

**DURHAM CONSERVATION COMMISSION MEETING
MONDAY, JANUARY 21, 2021 – 7:00 PM
DURHAM TOWN HALL - COUNCIL CHAMBERS - DURHAM, NH**

Note: Due to the Coronavirus pandemic, most members and presenters attended via Zoom video conferencing while a limited number were in Council Chambers.

Members Present: Chair Sally Needell; James Bubar; Coleen Fuerst; Jake Kritzer; John Nachilly; Walter Rous and Alternate Roanne Robbins.

Absent: Vice-Chair Mary Ann Krebs

Also Present: Town Planner Michael Behrendt and Minute Taker Lucie Bryar

I & II. Call to Order and Reading of Covid Emergency Preamble

Chair Sally Needell called the meeting to order at 7:00 p.m. and read a required statement pursuant to the Governor’s Emergency Order #12 pertaining to meeting remotely during the Covid-19 pandemic and outlining how the public can continue to participate. More information is available on the town of Durham website.

Chair Needell then conducted roll call and seated alternate Roanne Robbins as a voting member, filling in for Ms. Krebs this evening. She advised the Commission that alternate Liz Durfee has had to step down due to family and work commitments.

III. Approval of Agenda

Mr. Rous MOVED to approve the agenda as submitted; SECONDED by Mr. Kritzer, APPROVED unanimously, 6-0, Motion carries.

IV. Public Comments

Chair Needell invited public comments for any items not on the agenda this evening and there were none.

V. 190 Piscataqua Road – Plans for new house. Conceptual discussion about plans to build a new house including various related structures with possible activity within the shoreland and wetland overlay districts. Map 12, Lot 7. Residence Coastal District.

Mr. Behrendt said Landscape Architect Eric Buck and Property Owner Tom Daly are here this evening to begin discussion with the Commission about a proposed new house on Piscataqua Road. The site is constrained by a Shoreland Overlay District and Wetlands Overlay District and only a small triangle of land is buildable. The applicants will need variances and a conditional use permit to proceed with their plans.

Mr. Daly came forward to introduce himself and his wife Erin. He said they live in Nashua and purchased this site in 2019, after a three-year search for property for their “forever home.”

Landscape Architect Eric Buck then shared some preliminary site plans. The property is a five-acre lot with a pocket of designated wetlands and about 200 feet of shoreline on Little Bay.

Existing structures on the site are a two-story house, guesthouse cottage, barn and shed, some of which are non-conforming to current setbacks. The plans call for tearing down the non-conforming structures and building a new home and septic system within the buildable area.

They are proposing hardscape surfaces throughout the landscape with rain gardens to collect stormwater. The new septic would be further away from the shore front and there would be a permeable pavement area in the driveway. A pool and patio are proposed on the southern side of the property and native species would be re-introduced to the shoreland buffer.

Mr. Rous offered his initial opinion that the project may need to be scaled back in size to conform to conservation rules. He noted “some trees have disappeared” on the proposed site plan, which could be problematic. While the overall design results in less encroachment to the wetlands and shoreline, he thinks the design is very large for the site.

Chair Needell asked a number of questions about pervious/impervious surfaces and restoring trees to the shoreline. She mentioned an earlier project that came before the Commission in which wood chips are being used to catch some septic tank overflow and Mr. Daly said they’re willing to explore that option.

Mr. Kritzer said the plans are “pushing beyond the boundaries of what the lot can arguably accommodate.” He’s most concerned by the proposed circular driveway to the north which appears to eliminate the wetlands buffer.

Commissioners then decided to do a site walk at 190 Piscataqua Road on Friday, February 5 at 10:00 a.m., with a weather date of Monday, February 8 at 11:00 a.m.

VI. Subdivision off Gerrish Drive. Parcel at 91 Bagdad Road. Conditional use application to cross/fill three wetlands and build infrastructure in the wetland buffer for conservation subdivision for 15 dwelling units (7 single family and 4 duplexes plus one existing house) on 16-acre lot off Gerrish Drive. Marti and Michael Mulhern, property owners. Mike Sievert, engineer. Robbi Woodburn, Landscape Architect. Mark West. Wetland Scientist. Map 10, Lot 8-6. Residence B District.

Mr. Sievert is here to present tonight, along with Wetland Scientist Mark West; Landscape Architect Robbi Woodburn and Sharon Somers, the attorney for the property owners. Mr. Sievert previously submitted updated plans to the Commission. He asserted, “We’ve met requirements for the first two phases (conceptual and preliminary) and now we’ve been moved to the third phase.”

Tonight’s plan is a culmination of many months of revisions, taking into account concerns from the Planning Board, Conservation Commissioners and the public. He believes his team has reached a design that addresses all four criteria for a Conditional Use Permit.

Mr. Sievert emphasized the project includes 12 full acres of conservation land in perpetuity. The proposed road is now two 11-foot lanes, with 3-foot gravel shoulders. The retaining walls and the grade are as low as possible while still meeting all engineering standards. The total impact to the wetlands has been reduced from 10,500 square feet at the start to now 8,381 square feet total.

Mr. Sievert addressed impacts to the buffers and talked about modifications made since the last plan. He said the total impact to buffers has been reduced from 41,891 square feet to 36,674 square feet.

He then addressed how he believes the engineering plans meet the four criteria for conditional use [Ordinance 175-62b] :

1.) *There is no alternative location on the parcel that is outside the WCOD that is reasonably practical for the proposed use.* Mr. Sievert said by moving the project forward [to the third phase] the Planning Board implicitly agreed this is the best location for the development. There's no better alternative that would allow this type of pocket development.

The only other access outside the WCOD is not reasonably practical to meet engineering, town or DOT standards for a roadway, due to its steep grade over 30%. Use of the town ROW from Gerrish Drive/Ambler Way is the least impacting alternative – being the shortest distance from the public way. Wetland areas impacted by buffer disturbance are of the lowest value, as designated by Wetland Scientist Mark West.

2.) *Amount of soil disturbance will be the minimum necessary for the construction and operation of the facilities as determined by the Planning Board.* Mr. Sievert said grading in wetlands and buffers has been designed to meet all engineering standards. Retaining walls are being used to minimize soil disturbance and reduce removal of existing native vegetation. With this type of stormwater treatment system, wetland buffers can effectively be replaced.

3.) *Location, design, construction and maintenance of facilities will minimize any detrimental impact on the wetland and mitigation activities will be undertaken to counterbalance any adverse impact.* Mr. Sievert said conserving 12 acres of land is a big mitigation activity. Use of a gravel wetland treatment system replaces a woodland buffer to the highest extent possible. NHDES best management practices will be followed; the gravel wetland removes solids, nitrogen, and phosphorous. There will be extensive re-vegetation of disturbed areas with native species.

4.) *Restoration activities will leave the site, as nearly as possible, in its existing condition and grade at the time of application.* Mr. Sievert replied that all engineering standards are being used; slopes and fills have been minimized to the greatest extent possible while still getting elevations necessary to treat stormwater.

Wildlife Corridors

Wetland Scientist Mark West addressed a question raised by Mr. Kritzer at a prior meeting about wildlife corridors. Based on 2019 mapping information from the Nature Conservancy, he said while there's a corridor near the site, there are no "prioritized habitat blocks." There doesn't appear to be significant wildlife movement directly south through the property, likely because of Routes 4 and 108.

Mr. West identified the northern boundary of the site as an important wildlife protection area. He said typically NHDES requires a protection ratio of 10 to 1; With the proposed 12 protected acres to the 8,000 square feet total, the plan far exceeds that.

Discussion of Vegetation, Pocket Neighborhood Concept and Solar Energy

Landscape Architect Robbi Woodburn said the pocket neighborhood design impacts the removal of trees, since the concept is to leave an open area to encourage socialization. Some trees would also be removed to allow for units to have solar energy. There was further discussion about solar and it was clarified the homes will not be built as solar units, but some may have the capacity to add it later.

Town Planner Michael Behrendt said based on his long experience in the field, he believes the developer is "following the textbook" for pocket neighborhoods. There's a small central open area relative to the entire parcel. Eighty percent of the parcel will be preserved in perpetuity.

Mr. Bubar questioned why there's a proposed loop road instead of two dead-ends and Mr. Sievert replied the layout is to allow for the pocket neighborhood and a loop is also preferred by the fire department. There was discussion between Mr. Bubar and Mr. Sievert about a pocket neighborhood vs. a more traditional layout. Mr. Sievert said if it were not a pocket neighborhood, there would be 18 homes built on a cul-de-sac. He has an alternative design to show to the wetlands bureau, if needed.

Mr. Sievert said some septic systems on Gerrish Dr./Ambler Way have failed and are draining into the wetlands. The decision was made to tie into sewer lines here.

Discussion of Approval Process / Role of Conservation Commission in this Phase

There was back and forth discussion about Mr. Sievert's opening statement that the plan had already received preliminary approval from the Planning Board and is now in the third and final phase.

Chair Needell said the Conservation Commission was not part of any earlier decisions and has not had an opportunity to give input to the Planning Board until now. Mr. Bubar, who also serves on the Planning Board, said he's not aware that he voted to approve anything. As he understands it, phase one is conceptual only and the second phase is acknowledgement that all plans and documents have been submitted.

Mr. Sievert said the early application process is designed to "flush out where the best location is" and he believes they've reached agreement with the Planning Board that this is the best location.

Town Planner Michael Behrendt said while the Planning Board has not approved anything, the applicant has completed two required preliminary phases and this design has gained momentum through those phases. At this stage, he believes it would be difficult for the Planning Board to suggest another location for the subdivision.

Mr. Kritzer questioned what the Conservation Commission's role is at this point in the process and Mr. Sievert replied the Commission's task is to determine if the subdivision plan before them meets the four criteria for conditional use in a Wetlands Conservation Overlay District.

Mr. Bubar said at two separate Planning Board hearings about lot line adjustments for this parcel, he commented that it looked like they were creating a landlocked parcel, but there was little discussion about it. He said the charge before this Commission now is to decide if this is an appropriate use of town-owned wetlands.

Chair Needell said Town Council has said the proposed access could be recognized as a right-of-way only if it meets all four criteria for conditional use.

Mr. Nachilly said it was demonstrated this evening the only access to the development that does *not* go through a wetland is not feasible from a road engineering perspective. He is on record as stating the proposed access through wetland #1 is impactful. He added that Mr. West arguably says that wetland is of low value.

Homeowner Association Maintenance of Private Access Road and Buffer

Chair Needell said since the access road is now private, a homeowners' association would be 100% responsible for its maintenance in perpetuity. She questioned how snow removal, salt or sand applications would be handled to ensure treatments wouldn't end up in the wetlands.

She read from a November 2020 memo from the Town Administrator and town staff (including DPW Director Rich Reine and Town Engineer April Talon) stating, "This road is not typical due to two wetlands crossings and the substantial infrastructure needed for the first crossing." The determination to make it a private road was made due to concerns about "inordinate long-term maintenance and replacement costs for this infrastructure."

Chair Needell said she does not believe the issues of storm runoff, snow removal and storage, salt or oil in the right-of-way have been fully addressed by the applicant.

Mr. Sievert replied the plans call for curbing. Runoff will be collected and treated, unlike what occurs on many other town roads. At another crossing, the runoff will be taken into the buffer before reaching the wetlands.

Chair Needell said by accepting the proposed plan, "We're choosing to put salt directly into these wetlands." Later Mr. Sievert said the road could be designated "no salt" and restricted to the use of sand only.

Chair Needell asked if invasives would be periodically removed and how the vegetative barrier would be maintained. Mr. Sievert replied a vegetation maintenance plan hasn't been written yet.

Proposed Hiring of Independent Wetland Scientist and Sewer Line Access

Discussion turned to plans to hire an independent wetlands scientist to review the stormwater treatment plan. Mr. Sievert said there have been two wetland scientists involved to date, and Mr. West is highly regarded in the field. The project is also subject to rigorous review by the state wetlands bureau and an Alteration of Terrain permit.

Discussion followed about sewer line access for abutters. Mr. Sievert said everyone from the “Whites to the Kellys to the Canney Road intersection” would be able to tie into the sewer. There’s an issue still under discussion with the town regarding sewer line access off Sumac Lane.

Mr. Rous said he would like to address resident John Lewis’ question on whether the design affects the runoff from his property and the Kellys. Mr. Sievert said that would be part of a stormwater review analysis.

At this point, the public was invited to give comments – limited to five minutes each. Speakers’ comments are briefly summarized here:

Gail Kelly: reiterated her request for an independent study of the wetlands. She believes all four criteria for a Conditional Use Permit in a wetland are being violated by the obliteration of the wetland. She said to characterize wetland #1 as a “junk wetland” with few functions defies common sense – when it filters silt before it reaches streams, stores stormwater and floodwater, and performs other important functions.

John Carroll, 54 Canney Road – responded to the Nature Conservancy maps shown by Mr. West, saying the property to be altered lies adjacent to sizable acreage designated as a wildlife corridor. He said removing the Gerrish wetlands will impact water flowing into Gerrish Brook and Johnson Creek, which are critical to wildlife. He reiterated his request for an independent study to be done on the hydrology and ecology of the wetlands in all seasons. He proposes using the Bagdad entrance as a simple solution.

John Lewis: said as a judge who has dealt with condo associations going bankrupt, he questions if a homeowners’ association would be able to maintain a right-of-way in perpetuity. He questioned why the town doesn’t want to take responsibility for the road. Referencing the access issues to the property, Mr. Lewis said, as he understands it, the Mulherns still have legal access to the whole premises.

Juan Nieves, 95 Bagdad Road, said two years ago when the Mulherns sold 93 Bagdad Rd., he discovered accidentally there was a title issue and he owned the end of the driveway area. “I never would have sold or written off my part if I had an inkling that a right-of-way was going to be put there,” he said, adding, “I am a 100% disabled veteran with severe PTSD issues and two young children. We enjoy having the driveway tucked away.” He’s in favor of the current plan presented by Mr. Sievert.

Christine Conland – said she can appreciate Mr. Nieves’ position and also added there are a lot of children on Gerrish Drive and Ambler Way. Construction will cause noise for everyone. She asked who would maintain the sewer line if it breaks.

It was agreed (between Chair Needell and Mr. Sievert) that the sewer line would be a town responsibility.

Attorney Somers (for the applicant): said she appreciates the Conservation Commission’s understanding of their jurisdiction to review the application in light of the four criteria for conditional use. Addressing the idea of access from Bagdad road, she said, “I hope Mr. Nieves has put that issue to bed; as a party who owns an interest over which a road could allegedly be constructed, he has said he’s not going to allow it.” Aside from the reasons outlined by Mr. Sievert for not choosing that access, she said the Mulherns can’t unilaterally decide what’s going to happen to the roadway. Mr. Nieves holds an access easement and is going to say “no,” as is Dr. Embrie.”

John Lewis: commented that Mr. Nieves hasn’t “put it to bed,” because he said the Mulherns retain access, irrespective of their neighbors’ rights. He said the Conservation Commission’s responsibility is to deal with the wetlands impact.

Mike White, 20 Ambler Way – urged the Planning Board and Conservation Commission to consider the issue of a homeowners’ association taking responsibility for the road. He questioned what happens if the homes don’t sell or the development never happens. He said other municipalities would have an assurance bond and said the town needs to consider a long-term plan for the road.

Joshua Meyerwitz: said the access issue needs to be resolved before a conditional use permit can be granted. He said 100-year floods are almost an annual event in the Northeast and they need to be considered. In his view, without ruling out the other access point through a wetland, you can’t recommend conditional use on the basis that “there’s no alternative location.”

With no further comments from the public, Chair Needell said the Commission needs time to discuss the project further and possibly do another site walk. [Note: Since most commissioners have already visited the site more than once, it was later decided there was no need for another site walk.]

Mr. Behrendt outlined the timeline for the project, adding that a stormwater analyst still needs to be hired. The 65-days required to act on the application expires on February 13th, but an extension can go as far as 90 days.

The Commission decided to hold a special meeting on Thursday, February 11th to discuss the Gerrish Drive subdivision. No public comment will be taken that evening. Mr. Sievert will be present only to answer any questions from the Commission.

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Mr. Sievert also asked if he could be given time at the special meeting to respond to some statements made this evening and to respond to a letter from Mr. Carroll, although that could be delayed to the next regular Conservation meeting.

VII. Conservation Land. Updated Guidelines for Acquiring Legal Interest in Conservation/Open Space Land. This item was tabled to the next regularly scheduled meeting of the Commission.

VIII. 2021 Conservation Commission Schedule

Commissioners discussed meeting dates for 2021 and agreed the final date for the December 2021 meeting will be confirmed as it gets closer.

IX. Other Business. There was none at this time.

X. Roundtable. Updates from Conservation Commission members. Tabled to a future meeting.

XI. Review of 2020 Minutes: August 24, September 24, October 26, November 20 site walk, November 23, December 9 special meeting, and December 28.

Chair Needell said she found two typos that she will submit for correction.

With no other corrections, Ms. Needell MOVED to approve the minutes as amended, SECONDED by Mr. Rous, Approved 6-0, Motion carries -- with Mr. Nachilly abstaining from approving the November 9, 2020 minutes since he was not in attendance. Ms. Fuerst was not present to vote on the minutes.

XII. Adjournment

Mr. Nachilly MOVED to adjourn the meeting at 10:11 pm; SECONDED by Mr. Rous, APPROVED unanimously, 6-0, Motion Carries.

Respectfully submitted,
Lucie Bryar, Minute Taker
Durham Conservation Commission

Note: These written minutes are intended as a general summary of the meeting. For more complete information, please refer to the DCAT22 On Demand videotape of the entire proceedings on the town of Durham website.