

Nathan R. Fennessy  
nfennessy@preti.com  
603.410.1528

March 23, 2022

**VIA EMAIL**

Durham Planning Board  
c/o Michael Behrendt  
Town Planner  
Town of Durham  
8 Newmarket Road  
Durham, NH 03824

**RE: Toomerfs, LLC's February 18, 2022 Attorney Memo**

Dear Mr. Behrendt and Members of the Planning Board:

I represent the Ursos on Smith Park Lane, and the Andersen and Meyrowitz households on Chesley Drive, as well as residents on every street of the adjacent Faculty Neighborhood and many residents in other parts of Durham. I write this letter in response to the February 18, 2022 memorandum that was provided by Attorneys R. Timothy Phoenix and Monica Kieser on behalf of Toomerfs, LLC's Site Plan and Conditional Use Applications ("Toomerfs Attorney Memo"). This letter is not intended to provide an exhaustive rebuttal of each and every item that my clients disagree with in the Toomerfs Attorney Memo (I am sure the Board would quickly lose patience with such a long letter), but we did want to highlight several major issues with the Toomerfs Attorney Memo. You already have extensive input from residents and urban forest experts that counters many of the claims in the memo and we would refer you to that input on any issues not addressed below.

**1. Who is going to be parking at the proposed lot?**

The Toomerfs Attorney Memo states on page 2 that the "parking spaces will be rented by students living on or off-site, workforce housing occupants and downtown business employees." But, the information provided by Toomerfs to date regarding the anticipated traffic impact assumes that the parking spaces will be rented solely by students residing in the immediate area.

As you know, the Planning Board retained Vanasse Hangen Brustlin (VHB) to review the traffic analysis prepared by Toomerfs' consultant, Stephen Pernaw Associates. In their report, VHB observed that the parking spaces were intended for students and stated that, "[s]hould these parking spaces be purposed for another use, then the volume and frequency of the site trips could differ." In his March 19, 2021 reply to VHB, Mr. Pernaw agreed that "the traffic study projections, analyses, and findings apply only to the proposed expansion of the student housing parking lot, and no other

March 23, 2022

Page 2

hypothetical use.” Similarly, in a April 4, 2021 memorandum prepared by Durham’s Department of Public Works, the DPW reaffirmed that: “[t]he analysis and findings of the traffic study are strictly based on the proposed parking lot expansion for UNH students who reside at 19-21 Main St and student housing developments nearby. Should the parking lot be used for any other use in the future the developer should be required to come back to the Planning Board.”

Given that the Toomerfs, per their attorneys, now intend to rent these parking spots to another universe of potential customers, then the prior traffic study analyses are inapplicable. The Board should therefore require further traffic analyses based on the anticipated customers identified in the Toomerfs Attorney Memo. As it stands, Toomerfs do not meet their burden of proving that the site has adequate pedestrian and vehicular access for the intended use to meet the requisite conditional use criteria.

**2. The ZBA has not determined that the current plan constitutes “surface parking.”**

As detailed in my accompanying letter, the revised version of the Toomerfs site plan includes a retaining wall. This design element was not part of the plan submitted in May 2021 that the Planning Board and ZBA determined was “surface parking.” To the contrary, the ZBA previously concluded that incorporation of a retaining wall in the initial design constituted “structured parking.” Therefore, the Toomerfs Attorney Memo statements to the contrary on page 14 are inaccurate.<sup>1</sup>

**3. Where is the Urso easement?**

On page 2 of the Toomerfs Attorney Memo, the applicant acknowledges that “the Hall and Urso properties are benefitted by an access easement from Main Street.” But the plan fails to show where that access easement extends to the Urso property. This makes the statements on page 13-14 of the Toomerfs Attorney Memo that the right of way “is not obstructed by the Project” particularly curious. How can the Toomerfs’ attorneys assert that the right-of-way is unobstructed if they fail to show it on the site plan because their surveyor (purportedly) cannot locate it? How can the Board evaluate the potential impact of the site plan on the access easement if Toomerfs do not show it on the plan?

**4. The Toomerfs mischaracterize the Planning Board’s obligations.**

In an apparent effort to confuse the Planning Board, the Toomerfs Attorney Memo mixes and matches the various criteria applicable to the site plan application and the conditional use permit application on pages 14 and 15. The Board has no obligation to grant the conditional use permit unless Toomerfs meets its obligation to show that the proposal meets all of the conditional use

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<sup>1</sup> As the Board may know, the ZBA’s determination regarding the Toomerfs site plan that was submitted back in May 2021 is currently the subject of a lawsuit pending in Strafford Superior Court – *Meyrowitz, et al. v. Town of Durham, et al.*, Docket No. 219-2021-CV-00316. If the Court reverses the ZBA’s determination, then the Toomerfs will have to return to this Board with another new plan.

March 23, 2022

Page 3

criteria. Durham Zoning Ordinance § 175-23. The failure of the proposal to meet even one of the criteria requires the Board to deny the application.

The Toomerfs Attorney Memo also appears to discourage the Board from considering the overwhelming evidence submitted by the public in opposition to the applications. Durham Zoning Ordinance § 175-21(A) very clearly states that “[t]he Planning Board shall make findings of fact, **based on the evidence presented by the applicant, Town staff, and the public**, respecting whether the Conditional Use is or is not in compliance with the approval criteria of Section 175-23.” (emphasis added). Failing to consider the evidence submitted by members of the public, including two urban-forestry experts, in deliberating on the conditional use criteria would be an error of law by the Planning Board.

**5. The Toomerfs confound the term “zone” with “neighborhood.”**

The Toomerfs Attorney Memo repeatedly tries to limit the Planning Board’s consideration of the external impacts to simply the “zone” in which the Toomerfs property is located and ignores the impact of the proposed parking structure on the larger “neighborhood.” There is nothing in the conditional use criteria that limits the Board’s analysis in this manner. To the contrary, Durham Zoning Ordinance § 175-23(C)(2) specifically requires that the Board consider “[t]he **external impacts of the proposed use on abutting properties and the neighborhood** shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone.” (emphasis added).

In considering the conditional use criteria, the Board not only should, but must – pursuant to the terms of the ordinance – consider the impact of the proposed project to the Faculty Neighborhood and other properties that are within the “neighborhood” but outside the particular zoning district. The Board has been presented with extensive testimony on how other parking lots in Church Hill are considerably different and have almost no impact on the properties abutting, surrounding, and neighboring the proposed structure and, conversely, about how the abutting properties, neighborhood, and surrounding environments would all be very negatively impacted by the proposed structure. Failing to consider these impacts would be a mistake.

**6. The Toomerfs do not have a constitutional right to develop this property as they see fit.**

The Toomerfs Attorney Memo makes an astounding claim on page 16 that “Toomerfs has constitutional rights to develop and use the Property as it sees fit.” This is simply not the law. The New Hampshire Supreme Court has repeatedly stated that “[i]t is beyond question that the zoning of property to promote the health, safety and general welfare of the community is a valid exercise of the police power which the State may delegate to municipalities.” *Buskey v. Town of Hanover*, 133 N.H. 318, 322 (1990) (citing *Town of Chesterfield v. Brooks*, 126 N.H. 64, 68, 489 A.2d 600, 603 (1985); RSA 672:1, I-III). There is a presumption that zoning ordinances are valid, and the party challenging their constitutionality carries the burden of overcoming this presumption. *Town*

March 23, 2022  
Page 4

*of Nottingham v. Harvey*, 120 N.H. 889, 892 (1980); *Carbonneau v. Town of Exeter*, 119 N.H. 259, 264, 401 A.2d 675, 678 (1979).

Durham has exercised its police power by adopting a conditional use permit ordinance. The burden lies with Toomerfs to show that their proposed use – which is not allowed by right in the Church Hill District – meets the relevant criteria. To date, the Toomerfs have failed to meet that burden and there is no constitutional requirement that the Planning Board overlook the failure of Toomerfs to meet all the necessary criteria for obtaining a conditional use permit.

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As you have seen from the extensive feedback the Board has received from the citizens of Durham on these applications, there are a multitude of other problems with the plans submitted and the assertions made in the Toomerfs Attorney Memo. We would refer you to the testimony and emails that you have received that clearly demonstrate that Toomerfs have failed to meet their burden.

Sincerely,

*Nathan R. Fennessy*

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