

August 6, 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 write to request Alternate Planning Board Member Friedrichs (“Friedrichs”) to recuse zirsself¹ from further deliberation regarding Toomerf’s parking lot proposal (the “Project”) for 19-21 Main Street. We do not make this request lightly but believe Friedrichs’ actions demonstrate a conflict of interest requiring disqualification.

Our State Constitution demands that all judges be “as impartial as the lot of humanity will admit.” N.H. CONST. pt. I, art. 35. This applies similarly to members of boards acting in a quasi-judicial capacity. N.H. Milk Dealers’ Ass’n v. Milk Control Board, 107 N.H. 335, 338–39, (1966). A municipal body is acting judicially when acting upon a landowner’s land use application related to a specific parcel of land. Ehrenberg v. Concord, 120 N.H. 656 (1980). NH RSA 673:14, I forbids a planning board member from sitting on “any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, *or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.*” (emphasis added). Member Friedrichs must therefore meet the juror standard of RSA 500-A:12. Winslow v. Town of Holderness Planning Board, 125 N.H. 262 (1984). NH RSA 500-A:12, I sets forth the standard inquiry for jurors:

Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

- (a) Expects to gain or lose upon the disposition of the case;
- (b) Is related to either party;
- (c) Has advised or assisted either party;
- (d) *Has directly or indirectly given his opinion or has formed an opinion;*
- (e) Is employed by or employs any party in the case;
- (f) *Is prejudiced to any degree regarding the case; or*
- (g) Employs any of the counsel appearing in the case in any action then pending in the court. (emphasis added).

¹ Member Friedrichs’ pronouns are ze/zir.

DANIEL C. HOEFLE
R. TIMOTHY PHOENIX
LAWRENCE B. GORMLEY
STEPHEN H. ROBERTS

R. PETER TAYLOR
KEVIN M. BAUM
GREGORY D. ROBBINS
MONICA F. KIESER

JACOB J. B. MARVELLEY
DUNCAN A. EDGAR
STEPHANIE J. JOHNSON

OF COUNSEL:
SAMUEL R. REID
JOHN AHLGREN

Any juror who is not indifferent may not sit for trial. RSA 500-A:12, II. Prejudgment of the case is a basis for disqualification. Winslow v. Town of Holderness Planning Board, 125 N.H. 262 (1984)(finding public support for proposal prior to board participation constituted prejudgment).

Board Members are presumed to be unbiased and the burden is upon the party alleging bias to prove otherwise. Petition of Grimm, 138 N.H. 42, 52 (1993). If the issue is raised, prior to or at the required public hearing, the board shall, upon the request of any member, take an advisory non-binding vote on the question of whether the member should be disqualified. RSA 673:14, II.

Friedrichs recently moved to Durham and joined this board in February, 2022 shortly after zir husband authored a detailed letter opposing the Mill Plaza development, a project connected to Toomerf's Project by some members of the public, due in part to wetland concerns and impacts to College Brook. **(Exhibit A)**. Ze lives at 18 Garden Lane in the Faculty Neighborhood. The Citizen's petition against Toomerf's Project has signatures from 32 residents of Garden Lane in Durham including 14 Garden Lane, 15, 16, 17, 19, 24 and 27 Garden Lane as well as multiple other Faculty Neighborhood addresses. Friedrichs has engaged in outside research and submitted several pieces of information regarding 19-21 Main Street to Michael Behrendt for distribution to the Planning Board and Conservation Commission:

- 1.) 5/11/2022 Friedrichs states it is zir understanding that the Planning Board can request input from the Durham Conservation Commission ("DCC"). **(DCAT 3:32:19)**.
- 2.) 6/8/2022 email to Michael Behrendt re: 19-21 Main Street attaching for distribution to Planning Board *and Conservation Commission* Members containing a graphic representation of a riparian buffer, stormwater flow and groundwater flow and related guidance from Pennsylvania Source Water Protection which advocates for a 100 to 150 ft. riparian buffer and increased buffers in areas of steep slopes, soils with low permeability or potential for high erosion.² **(Exhibit B)**.
- 3.) 6/22/2022 while the public hearing was adjourned, Friedrichs offered lay testimony based on zir own site walk and erroneously claimed that wetlands on the Property drain into College Brook, contrary CWS Mark West's wetland delineation. Ze further asserted that there is no measurement from the wetlands to the affected area, and advocated for an expert to opine on the impacts.³ **(DCAT 1:47:23-1:55:44)**. No action was taken by the Board on zir request.
- 4.) 6/22/2022 while the public hearing was adjourned, Friedrichs offered testimony to the Planning Board including a spreadsheet ze developed through review of other Church Hill Zone Properties, their density and massing based on information ze obtained by reviewing tax cards and tallying parking spaces. Relying on this spreadsheet, which is not based on accurate information, Friedrichs opined that the density for the proposal was

² The Project is outside the Wetland Conservation Overlay District ("WCOD") and Shoreland Protection Overlay District ("SPOD") and over 200 ft. to College Brook, which requires a 25 ft. buffer. DZO §175-74.A

³ Member Friedrichs repeatedly overlooks the wetland delineation provided on the plan which indicates site disturbance is more 75 ft. from the nearest jurisdictional wetland and more than 200 ft. from College Brook which requires just a 25 ft. buffer pursuant to DZO §175-74.A

- 10 times greater than the median footprint for development in the Church Hill Zone. Ze did not appear to be seated for deliberation as Alternate Germain was seated for Chair Rasmussen.
- 5.) 7/6/2022 email to Michael Behrendt requesting zir spreadsheet be distributed to other Planning Board Members and uploaded to the website if appropriate. **(Exhibit C)**. This led to an alternative calculation submitted by recused Planning Board Member Paul Rasmussen.
 - 6.) 7/11/2022 email to Michael Behrendt for distribution to the Planning Board regarding efforts to restore College Brook. **(Exhibit D)**.

Most recently, on July 25, 2022, Friedrichs, while in the midst of deliberation on the Toomerf's application, addressed the Durham Conservation Commission ("DCC") about the Toomerf's Project. Ze spoke immediately after principal opponent Mr. Meyrowitz's presentation and request for DCC review of Toomerf's Project, which has been pending before the Planning Board for nearly two years and is without question outside the WCOD and SPOD. After Mr. Meyrowitz's comments and before DCC determined whether it would review the Project, Friedrichs addressed the DCC, purportedly as a private individual and not on behalf of the Planning Board. Ze was responding apparently, to a comment made by Michael Behrendt, regarding the purview of another committee, the Oyster River Local Advisory Committee ("ORLAC"). ORLAC is one of New Hampshire's Local River Advisory Committees which, pursuant to RSA 483:12-a, must be notified by any state agency acting on any application (i.e., NHDES Wetland, Shoreland, Alteration of Terrain, Dam, etc), or notified by any municipality considering actions in managing and regulating activities in the designated river corridor. RSA 483:8-a, III(a). Local River Advisory Committees also review any federal, state, or local application that "may alter the resource values and characteristics for which the river or segment is designated", though no notice requirement is listed. RSA 483:8-a, III(b).

Friedrichs said ze was hearing for the first time that the Project may be outside the purview of ORLAC. Ze opined the matter was clearly within the purview ORLAC based on an interactive map ze was reviewing on zir phone at the time of zir testimony depicting the property within a quarter mile of Oyster River.⁴ After Member Friedrichs testified, the Conservation Commission indicated an intent to review the Project at their next meeting, August 22, 2022. Subsequently, DCC scheduled a special meeting on August 8, 2022, for which Toomerf's received notice on August 2, 2022.

A municipal body acting on a land use application is engaged in a judicial action where it must weigh and consider "evidence and arguments *the parties choose to lay before them*" (emphasis added). In Re: Bethlehem, 154 N.H. 314 (2006). Cases reviewing prejudgment are highly fact driven, see City of Dover v. Kimball, 136 N.H. 441 (1992)(no prejudgment where a board member publicly opined he would vote against the project due to numerous discrepancies in applicant's submission), Webster v. Town of Candia, 146 N.H. 430 (2001) (no prejudgment

⁴ As a new resident of Durham and a new Planning Board Member, Member Friedrichs may or may not have been aware that Michael Behrendt notified ORLAC Chair Eric Feigenbaum on December 10, 2020 and again on May 26, 2021. No comments from ORLAC were ever submitted.

where a member prepared a motion summarizing the reasons he would move to deny), and Winslow v. Holderness Planning Board, 125 N.H. 262 (1984) (public comment in favor of subdivision disqualified member from sitting upon application once he joined the board), Atherton v. City of Concord, 109 N.H. 164 (1968) (planning board member's vote in favor did not disqualify from voting on same project a member of city council).

Unlike the aforementioned cases, which relate to a single event, after zir requests for DCC review and additional peer review received no action from the Planning Board, Friedrichs accumulated and presented evidence outside the record to the Planning Board *and* the Conservation Commission, clearly and unobjectively arguing against approval in an effort to invite further scrutiny while ze and other Planning Board members are engaged in deliberations. Indeed, zir anti-project actions and statements demonstrate that ze does not have an open mind and is not acting as an impartial "juror" but is instead actively seeking evidence outside the record and outside support for denial.

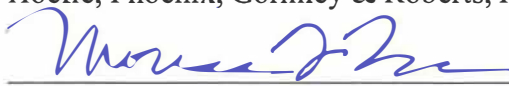
Toomerf's Project has been pending for nearly two years. It falls outside the WCOD and SPOD, is over 200 ft. from College Brook⁵, and includes replanting of approximately 40 trees. Expert evidence, verified by the Town's Engineers, demonstrates that the Project will decrease stormwater runoff rate and volume compared to existing conditions.⁶ Given this evidence, there is no reasonable basis for the recent flurry of extraneous submissions to the Planning Board and Conservation Commission. Such actions in context demonstrate that Member Friedrichs' interest in the outcome is "not remote, uncertain, contingent or speculative." Atherton v. City of Concord, 109 N.H. 164 (1968). Accordingly, we respectfully move Member Friedrichs to recuse zirself from Toomerf's application.

Respectfully submitted,

TOOMERFS, LLC

By and through their Attorneys

Hoefle, Phoenix, Gormley & Roberts, PLLC



R. Timothy Phoenix, Esq.

Monica F. Kieser, Esq.

⁵ Entitled to a 25 ft. buffer pursuant to DZO §175-74.A

⁶ Michael Sievert, P.E. has testified several times 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 prepared by Chris Hernick, P.E. submitted 10/2020, 1/2021, 3/2021, 2/2022).

February 2, 2022

Dear Durham Planning Board,

My name is Aldo Santillana Chebar and I am the excited new homeowner of 18 Garden Lane. My spouse Emily Friedrichs grew up in Exeter, and we moved here after nearly a decade together in Buenos Aires, Argentina because we both love this region. We chose to come to Durham for two principal reasons: the walkable downtown and the available access to conservation lands for recreational purposes. We are both thrilled to be joining this community and excited to help strengthen the town's fabric and assets.

While the current Mill Plaza is underutilized and I would love to see it redeveloped, I want to share my concerns that the current Mill Plaza proposal does not meet all requirements for a Conditional Use permit.

First I am concerned that the impact of flooding causes the proposal to fail to meet several criteria (Criterion #2 – External Impacts, Criterion #5 – Preservation of natural, cultural, historic and scenic resources, Criterion #6 – Impact on Property Values):

As acknowledged by the HW peer reviewer at the December 8 Public Hearing and in the chart for HW on Peak Rate of Stormwater Discharge in CFS, evidence suggests that the proposed development does not include sufficient water mitigation for anticipated storms. While the proposed plan will decrease the current developmental footprint into College Brook, the overall impermeable surface will increase.

The proposed increase in wetland area is likely insufficient to offset the resulting increase in waterflow. Currently, flooding occurs where College Brook meets Mill Pond, which means the baseline is not zero: even an increase in wetlands *proportionate* to an increase in impermeable surface would guarantee continued flooding at Mill Plaza. If not addressed by the developer now, flooding will be a burden on the town and on taxpayers to fix.

That is the situation this year, but storms are becoming more extreme. Our plans must account for increased water flow during future storms because we are in the early stages of climate change. Any water mitigation plans that the town accepts today must take into account the likely exponential increase in flooding over the next few decades. Given what we already know, it is extremely unlikely that the current plan's proposed water mitigation is sufficient for even the near future, let alone its design lifespan.

I also urge you to not consider the project in isolation, but to consider it in the context of the impact on the downtown's future. If the current plan maxes out the water-carrying capacity of College Brook, and the included parking proves to be insufficient for the number of additional residents and businesses, where can additional parking be added? Will the proposed development be adaptable in the future, or is it already maxing out the site's capacity?



Additionally, the current proposal is not in keeping with the terms of the 2015 settlement which explicitly (please refer to Exhibit a.1-2 which was overlooked in the 10/6/21 email from the town attorney) states that all buildings and roads will be outside the shoreland and wetland buffers and that the buffers will be maintained by the property owner.

Secondly, I am concerned that noise and vehicular traffic could also cause the application to fail to meet the necessary conditions (Criterion #2 – External Impacts, Criterion #5 – Preservation of natural, cultural, historic and scenic resources, Criterion #6 – Impact on Property Values): If the Plaza's tenants, as proposed, will not use the Plaza parking lot, then Faculty Road and Chesley Drive could become frequent car pick-up and drop-off spots. Proceedings so far have not sufficiently addressed the level of noise (particularly at night) and potential for litter in this area from students returning home or leaving large gatherings at the proposed Plaza buildings.

Finally, an influx of housing dedicated to students in the downtown could alter its current character and functioning, which is a dramatic external impact that affects cultural resources and property values. While the presence of students and of UNH is a huge asset for our town, it's also important for Durham to maintain its own, independent town identity. This is what drew my spouse and me to Durham and what draws other families and retirees not otherwise connected to UNH.

The proposed buildings' blocky massing and sheer number of residential units threaten to dwarf Main St and could amount to over-development of student housing for this corridor. Rather than having the intended outcome of creating dense, walkable and multigenerational neighborhoods, it could drive the downtown to become an extension of campus. This would hurt our downtown's diversity, its ability to serve the needs of the community as a whole, and Durham's ability to be seen as a destination community.

The current proposal, with its emphasis on student housing rather than community use, negatively impacts the stated goals of our town's Master Plan (Conditional Use Criterion #2 – External Impacts). The Durham Master Plan embraces higher density housing in the downtown area but in a way that continues to feed our vibrant community by promoting social interactions through chance encounters downtown. Similar nearby towns, such as Exeter, have thriving centers because as they have grown, they have incorporated connected public spaces to create a town center that serves all ages. The current Plaza proposal does not include enough public space for non-tenants that will draw them in for pleasant and interesting experiences, nor are there gathering places for events that would serve the public of all ages. As a result, the character and function of the downtown would change if this site were to be developed as proposed.

I know that the Planning Board takes its service seriously to protect the interests of Durham residents. Please make sure that your deliberations are based on hard evidence that conditional use criteria are met and, when additional information is necessary to reach a sound conclusion, do not accept excuses such as "this is too hard," "this is not what we looked at," "that's not what is usually defined as traffic," and "this matter is in the eye or ear of the beholder." These are not

valid excuses. The Planning Board can appoint a special master at the cost of the applicant to answer these questions.

If the applicant is not willing or able to provide the necessary information, then the Planning Board needs to deny the application based on well-reasoned doubt. The burden of proof is on the applicant, not the Planning Board, nor the public.

Thank you for your service to Durham and for considering these points.

Sincerely,
Aldo Santillana Chebar
18 Garden Lane, Durham

Monica Kieser

From: Michael Behrendt <mbehrendt@ci.durham.nh.us>
Sent: Wednesday, June 8, 2022 3:55 PM
Subject: Main Street #19 - email from Emily Friedrichs

To the Planning Board (and Conservation Commission),
Please see the email from Emily Friedrichs below.

Michael Behrendt

Durham Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824
(603) 868-8064
www.ci.durham.nh.us

From: Emily Friedrichs <emilyfriedrichs@gmail.com>
Sent: Wednesday, June 08, 2022 3:12 PM
To: Michael Behrendt <mbehrendt@ci.durham.nh.us>; paul rasmussen
(pnrasmus@gmail.com) <pnrasmus@gmail.com>
Subject: photo for question tonight at Planning Board meeting

Hi Michael and Paul,

I'm sharing an image I would like to reference tonight in order to ask a question of the landscape architect for 19-21 Main Street. It is best viewed at
https://3jgs2o4a02n22u73bi2gnd3l-wpengine.netdna-ssl.com/wp-content/uploads/RiparianForest_full.jpg

but the information explaining the image is here: https://sourcewaterpa-archive.prwa.com/index.html%3Fpage_id=4831.html

Please also share with other Planning Board members and the Conservation Commission as it may be a helpful general reference.

Thank you!
Emily

Emily Friedrichs



(Pronouns) ze / zir

(USA Cell) +1 603 706 8174

(Argentina Fija) +54 11 4621 1556

Monica Kieser

From: Michael Behrendt <mbehrendt@ci.durham.nh.us>
Sent: Wednesday, July 6, 2022 6:14 PM
Subject: Main Street #19 - information from Emily Friedrichs

To the Planning Board,
Please see the information below from Emily Friedrichs.

Michael Behrendt

Durham Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824
(603) 868-8064
www.ci.durham.nh.us

From: Emily Friedrichs <emilyfriedrichs@gmail.com>
Sent: Wednesday, July 06, 2022 5:31 PM
To: Michael Behrendt <mbehrendt@ci.durham.nh.us>
Subject: Followup from last Planning Board meeting

Hi Michael,

At the last meeting I mentioned the table I had created of existing development footprints in the Church Hill zone. I want to be sure that other planning board members can access that if they want to review/verify for themselves, but I can't find it on the town website.

Could you forward this to the PB and also add to the website if appropriate?

Thank you!
Emily

Copy of Church Hill Zone Development



Emily Friedrichs

(Pronouns) ze / zir

(USA Cell) +1 603 706 8174

(Argentina Fija) +54 11 4621 1556

Monica Kieser

From: Michael Behrendt <mbehrendt@ci.durham.nh.us>
Sent: Monday, July 11, 2022 2:05 PM
Subject: Main Street #19 - riparian buffer of College Brook - email from Emily Friedrichs

To the Planning Board,
Please see the email from Emily Friedrichs below.

Michael Behrendt

Durham Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824
(603) 868-8064
www.ci.durham.nh.us

From: Emily Friedrichs <emilyfriedrichs@gmail.com>
Sent: Sunday, July 10, 2022 10:50 AM
To: Michael Behrendt <mbehrendt@ci.durham.nh.us>
Subject: 19-21 Main Street - riparian buffer of College Brook

Hi Michael,

If anyone else on the Planning Board would like more information on UNH's plans to restore College Brook on within campus, I found these documents:
UNH's current Master Plan: <https://www.unh.edu/facilities/about/campus-stewardship/campus-master-plan> and
https://www.unh.edu/sites/www.unh.edu/files/departments/facilities/CMP/unh_2012_approved_campus_master_plan.pdf

Letter from UNH official on progress towards restoration as of 2020:
https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/page/54487/joshua_meyrowitz_12-22-20.pdf

It seems that UNH has been working on restoration of College Brook since at least 2008:
https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_and_zoning/page/17551/appendix_e.pdf

Best,



Emily

Emily Friedrichs

(Pronouns) ze / zir

(USA Cell) +1 603 706 8174

(Argentina Fija) +54 11 4621 1556