Threading the needle of PB assessment after being overridden by the ZBA

Addendum to my "The 'Retaining Elephant' in the Planning Board Room"

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

Academics like me are accustomed to thinking and explaining processes through analogies. In light of some of the things that Planner Michael Behrendt has written to Board members and to me about the return of a retaining wall to the Toomerfs' parking edifice plan, I write with an analogy to the case of an appeals court (analogous to a ZBA) overturning the decision of a jury (analogous to a Planning Board), as noted below. *[The details below are adapted from here and here.]*

A man convicted of raping a woman by pretending to be her boyfriend in the darkness of her bedroom was granted a retrial by a California appeals court, which overturned the man's rape conviction.

Julio Morales was accused of entering a woman's bedroom after her boyfriend had gone home and after the woman had fallen asleep, initiating sexual intercourse while she was sleeping and under the influence of alcohol.

The victim, who was not awake to see her boyfriend leave, believed that Morales was the one she was dating – until a ray of light flashed across his face, revealing his identity. The woman pressed charges, and Morales was convicted by a jury and sentenced to three years imprisonment.

Case closed, right? Not so fast!

California's Second District Court of Appeals *reluctantly* lifted these charges and called for a retrial after examination of the 1872 law drawn on at trial, which considers a crime a rape if the sleeping or unconscious victim "submits under the belief that the person committing the act is the victim's **spouse**."

If the victim had been married, the act would have been considered a rape, but the law does not protect against a perpetrator deceiving a woman into believing he is her boyfriend.

"A man enters the dark bedroom of an unmarried woman after seeing her boyfriend leave late at night, and has sexual intercourse with the woman while pretending to be the boyfriend," the court said in its ruling. "Has the man committed rape? Because of historical anomalies in the law and the statutory definition of rape, the answer is no, even though, if the woman had been married and the man had impersonated her husband, the answer would be yes."

In all likelihood the jury members (parallel to Planning Board members) would still believe that the woman had been raped. But their *personal* views became irrelevant after being overridden by the

appeals court. At most, the jury members could be asked to restate their views *in light of the appeals ruling*. But, actually, they have been overridden by the appeals court, and they no longer have any standing in the case at all, which rests fully with the Appeals Court.

Furthermore, even the Appeals Court judges' personal views (they were reluctant to overturn the conviction because they also *personally* thought it was rape) became irrelevant once they read the law that was being used to convict the man.

It took me a while, but I've come to understand that this is the same principle underlying the following excerpt from the Letter from Attorney Nathan R. Fennessy 5-10-22, asking the Planning Board to respect the April 2021 ZBA ruling on retaining wall or, at the very least, consider the return of a retaining wall *in light of the ZBA's April 13, 2021 deliberations regarding a retaining wall (of any height)* and not the Board members' personal views.

> "We would encourage the Planning Board to do so given the prior determination made by the ZBA in the April 2021 ZBA Decision. Although members of the Board may disagree with that ZBA determination – and likely do given the Board's prior determination that the inclusion of an even larger retaining wall did not constitute structured parking – the Board is ultimately bound by the ZBA's determinations regarding the interpretation of the DZO. Given what transpired on April 13, 2021, it is the ZBA – not the Planner, the Code Enforcement Officer, the Town Attorney, the Town Administrator, the Town Council or the Planning Board – which has the authority to interpret the zoning ordinance."

Indeed, even the *current* **ZBA** members' personal views would be technically irrelevant, as they ought to evaluate the case in light of the final, closed decision of the April 13, 2021 ZBA.

The prime issue is that, contrary to false claims by Toomerfs' attorneys, the April 2021 ZBA did not specify any particular *height* of a retaining wall that would change a plan from "at-grade surface parking" to "structured parking." Indeed, they explicitly avoided doing so.

To see the evidence supporting this description of what the ZBA actually decided, see the precise transcript of the April 2021 ZBA deliberations on pages 7-18 here: "**Five Misleading Toomerfs Claims about the April 13, 2021 ZBA Hearing,"** Joshua Meyrowitz 5-11-22 (text, 18 pages)

As I note there, I also confess to some prior misunderstandings of the situation at the ZBA until I carefully re-watched the hearing and prepared the transcript. For example, I did not at the time grasp the distinction between a "fence" and a "wall." Also, until I reviewed the deliberations carefully, I did not realize that Paul Rasmussen's summary (emailed to the PB at 10:34 pm on April 13, 2021) was correct: "Effectively, the ZBA determined that if **a retaining wall of any size** is used to provide parking, then it is STRUCTURED PARKING." (See Joshua Meyrowitz 4-12-22, p. 5.)