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July 21, 2022

Michael Behrendt, Town Planner
Durham Planning Board
8 Newmarket Road
Durham, NH 03824

**Re: 19-21 Main Street (the “Property”)
Conditional Use Permit Application & Site Plan Application**

Dear Mr. Behrendt, Vice Chair Grant, and Members of the Planning Board:

We respectfully submit the following because it is our understanding that, despite comments to the contrary at the last public hearing (June 8, 2022), you have decided to accept comments while the public hearing is adjourned during deliberations.

We have twice objected to consideration information submitted after the June 8th decision to adjourn the public hearing for deliberations. This letter, and those we submitted on July 8th and 13th, are submitted for rebuttal purposes, in the event that the Planning Board determines consideration of oppositions materials submitted after June 8, 2022 is permissible.

Planning Board Procedure

1. New Information submitted during deliberations.

Since our last letter, submissions (many which are repetitive) continue to arrive, including one from Dover State Representative and Member of the Strafford County Delegation, Peter Schmidt, Professor Wilfred Wolheim, and private citizen, former Town Council Member, and former HDC Chair, Peter Stanhope. We object to the Planning Board’s consideration of these and other submissions filed after June 8, 2022. After a 21-month public hearing process, consideration of the opposition’s eleventh hour submissions at the deliberative stage when Toomerfs has no reasonable time and ability to respond, is demonstrably unreasonable and unfair. In addition, these submissions are being elevated to “expert status” with no indication the writers have expertise with respect to this application nor that they reviewed the full plans which received Historic District Approval, comply with wetland and riparian buffers (200+ ft. to College Brook), include a stormwater management plan which *reduces* runoff toward College Brook, and provide generous yard buffers, plantings, and screening. Some submissions, such as that of Peter Stanhope, do not comment in any professional capacity, yet are nonetheless erroneously touted as expert evidence. (See Robin Mower submission dated July 19, 2022).

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The Planning Board is a quasi-judicial body empowered to impartially adjudicate applications for land use approvals. In accordance with RSA 676:1, Planning Boards must adopt Rules of Procedure. See also RSA 676:4 (Planning Board Procedures on Plats), applicable to Planning Board action on Site Plans. RSA 674:43, III. The purpose of a Planning Board's Rules of Procedure is to ensure due process and fundamental fairness to all parties.¹

The Durham Planning Board adopted Rules of Procedure on March 10, 2021. Durham Rules of Procedure address the conduct of the public hearing and afford applicant the final word. See Rules of Procedure §5.3(e) and 5(f):

After everyone has spoken who wishes to, the applicant may respond to questions and comments raised by members of the public.

After all parties have spoken, the Planning Board will determine whether to begin deliberations or continue the project review to a subsequent meeting.

This Board stated it would enter deliberations at the conclusion of the June 8, 2022 Planning Board Meeting and wanted no further information. (**DCAT 6/8/2022 3:59:00-4:04:45; 6/8/2022 Minutes, p. 10-11**). It further stated that the public hearing was adjourned until July 27, 2022, when a draft Notice of Decision was anticipated to be available, and advised that the public hearing on July 27, 2022 would be limited to comments upon the draft Notice of Decision. (**Id**). This is consistent with Planning Board Rule of Procedure §6.6, which requires formal deliberations to begin after the public hearing is closed:

Formal deliberations will not begin until the public hearing is closed. If the board wishes to ask questions of the applicant or any other parties the public hearing must be reopened (See subsection 5.3 i).

See also, Planning Board Rule of Procedure §5.4:

Public Submission of Information. The public is welcome to submit information via emails and letters prior to the opening of a public hearing and while the public hearing is open. This correspondence will be posted on the website and forwarded to the Planning Board.

The Planning Board will not accept public input after a public hearing has been closed except for the following:

¹ The importance of impartial adherence to Planning Board Rules of Procedure is addressed in various New Hampshire Municipal Association materials including **Planning Board Basics Part 2** and **Meeting Mechanics of Land Use Boards**, both of which were presented at NH Municipal Associations 2020 Land Use Conference and available here <https://www.nhmunicipal.org/workshop-material/2020-land-use-law-conference>

a) Verbatim copies of statements made at the public hearing may be submitted up until any time on the next business day following the public hearing (or for a longer period of time if so specified by the Planning Board prior to closing the public hearing).

b) For administrative matters (See Section 8.2), the Planning Board may, on a case-by-case basis, allow that additional written input be submitted for a limited period of time after the public hearing is closed. This allowance must be stated prior to closing the public hearing.²

While RSA 676:4 provides that reviewing courts will not scrutinize planning board rules of procedure for technical compliance, “procedural defects shall result in the reversal of a planning board's actions by judicial action only when such defects create serious impairment of opportunity for notice and participation.” The coordinated campaign of the opposition, which has continuing during deliberations has served to flood the Planning Board with information, much of it repetitive, erroneous, and irrelevant. Because this information is immediately transmitted to the Board and Toomerfs at the same time, Toomerfs is unable to timely respond, nor should any party submit information for consideration during deliberations. Members of the public were not permitted to comment during the public meetings on June 22, and July 13, 2022 when the Planning Board deliberated. It follows that it is also improper for additional written “evidence” to be proffered during deliberations.

A central point of Toomerf’s rebuttal on June 8, 2022 was the *unrebutted expert evidence* it had submitted³, verified by the Town’s Peer Reviewers, Altus Engineering, Inc., VHB Engineers, and Town Assessor and Appraiser, Jim Rice. On June 8, 2022, the only expert evidence submitted by the opposition were of two foresters opining generally on the value of urban forests and trees role in stormwater management. While in deliberations, the Planning Board has accepted and considered new information, submitted in the last few days of a 21-month process contravening its own Rules of Procedure resulting the opposition touting its newly submitted “expert evidence”. Acceptance and consideration of such information is fundamentally unfair, wholly undermines the process, and denies Toomerfs due process. No information submitted after June 8, 2022 should be considered.

² Note §8.2 of the Rules of Procedure distinguishes between “quasi-judicial matters”, such as applications and project reviews, and “administrative, policy, and legislative matters such as proposed amendments to the Zoning Ordinance or Site Plan Regulations.

³ Joseph Noel, Certified Soil Scientist #17; Charles Moreno, Licensed Professional Forester #115; Stephen Pernaw, Licensed Professional Engineer #5234 and Professional Traffic Operations Engineer; Mike Sievert, Professional Engineer; Certified Residential Appraiser Jeffrey Wood (from the Stanhope Group); Licensed Land Surveyor Randy Tetreault; and Robbie Woodburn, Licensed Landscape Architect.

2. Structured vs. Surface Parking.

Given the procedural ping-pong that has occurred over the last two years, there appears to be some confusion about the history of Toomerf's Project at 19-21 Main Street. By its acceptance and continued review, however, the Planning Board deemed this Project "surface parking" permitted as a principal use in the Church Hill Zone with a Conditional Use Permit.

Indeed, nearly two years ago on November 28, 2020, Planner Behrendt determined the *original* parking lot proposal with the tall retaining wall was surface parking permitted as a principal use in the Church Hill Zone with a Conditional Use Permit. During the public hearing on December 16, 2021, no member of the Planning Board or the public objected that determination. On March 10, 2021, Vice Chair Parnell brought the matter to the attention of the Planning Board and asked if any board members disagreed with the determinations made by staff and Town Counsel that the proposed parking lot (with the tall retaining wall) *was surface parking permitted in the Church Hill Zone by Conditional Use Permit*. No Board Member offered any response or comment and review continued.

After Mr. Meyrowitz appealed the March 10, 2021 decision to the ZBA, the ZBA found that the proposal then before the Planning Board was "structured parking". (4/13/2021 ZBA decision) Subsequently, Toomerfs abandoned the original plan in favor of one that used all fill for the parking (5/6/2021 Site Plan). On May 12, 2021, Planner Behrendt again opined that the 5/6/2021 Site Plan proposed "surface parking". Vice Chair Parnell opened the matter to the Board, and only Member Bubar had reservations; however, he mentioned that he was comfortable continuing to review the application. (5/12/2021 Planning Board Minutes). This determination of surface parking was also appealed to the ZBA, but this time the ZBA ruled in Toomerf's favor.⁴ (7/13/2021 ZBA Decision). On September 2, 2021, Toomerfs submitted a substantially similar plan that incorporated a low retaining wall to maintain a buffer to wetlands at the rear of the Property (9/2/2021 Plan). 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.⁵ The Planning Board has continued to review the proposed parking lot without objection since 9/8/2021.

Most recently, Code Enforcement Office Audrey Kline and Planner Behrendt disagreed with Attorney Fennessy's assertion that the new retaining wall plan was barred by the ZBA's April

⁴Meyrowitz sought rehearing before the ZBA, was denied, and appealed to Strafford Superior Court where the matter is pending.

⁵ 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 disagreed with Fennessy's position because the current retaining wall is under 6ft. high and does not "provide parking".

13, 2021 decision. (3/24/2022 Email from Behrendt to Attorney Fennessy). Neither Attorney Fennessy nor Meyrowitz appealed this determination. Furthermore, no party has appealed the actions of the Planning Board in continuing to review the 9/2/2021 Plan, nor has anyone appealed staff's determination that the 9/2/2021 Plan, now pending for nearly a year, proposes "surface parking". A determination that the Project is not surface parking at this juncture is fundamentally unfair to Toomerfs, which has expended significant resources on professional services to present and refine the 9/2/2021 Plan over the last ten months, thus the issue is settled.

External impacts

19-21 Main Street is in an area identified by the latest Durham Master Plan as the "Downtown and Commercial Core", an area comprised of several zoning districts. The Property shares a common boundary line with the Central Business District, over 400 ft. of which abut the Mill Plaza. Durham Zoning Ordinance §175-23.C.2 states, "The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of existing adjacent uses or other uses permitted in the zone." (emphasis added). Some members of the Planning Board have posited that the phrase "in the zone" applies to both "existing adjacent uses" and "other permitted uses" resulting in some members potentially declining to consider Mill Plaza because it is the Central Business District.

Applying general principle of statutory interpretation, this interpretation is plainly erroneous. Interpretation of a zoning ordinance is governed by traditional rules of statutory interpretation. Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743, 754 (2017) (citing Anderson v. Motorsports Holdings, LLC 155 N.H. 491, 494 (2007)). Among the rules of statutory interpretation is the principal that the legislative body is not presumed to waste words or enact redundant provisions and whenever possible, *every word of [an ordinance] should be given effect.* Garand v. Town of Exeter, 159 N.H. 136, 141 (2009). Thus, an interpretation which renders a word or phrase meaningless is avoided. There is no purpose for the words, "existing adjacent uses" or, for that matter, the word "or" (a disjunctive conjunction separating two alternatives) if the phrase "in the zone" applies equally to "existing adjacent uses" *and* "other uses permitted" because existing adjacent uses would already be included in "uses in the zone".

Had the legislative body intended to remove adjacent uses in another zone from consideration, it would have instead drafted, "The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of other uses permitted in the zone." It did not. An interpretation which reads out "existing adjacent uses" also leads to an absurd result because it would hamper application of the Conditional Use Criteria to any lot bordering another zone. If such an analysis were applied to Mill Plaza development, for example, none of the abutting faculty neighborhood properties could be considered "existing adjacent uses" because they are outside the Central Business District. This is clearly an absurd result the legislative body could not have intended.

Real Estate Opinion

Separate from the procedural challenge to the submission of untimely information, we implore the Planning Board to reject the substance of the real estate opinion submitted on behalf of the Ursos. The Urso realtor is not a certified residential appraiser and the letter Ms. Friel submitted contains several inaccuracies. It fails to accurately describe the existing conditions, the most important of which is that the Urso property overlooks the Church Hill Apartment Complex and its related parking lots, use, and lighting. The letter improperly claims the proposal does not comply with Church Hill Zoning and Historic District requirements, when the Project proposes a principal use permitted by conditional use permit with no variance is required, and HDC approved the Project. The letter states that the cars will be a short distance from backyard and home when there is a 39 ft. vegetated buffer before any disturbance, several proposed trees, and a fence between the Urso property and any cars. It erroneously assumes that cars will be coming and going at all times of the day, contrary to the proposed long-term parking use supported by data from Toomerf's Traffic Engineer and verified by the Town's Traffic Engineers. The letter claims there will be lighting impacts despite evidence that Toomerf's lighting plan is well under the limits (2.9 foot candles vs. 8). Lastly, the opinion assumes the proper comparison is woods vs. the proposed long-term parking lot and entirely overlooks other permitted uses in the zone that would be more impactful (light manufacturing, nursing home, elderly housing complex), each of which would include related grading, parking, and lighting.

Evidence regarding the value of an abutting property before and after a parking lot expansion was submitted over a year ago appended to Toomerf's letter dated March 8, 2021: https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/page/59631/letter_from_tim_murphy_3-8-21.pdf As demonstrated by the tax card, the assessed value of 12 Cowell Drive in the Residence A Zone increased between 2017 and 2020 despite the approval and construction of a significantly expanded parking lot proposing a second principal use, at adjacent 18 Main Street with minimal buffers and less screening. More importantly, the professional appraisal completed by Jeff Wood, Certified Appraiser from Stanhope Group demonstrated that the 2021 appraised value 12 Cowell Drive in early 2021 compares quite favorably with other comparable homes. Of the four homes reviewed, 12 Cowell Drive had the second highest appraised value (\$315,000) despite its proximity to Toomerf's long-term parking lot with minimal buffers and screening and its proximity to St. George's parking lot which rents parking spaces to students.

This previously submitted appraisal is a strong indication that the similarly situated Urso property will not be affected by the Project at 19-21 Main Street. Like 12 Cowell Drive, the Urso home is centrally located. It overlooks the Church Hill Apartments with its related parking and lighting and shares its street with Durham Community Church, which also rents a portion of its parking lot to students. The proposed screening and buffers exceed that provided to 12 Cowell Drive. As noted in the 12 Cowell Drive appraisal, Durham properties are sought after for access to highly regarded schools, proximity to the University, rail travel to Boston, commuter routes and employment centers in Portsmouth, Dover, and Rochester. (Appraisal p. 1). The

addition of a parking lot with generous buffer and screening will not change this fundamental truth.

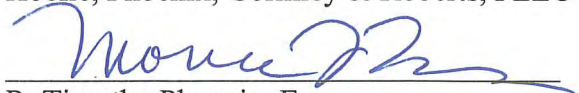
We thank the Planning Board for its consideration.

Respectfully submitted,

TOOMERFS, LLC

By and through their Attorneys

Hoefle, Phoenix, Gormley & Roberts, PLLC

A handwritten signature in blue ink, appearing to read "Monica F. Kieser", written over a horizontal line.

R. Timothy Phoenix, Esq.

Monica F. Kieser, Esq.