

Karen Edwards

From: Michael Behrendt
Sent: Wednesday, May 11, 2022 2:35 PM
Subject: Main Street #19 - letter from Attorney Keiser

Importance: High

To the Planning Board (cc to Attorney Fennessy),
Please see the email from Attorney Monica Kieser who represents Toomerphs for 19 Main Street.

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From: Monica Kieser <MKieser@hpgrlaw.com>
Sent: Wednesday, May 11, 2022 2:14 PM
To: Michael Behrendt <mbehrendt@ci.durham.nh.us>
Subject: Re: Main Street #19 - letter from Attorney Fennessy
Importance: High

Dear Michael,

We received Attorney Fennessy's letter late yesterday afternoon. With apologies for submitting a response the day of the hearing, we do not know what the board intends in terms of keeping the public hearing open and we want the record to be complete.

We dispute Attorney Fennessy's assertion that Toomerfs concluded "that the Planning Board has not made an administrative decision that the proposed retaining wall and retaining slope edifice contained in the February 2022 Plan constitutes 'structured parking'". (Fennessy 5/10/2022 submission p. 3). Toomerfs made no such conclusion. Page 4 of the Toomerf's 5/6/2022 submittal specifically refers to the actions of the Planning Board underlying the 4/13/2021 Administrative Appeal filed regarding the original 20 ft. wall proposal. *That* 3/10/2021 Planning Board decision involved no discussion about the height of the wall or degree of fill proposed at that time. To select a single sentence from a paragraph which plainly describes circumstances surrounding the 4/13/2021 appeal and claim it refers to the Planning

Board's actions on a plan submitted months later is disingenuous. As evidenced by its continued review of 9/2/2021 Plan with a 6ft. retaining wall, the Planning Board long ago concluded that the instant plan is surface parking, and this decision has not been appealed. On 3/24/2022, Planner Behrendt explicitly advised Attorney Fennessy that he and Audrey Cline deemed the current 6 ft. retaining wall plan surface parking and he did not appeal this determination.

With respect to Toomerf's assertion that the ZBA considered the fact that the original retaining wall exceeded 6 ft. when it granted Meyrowitz's Administrative Appeal back on 4/13/2021, a fair review of the Request for Administrative Appeal, public comment, presentations, and minutes demonstrate that it was asked to do so beginning with Mr. Meyrowitz's 3/24/2021 Administrative Appeal:

Mr. Behrendt challenges the notion that “there is a point surface parking becomes structured parking definition states nor what is intended by structure overlooked that the definition of “Structure” in the include a minor installation such as a fence six (flagpole, or an accessory shed.” Thus, there is in height – at which a fence becomes a structure. In t

Attorney Puffer's 4/13/2021 letter to the ZBA also relied on the DZO definition of structure and his presentation focused on the size of the wall: *“I'm not arguing that the fill itself is a structure. The structure is of course the massive steel and concrete retaining wall.”* DCAT, 8:52:28. While Chair Sterndale may have opined that the Members should not focus on a specific height, a majority of the ZBA voted to grant Mr. Meyrowitz's appeal, and thus adopted his reasoning that a height in excess of 6ft. rendered the wall a “structure” within the meaning of the DZO that “provided parking” and thus “structured parking”.

The current wall neither exceeds 6ft., nor provides parking.

Monica