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To: Mark Scheier, Esq.
FR: Paul Alphen, Esq.
DA: September 30, 2013
RE: Pine Ridge Road, Action/Status as a "Way"

You asked me to determine if Pine Ridge Road in Acton, described as "a proposed street" and/or "Pine Ridge Road" and/or "a private way" in a series of deeds from 1952 to 2013, is still a "way" in existence when the subdivision control law became effective" notwithstanding that it was also shown as a "Private Drive" on a plan dated 1972 and referred to as such in some deeds since 1972.

First, the applicable standard is whether the way was in existence when the subdivision control law became effective in the town. The deed and plans from 1952 refer to Pine Ridge Road as "a proposed street" and as "Pine Ridge Road". The road was not called a "Private Drive" until 1972, well after the subdivision control law became effective in Acton (March 9, 1953). Secondly, the statute says nothing about the need for abutting lots to be held in separate ownership to benefit from the Section 81L exception. That should be the end of the inquiry regarding whether Pine Ridge Road is a "way" for purposes of the statute. However, if necessary, below please find substantially more support for the conclusion that the subject way is a "way" and not something less:

1. DEEDS HAVE CONTINUED TO DESCRIBE THE WAY AS "PINE RIDGE ROAD" OR "PRIVATE WAY" THROUGH 2013. Pine Ridge Road is not referred to exclusively as a "Private Drive" after 1972. In various places in various deeds since 1972 is referred to both a "Private Drive" and as "Pine Ridge Road", including as recently as 2006 and 2013.

2. SINCE 1968 ABUTTING LOT OWNERS HAVE HAD THE RIGHT TO USE THE WAY FOR ALL STREET PURPOSES. In 1968 when Donnelly conveyed land on the southeasterly side of Pine Ridge Road to Ziman (Book 11606, Page 365) the deed states that it is "subject to and with the benefit of the right to use said Pine Ridge Road for all purposes for which streets and ways may be used in the Town of Acton in common with other entitled thereto." Unless those rights were released in the chain of title in the future, the benefitted estate has the right to continue to use Pine Ridge Road as a street regardless of any future designation on a plan or otherwise. There were times when the lots were held in common ownership, but in every circumstance all of the land owners since 1952 described each of the individual lots and the private way. There was never any intent to discontinue the way or erase the lot lines describing three (3) lots. When the lots were again later conveyed in separate ownership, the parties

continued to describe each of the individual lots and granted rights to use the private way for all purposes for which streets and ways may be used in Acton. See for example the deed dated June 30, 2004 at Book 43297, Page 53.

Even after Pine Ridge Road was shown a plan as "Private Driveway" deeds continued to grant to the grantees, their heirs and assigns, the "unobstructed right to use the parcel entitled 'Private Driveway' on said plan for all purposes for which streets and ways may be used in the Town of Acton in common with others entitled thereto". Just because a surveyor renamed the street a "Private Driveway" did not change the rights of the property owners.

3. BY LAW, ABUTTING LOT OWNERS HAVE RIGHTS TO USE THE WAY AS A STREET: It is well settled that "when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such street or way, and the right thus acquired by the grantee (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way, as it is then laid out or clearly indicated and prescribed." Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 677, 205 N.E.2d 222, 224 (1965).

And, as recently as this past July, Judge Piper of the Land Court opined that: "Murphy v. Mart Realty of Brockton and the related body of law establishes that 'when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such street or way, and the right thus acquired by the grantee (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way, as it is then laid out or clearly indicated and prescribed.' 348 Mass at 677 (quoting Casella v. Sneideron, 325 Mass 85, 89 (1949)). In determining whether a way has been sufficiently defined as a proposed street, reference may be made to the plans described in the deed. *Id.* 'A plan referred to in a deed becomes a part of the contract so far as may be necessary to aid in the identification of the lots and to determine the rights intended to be conveyed.' Labounty v. Vickers, 352 Mass. 337, 344 (1967), quoting Wellwood v. Havrah Mishna Anshi Sphard Cemetery Corp., 254 Mass. 350, 354 (1926)." Puner v. Sierputoski, 11 MISC 454440 GHP, 2013 WL 3776820 (Mass. Land Ct. July 15, 2013).

4. THE RENAMING OF THE WAY DOES NOT CHANGE THE RIGHTS OF OTHERS TO USE THE WAY. There is nothing in the line of cases that supports the conclusion that renaming the street releases the rights that other have to use the way. First, there are the rights of others as described in Murphy v. Mart Realty of Brockton, Inc and the related cases, as described above. Secondly, there is the corollary rule that the recording a plan that shows an "easement" does not create any easement rights without a specific grant in the chain of title. See Patel v. Planning Bd. of N. Andover, 27 Mass. App. Ct. 477, 483, 539 N.E.2d 544, 548 (1989). In the matter of Pine Ridge Road, all that changed was the name of the right-of-way, but there were no changes in the appurtenant rights of the parties who had the benefit of the use of the street.

5. A WAY CAN BE CALLED MANY THINGS AND STILL REMAIN A PRIVATE WAY. There is also a series of cases that stand for the position that a private way can be called many things without losing its status of a private way. "In Opinion of the Justices, 313 Mass. 779, 47 N.E.2d 260 (1943), the Supreme Judicial Court provided guidance as to the definition of a

private way. There the court recognized that the term 'private way' is 'susceptible of different meanings.' *Id.* at 781, 47 N.E.2d 260. The court then discussed possible definitions of a private way: 'The words may well mean or 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.' *Id.* at 782-783, 47 N.E.2d 260." Haugh v. Simms, 64 Mass. App. Ct. 781, 788, 835 N.E.2d 1131, 1136 (2005).

The Appeals Court in Haugh went on to say that there can be many definitions of a private way, including reference to the decision of Barlow v. Chongris & Sons, Inc., 38 Mass.App.Ct. 297, 299, 647 N.E.2d 437 (1995) holding that a driveway easement is a private way for purposes of M.G.L. c. 187, § 5.

6. WORDS LIKE "EASEMENT" AND "WAY" ARE NOT MUTUALLY EXCLUSIVE. The reference to M.G.L. c. 187, § 5 as also helpful to the Pine Ridge Road issue because it helps clarify that terms like "easement" and "private way" are not mutually exclusive. The statute allows owners of real estate abutting private ways to install public and private utilities within a private way. In Barlow v. Chongris & Sons, Inc., "[T]he plaintiffs, Lewis A. Barlow and Barbara J. Barlow, brought an action seeking a declaration that the defendant Chongris & Sons, Inc...., did not have any right, with regard to a certain driveway easement located on the plaintiffs' property, to install a sewer line, pave, or install a guard rail. The plaintiffs also sought an order enjoining the defendant town from issuing a permit for the installation of a sewer line under the easement." *Id.* The Appeals Court rejected the plaintiff's argument that that the driveway easement is not a "private way" for purposes of G.L. c. 187, § 5. The court concluded: "The words 'easement' and 'private way' are not mutually exclusive. 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' (emphasis added; citations omitted). *Opinion of the Justices*, 313 Mass. 779, 782-783, 47 N.E.2d 260 (1943). We agree with the judge that for the purposes of G.L. c. 187, § 5, the easement in this matter constituted a private way." Barlow v. Chongris & Sons, Inc., 38 Mass. App. Ct. 297, 299, 647 N.E.2d 437, 439 (1995)

7. THE SURVEYOR THAT PREPARED THE PLAN CERTIFIED THAT THE "WAY" WAS A PRIVATE STREET OR WAY. There is a description of the land which is now Lot 3 at in a deed dated 1968 at Book 11606 Page 365. Lot 1 was conveyed out of the parcel on the south side of the street in 1952. The plan was created in 1972. The plan contains the certificate of the Registered Land Surveyor that the plan shows existing lines of ownership "and the lines of streets and ways shown are those of public or private streets or ways already established..." in accordance with the 5th ppg of MGL Ch 41 Sec 8IX. Therefore, the surveyor may have named Pine Ridge Road a "Private Driveway", but he certified that it was a street.

8. LOTS 1 AND 3 ARE MIRROR IMAGES OF THE LOTS SHOWN ON THE PROPOSED ANR PLAN. Lots 1 and 2 shown on the 1972 Plan recorded as Plan Number 43 of 1972 depict two lots that were described separately as far back as 1952 for Lot 1 and 1968 for Lot 3 (perhaps earlier but that is as far back as my research went). The plan was lawfully recorded because it

showed lines of existing ownership (See MGL Ch 41, Sec 81X). Even though the lots are currently in common ownership, so long as they each have the prerequisite area and frontage, they can be divided into separate ownership and dwellings can be constructed on each of the lots. Each of the lots can use the private way for frontage and access. The Zoning By-Law defines "Frontage" as "a continuous lot line along the sideline of a street. The sideline of a street is defined by the front boundary lines of lots along a street and not necessarily the pavement edge of a street or sidewalk." The definition of "Street" is remarkably similar to the definition contained in Section 81L, with the added proviso that "A public or private way shall not be deemed to be a street as to any lot of land that does not have rights of access to and passage over said way." As stated above, all of the property owners have rights of access and passage over Pine Ridge Road, so we have come full circle; because Pine Ridge Road was a way in existence in 1953, the existing lots have access and frontage along Pine Ridge Road and therefore qualify for treatment as lawful building lots. A different conclusion cannot be made for the new lot shown on the proposed ANR plan.