

November 27, 2017

Planning Board
8 Newmarket Road
Durham, NH 03824

RE: **Mill Plaza Redevelopment.** 7 Mill Road. Conceptual consultation (preliminary) for the redevelopment of this 10-acre site (revision of earlier plan) and request for extension/ continuation of one-year timeframe for submission of a formal application under RSA 676:12 VI... [November 29, 2017 Planning Board agenda]

Greetings,

I suppose one shouldn't be surprised by anything in the ongoing three-year-plus Mill Plaza redevelopment saga, but this latest proposal takes the cake. Or, rather, makes unavoidable the conclusion that Colonial Durham Associates wants to have its cake and eat it, too—in terms of process, but also wants to stick a finger in the eye of the community by way of the “conceptual consultation” plan itself.

It is also clear that CDA is acting as if it is not “subject to normal planning board review.” (Remember, that's a requirement of the December 2015 Settlement Agreement. In living memory, has Design Review for any Durham Planning Board site plan application *ever* been reopened or extended? And how can one *continue* something that has been *terminated*?)

First, State statute establishes the vesting period. As CDA attorney Ari Pollack well knows (being a prime drafter of HB 1508, which *became* the “vesting statute,” RSA 676:12 VI), a key goal of the statute was to *provide clarity* for both developer and municipalities regarding the point at which vesting is in effect.

Yet RSA 676:12 VI provides no discretionary authority whatsoever to waive or extend the 12-month vesting deadline. By contrast, if the State wishes to authorize discretion to planning boards, *it does so explicitly.*

For example, RSA 674:39 allows planning boards to extend a vesting deadline for approved subdivisions under certain conditions. The statute opens with paragraph I allowing vesting... “for a period of 5 years after the date of approval; provided that:”

(a) Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved subdivision plat within 24 months after the date of approval...

...but later the same statute grants the following discretion:

RSA 674:39 (IV) ...The planning board may, for good cause, extend the 24-month period set forth in subparagraph I(a) [above].

One logical explanation for this deliberate silence is that if Planning Boards throughout the state were allowed the discretion to reopen or extend Design Review, it would wreak havoc.

Second, a planning board may not waive a local regulation that in essence restates the statute. (That would be tantamount to ignoring the statute.) Part I, Section 1.28 of Durham's Site Plan Regulations *applicable to the Mill Plaza project* reads:

In accordance with RSA 676.12, an applicant is subject to the regulations in place as of the date that public notice of the start of the Design Review is published in a local newspaper. Those regulations adhere for up to 12 months following the end of the Design Review only if the applicant then submits a complete, formal application before the expiration of that 12-month period.

...which echoes the relevant portion of RSA 676:12 (VI):

...No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.

Third, municipalities may adopt regulations that are stricter but not more lenient than State statutes. While reopening or extending Design Review is explicitly not addressed in our Site Plan Regulations, that action would constitute a greater "leniency."

Fourth, approval of this request would set troubling precedent for Durham.

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On June 14, 2017, Planning Board members stated, one by one, that it was time to close Design Review. Then, according to the videorecording, at approximately 9:58pm that night, Attorney Pollack stated "we are ready to close Design Review." The Board subsequently unanimously approved a motion to do so. Design Review was closed. Period.

The applicant may submit a formal plan until June 14, 2018. Vesting then evaporates.

Please deny the applicant's request to reopen/continue/extend Design Review.

But IF the Board votes to reopen Design Review under some legal rationale that I haven't identified, *then notice to abutters and a public hearing are required*—the former by statute and Durham's Site Plan Regulations, and the latter by our Site Plan Regulations.

Sincerely yours,

[Signed: *Robin Mower*]