



**Bernstein, Shur,
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Portland, ME 04104-5029

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Ann M. Freeman, Esquire
207-228-7121 direct
afreeman@bernsteinshur.com

January 29, 2016

Dave Goldberg, Chair
Falmouth Town Council
271 Falmouth Road
Falmouth, ME 04105

Via email (mtryon@falmouthme.org) and Regular Mail

RE: Consent Agreement pursuant to Falmouth Code Section 19.118.1: Mislocated
Single Family Dwelling Appeal

Dear Chair Goldberg:

Enclosed please find attached a Request for Consent Agreement filed by Petitioner Dale Bragg Builders for the property at 20 Preservation Drive owned by Andrew Golden. On January 26, 2016, the Falmouth Board of Zoning Appeals approved a Mislocated Single Family Dwelling Appeal pursuant to its authority under the Falmouth Code Section 19.118.1. At this time, we are requesting that the Council approve a Consent Agreement consistent with the requirements of this Section.

Attached to the application is the following:

- 1) Board of Zoning Appeals Notice of Decision
- 2) Property Survey showing the location of the mislocated dwelling
- 3) Authorization from Andrew Golden to represent his interests in this matter
- 4) Check in the amount of \$450 for the Application Fee (\$250) and Recording Fee (\$200)

A brief history of the property and the circumstances will make clear the reasons the Appeal was granted by the Board and the reasons the Council should approve a Consent Agreement. Dale Bragg Builders is the builder of the residential property at 20 Preservation Drive, also known as Lot 2 in the Foreside Woods Subdivision. The original plans submitted to the Town with the Building Permit Application in July 2015 anticipated a 23-foot setback on either side of the home, which exceeds the 20 foot

setback required in the zone. A building permit was granted for the building construction on July 24, 2015, and excavation of the foundation commenced.

The foundation pins were set by Dave Chase of Chase Excavating in his usual and customary manner. Mr. Chase reviewed the plans and the site, found the property stakes and felt comfortable with the information and offsets available for him to accurately site the foundation. In order to set the garage foundation, blasting was required. During the course of the blasting, the stakes were removed. Mr. Chase subsequently measured and re-measured the location of the garage using offsets as he normally would, consistent with his knowledge and experience. At no time during the course of setting the foundation was Mr. Chase concerned that the home was encroaching the setback.

After the foundation was set, the builder proceeded with construction of the home and the attached garage without knowledge of any violation. The violation was first discovered during the course of a mortgage inspection in September 2015. The surveyor for the mortgage company discovered that the outside edge of the garage was encroaching the 20-foot setback as indicated on the attached survey. At this point, the home had already been built.

Immediately upon discovering the mistake, Dale Bragg and Dave Chase went to the Town to report the violation and discuss possible resolutions. They explored the idea of redrawing the property boundary. Both Mr. Bragg and Mr. Chase worked closely with the abutting property owner, Paul Goldstein, in an effort to redraw the boundary line in a manner that would allow both properties to meet the setback requirements. In October 2015, the Planning Board approved a subdivision amendment which adjusted the lot line in a way that came close to fully resolving the setback issue. Although Mr. Bragg and Mr. Goldstein worked amicably through the process, the parties ultimately decided that redrawing the boundary between the two properties was not a viable option, and a better avenue to resolve the setback violation would be to apply to the Board of Zoning Appeals for relief pursuant to Section 19-118.1. Mr. Goldstein testified in support of the appeal before the Board of Zoning Appeals.

The application for a Mislocated Single Family Dwelling Appeal fully meets criteria a-d (below in **bold**) of the Ordinance as follows:

(a) **It would not serve the public interest to require the removal or relocation of the structure or the acquisition of abutting property.** The erroneous placement of the foundation for the garage by the excavation sub-contractor was an unfortunate and unintentional mistake on which the builder relied. Removing or relocating the structure in order to meet the setback requirements would not be in the public interest, particularly when, as here, the abutter is in support of this appeal.

(b) Allowing the structure to remain in its existing location would not be contrary to the public health, safety or welfare and would not unreasonably detrimentally affect the use or market value of the abutting property. A modified setback in this instance is not contrary to public health, safety or welfare. The market value of the abutter's property is not an issue here either. The granting of the appeal will not have any type of negative impact on the abutter's property, as has been confirmed by the abutter's testimony at the Board of Appeals hearing.

(c) The setback violation is not the result of a willful, premeditated act or gross negligence on the part of the petitioner, a predecessor in title or agent of either. There was no willful, premeditated act or gross negligence in the erroneous placement of the foundation within the setback. Willful premeditation requires a plan or intent to violate the setback. As seen on the attached survey, there is ample room on the lot to have allowed compliance with the setback requirement. Furthermore, neither Dale Bragg nor Dave Chase had anything to gain by placing this home within the setback in violation of the Town's Ordinance.

The violation was also not the result of gross negligence. Gross negligence requires wanton and reckless conduct; a severe departure from the ordinary standard of care owed. It requires an utter disregard for the rights of others; specifically in this case, the rights of the Golden Family. Dave Chase sited the foundation and set (and re-set) the stakes for the foundation in the same usual and customary manner that he does for similar projects. Following the discovery of the violation, he realized that the property boundary on the side of the property where the violation occurred angled in more severely than first appeared to be the case. This likely was the culprit which resulted in the violation. This situation is, at best, a case of a simple and honest mistake or error in judgment; at worst, this was a case of ordinary negligence. However, there was no willful premeditation or gross negligence on the part of either Dave Chase or Dale Bragg.

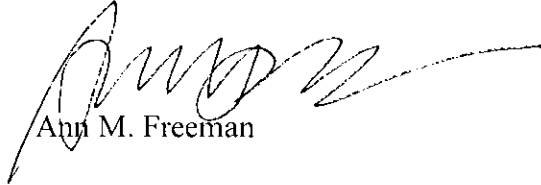
(d) The petitioner has no reasonably available alternative to this appeal. Petitioner has exhausted the possibility of any reasonably available alternative. Adjusting the property line has, after much effort, proved to be an unworkable solution, and removing the offending sliver in order to comply with the setback would disfigure the house or require a complete tear down and relocation of the structure at a conservative cost estimate of \$120,000. There is no reasonably available alternative to this appeal.

Petitioner respectfully requests the Council grant this Consent Agreement so as to allow the structure to lawfully exist in its current location.

January 29, 2016
Page 4

If possible, we would like to have this item placed on the Agenda for the February 8, 2016 Special Meeting of the Town Council. If that is not possible, we request to be placed on the agenda for the next regularly scheduled Council meeting on February 22, 2016. Thank you for your attention to this matter. Please call me if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ann M. Freeman', with a long horizontal flourish extending to the right.

Ann M. Freeman

FALMOUTH TOWN COUNCIL
REQUEST FOR CONSENT AGREEMENT
19-118.1 Mislocated single family dwelling appeal

Name of Applicant: Dale Bragg Builders Phone# 207-228-7121

Address of property: 20 Preservation Drive

Map/Lot U14-007-002 Tax Sheet 164 Zone RA

Mailing Address (if different): Ann Freeman, 100 Middle St., PO Box 9729,

Property Owner (if other): Andrew Golden Portland, ME

Email Address afreeman@bernsteinshur.com 04104-5029

Submittal Items Required: One hard copy and one electronic copy (PDF format) of each.

- Board of Zoning Appeals Notice of Decision including any conditions of approval
- Property Survey showing location of mislocated dwelling

Fees

- Application Fee: \$250
- Recording Fee: \$200

The undersigned requests the Town Council consider a Consent Agreement as referenced below:

Zoning and Site Plan Review Ordinance Section 19-118.1 Mislocated single family dwelling appeal.

In addition to other powers conferred by this section 19-118, the Board of Zoning Appeals shall have authority to hear and decide appeals taken from decisions made by the Code Enforcement Officer that an existing single family dwelling or its attached garage violates the setbacks for the zoning district in which it is located and that the violation must be remedied by removal or relocation of the portion of the structure which encroaches into the setback or by the acquisition of abutting property. If the Board finds that the violation exists, as found by the Code Enforcement Officer, it may nevertheless grant the appeal and render a decision that permits the existing structure to remain but shall not authorize any expansion, enlargement or relocation of the structure within the required setback area provided that the Board finds that the following criteria

- a. It would not serve the public interest to require the removal or relocation of the structure or the acquisition of abutting property;
- b. Allowing the structure to remain in its existing location would not be contrary to the public health, safety or welfare and would not unreasonably detrimentally affect the use or market value of abutting properties;
- c. The setback violation is not the result of a willful, premeditated act or of gross negligence on the part of the petitioner, a predecessor in title or agent of either;
- d. The petitioner has no reasonably available alternative to this appeal.

The appeal application must be accompanied by a survey, stamped by a Maine professional licensed land surveyor, showing the property boundaries and the location of the offending structure.

Any appeal granted under this section shall be conditioned upon the petitioner's entering into a Consent Agreement with the Town, acting through the Town Council, which provides that the Town will not bring an enforcement action with respect to the violation if the petitioner pays a civil penalty to the Town stated in the Consent Agreement. The Consent Agreement shall reference the action of the Board and shall become effective upon signing by the petitioner and the Code Enforcement Officer and payment of the civil penalty. The Consent Agreement shall be recorded at the Cumberland County Registry of Deeds by the Town.

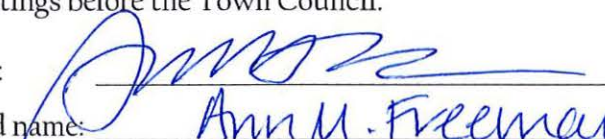
Code of Ordinances Section 1-14. General penalty; continuing violations; consent agreements

(c) In determining what, if any, civil penalty to impose as part of a consent agreement entered into pursuant to section 19-118.1 of the Zoning and Site Plan Review Ordinance, the Town Council may consider:

- (1) how long the violation has existed;
- (2) the circumstances surrounding the construction which violates the setback;
- (3) whether a building permit was issued for the construction;
- (4) whether the violation is the result of survey work conducted after the construction which resulted in a shift of the boundary line; and
- (5) such other facts as the Council deems relevant.

Application Authorization

I hereby make application to the Town of Falmouth for the above-referenced property(ies) and certify that the information contained in this application and its supplement is true and correct. I understand that I am responsible for appearing, or having someone appear on my behalf, at any and all meetings before the Town Council.

Signed:  Date: 1/29/16
Printed name: Ann M. Freeman
Please identify yourself (check one): Agent* Property Owner

*(If you are an agent, written authorization from the property owner must be attached to this form.)

FALMOUTH BOARD OF ZONING APPEALS

**Notice of Decision
Map U14-007-002
20 Preservation Dr.**

To: Dale Bragg Builders

Date: January 28, 2016

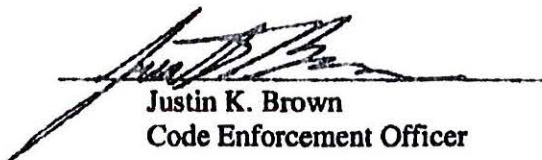
**The Board of Zoning Appeals, at its regular meeting on Tuesday, January 26, 2016,
acted on the Request for an Appeal under Section 19-118-1 for a Mislocated Dwelling.**

Action: Approved

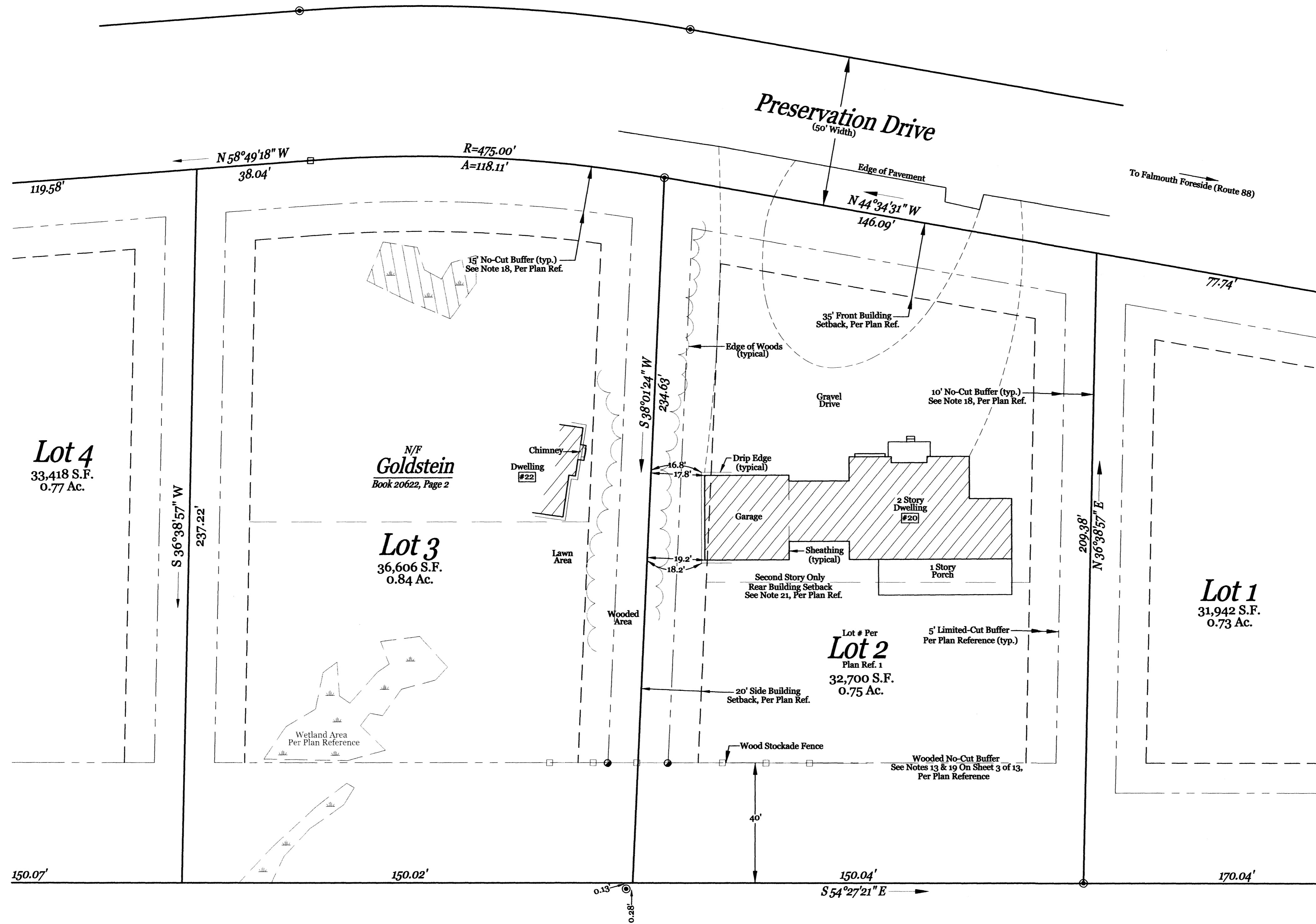
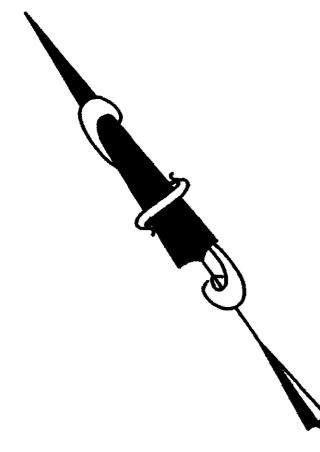
Conditions: None

**No construction shall begin until a building permit is issued. Please be aware of the limits of
your right to appeal as described in the Zoning Ordinance:**

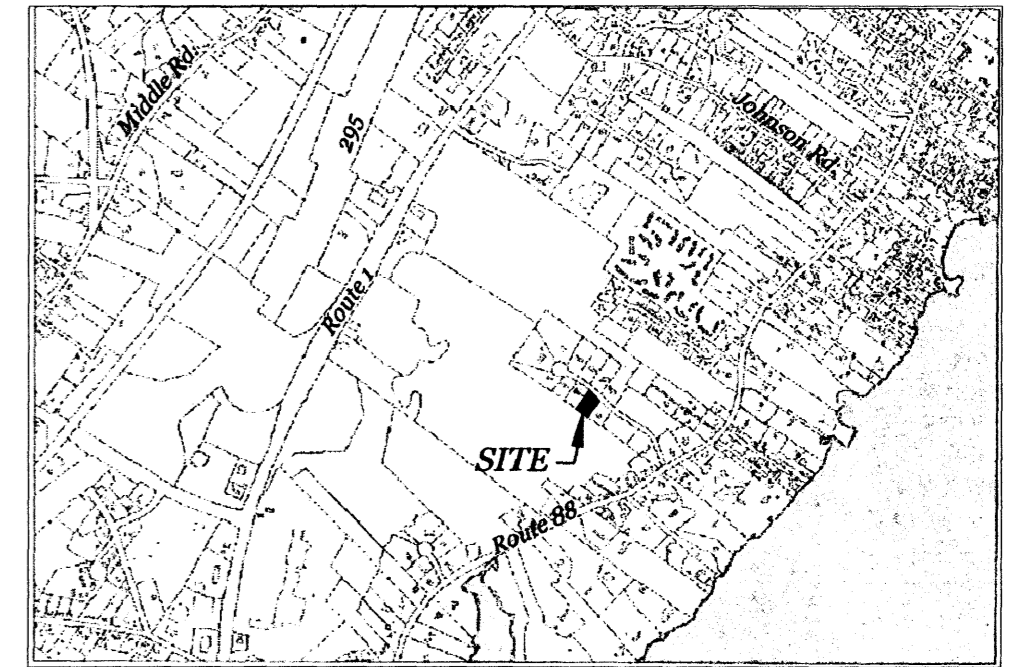
- Section 8.2 Appeals shall lie from the Board of Zoning Appeals to the Superior Court according
to the provisions of Maine Revised Statutes.**
- Section 8.8.k. If the Board grants an appeal, the appellant's legal right, duties or privileges
determined thereby shall expire if the construction or alteration involved is either not
commenced within one (1) year or not substantially completed within two (2) years
of the date on which the appeal was granted. The Board of Zoning Appeals may
extend these time limits by not more than one (1) year upon a showing that
additional time is needed due to required local, state, or federal permits or approvals.**
- Section 8.8.l. If the Board denies an appeal, a second appeal of a similar nature shall not be
brought before the Board within one (1) year from the date of the denial of the first
appeal, unless a majority of the Board finds that substantial new evidence exists or
that it committed an error or mistake of law or misunderstood the facts.**


Justin K. Brown
Code Enforcement Officer

True North
Per Plan Reference



Location Map (Not to Scale):



General Notes:

- This plan is not intended to depict limits or extent of fee title ownership. An opinion of title should be rendered by a title attorney.
- This office reserves the right to be held harmless by all 3rd party claims.
- This survey does not purport to reflect any of the following:
 - easements other than those that are visible or specifically stated in the referenced documents.
 - zoning or other land use regulations.
 - the location of any underground utilities or structures.
- This office reserves the right to be held harmless for unknown or unobtainable private records which could affect the results of this survey.
- Reference is made to "Letter of Agreement" dated October 8, 2015 between Nadeau Land Surveys and the below listed client(s), which shall be considered an integral part of this survey.
- N/F is an abbreviation for Now or Formerly.
- All deeds referenced on this plan are recorded at the Cumberland County Registry of Deeds (CCRD).
- This office does not accept any liability for errors in the Plan Reference listed hereon.
- Locus Parcel is shown on the Town of Falmouth Assessor's Map U14 as Lot 7-2, and is listed as 20 Preservation Drive.
- Area of Lot 2 is 32,700 square feet (0.75 acre).
- Lot 2 is subject to restrictions and conditions described in the Locus Deed Reference, CCRD Book 32455, Page 272.
- All building corner offsets to boundary lines are from sheathing and not building foundation or roof overhangs, unless noted.
- The purpose of this plan is to depict the existing location of the building and to dimension the distance of the northwesterly face of the garage and closest structural point (drip edge) to the northwesterly sideline of Lot 2.
- Reference is made to Declaration of Restrictions and Covenants, Foreside Woods Subdivision, Falmouth, Maine, recorded August 2, 2001 in CCRD Book 16597, Page 148, as amended August 28, 2001 and recorded August 30, 2001 in CCRD Book 16688, Page 76.

Plan Reference:

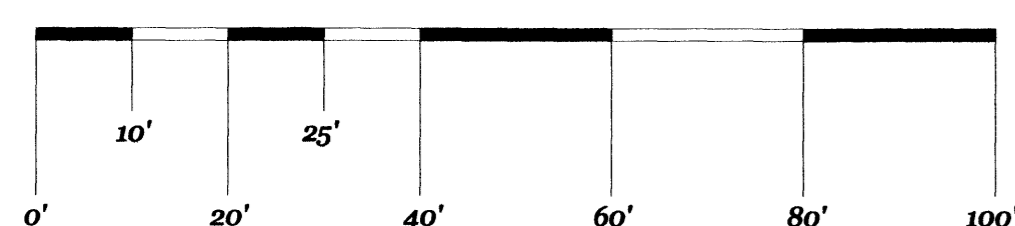
- "Subdivision Plan Of Foreside Woods For Black Bear Development, Inc.", dated February 17, 2000 and revised through June 6, 2001 by Sebago Technics, Inc., recorded August 2, 2001 at the Cumberland County Registry of Deeds in Plan Book 201, Pages 297-301.

N/F
Town of Falmouth
Book 3175, Page 404

Legend:

- Found Monument
- Found Steel Rebar w/Survey Cap
- Found Iron Rod
- #5 Steel Rebar w/Survey Cap #2124 To Be Set
- Boundary Line/R.O.W.
- - - - - Buffer Line
- Setback Line

Graphic Scale:



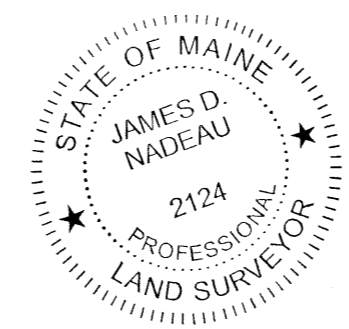
Locus Deed Reference:

Paul A. Shapero & Jane L. Shapero
To
Andrew G. Golden
dated July 16, 2015 and recorded July 24, 2015 at the
Cumberland County Registry of Deeds in Book 32455, Page 272

Surveyor's Statement:

Nadeau Land Surveys hereby states exclusively to the client listed hereon, that this plan is based on, and the result of, an on the ground field survey and that to the best of our knowledge, information, and belief, it conforms to the Maine Board of Licensure For Professional Land Surveyors Standards of Practice.

This plan is not valid without the signature and embossed seal of the below listed Professional Land Surveyor who prepared this plan as it may contain unauthorized alterations unknown to this office.



Nadeau Land Surveys
James D. Nadeau, P.L.S. #2124 (agent) Date: 11-24-2015

Building Location Plan - 20 Preservation Drive
Lot 2 ~ Foreside Woods
Map U14, Lot 7-2
Made For
Dale Bragg Builders, Inc.
Southwesterly Sideline Of Preservation Drive
Falmouth, Maine

PREPARED BY:			
918 BRIGHTON AVENUE PORTLAND, ME 04102		Professional Land Surveyors Certified Floodplain Managers	
		PH. (207) 878-7870 FAX (207) 878-7871	
RECORD OWNER:	DRAWN BY:	MLC	PLAN DATE: 11/23/2015
Andrew G. Golden 566 Commonwealth Avenue, #602 Boston, Massachusetts 02215	CHECKED BY:	JDN/TPB	SURVEY DATE: October 2015
	INST.:	Topcon GPT-3003W	SCALE: 1" = 20'
FIELD BOOK: FB 403 & Topcon Ranger	JOB No:	2151623BL	SHEET No: 1 of 1

LETTER OF AUTHORIZATION

November 24, 2015

To Whom It May Concern:

I, the undersigned, hereby authorize the office of Dale Bragg Builders, Inc. and/or its attorneys, Bernstein Shur, thereof to act on my behalf in all manners relating to an application to the Town of Falmouth Zoning Board of Appeals and the Falmouth Town Council for a Mislocated single-family dwelling appeal for my property at 20 Preservation Drive, Lot 2, including signing of any documents relating to these matters. Any and all acts carried out by the office of Dale Bragg Builders, Inc. and/or agents or attorneys thereof on my behalf shall have the same effect as acts of my own.

This authorization is a valid until further written notice from Dale Bragg Builders, Inc.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Golden". The signature is written in a cursive style with a horizontal line extending to the left from the start of the name.

Andrew G. Golden, Owner

01/28/16
3267

TOWN OF FALMOUTH

Bernstein Shur
CHECK NO.: 128484

DATE	INVOICE NUMBER	ACCOUNT#	DESCRIPTION	MATTER #	AMOUNT
01-28-16	012816			018022-00003 LFW	450.00
				TOTAL:	450.00

AMF

ORIGINAL DOCUMENT PRINTED ON CHEMICAL REACTIVE PAPER WITH MICROPRINTED BORDER

Bernstein Shur
100 Middle Street
P.O. Box 9729
Portland, Maine 04104-5029

52-7258
2112
NORWAY SAVINGS BANK
PORTLAND, ME 04101

CHECK NO.: 128484

DATE	01/28/16
NET AMOUNT	\$450.00

PAY FOUR HUNDRED FIFTY AND 00/100 DOLLARS

TO THE ORDER OF TOWN OF FALMOUTH

TWO SIGNATURES REQUIRED ON AMOUNTS OVER \$500.00

James E. ...

SECURE SAFEGUARD SECURE SAFEGUARD

THIS DOCUMENT CONTAINS HEAT SENSITIVE INK. TOUCH OR PRESS HERE. RED IMAGE DISAPPEARS WITH HEAT.

⑈ 128484 ⑈ ⑆ 211274515 ⑆ 870 212587 3⑈

Details on back. Security Features Included.