

Belmont Planning Board

Decision and Opinion on

Lot 1 Clark Lane: Design and Site Plan Review:
Single-Family Home in General Residence Zoning District

Given the serious and substantial doubts about the legal status of Clark Lane and applicable property boundaries (to echo a 1980 ZBA opinion about lots on Clark Lane, discussed below), Applicants were invited at least three times to withdraw the present application and seek clarity about the availability of frontage on Clark Lane from the Land Court and/or the Board of Survey.¹ Applicants declined the invitations and insisted on a full hearing before the Planning Board and a decision on their application. The public hearing closed on November 5, 2020. This is the Planning Board's decision.

After due consideration and for the reasons explained below, the Belmont Planning Board (the "PB") denies the present application (the "Plan") for Design Site Plan Review ("DSPR"). The applicants have not established that the Plan is in compliance with the Belmont Zoning By-Law (the "ZBL") with respect to frontage, there is no variance being sought and the application is therefore denied. This denial is without prejudice to a new application, should the circumstances concerning frontage change materially, e.g., by Land Court decree and/or determination of the Board of Survey.

The Plan also does not meet the requirement that the Plan be of an appropriate scale and height. While it may be possible to address this through discussion and revision (as the PB

¹ The Board of Selectman currently also serves in the role of the Board of Survey under G.L. c. 41, § 73, for the purpose of approving new private ways.

has done numerous times before), the PB does not believe that doing so before issues related to frontage have been resolved would be productive. In the event that the Applicants can establish frontage in compliance with the ZBL, the PB would be happy to entertain a renewed application and discuss whether and how it may be possible to alter the design in a manner the PB would approve.

This Decision and Opinion is not intended to determine or alter the legal or equitable rights of the Applicants and abutters with respect to Clark Lane (or otherwise), is not intended to prejudice any party in a future proceeding, and is specific to ascertaining only whether the Applicants have demonstrated in the present application that the Plan is in compliance with the ZBL. They have not.

I. Background

Below are the facts presented to, and ascertained by, the PB. In reaching these conclusions, the PB has received and considered a tremendous volume of material supplied mostly by the Applicants over a number of years as well as materials provided by certain abutters in connection with this application.²

The application concerns properties in proximity to Clark Lane:³

² Failure to mention a document or fact in this opinion does not mean that such was not considered by the PB. Citation of a record is also not intended to convey a determination that this record is reliable or relied upon, without more.

³ The image for the subject lot reproduced above is from the original application. The PB is mindful that Applicant has sought to redraw property boundary lines from the original submission and this will be discussed below. Use of the original drawing is only for establishing terminology and is not intended to convey anything more.



The above shows a rough approximation of the location for the Plan on a Google satellite image of Clark Lane, with the upper lot (1A) outlined in white being the subject of the Plan for DSPR.

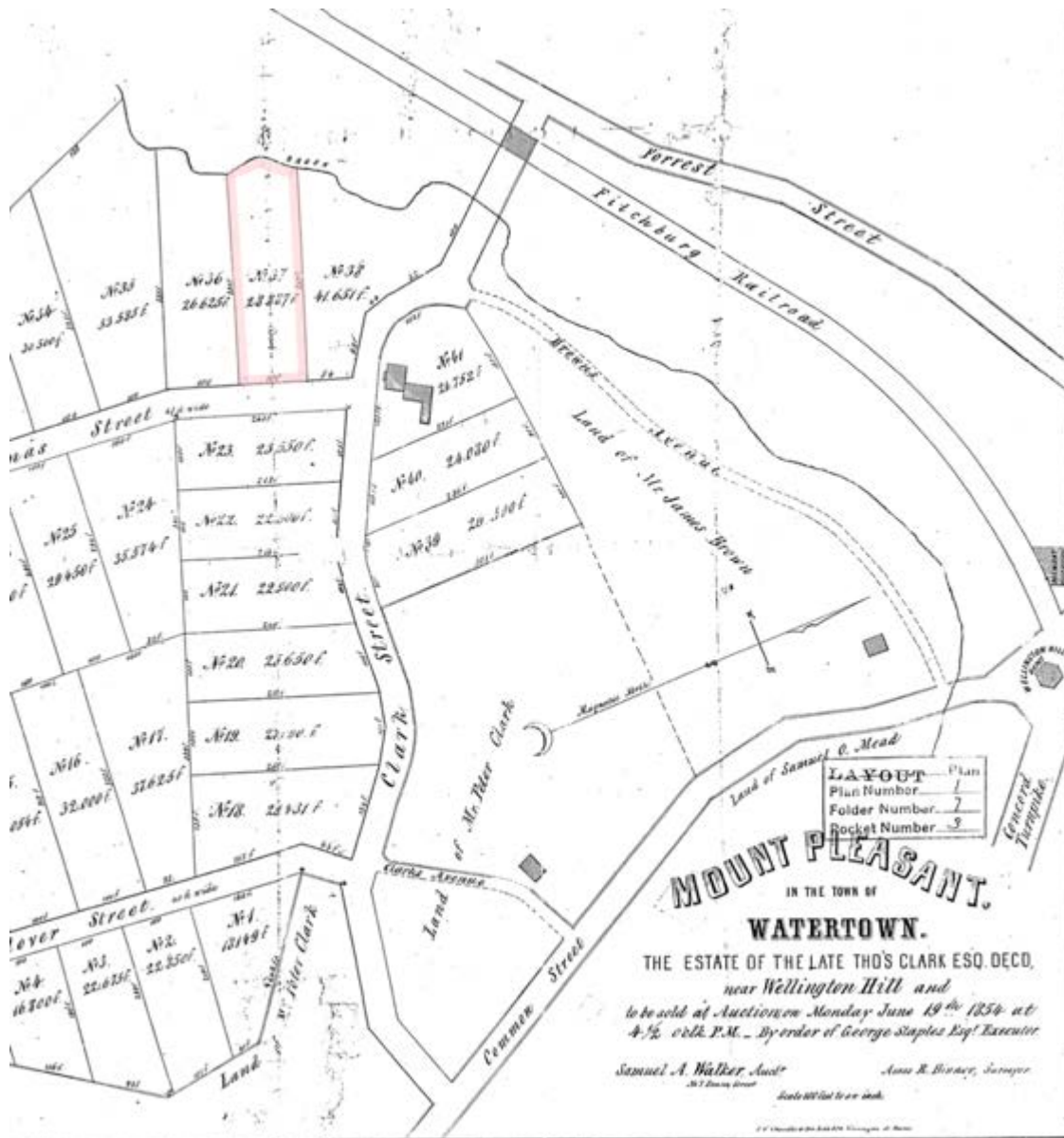
The lots on the Railroad/Pleasant Street side will be referred to as the lots on the “Pleasant Street side” or the “interior lots,” as these lots are landlocked in the absence of Clark Lane. The lots across the Lane will be referred to as on the “Thomas Street side” as all of them have frontage on Thomas Street, at least before the proposed subdivision.

The present application seeks (among other things) a determination that Clark Lane serves as frontage for a (subdivided) lot (Lot 1A) on the Thomas Street side.

A. Clark Lane

1. Early documents (up to 1980)

The first document (chronologically) is an 1854 map showing the estate of Thomas Clark, Esq. “to be sold at auction” (Plan No. 1, Folder No. 7, Pocket No. 3):



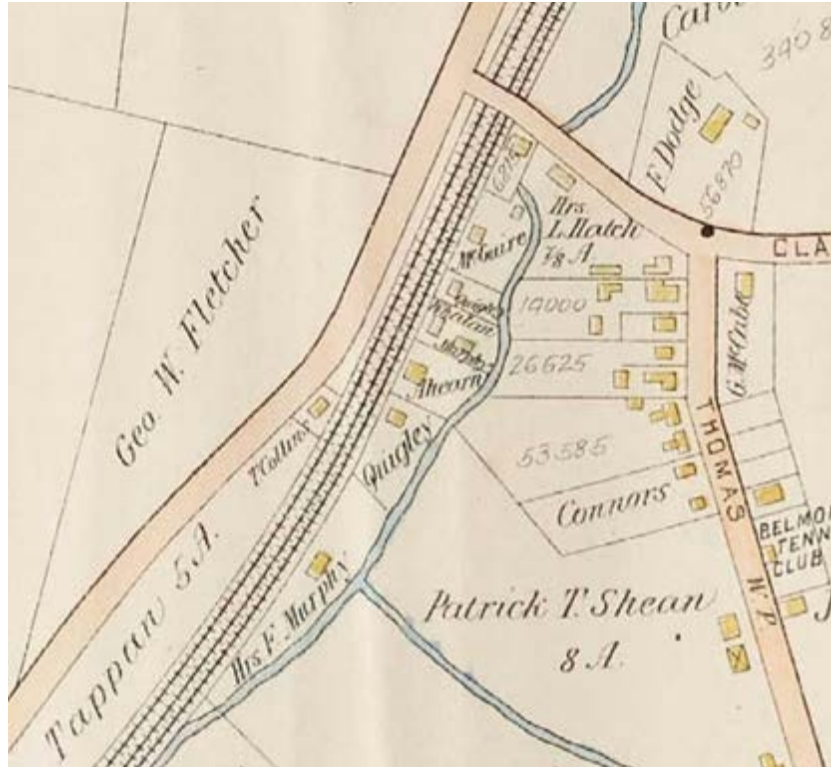
The Applicants also provided a deed to Lot 37, describing the above as a subdivision plan. To the extent it is one, it subdivides lots on the Thomas Street side of Wellington Brook, with the only frontage being on Thomas Street, no frontage on the brook and no indication of the existence of Clark Lane.⁴

⁴ The deed actually does not recite the center of the brook as a boundary. Rather, the property line runs "to the brook" and then "on" it. The Binney deed runs "to a stake at a brook." Presumably the stake was at or near the edge of the brook, not at its center, leaving in question

Apparently, the origin of Clark Lane was in the 1880s and it: (i) was for access to the interior lots of Clark Lane and not the Thomas Street side and (ii) was a result of a subdivision of (six houses on) the land on the Pleasant Street side of Clark Lane and not the Thomas Street side. Clark Lane was not officially recognized by Belmont at that time.

[illegible]

what it means to then run “on” (the edge of?) the brook. There is no need, however, to resolve whether the boundary was at the edge or center of the brook at that time in order to decide the present petition for DSPR.



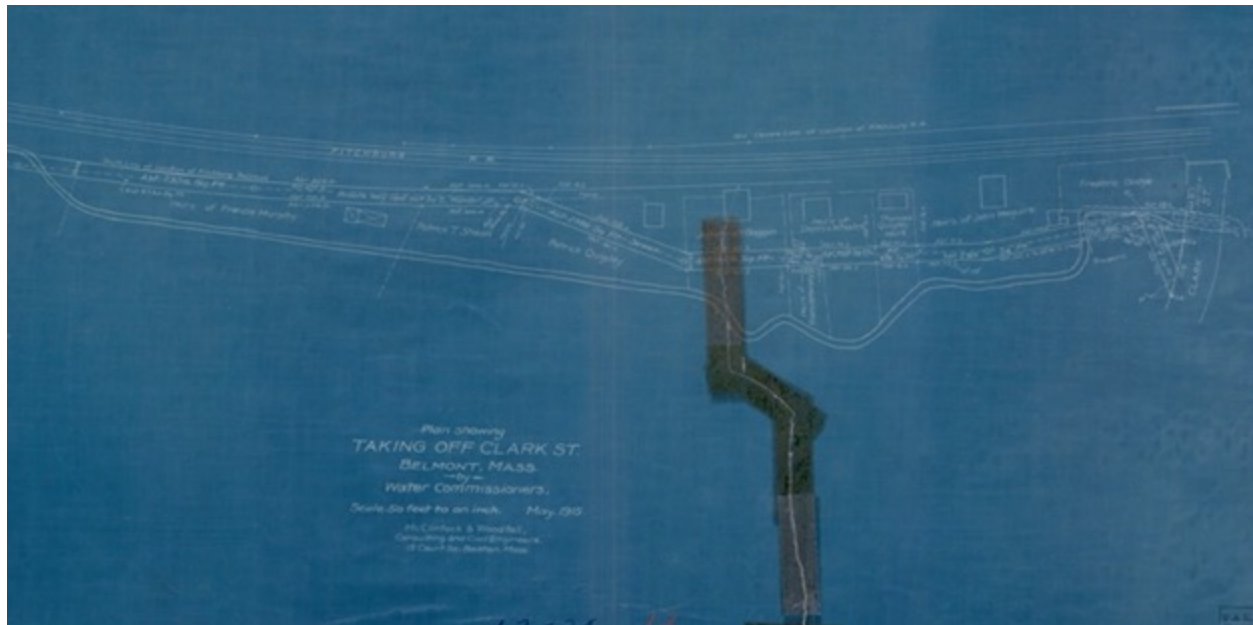
These maps show Wellington Brook and also properties with buildings on the Pleasant Street/interior side, with no access to those lots from Pleasant Street due to the railroad. Clark Lane is not shown (presumably because it was not recognized by Belmont), but must have existed for access to the houses shown on the map.⁵ From this, it is apparent that:

- (i) Sometime between 1854 (or perhaps 1886) and 1898, the land on the Pleasant Street side of Clark Lane was subdivided into lots whose only access was Clark Lane.
- (ii) A brook still existed after Clark Lane was initially created, preventing access from Clark Lane to the Thomas Street side of the brook and (given that the relevant deeds seem to convey no farther than the center of the brook), establishing that Clark Lane at its inception was entirely within the lots on the Pleasant Street side

⁵ At the November 5 hearing, Applicants seemed to suggest without further support that access to the interior houses could have been by driving across the railroad tracks. Such a claim is inconsistent with common sense, the history above, and the plan itself which shows that one or two of the six houses would not have direct access to Pleasant Street by crossing the tracks – they would have to drive along the tracks on the way. The willingness to advance such theories without support is, to be blunt, concerning.

of the brook and that the lot boundaries on the Thomas Street side ended short of reaching Clark Lane.

The next document provided is a 1915 document concerning a sewer easement, on the Pleasant Street side of the brook:



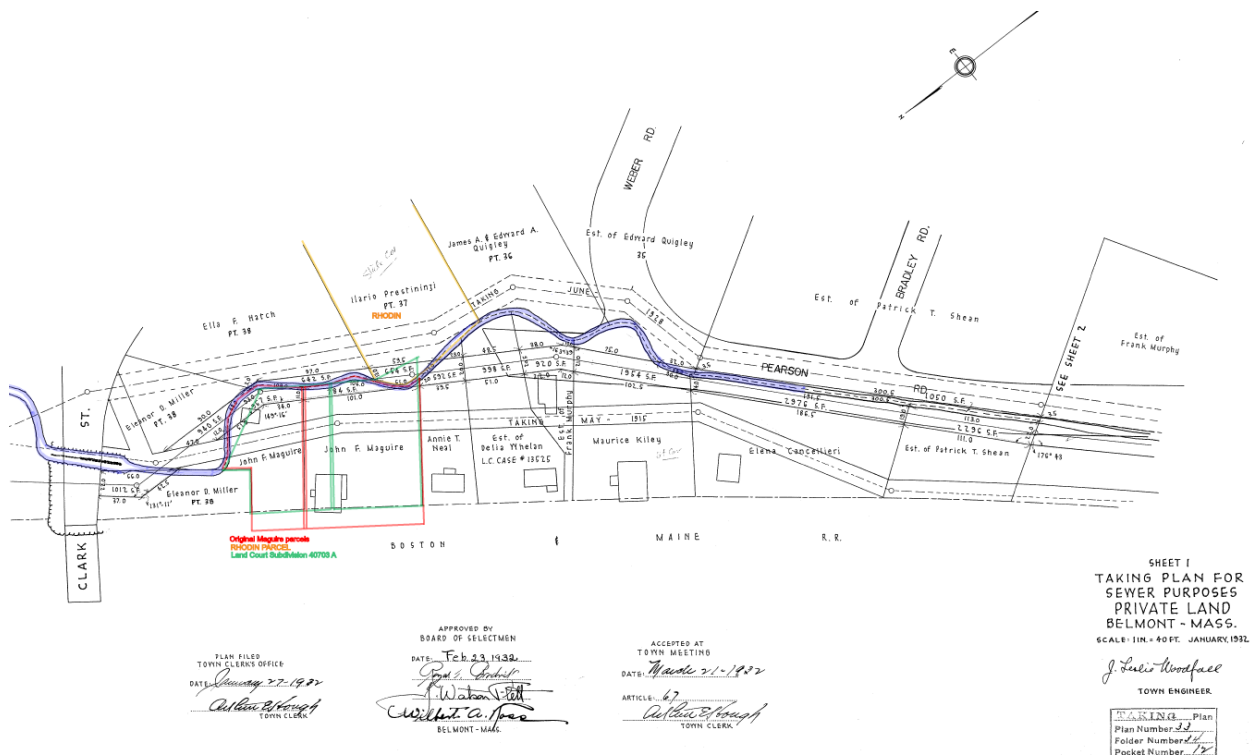
As before, this map appears to show that the only access to the interior lots must have been provided by Clark Lane (not shown) and that the brook prevented access to the Thomas Street side from Clark Lane.

Also apparent from the above is that the shape of the brook is materially different than the 1854, 1898 and 1900 documents (which also may not be consistent among themselves).

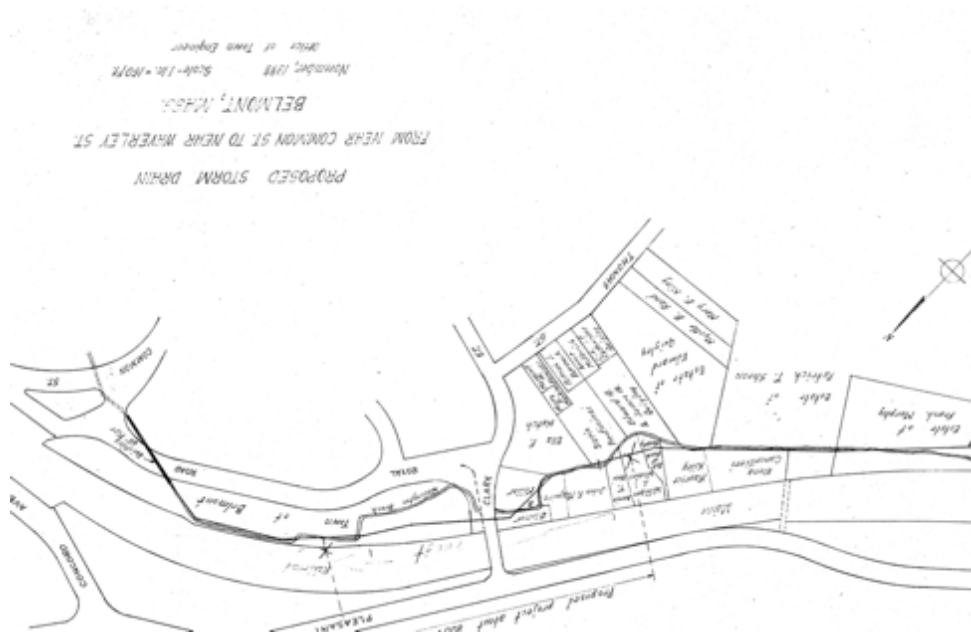
The next documents are from the 1930s. 1931:



1932 (taking plan for sewer easement on Thomas Street side of Clark Lane – notations and coloring added by Applicants):



1933 (storm drain plan):



The following is again apparent from these drawings:

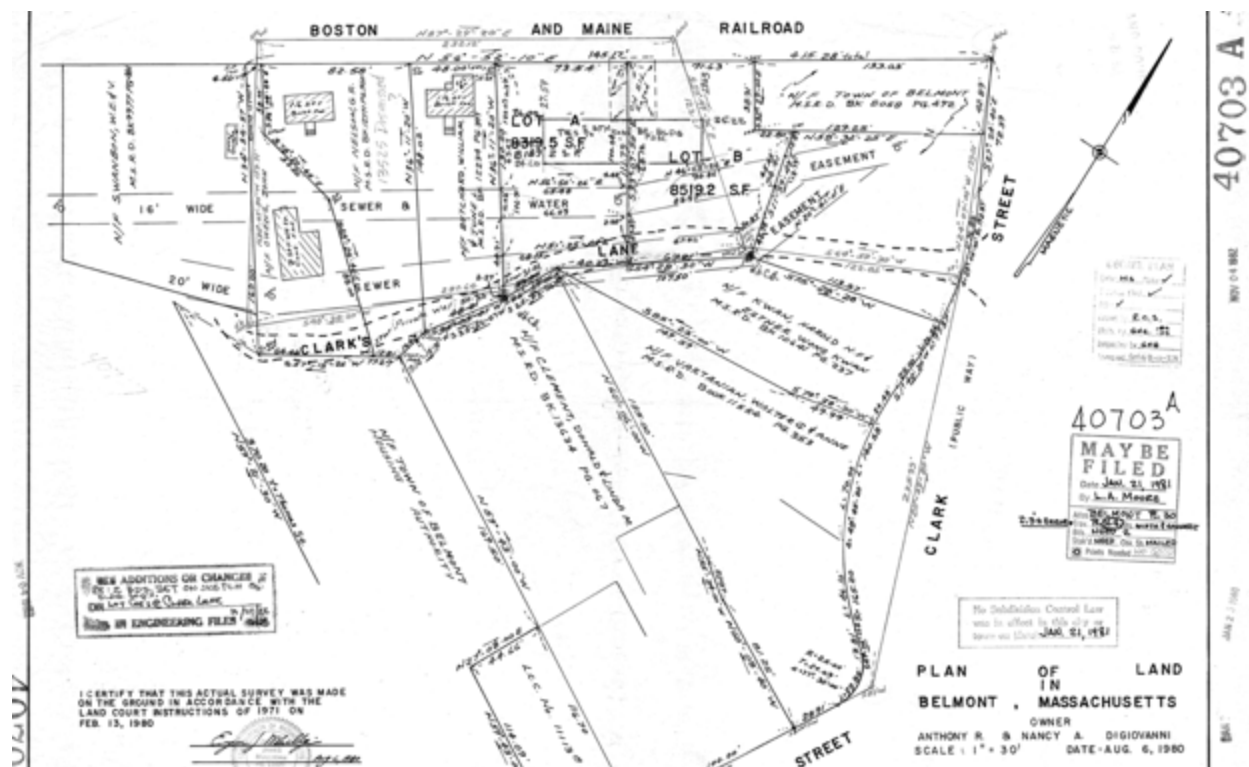
- (i) The shape of the brook in the 1915 and 1932 sewer easement documents are consistent but also materially different than the 1931 and 1933 drawings which seem consistent, which are different than the 1898 and 1900 drawings which are consistent, which is different than the 1854 drawing. In short, any one or two of these documents is of dubious value in ascertaining the actual location of the brook at any singular point in time at least so far as a DSPR application is concerned.
- (ii) Into the early 1930s, Clark Lane appears to have continued to provide the only access to the Pleasant Street/interior side of the brook, was located within the properties on that side, did not provide access to the Thomas Street side due to the brook (and probably the need to pass over land on the interior lots between Clark Lane and the brook) and the property lines of the Thomas Street side stopped in or before the brook and therefore did not extend to Clark Lane.

None of the above maps show Clark Lane. According to Applicants, the brook was filled in at some point in time and Clark Lane was located over the brook. This may not be entirely accurate. It appears that the 1932 plan above involved a sewer easement for construction of an underground culvert, into which the Wellington brook was diverted. Prior to that work, Clark Lane must have existed only on the interior lots and provided access only to those lots. When asked, Applicants were unable to provide a suggestion of when Wellington brook was

filled in (as Applicants suggested) or diverted underground. Applicants have submitted no explanation of when/where/why/how the location of Clark Lane may have changed after or as a result of this work.

2. The DiGiovanni subdivision (early 1980s)

In 1980, the DiGiovanni's sought to subdivide a lot on the Pleasant Street side of Clark Lane, in order to allow the razing of an existing (and apparently hazardous) structure and the building of two new houses on the subdivided lots. Apparently, everyone believed that Clark Lane did not provide frontage even for the lots on the Pleasant Street side interior lots and that continued access to the subdivided lots over Clark Lane was not guaranteed. The following drawing was prepared:



Clark Lane is shown running from Clark Street over Town property, then over the DiGiovanni's land which was proposed to be divided (Lots A and B), and on from there.⁶

In September 1980, the DiGiovannis requested a variance to allow construction on the subdivided lots, without the requisite (or any) frontage. A hearing was held on September 8, 1980. After the hearing, on September 9, counsel for the DiGiovannis wrote a letter addressing a concern expressed at the hearing that the DiGiovanni's did not have a continuing right to pass over the Town property (on Clark Lane) to get to their lots from Clark Street. Counsel stated:

The neighbors have pretty well agreed to the lot lines and delineation of Clark's Lane as shown on the plans submitted to the Board of Appeals. It is planned to submit to the Land Court a petition to register title to the DiGiovanni land. In the course of the registration proceedings the Court will undoubtedly determine the status of Clark's Lane and any rights in it. In my opinion, the interior lots have at least ^{an} ~~one~~ easement by proscription, and in most cases an outright grant of a right of way.

That is, the letter indicates that Clark Lane provided access to the Pleasant Street side of Clark Lane (the "interior lots"). There is no suggestion of a right of way for the Thomas Street side lots.

The letter went on to say:

⁶ These will be referred to as the DiGiovanni lots. During the pendency of the land court case, the land was transferred to the Auterios and they were substituted into the Land Court case. For convenience, these lots will simply be referred to as the DiGiovanni lots irrespective of actual ownership at any particular time.

The Board of Appeals member was concerned that at some time the Town might shut off access for the interior lots over Lots 9 and 10, the town owned land. He suggested that he would be more comfortable with the situation if the Board of Selectmen would give to the DiGiovannis a letter granting them the right to pass over the Town property. It was suggested that I request such a letter.

On consideration, if the Selectmen are amenable to this suggestion, such a letter should run to all of the lots fronting on Clark's Lane. If you are willing to do so, I would be happy to cooperate with the Town Counsel in preparing such a document.

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The letter indicates a couple things. First, in 1980, there was a question as to whether *anyone* had the *right* to travel over Clark Lane at all. Second, at that time, a claim was being made of a right to access only for the interior lots and a letter was requested for guaranteeing access either for the DiGiovanni lots alone or with the remaining (interior) lots. Having been asked, Applicants have not provided evidence of whether such a letter was given, but to the extent one was, it appears unlikely that the granting of a right to pass over Town property or the DiGiovanni lots was granted to any lot on the Thomas Street side of Clark Lane at that time or any time after.

On September 26, the Belmont Zoning Board of Appeals (“ZBA”) granted the variance, to build without frontage. The ZBL at that time defined a street as:

1.4.21 Street – Any public way; also any private way commonly used by the public and having a right-of-way width of 20 feet or more.

⁷ Applicants appear to suggest that the last paragraph indicates a desire to guarantee access to lots on the Thomas Street side as well as the “interior lots”. That is not how the PB interprets this letter. The context – reference exclusively to access by the interior lots – indicates that the request was for all of the *interior* lots and not the lots fronting on Thomas Street. In any event, Applicants have not claimed the benefit of any such letter or easement granted by the Town in or after 1980.

The ZBA noted that the way may have only been 16 feet wide. It also noted that there were “serious and substantial questions” about the ownership and location of Clark Lane.

The ZBA did *not* conclude that Clark Lane qualified as a street or provided frontage. Rather, it was taken as a given by all involved that Clark Lane did not. This may be for one or more of a few reasons: doubts about location/ownership, inadequate width (16 feet) or use by the public.⁸ The Board granted a variance allowing building on the lots in the absence of any frontage, motivated in substantial measure by the desire to raze the existing hazardous structure and construct a safety fence between the lots and the railroad. Finally, the Board required that every effort be made to resolve the property boundaries and rights in Clark Lane with the understanding that a petition was going to be filed in Land Court.

In short, if anything, the decision granting a variance indicates that Clark Lane, as depicted in plan 40703A, was not considered to be a private way that qualified for frontage for the DiGiovanni lots, notwithstanding the “Private Way” label on the plan and that the plan showed Clark Lane as passing over and almost entirely within the DiGiovanni lots. Given the decision (which was recorded and referred to by the Land Court as discussed below), the ZBA qualified the label of “Private Way” on the 1980 plan as subject to serious and substantial doubt about location and ownership and that this was not a “private way” that qualified to serve as frontage for any lot, for purposes of the ZBL at that time.

⁸ At least one owner of an interior lot has contended that Clark Lane is a shared driveway. Much of the submitted material is consistent with that contention, e.g., referring to Clark Lane as a “way” without more. The 1983 affidavit from Richard Betts submitted in the Land Court case addresses use by the DiGiovannis and does not address whether the use was common or public. The materials also do not necessarily support status as a shared driveway. The PB is not suggesting a view on that issue.

The DiGiovannis then filed a petition in the Massachusetts Land Court concerning the subdivision of the lots and the property boundaries. The only materials Applicants have provided related to these proceedings are the submitted map (shown above) and the final decree. To the extent there are relevant materials submitted by the petitioners or abutters or any explanatory material provided by the Land Court, these have not been provided.

The decree seems to identify the boundaries of the two (subdivided DiGiovanni) lots as what is subject to the decree. For Clark Lane, the decree states:

So much of the land hereby registered as is included within the limits of said Clark's Lane is subject to the rights of all persons lawfully entitled thereto in and over the same; and there is appurtenant to the land hereby registered the right to use said Clark's Lane, to and from said land and Clark Street, in common with all other persons lawfully entitled thereto.

The decree thus appears to establish the boundaries of the DiGiovanni plots, access from the DiGiovanni lots to Clark Street, and identification of Clark Lane within the land “hereby registered,” i.e., Clark Lane within (and not outside) the DiGiovanni lots. The decree does not impact rights (if any) beyond the DiGiovanni lots and certainly does not declare what persons or lots have rights to go over Clark Lane beyond the two DiGiovanni subdivided plots. A partial copy of the submitted plan specifically notes that “abutters are not adjudicated”.

The decree goes on to observe that:

The land hereby registered is affected by a Decision of the Board of Appeals of the Town of Belmont, a copy of which is duly recorded in Book 14163, Page 222.

As noted above, that decision allows building on the lots even though it was agreed and noted that Clark Lane did not provide frontage (for zoning purposes) for those lots, presumably because Clark Lane was not a *qualifying* private way.

A subsequent Land Court petition was filed for a lot near the end of Clark Lane (owned by Owens), also on the Pleasant Street side, using a similar map labeled with Land Court case number 40767A. Apparently, the petition was dismissed. While Applicants did provide this plan, the circumstances of the filing in Land Court and reasons for dismissal remain unexplained and Applicants no longer appear to rely on this document.

B. The pending application and proceedings related to it

Apparently, Applicants filed a similar petition for DSPR in 2015 which was withdrawn when doubts were raised about frontage on Clark Lane. What ensued was a lengthy conversation with Belmont’s Office of Community Development.⁹ As noted below, after all this time and aware that there were issues about ownership and frontage, Applicants renewed their

⁹ Applicants seem to rely on communications with Town Counsel and the Office of Community Development (“OCD”) concerning Clark Lane as though they were somehow determinative of the outcome. They are not. First, the communications were *ex parte* and unappealable. They were thus at most current opinions, subject to change and could not be binding. Applicants characterizations of the communications also overstate the discussion – which generally encouraged Applicants to resolve matters in the Land Court. The letter from OCD, for example, states that it is based on the information provided (*ex parte*) by the Applicants. These proceedings have included more information than that. At the November 5, 2020, hearing, Applicants told the Board that Town Counsel had opined that “the Land Court plan establishes that Clark Lane meets the third-part of the definition of ‘street’ in the ZBL” – omitting that this phrase in the email was prefaced with “So let’s assume, for the sake of argument...” It was not an opinion at all. But again, even if it were, we have now examined more material than was available at the time, which is the very nature and purpose of a public hearing on the matter. The opinions expressed here were reached after lengthy discussion with Town Counsel and OCD and are based on considerations and documents not made available before.

application with a plan that they now contend was in fact erroneous with respect to property boundaries. Applicants have submitted a revised plan.

For the initial DSPR, Applicants used a plot plan that showed boundaries seemingly identical to those shown in the plan submitted to the Land Court. After discussion of whether Applicants could show rights of access to Clark Lane, Applicants submitted a revised plan which altered the boundary lines of their property, claiming to own more property than was shown in the original petition. To do so, Applicants took the 1915 sewer plan above, superimposed it onto the plan submitted to the Land Court, then claimed ownership of the land up to the center of what the 1915 plan showed as the location of the brook. This was done to support a claim that Clark Lane passes over Applicants' property. (Images reproduced below.)

In addition, Applicants submitted materials intended to show that they have acquired prescriptive rights to Clark Lane, going back to claimed adverse use as early as the 1980s. When asked whether such use was with permission, Applicants did not at first directly answer the question. The claimed use was for parking cars for storage, parking a boat for storage, and for construction access. Certain of the Clark Lane abutters contest the existence, scope and nature of the claimed adverse use.

II. Zoning Bylaw

This opinion does not address whether (among other things) Clark Lane is a private way in any general legal sense. One purpose of DSPR is to assure compliance with the Belmont Zoning Bylaw (the "ZBL"). (ZBL 7.3.1.) Here the PB is only applying the ZBL and its definitions to ascertain whether the Applicants have satisfactorily shown compliance.

The ZBL in its current form was adopted in 1988 and has been amended from time to time. Two definitions are relevant for determining frontage. Lot frontage is defined as:

Lot Frontage - The boundary of a lot on land coinciding with a street line if there are both rights of access and potential vehicular access across that boundary to a potential building site.

A “street” is defined as Either:

- a) a public way or a way which the Town Clerk certifies is maintained and used as a public way, or
- b) a way approved by the Board of Survey, or
- c) a private way that has been and is continually used as a means of vehicular access to the lots fronting on it provided said private way is shown on a subdivision plan recorded prior to September 21, 1988.

At first glance, the specification of “shown on a subdivision plan recorded prior to September 21, 1988” is curious. Apparently, this is the date that the new, restated ZBL went into effect. That indicates that the ZBL wanted to rely on public ways and those that have gone through certification (and therefore meet certain size and safety requirements) going forward. Private ways are grandfathered in, but only if shown in a subdivision plan that was filed before the new ZBL went into effect. Subsequent subdivision plans (and any others) presumably require approval of private ways under subsection b.

One concern with the ZBL definition (c) is that Belmont has not subscribed to the Massachusetts subdivision control law. A consequence is that there is, arguably, no such thing as a recorded subdivision plan for Belmont and subsection (c) therefore refers to an impossible document or an “empty set.”

The PB does not adopt that interpretation as the ZBL contemplates that something will meet this definition. The consequence, however, is that “private way ... shown on a subdivision plan” needs to be interpreted to give effect to its purpose in the ZBL.

To give meaning to “subdivision”, not any recorded plan will do. Rather, to be a subdivision plan, the plan must be recorded and the (objective) purpose must be to effect a subdivision with a private way in the subdivided property. Any other definition would allow a subdivision plan to determine rights beyond what the recorder has the ability to convey and beyond the purpose of the recording. The ZBL allowed recorded subdivision plans to define rights of way right up until the new ZBL became effective. It would be unreasonable to conclude that the ZBL intended to allow a person purporting to subdivide their property just before the effective date of the new ZBL to effect changes to the legal status of ways beyond or outside the limits of the property affected by the recorded subdivision plan.

In addition, if simply recording a subdivision plan showing a private way *outside* the subdivision were enough without more to establish a private way *outside the subdivision*, there is no principled reason to restrict private ways to be only those shown on previously recorded *subdivision* plans as the ZBL provides. Something shown on a subdivision plan that is outside the subdivision has no more indicia of reliability than a private way shown on any other plan.

The Owens plan demonstrates the point. The Owens plan is nearly identical to the DiGiovanni plan. The subject of the recordation of the plan, however, appears to be recordation of transfer of the Owens property. This is plainly not a subdivision plan.¹⁰ There is

¹⁰ One might argue that the Owens plan shows the DiGiovanni subdivision and is therefore a subdivision plan. Such an argument would be rejected. Every plan showing multiple lots in Belmont is showing property that was subdivided at some point in time. If that made the plan a

no principled reason to accept the DiGiovanni plan as showing a private way *outside of the DiGiovanni subdivision* while at the same time rejecting the same plan when filed by Owens because it is not effecting a subdivision.

We also need to determine what “*private way ... shown on a subdivision plan*” refers to. A primary function of the definition of street is to determine what qualifies as frontage. For example, if a subdivision plan shows a private way single lane road which did not qualify as a street before the amendment to the Bylaw, that single lane should not be converted into a “street” that provides frontage after the amendment. The intent of the amendment of the ZBL was not to extend the definition of a street to create new frontage where none existed before amendment to the ZBL. Such a result would be anathema to the idea of grandfathering in pre-existing private ways, as it was not a *qualifying* preexisting private way before amendment of the ZBL.

Put another way, if a private way did not qualify for subdivision frontage before the amendment to the ZBL and there is no certification by the Board of Survey after amendment, allowing conversion into a qualifying private way would be to essentially remove all previous and post-amendment safety and access requirements for any and all private ways that happen to be shown in a subdivision plan. Such a result would defy both common sense and the purpose of the amendments to the ZBL.

“subdivision plan,” then every plan is a subdivision plan and the word “subdivision” becomes meaningless. Just as “subdivision” plan was not intended to refer to an empty set because Belmont did not adopt the subdivision control law, “subdivision plan” was also not intended to refer to all plans.

Rather, if one wished to change a *nonqualifying* private way into a street after the ZBL was amended, one should seek certification of the private way by the Board of Survey to assure (among other things) that the private way is safe – in agreement with an apparent purpose of the amendment to the ZBL which requires Board certification for private ways in and outside subdivisions after 1988.

In sum, to qualify as a “street” for purposes of frontage, by being grandfathered-in as a “private way... shown on a subdivision plan,” the private way needs to have been one that qualified to serve as frontage in the subdivision effected by the plan. Such would be required under the subdivision control law and under any “subdivision plan” for which building in the subdivision could be permissibly done before the 1988 amendment to the ZBL.

III. Further Analysis

A. Private Way

Clark Lane certainly came into being in association with subdivision of land – specifically the original creation of six otherwise landlocked lots on the Pleasant Street side of Clark Lane, in the late 1800s. Plainly the purpose of Clark Lane at its inception was to provide access to those subdivided lots and only those lots. There is no recorded plan identified to date, however, purporting to show the creation of such a subdivision with Clark Lane as a private way providing access to those lots being subdivided.

The early plans (1898 through at least the early 1930s) do not show Clark Lane, but they do show the houses and, assuming that the brook was still there as shown on the maps and as Applicants agreed at the November 5, 2020 hearing, Clark Lane sat entirely on the Pleasant Street interior lots, and could not be used for access to the lots on the Thomas Street side due

to the presence of the brook and the need to travel over Pleasant Street side land between the brook and lane. In fact, while the brook existed, the property boundaries on the Thomas Street side stopped in the middle of the brook (according to Applicants), short of the location of Clark Lane which was on the other side of the brook. The Thomas Street lots therefore were not originally “on” Clark Lane at all.

The only document Applicants have provided, that could qualify as a “subdivision plan” showing a private way, is the DiGiovanni plan (labeled 40703A) filed with the Land Court. (Arguably this was registered rather than recorded, but we assume either to be sufficient.)

These documents may very well establish Clark Lane as providing DiGiovanni Lots A and B with a right of access over Town property to Clark Street. That (and no more than that) is what the Land Court decreed. That is also not the issue before the PB.

Viewed in context and based on the materials provided, plan 40703A does not establish that Clark Lane is a “private way” cognizable as a “street” under the ZBL at all. Applicants reasonably place reliance on the label “Private Way” on the drawing. That label, however, must be read in conjunction with the September 1980 Zoning Board opinion (which is recorded and specifically referenced in the Land Court’s decree) which says in no uncertain terms that Clark Lane is not a qualifying private way for the DiGiovanni subdivision even though it runs over the DiGiovanni property.¹¹ The opinion also notes the “serious and substantial” doubts about

¹¹ “The words ‘private way’ include ‘defined ways for travel, not laid out by public authority or dedicated to public use, that are wholly the subject of private ownership, either by reason of the ownership of the land upon which they are laid out by the owner thereof or by reason of ownership of easements of way over land of another person.’” Barlow v. Chongris & Sons, Inc., 38 Mass. App. Ct. 297, 299 (1995), quoting Opinion of the Justices, 313 Mass. 779, 782-783 (1943). The use of the label “private way” on a plan is not determinative of who, if anyone,

ownership and status of what is shown on the plan. As explained above, Clark Lane was also too narrow to serve as a private way qualifying as a “street” before the 1988 amendment and likely too narrow to qualify for certification afterward. To conclude that the 1988 amendment to the ZBL approved for frontage unqualified, uncertified narrow right of ways simply would make no sense.

The Land Court resolved the “serious and substantial” doubts about Clark Lane *but only up to the far end of the DiGiovanni lots* – for the most part, before Clark Lane passes by the lot that is the subject of this DSPR. The Land Court specifically had the plan altered to make clear that abutters were not adjudicated. As a result, the purpose of the petition and plan was not to create a subdivision anywhere other than those two DiGiovanni lots, which lots (and only those lots) were noted as having access to Clark Street by way of Clark Lane.

In addition, as noted by reference in the Land Court decree itself, it had been determined by the ZBA that Clark Lane did not provide frontage for the DiGiovanni lots over which Clark Lane ran, presumably because it was not viewed as a private way which qualified for frontage (because it was too narrow and/or because its location and status were in doubt). To the contrary, a variance was required to allow building in the absence of frontage, along with a Land Court determination of boundaries and access rights, all specific only to that DiGiovanni property.

To then turn around and conclude that this very same document, which was insufficient to establish frontage in 1980 for the DiGiovanni property (or anywhere else) and which

holds the rights to use it, or any rights that attach to it under zoning. As indicated in Barlow, a common driveway can be considered a “private way” for some purposes.

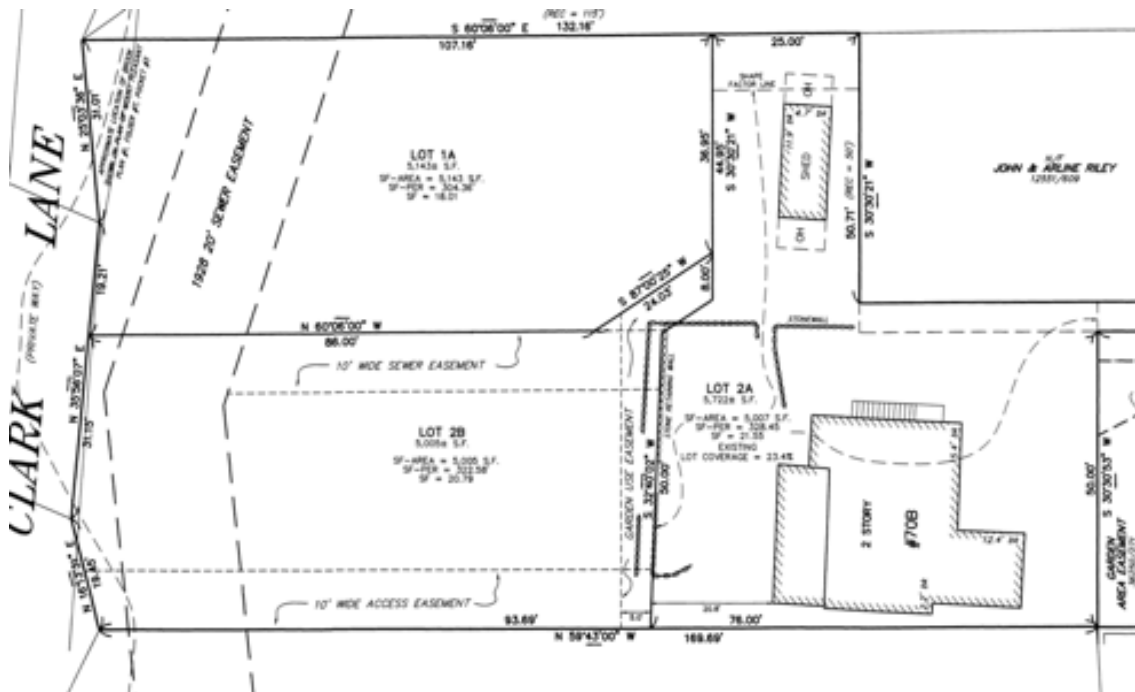
required a Land Court decree to finalize location and right of access for the DiGiovanni lots, nevertheless in 1988 creates grandfathered in private way frontage along the *full length* of Clark Lane on *both sides* would be to twist the document and its registration so far outside their purpose and scope as to lack any sense of legitimacy. That is not what the ZBL contemplates.

B. Right of access.

Even if Clark Lane is a private way under the ZBL, Applicants would have to show rights of access. In general, a right of access can be created by deed or by prescriptive easement.

1. Deeded access

As noted above, Applicants original submission showed Clark Lane as almost entirely on the properties on the Pleasant Street side of Clark Lane, which would generally lead one to infer that the right of access is (at most) only to those interior properties.



When this is coupled with the absence of any deed on the Thomas Street side referring to access to Clark Lane and the lack of any deeded easement for the subject lot to travel over

Town or DiGiovanni property, and the apparent need in 1980 for a Land Court determination providing such for the DiGiovanni lots, one would immediately think that there would be no claim of deeded access.

Applicants however submitted an amended plan seeking to claim ownership of more land than they had before, by assuming that the 1915 plan correctly identified the location of the brook for purposes of establishing property ownership at some unspecified, but whenever may be relevant, later date:¹²



This map does not show Clark Lane. If it did, presumably the lane would be entirely on the interior lot side of the brook and could not serve as frontage for the Thomas Street side.

Applicants then project that 1915 drawing of the brook into the future to produce this:

¹² At the public hearing on November 5, 2020, Applicants claimed that the new map was generated from the brook location on the 1854 map. This seems to be in error as this image

The submissions only further the conviction that this is not an issue for the PB to resolve.

At the hearing on November 5, 2020, the surveyor who prepared the original and revised drawings acknowledged that the brook locations on the 1915 and 1931-33 plans were in fact differing, saying that this was likely because the sewer/storm water plans were not intended to be precise as to location of the brook. With that, the entire premise for the redrawn plan (accuracy of the location of the brook in the 1915 sewer plan) falls.

Obviously, the Land Court did not adopt such an approach. According to Applicants, the Land Court determination of boundaries for the DiGiovanni lots was therefore wrong, albeit now binding.

The PB declines Applicants' invitation to declare that the Land Court erred. Arguments premised on Land Court error should be addressed first to the Land Court.

Perhaps the more troubling part of Applicants' argument is that, to make the argument, Applicants have to take the position that the very document that they seek to rely on as a "subdivision plan" (40703A) is also very wrong and should be disregarded for anything other than the actual DiGiovanni adjudicated lots. While Applicants are right to suggest that the other parts of the plan should be disregarded, that is also *the very reason that this document cannot serve as a subdivision plan that establishes a private way outside the DiGiovanni lots.*

In addition, the redrawn lines create a mess. With a shared private way, the way is generally owned to the center point by each neighboring lot. The redrawn lines do not do this.

Finally, the origin of Clark Lane shows that it was entirely on the Pleasant Street side (interior) lots and was intended only to serve them. The present effort to establish a right of way through plot plan gymnastics is not sufficient to establish *deeded* access rights, for purposes of the PB determining compliance with the ZBL.

To the extent the Wellington brook was later filled in (or diverted into a culvert) and Clark Lane later encroached on what had been or is Applicants' land, that would *at most* be a later trespass onto that land. It would not (without more) create a right (let alone deeded right) for Applicants to use the length of Clark Lane as their own deeded private way. Thus, assuming that Clark Lane was later adjusted to pass over Applicants' property, that would not

(without more) cause a deeded easement to spring into existence to the Applicants' lot over the Town lots and the DiGiovanni lots, none of which use Applicants' (claimed) part of Clark Lane in their own ingress and egress from Clark Street.

That is not to prejudge any ultimate conclusion a judicial body might reach. The PB is not a court. What is plain from the changing submissions and many plans and documents submitted to the PB is that this should be resolved in the first instance by a court and, as the ZBA did in 1980, the PB will not recognize Applicants as having shown compliance with the ZBL's frontage requirements in the present circumstances.

2. Prescriptive easement

The PB declines to consider this contested case of prescriptive easement. The ZBL contemplates certainty for frontage by Town clerk certification, certification by the Board of Survey or a previously recorded subdivision plan. Even to recognize a shared driveway, the ZBL requires a recorded easement. Resolving disputed cases over the existence, scope and nature of an undocumented (by deed or court order) easement is not what a PB should do and not what the ZBL calls for.

We also observe that the claimed prescriptive easement may not have arisen until after the year 2000 (20 years of qualifying, continuous use). To conclude that a 1980 (allegedly erroneous) document created a grandfathered private way as of 1988 (even though it did not qualify as such before 1988), for which a right of access (and therefore frontage) sprang into existence for Applicants in 2000, long after the period being grandfathered, would be illogical and is not what the ZBL could reasonably contemplate.

Finally, even assuming there is a prescriptive easement, it is not at all clear that the asserted existing auxiliary use for a house with frontage on Thomas Street would create an easement of sufficient *scope* to cover an additional house on Clark Lane with no other frontage. Such a determination could be fact intensive and in all cases is better suited for judicial determination.

In short, in the absence of a judicial declaration or recorded easement, the PB declines to conclude that a genuinely disputed claim of right of access by prescriptive easement sufficiently demonstrates access rights for compliance with the ZBL, in the present circumstances.

C. Scale and Height

For the reasons explained at the November 5, 2020, hearing, the PB also finds that the scale of the Plan is not consistent with the other structures in the area. The TLA and FAR are unusually large for the neighborhood and the proposed structure is too massive to fit in generally, and specifically on the proposed subdivided lot. In addition, the proposed height (34 feet) is out of scale with the neighborhood (generally 30 feet).

The PB is accustomed to working with applicants to resolve such issues in a manner that meets the needs of the applicants, the needs of abutters and the Town interest in promoting reasonable development. In the event that the frontage question is adequately addressed by another body, we would invite the Applicants to reapply so that the PB has an opportunity work with them to try to get to “yes.”