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July 8, 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 you have decided to accept comments while the public hearing is adjourned during deliberations.

Conditional Use Permit Criteria.

During the Planning Board’s consideration of the Conditional Use Permit (“CUP”) criteria contained in the Durham Zoning Ordinance (“DZO”) §175-23.C, the Board discussed §175-23.C.1(c): “The absence of environmental constraints (floodplain, steep slopes, etc.) or development of a plan to substantially mitigate the impacts of those constraints.” Given the discussion about riparian buffers, wetland buffers, and steep slopes, we would like to point to the following evidence addressing questions the Board may have on these issues.

- The property is not located within any 100 year flood zone as demonstrated by the initial existing conditions plan submitted October 28, 2020 and each revision of the Plan Set subsequently submitted.
- Soils were analyzed by Certified Soil Scientist Joseph Noel and wetlands were delineated by Certified Wetland Scientist Mark West. One jurisdictional wetland was located off-site and a 75 ft. buffer from that jurisdictional wetland was identified on the Site Plan submitted October 28, 2020 and each revision of the Plan Set subsequently submitted. No parking lot site work is proposed within that 75 ft. buffer¹ and the parking lot itself is over 100 ft. from the off-site jurisdictional wetland.
- The Durham Zoning Ordinance provides for a 25 ft. buffer to College Brook. DZO 175-74.A.3. The Planning Board heard testimony from Vicky Martel (“Martel”) and Michael Sievert (“Sievert”) that there is approximately 200 ft. between College Brook and any

¹ Note however, that Toomerfs will replace the Town’s aging sewer line to the South boundary.

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disturbance related to the Project. (6/8/2022 Minutes, p. 7-8). Sievert also explained that the proposed fill offers filtration and that the stormwater management plan decreases both runoff rate and volume compared to existing conditions benefitting the off-site wetland, even in a 100-year storm event. (See peer-reviewed stormwater reports submitted 10/2020, 1/2021, 2/2022).

- We agree with the Board’s consensus that the existence of steep slopes does not preclude development. Therefore, the focus under CUP should be on whether Toomerfs has developed a plan to substantially mitigate the impact of constraints posed by the existence of steep slopes. The concern with development on steep slopes is the risk of erosion and associated impacts to water quality from erosion and sedimentation, so those are the impacts to be mitigated. Toomerfs has preserved the steep slopes on either side of the Project and added fill to the bowl area in the middle of the lot for the parking lot. Over time, Toomerfs’ has responded to feedback and substantially reduced the fill within limits posed by the stormwater management. The fill is a key component of the superior stormwater management plan which decreases the volume and rate of stormwater runoff compared to the undeveloped lot. The fill also provides filtration for pollutants. (6/8/2022 Minutes, p. 8). In addition, the features of this sight include a high water table providing minimal capacity for stormwater treatment. (See Test Pit Logs, submitted October 28, 2020). Terraced parking is not appropriate for the site because stormwater would not be similarly managed in a terraced parking lot without fill. Given that steep slopes are preserved around the perimeter of the Property, stabilized with fill in the middle with a stormwater management plan improving over existing conditions, Toomerfs’ Plan substantially mitigates the impact of constraints posed by steep slopes by improving stormwater runoff thus minimizing the effects of erosion and sedimentation.

The Project must be judged in reference to all existing adjacent uses, including Mill Plaza.

DZO §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). This includes the design and height of the structure as well as its scale.” DZO §175-23.C.2 (emphasis added). Similarly, DZO §175-23.C.3 and C.4 states that the proposed site layout, buildings, and structures shall not be “incompatible with the established character of the neighborhood” (emphasis added). “Neighborhood” is a defined term in the Ordinance including an area of land generally within a 1,000 ft. radius with unifying characteristics.

The Mill Plaza, with a common property line of over 400’, cannot be overlooked when considering subsections 2-4. Although it was said that the Mill Plaza was “different”, either because its parking lot is an accessory use, or because it is in a different zone, neither rationale is supported in Ordinance, the plain language of which refers to existing adjacent uses or “the neighborhood” without regard to whether such uses are in the same zone or not, permitted or not, or principal or accessory in nature. See Harrington v. Town of Warner, 152 N.H. 75,79 (2005) citing Duffy v. City of Dover, 149 N.H. 178 (2003). (“Moreover, we will not guess what the

drafters of the ordinance might have intended, or add words that they did not see fit to include.”). Because the Ordinance directs the Board to consider existing adjacent uses without limitation and Mill Plaza is a direct abutter and clearly in the neighborhood, it is both unreasonable and unlawful to exclude Mill Plaza from consideration of whether the Toomerfs’ Project meets CUP criteria 2-4. Moreover, it is not merely the comparison of the proposed parking lot to the Mill Plaza parking lot that is required, but the adjacent use of the shopping center itself, including its 355 parking spaces on a lot more than twice the size as here proposed. Clearly, the Toomerfs’ Project compares favorably in all respects. We respectfully request that board members who may vote against the application based on subsections 2-4 articulate their reasoning to specifically address 1) whether they compared the proposal to the Mill Plaza, and if not why not; and 2) if they compared the proposal to the Mill Plaza, what feature(s) of the Toomerfs’ Project led them to conclude that it did not conform to the particular CUP they cite even when compared to Mill Plaza.

Analysis of the Toomerfs’ Project to other Church Hill properties.

For the same reason, an analysis concluding that the Toomerfs’ footprint was 10X greater than the median and 1.6X greater than the next largest “footprint” “in the zone” is also erroneous as a matter of law because both “existing adjacent uses” and “the neighborhood” comprise properties beyond the Church Hill Zone. We question the reliability of information compiled from tax cards which are often inaccurate, reflect only post-development conditions, and provide no information regarding the square footage of surface parking, a significant portion of any commercial development. Introduction of unreliable information during deliberations also compromises Toomerfs’ ability to rebut the conclusion presented.

To the extent that comparison to adjacent Church Hill Zone properties is needed, the Project meets all setbacks, including generous buffers on the south and east sides of the Property and proposed aggregate impervious coverage is 43.1%, well below the 80% maximum for the zone. We have also confirmed that no individual parcel at 19-21 Main exceeds 80% impervious coverage. Compliance with the Church Hill Zone dimensional requirements demonstrates that the Project is not incompatible with the character of the neighborhood even when the analysis is limited to Church Hill Zone properties. The Ordinance requires more than that, however, and directs the reader to compare the Project to all properties within a 1000 ft. radius which includes the Mill Plaza and other nearby properties in the both the Central Business District and Courthouse Zones.

Steep Slopes under Durham Site Plan Regulations.

The consideration of steep slopes under the Durham Site Plan Regulations (“SPR”) is separate and distinct from that required under Conditional Use Criteria in the Ordinance. As has been presented, Durham SPR, Article VIII, § 8.21 does not prohibit grading and filling, it says that topography should be maintained “to the extent practicable”. The next sentence says, “[e]xtensive grading and filling shall be avoided”. As we have pointed out, existing site features drive the design and what might be extensive fill on one site is just right on another, and other

projects have likely resulted in more grading and fill than Toomerfs proposes here. In addition, “avoided” does not mean “prohibited”. “Avoid” can mean “to try not to do something” (Cambridge Dictionary¹), or “to endeavor not to meet” (yourdictionary.com²). These definitions are consistent with Article VIII as a whole which includes repeated references to “where practicable” and “where appropriate”, so it is clear that the Site Plan Regulations do not prohibit reasonable grading and fill. Here, the fill is also an integral part of the superior stormwater management plan described by Durham’s Peer Reviewers as “reasonable and consistent for a site of this type”. (Peer Review letters dated 2/22/2021 and 2/18/2022 from Altus Engineering, Inc.).

The Site Review Process is required for any permitted commercial use on these lots, which predate the enactment of Durham’s Site Plan Regulations. The existing features of the Property include slopes in the middle of the lot and along both sides, as well as a high water table in several lower lying areas of the undeveloped lot. These conditions require grading and fill to prepare the lot for any development. Interpretation of Article VIII to preclude grading and filling on the lot is a departure from the Board’s approach on other commercial projects and will thwart any economically reasonable development of the Property in violation of Toomerfs’ constitutional rights to develop its property.

We thank the Planning Board for its consideration.

Respectfully submitted,

TOOMERFS, LLC

By and through their Attorneys

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