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VIA EMAIL
Durham Planning Board
c/o Rick Taintor, Contract Planner <rtaintor@ci.durham.nh.us>
Town of Durham
8 Newmarket Road
Durham, NH 03824

RE: Colonial Durham Associates' (CDA's) 2019-2021 Conditional-Use Site Plan for Mill Plaza

Dear Mr. Taintor and Members of the Planning Board:

I continue to represent a large group of Durham residents who are concerned about the proposed Mill Plaza development by Colonial Durham Associates (aka CDA) and the deeply inter-connected adjacent Church Hill Woods parking structure proposal by Toomerfs. My clients and I continue to maintain that these supposedly "independent" projects are, in fact, dual components of one "new" Mill Plaza redevelopment proposal that is, thereby, no longer grandfathered under the 2015 Legal Settlement agreement. We still assert that the current review process, which treats this "new" plan as an old plan, is not legitimate. My clients and I reserve that argument, as set forth in my February 5, 2020, letter to the Board.

My clients include direct abutters to both Mill Plaza and the Church Hill Woods properties, as well as residents from every street in the Faculty Neighborhood that is adjacent to (and partly defined and bounded by) these two properties. These residents clearly have standing with respect to Durham's Article XIII: Wetland Conservation Overlay District and Article VII: Conditional Use Permits. The Conditional Use criteria explicitly apply to "abutting properties," "the neighborhood," and the "surrounding environment." I also represent a number of residents from other parts of Durham who are concerned about the future of downtown development and the overall environmental, aesthetic, and fiscal health of the Town of Durham, which they believe would be severely compromised if such non-compliant projects were to move forward.

In this letter, however, I am writing on a narrower issue, namely CDA attorney Ari Pollack's spurious claim on March 24, 2021, that CDA's current site plan would be compliant with Section 1(d) of the 2015 Agreement because CDA's still non-conforming proposal is "bringing the property more nearly conforming."

As you may recall, at approximately 9:35 pm on March 24, Mr. Pollack responded to a query regarding the wording of Section 1(d) of the Settlement as follows:

> "Are you asking why it is we don't need a variance? I think the answer is because the existing condition provides more coverage than we're proposing, and we're bringing the property more nearly conforming, which based on my understanding of prior applications and other questions before this board and other boards has been viewed as eligible for a Conditional Use permit, which is what we have applied for."

My clients and I appreciate that at least two Board members raised some questions about this claim on March 24, but we remain concerned that Mr. Pollack's unfounded reasoning, which is unsupported by established case law, and which he has repeated in various forms over many months, has not yet been directly confronted and dismissed by the Board at such a late date. This hesitancy and delay is particularly concerning given that residents have raised the flawed reasoning in Mr. Pollack's statements in both citizens' written letters and oral comments at Public Hearings, dating back to at least February 2020, as documented in meeting minutes and in posted Citizen Comments. I write here in support of the fundamental logic of that extensive resident input, but with the addition of citation to the relevant case law.

There are at least FOUR essential problems with Attorney Pollack's claim:

One: The meaning of Section 1(d) of the December 14, 2015 Settlement Agreement is clear: there will be ***no*** buildings or roads within the wetland buffer area. Section 1(d) provides that:

> **"The Revised [Mill Plaza] Application will provide for proposed buildings and vehicular roads outside of the shoreland and wetland buffers such that variances from town ordinances are not required and the buffers are maintained by the property owner."**

Section 1(d) does not say that buildings and roads can be maintained "inside" the buffer. To the contrary, the section plainly states that the buildings and roads must be located "outside of the shoreland and wetland buffers…such that the buffers are maintained by the property owner." If the intent were to allow buildings and roads inside the buffer, as long as they made the violation less severe, that intent would have been made clear by saying that buildings and roads may be allowed inside the buffer "as long as" or "if" they are more conforming. Section 1(d) contains no such language.

Two: On January 27, 2016, Town Attorney Laura Spector-Morgan provided the Planning Board with a crystal-clear restatement of Section 1(d):

> **"All of the buildings and the roads will be outside the shoreland and wetland buffers, so that no variances are required for those."**

That is, no variances would be needed or applied for *because* there would be no encroachment in the wetland setbacks. Any other interpretation is an extreme distortion of the clear intent of Section 1(d).

Three: A June 8, 2020 memorandum on "grandfathering" from Rick Taintor and Audrey Cline describes prevailing law: that to be grandfathered, a use must have been lawfully established in the first place. One does not get "grandfathered" or "vested" if the use was not in compliance with zoning provisions at the time the use was established. Mr. Taintor and Ms. Cline are correct: a legal nonconforming use must have been legal at the time it was established. New London Land Use Association v. New London Zoning Board of Adjustment, 130 N.H. 510, 515-16 (1988). The long history of Plaza site *non*-compliance has been well documented by residents.

Four: Any use that is lawfully nonconforming must come into compliance if it is changed or substantially expanded. See Cohen v. Town of Henniker, below. A minor change of the use of property might not cause the loss of a lawfully established vested use, but major changes, such as adding housing for 258 students, would certainly cross the line (*even if* the prior use was vested). Such a significant change of use requires that the property be brought into compliance. The wetland buffer must be met.

Attorney Pollack presents his argument based on his "understanding of prior applications and other questions before this board and other boards has been viewed as eligible for a Conditional Use permit, which is what we have applied for." It is understandable that Attorney Pollack speaks about his "understanding, " rather than the basic law related to nonconforming uses – *because the case law does not support his position.* As Planning Board members, you must respect the case law as it applies to the application before you and not Attorney Pollack's "understanding" based on *prior* applications and *other* boards.

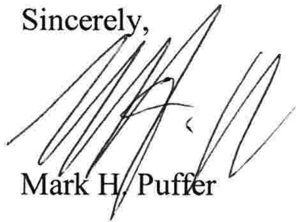
The doctrine of nonconforming uses was succinctly stated in Cohen v. Town of Henniker, 134 N.H. 425 (1991), as follows:

> "A use of land which, at the time a restriction on that use went into effect, was established (or vested'), and has not been discontinued or abandoned, can continue indefinitely, unless it includes activity which is a nuisance or harmful to the public health and welfare; but the use cannot be changed or substantially expanded without being brought into compliance."
>
> Id. at 426-27. A lawful nonconforming use cannot be changed or substantially expanded without being brought into compliance. CDA's current site plan clearly entails significant changes and substantial expansion. The site must be brought into compliance, both under the prevailing law and the 2015 Settlement Agreement.

It remains true that the proposed CDA use is *eligible* for a CU permit, but eligibility on any matter is not equivalent to having a case that merits receiving what is being applied for. CDA *eligibility* does not in any way mean that CDA can violate the wetland buffer requirements and expect to *receive* such a permit. CDA may be technically "eligible" for a Conditional Use permit, but you must not grant them one if they plan to violate the Settlement and the Wetland Setback zoning.

The prime issue is clear: even a lawful nonconforming use cannot be changed or substantially expanded without being brought into compliance. CDA's current site plan clearly entails significant changes and substantial expansion. The site must be brought into compliance, both under the prevailing law and the 2015 Settlement Agreement.

Sincerely,



Mark H. Puffer

MHP:sas
cc: Karen Edwards <kedwards@ci.durham.nh.us>