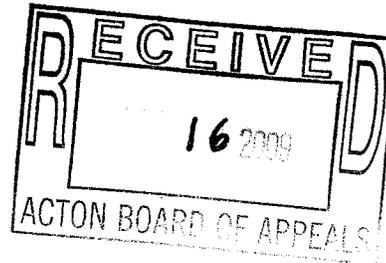


MEMORANDUM

TO: Kristin Alexander
FROM: Ryan D. Pace
Mina S. Makarious
DATE: October 16, 2009
RE: Comprehensive Permit Application
93 Central St. – Marsh View, LLC



In your email of September 17, 2009, you explained that the Acton Board of Appeals requested legal analysis and further clarification concerning the following questions in the context of the captioned project. This memorandum contains that analysis and clarification.

1. Does the applicant have the right to use Pine Ridge Road for access to Lot 2A, as shown on the project plan?
2. Does the right to use Pine Ridge Road include the right to access four lots or does such use constitute overburdening of the easement?
3. Can the applicant improve Pine Ridge Road, and does the applicant need permission from the owners of the road and others who are entitled to use that way, if any, to make improvements?
4. Does paving the remainder of Pine Ridge Road—thereby doubling the amount of paved surface on the road—constitute a reasonable repair and improvement of the easement?
5. What other repairs and improvements would be considered reasonable presently and over time after the site is completed?
6. Do the owners of 89 Central Street have to sign the comprehensive permit application for the Marsh View project because they own the Pine Ridge Road parcel?

1. Does the applicant have the right to use Pine Ridge Road for access to Lot 2A, as shown on the project plan?

As set forth in the e-mail that Ryan sent to you on September 14, 2009, the applicant may use Pine Ridge Road for access to the property at 93 Central Street provided the applicant acquires title to that property from Charles D. Micol, the record owner. In a deed dated April 18, 2006, Mr. Micol acquired ownership of 93 Central Street from Brian J. Matthews, and Mr. Micol also acquired the right to use Pine Ridge Road “for all purposes for which streets and ways may

be used in the Town of Acton.” We presume that any transfer of 93 Central Street to the applicant will include the right to use Pine Ridge Road for access to Lot 2A.

We have not completed a detailed review of the chain of title to the Micol property and Mr. Micol’s easement rights in Pine Ridge Road. The applicant’s attorney should supplement his title certification by including a certification with respect to the validity and enforceability of Mr. Micol’s easement rights in Pine Ridge Road.

2. Does the right to use Pine Ridge Road include the right to access four lots or does such use constitute overburdening of the easement?

Based on the facts that you have detailed, we believe that a court will conclude that the use of Pine Ridge Road by three homes in addition to the home at 93 Central Street that currently uses Pine Ridge Road for access will not constitute overburdening of the easement.

The limits to which any right of way can be put to use “are not set by any per se rule, but rather by application of a reasonableness standard to the specific facts of each case.” King v. Nickerson, 3 Land Court Rptr. 26, 28 (1995). Where “use of an easement becomes so intensive that it reaches the point of constituting a tort” it “can be construed as overburdening the easement.” Lombardi, Bailin, Hovey, & Pill, Massachusetts Easements and Land Use Restrictions III-16 (Professional Education Systems Institute 2003). An “increase in the number of persons who [use] the easement in connection with going to and from” a property is “a change in degree only and would not overload the easement.” Guleserian v. Pilgrim Trust Co., 331 Mass. 431, 436 (1954). See also Dunham’s Corner Residents Assn., Inc. v. West, 12 Land Court Rptr. 163, 168 (2004) (holding easement not overburdened where the owners of the new lots “will use the [easement] in a manner similar to” other users of the easement).

Massachusetts courts have applied these principles broadly, allowing substantially more lots to utilize an easement in a number of cases. In Lane v. Zylinksi, for instance, the Land Court held that the addition of *twenty* units to a lot through a Chapter 40B development did not constitute an overburdening of an easement. 12 Land Court Rptr. 127, 131 (2004). In Barrett v. Lyons, the Land Court similarly upheld a fivefold increase in the use of the easement. 4 Land Court Rptr. 235, 237 (1996). In that case, the easement owner added eight condominiums to a lot that did not originally abut the easement. However, since the non-abutting lot had come into common ownership with an appurtenant lot, the court found the easement could be used by the eight new units. *Id.* See also Dunham’s Corner, 12 Land Court Rptr. 163, 168 (2004) (“I do not find allowing the owners of the five lots to use the West Easement to be an excessive increase in use or burden on the servient estate.”) The Marsh View project, by comparison, adds only three units to the use of Pine Ridge Road. This increase is relatively small compared to the increases in Lane, Barrett, and similar cases and, as a result, we believe that a court will determine that the increase is reasonable and that it does not constitute overburdening of the easement.

3. Can the applicant improve Pine Ridge Road, and does the applicant need permission from the owners of the road and others who are entitled to use that way, if any, to make improvements?

Because the applicant has a right to use Pine Ridge Road, the applicant also has a right to make reasonable repairs and improvements to the road, including paving the road, and the applicant does not need to obtain permission from the owners of Pine Ridge Road and others entitled to use it before making improvements. Prescott v. Williams, 46 Mass. 429, 435 (1843) (one who has easement also has “right to enter upon the land below, and in a reasonable and proper manner do all acts necessary to secure the enjoyment of his easement”); Stagman v. Kyhos, 19 Mass. App. Ct. 590, 593 (1985) (paving of portion of an easement “did not constitute a trespass” under settled law because “owners of the dominant easement have a right reasonably to improve the surface of the way over which they have the right to pass.”).

The right to use a private road includes the right to make reasonable repairs and improvements thereon. Hodgkins v. Bianchini, 323 Mass. 169, 173 (1948). See also Chatham Conservation Foundation v. Faber, 56 Mass. App. Ct. 584, 590(2002) (“the right to make reasonable repairs or improve the passageway is incidental to the landowner’s right to pass and repass.”). “Whether improvements made are reasonable in view of the equal rights of others is largely a question of fact.” Guillet v. Livernois, 297 Mass. 337, 341 (1937). In determining reasonableness, “the usual and customary mode” of use of such ways in question “is good evidence.” Prescott v. White, 38 Mass.341, 342-343 (1838).

Maintaining a smooth surface and paving a right of way have routinely been held to constitute reasonable repairs and improvements. Glenn v. Poole, 12 Mass. App. Ct. 292, 296 (1981); Janetka v. Wilcox, Mass. App. Ct., No. 06-P-1099, at 2 (Oct. 17, 2007) (“Grant of a general right of way confers on the grantee rights to maintain the surface of the way, including paving of the surface, to install utility lines and to have ingress and egress.”).

The applicant will be entering Pine Ridge Road at its own risk to make improvements, and the applicant may be liable for any resulting damage to persons or property. Prescott v. Williams, 46 Mass. at 434 (in making repairs, easement owner “bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labors might have caused to the servient tenement.”). See also Lombardi, Bailin, Hovey, & Pill at IV-9 (noting that easement holder may be liable for damage to the servient property or for injuries sustained by others due to negligent repairs and improvements).

4. Does paving the remainder of Pine Ridge Road—thereby doubling the amount of paved surface on the road—constitute a reasonable repair and improvement of the easement?

Yes. Paving the entire length and width of a road is considered a reasonable repair and improvement.

Where an easement is created by grant or reservation, the easement holder is entitled to reasonable use of the entire easement. Onorati v. O’Donnell, 3 Mass. App. Ct. 739, 739 (1975); Guillet v. Livernois, 297 Mass. 337, 340 (1937) (holding defendant had right to travel over entire

width of easement). The Land Court has applied this principle to a situation of a partially paved driveway. In Gustenhoven v. Smith, the Land Court held the easement holders had the right to “improve and pave over the entire 30 feet width and 180 feet length of the Easement.” 3 Land Court Rptr. 85, 86 (1995). Even where no road exists at all, the owner of the right of way “has the right to enter upon the servient estate on which no actual way has been prepared and constructed and to make such changes therein as will reasonably adapt it to the purposes of a way.” Walker v. E. William and Merrill C. Nutting, Inc., 302 Mass. 535, 543 (1939). Based on this precedent, the applicant has the right to pave the entire length of Pine Ridge Road as long as doing so is otherwise reasonable. For a discussion of repairs and improvements that are considered reasonable, please see Section 5 below.

5. What other repairs and improvements would be considered reasonable presently or over time after the site is completed?

Repairs and improvements are considered reasonable unless they burden the servient estate “to a greater extent than was contemplated or intended at the time of the grant.” Bechis v. Nicholi, Land Court, No. 133123, at 2 (Jan 13, 1992) (citing Doody v. Spurr, 315 Mass. 129, 133 (1943); Codman v. Wills, 331 Mass. 154, 158 (1954)). Although it is impossible to provide an exhaustive list of what may be considered reasonable, there are some common improvements which have regularly been held reasonable.

- (a) Improvements such as paving, clearing limbs from a roadway, smoothing the surface of a way, and placing gravel on a way are typically considered reasonable and incidental to the ability to render the way usable. Glenn v. Poole, 12 Mass. App. Ct. 292, 296 (1981). Providing ingress and egress to those entitled to use the way is also reasonable. Janetka v. Wilcox, Mass. App. Ct., No. 06-P-1099, at 2.
- (b) Safety improvements, such as the addition of guardrails, are also reasonable, especially where required by local laws. Barlow v. Chongris & Sons, Inc., 38 Mass. App. Ct. 297, 300 (1995). See also Stamell v. Hancock, 2004 WL 1924357 at *6 (citing Glenn for the proposition that “improvements required for safety purposes . . . fall among the implicit rights of the holder of a prescriptive easement.”). “Flaring” the corners of a road “so that access can be less abrupt” and “so that the field of vision of drivers . . . is enlarged” is similarly reasonable. Glenn, 12 Mass. App. Ct. at 296.
- (c) Changing the grade of a way, where a grade is already established, is normally considered unreasonable. Draper v. Varnerin, 220 Mass. 67, 70 (1914). However, where a road is “unimproved and impassable” the owner of an easement can alter the level and grade so that “a usable way could be built.” Guillet, 297 Mass. at 341.
- (d) Abutters on a private way who “have by deed existing rights of ingress and egress upon such way or other private ways” have a statutory right to “place, install or construct in, on, along, under and upon said private way or other private way pipes, conduits, manholes and other appurtenances necessary for the transmission

of gas, electricity, telephone, water and sewer service.” G. L. c. 187 §5. This right is limited to installations which do not “unreasonably obstruct said private way” or “interfere with or be inconsistent with the existing use by others of such way or other private ways.” G. L. c. 187 § 5.

6. Do the owners of 89 Central Street have to sign the comprehensive permit application for the Marsh View project because they own the Pine Ridge Road parcel?¹

No. Acton's Rules and Regulations for Comprehensive Permits contain relatively common provisions that require owners of properties that will be developed for affordable housing to sign applications that have been submitted by developers who do not own the underlying land. In accordance with this requirement, the applicant has obtained the signature of Charles Micol, the owner of Lot 2A, in this case.

In contrast to the provisions that expressly state that an applicant must obtain the signature of an owner of a property that will be developed using a comprehensive permit, the Rules and Regulations for Comprehensive Permits do not explicitly require the signature of the owner of a property that is subject to an easement that will be used for a development. In the absence of such a requirement, the Board of Appeals should not require the signature of the owner of the Pine Ridge Road parcel on the developer's Marsh View application.

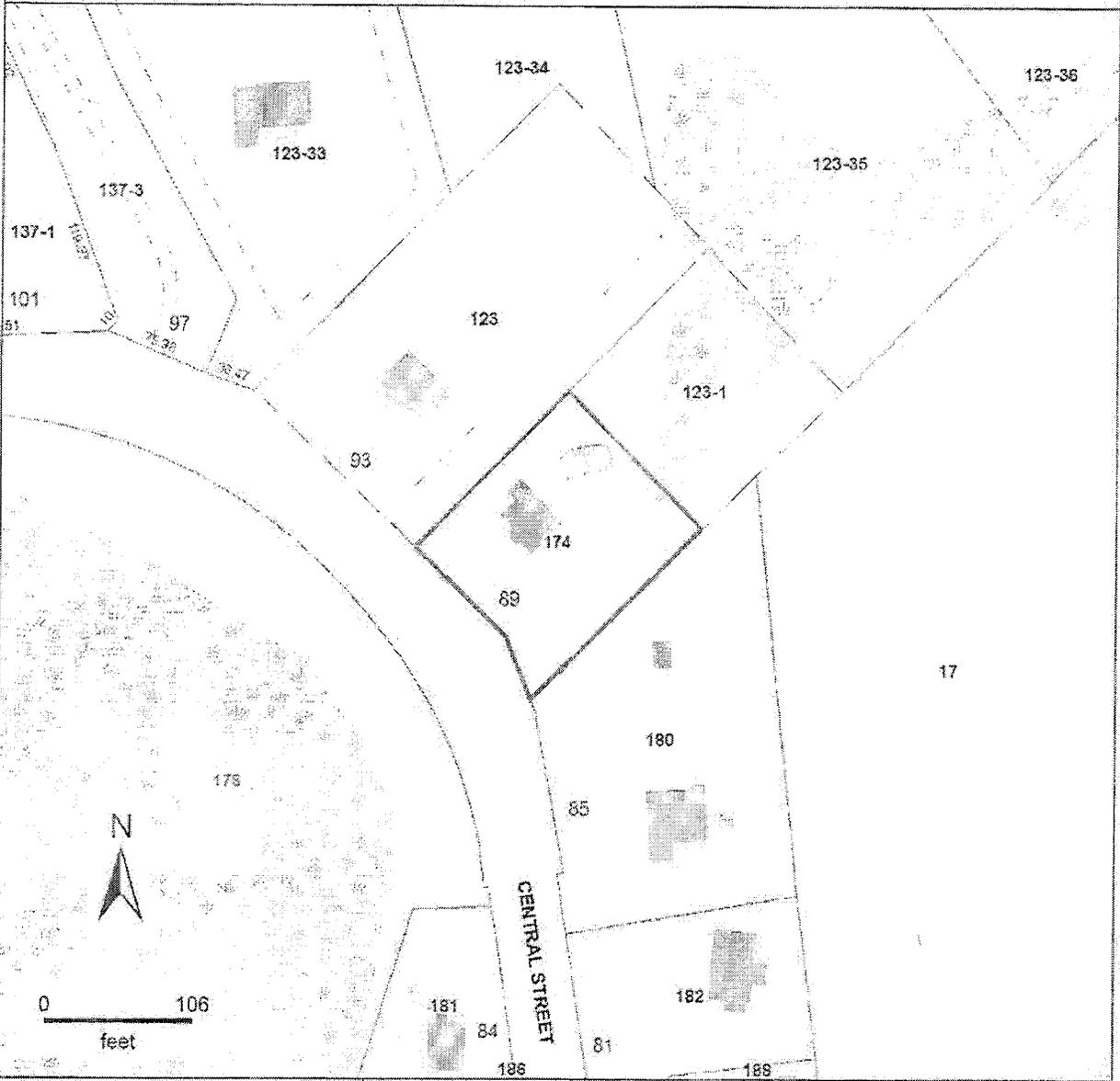
As always, please feel free to call or email with any questions.

¹ The Acton GIS map that is attached as Exhibit A does not show Pine Ridge Road as a separate parcel, nor does it show the correct boundaries of the parcel as illustrated on the plan attached hereto as Exhibit B. We recommend the review of this matter by the Acton Assessor's Department.

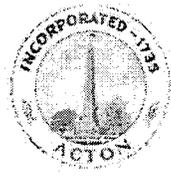
EXHIBIT A

GIS Plan

89 Central Street, Acton



Property Information
 Property ID G2-174
 Location 89 CENTRAL ST



**MAP FOR REFERENCE ONLY
 NOT A LEGAL DOCUMENT**

This data set/map is for planning purposes only and should not be used for larger scale analysis. The Town of Acton shall not be held liable for any use of the data or images shown on this map, nor is any warranty of accuracy expressed. All uses of this data set/map are subject to field verification.

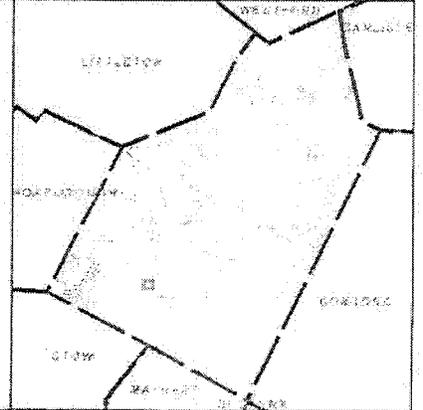


EXHIBIT B

1972 Plan

