

To: Planning Board / From Joshua Meyrowitz, 7 Chesley Dr / June 8, 2022

## **Technical Review Group (TRG) vs. Planning Board (PB) Roles on Church Hill Woods parking proposal**

Since Toomerfs' attorneys Phoenix and Kieser have claimed that Durham's Technical Review Group meetings with the Toomerfs team have signaled approval of the Toomerfs' parking proposal for Church Hill Woods, I want to write for the record that the role of the Technical Review Group is quite distinct from the role of the Planning Board. Further, I encourage the Planning Board members to keep that distinction uppermost in their minds as they approach Conditional-Use review for the Church Hill Woods parking proposal.

The TRG does not to approve or deny a proposal. Rather the TRG assists applicants in such things as the Best Management Practices for a site-plan that might or might not meet Planning Board approval. As noted on the Town's web site for the [TRG](#):

The Technical Review Group (or TRG) is composed of Town staff members and representatives from several boards. Its purpose is to review development applications (site plans and subdivisions), raise issues of concern, and provide comments to applicants/developers and the Planning Board. **The TRG, chaired by the Town Planner, is purely an advisory committee. It does not have any specific authority and makes no decisions.** (emphasis added)

In contrast, the Planning Board's role is determine *whether* an application meets the criteria for approval.

The contrast between TRG and PB roles is particularly sharp with respect to Conditional-Use applications. That is because, ironically, the Best Management Practices for a proposed site might make its negative impacts so great that it would – and should – fail to meet Conditional Use criteria for approval.

For example, in my recent submission, “**Chloride is a difficult beast...**” (on negative external impacts on the watershed), [Joshua Meyrowitz 6-1-22](#), I provide direct quotes from the Dec 7, 2021, TRG meeting, where the prime focus was on best-management practices, as if the application were already approved.

But the Planning Board's first responsibility is to assess *whether* the proposal would have negative external impacts beyond what the surrounding environment experiences now from other existing or permitted uses in the zone, as this plan surely does – as indicated from the quotes from the TRG meeting and in three resident letters that followed up on my chloride letter: [Emily Malcolm-White 6-1-22](#), [Eric Lund 6-2-22](#), [Robin Mower 6-3-22](#).

Only after a plan passes strict Conditional-Use review should conditions for best-management of the approvable plan come into play. (The same is true for light-pollution review for whether a plan passes Conditional Use vs. lighting for safety of an approved plan.)

**1) Drifting from “*Should it be approved?*” to “*How it should be operated?*”** In some Planning Board discussions, this distinction between how best to run an approved site and whether to approve a site plan has been lost, as I detailed in my “**Skirting the Conditions of Use?**” [Joshua Meyrowitz 3-5-21](#) submission regarding the February 17, 2021 discussion of Conditional Use for the then current plan for Church Hill (with the retaining-wall that was rejected by the ZBA on April 13, 2021). Since it has been over a year since that submission of mine, I review some of its highlights here.

For example, the issue of whether an acre asphalt parking surface replacing woods would add to pollution of College Brook (into which it drained) and the Great Bay watershed (even with the applicant claiming at that time no use of rock salt), turned on February 17, 2021 into a discussion of preference for using rock salt to melt snow and ice for safety reasons in a likely to-be-approved parking surface.

Similarly, the question of whether a lit-up parking lot on what is now dark-at-night woods would add unacceptable light and glare to the surroundings (even with dimmer- and motion-detection lighting systems then being discussed, but since abandoned) flipped into a discussion of how an approved parking lot should be sufficiently bright and safe 24/7 to meet police approval.

Ironically in both of these instances, the stated Board members’ preferences for how the parking structure would likely *have* to operate lent unstated credence to arguments that the project should be *rejected* to start with, because the stated safe-operation-mode would clearly violate Conditional Use criteria (adding pollution and further degrading College Brook and adding light and glare to the surrounding now-dark environment).

But those on-topic arguments for a *Conditional Use review* were barely floated. In that discussion, the expected focus of subjecting the project to the CU criteria was lost in favor of an unrelated discussion of “management practices” for a project seemingly heading toward approval without serious discussion of the conditions to which it was subject.

**2) Ignoring the *Conditional Nature of the Application.*** Repeatedly throughout the February 17, 2021 discussion, Board members mentioned that a related *permitted* use would avoid Planning Board debate. Well, of course. But instead of that point leading to the suggestion to the applicant to abandon the held-to-higher-standards Conditional Use and turn to a by-right permitted use, the discussion fell into “Well, if it is okay for a permitted use, why don’t we just allow it for this conditional use also?”

An analogy I presented at that time would be for a judge greeting a couple too young to marry legally

without parental permission, and rather than saying, “Please wait until this is permitted outright, or get that parental permission!,” the judge instead says, “Well, others just a few years older can marry without parental permission, so we’ll just skip that condition for you as well. Congratulations on your union!”

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

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

**3) Disappearing the Neighborhood?** The Board also went off topic on this related Conditional-Use issue in February 2021 when it failed to take note of the fact that there is nothing in the CU criteria that suggests that the cited relative **uses** in the “zone” apply only to **impacts** of properties *within* that same zone. As the ordinance indicates, “uses” apply to the zone; “impacts” from those uses are explicitly stated as not limited to the zone. (“The external impacts of the proposed use **on abutting properties and the neighborhood** shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone.”)

Abutting properties and neighborhoods are not bounded by zones, and it was dispiriting to hear discussions that suggested that the boundary of a zone (not established until 2006) created a *de facto* soundproofing and an invisibility shield around the proposed use. The questions at hand ought to have been how would the proposed massive parking structure impact abutting properties (regardless of zone), the adjoining neighborhood (regardless of zone crossing) and the “surrounding environment” (clearly not a zone-delimited concept), as contrasted with other existing and permitted uses in the zone of the proposed project. Also of prime significance is that the Church Hill zoning district was not created until many decades after the “neighborhood” came into active existence.

You have already received extensive testimony on how other parking lots in Church Hill are considerably different and have almost no impact on the properties abutting, surrounding, and neighboring the *proposed* structure and, conversely, about how the abutting properties, neighborhood, and surrounding environments would all be very negatively impacted by the proposed structure. (See, for example, the rich testimony [here](#) from many citizens, including those cited in my [Joshua Meyrowitz 2-12-21](#) and the recent poignant testimony from [Martha Andersen 5-19-22](#).)

Moreover, as Planner Michael Behrendt read from the [Zoning](#), p. 32, on February 17, 2021, the definition of “Neighborhood” begins with “An area of land **local to the use concerned**.” The Faculty Neighborhood is certainly an “area of land” that would be very “local” to the Toomerfs proposed structure, which would loom over the Chesley Marsh, Chesley Drive homes, and the cherished

Faculty Neighborhood “magic path” and College Brook Footbridge. Again, being “local to” something clearly does not stop at a zoning district boundary.

**4) Losing Lots of Distinctions.** The bulk of the proposed Church Hill parking structure would be on two legally distinct lots that do NOT front on Main Street (1-16 & 1-15, [Tax Map 5](#)). Although the applicants and Board have made extensive mention of what was at the “front” and “rear” of the proposed project, referring to “the lot” (singular), these discussions missed the legal mark of the boundaries and lot locations: that there are multiple legally distinct lots in question. The shared ownership of four lots does not make them one legal lot. Moreover, the most visually offensive parts of the massive structure proposed would be on the 1-16 lot that abuts the Chesley Marsh and essentially fronts on Chesley Drive and the neighborhood footpaths, rather than Main Street. For the areas most affected by the project, the massive parking structure is at the “front” of the property.

When at some meetings, the Board has seemed to accept the applicant’s claim that the project would improve the “neighborhood” by removing parked cars from the side of a driveway on Main Street (on a legally *different* lot), the actual neighborhood most at risk from the project was defined out of existence.

**5) Not all the CU criteria are comparative to other uses in the zone.** Only CU criterion #2 (“External impacts”) refers to “impacts...no greater than the impacts of adjacent existing uses or other uses permitted in the zone.” The other criteria set higher standards for Conditional Use applications than for by-right applications *without reference to other existing/permitted uses in the zone*. These include #3 “Character of site development,” #4 “Character of the buildings and structures,” and #5 “Preservation of natural, cultural, historic, and scenic resources.” Therefore, all the Board discussion comparing the proposal to other permitted proposals or existing structures with respect to *these* other criteria was off track. “The proposed layout and design of the site shall not be incompatible with the established character of the neighborhood,” or it fails CU. If the proposed use (*not* other permitted uses) is not compatible with the neighborhood in “scale, height, and massing of the building or structure,” then it fails CU.

How could the scale, height, and massing of the proposed parking structure be compatible with the Chesley Drive homes it abuts and would loom over?



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