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February 5, 2020

VIA EMAIL
Durham Planning Board
c/o Rick Taintor, Contract Planner
<rtaintor@ci.durham.nh.us>
Town of Durham
8 Newmarket Road
Durham, NH 03824

RE: Colonial Durham Associates 2019-2020 Site Plan for Mill Plaza Redevelopment

Dear Members of the Planning Board:

My name is Mark H. Puffer. I am a land-use and real estate attorney in Concord, New Hampshire, with the law firm Preti, Flaherty, Beliveau & Pachios, PLLP.

My land use work has taken many forms. I have represented municipalities, I have represented developers, and I have represented concerned citizens. With that diverse background, I feel that I have a balanced view of situations. I follow the facts, not a pre-determined position of advocacy. My primary concern, regardless of whom I am representing – whether a town, a developer, or residents – is that the law and the regulations are complied with.

In this particular case, I represent a large group of concerned Durham residents. This group includes direct abutters to the Mill Plaza, residents from every street in the larger Faculty Neighborhood that is adjacent to (and partly bounded by) the Mill Plaza, as well as about twenty residents from other parts of Durham, who, while not living next to or near the Plaza, are very concerned about the future of their downtown.

In this letter, I will restate and expand upon the major points that I made in my comments at the Public Hearing on the Mill Plaza on January 22, 2020, as well as points I made in telephone and email interactions with your Town Attorney, Laura Spector-Morgan, following that meeting.

I am not a newcomer to the Mill Plaza redevelopment process. On November 28, 2017, I wrote a letter to the Durham Planning Board pointing out that the Board did not have the authority under the RSAs to grant Colonial Durham Associates' (CDA's) request to extend the period of time after the end of Design Review to submit a formal final plan.

Although my letter was not posted on the Plaza review web site, nor was it to my knowledge discussed publicly, the Board agreed with me, and the period of time for CDA's submission of a final plan was not extended.

More recently, I was asked to take a more global view of the Mill Plaza project. I am acquainted with the whole history, and pre-history, of the recent round of proposals. That includes the award-winning redevelopment plans for "A New Village Center" that emerged in 2008 after more than a year of broad stakeholder effort, initially encouraged by CDA in 2006, and posted on the Town's website as the "Mill Plaza Study 2008." I also know that in 2009, the Planning Board rejected a CDA plan to add more parking spots in the rear wetland setback of the Plaza because the Town Attorney at that time, Walter Mitchell, ruled that the Plaza site was out-of-compliance by way of its (still) unlicensed side-business of renting car parking spaces. In addition, I know that in 2013, the Town Council and the Planning Board – in response to broad citizen consensus – re-designated "mixed-use residential" as only by Conditional Use in the Central Business District.

I am also familiar with the entire history of the more recent redevelopment proposals, including the eight prior redevelopment designs submitted by CDA since 2014. I also know the background and the specifics of the December 2015 legal agreement between the Town of Durham and Colonial Durham Associates ("The Settlement."). And I know that, in June 2018, Attorney Amy Manzelli, of BCM Environmental & Land Law, put the Planning Board on written notice that, notwithstanding any other advice they may have been given, the Planning Board "may grant a conditional use permit only if the applicant complies with *every* aspect of the required conditional use criteria" that had been established in 2013 for mixed-use with residential in the Plaza.

I am, of course, also familiar with the most recent Colonial Durham proposal, first submitted in late October 2019, and since refined, which we argue is substantially different from all the prior proposals in ways that require it to be considered a completely new application, not covered by "The Settlement" and thus subject to a new Design Review process under current zoning and site plan regulations.

In addition, I am aware of the preliminary proposal by Peter Murphy & Tim Murphy, aka Toomerfs, for a parking lot on the adjacent Church Hill property. In particular, I am aware that the Church Hill parking lot idea, which you considered for Preliminary Design Review on January 8, 2020, is facing many problems, and is certainly not assured of being approved, even if it is formally applied for. As you know, three Board members agreed that the parking lot proposal would face a very "high bar" in trying to pass the Conditional Use requirements. In short, it is a very problematic proposal.

A key factor in the current Plaza site plan proposal is the role of the anchor tenant, Hannaford. Hannaford has invoked its contractual right of approval of any redevelopment of

the Mill Plaza parcel. Furthermore, Hannaford has made it clear in its November 4, 2019, letter and in a November 13, 2019 comment before your Board, that its approval of the current Mill Plaza proposal is contingent on a large parking lot on the adjacent Church Hill property, a parking lot that would be available for residents of the new housing that is proposed for the Mill Plaza site. Indeed, on November 13, 2019, Hannaford representative Mary Gamage told you that "the adjacent parking lot" is "the essential ingredient" for Hannaford's approval.

Given this context, it seems clear that the latest CDA proposal is no longer grandfathered under the 2015 agreement. The latest proposal is for a fundamentally different project, a new project that for the first time encompasses a parcel beyond the Plaza site that has long been the subject of your review. The added parking lot parcel is in a different zoning district and under different ownership. This leads my clients to ask a crucial question: Why is the current Plaza plan even moving forward now? Who even knows whether the Church Hill project will ever come to be? And yet, that parking lot is a critical element of the current Mill Plaza site plan. A great deal of time, effort, and money is being spent by many parties (including my clients' and other Durham residents' tax money) to proceed with a substantially different plan. You ought to be requiring CDA to re-submit its proposal as a new plan. Moreover, if the new submission continues to rely on an "essential" parking lot on Church Hill, the review of that new CDA submission should be delayed until the proposed parking lot on Church Hill is fully reviewed.

How do we know that the current proposal is a truly new plan? To begin with, the Planning Board itself offered *prima facie* evidence that the current site plan, posted on the Mill Plaza review web site on October 28, 2019, is a new proposal. Two days later, at your October 30 Planning Board Workshop, you discussed the striking first-time inclusion of a new parcel on the submitted plan, with a pictured pedestrian bridge linking the two parcels. And you therefore took the unusual step of voting unanimously to seek a legal opinion as to whether and how to proceed with the review that had been tabled on November 14, 2018.

On November 12, 2019, Town Attorney Spector-Morgan, of the Mitchell Municipal Group in Laconia, responded to your request with a brief letter addressed to Town Administrator, Todd Selig. In that letter, Ms. Spector-Morgan argued that the current plan is not really a new plan, and that the two applications (Plaza and Parking Lot) are separate. I know and respect the staff of the Mitchell Municipal Group, but I strongly disagree with her assessment in that letter. Moreover, I counter that letter here, not simply with an alternative "opinion," but based on numerous factual errors in the Spector-Morgan letter, as I detail below.

The applications for Mill Plaza & Church Hill are functionally intertwined. In her letter, Ms. Spector-Morgan argues that the Mill Plaza plan and the Church Hill application need not be linked. But of course they are linked. They are inextricably tied together. They are tied

together not because of anything that you, the Planning Board, has done, and not because of anything in Durham's zoning. They are tied together because of what Hannaford has said: that CDA *must* have parking on the adjacent parcel or CDA cannot go forward with its redevelopment project.

In the Planning Consultant's review, dated January 16, 2020, in anticipation of the January 22 Public Hearing, Mr. Taintor worded it a little differently, yet it amounts to the same point: "There is an explicit connection between the two projects." Mr. Taintor supports that assertion both through the CDA site-plan description of the number of parking spaces it will be providing in its proposed plan – 581 – which, in fact, includes 157 on the adjacent Church Hill parcel. Mr. Taintor also quotes from Hannaford's November 4, 2019, letter to the Board, regarding what Hannaford's approval is contingent upon:

> Evidence that the proposed parking directly adjacent to the residential building (the "New Parking Area") will be controlled and made a part of the Durham Plaza through the full available term of the Hannaford lease 12/31/2059, with ongoing full access to the proposed residential building. All loading, parking and other activities related to the residential building would be serviced by the New Parking Area.

What could be clearer than "controlled and made a part of the Durham Plaza" to indicate that the "new parking area" is *not* separate from the Plaza site plan? Put differently, although the Church Hill parking lot is, as Ms. Spector-Morgan notes, not dependent on what does and does not happen with the Plaza (yes, Toomerfs, would be free to rent to whomever they want), the Plaza plan is *not* separate from, and is indeed wholly dependent on, the Church Hill proposal being successful.

The stated premise for citing the Hebron court case bears no factual relationship to the current Plaza site plan. Ms. Spector-Morgan cited a 2008 NH Supreme Court case for the proposition (quoting from the ruling in that case) that the Town "cannot discontinue review of the plan that has been revised in response to the Planning Board's own objections, as well as those of abutters, under the guise of 'abandonment' of the original plan." Even before examining the specifics of the cited case, we have to note that this stated premise for citing that case is factually flawed. There are two major changes in the current Mill Plaza site plan: 1) a new adjacent parking lot; and 2) the removal of the "streetscape" that was in the prior plan. Contrary to what Ms. Spector-Morgan suggests, those changes were *not* made in response to Planning Board or abutter input. The CDA site plan has been revised to add an adjacent parking lot due to the contractual rights and demands of Hannaford. That is the reality that Colonial Durham needs to deal with: Hannaford is requiring a substantially different plan using another parcel of land with 157 parking spaces to support the proposed residential uses on the CDA property.

Moreover, the second major revision, the elimination of the streetscape, has been

made in *opposition* to what the Planning Board has long desired. It is, in fact, this revised plan that is receiving Planning Board objections, as is outlined in Mr. Taintor's Planner's review ("the degradation of the pedestrian circulation, streetscape and sense of place") as well as in the following related comments he made at the Technical Review Group meeting on January 14, 2019:

> I like the old plan a lot better. I would call this a dumbing down of what you had before. And I don't really see it as an improvement.... you're trying to squeeze a lot into one corner of the site.... I would take exception to when...the plan says that this is an extension of the downtown. I don't think it is at all. It's two buildings in a parking lot.... It's a marginal improvement from a 1960s shopping center, a strip mall kind of thing, just taller buildings.

The substance of the case cited by Ms. Spector-Morgan bears no relationship to the CDA proposal. The only case cited in Ms. Spector-Morgan's letter is Limited Editions Properties, Inc. v. Town of Hebron, decided on June 30, 2008, in favor of the developer. Yet, the details of that case lend little support for her opinion, for at least two important reasons.

First, the project described in the Hebron case bears no relationship to what has changed in the latest Mill Plaza proposal. The Hebron case involved a developer having to reengineer a road within a 21-unit condominium development on Newfound Lake following the denial of a variance from a road radius requirement. When the revised plan (not requiring the variance) was submitted, the Planning Board voted that the revised plan was materially different from the original concept and could not go forward. A reengineered road within the same parcel, as a result of a variance denial, however, is a far cry from the types of change CDA is now proposing, which involves an added parcel of land and 157 parking spaces to be built there to serve the Plaza site.

Most significantly, however, it appears that what was really driving the Supreme Court in its order in favor of the developer in the Hebron case was the fact that the Planning Board Chair had explicitly told the applicant at a hearing that if it had to reengineer the road within the subdivision, a new application would *not* be required. That direct promise was likely the determining factor in the Hebron case (and probably led to the case being handled by less than the full court). At the end of its order, the Supreme Court says: "notably, the board's chairman had stated that a new application would not be required if the waiver request were denied." Is there a parallel with Durham and CDA? I think not. To my knowledge, neither the Durham Planning Board Chair nor anyone else on the Board represented to Colonial Durham that it would not be a "new application" if it came back with a proposal that involves another parcel of land to accommodate 157 parking spaces. CDA has a significantly different plan before you, and it is your obligation to consider it as such.

The *type* of case cited by Ms. Spector-Morgan has no precedential value. I also need to point out that the case that was cited by Ms. Spector-Morgan was not an actual "published decision" of the Supreme Court. The order in the Hebron case is what is called a 3JX panel order. That is, it is a case decided by only three judges, not the full court. Such 3JX cases are typically relatively routine and straightforward. Significantly, per Supreme Court Rule 12-D(3), "An order issued by a 3JX panel shall have no precedential value …." None. Rule 12-D(3) goes on to say that such orders may be referenced "so long as it is identified as a non-precedential order." Yet, in her letter to you, Ms. Spector-Morgan failed to mention that the case she cited had no precedential value.

The current CDA proposal does not "substantially conform" to the 2015 Settlement Agreement. In her November 12, 2019, letter, Ms. Spector-Morgan writes that: "The revised Mill Plaza application is for the same…use as the previous applications; it is simply laid out differently. This is not a material difference that rises to the level of a new application." This assertion is implicitly stating that the current site plan continues to conform to the 2015 Settlement Agreement. Yet an examination of the 2015 legal agreement shows otherwise. The agreement provides, in paragraph 1, that the Town "will forbear from the application and enforcement" of newer zoning density amendments, provided that Colonial Durham "submits revisions to the Design Review Application that substantially conforms to the following design considerations (the Revised Application), as also reflected on the attached non-binding conceptual plan set." Paragraph 1 then sets forth a number of design considerations, subparagraphs (a) through (h). One of those conditions, subparagraph (e), is that proposed "onsite parking shall be increased." There is nothing in the Settlement Agreement about *offsite* parking. Nor does the conceptual plan referred to (and attached in a conceptual site-plan diagram as Exhibit A to the Settlement Agreement) depict any offsite parking. No parcel other than the 9.7-acre Mill Plaza site is even depicted. In contrast, the latest CDA plan adds substantial offsite parking on a new parcel never before seen in a prior submitted site plan and not on the conceptual design attached to the Settlement. The current site plan is plainly a very different and new plan.

To restate, I accept that the development of the Murphy parcel into a parking lot would be a separate Planning Board application – different parcel, different owners, different proposal – but that does not mean that the present Colonial Durham proposal is substantially the same as Colonial Durham's prior proposals. With the new Plaza site plan (a plan that does not conform to the Settlement, in that it requires the use of another parcel of land for 157 parking spaces for the development of the CDA parcel to proceed), a new Design Review must begin, and the Planning Board must enforce the present Zoning Ordinance. The Town would not be violating the 2015 Settlement Agreement in doing so.

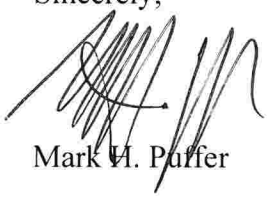
In short, I respectfully request that you rethink your reliance on the flawed one-page letter that you received from Town Attorney Spector-Morgan on November 12, 2019. I urge

you to inform CDA that they need to resubmit the current proposal as a new application, an application that will adhere to current zoning and current site plan regulations. Alternatively, CDA could submit a new plan that stays within the boundaries of the long-reviewed Plaza site and could thus be covered by the 2015 Settlement. Logic would suggest that such a plan could gain Hannaford's approval if it were limited to commercial use without the addition of housing and Hannaford-required parking for the new Plaza tenants. Moreover, since one of the major objections for Durham citizens to the CDA proposals over the past several years has been almost certain violations of Conditional Use criteria with the addition of student housing to what has long been a non-residential buffer between the neighborhood and the student housing on campus and on Main Street. Long-expressed citizen opposition would likely dissolve with an all-commercial Plaza plan, a site that would quiet down at night in keeping with adjacent family neighborhood life.

I appreciate your giving me the opportunity to set forth my clients' position on these issues, as supported by a strong basis of fact and logic. I trust that you will give it due consideration in moving forward, or, in this case, *not* moving forward with a review of a plan that does not comport with the Settlement and does not meet the requirements for "continuation" of the final review tabled on November 14, 2018. Moreover, I urge you not to proceed with review of any Plaza redevelopment plan that requires parking on Church Hill until that latter proposal obtains final approval and until the CDA's negotiations with Hannaford are finalized. To do otherwise is to continue to needlessly waste your own time and the time and tax money of my clients and all other Durham citizens.

Finally, I wish to affirm that my clients reserve all arguments that the current CDA plan is a different plan, not contemplated in the 2015 Settlement Agreement, and that it is not grandfathered under that Agreement.

Sincerely,



Mark H. Puffer

MHP:sas

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