

April 26, 2021

Via Email
Town of Durham Planning Board
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Re: Mulhern Subdivision Conditional Use Permit Application
Tax Map 10, Lot 8-6
Letter of Opposition

Dear Chair and Members of the Planning Board:

I represent Gail Kelley and Andrew Merton, the closest abutters to the wetland to be traversed by the proposed access road over the Town-owned right-of-way from Gerrish Drive to the proposed Mulhern Subdivision, along with other residents of the Gerrish-Ambler neighborhood. I write on behalf of these residents in opposition to the application for Conditional Use Permit approval submitted by Michael and Martha Mulhern (“Applicant”) to develop property identified as Town Tax Map 10, Lot 8-6 into a conservation subdivision accessed by a new road through a wetland (“Proposed Project” or “Application”). Please make this letter a part of your record in this matter.

These residents strongly oppose the use of the Town ROW from Gerrish Drive to the Proposed Project. They do not oppose the development itself, only the access over the wetlands from Gerrish Drive. The Applicant has applied for a Conditional Use Permit for construction of an access road through the WCOD and over an unbuilt, Town-owned ROW from Gerrish Drive. See Zoning Ordinance Section 175-61(A)(1). The ROW runs through and across significant wetlands and wetland buffers within the WCOD. To be granted a Conditional Use Permit, the proposed access road must meet the criteria under the general Town of Durham Zoning Ordinance (“Zoning Ordinance”) Article VII Conditional Use Permits, and specific Article XIII Wetland Conservation Overlay District Section 175-61 (“WCOD”).

To obtain a Conditional Use Permit, the Applicant “bear[s] the burden of persuasion, through introduction of sufficient evidence, through testimony, or otherwise, that the development, if completed as proposed, will comply with this Article and will satisfy the specific requirements for the use contained in the ordinance.” Zoning Ordinance Section 175-23(B). The Applicant has failed to do so here.

The Planning Board shall approve an application for a Conditional Use Permit “if the application is found to be in compliance with the approval criteria in Section 175-23.” Zoning Ordinance, Section 175-21(A). In addition “[f]urther Conditions may be placed on the Conditional Use Permit by the Planning Board to ensure that the Conditional Use will have a positive economic, fiscal, public safety, environmental, aesthetic, and social impact on the town.” *Id.* The Planning Board must consider only the use involved in the Conditional Use

Permit, the access road, not the Proposed Project as a whole, when determining the use's compliance with the criteria.

General Conditional Use Permit Criteria

The Planning Board can only grant a Conditional Use Permit if it “determines that the proposal conforms to all of the following conditional use permit criteria” The proposed road through the Gerrish Drive wetland fails to comply with at least six of those criteria. The proposed access road does not conform with seven of the eight general criteria for all Conditional Use Permits: (1) Site suitability; (2) External impacts; (3) Character of the site development; (4) Character of the buildings and structures; (5) Preservation of natural, cultural, historic, and scenic resources; (6) Impact on property values; and (8) Fiscal impacts. Zoning Ordinance, Section 175-23(C).

1. Site Suitability

The site for the proposed road fails to have adequate vehicular and pedestrian access for the intended use. See Zoning Ordinance, Section 175-23(C)(1)(1). The geometry of the existing road and the proposed access will create a hazardous intersection. A hazardous road cannot be an adequate road. The entrance to the proposed access road to the Mulhern subdivision will be located on the convex side of the right-angle curve where Gerrish Drive and Ambler Way meet. The curve around Gerrish Drive has seen a significant history of motor vehicle accidents due to a blind curve and multiple traffic patterns. The proposed road to the Mulhern subdivision increases the potential for more serious accidents as traffic and turning options increase. In addition, the proposed road will have a row of Atlantic White Cedars on its south side. This row of trees will be tall enough to block the view of vehicles and pedestrians on the proposed road or the driveway at 11 Gerrish Drive from seeing drivers proceeding down Ambler Way toward the Gerrish-Ambler curve, causing a significant hazard to both drivers and pedestrians.

Further, commercial trucks back into the driveways in the Gerrish-Ambler neighborhood. Backing into the driveway at 11 Gerrish Drive already requires skill, but at least drivers are backing directly off the town road onto the driveway and have only two directions of easily visible traffic to pay attention to. If the driveway to 11 Gerrish Drive is relocated to the proposed private road, 90 feet from the intersection with the town road, backing into the driveway will become more complex and dangerous. The reconfigured driveway will be several feet above grade with significant drops on either side. The reconfigured driveway will be unacceptably more hazardous for trucks attempting to access that driveway than the current one.

The Applicant fails to satisfy another factor requiring “[t]he absence of environmental constraints (floodplain, steep slope, etc.) or development of a plan to substantially mitigate the impacts of those constraints.” Zoning Ordinance, Section 175-23(C)(1)(3). The Conditional Use Permit here is proposed to fill a wetland for the construction of an elevated road. Not only is the

area a delineated wetland, but it floods regularly, including significantly with snowmelt and heavy rains. Floods can create a 100-foot-wide shallow pool on the lawns of 20 Ambler Way and 9 Gerrish Drive. The Applicant fails to plan sufficient mitigation to address with these flooding events and does not increase flood loading on neighboring residential properties.

The Applicant proposes to dredge and fill the wetland to create an elevated roadbed buttressed by concrete retaining walls. In a halfhearted attempt to mitigate the impacts of this road, retaining walls on the north side of the road will be taller than those on the south, tilting the road toward a swale along the south side of the road. No longer receiving the natural processing and treatment that a wetland provides, the collected runoff in the swale, along with subsurface water arriving via culverts, will then flow through a large, wide culvert to be dumped directly into a bigger stream on the east side of the Kelley property, Lot 6-10.

This fails to mitigate the removal of healthy wetlands and the flooding issue on these properties. Moving the flow of water to a different area does not mitigate the removal of vegetative matter that absorbed pollutants like nitrates and phosphates from the water. Channelizing water through culverts does not sequester carbon. Removing silt by directing the flowing water over rip rap does nothing to replace the trees removed, nor does it support the beneficial microbial life of a natural wetland. The Application fails to mitigate the impacts of removing the wetlands and cannot be approved.

2. External Impacts

The Applicant fails to show that the “external impacts of the proposed use on abutting properties and neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone.” Zoning Ordinance, Section 175-23(C)(2). Again, the Applicant has not shown that the construction of a road will not impact the adjacent properties and neighborhood more than other uses. Filling this flood-prone wetland will very likely increase flooding into the neighboring properties and the Applicant has not proven, and cannot prove, otherwise. Further, “the location” of the road and in particular “its nature and intensity of use” in the wetlands will undoubtedly have a major external impact on the surrounding environment, in contravention of this factor and Section 175-61(B)(3) (a specific criterion applying to the WCOD, more fully discussed below), and likely greater than the use of the possible access from the Bagdad Road ROW.

The 11 Gerrish Drive property will be devastated by additional water pooling and flooding. On the north side of the proposed road, the taller retaining wall will create a triangular basin on 11 Gerrish Drive bordered by the retaining wall, the driveway, and low embankment of the lawn. This area has a spring-fed, perennial stream that runs roughly parallel along the north side of the boundary of the Town-owned wetland ROW. That stream flows from 9 Gerrish Drive to 11 Gerrish Drive, where it crosses approximately 100 feet of wetlands before it joins a larger stream. This stream is highly susceptible to flooding. The proposed retaining wall will likely constrict the dispersal of water across the wetland and will cause water to pool in the

basin. This pooling could cause flooding of the driveways at 11 Gerrish Drive and 9 Gerrish Drive and render them dangerous and impassable by water or ice.

The analysis of stormwater management by Mark Verostick of VHB, dated February 25, 2021, fails to address the concerns of the residents who have experienced the water flow over these properties firsthand for many years. The future flooding of these properties was not fully analyzed and the report did not fully confirm the analysis that did occur with adequate fieldwork.

3. Character of the Site Development

The Applicant also fails to show that “[t]he proposed layout and design of the site shall not be incompatible with the established character of the neighborhood and shall mitigate any external impacts of the use on the neighborhood.” Zoning Ordinance, Section 175-23(C)(3). The following comments refer only to the proposed access road to the Mulhern subdivision. The design of the Gerrish-Ambler intersection with a third road is dangerous for pedestrian and cyclist use that the loop road now accommodates. It is used regularly by high school physical education classes and road races. The increased traffic volume to the proposed Mulhern subdivision would not be an issue if the design of the access was not potentially dangerous.

The character of the neighborhood will be destroyed by adding a raised roadbed with cement retaining walls and guardrails creating an eyesore. While one side is buffered by planned trees, the north side of the proposed road lacks such screening. The proposed evergreen plantings, including Atlantic White Cedar, are unlikely to survive on the north side because of a local deer herd that eats many plantings in the neighborhood. The visual impact of the raised road will be significant and will destroy the character of the immediate area.

4. Character of Buildings and Structures

The Applicant also fails to show that “[t]he design of any new buildings or structures and the modification of existing buildings or structures on the site shall not be incompatible with the established character of the neighborhood.” Zoning Ordinance, Section 175-23(C)(4). With an elevation as much as eight feet above existing grade and a roadbed with cement retaining walls crowned by guardrails on both sides, the proposed road will stick out garishly from a small New England neighborhood. It is totally incompatible with the existing Gerrish-Ambler subdivision.

5. Preservation of Natural, Cultural, Historic, and Scenic Resources

The Applicant also fails to show that “[t]he proposed use of the site, including all related development activities, shall preserve identified natural, cultural, historic, and scenic resources on the site and shall not degrade such identified resources on abutting properties. This shall include, but not be limited to, identified wetlands, floodplains, [and] significant wildlife habitat . . .” Zoning Ordinance, Section 175-23(C)(5). Obviously, the proposed filling of wetlands does not preserve identified natural and scenic resources. Vegetative growth in the wetland provides a

scenic view for all in the neighborhood, especially in the summer, when it is in full leaf, and in the fall, when the tall red maples are a blaze of color.

The removal of significant amounts of wetlands from the wetland complex will devastate the wetland areas on the abutting properties. Filling these wetlands will destroy wetlands, increase the floodplain size, and destroy significant wildlife habitat. The Gerrish Drive wetland also provides significant aquifer recharge. The loss of this function by the proposed channeling of water through culverts directly into streams outside the Gerrish-Ambler neighborhood will negatively impact vegetative growth well beyond the immediate boundaries of the wetland. For all these reasons, the Conditional Use Permit cannot satisfy this criterion and cannot be granted. Also, for the specific reasons outlined below, the criteria specifically related to the WCOD support the finding that this general criterion is not satisfied.

6. Impact on Property Values

The Applicant also fails to show that “[t]he proposed use will not cause or contribute to a significant decline in property values of adjacent properties.” Zoning Ordinance, Section 175-23(C)(6). Due to all of the impacts more fully explained above, the Applicant has failed to show that granting this Conditional Use Permit will not negatively affect property values. The anticipated increase in flooding, loss of ecosystem services of the wetlands, and eyesore of the road will negatively affect the property values of adjacent properties significantly.

Specifically, potential buyers seeking to purchase a home in Durham would be deterred from a property with a view of an elevated road six feet high fortified by cement retaining walls and guardrails. On one side, the tallest retaining walls will not be obscured by a buffer from the view from 11 Gerrish Drive. This eyesore will have a major negative impact on the value of that lot, which now offers the most privacy in the Gerrish-Ambler neighborhood. The proposed intersection will make accessing that lot much more dangerous and difficult, further diminishing the value of that property. Finally, the increased flooding and the destruction of the wetland that absorbed and allowed wider dispersal of storm water could also negatively impact the value of the homes at 9 and 11 Gerrish Drive. The Applicant has failed to prove that this is not the case.

8. Fiscal Impacts

The Planning Board must also consider the fiscal impacts of the proposed access road on the Town. Zoning Ordinance, Section 175-23(C)(8). While making the road private may save the Town money in the near-term, relying on a 15-household homeowners association to maintain an elevated roadway with guardrails, culverts, and other structures is shortsighted. The lifespan of a constructed road like this is likely a few decades. After that time, the road may deteriorate to the point of being a safety hazard and/or causing further destruction of the wetland. The Town may need to take on the road maintenance or reconstruction for the safety of the residents of the neighborhood, at a significant cost.

In addition, the Applicant has failed to provide a fiscal impact study of a sewer line from Gerrish Drive to Canney Road and across to Sumac Lane. While Gerrish Drive residents would have the option to hook into the line, it would be at their own expense. It is unknown what impact this additional line will have on the Town financially, which means that Planning Board cannot grant the Conditional Use Permit without more information.

Specific Criteria for Conditional Use Permit in the WCOD

The Planning Board can approve a Conditional Use Permit “only if it finds, with the advice of the Conservation Commission, that all of the following standards have been met in addition to the general standards for conditional uses and any performance standards for the particular use” Zoning Ordinance Section 175-61(B). There are four such standards:

1. There is no alternative location on the parcel that is outside of the WCOD that is reasonably practical for the proposed use;
2. The amount of soil disturbance will be the minimum necessary for the construction and operation of the facilities as determined by the Planning Board;
3. The location, design, construction, and maintenance of the facilities will minimize any detrimental impact on the wetland, and mitigation activities will be undertaken to counterbalance any adverse impacts; and
4. Restoration activities will leave the site, as nearly as possible, in its existing condition and grade at the time of application for the Conditional Use Permit.

Zoning Ordinance Section 175-61(B)(1)–(4).

The Planning Board must recognize that the Applicant does not own the parcel underlying the Town ROW extending from Gerrish Drive, so the language requiring examination of location(s) “on the parcel” should be considered broadly to also include other possible access routes to the development lot that are within the development parcel that are reasonably practical for the proposed use and not on the Town ROW. An examination of only the small Town ROW would be too narrow an examination.

Based on extensive discussions between the Planning Board, Town Planner, and legal counsel for the Town and the Applicant, it appears that another legal access exists from the Bagdad Road right-of-way that has not been fully evaluated for impact on the WCOD. Given the high impact on the wetlands in the proposed access area, it is not reasonable for alternatives to not have been fully examined and presented to the Conservation Commission and Planning Board.

In a recent letter to the Conservation Commission, the Applicants argue that a Bagdad Road ROW access is not “reasonably practical.” Yet the Town’s counsel maintains that the Mulherns have legal access to their entire premises, which includes the area where the proposed

subdivision would be located, and that, if they moved forward to use this legal access for the project, they could do so without their neighbors' consent. If the neighbors wished to oppose such action, they would be the ones who would need to seek court relief. Also, the Applicants do not properly recognize that the pertinent premises having legal access from the Bagdad Road ROW is not confined to the now non-existent "Allen parcel" but to a much larger one containing the proposed subdivision land. This larger parcel came into being by virtue of the 2018 lot line adjustment the Mulherns requested and obtained.

Under Section 175-61(B)(3), the Applicant is required to persuade the Planning Board that "[the] location, design, construction, and maintenance of the facilities will minimize any detrimental impact on the wetland, and mitigation activities will be undertaken to counterbalance any adverse impacts." Here, the wetland will be dredged and filled for the proposed road. It is impossible to say that this type of use is minimizing any detrimental impact on the wetland. Due diligence would require an engineer to outline a reasonably conceived access road from the Bagdad Road ROW followed by a study of wetland impact such an access would have as compared to the severe adverse impact of using the proposed access. It is also concerning that little to no discussion has occurred related to the impact of placing the sewer line under the pavement of a road in this location. Any issue with or failure of such a sewer line would be devastating to the wetlands.

Detrimental impacts to this wetland are not isolated to impacts on the development lot itself. In fact, the residents of the proposed Project will feel little direct effect of degradation of these wetlands in particular. Instead, the impacts to the wetlands will be felt most acutely by the residents of Gerrish Drive and Ambler Way. The Town ROW accesses these existing streets between existing residential properties that also contain arms of these wetlands. Any additional flooding (because some already occurs and affects these properties) enabled by the proposed road structures erected in the wetland will threaten these residents. Allowing this Conditional Use Permit will endanger these existing homes and their properties.

Further, the possible change from the road being Town-maintained to being privately maintained by an HOA throws the maintenance and ongoing mitigation of impacts to the wetland into question. It will be extremely difficult to monitor what salt or sand the HOA uses on the road, how it is plowed, when and if the culverts are cleaned and maintained, how any erosion is mitigated, and how any future repairs or reconstruction are done. It even remains unknown what the structure of the HOA will be, how it will function in the early development stages, how much will be contributed by residents for road maintenance, and other relevant details. Without any of this information, it is not possible for the Planning Board to be confident that the location, design, construction, and maintenance of this road will minimize detrimental impacts in the long run.

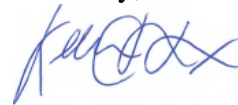
Under Section 175-61(B)(4), the Applicant must show that "[r]estoration activities will leave the site, as nearly as possible, in its existing condition and grade at the time of application for the Conditional Use Permit." The proposal is for an elevated roadway, graded above the

existing wetlands, to cross land that is constantly wet and frequently floods. It is not possible for such a proposal to “leave the site, as nearly as possible, in its existing condition and grade” From this requirement, it should be inferred that this type of permanent disturbance and significant change to the topography of the WCOD in this area is not what was anticipated by the Conditional Use Permit. From Section (B)(4), it appears that the Conditional Use Permit was intended for much lower impact proposals, both with less dramatic change to the land and for areas that may not be as saturated as this wetland.

Finally, the Applicant frames its discussion of the Conditional Use Permit as an examination of the proposed Project as a whole. This is misguided and incorrect. The Conditional Use Permit is concerned only with the impacts on the WCOD caused by the access road, not the conservation benefits or other pros and cons of the Project itself. We ask the Planning Board to focus on the impact to the WCOD and not to be affected by the arguments that the other parts of the Project have conservation value – that is not the issue now.

In conclusion, for all of the reasons stated here, and on behalf of my clients, I respectfully request that the Planning Board deny the Conditional Use Permit. Thank you for your attention to my clients’ input and request.

Sincerely,



Kelsey Peterson

Cc: Clients