

May 21, 2020

Dear Members of the Durham Planning Board and Durham Conservation Commission,

As an abutter adjacent to the proposed construction of an access road to the proposed Mulhern subdivision over town-owned property in a wetland, I am writing to address two issues integral to considerations surrounding this project:

- 1) advice by Durham Town Attorney Laura Spector to the Durham Town Council regarding whether it should allow the Mulherns to use this property, and
- 2) real estate transactions orchestrated by the Mulherns to enable them to claim the town-owned right-of-way is the only possible access to their proposed subdivision.

According to the transcript of Durham Town Planner Michael Behrendt's presentation at the January 13, 2020, town council meeting on behalf of the Mulherns' request to use this ROW, attorney Spector issued this instruction to the council:

"...The council can't act in a manner that is arbitrary. This particular piece of property was deeded to the town to be a street. ... The only question is whether this parcel can be used as a road, as it was originally intended to be."

The substance of that statement, i.e. that the parcel was "deeded to the town to be a street," cannot be verified. The planning board approved the Gerrish Drive/Ambler Way subdivision plan (aka, Pine Ridge) in January 1972 and later that year accepted the deed to the right-of-way. Records of the planning board proceedings of 1971 and 1972 are missing. Neither the zoning ordinance in effect at the time nor the current one requires a reserve strip within a planned subdivision that will connect it to a potentially developable adjacent parcel. However, by adding the ROW to the subdivision plan, the developer (Walter Cheney) was able to squeeze in one more lot that would otherwise be landlocked. (My husband, Andrew Merton, and I built our house on that lot.) The construction of this subdivision has a problematic history. Due to shoddy installation of culverts and a fire hydrant, Cheney's construction bond was suspended until those fixtures were dug up and properly replaced. So, one can only guess what his intent was in designating the ROW, which, without question, he knew lay in a sizeable wetland that constitutes the drainage basin for the entire subdivision.

Yes, the planning board ultimately approved the subdivision plan and accepted the ROW deed, but under what circumstances is open to conjecture. There were no wetlands protection provisions in the zoning ordinance in 1972. Indeed, the only mention in the ordinance of wet areas of any kind is in the section governing mobile home parks: "All such parks will be in areas free from marshes, swamps, stagnant pools, or other potential breeding places for insects or rodents." Such was the lack of appreciation at the time for the role of wetlands in an ecosystem. (Durham did not take

measures to protect wetlands, through the adoption of a wetlands conservation overlay district amendment, until 1975.)

Attorney Spector proffered this further advice to the town council at its January 2020 meeting:

“The wetlands and open space issues are not something the council should consider. Really, the issue for the council is whether this ‘should’ be a road. While that seems to imply a lot of discretion, unless the existing Gerrish Drive or Ambler Way are roads which cannot safely accommodate the traffic that is anticipated to be created by this subdivision, I don’t see a rational basis on which to deny the request to construct what was always intended to be a street.”

Open space is not, nor was it ever, an issue in the opposition to building a road on this property. Indeed, the “closed space” provided by mature trees, shrubs and other plants in the wetland that aid absorption and filtration of ground and surface water is part of what we opponents want to preserve.

As any long-time resident of the Gerrish Drive/Ambler Way neighborhood can attest (there are five of us), the water table has risen dramatically in the nearly 50 years since the first houses were built. The wetland where the ROW sits accepts three year-round running streams and accommodates increasingly frequent torrential rains that have temporarily raised the water level by more than two feet. Ending the functions of this wetland by completely filling it in – an extreme violation of the town’s rigorous wetland conservation provisions – isn’t a rational basis for denying a request for constructing a road through it? I leave the reader to ponder the logic of that advice.

The Mulherns maintain that this ROW is the only access they have to the land they want to develop. That wasn’t the case when this project made its debut at the July 11, 2018, meeting of the Durham Planning Board as part of a request by the Mulherns for a lot line adjustment. Two other access possibilities were available. One would require blasting through a steep ledge near two houses and thus, was not worth exploring. The other was via a spur road off Bagdad Road, where the Mulherns live. While a road from this spot to the location of the planned houses would be longer and more expensive to build than using the ROW off Gerrish Drive, it could skirt any wetlands, none of which contained running streams. At that 2018 meeting, the Mulherns announced they owned another, bigger house on the spur road, which they were putting on the market. What they didn’t announce was that, in addition to the house they were selling, they planned to sell the spur road, along with the right to use it for access to their proposed subdivision, thus removing this access option from consideration.

Two months later the Mulherns had a buyer for their bigger house. This would clinch their claim that the Gerrish Drive ROW was the only access to their land. But the title search for the house sale revealed the Mulherns didn’t own the spur road. It was owned by another resident on that road. So they negotiated with this neighbor,

acquired sole ownership of the road, and nine days later conveyed it with the house to a new owner. According to the deed for this transaction, the only access right the Mulherns retained on the spur road is to the house in which they live, not the 15 or so acres beside and behind that house, the locus of their proposed subdivision. They now pay a road maintenance fee to the new owner of the road. In an April 26, 2020 letter to the planning board, this new owner stated, "I own the driveway and under no circumstances would I give the Mulherns permission to build a road in its place to access their land."

Now, with this self-orchestrated hardship of no other access to their land, the Mulherns are moving forward with their proposal to build a "conservation subdivision," in the process subverting Durham's conservation regulations protecting wetlands.

Respectfully submitted,

Gail Kelley
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