

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 Conditional Use and Site Plan Applications**

Dear Mr. Behrendt and Members of the Planning Board:

I write this letter in response to the revised site plan that was provided by Toomerfs, LLC on February 3, 2022 (the "February 2022 Plan"). 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 residents in other parts of Durham.

I want to bring to the attention of the Planning Board that the February 2022 Plan does not comply with the Zoning Board's decision of April 13, 2021 ("April 2021 ZBA Decision"). As a result, the Planning Board should not approve the February 2022 Plan. If it does approve the current version of the plan, it will be committing an error of law.

As you may recall, the original plan submitted by Toomerfs on October 28, 2020 included a retaining wall. After the issue was raised by my colleague, Mark Puffer, that the inclusion of the retaining wall made this "structured parking" (prohibited in the Church Hill Zone) rather than "surface parking," the Planning Board made a determination at its March 10, 2021 meeting that the original plan with the retaining wall still constituted "surface parking." My clients appealed that decision to the ZBA, which made a determination at their April 13, 2021 meeting that the inclusion of the retaining wall made the proposed plan "structured parking" rather than "surface parking."

Toomerfs appealed the April 2021 ZBA Decision to the Strafford Superior Court on June 10, 2021. On October 27, 2021, however, Toomerfs dropped their appeal to the Superior Court. By withdrawing their appeal to the Superior Court, the Toomerfs waived their right to challenge that determination by the ZBA. This means that the April 2021 ZBA decision, concluding that the inclusion of retaining wall constitutes "structured parking," remains in effect for this property.

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Whether members of the Planning Board agree with that determination or not, the Planning Board is bound by that zoning determination in considering the Toomerfs site plan application.

As you may recall, in May 2021, after the ZBA's ruling, the Toomerfs submitted a new plan, touting the removal of any retaining wall "whatsoever" in light of that ZBA ruling. It appears that recently Toomerfs made the decision to bring back the retaining wall as part of the proposed design. I do not know what motivated Toomerfs to revive the retaining wall as part of their proposed plan and whether it was required to make the proposed design technically feasible – I am not an engineer, so I will not speculate. What I can tell you, as a lawyer, is that the revised version of the plan submitted on February 3, 2022 constitutes "structured parking" based on the April 2021 ZBA Decision, which continues to govern this application.

From their prior communications with the Town, Toomerfs have already acknowledged that the April 2021 ZBA Decision precludes inclusion of a retaining wall in their proposed parking lot. On April 15, 2021, within hours of the Town Planner announcing the creation of a subcommittee to revise the definitions in zoning for surface parking and structured parking, one of the principals of Toomerfs, Timothy Murphy, emailed the Town Planner suggesting another revision of the Zoning that would help the Toomerfs override the ZBA decision:

“‘At grad’ [sic] needs some work too—for example, our proposal is ‘at grade’ from the front, but not the back, and any lot with a retaining wall around any of it’s (sic) border could be called not at grade.”

No such revision has been made to the Zoning Ordinance; hence the current plan, per the Toomerfs themselves, is not at grade surface parking, both because of it not being at grade at the southern end and because of the return of a retaining wall. As a result, if the Planning Board were to approve this plan with a retaining wall, the Board would be committing an error of law.

On behalf of my clients, I therefore strongly urge you to deny approval of the February 2022 Plan submitted by Toomerfs.

Sincerely,

*Nathan R. Fennessy*

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