

TEN Planning Board Confusions on Jan 27, 2021 over ConCom Recommendations During a “Public Hearing” with Stifled Public Input

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1. Wetland Setback CU Criterion #1 is about the proposed *USE*, not the proposed *DESIGN*

“There is no alternative location on the parcel that is outside of the WCOD that is reasonably practical for the **proposed use**.” [Article XIII Wetland Conservation Overlay District](#), p. 4 (bold added)

This CU WCOD permit criterion would be meaningless if it applied to the proposed *design*, since any applicant could then circumvent the Ordinance simply by designing oversized structures that could not possibly fit on the site without incursions into the wetland buffer (as CDA has done), and then demand a permit by saying that there’s no other location to put those oversized structures. See the precedent for rejecting that strategy drawn on by current Conservation Commission, [Mathes Terrace & 15 Madbury Rd Project](#).¹

2. The PB confused two distinct uses of the term “buffer” in Mill Plaza review/requirements

How can it be that the CDA site plan has NO “increased natural buffer” (as is required by 2015 Legal Settlement & per Zoning/ConCom recommendation, at 75’), yet also have 25% reduction in impervious within the “setback buffer”? Per Rick Taintor 2/20/21 email to me, *there are two distinct buffers at play*:

Buffer Type One: “The settlement agreement calls for the revised plan to ‘have increased natural buffer along the southern property line adjacent to the College Brook.’ That implies that the ‘buffer’ is both vegetated and **contiguous to the brook**. (The site plan attached to the settlement agreement actually shows such a condition.)”

Buffer Type Two: “The 25% figure refers to the reduction in impervious area within the 75-foot buffer (CDA table from sheet C-701).... an improvement over existing conditions [on that part of site], but it is not the same thing as an increase in ‘natural buffer.’ The new pervious areas consist of parking lot islands and the gravel wetland.” In short, **landscape islands in a parking field bear no relationship to the Zoning requirement nor to the two [Settlement](#) requirements regarding buffers**.² (Moreover, the proposed increase in pervious within the 75’ buffer is, ironically, partly related to the fact that the *current* 10’ wide landscape islands, although water-absorbing in the past, were paved over some years ago by CDA, after people tripped on the loose bricks in them.)

3. Focus on increased pervious area has obscured OVERALL planned decreased pervious

The overall site plan calls for a significant *increase in impervious area* with the planned destruction of the 1.1-acre thickly vegetated hillside between current Building Two and Main Street housing. (After months of strategic obfuscation by CDA, Rick Taintor was finally able to

ascertain on [Nov 18 2020](#) that this entailed an increase in impervious area in the “New Development” area of 47,610 sf, 1.09 acre.)

4. Terrible “existing conditions” do NOT provide grandfathering WCOD permit protection

CDA continues to claim falsely that the wetland area they want to build on is grandfathered and thus exempt from the Zoning. This has been repeatedly disproven, most recently in [Rick Taintor Email 10-23-20](#) to the Conservation Commission: “**I don’t believe that *any* of the proposed redevelopment within the wetland buffer, including the parking lot, is exempt from compliance with the zoning**, because (a) new underground utilities and infrastructure are proposed in existing paved areas, and (b) there will be extensive changes in grade throughout – some areas within the wetland buffer are proposed to be raised or lowered by up to at least 3 feet in elevation. As a result, **all the items listed on pages 2 and 3 of my [report](#) require conditional use approval.**” (Emphases & link added.) See more from Mr. Taintor and Zoning Administrator Audrey Cline on lack of CDA grandfathering [here](#).

5. A high-quality stormwater system is required & is no “substitute” for required setbacks

The proposed stormwater management system – a *requirement* for the site redevelopment – is designed to slow the flow of water from the site into the flood zone. It will not mitigate pollutants and nutrients flowing into the impaired College Brook. Conservation buffers are needed to work in *combination* with an engineered stormwater system to filter nutrients, reduce flooding, improve water quality in the watershed, promote biodiversity, and stabilize the ecosystem. *Both* are needed, both are *required*!

6. With *increase* in impervious areas on site, the stormwater system will not reduce flow

As the [external Stormwater reviewer](#) indicated; “the runoff volume for all storm events analyzed will increase with the proposed design” (p. 3). As noted on p. 9 [here](#), even Tighe & Bond’s optimistic calculations indicated little benefit at 100-year storms, which, as the new [flood maps developed by Princeton researchers](#) document, are increasingly *annual* events in the Northeast. The expected greater storms will overwhelm the capability of the stormwater system proposed. Moreover, as Prof. Ballestero explained on Jan 27, the delayed release of water from the site with the stormwater system, flooding might *increase* because Plaza water will join the slower flow from upstream at the same time.³

7. Streamworks’ Brook Restoration Plan is no substitute for following WCOD Zoning

The *possible* Brook restoration efforts of the skilled & experienced Prof. Tom Ballestero (many steps of which are attempts to undo [years of Plaza damage](#) to the curbing, plantings, etc.), are largely unrelated to setback requirements, with one exception⁴ cited by Rick Taintor.

8. Damage to the Brook and flooding from “the other side” is comparatively negligible

A PB member claimed that the Plaza’s role in Brook damage and flooding should be downplayed because of damage from the “other side” of the Brook. This is questionable. The

land on the side across the Brook from the Plaza is completely pervious. Moreover as Prof. Wil Wollheim informed the Conservation Commission, the Plaza site is uniquely massive impervious surface in the College Brook watershed. Moreover, CDA dramatically increased the impervious Plaza area by illegally bulldozing 9,000 sf of the eastern hillside in 2002, something unmentioned on Jan 27 but taken into account in the ConCom recommendation. And citizen video illustrate that the flow of water coming into the Brook from UNH and above during heavy rain is much less than the water flowing out.⁵

9. UNH past treatment of the Brook is not relevant to the Plaza Review

Not only are UNH actions not under Planning Board control or supervision, as the Conservation Commission noted after first raising the issue, but as the Conservation Commission eventually realized (prompting a spoken apology to UNH), the University has spent the last 10 years (in coordination with CDA Engineer Joe Persechino's company, Tighe & Bond!) to reverse past damage to the Brook (see summary [here](#)), confirming my prior statement that "UNH has worked to reduce flow into Brook, while Plaza promises only not to significantly increase it."

10. The Public is supposed to be heard in a "Public Hearing" prior to deliberations

Holding extensive deliberations, influenced heavily by Applicants, and keeping the public silent until after 11pm and then telling them to "speak as quickly as possible" and "keep it short" does not match the spirit or the regulations for "Public Hearings." See pp. 109-110 of the [NH Planning Board Handbook](#) and Durham's own [PB Public Hearing rules](#). The public *shall* be heard *before* deliberations.

The exclusion of the public on January 27 and the rebuffing of citizen attempts to be heard meant that the above NINE confusions were not corrected in a timely matter with the help of public input. These confusions have tainted the review process. The exclusion of the public also delegitimizes the deliberations that took place and raises profound questions about the "messages" sent to the Applicant during this meeting, including how a promised CDA "contribution" of \$25,000 had the feel of sealing an agreement for the PB *not* to follow the WCOD Zoning requirements. This situation needs to be "repaired," and quickly.

¹ The same general distinction between proposed USE vs. submitted DESIGN arose in the [8 Mathes Terrace & 15 Madbury Road Project](#) that the current Conservation Commission explicitly used as a precedent: "The Durham Conservation Commission is concerned that the project construction will occur within the Wetland setback area. Protection of this area and nearby Pettee Brook is important. ...[I]n regards to Standard 1, an alternative location outside of the wetland setback area is feasible when the size of the building is reduced. **We do not recommend granting a CUP....** Our main concern....is that...the proposal did not meet Standard 1 – "There is no alternative location on the parcel that is outside of the

SPO District that is feasible for the proposed use.” [NOT for the same exact over-sized design, but for a similar “use.”]

“An alternative location outside of the wetland setback area would be feasible if the project was designed differently, and the scale of the building was reduced. **There did not seem to be any practical reason that the construction needed to extend into the buffer area other than the developers were trying to make the building capacity as large as possible....** An alternative location outside of the wetland setback area would be feasible with a smaller building design...”

In other words, the applicants in the Mathes case (and now, Mill Plaza) created their own hardship by proposing a design oversized for the site, intentionally designing structures that would infringe deeply on the wetland setback, when smaller structures, for the same *use* could respect the setbacks.

² [Settlement](#) 1d: “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.**” And 1f: “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.”

³ Prof. Ballesterio at 10:17:12 on Jan 27: “Today, when it rains, it hits the asphalt gets to the Brook and runs out to the Oyster River very quickly. While all the other runoff from upstream is coming downstream [more slowly]. In the future, you are going to be holding that runoff and then slowly releasing it at the same time the water is coming from upstream.”

⁴ “And then the one I think would have probably the most impact on the plan would be p. 6, talking about laying back the slope or using reinforced earth at the steep slopes. I think before you get to anything in terms of a planting plan, or invasives removal plan, or anything along those lines, you need to be figuring out what the base is. What’s going to be changed? Is there going to be some type of reinforced earth added?” 10:29 pm, Jan 27 2021 ([video](#))

⁵ See, for example, GENTLE UNH water flowing into College Brook at Plaza entrance at Mill Road [Dec 5 2020, 3:02pm](#) (12 secs); FLOODED walkway in Plaza, along College Brook, with parking-lot runoff overwhelming drains into the Brook, [Dec 5 2020, 3:05pm](#) (44 secs); TORRENT downstream of Plaza (Chesley Dr), [Dec 5 2020, 3:14 pm](#) (9 secs). See also: [COLLEGE BROOK FLOODING YouTube Channel](#).