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By Electronic Mail

George Chimento, Chair
Dover Board of Appeals
5 Springdale Avenue
Dover, MA 02030

Re: 15 Park Avenue

Dear Chair Chimento and Members of the Board of Appeals:

In response to your request for an additional letter on the legal issues before the Board, I am submitting the following rebuttal to the arguments raised by the applicant's counsel at the hearing on March 20, 2025. Please also refer to my letter to the Board dated March 17, 2025, the legal points of which are renewed and incorporated herein.

As noted in my March 17th letter, Oakley Road is a "Street" in accordance with the terms of the Zoning Bylaw and, accordingly, the setback from Oakley Road for any accessory building constructed or relocated on 15 Park Avenue should be twenty (20) feet for the reasons set forth in this letter.

1. Oakley Road is a "Street" under the Dover Zoning Bylaw.

The Selectmen unanimously voted to lay out the entire length of Oakley Road, including the unimproved portion, on April 15, 1998 and it was accepted as a public way at the Annual Town Meeting on May 4, 1998. Therefore, Oakley Road is "dedicated to public use" and is a "Street" as defined in the Dover Zoning Bylaw. Please see my March 17th letter for a copy of the Certificate of Vote and the relevant plans.

Chapter 82 of the Massachusetts General Laws pertains to the laying out of public ways. Section 23 of that Chapter provides that:

"No town way or private way which has been laid out, relocated or altered by the selectmen or road commissioners shall, except as hereinafter provided, be established until such laying out, relocation or alteration, with the boundaries and measurements of the way, is filed in the office of the town clerk and, not less than seven days thereafter, is accepted by the town at a town meeting."

The only requirements to "establish" a public way are the approval of the selectmen, filing of the layout with the town clerk and the acceptance of the way by town meeting vote, all

of which happened with respect to Oakley Road. There is no requirement that any document be recorded with the Registry of Deeds.

2. **The Town does not need to acquire title to Oakley Road by a deed or taking by eminent domain to create a “Street.”**

The applicant claims that Oakley Road is not a “Street” because the Town did not acquire title to Oakley Road pursuant to M.G.L. c. 82, Section 24 and no deed or taking was recorded with the Registry of Deeds. However, the applicability of that statute is limited to instances where “necessary.” The relevant portion of Section 24 provides:

“If it is necessary to acquire land for the purposes of a town way or private way which is laid out, altered or relocated by the selectmen, road commissioners or other officers of a town under this chapter, such officers shall, within one hundred and twenty days after the termination of the town meeting at which the laying out, alteration or relocation of such town way or private way is accepted by the town, acquire such land by purchase or otherwise, or adopt an order for the taking of such land by eminent domain under chapter seventy-nine or institute proceedings for such taking under chapter eighty A.”

In this case, Oakley Road was shown on a 1926 Land Court Plan. The owners on Oakley Road were deeded title to their lots shown on that plan, but were not conveyed any interest in Oakley Road. (See the discussion on the Derelict Fee Statute below.) Since no land that was previously deeded to an owner was necessary for the layout of Oakley Road, there was no need to compensate the owners for the loss of their land that was deeded to them.

The applicant suggests that the Town made a mistake or was negligent by not acquiring title to Oakley Road and recording a deed or taking instrument with the Registry of Deeds. It was not “necessary” for the Town to acquire fee title to Oakley Road. In fact, the Town seldom acquires title to the public roads in Dover. A title search at the Norfolk County Registry of Deeds determined that there are ample cases in Dover where a deed or instrument of taking was not recorded for a public way, including, without limitation, the following streets:

Park Avenue
Cross Street
Hutton Road
Burnham Road
Old Farm Road
Draper Road

Clearly the Town did not make a mistake by not recording a deed or taking with respect to Oakley Road.

3. The Derelict Fee Statute does not allow the Heers to build in the layout of Oakley Road or to use the centerline of Oakley Road for calculating the setback requirement.

M.G.L c. 184, Section 58 (the so-called “Derelict Fee Statute”) provides in relevant part that:

“Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.”

This statute was created to quiet title to roads that were never deeded to third parties, for instance, in a subdivision where the original developer is no longer in existence. As previously noted, the conveyance of the lots in the 1926 Oakley Road/Park Avenue subdivision did not include any interest in Oakley Road or Park Avenue. As a result, each owner owns their respective lot deed to them plus the fee title to the centerline of Oakley Road or Park Avenue, as the case may be, by virtue of the Derelict Fee Statute.

Unfortunately, the applicant is overstating its rights under the Derelict Fee Statute. It is well established law in Massachusetts that the Derelict Fee Statute relates only to the determination of title in streets, but not to the right to build or compliance with zoning. See Sears v. Building Inspector of Marshfield, 73 Mass. App. Ct. 913 (2009) (“It makes little sense to read (the Derelict Fee Statute) as a grant of additional lot area for the purposes of meeting minimum lot size requirement in zoning laws.”) In the Sears case, the Court held that use of the Derelict Fee Statute for building and zoning purposes would lead to “dysfunctional” results. Therefore, no portion of Oakley Road can be used in the calculation of setback requirements for zoning purposes.

This is consistent with the Dover Zoning Bylaw which defines “Setback” as the “distance between the closest point of a structure to the nearest lot line.” In this case, the applicable nearest lot line is not the centerline of Oakley Road, but rather the western boundary of Lot 26 shown on the 1926 Land Court Plan.

So how do we reconcile the ownership of title under the Derelict Fee Statute with the normal rights of ownership? The Supreme Judicial Court answered this in Smith v. Haddad, 366 Mass. 106 (1974) where it held that “While it is true that after the taking of an easement for a

public way the fee to the underlying land remains in the adjoining private owners, we have noted that this property right is effectively useless unless the public way is abandoned.”

4. The unimproved portion of Oakley Road cannot be treated separately or differently from the paved portion of Oakley Road.

As previously noted, the Town accepted both the paved and unimproved portion of Oakley Road at the 1998 Town Meeting. Accordingly, all of Oakley Road is a “Street.” Even though currently unimproved, the Board of Appeals does not have the authority to find or determine that this portion of Oakley Road is no longer dedicated for public use. A public way can only be discontinued by a vote at Town Meeting as provided in M.G.L. Chapter 82, Section 21.

If the Board determines that all of Oakley Road is not a “Street,” then serious unintended consequences could result. For instance, the owners of the properties at the corner of Dedham Street and Oakley Road could build a 36’x24’ accessory structure with only a 7.5 feet setback from Oakley Road. This would adversely affect the charm of the neighborhood and result in chaos from a land use and planning perspective.

5. The buildability of Oakley Road does not affect whether it is a “Street.”

A “Street” is defined in the Zoning Bylaw as “a public or private way, alley, lane, court, or sidewalk which is open or dedicated to public use.” The definition for zoning purposes does not include whether the public or private way is buildable in compliance with current subdivision road design standards. Presumably, the extension of Oakley Road would be built in harmony with the existing design of the paved portion of Oakley Road. Regardless, Section 248-17 of the Bylaw provides that “A variation of these design requirements may be permitted when, in the opinion of the Planning Board, topography or other physical consideration necessitates such variation.”

6. A site walk does not affect whether Oakley Road is a “Street” as a matter of law.

The fact that the extension of Oakley Road is unimproved is not relevant to the definition of “Street” in accordance with the Zoning Bylaw as Oakley Road must be either “open or dedicated to public use” not both open and dedicated to public use. As previously noted, Oakley Road is dedicated to public by virtue of the Town Meeting vote. It is also worth noting, however, that a portion of the extension is currently used to access 14 Oakley Road. The extension could also be improved for access to the rear lot of 14 Oakley Road, shown as Lot 8 on the Land Court Plan submitted with my March 17th letter.

7. Oakley Road provides access to 14 Oakley Road (shown as Lots 7 and 8 on the Land Court Plan).

Although the buildability of Lot 8 is not before the Board, the original subdivision plan shown on the 1926 Land Court Plan shows Oakley Road providing access to Lot 8. The Board

does not have the authority to cause Oakley Road to be abandoned as a public way for purposes of access to Lot 8. That can only occur by Town Meeting vote.

Conclusion.

The applicant contends that the unimproved portion of Oakley Road is not a “Street” because it is only a paper street. There are countless cases regarding all aspects of paper streets which might create confusion. However, this case is different. The citizens of Dover determined that Oakley Road is a “Street” by a Town Meeting vote as required under Massachusetts General Laws. There is no nuance to this issue.

Thank you for your time and attention to these matters.

Very truly yours,
John P. Dougherty

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