



**TOWN OF ACTON**  
472 Main Street  
Acton, Massachusetts 01720  
Telephone (978) 264-9636  
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planning@acton-ma.gov

Planning Department

**MEMORANDUM**

**To:** Planning Board **Date:** January 21, 2005  
**Revision Date:** April 7, 2005

**From:** Roland Bartl, AICP, Town Planner *R. Bartl*

**Subject:** **Ellsworth Village** – Application for Senior Residence Special Permit  
**Review of Revised Plan (March 1, 2005) and of Additional Materials (in bold)**

**Location:** Off End/ Brabrook Road  
**Applicant:** Ellsworth Village, LLC (James Fenton & Michael Jeanson)  
**Address:** PO Box 985, Acton MA 01720  
**Owner:** 125-135 Great Road Realty Trust (Robert R. Moran, Richard B. Warren)  
James Fenton  
Michael Jeanson  
**Engineer:** Stamski and McNary, Inc.  
**Units:** 33 Proposed Units (3 affordable)  
**Street:** Brabrook Road  
**Street Length:** 1050 +/- proposed  
**Map/Parcel:** F-4/69 & F-5/40  
**Zoning:** R-8, Affordable Housing Overlay Sub-district B  
**Hearing Dates:** 1/25/05, **2/22/05, 3/22/05 (w/o discussion)**  
**Decision Due:** 4/25/05, **extended to 4/28/05 (vote on meeting of 4/26)**

Attached for your review are the plan and application for the "Ellsworth Village" senior housing special permit, and comments from other Town departments, committees, and agencies.

Planning has reviewed the plan and the application and offers the following comments:  
**Revised and additional comments are in bold print below.**

**Access:**

(See also: 1. traffic impact study by David J. Friend Transportation Planning Services.  
2. Transportation Advisory Committee Comments.)

During the preliminary discussions with the proponent, the Planning Board expressed a preference for Brabrook Road to serve as primary access to the development, with emergency access provided from Great Road, and direct pedestrian connections into East Acton Village and perhaps to Brookside Shops.

1. Brabrook Road is a public way, but Town ownership takes three different forms (see also several attached historic plans and documents):

- a. The Town owns fee-simple the improved portion from Pope Road to the end of pavement at lot 8 (house #10) Brabrook Road on the left. No issue or question here.
- b. The Town owns a right-of-way easement in the layout of Brabrook Road, which extends for +/-250 feet beyond the end-of-pavement and along the property of the applicant for Ellsworth Village. With an easement, the fee in the layout is owned by someone else. In this case, it appears from our records that the fee is owned by the owners of lots 8 and 9, house #s 10 and 11 Brabrook Road respectively, each to the middle of the layout for the length that they abut it. A third owner might be quite possibly the original developer for the portion of the layout that abuts the Ellsworth Village proper – Arthur Dunphy and Robert McGarigle. The Ellsworth Village proper was not part of the original “Acton Heights” subdivision that created Brabrook and Flagg Hill Roads, and the deeds we have do not seem to convey any ownership right to it. However, we do not have a complete chain of title here. The applicant will have to research this at the Registry of Deeds.

The fact that the Town owns as a right of way easement and not as fee simple the unimproved portion of the Brabrook Road layout has implications on how the applicant can use and improve it. I refer you to Town Counsel's e-mail correspondence of 10/27/04, which is attached. In short, the easement gives the Town (but not the applicant) the right and authority to construct a street. The applicant has the right to build an access driveway (as currently proposed on the plan) only if he owns the entire underlying fee in the layout. If the Town extends the street (or contracts the work out to someone else) procurement rules that apply to the Town come into play. Ownership and control of the proposed improvements in the layout also affects potential liabilities later on. The applicant (or his attorney) should propose a method by which to create the access from Brabrook Road in a manner that resolves these complications and addresses these concerns. We would then check with Town Counsel as needed.

If the extension of Brabrook Road will be a public street rather than a driveway, the applicant's engineer will have to fully meet the technical street design requirements as set forth in the subdivision rules, including a location for a turnaround.

- c. The town owns a temporary right-of-way easement in the turn-around at the current end of Brabrook Road in front of house #11. Under the State Subdivision Control Law, this easement reverts to the adjacent land owner if the street is extended. In that case the turn-around should be removed. But, if the applicant establishes the right to build just a private driveway in the layout, then the turn-around would conceivably remain as is.

**(4/7/2005) Questions regarding the ability and right of access via Brabrook Road have now been resolved definitively. Brabrook Road extension is a street easement that the Town owns for all purposes for which street are used in the Town. The applicant does not own the underlying fee. The applicant has the right to use the street easement for access, subject however to terms and conditions by the Town affecting its construction.**

**The Planning Board, with the assistance of departmental reviews, is best positioned to determine appropriate and necessary construction standards, which it should do in its decision if it grants the special permit. The actual work would then still require a “permit to construct in a public way” following the procedures that the Town has outlined for such permits. This “street cut permit” (in short) is under the authority of the Board of Selectmen in their role as Street Commissioners, but the permit is generally an administrative matter handled by “the Town Manager or his designee”.**

**Once completed, the applicant should formally give all the improvements within the Brabrook Road extension to the Town.**

The Plan now shows a new turn-around at the end of Brabrook Road that meets the practical needs of the Town's Highway Department to turn snow plows at the end of a public way, a function that existing temporary turnaround could no longer fulfill. To minimize wetlands impacts, the turnaround would be located on land presently owned by the applicant (see parcel 1D-2), which should eventually be divided from the main tract via an ANR plan and then given to the Town for street purposes along with the improvements thereon. The plan now appropriately specifies the removal of the existing temporary turnaround.

2. Brabrook Road safety improvements:

- a. The applicant proposes to add a sidewalk for the entire length of Brabrook Road. This is appropriate mitigation.
- b. The pavement of Brabrook Road appears wider in parts than necessary even with the insertion of the proposed sidewalks – up to 26 feet. The Subdivision Rules require 22-24 feet. A narrower street should be considered as this tends to discourage speeding.

**(4/7/2005) No change in width shown.**

- c. There is sufficient width in the Brabrook and Flagg Hill Roads layout to reconfigure their intersection for additional "traffic calming" as shown on the attached sketch, possibly with a "stop" for Brabrook Road traffic. This would be an alternative option to the traffic impact study recommendation. The applicant's traffic engineer should evaluate and prepare a preliminary design of this option for further review.

**(4/7/2005) This adjustment is shown on the revised plan. This effectively makes Flagg Road and Brabrook Road to Pope the main street, and the rest of Brabrook the side street. The applicant's traffic P.E. should review the revised intersection and prepare a warrant to determine if a stop sign and line is warranted for the side street. A yield sign may be sufficient.**

3. Brabrook/Pope Road intersection improvements:

- a. The applicant proposes to improve sight distance for Pope Road traffic approaching Brabrook Road by regarding the west-side shoulder of Pope Road and removing several trees. Improving sight distance in this location is appropriate mitigation. Pope Road is a scenic Road. Removals of public trees and stone walls require a joint hearing of the Planning Board and the Tree Warden.  
I would not agree with TAC comments on this point. Lack of sight distance is a safety issue that cannot be mitigated with a raised crosswalk. The TAC recommendation could possibly be an additional modification to the Brabrook Road/Pope Road intersection, but not as a substitute for a raised crosswalk at Bayberry Road. The raised crosswalk design at Bayberry Road is a recommendation in the EAV plan as an "entrance" feature into the Village. Brabrook Road is further from the village.
- b. The applicant proposes a stop sign for traffic exiting Brabrook Road onto Pope Road. This is appropriate mitigation, but the stop line could be moved forward a bit, which might in itself enhance sight distance.

**(4/7/2005) The stop sign/line has been moved as recommended. We have received and forwarded to the Board two series of photographs by Mr. Chapin on the subject of sight distance. The Town's Engineering Department staff has revisited the location, took further measurements, and has concluded that the sight distance improvements as proposed by the applicant would be adequate.**

4. As an additional and appropriate mitigation I recommend that the applicant install a sidewalk along the Pope Road west side from Brabrook Road to connect with the existing sidewalk at the first commercial driveway in EAV near Great Road. See also TAC recommendation. The scenic road bylaw will apply.

**(4/7/2005) Not shown on revised plan. The plan now shows a pedestrian connection from the end of Brabrook Road extension into East Acton Village and a crosswalk on Pope Road connecting the new sidewalk on Brabrook to the Pope Road sidewalk on the other side. The Board might perhaps consider that to be adequate pedestrian accommodation – or not.**

5. As proposed, the length of the single access way into Ellsworth Village is substantial and in addition to single-access Brabrook Road. The number of dwelling units on a single access would also be significant. By both measures, the proposal would exceed the Acton Subdivision Rules, which are referenced as a guide for the construction of ways in a senior residence development (ZBL section 9B.13). As mitigation for this deficit, the applicant should provide an emergency access to Great Road, presumably via lot 1C as shown on the record plan. The Planning Board gave this direction to the applicant during preliminary consultations in the fall 2004. This access should also be available for general public non-motorized use.

**(4/7/2005) The emergency access is now shown. I concur with Engineering Department's recommendation for an easement to ensure the Town's interest and right in the emergency access. The easement should also include the right for pedestrians to pass and re-pass.**

6. The Planning Board last fall also directed the applicant to seek agreement with the owners of Wetherbee Plaza to install direct pedestrian access from the end of the Brabrook Road layout to the Wetherbee Plaza in East Acton Village. The site plan approved for Wetherbee Plaza incorporates pedestrian accommodations to make this connection. The application now before the Board does not address this. In my opinion this pedestrian connection is more important and more consistent with Acton planning objectives than the proposed pedestrian connection to the Brookside Shops.

**(4/7/2005) The pedestrian access is now shown on the revised plan, primarily in form of a boardwalk due to the presence of wetlands.**

7. The applicant proposes a pedestrian access to Brookside Shops across Town land. There exist a number of restrictions on the Town-owned land and on the easements for access to that land from Great Road, which cast some doubt on whether or not the pedestrian access is allowed as proposed. To resolve this matter, the Board of Selectmen and the owner of Brookside Shops should be consulted. At this time it may be simpler to just build the access to the border of the Town land and let the future development of a recreation facility on it take care of the rest. With future ball field development in mind, the access to the Town land would be better located between street numbers 12 and 14, so that it can tie into other recreation access facilities along that side when the Town constructs them.

**(4/7/2005) I have looked into this matter further and can offer a slightly changed recommendation, here. A 5-foot recreational pedestrian path should be pursued in the location suggested previously (between house #'s 12 and 14), and follow along the westerly edge of the Town-owned land to Brookside Shops. This recommendation is subject to the following: (a) the trail should be open to the general public to walk back and forth between Brabrook Road and Brookside Shops; and (b) the trail needs the consent of the Board of Selectmen. There is no need consult with the owner of Brookside Shops.**

**As originally shown, the path was cutting up the land that the Town might use in the future for recreational fields. Also as originally shown, it resembled an emergency**

**vehicular access, which raised the prior legal questions since the Town's land is restricted to recreation and conservation use. The emergency access is now shown in a better location.**

#### *Affordable Units*

(please see the various draft documents in the application and comments from the Acton Community Housing Corporation (ACHC))

8. A brief scan (no detailed review was conducted in Planning) of the draft application materials related to the affordable units reveals familiar LIP (Local Initiative Program) documents. I therefore share the ACHC's assumptions that the affordable units are proposed as LIP or LIP Elderly Exception units and recommend that the LIP compliance will be a special permit condition so that the units may count towards the Town's DHCD-recognized affordable housing stock.

**(4/7/2005) The applicant's attorney has made proposed revisions to the master deed and regulatory agreement that appear to address the ACHC comments adequately. They related to affordability levels (2 units at or below 80% if median income, 1 unit at 70% or below), inclusion of the LIP Elderly Exception Program as optional, monitoring agent fees, etc. If the project is approved, the special permit should condition compliance with these aspects and all other elements needed to ensure that the three affordable units count towards the Town's 10% goal under M.G.L. Ch. 40B and remain affordable in perpetuity. In addition such condition should designate the ACHC as the monitoring agent, spell out the local preference criteria and should be flexible enough to allow final adjustments to the master deed, regulatory agreements, deed riders, etc. as necessary to achieve the stated goal.**

9. The distribution of the affordable units should be indicated on the plan (ZBL 9B.12.6).

**(4/7/2005) The revised master plan sheet indicates the proposed location of the affordable units consistent with the request by the ACHC.**

10. The zoning bylaw requires that 65% of the affordable units be marketed initially to income eligible Acton seniors unless otherwise regulated by the State or the Federal Government (ZBL 9B.12.7). Can the applicant comply with the 65% rule?

**(4/7/2005) The applicant has confirmed. The ACHC in their original comment letter has suggested more detailed local preference criteria that seem to be consistent with the bylaw requirement.**

11. I recommend that the Planning Board appoint the ACHC to act as the Town's monitoring agent subject to the agent fees suggested in the ACHC comment letter.

**(4/7/2005) See new comments under 8. above.**

12. The proposed number of three affordable units meets the minimum requirement of the zoning bylaw. It would seem rather appropriate to ask the proponent if one or two additional affordable units could be provided.

**(4/7/2005) The applicant has responded that 3 units will be all he wishes to set aside as affordable, which is the minimum bylaw requirement.**

#### *Condominium Master Deed*

13. The age restriction (p. 7 of draft deed) should be revised to allow up to two children, whose parents are deceased or are otherwise incapacitated to perform their parental functions, to reside with their grandparents at Ellsworth Village without a limitation on time. A tragedy

should not be the cause for additional hardships such as eviction or separation of families.  
(see also ZBL section 9B.11)

**(4/7/2005) The proposed master deed has been amended accordingly..**

14. In some spots the draft refers to "Summerfields" Condo matter, a carry over from another project by the developer that should be corrected.

**(4/7/2005) I have not checked for this but assume this has been corrected.**

15. The condominium master deed should be modified to include a common land restriction for open space easements A, B, and C that is consistent with sections 9B.9.2 and 9B.9.3 of the zoning bylaw and section 3.7 of the applicable special permit rules.

**(4/7/2005) Done.**

#### *Condominium Bylaws*

16. The condominium bylaws should allow the exterior modification of dwellings for solar power and heating installations with approval powers by the Board of Governors only to address reasonable design and quality issues, but not over whether or not such improvements are allowed.

**(4/7/2005) Done.**

#### *Zoning Bylaw Compliance Check (for items not covered above)*

17. The units do not comply with ZBL section 9B.10 to be adaptable for persons with disabilities.

**(4/7/2005) This bylaw requirement is enforceable at the point of issuance of building permits. No other assurances are necessary at this point. The special permit, if granted, should carry a condition to that effect as a reminder.**

18. It appears that in one location (unit 6 / #11) the standard required 15-ft. building setback to Ellsworth Village Road is not met (see ZBL 9B.5.3). The Planning Board may waive the dimensional standards where additional affordable housing is provided as is the case in this proposal (ZBL 9B.12.3.4).

**(4/7/2005) Change was made to comply with the 15-ft. requirement.**

19. The use description in the application should be expanded to address the proposed uses of the common land and the village house in general terms to meet intent of ZBL section 9B.9.2.1.

**(4/7/2005) Done.**

#### *Other*

20. All outdoor lighting, whether proposed on the plan or added in the future should comply with the applicable requirements of section 10.6 of the zoning bylaw. Outdoor lighting details should be shown for luminaries that are regulated by section 10.6.

**(4/7/2005) Still nothing indicated on the plan. However, this can be a condition. The zoning bylaw does not regulate residential lighting around homes. This development should be treated alike. However, should there be street lights or other luminaries with more lumens than the standard residential type lighting; it should meet the standards of section 10.6.**

21. A performance guarantee as required in the Acton Subdivision Rules is recommended for proposed Ellsworth Village Road, including drainage facilities, and for the access improvements that the Planning Board may require in the special permit.

22. The letter authorizing the Town to enter and complete the work should be modified so that the proponent can sign it now, as has been the case in most other projects before the Board. I do not wish to have to chase it later.

**(4/7/2005) Revised but not signed.**

23. The landscaping plan needs refinement and a L.A. stamp.

**(4/7/2005) Now stamped. Tree Warden has reviewed landscape plan and found it appropriate and adequate.**

**(4/7/2005)**

24. The ownership of the Town's parcel on the north side is incorrectly shown as that of Esterbrook Road LLC.

25. The Board might ask the applicant if primary construction site access could be established via Great Road 2A. Otherwise, travel of construction vehicles on Brabrook Rd. should be limited to reasonable hours during weekdays, say 7:00 AM to 6:00 PM.

26. There was mention at the last hearing about intermittent stream not shown on the plan. The Town's Natural Resources Director has informed me that the intermittent stream is contained within the wetland shown on the plan and is therefore properly identified.

27. I have reviewed the common land calculations (Land Use Data on Master Plan Sheet) and found that the calculations were done correctly. The P.E. and L.S. stamps on the plan certify that the numbers are correct.

Cc: Applicant  
Town Manager  
Engineering Department

I:\planning\planning board\reviews\ellsworth village 4.doc

**TOWN OF ACTON**  
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**Engineering Department**

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**INTERDEPARTMENTAL COMMUNICATION**

**To: Planning Department**

**Date:** March 28, 2005

**From: Engineering Department**

**Subject: Senior Residence Special Permit entitled "Ellsworth Village"**

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We have the following comments regarding the above mentioned plan dated March 1, 2005.

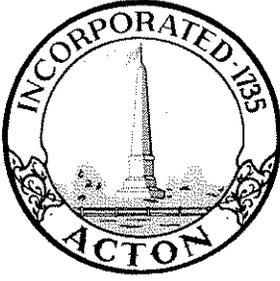
1. The engineer has proposed a new turnaround for the extension of Brabrook Road. We reviewed the layout of the proposed turnaround with the Highway Department and found it to be adequate for snowplows since the turnaround leg will be elevated entirely on fill.
2. The engineer should change the curb reveal for the slope granite edging on the Pavement & Slope Granite Edging Detail (sheet 6 of 10) from 4-inches to 6-inches.
3. The Typical Roadway Cross Section Station -1+24.65 to 0+52 shows the 5 foot sidewalk width to include the steel beam rail and spacer block of the proposed guardrail. The engineer should label the sidewalk width to be a minimum of 4-feet wide free of obstructions.
4. The engineer needs to include some notes or a detail showing how the guardrail will be attached to the precast modular retaining wall in order to prevent vehicles from driving into the wetlands. If the alternate block retaining wall is used, the engineer will need to propose a concrete cap or some other acceptable alternative so that the guardrail can be mounted to the retaining wall.

We do not foresee a need for the stop sign and double yellow centerline on Ellsworth Village Road at the intersection with the end of Brabrook Road extension.

5. Stop signs must be installed in conformance with section 2B.05 of the MUTCD. The Acton Engineering Department will not recommend the installation of signs that do not conform to this section. The applicants traffic engineer needs to clearly state that in his/her engineering judgment the stop signs proposed meet one or more of the listed criteria in this Section. Since the MUTCD requires "engineering judgment" this requires the applicant's traffic engineer to be a Registered Professional Engineer in the Commonwealth of Massachusetts.
6. The engineer should add a typical cross section of the emergency access adjacent to the detention basin. The applicant will need to obtain an easement for the emergency access

as it is shown on the abutting property (129-133 Great Road). The engineer also needs to show an easement for Ellsworth Village Road and the emergency access road granting the Town the rights to use this secondary access. It is not clear whether pedestrians will be allowed to use the emergency access to walk to the shopping plaza on Great Road. The Fire Chief will need to review and approve any access roads. As part of the maintenance agreement, the condo association should be required to maintain the access such as snow plowing and clearing any obstructions.

7. The engineer should add a typical cross section of the pathway between units 20 & 21. We recommend a stone dust material for the top surface of the path over the gravel base.
8. The contractor will need to coordinate his work schedule with the Highway Department regarding any work within a Town way.
9. The applicant will need to apply for a Permit to Construct within a Public Way for the work shown in the layouts of Pope Road and Brabrook Road such as the water and gas main installation and the sidewalk. Any work within the Town roads such as backfill and compacting the trenches and pavement patches will need to comply with the Town's "Specifications For Regulating Construction Within Public Ways". The applicant will also need to keep abutters informed of his ongoing work schedule so that residents on Brabrook Road can prepare and make the necessary arrangements for vehicular access.
10. We want to ensure that the standard language for private ways is written into the decision and the maintenance agreements so the future residents clearly understand the Town will not be responsible for snow plowing or any other related maintenance and that the road will not become a public way.
11. We recommend that an as-built plan showing the buildings, pavement, drainage and utilities be required at the conclusion of construction along with a letter from a professional engineer certifying that the project was constructed according to the approved plans.



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Planning Department

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**INTERDEPARTMENTAL COMMUNICATION**

**To: ACHC**  
**Acton Water District**  
**BOH**  
**Building Dept.**  
**Fire Dept.**

**Date: March 16, 2005**

**From: Kim DelNigro, Secretary for Planning & Engineering**

**Subject: Ellsworth Village Senior Residence Plan Revisions**

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Attached are the revised plans for Ellsworth Village Senior Residence, if needing a larger map, feel free to contact me.

Please review, and if there are any comments, please respond by Thursday, April 7, 2005.

Thank you.

*no comments*  
*Sampson*  
*3/17/05*

# ACTON MUNICIPAL PROPERTIES DEPARTMENT

## INTERDEPARTMENTAL COMMUNICATION

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**To:** Kim DelNigro, Planning Secretary *Date:* 3/16/05  
**From:** Dean A. Charter, Municipal Properties Director (DAC)  
**Subject:** Review of Ellsworth Village revised plans

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I have reviewed the revised plans submitted on March 15, 2005, for the above noted development. I find the Landscape Plan, prepared by Kim Ahern, dated March 1, 2005 to be adequate and appropriate for the development, and that the plan addresses the concerns I raised in my original review dated December 15, 2005.

## Roland Bartl

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**From:** Stephen Anderson  
**Sent:** Friday, March 18, 2005 6:07 PM  
**To:** Roland Bartl  
**Subject:** RE: Brabrook Road/Ellsworth Village



RE: Acton/Gen  
Planning Board: ...

I think this question is answered by numbers 1 and 3 of my prior email (attached). Your interpretation is correct (answer 1) as long as the developer does not own the underlying fee (answer 3).

-----Original Message-----

From: Roland Bartl [mailto:rbartl@acton-ma.gov]  
Sent: Friday, March 11, 2005 3:28 PM  
To: Stephen D. Anderson  
Subject: FW: Brabrook Road/Ellsworth Village

What do you think - is he correct or stretching it? Your previous e-mail seemed to say that the Selectmen have discretion but that the courts would expect the parties to work something out. Same thing?

Roland Bartl, AICP  
Town Planner, Town of Acton  
472 Main Street  
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-----Original Message-----

From: gd@stamskiandmcnary.com [mailto:gd@stamskiandmcnary.com]  
Sent: Friday, March 11, 2005 2:05 PM  
To: Roland Bartl  
Subject: Fwd: Brabrook Road/Ellsworth Village

----- Start of forwarded message -----

From: "Lisa Bergemann" <lbergemann@dlpnlaw.com>  
Date: Thu, 24 Feb 2005 13:44:58 -0500  
Cc: "Louis Levine" <llevine@dlpnlaw.com>,  
"George Dimakarakos (E-mail)" <gd@stamskiandmcnary.com>  
Subject: Brabrook Road/Ellsworth Village  
To: "Stephen D. Anderson (E-mail)" <sanderson@andersonkreiger.com>

Steve -

It is my understanding that a member of the Planning Board is unclear about the Town's approval of the unconstructed portion of the public way Brabrook Road, as it extends from the end of the temporary turnaround to our client's property.

Kindly reconfirm with the Planning Board that our client, Ellsworth Village, LLC, has the right to use the unconstructed portion of Brabrook Road as access to the property and that the Town's review and consent is solely limited to imposing reasonable construction requirements for the way.

If you have any questions, please call me. Thank you  
for your prompt attention to this matter.

Lisa Bergemann  
(978) 263-7777

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----- End of forwarded message -----

George Dimakarakos, P.E.  
Stanski and McNary, Inc.  
80 Harris Street  
Acton, MA 01720  
ph:978-263-8585 ext:112

**Roland Bartl**

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**From:** Stephen Anderson  
**Sent:** Wednesday, February 16, 2005 12:48 PM  
**To:** Roland Bartl  
**Cc:** Don Johnson; John Murray  
**Subject:** RE: Acton/Gen Planning Board: EMT RB re Access over un-improved public street layout (Brabrook Road)

Roland:

After discussions today with the developer's attorney Lisa Bergemann and separately with Don Johnson, I can supplement the email below with the following information:

In the event the Planning Board approves the Project, it can impose a condition of approval requiring the developer at its sole expense to:

- \* improve the street within the Town's easement to Town specifications and to grant all of the developer's right, title and interest in said completed work to the Town upon completion of the work to the Town's satisfaction,
- \* remove the existing temporary turnaround (except in the portion of the turnaround included in the street extension) and fill, grade and landscape the affected areas to the Town DPW superintendent's satisfaction,
- \* grant a new easement for public use and install a new temporary turnaround to the Town's satisfaction on the developer's property at the terminus of the public street (or make other suitable arrangements for public travel and turnaround at the end of the street as the Planning Board shall require), and
- \* provide releases of all mechanics liens with respect to the foregoing work prior to any release of surety or issuance of building or occupancy permits (as appropriate).

Steve

> -----Original Message-----

> From: Stephen D. Anderson  
> Sent: Wednesday, October 27, 2004 10:08 AM  
> To: Roland Bartl (E-mail)  
> Subject: Acton/Gen Planning Board: EMT RB re Access over un-improved public street layout (Brabrook Road)

>  
> Dear Roland:

>  
> I am responding to your questions in an earlier email about the  
> Brabrook Road extension easement. Your questions are in italics. My  
> answers follow each.

>  
> 1. The order of taking separates the built and unbuilt portion into a fee simple taking and an easement taking of the street, but I fail to see how the two are different in their ultimate effect and purpose. What do you think?

>  
> The main differences between a taking in fee and a taking of an  
> easement for a public street are that (a) the fee owner retains some  
> rights when there is a taking of an easement, and (b) if the Town does  
> not improve the street in the easement and discontinues its interest,  
> it can revert to the fee owner.

>  
> In general, the owner of land fronting on an unimproved public street may > ">  
> petition to have paper or otherwise inadequate public ways constructed or upgraded> "> or  
> "> petition to have the ways discontinued.> "> See G.L. c. 82, §§ 21-25. See also

Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144, 157-158 (1983) (referring to analogous procedure for county roads). Responsibility for construction rests with the town, acting through the Board of Selectmen, in accordance with the eminent domain taking of the easement. G.L. c. 82, § 21 (> "> selectmen or road commissioners of a town ... may lay out, relocate or alter town ways, for the use of the town ...> "> ). The Selectmen are not under any legal duty to do so. See Marcus v. County Commrs. of Norfolk, 344 Mass. 749, 750, 181 N.E.2d 654 (1962) (citing analogous discretionary county commissioner procedure). However, the Court > "> would expect that [the developer] and local officials will work responsibly to achieve a practical solution for problems created by the present state of the ways.> "> Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144, 160 (1983).

>  
> In the alternative, a petition to have the ways discontinued  
> requires Town Meeting approval. G.L. c. 82, § 21 (> "> a town, at a  
> meeting, ... may discontinue a town way or a private way> "> ). Where  
> the town holds only an easement in the land, "the law in Massachusetts  
> is well settled ... that upon the discontinuance of the highway, the  
> soil and freehold revert to the owner of the land." Perry v. Planning  
> Board of Nantucket, 15 Mass. App. Ct. 144, 157-158 (1983), citing  
> Harris v. Elliott> , 35 U.S. (10 Pet.) 25, 55-56, 9 L.Ed. 333 (1836).  
> See also Fairfield v. Williams, 4 Mass. 427, 428-429 (1808).

>  
> 2. The easement gives the Town the right to construct in the easement a street and  
> everything else that goes with it. Can the Town, by virtue of a project approval from the  
> Planning Board under zoning, authorize a developer to build the street as a private way,  
> perhaps in conjunction with the usual permit for construction in the public way, or should  
> the process of building the street go through a separate and new subdivision approval?

>  
> An old case, cited with approval in a more recent case, suggests that the Town  
> "> is free to contract with others, including [the landowner], to do the work.> "> See  
> Tuckerman v. Moynihan, 282 Mass. 562, 566, 185 N.E. 2 (1933), cited with approval in Perry  
> v. Planning Board of Nantucket, 15 Mass. App. Ct. 144, 157 (1983). If this approach is  
> taken, we would need to discuss the procurement law implications. As a preferred  
> alternative, the Selectmen may authorize the improvement of the public way within the  
> easement, conditioned upon the developer donating to the Town the necessary funds to  
> construct it. See G.L. c. 44, § 53A. The Town would bid the job and perform the work.

>  
> Building the street should certainly go through a separate  
> subdivision approval if it extends onto the private property outside  
> the easement (or if it is constructed by the underlying fee owner,  
> infra). If it is a public way entirely within the public easement, it  
> would be improved in accordance with the procedures for any other  
> public way.

>  
> 3. In either scenario, will the extended street remain private as intended by the  
> developer, or will it automatically be public due to public ownership of the underlying  
> road easement?

>  
> Unless the private party owns the underlying fee, the new street  
> within the Town> 's easement would be public. The right to build it  
> derives from the Town> 's easement, and under the preferred  
> alternative it would be built by the Town. If the street is continued  
> onto private property where the Town holds no easement, it will be  
> private unless and until offered to and accepted by the Town.

>  
> If the developer owns the underlying fee, he > "> may have the right to  
> construct access roads over the unused highway easements or unimproved existing ways in  
> which he holds the underlying fee, if there is a refusal either to construct the ways or  
> abandon the easements.> "> Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144,  
> 158 (1983). "> '> By the location of a highway an easement of passage is secured for the  
> public with all incidental privileges thereby implied. The fee of the land commonly  
> remains in the owner, who may make any use of it not inconsistent with the paramount right  
> of the public.> '> " Id., citing Commonwealth v. Surridge, 265 Mass. 425, 427, 164 N.E.  
> 480 (1929) and Commonwealth v. Morrison, 197 Mass. 199, 204, 83 N.E. 415 (1908).

>  
> 4. One problem with extending the subdivision street is the requirement for the

termination of the temporary turnaround in the event of a street extension (Ch. 41. S.81Q). There is not enough space for a new full-sized turnaround at the end of the layout due to the limited width of the layout, and due the presence of wetlands in that area even if we were to include some of the developer's land. Does an extension automatically trigger the removal of the temporary turnaround even if the extension is intended as a private access way?

>  
> G.L. c. 41, § 81Q, provides in pertinent part (emphasis added):

>  
> Such rules and regulations may set forth a requirement that a  
> turnaround be provided at the end of the approved portion of a way  
> which does not connect with another way. Any easement in any  
> turnaround shown on a plan approved under the subdivision control law  
> which arises after January first, nineteen hundred and sixty, other  
> than an easement appurtenant to a lot abutting the turnaround, > shall  
> terminate upon the approval and recording of a plan showing extension  
> of said way, except in such portion of said turnaround as is included  
> in said extension, and the recording of a certificate by the planning  
> board of the construction of such extension.

>  
> The Order of Taking took temporary turnaround easements. The  
> temporary easement terminates upon approval and recording of the plan  
> for and construction of the extension of the way. (Of course, the  
> underlying fee owners in the turnaround could grant a new easement to  
> the Town for the continued existence of the turnaround.)

>  
> 5. He could, of course propose a subdivision street into the development parcel, but we  
may not want to accept all the ways in the senior development project as public ways.  
There seems to be no good point for ending the public way and beginning the private way,  
and for clearly marking the transition between the two except much further into project  
parcel.

>  
> This is a planning issue, not a legal one.

>  
> 6. We could view the proposed access as merely equivalent to any other driveway access  
to land. They all cross the public street layout to reach the pavement edge. But, here we  
have a very long distance to cross and I am concerned what that might mean in terms of  
precedent. The Town owns other unbuilt street projections to adjacent properties. Their  
intent was to provide connectivity when the other gets developed. They were not intended  
for use as private driveway areas. Unlike many of these projections, In this case, there  
will probably never be a street continuation of Brabrook Road all the way to Great Road  
due to wetlands at the point of connection to the adjacent property. How concerned about  
precedent do we need to be with a 150- to 200-foot long private driveway running along a  
public right of way?

>  
> Unless the developer owns the fee underlying the easement, in my  
> view the Town should not allow construction of a 150- to 200- foot  
> long private driveway within the easement.

>  
> 7. How would the question of liability be answered for such a long private way in a  
public layout? Would it be better to take full control of the way?

>  
> Given the statutes governing municipal liability, the Town is better  
> off if it owns and controls the street within the public layout. If  
> the underlying fee owner improves the road because the Town will not  
> do so, that road would be a private way within a public easement,  
> complicating liability issues for the Town and the fee owner.

> \_\_\_\_\_  
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