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Town Of Durham
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MEMORANDUM

TO: Zoning Board of Adjustment

FROM: Michael Behrendt, Director of Planning and Community Development

DATE: March 9, 2015

SUBJ: **Variance Application from Mill Plaza**

E. PUBLIC HEARING on a petition submitted by Ari B. Pollack, Gallagher, Callahan & Gartrell, Concord, New Hampshire, on behalf of Colonial Durham Associates, New York, New York, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7.A, from Article XII, Section 175-53(A) and Article XII, Section 175-41(F)(7) of the Durham Zoning Ordinance to permit the construction of a mixed-use development of four, 4-floor buildings wherein some buildings will contain one floor of non-residential space with three floors of residential space, wherein one building will have all residential units on all floors and wherein the density requirement is calculated using gross floor area instead of habitable floor area. The property involved is shown on Tax Map 5, Lot 1-1, Mill Road Plaza; and is in the Central Business Zoning District.

I do not believe that either variance request meets the five required criteria required for consideration by the Zoning Board of Adjustment. As you know, the burden is on the applicant to meet all five criteria. This is a substantial hurdle.

The pertinent ordinances are well thought out, were subject to a rigorous review and adoption process involving both the Planning Board and the Town Council, and are consistent with good planning practice. The desire of the applicant to build the way he wishes, regardless of the community's ordinance requirements, is simply not a sufficient reason for the granting of the requested variances by the Zoning Board of Adjustment.

Article II, Section 175-7.A, to use "gross floor area" instead of "habitable floor area."

1. *No decrease in value of surrounding properties would be suffered because...*

This would allow for a significantly greater level of development which I believe would allow for an unduly large project, out of scale with neighboring properties, particularly the single family Faculty Road and Chesley Drive neighborhoods. It may negatively impact property values in those neighborhoods.

2. *Granting the variance would not be contrary to the public interest because...*

Allowing for residential development at this scale could very well be detrimental to neighboring properties and the general public due to traffic, parking, noise, and other impacts generated by a large number of residences (likely students) in close proximity to the neighborhoods.

3(A). *Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:*

a. *no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because...*

There is nothing unique about this particular property in the context of this request that merits special treatment making it at variance with the provisions of the Zoning Ordinance.

b. *the proposed use is a reasonable one because:*

This ordinance was carefully thought out by both the Planning Board and the Town Council as part of the adoption process and it was determined to be the appropriate standard for multi-dwelling housing. As outlined above, there is nothing unique about this particular property as part of this application that merits special treatment at variance with the provisions of the Zoning Ordinance.

3(B). *Owing to special conditions of the property that distinguishes it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.*

There is nothing inherent in this specific property that argues for special treatment pursuant to this variance request. The relatively new ordinance applies to all new development from this point forward. There are numerous uses presently permitted by right or by conditional use in the Central Business District that the applicant can pursue, including multi-dwelling housing as currently specified.

4. *By granting the variance substantial justice would be done because:*

Substantial *injustice* would result from the applicant being able to develop at odds with a carefully thought-out ordinance, an ordinance that was crafted based upon consideration of Mill Plaza Variance Applications – Comments from Town Planner - 3/9/15 | Page 2

numerous factors and the broad public interest. In addition, other projects in Town have not been afforded the ability to use gross floor area instead of habitable floor area.

5. *The use will not be contrary to the spirit and intent of the ordinance because:*

The proposal is very much contrary to the spirit and intent of the ordinance. It is an attempt to circumvent the clear purpose of the ordinance.

Article XII, Section 175-53 (A) and Article XII, Section 175-41 (F) (7) to allow for four 4-floor buildings wherein some buildings will contain one floor of non-residential space with three floors of residential space and one building will have all residential units on all floors.

1. *No decrease in value of surrounding properties would be suffered because...*

This would allow for a significantly greater level of development, particularly with a far greater number of residents, which would almost certainly be students. This proposal would allow for an unduly large project, out of scale with neighboring properties, particularly the single family Faculty Road and Chesley Drive neighborhoods. It could thus negatively impact property values in those neighborhoods.

2. *Granting the variance would not be contrary to the public interest because...*

Allowing for residential development at this scale could be harmful to neighboring properties and the general public due to traffic, parking, noise, and other impacts generated by a large number of residences (likely students) in close proximity to the neighborhoods.

3(A). *Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:*

a. *no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because...*

There is nothing unique about this particular property pursuant to this request that merits special treatment, at variance with the provisions of the Zoning Ordinance. The specific requirements for a maximum of 2 floors of residential development are long established in Durham in order to carefully manage the number of new residences (likely students) that will reside in the downtown. It also ensures that along with residential, the Town obtains non-residential space for other purposes in the community.

b. *the proposed use is a reasonable one because:*

This ordinance was carefully thought out by both the Planning Board and the Town Council and it is the longstanding appropriate standard for multi-dwelling housing. Again, there is nothing unique about this property as part of this particular application that merits special treatment at variance with the provisions of the Zoning Ordinance, especially for a project of this very large size.

3(B). Owing to special conditions of the property that distinguishes it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

There is nothing inherent in this specific property that argues for special treatment as part of this application. There are numerous uses presently permitted by right or by conditional use in the Central Business District, all of which the applicant can pursue, including multi-dwelling housing as currently specified.

4. By granting the variance substantial justice would be done because:

Substantial *injustice* would result from the applicant being able to develop at odds with a carefully thought-out ordinance, an ordinance that was crafted based upon consideration of numerous factors and the broad public interest. The ordinance is consistent with best practices for managing housing within an area driven primarily by the college student rental industry in a downtown and leveraging the benefits of commercial development. This approach has worked very successfully in Durham for many years. There is no reason to flout the logic and established practice by granting this request.

5. The use will not be contrary to the spirit and intent of the ordinance because:

The proposal is very much contrary to the spirit and intent of the ordinance. It is an attempt to circumvent the clear purpose of the ordinance.