

Attempts to Override [April 13, 2021 ZBA Ruling](#) Against PB & Toomerfs

To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / April 12, 2022

Please include this document in the legal record for Planning Board review of Toomerfs Church Hill Woods parking proposal (aka “19-21 Main St”)

Background of Residents’ First Appeal to the ZBA Regarding Toomerfs’ Plans

On March 4, 2021, Attorney Mark Puffer of Preti Flaherty Law Firm in Concord, NH, sent a letter to the Planning Board (PB), c/o Planner Behrendt, on behalf of many Durham residents ([Letter from Attorney Mark Puffer 3-5-21](#)). Attorney Puffer detailed a case summarized as: “What Toomerfs is proposing is not ‘surface parking’ within the meaning of the DZO. It is ‘structured parking,’ as has been repeatedly conceded by the applicants, mentioned by Board members, and also referred to in numerous public comments.”

Planner Behrendt deviated from his typical practice and delayed the posting and the forwarding of the Attorney Puffer letter to the Board members to whom it was addressed in care-of him. As he later [confirmed](#), Mr. Behrendt waited until he had a day to consult with other Town staff (Administrator Todd Selig, Zoning Administrator Audrey Cline, and Town Attorney Laura Spector-Morgan) and write a rebuttal to Attorney Puffer’s letter ([Planner's Response to Attorney Puffer's Letter 3-5-21](#)). Then, both letters were posted and sent to the Board on the same day, March 5, 2021, thereby significantly diminishing the opportunity for the Board Members to assess the merits of Mr. Puffer’s letter before receiving the “official answer” from Town staff. (Moreover, the date of the Puffer letter posting on the application site was, and remains, March 5, instead of the actual day-earlier date on the letter itself.)

In response to Attorney Puffer’s request after that delayed delivery, Mr. Behrendt affirmed that Attorney Puffer would have an opportunity to make the case for his legal argument during the March 10, 2021, Public Hearing *prior* to the Board discussing and evaluating the issues and the opposing letters. However, that promised opportunity was not, in reality, granted at the meeting. At the start of the agenda item, the Acting Planning Board chair raised and dismissed (via 6 seconds of silence) Mr. Puffer’s letter, about 75 minutes before the Public Hearing on Church Hill was opened for potential comments from Attorney Puffer and others.

What was later defined as a legal “determination” by Zoning Administrator Audrey Cline (see correspondence on that further below), proceeded as follows on March 10, 2021 ([video](#), [agenda](#), [minutes](#)), with no deliberation, motion, or vote on the part of the Board (only the Acting Chair, two Board members, and “staff-letter” author Planner Behrendt were physically present at the table):

7:28:42pm **Acting Chair Lorne Parnell:** “Um, I think what we’d like to do tonight is, uh, hear the, the some reports from the third-party reviewers who, who studied the stormwater and the

traffic study. But just before we do that, um, we received some correspondence, uh, from, uh, Attorney Mark Puffer concerning, um, whether or not this application should be allowed to go forward, and the issue really is whether this is a, a structured parking, which is not allowed in the Church Hill District or whether it is surface parking. And, um, the, the, an answer has been provided to this, this question from the Town staff, and from our lawyer that this in fact is surface parking, which is allowed within, which is allowed by Conditional Use under the, uh, in the, uh, Church Hill District. Uh, and, I would, just before we go forward, I would just like to know if anyone on the Board disagrees with this opinion. **[7:29:56-7:30:02 = 6 seconds of silence; less time that it often takes Board members on Zoom to unmute their microphones.]** Okay, then I think we shall proceed. Um, I think the first thing we would like is, uh, [Applicant] Peter [Murphy] do you have something to start us off with?"

Applicant Peter Murphy: "Um, I don't!"

Lorne Parnell: "Well then, maybe, we can hear from the stormwater, the, what was done regarding the stormwater review. Do we have someone from that?"

Erik Saari, Altus Engineering, Portsmouth: Yes, good evening everybody....

The meeting continued, with the initial stated intent of "what we'd like to do tonight," that is, with a detailed discussion of the third-party stormwater management review and third-party traffic review.

**A formal "determination"? March 22, 2021, email exchange between
former Council Chair Malcolm Sandberg & Zoning Administrator Audrey Cline
(in chronological order)**

From: Mal <mal.sandberg@comcast.net>
Sent: Monday, March 22, 2021 8:26 AM
To: Audrey Cline <acline@ci.durham.nh.us>
Subject: 175-12. Administrative Appeals.

Good morning, Audrey,

On March 5, Planner Michael Behrendt responded to two points made in correspondence from Attorney Mark Puffer in which he invoked your name as Zoning Administrator (attached). Is his letter to be construed as a formal determination by you and therefore appealable under Article IV, 175-12. Administrative Appeals?

https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/page/59631/planners_response_to_attorney_puffer.pdf

Best regards,

Mal

On Mar 22, 2021, at 2:01 PM, Audrey Cline <acline@ci.durham.nh.us> wrote:

Dear Mal,

Michael's letter to the Planning Board was opinion, not an administrative decision. The Planning Board did make an administrative decision on the issue on March 10, and that is the appealable decision. Durham's appeal period is 30 days from the date of decision, which if I have counted right, is April 9th. Karen can help you with any paperwork and verify the deadline date if you'd like to call or email her.

Thanks,

Audrey Cline CBO
Code Official
Zoning Administrator
Health Officer

From: Malcolm Sandberg <mal.sandberg@comcast.net>
Sent: Monday, March 22, 2021 2:34 PM
To: Audrey Cline <acline@ci.durham.nh.us>
Subject: Re: 175-12. Administrative Appeals.

Thank you, Audrey,
You might want to watch the PB meeting to see how MB's letter was handled.
Best,
Mal
Home: 603-868-2350
Mobile: 603-767-0327

On Mar 22, 2021, at 7:19 PM, Audrey Cline <acline@ci.durham.nh.us> wrote:

Hello Malcolm,

I did review the DCAT, and I heard the acting Chair ask if any of the Planning Board members disagreed with the staff opinion. No one disagreed.

Regards

From: Malcolm Sandberg <mal.sandberg@comcast.net>
Sent: Monday, March 22, 2021 7:31:39 PM
To: Audrey Cline <acline@ci.durham.nh.us>
Subject: Re: 175-12. Administrative Appeals.

Yes, there was no discussion or comment. You referred to an MB letter to the PB. I am only aware of a letter from MB to Mark Puffer in response to Puffer with no cc to other parties. Is there another letter to the PB regarding Puffer's March 5 letter?

Thanks, again,

Mal

Home: 603-868-2350

Mobile: 603-767-0327

From: Audrey Cline <acline@ci.durham.nh.us>
Date: March 22, 2021 at 8:00:36 PM EDT
To: Malcolm Sandberg <mal.sandberg@comcast.net>
Subject: Re: 175-12. Administrative Appeals.

Malcome,

I did not refer to an MB letter to the Planning Board. I was referring to the letter from MB to Mark Puffer with staff opinion, which was shared with the PB, which I was assuming was what the Planning Board chair was referring to.

Andersen & Meyrowitz File Administrative Appeal

After the Code Enforcement Officer confirmed in writing (above) that the 6 seconds of silence at the hybrid live/zoom March 10, 2021 meeting constituted an "administrative decision," Peter and Martha Andersen of 8 Chesley Dr (which abuts the Toomerfs lot 1-16) and Joshua Meyrowitz of 7 Chesley Dr (whose property is less than 150 feet from Toomerfs lot 1-16) filed an Administrative Appeal (full [Application](#) with appendices; searchable version of [main text](#) of the appeal), asserting that the proposed parking lot supported by fill and a retaining wall met the definition of "structured parking" under the Zoning Ordinance and was thus prohibited. This material was supplemented by another letter from Attorney Puffer, dated [April 13, 2021](#).

The Toomerfs filed a responsive [Letter from Timothy & Peter Murphy/Toomerfs](#), arguing that the parking lot met the definition of "surface parking." The Town Attorney, Laura Spector-Morgan acting as Counsel for the Planning Board, also presented a legal opinion [Letter from Attorney Laura](#)

[Spector-Morgan 4-13-21](#), arguing that the parking lot “clearly falls within the definition of ‘surface parking.’” Meyrowitz supplemented the appeal document with a PowerPoint presentation at the April 13, 2021 hearing (see [Joshua Meyrowitz 4-5-22](#), with added details on cover slide).

The ZBA deliberated on the Andersen-Meyrowitz Administrative Appeal at its April 13, 2021 meeting ([video](#)) and ultimately concluded by a vote of 3-2 at 9:19 pm that the parking lot, as proposed by Toomerfs with a large retaining wall, qualified as “structured parking.” Per the [Minutes](#) p. 5: “[ZBA Member] Joan Lawson summarized points from speakers. At grade would be at the bottom of the wall. Finished grade becomes the level of surface parking. This falls under the definition of structured parking because it is a structure (arrangement of parts) that makes parking available.... **The wall is a structure and provides part of the parking according to the definition for structured parking.**” (Emphasis added.) See the [Final Notice of Decision](#).

The Andersens, Meyrowitz, and other residents soon learned that only 75 minutes after the ZBA vote in favor of Andersen and Meyrowitz at 10:34 pm on April 13, 2021, the Chair of the Planning Board, Paul Rasmussen (who was then recused on the Toomerfs application, but not recused on the intertwined Mill Plaza [redevelopment proposal](#) dependent on the success of the Toomerfs lot to bypass [Hannaford’s threat to veto the Mill Plaza plan](#)), wrote an email to the Planning Board members (later acquired by residents through Right-to-Know requests), urging an immediate effort on the part of the Planning Board to change the Zoning definitions.

In that 10:34pm email, Chair Rasmussen criticized “the overly generic manner in which STRUCTURED PARKING is defined in combination with the use of the term at-grade instead of final-grade or prior-grade in SURFACE PARKING” [capitalization in original]. Mr. Rasmussen added: “Effectively, the ZBA determined that if a retaining wall of any size is used to provide parking, then it is STRUCTURED PARKING.” This, Rasmussen said was something that Zoning Administrator Audrey Cline “will want clarified as soon as possible.”

PB Chair Rasmussen followed up on that email the next day (prior to that evening’s Planning Board meeting) explicitly urging the Planning Board to change the definition of “structured parking” to a “parking garage,” a change what would almost certainly reverse the April 13 ZBA ruling, since the Toomerfs’ retaining-wall plan, though encompassing a massive concrete structure and a major change in grade (up to 17 feet elevation with 17,000 CY of fill), was not what would generally be considered a “parking garage.”

The unedited email exchanges acquired by residents through Right-to-Know requests follow

PB Chair Rasmussen emails to PB call for soon-as-possible” Zoning clarification

From: Paul [mailto:pnrasmus@gmail.com]

Sent: Tuesday, April 13, 2021 10:34 PM

To: pnrasmus@gmail.com; Lorne Parnell; Richard Kelley; James Bubar; Barbara Dill; Bill McGowan; external forward for stobias; Heather Grant; Eleanor Lonske; Raymond Philpot; Nicholas Germain; Chuck Hotchkiss

Cc: Michael Behrendt; Audrey Cline

Subject: ZBA decision

Planning Board,

Please find time to review the ZBA meeting last night. Specifically their deliberations which occurred during the last 15 minutes or so of the 19-21 Main Street Appeal. The ZBA members pointed out a disturbing overlap in the zoning definitions of SURFACE PARKING and STRUCTURED PARKING. This is due to the overly generic manner in which STRUCTURED PARKING is defined in combination with the use of the term at-grade instead of final-grade or prior-grade in SURFACE PARKING. Effectively, the ZBA determined that if a retaining wall of any size is used to provide parking, then it is STRUCTURED PARKING.

Based on their decision, I believe the parking lots of many residences, including Councilor Tobias' and mine, are structured parking. This is not permitted in any residential zone as an accessory use.

I will speak with Mr Behrendt and Ms Cline during the day about this issue, since I believe it is something that our Code Enforcement Officer will want clarified as soon as possible.

Paul Rasmussen
Planning Board Chair

From: Michael Behrendt

Sent: Wednesday, April 14, 2021 12:46 PM

To: 'Paul'

Cc: Audrey Cline

Subject: Parking and retaining walls

Hi Paul,

The ZBA was not clear whether any retaining wall would be considered structured parking. However, to say that a 3 foot retaining wall, for example, with a single family house was structured parking would be a huge and patently unreasonable stretch. Regarding single family houses I would treat any reasonable necessary retaining wall as surface parking or even just a driveway, which is accessory to a residence, as an allowed accessory use. Pursuant to the ZBA's decision, however, in the very rare case where a single family owner sought to build a very high retaining wall to support parking we would need to examine that carefully. One could reasonably infer from the ZBA's discussions and public input that a wall 6 feet or less is fine.

Michael Behrendt

Durham Town Planner

Town of Durham

8 Newmarket Road

Durham, NH 03824

(603) 868-8064

www.ci.durham.nh.us

From: Michael Behrendt

Sent: Wednesday, April 14, 2021 4:50 PM

Subject: new definitions

To the Planning Board,

Please see the email from Paul below.

Michael Behrendt

Durham Town Planner

Town of Durham

8 Newmarket Road

Durham, NH 03824

(603) 868-8064

www.ci.durham.nh.us

From: Paul [mailto:pnrasmus@gmail.com]

Sent: Wednesday, April 14, 2021 3:20 PM

To: Michael Behrendt

Subject: new definitions

Michael,

Please forward to the Planning Board.

Planning Board,

Last night two ZBA members claimed that the application under review met the criteria

for both surface parking and structured parking. This is irrefutable evidence that these definitions fail the "reasonable person" test and should be immediately reviewed and corrected.

I am proposing some new wording to start that process on its way. These are suggestions for updating three of our current definitions, below those are the current definitions along with some other dependent definitions.

James has also suggested that we define BERM...Oxford's definitions are lacking, but Merriam-Webster supplies "a mound or wall of earth or sand." James, maybe you have a better definition?

Proposed:

STRUCTURED PARKING(rename PARKING GARAGE?) - A building providing multi-level parking for non-tenants.

SURFACE PARKING – A parking lot or similar uncovered, single-level parking facility that provides **finished-grade** parking that is not located within a building.

STRUCTURE (See additional definitions immediately below.) – That which is built or constructed with a fixed location on the ground or attached to something having a fixed location on the ground. Structure includes but is not limited to a building, swimming pool, mobile home, billboard, pier, wharf, septic system, parking space/**surface parking** and deck. Structure does not include a minor installation such as a fence six (6) feet high or less in height, a mailbox, a flagpole, or an accessory shed.

Current:

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. See “Surface Parking”

SURFACE PARKING – A parking lot or similar uncovered, single-level parking facility that provides **at-grade** parking that is not located within a structure.

STRUCTURE (See additional definitions immediately below.) – That which is built or

constructed with a fixed location on the ground or attached to something having a fixed location on the ground. Structure includes but is not limited to a building, swimming pool, mobile home, billboard, pier, wharf, septic system, parking space/**parking lot** and deck. Structure does not include a minor installation such as a fence six (6) feet high or less in height, a mailbox, a flagpole, or an accessory shed.

BUILDING – Any structure designed or intended for the support, enclosure, shelter or protection of persons, domestic animals, or property. For purposes of determining exterior measurements or footprint in order to locate the setback line, "building" shall include all attached structures such as open or closed porches, carports, garages, balconies, stairways and other similar structures. See “Setback.”

PARKING SPACE – A space within or outside of a building, exclusive of driveways, meeting the minimal requirements of this chapter, used to temporarily park a motor vehicle and having access to a public street or driveway.

Respectfully,
Paul Rasmussen
Planning Board Chair

[HM / MPP / Docs / PB Chair on new Parking Defs April 13 & April 14 2021]

April 14, 2021, Planning Board Discussion of Changing Parking Zoning Definitions¹

This discussion occurred less than 24 hours after the ZBA ruling ([video](#), [minutes](#), [original agenda](#))

On the evening on April 14, 2021, Planning Board Chair Paul Rasmussen urged the Planning Board to set up a subcommittee to work on Zoning redefinitions “in a very expedited manner,” at one point volunteering himself as a subcommittee of one to work with Planner Behrendt. Ultimately, a subcommittee of three members was formed.

Planning Board attendees: Paul Rasmussen, Chair, Sally Tobias, Council Rep to PB, Lorne Parnell, Vice Chair, and Alt. Heather Grant in Council Chambers; James Bubar, Richard Kelley, Barbara Dill,

¹ Robin Mower, initial transcriber notes: Transcription is difficult when several people speak simultaneously, so some comments may have been missed. The use of an ellipsis i.e., ... , indicates a speaker's pause or shift in direction of speaking, not a transcription gap. [Brackets] may indicate a place where transcription wasn't possible due to inaudible or garbled audio. Transcript reviewed and refined by Joshua Meyrowitz.

Bill McGowan, Alt. Chuck Hotchkiss, Alt. Nick Germain, and Alt. Ray Philpot, on Zoom.

Agenda Item: XI. Other Business

This section of the meeting focused on when and how to clarify or amend the definitions for “surface parking” and “structured parking.” **Discussion starts at about DCAT recording mark 1:03**

Chair Paul Rasmussen: All right, next item. So this one was a late addition. Last night the ZBA met, as Mr. Behrendt said, and there were a couple of comments made while I was watching it that waived the red flag that any Planning Board member should pay attention to. There’s a requirement in zoning that, or an item referred to as a “reasonable person test.” And we had two ZBA members say that they were confused by our definitions and that the project that they were looking at met both definitions when in a situation that should be an either/or type decision.

So, given that, I believe it’s imperative for the Planning Board to review those definitions and to move forward in a very expedited manner to correct them, or else it could, uh...I just feel that if we don’t, that it’s going to lead to a potential, even more and more confusion, the longer we let it slide.

Sally Tobias: Yeah, it could.

Paul Rasmussen: And to support that, I did provide late this afternoon my, some proposals, which act as a starting point on those definitions. What I’d like to do tonight is, I mean it is 8:00, we have time. My goal had been simply for us to lay out a strategy of when we do that. If people want to massage these, sort of get some feedback on what people think about them, and have Mr. Behrendt start putting things together for an actual zoning update to include the new definitions. Comments?
Barbara.

Barbara Dill: I did see your email, but I was really focused on preparing for tonight’s meeting, and so I sort of just said, “I can’t digest this right now.” But I think it’s a good idea to do it. But what I’m thinking is, I don’t know if all of the other members watched last night, or, and/or if they have had a chance to look at the DCAT, which, it is posted now. It didn’t go up until sometime later this afternoon. But I think that you can only really appreciate this situation if you actually have seen that meeting and seen the members that you spoke of, sort of, you can go either way on this. So that’s just my thought. I don’t know that we should even start it tonight. Unless everybody has looked at the meeting and knows what they think, and, blah-blah-blah.

Paul Rasmussen: Mr. Kelley?

Richard Kelley: Like Barbara, I haven’t seen the meeting. I did go to DCAT earlier today and it wasn’t there, but I certainly see now, it is there. For those members who did attend the meeting, those Planning Board members who were able to attend the meeting, if I could understand: There

were ZBA members who struggled with the current definition of structured parking, and more to the point, and struggled with the definition of surface parking, specifically, the term “at grade.” Would that be correct?

Paul Rasmussen: That is correct.

Richard Kelley: And the reading of “at grade” was it had to be an “existing grade.”

Paul Rasmussen: That’s where members disagreed on the Zoning Board. Some felt that “at grade” meant finished grade. Others felt that it did not necessarily mean finished grade, that it meant starting grade.

Richard Kelley: It implied “existing grade,” an existing grade out there, or in close proximity to.

DCAT recording mark about 1:08

James Bubar: I think the other thing you may want to consider, if you look at our existing structured parking definition, anybody with a garage has actually got structured parking... Which means garages aren’t allowed in Church Hill district...

Paul Rasmussen: Based on the logic used by [ZBA member] Joan Lawson last night, yes, anybody with a garage has structured parking.

Richard Kelley: Hmm [nods].

James Bubar: I mean, that does fit neatly into our definition. It isn’t the intent, but they are dealing with the language, and I don’t know that anyone knows the intent behind these definitions when they were created.

Paul Rasmussen: Right, thank you James. All right, Chuck, go ahead, Chuck.

Chuck Hotchkiss: Thank you. I did watch the entire debate last night and actually found it very interesting, the differing interpretations and the need for clarity. While I support Paul’s contention that this is something that needs to be addressed, I would warn against trying to rush to a new set of definitions, because I think that it would be better to give this more consideration and be careful. Whether we start that tonight or not, you know, I think we need to take our time and get it right, so that we don’t prompt another discussion like the one that occurred yesterday evening.

Paul Rasmussen: I agree, I agree.

James Bubar: I really agree with Chuck. What I was struck with last night was Mr. Sievert essentially

saying, "Well, okay, get rid of the wall. I will just use fill. It will be longer and narrower, but I can still build it." You know, and I walked away from that, and that's why I raised the issue of the berm, Paul, that, if I put 20 feet of fill on top of the grade at the time of the application, is, that's effectively a wall. It's doing, it's serving the purpose that that wall served. And I would, quite frankly, if I was on the ZBA, I would probably go down the same path that says, "Nah, I don't like 20 feet of fill." To put a wall in would be, actually, be less damaging than the 20 feet of fill, because it would be much closer to the wetland, much closer to Chesley Drive, in that case.

Lorne Parnell: I don't think we should get into a discussion on the merits of that decision or the project itself.

Sally Tobias: Yeah.

James Bubar: That's fine, but the issue I'm trying to raise is, I think there's more than just a wall at stake. I think you need to deal with the issue of fill, and how is that going to happen going forward? And what is, how do I get from the current grade at the time of the application to the finished grade? Now, is that a 20-foot difference? Is that okay, or is only a 4-foot difference?

Sally Tobias: That would be something other than, that goes off into something other than the definitions that we're looking for. Um.

James Bubar: Hmmm, it's part of "structure." I maintain that fill, to that extent, if you're bringing in rocks so that you can build a platform, that's a *structure*.

Sally Tobias: And depending upon the site, it may or may not be needed.

James Bubar: No, if it's not needed, then, if it doesn't exist, then it's not a structure, but if you have to put in 20 feet of rocks, you're puttin' in a structure.

DCAT recording mark about 1:12

Sally Tobias: Still, I come back to the definition of what structured parking... In my head, when I think of structured parking, I think of a parking garage, or....

Paul Rasmussen: Right, Bill?

Bill McGowan: I mean, given the discussion that's going on right now, we need more time to take a look at the video from last night and get more information from Michael. Otherwise, we're going to be spending a lot of time going round and round and not make much progress. So I, my consensus is that we need to wait for another meeting until we get more information.

Paul Rasmussen: All right. Like I said originally, my definite original intent was simply for us to lay out a strategy on how we want to move forward.

Lorne Parnell: Could I just ask Michael, I agree with the comments made about not rushing into this, and I just wonder, are there *other* definitions that you're aware of that are, where there are potentially issues, similar problems, that have come up in the last...?

Michael Behrendt: I mean, conventional... I've looked at a couple of ordinances and other templates. Conventionally, there's two kinds of parking....

Lorne Parnell: No, I'm not speaking about parking. I'm speaking about definitions in general, the definitions section we have. I mean, if we're going to be rewording some of these things, maybe we should spend a bit of time and solve *all* the problems, or try to solve the problems.

Michael Behrendt: All the problems related to parking? Structured, or all of the...

Lorne Parnell: Definitions.

Barbara Dill: Yep. Definitions.

Michael Behrendt: Well, that's one of the things, as soon as we have an opening, I'm going to bring to you early on is a whole revised definitions section, but that's months away.

Lorne Parnell: I'm reluctant to just, uh, twenty-four hours after this [ZBA ruling], we're talking about changing the wording on this thing, and I'm, I think we should take a bit more time and think about it a bit, including other things, other changes, that might have to be required.

Michael Behrendt: You mean that are related to this?

Lorne Parnell: Or similar problems, that you've experienced, when people have done something, and then there's been an issue of whether it's that, this or that.

Michael Behrendt: Well, I do have a list of numerous zoning changes. I've made my list, waiting to bring it forward. So, I mean, we could, I could work with Paul on this. We could come up with, you know, revised parking definitions, and at the same time, there's a dozen or more other, pretty simple things we could tack on and just clean up.

Lorne Parnell: I think that would be a good idea.

James Bubar: Michael, do you have a list of all the items that we have essentially adopted

administrative gloss for?

Michael Behrendt: Pretty much so.

James Bubar: I think that should be included.

Michael Behrendt: I mean, we could do that. Probably, um, take advantage, if we're going to go through the process of a zoning amendment for parking definitions, and we've got a couple dozen other things that are straightforward, we may as well put it all together, which is easy to do, recognizing that in the coming year and two and three, when we have time, I'm going to be bringing a lot of articles one at a time to redo. But that's off.

Paul Rasmussen: My big concern about delaying too long is, I totally get that we don't want to tackle it tonight, but the fact that, and I encourage you all to go watch Joan Lawson work through her logic on how she voted last night, but, basically, anybody, I think it's, we've opened ourselves up at this point, or the ZBA has, anyway, that anybody who's working on a garage or even their driveway...

Barbara Dill: No!

Paul Rasmussen: ...could potentially be open to a similar type of administrative appeal that what they're doing is structured parking. Yes, Richard.

Richard Kelley: There are numerous definitions available on LawInsider and other websites out there that we can consider, but one consideration that we could just simply do immediately, if the concern arises so much, is to revise our current definition to say that this does not include residential garages or carports. I don't think there's people out there worried, "Oh, my goodness, I'm not in conformance with the zoning." But if it rises to such a degree that we share that concern, we could just simply say, under our definition of "structured parking," revise it tonight by saying that "structured parking does not include parking or carports."

James Bubar: Residential.

Sally Tobias: Or driveways.

Paul Rasmussen: Barbara?

DCAT recording mark about 1:17:36

Barbara Dill: I just want to say that this particular situation that we're talking about is a principal use, and driveways in residential areas and garages that you park your car in, those are all accessory. So I think that this particular instance should not be of great concern to people in residential areas. It

shouldn't be of any concern whatsoever.

Paul Rasmussen: Let me clarify. Last night's decision had what to do with what the definition of structured parking meant. Structured parking as an accessory use is not permitted in a residential zone.

Barbara Dill: Fine, so, that's fine.

Paul Rasmussen: It...no, it isn't.

Sally Tobias: It entails...a wall...it requires a retaining wall.

Paul Rasmussen: No, it isn't because, it...

Michael Behrendt: Well, we need, we need to change or clean up the definitions. But this is not hugely pressing. Audrey is not gonna cease giving someone in a single-family a permit to build a garage for their car. We're not gonna be issuing violations to people with three-foot retaining walls. But the definitions are problematic and we need to correct them.

Paul Rasmussen: All right. So, what I do need is to get a feel for from the board is, we've had several different suggestions of how we should be moving forward. Lorne would like to have a larger package of definition changes move forward. There's also been a proposal for just the targeted ones that were causing the problems last night to be dealt with. Which way do we want to go? How do we want to move forward with this?

DCAT recording mark about 1:19:50

Sally Tobias: I wouldn't know which ones are going to be problematic if they haven't become a problem yet. If Michael is aware of problematic definitions, bring that to the table and this. I don't want to start going through every definitions and decide it's problematic, because we're going to get lost in the weeds there. And I do think that, you know, Michael says this isn't pressing, but it certainly does have an impact, a tremendous impact, on an application that's here, and it could impact future applications. So I think we do need to clarify it. I think we need to look at the suggestions, look at the definitions ourselves, and it would be good for everybody to watch the ZBA meeting, because it would give us an example of how someone's logic, you know, worked this out, and then have a discussion about it. But I don't necessarily think that we can tackle *every* issue. And whereas I get what Lorne is saying—we're going to do one, we might as well do them all, but I think that's a lot, that could be a lot of time, and I think that we should start with this one, and any others that you have seen have definitely become an issue.

Paul Rasmussen: So, how much time would you need to put together...

Michael Behrendt: Oh, I could have something, you know, for the next meeting. I can talk with you. And I can include a bunch of things that are pretty straightforward. We may as well, if we're going to process it, we may as well have a bunch of stuff at the same time.

Paul Rasmussen: Okay. So, is that agreeable to everybody? Michael will put together the, his backlog of changes that he has for us, we'll include this with it, and we'll, he'll present it to us at our next... What's on our agenda for the next meeting?

Michael Behrendt: We have Gerrish Drive and Mill Plaza. [Rasmussen groans.] So I could do it then or I could do it on the 12th. What would you prefer?

Heather Grant: Or we could do it during the workshop, on the 27th of May.

Paul Rasmussen: Gerrish Drive and Mill Plaza. That's a full night. So let's take a look at...and we have one, two...

Michael Behrendt: We'll be busy on April, on May 12th, too.

Paul Rasmussen: I have, just so you guys know, I have Chuck and Richard cued up. Once I get my head out of the current loop, I'll be getting to you. Yeah, let me think about that one. Chuck, you were waving your hand first.

Chuck Hotchkiss: Yeah, thank you. In my experience, wordsmithing with a larger crowd is probably not the most efficient way to get this done, and I'm wondering if maybe Michael can come up with his Top 10 or Top Dirty Dozen of definitions and maybe work with some subcommittee of the Planning Board to come up with some proposed new wordings before presenting that to the full Planning Board?

Barbara Dill: Yay!

DCAT recording mark about 1:23:30

Paul Rasmussen: I think that's sort of what we had been discussing. Yes, he already has something. It's not a list of things that need to be fixed but a list of fixes that he's ready to give to us, and he'll run it by me before the next, before we bring it to the board. I think that is the plan we're following, Chuck, which I think melds nicely with your suggestion. Richard?

Chuck Hotchkiss: All right. Thank you.

Richard Kelley: Well, I think the councilor has an excellent idea, and that's what I was going to put

on the table as well, was that, you know, a smaller committee of individuals could work, basically via email, to get something together to put in front of the planning board and the public.

Paul Rasmussen: Yeah. Okay. Is there anyone else who'd like to be involved in this besides just me and Mr. Behrendt? Barbara, you have your hand up?

Barbara Dill: Because I'd like to be involved.

Paul Rasmussen: Okay.

Sally Tobias: Barbara's a good wordsmith.

Paul Rasmussen: One, two. We could do one more, if anybody's really interested. Chuck?

Barbara Dill: Chuck!

Paul Rasmussen: All right. Sounds great.

Chuck Hotchkiss: I'll do it.

Paul Rasmussen: Great. If we get any more people involved, then we become a public meeting, and I have to limit it there.

Sally Tobias: More power to the policy.

James Bubar: Dueling subcommittees.

Paul Rasmussen: Excuse me, James?

James Bubar: I said, dueling subcommittees.

Paul Rasmussen: [Laughs] I don't have the time to be doing subcommittees.

Michael Behrendt: So, if we have, if I'm working with a few of you, we should make it May 12th, then. The 28th wouldn't give us enough time.

Paul Rasmussen: Yeah, yeah, definitely, well, May 12, and we'll look at the agenda. If we have to push it, we'll push it.

Sally Tobias: May 12th might be a, an appropriate thing to do.

Paul Rasmussen: It may fit better on May 19th, after Mill Plaza. That would be my backup.

Sally Tobias: Maybe pencil May 12th in and a “To be determined”?

Paul Rasmussen: Yeah. That sounds like the best idea. All right. We’re good? Any last comments on that? All right, review of minutes?...

JM re RM April 14 2021 PB transcript

**April 15, 2021: Planner Behrendt announces to his email list
the formation of parking redefinition subcommittee**

[He receives response email from Tim Murphy asking for a change in definition of “at-grade” as well.]

From: Michael Behrendt <mbehrendt@ci.durham.nh.us>

Sent: Thursday, April 15, 2021 2:08 PM

Subject: Planning Board recap and preliminary agendas ***

A recap of last night’s Planning Board meeting and preliminary agendas for the meetings on April 28 and May 12 are attached. We may still receive new applications for the May 12 meeting.

Note that the May 26 meeting will be a regular meeting, not a workshop.

Michael Behrendt

Durham Town Planner

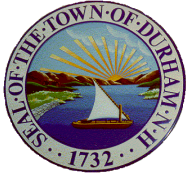
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TOWN OF DURHAM

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Michael Behrendt, Durham Town Planner

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RECAP

DURHAM PLANNING BOARD

Wednesday, April 14, 2021

AGENDA

Planning Board members

(7 voting)

Paul Rasmussen, *Chair*
Lorne Parnell, *Vice Chair*
Richard Kelley, *Secretary*
James Bubar
Barbara Dill
William McGowan
Sally Tobias, *Council Rep.*
Nicholas Germain, *Alternate*
Heather Grant, *Alternate*
Chuck Hotchkiss, *Council*
Alternate
Ellie Lonske, *Alternate*
Ray Philpot, *Alternate*

Michael Behrendt, *Town*
Planner
Victoria Parmele, *Minute*
Taker

I. Call to Order

VIII. **Public Hearing - Yates Electric – New Building**. 88A Dover Road (behind Police Station). Site plan for new 1,800 square foot storage building/garage and driveway. Coyote Court, LLC, c/o William and Nancy Yates, owner. Bob Scholefield, applicant. Map 11, Lot 4-2. Office Research (OR) District.

Approved

IX. **Public Hearing - 74 Main Street – Design Review** Preliminary site plan and conditional use application for demolition of current wood frame building and construction of a 5-story mixed-use building with commercial use, 15 residential units, and 13 shared parking spaces. Doug Clark, applicant. Mike Sievert, Horizons Engineering. Map 2, Lot 14-1-1. Central Business Zone.

The design review was closed. The formal application is scheduled for May 12 if the application is submitted.

X **Public Hearing - 19-21 Main Street – Parking Lot**. Formal application for site plan and conditional use for parking lot on four lots and reconfiguration of the entrance. Presentation of peer reviews for traffic and drainage studies. Toomerfs, LLC c/o Pete Murphy and Tim Murphy, owners. Mike Sievert, engineer. Robbi Woodburn, Landscape Architect. Map 5, Lots 1-9, 1-10, 1-15, and 1-16. Church Hill District.

This application was postponed to May 12 at the applicant's request. On Monday the Zoning Board of Adjustment voted to support an appeal from abutters regarding the Planning Board decision that the project is surface parking with a finding that the project is structured parking. Structured parking is not allowed in the Church Hill district. The applicant is now considering their options.

XI. Other Business

The Planning Board workshop scheduled for May 26 is postponed due to the workload with current applications. No new date was set.

In light of the ZBA's decision about 19-21 Main Street pursuant to the current definitions in zoning for surface parking and structured parking and concern about the ambiguity of those definitions the Town Planner will work with board members Paul Rasmussen, Barbara Dill, and Chuck Hotchkiss to revise

those definitions and to prepare other zoning amendments for items (most likely fairly straightforward items) that are backlogged.

The board will decide later to hold a special meeting tentatively scheduled for May 19 to discuss Mill Plaza and other matters.

XII. **Review of Minutes** (new): February 10, 2021, March 10, 2021, March 24, 2021 Site Walk

Approved

XIII. **Adjournment**

**Timothy Murphy admits in email that Toomerfs' proposals are not
– by current Zoning definitions – “at-grade” parking**

Less than 2.5 hours after the Behrendt April 15 email, above, Applicant Timothy Murphy, apparently encouraged by the rapid establishment of a subcommittee to revise the zoning definitions in Toomerfs' favor, suggests (in a private email to Planner Behrendt) another Zoning revision, a revision that would clearly help the Toomerfs override the negative April 13 ZBA decision and prevent others.

Ironically, in this email, the Applicant admits to one of the prime ZBA Appeal claims of Andersen & Meyrowitz in their successful April 13, 2021 ZBA hearing regarding the Toomerfs' “retaining-wall” plan (as well as in the unsuccessful Meyrowitz-Andersen-Urso ZBA Appeal hearing on July 13, 2021 for the Toomerfs' “retaining-slope” plan, which involved essentially the *same* elevation of grade on the southern end). Mr. Murphy's email makes clear that none of the Toomerfs' plans meet the Zoning requirement for “at-grade surface parking” for principal parking lots on Church Hill, *per the current definitions that the Toomerfs hoped to see the PB change*. (Email acquired as part of Right-to-Know request by Durham resident Katherine Morgan. Misspellings of “grade” and “its” are in original.)

From: Timothy Murphy [<mailto:timpatmurphy@yahoo.com>]

Sent: Thursday, April 15, 2021 4:34 PM

To: Michael Behrendt

Subject: Re: Planning Board recap and preliminary agendas ***

“At grad” needs some work too--for example, our proposal is “at grade” from the front, but not the back, and any lot with a retaining wall around any of it's border potentially could be called not at grade.

But then, the **PB's parking redefinition effort is put on “hold,”** leaving in place existing Zoning definitions – *as well as the admitted mismatch between the Zoning and Toomerfs' proposed plans.*

[Planner Behrendt's “Parking Definitions” Memo to PB, 4/23/21](#)

Written on April 23, but dated for April 28 meeting; includes text of Administrator Todd Selig's “pause the zoning parking redefinitions” memo, written to the Planning Board on April 16

[note that formatting was somewhat affected by conversion from posted PDF]



TOWN OF DURHAM
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Town Planner's Review
Wednesday, April 28, 2021

X. Other Business

- Clarification whether to establish a committee to discuss definitions related to parking and other miscellaneous zoning amendments
- I recommend that the board not establish a committee to review definitions for parking at this time.

At the April 14 Planning Board meeting the board established a committee to develop revised definitions for parking and to put forward various miscellaneous proposed zoning amendments. The intent of the latter was to address numerous mostly minor issues that have arisen over the years.

The impetus for setting up the committee was to evaluate the current definitions for *surface parking* and *structured parking* in light of the decision by the Zoning Board of Adjustment on April 13 to support an appeal from Josh Meyrowitz and Peter and Martha Andersen of a Planning Board determination that the proposed parking facility for 19 Main Street was surface parking. The ZBA found that the facility is structured parking and structured parking is not allowed in the Church Hill district.

The staff and Planning Board had considered the facility to be surface parking (hence processing the application accordingly) but the ZBA has determined otherwise. The two definitions are clearly inadequate: they are imprecise and ambiguous and it was confusing for the ZBA members to sort through the respective meanings. I think the board was also concerned that the ZBA's interpretation could have wider impacts, possibly affecting any new parking lot with a retaining wall, particularly a larger retaining wall.

I have spoken with Audrey Cline, Zoning Administrator, and we agree that this decision of the ZBA likely will not have broader impacts. I think it was a one-off interpretation of the ordinance based upon the particular nature of the design of the parking facility proposed at 19 Main Street. I am not concerned it will have an adverse impact upon construction of a typical parking lot. However, if we were to receive an application for a parking lot, even for a single family property, with a 20 foot retaining wall, then we would, of course, need to consider the application carefully. But it is extremely unlikely we will see such an application.

Since the ZBA has made its decision, based upon the current zoning ordinance, I think it best to leave this matter in the hands of the applicant to decide how they wish to proceed. I have spoken with Todd Selig and we do not think it appropriate for the Town or the Planning Board to request a rehearing of the ZBA's decision. The applicant could do that if they wish. We should revise the definitions related to parking in the future but I do not think this is pressing.

I will be presenting numerous larger amendments to the Zoning Ordinance to the Planning Board as part of a complete zoning rewrite pursuant to the Master Plan as soon as the board's schedule lightens up. If it is desirable I can still prepare a set of miscellaneous changes for items that have arisen over the years for presentation at an upcoming meeting.

Here is an email that Todd Selig sent to the Planning Board on April 16 regarding the committee and the parking definitions. (I added the italics/underline below.)

Dear Michael, Paul, and Members of the Planning Board,

As you know, the Planning Board has been reviewing a site plan and conditional use application for expansion of the existing parking lot behind 19 and 21 Main Street (behind the Red Tower) for a number of months. The project, submitted by Pete Murphy and Tim Murphy (no relation), would expand the site from 40 to 180 spaces. Attorney Mark Puffer, representing a group of abutters opposed to the project, sent a letter to the Planning Board arguing that the proposed facility is structured parking rather than surface parking because there will be a large retaining wall supporting substantial fill to bring the site up to the grade of the front of the property. Surface parking as a principal use is allowed in the Church Hill zoning district (by conditional use) whereas structured parking is not allowed in the zone.

In your professional opinion, after consulting with staff and the Town's legal counsel, you asserted in response to Attorney Puffer's letter that the proposal was for surface parking (taking a position on this finite zoning issue but not on the project itself). The Planning Board concurred with Mr. Behrendt's assessment.

Josh Meyrowitz and Peter and Martha Andersen, who live below the site on Chesley Drive, appealed the Planning Board's position to the Durham Zoning Board of Adjustment. The Town's legal counsel represented the position of the Planning Board before the Zoning Board so the ZBA would have the benefit of how/why the determination had been made.

After thoughtful deliberation, the ZBA ultimately agreed with Attorney Puffer and the appellants, finding (by a vote of 3-2) that the parking facility as proposed should be classified as structured parking. Therefore, the project is not allowed as now designed.

The applicant informed the Town Planner that they still wish to proceed. If so, they have several options:

- Request a rehearing before the ZBA;
- Apply for a variance to allow structured parking at this site;
- If they do not succeed with a rehearing, they could apply to court; or
- Modify the application/design pursuant to the ZBA's decision.

The project is continued on the Planning Board's agenda for May 12.

As I understand it, the Planning Board is now examining revising the definitions to provide additional clarity to this complex matter concerning what constitutes surface v. structured parking. Any proposed changes would represent an amendment to the Zoning Ordinance and would need to be brought through the formal zoning change process involving both the Planning Board and the Town Council, as well as public hearings before each board.

After giving this matter some thought, I believe it would be prudent for the Planning Board to set aside for now the idea of pursuing a zoning change dealing with surface/structured parking and to take it up either individually or as part of a more comprehensive zoning update review at a future time once the 19/21 Main St. application has been fully adjudicated by the Planning Board. [italics/underline added]

There is not urgency to addressing the issue now, and doing so will almost certainly create confusion and frustration for individuals following the specific parking lot application currently under review. The ZBA decision is limited in scope based upon the particular circumstances of the 19-21 Main St. application, there may or may not be a re-hearing request by the applicant before the ZBA, and the Planning Board is already stretched for time with a full load of highly complex applications under review before it.

Thank you very much for your consideration.

—Todd I. Selig, Administrator

**Resident Beth Olshansky and Councilor Sally Tobias Comments at
Town Council Meeting: April 19, 2021 ([video](#))**

7:11:45-7:14:34: **PUBLIC COMMENT, BETH OLSHANSKY**

I have been engaged in Durham Town government for the last 20 years, and whether or not I have always agreed with decisions made by various boards and committees, I've always taken some comfort in knowing that the process was fair and that it was followed with integrity. I guess last week, I was a bit shaken. My faith and my trust in Town government was a bit shaken by a series of events that happened *very quickly* last week. And I just want to thank Todd for sending out that letter and intervening in, you know, a series of events, that just the optics weren't good. And I just appreciate Todd encouraging everyone to take a deep breath and step back and look at our zoning from a more

holistic perspective rather than drilling in on one particular issue where some folks didn't like the outcome of a particular decision at the ZBA. So I appreciate that, Todd, and your encouragement to continue viewing our zoning from a holistic perspective, not to rush the process. I think that's very important. And, also, the other piece of that was to wait until this particular issue was no longer at the Planning Board. I guess one concern I have is that the applicant could choose to withdraw their application immediately and then they would no longer be at the Planning Board. And so that is a remaining concern. And I hope that you will just continue to oversee and guide this process so that citizens will feel that there is some integrity to the process of reviewing existing language and making changes. But again, I do want to thank you, Todd, because otherwise, I know myself and many people in Town have been very concerned about those events last week. So I again, appreciate that and, of course, the integrity that this Council brings to the Town. So thank you to everybody.

COUNCILOR (AND PLANNING BOARD COUNCIL REP) SALLY TOBIAS

7:25:12-7:29:30 [Section of Councilor & Town Administrator Roundtable]

Well first thing, I'd like to thank Chuck for giving such a thorough report [of the April 14, 2021, Planning Board Meeting]. As Chuck explained about the 74 Main Street and Yates electric, and the postponement of the application for 19-21 Main Street.

I would like to just make a comment about some of the concerns in the community relative to the Planning Board putting together a small working group of Paul Rasmussen, Barbara Dill, and Chuck Hotchkiss to revise some definitions. And just to assure people that this was not done out of a desire to fix something or because of a dislike for a decision by the ZBA. The ZBA did the job that they are assigned to do. And at the same time, I think it is the responsibility of the Planning Board to do its job. And Chair Rasmussen watched the ZBA meeting, and he was struck by the fact that there was such a diverse interpretation of one of our vocabulary words, which told him that it would not be clear to the average person, and that would say that there was an issue in the way we had worded the definition, and that it was perhaps be interpreted in a way that we ourselves and our own planner had advised us as to what we meant by a certain vocabulary word or definition.

So that was the reason why we or he suggested that and why the Board agreed, that we should look at not only that but others, and that it shouldn't just be that one, and we definitely were not choosing to rush into something or to rush, you know, quickly change a definition to allow an application to go forward. That was *never* the intent. And that there were other vocabulary words that, you know, we asked Michael Behrendt to bring other aspects of the code that had been problematic and that he was working on. And that group would be able to sit down and start looking at some of these, as a small group, and then bring, of course, their recommendations to the Planning Board where it would be all, any and all, of their recommendations would be fully vetted at the Planning Board and, of course, would be brought to Council to be fully vetted here.

It makes me sad to hear here members of the community somehow believe that the Planning Board would be doing anything underhanded. Maybe that's not your intent, but that's how I'm hearing it. We have some long-standing members on the Planning Board. And we have some, I think they are all excellent people, they know what they are doing, and they sacrifice a great deal of their time and energy performing, in performing their duties for the Town of Durham. And nothing was done on Wednesday night at all that was motivated by any personal choice. I think the members take, do their best to do their duty as they're supposed to. And that I would really like to assure the community, if they will, you know, believe me that that was never the intent. What the intent was to do, indeed what the Planning Board should be doing, and that is addressing a situation that had been challenged that actually turned our own view of what our definition was upside down. So that would require a serious look at the way we define something and to make that decision. And nothing is a shortcut or an under-handed manner. That was never the intent.

jm / home/mp plan/ docs / Olshansky & Tobias TC April 19 2021

April 28, 2021 PB Meeting: Chair Rasmussen resists abandoning Zoning redefinitions

(per the [minutes](#), below, pp. 10-11; see also [video](#))

X. Other Business

- Clarification whether to establish a committee to discuss definitions related to parking and other miscellaneous zoning amendments....

Following a conversation in which Town Administrator Todd Selig asked the Board to delay its discussion on parking definitions, Chair Rasmussen said he and Mr. Behrendt decided not to schedule a Sub-Committee meeting until the Board could re-visit the issue.

Mr. Rasmussen said he wished to clarify his position on this. At an April meeting, multiple zoning board members stated the definitions between structured parking and surface parking were confusing and overlapping. Because of that, a majority on the ZBA decided if it's a structure and it supports parking, then its structured parking. By that logic, Mr. Rasmussen said, every residential garage is structured parking and non-conforming.

He said town staff disagrees with him on this, but his concern remains that if it's not addressed, it opens the door for "any disgruntled neighbor to object to a garage addition."

It was clarified that Administrator Selig would like the Board to wait a month or so to clarify its definitions until the Toomerfs appeal goes through the ZBA.

The Board discussed whether a Sub-Committee should begin work now on revising the definition of structured parking (along with other definitions that need clarification) or if that work should be delayed until after the Toomerfs application is resolved.

Ms. Tobias said she's bothered there's a definition being interpreted contrary to the Planning Board's original intent. This has nothing to do with a specific project, but is about the sanctity of the code.

Board members agreed even if a Sub-Committee were formed now, it would be many weeks before changes would be brought forward.

Mr. Behrendt said while he welcomes feedback, he's troubled by some of the comments made to him on this topic. He said many were surprised by the ZBA's decision on the 19 Main Street project – but he respects the ZBA's decision because it was well thought out. He disagrees with the view the ZBA decision could have significant broad impacts on both commercial and residential properties and also disagrees with the perception there's something insidious about the Planning Board's reaction to a ZBA decision. In his experience, it's appropriate for the Planning Board to examine a definition that caused confusion.

Mr. Behrendt said he met with Town Administrator Selig and Zoning Administrator Audrey Cline and they believe the ZBA ruling was a one-off decision and not one that would set new precedents. It's his view it would be best to delay discussing the definition for now and let the ZBA work through the next steps in the 19 Main Street application process.

Following discussion, the Planning Board decided to appoint a Sub-Committee to look at a number of definitions that need revision, with the understanding the process is likely to take many weeks, if not months. The Sub-Committee consists of Chair Rasmussen, Mr. Hotchkiss, Ms. Dill and Mr. Behrendt.

May 2021—Toomerfs propose a new plan: less fill, less elevation of grade, no wall

See also: [The May 2021 Church Hill Site Plan Impressed the PB – Then It Disappeared!](#)

In May 2021, following the ZBA ruling against them, and then with the pause in immediate attempts by the PB to change the Zoning parking definitions in a manner that could have subverted that ZBA ruling (and allowed their retaining wall plan to proceed), the Toomerfs were eager to convince the Planning Board that they were ready to move forward with a very different post-ZBA, plan, with no retaining wall: [Revised Site Plan 5-6-21](#).

“This submission is a revised design based on the ZBA decision at the April [2021] meeting. This revised site design has eliminated the proposed retaining wall at the southerly side of the parking lot and replaced the retaining wall with a fill slope to match the existing grade at the southerly side of the property.” — Mike Sievert, [Cover Letter Explaining Changes 5-6-21](#)

Planner Behrendt summarized the plan in his [Planner's Review 5-12-21](#):

“Mike Sievert has redesigned the proposed parking lot for 19 Main Street pursuant to a decision by the Zoning Board of Adjustment finding that the retaining walls for the former

design constituted a parking structure rather than surface parking. A parking structure is not allowed in the Church Hill zoning district.”

At the May 12, 2021 Public Hearing (2:34:30 to 2:41:04 [video](#), [minutes](#)), the Toomerfs said a new plan would involve (see highlights in 47-sec video at [YouTube](#)):

- **significantly less elevation of grade** – from 17 feet in prior plan down to 11-12 feet
- **dramatically less fill** – from 17,000 to 11,000 cu yds
- **no retaining wall “whatsoever”** – from 20-foot high concrete wall to no wall at all
- **preserving at least a 75-foot southern “woodland buffer”** (up to 109 feet)

***At the same May 12, 2021 Hearing, in 3-sec “silent determination,”
PB accepted above proposed general plan as “surface parking.”***

10:04pm, **Planner Behrendt**: I certainly consider this “Surface Parking.” Now I’ve been wrong before. So, you know, anything is possible.

10:36pm, **PB Acting Chair Parnell**: Michael has said that, as far as he’s concerned, this is “Surface Parking,” but I would like to know if there are others that have serious objections with this. James? [7 second delay after being called on, because of muted Zoom microphone.]

10:37pm: **Board Member James Bubar**: ...It’s really the issue of the six feet that got me going and the whole definition of “structure.” And I can honestly see a decision that, you know, this is a “structure.” You’re taking something and you are putting it on a fixed point on the land. I can go forward with this, it’s all right. But I would not disagree with someone making a decision that it is “Structured Parking.”

10:37:49pm: **Chair Parnell**: Any other comments on this? [3 secs] Okay! I guess we will proceed.

This was a procedurally odd “determination”: There was no roundtable Planning Board discussion of the topic; the *only* Planning Board member to speak on this issue during this “decision” portion of the meeting spoke almost exclusively in *disagreement* with Mr. Behrendt’s opinion (James Bubar: “I would not disagree with someone making a decision that it is ‘Structured Parking.’”)²; no Board members put forward or seconded a formal motion; the Board did not take any sort of vote; and the Planning Board Chair allowed only three seconds of time for other Board members to respond after Mr. Bubar spoke against what came to be called the Planning Board “determination,” before the Chair

² To complicate things further, Board Member Richard Kelley, who left the meeting before Chair Parnell directly put the question to the full Board, had commented briefly before leaving that he thought that both the revised plan *and* the original large retaining wall plan were “surface parking.” Yet that statement indicates that Mr. Kelley spoke against the official – and higher – Town determination from the ZBA, which ruled on April 13 that the prior plan was “Structured Parking.” Thus, such an “it’s the same as before” argument could be construed to lend support to the position that the revised plan is also prohibited per the Town’s April 13 ZBA ruling and should not be allowed to proceed because of that.

turned *immediately* to a different topic. Three seconds is an interval shorter than Planning Board members have typically needed to unmute their Zoom microphones (and less than half of the time that Mr. Bubar, in this very instance, took to be heard). Simple observations of Town meetings indicate that, even beyond unmuting-microphone time, Board members usually need more than three seconds to feel comfortable jumping in to a conversation without being called on individually for their input. In any case, what occurred in those three seconds was clearly far short of a formal Board “decision,” with a motion and a roll-call vote, as *required* for Zoom meetings.

That new “determination,” such as it was, triggered another [ZBA Appeal \(Appendices\)](#).

The newly reconfigured ZBA (without Joan Lawson) voted against the appeal, 4-1, on July 13, 2021 ([video](#); [minutes](#); [PPT](#)) with, among other issues, the Board refusing to look at legally acquired right-to-know material (such as the April 15, 2021 Tim Murphy email reprinted above), as detailed in [Joshua Meyrowitz 9-3-21](#) (see p. 13) and in the pending Meyrowitz-Andersen-Urso [Superior Court Appeal](#).

Oct 27, 2021 – Toomerfs withdrew their Superior Court Appeal of the April 13, 2021 ZBA ruling

Although Toomerfs at first challenged the April 13, 2021 ZBA ruling that a retaining wall created structured parking, they then withdrew their challenge on October 27, 2021, writing that Toomerfs “voluntarily withdraws the above-captioned appeal of the Durham Zoning Board of Adjustment decision.” [Notice of Withdrawal](#).

In the meantime, the no retaining wall plan pitched by Toomerfs on May 12 – and accepted as “surface parking” by the Planning Board, as just detailed, is no longer on the table and Toomerfs’ recent comparative claims (“25% less fill” and the like) ignore the May 12 plan as if it were never submitted and touted, jumping back instead to the first retaining wall plan for comparisons (even then, massaging the numbers to suit their arguments of the moment), as in [Cover Letter 3-17-22](#).

Toomerfs quietly reintroduce a retaining wall

After both the Toomerfs and the Town Planner heralded the removal of *any* retaining wall from the Toomerfs’ plans, the *image* of a retaining wall quietly re-appeared on the [Updated Site Plan 9-2-21](#) (without it being labelled as such). Yet, Planner Behrendt thought he noticed a retaining wall, as he commented in his [Planner's Review 9-8-21](#) “I believe a low retaining wall has been included at the bottom (shown on the grading plan).” And Planner Behrendt identified for me a brief mention of a “remnant of a wall” by Mike Sievert at the Sept 8, 2021 meeting at about 1:36:50 ([video](#)). That image was not labelled as a retaining wall until the [Revised Plans 2-3-22](#), with no mention in Toomerfs’ cover letters and no mention in [Planner's Review 2-23-22](#) & [Planner's Review 3-23-22](#).) Moreover, the only mention of a retaining wall in the Toomerfs’ [Cover Letter 3-17-22](#) is the large retaining wall

for the first proposal that was turned down by the ZBA on April 13, 2021.

The March 2022 plan is quite *different* from the promised May 12, 2021 plan – and, as of mid-April 2022, it remains unjudged by the PB as a match to “surface parking”

May 12, 2021

- <> ~~dramatically less elevation of grade (17' down to 11-12') – **HIGHEST ELEVATION EVER! (18.5'+)**~~
- <> ~~dramatically less fill (from 17,000 to 11,000) – **15,000 cubic yds, per Sievert Dec 15, 2021 ([video](#))**~~
- <> ~~no retaining wall “whatsoever” (from 20 ft tall to zero) – **a retaining wall again *identified* ([2-3-22](#))**~~
- <> ~~at least a 75-ft southern “woodland buffer” (up to 109 feet) – **buffer reduced to just 50 ft ([9-2-21+](#))**~~

March/April 2022

Letter from attorney for residents addresses the return of a retaining wall

In a [Letter from Attorney Nathan R. Fennessy 3-23-22](#), Mr. Fennessy claims that the Toomerfs, by withdrawing their objections to the ZBA determination that a retaining wall plan was structured parking, waived their rights to challenge that ZBA determination. As I understand it, Toomerfs have waived their right to appeal what they summarize as the ZBA decision: “A majority [of ZBA members] believed that because the retaining wall was a structure that provided a portion of the parking, the proposal was ‘structured parking’” (clause 26, p. 6). **Neither the ZBA nor Toomerfs described any size variables for a non-allowed retaining wall that “provided a portion of the parking.”**

Citing the ZBA April 13, 2021 determination and the Tim Murphy admission email of April 15, 2021, Attorney Fennessy concludes: “the current plan, per the Toomerfs themselves, is not at grade surface parking, both because of it not being at grade at the southern end and because of the return of a retaining wall. **As a result, if the Planning Board were to approve this plan with a retaining wall, the Board would be committing an error of law.**” (Emphasis added.)

Attorney Fennessy’s March 23, 2021 letter was appropriately forwarded by Planner Behrendt to the Board upon receipt. Yet, the next day, Planner Behrendt, writing to Attorney Fennessy, and copying the Planning Board and others, dismissed the letter’s argument out of hand, as seen below:

----- Forwarded message -----

From: **Michael Behrendt** <mbehrendt@ci.durham.nh.us>
Date: Thu, Mar 24, 2022 at 5:05 PM
Subject: Main Street #19 - retaining wall - Attorney Fennessy
To: Fennessy, Nathan R. <NFennessy@preti.com>
Cc: Audrey Cline <acline@ci.durham.nh.us>

Hello Attorney Fennessy (cc to Planning Board),

Thank you for your letter. We have shared this with the Planning Board. I have spoken with Audrey Cline, Code Administrator and staff to the Durham Zoning Board of Adjustment. We disagree with

your assertion that the ZBA's finding about the earlier submission regarding the retaining wall applies to the current application. The ZBA's finding that the earlier application constituted structured parking applied specifically to that application. It does not apply to the current application which has a 6 foot retaining wall, about one third the height of the other wall. There are countless retaining walls about that height in Durham for various projects and I believe for numerous parking lots in Durham. Those parking lots are considered surface parking.

You can see the documents related to the ZBA's finding here:

https://www.ci.durham.nh.us/boc_zoning/application-appeal-administrative-decision-19-21-main-street

If you wish for the board to make a specific determination that the current application with a 6 foot retaining wall constitutes surface parking then please advise us accordingly.

Michael Behrendt

Durham Town Planner...

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Planner Behrendt's final sentence is doubly interesting in terms of Attorney Fennessy's argument and wishes. First, Planner Behrendt assumes, contrary to the thrust of the letter, that those parties whose opinions and determinations on the large retaining wall plan were overruled by the ZBA on April 13, 2021 (Planner Behrendt, Code Officer Audrey Cline, Administrator Todd Selig, the Town Attorney Laura Spector Morgan, and the members of the Planning Board) are nevertheless empowered to state their *direct* opinions again. (Yet, obviously, if they all held that the original massive retaining wall plan was surface parking, then they would likely believe the same thing with the current plan.)

If I understand the Fennessy argument correctly, the issue is not about what Board members directly think about the current plan but about whether the April 13, 2021 ZBA ruling, as framed, applies to it. (That is, a Board member could disagree with the April 13 ruling and yet observe that it applies to any plan with a wall, as Chair Rasmussen wrote on April 13, 2021: "Effectively, the ZBA determined that if a retaining wall of any size is used to provide parking, then it is STRUCTURED PARKING.")

Secondly, pending future determination of whether Attorney Fennessy's argument holds legal weight, certainly Planner Behrendt in anticipating Attorney Fennessy's "wish" might have acknowledged that it would actually be for the board to do the **opposite** of what Behrendt writes, that is: "to make a specific determination that the current application with a 6 foot retaining wall DOES NOT constitute surface parking, at least per the April 13, 2021 ZBA ruling." Or, if openness to outcome underlay the question, Planner Behrendt could have written: "*If you wish for the board to make a specific determination of **WHETHER** the current application with a 6 foot retaining wall constitutes surface parking, in light of the April 13 ZBA ruling, then please advise us accordingly.*" Time will tell us more.