

TOWN OF DURHAM
ZONING BOARD OF ADJUSTMENT

RECEIVED
Town of Durham
MAR 24 2021
Planning, Assessing
and Zoning

APPEAL FROM AN ADMINISTRATIVE DECISION

Names of Applicants: Peter Andersen & Martha Andersen
Joshua Meyrowitz

Addresses: 8 Chesley Drive / Andersen Williams Group, LLC [Map 5 / 7-59]
7 Chesley Drive / Joshua Meyrowitz Rev Trust [Map 5 / 7-58]

Phone #s / Email: 603-868-1019 – Andersen <M-andersen@comcast.net>
603-868-5090 – Meyrowitz <Prof.Joshua.Meyrowitz@gmail.com>

Owner of Property Concerned: Toomerfs, LLC (c/o Peter Murphy)
Address: 37 Main Street, Unit O, Durham, NH 03824

Location of Property: “19-21 Main St”
Tax Map & Lot Numbers: Map 5 / Lots 1-10, 1-9, 1-15, 1-16

Decision(s) of the enforcement officer to be reviewed:

We are filing an appeal of what Zoning Administrator Audrey Cline has confirmed (via March 22, 2021 emails, *enclosed*) was an appealable “administrative decision” by the Durham Planning Board on March 10, 2021, at approximately 7:29pm. At that time, the Board was asked by the Acting Chair if members had any disagreements with respect to a “staff opinion” letter (*enclosed*) written on March 5, 2021, by Planner Michael Behrendt to Attorney Mark Puffer. Mr. Behrendt’s letter disputed the claims in Mr. Puffer’s March 4, 2021 letter (*enclosed*). Audrey Cline writes that at that time in the March 10 meeting, she **“heard the acting Chair ask if any of the Planning Board members disagreed with the staff opinion. No one disagreed.”**

The “staff opinion” conveyed by Mr. Behrendt’s letter was that the pending proposal for Church Hill Woods (aka “19-21 Main Street”) is merely an at-grade “parking lot” and not, as Mr. Puffer argues in his letter, far-above-grade “structured parking,” as defined in the Durham Zoning Ordinance (DZO).

We are appealing in support of Attorney Puffer’s assertion in his letter that the massive plan for 4 lots on Church Hill is clearly not for “at-grade, surface parking,” given the basic elements of the proposal, as they relate to the particular definitions in the DZO, cited further below:

- Cut down 1.3 acres of trees on steeply sloped wooded lots that descend about 30 feet in elevation from 19-21 Main Street toward the Chesley Marsh and College Brook flood zone (and toward our #7 and #8 Chesley Drive homes), lots that are entirely unsuitable for at-grade parking, as they are;
- Truck in an estimated 17,000 cubic yards of fill, in over a thousand 10-wheeler dump truck loads, to dramatically raise the grade of those lots to closely match the grade of the two Main Street lots (with a remaining 3% descending grade on the proposed parking surface);
- Thereby construct, far-above-the-existing-natural-grade, a football-field size asphalt-topped parking surface held together by, and contained within, a 20-foot tall Recon® retaining wall system (*see enclosed image of sample Recon wall, “only” 13-feet tall*).
- Lots 1-15 & 1-16, are legally distinct lots from Main Street lots 1-9 & 1-10. Moreover, they (particularly 1-16) abut Chesley Drive property, are quite distant from Main Street, and in contrast to the Main Street lots, are at too steep a grade to accommodate even a single vehicle spot for “surface parking.” (*See enclosure on “Misleading Labels”*) Additionally, Mr. Behrendt mistakenly refers to matching the grade from the “front of the lot” – singular – when there are four lots involved with major grade distinctions between them. (Mr. Behrendt writes that the parking lot is not a structure because **“It is on the finished grade, and extends continuously from the front of the lot.”**)

We assert, along with Attorney Puffer, that what is planned, *in toto*, clearly constitutes a structure that “provides parking” far above the existing surface and far above the natural grade. Without the planned massive amount of fill or other extensive material, no parking surface on those lots could be constructed. And without the fill being contained in, and held together by, a huge multi-sided retaining wall system, the overall structure would fall apart.

Given these facts, the overall parking proposal much more closely matches the DZO definition of “Structured Parking,” which is prohibited in the Church Hill district per Durham’s Table of Uses, and does not conform with the DZO definition of “Surface Parking,” which must be “at grade.”

Both Attorney Puffer and Mr. Behrendt cite the DZO definitions, but interpret them differently:

SURFACE PARKING — A parking lot or similar uncovered, single-level parking facility that provides at-grade parking that is not located within a structure. (DZO, Article II, Definitions, Section 175-7.)

STRUCTURED PARKING — A structure or portion of the structure that provides parking. The parking may be above or below grade, may be covered or uncovered, and may be on multiple levels. (DZO, Article II, Section 175-7.)

“Structured parking” by our DZO definition, “**may be above or below grade**” (in the Toomerfs proposal, it would be very much above the current natural grade), it may “**be covered or uncovered**” (the proposal is for uncovered), and “**may be on multiple levels**” (emphasis added), and thus *may be* on a single level, as proposed here. The Toomerfs proposal matches “Structured Parking,” a use that is not allowed on Church Hill, per the DZO’s Table of Uses.

Mr. Behrendt defends his assertion by saying that “**Structured parking refers to parking situated inside or on top 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.**”

This may be what Mr. Behrendt has in his mind. However, as seen in the definition quotes above, there is no language in the DZO that supports Mr. Behrendt’s assertion that “Structured Parking” is limited to “parking situated inside or on top of a building.” Moreover, there is nothing in the DZO definitions that specifies only particular *materials* (such as concrete or steel) as things that make for “Structured Parking.” The DZO could be amended in the future to meet Mr. Behrendt’s preferred definitions, but current applications must be judged on the basis of the current DZO. The DZO’s definitions set the rules, not what the Town Planner and other “Town staff” wish the written definitions were.

Consider alternative proposals where Mr. Behrendt’s definitional certainty breaks down. Imagine, for example, that the Town determined (not unreasonably) that 1,100 10-wheeler dump truck loads were not acceptable for busy and historic Main St. And imagine that that restriction led the applicants to propose the same retaining wall but with steel girders reaching from the wall to concrete footings where the land starts to drop down away from the Main Street lots, and that they then used reinforced concrete, instead of the planned asphalt, to construct the parking surface. Over the phone, Mr. Behrendt conceded that this alternative would meet his “steel & concrete conception” of “structured parking.” Moreover, the resulting parking structure would be well above grade, given the drop off in ground-level elevation toward Chesley Drive. Yet, the parking surface would be at exactly the same grade as the current proposal, which we also argue is very much “above grade.” Most damaging to Mr. Behrendt’s definitions, that concrete & steel parking structure would *not* be “inside or on top of a building.” Clearly, there is no governing consistency in Mr. Behrendt’s definitions. We hope that the ZBA will follow the DZO definitions.

We can add that if a surface that requires 17,000 cubic yards of fill is “at grade,” then almost

anything constructed could be defined as “at grade” – if one conveniently starts to measure grade after doing the major changes in grade. Our understanding is that terms in Zoning definitions, such as “at grade,” are not supposed to be meaningless, thus “at grade” should refer to parking lots at or very near to the original grade. What is proposed is very far from the original, natural grade. And without the retaining wall, the parking mound would collapse. Thus, the massive retaining wall system does, in essence, “provide” the parking.

Mr. Behrendt challenges the notion that **“there is some particular height of the wall at which point surface parking becomes structured parking, and that this is clearly not what the definition states nor what is intended by structured parking.”** Mr. Behrendt may have overlooked that the definition of “Structure” in the DZO includes that **“Structure does not include a minor installation such as a fence six (6) feet high or less in height, a mailbox, a flagpole, or an accessory shed.”** Thus, there is indeed a particular height – more than six feet in height – at which a fence becomes a structure. In this case, the proposed retaining wall and fence atop it are almost 400% taller than the height specified in the DZO as becoming a significant structure. In any case, as Mr. Puffer details in his letter, the applicant and multiple Board members have consistently referred to what is being planned as a large “structure” that would be necessary to facilitate the proposed use, that is, that would “provide parking” on lots that would otherwise not be even remotely usable for such a purpose.

Please also note that the base of the proposed 20-foot tall retaining wall would start more than two stories above the Chesley Drive street level, and that that elevation, combined with the height of the wall and its visual severity (contrasted with a building with windows and trim), would result in a structure that would loom over our homes in the manner of an adjacent prison fortress, 4-5 stories tall. (*See enclosed images of the Church Hill Woods from our Chesley Dr. homes.*)

Mr. Behrendt wants to argue for “parking garage” as the *intent* of the “Structured Parking” definition. Yet, looking at “intent” would also bring us even more pointedly to the apparent intent of prohibiting structured parking in the Church Hill District. Church Hill is a beloved and cherished small district, and the intent of prohibiting Structured Parking seems to have been not to violate Church Hill’s wooded and topographical beauty interwoven with the Historic District. The restriction on “structured parking” obviously maintains Church Hill as a *hill*. What is being proposed by Toomerfs is certainly the sort of massive visual desecration and change in topography – **from wooded hill to barren paved mesa** – that the Table of Uses seems to have been intended to prohibit. Again, there’s nothing in the DZO definitions that describes the material that has to be used for such a desecration of the Hill to designate it as a prohibited use.

Procedural Impropriety: We also wish to register an objection to the fact that although Attorney Puffer addressed his March 4, 2021, letter to the Planning Board, c/o Mr. Behrendt, that Mr.

Behrendt deviated from typical Planning Department practice and delayed the posting and forwarding of Mr. Puffer's letter to the Board until Mr. Behrendt had a day to consult with other Town staff and write a rebuttal to Mr. Puffer's letter. Then, both letters were sent to the Board on the same day, March 5, 2021, thereby diminishing the opportunity for the Board Members to assess the merits of Mr. Puffer's letter before receiving the "right answer" from Town staff.

Further, although Mr. Behrendt informed Mr. Puffer that he would have an opportunity to make the case for his position during the March 10, 2021, Public Hearing *prior* to the Board discussing and evaluating the issues, the Board raised and dismissed (via 6 seconds of silence) Mr. Puffer's letter, about 75 minutes before the Public Hearing was opened. (*See enclosed transcript.*)

Moreover, as Ms. Cline's description concedes, the Planning Board dismissed Mr. Puffer's detailed argument with not a word of discussion or debate, with no motion, and with no vote.

We appeal to the ZBA to reflect carefully on the arguments in Mr. Puffer's letter and those presented above, with the support of the enclosures.

Enclosures:

- ◇ List of Abutters
- ◇ Email exchange, Malcolm Sandberg & Audrey Cline, March 22, 2021
- ◇ Planner's Response to Mr. Puffer, March 5, 2021
- ◇ Attorney Puffer's letter to the Planning Board c/o Michael Behrendt, March 4, 2021
- ◇ "Misleading Labels #1 & #2" – not at "19-21 Main St" and not "a parking lot"
- ◇ Topography of Church Hill Woods / Site Plan for Parking Structure (from applicant)
- ◇ Recon Retaining Wall photo (13-foot sample vs. proposed 20-foot wall)
- ◇ Regis 3131 3-Rail Spear Top Aluminum Fence Panels (proposed for top of retaining wall)
- ◇ Retaining Wall Detail (from applicant)
- ◇ Views of Church Hill Woods & 8 Chesley Dr. from 7 Chesley Dr front hallway/front door)
- ◇ Transcript of the "Administrative Decision," Planning Board, March 10, 2021

NOTE: We are unable to enclose elevation drawings of the proposed parking structure because the applicant has not yet responded to requests to provide them. Similarly, we are unable to enclose details of the appearance of the Chesley Dr. side retaining wall because only one blurry image has been provided by the applicant. And we are unable to provide any rendering or images of the retaining wall as it would appear from Mill Plaza because the applicant has not yet responded to requests to provide those.

TAX MAP 5:

www.ci.durham.nh.us/sites/default/files/fileattachments/assessing/page/22321/map_5.pdf

Co-Filers of Appeal of Administrative Decision:

Peter Andersen & Martha Andersen
Andersen Williams Group, LLC [Map 5 / 7-59]
8 Chesley Drive
Durham, NH 03824
603-868-1019 / Martha Andersen <M-andersen@comcast.net>;

Joshua Meyrowitz
Joshua Meyrowitz Rev Trust [Map 5 / 7-58]
7 Chesley Drive
Durham, NH 03824
603-868-5090 / Joshua Meyrowitz <Prof.Joshua.Meyrowitz@gmail.com>;

Subject Property of Contested Zoning Determination

"19-21 Main St" [Map 5 / Lots 1-10, 1-9, 1-15, 1-16]
Toomerfs, LLC (c/o Peter Murphy)
37 Main Street, Unit O
Durham, NH 03824
617-312-4112

ABUTTERS:

Matthew Morgan
Manager of Torrington NH OP LLC
23 Main Street
Durham, NH 03824
603-868-5400

TORRINGTON MALDEN ONE LLC
Co-Owner UEP LIVING LLC
11 ELKINS STREET SUITE 420
BOSTON, MA 02127

8 Main Street – Map 4, Lot 54-4 (two buildings).
10 Main Street – Map 4, Lot 54-3.
23-35 Main Street - Map 5, Lot 1-6 (six buildings)
+++

St. George's Episcopal Church of Durham [Mat 5 / Lot 54-2]
1 Park Court
Durham, NH 03824
603-868-2785 / officestg@comcast.net
+++

Community Church of Durham [Map 5 / Lot 2-8]
P.O. Box 310
17 Main Street
Durham, NH 03824
868-1230 / office@ccdurham.org
+++

William F. Hall Rev Trust [Map 5 / Lot 1-12]
3 Smith Park Ln
Durham, NH 03824
603-868-7400
+++

Michael F. Urso [Map 5 / Lot 1-13]
Sandra A Ceponis
[Re: 5 Smith Park Lane]
421 Hillcrest Lane
Lombard, IL 60148

[son of owners, Lee, NH: Kyle Urso 603-489-8435 <KyleUrso@me.com>]
+++

Colonial Durham Associates [Map 5 / Lot 1-1]
Administrative Offices
7 Mill Rd, Unit L
Durham, NH 03824
+++

Not technically abutters? (across from wetland on Andersen Property)
Martin A Lee Rev Trust & Nancy J Lambert Rev Trust [Map 5 / Lot 6-6]
17 Faculty Road, Durham, NH 03824
Marty Lee 868-1268 <marty.lee@unh.edu>;
Nancy Lambert 868-1268 <nancy_lambert_durham@hotmail.com>;

**March 22, 2021, Email Exchange Between
Resident Malcolm Sandberg & Zoning Administrator Audrey Cline**
(in chronological order)

From: Mal <mal.sandberg@comcast.net>
Sent: Monday, March 22, 2021 8:26 AM
To: Audrey Cline <acline@ci.durham.nh.us>
Subject: 175-12. Administrative Appeals.

Good morning, Audrey,

On March 5, Planner Michael Behrendt responded to two points made in correspondence from Attorney Mark Puffer in which he invoked your name as Zoning Administrator (attached). Is his letter to be construed as a formal determination by you and therefore appealable under Article IV, 175-12. Administrative Appeals?

https://www.ci.durham.nh.us/sites/default/files/fileattachments/planning_board/page/59631/planners_response_to_attorney_puffer.pdf

Best regards,

Mal

On Mar 22, 2021, at 2:01 PM, Audrey Cline <acline@ci.durham.nh.us> wrote:

Dear Mal,

Michael's letter to the Planning Board was opinion, not an administrative decision. The Planning Board did make an administrative decision on the issue on March 10, and that is the appealable decision. Durham's appeal period is 30 days from the date of decision, which if I have counted right, is April 9th. Karen can help you with any paperwork and verify the deadline date if you'd like to call or email her.

Thanks,

Audrey Cline CBO
Code Official
Zoning Administrator
Health Officer

From: Malcolm Sandberg <mal.sandberg@comcast.net>
Sent: Monday, March 22, 2021 2:34 PM
To: Audrey Cline <acline@ci.durham.nh.us>
Subject: Re: 175-12. Administrative Appeals.

Thank you, Audrey,
You might want to watch the PB meeting to see how MB's letter was handled.
Best,
Mal
Home: 603-868-2350
Mobile: 603-767-0327

On Mar 22, 2021, at 7:19 PM, Audrey Cline <acline@ci.durham.nh.us> wrote:

Hello Malcolm,

I did review the DCAT, and I heard the acting Chair ask if any of the Planning Board members disagreed with the staff opinion. No one disagreed.

Regards

From: Malcolm Sandberg <mal.sandberg@comcast.net>
Sent: Monday, March 22, 2021 7:31:39 PM
To: Audrey Cline <acline@ci.durham.nh.us>
Subject: Re: 175-12. Administrative Appeals.

Yes, there was no discussion or comment. You referred to an MB letter to the PB. I am only aware of a letter from MB to Mark Puffer in response to Puffer with no cc to other parties. Is there another letter to the PB regarding Puffer's March 5 letter?

Thanks, again,

Mal
Home: 603-868-2350
Mobile: 603-767-0327

From: Audrey Cline <acline@ci.durham.nh.us>
Date: March 22, 2021 at 8:00:36 PM EDT
To: Malcolm Sandberg <mal.sandberg@comcast.net>
Subject: Re: 175-12. Administrative Appeals.

Malcome,

I did not refer to an MB letter to the Planning Board. I was referring to the letter from MB to Mark Puffer with staff opinion, which was shared with the PB, which I was assuming was what the Planning Board chair was referring to.



Michael Behrendt
Durham Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824-2898
Phone (603) 868-8064
mbehrendt@ci.durham.nh.us
www.ci.durham.nh.us

March 5, 2021

VIA EMAIL

Mark Puffer, Esquire
Preti Flaherty
P. O. Box 1318
Concord, NH 03302-1318

Re: Your letter of March 4 regarding the Site Plan Application at 19-21 Main Street

Dear Mr. Puffer,

This correspondence is in response to your letter to me from yesterday regarding the site plan application at 19-21 Main Street for Toomerfs, LLC. I am responding to two interpretations that you offer of the Durham Zoning Ordinance as applicable to the project. As you know, the application is still active and no final determination has been made by the Planning Board. I am not taking any position at this time regarding the application itself but only responding to these two points.

Please note that Town Administrator Todd Selig, Zoning Administrator Audrey Cline, Town Attorney Laura Spector, and I have all conferred and we are in agreement in this response.

Parking Structure

You assert that the proposed parking facility is not *surface parking* which is allowed by conditional use in the Church Hill zoning district but rather *structured parking* which is not allowed in the Church Hill zoning district. Your position appears to be based upon there being a tall retaining wall at the lower side of the parking lot. I certainly disagree with this interpretation.

Here are the definitions for both uses in the Durham Zoning Ordinance:

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 definition for Surface Parking below).

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

The proposed parking lot is just that: a parking lot. As such it falls under the definition of surface parking. Based upon your argument, any significant regrading of land or use of a retaining wall to accommodate conversion of raw land to development, as is commonly used in many site designs, would render the parking lot structured parking (unless there is some particular height of the wall at

which point surface parking becomes structured parking). This is clearly not what the definition states nor what is intended by structured parking.

The wall itself is a structure but the parking lot is not. It is on the finished grade, and extends continuously from the front of the lot. Land that is regraded and supported at one end by a retaining wall is not a structure, neither in the Town's definition nor in common understanding and use of the term. If this use were to be classified as structured parking then one would have to wonder what would constitute surface parking.

Structured parking refers to parking situated *inside or on top 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.

Extension of Central Business District Use

You assert that this plan is an improper extension of the Mill Plaza project situated on a nearby lot in the Central Business District. That project is also being reviewed now by the Planning Board.

The parking lot application at 19-21 Main Street is independent of the Mill Plaza project. It was submitted as a separate application and is being reviewed as such. It is owned by a different party from Mill Plaza. The applicant has stated explicitly that they are open to considering a leasing arrangement with Colonial Durham Associates for rental to potential future occupants of Mill Plaza but that they are proceeding with this application on their own and it is not dependent on any arrangement with Mill Plaza. The applicant stated they believe there is a strong market for rental of these parking spaces whether or not the Mill Plaza project proceeds.

Your argument appears to be that a parking lot may not serve residents of a mixed-use project (located in a different zone) because a mixed-use project is not allowed in the Church Hill zone. The proposal is for surface parking as a principal use, meaning that it can serve any parties coming from off site (except as may be specifically restricted for good cause because it is a conditional use). However, the plan is for a parking lot, not for a mixed-use project.

Whether the lot ultimately serves residents of Mill Plaza and/or residents of other properties it will serve people who live somewhere. To assert that a parking lot is not permitted in the zone because it is serving residents of a mixed-use building and mixed-use buildings are not allowed in the zone would be akin to arguing that a retail store is not allowed in a retail commercial zoning district if that district does not also allow apartments (since many of the customers of the store live in apartments).

My best regards to you.

Sincerely,



Michael Behrendt
Town Planner
Town of Durham

Mark H. Puffer
mpuffer@preti.com
603.410.1545

March 4, 2021

VIA EMAIL (mbehrendt@ci.durham.nh.us)
Durham Planning Board
c/o Michael Behrendt, Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824

RE: Site Plan Application for Toomerfs, LLC ("19-21 Main St. - Parking Lot")

Dear Mr. Behrendt and Members of the Planning Board:

I continue to represent a large group of Durham residents who are concerned about the above-referenced parking structure proposal and the proposed Mill Plaza development adjacent thereto. My clients and I continue to maintain that these supposedly "independent" projects are, in fact, two components of one "new" Mill Plaza redevelopment proposal that is, thereby, "no longer grandfathered under the 2015 agreement," as I argued in my February 5, 2020, letter to the Board.

However, the focus of this letter is on the Toomerfs proposal in particular. The Toomerfs proposal is clearly a "not permitted" use in the Church Hill District, per the Durham Zoning Ordinance ("DZO") Table of Uses, and it must therefore be denied for that reason.

My clients include direct abutters to both Mill Plaza and the Church Hill Woods properties, as well as residents from every street in the Faculty Neighborhood that is adjacent to (and partly defined and bounded by) these two properties. These residents clearly have standing with respect to Durham's Article VII: Conditional Use Permits, the criteria of which explicitly apply to "abutting properties," "the neighborhood," and the "surrounding environment." I also represent a number of residents from other parts of Durham who are concerned about the future of downtown development and the overall environmental, aesthetic, and fiscal health of the Town of Durham, which they believe would be severely compromised if such non-compliant projects were to move forward.

I listened with great interest to the Planning Board's Public Hearing on Wednesday, February 17, 2021 on the Toomerfs' proposed parking structure. There was substantial public and urban-forest expert input (about 75 minutes), which built on extensive prior written and spoken input, all making a convincing case for how the project would clearly fail to meet Conditional Use ("CU") criteria, if the criteria were diligently applied. (Such a failure was already previewed by

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Planning Board members' final negative comments in the preliminary design phase on January 8, 2020.) On February 17, there was also "preliminary discussion" among Board members of the CU criteria.

Although the Board discussed those criteria, no votes were taken nor were decisions made on February 17. My understanding is that the matter was continued to the Board's March 10, 2021 meeting, at which time the Board is expected to receive and discuss the results of two independent studies (for stormwater and traffic), and that there was the intention to discuss further whether the proposed parking project meets the CU criteria, so as to give the Town Planner an indication as to whether he should be drafting a proposed approval or disapproval of the project.

From my investigation of the review of the parking structure at the request of my clients, however, it is apparent that the Planning Department and the Planning Board have been proceeding on the basis of false assumptions with respect to the nature of this proposal, without carefully examining and referencing the definitions in Durham's Zoning Ordinance and the Table of Uses.

Based on the Town's Zoning Ordinance, the proposed parking structure is not allowed by Conditional Use permit in the Church Hill District. It is quite clearly and simply a "not-permitted use," per the Table of Uses, and it would be an improper extension of Central Business District uses into the Church Hill Zone.

The Proposed Parking Structure Is Not Allowed In The Church Hill District

"Surface Parking" is allowed in the Church Hill District by Conditional Use. However, the Toomerfs' proposal is not for "Surface Parking," as defined under the DZO, as follows:

SURFACE PARKING – A parking lot or similar uncovered, single-level parking facility that provides at-grade parking that is not located within a structure. (DZO, Article II, Definitions, Section 175-7.)

The Toomerfs proposal is, instead, clearly for "structured parking," as defined under the DZO, a "not permitted" use in Church Hill.

STRUCTURED PARKING – A structure or portion of the structure that provides parking. The parking may be above or below grade, may be covered or uncovered, and may be on multiple levels. (DZO, Article II, Section 175-7.)

What Toomerfs is proposing is not "surface parking" within the meaning of the DZO. It is "structured parking," as has been repeatedly conceded by the applicants, mentioned by Board members, and also referred to in numerous public comments.

Because of the severe downward slope of the Toomerfs' property, away from Main Street and down toward Chesley Drive, an enormous amount of fill (estimated to require 1,100 or more

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filled dump trucks, or 17,000 cubic yards of fill, per Planner's Review for February 17, 2021) will need to be brought to the site to create a new, much-elevated surface that is clearly not "at-grade." Moreover, a twenty (20) foot high retaining wall, topped by a 30" black aluminum fence, will need to be constructed into the hillside in order to contain such large amount of fill. What is proposed is clearly structured parking and certainly well "above grade."

The applicant's engineer, Mike Sievert, in describing the proposed retaining wall, stated as follows: "That's a structure. It's defined as a structure." (Planning Board meeting of February 17, 2021 at 7:35 PM). Board Vice Chairman Parnell, at approximately 10:27 p.m. on February 17, 2021, correctly observed that: "This is not about a building, obviously, but it is about a structure." Board member Tobias, at approximately 10:35 PM at the same meeting, repeatedly referred to the proposed retaining wall as a "structure."

Indeed, the proposed retaining wall is a structure that "provides parking," and therefore meets the definition of "structured parking" under the DZO, a use not allowed in the Church Hill District.

The definition of "structured parking" further provides that the parking "may be above or below grade" (in this proposal, it would most definitely be very much above grade), it may "be covered or uncovered" (it would be uncovered), and "may be on multiple levels" (note that since it only "may" be on multiple levels, it is thus not required for it to be on more than one level to fit the DZO definition of "structured parking"). The Toomerfs proposal is clearly "Structured Parking," a use that is not allowed on Church Hill per Durham's Table of Uses.

By the same token, the proposed parking facility does **not** meet the definition of "surface parking" within the definitions of the DZO. The proposed facility would be "uncovered" and "single-level," however it would not provide "at-grade parking" because there would be a dramatic, multi-story-degree drop-off from the artificially constructed parking lot surface to the ground-level below. In addition, the proposed facility would in fact be "located within a structure."

The Proposed Structured Parking Facility Amounts To An Improper Extension Of A Central Business District Use Into The Church Hill District

Durham does not allow "structured parking" in the Church Hill District, unlike in the Central Business District. This non-compliant proposal emerges from the creative attempts to obscure the obvious inter-dependence of the Mill Plaza and Toomerfs proposals. Subsequent denials aside, both Colonial Durham Associates (CDA) and Toomerfs explicitly acknowledged the "coordination" of the two proposals in their original applications.¹ Moreover, CDA agent Sean

¹ CDA's Updated Letter of Intent 10-28-19, p. 1: "In coordination with...the direct easterly abutter, Toomerfs, LLC, Colonial Durham Associates, LP (CDA) is preparing to move forward with its tabled planning application for redevelopment of the Mill Plaza." Toomerfs Preliminary Application Oct 23 2019, p. 4: "The options for parking lot

PRETI FLAHERTY

March 4, 2021

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McCauley has repeatedly informed the Planning Board of “a long-term lease arrangement with our neighbor,” not much of a secret, in any case, as the first page of the Pernaw Updated Traffic Report, 11-23-20 for the Toomerfs application explicitly states that “A portion of the new parking lot is intended to serve another off campus student housing facility proposed by others at 5 Mill Road [Mill Plaza] in Durham, New Hampshire.” In short, the two projects are clearly interconnected.

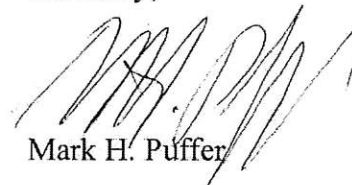
As a general rule, it is perfectly appropriate for two or more parcels to be developed together as a single project. The problem here is not only that that would further undermine CDA’s claim that the current site plan is still grandfathered under the 2015 Settlement, but also that the two projects are in different zoning districts. CDA’s proposed use, Mixed-Use with Residential, is allowed by Conditional Use Permit in the Central Business District. But it is not allowed in the Church Hill District. The Toomerfs’ proposed structured parking facility is as big as it is because it is designed to accommodate a use in a more intensive zoning district.

In effect, what is happening here is that the Toomerfs’ proposal, to support a use not allowed in the Church Hill District, is a functional attempt to expand a Central Business District use into the Church Hill Zone, where it is not allowed and would undermine the integrity of that Zone. Such a classification of uses between the two Districts is not unreasonable or invalid. See Windham v. Alford, 129 N.H. 24, 31 (1986) (“The fixing of zoning lines is a matter of legislative discretion and necessarily results in a different classification of uses on either side of the line. This does not render limitations on use of property near the boundary line in a more restricted district unreasonable or invalid.”).

Conclusion

In short, this Board need not, and should not, deliberate and reach decisions on the Conditional Use criteria for the pending project for two main reasons: (1) Toomerfs’ proposed parking facility is not “Surface Parking” within the meaning of the DZO; and (2) the Toomerfs’ proposal is to accommodate a use, “Structured Parking,” that is allowed in the adjacent Central Business District but is not allowed in the Church Hill District.

Sincerely,



Mark H. Puffer

MHP:sas

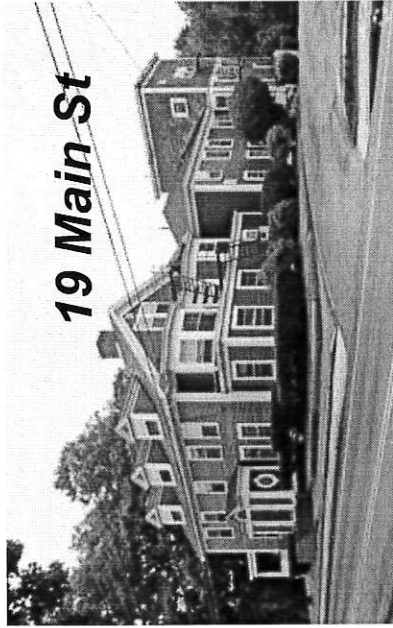
cc: Laura Spector-Morgan, Esquire

development also lends the opportunity for combined use of the parking lot with the adjacent proposed development on the Colonial Durham Associates lot....”

Misleading Label #1

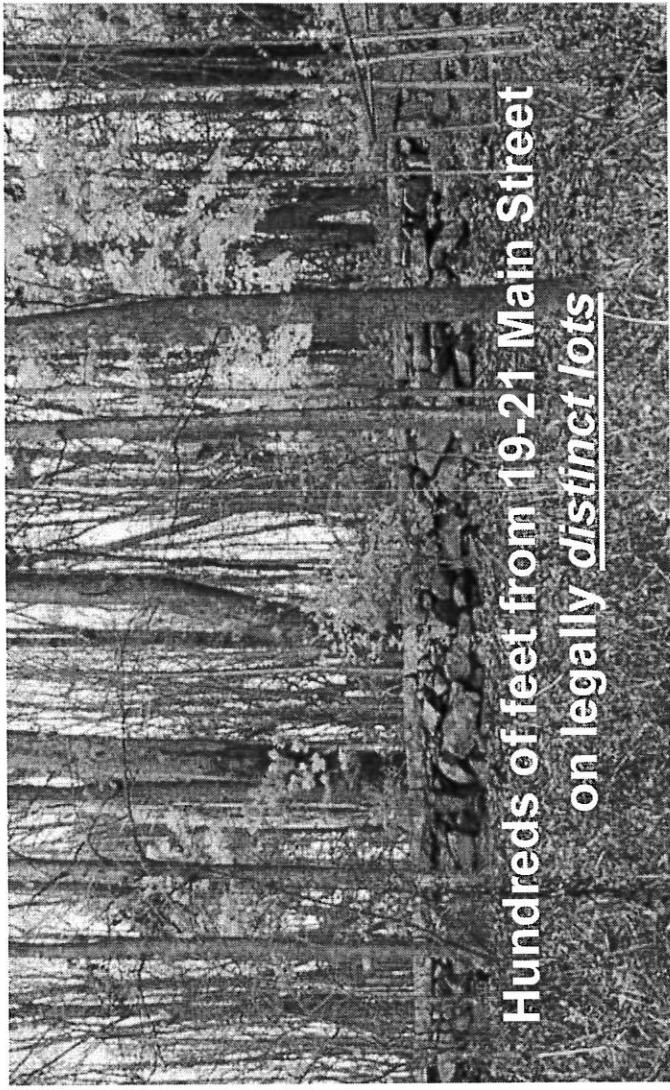
The proposed project is not located at "19-21 Main Street"

Those house addresses are only for driveway entrance/exit to 4 contiguous lots purchased by Toomerfs. The parking expansion proposed is on lots that have no street address and are distant from Main Street.



Project location is more accurately:

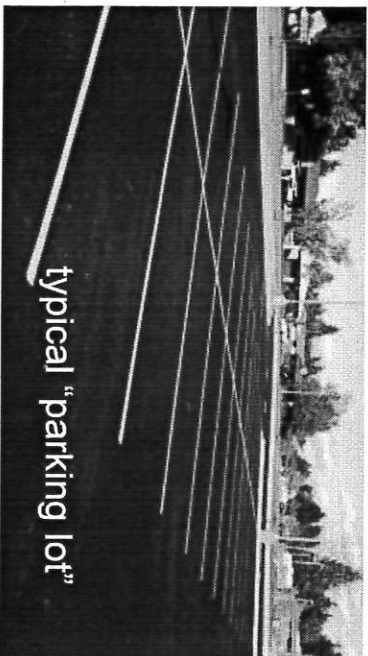
"1.3 acres of iconic woods that slope steeply toward the Chesley Marsh wetland and the College Brook flood zone." →



Misleading Label #2

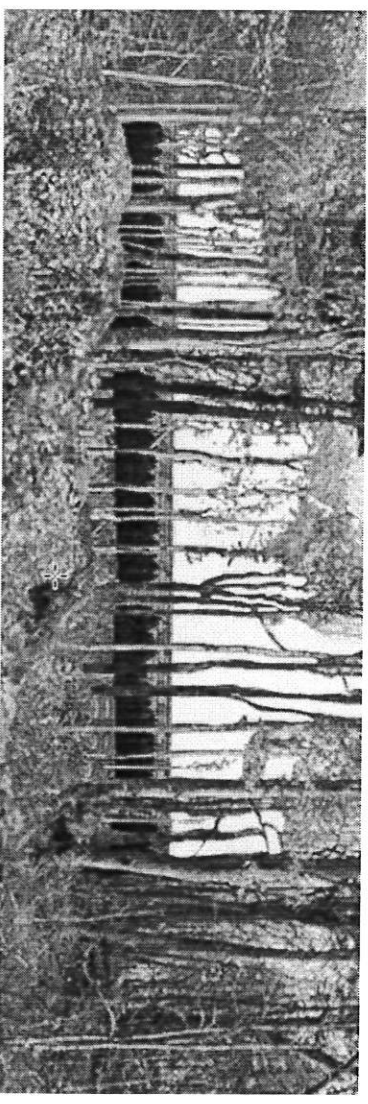
The project does not match the standard definition of a "Parking Lot"

"Parking lot" conveys image of plan to compact, pave, & paint spot stripes on an "at-grade," relatively level surface. Actual proposal: construction of massive 17-foot high football-field size mound with 17,000 cubic yards/tons of fill encased in 20-foot tall retaining wall, made taller with 30" black aluminum fence atop the wall & all-night-on (dimmed or not) lighting poles extending 14-18' above parking surface.



typical "parking lot"

vs.

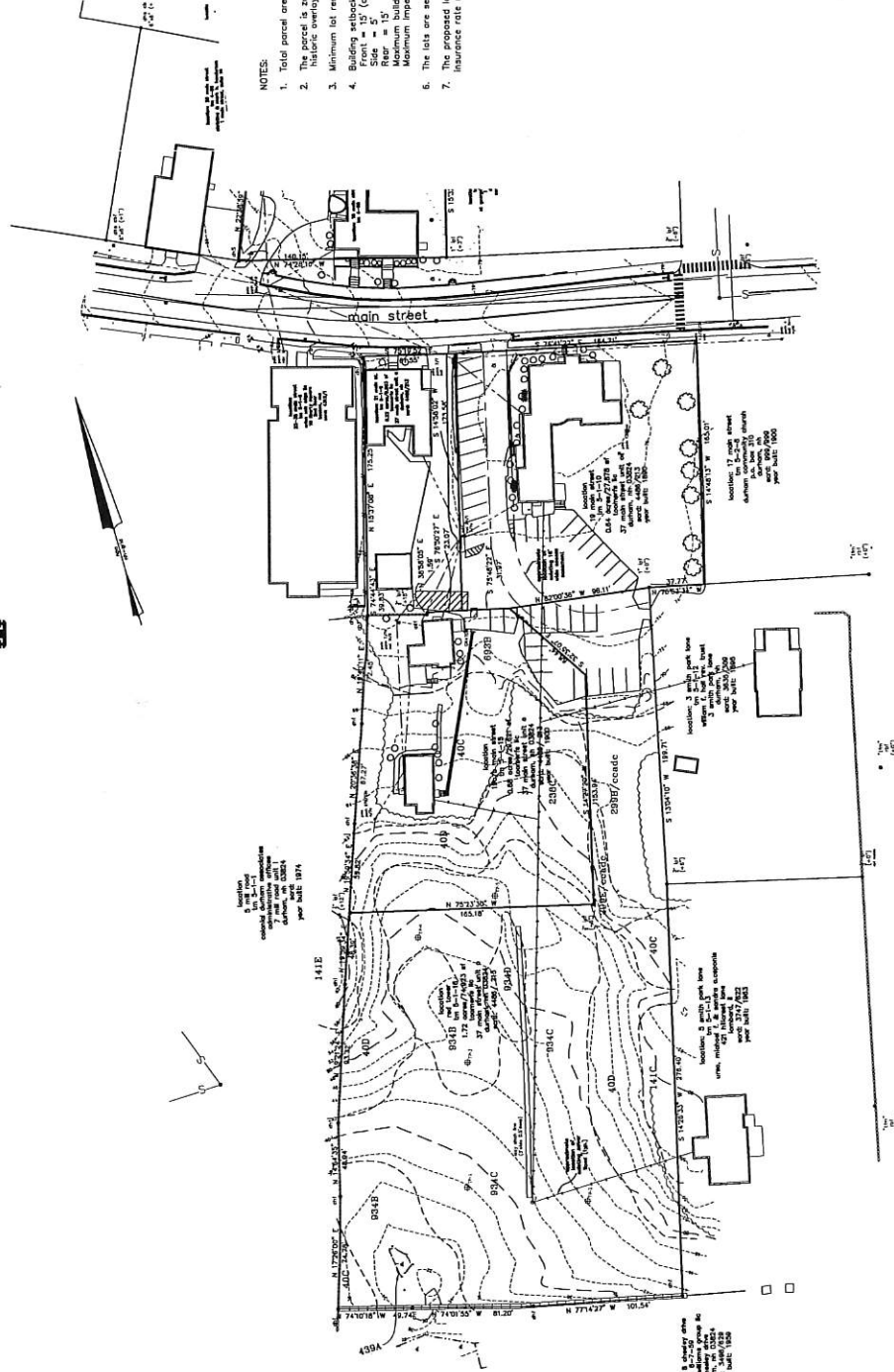


The proposed prison-like structure would be built on hillside already, at its lowest point, two+ stories above street level at Chesley Dr, thus impacting adjacent homes & neighboring foot/bike paths in manner akin to looming 5-story tall fortified citadel.

There is no equivalent parking structure anywhere in the area!



reserved registry of deeds



- NOTES:
- Total parcel area: Map 5, Lots 1-9, 1-10, 1-15, 1-16 3.2 acres
 - The parcel is zoned Church Hill District. Tax map 5 Lots 1-9 & 1-10 are within the historic wendy district.
 - Minimum lot requirements: lot size = 5000 SF.
 - Building setback:
 - Side = 25' (all Streets)
 - Rear = 15'
 - Maximum building height: 30'
 - Maximum impervious surface Ratio 80%
 - The lots are serviced by the municipal water and sewer system.
 - The proposed lot is not located within the 100 year flood zone as shown on the flood insurance rate map dated 09/30/15 community panel 330760308.

Tax Map & Lot Number
 5-1-9,1-10,1-15,1-16
 OWNER OF RECORD:
 TOOMERFS, LLC
 37 MAIN STREET, UNIT 0
 DURHAM, NH.

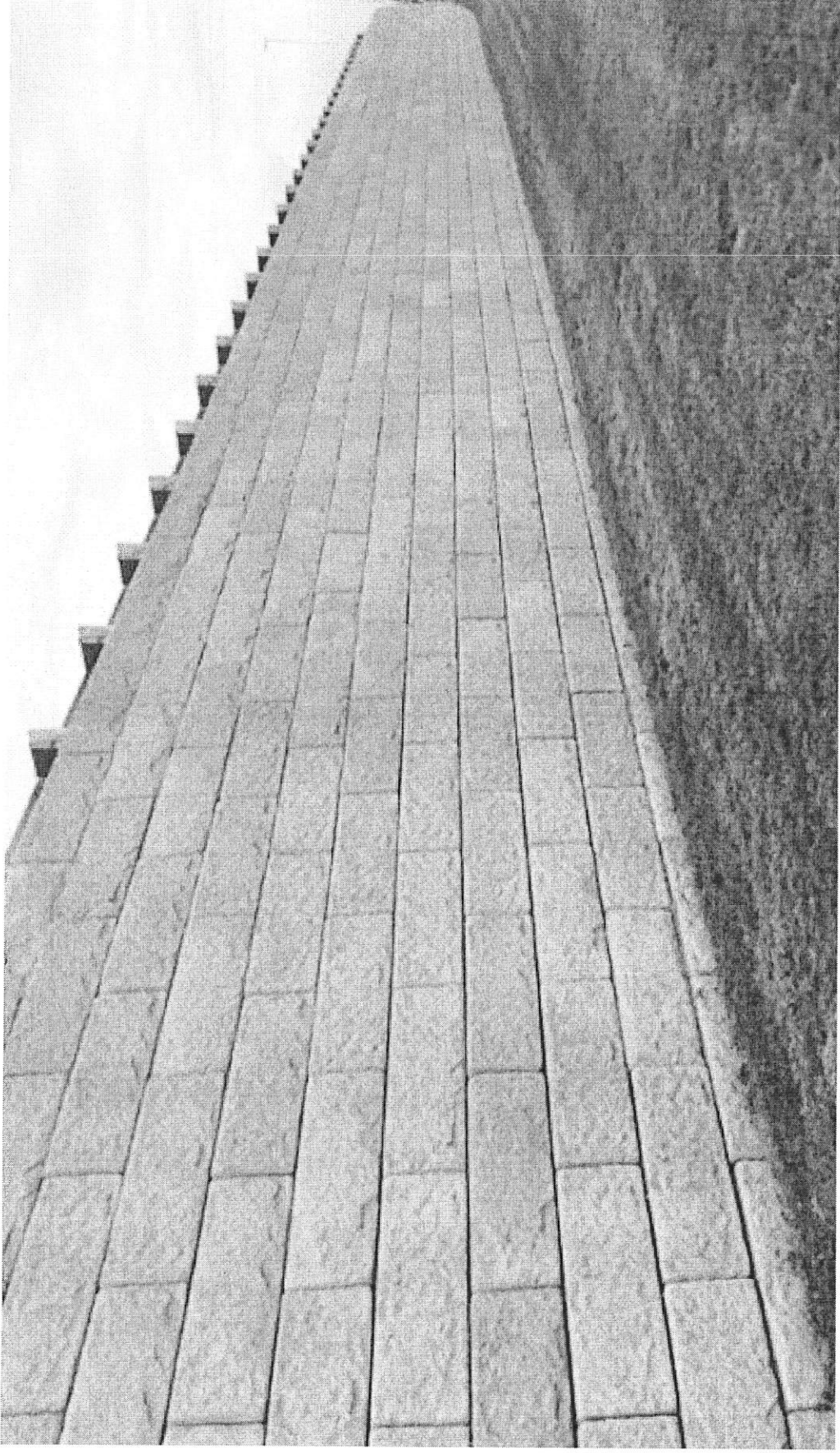
existing features plan
 19-21 main street
 durham, strafford county, nh
 for: Toomerfs, LLC

1"=40' August, 2019



DATE: 10/1/19
 PLAN NO.:
 DWG. NO.:
 P.E. NO.:

RECON WALL SYSTEMS



- 16" high blocks
- Approximately 13-foot reveal in this sample photograph
- Church Hill parking structure retaining wall would be more than 50% taller (20 feet)
- PLUS 30" or 36" black aluminum fence on top (for approx. 23-foot-tall prison-like structure)

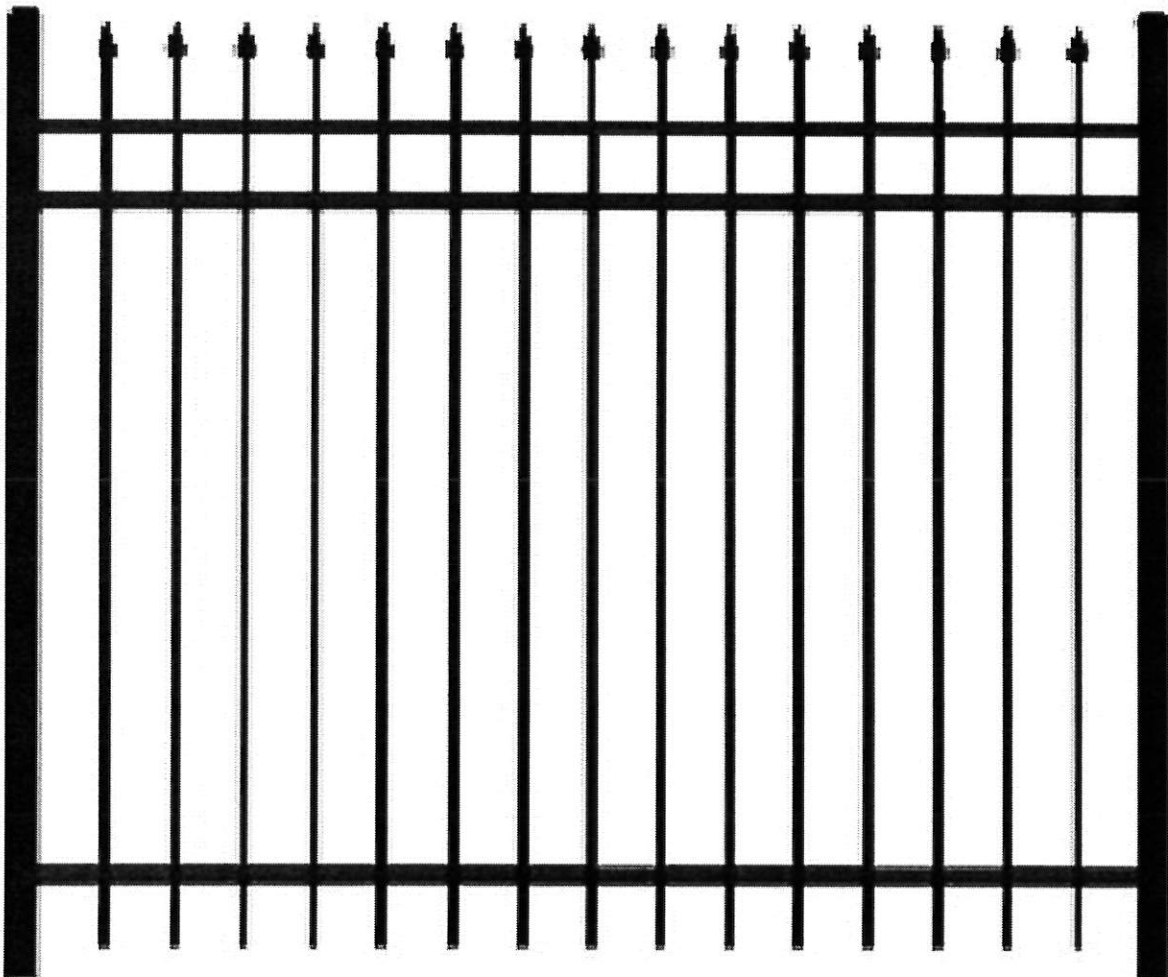
PROPOSED
Regis 3131 3-Rail Spear Top Aluminum Fence Panels

For the top of the 20-foot tall Recon Wall System

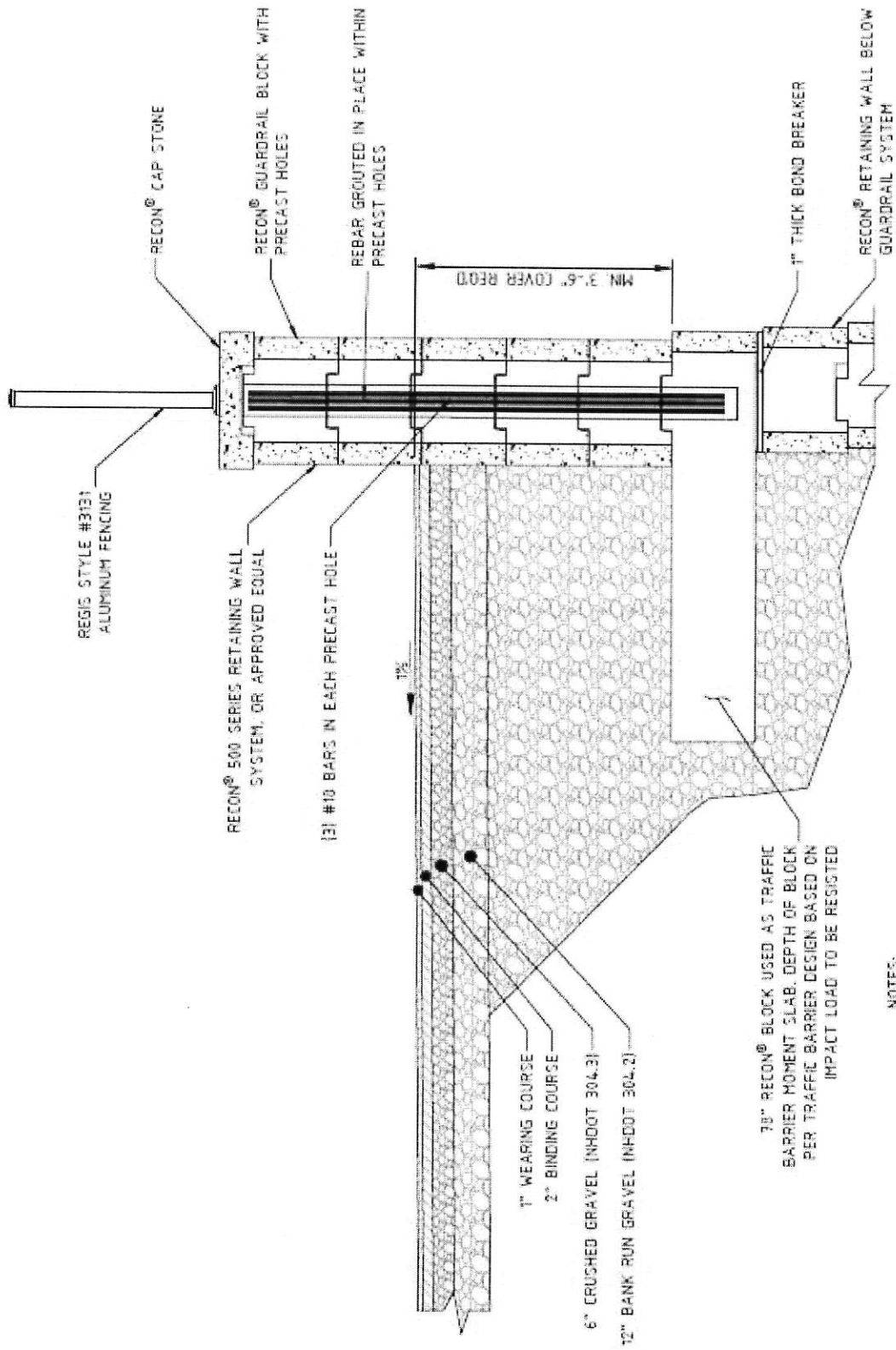
Height: * 36" 42" 48" 55" 60" 72"

(Engineer Mike Sievert indicated that the height of this fence for atop the retaining wall would be 30", but the shortest shown here is 36")

<https://www.signetfence.com/regis-3131-3-rail-spear-top-aluminum-fence-sections/>



As of March 23, 2021, the applicants have not yet responded to requests for clearer images of the retaining wall with the fence on top, as it would be seen from the Chesley Drive side of the lots. And they have not shown *any* renderings/images of the retaining wall as it would be seen from the Mill Plaza side of the parking structure.



- NOTES:
1. DELETERIOUS MATERIALS ENCOUNTERED BELOW PARKING AREA SHALL BE COMPLETELY REMOVED.
 2. COMPACT SUBGRADE TO 95% OF STANDARD PROCTOR.

RETAINING WALL DETAIL

NTS

**View of the
FRONT of the
Church Hill
Woods
property, as
experienced
by the Faculty
Neighborhood**



View from front hallway, Chesley Drive home.

VIEW FROM 7 CHESLEY DR (MEYEROWITZ) HOME
TOWARD 8 CHESLEY DR (ANDERSEN) HOME & CHURCH HILL WOODS



Site for 20' retaining wall

FRONT of the property to the Faculty Neighborhood

VIEW FROM FRONT PORCH AT 7 CHESLEY DR (MEYEROWITZ)
TOWARD 8 CHESLEY DR (ANDERSEN) AND CHURCH HILL WOODS

Transcript of the “Administrative Decision” Made by the Planning Board, March 10, 2021

7:28:42

Lorne Parnell: “Um, I think what we’d like to do tonight is, uh, hear the, the some reports from the third-party reviewers who, who studied the stormwater and the traffic study. But just before we do that, um, we received some correspondence, uh, from, uh, Attorney Mark Puffer concerning, um, whether or not this application should be allowed to go forward, and the issue really is whether this is a, a structured parking, which is not allowed in the Church Hill District or whether it is surface parking. And, um, the, the, an answer has been provided to this, this question from the Town staff, and from our lawyer that this in fact is surface parking, which is allowed within, which is allowed by Conditional Use under the, uh, in the, uh, Church Hill District. Uh, and, I would, just before we go forward, I would just like to know if anyone on the Board disagrees with this opinion. [7:29:56-7:30:02 = 6 second pause] Okay, then I think we shall proceed. Um, I think the first thing we would like is, uh, Peter do you have something to start us off with?”

Applicant Peter Murphy: “Um, I don’t!”

7:30:14

Lorne Parnell: Well then, maybe, we can hear from the the stormwater, the, what was done regarding the stormwater review. Do we have someone from that?

7:30:35

Erik Saari, Altus Engineering, Portsmouth: Yes, good evening.

* * *

Attorney Puffer had been promised an opportunity by Mr. Behrendt to make the case for his letter and position during the Public Hearing. The Public Hearing was opened at 7:44pm, 75 minutes after the “Administrative Decision” above was made.

PB March 10 2021 video:

<https://durham.vod.castus.tv/vod/?video=9f89c9ea-5760-4293-a480-5fc69981379f>

