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BY EMAIL ONLY

Ms. Emilie Cademartori  
Lynnfield Director of Planning and Conservation  
55 Summer Street  
Lynnfield, MA 01940

Re: 36 Elmwood Road, Lynnfield

Dear Ms. Cademartori:

You have asked on behalf of the Lynnfield Conservation Commission (the “Commission”) for my opinion concerning the ownership of certain land at the end of Elmwood Road. That road was originally a private way shown on a subdivision plan recorded in 1928 (the “Subdivision Plan”). The way dead-ended at Pillings Pond. Bryan Last is the current owner of two parcels of land abutting Pillings Pond that are immediately adjacent to Elmwood Road, one to the east of the way and the other to the west. In 1958 the Town of Lynnfield (the “Town”) accepted part of Elmwood Road as a public way, but the acceptance stopped short of the end of the road at the water’s edge. As a result, Mr. Last owns all of the privately held land abutting what is left of the portion of Elmwood Road that remains a private way. For reasons that are unclear, today there is land jutting out into Pillings Pond at the end of Elmwood Road that was not shown on the Subdivision Plan. Mr. Last wishes to file a notice of intent with the Commission concerning this land. The Commission wants to know if he has the right to sign such a notice as owner.

I believe that Mr. Last may sign as owner. I agree with his attorneys that one need only demonstrate a “colorable” claim of ownership to meet the applicable standard, and that the Commission should not be put in the position of serving as a mini-Land Court weighing title issues. See Tindley v. DEQE, 10 Mass. App. Ct. 623, 626-627, n. 5 (1980). On the merits of the title question, I advert to the remarkably similar case of Kubic v. Audette, 98 Mass. App. Ct. 289 (2020), which concerned the “question of who owned the formerly submerged land that lies at the end of” a private right of way that extended to a great pond. Id. at 290. The Court noted:

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“As a general rule, a littoral owner is entitled to newly emergent land whether that land emerged as a result of accretion (the gradual buildup of material next to the existing land) or reliction (the gradual receding of the waters), while such an owner loses title to land lost to the water through erosion.”

Id. at 299. The Court observed that this rule applies to ponds as well as other bodies of water, and cautioned that it would not apply where “an owner ... artificially add[ed] to his land and then claim[ed] the benefit of the addition.” Id. Applying this case law, the Court held that “whoever holds title to the ROW [right of way] above the 1948 waterline [i.e., the edge of the pond shown on the plan establishing the right of way] now holds title to the shoreline area below it.” Id. at 301. Provided that the abutting owner had not created the addition himself through filling, it did not matter how the new land came into existence. “Regardless of whether the shoreline area emerged as a result of natural reliction or as a result of the operation of a dam, we conclude that the ROW now extends through the shoreline area to the current waterline.” Id. Applying the derelict fee statute, G.L. c. 183, § 58, the Court held that an abutter to the way whose property was also bounded by the pond held the fee in the way, and all land that had been added to it, to the centerline, subject to any easement rights of others. Id. at 302-303.

I take it from Kubic v. Audette that Mr. Last owns the fee in so much of Elmwood Road as survived the Town’s acceptance of the way, and that the land that has been added over the years at the end of the way is likewise owned by him in fee as part of the private way. Whether other persons whose property abuts the part of Elmwood Road that is now a public way retain any easement rights over the private portion of the way is a question that I have not researched and which the Commission need not reach. As the fee owner in all of the land between the end of the public way acceptance and the new waterline, Mr. Last has a sufficient ownership interest to sign and file a notice of intent with respect to such land.

I hope this letter is helpful and responsive. As ever, feel free to call me any time.

Very truly yours,

  
Thomas A. Mullen