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Please Respond to the Exeter Office

March 18, 2021

VIA ELECTRONIC MAIL (sneedelltc@gmail.com)

Sally Needell, Chair
Durham Conservation Commission
8 Newmarket Road
Durham, NH 03824

Re: Michael and Martha Mulhern
91 Bagdad Road, Durham, New Hampshire
Subdivision Application / Conditional Use Application

Dear Chair Needell and Members of the Commission:

This letter is provided following your meeting of February 22, 2021 and in anticipation of your meeting of March 22, 2021 at which time you will review a draft report to go to the Planning Board.

During the meeting on February 22, 2021, the Chair referenced various complexities associated with the project and the Commission then analyzed the four impacted areas against the four criteria on which the Commission is required to make recommendations.

The Commission was unable to reach consensus regarding whether there was an alternative location for the proposed road crossing. While several references were made by Commission members and abutters regarding the conflicting views of myself and the town attorney, the fact is that the Commission is required to examine the concept of "alternative location" through the lens of what is reasonably practical. Here, my understanding is that town counsel agrees with the fact that the Mulherns cannot unilaterally decide to use Bagdad Road and, that the permission of two other interested parties, namely the Imbries and the Nieves, is required before Bagdad Road can be used for the development project. Both of these parties are on record to indicate that they will not grant consent to allow the Mulhern easement to be used to allow access for anything other than the Mulhern house lot. My understanding is that the town attorney believes that it is unclear whether a court would force the interested parties to allow

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Bagdad Road to be used. By contrast, I do not believe that there is any question that the Court would rule against any request to force the interested parties to allow Bagdad Road to be used for access to the proposed development.

Under New Hampshire law, key concepts in determining the rights of easement holders are:

1. The language of the easement;
2. The “reasonableness” of the request to change the original easement; and
3. The burden to be placed on the other interested parties.

Here, an easement was granted to the Mulherns by Michael D. Allen in 2013 to use Bagdad Road for ingress and egress to “said premises”. In other words, it was not an easement with broad language such as “for all purposes” or pertaining to land other than the Allen parcel. The easement area is a fairly narrow roadway serving only three properties, and I do not believe a court would find that it is “reasonable” to allow the easement to be burdened with traffic associated with fifteen homes. Finally, I believe a court would find that such an expansion of easement rights would be burdensome to the Imbries and the Nieves because the level of activity would be expanded by over four times the current level of activity.

In short, it is not “reasonably practical” to expect the Mulherns to initiate litigation against their neighbors in what I believe to be a fruitless venture, all at considerable cost in legal fees to themselves and their neighbors. With this conclusion in mind, the Conservation Commission and Planning Board should follow the earlier recommendation of the town attorney and simply review the road proposal as presented on its merits.

As well, although the Conservation Commission minutes demonstrate that the Commission appears to understand the scope of their assignment, it bears repeating that, contrary to comments from the abutters, the Commission is charged solely with rendering advice to the Planning Board on the four criteria set forth in Section 175-61 (B). The decision to require various studies rests with the Planning Board, and the examination of the criteria in 175-C 1-8 resides solely with the Planning Board and even then, only as the criteria pertains to wetland impacts.

By statute, the Planning Board is only given a certain amount of time in which to make decisions on site plans and subdivisions, and generally obtains permission from the applicant to exceed that timeline. We have granted such permission but at the same time also want the town review to be completed as swiftly as possible. The Conservation Commission’s advice is an important component of this process, but it is important that your work be brought to a conclusion. It would certainly be possible for you to complete your report, take a vote and then present same at the next Planning Board meeting, together with whatever supplemental explanations you feel would assist the Board.

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We strongly encourage you to complete your review on March 22 and provide the results to the Planning Board for their review on March 24, 2021.

Please feel free to contact me with any questions.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC



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SCS/jh

cc: Michael Mulhern and Martha Mulhern
MJS Engineering, P.C.
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Durham Planning Board

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