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March 3, 2022

BY HAND AND

BY ELECTRONIC MAIL.

Mr. Stanley Andrews, Chairman and
the several members of the Board of Health
for the Town of Bourne
Bourne Town Hall
24 Perry Avenue, Room 201
Buzzards Bay, MA 02532-3441

Re: *Hearing Regarding Application for Variance*
Applicants: Edward and Peri Jacoubs (the 'Applicants')

Dear Chairman Andrews and the several members of
the Board of Health for the Town of Bourne:

I am writing to you in behalf of my client, Ms. Barbara Princiotta ("Ms. Princiotta"), regarding the hearing that is presently scheduled to take place on March 9, 2022. Based upon the information and materials that I have been able to review to this point, below please find a summary of some of the issues and concerns that should be addressed by the Board of Health (the "Board"), regarding this matter, and which serve as grounds for denial of the subject application (the "Application"), regarding 60 Arlington Drive (the "Property").

- I. THE PLAN SUBMITTED BY THE APPLICANTS DOES NOT INCLUDE REQUIRED ELEMENTS AND IS OTHERWISE DEFECTIVE.
 - A. The Subject Plan Fails To Show An Easement That Burdens The Area Of The Subject Property At Which The Applicants Intend To Install Elements Of The Proposed Septic System.

310 CMR 15.220(4)(b) provides, in relevant part, that: "Every plan for a system shall . . . include depiction of . . . the holder and location of any easements appurtenant to or which could impact the system." (Emphasis added.) The plan submitted with the Application, which is dated December 23, 2019, with revisions through October 19, 2021 (the "Plan"), does not depict any easement(s) burdening the subject property. Nevertheless, Ms. Princiotta's property, and other properties within the subject development, benefit from a deeded easement that passes through the front of the Property in the approximate area shown as "Gravel Drive" on

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the Plan (the "Easement"). (For the convenience of the Board, a sketch plan showing the approximate location of the Easement is attached hereto as "Exhibit A".) Indeed, the Easement burdens the very area of the Property under which the Applicants are proposing to install the "Proposed Presby Enviro-Septic Leaching System". The Applicant's failure to depict the location of the Easement, and to identify the persons that benefit from the right to pass and repass over that Easement, is a material defect of the Plan.

As the Plan does not comply with 310 CMR 15.220(4)(b) in a material respect, the Board should deny the Application.

B. The Plan Fails To Use The Legal Boundaries As Required By 310 CMR 15.220(4)(a).

310 CMR 15.220(4)(a) provides, in relevant part, that: "Every plan for a system shall . . . include depiction of . . . the legal boundaries of the facility to be served." Ms. Princiotta notes that the subdivision plan that created the subject Property, which is dated October 7, 1955, and was recorded in the Barnstable County Registry of Deeds (the "Registry"), at Plan Book 124, Page 103 (the "Subdivision Plan"), includes several material differences from the Plan. (For the convenience of the Board, a copy of the Subdivision Plan, reduced in size, is attached hereto as "Exhibit B".) These differences include, *inter alia*, (a) the square footage for the subject property shown on the Subdivision Plan is 24,020, and the Plan suggests that the subject property consists of 24,054 square feet; and (b) the linear courses and the lot lines shown on the Plan do not accurately follow the courses and distances shown on the Subdivision Plan. The "legal boundaries" of the subject property are established by the Subdivision Plan.¹ Accordingly, the Applicants' failure to abide the boundaries established on the Subdivision Plan constitutes a violation of the unambiguous language of 310 CMR 15.220(4)(a).

Because the Plan includes material defects concerning the identification of the dimensions of the Property in violation of 310 CMR 15.220(4)(a), the Board should deny the Application.

C. The Plan Fails To Show All Of The Proposed Impervious Surfaces.

310 CMR 15.220(4)(d) provides, in relevant part, that: "Every plan for a system shall . . . include depiction of . . . the location of existing or proposed impervious areas . . ." Ms. Princiotta notes that the Plan shows the installation of a new swimming pool on the southern

¹ It is curious that although 310 CMR 15.220(4)(a) requires the Applicant to show the "legal boundaries" of the subject Property, the Plan shows only the approximate orientation of the Property's boundary lines. However, the Subdivision Plan includes definitive statements of the precise orientation of the boundary lines, which the Applicant failed to follow. In addition, each of the distances to boundary lines and each variance shown on the Plan is expressed as "±". This lack of precision represents another defect in the Plan, and another basis for the Board's rejection of the Application for failure to comply with 310 CMR 15.220(4)(a).

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portion of the existing home. Such a pool requires the installation of a concrete pad, which will be approximately 23' feet by 9' 6" feet in size (216.6 sf±). (A copy of relevant materials concerning the requirements of the proposed swimming pool is attached hereto as "Exhibit C".) This concrete pad is an impervious surface, which must be shown on the Plan pursuant to 310 CMR 15.220(4)(d) and accounted for within the subsequent nitrogen loading calculations. The Applicants' failure to show the location of additional proposed impervious surfaces constitutes another material defect of the Plan.

D. The Plan Fails To Include A "Benchmark" Location As Required By The CMR.

310 CMR 15.220(4)(q) provides, in relevant part, that: "Every plan for a system shall . . . include depiction of . . . the location and elevation of one benchmark within 50 to 75 feet of the system components which is not subject to dislocation or loss during construction on the facility". The "benchmark" identified on the Applicants' Plan is located to the east of the existing home, across Arlington Drive, and it is in excess of 80' from the components of the proposed septic system. The Applicants' failure to show the location of an appropriate "benchmark" as required by 310 CMR 15.220(4)(q) constitutes another material defect of the Plan.

II. THE EXTENT OF THE VARIANCE SOUGHT IS INCORRECT AND IGNORES THE CLEAR LANGUAGE OF THE APPLICABLE REGULATION.

Within the Application, the Applicants have requested a variance of "10'±" from the Board's "150 Foot Setback Regulation". § 1 of that regulation provides, in relevant part, that: "a 150 foot setback will be required for all leaching facilities from the edge of a wetland resource or watercourse Setback distance shall be measured during periods of highest ground or surface water conditions." § 2 of the 150 Foot Setback Regulation provides that: "Highest surface water shall be defined as . . . in a coastal zone, maximum high water at high tide (including moon and spring tides)." (Emphasis added.)

Ms. Princiotta notes that the Plan shows that the Applicants have sought to measure the extent of their requested variance from the "Mean High Water [line] Per" the 1955 Subdivision Plan. Therefore, the distance of the requested variance relies upon an outdated "mean high water" line, rather than "maximum high water" line, and is therefore completely inaccurate. Ms. Princiotta further notes that the Plan shows a "FEMA Flood Zone 'VE19'" line, which although is not the "maximum high-water line" would be more representative than the mean line. However, that FEMA line is also wholly unreliable because the Plan relies-upon the outdated FEMA Flood Map from 2014, rather than the updated FEMA Flood Map dated July of 2021, which was subsequently accepted by the Town.

Accordingly, the extent of the requested variance is wholly incorrect and does not accurately reflect the actual variance distance sought. The Applicants' failure to request the

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correct variance distance, and likely to artificially depress that distance by more than twenty (20) feet (or 200% of the stated request), should result in a denial of the requested variance.²

III. THE PROPOSED ADDITION REPRESENTS NEW CONSTRUCTION PURSUANT TO THE APPLICABLE REGULATIONS.

The home addition proposed by the Applicants constitutes New Construction pursuant to the applicable regulations. Ms. Princiotta notes that the Board does not appear to have a definition of what constitutes “New Construction”; however, the Bourne By-Laws define New Construction as follows:

NEW CONSTRUCTION. Structures for which the start of construction commenced on or after the effective date of the first floodplain management code, regulation, ordinance, or standard adopted by the authority having jurisdiction, including any subsequent improvements to such structures. New construction includes work determined to be substantial improvement.

(emphasis added)

Additionally, 310 CMR 15.002 defines “New Construction” as follows:

The construction of a new building for which an occupancy permit is required or an increase in the actual or design flow to any system or an increase in the actual or design flow to any nonconforming system or an increase in the design flow to any system above the existing approved capacity. New construction shall not include replacement or repair of a building in existence as of March 31, 1995 that has been totally or partially destroyed or demolished, provided there is no increase in design flow, no increase in design flow above the existing approved capacity to any system, no increase in the number of dwellings or dwelling units or no increase in the number of bedrooms in any dwelling or dwelling unit.

(emphasis added.)

The proposed addition seeks to add approximately 1,600 square feet of habitable space to the existing residence, which represents an increase of habitable space of approximately 80%. Clearly, such a dramatic increase in the living area/habitable space of the subject residence must constitute “substantial improvement” within the Town’s definition of “New Construction”.

Further, Ms. Princiotta notes that the current existing approved capacity for the septic

² As the Applicants have requested a variance of only 10’, but they would require a variance of more than 30’, their project, even if approved, would never be compliant.

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system on the Property is 1,000 gallons. The proposed capacity of the new septic facility is 1,500 gallons, which represents an increase of 500 gallons. Thus, the proposed system represents an “increase in the design flow to any system above the existing approved capacity” within the plain language of 310 CMR 15.002. Therefore, the proposed project clearly constitutes “New Construction” within the definitions provided by both the Town’s By-Law and 310 CMR 15.002. Accordingly, the Applicants are required to submit a PERCENTAGE OF INCREASE WORKSHEET, which they have failed to do. Indeed, per the Board’s own “Application for Septic Variance Requests”, a PERCENTAGE OF INCREASE WORKSHEET is required for waivers or increases in flow.

As the Applicants have failed to provide this necessary information, their Application is incomplete, and it cannot be approved.³

IV. THE APPLICATION INCLUDES A MATERIAL MISREPRESENTATION OF THE NUMBER OF BEDROOMS TO BE INCLUDED WITHIN THE PROPOSED HOME.

The Application states that the resulting home will contain only three (3) “bedrooms”, and this 3 bedroom count serves as the basis for the Applicants’ nitrogen loading calculations and septic system sizing. This purported “bedroom” count is nonsensical in light of the unambiguous wording of the Board’s own definition of “Bedroom”. Per the Board’s regulations:

Bedroom means any portion of a dwelling with is so designed to furnish the minimum isolation necessary for use as a sleeping area and includes, but is not limited to, bedroom, den, study, sewing room, sleeping loft, loft, dining room, library, family room, enclosed porch, or any other space in a building that could be used as habitable space, but does not include kitchen, bathroom or halls.

Based upon the Board’s own definition of “Bedroom”, for the purpose of nitrogen loading calculations and septic system sizing, the Applicant’s alleged intention of using a current (actual) bedroom in the existing residence as a “study” is of no consequence, and that room must still be counted as a “bedroom” for the purpose of nitrogen loading calculations and septic system sizing. Further, the proposed addition includes an additional bedroom, a “study”, and a living room. Therefore, pursuant to the Board’s own definition, the resulting structure would have at least six (6) bedrooms for the purpose of nitrogen calculations and septic system sizing.

³ Also, the Board’s PERCENTAGE OF INCREASE WORKSHEET clearly requires that Applicants must submit architectural renderings of the existing house and the proposed additions when there has been a “Request for variances or waivers that include renovations, alternations, or additions to the existing dwelling.” Despite the express request for those architectural by Mr. Andrews, the Applicants have not yet submitted a complete set of the required architectural renderings.

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At a prior hearing, Applicant's representative suggested that the addition would not result in any additional bedrooms, in part because an existing bedroom would be labeled as a "study". He further suggested that the new master bedroom, "has a large, cased opening and would not be considered a bedroom nor would other rooms in the addition be considered bedrooms since there is no privacy provided or they do not provide privacy". Nevertheless, the Applicant's representative's suggestion cannot survive the clear language of the Board's definition of "bedroom". First, Ms. Princiotta notes that by their very nature, rooms such as "family rooms" and "dining rooms" are not private or otherwise isolated. Further, "enclosed porches" are open to view from passers-by on the street. Nevertheless, these generally accessible spaces are required to be counted as "bedrooms" for the limited purpose of nitrogen loading calculations and septic sizing by the Board. Also, there is no requirement for any "door" to close off a space for privacy within the Board's definition of a bedroom. Rather, the plain language of the Board's definition is divided into two (2) separate parts. The first part includes a broad recitation of several types of interior spaces, including such areas such as "sewing rooms" and "lofts", which shall be considered "bedrooms" for the purpose of the regulations. Significantly, after this first portion of the definition, the definition includes an even broader "catchall provision", with three (3) limited exceptions. Indeed, the definition concludes with the following: "or any other space in a building that could be used as habitable space, but does not include kitchen, bathroom or halls."

Ms. Princiotta states that the first portion of the definition is fatal to the Applicants suggestion that the resulting structure will include only 3 bedrooms as the resulting structure would include two (2) additional "studies", another living room, and another bedroom. However, the second portion of the definition, with the clear use of the disjunctive "or", followed by "any other space in a building that could be used as habitable space" removes any feigned or contrived doubt. (Emphasis added.) Accordingly, the Applicants' nitrogen loading calculations and proposed septic system size are based upon an incorrect and misleading statement of the number of "bedrooms" in light of the unambiguous language of this Board's own definition.

As the nitrogen calculations and proposed septic system size presented by the Applicants are based upon false and misleading data, this Board cannot approve the Application.

V. THE INFORMATION UPON WHICH THE APPLICANTS' NITROGEN LOADING CALCULATION IS BASED IS FATALLY DEFECTIVE.

As noted above, the Applicant's nitrogen loading calculation is based upon an incorrect statement of bedroom count. Nevertheless, this is not the only patently incorrect information submitted by the Applicants. The calculations made by the Applicants within the Board's own "Nitrogen Loading Calculation Sheet For Residential Housing" form (the "Form"), are improper and misleading because those calculations are based upon a "Lot Size" number that is improperly inflated. Pursuant to the plain language of the Form, the Lot Size is to be stated "in

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square feet of upland areas". (Emphasis added.)

Upland areas are limited to the land on the Landward Side of a Coastal Bank. The plans submitted by the Applicants show a total lot size of 24,054 square feet. However, those plans clearly show that a significant portion of the subject property is located on the Seaward Side of a steep coastal bank.⁴ The steep grade change is confirmed by the contour lines included on the Applicants Plans. Ms. Princiotta states that the Applicants' inclusion of the lowland areas of the Property within the Lot Size figure of the nitrogen loading calculation form was clearly improper, and impermissibly distorted the calculations resulting from that figure as the lowland areas constitute a significant portion of the total area.

As noted by Mr. Andrews at a prior meeting the figures presented by the Applicants do not reach the target of 5 ppm nitrogen. As discussed in some detail above, the proposed project clearly constitutes "new construction" within the applicable definitions. Therefore, any suggestion by the Applicants that the required target of 5 ppm for "New Construction" should not be credited is wholly without basis. Indeed, this Board must hold the Applicants to that target of 5 ppm nitrogen, and the Board must require the Applicant to demonstrate such compliance based upon accurate and reliable figures.

As the Applicants have artificially inflated their relevant lot size for the purpose of nitrogen calculations by: (a) including lowland and inter-tidal areas; (b) using a total square footage number that is larger than the figure resulting from the "legal boundaries" established by the Subdivision Plan; and (c) failing to show all impervious surfaces, the Board cannot approve the Application and the incorrect calculations included therein.⁵ Because Buttermilk Bay is considered a Nitrogen Sensitive Area per 314 CMR 4.0, it is crucial for the protection of the environment that the Applicants' calculations be reliable and accurate. However, the presently proposed system, even based upon the false and misleading data provided by the Applicants, is not designed to provide the necessary environmental protections, and the system would not satisfy the additional requirements established under 314 CMR 4.0 for the protection of nitrogen sensitive areas. Accordingly, the Board must deny the Application.

VI. ADDITIONAL ISSUES.

⁴ It appears that as much as a full 1/3 of the subject Property is located on the seaward side of the coastal bank.

⁵ Ms. Princiotta notes that it is a violation of 310 CMR 15 to make any false, inaccurate, incomplete, or misleading submission or statement in any record, report, plan or other document required to kept pursuant to 310 CMR 15 (310 CMR 15.024 – 13 and 14). Further, failure to provide any required information is also a violation (310 CMR 15.024 – 15). As demonstrated above, these provisions have been breached in several respects within the Application.

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A. The Applicants Are Improperly Moving Elements Of Their Project Closer To The Coastal Bank.

In issuing a Superseding Order Of Conditions for the Property in October of 2020, the Department of Environmental Protection stated that: "all runoff shall be directed into drywells that are located as far from the top of the coastal bank as possible." Despite the plain requirement that runoff be moved way from the coastal bank, the most recent iteration of the Plan shows the drywell on the southwest of the Property being expanded an additional five (5) feet closer to the coastal bank. The Board should not permit such expansion of the proposed project in the direction of the already eroding coastal bank.

B. The Applicants Are Proposing To Create A Depression To Collect Standing Water In Close Proximity To Ms. Princiotta's Property.

Without explanation, the Applicants are proposing to dig a water collecting basin of significant size in an area abutting Ms. Princiotta's property. The Applicants have not offered an explanation as to why such a pit is necessary, or why the topography of Applicants' Property, would make such a water collection basin necessary. Such a basin would retain unwanted standing water and provide a breeding facility for pests such as mosquitoes. The Board should not permit the installation of such a nuisance on the Property, and certainly not at the boundary of Ms. Princiotta's property.

C. Additional Outdoor Shower.

Ms. Princiotta notes that the Plan includes the installation of a second outdoor shower located at the northwestern corner of the proposed addition, in close proximity to the Coastal Bank. However, the Plan does not include any indication as to the direction and location to which this outdoor shower would drain. This basic information should be submitted to the Board for its consideration.

D. The Board Should Consider The Prior Expansion Of Use For The Property.

The Applicants have recently expanded their use of the Property from seasonal use to year-round use. This expansion of use, together with the proposed enlargement of the residence on the Property suggest a significant expansion of the actual use of the system. These are issues that the Boards should consider when evaluating the need for environmental protection and the variances sought by the Applicants. Clearly, a year-round use with ample room for guests can reasonably be expected to generate, over the long haul, more sewerage than a significantly smaller home used only seasonally.

As environmental protection is the paramount obligation of the Board, the Board should

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deny the requested variances.

E. Pool Fence.

The proposed pool would be 58" in height. (*See, Exhibit C.*) Therefore, stairs will be required to provide access to the proposed pool. Pursuant to § 10 of the Board's Swimming Pool Fence Regulation, such stairs "shall be surrounded by a barrier" which meets the requirements of §§ 1- 8 of that regulation. However, the Plan does not include any such barrier.

CONCLUSION.

The Board's "Adverse Impact Regulation" provides that:

When a request for a variance from 310 CMR 15.00 The State Environmental Code Title 5 and/or Bourne Board of Health Regulations is requested, the addition of "Bedroom" and/or "Habitable Space" as defined in the Bourne Board of Health regulation [adopted April 8, 1992] may be considered an adverse impact to the environment in conjunction with the distance and number of variances requested. The Bourne Board of Health may deny any variance request when in the Boards opinion the increase in the numbers of "Bedroom" and/or the amount of "Habitable Space", or conversion of a dwelling to year round use may increase the adverse impact on the environment.

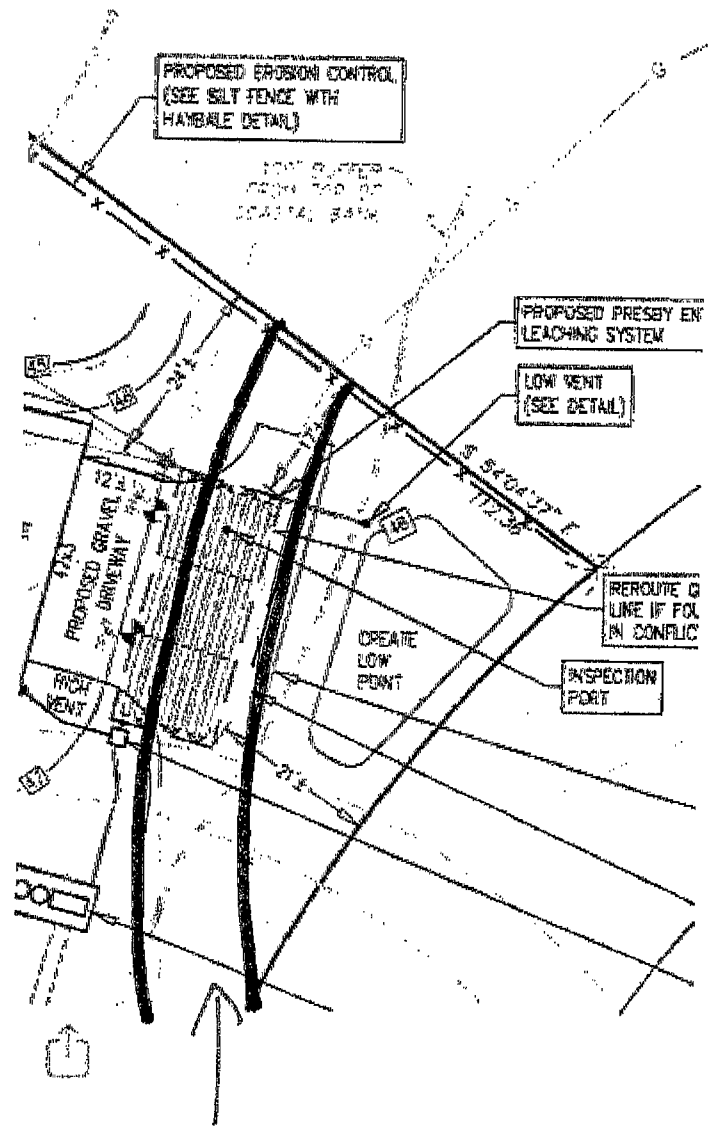
With regard to the project proposed by the Applicants, all three (3) of the factors articulated within the Board's Adverse Impact Regulation are present. Those facts, together with the numerous defects, omissions, and inaccuracies included within: (a) the Plan, (b) the Application, and (c) the associated nitrogen loading calculation result in a situation where this Board must deny the Application. Accordingly, Ms. Princiotta respectfully requests that this Board deny the project as presented by the Applicants.

Best regards,

/s/ Kevin P. Geaney
Kevin P. Geaney

cc: Town Clerk (by hand)
Ms. Terri Guarino, R.S. C.H.O. (by electronic mail)
Ms. Syreeta Amaral (by electronic mail)

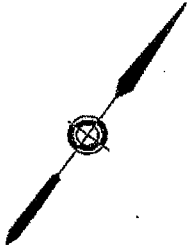
EXHIBIT A



Approximate Location Of Easement

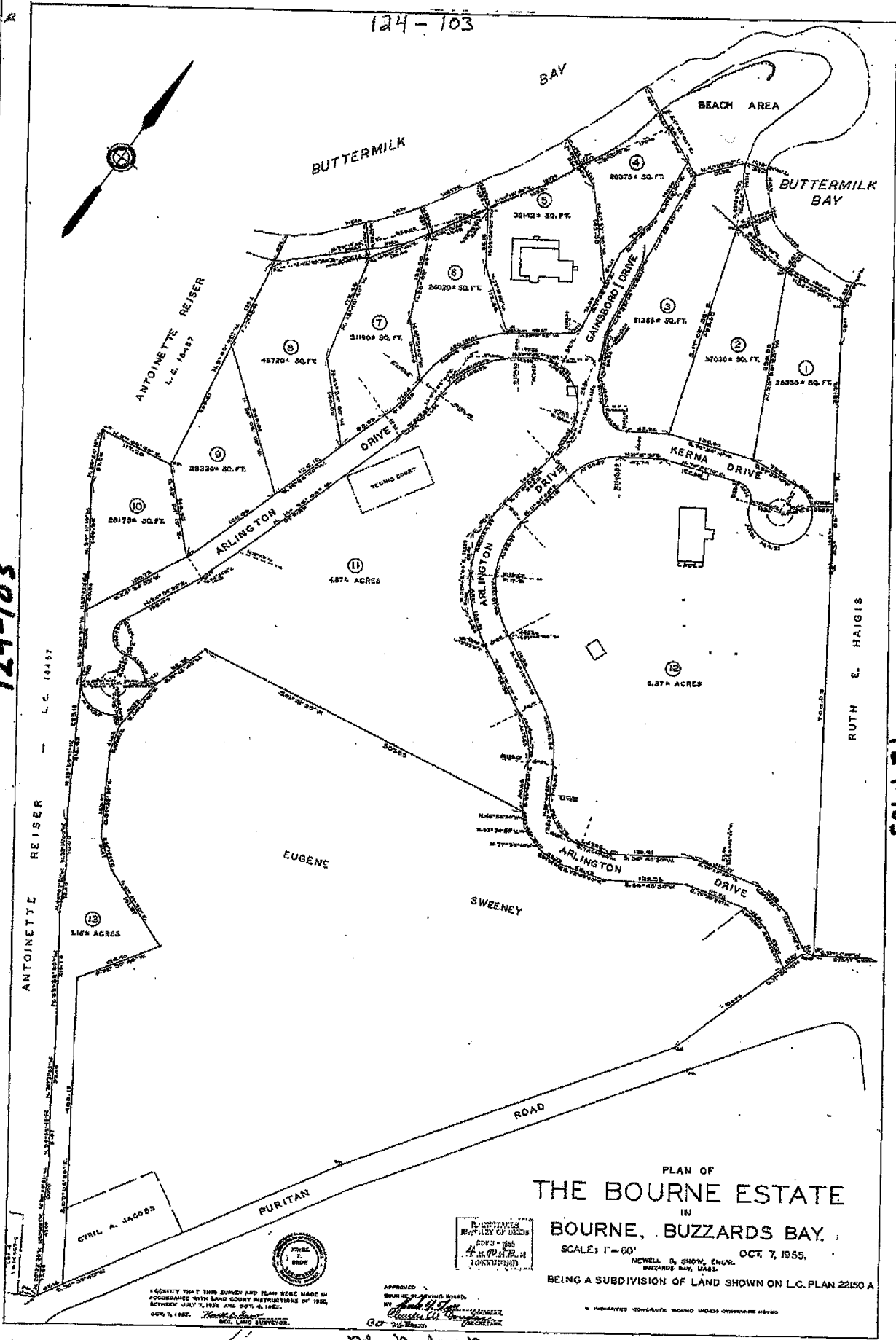
EXHIBIT B

124-103



124-103

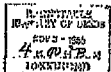
124-103



PLAN OF
THE BOURNE ESTATE
 IN
BOURNE, BUZZARDS BAY.

SCALE: 1" = 60' OCT 7, 1955.
 NEWELL & SHOW, ENGRS.
 BOSTON, MASS.

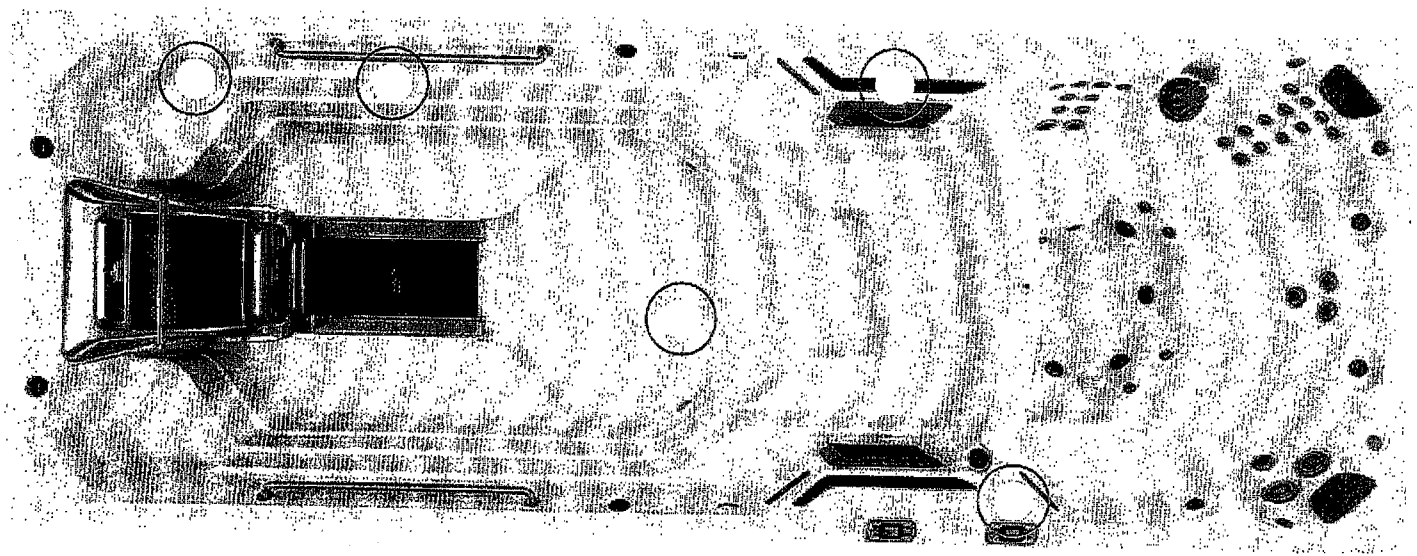
BEING A SUBDIVISION OF LAND SHOWN ON L.C. PLAN 22150 A



APPROVED
 BOARD OF SURVEYING
 BY *[Signature]*
 SURVEYOR GENERAL

NOTE: THAT THIS SURVEY AND PLAN WERE MADE IN ACCORDANCE WITH LAND COURT INSTRUCTIONS OF 1950, BETWEEN JULY 2, 1952 AND NOV. 6, 1952.
 OCT. 7, 1955. *[Signature]*
 SURVEYOR

EXHIBIT C



DIMENSIONS

Overall Dimensions
20' L x 58" H x 89" W

Swim Area Dimensions
15' L x 58" H x 89" W

Spa Area Dimensions
5' L x 38" H x 89" W

Weight Empty
4090 lbs. or 4195 lbs. w/ treadmill

Capacity
2,395 gal (2,045 swim/350 spa) or 2,350 gal. w/ treadmill (2,000 swim/350 spa)

DESIGN FEATURES

OPTIONS & ACCESSORIES

POWER & MAINTENANCE

DOCUMENTATION

SHELL COLORS

Things to Consider When Planning Your Pool

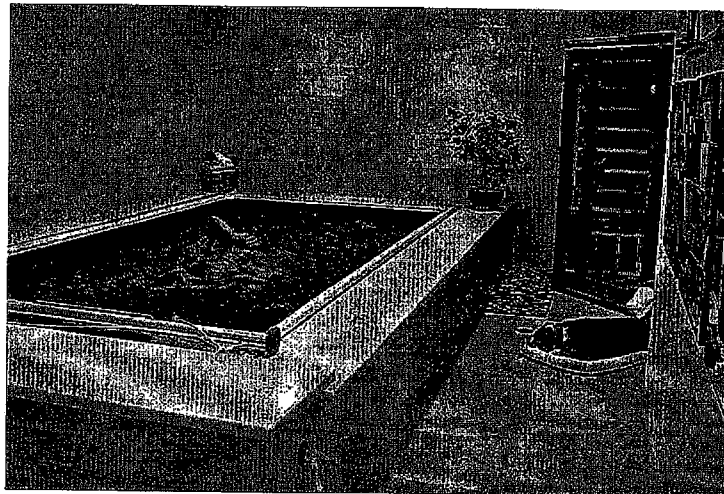
[Home](#) / [Blog](#) / Things to Consider When Planning Your Pool

Share:



Planning your home's Endless Pools® installation gives you so many choices!

You have pool options to consider, and our pools' greater flexibility lets you customize the pool of your dreams. This handy checklist helps you go from dream to reality.



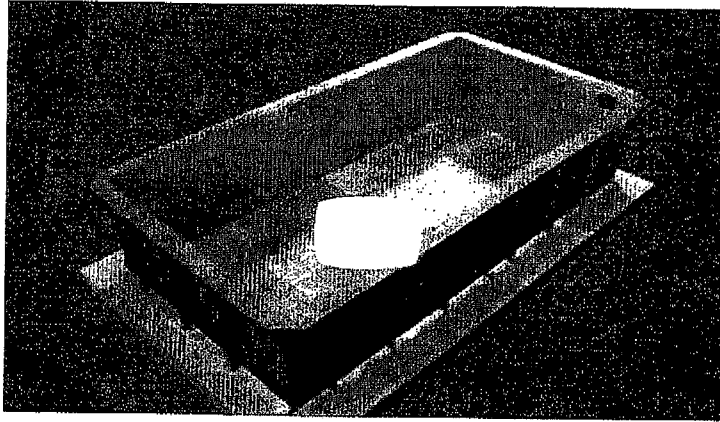
This swimmer enjoys his Endless Pools® Original Series model in his basement, in a corner, and partially in-ground. The pool's flexibility let him create his own spa getaway at home.

SITE REQUIREMENTS

- Your pool needs a solid, level floor or concrete pad. It must be capable of supporting up to 250 pounds per square foot. Most ground-level spaces and on-grade concrete floors can support this weight.
- Your pool site must be two-feet wider and three-feet longer than your pool's interior dimensions. That will

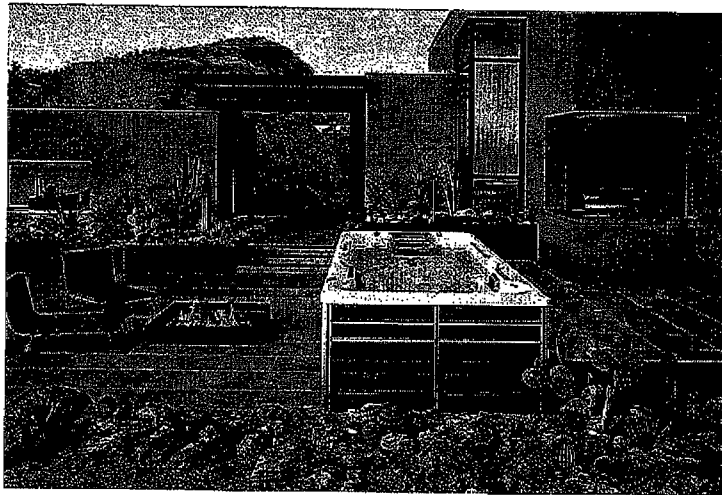
allow you to access the pool and its internal components.

- Want to conserve space? Remember that any Endless Pools model can be placed in a corner.



EQUIPMENT ACCESS

- The Water Quality System is typically installed at the front of the pool.
- Endless Pools technology has evolved toward quieter pumps and motors. Still, you can minimize the noise of the Hydraulic Power Unit by locating it remotely, up to 75 feet away.



This Endless Pools Fitness Systems E500 swim spa arrived fully assembled. Placed against the raised section of the courtyard, it functions as an above-ground pool to the left, and a partially in-ground pool on the right.

INSTALLATION CONFIGURATIONS