—*NEGOTIATIONS AND CLAIMS*—

November 29, 2021

Planning Board
8 Newmarket Road
Durham, NH 03824

Re: Mill Plaza Redevelopment. 7 Mill Road. Continued review of application for site plan and conditional use for mixed-use redevelopment project, drive-through facility for bank, and activity within the wetland and shoreland overlay districts. Colonial Durham Associates, property owner….Central Business District. Map 5, Lot 1-1.

Dear Members of the Board,

As you review the CDA application, please keep in mind: Even if an application meets all land use regulations, **the Board may exercise its authority to negotiate with the applicant.**

> [11/22/21 Conservation Commission, DCAT recording marker about 31:50, verbatim]
>
> James Bubar: Michael knows better, but I don't think that the Planning Board really is in a position to negotiate anything. We enforce ordinances to the best of our knowledge and ability.
>
> Michael Behrendt: You do. You have control over the site plan process, but the Board also has.…
>
> Bubar: You can't say, "If you do this, I'll do that." You can't do that.
>
> Behrendt: You can have good-faith, open negotiations, but ultimately it's the regulations and Conditional Use and the Board's judgment that counts.
>
> Walter Rous: I think the Conditions of Approval are the way you negotiate.…

Negotiations are always appropriate, whether or not it is a Conditional Use permit application, if they are focused on the impacts of the project and the interests of the town, as reflected in our zoning ordinance's purpose statement, i.e., "in accordance with RSA 674:17."

While the Board must conduct its negotiations with fairness, courtesy, and respect for land use regulations, concerns that the applicant "might walk away" should be held up to the light. The economic potential of the site is obvious. As Dr. Dennis Meadows noted at the November 22nd Conservation Commission meeting, the Mill Plaza parcel, in the center of Durham and with its proximity to UNH, has high profit value for any potential development—not just for CDA's current application.

Negotiate meaningful terms

Negotiations should entail meaningful proposals, unlike the relocation of the trash compactor. (The applicant surely must have known the Board would respond with a request to relocate it away from the residential neighborhood—quickly accomplished.) Ask for what is valuable to the community for the life of the project!

The number and location of parking spaces is the most obvious example of the Board's authorized opportunity to negotiate meaningfully with the applicant. What lies in the contractual terms (or what happens on the ground or in negotiations) between Hannaford and CDA is not the Town's business—as Durham's attorney has explicitly stated. Negotiations should also recognize damage to the southern edge of the parcel and to College Brook due entirely to decades-long Plaza operations.

Whose interest?

At your October 27th meeting, Chair Rasmussen noted that Attorney Nathan Fennessy represents the interests of his clients, i.e., a group Durham residents. Of course he does. Attorneys always represent their clients. Ari Pollack is doing a fine job of representing Colonial Durham Associates. He does not represent Durham residents. But you do.

It is critical that the Board identify claims made in the interest of the applicant and distinguish between what is right for the applicant and what is right for Durham. (To take one example, Lorne Parnell recently emphasized to CDA that we require construction management plans prior to approval, not afterwards, as CDA proposed.)

Claims made by the applicant should not hinder negotiation

We did see one significant, albeit late, come-about—in essence, the result of negotiation—between May and August 2021 site plans, i.e., parking in the 75-foot wetland upland buffer strip ("the setback"), putting paid to Mr. Pollack's earlier claim that CDA had done all it could in negotiating with Hannaford.

You have also heard Mr. Pollack claim, in his "summary" statements on August 25th, that his client has made numerous "offers" (as transcribed verbatim below):

> "We've offered, I mean, we've offered onsite management. We've offered security. We've offered no residential parking on the property. We've offered a contribution to the restoration of the waterway. I mean, we've covered these things. You know what they are as well as I do. They're, I'm happy to continue to summarize, but ultimately it's a recognition that we've got a compliant proposal on the table, and we're entitled to a vote."

Scrutiny would show the overwhelming majority of those "offers" to be either (a) Town requirements (adherence to which has been strongly emphasized by residents), or (b) responses to Hannaford asks.

Burden of compliance, burden of proof

Claims aside, it is up to CDA to submit a plan that actually does conform to Durham's land use regulations. In addition, as attorney Bernard Waugh documents,* the burden of proof is on the applicant regarding any "grandfathering" claims for legal nonconforming uses (which CDA has not provided). The burden of proof is also on the applicant to convince the Planning Board that the proposal will provide measures sufficient to address concerns inherent in the Conditional Use Permit criteria, e.g., that would mitigate any "negative external impacts."

Sincerely (if preachily) yours,

Robin

* "…the burden of proof is on the landowner who claims a 'grandfathered' use, to prove all the necessary elements establishing that right (New London v. Leskiewicz, 110 N.H. 462, 467 (1970)…"
2015 NH Municipal Association Law Lecture: "'Grandfathered': The Law of Nonconforming Uses and Vested Rights." H. Bernard Waugh, Jr., and Adele M. Fulton, Esq., Gardner Fulton & Waugh, P.L.L.C., Lebanon, NH.