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April 13, 2021

Chris Sterndale, Chairman
Durham Zoning Board of Adjustment
8 Newmarket Road
Durham, NH 03824-2898

Re: Meyrowitz/Anderson Appeal of Administrative Decision

Dear Chairman Sterndale and Board Members:

I write on behalf of the Durham Planning Board in response to the administrative appeal filed by Joshua Meyrowitz and Peter and Martha Anderson (“the appellants”) regarding property owned by Toomerfs, LLC and located at 19-21 Main Street. Appellants contest the Planning Board’s March 10, 2021 decision that Tommerfs’ site plan application is for structured parking, rather than surface parking. The categorization of the use is important because surface parking is permitted in the Church Hill Zoning District by conditional use permit; whereas structured parking is not permitted in that district without a variance.

As the board is aware, both “surface parking” and “structured parking” are defined in the Durham Zoning Ordinance. Surface parking is defined as:

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

Structured parking is defined as:

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.

The proposed parking lot clearly falls within the definition of “surface parking.” It is a parking lot, which is uncovered and single level, providing at grade parking not located within a structure.

Appellants contend that because the property requires substantial fill and a retaining wall, that Tommerfs is creating a “structure” which provides above grade parking. Appellants’ argument ignores two things. First, the existing topography of the lot is approximately 30 feet **below** grade. The fill is required to bring the lot up to grade so that it can provide “at grade” parking. The fact that the parking is not being constructed at the current below grade elevation does not render the proposed parking above grade—it renders it “at grade.” To find otherwise would mean that any time fill or a retaining wall is required to prepare a lot for construction of a parking lot, that that parking lot constitutes structured parking. This was clearly not the intention of the

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Ordinance.

Second, appellants overlook the last clause in the surface parking definition—specifically, parking that “is not located within a structure” is surface parking. Even assuming the fill and the retaining wall are structures, the parking is not “within” that structure. A basic tenant of statutory construction is that one cannot ignore the plain language of an ordinance. See, e.g., Impact Food Sales, Inc. v. Evans, 160 N.H. 386, 391 (2010). Therefore, since the parking proposed here is not “within a structure,” it is, by definition, surface parking.

The proposed parking lot clearly falls within the definition of surface parking. It is an uncovered, single level parking facility that provides at grade parking not located within a structure. This board should therefore affirm the decision of the Planning Board

Sincerely,


Laura Spector-Morgan
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cc: Todd Selig, Town Administrator
Michael Behrendt, Town Planner
Mark Puffer, Esquire