*To: Durham Planning Board / From: Joshua Meyrowitz, 7 Chesley Dr / July 22, 2022*

# Please Correct False & Misleading Statements at Deliberations on Church Hill Parking Lot Application

Planning Board Meetings: June 22, 2022 (video) & July 13, 2022 (video)

**1. "They [Ursos] already overlook a parking lot now" and thus would not be additionally negatively impacted by the Toomerfs' parking lot.** (Tobias, 6-22-22, 9:23 pm & 7-13-22, 9:15 pm)

**See:** Sandy Urso 7-7-22 invitation to see actual distances from, and sightlines of, small senior-housing *accessory* parking lot with visual dominance of the housing and scenic views beyond:

**From about half way up Urso driveway (normal lens)**

Distant & screened view of *section* of Church Hill Apts (above) is hardly comparable to the much larger 24/7 commercial parking lot proposed for close to the back of the Urso home:

Applicant rendering

**See also:** "Toomerfs' Plan: Unequal Impact on Abutters," J Meyrowitz 7-7-22, with images of what the Ursos now see from the back of their home, both with and without leafed trees.

**2. "Another use… is going to have the parking at back where it's shown on this application." "Our Zoning says that the parking *has to* go out back."** (Kelley, 6-22-22, 9:11 & 9:20 pm)

**See:** Joshua Meyrowitz 7-6-22 ("Behind buildings" ≠ at the *far back* of a lot).

**3. "I think Faculty Road is more than 1,000 feet away [and thus not in the 'neighborhood' of the parking structure]; I'm not positive though."** (Bubar, 6-22-22, 9:25 pm)

**See**: "Toomerfs – Distances to Faculty Rd homes" (about 550 ft), Joshua Meyrowitz 6-24-22[1]

**4. For neighbors, looking at the parking lot will be the same as "really looking at somebody's backyard…. It just is!"** (Grant, 6-22-22, 9:08 pm)

In terms of both scale and appearance, there is clearly *nothing* in the front or back yards of the "established character of the neighborhood" that looks anything like what is being proposed by Toomerfs (see simulation at right, in absence of the PB requiring the developer to submit a clear rendering of what the Toomerfs are proposing). Moreover, the structure's location, so close to the Chesley Marsh, to the College Brook Footbridge, and to the adjoining neighborhood overall, increases its incompatibility. See Joshua Meyrowitz 7-6-22.

**5. "I think that if the proposed use is something that is an allowed use, then I don't see that that would have a significant impact on [adjacent] property values because it's something that could happen at any time, and because it's happening now shouldn't affect the value of the [Urso] house."** (Parnell, 7-13-22, 9:09 pm)

**See the more ordinance-focused Parnell from a minute earlier:** *"I think we have to think the house would have a particular value now. Would that value change when there's a parking lot there? And I think that's really what, if we think that it would have a significant negative impact, then that's a concern." (7-13-22, 9:08 pm)*

Yes, that's exactly the Conditional Use Criterion #6, which the Planning Board is obligated to follow, with *NO* comparative element to other uses – and no adjustment for "the buyer should have known" about a possible other use (and, in this case, NOT a by-right permitted use):

"6. **Impact on property values:** The proposed use will not cause or contribute to a significant decline in property values of adjacent properties."

See also: Realtor's Letter on Behalf of Sandy Urso 7-8-22. And note that the PB is having this deliberative discussion precisely because the parking lot is *NOT* a by-right permitted use. Thus, a well-informed adjacent property owner could reasonably expect that such a use would *fail* the strict conditional-use criteria – including negative impact on their property values!

[1] Please note that it was only after Planner Behrendt declined my suggestion that *he* provide the PB with objective Town documentation of distances and other factual information, that I submitted this map and cover note.

**6. "This whole project…is outside of the [wetland] setback…. I mean… it is out of the setback; it's *well* out of the setback."** (Tobias, 7-13-22, 9:58 pm)

Even Toomerfs' site plans show disturbed areas quite close to edge of the wetland setback. **Per abutter letter,** Martha Andersen 7-12-22, owner of Chesley Marsh, 8 Chesley Dr., the actual distances and retaining-wall construction needs suggest wetland setback violations.

**7. "So what would be our purview for trying to mitigate for possibility that it would contribute to higher chlorine quantities to College Brook? Where is the information that would give us a direct line on that?"** (Tobias, 7-13-22, 9:59 pm).

**See expert input:** Prof. Wilfred Wollheim 7-7-22, UNH Waters Systems Analysis Group.

**8. "So we are expected to report to the EPA on our ability to clean our stormwater. And our problem areas, some of which are nearby. And if we were to remediate those problem areas…much of what the Applicant [Toomerfs] is proposing is how we would mitigate those areas. Minus ripping up C-lot and re-establishing the stream corridor there, it's a matter of cleaning that runoff prior to it hitting the receiving body."** (Kelley, 7-13-22, 9:55 pm)

Other Board members made efforts to correct Kelley: Bubar: *"But stormwater doesn't deal with the salt issue,"* leading Kelley to concede: "*Dissolved solids are a tricky one."* Then Friedrichs: *"When I turn to the language of the ordinances…negative impact, and there's no comparison to other uses or adjacent uses even. And what is currently there is forest. And if I'm sticking to the letter of the Ordinance, I don't see a lot of wiggle room for saying, of course, compared to other lots nearby, this is going to be much better.…"*

Indeed, "**shall preserve identified natural…resources on the site and shall not degrade such identified resources on abutting properties"** (CUP Criterion # 5), provides little wiggle room, and is not to compared with degradation from other possible uses. And see again **expert input:** Prof. Wilfred Wollheim 7-7-22, UNH Waters Systems Analysis Group.

**9. "The Town, in conjunction with the University, may be cleaning up the Oyster River, in *part* because of this parking lot, contributed by the parking lot."** (Kelley, 7-13-22, 9:57 pm)

Efforts to clean up the College Brook and Oyster River watershed began many years ago, long before the Toomerfs even purchased the property in 2017. See The College Brook Restoration Work Group Report, 15 Dec 2007. Even if it were true that such an environmentally disastrous proposal somehow spurred more recent increased countermeasures on other nearby sites, it would be irrelevant to the parking lot's clear failure of the "shall not degrade" in CUP criterion #5, quoted in another fact-correction below.

**10. "I mean we have to follow our own rules. And I don't like to get into crunching, you know, bringing all these things together, to try to say, 'Oh, you know, this parking lot's going to, you know, raise this.' But it's out of their setback, and we have only so much that we can play with because we have the rules in front of us. And I'm not sure how that would really be, I can't really draw a line between that and how it would affect our fiscal impact. That's a crystal ball."** (Tobias, 7-13-22, 9:59 pm).

> **See Durham's Conditional Use Zoning Article "rules" long in front of the Board,** as in Criterion #2 (that would address greater impact from a parking lot, such as from chloride and auto fluid pollution, than from other existing and potential uses of the site) and Criterion #5 (that requires preserving identified wetland and forbids degrading them) – and is *NOT* to be compared to other existing or potential uses. Refer again to the expert input from Prof. Wilfred Wollheim 7-7-22.
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> 2. **External impacts: 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.** This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare….
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> 5. **Preservation of natural, cultural, historic, and scenic resources:** The proposed use of the site, including all related development activities, **shall preserve** identified natural, cultural, historic, and scenic resources on the site and **shall not degrade** such identified resources on abutting properties. This shall include, but not be limited to, **identified wetlands**….
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> See also: "Conditional-Use Projects Are…Subject to Specified *Conditions!*," Joshua Meyrowitz 6-21-22. And see Beth Olshansky 7-11-22 regarding the related CUP criteria that are not met.

**11. "It's a [fiscal] plus for the Town [in property tax revenue], which we need, guys!"** (Sally Tobias, 7-13-22, 9:53 pm)

> **See forest ecologist** Richard Hallett 3-17-22 on negative fiscal impacts (also Gail Kelley 5-11-22 & Joshua Meyrowitz 6-21-22). And refer again to: Prof. Wilfred Wollheim 7-7-22, WSAG.

**12. It's appropriate to refer to the whole proposal as being at 19-21 Main Street because that's where the driveway entrance to the project is.** (Grant, 6-22-22, 9:08 pm)

> The project site comprises *four legally distinct lots*; almost all the new parking is on the lots that are *not* at 19 or 21 Main St. See: "Details on Successful Andersen/Meyrowitz ZBA Appeal, April 13, 2021," Joshua Meyrowitz 4-5-22. Regarding the distinct grade of the rear lots, see "Toomerfs' Admission of Non-Permitted Use," Joshua Meyrowitz 5-5-22.

**13. "But do you think for a moment that an approved use would not have the changes in topography that are being currently proposed?"** (Kelley, 6-22-22, 8:48 pm)

> **For examples of designs that preserve sloped topography, see: "**Skirting the Conditions of Use?" Joshua Meyrowitz 3-5-21; and "Is it really okay to break the rules just because one can't build what one wants to build without breaking the rules?," Joshua Meyrowitz 6-17-22. See also responses at the meeting from James Bubar and Chuck Hotchkiss, which leads Richard Kelley to concede that there could indeed be "a terraced type of development."
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> The PB has routinely compared the proposed parking lot to hypothetical proposals that would have a worse impact, yet it has rarely compared the proposal before it to a proposal that would have a lesser impact. One obvious comparison would be with a parking lot of much reduced scale that does not extend as far to the back, therefore requiring less fill. In any case, lesser-of-possible evils is not an excuse for violating the rules of preserving the topography and not degrading natural resources on the site.

**14. The amount of nontaxable land in Durham fits into a discussion of how strictly or loosely the Natural Resources provision of the Conditional Use Ordinance should be applied.** (Kelley and others, 6-22-22, 9:29 pm)

> The amount of non-taxable land in Durham should be irrelevant to the application of Conditional-Use Zoning to this proposal.

**15. "We had this discussion [about whether the proposal was really "surface parking"] before it went to the ZBA [in April 2021]."** (Kelley, 7-13-22, 10:15 pm)

> There was no PB "discussion," just 6 seconds of silence at a hybrid March 2021 meeting (with long delays in unmuting microphones in other parts of the meeting) in response to Acting Chair Parnell asking if "anyone on the Board disagrees with this [staff] opinion" (that is, disagrees with Planner's Response to Attorney Puffer's Letter 3-5-21, the staff rebuttal to Letter from Attorney Mark Puffer 3-5-21). See: "Details on Successful Andersen/Meyrowitz ZBA Appeal, April 13, 2021," Joshua Meyrowitz 4-5-22. See the full March 10, 2021, treatment of the Attorney Puffer letter and staff response by the Acting Chair in this 01:46 YouTube video.

**16. The PB already accepted the current 2022 plan with a 6-foot retaining wall as "surface parking" in May 2021, soon after the April 13, 2021 ZBA ruling because that's when "the applicant came back with a project that didn't have that much of a retaining wall… and we agreed that it was 'surface parking.'"** (Parnell, 7-13-22, 10:16 pm)

> The Planning Board could not have approved of the plan with a 6-foot retaining wall the month

after the ZBA denial of the larger retaining wall plan, because the scaled-down May 2021 plan had “no retaining wall whatsoever” (instead, it had a “retaining slope”). See Mike Sievert’s Cover Letter Explaining Changes 5-6-21 *“This submission is a revised design based on the ZBA decision at the April 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.”*

This PB error has been repeatedly corrected by me in both short and long Public Comments and written submissions. See, for example, the *one-page summary*: **“**The May 2021 Church Hill Site Plan Impressed the PB – *Then It Disappeared!* Joshua Meyrowitz 3-18-22. And please listen to and watch the very short (47-second) YouTube video of Applicant Peter Murphy & project engineer Mike Sievert outlining the no-retaining-wall plan on May 12, 2021, the day of the so-called “approval” by the Board. (I replayed that 47-second video for the Planning Board on March 23, 2022 in a 10pm Party-in-Interest Public Hearing comment.)

In fact, as the Board has been informed repeatedly, a plan with a 6-foot retaining wall – as in the plan before you now – appeared only months later. The wall was first mentioned in passing at the Sept 8, 2021 meeting, but was not labelled as a retaining wall on the publicly posted plans until Feb 2022.

Moreover, no PB “determination” regarding the new retaining wall plan was made until the just-occurred July 13, 2022 “deliberations” meeting, where the consensus of the voting members was that it was not “structured parking.” (Four members, however, thought that the current proposal with a 6-foot retaining wall and a 20-foot tall “retaining slope” was not at-grade “surface parking” either, and thus not allowed on Church Hill. But only two of those were voting members – James Bubar and Barbara Dill – who were joined in that view by two non-voting alternates – Chuck Hotchkiss and Emily Friedrichs.) The Board has continued to stonewall my and Attorneys Puffer’s and Fennessy’s requests to confront the Toomerfs’ written admission that none of their proposals have been “at-grade” at the Chesley Marsh end of the parking proposal and are, thus, forbidden on Church Hill. See: “Toomerfs’ Admission of Non-Permitted Use,” Joshua Meyrowitz 5-5-22.

It’s baffling how Planning Board members could remain confused about such basic facts about the May 12, 2021 plan (that it had no retaining wall at all), when the accurate information was repeated for the Board in numerous oral and written comments beyond the ones mentioned above, including: “Attempts to Override April 13, 2021 ZBA Ruling Against PB & Toomerfs,” Joshua Meyrowitz 4-12-22; “Toomerfs’ Fill Numbers Game,” Joshua Meyrowitz 5-4-22; “Toomerfs’ Misleading Claims & Unrealistic ‘Renderings,’” Joshua Meyrowitz 5-6-22; “Five Misleading Toomerfs Claims about the April 13, 2021 ZBA Hearing,” Joshua Meyrowitz 5-11-22.

**17. "We [Planning Board members] were given plenty of time" on May 12, 2021 to disagree that the post-ZBA plan was Surface Parking.** (Tobias, 7-13-22, 10:17pm)

Compounding the false claim on July 13, 2022 that the May 12, 2021 plan had a 6 foot retaining wall, Board Members also claimed that they had a significant amount of time to disagree with Michael Behrendt's assertion that the May 2021 plan (with a large "retaining slope," but no retaining wall) was "surface parking."

As Public Comments and written submissions documented: Board member James Bubar (who had taken 7 seconds to unmute his microphone) concluded his comment with: "I would not disagree with someone making a decision that it is 'Structured Parking,'" (that is, presenting a *contrary-to-Behrendt* view). Then the Acting Chair **waited only 3 seconds during a hybrid meeting** for other Planning Board members to respond to the chair's query: "Any other comments on this? [3 seconds] Okay! I guess we will proceed." See: "Details on Meyrowitz-Andersen-Urso ZBA Appeal, July 13, 2021," Joshua Meyrowitz 5-26-22. See also the short YouTube video (20 seconds) of that 3-second of silence passive acceptance of that retaining slope plan at a hybrid meeting, which normally requires roll-call votes.

**18. Town Assessor Jim Rice's Feb 2021 email contradicts realtor Joan Friel's letter and her knowledge is not "equal to the knowledge of our Town Assessor."** (Tobias, 7-13-22, 9:13 pm)

The Email from Assessor, Jim Rice, on Property Values and Fiscal Impact 2-24-21 does *not* include any assessments of the abutting Urso or Andersen homes and therefore does not in any way undermine realtor Friel's expert opinion. Indeed, Rice cautioned against speculating on the impact on their property values. *"Whether this project would cause a diminution of value to these [abutting] properties would be pure speculation at this point. The true litmus test would be to analyze properties that sold within this neighborhood (Chesley Drive) before and after the construction of this parking lot to ascertain market value changes."* Obviously, that litmus-test analysis has not yet happened, as the parking lot site is still an urban forest. Moreover, the Ursos on Smith Park Lane would be most damaged, with those on Chesley Drive next. Additionally, the assessing and appraising credentials that Jim Rice possesses, and were repeatedly touted by Board members, mean little if Mr. Rice did not employ them to offer an opinion for the Conditional Use criterion the Planning Board is required to take into account.

Finally, Jim Rice's stating that Durham property prices are very high has no bearing on the Conditional Use criterion that must be considered, as abutter Martha Andersen 5-19-22 accurately notes: *"The fact that housing prices are high in Durham does not address the variable that the Board must consider: You must compare the price of a single-family home next to woods to a similar home next to a commercial parking lot. Would any of you want to buy a home next to a large, 24/7 commercial parking lot?"*

The only expert to do that required comparison thus far is Joan Friel in Realtor's Letter on Behalf of Sandy Urso 7-8-22, in which she concludes that replacing Church Hill Woods with a large parking structure would be an "aggressive negative" to the sale price of the Urso property, with as much as a $100,000 decline in value on a house worth between $500,000 and $550,000 now. On top of that, an experienced assessor Peter Stanhope 7-14-22 (Chief Appraiser of The Stanhope Group) notes *"Diminution in value of less intense land uses is historically an issue that must be considered. An experienced Realtor Joan Friel with a long history of pricing Durham real estate has opined the land use as proposed will have an adverse influence on neighborhood values. That professional opinion deserves full consideration."*

**19. "What was in the mind of the Town in the decision of make a primary use parking lot something that should be considered, under conditional use?... A conditional use has to something that we would think is okay in that zone in the first place or we wouldn't put it down in Conditional Use…. If this was something that completely, something we wouldn't have wanted in the first place, we would never have allowed it by conditional use."** (Tobias, 7-13-22, 9:43 pm)

This statement confuses what an applicant has a "right" to do (apply for something that should not be approved if it does not meet strict CU criteria) with an unknowable (and unlikely) intent of the Town to favor the type of large commercial parking lot proposed by Toomerfs. This statement turns on its head the opening sentence of the Conditional Use Permits Zoning Article of uses "not normally permitted under conventional zoning provisions" needing to be subject to strict Conditional Use criteria.

As Planner Michael Behrendt writes in: Planner's Review 7-13-22: *"Uses permitted in the Church Hill zone include (from the top of the Table of Uses, not including accessory uses) agricultural uses, single family houses, senior residential uses, a senior care facility, a nursing home, adult day care, an art center, a government building, a library, a museum, a church, a personal wireless facility, a restaurant, a craft shop, a gallery, a small retail store, an office, and light manufacturing."* Those uses are the clearly "intended" ones by those writing the Zoning.

Moreover, a commercial parking lot does not match the overall intent of the district: *"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…."* (Durham Zoning Ordinance, 175-44, p. 72)

**20. "I think we have to be careful on this one [Natural Resources CUP criterion], because this is directed at 'identified' natural, cultural, historic resources."** (Tobias, 6-22-22, 9:44pm)

See: Letter from Attorney Nathan R. Fennessy 7-12-22: "*On June 22, a member of the Board echoed February 2021 advice from the Town Attorney suggesting that the natural resources criterion in the Conditional Use article referred only to specially designated areas, such as those under Conservation Easements. As I've stated previously [see May 11, 2022], that interpretation is not consistent with the text of the zoning ordinance. 'Identified' and 'designated' are NOT narrowly defined, and, even more significantly, not all the nouns in that passage are modified by 'identified' and 'designated.' In short, I would argue that the Planning Board and public can and must draw on common meanings of the terms in Conditional Use criterion #5, particularly as regard to such features as stonewalls, cemeteries and, for the Church Hill Woods site, mature tree lines, wildlife habitat, scenic views, and viewsheds."*

**21. "All done number 2," CUP Criterion External Impacts.** (Consensus, 6-22-22, 9:21 pm)

Far from it in terms of review obligations! See, for example, Robin Mower 7-8-22: *"**Deleterious impacts were not addressed ('external impacts')** Remarkably, on June 22 the Board neglected to weigh ANY of the enumerated examples of deleterious impacts (noise, glare, fumes, et al.), let alone additional ('not limited to') deleterious impacts (e.g., air and water pollution, increased electrical use for air conditioning due to the heat island effect of a large parking lot). Historically, the 'meat' of the criterion, that omission is particularly notable—and concerning."* The PB did not return to address these issues on July 13, 2022, and it has yet to address the following basic requirements:

A. The Planning Board shall make findings of fact, based on the evidence presented by the applicant, Town staff, and the public, respecting whether the Conditional Use is or is not in compliance with the approval criteria of Section 175-23

**22. The significant elevation of grade (with 16,000 CY of overall net fill) is reasonable given that the site is a "hole" and fill will merely be "getting rid of the hole."** (Kelley, 7-13-22, 10:24 pm)

The wooded site slopes steeply (42-foot drop) toward the *even lower* elevation Chesley Marsh and College Brook. Raising the site's grade by up to 20 feet is *not* "filling in a hole"; it is creating a large mound that would loom over the adjacent wetland, College Brook, and the wooded path to Faculty Rd and Thompson Ln. As Michael Behrendt has written in his Planner's Review 2-23-22, the "The southerly end of the parking lot is about 34 feet above Chesley Drive…" To flatten out the whole area would require filling in the entire large "valley" up to the rear of Faculty Rd homes! In short, it is the proposed project that *creates* a giant vertical gap, or hole, in the existing topography rather than getting rid of one.

**23. The PB has no means to assess improper of amount of fill without clear answers to such questions as: "What's the number? What's the cubic footage? What's the tonnage? What is it? Give me a number! And I'll go with it, but I need a number."** (Tobias, 7-13-22, 10:26 pm)

If there were such numbers, a Code Enforcement official could determine whether a project was allowed or forbidden. The PB is charged with making reasonable judgments.

**24. "We've heard from three direct abutters, literally direct abutters to the site. One certainly has been outspoken against it [Andersen], one has been rather outspoken in favor it [Hall], one [Urso] in between, sort of in between. Isn't clicking their heels."** (Kelley, 6-22-22, 9:26pm)

See: "Toomerfs' Plan: Unequal Impact on Abutters," Joshua Meyrowitz 7-7-22.

See also: Letter from Attorney Nathan R. Fennessy 7-12-22: *"I was surprised to see a suggestion made by a Board member during your deliberations that one of my clients, the Urso family, was not actively opposed to these applications. As you know, my firm has written multiple letters and appeared before the Board at least half a dozen times on behalf of the Ursos and others to express serious objections to the Toomerfs' applications. You may also recall that Sandy Urso has submitted letters and spoken to you about her home being the one most negatively affected by the project, and her son, Kyle Urso, appeared before the Board multiple times to express the family's concerns with the Toomerfs' applications and the absence of the Urso ROW on the application submission. In recent months, Peter Murphy and Timothy Murphy (aka "Toomerfs") have spoken primarily through their attorneys, yet I doubt that any member of the Planning Board would now characterize the Toomerfs' advocacy for their parking proposal as being lukewarm."*

**25. "We heard a lot of testimony regarding this, but does not come into my consideration, is that…we give these things names is what they do, or it was an Urban Forest, the Church Hill Forest. And, you know, if we want to keep it that way, then we got to purchase it because outside of that, that current landowner is certainly has the right to develop that land as they see fit in conformance with our Zoning and Site-Plan Regs."** (Kelley, 6-22-22, 9:28 pm)

This comment sets up an false choice, the choice between approving the proposed parking lot or the town purchase of the wooded lot in order to preserve it. It ignores the possibility of a development that preserves a significant part of the urban forest, per CUP criteria.

This comment also falsely implies that residents have made up the concept of "urban forest" in order to oppose the deforestation of the site. This suggests that the Board has not given attention to the forest ecologist expert testimony of John Parry 3-21-22 & Richard Hallett 3-17-22 and the key issues in the now vast literature on urban forests and their environmental and fiscal implications. Thus, the stated "conformance with our Zoning and Site-Plan Regs" include

taking into account the status of an urban forest, not as it contrasts with our Zoning, but as it relates to CUP #5: “Preservation of natural, cultural, historic, and scenic resources.”

See also “Expert Testimony Requires Respect,” Robin Mower 7-19-22.

**26. “Extensive” fill in the site-plan regulations “is not a concept that makes sense,” because although 15,000 CY of fill “seems big to us, that doesn’t mean it’s big as related to other projects in construction…you know, fill a stadium.”** (Grant, 6-22-22, 9:41pm)

Planning Boards must assume that terms in Town regulations have meaning and make sense.

**27. The applicant is preserving natural resources by keeping “significant mature tree line amount on all sides.”** (Tobias and others, 6-22-22, 9:43 pm to 9:50 pm)

In actuality, the current plan dramatically reduces the mature tree line at the southern (Chesley Marsh) end, dipping down to only 50 feet, which, as residents have mentioned, could effectively mean a sparse buffer only a single-tree deep with visual gaps between trees, and which does *not* comply even with the already questionable Town Attorney advice on preservation. Per the Minutes for the Feb 17, 2021 Public Hearing, p. 3: “*Mr. Behrendt mentioned that he had spoken with the Town Attorney about the conditional use criteria (sic) regarding tree preservation. If there is a wooded area on a vacant lot, one cannot legally require someone to preserve the wooded area. A 100-foot buffer could legally meet the criteria (sic) of a ‘mature tree line.’”* The current plan has a 50% smaller “woodland buffer.” Moreover, construction is highly likely to damage trees in the buffer when trees are damaged, tree roots are cut, and soil is compacted by construction equipment.

Similarly, it’s difficult to imagine how replacing most of the woods on the site with a sharply elevated paved commercial parking lot (see image on first page of this document) with 24/7 lighting could be said to preserve a “wildlife habitat,” as Richard Kelley claimed at 9:43 pm on June 22, 2022. As the Durham Land Stewardship “wildlife habitat” document notes, wildlife need water, cover, cavities, nest trees, woody debris, and a variety of food resources. Will the deer, and foxes, and other wild animals, and the birds that now use Church Hill Woods as habitat really find an asphalt slab atop a fortress-like structure a suitable habitat?

**28. Conditional Use criterion #5, preservation of natural, cultural, and historic resources, does not apply strictly to the site because “it’s zoned for business purposes.”** (Tobias, 6-22-22, 9:46 pm)

The proposed parking lot is by Conditional Use in the zone it sits in, and CUP Criterion #5 applies to it. Moreover. as Eric Lund 7-1-22 writes, compliance to CUP Criterion #5 is not to be

assessed in relation *"to any hypothetical future development that the zoning ordinance may permit…. Thus, for example, the fact that a by right development on the site would result in removal of most of the urban forest on the site is irrelevant for considering whether the CU application meets the fifth criterion; if the proposed development would result in the removal of mature tree lines, as would certainly happen should the proposed facility be built, then it fails criterion 5."*

**29. The "high-bar" for a Conditional Use project should no longer be applied to Toomerfs because they, unlike another applicant [Mill Plaza], have revised their plans so many times, including offering dimmers on the lighting (to go to full illumination with motion detectors).** (Kelley & others, 6-22-22, 9:15 pm)

There is nothing in the Conditional Use ordinance that indicates suspension of the applicable criteria merely for changing the proposal or being more adaptable than another applicant. Moreover, the biggest changes in the Toomerfs' proposals resulted from the ZBA finding that the original proposal was not allowed on Church Hill. Then, embarrassing confrontations at the May 26, 2021 site walk regarding impact on the Ursos (see YouTube, at 03:00+) led to more changes.

Although some of the changes have been for the better, the current application before the Board has the highest elevation of grade of any prior plan (worst match to "surface parking," the only permitted use on Church Hill), the return of a retaining wall, which violates a ZBA ruling (and which we still have no images of as it relates to the "retaining slope"), and the smallest southern buffer (hardly matching the lush-sounding term "woodland buffer"). This "changed" plan should still fail most of the Conditional Use criteria, as over 100 citizen and expert comments and letters document.

For neighbors trying to sleep next to the parking lot, the addition of motion-sensitive full-illumination from dimmed illumination back to dimmed lighting would not clearly be a less-disturbing external impact on their homes that now sit in nighttime darkness.

In any case, the PB ought to recall that on May 11, 2021, at 10:22 pm, video, Mike Sievert indicated that the Durham PD was concerned about low illumination in a parking lot, and he had taken out the dimmers and even added more lighting poles (though of lower illumination).

As I wrote to the Board on July 8, 2022, "I would urge the Board…to look beyond the flurry of changes to see precisely what is now being proposed" as it relates to zoning criteria.

**30.** **Although "Impact on Properties Values" for a Conditional Use proposal is not supposed to be comparative to the property-value impact from other possible uses, "when we look at the impact on property values, we really do have to turn the page, back. Because those impacts to property values are due to the other elements, the 'external impacts.'… "*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*.'... And it's hard for me to look at this one without going back and without looking at other pages. Because clearly the impact on property values is due to those items on the other page."** (Kelley, 7-13-22, 9:38 pm)

> How could that possibly be a legitimate way to consider CUP criterion # 6, that is clearly meant to be a stand-alone concern to be evaluated apart from impact from other possible uses?

**31.** **"Writing up the Notice, that would be just a formality, and I hope opening up the Public Hearing again will be a formality as well."** (Parnell, 7-13-22, 10:30 pm)

> The Board has yet to discuss detailed "findings of fact" for each Conditional Use criterion, has not voted on anything, and has, so far, made no mention of most of the public and expert input it is required to take into account. Moreover, any Board that respects the integrity of the review process and public input would never announce in advance that shaping a Notice of Approval or a Notice of Denial is just a "formality" or that opening a Public Hearing is just a "formality" to be closed off again quickly, which expresses Planning Board contempt for public input.