March 5, 2021
To: Durham Planning Board
From: Joshua Meyrowitz, 7 Chesley Drive
Re: Skirting the Conditions of Use?

Thank you for the extraordinary amount of time that you devote to Town service through processing extensive information from applicants and citizens and by attending and engaging in very long meetings. Almost three hours into the February 17, 2021, Planning Board meeting and Public Hearing on the **Church Hill Parking Structure** you held a preliminary, informal discussion of the Town's Conditional Use criteria with reference to the Toomerfs proposal. I listened carefully to that discussion, from 9:44pm to 11:07pm, and subsequently took extensive notes on the video recording of it. Below, I offer some observations on what I heard in the hope that my comments will encourage your more rigorous application of our Town's Conditional Use (CU) criteria to any application subject to them.

1) Drifting from "*Should* it be approved?" to "How it should be *operated*?" A CU discussion is supposed to focus on *whether* the proposed use would violate or pass Conditional Use criteria. Instead, this discussion often drifted into *assuming* approval (the very issue that was to be subjected to rigorous questioning) and into expressions of preferences for how a likely to-be-approved project ought to operate.

For example, the issue of whether a football-field-sized asphalt parking surface replacing woods would add to pollution of College Brook (into which it drained) and the Great Bay watershed (even with the applicant claiming no use of rock salt), turned into a discussion of preference for using rock salt to melt snow and ice for safety reasons in a likely to-exist parking surface. Similarly, the question of whether a lit-up parking lot on what is now dark-at-night woods would add unacceptable light and glare to the surroundings (even with dimmer- and motion-detection lighting systems) flipped into a discussion of how an approved parking lot should be sufficiently bright for safety 24/7. Ironically in both these instances, the stated Board member preferences for how the parking structure would likely *have* to operate lent credence to arguments that the project should be *rejected* to start with, because the stated safe-operation-mode would clearly violate Conditional Use criteria (adding pollution and further degrading College Brook and adding light and glare to the surrounding environment). But those on-topic arguments were barely floated. That's because the expected focus of subjecting the project to the CU criteria was lost in favor of an unrelated discussion of "management practices" for a heading-toward-approval project.

2. Ignoring the *Conditional* Nature of the Application. Repeatedly throughout the discussion, Board members mentioned that a related *permitted* use would avoid the debate. Well, of course. But instead of that point leading to the suggestion to the applicant to abandon the held-to-higher-standards Conditional Use and turn to a permitted use, the discussion fell into "Well, if it is okay for a permitted use, why don't we just allow it for this conditional use also?"

An analogy would be for a judge greeting a couple too young to marry legally without parental permission, and rather than saying, "Please wait until this is permitted outright, or get that parental permission!," the judge instead says, "Well, others just a few years older can marry without parental permission, so we'll just skip that condition for you as well. Congratulations on your union!"

In one instance, the Board stretched this “Okay for permitted, so okay for you” to the logical breaking point with a questionable argument that some imagined permitted use on the site would require 180 “accessory” parking spaces there, ignoring Planner Michael Behrendt’s plaintive comment (about 10:02 pm): ~But mostly if it were accessory parking, it would be considerably smaller.~

Conditional uses are subject to conditional criteria; that is what makes them distinct from by-right uses.

3) Disappearing the Neighborhood? Certainly each of us has a unique sense of “Neighborhood” depending on where we’ve lived and live now. But people’s individual “feelings” about neighborhood – as invited from Board members at the meeting – stand apart from how redundantly the Conditional Use criteria and the definition of neighborhood in the DZO guide the Board *not* to ignore the neighborhood. The CU criteria and DZO definitions hammer it home in multiple and overlapping ways, mentioning the properties adjacent to, surrounding, and near the proposed use – which encompasses a lot of different individualized “feelings” about what the neighborhood of a proposed project is.

Whether individual Board members conjure up images of a Mr. Rogers living nearby or Big Bird hanging out or not on their street, the attempt to “zone-out” the clearly adjacent neighborhood is not logical, not experiential, insulting to those who live nearby, and clearly not what is intended by the Conditional Use Ordinance. (If anyone’s personal feelings about neighborhood are to be invoked, they should be the people who live in the adjacent neighborhood, who have consistently cared enough to write letters and speak at meetings, who are members of neighborhood-focused social media, and so forth.)

The Board went off the rails on this issue when it failed to take note of the fact that there is nothing in the CU criteria that suggests that the cited relative ***uses*** in the “zone” apply only to ***impacts*** of properties *within* that same zone. “Uses” apply to the zone; “impacts” from those uses are explicitly stated as not limited to the zone. (“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.”) Abutting properties and neighborhoods are not bounded by zones, and it was dispiriting to hear discussions that suggested that the boundary of a zone created a de facto soundproofing and an invisibility shield around the proposed use. The questions at hand ought to have been how would the proposed massive parking structure impact abutting properties (regardless of zone), the adjoining neighborhood (regardless of zone crossing) and the “surrounding environment” (clearly not a zone-delimited concept), as contrasted with other existing and permitted uses in the zone of the proposed project. You received extensive testimony on how other parking lots in Church Hill are considerably different and have almost no impact on the properties abutting, surrounding, and neighboring the *proposed* structure and, conversely, about how the abutting properties, neighborhood, and surrounding environments would all be very negatively impacted by the proposed structure. (See, for example, the rich testimony here from citizens, including many of those cited in my Joshua Meyrowitz 2-12-21.)

Moreover, as Michael Behrendt read from the Zoning, p. 32, the definition of “Neighborhood” begins with “An area of land **local to the use concerned**.” The Faculty Neighborhood is certainly an “area of land” that would be very “local” to the Toomerfs proposed structure, which would loom over the Chesley Marsh,

Chesley Drive homes, and the cherished Faculty Neighborhood "magic path" and College Brook Footbridge. Again, being "local to" something clearly does not stop at a zoning district boundary. Please be more neighborly!

4) Losing Lots of Distinctions. The bulk of the proposed parking structure would be on two legally distinct lots that do NOT front on Main Street (1-16 & 1-15, Tax Map 5). Although the Board made extensive mention of what was at the "front" and "rear" of the proposed project, it missed the legal mark of the boundaries and lot locations. I did not hear any acknowledgement of your being told in public testimony (and also applicant presentation) that there are legally distinct lots in question. The shared ownership of four lots does not make them one legal lot. Moreover, the most visually offensive parts of the massive structure proposed would be on the 1-16 lot that abuts the Chesley Marsh and essentially fronts on Chesley Drive and the neighborhood footpaths, rather than Main Street. For the areas most affected by the project, the massive parking structure is at the "front" of the property.

Thus, when the Board seemed to accept the applicant's claim that the project would improve the "neighborhood" by removing parked cars from the side of a driveway on Main Street (on a legally *different* lot), the neighborhood most at risk from the project was defined away.

5) Not all the CU criteria are comparative to other uses in the zone. Only CU criterion #2 ("External impacts") refers to "impacts…no greater than the impacts of adjacent existing uses or other uses permitted in the zone." The other criteria set higher standards for Conditional Use applications than for by-right applications *without reference to other existing/permitted uses in the zone.* These include #3 "Character of site development," #4 "Character of the buildings and structures," and #5 "Preservation of natural, cultural, historic, and scenic resources." Therefore, all the Board discussion comparing the proposal to other permitted proposals or existing structures with respect to *these* other criteria was off track. "The proposed layout and design of the site shall not be incompatible with the established character of the neighborhood," or it fails CU. If the proposed use (*not* other permitted uses) is not compatible with the neighborhood in "scale, height, and massing of the building or structure," then it fails CU. (How could the scale, height, and massing of the proposed parking structure be compatible with the Chesley Drive homes it abuts and would loom over?) If the proposed *Conditional* use of the site does not "preserve identified natural, cultural, historic, and scenic resources on the site," then it fails CU criteria, even if a permitted use would be allowed to do something very similar.

6) False claim: *Any* building on the lots would require massive retaining wall. Simply googling "buildings on hillsides" or "homes on slopes," or the like yields hundreds of images of beautiful structures that are built into hillsides without using massive and ugly retaining walls and thousands of tons of fill. (See two examples at end of this document.)

7) Absurdly claiming that the most horrific possible use of the site would enhance property values by reducing ambiguity and fear of what "could be" built there. Seriously?

8) Low inventory and high sales prices actually obscure, rather than reveal, the long-term negative impact on property values from a poor redevelopment of an adjacent property. This is a point that

has repeatedly been conveyed to the PB in relation to other projects, as in Eric Lund 7-1-20. To know the impact of such an ugly parking citadel on adjacent property values, one would have to do a "paired sales" analysis (a similar home adjacent to 1.3 acres of woods and one adjacent to a massive retaining wall and parking structure of that scale). Current low inventory obscures what the long-term differential would be. In the interim, a more reliable predictor can be found in urban-forest expert John Parry's analysis of up to a 10% difference in the value of properties near woods and those near asphalt and 24/7 lights and noise.

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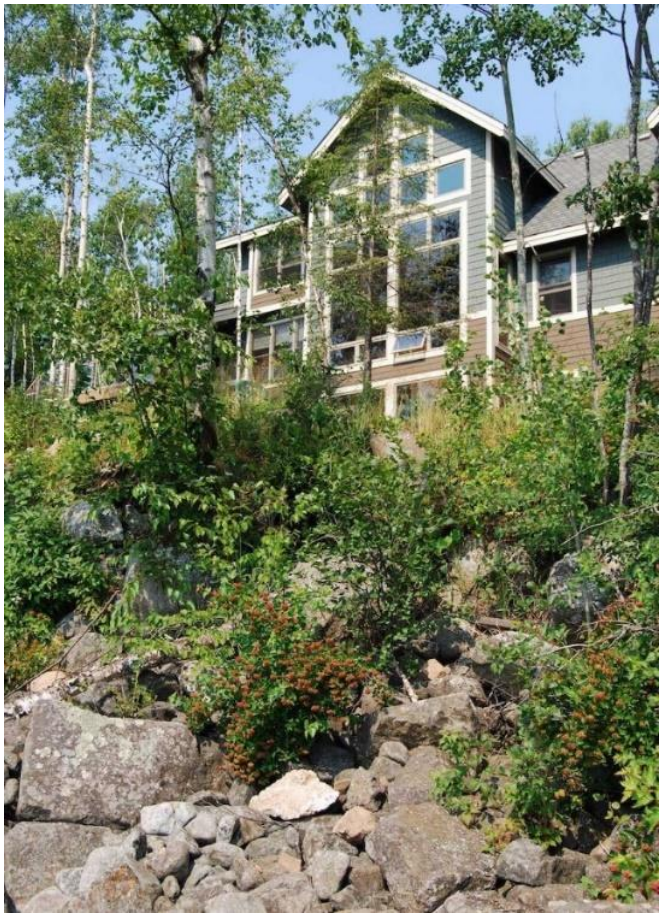
Conclusion: In short, the bulk of the February 17, 2021 preliminary CU discussion seemed to be applicant-friendly assumptions that the Conditional Use project would be approved, rather than conscientious assessments of *whether* it ought to be approved. The application was often treated as if it were a by-right use, with arguments about how to skirt the Conditional Use criteria rather than to apply them rigorously. Please contrast that to the Preliminary Design review. See pp. 37-38 here, video, minutes, and recall the advice of the Planning Board Chair on January 8, 2020, at 10:03pm, **"There's a half-dozen other permitted uses which I think would fit the property better."**



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"With a sloped site, the homeowner has the option of doing away with manicured lawns and simply leaving the natural surrounding as it is – or going all out with hedges, trees, shrubbery, and/or some hard landscaping." Six Advantages of Building on a Sloped Lot.

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