

**From:** [Michael Behrendt](#)  
**To:** [Heather Grant](#)  
**Subject:** Main Street #19 - grading of site  
**Date:** Friday, September 17, 2021 9:54:25 AM  
**Attachments:** [image002.png](#)

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Hi Heather,

I am copying the Planning Board and applicant here. Regarding the provision about grading in the site plan regulations there are three ways the condition could be addressed:

- 1) The board finds that the plan meets the provision
- 2) The board grants a waiver below if it determines the plan does not meet the regs
- 3) If the board determines the plan does not meet the requirement the applicant could appeal the determination to the ZBA

The Zoning Ordinance and variance provisions do not come into play here as the provision is in the site plan regulations.

### **Michael Behrendt**

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**From:** Heather Grant [mailto:[hcgrant51@gmail.com](mailto:hcgrant51@gmail.com)]  
**Sent:** Thursday, September 16, 2021 9:23 AM  
**To:** Michael Behrendt  
**Subject:** Re: Main Street #19 - grading of site

Can you guide the PB on how Part 1 of General provisions helps us through these two comparisons of Part 3 Article 8?

**Section 5.1 General**

- 5.1.1 In accordance with RSA 674:44 III. (c) the Planning Board may grant a waiver from any provision of these regulations provided the Board finds that either:
- (a) Strict conformity with the specific provision would pose an unnecessary hardship to the applicant and the waiver would not be contrary to the spirit and intent of the regulations; or
  - (b) Specific circumstances relative to the site plan, or conditions of the land in the site plan, indicate that the waiver will properly carry out the spirit and intent of these regulations.

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(Note that a variance is granted from the Zoning Ordinance, whereas a waiver is granted under Site Plan Regulations. There are different criteria for variances.)

- 5.1.2 Unless “unnecessary hardship” is defined otherwise in applicable case or statutory law, it is defined herein as a situation where practical difficulties or unnecessary expense would result from strict compliance with the requirement, and where the applicant would be unduly burdened by the requirement as opposed to merely inconvenienced. Factors to be considered in determining the existence of a hardship shall include, but not be limited to:
- (a) Topography;
  - (b) Existing site features;
  - (c) Geographic location of the property; and
  - (d) Size/magnitude of the proposed project.
- 5.1.3 Unless defined otherwise in applicable case or statutory law, the Planning Board shall consider the following in determining whether a waiver would “not be contrary to the spirit and intent of the regulations” (per waiver provision 5.1.1 (a), above) or “properly carry out the spirit and intent of these regulations” (per waiver provision 5.1.1 (c), above):
- (a) whether granting the waiver will be detrimental to the public safety, health, or welfare, or injurious to other property,
  - (b) whether granting the waiver will promote the public interest; and
  - (c) whether granting the waiver is consistent with the provisions of the Durham Zoning Ordinance, Durham Master Plan, and any official maps.

Factors to be considered shall include, but not be limited to:

On Tue, Sep 14, 2021 at 9:49 AM Michael Behrendt <[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)> wrote:

To the Planning Board,  
I was asked about the grading provision in the Site Plan regulations discussed below. I think it would be appropriate for the Planning Board to discuss this issue at the October 13 meeting when 19 Main Street comes back to the board.

**Michael Behrendt**

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**From:** Michael Behrendt  
**Sent:** Wednesday, September 08, 2021 12:21 PM  
**Subject:** Main Street #19 - Toomerfs reply - site plan regulations | Standard III. 8.1 - letter from Robin Mower

To the Planning Board,  
Please see the email from Tim Murphy below.

(Please note, however, that it was entirely appropriate for Robin Mower to offer her comments. Regarding the provision that Tim Murphy refers to, this means simply that in the event that a person claims direct damage to themselves they must be specific in their claim. Ms. Mower is not making that claim in her comments. In addition, the provision that Mr. Murphy cites is related to conditional uses.)

**Michael Behrendt**

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**From:** Timothy Murphy [mailto:[timpatmurphy@yahoo.com](mailto:timpatmurphy@yahoo.com)]  
**Sent:** Tuesday, September 07, 2021 7:49 PM  
**To:** Michael Behrendt  
**Cc:** Peter Murphy; Mike Sievert  
**Subject:** Fw: Toomerfs reply/Main Street #19 - site plan regulations | Standard III. 8.1 - letter from Robin Mower

Hi Michael, Toomerfs objects to Robin Mower's letter because it does not comply with the requirements in the Zoning Ordinance ("*Any written comment*

*shall be specific when maintaining that the granting of the conditional use permit would adversely or injuriously affect the writer's personal and legal interests"). Ms. Mower is not directly affected by the proposed development and lacks personal and legal standing. She has offered a legal opinion of the Site Plan Regulations, but to our knowledge lacks legal qualifications.*

Section 8.2.1 says, "*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* (emphasis added). *Extensive grading and filling shall be avoided*". Ms. Mower expounds on the meaning of the word "shall", but has overlooked the common meaning of "avoided", which is more equivocal than "prohibited", and means in this context "to endeavor not to meet". Read in context, natural topography should be preserved to the extent practicable, and efforts made to not have extensive grading. That interpretation is consistent with the section on Low Impact Development (5.6.7) ("*with the goal of...achieving...[a]voidance of extensive grading*"). Similarly, see section 8.2.3: "*Development shall follow the natural contours of the landscape to the extent practicable to minimize grading*"; 8.2.7, "*Natural features and systems shall be preserved in their natural condition, wherever practicable. Such areas include...steep slopes...*" Section 8.4 also describes steep slopes and says, "*These elements shall be preserved, if practicable...*". Indeed, "significant" grading is part of the very definition of "Development" in the regulation. Read as a whole, the regulation intends developers to preserve natural features, including slopes, when practicable, but does not prohibit fill when needed. Thank you.

Tim

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----- Forwarded Message -----

**From:** Michael Behrendt <[mbehrendt@ci.durham.nh.us](mailto:mbehrendt@ci.durham.nh.us)>

**Sent:** Tuesday, September 7, 2021, 05:56:19 PM EDT

**Subject:** Main Street #19 - site plan regulations | Standard III. 8.1 - letter from Robin Mower

To the Planning Board,

Please see the attached letter from Robin Mower.

**Michael Behrendt**

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**From:** RobinM [mailto:[melodyofharpists@gmail.com](mailto:melodyofharpists@gmail.com)]

**Sent:** Tuesday, September 07, 2021 3:53 PM

**To:** Michael Behrendt; Karen Edwards

**Subject:** 19 Main Street | site plan regulations | Standard III. 8.1

Greetings, Michael and Karen,

Please forward and post the attached letter to the Planning Board.  
Thank you.

Thank you.

Regards,

-- Robin

Robin Mower  
Durham, NH

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