

RECEIVED
Town of Durham
DEC 12 2014
Planning, Assessing
and Zoning

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VIA FEDERAL EXPRESS
AND EMAIL

December 12, 2014

Mr. Sean Starkey
Chair, Zoning Board of Adjustment
Town of Durham
15 Newmarket Road
Durham, NH 03824-2898

Re: Appeal of December 4, 2014 Administrative Decision of Michael Behrendt, regarding Application of Ordinance #2014-14 to Mill Plaza Design Review Application.

Dear Chairman Starkey:

I am writing on behalf of Colonial Durham Associates, LP (Appellant) regarding the enclosed Appeal from Administrative Decision, which is hereby submitted to the Zoning Board of Adjustment for review pursuant to RSA 676:5.

On December 4, 2014, Administrative Officer, Michael Behrendt, provided written notice of his decision that Appellant's application for Design Review for the proposed redevelopment of the Mill Road Plaza (pending before the Durham Planning Board) is subject to the provisions of Zoning Amendment, Ordinance #2014-14, increasing the required habitable square footage per occupant in unrelated households in apartments from 300 square feet to 600 square feet (Article II, Section 175-7, Definitions, Table II-1. Dwelling Density by Type). See Email of Michael Behrendt, attached hereto. Mr. Behrendt's administrative decision is contrary to the Durham Zoning Ordinance and New Hampshire law for the reasons set forth below.

I. Appellant's application for design review vested prior to first legal notice of the zoning amendments set forth in Ordinance #2014-14.

On September 12, 2014, Appellant submitted its application for Design Review with the Town of Durham Department of Planning and Community Development. The application proposed construction of 120 residential apartments in a mixed use, commercial/residential development. At the time of its submission, the proposed construction was consistent with the Zoning Ordinance's density requirements for unrelated household apartments of 1 occupant per 300 square feet of habitable space.

The Planning Department published and mailed notice of Appellant's application approximately two weeks later, on or about September 26, 2014. In the interim, the Planning Department published notice of Ordinance #2014-14 on September 16, 2014 (as previously represented by Mr. Behrendt).

The Planning Department's decision to defer publication and mailing of Appellant's application until after notice of Ordinance #2014-14 is inconsistent with the purpose of RSA 676:12 and RSA 676:4 and has foreseeably prejudiced Appellant.

Under RSA 676:12 proposed changes to a building code or zoning ordinance "shall not apply to any plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d). 676:4, I(d) further provides that notice of an application shall be mailed at least 10 days prior to submission to the planning board.

These statutory provisions exist to protect the interests of an applicant who designs and submits an application to a municipality prior to a change in a zoning ordinance. The legislature and courts have been clear that in such circumstances, an applicant should obtain vested rights. Further, the 10 day posting requirement in 676:4 sets a minimum timeline for notice, and does not prohibit an earlier posting or mailing.

The Planning Department's decision to withhold Appellant's application from public notice until after posting of Ordinance #2014-14 has foreseeably prejudiced Appellant. Accordingly, the Zoning Board of Adjustment should reverse Mr. Behrendt's decision and determine that the preexisting version of Article II, Section 175-7, providing for a density of 1 occupant per 300 square feet of habitable floor area in unrelated household apartments, applies.

II. First legal notice of a zoning amendment does not occur until the legislative body with authority to make such change publishes legal notice.

Under Article IV, Section 175-14(a), the Planning Board has no authority to amend the Zoning Ordinance. The Board's authority is expressly limited to making recommendations to the Town Council. This procedure and limitation is consistent with New Hampshire law, under which a Planning Board's powers are expressly limited and do not include zoning authority. Accordingly, because the Planning Board's powers are limited to making recommendations, the Board's consideration of a zoning amendment has no binding legal effect. Therefore, notice of such review by the Board does not constitute first legal notice under RSA 676:12. To conclude otherwise, would run counter to the purpose of RSA 676:12.

The Durham Town Council did not publish notice of the proposed amendment until Thursday, November 20, 2014. Accordingly, the public notice and mailing of Appellant's application on or before September 26, 2014, occurred prior to first public notice of the zoning amendment and Appellant's application is entitled to proceed under the preexisting density requirements. To this end, the administrative decision to apply the amendment should be reversed.

- III. Appellant's application has vested rights because the Town's Planning Department failed to comply with the provision of RSA 675:7 when posting notice of Ordinance #2014-14.

Under RSA 675:7, as recently amended (effective July 10, 2014), if "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 the amendment shall be sent by first class mail to the owner of each property in the district."

This recent amendment is intended to require specific notice where a municipality changes density requirements or a permitted use, both of which factors were implicated by the amendment set forth in Ordinance #2014-14. Specifically, the amendment changed both the minimum density and use of properties in the Central Business District, including the Mill Plaza site. Therefore, legal notice could not have occurred until the impacted owners in the district were provided notice by first class mail. Since that notice has not occurred, the amendment in Ordinance #2014-14 is not applicable to Appellant's application. Therefore, the Zoning Board of Adjustment should reverse the decision that Appellant is subject to Ordinance #2014-14.

Very truly yours,



Ari B. Pollack

Enclosures

cc: Colonial Durham Associates, LP
Thomas F. Johnson, Durham Code Enforcement
Michael Behrendt, Durham Town Planner

Robert J. Dietel

Subject: FW: Mill Plaza - 600 square foot requirement

From: Michael Behrendt [<mailto:mbehrendt@ci.durham.nh.us>]
Sent: Thursday, December 04, 2014 1:49 PM
To: Ari Pollack
Cc: Laura Spector-Morgan (laura@mitchellmunigroup.com); Tom Johnson; Todd Selig
Subject: RE: Mill Plaza - 600 square foot requirement

Ari,

In response to your request below, please accept this email as a determination that the proposed redevelopment of the Mill Plaza property, presently before the Planning Board as a design review, **is subject to the zoning amendment** that increased the required habitable square footage per occupant in unrelated households in apartments from 300 to 600 square feet. The Durham Town Council adopted this amendment on Monday, December 1, 2014. This determination is based upon the notice for the project being published after the notice for the public hearing for the amendment was published, pursuant to RSA 676:12.

Michael Behrendt

Director of Planning and Community Development
Town of Durham
8 Newmarket Road
Durham, New Hampshire 03824-2898
(603) 868-8064 (phone)
mbehrendt@ci.durham.nh.us
www.ci.durham.nh.us

From: Ari Pollack [<mailto:pollack@gcglaw.com>]
Sent: Thursday, December 04, 2014 9:40 AM
To: Michael Behrendt
Cc: Laura Spector-Morgan (laura@mitchellmunigroup.com)
Subject: RE: Mill Plaza - 600 square foot requirement

Michael-

I am in receipt of your recent forward of Attorney Spector-Morgan's legal opinion delivered to the Town. I respectfully disagree with her conclusions.

Now that the Town Council has adopted Ordinance Amendment 2014-14, and the discussion is no longer advisory/cautionary in nature, please confirm whether a proper "administrative officer" of the Town has in fact made the final decision to apply the terms of the newly adopted 600 SF requirement to the Mill Plaza redevelopment. Perhaps

this was your clear intention in sending your Nov. 25, 2014 e-mail (below), but it never hurts to clarify. Thank you for your consideration and anticipated reply.

-Ari

Ari B. Pollack, Esq.

603.228.1181

800.528.1181



<http://www.gcqlaw.com>

Gallagher, Callahan & Gartrell, PC
A multidisciplinary law firm
214 N. Main Street, PO Box 1415
Concord, New Hampshire 03302-1415

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From: Michael Behrendt [<mailto:mbehrendt@ci.durham.nh.us>]

Sent: Tuesday, November 25, 2014 2:48 PM

To: Adam Wagner (awagner@destefanoarchitects.com); Ari Pollack; Edgar Ramos (edgar.ramos@sintracapital.com); Joe Persechino (jmpersechino@tighebond.com); Sean McCauley (sean@mccauleyrealtyadvisors.com); Sean McCauley (sean@mralp.com)

Subject: Mill Plaza - 600 square foot requirement

To Mill Plaza,

The letter from Laura Spector, Durham Town Attorney, regarding the 600 square foot zoning amendment, is attached. She believes that the new amendment does apply to the Mill Plaza project. Please keep this in mind as you design your project. Thank you.

Michael Behrendt

Director of Planning and Community Development

Town of Durham

8 Newmarket Road

Durham, New Hampshire 03824-2898

(603) 868-8064 (phone)

mbehrendt@ci.durham.nh.us

www.ci.durham.nh.us

Please send this form with Plot Plan and List of Abutters to the Town of Durham, 15 Newmarket Rd., Durham, NH 03824, Attn: Zoning Board of Adjustment.

Appeal for Applicant

State of New Hampshire

Strafford, SS

To: Zoning Board of Adjustment, Town of Durham NH 03824

Name of Applicant: Colonial Durham Associates, LP - By Colonial Durham, LLC, John Pinto, Manager

Address: c/o Gallagher, Callahan & Gartrell, PC, 214 N. Main Street, P.O. Box 1415, Concord, NH 03302-1415
Phone # (603) 228-1181

Email: pollack@gcglaw.com

Owner of Property Concerned: Same
(If same as above, write "Same")

Address: Same
(If same as above, write "Same")

Location of Property: 5 & 7 Mill Road, Tax Map 05, Lot Number 1-1
(Street & Number, Subdivision and Lot number)

Description of Property (Give Tax Map number, length of frontage, side and rear lines and other pertinent descriptive information) _____

Tax Map 05, Lot Number 1-1, Located at 5 & 7 Mill Road, and commonly known as the Mill Plaza

Fill in Section 1, 2, 3 or 4 below as appropriate. Do not fill in more than one section. This application is not acceptable unless all required statements have been made. Additional information may be supplied on separate sheets if the space provided is inadequate.

SECTION 1: APPEAL FROM AN ADMINISTRATIVE DECISION

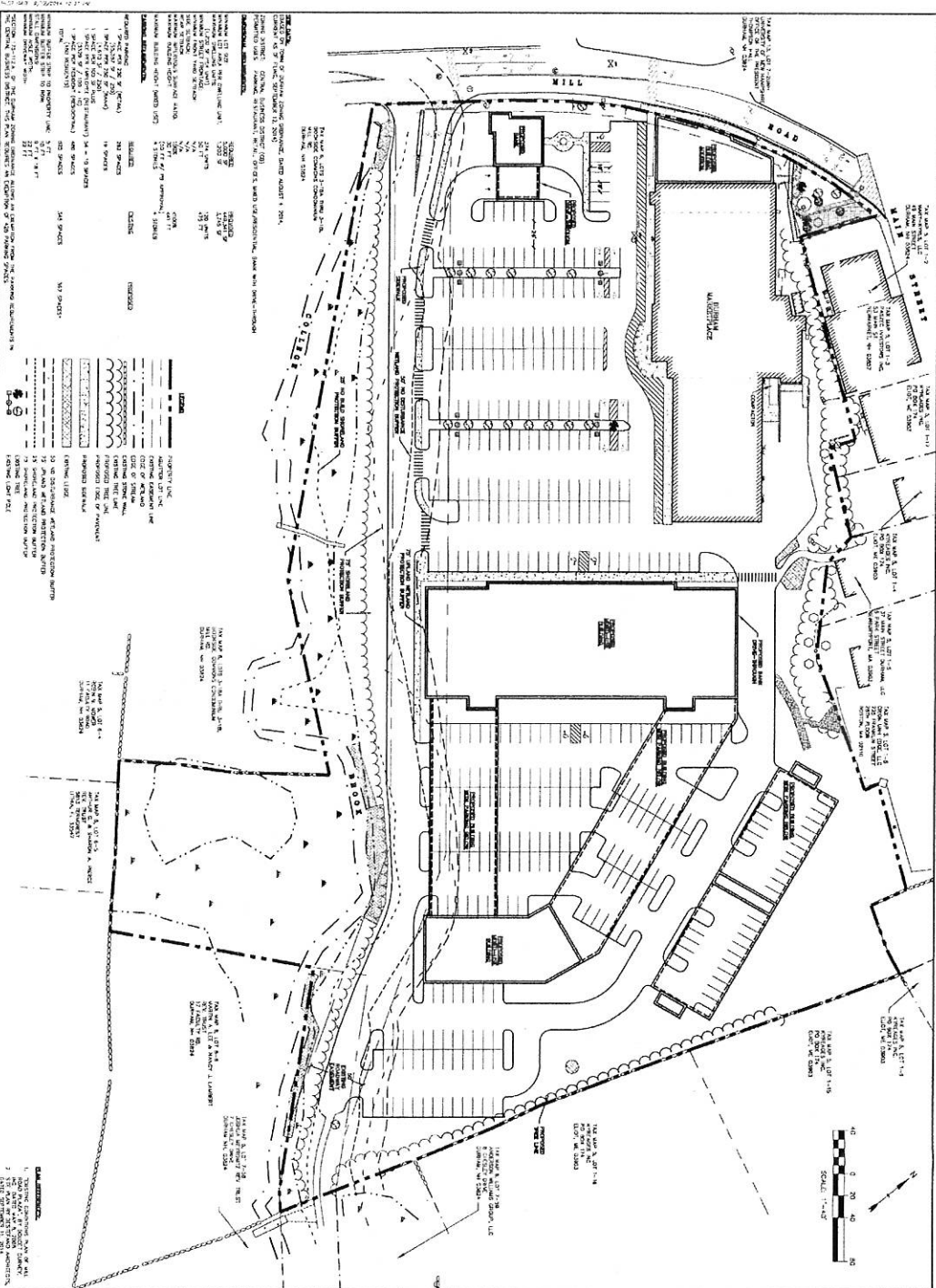
Appeal must be filed no later than 30 days from the date of the original decision.

Relating to the interpretation and enforcement of the provision of the Zoning Ordinance.

Decision of the enforcement officer to be reviewed: December 4, 2014 Administrative Decision
of Michael Behrendt, Director of Planning and Comm. Dev. Number NA Date 12/04/14

Article 11 Section 175-7 of the Zoning Ordinance in question.

See attached letter.



Tight & Bond
 Consulting Engineers
 www.tightandbond.com

Colonial Durham Associates, LLC
 Proposed Mill Road Plaza Redevelopment
 Durham, New Hampshire
 TBM Map 5, Lot 1-1
 September 12, 2014

DATE: 9/12/14
 DRAWN BY: [Name]
 CHECKED BY: [Name]
 SCALE: AS SHOWN
 SHEET: 1 OF 1

OVERALL SITE PLAN

**Colonial Durham Associates, LP
Durham Mill Road Plaza
Project #2215291
Abutters List**

Lot #	Owner
05/1/2	Mary-Kyrls, LLC 49 Main Street Durham, NH 03824
05/1/3	Paszec Investors, Inc. 53 Main Street Newmarket, NH 03857
05/1/17	Kyreages, Inc. PO Box 174 Eliot, ME 03903
05/1/4	Kyreages, Inc. PO Box 174 Eliot, ME 03903
05/1/5	37 Main Street Durham, LLC 6 Park Street Newburyport, MA 01950
05/1/6	Orion UNH Edge, LLC 225 Franklin Street, 26 th Floor Boston, MA 02110
05/1/9	Kyreages, Inc. PO Box 174 Eliot, ME 03903
05/1/15	Kyreages, Inc. PO Box 174 Eliot, ME 03903
05/1/16	Kyreages, Inc. PO Box 174 Eliot, ME 03903
06/7/59	Andersen Williams Group, LLC 8 Chesley Drive Durham, NH 03824
06/7/58	Joshua Meyrowitz Revocable Trust 7 Chesley Drive Durham, NH 03824
06/6/6	Martin A. Lee Revocable Trust Nancy J. Lambert Revocable Trust 17 Faculty Road Durham, NH 03824

**Colonial Durham Associates, LP
Durham Mill Road Plaza
Project #2215291
Abutters List**

Lot #	Owner
06/6/5	Arthur G. Pierce Revocable Trust Sharon A. Pierce Revocable Trust 5813 Terncrest Lithia, FL 33547
06/6/4	Robin M. Mower 11 Faculty Road Durham, NH 03824
06/3/18/A	Rosemary E. Thomson 13 Mill Road #1 Durham, NH 03824
06/3/18/B	Deborah Penttila 13 Mill Road #2 Durham, NH 03824
06/3/18/C	Robert A. Chesley Alison E. Chesley 13 Mill Road #3 Durham, NH 03824
06/3/18/D	Barry & Denise Smith Revocable Trust 84 Durham Point Road Durham, NH 03824
06/3/18/E	Sherrie Zirkle Holly Zirkle C/O Patricia M. Zirkle 13 Mill Road #5 Durham, NH 03824
06/3/18/F	Willard B. Merrill Revocable Trust 13 Mill Road #6 Durham, NH 03824
06/3/18/G	Steven D. Merrill 13 Mill Road Unit #7 Durham, NH 03824
06/3/18/H	Carol A. Knox 13 Mill Road #8 Durham, NH 03824
06/3/18/I	John L. Hart PO Box 65 Durham, NH 03824

**Colonial Durham Associates, LP
Durham Mill Road Plaza
Project #2215291
Abutters List**

Lot #	Owner
06/3/18/J	Barbara & Richard C. Siegert Katherine S. Stryck 13 Mill Road #10 Durham, NH 03824
06/3/18/K	Martha R. Smith Revocable Trust 26 Woodbridge Road Durham, NH 03824
06/3/18/L	Mark McPeak Jean McPeak C/O John Hart PO Box 65 Durham, NH 03824
13/7/2UNH	University of New Hampshire Office of the President Thompson Hall Durham, NH 03824
Owner	Colonial Durham Associates, LP By Colonial Durham, LLC 7 Mill Road, Unit L Durham, NH 03824
Engineer	Tighe & Bond, Inc. 177 Corporate Drive Portsmouth, NH 03801