

Mark H. Puffer  
mpuffer@preti.com  
603.410.1545

April 13, 2021

**VIA EMAIL**

Chris Sterndale, Chairman  
Durham Zoning Board of Adjustment  
8 Newmarket Rd.  
Durham NH 03824

**RE:** Application for Appeal of Administrative Decision  
Application of Joshua Meyrowitz and Andersen Williams Group, LLC  
("Appellants")  
Tax Map 5, Lots 1-9, 1-10, 1-15, 1-16

Dear Chairman Sterndale and Zoning Board of Adjustment Members:

I continue to represent a group of Durham residents who are concerned about the Toomerfs, LLC's parking structure proposal on the above-referenced parcels. My letter to the Durham Planning Board dated March 4, 2021 set forth the position that the proposed parking facility was "structured parking" as that term is defined in the Durham Zoning Ordinance ("DZO"). The Town Planner's letter to me dated March 5, 2021 took the position that the parking proposal was for "surface parking" as that term is defined in the DZO.

The purpose of this letter is to supplement the anticipated testimony of the Appellants at your hearing this evening that the proposed parking facility constitutes "structured parking" as that term is defined in the DZO. I will do so by setting forth and applying basic and well-established canons of statutory and ordinance construction to the definitions of "structured parking" and "surface parking" in the DZO.

**Where Terms are Defined in an Ordinance, the Definitions Govern**

Where an ordinance defines a term, the definition will govern. 15 New Hampshire Practice: Land Use Planning and Zoning, Section 6.01 (LexisNexis Matthew Bender). Courts do not redraft ordinances to make them conform to an intention not fairly expressed in the language of the ordinance. Arnold v. Manchester, 119 N.H. 159 (1979). A court may not speculate on any supposed legislative intent that is not appropriately expressed in the language of the act itself. Derry v. Adams, 121 N.H. 843 (1981).

The two terms in question are defined in the DZO as follows:

April 13, 2021

Page 2

**STRUCTURED PARKING** – a structure or portion of a structure that provides parking. The parking may be above or below grade, may be covered or uncovered, and may be on multiple levels. See "Surface Parking."

**SURFACE PARKING** – a parking lot or similar uncovered, single-level parking facility that provides at-grade parking that is not located within a structure.

As set forth above, these definitions govern. They determine whether the Toomerfs LLC's parking proposal is "structured parking" or "surface parking." This Board may not redraft these definitions to make them conform to an intent that is not expressed in the language of the definitions themselves. This Board should not speculate on any supposed legislative intent that is not expressed in the definitions themselves.

First, it has been readily acknowledged, by Planning Board members, the Town Planner, and Toomerfs' engineer himself (Mike Sievert), that the proposed 20-foot high, approximately 220-foot long concrete structure, reinforced by steel, is a "structure" within the meaning of the DZO.<sup>1</sup> And, significantly, it is a structure that "provides parking." To "provide" means "to supply or make available (for something wanted or needed)." Merriam-Webster Online Dictionary. The proposed structure without any doubt supplies or makes available parking for the Toomerfs's property. Without such a massive structure, the 17,000 cubic yards of asphalt-topped fill would collapse. Without that structure, the Toomerfs's steeply sloped property could not be used for adding 137 new parking spaces. The other parts of the "structured parking" definition are also met:

- "The parking may be above or below grade..." – the proposed parking will be above grade;
- "The parking... may be covered or uncovered" – it will be uncovered; and
- "The parking... may be on multiple levels" – it "may be" on multiple levels, but by definition need not be.

The proposed facility squarely meets the definition of "structured parking," which governs.

The Town Planner's position as set forth in his letter of March 5, 2021 is that:

Structured parking refers to parking situated *inside or part of a building*, or what is commonly referred to in non-planner parlance, as a *parking garage*. Parking garages are buildings that are typically constructed of concrete and/or steel.

---

<sup>1</sup> The retaining wall on the south (facing Chesley Drive) is 222 feet, on the west (facing Mill Plaza) is 197 feet, and on the east is 25 feet, a total of 444 linear feet.

April 13, 2021

Page 3

There is nothing in the definition of "structured parking" in the DZO that requires that the parking be situated "inside or on top of a building," or that requires it to be specifically a "parking garage." All that the definition requires is that there be a "structure" that "provides parking." That is precisely what Toomerfs is proposing. The Town Planner's interpretation is not fairly expressed in the definition; and the ZBA, a quasi-judicial body, should not speculate on any supposed legislative intent that is not appropriately expressed in the language of the definition itself.

At the same time, the proposed facility is not "surface parking" within the meaning of the DZO. It is not "surface parking" because it is not "at-grade." "At-grade" does not mean that a parking facility is "at-grade" with itself. Whether a parking facility is "at-grade" is with reference to the land surrounding it. There is a steep drop-off from the Toomerfs's proposed parking facility down toward Chesley Drive and Mill Plaza. Mike Sievert has referred to 17-20 feet of elevated grade. What is proposed is by no stretch of the imagination "at-grade."

### **One Cannot Add Words to a Statute (Or Ordinance) That The Legislative Body Chose Not To Include**

One cannot add words to a statute (or ordinance) that the legislative body chose not to include. Belluscio v. Westmoreland, 139 N.H. 55, 56 (1994) ("We will not insert into a statute words the Legislature has chosen not to include."). The Town Planner's interpretation attempts to add words to the definition of "structured parking" that the legislative body, the Durham Town Council, chose not to use. The definition of "structured parking" does not say that the parking must be situated inside or on top of a building, nor is the definition limited to a parking garage. The Town Planner's interpretation seeks to add words to the ordinance that are not present.

The interpretation set forth in my letter of March 4, 2021, however, does not seek to add language to the definition that is not present. Toomerfs, LLC is proposing "a structure that provides parking," no more and no less. Note that the definition of "structured parking" does not require that the parking be located within the structure, only that the structure "provides [supplies or makes available] parking." The definition also specifically provides that the structure may be "uncovered," and may be on a single level, which is the case with Toomerfs's proposal.

### **Proper Construction of a Statute (Or Ordinance) Requires That All Words Be Given Effect**

Proper construction of a statute (or ordinance) requires that all words be given effect. Windham v. Alford, 129 N.H. 24 (1986). The Town Planner's conclusion that Toomerfs's proposal is for "surface parking" violates this basic canon of statutory construction. His analysis gives no effect to the "at-grade" requirement in the definition of "surface parking." Instead, he states the truism that the proposed facility would be "on the finished grade." He gives no meaning to (fails to give effect to) the requirement that "surface parking" be "at-grade." He equates "single-level" parking with "at-grade" parking, which effectively eliminates "at-grade" as a separate requirement of the definition.

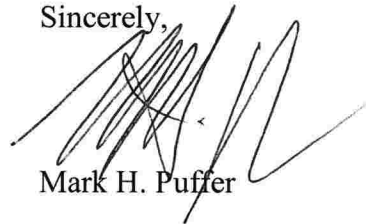
PRETI FLAHERTY

April 13, 2021  
Page 4

**Summary**

In sum, definitions in a zoning ordinance govern, and the Toomerfs's proposed facility is "structured parking" (and is not "surface parking") within the meaning of the DZO. The Town Planner's analysis seeks to add words to the definitions that are not present and should be rejected.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark H. Puffer', written over a light blue horizontal line.

Mark H. Puffer

MHP:sas  
cc: Michael Behrendt