Regarding Improperly Posted June 2021 PB Chair Email to the Board: "misuse_of_conditional_use_criteria.pdf"

To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / Feb 9, 2022

I am writing about a serious omission in the June 2021 postings on the Mill Plaza CUP site, which resulted in a significant deficiency in public information and a lack of advance notice. That led, in turn, to a profound negative impact on the quality of the deliberations in the August 25, 2021 Public Hearing for Mill Plaza, a hearing that sent multiple misguided signals among Board members, to the public, and to the applicant (as others have documented, including regarding the misapplication of WCOD Zoning requirements).

Wrong about Civil Rights: I and many other residents were surprised – and offended – during the August 25, 2021 Public Hearing, when the Council Rep to the PB, Sally Tobias, and the PB Chair, Paul Rasmussen, invoked the Civil Right Act, the Fair Housing Act, and anti-racist rhetoric to counter years of residents' concerns about the best ways – and the worst ways – to redevelop the prime property in our downtown core.

The civil-rights talk on August 25 served to misinform other Planning Board (PB) members and the public, by falsely suggesting that college students are a "protected class." Those discussions also conveyed the unfortunate implicit message to Colonial Durham Associates (CDA) that our Conditional Use Zoning would not be applied rigorously to the clearly anticipated "external impacts" of a site plan that would add 258 "beds" to a property that has never had any housing. As detailed in Beth Olshansky 8-31-21, and as documented in Mill Plaza History, 1967-2018 by Joshua Meyrowitz, conditional use zoning was applied to the Central Business District (CBD) in 2013 (prior to any CDA redevelopment proposal) precisely to address concerns about the "external impacts" of student housing as experienced locally and documented nationally.

That meeting was bad enough on its own. But we now know that the public should have been warned, yet was not, regarding this incorrect line of thought. A neighbor has forwarded to me a link to a June 27, 2021 letter from Chair Paul Rasmussen to the Planning Board, two months before the horrendous August 25 meeting, that is posted on "Other Planning Information," with the same false Fair Housing information and similar claims and word-for-word quotes that were employed on August 25 to throw the review discussion off track:

Conditional Use Criteria - Email from Board Chair Paul Rasmussen (June 27, 2021)
www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/page/15701/misuse_of_conditional_use_criteria.pdf

Thus, the PB members were presumably less shocked and surprised on August 25 than the public was, in that they were given a two-month advance warning (and "training from the Chair") on that misguided issue as it (supposedly) related to Mill Plaza review.

That email was obviously a communication in preparation for upcoming Mill Plaza conditional use discussions, in which the Chair planned to argue that the Board was not legally allowed to discuss the likely “who” moving in (students). Yet that crucial advance notice to the Planning Board was not posted on the Mill Plaza site in June (or since), as ought to have been done immediately. Had it been properly posted in June, residents would have had a chance to respond directly (or with the help of legal counsel) to incorrect claims in the letter, and the related wildly off-track deliberations on August 25 (see samples after the text of the letter further below) might never have taken place. That was a bad, and fateful error.

On February 8, 2022, I wrote to Rick Taintor about the letter, fully expecting him to say he had never seen it. I also wondered whether the not-publicized letter I forwarded to him was problematic in terms of right-to-know requirement. His reply:

---------- Forwarded message ---------
From: ***Rick Taintor*** *<rtaintor@ci.durham.nh.us>*
Date: Tue, Feb 8, 2022 at 11:58 AM
Subject: Re: Conditional Use Criteria - Email from Board Chair Paul Rasmussen (June 27, 2021)
To: Joshua Meyrowitz <prof.joshua.meyrowitz@gmail.com>

Hi Joshua,

I have just looked back in my emails and see that I received Paul’s letter on June 28, and that Michael [Behrendt] forwarded it to the Board and posted it on the “Other” page on the same day. As Michael was handling the posting and distribution, I didn’t think much about it at the time. I certainly wouldn’t second-guess Michael’s choice of how and where to post it.

In his letter Paul gives an opinion about the conditional use criteria and cautions that Board members should not discuss those opinions until a future meeting. As you note, Board members did in fact do that at the August 25 public hearing. Regardless of where Paul’s letter was posted, the discussion took place at a public hearing, so I am not concerned.

Rick

Rick Taintor, AICP
Community Planning Consultant
978-872-8230
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Whether what occurred and did not occur with respect to this letter technically violates "right-to-know" rules, I believe the public indeed had a right and a need to know about it – yet we were kept in the dark.

Please see the Rasmussen letter below and the resulting dialogue on August 25 on the pages that follow.

To: Durham Planning Board

Subject: Misuse of Conditional Use criteria

For this discussion, I suggest that you familiarize yourselves with RSA 354-A, New Hampshire's "Law Against Discrimination" and the New Hampshire Municipal Association's treatment of Fair Housing in New Hampshire.

I would like to draw specific attention to **354-A:1** which includes

> "The general court hereby finds and declares that practices of discrimination against any of its inhabitants because of age, sex, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. "

And in the NHMA document the paragraph on **Age Discrimination** and the section on **Prohibited Activities Under the Fair Housing Act**, which several federal courts have affirmed apply to Municipalities and their Boards.

There is a hierarchy of law within Durham that runs Federal Law, State Law, Local Laws and Regulations. Our Zoning Regulations and Conditional Use criteria are subservient to the greater laws of the land. I feel that there is currently a concerted effort by some in the community to utilize the Conditional Use criteria in an inappropriate manner to urge us to violate RSA354-A. This is their right under the First Amendment, but we should be vigilant regarding which arguments we allow to sway our decisions so that we may reasonably defend them in the end.

The Conditional Use criteria have us evaluate social impacts, as well as potential noise, odors, and hours of operation. These are meant regarding physical structure or commercial activities. Examples would be placing a gentleman's club near the middle school, noise caused by a metal manufaturer, or odors from a processing operation. They are not meant to be used against people going about their normal lives.

As a child I remember one of my elders telling me that you can choose where you live, but you cannot choose who moves in next to you. This is a yardstick of discrimination that is easy to apply and that has been bothering me for a long time.

I appreciate your views and comments, but please hold them until an appropriate meeting of the Board.

Paul Rasmussen
Durham Planning Board Chair

Excerpts from the August 25, 2021, Public Hearing

Meeting Agenda, Video, Minutes; Mill Plaza app site, Citizen Comments

8:11:44pm

Council Rep to the PB, Sally Tobias (ST): "I'd just like to say one more quick thing. I think that the frustration. And I hope you know what it is that is causing the community angst. **It is unfortunately the 'who' who is going to be living there. And I don't like saying that, because I do feel it kind of enters into the territory of Fair Housing, because we can't determine between who.** But I think I'm saying that more for the community than for you [resident Tom Timpone] is that: We can't make a decision based on 'who' is living here unless it is a protected class such as of an over 55 or over 65 class, you know, a classification of housing. Or if it is 'workforce housing.' So I think that the community is coming out and saying we don't want more students, but there's no such thing as a student classification for housing. Students fall into the 'everybody else' category. And, so that's where I think there is a some uncomfortable feelings from my side when I see some of the comments from the community, because it's like, 'oh, we can't really decide who's going to live here.' And 'not in my backyard.' And, unfortunately, it does kind of ring true for some things I heard when I was in California from neighbors about where you shouldn't move, shouldn't live. It was very ugly. And I don't want to repeat that. And I was, I have to admit I was aghast when I finally started hearing it where I lived in California. And I have to admit I was a bit aghast when I saw some of the [lawn] signs around town, because I did felt it was a bit – you know, you could disagree – but I did feel it was a bit biased and bigoted. Because 'who' is gonna live there is what upsets the community…."

Chair Paul Rasmussen: "Yes, actually, I had something that I wanted to talk to the Board about. Thank you, Thank you. But. You know several members of the Board have talked about 'the who.' And I wanna read something and this is for everybody, not just here in the room. And it's from RSA 354A: **'The general court hereby finds and declares that practices of discrimination against any of its inhabitants because of *age*, sex, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.'**

"RSA 354 is the NH Civil Rights Act. Right. We're talking, and it is illegal for us to make a decision on *housing* based on the age of who is going to be there. It's very simple. All right. It's in the Civil Rights Act and the Fair Housing Act. And the Federal Courts have said – and, even though it's written toward landlords and owners – the Federal Courts have upheld that Town Municipal Boards, like us, are held to that same standard in terms of the projects we approve and disapprove."

Richard Kelley: “With the exception, of course, of age restriction, age-restricted housing. That is legally— ”

PR: “Right. In certain cases, you are allowed to discriminate *for* somebody. But you are never, *ever* allowed to discriminate *against* somebody. It falls into the category of ‘you can move into anyplace you want. You can live wherever you want. You do NOT get to choose who moves in next to you.’”

ST: “Just a protected class, such as over 55.”

PR: “Yes” *[4 seconds of silence; NO challenge from any PB member] “*So the talks of, you know, ‘students shouldn’t be there’ *[arms crossed & then out as in “no way” is that acceptable!]* it’s irrelevant to our decision. [Pause] Yes, Mr. Bubar.”

James Bubar (JB): “I don’t disagree with anything you said, Paul. But I am a little concerned with our reaction to the food truck and the issue of noise. And we’re sort of silent on noise from 258 beds.”

PR: “It’s apples and oranges in this case, right. In one, you have a commercial establishment, which would be generating the noise and attracting the noise as part of its commercial enterprise. In the other, it’s res-, housing.”

JB: “Which is [also] a commercial enterprise.”

PR: “But, well, it, it’s, it, when you start to talking about the culture of the person who is living there and whether they are loud, or how they play their music or what they cook and what they smell like, or whatever, that’s protected. You can’t discriminate based on that.”

JB: “Then the issue of noise is not an issue of Conditional Use, is what you are saying?”

PR: “It’s the noise that would be generated by a normal commercial applications, right? But somebody’s house is not, you know – if it comes down to, so in case of the food truck, for instance, you put 20 people out there talking, whatever, it doesn’t matter who they are, there’s going to be a certain amount of noise, okay. When you start talking about the noise generated by an apartment, you can’t say well, this person is louder than that person. That’s where—”

Chuck Hotchkiss: “Even when there’s evidence.”

PR: “Even if there’s evidence, yeah, that becomes a discrimination issue, yes.”

Board Member Heather Grant: “My note is that the application before us here [CDA] has been going on for many years and is actually under old zoning right? And this [food truck] is a brand new application. The food truck is a brand new application and is a completely different; it’s completely different. [pause] As far as I can tell it [which?] would be considered part of the zone, the district, that this application is under.”

ST: “They are irrelevant to each other. One is [?] and one is development.”

8:23:39
Board Member Richard Kelley: “To respond to what James said earlier, I think that there is a door open for us under conditional use with mixed use that *applies*, to noise, odors, those external impacts. Despite *who’s* there. You know, it could be me, it could be you. It doesn’t matter necessarily *who’s* there, it’s that, as you [Sally Tobias] put, there’s a human, right, there. There’s *some*body there.”

PR: “Right, but we sort of need to be blind as to who that person is, but just think of it as a person.”

RK: Yes!

ST: “A Tenant.”

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JM to PB b re: “misuse_of_conditional_use_criteria.pdf”