

To: Durham Conservation Commission, Durham Planning Board

From: Gail Kelley, 11 Gerrish Dr., Durham, NH

Re: **Compliance with court ruling in Gail Kelley v. Town of Durham must not be limited**

Durham Town Planner Michael Behrendt has notified the Conservation Commission and Planning Board that Town Attorney Laura Spector-Morgan advises them to limit their Court-ordered re-review of the Mulhern subdivision proposal to “only one issue, a review of the HISS map.”

This advice contradicts the wording of the judge’s ruling, which states:

“For the foregoing reasons, the court finds and rules that the Board improperly accepted the application as complete, and made unreasonable findings based on an insufficient application. Accordingly, the Board’s decision is REVERSED, and the matter is remanded to the Board for further proceedings consistent with this order.” (Full text of Kelley v. Durham appeal attached)

Note the use of plural nouns in the ruling. Those nouns refer to issues raised in the appeal -- in addition to the missing HISS map -- that require more consideration than merely accepting at the map and putting it in a file. Who holds the greater authority here? The judge who issued the ruling? Or the lawyer who lost the case?

The Board’s and Commission’s following of the advice of Attorney Spector-Morgan and Mr. Behrendt is what drove this appeal into Superior Court and led to its success.

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Indeed, it is the *court* that is limited in its scope of action. Judicial review of a planning board decision rests solely on determining whether there is evidence that reasonably supports the board's decision. Only when such evidence is lacking can the court reverse a planning board decision.

In the paragraph leading into the ruling in Kelley v. Durham, the court cited Victorian Realty Group v. Nashua, 130 NH (1987) in describing how a planning board gathers the necessary supporting evidence: “[The board], in exercising its discretion to grant or deny an application, **must consider the proposal ‘in a depth consistent with its duties under all relevant statutes, ordinances, and regulations.’**” (Emphasis added.)

And what are those planning board duties? NH Revised Statute Title LXIV, Chapter 674:1- *Duties of the Planning Board* spells them out. Most pertinent to the case at hand is 674:1, IV: **“The planning board, and its members, officers, and employees, in the performance of their functions may, by ordinance, be authorized to enter upon any land and make such examination and surveys as are reasonably necessary and place and maintain necessary monuments and marks and, in the event consent for such entry is denied or not reasonably obtainable, to obtain an administrative inspection warrant under RSA 595-B.**

Even though the permissive verb “may” is used here rather than the imperative

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“shall,” 674:1, IV underscores the importance of site visits in planning board decision making by providing a means for overcoming obstruction to a site visit.

Durham Subdivision Regulations 5.02 A, 5 – Phase 1, Preliminary Conceptual Consultation provides the authorization-by-ordinance referred to above in 674:1, IV: **“The Planning Board may hold a public on-site inspection of the site to review the existing conditions, *field verify the information submitted*, and investigate the preliminary development proposal. The Board may schedule this visit either before or after the meeting at which Phase 1 is considered.”** (Emphasis added.)

In violation of the above-cited statute and ignoring Durham’s subdivision regulation, Mr. Behrendt “advised” Acting Planning Board Chair, Lorne Parnell, Conservation Commission Chair Bart McDonough, and the Mulherns’ project engineer Mike Sievert to restrict site walks to just the Gerrish Drive wetland route onto the property and the four-acre area of the subdivision’s proposed homesites. To this day, 12 of the 16 acres of the property and the access route from the Bagdad Road right-of-way remain unexamined by the Planning Board and Conservation Commission.

On those unseen acres is an existing roadway running from the paved Bagdad Road right-of-way to the prospective homesites. Former Conservation Commission members Walter Rous and Sally Needell independently walked that roadway. So did Town Council Representative to the Planning Board Sally Tobias. A few members of the Gerrish Drive neighborhood, including me, have also walked it.

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As Mr. Mariano mentions in his 2018 HISS soil report (p.1), Trittech Engineering, the first engineering firm employed by the Mulherns, had an excavator on the property to dig test pits. That heavy equipment traveled over this roadway, leaving no sign of adverse impact to wetlands, even in one spot where a log bridge was built across a small stream. Indeed, soil scientist Mark West, hired by the Mulherns after Mr. Mariano finished his work, has determined that this particular wetland is the most pristine of any on the property.

Yet, the Planning Board, following Mr. Behrendt's advice, has refused – for the past four years – to examine this access route as an alternative to violating Durham's wetland protection regulations by filling the Gerrish Drive wetland to build a road through it.

Last November, the Planning Board, with the imprimatur of the Conservation Commission, voted to grant the Mulherns a conditional use permit to build the access road to their proposed subdivision through the Gerrish Drive active stream bed wetland. Then, as now, neither the Board nor the Commission, had ever seen 75 percent of the Mulhern property, much less examined it. The map they relied on had been prepared by Mr. Sievert, a civil engineer, not a soil or wetland scientist. That map depicts wetlands covering the whole mid-section of the parcel, from west to east, creating the impression that this area is under water. Mr. Behrend and Mr. Sievert played up this perception during Planning Board and Conservation Commission deliberations on the conditional use permit, claiming there is no way to get from the south to the north

without going through wetland. Those few of us who had explored the property more than once know this is a fantasy.

The court appeal has now resulted in the production of a proper HISS map. The wetland areas depicted on this HISS are smaller than those on the map produced by Mr. Sievert. Michael Cuomo, wetland scientist for the Strafford County Conservation District, conducted a field review of the HISS data collection, soil report, and map that wetland scientist Michael Mariano had prepared for the Mulherns in 2018. With Mr. Mariano, he walked the property and hand-dug several holes to compare his findings with Mr. Mariano's, ultimately confirming the accuracy of the Mariano's map.

Mr. Sievert produced the electronic rendition of the map. It was at this stage of the process that some red flags went up, though Mr. Cuomo calls them minor. Mr. Sievert added some text to the map in the form of four notes; all four, according to Mr. Cuomo, are incorrect. Note 1 incorrectly cites the publication that set the standards used for HISS mapping in New Hampshire. The title of that publication appears twice in Mr. Mariano's three-page report. All Mr. Sievert had to do was copy it. Note 2 states that the HISS map is used for meeting state requirements for Alteration of Terrain rules. It is not. Note 3, misstates the date of Mr. Mariano's accompanying narrative covering the methodology, map symbol legend, and interpretations of data on which the HISS map is based. That date appears prominently on the first line of the narrative. Note 4, the statement: "Use of the map symbol denominators for disturbed or altered soil is at

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the discretion of the soil scientist” has nothing to do with this map and does not belong on it. While these errors may be minor, they do indicate a certain casualness with factual details, something those of us who have followed Mr. Sievert’s actions and comments in this project and others he is involved in have seen on several occasions.

This week, in his cover letter accompanying numerous documents, plans, and maps, including the HISS map, which he submitted for re-review in light of the court ruling, Mr. Sievert states, “There is nothing materially different between what was originally approved by the Planning Board and what is being submitted herewith.” With the exception of the HISS map, he’s right. The HISS map shows that a road can definitely be built from the Bagdad Road right-of-way at the south end of the parcel to the house sites in the north without destroying any wetland and without having to go *through* any wetland. Other than that, materially, nothing has changed. The existing roadway on the Mulhern property is still there – though, due to No Trespass signs now posted on the perimeter of the parcel, I haven’t checked. Streams in the Gerrish Drive wetland are still flowing. Mr. Behrendt is still doing all he can to perpetuate the Mulhern myth that they don’t have legal access to their property from the Bagdad Road right-of-way, so he must continue to block Planning Board and Conservation Commission members from seeing that portion of the property. And the Planning Board’s and Conservation Commission’s reasoning in granting the Mulherns a conditional use permit to build a road through the Gerrish Drive wetland rendered the language of the conditional use criteria nearly meaningless.

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Meanwhile in February, NHDES sent Mr. Sievert a request for more information on his application for a permit to dredge and fill the Gerrish Drive wetland. The request runs four single-spaced pages. The second item on that list is particularly pertinent:

... [P]lease describe what alternative access routes to the proposed development have been considered in the design of this project. Specifically, NHDES review of the plans identified two alternative access points available to the proposed development available off of Bagdad Road and off of Route 108. Please either provide documentation to support that the proposed access off of Gerrish Drive is the least impacting alternative or revise the proposed plans to utilize the alternative access point that demonstrates avoidance and minimization requirements in accordance with Env-Wt 311.07 and Env-Wt 313.03. (Full DES information request attached).

For all these reasons, the Planning Board and Mr. Behrend must use the remand ruling in this case to do a full review of the Mulhern project. Doing otherwise will just continue wasting the time and money of all concerned.

The saddest part about all this is that houses could have been built on the Mulhern property by now if everyone had played by the rules and given a moment's thought to the consequences of what we are doing to the planet.

Thank you for your attention,

Gail Kelley

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

Gail Kelley

v.

Town of Durham, et al.

Docket No. 219-2021-CV-00369

ORDER

The petitioner Gail Kelley appeals the November 10, 2021 decision of the Durham Planning Board (“the Board”) approving a subdivision application with conditional use permits. (Court index ##1, 4). The court held a hearing on March 30, 2022 at which it heard arguments from Kelley and the Town of Durham (“the Town”). Based on the certified record, the parties’ arguments, and the applicable law, the court finds and rules as follows.

Facts

On December 16, 2020, the Board accepted as complete an application for an age-restricted condominium development off Gerrish Drive in Durham (“the Mulhern Project”). (C.R. 237).¹ Kelley contests the Board’s decision, in part, because she believes the Board accepted an incomplete subdivision application for review—specifically, that the High Intensity Soils Survey (HISS) was not verified, as required by the Durham Subdivision Regulations (“Regulations”). Regulations § 7.06 requires:

A High Intensity Soils Survey submitted as part of a pre-application submission or an application shall be prepared by a New Hampshire Certified Soil Scientist and shall be verified by one of the following methods prior to its consideration by the Planning Board in the review of the project:

¹ C.R. is a reference to the Certified Record provided to the court by the parties.

- A. Written evidence provided by the applicant that the Strafford County Conservation District or its designee has reviewed the soils data and mapping and agrees that it accurately represents the soil conditions on the site...

(See C.R. 182).² New Hampshire Certified Soil Scientist and Wetland Scientist Michael Mariano performed a High Intensity Soil Survey (HISS) of the Mulhern Project and filed a report on December 9, 2020. (C.R. 080-144). The defendants concede, however, “that no verification of the soil survey by the Strafford County Conservation District was submitted.” (Def.s’ Trial Mem. 3). Nevertheless, the Town accepted the application without verification.

Notably, the HISS report references an accompanying map; however, that map is missing from the application. Because of the absence of Mariano’s map, the Board and members of the Conservation Commission relied on maps produced by the applicants’ project engineer. Kelley argues that the applicants’ maps contradict several pieces of information in the HISS report—in particular, the HISS report does not mention a wetland to the east of the subject parcel, which is depicted in the applicants’ maps. (C.R. 491).

Kelley also argues that the Board did not exercise “due diligence” in determining the viability and impact of different access roads. Kelley cites Durham Zoning Ordinance § 175-61(B)(3), which requires that “[t]he location, design, construction, and maintenance of the facilities will minimize any detrimental impact on the wetland.” (Def.s’ Trial Mem. 5). Kelley contends that the word “minimize” implies comparison and that by not requiring a comparative study of available wetlands routes, the Board has failed to exercise due diligence.

²The Regulations offer, in the alternative to Part A, that the data may be verified by written evidence from the Town's independent certified soil scientist. That provision does not apply here because Durham does not employ an independent soil scientist.

In support of her argument, Kelley cites Durham Subdivision Regulations § 5.04, which states, “[a]dditional reports or studies may be required by the Board, including but not limited to, high intensity soil survey [...] and environmental impact analyses.” (Pet’r’s Trial Mem. 14).

Kelley similarly challenges the Board’s finding that “there is no alternative location on the parcel that is outside of the [Wetlands Conservation Overlay District (WCOD)] that is reasonably practical for the proposed use,” as required by § 175-61(B)(1)—that condition use being the proposed access road. For example, Kelly contends that the applicants have another access route to the project through their own parcel. The defendants contend that the applicants share an easement to utilize that access for one particular home on the lot (C.R. 287), and that using the road for all proposed residential units far exceeds the scope of the easement (C.R. 318). The defendants also argue that both the owner of the dominant estate and the co-easement holder refused to permit use of the easement as an access to the Mulhern Project. (C.R. 318, 474, 528-29).

On March 22, 2021, the Durham Conservation Commission found “no alternative location on the parcel that is outside the WCOD that is reasonably practical for the proposed use.” (C.R. 722). The Commission, charged strictly with reading the application alone, stated as follows: “While not endorsing the use of the ROW access, the Commission finds on a strict reading of this standard that there is no alternative location.” (*Id.*). The Commission similarly

voted, based on a “strict reading” of the standard, that the amount of soil disturbance will be the minimum necessary; the location, design, construction and maintenance of the facilities will minimize any detrimental impact, and mitigation activities will counterbalance any adverse effect; and that restoration activities will leave the site in its existing conditions much as possible. (C.R. 723). The Board made similar findings at its March 24, 2021 meeting, and the Board adopted those findings in its final decision. (See C.R. 736-37, 1422).

On November 10, 2021, the Board approved the application along with conditional use permits to build the subdivision’s access road through the Gerrish Drive wetland. (C.R. Tab 125).

Legal Standard

The trial court's review of a planning board's decision is governed by RSA 677:15, which provides that the trial court “may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that [the board's] decision is unreasonable.” RSA 677:15, V; see Girard v. Plymouth, 172 N.H. 576, 581 (2019). Thus, judicial review of planning board decisions is limited. Trs. of Dartmouth Coll. v. Hanover, 171 N.H. 497, 504 (2018). The court must treat factual findings of the planning board as *prima facie* lawful and reasonable. *Id.* The court determines not whether it agrees with the findings of the planning board, but whether there is evidence upon which those findings could have been reasonably based. *Id.* The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable. Girard, 172 N.H. at 581.

Analysis

I. Timeliness of Petitioner's Appeal

The Town argues that petitioner's appeal is untimely because she did not challenge the Board's acceptance of the application as complete within thirty days of the relevant vote. The Board voted to accept the application on December 16, 2020, and to approve the application with conditional use permits on November 10, 2021. Kelley filed her appeal with the court on December 8, 2021.

RSA 677:15, I, provides: "Any person aggrieved by any *decision* of the planning board concerning a plat or subdivision may present to the superior court a petition.... Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application." (Emphasis added.); see DHB, Inc. v. Pembroke, 152 N.H. 314, 317 (2005) (finding plaintiff had no statutory right under RSA 677:15 to appeal Board's decision that an application was not complete because the Board never approved or disapproved the application in whole). The second sentence of RSA 677:15, I states that a petition "shall be presented to the court within 30 days after the date upon which the board *voted to approve or disapprove* the application." (Emphasis added). "Thus, RSA 677:15, I, requires that a petition be presented only after the planning board has considered whether to approve an application." DBH, Inc., 152 N.H. at 318.

"A planning board cannot consider whether to approve an application before it accepts that application as complete." Id.; see Atwater v. Plainfield, 160 N.H. 503, 509 (2010) ("The

plain language of RSA 677:15, I, makes clear that planning issues are ripe for appeal to the superior court when the board has voted to approve or disapprove the application, and that such appeals are to be taken within thirty days of that approval or disapproval.”). In the present case, Kelley could not have challenged the Board’s decision until they voted to approve the application on November 10, 2021. While Kelley submits that the Board improperly accepted the application as complete in 2020, she does so as part of her overall appeal of the Board’s approval. Kelley could not properly challenge the Board’s approval, and thus the acceptance of the application, under RSA 677:15 until they voted to approve the project, which occurred on November 10, 2021. Therefore, Kelley’s appeal on December 8, 2021 is timely and properly before the court.

II. Verification of the HISS

Kelley argues that the Board erred in accepting an incomplete application. The Town concedes that verification is absent from the application and that the Board voted to accept it as complete without that requirement. The Town argues, however, that accepting the application without verification does not constitute error because (1) the Board deemed the application sufficient for them to make an informed decision, and (2) the Town later hired an independent engineer to review “the plans and information related to the stormwater management system.” (C.R. Tab 55); see Rallis v. Hampton Plan. Bd., 146 N.H. 18, 21 (2001) (finding application sufficiently complete where the record indicated that both the planner and board chair considered the application sufficiently complete). Notably, an engineer is not a soil scientist, which § 7.06 requires. (See C.R. 182 (subdivision application checklist)).

“The planning board shall specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval. A completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision.” RSA 676:4(b). The Regulations require verification of the soil data included in a subdivision application for the application as a whole to be considered complete. The Town offers no explanation as to why the verification was not included.

In Rallis, the court deemed the application sufficiently complete because the record indicated that both the planner and board chair considered the application sufficiently complete, and the application included “detailed subdivision plans *and* the other items required by the subdivision regulations.” 146 N.H. at 21 (emphasis added). Moreover, the board in Rallis declined to accept the application “because it: (1) did not include written waiver requests for the double-fronted lots and road location; and (2) presented too many design issues ‘which ultimately could be reconfigured and submitted at a later date.’” Id. at 19-20. The court, however, held that the board was not entitled to decline jurisdiction over the waiver requests because the corresponding amendment did not take effect until *after* the hearing on the plaintiff’s application, leaving only the design concerns. Id. at 20. Notably, the Rallis applicant did not fail to include an item specified by the subdivision regulations. “That the plaintiff offered to revise or redesign his plans to satisfy various planning board concerns, after submitting a completed application, did not render his application ‘incomplete’ for jurisdictional purposes.” Id. at 21-22.

By contrast, in DHB, Inc., neither the planner nor the board chair nor any member of the board considered the application sufficiently complete, nor did the plaintiff provide the

requirements of the subdivision regulations. 152 N.H. at 322. RSA 676:4, I(b) provides: “The planning board shall specify *by regulation* what constitutes a completed application sufficient to invoke jurisdiction to obtain approval. A completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision.” (Emphasis added). “The first sentence provides that a planning board in its regulations determines whether or not an application is sufficient to invoke jurisdiction. The second sentence, defining a completed application, merely provides guidance for the planning board in constructing its regulations.” DHB, Inc., 152 N.H. at 322. In DBH, Inc., the court reasoned that the plaintiff did not present any proof that it satisfied the requirements for a completed application as per the subdivision regulations, therefore, the plaintiff had not submitted “sufficient information to enable the board to make an informed decision.” Id. at 323.

In sum, applicants must submit a completed application. Rallis, 146 N.H. at 21. In the present case, Kelley has demonstrated, and the Town concedes, that the application did not include verification of the HISS, as required by the subdivision regulations. Moreover, any subsequent assessment by an engineer does not satisfy the regulations’ specific requirement that the HISS be verified by the Strafford County Conservation District, its designee, or a certified soil scientist hired by the Town. Regardless of whether the Board considered the application complete, the applicant did not meet the requirements of the Durham subdivision regulations and the Board, therefore, could not properly accept the application.

III. “Due Diligence” and Required Procedure Under Zoning Ordinance

Kelley also challenged the Board’s issuance of a conditional use permit for the proposed access road, arguing that the Board did not exercise due diligence by undertaking a comparative study

of the available wetland routes, and, more specifically, that the Board overlooked another available route that Kelley alleges is outside the WCOD.

In the present case, Kelley interprets the use of “minimize” in the ordinance as implying comparison. “Interpretation of the words of a zoning ordinance presents a question of law which we evaluate according to well-settled principles of statutory construction.” Mountain Valley Mall Assocs. v. Conway, 144 N.H. 642, 652 (2000). The court will “first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” State v. Proctor, 171 N.H. 800, 805 (2019). In doing so, the Court “construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” McCarthy v. Manchester Police Dep’t, 168 N.H. 202, 207 (2015). “Moreover, [the court] do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole.” Id.

Zoning Ordinance § 175-61(B)(3) requires that “[t]he location, design, construction, and maintenance of the facilities will minimize any detrimental impact on the wetland.” In support of her contention that the Board must undertake a comparative study to determine whether the proposed use minimizes negative effects, Kelley points to Regulations § 5.04, which states: “[a]dditional reports or studies may be required by the Board, including but not limited to, high intensity soil survey [...] and environmental impact analyses.” The zoning ordinance itself does not explicitly require a comparison to ensure that any detrimental impact is in fact “minimized.” The Regulations, moreover, permit but do not mandate the Board procure additional reports studies. Accordingly, the Board’s determination that the application sufficiently demonstrated

that the location, design, construction, and maintenance will minimize detrimental impact is not unreasonable simply by not specifically comparing alternative access points.

Kelley similarly challenges the Board's finding that there is no alternative location for an access road on the parcel outside of the WCOD. More concerning, as Kelley points out, the application did not include verification of the HISS, nor did it include maps created for and referenced by the HISS. Instead, the Board and members of the Commission relied on maps produced by the applicants' own project engineer. (See C.R. 491). Notably, the applicant's project engineer indicated that the New Hampshire Department of Environmental Services would look into alternative access points, while the Commission was prevented from doing the same and could only rely on the application as submitted. (C.R. 722). Moreover, the Commission noted in its vote that "[t]he Conservation Commission does not support the destruction of wetlands, but believes their destruction is a *necessary* part of this application." (C.R. 723 (emphasis added)). In the Board's vote, members "agree[d] with the Conservation Commission that there is no alternative location." (C.R. 736).

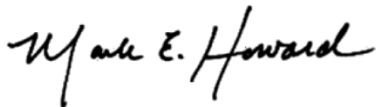
Members of the Board and Commission, however, made such assessments based on what the court has already determined was an incomplete application. Indeed, the missing requirement relates directly to the very issues Kelley points out—namely, the identification of wetland areas in the HISS and corresponding maps influenced the data upon which these entities made their decisions. (See C.R. 722-23, 736-37). Accordingly, ultimate findings based on an incomplete application—especially considering the deficiencies of this application in particular—are inherently unreasonable. See Girard, 172 N.H. at 588 ("Thus, a trial court's task is limited to

determining whether the record contains evidence that reasonably supports the board's findings.”); Batakis v. Belmont, 135 N.H. 595, 598 (1992) (“[T]he court could decide that the board's decision was unreasonable by considering the evidence as a whole, including evidence arising before the board formally invoked its jurisdiction pursuant to local regulations...”); Victorian Realty Group v. Nashua, 130 N.H. 60, 62 (1987) (finding board, in exercising its discretion to grant or deny an application, must consider the proposal “in a depth consistent with its duties under all relevant statutes, ordinances, and regulations.”).

As such, the court finds that Kelley has demonstrated by a balance of probabilities that the Board’s decision was unreasonable.

Conclusion

For the foregoing reasons, the court finds and rules that the Board improperly accepted the application as complete, and made unreasonable findings based on an insufficient application. Accordingly, the Board’s decision is REVERSED and the matter is remanded to the Board for further proceedings consistent with this order.



Date: June 1, 2022

SO ORDERED.

Mark E. Howard Presiding Justice

Clerk's Notice of Decision

Document Sent to Parties on 06/01/2022



The State of New Hampshire
Department of Environmental Services



Robert R. Scott, Commissioner

February 10, 2022

MARTHA/MICHAEL MULHERN
91 BAGDAD RD
DURHAM NH 03824

**Re: Request for More Information – Standard Dredge and Fill Wetlands Permit Application (RSA 482-A)
NHDES File Number: 2021-03763
Subject Property: 91 Bagdad Rd, Durham, Tax Map #10, Lot #8-8**

Dear Applicant:

On February 10, 2022, the New Hampshire Department of Environmental Services (NHDES) Wetlands Bureau reviewed the above-referenced Standard Dredge and Fill Wetlands Permit Application (Application). Pursuant to RSA 482-A:3, XIV(a)(2) and Rules Env-Wt 100 through 900, the NHDES Wetlands Bureau determined the following additional information is required to complete its evaluation of the Application:

1. In a letter received by NHDES on November 30, 2021, an abutter expressed concerns regarding this project. In order to meet the standard approval criteria in accordance with Rule Env-Wt 313.01(a) and pursuant to RSA 482-A:11, II, please provide a response to the abutter concerns regarding this project as identified in the attached letter.
2. In order to fully address how all impacts to functions and values of all jurisdictional areas have been avoided and minimized in accordance with Env-Wt 311.07 and Env-Wt 313.03 as required by the approval criteria for residential development projects in accordance with Env-Wt 524.02(b), please describe what alternative access routes to the proposed development have been considered in the design of this project. Specifically, NHDES review of the plans identified two alternative accesses points available to the proposed development available off of Bagdad Road and off of Route 108. Please either provide documentation to support that the proposed access off of Gerrish Drive is the least impacting alternative or revise the proposed plans to utilize the alternative access point that demonstrates avoidance and minimization requirements in accordance with Env-Wt 311.07 and Env-Wt 313.03.
3. In accordance with Env-Wt 306.06(a) and (b), the applicant must notify abutters prior to filing an application, and as required by RSA 482-A:3, I(d)(1), must provide notice to abutters in writing by certified mail or other delivery method that provides proof of receipt. Please provide copies of the certified mail receipts as required by RSA 482-A:3, I(d)(1). The photocopy of the USPS receipt provided is insufficient to meet this requirement.
4. Based on the tax maps provided with the application, the abutting property at Madbury Tax Map #9, Lot #32 was not included in the abutters list. Please provide an explanation as to why this property was not included in the abutters list.

If this property is an abutting property, then please revise the abutters list, provide abutter notification via certified mail or other delivery method that provides proof of receipt in accordance with Env-Wt 306.06(a) and (b), and provide copies of the certified mail receipts as required by RSA 482-A:3, I(d)(1).

However, if the property at Madbury Tax Map #9, Lot #32 is actually a part of the property of interest along with Durham Tax Map #10, Lot #8-8, meaning the property is located in more than one municipality, then in accordance with RSA 482-A:3, I (a)(1), a complete application form must be signed by the town clerks of each individual

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TDD Access: Relay NH 1 (800) 735-2964

municipality in which the property is located, certifying that the municipality has received 4 copies of the form and attachments as provided in subparagraph RSA 482-A:3, I (a)(2). Please include the following as a part of the response to this letter:

- a. A revised application form that includes the additional project location information for the portion of the of the property located in Madbury under "Section 3 – Project Location."
 - b. A revised application form that includes the town clerk signature for the Town of Madbury under Section 16 of the application in accordance with Env-Wt 311.04(f).
5. The plans show the proposed stream and wetland impacts, identified as "Proposed Wetland Crossing #1," occur outside of the limits of the applicant's property interest on Durham Tax Map #10, Lot #8-8 in an existing right-of way owned by the Town of Durham. Please include the following as a part of the response to this letter:
- a. Please provide a revised application form that includes the information for owner of the existing right-of-way where impacts are proposed as required in Section 6 of the application form in accordance with Env-Wt 311.04(b).
 - b. In accordance with Env-Wt 311.11(d), because the applicant is not the owner of the right-of-way where these impacts are proposed, the owner of the right-of way must also sign and date the application.
 - c. As the applicant is not the owner in fee of the existing right-of-way, please provide documentation of the applicant's legal interest in the subject existing right-of-way in accordance with Env-Wt 311.06(f).
6. The plans show the proposed impacts related to the stream crossing identified as "Proposed Wetland Crossing #1" will be taking place within 10 feet of the abutting properties at Durham Tax Map #10, Lot #6-10, and Durham Tax Map #10, Lot #6-9, the owners of these lots are identified as Gail J. Kelley Rev. Trust, and Michael P. & Molly P. White on the provided abutters list respectively. In accordance with Env-Wt 307.13(d) if an applicant wishes to extend an activity that is covered by a standard permit closer than 10 feet to an abutting property line, the applicant must provide the department with written consent from the affected abutter.
7. As this project involves a subdivision, in accordance with Env-Wt 311.05(a)(20), Env-Wt 311.05(a)(17), Env-Wt 311.05(a)(18), Env-Wt 524.03(a)(2), Env-Wt 524.03(a)(3), Env-Wt 524.03(a)(4), and Env-Wt 524.03(a)(5), as a part of the response to this letter, include a plan prepared and stamped by a land surveyor licensed in the state of New Hampshire pursuant to RSA 310-A showing:
- a. the existing and proposed topography;
 - b. the location of all proposed lot lines;
 - c. the boundaries of all wetlands and surface waters with the wetlands classifications clearly indicated in accordance with Env-Wt 400;
 - d. the footprint of all proposed impacts identified by labeled and lightly shaded or stippled areas indicating the limits of all temporary and permanent impacts in jurisdictional areas; and
 - e. if the project is associated with one or more phases of a multi-phase subdivision, a project impact plan that also shows all wetlands on remaining property proposed for future phases of development.
8. The Natural Heritage Bureau (NHB) DataCheck report that was submitted with the application (NHB File ID: NHB19-4057) expired on December 19, 2020, and is no longer valid. In accordance with Env-Wt 311.06(g), please provide an updated version of the Natural Heritage Bureau of the NH Department of Natural and Cultural Resources (NHB) memo containing the NHB identification number and results and recommendations from NHB as well as any written follow-up communications such as additional memos, email communications or other documentation of coordination with either NHB or NH Fish and Game Department (NHF&G) as applicable to determine how to avoid and minimize project-related impacts on the resource in accordance with Env-Wt 311.01(b). Please note that if recommendations are not fully met, then the wetlands on the property would be considered a Priority Resource

Area (PRA) and mitigation may be required for all permanent impacts related to this project in accordance with Env-Wt 311.01(c).

9. The provided plans do not show a distinction between the location of the proposed permanent impacts or the proposed temporary impacts. In accordance with Env-Wt 311.05(a)(18) and Env-Wt 311.04(g)(7), please revise the plans to provide lightly shaded or stippled areas indicating limits of all temporary and permanent impacts in jurisdictional areas that have been labeled with the square footage of impact and linear footage of impact.
10. Sheet C103 of the plans show the installation of proposed erosion controls well outside of the identified limits of the proposed impact areas, particularly around wetland crossing #3. Please revise the plans to either relocate the proposed erosion and sedimentation controls within the already proposed limits of impact or revise the plans to include these areas as additional temporary impacts in accordance with Env-Wt 311.05(a)(18). Please note that if these additional temporary impacts will result in an increase in the total square footage of requested impact area for this project, please adjust the filing fee to include any additional square footage of impact in accordance with the fee schedule pursuant to RSA 482-A:3, I, (c). As of the writing of this letter, the Wetlands Bureau has received \$3,060.00 for the originally estimated 7,649 square feet of permanent and temporary impact. If any additional permanent or temporary impacts have been calculated beyond what has already been estimated, please submit a check for any additional impact at a rate of \$0.40 per square foot with your response.

Additionally, please note that if this request results in an overall increase of the total requested impacts for this project above 9,999 square feet, then compensatory mitigation will be required for this project in accordance with Env-Wt 313.04(a)(2). If this is the case, please contact NHDES Mitigation Coordinator, Lori Sommer, at lori.sommer@des.nh.gov or at (603) 271-4059, in order to discuss potential mitigation options and include a copy of all correspondence as a part of the response to this letter. In addition, provide all information required pursuant to Env-Wt 311.08, including the type of mitigation proposed by the applicant and a complete compensatory mitigation proposal that includes all information required in accordance with Env-Wt 312.04.

11. Proposed wetland crossing #3, identified on plan sheet C101 as "Wetland disturbance area = 752 SF," does not maintain hydrologic connectivity within the existing wetland as required in accordance with Env-Wt 524.04(d). Please revise the proposed residential development project design to maintain or restore hydrologic connections to maintain flows necessary to preserve adjacent wetland and riparian functions in accordance with Env-Wt 524.04(d).
12. In accordance with Env-Wt 311.05(a)(13), please revise the plans to clearly identify the locations of the existing streams on the property as delineated in accordance with Env-Wt 406.
13. The proposed fill to provide access to the property from Gerrish Drive appears to include fill within approximately 200 linear feet of the intermittent stream channel, however Section 11 of the Standard application form indicates that there are only 37 linear feet of impacts proposed to the intermittent stream. Please revise the plans to include the construction of a new stream channel in order to maintain the hydrologic connectivity and maintain flows necessary to preserve adjacent wetland and riparian functions in accordance with Env-Wt 524.04(d). Additionally, please revise the plans to clearly show the linear footage of all stream impacts in accordance with Env-Wt 311.05(a)(18) and please revise Section 11 of the Standard application form to include the correct linear footage of all stream impacts related to the two proposed stream crossings in accordance with Env-Wt 311.04(g). Please note that for intermittent streams, the linear footage of impact shall be measured along the thread of the channel, while for perennial watercourses, the linear footage of impact shall be calculated by summing the lengths of the disturbance to the channel and the banks in accordance with Env-Wt 407.03(c).
14. Please revise Section 11 of the Standard application form to include the square footage of all stream impacts related to the two proposed stream crossings in accordance with Env-Wt 311.04(g).
15. The profile detail of stream crossing #1 crossing indicates that the invert elevations for the proposed stream crossing will be constructed below grade of the existing crossing and does not appear to meet the design requirements in

- Env-Wt 904.01(a) as a result. Please redesign this stream crossing to construct the proposed culvert inverts at grade with the existing stream channel and maintain the existing flows within the stream channel as required in accordance with Env-Wt 904.01(a) and Env-Wt 524.04(d).
16. In accordance with Env-Wt 903.04(b)(3), for the proposed stream crossing, provide plans for both the existing structure, and the proposed structure, that show the location, type, dimensions, and inlet and outlet invert elevations. In addition, please revise the provided stream crossing worksheets to include this additional information about the existing stream conditions.
 17. For the proposed stream crossings, please provide a USGS map or updated data based on LiDAR required by Env-Wt 311.06, with the approximate boundaries and size of the contributing watersheds, and identification of the stream tier based on watershed size in accordance with Env-Wt 903.04(a).
 18. For the proposed tier 1 stream crossings, please revise the plans to include cross-sections showing the water surface elevation resulting from the 50-year design storm, with bed material and backfill zones, for each proposed stream crossing in accordance with Env-Wt 903.04(b)(7).
 19. For the proposed stream crossing project, please provide the information specified in Env-Wt 903.04(d) regarding the dewatering and water diversion systems proposed to be utilized during construction including:
 - a. Estimates of the maximum flow anticipated during construction, including any summer storm estimates;
 - b. The hydraulic calculation for the bypass pipe or channel size, length, and gradient;
 - c. Location, height, and width of the diversion dam;
 - d. Sump locations, including estimate of necessary flow and sump capacity;
 - e. Backwater prevention method; and
 - f. Sediment treatment plan with methods, release point, and extent;
 20. In accordance with Env-Wt 311.05(a)(14), revise the plan sheets to provide the name and professional license number of the individual responsible for the delineation of jurisdictional areas, including but not limited to wetlands, streams, and vernal pools on the property, if other than the individual identified as being responsible for the plan in accordance with Env-Wt 311.05(a)(5).
 21. Please revise the plan sheet(s) depicting wetland boundaries to include notes that specify the date(s) on which the wetlands delineation was performed, and the method of delineation, in accordance with Env-Wt 311.05(b)(5).

Please submit the required information as soon as practicable. Pursuant to RSA 482-A:3, XIV(a)(2), **the required information must be received by the NHDES Wetlands Bureau within 60 days of the date of this request (no later than April 11, 2022), or the Application will be denied.** Should additional time be necessary to submit the required information, an extension of the 60-day time period may be requested. Requests for additional time must be received prior to the deadline in order to be approved. In accordance with applicable statutes and regulations, the applicant is also expected to provide copies of the required information to the municipal clerk and all other interested parties.

Pursuant to RSA 482-A:3, XIV(a)(3), the NHDES Wetlands Bureau will approve or deny the Application within 30 days of receipt of all required information, or schedule a public hearing, if required by RSA 482-A or associated rules.

If you have any questions, please contact me at Kristin.Duclos@des.nh.gov.

Sincerely,



Kristin L. Duclos

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File Number: 2021-03763

February 10, 2022

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Wetlands Specialist, Wetlands Bureau
Land Resources Management, Water Division

cc: Durham Municipal Clerk/Conservation Commission
Madbury Municipal Clerk/Conservation Commission
Horizons Engineering, Inc., c/o Michael J. Sievert

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