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AGENDA ITEM:

DATE: January 13, 2020

COUNCIL COMMUNICATION

INITIATED BY: Michael Behrendt, Town Planner

AGENDA ITEM: **REQUEST FROM MARTI AND MICHAEL MULHERN TO USE A TOWN RIGHT OF WAY SITUATED AT THE END OF GERRISH DRIVE FOR A NEW ROAD TO PROVIDE ACCESS TO A PROPOSED SUBDIVISION**

CC PREPARED BY: Michael Behrendt, Town Planner

PRESENTED BY: Michael Behrendt, Town Planner
Mike Sievert, MJS Engineering, for the applicant
Sharon Somers, Attorney with Donahue, Tucker, and
Ciandella

AGENDA DESCRIPTION

Marti and Michael Mulhern own a lot with the address of 91 Bagdad Road - Map 10, Lot 8-6. The lot is about 15.6 acres which includes about 2 acres in Madbury. The lot is undeveloped except for a single family house in the southerly portion where the Mulherns live.

The Mulherns submitted a preliminary conceptual application for a conservation subdivision on the lot which would include between 8 and 12 houses. The Planning Board held public hearings on the application on December 11, 2019 and January 8, 2020. The review and hearing has been continued to February 12.

The Mulherns seek to use a vacant right of way owned by the Town of Durham located off Gerrish Drive to build a road to access their site. Because the right of way is owned by the Town, approval from the Town Council is required for its use. The Mulherns have requested action from the Town Council before proceeding further with the subdivision application. They said they do not wish to spend more money on the project without this approval since the project as proposed is dependent on using this access.

- *The request before the Town Council is from Marti and Michael Mulhern for approval to use the vacant Town right of way at the end of Gerrish Drive for a road to provide access to a subdivision on Map 10, Lot 8-6 (The lot is presently addressed as 91 Bagdad Road). The road could be a Town road or a private road depending on which would be approved by the Planning Board. Approval would also include drainage structures and any attendant utilities (including Town water and electric).*

BACKGROUND

Gerrish Drive Subdivision

The Gerrish Drive - Ambler Way subdivision, then called Pine Ridge, was approved by the Planning Board on January 5, 1972. Walter Cheney was the developer. The approved plat includes a right of way extending from Gerrish Drive to the lot now owned by the Mulherns. The right of way is labeled on the plat as "Future Street." It is vacant and wooded and partly wetland. (In a subsequent lot line adjustment from 1997, the right of way is labeled "Unbuilt Town Right of Way.")

Unfortunately, we do not have a copy of the approval notice for the Gerrish Drive - Ambler Way subdivision nor the minutes of the Planning Board when it was approved (we have records extending back to the 1950s but the board minutes from 1971 and 1972 are missing).

Inclusion of this kind of right of way, also called a *paper street, stub, spur, or reserve strip*, as part of a subdivision, is fairly common practice when there is a vacant potentially developable adjacent parcel. Subdivision regulations or planning boards can require (or at least negotiate) dedication of the land to allow for connection to a future subdivision because the adjacent parcel may be landlocked and because interconnectivity can enhance a broader sense of community (though it could be argued otherwise) and provide additional emergency access.

The present Subdivision Regulations do not include any reference to this kind of right of way but the Subdivision Regulations in effect at the time had various references to reserve strips (See section below). Without the board minutes we do not know what discussions there may have been about the reserve strip that was part of the Gerrish Drive subdivision.

A number of residents in the 23-house Gerrish Drive - Ambler Way subdivision have expressed concern about and opposition to the use of the right of way for this project because of drainage, wetlands, and open water within and near the right of way; traffic from the project; and change in character of the open space on the subject lot. A number of neighbors will likely speak to the Town Council at the January 13 meeting about the request.

You can see the documents related to the proposed subdivision, including emails and letters from several concerned neighbors, at this link:

https://www.ci.durham.nh.us/boc_planning/conceptual-consultation-91-bagdad-road-subdivision

Maps and Other Documents

**See the maps at the bottom.* Also, the following documents are included in this packet:

- 1) An email from Marti Mulhern to me formally requesting use of the right of way for a road.
- 2) Approved plat of the subdivision dated January 5, 1972. The future street is shown at the upper right.
- 3) 1971 letter from Walter Cheney.
- 4) 1971 memo from Henry LeClair, Public Works Director at the time.
- 5) A preliminary design for the road within the Gerrish Drive right of way prepared by Mike Sievert, design engineer for the project. The vertical stone wall in the middle is the westerly boundary of the subject parcel. The bold blue lines demarcate the edges of wetlands. The wetland in the right of way is located to the left of the blue line. You can see the northeasterly corner of Gerrish Drive and Ambler Way at the far left.
- 6) Preliminary Site Analysis Plan. This plan prepared by Mike Sievert shows the subject parcel in green, wetlands in blue, and the planned building area in white (ledge is shown in red). The three access ways (See below) are shown in shading: Gerrish Drive at the upper left, Dover Road at the upper right, and Bagdad Road at the bottom. The northerly portion of the parcel, shown in light green, is in Madbury.

Water in the Gerrish Drive Right of Way

The westerly 2/3 of the right of way is jurisdictional wetlands. From photographs and videos provided by neighbors it appears that the right of way and adjacent areas are quite wet with running water (at least right now).

If the Town Council approves use of the right of way there would be other related approvals required: a) from NH Division of Environmental Services Wetlands Bureau to fill/alter the wetlands and b) a conditional use from the Planning Board to fill the wetland and cross the adjacent 75-foot wide wetland buffer. The Conservation Commission would provide a recommendation to the Planning Board.

While much of the right of way is a wetland and there appear to be challenging drainage issues in the right of way and on several adjacent private lots, NHDES, the Planning Board, and Conservation Commission will review the proposed road and drainage impacts carefully. NHDES often approves wetland changes to allow for crossings to access developable areas on a parcel. Mike Sievert has presented a preliminary road design and will provide a detailed road design to NHDES and the Planning Board later.

He has stated that he is confident he can develop a design that will meet requirements of NHDES and the Town of Durham though this remains to be seen.

In order for the road to be approved, under the Town's Subdivision Regulations, the design cannot aggravate any existing drainage situation. It is possible that the design would improve the drainage in the area as it would provide ditches and culverts to direct the water away more efficiently. The stormwater makes its way to the east, to an easement on the east side of the Kelley lot (north of the right of way) and the wetland on the Mulhern lot, then north into Madbury to an unnamed tributary of Gerrish Brook, then easterly to Gerrish Brook, then southerly in Johnson Creek, then to the Oyster River. There is no flood zone within the right of way or in the immediate vicinity.

Reserve Strip

The Subdivision Regulations in place when the Gerrish Drive subdivision was approved included the following references to reserve strips:

Definitions. 2.6 Reserve Strip means and includes areas for which future public use is planned or intended, whether for streets, pedestrian ways, recreation or other services.

4.2 Design and Technical Requirements.

B. Streets. (2) Arrangement. The street pattern within the subdivision shall (a) provide for the continuation of the principal streets in adjoining land, and/or (b) correspond in its location and lines with an adopted major street plan or official map, and/or (c) provide for the projection of the principal streets of the proposed subdivision when adjacent land is undeveloped.

C. Inspection. (11) Reserve Strips. No subdivision showing reserve strips controlling access to streets shall be approved unless the land included in such reserve strips has been dedicated to the public use under conditions approved by the Planning Board.

5.2 Reserved Land. In general, no reserve strips controlling access to land dedicated or to be dedicated to public use will be permitted, unless such strips are conveyed to the Town of Durham. Reserve strips of land which may prove to be untaxable for improvements shall not be permitted.

Other Access Ways

There are two other easements leading to the subject lot. See the map at the end. Several neighbors in the Gerrish Drive subdivision request that one of the other access ways be used. However, there are hurdles with these two other access ways.

Dover Road/Route 108. There is an easement leading from Dover Road that is partly on the subject lot and partly on a lot owned by a different party (so it is questionable whether the easement would legally allow for a road in contrast to a shared driveway), part of the easement is situated in Madbury, there is an existing driveway within the easement

servicing several lots, and there are some steep slopes and significant ledge within the easement.

Bagdad Road. There is an easement situated off Bagdad Road at the southerly end. The Mulherns executed a lot line adjustment in 2018 which placed the easement on a different lot which they subsequently sold. Therefore the easement is not available for use now. Several neighbors have stated that the Mulherns elected to convey this easement to another party and therefore created a hardship themselves. (There is a link to the lot line adjustment at the bottom of the link to the current subdivision, above.)

Apart from this point, there are/were several challenges with the prospective use of this easement: a) it turns out, according to Mike Sievert, that the Mulherns never owned the easement area in the beginning though they believed they did when the lot line adjustment was executed, so it would not have been available even without the lot line adjustment; b) use of this access would require a much longer road, with more impact upon the parcel and the open spaces areas, to reach the buildable area of the lot situated in the northerly section; c) the road would need to go either through parts of the large wetland on the lot, through the wetland buffer, or along the easterly edge near some other houses; and d) the road would pass very close to a house at the southerly section of the lot. The Mulherns built this house for themselves in 2006 after they acquired the lot; it was sold after the lot line adjustment.

Marti Mulhern told me that when they bought the lot in 2005 they were thinking of possibly doing a subdivision at some time in the future and assumed they would use the right of way off Gerrish Drive to provide access.

Traffic impacts

Neighbors have expressed concern about traffic impacts from a new subdivision. The Planning Board will likely require a traffic study at the appropriate time. Mike Sievert offered these preliminary estimates:

"According to the latest Institute of Traffic Engineers, (ITE) Trip Generation manual for traffic generation from residential developments, this proposed development of 8-12 units will generate between 6 - 9 average vehicle trip ends in the peak AM hour, and 8 - 12 average vehicle trip ends in the peak PM hour."

If there are some or all senior units there would likely be fewer trips at peak times. One advantage of the layout of the Gerrish Drive subdivision is that traffic could be distributed with some vehicles coming from Bagdad Road likely using Ambler Way and some vehicles heading toward Bagdad Road likely using Gerrish Drive.

Proposed project

A drawing at the end shows a proposed design. This is very much subject to change as the design is refined during the subdivision review. A conditional use would also be needed for placement of a road in the developable area within the 75 foot buffer. The

applicant proposes a private road with one or two legs in the subdivision and a Town or private road leading from Gerrish Drive.

There would be 8-12 privately owned houses, possibly including a few duplexes. The applicant is considering making some or all of the houses for seniors (55+). There would not be individual lots but the site would remain largely unsubdivided and owned and maintained by a homeowners association. There might be some kind of limited common space around each house controlled by the homeowner. The applicant proposes what is called a "pocket neighborhood."

Town Attorney's guidance

Laura Spector, Durham Town Attorney, offered comments in response to my request for guidance. Comments from the Town Attorney are ordinarily confidential but the Town Administrator has authorized sharing pertinent excerpts here. From the Town Attorney:

"...The council can't act in a manner that is arbitrary. This particular piece of property was deeded to the town to be a street...The fact that the developer did a lot line adjustment which affected access to the property isn't something that the council can take into consideration. The only question is whether this parcel can be used as a road, as it was originally intended to be.

"...The wetlands and open space issues are not something the council should consider. Really, the issue for the council is whether this 'should' be a road. While that seems to imply a lot of discretion, unless the existing Gerrish Drive or Ambler Way are roads which cannot safely accommodate the traffic that is anticipated to be created by this subdivision, I don't see a rational basis on which to deny the request to construct what was always intended to be a street...The mere fact that the abutters would prefer not to have that additional traffic is not a consideration for the council in making this decision.

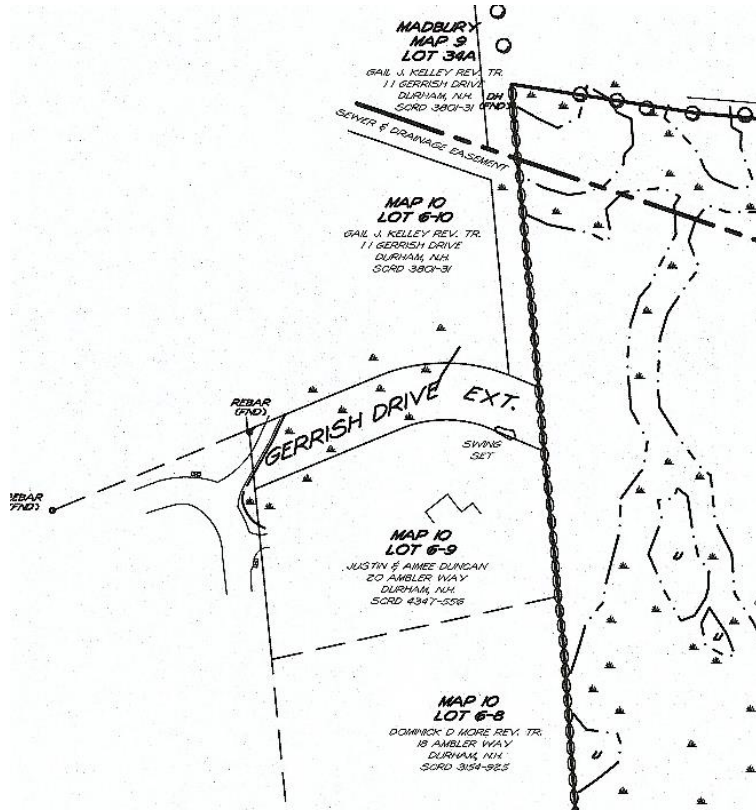
"If the council does feel that the existing Gerrish Drive and/or Ambler Way need to be improved to accommodate this traffic, it can, of course, require that as a condition of approval of the road construction. The planning board will also review that issue, and even if the council does not require such upgrades, the planning board may do so if it determines they are necessary..."

"...It's up to the Council whether or not to grant permission to build the road. But the planning board has to consider whether the spur road, along with the existing road network, will be sufficient to accommodate the expected traffic from the subdivision..."

Maps and images

See the maps and images below.

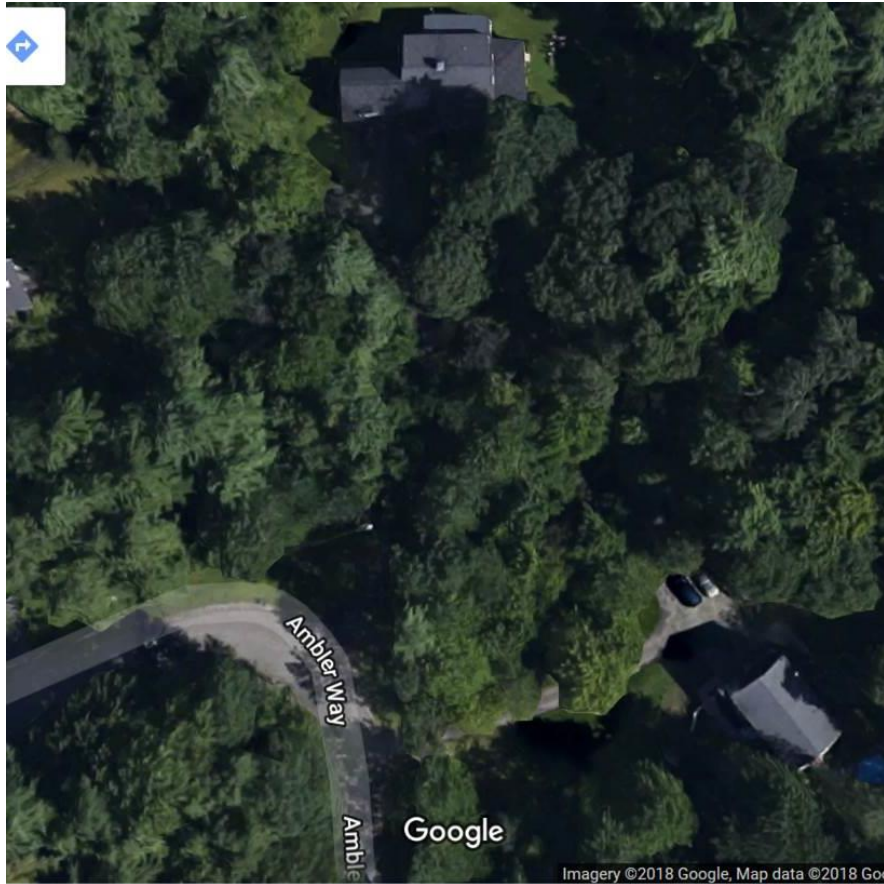
The westerly 2/3 of the right of way, "Gerrish Drive Ext.," is a wetland (2017 plat):



Preferred option for the subdivision layout at this point:



Aerial photo of right of way. Kelley house at the top and White house at lower right



Looking due east toward spur (It's much wetter now):



AUTHORITY:

The right of way is owned by the Town.

LEGAL OPINION:

Pertinent comments from the Town Attorney are included above.

FINANCIAL DETAILS:

N/A

SUGGESTED ACTION OR RECOMMENDATIONS:

In response to the request, the options for the Town Council include:

- 1) Approve the request, i.e. allow the applicant to use the Town right of way at the end of Gerrish Drive for a new road (whether Town or private) including drainage structures and any attendant utilities to access their property for a subdivision. The Town Administrator would coordinate to provide the appropriate documentation (If the road is private an easement from the Town would likely be needed).
- 2) Approve the request with conditions (including language in 1, above). The right of way could not be used without subdivision approval from the Planning Board.
- 3) Continue the discussion to another meeting. The Town Council could schedule a site walk of the right of way if desired though the area is presently covered in snow.
- 4) Deny the request. If the request is denied the Town Council should include clear reasons for the decision.

MOTION:

The Durham Town Council does hereby...