

BENJAMIN H. DOWLING

ATTORNEY AT LAW

April 10, 2025

By E-Mail

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

RE: 15 Park Avenue, Dover, Massachusetts

Dear Chairman Chimento and Members of the Dover Zoning Board of Appeals:

I represent John and Indra Guertler who own 14 Oakley Road in Dover, Massachusetts (identified as Assessors Map 6, Parcel 101). The Guertler property is comprised of two lots known as lots 7 and 8 on a 1926 plan prepared by Farnham & Gleason, Inc. Civil Engineers filed with Certificate of Title No. 9734 in the Norfolk County Registry of the Land Court on July 8, 2926 (attached as **Exhibit A**).

I write this letter to inform the board that the Guertlers are in support of the Dover Building Inspector's decision with regard to 15 Park Avenue (identified as Assessors Map 6, Parcel 103, also identified as Lots 25 and 26 on the 1926 Plan) that 15 Park Avenue is a corner lot and therefore should be subject to the twenty foot setback requirement where that lot abuts Oakley Road.

Declaring that the dead-end portion of Oakley Road is not a street will have severe, irreversible consequences for 14 Oakley Road. Such a decision is premature and the Zoning Board of Appeals does not have jurisdiction to make such a determination.

The definition of “Street” in the Dover Zoning Bylaws
establishes that the dead-end portion of Oakley Road is a “Street”

The term "Street" is defined in Section 185-5 of the Dover Zoning Bylaws as follows:

"A public or private way, alley, lane, court, or sidewalk which is open or dedicated to public use"

There is a path in the dead-end portion of Oakley Road that is regularly used, every day, by different people, for different reasons. People walk their dogs there, people use the path to access the Most Precious Blood Church and to access the Chickering School. This path qualifies as an alley or lane and for that reason alone, the dead-end portion of Oakley Road falls within the definition of a "Street" under the Dover Zoning Bylaw. Pictures of the path are attached hereto as (**Exhibit B**).

Definitions from the online Oxford Language Dictionary defines an "Alley" as a "a narrow passageway between or behind buildings." The path in the dead-end portion of Oakley Road can fairly be characterized as a passageway between buildings.

The Building Inspector in 2002
did not make a determination that Oakley Road was not a “Street”

The Dover Building Inspector in 2002 approved a building permit for a "detached storage shed." That is all that the Dover Building Inspector did in 2002. A close review of the building permit from 2002 reveals that the Building Inspector at the time made no mention of Oakley Road.

In January of 2025 the owners of 15 Park Avenue received a Planning Board site plan approval for the construction of a "32' x 26' detached 3-car 1½ story garage."¹ The two

¹ Planning Board Site Plan Approval January 8, 2025

applications (a building permit for a shed from 2002) and a site plan approval (for a 3-car garage in 2025) are very different from each other and each requires their own analysis. Simply put, there is no precedence to be upheld.

The Building Inspector made no “determination” with regard to the status of Oakley Road. At best the Building Inspector in 2002 made an error with regard to the shed building permit. As it was for a shed—one of the most minor construction activities requiring a building permit—apparently nobody noticed the error and or thought it worth an appeal. Such a clerical error, or oversight, cannot and should not now be relied upon by the Zoning Board of Appeals to endorse a plan for the construction of a significantly larger structure even closer to the property line setback. The 2002 building permit allowed the shed to be constructed 10 feet from the property line, whereas the current proposal for the garage is to locate the structure 7.5 feet from the property line.

The owners of 14 Oakley Road, or their successors, have the right to seek approval to formalize Lots 7 and 8 as separate lots

It will not be easy but the owners of 14 Oakley Road, or their successors, may obtain approval from the Planning Board to separate Lot 8 and Lot 7. After approval from the Planning Board the owners of 14 Oakley Road could then seek a seven-foot variance from the frontage requirement, from the Zoning Board of Appeals, thereby creating two buildable lots, both fronting on Oakley Road. Allowing construction of a 3-car garage at 15 Park Avenue 7.5 feet from Oakley Road would mean a different set of rules would apply on either side of Oakley Road.

In Arrigo v. Planning Board of Franklin, 12 Mass. App. Ct. 802 (1981) the court analyzed the authority of a Planning Board to waive strict compliance with the frontage requirement specified in the Subdivision Control Law and also provided insight into the different functions served by Planning Boards and Zoning Boards of Appeal.

“In short, then, persons in the position of the Mercers, seeking to make two building lots from a parcel lacking adequate frontage, are required to obtain two independent approvals: one from the planning board, which may in its discretion waive the frontage requirement under the criteria for waiver set out in G.L. c. 41, s. 81R, and one from the board of appeals, which may vary the frontage requirement only under the highly restrictive criteria of G.L. c. 40A, s. 10. The approvals serve different purposes, one to give marketability to the lots through recordation, the other to enable the lots to be built upon. The action of neither board should, in our view, bind the other, particularly as their actions are based on different statutory criteria.”

The key point here is that the feasibility of creating two lots from Lot 7 and Lot 8 (i.e. obtaining “two *independent* approvals,” emphasis added) is not the relevant analysis for the Zoning Board of Appeals. The key point is that the Zoning Board of Appeals ought to tread carefully, because the consequences of overstepping its authority—and making a determination only the Planning Board is authorized to make—may have severe consequences for the owners of 14 Oakley Road.

The Zoning Board of Appeals is not authorized to determine whether the dead-end portion of Oakley Road is a “Street”

Section 185-50 of the Dover Bylaws sets forth the powers of the Board of Appeals. Pursuant to the Bylaw, the Board of Appeals has authority to do three things:

- 1) Hear and decide appeals from decisions of the Building Inspector.
- 2) Hear and decide petitions for variances pursuant to § 185-51; and
- 3) Hear and decide applications for Special Permits pursuant to § 185-52.

This matter is indeed an appeal of the decision of the Building Inspector. However, the subject matter of the Building Inspector’s decision is not a subject matter which the Zoning Board of Appeals is authorized to rule upon pursuant to Massachusetts General Laws.

In Massachusetts, it is the Planning Board of a city or town which is authorized to make determinations with regard to the adequacy of ways. M.G.L. Chapter 41 § 81B sets forth the powers and duties of planning boards, which are enumerated further under sections 81C-81GG. The Planning Board serves this function through administration of subdivision applications and so-called “Approval Not Required” applications.

Thus, it is the Dover Planning Board (not the Zoning Board of Appeals) that is the only entity in Dover with authority, pursuant to state law, to determine whether Oakley Road is a way.

The Dover Zoning Bylaw (185-19) on “Street frontage interpretation” details the different ways a lot may be deemed to have frontage and it is the Planning Board, not the Zoning Board, that is empowered to make these kinds of determinations.²

As the Court summarized in Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the enactment of the approval not required process by the Legislature was not intended to enlarge the substantive powers of a **Planning Board** (emphasis added), but rather to provide a simple method to inform the Register of Deeds that the **Planning Board** was not concerned with a plan because the vital access is reasonably guaranteed.

² 185-19(A)(2)(c) A way in existence on the date when the Subdivision Control Law, MGL, c. 41, §§ 81K through 81GG, became effective in Dover and having, in the opinion of the **Planning Board**, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby and for the installation of municipal services to serve such land and the building or buildings to be erected thereon; and (emphasis added)

185-19(A)(3) Physical access to the lot shall be through the frontage or, if the **Planning Board** approves, through an alternative point of access from a way described in § 185-19A(2). Shared driveways or curbcuts shall not be permitted. (emphasis added)

A site visit by the Zoning Board of Appeals was improper

The Zoning Board is not without authority or responsibility in this situation. However, information that can be gained at a site visit, is not the kind of information a Zoning Board of Appeals may, or should, take into consideration to make its determination. The adequacy of the way in question, what it looks like on the ground, these are unequivocally questions only the Planning Board may consider. The Zoning Board need only review the 1926 plan and the subsequent unanimous vote of the Selectmen to lay out the entire length of Oakley Road, including the unimproved portion, on April 15, 1998 and then also the vote to accept it as a public way at the Annual Town Meeting on May 4, 1998.

Conclusion

The Zoning Board of Appeals does not have the authority or jurisdiction to make the determination that the dead-end section of Oakley Road is not a "Street" based on the property's physical characteristics. The information and evidence that the Zoning Board of Appeals must rely on is the evidence of the existence of the way as laid out in a plan that predated the subdivision control law and the acceptance of the way as a public way by the Town of Dover in 1998.

Sincerely,



Benjamin H. Dowling

EXHIBIT A

EXHIBIT B



