

# SUPPLEMENTAL MEMORANDUM

To: Newton Zoning Board of Appeals  
From: Peter F. Harrington  
Date: May 25, 2022  
RE: 34 John Street,  
Docket # 04-22

---

This Memorandum is intended to supplement the application of Olivia Zhao for a variance for relief from the provisions of Section 3.2.3. of the Newton Zoning Ordinance relating to lots size and lot area per unit; asking for a reduction of lot size from 10,000 sq ft to 8,800 sq ft and a reduction of lot area per unit from 5,000 sq ft per unit to 4,400 sq ft per unit.

Considering the current housing shortage, an approval would be to the public benefit and in support of our municipal housing policy.

This request falls under the provisions of MGL Chapter 40A, section 10 and Newton Ordinance 30-7.6.1. B, owing to circumstances relating to i) the shape of the land and ii) the structure thereon. The property consists of 8,800 sq ft of land that is shown as two rectangular shaped lots. Properly and timely joined they would have met “Old Lot” zoning requirements. Or, if the original lot lines had been drawn differently, the shape would be different and the land would qualify as an “Old Lot”.

The lots were created in 1902 and were shown as two lots, Lot 8 and Lot 9 on a plan dated March 7, 1902, by French & Bryant, engineers, and recorded in the Middlesex South District Registry of deeds. For the time, they were oversized lots in a multifamily use zone, as compared to other subdivisions in West Newton and other Newton villages that created large tracts of 2,000 sq ft, 2,500 sq ft subdivisions intended for single family use.

Zoning came into effect in Newton in 1922. A house was constructed on Lot 9 in 1927 and was numbered 34 John Street. Minimum lot sizes were not established in Newton until 1953 [7,000 sq ft for 34 John Street]. John Tudor acquired Lot 9 in 1941 and acquired Lot 8, in 1946. When the 1953 Zoning Ordinance went into effect, the two lots owned by John Tudor should have merged. See attached deeds marked Exhibit 1A, 1B, 1C & 1D.

Section 23.8 (e) of the 1953 ordinance provided, in part, that “. . . if, at any time subsequent to 1950, two or more contiguous lots with frontage on a common street shall be in common ownership, . . . [the 7,000 sq ft lot size requirement . . .] shall apply to the extent that it is possible by combining such lots, . . .” See attached ordinance sec. 23.8 marked Exhibit 2.

The City of Newton maintains that the two lots that comprise 34 John Street did not merge in 1953 and that the merging of the lots resulted when the Petitioner recorded a plan dissolving the line dividing Lots 8 & 9 in 2021.

One of the facts that may have contributed to the problems related to this particular parcel of land is that when two adjacent lots are sold, lawyers, regardless of other considerations, tend to copy the land

description from the previous deed and do not combine the lots in one descriptive paragraph unless there is a proper plan and instructions from a surveyor as to the new meets and bounds description.

The City maintains that neither Lot 8 or Lot 9 will qualify, separately, as a building lot. I expect that the City would rule that the vacant lot cannot be sold separately without creating a zoning violation.

Massachusetts is a common law state, as opposed to a state that has legal roots that trace back to the Roman legal code. At common law there are certain rights that are protected by the courts that came into being as a result of custom or practice over the years. They are rights that have been established by use, over the centuries. One example is the ownership of land.

In law school the professors explain the ownership of land as being like a bundle of sticks. Included in that bundle are the sticks of ownership. They include named and unnamed owners.

At common law, if a married person held the title to land, their unnamed spouse also had an ownership interest in the land. It is called dower or courtesy. When John Upton married Mildred, she automatically became one of the owners of 34 John Street. Together, they were the owner of the property. John could not give a buyer a good title to the land without Mildred signing her assent and giving up her interest. When John put Mildred's name on the deed to a portion of the property (lot 9) he upgraded her ownership interest. He changed the proportion of her existing ownership interest in the property they owned together. The property, already in common ownership, remained in common ownership, only the magnitude of interest of a portion of the property changed.

This common ownership, under the provisions of Section 23.8 of the 1953 Newton zoning ordinance, Exhibit 2, would qualify 38 John Street as a pre-existing nonconforming lot and the Petitioner could have been allowed to build her two-family house on the land.

The fact that the land is described in the deed in two separate paragraphs and drawn on a plan as separate lots should not prevent the merger of the lots as required under the 1953 Ordinance. The plan, while relied upon to identify the property, is an exhibit to the deed to help identify the property. Under the doctrine of merger, the plan, as a descriptive tool for identifying different legal lots, phased out of existence.

Rather than go to court to determine this matter, the Petitioner followed the advice of the Planning Department and has applied for this variance.

The problem the applicant faces is the interpretation of the application of Section 7.8.4.D.4 of the Newton Zoning ordinance that relates to the size and shape of the lot. The question is whether or not the land had merged into one lot or remained divided, although used as one lot. Accepting that the municipal interpretation is correct, the Petitioner is seeking relief to allow her to use the property for a two-family house. The use is an as of right use under the zoning ordinance. It is the size of the land that is the problem.

Had one of the prior owners prepared and recorded an appropriate plan, this lot would qualify as a pre-existing non-conforming lot.

**Existing conditions that create a hardship owing to the structure:** There is an existing single family house on the land. The house has a cement foundation. The foundation was poured in place without installing any footings to support it. The existing house can not be expanded or added to

without creating a potentially dangerous condition. That condition is the potential for settlement or movement of the existing structure resulting from natural settlement, earth tremors or vibrations created by traffic on Route 9 (Boylston Street) that intersects John Street approximately 200 – 250 feet to the south, or results from natural causes. An Addition, attached to the existing house, would not be subject to the same movement and the result would be cracks or breakage of connecting materials. This would increase the potential for structural damage. It may also subject the Petitioner to charges of producing a finished produce with a latent defect that the Petitioner knew or should have known about.

The Petitioner requests the Board make the following findings:

**1. There are special circumstances related to the shape of the land which affect it but do not generally affect the zoning district in which it is located and a literal enforcement of the provisions of the Newton Zoning Ordinance will involve a substantial hardship, financial or otherwise, to the owner.**

The failure to grant the requested variance will result in a hardship because of the inability of the Petitioner to use the property for its intended zoning purpose (a two-family house); it will result in a financial hardship to the petitioner; it will be in derogation of the intended purpose of the zone in which it is located; and it will be in opposition the Newton housing goals of creating new, additional housing to help overcome the metropolitan area housing shortage.

**2. There are special circumstances related to the structure which affect it but do not generally affect the zoning district in which it is located and a literal enforcement of the provisions of the Newton Zoning Ordinance will involve a substantial hardship, financial or otherwise, to the owner.**

The structure on the land was built without footings to support the cement foundation. This was confirmed by Mr. Kai, a civil engineer who observed the condition when test holes were dug on the site. Mr. Kai says that the condition is a potential safety hazard resulting from settlement or movement of the existing structure resulting caused by natural settlement, earth tremors or vibrations created by traffic on Route 9 (Boylston Street) that intersects John Street approximately 200 – 250 feet to the south. An Addition, attached to the existing house, would not be subject to the same movement and the result would be cracks or breakage of connecting materials. This would increase the potential for structural damage. It may also subject the Petitioner to charges of producing a finished produce with a latent defect that the Petitioner knew or should have known about.

Any addition to the existing structure would require a replacement of the existing foundation at a significant cost that would be in excess of the benefit obtained. The requirement that it be preserved creates a substantial hardship.

**3. The variance will be in harmony with the general purpose and intent of the Newton Zoning Ordinance. Relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Zoning ordinance.**

The requested change is the minimum change that is necessary to allow a two-family use of the property. The neighborhood consists of John Street (a dead-end street) and close abutters, including

Chestnut Hill Towers (northeast) and Beecher Terrace condominiums (northly). It is zoned for two-family use and its southern boundary is Route 9. Attached plan marked Exhibit 3.

Six of the 11 residential dwellings on John Street are single family homes.

The other five are:

38-40 John Street, a two family on 8,795 sq ft. (northerly abutter)

26 John Street, a three family on 4,400 sq ft (southerly abutter)

22-24 John Street, a three family on 4,400 sq. ft., 100 feet south of 34 John Street and an abutter to an abutter)

21-23 John St, 4 units on 4,783 sq ft. with an adjacent vacant lot with 5,169 sq ft. (9,952 sq ft)

11 John Street, 4 units on 9,019 sq ft, less than 200 ft south of 34 John Street

The Board has granted similar relief under Sec. 7.8.4.D.4 for a lot size issue at 34 Morton Street in a 2019 decision, Docket #08-19. The decision is recorded in Middlesex South District registry of Deeds in Book 74084, Page 41. A copy is attached and marked Exhibit 4 [4 pages].

In this matter the same type of relief will occur if this petition is granted.

**In the Alternative**, this Board could determine that the lots merged when the zoning ordinance went into effect on January 1, 1953 and the grant of a variance is not necessary for the Petitioner to build a two-family house, conforming to current density and dimensional requirements, at 34 John Street.

*Peter F. Harrington*

Harrington & Martins

Attorneys at law

505 Waltham Street

West Newton, MA 02465

617-558-7722

[pfh@harringtonandmartins.com](mailto:pfh@harringtonandmartins.com)



payment; and that the grantor agrees that thirty days' default in the performance or observance of any condition or covenant herein contained shall render the whole debt hereby secured due and payable at the option of the holder hereof. It is further agreed that all the conditions and stipulations herein contained shall apply to and be binding upon the heirs, executors, administrators, successors and assigns of the grantor or grantors herein. The word "grantee" as used herein shall be taken to mean the mortgagee, its successors or assigns. This mortgage is upon the Statutory Condition, for any breach of which, or for any breach of any of the aforesaid provisions or conditions, the holder hereof shall have the Statutory Power of Sale. WITNESS our hands and seals this 20th day of March 1941 Ellsworth Holibaugh (seal) Minnie Holibaugh (seal) COMMONWEALTH OF MASSACHUSETTS Middlesex, ss. March 20, 1941. Then personally appeared the above named Ellsworth Holibaugh and Minnie Holibaugh and acknowledged the foregoing instrument to be their free act and deed, before me, Olin K. Nellson Notary Public My commission expires - - Middlesex ss. March 20, 1941. 10h. 30m. A.M. Rec'd & Recorded.

Home Owners' Loan Corporation, a corporate instrumentality of the United States of America, organized and existing under and by virtue of an Act of the Congress of the United States of America, known as the Home Owners' Loan Act of 1933, as amended, having its principal office and place of business in the City of Washington, District of Columbia, for consideration paid, grants to John Tudor, of Brookline, Norfolk County, Massachusetts, with QUITCLAIM COVENANTS A certain parcel of land with the buildings thereon situated in NEWTON, Middlesex County, Massachusetts, being Lot 9 on a plan of land by French and Bryant dated March 7, 1902, recorded with Middlesex South District Deeds, Book of Plans 140, Plan 22, and bounded and described as follows: Southeasterly by John Street, 50 feet; Southwesterly by Lot 8 as shown on said plan, 88 feet; Northwesterly by land now or formerly of Beck, 50 feet; Northeasterly by lot 10 as shown on said plan, 88 feet. For grantor's title see mortgage given by Mariannina Tornabene to the said Corporation, recorded with said Deeds, Book 5908, Page 32; see also foreclosure deed recorded with said Deeds, Book 6070, Page 96. Said premises are hereby conveyed subject to any building law and zoning law requirements which may be in force and applicable; also subject to restrictions, easements and conditions of record, if any, so far as the same are now in force and applicable., to assessments (special or otherwise) and betterments, if any, and to taxes

HOME OWNERS' LOAN CORP.

to  
TUDOR

\* \* \* \* \*  
\* U.S. \*  
\* Rev. \*  
\* Stamps \*  
\* \$3.85 \*  
\* H.O.L.C. \*  
\* 3/20 1941 \*  
\* \* \* \* \*

EXHIBIT  
1A

for the year 1941, which the grantee assumes and agrees to pay. IN WIT-  
NESS WHEREOF, the said Home Owners' Loan Corporation has caused its cor-  
porate seal to be hereto affixed and these presents to be signed, acknowl-  
edged and delivered in its name and behalf by Thomas H. Twitchell, As-  
sistant State Manager, at Boston, Massachusetts, this 14th day of March  
1941. For authority, see copy of resolution of the Board of Directors  
of the Home Owners' Loan Corporation, duly recorded with said Deeds,  
Book 6159, Page 388. Home Owners' Loan Corporation By Thomas H. Twit-  
chell Assistant State Manager (Corporate seal) COMMONWEALTH OF MASSA-  
CHUSETTS Suffolk, ss. On this 14th day of March, 1941, before me ap-  
peared Thomas H. Twitchell to me personally known, who, being by me duly  
sworn, did say that he is the Assistant State Manager of the Home Own-  
ers' Loan Corporation, the corporation named in the foregoing instrument  
and that the seal affixed to said instrument is the corporate seal of  
said Corporation and was so affixed by authority of its Board of Direc-  
tors, and said Thomas H. Twitchell acknowledged said instrument to be the  
free act and deed of said Corporation. Philip Fein Notary Public (No-  
tarial seal) My commission expires: May 16, 1941. - - - - -  
Middlesex ss. March 20, 1941. 10h. 32m. A.M. Rec'd & Recorded.

TUDOR  
to  
HOME OWNERS'  
LOAN CORP.

KNOW ALL MEN BY THESE PRESENTS That I, we, John Tudor of  
Brookline in the County of Norfolk and Commonwealth of Massachusetts,  
hereinafter called Mortgagor, for consideration paid, grant unto Home  
Owners' Loan Corporation, a corporate instrumentality of the United  
States of America, organized and existing under and by virtue of an Act  
of the Congress of the United States of America, known as the Home Own-  
ers' Loan Act of 1933, as amended, having its principal office and place  
of business in the City of Washington, District of Columbia, hereinafter  
called Mortgagee, with MORTGAGE COVENANTS for the purpose of securing:  
I. Payment of the indebtedness evidenced by one promissory note (and  
any extension or renewal thereof), of even date herewith, which indebted-  
ness represents and is the unpaid balance of the purchase price of the  
property hereinafter described, and each and all of the terms and provi-  
sions of said promissory note are hereby made a part hereof as if the  
same were set out in full at this place, for the principal sum of Three  
thousand and sixty Dollars, with interest at the rate of four and one-  
half per cent (4 1/2%) per annum from the 20th day of March, 1941, until  
paid; principal and interest payable in installments of Twenty-three  
and 41/100 Dollars on the 20th day of each month, beginning on the 20th

Asst.  
See, Book 75/2 Page 136

See Discharge, B 7322P 160

Book 5548 Page 413 acknowledge satisfaction of the same WITNESS my hand and seal this 2nd day of April 1946. Antonetta (her x mark) Amendola Anthony J. Consolmagno witness to mark of A.A. THE COMMONWEALTH OF MASSACHUSETTS Middlesex, ss. April 2, 1946 Then personally appeared the above named Antonetta Amendola and acknowledged the foregoing instrument to be her free act and deed before me Francis A. O'Loughlin Notary Public My commission expires Jan 24, 1947. - - - - - Middlesex ss. April 2, 1946. 11h. 43m. A.M. Rec'd & Recorded.

EXHIBIT  
18

AMENDOLA et ux  
to  
TUDOR et ux

\* \* \* \* \*  
\* U.S. \*  
\* Rev. \*  
\* Stamps \*  
\* \$.55 \*  
\* Affixed & \*  
\* Cancelled \*  
\* \* \* \* \*

We, Giuseppe Amendola and Antonetta Amendola, husband and wife as tenants by the entirety, both of Cambridge, Middlesex County, Massachusetts, for consideration paid, grant to John Tudor and Mildred E. Tudor, husband and wife, as tenants by the entirety, both of Newton, Massachusetts with QUITCLAIM COVENANTS A certain parcel of land situated in NEWTON, Middlesex County, Massachusetts, being lot numbered 8 as shown on a plan entitled "Plan of Land in Newton, Mass., for John C. Barthelme dated March 7, 1902, French and Bryant, Engineers," recorded with Middlesex South District Registry of Deeds in Book of Plans 140, plan 22, and bounded and described as follows:- Southeasterly by a proposed Street as shown on said plan, (now called John Street) fifty (50) feet; North-easterly by lot numbered 9 as shown on said plan, eighty-eight (88) feet Northwestérly by land now or formerly of Beck, fifty (50) feet; South-westerly by lot numbered 7 as shown on said plan, eighty-eight (88) feet Containing 4440 square feet of land according to said plan and be said contents or measurements more or less or however otherwise said premises may be bounded, measured or described. Being the same premises conveyed to us by Giacomo Tornabene et ux by deed dated January 16, 1933, and recorded with Middlesex South District Registry of Deeds in Book 5702, Page 395. WITNESS our hands and seals this 2nd day of April 1946. Giuseppe Amendola Antonetta (her x mark) Amendola Anthony J. Consolmagno witness to signature of G.A. and mark of A.A. THE COMMONWEALTH OF MASSACHUSETTS Middlesex, ss. April 2, 1946. Then personally appeared the above named Giuseppe Amendola and Antonetta Amendola and acknowledged the foregoing instrument to be their free act and deed, before me Francis A. O'Loughlin Notary Public My commission expires Jan. 24, 1947. - - - - - Middlesex ss. April 2, 1946. 11h. 44m. A.M. Rec'd & Recorded.

CHARLESTOWN  
FIVE CENTS  
SAVS. BK.  
DISC. MORT.

KNOW ALL MEN That the Charlestown Five Cents Savings Bank as-



I, John Tudor,

of Newton Middlesex County, Massachusetts,  
~~XXXXXXXX~~ for consideration paid, grant to Geraldine T. Downey,

of Boston, Suffolk County, Massachusetts, with quitclaim returns  
~~XXXXXXXX~~

(Description and encumbrances, if any)

A certain parcel of land with the buildings thereon situated in Newton, Middlesex County, Massachusetts, being Lot 9 on a plan of land by French and Bryant dated March 7, 1902, recorded with Middlesex South District Deeds, Book of Plans 140, Plan 22, and bounded and described as follows:

SOUTHEASTERLY by John Street, 50 feet;  
SOUTHWESTERLY by Lot 8 as shown on said plan, 88 feet;  
NORTHWESTERLY by land now or formerly of Book, 80 feet;  
NORTHEASTERLY by Lot 10 as shown on said plan, 88 feet.

Being the same premises conveyed to me by Home Owners' Loan Corporation by deed dated March 14, 1941, recorded with said Deeds, Book 6478, page 447.

Said premises are conveyed subject to a mortgage held by the Home Owners' Loan Corporation dated March 20, 1941, recorded with said Deeds Book 6478, page 448.

The consideration being less than \$100.00, no Revenue Stamps are hereto attached.

I, Mildred E. Tudor, ~~XXXXXXXX~~ wife of said grantor,

release to said grantee all rights of ~~XXXXXXXXXXXX~~ dower and homestead and other interests therein.

Witness our hands and seals this 25th day of April 1946.

*John Tudor*  
*Mildred E. Tudor*

The Commonwealth of Massachusetts

Middlesex, ss. April 25, 1946.

Then personally appeared the above named John Tudor

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

*H. D. Laughlin*  
Notary Public - ~~XXXXXXXXXXXX~~

My Commission expires January 24, 1947.

Rec'd & entered for record May 6, 1946 at 1h. 6m. P.M.





I, Geraldine T. Downey,  
 \_\_\_\_\_  
 \_\_\_\_\_  
 of Boston Suffolk County, Massachusetts,  
 being unmarried, for consideration paid, grant to John Tudor and Mildred E. Tudor, husband  
and wife, as tenants by the entirety, both  
 \_\_\_\_\_  
 of Newton, Middlesex County, Massachusetts, with quitclaim conveyance  
 \_\_\_\_\_  
 \_\_\_\_\_

(Description and encumbrances, if any)

A certain parcel of land with the buildings thereon situated in  
 Newton, Middlesex County, Massachusetts, being Lot 9 on a plan of  
 land by French and Bryant dated March 7, 1902, recorded with Middle-  
 sex South District Deeds, Book of Plans 140, Plan 22, and bounded and  
 described as follows:

- SOUTHEASTERLY by John Street, 50 feet;
- SOUTHWESTERLY by Lot 8 as shown on said plan, 88 feet;
- NORTHWESTERLY by land now or formerly of Beck, 50 feet;
- NORTHEASTERLY by Lot 10 as shown on said plan, 88 feet.

Being the same premises conveyed to me by the said John Tudor  
 by deed of even date, to be recorded herewith.

Said premises are conveyed subject to a mortgage held by the  
 Home Owners' Loan Corporation dated March 20, 1941, recorded with  
 said Deeds Book 6478, page 448.

The consideration being less than \$100.00, no Revenue Stamps  
 are hereto attached.

\_\_\_\_\_ ~~notary~~  
 \_\_\_\_\_  
 \_\_\_\_\_

Witness my hand and seal this 25th day of April 1946.

Geraldine T. Downey  
 \_\_\_\_\_  
 \_\_\_\_\_

The Commonwealth of Massachusetts

Middlesex, ss. April 25, 1946.

Then personally appeared the above named Geraldine T. Downey

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

F. H. Longfellow  
 Notary Public - ~~MASSACHUSETTS~~

My Commission expires January 24, 1947.

- 45. Soda and soda compounds manufacturing.
- 46. Stockyards.
- 47. Stove blacking or polish manufacturing.
- 48. Sugar refining.
- 49. Tanning, curing or storage of leather, rawhides or skins.
- 50. Tar distillation or manufacturing.
- 51. Tar roofing or tar waterproofing manufacturing.
- 52. Tobacco (chewing) manufacturing.
- 53. Yeast manufacturing.

54. Residential structures or uses of any type, except accommodations for a watchman or janitor in connection with a commercial or manufacturing use.

(b) In manufacturing districts, buildings or structures may be erected, altered, enlarged, extended or reconstructed, and buildings, structures and lands may be used for: (1) Storage warehouse, place of business of a cleaner, and for (2) any purpose not prohibited by paragraph (a) of this section except: (a) public or private dump or place of depositing abandoned property or refuse, (b) removal of sod, loam, subsoil, sand or gravel for the purpose of sale thereof.

(c) In manufacturing districts, the board of aldermen may give permission in accordance with the procedure provided in section 23.20 for the construction, alteration, enlargement, extension or reconstruction of buildings or structures and for the use of buildings, structures or lands for one or more of the following purposes: (1) Public or private dump, or place of depositing abandoned property or refuse; (2) the removal of sod, loam, subsoil, sand or gravel for the purpose of sale thereof; (3) plant for mixing asphalt or cement with sand or gravel, stone or other aggregates; (4) junk yards. (Ord. No. 276.)

**Sec. 23.8. Minimum lot areas and widths.**

(a) In single residence districts A, B and C, there shall be provided for each dwelling hereafter erected the following minimum lot areas and minimum lot widths respectively:

	Lot area	Lot width
Single residence A	15,000 sq. ft.	100 ft.
Single residence B	10,000 sq. ft.	80 ft.
Single residence C	7,000 sq. ft.	70 ft.

(b) In private residence and residence D and E districts, there shall be provided for each single or two-family dwelling hereafter erected a lot area of not less than seven thousand square feet and a lot width of not less than seventy feet.

(c) In the case of a lot on a street, the line of which has a curve with a radius of less than two hundred feet, the required lot width shall be measured along the setback line. In the case of a lot on a street and a public footway, the required lot width may be measured along the public footway with the permission of the board of aldermen in accordance with the procedure in section 23.20. In the case of a rear lot not having the required width on a street, the required lot width may be measured along the rear line of the lot or lots in front of it with the permission of the board of aldermen in accordance with the procedure in section 23.20. In all other cases the required lot width shall be measured on the street line. In the case of corner lots, the width when measured on the street line shall run to the point of intersection of the two street lines.

(d) No new buildings shall be constructed and no existing buildings shall be altered, extended or reconstructed to provide living quarters for more than one family for each three thousand square feet of lot area in private residence and residence D districts and for each twelve hundred square feet of lot area in residence E and in business A and B districts.

(e) Paragraphs (a), (b) and (c) shall not apply to lots not in compliance therewith which, prior to October 11, 1940, were shown as separate parcels on the assessors' plans, filed in the assessors' office and were assessed as such, or were so shown on subdivision plans approved by the planning board, acting as the board of survey or were so shown or described in plans or deeds duly recorded with the Middlesex South District Registry of Deeds; provided, however, that such paragraphs shall apply to any such lot, the lot lines of which shall have been changed since October 11, 1940; and provided further, that if, at any time subsequent to 1950, two or more contiguous lots with frontage upon a common street shall be in common ownership, such paragraphs (a), (b) and (c) shall apply to the extent that it is possible by combining such lots, or by resubdivision thereof by straight line boundaries and without bringing the location of any buildings thereon into violation of the provisions of section 23.17, to provide one or more lots each of which comply, or more nearly comply than theretofore, with such paragraphs (a), (b) and (c). (Ord. No. 276.)



EXHIBIT  
3



**MAP FOR REFERENCE ONLY  
NOT A LEGAL DOCUMENT**

City of Newton, MA makes no claims and no warranties, expressed or implied, concerning the validity or accuracy of the GIS data presented on this map.

Geometry updated 06/29/2021  
Data updated 11/14/2018

Print map scale is approximate. Critical layout or measurement activities should not be done using this resource.



Ruthanne Fuller  
Mayor

### CITY OF NEWTON, MASSACHUSETTS

City Hall

1000 Commonwealth Avenue, Newton, MA 02459-1449

Telephone: (617) 796-1120 TDD/TTY: (617) 796-1089 Fax: (617) 796-1086

www.ci.newton.ma.us

### ZONING BOARD OF APPEALS

Adrianna Henriquez, Board Clerk

#08-19

### DETAILED RECORD OF PROCEEDING AND DECISION

Petition #08-19 Brendan and Betsy McSheffrey, 34 Morton Road, Newton, Massachusetts requesting a variance from sections 7.8.4.D.4 and 3.1.3 of the Newton Zoning Ordinance to waive the new (post-December 7, 1953) lot dimensional requirements so that the old lot dimensional requirements will apply. Specifically, the petitioners seek to waive the following new lot requirements: lot size, frontage, front and side setbacks, maximum lot coverage and minimum open space. The property consists of a 10,411 square foot lot with a single-family residence constructed in 1910 located in a Single-Residence 2 (SR-2) zoning district.

The Zoning Board of Appeals for the City of Newton (the "Board") held a public hearing on Tuesday, November 26, 2019 at 7:00 p.m. in the Council Chambers, Room 207, Newton City Hall, 1000 Commonwealth Avenue, Newton, Massachusetts.

Due notice of the public hearing was given by mail, postage prepaid, to all "parties in interest" in accordance with M.G.L. c. 40A, § 11 and by publication in the *Newton TAB*, a newspaper of general circulation in Newton, Massachusetts, on November 13, 2019 and November 20, 2019.

The following members of the Board were present:

- William McLaughlin (Vice-Chair)
- Stuart Snyder
- Barbara Huggins Carboni
- Michael Rossi
- Michael Quinn

RECORDED  
NOV 26 2019 9:54

The following documents were submitted to the Board and/or entered into the record at the public hearing:

1. Application for Variance, with accompanying plans, Zoning Review Memorandum and other supporting documents, dated November 5, 2019.

### FACTS

The subject property is located 34 Morton Road and consists of 10,411 square foot lot. The petitioner is requesting a variance from sections 7.8.4.D.4 and 3.1.3 of the Newton Zoning Ordinance to waive the new (post-December 7, 1953) lot dimensional requirements so that the old lot dimensional requirements will apply after the demolition of the existing single family home and construction of a new single-family home. Specifically, the petitioners seek to waive the following new lot

Need reference: BIL 39865 Pg. 483

Attest:  
  
City Clerk of Newton, Mass.

requirements: lot size, frontage, front and side setback, maximum lot coverage and minimum open space.

The Petitioners were represented by Laurance Lee of Rosenberg, Freedman and Lee, LLP, 246 Walnut Street, Suite 201, Newton, Massachusetts. Attorney Lee, who presented an overview of the petition to the Board. Attorney Lee explained that the property was subdivided in 2003 prior to the Petitioners' purchase of the property and that they were not aware of the subdivision at time of purchase. Attorney Lee noted that because of subdivision, the proposed substantial renovation will put the property under the jurisdiction of Section 7.8.4 of the Newton Zoning Ordinance. Section 7.8.4.D.4 states that if more than 50 percent of a single or two-family dwelling is demolished, and the size or shape of the lot was changed at any time after January 1, 1995, all of the dimensional requirements for a "new lot" (post December 7, 1953) apply to any subsequent construction, reconstruction, alteration or structural change. Attorney Lee explained that the variances are necessary because the property cannot meet the new lot dimensional requirements and that this petition seeks subject the property to old lot standards rather than new lot dimensional controls. Attorney Lee also noted that the project has already been approved by the Newton Historical Commission.

Architect, Michael McKay of 35 Bryant Street Dedham, Massachusetts spoke on behalf of his clients explaining the challenges of this type of construction. Attorney Lee further explained the seeking a variance is the only option available to the Petitioners because the home was constructed with concrete blocks, which severely limits the ability to renovate or modify the home.

A motion was made by Michael Quinn to close the public hearing. This motion was duly seconded by Stuart Snyder. The motion passed five in favor and none opposed.

**FINDINGS, DETERMINATION & CONDITIONS**

1. *There are special circumstances related to the soil conditions, shape or the topography of the land or structures which affect it but do not generally affect other properties in the zoning district in which it is located. The existing single-family home located on the property was originally constructed, circa 1915, with reinforced concrete-block, making modification of the structure impossible.*
2. *A literal enforcement of the provisions of the Newton Zoning Ordinance would result in substantial hardship to the owner and the variance requested is the minimum change that is necessary to allow reasonable use of the building or land. The property is currently subject to "old lot" dimensional requirements, but the proposed reconstruction of the home, when combined with the 2003 subdivision of the lot, will trigger the "new lot" dimensional requirements. This constitutes a hardship where the petitioners were not aware of the subdivision and where renovation that does not trigger the "new lot" requirements is impossible given the unique concrete-block construction of the existing home.*
3. *The variance will be in harmony with the general purpose and intent of the Newton Zoning Ordinance and will not be detrimental to the neighborhood or the public welfare. No substantial detriment to the public will occur because the proposed home will still comply with all dimensional requirements for "old lots" under the Newton Zoning Ordinance, the*

A True Copy  
Attest  
*Stuart Snyder*  
City Clerk of Newton, Mass.

proposed home is not overly large in scale and is consistent with other homes in the neighborhood, and the project has been approved by the Newton Historical Commission. Accordingly, a motion made by Michael Quinn, duly seconded by Michael Rossi, to grant the following variances from the new lot dimensional requirements of Section 3.1.3 of the Newton Zoning Ordinance:

1. variance to have a 10,411 square feet lot, where 15,000 square feet is the minimum required;
2. variance to have 90.23 feet of frontage, where 100 feet is the minimum required;
3. variance to have a front setback of 25.1 feet, where 30 feet is the minimum required;
4. variance to have a side setback on the north lot line of 8 feet and on the south lot line of 12.6 feet, where 15 feet is the minimum required;
5. variance to have lot coverage of 29.5%, where 20% is the maximum allowed;
6. variance to have 59.4% open space, where 65% is the minimum required.

The motion passed five in favor and none opposed. Therefore, the above variances are granted, subject to the following conditions:

1. All buildings, parking areas, driveways, walkways, landscaping and other site features associated with this Variance shall be located and constructed consistent with the plans and documents submitted with Petitioners' application.
2. No building permit shall be issued pursuant to this Variance until the Petitioner has:
  - a. Recorded a certified copy of the Variance with the Registry of Deeds for the Southern District of Middlesex County; and
  - b. Filed a copy of such recorded Variance with the Clerk of the Zoning Board of Appeals, the Department of Inspectional Services, and the Department of Planning and Development.
3. This Variance must be exercised within one year from the date of its filing with the City Clerk or the variance lapses.

AYES: William McLaughlin (Vice-Chair)  
Barbara Huggins Carboni  
Michael Rossi  
Michael Quinn  
Stuart Snyder

NAYS: None

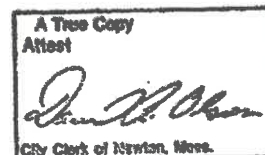
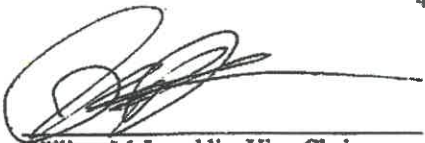
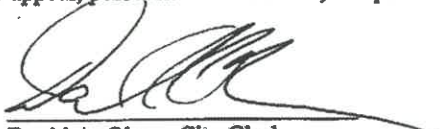


EXHIBIT  
5




William McLaughlin, Vice-Chairperson

The City Clerk certified that all statutory requirements have been complied with and that 20 days have lapsed since the date of filing of this decision and no appeal, pursuant to Section 17, Chapter 40A or Section 21 of Chapter 40B has been filed.



David A. Olson, City Clerk

A True Copy  
Attest  
  
City Clerk of Boston, Mass.