

To: The Durham, NH Planning Board
From: Dennis Meadows, 34 Laurel Lane, Durham
Date: February 22, 2022
Re: Evidence Provided in the February 18 Toomerf's memorandum

Introduction

On February 18, 2022, Toomerfs, LLC, submitted a 40 page Memorandum demanding that Durham's Planning Board approve its conditional use application for permission to build a 150-car parking lot in Durham's Church Hill District. The report was prepared by attorneys Monica Kieser and Timothy Phoenix, of Hoefle Phoenix Gormley & Roberts in Portsmouth, NH.

Durham's zoning code on Conditional Use Permits, *175-23. Approval Criteria*, is explicit about the procedure for responding to CU requests:

[Every decision of the Planning Board pertaining to the granting, denial or amendment of a request for a conditional use permit shall be based upon findings of fact and conditions of approval.](#)

Therefore it is important to identify and evaluate the evidence provided in the Memorandum. That is the sole objective of this letter; this letter does not describe the project, nor does it advocate for any specific decision on the Toomerf's CU request.

Most of the Memorandum, 21 pages, provides information already familiar to the Planning Board - a description of the project and its history, text of some Church Hill property deeds, and pictures of the Community Church parking lot. Of the 19 pages with new material, over half, 12 pages, is a soliloquy that asserts the project fulfills all the Conditional Use criteria and that rejects the abutter's easement claims. The memorandum concludes with a lecture on the proper role for Durham's Planning Board, information on development rights, reference to Durham's Master plan, and attachments illustrating the steep slopes on two properties.

The project described by the Memorandum poses two central questions for the Planning Board.

First, can the parking lot be constructed without violating the many environmental, social, and economic goals lawfully embedded in in the conditional use provisions of Durham's zoning code?

Second, if it is constructed, will its benefits outweigh the various burdens it imposes on the town?

Durham's zoning code explicitly describes the source of information to be used in answering these questions.

The applicant shall bear the burden of persuasion, through the introduction of sufficient evidence, through testimony, or otherwise, that the development, if completed as proposed, will comply with this Article and will satisfy the specific requirements for the use contained in the ordinance.

The following discussion presents the evidence introduced by the February 18 Memorandum and suggests 15 questions that will help Planning Board members evaluate that evidence.

Purpose of the Parking Lot

The parking lot is clearly intended to serve a non-student population. On page 2 the Memorandum states, "parking spaces will be rented by students living on or off-site, workforce housing occupants and downtown business employees." Page 9 states the goal, "to accommodate students, local employees and visitors."

As evidence in support of the project, the Memorandum cites a study by Stephen Pernaw Associates and communications from the Durham Department of Public Works (DPW). All texts are on the Durham website.

Durham commissioned Vanasse Hangen Brustlin (VHB) to review Mr. Pernaw's projections. In their report, VHB observed that the parking spaces were intended for students and said, "Should these parking spaces be purposed for another use, then the volume and frequency of the site trips could differ."

In his March 19, 2021 reply to VHB, Mr. Pernaw agreed, "the traffic study projections, analyses, and findings apply only to the proposed expansion of the student housing parking lot, and no other hypothetical use."

In its (4/9/21) memo Durham's DPW reaffirmed this restriction: "The analysis and findings of the traffic study are strictly based on the proposed parking lot expansion for UNH students who reside at 19-21 Main St and

student housing developments nearby. Should the parking lot be used for any other use in the future the developer should be required to come back to the Planning Board."

Question #1: When will Toomerf submit the formal traffic study mentioned by DPW that shows the impacts of the parking lot they actually intend to build.

Impact of the Parking Lot on Property Values

Page 11 of the Memorandum states "All of these conditions will not cause or contribute to a significant decline in property values of adjacent properties as demonstrated by Town Assessor Jim Rice on February 24, 2021."

In his 2/24/21 memo Jim Rice's exact words were, "Whether this project would cause a diminution of value to these properties would be pure speculation at this point."

Question #2: When will Toomerf submit the formal study required to permit more than speculation about the parking lot's impact on property values?

Need for the Parking Lot

On page 4 is the assertion: "This expansion will provide much needed additional parking in a location within walking distance of the downtown district."

A study of the supply and demand for parking in downtown Durham was published in November 2019 using data collected by Carden Welsh, Sandra Hebert, and Jim Lawson. Their research supported three conclusions. (1) The main requirement is for a completely different type of parking client than those that would be served by the Toomerfs' project. (2) The need for more parking is not urgent: "The average utilization of Downtown parking during the peak period was 76.7% with an average of thirty-one spaces available." (3) As you would expect, the report's data charts also reveal that average use of parking areas declines with increasing distance from central Main Street. Parking areas that are even closer to downtown than is the parking lot proposed for Church Hill average a vacancy rate above 30 percent.

Question #3: What formal study supports the suggestion that the proposed parking lot will benefit the downtown district?

Reference Properties

An important influence on the Planning Board's decision is the choice of reference properties. The Zoning Code states, "The external impact of the proposed use on the abutting properties and the neighborhood will be no greater than the impacts of adjacent existing uses or other uses permitted in the zone."

In defending its project the Memorandum ignores all other alternatives and compares its proposal only to existing parking lots in and near Church Hill - one of which, at 18 Main Street, was recently created by Toomerf.

Examples from the Memorandum are on page 7: "The Property is surrounded by a mix of parking lots," and it will not be out of character with, "the parking lots that currently exist in the neighborhood." The visual effect "will be similar to the adjacent Durham Community Church Parking Lot."

Question #4: How will the parking lot impacts compare with other uses permitted in the zone?

The Memorandum states: "The proposed parking lot will not cause have (sic) any impact to abutting properties greater than any other existing adjacent (sic) or than other uses permitted in the zone."

Question #5: Permitted uses in the Church Hill zone include Conservation, Forestry, Farmers' Market, rabbit husbandry and beekeeping, various modes of residences, and nursing homes. What features of the design will ensure that the impacts of the 150-car parking lot are not greater than those permitted uses?

Development Rights

The Memorandum states, "Toomerfs has constitutional rights to develop and use the Property as it sees fit."

Question #6: Will those rights be violated if the Planning Board decides to reject the Toomerf's request for a conditional use permit?

Other Issues

The Memorandum states, "Urso's right-of-way...is not obstructed by the Project"

Question #7: The letter attached to the Memorandum states, "The right of way location...to the 'Urso' property...could not be determined." How can the applicant be certain the right-of-way is not obstructed?

Whatever the physical path of the right-of-way, the Memorandum acknowledges that both the Ursos' deed and the Toomerf's deed promise the Urso property, "the free and unobstructed use of a sixteen (16) foot right of way across land herein described to Main Street."

Question #8: Which 16' path from the Urso's property to Main Street will be left unobstructed by curbing, parked cars, and occasional snow piles?

On page 10: The Memorandum states, "The historic buildings on the site are being preserved." But on page 2 it was acknowledged that, "Toomerfs intends to...remove one of the four residential structures."

Question #9: Is the building that is intended for demolition significant in Durham's history?

The Memorandum states, "The Property is suitable for the proposed expansion because it can accommodate a downtown parking lot while meeting all dimensional requirements."

Question #10: If the property is already suitable, why will 1000 - 1500 large trucks of fill be required before the parking lot can be constructed?

The Memorandum includes a site plan of the RiverWoods Durham (RWD) project without explanation.

Question #11: Given that the RWD project was a permitted use in a zone remote from the center of town, what is the relevance of the plan to the proposed project?

The Memorandum frequently mentions that the project meets the setback requirements specified for the zone.

Question # 12: Could the plan to place 17 lamps on poles that will be approximately 35 feet above the roofs of some nearby single-family homes justify the Planning Board's imposition of, "Other performance standards as appropriate?"

Page 5 states, "The Property...has only one small non jurisdictional wetland pocket that is not impacted by the Project."

There is small wetland on the property. The wetland setback indicated on the parking lot relates to a larger wetland located on the abutting property. One is large enough to be classified as jurisdictional, and one is not.

Question #13: The project includes a 6-foot-high concrete retaining wall to be constructed immediately at the boundary of the 75-foot wetland setback. Will constructing that wall require clearing an area within the wetland setback for access by heavy construction equipment, for materials storage, and for excavating the trench required by the wall's foundation?

Page 8 states, "It cannot reasonably be argued that the proposed parking lot would have greater external impacts than those other permitted uses (the Memorandum is here referring to accessory parking lots) in the zone."

Question #14: Is it reasonable to expect that a 150-car parking lot could have greater impacts than parking lots one-fifth that size?

Page 7 states, "The proposed parking lot will not produce odors, noise, vibrations, or fumes out of character than (sic) the parking lots that currently exist in the neighborhood."

Question #15: What objective evidence justifies this statement?

Role of the Master Plan

The Memorandum devotes three pages to the Master Plan. The main point it makes is that the role of the Master Plan is only to guide the drafting of zoning codes. The Planning Board must make its decision based on the specifics of the zoning code not the generalities of the Master Plan. Quotations from Portsmouth attorney Peter Loughlin and several New Hampshire court cases are cited to reaffirm that obvious point.

However, that discussion is irrelevant in this case. In compliance with the law, Durham has translated the vision of the Master Plan into the regulatory provisions of its zoning code. In its deliberations the Planning Board has steadfastly focused only on the provisions of the zoning code.

The Master plan explicitly states its vision:

In 2025 and beyond, Durham is a balanced community that has successfully maintained traditional neighborhoods, natural resources, rural character, and time-honored heritage, while fostering a vibrant downtown, achieving energy sustainability, and managing necessary change.

And that vision was translated into specific zoning regulations, where the zoning code for Church Hill states:

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....New development should maintain the character of the area and is subject to the standards of the Historic Overlay District. Parking should be located behind buildings.

For that reason Durham's zoning code prohibits structured parking in the Church Hill zone and allows surface parking only if it satisfies all the conditional use criteria. Deciding if it does meet all the CU criteria is, of course, the responsibility of the Planning Board.

Role of the Planning Board

After explaining the process for considering the CU application the Memorandum tells the Planning Board how it should vote: "The Project ... must be approved." "the Planning Board is obligated to issue the CUP and grant Site Plan Approval." And then it assumes the decision has already been made: "given that the Project is permitted by Conditional Use Permit as determined by the ZBA, meets the CUP Criteria and satisfies the Site Plan Regulations."

However, there has not yet been a formal vote about the project's compliance with the CUP criteria. Planning Board members still must

decide on the basis of all the evidence whether or not they believe the Toomerf application completely satisfies all 8 Conditional Use criteria.

Durham's zoning code specifies, [At least five \(5\) members must vote in favor of the issuance of a Conditional Use Permit for an application to be approved.](#)

If only three members vote that even one of the 8 criteria is not fully satisfied, the application will be denied.

Of course the Planning Board members will make that vote in compliance with the Durham Zoning Code, which states: "[recitation of the enumerated conditions unaccompanied by findings of specific fact shall be deemed not to be in compliance with these regulations.](#)"