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MEMORANDUM

TO: Zoning Board of Adjustment

FROM: Michael Behrendt, Director of Planning and Community Development

DATE: January 5, 2014

SUBJ: **Mill Plaza – Appeal of Administrative Decision (revised)**

Attorney Ari Pollack has appealed my administrative decision of December 4, 2014 regarding the application of ordinance #2014-14 to the current Mill Plaza Design Review Site Plan Application. Mr. Pollack is appealing on behalf of Colonial Durham Associates, LP, the owner of the Mill Plaza development in Durham. I believe that Mr. Pollack's contentions about our process for effecting the amendment are erroneous and that my administrative decision was indeed correct. See the enclosed letter in the packet from Town Attorney Laura Spector, supporting my position. Please note the following:

1) The Durham Town Council enacted the amendment to the *Zoning Ordinance* below (shown in bold italics) on December 1, 2014. The ordinance providing background for the amendment is enclosed in the packet. The minimum habitable square footage per occupant in an apartment (as defined below) was increased from 300 square feet to 600 square feet (changed from a maximum of 1 to .5 occupants per 300 square feet). My determination is that any apartments proposed for the Mill Plaza site plan would be required to meet the new 600 square foot standard (rather than the old 300 square foot standard).

2) Under New Hampshire state law applications before the Planning Board must comply with *pending amendments* to the Zoning Ordinance (those that are not yet adopted); i.e. , the time threshold is not the adoption of the ordinance but rather the posting of the proposed ordinance. For an application to be protected from a proposed amendment the public notice for the application must appear in the newspaper prior to the publication of the proposed amendment.

3) The Planning Board voted to commence a proposed amendment at its meeting on Wednesday, September 10, 2014. Planning Board member (and Town Council member)

Julian Smith raised this issue at the end of the meeting under Other Business. The board then voted to hold a public hearing at its meeting on October 8.

4) The next day, Thursday, September 11, Karen Edwards sent an email to Foster's Newspaper to place a public notice for the zoning amendment.

5) The public notice for the amendment appeared in Foster's Democrat on Tuesday, September 16 (We sent it in late in the day so the first available time for publication was Tuesday).

6) On Friday, September 12 (or possibly Monday, September 15), Karen posted 2 hard copies of the public hearing notice in 2 places in Town Hall. She also sent hard copies to the Public Works Department and Durham Post Office for posting. It is the practice of the department to post/send these 4 hard copies, though state law requires posting only 2 hard copies. Karen said the Public Works Department and Post Office post them shortly after receiving them. Thus, all required notices were certainly placed/posted well prior to the required 10 days. There is no requirement to post the amendment on the Town's website but it was posted nonetheless, and it was posted prior to the 10 day timeframe, though not at the same time as the other *required* notices.

7) On Friday, September 12 in the afternoon (I believe around 2:00 p.m.), Joe Persechino of Tighe & Bond, brought in a design review application for the Mill Plaza. Karen was away or at lunch so I took the application. When Karen returned I gave her the application for processing. The application deadline is 3 weeks so this application would be placed on the October 8 agenda, the next available agenda (too late for the September 17 meeting).

8) State law requires that there be notification for design review at least 10 days in advance of when the application will be presented to the Planning Board. The notices must be placed in the newspaper and in 2 other places and mailed to abutters. There is no requirement for a public hearing for design review under state law. The Durham Planning Board's policy (per the Rules of Procedure) complies with state law but also provides for a public hearing (which is permissible). In all of our notices, we state that the application will be presented at one meeting and there will be a public hearing at the following meeting. Thus, our notices for Mill Plaza stated that the application would be presented to the board on October 8 and there would be a public hearing on October 22.

9) It is the department's practice to send in notices for projects to comply with the 10 day requirement (rather than immediately upon receiving them) so we email the notice to the newspaper about 2 weeks in advance (to allow for publication prior to the 10 days) and send the letters to abutters a day or two after that.

10) It is typical practice for municipalities (and standard procedure for me in my many years of practice) to send in notices for proposed amendments to zoning ordinances, site plan regulations, and subdivision regulations, immediately, specifically in order to establish those

proposed amendments so that any new applications will need to comply with those proposed amendments.

11) In contrast, there would have been no reason to send the notices for Mill Plaza earlier than our customary timeframe. This timing was consistent with our practice and met the requirements of state law and Planning Board policy, and nothing would have been accomplished should we have “jumped on” this application and send it out immediately on Friday afternoon. Even had we “jumped on” the application and sent in notices for it immediately upon receiving it, the application would still have been fully subject to the proposed amendment, because the notice of the application would not have been posted or published prior to the notice of the proposed amendment. Thus, we simply followed our standard timeframe for submitting notices for applications.

13) In III., Mr. Pollack states that I did not comply with RSA 675:7, which has recently been amended to require individualized notice of proposed zoning amendments in certain circumstances. Specifically, the statute requires such notice for proposed changes to “minimum lot sizes or the permitted uses.” The proposed change was not about lot sizes nor permitted uses and thus the statute was not applicable. These 2 standards have very precise and unambiguous meanings to land use and real estate professionals. Durham’s Dimensional Table includes a standard for minimum lot size. This standard is not being changed. The Table of Permitted Uses is not being changed. If the intent behind the statute were to notify property owners of any broad dimensional changes then the statute could easily have stated that. Frontage requirements, setbacks, wetland buffers, floodplain elevations, for example, are all dimensional standards but clearly not covered by this statute. There was no requirement to notify property owners of this proposed amendment and thus no such notices were mailed.

14) In conclusion, the correct and legal process was followed throughout this amendment procedure. The notice for the project was posted after the notice for the amendment was posted and thus, simply, the new amendment applies to the proposed Mill Plaza project.