



TOWN OF DURHAM
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MEMORANDUM

TO: Durham Planning Board & Town Council
FROM: Todd Selig, Administrator
DATE: 4/7/21
RE: Mill Plaza/Colonial Durham Site Plan Application Process &
Settlement Agreement

In an effort to address several questions that have been brought to my attention regarding the above referenced matter, you will find attached two documents. The first is a letter from Town Counsel Laura Spector dated April 6, 2021, which I am releasing both for your reference and that of the general public. The second is a memorandum dated July 3, 2018, which I provided to the Planning Board concerning some of the same issues being raised today.

Enclosures

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April 6, 2021

Todd Selig, Town Administrator
Town of Durham
8 Newmarket Road
Durham, NH 03824

**This confidential document
was released for public
information by the Town
Administrator on April 6, 2021**

Re: Mill Plaza Application

Dear Todd:

I understand that the Planning Board is nearing the end of its review of the Mill Plaza application. Several questions have arisen regarding various aspects of the Settlement Agreement. I write to attempt to answer those questions.

The first question is whether the Settlement Agreement impacts the planning board's review of the application. The short answer is that it does not as long as the planning board does not attempt to circumvent that agreement. The settlement agreement simply dictates that the zoning provision which requires 600 square feet per resident does not apply to this application. It places no other limits on the planning board, although it does impose some requirements on the applicant. Those requirements are found in paragraph 1 of the settlement agreement.

The planning board is to treat this application as it would any other application. The application must meet all of the site plan review regulations from which it is not granted a waiver, and it must comply with all zoning requirements other than the "new" density requirement or changes that were adopted after the application was originally noticed. The application as submitted may be changed in either minor or major ways to make it more desirable to the planning board.

If the application does not satisfy the site plan review regulations or the conditional use requirements, the board is free to deny the application based on those criteria. In such a case, the applicant could appeal the planning board decision to court. This would not reactivate the earlier case unless the planning board's denial was an attempt to regulate the density.

An allegation has also been made that because the latest iteration of the plan requires a conditional use permit for uses in the WCOD and SPOD that it violates the settlement agreement provision which requires that the plan shoreland and wetland buffers must be provided "such that variances from town ordinances are not required." A variance is relief granted by the zoning board when a use is not permitted by the zoning ordinance. A conditional use permit is not a variance—it is a use permitted by the ordinance under certain conditions. Therefore, the need for a conditional use permit does not violate the settlement agreement.

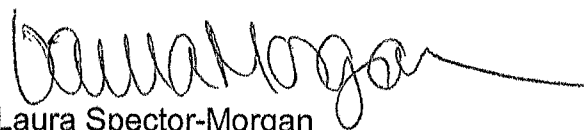
Todd Selig
April 6, 2021
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A request has been made for the Council to review the latest plan for compliance with the Settlement Agreement. The Council reviewed the plan in 2018 and found it to be compliant. According to Mr. Taintor, no substantive changes pertaining to aspects of the Settlement Agreement have been made since this time; and therefore the plan would still comply with the settlement agreement. Moreover, it is the Town Administrator who is responsible for enforcement of the zoning ordinance. Therefore, he is integral to any determination as to whether the plan is compliant or not.

Finally, I have been asked to opine on the "Hannaford issue." Disagreements between Hannaford and Colonial Durham regarding Hannaford's lease, replacement of the existing building, and/or parking are private disputes in which the town should not involve itself. If the application complies with the town's regulations and the settlement agreement, those other issues are irrelevant to the planning board, and the town may approve it and let the parties in interest resolve the disputes.

Please let me know if I can be of additional assistance. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Spector-Morgan", with a long horizontal flourish extending to the right.

Laura Spector-Morgan
laura@mitchellmunigroup.com



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MEMORANDUM

TO: Durham Planning Board
FROM: Todd Selig, Administrator
DATE: 7/3/18
RE: Mill Plaza Site Plan Application

On June 18, 2018, the Town Council reviewed a memorandum from Durham contract planner Rick Taintor dated 6/18/18 regarding the latest Mill Plaza application and talked with the Town's attorney and myself in a non-meeting to discuss whether the application complies with the Settlement Agreement into which Colonial Durham Associates and the Town of Durham entered in 2015.

Following that discussion with counsel and after consideration of Mr. Taintor's memorandum, it appears to the Council that the application does comply with the Settlement Agreement.

A subsequent email from Rick Taintor dated 6/20/18 concerning maximum allowable residential density was received and reviewed by the Administrator, which confirms the application is compliant with the Settlement Agreement in this area as well.

Should significant changes be made to the application, the Council reserves the right to review those changes for compliance with the Settlement Agreement.

The Council's determination in no way is intended to imply that the application complies with the Town's site plan review regulations or its zoning ordinance. Those determinations will need to be made by the planning board as part of the normal review process.

MEMORANDUM

TO: Todd Selig, Town Administrator
FROM: Rick Taintor, Planning Consultant *RT.*
DATE: June 18, 2018
RE: Mill Plaza Site Plan Application – Conformance with Settlement Agreement

A question has been raised as to whether the formal site plan application submitted by Colonial Durham Associates, LP for the redevelopment of Mill Plaza is in conformance with the settlement agreement entered into in 2015 between Colonial Durham and the Town. The purpose of this memo is to provide a review of the plan and provide an opinion as to its conformance with the agreement. Please note that this review and opinion are made from a professional planning perspective and are not intended to provide any legal analysis.

Settlement Agreement Milestones

It is important to understand where the formal site plan application stands with respect to the milestones established by the settlement agreement. The agreement includes the following key requirements relating to submission, review and action on the design review application and the formal site plan application:

1. *[Colonial Durham was required to submit] revisions to the Design Review Application that substantially conforms to the following design considerations (the "Revised Application"), as also reflected on the attached non-binding conceptual plan set (Exhibit A) [...]*
2. *The Revised Application shall be submitted to the Durham Planning Board by January 31, 2016.*

Colonial Durham submitted the Revised Application for design review on January 20, 2016 and the Planning Board discussed it at its meeting on January 27, 2016. As the issue of compliance with the settlement agreement was not raised at that time, the requirements of paragraphs 1 and 2 of the settlement agreement (above) appear to have been met.

3. *The Revised Application shall be pursued by Colonial Durham, and considered by the Planning Board, in good faith and in the usual course, consistent with and subject to the terms of this Agreement (the "Planning Board Review").*

The Board continued its review of the Revised Application for 17 months, during which time the site plan was revised to address various issues and comments. The review process culminated with the closing of the design review phase at its meeting on June 14, 2017. This would satisfy paragraph 3 of the settlement agreement.

- 5.a. The [Planning Board's] final approval must provide for Colonial Durham to proceed with redevelopment of the Mill Plaza site [...] in a form substantially similar to and consistent with that proposed in the Revised Application, but subject to normal planning board review.*

As a result, the relevant issue for this analysis is whether the formal site plan now under consideration by the Planning Board is (or will be upon approval) “substantially similar to and consistent with” the Revised Application which was the subject of the design review process that ended on June 14, 2017. To the extent that there is any question about whether the formal site plan conforms to the settlement agreement, the analysis should take into account the design review plan (the “Revised Application”) as it stood on June 14, 2017.

Design Considerations

The settlement agreement itemized eight “design considerations” which the design review application, and by extension the formal site plan, should incorporate. These are listed below along with my assessment as to whether the site plan conforms to them.

- a. The Revised Application will propose construction of not more than 330 residential beds for the entirety of the Mill Plaza site, with a density of not less than 300 SF per occupant.*

Complies: The site plan proposes construction of 330 residential beds in 85 dwelling units.

- b. To the extent reasonably practicable, and subject to planning review, the Revised Application shall locate the residential beds upon the Mill Plaza Site with the goal of placing as many beds as possible in the buildings proposed to be located in the northern half of the property;*

Complies: The great majority of the proposed beds are located on the northern half of the property.

Note: It is understood that “northern” in the settlement agreement was intended to mean “plan north” or “project north”, i.e., the top of the plan, rather than true (compass) north. If “northern” were intended to mean true north, the majority of the dwelling units would need to be located along Mill Road and over the building occupied by Hannaford’s

and Rite-Aid. In the design review plan (the “Revised Application”), the majority of residential units were in the northern half of the plan with respect to “plan north” but not with respect to true north. The formal site plan is largely consistent with the design review plan, except that no dwelling units are now proposed on the site of Rite-Aid.

- c. *The Revised Application will provide for a total development of existing and new non-residential commercial space, exclusive of parking, totaling at least 80,000 to 90,000 sq. ft.*

Complies: The site plan shows 90,374 sq. ft. of commercial (office and retail) space, including 31,165 sq. ft. in the existing Hannaford’s/Rite-Aid building and 59,209 sq. ft. in the proposed new buildings. (Note that this differs from the figures stated in the letter of intent, which understated the floor area of the Hannaford’s/Rite-Aid building.)

- d. *The Revised Application will provide for proposed buildings and vehicular roads outside of the shoreland and wetlands buffers such that variances from town ordinances are not required and the buffers are maintained by the property owner.*

Complies: All proposed buildings are located outside of the shoreland and wetlands buffers. Parking areas and driveways are proposed to be located within the 75-foot shoreland buffer and (minimally) within the 25-foot wetland buffer, but the shoreland and wetland buffer impacts are proposed to be reduced by 23% and 15%, respectively from the existing condition.

Note: Colonial Durham has applied to the Planning Board for conditional use permits for the shoreland and wetland buffer impacts. These permits are not “variances from town ordinances” (which can only be granted by the Zoning Board of Adjustment).

- e. *Proposed on-site parking shall be increased from the existing 345 spaces to a number acceptable to the planning board based on the zoning ordinance and site plan regulations.*

Complies: The site plan provides for 363 parking spaces, including 263 surface spaces and 100 spaces in a garage on the ground floor of building “C2”.

Note: Whether this amount of parking will be “acceptable to the planning board” will be determined during the site plan review process.

- f. The Revised Application will have increased natural buffer along the southern property line adjacent to the College Brook; such buffer to be maintained by the property owner in perpetuity.*

Complies: The site plan shows a modest increase in the amount of vegetated buffer area along the southern property line. A certain proportion of this increase consists of landscaping in parking lot islands rather than “natural” buffer. However, the site plan complies with this provision of the settlement agreement as long as there is any increase in natural buffer.

- g. The proposed center building shall provide for a ground level connector to encourage pedestrian connectivity through the site towards Main Street.*

Not applicable: In the conceptual plan that was included in the settlement agreement, the “proposed center building” was much longer than in the current proposal, and as a result a ground level connector was important to allow for pedestrian circulation through the site. In the final version of the Revised Application and in the current formal site plan application, the center building (building “B”) has been greatly reduced in size, such that a continuous pedestrian connection has been created along the northerly side of the building, providing a potentially attractive “main street” path. As a result, a ground level connector through building B is no longer necessary, and it would adversely affect the use of space within the building.

- h. The proposed development will have dedicated on-site professionally staffed management office and security 24 hours a day, 7 days a week, 365 days a year.*

Will comply: The applicant has represented that there will be professional, on-site management. This will be enforced through a condition of approval of the conditional use permit.

Conclusion

Based on my analysis of the “design considerations” applicable to the Revised Application submitted for design review, and on the relationship of the current site plan application to the Revised Application, I believe that the application largely conforms to the settlement agreement. The only outstanding issue, which will be resolved during the site plan review process, is whether the increased number of parking spaces will be “acceptable to the planning board” as stipulated in item (e).

Subject: Residential density

Date: Wednesday, June 20, 2018 at 3:15:28 PM Eastern Daylight Time

From: Rick Taintor <rtaintor@ci.durham.nh.us>

To: Todd Selig <tselig@ci.durham.nh.us>

Todd,

Carden Welsh called me today with several questions about my memo to you regarding conformance to the settlement agreement. He pointed out one factor that I had missed in my analysis: the maximum permitted residential density. This email is to correct that oversight and supplement the analysis in my memo.

Settlement Agreement Standard

In addition to setting a cap of 330 on the number of beds in the development, the settlement agreement also sets a maximum residential density of "not less than 300 SF per occupant." It is not clear from the context whether this refers to gross density (i.e., including the floor area of hallways, stairs, and other common areas) or net density (considering only the area within dwelling units). In either case, the proposed development appears to comply with the standard.

Gross Density

The total residential floor area, as indicated on the A10 plans submitted to the Town, is 165,036 sq. ft., including all upper-floor hallways as well as ground-floor residential circulation areas (lobbies, stairs, elevators). Dividing this figure by 330 (the number of beds = occupants) results in a gross density of 500 sq. ft. per occupant.

Net Density

The ground floor "residential circulation" areas total 4,905 sq. ft. No information has been provided as to the breakdown of residential floor area between dwelling units and common areas on the residential floors of the buildings, but it is reasonable to assume that the latter could comprise 10% of the total floor area, or 16,013 sq. ft., for a total common area of 20,918 sq. ft. Deducting this figure from the gross residential floor area results in an estimated net residential area of 144,118 sq. ft., for a net density of 437 sq. ft. per occupant.

Another approach is indicated by the definition of "habitable floor area" in the zoning ordinance:

... "habitable floor area is deemed to be seventy (70) percent of the gross floor area of a given building unless evidence sufficient to rebut that presumption in the form of complete floor plans drawn to a standard scale is submitted to the Durham Code Enforcement Officer.

Applying this approach, 70% of the residential floor area equals 115,525 sq. ft., for an estimated net density of 350 sq. ft. per occupant.

Conclusion

Whether calculated as gross or net density, the floor area per occupant is significantly greater than the 300 sq. ft. per occupant minimum specified in the settlement agreement. The application therefore conforms to the settlement agreement on this point.

Rick

Rick Taintor, AICP
Community Planning Consultant
978-872-8230