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May 17, 2022

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Brett Walker  
Board of Selectmen, Chair  
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## **RE: Old Center Rangeway: Petition to Reclassify**

Dear Mr. Chairman:

This office represents Five Rivers Conservation Trust ("Five Rivers"). Five Rivers holds a conservation easement on property of Joseph Schmidl and Cynthia Owen (Tax Map 238, Lot 24) ("Schmidl-Owen property"). The conservation easement deed is recorded in the Merrimack County Registry of Deeds at Book 3310, Page 579. The Old Center Rangeway runs over the Schmidl-Owen property, which is burdened by the conservation easement. Five Rivers did not receive notice of the Petition to Reclassify filed by Joyce and Charles Rose (collectively, "Rose"), but was provided a copy of the notice by April Rollins, Salisbury Town Administrator, upon request. Five Rivers wishes to express its opposition to the petition. Please add this letter to the record of this matter.

It is important to point out that Rose's request is for the *layout* of a Class VI highway over the Old Center Rangeway, rather than a *reclassification*. See RSA 231:22.

The conservation easement on the Schmidl-Owen property is a significant obstacle to this petition. Granting this petition would amount to a taking of private property, which would require the petitioner to compensate the landowners whose property is taken. A taking such as this would result in an extinguishment of that portion of the conservation easement impacted by

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the taking. Because conservation easements are considered interests in real estate (See RSA 477:47), Rose would also need to pay damages associated with the termination of this portion of the conservation easement. - Does the easement prohibit Road

An extinguishment of a conservation easement interest requires involvement of both the Charitable Trust Unit of the Attorney General's Office and the probate court. In its published guidelines entitled "Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements" the Charitable Trust Unit provides, "The release, extinguishment, or other termination of a conservation easement, whether in whole or in part, requires court approval in a *cy pres* proceeding. The Attorney General must be given notice of and is a necessary party to such a proceeding."

It is unclear from the petition what Rose's intentions are with regard to the proposed Class VI road. It is assumed that Rose desires better and more convenient access to his lots for timbering purposes. If this is the case, we question why the applicant has not filed a petition for the laying out of a right-of-way for removal of lumber and other materials pursuant to RSA 231:40. That statute provides:

Upon petition, when it becomes necessary for the convenient removal of lumber, wood or other material, to pass through the lands of a person other than the owner of the land from which such lumber, wood or other material is to be removed, the selectmen of the town within which said lands are situated, in their discretion, may lay out a right-of-way through the land of any person for the purposes aforesaid, and, upon notice to and hearing of the owner of the lands, shall determine the necessity for and assess the damages occasioned by the laying out of such right-of-way, and such damages shall be paid by the person applying for such right-of-way before the same shall be open for use.

Because a right-of-way under this statute can be created for a fixed length of time and made subject to other conditions, it would appear to be the more reasonable alternative, in the event access is actually necessary. It is worth noting that, currently, Rose possesses the right to utilize the discontinued road for ingress and egress to his lots.

We also raise concerns to the Town regarding the private benefit of the potential Class VI road layout. There is significant New Hampshire case law which stands for the proposition that a purely private benefit cannot alone justify the laying out of a new public highway. Additionally, the decision of whether to lay out a new public highway must be based on a balancing of the public interest in the layout with the rights of landowners affected by it. Rodgers Development Co. v. Tilton, 147 N.H. 57 (2001).

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From the facts presented, it appears that the proposed layout of a Class VI road would largely amount to a purely private benefit for Rose. This is evidenced by the fact that Rose is currently the sole signatory to the petition, and that several abutters are opposing the petition.

In sum, Five Rivers wishes to express its concern regarding the Rose petition. The taking of private property that is subject to a conservation easement will result in the extinguishment of a portion of the easement, and thus will likely necessitate involvement of the Attorney General's Office and the probate court. The burden of such an endeavor outweighs the private benefit to Rose.

Sincerely,



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