

**From:** [Michael Behrendt](#)  
**To:** [Karen Edwards](#)  
**Subject:** Main Street #19 - WEBSITE  
**Date:** Tuesday, August 9, 2022 5:37:27 PM

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Karen,  
Please post this email chain unde 19 Main Street, Town Planner Correspondence. You can call it "Correspondence with Town Attorney".  
Thanks.

**Michael Behrendt**

Durham Town Planner  
8 Newmarket Road  
Durham, NH 03824  
(603) 868-8064

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**From:** Michael Behrendt <[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)>  
**Sent:** Monday, April 25, 2022 3:00 PM  
**Subject:** Main Street #19 - email from Robin Mower

To the Planning Board,  
For your information below from Robin Mower.

**Michael Behrendt**

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**From:** RobinM <[melodyofharpists@gmail.com](mailto:melodyofharpists@gmail.com)>  
**Sent:** Sunday, April 24, 2022 12:36 PM  
**To:** Michael Behrendt <[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)>  
**Subject:** Re: Conditional uses - natural resource criterion #5 | response to attorney's comment

Greetings, Michael --

A long-delayed response to your email of March 15, 2022.

As a student of language, I take issue with (and am frankly surprised by) Laura Spector-Morgan's interpretation of Conditional Use criterion #5 -- and believe my arguments could be defended in court. I refer specifically to her final sentence in the below email:

\*But the use of the word "identified" would certainly suggest that those viewsheds need to be, for example, preserved by conservation easement.\*

First: The word \*identified\* may not apply to the word \*viewsheds\* (nor to \*mature tree lines\*; see below).

Second, why assume that \*identification\* would also require preservation by conservation easement? The 2006 Master Plan Chapter 4: Environmental and Cultural Resources highlighted (identified) resources that are not necessarily preserved or protected. Wagon Hill Farm is a prime example.

I do agree that some of our land use regulation language would benefit from clarification. But in this case, if one analyzes the language of the CUP criterion using common linguistic rules for a series of modifiers and nouns, then one sees chinks in Laura's argument.

*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 habitat, stonewalls, mature tree lines, cemeteries, graveyards, designated historic buildings or sites, scenic views, and viewsheds.*

a) *identified natural, cultural, historic, and scenic resources*

This phrase carries through the word *\*identified\** to modify each of the following types of resources.

b) *identified wetlands, floodplains, significant wildlife habitat, stonewalls, mature tree lines, cemeteries, graveyards, designated historic buildings or sites, scenic views, and viewsheds.*

This part of the sentence is a horse of a different color:

-- *\*identified wetlands\** has a special meaning vis a vis NHDES; I do not know whether the framers intended a parallel with the word *\*jurisdictional\**, but the use of the word *\*intended\** might be linked to that concept

-- *\*floodplains\** is not directly modified; it also falls between two modified nouns, i.e., *\*identified wetlands\** and *\*significant wildlife habitat\**

-- Nor are *\*stonewalls, mature tree lines, cemeteries, graveyards\** directly modified, for the same reason given for *\*floodplains\**

None of the above nouns is preceded by a modifier (i.e., not directly modified). Is the modifier *\*significant\** intended to carry over to all these, as in *\*significant cemetery\** or *\*significant graveyard\** ?? I doubt it.

-- *\*designated historic buildings or sites\**: both the buildings and the sites are modified, since they are linked by the word *\*or\**

Then comes the big question: Does the qualifier *\*designated\** carry through to *\*scenic views, and viewsheds\**? It is not clear, thus one could interpret these in two ways.

Page 4.3.4 of the 2006 Master Plan Chapter 4 includes this excerpt:

...All of Durham's tidal estuaries, freshwater streams, saltwater wetlands, and freshwater wetlands are vitally important greenways.

...In total, conservation of these greenways and all of the tidal estuaries and named streams in the Town provide natural wildlife corridors penetrating into all of our neighborhoods and into the Town core. These corridors provide not only areas for maintenance of wildlife and

plants, but they are also areas of recreation immediately available to those living adjacent to them. The protection of the estuarine and marine environments, Little Bay and Great Bay, depend ultimately upon the maintenance of these waterways as greenways. Natural processes will help minimize the adverse effects of contaminants as long as these greenways are not degraded.

**Final note: Not all these areas are identified by location or name, but they ARE described as \*vitaly important greenways.\***

Regards,

-- Robin

Robin Mower

\* \* \*

On Mar 15, 2022, at 3:02 PM, Michael Behrendt  
<[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)> wrote:

Hi Robin,

You asked about this correspondence from the Town Attorney from 2021. I don't recall whether I had forwarded this to the general public at the time but Laura speaks to a broad legal principle so I do not see any concern sharing this with you (whether or not I did earlier). My best regards.

**Michael Behrendt**

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**From:** Laura Spector-Morgan <[laura@mitchellmunigroup.com](mailto:laura@mitchellmunigroup.com)>  
**Sent:** Monday, February 01, 2021 4:20 PM  
**To:** Michael Behrendt <[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)>  
**Cc:** Todd Selig <[tselig@ci.durham.nh.us](mailto:tselig@ci.durham.nh.us)>  
**Subject:** RE: Conditional uses - natural resource criterion CONFIDENTIAL

Hi Michael. Setting aside the question of why a CUP is required for a parking lot . . .

No, I don't think that the planning board may reject the application because extensive mature trees would be removed. The criteria speaks to "mature tree lines," and since the buffer will be retained, the tree line remains. As for scenic views and viewsheds, there is certainly an issue as to vagueness. But the use of the word "identified" would certainly suggest that those viewsheds need to be, for example, preserved by conservation easement.

Is there any appetite for amending the ordinance to clarify? It seems we often have these discussions re: the CUP criteria.

Laura

Laura Spector-Morgan, Esquire  
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<image002.jpg>

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**From:** Michael Behrendt

**Sent:** Monday, February 01, 2021 3:26 PM

**To:** Laura Spector-Morgan <[laura@mitchellmunigroup.com](mailto:laura@mitchellmunigroup.com)>

**Cc:** Todd Selig <[tselig@ci.durham.nh.us](mailto:tselig@ci.durham.nh.us)>

**Subject:** Conditional uses - natural resource criterion CONFIDENTIAL

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGE

Hi Laura,

I have a question for you regarding this general conditional use criterion:

*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 habitat, stonewalls, mature tree lines, cemeteries, graveyards, designated historic buildings or sites, scenic views, and viewsheds.*

If this were interpreted in a strict manner I would be concerned about the legality/constitutionality of the provision on its face. Part of the problem is that "identified" is not defined in the ordinance. Significant resources that already enjoy state or federal protection is not really a concern. We need to work around wetlands, floodplains, stonewalls, cemeteries, and historic buildings (in the local historic district or even on the National Register) already. But the more broad natural and scenic resources is a challenge, particularly "mature tree lines," "scenic views," and "viewsheds."

We have an application to create a large parking lot behind Main Street on the large rear wooded portion of a lot. Much of the site would be cut down and an

asphalt parking lot installed. There would still be a 100 foot wooded buffer at the rear though a very tall retaining wall would be visible to residential neighbors at the rear. There are numerous other issues for the Planning Board to evaluate and a consideration of the extent of development and proportion of the overall lot is probably a reasonable issue to debate.

Anyway, the key question is whether the Planning Board could or should reject an application because extensive mature trees would be removed to accommodate a parking lot. There is a debate about the quality of this woodland for what that is worth.

I am concerned that this provision could be used to prevent development of any wooded area that has mature tree cover. I know there is a balance about how much of a lot is affected and if the lot is still developable. But where a substantial portion of a lot is mature tree cover, a finding of a violation of criterion 5) could be a concern.

Thank you.

**Michael Behrendt**

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