

TO: Durham Planning Board, Town Planner Michael Behrend, Town Administrator
Todd Selig

RE: Conditional use permit application for proposed 19-21 Main St., Church Hill
parking lot (full text of letter by Gail Kelley, parts of which were read at the May 11,
2022, Durham Planning Board meeting)

FROM: Gail Kelley, 11 Gerrish Dr., Durham

DATE: May 18, 2022

Durham Site Plan Regulations Are Clear:

Environmental protection supersedes tax revenue considerations.

My focus here is on the following portions of Durham's Site Plan
Regulations, in the order listed below:

Part I -- Article 9. Word Usage;

*Part III -- Article 8. Natural Resources Standards and Article 4.
Compliance;*

Part I – Article 3. Purpose; and

Part II – Article 5. Independent Studies and Investigations.

Part I -- Article 9. Word Usage

As the title of *Article 9* establishes, this portion of the Site Plan
Regulations explains *how words are used* rather than defining them.
(*Article 10. Definitions* fills that latter function.) Only five words are
specifically dealt with in *Article 9*. One of them is a short but critical word
that appears throughout the Site Plan Regulations -- the word "shall."
Article 9. states:

“In these regulations ... the word ‘shall’ is mandatory, and the word ‘may’ is permissive.”

As Nancy and Malcolm Sandberg emphasized in their March 16, 2022, letter to the Board, and as repeated by Beth Olshansky and Robin Mower in their recent letters to the Board, “shall” is not open to interpretation. The drafters of the Durham Zoning Ordinance **and** Site Plan Regulations deemed it so important that this word be clearly understood that its usage is **explained in both documents. In the Zoning Ordinance and the Site Plan Regulations, “shall” denotes that which is “mandatory.”**

“Mandatory” is not defined in *Site Plan Regulations, Article 10. Definitions*. But this omission is addressed in the last paragraph of *Article 9* as follows:

“Where terms are not defined in Article 10 or within a given Article, they shall have their ordinary accepted meanings or such as the context may imply.”

Ordinary accepted dictionary definitions of “mandatory” differ slightly in wording but not in meaning. **“Mandatory”** means:

- **“required by a law or rule”** (*Merriam-Webster Dictionary*),
- **“must be done, usually because the law states that it is necessary”** (*Cambridge English Dictionary*),
- **“pertaining to, of the nature of, or containing a command; [in the context of] Law, permitting no option”** (*Random House Dictionary*)

“Shall” does NOT mean “should.” **“Should”** implies a sense of responsibility or obligation to follow a recommendation or piece of advice, but **the option is available to choose NOT TO FOLLOW a recommendation.** With “shall,” however, there is no opting out. “Shall” carries the force of law, as set forth in *Site Plan Regulations, Part I, Article 9*. Whatever action “shall” refers to, **must be done.**

Part III -- Article 8. Natural Resources Standards

The purpose of this Article, as stated in *Section 8.1*, is:

“to protect, preserve, and enhance Durham’s rich and varied natural resources while accommodating appropriate growth and development by encouraging the applicant and the Planning Board to consider natural resources in the planning process.”

Section 8.2.1 of this Article states:

“Buildings, parking areas, travel ways, and other site elements shall be located and designed in such a manner as to preserve natural resources and maintain natural topography to the extent practicable. Extensive grading and filling shall be avoided.

In her May 6, 2022, letter, Ms. Mower dealt handily with the meaning of the word “practicable” and with the applicants’ ungrammatical and illogical attempt to parse the word “avoid” to justify the granting of a conditional use permit to them.

My focus is on the last sentence of this provision, specifically on the word “shall.” **“Extensive grading and filling shall be avoided.”** This sentence DOES NOT CONTAIN the wiggle-room phrase “to the extent practicable.”

There is simply no getting around the meaning of that last sentence. **Extensive grading and filling is NOT PERMITTED under Durham’s Site Plan Regulations.**

To characterize the dumping of 14,000-15,000 cubic yards of fill onto what is now the Church Hill urban forest as anything other than “extensive” is to engage in Humpty Dumpty linguistics. (In the Lewis Carroll children’s classic *Through the Looking Glass*, Humpty Dumpty tells Alice, “When I use a word, it means just what I choose it to mean – neither more nor less.”)

On the basis of 8.2.1 alone, the Toomerfs application for this Church Hill District parking lot proposal **MUST BE DENIED.**

Part III – Article 4. Compliance

As this Article stipulates, only after **“a proposed application complies with ALL PERTINENT REQUIREMENTS OF THE SITE PLAN**

REGULATIONS [upper case emphasis added] and other applicable requirements and objectives, may the application be approved.”

Failure to comply with even one SPR requirement renders an application unapprovable. As already shown, the Toomerfs application defies the *SPR Part I, Article 8.2.1* prohibition of extensive filling.

While the extent of fill called for in this plan is reason enough to deny permit approval, the irreparable environmental consequences and the safety risks to abutters resulting from what that fill will be dumped on – the steeply sloped Church Hill urban forest -- renders an approval unconscionable.

Whenever Durham residents have voiced concerns over the adverse environmental impacts of eliminating this urban forest, the Planning Board and Town Planner have brushed those concerns aside and placed higher priority on the tax revenue that could be generated by the development of a parking lot.

Part I -- Article 3. Purpose

Part I, Article 3 lists twelve purposes of the Site Plan Regulations. Seven of them – numbers 1-5, 11, and 12 -- address environmental, health, and safety matters. In other words, the Site Plan Regulations give environmental, health and safety concerns the highest priority. Only purposes 2 and 11 in that list relate somewhat to broadening the property tax base, but as can be seen in the citations of those two purposes, “economic vitality” and “prosperity” are tied to “ecological integrity” and environmental protection:

“2) Promote sustainable design and development that supports long-term economic vitality and ecological integrity;”

.....

“11) Include such provisions as will tend to create conditions favorable for health, safety, convenience, prosperity, and general welfare

Admittedly, the words “environmental,” “ecological,” “health” and “safety” do not appear in Purpose #12 on that list. This last of the purposes listed in *Part I, Article 3*, simply states:

“12) Implement the goals of the Durham Master Plan.”

Broadening and stabilizing the tax base is among the goals of Durham’s Master Plan, as it should be. The Master Plan details how this should be achieved through “Smart Growth Principles.” These principles are grounded in efficient use of land and in protection, enhancement, and stewardship of the environment. Durham’s Zoning Ordinance and Site Plan Regulations are formulated to promote Smart Growth Principles.

Nowhere in Durham’s Site Plan Regulations is there any mention of increasing property tax revenue as one of the purposes or intents of the regulations.

Nor is there any provision in the Site Plan Regulations for increased property tax revenue as a rationale for overriding any of the standards or requirements in those regulations.

So, what are the environmental consequences of eliminating the small urban forest on Church Hill and dumping extensive fill on the slope this woodland occupies in order to construct more than an acre of paved parking lot? What risk does this pose to human health, safety, and prosperity?

In short, we don’t have well-researched answers to these questions. Durham’s Site Plan Regulations and Zoning Ordinance empower the Planning Board to commission – at the applicant’s expense -- independent environmental impact and fiscal impact analyses that would answer those questions. But the Board has declined to require such studies for the Toomerfs parking lot proposal.

However, we *do have* a well-researched challenge to the Planning Board’s decision to forego those studies – in the form of a March 17, 2022, letter to the Board from forest research ecologist and Durham resident Richard Hallett. Mr. Hallett holds BS, MS, and PhD degrees in forestry and has spent the past 10 years studying and publishing articles in scientific journals on the ecology and health of urban forests in the eastern U.S. The

incalculable ecological value of the Church Hill urban forest, Mr. Hallett explained, is in its function as a “forested ecosystem that is currently functioning as green stormwater infrastructure” which mitigates and filters runoff from the hill into College Brook at the base of the hill and, ultimately, into Great Bay. This functionality will be forever lost and impossible to replicate once the trees are removed, the hill is made steeper with enough fill to raise it to 34 feet above Chesley Drive at its base, and the newly leveled top of the hill is paved over.

In his letter, Mr. Hallett pointed out the Zoning Ordinance specifies that 1) the nature and intensity of use shall not have an adverse effect on the surrounding environment, i.e., the wetland and water quality of College Brook and abutting residential properties; 2) the proposed use of the site shall not degrade identified natural resources on abutting properties – again the wetland and floodplain of College Brook; and 3) the proposed use shall not have a negative fiscal impact on the town.

As stipulated in Durham Zoning Ordinance Article VII, 175-23. C. 8, the Planning Board’s decision on whether a proposed use will have a negative impact on the town, “shall be based upon an analysis of the fiscal impact of the project on the town.” (Note the presence of the word “shall.”)

To determine the *fiscal impact* of the proposed parking lot on the town, the *environmental impact* of the project has to be assessed.

“Where is the cost/benefit analysis showing that the benefits outweigh the current and future environmental costs of this project?” Mr. Hallett asked in his letter.

The Zoning Ordinance and Site Plan Regulations state the Board *may* commission an independent analysis – but it doesn’t have to -- at the applicant’s expense, to determine the fiscal impact of the project on the town. The Site Plan Regulations go further and specify that any fiscal impact analysis or environmental analysis **shall** be done “**in accordance with best practices.**” However, the word “may” does not have the strength of “shall.” Nonetheless, *if* the Board commissions an impact analysis, it *must* be done according to best practices.

Apparently, Mr. Behrendt considers the comments of Durham Tax Assessor Jim Rice in a Feb. 24, 2021, email sufficed as a fiscal impact

analysis. Mr. Rice had responded to an email from Mr. Behrendt asking him about the “likely increase in the value of the subject property [the Church Hill proposed parking lot] and the fiscal impact.” (Notice the lack of neutrality in that question.)

Mr. Rice replied that a house on Chesley Drive (which abuts the subject Church Hill property) had recently sold for \$46,000 more than the asking price, even when the buyer had been informed of the parking lot proposal. Mr. Rice also said that he had consulted with a commercial real estate appraiser who “estimated that the additional 140 parking spaces could contribute approximately \$1.4-\$1.7 million in assessed value.” What these numbers were based on, Mr. Rice did not say. As a result of his research, Mr. Rice concluded that the proposed parking lot will have “no chilling effect.” He added that he didn’t think an outside consultant was required to investigate this question any further. Mr. Behrendt forwarded this email exchange to the Board.

So much for an *independent* fiscal impact analysis *in accordance with best practices* – which an email exchange between town officials is not. The DZO and SPR make no mention of the town tax assessor as the entity who determines whether the planning board should commission a fiscal impact study. Far be it from this Town Planner and Planning Board to comply with the Zoning Ordinance and Site Plan Regulations and ask an applicant to pay for necessary and impartial information the Board needs to reach an informed decision on a matter that will affect the whole town – and the water of Great Bay -- forever.

Are this Planning Board and Town Planner aware our planet is in existential crisis? Do they realize what actions are needed to mitigate the crisis in order to “maintain the conditions for life on Earth”? The drafters of the Site Plan Regulations realized that. The quoted phrase in the above sentence is taken from *Article 10* of those regulations -- in the definition of “ecosystem services.”

Respectfully submitted,
Gail Kelley
11 Gerrish Dr., Durham