

May 22, 2020

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' 2019-2020 Conditional-Use Site Plan for Mill Plaza

Dear Members of the Planning Board,

As you know, I represent a large group of concerned Durham residents. This group includes direct abutters to the Mill Plaza and residents from every street in the full "Faculty Development," a long-established, well-defined, and coherent "neighborhood" that is adjacent to (and partly bounded by) the Mill Plaza. I also represent a number of residents from other parts of Durham, who, while not living next to or very near to the Plaza, are concerned about the future of this dominant downtown site and also with the overall fiscal health of the Town

I appeared on my clients' behalf at your January 22, 2020 meeting and spoke primarily on the issue of whether CDA's present proposal is a "new application," and whether it is "grandfathered" by the 2015 Settlement Agreement between the Town and CDA. We continue to believe that a proposal that now appears to require 157 parking spaces on an adjoining property in a separate zone is a substantially different project from that which was the subject of the 2015 Settlement Agreement; and thus the proposal is not allowed without a number of variances, including a variance for the use itself. That issue is still outstanding and is expressly reserved by my clients.

However, more recent meetings of the Planning Board, including your May 13, 2020 meeting, have brought other issues to the forefront that I would like to address in this letter. Foremost among those issues is the applicability of Article VII of the Zoning Ordinance, entitled "Conditional Use Permits."

CDA appears to be proceeding on the assumption that its proposed use is allowed as a matter of right. And unfortunately, certain comments made by Board members on May 13, 2020 and at prior meetings suggest that Board members may be functionally operating in agreement with this fanciful proposition of CDA.

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Conditional Use Permits Generally

The Durham Town Council and Planning Board have provided through a 2013 Zoning Amendment that CDA's proposed Mixed Use development not be allowed as a matter right, but only upon the issuance of a Conditional Use permit. Durham Zoning Ordinance ("DZO"), §175–53 (Table of Land Uses). Each of the criteria set forth in §175–23 must be met, including but not limited to, site suitability; external impacts; impact on property values; and fiscal impacts on the Town.

Meeting these criteria is **not** a requirement for a use permitted as a matter of right. These Conditional Use criteria are set forth for a good reason: a new Mixed-Use proposal, particularly one as substantial as that proposed by CDA, must not have a negative economic, fiscal, public safety, environmental, aesthetic, or social impact on the Town. See DZO, §175–21 (A). Further, your Board must make findings of fact, based on the evidence presented by the applicant, Town staff, and the public, as to whether each of the eight approval criteria have been met. The criteria are not to be looked at generally, with the Board having the discretion to give whatever weight it desires to the criteria and making a broad decision as to whether or not the criteria have been met. The Town and the public are further protected in that each one of the criteria, individually, must be met. Indeed, your Town Attorney, Laura Spector-Morgan affirmed this principle in a November 1, 2018 email to the Planning Board via Durham Town Planner Michael Behrendt, writing: "In order to grant a conditional use permit, the board must find that each of the conditional use permit criteria are met." As Ms. Spector-Morgan indicated in response to a Planning Board query, no "trading" or "balancing" judgments are permitted; *all* the criteria must be met fully, individually and specifically.

Further evidence of the importance of the Conditional Use criteria in protecting the Town and the public is that a "super majority" of your Board must vote in favor of the issuance of a Conditional Use permit—unlike votes for "by right" permit applications, which require only a simple majority. At least five members of your seven-member Board must vote in favor of the issuance of a Conditional Use permit. DZO, §175–22 (C).

All of the above factors – the eight criteria themselves, that specific findings must be made with respect to each of the criteria, and that a "super majority" must vote in favor – make it clear that, under the DZO, Conditional Use permits must not be lightly granted, in order to preserve the public health, safety, and welfare of the community.

Fiscal Impacts of CDA's Project

You have had some discussion about the scope of the fiscal impacts of CDA's project and, in particular, whether the scope is the fiscal impact on the Town as a whole or whether the Board should look merely at the net effect of this project, in isolation, on the Town's revenue stream. I'm sure you are all familiar with the specific language of the "fiscal impacts" criterion required to grant a Conditional Use permit. However, it is worth repeating here, with emphasis on the language that supports the position that the effects on a community as a whole must be taken into consideration:

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Fiscal Impacts: The proposed use will not have a negative fiscal impact **on the Town** unless the Planning Board determines that there are other positive community impacts that off-set the negative fiscal aspects of the proposed use. The Planning Board's decision shall be based upon an analysis of the fiscal impact of the project **on the town**. The Planning Board may commission, at the applicant's expense, an independent analysis of the fiscal impact of the project **on the town**.

DZO, §175–23 (C)(8) (emphasis added). Clearly, the focus in the Article is on the impact on the Town as a whole. If the intent was that this Board look only at the fiscal impact of a project in a narrower sense (increased tax revenue from this one property minus related increased governmental expenditures), then DZO §175–23 (C)(8) would have been written in narrower fashion, such as by explicitly stating that fiscal impact was to be determined by the net increase in taxes as a result of the project, minus the cost of governmental services for the project. But that is not the language adopted by the Town Council. The relevant impact is that "on the Town" as a whole, not just the fiscal impact on the government of the Town.

Fougere Planning's Fiscal Impact Analysis of the Town

The fiscal impact analysis ("FIA") dated April 2, 2020 by Fougere Planning & Development, Inc. misses the mark, in that the methodology employed looks only at the fiscal impact of CDA's proposed project on the Town's government (increased tax revenue minus increase in government expenditures as a result of the project). Indeed, as the applicant stated at the May 13 meeting, Fougere Planning was hired to look at the impact on the Town "budget" – a word that is not used in the DZO Conditional Use criterion.

The submitted FIA fails to make any attempt to analyze or estimate the effect of CDA's project on the Town as a whole (e.g., the effect of adding 258 student housing beds on existing public or private student housing, or upon the property values and lifestyles of the abutting residential neighborhood). Moreover, it does not address these impacts under anything other than a "best case" scenario, and that only for the immediate future.

It's understandable that a fiscal analyst engaged and paid by a developer would employ a narrow scope in determining the fiscal impact of the project. This is not to denigrate the character of Mr. Fougere. It is simply human nature to fulfill a commissioned task

Nevertheless, Mr. Fougere's approach is wrong from the perspective of what the Durham Planning Board needs to assess the proposed project. Mr. Fougere should not be ignoring the Town-wide fiscal impact of the proposed project. He should not be focusing solely on the net effect of the project on Town government. Moreover, Mr. Fougere's analogy to Madbury Commons is off the mark, given that Madbury Commons was not a Conditional Use project, but was permitted as a matter of right.

Fougere's FIA underscores the need for this Board to require an independent analysis of the fiscal impact of the project on the Town of Durham. As you know, DZO §173–23 (C) provides in part that: "The planning board may commission, at the applicant's expense, an

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independent analysis of the fiscal impact of the project on the town." The independent analysis should, as noted, be paid for by the applicant, but would be hired by the Planning Board. This would make it more likely that an objective FIA would be presented for this Board's consideration.

On behalf of many concerned residents of Durham, we respectfully urge you to require an independent FIA, commissioned by the Planning Board, not by the applicant.

"Let the Market Decide" is Misplaced

It would appear, based on discussions at various Board meetings, that the concept "let the market decide" has obfuscated the fiscal impact analysis required under the DZO §175-23 (c)(8). "Let the market decide" is a broad statement of a planning board's purview in regard to whether a specific project is, within its own confines, financially viable. One does not look at a proposal for a new restaurant, for example, and determine that the proposed use is not financially viable because there are other restaurants in the area, and thus turn the project down. If the restaurant is a permitted use in the proposed area, then it should be allowed, subject of course to reasonable planning board conditions.

However, "fiscal impact" under the Conditional Use criteria is an entirely different matter. Where a Conditional Use permit is required, the DZO mandates a finding by the Planning Board that the proposed use will not have a negative fiscal impact on the Town overall. Whether there will be a negative fiscal impact on the Town is an entirely different inquiry than whether a particular project will be financially viable, in and of itself.

Conclusion

By no means have I tried in this letter to discuss every conceivable issue that CDA's project raises. I have tried to focus mostly on the importance of the DZO's Conditional Use requirements and the effect of the proposed project on the Town of Durham as a whole, including but not limited to existing student housing and the abutting residential neighborhood. There are, of course, many other aspects of the project that interact with the other limitations on the external impacts on the adjacent neighborhood that are imposed by Durham's Conditional Use zoning, as you have already heard from residents – and will likely hear again.

Thank you for your consideration.

Sincerely,

/s/ Mark H. Puffer

MHP:sas

cc: Karen Edwards, Administrative Assistant <kedwards@ci.durham.nh.us>
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