



TOWN OF DURHAM
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NOTICE OF DECISION

Project Name: 19 Main Street
Action Taken: DENIAL
Project Description: Site Plan and conditional use application for expansion of existing parking lot and use of parking lot as a principal use
Address: 19-21 Main Street
Property Owner: Toomerfs, LLC c/o Pete Murphy and Tim Murphy
Engineer: Mike Sievert, Horizons Engineering
Map and Lot: Map 108, Lot 10, 11, 12, and 13
Zoning: Church Hill District
Date of decision: **September 14, 2022. The conditional use was denied on August 24, 2022.**

The application for a site plan for expansion of the existing parking lot and the conditional use for use of the parking lot as a principal use (in contrast to an accessory use) is denied. The application for a conditional use was denied by the Planning Board on August 24, 2022 (by a vote of 7-0). Since the requested use has been denied the site plan application cannot go forward and was thus denied (by a vote of 7-0).

Approval of a conditional use requires an affirmative vote of at least five (out of seven) Planning Board members finding that all of the eight conditional use criteria are met for the application. The board found unanimously that the application failed to meet this requirement. Planning Board members provided extensive comments on August 24, 2022 prior to the vote on the conditional use, explaining why they determined that particular criteria were not met. All of the Planning Board members concluded that at least one of the conditional use criteria was not met. The application was duly denied for the reasons given in italics.

175-23. Approval Criteria. [Excerpt from Durham Zoning Ordinance]

...C. ***Criteria Required for Consideration of a Conditional Use Permit.*** A conditional use permit shall be granted only if the Planning Board determines that the proposal conforms to all of the following conditional use permit criteria (except for specific criteria that are deemed by the Planning Board to be not pertinent to the application):

1. Site suitability: The site is suitable for the proposed use. This includes:

- a. Adequate vehicular and pedestrian access for the intended use.
- b. The availability of adequate public services to serve the intended use including emergency services, pedestrian facilities, schools, and other municipal services.
- c. The absence of environmental constraints (floodplain, steep slope, etc.) or development of a plan to substantially mitigate the impacts of those constraints.

One or more Planning Board members found that the steep slope constituted an environmental constraint that could not be mitigated.

- d. The availability of appropriate utilities to serve the intended use including water, sewage disposal, stormwater disposal, electricity, and similar utilities.
2. External impacts: The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare. In addition, the location, nature, design, and height of the structure and its appurtenances, its scale with reference to its surroundings, and the nature and intensity of the use, shall 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.

One or more Planning Board members found that:

- a) *the facility is out of scale with the neighborhood;*
- b) *the lighting will be so high that it would cause glare toward neighboring properties; and*
- c) *the project is in conflict with proper orderly development.*

3. Character of the site development: The proposed layout and design of the site shall not be incompatible with the established character of the neighborhood and shall mitigate any external impacts of the use on the neighborhood. This shall include, but not be limited to, the relationship of the building to the street, the amount, location, and screening of off-street parking, the treatment of yards and setbacks, the buffering of adjacent properties, and provisions for vehicular and pedestrian access to and within the site.

One or more Planning Board members found that the amount, location, and screening of off-street parking is incompatible with the established character of the neighborhood and does not mitigate all external impacts on the neighborhood.

4. Character of the buildings and structures: The design of any new buildings or structures and the modification of existing buildings or structures on the site shall not be incompatible with the established character of the neighborhood. This shall include, but not be limited to, the scale, height, and massing of the building or structure, the roof line, the architectural treatment of the front or street elevation, the location of the principal entrance, and the material and colors proposed to be used.

-One or more Planning Board members found that the scale, mass, and height of the parking facility does not fit into, and is incompatible with, the character of the Church Hill District.

5. Preservation of natural, cultural, historic, and scenic resources: 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, cemeteries, graveyards, designated historic buildings or sites, scenic views, and viewsheds.

One or more Planning Board members found that the extensive clearing, regrading and establishment of impervious surface would have a significant adverse impact on the natural habitat including the heat-island effect, adverse impacts on wildlife habitat and mature tree lines, and adverse impacts of chloride on nearby College Brook, the Oyster River, and Great Bay, which cannot be mitigated.

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

One or more Planning Board members found, based on specific local testimony, that the value of abutting properties would be adversely affected.

7. Availability of Public Services & Facilities: Adequate and lawful facilities or arrangements for sewage disposal, solid waste disposal, water supply, utilities, drainage, and other necessary public or private services, are approved or assured, to the end that the use will be capable of proper operation. In addition, it must be determined that these services will not cause excessive demand on municipal services, including, but not limited to, water, sewer, waste disposal, police protection, fire protection, and schools.
8. Fiscal impacts: The proposed use will not have a negative fiscal impact on the Town unless the Planning Board determines that there are other positive community impacts that off-set the negative fiscal aspects of the proposed use. The Planning Board's decision shall be based upon an analysis of the fiscal impact of the project on the town. The Planning Board may commission, at the applicant's expense, an independent analysis of the fiscal impact of the project on the town.

Findings of fact.

- a) The Planning Board received a design review application for the project on October 23, 2019.
- b) The application was for a conditional use to allow for parking as a principal use, meaning that it could be used by any parties, in contrast with parking as an accessory use, meaning it can serve only users of the buildings on site. There was a separate site plan application to expand the existing parking lot extensively.
- c) The Planning Board conducted a design review and held a public hearing on the proposed application over several meetings in late 2019 and early 2020.

- d) The Planning Board held several site walks on the application including one held during the design review.
- e) The application was presented to the Technical Review Group several times over the course of the review including during the design review.
- f) Numerous letters and comments from the public were shared during the design review, the vast majority stating opposition to the proposal.
- g) There were several comments from Planning Board members during the design review stating that it might be difficult for the project to meet all of the conditional use criteria.
- h) The Planning Board received a formal application for the site plan and the conditional use on October 28, 2020.
- i) The Planning Board accepted the application as complete on November 18, 2020.
- j) The applicant submitted numerous studies for the site including a forest assessment, a traffic analysis, a stormwater report, and others.
- k) The Planning Board received numerous written comments from neighboring residents and other residents throughout Durham in the course of the review. The vast majority of the comments were in opposition to the plan.
- l) The applicant, the attorneys for the applicant, and the applicant's design engineer, wetland scientist, and landscape architect provided responses to these criticisms. There remained debate throughout the review whether or not the application was meeting one or more conditional use criteria.
- m) The applicant revised the plan several times in response to comments and concerns expressed by the public, Town staff, and the Planning Board.
- n) In response to requests the applicant submitted numerous views of the project from various vantage points.
- o) Although the proposal did not require input from the Durham Conservation Commission, the commission provided a letter on August 9, 2022 expressing concerns about environmental impacts.
- p) The Planning Board reviewed the application continuously over a two-year time span from acceptance in November 2020 to final action in September 2022. The application was reviewed at one or two meetings most months within that time span except for a few periods during which the applicant requested a postponement. The public hearing remained open from acceptance to August 10, 2022.

- q) The Planning Board listened to presentations from the applicant and comments from the public, discussed the application, asked questions of the applicant, and considered the requirements of the Durham Zoning Ordinance and the Durham Site Plan Regulations throughout the review process.
- r) The changes to the front portion of the site (largely related to access into the site) situated close to Main Street, are located in the Durham Historic District. The Historic District Commission approved these changes.
- s) The Planning Board met with the Town Attorney in closed session to discuss the proper procedure for holding final deliberations and making its final decision on the application.
- t) The Planning Board spent much time discussing the optimal procedure for reviewing the application considering its complexity, potential impacts upon abutters, and the challenges with reviewing the conditional use application and the site plan application.
- u) The Planning Board voted 7-0 to deny the conditional use application on August 24, 2022 finding that the application did not meet all of the eight criteria as required under the ordinance.
- v) The Planning Board voted 7-0 on September 14, 2022 to deny the site plan application because approval of the site plan required allowance for the conditional use and the conditional use had been denied.

Signature of Planning Board Chair

date

Printed name of Planning Board Chair