

— SITE PLAN REGULATIONS 8.2.1: THE TEXT SAYS “NO” —

May 6, 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 my letter dated [September 7, 2021](#), I asked you to focus on Section 8.2.1 of our Site Plan Regulations:

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.**

As I wrote then and believe today:

The very foundation of the Toomerfs application runs counter to the regulation’s intent.” This regulation is the lynchpin of the application, yet 18 months after the formal application submittal, this violation has not yet been discussed, resulting in an extended and questionable use of public resources, not least of which is your own time.

Language in the Site Plan Regulation: Definition of “avoided” is contested?

The applicants responded to my letter in [Tim Murphy’s Response to Robin Mower’s Email of 9-7-21](#), (a) focusing on the word “avoided,” and (b) arguing that the fill under scrutiny is needed and thus not prohibited.

That Tim Murphy argument is not supported by the text of the regulations.

Starting with definitions: The applicant argues that the “common meaning of ‘avoided’ ... means in this context ‘to endeavor not to meet.’”

First, “endeavor not to” is not equivalent to “shall.” Toomerfs implies that the word “shall” is irrelevant. To the contrary. The word “shall” was deliberately included because it invokes a requirement and, in this case, a prohibition. Second, consider how the text would read if one substituted the Toomerfs’ definition for the Town’s: “Extensive grading and filling shall be endeavored not to be met.” (How much sense does that make?)

In reality, Toomerfs is just asking for the Board to ignore the ordinance.

“Common meaning?” It would also seem that Toomerfs is using an unusual, rather than a “common,” dictionary. Definitions of “avoid” in “common” dictionaries include:

- [The American Heritage® Dictionary](#)

avoid

1.

- a.** To stay clear of; go around or away from: *swerve to avoid a pothole.*
- b.** To take measures so as not to meet or see (someone)

2. To prevent from happening: *You can avoid illness with exercise and a balanced diet.*

3.

- a.** To refrain from using, engaging in, or partaking of: *avoid red meat; avoid risky behavior.*
- b.** To refrain from (doing something): *It was all we could do to avoid laughing at the remark.*

- [Cambridge Dictionary](#)

avoid

B1. to stay away from someone or something:

B2. to prevent something from happening or to not allow yourself to do something

- [Merriam-Webster Thesaurus](#), which provides synonyms:

avoid

B1. to get or keep away from (as a responsibility) through cleverness or trickery

B2. to prevent something from happening or to not allow yourself to do something

The Merriam-Webster Thesaurus also includes a FAQ about “avoid”:

Q. How does the verb **avoid** contrast with its synonyms?

A. Some common synonyms of avoid are *elude*, *escape*, *eschew*, *evade*, and *shun*. While all these words mean “to get away or keep away from something,” **avoid** stresses forethought and caution in keeping clear of danger or difficulty.

Language in the Site Plan Regulation: **Other definitions**

“to the extent practicable”

- practicable: capable of being put into practice or of being done or accomplished: FEASIBLE [[Merriam-Webster dictionary](#)]
- to the extent...the degree to which a provision applies depends on some variable [[Adams on Contract Drafting](#), by the author of *A Manual of Style for Contract Drafting*]
 - What would be a “variable” in this case? It cannot simply be, “can it be done?”—because that would result in circular reasoning.
- author note: For Durham’s land use regulations, the choice of the word “practicable,” as opposed to “practical,” has been deliberate, debated, and approved. **It is, like the word “shall,” a restrictive term.** In this context, it means either “do not do it” or “exception permitted for good reason.” **It is not a synonym for the less-stringent “practical.”**

“extensive”

Section 8.2.1 does not use the word “excessive,” which is what some Board members and the applicant may believe is an equivalent to “extensive”—which might justify a different argument. The word “excessive” allows for the interpretation of going beyond what is required.

However, that is not the language used in this regulation. “Extensive” is what we have.

- Definitions
 - large in extent, range, or amount.—[The American Heritage® Dictionary](#)
 - covering a large area; having or being a large amount—[Cambridge Dictionary](#)
- Synonyms
 - greater than the average size or amount—Cambridge Dictionary (above)
 - broad, deep, expansive, extended, far-flung, far-reaching, rangy, sweeping, wide, wide-ranging, widespread—[Merriam-Webster Dictionary](#)
 - broad; comprehensive; considerable; expanded; huge; large; large-scale; lengthy; major; pervasive; protracted; sweeping; vast; voluminous; wide-ranging—[thesaurus.com](#)

The applicants may “need” the fill to complete the development they have chosen to propose, but the amount of grading and filling proposed is, clearly, (1) a choice, and (2) by their chosen design, **extensive**—the word written into Section 8.2.1, i.e., “**Extensive** grading and filling shall be avoided.”

“shall”

- As the Sandbergs noted in [Nancy & Malcolm Sandberg 3-16-22](#) (in which they, too, argue that the application does not meet section 8.2.1 of our Site Plan Regulations), our zoning ordinance, **in section 175-6. Meaning of Words, states that “The words ‘shall’ and ‘must’ are mandatory...”**
- Note: Furthermore, the author of *A Manual of Style for Contract Drafting* states that “...courts acknowledge that the foundational meaning of shall is to express that which is mandatory.” [[Adams on Contract Drafting](#)]

Language in the Site Plan Regulation: **Omissions**

The relevant sentence in Part III. Section 8.2.1 does not read “Extensive grading and filling shall be avoided *to the extent practicable*,” for example. Nor does it append the clause “unless the project requires it.”

Language in the Site Plan Regulation: **Synonyms, equivalent meanings**

In addition, as many of you know from experience, the Board’s choice of words for our land use regulations is deliberate, yet regulation drafters also sometimes seek language variations with equivalent meaning, if only to avoid monotony. See example below.

These two phrases are both synonymous and restrictive:

- “Extensive grading shall be avoided,” and
- “Extensive grading is prohibited.”

Any claim that “shall be avoided” as used in Section 8.2.1 of the Site Plan Regulations may be interpreted in any way other than as a prohibition is both a wild stretch and ludicrous.

Underlying rationale of Article 8. Natural Resource Standards

Article 8. Natural Resource Standards of our Site Plan Regulations opens with this statement:

“The purpose of this section is to **protect, preserve, and enhance** Durham’s rich and varied natural resources while accommodating **appropriate** growth and development by encouraging the applicant and the Planning Board to consider natural resources in the planning process.”

There follow these additional sections:

8.2.2 Development shall be directed away from valuable and fragile resources to the extent practicable.

8.2.3 Development shall follow the natural contours of the landscape to the extent practicable to minimize grading.

Article 8 requires the applicant—and the Planning Board—to take protection of our natural resources seriously. Thus, the Board should both seek to guide applicants to meet our land use regulations and, when they do not, to deny applications.

Denial is the only option under Section 8.2.1

This application as submitted does not meet Section 8.2.1 of the Site Plan Regulations. It must be denied.

Regards,

Robin