

These minutes were approved at the May 25, 2022 meeting.

**TOWN OF DURHAM
DURHAM PLANNING BOARD**

**Wednesday April 27, 2022
Town Council Chambers, Durham Town Hall
7:00 pm**

MEMBERS PRESENT: Lorne Parnell (Acting Chair), Heather Grant, Sally Tobias (Council Rep), William McGowan, Nicholas Germain (Alternate), Barbara Dill (Alternate), Chuck Hotchkiss (Alternate), Emily Friedrichs (Alternate)

ABSENT: Paul Rasmussen, Richard Kelley, James Bubar

ALSO PRESENT: Town Planner Michael Behrendt (Remote)

I. Call to Order

Lorne Parnell said he will be Acting Chair for this meeting as Paul Rasmussen will not be attending and called the meeting to order at 7:00 pm.

II. Roll Call and Seating of Alternates

Chair Parnell took roll call: Seated Barbara Dill for Richard Kelley, Emily Friedrichs for James Bubar, and Nicholas Germain for Paul Rasmussen

III. Approval of Agenda

Mr. Germain MOVED to approve the Agenda, and Mr. McGowan noted that Item X was postponed to May 11, 2022 by request of the applicant; SECONDED by Ms. Grant; APPROVED by a vote of 7-0, Motion carries.

IV. Town Planner's Report

Town Planner Michael Behrendt said as stated earlier 74 Main Street was postponed to May 11 at the applicant's request; there are 3 meetings in May with regular meetings May 11 and 25, and a Workshop on May 18, 2022.

V. Reports from Board Members who serve on Other Committees – None

VI. Public Comments – No Public Comments.

VII. Review of Minutes: (Old)

VIII. Public Hearing - Durham Point Road – New Driveway. Conditional Use Application for driveway to cross wetland buffer for new single-family house. Located catty corner to the

Durham Transfer Station. The lot shares a driveway with 101 Durham Point Road. Karon Walker, owner. Scott Boudreau, surveyor. Map 11, Lot 38-2. Residence Coastal Zone.
Recommended action: Final action.

Peter Howd stated that Scott Boudreau, Surveyor, was on Zoom and his wife Karon Walker here in the room. He said he and his wife are seeking a CU Permit to allow a residential driveway to cross through the WCOD; the driveway segment leaves the shared driveway and passes through the wetland buffer and is entirely contained within their property on Map 11, Lot 38-2 and does not cross the wetland proper.

Mr. Howd explained that the placement of the driveway is based on several factors: the prior Planning Board action approving the 1981 sub-division plan with clear intent in the Planning Board minutes at the time that the shared driveway be the access to our lot from Durham Point Road to avoid further curb cuts off a Scenic Road. He said much of the property is shoreland and wetland and contains steep slopes. He said they have a right to use the shared driveway by a deeded easement and feel that a CU Permit request for a driveway crossing the wetland buffer, with minimal alteration of the natural slopes, represents the optimal approach.

Mr. Howd said the siting of a single-family house is not the issue here and is not subject to a site plan review. He said he and Ms. Walker agree with Mr. Behrendt's assessment that the 8 CU Criteria are largely irrelevant in this case and also agree with the recommendations of the Conservation Commission regarding the 4 additional criteria; the primary concern of the Conservation Commission is with sediment leaving the driveway surface in the direction of the wetlands.

Mr. Howd said they plan to meet all NHDES best management practices and any additional conditions the Town wishes to impose on the wetland zone through the crossing area. He said due to the short amount of time between meetings, Surveyor Scott Boudreau has not had time to update plans to reflect that they will alter the driveway crown to slope away from the wetland to the uphill side of the driveway and make sure there is a swale on the downhill side to catch sediment while allowing water to flow to the wetland below, with the goal to slow the velocity of the water to the wetland.

Chair Parnell said there is a swale in the current plans and asked Mr. Howd what he proposed to add. Mr. Howd said the proposal is to add a swale on the downhill side and the existing swale will be accentuated. Mx. Friedrichs asked how snow and ice will be handled on the steep portions of the driveway. Mr. Howd said there is one steep portion and they expect to plow to the uphill side and do not plan on using salt.

Councilor Tobias MOVED to open the Public Hearing for Durham Point Road – New Driveway; SECONDED by Mr. Germain; APPROVED by a vote of 7-0, Motion carries.

Chair Parnell opened the Public Hearing for Durham Point Road at 7:15 pm.

Chris Wyskiel, Attorney representing Bob McNitt, owner of adjacent lot, said Mr. McNitt submitted a summary of his position and attended the Conservation Commission meeting. He first addressed the representation that the driveway being used by the applicant is required to be the shared driveway shown on the sub-division plan and application, and said the condition on the Planning Board, along with 7 findings of fact, do not cumulatively require that the common driveway absolutely be shared by both lots. He said the Planning Board required if it were used that the deeds recite common maintenance obligations to be shared by the 2 lots.

Attorney Wyskiel said a premise to the argument made by Mr. McNitt to this Board and the Conservation Commission, relates to the Board's interpretation and application of the CU Criteria of Zoning Ordinance Section 175-61-B.1, which states a CU Permit for use in WCOD can be approved *only* if there is no alternative location on the parcel outside the WCOD reasonably practical for the proposed use. He said Mr. McNitt's position is that the proposed use is collectively the residence and that there is an alternative location for the driveway. He said the Conservation Commission deferred the decision to the Planning Board on how that section of the Zoning Ordinance should be interpreted.

Attorney Wyskiel said in his latest letter he makes the point that the 8 CU Criteria cannot be ignored. He said the Conservation Commission assumed this proposal is for a residence-specific site and it should be designated as such. He said the Planning Board should deny the CU Permit, and if it is granted, should include the condition of language similar or exactly as he proposed in his letter.

Bob McNitt said he and his sister own the abutting property on the west side and the shared driveway. He said the Conservation Commission has acknowledged the need to define "proposed use" as stated in Zoning Ordinance, Section 175-61-B.1, and felt the Planning Board should define the proposed use under these criteria. He said by following the Conservation Commission recommendation the Planning Board sidesteps its obligation to do exactly what the Ordinance requires.

Robin Mower of 6 Britton Lane asked that the Planning Board pay close attention to the language of the Zoning Ordinance and said the Board must go through the 8 CU criteria for WCOD.

Chair Parnell said there was never any intention of the Board to not go through the 8 CU Criteria and said the comment from Mr. Behrendt was simply that most of the criteria would not be applicable to a roadway passing through WCOD.

Karon Walker said she is Trustee of the Trust that is the applicant here and said her understanding of the CU process is that it is intended to protect WCOD and said they are doing their best to protect large areas of sensitive portions of their lot. She said Mr. McNitt just does not want to share the driveway, which is a deeded easement, and he wants more protection from neighboring residences than is available under the applicable Zoning Ordinance. She said she is

concerned that Mr. McNitt is trying to use this CU Permit process, focused on a driveway only, to achieve goals that are not permitted. She said the Conservation Commission defined the proposed use as the driveway and were in unanimous agreement that there was no other reasonably practical location under the circumstances.

Ms. Walker said the sub-division plan is a recorded document which lists as a finding of fact that the access shall be a shared driveway to both of the lots, and it should be binding. She asked that the Board consider the applicant's reasons why they believe there is no other location for the driveway, and said the driveway is half on our property and we have the right to its use. She said they are trying to limit disturbance here and find it unreasonable they should move the building site, so the driveway is not in a buffer.

Katy Paine said she is a cousin of Bob McNitt and grew up on this property. She urged the Board to think about what is reasonable and practical, and that they think of the conservation versus convenience of putting the driveway where it is now.

Chris Wyskiel in reply to Ms. Walker said the Conservation Commission did define proposed use but clearly deferred that issue to the Planning Board. He said the issue with the shared driveway is whether the Zoning Ordinance requires its use. He said he submits here that the proposed use is to build a residential dwelling on the lot, and the Board needs to go through the 8 CU criteria to see if the applicant can have a river view for their residence.

Peter Howd said if the Board is going to consider the house at this point being an integral part of the CU Permit process, the applicants will need to consult with Counsel and would appreciate the Board granting a continuance. He said the use as outlined for the CU Permit for using the WCOD buffer is actually for a driveway crossing and not to build a house in the WCOD.

Mr. Behrendt said as Town Planner he recommends that the Planning Board approve this conditional use. He said the key issue is the 4 wetland criteria, and the Town Attorney has confirmed that the 8 general criteria are largely not applicable. He said it would have to be proven that the construction of a driveway within a wetland buffer has an effect on the property value of an abutting property.

Mr. Behrendt said he firmly believes the extent of the requirement of the original sub-division is that the applicant must use the shared driveway as a Condition of Approval for the sub-division as well as shared maintenance. He said if the Planning Board denies this application on the grounds that there is another location for the driveway, the applicant will need to build a separate driveway off Durham Point Road which would disturb more land and access would be difficult to obtain. He said there is already 900 ft of existing gravel driveway split between the 2 lots and its use is reasonable and practical; the only issue about use that is relevant here is the driveway within the wetland buffer.

Bob McNitt said he felt Mr. Behrendt was fundamentally misreading the Zoning Ordinance regarding no alternative location reasonably practical for the driveway, and the original subdivision minutes stating that the sight distance exiting from the present driveway toward town was limited but “nothing can be done about it at this time” implying the possibly of moving the existing driveway in the future. He said doubling the amount of traffic on the driveway could create a hazard, and he urged the Planning Board to read the Zoning Ordinance restrictively.

Councilor Tobias MOVED to close the Public Hearing for Durham Point Road – New Driveway; SECONDED by Mx. Friedrichs; APPROVED by a vote of 7-0, Motion carries.

Chair Parnell closed the Public Hearing for Durham Point Road at 8:08 pm.

Chair Parnell said the Board has a CU application before them to put a driveway within the buffer of the WCOD. He said the Board will go through the criteria, take member comments, and then vote on the criteria as a total starting with the 4 WCOD criteria.

Mr. Germain asked for clarification that this plan would not be before the Board if the WCOD was not involved, and has nothing to do with where the residence is located; that the major concern is the 230 ft of driveway through WCOD which encompasses about 12,000 sq ft. Chair Parnell said that is correct. Mx. Friedrichs asked if in consideration of WCOD there can be conditions of approval, and Mr. Behrendt said the Board can put any conditions which they find appropriate and recommended follow-up with the Conservation Commission.

WCOD Specific Criteria

Chair Parnell said the Planning Board shall approve a CU Permit for a use within the WCOD only if it finds, with advice from the Conservation Commission, that all of the following standards have been met in addition to the general standards for conditional uses in any performance:

- 1.** There is no alternative location that is outside the WCOD that is reasonably practical for the proposed use.

Mx. Friedrichs said she struggles with the wording of the Zoning Ordinance and felt more studies needed to be done to determine whether or not there are also wetland restrictions on other parts of the lot and whether there was a possible alternative location for the driveway. Councilor Tobias said this lot was divided at some point in time with the assumption someone would build upon it, and felt it was reasonable and practical to assume access to the property would be off the shared driveway. She said the intent of the sub-division was to keep that one access point otherwise it would not have been a Condition of Approval by the Planning Board and said she agrees with Mr. Behrendt and trusts his ability to understand the code.

Ms. Grant said the driveway is what the Board is looking at in terms of reasonable and practical location and needs to make sure that the right things are on the construction plan or mitigation

is guaranteed to do the best for the WCOD. She said she feels it is reasonable and practical to put the driveway through that little section because you cannot go all the way around anywhere else.

Mr. McGowan said he will go with the Town Planner's recommendation and look at the plan in front of him. He said the Board can make conjectures about where the house will be put, but the applicant still needs to go through the wetland to get there, and devastation to other property would be clearly impractical.

Mr. Germain said he was at the site walk and given the plans in front of the Board this is the least amount of impact on the area. He said there would be a lot of wildlife habitat that would be taken away to change where the driveway is located, and there will be Conditions of Approval to do what is best to protect the wetlands.

Mx. Friedrichs said that the language is tricky in the deed and felt the Zoning Ordinance language could be improved. Ze said it is reasonably practical to expect you would use an existing driveway on your own property but felt there may be other locations that are reasonably practical.

Chair Parnell said he looks at this application and sees a driveway being proposed to be constructed to go to a house to be determined by the owners of the property. He said in his opinion there is no other location this road could go to get to that particular site, and there is no other location outside the WCOD.

Mr. Hotchkiss agreed that if the Board interprets the language as confining our attention to the driveway, there is no question and he is in accord with the rest of the Board; if the definition were broadened to include the house in proposed use that brings up the issue of property rights. He said he also agrees that another curb cut proposes at least as big a problem as any issues that arise with the existing driveway.

2. The amount of soil disturbance will be minimum necessary for the construction and operation of the facilities.

The Board agreed they found no issues with this standard.

3. Location, design, construction and maintenance of facilities will minimize any detrimental impact on the Wetlands, and any adverse impacts will be mitigated.

Councilor Tobias said here the recommendations of the Conservation Commission should be noted. Mr. Behrendt said the Conservation Commission suggests the Board include a condition that the applicant install a structure to mitigate the impacts of runoff from the gravel driveway to the Wetlands below and shall develop a design to be approved by DPW and the Planning Board according to best management practices.

Mx. Friedrichs suggested as an additional condition of approval that the driveway remain gravel and emphasis be put on using sand and plowing techniques and avoiding use of melt products.

4. Restoration activities will leave the site as nearly as possible in its existing condition and grade at the time of application for CU Permit.

Chair Parnell said the site will not be the same as it is now once the road goes in, but it will be as nearly as possible. Ms. Grant said the applicant makes sure they will not disturb outside that particular area.

Mr. Behrendt suggested the Board first find that the 4 criteria are met, then vote that the 8 criteria are met, then a final vote approving conditional use.

Councilor Tobias MOVED that the Planning Board approve the 4 criteria for conditional use in the WCOD; SECONDED by Ms. Grant; APPROVED by a vote of 6-1, Motion carries.

Mx. Friedrichs explained that ze voted against the motion because ze understood there may be an alternative location for the proposed driveway and felt it was not sufficiently explored.

Chair Parnell asked Mr. Behrendt if all application and notice regulations were met, and Mr. Behrendt said all conditions were met.

General Standards for Conditional Use

1. Site Suitability – Site is suitable for proposed use with adequate vehicular and pedestrian access, availability of adequate public services, absence of environmental constraints or mitigation of impacts, and availability of utilities to serve intended use.

Chair Parnell asked the Board to keep in mind that the proposed use is a section of a driveway.

There were no negative comments by the Board.

2. External Impacts – External impacts on abutting properties no greater than impacts of adjacent existing uses; no adverse effects on surrounding environment and neighborhood.

Mx. Friedrichs said the nature of this particular use is not any different from any other use of this property and additional traffic coming out of the driveway is no different from a driveway located elsewhere on the lot.

Councilor Tobias said the driveway is off of an existing driveway to a residential lot. Chair Parnell added that the existing driveway is partly on this property anyway and there is really no change.

3. Character of Site Development – Character of Site Development is compatible with zoned use for Residence C District; proposed layout and design of site shall not be incompatible with established character of neighborhood; mitigate any external impacts on neighborhood.

Chair Parnell said he would say this is not pertinent or relevant. Mx. Friedrichs said buffering of adjacent properties is constrained by WCOD.

4. Character of Buildings & Structures – Character of Buildings and Structures shall not be incompatible with established character of the neighborhood.

Mr. Germain said this criterion is not applicable; the driveway will be gravel and that is what is already there.

5. Preservation of Resources – Proposed use within WCOD will preserve natural, cultural, historic, and scenic resources on the site and will not degrade such resources on abutting properties.

Chair Parnell said he does not think this proposed use will change any of this. Councilor Tobias said the location of the proposed use is trying to protect a good deal of the other land by not going around the whole way. Ms. Grant said the one stone wall there will be addressed with movement, but it is not a stone wall that defines a boundary.

6. Impact on Property Values – Proposed uses of land within the WCOD will not cause or contribute to a significant decline in property values of adjacent properties.

Mr. Germain said he does not believe the 230 ft of driveway will affect the property value. Mx. Friedrichs said she did hear arguments that the impact of values would come from the choice of the driveway location but not the part in the WCOD.

7. Availability of Public Services & Facilities - Adequate and lawful facilities and necessary public and private services are approved or assured and will be capable of proper operation and not cause excessive demand on municipal services.

Chair Parnell asked if there were issues with Fire, and Ms. Grant said the applicant widened the road after the review. Mx. Friedrichs asked about underground versus above-ground utilities. Mr. Behrendt said he believed they would be required to be buried and that is the intent of the applicant and included in the plans. Mr. McGowan said a conduit can be put in while they are doing the road.

8. Fiscal Impacts – Proposed use of land within WCOD will not have a negative fiscal impact on the Town.

Chair Parnell said he did not think this section of road will have any impact on the Town. Mr. Germain said the driveway will be taxed which will be a positive.

Mr. McGowan MOVED that the Planning Board approve the conditional use application for a driveway to cross the wetland buffer for a new single-family house located catty corner to the Transfer Station; the lot shares a driveway with 101 Durham Point Road, Karon Walker owner, Scott Boudreau Surveyor, Map 11, Lot 38-2, Residence Coastal Zone; in the WCOD; SECONDED by Mr. Germain; APPROVED by a vote of 7-0, Motion carries.

IX. 52 Oyster River Road – Regrading of site. Permitted Use B for regrading of site for new single-family house and installation of a drainage pipe in Shoreland Protection Overlay District (SPOD). Ted and Christina Baker, property owners. Alex Ross, Ross Engineering, engineer. Stephen Meade, agent/contractor. Map 6, Lot 7-4. Residence A Zone. Recommended action: Final action.

Ted Baker, owner, said he had no new information to present tonight and said the scope of what is being discussed is Permitted Use B. He said he met with the Conservation Commission Monday and got their endorsement for the 3 criteria.

Mr. Behrendt said he had nothing to add and the Conservation Commission recommended approval as submitted with no conditions. He said a lot of information is included in the application about fill, erosion control plan, and layout of the site.

Mx. Friedrichs asked the applicant if they had considered permeable asphalt for the driveway versus traditional to avoid a flash water runoff going down to the river and asked about use of rain barrels to catch roof runoff. Mr. Baker said he is open to the ideas and would be willing to explore their feasibility. He said they spent a lot of time on the early stages of the project and have not yet gotten to fine details, but he would do anything to protect the property as it is deteriorated. Councilor Tobias said permeable surface driveways are not always best and require maintenance.

Mr. Behrendt said Permitted Use B only involves 3 criteria and the process is simpler: (1) appropriate erosion control measures will be used; (2) any disturbed areas will be restored; (3) the activity will be conducted in a manner that minimizes having an impact on the shoreland.

Chair Parnell asked Mr. Behrendt if all these 3 criteria are being met, and Mr. Behrendt said he believes they have and said the applicant has been diligent working on their plan and making revisions.

Mr. McGowan MOVED that the 3 criterial for Permitted Use B have been met and the Planning Board recommends approval for a Permitted Use B on the site of a new single-family house at 52 Oyster River Road, Map 6, Lot 7-4 in Resident A Zone; SECONDED by Ms. Grant;

Discussion: Mx. Friedrichs asked if the Board will include any conditions of approval. Councilor Tobias felt the Board should stick to what is here or add that the applicant be diligent pursuing appropriate erosion control for that particular site. Mx. Friedrichs suggested asking that the applicant consult with professionals as to best practices. Chair Parnell said he would not add that as it puts additional costs on the applicant. Mr. McGowan said right now it is just for regrading of the site. Mx. Friedrichs said there is a Town easement through there and it is a potential expense to the Town. Mr. Hotchkiss said any conditions come at an awkward time in the process, because to say someone needs to consider doing something is not a condition that is enforceable and is premature.

Motion APPROVED by a vote of 7-0, Motion carries.

- X. ***Public Hearing - 74 Main Street – Mixed-Use Building***. Formal site plan and conditional use application for demolition of current wood frame building and construction of a 4-story mixed-use building with nonresidential uses, 12 residential units, and 5 parking spaces. Minor site changes are also proposed for the adjacent lot at 72 Main Street. Doug Clark, applicant. Jerry Pucillo, consultant with Centergreen, representing Foundation for Civic Leadership/Democracy House, a potential partner in project. Mike Sievert, Horizons Engineering. Zach Smith, Bergmeyer Architects. Map 2, Lot 14-1-1. Central Business Zone. Recommended action: Discuss and continue review to a May meeting.

****POSTPONED AT THE APPLICANT'S REQUEST TO MAY 11***

XI. Other Business

XII. Review of Minutes (new): February 23, 2022

Approval of Meeting Minutes of February 23, 2022

Changes/corrections: Ms. Dill asked that 2 sentences on page 2, line 20, be taken out entirely as something was missing. She also corrected page 7, line 17 and submitted other small changes to Mr. Behrendt.

Mr. Germain MOVED to approve the meeting minutes of March 23, 2022 as amended; SECONDED by Mx. Friedrichs; APPROVED 7-0, motion carries.

XIII. Adjournment

Mr. McGowan MOVED to adjourn the meeting; SECONDED by Mr. Germain; APPROVED 7-0, motion carries.

Chair Parnell adjourned the meeting at 9:10 pm.

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Respectfully submitted,

Patricia Denmark, Minute Taker

Durham Planning Board