

Five Misleading Toomerfs Claims

about the April 13, 2021 ZBA Hearing

To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / May 11, 2022

The letter from Toomerfs' attorneys, Tim Phoenix and Monica Kieser (posted as [Letter from Attorney Monica Keiser 5-6-22](#), hereafter "P&K") makes a series of misleading claims – a combination of half-truths and full-blown falsehoods – about the ZBA deliberations and vote of April 13, 2021.

These P&K distortions are exposed by the unedited transcript of the full ZBA deliberations (provided further below), a look at the [video](#), and a reading of the official [meeting minutes](#). I start with FIVE HIGHLIGHTS below.

See also: "Details on Successful Andersen/Meyrowitz ZBA Appeal, April 13, 2021," [Joshua Meyrowitz 4-5-22](#) (PPT, 43 slides) and "Attempts to Override April 13, 2021 ZBA Ruling Against PB & Toomerfs," [Joshua Meyrowitz 4-12-22](#) (text 30 pages).

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Toomerfs' MISLEADING CLAIM #1: Toomerfs' attorneys claim that the ZBA did not determine that a retaining wall, in general, resulted in "structured parking."

Quoting from the P&K letter:

Contrary to Attorney Fennessy, the ZBA did not determine that any retaining wall resulted in "Structured Parking" on 4/13/2021. The ZBA's (sic) merely passed a motion saying that they "...approve a petition submitted by Joshua Meyrowitz & Andersen Williams Group LLC, Durham, New Hampshire for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a March 10, 2021 Planning Board decision that the Site Plan/Conditional Use Application for the properties located at 19-21 Main Street proposes surface parking.

In TRUTH, the ZBA did much more regarding retaining walls and structured parking than "merely" passing the motion quoted above by P&K.

- With a motion proposed and seconded, ZBA Chair Chris Sterndale wanted to make certain the Board members understood the intent of the motion. At 9:18:40 pm, he stated: "**And our intent is to declare that this is structured parking.**" Board

members Morong, Warnock, and Lawson agreed. Then the motion passed 3-2 at 9:19:05 pm.

- Prior to the vote, Board members who made the argument that a retaining wall created structured parking repeated their arguments that a wall – any wall – would be **“providing a portion of the parking.”** They did so without quantifying the size of the wall or the magnitude of the “portion” of the parking provided. Indeed, the only member to mention the size of the Toomerfs retaining wall, Joan Lawson, did so in passing and in relation to what she was *not* going to focus on.¹ As Board Member Mark Morong said at about 9:15:50 pm: “If you wanna fill, fill, but **you can’t be putting walls up providing parking. Can’t be putting walls to hold up parking spaces.**” Mr. Morong also indicated that even a 3-foot wall – in the Church Hill district – would be something for the ZBA to assess: “The way it’s written, I don’t know, it’s so clear to me. I only have one way I can vote.” (See, in particular, exchange from 9:16:40 – 9:17 pm.) Micah Warnock added: “I’m kinda with Mark. I mean at this point, I don’t see another way I can vote.”
- ZBA Chair Sterndale cautioned against any motion that specified any height or size of a wall, or other quantifications, such as truckloads of fill: “I’m just saying to members, keep your, keep your variables narrow.” (9:10 pm.) And the Board did that.

Toomerfs’ MISLEADING CLAIM #2: Toomerfs’ attorneys claim that the official minutes for the April 13, 2021 ZBA hearing refer to the ZBA reasoning being based on the 20-ft. tall size of the retaining wall.

Quoting from the P&K letter (awkward construction in original):

Moreover, the reasoning underlying the April 13th ZBA decision that the Project reviewed by the Planning Board on March 10, 2021 (Plan date 2/2/2021) was “structured parking” because

¹ At 9:08:40 pm: **Joan Lawson:** “I agree with you, Mark. And I think if we look at intent, and we talk about surface parking, the expectation is that it’s going to be at grade, at the grade of the road, okay. It’s not going to be supported by a 20-foot wall, or retained by a 20-foot wall and 1100 truckloads of fill. Okay. So, I think the intent was something very different, and **that’s why I, too, don’t want to look at intent, I want to look at the words.** And the words are telling me that there is a (sic) overlap of surface and structured definitions, and in this case, it goes beyond the pure surface definition and it goes into the structure definition. (Emphasis added.)

its 20 ft. retaining wall was a ‘structure’ that ‘provided parking.’” (ZBA Minutes 4/13/21)

This is a shocking misrepresentation of cited official minutes by licensed attorneys. In TRUTH, the ZBA minutes never refer to a 20 ft. tall wall, or to any height of any wall.

- The minutes say only: “The wall is a structure and provides part of the parking according to the definition for structured parking.” ([ZBA Minutes](#), 4/13/21, p. 5)
- Moreover, the Toomerfs’ June 10, 2021 [Superior Court Appeal](#) ([withdrawn](#) Oct 27, 2021 more honestly summarized the ZBA decision: “A majority believed that because the retaining wall was a structure that provided a portion of the parking, the proposal was ‘structured parking’” (p. 6). The Toomerfs correctly make no mention of any size of a wall.

Toomerfs’ MISLEADING CLAIM #3: The Toomerfs’ attorneys claim that the ZBA focused on the distinction between a wall that is higher or lower than six feet in height.

Quoting from the P&K letter:

The ZBA also noted the height of the wall at that time in excess of 6 ft required additional relief.

This is another egregious misrepresentation of the ZBA’s deliberations, as one can see from the unedited transcript further below. In TRUTH:

- No member of the ZBA raised the issue that a wall in excess of 6 ft. was something requiring “additional relief” or as anything relevant to their deliberations. (It’s true that Toomerfs and the Appellants debated issues about 6 ft. fences and the like during the Public Hearing, but this was not a variable picked up on by the ZBA members themselves in their deliberations.)
- Indeed, at about 9:08 pm, as the views of the Board members hardened into what would become the 3-2 vote divide, ZBA Chair Sterndale cautioned strongly against being overly specific in a motion, such as by “picking a number, picking a height, picking a scale.” He even specifically warned not to “arbitrarily pick a 6-foot number.” (See 9:08:06 to 9:08:29 pm.)

Toomerfs' MISLEADING CLAIM #4: The Toomerfs' attorneys claim that the May 12, 2021 plan and the PB & ZBA's determinations regarding it are relevant to the current 2022 plan.

Quoting from the P&K letter:

Subsequently, Toomerfs' (sic) prepared a smaller parking lot which incorporated fill alone and no wall. The Planning Board determined on May 12, 2021 that the new proposal was "surface parking". This decision was appealed by Meyrowitz to the ZBA which upheld the Planning Board's decision. (ZBA Minutes 7/13/2021).

The surface statements here are accurate, but the cumulative message is deceptive. It's true that Toomerfs proposed a "smaller parking lot" (only 11,000 CY of fill, only 11-12 feet in height, and "no retaining wall whatsoever") on May 12, 2021. It's true that the Planning Board accepted it as "surface parking," also on May 12, 2021. And it's true that the ZBA upheld the Planning Board's decision on July 13, 2021. But taken together and without explanation of the larger context, this paragraph creates a false impression of Toomerfs' compliance with the April 13, 2021 ZBA ruling.

In TRUTH:

- After receiving tacit Planning Board approval for the "smaller" May 12, 2021 plan, the Toomerfs quietly abandoned it. They have neglected to mention its existence in citing deceptive comparison numbers for their 2022 plan. (Instead, they have falsely claimed "25% less fill," when the 2022 plan has 35% *more* fill than the May 12, 2021 plan.) Then, Toomerfs quietly reintroduced a retaining wall (pictured but not identified as such on the September 2021 plans and only properly labeled on the site plans beginning with the February 2022 site-plan diagrams). Moreover, Toomerfs are currently proposing the *greatest elevation in grade of any of their proposed plans*.
- All that makes the May 12, 2021 plan the "bait" in a bait-and-switch operation. For details see: "The May 2021 Church Hill Site Plan Impressed the PB – *Then It Disappeared!*, [Joshua Meyrowitz 3-18-22](#) (one-page) and "Toomerfs' Fill Numbers Game," [Joshua Meyrowitz 5-4-22](#) (PPT, 2 slides).

Toomerfs' MISLEADING CLAIM #5: The Toomerfs claim that the lack of objections to the return of a 6 ft. retaining wall on the part of Planner Behrendt, Code Enforcement Officer Cline, and the Planning Board has any relevance to Attorney Fennessy's argument that the current site plan, with the return of a retaining wall, violates the April 13, 2021 ZBA Ruling.

Quoting from the P&K letter:

Michael Sievert explained to the Planning Board that the retaining wall was added at the bottom of the slope to protect the wetland (9/8/21 Planning Board Minutes), not to “provide parking”, and is not more than 6 ft tall.

[in P&K footnote to above sentence] The Ordinance's definition of structure does not include retaining walls and excludes minor installations such as fences under 6 ft. in height. This had factored into the ZBA's rationale that the 20 ft. tall retaining wall previously proposed was a structure. Both Code Enforcement Office Audrey Cline and Town Planner Michael Behrendt also [*missing word*] with Fennessy's position because the current retaining wall is under 6ft. high and does not “provide parking.”

In TRUTH:

- P&K attempt to distinguish between a retaining wall “protecting the wetland” and a retaining wall providing for a portion of the parking. This is a classic example of “a distinction without a difference.” As is clear from recent site plans, the proposed retaining wall facilitates the proposed parking surface being as large as it is. Without that wall – in combination with the 20-ft. tall retaining slope that it helps to reinforce – the parking surface would have to be smaller to fit on the site. (Indeed, the May 2021 plans, [Revised Site Plan 5-6-21](#), show the parking lot much further from the southern site boundary and wetland – and with no retaining wall.) A parking lot could be built without that retaining wall, but it would have fewer spaces. Thus, that retaining wall “provides for a portion of the parking,” the variable that the ZBA repeatedly highlighted in its April 13, 2022 deliberations (even applying it to a wall providing a “couple extra spaces,” see 9:15:20 pm), as can be seen in the full transcript further below.
- The Planning Board and public are still in the dark about the technical specifics and visual appearance of the proposed wall/slope combination, but if a concrete-block 6-ft. high wall is proposed, that would seem to have a major structural containment

function, far beyond the function of a much shorter wall to protect from runoff or (to quote our Zoning Ordinance for what is NOT a “structure”): “a minor installation such as a fence six (6) feet high or less in height, a mailbox, a flagpole, or an accessory shed.” (I confess to not grasping the key structural and functional differences between a “fence” and a “wall” in my earlier engagements with the Toomerfs’ applications.)

- Although this Toomerfs statement gives the impression of rebutting the essence of Attorney Fennessy’s [March 23 letter](#), it bypasses its core point: That those parties whose opinions and determinations on the large retaining wall plan were overruled by the ZBA on April 13, 2021 (i.e., Planner Michael Behrendt, Code Officer Audrey Cline, Administrator Todd Selig, the Town Attorney Laura Spector Morgan, and the members of the Planning Board) have no standing now to state their own personal opinions, given that the ZBA previously overruled them. (Obviously, if those listed above all held that the original massive retaining wall plan was “surface parking,” then they would likely believe the same thing with the current plan with a smaller retaining wall against a massive “retaining slope.”) The issue is not about what Board members personally think about the current plan, but about whether the April 13, 2021 ZBA ruling, as framed, applies to the current plan. (That is, a Planning Board member could disagree with the April 13 ruling and yet observe that it applies to any plan with a wall, as Chair Paul Rasmussen wrote to the Planning Board at 10:34 pm on April 13, 2021, 75 minutes after the ZBA vote: “Effectively, the ZBA determined that if a retaining wall of any size is used to provide parking, then it is STRUCTURED PARKING.”)
- In Planner Behrendt’s March 24, 2022, 5:05 pm email to Attorney Fennessy (cc-d to the Planning Board and others), he acknowledges that the Planning Board has not yet made a “specific determination” on whether or not the current plan constitutes surface parking when he writes: *“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.”* In any case, it is difficult to know how the Planning Board and Planning Department officials could have already determined any meaningful specifics about the new retaining wall/retaining slope combination in the absence of any detailed renderings of them (which astoundingly remains the situation as of May 11, 2022).
- The following P&K statement repeats the falsehoods about the ZBA deliberating about 6 ft. vs. 20 ft. walls (which I previously rebutted in relation to misleading

claims above): *“The Ordinance’s definition of structure does not include retaining walls and excludes minor installations such as fences under 6 ft. in height. This had factored into the ZBA’s rationale that the 20 ft. tall retaining wall previously proposed was a structure.”* As noted above, no member of the ZBA raised the issue that a wall in excess of 6 ft. was something requiring “additional relief” or as anything relevant to their deliberations. Indeed, ZBA Chair Sterndale cautioned against any motion that specified any height or size of a wall.

See the full, unedited transcript of the ZBA’s April 13, 2021 deliberations below in order to verify all my above points.

UNEDITED TRANSCRIPT OF APRIL 13, 2021 ZBA DELIBERATIONS ([video](#))

8:54:10 – unanimous vote to close the public hearing

Chair Chris Sterndale: Okay, we’re closed. Joan, since you’re raring to go.

Joan Lawson: I am, because I’ve been building a list of notes here. So, I just have a bunch of things that ultimately come down to my siding on not allowing a wall, and I don’t know how to word that correctly. Let me go through these.

Mr. Sievert had made a comment that we can’t add words, and he brought up the “at grade” issue, so therefore we can’t state that it’s original “at-grade” or “finished at grade.” With that, I agree with him.

Ms. Olshansky did highlight Mr. Sievert’s comment saying that at-grade referred to being at the bottom of the wall. So, therefore, the “finished grade” is not the grade—, it’s the finished grade that becomes the, uh, the level of the surface parking.

Now, then we get on to what’s the definition of a “structure.” And a “structure” is an arrangement of parts. So if you look at a— and, unfortunately, these things aren’t defined in the ordinances, but if you look at dictionary definitions, a structure is an arrangement of parts. So, therefore, I think, Mr. Sievert somehow, somewhere referred to, then, would that then make all parking lots be structured parking. Because it becomes an arrangement of fill and asphalt and perhaps retaining walls.

And you also get to the definition of the word “provides.” And I’m glad that Mr. Puffer

brought that up at the end, is in addition to, it was talked about during the majority of the meeting that the word “provides” means supplies. But the word also means “make available” or “make adequate provision for.”

So, as I look at all of that, what it brings me to is that this is, this falls under the definition of “structured parking” because it is a structure, it is an arrangement of parts that makes available parking. The parking is above or below grade, really doesn’t matter. It may be covered or uncovered; it’s clearly uncovered. And it may be on multiple levels, also doesn’t matter. And so that is, that’s my summary of my notes from our discussion.

8:57:15

Micah Warnock: I want to piggyback on that a little bit. So, um, we’re talking about parts. Mr. Sievert had said that without the wall, they could build something different, totally long and narrow. But *this* parking lot, they can’t. This parking lot requires that wall, which is part of the overall structure in my vision of it. To build that structure, they need that wall. That whole, that is the entire structure itself, together is a parking lot. So without that wall, as is, with this plan, which we are looking at, nothing hypothetical, nothing “Oh, we could do it long and narrow,” this structure, this wall, and they could not build this parking lot without this wall. Period. That together makes it structure in my mind.

Joan Lawson: Oh, great.

8:58:14

Tom Toye: I feel like I’m taking a class in rhetoric. I went to school for engineering, and English was never my strong suit. So, forgive me if I’m a little tired. I go back to Attorney Spector-Morgan’s, you know, messages here. I think everybody’s done a great job of analyzing this, you know, from a million different perspectives and trying to support their case. And in Attorney Spector-Morgan’s letter, she suggested that the verbiage is there for the two different definitions. And it can’t be both. And, so, for me, if you have to pick one, I think the surface parking is a better, a better description of what we are talking about for this property. I think if we, we can poke holes in both of them, but I think if you try to argue that it meets one, it also meets the other one. And the intent of the ordinance was that it would be one or the other. And I think it best meets the surface parking argument. That’s my opinion.

Joan Lawson: Can I ask you a question on that, Tom?

Tom Toye: Sure

Joan Lawson: Would you agree that all surface parking is structured parking, or vice versa? Do you believe there's any overlap in the two?

Tom Toye: I think that the definition of the structured parking is pretty clear in our ordinance. And I don't feel that this, you know, meets the strict letter of the ordinance. I can see and I can appreciate what are the abutters are trying to make an argument, that it's their dislike of the project. And I can, I don't have any disrespect for that. But at the same time, I think, if you look at the letter of the ordinance, I think that it best fits the definition surface parking versus structured parking, as it's written.

Joan Lawson: So, can you explain, then, why you don't believe that it's structured parking?

9:00:43

Tom Toye: I can, let me pull up the definitions, if we want to keep talking about it. Get the right one. So the argument with, against the surface parking is the piece about being at grade; and the argument against structured parking, has to do with it being within the structure. Am I summing that up properly?

Joan Lawson: But If we do away with where their arguments are, their arguments and the debates on the words, how do you justify, what are your thoughts as to why this is surface parking and not structured parking? How do *you* see the definition of the words?

Tom Toye: I think, the reason I think it fits the surface parking definition better is that I personally feel that the grade is wherever you put it.

Micah Warnock: That leaves a pretty large swath of manipulation and circumventing the code. Right? If surface is where I put it, then there's a lot of things that you can really manipulate to make it in your favor.

9:02:08

Joan Lawson: Tom, if you say that, though, you have to look at the definition of *structured* parking and rule out the components of that definition that don't fit this example. Okay, because I look at it and say. Okay, "this is surface parking." But I also look at it and say, "this is structured parking too." I believe it's both; and given that structured parking is not allowed in this district, then therefore, it should not be allowed. But I believe that it actually falls under both definitions. It satisfies both definitions, is another way of putting it.

9:02:55

Mark Morong: I agree with you sort of, on what Joan just--. I think part of the problem here is we don't have a perfect definition. And, unfortunately, this comes from having been someone who has been a lay person who helped write zoning, even when you have a consultant helping you, you still end up with redundancies and mistakes and unclear definitions, unclear, um--. It's just very difficult to get a perfect zoning ordinance. So I agree with you. And I can see part of each here.

9:03:31

Micah Warnock: Yeah, I struggle with the definition of "surface." Is it unmolested land? Is it modified land? At what point does surface change? When is it no longer surface, for its adjusted purpose? Be it by, you know, even as Mr. Sievert said, "I can just bring in more fill and make it longer," well, he is still overly molesting that land by bringing in hordes and hordes of fill. So the definition, if that's the definition, "It's just dirt." Yeah, that works. If it's bringing in more structure, then it starts to get confusing. I don't see where—it's almost that he's doing enough to satisfy my view that it's a structure, I guess. Right or wrong, but.

9:04:21

Mark Morong: And Tom, as far as grade goes, I know you've worked on a lot of construction sites; so have I. In my mind, you're building a house, you have a driveway, you have to bring in fill. This is the grade [lowers right hand to table in front of him], this is above grade [left arm/hand raised to shoulder level]. That's just, that's the way I think. But that's the way I've always thought, and it doesn't make it right or wrong, but it certainly causes confusion, when one person thinks one way, and another person thinks another way.

Tom Toye: I'm not sure what the limitation is, but when you disturb a large piece of land, there's a certain square footage above which you have to submit an alteration-of-terrain permit to the State of New Hampshire and you have to get permission to alter the characteristics of the land. But when you're finished, the new grade is the grade.

9:05:06

Mark Morong: It's the new *approved* grade, but nobody's approved this grade.

Tom Toye: Well, that's true, but the grade is wherever you finish.

Mark Morong: I've got one other comment.

Chris Sterndale: Yeah, go ahead.

9:05

Mark Morong: I'm gonna focus on the structured parking is structure or "portion of" the structure which provides parking. I'm gonna say if that wall wasn't there, there's a *portion* of that parking which wouldn't be there. It just would fall off. So I say come back to us to get a variance and then we can explore the other reasons why this is a good or bad project and whether it's gonna affect property values and such. Or, bring your fill in; bring all the fill you want in. But I can't go along with the thought, and it's just common sense, that this wall is gonna provide a *portion* of this parking.

9:06:09

Chris Sterndale: Yeah, I can't disagree with that.

Joan Lawson: It's going to "make a provision for," which is what "provides" means.

9:06:14

Chris Sterndale: Joan, hold, give me a shot at it. I think earlier, we, you came to a consensus that perhaps neither definition, or both definitions, work. You can wordsmith your way into fitting this in to both. And, as reluctant as I would be to looking at intent or context, because I don't like reading those things into the ordinance, I think we may have to do some of that in this case. And, in doing so, I think the intent of the ordinance was to draw this distinction between things like underground and garage parking, buildings, and parking lots, in layman's terms. Admittedly, a simplistic approach. But I think that's what these definitions were trying to draw the distinction between.

And one of the members of the public, it might have been Mr. Sandberg, told us to look to intent. I think that's, I think we can look at the intent there. And in that context, I think this is surface parking. There are, you can read it both ways, and both sides have eloquently found ways to do so, but I think in this case, I've got to revert to a simplistic reading of it because we have that situation, where it's both.

Mark Morong: It's funny, Chris, 'cause I am trying not to look at intent. If I look at intent, in my mind, the intent was not to have something that's structured like that up there.

9:08:02

Chris Sterndale: Well, that's reading a *lot* into the ordinance.

Mark Morong: Well, you're reading—

9:08:06

Chris Sterndale: Like picking a number, picking a height, picking a scale. If there was some amount of fill that was too much, or some height that was too much, or there was some quantity—

Mark Morong: It sounds like you're reading intent also.

9:08:29

Chris Sterndale: —that would have been stated in the ordinance, and it wasn't. So, I think to arbitrarily pick a 6-foot number is—

Mark Morong: It just sounds like you're reading intent. I'm saying I tried *not* to, I have another reason. But if I went to intent, I would be seeing it very differently than you do.

9:08:40

Joan Lawson: I agree with you, Mark. And I think if we look at intent, and we talk about surface parking, the expectation is that it's going to be at grade, at the grade of the road, okay. It's not going to be supported by a 20-foot wall, or retained by a 20-foot wall and 1100 truckloads of fill. Okay. So, I think the intent was something very different, and that's why I, too, don't want to look at intent, I want to look at the words. And the words are telling me that there is a (sic) overlap of surface and structured definitions, and in this case, it goes beyond the pure surface definition and it goes into the structure definition.

9:09:31 to 9:09:54 – 23 seconds of silence

Joan Lawson: Quiet bunch!

Chris Sterndale: What more do we need to do?

Tom Toye: Hmm.

Mark Morong: Vote on it.

Joan Lawson: Let's take a vote!

Micah Warnock: Make a decision!

9:10

Chris Sterndale: If we're heading that way, I would suggest that members not be, not allow things like, as valid of a concern as it is, things like the number of truckloads of dirt it will take to achieve this are not factors in our decision. Um, you know, the impact. I'm not saying there aren't any, and I'm not saying that this is a good use of the land or this is a good thing for Durham or the Church Hill district.

Mark Morong: I'm not, I'm not—

Chris Sterndale: Any of those things. I'm just saying to members, keep your, keep your variables narrow, in terms of the things we're—

Joan Lawson: Yes, because once you do that—

Mark Morong: As I said, bring the fill in, just don't put the wall there.

Joan Lawson: Once you do that, you start treading on intent.

9:10:52

Micah Warnock: I stand behind the aspect that this parking would not exist without the structure of a wall and together it becomes a parking structure. No matter how much dirt goes in or not. The magnitude of this would *substantially* change without that wall, and that's enough for me to call it a structure.

Chris Sterndale: Okay, I see where you are going there, Micah. I don't agree with your reading in a magnitude.

Mark Morong: Just, Chris, what don't you agree with that that wall is going to provide a *portion* of the parking? If the wall wasn't there—

Chris Sterndale: I don't think I disagree with that, but I disagree any—

Mark Morong: This is structured parking says "a *portion* of the structure provides." It doesn't have to be the whole structure. Any—

Tom Toye: Surface parking definition says that it's "parking at grade that is not located

within a structure.” So I think it’s kind of, they’re both equal arguments. So which one is a better argument is what we’re at.

9:11:55

Micah Warnock: “Within” kind of gets confusing because it also says it’s inside or outside. Housed or unhoused. So the “within” doesn’t really, it becomes, “within” is the general parameters, not the structure.

Tom Toye: Well, I think it speaks to the intent of who wrote the ordinance, not the intent of the zone, the spirit or intent of the zone, but the intent of that definition, was they were thinking about having something inside of a structure, versus— [gestures with hands above something].

Micah Warnock: But it specifically says it does not matter if it’s inside or outside of a structure.

Mark Morong: “Covered or uncovered,” so I don’t know how you can come to that conclusion.

Tom Toye: Yeah, it says “covered or uncovered”? But within a structure, I mean it could be—

Mark Morong: Well if it’s within a structure, it’s gonna to be covered.

Micah Warnock: Yeah, the wall, you know, wrapped around it, so it’s technically within that structure at that point, too.

9:12:48

Chris Sterndale: I agree more with your [Tom Toye’s] thinking on “within.” But, and, to Micah, the add on, or the codicils to your, uh, to your line of thinking, I think every parking lot, you run the danger, as many people said, every parking lot becomes a parking structure, if we’re going to read *scale* into the ordinance.

9:13:10

Micah Warnock: But then every opportunity [overtalk] to make a parking lot becomes the same thing, it’s tit for tat there. I mean, it’s kinda hard to argue, well every one can become a parking lot and can’t become a parking lot. That really goes both ways.

Tom Toye: I'm trying to think of an example of where it could be within a structure but not covered, so it was retaining walls that were holding buildings up, and your parking was down below, you could argue that that was structured parking. An opposite scenario. But if you move the cars up on top of a pile of dirt, then I think it's at grade.

Mark Morong: Is a portion of the structure providing parking? It's right in the definition. If it is, it's structured parking. Period. End of argument.

Chris Sterndale: In practical terms, that's a pretty dramatic change for how we interpret this ordinance for every parking lot going forward.

9:14:16

Mark Morong: That's the way it's written.

Chris Sterndale: Okay.

9:14:18 to 9:14:33 – 14 seconds of silence

Chris Sterndale: Here we are. Are we waitin' on a motion? [Looks toward Tom Toye.] I'm not trying to rush any discussion. So if you need time to think, or you wanna—

Tom Toye: Hmm, hmm, hmm. I think we've hashed it out, as far as we need to.

Chris Sterndale: If you want more time, we can provide it.

Tom Toye: Do we want to talk about the definition of a structure, if we're giving consideration to Mark's, Mark's, uh, that it's the [reads] "structure or a portion of the structure providing parking."

9:15:20

Mark Morong: Right, 'cause, I mean, one of the Murphys talked about, say, a building on a parking lot. Well that's accessory to the parking, but it's not actually "providing" parking. It may be taking away parking spaces, in matter of fact. It's not providing parking, like this wall is providing a few, maybe a few, couple extra spaces that otherwise you'd have the slope there. And which is why I say to Mike Sievert, or the Murphys, if you wanna fill, fill, and whatever you get for a stable surface is your parking lot, but you can't be putting walls up to hold up parts of those parking spaces.

Chris Sterndale: That would apply with a 20ft wall or a 3-foot wall?

Tom Toye: The walls also give him a lot more opportunity to control the runoff and deal with all that.

Mark Morong: If it were in the Church Hill district, I guess I'd have to take a look at it, consider it, yeah.

Chris Sterndale: I think you're putting in a variable that we shouldn't be considering, I mean, the location is not a factor here, it's the definition.

Mark Morong: All right, look, fair enough. But I don't think we'd see someone here for a 3-foot wall outside the Church Hill district.

9:16:42

Chris Sterndale: If, we, by our action, change the definition, or an interpretation of what's there, um, we might be seeing people with 3-foot walls.

Mark Morong: The way it's written, I don't know, the way it's written, it's so clear to me. I only have one way I can vote. So, that's kinda—

Tom Toye: Okay, I'll make a motion. Don't have to second it.

Chris Sterndale: Anything else you wanna say before we make a motion.

Micah Warnock: I'm kinda with Mark. I mean at this point, I don't see another way I can vote.

Tom Toye: Okay,

Joan Lawson: I as well.

Tom Toye: We're ready to vote, then? Create a motion?

Chris Sterndale: Make a motion.

Joan Lawson: Tom, are you making a motion, or do you want me to? *[group laughter]*

Chris Sterndale: If Tom goes first, I think we're doing two motions, so, Joan, why don't you go first.

Micah Warnock: Go ahead, Tom, you called it.

Joan Lawson: No, I'll do the motion. Let's get right to the point now. I make a motion that we approve the application for appeal of administrative decision from a March 10, 2021 Planning Board decision that the Site Plan/Conditional Use Application for the properties located at 19-21 Main Street proposes surface parking.

Tom Toye: Uh, okay.

Joan Lawson: Properties involved are shown on Tax Map 5, Lots 1-9, 1-10, 1-15, and 1-16 and located at 19-21 Main Street and in the Church Hill Zoning District.

Micah Warnock: I'll second the motion.

9:18:24

Chris Sterndale: We have a motion, and a second. Are we clear on the motion? Any discussion?

Micah Warnock: We're upholding the appeal by the, Meyrowitz & Williams, is that correct?

Joan Lawson: Correct.

9:18:40

Chris Sterndale: And our intent is to declare that this is structured parking.

[overlapping]:

Micah Warnock, Mark Morong, Joan Lawson: Yes / Yeah / Correct

Chris Sterndale: All right, further discussion? Seeing none, roll-call vote. Tom?

Tom Toye: Nay.

Chris Sterndale: Mark?

Mark Morong: Aye.

Chris Sterndale: Joan?

Joan Lawson: Aye.

Chris Sterndale: Micah?

Micah Warnock: Aye.

9:19:03

Chris Sterndale: I'm "Nay." That's 3-2 in favor, and the motion passes. All right.

Mark Morong: They can come to us for a variance?

Chris Sterndale: Yes. Uh, There you have it! Item 6, Other Business.

9:19:19 pm

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