
PLAN OF LAND  
LOCATED IN

MARBLEHEAD, MASS.

PREPARED BY  
EASTERN LAND SURVEY ASSOCIATES, INC.  
CHRISTOPHER R. MELLO, PLS  
104 LOWELL ST. PEABODY, MA 01960  
(978) 531-8121  
SCALE: 1" = 20' DECEMBER 14, 2009



ZONING DISTRICT: SINGLE RESIDENCE  
LOT AREA: 1200 SF  
LOT FRONTAGE: 100 FT  
LOT DEPTH: 120 FT  
SQUARE YARD: 120 SF  
NEAR YARD: 15 FT

THIS PLAN IS BASED ON THE REFERENCED PLANS, DEEDS  
AND RECORDS. THE SURVEYOR HAS CONDUCTED A VISUAL  
INSPECTION OF THE PROPERTY AND HAS FOUND NO  
EVIDENCE OF UNLAWFUL OR UNRECORDED  
EASEMENTS.

I HEREBY CERTIFY THIS PLAN CONFORMS  
TO THE RULES AND REGULATIONS OF THE  
REGISTER OF DEEDS OF THE COMMON-  
WEALTH OF MASSACHUSETTS.

*[Signature]*

FOR REGISTRY USE ONLY

PLAN BOOK 421 PLAN 20  
2010

*[Signature]*





TOWN OF MARBLEHEAD  
BUILDING INSPECTION DEPARTMENT

Mary A. Alley Municipal Building • 7 Widger Road, Marblehead, MA 01945  
Tel: (781) 631-2220 • Email: build@marblehead.org

Kathleen M. Heyer, Esq.  
Pierce Atwood LLP  
100 Summer Street  
Boston, Massachusetts 02110

September 9, 2022

Re: Zoning Enforcement Request  
9 & 11 Bartlett Court

Dear Attorney Heyer:

This office has reviewed your request for zoning enforcement regarding the above properties, dated March 18, 2022. The matter required significant investigation. I appreciate your patience in awaiting a response.

The existing parcels known as 9 Bartlett Court (B1) (map 27/parcel 24), and 11 Bartlett Court (C1) (map 27/parcel 23) each have conforming frontage for the Shoreline Single Residence district (SSR) in which they are located. It is my determination that the parcels have not merged despite their common ownership status.

This office consequently finds no merit in the substance of your request; thus, no enforcement action will be taken.

If you are aggrieved by this notice you may appeal within thirty (30) days to the Zoning Board of Appeals by filing a notice of appeal specifying the grounds thereof with the Town Clerk, per statute and as outlined in the Marblehead Zoning Bylaw, §200-2.H.

Respectfully,

Robert Ives - CBO  
Marblehead Building Department

cc: Town Administrator; Town Planner; Town Counsel  
ZBA, Planning Board, File: Map 27 -Parcel 23, 24