101 DURHAM POINT ROAD DRIVEWAY EXTENSION

Michael,

Thank you for forwarding this to the members of the Planning Board and the Conservation Commission.

I know that people are planning to ride-pool to the site visit because of parking constraints, but I want to invite and welcome members of the Planning Board and the Conservation Commission to park on the asphalt just past the end of the driveway between our house and barn. If the asphalt can't accommodate enough vehicles, the grass between the asphalt and the barn is available and should suffice.

I find the "subject property" (Lot#2) attractive to an extreme and I think you and the various members will enjoy exploring it. I will tease everyone with the bald eagles' nest, which is not far from the barn. Further in, there are numerous stone foundations and other remnants from structures dating back to the brick factory of Durham's colonial history. The natural beauty of the ravine and the shoreline are truly remarkable. After briefly describing the ravine to Michael, he said "Fallingwater" to which I responded, "If Frank [Lloyd Wright, whose design I thought Michael was referring to] were alive, that would be just the ticket." I am sure architect Michael Graf, who has been engaged by Karon Walker, will relish the challenge and opportunity presented by this property. I hope he is joining the site walk as well.

Thank you again for suggesting that I send you this email. In it I attempt to present or clarify most of the issues which I see as material and relevant to the tasks either before the Planning Board or the Conservation Commission. Not all of it will be apply to both groups, but I hope all of it is interesting enough to justify your attention and efforts.

COMPASSION FOR THE APPLICANT BECAUSE THEY SPENT SO MUCH MONEY

During the Conservation Commission hearing Monday evening (March 28, 2022), Peter, Karon Walker's husband, present on behalf of the Karon Walker Trust, the applicant, said that they did not spend that kind of money not to be able to build where they wanted. After the Planning Board meeting (Wednesday, March 23, 2022) Peter and Karon were gracious enough to talk with me and hear some of my concerns. In that conversation Karon also made a similar statement to the effect that they didn't pay that much money so they couldn't build where they wanted. Clearly, if they had been told in advance that they couldn't build where they wanted to build, they wouldn't have made their offer to purchase or at least not at that price. It is easy to be sympathetic to their situation. However, if they had undertaken reasonable steps to determine exactly what limitations they would face, then they may have been told, in advance, that they couldn't build where they wanted. They would have learned of those limitations and either re-negotiated or looked to another property. As such, as a preliminary matter, I would like to share my understanding as to how we got here. The context is in places somewhat dramatic, but the details are important:

Shortly after my cousin put Lot#2 on the market, she received an offer, ostensibly for her asking price. I was made aware of this because as an owner of Lot#1 I had a right of first refusal to purchase Lot#2. A developer made that offer and it contained conditions such that the developer could renegotiate or withdraw the offer pending the developer's thorough investigation, testing and evaluation of the property – as it was stated to me, the developer could renegotiate or withdraw at their discretion based upon what they learned after completing their "***due diligence***". I told my cousin that I was interested in buying Lot#2 before she ever put it on the market, but I had also told her that I did not believe that her asking price reflected the difficulties associated with building on the lot, and that should be reflected in a fair market valuation.

When the developer made its offer, I was asked if I wanted to exercise the right of first refusal (at the asking price). I told my cousin and her realtor that asking me at that time was premature because they had yet to determine what price, if any, would ultimately be agreed upon. I suggested that the developer's contract was

illusory* and if accepted, it acted like an option, effectively taking the property off the market without obligating the prospective buyer. Her realtor went so far as to tell me the developer's attorney said I was required to either exercise the right of first refusal or lose the right. I let her know that I didn't think any court in the country would support that attorney's opinion because it would provide a means to avoid not just this right of first refusal, but virtually every such right of first refusal, rendering the language creating the right, meaningless. Courts, as a general rule, abhor construing the language in a document as meaningless, so I was quite confident suggesting this to the realtor. The realtor either got another opinion from another attorney or simply recognized the logic of what I was saying and acknowledged the problems associated with that purchase offer and that attorney's opinion.

Why is this pertinent to the matter before you? Karon Walker indicated to me during our conversation after the Board hearing that she had been told there was another offer on the property at a higher price. She said to me, "Well, you know there was another offer, for more money?"

I want to be emphatic that I do not believe Karon and Peter to be unintelligent or gullible people. It makes sense to me though that they were told (I am presuming, by the realtors) about the prior offer, probably in the same context that Karon said it to me, as a "confirmation" of the property's value. However, because of its illusory nature, the developer's offer confirmed nothing. In addition though to ***appearing*** as a confirmation of value, it was undoubtedly related to Karon so that she would believe and act under the belief that she was competing for the property. That competition was not limited to just the purchase price, but also to the expediency of the transaction. It was important to the seller to close quickly, and perhaps this could be used to their advantage as buyers? In other words, Karon was given selective information to lay the foundation for Karon and Peter to believe that if they made a cash offer without difficult contingencies that could close quickly, it might be accepted, even if for less than the amount of the previous purchase contract. And indeed, they made an offer and it was accepted. No doubt Karon and Peter had to ask themselves why the seller would be willing to take less money? The answer is that the seller wanted to avoid the contingencies – the delays and possible results of doing such "due diligence" that were required by the first offer (and avoid the possibility of discovering severe or even overwhelming obstacles to constructing a residence on the lot). Karon and Peter offered "a bird in the hand" as the saying goes. I believe the realtor was hoping that the beauty of Lot#2 would seduce the buyers into foregoing the reasonable precautions of a professional inspection and evaluation of the property in order to wrestle the purchase from the competing offer. But in foregoing those precautions, Karon Walker and her husband accepted the risk of moving forward in ignorance, hoping that such due diligence was unnecessary and risking that they may not be getting what they thought and hoped for. While compassion is laudable, the Board and the Commission should not be so sympathetic as to inflict the consequences of applicant's mistakes on me and my family.

When I was informed of Karon and Peter's offer, I asked my cousin where they were thinking of building and how they were going to access the lot? My cousin said that they thought that with that size of a lot, they were not worried and could figure it out later. Knowing what I know about the lot, I was floored and a bit dumbfounded by this. From my many conversations with my cousin and my conversation with her realtor after the first offer, they both knew my thoughts regarding the obstacles to building on the lot. They certainly did not want me to share my thoughts with prospective buyers as evidenced by their actions to keep the identity of the buyer from me. In fact, when they presented the purchase offer to me (because of the right of first refusal), they actually redacted the information that identified the buyer. I do not know whether the buyers were represented by an attorney for this purchase, but this would have been a red flag that should have prompted some investigation on their behalf. From my standpoint, the redaction allowed me to escape having to make the decision of whether to contact the buyers and share my thoughts and caution them about the purchase, which would appear as grossly self-interested because of my right of first refusal and also be seen as sticking my nose into their business. On the other hand, my doing so, sharing my thoughts, would likely result in very negative effects for my cousin, at a minimum delaying the sale, and likely by reducing the price. In any event, I wasn't given the opportunity. Karon and Peter were carefully positioned to act as they did, and had that not been the case, they might have been more careful to protect their interests, conducted the due diligence and offered less (in which I case I might have exercised the right of first refusal) or they

may have passed on the property entirely. It is not appropriate for me to suggest if Karon and Peter have another remedy. What transpired between them and their realtor is outside of my knowledge and I am not aware if there is a fiduciary obligation from a realtor to their client in New Hampshire. I do not know if they consulted with other professionals as to the value of the property or the difficulties of building on this specific property, but I can presume they did not because they went forward with a sale that they may now regret ("We didn't spend this kind of money.…") It is also possible that they acted fully informed and/or would have purchased at that price regardless, but common sense says that is not the case. My impression is that they are smarter than that.

It is my purpose, wherever the responsibility lies, to protect me and my family from the fallout. Obviously, I did not exercise my right of first refusal, despite my desire to own the lot, because it was my opinion (buttressed by opinions of individuals far more knowledgeable of this market than myself) that that price was exorbitant in light of these difficulties, difficulties that would have been discovered with proper due diligence and which now confront the buyers and bring them before the Planning Board and the Commission. If they are permitted to extend the existing driveway, the repercussions hurt my family. Whatever the reason, be it that they were manipulated not to investigate or merely chose not to investigate and accept the risk of being ignorant of matters that due diligence would have brought to light, my family should not suffer economically or otherwise because of it.

APPLICANT'S ASSERTION THAT THEY ARE REQUIRED TO USE THE EXISTIING DRIVEWAY BECAUSE IT IS IN THE DEED/PLAN

When Karon Walker told the Board at the March 23rd meeting that they were required by their deed to use the existing driveway, I was surprised because I had never heard mention of such a requirement before. I had participated in conversations between both parties of the subdivision where it would have come up had anybody thought there was such a restriction. It is a threshold question which bears heavily on these proceedings. Karon's statement explains why alternatives have not been considered by the applicant and supports the applicant's intention to build off the existing driveway. It does not preclude the Planning Board from considering other access points, but it is clearly important.

I reviewed a copy of the applicant's deed (Document 210019610, Book 4959 Page 295 and 296) and found no such language. The deed does refer to Plan No. 30-10 (8/25/1986, recorded 10/3/1986). However, I believe it is incorrect to interpret the language used in that plan as restricting the owner of Lot#2 from accessing their lot from other than the existing driveway. It is noteworthy that the plan preceded the town restriction on subdividing from a common driveway.

DEFECTIVE TITLE

At this point, before diving deeply into the language in the plan(s), it is appropriate to note that there appears to be a defect in Karon Walker's chain of title. I am not licensed to practice law in New Hampshire, but I suggest a review of the documents. The trust which purported to convey Lot#2 to Karon Walker received the property from the grantor of the trust by Deed (Deed Book 4340, Page 0530) dated November 18, 2015. The grantor's deed does not in fact reference Plan P30-10, but references Plan 21A-80. Plan P30-10 reflects an adjustment to the boundary lines that was made in 1986 not reflected in Plan 21A-80. Thus, the deed to the trust is defective and attempts to convey to the trust land that the grantor did not own. It does not appear that this was corrected (there was a corrective deed filed but it corrected a different problem) and is a defect in the chain of title.

Karon Walker's deed perpetuates the defect in specifying that it is intended to convey the land that was conveyed by the [defective] deed to the trust.

> Meaning and intending to describe and convey the same premises conveyed to Priscilla L. Pearmain, as Trustee of the Content M. Richmond Revocable Trust, u/a dated October 28, 2015 by virtue of a Deed from V. Content M. Richmond, a/k/a Content M. Richmond.[sic] dated November 18, 2015 and recorded in the Strafford Registry of Deeds in Deed Book 4340 at Page 0530. [Book 4959, Page 0296]

Plan 21A-80, referenced in the deed of the grantor to the trust, had been superseded by Plan P30-10 (recorded 10/3/1986). P30-10 reflects the transfer of land long before the trust came into existence, from the grantor of the trust (and owner of Lot#2) to the owner of Lot#1 and the subsequent adjustment of the boundary between Lot#1 and Lot#2. While Karon Walker's deed attempts to leapfrog the problem by referring to P30-10, the trust did not own pursuant to P30-10 and the parties to the sale to Karon Walker are powerless to cure the defect because it goes back to the grantor of the trust.

It is commonly understood that a person or trust cannot convey property which it does not own. The grantor's deed to the trust attempts to do precisely that. It attempts to convey property that is owned by the owners of Lot#1 as shown in the adjustment of the boundary on the later 1986 plan. Similarly, all subsequent conveyances down the chain of title, being based on the presumption of good title in the trust, are equally flawed. Karon Walker's title is so flawed. Unfortunately, it may not be an easy matter to correct because the grantor of the trust is deceased and has heirs that were not beneficiaries of the trust and may claim an interest in the property. Thus, it is possible that such a conveyance is wholly ineffective and the deed from the grantor is null and void. If that is the case, Karon Walker may not own any interest in Lot#2 and further has no standing to present the application before the Planning Board and Conservation Commission. The deed to Karon Walker is a warranty deed, which may afford relief, and even if there isn't a mortgage, there is likely to be title insurance which might come into play. Speaking as an owner of the land that was attempted to be conveyed improperly, I certainly have a problem with the defect. Clearly, it is necessary to remedy the title situation before coming before the Board and Commission.

I am unaware of particulars regarding the closing, for instance, if there is title insurance, but I doubt that Karon Walker had an attorney to represent her interests. An attorney could have alerted her to the defect and addressed it before she closed on the property. Lack of professional advice is a recurring theme, because had Karon Walker engaged professional advice regarding the obstacles to building on the property, she might not be confronted and certainly not surprised by these problems that bring her before the Planning Board and the Conservation Commission.

APPLICANT'S ASSERTION THAT THEY ARE REQUIRED TO USE THE EXISTIING DRIVEWAY BECAUSE IT IS IN THE DEED/PLAN - THE LANGUAGE IN THE PLANS

If we look past the suspect quality of title held by Karon Walker and with blinders on, focus on the how either of these Plan documents address the issue of restricting the lot owners from accessing their property from other than the existing driveway, both plans contain two references regarding the existing driveway, both using the same language. One directly follows the other. Read together the meaning is clear.

The plans contain a single item under the heading "Conditions of Approval" as follows:

1) The maintanance[sic] of the common driveway shall be guarantead[sic] in the needs of Lot#1 & Lot#2.

This condition (1) is interesting in multiple facets, but it is safe to say that it was never proofread, and the parties did not pay much heed to it, as would behoove an interpretation that it was intended as a restriction on the access of Lot#2. It contains two unusual spellings, and the phrase "guarantead[sic] in the needs of Lot#1 & Lot#2" clearly was intended to read "guaranteed in the deeds of Lot#1 & Lot#2."

I recognize this language as simply a mutual requirement to maintain the existing driveway by the owners of Lot#1 and Lot#2. However, a requirement to maintain something is not a restriction from using or creating something else. In this situation, the requirement to maintain the existing driveway is not a restriction or prohibition from using or creating a separate driveway. “Required to maintain” does not equate to “required to use and use exclusively.” Any common understanding or reading of this condition does not require Karon Walker to use the existing driveway or exclude the possibility of any other access. It is only about maintaining the existing driveway. And this is the only Condition of Approval of the Plan.

The plans also contain another interesting curiosity under the heading “FINDINGS OF FACTS”:

7) Access to Lot#2 will be made by using the existing driveway to Lot#1.

This finding of fact has indeed turned out to be true. The existing driveway has been used to access Lot#2. As a FINDING OF FACT, it does not impose any requirement like the Conditions of Approval. It merely states a fact. It is unusual for a FINDING OF FACT to be about future events but that is apparently the intent evidenced by the use of the words “will be”. And as previously stated, it has indeed been true that access to Lot#2 has been made by using the existing driveway for the forty some years since Lot#2 and Lot#1 were divided.

The purpose of (7) is clear when it is read in conjunction with the obligation that the driveway be maintained by the owners of both lots. Obviously, the owner of Lot#1 will use the driveway – it is the only way to get to the house and barn on Lot#1, but why should the owner of Lot#2 be burdened by the obligation to help maintain it? Lot#2 is undeveloped land, why should the owner of Lot#2 help maintain the driveway. This Finding of Fact explains why. It is because the driveway will be used to access Lot#2. This Finding of Fact is the justification for the Condition of Approval for owners of both properties to maintain the driveway.

If the intent of this (7) was to restrict the owners of Lot#2 to only accessing their lot via the existing driveway it would not be in the “Findings of Fact”, it would be a “Condition of Approval” and it would be worded differently. At a minimum the language would be along the lines of “Access to Lot#2 SHALL BE MADE BY, AND ONLY BE MADE BY using the existing driveway….” if that were its intent. And the language would be part of the Conditions. Findings of Fact are presented to express supporting facts, in this case, the fact that the existing driveway will used to access Lot#2 supports the Conditions for Approval that the owners will share in its maintenance. Construing this language as a restriction limiting access to Lot#2 to just the existing driveway, as interpreted by Karen Walker and presented to the Planning Board, was never intended, and to read it as such is contrary to how legal documents are construed and drafted.

HARM TO NEIGHBORING PROPERTY – THE LAY OF THE LAND AND BUILDING RESTRICTIONS OFF A SINGLE DRIVEWAY

Lot#2 has over 600 feet of frontage along Durham Point Road (dimensions from referenced surveys/plans). Lot#1 also has over 600 feet of frontage along Durham Point Road. There is a substantial difference between the two, however. The frontage along Lot#1 is predominantly a stone embankment rising up a couple dozen feet in some places. The existing driveway, on the eastern edge of Lot#1’s frontage of Durham Point Road, is the only suitable place to come off Durham Point Road and access Lot#1. The same is not true of Lot#2. The elevation of Lot#2 is close to, slightly below, or at the same elevation as Durham Point Road along much of Lot#2’s frontage. The natural terrain has restricted the access to Lot#1 to the existing driveway, but that is not true of Lot#2.

Sometime after the referenced plans were adopted creating the current boundary and use of the existing driveway, Durham restricted the number of subdivisions allowed of a property served by a single driveway. As I understand its application to the lots under discussion, after a new house is built on Lot#2 using the existing driveway, the owners of Lot#1 and Lot#2 collectively are restricted to not building more than a single additional house on Lot#1 and Lot#2, again, collectively. My sister Barbara and I are the owners of Lot#1. I

have an adult son. Again, as I understand it, if the owners of Lot#2 extend and use the existing driveway to serve a new home, we cannot add houses for my sister and my son. If the owner of Lot#2 added a second house, my sister, co-owner of Lot#1 couldn't even build a house. Remember, topography has taken away the possibility of accessing Lot#1 other than by the existing driveway. As distressing as this is, there is a financial component to this as well. If at some point in the future my son becomes the owner and needs to sell or develop the property for financial reasons, he will be greatly affected by the owner of Lot#2 using and extending the existing driveway for their house. He will be restricted or limited from doing so. In fact, any owner of either lot would be so restricted or limited.

Addressing the application before the board, in the CONDITIONAL USE CRITERIA presented within the Walker application, the owner of Lot#2 states: "The proposed work should have no negative impacts on the property values in the vicinity."

The actual result of coming off the existing driveway is that the value of the property will immediately and dramatically decline. In the application the applicant states as a criterion that the value of neighboring properties will not be affected. I do not understand how they can believe that to be true. It is harder to quantify, but true none the less, extending the driveway will also change the character of that area as every vehicle uses it. Everyone in our house at 101 Durham Point Road will know when a vehicle comes or goes from our neighbors'. That too affects the value of Lot#1 and not just the financial value.

ACCESS TO DURHAM POINT ROAD AND SAFETY

On another front, safety is an issue here as well. Using the existing driveway even to access Lot#1 is less than ideal, but, as described above, necessary for Lot#1. However, accessing the road east of the existing driveway for Lot#2 is a safer alternative. Countless times while one vehicle is eastbound on Durham Point Road and waiting for oncoming cars to pass to make a left turn into the existing driveway, another eastbound car will come over the rise just east of the entrance to the transfer station. To the second vehicle driver's surprise and horror, they find the first vehicle stopped in front of them and must slam on the brakes. If the driver of the second vehicle has reasonable reactions and is not exceeding the speed limit, a collision will probably be avoided, but it will raise the hair on the back of your neck. When I come up the hill next to the transfer station, my turn signal is on, I am checking my mirrors, and as I come over that hill, I am checking oncoming traffic. Please be mindful of this if you are driving out for the site visit so you don't prove my case. Using an access to Lot#2 farther to the east (past the existing driveway) would provide such a vehicle approaching from the rear additional time to react, thus providing a safer access for Lot#2 and for the general public that travels Durham Point Road.

I am also concerned that the existing driveway cannot sustain the weight or the size of modern construction equipment. The existing house and barn were not constructed with the use of bulldozers and excavators. My grandfather had a good story about a horse he used traveling to and from town in the early days at the farm. When my parents moved in, the moving van got stuck coming in the driveway and they had to unload it and carry the furniture in from there. When my father moved out, we hired a smaller moving van, but that too got stuck. Delivery vehicles occasionally have a problem, but most negotiate the driveway without problems, though they aren't construction equipment. Most recently, Karon Walker was considerate to ask if I would allow access past the driveway, over the asphalt apron and through the yard for a "mini-excavator" which I permitted. I didn't see it happen, but during this time, the end of the driveway closest to the asphalt deteriorated in that short period as if it had been neglected for years. Karon denies that it was caused by bringing in the "mini-excavator" but there isn't any other likely culprit. If you drive over it when you come to the site walk, you will know exactly where it is.

THE SEDUCTIVE BEAUTY OF LOT#2

An access driveway closer to the eastern end of Lot#2's frontage along Durham Point Road would be a more attractive entrance than the existing driveway. The existing driveway is attractive, but it doesn't have a view of the ravine. A driveway to the east could have a spectacular view of the ravine, and wouldn't that be worth it? Further, such an entrance could lead to a fantastic location for a house on Lot#2 that could not only look upon the best of the ravine but have a spectacular view of the river as well. I recognize that there may be more expense than extending the existing driveway, but the opportunity that exists there shouldn't be discarded lightly.

WHAT IF LOT#2 IS JUST NOT SUITABLE?

I sincerely hope that this is not the situation, but to cover all bases, if it should turn out that the property is not suitable for building what Karon Walker had envisioned, because of the wetlands, the costs, or other reasons, I note for the Board and the Commission that she had the opportunity to discover and deal with that before making an offer on the property. A good attorney could have caught any title defects and may have seen other red flags. Other professionals could have cautioned her about the wetlands and other obstacles. Good advice was available, not only from experts, but if she had simply picked up the phone and called her prospective neighbors. And I'm not necessarily referring to me. I was certainly aware of the problems that might be encountered in building on Lot#2 but others maybe more so. I have had conversations with neighbors on the subject. It appears that either Karon decided to purchase without taking reasonable steps to protect herself or possibly she was lulled into not doing so. The responsibility for her decision to act in ignorance and its consequences are ultimately hers to suffer and should not entitle her to relief, particularly at the expense of her neighbors.

I apologize for being long-winded in expressing these concerns, but they are in fact, great concerns to me. Thanks, all of you, for your consideration, your time, and your efforts in serving on the Planning Board and the Conservation Commission and addressing this situation.

Bob McNitt

*The members of the board and the commission are probably all familiar with the term "illusory" as a legal term of art, but because it is rarely used in common parlance - "Illusory promise. A purported promise that actually promises nothing because it leaves to speaker the choice of performance or nonperformance. When promise is illusory, there is no actual requirement upon the promisor that anything be done because promisor has an alternative which, if taken, will render promisee nothing…." (Black's Law Dictionary, 5th Edition) It goes on, but you get the idea.