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Town of Durham

SEP - 8 2017

Planning, Assessing
and Zoning

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VIA EMAIL AND REGULAR MAIL

September 6, 2017

Audrey Cline, Zoning Administrator
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Town of Durham
8 Newmarket Road
Durham, NH 03824-2898

Laura A. Spector-Morgan, Esq.
laura@mitchellmunigroup.com
Mitchell Municipal Group PA
25 Beacon Street East
Laconia, NH 03246

Re: Motion for Rehearing – Colonial Durham Associates, LP

Dear Ms. Cline and Attorney Spector-Morgan:

Enclosed please find a Motion for Rehearing filed on behalf of Colonial Durham Associates, LP.

Should you have any questions or require any further information, please do not hesitate to contact me.

Very truly yours,

Ari B. Pollack

ABP/mla
Enclosure

cc: Colonial Durham Associates, LP

STATE OF NEW HAMPSHIRE
TOWN OF DURHAM

STRAFFORD, SS.

ZONING BOARD
OF ADJUSTMENT

**MOTION FOR REHEARING OF AUGUST 8, 2017 DECISION
OF ZONING BOARD OF ADJUSTMENT PURSUANT TO RSA 677:3**

NOW COMES Colonial Durham Associates, LP (“Appellant”), by and through its attorneys, Gallagher, Callahan and Gartrell, P.C., and respectfully submits this Motion for Rehearing, and says:

The August 8, 2017 decisions of the Zoning Board of Adjustment (the “ZBA”), denying Appellant’s two (2) separate applications for variances were unlawful and unreasonable for the reasons set forth below.¹

- I. The ZBA denial of a variance relative to Section 175-41(F)(7), as it applies to floor composition in proposed four-story buildings, was unlawful and unreasonable.

After substantial design review efforts with Town of Durham municipal staff and numerous presentations before the Durham Planning Board, the Appellant sought variances in relation to its “final” design review concept. One such variance was for floor composition of three (3) distinct four-story buildings.

These three (3) buildings, identified in design review as Buildings B, C, and D1, would each contain one (1) ground floor of non-residential usage, with three (3) upper floors of residential apartments. To be clear, the variance application did not request relief for building

¹ Appellant also incorporates in full the factual and legal arguments contained in Appellant’s Application for a Variance under Section 175-41(F)(7) and Application for a Variance under Section 175-53(A)(5). In addition, Appellant incorporates the official ZBA meeting minutes from August 8, 2017, when the same are made publically available. As of the date of this Motion, the minutes had not been posted in either draft or final format.

height, or the construction of four-story structures – both of which are within the purview of the Planning Board. Instead, the request focused solely on the composition of uses within the four-story buildings.

Section 175-41(F)(7), as written, requires a mixture of uses within multi-floor buildings. The purpose of the regulation is apparent on its face – bring forward new non-residential/commercial uses along with, and in rough proportion to, new residential uses. In the context of a four-story building, a strict interpretation of the Ordinance requires two floors of non-residential usage to compliment two companion floors of residential usage. In the case of the Mill Plaza redevelopment, however, the overall project is mixed-use in nature and proposes seven (7) buildings upon a ten (10) acre site. Consequently, the ZBA’s focus on each specific building, versus the overall mixed-use nature of a multi-building redevelopment led to an artificially constrained review, and was therefore in legal error. Had the ZBA focused on the overall mixed-use nature of the project as a whole, and not on the particulars of individual building floors within an otherwise permitted building, it would likely have concluded that a strict interpretation of the Ordinance was unwarranted and unreasonable. Put differently, the ZBA would likely have concluded that a variance from strict interpretation of the Ordinance was entirely appropriate under the special circumstances of the redevelopment and that it was consistent with the spirit and intent of the Ordinance.

Further, the ZBA failed to afford adequate consideration and weight to the Agreement dated December 14, 2015 reached between the Appellant and the Town relative to the Mill Plaza redevelopment. The Agreement, among other items, including the suspension of pending Superior Court litigation, provided design parameters to guide the redevelopment effort. A key component of these parameters was the Appellant’s entitlement to propose up to a maximum of

330 residential beds within the project, and the Appellant's obligation to try and locate these beds, to the extent "possible", in the "northern half" of the property. The "final" design review concept complied with and achieved these goals, largely in an effort to address neighbor concerns about impacts. Had the ZBA yielded appropriate consideration to the terms of the Agreement, and had the ZBA afforded weight to the Town Council's conception as expressed in the terms of the Agreement, the ZBA should have concluded that the request to concentrate the housing units in fewer building located to the northerly portion of the site was both consistent with the Town Council's vision and entirely reasonable in scope and application. In this regard, granting of the variance should have been considered to be in the public interest and furthering substantial justice.

Lastly, after closure of the public hearing and during its deliberation, members of the ZBA showed rigid allegiance to extreme black-letter interpretations of the Zoning Ordinance. These statements unveiled a perception that variances could not, or should not, be granted under any circumstances. This bias amongst at least some ZBA members meant that consideration of relief made available by State statute, and enforced by judicial review, was unavailable in the Town of Durham. It also meant that the entire purpose and premises behind the creation of a zoning board of adjustment was absent in application. To the extent this viewpoint dominated the ZBA's deliberation and decision, such a viewpoint is unlawful, unreasonable and contributed to the commission of legal error.

For these reasons, and in consideration of the arguments presented by Appellant on August 8, 2017, the ZBA should grant rehearing to further explore and revisit its denial of the requested relief.

- II. The ZBA denial of a variance relative to Section 175-53(A)(5), as it applies to the development of a drive-thru facility accessory to a pharmacy, was unlawful and unreasonable.

Appellant also sought a variance from Section 175-53(A)(5) to append a drive-thru facility to the southerly side of proposed Building E. The proposed drive-thru was explained as being specifically for and accessory to a pharmacy. The variance was sought because Section 175-53(A)(5) prohibits drive-thru facilities in all applications except financial institutions. The spirit and intent of the Ordinance is clear on its face – deter high-intensity drive-thru establishments such as fast-food restaurants and coffee shops. Appellant explained that modern pharmacies depend upon drive-thru facilities to offer conveniences to its customer population, a percentage of which are disabled or mobility-impaired. Several members of the public testified in support of offering such conveniences to customers, especially those with special needs. Moreover, the Applicant’s pharmacy user had expressed that provision of a drive-thru was critical to its willingness to relocate and accommodate the redevelopment plan.

In denying the variance, the ZBA focused primarily on site plan considerations such as traffic flow, vehicle stacking, and headlight glare – all of which can be mitigated with site plan improvements and are the purview of the Planning Board during its site plan review. Appellant certainly anticipated the need to offer mitigation measures during its site plan presentations, but could not have reasonably anticipated the need to address site-specific design features before the ZBA. The ZBA should grant rehearing so that the Appellant, and its pharmacy user, can offer the ZBA testimony and exhibits regarding commonly-used methods of mitigating the impacts of a drive-thru facility. This new information should then be factored into deciding whether a

drive-thru, which could otherwise be offered for a bank but not a pharmacy, represents a reasonable accommodation for an otherwise desirable redevelopment opportunity.

For these reasons, including the desire to present new evidence and information, and in consideration of the arguments presented by Appellant on August 8, 2017, the ZBA should grant rehearing to further explore and revisit denial of the requested relief.

WHEREFORE, for the reasons stated, Appellant respectfully requests that the Durham Zoning Board of Adjustment:

- A. Grant Appellant's Motion for Rehearing relative to its Application for a Variance under Section 175-41(F)(7);
- B. Grant Appellant's Motion for Rehearing relative to its Application for a Variance under Section 175-53(A)(5);
- C. Vacate its Decisions of August 8, 2017; and,
- D. Grant such further relief as justice and equity requires.

Respectfully submitted,

COLONIAL DURHAM ASSOCIATES, LP

By Its Attorneys

GALLAGHER, CALLAHAN & GARTRELL, PC

Dated: September 6, 2017

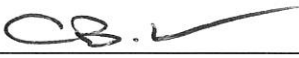
By:  _____

Ari B. Pollack
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Rehearing has this day been forwarded via electronic mail and first-class mail, postage prepaid, to Audrey Cline, Town Zoning Administrator, and Laura Spector-Morgan, Esq., attorney for the Town of Durham.

Dated: September 6, 2017

By:  _____
Ari B. Pollack