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December 21, 2016

Jeffrey Wheeler, Senior Planner
Town of Belmont
Homer Municipal Building
19 Moore Street, 2nd Floor
Belmont, MA 02478

RE: Belmont Day School
Use of Easement
Project No. 16-002

Dear Jeffrey,

Attached for your review is a letter prepared by Robinson & Cole, LLP for Belmont Day School dated December 15, 2016 describing the easement that is part of the project site and its proposed use as a driveway. Please let me know if you have any questions regarding this submittal.

Regards,
Avalon Consulting Group, LLC

Kelly Durfee Cardoza
Principal

KDC/dma

Enclosure

DID: 160015

Robinson+Cole

MICHAEL S. GIAIMO

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By Email and U.S. Mail

December 15, 2016

Brendan W. Largay
Head of School
Belmont Day School
55 Day School Lane
Belmont, MA 02478
blargay@belmontday.org

Dear Mr. Largay:

You have asked me to address a question concerning a proposal by Belmont Day School (“BDS”) to construct a driveway allowing direct vehicle access from Concord Avenue to its buildings and parking areas. The driveway would provide a second means of access to the BDS campus and improve traffic flow within the campus. It would be constructed, in part, along a strip of land that BDS owns, which fronts on Concord Avenue and is approximately 40 feet wide and almost 1,100 feet in length (“Driveway Parcel”). The Driveway Parcel is described as “Parcel Two” in the 1998 deed from Edith S. Varkas, Trustee of the Edith S. Varkas Realty Trust to BDS, which is recorded with Middlesex South Registry of Deeds at Book 28053, Page 15 (“Varkas Deed”). A copy of the Varkas Deed is attached as Exhibit 1.

The Driveway Parcel is burdened by an easement (the “Easement”) benefitting the property that was formerly owned by Massachusetts General Hospital (the “Benefitted Property”). The Easement was reserved in the deed from The Massachusetts General Hospital to Edith S. Varkas dated November 30, 1953 and recorded with Middlesex South Registry of Deeds at Book 8184, page 602 (“MGH Deed”). The Easement reserves for the Benefitted Property, “the right to use the premises hereby conveyed in common with the Grantee and all others lawfully entitled for all purposes for which streets or ways may now or hereafter be commonly used in said Belmont.” A copy of the MGH Deed is attached as Exhibit 2.

I understand that one of the abutters to the BDS property has contended that the proposed driveway must be constructed in accordance with the standards of the Belmont Board of Survey for new “streets.” I see no basis for that contention in the language of the Easement or otherwise.

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There is no doubt that BDS has the right to construct a private driveway to Concord Avenue over the Driveway Parcel in accordance with the regulatory requirements that generally pertain to the construction of private driveways in Belmont, and the issuance of a street opening permit. There is no restriction in the Varkas Deed or the MGH Deed that prevents BDS from using the Driveway Parcel for a driveway. I am not aware of any zoning requirement or other regulation that would preclude the construction of such a driveway in accordance with any applicable zoning sight distance and open space requirements, any applicable wetland or other regulatory requirements, and subject to the grant of a curb cut permit.

Scope of the Board of Survey Rules and Regulations

I have reviewed the “Rules and Regulations of Board of Survey, Belmont, Massachusetts” dated January 23, 1989 (“BOS Regulations”). The BOS Regulations govern “the Layout of Streets in Belmont, Massachusetts.” The scope of the BOS Regulations clearly pertains to proposals for new “streets” serving and providing frontage for new lots for proposed development. There is no indication that the Belmont Board of Survey regulates new private driveways serving an existing lot, or that the BOS Regulations are intended to do so. As one authority on streets and ways in Massachusetts states:

Private ways, if they are intended to constitute frontage for zoning purposes, must be laid out and constructed in accordance with the provisions of the Subdivision Control Law, G.L. c. 41, Section 81KK-81GG, otherwise a landowner may create such private ways crossing his property as he wishes.¹

The BOS Regulations are similar in subject and scope to the regulations for the subdivision of land that exist in Massachusetts municipalities that have adopted the Subdivision Control Law. Belmont has not adopted subdivision control and instead regulates new streets pursuant to a special act of the legislature creating the Board of Survey in Belmont, as well as the Massachusetts General Laws pertaining to Boards of Survey.² Because the proposed driveway will only provide access to the BDS property and is not providing frontage for any new or existing lot or being opened to public use, there is no obligation to construct the way to the Board of Survey standards.³

¹ F. Sydney Smithers Massachusetts Streets and Ways for Surveyors (2011), available at <http://www.mass.gov/courts/case-legal-res/law-lib/laws-by-subj/about/roads.html>

² 1903 Mass. Acts 141; M.G.L. c. 41, §§ 73-81.

³ See G.L. c. 41 §74, providing that “no person shall open a private way for public use” without submitting plans for Board of Survey approval (emphasis added).

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Scope of the Easement

The Easement language reserves for the Benefitted Property the right to use the Driveway Parcel “for all purposes for which streets or ways may now or hereafter be commonly used.” This indicates that the Benefitted Property may (to the extent otherwise permitted by applicable laws) use the Driveway Parcel for customary uses of a street or way, such as access by vehicle or on foot and the installation of utilities.⁴

Massachusetts courts have interpreted similar easement language as describing the scope of permissible uses for the easement, rather than determining its status or dictating construction standards. For example, one case involving an easement benefitting an abutting property stated:

It would be an unwarranted inference that by the phrase “as if the same were a public highway” [the easement grantor] meant to say it was to be of the width usually prescribed for public ways; and this wording may be treated as descriptive of the character of the use, and not the breadth, of the layout.⁵

Therefore, the use of the word “street” in the Easement does not restrict the use of the Driveway Parcel to a street that is approved by the Board of Survey and built in accordance with its regulations.

The terms of the Easement are relevant to the use that the Benefitted Property may make of the Easement. BDS itself does not exercise the Easement when it constructs a driveway within its own property. The fact that the driveway will be constructed within an area of its own property that is burdened by the Easement does not require that BDS transform its proposed private driveway into a street, let alone one requiring Board of Survey approval.

If BDS or any Benefitted Property owner, at some point in the future, desired to use the Driveway Parcel for the purpose of constructing a street that could serve as frontage for development lots, there would then be a need to consider the BOS Regulations.⁶ BDS is not proposing such a subdivision. It would be extremely

⁴ See e.g. *Beals v. Inhabitants of Brookline*, 245 Mass. 20, 23-24 (1923) (stating that deed containing the words “together with the right to use [the way] for all purposes for which streets or ways are ordinarily used...” authorized holders of that easement the right to layout drains and sewers because “streets and ways are ordinarily used for the laying of drains and sewers”); *Bds Realty, LLC v. Broutsas*, 11 LCR 94, (Mass. L. Ct. 2003) (stating “such language has been interpreted to mean the right of ingress and egress and the right to bring in utilities” and holding that, because parking was allowed on the town streets at the time the easement in question was created, parking was permitted on the easement).

⁵ *McKenney v. McKenney*, 216 Mass. 248, 251 (1913).

⁶ See Belmont Zoning Bylaw, Section 1.4, defining “lot frontage” with reference to “the boundary of a lot on land coinciding with a street line. . .” and defining “street” as “Either: a) a public way or a way

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unlikely that the owner of the Benefitted Property could ever propose a subdivision making use of the Easement, because the Benefitted Property with immediate access to the Driveway Parcel is zoned as Open Space and Town Cemetery and dedicated to those uses. Under the McLean District zoning, a 13.91 acre area abutting Concord Avenue and the west side of the Driveway Parcel is designated as Town Cemetery and placed in the Cemetery Subdistrict. A 101.12 acre Public Open Space subdistrict is adjacent to the Town Cemetery and to the south boundary of the BDS property, including the southern end of the Driveway Parcel. Accessory parking, trails and visitor and interpretative facilities are allowed within publically owned land in the Open Space Subdistrict. Construction and use of vehicular and pedestrian access ways, however, are allowed only within areas identified on the Zoning Map as "Vehicular Access Easement." It appears from the Zoning Map that there are no "Vehicular Access Easement" areas that abut the Driveway Parcel or the Cemetery Subdistrict.⁷ In sum, it appears that the current zoning applicable to the McLean District would not allow vehicular access across the Open Space District to reach the Driveway Parcel directly, or indirectly through the Cemetery District. As a practical matter, this makes it highly unlikely that a Benefitted Property owner could ever exercise rights under the Easement that would entail constructing a "street" requiring Board of Survey review on the Driveway Parcel.

Additionally, with reference to the November 9, 2016 Site Plan that you provided for our reference, the work BDS proposes within the Driveway Parcel would not interfere with the rights granted to the Benefitted Property by the Easement. Construction of a driveway to serve the BDS property is not inconsistent with the Benefitted Property's use because it would not prevent or interfere with the use of the Driveway Parcel for access, for running utility lines, or other purposes that streets and ways in Belmont are commonly used. It would not prevent, diminish, or interfere with the exercise of the Easement rights granted to the Benefitted Property.

which the Town Clerk certifies is maintained and used as a public way, or b) a way approved by the Board of Survey or c) a private way . . . used as means of vehicular access to the lots fronting on it . . . [and] shown on a subdivision plan recorded prior to September 21, 1988."

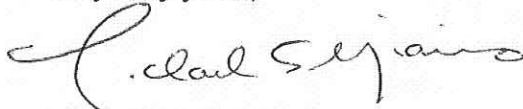
⁷ Furthermore, Section 6A.3.3 of the Belmont Zoning By-law provides that "[v]ehicular access to the Residential Subdistricts and the McLean Institutional Subdistrict shall be via Mill Street, except in case of emergency access. Vehicular access to the Senior Living Subdistrict and the Research and Development Subdistrict shall be via Pleasant Street, except in case of emergency access." This would be another zoning impediment to using the Driveway Parcel for access to the developed part of the McLean District.

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Please call me if you have any questions or wish to discuss this matter further.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Michael S. Giaimo".

Michael S. Giaimo

cc: Lucille Kooyoomjian, Director of Finance and Operations, Belmont Day School (by email)