



September 18, 2024

BY EMAIL: jeanne.guthrie@sherbornma.org

Sherborn Zoning Board of Appeals
19 Washington Street
Sherborn, MA 01770

Re: 34 Brush Hill Rd., Sherborn, MA – Chapter 40B Application

Dear Members of the Zoning Board of Appeals:

This Firm represents Andrew and Michelle Lauterback (36 Brush Hill Road), and Dennis and Victoria Natale (36 Brush Hill Road), who are direct abutters to the proposed Chapter 40B development located at 34 Brush Hill Road in Sherborn (“Project Site”). The Project Site, the Lauterbacks’ property, and the Natales’ property were all created from the same division of land back in 1962, by Constance Mayo. The Project Site, which is Lot 4 on the 1962 land division plan, is encumbered by a valid unexpired title restriction that prohibits the Chapter 40B project as currently laid out. As such, the Board should deny this application for the same reasons that it recently denied a similar Chapter 40B application on Farm Road.

Background

Title to Project Site, and to the abutters’ lots, derives from a 1962 plan dividing an 11.3-acre tract (shown as Lot B on a 1955 plan recorded with the Middlesex South Registry of Deeds as Plan 2173 of 1955) into four lots, labelled Lots 1 – 4 on the plan. That 1962 plan, recorded with said Deeds as Plan 823 of 1962, is attached for your reference as Exhibit A. The Project Site is shown as Lot 4 on the 1962 Plan. The Lauterbacks’ home is Lot 2, and the Natales’ home is Lot 3.

Where it shows a division of land with new lot lines, the 1962 Plan required the approval of the Sherborn Planning Board under the so-called “subdivision approval not required” provisions of the state Subdivision Control Law, G.L. c. 41, § 81P (commonly known as the “ANR” provisions). The 1962 Plan indicates that it was in fact approved by the Planning Board, as it bears the endorsement of its Chairman. On the face of the plan, right below the endorsement, there lies the following condition:

Note: Approved subject to the restrictions that no building shall be built on lot #4 within 80' of the centerline of an excision of the access strip to lot #4 projected northerly to the property line of property, "Now or formerly W.H. Staples"

This condition, which is expressly framed as a "restriction," effectively renders a 160-foot wide column in the center of the Project Site as unbuildable. The boundaries of this "no-build" area are delineated on the plan, with the words "building line" pointing to each tangent that is 80-feet from the centerline. See, Exh. A. Homes were eventually built on Lots 2 and 3, which are unencumbered, but not on Lot 4.

Legal Analysis

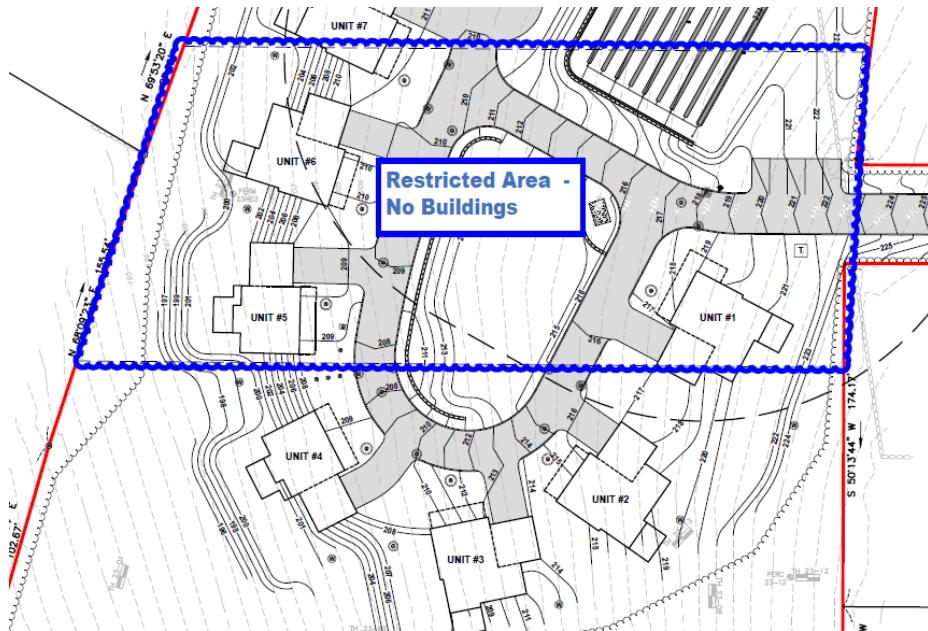
The enforceability and duration of land use restrictions is governed by Chapter 184 of the Massachusetts General Laws. Private perpetual restrictions are generally disfavored as a matter of public policy, and therefore when the legislature adopted Chapter 184, it imposed a series of procedural requirements and preconditions to enforceability. In Section 26, the legislature exempted certain types of restrictions, namely conservation, preservation, agricultural preservation, and affordable housing restrictions, as well as, more generically, "other restrictions held by any governmental body" from these procedural requirements. G.L. c. 184, § 26.

In Murphy v. Hopkinton Planning Bd., 70 Mass. App. Ct. 385, 395-396 (2007), the Appeals Court was asked to interpret the "other restriction" clause of Section 26 in the context of a condition imposed by the Hopkinton Planning Board on its approval of an ANR plan in 1982. In that case, the Planning Board approved an ANR plan and imposed a condition on the use of one of the newly-created lots, similar to what the Sherborn Planning Board did in 1962. The Hopkinton ANR condition restricted Lot 25 on the plan from gaining access through a private way called Penny Meadow Lane, all as shown on the plan. Twenty years later, Lot 25's owner brought suit to strike the condition, challenging the Planning Board's authority to impose it and the Town's ability to enforce it under Section 26. The Appeals Court rejected both attacks, holding that since the ANR condition was not timely appealed in 1982, the owner was estopped from challenging it now, and finding that a condition imposed on an ANR plan qualified as an "other restriction held by any governmental body."

There's another provision of Chapter 184 that is relevant here. Section 23 imposes a durational cap of 30 years on the enforceability of restrictions among private parties that are unlimited as to time, i.e., they have no set term of years. Naturally, if that provision were applicable here, it would bar enforcement of the 1962 ANR restriction, since that plan restriction is unlimited as to time and is more than 30 years old. But the sunset provision in Section 23 does not apply here based on another Appeals Court case that resolved this precise question.

In 2007, when the Appeals Court was confronted with Murphy v. Hopkinton, there was lingering doubt whether the legislature intended to exempt “other restrictions” such as ANR plan conditions from the 30-year term limit. In that Hopkinton case, the 1982 ANR condition was *less than* 30 years old, and the Appeals Court specifically noted in a footnote to its decision that it “voiced[d] no view whether the subject restrictions are exempt from the thirty-year limitation imposed by § 23,” Murphy, 70 Mass. App. Ct. at 396, n.10. However, the Appeals Court *did* address this issue four years later, in Killoran v. Zoning Bd. of Appeals of Andover, 80 Mass. App. Ct. 655, 658-659 (2011), holding that restrictions created through zoning or planning approvals are *not* subject to the 30-year limitation. See also, Samuelson v. Planning Bd. of Orleans, 86 Mass. App. Ct. 901, 901-902 (2014) (“[L]and use restrictions imposed by a zoning board of appeals or a planning board, unlike private restrictions imposed by deed or other instrument, are not subject to the thirty-year sunset provisions of G. L. c. 184, § 23.”); Maguire v. Town of Hamilton Planning Bd., 29 LCR 538, 544 (Mass. Land Ct. 2021).¹

The consequence of this unambiguous and controlling legal precedent is that the no-build restriction imposed on the 1962 ANR plan remains valid, enforceable, and precludes the construction of buildings within that 160-foot wide column running through the middle of the Project Site. Tellingly, the Developer’s own engineer found significance in that restriction, because he shows the same no-build area boundaries on the Chapter 40B site plan – the boundaries are shown, but not labelled. Figure 1 below is an excerpt of the site plan, with the restriction area outlined in blue.



¹ Killoran concerned a condition in a zoning permit, and Samuelson concerned a traditional subdivision approval, but we know from Murphy that these rules apply equally to ANR approvals under G.L. c. 41, § 81P.

As is evident from Figure 2, the 1962 ANR restriction with a 160 foot wide no-build zone in the middle of the site would prevent 4 of the 8 homes from being developed.

The Town of Sherborn's right to enforce this restriction is even more firm than the deed restriction affecting the Farm Road Chapter 40B project. Here, the restriction was imposed by the Planning Board, and, therefore, the Planning Board is undisputedly entitled to enforce it. The same instrument that contains the restriction also created the abutters' lots, so abutters can also enforce the restriction. Because the restriction was imposed on the same plan that created the abutters' lots, the intent was to benefit all of the lots on the ANR plan. Even if that was not the intent, there is black letter law confirming the unconditional ability of abutters to enforce land use restrictions under similar circumstances. See, Rosenfeld v. Zoning Bd. of Appeals of Mendon, 78 Mass. App. Ct. 677, 682 (2011) ("an owner of land that adjoins the restricted land is entitled to enforce a deed restriction, whether or not the instrument imposing the restriction contains an express statement that the adjoining land is intended to benefit from the restriction.").

Finally, the enforceability of the 1962 ANR restriction is unaffected by Chapter 40B. Unlike ordinary subdivision approvals or plans, an ANR plan cannot be later modified to remove a condition. The modification provisions of the Subdivision Control Law, G.L. c. 41, § 81W, do not apply to ANR plans under § 81P. However, even if the Sherborn Planning Board could modify the 1962 ANR plan to remove the no-build restriction (or even if the Zoning Board were to assume the Planning Board's Chapter 41 authority over Subdivision Control to consider modification of the condition as "consistent with local needs" pursuant to Chapter 40B), the modification would still be governed by G.L. c. 41, § 81W, which requires consent of other lot owners who are "affected." The Lauterbacks and Natales are be "affected" parties and would not consent.

As we explained in connection with the Farm Road Chapter 40B matter, neither the Zoning Board nor the state Housing Appeals Committee has the authority to "waive" the Town's and Planning Board's rights in the 1962 ANR restriction. The powers of the Zoning Board and HAC under Chapter 40B are sweeping and extraordinary, but they do not extend to divesting municipalities of their real estate interests. That limitation was firmly established by the state's highest court in 2017 in 135 Wells Ave., LLC v. Housing App. Comm., 478 Mass. 346 (2017), which also concerned a land use restriction encumbering a 40B project site. At issue was whether a zoning board's authority under Chapter 40B empowered it to amend or waive a restrictive covenant encumbering the project site's title. The SJC said no. Ibid., at 358 ("[D]eed restrictions are a property interest, a restrictive covenant on land, that cannot be abrogated by any act by a zoning board.") The SJC specifically recognized the special protection afforded to municipally-held title restrictions like the one at issue here. Id., at 359 ("In general, we have noted that restrictions on land are disfavored and should be as limited as possible. That is not the case, however, for restrictions on municipally-owned land; municipal deed restrictions are explicitly exempt from the provisions of G. L. c. 184, § 30, and are enforceable in perpetuity.") (citation omitted).

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While there are many other problems with this Chapter 40B project, this title restriction is a foundational barrier to its development, and it is incapable of being removed, rescinded, revoked or revised. Before any further time and resources are wasted, the Developer should withdraw its Chapter 40B application and consider an alternative use of Lot 4 that complies with the ANR restriction.

Thank you for the opportunity to comment.

Very truly yours,

/s/ Daniel C. Hill

Daniel C. Hill

Enc.

cc: Sherborn Planning Board
 Clients

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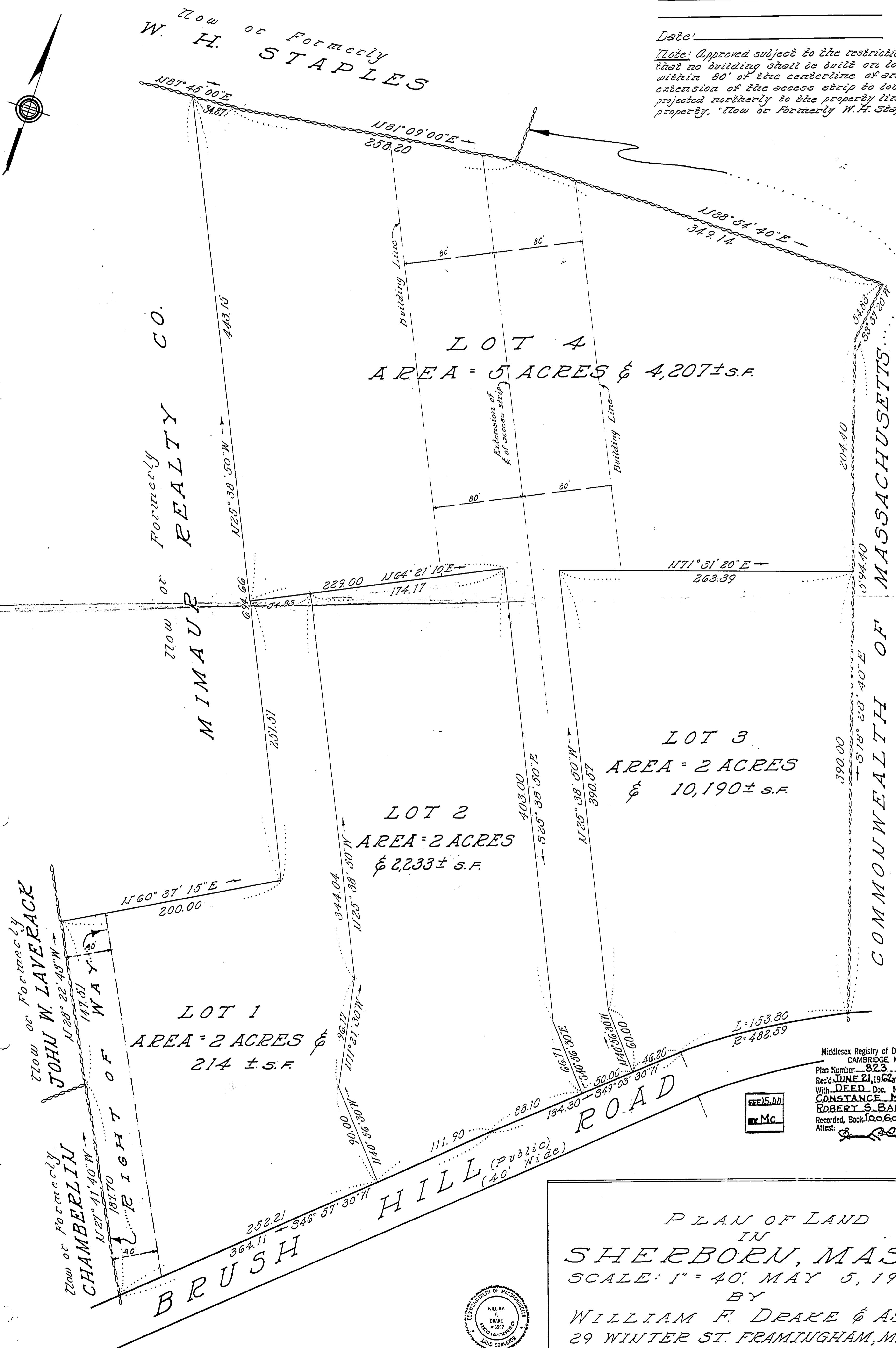
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EXHIBIT A – 1962 Plan

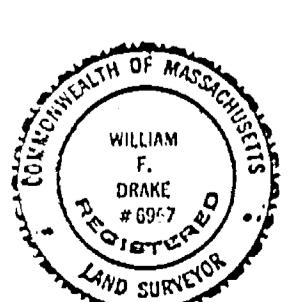
Approval under the Subdivision
Control Law not required:
Stevenson Planning Board.
Thomas F. Cookson Jr. Chairman
June 19, 1962

Date:

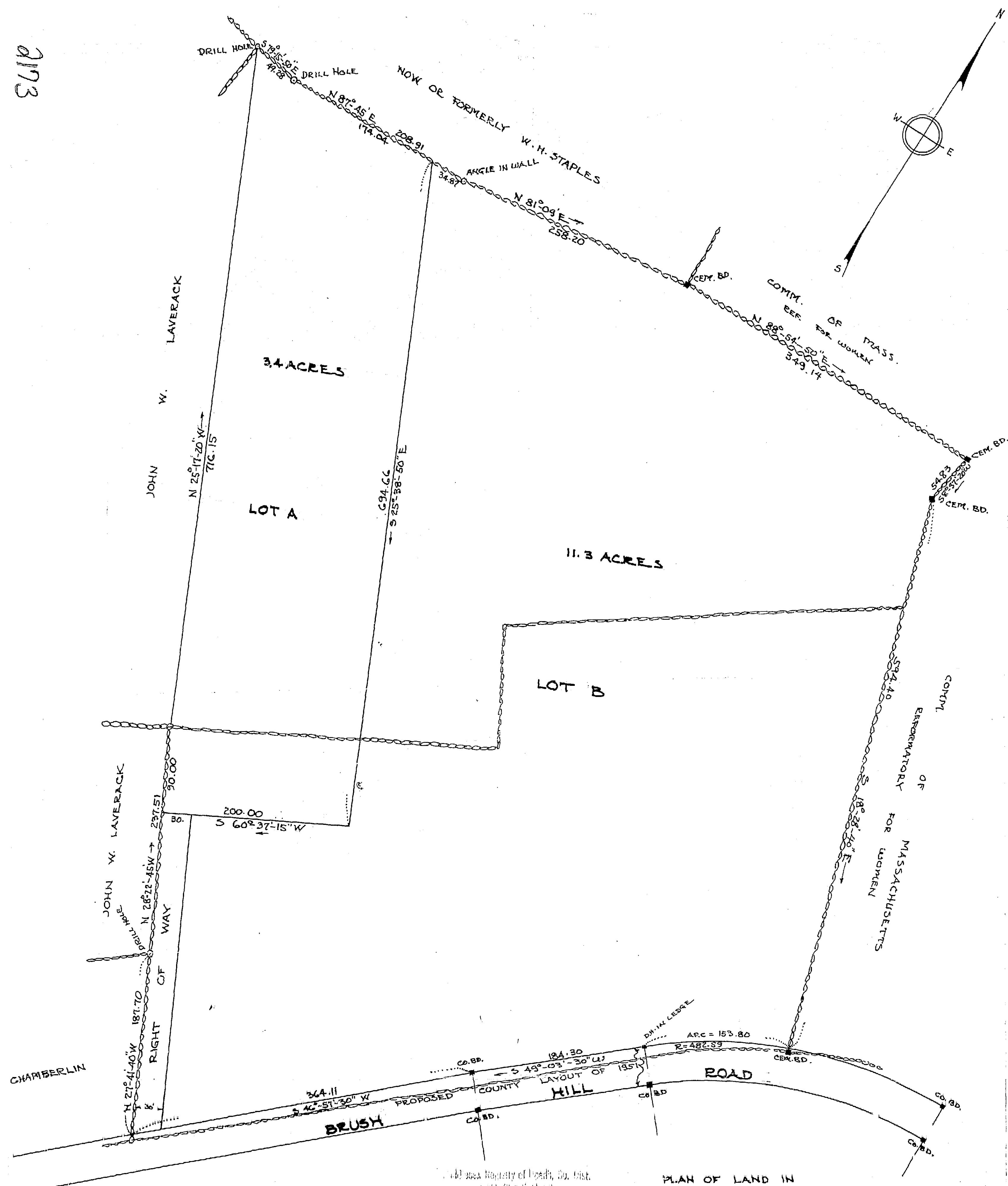
Note: Approved subject to the restrictions that no building shall be built on lot #4 within 80' of the centerline of an extension of the access strip to lot #4 projected northerly to the property line of property, "Now or Formerly W.H. Staples"



PLAN OF LAND
IN
SHERBORN, MASS.
SCALE: 1" = 40' MAY 5, 1962.
BY
WILLIAM F. DRAKE & ASSOCs
29 WINTER ST FRAMINGHAM MASS



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APPROVAL UNDER THE SUBDIVISION CONTROL
LAW NOT REQUIRED

SHERBORN PLANNING BOARD
Chairman of Board of Commissioners
Nov. 7, 1955

1. Admitted Notary of Health, Co. Dist.
C. A. M. D. M. No. 23.
Plan Number 2173 of 1955
Rec'd Nov 23 1955 at 9:15 a.m. Quin
Will ~~Dated~~ Doc. No. 67
Donald R. Maynard
Minnow Health
Recorded, Book Page
Attest: William H. Daily
REGISTER

PLAN OF LAND IN
SHERBORN MASS.

OWNED BY

DONALD MAYO

SCALE 1" = 50'

YING ROSENBLATT ENGR. FRAMINGHAM MASS.