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August 25, 2023

Via US Mail and Email

Philip Auger, Chair, Strafford Planning Board
Town of Strafford
12 Mountain View Drive
PO Box 23
Center Strafford, NH 03823

Re: 681 First Crown Point Road (Tax Map 19, Lot 72)
Use of Shared Driveway

Dear Chairman Auger:

Please accept this letter, on behalf of my clients, Dawn and Michael Thivierge with respect to their pending subdivision application for the above-reference property (the "Property"). My clients have asked me to respond to the letter submitted by Kim and Todd Scruton with respect to the shared driveway easement between proposed Lot 72-2 and the Scruton's Lot 72-1 (the "Driveway Easement"). For the seasons set forth below, the Scruton's claims are not supported by the record or New Hampshire easement law and do not limit the Thivierge's ability to subdivide the Property.

1. The creation of proposed Lot 72-2 will not overburden the Driveway Easement.

In New Hampshire, easements are subject to the "Rule of Reason", meaning that the benefited landowner is to be provided reasonable use of the easement in light of the intent of the parties at the time of its granting. *Sakansky v. Wein*, 86 NH 337, 339 (1933). With respect to claims of overburdening, the test is whether the benefited or dominant owner materially increases the burden of the easement on the underlying landowner. *Ettinger v. Pomeroy*, 166 N.H. 447, 451 (2014). "[T]he mere addition of other land to the dominant estate does not necessarily constitute an overburden or misuse of [an] easement." Id. at 452 (*citing Heartz v. City of Concord*, 148 N.H. 325 (2002) and *Soukup v. Brooks*, 159 N.H. 9 (2009), in each of which the NH Supreme Court found the addition of an additional lot did not overburden the easement).

Based on the above-referenced court cases, it is, at best, arguable that the addition of a single residential lot constitutes unreasonable use of the Driveway Easement. However, the Thivierge's are not proposing to add to the use of the easement. The Driveway Easement will be fully within the newly created lot and will provide access for only that lot. Accordingly, there will be no change to the number of lots utilizing the easement. It is and will remain available for use by only two lots.

2. The Driveway Easement is not an implied easement and cannot be extinguished by lack of necessity.

Contrary to the Scruton's claim, the Driveway Easement is not a easement by necessity. An easement by necessity applies where the existence of an easement may be *implied* by the by the actions of the parties. *Bradley v. Patterson*, 121 NH 802, 803 (1981). A common example is the creation of a back lot without road access, e.g. a "landlocked" parcel. The Driveway Easement was not implied, rather, it was *expressly* granted in the deed to Alicia Scruton, previously provided to this Board.[1] Accordingly, the easement cannot be extinguished by lack of necessity

3. The Driveway Easement has not been abandoned.

"Abandonment of an easement must involve 'clear, unequivocable and decisive acts' by the owner of the dominant estate". *Titcomb v. Anthony*, 126 NH 434, 437 (1985). Mere lack of use is not sufficient. *Id.* Failure to contribute to the maintenance is likewise insufficient. The Thivierge's do not dispute the requirement to share the cost of maintenance of the Driveway Easement area. The Thivierge's predecessor in title, Alicia Scruton, paid $15,000 towards the construction of the driveway. Since the Thivierge's purchase from her, the Scrutons have never identified the need for repairs or requested contributions towards maintenance. The bar to show abandonment of an easement, and termination of the property rights granted to the Thivierges by deed, is appropriately high. The facts alleged by the Scrutons do not come close to meeting that high standard.

Moreover, regardless of the status of the Driveway Easement, its validity is not a factor for this Board to consider in reviewing the Application. As noted by Peter Loughlin in his treatise on Land Use Planning and Zoning:

> The existence of private restrictions or minor boundary disputes or other disputes between landowners are frequently raised as objections to the granting of [planning board] approval. Planning boards need to be mindful of the fact that as a general rule, these private disputes should not enter into the local review process....While private restrictions and other disputes are frequently raised as objections by abutters, they should not enter into the local review process. Frequently, alleged problems with private restrictions of boundary disputes, real or imagined, are raised simply to deny an applicant his right to develop his land. If the landowner meets all of the board's requirements, approval should be granted...If an abutter has legitimate rights under a private restriction, it is up to that abutter to enforce those rights by private action.
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> 15 Loughlin, *New Hampshire Practice Land Use Planning and Zoning*, at §37.09

[1] We have not reviewed title to determine if the Driveway Easement was originally granted as part of the deed to Alicia Scruton recorded in the Strafford County Registry of Deeds at Book 3247, Page 576 or in a prior deed or deeds; however, there is no question that the easement was created by express grant via deed(s) and not by implication.

4. The Planning Board may approve a new lot using a shared driveway.

There is no requirement under the building code or subdivision regulations requiring that each lot utilize a separate driveway. In fact, the definition of "Driveway" within the Town's subdivision regulations specifically refers to shared driveways for up to three lots. *See* Section 2.3.11. With respect to building code requirements, it is irrelevant to the pending Application, which only addresses subdivision of the lot. A building permit will be submitted prior to the construction of any future residence on proposed Lot 72-2, which will be reviewed by the Town building inspector for compliance with applicable building code requirements. Additionally, the proposed new driveway will have shared driveway specifications under the Subdivision and driveway regulations, as shown on the revised plans submitted by Berry Surveying & Engineering.

5. Proposed Lot 72-2 is not a "back lot" and is not prohibited.

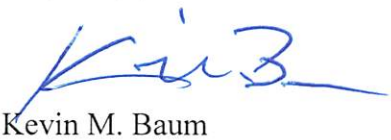
Back lot is not defined in the Town Ordinances and Regulations. However, it appears to refer to the creation of new lots to the rear of an existing parcel having only 50 feet of road frontage. Proposed Lot 72-2 meets the 200 foot frontage requirement and therefore is not a back lot nor subject to the restrictions of Section 1.4.1 of the Zoning Ordinance.

6. There is no Undue Hardship to Lot 72-1

As noted above in Section 3, the Thivierge's do not dispute the objection for both lot owners to share driveway maintenance costs. They have not previously been notified of any needed repairs nor asked to contribute towards maintenance. Any dispute related to ongoing maintenance is a matter to be addressed between the parties and outside of the Planning Board's proceedings.

For the reasons set forth above, the claims raised in the Scruton's letter are not supported by the record before this Board or New Hampshire law and should not delay or restrict review of the pending subdivision application.

Very truly yours,



Kevin M. Baum

KMB:slb

cc: Dawn and Michael Thivierge
Berry Surveying & Engineering