

Is it really okay to break the rules just because one can't build what one wants to build without breaking the rules?

To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / June 17, 2022

My understanding has always been that if one cannot build a particular structure on a piece of property without violating explicit rules (whether Site-Plan Regulations or Zoning), then one cannot build that particular structure on that property. Property-buyers beware! Yet, now I'm wondering if there are much more permissive guidelines, per the Durham Planning Board.

At the June 8, 2022 Public Hearing, some PB members repeated a theme that we've heard before from a few Board members: that if a property owner cannot build what they want on a steeply sloped property without violating the prohibition in the site-plan regulations on extensive grading and filling, then the property owner magically gains a "right to build" what is forbidden by the rules.

Indeed, based on what was expressed by a few Board members, a property owner could employ as extensive an amount of grading and filling as is possible to imagine because of it being "necessary" to do what the property owner wants to do. Indeed, the more that the prohibition on extensive grading and filling would seem to apply by basic reasoning – given how dramatically "inhospitable" to the proposed use the natural topography of a property might be – the MORE a property owner can violate the rules, using "*if-you-can't-build-what-you-want-without-it...*" reasoning.

As has been noted by residents and by Attorneys Fennessy and Puffer, although the phrase "maintain natural topography *to the extent practicable*" in the regulations offers some flexibility for relatively minor changes in topography; it is clearly not applicable to "extensive grading and filling," which, per the regulations, "SHALL be avoided." The non-existent wiggle room in the regulations that Toomerfs' attorneys Phoenix and Kieser keep trying to put forward has been rigorously and clearly negated by [Robin Mower 5-6-22](#) and [Gail Kelley 5-11-22](#).

Given some Planning Board members' conception of how to turn the rules on their head ("needing" what is not to be allowed suddenly makes it allowed), I've been wondering if I should pick up a cheap parcel of extraordinarily wet New England wetland property, similar to what is pictured below, with the expectation that I can argue that since I can't build a house on the property without draining and filling in the wetland, I should be allowed by the Planning Board and NHDES to drain and fill in the wetland and build whatever I want. Indeed, the wetter the property is, the more I would "need" to fill in wetland – and thus I would be allowed to drain & fill within the "*it's-okay-if-there's-no-other-option*" proposition.

If I can't build my dream home here without filling & draining the wetland, is it then okay to fill, drain, & build my dream house?

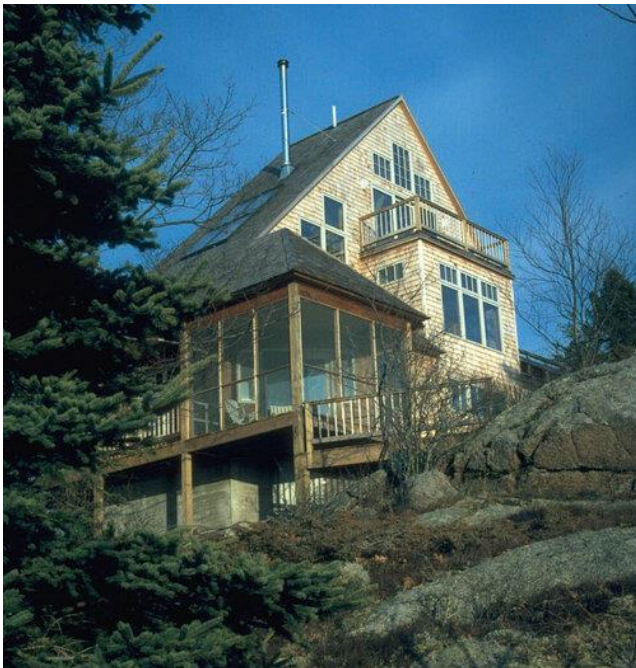


There are added twists to the “not-allowed” issue for the Toomerfs’ two steeply sloped back lots (with their admitted 42-foot drop in elevation from the legally distinct Main Street fronting lots¹), including:

- The proposed parking edifice is **not a permitted use in the district**, and is thus subject to enhanced restrictions under Conditional-Use Zoning. Practices that might be allowed for by-right uses are not necessarily allowed for restricted conditional uses. (Toomerfs admitted as early as Preliminary Design Review that they knew before buying the land that a commercial parking lot was not a by-right use of the property. Buying that land with a parking lot in mind, given its obvious topography and close-by abutting family homes, was a form of gambling.)
- The **proposal violates the purpose of the district per the Zoning**. “The purpose of the Church Hill District is to preserve and enhance the historic character of this area by allowing for multiple land uses including professional offices, limited retail uses, and senior housing.... New development should maintain the character of the area....” A stark and ugly edifice for a commercial parking lot does not “preserve and enhance the historic character of this area.”
- As [conceded](#) by Toomerfs, **their proposal is not “at grade”** (and is thus forbidden).

Most dramatically relevant in terms of the prohibition on “extensive grading and filling” (something that makes the Church Hill Woods situation different from my analogy to draining and filling in a wetland) is that the Toomerfs **could build an architecturally appropriate and beautiful permitted building (such as senior housing) without extensive grading and filling, and without mass deforestation**, as one can see from hundreds of photographs online from the dozens of books filled with designs for building elegant structures into hillsides and slopes.

Yes, Toomerfs have a “right to build” what they have the right to build. They do not have a right to build what is prohibited by Site-Plan Regulations and/or Zoning.



<https://knightarchitect.com/lucias-little-houses#/a-tall-place-at-the-edge/>



<https://knightarchitect.com/lucias-little-houses#/hillside-house/>

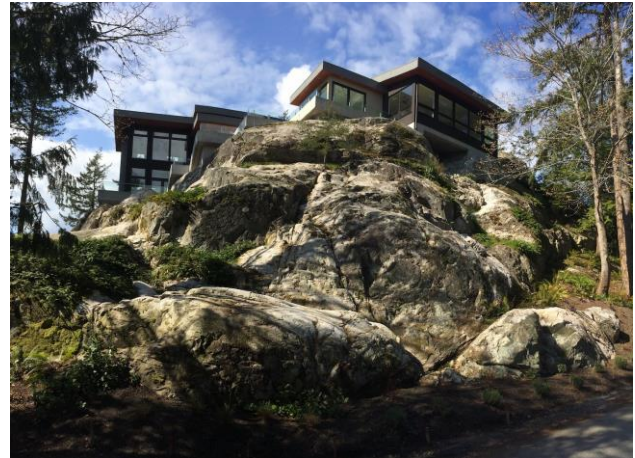
¹ “The topography of Lots 1-15 and 1-16 results in a steep sloping grade ranging from elevation 74 at the northern most portions of Lot 1-15 and 1-16 to elevation 32 at the southern most portion of Lot 1-16. Accordingly, Petitioner’s proposal included significant fill and a retaining wall to support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



<https://www.trendir.com/grass-roofed-home-built-into-slope-uses-hillside-for-cooling/>



<https://staging.alairhomes.ca/west-vancouver/blog/cliffside-custom-home/>



<https://staging.alairhomes.ca/west-vancouver/blog/building-a-home-on-a-steep-slope/>



<https://www.dezeen.com/2018/09/10/stack-house-freelandbuck-steep-hillside-los-angeles/>



<https://www.trendir.com/2-tiered-60s-house-studio-and-cottage-ruin-get-modern-upgrade/>



<https://warmmodernliving.com/blog/2018/10/23/smart-solutions-for-steep-slope-building>



“No house should ever be on a hill or on anything. It should be of the hill. Belonging to it. Hill and house should live together each the happier for the other....”

– Frank Lloyd Wright

Can anyone take seriously the claim by Toomerfs’ Attorneys Phoenix & Kieser that an ugly parking edifice (with retaining wall, 20-ft tall retaining slope, 6-ft cedar fence, 14-ft lighting poles, and a sea of 123 asphalt-paved parking spots (simulation above left; applicant rendering below) is somehow more compatible with the district and surrounding environment than by-right uses built into the hillside?

Beauty on the hill is quite possible, yet what Toomerfs propose is not it. With a built-into-the hillside structure, especially one that would draw on appropriate architectural elements, the height of the structure would add majesty, not horror – and site-plan regulations and Zoning could be adhered to.



From: [Additional Information and Color Renderings 6-2-22](#), p. 9