

July 12, 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:

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 addresses some of the issues that were raised during the deliberations on Toomerfs' applications on June 22, 2022, and the recent letter sent to you by Toomerfs' attorneys.

**1. Abutters and members of the "neighborhood" have been actively opposed to the Toomerfs' application.**

I was surprised to see a suggestion made by a Board member during your deliberations that one of my clients, the Urso family, was not actively opposed to these applications. As you know, my firm has written multiple letters and appeared before the Board at least half a dozen times on behalf of the Ursos and others to express serious objections to the Toomerfs' applications. You may also recall that Sandy Urso has submitted letters and spoken to you about her home being the one most negatively affected by the project, and her son, Kyle Urso, appeared before the Board multiple times to express the family's concerns with the Toomerfs' applications and the absence of the Urso ROW on the application submission. In recent months, Peter Murphy and Timothy Murphy (aka "Toomerfs") have spoken primarily through their attorneys, yet I doubt that any member of the Planning Board would now characterize the Toomerfs' advocacy for their parking proposal as being lukewarm.

I was pleasantly surprised to see that the Applicants' attorneys now agree with the position that my clients have taken from the start that in considering the Toomerfs' applications, the Board must consider the impact of the requested conditional use on the larger "neighborhood" and not just

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the immediate vicinity. Although Attorneys Phoenix and Kieser erroneously contend that the proposed conditional use of the lots as a parking structure compares favorably with the Mill Plaza, the reality is that the comparison with Mill Plaza illustrates how inappropriate this parking structure is in the Church Hill neighborhood. Unlike the parking lot at Mill Plaza or any of the other parking lots in the vicinity, the Toomerfs' parking structure is a principal (not an accessory use) and will do nothing to enhance the commercial or community character of the Church Hill or downtown districts.

As our law firm and residents have repeatedly noted, the Toomerfs' project does not match the clearly stated purpose of the Church Hill District, per the Zoning Ordinance: "The purpose of the Church Hill District is to preserve and enhance the historic character of this area by allowing for multiple land uses including professional offices, limited retail uses, and senior housing.... New development should maintain the character of the area...." DZO §175-44. Scores of long-term members of the Community Church that gives the District its name and over 250 residents of the Faculty Neighborhood have submitted petitions in opposition to the proposal, which would serve only a student community that already has many parking options outside the downtown core. It is no surprise then that the vast majority of the residents in the "neighborhood" think this is a really bad idea and is out-of-scale with the neighboring properties and the Faculty Neighborhood overall.

**2. 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.

On June 22, a member of the Board echoed the February 2021 advice provided by the Town Attorney suggesting that the natural resources criterion in the Conditional Use article referred only to specially designated areas, such as those under Conservation Easements. As I have stated previously, that interpretation is not consistent with the text of the zoning ordinance. "Identified" and "designated" are not narrowly defined, and, even more significantly, 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 the Conditional Use criterion #5, particularly with respect to such features as stonewalls, cemeteries and, for the Church Hill Woods site, mature tree lines, wildlife habitat, scenic views, and viewsheds.

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Regardless of how the Board view its obligations on that disputed point, the Board still has an obligation to consider the potential negative impact of “identified resources” on abutting properties. This means that the Board must consider whether the proposed conditional use will “degrade” the identified wetlands, the impaired College Brook, and the designated flood zone on the abutting properties. You now have some definitive input on that very issue. I urge the Board to give close attention to the expert opinion provided to you on July 7, 2022 by Wilfred Wollheim, an aquatic ecosystem ecologist in the Department of Natural Resources and the Environment at UNH and Co-Director of UNH’s Water Systems Analysis Group (WSAG). Professor Wollheim outlines the significant negative impact that the proposed parking structure would have on College Brook and how allowing this parking structure to proceed would harm the efforts taking place upstream to restore riparian buffers and improve the quality of the water flowing through College Brook to the Oyster River and eventually Great Bay. As he writes, in part: “A parking lot will also result in more road salt additions, tire particles, automobile pollution, and other atmospheric deposition getting into the stream, further degrading it.” Note that all of these adverse impacts will first pollute the Chesley Marsh, which is on one of my client’s (the Andersen family) property.

I would also recommend that the Board take another look at the recent letters that have detailed the significant negative impact of chloride in the road salts that will be required in winter to maintain the proposed parking structure. With the depletion of the existing urban forest, these contaminants will flow into the Andersen’s wetland and College Brook, unimpeded by the proposed storm water management system, and will continue to degrade the Chesley Marsh and College Brook and the larger watershed.

**3. The proposed conditional use will have significant negative impact on the property value of adjacent properties.**

Toomerfs has repeatedly suggested that their proposed parking structure will not have a significant negative impact on the property value of adjacent properties. I would urge the Board to look at the letter that was recently provided by Durham real estate agent Joan Friel demonstrating her expert opinion that the Urso property would decline in value by approximately 20% if the Board approves these applications. That would seem to be a violation of Criterion #6 “Impact on property values: The proposed use will not cause or contribute to a significant decline in property values of adjacent properties.” This criterion is not a comparative one. That is, if the Toomerfs’ proposal would significantly reduce adjacent property values it must be denied, even if another conceivable by-right use might have a similar negative property-value impact.

**4. Toomerfs’ Site Plan is at odds with the Natural Resource Standards set forth in the Site Plan Regulations.**

I want to address briefly the recent suggestion made by Toomerfs’ attorneys in their July 8, 2022 letter that the Board should ignore the Site Plan Regulations that prohibit “extensive grading and filling” and instead focus on whether Toomerfs has “substantially mitigate[d] the impact of constraints posed by the existence of steep slopes.” The relevant provisions in Article 8 of the Site

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Plan Regulations say nothing about mitigating the impact of constraints posed by a particular piece of property. Instead, the provisions provide the following:

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 approximately 14,000 cubic yards of trucked-in fill (about 16,000 CY "overall net fill" with stormwater chambers and paving, per Toomerfs' March 17, 2022 "Cover Letter") and some combination of a retaining wall and twenty-foot retaining slope 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.

Toomerfs attempt to rebut such concerns by claiming that "terraced parking is not appropriate for the site because the stormwater would not be similarly managed," but they have provided no evidence to support their claim. In any case, there are many "permitted" uses for the site for Toomerfs to choose from that would not require such an extensive alteration of the property. Nor have they explained how their concept of "mitigating" the steep slopes – by cutting down all the trees and filling in the site to make it flat – "maintain[s] the natural topography." In short, Toomerfs wants this Board to apply a subjective sliding-scale fill-amount test based on the relative steepness of the lot on a particular application, turning the restrictions on their head and eviscerating this requirement for all future applications.

\* \* \* \*

Finally, I would refer the Board back to my letters of May 11, May 10, and March 23 and the issues that continue to remain unresolved including our repeated requests that the Board make a determination about whether the most recent version of the proposed plan, which includes a retaining wall, constitutes "structured parking." We continue to believe that the Planning Board is bound by the ZBA's April 2001 ruling that the inclusion of a retaining wall to provide support for a portion of the parking constitutes "structured parking" and therefore is not permitted without a variance. Indeed, one of the principals of the applicant, Timothy Murphy, conceded as much in an April 15, 2021 email to Town Planner Michael Behrendt when he acknowledged that the Toomerfs' proposal was not "at-grade" at "the back" (the southern, Chesley Marsh side that is the "front" for most of my clients) and therefore would not be a permitted use on Church Hill, where only at-grade Surface Parking is permitted (by Conditional Use).

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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. Respectfully on behalf of my clients, we request that you deny these applications.

Sincerely,

*Nathan R. Fennessy*

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