Massachusetts Association of Land Surveyors & Civil Engineers

Thirteenth Annual
Legal Perspectives on Land Surveying

Sponsored by MALSCE Sustaining Members:

Airworks Solutions, Inc, Allen & Major Associates, Inc., Beals and Thomas Inc., Bluesky Geospatial Limited, BSC Group, Inc., Carlson Software, CHA Consulting, Coastal Engineering Co., DGT Associates, Donovan Hatem LLP, Eastern Topographics, Feldman Geospatial, GM2 Associates, Inc., Hancock Associates, Maine Technical Source, Moran Surveying, Inc., Nitsch Engineering, Samiotes Consultants Inc., Spiller's, Topcon Solutions Store, VHB, Inc., Winwood Sawmill

Speakers:
Daniel J. Bartlett
Denise A. Chicoine
Edward S. Englander
Melanie Kido
Jeffrey Loeb
Kathleen M. O'Donnell
Paul Tyrell

Massachusetts Association of Land Surveyors and Civil Engineers Seminar
May 6, 2022
Waltham, MA

Thirteenth Annual
Legal Perspectives on Land Surveying
Agenda

7:30 AM	**Registration & Continental Breakfast**
8:00 AM	**Recent Changes in Surveyor Regulations** **Paul Tyrell**
9:00 AM	**Title Searches During Covid** **Dan Bartlett**
9:30 AM	**Beach Easement Case Briefing** **Ed Englander**
9:45 AM	**Break**
10:00 AM	**Live Hearing on a Motion for Summary Judgment on a Beach Easement Case** **Ed Englander**
11:00 AM	**Surveys and Title Insurance– Who Said Real Estate is Boring?** **Melanie Kido**
12:00 PM	**Lunch**
1:00 PM	**Caselaw Developments 2021** **Denise Chicoine**
2:00 PM	**Derelict Fee Statute** **Jeffrey Loeb**
2:45 PM	**Break**
3:00 PM	**All About Easements** **Kathleen M. O'Donnell**

Thirteenth Annual
Legal Perspectives on Land Surveying
Speaker Biographies

Denise A. Chicoine, Esq.

Ms. Chicoine is a partner in the Boston law firm of Englander & Chicoine P.C. Ms. Chicoine has significant experience litigating disputes involving rights in the intertidal zone and beach access claims, easements, zoning matters, and Chapter 91. She also has an expertise in employment law. She has handled a number of appeals, including arguing three times in the Supreme Judicial Court on behalf of the prevailing parties.

Ms. Chicoine received her B.A. from Trinity College in Hartford, Connecticut in 1990; J.D. from Boston College Law School 1993; admitted to the Massachusetts bar 1993 and the Connecticut bar in 1994. She is a member of CREW (Commercial Women in Real Estate), REBA (Real Estate Bar Association for Massachusetts), and has been a chair for a zoning panel for MCLE (Massachusetts Continuing Legal Education) for the past six years. She enjoys running, hiking, and skiing.

Edward S. Englander, Esq.

Ed is a partner in the law firm of Englander & Chicoine. The firm concentrates in real estate and general civil law with an emphasis in real estate litigation and employment disputes. Englander & Chicoine has assisted numerous clients with solving their legal problems from title insurance companies, the Boston Redevelopment Authority, shell fishermen, to the single 89 year-old school teacher who faces eviction. Ed served on the Board of Registration for Professional Engineers and Land Surveyors for 6 years. Ed has practiced law for 49 years. He attended the University of Wisconsin and Suffolk Law School.

Melanie E. Kido, Esq.

Melanie E. Kido is Vice President and Massachusetts State Counsel for CATIC in Waltham, Massachusetts. She has worked in the title insurance industry for over 20 years, underwriting both residential and commercial real estate transactions. Prior to joining CATIC, she was Vice President and Regional Underwriting Counsel for Stewart Title Guaranty Company. Prior to her employment with Stewart Title, she was Underwriting Counsel for both First American Title Insurance Company and Land¬America Lawyers Title Insurance Corporation and was in private practice. Ms. Kido is a graduate of the University of California at Irvine and Boston University School of Law. She is a member of both the Massachusetts and California bars, ACP (American Clean Power Association), ICSC (International Council of Shopping Centers), CREW Boston, NNCREW (National Network of Commercial Real Estate Women), the Real Estate Bar Association for Massachusetts (REBA), REBA's Title Insurance and National Affairs Section, New England Land Title Association, the ALTA Title Counsel Work Group, ALTA's State Legislative/Regulatory Action Committee and the American Bar Association. Ms. Kido has published articles and been a panelist for MALSCE, ICSC, ACP, REBA, NELTA, MCLE, and the Massachusetts Bar Association.

Jeffrey B. Loeb, Esq.

Jeff is a shareholder at the Rich May, PC in Boston. He is the co-chair of the firm's litigation group and he practice focuses on business and real estate disputes. He has tried cases in all levels of the state and federal courts in MA and has argued appeals in both state and federal court. He is a graduate of Yale College and Boston College Law School. He lives in Ipswich.

Kathleen M. O'Donnell, Esq.

Ms. O'Donnell concentrates her practice in real estate law with a specialty in municipal law including acquisitions of land for open space, affordable housing, and community preservation. Ms. O'Donnell is a past president of the Real Estate Bar for Massachusetts (REBA) and is presently serving as co-chair of the Real Estate Section of the Boston Bar Association. Her professional memberships include the Abstract Club, the Boston Bar Association, REBA, City Solicitors and Town Counsel Association, CREW (Commercial Women in Real Estate), and the Council for Women of Boston College. She is a member of the Steering Committee of the Community Preservation Coalition and the Board of Directors of the Massachusetts Land Trust Coalition. Ms. O'Donnell is the Secretary of the Cohasset Yacht Club. Ms. O'Donnell is the editor of two MCLE publications; Handling Residential Real Estate Transactions in Massachusetts and Massachusetts Real Estate Law Sourcebook & Citator. She is a graduate of Boston College and the University of Miami School of Law.

Paul Tyrell, PE, PLS, LEED AP, DBIA

Paul Tyrell is an accomplished professional engineer licensed in MA, ME, NH, RI, VT, CT, and NY and a professional land surveyor in MA. He's a LEED Accredited and certified Design Build professional with 30 years of experience in Land Surveying, Civil Engineering and Construction Management.

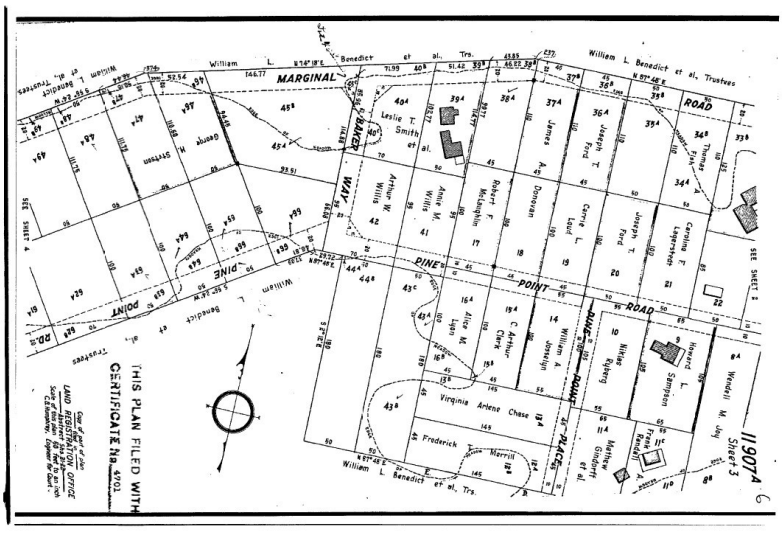
Registered Land Beach Easement Case

Edward S. Englander
Englander & Chicoine P.C.
One Boston Place, Suite 2600
Boston, MA 02108
(617) 723-7440

1

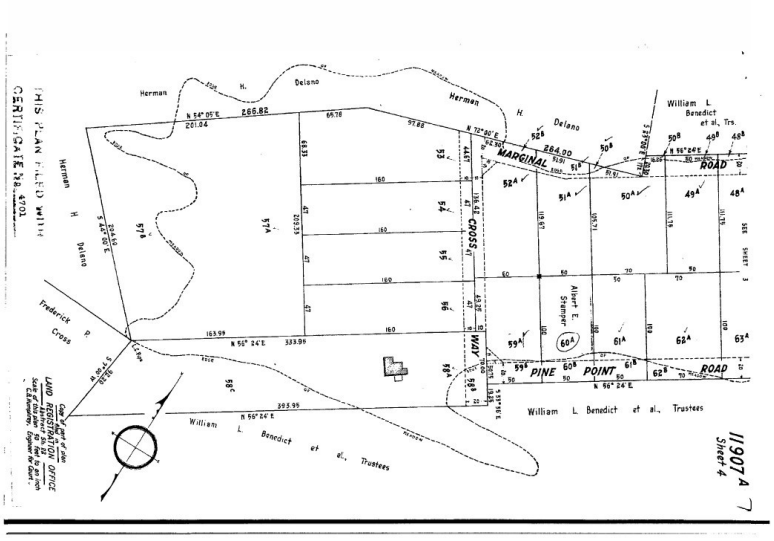
1

Stamper v. Town of Duxbury



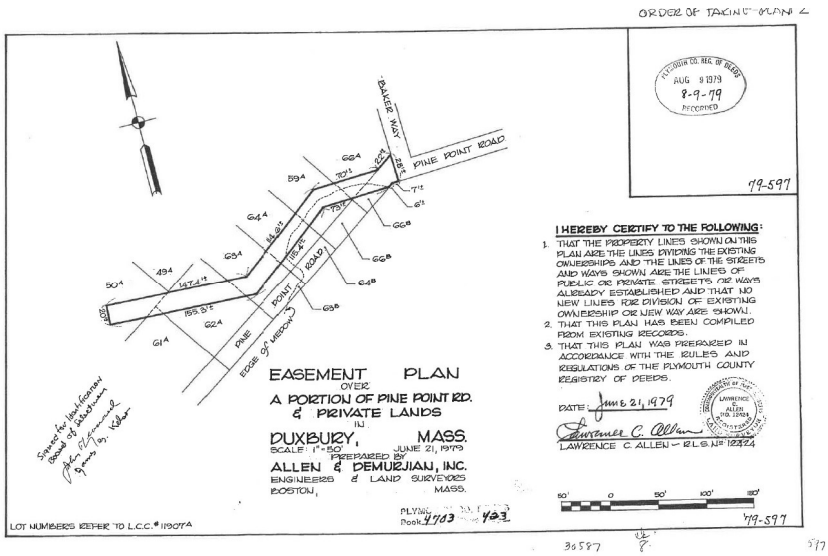
2

Stamper v. Town of Duxbury



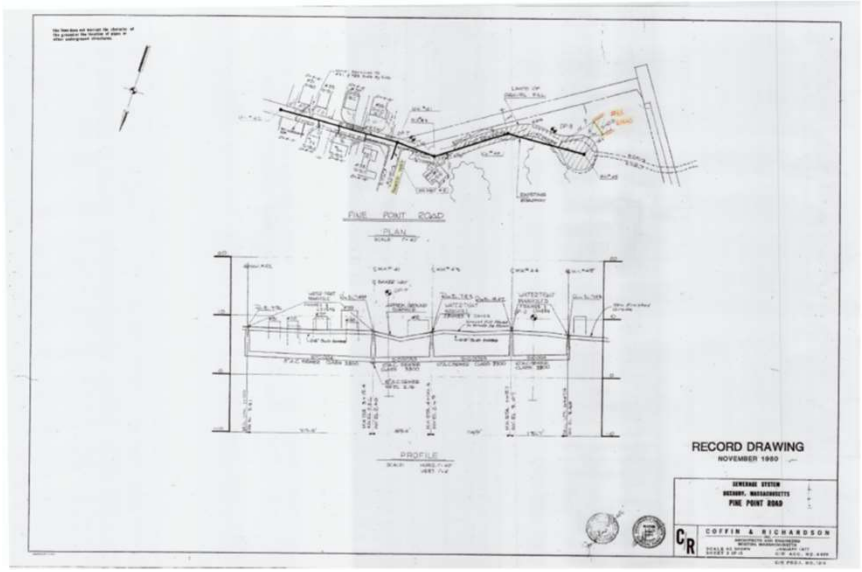
3

Stamper v. Town of Duxbury



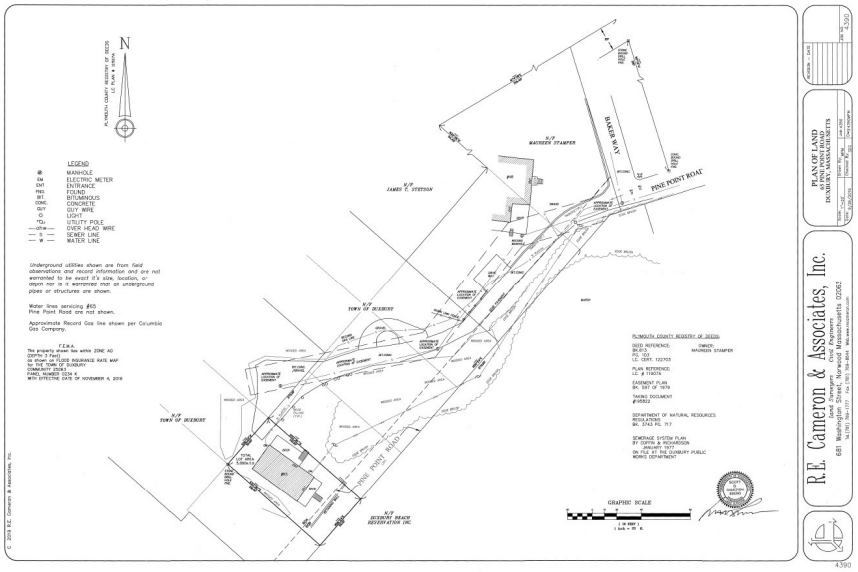
4

Stamper v. Town of Duxbury



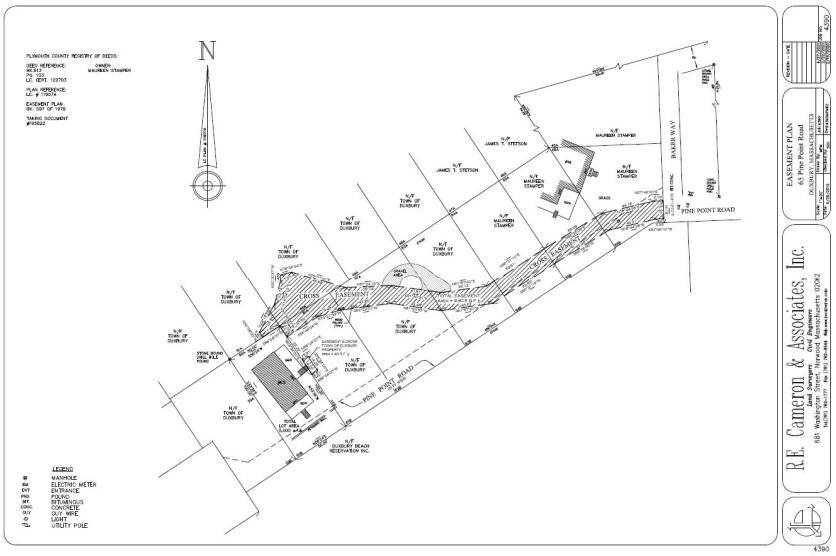
5

Stamper v. Town of Duxbury



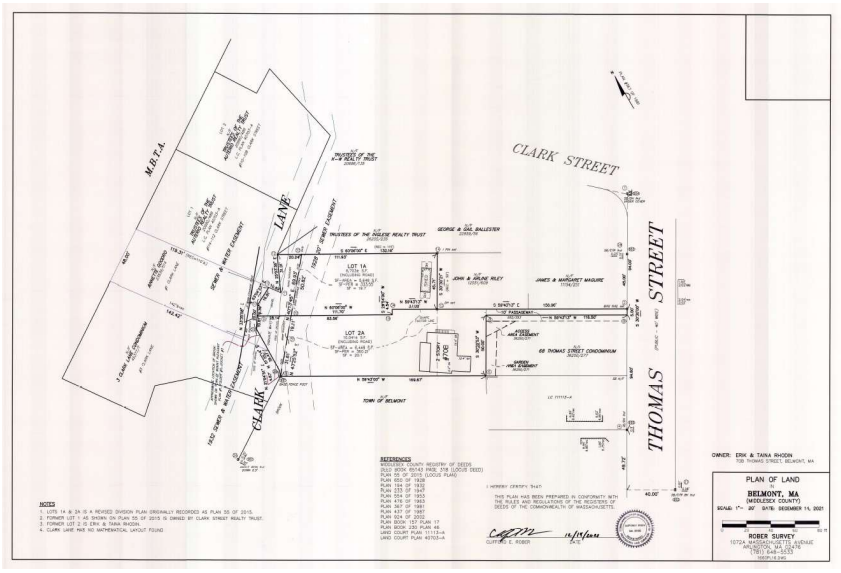
6

Stamper v. Town of Duxbury



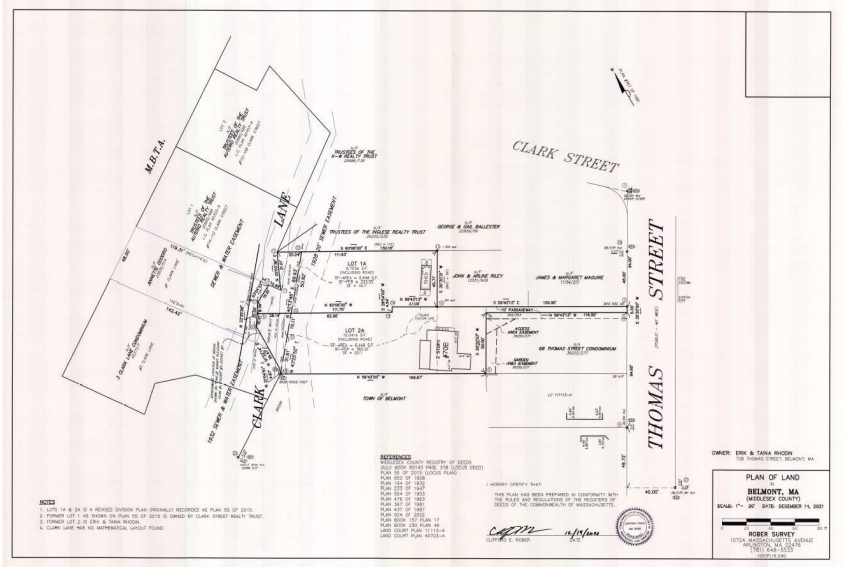
7

Rhodin v. Town of Belmont



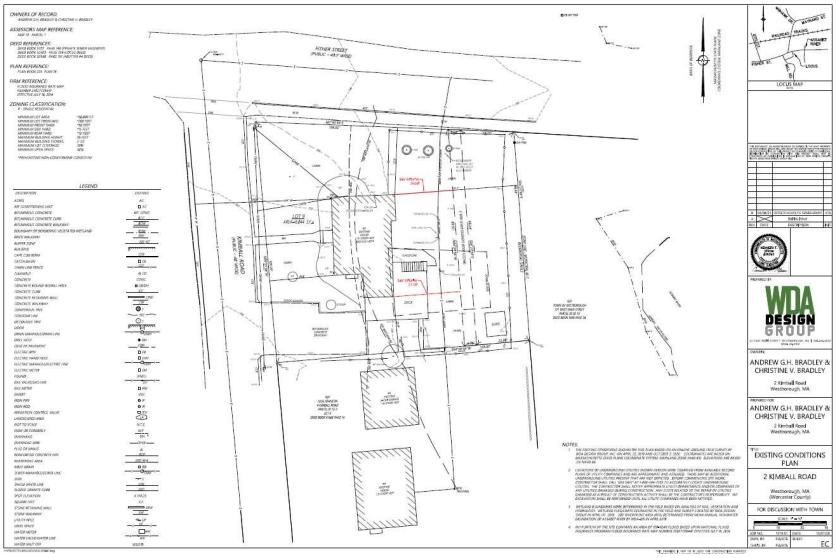
8

Rhodin v. Town of Belmont



9

Johnston v. Bradley

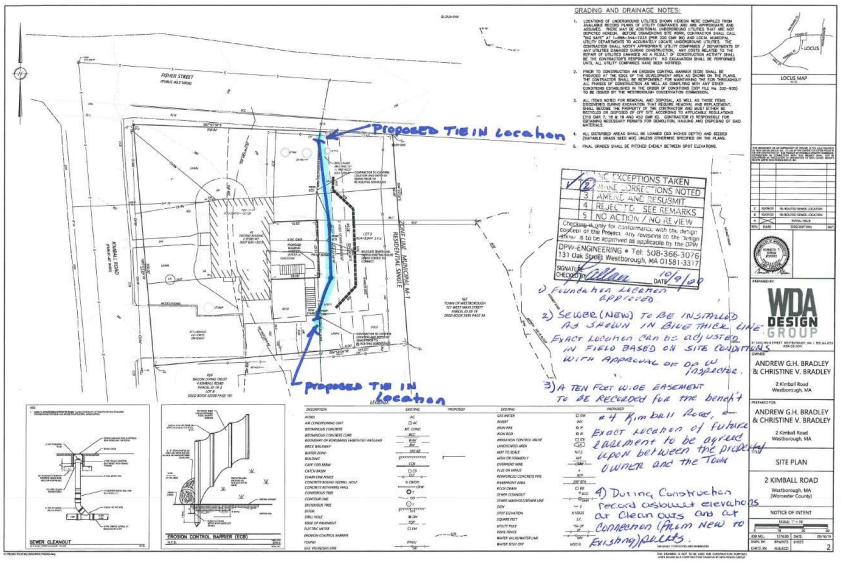


10

Johnston v. Bradley

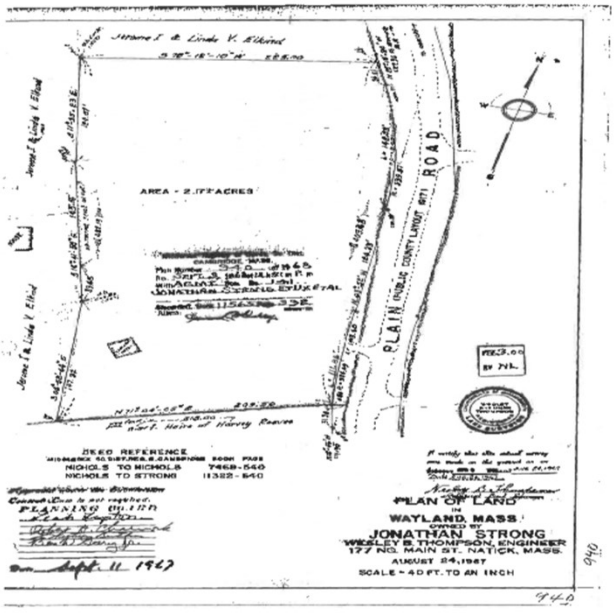
11

Johnston v. Bradley



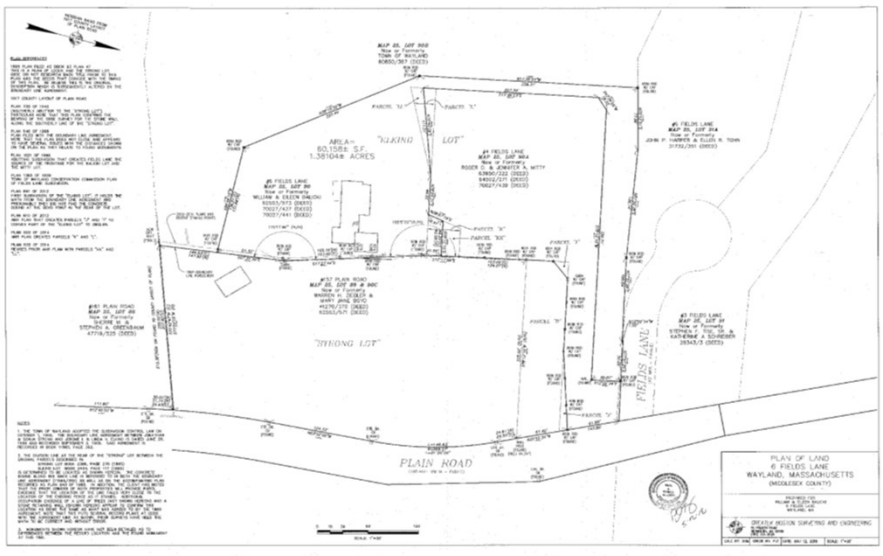
12

Balicki v. Ziegler/Boyd



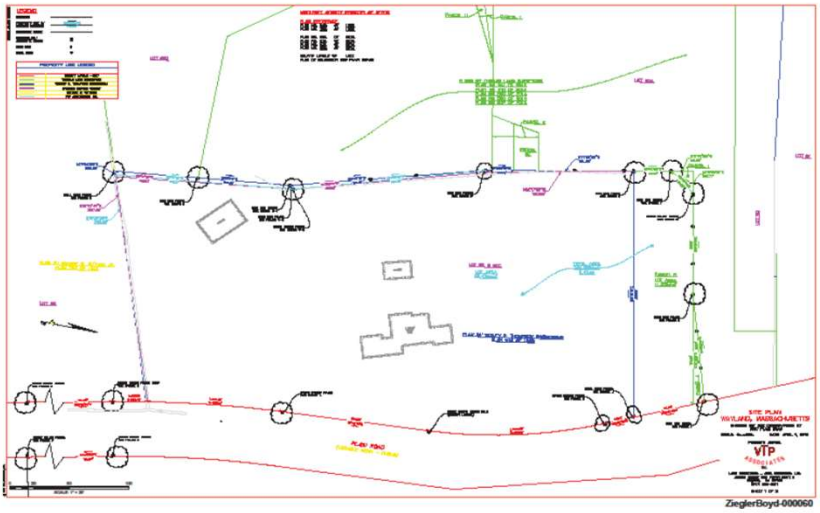
13

Balicki v. Ziegler/Boyd



14

Balicki v. Ziegler/Boyd



15

Balicki v. Ziegler/Boyd

GT GreenbergTraurig

Gary R. Greenberg
Tel (617) 310-6013
Fax (617) 279-8413
greenbergg@gtlaw.com

October 1, 2021

VIA EMAIL (eenglander@ec-attorneys.com)
AND
U.S. FIRST CLASS MAIL

Edward S. Englander, Esq.
Englander & Chiconne P.C.
One Boston Place, Suite 2600
Boston, MA 02108

RE: Open House at 4 Fields Lane, Wayland, MA

Dear Ed:

We are writing to you in your capacity as the attorney for Eileen Balicki. In view of the pending litigation between our clients, Mary Jane Boyd and Warren Ziegler ("the Ziegler-Boyds"), it would be inappropriate to contact Ms. Balicki directly. Accordingly, we trust that you will forthwith inform Ms. Balicki of the information and demands set forth herein.

Our clients have learned that the property at 4 Fields Lane in Wayland, MA is for sale by the Mitty family and that Eileen Balicki of Gibson Sotheby's International Realty is the real estate agent in connection with the listing and potential sale of the property.

We understand that there have been visible and considerable efforts to unlawfully expand the Mitty property, including landscaping, mowing, planting grass, and mulching into the abutting property owned by the Ziegler-Boyds. This encroachment has never been agreed to by the Ziegler-Boyds. Further, there are a number of visible markers including rebar and stakes around the property at 4 Fields Lane. These markers do not reflect that actual boundary lines of the Mitty property as described in the Mitty's deed and reflected on the 2012 Conservation Cluster agreement.

It is imperative that Ms. Balicki take immediate action in order to prevent any direct or indirect misrepresentation as to the Mitty's boundary lines and what the Mitty's and their broker may offer for sale. Demand is hereby made as follows:

1. The seller and realtor immediately disclose the specifics of the current lawsuit regarding the boundary between 6 Fields Lane and 157 Plain Road to all prospective buyers as the result of the trial is pending and may have an impact on the property at 4 Fields Lane.

2. The buyer of the property (or seller) have a survey conducted of the 4 Fields Lane property that aligns with the deed from the 2012 Conservation Plan. Further, in order to ensure that any buyer fully understands the precise boundary lines of the property being sold, that survey must be completed sufficiently prior to closing to enable the buyer adequate time to analyze the results of the survey. In addition, the surveyor should install, well prior to the closing, permanent and visible markers around the corners and bends of the Mitty property.

3. In order to hopefully avoid any future litigation with any prospective buyer(s) concerning the precise boundary lines of the Mitty property, at least thirty (30) days prior to any scheduled closing and before any binding purchase and sale agreement is executed, the surveyor provide electronic and paper copies of the survey to the Ziegler-Boyds and meet with them to review the survey.

4. The seller (or buyer of the property) install a privacy fence on their side of the property lines (West sides of the Ziegler-Boyd property), prior to closing, that aligns with the original deed conveyed per the 2012 Plan. This would ensure compliance with the conditions of the Conservation Cluster agreement.

5. Seller (or buyer) provide funds to restore the Ziegler-Boyd property to its natural state prior to the closing. The amount to be determined and paid at least thirty (30) days prior to closing;

6. Immediately confirm that there will be no further trespass or entry for any reason onto the Ziegler-Boyd property by the seller, the real estate agent, their respective families, and/or their representatives.

The Ziegler-Boyds expect prompt compliance with the demands set forth herein.

Finally, nothing contained herein shall constitute a waiver or relinquishment of any right or claim by the Ziegler-Boyds, all of which are expressly reserved and retained.

Best Regards,

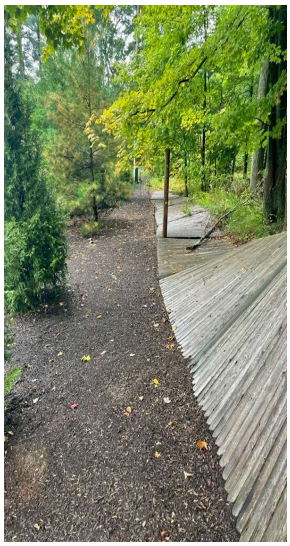
Gary R. Greenberg

Gary R. Greenberg

cc: Norman Vigil, Esq.
John S. Craig, Esq.
Ziegler-Boyds

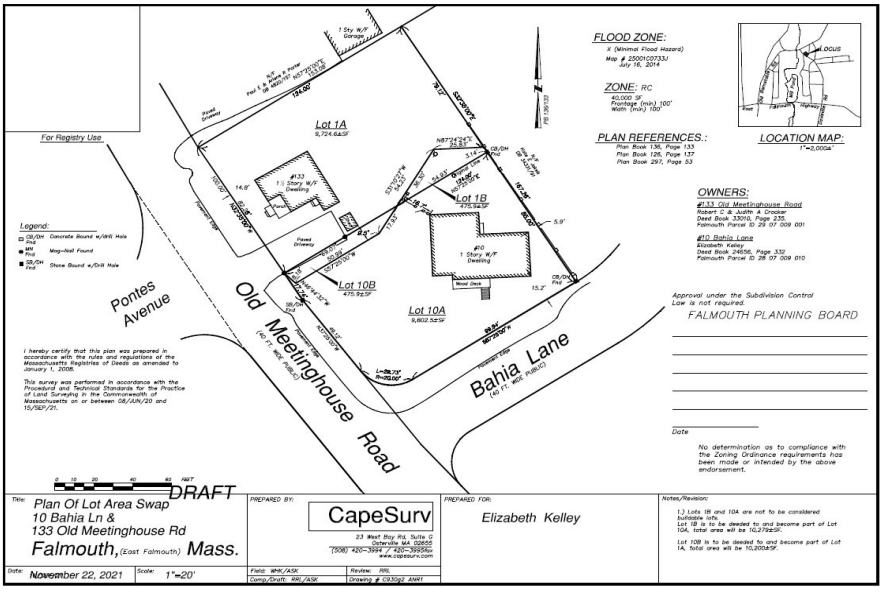
16

Balicki v. Ziegler/Boyd



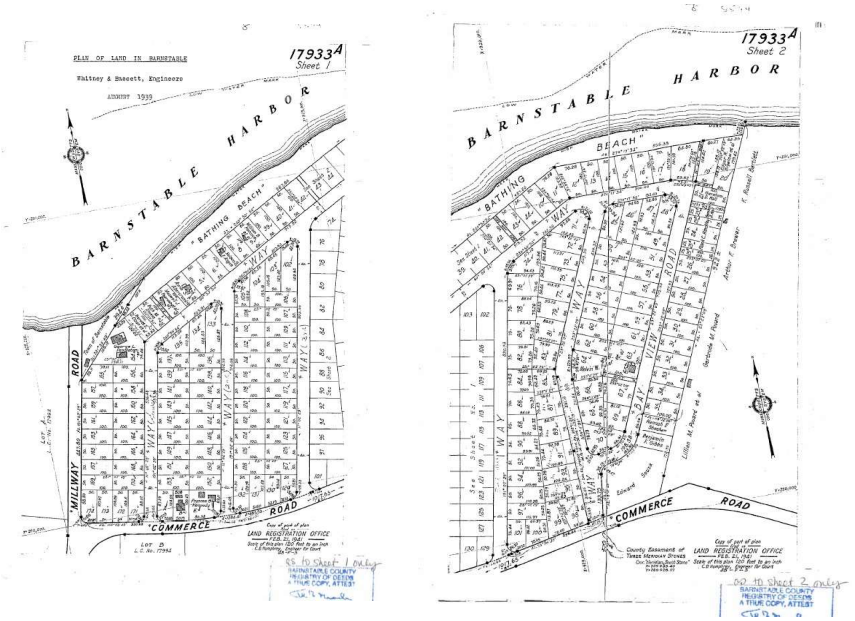
17

Crocker



18

Tirrell et al. v. Scott



19

Tirrell et al. v. Scott

Original Certificate of Title.

Doc. 19,184.
No. 8594

Entered pursuant to a decree of the Land Court, dated at Boston, in the County of Suffolk and Commonwealth of Massachusetts, the twenty-ninth day of November in the year nineteen hundred and forty-six, and numbered 17933 on the files of said Court.

Copy of Decree.

COMMONWEALTH OF MASSACHUSETTS. LAND COURT.

In the matter of the Petition of Elizabeth J. Cobb,

numbered 17933 after consideration, the Court doth adjudge and decree that said Elizabeth J. Cobb,

CANCELLED

20

Tirrell et al. v. Scott

original certificate of title issued on this decree.

There is excepted and excluded from the operation of this decree lots 1, 2, 3, 4, 7, 9, 20, 21, 22, 23-A, 23-B, 24, 25-A, 63, 64, 65, 154 and E, as shown on said plan, together with the fee in the soil of the ways adjacent thereto to the middle line thereof.

So much of the land hereby registered as is included within the limits of Bay View Road and the ways, shown on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same.

So much of the land hereby registered as is included within the area marked "Bathing Beach", on said plan, is subject to the rights of all persons lawfully entitled thereto in and over the same.

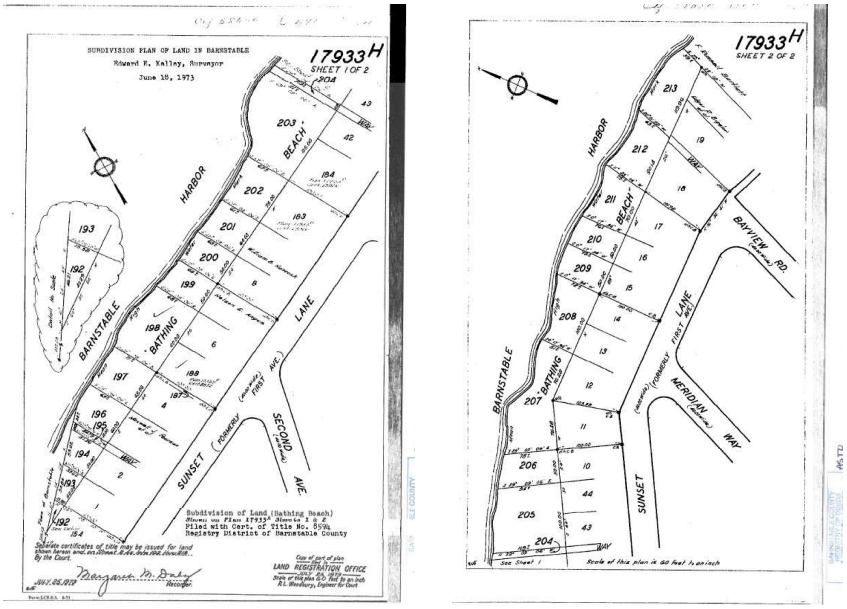
The land hereby registered is subject to rights as set forth in a stipulation between the petitioner and Edgar R. Bigelow et al, filed with the papers in this case on May 5, 1942, a copy of which will be filed at the Barnstable County Registry of Deeds, with the copy of this decree.

The above described land is subject to the right of the County of Barnstable to erect meridian stones as set forth in a deed given by Loring Crocker to said County of Barnstable, dated April 11, 1871, duly recorded in Book 106, Page 80.

There is appurtenant to the land hereby registered the right to use the private ways shown on said plan, and the right to use said "Bathing Beach" in common with others entitled thereto.

21

Tirrell et al. v. Scott



22

Tirrell et al. v. Scott

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. LAND COURT Case #17933

ELIZABETH J. COBB, Petitioner

vs

~~Unknown Claimants or Any Respondents~~

STIPULATION

Now come Elizabeth J. Cobb, the petitioner in the above registration proceedings, and Edgar R. Sigelow and Eva J. Sigelow, husband and wife, as tenants by the entirety, of Bridgewater, Plymouth County, Massachusetts, respondents in the above-entitled matter, and hereby stipulate that in the event a decree for registration is entered in said case, said decree shall be entered subject to the rights of these respondents as hereinafter stipulated:

1.) That these respondents are the owners of Lot Twenty (20), as shown on the petitioner's plan, and as such, they should have been named as respondents in the above-entitled registration proceedings.

2.) That these respondents are entitled to an easement of way, in common with others, for the purpose of travel on foot or by vehicle from Commerce Road, a Town Way, over a right of way as shown upon the petitioner's plan, to the waters of Cape Cod Bay, and to another easement of way, ten (10) feet in width, in common with others, extending from the aforementioned right of way over the southerly end of Lot Nineteen (19) to said Lot Twenty (20), which said right of way is not shown upon the petitioner's plan, owned by them as a means of egress and ingress to the first mentioned right of way, and thence to the Town Way, all as set out and contained in a deed to the respondents, as tenants by the entirety, from George Cobb and Elizabeth J. Cobb, dated September 14th, 1929 and recorded with Barnstable County Deeds, Book 504, Page 527.

3.) That these respondents are also entitled to the use of certain land on the beach, shown and designated on a plan entitled, "Subdivision of land in Barnstable as surveyed for George Cobb, Sept. 1929", drawn by Newell B. Snow, Engineer, filed in the Registry of Deeds at Barnstable, as "Bathing Beach", included in said petition, for bathing and boating privileges, all as set forth in their deed of ownership from the petitioner.

4.) That the ten (10) foot right of way over the Southerly end of Lot Nineteen (19) shall not be obstructed by the petitioner making it impossible for these respondents to pass freely to and from their lot by vehicle, and that if the Land Court, or the Engineer for the Court, find that such way is obstructed by a garage of the petitioner located on said Lot Nineteen (19), said garage or structure shall be removed.

EDGAR R. SIGELOW and
EVA J. SIGELOW, Respondents,
By Their Attorney,
Harold W. Williams

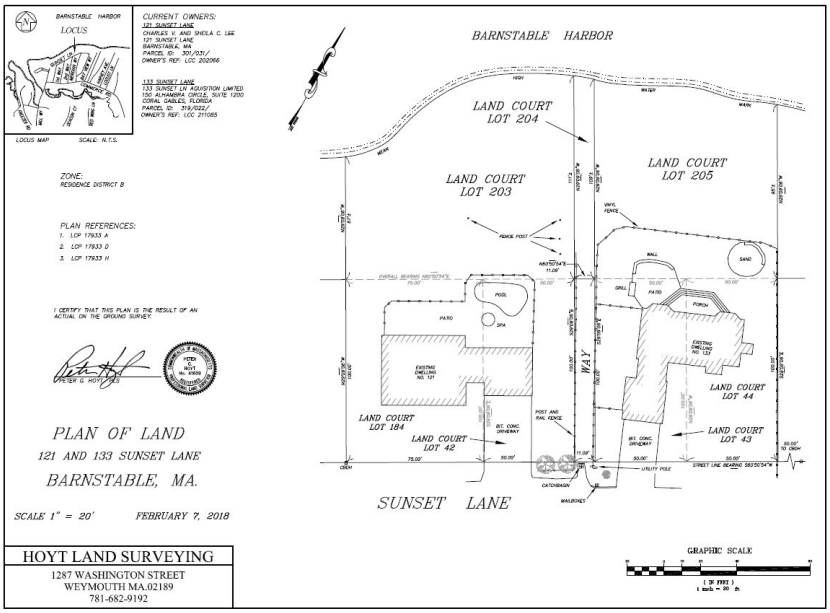
ELIZABETH J. COBB, Petitioner,
By Her Attorney,
Gershom D. Hall

A TRUE COPY, ATTEST
Robert French

LAND COURT
MAY-5'42
FILED

23

Tirrell et al. v. Scott



24

CATIC
building partnerships together.

MALSCE

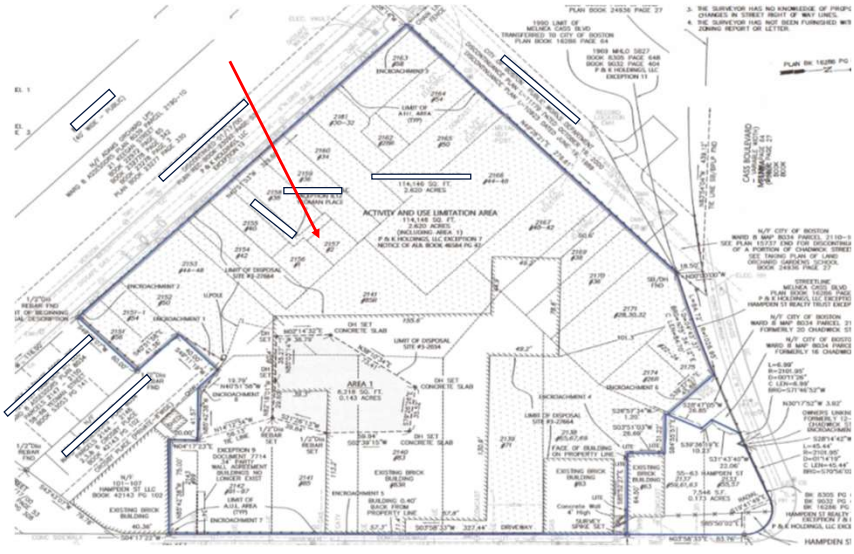
SURVEYS AND TITLE INSURANCE –
Who Said Real Estate is Boring?

May 6, 2022

Melanie E. Kido
Vice President and MA State Counsel

1

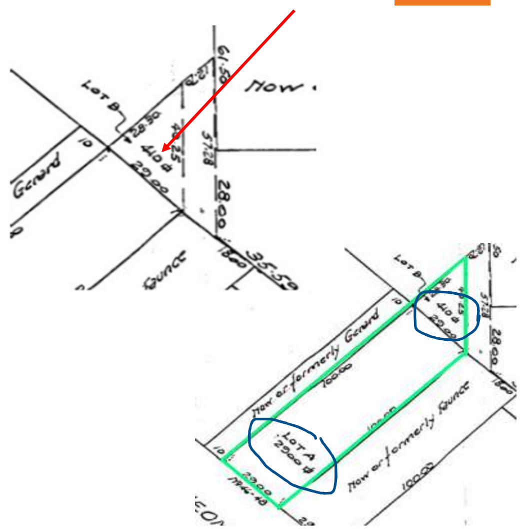
IT STARTS WITH AN ALTA



2

2

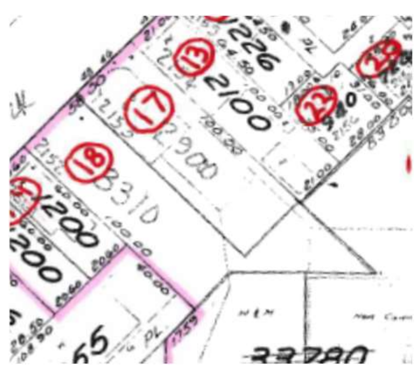
IT'S A MATTER OF OPINION…



3

3

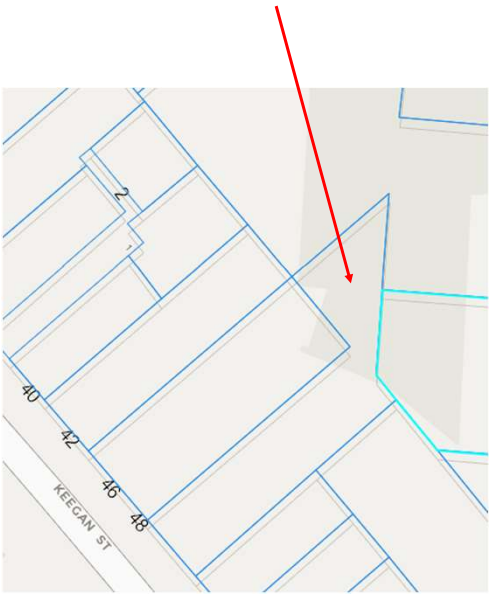
1932 ASSESSOR'S MAP



4

4

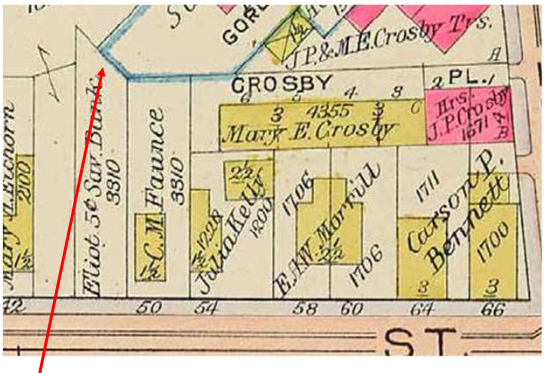
2020 ASSESSOR'S MAP



5

5

1915 ATLAS



CATIC

6

6

RYAN v. STAVROS

"It is proper to consider the improbability that a grantor who conveyed all her adjoining land would seek to retain such a relatively useless strip." Ryan v. Stavros, 203 N.E.2nd 85, 348 Mass. 251 (Mass. 1964)

CATIC

7

7

ADVERSE POSSESSION

CATIC

8

8

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:…

3. Defects, liens, encumbrances, **adverse claims**, or other matters
    1. (a) created, suffered, **assumed**, or agreed **to by the Insured Claimant**;
    2. (b) **not Known to the Company**, not recorded in the Public Records at Date of Policy, **but Known to the Insured Claimant** and not disclosed in writing to the Company by the Insured Claimant **prior to the date the Insured Claimant became an Insured under this policy**;

CATIC

9

9

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:…

3. Discrepancies, conflicts in boundary lines, shortages in area, easements not shown by the Public Records, encroachments, and **facts which an** accurate survey and **inspection of the Land would disclose**, as well as all those matters described in Covered Risk 2(c).

CATIC

10

10

VAGUE LEGAL DESCRIPTIONS

the premises situate in the City of Pittsfield, Berkshire County, Commonwealth of Massachusetts, bounded and described as follows:

Beginning at a point in the northerly line of Lebanon Avenue, which point is five hundred (500) feet westerly of the southwesterly corner of lands of one Penny, as well as the southeasterly corner of land conveyed to Hermann Jones and Emilie Jones by deed of the Trustees of the United Society called Shakers of Pittsfield and Hancock, which deed is recorded with the Berkshire Middle District Registry of Deeds in Book 353, Page 260. This point of beginning is the southwesterly corner of the first parcel conveyed herein.

Running thence from said point of beginning, northerly to an angle formed by the northerly line of the first parcel herein conveyed with the easterly line of the second parcel herein conveyed;

Thence running easterly in the southerly line of land of said Penny, six hundred nine and 4/10 (609.4) feet to the westerly line of said Penny;

Thence southerly, in the westerly line of said Penny five hundred seventy-nine and 3/10 (579.3) feet to the northerly line of Lebanon Avenue;

Thence westerly, in said northerly line of Lebanon Avenue, to the place of beginning.

CATIC

11

11

VAGUE LEGAL DESCRIPTIONS

Also conveying another portion of the lands deeded in said deed of said Shaker Trustees, vis: Beginning at the above-described angle, thence running westerly, extending the northerly line of the parcel first herein conveyed, to the easterly line of land of the Boston & Albany Railroad Company;

Thence northeasterly in said Railway line to lands of said Penny;

Thence, at an angle, easterly in the line of Penny, one hundred seventy-seven feet (177');

Thence, at an angle, southerly in the west line of land of said Penny, five hundred seventy-eight and one half (578.5) feet, to the place of beginning.

Together with a right of way twelve (12) feet in width, for all the usual purposes of a way. Said right of way adjoins the angle hereinbefore mentioned and gives access through from the first parcel herein conveyed to the second and crosses the northeasterly corner of remaining land of Hermann Jones and Emilie Jones.

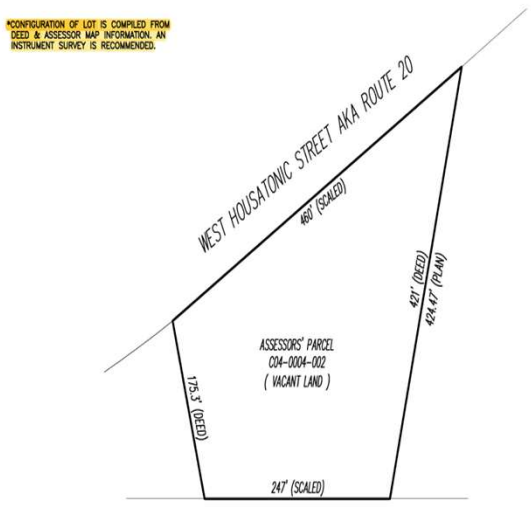
EXCEPTING THEREFROM a taking by the Commonwealth of Massachusetts, dated May 24, 1932, and recorded June 6, 1932, with said Registry in Book 456, Page 238.

CATIC

12

12

PLOT PLANS v. ALTA SURVEYS



13

13

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:…

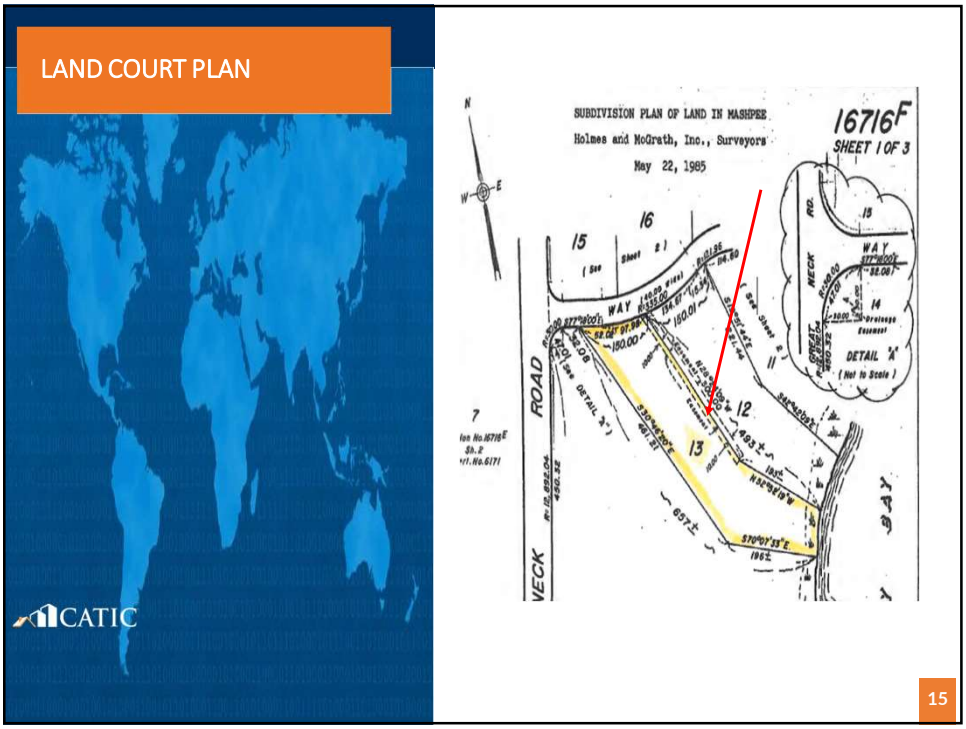
3. Discrepancies, conflicts in boundary lines, shortages in area, easements not shown by the Public Records, encroachments, and facts which an accurate survey and inspection of the Land would disclose, as well as all those matters described in Covered Risk 2(c).

CATIC

14

14

LAND COURT PLAN



CATIC

15

15

NEIGHBORING LOT'S DEED DESCRIPTION

LEGAL DESCRIPTION FOR LOT 12

That certain parcel of land situated in Mashpee in the County of Barnstable and the Commonwealth of Massachsuets, bounded and described as follows:

Northeasterly	by Lot 11, two hundred twenty-one and 44/100 (221.44) feet;
Northeasterly	by Lot 11, about two hundred (200.00) feet;
Southeasterly	by Ockway Bay;
Southwesterly	by Lot 13, about one hundred ninety-three (193.00) feet;
Southwesterly	by Lot 13, three hundred (300.00) feet;
Northwesterly	by Ockway Bay Road, one hundred fifty and 01.100 (150.01) feet.

Subject to a ten (10) foot wide driveway easement on the southwesterly bound, for the benefit of Lots 12 and 13 and with the benefit of a ten (10) foot driveway easement on the northeasterly bound of Lot 13, for a distance of three hundred (300) feet, southeasterly from Ockway Bay Road, all as shown on Plan No. 16716 F, hereinafter referred to.

CATIC

16

16

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:…

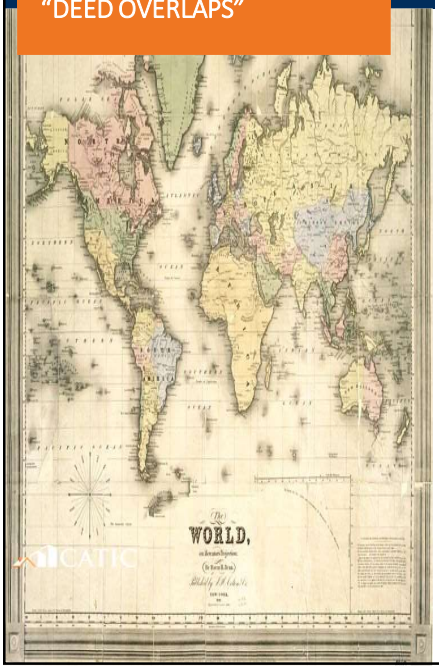
3. Discrepancies, conflicts in boundary lines, shortages in area, easements not shown by the Public Records, encroachments, and facts which an accurate survey and inspection of the Land would disclose, as well as all those matters described in Covered Risk 2(c).

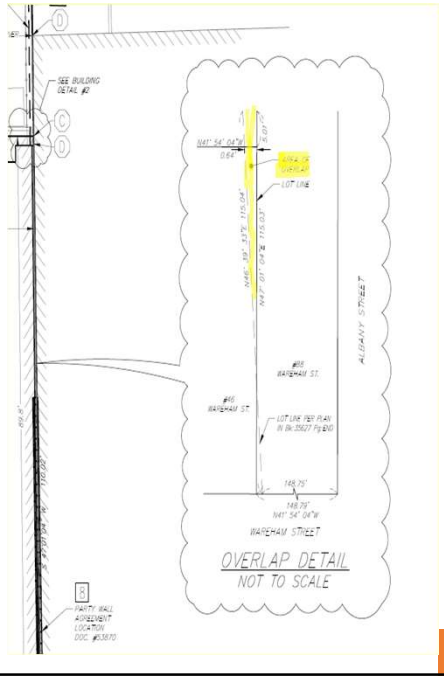
CATIC

17

17

"DEED OVERLAPS"

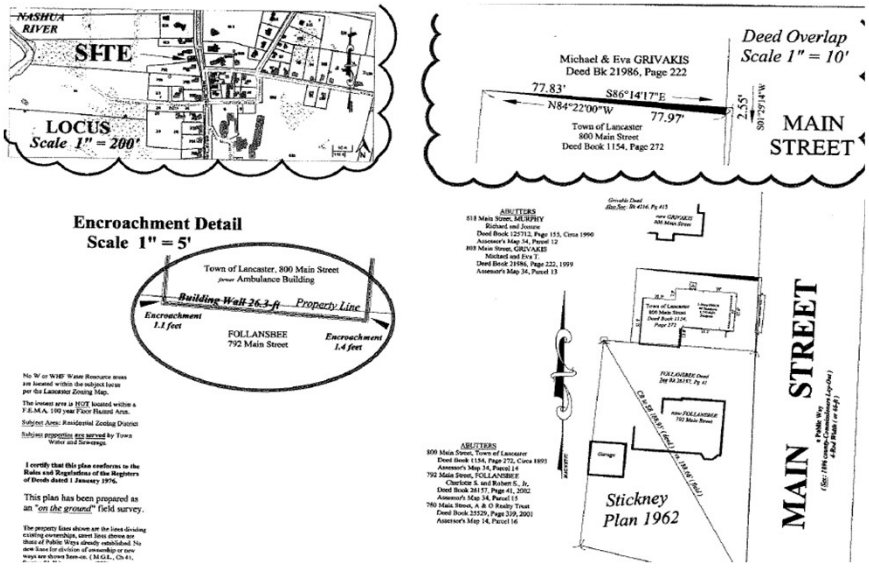




18

18

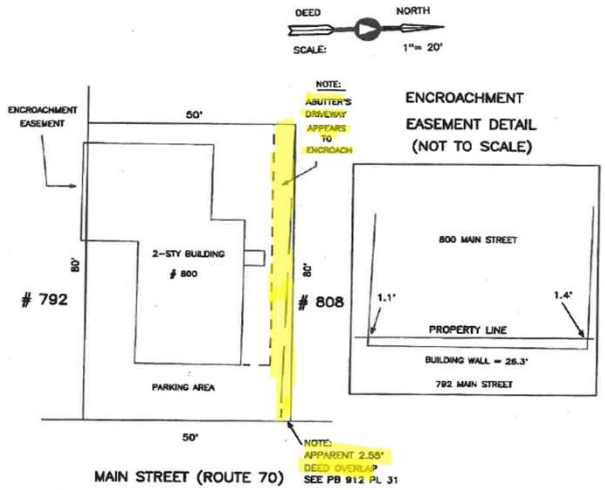
MORE OVERLAPS



19

19

"DEED OVERLAPS"



CATIC

20

20

"DEED OVERLAPS"

CATIC

21

21

AP HYPOTHETICAL

Year 1 through year 50: MacDonald & heirs grew crops on a multi-acre field at rear most boundary of 70 acre MacDonald property. About 1/3 of it is NOT MacDonald land. It is surrounded by forested land, accessible by a "cart path" which is partly on MacDonald land and partly on a neighboring parcel but is available to MacDonald by a granted easement where it is not on MacDonald land.

Sometime after year 50, MacDonald & heirs stop plowing or planting in the field.

Year 65: X acquires the area not owned by MacDonald as part of a purchase of a 20+ acre adjacent to MacDonald's land.

X used the 20+ acres for 5 years for hunting, hiking, and other recreational uses by license from the prior Owner before he purchased the land. While it was obvious that the field was once cleared of trees, for those 5 years, he never saw a person or any use of the field.

Shortly after his purchase, X starts to do cleanup work in the most valuable portion of the 20+ acre – the 1/3 portion – the remainder being wetlands. He immediately receives a letter from MacDonald's current living heir claiming AP to the entirety of the field.

CATIC

22

22

AP HYPOTHETICAL

Question One: Since MacDonald did not use the field for at least five years before X purchased part of it, does the prior adverse possession still succeed against X's claim, which claim is based on the title record without any notice, actual or constructive, of the prior adverse use?

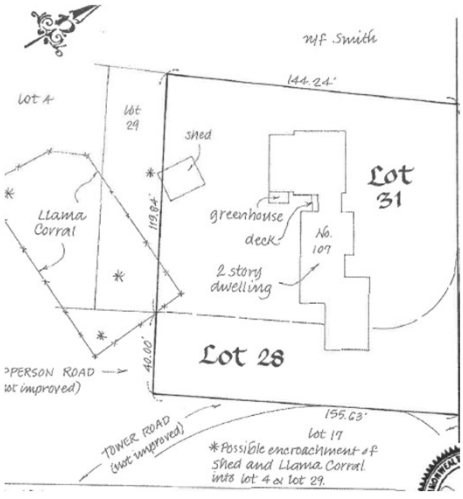
Question Two: Is it likely that a survey would have revealed the "possible adverse use" by reason of the fact that the property boundary passes through a field in the middle of forested lands without encompassing the entire field? Would a survey even show that detail?

CATIC

23

23

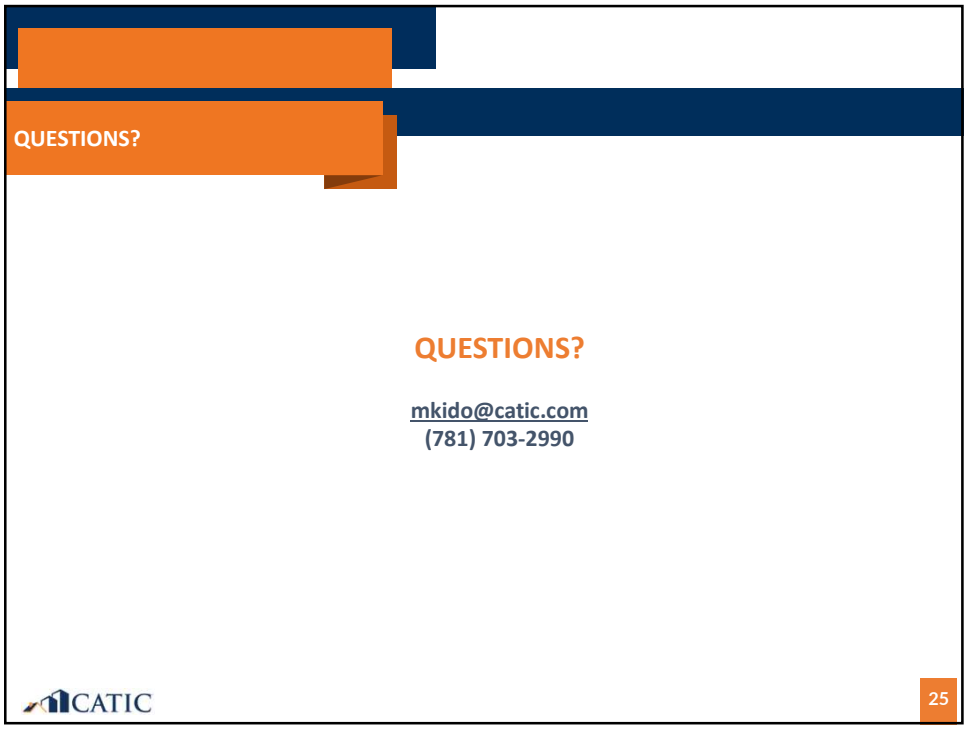
LLAMA DRAMA



CATIC

24

24



25

Caselaw Developments 2021

Denise A. Chicoine
Englander & Chicoine P.C.
One Boston Place, Suite 2600
Boston, MA 02108
(617) 723-7440

1

1

***Bowen v. Howell,* LC 69, 2021 WL 3575564**

Facts

- Plaintiff wants to erect a gate across a private way
- Defendants object, arguing interference with the way
- properties originated from parcel registered in 1920
- several subdivisions over time

2

Bowen v. Howell

Facts

- Plaintiff owns lots 9 and 12
- One Defendant owns Lot 3A
- Other Defendant owns Lot 2A
  - Both Defendants have a grant in their Certificates of Title: "Also the right to use as a private way in common with others entitled thereto a strip of land…"

3

Bowen v. Howell

4

Bowen v. Howell

Issues

- Count I – declaratory judgment: seeking determination that Defendants have no rights in the way
  - No mention in Certificate
- Count II – preliminary injunction to prohibit Defendants from interfering with Plaintiff's efforts to erect a gate and to order Defendants to maintain way
- Count III – negligence against all Defendants for their alleged failure to maintain way

5

Bowen v. Howell

Statutory Rules

- M.G.L. c. 185 Sec. 46: "every plaintiff receiving a certificate of title in pursuance of a judgment of registration, and every subsequent purchaser of registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate."

- M.G.L. c. 185, Sec. 53: "no title to registered land, or easement or other right therein, in derogation of the title of the registered owner, shall be acquired by prescription or adverse possession. Nor shall a right of way be implied under a conveyance of registered land.

6

Bowen v. Howell

Caselaw Rules

- For registered land to be burdened by an easement it must be on the certificate of title

- Exceptions → *Jackson v. Knott*
  - facts described on Certificate which would prompt a reasonable purchaser to investigate further other documents or plans in the registration system
    - If Certificate refers to a plan, reasonable purchaser expected to review
    - Based on what is depicted on plan or other references in Certificate further review of other registration docs may be required

    =or=
  - purchaser has actual knowledge of a prior unregistered easement

7

Bowen v. Howell

Analysis

- There were facts available to Plaintiff that should have led to discovery that property was burdened by the easements
  -- "in common with others" was a tipoff
- Plaintiff should have realized review of plan and other Certificates needed = Defendants have right in way
- court must balance the rights of the owner of the servient estate to erect a gate with the rights of the easement holders to use the way
  - gates across a way are generally considered adverse as they impede passage
  - question is whether the interference is so slight as to be reasonable in all circumstances.

8

Bowen v. Howell

Analysis

- absent an express requirement, owner of servient estate has no obligation to maintain or repair an easement that benefits others
- general rule is that servient estate has right to maintain or repair right of way at own expense, but no legal duty to do so

9

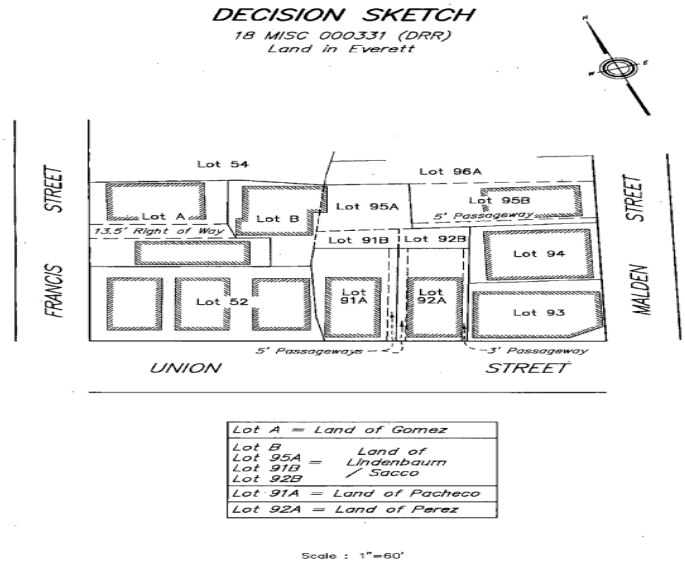
Lindenbaum v. Perez, LC 41, 2021 WL 2778842

Facts

- Plaintiff claims property has benefit of two 5-foot wide easements over two abutting properties → each owned by the two defendants
- Parties own registered land and five-foot easement is not on Certificates of Title
- Five-foot easement was subject of 1927 court ruling
- Plaintiff's property is 4 lots 91B, 92B, and 95A on one parcel, B on the other
  - B → "conveyed with the benefit of rights in and over a passageway 13.5 wide leading from the premises to Francis Street as shown on the [1947 Plan], which passageway is to be forever kept open for all purposes for which passageways are commonly used ("ROW")"
  - 91B… → "subject to and with the benefit of restrictions"
- Defendant Pacheco (Lot 91A) defaulted
- Defendant Perez (Lot 92A) defended

10

Lindenbaum v. Perez



11

Lindenbaum v. Perez

Facts

- Plaintiff's property does not have frontage to the street and uses passageway
- Plaintiff's backyard abuts Defendants' backyard
- chain of title for Pacheco included: property as shown as Lot 91A on subdivision plan filed in Land Registration Office and states "above described land is subject to rights of said passageway"
- easement was paved from road until about 10-12 feet before the boundary with Plaintiff's property
- Plaintiff was unaware of easement when he purchased until 2016
  --uses the property as an investment and wanted to convert backyard into a parking lot

12

Lindenbaum v. Perez

Issues

- declaration of rights in each of the five-foot wide passageway easements
- effect of 1927 decision
- whether Plaintiff abandoned the easement rights
- whether use of the passageway easements located on Defendant's property to access Plaintiff's property would overload these passageway easements

13

Lindenbaum v. Perez

Caselaw Rules

- Party claiming easement rights has burden of proving its existence
- Where land is conveyed with reference to a plan, an easement is created only if clearly so intended by the parties to the deed

- Jackson Knott exception 1 requires purchaser to examine other documents in registration system

14

Lindenbaum v. Perez

Caselaw Rules

Defendant bears burden of proof on issue of whether the passageway easement has been extinguished

- Intent to abandon
  - Requires a showing of intent to abandon by acts inconsistent with continued existence
  - Issue is intent → ascertained from the surrounding circumstances and the conduct of the parties

15

Lindenbaum v. Perez

Caselaw Rules

Overloading

- use of an appurtenant easement to benefit property located beyond the dominant estate constitutes an overloading of that easement

16

Lindenbaum v. Perez

Analysis

- Scope
  - No evidence of vehicular use
    - Plaintiff's burden to prove this was a use

Jacskon v. Knott 1st exception applies and Perez was on notice

- deed referenced Certificate which certified title by reference to 1901 Compilation plan showing easements
- Certificate specifically states 91A, 92A, and 95B are subject to restrictions
  - Here consideration of the registration documents show 1901 plan was understood by all contemporaneous parties to create permanent passageway easements for the benefit of the rear lots

  = plain intent to create an easement

17

Lindenbaum v. Perez

Analysis

Abandonment

Facts insufficient to establish intentional abandonment

Overloading

- Use to benefit property other than lots 91B and 92B is an overload

  --Plaintiff wanted to use to benefit Lot B
- Neither subdivision plan indicates any intent other than to permit passage from street to interior of lot
- Absent consent of owner of front lots, use of appurtenant easements to benefit property located beyond rear lots constitutes overloading passageway easements

18

Lindenbaum v. Perez

Holding

- Defendants charged with notice that passageway easements burden their properties because examination of the deeds, registration plans, and other documents available at the time of their purchase would have disclosed the easements
- Insufficient evidence to conclude Plaintiffs and their predecessors in interest abandoned either of the easements
- Scope of the easement supports pedestrian use only
- Use of the easements for the benefit of the 3-family dwelling on Plaintiffs property overloads the easements and is therefore prohibited

19

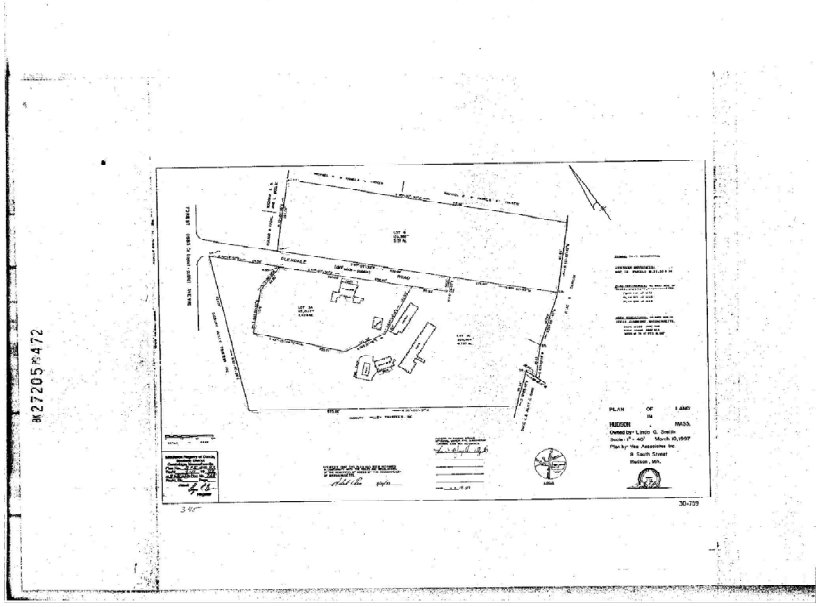
***Smith v. Silva*, LC 28, 2021 WL 1337997**

Facts

- Plaintiff seeks damages for trespass to trees and declaration of rights
- Plaintiff owns Lot 3A
- Defendant owns Lot 5C
- In 1997 grantor reserved ten (10') foot wide easement over lot 5C "for purposes of maintaining and up keeping the arborvitae as may grow on Lot 3A" along easement

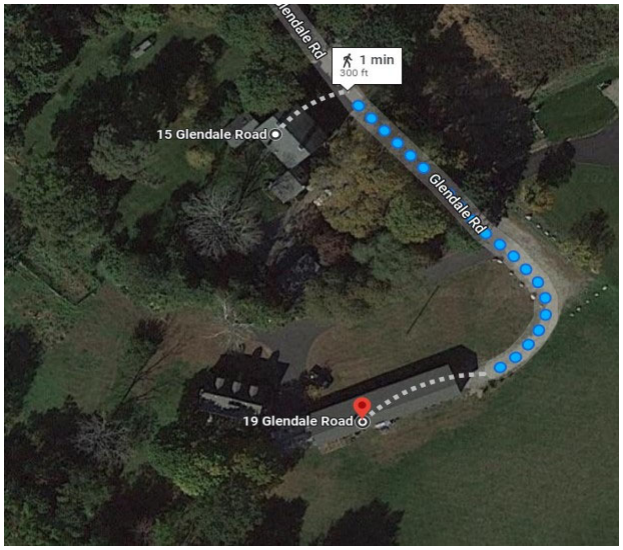
20

Smith v. Silva



21

Smith v. Silva



22

Smith v. Silva

Facts

- Trunks of the arbor vitae trees located on Plaintiff's 3A and roots and limbs extend into the easement
- Trunk of spruce tree located on 3A, roots extend into the easement area
- Weeping evergreen entirely within the easement area
- Defendants removed limbs and damaged roots located within easement area for all the trees while constructing a driveway in easement area.

23

Smith v. Silva

Caselaw Rules

- affirmative easement "creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Restatement (Third) of Property (Servitudes) § 1.2(1) (2000).
- negative easement restricts the uses that can be made of property

24

Smith v. Silva

Analysis

- easement language was unambiguous
  - --grant allows Plaintiff to enter 5C to maintain arborvitae growing on Lot 3A
  - --no restriction on servient estate use
- Defendant as the owner of the servient estate retains the use of his land for all purposes except such as are inconsistent with the right granted to the dominant owner
- easement contains defining characteristics of an affirmative easement as it confers upon Plaintiff affirmative right to enter Defendant's property for purposes of maintaining arborvitae

25

Smith v. Silva

Holding

Scope of Easement

- 1997 Easement is an affirmative easement and does not prohibit Defendants from using easement area
- Defendant's obligations are limited to not interfering with Plaintiff's maintenance and upkeep of arborvitae that grow on Lot 3A

Trespass

- Weeping evergreen was in easement so no trespass
- Because an easement is a nonpossessory interest in real estate, Plaintiff's trespass claim cannot succeed
- Defendant had right to cut back any overhanging branches and intruding roots in the easement area

26

***Hanig v. Town of Sudbury*, LC 55, 2021 WL 2910105**

Facts

- Plaintiff seeks town maintenance and repair of way which town provided prior to 2017
- Town denies that unpaved portion of way is public and has refused
- way is ~3,700 feet in length with the first 2,200 feet being paved and the rest unpaved
- way is ~16 feet wide and serves multiple residential properties

27

Hanig v. Town of Sudbury

Facts

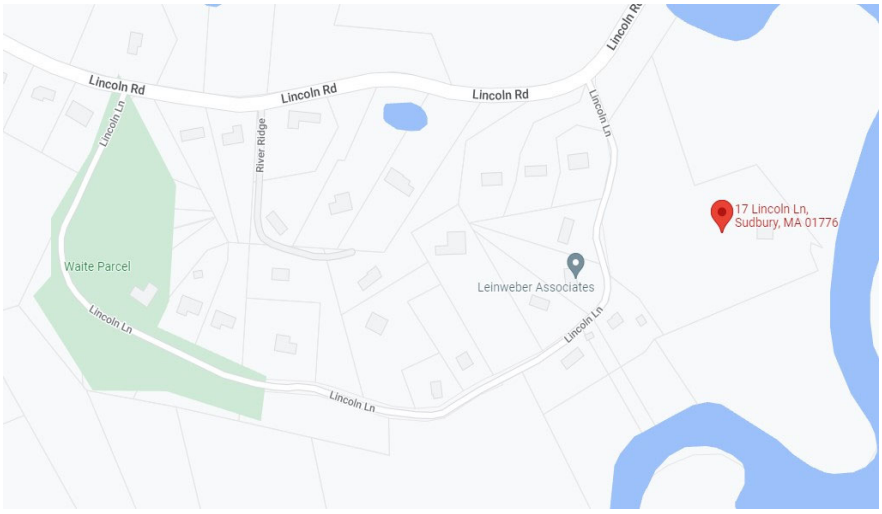
- Lincoln Lane was created prior to 1949
- two attempts at town meetings to have Lincoln Lane accepted as a public way
  --failed first time
  --second time a new layout plan was created which showed first 2,200 feet section but was 40 feet wide

BUT

- no evidence Town took steps to carry out authorization required to accept the section as a public way

28

Hanig v. Town of Sudbury



29

Hanig v. Town of Sudbury

Facts

- from 1957 to 2017 the Town treated both sections in substantially the same manner
  - --maintained and plowed at no cost to abutters
  - --provided fire, police, and school bus service
  - --on at least two occasions used the way for detours
- unpaved way used by the general public, largely for parking to access local river
- used sporadically by general public

30

Hanig v. Town of Sudbury

Issue

What is the legal status of the unpaved portion of the roadway?

31

Hanig v. Town of Sudbury

Rules

Three ways road may become public

1. Prior to 1846, a dedication of way by owner coupled with acceptance by public

--*inapplicable here*

2. Laying out by public authority in manner prescribed by M.G.L. c. 82, Secs. 21-24
   adopt an order of taking by eminent domain and pay damages
   --requires strict compliance by municipality

3. Prescription
   - requires proof of actual use by general public that is continuous and uninterrupted, open and notorious, and adverse to use of the private way for a period of at least 20 years
     --high bar to make such a showing
     --failure to prove even one defeats the claim

   Must be evidence that the general public used the way as a matter of public right as distinguished from a rightful use by those who have a permissive right to travel over the private way

32

Hanig v. Town of Sudbury

Analysis

Statutory laying out

Town vote was first step, but town failed to comply with remaining statutory requirements including the important step of acquiring title to the way

>Therefore, cannot become a public way through this means

33

Hanig v. Town of Sudbury

Analysis

Estoppel

>if town failed to properly carry out process under M.G.L. c. 82, it is now estopped from denying that way is public because such inconsistent with Town's subsequent treatment of the way for the next 60 years

No MA court has recognized the acquisition or transfer of property rights by estoppel as a means of creating public way --would frustrate uniform statutory process by which a municipality accepts a way, appropriates private property, and compensates

= Estoppel not sufficient to declare Lincoln Lane public way

34

Hanig v. Town of Sudbury

Analysis

Public way by prescription

Here the evidence falls short

- Public use was not sufficiently continuous
  --Parking by public, non-abutters was sporadic
- Failed to show that it was adverse
  --Public use does not include a person using the road either by right or permission, express or implied
    >town's use was for the benefit of the abutters and implied permission
- Little evidence that the general public used the way as a regular means of travel

35

Hanig v. Town of Sudbury

Holding

Unpaved section is not a public way

36

***Thomas v. Medeiros*, 100 Mass.App.Ct. 1106**

Facts

Appeal from Land Court decision
Ambiguity in language in 1955 deed

properties at issue are on Martha's Vineyard, on or near Rogers Path in West Tisbury, except Luce Homestead, which is on Lambert's Cove Road

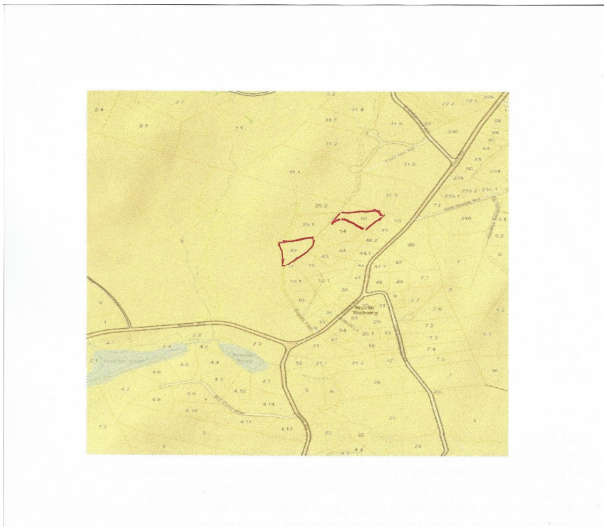
Question whether Plaintiff's predecessor in title intended to convey lots 30 and 45, with wording that she was conveying all her land in West Tisbury

- at the time there was a question as to her percent ownership to lots 30 and 45
- grantor stated she did not have ownership to lots 30 and 45 which were woodlands

Defendant used lots 30 and 45 to collect firewood, occasionally for recreational purposes, such as camping, and parking cars

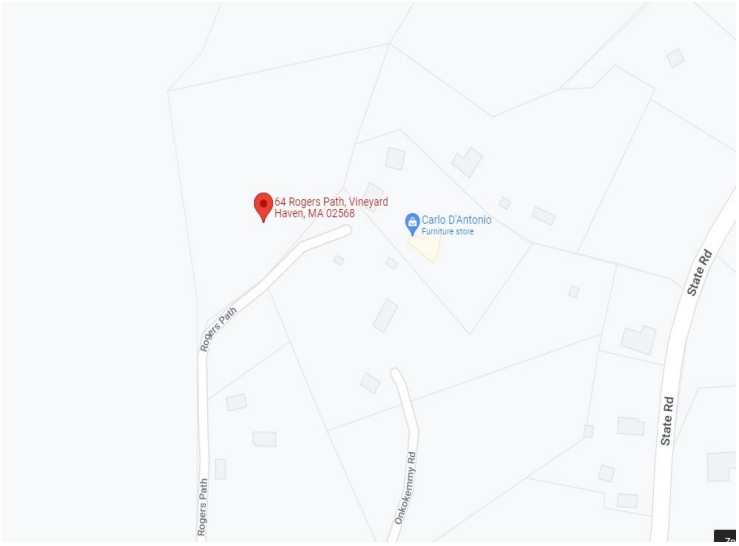
37

Thomas v. Medeiros



38

Thomas v. Medeiros



39

Thomas v. Medeiros

Issues

- Was the seemingly expansive nature of a 1955 deed based on a mutual mistake
- mutual mistake was not explicitly mentioned in pleadings for the land court trial - could a decision be rendered on the issue

40

Thomas v. Medeiros

Rules

- mistake must either be mutual or be made by one party and known to the other party
- mistake relates to essential element of agreement
- If language of written instrument does not reflect true intent of both parties, mutual mistake is reformable
- parol evidence rule does not bar extrinsic proof of intent

= testimony about what the parties said or did at the time

41

Thomas v. Medeiros

Analysis

Mutual mistake

> "The mutual mistake doctrine exists to effectuate the agreement intended by the parties to a contract where the contract language fails to capture that agreement."

= parties reached an agreement on a point they intended to enshrine in written contract but which, for some reason, was mistakenly omitted from that written contract."

"Clear and convincing proof of the mistake is required to reform a deed due to mutual mistake."

42

Thomas v. Medeiros

Holding

Land Court was correct in finding mutual mistake

Land Court properly considered extrinsic evidence about 1955 deed

43

Attorneys at Law
RichMay

Derelict Fee

By: Jeffrey B. Loeb

Rich May P.C.
176 Federal Street
Boston, MA 02110
617-556-3871
jloeb@richmaylaw.com

1

Section 58: Real estate abutting a way, watercourse, wall, fence, or other monument

Section 58. Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.

Attorneys at Law
RichMay

2

The "Derelict Fee" statute, General Laws Chapter 183, Section 58 established an authoritative rule of construction for all instruments passing title to real estate abutting a way so long as the way is sufficiently designated. Boardman v. Pikula, Land Court Misc. No. 183286 (Jan. 23, 1998) (Lombardi, J.) at 8-9 quoting Tattan v. Kurlan, 32 Mass. App. Ct. at 242-44; Adams v. Planning Board of Westwood, Land Court Misc. No. 256869 (July 3, 2003) (Lombardi, J.), modified 64 Mass.App.Ct. 383 (2005).

Attorneys at Law RichMay

3

Even if the deeds in the chain of title did not make specific reference to the railroad bed, the "Derelict Fee" statute would still apply. The statute states, in part, "…every deed or real estate abutting a way…" Mass. Gen. Laws ch. 183 § 58; Rowley, 438 Mass. at 802; Hanson, 66 Mass.App.Ct. at 501.

Attorneys at Law RichMay

4

Supreme Judicial Court made it clear in Rowley v. Massachusetts Electric, 438 Mass. 798 (2003), that the statute applies to abandoned railroad beds just as it applies to private ways whether proposed or existing.

Attorneys at Law
RichMay

5

The effect of the Derelict Fee Statute is to strengthen the common law presumption that "a deed bounding on a way conveys the title to the center of the way if the grantor owns so far." Rowley v. Massachusetts Elec. Co., 438 Mass. 798, 803 (2003), quoting Gould v. Wagner, 196 Mass. 270, 275 (1907) (emphasis added). In this regard, the Derelict Fee Statute is wholly consistent with well-settled law that a grantor cannot convey something that it does not own. Bongaards, 440 Mass. at 15.

Attorneys at Law
RichMay

6

Per the Land Court Manual of Instructions:
At common law the word "by" has been interpreted as including the fee in the way abutting a parcel, and the words "by the line of" and other similar phrases have been interpreted as excluding the fee in a way abutting a parcel. The common law principle was codified by G. L. c. 183, § 58 (the so-called Derelict Fee Statute), which creates a rebuttable presumption as to the fee in a way, water course or monument abutting a parcel. The statute applies to all instruments executed on or after January 1, 1972 and to instruments executed prior to that date on the recorded land side. The statute does not apply to registered land instruments executed prior to January 1, 1972 where the land has been registered or confirmed before that date.

Attorneys at Law
RichMay

7

When there are no reservations in the deeds in the chain of title the owners have an ownership interest at least to the centerline of the way. See, e.g., Lane v. Zoning Board of Appeals of Falmouth, 65 Mass.App.Ct. 434, 437 (2006).

Attorneys at Law
RichMay

8

In light of the fact that property owners have an ownership interest in a portion of the way, they have an easement in the remainder of the way. Lane at 437, citing Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 677-678 (1965) (quoting Casella v. Sneierson, 325 Mass. 85, 89 (1949)). It is black letter law in the Commonwealth that one who has an ownership interest in a portion of a private way has an easement in the length of the way.

Attorneys at Law RichMay

9

The Court held in Rowley, id. at 802, and reaffirmed in Hanson, 66 Mass.App.Ct. at 501, that the Derelict Fee statute applies to instruments that convey property that in fact have "frontage along the length of a way or other similar linear monument."

Attorneys at Law RichMay

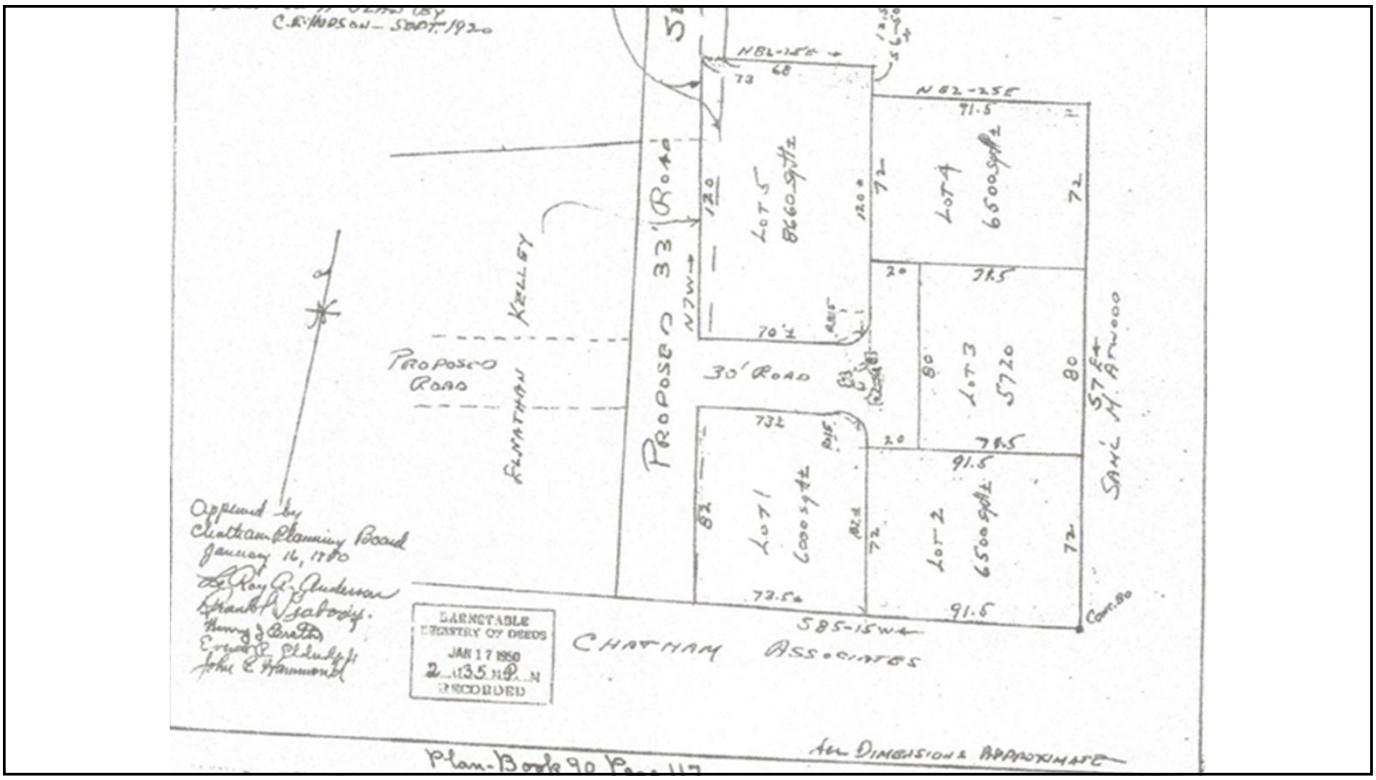
10

A parcel that abuts only the "stub" end of a way presents no possibility of creating a derelict fee when the statute is first applied to the other parcels along the way. Where a road abruptly terminates in a dead-end that is perpendicular to the sides of the way, granting the fee to the parcels along the parallel sides will fully account for the entire fee in the way.

Tighe v. O'Brien, No. MC16MISC000615HPS, 2017 WL 819748, at *7 (Mass. Land Ct. Feb. 27, 2017)

Attorneys at Law
RichMay

11



12

Surveyors Update 2022

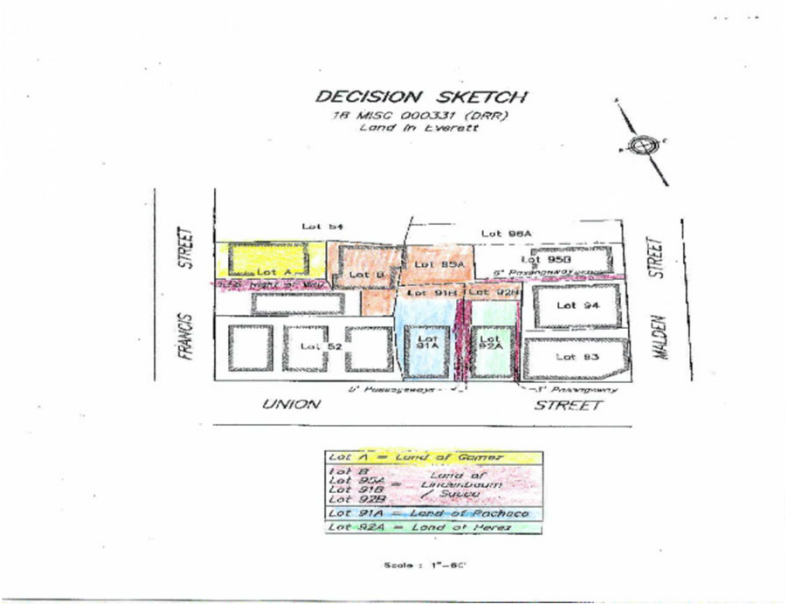
Kathleen M. O'Donnell, Esq.
Milton

1

Easements

- Lindenbaum v. Perez – 18 MISC 000331 (2021)
  - Plaintiffs sought a declaration that their property had the benefit of two adjacent 5-foot easements over parcels of land owned by Perez and Pacheco
  - Parcels are registered land – prior litigation almost 100 years ago
  - Perez argued that he wasn't bound by the judgment in the 1927 case because it was not recited on his certificate of title and further, that the easements had been abandoned
  - Pacheco was defaulted

2



3

Decision

- Defendants were on notice of the existence of the easements because of language in deeds in the chain of title and the easements were shown on registration plans
- Not enough evidence to show that easements were abandoned
- Scope of easements is far more limited than plaintiffs have argued – no vehicular access, only pedestrian use and use by the three-family house located on Lot B is overloading the easements

4

Prior Decision

- "The principle of construction governing the interpretation of deeds is that where mention is made of an easement as an encumbrance or as an appurtenace of the land conveyed and reference is made in the deed to a plan, the plan must be considered as part of the deed, so far as is necessary to aid in the description and identification of the easement." Dubinsky v. Cama 261Mass. 47 (1927)

5

Abandonment

- Defendants have the burden of proving whether the easements have been extinguished:
  - An express easement can be extinguished only by grant, release, abandonment, estoppel or prescription (Emery v. Crowley 371 Mass 489 (1976))
  - Look for acts of the holder of the easement that conclusively and unequivocally show either a present intent to relinquish the easement or use for a purpose inconsistent with its further existence (First National Bank v. Konner 373 Mass 463 (1977))
  - Intent is key
  - Mere non-use is not abandonment

6

Scope

- Goal is to ascertain the presumed intent of the grantor by reference, first and foremost, to the language of the grant and then, if necessary, to the then existing circumstances (Adams v. Planning Board of Westwood 64 Mass. App. Ct. 383 (2005)
- Plaintiff has to prove by a preponderance of the evidence that the disputed easements were intended to by used for vehicular travel – neither 5 foot passageway is wide enough for a car

7

Overloading

- Absent consent of the owner of the servient estate, use of an appurtenant easement to benefit property located beyond the dominant estate constitutes overloading. (Taylor v. Martha's Vineyard Land Bank Comm. 475 Mass 682 (2016))

8

Private Ways

- Tribuna v. Cohen – Mass. App. Ct. UP 2/10/22
  - Plaintiff owns a two acre parcel on Parker Drive, a private gravel road in a subdivision in Truro
  - Defendant owns a lot directly across the street
  - Co-defendant Tru-Haven Association owns the fee to the roads in the subdivision
  - Plaintiff and Defendant have an express easement to use Parker Drive "for all purposes for which roads are commonly used in the Town"
  - The travelled way is fourteen feet wide but the layout on the subdivision plan is forty feet. Defendant has landscaped and installed a lamppost and rocks outside the travelled way but within the forty foot way

9

Decision

- Did the lamppost, rocks and landscaping interfere with plaintiff's use of Parker Drive –

  No – the easement language didn't require that the entire 40 feet width be kept open and there was no evidence that this landscaping prevented the plaintiff from using Parker Drive for its intended purpose and

  The judge's ruling didn't mean that a strip was created between the travelled way and his lot. His frontage was still on a forty-foot wide roadway

10

What does "purposes for which public ways are used" mean?

Plaintiff argued that another purpose for the easement was to maximize the development opportunities for the subdivision lots –

No – this language has been interpreted by the courts to mean an easement for the normal actual active uses of public ways in the town, like walking, driving, bicycling not the indirect development value they may have. (McLaughlin v. Board of Selectmen of Amherst, 422 Mass. 359 (1996))

11

G.L.c. 41 Section 81L

- The division of land into two or more lots all having frontage on a public way for the distance required under the local by-law is not considered a subdivision
- Endorsement by the Planning Board is not required if the lots are fronted by an unconstructed public way or a way that provides only "illusory access" – favorite example – claim that lots fronting Mass Bay were on a "public way" or on a statutory private way
- Endorsement not required if access is practically impossible
- Test for planning board – if access could be better but is manageable – approve

- As in *Bruno* – endorsement does not mean that lot is buildable

12

ANR Plans - process

- Submit Form A to planning board and file notice with town or city clerk
- Planning Board has 21 days to approve, BUT check local bylaw. No public hearing is required
- If plan doesn't show a "subdivision", approval shall happen "forthwith"
- Planning Board vote should be detailed enough so a reasonable person would understand that the decision was yes or no
- If Planning Board fails to act or to notify applicant and the town or city clerk, the board is deemed to have determined that approval under the subdivision control law is not required and the town clerk shall certify the plan

Kitras v. Planning Board of Aquinnah – 70 Mass. App. Ct. 561

Planning Board's failure to comply with Section 81U resulted in construction approval but final approval was not automatic. If the Town Clerk refuses to issue the certificate, recourse is mandamus.

13

Is it really a public way?

- Public ways are created three ways
  - Layout and acceptance
  - Prescription (unusual)
  - Dedication and acceptance before 1846

Way shown on an approved subdivision plan?

Way in existence on effective date of subdivision control law having IN THE OPINION OF THE PLANNING BOARD – sufficient width, suitable grades, and adequate construction to provide vehicular access appropriate for the use of the site and for the installation of municipal services for the use

Dispute over title to private way is not a reason to withhold approval

14

Decision

- Planning Board had endorsed ANR plans in 1972 and 1973 indicating that the Board believed that Parker Drive complied with the then applicable subdivision regulations, even though the wider road was never built.

15