

February 23, 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 and activity within the wetland and shoreland overlay districts. Colonial Durham Associates, property owner. Sean McCauley, agent. Joe Persechino, Tighe & Bond, engineer. Emily Innes and Sharon Ames, Harriman, project designer. Ari Pollack, attorney. (Rick Taintor is serving as the Town's Contract Planner.) Central Business District. Map 5, Lot 1-1.*

Topic of this letter: Conservation Commission advisory on WCO and SPO Conditional Use Permit | Wetland setback to College Brook (2nd letter)

Dear Planning Board members:

As required by the zoning ordinance, the Conservation Commission has provided advice to you regarding the application for Conditional Use Permits relative to the Wetland Conservation and Shoreland Protection overlay district zoning. A discussion focused on the Commission's findings should have occurred at your January 27 meeting, specifically that the application does not meet one of the four required approval criteria.

If an application cannot meet any single criterion of Section 175-61(B), then the other criteria become moot, and the Board's discussion should focus on that specific criterion.

The Commission stated that it did not find that the application meets the first of the four criteria—arguably the linchpin:

1. There is no alternative location on the parcel that is outside of the WCOD that is reasonably practical for the proposed use;

(175-61. Conditional Uses in the WCOD.

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;)*

Put another way, unless the applicant can prove that—contrary to the Commission's finding—there is no other location for the use that would avoid incursion into the Wetland Conservation Overlay, **then the Planning Board must deny this Conditional Use permit.**

Unsurprisingly, Colonial Durham Associates' attorney Ari Pollack argued at the January 27th meeting that: "...any requirement to eradicate occupation of the buffer is just unreasonable and would really provide, it would require a complete redesign of the work that we've been doing to this point."

In other words, Colonial Durham says: It's too late to ask us to change our plan.

I and other members of the public have repeatedly (and I repeat, repeatedly) asked that the Board address the big picture, *specifically to preclude such an eventuality*. At any time in the last six and a half years the Board could have urged the applicant to present an alternative plan. Doing so would have helped avoid this very moment.

None of the nine (9) designs submitted over this period has substantively—if at all—altered the southern edge of the pavement, i.e., the encroachment of parking, other impervious surfaces, or disturbances into the 75-foot upland wetland setback of College Brook:

- The applicant has never demonstrated that the submitted plan presents the only alternative relative to that buffer.
- The obverse is also true: CDA has never presented the Board with an alternative plan that shows no violation of that buffer.

An alternative plan could have reconfigured a single building's footprint or its geometry, the arrangement of structures relative to each other, or the arrangement of structures relative to the property lines, with the intent of avoiding the setback.

Why no alternative plan?

The reason that we have not seen such a plan has *everything* to do with Colonial Durham Associate's internal contractual relationship with anchor tenant Hannaford and *nothing* to do with the Planning Board's obligation to uphold our zoning ordinance, which the community drafted to codify a respect for the functions of wetlands.

What's worse is that the long-term lease contractual terms to which Colonial Durham Associates agreed hold us hostage to Hannaford's corporate, one-size-fits-all policy: specifically, that, regardless of the location and setting of its stores, parking be sized for the four or five days of extreme use during the holidays of Thanksgiving and Christmas.

Given our demographics and the town's layout, an atypical percentage of Hannaford's customers likely does not drive to the Durham store. Certainly, the percentage is lower than for Hannaford's other locations along highways.

So, for 300 days of the year, we can anticipate that—particularly if CDA no longer will be issuing leasing permits for approximately 100 spaces to non-customers (which must be a Condition of Approval)—we will see a large number of unused parking spaces. I say this with some certainty: As I noted during the 2009 public hearing at which CDA requested expanded parking, from my home on Faculty Road during no-foliage months, I never saw the parking lot more than 2/3 occupied, even with full permit parking.

Thus, it is highly questionable whether the parking spaces within the WCO are even necessary to regular operations of the commercial tenants.

The Settlement Agreement included an alternative plan!

The Agreement set terms: "...provided that Colonial Durham submits revisions to the Design Review Application that substantially conforms to the following design

considerations (the 'Revised Application'), **as also reflected on the attached non-binding conceptual plan set (Exhibit A)...**"

So the Agreement was predicated *not only on verbal conditions but on "substantial conformity" to a visual plan that reflects the Agreement's intent*—and that was required to be submitted within six weeks, by January 31, 2016. The "non-binding conceptual plan" attached to the December 14, 2015 Settlement Agreement—a legal component of the agreement—showed a different possibility *on which the signature of the Town of Durham relied*.

Yet the very first plan submitted subsequent to signing of the Agreement varied so significantly from that "non-binding conceptual plan" as to appear nearly unrelated.

It is dismaying that this discrepancy was not adequately addressed at the time. Had it been, again, we might not be at this inflection point.

Why buffers PLUS stormwater management systems?

Engineered stormwater management systems primarily address water volume and flow, not nutrients. Conservation buffers filter nutrients but also help stabilize a stream and reduce its water temperature and encourage biodiversity

The zoning ordinance codifies how a vegetated buffer strip shall protect our wetlands. Performance standards in the Wetland Conservation Overlay District (Section 175-65) state that "Where existing buildings or structures or other site considerations preclude the maintenance of a vegetated buffer for the full width of the upland portion of the WCOD, a buffer of the maximum possible width as set forth in 175-75.1 **shall** be provided."

Further underscoring the community's commitment to protecting our wetlands and waterbodies, the Settlement Agreement requires an "increased natural buffer" for College Brook—in addition to the Town's site plan stormwater management regulations.

In other words, the Town Council recognized that even the best engineered stormwater management system is not a replacement for the functions provided by a natural buffer to College Brook.

A unique demand placed on Colonial Durham? I don't think so.

The only other comparable development relative to wetland encroachment in our downtown developments has been Madbury Commons, which abuts Pettee Brook.

That application required two variances from the Zoning Board for encroachment into the wetland and shoreland setbacks. In addition, other precedent conditions in the Notice of Decision included the following:

- n) Pettee Brook Invasives. "For those invasive plants appropriate for manual removal the contractor shall carefully excavate smaller stumps, roots and vines using hand tools as needed, while preserving and protecting the root mass of the native trees and shrubs. Larger stumps that are not possible to excavate by hand shall be left, but treated with an appropriate herbicide to kill the plant and prevent resprouting. The contractor shall store, remove and dispose of all parts of invasive species from

the site, using commonly accepted practices, so that those plants do not spread via roots, fruit or any other part.”

- bb) Snow removal. “Snow shall be removed from the site, as needed, and shall not be pushed against trees or other vegetation.”

In the case of Madbury Commons, it was the primary use, i.e., housing, that was the encroachment. In the case of Mill Plaza, it is an accessory use, i.e., parking, that encroaches.

To equate impacts from the southern side of the brook to those of Mill Plaza’s is to set up a false equivalence. While the Planning Board chose not to include in its site walk a viewing of the southern edge of the Plaza from Brookside Commons, i.e., a view across College Brook to the north, the Conservation Commission did include that view in its site walk.

Some of you may recall that I have shown the Board photographs taken over the years of the damage to both trees and bank that result from the Plaza’s snow management. That is incontrovertible evidence of a responsibility to which the Plaza must not be accountable.

Below see two photographs of the southern edge of the parking lot near the entrance from Mill Plaza; these were taken from Tighe & Bond “Drainage Report” dated January 2, 2020.



FIGURE 2
View into College Brook from the entrance of Mill Plaza.



FIGURE 5
Looking south into brush and College Brook.

Natural buffer and pervious surfaces: A technical point

A natural vegetated buffer—such as is required in the Settlement Agreement—is a strip of land, immediately adjacent to the waterbody being buffered, that is populated by native species. It does not consist of a patchwork of manmade or “manicured” areas, particularly those not adjacent to the waterbody. (The *functions* of a buffer are not fulfilled by these alternatives.)

In other words, while pervious parking islands or end caps may help with stormwater management, they may not be counted as part of the buffer to College Brook.

Commit to a better future

As I walked through Durham this past week, I listened to the “Birdnote” podcast, specifically, the episodes about the threatened bird sage-grouse. (Stay with me.)

The podcast host, a former environmental reporter for NPR who moved from Seattle to rural Washington, herds cattle with ranchers whose political beliefs range far afield from hers. But here’s part of a conversation she has with one lifelong rancher in Idaho who grazes his cows in sage-grouse country, now in his 70s:

“If you value something, you’re going to invest in it. Doesn’t matter what it is,” the rancher says.

“Do you value sage-grouse?” the podcast host asks.

“Yeah, I think I do.”

“Do you value them as much as cows?”

“Well, now, you’re talking to a rancher! [laughs] No, if we were actually, if you had to pick, you’d pick the sage-grouse.”

“Really? Really? You’re blowin’ smoke!”

“If it came right down to it, simply, because, you know, you make the journey one time. And you don’t want to do something that ruins it for generations to come.”

Please: Uphold the community’s values. Ask the applicant to submit a plan that adheres to our regulations, as it should have done from the get-go. Let’s not sacrifice a functioning vegetated natural buffer for unused asphalt. Where’s the future in that?

Sincerely yours,

—*Robin*