

CITY OF CAMBRIDGE

CITY HALL, CAMBRIDGE, MASSACHUSETTS 02139

• (617) 498-9020

LAW DEPARTMENT

RUSSELL B. HIGLEY
CITY SOLICITOR

MICHAEL C. COSTELLO
ASSISTANT CITY SOLICITOR

EDWARD A. CUNNINGHAM
SEVERLIN B. SINGLETON
DAVID B. O'CONNOR
BIRGE ALBRIGHT
LEGAL COUNSEL

November 30, 1983

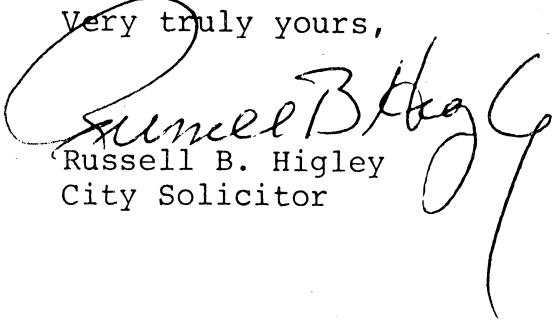
Mr. Robert W. Healy
City Manager
City Hall
Cambridge, MA

Re: Petition of Ruth Hiller for a driveway at the
side of 407 Broadway on Dana Street

Dear Mr. Healy:

Pursuant to the request of Councillors David Sullivan
and Thomas Danehy, I am enclosing a memorandum prepared by
this office on "Whether property owner has a right to a curb
cut."

Very truly yours,


Russell B. Higley
City Solicitor

RBH/jl

Enc.

MEMORANDUM

To: Russell B. Higley
From: Birge Albright

Date: January 11, 1982

Re: Whether property owner has right to curb cut

There is a "common law rule that an abutting owner has a right of access to the highway...." Dwyer v. M.D.C., 269 Mass. 573, 578 (1930). In Anzalone v. M.D.C., 257 Mass. 32, 36 (1926), it was stated:

...Access to a public way is one of the incidents of ownership of land bounding thereon, and this right is appurtenant to the land and exists when the fee of the way is in the municipality as well as when it is in private ownership. Metcalf v. Mayor and City Council of Boston, 158 Mass. 284, 285. Attorney General v. Mayor of Boston, 186 Mass. 209. Home for Aged Women v. Commonwealth, 202 Mass. 422, 429.

See also Betty Corporation v. Commonwealth, 354 Mass. 312 (1968) (loss of access to property is compensable damage) and Wenton v. Commonwealth, 335 Mass. 78, 80 (1956), where it is stated that the power of the D.P.W. under G.L. c. 81, §21 to regulate the digging up or opening of a State highway did not extend to barring entirely the access of an abutting landowner. In Opinion A.G. (10-5-45) 50, 52, it is stated:

It is a settled principle of our law that abutting owners have a right of way for reasonable needs from their lands to the public way adjoining.

In 6 Powell on Real Property, par. 866.2(1), it is stated:

Access in the law of real property is defined as the right vested in the owner of property abutting a roadway to leave and return from his or her own land to the roadway without obstruction. State ex rel. Wilson v. Herman, 103 Ariz. 194, 438 P2d 760 (1968).....

See 10 McQuillin, Municipal Corporations, §30.63 (1981).

However, the property owner's right of access to the street is not absolute, but, rather, is subject to reasonable regulation in the public interest. Thus, in 39A C.J.S., Highways, §141(2)(a) (1976), it is stated:

An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes; and this is a property right which cannot be damaged or taken from him without due compensation, but which may be subject to reasonable regulation and restriction.

In 39 Am. Jur. 2d, Highways, Streets, and Bridges, §181 (1968), the rule is stated as follows:

In the exercise and enjoyment of his easement of access, an abutting owner has a right to construct a driveway or other suitable approach in front of his premises, from his land to the traveled part of the highway, if reasonably necessary and if done in such a way as not to interfere with the rights of the public, subject to such reasonable regulations as the public authority may prescribe. Cities,...may regulate the access of abutters by granting or withholding permission to make curb cuts, construct driveways to the road, and the like, although an abutter may not thereby be deprived of all access without compensation.

I am attaching a copy of S181. See also 10 McQuillin, Municipal Corporations, §30.64 (driveways) (1981); Annotation, "Power to directly regulate or prohibit abutter's access to street or highway," 73 ALR 2d 652 (1960).

public highway system, it does not follow that they have a right of direct ingress and egress to and from a controlled-access highway; the right of access, if it can be determined to be a right under such circumstances, is the right to reasonable, but not unlimited, access to and from the abutting land.²⁰ The courts have held unreasonable those regulations which entirely cut off an abutter's practicable access to the highway system.¹

There is no right of access in the case of a new controlled-access highway established through property where no highway previously existed.²

§ 181. Driveways, curb cuts, etc.

In the exercise and enjoyment of his easement of access, an abutting owner has a right to construct a driveway or other suitable approach in front of his premises, from his land to the traveled part of the highway, if reasonably necessary and if done in such a way as not to interfere with the rights of the public, subject to such reasonable regulations as the public authority may prescribe.³ Cities, towns,⁴ counties, state agencies,⁵ and other bodies having

20. Brock v State Highway Com., supra.

The state owes no duty to send traffic past a landowner's door, and no denial of access occurred merely because abutting owners had some circuitry of travel in reaching a through highway lane via an interchange one-third of a mile from the subject land. State ex rel. State Highway Com. v Mauney, 76 NM 36, 411 P2d 1009.

The erection of a barrier on a road abutting the plaintiff's property, cutting off access to a nearby controlled-access highway, but without interfering with less convenient ingress or egress in another direction, was an exercise of the police power for which no compensation was payable even though the plaintiff's property was left in a cul-de-sac, since the plaintiff had no right to have traffic pass by his property. Snow v North Carolina State Highway Com. 262 NC 169, 136 SE2d 678.

1. § 179, supra.

2. Moore v State Highway Com. 191 Kan 624, 383 P2d 549.

That a property owner having no right of direct access to a highway before its conversion into a freeway abutting upon his property is authorized to pass directly from his property to the freeway during the construction work and before erection of a fence to protect the limited-access nature of the freeway does not create a continued right to access in the absence of circumstances constituting an estoppel. Schneider v State, 38 Cal 2d 439, 241 P2d 1, 43 ALR2d 1068.

3. Brownlow v O'Donoghue, 51 App DC 114, 276 F 636, 22 ALR 939; Howell v Quitman, 169 Ga 74, 149 SE 779; Continental Oil Co. v Twin Falls, 49 Idaho 89, 286 P 353; Goodfellow Tire Co. v Parks & Boulevards, 163 Mich 249, 128 NW 410; Meridian v Peterson, 132 Miss 7, 95 So 625; Griffin v Chillicothe, 311 Mo 648, 279 SW 84, 42 ALR 1273; Shawnee v Robbins Bros. Tire Co. 134 Okla 142, 272 P 457, 66 ALR 1047.

Annotation: 73 ALR2d 661, § 3.

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Highway commissioners may make reasonable regulations for the use of driveway across sidewalks, and their decision in that regard will not be disturbed if it has any reasonable basis in the facts relating to the matter. Brownlow v O'Donoghue, 51 App DC 114, 276 F 636, 22 ALR 939.

The owner of a lot abutting a city street has a right of access to his property from the street, and the city is bound to permit such owner to construct and maintain a driveway from his property to the street under reasonable regulations, where it appears that the construction and maintenance of such driveway will not materially interfere with the full and free use of the street and sidewalk by the public. Norman v Safeway Stores, 193 Okla 534, 145 P2d 765.

4. Miami v Girtman (Fla App) 104 So 2d 62; Howell v Quitman, 169 Ga 74, 149 SE 779; Johnston v Boise City, 87 Idaho 44, 390 P2d 291; Bowling v Somerset (Ky) 333 SW2d 769.

Annotation: 73 ALR2d 664, § 5.

A city's reasons for its refusal to allow a curb cut into a parking lot were legitimate public aims, and where the lot had two other streets giving access, refusal to permit access to the third was reasonable and the resultant depreciation was *damnum absque injuria*. Oregon Invest. Co. v Schunk, 242 Or 63, 408 P2d 89.

The court in Farmers-Kissinger Market House Co. v Reading, 310 Pa 493, 165 A 398, held that an ordinance which the city was authorized by statute to pass, prohibiting the passage of vehicles on private driveways across the sidewalks on a particular street, and an ordinance prohibiting the construction and maintenance of private driveways across the sidewalks on the particular street, did not deprive of property without due process of law in the case of a corporation owning and operating market houses fronting on the particular street, which corporation, under previously

jurisdiction over highways and streets,⁶ may regulate the access of abutters by granting or withholding permission to make curb cuts, construct driveways to the road, and the like, although an abutter may not thereby be deprived of all access without compensation. The courts in cases involving the closing off of driveways, or otherwise shutting off access, have attempted to balance public and private interests, and in some instances, have applied the principle that an abutter may not be deprived of all access without compensation.⁷ Where the abutting property is at the end of a dead-end street, and not on either side of it, the governmental power to cut off access thereto is in some part dependent on whether the particular jurisdiction takes the view that an abutter at the end of a street does or does not have the same right of access as an abutter on the side of a street, the ordinary rule being that the abutter at the end of a street does have a right of reasonable access, and where a governmental agency seeks to shut it off or regulate it, the court must attempt to balance the public and private interests involved.⁸ Particular revocations by

granted permits, had commenced a renovation of its properties and the construction of a driveway from the particular street to a garage in the rear, where it appeared that there was other access to the garage previously in use on another street, and that the street to which access was prohibited was heavily traveled by vehicles and pedestrians.

The right of access of an abutter at a busy downtown intersection is not an absolute one, and where he already has access from one street, the municipality may, in the exercise of its police power, refuse him access from the other street; this includes the power to refuse to a licensed pigeonhole parking garage a permit to cut a driveway across a sidewalk for vehicular traffic when it already has a driveway on another street. *San Antonio v Pigeonhole Parking of Texas, Inc.* 158 Tex 318, 311 SW2d 218, 73 ALR2d 640.

5. *Ft. Dodge, D. M. & S. R. v American Community Stores Corp.* 256 Iowa 1344, 131 NW2d 515; *Alan Constr. Co. v Gerding*, 209 Md 71, 120 A2d 353.

Annotation: 73 ALR2d 670, § 7.

In *State ex rel. State Highway Com. v Hoffmann* (Mo App) 132 SW2d 27, one whose land was being taken for highway purposes was held not entitled to damages for reduction of access, the court stating that the mere fact that the state had provided several entranceways at its own expense did not interfere with the abutting owner's right to provide an entranceway more convenient to him, provided that it did not materially interfere with the public's use of the highway.

6. *Anzalone v Metropolitan Dist. Com.* 257 Mass 32, 153 NE 325, 47 ALR 897.

Annotation: 73 ALR2d 671, § 8.

Public authorities having supervision of a boulevard cannot refuse to grant to an abutting owner access from the roadway to his property to facilitate its use as a gasoline filling station. *Anzalone v Metropolitan Dist. Com.*, supra.

A conventional road may be built with an intent to serve abutting owners, but a freeway is established with the opposite intent, and a resolution of the highway commission creating a freeway gives adequate notice that no new rights of access will arise unless specifically granted. *Schneider v State*, 38 Cal 2d 439, 241 P2d 1, 43 ALR2d 1068.

7. *Chain Locations of America, Inc. v Westchester County*, 20 Misc 2d 411, 190 NYS2d 12.

Annotation: 73 ALR2d 674, § 9.

Elimination of curb cuts affording vehicular access to two separate properties was a reasonable exercise of the police power, and not an improper deprivation of property, where such curb cuts were not used by the occupants, one property had other means of access and the second property's occupant required no driveway, and the curb cuts constituted a burden on the municipality. *Johnston v Boise City*, 87 Idaho 44, 390 P2d 291.

Where the department of highways blocked off one end of an alley, leaving the plaintiff with access to his property by use of the other end of the alley, no damage resulted to the plaintiff, since all means of access were not removed. *Gayton v Department of Highways*, 149 Colo 72, 367 P2d 899.

The right of one maintaining a filling station for automobiles to maintain an entrance across the sidewalk to his property for the use of automobiles is a property right which cannot be destroyed by the public authorities without compensation. *Brownlow v O'Donoghue*, 51 App DC 114, 276 F 636, 22 ALR 939.

8. *Hofstra College v Board of Trustees* (Sup) 145 NYS2d 323, aff'd without op 3 App Div 2d 712, 159 NYS2d 943; *Royal Transit, Inc. v West Milwaukee*, 266 Wis 271, 63 NW2d 62.

Annotation: 73 ALR2d 675, § 10.

In *Good Deal of Ivy Hill, Inc. v Newark*, 32 NJ 263, 160 A2d 630, it was held that a

governmental units of permits for curb cuts or other forms of access have been held beyond the power of the units in question, because of such factors as the applicability of the principle that an abutter may not be deprived of all access, strict construction of statutory authorizations of power, or the apparent unreasonableness of the particular revocation, in the circumstances.⁹

§ 182. Effect of change of grade.

While an abutting owner has a right of access to and from a highway,¹⁰ it is subject to the paramount right of the proper public authorities to change the grade of the highway.¹¹ The fact that the abutting owner owns the fee of the highway and the public has only an easement of passage is of no materiality in this connection.¹² However, a municipality, by exercising its right to establish its grades and to fill in or bridge or otherwise improve a street and right of way so as to raise or lower the surface of such grade, cannot preclude an abutting owner from employing and using such reasonable means or making such reasonable improvements as may be necessary to enable him to go from his property to the street.¹³

§ 183. Curved highways.

An abutting owner's access to a highway which is curved should be between the lines which are extended from the point of intersection of the side lines of the owner's abutting lot with the highway line, along radial lines perpendicular to the tangent of the circle (centerline of the highway) at the point of intersection with such centerline.¹⁴ It is deemed that this method will continue an equal distribution of the right of access between such lines without discrimination between adjoining owners.¹⁵ Any other method might result in some owner's obtaining a right of passage over an unduly large section of the

city was within its governmental authority in erecting a railing at the end of a dead-end street, and in refusing to remove it at the plaintiff's request so that the plaintiff could have additional access to his supermarket.

9. Greeley Sightseeing Co. v Riegelmann, 119 Misc 84, 195 NYS 845; Russell Dairy Stores v Chippewa Falls, 272 Wis 138, 74 NW 2d 759.

Annotation: 73 ALR2d 676, § 11.

However, in *Peck v State (Okla)* 350 P2d 948, it was held that under statute, the highway department was authorized to regulate the construction and maintenance of driveways on the highway right of way, and that the department had the right, if properly exercised, to remove driveways from its right of way.

10. § 178, *supra*.

11. *Sauer v New York*, 180 NY 27, 72 NE 579, *affd* 206 US 536, 51 L. Ed 1176, 27 S Ct 686.

As to the right to compensation in case of a change of a grade interfering with access to abutting property, see 26 Am Jur 2d, EMINENT DOMAIN § 233; 27 Am Jur 2d, EMINENT DOMAIN § 327.

12. *Meloon Bronze Foundry, Inc. v State*, 6 App Div 993, 176 NYS2d 452, on remand 18 Misc 2d 403, 191 NYS2d 3, *mod* on other grounds 10 App Div 2d 905, 200 NYS2d 563.

13. *Sandpoint v Doyle*, 14 Idaho 749, 95 P 945.

A village which has constructed a bridge 450 feet long across a small stream 25 feet wide and the adjacent ravine or depression in the natural surface of the ground, and has built the bridge at a height of 20 feet from the ground at a place where it passes an abutting property owner's lot, is without power and authority unqualifiedly to prohibit the property owner from erecting a platform on his own lot to such a height as to enable him to go from his building to the bridge, and to connect such platform with the bridge by proper and substantial railings, and to exercise in such manner the right of ingress and egress. *Sandpoint v Doyle*, *supra*.

14. *Lindel Realty Co. v Miller*, 2 NJ Super 204, 62 A2d 817, *affd* 4 NJ Super 37, 66 A2d 539.

15. *Lindel Realty Co. v Miller*, *supra*.



CITY OF CAMBRIDGE
OFFICE OF CITY CLERK
INTEROFFICE CORRESPONDENCE
DEC 12 4 42 PM '83
CAMBRIDGE, MASS.

To Joseph Cellucci, Commissioner
Inspectional Services Department
Date December 12, 1983
From Richard Horgan, Zoning Specialist *RH* **Reference**
Subject Councillor Duehay's Request for a Memorandum
on R. Hiller's Driveway Petition (409 Broadway)

In response to your request of December 9, 1983, I forward the following information.

The curb cut petition for 409 (407A) Broadway reviewed by this Department indicated that an 8½' by 18' parking space would be created at the end of a driveway running from Dana Street behind 407A Broadway. The plan submitted indicated an easement for the driveway over the land at the rear of 407A Broadway. The driveway is approximately 60 feet from the intersection of the front and side property lines of 407A Broadway at the corner of Dana Street and Broadway. Therefore, the driveway is in compliance with Section 6.434b of the Zoning Ordinance.

By virtue of Inspectional Services Department records and zoning regulations, 407A Broadway may be occupied legally as a three-family dwelling at maximum. 409 Broadway does not exceed three dwelling units in occupancy. Therefore, the driveway plan presented is in compliance with Section 6.441 of the Zoning Ordinance. For the same reasons, the parking space proposed is in compliance with Section 6.441b of the Zoning Ordinance.

The distance between the rear wall of 409 Broadway and the rear property line for this lot is indicated as 11'3". The 8½' wide parking space proposed is approximately centered in this width. The single window at grade is proposed to be blocked up. The window at the first story is approximately 8 feet above grade.

Section 6.441a of the Zoning Ordinance reads as follows:

"No on-grade open parking space shall be located within ten (10) feet of that portion of a building wall containing windows of habitable or occupiable rooms at basement or first story. However, on-grade open parking spaces serving 1, 2 or 3 family dwellings may be located within five (5) feet of that portion of such building wall."

December 12, 1983

- 2 - 409 Broadway

Given the ambiguous language regarding setbacks for parking spaces for 1, 2 or 3 family dwellings, it would appear that no setback is required for such use. Given the blocking of the basement window and the 8' height to the sill of the first story window at 409 Broadway in the curb cut application, it is my opinion that there is compliance with the spirit of Section 6.441a of the Zoning Ordinance. Seemingly, compliance with the spirit of the law is paramount as the present language of the Ordinance is such as to be contradictory or meaningless.

The Inspectional Services Department has been in contact with residents of 407A Broadway in an attempt to obtain admittance to the basement apartment which apparently is the unit created in violation of the Building Code and Zoning Ordinance.

S-704