

To: The Durham, NH, Planning Board
From: Dennis Meadows, 34 Laurel Lane, Durham
Date: May 8, 2022
Re: Omissions from the Toomerfs' May 6, 2022 letter

Attorney Monica Kieser's May 6, 2022 letter about the Toomerfs' parking lot proposal acknowledges that Michael Behrendt made two suggestions:

1. Seek a waiver from Toomerfs' obligation to provide abutters with an unobstructed 16-foot right of way through the Church Hill property, and
2. Respond to my April 11, 2022, e-mail.

The Murphys refused the first suggestion saying that their expert advised them a waiver was not necessary. Their May 6 letter does not identify their "expert." It does not tell us specifically what their expert said or how the expert said it. It does not tell us if the refusal was based on a written legal opinion or merely on hearsay.

The May 6 letter also stated without any offering any evidence, "[Michael Behrendt has deemed the Plan adequate.](#)" I asked Michael what the Murphys were using as the basis for that statement. He replied, "[I'm not sure exactly where they take that information from.](#)"

Thus I cannot comment further on the Murphys' response to suggestion number one. You will have to decide for yourselves whether you agree with Michael Behrendt or with the Murphys' anonymous "expert."

However, it is simple to comment further on the Murphys' response to suggestion number two, because they have completely ignored the main point.

Everyone agrees that Toomerfs is legally obligated to provide the Ursos with an unobstructed 16-foot right of way through the Church Hill property. Everyone can see they have not done so.

The 2017 Toomerfs' deed explicitly obligates them to provide an easement. The Ursos' deed explicitly promises them to receive an easement. Yet every single parking lot plan submitted by Toomerfs has ignored that legal obligation.

Everyone also agrees that the Durham Planning Board is not the proper place to decide on the relative merits of the competing statements about an easement. That responsibility lies with the New Hampshire court system. Even though Ms. Kieser keeps suggesting this is an issue. It is not now, and it has never been in dispute.

The dispute concerns Durham's site plan regulations. They state clearly:

"The application shall include: ...**Location and widths of any easements or rights-of-way**" ... delineated in color on one digital copy and fifteen ..printed copies: ...

When that information has not been properly provided by the applicant, the regulations state that:

"then the application shall be deemed a preliminary conceptual application, rather than a design review application."

None of the Toomerfs' plans for the proposed parking lot has ever shown the Ursos' easement. Until Toomerfs' plan meets the requirements of Durham's site plan regulations, it cannot be used as the basis for a formal decision.

Ms. Kieser argues that since the easement's precise location is not described in the deeds, Toomerfs does not have to show it. But omitting the easement from the plan is the same as asserting that it does not exist.

That is one thing we all know to be false.

In fact the easement location is known well enough to indicate it approximately on the site plan. DCAT has recorded both Ms. Kieser and Michael Sievert on different occasions before the Planning Board describing where they think the easement runs. And when Church Hill was subdivided, its lots were given peculiar boundaries specifically to fulfill the obligation for a right of way and to provide for the path it was expected to take.

Because the easement's metes and bounds are not stated in the deeds, Toomerfs is legally entitled to determine the location of the right of way. But Toomerfs is also legally obligated to show it explicitly in some location. Look at the current site plan for the possible path of an unobstructed 16-foot right of way linking the Urso property to the Main Street through Church Hill land. There is no possible path.

In her letter Ms. Kieser seems to imply that the easement obligation may actually not exist, since she writes, "[The Durgin Plan is the controlling plan.....It shows no easements on the property.](#)"

Of course Durgin's plan shows no easements on the property. It was drawn in June 1944 before the property was first subdivided. Since all the land still belonged to one owner, there was no need for an easement.

The Durgin Plan, reproduced on page 8 of the May 6 letter, shows a single large plot. But today that plot is subdivided into five separately-deeded parcels. Thus the Durgin plan is completely irrelevant to the current situation. Note that long ago when the owners did draw a preliminary plan showing possible subdivision of the Church Hill, they explicitly showed a path for the back lots to access Man Street.

It has been difficult for anyone to critique Toomerfs' proposal, since it keeps changing.

One example: In February this year Ms Kieser wrote, "[parking spaces will be rented by students living on or off-site, workforce housing occupants and downtown business employees.](#)" The goal is "to

accommodate students, local employees and visitors." Now she claims the opposite - "parking spaces will be rented solely by students residing in the immediate area."

Another example: The Murphys originally claimed their project would provide "a possible parking arrangement for Mill Plaza." Some site plans submitted by Colonial Durham Associates even portrayed the Church Hill parking lot as an integral part of the Plaza project. Now the Murphys claim the opposite - the two projects are completely unrelated.

And of course there have been at least nine different versions of the site plan - adding a feature, taking it away, adding it again, taking it away again.

But one fact about their plans has remained constant They have always failed to comply fully with Durham's site plan regulations.

I was the Chair of a graduate program in policy analysis for 16 years in the Engineering school at Dartmouth College. I considered Dartmouth's graduate course on techniques of professional communication to be so important that I personally taught it myself. I always told my students it is best to design excellent solutions that benefit everyone.

But if you are trapped into defending a bad project, there are two tactics that might help you win the argument. The first is called a Red Herring. That is an argument that is deliberately intended to be misleading or distracting. The second is called a Straw Man. That is an intentionally irrelevant proposition that is set up, because it is easier to defeat than the opponent's real argument.

The Toomerfs' May 6 letter is throwing a Red Herring at a Straw Man.