

**From:** [Michael Behrendt](#)  
**Subject:** Planning Board response to ZBA decision | zoning amendments | parking definitions - email from Robin Mower  
**Date:** Friday, April 16, 2021 3:32:35 PM

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To the Planning Board,  
Please see the email from Robin Mower below.

## Michael Behrendt

Durham Town Planner  
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**From:** RobinM [mailto:malpeque@gmail.com]  
**Sent:** Friday, April 16, 2021 3:19 PM  
**To:** Michael Behrendt  
**Cc:** Durham Town Council  
**Subject:** Planning Board response to ZBA decision | zoning amendments | parking definitions | CORRECTED EMAIL ADDRESS

Greetings, Michael --

Please forward this email to the Planning Board. Thank you.

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At the April 14th meeting of the Planning Board, I heard with surprise Chair Paul Rasmussen's request (using the words *\*imperative\** and *\*in a very expedited manner\**) to amend the zoning ordinance's parking definitions.

Paul said that he was prompted to make this request by the previous evening's Zoning Board discussion on an administrative appeal regarding zoning ordinance definitions, as he had noted in his email to Board members that night (included below).

He pointed specifically to a portion of the ZBA discussion reflecting two members' confusion about the distinction between the two types of parking, i.e., surface parking and structured parking (identified in Paul's April 13th email to the Board).

I said *\*surprise,\** above, because three years ago I had alerted the Council and the Planning Board about a need for greater clarity in these same two definitions. In 2017 I did not address the precise source of confusion that was the subject of Tuesday's ZBA appeal and decision. Nonetheless, Michael Behrendt did notify the Board of my request that it review the definitions and, as you will see in the email thread and minutes from the October 11, 2017, Planning Board meeting, below, the Board did not perceive any urgency to review them.

In addition, since the adoption of the final updated chapter of the Master Plan, the Board and Town Planner at numerous times have affirmed that they would be addressing changes to the zoning ordinance *as a whole* to reflect the Master Plan update, preferring not to accommodate various individual requests (except, of course, as the Town Council initiates them) until then.

It is no surprise that a zoning ordinance requires occasional revision, as it is put to the test and found wanting. But while it may well be appropriate to revise the two definitions at issue, *I can only conclude that the proposed urgency relates to the pending Toomerfs application to construct a parking lot on Church Hill, currently before the Planning Board, and from which Paul Rasmussen has recused himself.*

(It certainly would be a stretch if the urgency concerned existing residential garages or driveways, which are *\*grandfathered,\** or about future such structures, as Michael Behrendt pointed out would be unreasonable.)

The *\*optics\** of this are not good.

As we all know, site plan applications are vested in the land use regulations applicable at the time of submission for Design Review. It is easy to forget that an applicant may voluntarily choose to take advantage of subsequent changes to regulations if they are to the applicant's advantage, as could be the case -- intended or not -- with any reactive, let alone *\*urgent,\** revision.

I would caution the Board to keep in mind both that terms of the zoning ordinance must apply equally across a district -- sometimes across all districts and uses (e.g., definitions), and that even the perception of unwarranted haste would be unfortunate.

As Councilor Hotchkiss noted during the April 15 discussion,

\*...While I support Paul's contention that this is something that needs to be addressed, I would warn against trying to rush to a new set of definitions, because I think it would be better to give this more consideration and be careful. Whether we start that tonight or not, I think we need to take our time and get it right, so that we don't prompt another discussion like the one that occurred yesterday evening.\*

I was glad to hear agreement from at least some members of the Board.

Regards,

-- Robin

Robin Mower  
Durham, NH

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## **SUPPORTING DOCUMENTS**

DEFINITIONS FROM THE ZONING ORDINANCE LAST AMENDED FEBRUARY 1, 2021

STRUCTURED PARKING – A structure or portion of a structure that provides parking. The parking may be above or below grade, may be covered or uncovered, and may be on multiple levels. *See “Surface Parking”*

SURFACE PARKING – A parking lot or similar uncovered, single-level parking facility that provides at-grade parking that is not located within a structure.

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**From:** Michael Behrendt  
**Sent:** Wednesday, April 14, 2021 12:46 PM  
**To:** 'Paul'  
**Cc:** Audrey Cline

**Subject:** Parking and retaining walls

Hi Paul,

The ZBA was not clear whether any retaining wall would be considered structured parking. However, to say that a 3 foot retaining wall, for example, with a single family house was structured parking would be a huge and patently unreasonable stretch. Regarding single family houses I would treat any reasonable necessary retaining wall as surface parking or even just a driveway, which is accessory to a residence, as an allowed accessory use. Pursuant to the ZBA's decision, however, in the very rare case where a single family owner sought to build a very high retaining wall to support parking we would need to examine that carefully. One could reasonably infer from the ZBA's discussions and public input that a wall 6 feet or less is fine.

### **Michael Behrendt**

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**From:** Paul [<mailto:pnrasmus@gmail.com>]

**Sent:** Tuesday, April 13, 2021 10:34 PM

**To:** [pnrasmus@gmail.com](mailto:pnrasmus@gmail.com); Lorne Parnell; Richard Kelley; James Bubar; Barbara Dill; Bill McGowan; external forward for stobias; Heather Grant; Eleanor Lonske; Raymond Philpot; Nicholas Germain; Chuck Hotchkiss

**Cc:** Michael Behrendt; Audrey Cline

**Subject:** ZBA decision

Planning Board,

Please find time to review the ZBA meeting last night. Specifically their deliberations which occurred during the last 15 minutes or so of the 19-21 Main Street Appeal. The ZBA members pointed out a disturbing overlap in the zoning definitions of SURFACE PARKING and STRUCTURED PARKING. This is due to the overly generic manner in which STRUCTURED PARKING is defined in combination with the use of the term at-grade instead of final-grade or prior-

grade in SURFACE PARKING. Effectively, the ZBA determined that if a retaining wall of any size is used to provide parking, then it is STRUCTURED PARKING.

Based on their decision, I believe the parking lots of many residences, including Councilor Tobias' and mine, are structured parking. This is not permitted in any residential zone as an accessory use.

I will speak with Mr Behrendt and Ms Cline during the day about this issue, since I believe it is something that our Code Enforcement Officer will want clarified as soon as possible.

Paul Rasmussen  
Planning Board Chair

\* \* \* \* \*

Begin forwarded message:

**From:** Michael Behrendt <[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)>  
**Subject:** Zoning amendments - comments from Robin Mower  
**Date:** October 6, 2017 at 6:14:01 PM EDT

To the Planning Board,  
Robin Mower presented comments to the Town Council for the public hearing on the set of zoning amendments that were initiated by the Planning Board. The Town Council adopted the amendments exactly as written by the Planning Board (with minor corrections on hyphenation for *single family* and *mixed use*). The Town Council decided to not incorporate Robin's comments but rather to ask the Planning Board to review them for possible action in the future.

I would suggest that the board discuss Robin's comments – shown below - during Other Business at the meeting this Wednesday, October 11. These were also included in the packet that was mailed today.

**Michael Behrendt**

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\* \* \*

Begin forwarded message:

**From:** Michael Behrendt <[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)>  
**Subject: Zoning amendments - comments from Robin Mower**  
**Date:** October 2, 2017 at 4:02:00 PM EDT

To the Town Council,

I hope that it is acceptable for me to comment on Robin Mower's email here.

Again, many thanks to Robin for putting together these thoughtful comments. I think there is a lot here worth discussing but I would recommend to the Town Council that it forward the comments on to the Planning Board to consider for another future zoning initiative – as a separate initiative or rolled into the upcoming zoning rewrite (per the land use chapter). It doesn't appear that Robin's comments point to significant shortcomings in the current amendments or to elements that could be readily changed/fixed but rather to various additional items in the zoning ordinance that could be improved. I would be concerned that we would continue to find problems in the ordinance and never get closure on the current amendments, so I think a phased approach is desirable. Making improvements to the zoning ordinance is a continuing process. With a more relaxed timeframe to discuss additional items the Planning Board could have a lively discussion about the items that Robin mentions.

**Michael Behrendt**

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[EXCERPTED BY ROBIN MOWER ON APRIL 16, 2021]

**From:** RobinM [<mailto:malpeque@gmail.com>]  
**Sent:** Monday, October 02, 2017 2:48 PM  
**To:** Durham Town Council  
**Cc:** Michael Behrendt  
**Subject:** zoning amendments proposed | tonight's public hearing comments

Greetings, Councilors --

/.../ Below, I will address the amendments as proposed, but first, I note that several inadequacies that I thought might be addressed during this review escaped the net. I hope that the Council will consider either initiating additional amendments or asking that our Council Representatives raise the topic with the Planning Board in the near future. Specifically:

#### 4) STRUCTURES AND PARKING: CIRCULARITY AND LACK OF CLARITY

The definition of surfaces includes as an example \*parking space/parking lot and deck:\*

STRUCTURE (*See additional definitions immediately below*) – That which is built or constructed with a fixed location on the ground or attached to something having a fixed location on the ground.  
*"Structures"* Structure includes but *are is* not limited to a building, swimming pool, mobile home, billboard, pier, wharf, septic system, parking space/parking lot and deck. *It shall Structure does* not include a minor installation such as a fence *under* six (6) feet *or less in height high*, a mailbox, a flagpole, or an accessory shed.

The proposed definition for SURFACE PARKING, which includes the phrase \*within a structure,\* thus leads me to think of Russian nesting dolls or a hall of mirrors...

SURFACE PARKING *FACILITY* – A parking lot or similar uncovered, single-level parking facility that provides at-grade parking that is not located within a structure.

The definition of SURFACE PARKING should be amended. One option might be to replace the \*offending phrase\* with:

AT-GRADE PARKING THAT IS NOT PARTIALLY OR FULLY ENCLOSED.

The definition of STRUCTURE should be amended to clarify whether the examples reference (a) a parking lot combined with a deck, or (b) any type of deck, i.e., with or without parking. Clarifying wording might be one of the following:

- a. parking space/parking lot, or a parking deck.
- b. parking space/parking lot, or a deck.

\*

Thank you.

Regards,

-- Robin

Robin Mower  
Durham, NH 03824

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[https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning\\_board/meeting/47451/101117.pdf](https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/meeting/47451/101117.pdf)

*These minutes were approved at the January 10, 2018 meeting.*

DURHAM PLANNING BOARD

Wednesday, October 11, 2017

Town Council Chambers

7:00 p.m.

MINUTES

MEMBERS PRESENT:

Paul Rasmussen, Chair

Bob Brown, Secretary

Lorne Parnell

Andrew Corrow

Councilor Carden Welsh, alternate Council Representative to the Planning Board

MEMBERS ABSENT

Barbara Dill, Vice Chair

Bill McGowan

Councilor Jim Lawson, Council Representative to the Planning Board

Nathaniel Morneault, alternate



/.../

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X. Other Business:

Mr. Behrendt said he was pleased that the Zoning Amendments were recently adopted by the Town Council, with some very minor changes. He noted that Robin Mower submitted a memo to the Council at the public hearing with some Zoning changes she recommended. He said the Council didn't address them, but wanted the Planning Board to take a look at them, and said he'd sent Ms. Mower's memo to Board members for their consideration.

/.../

Mr. Parnell also said he didn't think what had just been approved should be revisited for a while, **because a major Zoning rewrite would be coming forward.**

Mr. Behrendt said the final copy of the revised Zoning Ordinance would be available shortly.

[text continues]

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