

June 4, 2021

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. Mike Sievert, engineer. Robbi Woodburn, Landscape Architect. Map 5, Lots 1-9, 1-10, 1-15, and 1-16. Church Hill District.

Dear Members of the Board,

As an attendee of the Planning Board's site walk held on May 26, 2021, I assure those who did not attend that a collective gasp was in the air as we walked up to and onto the property of the closest single-family abutter to the subject property, 5 Smith Park Lane, owned by Sandy Ceponis Urso and her husband Michael Urso.

I see no reason to pull punches here: The May 6, 2021 proposal is among the most appalling, egregious violation of community values we are likely to witness in our small town. Indeed, I would go so far as to call it rapacious.

It is one thing to lay out on paper what may be allowed in our zoning or site plan regulations. It is another thing entirely to evaluate on the ground what the impacts would be—as both Toomerfs and their engineer are well aware from other projects. It is impossible to believe they not could have anticipated the community's response.

The May 26th site walk is the Board's third site walk (including one held during Design Review, on November 25, 2019) but the first to bring Board members and the public to the perspective of an abutting homeowner. **See for yourself in the below photos.**

A videographer attended the site walk with his camera. About four minutes into the 11-minute video, homeowner Sandy Ceponis Urso's daughter-in-law Erica—for whose toddler-age children Sandy almost daily cares at 5 Smith Park Lane—stands in the Urso backyard and indicates where cars would be parked (head-in, with headlights practically inches from her home). She comments that “the family Urso has been fairly vocal about saying, ‘This is absurd!’ but until you see it...” She then says, “The point of Conditional Use is, ‘Does it affect the abutters, does it affect the environment, does it affect property values... consider all of these things before we spend time and energy moving forward...”

<https://www.youtube.com/watch?v=X1SKgomiVgk>

Private property rights: What are we talking about?

Private property rights inhere in ownership of both existing developed properties and would-be developed properties. I think it useful to remember a few points.

One: A right to realize economic value—the economically beneficial or productive use of land—should not be interpreted to extend to an expectation of maximizing that value where Conditional Use criteria are at stake. Yet the Toomerfs proposal would appear to the layperson to attempt to maximize that value, despite what the property owner could have expected at the time of purchase.

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**. Thus, the purchaser could have had no expectation at the time of acquisition (June 2017) that this use would be allowed by right, nor that it would clear with ease the hurdle of Conditional Use.

Two: In 2009 the Urso family purchased a house at 5 Smith Park Lane, a rarely traveled private road, abutting a large wooded hillside that had remained untouched for decades, was part of the Church Hill district, and would, to most observers, appear to be unbuildable. The Ursos had every reason to believe they could continue to enjoy the property rights inherent in that ownership.

...It is well to remember, here, the concept that property is not just physical land or building. What gives primary value to property is the bundle of rights associated with property. A non-exhaustive list of the “sticks” in this bundle of property rights will include the rights to: own, use, occupy, convey, and exclude others from the property.

[2014 Lakes Region Planning Commission Municipal Law Lecture: “Making Defensible & Enforceable Land Use Board Decisions,” by Attorney Daniel Crean, Crean Law Office, Pembroke, NH

The N.H. Supreme Court defines property as “refer[ring] to a person’s right to ‘possess, use, enjoy and dispose of a thing and is not limited to the thing itself.” (*Burrows* at 597; *Metzger* at 502).

[<https://www.bufferoptionsnh.org/wp-content/uploads/2017/12/BOB_Takings_Extended-Legal-Fact-Sheet.docx_171218-CT.pdf>

Conditional Use Criteria Not Met

I. See Section 175-23.C. of the zoning ordinance dated December 17, 2018:

- 6. Impact on property values:** The proposed use will not cause or contribute to a significant decline in property values of adjacent properties.

The homeowners at 5 Smith Park Lane would suffer the most impact from the construction of this large commercial parking lot, with or without the screening required in our site plan regulations in Section 5.9. Noise and litter in a college town have a way of disregarding screening, and the proximity of Main Street bars can lead to surprising behavior.

Applicant Peter Murphy stated at the site walk that “there’s a value” in being within walking distance to the Plaza and to town, that “all over the country, everybody wants to be in walking distance.” Yes, indeed: We all know that property values are higher if they have what is called a high “walk score,” as our downtown single-family homes currently enjoy.

However, many would agree that **that incremental value for the Ursos would be negated by the impact of a commercial parking lot located a stone’s throw from the home**. If this were another town where such abutting intrusive and aesthetically unappealing uses were common, then perhaps potential homebuyers would view the situation differently.

With the construction of a parking lot with 142 new spaces on its edge, 5 Smith Park Lane would be in the position of being the **only Durham residence that abuts a commercial parking lot**—in this case, not even a lot that serves a municipal need but whose principal use is leasing to vehicle owners who do not live on the premises and may have little or no vested interest in the community to guide their behavior.

Note that the churches have parking lots, but their parking use is accessory, i.e., related to their “business.” Brookside Commons, on Mill Road across College Brook from Mill Plaza, is at least buffered by the brook and whatever remains of the vegetated buffer required in the original Planning Board approval and noted in the 2105 Settlement Agreement.

II. See Section 175-23.C. of the zoning ordinance dated December 17, 2018:

2. **External impacts:** The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of **adjacent existing uses or other uses permitted in the zone**. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare...

One: “Adjacent existing uses” include a woodland hillside, single-family homes, and a senior apartment complex. No commercial uses, no to-ing and fro-ing of dozens of cars (despite what the applicant says is likely to happen, those who have lived within hearing distance of the Mill Plaza know the reality of Thursday and Friday nights in Durham), let alone a commercial parking lot.

Many of us would be happy to see the driveway at 19-21 Main Street improved both for safety and aesthetics. And I understand that improvements must be funded, and thus the property owner must find economic incentive to do so. But because the real story is what happens far from Main Street, on lots abutting residential properties on Smith Park Lane and Chesley Drive, we need to focus on the impacts there, not on Main Street.

Despite the project's formal address as 19-21 Main Street, this is not about a property on Main Street, as Joshua Meyrowitz has emphasized numerous times. Anyone who attended the site walk on May 26 cannot avoid understanding that point.

That is, while the proposal would address driveway aesthetics and safety at one of the front lots on Main Street, the vast majority of the application relates to two large back lots that lie far from Main Street and are as unrelated to Main Street as one might imagine.

I am not quibbling with the convention of referring to an application by its formal street address. The challenge is to overcome a perhaps normal subliminal bias toward thinking of the project as “on Main Street.”

Two: “Other uses permitted in the zone” (Church Hill). As Planning Board member Richard Kelley may recall, the Planning Board decided in 2004 to create the Church Hill district. (See Durham Planning Board Minutes, November 10, 2004.) What uses were envisioned with that rezoning?

We cannot know that answer, but existing uses permitted in Church Hill district as listed in the zoning ordinance in effect when the application for Design Review was submitted (October 23, 2019), i.e., the version dated December 17, 2018, appear to fall into two categories:

- a) Uses that were in existence when the district was created in 2004; and
- b) Uses that the Council believed were appropriate for the district.

Those uses had historically been churches with distinct architecture, historic homes and other structures, and single-family homes (as in the small pocket neighborhood between “gasoline alley” and the post office). It is only fairly recently that multi-unit dwellings, aka apartments, have edged the district. At this distance in time, and without clear records or the recollection of a participant in the drafting, it is impossible to ascertain the intent of the ordinance. However, if you look at the Table of Uses list of principal uses either permitted by right or permitted by Conditional Use, it seems clear that the intent was to allow only those uses that could conform with the character of the neighborhood as it had existed for decades and that would not be disruptive in their impacts.

Existing parking lots in the zone are accessory, buffered to 5 Smith Park Lane, or created by the applicant. The parking lots for St. George’s and the Community churches are at a distance from 5 Smith Park Lane and buffered by distance, lower elevation, buildings, and trees. But in 2019, Peter Murphy applied to create a commercial parking lot on what had been a field, expanding parking for his tenants at his 18 Main Street property to add 26 spaces to rent to non-tenants. As resident Susan Richman stated earlier during the public hearing for this application, what that means is *that the applicant created the very conditions that he now argues support his application.*

III. See Section 175-23.C. of the zoning ordinance dated December 17, 2018:

2. **External impacts:** ...In addition, the location, nature, design, and height of the structure and its appurtenances, **its scale with reference to its surroundings, and the nature and intensity of the use, shall not have an adverse effect on the surrounding environment** nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood.

The scale, nature, and intensity of the use **shall indeed have an adverse on the surrounding environment.** It is reasonable to assume that this would be obvious to all, but consider even the loss of passive cooling provided today by the wooded hillside. The removal of trees will lead to increased temperatures for adjacent properties—not just 5 Smith Park Lane—during the hot months, which creates greater human discomfort that in turn can lead to greater use of air conditioning, which puts a greater burden on the electric grid.

Because we have been advised to avoid discussion of climate change from a land use regulation perspective, I will only note that many in the community are appalled by the prospect of replacing the environmental functions of a wooded hillside sloping down to a brook with a treeless asphalt-topped parking lot propped up by fill that may be as high as 17 feet in places.

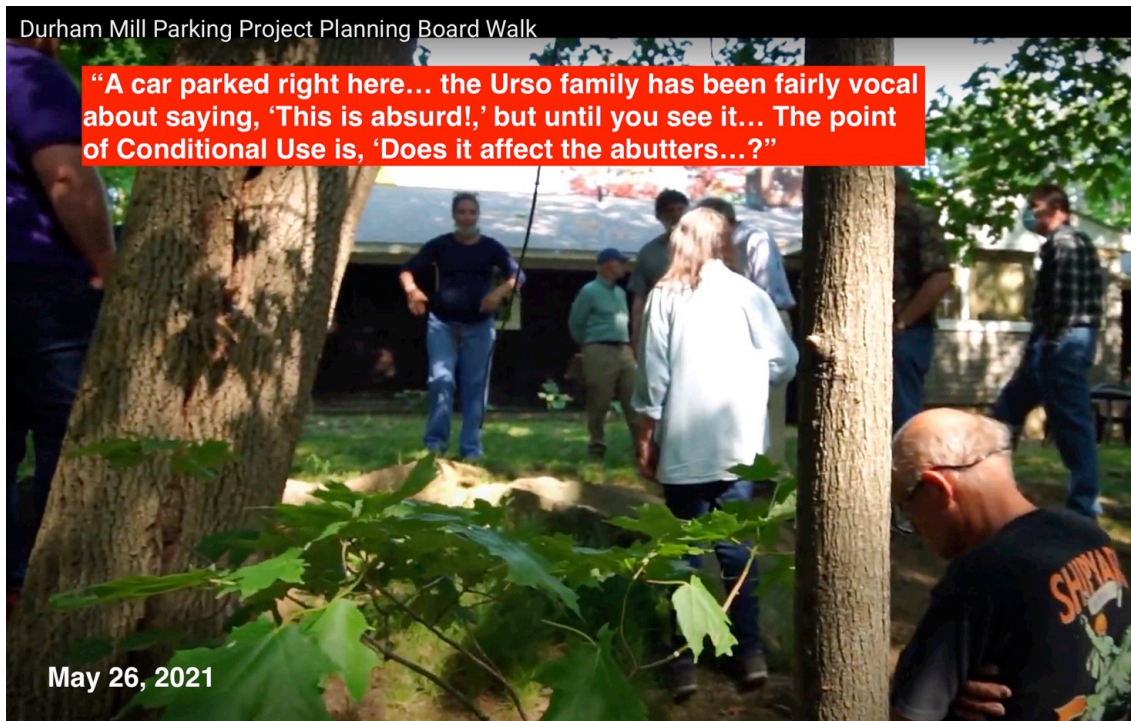
Debunking a specious argument: commuter parking needed

The applicant has claimed it would be providing closer parking for students who “have to get up at 5 in the morning to go to work.” However, every tenant knows when he or she signs a lease whether nearby long-term parking is available. If having a car nearby an apartment were more important than living downtown where there is little or no parking, one could have chosen to live where parking is already available, such as at the Cottages or Lodges or River's Edge.

Adults make tradeoffs and don’t try to wriggle out of their decisions to someone else’s detriment.

If this parking lot were intended to support our local businesses, perhaps we would be having a different discussion, with community benefits slightly offsetting private impacts. That, of course, is not the case here.

Photos taken on the May 26, 2021 site walk







"Conditional Use" sets a high bar

Drafting a zoning ordinance, or even amendments, is a considerable challenge. My hat is off to those who have engaged in this tedious process, particularly to those of you have done so for many years. You have given the community great service.

The applicants have a right to develop their property if they meet our land use regulations. Shame on us if we haven't done a better job at envisioning the future we want for our community and in drafting regulations to help ensure that. This application shows exactly why residents must become engaged, at the public hearing stage if not earlier.

But it is a Conditional Use Permit that these applicants are seeking, which, as Michael Behrendt and others have argued over the years, gives the Board considerable authority. The Purpose statement of Article VII, 175-21. Conditional Use Permits, provides guidance, including:

...Further Conditions may be placed on the Conditional Use Permit by the Planning Board to ensure that the Conditional Use will have a positive economic, fiscal, public safety, environmental, aesthetic, and social impact on the town.

A supermajority of voting Board members (five) must find that the proposal meets all eight criteria. With the evidence before you, it would seem like a snowball's chance in hell that an honest appraisal of the application could meet that threshold.

Regards,

—Robin