Need for more-informed PB "determination" regarding Church Hill woods-to-parking plan

To: Durham Planning Board / **From:** Joshua Meyrowitz, 7 Chesley Drive / **2 September 2021**

On July 13, the ZBA denied the appeal that I filed along with the Andersen and Urso households. We argued that a plan to build retaining slopes to elevate the grade on Church Hill by as much as 17 feet with thousands of cubic yards of fill was not "at-grade surface parking" – not per our Zoning Ordinance (ZO), not per basic meanings of words, not per the core of the April 13 ZBA ruling with a differently composed Board, and most certainly not per an email admission by applicant Tim Murphy when he thought he could influence a Planning Board effort to redefine ZO terms in his favor.

Because the core of our appeal was based on a so-called "administrative decision" that the Planning Board made on May 19, 2021 (or, perhaps, did *not* actually make, given the ambiguities surrounding it that we detailed, and that Code Administrator Audrey Cline and Town Planner Michael Behrendt and even Toomerfs Attorney Kieser acknowledge), and *because you, as Planning Board members still have a chance to make a different determination based on details of Toomerfs plans that were not available to you on May 19, 2021, I share here our detailed 12-part appeal for rehearing at the ZBA.*

You could, of course, make this appeal for a rehearing moot with a new determination, via a full deliberation and vote, and based on a wider set of facts than was available to you on May 19, 2021.

1) The ZBA erred in accepting the claim that a legally appealable administrative decision had indeed been made by the Planning Board on May 12, 2021, when the specifics of the May 12 meeting do not support that conclusion.

2) Although the ZBA ultimately made the correct decision in affirming the Board's standing with respect to a Planning Board Zoning determination, the ZBA erred in giving undue time and consideration to the Toomerfs' attorney's spurious argument about the Board not having such standing when the underlying site plan is for a Conditional Use.

3) The ZBA erred on July 13 in giving no noticeable attention in its deliberations (except in the comments of the one ZBA member who voted in support of our appeal) to the compelling arguments from two key sources as presented in our appeal document and PPT presentation, that the April 13 ZBA ruling on the "retaining walls" plan was still germane to the revised "retaining slopes" plan.

4) The ZBA erred in not doing due diligence in pressing applicant Tim Murphy to explain to the ZBA exactly how the new and old plans differed in terms of being or not being "at grade" at the rear (the Chesley Marsh end of Lot 1-16). In a related oversight, the ZBA also did not

question Planner Michael Behrendt on this issue – which would have revealed that the plans were identical in terms of change of grade.

5) The ZBA erred in explicitly stating (and acting on) its intent to ignore legally acquired and centrally relevant material about Planning Board efforts to change the zoning definitions immediately following the April 13 ZBA ruling overriding the Planning Board and, in particular, Tim Murphy's email admission that, by current zoning definitions, their plans – both old and new versions – are *not* "at-grade" at the Chesley Drive rear of Lot 1-16.

6) The ZBA erred in allowing Michael Behrendt (who promised only a very brief comment about the Zoning definitions) to speak at great length on a type of "research" that should have been ignored by the ZBA.

7) The ZBA erred in deferring to the Planning Board out of misplaced (but also irrelevant-to-its-mission) fear of "ping-ponging" back and forth between ZBA and the Planning Board. Moreover, the ZBA explicitly stated a willingness to abdicate its responsibility to get involved in citizen appeals related to Planning Board decisions. Indeed, the ZBA even stated a bias in favor of not slowing down *developers'* applications, thus expressing a bias against the rights of abutters and affected citizens, such as the appellants in this case.

8) The ZBA chair erred in inappropriately mocking the quality of the April 13 ZBA deliberations (where he was overruled by the majority of the ZBA), in effect, "guiding" new and old members to vote his way this time on July 13.

9) The ZBA erred in interrupting Mr. Meyrowitz's response to unfounded attack by Toomerfs' attorney on the integrity of his PowerPoint presentation, with a Board member even adding his own inappropriate critiquing of a perfectly legitimate visual analogy about how overhead images of structures/designs do not reveal mass, height, etc. (PPT Slide #26.)

10) The ZBA erred in ignoring our argument that the Toomerfs and Town Planner's conceptions of the parking proposal inappropriately rendered the term "at-grade" meaningless.

11) The ZBA erred in mostly ignoring our repeated written and oral pleas to focus on our claim (that the proposal was NOT "at-grade surface parking"). Instead the Board essentially argued that what was proposed was not a "parking garage," a position that we agreed with, but saw as irrelevant.

12) The ZBA erred in straying from the core of its mission, as cited in RSA 674-33, to respect the "spirit of the ordinance."

TOWN OF DURHAM
ZONING BOARD OF ADJUSTMENT
8 NEWMARKET RD
DURHAM, NH 03824
PHONE: 603/868-8064
www.ci.durham.nh.us

REQUEST FOR REHEARING

A Request for Rehearing must be filed with the office of Planning and Zoning at the Durham Town Hall within thirty calendar days of the decision date of the Zoning Board of Adjustment. According to RSA 677:3, a request for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." The Zoning Board of Adjustment has thirty (30) calendar days to either grant or deny the application for rehearing once it has been filed.

Names of Applicants: Joshua Meyrowitz
Peter Andersen & Martha Andersen
Michael F. Urso & Sandra A. Ceponis

Addresses: 7 Chesley Drive / Joshua Meyrowitz Rev Trust [Map 5 / 7-58]
8 Chesley Drive / Andersen Williams Group, LLC [Map 5 / 7-59]
5 Smith Park Lane / Urso & Ceponis [Map 5 / Lot 1-13]

Phone #s / Email: 603-868-5090 – Meyrowitz <Prof.Joshua.Meyrowitz@gmail.com>
603-868-1019 – Andersen <M-andersen@comcast.net>
630-997-1699 – Urso & Ceponis <sandysu777@hotmail.com>

Owner of Property Concerned: Toomerfs, LLC (c/o Peter Murphy)
Address: 37 Main Street, Unit O, Durham, NH 03824

Location of Property: "19-21 Main St"
Tax Map & Lot Numbers: Map 5 / Lots 1-10, 1-9, 1-15, 1-16

Date of Zoning Board Decision: July 13, 2021

Reason for Request for Rehearing:

See attached details of the grounds on which we believe the July 13, 2021, ZBA decision is unlawful and unreasonable.

REQUEST FOR REHEARING

We appreciate the extensive efforts made by the Zoning Board of Adjustment in hearing our Appeal of Administrative Decision on July 13, 2021 (video & minutes), as detailed and supported by the following documents submitted in advance of the July 13 Public Hearing:

- Meyrowitz/Andersen/Urso Appeal of Administrative Decision Application (10 pages)
- Meyrowitz/Andersen/Urso Supporting Appendices (24 pages)
- Comments from Robin Mower 7-12-21 (6 pages)
- Letter from Attorney Mark Puffer, 7-13-21 (4 pages)

and also as summarized in the PowerPoint (PPT) document (47 slides) presented by Joshua Meyrowitz on July 13, 2021.

Note that the "Toomerfs" are Peter Murphy (Massachusetts resident) and Tim Murphy (Rhode Island resident) and that the two Murphys share a last name but are not related to each other. The Toomerfs were represented at the July 13 hearing by Attorney Monica Kieser. Toomerfs engineer is Mike Sievert.

Despite our appreciation for the ZBA's time and attention, we believe that the decision that was made (by a vote of 4-to-1) against our appeal was logically and legally flawed for the following reasons:

1) The ZBA erred in accepting the claim that a legally appealable administrative decision had indeed been made by the Planning Board on May 12, 2021, when the specifics of the May 12 meeting do not support that conclusion.

ZBA accepted as a "determination" something that was ambiguous even in the minds of experienced Town Staff: As detailed in our core appeal document, in the emails submitted in our appendices, and in July 13 Public Hearing testimony, Zoning Administrator Audrey Cline declined to respond to a June 8 email query (and expressed uncertainty in a follow-up June 9 phone call) from Joshua Meyrowitz about whether a legally appealable administrative decision had even occurred on May 12, given the **highly ambiguous circumstances of that "decision"** as enumerated in our appeal (see June 11 Appeal document pp. 1-3; Appeal Appendices, pp. 1-5; and Presentation PPT, slide 3) and summarized further below.

Just-in-case appeal. Instead, Ms. Cline deferred to Planner Michael Behrendt, who granted in a June 9 email to Mr. Meyrowitz "that there is some gray area" regarding whether a formal "decision" had been made, but who nevertheless advised filing our appeal in a timely manner (by June 11), in case it was later determined to be an actual "decision." (See p. 4 in our Appendices.)

Subsequently, on June 15, Mr. Behrendt advised Mr. Meyrowitz by email that:

> "I contacted the Town Attorney last Thursday morning for her guidance on whether the discussion with the Planning Board on May 12 constituted a determination, which would be the basis for an appeal. Or if it did not, in which case I could ask the board for a formal vote on the matter at an upcoming meeting. She was not able to get back to me until this morning and conveyed that she believes the Planning Board made the decision on May 12 and that therefore the timeframe for an appeal would go from that date (to June 11)."

Multiple deviations from a clear Planning Board "decision." Neither Town Attorney Laura Spector-Morgan's communications with Planner Behrendt nor her reasoning in supporting her belief that a formal "decision" had been made on May 12 has been conveyed to the appeal applicants, and we are thus unable to respond to those specifics. Nevertheless, we believe that the ZBA was unduly deferential to Planner Behrendt and the Town Attorney's reported agreement with him, when the ZBA should have recognized that no formal decision had been made, given the following multiple deviations from proper and logical procedures for a Planning Board's "decision," particularly under the technological nature and legal requirements for Zoom meetings, still in effect on May 12:

(a) There was no roundtable Planning Board discussion of the topic; (b) the *only* Planning Board member to speak on this issue during this "decision" portion of the meeting spoke almost exclusively in *disagreement* with Mr. Behrendt's opinion (James Bubar: "I would not disagree with someone making a decision that it is 'Structured Parking.'")[1]; (c) no Board members put forward or seconded a formal motion; (d) the Board did not take any sort of vote; and (e) the Planning Board Chair allowed only three seconds of time for other Board members to respond after Mr. Bubar spoke against what came to be called the Planning Board "determination," before

[1] To complicate things further, Board Member Richard Kelley, who left the meeting before Chair Parnell put the question to the full Board, had previously commented briefly that he thought that both the revised plan *and* the original plan were "surface parking." Yet that statement indicates that Mr. Kelley spoke against the official Town determination from the ZBA, which ruled on April 13 that the prior plan was "Structured Parking." Thus, such an "it's the same as before" argument actually lends support to our position that the revised plan is also prohibited per the Town's April 13 ZBA ruling and should not be allowed to proceed because of that.

the Chair turned *immediately* to a different topic. Three seconds is an interval shorter than Planning Board members have typically needed to unmute their Zoom microphones (and less than half of the time that Mr. Bubar, in this very instance, took to be heard). Simple observations of Town meetings indicate that, even beyond unmuting-microphone time, Board members usually need more than three seconds to feel comfortable jumping in to a conversation without being called on individually for their input. In any case, what occurred in those three seconds was clearly far short of a formal Board "decision," with a motion and a roll-call vote, as *required* for Zoom meetings.

Toomerfs' attorney also sees the issue of a decision as "imperfect" and "unclear." Please note that even the Toomerfs' counsel, Monica Kieser, conceded at 7:37:00 pm on July 13: "We don't disagree that the Planning Board made, to the extent that they made, sort of, this imperfect 'administrative decision,' or this unclear 'administrative decision.'"

The ZBA should have recognized a "premature determination." Moreover, this so-called "determination" occurred at a moment in time when there was not enough detail on the revised proposal for much reasonable assessment, in that (a) the Board had been shown only a flat, two-dimensional "from-above image" of the proposed *parking surface* (that is, nothing that would depict the height, scale, mass of the proposed mound or its appearance from abutting and nearby properties) and given that (b) May 12 was two weeks *before* a site walk would be held for the plan (May 26), a site walk that led to major perceptual shifts – even gasps from attendees – as described in a Citizen Comment on the proposal by Robin Mower 6-4-21.

Additionally, the continued Public Hearing on the revised Toomerfs plan, originally scheduled for June 9 (two days before we filed our appeal), and which promised to provide more information on the details of the plan has been repeatedly postponed (now tentatively scheduled for August 25, 2021). Thus, the public and the Planning Board and the ZBA remain in the dark on key details and renderings, including those suggested by Planner Behrendt for the postponed August 11 Public Hearing, Planner's Review 8-11-21. A Planning Board meeting that *followed* receipt of site-plan details would be the first possible *appropriate* opportunity for the Board to discuss and vote on what type of parking is proposed, per our Zoning definitions, and in light of the April 13 ZBA ruling.

The ZBA should have realized that the Planning Board was in the dark on May 12 regarding the key applicant admission. Quite significantly, we have seen no indication of any kind that when the Planning Board met on the supposed "administrative decision" day, May 12, 2021, that Board

members knew about the one-sentence email sent by Tim Murphy to Michael Behrendt on April 15 at 4:34 pm. This strikingly revelatory email was sent two days after our earlier successful appeal to the ZBA about a similar "administrative decision" on March 10, 2021. That is, the Murphy email was sent one day after the Planning Board voted to establish a subcommittee to work on new parking definitions. Moreover, the Murphy email was sent less than 2.5 hours after Planner Behrendt sent a 2:08 pm April 15 email (subject "Planning Board recap and preliminary agendas") with the following in bolded red text in the recap of April 14:

> **"In light of the ZBA's decision about 19-21 Main Street pursuant to the current definitions in zoning for surface parking and structured parking and concern about the ambiguity of those definitions the Town Planner will work with board members Paul Rasmussen, Barbara Dill, and Chuck Hotchkiss to revise those definitions and to prepare other zoning amendments for items (most likely fairly straightforward items) that are backlogged."**

It's difficult to interpret Tim Murphy's 4:34 pm email from that day as anything other than an effort by a Rhode Island based developer to engage with a Durham Zoning redefinition effort and to suggest that the Planning Board also change the definition of "at-grade" in the Zoning Ordinance in a manner that would fix a "problem" with the Toomerfs parking plans, under current Zoning definitions, a problem manifested in the ZBA's April 13 ruling against Toomerfs. Tim Murphy's email describes succinctly: **"'At grad' [sic] needs some work too—for example, our proposal is 'at grade' from the front, but not from the back, and any lot with a retaining wall around any of it's (sic) border (sic) could be called not at grade."**

See p. 19 of our Appendices for this full Tim Murphy email, as obtained by Kay Morgan in a Right-to-Know request surrounding the Planning Board's efforts to move quickly to revise the parking definitions at the heart of the April 13 ZBA vote. That effort started only 75 minutes after the ZBA vote in our favor, with a 10:34 pm email to the Planning Board from Chair Paul Rasmussen. (See pp. 15-17 in our appeal Appendices for that Rasmussen email and subsequent ones the next day.) As Kay Morgan wrote to us, explaining her RTK request and why she thought the resulting material was relevant to our appeal: "Paul Rasmussen had recused himself from discussion/deliberation on the Parking proposal b/c of a conflict of interest and this move on his part seemed unethical to me, and potentially an illegal conducting of business outside of the public eye. It was the unethical nature of that email that motivated me to file the RTK request. And Tim Murphy's email represents someone who doesn't even live in Durham attempting to influence our zoning rules/definitions."

As Michael Behrendt conceded at 8:03 pm on July 13, the rush to redefine terms in the Zoning Ordinance at the heart of a ZBA decision immediately after the Planning Board was overridden by the ZBA – overridden in relation to those very terms – was "not a good look" (though he excuses it as a well-intentioned effort). And because these redefinitions were halted by Durham Town Administrator Todd Selig (see Planner Behrendt's "Parking Definitions" Memo to PB (w/ Selig "pause" email) 4/23/21), the redefinition "work" Mr. Tim Murphy said was needed regarding his not "at-grade" proposal has not taken place. This makes that email all the more significant in that it still applies to current Zoning definitions.

Had the Planning Board known on May 12 that the applicant had conceded the main point at the core of the "at-grade" question (that the rear of the lot would *not* be "at-grade" by current Zoning definitions), there would likely have been a more robust and extensive discussion and debate on whether the revised plan was "at-grade surface parking." The Planning Board, after all, knows well, what the ZBA did not seem to grasp fully on July 13: **that both the original Toomerfs' plan ("retaining walls" plan) and the revised plan ("retaining slopes" plan) involve the *same* 17-foot elevation of grade with tons of fill on the low-lying rear lots.**

Moreover, as Robin Mower details in her July 12 letter: Nearly 75% of the parking spots would be on these legally distinct southern lots "with significant 'natural elevation of the ground surface prior to construction'…. In other words, by inference, the surface on which vehicles would park would not be 'at-grade' and thus not 'surface parking.'"

False assumption about Planning Board opportunity to weigh in. In a related error on July 13, the ZBA mistakenly proceeded on the false impression that the Planning Board actually had had an opportunity to discuss the issues raised in our appeal prior to the July 13 ZBA Public Hearing. In answering a question, Michael Behrendt said that the Planning Board had "met" following the May 12 so-called "decision" and after our June 11 filing of a ZBA appeal, thus mistakenly conveying the impression to the ZBA that the Planning Board members had had an opportunity, per ZBA Chair Sterndale's query, to "weigh in" on key aspects of our appeal and had chosen not to. (Such key aspects would include whether a real "decision" had occurred on May 12, as well as Tim Murphy's admission that "our proposal is 'at grade' from the front, but not from the back.…")

In fact, although Mr. Behrendt's statement was strictly correct (that the Planning Board was made aware of our appeal and had *met* since we filed it), he neglected to clarify immediately (and did so

only after Mr. Meyrowitz was later allowed to speak to correct the error) that the Toomerfs proposal has not been on the Board's agenda since May 12, other than for a May 26 site walk (with no "deliberation" opportunity) and is delayed again, at present, to Aug 25.

Additionally, Planner Behrendt's assertion that Planning Board members *could have* chosen to comment by email stretches the notion of "opportunity to comment" beyond a reasonable point and also raises potential right-to-know violations. (As the NH Municipal Association writes: "Under amendments that became effective in 2008, public bodies may not conduct official business via e-mail.") In any case, Planning Board policy is not to discuss applications in the absence of the applicants and an agenda item on the application. The simple fact is that the Toomerfs have not been before the Planning Board at a regular meeting since the "decision" day of May 12.

In short, a true deliberation and *informed* vote on the nature of the proposed parking did not occur on May 12. Three seconds of Zoom-meeting silence is neither a Board vote nor a formal "determination." The ZBA ought to have ruled, based on the facts detailed in our appeal, that no appealable administrative decision occurred on May 12. Thus, the Board ought to have returned the question to the Planning Board for a formal roundtable discussion, motion, and vote – *after* the details of the mass and scale and visualizations of the plan are to be provided by the Toomerfs.

*** * ***

2) Although the ZBA ultimately made the correct decision in affirming the Board's standing with respect to a Planning Board Zoning determination, the ZBA erred in giving undue time and consideration to the Toomerfs' attorney's spurious argument about the Board not having such standing when the underlying site plan is for a Conditional Use.

As detailed in Robin Mower's letter to the ZBA, in support of our appeal, the Toomerfs argument about no ZBA standing has been presented with respect to both of our ZBA appeals and is incorrect in both instances, because the nature of an underlying site plan is distinct from a zoning determination:

> "The property owners argue in their NH Superior Court appeal of the ZBA's April 13, 2021, decision that the ZBA had no purview since the application to the Planning Board requires a Conditional Use Permit.

> To the contrary, Mr. Meyrowitz's current appeal of an Administrative Decision focuses on the Planning Board's authority relative to two 'generally-applicable,' or 'umbrella' definitions in the zoning ordinance rather than on any element inherent in, or specific to, the Board's authority over adopted innovative land use controls, such as a Conditional Use Permit (CUP) review. Likewise, the administrative decision concerned definitions not unique or specific to Conditional Use Permits. The administrative decision was not made relative to an innovative land use control, so the appeal may appropriately be brought before the Zoning Board."

Ironically, the Toomerfs' appeal of the April 13 ZBA ruling to Superior Court (Docket #219-2021-CV-00186), filed by Attorneys R. Timothy Phoenix and Monica F. Kieser, clearly lays out (on page 8, paragraph 33), how a zoning determination is distinct in timing and nature from a final approval of a site plan and how the former is "ripe and appealable [to the ZBA] when made."

> "In the context of Planning Board action on Site Plan Review, one need not wait for Site Plan Approval before appealing threshold issues to the ZBA. The New Hampshire Supreme Court has opined that a planning board's decision about a zoning ordinance is ripe and appealable when made. Atwater v. Town of Plainfield, 160 N.H. 503 (2010). 'It makes little sense to require that the planning board's approval of a site plan be final before a party can appeal to the ZBA on a zoning issue including something as fundamental as whether the proposed use is allowed by the zoning ordinance.' Id. (quotations omitted)."

Moreover, as Robin Mower further notes, "The zoning ordinance definitions at the heart of Mr. Meyrowitz's appeal **apply equally to the review of site plans submitted unaccompanied by applications for a Conditional Use Permit.** In contrast, sections of the zoning ordinance specific to Conditional Use Permits apply uniquely to CUP applications, whether Article VII or sections within Wetland Conservation or Shoreland Protection Overlay Districts, for example."

In short, should our rehearing request be granted, the ZBA should give no further attention to the Toomerfs' unfounded challenge to the ZBA's standing on zoning definitions at the heart of this appeal.

* * *

3) The ZBA erred on July 13 in giving no noticeable attention in its deliberations (except in

the comments of the one ZBA member who voted in support of our appeal) to the compelling arguments from two key sources as presented in our appeal document and PPT presentation, that the April 13 ZBA ruling on the "retaining walls" plan was still germane to the revised "retaining slopes" plan.

Ignoring Planning Board member James Bubar. The issue of "fill" was raised by Planning Board member James Bubar on April 14, 2021 (video) (minutes) – the day after the ZBA overruled the Planning Board on the earlier Church Hill parking plan, which had included a retaining wall. Mr. Bubar said: "if I put 20 feet of fill on top of the grade at the time of the application…that's effectively a wall. It's doing, it's serving the purpose that that wall served. And I would, quite frankly, if I was on the ZBA, I would probably go down the same path that says, 'Nah, I don't like 20 feet of fill'…. I maintain that fill, to that extent, if you're bringing in rocks so that you can build a platform, that's a structure…. if you have to put in 20 feet of rocks, you're putting in a structure." (8:11 pm; see PPT Slide # 16.)

As the only Planning Board member who "deliberated" on the May 12 "decision day"), Mr. Bubar further said: "My issues: If I were to neatly pile seven feet of granite block on my property line, I would get a penalty, **because anything over 6 feet is a wall.** But what I'm hearing from our Planning Board is that if I bring in a bunch of dump trucks and dump rocks on the ground, and go up 15 feet, that's okay." (PPT Slide #23.)

ZBA ignored Planner Behrendt's memo regarding what the April 13 ZBA ruling does and does not apply to. In a memo to the Planning Board dated April 28, 2021 (but written the week before), Planner Behrendt acknowledged the applicability of April 13 ZBA ruling *to proposals with tall retaining structures – that is, to proposals just like the one before the ZBA on July 13.* (See PPT, slide #42.)

> "I have spoken with Audrey Cline, Zoning Administrator, and we agree that this decision of the ZBA likely will *not* have broader impacts. I think it was a one-off interpretation of the ordinance based upon the particular nature of the design of the parking facility proposed at 19 Main Street. I am not concerned it will have an adverse impact upon construction of a typical parking lot. However, **if we were to receive an application for a parking lot…with a 20 foot retaining wall, then we would, of course, need to consider the application carefully. But it is extremely unlikely we will see such an application."** – "Parking Definitions" April 28 2021 Memo to PB (emphasis added)

Not long after Mr. Behrendt wrote that assessment, with Audrey Cline's input, the Toomerfs submitted a "retaining slopes" plan precisely of that "extremely unlikely" scale. Per the Behrendt memo above, the ZBA ruling of April 13 ought to apply to the new plan as well. That is, a plan with close to 20 feet tall retaining slopes is also NOT "at-grade surface parking." Even at the July 13 ZBA hearing, Mr. Behrendt acknowledged that a plan for 17-feet tall retaining slopes is highly unusual and thus, by clear implication, not a typical "at-grade surface parking lot."

On a closely related error, the ZBA members (except the one who voted in favor of our appeal) gave no noticeable consideration in its deliberations to the arguments presented by Mr. Bubar (and cited and elaborated on by Mr. Meyrowitz) that the "function," not the material used, determines when something is or is not a "structure." As presented in our PPT slides #18, 19, and 20: "In the *original* 'retaining walls' design, the many tons of fill were *contained within* the walls." The walls were the structure and the fill was its content. "In the revised plan, part of the fill is repurposed to create 'retaining slopes'" that serve the same structural purpose served by the retaining walls.

As we noted on slide #21: "Without the multi-sided retaining slopes – dramatically elevating the grade of the Chesley Drive side of the proposal and "providing" parking – the proposed parking structure of thousands of cubic yards of fill and asphalt would collapse."

We also cited Planning Board member James Bubar comment about the need to focus on "function," not "materials": "I am concerned that we don't focus on the materials being used but the function being performed…. a pile of stones can be considered a 'structure' as it is built or constructed with a fixed location on the ground." (Email to Michael Behrendt & Paul Rasmussen, April 15, 2021, 11:06 am; see PPT slide #20.)

Similarly, the ZBA erred in giving no noticeable attention to the "threshold issue" for what height of fill would tip from "at-grade surface parking" to "structured parking." This was brought up by Mr. Meyrowitz in his presentation in reference to Robin Mower's July 12 letter, where she writes (in part): "What if it were 20 feet of fill, or 25, or 30 feet? Is there a tipping point where engineering could not accomplish the goal merely via supportive fill, i.e., without a supportive structure? What is the threshold for 'structured parking?'" Put differently, the ZBA erred in not considering at what point of elevating grade – 20, 30, 40, 50 feet? – would a parking proposal no longer be for "at-grade surface parking."

* * *

4) The ZBA erred in not doing due diligence in pressing applicant Tim Murphy to explain to the ZBA exactly how the new and old plans differed in terms of being or not being "at grade" at the rear (the Chesley Marsh end of Lot 1-16). In a related oversight, the ZBA also did not question Planner Michael Behrendt on this issue – which would have revealed that the plans were identical in terms of change of grade.

Put differently, the ZBA erred in not pressing Tim Murphy on why exactly his not-at-grade at the back email was not relevant to *both* new and old proposals. This oversight was particularly glaring in that our appeal documents and presentations emphasized repeatedly the argument that the change of grade with fill was the same in both old and new plans as a response to Tim Murphy misleadingly insisting that his email applied only to the retaining wall plan.

In short, the ZBA ignored its obligation to try to determine which side was telling the truth on this core question. Moreover, since the truth would have been easy to acquire and since the truth was on our (the appellants') side, this lack of due diligence on a basic factual matter functioned as significant bias against our appeal during the July 13 ZBA hearing.

*** * ***

5) The ZBA erred in explicitly stating (and acting on) its intent to ignore legally acquired and centrally relevant material about Planning Board efforts to change the zoning definitions immediately following the April 13 ZBA ruling overriding the Planning Board and, in particular, Tim Murphy's email admission that, by current zoning definitions, their plans – both old and new versions – are *not* "at-grade" at the Chesley Drive rear of Lot 1-16.

At 9:07:47 pm, ZBA Chair Chris Sterndale said: "If we're speaking into the record, I'll say I think on behalf of the Board, I think we're pretty clearly focused on the core issues here. A number of things came up in testimony about emails and right-to-knows, and I don't think those are really factored into our thinking. And, you know, I don't want the record of the public to think that we're looking any further afield than the very specific question that the Planning Board made a decision on."

In short, the ZBA erred by turning a blind eye to highly relevant emails acquired by legal right-to-know requests, and that are directly related to "the very specific question that the Planning Board made a decision on."

* * *

6) The ZBA erred in allowing Michael Behrendt (who promised only a very brief comment about the Zoning definitions) to speak at great length on a type of "research" that should have been ignored by the ZBA.

In his longest statement starting at 8:01:50, Planner Behrendt gave a rambling and disorganized nearly 13-minute comment, with a focus *not* on the language of the Zoning Ordinance, which is the core of what the ZBA focus ought to be, but on things Mr. Behrendt found by "Googling" and his personal assumptions about "intent," focusing on a "parking garage" as the exemplar of "structured parking." (See our PPT slides #33 to #35 for our arguments for why these personal Behrendt beliefs – both in his March 5 "opinion letter" and this July 13 comment should have been ignored by the ZBA.)

*** * ***

7) The ZBA erred in deferring to the Planning Board out of misplaced (but also irrelevant-to-its-mission) fear of "ping-ponging" back and forth between ZBA and the Planning Board. Moreover, the ZBA explicitly stated a willingness to abdicate its responsibility to get involved in citizen appeals related to Planning Board decisions. Indeed, the ZBA even stated a bias in favor of not slowing down *developers'* applications, thus expressing a bias against the rights of abutters and affected citizens, such as the appellants in this case.

Commenting initially on whether the ZBA has jurisdiction over a zoning definition dispute, ZBA Chair Chris Sterndale instantly transitioned (at 7:41:55 pm) from: "Yeah, this is narrow enough in terms of interpreting a definition that I don't think it's an overreach for us to opine" – with no discernible pause to – "I am *very* concerned about the ping-pong question. And I am loathe to get in the middle of Planning Board proceedings…. And if we find ourselves in this position every month on this case, then you know, we probably have to think about it a little differently…. You know, the *last* thing, we're here to be an outlet for people's, to protect people's property rights. The last thing we need to be is an obstruction to the process and a vehicle for slowing down a fair consideration of a question. So, I'm comfortable with us tackling this on this narrow basis, one more time."

This statement seemed to suggest that developers' property rights (Toomerfs in this case) trump the rights of abutters and other citizens (we, the appellants, in this case). Moreover, this monthly "ping-pong" concern is a wild misconception of what could happen with a site-plan application

where it has been the Toomerfs and the Planning Board, not those appealing to the ZBA, who have just repeated the "it's just 'surface parking'" claim for basically the same elevated parking plan that was ruled against by the ZBA on April 13.

Additionally, for the record, the April 13 hearing was on the topic of our *only* prior appeal to the ZBA, and April and July have some other months between them. Moreover, had the Planning Board simply respected the full implications of the April 13 ZBA ruling (that is, how it also applies to the revised plan, with similar alteration of grade) or had we received the due consideration on July 13 that we received on April 13, our interactions with the ZBA would be over. The 42-foot drop in elevation from Main St to Chesley Marsh boundary limits parking lot options to basically what has already been proposed and thus ping-ponging options are narrow.

Most significantly, the ZBA should not be abdicating its very responsibility to "get in the middle of [such] Planning Board procedures." Getting involved in disputes about the Planning Board "Zoning determination" process, such as in the current appeal, is precisely the ZBA's essential mission and responsibility.

Finally, we note that the "ping-pong" metaphor was first presented by the Toomerfs' attorney (at 7:31:40 pm) and that by embracing it, the ZBA displayed bias toward the Toomerfs' position and bias against our rights to file legally grounded appeals to the ZBA.

* * *

8) The ZBA chair erred in inappropriately mocking the quality of the April 13 ZBA deliberations (where he was overruled by the majority of the ZBA), in effect, "guiding" new and old members to vote his way this time on July 13.

At 9:03:45 pm Chris Sterndale said: "I appreciate the lesson in legislative interpretation or whatever that was. This conversation I thought was actually better than the last one that you all did not have to suffer through, but I end up in the same place."

* * *

9) The ZBA erred in interrupting Mr. Meyrowitz's response to unfounded attack by Toomerfs' attorney on the integrity of his PowerPoint presentation, with a Board member even adding his own inappropriate critiquing of a perfectly legitimate visual analogy about how overhead images of structures/designs do not reveal mass, height, etc. (PPT Slide #26.)

At 8:20:00 pm on July 13, Attorney Kieser representing Toomerfs said:

> "A couple of things I need to do for the record… Most of those slides that you saw are Mr. Meyrowitz and his team's graphic representations. They are not plans that were presented to the Planning Board. He does a great job sort of illustrating things with different pictures, but we take great offense that anyone would consider them to be the appropriate evidence in this case. So that's all I'm going to say about that."

In fact, Toomerfs had submitted only *one* image of the pending plan to the Planning Board, thus dramatically limiting what "plans that were presented to the Planning Board" were available to us to present. Nevertheless, our PPT showed that Toomerfs image *seven* times (the most frequently shown image in the PPT), and in the absence of any other rendering by the Toomerfs, we used only one image of what the proposed retaining slope might look like (labeled "Simulation in absence of developer imagery"). All the other slides in the PPT were unaltered photographs, direct quotes from carefully cited sources, and simple factual claims and clear arguments.

Mr. Meyrowitz began to explain these facts and also how he, trained as a professor, took issue with Attorney Kieser's specious accusation that the presentation was somehow a distortion and not "appropriate evidence." But he was cut off by a Board member.

At 8:47 pm, ZBA member Alex Talcott interrupted Mr. Meyrowitz's defense and description of the presentation and inappropriately critiqued a perfectly legitimate visual analogy about how overhead images of structures/designs (such as the one-and-only flat overhead image of the pending proposal submitted by Toomerfs) conceal more than they reveal. In slide #26, we juxtaposed that flat image (the only one provided by Toomerfs) with an image of the Eiffel Tower from above (clearly labeled as what it was) to make the point of our analogy: in the view-from-directly-above, even the 1,000 foot tall Eiffel Tower appears rather flat. Similarly, the Toomerfs only provided image (a flat, 2-dimensional overhead drawing) does not reveal mass, height, etc. This is a valid point, and a legitimate analogy. The ZBA erred in critiquing it and, by implication, supporting the broader unfounded critique of our evidence from Attorney Kieser. No other member of the ZBA spoke to correct/defend this legitimate analogy.

Nevertheless, a review of the presented PPT (see list of prime info on each slide below) reveals its very solid foundation in fact, direct quotes, legitimate arguments, precise citations of (and links to) sources, and unaltered photos, with only one simulated image of a retaining slope labeled as "simulation in absence of developer imagery."

1—Names/addresses of appellants & Toomerfs, PPT presenter, ZBA hearing date, link to appeal documents (**text** only)
2—Appellants' proximity to proposal (**photo** from Meyrowitz front porch looking to Church Hill & Andersen & Urso homes)
3—**Direct quotes** from the May 12, 2021, so-called "administrative decision," with links to video & minutes
4—**Text** slide (date of appeal and prime reasons for filing it)
5—Central Q: Is proposal "at-grade parking that is not located within a structure" (link to ZO & **photo** of typical parking lot)
6—Proposed project is NOT located at "19-21 Main St" (basic **photo** of 19 Main St & **photo** of stone wall/woods of Lot 1-16)
7—Labeled side-by-side **satellite images** of the *four* lots, with Toomerfs parking plan location shown on right image
8—Labeled side-by-side **Durham tax maps,** with Toomerfs parking plan superimposed on right image
9—**Direct quotes** from Toomerfs' appeal to Superior Court about "steep slopping grade"; **photo** looking up to Red Tower
10—Three **photos** looking uphill to Red Tower and the Community Church, where "far above-grade" parking is proposed
11—Unaltered **photo** from May 26 site walk of engineer Mike Sievert holding a 17-foot tall rod to illustrate grade elevation
12—Same **photo** of Sievert, with his image highlighted, and with three factual "height comparisons" in **text**
13—Same Sievert **photo** juxtaposed with **photo** of a retaining slope, *labeled* "simulation in absence of developer imagery"
14—**Same juxtaposition and labeling** next to contrasting **photo** of a typical at-grade parking lot
15—Same Sievert **photo** next to summary and **direct quote** from Tim Murphy April 15 email re: back not "at grade"
16—Direct **quotes** James Bubar from April 14, 2021, with link to video and meeting minutes (**text** only)
17—Our request for the ZBA to follow James Bubar's reasoning (**text** only)
18—**Toomerfs rendering** of initially proposed 15-block Recon wall (next to **photo** of a Recon wall) to hold the tons of fill
19—Contrasting **photos** of sand *contained* in bottles vs. sand as *confining structure* to illustrate point of next slide
20—**Photo** of loose rocks as part of landscape vs. "pile of rocks" as "structure" with fixed ground location & Bubar **quote**
21—Same labeled "**simulated image"** of retaining slope, with fill as containing/supporting structure & "providing" parking
22—**Direct quote** from Zoning definition of "Structure" (with more than 6' in height as key defining element) (**text** only)
23—**Direct quote** from PB Member Bubar from May 12, 2021 "decision-day" meeting **(text** only)
24—Five **direct quotes** from Zoning Ordinance pointing to 6-feet as key trigger point (**silhouette** of male "human scale")
25—**Toomerfs' solo rendering,** with our claim about it concealing how it differs structurally from at-grade surface parking
26—"Flat overhead images obscure mass, height, scale" (Eiffel Tower **photo** from above next to **Toomerfs' plan image**)
27—**Toomerfs' solo plan image** with arrows and text showing the angles from which views have *not* been provided
28—**Photo:** Mill Plaza looking toward Urso home at 5 Smith Park lane (illustrating *missing* key rendering of parking mound)
29—**Photos** from 5 Smith Park Lane looking out to Church Hill Woods (illustrating *missing* key rendering of parking plan)
30—**Toomerfs' solo plan image** with illustration (and juxtaposed Urso-home **photo**) of its position relative to Ursos' house
31—**Photo,** same retaining slope next to **photo** from Chesley Dr toward Church Hill Woods (showing site for retaining slopes)
32—**Direct quotes** from Planner Behrendt's March 5 personal definition of "structured parking" (with our critique) **(text** only)
33—**Direct quotes**, Durham Zoning definitions of "structured parking" and how they match Toomerfs' plans (**text only)**
34—**Textual** critique of how Planner Behrendt's definitions break down in attempts to apply them
35—**Photo** of steep slope near Urso home with **direct quote** from Zoning Ordinance about preservation of Church Hill
36—**Photo** of dramatic elevation of grade and text about how "at-grade" term in Zoning "cannot be meaningless"
37—**Photos** of grade changes; "proposals…makes a mockery of 'at-grade' and 'grading' terms in Durham Planning docs"
38—**Page from Table of Uses** in Zoning Ordinance, highlighting what Church Hill parking is permitted (by Conditional Use)
39—**Photo** (prohibited rooftop parking) next to "retaining slope" **photo**; no ZO language regarding okay/forbidden "materials"
40—**Text** about rushed, then paused, Planning Board efforts to change parking definitions after April 13 ZBA
41—Mike Sievert measuring stick **photo** at "back" of Lot 1-16, with **direct quote** from Murphy email not "at grade" at back
42—**Direct quote** from Planner Behrendt about applicability of April 13 ZBA ruling to proposals with tall retaining structures
43—**Textual** argument: likely need for clear 3rd category ("elevated parking"), something also to be forbidden on Church Hill
44—**Quote**, Town's *Architectural Design Standards*; "Church Hill..most sensitive to inappropriate development"; 3 **photos**
45—Conclusion: "…under current Zoning definitions, what is proposed…is NOT at-grade 'Surface Parking'"
46—Repeat of Slide #2 (labeled **photo** of appellants' proximity to proposal)
47—Repeat of "cover slide" #1 with parties to the Appeal and link to documents

In short, we believe that the ZBA erred, not only in allowing this carefully illustrated and argued PowerPoint presentation to be maligned by the Toomerfs' attorney ("we take great offense that anyone would consider them to be the appropriate evidence in this case"), but also in adding an inappropriate critique of their own. The ZBA erred in not given closer attention – and respect – to our very "appropriate" evidence and argument. Indeed, while our PPT was clear and transparent in its claims and visuals, it does illustrate (as we explicitly noted): how the Toomerfs have attempted to hide from the Planning Board, other Town Officials, and the Public all the ways in which their proposals differ structurally from "at-grade," surface parking lots – including by providing no images or renderings beyond a single flat image from above and no images from abutting properties and Chesley Drive.

We added one carefully labeled "simulated" image out of necessity, an image of a retaining slope that is likely of a less massive scale that what is actually proposed. As Kyle Urso commented on July 13 at 8:40:27 pm: "The reason that we have to *add* pictures to these presentations is because they're not provided [by Toomerfs]. And we would include plans that showed site grade and cutouts and other things – if they existed. And they don't at this moment."

The ZBA erred in not recognizing that our PPT was maligned by Toomerfs' attorney, not because our presentation was "inappropriate evidence," but because it so powerfully undermined the validity of the Toomerfs' core contentions.

*** * ***

10) The ZBA erred in ignoring our argument that the Toomerfs and Town Planner's conceptions of the parking proposal inappropriately rendered the term "at-grade" meaningless.

Restrictions on major changes in grade ("minimize grading," protect "steep slopes," etc.) in Durham zoning and site-plan documents make no sense if "at grade" is defined *after* one changes the grade. (See PPT slides # 36 & 37.) As Attorney Mark Puffer wrote on April 13, 2021, with respect to flaws in Michael Behrendt's written reasoning:

> "Proper construction of a statute (or ordinance) requires that all words be given effect. Windham v. Alfond,129 N.H. 24 (1986). The Town Planner's conclusion that Toomerfs's proposal is for 'surface parking' violates this basic canon of statutory construction. His analysis gives no effect to the 'at-grade' requirement in the definition of 'surface parking.'

> Instead, he states the truism that the proposed facility would be 'on the finished grade.' He gives no meaning to (fails to give effect to) the requirement that 'surface parking' be 'at—grade.' He equates 'single-level' parking with 'at-grade' parking, which effectively eliminates 'at-grade' as a separate requirement of the definition.

Moreover, as Robin Mower indicates in her July 12, 2021, letter:

> "The zoning ordinance is a reference for both professionals (e.g., engineers on an applicant's team) and laypersons (e.g., members of the Planning Board or Zoning Board of Adjustment). In drafting definitions, unless complexity is at the core of the definition and would require a professional's knowledge, for obvious practical purposes, terms therefore must 'have their ordinary accepted meanings or such as the context may imply.'…In other words, without a preceding adjective, a more precise definition, or a technical elaboration, Durham's definition of 'at-grade' most likely has been interpreted over the years by those without engineering experience as 'at natural grade, more or less'—allowing for 'normally varying' uneven ground that might require minimal grading to level."

The ZBA erred in imposing special "professional engineer" understandings of "at-grade" in its deliberations and voting, in place of "ordinary accepted meanings," such as: "at natural grade, more or less." Mower continues: "Furthermore, the zoning ordinance does include the following definition, pertinent to the Flood Hazard Overlay District: Highest Adjacent Grade - The highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure."

In a related error, the ZBA ignored our repeated arguments that the parking proposal involves *four* legally distinct lots, with a major drop (42 feet) in elevation from Main Street to the Chesley Marsh boundary with Lot 1-16. Yet the ZBA never corrected Planner Behrendt's repeated mention of what was at-grade at the front of "the lot" (singular) and of how the parking facility was "at-grade" with the entrance from Main Street. (See PPT slides 7, 8, 9, & 10.) Indeed, ZBA members also spoke about the parking plan as if it were on a single lot (such as Neil Niman at 9:06:51 pm), with no mention of the extreme elevation of grade on the rear, and legally distinct, Lot 1-16, as it would be experienced from Chesley Drive.

Moreover, as Robin Mower documents in her July 12 letter, "Any way you look at it—number of spaces or acreage—the preponderance of the proposed parking use of the site lies on 'back' parcels toward Chesley Drive with elevations hugely different [significantly lower] from that of

the ‘front’ parcels with addresses 19 and 21 Main Street.”

In ignoring the “distinct lots” issue, the ZBA lost focus on how most of the proposed parking structure is, per Tim Murphy concession, not “at-grade” under still-extant Zoning definitions.

* * *

11) The ZBA erred in mostly ignoring our repeated written and oral pleas to focus on our claim (that the proposal was NOT “at-grade surface parking”). Instead the Board essentially argued that what was proposed was not a “parking garage,” a position that we agreed with, but saw as irrelevant.

As we noted on “Conclusion” slide #45: “We urge the ZBA to consider all the evidence, including the applicant’s written admission that their proposals have not been ‘at-grade’ at the Chesley Drive end of the plans. We ask you to support our appeal that, under *current* Zoning definitions, what is proposed – *contrary to the Planning Board’s May 12 ‘Administrative Decision’* – is NOT at-grade ‘Surface Parking.’”

Instead, the ZBA erred by deferring to the **false dichotomy proposed by Planner Behrendt** (largely based on his Googling research), that anything that is not a “parking garage” is at-grade surface parking.

* * *

12) The ZBA erred in straying from the core of its mission, as cited in RSA 674-33, to respect the “spirit of the ordinance.”

Indeed, during the entire discussion by the ZBA members, there was no reference to the **intent of the ordinance**, except by the sole member of the board who voted for our appeal and against the majority. Because Church Hill plays a unique role in the history and the character of Durham, a special zoning code was created for it. That code, adopted by the Durham Town Council, effective 2006, explicitly describes the purpose of the zone. On page 72, section 175-44 of the Durham zoning ordinance: “A. Purpose of the Church Hill District. The purpose of the Church Hill District is to preserve and enhance the historic character of this area….”

To achieve the goals of the zoning code no parking areas were permitted without special consideration. Surface parking was allowed, if it met conditional-use criteria. Structured parking projects were prohibited as a principal use.

The Toomerfs' parking lot would spread over 20 million pounds of fill onto the hill, eliminate its woods, and almost certainly further contaminate the abutting Chesley Marsh wetland and College Brook, a tributary of the State-protected Oyster River. It will make impossible future developments on Church Hill for the uses explicitly desired by the Zoning code, such as professional offices, limited retail uses, and senior housing. None of those would be likely to be developed in the future if the natural steeply sloped topography of the Hill is destroyed and this football-field size elevated parking mound is built.

The concepts of Structured and Surface Parking were used by a group of Durham citizens not as contributions to a dictionary, or the subject of Googling searches, but as an expression of the *intent* of their zoning code. The project proposed by the Toomerfs, with its estimated 17-foot elevation of grade, clearly violates that intent, and thus it should not be embraced by the term adopted by the zoning code to include uses that are permitted by Conditional Use – "at-grade Surface Parking."

When a New Hampshire town clearly decides on its goals and embeds them in a zoning code through legal processes, those goals should be respected by the Town's boards. The Zoning definitions should be recognized as manifestations of those goals. Those goals for Church Hill have been respected in Durham for the past 15 years.

Now, however, out-of-state developers refuse to accept the legal decisions of the Town of Durham and are attempting to game the system. When their initial proposal seemed to be in trouble on April 13, Toomerfs' engineer Michael Sievert boasted that he would work around the concerns about the retaining walls and build essentially the same structure with retaining slopes. Moreover, when the original design was ruled by the ZBA to be prohibited, Toomerfs decided to ignore the Town's rulings and try to override them in the state's Superior Court (the case is pending with a November 2 hearing date). The Toomerfs have also tried in intercede in changing Durham's zoning definitions.

If the Toomerfs succeed with either the original or slightly revised current plan, they will turn Durham's zoning goals on their head: They will effectively make their strained interpretation of the Zoning definitions rewrite the goals of the zoning code, rather than have the Town's goals in the zoning code provide the context for the interpretation of the Zoning definitions. The precedent thus set would diminish respect for all zoning codes throughout Durham, and the state.