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July 26, 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 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. I write here to correct some misleading and inaccurate statements, which my clients believe were made on behalf of Toomerfs in the letter to the Board by Attorneys Timothy Phoenix and Monica Kieser dated July 21, 2022 (the "Phoenix Letter").

Misstatement: The Planning Board's acceptance of written input during deliberations has been discriminatory against Toomerfs and is "demonstrably unreasonable and unfair."

It is true that the Planning Board made inconsistent statements regarding whether or not written input could be submitted to the Board during the time period when the Public Hearing was "adjourned." These changes in announcements, however, applied to all parties and have not discriminated against Toomerfs. Indeed, accepting Toomerfs' suggestion that the Board should not consider any public comment submitted after June 8, 2022, would be unreasonable and unfair to my clients as the Board denied my colleague, Mark Puffer, a full opportunity to address the Board at the June 8, 2022 meeting on the basis that we could submit additional public comments in writing after June 8, 2022. Denying consideration of materials submitted by my clients (and others who were rushed along or denied an opportunity to comment at the June 8th meeting) would clearly constitute viewpoint discrimination, which is not only a violation of state laws regarding public comment, but also is a violation of the First Amendment. In short, the Phoenix Letter is inviting this Board to violate both state and federal law.

On June 8, 2022, the Acting Chair of the Planning Board justified cutting short Attorney Puffer's remarks by offering him an invitation to submit his uncensored extended remarks in

writing. At 10:44:50 pm (video), Acting Chair Grant said: "Obviously, you can put that in writing as public comments to us, and we'll be able to see *all* of the content that you wanted to speak to as well. We will read all of the public comments."

Two days later, however, on June 10, 2022, 9:38 am, Planner Behrendt wrote to Attorney Puffer:

> Unfortunately, once the public hearing is closed (or ***adjourned*** in this case) I cannot forward anything from a citizen nor the applicant to the Planning Board other than verbatim transcripts of comments made at the hearing, by the following day. We expect the public hearing will be reopened on July 27 (as announced at the meeting on Wednesday) since it is adjourned until that evening to give the Planning Board an opportunity to start deliberations. You can submit comments now if you wish and assuming the board reopens the hearing the evening of July 27, I would forward your comments to the board the following day….

This offer by Planner Behrendt to submit "*verbatim transcripts* of comments made at the hearing by the following day" (emphasis added) was doubly ironic in that Acting Chair Grant's offer was to submit *beyond* what Attorney Puffer was permitted to share with the Board on June 8 – and "the following day" had already passed by the time this email was sent.

After consulting with the Town Attorney, Planner Behrendt advised the Planning Board and members of the public in an email dated June 14, 2022 that written submissions could be made during the "adjournment," while no oral comments from the public, applicants, or experts would be accepted at the deliberative meetings. Although the changing instructions were a little confusing and disruptive to all who are concerned about the pending application, and some members of the public likely missed the reversal of policy that would have allowed them to submit (and thus have not been heard from), the shifts in policy have not been discriminatory to any party. Indeed, Toomerfs would obviously have followed the changes more closely than would average members of the public.

While the Phoenix Letter suggests that their clients have been mistreated by the Planning Board with this recent policy change, our observations over the past two years have been that the Planning Board and town staff have routinely displayed significant bias in favor of Toomerfs and against the public.

For example, in early 2021, my clients learned (quite by accident) that in late 2020, Planner Behrendt, with no public announcement, had strayed from formal written policy on every agenda, and letters submitted by the public and submitted by experts who were not writing on behalf of the applicant were no longer being routinely forwarded in hard copy to Planning Board members for their weekend packets prior to Public Hearings. In the intense and extended email exchanges about these changes with one of my clients, Joshua Meyrowitz, Planner Behrendt explicitly described that, when there was a great deal of input and when staff were busy, applicant material was being given priority for sharing with Board members and that this dramatic policy change that

discriminated against my clients and other members of the public and experts not commissioned by the applicants had been approved by the highest town authority, Town Administrator, Todd Selig.[1] This behind-the-scenes procedural shift, in contrast to the current situation described by the Phoenix Letter, reflected clear and serious bias *in favor of Toomerfs*. Moreover, the months of discrimination in favor of Toomerfs has had lasting impact on undermining the integrity of the review of the Toomerfs' proposals by narrowing the range of discussion at the Planning Board.

Among the late 2020 letters *not* forwarded in hard copy to the Board were the initial inputs from two urban-forest experts, John Parry (who worked for the U.S. Forest Service from 1999-2021) and Dr. Richard Hallett (Research Ecologist for the U.S. Forest Service). Additionally, Planner Behrendt refused to have these forestry-expert letters treated as "expert input" (which would mean their posting on the main application site and forwarding to the Board in hard copy). Indeed, he refused a written request to have these initially passed-over letters forwarded in hard copy even when there was subsequently a week where other non-applicant material was being forwarded to the Board in hardcopy, because of looser staff schedules at that time. (See these unedited email exchanges in the posting described in footnote #1.) More recently, Planner Behrendt marginalized the more recent input of these professional foresters by describing them in his June 22, 2022 and July 13, 2022 Planner's Reviews as having been submitted "on behalf of abutters," when neither the Ursos nor the Andersens report even knowing these foresters.[2]

Although both Administrative Assistant Karen Edwards and Planner Behrendt reported to my client, Joshua Meyrowitz, in mid- and late 2021 that the deviation in forwarding policy had gone on only for a short period of time and had ended by April 2021, Planner Behrendt again asserted in an April 1, 2022 email to Mr. Meyrowitz *"we reserve the right to not make hard copies of them for a particular packet. In that situation we would inform the board and bring special attention to the letters so they could focus on the copies they get on email. We would provide hard copies for any board member who requests it."* This "reservation of the right not to forward" is not the procedure in place for Toomerfs' materials, and thus the bias in favor of Toomerfs persists to this day.

As my clients and I have pointed out, the viewpoint discrimination provided in favor of the applicant over public input is especially disturbing given that the Conditional Use zoning article

[1] See the unedited email exchanges between Planner Behrendt and Joshua Meyrowitz in the publicly posted: **"**Months of Durham, NH, Planning Department Deviation from Long-Held (Written) Policy Regarding Forwarding Hard-Copy Citizen Input Along with Applicant Materials,**"** Joshua Meyrowitz 4-1-22 (pp 1-29).

[2] In the Phoenix Letter, Toomerfs oddly refer to these forestry experts' evidence being first submitted on June 8, 2022, and their content being merely "opining generally on the value of urban forests and trees (sic) role in stormwater management." As just described, Parry and Hallett first submitted letters in late 2020 (though they were not forwarded to the Board in hard copy nor identified by the Planner at that time as expert input), and their most recent inputs were in March 2022. Moreover, anyone reading the March 17, 2022 Hallett letter, with its appended research articles, would recognize the precise details that he provides, including on a more realistic fiscal-impact perspective beyond tax-assessment of parking spaces.

clearly establishes the important role of public input in the Planning Board's determination that an application "will have a positive economic, fiscal, public safety, environmental, aesthetic, and social impact on the town." Those determinations, per the Zoning Article, are to be decided with "findings of fact, based on the evidence presented by the applicant, Town staff, **and the public….**" (emphasis added). Determinations of "public safety, environmental, aesthetic, and social impact on the town" should certainly not be left up to the applicants alone, particularly when they, as in the case of Toomerfs, do not even live in Durham to experience and fully grasp the "social impact."

The bias toward Toomerfs has manifested itself during regular public hearings as well, such as when the Toomerfs were allowed to interrupt Planning Board members' deliberations and voting, while the public was not allowed to speak (at a purported "Public Hearing"). For example, on January 27, 2021, the Planning Board made motions and took votes for the Toomerfs' project on the nature of peer reviews of stormwater and traffic impact (rejecting a review of lighting), allowing the applicants to speak, but not allowing the public to comment until after the motions were passed, rendering moot the public's views. (See January 27, 2021 video and minutes). When the public was finally permitted to speak after 11:00 pm, they were advised by the Council Representative to the Board to "Keep it short!" and the Acting Chair advised that the public "speak as quickly as possible." This type of guidance has rarely, if ever, been directed by the Planning Board at applicants, including Toomerfs. It unequivocally constitutes unconstitutional viewpoint discrimination by a government body.

Other instances of bias in favor of Toomerfs abound. On March 4, 2021, for example, a letter my colleague, Mark Puffer, wrote to the Planning Board c/o Michael Behrendt regarding the large retaining-wall plan not being permitted as at-grade surface parking was not even forwarded to the Board until Planner Behrendt had a day to write a rebuttal letter in consultation with the Town Administrator, the Zoning Administrator, and the Town Attorney. Then both letters were sent to the Board together, significantly muting the impact of Attorney Puffer's letter. Moreover, Planner Behrendt's promise to Attorney Puffer (to allow him to make his case to the Board before the Board weighed the two letters against each other) was not kept, and the Board dismissed Attorney Puffer's letter via six-seconds of silence at a hybrid meeting where roll-call votes are required. (That so-called Planning Board "determination" was overturned by the ZBA on April 13, 2021.)

Even after my clients' successful ZBA appeal regarding that retaining wall plan, the Planning Board chair immediately (on the very night of the ZBA vote) began to urge the Board, via emails, to change the Zoning definitions for "surface parking" and "structured parking" in a manner that would have reversed that ZBA decision. The Planning Board began that redefinition effort just one night after the ZBA vote, on April 14, 2021. (That effort was subsequently "paused.")

Moreover, despite dozens of written and spoken requests from residents and our law firm, the Planning Board has yet to confront Timothy Murphy's written admission that none of their proposals have been at-grade at the southern (Chesley Marsh) end of the proposal – and thus, by the clearest of zoning criteria, are simply *not allowed* in the Church Hill District. (April 15, 2021 email to Planner Behrendt.)

I could go on, but I think the pattern of bias and viewpoint discrimination against the concerned citizens who oppose this Project and in favor of Toomerfs has been clear, sustained, and profound to the point that my clients believe that Town staff and the leadership of the Planning Board have put a thumb on the scale in favor the Applicant throughout this process. The recent complaints from Toomerfs about having to respond to additional correspondence from the public pales in comparison and significance.

Misstatement: Toomerfs persist in claiming that there was a Planning Board determination (prior to July 13, 2022), that the plan with a 6-foot retaining wall was "surface parking."

Oddly, the Phoenix Letter continues to refer to the original acceptance and review by the Planning Board of their initial application with a large retaining wall as somehow impacting a determination that what is proposed today is not structured parking. Although we can easily refute their assertions regarding this, it would be a waste of the Board's time to detail that argument because the April 13, 2021, ZBA ruling determined that the retaining wall plan was "structured parking," rendering moot any prior positions and arguments by the applicant, the Board, and the public.

Similarly, any Planning Board positions vis-à-vis the May 2021, plan – with no retaining wall "whatsoever" – is moot, as the current plan has brought back a retaining wall.

Thus, the only relevant inquiry pertains to the most recent version of the Plan that was submitted in February 2022.[3] (Furthermore, as my clients and I have repeatedly noted, the Toomerfs

[3] The Phoenix Letter claims that the retaining wall returned in a September 2021 plan, but it was not labeled on the Plan at that time, and even the Planner's Review comments were uncertain as to what was depicted in the plan. The Board did not consider the return of the retaining wall at all during the September 2021 meeting because they were so busy expressing disappointment with the revised plan. Per the minutes:

> Vice-Chair Parnell said after the 2-month break he was expecting something different and was disappointed the ground area is bigger than it was before. He said he assumed it would be much more compact and more sensitive to the boundaries but does not see that and is surprised.
>
> Mr. Bubar said absent the issue of sand and salt, he really does not like the snow storage area over the back; it is not temporary but permanent storage until melting. He said he is not sure what kind of matting is being put down to prevent erosion in the bank and how it would all be stabilized, but he does not like snow storage there in general….
>
> Mr. Hotchkiss said… this is the wrong location and is wrong under CU criteria #2 which says, "development should not have an adverse effect on the surrounding environment nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood", meaning orderly in terms of logical arrangement of land use and patterns of development. He said he does not think this parking lot fits in and would have real concerns before voting.
>
> Ms. Tobias said understanding this is a principal use vs. accessory use she is concerned about how it is going to be hidden and screened and to eliminate the parking as much as possible. She said she agreed with Lorne [Parnell] that she would like to have seen a smaller lot pulled back from the Urso property as much as possible….

have yet to submit the details of the retaining wall's appearance and its proposed structural relationship to the retaining slope making any determination regarding its "role" with respect to the parking on-site inherently uninformed.).

On March 23, 2022, I submitted a letter (and summarized it at that evening's Public Hearing) on how the return of a retaining wall violated the April 13, 2021 ZBA ruling. The Board did not address my concern at that meeting. The next day I received correspondence from Planner Behrendt, which the Phoenix Letter erroneously claims as evidence of a Planning Board determination on the 6-foot retaining wall. In the text of that correspondence, Mr. Behrendt clearly wrote that a determination on this issue had not yet occurred: "If you wish for the board to make a specific determination that the current application with a 6-foot retaining wall constitutes surface parking then please advise us accordingly."[4]

Similarly, Planner Behrendt responded on March 25, 2022 to a query from Planning Board Alternate Emily Friedrichs, copied to the full Board (and posted on the Planner's Correspondence site): "It is obvious to Audrey and me, and I think would be obvious to the board that a 6 foot retaining wall does not create structured parking (which really means a parking garage). *If they want to appeal this interpretation to the ZBA they are welcome to do that. If so, they can request a formal determination from the Planning Board first."* (emphasis added). The phrases "I think would be obvious to the board" and "they can request a formal determination from the Planning Board" clearly indicate that no such determination had yet been made by the Board and that Planner Behrendt is merely speculating what the PB might decide should the question finally be put to it.

This situation is similar to the issue presented back in March 2021 when the question was raised as to whether Planner Behrendt's March 5, 2021 rebuttal of Attorney Puffer's March 4, 2021 letter was a formal determination. The Code Enforcement Officer, Audrey Cline, responded that: "Michael's letter to the Planning Board was opinion, not an administrative decision. The Planning Board did make an administrative decision on the issue on March 10, and that is the appealable decision."[5]

> Chair Rasmussen said 90% of what he was going to say has already been said. He said if they are not going to make the plan smaller, there would need to be a solid barrier here which he does not see; solid in the sense of 8 ft tall and appropriately buffer from the side. He asked the applicant about a date for return.

[4] Please take note that the framing of this sentence also reveals a predilection toward Toomerfs, as Planner Behrendt ought to realize that my "wish" was that the Board would more accurately determine that the current plan, with a returned retaining wall is *not* surface parking. Moreover, a Planner who indeed left the decision up to the Board, would frame the issue to me as: "If you wish for the board to make a specific determination about ***whether or not*** that the current application with a 6 foot retaining wall constitutes surface parking, then please advise us accordingly."

[5] The full texts of these emails are reproduced in the posted Citizen Comment: "Attempts to Override April 13, 2021 ZBA Ruling Against PB & Toomerfs," Joshua Meyrowitz 4-12-22 (pp. 1-30).

Mr. Behrendt's March 24, 2022 letter was clearly "opinion, not an administrative decision." Moreover, in response to Mr. Behrendt's offers, I, my colleague Mark Puffer, and members of the public repeatedly made a request for the Board to make a decision regarding the plan with the 6-foot retaining wall. (We requested that the Planning Board take into account the fact that the Board had been overruled by the April 13, 2021 ZBA vote that any retaining wall that provides for a portion of the parking is structured parking.)

Based on what we observed, we believe a formal Planning Board determination on this issue finally occurred in an extended PB deliberation starting at 10:09:55 pm on July 13, 2022, during which it appeared that a majority of the PB agreed that the current proposal is not "structured parking." After almost 20 minutes of deliberation, Council Representative to the Planning Board, Sally Tobias, summarized the discussion at 10:28:49 pm: "We can put the surface parking to bed." No one disagreed.

Misstatement: The Phoenix Letter improperly characterizes CUP Criterion #6 (Impact on Property Values) as one that is comparative to other permitted uses.

The Phoenix Letter asserts that the expert input from realtor Joan Friel *"assumes the proper comparison is woods vs. the proposed long-term parking lot and entirely overlooks other permitted uses in the zone that would be more impactful (light manufacturing, nursing home, elderly housing complex), each of which would include related grading, parking, and lighting."*

In fact, CUP Criterion #6 is one of the zoning criteria that is *not* to be compared to other permitted uses in the zone:

> 6. Impact on property values: The proposed use will not cause or contribute to a significant decline in property values of adjacent properties.

As I already communicated in my July 12, 2022 letter: *"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."* The Phoenix Letter is simply wrong on the relevant analysis required of the PB.

Misstatement: The Phoenix Letter characterizes any input that agrees with their position as "unrebutted expert evidence," while they challenge the expertise of those whose input disagrees with them by referring to it as something that is "erroneously touted as expert evidence."

The Phoenix Letter invites the PB to pick and choose only the expert testimony that supports Toomerfs' application. Yet, as Robin Mower accurately outlines in her July 19, 2022 submission on "Expert Testimony Requires Respect," the Board is obligated to weigh the expert input provided to it.

The term "expert" is not explicitly defined in Durham's zoning code, likely because a widely accepted meaning already exists. According to most English dictionaries, an expert is a person who has a comprehensive and authoritative knowledge of, or skill in, a particular area. Regardless of Toomerfs' thoughts about the content of their letters, there is no reasonable dispute in the community that Joan Friel, Peter Stanhope, John Parry, Richard Hallett, and others cited by opponents to the parking lot project have expertise in their respective fields. The fact that they are not taking money from the applicant or the abutters for their opinions should enhance their credibility, not be considered a detriment.

It is understandable that Toomerfs want the PB to ignore the expert input of Professor Wilfred Wollheim, an aquatic ecosystem ecologist in the Department of Natural Resources and the Environment at UNH and Co-Director of UNH's Water System Analysis Group. After all, Professor Wollheim describes his 10 years of "extensive hydrological and water quality measurement" in College Brook and details the unique watershed pollution that would result from the parking lot proposal in contrast to other potential uses (violating CUP Criterion #2: "External Impacts"), as well as how the proposal would degrade identified resources on abutting properties (violating CUP Criterion #5 "Preservation of Natural…Resources," which is not comparative with other potential uses).

Misstatement: The Phoenix Letter falsely claims that Toomerfs' proposed large commercial parking lot, close to the rear of the Urso home, would not have much additional impact on the Ursos because of the existing senior-housing parking lot across from their property on Smith Park Lane.

As my client Sandy Urso wrote on July 7, 2022:

> Due to the landscape and elevation differences, I look past the [senior-housing] parking lot and instead view the apartment buildings, Mill Pond and Mill Pond Road. My property is not currently affected by a commercial parking lot. You are welcome to come and see for yourself. I have a front yard, a back yard and side yards. In contrast, an open area of such huge size and height of the proposed lot will certainly provide an amplification of any car doors slamming, horns beeping, or voices speaking, especially since it will have no closing hours. Being stirred in the night is not healthy for anyone. There is no comparison of what I experience now in a lot to what I will experience if approved.

The Church Hill Apartments accessory-use parking lot has a total of about 40 spaces, including visitor spaces that are usually empty. The section that is slightly visible from the Urso home, about 250 feet away, has only about 20 spaces. The Toomerfs proposed lot would be more than 550% larger and significantly closer to the Urso home. (The Phoenix Letter touts a "39 ft. vegetated buffer before any disturbance.") See also the pictures and text on the first page of Joshua Meyrowitz's July 22, 2022 submission on "False & Misleading Statements."

My clients were pleased to learn from the Phoenix Letter that the Toomerfs have now apparently decided that their proposed parking lot will not be open 24/7. If that is true, which seems unlikely, the Toomerfs should now specify how the lot will be closed off at night, and at what time. Otherwise, we can certainly expect that the late hours that college students enjoy, and their tendency to "share" the music they are listening to with those around their vehicles will dwarf the impact on abutters from an accessory parking lot for seniors, who rarely come and go late at night, and who would be chastised by their residential neighbors if they blared music from their open car windows.

Misstatement: The Phoenix Letter presents irrelevant comparative data about Cowell Drive properties, which merely illustrates that Durham housing prices have been rising.

The Phoenix Letter misleadingly claims "Evidence regarding the value of an abutting property before and after a parking lot expansion was submitted over a year ago appended to Toomerf's (sic) letter dated March 8, 2021." They proceed to explain that the assessed value of 12 Cowell Drive increased between 2021 and 2020 "despite the approval and construction of a significantly expanded parking lot proposing a second principal use…."

Not only is the parking lot described as abutting Cowell Drive significantly smaller than what is proposed for Church Hill Woods (Toomerfs was approved in 2019 to add 26 spaces to a 17-space parking lot), and not only is that lot tucked in next to residential units whose tenants, in effect, "monitor" the lot, but the tax card data is irrelevant, as it merely reflects the rising prices of Durham homes overall, and does not provide any data on whether 12 Cowell Drive would be worth even more now had the parking lot expansion *not* been approved.

My client Martha Andersen already clarified the essential concept in both her May and July letters to the Board: *"The fact that housing prices are high in Durham does not address the variable that the Board must consider: You must compare the price of a single-family home next to woods to a similar home next to a commercial parking lot. Would any of you want to buy a home next to a large, 24/7 commercial parking lot?"*

Conclusion

In summary, Toomerfs persist in presenting selective and misleading information to distract the Planning Board from its primary obligation to apply Conditional Use zoning requirements and Site Plan Regulations to the Toomerfs' application.

Although Toomerfs have repeatedly suggested that their proposed parking structure is better than alternative uses of the site, the Phoenix Letter – perhaps unintentionally – highlights how they could make better use of such coveted property in Durham while maintaining the topography and history of the current site: *"As noted in the 12 Cowell Drive appraisal, Durham properties are sought after for access to highly regarded schools, proximity to the University, rail travel to Boston, commuter routes and employment centers in Portsmouth, Dover, and Rochester."* If Toomerfs really embraced those values, then they would propose a better use of the site such as attractive by-right owner-occupied residential properties (apartments, townhouses, or condos) built into that

sloping site rather than building a giant earthen structure for a 123-car commercial parking lot for by-semester rental to UNH students.

In the meantime, the Planning Board should not allow Toomerfs to employ spurious arguments to distract them from their obligations under the Zoning Ordinance and the Site Plan Regulations. We believe the PB should deny this non-compliant application so that better plans emerge in the future.

Sincerely,

Nathan R. Fennessy

Nathan R. Fennessy