

May 11, 2022

VIA EMAIL

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

RE: Outstanding Issues with the Toomerfs, LLC's Site Plan and Conditional Use Permit Applications

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. This letter follows up on my letter from May 10, 2022, which focused on the retaining wall and April 2021 ZBA Decision. This letter focuses on a few of the other outstanding issues, some of which were recently addressed by Toomerfs' attorneys, Monica Kieser and R. Timothy Phoenix, in their May 6, 2022 letter.

1. A conditional-use application is, by definition, not a by-right application.

The recent letter from Toomerfs' attorneys continues to conflate the idea of what *may* be allowed, but only by conditional use, with what is permitted by right in a particular zoning district. The Planning Board has no obligation to allow a property owner to "use" his property in a manner that is not permitted by right in the relevant zoning district unless the property owner meets all of the necessary criteria for a conditional use permit. A Planning Board denial of a non-compliant plan is not an illegal "taking."

2. The applicant has the burden of proving that it meets the requisite elements for a conditional use permit. And Toomerfs has failed to meet its burden.

Toomerfs continues to suggest that the abutters and other opponents of its site plan have some burden to establish – through expert testimony or otherwise – that it should *not* receive the requested conditional use permit. But the unambiguous terms of Durham Zoning Ordinance ("DZO") § 175.23 place the burden on the applicant to demonstrate that it meets the relevant criteria:

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B. Burden on applicant. The applicant shall bear the burden of persuasion, through the introduction of sufficient evidence, through testimony, or otherwise, that the development, if completed as proposed, will comply with this Article and will satisfy the specific requirements for the use contained in the ordinance.

To date, Toomerfs has failed to introduce sufficient evidence that it meets each of the relevant criteria identified in the DZO.

For example, Toomerfs has asserted – without citing any evidence – that “[i]t cannot reasonably be argued that the proposed parking lot would have greater external impacts than those other permitted uses in the zone.” Kieser February 18, 2022 letter at p. 8. But one could reasonably argue that a large commercial parking lot would have a significantly greater impact than other permitted uses within the relevant Church Hill zoning district such as conservation, forestry, farmers’ market, rabbit husbandry, and beekeeping. The burden is therefore on Toomerfs to demonstrate through the introduction of sufficient evidence that its proposed use would not have greater impact. Toomerfs has failed to do so.

Instead, Toomerfs wants the Planning Board to focus on the fact that there are other parking lots in the general vicinity. But Toomerfs neglects to mention that most of the parking lots it references are accessory uses to permitted uses rather than a principal use as Toomerfs has proposed. Moreover, the Andersen home at 8 Chesley Drive, as one example, is well buffered from all other area parking lots, and the adjacent Faculty Neighborhood has no commercial parking lots.

Again, Toomerfs has the burden of presenting evidence to support its position rather than pointing to the alleged absence of evidence contradicting its position. To that end, I would recommend that the Board take another look at a letter that was submitted by Dennis Meadows on March 17, 2022, which does an effective job of comparing the relevant impact of Toomerfs requested departure from the zoning ordinance with another project that the Planning Board is considering, which unlike the Toomerfs’ project offers significant positive social benefit to the community.

3. Toomerfs fails to get its parking story straight.

My clients appreciate that the Toomerfs have now reversed themselves and acknowledged that the relevant traffic analysis applied only to student parking. But this reversal begs the question: why is there a need for more student parking downtown?

Toomerfs’ attorneys claimed in their February 18, 2022 letter that this site was “suitable” because the proposed parking lot “will provide much needed additional parking in a location within walking distance of the downtown district, will improve the functionality of the Property and other rental and commercial properties owned by the developer and others.” Toomerfs has not provided any evidence of a Town *need* for “additional parking” (as contrasted with a convenience *desire* on

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the part of some UNH students) nor has it explained how limiting the parking to students will “improve the functionality of the Property and other rental and commercial properties owned by the developer and others.” Indeed, the Toomerfs plan flies in the face of Durham and UNH planning with respect to limiting student cars downtown. As numerous residents have noted, a pedestrian-focused downtown is a feature of Durham’s long-term planning, not a flaw. In short, the recent reversal by Toomerfs demonstrates that the applicant has failed to meet the criteria for showing the site is suitable. Moreover, the Toomerfs have failed to demonstrate a positive “environmental,” “aesthetic,” and “social impact” as are among the stated goal of the Conditional Use criteria.

4. Toomerfs’ proposed parking lot does not preserve natural, cultural, historic, and scenic resources.

The fifth element that an applicant must demonstrate in order to obtain a conditional use permit is:

The proposed use of the site, including all related development activities, **shall preserve** identified natural, cultural, historic, and scenic resources on the site and shall not degrade such identified resources on abutting properties. This shall include, but not be limited to, identified wetlands, floodplains, significant wildlife habitat, stonewalls, mature tree lines... designated historic buildings or sites, scenic views, or viewsheds.

I understand that the Board was given advice from the Town Attorney in February 2021 suggesting that the natural resources criterion in the Conditional Use article referred only to such specially designated areas, such as those under Conservation Easements. That interpretation, however, is not consistent with the text of the zoning ordinance. Identified and designated are NOT defined, and, in any case, not all the nouns in that passage are modified by "identified" and "designated." In short, I would argue that the Planning Board and public can and must draw on common meanings of the terms in Conditional Use criterion #5, particularly as regard to such features as stonewalls, cemeteries, and for the Church Hill Woods site, mature tree lines, wildlife habitat, scenic views, and viewsheds.

In considering this element it is important not to forget that the Conditional Use criteria are intended to impose higher standards on applicants who wish to depart from the permitted uses in a particular zoning district. The Planning Board should only approve such special projects when the applicant demonstrates positive environmental and aesthetic outcomes and the Board has wide leeway to ask for modifications in the plan -- or to reject it if it does not comply.

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5. Toomerfs' Site Plan is at odds with the Natural Resource Standards set forth in the Site Plan Regulations.

Although Toomerfs has attempted to downplay their significance, there are two important provisions in Article 8 of the Site Plan Regulations that counsel against the commercial parking lot proposed by Toomerfs:

8.2.1 Buildings, **parking areas**, travel ways, and other site elements **shall be located and designed in such a manner as to preserve natural resources and maintain natural topography to the extent practicable. Extensive grading and filling shall be avoided.** (emphasis added)

8.2.3 Development shall follow the natural contours of the landscape to the extent practicable to minimize grading.

Reading these two provisions together, it becomes apparent that Toomerfs' proposed plan constitutes a substantial departure from what is *required* by the Site Plan Review regulations. Toomerfs are not maintaining the natural topography of the site nor minimizing grading. What they have proposed will require, as recently estimated by them, 857 truck trips of 13,702 cubic yards of fill and some combination a twenty-foot retaining slope and wall to create an artificial topography to support the commercial parking lot. By any measure, this is extensive grading and filling that marks a substantial deviation from the Town's Site Plan Regulations. This fact alone justifies denial of the site plan application.

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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 by Toomerfs. We would refer you to the testimony and emails that you have received that clearly demonstrate that Toomerfs have failed to meet their burden. At the very least, if the Board is inclined to continue the public hearing, rather than reject the plan outright now, it ought to require Toomerfs to provide proper renderings of the site with all appropriate views and relative elevations from all angles of the property, as it would be seen from abutters, the surrounding environment, and the neighborhood. It is only with such additional information that the Board will be able to see how out-of-scale the proposed commercial parking lot is with abutting properties, the surrounding environment, and rest of the neighborhood.

Sincerely,

Nathan R. Fennessy

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