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February 18, 2009

(Digitally transmitted to brough@broughlawfirm.com)
Mr. Michael Brough
Town Attorney
Town of Carrboro
301 West Main Street
Carrboro, NC 27510

Re: Colleton Crossing Private Access Easement

Dear Mike:

You asked for our opinion on whether the private access easement recorded at Book 482, Page 439 and shown on the plats recorded at Plat Book 39, Page 154 and Plat Book 41, Page 166 could be used as a private road serving all the property owners in the proposed Colleton Crossing development. I will assume your question goes to whether the proposed use by up to 39 lot owners is within the scope of the grant of easement. I believe that it is.

The scope of a grant of easement is controlled by the terms of the instrument if the grant is precise on the point. Absent a clear expression of the scope in the grant, courts "will interpret the scope and extent of the easement so as to effect a rational purpose and to effectuate the intention of the parties." WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA, 5th Edition, § 15-22 at 736 (Hetrick and McLaughlin ed., 1998). Among the factors the courts consider are the purpose for which the grant was made, the subject matter of the grant and the situation of the parties, and the courts tend to have an "elastic view" of what purposes were in the contemplation of the parties at the time of the grant. *Id.*

It is clear from the instrument in this case that the parties to the grant anticipated the easement would be used for vehicular access so the question becomes whether the parties anticipated the potential development of the Colleton tract which would increase its use from more than one owner. The history of the Colleton tract and the surrounding tracts is pertinent on this point. The Colleton tract was a single 31.51 acre tract at the time the easement was granted. The Colleton tract and the tracts immediately to the east and north were created in a partition of the Walker family land in 1961. The partition map shows an undefined roadway running across the tract to the east to the eastern line of the Colleton tract but nothing appears to have been done

in the partition action to give the owner of the Colleton tract recorded access to a public right of way. This meant that a purchaser of the surrounding tracts that had been created in the Walker family partition action would take title to the tracts subject to the as yet unasserted claim of the owner of the Colleton tract for a way of necessity or an implied easement connecting the tract to a public road.

One assumes First Tallyhoe Corporation, which developed part of Fox Meadow subdivision, recognized this potential problem when it began acquiring tracts around the Colleton tract for its development and arranged for the grant of easement from the then owner of the tract immediately to the east of the Colleton tract in order to cut off any potential future claims for access by the owner of the Colleton tract. Given the facts that First Tallyhoe was in the business of creating lots at on surrounding property at the time it procured the easement and the width of the easement which is far more than would be required for a driveway, it is fair to say that a court would more likely than not find that the possible subsequent subdivision of the Colleton tract was in the contemplation of the parties at the time the easement was created.

Please call me if you have any questions.

Sincerely,

Northern Blue, LLP



David M. Rooks

DMR/

cc: Jeff Kleaveland
Marty Roupe
Tim Smith
Jim Melville