

May 10, 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 to address the ongoing issue related to the Zoning Board's interpretation of the terms "structured parking" and "surface parking" under the Durham Zoning Ordinance ("DZO"). As you know, 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.

This letter responds to the portions of the letter that was recently provided to the Board by the Toomerfs' attorneys, Monica Kieser and R. Timothy Phoenix, on May 6, 2022 regarding the proposed retaining wall.¹ Specifically, I would like to address how the Kieser/Phoenix letter mischaracterizes the decision made by the Zoning Board on April 13, 2021 ("April 2021 ZBA Decision"). I would strongly encourage the members of the Board to review the April 2021 ZBA Decision and watch the video of the ZBA's deliberations in preparation for your further deliberations on this application.

Contrary to what Toomerfs' lawyers suggest, the ZBA did not base its decision on the *size* of the proposed wall. Indeed, various members – although on different sides of the ultimate outcome – agreed that the relevant definitions in the DZO did not draw a distinction between a three-foot wall or a twenty-foot wall. The issue was whether the proposed wall provided support for the proposed parking, or even for a "portion" of it.

The only appropriate conclusion for the Planning Board to draw from the April 2021 ZBA Decision is that the DZO must be interpreted in such a way that any wall that provides support for

¹ I will address the other aspects of the Kieser/Phoenix letter separately.

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even a portion of the proposed parking on Church Hill does not meet the definition of “surface parking.”

If Toomerfs wanted to proceed with a retaining wall, it had the opportunity to appeal the April 2021 ZBA Decision to the Superior Court (which it did, but then later withdrew) or seek a variance from the ZBA (an option that was explicitly mentioned twice during the ZBA’s April 2021 deliberations). An applicant is not permitted to re-submit an element of their application that has already been determined to violate the zoning ordinance and hope that Planning Board ignores the prior ZBA decision.

In looking back at the ZBA’s deliberations, I cannot find any support in the record (neither video nor minutes) for the statement made by Toomerfs’ attorneys in their letter that “[t]he ZBA also noted the height of the wall at that time in excess of 6 ft. required additional relief.” Toomerfs Letter at p. 4. No member of the ZBA raised the issue that a wall in excess of 6 ft. was something that required “additional relief” or as anything relevant to their deliberations. Indeed, at about 9:08 pm, the ZBA chair cautioned members strongly against “picking a number, picking a height, picking a scale” and he specifically warned members not to “arbitrarily pick a 6-foot number.”

Moreover, in filing its appeal of the April 2021 ZBA Decision to the Strafford Superior Court, Toomerfs never drew such a wall-height distinction and instead summarized the Decision as “A majority believed that because the retaining wall was a structure that provided a portion of the parking, the proposal was ‘structured parking.’” Compl. at ¶ 23. Indeed, Toomerfs acknowledged that the site plan “included significant fill and a retaining wall to support the [proposed] parking.” Compl. at ¶ 12. At no point in the appeal to the Superior Court did Toomerfs suggest that the April 2021 ZBA Decision turned on the height of the proposed retaining wall. Subsequently, by withdrawing its appeal on October 27, 2021, Toomerfs waived the right to contest the ZBA’s conclusion.

The recent suggestion by the Planner and the Code Enforcement Officer that a six-foot retaining wall may be permissible is simply unsupported by the terms of the DZO.² It appears that the Planner and the Code Enforcement Officer are relying upon the definition of “Structure” for this interpretation. But that definition does not reference a wall anywhere. Instead, it states that a “minor installation such as a fence six (6) feet high or less in height, a mailbox, a flagpole, or an accessory shed” do not constitute a structure. It is hard to believe that the proposed retaining wall

² I would note that the Planner initially claimed in a March 24, 2022 email to me (cc-ed to the Planning Board) that there were “countless retaining walls about that height in Durham for various projects and I believe for numerous parking lots in Durham,” but when pressed to provide comparable examples of a retaining wall supporting part of a principal-use parking surface, the Planner acknowledged in an April 22, 2022 email to one of my clients that there were “no principal uses that I know of.”

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contained in the revised site plan provided by Toomerfs, LLC on February 3, 2022 (the “February 2022 Plan” and in more recent plans) could be considered a “minor installation” or a simple “fence,” when it, in combination with the approximately 20 ft. tall retaining slope behind it, will be holding thousands of cubic yards of fill and asphalt (as well as the cars parking on top of it) from cascading down a slope and into the Chesley Marsh and College Brook. As is clear from the February 2022 Plan, the proposed retaining wall facilitates the proposed parking surface. Without that wall, the parking surface would need to be significantly smaller to fit on the site. Thus, that wall “provides for a portion of the parking,” the variable that the ZBA highlighted in its April 13, 2021 deliberations.³

I agree with the conclusion drawn by Toomerfs’ attorneys that the Planning Board has not made an administrative decision that the proposed retaining wall and retaining slope edifice contained in the February 2022 Plan constitutes “structured parking.” We would encourage the Planning Board to do so given the prior determination made by the ZBA in the April 2021 ZBA Decision. Although members of the Board may disagree with that ZBA determination – and likely do given the Board’s prior determination that the inclusion of an even larger retaining wall did not constitute structured parking – the Board is ultimately bound by the ZBA’s determinations regarding the interpretation of the DZO. Given what transpired on April 13, 2021, it is the ZBA – not the Planner, the Code Enforcement Officer, the Town Attorney, the Town Administrator, the Town Council or the Planning Board – which has the authority to interpret the zoning ordinance.

Sincerely,

Nathan R. Fennessy

Nathan R. Fennessy

NRF/srb

³ At about 9:06 pm on April 13, 2021, ZBA Board Member Mark Morong explained his position as “it’s just common sense that this wall is gonna provide a portion of the parking.” ZBA Member Joan Lawson concurred, “It’s going to make a provision for, which is what ‘provides’ means.” Even ZBA Chair Chris Sterndale, who voted against my clients’ appeal, said “Yeah, I can’t disagree with that.”