

**PARKING IN THE 75-FOOT WETLAND UPLAND BUFFER STRIP: *NOT ALLOWED***

June 14, 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, 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,

Commercial parking is not allowed in the Wetland Conservation Overlay District's (WCOD's) 75-foot wetland upland buffer strip, aka the 75-foot setback, either by right or by Conditional Use.

The March 10, 2021 site plan under review includes commercial parking within this 75-foot WCOD "setback." The use is not "grandfathered."

Based on this plan, the applicant must therefore seek a variance from the Zoning Board.

***I. Permitted uses in the WCOD—August 16, 2014 versus later zoning ordinances***

The Mill Plaza project is vested in the August 16, 2014 ordinance. This and later versions of "Section 175-61. Conditional Uses in the WCOD" start off the same, i.e.:

- A. The following uses, including any necessary grading, shall be permitted as conditional uses in the WCOD provided that the use is allowed in the underlying zoning district and a Conditional Use Permit is granted by the Planning Board in accordance with Article VII:

...and then the language splits in the two versions, with language added in the latter:

August 16, 2014

- 1. The construction of streets, roads, access ways, bridge crossings, and utilities including pipelines, power lines, and transmission lines;

October 2, 2017 and all subsequent versions

- 1. The construction of streets, roads, driveways, access ways (**but not including any parking areas other than those serving single-family uses**), bridge crossings, and utilities including pipelines, power lines, and transmission lines;

You will see below a clear record showing that the Planning Board thoroughly evaluated the proposed new language and concluded that it does not reflect a change in policy. Put another way, the earlier language has the same intent and meaning as does the later and therefore must be interpreted identically.

**The amendment reflects a deliberate decision to:**

- (a) avoid changing policy, and
- (b) clarify that commercial parking is not allowed in the WCOD.

## II. Planning Board meeting of October 12, 2016—proposed zoning amendments

Key sections of both official minutes (as posted online) and my own verbatim description—fleshing out the discussion—follow.

### October 12, 2016 Planning Board official minutes, page 9:

#### 175-61. Conditional Uses in the WCO District.

A. The following uses shall be permitted as conditional uses in the WCO District provided that the use is allowed in the **underling underlying** zoning district and a Conditional Use Permit is granted by the Planning Board in accordance with Article VII:

1. The construction of streets, roads, **driveways**, access ways (**but not including any parking areas other than those serving single-family uses**), bridge crossings, and utilities including pipelines, power lines, and transmission lines;

There was discussion on #1. Mr. Behrendt said what was proposed wasn't a change in policy, and just provided clarification, including the inclusion of "driveways". He said if the Board thought parking should be allowed by conditional use, it should discuss this. He noted that this would be a policy change. There was discussion, and the Board agreed to leave the language as it was proposed.

### Verbatim transcription of the above discussion, from the DCAT recording

[recording marker 2:27:56]

Paul Rasmussen: But you do raise a valid point in that the Shoreland and the Wetlands Conservations, which do, you know, the Shoreland Protection Overlay overlap each other. So if they're in direct conflict, that's not good, either.

Michael Behrendt: Well, you would, for College Brook and Pettee Brook, you'd have 25-foot for Shoreland, 75 feet for Wetland, **so you would just go with the 75 feet in the review.**

/.../

[recording marker 2:31:42]

Paul Rasmussen: Is there a reason we're, with regards to Conditional Use, 175-65A.1—we're allowing Conditional Use permits but not, and in parentheses [referring to added language] "but not including any parking areas other than those serving single-family uses"?

Michael Behrendt: Yeah, that's a good question.

Rasmussen: Again, in the core business area, that becomes, one of the things we absolutely need, would be parking, and to use Pettee Brook as an example, you have a parking lot right there. We've already done it. We would say, I mean...

Behrendt: Well, actually, this, what I'm, **the proposed addition is not a change in policy, but really just clarifying.** I added driveways, because we allow driveways 'cause they're considered access ways, but I wanted it to be clear. And in parentheses is the same thing. If you have a driveway for a single family, well, you park there, but it's really just a driveway, so we would allow that. But parking areas for commercial are not allowed. **So there's no change in the blue [added language], it's just clarification of how it's administered.** If you think parking should be allowed by conditional use, we should talk about that. That would be a policy change—parking for commercial.

/.../ [discussion follows of potential applications where this could be an issue]  
[recording marker 2:36: ]

Behrendt: Yeah, I would recommend leaving it. I think the thinking here is, that, sometimes you have need to have a driveway, because you have limited choices for your access, and that's why that's allowed, **whereas parking lots, the effort is to really keep them outside.**

**Corrow: So we'll leave the new language.**

**Behrendt: I would suggest leaving it.**

**Corrow: I'm fine with that.**

And that's the end of the discussion on this proposed amendment.

### **III. What does this mean for the Colonial Durham application?**

Colonial Durham Associates claims that it does not require a variance for the parking and roadway within the 75-foot wetland upland buffer strip. The evidence argues to the contrary.

At the Planning Board meeting held on March 24, 2021, Board member Richard Kelley and CDA's Attorney Ari Pollack discussed the Settlement Agreement. Mr. Pollack stated that he had reviewed the Agreement before his client "executed it."

The discussion focused on the "design consideration" of Clause 1(d) of the Agreement, i.e.:

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

At approximately 9:35 p.m., Mr. Kelley asked:

*"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:

*"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."*

### **IV. Encroachment not grandfathered: Neither existing use nor proposed use**

#### **Existing use**

CDA Attorney Ari Pollack argued at the January 24, 2021 Planning Board meeting that "there is an existing condition with a grandfathered encroachment. The encroachment occurred before the buffer."

However, planning consultant John Harwood, having reviewed files going back decades, wrote to then-Town Planner Jim Campbell in an October 2, 2002 memo that:

...Another limitation that appears on the site plan is a 70 to 75-foot buffer along the southeastern edge of the property. Although I could not find any specific discussion about this buffer, the zoning ordinance at the time of approval gave the Planning Board the authority to determine what an appropriate setback would be for a parking lot. Since the lot borders on a residential neighborhood, a seventy-foot buffer was chosen (note: a few copies of the site plan show the buffer as 75 feet but the signed copy is noted as 70 feet). Every plan shows this buffer, and some have a notation that (drawn) parking spaces will be removed from the buffer. Another reference to the buffer was made when lighting was being considered for the lot and the setback was highlighted as a buffer to prevent glare from the light poles. As a result, **this 70-foot buffer should be recognized as part of the original approval and therefore maintained....**

### **Proposed use**

In preparation for the Conservation Commission's review of two Conditional Use Permits, Rick Taintor advised the Commission that the site plan includes elements that are not grandfathered. His "Planning Consultant's Review" for the Commission's October 26, 2020 meeting includes the following excerpt:

The zoning ordinance calls out the following elements of the redevelopment plan as subject to conditional use review under the Wetland Conservation Overlay District:  
/.../

- All parking spaces within the WCOD, as accessory structures to a permitted principal use (sec. 175-61.A.4)
  - The zoning ordinance defines "structures" to include parking spaces.
  - Existing parking spaces that are not being reconfigured would be exempt from the conditional use permit, but it does not appear that any existing spaces are proposed to remain unchanged.

### ***V. Performance standards in the WCOD and SPOD***

While I will not expand upon the point here, I also refer you to the zoning ordinance's interlaced performance standards for these two districts, specifically those related to a "naturally vegetated buffer strip."

These, too, must be considered in your discussions about the WCOD upland buffer strip and whether the applicant should, based on the March 10, 2021 site plan, seek variances.

Regards,

*Robin*