

PARKING AT THE PLAZA: THE REAL STORY, AND WHAT WE SHOULD DO ABOUT IT

April 23, 2021

Planning Board
8 Newmarket Road
Durham, NH 03824

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....Central Business District. Map 5, Lot 1-1.

Dear Members of the Board,

Recent Planning Board meetings continue to raise questions about the number and location of parking spaces proposed for the Mill Plaza. The applicant has not been forthcoming, even with the Town Administrator. There is more to the “Mill Plaza Parking Story” than has been discussed during this six-and-a-half year “full and fair hearing process.”

Summary points

- Colonial Durham Associates (“CDA”) currently rents—and for many years (decades?) has rented—parking spaces at Mill Plaza for non-employees and non-patrons.
 - This use violates the original approval, wrote Durham’s legal counsel in 2009.
 - CDA, the Planning Board, and the Town have known of this non-approved use since at least November 2002 (although some say that it began years earlier).
 - CDA has never reported accurate rental parking figures to the Town.
- Many (i.e., 100+) permit-displaying vehicles park in prime locations facing Building A.
- Even so, Hannaford customers and other Plaza shoppers always find parking spaces.
- On March 30, 2021, a count at 9:30 that night tallied 144 rental permits—45% of the existing 345 spaces on site—displayed in parked vehicle windshields, including those in nearly the entire row along Mill Road.
- Permit-displaying vehicles also park within the 75-foot wetland upland buffer strip.
- Site plan regulations state: *...there shall not be created an excessive amount of parking.*
- **Conclusion #1:** Hannaford—and, thus, CDA—does not “need” as many parking spaces for the proposed project as CDA has led us to believe.
- **Conclusion #2:** The Planning Board has greater room for negotiating numbers and locations of parking spaces than it may have realized; it should require **removal of ALL parking spaces within the Wetland Conservation Overlay’s 75-foot upland buffer strip.**
- Respecting this WCO setback would allow implementation of **additional low-impact design measures** (green infrastructure) to address nutrient loading to the Oyster River tributary, College Brook, as required by Durham’s EPA permit, and to add a safe and attractive **pedestrian path** connecting to Chesley Drive.

Steps to take and rationales for doing so

1. **Re-evaluate parking requirements for this project: A reduction is appropriate.**

A “one size fits all” approach—per Durham’s regulations or a tenant’s corporate policy—should not be applied, given the uniqueness of this specific location and proposal.

 - Considerations should include: size of parcel, multi-building layout, multiple uses, a compact downtown with thousands of residents, proximity to the UNH campus, and walking distance for more than one-third of Durham households.
 - This is an *atypical Hannaford location*, i.e., perhaps *uniquely* pedestrian-friendly for Hannaford; its “standard policy” must not drive the train, i.e., it should not be allowed to determine what is best for Durham. (See quotes from both Ari Pollack and Laura Spector-Morgan on the last page of this document regarding how the Planning Board *must not incorporate Hannaford’s concerns in its review criteria*.)
 - Good planning does not waste resources on outliers: the “holiday shopping need” argument that Hannaford may propound should not hold our planning—nor our downtown—hostage, as Beth Olshansky noted to the Planning Board years ago.
 - Significant drops in UNH enrollment from 2025 onward and pandemic impacts (among them online teaching, remote work) argue for lower overall parking needs even for commercial uses: numbers of employees and in-person patron visits alike may be reduced, even if we cannot now predict by how much.
 - A “shared-parking model” may be appropriate in such a site, where all commercial uses are situated in close, walkable proximity by patrons.
 - It is obvious that the “proposed use” language of the Conditional Use Permit criteria is parking for the purpose of supporting onsite principal uses.
 - *In sum: If less parking is needed, pull all impervious surfaces back from the brook.*
2. **Remove all parking from the Wetland Conservation Overlay upland buffer strip.**
 - Currently, it appears that in the portion of the site facing Building A most vehicles parked within the 75-foot setback display rental parking permits.
 - On the March 10, 2021 site plan, parking located in this setback would be farthest from commercial uses and thus be least attractive to Plaza patrons and employees.
3. **Shift the onsite through-road north.**
 - Shifting the road away from the entrance conforms more closely to the conceptual site plan attached to the Settlement Agreement.
 - The shift would allow for a deeper naturally vegetated buffer to College Brook.
4. **Replace impervious surfaces in the WCO 75-foot upland buffer strip with pervious surfaces that benefit the community and redress decades of Plaza-generated damage.**
 - Such a site plan amendment would better meet the intent of the Settlement Agreement’s “increased natural buffer.”

Supporting documentation, below, for:

- A. Rental (permit) parking history argues that fewer spaces than the number proposed are appropriate—allowing for the provision of site plan amendments that could provide community benefits, whether environmental or social.
- B. The Planning Board has authority to negotiate and discretion to recommend that the applicant amend its site plans.

A. Rental (permit) parking history argues that fewer spaces are appropriate

The original (1978) Planning Board approval was only for the principal use of patron and employee parking. Rental parking—a second, unapproved, principal use—has continued for decades. The applicant claims that would not continue were the application to be approved.

Over the years, meeting minutes reflect that both Planning Board members and other residents have repeatedly stated publicly that customer parking is always available at the Mill Plaza. These statements cover periods when residents have also documented large numbers of vehicles displaying Mill Plaza rental parking permits, including routinely in the row along Mill Road at all times of day and night—during Hannaford’s operating hours—and beyond.

On January 6, 2010, then-Town Planner Jim Campbell wrote a two-page memo to the Administrator, copying the Director of Zoning, in which he addressed several issues with respect to whether the Plaza conforms to the 1978 Site Plan approval. Those nonconforming issues included rental parking, erosion on the hill near Chesley Drive that resulted from the 2002 illegal bulldozing, the bike / pedestrian path along the southern edge, landscaping, and the buffer to the Chesley Drive neighborhood. The memo noted:

It has come to our attention that the Plaza is leasing/renting parking spaces in the parking spaces that do not go with the businesses for the customers. While this happens in many places in Durham, it was never approved as a use at the Plaza.... Attorney Mitchell said that the use must cease until it is approved.

And yet that unapproved use continues—and, from recent observation, has, in fact, increased.

March 30, 2021 evidence: Diagram showing locations of parked vehicles with permits

Here are samples of Mill Plaza parking permits, both from earlier years and current:



<< From May 2016



<< Spring 2021 and full-year 2020–2021

On March 30, most of the permit-displaying vehicles were parked in areas long-observed (at least since spring 2016) by residents as reserved for rental parking. Another 31 vehicles parked in the more easterly portion of the site also displayed permits.

Below is a diagram, based on the 2008 Doucet survey of existing conditions, excerpted to focus on Building A, the Hannaford/Rite Aid building. It is marked with the number of parking spaces in each row adjacent to or facing Building A.

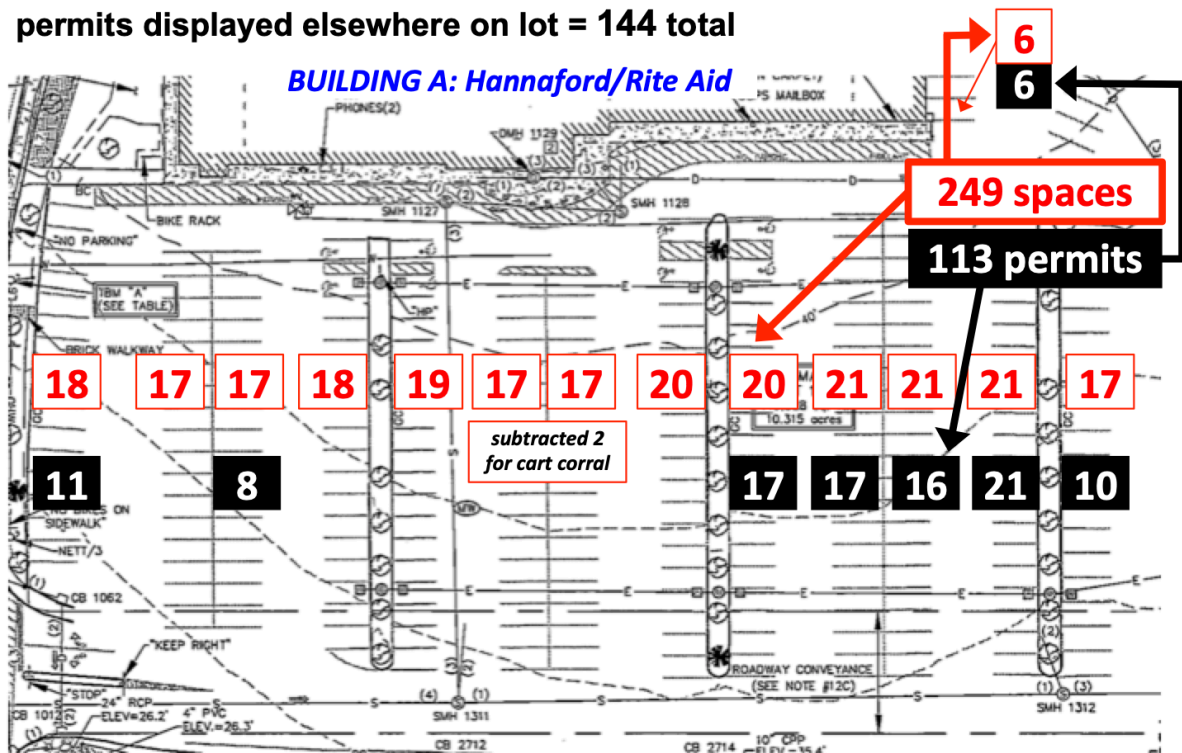
More to the point, it is marked with the number of permit-displaying vehicles parked in each row on March 30, 2021 at 9:30pm—after Plaza businesses had closed for the night. Of the 249 parking spaces in this part of the site, at that time 113 were occupied by permit-displaying vehicles. Another 31 permit-displaying vehicles were parked elsewhere on the site.

Put another way: As of March 30, Colonial Durham Associates was enjoying revenue from an unapproved use for 45% of the spaces in this front part of the site. And at prime shopping times on other days, such as at 5:11pm on April 19, one could observe permit-displaying cars parked in rows near Building A. It is clear that no one has been enforcing what residents have been led to believe is a contractual agreement between CDA and Hannaford.

The upshot is that, for years, many convenient spaces have been unavailable to Hannaford’s and Rite Aid’s customers—many, if not most, of them Durham residents—because they have been rented out by Colonial Durham for non-patron use.

Permits displayed in parked vehicles

March 30, 2021 at 9:30pm: 113 permits near Building A, plus 31 more permits displayed elsewhere on lot = 144 total



Existing conditions plan: Doucet Survey, Inc., May 8, 2008

A pattern of understatement by the applicant persists to this day

Over the years, residents, the Town Planner, Town Councilors, and other Board members have repeatedly asked for parking numbers. We still do not have answers.

Five years ago—on April 6, 2016—Attorney Pollack wrote to Administrator Selig (in a document Mr. Selig has authorized for public quotation) that:

...Mill Plaza's management team places rough limits on the number of rented spaces. These limits help ensure that tenant and customer parking is not negatively impacted.

In the past, spaces have been rented by semester, for the summer months, or sometimes year-round. For the summer of 2016, for instance, approximately 25 parking spaces are rented at an average of rate of \$200 for the summer. At these numbers and rates, parking rentals are hardly a major source of revenue.

[To the contrary: In May 2016, tallies of rental permits hovered around 100, and that September, Town Assessor Jim Rice began assessing the Plaza for 97 rental parking spaces. Today, at the Spring 2021 price of \$600—or more—a semester, CDA continues to derive considerable annual revenue from permit sales—even during Site Plan review. Do the math: 144 spaces times \$600 = \$86,400, a low-ball figure, given that most permits displayed on March 30, 2021 were for the full year 2020–2021 and it is likely that more than 144 permits are current.—R. Mower, 4/23/21]

Administrator Selig replied, in part:

...I do urge the Mill Plaza redevelopment team to cooperate with the Planning Board regarding ascertaining the actual number of spaces currently rented so that the parties may determine exactly how many parking spaces, exclusive of rental spaces, are necessary to service the existing site and any future redevelopment proposal that may ultimately come forward as a result of Colonial Durham's dialogue with the Planning Board.

We have asked *how many parking spaces are rented*. At the February 10, 2016 Planning Board meeting, Beth Olshansky pointed out that Councilor Kitty Marple had asked how many rental spaces there were: When Michael Behrendt then asked the applicant for the number, Attorney Pollack said, "We do not have that information yet."

At the March 24, 2021 public hearing, Board member Heather Grant point-blank asked *how many spaces Hannaford requires*. No one picked up on that question. Déjà vu, but surely, CDA today has accurate figures and should be required to convey those to the Board.

Suffice it to say that over more than six years, the Mill Plaza team has shown no sign of cooperating with the Planning Board on this matter—and the Board has yet to become forceful in requesting that the applicant do so, despite the value of obtaining this data.

B. The Planning Board has authority to negotiate and discretion to recommend that the applicant amend its site plans.

The Planning Board has legal authority vested in the site plan regulations:

- to require more than the minimum standards of land use regulations, and
- to grant waivers (to be documented by a formal motion and vote).

In Town Counsel Laura Spector-Morgan’s April 6, 2021 letter to Town Administrator Todd Selig, she notes that the Settlement Agreement “simply dictates that the zoning provision which requires 600 square feet per occupant does not apply to this application.” That sentence is immediately followed by this one: “It places no other limits on the planning board, although it does impose some requirements on the applicant...”

Ms. Spector-Morgan continues [*emphasis added*]:

*“The planning board is to treat this application as it would any other application. The application must meet all of the site plan review regulations from which it is not granted a waiver, and it **must comply with all zoning requirements** other than the “new” density requirement or changes that were adopted after the application was originally noticed. **The application as submitted may be changed in either minor or major ways to make it more desirable to the planning board.**”*

In other words: The Board is free to determine an appropriate number of parking spaces **even if it is lower** than the Settlement’s 345-plus requirement. It is free to use its experience and judgment—as well as our land use regulations—to **plan for the long-term benefit of the community.**

Site plan regulations provide authority and discretion to the Planning Board

One could make a strong case today that the Planning Board should re-evaluate the Settlement Agreement’s parking “design consideration,” i.e., that parking “shall be increased from the existing 345 spaces,” both in light of documented rental spaces (as above) and our Site Plan Regulations’ mandate to not create “an excessive amount of parking.”

[NOTE: all excerpts from SITE PLAN REGULATIONS THAT APPLY ONLY TO THE MILL PLAZA PROJECT]

Part III. Development Standards

Section 10.2 Shared Parking and Reduction in Parking Spaces

General Provisions Regarding Required Parking Spaces—Purpose:

7. While the subsection above provides the minimum number of on-site parking spaces, **there shall not be created an excessive amount of parking either**, in order to avoid unnecessary development and unsightly expanses of pavement. The Planning Board may limit the total amount of on-site parking spaces where it determines that an excessive amount is proposed, **including, in unusual cases, stipulating a total amount less than what is specified in the subsection above.**

Part I. General Provisions

Article 4. Compliance

...The standards contained in these regulations shall be interpreted as minimum requirements, and compliance with these minimum requirements shall not obligate the Planning Board to approve any particular application solely on that basis. The Planning Board may at its discretion require higher standards in individual cases or may waive certain requirements for good cause in accordance with the procedures outlined in these regulations. Only after the Planning Board is reasonably satisfied that a proposed application complies with all pertinent requirements of the Site Plan Regulations and other applicable requirements and objectives, will the application be approved.

(Planner’s note: [“will” in the last sentence changed to “may” in the adopted regulations])

Article 5. Waivers

5.1.3 Unless defined otherwise in applicable case or statutory law, the Planning Board shall consider the following:

5.1.3(2) *whether granting the waiver will promote the public interest; and*

5.1.3(3) *whether granting the waiver is consistent with the provisions of the Durham Zoning Ordinance, Durham Master Plan, and any official maps.*

Factors to be considered shall include, but not be limited to:

- a) *Topography;*
- b) *Existing site features;*
- c) *Geographic location of the property; and*
- d) *Size/magnitude of project being evaluated.*

In addition...

CDA attorney Ari Pollack wrote to the Board on February 12, 2020, that:

"...the Planning Board's approval of the Mill Plaza Redevelopment plans is not dependent on Colonial Durham acquiring Hannaford's consent to all aspects of the project.... Colonial Durham will work to find a suitable compromise with Hannaford...."

...and Durham's Town Attorney Laura Spector-Morgan wrote to Todd Selig on April 6, 2021:

...Disagreements between Hannaford and Colonial Durham regarding Hannaford's lease, replacement of the existing building, and/or parking are private disputes in which the town should not involve itself....

No, this is not the Town's business—except as it influences planning, per our zoning ordinance, to "regulate the use of land for the purpose of protecting the public health, safety, convenience and general welfare of the residents of the Town of Durham."

If the Board determines that a lower number is appropriate, it could then ask for legal and procedural advice. For example, if Colonial Durham Associates were also amenable to a lower number of parking spaces, then the Town and CDA could ask the court to amend the terms of the Settlement Agreement, which, Todd Selig has told me, would likely be acceptable.

We are left with two questions for the Board:

- Are you willing to hold the applicant to our land use regulations?
- Are you willing to seek amenities for the community and critical environmental protections for College Brook to offset impacts related to the adjacent sea of asphalt?

Regards,

Robin