August 31, 2021

Dear Todd, Rick, and Durham Planning Board,

The more I think about the August 25 Planning Board meeting, the more dismayed I become. I remain extremely concerned about several things that were said by Board members at the meeting and the actions that resulted. The hostile tone toward the public was also distressing.

The Chair stated that PB members must be blind to type of tenants when reviewing Conditional Use

Such statements undermine the intent of the Conditional Use Zoning by eliminating the PB's ability to apply the Conditional Use criteria honestly to evaluate and require effective mitigation for external impacts such as noise, pedestrian traffic, trash, light/glare, hours of operation, and so forth.

The Chair's stance takes away the very tools that the Planning Board and Town Council purposely put in place in 2013 to address "broad concerns in Town" when they voted unanimously – and with no stated objection from anyone – to make mixed-use allowed by Conditional Use only in the Central Business and Church Hill Districts. (See Ordinance 2013-10.)

Minutes from those meetings reveal statements by Councilors and Board members that affirm Planner Michael Behrendt's comment (per the minutes of the November 13 Planning Board meeting) that making Mixed-Use allowed by Conditional Use *"would allow the Planning Board a fair amount of judgment in terms of allowing student housing as part of mixed-use applications" (p. 7).* Or, as acting PB Chair Richard Kelley said at the same meeting: *"the conditional use process allowed the Planning Board to provide more influence and authority in regard to an application" (p. 8).* That influence and authority is what the PB should be manifesting at this moment as it considers a plan that would move the type of late-night student "action" now taking place at Madbury Commons and Main Street into the Mill Plaza, a site that has always served as a buffer for the Faculty Neighborhood from that action.

While undoubtedly well-intentioned, the Chair applied improper logic to conclude that, even though the Plaza site plan is designed, located, and priced for student tenants, the Board will not be allowed to consider the fact that the proposed mixed-use development will likely house 258 students directly adjacent to a family neighborhood. The Chair cited the NH Civil Rights Act RSA 354A as his rationale, even though students are not considered a protected group. As sites that inform students about housing laws describe: *"While students are not a protected class in and of themselves, each student is still protected under fair housing laws. This provides students with the right to ask about, apply for, and obtain housing without being discriminated against on account of their race, national origin, color, religion, disability, sex, familial status, or any other protected class status given to them by state or local laws" (FindLaw).* Such individual protections from discrimination are distinct from the obligations that the Planning Board has to distinguish between projects that portend different types of impact on adjacent properties. The

Board has received Durham resident input and been shown and sent many video samples that clearly document what types of behaviors would be moving into the Plaza and adjoining neighborhood if the CDA site plan is approved.

Ironically, earlier on August 25, PB members seemed very concerned about potential late-night noise from a group of student customers gathering around a proposed food truck that would be located at the far end of the Plaza (away from Chesley Drive and Faculty Road) next to the Bagel Works and that would be open to 1am or 2am. I was pleased that the Board showed concern for the neighbors in terms of that relatively contained application. Where was the similar concern for the noise, foot traffic, and much more from 258 students living on the site, even closer to the neighborhood?

Confusion over the planning board process

Statements made during PB meetings indicate that members of the PB (even some longtime members) are not clear on how the PB should review the CDA project given the Settlement Agreement.

On April 6, 2021, Todd Selig released a letter by Attorney Laura Spector-Morgan which clearly address questions raised by Lorne Parnell on August 25, 2021:

> 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.**
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> 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.
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> **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.**

I have heard some members of the PB express their belief that the Board must approve a plan, (whether or not it meets CU or other zoning regulations). I hope rereading LSM's comments will offer clarification on this matter and provide the PB with permission for a full and honest review of the plan. The PB members need clarification from you, Todd. The Community deserves nothing less.

Incomplete reading of what is permitted in the WCOD

When reading from 175-61, the Chair stopped reading after Section A, neglecting to consider Section B regarding the *limited* circumstances under which roads are permitted in the WCOD:

> **175-61. Conditional Uses in the WCOD.**
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> A. The following uses, including any necessary grading, shall be permitted as conditional uses in the WCOD provided that the use is allowed in the underlying zoning district and a Conditional Use Permit is granted by the Planning Board in accordance with Article VII:
> 1. The construction of streets, roads, driveways, access ways (but not including any parking areas other than those serving single-family uses), bridge crossings, and utilities including pipelines, power lines, and transmission lines;
> And…
>
> B. The Planning Board shall approve a Conditional Use Permit for a use in the WCOD only if it finds, with the advice of the Conservation Commission, that all of the following standards have been met in addition to the general standards for conditional uses and any performance standards for the particular use: 1. There is no alternative location on the parcel that is outside of the WCOD that is reasonably practical for the proposed use;

Note that the Conservation Commission has *not* advised the Board to allow a road in the WCOD for the very reason that they believe that there is an alternative location outside the WCOD. While ConCom did agree to allow the entrance to remain in its current location if the applicant so chooses, they did not state their acceptance of a road within the WCOD.

As several counts by citizens of Mill Plaza Parking Permits have verified, there will be ample room for the required 338 commercial parking spaces in the lot once CDA stops renting approximately 150 parking spaces to students. This would provide an alternative location for the road outside of the WCOD. As I read 175-61, both paragraph A and B must be met, thus I believe CDA received an inappropriate signal on this aspect of the plan.

Troubling Outcome

I am extremely troubled not only by the misinformation and incomplete information provided to the new and longtime members of the PB on August 25 as guidance but also by the resulting actions by the Board. Based on this improper guidance, the PB gave CDA a tentative green light to spend tens of thousands more dollars to work up new engineering plans, without having gone through the CU Criteria for Mixed-Use as was requested that evening by at least one member of the PB. The Board basically gave CDA a “nod and a wink,” conveying the impression that it was okay to invest significant amounts of more money in new engineering plans under the informal assumption that the plan will be approved. This occurred after the Chair misled the Board on some critical understandings and without a proper review of the CU Criteria that LSM says the PB is held to. This is most unfortunate.

Is there a remedy?

If the PB does not *immediately* remedy this situation by explaining to CDA their tentative nod to go ahead with costly engineering plans was premature, I fear that CDA will come back with fully engineered new plans and vehemently protest should the PB belatedly go through a proper and honest review of CU Criteria and conclude that the plan does not meet CU Criteria.

I urge the PB to take action immediately to remedy this set of circumstances before the Town finds that the plan before it does not meet our ZO and is not in the best interest of our community. Voting based on misinformation leaves wide open causes for legal challenges from whichever party ends up on the losing side.

When will the Council review the plan based on the Settlement Agreement?

One final matter of concern is that it is not clear when the Town Council will review of CDA site plans to see that the modest gains the public was promised via the Settlement Agreement are in place? In this regard, the members of the public who have followed the site-plan review most closely needs to be given proper opportunity to present what they know about the current plan. (In the latest iteration there is some blatant divergences between The Plan and the Settlement Agreement.) If these matters are not addressed, the public will have every right to lose faith in our Town government, and act accordingly.

In closing
Todd and Rick, we are at a critical point in the review process. Please don't allow these serious lapses in judgment and procedure to undermine our Planning Board process. I implore you to step in and provide clear direction to the Planning Board to put the review process on a proper and legally defensible track.

Respectfully submitted,

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