

— REVISED SITE PLAN: MORE QUESTIONS —

August 24, 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,

Below are a few of the topics that should be addressed before a final vote.

Legally nonconforming? The applicant has the burden of proof.

...yet CDA has presented no evidence whatsoever of any “grandfathering.”

In 1988, the [NH Supreme] Court also said that provisions allowing continuation of nonconforming uses are “strictly construed.” (*New London Land Use Assoc. v. Zoning Board*, 130 N.H. 510 at 518 (1988).) Thus 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)), or to show that an expansion of use is “not a new and impermissible one.” (*Hampton v. Brust*, 122 N.H. 463, 470 (1982))....

[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]

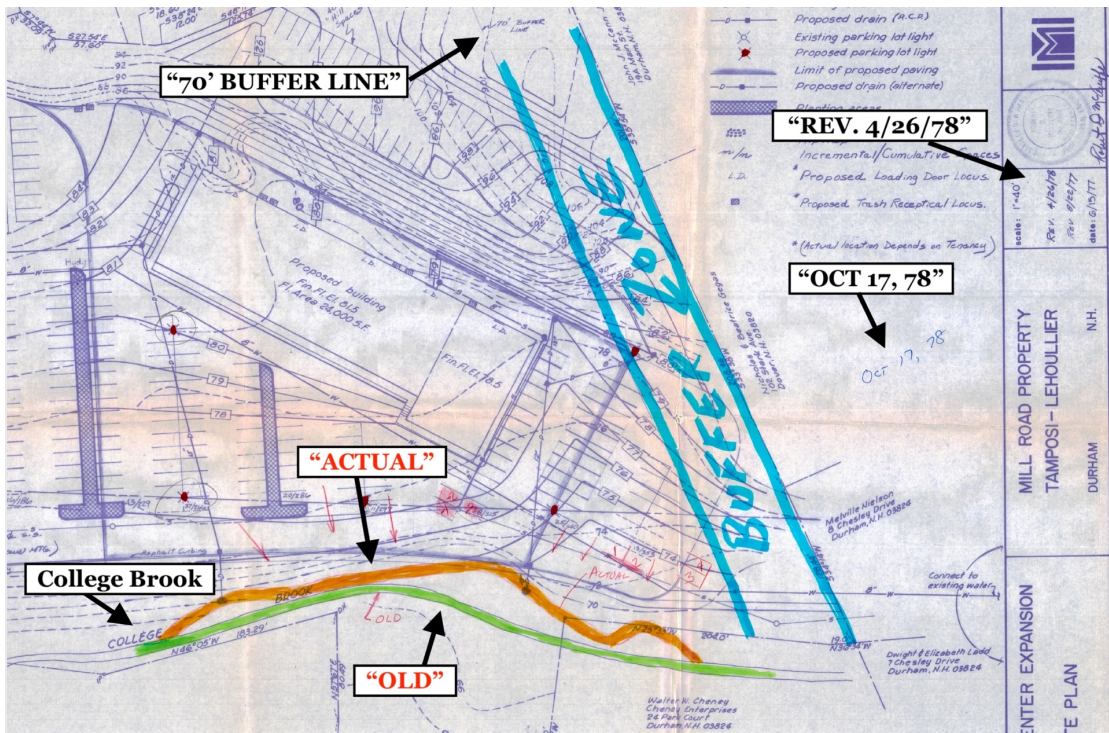
What will the Planning Board do about a residential buffer?

Of interest to many is the location of pavement relative to (a) College Brook and (b) the historic residential buffer at the edge of the property toward Church Hill/ Chesley Drive.

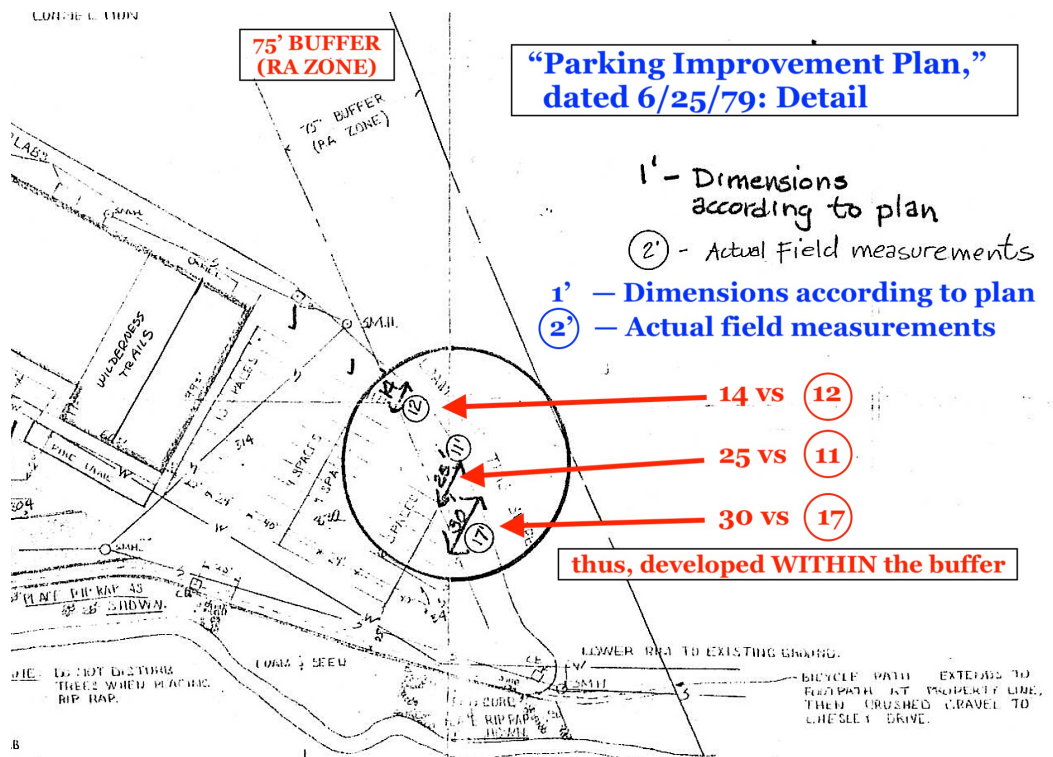
The following relies on research of site plans and other documents found at Town Hall subsequent to my statements to the Board on May 19 regarding a “70- to 75-foot buffer.”

A Planning Board letter dated May 1, 1978 refers to having approved a revised site plan dated April 26, 1978. It turned out that that plan showed a section of College Brook located in the wrong place, leading to construction closer to the brook.

(Public Works Director George Crombie wrote to the developer on October 17, 1978: “Due to the fact that the [former engineer’s] plan showed the brook in the wrong location, **your present engineer had to redesign the parking lot closer to the brook than was originally anticipated....**” See the highlights on the detail from the plan, below. Note: The colored markings are on the original, not mine.)



In addition, some discrepancies between site plan and field measurements were significant. It would appear that the edge of pavement toward Church Hill encroached into the 75-foot buffer to the residential zone. (See the comparison of site plan and field measurements on the detail from the "Parking Improvement Plan" dated June 25, 1979, below.)



At Town Meeting on March 14, 1978, voters approved a 70-foot residential buffer zoning amendment separating commercial and residential districts. (See Town’s annual reports.)

“Article 10. To see if the Town will vote to amend the Durham Zoning Ordinance as proposed by the Planning Board as follows: Article 5, Section 5.18. [passed YES 495 NO 106]

(PURPOSE: To provide a buffer between businesses and residential properties.)

Note 18: Where this district abuts a residential district (RA, RB, RC, R, except property of the University of New Hampshire so zoned) at a lot line (i.e., without Intervening street) there shall be provided in this district for a distance of seventy (70) feet from the lot line, a buffer zone in which any structure or vehicle parking shall be prohibited (see also 5.23, c).”

In the absence of records proving otherwise, it appears that the “original approval” thus incorporated an intentional 75-foot buffer to Church Hill and Chesley Drive. A degree of encroachment was later approved, but doing away with the buffer entirely? I don’t think so.

Will the Planning Board do anything about the access at Mill Road?

While the Conservation Commission “exempted” the access point at Mill Road in its January 4, 2021 advisory to the Board about the WCO Conditional Use application, the Planning Board may wish to take a second look. First, a Conditional Use permit is required for “The construction of streets, roads, access ways, bridge crossings, and utilities including pipelines, power lines, and transmission lines.” Furthermore, that access point may not be “grandfathered,” as the Board should be aware:

...Under New Hampshire law, access points are not vested property rights incident to the ownership of the land, or under the control of the property owner. Instead, access points are subject to movement or alteration by action of municipal officials in the interest of safety and the efficient operation of highways.

[“Property Owners Do Not Have Control Over Highway Access Point Location: Fred Lowell v. City of Portsmouth, No. 2008-0700” see <<https://www.nhmunicipal.org/court-updates/property-owners-do-not-have-control-over-highway-access-point-location>>]

Excess parking

Residents have already testified that the amount of commercial parking proposed—in excess of that required—is excessive, as well as noted related Site Plan Regulations.

Who is going to park in the 22 spaces added between Building B and the hillside to Orion/Main Street—or in the 10 spaces at the very southeastern corner of the site?

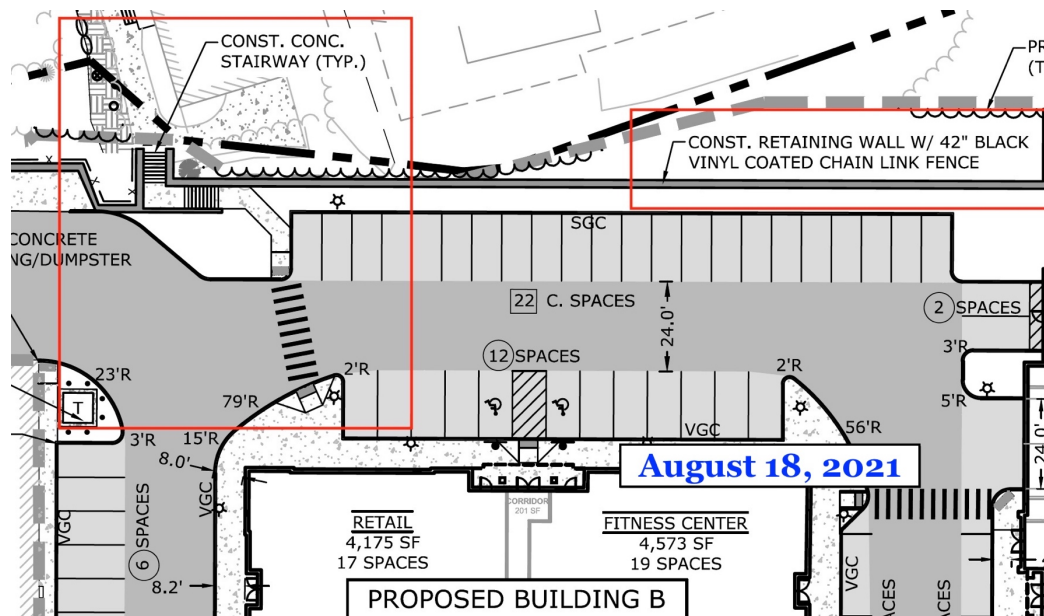
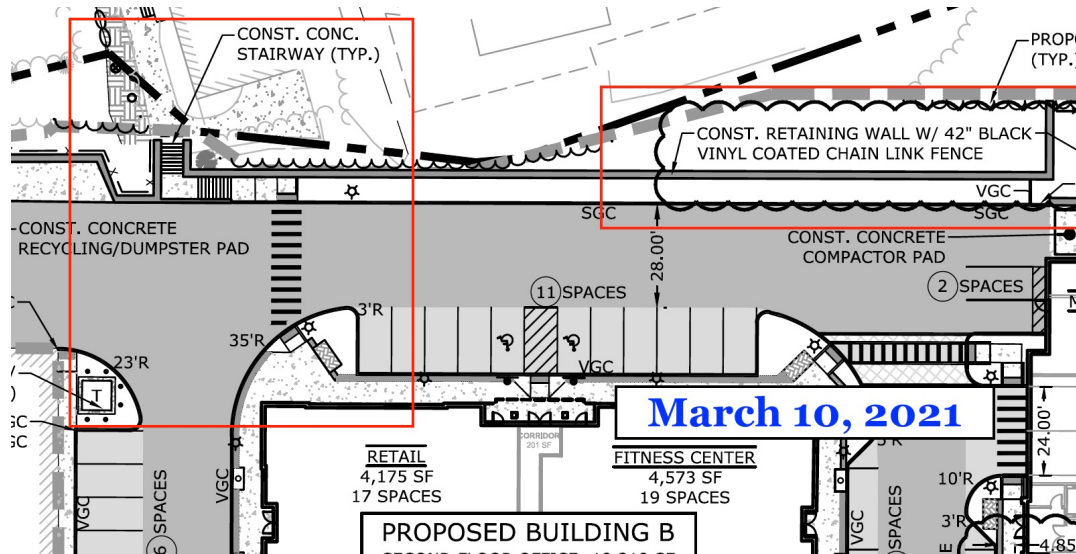
Pedestrian-friendliness

It is up to Colonial Durham to submit a site plan that meets the terms of the Settlement Agreement, but the Planning Board may evaluate elements of the plan under its purview. As I and others have noted, this plan is vehicle-centric and not designed to encourage pedestrians—counter to Master Plans and other community planning goals.

While interpretation of some portions of the Agreement can be argued, this language is clear: “encourage pedestrian connectivity through the site towards Main Street.” The proposed pedestrian connection to Main Street along the hillside and the Grange can hardly be called an improvement over what exists today.

Both the March 10 and August 25 plans require excavation into the hillside, constructing a retaining wall, and topping that with a chain link fence, along which pedestrians must walk. The August 25 plan appears to bring pedestrians directly against a parking space, or, rather, parked cars.

How would the aesthetics—or safety—of that plan “encourage pedestrian connectivity”?



Reconfigure and landscape this area. The August 18 plan removes a landscaped island from the south side of Building B, thus reducing the amount of landscaped areas—an amount that already was suboptimal. Were it not for the excess of parking pavement, a better shopping and pedestrian environment—and more substantial and attractive connection with Main Street—could be envisioned and implemented.

What will the Planning Board require for pedestrian-friendly improvements?

Vegetated buffer to College Brook: Zoning

Asked (at least twice), but not answered: Does the Shoreland Protection Overlay performance standard “naturally vegetated buffer strip at least fifty (50) feet in width....” apply to the Mill Plaza proposal?

Excerpt from the June 16, 2014 zoning ordinance (emphasis added):

175-74. Dimensional Requirements.

All land, buildings, and structures to be used, erected, altered, enlarged, or moved within the SPO District shall be in accordance with the dimensional standards of the underlying zoning district except as modified and required by this section.

A. Shoreland Setback of Buildings and Structures

Any new building or structure or any enlargement or modification of an existing building or structure shall be set back from the reference line of the waterbody as follows:

- 3. College Brook and Pettee Brook: 25 feet

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

/.../ 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.

What will the Planning Board require for renewable energy measures?

In 2010 the Durham Energy Committee developed a nonbinding “Energy Considerations Checklist” to help advise and educate developers and the community. The current version was adopted in May 2015. CDA submitted a completed checklist, but almost none of the recommended energy-reducing measures will be provided.

In addition, the checklist does not reflect that the applicant has met with the building inspector: no signature and date of such a meeting are included. If I remember correctly, representatives for the “Peak” Lodges, Madbury Commons, and Orion met with the building inspector, as well as a representative from the Energy Committee. I hope the Board will advise Colonial Durham to do the same.

Among the checklist measures that CDA indicates **it will provide** are:

- Solar access (access of a solar energy system to unobstructed, direct sunlight)
- Solar-ready zone (a section of the roof or building overhang reserved for a future solar photovoltaic or solar thermal system with required internal conduit or plumbing pre-installed)
- Permit installation of outdoor energy-efficiency devices, e.g., solar panels

Among those that CDA indicates **it will NOT provide** are:

- Energy usage monitoring system(s), e.g., smart meters or submeters
- Renewable hot water system (e.g., solar thermal)
- Photovoltaic renewable electricity generation system (i.e., solar panels)
- Ability to charge electric vehicles
- Bicycle lane or path network within project area

Does the Planning Board intend to ask the applicant to discuss these matters?

- Why shouldn't a couple of EV charging stations be installed in the covered garage? We know that electric vehicle use is expanding, and I believe it may be cheaper to install them during construction.
- Sited in a 10-acre open parcel, Buildings B and C would provide an excellent opportunity for generating energy through a renewable solar energy system. What, exactly, are CDA's plans?
- Does the applicant understand that it might benefit from (a) state and/or federal rebates, and (b) Durham's own tax exemption for solar energy systems?

At the very least, the applicant should be asked to explain its checklist answers.

In 2012, Peter Wolfe was Planning Board Chair. At his insistence, Peak Campus Communities had ALL its Lodges buildings on Mast Road wired for solar electricity.

Given what we know today about climate change and the contributions to it of fossil fuels, surely we can ask developers today to be at least as "modern" as those nearly a decade ago.

Regards,

Robin