

*Unedited Transcript of Attorney Laura Spector-Morgan explaining the December 14, 2015,
legal Settlement between the Town of Durham and Colonial Durham Associates
January 27, 2016, Planning Board Meeting*

Viewable from 03:20 to 19:32 (16 mins, 12 secs) at [DCAT-on-Demand recording](#):

Planning Board members [all present]: Andrew Corrow; Chair William McGowan; Vice Chair Barbara Dill; Richard Kelley; Kitty Marple, Town Council Rep; Lorne Parnell; Steve Roberts; Jay Gooze, Council Alternate; Wayne Lewis, Alternate; Paul Rasmussen, Alternate

Good evening. I'm Laura Spector-Morgan. I'm from the Mitchell Municipal Group, and we represent the Town of Durham and its various boards.

I'm here to tell you tonight about a Settlement Agreement in a case involving the Zoning Board, which has an impact on the Planning Board's review of the Mill Plaza application.

There was some litigation – and I'm not going to get into the details of the litigation – about whether the change to the zoning ordinance that increased the required square footage per occupant from 300 square feet per occupant to 600 square feet per occupant applied to the Mill Plaza application. And it was a very technical argument having to do with when the zoning amendment was noticed versus when the application was noticed.

And the court treated this not as a traditional Zoning Board appeal, which would be a very cut and dry – we file something very big with the Court, which is the record before the Town, the court has a 30-minute hearing, and we're in, we're out, we're done. The Court was treating this as normal civil litigation, which meant we had begun to engage in discovery, including literally hundreds of pages of documents that we produced. Councilor Smith, Planning Board member, former Planning Board member, was deposed in connection with that litigation, and we were looking at at least a couple of other depositions and more discovery to come.

So the Town Council, as a business decision, made the decision to settle the lawsuit. And that Settlement Agreement is on file here at the Town Hall. You can all review it, if you like, and I think we have a couple of extra copies tonight, and it's on the website. The basic gist of that Settlement Agreement is that the Mill Plaza application is not subject to that zoning amendment. So they are subject to your original density requirement of 300 square feet per occupant.

In return, the Town got some really good concessions from Mill Plaza. And I'm going to run through them really quickly for you, just so that everyone knows what they are. And there are some copies of the plan up here if anyone is interested in seeing it.

So the property is the Mill Plaza property. I'm sure you're all familiar with it. The southern half of the property abuts Faculty Road, where the northern half of the property abuts, for the most part, other student housing. And so, to the extent reasonably practicable, the plan is to put as many students as possible on the northern half of the property, as opposed to the southern half of the property, keeping them closer in proximity to the other students as opposed to the neighborhood.

There will be a maximum number of beds of 330.

There will be an increase in nonresidential commercial space from, I think there's about 45,000 square feet right now, to something between 80,000 and 90,000 square feet. And that new commercial space: It is the plan to build that in phases, so that none of the current tenants are displaced, but instead, the new space will get built, those tenants who are there will be able to move into their new space, and then the old spaces, to the extent they need to be demolished or renovated, can be demolished or renovated. But the plan is not to displace any of the current tenants who wish to stay.

All of the buildings and the roads will be outside the shoreland and wetland buffers, so that no variances are required for those.

On-site parking will be increased from the 345 spaces that are there right now. The plan that's been submitted shows a proposed number of spaces of 360 spaces.

The revised application will have a natural buffer along the southern property line adjacent to College Brook, and that buffer will be maintained by the property owner.

There's a center building on the plan, and there's a requirement that there be a pedestrian walkway in the middle of that center building so that the two halves of the property can be connected and people who are parking or living on the back half of the property can get to the front half of the property easily and conveniently.

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

One other thing that was discussed that's not reflected in here is that the location of these buildings on the plan prevents the connection of Chesley Drive through the property, which I think is something that has been discussed in the past and, as I understand it, is not palatable necessarily to the people who live in that neighborhood.

So that is the gist of the Settlement Agreement. The Planning Board, for its part, is going to review this application as it would any other application. It is subject to all other zoning requirements. It is subject to all of your site-plan review regulations. And so the only restriction the Planning Board has is that it cannot impose a greater density, and it cannot require less than 330 beds.

And I'm happy to take any questions from anyone about the Settlement Agreement.

Robin Mower, Faculty Road: First question is, which version of the site plan regulations are applicable?

Laura Spector-Morgan: That's a matter of some discussion at the moment. However, it is my opinion that the site plan regulations that were noticed before the Mill Plaza Design Review application was noticed are applicable to this application. So I know there were a couple of iterations of site plan review regulations, so Michael's actually, as I understand it, done a chart of which ones had been noticed in that first round and made it through to final adoption.

Mower: So, if I remember correctly, then that would have been something like September 17...?

Spector-Morgan: It was sometime in September, yes.

Mower: ...2014 that the Planning Board saw those regulations in its meeting, but it would have been noticed before that.

Spector-Morgan: That is my understanding.

Mower: But of those that made it through the process? And that is a challenge for our Town Planner to figure out.

Town Planner Michael Behrendt: We've already got a document prepared that delineates what would apply.

Mower: Then I have a few more questions that relate to the Settlement Agreement specifically, if I may. So the Settlement Agreement notes that the applicant may have "not more than 330 residential beds" for the entirety of the Mill Plaza site. I just wanted to make it very clear this is the *maximum* they may be allowed; they are not guaranteed 330.

Spector-Morgan: We had a discussion somewhere in the 325 to 330 range, yes.

Mower: But it could be, depending on how the site plan review goes, that it could be 220. Is that accurate?

Spector-Morgan: Those are discussions we'll have as the project proceeds.

Mower: Okay. The second question is, what does "reasonably practicable" mean? You raised that as, in a sense, one of the items that the town received in return for the 300 vs. 600. So that's relative, just to remind everybody, to the *location* of the residential portion of this, as closest to the northern side rather than the southern side.

Spector-Morgan: Yes. Right. So the plan that's before you at the moment puts not most, but almost most, of the students on the northern half of the property. And there were discussions about whether there were ways to put additional students on the northern half of the property and move them off the southern half of the property. And to the extent those can be achieved, I know Mill Plaza is certainly open to those. There's one potential avenue that, at

the moment, we're being told isn't practical from a construction point of view, and there is one that may or may not be permitted under your zoning ordinance. So I would say, what you have before you is the "reasonably practicable" – most students you can have on the northern half of the property – but there are at least a couple of avenues that will be discussed in terms of how to get some more students on the northern half of the property.

Mower: And you are referencing the plan that is before the Planning Board tonight, not the plan that was provided for discussion purposes at the Town Council, is that correct?

Spector-Morgan: Yes, well, they should be substantially the same, but, yes.

Mower: So this plan shows one building near the Brookside Commons on the southern side of the Plaza having two floors for residential beds, and another building that is pretty close to the brook as well, farther east, that also has two floors of residential beds.

Spector-Morgan: Yes.

Mower: Alright. And the next and final question that I have is, how do you interpret the following condition, since one reading might be that the Town is in essence held hostage to the applicant? So this is Section #5 in the Settlement Agreement, which reads, "If the Planning Board Review results in a final non-appealable approval satisfactory to Colonial Durham, then Colonial Durham shall withdraw the Appeals in their entirety with prejudice, subject to the following conditions," and I'm looking at b., the second portion of b.,: "If the Planning Board Review yields an approval with conditions that have the effect of imposing a stricter density requirement," blah blah, blah: that's understandable, because that's the settlement agreement, very straightforward. But it also says, "or if the Planning Board approval imposes conditions that otherwise circumvent or frustrate the force or intent of this Agreement, then Colonial Durham's obligations hereunder shall cease..." So, how do you interpret that?

Spector-Morgan: This agreement was really hard to write, because we were trying to cover all the bases and make it very clear that the Settlement Agreement covered density and the Planning Board couldn't circumvent that. So that language is in there really as an excess of caution. We actually had that conversation before we met with the public, and we discussed what conditions of approval might be imposed that might affect density, and we couldn't really come up with any. But as this process moves along, we're all going to be involved in this process, we're all going to be involved in discussions regarding number of beds, traffic studies, fiscal-impact studies, and we're going to work together to make this work for the town and the applicants.

Mower: So is it accurate to say that that clause, the "imposes conditions that otherwise circumvent or frustrate the force or intent of this Agreement" – that relates solely to the density?

Spector-Morgan: Yes.

Mower: Okay. Thank you.

Beth Olshansky, Packers Falls Road: So I heard you say a few minutes ago that the Planning Board has the right to review this application as it normally would, except for 300 square foot density. So one of my question is, looking at the current plan, it appears that the two buildings in the back are not permitted under our current zoning ordinance.

Spector-Morgan: I'm not going to have that discussion with you. That's something that can be discussed during the review of the project, because that doesn't have anything to do with the Settlement Agreement.

Olshansky: Okay. Well, is the Planning Board under any obligation to waive any requirements under this Settlement Agreement, any existing requirements in our zoning?

Spector-Morgan: The Planning Board can't waive zoning requirements.

Olshansky: Pardon me?

Spector-Morgan: The Planning Board can't waive zoning requirements.

Olshansky: They cannot waive zoning requirements. Can they waive parking requirements?

Spector-Morgan: If those are contained in your site plan review regulations, then yes they can.

Olshansky: Are they under any obligation to waive parking requirements?

Spector-Morgan: The Settlement Agreement provides that there will be an increase in parking from the 345 spaces to a number agreeable to the Planning Board. So it will be up to the Planning Board.

Olshansky: Okay, because when I looked at this map, I noticed that the commercial spaces are required – the commercial, the space for the commercial tenants – requires 320 parking spaces, and this plan offers 126 parking spaces.

Spector-Morgan: It offers 360 parking spaces.

Olshansky: No, for the commercial.

Spector-Morgan: Well, I don't think there is any restriction on the parking spaces in the garage not being used for the commercial spaces, but again, that has nothing to do with the Settlement Agreement. That's something to discuss during the public hearing process.

Olshansky: I heard during the EDC [Economic Development Committee] meeting that the parking for commercial was to be toward the front of the Plaza, surrounded by the commercial properties, and that's limited to 126. Are you able or willing to answer a question about Conditional Use, or...?

Spector-Morgan: It doesn't have anything to do with the Settlement Agreement.

Olshansky: You said that the Planning Board is not allowed to waive zoning, anything in the zoning amendments. Is the ZBA allowed to waive uses that are not permitted in the Table of Uses?

Spector-Morgan: The applicant could go to the Zoning Board for a variance, yes.

Diana Carroll, 54 Canney Road: My question is, in the Agreement, if this project goes forward, that the applicant must provide the security onsite, as we heard, 7 days a week, 24 hours a day. What if, in the course of this complex up and running, they don't?

Spector-Morgan: Then that's an enforcement issue, and I suspect your Town Administrator would be on top of that in a heartbeat.

Carroll: What would the consequences be?

Spector-Morgan: So, when the Town brings an enforcement action, the statute allows the Town to collect civil penalties in the amount of \$275 a day for every day of the violation, as well as its cost in attorney's fees.

Carroll: Thank you very much. I appreciate this, because sometimes, I think, Durham has experienced the fact that sometimes things that were going to be done didn't get done, and the consequences were not very clear. Thank you for making that clear.

Spector-Morgan: You're welcome.

Andrew Corrow: Any other comments, pertinent comments or questions with regards to the Settlement Agreement?

Nancy Lambert, 17 Faculty Road: In regard to the requirement for the security 24/7: And if there's a new owner, are they also beholden to this Settlement Agreement?

Spector-Morgan: That condition of approval will be on the plan, it will be a condition of this Planning Board approval, and they will be subject to it.