

**DURHAM CONSERVATION COMMISSION MEETING
THURSDAY, FEBRUARY 22, 2021 – 7:00 PM
DURHAM TOWN HALL - COUNCIL CHAMBERS - DURHAM, NH**

Note: Due to the Coronavirus pandemic, this meeting was held entirely on Zoom.

Members Present: Chair Sally Needell, Vice-Chair Mary Ann Krebs, James Bubar, Jake Kritzer, John Nachilly, and Walter Rous

Absent: Coleen Fuerst and Alternate Roanne Robbins

Also Present: Town Planner Michael Behrendt, Land Stewardship Coordinator Ellen Snyder; Incoming Land Stewardship Coordinator Tom Brightman and Minute Take Lucie Bryar

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

Chair Sally Needell called the meeting to order at 7:00 p.m. and then read the current guidelines (per the Governor’s executive order) pertaining to town meetings during the Covid-19 pandemic. Instructions were given for the public to participate in the meeting via phone or zoom. All details are available on the town website.

III. Roll Call

IV. Approval of Agenda

Chair Needell asked to move the Land Stewardship request up to Item V. on the agenda.

Mr. Bubar MOVED to approve the agenda as amended, SECONDED by Mr. Rous, APPROVED unanimously, 6-0, Motion carries.

IV. Public Comments

Chair Needell invited comments for anything not on the agenda and there were none.

V. Land Stewardship

Land Stewardship Coordinator Ellen Snyder came forward to present two funding requests. She said the Commission’s account showed a balance around \$71,000 in December 2020 and she is grateful for the ongoing support. With planning for stewardship work in 2021 underway, Ms. Snyder requested:

- A motion to authorize expenditure of up to \$5,300 from the Conservation Fund to cover the cost of a kiosk, design and printing of informational signs for the kiosk and for trail bridge construction at Stevens Woods.
- A motion to authorize expenditure of up to \$1,750 from the Conservation Fund to cover the cost of a kiosk sign design and printing, as well as trail bridge repair at the Longmarsh Preserve.

She told the Commission Tom Brightman (present this evening) will be taking over her position starting April 1st.

Chair Needell MOVED to authorize up to \$5,300 as requested for work at Steven Woods, SECONDED by Ms. Krebs, APPROVED unanimously, 6-0, Motion carries.

Chair Needell MOVED to authorize \$1,750 as requested for work at Longmarsh Preserve; SECONDED by Mr. Kritzer, APPROVED unanimously, 6-0, Motion carries.

V. 190 Piscataqua Road – Plans for new house. Conditional use and discussion about plans to build a new house including a deck, driveway, and other structures within the shoreland and wetland overlay districts. Map 12, Lot 7, Residence Coastal District.

The applicant will meet with the ZBA on March 9th before submitting a conditional use permit to the Conservation Commission and eventually an application to the Planning Board.

Landscape Architect Eric Buck came forward to present on behalf of homeowners, Tom and Erin Daly. He said based on a site walk with the Conservation Commission a few weeks ago, some revisions (submitted via email) were made to the plan.

Tonight the applicant is seeking a favorable recommendation from the Commission to the Zoning Board. The house has been rotated about 10 degrees and pulled back further from the wetland buffer. The driveway turnaround is more of an oval to allow the surface to run parallel to the wetland edge. Invasive species will be removed and a number of native plantings will be added. All hardscape surfaces will use permeable materials.

The Commission received a copy of the wetlands report and also a letter from an abutter, Mr. Leland, summarizing the history of the property and the reasoning behind the drainage area. Mr. Daly is present this evening with his attorney.

In answer to questions or comments from Commissioners, Mr. Buck confirmed the proposed retaining wall, pool and spa have now been sited closer to the house; mature trees near the shore (though not shown on the site plan) will remain. Also, the project is subject to NHDES approval.

Mr. Behrendt said the Zoning Board will hold a public hearing on the application but they rarely do site walks. He advised the Commission to be thoughtful in their comments to the Zoning Board, as it will impact any decision.

Mr. Kritzer echoed the sentiments of other Commissioners that the project is big for the buildable area. He believes there are trade-offs, i.e., two non-conforming buildings will be removed and an old septic system will be replaced.

Mr. Nachilly said he and Mr. Rous walked the site extensively. From a surface impact, he believes it's a zero-sum game. A remaining concern is the lawn that goes down toward Little Bay. Mr. Bubar said he'd prefer to see a low-height wildflower planting there.

There was further discussion about the soil type and the impact of the proposed swimming pool and retaining wall on the south side. Mr. Buck said the Dalys will use best management practices as outlined by NHDES.

Attorney Suzanne Brunelle for the applicant asked to address the Commission briefly. She thanked them for doing a site walk and said re: the size of the project -- this parcel is in excess of five acres, with only a relatively small buildable area. The non-conforming footprint will be reduced by 1,236 square feet.

There was discussion about moving the side yard setback on the west, to ease the encroachment on the southside shoreline. Mr. Behrendt asked if he could invite the abutter, John Leland, to comment on this since he is present this evening.

Mr. Leland came forward and said he would prefer to leave the setback where it is, since moving it would bring it closer to their field.

In further discussion, Commissioners and the Town Planner made the following statements about the project that will be submitted to the Zoning Board. Chair Needell will work with Mr. Behrendt to refine the wording for final approval by the Commission.

- The proposed project is a large and ambitious plan and hard to fit in the buildable area.
- Overall, there are environmental trade-offs; Non-conforming buildings and septic systems are being removed.
- The applicant has shown a willingness to listen to concerns and suggestions.
- The house appears to be located in the optimal location on the site, given the severe constraints of the WCOD and SPOD.
- Further efforts to reduce the entire footprint would be beneficial [to any wetland or buffer impacts.]
- The lawn area to the Bay is a concern, since it affects the buffer.

Mr. Behrendt suggested the Commission recommend the Zoning Board listen to the DCAT tape of this meeting so they can better understand the discussion. Further, any statements made by the Conservation Commission now should not be construed as to how the Commission will respond on a conditional use request.

Mr. Kritzer MOVED to accept the above statements (to be further revised by Chair Needell and Mr. Behrendt) and subsequently submitted to the Zoning Board; SECONDED by Mr. Rous, APPROVED unanimously, 6-0, Motion carries.

VI. Eversource – Replacement of 14 Utility Poles. Permitted Use B application for wetland impacts for work in right of way in the vicinity of Beech Hill Road. Eversource Energy c/o Jeni Menendez. Sherrie Trefry, Soil Scientist, VHB.

Mr. Nachilly recused himself from reviewing this application since he works for Eversource.

Soil Scientist Sherrie Trefry said Eversource is applying to do work that will temporarily impact the wetland and buffers. They are proposing to replace single wood laminate poles with new steel poles. There are nine located in Durham (shown on a site plan).

The work will impact just over 47,000 square feet of wetland buffers. Some private easements have been obtained to try to minimize the impact area. They hope to start work in mid-March, pending Planning Board approval.

Commissioners confirmed that standard procedures and erosion control measures will be followed to minimize any impact and then voted on the three criteria for permitted use.

Mr. Rous MOVED that the Conservation Commission approve Eversource’s application as presented since it meets the three criteria; SECONDED by Mr. Bubar, APPROVED 5-0, with Mr. Nachilly recused. Motion Carries.

VII. 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.

Engineer Mike Sievert does not have new information to present tonight but will answer questions. Chair Needell asked if the NHDES requirement for further mitigation (when 10,000 square feet of wetlands is impacted) applies to both contiguous and non-contiguous wetlands.

Mr. Sievert replied while the project is on two different parcels, they have approached it as one property. Wetland Scientist Mark West added there are new rules at NHDES where mitigation only applies if you impact a prime resource area, which this is not. The Mulhern project doesn’t pass any threshold for mitigation requirements by the State.

Chair Needell asked if the culvert in the Right-of-Way was designed for a 100-year-flood and Mr. Sievert said they’ve determined a storm of that magnitude wouldn’t overtop the culvert, but it’s not specifically designed for a 100-year-flood.

Chair Needell then invited public comment, summarized here:

Gail Kelley, 11 Gerrish Drive: said she had submitted a letter [which Commissioners confirmed they received] but she read it into the record this evening. [See town website for a copy of the letter.] The main premise of the letter is that the Mulherns have retained legal access to 91 Bagdad Road and that entrance point needs to be examined more closely.

John Lewis: said “there is no way you can make an assessment if this project has a detrimental affect on wetlands without checking the Bagdad Road access as well.” He advocates for an independent wetland review and maintains the Mulherns have retained legal access to their premises.

Peter Sweetman, 18 Ambler Way: said he is concerned about the use of town-owned wetland to create a road for a private development. The town attorney has indicated the developer has a legal right to an alternative access. He said it's not known if the proposed access minimizes any detrimental effects on the wetlands because other options have not been investigated.

Christine Conlon, 6 Gerrish Drive: said [the proposed road] will decimate the wetlands. This all started with a simple lot line adjustment, which neighbors questioned and then with a decision by the town to establish a Right-of-Way for a future road. She said the Mulherns have chosen the Gerrish Drive access because it's more cost effective for them. She believes the town's attorney has declared the Mulherns have legal access [to the Bagdad entrance].

Diana Carroll, 54 Canney Road: is in agreement with what has been said [by neighbors] this evening. She said it's really important to take a look at the Bagdad access. It would be nice to have buffers staked out and to see where a road would go. She advocates for an independent scientist to evaluate which access is better for the environment.

Mr. Sievert asked permission to respond to some of the neighbors' comments. He said the Commission has seen extensive environmental studies, engineering analyses, wetland and wildlife studies – all completed by qualified professionals. He added the following points:

- The applicant's request to fill the wetlands is similar to what occurred by Young Drive and Longmarsh Roads. NHDES is involved and the applicant has successfully completed the town review process to date.
- Only 23 percent of the property is proposed for development; 77 percent will be conserved.
- This project impacts the lowest value wetland.
- The State permits will require the applicant to compare the two entrances to determine which access has the least environmental impact.
- He believes the project meets the four criteria the Conservation Commission is charged with reviewing. Other criteria cited by residents are reviewed by the Planning Board and not the purview of this Commission.

Chair Needell said the application has been difficult and complex for the Commission and borrowing from some points previously made by Mr. Kritzer, she listed some of the contradictions or complexities including (but not limited to):

- Letters from applicants and town attorneys do not share the same advice regarding access routes to the proposed subdivision.
- The road to the parcel hasn't been approved by the Planning Board and was only approved with conditions by Town Council.
- The ROW is not on the parcel, but is considered part of the application.
- The ROW is on public land that may become a private road; Details haven't been approved by the Planning Board.
- Unbuildable town-owned land was deeded as a future street and approved as a ROW by Town Council; Abutters were told that ROW would never be used.

- No study of the Bagdad access has been completed.
- The Commission is asked to consider if there any alternative locations outside of the WCOD; but both access points are inside the WCOD.

Before considering the four criteria for conditional use, Mr. Rous said he wanted to address the potential for flooding issues in the adjacent neighborhood and also the town's preference to make this a private road. He relayed a conversation he had with Town Engineer April Talon in which she said she does not believe the project would negatively impact water flow, but that needs to be confirmed by NH DES and the AOT. As for making it a private road, she said the town foresees the high initial expense and projected maintenance costs of all the infrastructure to be a financial burden that would be unfair to other residents.

Commissioners then decided to narrowly address the four criteria for each impacted wetland or buffer and then separately discuss additional comments they'd like to submit to the Planning Board.

Wetland 1 (Road crossing)

Criteria #1: *There is no alternative location on the parcel that is outside the WCOD that is reasonably practical for the proposed use.*

After much discussion, consensus was not reached on this criterion. Mr. Bubar, Mr. Kritzer and Mr. Nachilly generally agreed there is no alternative outside the WCOD that is reasonably practical. Chair Needell and Mr. Rous said they were not able to reach a decision due to conflicting legal information and some unanswered questions.

During discussion, Mr. Nachilly said the town has already granted access to the proposed subdivision and it's the Commission's job to comment only on the conservation values. After about 10 hours of deliberation and studying all the data points, he would like the Commission to move the project to the next stage.

Criteria #2: *The amount of soil disturbance will be the minimum necessary for the construction and operation of the facilities as determined by the Planning Board.*

The general consensus seemed to be that if the Planning Board determines Gerrish Drive is the best way in, then the plan would meet this criterion.

Criteria #3 – *The location, design, construction and maintenance of facilities will minimize any detrimental impact on the wetland and mitigation activities will be taken to counter-balance any adverse impacts.*

There was discussion on the feasibility of building a bridge over the wetlands instead of a road with culverts, in order to minimize any detrimental impacts to the wetlands.

Mr. Bubar said implicit in any decision on the application is that 7,000+ square feet of wetland will be filled. The issue for him then becomes the quality of the wetlands.

Mr. Kritzer said strictly from a conservation perspective, there is no benefit to filling in this wetland. If other considerations are taken into account, e.g., the desire to meet housing demand or improve the tax base, then an argument could be made that granting conditional use is reasonable.

Criteria 4 – *Restoration activities will leave the site, as nearly as possible, in its existing condition and grade at time of application for the Conditional Use Permit.*

Commissioners considered this from two perspectives: the wetlands will not be restored to their existing condition if a road is built; However, if it's accepted that a road *will* be built, then the phrase "as nearly as possible" might allow them to vote yes.

Mr. Bubar said town ordinances allow the building of roads and driveways, etc. as a conditional use in the Wetlands Conservation Overlay District.

Wetland # 2 (Ravine)

Criteria #1 – Commissioners did not reach consensus on this. It was generally agreed that if the first wetland crossing is allowed, then the second one is necessary. Mr. Rous said he maintains the same reservations as he expressed for the first wetland and cannot vote "yes" since it's unclear to him at this juncture if there is an alternative access.

Criteria #2 – Mr. Rous said the Planning Board needs to make a determination on this. He believes the applicant has responded to a number of requests by elevating the road and widening it; They are also proposing culverts large enough for wildlife.

Criteria #3 – Commissioners seemed to reach a qualified consensus this would be met.

Criteria #4 - There was qualified or "uncomfortable" consensus (in Mr. Kritzer's view) this would be met.

Wetland #3 (Finger)

Criteria #1 – Discussion focused on a couple of points, including that filling this wetland is not 100% necessary to completing the project. *Not* filling it, however, would impact the proposed loop road and the total number of houses -- which might affect the viability of the project. Mr. Nachilly said after walking this section in all seasons, he believes this is a low value wetland which may have limited value.

There was further discussion about a loop road vs. two cul-de-sacs and Town Planner Michael Behrendt said the Planning Board seems to have reached consensus on a loop (for a number of reasons) and it would be very difficult, though not impossible, at this stage in the application to change it.

Consensus was reached to say a qualified "yes," to this criterion with detailed commentary.

Criteria #2

General consensus seemed to be yes to meeting this criterion for the wetland finger.

Criteria #3

General consensus was “yes” to meeting this criterion.

Criteria #4

There was lengthy discussion on this point. Commissioners asked Engineer Mike Sievert about the mitigation efforts in this area. He replied there will be a sediment forebay and trees will be planted. The main reason for filling this wetland is to allow for a loop road and the pocket neighborhood design.

Mr. Rous asked about an alternate design to include one small cul-de-sac or a shared driveway and Mr. Sievert said many options had been explored and said ultimately cost considerations and the desire for a pocket neighborhood led to this decision.

After discussing the minimal value of this wetland and other topics, Commissioners seemed to reach consensus for a qualified “yes” on this criterion.

Wetland Buffer (Impact area 4)

Criteria 1, 2, 3 & 4: Mr. Rous said he believes all the engineering for this area has been done correctly since the run-off will be treated and the impacts are mitigated. Mr. Nachilly and others agreed the stormwater system is well-done and a necessary part of the design. The applicant has moved the system as far away from the wetlands as possible. Commissioners reached consensus that the applicant has met all four criteria for the wetland buffer.

As a side note, Mr. Nachilly said in walking the area, he saw a number of invasive species that should be part of a long-term stewardship plan to manage the open space. It was determined a homeowners’ association and not the town would likely be responsible for this.

At this point, Mr. Behrendt encouraged Commissioners to affirm (either by consensus or vote) that they found the project meets all four criteria for each of the four impacted areas, if he understood their discussion correctly. He suggested they take a vote now and then finish drafting their detailed commentary at their March 22 meeting.

There was back and forth discussion regarding how to proceed. Mr. Rous said he remains undecided on criterion 1 and does not think Mr. Behrendt captured his opinion correctly. Later he said it’s still unknown if there’s an alternative access that would be preferable and he believes the Planning Board needs to resolve the legal issue.

After further discussion, Mr. Behrendt urged Commissioners to be very clear this evening with the applicant and the abutters regarding the decisions they’ve made. He expressed his view that the Commission can provide further commentary at their next meeting, but it’s his understanding they’ve approved the criteria; he recommends they take a vote this evening and not re-visit the criteria at a future meeting.

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Ultimately, Commissioners agreed they were not ready to vote – with some expressing the view that sending an affirmative vote to the Planning Board strictly on the four criteria now might send the wrong message that the Commission endorses the project, when in fact they have not reached a formal position.

Mr. Kritzer said this is a large controversial project that has raised many questions. He believes the detailed commentary the Commission will provide to the Planning Board is critical to a full understanding of the Commission's position.

Chair Needell offered to draft a summary of comments made this evening for editing and review by members at their March 22nd meeting.

Mr. Kritzer MOVED that the Commission continue their discussion to the March 22nd meeting, but close that meeting to public comment; Also, the Commission will draft a report to the Planning Board between now and March 22 and will review, edit and approve that report on March 22; SECONDED by Mr. Rous, APPROVED unanimously, 6-0, Motion carries.

Mr. Behrendt clarified while no public comments will be allowed at the Commission's March 22nd meeting, the public is still free to submit comments via email.

Mr. Bubar MOVED to adjourn the meeting at 11:10 p.m.; SECONDED by Vice-Chair Krebs, 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.