



Town of Arlington
Zoning Board of Appeals
51 Grove Street
Arlington, Massachusetts 02476
781-316-3396
www.arlingtonma.gov

LEGAL NOTICE

Notice is herewith given in accordance with the provisions of Section 3 (3.1.3) of the Zoning Bylaws that there has been filed by **FTO Realty Trust**, of Arlington, Massachusetts on **December 11, 2020** for a hearing before the Zoning Board of Appeals. The appeal addresses the issue of whether the existing structure located at **64 Brattle Street, (Plan 079.A-0002-0006.0)** could be razed and re-built. Said petition would require "**Appeal from the Building Inspector**" of the Zoning Bylaw for the Town of Arlington.

Hearing in regard to the said petition will be remotely conducted via "Zoom" **Tuesday evening, January 12, 2021 at 7:30 P.M or as soon thereafter as the petitioner may be heard. Please visit the Town of Arlington website for hearing information.**

DOCKET NO 3642

Zoning Board of Appeals
Christian Klein RA, Chair

For Information Contact: **ZBA@town.arlington.ma.us**

DEPARTMENT OF COMMUNITY SAFETY

Inspections Division



51 GROVE STREET
TELEPHONE (781) 316-3390

Town of Arlington
MASSACHUSETTS
02476

APPEAL FROM DECISION OF BUILDING INSPECTOR

TOWN OF ARLINGTON

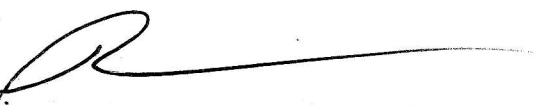
In the Matter of the Appeal of FTO Realty Trust
To the Zoning Board of Appeals for the Town of Arlington David B. Mack
Respectfully represents FTO Realty Trust of Arlington, that he
is/are the owner of certain land in Arlington, located at 64 Brattle Street
That he/she made application of the Inspector of Buildings for a decision with respect thereto, to wit:
Whether the existing structure a two-family residence, may be demolished and reconstructed.

that he has/have been aggrieved by the decision of the Inspector of Buildings on November 10, 2020
on the grounds of noncompliance with the Zoning By law; that no unfavorable action has been taken
by the Zoning Board of Appeals upon similar appeal regarding this property within the two (2) years
next immediately prior to the filing hereof. Wherefore appeal is claimed from the decision of the
Inspector of Buildings in accordance with the provisions of Section 10.10 (e.) of the Zoning By law
for the Town of Arlington and as grounds therefore, your appellant states as follows:

Please see attached statement with Exhibits.

Arlington, Massachusetts

Telephone # 781-359-9005

Signed by: 

Address: I van de Graaff Jr.

Suite 104

Burlington MA 01803

O'Connor Carnathan and Mack

Statement in Support of Appeal of Zoning Determination

Pursuant to G.L. c. 40A, §15, Stephen Doherty, Trustee of the FTO Realty Trust ("FTO"), appeals the November 10, 2020 determination of Michael Byrne, Director of Inspections ("Director"), in which the Director determined that the proposed demolition of a non-conforming structure at 64 Brattle Street (the "Property") would render the lot non-buildable. A copy of the Director's decision is attached as Exhibit A.

The Property is in the R2 zone, and there exists a two-family residence, which was constructed in approximately 1920. See Existing Conditions Plan dated July 8, 2020 attached as Exhibit B. The structure is nonconforming because it is within the ten feet side yard setback required by the Zoning Ordinance. FTO proposes to demolish the structure and rebuild a new two-family structure that would eliminate the existing nonconformity. The existing structure is approximately 8.2 feet from the side lot line. The proposed new structure would be approximately 10.3 feet from the side lot line. See Proposed Plot Plan dated July 8, 2020 attached as Exhibit C. In other words, the proposed construction would render a nonconforming structure a conforming structure.

The lot has slightly less than 20 feet of frontage on Brattle Street. For at least the last 57 years, and likely longer, access to the Property has been by via a driveway on Brattle Street, with one part consisting of the Property's frontage (about 19') and the other part consisting of an approximately 11 foot wide right of way owned by an abutter. In 1963, the Zoning Board of Appeals approved the creation of two lots, one being the Property (Lot K-3 on the 1963 Plan, enclosed), and the other lot being Lot K-4, with frontage on Summer Street. The ZBA's 1963 decision thereby approved a lot with less than the required 60 feet of frontage. See Exhibit D.

The Director determined that the razing of the building would extinguish FTO's right to rebuild because the ZBA in 1963 did not expressly authorize the right to build on a lot with insufficient frontage. Respectfully, for the following reasons, FTO believes that the Director erred and that FTO is entitled, as of right, to a building permit for the proposed project because the proposed reconstruction of the nonconforming structure on a nonconforming lot would not increase the nonconforming nature of the existing structure, but would rather eliminate the nonconforming nature altogether.

Section 8.1.3 of the Bylaw governs alterations of Nonconforming Single-Family or Two-Dwellings. Specifically, §8.1.3.B provides (emphasis added):

No alteration, *reconstruction*, extension or structural change to a single or two-family residential structure that increases the nonconforming nature of said structure shall be permitted under there is a finding by the [ZBA] that the proposed alteration, reconstruction, extension or structural change will not be substantially more detrimental to the neighborhood.

On its face, Section 8.1.3 permits reconstruction of nonconforming structures even where the nonconformity is increased, provided the ZBA first makes the requisite finding of no substantial detriment to the neighborhood. Here, FTO's proposed project will eliminate the

nonconformity by reconstructing the residence greater than ten feet from the side lot line. Therefore, no finding by the ZBA is needed at all.

Section 8.1.3 is consistent with the so-called “second except” clause of paragraph 1 of G.L. c. 40A, §6, which provides (emphasis added):

Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any *reconstruction*, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.* . .

As explained recently in Comstock v. Zoning Board of Appeals of Gloucester, 98 Mass. App. Ct. 168, 173 (2020) (citations omitted) (emphasis added):

Generally speaking, preexisting nonconforming structures lose the protection provided by [G.L. c. 40A, §6] when the structures are extended or structural changes are made to them. However, if the structure in question is a single- or two-family residence, the statute provides an additional layer of protection. Such structures can be modified, extended, *or reconstructed as of right* “so long as the ‘extended or altered’ structure ‘does not increase’ its ‘nonconforming nature.’” Moreover, even where the changes do increase the nonconforming nature of a protected residence, they still can be undertaken by special permit so long as the permit granting authority finds “that the proposed modification would not be ‘substantially more detrimental’ to the neighborhood than is the existing nonconformity.”

Comstock did not change the law. More than thirty years ago, the Appeals Court declared that “reconstruction of a nonconforming single-family residential structure is legitimated under the second except cause of the first sentence of [G.L. c. 40A, §6] if it does not increase the nonconforming nature of said structure; otherwise . . . it must be submitted to the special permit procedure of the second sentence for the determination by the board of the question whether it is substantially more detrimental than the existing nonconforming use [or structure] to the neighborhood.” Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 55 (1985).

In a subsequent email from the Director, the Director referenced Section 5.4.2B(1), which provides, in part:

The following applies to any lot show on a subdivision plan approved by the Board of Survey or on a plan or deed recorded with the Registry of Deeds prior to May 15, 1924. If such lot did not contain a principal building . . . the minimum lot size, frontage, open

space and side yard requirements for a residential use shall not apply, and the lot may be built upon with a single- or two-family residential use if permitted in the applicable district, provided that:

- the lot contains at least 5,000 square feet of area and 50 feet of frontage.,

This provision mirrors the fourth paragraph of G.L. c. 40A, §6. The courts have interpreted that paragraph to apply to vacant land, not land on which a nonconforming structure is altered. Moreover, the Appeals Court in Dial Away Co. v. Zoning Bd. of Appeals, 41 Mass. App. Ct. 165 (1996) and Willard v. Bd. of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987), held that the second except clause in Section 6 applies where the nonconforming structure is razed and reconstructed, unless the ordinance states it applies only to alterations. The Arlington ordinance (section 8.1.3) specifically includes "reconstruction."

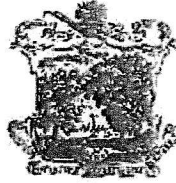
Respectfully, the fact that the lot has less than 60 feet of frontage on Brattle Street does not change the analysis. The 1963 ZBA decision approved the lot (Lot K3) with less than the required frontage. The approval of Lot K3 with an existing nonconforming structure did not eliminate the protections afforded said nonconforming structure under G.L. c. 40A, §6. Even if Lot K3 is considered a nonconforming lot, there is nothing in the Bylaw which would prohibit, with or without a special permit, the demolition of an existing nonconforming structure and the reconstruction of either a conforming structure or a nonconforming structure without an increase in the nonconforming nature.

Similarly, there is nothing in Section 8.1.7 of the Bylaw, which addresses restoration, abandonment or non-use, that applies to the situation here, i.e. a voluntary demolition of a nonconforming structure. Section 8.1.7.A does not apply as it pertains to nonconforming structures damaged by fire or natural cause. Subsection B applies to nonconforming *uses* of a conforming structure and lot, and therefore does not apply since the Property is used as a two-family, in compliance with current zoning. Subsection C applies to abandonment of a nonconforming *use*.

Critically, Section 8.1.7 does not address abandonment of a non-conforming structure. As noted in Dial-Away, "our cases seem to distinguish between non-conforming uses and structures." 41 Mass. App. Ct. at 171 (1996). Therefore, while the Dial-Away court did declare that "when a building is totally demolished, the use to which it was put is necessarily discontinued," the abandonment provision in the Arlington Bylaw, just like the abandonment provision in the Auburn Bylaw, cannot be applied to demolition of non-conforming structures. Moreover, even if somehow the Bylaw's abandonment provision were to apply, FTO would be permitted to proceed with its proposed project, as of right, as long as it met the applicable time parameters in whatever subsection of 8.1.7 were deemed applicable.

For the foregoing reasons, FTO respectfully requests that the Board overturn the Director's decision and direct him to issue a building permit for the proposed project.

EXHIBIT A



Town of Arlington
Inspectional Services Department
51 Grove Street
Arlington, Massachusetts 02476
781-316-3390
www.arlingtonma.gov

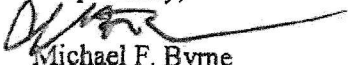
Mr. James F. Mackey
P.O. Box 216
Tewksbury, MA 01876

November 10, 2020

Dear Mr. Mackey,

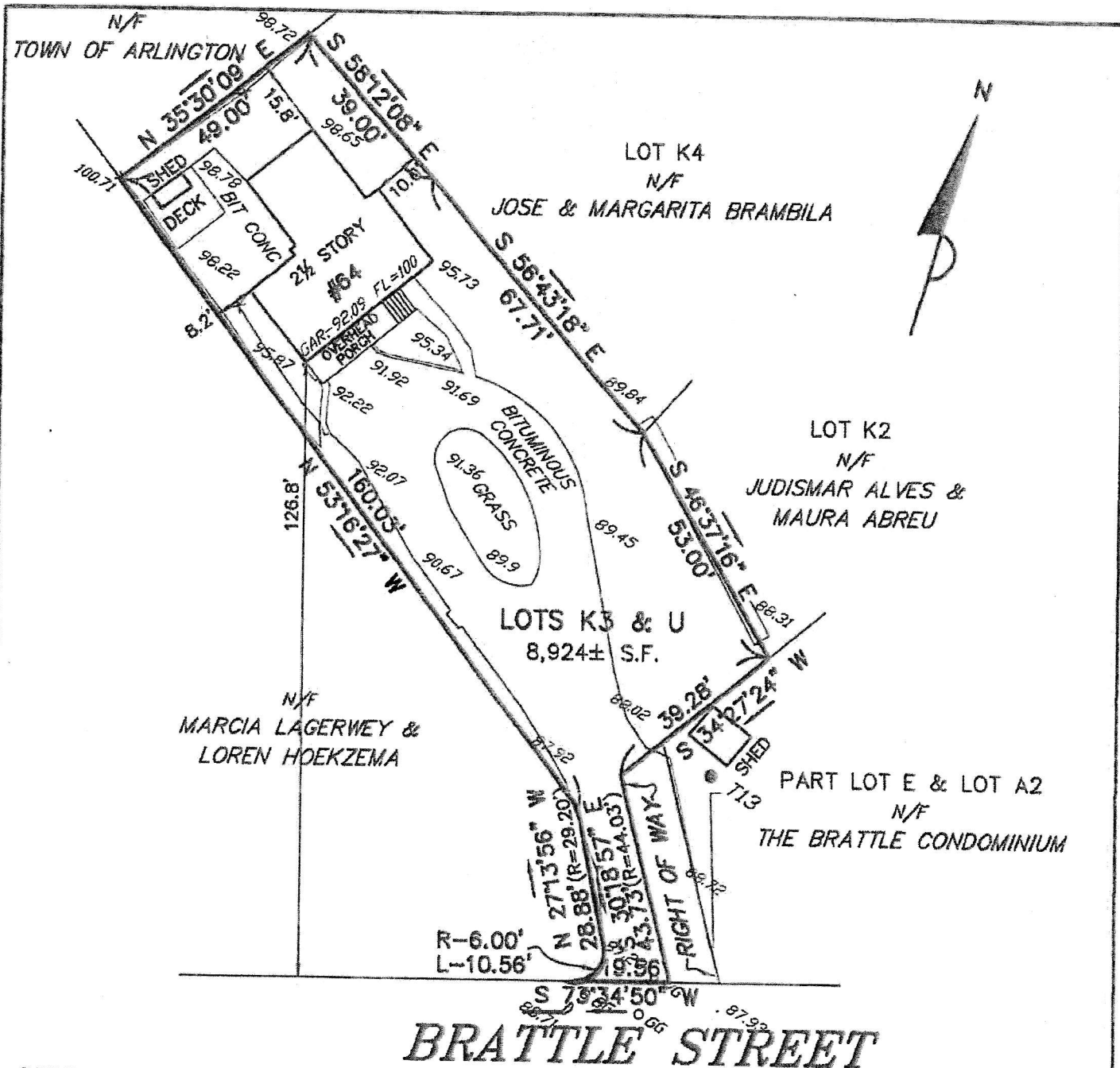
After reviewing Zoning Board of Appeal Special Permit Docket no. 790 regarding 64 Brattle St. dated June 1963 and consulting with Town Counsel, unfortunately we find the lot in question K3 is nonconforming due to insufficient frontage and yard setback concerns. Furthermore, if the structure was to be razed the right to rebuild a new structure would be extinguished. The Board in its decision did allow a single family dwelling to be built on the lot K4, but remained silent on Lot K3.

Respectfully,


Michael F. Byrne
Director of Inspections

cc,
D.Heim
M.Ciampa
R.Vallarelli

EXHIBIT B



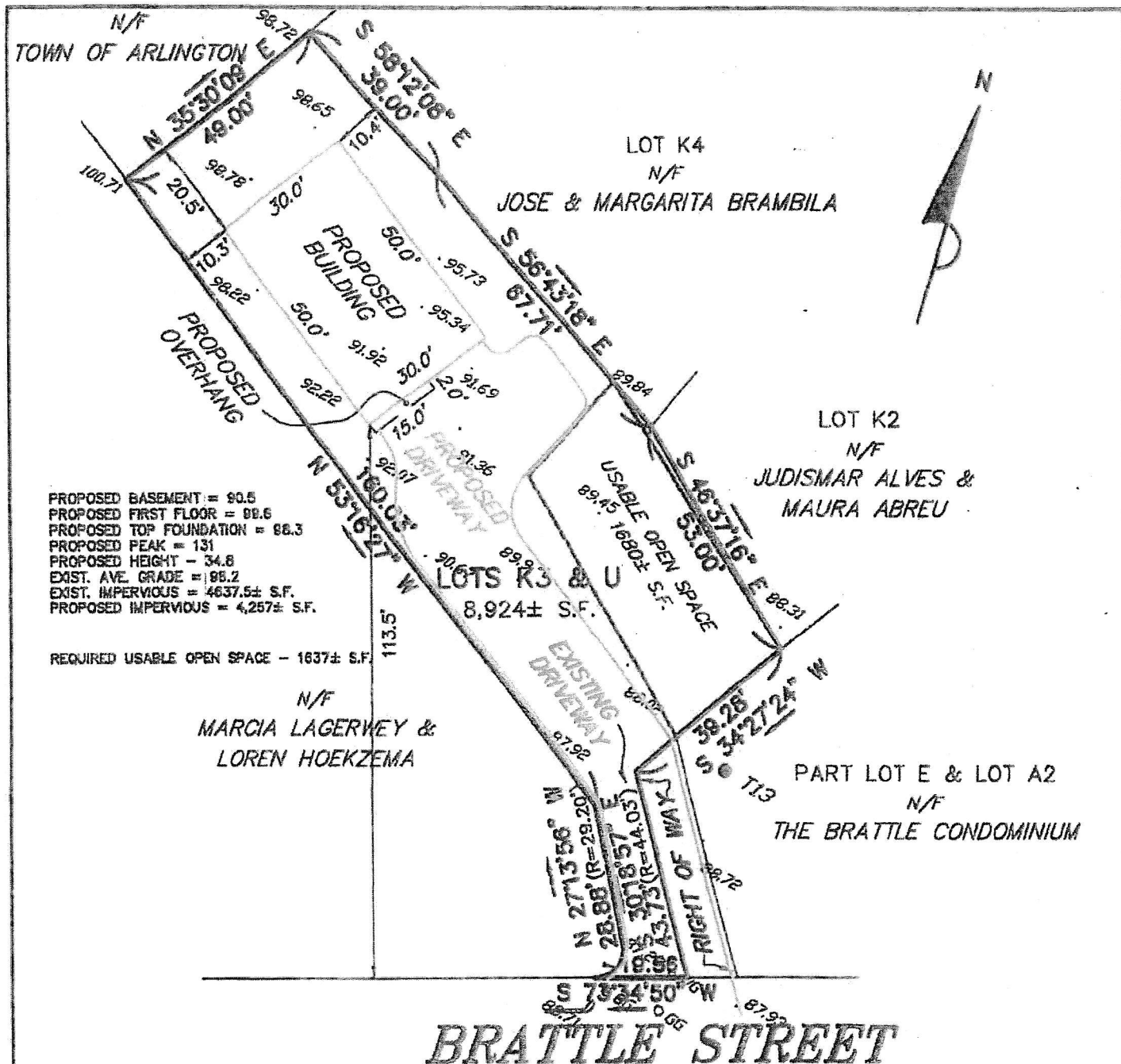
PREPARED FOR: JIM MACKEY

I HEREBY CERTIFY THAT THE BUILDING IS
LOCATED AS SHOWN.

CLIFFORD E. ROBER, PLS

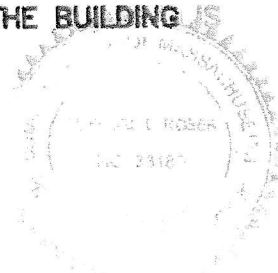
DATE

THIS PLAN MAY HAVE BEEN ALTERED IF
THE SIGNATURE IS NOT SIGNED IN BLUE.



PREPARED FOR: JIM MACKEY

I HEREBY CERTIFY THAT THE BUILDING IS
 LOCATED AS SHOWN.



CLIFFORD E. ROBER, PLS DATE

THIS PLAN MAY HAVE BEEN ALTERED IF
 THE SIGNATURE IS NOT SIGNED IN BLUE.

**PROPOSED PLOT PLAN
 #64 BRATTLE STREET**

**IN
 ARLINGTON, MA
 (MIDDLESEX COUNTY)**

SCALE: 1" = 30' DATE: 7/8/2020



ROBER SURVEY

1072A MASSACHUSETTS AVENUE
 ARLINGTON, MA 02476
 (781) 648-5533
 6178PP1.DWG

TOWN OF ARLINGTON

ZONING

BOARD OF APPEALS

PETITION NO. 790

of Owen J. Nolan

Statement of Facts.

The Zoning Board of Appeals, hereinafter called the "Board" conducted a public hearing on the petition of Owen J. Nolan of Arlington seeking permission to subdivide the land located at 64 Brattle Street. The proposed subdivision would create a lot having less than the sixty feet of frontage required by Section 14-A of the Zoning By-Law.

The petition was filed in the office of the Inspector of Buildings on June 21, 1963. The hearing was held at the Town Hall on Tuesday evening July 23, 1963 after due notice had been given by publication in the Arlington Advocate on June 27 and July 5, 1963 and by mail, postage prepaid, to owners of real estate opposite to and abutting on the property in question, and to other parties in interest whose names and addresses are recorded on a separate list which forms a part of the official record of these proceedings, and by posting the property.

The members of the Board present were:

Ralph F. Tuller, Chairman
Alfred C. Bridgens, Secretary
John J. Bilafer

The petitioner's wife, Margaret Nolan, and son-in-law John Whitney, attended the hearing. Also present were Frederick R. Joyce, Registered Land Surveyor, and Mr. and Mrs. Lawrence S. Page of 66 Brattle Street.

The property involved in this petition is shown on Block Plan #79 as 64 Brattle Street, containing approximately 15,400 sq. ft. of land.

This is a large lot, with 97.5 feet of frontage on Summer Street. In actual fact, however, the Summer Street frontage is not used by the residence which presently is located on the lot. This residence faces Brattle Street, it is numbered on Brattle Street and the only egress at present is onto Brattle Street.

Petitioner proposes to divide the land into two lots in accordance with a plan prepared by Mr. Joyce and dated June 1963. One lot, designated "K3" on the plan, would have approximately 8,200 sq. ft. of area; the existing dwelling is located on this lot, and the only egress from the lot is to Brattle Street. The other new lot,

designated "K4, would have approximately 7,200 sq. ft. of area and would have the entire 97.5 feet of Summer Street frontage.

The proposed subdivision would leave the new Lot K3 without the sixty-feet of frontage required by the By-Law. However, there would be no change in the manner in which the existing dwelling is used, since the present manner of access to Brattle Street would continue.

Access to Brattle Street is obtained by two narrow strips of land which border each other and which together constitute a paved driveway about 50 feet long running from Lot K3 to Brattle Street. One such strip is designated Lot U; it is owned by the petitioner and is approximately 11 feet wide, with a throat opening which gives 19.56 feet of frontage on Brattle Street. The other strip is owned by the owners of 66 Brattle Street, Mr. and Mrs. Page, but subject to an easement whereby the petitioner as owner of 64 Brattle Street has a right of way over it; this strip also is approximately 11 feet wide, with frontage on Brattle Street of 10.3 feet.

It therefore appears that the proposed Lot K3 would have effective frontage, including Lot U and the right of way, of 29.86 ft.

At the time of the hearing, most of the information recited above was not available to the Board. At the petitioner's request a decision on this case was delayed until more precise information could be obtained. The Board acknowledges the valued assistance rendered to it on behalf of the petitioner by Daniel J. Buckley, Jr. Esq.

Since this property is located in a two-family Residence B district, the petitioner's original proposal was to construct a rather large duplex house, fronting on Summer Street, in the new Lot K4. Although this lot would be 7,200 sq. ft. in area, its shape is such that variances in the yard space requirements of the By-Law would be required for a house of this size; such variances the Board is not prepared to grant.

It also should be noted that the Board previously had authorized the owners of the residence at 280 Summer Street to construct a side porch addition closer than the required 10' from the property line of Lot K4. Any new house constructed on Lot K4 therefore should be located as far as possible from the boundary line of 280 Summer Street.

After considerable delay, Mr. Robert Stevens, a builder with offices at 733 Massachusetts Avenue, advised the Board that he was desirous of purchasing Lot K4 from the petitioner for the purpose of constructing a single-family residence on it. Mr. Stevens gave his assurance to the Board that he would build a house which would be in keeping with the neighborhood, that it would be single-family, that its dimensions would not exceed 24 feet by 39 feet, that it would comply with all yard requirements of the By-Law, that sufficient fill would be put in the lot to bring the house up to a reasonable level in relation to surrounding homes and Summer Street, and that the house would be situated so as to provide as much space as possible between it and the home at 280 Summer Street.

It is the opinion of the Board that the proposed subdivision, coupled with Mr. Stevens' plans for construction on Lot K4, provide the best possible program for effective utilization of the existing over-sized lot. It is the unanimous decision of the Board that the petition for subdivision shall be allowed in accordance with this decision and the submitted plan of Frederick R. Joyce dated June 1963.

John F. Sullivan
Chairman

Alfred C. Bridgman

John J. Baker

TOWN OF ARLINGTON
Dimensional and Parking Information
for application to
The Zoning Board of Appeals or the Arlington Redevelopment Board

1. Property Location 64 BRATTLE ST Zone R-2
2. Owner FTO REALTY TRUST Address 109 BLANCHARD ST LAWRENCE MA
3. Present Use/Occupancy: No. of Dwelling Units 2 Use(s) and their Gross Floor Area
2 FAMILY 2562.24
4. Proposed Use/Occupancy: No. of Dwelling Units 2 Use(s) and their Gross Floor Area
2 FAMILY 4528

	Present Conditions	Proposed Conditions	Min. or Max. Required for Proposed Use by zoning
5. Lot Size (Sq. Ft.)	8924	8924	min. 6000
6. Frontage (Ft.)	19.56	19.56	min. 60
7. Floor Area Ratio	34.1%	61.1%	max. NA
8. Lot Coverage (%) (where applicable)	10.4%	16.8%	max. 35%
9. Lot Area per Dwelling Unit (Sq. Ft.)	-	-	min. NA
10. Front Yard Depth (Ft.)	126.8	113.5	min. 20
11. Side Yard Width (Ft.)	8.2	10.3	min. 10
12. Rear Yard Depth (Ft.)	15.8	20.5	min. 20
13. Height: Stories:	2.5	2.5	max. 2.5
Feet:	32.8	34.8	max. 35
14. Open Space: (% of G.F.A.) Landscaped: (Sq. Ft.)	3625	4666	min. 545.9
Usable: (Sq. Ft.)	1246	1680	min. 1637
15. Parking Spaces (No.)	-	-	min. -
16. Parking Area Setbacks (Ft.)	-	-	min. -
17. Loading Spaces (No.)	-	-	min. -
18. Type of Construction	Wood	Wood	-
19. Distance to Nearest Principal Building (Ft.)			min. -

INFORMATION FOR BOARD OF APPEALS RECORD

To be completed by OWNER, signed, and returned to Secretary of the Board of Appeals:

FTO REALTY TRUST

(Owner or Petitioner)

Address: 109 BLANCHARD ST

City or Town: LAWRENCE MA 01843

Premises: BRATTLE #64 2 FAMILY ARLINGTON MA.
(Street & Number) (Identify Land Affected) (City)

the record title standing in the name of: STEPHEN E DOHERTY

whose address is: 109 BLANCHARD ST LAWRENCE MA 01843
(Street) (City or Town) (State)

by a deed duly recorded in the Middlesex ^{South} County Registry of Deeds in

Book: 75232 Page: 144, Middlesex ^{South} Registry District of the Land

Court Certificate NO. 124373 Book 75232 Page 144.

Stephen E Doherty
(Signature, by Land Owner)