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Erik Rhodin

June 9, 2015

70B Thomas Street

Belmont, MA 02478

RE: 70B Thomas Street and Lots 1 and 2 Clark Lane

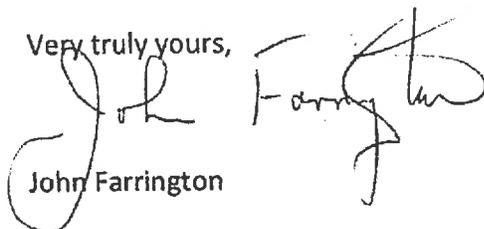
Dear Erik:

You asked me to take a look at the status of Clark Lane in terms of your rights to use it, along with others, to access your home with an address of 70B Thomas Street, shown as Lot 2 on a plan December 31, 2014 on a Plan of Land in Belmont, MA by Rober Survey, said Plan recorded at the Middlesex South District Registry of Deeds in Plan Book 2015, Pg. 55. Also, shown on that Plan, is Lot 1. Both Lots 1 and 2 have their frontage on Clark Lane and, in addition, Lot 2 has frontage on and an access to Thomas Street.

Clark Lane is a private way, in existence since at least 1928, The Town plows and repairs Clark Lane. There is regular trash pickup. All utilities, including public water and sewer, are in Clark Lane. Clark Lane is the means of access for the twelve residential living units, including yours, which abut it. Clark Lane is shown on at least one recorded plan by Frederick R. Joyce dated August 6, 1980 (see Book14262, Pg. 94). As important is the use of Clark Lane and its maintenance by the Town. Each brings Clark Lane within the Bylaw definition of a Street.

Attached to this letter is a legal memorandum giving both a statutory basis, MGL Ch. 187, sec 5, and a case law basis, *Jerome Berg Others vs. Town of Lexington & Others*, giving you and the other abutters legal rights to use Clark Lane and bring or use utilities to/for each lot. This is in addition to the actual use of Clark Lane for these purposes since the 1920s.

Very truly yours,


John Farrington

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LEXINGTON, MASSACHUSETTS 02421

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Memorandum: June 9, 2015

RE: Lots 1 and 2, Clark Lane and 70B Thomas Street, Belmont, MA

This Memorandum takes a look at the rights of the owners of two lots shown on a Plan of Land dated December 14, 2014 by Rober Survey and recorded at the Middlesex South District Registry of Deeds in Plan Book 2015 Pg. 55, to use Clark Lane, a partially improved private way. Clark Lane is show on the Rober Plan as a somewhat irregular layout as it passes over Lot 1 and Lot 2. Part of Lot 1 and Lot 2 include between 80% to 90% of Clark Lane within their legal boundaries. Both Lots 1 and Lot 2, and abutting homeowners to the North access their lots and dwelling units over Clark Lane. Lot 2 also encompasses 70B Thomas Street, which property has a ten foot wide right of way to Thomas Street and 5' of frontage on Thomas Street. Thus, at some points the legal fee to Lot 1 and Lot 2 encompass almost sides of Clark Lane.

Lot 1 and Lot 2 are collectively owned by the Clark Street Realty Trust, u/d/t dated March 16, 2015 and recorded at the Middlesex South District Registry of Deeds in Book 64143 Pg. 316. Attached is a copy of the Rober plan showing Lot 1 and Lot 2 and the layout of Clark Lane. See Exhibit 1 Note, the rear lot lines of these properties is described as running northerly along the location of a brook shown on a plan titled the "Mount Pleasant" plan a copy of which is attached as Exhibit 2. The brook is Wellington Brook which eventually runs behind the First Church in Belmont.

Clark Lane intersects Clark Street, a public way and serves twelve residential living units. Clark Lane dead ends at the Belmont Housing Authority land. Clark Lane has all public utilities, is plowed by the Town, trash and yard refuse is picked up by the Town, and repaired by the Town.

Clark Lane was engineered and laid out in the 1920s, when the brook was constructed as a culvert, and a part of it "taken" in 1932 by Belmont to layout and install a sewer system.

The issues with using what currently is a non-public or private road or street to access land of lot owners abutting either side of the private way, road or street and to gain legal frontage on the private way was extensively analyzed and ruled on by the Massachusetts Appeals Court in the case *Jerome Berg & Others vs. Town of Lexington & Others*, 68 Mass. App. CT. 569 (April 2006). Additionally, the

rights of a property owner whose land abuts a private way, road or street to bring necessary utilities to his lot over and under a private way, where typically other abutters own to the midpoint of that private way, is expressly granted by Massachusetts General Laws Ch. 187, sec 5, ("installation of public utility services for abutting owners on private ways authorized"). In this case, Lot 1 and Lot 2 own beyond the midpoint.

A: Legal Authority of the Planning Board to Require Road Improvements.

We are using Clark Lane to access and as the legal frontage for Lot 1 and Lot 2. Clark Lane intersects Clark Street, a public way. The first issue is the Owner of Lot 1 and Lot 2 and their legal ability to use Clark Lane, and derive frontage on Clark Lane for each Lot. This already was the case for Lot 2, and it is for the other six abutting lot owners who also use Clark Lane as their legal frontage and to bring utilities to and access their properties. The legal answer is yes.

In the *Berg* case the Court rules, using the *Toothaker v. Planning Board of Billerica*, 346 Mass. 436, (1963) case as its basis, as follows:

Our cases indicate that planning boards may regulate access to lots established by subdivision plans predating acceptance of the subdivision control laws. Thus, *Toothaker v. Planning Bd. of Billerica*, 346 Mass. 436, 439 (1963) (*Toothaker*), held that the planning board had authority to regulate access to the lots of a 1914 plan. That case was an appeal by the planning board from a decision in the Superior Court which held that the "subdivision of the petitioners¹ land is not subject to the 'subdivision control law.' " [Note 19] The plaintiffs in *Toothaker* were the owners of 1,200 lots in a subdivision of more than 1,800 lots shown on a 1914 plan. At the time the subdivision control law became effective in Billerica in 1951, about a third of the lots were exempt from the subdivision law under G. L. c. 41, § 81FF. [Note 20] *Toothaker*, supra at 437. Holding that the plaintiffs' tract is "plainly, a subdivision within the meaning of § 81L," the Supreme Judicial Court ruled: "Nothing in the exceptions to that definition exempts the plaintiffs' land. Nor can it be argued that the planning board lacks power under § 810 and § 81FF to regulate access to the lots of the 1914 plan." *Id.* at 439. The court did not limit the authority of the planning board to the lots which were not exempt. Even as to the lots which were exempt under § 81FF, the court held that the planning board could apply its regulations to the rights of way appurtenant to those lots, as long as the plaintiffs and planning board applied the law so "that the existing exempt rights of way of the

lots separately owned in 1951 are not destroyed or substantially limited or interfered with. ... In any event, nothing would preclude application of regulations [to those lots] requiring construction of ways and installation of municipal services." Id. at 440.

B: Lot Owner's Legal Right to Make Access Over a Private Way Adequate and Passable

The next issue decided by the Court in *Berg* is the right of the Owner of the lot wanting to use the private way to make access to their abutting lot adequate and passable, as required by the requirements and decision of the Lexington Planning Board. The Court ruled:

'the defendants, as owners of parcels abutting Grandview Avenue as shown on the 1893 plan, have an easement to use Grandview Avenue in its entire length. *Murphy v. Mart Realty of Brocton, Inc.* 348 Mass. 675 (1965). The defendants also have a right to make the street "passable and usable for its entire width, having due regard for the rights and interests of others..." This right exists even more clearly ... where, without improvements, the way is impassable and useless."

Note, Here Clark Lane already is improved, utilities are installed and the road is plowed and patched by Belmont.

[Court Note 18] These rights are not dependent on the consent of the owners of the fee in the paper street, and we do not consider that § 2.2.4 (of the Lexington Zoning Bylaw) of the development regulations is to be construed to apply to such rights. Emphasis added

C: Reasonableness of Required Improvements

Sometimes, there are issues raised as to "overburdening" the easement, along with the Planning Board having due regard for the rights and interests of the abutters. In this case, Clark Lane already is used by its several abutting landowners to access and bring utilities to their dwelling units. Including the existing Lot 2, and which today also parks their vehicles, accessed via Clark Lane and their two gates leading to their property. Here, only one new single family structure is being considered as part of Lot 1.

D: Statutory Authority of a Lot Owner to Bring Utilities through a Private Way

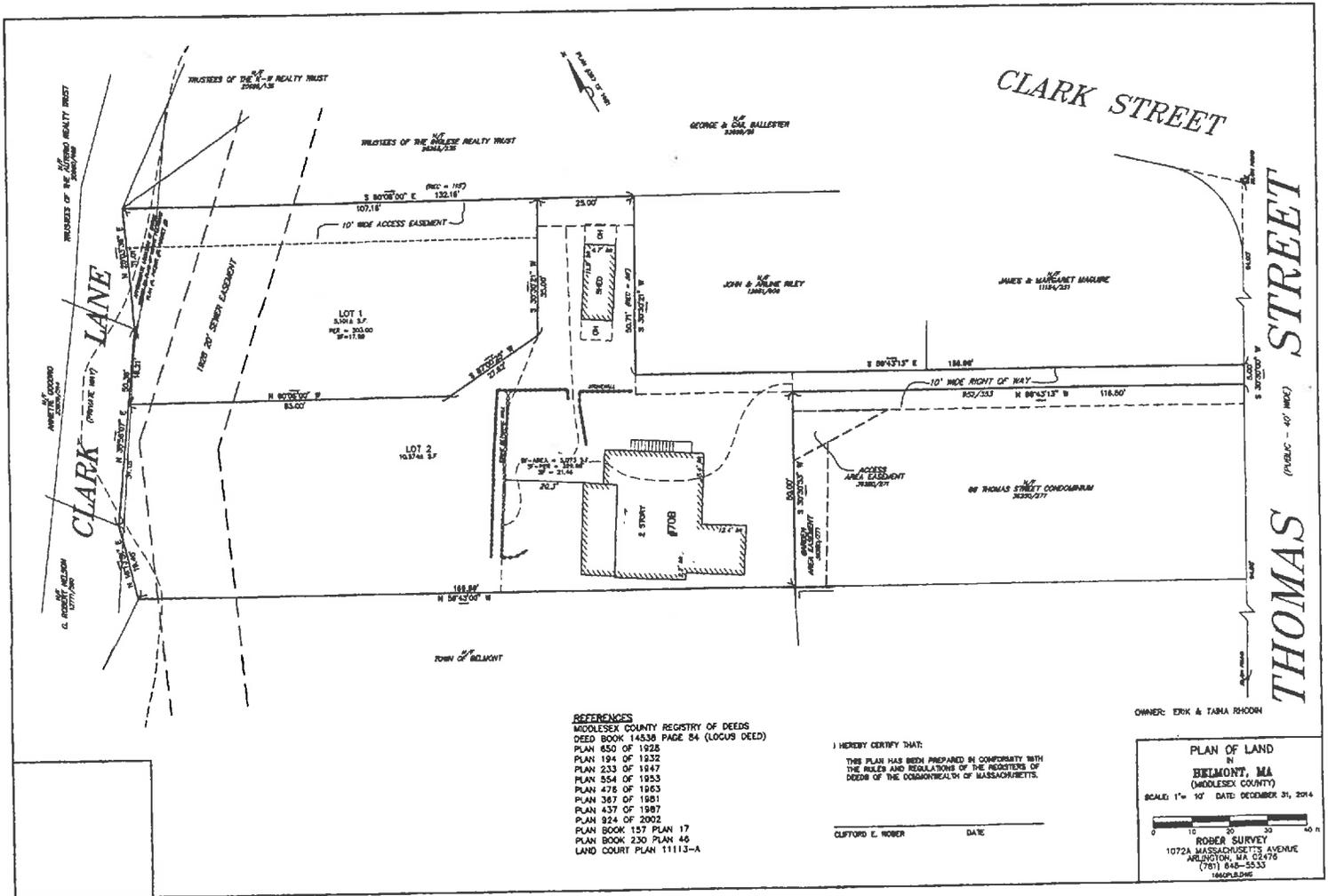
Finally, there is clear statutory authority for the owner of a Lot on a private way to bring all needed utilities through the private way to his Lot.

GL Ch. 187, sec 5. Provides as follows:

Section 5. The owner or owners of real estate abutting on a private way who have by deed existing rights of ingress and egress upon such way or other private ways shall have the right by implication to place, install or construct in, on, along, under and upon said private way or other private ways pipes, conduits, manholes and other appurtenances necessary for the transmission of gas, electricity, telephone, water and sewer service, provided such facilities do not unreasonably obstruct said private way or other private ways, and provided that such use of the private way or other private ways does not interfere with or be inconsistent with the existing use by others of such way or other private ways; and, provided further, that such placement, installation, or construction is done in accordance with regulations, plans and practices of the utility company which is to provide the gas, electricity, or telephone service, and the appropriate cities, towns, districts, or water companies which provide the water service. Said agencies, which provide such service, shall comply with the rules and regulations of the division of water supply and the department of public utilities or the department of telecommunications and cable. Any such owner or owners may grant permission to a public utility company or water company to enter upon said way or other private ways to place, install, repair, or relocate pipes, conduits, manholes, and other necessary appurtenances for the transmission of gas, electricity, telephone or water service in accordance with such company or companies regulations, practices and tariffs filed with the department of public utilities or the department of telecommunications and cable or the division of water supply; provided, however, that no charge or added assessment shall be levied by such public utility company or companies against any such owner or owners not connected to such service or services.

Therefore, there is a statutory right to build the infrastructure necessary for the two lots on Clark Lane, to the extent the necessary infrastructure doesn't exist already.

Finally, I note that while the Berg case has become the leading case generally in Massachusetts on the issues of use and improvements of private ways.



- REFERENCES**
- MIDDLESEX COUNTY REGISTRY OF DEEDS
 - DEED BOOK 14538 PAGE 84 (LOCUS DEED)
 - PLAN 850 OF 1928
 - PLAN 194 OF 1932
 - PLAN 233 OF 1947
 - PLAN 554 OF 1953
 - PLAN 476 OF 1963
 - PLAN 387 OF 1981
 - PLAN 437 OF 1987
 - PLAN 924 OF 2002
 - PLAN BOOK 157 PLAN 17
 - PLAN BOOK 230 PLAN 46
 - LAND COURT PLAN 11113-A

I HEREBY CERTIFY THAT:
 THIS PLAN HAS BEEN PREPARED IN CONFORMITY WITH
 THE RULES AND REGULATIONS OF THE REGISTRARS OF
 DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

CLYFORD E. ROBER DATE _____

OWNER: ERIC & TARA RHODIN

PLAN OF LAND
 IN
BELMONT, MA
 (MIDDLESEX COUNTY)

SCALE: 1" = 10' DATE: DECEMBER 31, 2014

ROBER SURVEY
 1072A MASSACHUSETTS AVENUE
 ARLINGTON, MA 02476
 (781) 848-5533
 1469PLDING

*Book. 2015 pg. 55
 Recorded Plan.*