



**TOWN OF DURHAM**  
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***Town Planner's Recommendation***  
**Wednesday, November 10, 2021**

- IX. ***Public Hearing - Subdivision off Gerrish Drive***. Parcel at 91 Bagdad Road (address). Application for conservation subdivision and condominium for single family and duplex dwellings (18 units total) on 16-acre lot off Gerrish Drive including conditional use for wetland crossings. Marti and Michael Mulhern, property owners. Mike Sievert, Horizons Engineering. Robbi Woodburn, Landscape Architect. Mark West, Wetland Scientist. Map 10, Lot 8-6. Residence B District.
- I recommend the board approve the project making any adjustments in the draft notice of decision, below, that are needed.

Please note the following:

- **Waivers**. The approval includes a number of waivers specified below.
- **Revisions**. Mike Sievert incorporated numerous changes to the plans and Sharon Somers incorporated numerous changes to the Declaration that I had suggested in the prior draft notice of decision. Accordingly, I removed all of those precedent conditions which are now incorporated. [I included a note below several items like this where the board needs to discuss an item.]
- **Madbury Planning Board**. Eight conditions have been incorporated into this approval under *Madbury Planning Board*, below, as requested.
- **Requirements**. See condition 41 which I added. Note that numerous terms which are intended as requirements of this approval are incorporated into the Declaration. However, the Declaration is a private document and the Town cannot enforce the Declaration. Therefore, we either need to include in this notice any specific requirements or rely upon this general condition. I will speak with the applicant and their attorney prior to the meeting to see if they have any thoughts about this issue.

**\*Draft\***

**NOTICE OF DECISION**

**Project Name:** Gerrish Drive Subdivision  
**Action Taken:** APPROVAL  
**Project Description:** 18-unit conservation subdivision  
**Address:** Off Gerrish Drive. Property address of 91 Bagdad

**Property Owner:** Michael and Marti Mulhern  
**Engineer:** Mike Sievert, Horizons Engineering  
**Map and Lot:** Map 10, Lot 8-6  
**Zoning:** Residence B  
**Date of approval:** **November 10, 2021**

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[Office use only. Date certified: \_\_\_\_\_ Register of Deeds received? \_\_\_\_\_  
As built received? \_\_\_\_\_ Surety returned? \_\_\_\_\_ ]

"Applicant", herein, refers to the property owner submitting this application and to their agents, successors, and assigns and to the subsequent association, as appropriate.

### **PRECEDENT CONDITIONS**

All of the conditions below must be met by the applicant prior to the plans being certified by the Town Planner. Certification of the plans is required prior to recording of the plans. No dwelling unit or land unit may be conveyed until the plans are recorded. Once these conditions precedent are met, and the plans are certified the approval is considered final.

Please note. If all of the precedent conditions are not met within one year to the day of the board's approval - by November 10, 2022 (or as extended) - the Planning Board's approval will be considered to have lapsed. Extension(s) may be granted by the Planning Board for reasonable cause. *It is the sole responsibility of the applicant (or their agent) to ensure that the precedent conditions are met by this deadline.* See RSA 674:39 on vesting. *No changes to the plans that were reviewed and approved by the Planning Board on October 27 may be made except for the specific required changes that follow.*

**Changes to plans.** The following changes shall be made to the plans.

- 1) Change name of street on sheet C101 if a different street name is designated.
- 2) Clarify on the landscaping plan which plant images go with which plant names. The lines connecting the two are faded.

[This is still not clear on sheet L100.]

- 3) Show the road name on the plans when it is determined. Submit application to the Fire Department for approval by the Town Council. (The Fire Department and Town Administrator recommend it be Gerrish Drive as suggested by E911.)
- 4) Show the full land unit lines for duplexes on Sheet C104 (shown at the end of the Declaration but not the subdivision drawing).

[These are still not shown on Sheet C104 nor on the utility plan.]

- 5) Addressing. Proposed street numbers are shown on the plan. Obtain approval from the Fire and Police Departments for numbering scheme.
- 6) Obtain new Assessor's Map and Lot #'s from the Assessing Office and show on each dwelling unit
- 7) Additional drawings. Submit the full plan set together including all appropriate drawings (off site sewer plan, etc.)

**Notes on plans**. The following notes shall be added to the plans on the appropriate page (generally the overall site plan page)

- 8) House layouts. Clarify this note. It states there must be 20 feet between houses.
- 9) Septic systems. The septic systems shall be located within the land unit serving each dwelling unit unless the Building Official determines that it is not practical for any given unit as part of the building permit process."

[The applicant said this condition is not acceptable. The board should discuss this. Now, all of the septic tanks *are* shown within the land units. The purpose of this provision is to allow for flexibility rather than requiring that they be installed exactly where shown on the plans (Sheet C101)

**Changes to the Declaration**. The following changes shall be made to the condominium declaration. Submit the final revised declaration to the Planning Department.

- 10) Exhibits. Include all exhibits and appendices (may reference for long documents such as the drainage plan).
- 11) Confirmation of senior occupancy. The applicant or Association once established shall submit a notarized statement annual attesting that the development is in compliance with the occupancy conditions for seniors (specifying that each unit has at least one resident over 55 years of age or as otherwise specified in the declaration).

[This condition was added but it does not say annually. It should be submitted annually recognizing there will be exceptions, such as when the older person dies or gets divorced, when there will not be somebody over 55 for a limited period of time.]

- 12) Under Article 18 – Amendments, include Articles 4, 5, 7, 12 and 13 along with Articles 10 and 11.

[There are provisions in those articles that should not be changed without Planning Board approval.]

- 13) Under Article 7, Section 9 change “easement” to “assessment.”

**Other precedent conditions**.

- 14) Revised drainage plan. In regard to the revised subdivision plan and accompanying revised drainage report, and to ensure continuity with the prior 3<sup>rd</sup> party review as well as consistency with the Town's stormwater regulations, the changes should be reviewed by the previously hired third-party reviewer to determine whether they are substantial enough to require a complete review. These changes shall be subject to the terms and conditions of the third-party reviewer. Any significant concerns shall be presented to the Planning Board for review.
- 15) Construction Surety. The applicant shall post an acceptable surety in an amount to be approved by Durham Public Works and a form to be approved by the Business Manager. The surety shall be in an amount sufficient to ensure the completion of all roads, water service, sewage disposal, drainage, electric lines, erosion control, mail kiosk, and other infrastructure/improvements. The surety shall remain in place until the work is satisfactorily completed. The surety may be released in phases as portions of the secured improvements are finalized.
- 16) Quality Guarantee. The applicant shall post an acceptable surety in an amount to be approved by Durham Public Works and in a form to be approved by the Town Business Manager to guarantee that all site work is installed in a correct and workmanlike manner. The surety shall be in an amount of two percent of the estimated site improvement costs or as determined by Public Works and shall remain in effect for two years after site improvements are completed. If repairs or reclamation are subsequently needed and are not satisfactorily installed by the developer, then the surety may be used to complete/install the improvements. A cash deposit or letter of credit is an acceptable form.
- 17) Construction management plan. The construction management plan shall include a strategy for protecting trees if it is not already included. The applicant shall obtain approval from Public Works for the plan. Significant changes shall require approval from the Planning Board.
- 18) Strategy for road construction. Submit a strategy to be approved by Public Works laying out the process and timing for placing the top course of pavement. At a minimum, no certificate of occupancy will be issued until the base course of pavement and all necessary infrastructure is in place. The top course must be placed prior to issuance of the certificate of occupancy for the last house (or within a short time afterward if approved by Public Works)
- 19) Right of way. The Town Council shall resolve how the right of way adjacent to Gerrish Drive will be handled, whether the land will be conveyed to the applicant/future association or an easement will be established with the Town for use of the right of way for the private road.

- 20) Oversight of infrastructure. The applicant must hire an engineer to oversee construction of the road and infrastructure to ensure that it is built properly (See pertinent general condition). As a precedent condition, the applicant must submit a program outlining which inspections will occur and information about the engineer who will provide the reports, if available.
- 21) Electric connection. The connection of the new line to an existing service needs to be shown on sheet C104. Will there be a transformer at this location? If so, it must be optimally located and screened.
- 22) Condominiums. Per RSA 356:A a signoff from the New Hampshire Attorney General is required prior to the sale of any condominium units (required for projects which involve 15 or more units)
- 23) Mail kiosk. The location of the mail kiosk is shown on the plans. Obtain approval from the Post Office on final location, design, and operation.
- 24) Land units. Provide appropriate survey or reference showing precisely where the boundaries for the land units are located. (Readily discernible monuments must be placed at all corners of land units after construction of each dwelling unit, or after all units are completed).
- 25) Deeds and private road. Submit a draft deed to the Planning Department for approval of form with this note shown prominently. The note must be included on all deeds. **“Private road.** The entirety of the road serving this subdivision starting from the juncture of Gerrish Drive and Ambler Way is a private road, to be owned and maintained by the condominium association. The Town of Durham does not maintain this road nor pick up trash or recycling for the residents of the subdivision.”
- 26) Kelley property. Finalize with Gail Kelley and Andrew Merton how their driveway will be designed, i.e. whether they approve making changes on their property. If they do not grant approval, then show the optimal layout on the plans. Provide an easement for the owner to use the private road and to do so without any contribution toward its maintenance.
- 27) NHDES Alteration of terrain. Obtain approval from New Hampshire Division of Environmental Services for the alteration of terrain. Any significant changes to the plans as approved by the Planning Board shall be submitted to the Planning Board for review. No notices or public hearing shall be required (unless otherwise stipulated by the Planning Board).
- 28) NHDES Sewer Connection Permit. The applicant shall submit a wastewater connection permit application to the New Hampshire Department of Environmental Service Wastewater Engineering Bureau and submit a copy of the approval to the Planning Department.

- 29) Utility connection. A utility connect permit application with necessary plans and specifications shall be submitted to DPW for review and approval by the Town in accordance with the Durham Water and Wastewater ordinances.
- 30) Electric service approval. Obtain written confirmation from Eversource Energy that the plans for electric service to and on the site are acceptable.
- 31) Deeds and easements. Submit all draft deeds and easements to the Town for review and approval.
- 32) Sewer connections. The applicant will build the new sewer line in Gerrish Drive. Abutters along Gerrish Drive will be able to connect to the sewer line at their own expense now or in the future. The applicant shall coordinate with the abutters now prior to construction of the sewer line. At the option of any abutter, they may pay the cost for installing a stub into the new line to allow for future connection. The applicant will include such stubs in the road where payment has been secured or appropriately guaranteed in order that the applicant be reimbursed for this cost.
- 33) Signatures. The applicants must sign this notice at the bottom acknowledging and accepting all of the terms of this Notice of Decision.
- 34) Final drawings. The following complete sets of final approved drawings shall be submitted for signature (except the electronic version) by the Town: (a) two large sets of black line drawings (one to give back to the applicant when signed); (b) one set of 11"x17" drawings; plus (c) one electronic version by pdf. Each individual sheet in every set of drawings must be stamped and signed by the engineer responsible for the plans.

### **SUBSEQUENT CONDITIONS AND GENERAL TERMS**

These conditions apply after the plan is certified. Other items are general terms.

#### **Conditions to be met prior to commencing site work**

- 35) Site work. No significant site work (including any significant clearing of the site) or ground disturbance may be undertaken until:
  - a) all of the conditions precedent are met;
  - b) the preconstruction meeting with Town staff has taken place (Contact Michael Behrendt, Town Planner, to arrange for the meeting);
  - c) limits of clearing have been established in the field and approved by the Public Works Department; and
  - d) all appropriate erosion and sedimentation control structures are in place.

These erosion and sedimentation control measures and designation of the limits of clearing must be in place prior to the pre-construction meeting in order that they may be inspected at the meeting.

**Conditions to be met prior to issuance of building permits and/or certificates of occupancy**

- 36) No certificates of occupancy shall be issued until the base course of pavement and necessary infrastructure is properly installed. With the surety in place the Public Works Department may approve issuance of certificates of occupancy for one or more units provided the department determines that the subdivision may operate property for a temporary period of time without particular components completed.
- 37) Easements. All necessary easements shall be properly recorded at the Registry prior to issuance of the 10<sup>th</sup> certificate of occupancy.
- 38) Wall details. The applicant's engineer has provided a retaining wall and footing design details, roadway typical sections for road construction including through the wetland, and culvert details for the wetland/stream crossings. The applicant's engineer shall be required to provide complete designs of these plan elements stamped by a NH Professional Engineer in each appropriate discipline to include geotechnical, structural and civil. These should be requirements by the Planning Board, included in the Conditions of Approval, and required prior to the commencement of construction.
- 39) W/S easement. The applicant shall grant a water and sewer utility easement within the private road portion of the subdivision of adequate width for the purpose of access and maintenance to all underground service connections and water infrastructure (piping, valves, etc.).

**General Terms and Conditions**

- 40) Recording. The plat and this notice of decision (per RSA 676:3 III), must be recorded at the Strafford County Registry of Deeds within 30 days of when the plat is certified. Failure to comply with this requirement herein shall render the subdivision null and void.
- 41) Conditions in Declaration. Various conditions of this subdivision/condominium approval are expressed in the condominium Declaration, in Articles 10, 11, 12, and 13, in particular, rather than in this notice herein. Those elements that are integral to this project, consistent with the intent of this approval, and matters of interest to the Town – for example, the setbacks for units described in Article 13 - are considered to be conditions of this approval. The Planning Board shall make the determination in any case where it is not reasonably clear whether or not a particular provision is thereby considered to be a condition of this approval.

- 42) Oversight of construction. A qualified engineer shall be on site for all other aspects of the site work including stormwater management and roadway related infrastructure construction. The engineer shall verify construction is in accordance with design plans and submit field notes and inspection reports to the Department of Public Works on a schedule as agreed upon by the qualified engineer and Public Works.
- 43) As-built drawings. One set of full size, one set of 11” x 17”, and one electronic copy of as-built (“record”) drawings of all buildings, structures, infrastructure, utilities, drainage structures, roads, parking areas, and other pertinent elements shall be provided prior to returning the surety for the as built. The plans shall be stamped and signed by the Engineer or Surveyor and include the following language or comparable: “This as-built drawing substantially conforms with the final plans approved by the Town of Durham Planning Board and certified by the Planning Department except for the following significant modifications: ....”.
- 44) Improvements. All infrastructure and other activity and improvements included in this approval shall be completed within 3 months of issuance of the last certificate of occupancy unless other arrangements acceptable to Public Works are made. A surety shall be retained to guarantee completion of the infrastructure.
- 45) Waivers. The Planning Board approved the following waivers from the Road Regulations: Section 4.01 for minimum right of way width; Section 4.02 for minimum pavement width; Section 4.03 for minimum shoulder width; Section 4.13 for minimum tangent length between reverse curves; Section 4.17 for minimum center line curve radius; Section 4.19 for minimum gutter width; Section 4.20 to install a sidewalk. These waivers were approved after detailed discussion of the appropriate road design recognizing that it is a private road with an anticipated low traffic speed and volume serving a pocket neighborhood. The board also approved a waiver to keep the existing above ground electric for the house located off Bagdad Road (Unit 18). These waivers were granted upon a finding that specific circumstances relative to the subdivision plan or the conditions of the land in the plan indicated that the waivers will properly carry out the spirit and intent of the regulations.

[Mike Sievert questioned if a waiver is needed for the existing house since it is an existing condition. I believe it is needed since the subdivision regulations specify burying existing above ground utilities, but I recommend approval of the waiver as it is an existing condition for a single-family house.]

- 46) Erosion and sedimentation. All erosion and sedimentation control structures shall remain in place and be maintained until vegetation is established and the ground surface is stabilized. Erosion and sedimentation control measures shall be monitored by the applicant on a periodic basis during construction and any deficiencies shall be corrected as soon as possible.

- 47) Tracking form. Applicant shall complete Land Use Development Tracking Form, most recently revised version, utilizing the online Pollution Tracking and Accounting Pilot Project (PTAPP) portal. <https://www.unh.edu/unhsc/ptapp>. This program allows the Town of Durham to track changes in land use and account for pollutant load reductions achieved through various non-point source control projects.
- 48) Trash and recycling. The applicant shall implement the trash and recycling plan as discussed with the Department of Public Works and shall arrange to pick up the trash and deliver recycled material to the transfer station as often as necessary
- 49) Stormwater infrastructure. All stormwater management infrastructure shall be designed and installed in accordance with Design Standards of the Durham Site Plan Review Regulations. The infrastructure shall be owned by the property owner and it shall be operated and maintained by the property owner to protect the quality of on-site and offsite water resources and wetland habitat. Records of the maintenance of the stormwater system shall be submitted to Durham Public Works by December 15<sup>th</sup> of each year.
- 50) School impact fee waiver. A waiver was granted from the school impact fees (Ordinance 75-9 B). This waiver was granted upon a finding that specific circumstances relative to the subdivision plan for the exclusive use of households where at least one person is 55 or older indicate that the waiver will properly carry out the spirit and intent of these regulations. However, the appropriate fee(s) shall be paid for any grade school students who live at the project for whom the Town must provide educational services. Impact fee per dwelling unit: Single family detached: \$3,699; Two-unit structure: \$2,907
- 51) Kelley/Merton property. The owners of Map 10, Lot 6-10, 11 Gerrish Drive, will be able to use the new private road for access without contributing to its maintenance, they will retain their existing street address, and they will continue to receive Town services as their property is considered to lie on a Town road.
- 52) SWPPP. This project proposes to disturb over one acre of existing ground cover and meets other specific requirements related to permit criteria for EPA NPDES compliance. The Contractor is responsible for development and implementation of a Storm Water Pollution Prevention Plan (SWPPP), submission of a Notice of Intent (NOI) to EPA, inspection and maintenance of sediment control measures, documentation of maintenance activities, and submission a Notice of Termination (NOT) to EPA. The Contractor is also responsible to comply with any or all other aspects of current Federal, State and Local storm water or NPDES regulations or requirements.

- 53) Minor changes. Changes to the approved plans may be approved as described in the Planning Board's Rules of Procedures.
- 54) Logging. RSA Chapter 79 - Forest Conservation and Taxation addresses the removal of timber or wood from a property. It is the applicant's responsibility to comply with these requirements. The applicant shall contact the Town of Durham Assessing Office at 868-8064 if Chapter 79 would apply to any intended cut. RSA 79.1 II. (b) (5) states an intent to cut is not required for the removal of up to 10,000 board feet of logs and 20 cords of wood or the equivalent in whole tree chips within a tax year subject to certain requirements.
- 55) Conservation Subdivision. This development was determined to be in compliance with the requirements for conservation subdivisions in the Durham Zoning Ordinance and Subdivision Regulations, regarding density, layout of units, dimensional requirements (The land is owned by the association but allowance was made for individual ownership and control of small land units surrounding each dwelling unit), amount of open space, treatment of open space and other matters. The Planning Board determined, after consulting with the Conservation Commission and the Town Attorney, to not require payment into a stewardship fund nor creation of an executory interest.
- 56) Materials testing. The owner shall obtain the services of an independent engineering materials testing company to test and certify that the materials used to build the road comply with and were installed according to NHDOT Standard Specifications for Road and Bridge Construction.
- 57) Inspections of water and sewer utilities. All inspections for the installation of water and wastewater shall be performed by authorized independent third-party representatives of the Town of Durham as specified by the Durham Department of Public Works. The Developer shall reimburse the Town for all associated inspection costs.
- 58) Execution. The project must be built and executed exactly as specified in the approved application package unless changes are approved by the Town.
- 59) Approval. All of the documentation submitted in the application package by the applicant and any requirements imposed by other agencies are part of this approval unless otherwise updated, revised, clarified in some manner, or superseded in full or in part. In the case of conflicting information between documents, the most recent documentation and this notice herein shall generally be determining.
- 60) Dwelling units. No additional dwelling units may be established on this parcel without specific new approval from the Planning Board. This specification is made pursuant to the Planning Board's detailed review of the project and a determination that the number of units/beds approved is the maximum allowable for the parcel.

- 61) Conditional uses. The Planning Board approved the required conditional uses for this subdivision which included filling three wetland areas for road crossings and activity within the wetland buffer including construction of the road for the three crossings, related structures, and several drainage structures and basins.
- 62) Water infrastructure. All public water system infrastructure extensions as depicted on the plans shall be designed and installed at the expense of the developer in accordance with Town Water Ordinance Chapter 158, AWWA guidelines and applicable State regulations. Once installed and approved by the Town this infrastructure shall be owned by the Town of Durham (except where otherwise specified) and operated by the UNH/Durham Water System including all water mains, valves, fire hydrants, water meter assemblies and associated appurtenances. Water service lines and plumbing internal to the building shall be owned and maintained by the applicant.
- 63) Sewer infrastructure. All public sewer system infrastructure extensions shall be designed and installed at the expense of the developer in accordance with Town Sewer Ordinance Chapter 106 and applicable State regulations. Once installed and approved by the Town this infrastructure shall be owned and operated by the Town of Durham (except where otherwise specified) including all sewer mains, sewer manholes, and associated appurtenances. Sewer service lines and waste lines internal to the building shall be owned and maintained by the applicant.
- 64) Confirmation of senior occupancy. The applicant or Association once established shall submit a notarized statement annual attesting that the development is in compliance with the occupancy conditions for seniors (specifying that each unit has at least one resident over 55 years of age or as otherwise specified in the declaration).
- 65) Madbury review. A portion of the parcel is in the town of Madbury. The Madbury Planning Board submitted a memo to the Durham Planning Board dated October 21, 2021. The following terms and conditions are incorporated as requirements as part of this approval as requested by the Madbury Planning Board. (The Town of Durham will work in good faith to ensure these conditions are met but may defer to the Town of Madbury should there be a need for enforcement, at its reasonable option.)
  - a) Provisions of the Zoning Ordinances of the Town of Madbury apply to the portion of the development that is located in Madbury.
  - b) No use, including the proposed walking trails, shall infringe on the 25-foot undisturbed wet area buffer (Madbury Zoning Ordinance Article IX, Section 5).

- c) Stormwater management, roads, structures, or other development shall not be located in areas subject to the Wet Areas Conservation Overlay District (Madbury Zoning Ordinance Article IX).
- d) Apart from existing mutual-aid agreements between the Towns of Durham and Madbury, Madbury will not provide any additional civic services to homes in this development including those fronting the portion of the private road located in Madbury. The Town of Madbury shall not be responsible for any maintenance or repairs of the private road.
- e) The applicant shall coordinate with Madbury's Road Agent and Building Inspector for approval/permits for the portion of the private road and development in Madbury.
- f) The applicant shall provide a copy of the deed restriction, conservation easement, or other open space protection language that affects land in Madbury to the Madbury Planning Board.
- g) The Town of Madbury shall be notified of any proposed changes to the plan dated August 12, 2021. If there are substantial changes to this plan which have any reasonably likely affect upon Madbury, the applicant (or the Town of Durham at its option) shall provide a copy of the revised plans to the Town of Madbury Planning Board prior to the Town of Durham approving or conditionally approving the proposed revisions.
- h) The applicant shall provide a final complete approved plan set to the Town of Madbury Planning Board.

Findings of fact. a) The Planning Board conducted preliminary review of the application which concluded on June 10, 2020; b) The applicant submitted an application, supporting documents, and plans for the project; c) The Planning Board accepted the application as complete on December 16, 2020; d) The Planning Board held ongoing public hearings on the application; e) The applicant met with the Conservation Commission numerous times to discuss the conditional uses and other aspects of the project related to natural resources; f) The applicant met with the Technical Review Group several times; g) After numerous discussions, the Planning Board voted unanimously May 12, 2021 that the entire road should be a private road; h) The Town hired Mark Verostick of VHB to review the applicant's drainage plan. He found that the plan met the Town's requirements with various comments that were incorporated; i) The Planning Board reviewed the application in accordance with state law, the Durham Zoning Ordinance, the Durham Subdivision Regulations, and other applicable law and found that the application meets all requirements (including any waivers, conditional uses, that were have been granted); and j) The Planning Board duly approved the application as stated herein.

Signature. Signature by the applicant below acknowledging and accepting all terms and conditions of this approval herein.

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Signature of applicant

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date

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Printed name of applicant

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Signature of applicant

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date

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Printed name of applicant

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Signature of Planning Board Chair

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date

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Signature of Planning Board Chair

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date