

Settling the “Planning Board Role” regarding the 2015 Legal Settlement

To the Planning Board from Joshua Meyrowitz, 7 Chesley Dr., Durham, NH, March 19, 2021

As was clear from the February 24, 2021, Planning Board Public Hearing on Mill Plaza, there was little apparent Board knowledge (for new members) or memory (for continuing members) of the **email that Town Administrator Todd Selig sent on March 11, 2020, 1:35pm**, clarifying that, yes indeed, the **Planning Board “absolutely” has a role in seeing “that the [Mill Plaza] application is in conformance with the settlement agreement.”**

The Selig reference was specifically to Paragraph One of the Settlement, which addresses the Wetland Setbacks and the required enhanced natural buffer along College Brook. Mr. Selig’s email was consistent with Richard Kelley’s and Lorne Parnell’s prior insistence that the Board needed to attend to these Settlement clauses during the course of normal review (see, for example, Feb 12 2020, [video](#) 10:31pm+; [minutes](#), pp. 14-15). As you know, these issues have regained prominence in your review in light of the pending WCOD CUP application and the Conservation Commission input.

To help restore/provide the knowledge of that March 11, 2020, Selig email I will, further below, summarize the context for it and then include the full email thread that was forwarded to me by Todd Selig. But first, I note that Mr. Selig’s emailed statement is but one of *multiple* reasons that the Board must address key terms of the Settlement.

7 Reasons for Planning Board to hold CDA to compliance with WCOD Setbacks & the Settlement

1) CDA invokes the Settlement in its [Application for a WCOD Conditional Use Permit](#), pp. 1-2. CDA writes that what is proposed reflects “the terms of settlement between the Applicant and the Town of Durham as memorialized in a certain ‘Agreement to File Joint Motion to Stay Proceedings in Colonial Durham Associates, LP v. Town of Durham, Docket Nos. 219-2015-CV-00016 and 219-2015-CV-00173.’”

Since the Planning Board must review and vote on the merits of that CUP application (with advice from the Conservation Commission), this citation of the Settlement by CDA and the claimed compliance of the site plan with the Settlement, clearly brings adherence to the Settlement under your direct purview.

2) The Planning Board is required to solicit the advice of the Conservation Commission. And the ConCom [recommendation](#) to you is generally consistent with the requirements of the Settlement.

3) The Wetland Setbacks are *required* in the Zoning Ordinance, in their own chapter: [Article XIII, Wetland Conservation Overlay District](#). These are not “optional,” nor are they mere “suggestions.”

4) CDA Attorney Ari Pollack’s mantra suggesting grandfathering protection (“it’s an existing non-conforming site that we are making less non-conforming”) holds no legal weight, as has been repeatedly documented. (See, for example, extensive documentation in section #4 [here](#).)

5) When an applicant works so strenuously to distract from something, an attentive review Board

needs to look at what the applicant is trying to hide: in this case, CDA's persistent non-compliance with parts 1d and 1f of the Settlement. CDA calls out *"Look at our stormwater system"* (but that *required* system will not address water quality or flooding to the extent that a restored buffer would); CDA says *"Look at our restoration of permeable landscape islands in the parking field"* (but parking islands are not a restored natural buffer along the Brook); CDA's says *"See the Ballestero Brook Restoration plans"* (but those fine efforts – some of which are undoing CDA damage & neglect – have little to do with the required setback); CDA keeps repeating *"We are increasing pervious areas in the setback"* (a carefully scripted line to obscure lack of enhancement of the buffer along the Brook *and* to obscure an *increase* in impervious area on the site overall with the targeted destruction of the 1.1 acre thickly vegetated hillside, an action that will put more pressure on the stormwater system and the Brook); CDA's says *"See our generous \$25,000 contribution to improving the general area"* (but that is an insulting pittance compared to the cost of more damage to the ecosystem and watershed in the absence of a restored buffer). As CDA waves all those shiny objects, a clearly focused Planning Board should be saying *"Thank you. But you must adhere to the Zoning and the Settlement."*

6) How could it possibly make any logical or practical sense for the Planning Board, after years of review, to consider approving and forwarding to the Council a plan that is in clear violation of the 2015 legal Settlement?

7) Administrator Selig's March 11, 2020, email states that "there are aspects of the settlement agreement that directly call out the Planning Board's review."

Selig Email Context: Todd Selig's email was prompted by an exchange with Firoze Katrak, who, as a Councilor in 2015, was a party to the nonpublic Council deliberations regarding the Settlement. Mr. Katrak characterized Mr. Selig's March 10, 2020 email to the Planning Board as "deceptive," in that Selig did not acknowledge that the Council had been told when it voted to approve the Settlement that the Planning Board would use the Settlement in its normal review process. By the end, Selig relented this point.

The key passage from the March 11, 2020 Selig email:

"Does this mean that the settlement agreement is not an extremely important tool for the Planning Board to review and carefully consider? Absolutely not. There are numerous elements that the applicant and the Planning Board (in the course of its review) should endeavor to ensure are in place such that the application is in conformance with the settlement agreement. Determination of compliance with the settlement agreement ultimately lies with the Council/Town Administrator, however, as described above. Does this mean that the there are aspects of the settlement agreement that directly call out the Planning Board's review? It absolutely does. Some of the provisions in Paragraph 1 do just that."

Paragraph One of Legal Settlement ([context & key excerpts](#)) indicates [bold added], in section 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 in section 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.”

Moreover, the diagram in the [full Settlement](#) (p. 5) shows only the site entrance within the wetland setback. The rest of the WCOD on the diagram is green. But CDA has yet to submit a plan that comports with the legal agreement they signed in December 2015.

Weak institutional memory: The collective memory of the Selig/Katrak exchange is complicated by the fact that those who were copied on the Selig email at 1:35 pm on March 11 (including Contract Planner Rick Taintor and Planning Board Chair Paul Rasmussen) had apparently not read though the full email by the time of the Planning Board meeting, as can be seen in the meeting ([video](#), particularly 8:34p to 8:58p).

What follows is the email exchange that was forwarded to me and other citizens in March 2020 by Administrator Selig, rearranged into chronological order. There were apparently prior exchanges that were not shared with me.

The Email Thread

-----Original Message-----

From: Todd Selig <tselig@ci.durham.nh.us>

To: Firoze Katrak <FEKatrak@aol.com>

Sent: Tue, Mar 10, 2020 5:16 pm

Subject: FW: planning board role relative to colonial durham application | 12/14/15 settlement agreement

Dear Firoze,

For your general information.

Todd

Todd I. Selig, Administrator

Town of Durham, NH

a: 8 Newmarket Rd., Durham, NH 03824 USA

t: 603.868.5571 | m: 603.817.0720 | w: www.ci.durham.nh.us

He/him/his pronouns

Everyone can tackle climate change. How can you reduce your carbon footprint?

From: Rick Taintor <rtaintor@ci.durham.nh.us>

Date: Tuesday, March 10, 2020 at 5:13 PM

To: Planning Board

Cc: Karen Edwards <kedwards@ci.durham.nh.us>, Todd Selig <tselig@ci.durham.nh.us>

Subject: FW: planning board role relative to colonial durham application | 12/14/15 settlement agreement

From: Todd Selig <tselig@ci.durham.nh.us>

Date: Tuesday, March 10, 2020 at 5:11 PM

To: Paul Rasmussen <pnrasm@yahoo.com>, Rick Taintor <rtaintor@ci.durham.nh.us>

Subject: planning board role relative to colonial durham application | 12/14/15 settlement agreement

Dear Rick and Paul,

It has come to my attention that there have recently been questions raised from members of the Planning Board and the public concerning the role of the Planning Board's review relative to the Colonial Durham application for redevelopment of the Mill Plaza in light of the settlement agreement dated December 14, 2015. As such, I am writing to provide clarification and direction so the Planning Board may proceed with its review. This clarification and direction is reflective of guidance I have received from the Town's attorney and in my formal role as a party to the agreement itself as Town Administrator under Section 4.5 of the Town's Charter.

The Planning Board's role is to review the application submitted by Colonial Durham in front of it. If there is a claim that the plan violates the settlement agreement, that is something for the Town Council and the Town Administrator to determine. The Planning Board has no jurisdiction over the settlement agreement. Similarly, the Town Council has no jurisdiction over the Planning Board's review of the application.

Other than the narrow points contained in the settlement agreement, the Council and the Town Administrator intended the applicant to have to go through the normal Planning Board process.

I will note definitively that the northern half of the property referenced in the settlement agreement in section 1 b was intended to reflect the half of the property that generally parallels Main Street, not magnetic north.

The language of the settlement agreement itself says that the Town and Town Administrator will forbear (refrain) from enforcing the amendment against Colonial Durham as long as Colonial Durham filed a revised application that substantially conformed to the criteria set forth in the settlement agreement. Since it is the Town and the Town Administrator who are refraining from enforcing, it is only the Town and the Town Administrator that can determine whether the plan conforms to the criteria set forth. The Planning Board simply reviews for conformity with the Town regulations.

Please also note that the application for the redevelopment of the Mill Plaza by Colonial Durham and the application submitted by the Toomerfs at 19-21 Main Street are separate and distinct applications and must be treated as such by the Planning Board.

Planning Board members may find it generally informative to view the Planning Board meeting from January 27, 2016, in which Town Counsel Laura Spector discussed the settlement agreement with the board and answered questions from the public. This recording can be accessed on line at <https://durham.vod.castus.tv/vod/?video=281db2b9-ae74-4466-b813-58a5130995d4&nav=playlists%2Fplaylists%2FPlanning%20Board.m3u8>.

The settlement agreement itself may be found on line at https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/page/21851/colonial_durham_settlement-stay_proceedings_agreement.pdf.

Please share this communication with the Planning Board for the board's information and also include on the Planning Board section of the Town's web site relative to the Colonial Durham application for the information of the public who may be closely following this review.

Todd

Todd I. Selig, Administrator

Town of Durham, NH

a: 8 Newmarket Rd., Durham, NH 03824 USA

t: 603.868.5571 | m: 603.817.0720 | w: www.ci.durham.nh.us

He/him/his pronouns

From: Firoze Katrak <fekatrak@aol.com>

Date: Tuesday, March 10, 2020 at 7:29 PM

To: Todd Selig <tselig@ci.durham.nh.us>, Paul Rasmussen <pnrasm@yahoo.com>, Durham Town Council <council@ci.durham.nh.us>, Rick Taintor <rtaintor@ci.durham.nh.us>

Cc: Michael Behrendt <mbehrendt@ci.durham.nh.us>, Jennie Berry <jberry@ci.durham.nh.us>, Karen Edwards <kedwards@ci.durham.nh.us>

Subject: Re: planning board role relative to colonial durham application | 12/14/15 settlement agreement

Hi Todd, Planning Board Members, Town Council,

Todd your email to the Planning Board Chair is deceptive, and you continue to dodge the heart of the issue I have raised. You have explained your opinion as you see the situation today. My question is not what you believe today. My point is that you need to acknowledge what the then TC was told at the time it passed the SA. We were told the PB would use the SA in its normal review process.

You continue to ignore that matter. Why? Is it because you now want to encourage the PB to ignore the SA? If so, that would be an unethical bait and switch tactic on your part. I hope that is not the case.

The reason why this is important is that the SA has many elements beyond density and positioning (North side) issues. As you know the SA also includes issues for wet lands buffer, WCOD, privacy barrier for adjoining neighbors, onsite security, etc. Unless the PB considers all such relevant factors from the SA, it will not be doing what the then TC assumed PB would be doing in its review process.

There should be plenty of historic records to either prove me wrong, or to confirm what I have said. By avoiding my request, you continue to dodge the heart of the issue and you continue to mislead the PB. I am disappointed, I expect better from you. It is not too late for you to still set the record straight: that the PB should include the SA as one element in its tool kit when it reviews this application.

Thank you

regards

firoze

ps to Karen Edwards & Jen Berry: Please forward to all members of the PB in a timely manner.

From: Todd Selig <tselig@ci.durham.nh.us>

Date: Wednesday, March 11, 2020 at 1:35 PM

To: Firoze Katrak <fekatrak@aol.com>, Paul Rasmussen <pnrasn@yahoo.com>, Durham Town Council <council@ci.durham.nh.us>, Rick Taintor <rtaintor@ci.durham.nh.us>

Cc: Michael Behrendt <mbehrendt@ci.durham.nh.us>, Jennie Berry <jberry@ci.durham.nh.us>, Karen Edwards <kedwards@ci.durham.nh.us>

Subject: Re: planning board role relative to colonial durham application | 12/14/15 settlement agreement

Dear Firoze,

I have reviewed the sealed Town Council non-public minutes from that period and will note that it would be problematic for any person who was present for those discussions to disclose the contents. At the same time, while your recollection may be a perspective you brought to the table at some point in time, I cannot say that the information I have reviewed is necessarily reflective of your precise recollection. (See clarification below.) This all happened over 4 years ago. While we (myself included) all like to believe our memories are perfect, they are not! And regardless of what the intent of individual members may have been, what is actually binding is the settlement agreement.

It is important to remember what the lawsuit which led to the settlement agreement was all about: it was focused on the density requirement. And therefore it was largely that issue on which everyone was focused during the settlement discussions.

The settlement agreement is between the Town and the applicant; the Planning Board was not a party to that lawsuit or that settlement agreement. Therefore, the Planning Board is not bound by anything in the agreement, nor does it have jurisdiction to enforce anything in the agreement. Enforcement of the agreement is strictly in the hands of the Council and the Town Administrator. Mill Plaza, on the other hand, ***is*** bound by the agreement. It was required to submit a revised application in substantial compliance with the items identified in paragraph 1. (See settlement agreement on line at https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/page/21851/colonial_durham_settlement-stay_proceedings_agreement.pdf. If it had failed to do that, it is the Council/Town Administrator that could have brought an action in court claiming violation of the settlement agreement; it would not be a basis for the Planning Board to deny approval.

The fact that the Planning Board review is independent from the agreement is found elsewhere in the agreement as well. Paragraph 3 provides that "The Revised Application shall be pursued by Colonial Durham and considered by the Planning Board, in good faith and in the usual course, consistent with and subject to the terms of this Agreement (the Planning Board Review)".

Paragraph 5(b) even contemplates the Planning Board violating the agreement. It provides that if the Planning Board ***review yields an approval with conditions that have the effect of imposing a stricter density requirement than provided in the agreement***, or if the effect of that review somehow circumvents or frustrates that agreement, then Colonial Durham can pursue its original appeal.

I'd also encourage everyone to read the actual requirement regarding parking in Paragraph 1 e, which is

the topic of at least some of the present debate. The settlement agreement provides that proposed “on-site parking shall be increased from 345 spaces ***to a number acceptable to the Planning Board based on the zoning ordinance and site plan review regulations.***” So, if the on-site parking that is provided by Mill Plaza complies with the zoning and site plan regs, it meets the letter of the settlement agreement, even if additional parking is being provided off site.

In some respects, the settlement agreement essentially established a floor requirement for a number of narrow topics that were perceived by the Council/Town Administrator to be acceptable to the Town as part of those settlement deliberations. Now getting back to the heart of your concern, what the Council/Town Administrator overtly envisioned was that *other than the narrow points in the settlement*, we wanted the applicant to have to go through the normal Planning Board process.

Does this mean that the settlement agreement is not an extremely important tool for the Planning Board to review and carefully consider? Absolutely not. There are numerous elements that the applicant and the Planning Board (in the course of its review) should endeavor to ensure are in place such that the application is in conformance with the settlement agreement. Determination of compliance with the settlement agreement ultimately lies with the Council/Town Administrator, however, as described above. Does this mean that there are aspects of the settlement agreement that directly call out the Planning Board’s review? It absolutely does. Some of the provisions in Paragraph 1 do just that.

I don’t plan to continue this dialogue further as it is simply unproductive and generally a distraction to the important work we all envisioned the Planning Board would undertake.

All my very best,
Todd

Todd I. Selig, Administrator

Town of Durham, NH

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He/him/his pronouns

Everyone can tackle climate change. How can you reduce your carbon footprint?

-----Original Message-----

From: Firoze Katrak <fekatrak@aol.com>

To: tselig <tselig@ci.durham.nh.us>; pnrasm <pnrasm@yahoo.com>; council <council@ci.durham.nh.us>; rtaintor <rtaintor@ci.durham.nh.us>

Cc: mbehrendt <mbehrendt@ci.durham.nh.us>; jberry <jberry@ci.durham.nh.us>; kedwards <kedwards@ci.durham.nh.us>

Sent: Wed, Mar 11, 2020 2:56 pm

Subject: Re: planning board role relative to colonial durham application | 12/14/15 settlement agreement

Hi Todd,

While we may not see eye to eye on many points, I appreciate and thank you for finally conceding (in your 2nd last para) that the PB must not ignore the SA and that the SA must be a part of the PB's tool kit. In particular your

sentence "*There are numerous elements that the applicant and the Planning Board (in the course of its review) should endeavor to ensure are in place such that the application is in conformance with the settlement agreement.*"

We are now clearly in agreement on this important point that the PB must consider various clauses of the SA in its deliberations.

I too will now end this dialogue. Thank you being the gentleman I always you knew are :)

Thank you
regards
firoze

ps to Karen & Jen: please distribute to the PB in a timely manner ... and Thank you to both of you.

From: Firoze Katrak <fekatrak@aol.com>

Date: Thursday, March 12, 2020 at 7:19 AM

To: Paul Rasmussen <pnrasm@yahoo.com>, Rick Taintor <rtaintor@ci.durham.nh.us>, Sally Tobias <Sally.tobias@me.com>

Cc: Karen Edwards <kedwards@ci.durham.nh.us>, Jennie Berry <jberry@ci.durham.nh.us>, Laura Spector <laura@mitchellmunigroup.com>, Todd Selig <tselig@ci.durham.nh.us>

Subject: Mr. Taintor misleads ...

Dear Planning Board Chair, and PB Members,

It was disappointing and very concerning to see last night's (March 11) PB meeting because Mr Taintor continued to mislead the Board in regard to the SA. He continued to harp on his false opinion (encouraging the Board to almost ignore the SA), and he presented a myopic view of Todd's email to me by disregarding Todd's main overarching message (as highlighted in my earlier email below).

I hope the PB now understands that it should not ignore the SA; and that it will use its provisions as one tool during its review of the MP application.

It might be worthwhile to ask if Mr Taintor should be removed/replaced from the ongoing MP review process because he is biased against the residents of the town. I will leave that for the "Town" to decide. I have hope that the PB will protect the Town's residents, in spite of Mr Taintor's unwarranted and biased aggression.

Thank you
regards
firoze

ps to Karen Edwards: Please forward to all PB Members and please put this in public record. Thank you.