TOWN OF WALPOLE
COMMONWEALTH OF MASSACHUSETTS
OFFICE OF COMMUNITY DEVELOPMENT

JAMES A. JOHNSON
Town Administrator

ASHLEY CLARK
Community Development Director

To: Zoning Board of Appeals

From: Ashley Clark
Community Development Director

Date: November 25, 2019

Subject: Burns Avenue Access Issues

Please find attached a memo regarding access issues as they relate to the ZBA's review of the Burns Avenue 40B application.

In summary, the memo finds that the grant of a G.L. c. 40B comprehensive permit would not create access rights. The memo recommends the ZBA make the specific findings:

(1) that the rights of the Developers to use the disputed private way area in the manner proposed in the development plans have not been conclusively established;

(2) that, in granting the comprehensive permit, the Board recognizes that the Developers may be at risk of a potential court challenge by a person or persons with standing to contest the Developers' rights to use the disputed private way area; but

(3) that it is the Developers' responsibility to ensure that they hold the necessary rights to develop the project as approved prior to proceeding with construction.

The Memo recommends that the ZBA clearly state that approval of the comprehensive permit is not intended to either confirm existing private access rights over the disputed private way area or confer new private access rights to use the disputed area.

In addition, Staff recommends the ZBA include the following condition:

Site control must be demonstrated to MassHousing's satisfaction.

M E M O R A N D U M

TO: GXP

FROM: JCC

DATE: November 25, 2019

RE: WALPOLE - BURNS AVENUE ACCESS ISSUES

You have asked me to provide a further assessment of whether the Burns Ave. Developers have sufficient rights to access their proposed 36-unit GL c. 40B development site (which consists of parcels identified as Assessors' Parcel Nos. 119, 136 and 137) via a private way extending more than 100 feet beyond the dead end of Burns Avenue, an accepted public way. With the caveat that KP Law had not conducted independent title research, Attorney Everett advised the Walpole ZBA on April 3, 2019 that, based upon preliminary information submitted by Attorney Gallogly, the Developers could have ownership rights in the private way shown on the plans.[1] The Developers' attorney submitted a letter to the ZBA, dated May 13, 2019, setting out the basis for his conclusions that the Developers have sufficient rights in the private way to improve it and use it as access for the entire development site, as well as to install utilities within it.

In addition, current and former abutters to the proposed development site have challenged the Developer's rights to use the private way as proposed, and have submitted additional information to the ZBA which raises questions about the actual location, width and ownership of the private way. They have also argued that, if the Developers do own to the centerline of the private way, then the use of the private way to serve the entire development site would, in any event, constitute an overburdening of any portion of the private way which is not owned by the Developers. You have asked me to examine Attorney Gallogly's conclusions in the light of the abutters' claims and documentation, and to determine whether there is reason to make further investigation into the Developers' rights to use the private way. If the documentation presented to the ZBA thus far is not dispositive, you have asked how the ZBA might address the unresolved rights in a decision granting a comprehensive permit.

For the reasons discussed below, it is not possible to accurately assess the validity of either the Developers' claims or the abutters' claims without a complete title search. However, having reviewed and compared the documentation submitted by the abutters and Attorney Gallogly, it is my opinion that Mr. Gallogly's assessment of the Developers' rights is not supported by the

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[1] You have told me that the DHCD has deemed, through the site eligibility process, that the Developers have a sufficient interest in the development site to proceed with the C. 40B application. This determination is jurisdictional only. It is not a judgment that the Developers has sufficient rights to access the development over private land. Indeed, the site does have legal access from a public way via its Union Street frontage. So, the private access right issue may not have come under DHCD scrutiny at all.

materials appended to his May 13, 2019 letter. Rather, his assessment appears to be founded on certain assertions that are not fully borne out by the documentation he provided, and may ultimately prove incorrect.

These assertions include: (1) that the portion of the development site which is comprised of the Felton and Fiorio lots was conveyed out in a single, 1899 deed from Clara Morse to Edmund F. Gay (Exhibit J to the May 13, 2019 letter); (2) that Clara Morse then owned the private way referenced in the bounding description of the conveyed land, and consequently conveyed the fee interest to the centerline of the referenced private way, for the distance abutting the land conveyed, per operation of the Derelict Fee Statute; (3) that the private way referenced in the 1899 deed is the same private way once known as "Jennings Avenue;" (4) that the 1934 public way layout of Burns Avenue is identical in location and width to the original layout of Jennings Avenue, although the public way layout did not extend for the full length of Jennings Ave; (4) that the existence of this remaining private section of Jennings Avenue, following the acceptance of Burns Avenue is documented by several plans subsequently endorsed by the Walpole Planning Board as Approval Under the Subdivision Control Law Not Required ("ANR"), which depict a forty foot wide private way extending approximately 115 feet beyond the end of the accepted Burns Avenue layout, and which are referenced in later deeds conveying lots abutting such private way; (5) that the endorsed ANR plans evidence the actual existence and layout of the private way depicted thereon, and are conclusive evidence that the lots shown on those ANR plans as abutting the private way have rights of access over that way; (6) that the Burns Development Lot located at the southeasterly end of the disputed private way has frontage on that way; and (7) that any rights the Developers may have to use the disputed private way are sufficient to serve the all 36 units to be located on the several parcels which comprise the development site.

Discussion

Below, I have identified several reasons why the documentation submitted on behalf of the Developers does not conclusively establish that the Felton and Fiorio land was conveyed together with a fee interest in a forty-foot wide private way once known as Jennings Ave, via the 1899 deed from Clara Morse to Edmund Gay.

- Notably, the property description contained in the Exhibit J, 1899 deed follows abutting monuments (in this case, the monuments being the abutting properties identified only by the names of the land owners) and includes no specific measurements. Standing alone, the description does not establish the precise location of the conveyed parcel of land, or tie it directly to the Burns Avenue development site. Without additional documentation confirming the location and boundaries of the lands used as monuments in the 1899 deed, it is not possible to establish that Ex. J is, in fact, the source deed for the Fiorio and Felton lots or any of the other land which comprises the Burns Ave. development site. Nor can it be confirmed that the private way at issue is part of the same private way referenced in the 1899 deed.

- As has been explained by both Attorney Gallogly and Attorney Everett, the so-called Derelict Fee Statute, G.L. c.183, § 58 creates a statutory rule that, absent an express exception or reservation indicating a contrary intent, conveyance of land bounding on a way includes the grantor's fee interest in the abutting way, as well as the easement to use the entire way. This rule plainly does not apply, however, where the grantor does not have a fee interest in the abutting way at the time of the conveyance.

  Here, the documentation provided by Attorney Gallogly is insufficient to support his assertion that the conveyance of land described in the 1899 deed included the grantor's fee interest in the private way mentioned in the deed. Even if Ex. J proves to be the source deed for the Felton and Fiorio lots, additional documentation is needed to demonstrate that the private way referenced in the 1899 deed was then owned by the grantor. Otherwise, the words "then turning and running northwesterly by land of E. Burns and a private way to Pleasant Street" cannot be read as conveying a fee interest in that private way.

- Moreover, if, as asserted by the Developers' attorney, the private way referenced in the 1899 deed corresponds to the private way formerly known as Jennings Avenue, then language contained in an earlier deed from Lewis Jennings to Edward Burns suggests that Clara Morse *may not* have owned the referenced private way at the time of her1899 conveyance to Gay. Attorney Gallogly did not provide a copy of the 1895 deed from Lewis Jennings to Edward Burns, but he did quote a part of that deed. The quoted language *grants to Burns*:

  > "a right of way over a private way to be called Jennings Avenue, twenty feet in width *beside the wall bounding land of Richard Morse*, said right of way extending from the point of beginning referred to in the above description to Pleasant Street twenty feet in width *over land of the grantor, Lewis A. Jennings*." [Emphasis added.]

  I interpret this language as an express grant of a right of way easement to Edward Burns over a twenty-foot-wide private way located on Jennings' remaining land. Following the 1895 conveyance of the right of way easement to Burns, Jennings would have continued to own the fee in the twenty-foot wide "private way to be called Jennings Avenue." The quoted language also indicates that the Richard Morse land was not bounded by Jennings Avenue; rather it was bounded by a wall.

  Unless it is first established that the private way mentioned in the 1899 deed is, in fact, Jennings Ave., and unless further title research reveals a conveyance of the fee in Jennings Avenue to Clara Morse prior to the 1899 deed, she would have been unable to convey a fee interest in Jennings Avenue to Gay in that deed. Additionally, if Edward Burns never acquired more than an easement to use Jennings Avenue, then the Campbells would not have acquired more than an easement in Jennings Ave, as Edward Burns' successors in interest.

- If, as asserted, the private way referenced in the 1899 deed is Jennings Avenue, and if the disputed private way is part of Jennings Avenue, then the further assertion that the disputed private way is 40 feet wide is contradicted by the above-quoted, 1895 deed description of Jennings Avenue, as being "twenty feet in width." Moreover, none of the documentation provided thus far demonstrates the exact distance that Jennings Avenue extended over the Jennings land from its intersection with Pleasant Street; nor does it establish the location of the wall which marked the boundary of the Richard Morse property in 1895 and ran alongside Jennings Avenue private way. Without such additional documentation, it is not possible to ascertain the location and layout of Jennings Avenue on the ground in relation to the development site.

  To the extent that the Developers assert that the 1934 Burns Avenue public way layout aligns with the first 440+ feet of Jennings Avenue, there is nothing in the record of the Burns Avenue layout and acceptance, or in the taking documentation, which either references Jennings Avenue or suggests that the Burns Ave. public way layout corresponded with the layout of an already existing private way.

- Both the abutters and the Developers appear to rely on various, post-1953 ANR plans endorsed by the Planning Board to support their respective claims regarding the existence and layout of the disputed private way. It bears noting that these endorsed plans may, or may not, accurately depict the length and layout of the disputed private way. More importantly, however, the endorsement of an ANR plan does not, as Mr. Gallogly asserts, (a) indicate that the Planning Board was satisfied with the construction of the private way shown on those plans, or (b) evidence that the Felton Lot has one hundred feet of frontage on a private way in existence prior to subdivision control. See, October 29, 2019 Appeals Court decision in Barry v. Planning Board of Belchertown.

I will not address here the inaccuracies contained in the other assertions, including the assertion that the Burns Development Lot (Parcel 137) also has rights in the disputed private way pursuant to application of the Derelict fee Statute, or the apparent assumption that use of the disputed private way to serve as access for the entire 36-unit development sited on the several assembled parcels would not result in an overburdening. Nor will I address the Developers' alternative argument that they have acquired rights in the disputed private way through continuous adverse use. Suffice it to say, that the ZBA should not be satisfied, on the basis of the materials and analysis provided by the Developers, thus far, that the Developers have sufficient rights to use the disputed private way area for access and utility connections to serve the proposed C. 40B development. Ultimately, however, it is not the ZBA's role to adjudicate the Developers' rights. That is a matter for the courts.

<u>Recommendation</u>

As a practical matter, the grant of a G.L. c. 40B comprehensive permit would not create access rights. If the ZBA is otherwise satisfied with the Burns Ave. c. 40B application, and decides to grant a comprehensive permit for the project, I recommend that the Board adopt specific findings:

(1) that the rights of the Developers to use the disputed private way area in the manner proposed in the development plans have not been conclusively established;
(2) that, in granting the comprehensive permit, the Board recognizes that the Developers may be at risk of a potential court challenge by a person or persons with standing to contest the Developers' rights to use the disputed private way area; but
(3) that it is the Developers' responsibility to ensure that they hold the necessary rights to develop the project as approved prior to proceeding with construction.

Finally, I recommend that the ZBA include a statement to the effect that approval of the comprehensive permit is not intended to either confirm existing private access rights over the disputed private way area or confer new private access rights to use the disputed area.