

Re: 19-21 Main Street

July 11, 2022

Dear Members of the Durham Planning Board,

I watched the PB deliberations of June 22 with great interest. Here are a few comments I hope members of the PB will reflect upon prior to your July 13 meeting.

Words Matter—especially those in our Zoning Ordinance and Site Plan Regulations. The Superior Court’s rulings on the Gerrish Drive PB decision and one in 2008 on the PB decision re: the Stonemark application (which rested largely on the meaning of “contiguous”) should serve to remind PB members that “words matter”—especially those written in our ZO and Site Plan Regulations. It can be tempting to want to ignore those troublesome words that do not support one’s personal belief about an application. Even if one believes the regulations are poorly written or one wishes they said something else, PB members must uphold the Town’s regulations *as they are written*.

The definition of “structure” matters.

James Bubar has raised concerns many times regarding whether this current proposal— with its 6-foot retaining wall and massive amounts of fill in a fixed location— is actually “structured parking” and therefore not permitted in the Church Hill District. Please recall that on April 13, 2021, the ZBA determined that a parking lot *with any height wall* is to be considered “structured parking.”

STRUCTURE – That which is built or constructed with a fixed location on the ground or attached to something having a fixed location on the ground. Structure includes but is not limited to a building, swimming pool, mobile home, billboard, pier, wharf, septic system, parking space/parking lot and deck. Structure does not include a minor installation such as a fence six (6) feet high or less in height, a mailbox, a flagpole, or an accessory shed (bold added).

Also, please note that a concrete retaining wall that helps to support almost 14,000 cubic yards of fill is not the same as a 6-ft. fence. Does not the massive mound of fill itself, fixed in place with the help of a the retaining wall, pavement, and an internal, “underground” water filtration system (analogous to a septic system) not

represent a structure? Seen in this light, please revisit the definition of structured parking from our ZO.

STRUCTURED PARKING – A structure or portion of a structure that provides parking. The parking may be above or below grade, may be covered or uncovered, and may be on multiple levels (bold added).

Prior to the ZBA’s April 13 vote, some ZBA members pointed out that according to the precise language in the definition of structured parking and use of a retaining wall, the project resulted in “structured parking” and that a wall – any wall that provides for at least a portion of the parking – would meet the definition of structured parking. They did so without quantifying the size of the wall. In fact, ZBA Chair Sterndale specifically cautioned against any motion that specified any height or size of a wall.

Immediately before the ZBA April 13 vote at 9:18:40 pm, ZBA Chair Chris Sterndale clarified the motion when he stated: “And our intent is to declare that this is structured parking.” The motion passed 3-2 at 9:19:05 pm.

The ZBA ruling stands.

The ZBA was clear that a parking lot *with any retaining wall, no matter the height*, is considered structured parking, which is not allowed in the Church Hill District. **Please recall that Toomerfs waived their right to challenge this ZBA decision by withdrawing their Superior Court filing, thus the ZBA decision stands.** I am not clear how the PB can ignore a ruling by its own Town’s ZBA on the precise matter of whether the proposed parking lot is surface parking or structured parking. This seems wrong. ZBA decisions overrule PB opinions.

Our Site Plan Regulations must be followed.

Re: Site Plan Regulation 8.2: **“Extensive grading and filling shall be avoided.”** Those who rationalize that to build on a hill necessarily requires extensive grading and fill and thus to deny this application would be considered “a taking” are missing key points:

- 1) It is possible to build *into a hillside* as opposed to filling almost the entire slope in order to create a flat parking lot on top of a hill. There are other permitted uses that would be more environmentally appropriate, and that would comply with our regulations, and still provide a profit for the developer, such as building a well-designed professional office into the hillside.

2) The ordinance as stated requires that “extensive grading and filling shall be avoided.” Shall means “must.” The negative environmental impacts are laid out in the letter by Prof. Will Wollheim, the highly respected Co-Director of UNH’s Water Systems Analysis Group (WSAG), as to the hazards to our ecosystem from approving this proposal. Prof. Wollheim lays out the facts. The implications are profound and not to be ignored. Our regulations are there for a reason.

For anyone who is not clear about how to interpret our regulations, please read the following passage in our ZO 175-6. Meaning of Words.

Unless otherwise expressly stated, the following terms shall, for the purpose of this chapter, have the meanings indicated in this section. Words used in the present tense include the future. The singular number includes the plural, and the plural the singular. Where terms are not defined in this section, they shall have their ordinary accepted meanings or such as the context may imply. **The words “shall” and “must” are mandatory**, the word “may” is permissive, and the word “should” indicates a preferred or encouraged, but not necessarily a required, course of action.

Why are we not acknowledging the clear meaning of “shall” in this particular Site Plan Regulation?

The Plan does not represent “appropriate and orderly development.” Regarding CU Criterion #2 on External Impacts, Council Hotchkiss raised a critical point which has been overlooked until now. What does the phrase “appropriate and orderly development” mean? **We can look to the Purpose Statement of the Church Hill District to determine whether an enormous parking lot designed for UNH students and built on top of our historic Church Hill in the middle of our very small downtown should be considered “appropriate and orderly development.”** The Church Hill Purpose Statement reads:

“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...** (bold added).

How can an enormous parking lot built for UNH student rentals possibly be seen as “appropriate and orderly development” when it goes against the Purpose of the District, the character of the District, and the Durham Master Plan which makes clear that future development in our compact commercial core should be oriented toward commercial uses that support our residents in order to bring back some

semblance of balance between the Town and the University. **This parking lot is but one more example of our downtown being swallowed up by University functions, in this case a purpose contrary to both UNH and Durham goals of reducing student car use downtown.**

Our CU Criteria require the PB to consider the character of the buildings and structures.

CU Criterion # 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...**

Clearly this massive parking lot in the Church Hill District does not meet this criterion.

On June 22, the PB never discussed “External Impacts” such as noise, lights, glare, odors/fumes, and hours of operation...

There will be obvious negative impacts on abutters, even with promises to build a 6-foot fence and plant trees. **One negative impact that has not been mentioned is the noise created by snow plows in the winter in the wee hours of the morning. Fences and trees do not mitigate this noise.** Just ask the residents of Fairchild Drive about the regular disturbance of their sleep during the winter months due to the snow plowing of A-Lot, most often in the wee hours of the morning. A-Lot is much further away from Fairchild residences than the affected residences would be to the proposed Toomerfs’ parking lot. Fairchild residents also have an extensive wooded buffer behind their houses. Isn’t the PB supposed to protect the welfare of Durham’s residents? Please consider the potential severe impacts of the proposed parking lot on the Urso, Andersen, and Meyrowitz residences. If you were living in one of these homes, would you welcome this large student parking lot with its 24/7 hours of operation, snow removal, car stereos, horns, and alarms, and car doors slamming anytime during the night, disrupting the sleep of you and your family? And whether on dimmers or not (on June 8, Mike Sievert said “not”), the 14-ft lighting poles will light up what are now dark nights and penetrate the windows of the adjacent homes that do not now directly abut parking lots.

It’s no wonder that one of Durham’s most experienced and respected realtors, Joan Friel, estimates that the value of the Urso home on Smith Park Lane would decline

by up to 20% if the Toomerfs parking lot were built, and that “properties on Chesley Drive will lose the privacy they enjoy now.” **(This impact is one you must consider when you reach Criterion #6 “Impact on property values: The proposed use will not cause or contribute to a significant decline in property values of adjacent properties” – a criterion that is NOT, per the CU Article, to be compared/contrasted to other existing or permitted uses in the zone.)**

Rejecting this proposal is not a “taking.”

Contrary to Toomerf’s attorneys’ assertion in their July 8 letter, this enormous parking lot, which can only be brought up to grade by dumping 14,000 cubic yards of fill onto Church Hill, is not the only economically reasonable option for the Toomerfs to actualize their investment as noted in our Table of Uses. And not all economically reasonable development on their steeply sloped property requires “extensive grading and filling.” For example, a Permitted Use such as Senior Housing (which would in fact benefit our community as opposed to a student parking lot, which will not) could be designed and built into the hillside such that extensive fill and grading would not be required. Thus, **Toomerfs have other options for making money on their investment. Stopping a non-permitted use because it violates regulations and Zoning is NOT a “taking.”** Do not forget that the Toomerfs have admitted that they knew what the regulations were when they purchased the property. Uses that are actually permitted would be less environmentally damaging and a better match to our Master Plan goals and the character and purpose of the Church Hill District.

A Permitted Use, such as Senior Housing, which does not have to meet the rigors of Conditional Use, would likely preserve many more trees as it would be more economical to build up instead of out, and preserving and enhancing the landscaping would make for appropriate amenities for senior tenants. Additionally, this use would result in a dramatically smaller size accessory-use parking lot, thus reducing the amount of chloride and other pollutant run off into the Chesley Marsh, College Brook, and the Great Bay.

Expert testimony of Will Wollheim, Co-Director of UNH’s Water Systems Analysis Group should be taken to heart.

The Town has just been through a heart-wrenching process of voting on whether or not to remove the Oyster River Dam. A main argument for removing the dam was to initiate the process of restoring the water quality in the College Brook and thereby reducing contaminant flow into the Great Bay. **Approving this project, which will dump chloride and other pollutants directly into the wetland on the Andersen property, and then into College Brook and the Great Bay watershed**

would be a huge slap in the face to the entire Town, especially given that UNH is now making a concerted effort to clean up College Brook.

Please note that chloride and other pollutants were not discussed on June 22 and should be considered under *both* CU #2 External Impacts and CU #5 Preserving Natural Resources. And please remember that the “shall nots” in CU #5 are *not* to be compared to other existing or permitted uses. A conditional use project that violates the mandatory “shall preserve” and the “shall not degrade” natural resources in Criterion #5 must be denied, even if another permitted use might do that as well. Moreover, please remember that the Chesley Marsh is an identified wetland, that College Brook has been identified as a seriously impaired waterway, and that the Brook area is a designated flood zone. Further damage to those from a Conditional Use project must be stopped.

CU Criterion #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” (bold added and note the word “shall”).

CU Criterion #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.**

Please do not let your weariness result in a bad outcome for the Town.

There is a lot at stake here. I recognize that members of the PB are only human. Whether the lateness of the hour, the dragging on of an application for a very long time, or the annoyance of receiving an overwhelming amount of citizen letters—

especially from abutters whose quality of life is threatened, please do not let this impact what should be a strict adherence to our ZO and Site Plan Regulations.

We are counting on our Planning Board to uphold our regulations and not be swayed by the rationalizations of those very few who will profit economically, and their hired legal representatives, from approval of this application. The residents of this town worked diligently to create a vision for our Master Plan, out of which grew our Site Plan Regulations and our Zoning Ordinance. We, the citizens of Durham, rely on you, our representatives on the Planning Board, to see that they are adhered to.

Thank you for all the endless hours of service to our community.

Respectfully submitted,

Beth Olshansky
122 Packers Falls Road