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December 1, 2021

Jared Eigerman, Newburyport City Council (Ward 2)  
President  
Chair, Committee on General Government  
Member, Committee on Planning & Development  
Member, Committee on Rules

Re: Status of Coffin Street running South from Jefferson St.

Mr. Council President:

Pursuant to your instructions, I have examined such record title at the Essex, South District, Registry of Deeds as I deemed appropriate, as well as such municipal records previously provided to the Newburyport City Council by Coffin Street abutter, Jane Snow. I have further conducted legal research as I deemed necessary and appropriate to enable me to put the facts in context, apply the law and reach reasoned conclusions. Please note that some of my research is presented without attribution to the original authors. Essentially, this report begins with my conclusion and then explains how that conclusion was reached.

**EXECUTIVE SUMMARY:**

As the below presentation will demonstrate, it is my opinion that Coffin Street, south of Jefferson Street, is a private, partially unconstructed way, to which the fee title and easement use rights have not been abandoned by the abutters.

On several occasions since 1972 the Newburyport City Council has attempted to both initiate and finalize the layout and taking of said street as a public way. However, there is no evidence of compliance with all of the relevant state statutes which are conditions precedent to a legally effective layout and taking. Accordingly, due to such non-compliance, this portion of Coffin Street remains private.

## QUESTIONS ADDRESSED

1. Does the portion of Coffin Street running south from Jefferson Street legally exist as set forth by recorded deed or as shown on a recorded plan?

**ANSWER:** Yes

Common law principles have also created easement rights in so-called "paper streets." One such principle, easement by estoppel, is described as follows: "... when a grantor conveys land bounded on a street or way, he and those claiming under him are estopped to deny the existence of such street or way, and the right thus acquired by the grantee (an easement of way) is not only coextensive with the land conveyed, but embraces the entire length of the way, as it is then laid out or clearly indicated and prescribed." *Casella v. Sneirson*, 325 Mass. 85, 89 (1949). Therefore, in order for the principle of easement by estoppel to apply: (a) a property description must either contain a course bounding on a way or must refer to a plan showing that the property bounds on a way; (b) the way must be laid out or clearly indicated on a plan; (c) the chain of title must derive from the same grantor; and (d) rights in the way must not be reserved by the grantor.

See also, *Patel v. Planning Board of North Andover*, 27 Mass. App. Ct. 477, 481-482, 539 N.E.2d 544, 547 (1989).

2. Can an existing private way, such as the portion of Coffin Street running south from Jefferson Street, be eliminated purely by vehicular non-use by the abutters and those having private rights resulting from their failure to construct and pave the way?

**ANSWER:** No

To determine if an easement has been abandoned, courts evaluate whether there was an intent to abandon that easement, based on the surrounding circumstances and the conduct of the parties. *Carlson v. Fontanella*, 74 Mass. App. Ct. 155, 158 (2009). Mere nonuse or ignorance of an easement are insufficient to demonstrate an intent to abandon; an affirmative act by the dominant estate owner (i.e., the easement holder) evidencing such intent is required. *Id.*; *Dubinsky v. Cama*, 261 Mass. 47, 57 (1927).

When, for example, a dominant estate owner erects a fence that blocks its own access to the easement, courts typically will find this constitutes an affirmative act sufficient to show an intent to abandon the easement. See also, *Lasell College v. Leonard*, 32 Mass. App. Ct. 383 (1992).

3. Was either the fee simple title to the way (or surface passage easement rights to use the way) granted to the municipality (and subsequently accepted) by
  - a. the developer prior to conveying deeds out,
  - or
  - b. all of the abutting owners owning the fee title to that way?

**ANSWER:** No

4. As an alternative to such a grant and its acceptance, did the municipality comply with all statutory requirements prefatory to first
  - a. layout the way in words or on a plan,

and then

b. take that way by eminent domain for use as a public way?

**ANSWER to BOTH:** No

5. Further Facts: Certified copies of municipal records provided to the Newburyport City Counsel by abutter Jane Snow, (attached) disclose:
- i. **Exhibit A:** Resolution passed by the Newburyport City Council August 2, 1972 requesting that the City Solicitor “take such steps and prepare such documents as may be necessary for a confirmatory taking of [Coffin Street running south from Jefferson Street to Merrimac] and the opening thereof as a public way.”
  - ii. **Exhibit B:** Newburyport City Council Order of December 10, 1973 that “the Public Works Department ...proceed to take such steps as are necessary to implement the opening of such street as a public convenience.”
  - iii. **Exhibit C:** Newburyport City Council (unanimous) order of January 29, 1996 “upon the recommendation of the planning and Development Committee, accept the following streets that have not previously been recorded as having been accepted by the City Council.” Coffin Street is one of the sixty (60) streets on List B identified as “not on State Inventory List.” The other nine (9) street are on List A.

These documents are insufficient, by themselves, to comply with the requirements for layout and taking established by Massachusetts G.L. c. 82, §§ 21-24.

### **HISTORIC TITLE BACKGROUND:**

I have conducted a title examination beginning with a series of partial interest deeds from the presumptive heirs of Joseph E. Coffin, recorded April 4, 1873, beginning in Book 877, Pages 228 -231 which deeds vest title in one Philip D. Adams.

Those premises are described as a tract “commencing on Jefferson Street at the corner of a new Street, 2 rods in width laid down by us.” [*The Grantors*]. The remainder of the description indicates that this parcel is the Westerly side of a portion of what is today known as ‘Coffin Street’ leading south from Jefferson St. The grantors of the series of deeds do not retain the fee simple title in the adjacent way. According to then existing common law, the title in and to that section of Coffin St. immediately became vested in the abutters to the midpoint thereof. This common law assumption was subsequently confirmed in 1971 by the so-called “Derelict Fee” statute, G.L.c. 183, §58.

Fifteen months after the April 1873 deeds, another group of deeds from presumptive heirs of said Joseph E. Coffin conveying the easterly side of Coffin St. running south from

Jefferson St. were recorded July 20, 1874, in Book 909, Page 34-37 (Again, the street is also described as being “laid down by us” [*The Grantors*]).

The series of deeds for the almost 150 years to date is consistent with recognition of Coffin Street as a boundary, fee simple title to the midpoint and the creation of private way easement rights, by estoppel.

### LEGAL BACKGROUND:

As the Council President and I briefly discussed by email and telephone, this private way, originally created in 1873 cannot have been made public by resort to the “dedication to public use” statute, because that statute was eliminated in 1846. Further, the lack of construction of a usable roadway and allegations of inconsistent pedestrian use, primarily by minors, suggests that presentation of evidence sufficient for a court to adjudicate a ‘prescriptive’ public easement would be difficult.

Unless the City of Newburyport, complying with relevant statutes, properly took Coffin St. as a public way subsequent to the initial deeds referencing Coffin Street south of Jefferson St. in 1873, it remains a private way. Such private way, benefits the abutters and their invitees, only, and the fee simple title in and to the street (to the midpoint thereof) inures to those abutters by virtue of the so-called, “Derelict Fee Statute,” G.L. Ch. 183, § 58. As those abutters, each and together, own the fee title in the roadway, they have the right to control its use by non-abutter, non-invitees.

My opinion is based upon the following from the United States First Circuit Court of Appeals, (coincidentally, before a panel of judges led by Chief Judge Coffin) in United States v. 125.07 Acres of Land, More or Less, Situate in the Town of Truro, 667 F.2d 243 (1981), which states:

*Fenn v. Town of Middleborough*, 7 Mass.App. 80, 386 N.E.2d 740 (1979), appears to state the rule clearly:

“In general, it may be said that an existing way in a city or town in this Commonwealth is not a ‘public’ way— that is, one which a city, or town has a duty to maintain free from defects (see G.L. c. 84, §§ 1, 15, 22; *First National Bank of Woburn v. Woburn*, 192 Mass. 220, 222-223, 78 N.E. 307 [1906]) — unless it has become public in character in one of three ways: (1) a laying out by public authority in the manner prescribed by statute (see G.L. c. 82 §§ 1-32); (2) prescription; and (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal (see *Longley v. Worcester*, 304 Mass. [580] at 587-589, 24 N.E.2d 533; *Uliasz v. Gillette*, 357 Mass. at 104, 256 N.E.2d 290), coupled with an express or implied acceptance by the public. Because the 1846 statute put an end to the creation thereafter of public ways by dedication and acceptance (*Loriol v. Keene*, 343 Mass. 358, 361, 179 N.E.2d 223 [1961]), it has

only been possible since that time to create a public way by a laying out in the statutory manner or by prescription.”

Regarding our prior email correspondence concerning adjudication of a public easement by prescription I presented the following:

It is possible that proof of pedestrian use of the private way section of Coffin Street by the public for 150 years could be adjudicated as a prescriptive easement for the benefit of the public. See, Ward P. Graham, Esq., section on Private Easements from, Easements, Rights of Way and Access to Property MCLE, 2007.

Case law has established the other elements of prescriptive easements. See, Tucker v. Poch, 321 Mass. 321, 73 N.E.2d 595 (1947); Stagman v. Kyhos, 19 Mass. App. Ct. 590, 591, 476 N.E.2d 257 (1985) (essential prerequisites to a prescriptive easement -- open, uninterrupted, and adverse use for a period of not less than twenty years). While the burden of proof is on the party asserting the prescriptive easement, “[t]he rule in Massachusetts is that wherever there has been the use of an easement for twenty years unexplained, it will be presumed to be under claim of right and adverse, and will be sufficient to establish title by prescription and to authorize the presumption of a grant unless controlled or explained.” Tucker v. Poch, *supra*, at 324. This presumption is, of course, a rebuttable one. Mastandrea v. Baressi, 2 Mass. App. Ct. 54, 56-57 (1974) (“there is a rebuttable presumption that an unexplained use for twenty years which is open and uninterrupted is to be taken as adverse to the owner”).

See also, Houghton v Johnson, 71 Mass.App.Ct. 825, 887 N.E.2d 1073, (2008), speaking to non-permissive use interpreted as “Implied Acquiescence”.

**\*\*1082** “Implied acquiescence is not necessarily the same as permission. In re Rawlins Merc. Co., 251 Fed. 164, 166, 169 (S.D.Ga.). See Robert v. Perron, 269 Mass. 537, 541 [169 N.E. 489]. On the contrary, adverse possession may exist where there is possession with the forbearance of the owner who knew of such possession and did not prohibit it but tacitly agreed thereto. Sargent v. Ballard, [26 Mass. 251] 9 Pick. 251, 254. Myron [Myran] v. Smith, 117 Cal.App. 355, 362 [4 P.2d 219].... “[W]herever there has been the use of an easement for twenty years unexplained, it will be presumed to be under claim of right and adverse, and will be sufficient to establish title by prescription ... unless controlled or explained.” Flynn v. Korsack, 343 Mass. 15, 18 [175 N.E.2d 397], and cases cited therein.”

Thus, if the Newburyport City Council chooses to formally take this section of Coffin St. as a public way, based on the facts and caselaw, there should be no damages, since there is likely implied acquiescence. I understand that the “greening” of the short section of the street near the portion where Coffin St. turns and runs easterly to Merrimac St., is a relatively new development of less than the 20 year prescriptive period.



**LEGAL BACKGROUND CONCERNING  
WHAT CONSTITUTES A PUBLIC WAY:**

It would be imprudent for me to attempt to restate what has been said so very well by my colleague, Robert S. Mangiaratti, Esq. The following, other than my comments, is quoted directly from the Massachusetts Continuing Legal Education Inc. program, entitled "Easements, Rights of Way and Access to Property," dated 2008 of which I was a faculty member.

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**PUBLIC WAYS IN MASSACHUSETTS MUNICIPALITIES**

Robert S. Mangiaratti, Esq.  
*Murphy, Hesse, Toomey & Lehane LLP, Quincy*

**I. INTRODUCTION**

Public and private roadways have existed in the Commonwealth of Massachusetts since early colonial times. See *U.S. v. 102.07Acres of Land, More or Less*, 707 F. 2d. 11, (1983). Today, knowing whether any particular roadway is a public way is important for determining a wide range of rights and responsibilities. Governmental entities are responsible for maintaining public ways and are liable, subject to specific limitations, for damages caused by defects in a public way. See M.G.L. 84, §§ 1 and 15. Owners of land abutting public ways enjoy enhanced development rights; See M.G.L. c. 41, § 81P; but cannot exclude the public from using the way. *Opinion of the Justices*, 208 Mass. 603, 605 (1911).

Massachusetts Courts have consistently held that a roadway may become a public way in only one of three ways:

1. A layout by a public authority in a manner prescribed by statute;
2. By prescription;
3. By permanent and unequivocal dedication by the owner to public use prior to 1846, coupled with an express or implied acceptance by the public.

*McLaughlin v. Town of Marblehead*, 68 Mass. App. Ct. 490, 495 (2007), *Fenn v. Middleborough*, 7 Mass. App. Ct. 876, 877 (1981).

## II. LAYOUT BY PUBLIC AUTHORITY

Cities and towns are authorized under M.G.L. c. 82, §§ 21-24 to layout public ways.<sup>1</sup> In towns, Selectmen are required to give formal notice to owners of land that will be affected by the layout, and town meeting must vote to accept the way. A layout plan with boundaries and measurements must be filed with the town clerk. M.G.L. c. 82, § 23. Furthermore, the statutes contemplate that the municipality will acquire a real estate interest in the way for the benefit of the public, which is typically an easement of way rather than fee simple. See *City of Boston v. Richardson*, 95 Mass. 146 (1866). M.G.L. c. 82, § 24 authorizes a municipality to adopt an order of taking for a roadway that it has laid out. The acquisition of an easement of way by eminent domain requires a two-thirds vote of a Town meeting or city council. M.G.L. c. 40, § 14.

In cases where litigants have tried to establish the existence of a public way by a layout, Courts have insisted on strict observance of the applicable statutory requirements. In *Loriol v. Keene*, 343 Mass. 358 (1961), a landowner tried to establish that a certain way leading to her property was a public way. She pointed to Town meeting vote in 1951, which purported to accept the way. But the vote did not specify the location of the way, and no plan had been filed with the Town clerk in accordance with M.G.L. c. 81, § 23. Furthermore, no interest in real estate had been conveyed to the Town by deed or taking pursuant to M.G.L. c. 82, § 24; and the selectmen had not notified affected landowners in accordance with M.G.L. c. 82, § 22. In such circumstances, the Court refused to recognize the roadway as a public way by layout.

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Attorney Mangiaratti also provided a checklist identifying the statutorily mandated steps which must be followed by a city to achieve a public way. (Forms cited below have been omitted.) Ordinances refer to City of Attleboro ordinances. Presumptively, the City of Newburyport has similar ordinances.

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### CITY OF ATTLEBORO

Checklist Laying out Subdivision Streets as Public Ways  
Robert S. Mangiaratti, City Solicitor  
August 10, 2006

1. M.G.L. c. 82, § 21 authorizes a city council to lay out public ways for the use of the city. Ordinance 16-2.1 states that the Municipal Council may lay out streets or ways upon receipt of an application accompanied by a plan and profile satisfactory to the Superintendent of Public Works.
2. Ordinance 16-2.2 provides that the Municipal Council shall cause written notice of the proposed laying out to the owners of all land which would be taken for such purposes. Such owners are the abutters of the street to be laid out. Such notice shall be given at least seven (7)

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<sup>1</sup> State highways under M.G.L. 81 and county ways under M.G.L. c 82, s. 1-7 are not discussed in this article.

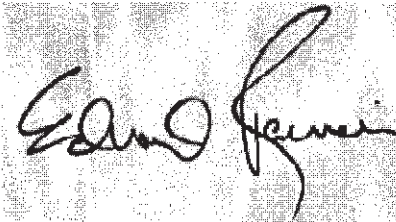
days in advance of a public hearing by mailing to the last known address of each person to be notified. **See FORM 1 Notice of Hearing.**

3. Ordinance 16-2.3 states that after such hearing, the Municipal Council may vote to layout the way if it adjudges that public necessity and convenience would be served. **See FORM 2 Vote to Layout.** A description of every layout together with a plan and profile thereof, shall be recorded with the Department of Public Works and with the office of the City Clerk. The plan and profile should also be recorded with the Registry of Deeds together with the Order of Taking described below.
4. M.G.L. c. 82, § 24 and Ordinance § 16-2.2 contemplate the acquisition of an interest in land for a public way through an Order of Taking. M.G.L. c. 79. An Order of Taking requires a two thirds vote of the Municipal Council. M.G.L. c. 40, § 14. The Order of Taking must include a description of the land taken, the interest taken, the purpose of the taking, whether betterments will be assessed and whether trees or structures are included in the taking. **See FORM 3 Order of Taking.** An Order of Taking must be recorded with the Bristol County Northern District Registry of Deeds within thirty days after the vote adopting the Order, M.G.L. c. 79, § 3.
5. After the instrument of taking has been recorded, the City should give notice to every person, including mortgagees of record, whose property has been taken or is otherwise entitled to damages. M.G.L. c. 79, § 7C. **See FORM 4 Notice After Taking.**

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If I may be of further assistance, please do not hesitate to contact me.

Very truly yours,

Rainen Law Office, P.C.

A handwritten signature in cursive script, appearing to read "Edna Rainen", is written over a rectangular area with a halftone dot pattern background.

By: \_\_\_\_\_  
ER/bk-m



EX "A" 7



CITY OF NEWBURYPORT.

IN CITY COUNCIL

~~SECRET~~

~~XXIX~~ AUG. 7, 19 72

RESOLUTION.

WHEREAS, in the latter part of the nineteenth century an owner of property on Jefferson Street in Newburyport purported to create a street to run between Merrimac Street and Jefferson Street, describing the same in deeds to various persons; and

WHEREAS, although a portion of said street was effectively accepted and is in use as a public street, the public nature of a portion thereof is in doubt; and

WHEREAS, it appears that the public convenience and necessity require that said street be opened to permit public travel thereon, between Jefferson Street and Merrimac Street; now therefore

BE IT RESOLVED, that the City Solicitor is requested to take such steps and prepare such documents as may be necessary for a confirmatory taking of said street and the opening thereof as a public way, as soon as the same may be conveniently accomplished.

A TRUE COPY ATTEST

*John F. Monk*  
John F. Monk, City Clerk  
Newburyport, Massachusetts

*Albert D. MacBurne*

In City Council, August 7, 1972:  
Councillor MacBurne moved, seconded by Councillor Hawkes that the city solicitor be instructed to prepare documents and proceed to implement this resolution as soon as possible. On roll call, 10 yes, 1 absent. Resolution adopted.

Attest:



EX "B" 1



# CITY OF NEWBURYPORT

IN CITY COUNCIL

ORDERED

December 10 19 73

## RESOLUTION

WHEREAS, in the latter part of the nineteenth century an owner of property on Jefferson Street in Newburyport purported to create a street to run between Merrimac Street and Jefferson Street describing the same in deeds to various persons; and

WHEREAS, although a portion of said street was effectively accepted and is in use as a public street, the public nature of a portion thereof is in doubt; and

WHEREAS, it appears that the public convenience and necessity require that said street be opened to permit public travel thereon, between Jefferson Street and Merrimac Street; and

WHEREAS, this Council resolves that an opening of said street is necessary for said public convenience and necessity; now therefore:

LET IT BE ORDERED that the Public Works Department of the City of Newburyport hereby proceed to take such steps as are necessary to implement the opening of such street as a public convenience.

**A TRUE COPY ATTEST**  
*[Signature]*  
John F. Monk, City Clerk  
Newburyport, Massachusetts

Councillor

*[Signature: Albert D. MacBurnie]*  
Albert D. MacBurnie, Ward VI

In City Council, December 10, 1973:

Councillor MacBurnie moved, seconded by Councillor Hawkes for adoption. On roll call, 6 y 5 no (Ghesmore, Melanson, Nolan, Wile, Brown). Order approved.

Attest:

George H. Lawler, Jr., City Clerk





# CITY OF NEWBURYPORT

IN CITY COUNCIL

ORDERED

January 29,

19 96

THAT the City Council of the City of Newburyport, upon the recommendation of the Planning and Development Committee, accept the following streets that have not previously been recorded as having been accepted by the City Council.

Road Inventory:

**List A. Roads on State inventory Not Yet Accepted by City Council:**

- |                   |                 |
|-------------------|-----------------|
| Cashman Park Road | Mulliken Way    |
| Graf Road         | Railroad Street |
| Grocalaf Street   | Shore Drive     |
| K Street          | Somerby Court   |
| Martha Street     |                 |

**List B. Roads Not on State Inventory List, to be accepted by City Council:**

- |                  |                           |
|------------------|---------------------------|
| Atkinson Street  | Helena Street             |
| Barker Street    | Lancaster Road            |
| Basin Street     | Lt. Leary Drive           |
| Bayberry Road    | Longfellow Drive          |
| Bourbean Terrace | Lorum Street              |
| Brown Square     | M Street                  |
| Chamanski Drive  | Marsh Street              |
| Christie Drive   | Nancy Street              |
| Circle Road      | North Reservation Terrace |
| Coffin's Court   | O Street                  |
| Corn Street      | P Street                  |
| Cross Road       | Pheasant Run Drive        |
| Cross Street     | Plum Island Turnpike      |
| Coombs Circle    | Point Road                |
| Curzondale Court | Pop Crowley Way           |
| Doc Run Drive    | Quail Run                 |
| 80th Street      | Reservation Terrace       |
| 82nd Street      | Riverview Drive           |
| F Street         | 74th Street               |
| Ferry Wharf      | Shandel Drive             |
| 54th Street      | Squires Glen              |

(Continued)

A TRUE COPY ATTEST

*John F. Moak*  
John F. Moak, City Clerk  
Newburyport, Massachusetts



Finnegan Way  
Fox Run Drive  
G Street  
Gloria Street  
Grant Street  
Hallisey Drive  
Harbor Street  
Hatch's Way  
Hale Court

Stanley Tucker Drive  
Storey Park  
Taylor Street  
Virginia Lane  
Whitcomb Lane  
Wildwood Drive  
Wilkinson Drive  
Wilson Way  
Windward Drive

  
Councillor, Kevin L. Finnegan

In City Council, January 29, 1996:

Councillor Finnegan moved, seconded by Councillor Welch to approve. On roll call 11 yes. Order approved.

Attest: \_\_\_\_\_  
John F. Moak, City Clerk

Approved

  
Lisa L. Mead, Mayor

A TRUE COPY ATTEST

  
John F. Moak, City Clerk  
Newburyport, Massachusetts



A TRUE COPY ATTEST  
*John F. Monk*  
 John F. Monk, City Clerk  
 Newburyport, Massachusetts

P. Roads NOT on State Inventory List, to be accepted by City and sent to State ASAP

Address	Year	Area	Condition	Notes	Adjacent
Albion Court	39.30	15	none		Beaumont St
Barber Street			poor		76th Street
Basin Street			poor		76th Street
Bayberry Road	1990	31.50	poor		Turkey Hill Rd
Fourteen Terrace	1990	31.50	poor		Turkey Hill Rd
Brown Square			poor		Green Street
Bayport's Way	394	31	poor		10th Street
Charmaine Drive			poor		Daisy Street
Christie Drive	31		poor		Wildwood Drive
Circle Road			poor		Merrimack Street
Coffee Court			poor		Lavalley Road
Columbian			poor		Hugh Street
Cross Road			poor		10th Street
Cross Street			poor		Lavalley Road
Coombs Circle			poor		2nd Street
Corzadain Court	485	26.5	poor		Noble Street
Dee Run Drive	831	26.5	poor		Hallway Dr.
30th Street			poor		Hals Street
Edad Street			poor		Northern Blvd.
F Street			poor		Northern Blvd.
Ferry Wharf			poor		Old Point Road
54th Street			poor		Northern Blvd.
Finnsagan Way			poor		Dennet Drive
For Run Drive	1919	39	poor		Carroll Ann Hollow
G Street			poor		Old Point Road
Gloria Street			poor		Old Point Road
Grant Street			poor		Pennington Terrace
Hallway Drive	1459	27.50	poor		Elba Hill Road
Harbor Street			poor		7th Street
Harnes's Way			poor		For Run
Hals Court			poor		Finnsagan Street
Isleam Street			poor		Old Point Road
Lansdown Road	253	26	poor		Shenell Drive
Lt. Levy Drive			poor		Stony Avenue

not to P  
 not to C