

October 20, 2022

To: The Durham Planning Board and the Conservation Commission

From: John Lewis, Durham Resident

Re: The Mulhern Project

My name is John Lewis. I am a Durham resident, living at 9 Gerrish Drive. I am also a retired New Hampshire Superior Court Judge with extensive experience in land use cases.

A few words about Judge Howard's remand decision. In his ruling, Judge Howard reversed the Planning Board's approval of the Mulhern project. He held that the "Board improperly accepted the application as complete, and made unreasonable findings based on an insufficient application." See Decision at 10. He remanded the matter "for further proceedings consistent with this order." Id.

Judge Howard highlighted that the Board's action in moving forward to consider the pertinent WCOD conditional use criteria without having before it verified HISS mapping materials resulted in improper reliance on "maps produced by the applicant's own project engineer," maps that had been substantially called into question by Ms. Kelley. Id. at 2.

While Judge Howard did state that the pertinent third WCOD conditional use criterion (see Durham Zoning Ordinance Section 175-61 (B) (3))—that the "location, design, construction and maintenance of the [project's] facilities will minimize any detrimental impact on the wetland"—did not necessarily require express comparing of specific alternative access points, he did insist that the Board make its approval decisions based on a complete application which included required HISS materials. So, the Board needs to now review the pertinent approval criteria—all four of them but particularly one and three—with the benefit of a complete application.

The now available HISS materials are pivotal here, **and they are revealing**. They show that the applicants **cannot satisfy** the 3<sup>rd</sup> WCOD conditional use criterion because an access from Bagdad Road is available that has minimal if any adverse impact on wetlands. Such a route would not destroy any wetlands as would be the case with use of the Gerrish Drive access. Indeed, it would appear to constitute an alternative location for an access road that would involve no more than perhaps very minor encroachment on wetlands and a small bridge going over, not through, wetlands. The Durham Zoning Ordinance Section 175-61 (B) makes no provision for destruction of wetlands to avoid building a longer road that would not destroy wetlands.

I do not understand the Board's and the Commission's use of what they called "a strict reading" in dealing with the pertinent criteria. This "strict reading" resulted in no meaningful review of the access question. One would think that a "strict reading" means paying close attention to every word and not allowing any distortion of meaning. **The Board and the Commission must adopt a reading of conditional use requirements that honors the essential purpose of preserving wetlands from harm.**

Indeed, and as stated in the Durham Zoning Ordinance, one of the purposes of wetland preservation is to protect humans from harm. See Article XIII, Section 175-58 Purpose of the Wetland Conservation Overlay District: ". . . The provisions of this article are intended to . . . (B) Minimize flooding and flood

damage by preserving the flood storage capacity of wetlands.” Filling of the Gerrish Drive wetland would remove the flood storage capacity of this wetland that has provided Gerrish-Ambler residents documented protection from increasingly severe flooding that has coincided with climate change.

It is necessary for the Board to consider all the facilities of the project (which encompasses 16 acres, including the possible Bagdad Road route) to determine if they are designed to minimize adverse wetlands impact. Further, and I highlight this, **the burden is on the applicants to establish satisfaction of the pertinent criteria.**

The Board has used the third WCOD conditional use criterion before in insisting on a change in the project’s routing for its inner road to avoid adverse impact on a wetland finger. It should as well review the evidence it now has regarding access routes and arrive at a decision which fairly deals with assuring minimization of adverse impact on wetlands.

Respectfully submitted,

John M. Lewis