

**19 MAIN STREET: NO WAIVER FOR “EXTENSIVE GRADING AND FILLING”  
(AND OTHER OBSERVATIONS ABOUT THE SITE PLAN REGULATIONS)**

August 10, 2022

Planning Board  
8 Newmarket Road  
Durham, NH 03824

Dear Members of the Board,

This may be a lengthier version of comments I made during the public hearing on August 10, 2022. As promised, I have sent them to Michael.

**Part I. Various questions and observations .....**

First, I ask two important questions that have not yet been raised:

How would the Board define “long-term parking?” It is not defined in our either the zoning ordinance or the Site Plan Regulations.

What authority could the Town have to enforce that time period, given that the parking would be on private property?

Second, I want to correct a misstatement made by a Board member on July 27:

While at least the northern portion of the site lies within our downtown commercial core, **it is simply not true that the site as a whole is constrained to only commercial uses**—as anyone who has read the Table of Land Uses knows.

Numerous other uses permitted by right fall into residential (examples: single family, various forms of senior housing) and institutional (examples: art center or museum, adult or child day care, government) categories.

Nor would other permitted uses necessarily require a large accessory parking lot. And as Councilor Hotchkiss pointed out, terracing could allow other construction options, which, I point out, would also deliver an economic return to the applicants.

Looking at a map showing lots and zoning district boundaries would suggest that some of these other permitted uses would fit considerably better with planning for “appropriate growth and development,” as both our Conditional Use criteria and Site Plan Regulations require.

Third, you may not just “dismiss” our regulations!

During the July 27th meeting, Board members discussed the language of the Site Plan Regulation 8.2.1., specifically the phrase “...extensive grading and filling shall be avoided”). I was shocked to hear arguments that effectively dismissed the regulation (not to mention manifesting a narrow perspective about construction options), stating that nothing could be built if the regulation were adhered to.

**What is going on?** The Board approved these Regulations, which translate the community's values into enforceable language. Don't like them? Propose amendments.

**You are legally bound to apply regulations in force for any application under the Board's review.**

The rationale for land use regulations is to codify a community's interest in what is an acceptable use for a specific location. Frankly, if you don't believe that, perhaps you should consider stepping down from the Board.

**Part II. The question of a waiver .....**

At the July 27th meeting, while discussing the proposed grading and filling, Board members briefly discussed the possibility of granting a waiver (authorized in Site Plan Regulations, Part I, Article 5, which includes required procedures and criteria).

As I wrote to you on September 7, 2021, regarding Section 8.2.1 of the Regulations:

...the Board must not even consider granting a waiver: **The very foundation of the Toomerfs application runs counter to the regulation's intent.**

In that letter, I also asked:

If not applied to this project, when? What, exactly, would be the "tipping point?"

Councilor Hotchkiss echoed that point at the [July 27th meeting](#) (about 10:14pm):

**"Well, if this isn't an instance where 8.2.1 comes into play, it's hard to imagine what, where it ever would affect."**

Both James Bubar and Lorne Parnell concurred.

Tonight I want to head a waiver off at the pass.

**Waiver process required in the Site Plan Regulations**

The Site Plan Regulations require that waivers must be "submitted in writing by the applicant along with the application for Board review" (Section 5.3.1).

Furthermore, and more significantly, granting a waiver must be guided by the **"spirit and intent"** of the Regulations. Additional guidance requires that "granting the waiver is consistent with the provisions of the Durham Zoning Ordinance, Durham Master Plan, and any official maps."

**What IS the *spirit and intent* of the relevant sections of the Regulations?**

We cannot know definitively unless we were “in the room where it happened.” Several sitting Board members approved the current Regulations, amended over a few years beginning in 2015. They may indeed remember what the Board intended at the time. (More than one recollection could help verify any claim.) Even so, it is only human to forget details from lengthy discussions held years ago.

So we must turn to the Regulations themselves for clues, reading the document in its entirety to uncover consistency, i.e., its internal integrity.

One should also remember that our Site Plan Regulations, like the zoning ordinance, evolve from our Master Plan, which in turn is underlaid by community surveys, forums, and public hearings—in themselves documenting “spirit and intent.”

**Purpose statements provide a key to “spirit and intent” .....**

While “purpose statements” are not enforceable, they are aspirational, and thus, by definition, they indicate “spirit and intent” and are foundational references when interpretation is required.

I excerpt verbatim, below, those in the Site Plan Regulations that I think most relevant to Section 8.2.1.

**Part I. General Provisions—Article 3. Purpose**

The purposes of these Regulations are to:

- 1) Further the safe and orderly development of the Town;
- 2) Promote sustainable design and development that supports long-term economic vitality and ecological integrity;
- 3) Achieve high-quality site appearance that conserves and protects natural resource systems, helps to reduce infrastructure costs, conserves energy, and provides for a pleasant, walkable environment for the future users and residents;
- 12) Implement the goals of the Durham Master Plan.

*Comments:*

“Extensive grading and filling” for the purpose of creating a large-scale private parking lot for long-term parking in the heart of a geographically extremely limited commercially-zoned area would not “further...orderly development.”

“Ecological integrity” is not served by “extensive grading and filling” that in this case would first require the clearing of trees that currently provide carbon

sequestration, passive cooling, and other ecosystem services critical to the health of the community—and by consequence, its “economic vitality.”

Purpose statement #3, above, requires no comment other than it would obviously not be served by “extensive grading and filling.”

## **Part I. General Provisions—Article 9. Word Usage**

In these regulations...the word “shall” is mandatory, and the word “may” is permissive.

*Comments:*

One might go so far as to say that **where the word “shall” is used, it is itself part of the “spirit and intent”** of these regulations.

In other words, the community—as implicit approvers of these Regulations—intended certain provisions to be mandatory because it “cared” enough to require them. (Other provisions are only “encouraged” or “should” be adhered to.)

## **Part III. Standards—Article 8. Natural Resources Standards**

### Section 8.1 Purpose

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.

*Comments:*

See, above, arguments under Part I. General Provisions—Article 3. Purpose.

Reminder: The Conditional Use criteria—**which are regulatory**—address the concept that I emphasized above. The final sentence of “External impacts” reads:

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.)

### Section 8.2 General Provisions

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.

*Comments:*

The spirit and intent of the final sentence of 8.2.1 is expressed in the preceding sentence, i.e., “to preserve natural resources and maintain natural topography...”

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

*Comments:*

The spirit and intent of the final sentence of Section 8.2.1 is echoed in the last two words of 8.2.3, i.e., “to minimize grading.”

**Master Plan as a guide to “spirit and intent” .....**

Section 1.2.2 in the Site Plan Regulations’ General Standards (as the Planner’s Review for this current meeting highlights) explicitly states that the Board may consult the Master Plan for guidance. So I first direct your attention to the Conservation Commission’s letter to the Planning Board, dated August 9, 2022, emphasizing inconsistencies with the Master Plan:

The project will have significant and detrimental impacts that should be considered very seriously....The site...provides aesthetic, habitat, and carbon sequestration benefits that will be lost. At the same time, it will facilitate more driving rather than alternative modes of transportation, increasing carbon emissions and congestion. These outcomes are inconsistent with the Town’s Master Plan, Town Council goals, and other policies focused on resilience and environmental stewardship.

Next, see excerpts from **four chapters of the Master Plan—adopted in 2015:**

1. The “**Natural Resources**” chapter records that the foundational 2011 Master Plan survey told us that respondents cared strongly about **water quality**, including two measures we know are relevant to College Brook and Oyster River, shown in this table:

	Overall Positive <u>Response Rate</u>	<u>Strongly Agree</u>	<u>Somewhat Agree</u>
Durham should protect its coastal streams and water bodies that lead to Great Bay	96%	71%	25%
Protecting aquatic habitats is important to me	91%	63%	28%

This chapter also acknowledges the value of **forests, both rural and urban, in part for effects on water quality**. Its “Goals and Recommendations” include:

- Issue:** Forests, which are a significant component of Durham’s water quality and overall quality of life, continue to be lost to new development.
- Goal:** Reduce the trend of continued loss of forestland and other natural areas, and increase the quantity and quality of existing forest cover in developed areas.

The value of an urban forested hillside in the center of town—as opposed to a cleared, extensively graded and filled area—may best be considered in light of the below section:

### **Ecosystem Services and Quality of Life**

Ecosystem services support society and contribute significantly to quality of life. Ecosystem services are benefits people obtain from ecosystems. These include provisioning services such as food and water; regulating services such as flood and disease control; cultural services such as spiritual, recreational, and cultural benefits; and supporting services, such as nutrient cycling, that maintain the conditions for life on earth.

...Protection and management of forests, trees, and other vegetation will ensure the provision of many benefits, services, and products including:

- Improved wildlife habitat for specific species of concern
- Places for recreational activities
- Improved scenic quality, community character, and property values
- Watershed protection, reduced impact of stormwater, and improved water quality
- Improved air quality.

### **Conclusion**

If the application does not meet all of our land use regulations, particularly if the project would not promote “appropriate growth and development” on this specific site, you must deny the application.

Regards,

Robin