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Let me start off by saying that I would like to see Mill Plaza redeveloped. However, to date a set of plans has not been submitted that will meet the concerns of the residents of Durham. Having said that, I must say that each set of plans appears to get closer and closer to something that will ultimately be approved.

The obstacle I see is that there appears to be objections to the size of the project required to meet the applicant's desired number of beds and related massing of the buildings. Should the applicant propose a plan that is scaled down, with fewer beds and lower massing of the buildings, I am convinced that the town will overwhelmingly get behind the project.

The problem I see for the planning board is that the agreement between the applicant and the Town does not allow the planning board to go through its standard process of determining the appropriate scope and size of the project. In other words, I believe that you are stuck with having to approve a project with 330 beds.

Now, you were told by the Town's attorney that you must approve 330 beds. That is not quite accurate. The applicant can agree to reduce the number of beds as part of the planning process. This is unlikely happen. Or, you can approve a project of less than 330 however, should you do that this matter will be back in court.

You as members of the planning board are stuck with a project size that you had no input in determining. My suggestion as a former planning board member is to do your due diligence and make a determination of the appropriate size for this project relative to the number of beds and building height. If your due diligence determines that the site is inappropriate for 330 beds, and you have a factual basis for that determination—whether it be traffic-related, massing of buildings, or other factors relating to the public health, safety, or general welfare, then it is your duty to deny the proposal for 330 beds.

In fact, the NH State Legislature has granted the Board with what lawyers refer to as "police powers" relating to determining what is appropriate development. So, if you determine—based on articulable standards or facts—that 330 beds is not appropriate or the building massing is not appropriate, then it is your *obligation* to deny the application. Such a course of action would likely send this case back to court.

There are many ways the legal process may handle such a denial but in the long run, the Town will prevail. The reason I say that the Town will prevail is that the court will look at the factual basis for the Town's denial. The courts have upheld numerous New Hampshire towns' findings as long as the factual bases for the denials have been valid.

I believe I am correct on these statements and I would ask the attorney for the applicant whether he has seen any case where a planning board's factual base for denial was overturned.