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March 3, 2017

Andrew Corrow, Chairman  
Town of Durham Planning Board  
8 Newmarket Road  
Durham, NH 03824

Re: **Continued Public Hearing on Zoning Ordinance Amendments – Elderly and Multi-Unit**

Dear Chairman Corrow and Members of the Planning Board:

As you know, this firm represents the interests of several business and property owners in the Town of Durham’s (the “Town”) Central Business District (“CBD”) to include Ken and Cathy Young, Stephen and Rennie Petrovitsis, Roger Hayden and Joseph Michael (the “owners”). We write in response to the Town Council’s discussion and debate regarding its proposed Zoning Ordinance amendments (the “amendments”) at its meeting on 20 February and to advocate for a Planning Board recommendation to not adopt the amendments or further increase the minimum square footage per occupant requirement in unrelated households.

As outlined in our previous communication to the Planning Board, and as the Town is generally familiar pursuant to its recent litigation in the case of Colonial Durham Associates, LP v. Town of Durham, the proposed amendments will violate the owners’ substantive due process and equal protection rights under the New Hampshire Constitution because they will have the intentional and predictable effect of discriminating against current and future residents of Durham on the basis of family status and age by prohibiting further development of unrelated housing in the CBD beyond 50% of what currently exists at any given property (which already requires a conditional use permit pursuant to § 175-28(D) of the Zoning Ordinance). The amendments would also constitute unconstitutional takings because they are arbitrary and unreasonable restrictions which will severely interfere with and are tantamount to deprivations of their use and enjoyment of their property which will significantly impact their property values.

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The purpose of this letter is not to rehash these arguments, however, which remain as pertinent as ever. Rather, this letter will highlight and focus on two new developments that further undermine the utility of the proposed amendments and the process employed by the Town Council in proposing them. First, the owners have confirmed with the Planning Department that no building permits for student housing development in the CBD have been issued since 1 December 2014, the date upon which the Town Council increased the minimum square footage per occupant requirement from 300 square feet to 600 square feet in unrelated households. Accordingly, the Town Council has already accomplished the goal that is clearly at the root of the proposed amendments, a desire to stop student housing in the CBD. As a result, the amendments seek to resolve a “problem” that does not exist. Second, Councilor Lawson’s latest allegations regarding an apparent correlation between the increase in unrelated housing and alleged increasing arrests/crime in Durham are misleading and inaccurate and are indicative of the problematic process employed by the Council from the beginning.

As explained below, the notion that the proposed amendments must be adopted to stop unmitigated student housing development in the CBD is demonstrably false. Further, the new evidence pointed to by elements of the Town Council regarding Durham Police Department (“DPD”) arrest data is questionable at best. What is not in question is the poor process employed to propose these amendments, the lack of collaboration with the owners in doing so, the public comments chastising the owners for defending their property rights, the emotional overreach of some of the people involved with this process behind closed doors, the obsolete nature of the proposed amendments in light of the realities of student housing development in the CBD, and the plain fact that the proposed amendments will unnecessarily and arbitrarily devalue the owners’ property.

## **Analysis**

### **1) The Proposed Amendments are Unnecessary**

Perhaps the most prominent theme that emerged from the Town Council meeting on 20 February were the notions that the student housing situation in the CBD has reached critical mass, the Council has received several complaints from residents over several years, and the time has come to take action. In some respects, the debate was framed as a choice between enacting the proposed amendments, or something like them, to be responsive to the residents of Durham, or, doing nothing which would in effect, ignore the plight of those in Durham who have suffered because of student housing development. Of the councilors who espoused this perspective, none were as adamant, within view of the public anyways, as Councilor Katrak, whose remarks were prepared, well-organized, and unequivocal in nature. To paraphrase the ten-point argument Councilor Katrak laid out in his remarks:

- the proposed amendments don’t constitute punishment to the owners and not taking action could be construed as punishing residents of Durham;
- the proposed amendments are four years late;

- the 600 square foot minimum per occupant requirement for unrelated households in the CBD is not enough;
- the student housing development of the last nine years could be viewed as a “stick” that has beaten down the residents of Durham;
- to the extent the proposed amendments diminished CBD property values, the student housing development of the last several years likely diminished surrounding property values in Town;
- taking no action is tantamount to ignoring the “pain” of many residents in Town; and
- the owners’ legal claims are “baseless” and amount to “saber-rattling”.

Councilor Katrak concluded his remarks by predicting that if action is not taken, the downtown will become a “student dormitory complex”, more student foot and vehicle traffic will slowly cause residents to abandon doing business downtown and ultimately, there will be no downtown commercial or social core, real estate values will decline, and the Town will lose its “soul.”

Putting aside the inference that the owners are some how in the wrong for turning to the New Hampshire Constitution to aid them in their opposition to regulations that will negatively impact their property values,<sup>1</sup> Councilor Katrak’s comments and the proposed amendments themselves presuppose that there is an ongoing problem with development or proliferation of student housing in the CBD that the amendments will address. That assertion, however, is simply false because there have been no student housing development projects in the CBD since the Council increased the minimum density requirement from 300 to 600 square feet in 2014. Accordingly, the proposed amendments are either the product of dissatisfaction with the development boom between 2008 and 2014, which was caused and encouraged by Town Council legislative actions, or, dissatisfaction with the current status of the CBD. Regardless, neither motivation represents legitimate grounds to enact the proposed amendments. Because it is clear that the change in density requirements has already stopped student housing development downtown, no logical or rational basis exists to adopt legislation whose primary accomplishment will be the diminution of CBD property values.

The Mill Plaza saga only reinforces these assertions. The owners have stated from the beginning that economic development initiatives, like those smartly referenced by Councilor Howland during the 20 February Council meeting (and those discussed at length in our previous correspondence and in the Master Plan), as well as the market and Master Plan should drive the development of the CBD and set property values. This sentiment was reinforced by Town Administrator Selig when he cautioned the Council to zone for what they want not what they are afraid of. To the extent that the Mill Plaza project, which was proposed in the fall of 2014 prior to the increase in the minimum square footage per occupant requirement in unrelated households, is developed, and adds 330 beds to the downtown area, there is a possibility that the highest and best use of the owners’ property will change. To be clear, and as they have indicated, the owners

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<sup>1</sup> The owners’ original correspondence to the Planning Board was provided to the Town Council in advance of the 20 February meeting but neither of the enclosures to the letter were. Enclosure (1), a letter from Brian W. White, MAI, SRA, a real estate appraiser with significant experience in the Durham area, affirmatively states that the proposed amendments will devalue the owners’ property.

support such natural, market based adjustments to the value of their property. They continue to reject, however, arbitrary regulatory changes that will devalue their property and are rooted in a desire to stop the proliferation of student housing development when said development has already stopped. In a word, the proposed amendments are unnecessary.

## **2) The Increase in Unrelated Housing in the CBD has not Led to More Crime in Durham**

At the 20 February Town Council meeting, the councilors discussed for the first time in this debate, the potential correlation between DPD arrest rates and unrelated housing. This new discussion, centers on Mr. Lawson's assertion that "[t]he increasing DPD yearly arrest data is highly correlated to the increase in unrelated apartment occupants." See 20 February Town Council Packet Agenda Item 11A, pg. 6. Figure 3 purports to show the "correlation and linear approximation . . . over eight years" and Councilor Lawson concludes that DPD "arrests increase at a rate of 1 per year for every 14-15 new beds." While the source of Mr. Lawson's data is not clear, we presume it's from the Durham Police Department's 2017 Annual Report ("Annual Report"), a copy of which is enclosed herewith as Enclosure (1), or the Durham Police Department 2016 Community Survey. As described below, Councilor Lawson's conclusions, which can only be interpreted as inferring that more unrelated housing leads to more crime, are misleading. Moreover, the Annual Report makes clear that the new student housing development in the CBD district does not constitute a policing problem. On the contrary, several new student housing developments in the CBD are specifically extolled by Chief Kurz for their *de minimus* impact on police services.

The Annual Report captures arrest and offense data in the Town of Durham for every year since 2005 which is convenient because it provides the opportunity to quantify the effect that increases in student housing since 2008<sup>2</sup> have had on crime. Contrary to the inference of Councilor Lawson's assertions, that the increase in unrelated housing has produced more arrests and apparently, more crime, the data suggests otherwise. For example, the average number of arrests per year for the three years between 2005 – 2007, before the influx of student housing in the CBD, was 499. By contrast, the average number of arrests per year between 2008 – 2016 *decreased* to 487 despite the significant increase in student housing beds downtown during that time frame. Similarly, the average number of thefts per year between 2005 – 2007 was 135 while the average number of thefts per year between 2008 – 2016 *decreased* to only 99. The trend continues. The number of alcohol offenses on average per year between 2005 – 2007 was 231 while the average number of offenses per year since then *decreased* to 219. The average number of traffic contacts per year between 2005 – 2007 was 4,169 while the average number per year since then *has decreased* nearly 1,000 contacts to 3,265. Of the events which have increased since 2008 when the density regulations changed, average noise violations per year

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<sup>2</sup> As Councilor Lawson noted during the Town Council's 17 October 2016 meeting during which it unanimously recommended the proposed amendments, "changes to the Zoning Ordinance initiated in 2008 by the Council decreased the amount of land required per dwelling unit in the Central Business District, and . . . the net result made Mixed Use development with residential and business uses financially viable." Town Council Meeting Minutes, 17 October 2016 Meeting, Section XI(A), pg. 11.

have increased a mere 8 events from 62 on average per year, to 70. Average DWI arrests have increased on average 5 per year from 46 to 51. Finally, while calls for service have consistently gone up each year since 2005, Chief Kurz makes clear in the Annual Report that this can be attributed to the increase in self-initiated officer responses which is the product of the ever-increasing high-visibility policing strategy employed by the DPD since 1999. *See Annual Report pg. 2.* In summary, the data suggests that despite the increase in off-campus unrelated housing downtown, Durham is a safer place than it was before 2008.

Even more significant, the Annual Report specifically states that the types of student housing which has been developed in the CBD does not constitute a policing problem. Specifically, Chief Kurz states:

Over the past four-years there have been approximately 2,400 student beds constructed in a number of complexes including the Cottages, Lodges, Madbury Commons, Orion, Henderson and Pauli's. While these beds have not added students to UNH they have essentially relocated them into the Durham community closer to the UNH campus. To adequately address this shift, it remains critical for the department to be engaged with the landlords of Durham. *One piece of data that has demonstrated itself to be true is that well managed properties will have fewer calls for service than those that do not. Given the density and composition of these large complexes I continue to report to you my pleasure in the level of calls for service and the continued cooperation within on-site management teams.*

Annual Report, pg. 3 – 4 (Emphasis added). Chief Kurz also provides a chart depicting the large number of occupants at the Cottages, Lodges, Orion and Madbury Commons and the negligible number of calls for service over the last two years.

An honest read of the data can lead to only one conclusion, not only is crime in Durham not increasing, the Town is a safer place thanks to Chief Kurz and the DPD, and the student housing in the CBD does not constitute a policing problem.

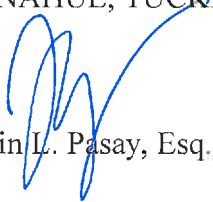
## **Conclusion**

Implementing the proposed amendments under these circumstances is illegal and wrong. As former Councilor Stanhope wrote to the Town Council, it's bad planning. Business development in Durham is already difficult. Attracting and keeping young professionals and developing affordable housing in Durham is already difficult. The proposed amendments will

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make both prospects even more challenging and they will have a detrimental impact on some of the most dedicated and longstanding property owners in the CBD. We respectfully urge the Planning Board to recommend not adopting the proposed amendments or any alternative.

Very truly yours,  
DONAHUE, TUCKER & CIANDELLA, PLLC

  
Justin L. Pasay, Esq.  
JLP

Enclosures (1)

cc:

Todd Selig, Town Administrator  
Town Council