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24 October 2020

Conservation Commission
Town of Durham
Durham, NH 03824

Dear Members of the Conservation Commission.

Thank you for your extensive service to the Town of Durham and for your commitment to Durham's regulations and zoning and to wise environmental stewardship. I am writing about Colonial Durham Associates' (CDA's) pending application before the Planning Board and Conservation Commission.

My Familiarity with the Mill Plaza Site

I have been an abutter of Mill Plaza for over 25 years. I own the first downstream-from-Plaza home along College Brook. As a result, I have extensive direct experience with how Colonial Durham Associates' actions and inactions have negatively impacted the Brook and wetland and the landscaping on my and other neighbors' properties. Additionally, after our regular Town Planner, Michael Behrendt, was removed from oversight of Mill Plaza Redevelopment in November 2017 for offering his professional negative assessment of the then proposed plan (Site Plan #7),¹ I was concerned that the newly hired "Contract Planner," Rick Taintor, a resident of Newburyport, MA, would have no local or historical context for taking over the guidance of such a major project at the heart of Town. Therefore, I spent six months researching, writing, and publishing a 50-year history of the Mill Plaza site, including a detailed reportorial account of every Mill Plaza site-plan review meeting that Rick Taintor had missed. In mid-2018, I distributed printed copies of the history to Rick Taintor and every (then) member of the Planning Board and Town Council (and to UNH & Durham libraries). A searchable digital version is [posted](#) online. I have attended every Mill Plaza review meeting since then, made numerous oral comments, and I have thus far submitted more than a half dozen letters and PDFs of PowerPoints since mid-2018 at the [Citizen Comments](#) site for Mill Plaza CUP review. As you know, mixed-use with residential in the Plaza (in this case, the proposed 258 "student beds") is by Conditional-Use only. Moreover, as Contract Planner Rick Taintor has informed you on the first page of his [Planner's Review 10-26-20](#): "The Zoning Ordinance provides that the Planning Board may grant the wetland and shoreland conditional use permits only upon receiving the advice of the Conservation Commission that all standards for the applicable overlay districts have been met **in addition to the general standards for all conditional uses.**" [Bold added]

¹ For details, direct quotes, and context of that fateful Nov 2017 meeting, see my [Mill Plaza History](#), pp. 285-309. Also note that although Rick Taintor now resides in Newburyport, MA, he was the Planning Director of Portsmouth, NH, for eight years.

Purposes of this Letter

I write here to 1) detail misstatements and missing context in CDA's Mill Plaza "Application for Shoreland/Wetland Buffer Conditional Use Permits," 2) explain why the 2009 Conservation Commission meetings regarding a CDA application for adding parking spaces in the wetland setback had to grapple with two different definitions of "pre-existing condition" (and why that's relevant to your task as well), 3) expose a long pattern of questionable CDA assertions and actions.

I hope you will carefully consider what I and other citizens and experts have submitted (recently, and over the years) and then, drawing on the extensive power of Conditional-Use permitting, advise the Planning Board to reject the Wetland & Shoreland Conditional Use permits – *unless* CDA returns with a site plan for less massive buildings and more landscaping, and, particularly, **unless the 17,415 square feet (4/10th of an acre) of thickly vegetated hillside behind current Building Two is no longer targeted for destruction. CDA should also finally take responsibility and address the site degradation (and increased College Brook flooding and downstream erosion) that it caused with its illegal bulldozing in 2002 of a 9,000 sf (1/5th acre) hillside at the Southeast portion of the Plaza near the Chesley Marsh. The "pre-existing condition" for your assessments ought to be the site *before* that hillside was illegally destroyed.**

Finally, I hope that you will conduct a site walk that includes cones to mark the planned edges of the proposed buildings, the retaining walls, and the parking spaces, and that also employs the common practice of helium balloons to illustrate the planned heights of the retaining walls and buildings (and visibility of proposed structures from the adjoining neighborhoods). Such actions should help you to "break the illusions" presented by some CDA submitted images, including the ones that make the proposed 13-foot-tall retaining wall, topped by a 4-foot fence (for Bldg C), appear shorter than the pedestrians walking by. (See, for example, image #53 [here](#), with actual dimensions at slide #63.)

CDA's WCOD/SPOD Narrative: Circular & Misleading Arguments

Item #1 in CDA's [narrative](#) cover letter (May 21, 2018, modified January 2, 2020) addresses three reasons for a claimed "necessary" 40,683 sf (more than 9/10th acre) incursion into the Wetlands buffer and 1,392 sf (.03 acre) incursion into the Shoreland buffer.

"These proposed permanent redevelopment impacts are consistent with the existing condition and cannot be located elsewhere without altering the configuration and layout of the proposed buildings and use densities - all of which reflect the redevelopment requirements of Applicant's anchor tenant, Hannaford Supermarkets, and the terms of settlement between the Applicant and the Town of Durham...."

These three CDA arguments defy both logic and the facts.

1) CDA asserts that the Configuration/Layout can't be changed—unless it's changed

CDA's first argument is that they cannot change the configuration and layout of the proposed plan – unless they, in fact, simply change the layout and configuration of the plan. That's a rather odd,

circular argument.

CDA can, of course, change the plan to reduce the massively oversized-for-the-site Buildings B & Building C, avoid the destruction of the thickly vegetated hillside buffer behind current (doomed) Building 2, pull back the buildings from the site boundaries, downsize or eliminate the tall retaining walls, and reduce the wetland encroachments resulting from paving and parking.

Indeed, Durham citizens have for more than six years of review meetings consistently argued that CDA is wildly over-building for the small size and narrow layout of the site along the impaired College Brook, proposing multi-story structures with student dormitories that would loom intimidatingly over adjacent single-family homes, and coming much too close to the cherished buffers of the abutting Faculty Neighborhood (Durham's oldest and largest family neighborhood), all in violation of Conditional-Use zoning. Of particular concern in residents' (and urban tree expert) testimony is the planned significant *increase* in impervious surfaces by blasting away 17,415 sf (4/10th of acre) of the thickly vegetated hillside behind current Building Two, increasing impervious surfaces on an already mostly impervious site by an additional 4%. (CDA has stonewalled for 10 months on the composition of the hillside and its *cubic* dimensions, but it is clearly the most heavily "landscaped" part of the Plaza and of major aesthetic, acoustic, and environmental benefit, *as it is*.) Moreover, in early stages of site-plan review, CDA had promised to *reduce* impervious surfaces, not increase them significantly. (See, for example, PB minutes, [Jan 27, 2016](#), p. 9.)

USDA Urban Forest specialist John Parry has repeatedly warned the Planning Board about the negative effects of destroying that vegetated hillside buffer behind Building 2, as in [J Parry 6-8-20](#):

"Saving forest cover in urban areas is a holistic way to provide environmental benefits such as improved air and water quality and energy conservation in nearby buildings. Though small, this small urban forest is in a prominent location that provides a valuable visual buffer between the downtown commercial and residential areas. Look at this area on an aerial photo, or on the ground from different viewpoints and you can appreciate how the loss of this woodland will have a negative effect on aesthetics. That woodland is also on a steep slope and the trees and other vegetation are important in protecting soil and reducing stormwater flow."

Indeed, citizen calls for smaller buildings and more landscaping were echoed by Planning Board Member Richard Kelley on June 10, 2020:

*"The applicant has asked for feedback in regards to landscaping. And I'd like to throw this on the table. We heard from the public, and I feel much the same way.... And I do realize what I'm asking: **That would be a reduction of building footprint, parking, in order to get greenspace. But I'm going to throw that out there and ask the applicant to look at that and report back next week, whether it can be done or not.**"* [emphasis added; transcribed from the [video](#) at 10:54 pm; see also the official [minutes](#), p. 18.]

That “next week” is now more than four months past, and CDA has remained silent on this matter.

Moreover, CDA apparently exerted inappropriate behind-the-scenes pressure to alter the name and mission of a Planning Board authorized “Architectural Design Review Subcommittee”² changing it to a “*Minor Architectural Subcommittee*,” which precludes input on the necessary types of changes that would reduce shoreland and wetland incursions and also bring the proposal into scale for the site and the adjoining neighborhood, as required by Conditional-Use zoning.

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2) Is Hannaford in fact “requiring” the proposed dense layout, as CDA claims?

Although CDA claims that the “configuration and layout of the proposed buildings...reflect the redevelopment requirements of Applicant's anchor tenant, Hannaford Supermarkets,” **the opposite is true**. Hannaford has consistently expressed extreme concerns about the CDA's plans to crowd the Plaza with large buildings and hundreds of “student beds” on a narrow site that has never had housing.

<> **June 25, 2018**—Mary Gamage, Hannaford's Director of Real Estate, wrote to the Planning Board to indicate that “The Hannaford lease includes the right of Hannaford to approve any proposed changes to the plaza.” Adding:

*“We have received copies of a proposed redevelopment plan that we understand will be presented to the Durham Planning Board on June 27, 2018. Please note that **Hannaford does not approve or support this proposed project** based on impacts to its business, including but not limited to inadequate parking and a **lack of convenient and safe access and circulation**.”* [Letter from Hannaford Management Company 6-25-18](#) (emphasis added)

With its concerns unaddressed, Hannaford then intervened with an even more forceful objection.

<> **Nov 14 2018**—Hannaford attorney *hand-delivered letter*, urging Board to deny the application:

“...the substantial increase in use on the Property will add significantly more traffic to the Property. The much larger number of vehicles coming and going from the Property, added to the vehicles travelling around the Property looking for parking, risks considerable congestion and danger to both other vehicles and pedestrians.

² On Sept 23, 2020, a Planning Board motion passed (6 to 1) for the formation of an Architectural Review Subcommittee for the Mill Plaza Plan. There was no mention at the public meeting of limiting the subcommittee to “minor” input. See comments on “not limited to color” but full “architectural review” in meeting [video](#) at about 9:12pm and pp. 13-14 in draft [minutes](#). Somehow, apparently out of public view, the subcommittee was transformed into a “[Minor Architectural Subcommittee](#)” limited to “focusing on color and minor architectural features” of CDA's application. Such an “offline” change, if true, would seem to violate public meeting requirements. As the PB Chair accurately noted at 11:25:46, at the [Oct 14 meeting](#) in relation to another issue, the Board “can't do much offline; we have to do all the work during the meeting. That's one of the ‘transparency’ rules.” See also [NH RSA 91-A](#), commonly referred to as the “Right-To-Know” law. In any case, the publicly stated intent of the PB vote has been subverted, and the chances for a more environmentally suitable plan have been significantly narrowed.

For these reasons, Hannaford urges the Planning Board to deny the Application in its current form....

*...CDA may not change the 'siting and location of buildings, parking, non-retail buildings, access and other facilities' at the Property without Hannaford's approval. **Hannaford expressly does not approve the Proposed Construction...** CDA does not have the authority to proceed with the Proposed Construction, and doing so will violate multiple contractual provisions in the Lease.... [W]e urge the Planning Board not to expend the time and cost to consider and approve an Application which will ultimately be futile."* [Letter from the Lawyer for Hannaford 11-14-18](#) (emphasis added).

The Nov 14, 2018 letter led to a year-long pause in Plaza review (and then to a new plan in late 2019, with a somewhat reduced number of proposed student beds).

In Nov 2019, a new Hannaford letter indicated that the only way that Hannaford would approve of making the Plaza so crowded (with massive buildings and 258 tenants on a site that has never had any housing) would be if the adjacent Church Hill 1.3-acre wooded lot (behind the Red Tower and sloping into the College Brook flood zone) were to be denuded and built up into a football-field size treeless parking mound to include at least 157 parking spots for Plaza tenants and "made a part of Mill Plaza" for at least the next 40 years(!), a combined Plaza/Church Hill plan that would make the environmental destruction considerably greater and probably irreversible.

<> Nov 6, 2019—[Letter from Hannaford 11-6-19](#) outlines significant conditions for its approval of CDA's latest site plan, including:

"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."

See also two subsequent Hannaford letters showing extreme disapproval, [Letter from Hannaford Supermarkets 8-10-20](#) and [Letter from Hannaford Supermarkets 9-23-20](#).³

³ Note that Hannaford's interactions with CDA took a sharply negative turn in 2017, after Hannaford became aware that CDA had long been secretly violating Hannaford's lease terms though an unlicensed side business of renting parking spaces at the front of the Plaza. Some Hannaford shoppers emerged from the store to find "boots" on their wheels for parking in the "wrong spots." CDA falsely claimed that some spots on the site were outlined in yellow only because CDA had run out of white paint! Now, to appease Hannaford, CDA no longer rents parking spots in the rows in front of Hannaford. But CDA continues to rent spots in five rows in front of Rite Aid, as well as in spots on the inner sides of the two buildings and at the rear of the Plaza, including in an area illegally bulldozed by CDA in 2002 (as detailed further below and on pp. 23-25 of my Mill Plaza History). Characteristically, CDA remained deceptively silent about its spot-rental business when the PB discussed limiting landscaping in front of Rite Aid because of how difficult it was to find *customer* parking there. (But at least CDA has apparently since located enough white paint for all the spots!) Over 120 lease spots are on site, despite a 2009 ruling by the Town's (then) Attorney, Walter Mitchell, that this unlicensed use "must cease" and that site-plan review could not continue for an out-of-compliance site. For details, see more below and on pp. 36-52 in my Plaza History.

To summarize the Hannaford issue: As of this moment, there is no written confirmation of Hannaford approving of (let alone “requiring”—as CDA’s narrative claims) the massive configuration and layout CDA hopes to build. And all indications are that Hannaford would prefer a redevelopment that does not entail a claustrophobic shopping plaza with over-sized buildings and hundreds of “student beds.”

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3) Does the Legal Settlement support Wetland/Shoreland violations CDA is proposing?

CDA makes the incredible statement that “These proposed permanent redevelopment impacts [in the wetland and shoreland setbacks]...reflect...the terms of settlement between the Applicant and the Town of Durham...”

In reality, the [Settlement](#) (Sections 1d & 1f), **clearly states the *opposite*:**

d. The Revised Application will provide for proposed buildings and vehicular roads outside of the shoreland and wetland buffers such that variances from town ordinances are not required and the buffers are maintained by the property owner....

f. The Revised Application will have increased natural buffer along the southern property line adjacent to the College Brook; such buffer to be maintained by the property owner in perpetuity.

* * *

Sadly, as I detail further below, this pattern of illogical arguments and false statements (as well as illegal actions) characterizes Colonial Durham Associates poor “citizenship behavior” in Durham over several decades.

LONG PATTERN OF MISLEADING ARGUMENTS & STATEMENTS

CDA Attorney Ari Pollack has argued that many aspects of the “existing” site are “grandfathered” because requirements were different in the past. However, as I detailed (with cited documents and photo evidence) in my submitted PDF of a PowerPoint presentation for the Planning Board, [Joshua Meyrowitz 6-18-20](#), the Mill Plaza site has been significantly out-of-compliance since the very start. CDA inherited a non-compliant site – and then made it much worse. (See slides #2 to #6 on grandfathering limitations per Contract Planner Rick Taintor & Code Enforcement Officer Audrey Cline, and slides #7 to #33 for documented long-term site non-compliance.)

CDA has further degraded the site not only by continuing to plow snow and salt into the impaired College Brook but also by a **major destructive and unauthorized act**: bulldozing and paving over a 9,000 sf (1/5th acre) hillside adjacent to the Chesley Marsh in 2002, which has significantly increased runoff, downstream flooding, and property damage.

2002—CDA Bulldozed 9,000 sf Southeastern Rear Hillside Without Permit

And CDA has not yet restored it. Thus, a question for the CC now (as in 2009) is whether the “pre-existing condition” is the site before or after that illegal hillside destruction?

In September 2002, Mill Plaza manager Dave Garvey received a Town permit to take out a chain-link fence and propane tank slab at the rear of the Plaza (gas lines had been installed to the site). But Garvey instead arranged for excavation of the entire rear hillside – almost 9,000 sf (1/5th acre) – for paving of new parking spaces (to create a 40-spot rental parking space area beyond the second Plaza building).

Citizens who questioned the bulldozing and took pictures of it were threatened with arrest by Garvey, who claimed that his actions were in keeping with a 1978 Planning Board site approval and that no pictures were allowed to be taken on private property. Moreover, the work was done without a required DES permit – a State-level violation, which initially led the Town to say initially that it had no authority over what was going on. Following citizen pressure, however, the Town eventually halted the excavation/paving, and the Plaza was forced to apply to the Planning Board for an amended parking plan.

Sept 25 & Oct 9 2002—Planning Board: Amended Plaza Parking Plan

At the September 25, 2002 Planning Board meeting, board members pressed Mr. Garvey on already existing **concerns about stormwater management, snow storage/removal impact on College Brook, and whether the Plaza rented parking spaces (without a license for that side business) and would rent those new parking spaces being proposed.** (“Yes,” Dave Garvey admitted, on the two space-rental questions.)

During the Public Hearing on the Plaza’s proposed parking expansion, concerns about the plaza plans were raised by abutters, by residents from different parts of Durham, and by UNH faculty (not all of them Town residents) whose research relates to preserving wetlands and greenways. The issues raised by residents included: **additional flooding of private properties and public paths, pollution and sediment runoff into the brook, further deterioration of the College Brook Greenway, the loss of a pleasant hillside previously used for picnics and meditation, and the thinning of the already delicate vegetative buffer between the commercial zone and residential and passive recreation areas.**

Residents also noted how the Plaza’s plan ran counter to the [2000 Durham Master Plan](#), which called for restoring the College Brook Greenway, enhancing vegetative buffers that protect residential areas, reducing runoff from impervious surfaces into the Town’s waterways, and adding planting areas to the Plaza parking lot. Additionally, the Town’s engineer raised concerns about the Plaza’s overall negative impact on the College Brook Greenway (and how that amount of runoff and pollution into a wetland would not be allowed by 2002 standards). Moreover, some questions from Planning Board members seemed to echo resident concerns that the plan to turn the whole bulldozed area into 31 rental parking spaces (then at \$400/semester) was a “change of use” from

the 1978 plan.

The deliberation of the application was continued into the next Planning Board meeting on Wed, October 9, 2002, when, after extensive deliberations, **the Durham Planning Board voted unanimously to REJECT the Mill Road Plaza's application for an "amended" parking plan.** The plaza was told to restore the "mistakenly" bulldozed area next to the pedestrian path at the rear of the plaza before a "stop-work order" would be rescinded. And no cars were to be parked there.

[DAMAGE RESTORATION UPDATE: A damaged 2,400 sf area was seeded, but over a compacted base (as prep for paving) that does not absorb stormwater. As of October 2020, the bulldozed hillside has not been restored, debris is often piled up there, and cars and trucks are routinely parked where the hillside was.]

Additionally, research through old documents completed by John Harwood of the Regional Planning Commission (at Town Administrator Todd Selig's request) revealed a few intriguing facts, such as non-compliance with various site-plan requirements, as well as the stipulation for a 70- or 75-foot buffer between parking spaces and the edge of the property (the plaza's 2002 plan had been to put spaces within about 20 feet of the boundary). The buffer issue was to be researched further. (John Harwood submitted a second report in December 2002.) [Full PB minutes: [Sept 25 2002](#) & [Oct 9 2002](#); Consultant John Harwood [Oct](#) & [Dec](#) 2002 Reports on Mill Plaza Parking.]

From the Oct 9 meeting: "In response to a question from [Town Council Rep to the Planning Board] Arthur Grant, [Town Planner] Jim Campbell stated **the applicant would have to put back land that had been removed from the property in order to have the Code Enforcement Officer rescind the stop work order.** The motion [to deny the Plaza's application] was unanimously APPROVED." [Emphasis added; see [minutes](#), p. 10.]

Seven years later, in 2009, CDA had the audacity to argue that they had the right to further impinge on the wetland setback because their proposal would improve a "degraded" site (that is, CDA employed their illegal destruction in 2002 to justify further infringement on the wetland setback!). See more on this further below.

2002 to present: Increased Flooding Since Rear Plaza Hillside Was Bulldozed.

Following the unauthorized bulldozing and paving at the Southern rear of the Plaza, residents downstream from the Plaza noticed a significant increase in water flow in College Brook and flooding during heavy rainstorms and snowmelts. UNH researchers have documented an average of 12 serious flooding events annually in recent years. Residents have lost topsoil and plantings near the brook, including trees whose roots have been exposed, causing the trees to fall over and die.

As one can see in this brief [video](#), shot in January 2016, from a second-floor window of my Chesley Drive home and looking toward the Mill Plaza, the area around College Brook downstream from the Plaza (which is otherwise a narrow and tame brook) becomes a lake during heavy rain and snow

melts. The brook channel rages like a major river, and a new brook channel (also with some “white water”) opens and then merges into the regular brook stream.

CDA was informed about the regular flooding and about flooding videos sent to the Planning Board. (See, for example, minutes from [Jan 27 2016](#), p. 9.) Yet, in 2020, the Horsley Witten reviewer, Janet Bernardo, reported to the Planning Board on [May 27, 2020](#) (see 9:25:30pm), that there was no College Brook flooding, that CDA was “able to explain how College Brook...continuously flows to Mill Pond, so there’s no real restrictions such as if it was a bathtub with a small outlet or something that would restrict it....”

I hope to have the opportunity to show the Conservation Commission a PowerPoint presentation with pictures and video regarding the flooding downstream from the Plaza before you send your advice to the Planning Board. In the meantime, I refer you to a related letter by my immediate next-door neighbor, [David McCormick 6-19-20](#).

2006-2008—CDA Encouraged, then Abandoned, Mill Plaza Study Work

In 2006, John Pinto of Colonial Durham Associates (CDA) – the New York City based owner of the Mill Plaza – encouraged Durham to “develop its vision for the future.” That led to the 18-month collaborative Mill Plaza Study Committee (MPSC) effort, culminating in the American Institute of Architects’ award-winning 2008 plan for a [Durham Village Center](#). The MPSC proposed a Plaza that “provides residents a ‘sense of place,’” with “year-round community space – indoor and outdoor areas where people linger to meet and talk to their friends, shop, and enjoy all of the seasons.” Such a Plaza of enhanced commercial and aesthetic value would feature “an expanded grocery store, retail shops, offices,” with housing (student, senior, workforce), if any, **“distant from current residential neighborhoods.”** There would be **“a brookside park for walking, biking, and other activities” with “curves and other features to appear more natural.”**

The Durham/AIA150 Community Partnership was honored by the NH Planners Association with its “Plan of the Year” Award www.nhplanners.org/ (look under Events, programs, awards, 2008). See press [release](#). But CDA walked away from the project (other than borrowing the phrase “Durham Village Center” for some of its horrendous site plans). Instead, just a year later, CDA proposed further incursion into the wetland setback

2009—CDA Tried Again to Add Parking at Rear in Wetland Buffer

(This led to a multi-month series of Planning Board and Conservation Commission meetings.)

In May 2009, CDA revived its attempt to add more parking spaces at the Southern rear of the Plaza – in effect, implicitly requesting retroactive permission for the unlawful (and still unrestored) bulldozing in 2002. CDA also made the implausible claim that more parking was needed behind the second Plaza building for the *customers* of Plaza businesses (rather than for their actual attempt to add more rental parking spaces). CDA also pressured its commercial tenants to testify falsely to that parking need (as several reported directly to me). At that time (2009), the rear of the lot, where the

expansion was planned, was almost empty almost all of the time, except for skateboarders (as documented for Town Boards in resident photos).

The 2009 Plaza application strategically treated the degraded results of its 2002 unauthorized bulldozing and paving as the “pre-existing condition” for 2009 “improvement” – rather than as damage from a major violation that had not yet been reversed. Therefore, CDA claimed that the 2002 damage they caused was not relevant to the 2009 application’s environmental or stormwater impact – just as CDA assumes (through silence) in 2020 that it has no lingering responsibility to mitigate the added runoff and flooding from its 2002 illegal bulldozing as part of its stormwater plan and, indeed, that it needs to remove an additional 17,415 sf hillside to squeeze in massive Building C.

The 2009 application by the Plaza ran directly counter to the thrust of the 2000 Durham Master Plan, which recommended restoring and enhancing the College Brook Greenway and buffers between commercial and residential zones. The Plaza’s application also ran counter to the 2007 [College Brook Study Report](#) that was part of the 18-month collaborative effort of the Mill Plaza Study Committee, which called for enhancing the neighborhood buffer. That report, for example, offers the following recommendation: ***“Restore vegetated buffers to improve water quality, moderate flood waters, provide wildlife and plant habitats and travel routes, contribute to the scenic quality of the site, and improve protection of the residential neighborhoods from the noise and visual impact of the commercial area....”*** (p. 8).

Resident Petition

A resident petition (eventually signed by **310+ Durham residents from 70 different streets all over Town**) and a cartoon, illustrating the history of the long struggle to protect the College Brook greenway buffer were completed. A UNH student who had grown up in Durham spoke eloquently about the potential further damage to a cherished *greenway* that would become a “*blackway*,” and a petition against the proposed parking expansion from the Student Environmental Action Coalition (SEAC) at UNH was submitted with 93 signatures. A petition against the parking expansion was submitted from neighborhood children who walk through the wooded path between Faculty Road and the Chesley Marsh and through the Plaza to school. More than three dozen residents spoke at the meetings and/or wrote letters to the Planning Board and Conservation Commission. Many others attended the meetings.

See “The Mill Plaza & the Return of the *Buffer-Eating Bulldozer*” [here](#). Text of Petition Opposing Expansion of Mill Plaza Parking–October 2009 [here](#).

Oct 8, 2009—DCC Discusses Plaza Parking Expansion Proposal for Almost 5 hours

Reason for DCC Meeting: The 2009 Plaza parking application came before the Durham Conservation Commission (DCC) primarily because the 2,600 sf of grass the Plaza wanted to pave is within about 20 feet of the wetland, and the Zoning Ordinances require a 75-foot buffer. (The DCC also considered parts of the plan that came within the Shoreland Protection Zone, but approved that

variance because the incursion was mostly for a minor, but slightly improved stormwater system.) The Plaza filed for a “conditional use permit” based on Zoning ordinance 175-61.

Focus of the debate: What’s the “pre-existing condition”? The DCC had a long discussion about whether the “pre-existing condition” for analyzing the impact of the Plaza’s application should be the site as it was before the unauthorized 2002 bulldozing and paving (since an acceptance of the current application would be the first legal permission to alter the hillside from the wooded forest it was up until mid-2002 into its current condition) or whether the “pre-existing condition” should be the 2009 degraded condition of the site following the illegal 2002 bulldozing. (The twist was that the degraded 2009 condition could possibly be improved a small amount by aspects of the Plaza’s 2009 plan, including a modest stormwater filtration system with an estimated \$10,000 cost, and a little landscaping).

The DCC also had to grapple with the devil’s bargain presented by the Plaza to them, which was essentially: *~Allow us to do even more damage to the greenway (by paving over 2,600 sf more of green space and violating the 75-foot setback from a wetland in order to gain 4 more rental parking spaces), or we’ll withdraw the whole plan, including a modest stormwater mitigation system that will reverse at least a bit of the damage we’ve already done and are doing.~*

DCC Conclusion: In the end, through Jamie Houle’s skilled chairing of the meeting, he was able to bring a very diverse set of views into a coherent motion that was approved unanimously, which can be summarized as follows: If the “pre-existing” condition is the current degraded site (after the illegal 2002 bulldozing), then the DCC believes the overall project meets three of the four standards for conditional use (#’s 2, 3, and 4). **But even with that CDA-favored definition of “pre-existing” condition, the DCC expressed reservations about the “need” and “necessary location” for the four spaces the Plaza wanted to put in the wetland buffer.**

“Buffers are created for a purpose,” said Chair Houle. The DCC then left it to Chair Jamie Houle to craft a footnote (which he had preferred to include directly in the motion) that **if the “pre-existing condition” is determined by the Planning Board to be the site before the illegal 2002 bulldozing, then the application failed to meet ANY of the standards necessary for conditional use.**

The CDA application then returned to the Planning Board for a series of October & November meetings.

The November 4, 2009, Planning Board meeting saw a dramatic end to the Plaza’s 2009 application to expand parking with 28 spaces in the greenway and wetland buffer. After some interesting twists and turns, **the Planning Board voted 5 to 2 to reject the Plaza’s application.**

The twists and turns of the meeting revolved primarily around a legal issue raised by Scott Hogan (the land-use attorney who was representing the interests of residents opposed to the application).

At the October 28th meeting, attorney Scott Hogan informed the Board that, in addition to many other problems with the application raised by him and by residents, the Planning Board could not approve the current application because “the unapproved commercial rental of 28 spaces is an unauthorized, unlawful use, which violates the clear language of the Zoning Ordinance....”

The Town’s attorney weighed in, saying that once the Plaza began renting parking spaces, however many years ago, CDA was indeed in violation of the Plaza’s site plan and that the Planning Board could not approve the current application until the Plaza applied for a conditional-use permit to allow the long-term rental. (That application for the long-term rental-spot business has never been made.)

Attorney Mitchell’s full assessment can be seen [here](#). The full minutes for the November 4, 2009, Planning Board meeting can be read [here](#).

November 20, 2009—Planning Board Notice of Denial of Proposed Parking Expansion

The Board carefully considered the arguments presented by the applicant and interested citizens both for and against, together with the purpose and specifics of the current zoning ordinance.

As stated at the Planning Board meeting of November 4, 2009, the motion to disapprove the applications stated that the applications were denied for the following reason(s):

- 1. Based on the advice of the Town Attorney, the Planning Board is not in the position to consider approval of this application without the owner first applying for approval of the existing leased spaces.*
- 2. The applicant has failed to address activities that were not approved by the Planning Board in 2002 such as clearing, excavating and grading.*
- 3. The 70 foot buffer approved on the original plan in 1978 is an important residential buffer and should be maintained as approved in the 1978 plan.*
- 4. The Planning Board is in agreement with the Durham Conservation Commission who finds that items 2-4 of Zoning Ordinance Section 175-61 are met assuming acceptance of the current existing conditions. The Commission has reservations regarding item one (1) which deals with alternative location/configuration for parking that could achieve the developer’s needs while respecting the integrity of the wetlands buffer.*

See full Notice of Denial letter [here](#). For a blow-by-blow account (and links to meeting minutes) of the months of meetings regarding CDA’s attempt to add more parking in the wetland buffer, please see pp. 36-52 in my Plaza History.

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SUMMARY & CONCLUSION

To repeat, a pattern of illogical arguments and false statements (as well as illegal actions) characterizes Colonial Durham Associates poor “citizenship behavior” in Durham over several decades. CDA has long pushed as hard as it can to get away with whatever it can get away with in terms of poor stewardship of Durham’s central property, illegal actions, and applications based on illogical arguments, strategic omissions, and outright misstatements of fact. Now that CDA is proposing a major transformation of the core of Durham for a century or more, it is long past time to put a stop to their misbehaviors.

Given the history, as well as the major flaws in the current application, I hope that the Conservation Commission will carefully consider what I and other citizens and experts have submitted (recently, and over the years) and then, with the extensive power of Conditional-Use permitting, advise the Planning Board to turn down the Wetland & Shoreland Conditional Use permits – *unless* CDA returns with a site plan for less massive buildings and retaining walls, more landscaping, and, particularly, unless the 17,415 square feet (4/10th of an acre) of thickly vegetated hillside behind current Building Two is no longer targeted for destruction.

CDA should also finally take responsibility and address the site degradation (and increased downstream College Brook flooding and erosion) that it caused with its illegal bulldozing in 2002 of a 9,000 sf (1/5th acre) hillside near the Chesley Marsh. The “pre-existing condition” for the Conservation Commission’s assessments in 2020 should be the site *before* that hillside was destroyed in 2002.

Moreover, as Rick Taintor has indicated, the Planning Board is relying on the “advice of the Conservation Commission that all standards for the applicable overlay districts have been met **in addition to the general standards for all conditional uses.**” The general standards of Conditional Use indicate that mixed-use with residential projects must be rejected if they are “**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....**” – which the proposed multi-story buildings certainly seem to be. [See CDA’s overhead image of Bldgs B&C at slide #11 [here](#); the comparatively tiny structure at the upper right is one of the *larger* homes in the adjacent neighborhood.]

Also, one wonders how multi-story student dormitory units for 258 residents added to a site that has always been a buffer for the Faculty Neighborhood from student life and noise on campus, Main Street, and beyond could possibly meet the restrictions that “**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. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare.**”

Indeed, what is restricted under the Conditional Use ordinance reads like an operational definition of

what adding the proposed student dormitories directly adjacent to single-family homes would obviously do.

Moreover, Durham Master planning has long noted that student housing should be “separated from town resident housing so that lifestyles don’t directly conflict.” (See, for example, pp. 3-9 & 6-44 at: [Master Plan Update May 1989 - Adopted as Master Plan November 3, 1993.](#))

Finally, Durham’s Conditional Use ordinance indicates that the Planning Board has the authority to require strict conditions beyond the minimums of the Ordinance, “to further the objectives of this ordinance and the Master Plan,” including:

- Front, side, and rear setbacks in excess of the minimum requirements
- Screening of the premises from street/adjacent property in excess of minimum requirements
- Landscaping in excess of any minimum requirements
- Modification of the exterior features of buildings or other structures
- Limitations on buildings/structures size more stringent than minimum/maximum requirements
- Footprint or lot coverage less than the allowed maximum of this Ordinance.

All of these conditions would be reasonable and appropriate to set for Colonial Durham’s Conditional Use site-plan application. Moreover, Conditional Use projects must “**preserve identified natural, cultural, historic, and scenic resources on the site.... This shall include, but not be limited to, identified wetlands, floodplains, significant wildlife habitat, stonewalls, mature tree lines...or sites, scenic views, and viewsheds,**” which would argue further for protection of the wooded hillside behind current building two and the infringed-upon areas in the wetland setback.

Please guide the Planning Board toward a Mill Plaza redevelopment that better meets our social and environmental needs and that complies with our Zoning.

Sincerely,

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