GML GREEN MILES LIPTON, LLP

ATTORNEYS AT LAW

77 PLEASANT STREET
P.O. BOX 210
NORTHAMPTON, MA 01061-0210
PHONE (413) 586-8218
FAX (413) 584-6278
www.greenmiles.com

WESTFIELD OFFICE
48 EAST SILVER STREET, SUITE 5
WESTFIELD, MA 01085
PHONE (413) 642-8367
FAX (413) 579-5357

JOHN J. GREEN, JR.
HARRY L. MILES
ROGER P. LIPTON
JOHN M. MCLAUGHLIN*
MICHAEL PILL
BRAD A. SHIMEL
SUSAN L. MILES
NICOLE S. BERCUME**
LEVI ROMAN
DAVID C. KUZMESKI, OF COUNSEL
RAYMOND W. ZENKERT, JR., OF COUNSEL***
BRIAN L. BLACKBURN (Dec.)

*ALSO ADMITTED IN CONNECTICUT **ALSO ADMITTED IN FLORIDA *** ALSO ADMITTED IN OHIO & MICHIGAN

May 14, 2017 VIA email attachment

To: Swampscott Town Meeting members

Re: Correcting inaccurate assertions denying abutting land owners own railroad right of way.

I am deeply concerned that Swampscott Town Meeting members may be misled by inaccurate statements that omit significant facts and disregard the law. I write the following as co-author since 2005 (with the late Louis Eno and the late William Hovey) of Volumes 28, 28A & 28B, Massachusetts Practice: Real Estate Law with Forms (4th Ed. & Supp. 2016).

(1) Ownership of an abutting railroad right of way is established simply by citing the statute governing linear monuments (Mass. General Laws, Ch. 183, Sec. 58 (G.L. c. 183, § 58)) and the Supreme Judicial Court case applying that statute to railroad rights of way (*Rowley v. Mass. Electric Co.*, 438 Mass. 798 (2003)).

G.L. c. 183, § 58 states abutting owners have legal title to the center line of an abutting linear monument (which here is the railroad right of way). To overcome that statute, an opponent must produce from the abutting landowner's chain of title an "instrument [that] evidences a different intent by an express exception or reservation and not alone by bounding by a side line." In other words, anyone who claims abutting owners do not own the railroad right of way must produce deeds that either expressly reserve ownership of the railroad right of way or convey outright ownership to the railroad.

Any assertion that abutting owners must somehow prove a negative (e.g. that there was no deed to the railroad) ignores the express legislative directive that G.L. c. 183, § 58 applies retroactively. 1990 Mass. Acts., Ch. 378, Sec. 2 states that the law "shall apply to instruments executed on and after said effective date and to instruments executed prior thereto," subject to limited exceptions not applicable here.

(2) It has been more than a hundred years since the Massachusetts court first rejected the notion that payment of taxes means anything with respect to ownership of an abutting linear monument (e.g. a road, watercourse, or in this case a railroad right of way).

In *Lemay v. Furtado,* 182 Mass. 280, 281 (1902), the court awarded title of disputed strip of land to an abutting owner, despite "the cutting of hay on the strip by the plaintiff for two years and her payment of taxes for ten. We see nothing whatever in any of the facts relied on by the plaintiff to take the case out of the general rule." The *Lemay* decision was reaffirmed by *Murphy v. Mart Realty of Brockton, Inc.,* 348 Mass. 675, 680-681 (1965), where the court stated as follows:

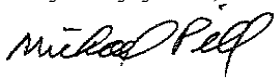
"The plaintiff, who testified that she did not intend of convey a fee to the center of the strip, has continued to pay taxes on the property. But, the subsequent unilateral action of one of the parties in paying taxes should be given little weight in construing the consequences of an earlier bilateral transaction, as was expressly recognized in the *Lemay* case.").

Both the *Lemay* and *Murphy* cases were decided under an old common law rule where intent mattered, which it does not under G.L. c. 183, § 58. In *Tattan v. Kurlan,* 32 Mass. App. Ct. 239, 243-244 (1992), the court explained that

"Section 58's mandate that title in the way is conveyed to the abutting grantee, however, is stricter than the common law rule which it codified and superseded. The statutory presumption is conclusive when the statute applies, unless (for purposes of this case) the 'instrument passing title'" evidences a different intent 'by an express ... reservation.' Other 'attendant' evidence of the parties' intent is no longer probative.")

Please let me know if there are questions or if anything more is needed in this regard.

Very truly yours,



Michael Pill

MP/csh/L1.1100.Swampscott