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March 11, 2024
BY EMAIL

Greg Sampson, Chairman
Attn: Denise Gaffey
City of Melrose Planning Board
Office of Planning and Community Development
Melrose City Hall
562 Main Street
Melrose, MA 02176

Re: Armando Plata
Application for Finding of Material Change and Slope Protection Special Permit
Melrose, Planning Board Case No. 22-007
22 Montvale Street, Melrose, MA

Dear Chairman Sampson, Director Gaffey, and Members of the Board:

As you are aware, this office represents Armando Plata ("Plata"), the owner of the property at 22 Montvale Street, Melrose, MA (the "Property"), and the plaintiff in the matter of Plata v. Melrose Planning Board, et. al., Land Court Docket No. 21 MISC 000395 (KTS) (the "Land Court Action"). Plata is also the applicant in Case No. 22-007, seeking a finding of material change in Plata's development plan to construct a single-family dwelling at the Property (the "Project Iteration 2"), and a special permit under Melrose's Slope Protection Ordinance for Project Iteration 2, from the Melrose Planning Board (the "Board"), all in an effort to moot the Land Court Action.

Our office understands that, as part of the City's holistic review of Projection Iteration 2, Director Gaffey and the Members of the Board would appreciate an explanation of the legal basis

for Plata's ability, pursuant to his private rights as the owner of the Property, to conduct work within the "paper"[1] portion of the layout of Montvale Street. Please accept this letter as our attempt to provide the explanation that the Board and Director Gaffey seek.

Before proceeding with the requested explanation, we are duty bound to set forth certain assumptions that frame the forthcoming analysis. First, it is our further understanding that the Board and City of Melrose have deemed that the work that Plata intends to conduct within the "paper" portion of Montvale Street, in connection with Project Iteration 2, to be itself non-jurisdictional with respect to Case No. 22-007 and the Slope Protection Ordinance. Second, applying its Police Powers, including the Board' acting in a *quasi*-judicial capacity on Plata's land-use permitting application for Project Iteration 2, the City does not adjudicate, and does not purport to adjudicate private property rights. Therefore, with the utmost respect, we would object on Plata's behalf if the matters discussed herein could possibly be viewed as a basis to deny Plata's application; we do not intend, in providing this analysis, to stipulate that it is directly legally relevant to Plata's application; and otherwise must reserve rights in these regards. Nevertheless, we wholly, practically understand and respect why the Board and Director Gaffey have asked for this letter, and hope that our analysis sufficiently addresses the matter.

In summary, by operation of the Derelict Fee statute, like the other abutters on this private way, Plata owns to the mid-point of that "paper" portion of the layout of Montvale Street that abuts the Property's frontage. As the fee owner, Plata has the established right to make any and all beneficial uses of this area not inconsistent with others' access rights over Montvale Street, writ-large. Under the binding authorities, this right of the servient estate owner generally includes the right to park motor vehicles in the private way; consistent with our understanding of the custom, usage and practice of most, if not all, other abutters on Montvale Street. Accordingly, Plata has the full right to develop a parking pad to locate the off-street parking[2] for Project Iteration 2 within the "paper" portion of Montvale Street.

In the areas of the "paper" layout of Montvale Street that he does not own, Plata is an easement holder; possessing an implied easement by estoppel, common scheme and/or necessity to use Montvale Street for access appurtenant to the Property. Any easement carries with it all so-called secondary or incidental rights to make such uses and engage in such development as would be reasonably necessary to exercise the primary easement right. It is well-established Massachusetts law that such incidental or secondary easement rights include the right to improve, or create practical, access over an unbuilt right of way (even when or where the right of way area

[1] "[A] paper street [is] a street shown on a plan but not built on the ground[.]" Berg v. Town of Lexington, 68 Mass. App. Ct. 569, 570 (2007).

[2] Understood, under the Melrose Zoning Ordinance, to be referring to parking that is not on a public way; Melrose being a municipality that does not generally permit overnight, on-street public parking.

is presently impassable). As such, Plata, again, has the full legal right to make the relevant improvements to the "paper" portion of Montvale Street across the midpoint thereof from the Property, to provide access to and from the developed portion of Montvale Street, and the parking pad being developed on the side of the way that Plata owns. Plata possesses the private property rights to develop Project Iteration 2 in all respects.

I. Plata Owns the Area of the "Paper" Portion of Montvale Street at which He Proposes to Locate the Off-Street Parking Pad Serving Project Iteration 2.

"Pursuant to G. L. c. 183, § 58, the derelict fee statute, the transfer of title to land abutting a way is presumed to transfer the grantor's fee interest in the way." Kubic v. Audette, 98 Mass. App. Ct. 289, 301 (2020), citing Tattan v. Kurlan, 32 Mass. App. Ct. 239, 242-247 (1992). "The effect of the statute is 'to quiet title to sundry narrow strips of land that formed the boundaries of other tracts, by establishing "an authoritative rule of construction for all instruments passing title to real estate abutting a way."'" Kubic, supra, quoting Rowley v. Massachusetts Elec. Co., 438 Mass. 798, 803 (2003), quoting Tattan, supra at 242.

By operation of the statute, "every deed of real estate abutting a way includes the fee interest of the grantor in the way -- to the centerline if the grantor retains property on the other side of the way or for the full width if he does not -- unless 'the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.'" Tattan, 32 Mass. App. Ct. at 243.[3] "The rule is applicable even if the way is not physically in existence, so long as it is contemplated and sufficiently designated." Brennan v. DeCosta, 24 Mass. App. Ct. 968, 968 (1987). Since there is no express exception or reservation in Plata's chain of title stretching back to his grantor's 1954 source deed,[4] Plata owns to the midpoint of the unbuilt-out, "paper" portion of the layout of Montvale Street along the Property's frontage on that private way. It is within this area of Montvale Street that Plata owns that he proposes, according to the Project Iteration 2 plans submitted to the Board, to develop the parking pad to provide off-street parking for his proposed single-family dwelling at the Property.

II. As the Owner, Plata May Make All Beneficial Uses of this Area of the "Paper" Portion of Montvale Street; which Rights Include the Right to Park Motor Vehicles, Just Like the Other Abutting Owners of the Way who Park their Cars in Front of their Homes.

As the owner, Plata has the right to create this parking pad and to park motor vehicles there, as a matter of well-settled Massachusetts law. "It is a long established ruled in the Commonwealth

[3] Unlike at common law, extrinsic evidence cannot be resorted to forestall application of the legal presumption codified in the Derelict Fee Statute, and the statute has retroactive effect. See Rowley, supra at 804, 803.

[4] Recorded at the Middlesex Southern Registry of Deeds at Book 8250, Page 570.

that the owner of real estate may make any and all beneficial uses of his property consistent with the easement." M.P.M. Builders, L.L.C. v. Dwyer, 442 Mass. 87, 91 (2004). "Consistent with the meaning of an easement, and in furtherance of the policy of maximizing the beneficial use available to the servient landholder, '[t]he person who holds land burdened by a servitude is entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement or profit….[a]ll residual use rights remain in the possessory estate – the servient estate."' Martin v. Simmons Props., LLC, 467 Mass. 1, 14 (2014), quoting Restatement (Third) of Property: Servitudes, § 4.9 (3d ed. 2000).

An established corollary of these principles is that the servient estate owner, generally, has the right to park motor vehicles in a private right of way. See Brassard v. Flynn, 352 Mass. 185, 189 (1967); Kubic, 98 Mass. App. Ct. at 304 (holding "only" servient estate owners "have the right to park on the ROW"). Accordingly, Plata is "entitled to make any use of [his] property which does not interfere with any rights that [easement holders] or others may have in the road. Such use would include the parking of automobiles . . . on the side of" the road owned by him, "which parking" is "'not a substantial obstruction in that [the other abutters'] ingress and egress [would be] unimpaired.'" Brassard, supra.

Here, we are discussing the "paper," dead-end portion of Montvale Street, which does not provide access to any homes, is presently impassable, and is beset with a concentration of ledge, beyond the area to be improved as part of Project Iteration 2, that renders further development of the dead-end private way prohibitively expensive and practically unfeasible. Plata's proposal to locate the parking pad serving Project Iteration 2 in this area also is wholly consistent with our understanding of the custom, usage and practice on Montvale Street. Residents of Montvale Street have routinely and consistently, since the private way came into existence and homes constructed thereon, parked their motor vehicles in front of their homes, in the areas of the way that they have owned, for many many decades. Surely no one can credibly argue that Plata engaging in the same conduct in the "paper" dead-end portion of the way's layout would obstruct access, when abutters park their cars daily on the improved street itself. Plata has the full right to develop the parking pad as proposed.

III. Plata Has an Implied Easement by Estoppel, Common Scheme and/or Necessity over Montvale Street.

Over the balance of Montvale Street that he does not own, Plata has implied appurtenant access rights. "'[T]he derelict fee statute pertains only to the question of ownership of the fee' in a way; it is not concerned with the existence or nature of any easement rights there." Kubic, 98 Mass. App. Ct. at 302, citing Adams v. Planning Bd. of Westwood, 64 Mass. App. Ct. 383, 389 (2005) (despite enactment of G. L. c. 183, § 58, "existence, nature, scope, and extent of easement rights in a way" can be shown by extrinsic evidence). While there is no express easement in his chain of title, Plata plainly possesses implied access rights over Montvale Street by estoppel,

common scheme and/or necessity.

Implied easements are well-established in Massachusetts: "Such circumstances may exist at the time there is a grant of land that the instrument of grant describing the premises but making no reference at all to an easement nevertheless creates one." Mt. Holyoke Rlty. Corp. v. Holyoke Rlty. Corp., 284 Mass. 100, 103-104 (1933). "The origin of an implied easement 'whether by grant or by reservation . . . must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.'" Labounty v. Vickers, 352 Mass. 337, 344 (1967), quoting Dale v. Bedal, 305 Mass. 102, 103 (1940).

"There are cases where a single circumstance may be so compelling as to require the finding of an intent to create an easement," Mt. Holyoke, 284 Mass. at 104, such as when the land granted would be land-locked without such an easement. See Kitras v. Aquinnah, 474 Mass. 132, 139-140 (2016); Bedford v. Cerasuolo, 62 Mass. App. Ct. 73, 76-79 (2004) (referring to such implied easements as easements by necessity). Here, the Property would be landlocked without access rights over Montvale Street, creating a presumption of the existence of an implied easement by necessity.

Another category of well-recognized implied easements is when a plan of conveyance depicts a planned development area, with easements depicted thereon. See Tenczar v. Indian Pond Country Club, Inc., 491 Mass. 89, 101 (2022); Hickey v. Pathways Assoc., Inc., 472 Mass. 735, 754 (2015); Reagan v. Brissey, 446 Mass. 452, 453-458 (2006); Leahy v. Graveline, 82 Mass. App. Ct. 144, 148 (2012); Tattan, 32 Mass. App. Ct. at 244 n.7. This doctrine is referred to alternatively as the creation of an implied easement by common scheme, or the so-called incorporation rule; the reference in the instrument of conveyance to a plan of record, depicting easement areas, evinces the common grantor's original intent to create easement rights in and over those areas. This doctrine would also have full application here.

Finally, and equally dispositive, here, Plata would have an implied easement by estoppel over Montvale Street as it has always been a lineal monument of the Property in its chain of title. See Patel v. Planning Bd. of N. Andover, 27 Mass. App. Ct. 477 (1989). "[W]here land situated on a street is conveyed according to a recorded plan on which the street is shown, the grantor and those claiming under him are estopped to deny the existence of the street for the entire distance shown on the plan." Id., 27 Mass. App. Ct. at 482, quoting Goldstein v. Beal, 317 Mass. 750, 755 (1945). Therefore, in sum, there are three well-settled theories of implied easement that establish Plata's access rights over Montvale Street, and these theories are likely the source of all other abutters' access rights as well. Plata has the right to use the balance of Montvale Street that he does not own to access the Property.

IV. As an Easement Holder, Plata May Improve Access to and from the Developed Portion of Montvale Street and the Parking Pad.

As an easement holder, Plata further has the right to improve his access. "When an easement or other property right is created, every right necessary for its enjoyment is included by implication." Sullivan v. Donohue, 287 Mass. 265, 267 (1934). See Tenczar, 491 Mass. at 101, quoting Commercial Wharf East Condominium Ass'n v. Waterfront Parking Corp., 407 Mass. 123, 138 (1990) ("'When an easement is created, every right necessary for its enjoyment is included by implication'").

Pursuant to these so-called secondary or incidental easement rights, "[t]he right of anyone entitled to use a private way to make reasonable repairs and improvements is well established". Guillet v. Livernois, 297 Mass. 337, 340 (1937). See Kubic, 98 Mass. App. Ct. at 303, quoting Chatham Conservation Found., Inc. v. Farber, 52 Mass. App. Ct. 584, 589 (2002) (right of way includes "right to 'make reasonable repairs and improvements to the right of way'). The cases, in fact, teach that "[t]he owner of a 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, having due regard to the rights of others who may have an interest in the way." Albert N. Walker v. William & Merrill C. Nutting, Inc., 302 Mass. 535, 543 (1939). Even where a private way presently does not exist on the ground, and is impassable, the easement holder possesses the right to build out the way. Therefore, Plata has the full right to make improvements to the "paper" portion of Montvale Street to access the Property.[5]

[5] These secondary or incidental easement rights, in particular, include the right to re-grade and pave a right of way. See Guillet, 297 Mass. at 341; Post v. McHugh, 76 Mass. App. Ct. 200, 206 (2010), quoting Glenn v. Poole, 12 Mass. App. Ct. 292, 296 (1981) ("'[c]learing limbs from a roadway, smoothing the surface of a way, placing gravel on a road, or even paving a road have been condoned as reasonable repairs, if necessary to enjoyment of [an] easement'") (emphasis added); Stagman v. Kyhos, 19 Mass. App. Ct. 590, 593-594 (1985), citing Guillet, supra ("we agree with the judge that the Stagmans' paving their property and a portion of the route in question did not constitute a trespass. It is settled law that the owners of the dominant tenement have a right reasonably to improve the surface of the way over which they have the right to pass") (citation omitted; emphasis added).

V. Conclusion.

While technically outside the purview of the Board's decision making, and nonetheless acknowledging that the Board's concerns in this regard are natural, the foregoing proves that the development activity proposed by Plata, within the "paper" portion of the layout of Montvale Street, falls well within Plata's private property rights. It is our fervent hope that this analysis will put any misgivings the Board may have to rest on these matters.

Sincerely,

/s/ Nicholas P. Shapiro
Nicholas P. Shapiro

NPS/hs

Cc: Client
City of Melrose Planning Board