

March 19, 2021

Via Email
Town of Durham Conservation Commission
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cc: sallyneedell@gmail.com

Re: Mulhern Subdivision Conditional Use Permit Application
Tax Map 10, Lot 8-6
Letter of Opposition

Dear Chair and Members of the Conservation Commission:

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 the following other residents of the Gerrish-Ambler neighborhood: John and Cindy Lewis, Kimberly and Peter Sweetman, Christine and James Conlon, and John and Diana Carroll. 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.

This letter highlights the concerns of these residents with the use of the Town ROW from Gerrish Drive to the Proposed Project and the Applicant’s failure to meet the criteria for a Conditional Use Permit under the Town of Durham Zoning Ordinance (“Zoning Ordinance”) Article VII Conditional Use Permits, and Article XIII Wetland Conservation Overlay District Section 175-61 (“WCOD”). The Application fails to meet the requirements of both the general requirements for a Conditional Use Permit under Article VII and the specific requirements under Article XIII, Section 175-61.

When applying for 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. As more fully explained below, the application lacks information on several specific criteria for a Conditional Use Permit to be approved by the Planning Board and fails to sufficiently address the specific criteria for a Conditional Use Permit for a roadway in the WCOD that falls within the jurisdiction of the Conservation Commission to advise the Planning Board.

The Applicant has applied for a Conditional Use Permit in the WCOD for “[t]he construction of streets, roads, driveways, access ways (but not including any parking areas other than those serving single-family uses), bridge crossings, and utilities including pipelines”

Zoning Ordinance Section 175-61(A)(1). The Applicant proposes to construct the access road to its development lot over an unbuilt Town-owned ROW from Gerrish Drive. The ROW runs through and across significant wetlands and wetland buffers within the WCOD.

In addition to the general requirements for a Conditional Use Permit decided by the Planning Board, the Conservation Commission has the power to advise the Planning Board on specific requirements of a 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 Conservation Commission should be fully aware 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 Conservation Commission and 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. The Applicant has not provided a road maintenance plan. Without any of this information, it is not possible for the Conservation Commission 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. The Conditional Use Permit is concerned only with the impacts on the WCOD, not the conservation benefits or other pros and cons of the Project itself. We ask the Conservation Commission to focus on the impact to the WCOD when making its recommendations to the Planning Board, 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 Conservation Commission recommend that the Planning Board not approve the Conditional Use Permit. Thank you for your attention to my clients' input and request.

Sincerely,

Kelsey Peterson

Cc: Clients