

**DURHAM CONSERVATION COMMISSION SPECIAL MEETING  
MONDAY, JANUARY 4, 2021 – 7:00 PM  
DURHAM TOWN HALL - COUNCIL CHAMBERS - DURHAM, NH**

*Note: Due to the Coronavirus pandemic, most members and presenters attended via Zoom video conferencing while a limited number were in Council Chambers.*

Members Present: Chair Sally Needell; James Bubar; Coleen Fuerst; Vice-Chair Mary Ann Krebs; Jake Kritzer; Walter Rous and Alternate Roanne Robbins

Absent: John Nachilly and Alternate Liz Durfee

Also Present: Contract Planner Rick Taintor and Minute Taker Lucie Bryar

**I & II. Call to Order and Reading of Covid Emergency Preamble**

Chair Sally Needell called the meeting to order at 7:01 p.m. and read a required statement pursuant to the Governor’s Emergency Order #12 pertaining to meeting remotely during the Covid-19 pandemic and outlining how the public can continue to participate. More information is available on the town of Durham website.

**II. Roll Call**

Chair Needell took roll call and said Ms. Krebs will join the meeting about 7:30 p.m. Ms. Fuerst also joined a little late. Ms. Robbins was seated as a voting member this evening.

**III. Approval of Agenda**

**Mr. Bubar MOVED to approve the agenda as submitted; SECONDED by Mr. Kritzer, APPROVED unanimously, 5-0, Motion carries.**

**IV. Mill Plaza – Conditional Use in WCOD and SPOD.** 7 Mill Road. Application for conditional use for construction within the Wetland Conservation and Shoreland Protection Overlay Districts. The Commission will make a recommendation to the Planning Board as part of the site plan application for redevelopment of the site. Sean McCauley, agent. Joe Persechino, Tighe & Bond, engineer. (Rick Taintor is serving as the Town’s Contract Planner.) Central Business District, Map 5, Lot 1-1.

Chair Needell said she could read a summary of past comments from the public or just open up the proceedings to new public comments; Commissioners agreed the latter option would be preferable. She encouraged residents to keep their comments as short as possible. Comments are summarized here:

**Susan Richman:** said Colonial Durham Associates’ plan will continue the process of minimizing urban greenspace in Durham, adding to the total impervious surfaces. In 2017, Administrator Todd Selig wrote that “our remarkable waterway is a priceless and fragile natural resource that must be protected against adverse impacts, especially when there are better alternatives

available.” She asked: Have we advised Oyster River Advisory Committee [about the project] and have we applied for alteration of terrain permit from NHDES? She encouraged the Commission to follow town regulations and ordinances and said, “There is nothing in this plan that is so imperative that we should get rid of green space, take down trees or impinge on a protected 75-foot buffer.”

Chair Needell said the Oyster River Advisory Committee has been contacted and also the Commission was advised an Alteration of Terrain (AOT) permit will be part of the process, but it’s too early to initiate it.

Mr. Taintor said the Oyster River Advisory Committee has expressed a willingness to respond to any requests for specific information from the Commission and otherwise they will look at the project through the normal process, in particular during Alteration of Terrain permitting.

**Joshua Meyerwitz:** said he would like to hear the summary of public comments to know what the Commission has paid attention to; He said, “We’ve written a lot; we’ve said a lot. Thank you very much for your attention to this critical issue.”

**Robert Russell:** said in his view, the project would not be wrecked by recommending the standard 75-foot setback be observed. When re-developing, it’s important to re-establish the natural environment in the buffer that was there historically. Mr. Russell reiterated a number of supportive statements made by Commissioners at previous meetings and noted a quick look at all of Colonial Durham Associates’ proposals shows they have never attempted to be consistent with the requirements. He added it’s not the Commission’s role to bargain with the CDA; that’s the role of the Planning Board or Town Council.

**With no further public comment, Mr. Bubar MOVED to close the public hearing; SECONDED by Mr. Rous, APPROVED unanimously, 6-0.**

The Commission proceeded to discuss making a recommendation for the Mill Plaza application: Chair Needell said she researched Commission statements from past projects that were similar, including a 2014 application for 15 Madbury Road which reads in part: “An alternative location would be feasible if the project was designed differently and the size of the project was reduced.”

Mr. Bubar expressed frustration with what he believes to be an arbitrary 75-foot buffer. He consulted Buffer on the Bay (BOB), an online resource, to better understand how buffer sizes are determined and learned the size of a buffer should depend on soils, vegetation and slope. He emailed BOB officials to ask if professionally engineered stormwater systems should be a factor in deciding on an appropriate buffer size and their response was that “engineered technology can certainly address the same threat as natural buffers.” In his view, “we don’t need 75-feet at all.” He believes the ordinance should be re-visited to account for vegetation, slope and underlying soils.

Mr. Rous said he also read BOB and came away believing their recommendation is for buffers greater than 75-feet. He said, “We have an ordinance and we’re the Conservation Commission.

Until we get a scientific basis for differentiating setbacks, I intend to live with the ordinance.” Ms. Fuerst concurred with his statement.

Mr. Kritzer wanted to clarify the difference between “jurisdictional buffers” (i.e., buffers on paper that prescribe what you can and cannot do within 75-feet) and a meaningful functional buffer. He asked Commissioners: do we want to just say how close buildings should come to the wetland or do we want to actually decide what that area needs to look like in order to recover full ecological and hydrological functions for College Brook – including bank stabilization, water runoff, habitat, etc.? He would like to see the Commission seriously consider a recommendation to restore a meaningful buffer.

Mr. Rous shared that he attended an online seminar about the Aquatics Resources Management (ARM) fund, which is handled by NHDES. ARM offers funding for stream restoration. He wants to encourage the Commission to look at a broad collaborative effort involving CDA, Brookside Commons, UNH, and possibly private owners on Chesley Drive. He said if they work together to create an easement, then funding to restore the brook might be available. He acknowledged that although he made a negative remark about UNH practices in the past, a recent letter from UNH Planner Doug Banks showed they’ve been actively working for the last 10 years on wetland buffer mitigation projects.

Chair Needell said in making a recommendation to the Planning Board, she wants to be comfortable that new precedents are not being set for disregarding the 75-foot buffer (e.g. averaging the buffer to 50-feet in some areas as previously discussed) and that the Commission’s recommendation is defensible.

Mr. Kritzer referenced a prior project at 18 Garrison Avenue and said in most instances like this, the existing impervious surfaces are grandfathered. He believes asking for a fully restored buffer now is a precedent in the right direction, though he acknowledged that means this project would be held to a different standard.

Mr. Rous said he is looking at it from the criteria used to allow disturbance in a buffer. Criteria number one states disturbance can be allowed “if there is no alternative location.” Aside from the entrance to the Plaza, which doesn’t have a reasonable alternative – he does not believe the rest of the project meets criteria number one.

He then turned to the issue of parking spaces and said a 2018 proposal showed 384 parking spaces and the current proposal shows 581. He said, “This is ballooning out of control.” He believes it’s being driven by the number of proposed beds, amount of commercial space and a desire to exceed the minimum requirements. He said, there is an alternative and that is to design a smaller project.

Mr. Bubar said he would like to see more emphasis placed on the role of the stormwater management system in helping to protect the buffer. He asked the Commission to clarify what they want the buffer to do.

Ms. Fuerst said more parking spaces lead to more contamination from oil, grease, sand and salt. She would like to see some parking spots reserved for electric vehicles. She also spoke about hydrogen vehicles and solar panels and encouraged the Commission to look at the project from a broader environmental perspective, not just a 75-foot wetlands setback.

Chair Needell addressed Mr. Bubar’s question and said as she sees it, the stormwater management system would still be in place, just not in the wetland buffer. The natural buffer would deal with precipitation coming directly into the brook and the stormwater management system would help with parking lot runoff.

Mr. Bubar said a restored buffer with vegetation could provide screening for Riverside [Brookside?] residents and might help with noise and light pollution.

Mr. Kritzer said he suspects a lot of residents’ flooding issues are not originating on site, but further upstream. In seeking to restore the buffer, he thinks increasing the floodplain capacity should be high on the list. He described some of the larger waterflow issues surrounding College Brook and said he’s not sure all of the mitigation should fall to CDA. He said, “If we want this buffer to do more work, then we should look at all sources of excess flow.”

Ms. Robbins agreed with his assessment of excess water flow from other sources, but she said the current applicant is looking to remove a vegetated hillside and add additional parking, which does not seem like a responsible action under the circumstances.

Commissioners spent a considerable amount of time discussing which functions they would like to see restored and how the design might be altered to achieve those functions. Consensus was ultimately reached that it’s not their role to design the project, but rather to state what needs to happen to protect the environmental resources.

Mr. Kritzer worked on a draft motion to incorporate the points raised and after additional discussion and edits, he presented it:

**Mr. Kritzer MOVED that the Conservation Commission recommend that the Mill Plaza redevelopment be re-designed to restore a 75-foot vegetative wetland buffer devoid of impervious surfaces to achieve functions including (but not necessarily limited to):**

- Stormwater Management – working in concert with engineered systems;
- Increased floodplain capacity to the extent possible, to reduce flooding impacts on the opposite side of College Brook reported by residents in that area;
- Increasing habitat area, especially if existing habitat will be lost on the opposite side of the site;
- Buffering light and noise pollution for the stream system and adjacent residences;
- Improving green space and aesthetics.

**To achieve these functions, the Conservation Commission expects that the buffer would need to include not only an increase in habitat area but also sufficient height and density of vegetation.**

Exceptions to this recommendation would be at the entrance to the parking lot and the minimum distance needed to safely turn away from the wetlands and the gravel wetland proposed at the opposite end of the site.

In making this recommendation, the Conservation Commission recognizes that this stretch of College Brook is being asked to handle higher than natural water flow during high precipitation events due to watershed management decisions and channeling upstream by the Town and UNH. Therefore, we urge the Town and UNH to work with the property owners to plan and consider jointly funding restoration as a form of mitigation.

Additionally, the Conservation Commission recommends that the development implement best practices for snow removal, salt and sand application, fertilizer use, waste management and other impacts outside of the wetland buffer.

After discussion the above motion was SECONDED by Mr. Rous, APPROVED 6-1-0, Motion carries, with Mr. Bubar voting No.

A number of topics were discussed during the motion drafting process, including:

- How to enforce compliance by the developer with any conditions set;
- Monitoring of water quality and how reporting could occur;
- An existing town sewer line in the buffer that might limit how much the floodplain can be extended;
- Where utilities would be located, with Mr. Taintor saying if a vegetative buffer were to be restored, all utilities would need to be outside of the buffer;
- Ms. Robbins recommended a resource for wetland buffer plantings

After the motion was approved, Mr. Taintor advised the Commission to submit a separate comment to the Planning Board saying they couldn't find affirmatively on Criteria number one, i.e., "there is no alternative location for the project." He explained the Planning Board looks to the Commission to address all four criteria for conditional use in a wetland buffer.

Mr. Rous advocated for recommending that the Town set up a committee to investigate tying Mill Pond redevelopment with Mill Pond itself (downstream and upstream), activities by UNH, etc. This would not be directed only at Colonial Durham Associates and might involve seeking an easement to manage the entire watershed.

#### **V. Statement About Mill Pond Dam Removal. Recommendation from the Commission.**

Based on the Commission's affirmative motion at its December 28, 2020 meeting to recommend removal of Mill Pond Dam for environmental benefits, Mr. Kritzer drafted and distributed a supporting document to be submitted to Town Council. *[The full document is available on the Durham website | Inside Town Hall | Conservation Commission | Completed Projects | Mill Pond Dam Recommendation]*

Ms. Fuerst said she would like to comment on a number of aspects of both Mr. Walker's (VHB) Report as well as some points in the supporting document drafted by Mr. Kritzer, summarized here:

- Mr. Walker stated the Exeter Dam is similar in length and height to Mill Pond Dam. Ms. Fuerst said she looked at measurements for both and his statement isn't true.
- She believes the consultant misstated how long invasive control would be necessary. She said it's ongoing and "you can't walk away after five years."
- She does not believe there are as many species of anadromous fish in the Oyster River as Mr. Kritzer indicated in the statement. She said the predominant species is blue back herring. This speaks to his point that removing the dam would allow for easier fish passage for blueback herring, American eel, sea lamprey and brook trout.
- She talked about the role of droughts in adversely impacting the fish population; Change in precipitation in summer and perhaps water usage by UNH can affect fish migration. She believes there are mitigation efforts such as water use restrictions that could be used.
- Ms. Fuerst questioned VHB's bathymetric studies, sediment reports, etc. and believes more detail could have been given on some of these issues. Arsenic and heavy metals were reported contaminants in 2009.
- She questioned if the decision to repair or remove the dam should be made by Town Council or should go to voter referendum.

On this last point, Chair Needell said it's her understanding a referendum is generally initiated if a project exceeds a certain dollar amount. She said the Conservation Commission is only charged with responding to the environmental aspects of the application.

Ms. Fuerst said she believes the consultants intentionally led the town down one path (removal), but Mr. Kritzer said he strongly disagrees with that statement. His view is the consultants followed the science and he said they reached a clearcut conclusion based on facts: removal of the dam will lead to improved fish passage; restoration of natural sediment transport; and improved water quality.

Ms. Fuerst and Mr. Kritzer discussed at some length the fish species that might be affected and how fish ladders work for different species.

Ms. Fuerst again raised the issue of bringing removal/repair of the dam to a town referendum and Mr. Bubar and others responded that would be Town Council's decision, based on the projected project costs. The Conservation Commission cannot bring it to a referendum.

Ms. Needell said Town Council is considering the cost of dredging, which is very costly – if a decision were made to repair the dam. Also an EPA permit would be required for dredging and it's questionable that could be obtained. She encouraged Ms. Fuerst and others to continue to be part of the discussion – listening to Town Council proceedings and/or attending the Public Hearing on January 11th.

## DCC FINAL MINUTES – JANUARY 4, 2021

Commissioners agreed that no vote was necessary on the supporting document to Town Council. Ms. Needell or Mr. Kritzer will present the recommendation to the Council.

**With no further business, Mr. Rous MOVED to adjourn at 9:44 p.m.; SECONDED by Ms. Krebs, Approved unanimously, 7-0, Motion carries.**

Mr. Rous said he would like to acknowledge Mr. Kritzer for being a “clear thinker and a clear writer” and others concurred that his work on both proposals was invaluable.

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.***