

LAW OFFICE OF  
**EDMUND C. GRANT**

THE LIBERTIES - SUITE 3

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30 April 2012

Planning Board  
Town of Lexington  
1625 Massachusetts Avenue  
Lexington MA 02420

RE: RANGEWAY EXTENSION

Dear Board Members:

I write in support of the application for approval of a Definitive Subdivision Plan of Jim Raymond (Applicant) that would create the legal frontage for the grandfathered lot at the end of Rangeway, Assessor's Map 87, Parcel 37 (Lot).

PROCEDURAL HISTORY

On June 21, 2002 Applicant and Doris Duff Nominee Trust obtained a Zoning Determination from the Town of Lexington that the Lot was grandfathered(attached). The Lot consists of 20,720 SF on 50 FT of the "paper street" at the end of Rangeway. There is a residential abutter on the same side of Rangeway. On the other side a 50 FT Conservation Easement, granted by Drummer Boy Condominiums to the Town when that property was subdivided for condominium development, extends along the entire Lot line. Directly across Rangeway is Town Conservation land.

In 2003, Applicant, after obtaining a Preliminary Subdivision Plan approval, was denied Definitive Plan approval by a 3-2 vote, which decision Applicant appealed to the Land Court. Applicant and the Town have agreed that Applicant may resubmit to the Board for approval, which Applicant now seeks to end the litigation in the best interest of both the Town and Applicant.

Applicant resubmitted a Definitive Plan on July 27, 2010. The Board held a public hearing on December 15, 2010 that continued to January 26, 2011, and to February 3, at which time it was continued to March 16. Since at that time it appeared that four, and possibly only three, members of the then-current Board could have voted on this matter following the March 7 election for two Planning Board positions, the Applicant withdrew the application in order that hearing and decision could be made by the full, new five-member Board. The Board acknowledged Applicant's withdrawal without prejudice on March 23, 2011.

As Applicant was readying to re-file, the Rockville Extension Definitive Plan came before the Board. Because Applicant's case was closely parallel to Rockville, as it is with the Stedman decision previously approved by the Board, Applicant deemed it prudent to see how Rockville was decided. The Board's unanimous decision of approval in Rockville and flexibility of policy in unique circumstances in both Stedman and Rockville would be equally applicable here.

REGULATORY PROCEDURE FOR A ROAD IMPROVEMENT OF A GRANDFATHERED LOT

On December 28, 1999 Town Counsel issued a comprehensive, nine-page advisory memo (TC Memo, attached) for analyzing the "Subdivision Jurisdiction of the Lexington Planning Board Over Orphan Lots." As in the present case, an orphan lot is not a newly created lot as part of a proposed subdivision of land, but a remaining lot from a prior subdivision. *Per* TC Memo, an orphan lot is a lot that has either insufficient frontage or no frontage on an existing way, as frontage is defined in the Lexington Zoning Bylaw (LZBL). While there "is no current division of land to be regulated," the Board regulates the road improvement/construction of the new way for legally sufficient frontage and access.

The TC Memo, Page 8, noted that the Board's regulatory powers in the case of a grandfathered lot "may be circumscribed somewhat by LeBlanc v. Board of Appeals of Danvers, 32 Mass. App. Ct. 760 (1992)," which held that a grandfathered lot on a paper street could provide the frontage if the owner was willing to construct the street in accordance with Town standards; and that the necessary road improvement is not required at the time the grandfathered lot was created but can occur many years later.

The TC Memo additionally notes that the LeBlanc Court "did recognize the special protections afforded nonconforming, grandfathered lots, and strongly indicated that the buildability of these lots should be preserved." And, "While the developer would still be required to comply with current standards, the denial of subdivision plan approval strictly on technical issues, or the refusal to grant minor waivers, might run afoul of the LeBlanc holding."

The legal principles *per* the analysis of the TC Memo and LeBlanc were confirmed by the Massachusetts Appeals Court case, Berg v Town of Lexington, 68 Mass. App. Ct. 569 (2007). Berg involved Planning Board approval for the new frontage on the paper way of Grandview Avenue for three grandfathered lots on different sides of that paper street. The Appeals Court in Berg established that a lot owner has the right to improve the street if willing to

comply with the standards imposed by Planning Board under local subdivision rules and regulations for such improvement; and further stated:

“to uphold the plan insofar as it regulates the construction and installation of municipal services is not only consistent with Toothaker and LeBlanc but also furthers the purpose of 41§81M, the Town’s interest in proper construction of streets, and the policy, recently strongly reaffirmed in Rourke v. Rothman, 448 Mass. 197, of protecting a once valid lot from being rendered unbuildable. To hold otherwise ‘would needlessly and drastically reduce the value of the defendant’s parcels and their existing right(s) of way,’”

citing LeBlanc at p. 764.

The Lot is on Rangeway A/K/A Rangeway Road, a way laid out on a plan entitled, “Park Heights Lexington, Mass. Plan 2. Owned by W.S. Griswold dated February 19, 1919 by John Dryer, Surveyor, recorded JSRD Plan Book 271, Page 28 (attached to Doris Duff Statement ). The Lot is Lot C on a Plan of Land in Lexington, MA, owned by Anthony Lanelli, Scale 1”=50”, Feb 20, 1958, Joseph W. Moore Reg. Land Surveyor, Bedford, Mass. Approved by the Lexington Planning Board August 4, 1958, recorded MSRD Book 9226, Page 331 (attached to Doris Duff Statement). As in the Berg case involving Grandview Avenue, the Board has the jurisdiction to regulate the road improvement which creates the legally sufficient frontage in order that the Applicant may build a single-family dwelling on the grandfathered lot.

#### LEGAL RIGHT TO MAKE RANGEWAY ROAD IMPROVEMENT

Massachusetts case law clearly establishes Applicant’s legal right to make the proposed road improvement of Rangeway. LeBlanc v. Board of Appeals of Danvers et al, 594 N.E. 2d 906 (Mass. App. Ct. 1992) provides as follows:

“The plaintiff as grantee of a lot bounded by a sufficiently designated proposed way not only has an easement in its entire length, Murphy v. Mart Realty, Inc., 348 Mass. 675, 677-78 205 N.E. 2d 222 (1965), but also the right to make it passable and usable for its entire width, having due regard for the rights and interests of others. The right exists even more clearly where without improvements the way is impassable and useless.” Guillet v. Livernois, 297 Mass. 337, 340 N.E. 2d 921 (1937).

Applicant proposes a road improvement of Rangeway that would connect from the Applicant's Lot to the road improvement for Rangeway approved by the Planning Board in 2004 for the LexHAB property. This portion of Rangeway may be considered presently impassable. Doris Duff, the current Lot owner and whose family has owned for 80 years, stated at a public hearing that in 1985 residents on Rangeway had a one-lane hot top put in because they were continually getting stuck in the mud; and that in 1985 a fire truck was stuck on this part of Rangeway for three days, after which the Town placed giant rocks on her land to prevent future incidents. See Doris Duff Statement filed with application.

In my January 20, 2011 letter to the Board in support of a previous application subsequently withdrawn, there is additional legal authority cited, including statutory State law cases and Lexington Zoning Bylaw reference which are consistent with and support the Board's decisions in Stedman and Rockville, so I need not repeat them here.

#### WAIVERS

Per MGL c. 41-81 R and the Board's *Development Regulations (Regs)* 175-30, the Board may waive strict compliance with specific provisions of the *Regs* where such action is in the public interest and not inconsistent with the intent and purpose of the Subdivision Control Law and *Regs*.

Significant in this regard is that, while Applicant as directed proceeds pursuant to the Subdivision Regulations, the application does not involve a "new" subdivision, but rather, a road improvement for one lot. As set forth above in this letter, and Town Counsel's Memo, cited, the Board's exercise of its jurisdiction likely requires greater flexibility to appropriately balance the owner's right to build with the Town's interest to approve the street construction in the case of a pre-existing, grandfathered lot, as compared to that exercised over a new subdivision of land; and that "technical issues" not related to public safety, for example, should not prevent an owner from constructing frontage for his buildable lot or easement rights to access the public road system.

The number and type of waivers requested here are similar to those requested in Stedman and Rockville. We sought to track the Stedman and Rockville waivers because of the similarities and consistency of application.

Applicant is proposing a substantial road improvement of Rangeway from Applicant's Lot at end of Rangeway to connect to the road improvement approved for the LexHAB property in 2004 at Rangeway and James Street. This

is a significant change from conditions existing at the time of the Board's 2-3 vote in 2002.

Applicant worked diligently to obtain Fire Department approval of the turn-around as per attached Fire Department Memos to Planning Department November 5, 2010 and November 15, 2011; and worked with Town Engineer to address design comments, see Engineer Fred Russell's submittal of supplementary information dated December 1, 2010. The road improvement would make Rangeway safer and more passable for vehicle use, provide access to the manhole for sewage, and enhance convenience to the Conservation land.

The current Rangeway condition is a "*de facto*" waiver of Town Regulations for that part of Rangeway that remains unimproved. The Applicant would improve and complete Rangeway as a street in accordance with the Board's *Regulations* and waivers; as was done with the LexHAB property in 2004, making the road fully passable for access and vehicular travel while enhancing public safety.

Applicant has also worked with the Tree Warden who expressed preference that trees in the street ROW be removed. Applicant has added more trees to the previous plan, as now shown on a separate landscape plan, in efforts to be particularly mindful of screening.

LEGAL SUPPORT FOR APPLICANT GRANTING EASEMENT ON LOT FOR TURNAROUND  
REQUIRED FOR ROAD IMPROVEMENT

The facts and circumstances of this application are quite similar to those of the Board's approval of the Definitive Subdivision Plan for Extension of Stedman Road (Stedman), dated July 21, 2010, and Rockville Avenue Extension dated December 14, 2011.

In Stedman and Rockville, regarding §175-45 E (4) (Turn-around for dead-end street), the Board approved a hammerhead turn-around on the lot, waiving the requirement that the turn-around be included in the street layout.

The Board's decisions in Stedman and Rockville balance the regulatory interest of making a road improvement with the property rights of an owner whose options are limited by the physical circumstances of the right-of-way and abutting land. The physical circumstances of Applicant's Lot and abutting land are even more restrictive than those of Stedman and Rockville. Applicant has no choice but to also request an easement for a turnaround to be located on Applicant's Lot; with the exception of one

residential abutter, the Lot is across from or abuts Conservation Land or a Conservation Easement. When Definitive Subdivision Plans were approved by the Planning Board for Drummer Boy, no provision was made for the future extension or connection to Rangeway.

When Applicant was denied in 2003, that Board expressed reservation that use of a portion of a grandfathered lot for the required turn-around might be viewed as making the lot more non-conforming. With the passage of time the Board has now demonstrated in Stedman and Rockville a flexible regulatory policy, consistent with the TC Memo, LeBlanc and Berg (2007) principles, that road construction may be approved while preserving the right of an owner to build on his or her property.

Applicant has in good faith reached out to neighbors. Dóris Duff has been a good neighbor and her family has paid taxes for the past fifty years. Applicant has spent considerable time and money in this process of approval which now dates back ten years. It is difficult to conceive of who would be harmed by a turn-around on Applicant's Lot at the end of a street facing open land of a condominium complex and abutting Conservation land. Fairness dictates that the same principle used in Stedman and Rockville, where one lacks no alternative but to use a portion of a pre-existing lot for a turn-around.

Based on all the above, Applicant respectfully requests the Definitive Plan be approved. Thank you for your time and consideration.

Very truly yours,



Edmund C. Grant

ECG/lsg  
Enc.



*Town of Lexington*  
Office of Community Development

Steven R. Frederickson, P.E., Director

Tel: (781) 862-0500 Ext. 211  
Fax: (781) 861-2780

**ZONING DETERMINATION**  
**GRANDFATHERED LOT STATUS**

Date: June 21, 2002

Map #: 87

Lot #: 37

Address: Lot C Rangeway Road Lexington

TO: Jim Raymond  
2 Stanford Circle  
Milford, MA. 01757

Doris L. Duff Nominee Trust  
8 Castle Hill Rd.  
Gloucester, MA. 01930

The following determination has been made from information provided. I also will use any other information available to this office that I feel necessary to review. This determination is for Zoning purposes only. This determination does not address any other issues that the Conservation or Planning Board may have.

Any determination may be appealed to the Town of Lexington's Board of Appeals within 30 days from the date of the determination.

Lot "C" was part of original lots 14,15,16 and 24 owned by Anthony Lavelli and shown on a plan of Park Heights dated February 1919. In February 1958 the 4 lots were combined and subdivided into 3 larger lots.

There has been no change in the lots since the change in 1958 has taken place. The lots were legal when created in 1919 and changing the lots in 1958 was allowed under the Zoning By-Law (making lots more conforming was allowed).

The lot in question, Assessors lot #37 of map #87 is a grandfathered lot for zoning purposes only.

Respectfully,

Matthew Hakala  
Zoning Enforcement Officer  
Town of Lexington

**Edmund C. Grant**

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**From:** Jimmy [lexingtonmass@aol.com]  
**Sent:** Friday, November 05, 2010 4:04 PM  
**To:** ed@edgrantlawoffice.com; FGilgun@nsglawyers.com; fred.nsgpc@rcn.com  
**Subject:** Fwd: Rangeway

-----Original Message-----

**From:** Kenneth Tremblay <ktremblay@lexingtonma.gov>  
**To:** lexingtonmass@aol.com  
**Sent:** Fri, Nov 5, 2010 9:52 am  
**Subject:** FW: Rangeway

**Lt. Ken Tremblay**

**Fire Prevention Inspector**

Lexington Fire Department

45 Bedford Street

Lexington, MA 02420

(781) 862-0272 x118

Please note my email address has changed effective October 1, 2010 to <mailto:ktremblay@lexingtonma.gov>

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**From:** William Middlemiss  
**Sent:** Friday, November 05, 2010 9:42 AM  
**To:** Kenneth Tremblay  
**Subject:** FW: Rangeway

William Middlemiss

Chief, Lexington Fire Department

781 862 0272 X 112

*Please note my new email address is [Wmiddlemiss@lexingtonma.gov](mailto:Wmiddlemiss@lexingtonma.gov)*

-----Original Message-----

**From:** William Middlemiss  
**Sent:** Friday, November 05, 2010 9:41 AM  
**To:** Aaron Henry  
**Subject:** Rangeway

Aaron,

I have reviewed the plans for Rangeway and they are acceptable.

Bill

William Middlemiss

Chief, Lexington Fire Department

781 862 0272 X 112

*Please note my new email address is [Wmiddlemiss@lexingtonma.gov](mailto:Wmiddlemiss@lexingtonma.gov)*





MEMORANDUM

Lexington Fire Department

To: Maryann McCall -Taylor, Planning Director

From: William Middlemiss, Fire Chief

Date: February 15, 2011

Re: Rangeway project

In order to eliminate some confusion, I have reviewed the plans for this project and offer the following. The end of the road turn around will be satisfactory provided that it is maintained free from snow and ice.

The width of the street at 18 feet is acceptable under the conditions presented, as an increase of the width would require a reconstruction of more than the portion proposed.