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December 1, 2021

Planning Board
Town of Lexington
1625 Massachusetts Avenue
Lexington, MA 02420

Re: Public Benefit Development – 12 Summit Road

Dear Planning Board Members:

As you know this firm represents the interests of the 12 Summit Road LLC (the “Applicant”) in connection with its application for a special permit allowing for a Public Benefit Development project at 12 Summit Road (the “Project”). We have been asked by the Planning Staff to address the Applicant’s right to use an easement across 8 Summit Road as part of its access road serving 5 dwellings in the Project (Unit 3 has its own exclusive use driveway that does not impact the easement). For the reasons set forth below, it is our professional opinion, the law supports the use of the easement, as depicted in the Site Plan submitted by the Applicant.

The express easement is found in the 1999 Quitclaim Deed, which is attached hereto as Exhibit A. The easement provides as follows:

Grantors hereby expressly reserve to themselves, heirs, successors and assigns an easement for driveway purposes over and across Lot A on the plan above referred to. Said Easement shall be located beginning fifteen (15) feet from the “D.H. Set” between Lot A and Lot B on Summit Road. It shall be approximately thirteen (13) feet in width and shall continue in a circular direction to intersect the southwesterly boundary between Lot “A” and Lot “B” which begins at a point marked “D.H. Set” and extends along said boundary line for a distance of fifteen (15) feet.

“Where the easement arises by grant ... and is not limited in its scope by the terms of the grant, it is available for the reasonable uses to which the dominant estate (12

Summit) may be devoted. A proposed use of a way must be consistent with what the parties reasonably anticipated at the time of the establishment of the way. In making that determination, it is to be assumed that the parties anticipated such uses as might reasonably be required by a normal development of the dominant tenement." *FOD LLC v. White*, 28 LCR 101 (2020). When there is no express limitation, an easement is "available for the reasonable purposes to which the dominant estate may be devoted." *Parsons v. N.Y., N. H. & H. R. Co.*, 216 Mass. 269, 273 (1913). In our opinion, these "reasonable purposes" include the use of a small portion of the easement for the road depicted on the Site Plan.

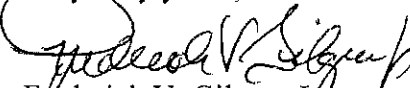
What constitutes "normal development" is "largely a question of fact." *Town of Bedford v. Cerasuolo*, 62 Mass. App. Ct. 73, 84 (2004). Multiple factors are used to consider whether a proposed use is "normal development," including, but not limited to: (a) did the original parties to the easement anticipate further development of that parcel; (b) at the time of its creation, was the easement the parcel's sole means of access; (c) was anyone already using the way described in the easement (and if so, what was the nature and frequency of that use); (d) did the size of the dominant parcel make its later development reasonably foreseeable; (e) at the time of creation of the easement, were the dominant and servient parcels zoned for the later-proposed use; (f) are there any express restrictions on use of the easement; and (g) at the time of creation of the easement, did the dominant parcel have any natural features that would limit its development. *Id.*

A consideration of these and other facts supports the conclusion that the proposed use is "normal development." First, the proposed use contemplates using only a small, limited portion of the easement. See the Site Plan. Second, the location of the proposed road is designed to protect a large existing tree, the significant sunken gardens and other natural features on the benefited parcel. Third, the size of the benefited parcel and the fact that it was zoned for a right of subdivision strongly implies that future development was contemplated by the parties at the time the easement was drafted.

The easement will not be overburdened. The plan calls for limited use of the easement as a means of access. There will not be any parking on the easement and traffic impacts are not relevant to an overburdening analysis because they do not alter the court's determination of what uses of the easement constitute foreseeable normal development. Rather, they are relevant for municipal land-use regulators and traffic authorities. *Stack v. D'Ambrosio*, 26 LCR 391, 396 (2018). Here, however, it does not matter whether they are part of the analysis or not, since traffic and queuing will not materially affect the easement, and the proposed use certainly does not rise to the level of a nuisance. The plan calls for the relatively modest addition of four units that will utilize the easement.

Accordingly, we respectfully opine that the law supports the use of the easement, as depicted in the Site Plan.

Very truly yours,


Frederick V. Gilgun, Jr.

4/11

QUITCLAIM DEED

Loces Lot A, adjacent to 12 Summit Rd., Lexington, MA

We, Raman Handa and Nilma Handa, husband and wife of Lexington, Middlesex County, Massachusetts for consideration paid, and in full consideration of Four Hundred Ten Thousand (\$410,000.00) Dollars grant with *Quitclaim Covenants*

to Jashir S. Gandhi

of 2 Jefferson ^{Ave}, Burlington, MA 01803

The land, together with the buildings thereon, situated in Lexington, Middlesex County, Massachusetts, being shown as Lot A on a plan entitled, "Plan of Land Lexington, Mass. Scale 1" = 20' December 2, 1998 Benchmark Survey 48 Elm Street Stoneham, Mass. 02180 (617) 279-9109," recorded with Middlesex South Registry of Deeds as Plan No. 1402 of 1998. Said Lot A is more particularly bounded and described as follows:

WESTERLY: by Summit Road, according to said plan, One Hundred Twenty-five (125.00) feet;

NORTHERLY: by land now or formerly of Kenneth R. and Rosemary S. Loomis and land of Gerald F. And Jill L. Gasperini, One Hundred Fifty-seven (157.00) feet;

EASTERLY: by Lot B as shown on said plan, One Hundred Two and 51/100 (102.51) feet;

SOUTHERLY: by said Lot B, One Hundred Eighty and 21/100 (180.21) feet.

Said Lot A contains 15,593 square feet, according to said plan.

Grantors hereby expressly reserve to themselves, heirs, successors and assigns an easement for driveway purposes over and across Lot A on the plan above referred to. Said easement shall be located beginning fifteen (15) feet from the "D.H. Set" between Lot A and Lot B on Summit Road. It shall be approximately thirteen (13)

NOT RECORDED AT COUNTY CLERK'S OFFICE

EXHIBIT A

feet in width and shall continue in a circular direction to intersect the southwesterly boundary between Lot "A" and Lot "B" which begins at a point marked "D.H. Set" and extends along said boundary line for a distance of fifteen (15) feet. All costs of construction and maintenance shall be paid by Grantors, their successors and assigns.

This easement shall run with the land and shall be binding on and inure to the benefit of the parties to this Agreement, their respective heirs and assigns.

Being a portion of the premises conveyed to us by deed dated July 3, 1996, recorded with said Deeds in Book 26471, Page 396.

Witness our hands and seals this 1st day of April, 1999.

Raman Handa
Raman Handa

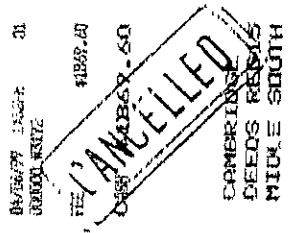
Nilma Handa
Nilma Handa

COMMONWEALTH OF MASSACHUSETTS

County of Middlesex, ss.

April 1, 1999

Then personally appeared the above-named Raman Handa and Nilma Handa and acknowledged the foregoing instrument to be their free act and deed. Before me,



Edwin P. Whittemore
Edwin P. Whittemore, Notary Public
My Commission Expires: September 15, 2000