

The “Retaining Elephant” in the Planning Board Room

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

“I respectfully ask that you make a specific finding as to whether [Toomerfs’ current proposal] is Structured Parking or Surface Parking and set forth what your reasons are.”

—Attorney Mark Puffer, PretiFlaherty, [June 8, 2022](#), Public Hearing, 10:44 pm

I write to remind Planner Behrendt and the Planning Board that the most recent time that the Board made anything that could be characterized as a “determination” regarding Toomerfs’ proposals’ match to “Surface Parking” was on May 12, 2021, about a month after the ZBA determined that the prior retaining-wall plan (previously accepted by the PB as Surface Parking) was, in fact, forbidden Structured Parking. On that May 12 evening, at 10:37:49 pm, the only Board member to speak in response to the Acting Chair’s query about whether the plan was “**Surface** Parking” finished his comment with: “I would not disagree with someone making a decision that it is ‘**Structured** Parking.’”

The Acting Chair then asked: “Any other comments on this?” And although that only speaking Board member had taken seven seconds to unmute his microphone during a hybrid meeting (which normally requires roll-call votes), the Chair waited only three seconds before saying: “Okay! I guess we will proceed.” Whether or not those seconds of silence comprised a legal “determination” is one of the many issues in the still-pending Meyrowitz-Andersen-Urso [Superior Court Appeal](#).¹

Yet, even if that May 12, 2021 “passive acceptance” of the plan was a valid PB determination, it has become functionally moot because the current plan bears little resemblance to what was promised by Toomerfs on that evening. As I have detailed in oral comments and other submissions,² the Toomerfs on May 12 proposed a major reduction in scale from the plan that had been rejected by the ZBA on April 13, 2021. The May 12 plan was for significantly less elevation of grade (5-6 feet lower), dramatically less fill (from 17,000 cubic yards, down to 11,000), a woodland buffer of 75 to 109 feet, and no retaining wall “whatsoever.”

The current plan before the Board (along with a few changes that could be considered improvements), strays significantly from anything that should be considered “at-grade surface parking.” It has the highest elevation ever in any Toomerfs’ proposal (about 20 feet with the asphalt), about 25% more fill than the May 12 plan, a reduced woodland buffer down to 50 feet (hardly a “woodland buffer” at all!) – **and the return of a retaining wall**. (These *overall* changes also raise questions about the claims by some Board members on June 22, 2022 that the Toomerfs’ willingness to make changes in their plan, in itself, is evidence of relative worthiness of the Toomerfs’ resulting

¹ See more details in “Attempts to Override April 13, 2021 ZBA Ruling Against PB & Toomerfs,” [J Meyrowitz 4-12-22](#) (text, 30 pages) and “Details on Meyrowitz-Andersen-Urso ZBA Appeal, July 13, 2021,” [J Meyrowitz 5-26-22](#) (PPT, 58 slides).

² See the one-page summary, “The May 2021 Church Hill Site Plan Impressed the PB – *Then It Disappeared!*,” [Joshua Meyrowitz 3-18-22](#); “Discounting Reality on Church Hill Woods,” [Joshua Meyrowitz 3-18-22 #3](#) (PPT, 44 slides); “Toomerfs’ Fill Numbers Game,” [Joshua Meyrowitz 5-4-22](#) (PPT, 2 slides); “Toomerfs’ Misleading Claims & Unrealistic ‘Renderings,’” [Joshua Meyrowitz 5-6-22](#) (PPT, 45 slides, with links to YouTube videos of key hearing excerpts).

plan, simply because the applicants for *another* plan that had been before the Board were less willing to make changes in *their* plans. I would urge the Board, instead, to look beyond the flurry of changes to see precisely what is now being proposed.)

As Attorney Puffer said to you on June 8, 2022:

Is this even allowed by Conditional Use? And that's the Structured Parking versus Surface Parking issue. We think it's already been decided that it's Structured Parking. That's what the Zoning Board decided on April 13 of 2021, with respect to the prior proposal that involved a retaining wall. And if you look at the minutes of the Zoning Board, and look at the entire video of what the Zoning Board did with respect to that prior application, it is clear that they were not making a decision with respect to a particular height or particular size of a retaining wall. Structured parking was any size structure which helped to "provide parking."³ And that's exactly what this does. It's Structured Parking. It's not allowed under your zoning ordinance.

Within a municipality, with all due respect to this Board, or the Code Enforcement Officer, or the Town Planner, it is the ZBA's interpretation that governs, which determines what the terms of the zoning ordinance mean.... The ZBA's April 13, 2021 decision was first appealed by Toomerfs, but then they withdrew that appeal, so the ZBA's decision stands.

Attorney Puffer also referred on June 8 to the April 15, 2021 email from Tim Murphy to the Town Planner, urging the redefinition of "at grade" in the Zoning Ordinance because their proposals are not, by current Zoning definitions, at grade at "the back."⁴ (That means their plans are forbidden on Church Hill.)

In response to a March 24, 2022 email query from Board Member Emily Friedrichs about retaining-wall issues raised in the [Letter from Attorney Fennessy 3-23-22](#) (and comments by Attorney Fennessy at the March 23 [Public Hearing](#)), Planner Behrendt (cc-ing the Planning Board) [wrote](#): "Thank you for your email but this would not be a good use of anybody's time now. It is obvious to Audrey [Cline] and me, and I think would be obvious to the board that a 6 foot retaining wall does not create structured parking (which really means a parking garage). **If they want to appeal this interpretation to the ZBA they are welcome to do that. If so, they can request a formal determination from the Planning Board first.**" [Bold added]

This request has clearly been made. Moreover, as I will argue, via an analogy, in a soon-to-be sent addendum to this submission, Planning Board members must put aside their *personal* opinions on the Surface Parking vs. Structured Parking issue and interpret the current Toomerfs plan in light of what the ZBA argued on April 13, 2021.

³ For a precise transcript of the ZBA deliberations, with video time cues, see "Five Misleading Toomerfs Claims about the April 13, 2021 ZBA Hearing," [Joshua Meyrowitz 5-11-22](#) (text, 18 pages)

⁴ "Toomerfs' Admission of Non-Permitted Use," [Joshua Meyrowitz 5-5-22](#) (PPT, 1 slide)