The CDA-Durham Legal Settlement is Clear:

"The Revised [Mill Plaza] Application will provide for proposed buildings and vehicular roads outside of the shoreland and wetland buffers…."

To the Planning Board from Joshua Meyrowitz, 7 Chesley Dr., Durham, NH, April 23, 2021

Clause 1d of the **December 14, 2015, Legal Settlement** (background/highlights; full agreement) is rather *unambiguous*:

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

Plain-Sense Meaning: No reasonable reading of that clause would lead one to believe that it offers the option for Colonial Durham Associates (CDA) to encroach on the wetland setbacks with buildings or vehicular roads. Indeed, the added clause about variances clearly precludes a CDA escape hatch through a ZBA variance. The obvious meaning is that ~**No ZBA variances would be needed or applied for because there would be no encroachment in the wetland setbacks that would lead to requesting such a variance.~** Moreover, even the clause about "the buffers" being "maintained by the property owner" presumes that the wetland buffers are indeed in place to be maintained. And, finally, the appended "Site Development Concept" diagram (p. 5) illustrates a *wetland-setback-compliant plan*.

The "obvious" meaning of Clause 1d led Board Member Richard Kelley to inquire on March 24, 2021 (**video**) if Attorney Pollack had represented CDA at the time of the agreement (yes), if he had "reviewed the document prior to signature" (yes), and whether "the document was fully vetted by yourself before your client executed that," to which Mr. Pollack replied "I reviewed it before my client executed, yes." Then, Mr. Kelley asked the key question at 9:35:03:

> ***Board Member Richard Kelley:*** *"How do you reconcile, then, that 'The Revised Application will provide for vehicular roads outside of the shoreland and wetland buffers such that variances from town ordinances are not required'?"* Mr. Pollack replied at 9:35:25:
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> ***CDA Attorney Ari Pollack:*** *"Are you asking why it is we don't need a variance? I think the answer is because the existing condition provides more coverage [into wetland buffers] than we're proposing, and we're bringing the property more nearly conforming, which based on my understanding of prior applications and other questions before this board and other boards has been viewed as eligible for a Conditional Use permit, which is what we have applied for."*

CDA Bait & Switch: In place of the plain meaning of the clause that ~**No ZBA variances would be needed or applied for because there would be no encroachment in the wetland setbacks that would lead to requesting such a variance~,** Mr. Pollack has substituted the twisted logic of **~We can violate the clearly stated prohibition on buildings and roads in the setbacks because we just don't think that we need to apply for a variance in order to continue to violate the setbacks.~**

No Qualifying Phrases: There are, however, no qualifiers in that Settlement clause: no "except when/if," no "other than when," no "unless." There is no mention of how past or existing nonconforming conditions offer an escape from the plain meaning of the prohibition. And there are no qualifiers for Mr. Pollack's "understanding of prior applications and other questions before this board and other boards."

Town Attorney Paraphrase of Clause 1d: When Town Attorney Laura Spector-Morgan summarized the essence of the Settlement for the Durham Planning Board and public on January 27, 2016, she reiterated the plain meaning of Clause 1d in her own words:

> **"All of the buildings and the roads will be outside the shoreland and wetland buffers, so that no variances are required for those."** [Transcript, p. 1]

There are no logical steppingstones between that clear explanation and Ari Pollack's claim. Attorney Spector-Morgan states plainly that no variances would be required – not because Ari Pollack thinks that CDA does not need a variance (based on *other* applications, *other* questions, and *other* boards) – but because "All of the buildings and roads will be outside the shoreland and wetland buffers." Simply said.

CDA's Grandfathering Claim is Getting Very Old: Note that even *if* the roadways were grandfathered, Clause 1d would not protect them. After all, there is no mention in Clause 1d of exempting existing roadways and restricting only "new roads" or "additional roads." In any case, grandfathering does not apply, as Rick Taintor detailed for the Conservation Commission in Oct 2020:

> **"I don't believe that any of the proposed redevelopment within the wetland buffer, including the parking lot, is exempt from compliance with the zoning, because (a) new underground utilities and infrastructure are proposed in existing paved areas, and (b) there will be extensive changes in grade throughout – some areas within the wetland buffer are proposed to be raised or lowered by up to at least 3 feet in elevation."**

Moreover, as Mr. Taintor and Zoning Administrator Audrey Cline outlined in a June 8 2020 memo (p. 2, emphases added) grandfathering does not cover **"any site condition that did <u>not</u> conform to a land use regulation that applied at the time that the condition was established,** nor does it apply to a site condition that does not conform to the most recent approved site plan. Such nonconforming conditions are not 'legally established' and therefore have no grandfathering protection under the Site Plan Regulations." (See the long history of Plaza site *non*-compliance here, pp. 7-32.)

CDA Asserts Settlement Compliance: On pp. 1-2 of its WCOD CUP Application, CDA writes that what is proposed reflects "the terms of settlement between the Applicant and the Town of Durham…." Please hold them to their word and require a submitted plan that (finally) adheres to the Settlement.

Bad Faith *NOW* (even if not earlier): More documentation would be needed to prove that CDA entered the Legal Settlement on bad faith, intending to wiggle out of Clause 1d with its twisted logic regarding the phrase "such that variances from town ordinances are not required." But there's little doubt that CDA is *now* displaying bad faith in relation to Clause 1d. Good-faith adherence would entail removing vehicular roadways and parking spaces from the Wetland Setback, which would also be accomplished by adhering fully to the Conservation Commission's input. Instead, Ari Pollack asserts immunity in the manner of elites who think they have the right to make up their own rules, avoid the common meaning of terms, give themselves pardons, and construct their own escape hatches from legal obligations.

Please do not allow the Planning Board and the public to be "played" – again and again – by such a dissembling distortion of the plain meaning of the Settlement, as well as of Wetland Setback Zoning.