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*Please reply to:
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MEMORANDUM

TO: Ralph Stewart and Don Holderman
FROM: Jeffrey W. Stover, Esquire
DATE: September 12, 2016
RE: Unordained streets

You have asked me to provide an opinion regarding the ownership and maintenance responsibilities of property within Bellefonte Borough that is unordained, commonly referred to as “paper streets”. I refer to those streets and alleys that appear on recorded plans of various locations in the Borough of Bellefonte, but that have never been opened or improved. Hence, they appear as streets only on paper, and have never been used as such in actuality. You ask whether the Borough owns those paper streets, and what responsibility does the Borough have regarding their upkeep and maintenance? Where a tree blows down, who is responsible to clean it up? If the tree lands on a neighbor’s structure, what liability does the Borough have?

The issue of unordained streets is covered by the Pennsylvania Borough Code. The Code generally provides that a Borough may lay out or open a street as it appears upon a Borough Plan. Pennsylvania Borough Code, 8Pa. C.S. Section 1721.1(b)(1). The Borough may also lay out or open a street via eminent domain (Id, Section 1721.1(b)(2)), or where the public has acquired rights to the street over its constant use by the public “over a period exceeding 21 years” (Id, Section 1721.1(b)(3)), or where the person owning the land constructs a street to standards and asks the Borough to accept it (Id, Section 1721.1(b)(4)).

A street is deemed to be laid out where it appears on a plan of streets. The mere laying out of a street in such fashion, however, does not create any obligation on the Borough. “The laying out of a street, without opening the street, creates no right to public use of the street and does not constitute the taking or acceptance of a property or obligate the Borough to improve or maintain the street or the property on which the street has been laid out.” Id, Section 1721.2(f). Where a street has been laid out but not opened for a period of 21 years, “the street may not thereafter be opened without the consent of at least 51 percent of the number of owners of the abutting real estate and without the consent of the owners of at least 51% of the property abutting the street, based on a front foot basis.” Id, Section 1724(b).

The foregoing provisions of the Borough Code clearly answer the questions presented. Where an unordained street (a paper street) has never been actually accepted and maintained by the Borough, the Borough has no ownership interest in that street, and no maintenance responsibilities. Furthermore, after the street has been laid out for 21 years (i.e., a map showing the street having been recorded more than 21 years ago), the Borough has no ability to open the street absent the consent of at least 51% of the adjoining property owners. Those owners would need to petition the Borough seeking for the opening of such street. Even then, the Borough would be under no obligation to accept and open the street.

Let me take a moment to further discuss the legal status of such unordained streets. If the Borough does not own the streets, who does? And what rights do members of the public have in such paper streets?

Pennsylvania common law answers those questions. The Borough Code is based upon the common law. The common law hold that where a municipality fails to open a paper street appearing on a recorded plan for a period of 21 years, it has effectively abandoned its rights to the street. Ferko v. Spisak, 373, Pa. Super. 303, 541 A.2d 327 (1988). Common law further holds that where the public's right to the use of the paper street is so extinguished by the failure of the municipality to open it, "the owners of the property abutting the street possess an easement for right-of-way purposes over the entire proposed street. In essence, while the public easement in a street is lost as a result of the passage of time, purely private rights of easement of property owners are not extinguished." Ferko v. Spisak, supra, at A.2d 330. See also Reed v. Reese, 473 Pa. 321, 374 A.2d 665 (1976). The sale of land and conveyance by a deed that makes reference to a plan which includes streets or parks is sufficient to create an enforceable interest or private right of use, that is an easement, in the buyer. Reed v. Reese, supra, at A.2d 669; Justin J. Powell, Inc. v. Wian, 456 Pa. 35, 318 A.2d 346 (1974), (holding that a deed to a lot that calls for a street as a boundary, that street not being opened as a public thoroughfare, conveys to the grantee "an easement by implication of it." Id., @ A.2d 350.

The Pennsylvania common law therefore clearly provides that where a plan of lots and streets is created, and where deeds are subsequently conveyed for such lots wherein the deed references the plan or where the descriptions for the lot call for the street as a boundary, the grantees of such lots obtain not only ownership of the lots, but an easement over the streets shown on that plan of lots. Hence in the case of the paper streets in Bellefonte, while the Borough has no ownership over the streets, and no legal obligation to maintain those streets, persons who have acquired lots shown on the plan, where their deed references the plan, have acquired private easement rights to those streets. Their deed not only conveys to them ownership of the lot, but a legally enforceable right of way over the "streets and parks" shown on that plan. Reed v. Reese, supra, at A.2d 669. Interestingly enough, the Reed v. Reese case involved an unrecorded plan of lots. Even where the plan was not recorded the Court held that the owners of lots had a private easement over such streets and parks.

It is possible that over time the private right of lot owners to use such paper streets may be lost through concepts of abandonment and adverse possession. An easement right can be abandoned where the person possessing that right takes affirmative acts that renders the use of the easement impossible, under circumstances that show an intent to so abandon the easement. See Piper v. Mowris, 466 Pa. 89, 351 A.2d 635 (1976). In other words, a person owning the right to use an alley beside their property may be deemed to have abandoned it where he takes such affirmative acts as

building a wall between his lot and the alley that is inconsistent with his further enjoyment of the alley, provided that those acts are deemed to have shown an intention to give up the right of use.

Similarly, an easement right may be lost through the adverse possession of the easement by a third party. Where a third party possesses the land over which the easement lies and does so in an actual, continuous, exclusive, visible, notorious, distinct and hostile manner for a period of 21 continuous years, that person will have acquired ownership in the land by adverse possession. Recreation land corporation v. Hartzfeld, 947 A.2d 771, 774 (Pa.Super.2008). In the case where somebody does exclusively possess land, keeping those with the legal right to it off of the land through obstructions, signage and other hostile acts, and for a period of 21 continuous years, the right to the easement will be lost.

I would be happy to discuss these concepts with you and Borough Council in more detail as necessary.