

Durham's Mill Plaza:
As Long-Required vs. As Has Been
– *and As Still Could Be*

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—CDA Attorney, Ari Pollack

Planning Board Hearing, February 12 2020, 10:30~pm

“Building A is existing. Building A is staying, and there’s a parking field there now. And that’s not to say that we shouldn’t improve upon things where we can. But we are improving upon what arguably would be a ‘non-conforming condition.’”

“The Planning Board’s Site Plan Regulations, Part III...

*1.1.4 Legally established nonconforming site conditions are considered ‘grandfathered’ **until** such time as site plan review is required due to proposed changes to a property....” [emphasis added]*

Rick Taintor on Grandfathering 6-8-20

When proposed site changes trigger a site plan review, Taintor notes, even “legally established nonconforming site conditions” are subject to the Board’s requirements for:

- 1) reducing the nonconformance, or
- 2) mitigating it, OR
- 3) bringing it into full compliance

Taintor on Grandfathering 6-8-20

*“It should also be noted that **Section 1.1.4 does not cover any site condition that did not conform to a land use regulation that applied at the time** that the condition was established, nor does it apply to a site condition that does not conform to the most recent approved site plan.” [emphases added]*

Taintor on Grandfathering 6-8-20

In short, long-Term NON-Compliance is NOT “Grandfathered”

“[N]onconforming conditions are not “legally established” and therefore have no grandfathering protection under the Site Plan Regulations....”

Taintor on Grandfathering 6-8-20

DURHAM'S MILL PLAZA AS INITIALLY *REQUIRED, 1968+*

“...green areas...along the brook and along Mill Road.... trees and shrubbery in the parking lot and along the exposed sides of the building.” —June 4 1968, Planning Board, H3



**Left & Right Sides,
Building A**
(if “sides” is
narrowly defined)



“We are especially interested in your landscaping plan for [Mill Road Plaza], which promises to dominate downtown Durham.... We assume that grassed areas will be provided along the brook and along Mill Road, and that foundation plantings will be made around the building.” —PB letter to Plaza owner; quoted, June 4, 1968, PB mins, H3



The final [Mill Plaza] plot plan promises “**foundation plantings**” in front of the new grocery store.

—Final developer plot plan, submitted Oct 28 1968, H4. See pp. 80-81 [here](#).

Non-Compliant – and UGLY!



Final plot plan: “**foundation plantings**” in front of new grocery store. —Final developer plot plan, submitted Oct 28 1968, H4. See pp. 80-81 [here](#).

Potted plants for sale are only hint of promised “plantings” at front of grocery!





“[T]he parking lot will be well screened from...Mill Road”

—Final **developer** plot plan, submitted Oct 28 1968, H4. See pp. 80-81 [here](#).

“The town has an unusual opportunity to develop a series of **greenways along the streams** [College Brook et al.] **penetrating the village**. In addition to their aesthetic and conservation value, these greenways could offer **walkways connecting various community facilities.**”

—Jan 1969, “Comprehensive Plan,” pp. 5, 8, 41, H4-5



Oct 2016

Despite promises, CDA continues to plow snow onto walkway & into College Brook, and even blocks the rear footpath to/from the Plaza near the Chesley Marsh.



March 2020

“It is the intent of the developers and owners to put as much emphasis upon landscaping as the aesthetic of the building.... There would be three new traffic control planters near the entrance to enhance the appearance as well as to control the traffic flow.” —Jan 26 1973, Site Review **Application for Expansion of Hannaford Supermarket, H5**

Grocery entrance has no planters; perhaps they meant at entrance to Plaza? But none there either!



“[N]ew...building and...lot...will cause more erosion...and more silting into...waterways unless preventive measures are guaranteed as a condition for...granting...new building permit.”

“A study of the College-Brook-Mill-Pond watershed area.... recommended that the **town require developers...not to alter the grade of natural drainage slopes into...waterways and...to require such developers to plant a cover of winter wheat or winter rye on any land whose natural water-retaining vegetative cover is destroyed by grading.**” —Feb 21 1973, Durham Conservation Commission, [letter](#), H6



I'm guessing NOT winter wheat/rye



“The landscaping plan approved along Mill Road in 1968 was developed but has been **indifferently maintained....**

The landscaping plan approved in 1968 for shrubs and trees along the east bank of the College Brook was **never completed....**

Walkways running southerly from Mill Rd to the Plaza buildings, also in the 1968 approved plan, have **not been constructed.”**

--PB, “**Findings of Fact,**” April 2 1973, regarding Mill Plaza non-compliance, H7

Public Works Director to Planning Board chair April 1975 **letter**:

“number of areas of the landscaping that do not meet the specifications of the proposed plans” (e.g., improper grass-planting, poorly planted and too-short Scotch Pines, lack of erosion control, and uncleared building material trash).

He recommended not allowing for the grocery expansion until “the above requirements are met.”

In May 1975, the **Hannaford project engineer refused to make any of the requested site improvements.**

“[T]he whole landscaping of this [Mill Plaza] site is woefully and shockingly inadequate. It grieves me that...the town should be forced to accept such a miserable landscaping job.... **[T]he amount of money...devoted to landscaping is laughable.** It is essentially nothing.... I am distressed that a fine opportunity to get some good landscaping for Durham seems to have passed by. All we have is just one more shopping center.” —**March 4 1975** letter from D.G. Routley, Durham's Tree Warden & Professor of Plant Science at UNH to Board of Selectmen. Prof. Routley resigned as Tree Warden a few days later. H9-10. The full letter can be viewed [here](#).



**No improvement
45 years later**
June 2020



“A raised barrier paved to a width of six (6) feet for pedestrian and bicycle traffic will be constructed from Mill Road to the Chesley Drive property line. Any change in the slope between the walkway and the brook will be consistent with roadway design practices of the Town....” —Planning Board, May 18 1977, “Conditions of Approval” for Mill Plaza expansion, H12.

Never-installed raised barrier would have stopped snow plowing into Brook and damage to curbing.



“The landscaping plan must show a mix of high trees and low shrubs along Mill Road and down the middle of every other row of parking throughout the project. The width of each planting strip shall permit enough greenery to be consistent with the Town’s overall landscaping plans....”

—Planning Board, May 18 1977, “Conditions of Approval” for Mill Plaza expansion, H12.



23 Rows of Parking in Plaza

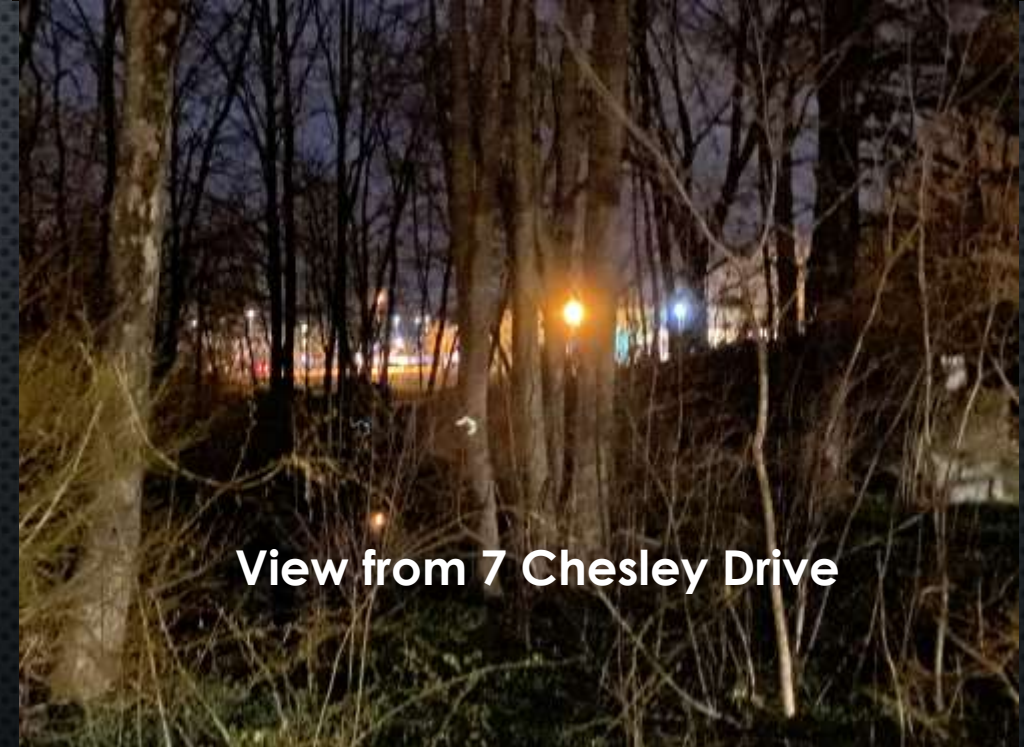
**1977 Site Plan
Landscaping
“Conditions of Approval”
have never been met**



Only FOUR 10-ft Wide Islands

“Lamps must be hooded to direct light onto the parking area and to prevent the light from disturbing adjacent residential areas. If possible the lights should be dimmed after all stores are closed.”

--PB, May 18 1977, “Conditions of Approval” for Mill Plaza expansion, H12.
Full May 1977



View from 7 Chesley Drive



**View from inside house
7 Chesley Drive**

“Lamps must be hooded...to prevent the light from disturbing adjacent residential areas. If possible the lights should be dimmed after all stores are closed.”

—Planning Board, May 18 1977, “Conditions of Approval,” Plaza expansion, H12

“Due to the fact that the McAuliffe plan [former project engineer] showed the brook in the wrong location, your present engineer had to redesign the **parking lot closer to the brook than was originally anticipated.**” —Oct 17 1978, Durham’s Public Works Director letter to developer



“Mr. Parnell said it looked like there would be enhanced landscaping at the southern edge of the site next to College Brook as part of the agreement.”

“Mr. Persechino said the [College Brook] buffer would increase significantly, and he spoke in some detail on this.”

--January 27, 2016, Planning Board Minutes, H129

“The new plan shows...**slopes on the outside edge of the parking lot, which are extremely steep and vulnerable to erosion....** [T]he toe of any slope running within three feet of the existing brook would have to be **riprapped a minimum of three feet from the toe**, extending upwards on the slope. From this portion up to the top of the slope, or any other portion which is a minimum of three feet from the brook, there would have to be **sufficient ground cover in order to protect against erosion.**” —Oct 17 1978, Durham’s Public Works Director letter to developer



“DURHAM PLAZA.... a letter to the Selectmen expressing the Planning Board’s concern with **noncompliance of the site review conditions of approval.... [A]s built construction of the landscaping plan, the parking, and the traffic circulation do not conform to the plans which were approved at the site review.**”

--Oct 16 1979, Planning Board work session notes, H15

Mill Plaza “has a direct relationship to the rest of the downtown area and to the Town as a whole. It appears to us at this time that **litter pickup, street sweeping, and the care of trees and islands are needed** in that area in order to maintain the shopping center.” —April 6 1981, Public Works Dir. to owner, H16

The problems persist decades later.



“The loss of buffers through variances/waivers and through illegal activities should be minimized....

“Pedestrian access to the Mill Pond may be encouraged with downtown displays of footpaths such as the pedestrian path to the pond from Main Street and Mill Road **through the Mill Plaza to the footpath through the woods that connects with Chesley Drive. This route should be enhanced as a pedestrian gateway to the Mill Pond.... College Brook should be restored in those areas where it has experienced degradation....** Sightings of rare and endangered species have been recorded in the College Brook greenway and Mill Pond area.” —Durham Master Plan 2000, H20-22. Full Plan [here](#)



TOWN ATTORNEY WALTER MITCHELL'S NOV 2009 RULING ON PLAZA PARKING-EXPANSION APPLICATION

- “Once the property owner leased out 30 some spaces for long term parking, they were no longer available to support the retail uses, and **from that point on the property owner was violating the site plan approval — and apparently still is.**”
- “In the absence of obtaining approval for an amended site plan to incorporate this second principal use of the property (I do not agree that it is an accessory use since...the **long-term parking** is not incidental to any principal use of the property), the **use must cease**. Further, in order to be approved as a second principal use, the property owner will have to apply for and obtain a conditional use permit from the board.” —Attorney Mitchell’s full assessment can be seen [here](#).

In the interim, Mitchell ruled, the Planning Board cannot consider a site plan for an out-of-compliance site.

For details, see pp. 36-52
Durham’s Mill Plaza, 1967-2018

March 2017 – one of the rows of cars with rental-spot stickers.



CDA has continued its unlicensed parking-space rental business, leaving the site “out of compliance.”

CDA has lied about the business to Town officials and to Hannaford, lied about the number of spaces it rents, and lied about why some of painted lines were white and others yellow.

Now, CDA claims it will stop the rentals. **How will that claim be assured by the Town?**



Full row of stickered cars, closest to campus, many with out-of-state plates.



covered in snow for days

Thus, there would seem to be a lot of room to add landscaping IF the illegal parking business ceased.



Despite posted signs, about ONE HUNDRED cars with "Mill Road Plaza" stickers are parked overnight during regular UNH semesters.

“Landscaping...to blend well with the character of the Town.”

--PB letter to developer, Nov 3 1968, H4. See p. 80 [here](#).



Foster's: Durham Celebrates 40th Anniversary as Tree City USA

Mill Plaza as it long has been

*Or: why the Planning Board
should require a multi-year
landscaping maintenance
agreement for new plan*

*Re: maintenance, see also: [John Hart 3-11-20](#)
& [John Parry 6-8-20](#)*



As USDA Urban Forestry expert [John Parry](#) argues, most of this wooded area should be preserved:

“environmental benefits such as improved air and water quality and energy conservation in nearby buildings.... a valuable visual buffer between the downtown commercial and residential areas.... loss of this woodland will have a negative effect on aesthetics.... important in protecting soil and reducing stormwater flow....”



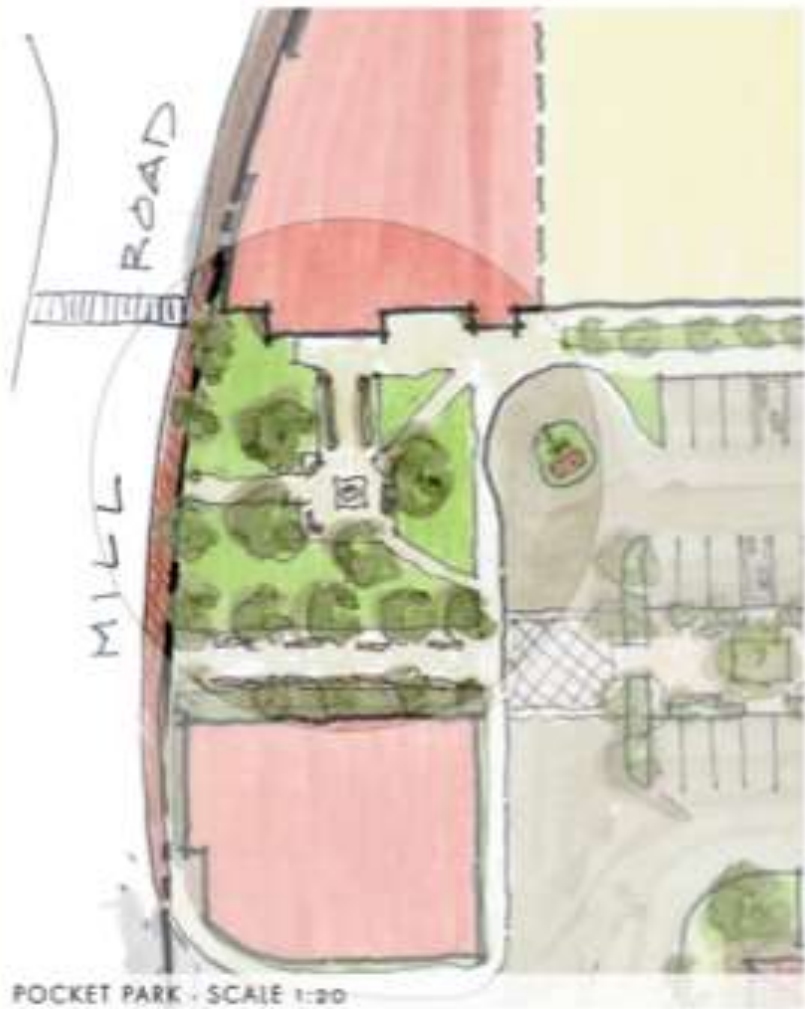
The only attractive green area on the Mill Plaza site is this dense, naturally “landscaped” hillside, now targeted for destruction by CDA.

Mill Plaza – As it still *COULD* be

In 2015, Colonial Durham Associates
Promised dazzling features of a

“Durham Village Center” DeStefano Architects

Jan 8 2015 Site plan, including “inspiration” photos
See pp. 5-7 [here](#)



DURHAM VILLAGE CENTER
MILL ROAD, DURHAM, NEW HAMPSHIRE

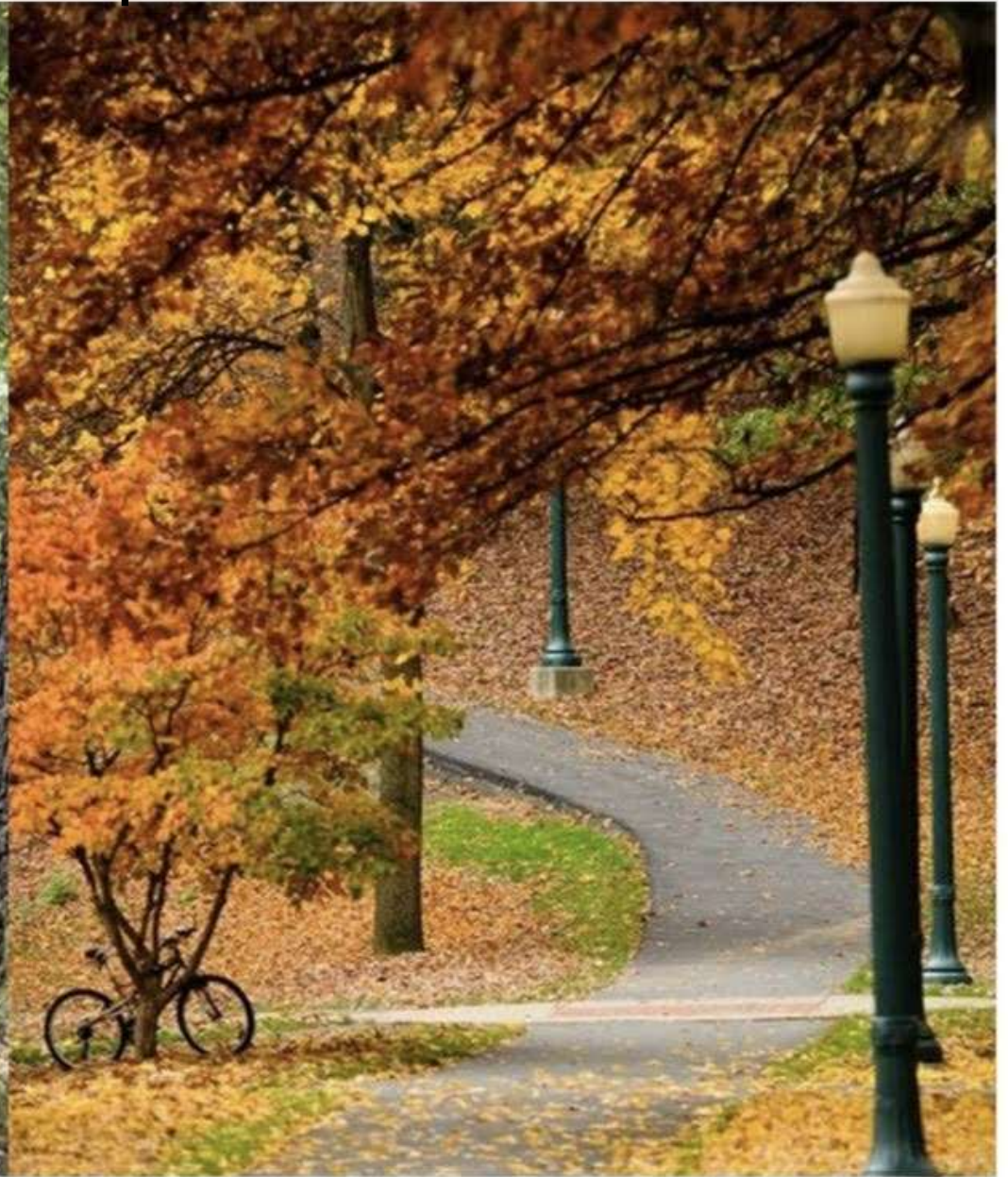
CDA Durham Village Center "Inspiration Photo" 2015





CDA *Durham Village Center* “Inspiration Photo” 2015

CDA *Durham Village Center* “Inspiration Photo” 2015



CDA *Durham Village Center* “Inspiration Photo” 2015



CDA Durham Village Center “Inspiration Photo”



CDA *Durham Village Center* “Inspiration Photo” 2015



CDA *Durham Village Center* “Inspiration Photo” 2015



For dazzling elements CDA tempted Durham with:

- ◆ Reduce the mass of the currently proposed buildings
- ◆ Preserve 4/10th acre of dense, natural landscaping behind Bldg B

◆ Push for the social spaces CDA proposed in 2015



To repeat, long-Term NON-Compliance is NOT “Grandfathered”

“[N]onconforming conditions are not “legally established” and therefore have no grandfathering protection under the Site Plan Regulations....”

Moreover, with site plan review, the Board has option to require even “legally established nonconforming site conditions” be brought up to full compliance.

Taintor on Grandfathering 6-8-20

Please continue to urge CDA to Dazzle Durham!

And to develop a plan for this dominant property that the public can enthusiastically support.

Another SITE VIOLATION?

Tied to
Conditional Use
Application
Review
Requirements



March 24 2020

ARTICLE VII: CONDITIONAL USE PERMITS

“a sign measuring two by three (2 x 3) feet shall be placed on the property by the applicant not less than ten (10) calendar days prior to the time of the public hearing by the Planning Board. The sign shall remain on the property until the conclusion of the public hearing. This sign shall be **visible from the most heavily traveled street right-of-way adjacent to the property.** The sign shall state the date of the public hearing, the time, the location and the action to be considered.”





Even if a member of the public bent down to read the sign, the state date would provide no useful information.



Additionally, as the PB & CDA were already reminded, the [2008 Doucet survey notes](#) indicate that this strip of land belongs to the Town of Durham, not CDA.

Therefore, even when the sign was eventually put up after public urging in March 2020, and even when it was briefly visible from Mill Road, as required, the sign placement location does not meet the Conditional Use Ordinance stipulations.

Durham's Mill Plaza:
As Required (but with no compliance)
As Is (and long has been)
As Imagined (and still could be)

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H = PAGE #S IN [MILL PLAZA HISTORY, 1967-2018](#) BY JOSHUA MEYROWITZ / K