

Late attention to months of resident concern over Plaza's "License-Plate Tracker" proposal

To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / Feb 7, 2022

➔ Please include the following letter to the Town Council in the legal record for Mill Plaza review ⬅

24 November 2021

To: Durham Town Council

From: Joshua Meyrowitz, 7 Chesley Drive, Durham

Re: Update on LPRs following my Council Comment

As you may recall, in my 4.5-min comment on Sep 27 ([7:24:31 pm](#)) and then in a more detailed letter ([Joshua Meyrowitz 10-1-21](#)), I raised concerns about the Town possibly approving an illegal plan to scan the license plates of everyone driving into the Mill Plaza. As I detailed, NH is known for having the most restrictive law about LPR use, and the applicable RSA seems clear on LPRs being prohibited to all except law-enforcement (with significant restrictions even for law enforcement):

“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.” – [NH RSA 261:75-b](#)

The second key point in my public comment was that multiple issues repeatedly raised by the public, attorneys, and experts over *many months* have received no response or attention from the Planning Board, as highlighted in my letter's subject subheading: “Inattention to intent to violate NH RSA 261:75-b (& ignoring the public).” There has since been some attention to this one LPR issue.

On Sat, Oct 2, Todd Selig forwarded my Oct 1 email to Contract Planner Rick Taintor, copying CDA's agent Sean McCauley and CDA's attorney Ari Pollack, writing:

Dear Rick, If not already being considered as part of the process, please be sure this topic is included as part of the outstanding long list of issues for you and the planning board to consider/address as you work through the CDA application currently before the planning board. My general understanding is that CDA is currently evaluating the issue that has been raised by Joshua Meyrowitz. CDA regulates parking use of the Mill Plaza property in its current state without the use of such license plate scanning technology, which I also believe to be prohibited in NH. Todd

When I inquired, Rick Taintor told me that he did not post Todd's email to the Mill Plaza site because:

Todd's email was addressed to me (copied to you and CDA) rather than to the Planning Board, so it was not correspondence to the Board that needed to be posted. In addition, I had already received a separate email from Sally [Tobias] requesting me to consult with Laura [Spector-Morgan] and I was already following up on her request....

Indeed, the Town Attorney did weigh in: [Email from Town Attorney 10-4-21 Re: License Plate Readers](#). In that letter, Laura Spector-Morgan (LSM), draws on the definition of LPRs that describes a *common use* by police (those personnel the RSA says the use is restricted to) rather than on the general nature of the technology. Building on that definition, LSM turns on its head the intent of the statute to prevent all private and commercial use, arguing inventively instead that since Mill Plaza's

LPRs would not be mounted in a police vehicle and would not be monitored by law-enforcement personnel, Mill Plaza's LPRs would not, in fact, be LPRs, as defined by the statute. Thus, she asserts Mill Plaza's "use of the technology would not violate RSA 261-75-b."

The LSM letter was sufficient for PB Chair Paul Rasmussen finally to address, in a fashion, more than 8 months of concerns expressed by residents. Mr. Rasmussen read the LSM letter at the Oct 27, 2021 Planning Board meeting, adding (at 7:33:14pm, [video](#)): "That was another thing that had been brought up several times asking us to challenge the applicant on their use of. And there's no reason to perform such a challenge since their use is legal."

But Alternate Planning Board member Barbara Dill immediately expressed concerns: "But wait. I also question that, because that statute seems to me to be referring only to use by law enforcement officers. It says that right after the part that Laura Spector pointed out. And this is *not* a law enforcement use of license plate readers. This is a private use. And I don't know what the rules are about private use, but I think we have an obligation to find out how this works. How long this information is held, whether it can be hacked, where it goes, etc., etc. On and on. Does it just keep piling up? Does it ever know when you *leave* the place. We don't know any of these things, and I think we *should* find out."

CDA's Ari Pollack responded in part: "We have no intention to violate NH law.... I think it is the case that these stationery mounted scanners are not currently prohibited. It wouldn't surprise me if the law evolves in that way. and it also wouldn't surprise me if just as many people are in favor of it as are opposed to it. And so my suggestion would be that you consider a condition that simply says that it can be used if it's legal in NH, and not used if it isn't. And, we will, of course figure it out before we install something, and we'll either use it or not as law dictates." [The LPR discussion on Oct 27 runs from 7:32:32 to 7:39:20.]

In short, my public comment at the Town Council led to an end of silence on the LPR issue, but it also highlighted in ways disturbing to me and others how *our* Town Attorney sometimes appears to intervene on behalf of site-plan applicants at the expense of the best interests of the citizens of Durham and the common understanding of RSAs and our Zoning Ordinance. With NH being known for having the strictest limits to LPR use, *even by the police*, this novel LSM interpretation has the appearance of something written by a staunch advocate for CDA, going even further in her written opinion than CDA's own normally very assertive attorney was willing to go in his Oct 27 statements.

As Attorney Allmendinger wrote in his ignored [June 16, 2021](#) letter: "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."

With LSM's input, the situation on LPR use in the Plaza now remains ambiguous. An observer of NH judicial processes informed me that if the LPR issue went to a court, a judge would be unlikely to support the LSM claim, since "there's a Latin phrase favored by courts, *in pari materia*, which requires that statutes covering the same subject matter must be read together, not separately, so as to reach a conclusion consistent with both of two or more statutes." He added: Ms. Spector-Morgan's "reading is quite a stretch given, the language of 261:75-b." Time may reduce that ambiguity.