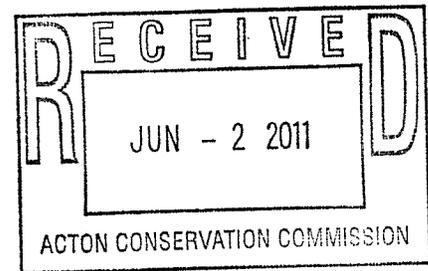


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JOHN R. McNAMARA
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May 27, 2011

Conservation Commission
Town of Acton
472 Main Street
Acton, MA 01720

Re: Hawthorne Homes, LLC – 101 Nonset Path

Dear Members of the Commission:

I am writing on behalf of the above applicant and in response to the position statements set out in attorney Sherrill R. Gould's letter to you dated April 14, 2011 and set out in attorney Louis N. Levin's letter to you dated May 16, 2011, issue by issue as follows:

1. Width of Access Easement from Locus to Nonset Path, Across Lots 14, 15 and 16

The access easement is 20 feet wide, and not 14.82 feet wide as alleged by Attorney Gould. Note that she does not cite any deed or other instrument of conveyance by which an owner of the subject property (known in the law as the "dominant estate" and sometimes referred to herein as the "Subject Property") relinquished any of its rights to the other 5.18 feet. The easement was reserved in a deed in 1983. Attorney Gould alleges that it was modified in 1984 in accordance with a land swap between the owners of Lots 14 and 15 (together with Lot 16 known in the law as the "servient estates"). However, all that land swap accomplished was to change the boundary line between Lot 14 and Lot 15, hence changing the ownership of a strip of the servient estates 5.18 feet wide. It is axiomatic that a conveyance of some or all of the servient estates does not affect the enforceability of the easement throughout its entire length and breadth by the owner of the dominate estate. It is possible that the Land Court case between the owners of Lots 15 and 16 (in which the owner of the dominant estate was not a party and is therefore not bound by any judgment entered) and/or this land swap may have altered the width of the easement available to Lot 16, but they clearly had no impact on the rights of the owner of the dominant estate.

2. The Applicant Does Have Rights in the 20 Foot Wide Easement

Both attorney Gould and attorney Levine allege that this easement was intended to benefit only Lots 14, 15 and 16 and not the Subject Property. The 1983 deed (a copy of which is attached to attorney Levine's letter as Exhibit D) creating the easement separated out and conveyed seventeen numbered Lots, including Lots 14, 15, and 16 "...reserve[ing] for...the benefit of "... [the grantor's] remaining land... the right to use [the easement]" The remaining land referred to is the Subject Property, and this allegation simply defies the plain meaning of the words of the reservation, as well as defying all logic.

Attorney Levine then goes on to further contort the plain meaning of the language of the reservation by somehow arguing that, because the easement area is not within the bounds of Nonset Path, it was not intended to provide access to Nonset Path. Just why an easement would be created to provide access to a road in which it, itself, is located is not explained by attorney Levine. At the middle of page two of his letter, attorney Levine conveniently obscures the insertion of the words "...further reserves the right to use existing and future utility lines...", accomplished by the use of asterisks, thus quoting the relevant language of the deed that reserves this easement out of order. In proper order, those words say "the grantor reserves...for the benefit of his remaining land...the right to use all...right of way and utility easements, as shown on the aforementioned plans for the purposes for which they were intended, **further reserving the right to use existing and future utility lines which are now located or which may be located in Nonset Path.**"[Emphasis Added]. Read in the proper order, it is clear that the modifying language "which are now located of which may be located in Nonset Path" refers to utility lines, and not access easements. Likewise, attorney Levine contorts the language "...for the purposes for which they were intended..." when he argues that, because there may be an alternate means of access from the Subject Property to Nonset Path, this easement was meant only to serve the three lots and not the Subject Property. In effect what he is saying is that somehow the "...right of way" reserved was not meant for the purpose of access. Since when is a parcel of land only entitled to a single means of access to a public way?

3. The Proposed Project Would not Unreasonably Interfere with the Use of the Existing Single Family Residential Lots

The Subject Property contained, at the time of the reservation of the easement (and at present) 7.1 acres. What the grantor meant by the words "unreasonably interfere" must be determined within that context, i.e. what was then contemplated as future uses to which these 7.1 acres might be put. The Subject Property has always been zoned for a residential use, and given historical density patterns of single family dwellings in the Town of Acton, it is most probably that quarter or half acre lots were contemplated as a possibility.

4. There is no Self- Created Hardship

Attorney Levine argues that this project is not entitled to be considered as a limited project by reason of an alleged self- created hardship arising when the Subject Property was separated from most of its frontage on Nonset Path in 1983. Note that Wetlands Policy 88-2, upon which attorney Levine relies, was adopted five years later, in 1988. Note also that the Regulation uses the word “may”, meaning that the Commission may choose not to consider such a self- created hardship. Under the circumstances, where the then owner of the Subject Property in 1983 had no way of knowing what the regulatory landscape would look like in 1988, let alone in 2011, basic fairness requires the Commission not to take it into account.

5. The Applicant’s Proposal Complies with Zoning

- A. The proposed common driveway does, in fact has the required curb radii.
- B. Requiring a written common driveway agreement that provides for joint and several maintenance and repair, including snow plowing, is an unconstitutional abdication of governmental authority, essentially giving abutting landowners veto power over zoning decisions. De facto, the legitimate goals of this requirement will be met. The Town wants assurance that the way in question will remain passable throughout its length, without any expense to the Town. The law governing the maintenance of private ways allows each and every owner of land using such a way for access to maintain the entire way in passable condition, at their own expense, and prohibits any owner of such land from obstruction such access. As a practical matter, if the owners do not enter into such an agreement, then each will no doubt arrange for the plowing etc. of at least that portion of the way that they use.

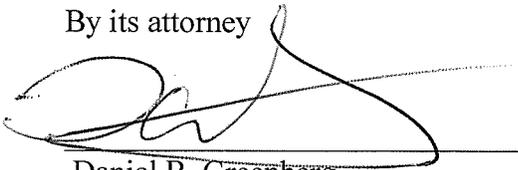
In any case, the Applicant would be willing to accept a condition imposed by the appropriate regulatory board that it impose these obligations, jointly and severally, on all purchasers of homes. This arrangement would meet both the substance and the letter of this requirement.

- C. The use to which the Subject Property will be put, single family residences, is in fact a permitted use, not only in the R-A Zoning District, in which the property is located, but also in the R-2 Zoning District, in which the proposed common driveway is located. The prohibition of more than one building used for dwelling purposes on a Lot in the R-2 Zoning District is a density requirement and not a use restriction.

6. All Private Building Restrictions Have Lapsed

In the 1970's private building restrictions were imposed upon the Subject Property, as set out in a Declaration of Restrictions dated February 7, 1977, recorded in MSDRD at Book 13138, Page 427; and as set out in an Agreement, Restrictions and Easements Concerning Land in Acton dated July 30, 1970, recorded in MSDRD at Book 11894, page 614. Such private building restrictions are subject to the durational limits set out in G.L. c. 184, §§ 26-30, limiting the enforceability to thirty years, plus additional extension periods of twenty years, provided that an appropriate written extension is recorded in the Registry of Deeds prior to the expiration of the then current period of enforceability. Both of the referenced sets of restrictions have now lapsed, since the thirty year period as to both has now expired and no effective extension has been recorded as to either. Note that the 1970 restrictions were unlimited as to time, and therefore are not subject to any extension at all, pursuant to G.L. c. 184, § 23, see Stop & Shop v. Urstadt, 433 Mass. 285 (2001); and that they do not provide for any extension and therefore are not subject to G.L. c. 184, § 27(b). Some abutters opposing this project have previously suggested that the 1970 restrictions were amended in 1981 by a document entitled "Amendment and Release" recorded in MSDRD at Book 14256, Page 558, and that supposed "new restrictions" were thereby created, and which in turn were extended by a document recorded by the owners of 25 Henley Road on March 18, 2011 at Book 56619, Page 192. Note that the document relied upon as having imposed new restrictions is entitled "Amendment and Release" which implies nothing new being imposed. Note also that the Amendment and Release is signed by less than all of the parties to the 1970 document, making it ineffective as an amendment.

Hawthorne Homes, LLC
By its attorney



Daniel B. Greenberg

cc: Kirk Ware
Louis N. Levine
Sherrill R. Gould