

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

FROM: Gail Kelley, 11 Gerrish Dr., Durham, NH

RE: Church Hill Parking Lot Proposal: Applying the Precise Wording of Durham's Zoning Ordinance and Site Plan Regulations

DATE: July 20, 2022

At its July 13, 2022, meeting the Planning Board again struggled with determining whether the Toomerfs parking lot proposal for Church Hill constitutes "surface parking" or "structured parking," terms defined in Durham's Zoning Ordinance. Since the Zoning Ordinance does not allow structured parking in the Church Hill Zone, the determination of the type of the proposed parking lot is a critical aspect – *but not the only critical aspect* – of approval or denial of the application.

Some Planning Board members deplored what they consider the imprecision and ambiguity of the wording of the Zoning Ordinance on this matter.

On the contrary, the wording of the Zoning Ordinance and Site Plan Regulations is precise and does not require complex parsing of its meaning -- if one isn't trying to contort its meaning in order to get around complying with it.

Applying the precise and simple language of the Zoning Ordinance is a surer route to resolution than creating linguistic pretzels to make the ordinance conform to a desire to approve this project. Let's revisit the Zoning Ordinance definitions:

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. (Durham Zoning Ordinance.)

This definition conforms those in standard general use dictionaries:

STRUCTURE -- Something that is built or constructed (Merriam-Webster Dictionary)

STRUCTURE -- Something built or constructed (Random House Dictionary of English Usage, unabridged edition)

Note: None of these definitions specifies the material(s) that a structure must be made of, nor do any of them specify how a structure must be anchored or held in place to "a fixed location on the ground." In other words, a structure doesn't have to have retaining walls, pillars, or any sort of buttressing to hold it in place to be considered a structure.

The Toomerfs' proposed parking lot will be built/constructed on top of a mound made of 14,000-16,000 cubic yards of earth. What is another word for a mound, especially one of such proportions, made of earth? **An earthwork.**

"Earthwork" is not defined in the Durham Zoning Ordinance. Standard dictionaries define the term as follows:

EARTHWORK -- An embankment or other construction made of earth (Random House Dict.)

EARTHWORK -- A construction formed chiefly of earth (Merriam-Webster Dict.).

Note: Both definitions use the word "construction." And what is a construction? That which is built, i.e., a structure.

And, finally, the Durham Zoning Ordinance definition of "structured parking:"

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.

Note the first sentence of this definition -- "A structure or portion of a structure that provides parking." An earthen mound, an earthwork, with or without retaining walls of any kind or height, is, by definition, a structure. The Toomerfs' proposed earthworks will provide for parking on the top of that structure.

Hence, the Toomerfs' proposed parking lot is a STRUCTURED PARKING LOT, per Durham's Zoning Ordinance definition. The DZO does not allow structured parking in the Church Hill District.

At the July 13, 2022, Planning Board meeting there was also heated discussion around the meaning of the word "extensive," specifically its use in Section 8.2.1 of Durham's Site Plan Regulations.

Site Plan Regulations Section 8.2.1:

“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.**” [emphasis added]

Town Council Representative to the Planning Board Sally Tobias declared (more than once) that the Site Plan Regulations are not specific enough in defining “extensive.” She said she needed specific numbers. “What’s the cubic footage? What’s the tonnage?” she asked. “Give me a number, and I’ll go with it. But I need a number.”

Are not 14,000-16,000 cubic yards of fill to create a mound 20 feet high specific enough and large enough numbers? They are for any reasonable application of Durham’s Site Plan Regulations.

Also, note the use of the word “shall” (twice) in Section 8.2.1. As stated in the definitions section of Durham’s Zoning Ordinance, “shall” means “must.” “Shall” does not imply any element of discretion. Thus, Section 8.2.1 means to extensive grading and filling MUST be avoided. In other words, extensive filling is prohibited.

Adherence to the Zoning Ordinance and Site Plan Regulations renders a denial of the Toomerfs parking lot proposal for Church Hill legally unassailable. Approving the proposal, with or without a retaining wall, leaves it easily vulnerable to a court challenge. If the Planning Board decides to follow this latter route, it will entail yet another huge expenditure of Durham taxpayer funds – as happened with the Gerrish Drive wetland case – not for the public good but to appease developers, no matter how harmful their proposed project will be to the public.

Respectfully submitted,
Gail Kelley