

Dear Members of the Durham Planning Board, Town Planner Michael Behrendt, and Town Administrator Todd Selig,

Below is the statement I prepared for the May 12 Planning Board meeting. Because I was out of town on that day, John Lewis read this in my behalf. I have added further comments at the end.

Article VIII, 175-23 (C) of the Durham Zoning Ordinance states: *“A conditional use permit shall be granted only if the Planning Board determines that the proposal conforms to all of the following conditional use permit criteria (except for specific criteria that are deemed by the Planning Board to be not pertinent to the application).*

Below is an assessment of whether the proposed access road to the proposed Mulhern subdivision complies with the pertinent criteria of **175-23 (C)**.

1. *Site suitability: The site is suitable for the proposed use.* [Only items a. and c. in the subsection under this criterion apply to the proposed road.]

a. Adequate vehicular and pedestrian access for the intended use.

A hazardous road is not an adequate road. The proposed road opens on the convex side of a blind, right-angle curve forming the junction of Gerrish Drive and Ambler Way. In the 34 years my husband Andrew Merton and I have lived on that curve, at least five vehicles have gone off the road there. On two occasions, cars tumbled head-on into the streambed four feet below the level of the curve and had to be extricated by a tow truck. One of the culverts conveying water into that stream is now torn and folded back on itself, a testament to the hauling out of vehicles from that spot. Our mailbox used to stand on that curve, but after having to replace it three times as a result of such incidents, we moved it to the property of our neighbor at 9 Gerrish Drive. Most of these accidents occurred in the 1990s. With the exception of the times when a vehicle ended up in the stream, it is unlikely Durham Police were aware of cases in which a vehicle failed to negotiate the curve but could drive away.

However, after the first two or three incidents, the Durham DPW erected two large yellow signs on the curve, each bearing a black arrow. One sign, placed directly on the curve on two poles about the height of a standard guardrail, pointed toward Ambler Way and was visible to drivers on Gerrish Drive proceeding toward the curve. The other, on a single, tall pole placed to the left of my driveway (11 Gerrish Drive) as one faces the house from the curve, pointed toward Gerrish Drive and was visible to those proceeding down Ambler Way toward the curve. Within a year or so, the signs and the poles the shorter sign was attached to disappeared, presumably the work of vandals. The tall pole remains in place, now slightly embedded in the trunk of a young elm tree. In 2013, after the signs had gone missing, another vehicle nearly pitched into the stream. I recently learned Durham Police have a record of this accident.

This treacherous spot will become more so if another road is added to it, especially with the proposed planting of an evergreen buffer along the south side of the proposed road obscuring visibility of drivers on Ambler Way from those on the proposed road and vice versa.

With 20-foot-wide pavement, three-foot shoulders, drops on either side ranging from six to 16 feet, and only a two-foot guardrail for protection, the proposed road is also dangerous for pedestrian use.

c. The absence of environmental constraints (floodplain, steep slope, etc.) or development of a plan to substantially mitigate the impacts of those constraints

The specific environmental constraints referred to parenthetically in this criterion are very much present in the proposed road plan. As documented by a video taken by Andrew Merton of the effects on the Gerrish Drive wetland of a heavy rainstorm combined with frozen ground or snow melt, the Gerrish Drive wetland is a floodplain wetland. The ravine to be crossed by the second segment of the proposed road has undeniably steep slopes.

Durham DPW Director Richard Reine is to be commended for the detailed, non-partisan memorandum he recently sent to the Planning Board regarding the issue of whether this road should be public or private. In evaluating the replacement cost (\$1.6 million, Mr. Reine told me in a recent conversation) of the infrastructure needed to “substantially mitigate” the impacts of the environmental constraints, coupled with the logistics of maintaining access to the proposed subdivision at all times when a new culvert will be needed in the ravine crossing, this document illuminates the *unsuitability* of this site for a road, regardless of its public or private status.

With 20-foot-wide pavement, three-foot shoulders, drops ranging from six to sixteen feet on either side, and only two-foot guardrails for protection, the proposed road provides adequate but precarious vehicular and pedestrian access to the proposed subdivision and to Gerrish Drive and Ambler Way. The addition of this road and its obscured sight lines to the already hazardous curve where Gerrish Drive and Ambler Way meet will increase the potential for harm to pedestrians and bicyclists, especially children on bicycles.

The cost of replacement of infrastructure needed to mitigate the impact of the proposed road on the environment renders the proposed site unsuitable for the proposed road. The road plan, therefore, does not conform to the pertinent standards of Criterion #1.

2. External impacts: The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare. In addition, the location, nature, design, and height of the structure and its appurtenances, its scale with reference to its surroundings, and the nature and intensity of the use, shall not have an adverse effect on the surrounding environment nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood.

The precast concrete block retaining wall, rising approximately seven feet on the north side of the proposed road, poses the threat of significant flooding of Lots 6-11 (9 Gerrish Dr., the Lewis residence) and 6-10 (11 Gerrish Dr., the Kelley/Merton residence). The retaining wall here will complete the formation of a triangular basin or pit in front of my house, with the retaining wall forming one side of the triangle, the driveway forming the second, and the low embankment of the lawn not quite closing the third side.

This triangular basin accommodates a perennial stream that runs roughly parallel along the north side of the town-owned ROW. Originating west of the Lewis property, this stream flows eastward through a culvert under the driveway there, across the lawn through a culvert under my driveway, and then into the Gerrish Drive wetland before joining a larger stream on the east side of my property.

When heavy rains coincide with frozen ground, this stream, combined with overflow of a large vernal pool between the Lewis and Kelley properties, joins this stream, rushes through the culvert under my driveway. For now, that volume of water has a nearly flat wetland more than 100 feet wide to spread over before making its way to the larger stream to the east.

The retaining wall, however, will constrict this dispersal, causing the water to pool in the basin. Water will still make its way eastward, but it will take longer. If the pooling water rises above the culvert, backup and overflow could cause flooding on both properties. When the rain stops, water in this low portion of both driveways will not subside quickly. An overnight freeze could cause the standing water to turn to ice, rendering the driveways impassable. The same outcome could occur with plowed snow from both the proposed road and the Kelley driveway accumulating in the triangular basin. The combination of the six-seven-foot-high retaining wall on the proposed road's north side and the low angle of the sun in winter will cause the low spot of my driveway where the triangular basin is located to remain in shade, slowing the melting of ice.

Neither project engineer Michael Sievert nor independent storm water management analyst Mark Verostick ever ventured down my driveway to look at the area north of the proposed road, the area that elevated road and its retaining wall could cause to flood in storm conditions. Wetlands scientist wetlands scientist Mark West has never mentioned he noticed the large vernal pool in this area that occasionally overflows into the Gerrish Drive wetland. Yet, they all claimed that properties to the north of the proposed road would not be affected by the loss of wetland that currently manages storm water and that the proposed retaining wall would not increase the potential for flooding on Lots 6-10 or 6-11. In their reports, Mr. Sievert and Mr. Verostick erroneously stated the water flowing through the culvert under the my driveway was run-off from the driveway and Gerrish Drive.

The rerouting of the driveway for 11 Gerrish Drive 90 feet away from its connection to the town road serving the Gerrish-Ambler subdivision to a private road serving a subdivision that doesn't

yet exist isolates the residents of 11 Gerrish from the neighborhood they have been a part of for 34 years.

This rerouted driveway, with a drop of at least six feet on one or possibly both sides will be treacherous for all users, particularly for commercial trucks backing in.

Most significantly, the Planning Board lacks the authority to allow a private developer to deprive a property owner of access to a town road granted by the town through a variance issued decades ago.

The potential for increased and more severe flooding on lots north of the proposed road caused by the location, design, and height of that elevated road and its appurtenances are greater impacts than those imposed by adjacent existing roads.

The rerouting of an abutter's driveway entrance 90 feet away from its town-granted access on a town road to a private road and the altering of the driveway's structure in a way that renders it dangerous for use by private and commercial vehicles are significantly adverse impacts that "discourage the appropriate and orderly" use of that abutter's land and building.

With such adverse external impacts on abutting properties, the proposed road fails to comply with Criterion #2.

3. Character of the site development: The 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. This shall include, but not be limited to, the relationship of the building to the street, the amount, location, and screening of off-street parking, the treatment of yards and setbacks, the buffering of adjacent properties, and provisions for vehicular and pedestrian access to and within the site.

Again, the placement of a third road opening from a right-angle curve overburdens an already precarious curve.

With 318 feet of precast concrete block retaining walls lining both sides of the proposed road and ranging in height from six to sixteen feet, and crowned with galvanized steel guardrails, the design and layout of the proposed road more closely resembles the fortified entrance to a military installation than a road in a small New England subdivision. All that will be lacking is barbed wire coiled around the guardrails. It is in no way compatible with the established character of the neighborhood in which it will be situated.

While planted buffering will be provided on the south side of the road structure, none has been offered for the one abutting property on the north side. Maybe this is acknowledgement on the developers' part that the wetland is such a popular nibbling hangout for herds of deer that only fenced in plantings will survive. So, the north side of the elevated road, where the wall be higher, will be fully displayed its arrogant, machismo glory.

In the April 28 Planning Board meeting, Mr. Sievert stated that early in the review process he had offered a road design using embankments rather than retaining walls and that, after rejecting that offer, I am now decrying the use of retaining walls. Mr. Sievert's statement is true. He simply left out what that offer required of me. All I had to do was a lot line adjustment and relinquish enough of my property to accommodate this design. How could anyone turn down such a deal? But I did.

The proposed road plan fails does not conform to Criterion #3.

4. Character of the buildings and structures: The 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. This shall include, but not be limited to, the scale, height, and massing of the building or structure, the roof line, the architectural treatment of the street elevation, the location of the principal entrance, and the material and colors proposed to be used.

Comments and conclusions supplied for Criterion #3 apply here.

5. Preservation of natural, cultural, historic, and scenic resources: The 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, significant wildlife, stonewalls, mature tree lines, cemeteries, graveyards, designated historic buildings or sites, scenic views and viewsheds.

Rather than preserve natural and scenic resources, the proposed road destroys a wetland, floodplain, mature tree line, and scenic view. Tree and other vegetative growth in the wetland provide a scenic view for the whole neighborhood, especially in the summer when that growth is in full leaf and in autumn when the red maples change color.

Putting 12 mostly unbuildable acres of ledge and wetland into conservation, thus avoiding paying taxes on them while depriving 23 households, countless individuals who frequent that neighborhood in one way or another, and animals that avail themselves of the ecological, healthful, psychological, and scenic qualities and pleasures the Gerrish Drive wetland provides hardly qualifies as sensitivity to the preservation of natural, cultural, historic, and scenic resources.

The proposed road does not conform to Criterion #5.

6. Impact on property values: The proposed use will not cause or contribute to a significant decline in property values of adjacent properties.

A house that once had most privacy and largest lot in a desirable neighborhood but now has a front yard view of a concrete block wall topped by steel guardrails all rising eight-nine feet high and a driveway removed from the town road serving every other house in the neighborhood sporting a drop of at least six feet on one side and the potential for flooding will decline in market value. No prospective homebuyer would seek out such attributes but might be willing to settle for them – if the price is low enough.

The proposed road fails to conform to Criterion #6.

7. Availability of Public Services & Facilities

Yes, the Town of Durham provides such services for most residents.

8. *Fiscal impacts: The proposed use will not have a negative fiscal impact on the Town unless the Planning Board determines that there are other positive community impacts that off-set the negative fiscal impacts of the proposed use. The Planning Board's decision shall be based upon an analysis of the fiscal impact of the project on the town. The Planning Board may commission at the applicant's expense, an independent analysis of the fiscal impact of the project on the town.*

Mr. Reine's report is the first time in the review process of the Mulhern subdivision that any dollar figures have been mentioned. It has been refreshing. On the basis of his fiscal analysis of the proposed road, he issued this statement regarding the proposed roads in the Mulhern subdivision: "... we can find no compelling rationale why the Town would accept the most expensive part of the roadway system, which has no connectivity and terminates at a private road. This scenario appears to provide no benefit for the Town of Durham and results in a large future capital liability."

The Planning Board has been provided no fiscal analysis of the Mulhern subdivision proposal. The residents of Durham have a right to know the to what extent their tax dollars are subsidizing such aspects of the proposal as the installation of a sewer line that will benefit 15 households and few, if any, others.

Conclusion: An honest and clear-eyed assessment of the extent to which the Mulhern subdivision proposal conforms to the eight conditional use permit criteria would result in the conclusion that it fails to comply with most of them and that approval of the subdivision should be denied.

There are other grounds besides the permit criteria for disapproving an application. According to **Section 5.04 (H)** of the **Durham, NH, Subdivision Regulations**, "*If any application is disapproved, the grounds for such disapproval shall be adequately stated in the records of the Board and in written notice given to the applicant within 72 hours (see Attachment 4b). Applications may be disapproved by the Board without public hearing on the grounds of failure by the applicant to supply information or to pay fees as required by these regulations.*"

The regulation assumes information supplied by the applicant will be truthful. This entire review of the Mulhern subdivision proposal has been based on a falsehood: that the Mulherns do not have legal access to their property. Their deed with Greg Imbrie attests that they have legal access. The Town Attorney has confirmed that the Mulherns have legal access to their entire property. They do not need permission from Greg Imbrie or Juan and Amanda Nieves to use that access. These people may object to the Mulherns using that access after the effort they went through to rid themselves of it, but that's for the Mulherns to contend with. It is not the duty of the Planning Board to rescue them from their own schemes.

Although Mr. Behrendt barred the Board – and the Conservation Commission -- from ever seeing the portion of the Mulhern property where the Bagdad Rd. ROW access is located, **NH RSA 674:1 Duties of the Planning Board (IV.)** provides:

“The planning board, and its members, officers, and employees, in the performance of their functions may, by ordinance, be authorized to enter upon any land and make such examinations and surveys as are reasonably necessary and place and maintain necessary monuments and marks and, in the event consent for such entry is denied or not reasonably obtainable, to obtain an administrative inspection warrant under RSA 595-B. “

Apparently Planning Board members are not aware of this statute.

The suppression of information pertaining to the Mulhern development proposal goes further. Mr. Behrendt cancelled the May 2020 meeting of the Conservation Commission, the meeting at which the Commission would have had the opportunity to discuss the observations they had made during their May 8 site walk of the only portion of the Mulhern property Mr. Behrendt allowed them to see. They could then have passed their comments on to the Planning Board before the second phase of the review was closed. Mr. Behrendt explained at the June meeting of the Conservation Commission that his reason for cancelling the May meeting was because, as he put it, “there really wasn't any other business.”

Apparently, discussion of the biggest subdivision proposal to come before the town in a long time and the fact that the proposal includes destruction of a significant wetland, a matter of particular importance to the Conservation Commission, was, in Mr. Behrendt's mind, not reason enough for the Conservation Commission to convene and formulate some input to the Planning Board.

At the June 22 Conservation Commission, when Commission member Sally Needell tried to add discussion of the Mulhern proposal to the agenda, Mr. Behrendt quashed any attempt at substantive discussion of the proposal on the grounds that the Planning Board had closed its public hearing on the second phase of the review, so it was too late for the Commission to pass its input on to the Board. In advising the Conservation Commission how to proceed at that meeting, Mr. Behrendt said, “I would just be very careful about having ... you know ... any in-depth discussion. I would not make any motions or specific recommendations ... A-- because

the public hearing is closed, and B – because it’s a sensitive project and the applicant and abutters were not informed about this.”

Never mind that the abutters *expected* that it is the duty of the Conservation Commission to have an in-depth discussion of this sensitive projects, especially when the meeting at which that discussion was supposed to have taken place was cancelled by the Town Planner.

During the public comment portion of this June 22 Conservation Commission meeting, abutter to the Mulhern project Kimberly Sweetman, on behalf of her neighbors, thanked the Commission members for their participation in the recent site walk. Then she added, “We would also like to suggest that it might be helpful to walk the Bagdad Rd. side of the prop”

Mr. Behrendt cut her off at that point. “You know, I’m sorry,” he said. “The Planning Board has closed the public hearing, and we’re not allowed to take any other public input.”

Did Mr. Behrendt forget he was at a *Conservation Commission meeting*? That’s unlikely. This was just another attempt at suppression of information.

For all of these reasons, the Planning Board should deny approval of the Mulhern proposal before it. This wouldn’t mean the end of this subdivision project. The Durham Zoning Ordinance allows for an applicant to resubmit a proposal in a year – with changes correcting the reasons for denial of the original proposal. This would enable the Board to do its due diligence in examining the Bagdad Rd. ROW access point and to engage a truly independent wetland scientist – not an acquaintance, former colleague, or potential colleague of Mr. Sievert or with any ties to the Mulherns – give that scientist a map and let him or her investigate the site alone, without the accompaniment or guidance of Mr. Sievert, Mr. Behrendt, either of the Mulherns – or any abutter.

Respectfully submitted,

Gail Kelley