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March 10, 2011

Mark London
Executive Director
Martha's Vineyard Commission
Olde Stone Building
P.O. Box 1447
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Re: Therese M. Hall, et al v. Martha's Vineyard Commission, et al.
Dukes County; Civil Action No.: 2007-00061

Dear Mark:

At your request I have made further inquiries into the public character of the 5 special ways in Edgartown which are the subject of the litigation referenced above.

The matter is complicated by the fact that the ways and the lots abutting them seem to have been set-off into individual ownership by votes of the Proprietors between 1733 and 1800. The Town Clerk and the Registry of Deeds maintain the Proprietors Record Books from that period, and these contain road layouts and conveyances effected by votes of the Proprietors.

Although rarely used in recent times, beginning in 1712-13, there was a statutory system for Proprietors, holding undivided lands in common, to layout separate lots and set them off into individual ownership, c. 9,§ 1, Coffin v. Lawrence, 143 Mass. 110, 11 (1886) (Proprietors "may grant land by a vote, instead of a deed.") The modern day version of this statutory scheme is G.L. c. 179. The courts have approved this unique system of conveyancing, wholly separate from the recorded and registered land systems, but documented in the Proprietors Record Books. Campbell v. Nickerson, 73 Mass. App. Ct. 2. (2008) (holding that conveyances made by the Proprietors in Brewster, but not recorded in the Barnstable Registry of Deeds were valid, and that the roads established by the Proprietors' layouts and conveyances by vote in 1713-14 were

similar to roads established under a common scheme of development, and that all the lots in the initial set-offs and in later set-offs had an easement to use those ways.) [1] These roads would therefore have had a public character, perhaps as statutory private ways, if not as private ways in which all the individual set-off lots held an easement of passage.

Since 1846, public ways could be established in only three manners: (1) a layout by public authority, (2) prescription, or (3) by dedication by the owner prior to 1846 and acceptance thereof by the town, either expressly or impliedly. Fenn v. Middleborough, 7 Mass. App. Ct. 80, 83-84 (1979). Prior to 1846 one can find instances of Proprietors dedicating ways they had laid out and towns accepting such dedications. See, e.g., Sturdy v. Planning Bd. of Hingham, 32 Mass. App. Ct. 72, 74 (1992) (dedication of a way laid out by the Proprietors and acceptance in 1737 by vote of Town Meeting.)

Edgartown's Town counsel has provided us with copies of the Proprietors' conveyances by vote in the "First Division of the New Purchase" at Proprietors' Book 2, Page 164 which bound set-off lots by Tar Kiln Path and Mill Path (a/k/a Tisbury Road) in 1733-34. We also have copies of the set-offs of lots in the "First Division of the Old Purchase" in 1737, Proprietors Book 2, Page 198, which bound the set-off lots "by Pennywise Way or Path" and by "Middle Line". (Town Counsel's title examiner advises that a part of the original layout of Middle Line Path is today known as Ben Tom's path or road.) The legal effect of laying out lots bounding on a path is somewhat uncertain as to the fee ownership of the ways.

Prior to 1822, the law seems to have been that the grantor would retain title to the roads/paths so referenced, but the grantees would have an easement to use the roads. Erickson v. Ames, 264 Mass. 436 at 442 (1928). This rule was changed by the common law (i.e., case law) and eventually by G.L. c. 183, § 58, (in 1971), which has retroactive effect. However, at the time of the Proprietors' votes of division, under the then prevailing construction of deed descriptions, the Proprietors would have retained title to the ways referenced in the votes. Moreover, even if the fee in the ways passed to the abutters in 1971, if the Proprietors' conveyances of the parcels abutting the ways created an easement in those ways for public passage, that easement of passage would continue unaffected by the fact that the fee passed to the abutters. See also Campbell v. Nickerson, 73 Mass. App. Ct. 2. (2008) (holding that conveyances made by the Proprietors in Brewster, gave all the lots in the initial set-offs and in later set-offs an easement to use those ways referenced in the conveyances).

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[1] By its nature this separate title system tended to be self-liquidating, in that as lots were severed from ownership in common by the Proprietors and set off to individuals as undivided fee simple ownerships, subsequent deeds and mortgages would be filed in the Registry of Deeds, rather than in the Proprietors Record Books. Thus, after all of the Proprietors' lands held in common had been conveyed away, there was no longer any need to conduct meetings of the Proprietors or to maintain their record books.

Proprietors Record Book 2, page 606, laid out set-off lots in 1798 for the "Third Division of the New Purchase" and contained an express provision at p. 608 which, "...reserve[d] to each and every of the said proprietors, the privilege of passing and repassing, with cart, or drift, or otherwise, in either or any of the paths, or ways, leading into or through the said tract of land, that have heretofore been commonly used. Thirdly, we have laid out and bounded the whole tract of land, as above described, into Forty Five lots, or shares, in manner following – only reserving what is above reserved and granted for roads and ways." (Note: "drift" or driftway is a reference to driving cattle.)

Another layout is found in the Second Division of the New Purchase in 1754 at Proprietors Record Book 2, Page 340-42, where "Watcha Road" is laid out as two poles wide (33 feet), and "not to be cumbered with gates or bars." I enclose copies of extracts of these records.

As with Sturdy v. Planning Bd. of Hingham, there could have been an acceptance of a the Proprietors" dedication of these ways by a meeting of the Freeholders and Inhabitants of Edgartown. However, Town Counsel has examined these old records without finding such a vote.. However, Soeder v. County Comm. of Nantucket County, 60 Mass. App. Ct. 780 (2004) indicates that Proprietors' Ways may be treated as public ways even if not all of the formalities of dedication were observed.[2] Depending on the historic circumstances, the Proprietors, acting in their corporate capacity, may be treated as the predecessors to town government. ("Such proprietors of common and undivided lands are a quasi corporation or body politic." Coffin v. Lawrence, supra, at 112.)

Given the unusual origins of these set-off lots, described as bounded by several of these ways, the two pole layout of Watcha Path, and the Proprietors' express reservation of rights of unencumbered passage, analogous to a common scheme, there is uncertainty about the character of the special ways. The two most likely candidates are (1) the "private and particular ways",

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[2] "In the sense of the historic succession as outlined in the margin,[fn2] the rights of the Proprietors are preserved: on the one hand, the County Commissioners derive their rights from the Proprietors and in effect are successors to them..."

> Fn. 2. "Land in Nantucket was early held in common undivided ownership with the owners (Proprietors) organized in (quasi) corporate form for management purposes. The procedures in use for conducting corporate meetings and disposing of business appear from the provincial statute of 12 Anne under the title "An Act directing how Meetings of Proprietors of Lands lying in Common, may be called," 12 Ann. c. 2 (1712), as modified and developed in subsequent statutes cited in *Coffin* v. *Lawrence*, 143 Mass. 110, 112 (1886). The current G.L. c. 179 is the evolved form of these statutes. The Proprietors in their corporate capacity might set out and allot particular parcels to individuals for private ownership, retaining the rest, including roads or ways and other landed public facilities, in the communal style". Soeder, supra, at 783-84, fn. 2. (emphasis added)

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now known as statutory private ways, G.L. c. 82, § 21, and (2) "common scheme" ways, in which all lot owners within the common scheme hold an easement of passage.

Statutory private ways are only nominally private; the public has the right to use them, although the town is not responsible for their maintenance nor liable for defects in the way.

'Although the words "private ways" may occasionally be used in the statutes with a different meaning (see, for example, G.L. [Ter. Ed.] c. 84, §§ 12-14), they commonly mean ways of a special type laid out by public authority for the use of the public. G.L. (Ter. Ed.) c. 82, §§ 21-32A. Such "'private ways' are private only in name, but are in all other respects public." Denham v. County Commissioners of Bristol, 108 Mass. 202, 208. Munroe v. Worthington Pump & Machinery Corp. 245 Mass. 474, 478. See also *Flagg v. Flagg,* 16 Gray, 175."

Opinion of the Justices, 313 Mass. 779, 782 (1943)

Statutory private ways, although open to public access, are not on that ground alone sufficient to serve as the basis for an ANR endorsement under G.L. c. 41, § 81L, the Subdivision Control Law. Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979). However, if a way provides safe and sufficient access on the ground, and is maintained by a town and used as a public way, it may serve as frontage sufficient for an ANR plan regardless of whether it is a statutory private way or a fully private way. See, Matulewicz v. Planning Bd. of Norfolk, 438 Mass. 37 (2002).

In sum, absent a judicial ruling, I cannot opine that the ways are subject to public control as public ways or statutory private ways. Similarly if they are properly considered private common scheme ways, there is no effective private regulation akin to that often found in a Declaration of Covenants and Restrictions governing a subdivision road and lots. Thus the width and surface of the ways and the development of the immediately abutting land are effectively unregulated and may be subject to inappropriate development which could destroy the historic character of these ancient ways..

Very truly yours,

Eric Wodlinger

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Enclosure
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Proprietors' Record Book 2, Pages 198: 1st Division of the Old Purchase.

1737

Pennywise Path is used as a boundary, as is Middle Line Path. The first reference to Middle Line Path is found on Page 214, within the description of Lot 26. Note what we now call Ben Tom's Path was referred to as Middle Line Path in this set off.

Proprietors' Record Book 2, Page 164: 1st Division of the New Purchase.

1733-4

Lots run between the Mill Path and Tar Kiln Path, and between Tar Kiln Path and Holmes Hole Road.

Proprietors' Record Book 2, Page 606: 3rd Division of the New Purchase, laid out 1798, recorded 1800 (post-Revolution.)

This division abuts the 1st Division of the New Purchase on the east.

"Secondly, we reserve and lay out for the use and conveniency of the said proprietors, a road, or cart way, of twenty feet in breadth, adjoining on the westernmost line of the First Division of the said New Purchase, to extend from Holmes Hole road to Tisbury road, aforesaid. We also reserve to each and every of the said proprietors, the privilege of passing and repassing, with cart, or drift, or otherwise, in either or any of the paths, or ways, leading into or through the said tract of land, that have heretofore been commonly used.

"Thirdly, we have laid out and bounded the whole tract of land, as above described, into Forty Five lots, or shares, in manner following – only reserving what is above reserved and granted for roads and ways."

NOTE: Middle Line Path (including the path now called Ben Tom's Path) and Pennywise Path merge and lead into Tar Kiln Path, which continues beyond the First Division of the New Purchase into the Third Division of the New Purchase.