

MEMORANDUM

TO: Todd Selig, Town Administrator
COPY: Audrey Cline, Code Enforcement Officer
FROM: Rick Taintor, Consulting Planner 
DATE: June 8, 2020
RE: “Grandfathering” in the Site Plan Regulations – Mill Plaza Landscaping

Robin Mower’s April 15 email to Audrey Cline asks for an interpretation of “grandfathering” of an existing nonconformity, with specific reference to landscaping at Mill Plaza. Her primary question is “about the possibility of grandfathering the absence of a planting strip, currently required in the site plan regulations that pertain to the Mill Plaza.” Subsidiary questions are:

- (1) Is a “planting strip” considered a “structure”?
- (2) What is the legal relationship of the site plan regulations to the zoning ordinance? Does one take precedent over the other?
- (3) Can one “grandfather” features or elements covered by site plan regulations, rather than only those covered by the zoning ordinance?

I have discussed these questions with Audrey Cline and we offer this letter in response.

Grandfathering in the Site Plan Regulations, Generally

The Planning Board’s Site Plan Regulations, Part III – Development Standards, Section 1.1.4, provide as follows:

- 1.1.4 Legally established nonconforming site conditions are considered “grandfathered” until such time as site plan review is required due to proposed changes to a property. The Planning Board shall use the nonconforming provisions in the Town of Durham Zoning Ordinance as a guide in reviewing such situations, to the extent appropriate.

As part of any site plan review, the Planning Board may require that:

- (a) nonconforming site conditions be brought into compliance; or
- (b) the extent of nonconforming site conditions be reduced; or
- (c) nonconforming site conditions be mitigated, giving due consideration both to the extent of the nonconformities and their adverse impacts and to the costs for addressing the nonconformities relative to the costs for the overall project.

The phrase “legally established nonconforming site conditions” includes any site condition that existed prior to the adoption of a land use regulation to which the condition does not conform. This covers both conditions that are shown on approved site plans and conditions that were not subject to site plan approval at the time they were created.

I interpret the words “site conditions” to mean conditions that are under the purview of the Planning Board in its review of site plans. This allows for expansive interpretation because Section 1.2.1 of the Regulations requires all site plans to “conform to all applicable ordinances, regulations, standards and statutes of the Town of Durham, State of New Hampshire, and United States Government, as applicable” Thus, for example, pre-existing nonconforming conditions with respect to state or federal environmental standards could be subject to Planning Board review. For the present discussion, however, it suffices to say that the “legally established nonconforming site conditions” can include nonconformities with respect to the Zoning Ordinance as well as the Site Plan Regulations.

In reviewing a site plan, the Planning Board has three options with respect to a legally established nonconforming site condition: (1) the Board may require the nonconforming site condition to be brought into compliance with current land use (zoning and site plan) regulations, (2) the Board may require that the extent of nonconformity be reduced, or (3) the Board may require that the nonconformity be mitigated. Because these are the only actions allowed by the Regulations, the Board may not simply let a nonconforming site condition remain without reduction or mitigation.

It should also be noted that Section 1.1.4 does not cover any site condition that did not conform to a land use regulation that applied at the time that the condition was established, nor does it apply to a site condition that does not conform to the most recent approved site plan. Such nonconforming conditions are not “legally established” and therefore have no grandfathering protection under the Site Plan Regulations. If the Town has let such conditions exist over some period of time they may be protected under the concept of “laches” (this would be determined on a case by case basis). However, a new site plan opens up such conditions for review. There is no general rule that a nonconforming site condition that is not “legally established” has any grandfathering protection, and it is likely that such a condition must be brought into compliance with existing regulations as part of a site plan approval.

Application to Mill Plaza Landscaping

Robin Mower’s query refers specifically to the foundation planting strip that is required by Section 5.8.9 of the Site Plan Regulations. Such a planting strip does not currently exist in front of the Durham Marketplace (Hannaford) building and is not included in the proposed site plan.

To begin with, I first respond to the three subsidiary questions posed by Robin:

- (1) Is a “planting strip” considered a “structure”?

I do not believe that this question is material with respect to the foundation planting strip requirement because the grandfathering provisions in Section 1.1.4 address not just

“structures” but all site conditions that are subject to the Site Plan Regulations, including grading, paving, parking spaces, landscaping, lighting, stormwater management, etc.

However, the zoning definition of “structure” is pertinent in cases where a nonconformity is to a specific Zoning Ordinance requirement rather than to the site plan regulations. The Zoning Ordinance defines “structure” as follows:

That which is built or constructed with a fixed location on the ground or attached to something having a fixed location on the ground. “Structures” include but are not limited to a building, [...], parking space/parking lot and deck. It shall not include a minor installation such as a fence under six (6) feet high, a mailbox, a flagpole, or an accessory shed.

Thus, the existing parking areas in Mill Plaza are structures under the Zoning Ordinance, and the portions of the parking areas that are within the wetland buffer areas are nonconforming to the Wetland Conservation Overlay District if they have not been authorized by a conditional use permit.

- (2) What is the legal relationship of the site plan regulations to the zoning ordinance? Does one take precedent over the other?

Both sets of land use regulations apply equally, although the municipal officers responsible for administration, approval and enforcement vary. Where the zoning and site plan regulations cover the same matter, a site development must comply with both, which in practice means that the stricter regulation applies.

- (3) Can one “grandfather” features or elements covered by site plan regulations, rather than only those covered by the zoning ordinance?

Section 1.1.4 explicitly provides that “Legally established nonconforming site conditions are considered ‘grandfathered’ until such time as site plan review is required due to proposed changes to a property.” [emphasis added] An application for site plan review thus opens up a “grandfathered” site condition for consideration by the Planning Board, which must decide whether to eliminate, reduce or mitigate the nonconformity. Because of its placement at the beginning of Part III of the Regulations, this provision clearly applies to all standards and requirements set forth in Part III.

Now for the main question, whether the absence of a planting strip can be grandfathered. For the purpose of this response, I am assuming that the foundation planting strip was not required when the Marketplace building was approved or when the last site plan approval for the Plaza was granted, and therefore that this is a “legally established nonconforming site condition” that is subject to Section 1.1.4. If so, the absence of the foundation planting strip is grandfathered until the owner makes changes to the property that are shown on a new approved site plan.

However, the grandfathering is ended by changes to the property that require site plan approval. In this case, with respect to the requirement to provide a foundation planting strip, the Board must take one of the following actions as part of its site plan approval:

- (1) Require the provision of the 4-foot planting strip (either adjacent to the building or between the walkway and the vehicular circulation aisle) to bring that part of the site into compliance with the Site Plan Regulations;
- (2) Require the provision of a planting strip that is less than 4 feet wide, thus reducing the extent of noncompliance; or
- (3) Require that the lack of the foundation planting strip be mitigated in some manner.

In determining what the planting strip is intended to accomplish, and therefore what type of mitigation might be appropriate, it is useful to refer back to Section 5.1 through 5.3 of the Site Plan Regulations, which describe the purpose, objectives and general requirements of the Landscaping and Screening Standards. In particular, Section 5.3.1 states,

Areas not occupied by buildings or other structures, parking, loading, access ways or natural vegetation or other natural features shall be landscaped to provide visual relief from expanses of paving and buildings while providing shade and stormwater management benefits. [emphasis added]

Thus, appropriate mitigation for not providing a foundation planting strip would focus on providing such visual, shade and/or stormwater management benefits through alternative measures. It would usually be most logical to provide those measures close to the building where the planting strip would have been required, so that they can functionally substitute for the benefits provided by the planting strip. But mitigation might also be provided elsewhere on the site. It is ultimately up to the Planning Board to determine (a) whether to permit mitigation rather than require conformance with the Site Plan Regulations, and (b) whether the type and location of such proposed mitigation is appropriate and adequate compensation for not providing the planting strip as required by the Regulations.