

To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / May 25, 2022

Details on Meyrowitz-Andersen-Urso ZBA Appeal, July 13, 2021

[Agenda](#) / [Minutes](#) / [Video](#) / [Notice of Decision](#)

***Please include in the legal record for the Church Hill Woods
(aka "19-21 Main Street") site-plan application***

[Appeal from an Administrative Decision](#) & [Appendices](#)

**** Presentation by Joshua Meyrowitz, ZBA Hearing, July 13, 2021 ****

**** Excerpts from ZBA Minutes, July 13, 2021 ****

**** Excerpts from Request for Rehearing, Aug 12, 2021 ****

**** Excerpts from Superior Court Appeal, Oct 21, 2021 ****

**** 2022 Toomerfs Plan Summary (*higher elevation, more fill, return of a wall*) ****

ZBA Appeal of Administrative Decision for “19-21 Main Street”

Joshua Meyrowitz

7 Chesley Dr, Durham, NH / Joshua Meyrowitz Rev Trust [Map 5 / 7-58]

Peter Andersen & Martha Andersen

8 Chesley Dr, Durham, NH / Andersen Williams Group, LLC [Map 5 / 7-59]

Michael F. Urso & Sandra A. Ceponis

5 Smith Park Lane, Durham, NH / [Map 5 / 1-13]

Owner of Property Concerned:

Toomerfs, LLC (c/o Peter Murphy) / 37 Main Street, Unit O, Durham, NH 03824

Location of Property: “19-21 Main St” + two lots / Map 5 / Lots 1-10, 1-9, 1-15, 1-16

Presentation by Joshua Meyrowitz
ZBA Hearing, July 13, 2021 ([video](#))

Appellants' proximity to proposal

CHURCH HILL WOODS
Targeted for Removal

URSO
5 Smith Pk Ln

MEYROWITZ
7 Chesley Dr

**SITE OF PROPOSED
17-FT TALL MOUND**

old stone wall →

ANDERSEN
8 Chesley Dr

“Administrative Decision” being appealed re: Toomerfs proposal for “19-21 Main Street” + 2 Lots

Quotes from: Planning Board, Public Hearing, May 12, 2021 ([video](#)) ([minutes](#))

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 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 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.

***June 11, 2021: We filed an appeal of that
“Administrative Decision”***

– reached with no discussion, no debate, no vote –

...a “decision” 2 weeks before revealing May 26, 2021 site walk ([video](#)) & well in advance of the **still-missing** visual details & renderings of scale/mass of the plan and its views from Mill Plaza, Chesley Dr, & Smith Park Ln.

...a “decision” made with no apparent knowledge on the part of Board members that Tim Murphy, of Toomerfs, had admitted in April 15 email to Planner Behrendt that Chesley Dr end (Lot 1-16) of their proposed parking mound was NOT “at grade” per existing Zoning (in expectation that definitions were going to be changed quickly in a manner favoring the Toomerfs’ plan).

CENTRAL QUESTION:

Is what is proposed by Toomerfs for Church Hill Woods really, per [DZO](#):

“at-grade parking that is not located within a structure”?

“SURFACE PARKING — A parking lot or similar uncovered, single-level parking facility that provides at-grade parking that is not located within a structure.” – Durham ZO, Article II, Definitions, Section 175-7



Project Name Has Misled the Planning Board

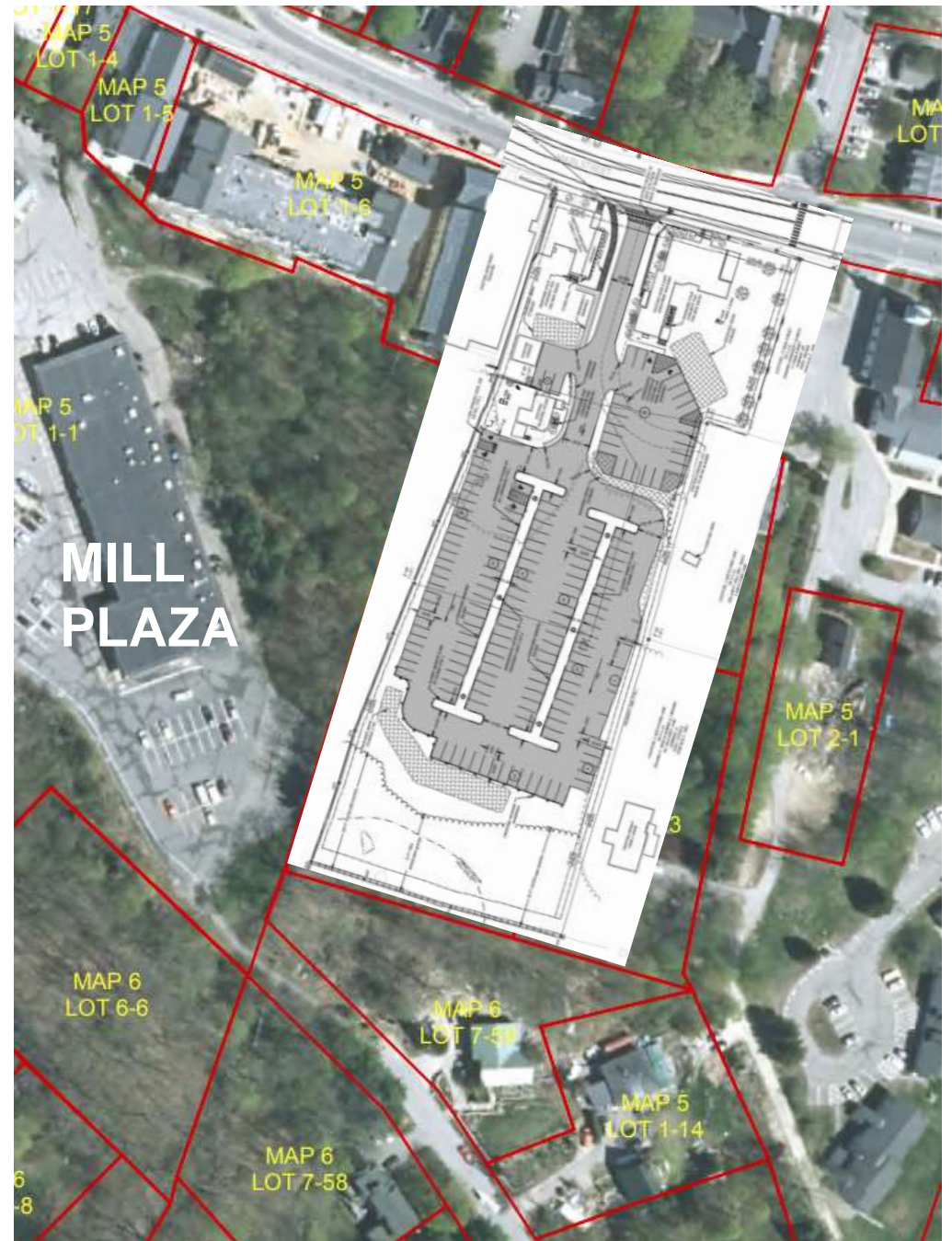
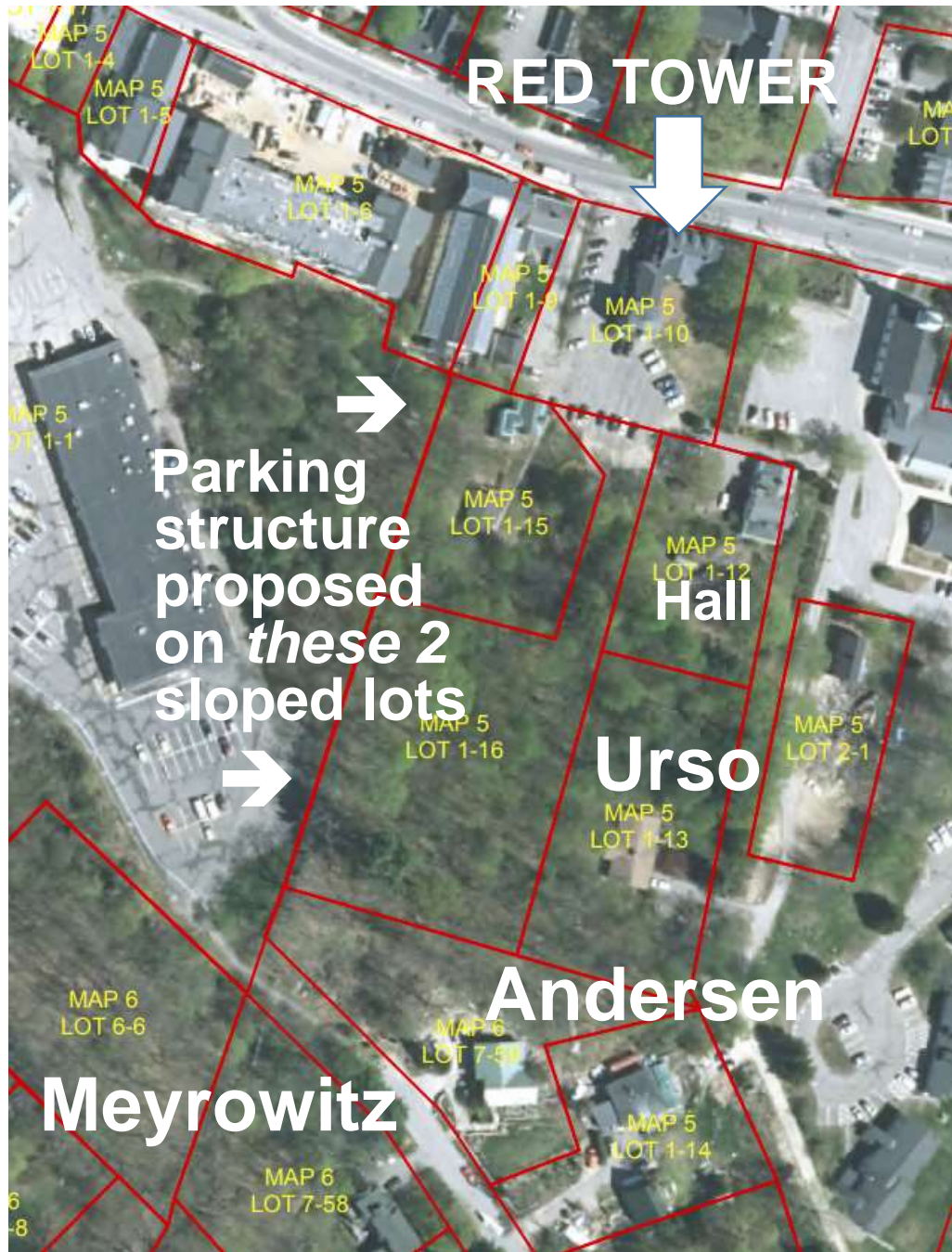
The proposed project is **NOT** located at “19-21 Main Street”

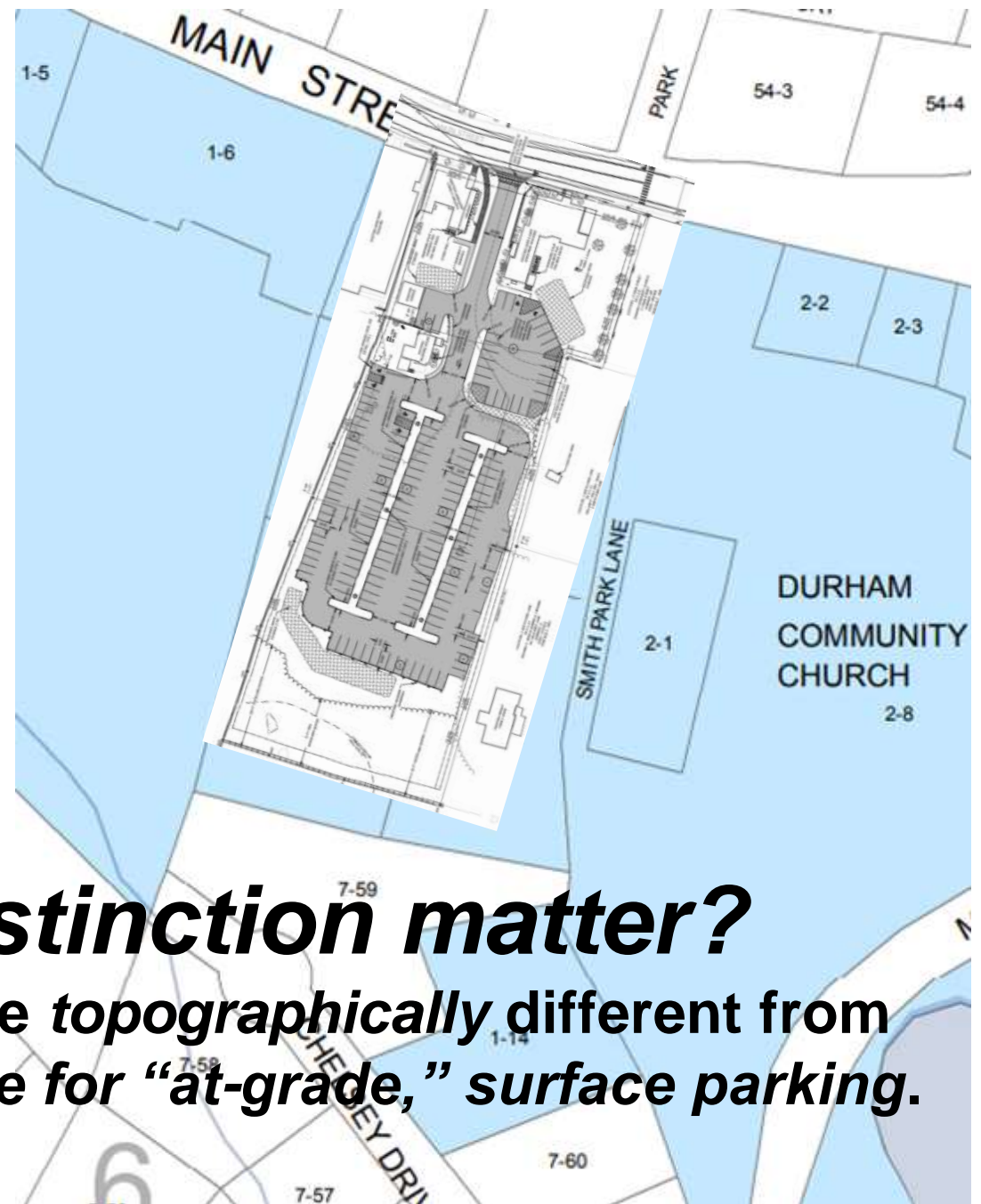
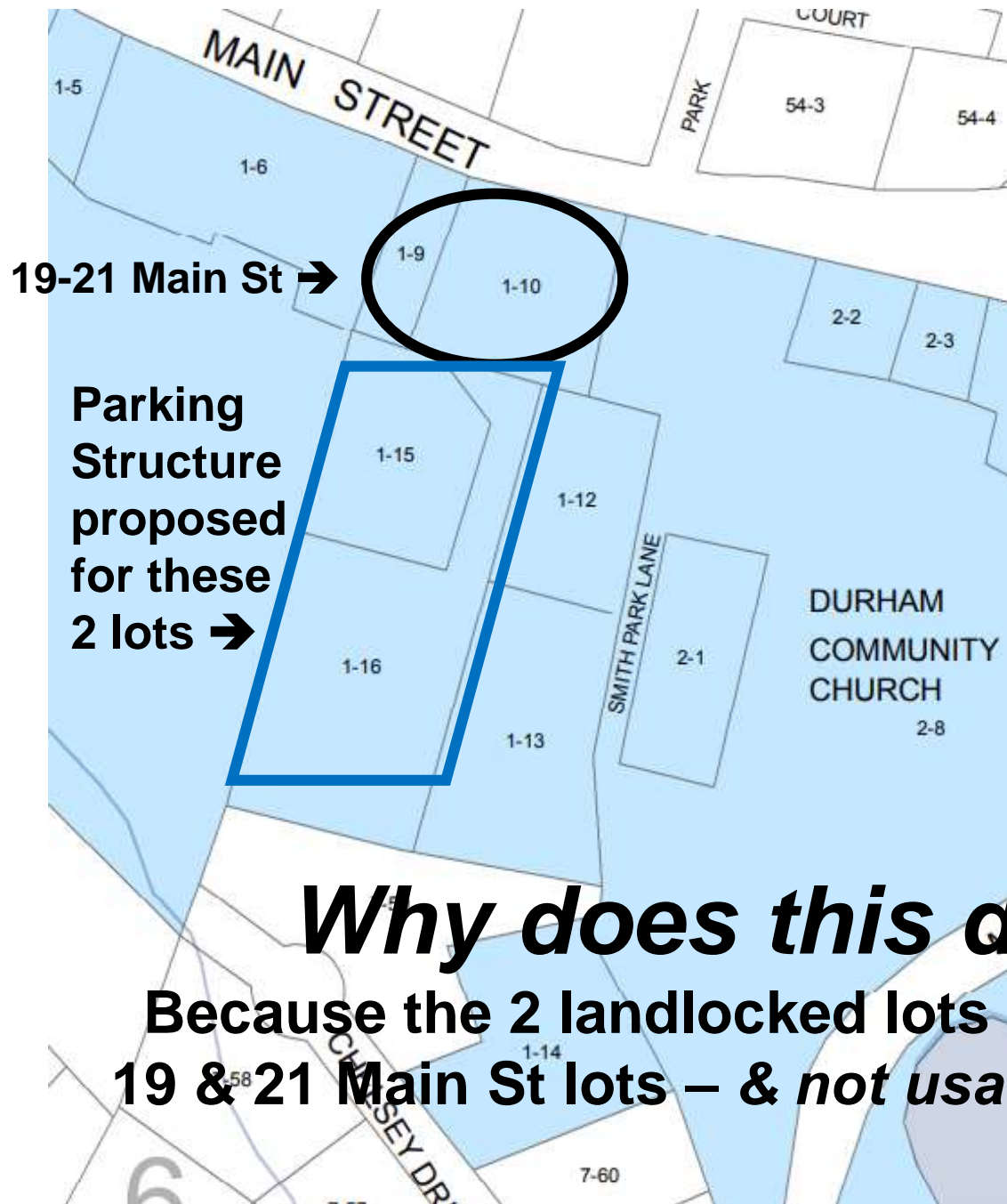
“19-21 Main” = driveway entrance/exit to Historic District lots. Parking expansion proposed is **on two legally separate landlocked lots (not in Historic District) with no street addresses**, distant from Main St.



Project location more accurately: 1.3 acres of iconic woods sloping steeply away from Main St & toward Chesley Marsh & College Brook flood zone. →





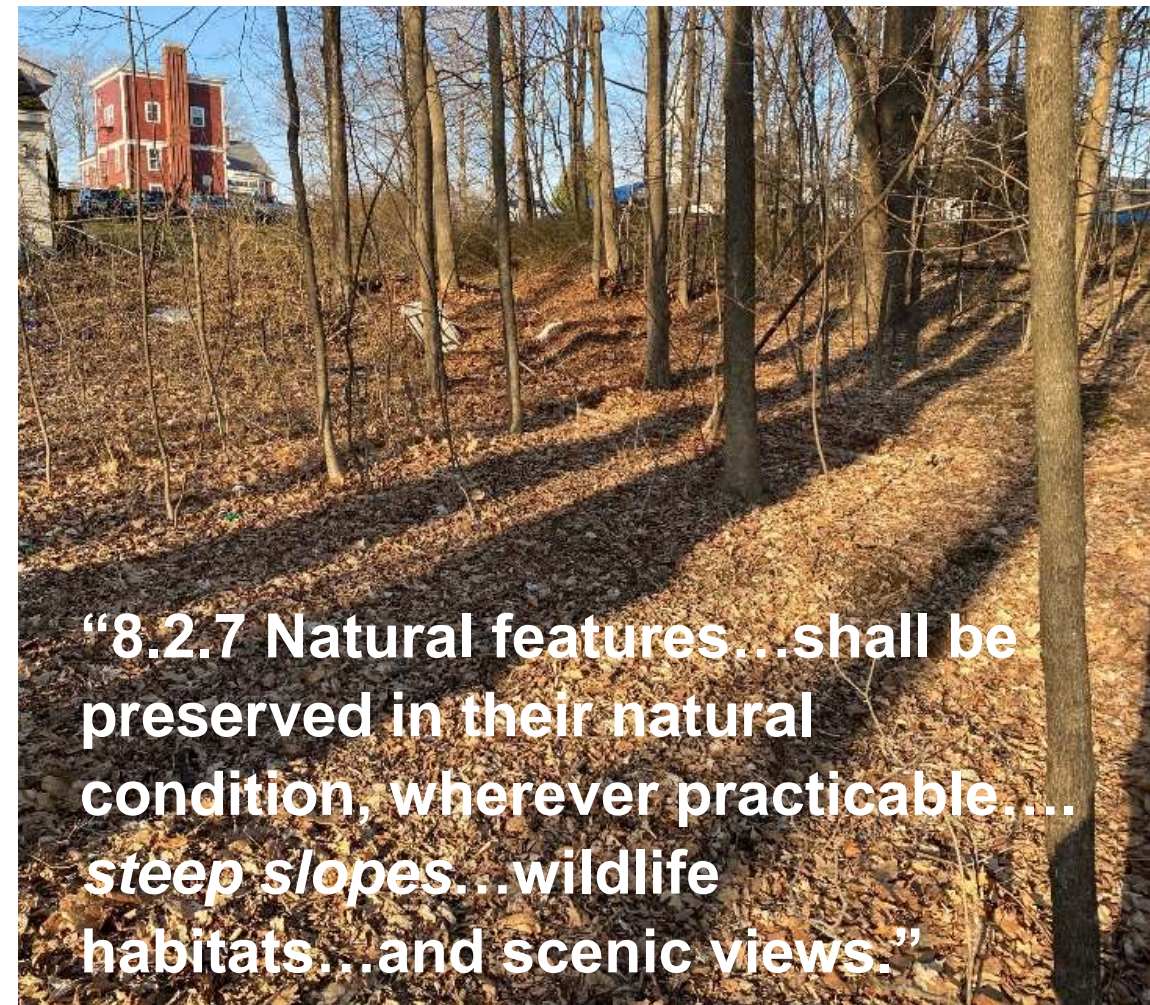


Why does this distinction matter?

Because the 2 landlocked lots are *topographically* different from 19 & 21 Main St lots – & *not usable* for “at-grade,” surface parking.

Indeed, Toomerfs have acknowledged* a **FORTY-TWO FOOT DROP in elevation** and a “**steep sloping grade**” from the 19-21 Main Street lots to the Chesley Dr end of Lot 1-16 lot.

That dramatic drop in elevation would *require* “significant fill” & retaining structures to construct a level parking lot (*contrary to Site Plan Regulations*) →



“8.2.7 Natural features...shall be preserved in their natural condition, wherever practicable.... *steep slopes...wildlife habitats...and scenic views.*”

***12. The topography of Lots 1-15 and 1-16 results in a steep sloping grade ranging from elevation 74 at the northern most portions of Lot 1-15 and 1-16 to elevation 32 at the southern most portion of Lot 1-16. Accordingly, Petitioner’s proposal included significant fill and a retaining wall to support the surface parking. – [Toomerfs’ Superior Court Appeal](#)**

“SURFACE PARKING – A parking lot...that provides at-grade parking....” – ZO

The common meaning of “at-grade” parking refers to the existing grade of the specific lots upon which the parking surface would be built.



Looking up to 19 Main (Red Tower)



Looking up toward 5 Smith Park Ln

The proposal is for a far-ABOVE-grade parking structure

as also indicated in discouragement of major changes in grading throughout Durham Planning documents

**Engineer
Mike Sievert
Illustrates height
of proposed
finished grade
of parking lot
(May 26, 2021
Site Walk)**





HEIGHT COMPARISONS

Height of ceiling in
Durham Town Council
Chambers:

12-foot, 4 inches

Average Height of
Berlin Wall: 11.8 feet

New (taller) White
House Security Fence:
13 feet

Project still does NOT match ZO definition of “at-grade surface parking lot.”

Now: retaining structures are tilted, but perform same function as retaining walls.



**Simulation,
in absence
of developer
imagery**

*Courtesy of
King Cuts Landscaping*

Thus, Misleading Label #2

Project does NOT match DZO definition of a Surface “Parking Lot”



Typical at-grade, surface “Parking Lot”

Parking LOT: Compact, pave, paint stripes on relatively level surface “not contained within a structure.”



Simulation, in absence of developer imagery

Proposed: Multi-sided retaining slopes containing 1,000s of cu yds of fill & asphalt topping to “provide parking” – **17+ ft above grade.**

This should now be an open-and-shut case, as the
**Toomerfs Have Admitted in Writing the MAIN Point:
“Our Proposal” is *NOT* “at grade” at “the back” (Lot 1-16)**

Two days after the April 13 2021 ZBA ruling, applicant Tim Murphy, encouraged by efforts of the Planning Board (starting just 75 mins after the ZBA ruling!) to change Zoning Definitions in a manner that would favor the Toomerfs’ plan and undo the ZBA ruling,

conceded the main point in an email to the Town Planner:

“our proposal is ‘at grade’ from the front but not the back.”

– Applicant Tim Murphy, April 15, 2021, 4:34 pm

In short, the applicant has admitted that we appellants were correct with regard to the most contentious point in our earlier appeal, and thus that we are correct again tonight.

***Both* rear-lot parking structure plans (“retaining walls” & “retaining slopes”) are NOT for “at-grade surface parking” – per *existing zoning* definitions.**



Planning Board Member James Bubar, April 14, 2021 ([video](#)) ([minutes](#))

The Toomerfs' currently proposed fill = a wall

8:11:02pm to 8:13:15pm: “What I was struck with [at the April 13 ZBA hearing] 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...

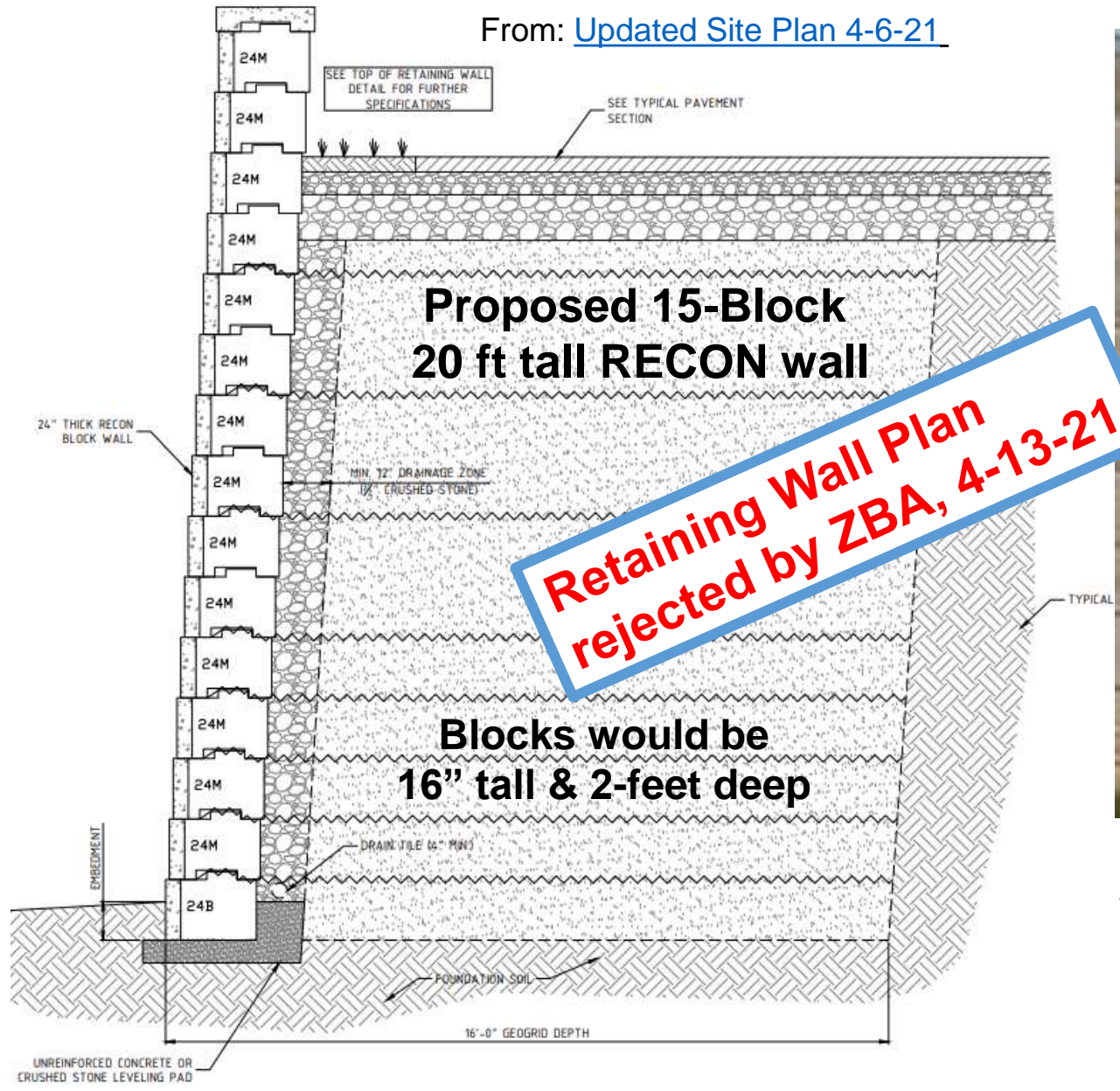
“if I put 20 feet of fill on top of the grade at the time of the application...that’s effectively a wall. It’s doing, it’s serving the purpose that that wall served.

“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.... I maintain that fill, to that extent, if you’re bringing in rocks so that you can build a platform, that’s a ‘structure.’... if you have to put in 20 feet of rocks, you’re putting in a structure.”

We are asking the ZBA tonight to, in Mr. Bubar's April 14, 2021 words: "go down the same path" that the ZBA did on April 13, 2021 "that says 'Nah,'" – that anything over 6 feet of fill is *not* "at-grade surface parking," but rather "putting in a structure," a structure that "provides parking" on lots that are not otherwise usable for parking. To repeat, Mr. Bubar's key claim:

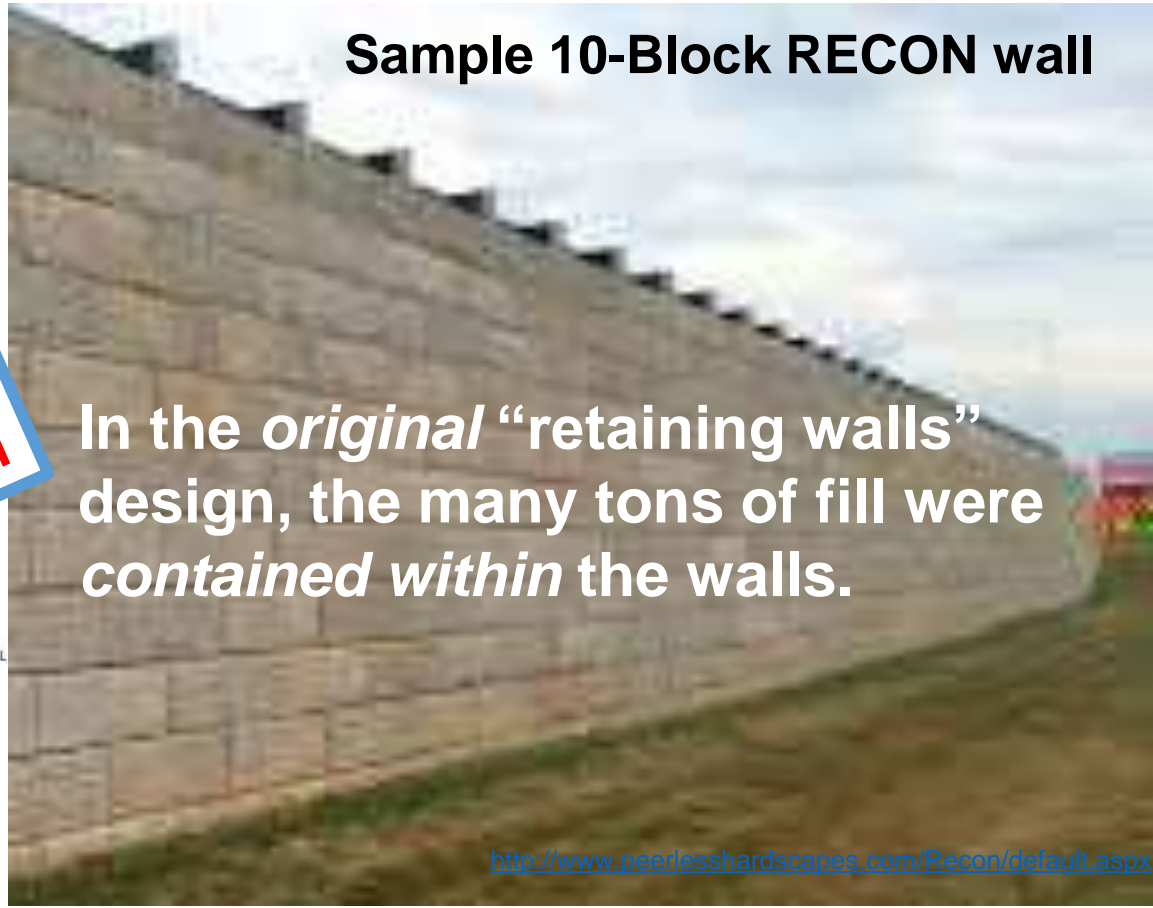
"if I put 20 feet of fill on top of the grade at the time of the application...that's effectively a wall. It's doing, it's serving the purpose that that wall served."

From: [Updated Site Plan 4-6-21](#)



**Retaining Wall Plan
rejected by ZBA, 4-13-21**

Sample 10-Block RECON wall



In the original “retaining walls” design, the many tons of fill were contained within the walls.

<http://www.peerlesshardscapes.com/Recon/default.aspx>

In the revised plan, part of the fill is repurposed to create “retaining slopes.”

RECON BLOCK WALL DETAIL
SCALE: 1"=2'

It's clear that the SAME Material (sand, rocks, soil, etc.) can be contained *or* container, i.e. content *or* structure.



Sand contained in glass bottles

Sand as structure that confines bodies

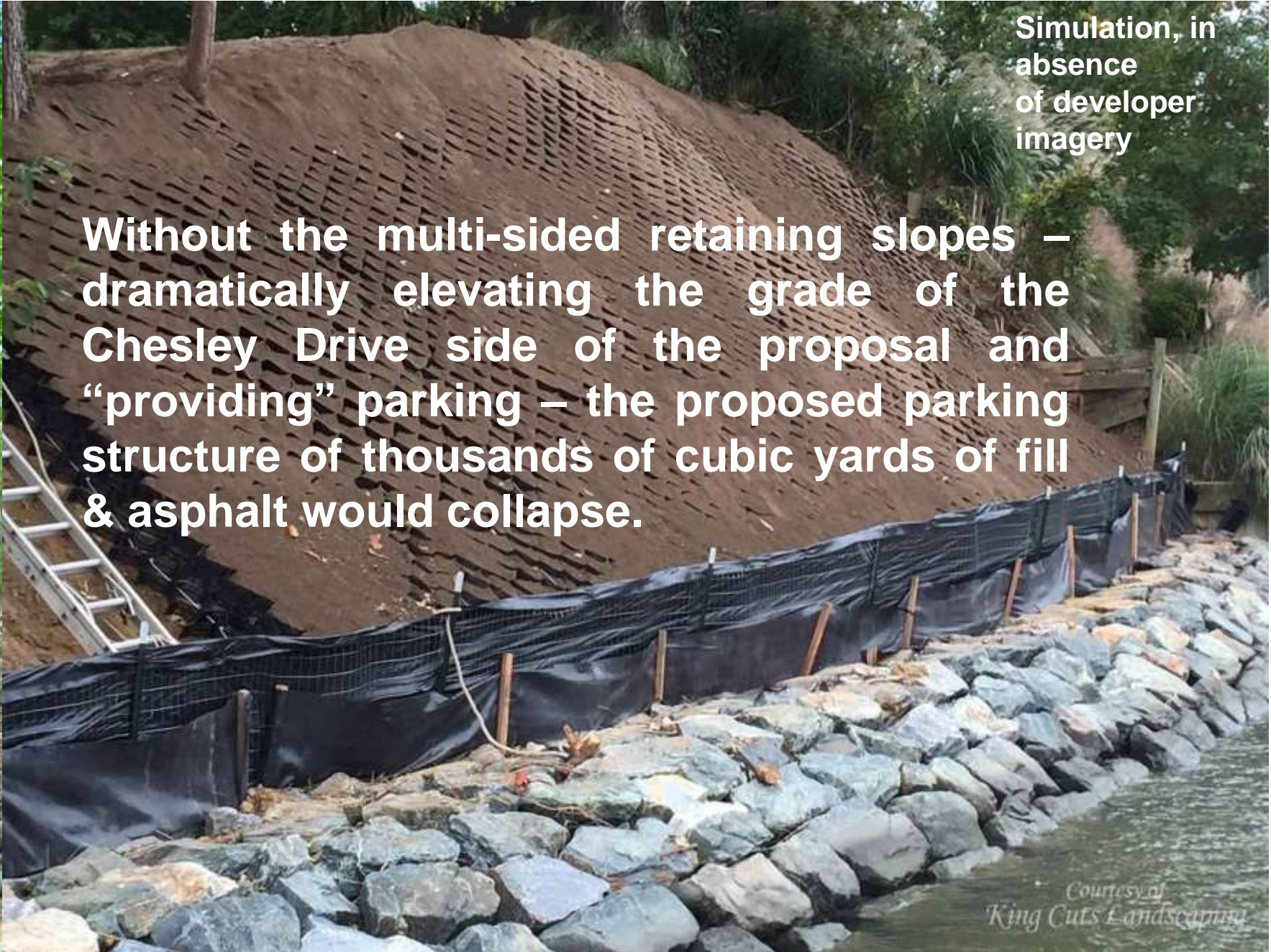


Here, loose stones are simply part of the landscape



Here, similar stones create a retaining wall STRUCTURE. If it were over 6 feet tall, it would fall into a different Durham Zoning category.

“I am concerned that we don’t focus on the materials being used but the function being performed.... a pile of stones can be considered a ‘structure’ as it is built or constructed with a fixed location on the ground.” — **PB Member James Bubar, email to M. Behrendt & P. Rasmussen, Thurs., April 15, 2021, 11:06am**



Simulation, in
absence
of developer
imagery

Without the multi-sided retaining slopes – dramatically elevating the grade of the Chesley Drive side of the proposal and “providing” parking – the proposed parking structure of thousands of cubic yards of fill & asphalt would collapse.

*Courtesy of
King Cuts Landscaping*

Durham Zoning Ordinance

on the significance of more than 6 feet in height

“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....**”

Thus, a constructed mass of MORE than 6 feet in height is a “Structure,” per Durham Zoning.

“anything over 6 feet is a wall”

“My issues: If I were to neatly pile 7 feet of granite block on my property line, I would get a penalty, because anything over 6 feet is a wall. But what I’m hearing from our Planning Board is that if I bring in a bunch of dump trucks and dump rocks on the ground, and go up 15 feet, that’s okay.”

— **Planning Board Member James Bubar, May 12, 2021, 10:07pm**

Six feet in height or more = key trigger point in [Durham Zoning Ordinance](#)

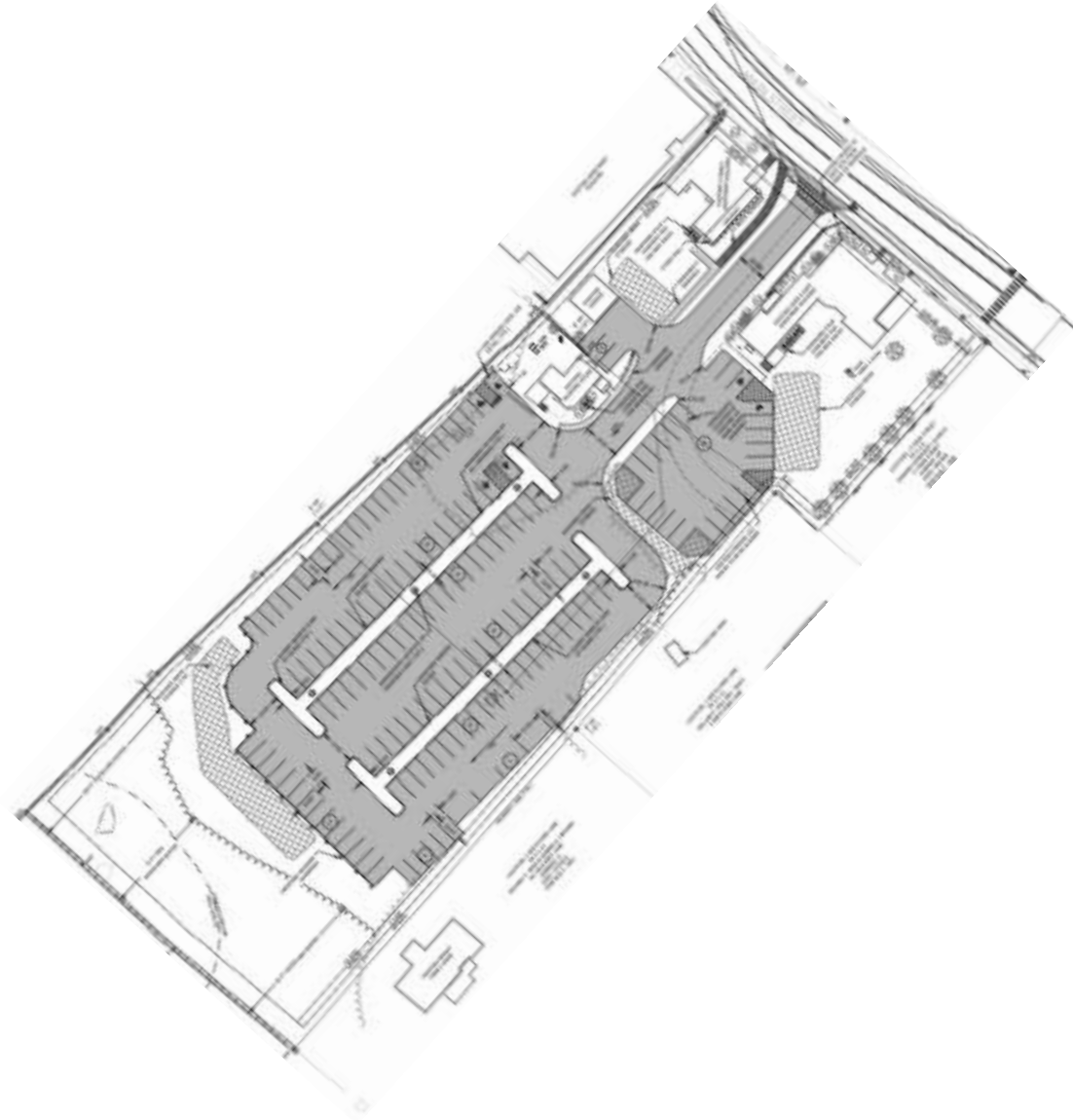
- ❑ **Fences** shall comply with the setback provisions of the zoning district in which the facility is located **if the fence is six (6) feet or more in height.** (p. 142)
- ❑ The **vertical opacity** of any such **fences that are higher than six feet** shall not exceed 25% (for the purpose of maintaining an open view through the fence). (p. 166)
- ❑ Application for a permit to erect a sign shall be made in writing to the Code Enforcement Officer, Town of Durham, **for all signs in excess of six (6) square feet of total exposed surface area or six (6) feet in height.** (p. 179)
- ❑ Freestanding Signs. In the PO, MUDOR, OR 108, and ORLI Districts maximum sign size will be twenty (20) square feet, and **maximum sign height will be six (6) feet.** (p. 183)
- ❑ **Structure does not include a minor installation such as a fence six (6) feet high or less in height....** (p. 39)

Thus, what is built up to more than 6 ft in height in Durham is a structure.

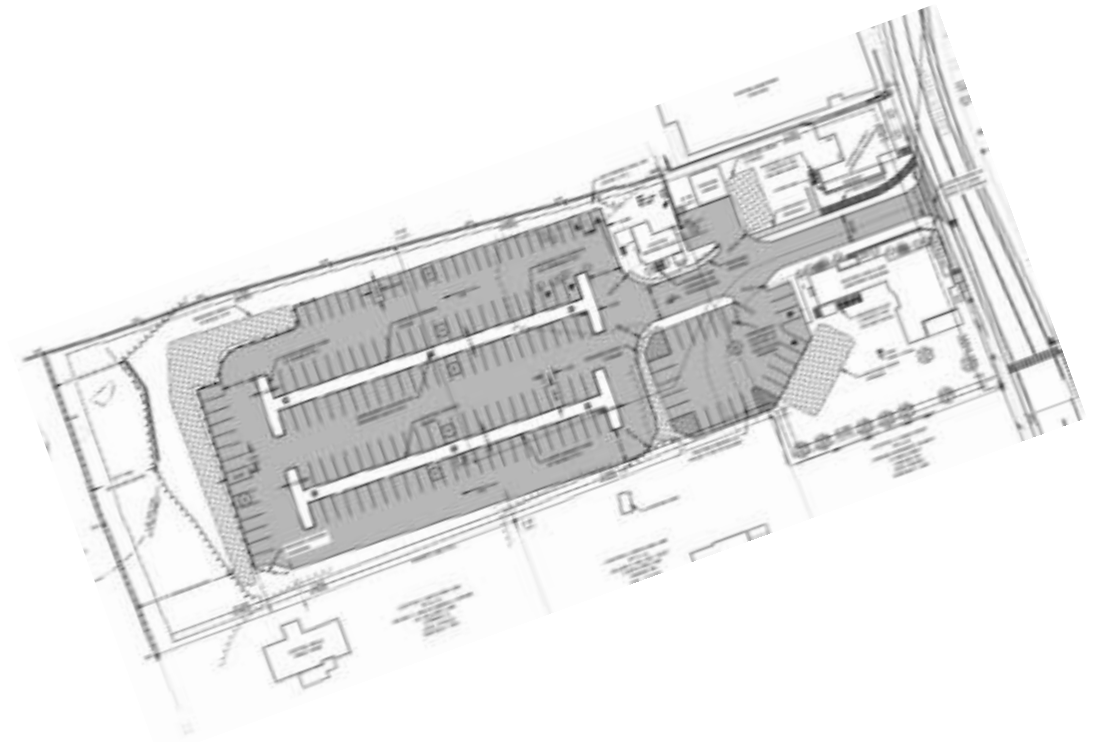
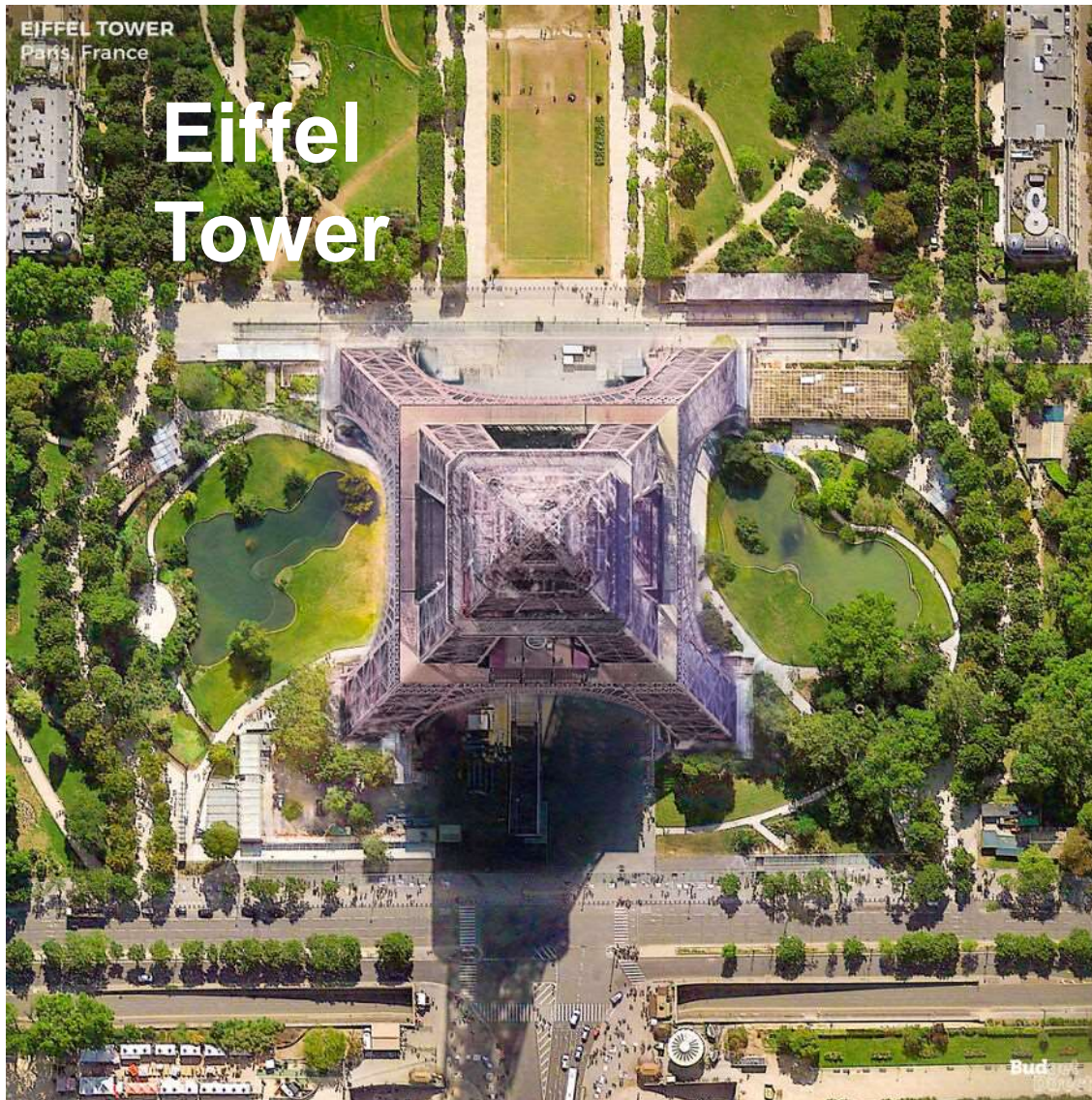
Applicants continue to obscure how massive a STRUCTURE is proposed

From the very start, the Toomerfs have hidden from the Planning Board, other Town Officials, and the Public how much about their proposals differs structurally from “at-grade,” surface parking lots.

Applicants have focused on FLAT images →



Flat overhead images obscure *mass, height, scale*:



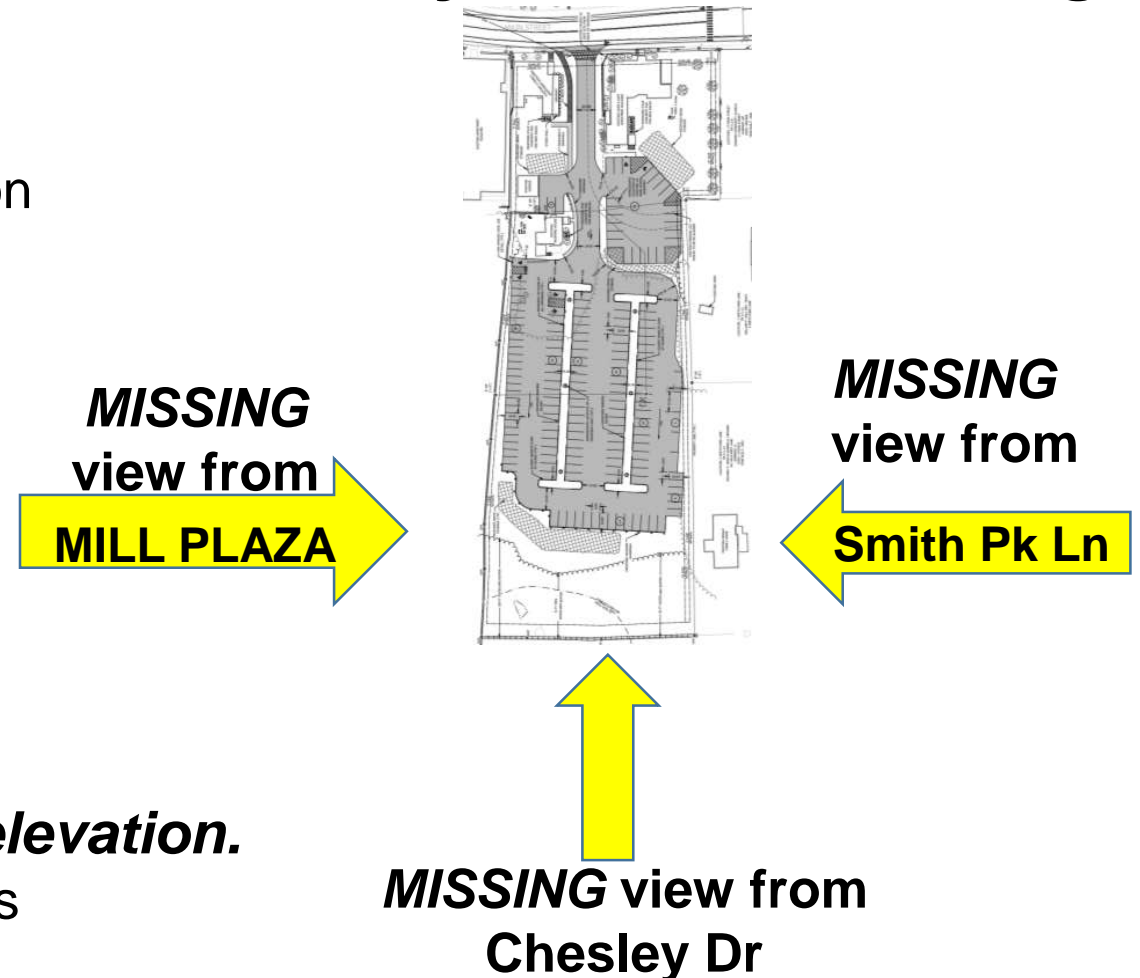
Even the 1,063 foot-tall Eiffel Tower looks small when seen only from above. Surely, the Planning Board & Public need better images of Toomerfs plan to see in-context, mass, height, & scale.

Missing Visual & Measurement Information for Planning Board (on both plans) to assess whether it's really "Surface Parking"

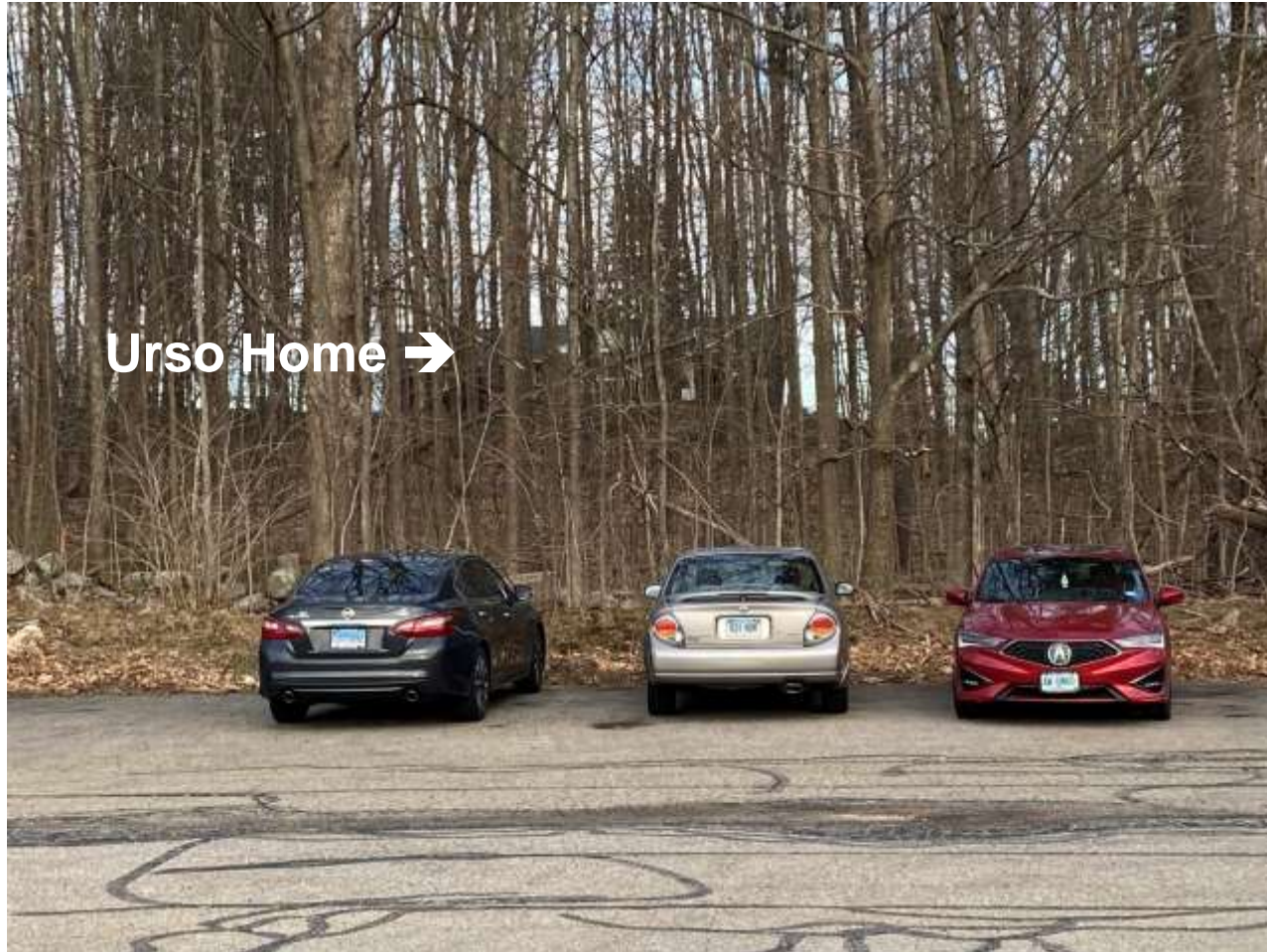
Per [Planner's Review 4-14-21](#), Toomerfs had (and have) yet to provide basic information to Planning Board and public:

➤ "profile (elevation) drawings... **on its three sides.**
This is indispensable information."

➤ "longitudinal profile from Main Street to Chesley Drive, or preferably Faculty Road, **showing the continuous final ground elevation.**
This would help clarify how visible the vehicles and lights would be from nearby properties."



Applicant has NOT provided parking-structure renderings from abutting Mill Plaza...



where the base of the west-side retaining slope would be at *ground level* and with only a proposed ***FIVE FOOT setback!***

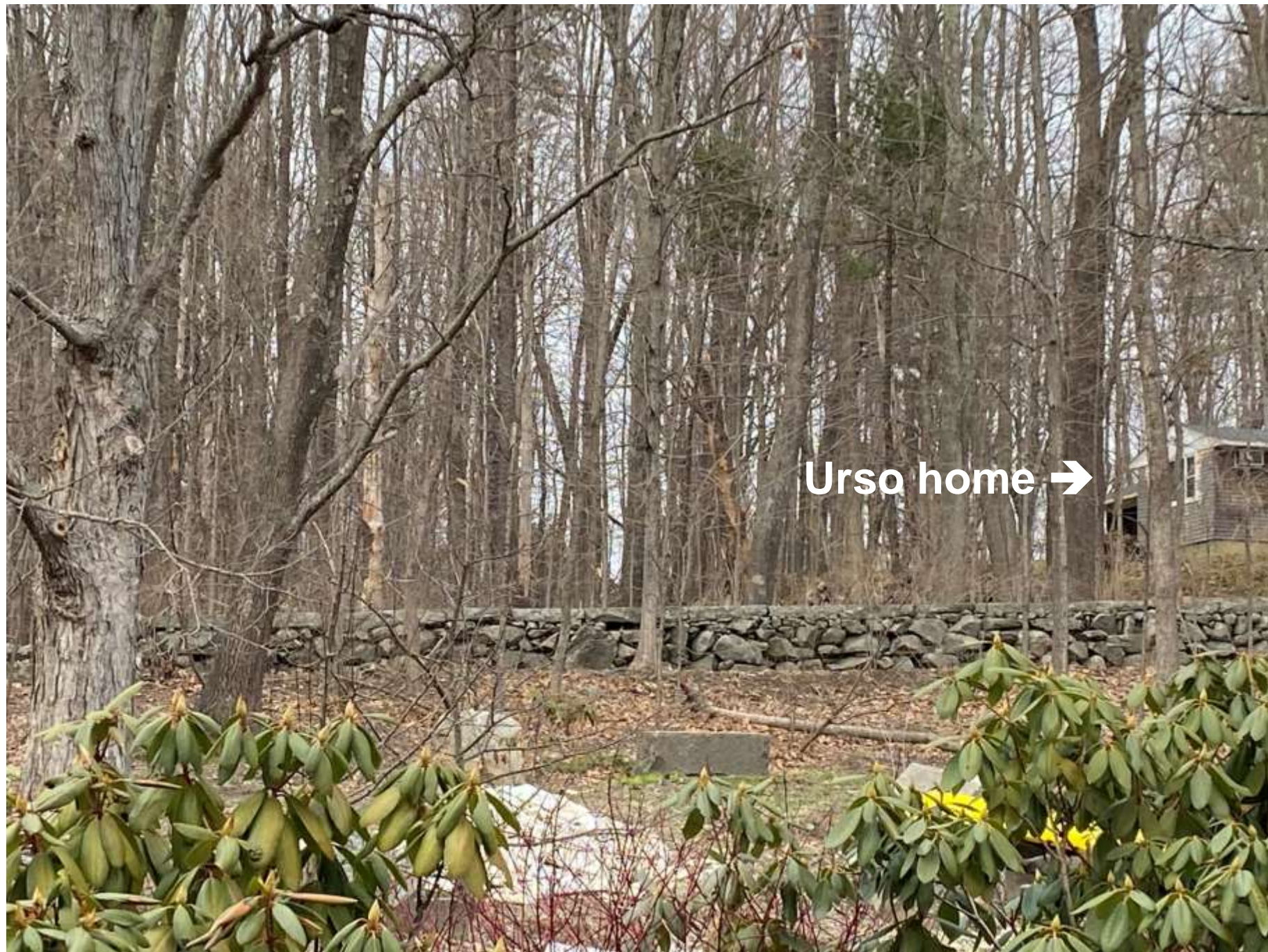
Toomerfs have NOT provided parking-structure renderings from abutting 5 Smith Park Lane Urso family home.



Retaining-slope crest line would be *aimed directly at center of house*, with football-field size mound of fill/asphalt replacing the steeply sloped woods.



Urso home



Urso home →

Applicant has NOT provided parking-structure renderings from Chesley Drive



The **football-field size parking mound** mass (+ guardrail, vehicles, light poles), rising above old stone wall, would be prominently visible – *in full* – from Chesley Dr & surrounding homes.

Planner Michael Behrendt's March 5, 2021 Opinion Letter

Details his *personal* definition of “Structured Parking,” suggesting that *anything* else is simply a surface parking lot.

“Structured parking refers to parking situated inside or on top of a building, or what is commonly referred to, in non-planner parlance, as a parking garage. Parking garages are buildings that are typically constructed of concrete and/or steel.” – Michael Behrendt (emphases added)

The ZO could be amended in the future to meet Mr. Behrendt's preferred definitions, but current applications must be judged on the basis of current ZO.

The Durham Zoning Ordinance has NO mention of:
inside/top of building, garage, concrete, or steel.

“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.” – DZO, Article II, Section 175-7

***Proposed:* Multi-sided retaining slopes to hold together 1,000s of yds of fill & asphalt, thereby “providing parking” for *added* 120~ spots on sloped site otherwise unusable for parking;**

- “Structured parking” by our ZO definition, “**may be above or below grade**” (in Toomerfs proposal, it would be **very much above the current grade, by almost 3x the 6’ trigger pt.**);
 - May “**be covered or uncovered**” (the Toomerfs’ proposal is for uncovered);
 - “**May be on multiple levels**” – thus *may be* on a single level, as proposed by Toomerfs.
- **Between the current two Zoning parking options: Toomerfs plan better matches DZO’s “Structured Parking” – a prohibited principal use on Church Hill. **It most certainly does NOT match “at-grade” Surface Parking.****

“Planner Behrendt’s Definitions” break down in attempts to apply them

- ❑ *IF* steel girders ran from lot 1-16 rear footings to where land drops away from Main St. lots, &
- ❑ *IF* reinforced concrete, instead of asphalt, was the parking surface...
- ✓ **Would match Behrendt’s “steel & concrete” definition of “Structured Parking”**
- ✓ **Would be well *above grade*, given drop in ground below parking surface, toward Chesley**

But OOPS!

That “structured parking” surface = **exactly same grade as current proposal**

That “structured parking” would **NOT** be “inside or on top of a building”

There is no functional consistency in Mr. Behrendt’s definitions

In any case, ZBA must follow ZO definitions, which set the rules, not what the Town Planner & other “Town staff” *wish* the written definitions were.

Mr. Behrendt argues for “parking garage” as *intent* of DZO “Structured Parking” definition – but there’s no hint of that in the Ordinance.

Yet we *do* know from our Zoning Ordinance that: “The purpose of the Church Hill District is to **preserve and enhance the historic character of this area.... New development should maintain the character of the area....**” (Article XII, 175-44)



Restriction on dramatic grade change for parking structures obviously preserves and maintains Church Hill as a *hill*.

“At-Grade” Term in Zoning Cannot Be Meaningless

If a surface that requires 11,000 cubic yards of fill is “at grade,” then almost *anything* constructed could be defined as “at grade” – ***if one conveniently starts to measure grade after finishing major changes in grade*** – which would render “at-grade” as a meaningless term in the Zoning Ordinance.



Proposal for 700~ ten-wheeler dump truck runs makes a mockery of “at-grade” & “grading” terms in Durham Planning documents



8.2.1 parking areas... and other site elements shall be...designed in such a manner as to preserve natural resources and **maintain natural topography** to the extent practicable. **Extensive grading and filling shall be avoided. – Site Plan Regs**



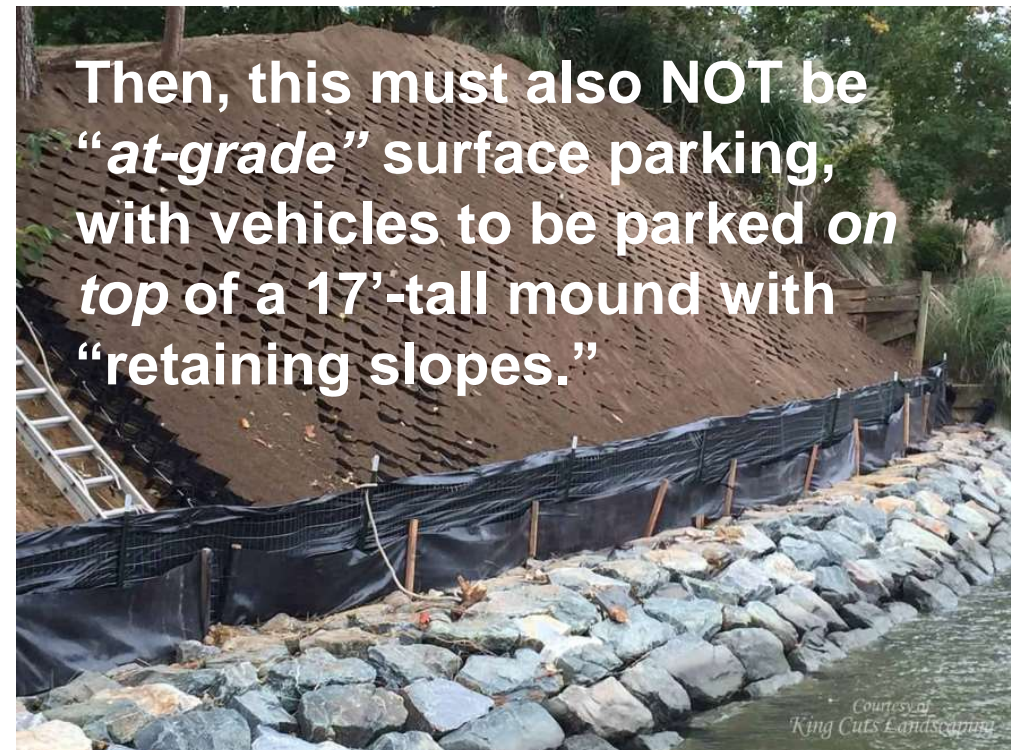
CATEGORY OF USES	RESIDENTIAL ZONES				COMMERCIAL CORE ZONES					RESEARCH-INDUSTRY ZONES			
	Rural (R)	Residence A (RA)	Residence B (RB)	Residence C (RC)	Central Business (CB)	Professional Office (PO)	Church Hill (CH)	Courthouse (C)	Coe's Corner (CC)	Office Research - Route 108 (OR)	Mixed Use and Office Research (MUOR)	Office Research Light Industry (ORLI)	Durham Business Park (DBP)
V. RECREATIONAL USES													
Principal Uses													
Golf course	CU	X	X	CU	X	X	X	X	X	X	X	X	X
Recreational facility, indoor	X	X	X	X	X	X	X	X	X	P	P	P	P
Recreational facility, outdoor	CU	X	X	CU	X	X	X	X	CU	CU	CU	CU	CU
Recreational playing fields, outdoor	P	P	P	P	X	X	X	X	CU	P	P	P	CU
VI. UTILITY & TRANSPORTATION USES													
Principal Uses													
Structured parking	X	X	X	X	CU	X	X	CU	CU	X	X	X	X
Surface parking	X	X	X	X	CU	X	CU	CU	X	X	X	X	X
Public utility facility	CU	X	X	CU	X	X	X	X	X	P	P	P	P
Personal Wireless Service Facility (See Article XVIII)	P	P	P	P	P	P	P	P	P	P	P	P	P

Only AT-GRADE SURFACE PARKING is permitted as principal use on Church Hill. The Toomerfs proposal is NOT “at-grade.”

Principal “Structured Parking” is PROHIBITED on Church Hill

“function,” not “material” should govern

There is no language in DZO definitions that suggests that it’s okay to use some material for a large parking structure (e.g., Toomerfs multi-sided “retaining slopes” containing thousands of cu yds of fill & asphalt) while it’s only other specific materials that are prohibited (e.g., steel & concrete for “garage” or rooftop parking).



The Planning Board & Applicant attempts to *change* Zoning Definitions immediately after April 13 ZBA decision *support the reasoning of both our prior & current ZBA appeals.*

Those rushed redefinition efforts (halted by Town Administrator Todd Selig), provide support for our argument that, **under the *existing* definitions – which the ZBA must follow – both the original and revised Toomerfs’ plans are NOT “at-grade” Surface Parking.**

Again, even the applicants admitted that point in writing when it looked as if the Planning Board might change all parking-related definitions in the Zoning Ordinance to Toomerfs’ benefit.

**Toomerfs Have Admitted in Writing the MAIN Point:
“Our proposal” is *NOT* “at grade” at “the back” (Lot 1-16)**

The only permitted principal use parking on Church Hill is “at-grade” parking. The Toomerfs have already conceded that what they have proposed is NOT “at grade” on the key lot 1-16, per current Zoning.

The original and revised plans are no different on this dramatic change-of-grade issue – a change in grade almost three times the Durham Zoning “trigger-point” of 6 ft or more in elevation.

“our proposal is ‘at grade’ from the front but not the back.”

– Applicant Tim Murphy, April 15, 2021, 4:34 pm



Planner Behrendt Has Acknowledged Applicability of April 13 ZBA ruling *to proposals with tall retaining structures – just like one before ZBA Tonight!*

“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...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.**” – “Parking Definitions” [April 28 2021](#) Memo to PB (emphases added)

Then Toomerfs submitted a plan with “retaining slopes” precisely of that scale! Per memo above, the ZBA ruling of April 13 would apply to the new plan as well.

Final Point: What Almost Was, and Might Still Be

Toomerfs apparently hoped the Planning Board would quickly change definitions of “Surface” & “Structured” parking & “at-grade” in the Zoning Ordinance to undo the April 13 ZBA ruling. That could have allowed the Toomerfs to **raise the grade of lot 1-16 by however many feet they wanted with retaining structures of one sort or another** – and have it still count as “at-grade” Surface Parking within the new definitions.

But it’s not clear that such limited change in definitions would *ever* happen, because the Toomerfs’ proposals suggest need for a THIRD CATEGORY of parking, something between at-or-near-original-grade Surface Parking (a standard “Parking Lot”) and a “Parking Garage.” **That *third type* of parking (“*elevated* parking”?) might entail very large retaining walls/slopes (over 6-feet) and substantial fill to alter grade and level out steep hills.**

With any zoning definition changes, there would also need to be a careful revision of the **Table of Uses**, district-by-district, for what is appropriate for each of them, a process that would, with public input, likely still keep Toomerfs’ “*elevated* parking” proposals prohibited in cherished Church Hill District, **because, as Planner Behrendt wrote in his...**

Town of Durham Architectural Design Standards

“Church Hill has the most distinct character and is thus most sensitive to inappropriate development.”



In any case, the definitions for “surface” and “structured’ parking and “at-grade” remain the same as they were on April 13, 2021. Please judge our appeal on that same basis.

CONCLUSION

We urge the ZBA to consider all the evidence, including the applicant's written admission that their proposals have not been "at-grade" at the Chesley Drive end of the plans.

We ask you to support our appeal that, under *current* Zoning definitions, what is proposed – ***contrary to the Planning Board's May 12 "Administrative Decision"*** – is NOT at-grade "Surface Parking."

Thank you for your attention & consideration – Joshua Meyrowitz,
Peter & Martha Andersen, Mike Urso & Sandy Ceponis

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ZBA Hearing, July 13, 2021 ([video](#))

ZONING BOARD OF ADJUSTMENT

Tuesday, July 13, 2021 at 7:00 p.m.

Town Council Chambers, Town Hall

8 Newmarket Road, Durham, NH

MINUTES (excepts)

MEMBERS PRESENT: Chris Sterndale, Chair Micah Warnock, Vice Chair Mark Morong, Secretary Alex Talcott Neil Niman Leslie Schwartz, Alternate. OTHERS PRESENT: Audrey Cline, Code Enforcement Officer....

Alex Talcott made a MOTION that the Zoning Board of Adjustment deny a petition submitted by Joshua Meyrowitz, Durham, New Hampshire for an APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a May 12, 2021 Planning Board decision that the revised plan for the parking facility at 19-21 Main Street is for surface parking. Neil Niman SECONDED the motion and it PASSED 4-1.

Excerpts from Meyrowitz-Andersen-Urso [Request for Rehearing](#), Aug 12, 2021

Despite our appreciation for the ZBA's time and attention, we believe that the decision that was made (by a vote of 4-to-1) against our appeal was logically and legally flawed for the following 12 reasons:

- 1) The ZBA erred in accepting the claim that a legally appealable administrative decision had indeed been made by the Planning Board on May 12, 2021, when the specifics of the May 12 meeting do not support that conclusion.**
- 2) Although the ZBA ultimately made the correct decision in affirming the Board's standing with respect to a Planning Board Zoning determination, the ZBA erred in giving undue time and consideration to the Toomerfs' attorney's spurious argument about the Board not having such standing when the underlying site plan is for a Conditional Use.**
- 3) The ZBA erred on July 13 in giving no noticeable attention in its deliberations (except in the comments of the one ZBA member who voted in support of our appeal) to the compelling arguments from two key sources as presented in our appeal document and PPT presentation, that the [April 13 ZBA ruling](#) on the "retaining walls" plan was still germane to the revised "retaining slopes" plan.**

Request for Rehearing excerpts, cont'd

4) The ZBA erred in not doing due diligence in pressing applicant Tim Murphy to explain to the ZBA exactly how the new and old plans differed in terms of being or not being “at grade” at the rear (the Chesley Marsh end of Lot 1-16). In a related oversight, the ZBA also did not question Planner Michael Behrendt on this issue – which would have revealed that the plans were identical in terms of change of grade. *[Note: In 2022 plan, elevation of grade is almost 20% greater.]*

5) The ZBA erred in explicitly stating (and acting on) its intent to ignore legally acquired and centrally relevant material about Planning Board efforts to change the zoning definitions immediately following the April 13 ZBA ruling overriding the Planning Board and, in particular, Tim Murphy’s email admission that, by current zoning definitions, their plans – both old and new versions – are *not* “at-grade” at the Chesley Drive rear of Lot 1-16.

6) The ZBA erred in allowing Town Planner Michael Behrendt (who promised only a very brief comment about the Zoning definitions) to speak at great length on a type of “research” that should have been ignored by the ZBA.

Request for Rehearing excerpts, cont'd

7) The ZBA erred in deferring to the Planning Board out of misplaced (but also irrelevant-to-its-mission) fear of “ping-ponging” back and forth between ZBA and the Planning Board. Moreover, the ZBA explicitly stated a willingness to abdicate its responsibility to get involved in citizen appeals related to Planning Board decisions. Indeed, the ZBA even stated a bias in favor of not slowing down *developers’* applications, thus expressing a bias against the rights of abutters and affected citizens, such as the appellants in this case.

8) The ZBA chair erred in inappropriately mocking the quality of the April 13 ZBA deliberations (where he was overruled by the majority of the ZBA), in effect, “guiding” new and old members to vote his way this time on July 13.

9) The ZBA erred in interrupting Mr. Meyrowitz’s response to unfounded attack by Toomerfs’ attorney on the integrity of his PowerPoint presentation, with a Board member even adding his own inappropriate critiquing of a perfectly legitimate visual analogy about how overhead images of structures/designs do not reveal mass, height, etc.

Request for Rehearing excerpts, cont'd

10) The ZBA erred in ignoring our argument that the Toomerfs and Town Planner's conceptions of the parking proposal inappropriately rendered the term "at-grade" meaningless.

11) The ZBA erred in mostly ignoring our repeated written and oral pleas to focus on our claim (that the proposal was NOT "at-grade surface parking"). Instead the Board essentially argued that what was proposed was not a "parking garage," a position that we agreed with, but saw as irrelevant.

12) The ZBA erred in straying from the core of its mission, as cited in RSA 674-33, to respect the "spirit of the ordinance."

The Request for Rehearing was denied on [September 21, 2021](#)

(in less than six minutes of discussion by the Board)

[Agenda](#) / [Minutes](#) / [Video](#)

ZONING BOARD OF ADJUSTMENT
Tuesday, September 21, 2021 at 7:00 p.m.
Town Council Chambers, Town Hall
8 Newmarket Road, Durham, NH

MINUTES

(full formal account of the less than 6-minute rehearing discussion is reproduced below)

MEMBERS PRESENT: Chris Sterndale, Chair (attending in person), Micah Warnock, Vice Chair (attending in person), Alex Talcott (attending remotely), Neil Niman (attending in person), Mark Morong (attending in person), Leslie Schwartz, Alternate (attending in person). OTHERS PRESENT: Audrey Cline, Code Enforcement Officer (attending remotely)....

Chair Sterndale asked the board to consider if any errors were made in law or if they disregarded something.

The board was comfortable with their process and deliberation done at the May and July meetings.

Chair Sterndale felt comfortable denying a rehearing. Neil Niman spoke positively of Chair Sterndale's directing of the board and went on record to say that Chair Sterndale does an excellent job for the town.

Neil Niman MOVED to deny the APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION from a May 12, 2021 Planning Board decision that the revised plan for the proposed parking facility at 19-21 Main Street is for surface parking. The properties involved are shown on Tax Map 5, Lots 1-9, 1-10, 1-15, and 1-16, are located at 19-21 Main Street, and are in the Churchill Zoning District. Mark Morong SECONDED the motion to deny, and it PASSED unanimously.

Excerpts from:
Meyrowitz-Andersen-Urso [Superior Court Appeal](#), Oct 21, 2021*

Court hearing has been repeatedly stayed by mutual agreement of parties,
most recently at Toomerfs' request on Feb 22, 2022

22. In considering the Second Toomerfs Parking Proposal, the ZBA appears to have given primacy to the nature of the earthen material used over the function of the proposed “mounding” that would allow for the creation of parking on a lot with such severe elevation change....

25. Similarly, the ZBA erred in giving no noticeable attention to the “threshold issue” for what height of fill would tip “at-grade surface parking” to “structured parking.” Is there a tipping point where engineering could not accomplish the goal merely via supportive fill, i.e., without a supportive structure? What is the threshold for “structured parking”? Put differently, the ZBA erred in not considering at what point of elevating grade – 20, 30, 40, 50 feet? – would a parking proposal no longer be for “at-grade surface parking.” ...

* See also related [Comments from Robin Mower 7-12-21](#) (in support of ZBA Appeal)

Meyrowitz-Andersen-Urso [Superior Court Appeal](#) excerpts, cont'd

54. The ZBA erred in imposing special “professional engineer” understandings of “at-grade” in its deliberations and voting, in place of “ordinary accepted meanings,” such as: “at natural grade, more or less.” ...

56. Moreover, the ZBA failed to address the fact that the preponderance of the proposed parking use of the site lies on “back” parcels toward Chesley Drive with elevations hugely different [significantly lower] from that of the “front” parcels with addresses 19 and 21 Main Street....

74. Although there are often many legitimate reasons for denying a request for a rehearing, it was unreasonable and inappropriate for the Chair of the ZBA to indicate that one reason for denying the rehearing appeal was that Petitioners had previously been at the ZBA regarding the Original Toomerfs Parking Proposal (an appeal in which the Petitioners had prevailed at the ZBA).

Toomerfs' 2022 Plan

deviates even further from “at-grade Surface Parking”

Toomerfs' 2022 [site-plan](#) is significantly different from the one “accepted” by the Planning Board as “Surface Parking” on May 12, 2021 (via 3 seconds of silence at a hybrid meeting). The current plan is an even poorer match to “Surface Parking” than the one that led to the ZBA appeal and still-pending Superior Court appeal detailed here. *No PB determination of the plan’s match to “Surface Parking” has been made as of May 2022.*

**** 2022 – return of retaining wall ****

**** 2022 – greatest proposed increase in grade elevation of any Toomerfs plan ****

**** 2022 – significant projected increase in amount of fill and truck runs ****

A structure identified as a “retaining wall” was first shown on the [Feb 2022 site plan](#) (the same wall, but with no label had first appeared on the [Sept 2021 plans](#)). The proposed elevation of grade has increased about 20% from 17 feet in the May 2021 plan to about 20 feet (with paving) in the 2022 plan. The projected amount of fill has increased about 25% from 11,000 cubic yards in the May 2021 plan to 13,702 cubic yards (or 15,925 CY “overall net fill” with pavement and stormwater chambers for 2022 plan), per March 2022 [cover letter](#)). The projected number of 10-wheeler truck runs has increased significantly (+23% to +34%) from 700 for the May 2021 plan to 938 (Dec 2021 hearing statement) or 857 (March 2022 cover letter).

To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / May 25, 2022

Details on Meyrowitz-Andersen-Urso ZBA Appeal, July 13, 2021

[Agenda](#) / [Minutes](#) / [Video](#) / [Notice of Decision](#)

***Please include in the legal record for the Church Hill Woods
(aka “19-21 Main Street”) site-plan application***

[Appeal from an Administrative Decision](#) & [Appendices](#)

**** Presentation by Joshua Meyrowitz, ZBA Hearing, July 13, 2021 ****

**** Excerpts from ZBA Minutes, July 13, 2021 ****

**** Excerpts from Request for Rehearing, Aug 12, 2021 ****

**** Excerpts from Superior Court Appeal, Oct 21, 2021 ****

**** 2022 Toomerfs Plan Summary (*higher elevation, more fill, return of a wall*) ****