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MEMORANDUM

TO: Durham Planning Board
FROM: R. Timothy Phoenix, Esquire
Monica F. Kieser, Esquire
DATE: May 6, 2022
RE: Toomerfs, LLC
Site Plan and Conditional Use Applications
19-21 Main Street
Tax Map 5 Lots 1-9, 1-10, 1-15, and 1-16
Church Hill District

Dear Vice Chair Parnell and Planning Board Members:

On behalf of Toomerfs, LLC (“Toomerfs” or “Applicant”) and with the input of Michael Sievert, P.E. Horizons Engineering and Randolph Tetreault, LLS, Norway Plains Associates, Inc., we respectfully offer the following to address issues related to Toomerf’s Applications for Site Plan Approval and Conditional Use Permit (“CUP”) for construction of a parking lot (the “Project”) on the four lots located at 19-21 Main Street (the “Property”).

This Memorandum will address issues raised by members of the public, their Counsel, and/or members of the Planning Board as well as respond to Town Planner Michael Behrendt’s requests.

I. Easements

As you know, we previously addressed the issue of easements with respect to the factual circumstances and the law. (Memorandum and Exhibit from Attorneys Phoenix and Kieser dated 2/18/2022). We understand Town Counsel agrees with our position that the existence of easements is a private matter that should not be considered by the Planning Board regarding the Application, but we have been asked by Michael Behrendt to respond to Dennis Meadows latest email dated Monday April 11, 2022.

Toomerfs’ licensed land surveyor Randy Tetreault (“Tetreault”) has provided an Existing Features Plan (Plan Set dated 2/3/2022) and explained his methodology (Exhibit A to Toomerfs’ 2/18/2022 Submission, p. 20). Tetreault depicted the 16 ft. right-of-way granted to Hall on the

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Existing Features Plan and included a reference to an earlier plan depicting the right-of-way. As previously explained, Toomerf's deed references a "further extension" of this 16 ft. right-of-way for the benefit of the Urso's Predecessor McIntire; however, no deed ever provided a metes-and-bounds description or other reference to the location of that extension and no reference plan ever depicted the location of the 16 ft. access path beyond where it connected with the Hall property, similar to that shown in the Existing Features Plan. (Toomerfs' 2/18/2022 submission p. 13 and Exhibit B, pp. 22, 23, appended to same). Moreover, conditions on the ground show no apparent area used to access Urso's property from the point where the easement connects to Hall's property.¹ Accordingly, Tetreault confirmed that as a surveyor, he cannot depict a location of the further extension of that right-of-way, but can only indicate it exists, which he has done by virtue of Note 9 on the Plan. We rely on the opinion of our expert and believe the easements have been depicted correctly. With all due respect to Mr. Meadows, he has admitted that he is not an expert on easements (ltr., 12/20/2021).

Respectfully, Mr. Meadows has made numerous errors in his easement analyses. Tetreault explained that the solid line through the parcel in the 1940 Plan that Mr. Meadows labeled "Access ROW" (ltr. 12/20/2021) is actually a proposed road that was never built. Tetreault further explained that none of the subdivided parcels (Toomerfs', Urso's or Hall's) were conveyed according to the 1940 plan Meadows referenced. In fact, a later plan of June 1944, the Durgin Plan (P004-F003-007), was incorporated into the deed when the land was sold to Loveren and Horne in 1944 (Exhibit A). The Durgin Plan is the controlling plan and was incorporated into a deed Meadows cited (Bk. 520 P. 470). It shows no easements on the property four years after the 1940 plan Meadows cited, as we previously discussed (ltr. 2/18/2022,p. 21).

The Existing Features Plan depicts the metes-and-bounds location of Urso's deeded sewer easement recorded at Strafford County Registry of Deeds, Book 684/Page 409. Because Urso's sewer line is not located in the deeded sewer easement area, the actual location of Urso's sewer line is also depicted on the Plan.

Michael Behrendt has deemed the Plan adequate but has suggested the Planning Board may require additional information and suggests that Toomerfs' consider seeking a waiver from the easement requirement. Toomerfs has complied with the requirement to note the existence

¹ Upon information and belief, the extension of the right-of-way has not been used by Urso or her predecessors, all of whom have separate access to their lot via Smith Park Lane and Mill Pond Road.

and location of all easements on the Existing Features Plan to the extent possible, consistent with usual and customary industry practice according to our expert, and we believe a waiver is not necessary.

II. Trees and Steep Slopes

Landowners cannot be required to donate their private property for public enjoyment without compensation. Robbins Auto Parts, Inc. v. City of Laconia, 117 N.H. 235, 236-37 (1977). This has been confirmed by Town Planner Michael Behrendt after consultation with Town Counsel, Laura Spector Morgan.² The proposed plan has been sensitive to abutters and incorporates significant buffers. It is entirely screened on the south and east sides of the proposed parking lot, toward the residential neighborhoods, and includes planting of forty-one new trees including elm, maple, and spruce.

Regarding “steep slopes”, mitigation of steep slopes is not only permitted in the ordinance but is a necessary element for many developments: developers are *required* have a plan to mitigate environmental constraints, including steep slopes (175-23(C)(1)). There is no restriction in the Zoning Ordinance on the amount of fill that can be used, and there are other projects that have received Conditional Use approval with more fill, grading, or excavation (e.g., River Woods). Similarly, Site Plan Regulations do not prohibit filling or grading. The purpose of Article 8 of Durham’s Site Plan Regulations is to protect, preserve and enhance natural resources while accommodating appropriate growth and development by encouraging development to *consider* natural resources. Article 8 is not an absolute bar against development. Opponents emphasize a single sentence in §8.2.1: “Extensive grading and filling shall be avoided”. That section is at best vague, because “avoiding” something is not the same as “prohibiting” it. Moreover, that narrow interpretation overlooks the preceding sentence and every other provision of §8.2, all of which promote preservation of natural resources and maintenance of existing topography *to the extent practicable* (ltr. 9/7/2021). The plain language of the regulations read as a whole doesn’t prohibit development on steep slopes, but only requires consideration of

² “And I checked with the town attorney and I shared this with the Planning Board...and the town attorney's feeling confirmed my concern that if you have an existing wooded area on a private lot this [Preservation of Identified Resources, DZO 175-23.C.5] criterion cannot legally be interpreted to say that you must preserve a substantial amount of that wooded area. That could be seen as an illegal taking.” Michael Behrendt, Durham Town Planner, Planning Board Feb. 17, 2021, 7:36 p.m.

design and methods that preserve natural resources *to the extent practicable*. The Project has been reviewed twice by the Technical Review Group; no concerns were raised about fill at either meeting. Similarly, the Town's own engineers have reviewed the design approach regarding grading and drainage and noted the approach was "reasonable and consistent with what we would expect for a site of this type." (Altus Engineering, Inc. letter dated 2/18/2022). There is no reasonable basis to classify this project differently from others which have presented similar disturbance of steep slope or introduced significant fill, as we have discussed (ltr. 2/18/2022 p. 40; Planning Board 3/23/2022).

III. The 4/13/2021 Zoning Board of Adjustment (ZBA) Decision

Contrary to Attorney Fennessy, the ZBA did not determine that *any* retaining wall resulted in "Structured Parking" on 4/13/2021. The ZBA's merely passed a motion saying that they, "*...approve a petition submitted by Joshua Meyrowitz & Andersen Williams Group LLC, Durham, New Hampshire for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a March 10, 2021 Planning Board decision that the Site Plan/Conditional Use Application for the properties located at 19-21 Main Street proposes surface parking.*" The Meyrowitz/Andersen petition referenced only "the pending proposal", and their attorney cited only "the proposed parking facility" (4/13/2021). The Planning Board had not made any administrative decision on other plans that were substantially different or all plans with retaining walls, and therefore those matters are not covered by the ZBA's motion. Moreover, the reasoning underlying the April 13th ZBA decision that the Project reviewed by the Planning Board on March 10, 2021 (Plan date 2/2/2021) was "structured parking" because its 20 ft. retaining wall was a "structure" that "provided parking". (ZBA Minutes 4/13/2021; See also 4/13/2021 Letter from Mark Puffer). The ZBA also noted the height of the wall at that time in excess of 6 ft. required additional relief. (*Id.*)

Subsequently, Toomerfs' prepared a smaller parking lot which incorporated fill alone and no wall. The Planning Board determined on May 12, 2021 that the new proposal was "surface parking". This decision was appealed by Meyrowitz to the ZBA which upheld the Planning Board's decision. (ZBA Minutes 7/13/2021). On September 2, 2021, Toomerfs submitted a plan that incorporated a low retaining wall to maintain a buffer to wetlands at the rear of the Property. This wall was identified by Town Planner Michael Behrendt in his review dated September 8,

2021. Michael Sievert explained to the Planning Board that the retaining wall was added at the bottom of the slope to protect the wetland (9/8/2021 Planning Board Minutes), not to “provide parking”, and is not more than 6 ft tall.³ The incorporation of the retaining wall was addressed by the Planner and explained to the Planning Board who reviewed the proposed parking lot without objection since 9/8/2021.

IV. Who will park at the proposed lot?

Atty Fennessy’s assessment that the Traffic Study assumes that “parking spaces will be rented solely by students residing in the immediate area” is correct (ltr. 3/23/2022). Toomerfs will accept a condition of approval that specifies parking will be for long-term use by students (e.g., for lease terms not less than 30 days).

V. Development Rights

Toomerfs has constitutional rights to develop the Property as allowed under the law. The law recognizes that the Ordinance must relate legitimate government interests, and the application of the Ordinance to the Property must bear a relationship to those interests. Community resources for Justice, Inc. v. City of Manchester, 154 N.H. 748 (2007). Thus, the Planning Board’s decisions cannot be arbitrary; they must be reasonable and treat the application the same as others similarly situated. Loughlin, P, 15 New Hampshire Practice: Land Use and Planning Ch. 32: Planning Board Procedures on Plat §32.17 (other citations omitted); U.S. Const. Amend. 14;, NH Const. Pt. 1, Article 12.

Toomerfs proposes to develop the Property for a use permitted by CUP that is less intensive than other permitted uses that meets or exceeds all dimensional requirements. The plan includes generous buffers and screening from adjacent properties. Toomerfs has demonstrated through production of unrebutted expert evidence that the Project meets each element of the CUP criteria and Site Plan Regulations.

³ The Ordinance’s definition of structure does not include retaining walls and excludes minor installations such as fences under 6 ft. in height. This had factored into the ZBA’s rationale that the 20 ft. tall retaining wall previously proposed was a structure. Both Code Enforcement Officer Audrey Cline and Town Planner Michael Behrendt also with Fennessy’s position because the current retaining wall is under 6ft. high and does not “provide parking”.

Moreover, the Planning Board must weigh expert evidence greater than nonexpert opinion. (15 New Hampshire Practice: Land Use, Planning and Zoning §28.10, Condos East Corp. v. Town of Conway, 132 N.H. 431, 438 (1989)). All technical details were designed by the Civil Engineer, Michael Sievert. Traffic impacts analyzed by Traffic Engineer Stephen Pernaw. The Project's design and methodology has been subject to rigorous review on the Town's behalf by the Technical Review Group, VHB Engineers, and Altus Engineering, Inc., which stated that the grading and drainage design was reasonable and appropriate for the site.

VI. Evidence Submitted by the Public

Atty. Fennessy states that, "The Toomerfs Attorney Memo also appears to discourage the Board from considering the overwhelming evidence submitted by the public in opposition to the applications." We certainly agree that the public is entitled to offer testimony about the Project and that the Planning Board must make findings on the evidence, including that provided by the public. But our point was, arguments against the project by members of the public are conclusory and lack supporting evidence. By way of example, if a member of the public claimed that the proposed parking lot failed to meet Conditional Use criteria because of an external impact, such as lighting, without objective evidence that the lighting external impacts were "*greater than the impacts of adjacent existing uses or other uses permitted in the zone*" (175-23), then those comments are conclusory, not responsive to the requirement in the ordinance to compare it to existing or permitted uses, and do not rebut fact evidence presented by the Applicant. Objective evidence would be, for example, a product specification, peer-reviewed publication, or expert opinion that our lights exceed 8 ft. candles, the maximum permitted in the ordinance. Statements that *any* lighting on the property makes the application noncompliant, without consideration of the lighting on the adjacent existing use or other permitted uses, are wrong. Similarly, claims that the parking lot would have more external impacts on abutters than the forest are not relevant, since the ordinance doesn't require the development to be invisible to abutters, only to be "no greater than...adjacent existing uses or other uses permitted in the zone" (175-23(C)(2)). The "*existing adjacent uses or other uses permitted in the zone*" standard makes the Application difficult to assail under the law because the adjacent existing use is a parking lot more than twice the size, and permitted uses on the site include, among others, a nursing home

with a parking garage. So, our point was that none of the public's voluminous input is rebuttal evidence *within the context of requirements of the Zoning Ordinance*.

Letters from two foresters are the only exceptions, but they only cite reasons to deny the proposal that would represent an illegal taking of the land, i.e., they rely on preserving the forest, trees and environmental concerns. Although they offer opinions on stormwater management, neither forester is a civil engineer or qualified to rebut Toomerfs' expert Michael Sievert's stormwater management design, which the Town's own experts acknowledge "should provide the reduction in peak rates of runoff required by the Site Plan Regulations and meet NHDES water quality standards." (Altus Engineering, Inc. letter dated 2/18/2022).

VI. Conclusion

In summary, Toomerfs' proposal is a permitted use, under certain conditions. The proposal has been designed and presented by professionals and vetted by numerous experts who've offered unrebutted expert evidence to the Planning Board supporting a finding that the Project meets the Conditional Use Permit Criteria and Site Plan Regulations. For all of the reasons stated herein and in previous submissions, we respectfully request the Planning Board grant the requested Conditional Use Permit and Site Plan Approval.

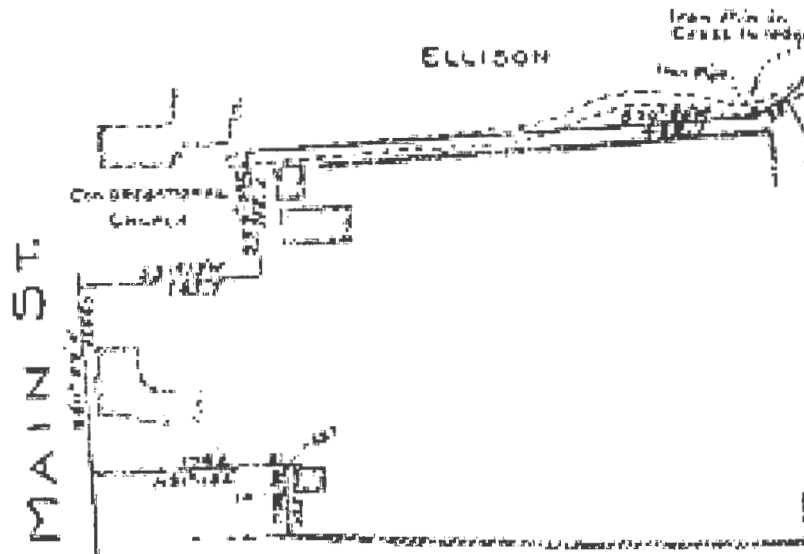
Respectfully Submitted,



R. Timothy Phoenix
Monica F. Kieser

Exhibit A

Durgin plan from 1944 (P004-F003-007), incorporated in Quinby to Loveren-Horne deed (Bk. 520, P. 470), showing no easements on the Toomerfs' property at 19-21 Main St., including all four lots (Tax Map 5, Lots 1-9, 1-10, 1-15, 1-16) four years after the "Proposed Plans" submitted by Meadows. All of Meadows' claims related to easements on the proposed plan of 1940 are wrong. Meadows' analysis overlooked this critical plan even though he cited the deed in which it is incorporated.



PLAN OF PART OF
RED TOWER ESTATE
DURHAM, N.H.

SCALE: 1 IN = 100 FT. JUNE 1944

BASED ON PLAN BY E. W. BOWLER 1928
AND ORIGINAL SURVEY BY
JOHN W. DURGIN