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April 3, 2014

Peter Wolfe, Chairman
Town of Durham Planning Board (the "Board")
15 Newmarket Road
Durham, NH 03824

**Re: 15 Madbury Road and 8 Mathes Terrace –
Site Plan Review and Conditional Use Permit Applications (the "Project")**

Dear Chairman Wolfe:

The purpose of this letter is to memorialize for your record some of the legal objections of our client, Lenk Orthodontics, PLLC, to the Project. Dr. Lenk operates his professional practice at the end of Mathes Terrace in one of the original single family homes that line Mathes Terrace, which he renovated for his office several years ago. Dr. Lenk has earned a strong local reputation and has built a thriving professional practice. He estimates that he serves about 8000 patient visits per year¹.

Mathes Terrace is a 30 foot wide, dead-end, private way. It is barely adequate to serve the access needs of the vehicles and pedestrians who use Mathes Terrace today. Because Mathes Terrace is not a public street, it is not marked, striped, or controlled by the municipality. It is not infrequently that Dr. Lenk and other owners of property on Mathes Terrace are required to have cars towed or moved when they are carelessly parked or left unattended within the narrow right-of-way in a manner that interferes with safe passage.

Dr. Lenk is concerned first and foremost about the safety and convenience of his patients and employees. He is concerned that a development of the size, scale, mass, and density of that proposed by this project will make a bad situation worse. He is also convinced that a project of this scale will completely transform – and not for the better – the character of the neighborhood of Mathes Terrace and the quality of life that the people who live and work there have long enjoyed.

For these reasons and others (which Dr. and Mrs. Lenk have summarized in letters that they have previously submitted for the record), Dr. Lenk opposes the Project and urges you to deny the application.

¹ Approximately 4 per hour over a 250 day work year.

Mathes Terrace is a short stretch of road. Still, a number of voices, besides those of the Lenks, have brought before you their significant concerns about the impact the Project will have on the neighborhood. The Town of Durham has entrusted the Board with the authority and responsibility to address these concerns through the Site Plan Review and Conditional Use Permit application processes. We set forth in the discussion below what we believe are some of the tools and standards available to you to support and sustain denial.

1. Site Plan Review Regulations

The *Site Plan Review Regulations of Durham, New Hampshire* (the “Regulations”) provide a statement of purpose plainly expressed in Section 1.02. Our review of the record of this case suggests that the Board is indeed mindful of the purpose of the Regulations and we are appreciative of the Board’s diligence. Still, we call specific attention to the following from Section 1.02:

- A. provide for the safe and attractive development of the site and guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of inadequate pedestrian and traffic plans.
- B. provide for the harmonious and aesthetically pleasing development of the municipality and its environs.
- C. provide for open spaces and green spaces of adequate proportions.

The Project is Unsafe in its Setting

To date, the applicant has not submitted a traffic and pedestrian impact study or plan that addresses the effects of increasing the residential population of the site from 8 to 63 residents - a population increase of approximately 780%, not including approximately 4,000 square feet of commercial space proposed. Even in the absence of such a study or plan, common sense compels the conclusion that the Project will adversely impact the health, safety, and prosperity of the neighborhood with no plan to mitigate such impacts as the Regulations require.

Pedestrian and vehicular access to all other properties on Mathes Terrace (business and residential) will, without question, be adversely impacted. You do not require a traffic study to explain the chaos, confusion, and calamity that will result during each move-in week when 64 students are simultaneously arriving with a semester’s worth of belongings; at each holiday break when students are preparing to head home; when residents are getting picked up on a Friday afternoon to visit friends at other colleges; on a constant basis when students are parking out front while they unload groceries, etc.; while deliveries are being made to the commercial units in the Project; while customers or employees of the commercial units are arriving to conduct business or change shifts – all while patients are coming and going from Dr. Lenk’s office, or from the dental office next door.

Besides the challenge of navigating the congestion caused by overburdening Mathes Terrace, the road surface, itself, will suffer from disrepair as a result of the dramatic increase in use. The overwhelming demands on Mathes Terrace will impede fire, police, and ambulance services that will each face the challenge of navigating the narrow right of way with pedestrians, bicyclists or illegally parked cars on Mathes Terrace, which has no stripes or shoulder. This is a public safety catastrophe that cannot, in good conscience or good planning, be permitted. From any logical perspective, Mathes Terrace simply cannot support the proposed use that necessarily comes with a Project of this size and scale in this small, historic neighborhood of single-family structures.

Moreover, as discussed in greater detail below, the applicant does not have a legal right to use Mathes Terrace as intended by the Project. But, even if it did, why has the applicant not offered any study or plan as to how the private way seen in the picture below will accommodate a population increase of more than 780%?



No traffic and/or pedestrian plan has been submitted to show how Mathes Terrace, the private way shown above, can accommodate the increased traffic, parking and pedestrian requirements of a 780% increase in residential population. The Project proposes to construct a 60+ student apartment complex in place of the two homes on the right, which currently house 8 residents.

The Project is not harmonious with its environs and will eliminate all of the existing trees, green space, and open space.

As the Board is aware, a large mixed use complex is situated immediately to the left of the yellow building shown in the picture above. If the Project is constructed, a significantly larger housing complex will be situated on the right side of the above picture where two homes with open green space and mature trees now exist. The setting depicted above will be transformed into an apartment building canyon reminiscent of eastern bloc communist style cluster housing instead of a neighborhood with the community character that the Regulations entrust the Board to preserve and protect.

In evaluating whether the Project is in harmony with the existing neighborhood, an old Sesame Street rhyme comes to mind:

*"One of these things is not like the others, one of these things just doesn't belong.
Can you tell which thing is not like the others, by the time I finish my song?"*



In the aerial photo of Mathes Terrace above, a recently developed mixed use student housing complex (white roof) is easily distinguished as disharmonious with the surrounding neighborhood. The Project proposes an even **larger** student housing development across Mathes Terrace to the north, obliterating the two homes shown at the top center of the photo and covering over nearly all surrounding green space and open space. The Mathes Terrace neighborhood would be eclipsed by the student housing complex. (Note how the building at 13 Madbury Road is literally eclipsed by the shadow cast by the new complex. No other building in the neighborhood casts such a shadow.)

Because of an engineering error, the Project is proposed to be larger than the maximum size permitted by zoning.

The calculation of the density of the Project was intentionally misleading or carelessly calculated. The applicant has calculated its “Lot Coverage” based upon a lot size which includes Mathes Terrace to the centerline. No part of Mathes Terrace is properly included in the calculation. The Zoning Ordinance defines “Lot Area” as “[t]he total horizontal area within the confines of the boundary lines of a lot. **The ‘lot area’ shall not include any part of a public right-of-way which it fronts or abuts.**”

Maybe the applicant relies on the word “public” and concludes this concept does not apply here since Mathes Terrace is private. Whether or not Mathes Terrace is “public” or “private” for the purpose of Lot Coverage calculations is immaterial, because one of the next definitions in the Ordinance is as follows:

“LOT COVERAGE – The aggregate gross ground floor area of all buildings on a lot expressed as a percentage of the total lot area, excluding parking facilities, sidewalks and driveways.”

Thus, if Mathes Terrace is “public,” it is not included in the definition of “Lot.” If it is “private,” and used for vehicular and/or pedestrian access, it is a sidewalk and/or a driveway excluded from the calculation of Lot Coverage. Whatever the explanation, it is clear that the applicant’s calculation on this important point is wrong, and its plans and presentation should be revised accordingly.

#	Regulation	Reality
1	Site suitability: The site is suitable for the proposed use. This includes: (a) adequate vehicular and pedestrian access for the intended use.”	The Project does not have adequate vehicular and pedestrian access for the intended use. Mathes Terrace is a private way intended and historically used for residential and professional practice uses within single family structures. Mathes Terrace has no lines, no shoulders, no sidewalks, and has not been constructed for sustained use by an apartment complex. By no means can it support a 780% residential population increase compounded by an additional 4,000 square feet of commercial space. Further, as set forth below, the Project’s applicant has failed to show that it has any legal access for the intended Project, let alone adequate access.
2	External impacts: The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone.	The proposed use of the Project destroys the character of the neighborhood. It replaces single family homes characteristically used as residences and small businesses with a housing complex that dwarfs the surrounding structures. It proposes housing for more than sixty (60) new residents without a single parking space for those residents. It proposes access by overburdening a private way intended for uses contained within single family structures. It is not currently a permitted use in the zone without a conditional use permit, for the very reason that it impacts the adjacent existing uses to an absurd degree.
3	Character of the site development: The proposed layout and design of the site shall not be incompatible with the established character of the neighborhood and shall mitigate any external impacts of the use on the neighborhood.	See photos above. The established character of the neighborhood consists of single family structures used for residential and small business purposes. Apartment complexes with no parking are not compatible with such neighborhoods, however lucrative they may be for a developer. They are compatible with urban settings where the primary means of travel is public transportation.
4	Character of the buildings and structures: The design of any new buildings or structures and the modification of existing buildings or structures on the site shall not be incompatible with the established character of the neighborhood. This shall include, but not be limited to, the scale, height, and massing of the building or structure...	The proposed project is 600% greater than the neighborhood average in square footage. It is 300% greater than the neighborhood average in lot coverage. It is characteristic of an apartment building in a densely developed urban center, not the Central Business District of Durham; certainly not Mathes Terrace.

The CUP standards apply to the entire project

In its letter of intent, the applicant discussed its simultaneous application for both Site Plan Review and a Conditional Use Permit, since components of the Project are located within the WCOD and the project could not exist without the CUP. The applicant itself interpreted the regulations as requiring that the entire Project – not merely the isolated elements proposed for the WCOD – must satisfy the Conditional Use Permit requirements of Article VII. We concur with this interpretation and urge the Board to follow suit.

A contrary interpretation is unsupported by the text of the ordinance and regulations. Uses classified as a conditional use in the WCOD are generally accessory uses, not primary (e.g., streets, accessory buildings, utilities and recreational equipment). It is not likely that the intent of the Ordinance is to hold only those discrete elements to the criteria set forth above and not the entire project to which they are appurtenant. For example, it is not likely that an accessory building like a shed should need access to public services like sewer and water. It is equally unlikely that an outdoor recreation facility should need access to electricity. An underground sewer line hardly needs to be analyzed for its compatibility with the character of the neighborhood. The more logical and likely interpretation of the Ordinance is that a proposed development, in its entirety, which encroaches into the WCOD, is only permissible with a conditional use permit if the entire development satisfies the conditional use criteria. When a rule or regulation has two possible interpretations, the logical interpretation must control.

2. Mathes Terrace

As the Board is aware, access to the Project is proposed via Mathes Terrace, a private right of way shared with others. While it is not the Board's responsibility to determine the applicant's legal access rights, we are obligated to inform the Board that those rights are disputed. In its submission to the Board (see letter from Attorney Christopher P. Mulligan dated December 18, 2013), the applicant has staked its claim to legal access to the property on the assertion that increasing the number of residents using Mathes Terrace by over 780% "*is consistent with past use and reasonable under all of the circumstances.*" Saying "one plus one equals three" does not make it true, and the applicant offers no other means by which it claims to have the requisite vehicular and pedestrian access to the Property.

It is highly unlikely that the applicant has any legal access to the property for the Project's intended use. Any development, whether subject to site plan review or not, must have vehicular and pedestrian access. The Board should be cognizant of the fact that the applicant has failed to demonstrate any vehicular or pedestrian access rights for the Project, let alone adequate access. Further, the Project includes encroaching upon the right of way by eight feet with its proposed sidewalk. The proponent of the Project has no legal right to do so, and therefore has submitted plans which require intentional encroachment and interference with the rights of others. It is not the Board's responsibility to decide these issues, but the Board must consider whether an application can proceed if it intentionally encroaches onto a right of way and reduces that right of way's width by almost thirty percent (30%).

Dr. Lenk is not opposed to construction of a sidewalk. He believes it would promote pedestrian safety. Given the pattern of pedestrian use of Mathes Terrace, good planning would support inclusion of a sidewalk. However, the applicant is obliged to construct that sidewalk on its own lot, not within the 30'-wide common right-of-way. While that would likely require a reduction in the scale and size of the project, that is the kind of trade-off that good planning represents. This Project, by comparison, flips

good planning on its head. It proposes the maximum utilization of every square inch of the lots in question and asks everyone around those lots, outside and off the property, to bear the burden of supporting the oversized proposal.

3. Architectural Design Regulations

Part of the Town of Durham's Site Plan Review Regulations are the Architectural Design Regulations found in Section 9.16 of the Site Plan Review Regulations (the "Architectural Regulations"). Like the Site Plan Review Regulations and the Conditional Use Permit Regulations, the Architectural Regulations provide their purpose before providing each specific regulation. Section 9.16 (B) of the Architectural Regulations states (with Project specific analysis following each in bold):

"The purpose of these Architectural Design Regulations is to accomplish the following:

#	Regulation	Reality
1	Provide for high-quality, human-scale architecture that conforms with generally accepted traditional design principles and is sensitive to neighboring buildings, streetscapes, the broader setting, and our natural and cultural resources	The student housing complex Project is none of these things. It is massive in scale, more than 600% greater than the neighborhood average. It will completely overshadow neighboring buildings and transform the traditional Mathes Terrace streetscape into something it has never been and put the street to use it was never intended to support.
2	Encourage design which is compatible with the architectural heritage of Durham, New Hampshire, and New England	The Project design is compatible with college dormitories and apartment complexes in the nation. It is wholly incompatible with the architectural heritage of the Town of Durham.
3	Enhance property values and foster civic pride	Placing a large student housing complex into a traditional four-square neighborhood will adversely affect the property values of the remaining properties. Civic pride is brushed aside for the profit that comes with packing as many students as possible into an area with great demand and little space.
4	Strengthen commercial vitality and promote the downtown as a welcoming, pedestrian and bicyclist-oriented destination, while maintaining the feel of a small town that is important to Durham residents.	The Project would no doubt bring some bicycles to Mathes Terrace, because no resident has a parking space for his or her car. Unfortunately, a twenty-two (22) foot wide private way is not sufficient to accommodate two-way traffic and the bicycles and automobiles that come with almost seventy (70) new residents.

4. Construction and Operational Plans are Inadequate to Mitigate Adverse Impacts

We have outlined above some of the concerns of the Lenks and some of the tools available to the Planning Board to deny the application. We turn now, briefly, to some of the mitigation measures proposed by the applicant.

In an effort to address the Project's impacts on the neighborhood, the applicant has submitted a "Construction Management and Mitigation Plan" and a "Property Management Plan." Both are woefully inadequate; they fail to propose any actual action to mitigate the impacts the proposed complex will have on Mathes Terrace.

A. Construction Management and Mitigation Plan Deficiencies.

Section 7 of the Construction Management and Mitigation Plan lists as its objective "to address traffic issues arising from construction of the project and to establish general guidelines and standards that address the issues." (See Section 7.1). In Section 7.2, the plan states that "deliveries will be scheduled between the hours of 7:00am and 4:00pm to avoid impact on traffic." This is not a limitation nor does it in any way address the impact that the Project would have on the neighborhood and current businesses. The Project proponent is saying that deliveries will be limited to all business hours of every day. It is an illusion to think that this proposal is considerate of the rights of others, when in fact it is expressly stating that it intends to make deliveries at the times that will be most disruptive to neighborhood businesses.

Section 7.2 asserts that no staging of trucks and no construction personnel parking will take place on Mathes Terrace. The plan claims that fines will be imposed on those who violate these rules. The Project proponent has no authority to impose or collect fines. **More importantly, imposing fines has no effect on mitigating the impact of construction parking and deliveries on Mathes Terrace. Such a plan only generates additional revenue for the Project's developer.**

Similarly ineffective, the applicant suggests mitigation efforts of "limiting" construction as follows:

"The construction project will operate as follows:

Regular work week - Monday through Friday, between the hours of 7:00 AM and 6:00PM.

Saturday work – Between the hours of 7:00 AM and 6:00 PM, Inside Work only – no limitations.

Sundays – No Work Allowed.

Holidays – No work Allowed.

UNH Graduation Day – No work allowed"

This schedule does not in any way mitigate the effects and impacts that the Project will have on the neighborhood. Construction will occur during every single minute that any business in the neighborhood is open.

B. Property Management Plan Deficiencies.

Following construction, the Project proponent claims to mitigate impacts on the neighborhood through the policies stated in its Property Management Plan. Similar to the Construction Management and Mitigation Plan, the Property Management Plan offers only lip service to the acknowledged issues of parking and access. On the very first page, the plan states that "Additional Staff will be available during

peak move in hours to assist in moving and managing traffic flow.” It is not disputed that there is no parking provided for students on Mathes Terrace. If there is no parking, there should be no traffic flow as there is no reason to drive down Mathes Terrace.

Contrary to the representations made in its letter of intent and application, the Project proponent is now acknowledging that it fully anticipates and plans for students to be using Mathes Terrace as a loading and unloading zone for move-ins and move-outs. Mathes Terrace will be a grid-locked parking lot during peak move-in periods, with access to the rest of the neighborhood shut down.

The “Onsite Parking Management” section of the Property Management Plan (See Page 6 – document not numbered), provides:

“There shall be no parking by tenants on Mathes Terrace. This restriction shall be prominently posted on the property and in common areas. The residential leases will specify this restriction and that violation will be grounds for eviction.”

It is fanciful, at best, to assert that “no parking” signs will prevent parking. The sign informs the violator of the rule; parking tickets or towing enforce the rule and deter future violations. The Project proponent, however, proposes that it will instead evict tenants for parking violations. Clearly no thought has gone into this so-called plan. With the slightest consideration, it would have realized that (a) a residential tenant cannot be evicted for a parking violation and (b) an eviction proceeding takes many months. It appears that the Project’s proponent has made no genuine effort to devise a plan for mitigation of the parking issue. Instead, it has hastily put words in paper to create only the illusion that a mitigation plan has been created.

With or without the “Construction Management and Mitigation Plan” and the “Property Management Plan,” the Project will impact parking and access to the neighborhood residents and businesses of Mathes Terrace to an extreme degree. When faced with such an extreme and negative impact, combined with a wholly inadequate plan for mitigation, the Board has virtually no support for approval and more than sufficient evidence to support for denial.

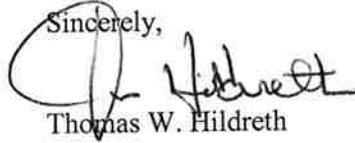
5. Conclusion

The Project satisfies a scant few of the Site Plan Review Requirements, the Conditional Use Permit Requirements, and the Architectural Review Requirements. In providing this selective regulation approach, the applicant has disregarded the primary and fundamental regulations that the Town of Durham imposes. The residents of the Town of Durham, however, trust that the Planning Board does not take a selective approach in deciding which regulations matter and which do not. All of the regulations matter. All of the regulations have a purpose. The regulations state those purposes, and the Planning Board is entrusted with the responsibility of carrying out those purposes.

Dr. Lenk shares the Board’s concerns regarding the impact that the sheer mass of the Project will have on the surrounding businesses and homes. Due to its size, lack of parking, lack of suitable access, elimination of all open and green space and failure to meet the fundamental requirements of the Site Plan Regulations, the Project Site Plan should not be approved. The residents of the Town of Durham look to the Planning Board to protect the character and prosperity of the Town of Durham, not the profits of a short-sighted development from a non-resident (presumably) that seeks to profit from an immediate need for student housing.

Peter Wolfe, Chairman
Town of Durham Planning Board
April 3, 2014
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Thank you for your consideration.

Sincerely,

Thomas W. Hildreth

ec: Dr. and Mrs. J. Lenk
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