

— **CONDITIONAL USE , TRANSITIONAL ZONING, FAILURE OF PERFORMANCE STANDARDS**—

May 2, 2022

Planning Board  
8 Newmarket Road  
Durham, NH 03824

*RE: 19-21 Main Street – Parking Lot. Formal application for site plan and conditional use for parking lot on four lots and reconfiguration of the entrance. Toomerfs, LLC c/o Pete Murphy and Tim Murphy, property owners. Map 5, Lots 1-9, 1-10, 1-15, and 1-16. Church Hill District.*

Dear Members of the Board,

On [October 6, 2021](#), I provided you with a cover letter and PDF version of the slide presentation that I had run through quickly for the August 25, 2021 public hearing on Mill Plaza. Titled “Character of Site and Buildings,” the presentation focused on numbers 3 and 4 of our Conditional Use Permit approval criteria.

Among other points in the presentation, I argued that, **in Durham, Conditional Use is a stand-in for transitional zoning**, which, as you know, our ordinance does not address. I wrote that:

To be consistent with our Conditional-Use zoning, the Mill Plaza site should be developed in a way that “transitions” from the intense uses of Main Street and north to the single-family neighborhoods on the south and east.

This is a point worth remembering for the 19 Main Street application, particularly given Councilor Sally Tobias’s statement during the recent deliberation on Colonial Durham Associates’ application for Mixed-Use with Residential ([DCAT recording of April 13, 2021](#) about 8:10:42 p.m.):

And unfortunately in Durham, we do not have transitional zoning. I really wish we had transitional zoning, but we don’t. A little late. As I’ve said, if I could wave my wand and go back 15 years, I’d make a lot of changes, but—that would have made this process a lot easier—but it is in that zone. But there is a tremendous need, if this proposal is to be built, there is a tremendous need for mitigation to account for those external impacts of noise after hours, because there is going to be a living facility where there was not one before....

In addition, Conditional Use was included when the Church Hill district was established in 2006 after lengthy discussions, guided by planning consultant Mark Eyerman, about rewriting the Zoning Ordinance to coordinate with the Master Plan. Regarding Conditional Use, Planning Board minutes of April 6, 2005 state:

[Town Planner Jim] Campbell suggested that the Board should decide whether the development standards were sufficient, or if conditional use should be brought back. He said if the latter was chosen, a motion should be made, and it would be put back to public hearing the next month.

Mr. McGowan asked what was to be gained by using the conditional use process, and Chair Roberts provided details on its benefits to a town.

[Nick] Isaak noted that the process was a double-edged sword, which was why the Board had tried to limit its use in the Table of Uses. He said once a Town said conditional use, this potentially opened up negotiations with a developer.

[Kevin] Webb said conditional use had the potential to be more restrictive, and said it gave the Board more negotiation power with the developer.

**Chair Roberts said an important aspect of conditional use was that the potential negative impact on abutters could be considered in more detail.** [emphasis added]

...Chair Roberts noted that the conditional use process was developed because development standards often failed.

## **Abutting zones present a unique challenge**

All the examples of “external impacts” listed in our zoning’s Section 175-23 Approval Criteria, plus others not listed, may come into play with new downtown developments at the edges of the commercial districts. Below see an excerpt from now-Councilor Carden Welsh’s February 16, 2012 letter to Administrator Selig, regarding another commercial-residential-abutting proposal:

In my work over the past several years on the Zoning Board of Adjustment, I have seen numerous efforts to change the rules that govern properties that are on the border of the various zoning districts. If granted, these have the effect of “creeping change” in our community, where the protections that are provided to property owners by our zoning laws slowly erode, as the rules governing properties at the edge of the zone change to allow more and more of the activities that were originally deemed undesirable when the master plan was developed.

Durham is often noted as a town that almost perfectly blends commercial, residential and university life, in a way that works for all three, and we need to maintain that delicate balance by following the rules originally developed in the master plan.

## **A “delicate balance.” Isn’t that what we all seek for Durham?**

My “Conditional Use as a stand-in for transitional zoning” argument is worth remembering as we move toward greater commercial density in our very small downtown, a downtown that cries out for only the “highest and best use” and that abuts several single-family neighborhoods. Our land use regulations attempt to seek balance for the rights of all interested parties, but our Conditional Use criteria are key to respecting individual private property rights for those who will be most affected by new commercial development adjacent to their residences.

The Mill Plaza application is a poster child for the argument that Conditional Use criteria may be seen as a stand-in for transitional zoning. The Toomerfs’ proposal to develop Church Hill into a large private commercial parking lot violates our Site Plan Regulations. It also strongly calls into question whether it meets the Conditional Use criteria that were imposed, as Steve Roberts stated, in 2005, so that “the potential negative impact on abutters could be considered in more detail.”

In particular, I remind you that were the Church Hill project built, it would be the only instance of a commercial parking lot adjacent to single-family homes in the whole of Durham, with attendant ensuing quality-of-life disturbances. For example, at least Davis/Fairchild Avenue residents has reported being awakened by snow removal at the UNH parking lot that is both through woods and further from their home than Toomerfs’ parking lot would be from the Ursos and Andersens.

We have no purview over UNH development, but we do elsewhere in Durham.

Conditional Use Permit approval states that the burden is on the applicant to persuade the Board that the plan under review complies with, or will provide mitigation for, all eight general Conditional Use criteria (Section B in 175-23). As always, I rely on the Board to follow our land use regulations and to ask an applicant to do so as well.

Regards,

Robin