

October 1, 2021

To: Todd Selig & Durham Town Council

From: Joshua Meyrowitz, 7 Chesley Drive, Durham

Re: Inattention to Mill Plaza intent to violate NH RSA 261:75-b (and ignoring the public)

Thank you for your incredible service to the Town and for being so welcoming of public input. I've been trying to leave you in peace as you have grappled with the Mill Pond Dam dilemma. That turned out to be a longer peace than I had at first anticipated.

Those of us who have been closely following other controversial issues in Town are unsure about how much Town Councilors know about the details of those issues, because they are not well reported on in local newspapers or in the limited space available in the valuable *Friday Updates*. **These include issues that will likely fall legally on the shoulders of the Town Council.** I am writing with an expanded version of what I summarized orally in 4.5 minutes on September 27 (7:24:31 pm) because I know how difficult it is to attend closely to the substance of multiple spoken Public Comments, let alone remember the details later.

I write with respect to the intent of the major downtown property owner to violate state law, specifically New Hampshire **RSA 261:75-b**. A subsidiary issue of great concern to the public relates to how poorly our written and oral input seems to be “heard” and responded to at “Public *Hearings*” at the Planning Board.

For the purposes of brevity in my oral comment, I began with a June 2021 Attorney letter to the Planning Board, which I cite again below. Yet I want you to know that public concerns about this apparent intent to break New Hampshire law were raised months earlier by members of the public to no apparent interest on the part of the Planning Board.

More than seven months ago, for example, Colonial Durham Associates (CDA) presented the core feature of their [Revised Proposed Management Plan 2-22-21](#) at the February 24, 2021 Planning Board hearing. A core feature of the plan, described on p 8 is: **“A parking lot monitoring system will track license plates as vehicles enter the parking areas.”**

During Public Comments at 9:23:40 pm ([video](#)), Eric Lund, a Faculty Road resident and UNH research scientist, mentioned, in part: “some additional concerns I had with the plan for enforcing parking with the license-plate recognition, some possible issues with **whether that’s legal in New Hampshire as other commenters have discussed at previous meetings.**”

Not only is this Eric Lund comment about possible illegality not mentioned in the meeting [minutes](#), but it, *along with the prior and subsequent public mentions of the apparently illegal*

plan, has yet to be addressed in any meaningful way by members of the Planning Board.

On June 16, 2021, Attorney James Allmendinger, of Portsmouth, wrote a letter to the Planning Board regarding the Mill Plaza's proposed site management plan. He wrote, quoting from the RSA: "The use of automated number plate scanning devices, also known as automated license plate readers (LPRs) is restricted to local, county, and state law enforcement officers." That is, LPRs are prohibited for private use.

Attorney Allmendinger added in his own words: "I am at a loss to understand both the need for such monitoring, and the apparent illegality of that part of the [Mill Plaza] Plan. **The potential legal liability that could arise—to the Town, Mill Plaza tenants, persons shopping at Mill Plaza—should be enough to deter what looks to me like an apparent violation of rights.**" [Emphasis added.] Attorney Allmendinger also included the full RSA in his letter.

I double-checked the RSA's intent with an attorney at the NH Civil Liberties Union, who confirmed what Attorney Allmendinger cited and also noted the "limitations" *even for law enforcement officials* to use it. (He also mentioned that the law may "sunset" at the start of 2027 unless it is renewed). Similarly, the National Conference of State Legislators (NCSL), describes [state-by-state regulations](#) for the technology and summarizes the NH Statute as follows:

"Restricts the use of automated license plate readers to local, county and state law enforcement officers, who shall only use the devices subject to specified conditions and limitations and for specified purposes. Provides that records of number plates read shall not be recorded or transmitted anywhere and shall be purged from the system within 3 minutes of their capture, unless the number resulted in an arrest, a citation or protective custody or identified a vehicle that was the subject of a missing or wanted person broadcast."

After three-and-a-half months of Attorney Allmendinger letter being posted, there's been no Planning Board acknowledgement, let alone response, to the substance of that Attorney letter, that is, that the core of the site-management plan before the Board is apparently *illegal*. (It's conceivable, of course, that CDA thinks it has some workaround for the law, but the Planning Board has not confronted them to explain what, if anything, that might be.)

There has also been no response to written resident complaints that that expert legal input letter was not even properly posted, with other expert input, on the Mill Plaza application site. Instead, it has simply been listed as [James Allmendinger 6-16-21](#), among more than 250 other [Citizen Comments](#), barely any of which have ever been referenced or addressed by Planning

Board members.

Also unaddressed by the Planning Board is the collapse of the promise for control over student vehicle and student traffic noise at the Plaza (if the site-plan is approved) with hundreds of college students and their guests living and visiting there. If state law forbids CDA from using the technology they propose, then the claimed control cannot take place. This is yet another largely ignored fundamental site-plan-review issue, one closely tied to [Conditional Use Zoning](#) applied to the Plaza & CBD by unanimous votes at the Planning Board and Council in 2013, specifically to “allow the Planning Board a fair amount of judgment in terms of allowing student housing as part of mixed-use applications” (Planning Board [minutes](#), Nov 13, 2013, p. 7).

I very much appreciate that Councilor Sally Tobias, Council Rep to the Planning Board, listened closely to my spoken comment and responded to it. Responses are always preferable to silence, even when – and often precisely because – they make visible some mismatched perceptions that deserve additional consideration.

Councilor Tobias said:

“You are talking about scanning of the license plates, and it was mentioned as part of their traffic control, or control of the parking at the Plaza. Heather Grant at the last meeting [August 25] did ask them [Mill Plaza] to clarify that, because she did comment that they have not, the Board had not heard anything about it since, and she wanted more information on it. So we are asking about and we haven’t forgotten anything. Trust me.”

I replied with a recommendation to review the video of the August 25 Planning Board meeting, since my recollection was that Board Member Heather Grant barely mentioned the traffic control method and instead left it up to Colonial Durham to handle the issue, and did not question its illegality. I spoke in a qualified manner, because I know from my experience that some things I was sure that I and others said at meetings are not actually on the recordings, and that some things I have no memory of hearing are somehow there! (As you know, this is a problem all committees have in reviewing meeting minutes.)

Thus, I did subsequently go back to check the recording, and here’s what I hear on the [video](#) at 9:38:48 pm (following on an exchange between Board Member Richard Kelley and CDA Attorney Ari Pollack):

Heather Grant: *“So, within that management plan, there were compensating controls for those concerns—the noise and the general activity of the Plaza. So, it’s been a while*

*since we've reviewed that management plan, I'm sure it'll come back as the full package. You know, obviously, it was pointed out, in that management plan, there was a suggestion that you were going to control the parking, who's going to come in, the scan, **that's for you to review**, but the emphasis on the compensating controls is in part of that management plan, it should come with the package when that comes up."*
[Emphasis added.]

Thus, Councilor Tobias was correct that Heather Grant assumed more details on the management plan would be coming. And Ms. Grant even seemed to *start* to say the phrase "scanning license plates," which would have been the first mention of it by a Planning Board member. Yet, Ms. Grant certainly did not question the illegality of the proposed traffic control, did not refer to Attorney Allmendinger's letter or to the multiple public comments on the RSA over seven months (including that very evening), did not press CDA to explain how they can get around the law. Indeed, she deferentially said "that's for you to review."

There may be alternative interpretations, but to me and other residents I've spoken to, that Heather Grant statement sounded as if all the public's comments about the Board needing to confront the apparently illegal plan were being dismissed, with the issue left in CDA's hands. In contrast, the essence of my Council comment was that the Town must not leave it up to Mill Plaza to decide whether they want to behave illegally, but for top Town officials to stop it! Moreover, CDA has never heard Planning Board pushback about the resulting inability to control student vehicle traffic and noise, *if* student-tenant vehicles could not indeed be legally tracked by CDA.

Sadly, this is but one example of many, many more regarding why the public has been so frustrated by the Planning Board review of Mill Plaza and other recent site plans. As I mentioned in a Public Comment to the Planning Board regarding general planning board processes (September 22, 2021), it might indeed help all sides if the Board were to consider following the NH Municipal Association's recommended "Procedures for a Hearing" under what they cite as RSA 676:1, on pp. 59-60 of the online "[The Planning Board in New Hampshire: A Handbook for Local Officials](#)." These procedures include:

5 "d. Any written comments are read into the record."

"6. The chair summarizes the comments and provides an opportunity for the applicant to clarify any issues." (Emphases added.)

The many engaged – and frustrated – residents wish these Public Hearing procedures would be in place in Durham. It would make the public feel less like ignored voices in the wilderness.