

April 21, 2020

Dear Durham Conservation Commission and Durham Planning Board Members,

The Mulhern conservation subdivision proposal (tax map 10, lots 8-6, 91 Bagdad Rd.) will be submitted for phase 2 preliminary design review to you at meetings April 27 and 29.

What follows is a collective response from residents of the Gerrish Drive-Ambler Way neighborhood to that proposal. This neighborhood is contiguous to the proposed subdivision and will experience the greatest impact of it. While several land use issues requiring scrutiny appear in this subdivision plan, our opposition is focused on two points:

- 1) the use of an undeveloped town right-of-way through extensive wetland as access to that subdivision and
- 2) the stage in the review process at which the proposed paving over of this wetland will be addressed. The proposed access is essentially a swath of wetland, as wet a wetland as there is before that designation has to be dropped, for the sake of accuracy, and replaced by “year-round flowing streams.”

Both boards have heard us speak out on this issue and have seen videos of the water flow on this site. After the Conservation Commission viewed these videos at its Jan. 27, 2020, meeting commission member Walter Rous suggested all members should do a site walk before further consideration of the proposal. There was general agreement among the commission members. To our knowledge, so far, only Planning Board member Richard Kelley has viewed the site. Recently a wetlands scientist flagged the extent of the wetlands in which the right-of-way lies, and a surveyor staked the boundaries of the proposed access road. Now would be the time for members of both boards to do a site visit.

In the site analysis narrative for the Mulhern Subdivision preliminary design review, submitted by project engineer Mike Sievert to the Conservation Commission and the Planning Board for their upcoming meetings, he addresses (on page 2, bullet point 3) the use of this right-of-way with the following comments:

“The only viable access to the parcel is from the exiting [sic] public ROW connecting Gerrish Rd. [sic] and Ambler Way. Using this location provides the shortest possible distance to access the best available building site and the minimal impact to the wetland complex within the parcel. *Unfortunately this access has a significant impact to wetlands in the ROW.* [italics added] This wetland has a lower function and value because of the developed lots surrounding it. The runoff from the impervious areas and from lawns, on the developed lots, and the groundwater from older septic systems drain to the wetland area. All this contributes to a lower function and value.”

The signers of this letter challenge every bit of that statement, except the third sentence (in italics).

To provide clarity for these challenges, some history of the geography of the Gerrish Drive-Ambler Way area and the development of the subdivision is helpful.

Geographical History

The Gerrish Drive-Ambler Way neighborhood is riddled with springs, vernal pools and a network of brooks. Judging from documented history of this subdivision and from present-day conditions in the undeveloped woodlands around this neighborhood, such conditions have persisted here for a very long time. They are part of a network of water systems that flow into Gerrish Brook in Madbury, which joins other tributaries forming the Great Bay Watershed.

Two years ago, when the Mulhern subdivision proposal first surfaced, Gerrish Drive resident Gail Kelley, whose property is adjacent to the town-owned ROW in question, delved into town records of the history of the Gerrish Drive-Ambler Way subdivision. She learned the presence of water in the subdivision was an issue from its inception. In January 1972, the Durham Planning Board granted developer Walter Cheney only conditional approval for this subdivision because of the highwater table throughout the subdivision area. Septic system designs for each lot had to comply with six, more rigorous than generally used, requirements regarding fill and depth of leach field. In March of that year, Cheney deeded to the town a ROW, a stretch of wetland, which, on paper, enabled him to carve out one more lot in a corner of the subdivision. It is doubtful any planning board member visited the site of this ROW to see what the town was getting before it accepted the deed to it. Technically, that corner lot would remain land-locked unless the town built a road on the ROW.

As the developer of the subdivision, Cheney knew fully well the nature of the terrain within the ROW he had handed over to the town. And if he didn't know in 1972, he would a year later when Durham's assistant director of public works inspected the first stage of the roads serving the as yet unbuilt Gerrish Drive-Ambler Way subdivision (at that time known by the unfortunate name "Pine Ridge"). The inspection revealed improperly installed culverts "settling" and "filling in with material" and a poorly installed fire hydrant. Both situations were the result of the high water table creating soggy ground conditions. These discoveries resulted in the remainder of Cheney's bond for the road construction being withheld until he dug up and put back the failing culverts on a "firm bed." All of these culverts helped direct water into a wetland basin -- the location of the town-owned ROW. To this day, all 21 lots in this subdivision benefit from drainage to that wetland.

By 1983, the land-locked corner lot, in a gully at the bottom of two hills and adjacent to the town-owned wetland/ROW was the only lot that had not been built upon. That year, when Gail and her husband Andy Merton viewed the lot for the first time with an eye to building their

home on it, they questioned whether the town would allow them to access the property by traversing the unbuilt ROW. Decades-long Durham realtor Don Thompson assured them they needn't be concerned. "No road will ever be built there. It's all wetland. Getting permit that allows cutting across that right-of-way won't be a problem." He was right about that last part. They built their house on the only dry spot on that lot, a slight mound in the center, in 1984.

With heavier, more prolonged and more frequent rainfall over the past several years, Gail and Andy, John and Cindy Lewis, and Otis Sproul, all of whom have lived for more than 30 years in the part of the neighborhood closest to the wetland/ROW, have seen a dramatic rise in the water table around their homes. The drainage basin wetland has widened. Low areas that used to dry out in summer and fall have become permanent large pools. Culverts have been overwhelmed by the volume of water produced by heavy rainstorms, resulting in flooding of the front lawn and driveway of Molly and Mike White's house. Their lot abuts the ROW on the opposite side from the Kelley/Merton property. This flooding is occurring more often and with greater quantities of water flowing toward the natural drainage basin, where the ROW begins, than any of us has ever seen there. Fortunately, once the water reaches this wetland basin, the basin is able to accommodate it.

Building a Road on a Wetland – The Only Viable Access or The Most Profit-Maximizing?

Not only has the climate changed in the nearly half century since the "paper right-of-way" was created in the Gerrish Drive-Ambler Way subdivision. So has our understanding of the function of wetlands and the trees that grow close to them, the importance of air and water quality on all life forms, the interdependence of all of these factors, and our stewardship responsibilities to the health of the planet.

Given all this and the water situations described above, the notion of building a road on top of an actively flowing wetland comes across as the height of hubris, especially when that road **really isn't "the only viable access."** As the accompanying maps to Mike Sievert's site analysis show, there is another "viable" access to the Mulhern's proposed subdivision. That access is at the bottom right of maps DR-1, DR-2, DR-3 and E-1 from a spur off Bagdad Road labeled "Access and Utility Easement." This road already serves the residence labeled "Existing House." Whenever any of us has pointed this out at meetings, we have been readily dismissed with the explanation that this access would pass near that existing house (but not as near as the wetland/ROW at the end of Gerrish Drive is to existing houses) and would require building a longer road to the proposed building sites. In other words, it would be more expensive.

These were the arguments raised by Durham Town Planner Mike Behrendt against the use of that Bagdad Road spur access when *he* presented the Mulhern proposal to the Durham Town Council in January of this year. The specific matter before the Town Council at that meeting was whether the Mulherns could use the unbuilt town right-of-way at the end of Gerrish Drive as the access road to their proposed subdivision. It was highly irregular, totally inappropriate, in fact, for the town planner to *act as an advocate for the applicants* by doing this presentation,

especially since the project's engineer, Mike Sievert, was at the meeting and, as he later told Gail, was fully prepared and expecting to do the presentation himself. During the course of that meeting, one member of the council even remarked that Behrendt seemed to be advocating for the Mulhern proposal. The town planner's performance at that meeting removed all pretense of his neutrality in regard to development proposals brought before a town board.

In addition to acting as advocate for the Mulhern project, Behrendt stated that the Mulherns "do not wish to spend more money on the project without this approval since the project as proposed is dependent on using this access." (quotation taken from the transcript of Mike Behrendt's presentation, which he read at the meeting). It is not the role of any town board to base its decisions on ensuring an applicant maximum profit from a development.

Mike Sievert also reveals saving money is behind his characterization of the wetland/ROW as the "only viable" access when he states in his preliminary design review narrative: "Using this location provides the shortest possible distance to access the best available building site and the minimal impact to the wetland within the complex." But Sievert can be excused for saying this because in doing so, he is acting in the best interest of his clients. That doesn't mean his statements are necessarily true. Using the Bagdad Road spur access would also have minimal impact – way less impact – on wetland in the Mulhern parcel than converting the Gerrish Drive wetland/ROW into a road would have on wetland and homes in the Gerrish Drive-Ambler Way neighborhood.

Sievert admits that "Unfortunately" using the town ROW at the end of Gerrish Drive to access the Mulhern property "has a significant impact on wetlands in the ROW." But he brushes this aside as of no importance with statements that are contradictory and lack any factual basis: "This wetland area [the Gerrish Drive wetland] has a lower function and value because of the developed lots surrounding it. The runoff from the impervious areas and from lawns, on the developed lots, and the groundwater from older septic systems drain to this area. All of this contributes to a lower function and value."

Let's start with the contradiction. It is precisely the homeowners of the those developed lots surrounding the wetland who put a high value on it. Why would we put ourselves through two years of meetings demanding protection of that wetland if we didn't value it? Is Sievert claiming this wetland is of lesser value than wetlands on the Mulhern property? If so, what makes them of lesser value? What kind of value – aesthetic? size? financial? How are those values determined? Without metrics, there are no means of comparison.

As for "lower function," a wetland has more than one function. Which one is he referring to? Its capacity to accept storm water and other drainage? Erosion control? The speed with which the wetland can accomplish these tasks? Suitability for plant habitat? Or for wildlife habitat? Its ability to filter out impurities from storm- and wastewater? This last function alone makes it a valuable asset that should be vigorously protected in an area with many septic systems. Conversely, some forms of plant life are enhanced by septic system groundwater or lawn runoff captured by a wetland. As mentioned earlier in this letter, springs and brooks original to this

area are also draining into that wetland. What other wetland is Sievert comparing the Gerrish Drive wetland ROW to? How can he determine how well a wetland is functioning in, say, filtration of coliform or other toxins absent the evidence of any water quality tests? What evidence of any kind does he have that this wetland is in some way low-functioning?

And how can Sievert claim the developed lots around the Gerrish Drive wetland have lowered its function (whatever function that is), thereby justifying its destruction, and then present the Mulhern subdivision proposal with houses sited within 75- and 125-foot wetland buffer zones, which were put in place to preserve the integrity of wetlands there?

The answer to all these questions is this: the statements that sparked them are baseless and, thus, meaningless. They do not constitute a sound rationale for destruction of a wetland that is serving more useful purposes than probably any of us realizes.

Questionable Review Chronology

Town Planner Mike Behrendt, Project Engineer Mike Sievert, and Marti and Mike Mulhern have all emphatically stated this subdivision proposal hinges on the paving over of a wetland to access their proposed subdivision. Why? Because it will be less expensive than using an alternate access.

But because **the wetland access route** is the top priority for those propelling this project forward, it **should be the first matter** the Conservation Commission and Planning Board deal with **in reviewing this project**. Waiting until after the review of common space and building sites, as delineated in Mike Sievert's schedule, to take up the layout of roads will mean the opportunity to make well-thought-out decisions from a range of access options will have been lost.

We appeal to both boards to deal with the use of the Gerrish Drive wetland ROW access first.

Thank you for your consideration,

Gail Kelley and Andrew Merton
11 Gerrish Drive

Michael and Molly White
20 Ambler Way

John and Cindy Lewis
9 Gerrish Drive

Kimberly and Peter Sweetman
18 Ambler Way

Otis Sproul
8 Gerrish Drive

John and Diana Carroll
54 Canney Road

