

# LAKE LEGAL LLC

July 21, 2022

**Via Electronic Mail**

Ipswich Planning Board  
Attn: Carolyn Britt, Chair  
25 Green Street  
Ipswich, MA 01938

RE: Anne Burkhardt ANR Plan Endorsement, 8 Hemlock Drive

Dear Ms. Britt, and other Members of the Board,

This office and the undersigned represent James and Shannon Cabot, owners and occupants of 5 Hemlock Drive, which abuts 8 Hemlock Drive. 8 Hemlock Drive gains its access to Hemlock Drive and County Road by way of an easement through the front yard of the Cabot's property. At a practical level, the Cabot's oppose the proposed ANR because Hemlock Drive is not adequate for the increase in traffic that would accompany the proposed division of 8 Hemlock into two lots. From a legal perspective, this letter outlines why the ANR is not entitled to endorsement. First, I review why the so-called "Hemlock Drive Extension", as shown on the Plan, does not meet the requirements for a "way" under the Massachusetts Subdivision Control Law (M.G.L. c. 41 §§81K-81GG) or a "street" under the Ipswich Zoning Ordinance. Specifically, "Hemlock Drive Extension" was not a way in existence currently or at the time Ipswich adopted subdivision control. Second, I review why the current access to 8 Hemlock is not adequate as required by Ipswich zoning and state case law. Lastly, I note that endorsement of the plan will result in both lots being non-conforming, creating an automatic zoning violation.

## **Background**

The current ANR Plan is the third iteration of the plan, two of which show "Hemlock Drive Extension" in different locations.<sup>1</sup> The Applicant revised the first plan then withdrew that revised plan late last summer. The current plan shows "Hemlock Drive Extension" as shorter than shown on the previous plan, even while the Applicant suggests and alludes to the Hemlock Drive Extension continuing through 8 Hemlock and continuing on the other side through 16 Lakeman's Lane to Lakeman's Lane. "Hemlock Drive Extension" is not referred to in any Deed

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<sup>1</sup> This relocation of the way begs a number of questions, such as (a) if a way is in existence, how does it move within the past year?; and (b) what is the basis for showing Hemlock Drive Extension in the current location versus any other location? I do not know the answers to these questions, but I can note that Hemlock Drive Extension did not exist before the current plan, meaning the Applicant is submitting a plan that creates new frontage (i.e., a subdivision plan, rather than an approval not required plan) that happens to just provide enough frontage to satisfy the Ipswich Zoning Ordinance.

presented by the Applicant nor shown on any Plan. And in their most recent submission on July 14, 2022, the Applicant is forced to admit that the only access from 8 Hemlock to Lakeman's Lane is by way of an easement granted in May of 1999 "on horseback or with horses, and in no other manner". (See Bridle Path Easement attached as "Exhibit A".) Despite that, it is clear that the Applicant seeks the opportunity to treat the balance of the driveway that historically ran through 8 Hemlock as frontage. Since there is no more or less support for that driveway being considered frontage than there is for "Hemlock Drive Extension" to be deemed frontage, if the current ANR is endorsed the Applicant would have some basis for arguing that the entire driveway must be considered frontage. On this topic, the note on the plan, which indicates Parcel B will not be further subdivided, is unlikely enforceable and thus is meaningless, intended only to make the public (and perhaps the Planning Board) feel better. There are proper ways to create such a condition or restriction, but it not by way of a note on an ANR, the endorsement of which is not a decision.

### **State and Ipswich Requirements for an ANR Endorsement**

MGL Chapter 41, s. 81L provides that a Plan submitted before the Board may only be considered an ANR Plan if:

...every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.

While not stated in their application or supporting submission, it is evident the Applicant seeks to demonstrate that "Hemlock Drive Extension" was a way in existence when Ipswich adopted Subdivision Control Law. If they can prevail on that point, this board still needs to determine whether the entirety of Hemlock Drive provides "*sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon.*" The Court has repeatedly ruled in favor of the Planning Board's authority to decline to endorse an ANR plan on the basis of the inadequacy of a way, regardless of the "existence", on paper or on the ground, of that way. In Rettig v. Planning Board of Rowley, 322 Mass. 476 (1955) the first of these cases, the Court upheld the Planning Board's decision to not endorse, stating that the way in question was "not a way 'adequate for access for vehicular traffic'", but many more such cases exist. See Malaguti v. Planning Board of Wellesley, 3 Mass. App. Ct. 797 (1975), and Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987) for further examples, and Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978) for an examination of the adequacy of *frontage*, rather than of the character of the way.

Let us also examine Ipswich's own Zoning By-Laws. Section III gives the following definition of a "Street":

A way, which in the reasonable judgment of the Planning Board, has sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic existing and/or resulting from the development of abutting land and for the installation of municipal services to such land(s) and/or buildings located on or to be constructed on such land and which complies with one of the following criteria: (1) a way which the Town Clerk certifies is used as and maintained regularly and consistently as a public way by the Town to the same extent to which other public ways are maintained by the Town; or (2) a way shown on a plan previously approved and endorsed by the Planning Board and recorded at the Registry.

It is clear that Ipswich Zoning upholds the two-fold requirement outlined in the state statute, namely that a way must both Exist and be Adequate for the needs of the residents who drive over the way and the municipal services, e.g., the Fire Department, which may make use of it. (We may also look to Musto v. Medfield Planning Board, 7 LCR 281 (1999) (Misc. Case No. 229690) for the Court's assurance that existence and adequacy of a way are separate considerations.)

### Argument

Part I: "Hemlock Drive Extension" was not a way in existence when the Subdivision Control Law came into effect in Ipswich (February 18, 1954).

The Applicant proceeds based on an incorrect understanding of what is required for a "way" under the subdivision control law and yet does not meet its own standard. As evidenced by its most recent submission, in a nutshell the Applicant urges that if some person or property is benefitted by access rights over the driveway crossing 8 Hemlock then that driveway is elevated to the status of a "way" that can be used as frontage. Such a conclusion would change the status of numerous shared driveways in Ipswich (which exist when one property grants an access easement or "right of way" over their existing driveway) from mere "driveway" to frontage. A driveway is not frontage. Such an outcome surely would lead others to consider granting such access as a substitute for the subdivision process.

Looking to logic, if your right to access a driveway or property only exists by way of easement, then that driveway is not a public way. That is, if the Applicant could prove its point – that there are easement rights over "Hemlock Drive Extension" – then it would prove that Hemlock Drive Extension is not a public way. On the other hand, if instead the Applicant could prove that Hemlock Drive Extension is a private way (like the Hemlock Drive that leads from County Road to the Cabot's property), even that would not be sufficient to prove that Hemlock Drive Extension is suitable for granting frontage. Such a determination would still be subject to the opinion of the Planning Board, as the "ANR Handbook" points out:

In Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), it was argued that a statutory private way was a public way for the purposes of determining whether a plan was entitled to be endorsed "approval not required." The court found that such a way was not as a matter of law a public way for the purposes of subdivision control and that development on a statutory private way would require Planning Board

approval unless it could be proven that such a way was both maintained and used as a public way.<sup>2</sup>  
(Emphasis added)

However, this is not the only fault with the argument of the Applicant, for indeed, even assuming the Applicant was correct that an easement is sufficient to transmute a driveway into a way providing access, the last easement providing access over 8 Hemlock Drive was extinguished in 1947.

The easement which created Hemlock Way as it currently stands, running from County Road to the property of the Cabots, was established in a Deed from Percy E. Bennett to Laura Katherine Clement, dated November 12, 1940 (Essex South District Registry of Deeds Book 3238, Page 240, and attached as Exhibit "B") which states:

The Grantee and his heirs and assigns shall have the right of ingress and egress over a driveway or right of way fifteen feet in width now leading from said County Road to the way or driveway at or near land now or formerly of Swain, leading to the building located upon the granted premises; (Emphasis added.)

Please note: "land now or formerly of Swain" refers to the Cabot's parcel, a/k/a 5 Hemlock; "granted premises" refers to the Applicant's parcel, a/k/a 8 Hemlock. It is clear that the two sections of the then extant driveway are being treated separately. The above-referenced portion corresponds to the now-in-use Hemlock Drive, the "way or driveway" at which this portion arrives is the "Hemlock Drive Extension.

If we then look to a subsequent deed, also from said Bennett to said Clement, we see the creation but also the temporary nature of the easement over the portion of the driveway being referred to as "Hemlock Drive Extension". Excerpt is from Deed of Bennett to Clement, dated February 18, 1943, (Recorded in Book 3324, Page 155, and attached as Exhibit C):

Reserving, however, to said Percy E. Bennett, as appurtenant to said Bennett land, in common with said Clement and the heirs and assigns of said Clement, the right to pass and repass with teams or otherwise over said fifteen (15) foot driveway above mentioned, lying Northeasterly and Northwesterly of said Clement land and adjacent to said way extending from County Road to said Swain land, and above referred to as "latter mentioned way," and runs from said "latter mentioned way" to land of Percy E. Bennett and which lies between the premises hereby conveyed and land of Clement and land now or formerly of Arnold E. Bennett; said right of way, however, to cease to exist whenever said last mentioned parcel of land of Percy E. Bennett shall be conveyed by said Percy E. Bennett, or upon the death of said Percy E. Bennett, whichever shall first occur, and on the happening of either event shall then not be appurtenant to said Percy E. Bennett land. (Emphasis added.)

As stated above, the easement over 8 Hemlock Drive was (a) specifically for the benefit of Percy E. Bennett so that he could access his other parcel, which is the parcel now known and numbered as 16 Lakeman's Lane. Also, said easement was only to exist as long as Percy Bennett himself was using it. Percy E. Bennett conveyed this parcel to Arnold E. Bennett on July 21,

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<sup>2</sup> Massachusetts Dept. of Housing & Community Development, Dept. of Community Services. (1998). ADEQUACY OF A PUBLIC WAY. In *The ANR Handbook: Plans not requiring approval under the subdivision control law* (pp. 8-8). essay.

1947 by virtue of a deed recorded in Book 3595, Page 520, and attached hereto as Exhibit "D". It is of note that this easement was thus extinguished more than five years before the adoption of Subdivision Control Law in Ipswich.

In the absence of direct proof that "Hemlock Drive Extension" is a way, the Applicant looks to language contained in Deeds to the property to suggest such access. However, that reliance is misplaced as the language is both common and generic in no way evidences public access. Specifically, while recorded easements and rights of way are carried forward irrespective of whether they are referenced in a Deed, as a matter of custom and caution most deeds contain language such as "subject to and together with easements and rights of way of record, insofar as the same may be in force and applicable". The existence of this language does not evidence the existence of any such easements or rights of way.

Likewise, the common practice is to define the scope of an easement holder's rights of way using language "for all purposes for which a public way is commonly used", typically with reference to the specific municipality, such as "[in the Town of Ipswich]". This language provides a shorthand means of defining how a driveway may be used, and is inserted in lieu of a lengthy description. The point is covered in "Easements and Rights of Way, Public and Private Roads", which states:

Private ways may be private, but open to the public. This does not make them public ways for which the municipality has the burden of liability and maintenance. Use of words in the grant of an easement such as "for the purposes for which public ways in the town are now or may hereafter be used" does not make the easement public. *McLaughlin v. Board of Selectmen of Amherst*, 422 Mass. 359, 364-365 (1996). (Emphasis Added.)<sup>3</sup>

In a nutshell, the language relied on by the Applicant in no way evidences, or frankly even suggests, that there in fact is private easement. Even if it did, however, that would prove only that there is private access over the driveway, not that there is public access or that the driveway constitutes frontage.

The only access that existed was for the limited use and benefit of specific abutters. This was not a "public way in existence at the time subdivision control was adopted in Ipswich", but a private driveway over which certain properties had a limited right of access. The evidence of this is overwhelming:

- (i) The 1940 plan recorded in the Essex South Registry at Plan Book 72, Plan 90 (the "1940 Plan"), which is relied on by the Applicant, shows the driveway as "15' Driveway". It was not a public way in 1940, but a driveway. For ease of reference, that plan is attached as "Exhibit E".
- (ii) While the Applicant references that 1940 Plan, there is no reference to the initial Deeds that used that plan. In 1940 Mr. Percy Bennett owned most of the land between County Road and Lakeman's Lane. Mr. Bennett saw fit to reserved "the right to pass and repass with teams or otherwise over said fifteen (15) foot driveway above mentioned, lying

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<sup>3</sup> Irene, D. (2016). *Easements and Rights of Way, Public and Private Roads*. Presentation, Massachusetts Land Conservation Conference 2H.

Northeasterly and Northwesterly of said Clement land and ..." Mr. Bennet would not have reserved a right of access if there were public access rights over this driveway. Further, even that Mr. Bennett reserved lapsed upon the earlier of his death or his conveyance of the benefitted property at 16 Lakeman's Lane. While the subsequent deeds may reference the 1940 Plan, the easement created in conjunction with that plan expired per its terms when Mr. Bennet sold the property at 16 Lakeman's Lane in 1947 (See Deed recorded in the Registry in Book 3595 Page 520, Exhibit "D").

- (iii) The Applicant carefully makes no reference to the plan of record for the Premises, which is the plan recorded in the Essex South District Registry of Deeds in Plan Book 157, Plan 17 (a copy of which is attached as "Exhibit A"): That plan shows a "15' ROW" ending at the shared property line between the Cabot's property and 8 Hemlock. There is no "Hemlock Drive Extension" going on to or over 8 Hemlock as shown on the Applicant's proposed plan. This is consistent with the language in the Bennett Deeds, which describe (i) a "way" from County Road to the Swain (now Cabot) property; and (ii) a driveway over 8 Hemlock Driveway. Mr. Bennett reserved an easement over the latter driveway, but as discussed above that easement lapsed upon his transfer of the property in 1947, before Ipswich adopted the Subdivision Control Law.

Part II: Hemlock Drive does not provide adequate access to 8 Hemlock Drive and "Hemlock Drive Extension".

The Applicant smartly focuses its discussion about the adequacy of the way on "Hemlock Drive Extension", the proposed new road to be located on 8 Hemlock Drive, but ignores the actual, existing Hemlock Drive over which it has a 15' easement. Most recent cases have addressed this question of access from the way to the building envelope, whether it is adequate or illusory, but the older cases focus more on the adequacy of the way itself. As stated in The ANR Handbook, "Not only must a Planning Board consider the adequacy of the existing way, the vital access standard requires an inquiry as to the adequacy from the way to the buildable portion of the lot." (See Id. at 16.) Per the Ipswich Bylaw, one element of a street is that it is a "way, which in the reasonable judgment of the Planning Board, has sufficient width, suitable grades, and adequate construction to provide for the needs of vehicular traffic existing and/or resulting from the development of abutting land ....". Existing Hemlock Drive is long, narrow and barely paved. Two cars cannot pass without one pulling off the improved area, and who know where a car would have to go if a horse trailer were coming.

In support, the Applicant looks to a letter dated June 21, 2022, from Fire Lieutenant Kendall Buhl indicating that Hemlock Drive Extension is adequate. In his more recent email of July 14, 2022, the Lieutenant has now, in effect, withdrawn that conclusion, stating that he is only speaking to "Hemlock Drive Extension", which he was asked to review, not Hemlock Drive, about which he provides no opinion. The prior Fire Chief, Mr. Andy Theriault, did provide his conclusions that Hemlock Drive was not 20' wide and that it was not adequate for the town's emergency equipment. (See "Exhibit G".) Approval of the ANR presented would result in the creation of additional dwelling units at the end of an access route that an Ipswich Fire Chief has concluded is not adequate. I hope the board will defer to the considerable expertise of Chief Theriault and Lieutenant Buhl on this particular topic.

Part III: Endorsement of the ANR will create zoning violations and result in both new lots being non-conforming with respect to Zoning.

If Hemlock Drive Extension and the new lots are approved as shown on the proposed ANR then the existing house and the existing barn will be within the front yard side backs of the new lot lines. Endorsement of the ANR thus will create at least two new non-conformities that do not presently exist.<sup>4</sup> My understanding is that the Planning Board has not taken a position about whether the owner should obtain zoning relief or not before endorsing a plan that may not meet all zoning requirements. (Gloucester, for example, expressly requires prior zoning board approval; see section 5.8.4.1 of the Gloucester Zoning Ordinance.) In this instance, however, the owner should get the zoning relief in advance where the endorsement of the ANR itself will result in the creation of obvious zoning violations for existing structures. That is, this is not a situation where the standard notation on the plan – that endorsement does not confirm compliance with the Zoning Ordinance – will work. That note in effect confirms that a buyer of the lot knows that they need to confirm the zoning status, but in this case the current owner of the house and barn could be subject to an enforcement order because of the new zoning violations. To avoid that, the owner will need variances from the ZBA to divide a lot in a manner that creates dimensional nonconformities.

**Conclusion**

The Applicant seeks to expand, and possibly significantly expand, the use of existing Hemlock Drive by getting the Planning Board to endorse an approval not required plan that would extend Hemlock Drive. However, Hemlock Drive is not suitable for an increase in use, and an ANR plan is not the suitable method for creating new frontage. Further, since there is no way to understand how the Applicant has located “Hemlock Drive Extension” on the plan, endorsement of this ANR arguably creates an implied obligation for the Planning Board to accept as legal frontage the entire driveway that passes through 8 Hemlock. This will lead to significant expansion in the use of existing Hemlock Drive.

As support the Applicant relies on easements that do not help and generic language from the historic deeds that prove nothing. The easements fall in two categories. The first is one which provides 8 Hemlock access over the existing Hemlock Drive but which does not provide others access over 8 Hemlock. The other easement did in fact reserve access over 8 Hemlock for the use of Mr. Bennett, but only for period of time that ended prior to Ipswich adopting subdivision control. All of that said, the existence of current easements of record would do nothing to support or confirm that “Hemlock Drive Extension” was or is a public way, and would in fact suggest the opposite.

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<sup>4</sup> Not only would endorsement result in direct zoning violation for the lot on which the house is located, but even if the barn lot were without have direct zoning violations, it would be rendered non-conforming indirectly due the doctrine of infectious invalidity. See Alley v. Building Inspector of Danvers 354 Mass. 6-7 (1968), which holds that the creation of non-conforming building lot “infected” the remaining parcel, from which it was divided; and thus rendered the remaining parcel non-conforming even though on paper it met all zoning requirements.

With respect to the adequacy of Hemlock Drive, the former Ipswich Fire Chief provided his clear conclusion that it is not. The current Ipswich Fire Prevention Officer has confirmed that he has only spoken to adequacy of the proposed new road at "Hemlock Drive Extension", and he provided no opinion about existing Hemlock Drive. As it stands, the only opinion presented to the Planning Board is that Hemlock Drive is not suitable for the expansion that would result from the endorsement of the ANR plan.

The Cabots respectfully request that the Planning Board vote to not endorse the ANR plan in front it that would create "Hemlock Drive Extension" and two new lots off of that new way.

Very Truly Yours  
LAKE LEGAL, LLC



Philip G. Lake, Esq.

PGL; rwb, Enclosures

CC: James and Shannon Cabot  
Ethan Parsons