

Initial Exchange: Michael Behrendt's June 9 response to my June 8 query.

----- Forwarded message -----

From: **Michael Behrendt** <mbehrendt@ci.durham.nh.us>

Date: Wed, Jun 9, 2021 at 5:25 PM

Subject: Main Street #19 - Appealable "Administrative Decision" - email from Josh Meyrowitz ***

To: Joshua Meyrowitz <prof.joshua.meyrowitz@gmail.com>

Cc: Audrey Cline <acline@ci.durham.nh.us>

Hello Josh (cc to Planning Board and applicant),

I reviewed your email below. I highlighted the key section in yellow. You are requesting a formal determination from the Planning Board whether the revised plans for 19 Main Street – using sloped earth rather than a retaining wall – constitute *surface parking* or *structured parking* under the Zoning Ordinance. The former is allowed in the Church Hill zone as a principal use by conditional use whereas the latter is not allowed as a principal use. There was some discussion about this issue at the May 12 meeting as you state below but I inferred from the discussion that the board concurred with my view that the revised plan is surface parking, though no vote was taken on this matter.

I believe that this position of the Planning Board (if I may use that term) constitutes a decision and is therefore appealable, akin to the board's earlier discussion about the design using a retaining wall. You have 30 days to appeal this decision to the Zoning Board of Adjustment. Thirty days takes you to this Friday, June 11. You would need to submit a formal appeal to this department by 5:00 p.m. on that day. Please coordinate with Karen if you would like to do so.

Michael Behrendt

Durham Town Planner

Town of Durham

8 Newmarket Road

Durham, NH 03824

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From: Joshua Meyrowitz [mailto:prof.joshua.meyrowitz@gmail.com]

Sent: Tuesday, June 08, 2021 4:50 PM

To: Audrey Cline

Cc: Michael Behrendt

Subject: Appealable "Administrative Decision"

Dear Audrey,

I'm writing to inquire about whether there has been an appealable legal "administrative decision" by the Planning Board regarding whether the revised Toomerfs parking plan for Church Hill, still in embryonic form, is indeed just at-grade "surface parking" or whether, because of the 17-foot

or more elevation of grade, falls under "structured parking," as was determined by the ZBA on April 13 for the original plan.

On April 14, James Bubar made a spirited argument for a 17- or 20-foot berm being functionally the same as a wall. The Toomerfs applicants were not there and there was no motion or vote. But this issue returned on May 12, when, again, there was some discussion, but no formal motion, no vote.

Also, as you may know, neither the board (nor the members of the public who might want to appeal a formal "determination") has yet seen in any image detail on the mass/scale/height of the new plan beyond a flat-as-a-pancake overhead image of the **parking surface**). Moreover, the next hearing, when we might finally see more detail, per Michael Behrendt requests, has been postponed to June 23.

Those of us concerned about this issue would like to request that – once the structural details of the plan are presented – there be a formal discussion among all Board members, a formal motion, and formal vote (which, I understand, under Zoom guidelines, is supposed to be a roll-call vote, not simply some seconds of silence).

I'm guessing that you watched the May 12 2021 PB meeting, where there was just a little bit of discussion of this issue, no formal motion, no vote.

<https://durham.vod.castus.tv/vod/?video=93121491-1e0b-4bd4-a839-ed121644092a>

Here are some key excerpts (almost direct quotes):

At about 10:03 pm

JAMES BUBAR: ~My presumption is, our Planning Department because we have the plan in front of us has decided that this is surface parking. Can you confirm that, Michael?~

MICHAEL BEHRENDT: ~Yes, that's correct. Audrey and I, I certainly consider this surface parking. Now I've been wrong before. Anything is possible.~

10:06:27

LORNE PARNELL: ~I think we should at least discuss at this time before we go much further. James you have some issues?~

JAMES BUBAR: ~My issues: If I were to neatly pile 7 feet of granite block on my property line, I would get a penalty, because anything over 6 feet is a wall. But what I'm hearing from our Planning Board is that if I bring in a bunch of dump trucks and dump rocks on the ground, and go up 15 feet, that's okay.~

There were then public comments

10:36

LORNE PARNELL: ~I'd like to continue the Public Hearing to May 26. But I would like to go back to the issue of structured parking, if there is serious opposition on the PB to going forward with this project because of the decision taken by the Zoning Board, we should speak about it now. Michael has said that as far as he's concerned this is surface parking, but I would like to know if there are others who have any serious objections. (James, you are muted.)~

10:37:08-10:37:45

JAMES BUBAR: ~I don't have a serious objection. It's really the issue of the 6 ft that got me going and the whole definition of structure. And I can honestly see a decision that, you know, that this is a structure. You are taking something and you are putting it on a fixed point on the land. I can go forward with this, it's all right. But I would not disagree with someone making a decision that it is structured parking.~

10:37:49—10:37:52

LORNE PARNELL: ~Anyone else have any comments on this?~

10:37:55 [after 3 seconds of silence]

LORNE PARNELL: ~Okay, I guess we will proceed.~

To repeat: Those of us concerned about this issue would like to request that – **after the structural details of the plan are presented** – there be a formal discussion among all Board members, a formal motion, and formal vote (which, I understand, under Zoom guidelines, is supposed to be a roll-call vote, not simply some seconds of silence).

Best, Joshua

*Joshua Meyrowitz, Ph.D.
Professor Emeritus
Department of Communication
Horton Social Science Center
University of New Hampshire
Durham NH 03824-2616
603-862-3031 – 24-hr voice mail; 603-868-5090 – Home
Prof.Joshua.Meyrowitz@gmail.com
<https://unh.academia.edu/JoshuaMeyrowitz>
NOTE: I rarely check "Messenger" or Facebook*

++++

Follow-up Exchange: Michael Behrendt's June 9 response to my June 9 response to initial exchange (there were subsequent exchanges as well)

----- Forwarded message -----

From: **Michael Behrendt** <mbehrendt@ci.durham.nh.us>
Date: Wed, Jun 9, 2021 at 6:05 PM
Subject: RE: Appealable "Administrative Decision" FRIDAY DEADLINE ***
To: Joshua Meyrowitz <prof.joshua.meyrowitz@gmail.com>
Cc: Audrey Cline <acline@ci.durham.nh.us>, Karen Edwards <kedwards@ci.durham.nh.us>

Hi Josh (cc to Planning Board and applicant),

I will grant that there is some gray area here so I am taking the more conservative position. The board's discussion on May 12 was similar to its earlier discussion about the parking facility which included the retaining wall. That discussion was considered a decision and thus was appealable. I would be wary of telling you that I will ask the board to take a vote on June 23 if it is then deemed that the board's action on May 12 was a decision and the deadline for you to appeal was thus missed.

I am happy to ask the Town Attorney for direction if you now wish to question my position but I would likely not have an answer back from her for a few days.

Michael Behrendt

Durham Town Planner
Town of Durham
8 Newmarket Road
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From: Joshua Meyrowitz [mailto:prof.joshua.meyrowitz@gmail.com]
Sent: Wednesday, June 09, 2021 5:49 PM
To: Michael Behrendt
Cc: Audrey Cline; Karen Edwards
Subject: Re: Appealable "Administrative Decision" FRIDAY DEADLINE ***

Thank you for asking for confirmation. Received. Though not happily!

I do think the Board and public -- and the integrity of the review process -- would be better served by the Board having a full discussion (all members speaking) -- and AFTER the Board and public see some details of the plan besides the flat overhead image of the surface.

Also note that the 3-seconds of silence, supposedly signaling the view/"vote" of other members, was shorter than a few of the "your mic is muted" silences in other parts of the meeting. And that certainly falls short of the Zoom rules for roll-call votes.

Also, the only Board member to speak about the definition during the specific deliberation was James Bubar, who said he'd understand a decision that it IS prohibited "Structured Parking." No one was given time to reflect on and respond to that..

Earlier, however, before he left the meeting, Richard Kelley said he thought it was, like the prior plan, "surface parking," but that means that he spoke against the official Town ruling at this point, regarding the prior plan being "Structured Parking." And so the "it's the same," ironically moves his comment party into the "it's also prohibited" camp!

Again, in my final pleading for the day: I do think the Board and public -- and the integrity of the review process -- would be better served by the Board having a full discussion (all members speaking) -- and AFTER the Board and public see some details of the plan besides the flat overhead image of the surface.

Surely, the process can and should tolerate full transparency and deliberation.

Best, j m

Joshua Meyrowitz, Ph.D.
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NOTE: I rarely check "Messenger" or Facebook

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 at 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

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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.

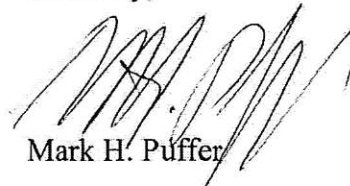
As a general rule, it is perfectly appropriate for two or more parcels to be developed together as a single project. The problem here is not only that that would further undermine CDA’s claim that the current site plan is still grandfathered under the 2015 Settlement, but also that the two projects are 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,

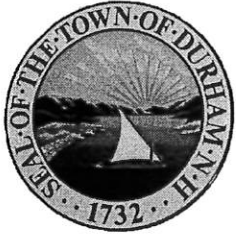


Mark H. Puffer

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...”



Michael Behrendt
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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

NO.	DATE	DESCRIPTION
1	05/06/21	INITIAL REVISION DESIGN SUBMISSION
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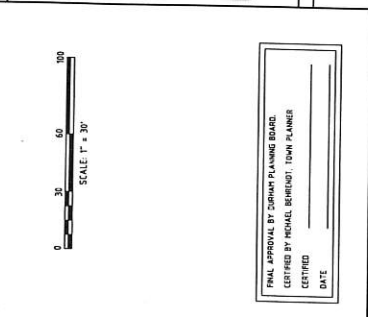
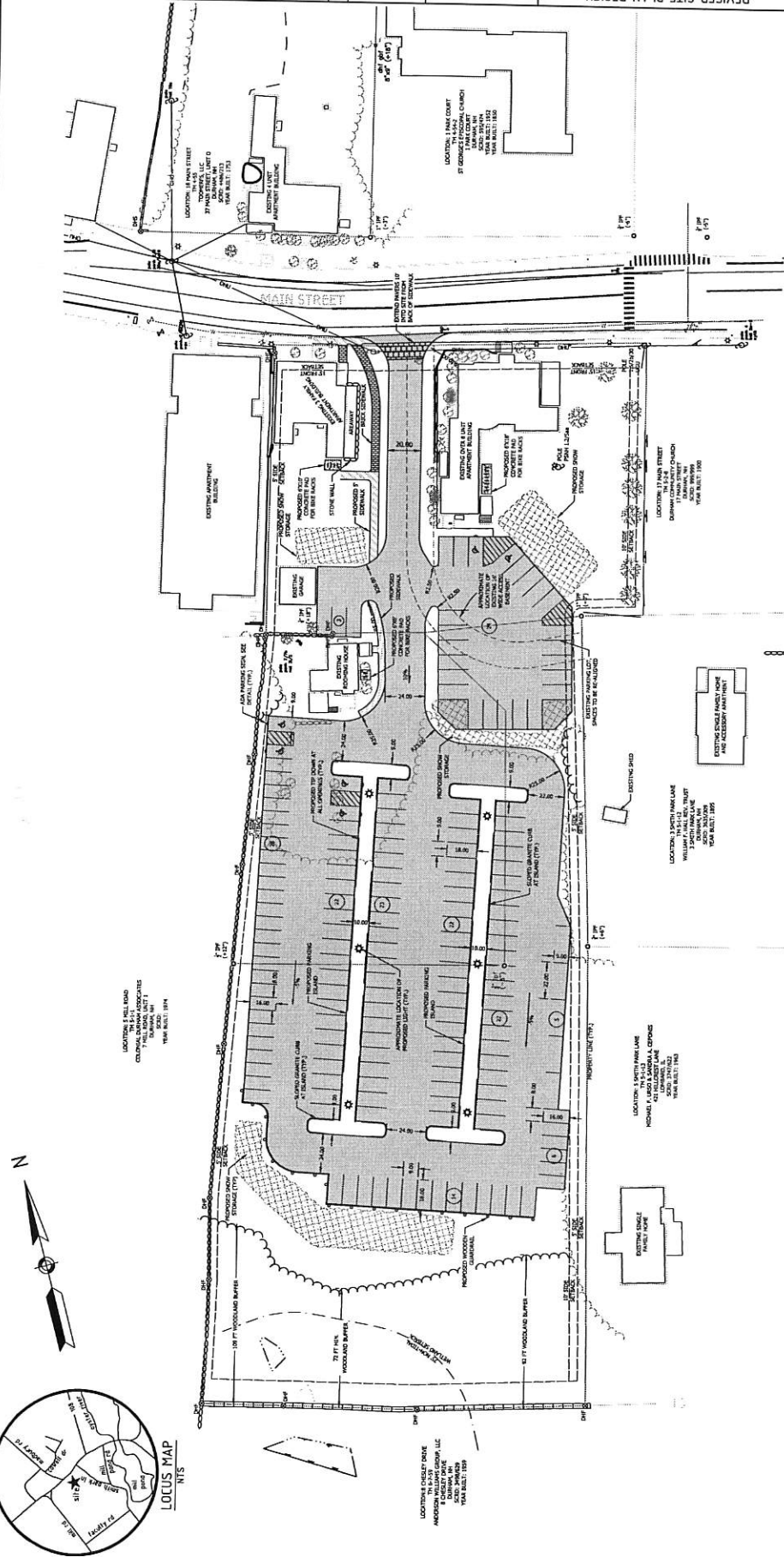
REVISOR: 05/06/21
 DATE ISSUED: 05/06/21
 SCALE: 1" = 10'
 DESIGNED BY: MMS
 APPROVED BY: MMS
 DRAWN BY: MMS
 DWG. FILE: 2021-05-06-11-34-AM
 19 MAIN ST AND 21 MAIN ST, DURHAM, NH 03824

M/S ENGINEERING, P.C.
 CIVIL & STRUCTURAL ENGINEERING
 1000 W. MAIN ST., SUITE 200
 DURHAM, NH 03824
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 FAX: 603.271.1235
 WWW.MSENGR.COM

Prepared for
TAX MAP 5, LOTS 1-9 AND 1-10
TOOHERS, LLC

REVISOR: 05/06/21
DATE ISSUED: 05/06/21
SCALE: 1" = 10'
DESIGNED BY: MMS
APPROVED BY: MMS
DRAWN BY: MMS
DWG. FILE: 2021-05-06-11-34-AM
19 MAIN ST AND 21 MAIN ST, DURHAM, NH 03824

C-101
JOB: 18-061



FINAL APPROVAL BY ZONING PLANNING BOARD
 CERTIFIED BY MICHAEL BURROUGHS, TOWN PLANNER
 DATE

FRONT NORTH PARKING SPACES = 77
 REAR SOUTH PARKING SPACES = 112

USE: COMMERCIAL
 REQUIRED IN DISTRICT: 100,000 SQ FT
 REQUIRED: 100,000 SQ FT
 PROVIDED: 199 SPACES

USE: RESIDENTIAL
 REQUIRED IN DISTRICT: 100,000 SQ FT
 REQUIRED: 100,000 SQ FT
 PROVIDED: 199 SPACES

USE: INDUSTRIAL
 REQUIRED IN DISTRICT: 100,000 SQ FT
 REQUIRED: 100,000 SQ FT
 PROVIDED: 199 SPACES

USE: OFFICE
 REQUIRED IN DISTRICT: 100,000 SQ FT
 REQUIRED: 100,000 SQ FT
 PROVIDED: 199 SPACES

NOTE: ADDITIONAL PARKING SPACES FOR RENT BY OTHER PROPERTIES:

From: Paul [mailto:pnrasmus@gmail.com]

Sent: Tuesday, April 13, 2021 10:34 PM

To: pnrasmus@gmail.com; Lorne Parnell; Richard Kelley; James Bubar; Barbara Dill; Bill McGowan; external forward for stobias; Heather Grant; Eleanor Lonske; Raymond Philpot; Nicholas Germain; Chuck Hotchkiss

Cc: Michael Behrendt; Audrey Cline

Subject: ZBA decision

Planning Board,

Please find time to review the ZBA meeting last night. Specifically their deliberations which occurred during the last 15 minutes or so of the 19-21 Main Street Appeal. The ZBA members pointed out a disturbing overlap in the zoning definitions of SURFACE PARKING and STRUCTURED PARKING. This is due to the overly generic manner in which STRUCTURED PARKING is defined in combination with the use of the term at-grade instead of final-grade or prior-grade in SURFACE PARKING. Effectively, the ZBA determined that if a retaining wall of any size is used to provide parking, then it is STRUCTURED PARKING.

Based on their decision, I believe the parking lots of many residences, including Councilor Tobias' and mine, are structured parking. This is not permitted in any residential zone as an accessory use.

I will speak with Mr Behrendt and Ms Cline during the day about this issue, since I believe it is something that our Code Enforcement Officer will want clarified as soon as possible.

Paul Rasmussen
Planning Board Chair

===

From: Michael Behrendt

Sent: Wednesday, April 14, 2021 12:46 PM

To: 'Paul'

Cc: Audrey Cline

Subject: Parking and retaining walls

Hi Paul,

The ZBA was not clear whether any retaining wall would be considered structured parking. However, to say that a 3 foot retaining wall, for example, with a single family house was structured parking would be a huge and patently unreasonable stretch. Regarding single family houses I would treat any reasonable necessary retaining wall as surface parking or even just a driveway, which is accessory to a residence, as an allowed accessory use. Pursuant to the ZBA's decision, however, in the very rare case where a single family owner sought to build a very high retaining wall to support parking we would need to examine that carefully. One could reasonably infer from the ZBA's discussions and public input that a wall 6 feet or less is fine.

Michael Behrendt

Durham Town Planner

Town of Durham

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Durham, NH 03824

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www.ci.durham.nh.us

+++

From: Michael Behrendt
Sent: Wednesday, April 14, 2021 4:50 PM
Subject: new definitions

To the Planning Board,
Please see the email from Paul below.

Michael Behrendt
Durham Town Planner
Town of Durham
8 Newmarket Road
Durham, NH 03824
(603) 868-8064
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+++

From: Paul [<mailto:pnrasmus@gmail.com>]
Sent: Wednesday, April 14, 2021 3:20 PM
To: Michael Behrendt
Subject: new definitions

Michael,
Please forward to the Planning Board.

Planning Board,
Last night two ZBA members claimed that the application under review met the criteria for both surface parking and structured parking. This is irrefutable evidence that these definitions fail the "reasonable person" test and should be immediately reviewed and corrected.

I am proposing some new wording to start that process on its way. These are suggestions for updating three of our current definitions, below those are the current definitions along with some other dependent definitions.

James has also suggested that we define BERM...Oxford's definitions are lacking, but Merriam-Webster supplies "a mound or wall of earth or sand." James, maybe you have a better definition?

Proposed:
STRUCTURED PARKING(rename PARKING GARAGE?) - A building providing multi-

level parking for non-tenants.

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

STRUCTURE (See additional definitions immediately below.) – That which is built or constructed with a fixed location on the ground or attached to something having a fixed location on the ground. Structure includes but is not limited to a building, swimming pool, mobile home, billboard, pier, wharf, septic system, parking space/**surface parking** and deck. 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.

Current:

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.

STRUCTURE (See additional definitions immediately below.) – That which is built or constructed with a fixed location on the ground or attached to something having a fixed location on the ground. Structure includes but is not limited to a building, swimming pool, mobile home, billboard, pier, wharf, septic system, parking space/**parking lot** and deck. 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.

BUILDING – Any structure designed or intended for the support, enclosure, shelter or protection of persons, domestic animals, or property. For purposes of determining exterior measurements or footprint in order to locate the setback line, "building" shall include all attached structures such as open or closed porches, carports, garages, balconies, stairways and other similar structures. See “Setback.”

PARKING SPACE – A space within or outside of a building, exclusive of driveways, meeting the minimal requirements of this chapter, used to temporarily park a motor vehicle and having access to a public street or driveway.

Respectfully,
Paul Rasmussen
Planning Board Chair

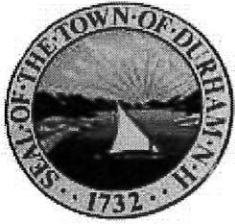
From: Timothy Murphy [<mailto:timpatmurphy@yahoo.com>]

Sent: Thursday, April 15, 2021 4:34 PM

To: Michael Behrendt

Subject: Re: Planning Board recap and preliminary agendas ***

"At grad" needs some work too--for example, our proposal is "at grade" from the front, but not the back, and any lot with a retaining wall around any of it's border potentially could be called not at grade.



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Town Planner's Review
Wednesday, April 28, 2021

X. Other Business

- Clarification whether to establish a committee to discuss definitions related to parking and other miscellaneous zoning amendments
- I recommend that the board not establish a committee to review definitions for parking at this time.

At the April 14 Planning Board meeting the board established a committee to develop revised definitions for parking and to put forward various miscellaneous proposed zoning amendments. The intent of the latter was to address numerous mostly minor issues that have arisen over the years.

The impetus for setting up the committee was to evaluate the current definitions for *surface parking* and *structured parking* in light of the decision by the Zoning Board of Adjustment on April 13 to support an appeal from Josh Meyrowitz and Peter and Martha Andersen of a Planning Board determination that the proposed parking facility for 19 Main Street was surface parking. The ZBA found that the facility is structured parking and structured parking is not allowed in the Church Hill district.

The staff and Planning Board had considered the facility to be surface parking (hence processing the application accordingly) but the ZBA has determined otherwise. The two definitions are clearly inadequate: they are imprecise and ambiguous and it was confusing for the ZBA members to sort through the respective meanings. I think the board was also concerned that the ZBA's interpretation could have wider impacts, possibly affecting any new parking lot with a retaining wall, particularly a larger retaining wall.

I have spoken with Audrey Cline, Zoning Administrator, and we agree that this decision of the ZBA likely will not have broader impacts. I think it was a one-off interpretation of the ordinance based upon the particular nature of the design of the parking facility proposed at 19 Main Street. I am not concerned it will have an adverse impact upon construction of a typical parking lot. However, if we were to receive an application for a parking lot, even for a single family property, with a 20 foot retaining wall, then we would, of course, need to consider the application carefully. But it is extremely unlikely we will see such an application.

Since the ZBA has made its decision, based upon the current zoning ordinance, I think it best to leave this matter in the hands of the applicant to decide how they wish to proceed. I have spoken with Todd Selig and we do not think it appropriate for the Town or the Planning Board to request a rehearing of the ZBA's decision. The applicant could do that if they wish. We should revise the definitions related to parking in the future but I do not think this is pressing.

I will be presenting numerous larger amendments to the Zoning Ordinance to the Planning Board as part of a complete zoning rewrite pursuant to the Master Plan as soon as the board's schedule lightens up. If it is desirable I can still prepare a set of miscellaneous changes for items that have arisen over the years for presentation at an upcoming meeting.

Here is an email that Todd Selig sent to the Planning Board on April 16 regarding the committee and the parking definitions. (I added the italics/underline below.)

Dear Michael, Paul, and Members of the Planning Board,

As you know, the Planning Board has been reviewing a site plan and conditional use application for expansion of the existing parking lot behind 19 and 21 Main Street (behind the Red Tower) for a number of months. The project, submitted by Pete Murphy and Tim Murphy (no relation), would expand the site from 40 to 180 spaces. Attorney Mark Puffer, representing a group of abutters opposed to the project, sent a letter to the Planning Board arguing that the proposed facility is structured parking rather than surface parking because there will be a large retaining wall supporting substantial fill to bring the site up to the grade of the front of the property. Surface parking as a principal use is allowed in the Church Hill zoning district (by conditional use) whereas structured parking is not allowed in the zone.

In your professional opinion, after consulting with staff and the Town's legal counsel, you asserted in response to Attorney Puffer's letter that the proposal was for surface parking (taking a position on this finite zoning issue but not on the project itself). The Planning Board concurred with Mr. Behrendt's assessment.

Josh Meyrowitz and Peter and Martha Andersen, who live below the site on Chesley Drive, appealed the Planning Board's position to the Durham Zoning Board of Adjustment. The Town's legal counsel represented the position of the Planning Board before the Zoning Board so the ZBA would have the benefit of how/why the determination had been made.

After thoughtful deliberation, the ZBA ultimately agreed with Attorney Puffer and the appellants, finding (by a vote of 3-2) that the parking facility as proposed should be classified as structured parking. Therefore, the project is not allowed as now designed.

The applicant informed the Town Planner that they still wish to proceed. If so, they have several options:

- Request a rehearing before the ZBA;
- Apply for a variance to allow structured parking at this site;
- If they do not succeed with a rehearing, they could apply to court; or
- Modify the application/design pursuant to the ZBA's decision.

The project is continued on the Planning Board's agenda for May 12.

As I understand it, the Planning Board is now examining revising the definitions to provide additional clarity to this complex matter concerning what constitutes surface v. structured parking. Any proposed changes would represent an amendment to the Zoning Ordinance and would need to be brought through the formal zoning change process involving both the Planning Board and the Town Council, as well as public hearings before each board.

After giving this matter some thought, I believe it would be prudent for the Planning Board to set aside for now the idea of pursuing a zoning change dealing with surface/structured parking and to take it up either individually or as part of a more comprehensive zoning update review at a future time once the 19/21 Main St. application has been fully adjudicated by the Planning Board. [italics/underline added]

There is not urgency to addressing the issue now, and doing so will almost certainly create confusion and frustration for individuals following the specific parking lot application currently under review. The ZBA decision is limited in scope based upon the particular circumstances of the 19-21 Main St. application, there may or may not be a re-hearing request by the applicant before the ZBA, and the Planning Board is already stretched for time with a full load of highly complex applications under review before it.

Thank you very much for your consideration.

Todd I. Selig, Administrator

