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**Town Planner's Project Review**  
**Wednesday, May 27, 2020**

- VII. **Public Hearing - Subdivision off Gerrish Drive**. Parcel at 91 Bagdad Road (address). Preliminary design review application for conservation subdivision for houses on 16-acre lot off Gerrish Drive. Marti and Michael Mulhern, property owners. Mike Sievert, engineer. Robbi Woodburn, Landscape Architect. Map 10, Lot 8-6. Residence B District.
- I recommend that the board hold the hearing and continue the review to June 10. The board can keep the hearing open or close it (since another hearing will be held at the formal stage).

Please note the following:

- 1) Town Attorney. Given a number of issues that have arisen I recommend that the Planning Board (and Conservation Commission) meet with the Town Attorney soon, during this phase, to better understand the parameters of its review. How does the applicant's interest in developing their land and obtaining access to it weigh against potential environmental impacts and concerns of neighbors? Meetings with the Town Attorney are closed to the public.

I spoke with the Town Attorney recently and posed a number of questions to her. She clarified that in order for the Planning Board to deny any application, the board would need to find that the application fails to meet specific requirements in the zoning ordinance and subdivision regulations. I mention this because of the numerous concerns that have been expressed.

- 2) Design review phase. I recommend that this phase continue beyond the May 27 public hearing as discussed above and so that all parties have a better sense of what to expect in the final phase.
- 3) Conditional uses. Conditional uses will be needed for wetland impacts in four locations. Planning Board approval is needed both to fill or alter a wetland and for activity within the 75 foot wetland buffer. Approval from NHDES is needed to fill or alter a wetland but not for activity adjoining wetlands. See comments about each of these four elements below.
- Wetland in Town right of way ("Future Street")\*
  - Stream and wetland crossing on the parcel\*

- Locating the private road in the buffer\*
  - Filling part of the wetland finger\*
- 4) Wetland in Town right of way\*. This seems to be the issue that has drawn the most attention. It will be helpful for the Planning Board to separate the pertinent elements in order to evaluate this issue clearly.
- *Stormwater quantity*. The regulations do not permit making conditions worse on any neighboring property or other sites, or to unduly tax downstream drainage structures, especially regarding peak flows.
  - *Stormwater quality*. The regulations do not permit degrading the quality of the water than runs off. Is there sufficient treatment in the design?
  - *Future flood events*. Are the requirements and the design sufficient to address potential/likely future flood events due to climate change? How should this question be addressed?
  - *Impacts on wetland*. Clearly, the plan would substantially change the wetland. Virtually all of the portion of the wetland situated within the right of way would be converted to a road and swale. How would the proposed changes impact the remaining portions of the wetland located outside of the right of way? It will be important to see the functions and values analysis (See below). If the wetland were found to be of exceptional quality and importance how should that affect the board's review? This should question should be posed to the Town Attorney.
  - *Impacts on and disruptions to neighbors from changes to wetland*. What are the pertinent concerns here both during construction and after completion of the road and the subdivision?
  - *Proposed design*. The board will need to examine all aspects of the proposed design – the road, the swale, the culvert, the retaining wall, proposed plantings – and determine if the design is appropriate and if there are changes that would mitigate impacts upon the wetlands, stormwater quantity and quality, and the neighbors.
- 5) Conditional use criteria. It would be helpful before closing this phase to have a discussion of the 8 general and 4 specific conditional use criteria and the overall plan to get a sense of how the project stands now and the issues and challenges that will need to be addressed in the next formal phase. Before doing that, it would be helpful to discuss these criteria with the Town Attorney for guidance in applying them to the project. Note that the 8 general criteria apply to work proposed in the wetland and buffers not to the project in general (For example, criterion 8 refers to fiscal impacts. It is unlikely that building within a buffer would have a fiscal impact so this criterion would probably be not applicable, though the project itself might have some fiscal impact).

- 6) Character of wetlands. Mike Sievert plans to provide a functions and values analysis of the wetlands that would be impacted by the project. I believe this analysis will be conducted by Mark West, the wetland scientist hired by the applicant.
- 7) Stormwater requirements. Mike Sievert has provided a plan which will be fully designed in the formal phase. The regulations require that runoff be collected and detained in order to not increase peak flows in downstream drainage ways, that it be directed in order to mimic predevelopment patterns as much as possible, and that it be treated to minimize impacts to water quality. What additional information would be useful for the Planning Board to have now to facilitate a productive review of the project? April Talon, Town Engineer, will review the formal plan and provide comments.
- 8) Outside review. I recommend that the Planning Board hire an outside consultant to review this project. April Talon, Town Engineer, suggested to me that the consultant review the stormwater management plan for the project. Since the plan won't be developed until the formal phase this review would be conducted at that time. The consultant would be hired by and work for the Planning Board but the applicant would pay their fee. Would this be the appropriate scope for an outside review? Note that the board can require any outside review but it must be very thoughtful in determining the scope of the review.
- 9) Conservation Commission. At the appropriate time, the Conservation Commission will make a recommendation to the Planning Board on the 4 specific criteria (not the 8 general criteria). While the mission of the commission is certainly to protect environmental resources, the Town Attorney said to me that, in its review of the conditional uses it must be guided by the language of the four criteria. Regarding the overall subdivision the commission may offer any comments that it wishes.
- 10) Petition regarding wetlands. Numerous neighbors submitted a petition to the Town Administrator on January 17 requesting that the Durham Zoning Administrator hire an independent wetland scientist to clarify the extent of the wetland in the Town right of way ("Future Street") pursuant to Section 175-66 in the Zoning Ordinance. The petition says the area is not designated as a wetland on "Durham's wetland map." I am not sure which map is being referred to. Most of the right of way is a wetland and is shown as such on the applicant's plans. Under Section 175-66 the specific task is the delineation of the wetland. The cost for the review would be borne by the petitioners unless otherwise decided by the Planning Board. I question if the petitioners really want to pursue the delineation since the area is shown largely as wetland. *The petitioners should clarify whether they want to proceed with this request.* I infer that their concerns relate to other matters.
- 11) Town Council decision. Once again, the Town Council approved use of the Town right of way ("Future Street") at a meeting on January 13 with this motion: "Councilor Howland MOVED that without endorsing this project, the Town Council approves the applicants' request to utilize the Town right of way at the end of Gerrish Drive for a new road, including drainage structures and any attendant utilities to access their

property for a subdivision, subject to approvals, conditions of the Planning Board, NHDES, and other applicable government bodies in accord with Town regulations, local ordinances and state law.” Councilor Corrow SECONDED the motion and it PASSED 5-1, with Councilor Burton voting against it.”

- 12) Drainage at Gerrish and Ambler. Public Works has spoken with Mike Sievert about potentially reconfiguring some of the drainage patterns in the area. The area being discussed is upgradient from the subject project and an existing condition so this would probably not be required of the applicant. But there might be some improvements - whether done by the Town, the applicant, or both - that would be in the interest of all parties.
- 13) Stream and wetland crossing on the parcel\*. This is the second wetland crossing. A stream conveys water northward. The area is fairly steep. Mike Sievert discussed with the Conservation Commission at the site walk possibly including a partial bridge or a large arch or box culvert to accommodate the water flow and movement for animals.
- 14) Locating the private road in the buffer\*. The proposal includes placing the southerly private road, some individual driveways, and drainage structures within the 75 foot buffer (no houses are within the buffer). These uses are allowed by conditional use. Keep in mind that the purpose of the wetland buffer is to protect the wetland from adverse impacts of nearby development. Typically, there is sheet flow off nearby development and the 75 foot buffer is thus needed for significant treatment. *If Mike Sievert can demonstrate that the runoff will be effectively treated before entering the wetland then I recommend this conditional use be approved.* By locating the road partly in the buffer a greater area is provided for a green. Keeping the road outside of the buffer would reduce the size of the green and adversely affect this important element of the project. Again, if the runoff will be effectively treated then this design is appropriate and is desirable to enhance the quality of the project for future Durham residents. The design is still underway. There may still be adjustments that enhance the layout of the roads, houses, and green, and minimize environmental impacts.
- 15) Wetland finger\*. We looked at the wetland finger during the Conservation Commission site walk. It is a shallow drainageway and does not appear to have significant value beyond that. Mark West stated at the site walk that he initially questioned whether it was a wetland but then concurred on closer examination of some details. Assuming that NHDES would approve partial fill of the wetland finger, I strongly recommend approval of the conditional use to fill this finger. It appears to have very limited environmental value which can be replicated under the drainage plan. The impact of buffers around a wetland finger is extensive, perhaps unduly so, because the buffer surrounds the narrow finger on three sides. *Again, assuming the functions and values report shows this finger to not have significant environmental value, then it should be filled to accommodate a superior site plan.*
- 16) NHDES. The New Hampshire Division of Environmental Services will review the application to fill the wetland in the Town right of way, the second crossing on the parcel (if the wetland is filled or altered), and the wetland finger. NHDES will also

review the stormwater management plan as part of the Alteration of Terrain application (applicable to projects that disturb more than 100,000 square feet of land). The requirements for the AOT are demanding. Any approval by the board would be conditioned on the NHDES approvals. Mike Sievert has met with NHDES. It would be helpful if Mike Sievert could obtain preliminary comments from NHDES about the project for the board's consideration but that may not be possible. He said that he is keeping NHDES informed of the project as it moves along. The Town's review, of course, is entirely separate from the NHDES review.

- 17) Town sewer. The plans now call for several group leach fields but the applicant has been exploring connecting to Town sewer. This is strongly encouraged. The applicant would need to extend the sewer from the current terminus at Sumac Lane and Canney Road. It would run down Gerrish Drive into the site. The line would likely include stubs for future connection for each lot along Gerrish Drive. The entire sewer extension would have to be paid by the applicant. I have spoken with Public Works and the Town administrator and this is the process that the Town (and most municipalities) follows. There would be no reimbursement of tie in fees from abutting lots. This would be a 2-4" pressurized line so for abutting lots to tie in they would need a septic tank to retain solids and the liquid would be pumped into the line. So they could abandon their leach fields. The process for tying in would need to be addressed but it is likely that abutters would be required to tie in at their own expense when their leach field fails. I believe the cost for tying in would be significantly less than that for installing a new leach field, in most cases. Connecting to the sewer system would be better environmentally than using the proposed leach fields for the project. The applicant is still looking at costs for the sewer.
- 18) Town water. The project will be connected to Town water.
- 19) Environmental impacts downstream. The question was raised whether this project would have adverse impacts downstream, to Gerrish Brook, Johnson Creek, the Oyster River, and Great Bay. If there are group leach fields then we will want detailed information about potential impacts from the leach fields. If the project is connected to Town sewer it seems unlikely that a small subdivision like this built to Town and State stormwater standards would have significant downstream adverse impacts. Nonetheless, the question of nitrogen loading downstream should be addressed.
- 20) Trees to be removed. Some have criticized the plan for the number of trees that would be removed to accommodate the road. Trees must be removed when a new road is installed. A Planning Board can specify changes in the location and layout of a road to preserve trees and proper erosion and sedimentation control must be incorporated but a subdivision cannot be denied because trees will be removed to accommodate the road.
- 21) General plan. There are numerous complex components to preparing a conservation subdivision plan. The general plan (apart from the ongoing questions about wetlands and wetland buffers) appears to meet the requirements. Substantial open space will be preserved in perpetuity as required in the regulations. The building area seems to be located in an appropriate section of the parcel. I have not heard concerns about the

general plan and conformity with the requirements. *What improvements might be made in the plan? What balanced measures could be taken to reduce environmental impacts?*

- 22) Green. The central green is an essential component in a pocket neighborhood. The design looks attractive and will be detailed further in the next phase. It is important for a pocket neighborhood for much, if not all, of the central green to be landscaped rather than preserved as natural woods (except for existing specimen trees and difficult topographic sections). This is the central area for the residents and should be open and accessible for use and gatherings. The large remainder of the parcel will be preserved in perpetuity as natural woods (except for forest management to be discussed in the formal phase). The landscaping plan for the green will be refined in the formal phase. Appropriate conditions/restrictions can be placed on the type of vegetation planted and use of fertilizers, pesticides, and herbicides. These restrictions could also be made to apply to private areas around the houses.
- 23) Architectural standards. I strongly encourage the applicant and the Planning Board to incorporate architectural standards into the project. The applicant appears to be receptive to doing this and has been researching various approaches. Given the tight developable area and the goal of creating a pocket neighborhood (a design approach now widely touted across the country), establishing standards, including limitations on the sizes of the houses and location of the houses, will significantly enhance the quality of the plan.
- 24) Impacts on neighbors. If the project goes forward appropriate measures will be needed to minimize/mitigate impacts on neighbors both for the construction process and for the presence of the new road (such as installing vegetation or fencing to buffer the road).
- 25) Adjusting road location. Mike Sievert has spoken with direct abutters about possibly relocating a section of road within the Town right of way onto the Kelley property to the north. The parties will let us know if they agree to something.
- 26) Traffic impacts. Steve Pernaw, the applicant's traffic consultant prepared a traffic study which is on the Town's website for the project. He noted, "This table shows that the proposed residences are estimated to generate approximately 4 vehicle trips (1 arrival, 3 departures) during the weekday AM peak hour, and 6 vehicle-trips (4 arrivals, 2 departures) during the weekday PM peak hour. It should be noted that site traffic will be immediately dispersed at the site entrance as one group will utilize Gerrish Drive for access and the remainder will utilize Ambler Way, depending upon the driver's origin or destination."
- 27) Roads. We have talked with Mike Lynch, Public Works Director, and he thinks it makes sense for the main road going to the site to be a Town road. The two roads branching off from there would be private roads owned by the Homeowners Association. All of the infrastructure would be built by the applicant but the Town would then take over the main road and the drainage and utilities along there. I think that is a good approach. The Planning Board (as part of the subdivision) and Town

Council would need to approve this being a Town road. Any part of this section would need to allow for low maintenance. The junction with the two private roads would need to be configured to allow for a turnaround for a garbage truck and a plow truck. I understand that the subdivision would have to provide for its own garbage pickup rather than bringing garbage to the Town road.

- 28) Madbury section. The current plan shows one of the private roads partly located in Madbury. Is approval from the town required?
- 29) Other access to the parcel. There has been discussion about two other accesses into the subject parcel. The access from Route 108 includes an easement across another lot. This access does not appear to be workable because it is questionable whether the easement would legally allow use for a road and a subdivision, the owner of the land stated his objection, there are several other driveways using this access, and Mike Sievert has pointed out significant topographic obstacles. The access from Bagdad Road does not allow access now so that is not a possibility. The applicant earlier believed that they owned the access and the use of it was precluded by a lot line adjustment that they executed in 2018. It turns out that they did not own it. Several parties have referred to the lot line adjustment as a self imposed hardship. Mike Sievert has stated that he thinks this access would not be desirable, even if it were usable, due to the greater distance to the developable portion of the parcel and impacts on wetlands. *The board should ask the Town Attorney whether this issue comes into play in consideration of the proposal.*
- 30) Existing house. There is an existing house on the subject parcel at the southerly end, where the applicant lives now, that is accessed via an easement from Bagdad Road. I would encourage the applicant to apply for a variance (needed because the lot would have no frontage) now to subdivide that house from the main parcel. It would be simpler to organize the homeowners association without that house which is entirely separate from the proposed project. Plus, it would be less burdensome for the owners of that house to have their own lot.
- 31) Dartmouth v Hanover. On another matter I was referred to the case of Dartmouth v. Hanover, decided by the New Hampshire Supreme Court, November 6, 2018. These two findings are always instructive:
  - Planning Boards cannot rely upon lay opinions and anecdotes refuted by uncontroverted expert evidence.
  - Planning Boards cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings.