

Toomerfs, LLC
37 Main Street
Durham, NH 03824

Mr. Michael Behrendt
Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824

August 28, 2021

Dear Mr. Behrendt,

Toomerfs objects to the letter by Eric Lund dated 8-19-21 regarding Toomerfs' surface parking proposal at 19-21 Main Street. The letter does not conform to requirements for written comments because it does not specifically state how granting the permit would "adversely or injuriously affect the writer's personal and legal interests." Mr. Lund is not directly affected by the proposed development and lacks personal and legal standing. Notwithstanding, the letter contains numerous errors of fact and law, so we'd like to set the record straight regarding the Conditional Use criteria.

- 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.**
 - d. The availability of appropriate utilities to serve the intended use including water, sewage disposal, stormwater disposal, electricity, and similar utilities.**

There is pedestrian access, via sidewalks leading from Main Street to the parking lot. Toomerfs has had a traffic study based on 12 more parking spaces than currently proposed that showed that the proposal was reasonable according to accepted traffic standards. That traffic study was reviewed by an external consultant hired by the town who agreed (Public Works letter, April 9, 2021). Because there are currently 12 fewer spaces than in the proposal reviewed by the external consultant, the traffic plan and review are applicable to the current plan.

Town Emergency Services have approved the plan (Planner's Review, Jan. 13, 2021; Fire Department letter, July 9, 2021). Although the raw land has a slope, all that is required to be compliant under CUP is a plan to "substantially mitigate" the slope, which has been presented. There are appropriate utilities already on the properties or contiguous properties that can be extended to the site.

The stormwater disposal plan is similar to the plan of 2-2-2021 that was reviewed by the external consultant and found to be satisfactory. There are currently 12 fewer parking spaces and less impervious coverage than the prior plan. The results of the external review of the stormwater disposal plan are therefore applicable to the current plan.

- 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.

Some members of the public have broadened the meaning of this section to claim that *any* development whatsoever is prohibited because it would entail more traffic, noise, dust, fumes, etc., than a forest (e.g., Josh Meyrowitz, Planning Board, December 16, 2020, DCAT, 8:57 p.m., also May 12, 2021, DCAT 10:21 p.m.). The ordinance says, “[t]he 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 (emphasis added).” An adjacent existing use is the Mill Plaza, which in addition retail shopping has more than twice the parking of Toomerfs’ proposed lot. Moreover, the following uses are permitted on the land under the ordinance: 1) a nursing home with a parking garage; 2) an office building with a parking garage; 3) a restaurant with a surface parking lot; 4) a small retail store with a parking garage; 5) multiunit housing with a parking garage; among others. The analysis of external impacts of the proposed parking lot isn’t a comparison to a forest, nor is it arbitrary. The analysis of external impacts rests on comparison to the Mill Plaza and those other permitted uses in the zone, as we have previously discussed (Durham Planning Board, December 16, 2020, 9:15 p.m., also May 12, 2021, at 3’30”).

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.

As seen from aerial views that are in the record, the neighborhood has many parking lots, including the adjacent one at Mill Plaza that is more than twice the size. Parking lots are not incompatible with the established character of the neighborhood. The amount of parking proposed is compatible with the established character of the neighborhood; the net increase in parking is 130 spaces, which is 38% the size of the parking lot right next door at the Mill Plaza.

The lot has been misrepresented by some as a “mound”, and even a “looming 5-story tall fortified citadel” (Josh Meyrowitz, DCAT, February 27, 2021, 1:53). The proposed parking lot will be nearly flush to its neighbors to the east (Hall/Urso) and west (Mill Plaza), with a 14’ high 26.6 degree slope at the south end with a substantial vegetative buffer. The proposal does not raise the elevation of Church Hill any higher than existing conditions. There is no “mound”.

Toomerfs has been responsive to the Town Planner and Planning Board in mitigating external impacts in the neighborhood. The lot is not visible from Main Street with considerable buffers and setbacks. It is 200+ feet through the woods from Chesley Drive. The plan has been modified to substantially comply with all of the Town Planner’s recommendations to mitigate impacts on the Urso property (May 27, 2021):

“1) A setback of the pavement/parking of 20 or 25 feet from the side lot line/rear lot line of the Urso property (Council Chambers is 25 feet wide.). It

would be preferable to simply eliminate the 6 parking spaces facing the lot so there are no headlights pointing toward the house. The 5 parallel spaces could be removed allow for a straight side line and keep parked cars further from the Urso lot.

2) *Installation of a 6-foot high fully opaque stockade fence at or near the side lot line (whether cedar or vinyl) with the finish side of the fence toward the abutter. The posts should be made of steel and set into concrete (or comparable).*

3) *Large, dense evergreen shrubs on the abutter's side of the fence (placed on the subject lot or the abutter's lot)."*

The 11 parking spaces Mr. Behrendt suggested, plus one more, have been eliminated. The setback behind the Urso house is 24 feet; the closest parking spot to the Urso property line is 34 feet away. Spaces are oriented so no headlights point toward the Urso house, and there is screening around the entire circumference including fencing and plantings. The proposed parking lot is at an angle; its shortest setback to the Urso property line is 16 feet at its northwest corner, but at that point the parking lot is 150' from the Urso house. There is a proposed 7' fully opaque stockade fence along the parking lot behind the Urso property; since the lot slopes slightly down the Urso's will not see any parking from their yard or in their house, only the fence. We have sought the input of the Urso's on the plan over a dozen times, to no avail. Nevertheless, we have given the Urso's conditional permission to use our land for their enjoyment up to the fence 20 feet within our property behind their house. We also offer to put plantings on their side of the fence according to their preference.

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.

There are no buildings or structures, and the Applicant believes this condition is not applicable. There is a modest retaining wall (less than 6' tall) to the south to preserve a 75' wetland setback from the Chesley marsh, which the Applicant believes is not a structure according to the definition and is common in surface parking lots in Durham (Dennis Meadows, "Parking Definitions", April 18, 2021, "*Six feet is frequently used to identify what is reasonable in the current zoning code*"). Moreover, the retaining wall is there to preserve the wetland, not to provide parking.

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.

There are no identified natural, cultural, historic, or scenic resources on the site. A frequent argument cited by some of the public is that the trees need to be preserved. For example, "*...the Master Plan 'yes' says to develop, but it also says, '...reduce the trend of continued use of forestland and other natural areas, and increase the quantity and quality of existing forest cover in developed areas.' So...you have to develop within that restriction*" (Josh Meyrowitz, Durham

Planning Board December 16, 2020, DCAT, 8:57 p.m.). It isn't possible to develop raw land within that restriction, and rejecting the application to preserve trees would be illegal:

"Very frankly, I was concerned about...if this is were to be interpreted as where you have an existing wooded area on a lot, that one cannot make significant removal of that wooded area. Frankly I was concerned about the legality of that. And I checked with the town attorney and I shared this with the Planning Board... and the town attorney's feeling confirmed my concern that 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.

The 1.5 acre lot is lightly-littered and contains immature trees, most of which will succumb to Emerald Ash Borer infestation within 10 years (Forest Assessment, January 8, 2020). It has never been "identified" as a special resource of public interest; most people didn't even know it existed: *"Many if not most Durham residents were unaware until now of a two acre area of forest hidden in the midst of the downtown Durham business district, land currently owned by respected Durham developer Peter Murphy"* (John Carroll, November 20, 2019).

Lastly, the trees can be removed by the property owner at will, without any permitting requirement (Planning Board, December 11, 2019, 9:31 p.m.).

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

The burden of persuasion has been met by the Applicant; the only objective evidence in the record is that the proposal will not contribute to a significant decline in adjacent property values (Jim Rice, Durham Town Assessor, email February 24, 2021; Tim Murphy letter, March 8, 2021, including appraisals of 18 Main Street before and after development of an adjacent parking lot).

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.

The impact of a surface parking lot on public services or utilities is minimal. All of the listed public services are available on the contiguous lots and can be brought to the lot as needed.

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.

The parking lot will have little negative fiscal impact on the town because the resources required from the Town for the lot are minimal (Rene Kelley letter, February 19, 2021; Brendan O'Sullivan letter, July 9, 2021). The lot will have a substantial positive fiscal impact on the town through tax revenues (Jim Rice, Durham Town Assessor, email February 24, 2021).

Toomerfs has been cooperative and responsive to requests of the Town Planner, Public Works, the Town Engineer, and the Planning Board. We are entitled to a fair hearing and due process according to the law, and we believe the proposal for a surface parking lot at 19-21 Main Street is compliant with the Conditional Use criteria, read properly.

Site Plan Regulations call for either 2 parking spaces per dwelling, or 1 per resident. The lack of parking for housing in the neighborhood is a hardship for residents, most of whom are students. As noted by the Planning Board on August 25, 2021, students are entitled to similar housing treatment as other age groups. Many members of the public who oppose the Toomerfs' parking lot have expressed anti-student bias (e.g., "*If the plan was [sic] for a different demographic of tenants, the negative external impacts would be significantly reduced*" (Mill Plaza file, Citizen Petition, 8-24-2021), see also Joshua Meyrowitz, 8-19-2021 in the Mill Plaza file). Arbitrary and intentional discrimination is illegal under New Hampshire (RSA 354-A:8) and U.S. law (42 U.S. Code § 3604). We urge the Board to approve our application, which will improve existing adjacent housing that doesn't conform with the Site Plan Regulations because of insufficient parking.

Thank you.

Sincerely,

Timothy Murphy
Peter Murphy
Toomerfs, LLC