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March 4, 2021

VIA EMAIL (mbehrendt@ci.durham.nh.us)
Durham Planning Board
c/o Michael Behrendt, Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824

RE: Site Plan Application for Toomerfs, LLC (“19–21 Main St. – Parking Lot”)

Dear Mr. Behrendt and Members of the Planning Board:

I continue to represent a large group of Durham residents who are concerned about the above-referenced parking structure proposal and the proposed Mill Plaza development adjacent thereto. My clients and I continue to maintain that these supposedly “independent” projects are, in fact, two components of one “new” Mill Plaza redevelopment proposal that is, thereby, “no longer grandfathered under the 2015 agreement,” as I argued in my February 5, 2020, letter to the Board.

However, the focus of this letter is on the Toomerfs proposal in particular. The Toomerfs proposal is clearly a “not permitted” use in the Church Hill District, per the Durham Zoning Ordinance (“DZO”) Table of Uses, and it must therefore be denied for that reason.

My clients include direct abutters to both Mill Plaza and the Church Hill Woods properties, as well as residents from every street in the Faculty Neighborhood that is adjacent to (and partly defined and bounded by) these two properties. These residents clearly have standing with respect to Durham’s Article VII: Conditional Use Permits, the criteria of which explicitly apply to “abutting properties,” “the neighborhood,” and the “surrounding environment.” I also represent a number of residents from other parts of Durham who are concerned about the future of downtown development and the overall environmental, aesthetic, and fiscal health of the Town of Durham, which they believe would be severely compromised if such non-compliant projects were to move forward.

I listened with great interest to the Planning Board’s Public Hearing on Wednesday, February 17, 2021 on the Toomerfs’ proposed parking structure. There was substantial public and urban-forest expert input (about 75 minutes), which built on extensive prior written and spoken input, all making a convincing case for how the project would clearly fail to meet Conditional Use (“CU”) criteria, if the criteria were diligently applied. (Such a failure was already previewed by

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Planning Board members' final negative comments in the preliminary design phase on January 8, 2020.) On February 17, there was also "preliminary discussion" among Board members of the CU criteria.

Although the Board discussed those criteria, no votes were taken nor were decisions made on February 17. My understanding is that the matter was continued to the Board's March 10, 2021 meeting, at which time the Board is expected to receive and discuss the results of two independent studies (for stormwater and traffic), and that there was the intention to discuss further whether the proposed parking project meets the CU criteria, so as to give the Town Planner an indication as to whether he should be drafting a proposed approval or disapproval of the project.

From my investigation of the review of the parking structure at the request of my clients, however, it is apparent that the Planning Department and the Planning Board have been proceeding on the basis of false assumptions with respect to the nature of this proposal, without carefully examining and referencing the definitions in Durham's Zoning Ordinance and the Table of Uses.

Based on the Town's Zoning Ordinance, the proposed parking structure is not allowed by Conditional Use permit in the Church Hill District. It is quite clearly and simply a "not-permitted use," per the Table of Uses, and it would be an improper extension of Central Business District uses into the Church Hill Zone.

The Proposed Parking Structure Is Not Allowed In The Church Hill District

"Surface Parking" is allowed in the Church Hill District by Conditional Use. However, the Toomerfs' proposal is not for "Surface Parking," as defined under the DZO, as follows:

SURFACE PARKING – A parking lot or similar uncovered, single-level parking facility that provides at-grade parking that is not located within a structure. (DZO, Article II, Definitions, Section 175-7.)

The Toomerfs proposal is, instead, clearly for "structured parking," as defined under the DZO, a "not permitted" use in Church Hill.

STRUCTURED PARKING – A structure or portion of the structure that provides parking. The parking may be above or below grade, may be covered or uncovered, and may be on multiple levels. (DZO, Article II, Section 175-7.)

What Toomerfs is proposing is not "surface parking" within the meaning of the DZO. It is "structured parking," as has been repeatedly conceded by the applicants, mentioned by Board members, and also referred to in numerous public comments.

Because of the severe downward slope of the Toomerfs' property, away from Main Street and down toward Chesley Drive, an enormous amount of fill (estimated to require 1,100 or more

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filled dump trucks, or 17,000 cubic yards of fill, per Planner's Review for February 17, 2021) will need to be brought to the site to create a new, much-elevated surface that is clearly not "at-grade." Moreover, a twenty (20) foot high retaining wall, topped by at 30" black aluminum fence, will need to be constructed into the hillside in order to contain such large amount of fill. What is proposed is clearly structured parking and certainly well "above grade."

The applicant's engineer, Mike Sievert, in describing the proposed retaining wall, stated as follows: "That's a structure. It's defined as a structure." (Planning Board meeting of February 17, 2021 at 7:35 PM). Board Vice Chairman Parnell, at approximately 10:27 p.m. on February 17, 2021, correctly observed that: "This is not about a building, obviously, but it is about a structure." Board member Tobias, at approximately 10:35 PM at the same meeting, repeatedly referred to the proposed retaining wall as a "structure."

Indeed, the proposed retaining wall is a structure that "provides parking," and therefore meets the definition of "structured parking" under the DZO, a use not allowed in the Church Hill District.

The definition of "structured parking" further provides that the parking "may be above or below grade" (in this proposal, it would most definitely be very much above grade), it may "be covered or uncovered" (it would be uncovered), and "may be on multiple levels" (note that since it only "may" be on multiple levels, it is thus not required for it to be on more than one level to fit the DZO definition of "structured parking"). The Toomerfs proposal is clearly "Structured Parking," a use that is not allowed on Church Hill per Durham's Table of Uses.

By the same token, the proposed parking facility does **not** meet the definition of "surface parking" within the definitions of the DZO. The proposed facility would be "uncovered" and "single-level," however it would not provide "at-grade parking" because there would be a dramatic, multi-story-degree drop-off from the artificially constructed parking lot surface to the ground-level below. In addition, the proposed facility would in fact be "located within a structure."

The Proposed Structured Parking Facility Amounts To An Improper Extension Of A Central Business District Use Into The Church Hill District

Durham does not allow "structured parking" in the Church Hill District, unlike in the Central Business District. This non-compliant proposal emerges from the creative attempts to obscure the obvious inter-dependence of the Mill Plaza and Toomerfs proposals. Subsequent denials aside, both Colonial Durham Associates (CDA) and Toomerfs explicitly acknowledged the "coordination" of the two proposals in their original applications.¹ Moreover, CDA agent Sean

¹ CDA's Updated Letter of Intent 10-28-19, p. 1: "In coordination with...the direct easterly abutter, Toomerfs, LLC, Colonial Durham Associates, LP (CDA) is preparing to move forward with its tabled planning application for redevelopment of the Mill Plaza." Toomerfs Preliminary Application Oct 23 2019, p. 4: "The options for parking lot

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McCauley has repeatedly informed the Planning Board of “a long-term lease arrangement with our neighbor,” not much of a secret, in any case, as the first page of the Pernaw Updated Traffic Report, 11-23-20 for the Toomerfs application explicitly states that “A portion of the new parking lot is intended to serve another off campus student housing facility proposed by others at 5 Mill Road [Mill Plaza] in Durham, New Hampshire.” In short, the two projects are clearly interconnected.

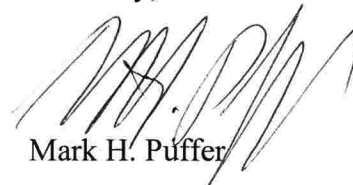
As a general rule, it is perfectly appropriate for two or more parcels to be developed together as a single project. The problem here is not only that that would further undermine CDA’s claim that the current site plan is still grandfathered under the 2015 Settlement, but also that the two projects are in different zoning districts. CDA’s proposed use, Mixed-Use with Residential, is allowed by Conditional Use Permit in the Central Business District. But it is not allowed in the Church Hill District. The Toomerfs’ proposed structured parking facility is as big as it is because it is designed to accommodate a use in a more intensive zoning district.

In effect, what is happening here is that the Toomerfs’ proposal, to support a use not allowed in the Church Hill District, is a functional attempt to expand a Central Business District use into the Church Hill Zone, where it is not allowed and would undermine the integrity of that Zone. Such a classification of uses between the two Districts is not unreasonable or invalid. See Windham v. Alford, 129 N.H. 24, 31 (1986) (“The fixing of zoning lines is a matter of legislative discretion and necessarily results in a different classification of uses on either side of the line. This does not render limitations on use of property near the boundary line in a more restricted district unreasonable or invalid.”).

Conclusion

In short, this Board need not, and should not, deliberate and reach decisions on the Conditional Use criteria for the pending project for two main reasons: (1) Toomerfs’ proposed parking facility is not “Surface Parking” within the meaning of the DZO; and (2) the Toomerfs’ proposal is to accommodate a use, “Structured Parking,” that is allowed in the adjacent Central Business District but is not allowed in the Church Hill District.

Sincerely,



Mark H. Puffer

MHP:sas

cc: Laura Spector-Morgan, Esquire

development also lends the opportunity for combined use of the parking lot with the adjacent proposed development on the Colonial Durham Associates lot....”