

WETLAND AND SHORELAND BUFFERS: ZONING PERFORMANCE STANDARDS

April 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 and activity within the wetland and shoreland overlay districts. Colonial Durham Associates, property owner....Central Business District. Map 5, Lot 1-1.

Dear Planning Board members:

As required by the zoning ordinance, the Conservation Commission has provided advice to you regarding the applications for Conditional Use Permits relative to the Wetland Conservation and Shoreland Protection overlay district zoning. However, the zoning ordinance also establishes performance standards for these two overlay districts.

These performance standards would appear to be relevant to the Mill Plaza application.

Question: Do the below performance standards apply?

If they do, then it would appear that the applicant must apply for a variance.

Please obtain a legal opinion.

Sincerely yours,

—Robin

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Below excerpts are from the June 16, 2014 zoning ordinance applicable to the Mill Plaza application:

Article XIII. Wetland Conservation Overlay District

175-59. Applicability.

A. The provisions of the WCO District shall apply to the following areas of the Town of Durham:

1. All wetlands except:

- a. isolated, non-tidal wetlands with a contiguous surface area of less than three thousand (3,000) square feet that are not vernal pools and are not associated with any surface water, natural drainage way, or other wetland, and
- b. wetlands associated with currently functioning and maintained, non-abandoned, manmade:

- ditches and swales,
- sedimentation and/or detention basins or ponds,
- agricultural and irrigation ponds and swales, and
- fire ponds, cisterns, and related facilities.

2. An upland buffer strip adjacent to each wetland subject to the provisions of this district as identified in 1. above. The width of the upland buffer strip from the reference line of the wetland shall vary with the type of wetland as follows:

a. bogs, prime wetlands, and rare and exemplary wetland communities:	150 feet
b. all other tidal wetlands:	100 feet
c. vernal pools:	100 feet
d. all other non-tidal wetlands	
- in the R and RC Zones:	100 feet
- in all other zones:	75 feet

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175-65. Performance Standards in the WCO District.

All buildings and structures shall be erected, altered, enlarged, or moved and all land within the WCO District shall be used in accordance with the following performance standards:

A. Naturally Vegetated Buffer Strip

A naturally vegetated buffer strip meeting the requirements of 175-75.1 of the Shoreland Protection Overlay District shall be maintained from the reference line of each wetland to the upland limit of the WCO District. 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 WCO District, a buffer of the maximum possible width as set forth in 175-75.1 shall be provided. No soil disturbance shall occur within fifty (50) feet of the reference line. Existing lawns within the upland buffer may be allowed to remain provided that a twenty-five (25) foot wide strip adjacent to the reference line of the wetland is not mowed and is allowed to reestablish naturally occurring vegetation. The application of fertilizers, pesticides, or herbicides within the buffer strip shall be prohibited except in conjunction with allowed agricultural activities.

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Article XIV. Shoreland Protection Overlay District

175-70. Applicability.

The provisions of the SPO District shall apply to all land within two hundred fifty (250) feet of the reference line of Great and Little Bays, the Oyster River, the Lamprey River, Durham Reservoir, Moat Island Pond, Johnson and Bunker Creeks, and Follett's Brook including the tidal sections of their tributary streams; and within seventy-five (75) feet of all other perennial brooks. These water bodies are designated on the Durham Shoreland Protection

Overlay District Map, which is based on United States Geological Survey quadrangle maps covering the Town of Durham.

The provisions of this article apply in addition to any state requirements for shoreland areas or other state approvals or permits. It is the intention of the Town that these provisions be coordinated with state requirements and standards but that these standards shall govern if they are more stringent than state standards.

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175-75.1. Performance Standards in the SPO District

All buildings and structures shall be erected, altered, enlarged, or moved and all land within the SPO District shall be used in accordance with the following specific performance standards:

A. Natural Woodland for Shoreland Development

The preservation of natural shoreland vegetation is intended to stabilize banks to prevent erosion, maintain wildlife habitats, minimize pollution of the water and preserve the scenic quality of shoreline properties.

Where existing, a natural woodland buffer shall be maintained within one hundred fifty (150) feet of the reference line or for the full width of the SPO District if the district is less than one hundred fifty (150) feet in width. The purpose of this buffer shall be to protect the quality of public waters by minimizing erosion, preventing siltation and turbidity, stabilizing soils, preventing excess nutrients and chemical pollution, maintaining natural water temperatures, maintaining a healthy tree canopy and understory, preserving fish and wildlife habitat, and respecting the overall natural conditions of the protected shoreland.

Where a natural woodland buffer does not exist, a naturally vegetated buffer strip at least fifty (50) feet in width, or the full width of the SPO District if the district is less than fifty (50) feet in width, shall be maintained adjacent to the reference line. Within the buffer strip, naturally occurring vegetation shall be maintained and encouraged. No new lawn, garden, or landscape areas shall be created within the buffer strip but existing lawns may be allowed to remain provided that a twenty-five (25) foot wide strip adjacent to the shore is not mowed and is allowed to reestablish naturally occurring vegetation.

Within the buffer, the following standards shall apply:

1. Selective cutting of trees and other vegetation other than ground cover shall be permitted provided that a healthy, well distributed stand of trees and other vegetation is maintained. No trees over six (6) inches in DBH [nineteen (19) inches in circumference] shall be cut within the natural woodland buffer. Not more than fifty (50) percent of the basal area of trees, nor more than fifty (50) percent of the total number of saplings shall be removed in any twenty (20) year period. A healthy, well distributed stand of trees, saplings, shrubs and ground covers and their living undamaged root systems shall be left in place.
2. Existing vegetation under three (3) feet in height including ground cover shall

not be removed except to provide for a single point of access to the shoreline as provided for in G. below, and in case of disease as provided for in 5. below.

3. No cleared opening in the forest canopy shall be created with a projected surface area of greater than two hundred fifty (250) square feet as measured from the outer limits of the tree crown unless a building is allowed within the buffer strip. In such case, a cleared opening for the building site may be created but the cleared opening shall not extend more than twenty-five (25) feet outward from the building.
4. Stumps and their root systems which are located within fifty (50) feet of the reference line shall be left intact. The removal of stumps and roots in conjunction with beaches or docks may be permitted with the approval of the Conservation Commission based upon a determination that the removal in combination with mitigation activities will not increase the potential for erosion.
5. Dead, diseased, or damaged trees, saplings, or ground covers may be removed with prior approval of the Conservation Commission, in consultation with the Tree Warden. The stumps and root systems of the removed trees shall not be disturbed and shall remain in place. If such removal results in the creation of cleared openings, these openings shall be replanted with native species unless existing new growth is present. Dead and living trees that provide dens and nesting places for wildlife are encouraged to be preserved.
6. The application of pesticides, herbicides, and fertilizers within the buffer is prohibited except in conjunction with allowed agricultural activities. In the case of allowed agriculture, no fertilizers, pesticides, or herbicides shall be applied within seventy-five (75) feet of the reference line.