

August 10, 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:

Despite the Board’s June 8, 2022 decision not to receive additional testimony or documents (**DCAT 6/8/2022 3:59:00-4:04:45; 6/8/2022 Minutes, p. 10-11**), administrative staff have received approximately fifty (50) pieces of correspondence from the opposition, including items they characterize as “expert” evidence. Each item has been accepted, contemporaneously forwarded to the Planning Board, and posted to the Town’s web page for the Project. We have requested, and continue to request that the Planning Board proceed as intended, follow its rules of procedure regarding deliberations, and decline to consider evidence submitted after June 8th.

However, given that the Board has continued to receive and consider these submissions, we have determined it necessary to periodically respond to refute erroneous assertions and preserve our client’s rights to due process. While we believe our responses to be necessary and reasonable, it is clear that the opposition merely views our replies as another opening to repeat the same arguments. In that vein, we have reviewed Attorney Fennessy’s letter dated July 26, 2022, which we reject in its entirety, including his claims that the Town has been biased in favor of the Applicants.

In our experience, no town in which we practice does as much as the Town of Durham to ensure the public are informed of and invited to participate in the land use permitting process. The website, DCAT, social media engagement, and other efforts by the Town are simply unparalleled. Some towns do not post applications and public comment online and interested parties must come to Town Hall to review application files. In others, public comment is limited in length with repeat comments discouraged. Simply put, in no other town is it easier to learn about a pending project, review the technical plans, and provide unlimited input.

We similarly reject Attorney Fennessy’s continued assertions that the pending plan incorporating a retaining wall under 6ft in height is barred by the previous ZBA denial. The low retaining wall was introduced in the 9/2/2022 Plan and called out in the 9/8/2021 Planner’s review. Michael Sievert, P.E. discussed the retaining wall when he reviewed the 9/2/2021 Plan at the 9/8/2021

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planning board meeting. Attorney Fennessy's clients Sandy Ceponis Urso, Kyle Urso, and Josh Meyrowitz attended this meeting and addressed the Board. Neither they, nor the Planning Board, raised concerns about the retaining wall, which is neither a structure under the Ordinance, nor structurally supporting the parking lot. Attorney Fennessy was advised by the Town on March 24, 2022 that the current plan was not prohibited by the previous ZBA decision and has declined to appeal that determination. **(See 7/21/2022 Hoefle Phoenix Letter)**.

Much attention has been paid to the submission of expert testimony and the Planning Board's obligation to consider expert testimony, especially if it is uncontradicted. Condos East Corp. v. Conway, 132 NH 431 (1989). Contrary to the assertions of Mr. Meyrowitz and Attorney Fennessy, Toomerfs have not mischaracterized the timing of the foresters' submissions by stating they were submitted on or after June 8th. Toomerfs in fact have previously acknowledged the two forester reports **(Letter from Hoefle Phoenix dated 5/6/2022)**. Toomerf's presentation on June 8, 2022 also heavily emphasized that, *as of that date*, despite nearly two years of hearings, the *only* expert evidence submitted by the opposition was the opinion of two foresters who offered illegal reasons for denial. **(6/8/2022 Power Point Presentation, Slide 4)**. The point of Toomerf's letter dated 7/21/2022 was to demonstrate the prejudicial impact of the Town's decision to allow continued public comment during deliberations: Having heard Toomerf's final argument regarding the opposition's lack of expert evidence, they scrambled to submit untimely purported "expert" evidence from Joan Friel and Professor Wolheim, and then cautioned then Planning Board not to overlook "uncontradicted expert testimony".

We again urge the Planning Board to dismiss this untimely evidence, which has continued to be filed or touted by members of the opposition as recently as yesterday, by the Conservation Commission today, and to which we have been compelled to respond in an effort to preserve Toomerf's rights to due process and fundamental fairness. As indicated in our 7/21/2022 Letter, the Board's Rules of Procedure for the Planning Board's allow for Applicant to rebut prior to commencement of deliberations, which then occur without any input. Should the Planning Board consider the substance of the expert testimony, however, we urge it to consider the general purposes of expert testimony and its generally accepted methods of production, none of which have here been followed. These concepts are outlined in the New Hampshire Rules of Evidence (NHRE) 702:

- A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if:
- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or *to determine a fact in issue*;
 - (b) the testimony is *based on sufficient facts or data*;
 - (c) the testimony is *the product of reliable principles and methods*;
- and
- (d) *the expert has reliably applied the principles and methods to the facts of the case.*

See also RSA 516:29-a and 516:29-b. While the formal Rules of Evidence do not apply to hearings before land use boards, the principles above provide land use boards guidance for evaluating expert testimony submitted.

As previously summarized, Toomerf's technical team of experts includes Joseph Noel, Certified Soil Scientist (and NH Wetland Scientist); Mark West, Certified Wetland Scientist; Charles Moreno, Licensed Professional Forester #; Stephen Pernaw, Professional Engineer and Professional Traffic Operations Engineer; Mike Sievert, Professional Engineer; Randy Tetreault, Land Surveyor; and Robbie Woodburn, Landscape Architect. Additional evidence supporting the Project comes from Town reviewers: Public Works Director Richard Reine and Town Engineer April Talon and peer reviewers Altus Engineering, Inc., VHB. All have engaged in a detailed review of the site and/or application, site plans, and designs. Furthermore, all have employed the usual and customary methods in their respective fields, as explained in various reports and/or testimony.

The same cannot be said of the opposition's claimed "experts".

Peter Stanhope

Mr. Stanhope has submitted written comment on two occasions:

- 1.) December 1, 2020, Mr. Stanhope stated he is not opposed to the Project. He also stated, "There is a clear need for additional and affordable parking in Durham's CBD." The remainder of his comments are directed to the street view/entry and its compliance with Historic District requirements, no longer at issue given the 1/7/2021 HDC approval.
- 2.) July 14, 2022, Mr. Stanhope states an unnamed party asked him to opine on HDC related issues. He goes on to explain that diminution of property values (a term which applies to variances) is an issue that must be considered, and defers to Ms. Friel before turning his attention to the extensive grading and fill he claims is proposed. He makes no further reference to the impact on surrounding property values, but recommends screening, buffers, compliance with HDC requirements, compliance with lighting standards, limitations on use and maintenance hours before urging the Planning Board to consider "what is in the best interest of the neighborhood and community as a whole". Nothing in the letter cites his professional qualifications, the facts or data underlying his comments, nor described the principles and methods reliably applied to the facts of this application. Instead, Stanhope lists his qualifications as a community member, former HDC chair, and town councilmember.

Had Mr. Stanhope been intending to opine with the full weight of his professional credentials, we can anticipate he would submit a formal report, on his company letterhead, listing the application, plans, ordinances, and sites reviewed, with a side-by-side comparison homes similar to Ursos in proximity to parking lots or other "inconstant" uses vs. those not in proximity to such uses. The absence of this information and deference to Joan Friel, indicates he was not hired to present a professional opinion and evinces an intent to limit his comments to that of an interested non-abutter community member's personal opinion.

Realtor Joan Friel

Ms. Friel submitted an opinion on behalf of the Urso Family dated July 8, 2022. We previously addressed this in our July 21, 2022 letter, but just learned that Friel, a member of the Faculty Neighborhood, signed Mr. Meyrowitz's June 7, 2021 petition opposing the Toomerf's Project before her June 27th meeting with Ursos and before she authored her letter. Thus, Friel is not an "expert" evaluating with an open mind, but instead with a clear bias against the Project from the outset. While bias alone should disqualify her opinion, Friel's letter is also rife with inaccurate statements significantly undercutting her ultimate conclusion.

- She begins by asserting a variance is required for the Project, instead of a Conditional Use Permit, which is an innovative land use designed to address the middle-ground between a variance for a use that is not permitted, and a by-right use permitted with no review. She later asserts that the proposal does not meet HDC requirements despite the HDC approval previously obtained 1/7/2021, and despite the fact that the lot bordering Urso's is not in the Historic District.
- Friel relies on the stakes at the Property to assert the Project will have a negative effect, but provides no information about which stakes. There are stakes marking the property boundary, stakes marking the previously proposed larger parking lot, and stakes marking the location of the new parking lot. Urso is currently using Toomerf's land as her backyard with Toomerf's permission, so it is unclear whether Friel was aware that some of the land she may be assigning to Urso for her valuation actually belongs to Toomerf's. Toomerf's current plan proposes a 39 ft. undisturbed buffer from the common lot line. The closest parking area is even further still, approximately 59 ft. from the lot line. The area bordering Urso will also be screened by a fence and additional arborvitae trees. This is not a "short distance" from Urso's backyard and home as claimed by Friel.
- The lighting is the minimum acceptable level considering public safety, and at 2.9 footcandles is a significantly lower intensity than the regulatory limit of 8. There has been discussion about additional opportunities for dimming provided safety is maintained.
- Cars, motoring, and "people noise" will not be all day and night as the long-term parking use serves individuals with different needs rather than a single purpose or venue resulting in all users coming and going at the same time.

Clearly, Ms. Friel failed to opine based on sufficient facts or data, describe the principles or methods underlying her opinion, or reliably apply these principles or methods to the facts of the case. In contrast, a professional report from Certified Residential Appraiser Jeffrey Wood (from the Stanhope Group) indicated 12 Cowell Drive had suffered no loss in value despite its proximity to a new student parking lot requiring a CUP for an additional principal use. This is an expert opinion regarding the closest comparable situation as 12 Cowell directly abuts a new parking lot serving students in the same neighborhood in the Church Hill District. In addition, Town Assessor and Certified Residential Appraiser, Jim Rice opined that effect on property was somewhat speculative, though he was able to confirm a Chesley Drive home close to the proposed Mill Plaza Project suffered no chilling effect: selling for \$46,000 over the asking price

(after 2 days on the market and nine offers) despite the fact that the buyer was advised of the Mill Plaza redevelopment plans. Rice further advised that he believed no outside opinion was required.

Most significantly, Friel overlooks the parcel's location in the Downtown Commercial Core and appears to view Toomerf's wooded lot as an extension of Urso's backyard without any regard to the by-right uses in the zone: art center, adult daycare, elderly housing; restaurant; and light manufacturing, any one of which could have tall buildings and/or parking a similar distance from her home and of which Urso had constructive knowledge when purchasing the home. Absent a conservation easement, Toomerf's land is not required to remain undisturbed in service of Urso or Anderson. Attorney Fennessy's arguments to the contrary is folly as any construction of the CUP criteria and the Ordinance *as a whole* cannot escape the reality of other permitted uses for this existing wooded lot, each of which can result in parking, lighting, and "people noise". It is not the *proposed use* that Friel claims negatively affects Urso or Andersen, it is *any commercially reasonable use* at all. Thus, the realtor opinion rests on an unconstitutional taking of Toomerf's property for Urso's enjoyment.

Professors Wolheim and MacDowell

Like the foresters who submitted comments earlier in the process about the value of urban forests and the need to preserve trees, Professors Wolheim and MacDowell assert that tree removal and development will harm College Brook. Neither provide any indication that they have reviewed the application, plans, nor even mention the distance of the Project to College Brook, but both opine that the lot must remain wooded to prevent surface water runoff and afford sufficient nitrogen and sediment removal.

Professors Wolheim and MacDowell may possess the requisite general knowledge to qualify as experts on the environment, but cannot rebut the testimony of Michael Sievert, P.E. that the grade of the parking lot directs stormwater to specific collection points, which offer initial filtration before infiltrating into clean fill *decreasing 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 prepared by Horizons Engineering submitted 10/2020, 1/2021, 3/2021, 2/2022). These claims have been evaluated on behalf of the Town by Altus Engineering who agreed that the design should reduce runoff as required by the Site Plan Regulations and meet NHDES Water Quality Standards and opined that "[t]he Project's design is reasonable and consistent with what we would expect for a site of this type". The plan also includes retention of a generous wooded buffer, 40 new trees, native plantings, and maintenance by Snow-Pro certified operators to reduce salt.

Like the previously submitted letters from foresters, Wolheim and MacDowell offer illegal/unconstitutional reasons for denial (preservation of trees) that would thwart any development and thus constitute an unconstitutional taking of Toomerf's Property for which the Town will have to pay just compensation. Such comments are more appropriate for consideration in conjunction with a municipal and/or state review of various setbacks to College Brook and other tributaries, but fail to offer any meaningful assistance to the Planning Board evaluating a Project outside the Wetland Conservation Overlay District, outside the Shoreland

Protection Zone and some 200 ft. from College Brook and applying an Ordinance which requires only a 25 ft. buffer to College Brook. Contrary to the foresters, professors, and Conservation Commissions opinions, neither the CUP nor Site Plan Natural Resource Standards can be reasonably and lawfully interpreted to prevent *any* development on the Site whether in fealty to an abutting lot owner, or the desire to preserve a small, wooded tract.

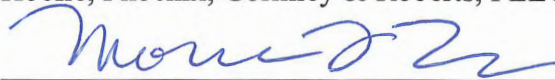
Toomerfs has in all respects demonstrated compliance with the Conditional Use Criteria and Site Plan Regulations. Accordingly, we respectfully request that the Planning Board issue the Conditional Use Permit and Site Plan Approval.

Respectfully submitted,

TOOMERFS, LLC

By and through their Attorneys

Hoefle, Phoenix, Gormley & Roberts, PLLC



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