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October 6, 2021

Rick Taintor, Community Planning Consultant
Town of Durham
8 Newmarket Road
Durham, NH 03824

Re: Mill Plaza Application

Dear Rick:

You have inquired as to whether the planing board may prohibit or restrict the use of the proposed Mill Plaza residential units for student housing through the conditional use permit process; or if it can limit the number of beds/bedrooms per unit. Some board members have expressed concern that such actions would violate the Fair Housing Act, while others disagree that that law is applicable to students.

It is my understanding that the Fair Housing Act does not protect student housing in its prohibition on discrimination based on age or familial status. However, any effort to regulate the type of tenants or the number of bedrooms in a unit would need to be rationally related to one or more of the conditional use permit criteria. Here, it would seem that the relevant conditional use permit criteria is:

External impacts: The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare. In addition, the location, nature, design, and height of the structure and its appurtenances, its scale with reference to its surroundings, and the nature and intensity of the use, shall not have an adverse effect on the surrounding environment nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood.

The important question here is what is the "use." Is it simply "residential," or is it "student housing"? Student housing is not a term defined or regulated by the zoning ordinance—instead the zoning use of the proposal is "residence, multi-unit." While the units are a bit unusual in that they provide for a bathroom connected to each bedroom, there is nothing so distinctive about them that would, in my opinion, take them out of the general "residence, multi-unit" category. Non-students, particularly young professionals, might very much appreciate occupying an apartment in which each bedroom has its own connected bathroom. Moreover, while a four bedroom unit might

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be particularly attractive to students, there is nothing per se about such a setup which would necessarily discourage other types of tenants from renting such a dwelling unit.

I understand that when the conditional use permit requirement for mixed use housing was adopted that those who proposed it did intend to have the planning board focus on the type of tenant when considering the conditional use permit criteria. In New Hampshire, however, we do not examine what the intent of an ordinance was unless it is ambiguous in some way. I do not find Durham's ordinance to be ambiguous.

I would therefore caution the planning board from attempting to regulate the type of tenants or the number of bedrooms or bathrooms in a given unit through the conditional use permit process. While doing so would not violate the Settlement Agreement or federal law, it may violate Durham's zoning ordinance.

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

Sincerely,

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

Laura Spector-Morgan
laura@mitchellmunigroup.com

cc: Todd Selig, Town Administrator