— RESPONSE TO TOOMERFS' CLAIMS ON MARCH 23, 2022 —

May 4, 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,

In his Presentation by the Applicant 3-23-22 to the Board, applicants' Attorney Tim Phoenix made numerous claims that require scrutiny:

1. New downtown residential development "created a parking problem" (and the Toomerfs proposal is the solution)
2. The Department of Public Works has vetted the plans
3. The Board risks a lawsuit if it denies the application
4. Caution! Toomerfs may receive unfair, i.e., different, treatment by the Planning Board
5. Objectors only care about defeating Mill Plaza

Toomerfs Claim One: We've got "a parking problem"

Solving a problem requires identifying (a) whether there is a problem, then, if so, (b) what the problem is, and, finally, (c) whose problem it is. The Board's analysis must be based on findings, such as:

- Evidence of a parking shortage *that supports downtown businesses*, today or in the near future
- Why, when, and how many parking spaces at the Town's new 66 Main Street lot sit empty
- Evidence submitted by the applicant that the proposal:
  - would alleviate any parking challenges our downtown businesses face (highly unlikely in any case, given the Church Hill location and by-semester leasing to students)
  - would not simply shift vehicle owners from current parking locations, such as at UNH
  - would not induce demand, bringing more vehicles to downtown—which would be contrary to the Durham community's planning efforts spanning decades

…and facts such as:

- Tenants who need a car for purposes such as commuting to work and who rent downtown apartments know—incontrovertibly—the parking lay of the land when they sign a lease. Students' cries of "Help! I need a parking space" are not evidence of a need the Durham Planning Board must address and should not shape Town policy.

- Toomerfs' plan would undermine the downtown pedestrian focus, which is a community asset, not a design flaw.

- Toomerfs' plan would undermine the non-transient community's goals, e.g., the Master Plan's long-term vision of a downtown residential demographic mix, i.e., not just students.

Toomerfs Claim Two: "Department of Public Works has vetted the application"

Slide #10 in Attorney Phoenix's presentation lists "expert opinion" on the record, and notes that both Altus Engineering and Public Works have "vetted it." One might infer that both "experts" had looked at the proposal in its entirety and blessed it.

That would not be an accurate interpretation. Altus Engineering's 's third-party review focused on grading and drainage and related engineering practices and standards—not on other standards in the Site Plan Regulations. **Public Works reviewed both the application and the Altus third-party review with a focus on grading and drainage.**

In fact, Public Works did not evaluate how the proposal meets Section 8.2.1 of the Site Plan Regulations. How do I know? On April 3, 2022, I wrote to Town Engineer April Talon and Director of Public Works Rich Reine, copying Town Planner Michael Behrendt on the email, and asked:

> Did DPW also specifically evaluate—and comment on—the application with regards to the following two sections of the site plan regulations in Part III. Article 8. Natural Resources Standards?
>
> In my view, these regulations lie within the purview of the Planning Board. It would be understandable if Public Works did not comment on these.
>
> ONE
> 8.2.1 Buildings, parking areas, travel ways, and other site elements shall be located and designed in such a manner as to preserve natural resources and maintain natural topography to the extent practicable. Extensive grading and filling shall be avoided.
>
> TWO
> 8.2.7 Natural features and systems shall be preserved in their natural condition, wherever practicable. Such areas include watercourses, waterbodies, floodplains, wetland areas, steep slopes, aquifer recharge areas, wildlife habitats, large or unique trees, and scenic views.

April Talon responded on April 8, 2022:

> **Hi Robin—no we did not specifically comment on the application with regards to those two sections of the site plan regulations.**

Interestingly, the applicants' March 23, 2022 slide #52, titled "Natural Resource Standards," mentions Sections 8.2.2, 8.2.3, and 8.2.4 of the Site Plan Regulations **but omits mention of the more restrictive Section 8.2.1** (emphasis added):

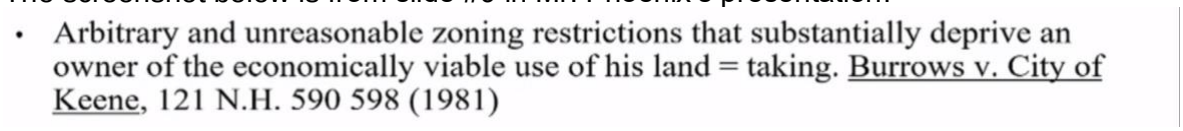
> 8.2.1 Buildings, parking areas, travel ways, and other site elements **shall** be located and designed in such a manner as to preserve natural resources and maintain natural topography to the extent practicable. Extensive grading and filling **shall** be avoided.

At this point, I refer you to previous relevant public comments: Malcolm Sandberg 4-7-22, Nancy & Malcolm Sandberg 3-16-22 and Robin Mower 9-7-21 and to what another letter I hope to include in your packet in which I analyze the language of Section 8.2.1.

It is the Planning Board's responsibility to determine whether, in nontechnical areas, an application meets the Site Plan Regulations.

Toomerfs Claim Three: We see a "taking" on the horizon

The screenshot below is from slide #9 in Mr. Phoenix's presentation:



("Arbitrary and unreasonable zoning restrictions that substantially deprive an owner of the economically viable use of his land = taking. Burrows v. City of Keene, 121 .H. 590 598 (1981))

Mr. Phoenix warns the Board against a "taking," citing *Burrows v. City of Keene,* 121 N.H. 590 598 (1981) One case summary explains:

> In *Burrows v. City of Keene*, 121 N.H. 590, the city amended a zoning ordinance so as to include a substantial portion of the plaintiffs' undeveloped land in a conservation area, after the plaintiffs had unsuccessfully submitted plans to subdivide the property for development purposes.[1]

There is no parallel with the Toomerfs and 19–21 Main Street. The proposed principal use has been listed for years in our zoning ordinance as permissible in the Church Hill District **only if it meets Conditional Use criteria.** Thus, the purchaser could have had no expectation at the time of acquisition that this use would be allowed by right, nor that it would clear with ease the hurdle of Conditional Use. No relevant change has been made to either the site plan regulations or the zoning ordinance since the purchase on June 22, 2017. No deprivation of the economically viable use of land is at hand. Toomerfs could not have had "a reasonable investment-backed expectation" (a legal concept) to use the major, southern portion of the wooded hillside as they intend in this application.

A Planning Board denial would not take Durham into "takings" territory.

"Takings" is a complicated area of law, but there are some guidelines that even lay people grasp.

If this Conditional Use application were denied, the property would nonetheless retain permitted opportunities for an economically viable use. Maximizing the viable use is not a right, under the Constitution or elsewhere, and a regulation adopted under the police power to protect the public health, safety, or welfare is not a taking, even if the taking reduces the value of property:

> There is little historical basis for the idea that a regulation of the use of land can constitute a taking of the land.[2]

[1] *Jack v. City of Olathe.* Supreme Court of Kansas (1989)

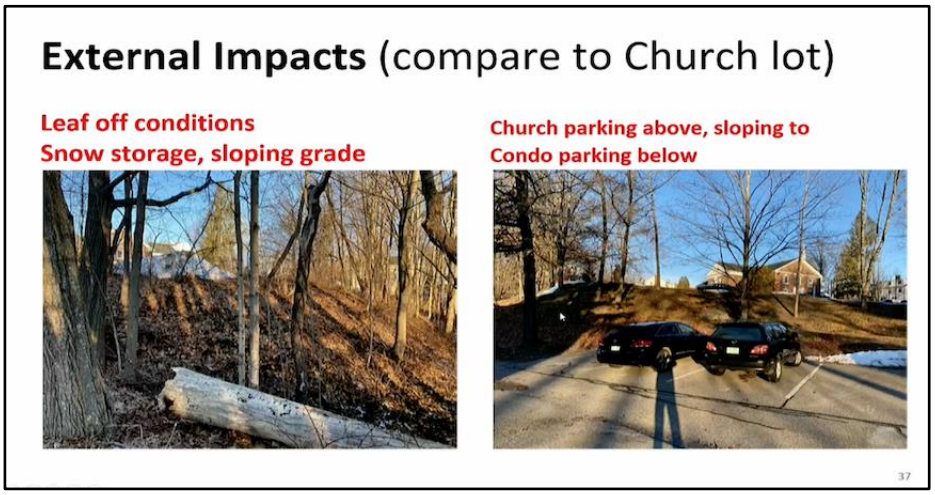
[2] [Legal Studies Research Paper Series No. 15 25. "Still an Issue: The Taking Issue at 40." 30 Touro L. Rev. 245 (2014), by Patricia Salkin, Dean and Professor of Law, Touro College, Jacob D. Fuchsberg Law Center]

Note also:

> Many regulatory takings disputes arise in the context of land use regulation. *Agins v. City of Tiburon,* 447 U.S. 255 (1980), the Supreme Court held that it there is not a requirement for government compensation where such regulations "substantially advance legitimate governmental interests," and as long as the regulations do not prevent a property owner from making "economically viable use of his land."[3]

Toomerfs Claim Four: The Board would be treating us unfairly (different from other developments)

Slide 37 of the applicant's presentation, "External Impacts (compare to Church lot)," would have the Board compare the application with sites that were not subject to the current site plan regulations or Conditional Use zoning.



Toomerfs Claim Five: "Opposition is not about parking lot." [sic]

The applicant here (see slide #12) makes a specious argument. How does it make sense, when:

- There is a long history of Durham residents acting to protect Church Hill, including the momentum and action to make it a distinct zoning district in 2006;
- Strong community resistance thwarted attempts to loosen Church Hill zoning in 2008;
- So-called "Mill Plaza activists" DO understand that Toomerfs could rent dozens, if not hundreds, of parking spaces without any assistance from Colonial Durham Associates;
- Opponents of the parking lot proposal have focused almost entirely on arguments unrelated to the potential for Mill Plaza residents to use it but instead centered on both community values and land use regulations specific to this site;
- We know that Colonial Durham Associates could be granted Site Plan Regulation exemptions for Mill Plaza's required parking; and

[3] Takings. Legal Information Institute, Cornell Law School. accessed April 10, 2022

- Numerous members of the public who live far from the site and have been silent about Mill Plaza have also raised concerns about the 19 Main Street project?

My objection to the proposal on the table is its overreach and disregard for the community's values as codified in our land use regulations.

Regards,

Robin