

Toomerfs Reply 6.8.2022

Evidence Presented by the Public

- DZO 175-22.B.4
 - Any written comment shall be specific when maintaining that the granting of the conditional use permit would adversely or injuriously affect the writer's personal and legal interests.
 - The Planning Board has an obligation to *consider* information presented by the public, but it does not have an obligation to weigh it equally to evidence provided by the Applicant's qualified experts, town consultants, or the town staff

Evidence Presented by the Public

- **Standing = a "person aggrieved" or directly affected by the Planning Board's action in a way different from the public at large.** See New Hampshire Office of Energy and Planning, The Board of Adjustment in New Hampshire, p.IV-2-3; Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment, 149 NH 63 (2003); Weeks Restaurant Corp. v. City of Dover, 119 NH 541 (1979).
- **A factual determination to be undertaken on a case by case basis.** Weeks, at 544-45.
 - (1) the proximity of the challenging party's property to the subject site;
 - (2) the type of change proposed;
 - (3) the immediacy of the injury claimed; and
 - (4) the challenging party's participation in the administrative hearings.

Id. at 545. See also, Johnson v. Wolfeboro Planning Board, 157 N.H. 94 (2008) applying the Weeks' factors to a Planning Board's decision granting a Special Use Permit.

Evidence Presented by the Public

- No expert opinions except two foresters, who offer **illegal reasons for denial**
- *All of these reasons would constitute an illegal taking:*
 - Trees/Global warming
 - Animal habitat (bee/rabbit keeping)
 - Preservation of natural topography/scattered small areas of steep slopes not visible to the public
 - Desire to defeat Mill Plaza development ≠ evidence

Evidence Presented by the Public

- Town has to allow an **economically viable use of the land** (*Burrows v. Keene*, 121 NH 590 (1981))
- If you have an existing wooded area on a private lot this criterion cannot legally be interpreted to say that you must preserve a substantial amount of that wooded area. That could be seen as an illegal taking.” Michael Behrendt, Durham Town Planner, Planning Board Feb. 17, 2021, 7:36 p.m.
 - Cannot mandate conservation, beekeeping, rabbit husbandry.

There is no less conspicuous or less impactful economically viable use of the land than a screened parking long-term parking lot with setbacks

Applicant's Evidence in the Record

- Applicant's survey, design & engineering plans
- Expert opinion: Applicant's professional team - surveyor, engineer, forester, traffic engineer, landscaping
 - Vetted and approved by:
 - Town officials (planning, public works, assessor)
 - Outside consultants commissioned by the town – engineers, traffic engineer

Evidence Presented by the Public

- Board members are allowed to base conclusions on their own understandings and observations, but they may not ignore expert opinion, especially if uncontradicted. Condos east Corp. v. Conway, 132 NH 431 (1989).

Conditional Use Permit Review

- Site suitability—the site can be adapted for the purpose
- External impacts—No greater than existing adjacent or other permitted uses
- Character of site development—not incompatible with other parking lots in the Downtown and Commercial Core district
- Character of building and structures—no buildings; reduced lot
- Preservation of natural, cultural, historic, and scenic resources—enhance vista of two historic properties, the only “identified” resources
- Impact on property values—no significant impact – Town Assessor
- Availability of Public Services & Facilities—use cleared by Public Works and Public Safety
- Fiscal Impacts—only positive fiscal impacts for the town

Natural Resource Standards

Site Plan Regulations, Article 8

- Purpose is to protect, preserve and enhance natural resources while accommodating appropriate growth and development by encouraging applicant and PB to consider natural resources
 - Article 8 does not *prohibit* development and is not intended to *prohibit* it.
 - 8.2.1 “Shall” be located and designed...to the extent practicable
 - “Extensive” grading and filling shall be avoided
 - Development methods are driven by features of the existing site
 - Extensive on one site is entirely appropriate on another
 - No concerns raised re: fill at either Technical Review Group Meeting
 - Town Engineers: Design approach re: grading and drainage “reasonable and consistent with what we would expect for a site of this type.” Expert evidence that neither filling nor grading is “extensive”.

Section 8.4 Specific Features – Steep Slopes

- Resources worthy of protection or special care; or features which, if disturbed, could cause hazards to the environment, health, safety, or property.
 - These elements shall be preserved, **if practicable**, and **enhanced, where appropriate**, or special design solutions shall be incorporated to avoid, minimize, or mitigate impacts or protect against hazard.
 - “Bowl” shape is filled; other slopes left
 - New steep slope created
 - Objectors are simultaneously arguing that the “steep slopes” must be preserved while lamenting creation of a “towering 18.5-ft mound” (Meyrowitz, 3/18/22)
 - No hazards created
 - Town Engineers: Design approach re: grading and drainage “reasonable and consistent with what we would expect for a site of this type.”

Because the purpose of the regulations is both to encourage preservation but also to accommodate development, consideration of what is practicable is paramount in the law.

Natural Resource Standards

Site Plan Regulations, Article 8

- 8.2.2 directed away from valuable and fragile resources **to the extent practicable**
- 8.2.3 shall follow the natural contours of the landscape **to the extent practicable** to minimize grading.
- 8.2.4 applicant is **encouraged** to make special efforts to protect elements considered **to have significant value**, which in many cases involves creating a buffer around them.

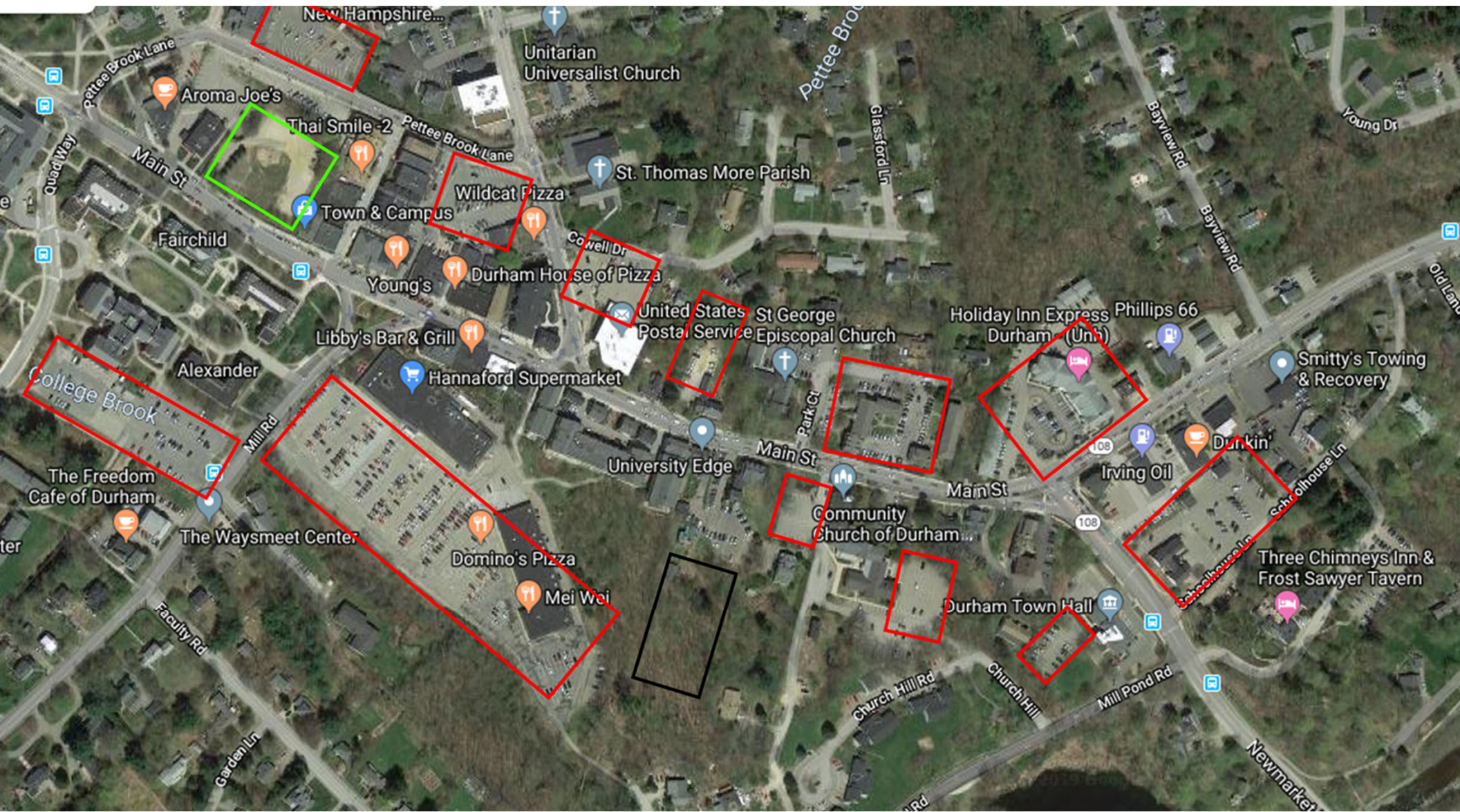
Applying the equal protection analysis, there is no rational basis to classify this project differently from others which have presented similar disturbance of steep slope or introduced significant fill.

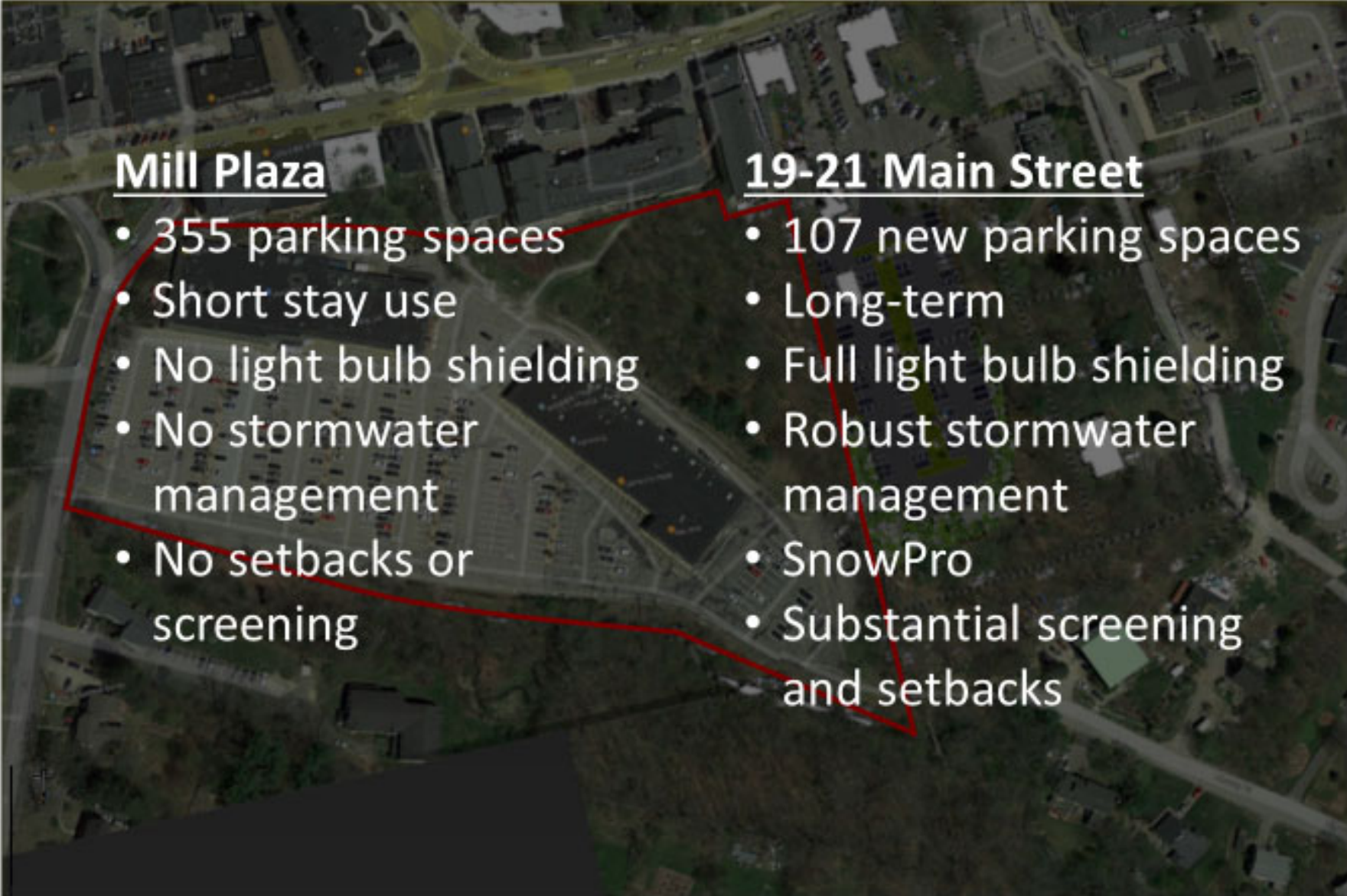
Planning Board Role

- Planning Board must act reasonably in applying statutory and municipal regulations. Batakis v. Town of Belmont, 135 N.H. 595 (1992).
- Obligation under NH Constitution to assist all citizens, work with applicants to negotiate the permitting process.

Anything constructed will require

- Clearing the land
- Grading/Fill/Excavation
- Parking
- Lighting





Mill Plaza

- 355 parking spaces
- Short stay use
- No light bulb shielding
- No stormwater management
- No setbacks or screening

19-21 Main Street

- 107 new parking spaces
- Long-term
- Full light bulb shielding
- Robust stormwater management
- SnowPro
- Substantial screening and setbacks