

**THE STATE OF NEW HAMPSHIRE**  
**JUDICIAL BRANCH**  
**SUPERIOR COURT**

Strafford Superior Court  
259 County Farm Road, Suite 301  
Dover NH 03820

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<http://www.courts.state.nh.us>

**SUMMONS**  
**ZONING BOARD APPEAL**  
**RSA 677:4**

Case Name: **Colonial Durham Associates, LP v Town of Durham**  
Case Numbers: **219-2015-CV-00116**

Date Complaint Filed: April 08, 2015

A Complaint has been filed in this Court. A copy of the Complaint is attached.

**The Court ORDERS that ON OR BEFORE:**

June 13, 2015	Colonial Durham Associates, LP shall have this Summons and the attached Complaint served upon Town of Durham.
July 04, 2015	Colonial Durham Associates, LP shall file the returns of service with this Court. Failure to do so may result in this action being dismissed without further notice.
30 days after service	Town of Durham must file an Appearance and Answer or other responsive pleading and certified record of all previous proceedings with this Court. A copy of the Appearance and Answer or other responsive pleading must be sent to the party listed below and any other party who has filed an Appearance in this matter.

**A Hearing on the Merits has been scheduled for July 16, 2015 at 9:00 AM.**  
**30 Minutes is allotted for this hearing, 15 min per side. Limited to oral argument based on the certified record absent an order to expand the record pursuant to RSA 677:13**

**Notice to Town of Durham:** If you do not comply with these requirements, you will be considered in default and the Court may issue orders that affect you without your input.

Send copies to:

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BY ORDER OF THE COURT

  
Karen A. Gorham  
Clerk of Court

April 29, 2015

(273)

STATE OF NEW HAMPSHIRE

STRAFFORD, SS

SUPERIOR COURT

COLONIAL DURHAM ASSOCIATES, LP  
7 Mill Road, Unit L  
Durham, NH 03824

v.

TOWN OF DURHAM  
8 Newmarket Road  
Durham, NH 03824

**PETITION FOR APPEAL FROM DECISION OF  
THE DURHAM ZONING BOARD OF ADJUSTMENT  
PURSUANT TO RSA 677:4 AND FOR DECLARATORY JUDGMENT  
PURSUANT TO RSA 491:22 AND RSA 354-A:21-A**

NOW COMES Colonial Durham Associates, LP (“Petitioner”), by and through its attorneys, Gallagher, Callahan & Gartrell, P.C., and respectfully submits this Petition for Appeal from Decision of the Durham Zoning Board of Adjustment Pursuant to RSA 677:4 and for Declaratory Judgment Pursuant to RSA 491:22 and RSA 354-A:21-A, and in support thereof, says:

**Introduction**

1. On December 1, 2014, the Durham Town Council adopted Ordinance #2014-14 (the “Amendment”). This Amendment halved the maximum allowed dwelling density for unrelated household apartments from 1 occupant per 300 square feet of habitable (interior) floor area to 0.5 occupants per 300 square feet – effectively doubling the square footage of living space required per unrelated occupant and prohibitively increasing costs of construction and projected rents.

2. The Amendment affects unrelated household apartments in most zoning districts in the Town, and it requires unrelated households with two or more occupants to have a minimum interior floor area of 600 square feet per occupant. In contrast, there is no limit on the minimum dwelling density for apartments housing related occupants or containing a “family,” as that term is defined in the Durham Zoning Ordinance. Consequently, the Amendment has the intentional and foreseeable effect of substantially increasing the cost of housing and unjustifiably discriminating against residents of New Hampshire based on age and family status, as more fully explained below.

3. Additionally, as evidenced by the facts and circumstances outlined in this petition, the Amendment was initiated and enacted in bad faith, with the intent to block Petitioner’s specific property from redevelopment. Further, on information and belief, Town agent(s) intentionally withheld posting of Petitioner’s design review application – submitted to the Town on September 12, 2014 – in an apparent effort to prevent Petitioner from acquiring vested rights to develop under the higher existing density standards. In so doing, the Town acted in bad faith and contrary to New Hampshire law, as set forth in RSA 676:12, the Town’s Zoning Ordinance, and RSA 675:7.

#### **Parties and Jurisdiction**

4. Petitioner is a New Hampshire limited partnership.

5. Petitioner owns and operates a parcel of property identified as Tax Map 5, Lot 1-1, Mill Road Plaza (the “Mill Plaza”).

6. The Mill Plaza is located in the Town of Durham's Central Business Zoning District. It is approximately ten (10) acres in size with access from Mill Road, close proximity to Main Street, and is roughly rectangular in shape.
7. Mill Plaza abuts the University of New Hampshire, commercial structures along Main Street, and residential neighborhoods on its southern and eastern boundaries.
8. Mill Plaza is currently improved with two commercial strips of leased storefronts with asphalt parking on most of the remaining acreage.
9. The Town of Durham is a New Hampshire municipal corporation located in Strafford County.
10. On information and belief, the Central Business District contains 100 or fewer properties.
11. The Court has jurisdiction to hear this appeal and petition for declaratory judgment pursuant to RSA 677:4, RSA 491:22, and RSA 354-A:21-a.<sup>1</sup>
12. Venue is appropriate in Strafford County because the Mill Plaza and parties are located in Strafford County.

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<sup>1</sup> RSA 354-A:21-A, Choice of Forum, provides that "any party alleging to be aggrieved by any practice made unlawful under [RSA 354-A]" may bring an action in Superior Court within 180 days after the filing of a complaint with the New Hampshire Human Rights Commission ("HRC"). Petitioner is in the process of preparing such complaint with the intent of filing with the NH HRC by the end of May 2015. Accordingly, Petitioner presents its claims arising under RSA 354-A at this time in order to preserve its rights. *See e.g. Morgenstern v. Town of Rye*, 147 N.H. 558 (2002) ("[W]here an applicant directly appeals from the zoning decision to superior court, the doctrine of res judicata requires that all claims that could be raised, be raised therein, or be barred"); *see also* RSA 677:4 (requiring appeal from decision of zoning board of adjustment to be brought within 30 days).

### **Factual Background**

13. Petitioner acquired the Mill Plaza in 1993 and has owned and operated the Mill Plaza since that time.

14. The Mill Plaza is an important and unique property in Durham, being located in the heart of the commercial core and abutting connecting commercial, university, and residential neighborhoods and uses.

15. In 2007, Petitioner was approached by the Town and asked to submit the property to a public design charrette sponsored by the Town and the American Institute of Architects NH Chapter (AIANH), among others (the "Mill Plaza Study").

16. The Mill Plaza Study was conducted by a Mill Plaza Study Committee. The Mill Plaza Study Committee engaged in an approximately yearlong review of options for redeveloping the Mill Plaza, which involved dozens of public meetings, workshops and focus groups with the Durham Community.

17. The stated purpose of the Mill Plaza Study was "to offer a vision for a redeveloped 'village center' that revitalizes our downtown, brings economic return to the property owner, and is reflective of community needs and concerns."

18. Petitioner gave its consent to the Mill Plaza Study but was not a member of the Mill Plaza Study Committee. Petitioner did attend study-related functions and otherwise participated in the study.

19. The Mill Plaza Study was completed in 2008, but due to the then existing prevailing economic conditions did not lead to redevelopment of the Plaza at that time.

20. In April 2014, Petitioner's representatives met with Town Planner Michael Behrendt and Town Administrator Todd Selig to notify the Town that it was beginning the process of preparing redevelopment plans for the Mill Plaza.

21. During the summer of 2014, Petitioner worked with a private design and engineering team to prepare redevelopment plans for the Mill Plaza. In preparing these plans, Petitioner incurred significant expense and relied on the then existing provisions of the Durham Zoning Ordinance and land use regulations, all of which provided for a minimum apartment dwelling density for unrelated households of 1 occupant per 300 square feet of habitable (interior) floor area.

22. Petitioner's plans for the redevelopment of Mill Plaza contemplated the guiding recommendations of the Mill Plaza Study, to the extent possible given the passage of more than 5 years and the economic considerations inherent in re-development.

23. On or about September 4, 2014, Petitioners' representatives met with Town Planner Michael Behrendt, Economic Development Director Mary Ellen Humphrey, and Town Administrator Todd Selig to discuss the current status of Petitioner's plans (the "September 4<sup>th</sup> Meeting").

24. The September 4<sup>th</sup> Meeting was held at the invitation and request of the Town, which had strongly encouraged Petitioner to engage in public disclosure, conceptual consultations, and charrette-style planning discussions.

25. At the September 4<sup>th</sup> Meeting, Petitioner's representatives disclosed the proposed plan for the Mill Plaza, which then mixed 120 residential apartments with

substantial retail and commercial redevelopment, among other environmental and aesthetic enhancements and features. The residential apartments were not proposed with any age, family or other tenant restrictions, but were likely to appeal to young adults, university students, and unrelated households, such as young unmarried couples.

26. Six days after the September 4<sup>th</sup> Meeting, the Durham Planning Board held a regularly scheduled meeting on September 10, 2015 (the “September 10<sup>th</sup> Meeting”).

27. The September 10<sup>th</sup> Meeting was lengthy and involved numerous agenda items. After discussion of all of the items that had been specifically noticed on the agenda, the Planning Board entered its final “Other Business” portion of the evening, and at approximately 10:30 pm, voted to extend the meeting. *See Planning Board Minutes, September 10, 2014.*

28. After the meeting was extended, Planning Board Member Julian Smith stated that he would like to propose a change to the minimum floor area per resident in the Central Business District from 300 sq.ft. to 600 sq.ft. for unrelated individuals. *See Planning Board Minutes, September 10, 2014.*

29. Julian Smith is a member of the Durham Town Council and serves as the Council’s representative to the Planning Board.

30. Councilor Smith’s business item and motion was neither posted nor mentioned in the Planning Board’s agenda for the September 10, 2014 meeting.

31. The presentation of this contrived and significant motion at the end of a lengthy meeting, and after the close of all regular business, raised immediate and strong concerns from some members of the Planning Board.

32. Planning Board Member Bill McGowan “said the Planning Board was doing this at 10:30 pm and asked why the Board couldn’t discuss this next week instead.” This question was seconded by Board Members Lorne Parnell and Linda Tatarczuch. Mr. McGowan also “asked what the sense of urgency was.” *See* Planning Board Minutes, September 10, 2014.

33. Councilor Smith responded and explained that he was “closing a gate” in raising the motion, and “would like the clock to start ticking now.” Councilor Smith also explained that his motion was intended to favor “families and married couples” in that it “would apply only to unrelated individuals.” *See* Planning Board Minutes, September 10, 2014.

34. Councilor Smith’s motion, calling for a public hearing on the proposed change, passed by a vote of 5-2 with Bill McGowan and Lorne Parnell voting against it.

35. Two days later, on Friday, September 12, 2014, Petitioner submitted a design review application in keeping with the plans discussed with the Town at the September 4<sup>th</sup> Meeting.

36. Approximately two weeks after the design review application was filed, on or about September 26, 2014, the Durham Planning Department sent mailed notice of



the Mill Plaza design review application to abutters. The notice called for discussion of the application at the Planning Board's October 8, 2014 meeting.

37. In the interim, the Durham Planning Department published notice of the Planning Board's September 10<sup>th</sup> decision to hold a public hearing regarding whether to recommend a density Amendment to the Town Council.

38. Town Planner Michael Behrendt has represented that the notice of the Amendment was published on the Town's website on or about September 16, 2015.

39. Mr. Behrendt has further represented that his processing and posting of the Amendment, relative to the Mill Plaza design review application, was intended to establish the legal notice of the Amendment as prior in time to legal notice of the Mill Plaza design review application.

40. Despite the Town Planner's stated intent, the Amendment was not legally posted prior to the design review application because the Town failed to comply with the additional notice provisions of RSA 675:7 (2014).

41. The publication of the amendment was also insufficient to prevent Petitioner from gaining vested rights because the Planning Board lacks any authority to effect an amendment to the Zoning Ordinance.

42. Further, because the Town Planning Department received the Petitioner's design review application several days prior to the posting of the Amendment, the Town Planner's decision to intentionally withhold mailing of abutter notices posting of the design review application was in bad faith, and is contrary to the spirit and

intent of New Hampshire law, where, as here, that action was intended to prevent Petitioner from acquiring vested density rights.

43. On October 8, 2014, the Planning Board met and began initial consideration of both the proposed amendment and Petitioner's design review application.

44. The Town Planner's recommendations for the October 8, 2014 meeting included a statement from the Planner that the Amendment was proposed at the September 10<sup>th</sup> Meeting and had the effect of applying to the design review application.

45. During the October 8<sup>th</sup> meeting, concerns were raised regarding the purpose and intent of the proposed Amendment. Planning Board Member Parnell noted "he had some problems with the proposed Zoning change" and in particular that "it appeared to be a euphemism for no more student housing, and said if that was what people wanted, they should say that." *See* Minutes of October 8, 2014 Meeting of Durham Planning Board.

46. Planning Board Member McGowan also again raised concerns with "the process and time frame" and "[h]e said this was a bad way to do business."

47. After discussion, the Planning Board voted to recommend the Amendment to the Town Council by vote of 5-2.

48. The Council subsequently considered the Amendment at public hearing held December 1, 2014, and the Amendment was adopted by a vote of 9-0.

49. During the Town Council's meeting, numerous comments were made evidencing that the Town was seeking to prohibit a specific use rather than a

measurement of an otherwise allowed use; i.e., student apartments. *See generally*, Durham Town Council Meeting Minutes, December 1, 2014. Additionally, Town Administrator Todd Selig admitted that based on the Amendment “Durham would likely not be a place that was attractive to people with limited incomes,” but asserted that student housing options in Durham “freed up space in other towns for people with limited incomes.” *See id.*

50. The preamble to the Amendment, as adopted, states that its intent is to discourage a specific type of use - student housing apartments – due to alleged adverse impacts on Town services and Town character. *See Ordinance #2014-14.*

51. Despite the Amendment’s stated intent to regulate a type of use, the Amendment was drafted in manner that creates a discriminatory density standard that applies to most zoning districts in the Town, and which creates unlawful classifications by treating related families more favorably than unrelated households.

52. The amendment also has the intended effect of increasing the costs of apartments for unrelated households, and in particular the younger demographic compared to the costs for related households and to encourage such individuals to locate to other surrounding communities. In these ways, the Amendment further discriminates against individuals based on family status (such as through marital status and/or kinship of residents) and age.

53. The Amendment also has the effect of changing the allowed uses in the Central Business zoning districts, in that its stated intent is to regulate and discourage a type of use; i.e., student housing.

54. Additionally, the Amendment has the effect of changing the uses available to unrelated households, by prohibiting such households from occupying dwellings that are otherwise available to “family” households, and which were previously available to unrelated households.

55. After the Council’s adoption of the Amendment, on December 4, 2014, Town Planner Michael Behrendt issued an administrative decision to the Petitioner, opining that the Amendment was properly applied to Petitioner’s Mill Plaza design review application, thereby precluding Petitioner from proceeding with the proposed apartment density set forth in its application.

56. Petitioner appealed Mr. Behrendt’s decision to the Durham Zoning Board of Adjustment (“ZBA”) on December 12, 2014.

57. A public hearing on Petitioner’s administrative appeal was held on January 13, 2015.

58. At the hearing, counsel for Petitioner presented arguments regarding the above facts and circumstances and pertinent New Hampshire law consistent with the arguments set forth in Petitioners’ December 12, 2014 application for appeal.

59. During the meeting, Councilor Julian Smith provided testimony regarding his intent in enacting the amendment, agreeing that his “intent was to close the gate.” *See* Zoning Board Minutes, dated January 13, 2015. He further attempted to

explain away his last minute motion at the September 10, 2014 Planning Board meeting, by stating that “he was old and forgetful” and that “he wasn’t generally attentive to procedure, and hoped that wouldn’t hurt the Town.” *See id.* Sadly for the Town, however, Councilor’s Smith’s effectiveness in implementing his intentional plan disproves his offer of more innocent excuses.

60. After closing public comments, ZBA Member Tom Toye addressed the above facts and circumstances that led to the Amendment and stated that “it wasn’t a very good way [for the Town] to conduct business.”

61. Similarly, ZBA Member Chris Sterndale remarked that “it was not an unreasonable perception from some people that this was a display of bad faith [by the Town].” He further remarked that “he wasn’t sure the letter of the law was followed and said the ends didn’t justify the means” but regardless of that conclusion, “he would vote to deny the appeal.”

62. In contrast, ZBA Member James Lawson, who recently became a member of the Durham Town Council, was dismissive of the concerns raised by Toye and Sterndale, and he asserted that the Town “had been ratcheting up the density or space requirements for [unrelated] occupants” over the past two years, and the Amendment “therefore wasn’t radical.”

63. Despite the concerns raised regarding the Amendment and its enactment, the ZBA voted to deny Petitioner’s appeal by a vote of 3-1-1.

64. On February 10, 2015, Petitioner filed a Motion for Rehearing of the ZBA’s January 13, 2015 decision.

65. The Motion for Rehearing was considered on March 10, 2015.

66. The March 10, 2015 hearing also included separate but related applications for variances and appeal of a subsequent January 8, 2015 administrative decision of Town Planner Michael Behrendt regarding other permitted dwelling types in the Central Business District.

67. Testimony at the March 10, 2015 hearing further confirmed that the amendment was intentionally enacted to preclude Petitioner from proceeding with the type of development proposed in Petitioner's Mill Plaza design review application. This clear intent was evident notwithstanding the Town's recent approval of other similar mixed-use student housing redevelopments that have added hundreds, if not over a thousand, new beds to the immediate downtown Durham area. The testimony also further confirmed that the amendment was and is intended to discriminate against New Hampshire residents based on age and family status.

68. The ZBA denied Petitioner's motion for rehearing and also denied Petitioner's applications for variances and other administrative appeal.

69. Petitioner has subsequently filed a motion for rehearing regarding the denial of its appeal of Mr. Behrendt's January 8, 2015 administrative decision.

70. On information and belief, discovery relating to this appeal and petition is likely to reveal additional facts and circumstances regarding the Town's decision to initiate the Amendment, the purpose of the Amendment, and the Town's motives in withholding notice of the Petitioner's design review application.

### Applicable Law

71. A municipal board is bound to exercise its duties and discretion consistent with the purpose of applicable statutes, ordinances and regulations. *See Webster v. Town of Candia*, 146 N.H. 430 (2001).

72. Any person claiming a present legal or equitable right may maintain a petition for declaratory judgment. RSA 491:22(I). A direct challenge to the validity of a zoning enactment is permissible under the declaratory judgment statute. *See Delude v. Town of Amherst*, 137 N.H. 361 (1993).

73. A declaratory judgment action is appropriate to determine the validity of a zoning restriction allegedly in excess of the jurisdictional authority of the zoning power. *See, Vlahos Realty Co. v. Little Boar's Head District*, 101 N.H. 460 (1958).

74. "Construction of the terms of a zoning ordinance is a question of law upon which [the trial] court is not bound by the interpretations of the zoning board." *Cosseboom v. Town of Epsom*, 146 N.H. 311, 314 (2001) (quotation omitted).

75. "In an appeal to the [superior] court, the burden of proof shall be upon the party seeking to set aside any order or decision of . . . the local legislative body to show that the order or decision is unlawful or unreasonable." *See* RSA 677:6.

76. The Superior Court may, on appeal, vacate the decision of the zoning board of adjustment in whole or in part, or may, in its discretion, remand the matter to the zoning board of adjustment. *See* RSA 677:11

77. The Superior Court may also award damages or injunctive relief or both under its equitable powers and for violations of RSA 354-A. *See* RSA 354-A:21-a.

78. The Superior Court's equitable powers are "broad and flexible" and intended to allow the Superior Court "to shape and adjust the precise relief to the requirements of the particular situation. A court of equity will order to be done that which in fairness and good conscience ought to be or should have been done. It is the practice of courts of equity, having jurisdiction, to administer all relief which the nature of the case and facts demand." *See Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 595 (1999) (internal quotations and citations omitted).

79. RSA 676:12 provides, in pertinent part, that "[n]o proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board . . . prior to the first legal notice of said change or amendment."

80. RSA 675:7 provides, in pertinent part, that "[i]f a proposed amendment to a zoning ordinance would change the minimum lot sizes or the permitted uses in a zoning district that includes 100 or fewer properties, notice of a public hearing on the amendment shall be sent by first class mail to the owner of each property in the district."

81. RSA 354-A prohibits discrimination in access to housing because of age, sex, race, creed, color, marital status, familial status, physical or mental disability or national origin.

82. Article IV, Section 175-14(a) of the Zoning Ordinance provides that the Planning Board has no authority to amend the Zoning Ordinance, and instead, is expressly limited to making recommendations to the Town Council.



83. Where a Town, as here, enacts an ordinance that is an unconstitutional exercise of its police powers, there is an issue of substantive due process. *See McKenzie v. Town of Eaton Zoning Bd., of Adjustment*, 154 N.H. 773 (2007). In that context, the Town must be able to demonstrate that there is a rational relationship between the purpose of the ordinance and a legitimate goal. *See id.*, at 779.

84. To withstand a substantive due process challenge, an ordinance must have a substantial relationship to the health, safety, morals or general welfare of the community. *See Morgenstern v. Town of Rye*, 147 N.H. 558 (2002).

85. Similarly, an equal protection claim is stated where, as here, an ordinance impermissibly establishes classifications, and treats similarly situated individuals in a different matter. *See Taylor v. Plaistow*, 152 N.H. 142, 146 (2005). In that context, the ordinance is reviewed with heightened scrutiny, and “must rest upon some ground of difference having a fair and substantial relation to the objection of the legislation.” *See id.*

**Count I – The ZBA’s decision to uphold the Planner’s administrative decision was unlawful and unreasonable**

86. Petitioner incorporates Paragraphs 1-85 as if fully restated herein.

87. The ZBA’s authority is derived from the State and must be exercised in conformance with State law. Accordingly, the ZBA erred, and acted unlawfully and unreasonably, by failing to account for, and give effect to, the purpose of RSA 676:12, which is intended to protect property owners from bad faith, retaliatory and discriminatory zoning amendments, such as occurred here.

88. Under RSA 676:12, applicants are entitled to proceed under an existing zoning ordinance where “any plat or application . . . has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) prior to the first legal notice of a proposed change in a building code or zoning ordinance or any amendment thereto.”

89. The legislative history of this statutory protection makes clear “ that the statute was intended to prevent municipalities from retroactively amend[ing] local land use regulations ... for the purpose of stopping proposed projects or developments while an application is under consideration.” Laws 1991, 331:4 (noting that 1991 amendment is consistent with original statutory intent behind paragraph V). *Rall v. Town of Belmont*, 138 N.H. 172, 175, 635 A.2d 1368, 1370 (1993).

90. Here, the evidence presented to the ZBA at the January 13, 2015 hearing (testimony and written submissions) should have left no doubt that the Planning Department intentionally withheld posting and manipulated the date of mailing notice of Appellant’s application until the last possible moment to gain advantage and ensure that the notice of the “Amendment” would be vested as “first in time”.

91. Additional evidence presented at the January 13, 2015 hearing demonstrated that the Town’s Planning Department used information obtained at the September 4<sup>th</sup> Meeting with the Appellant’s representatives to purposefully target, block and otherwise derail Appellant’s application.

92. Given this evidence, the ZBA erred in failing to reverse the decision of Michael Behrendt as being unreasonable and unlawful. The ZBA’s statutory

purpose is to review the reasonableness of the administrative decisions of others.

Where, as here, the law has clearly been adopted to promote fairness and integrity in land development, the ZBA should have given this legislative intent full force and effect.

93. The ZBA's decision was further unlawful and unreasonable because it ignored Section 175-14(a) of the Zoning Ordinance, under which the Planning Board had no authority to amend the Town's Zoning Ordinance.

94. At the January 13, 2015 meeting, it was undisputed that the Planning Board lacks authority to amend the Town's zoning ordinance, and instead serves in an advisory role to the Town Council. Accordingly, the ZBA should have concluded as argued by Petitioner that the first legal notice of an amendment to the Town's zoning ordinance did not occur until the Town Council published notice of its intent to consider the Planning Board's recommendation, which, occurred here, on November 20, 2014 – long after Appellant's Mill Plaza design review application was filed, noticed and heard publicly.

95. To further illustrate, the Planning Board is authorized under Section 175-14(a) to consider and make recommendations on amendments to the zoning ordinance. However, Durham follows a "Town Council" form of government, and consequently there is no corresponding requirement that the Town Council consider such recommendations. Accordingly, without the finite time element added by a conventional Town Meeting, the Town Council could ignore or defer consideration of a recommendation indefinitely and without explanation. In that event, the Planning

Board's recommendation, according to the Planner's interpretation and the ZBA's affirmation, would bind an application forever.

96. Further, the Planning Board's decision to make a recommendation to the Town Council is not a "proposed change" to the zoning ordinance, as that term is used in RSA 676:12, but rather, a mere recommendation that may languish for extended periods.

### **Count II – Violation of RSA 675:7**

97. Petitioner incorporates paragraphs 1-96 as if fully stated herein.

98. The ZBA's decision to affirm was unlawful and unreasonable because the Amendment, affecting fewer than 100 parcels in the Central Business District, was required to be noticed under the provisions of RSA 675:7.

99. At the outset, it is indisputable that the stated purpose of the goal is to prevent the development of student apartment housing, which is a type of use. Thus, since the Amendment sought to prevent specific uses, it was subject to the requirements of RSA 675:7.

100. In reaching its decision, the ZBA overlooked the fact that the increased apartment density requirement set forth in the Amendment was of a unique character that constitutes a dramatic change in the nature of uses available in the Central Business District – not merely a mathematic metric that affects the area or dimension of a use. Specifically, by adopting a 100% increase in the square footage requirement in unrelated apartment households, the Amendment dramatically

changed the types of allowed multi-family uses whereas “family” uses in “related households” remained wholly unchanged.

101. Presently, when a group of unrelated individuals choose to live together, they are engaging in a use that is different from a related family use, as the same is defined in the zoning ordinance. Therefore, by increasing the density requirement for unrelated households, and not similarly for related families, the Town created a new (and increasingly discriminatory) scheme of uses.

102. Accordingly, the ZBA should have determined that the Amendment dramatically altered the allowed uses under the Zoning Ordinance and was therefore subject to the notice requirements set forth in RSA 675:7, which were admittedly ignored.

103. For these reasons, and those contained in the Petitioner’s prior submissions to the Town, the ZBA’s decision was unlawful and unreasonable and should be reversed. Likewise, the Amendment should be stricken as void for failing to comply with RSA 675:7.

### **Count III – Declaratory Judgment**

104. Petitioner incorporates Paragraphs 1-103 as if fully restated herein.

105. The zoning Amendment is unlawful and contrary to New Hampshire law because it has the intent and foreseeable effect of discriminating against New Hampshire residents based on age and family status, either of which are sufficient to invalidate the Amendment.

106. This intent and effect is contrary to the protections of RSA 354-A, which, in pertinent part, prohibits discrimination based on age and family status.

107. Petitioner has been aggrieved by the Amendment, as provided for under RSA 354-A, in that the Amendment, as applied to Petitioner's property, would require Petitioner to treat similarly situated individuals differently based solely on their age and/or marital status contrary to New Hampshire law.

108. In this case, statutorily protected classes have been the subject of purposeful and unlawful municipal discrimination. For these reasons, the Town Council's enactment of the amendment was an unlawful delegation of zoning power, violates RSA 354-A, and should be stricken.

**Count IV – Substantive Due Process and Equal Protection**

109. Petitioner incorporates Paragraphs 1-108 as if fully restated herein.

110. The zoning Amendment is unlawful and contrary to New Hampshire law because there is no rational relationship between its stated and inferred purpose – preventing and discouraging the creation of new student apartments – and the manner in which the Town has decided to carry out those purposes; i.e., by discriminating against all unrelated households and individuals based on family status and age.

111. If the Town seeks to discourage student apartments it could have done so by limiting the student housing dwelling type of use in specific zoning districts. Instead, the Town adopted an Amendment that is overly broad – applying to all zoning districts in the Town – and places an undue and unconstitutional burden on

individuals based solely on family status and age. If one means of exclusion is illegal, both are.

112. Further, the amendment impermissibly establishes classifications, and treats similarly situated individuals in a different matter, based solely on the individual's age or family status.

113. The Amendment's discriminatory distinctions do not advance or have a fair or substantial relationship to the Amendment's stated and inferred purpose of limiting further development of student apartments.

114. Consequently, the Amendment constitutes a violation of substantive due process and equal protection and should be invalidated.

WHEREFORE, for the reasons stated, Petitioner, Colonial Durham Associates, LP, requests that the Court:

- A. Enter judgment reversing the January 13, 2015 decision of the Durham Zoning Board of Adjustment;
- B. Enter judgment declaring the Amendment invalid;
- C. Enter judgment under the Court's equitable powers enjoining the Town of Durham from applying the Amendment with respect to Petitioner's September 12, 2014 Mill Plaza design review application;  
and
- D. Grant such further relief as justice and equity requires.

Respectfully submitted,

COLONIAL DURHAM ASSOCIATES, LP

By Its Attorneys

GALLAGHER, CALLAHAN &  
GARTRELL, PC

Dated: 4/7/15

By: CR. ——— #12932

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