

To: Members of the Durham Planning Board, Mike Behrendt, and Todd Selig
From: Gail Kelley and Andrew Merton
Date: September 22, 2021

First, we extend our appreciation to the Mulherns, Mr. Behrendt, and Mr. Selig for acknowledging that the entrance to our driveway is grandfathered in its current location – on Gerrish Drive, the road we have lived on as residents of the Gerrish-Ambler neighborhood since 1988. Mike Sievert has revised the proposed road plan – and took the time to show us on-site -- how that entrance will remain where it is.

Now regarding the latest letter to the Planning Board from the Mulherns' lawyer, Sharon Somers:

1) Atty. Somers claims that only the area designated as "open space," i.e., the conservation area, "is subject to conservation restrictions." The area of the home sites and central green, she says, "is not subject to conservation restrictions but is to be of use for recreation for the residents." The implication here is that since the green will be used for recreation, the Planning Board cannot restrict the use of environmentally detrimental herbicides, pesticides, and fertilizer applied to it. This reasoning flies in the face of the definition and purpose of the conditional use permit the Mulherns are seeking. Conditional use permits are not restricted to conservation areas only.

2) Ms. Somers also states that an "executory interest" is not needed for ensuring adherence to conservation restrictions and that both this executory interest and a contribution by the Mulherns to the Stewardship Fund "can be waived." Executory interest is lawyer-speak for any future interest in -- or responsibility for -- property held by a party or person, other than the transferor of the property. In other words, neither the Mulherns (the transferors) nor the eventual home-owners' association should be required to cover the cost of periodic monitoring of soil and wetland water quality and other environmental factors to determine conformance with any conservation restrictions the Planning Board might place on the conditional use permit.

Ms. Somers' basis for the waivers: the Town has statutory authority to enforce conservation restrictions (via RSA 674:21-a). This statute, she maintains, provides "adequate protection to the Town without an executory interest." But since the Town lacks any staff with expertise in testing water and soil quality, it would have to hire an outside analyst, which it will not do -- nor should it. Durham taxpayers should not have to cover the cost of determining whether residents of a development are abiding by the

ordinance. This is precisely the reason the Stewardship Fund was established.

The Durham Zoning Ordinance states that the Stewardship Fund consists of "Payments to the Town to provide for the periodic monitoring of conformance with the conservation restriction on **common open space ...**" (emphasis added)

Contrary to Ms. Somers contention that a contribution to the Stewardship Fund is not needed because "the public will not be utilizing the open space," the zoning ordinance makes no mention of public or private use of the common space as a requirement for payment to the fund.

Ms. Somers offers an alternative to payment into the fund by the Mulherns or the home-owners' association: "the Conservation Commission is welcome to inspect the site..." Because the Town will incur no cost with this alternative, there's no need for the Mulherns to contribute to the Stewardship Fund. And we all know how well-equipped the Conservation Commission is to assess violations of conservation restrictions and how much free time its members have, even if they had the expertise and equipment to do such inspections as testing for water contamination.

So, although neither the Conservation Commission nor the Planning Board was welcome to inspect the open space portion of the Mulhern property to assess the suitability of the Bagdad Road right-of-way as an access point to the proposed development – and thus never did that assessment – the Conservation Commission would be welcome to do so to ensure compliance with conservation restrictions – even though the Commission lacks the ability to determine such compliance. All for the sake of saving the Mulherns and eventually the home-owners' association the cost of payments to the Stewardship Fund.

4) Lastly, let's recognize the obvious. We all know that conservation restrictions placed on a development are unenforceable anyway. What is the town going to do if pesticide or herbicide contamination is somehow detected? Slap a fine on the home-owners' association? Good luck collecting that. Place liens on all the units? Unthinkable, because Durham wants to keep those units marketable for the tax dollars they'll bring in.

Finally – regarding a different aspect of the Mulhern proposal -- the Planning Board has not addressed the lack of adequate pedestrian protection on the ravine crossing, as described in my Aug. 8 letter to the Board and April Talon.

If a pedestrian stumbled or a child on a bicycle fell in the gravel shoulder of the proposed road, the proposed 27-inch-high guardrail would not be enough to prevent that person from toppling into the stony ravine 14 feet below. AASHTO (American Association of State Highway and Transportation Officials) guidelines call for bridges or overpasses of that height to have a railing or barrier rising 42 inches from the top of the walkway. While the ravine crossing is not a bridge or overpass, it is still at least 14 above ground level. When I brought this matter to Rich Reine's attention, he said I should tell the Board about it. So that's what I did on Aug. 8 – and am doing again.

Respectfully submitted,
Gail Kelley and Andrew Merton, 11 Gerrish Dr., Durham, NH