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August 24, 2021

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 adjacent Church Hill Woods parking structure proposal by Toomerfs. Although not the prime focus of this letter, my clients and I continue to reserve the argument, as set forth in my February 5, 2020, letter to the Board 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 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 two specific subjects. First, I write again on the issue that I addressed in my May 14, 2021, letter to the Board, namely CDA attorney Ari Pollack's claim on March 24, 2021, that recent versions of CDA's 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." (This letter repeats, for the Board's convenience, much of my May 24, 2021 letter, so that prior letter need not be reviewed again at this time.)

Second, I write to offer my clients' suggested answer to the Contract Planner's recent query to the Board: "whether they feel that the changes in the revised plans are sufficient to justify the applicant moving forward with detailed engineering, landscape and architectural adjustments."

CDA's Application Fails to Comply with the 2015 Agreement and the Law Re: Nonconforming Uses

On the first issue, our well-founded objections to Attorney Pollack's "more nearly conforming" claim remains centrally relevant to the slightly revised plans submitted by CDA on August 18, 2021, which continue to show vehicular roads and other incursions in the wetland, in violation of the 2015 Agreement, as well as in violation of Durham's Zoning Articles VII and XIII and the Conservation Commission's January 4, 2021 written recommendation to the Planning Board regarding CDA's application for wetland and shoreland Conditional Use Permits.

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, 2021, and that several other Planning Board members voiced serious concerns about the plan on May 19, 2021. Nevertheless, 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 sufficiently confronted and dismissed by the Board at such a late date, as is manifested in CDA's latest "revised" plans submitted on August 18, 2021. These plans continue to defy the plain language of the Agreement, WCOD Zoning, and the Conservation Commission's recommendation.

That the Board should again be presented with a non-compliant plan is particularly troubling 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, a year and a half ago. These objections are documented in meeting minutes and in posted Citizen Comments. I write here again in support of the fundamental logic of that extensive resident input, and again with the additional support of citations to the relevant case law.

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

One: The plain 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.

Furthermore, the concept plan accompanying the signed Agreement shows extensive green space along College Brook, except at the Plaza entrance.

Two: On January 27, 2016, Town Attorney Laura Spector-Morgan provided the Planning Board and public 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 *simply because there would be no encroachment in the wetland setbacks that required ZBA relief.* Any other interpretation is an extreme distortion of the clear intent of Section 1(d).

Three: The June 8, 2020 memorandum on "grandfathering" from Rick Taintor and Audrey Cline accurately 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, including that the paving was "mistakenly" brought too close to College Brook, has been well documented by residents.

Four: Even if CDA disputes the documented history of non-compliance, any use that is lawfully nonconforming must come into compliance if it is changed or substantially expanded. See Cohen v. Town of Henniker, 134 N.H. 425 (1991). **A minor change of the use of property might not cause the loss of a lawfully established vested use, but major changes in *type* and *intensity* of use – such as adding first-time ever housing for 258 students in multi-story**

buildings, would certainly cross the line (*even if* the prior use was vested). Such a significant change in type and intensity of use requires that the property to be brought into compliance with current zoning. The wetland buffer *must* be met.

Attorney Pollack based his argument 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 frames his argument in terms of his "understanding, " rather than on 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 rather than 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, supra at 426-27, 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."

It is 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* a permit. CDA may technically be "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. A Planning Board cannot waive Zoning requirements.

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 in type and intensity of the use and substantial expansion in vertical height and horizontal breadth. The site must be brought into compliance, both with the prevailing law and the 2015 Settlement Agreement.

Should the Applicant Be Encouraged by the Board to Move Forward with Detailed Plans?

Regarding the second, broader issue, we offer an answer to Planner Taintor's recent question. Colonial Durham has now returned with a revised plan that it presents as an improvement to what Planner Taintor describes as the March 10, 2021 plans that "represented the best that could be done with respect to the buffer area and other concerns...." Yet, the new – "even better than the best" – plans fall far short of minimal compliance with the setback requirements. CDA has never responded to a June 10, 2020, Planning Board member's request (echoing multiple residents' pleas over many months) to design a "reduction of building footprint...in order to get [more] greenspace." Instead, the recent rearrangement of parking spaces

brings to mind the expression "rearranging the deck chairs on the Titanic." The overall plan would be a disaster for Durham if approved and launched.

Moreover, as more than 240 posted Citizen Comments, hours of oral citizen input at meetings, and expert testimony (such as submitted recently by Professor Karen G. Weiss of West Virginia University) indicate, CDA's site plan violates Conditional Use criteria for "mixed-use with residential" in multiple ways. You have received a significant amount of input from former Council and Planning Board members. To quote from the just-posted letter from State Representative Judith Spang, as an example:

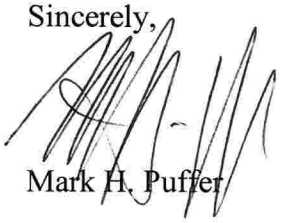
> "I have an advanced degree in land use planning and worked in economic development planning for 10 years in NYC and for the Lakes Region Planning Commission. I have also served on Durham's Planning Board and Conservation Commission..... The letters you have received from residents in the vicinity of the Mill Plaza have laid out indisputably the adverse impact that the proposed development will have on their neighborhood. Most of these points are not easily dismissed as extreme. In fact, in reading Durham's Zoning Ordinance Article VII regarding Conditional Use permits, it appears to me that enough of those points are legitimate for the Planning Board to be confident in denying conditional use permits for this development."

In short, my clients encourage you to respond with a resounding "No" to Mr. Taintor's query about whether "the changes in the revised plans are sufficient to justify the applicant moving forward with detailed engineering, landscape and architectural adjustments." Given the scope of the plan that is currently before you and its inevitable negative effect on the neighborhood, it is time to decide that CDA's plan as presently proposed cannot meet the Conditional Use criteria. The citizens of Durham **and CDA** deserve nothing less than a clear, final -- and negative -- answer.

To conclude, we call your attention again to the June 14, 2021, letter from Malcolm Sandberg -- widely referenced by residents:

> "Having served on the Town Council for nine years, 5 years as chairman, and having served on the Planning Board, I know what you're going through and I thank you for your service. **When a plan is so out-of-step with Town goals and regulations such as the CDA proposal, it is time to simply say 'No'.** I now encourage/implore you to exercise your authority, indeed your obligation, to close the public hearing, deliberate, and deny the CDA application. Enough of your time and that of the community has been expended." (Emphasis added.)

Sincerely,



Mark H. Puffer

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