65-46

TOWN OF WELLESLEY MASSACHUSETTS

BOARD OF APPEAL

GARRETT S. HOAG
JOHN L. HAYDEN
DANA T. LOWELL

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TELEPHONE
CE 5-1664

Appeal of Philip M. and Evelyn R. Dodge

Pursuant to due notice the Board of Appeal held a public hearing in the hearing room on the second floor of the Town Hall at 8:30 p.m. on October 28, 1965, on the appeal of Philip M. and Evelyn R. Dodge from the refusal of the Inspector of Buildings to issue a permit to construct a dwelling on Lot B 1, Bay State Road. The reason for such refusal was that said lot does not contain the required minimum lot area of 15,000 square feet exclusive of the Right-of-Way over the lot. Said appeal was made under the provisions of Section XVII A of the Zoning By-law and Chapter 40A, Section 15, of the General Laws.

Henry D. White, attorney, represented the appellants at the hearing.

Richard D. Lind stated that he had an agreement to purchase the property and favored the granting of the request.

Irma Schmetzer, 19 Bay State Road and George T. Luby, 31 Bay State Road, both opposed the request.

A petition signed by eleven nearby property owners opposing the granting of the request was submitted.

Edward E. Hicks, attorney, representing Hubert C. and Laura E. Fortmiller, owners of the property at 37 Bay State Road, who have rights over the Right-of-Way involved, opposed the granting of the request.

The Planning Board in its report opposed the request.

On October 8, 1965, the Inspector of Buildings notified the appellants that a permit could not be issued for the proposed dwelling for the above-mentioned reasons, and on the same date the appellants took an appeal from such refusal.

Statement of Facts

The lot involved is located within a single-residence district requiring a minimum lot area of 15,000 square feet.

At the hearing a plot plan was submitted, drawn by Gleason Engineering Company, dated January 13, 1965, which showed Lot A-1 with a dwelling thereon containing 15,025 square feet and Lot B-1, the lot involved as containing 15,523 square feet including a Right-of-Way approximately forty feet wide.

The appellants presently own both lots and occupy the dwelling on Lot A-1. They have entered into an agreement to sell Lot B-1 as a house lot, but the Inspector of Buildings has refused to issue a permit for a dwelling to be constructed on it. In his opinion, the area within the Right-

of-Way cannot be included to make up the minimum lot area required for a dwelling. The appellants now seek the opinion of this Board relative to whether the area of the Right-of-Way may be included to make up the required area for a house lot. They further seek a variance which will allow a house to be constructed on the lot involved if the Board is of the opinion that the area of the Right-of-Way cannot be included. It was pointed out by the appellants' attorney that if a Right-of-Way were over a lot, the area of the Right-of-Way would not have to be deducted from the lot.

Decision

The first question presented to the Board for decision is whether the word "lot" in the provisions of Section XVIII (a) of the Zoning By-law, which read:

> "...there shall be provided for each dwelling house..... hereafter constructed a lot containing not less than... 15,000 square feet...and hereafter no dwelling house... shall be erected or placed on a lot containing less than such minimum area..." (emphasis added)

should as a matter of law be construed to include area subject to a private way. There is no definition of the word "lot" in the Zoning By-law.

The Right-of-Way serves as the only means of access for the owners of the property at the rear of the appellants' property. Another nearby property owner likewise enjoys a right of way over the land. It is traversed regularly by various kinds of traffic, including automobile traffic. The Board considers that the inclusion of a strip of land so subject to a right of way would be inconsistent with the purpose of the provisions requiring that house lots in the area contain 15,000 square feet.

In a landmark case, our Supreme Judicial Court spelled out some of the evident purposes served by a provision requiring that house lots contain a certain specified minimum area. Some of these reasons included:

> "More freedom from noise and traffic might result. The danger from fire from outside sources might be reduced. A better opportunity for rest and relaxation might be afforded. Greater facilities for children to play on the premises and not in the streets would be available. There may perhaps be more inducement for one to attempt something in the way of the cultivation of flowers, shrubs and vegetables." Simon v. Needham, 311 Mass. 560, 563.

The Board believes that these and other similar purposes of the minimum lot size provision in Section XVIII (A) of the Zoning By-law would not be served by the inclusion of the Right-of-Way's area in the computation of the required area for this lot.

Moreover, the Board finds support for its view in the provision of the By-law itself which defines "Frontage" as a "lot boundary line which abuts a public or private way" (emphasis added) and seems clearly to consider that a private way would form a boundary to a lot and therefore not be a

part of it.

In its examination of the decisions of our Supreme Judicial Court, the Board was unable to find a case in which the problem raised by this appeal was considered. The Board has, however, studied two decisions in other jurisdictions which are in point, and which support its view that the Right-of-Way area may not be included. The first of these was Loveladies Property Owners Association v. Barnegat City Service Company et al.60 N. J. Super. 491, 159 A.2d 417 (1960) in which the New Jersey court was faced with the question whether a building inspector should be ordered to issue building permits to a developer for the construction of homes on lots shown on a plat which the developer had filed where the plat showed that easements of access, forty feet wide, had been included in the areas of the various lots for purposes of computing their areas. Without the inclusion of the easements, almost all of the lots fell short of the minimum area requirements.

After stating that

> "the determination whether these easement strips may be included in the area calculations depends upon the proper construction to be given to the directly pertinent provisions of the Zoning ordinance read in the context of the entire ordinance, their evident purpose and policy..." (at 421),

the court reasoned that

> "...inclusion of these easement ways within the required minimum lot area would be antithetical to the rationale justifying the requirement of open lot spaces in zoning regulations...." (at 422).

The court further reasoned that whether the areas in question were part of a "lot" or not depended "not on the way title is held, ... but rather on the function which each separate area is to serve..." and said:

> "We hold, therefore, that the clear meaning of the disputed provision of the ordinance... precludes the inclusion of the easement strips in the calculation of lot size." (at 424)

Also, in Sommers v. Mayor & City Council of Baltimore, 135 A.2d 625 (Md., 1957), "the main question" was "whether the bed of a nine-foot alley at the rear of a lot....title to the bed of the alley being held by the lot owner, may be included in determining whether the lot meets the area requirements." The court stated that it made no difference whether the alley in question was a so-called "public" alley or "private" alley, but rather that use had been made of the area. Citing an earlier Maryland case, Clarks Lane Garden Apts. v. Schloss, 79 A. 2d 538 (Md., 1951) which had held that the area of proposed, but undeveloped private streets along the borders of a garden apartment project might not be computed in determining whether the project met minimum area requirements, the court refused to permit the area of the alley to be included.

Finally, in an analogous case, Kefauver v. Zoning Boardof Appeals, 195 A. 2d 422 (Conn., 1963) the court refused to allow landowners to include

the area of a macadamized service road to which they held title, but over which a property owners association had an easement, as part of their required minimum front yard depth.

As to the cases advanced by the appellants, the Board does not find them persuasive. Rather the Board feels, as did the court in the Loveladies case, that a case such as Roncka v. Fogarty, 192 Nob. 467, 41 N.W. 2d 745 (1950) is "not particularly helpful since (it) rest (s) on specific ordinance provisions allowing inclusion of private ways in specified minimum lot areas..." and neither considered nor passed upon the question presented here. Similarly, "Weissmantel v. Village of Sands Point, 129 N. Y. S. 2d 640 (Sup. Ct. 1954) ...is distinguishable, first, because the nature of the easement there involved and its functional analogy to a public street do not appear, and, second, because the essential issue in that case was retroactive effect of an ordinance amendment which made an apparent change in plaintiff's right to a building permit applied for before the amendment." Loveladies Property Owners Assn. v. Barnegat City Service Co., Supra at 424. The case of Siegemund v. Building Commissioner of Boston, 259 Mass. 329, is not at all in point. It does appear from that decision that the court regarded the private way in question as part of the lot involved rather than as its boundary; it merely decided that the private way did not fulfill the requirements of a "street" upon which a new building was required to front under the zoning statute.

Thus the Board feels that the area of the Right-of-Way may not be included, that the decision of the Inspector of Buildings was correct and that the appeal should be dismissed.

The Board has also considered the request that the Board make a special exception under the provisions of Section XVIII A of the Zoning By-law or grant a variance under Chapter 40A, Section 15, of the General Laws.

Section XVIII A of the Zoning By-law provides that the Board of Appeal may make special exceptions to said section when it shall find that,

> "(1) Adjoining areas have been previously generally developed by the construction of houses on lots generally smaller than is prescribed by this section and the standard of the neighborhood so established does not reasonably require a subdivision of the applicant's land into lots as large as hereby prescribed,
>
> "(2) Lots as large as is hereby prescribed would not be readily salable or economically or advantageously used for building purposes because of the proximity of the land to through ways bearing heavy traffic or to a railroad or because of other physical conditions or characteristics affecting it but not affecting generally the zoning district in which the land lies."

Although there are a few houses constructed in the neighborhood on lots smaller than the required area, these houses were built before the area was restricted to 15,000 square-foot lots. Upon examination of a plan of the area involved, the Board found that there are a number of lots which contain more than the required area. To permit the construction of a dwelling on the lot involved would, in the opinion of this Board, be detrimental to the

neighborhood and defeat the intent and purpose of the Zoning By-law.

Moreover, the Board is not authorized to grant a variance under General Laws, Chapter 40A, Section 15, unless it finds that denial of the variance would involve an undue hardship to the appellants. It can make no such finding in this case. The property was purchased within the last two years by the appellants and undoubtedly they were aware of the area requirement at the time they purchased the property.

It is, therefore, the unanimous opinion of this Board that the lot does not include the area of the private way and that a special exception cannot be granted under the provisions of Section XVIII A of the Zoning By-law or a variance under Section 15, Chapter 40A, of the General Laws.

Accordingly, the appeal from the decision of the Inspector of Buildings is dismissed and the request for a variance or special exception is denied.

Garrett S. Hoag

Garrett S. Hoag

Dana T. Lowell

Dana T. Lowell

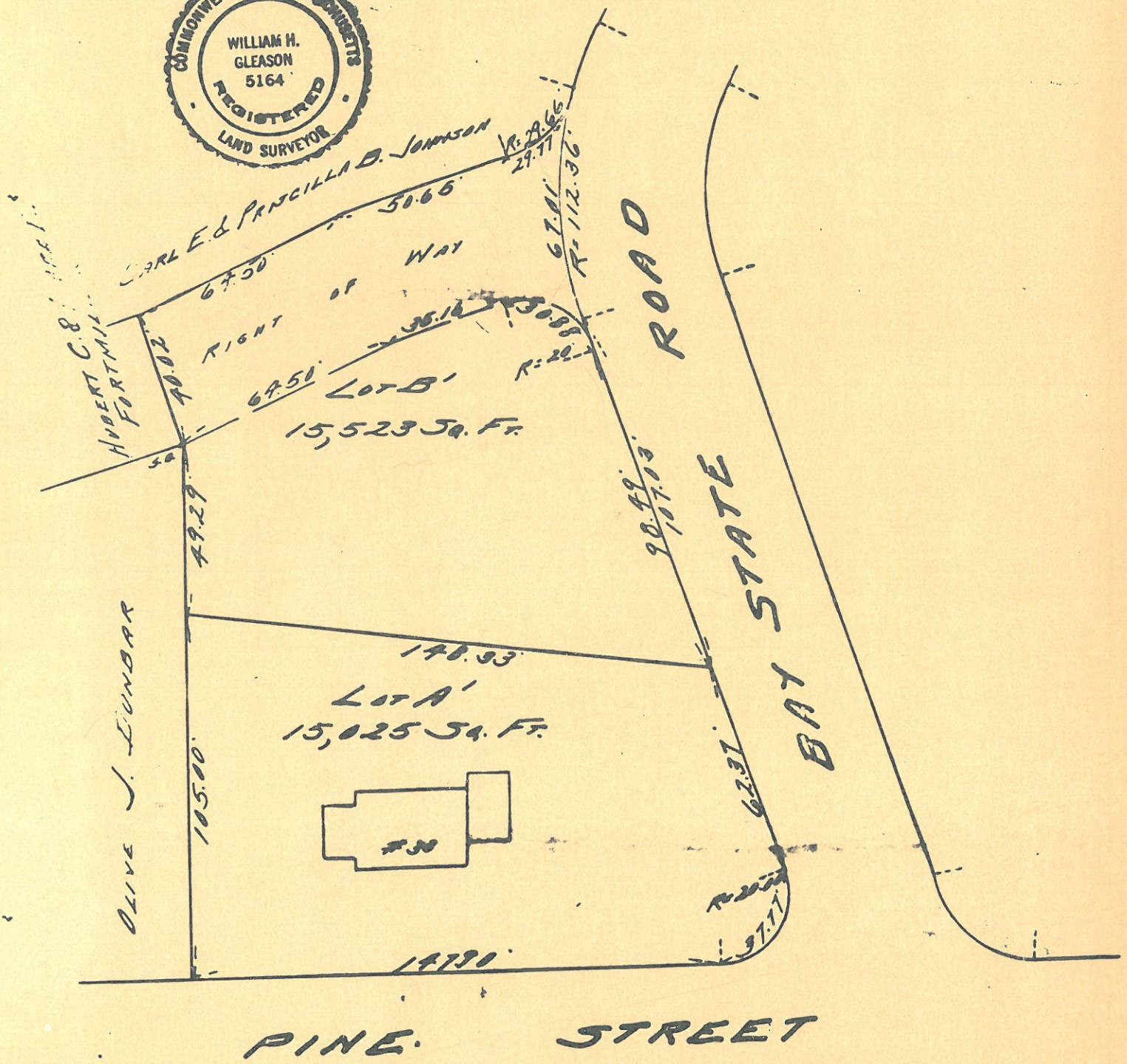
F. Lester Fraser

F. Lester Fraser

Filed with Town Clerk_____

PLAN OF LAND
IN
WELLESLEY, MASS.
SCALE 40 FEET TO AN INCH
JANUARY 13, 1964.
GLE[illegible] ENGINEERING COMPANY

COMMONWEALTH OF MASSACHUSETTS
WILLIAM H. GLEASON
5164
REGISTERED
LAND SURVEYOR



PLANNING BOARD APPROVAL NOT REQUIRED UNDER THE SUBDIVISION CONTROL LAW
BECAUSE LOTS A' AND B' HAVE REQUIRED FRONTAGE ON A PUBLIC WAY:—
A MAJORITY OF WELLESLEY PLANNING BOARD

February 27, 1964