April 25, 2022

Members of the Durham Conservation Commission and the Durham Planning Board

Re: 101 Durham Point Road
Interpretation and application of Durham Ordinance 175-61 B(1)

There is no deed restriction requiring applicant to use the existing driveway. The Board and the Commission were told there is a restriction, based on a misinterpretation of site plan "Findings of Fact". This was explained in my email sent on March 31, 2022 and also in an abbreviated version to the Conservation Commission during the application hearing. This fact is important to the Conservation Commissions focus on:

Durham Zoning Ordinance 175-61 B(1)

> The Planning Board shall approve a Conditional Use Permit for a use in the WCOD **only if** it finds, with the advice of the Conservation Commission, that **all of the following standards have been met** in addition to the general standards for conditional uses and any performance standards for the particular use:
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> 1. There is **no alternative location** on the parcel that is outside of the WCOD that is **reasonably practical** for the proposed use; [highlighting and underlining added]

"[N]o alternative … outside of the WCOD" - Practically the entire southeast section of Lot 2 is buildable and outside the WCOD. When the application was initially presented, applicant's documents and drawings didn't detail this area. Their thinking may have been constrained by the [false] belief that they were under a deed restriction. In Paul Rasmussen's email he states, "My only question is whether the Planning Board can set aside deed restrictions [restricting applicant to use the existing driveway], and if so is that practical?" The Planning Board doesn't need to set aside a deed restriction and, therefore, doesn't need to consider it further.

The applicant would not want the Conservation Commission or the Planning Board to consider other locations. While it is not in their interest to consider other locations, applicant was instructed to provide detail and update their plan. Since then, applicant has not asserted that there are no alternate locations, but merely expressed that they did not want to build in the upland area close to Durham Point Road. They have presented no evidence that there are no alternative locations, and it appears that **now, no one is contesting that there are alternate locations.**

Mr. Behrendt states "Certainly, if the access from Durham Point Road were taken further south there would be no encroachment upon the wetland or wetland buffer (in keeping with the first criterion) if the new house location were in the front part of the lot [the southeast section]." (Michael Behrendt's email accompanying his proposed "Draft Notice of Decision.") The email and video submitted by Emily Friedrichs, supports this, showing easily accessible, level, alternative locations. It is applicant's burden to

show there are no alternative locations, just as it is their burden to show their application meets all the other laws and regulations. They have not met this burden.

Continued examination of the language of the ordinance to **"proposed use" -** using applicant's own words in its application "Construction of a road to access buildable land" - demonstrate that alternate locations easily satisfy 175-61(B)1.

"[R]easonably practical" – Paul Rasmussen focused attention on this in his email. To assist in understanding the meaning of this sentence it is illustrative (reducing the clutter) to parse the sentence to "There is no alternative location … that is reasonably practical for the proposed use". In linguistic terms, "reasonably practical" modifies or describes "alternative location." It is extremely important to distinguish that this ordinance is not asking whether the **proposed** location is reasonably practical or whether it is reasonably practical to deny use of the **proposed** location, or anything else about the **proposed** location. "Reasonably practical" applies only to the "**alternative location**." It is only asking whether the alternative location is reasonably practical.

The word "practical" has the connotation that excludes consideration of preferences and desires, i.e., what is wanted, and focuses on what is "workable". Succinctly, the ordinance is asking if there are other workable locations. With regard to this application, there clearly are and the alternative locations are imminently practical: It is easier to access the alternate locations, with more than adequate frontage on the road (as a single residence on a single lot, not as an access to a subdivision), the alternate driveway would be significantly shorter, the grade would be easier, and as a result less expensive and it would access the lot from a safer point off Durham Point Road than the existing driveway. It is more than **reasonably practical**.

That is all the analysis that is required to understand the ordinance and to deny approval of the conditional use permit sought by the applicant.

Applicant's position is that they don't want to build in the southeast section of the lot but rather in a more aesthetically (to them, eye of the beholder …) location. If that were sufficient to avoid application of 175-61B(1), every application presented under this section of the ordinance would be approved. Allowing applicant's preferences to overrun the "only if" language of the ordinance eviscerates 175-61 B(1). Any applicant could then avoid the requirements set forth in 175-61 B(1) by simply asserting that they prefer the view (or anything else) in the location of their proposal, making the ordinance meaningless and ineffective. I doubt the drafters of the ordinance, intending to protect the WCOD, wanted it to be read as, "The Planning Board shall approve a Conditional Use Permit for a use in the WCOD only if it finds, with the advice of the Conservation Commission, that all of the following standards have been met in addition to the general standards for conditional uses and any performance standards for the particular use, **except when the applicant prefers what it has applied for over the alternative locations**." Approving the requested Conditional Use Permit would set a horrific precedent for any matter brought before the board or commission where this ordinance applies.

Michael Behrendt has submitted a Draft Notice of Decision, in advance of these hearings, presuming an outcome following his recommendation. He misleads the Conservation Commission and the Planning Board when he wrongly said there was a deed restriction, and he is misleading the Conservation Commission and the Planning Board with his incorrect reading and application of the ordinance.

Throughout this matter he has repeatedly tried to steer the Conservation Commission and the Planning Board away from considering any possibility that does not use the existing driveway.

Mr. Behrendt supported applicant's assertion that their title documents require applicant to use the existing driveway. He tells us how to read the pertinent ordinance (see his comments with the Draft Notice of Decision), relying not on the words with which the law is written, but instead by changing the words and the meaning to reach the conclusion he wants. "[R]easonably", used in the ordinance, is an adverb and modifies "practical", an adjective. "[R]easonably" immediately precedes "practical". It does not modify "location", a noun. And it certainly does not say that the Conservation Commission and the Planning Board have the discretion not to follow the "only if" requirement.

Does the phrase "reasonably location" sound like proper English or even make sense? Of course not, and that shows that "reasonably" applies to "practical" and not to "location". Nonetheless, Mr. Behrendt has somehow construed the phrase "reasonably practical" into "reasonable alternative location" which obviously changes the meaning. He has done this, not in an attempt to understand or clarify the ordinance, but in order to steer the decision. Somehow, he transforms "reasonably practical" into a justification for considering a host of factors which the drafters of the ordinance never included, along the lines of whether the Conservation Commission and Planning Board should approve a conditional use permit to purchasers simply because they bought a big lot or spent significant amounts of money. The drafters of the ordinance, **in protecting the WCOD**, did not want the Conservation Commission and the Planning Board to have such discretion. That is clear by the use of the strong language required to approve a conditional use permit, **ONLY IF**….

A reasonable person would have protected themselves and discovered the problems associated with where they want to build before they bought the property and either declined making an offer, passing on the property, or negotiated a price that reflects the problems. On this lot, those problems stick out like a sore thumb, and it was unreasonable and reckless to ignore them.

This ordinance, when it is broken down, isn't difficult to understand. It is not a guideline or a suggestion; it is determinative: It is the law**. It dictates that the Conditional Use Permit requested by the applicant cannot be approved.** Rule of Law is fundamental. Everyone is subject to law, and that is true here. It shouldn't matter if you are the town planner or a purchaser who didn't take the reasonable steps to understand what they are buying. The law should not be ignored, or worse violated, because of how much money someone has spent, or because of your personal philosophy on development, or because of your aesthetic preferences

Thank you again for your efforts and service.

- Bob McNitt