

— DEFINITIONS IN OUR LAND USE REGULATIONS: LEGAL RAMIFICATIONS—

July 20, 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,

I urge you to refocus on our land use regulations, the very tools on which courts will rely to evaluate the lawsuit that is all but surely coming down the pike. Attorneys and judges eat precise language—definitions and commas included—for breakfast.

In case you have forgotten or would like a refresher, please see [Robin Mower 5-6-22](#), in which I addressed this same point, i.e., that precision of language matters.

History backs me up. Three Board members will recall a court case brought in 2007 against the Town of Durham that in part hinged upon the definition of a word not defined in the zoning ordinance, i.e., “contiguous.” The Planning Board had approved an application; neighbors appealed the decision to the Zoning Board of Adjustment, which overruled the Planning Board, and the applicant then appealed the ZBA ruling to the Superior Court, **which supported the ZBA decision.**

[Minutes of the ZBA’s August 28, 2007 decision](#) read, in part (page 7):

John deCampi MOVED that the ZBA feels that the Planning Board has erred in its interpretation of the word “contiguous” in the definition of “Lot” in Section 175-7, which has direct bearing on Section 175-54, the Table of Dimensional Requirements, and for that reason, the combining of the two parcels to be used in the density calculation is in error. Ted McNitt SECONDED the motion, and it PASSED 5-0.

Excerpt from the Superior Court decision dated 6/09/08
Docket number 07-E-0260

Stonemark Management company appealing Town of Durham Zoning Board of Adjustment

Moreover, in reading the ordinance with an ordinary level of common sense, the court concludes that the petitioner’s interpretation of “contiguous” would lead to an absurd

result which would nullify the purpose of the statute. See *Green Crow Corp. v. Town of New Ipswich, N.H.* (May 30, 2008) (slip op. at 2-3).

I bring this concern to the Board's attention because it appears to be fast and furiously reaching beyond the "plain language of the ordinance and common definition" of terms. (See below summary of a related court case.) This is the second time within as many months that I felt it necessary to do so. My May 6 letter (see above) provided common dictionary definitions for terms in ordinary usage that are found in our land use regulations.

The NH Municipal Association website hosts the following "Court Update":

[When a term is not defined in a zoning ordinance, the plain language of the ordinance and common definition of the term will be used to interpret its meaning](#)

Batchelder v. Plymouth Zoning Board of Adjustment—No. 2008-847

Friday, May 7, 2010

...The key issue was the meaning of the term "incidental" as used in the ordinance. The ordinance did not include a definition for the term. The Court turned to the language of the ordinance as a whole, and to the common definition of the word. The word "incidental" is usually defined as something which is subordinate to something of greater importance. Here, the movement of earth was not commercial excavation and was of less importance than construction of buildings, and, thus, "incidental" to construction on the site. The lesson for land use boards is to take care during the drafting process to adequately define all important terms. **In the absence of such definitions, the common definition of the words in ordinary usage will be applied.**

...which is exactly what our local zoning ordinance states.

Unfortunately, some Board members also appear to be ignoring the precise language of **definitions that ARE included in the ordinance**, at times reaching for other towns'—or states'—definitions or to "industry standards" to try to justify their interpretation of what has already been codified, i.e., defined—and must be followed—in our own ordinance.

It would be wise for every Board member to have in hand the definitions and relevant sections of our land use regulations before tossing such suggestions into the discussion. Definitions should also be read in the context of the entire regulatory document, I believe.

Someone—if not the member speaking, then the Chair or the Town Planner—should read aloud from our ordinance or site plan regulations to remind everyone at the table of the precise language of our legally-binding codes.

Regards,

— Robin