CITY OF DOVER

ZONING BOARD OF ADJUSTMENT - AGENDA

Meeting Type:	Special Meeting
Meeting Location:	Council Chambers, City Hall, 288 Central Avenue, Dover NH 03820
Meeting Date:	**Thursday, July 7, 2022**
Meeting Time:	**7:00 pm**

1. **ATTENDANCE**

2. **OLD BUSINESS**

   A. Z22-05R, a Motion for Rehearing of Z22-05, by Applicants Garry & Marcia Lane (of 130 Emerald Lane; Tax Map F, Lot 15-47) and Benjamin & Sarah Brunt (of 96 Emerald Lane; Tax Map F, Lot 15-27), where Z22-05 was an appeal of a March 1, 2022 administrative decision regarding lot coverage under **Section 170-12(B) of the Zoning Ordinance** relative to an under-construction garage at 126 Emerald Lane (Tax Map F, Lot 15-48), and property owners Dana & Sherri Brown, located in the Rural Residential (R-40) Zoning District. The Zoning Administrator determined that within an Open Space Subdivision, the 10% lot coverage requirement of the underlying zoning district does not apply. The appeal request was denied by the Board on May 19, 2022.

3. **OTHER BUSINESS**

4. **ADJOURN**

*Indicates that if the application is accepted for discussion, the public hearing will be held the same evening. Note that some hearings will be continued from one meeting to another and some may be postponed. Since this is only a partial description of the proposal and may change, persons with questions or wishing to see the plans are invited to visit the Planning Office, Monday through Thursday from 8:30 am to 5:30 pm and Friday 8:30 am to 4:00 pm or email Dover-Planning@dover.nh.gov. You may also view materials at www.dover.nh.gov. Follow us on Twitter @DoverNHPlanning and find us on Facebook at https://www.facebook.com/DoverNHPlanning. The public is encouraged to leave comments in advance by emailing Dover-Planning@dover.nh.gov, or mailing written comments to the Zoning Board of Adjustment, Dover City Hall, 288 Central Ave., Dover, NH 03820. Messages must be received no later than 4 p.m. the day of the meeting and should identify the name and Dover address of the person leaving the message or providing the comment.

CITY OF DOVER

Zoning Board of Adjustment – STAFF MEMO

Meeting Type:	Special Meeting
Meeting Location:	Council Chambers, City Hall 288 Central Ave. Dover, NH 03820
Meeting Date:	**Thursday, July 7, 2022**
Meeting Time:	**7:00 pm**

INTENT: This is for a Motion for Rehearing of Z22-05, by Applicants Garry & Marcia Lane (of 130 Emerald Lane; Tax Map F, Lot 15-47) and Benjamin & Sarah Brunt (of 96 Emerald Lane; Tax Map F, Lot 15-27), where Z22-05 was an appeal of a March 1, 2022 administrative decision regarding lot coverage under Section 170-12(B) of the Zoning Ordinance relative to an under-construction garage at 126 Emerald Lane (Tax Map F, Lot 15-48), and property owners Dana & Sherri Brown, located in the Rural Residential (R-40) Zoning District. The Zoning Administrator determined that within an Open Space Subdivision, the 10% lot coverage requirement of the underlying zoning district does not apply. The appeal request was denied by the Board on May 19, 2022.

UNITS PROPOSED: N/A

AGENDA ITEM #: 2-A

ZONING DISTRICT: R-40

FILE: Z22-05R

APPLICANT/APPELLANTS: Garry & Marcia Lane and Benjamin & Sarah Brunt

LOCATION OF APPELLANTS: Lane's (of 130 Emerald Lane; Tax Map F, Lot 15-47) / Brunt's (of 96 Emerald Lane; Tax Map F, Lot 15-27)

LOCATION OF SUBJECT PROPERTY: 126 Emerald Lane (Tax Map F, Lot 15-48 owned by Dana R. and Sherri L. Brown)

ACREAGE: N/A

EXISTING LAND USE: Residential

PROPOSED LAND USE: Residential

SURROUNDING LAND USE: Residential

BACKGROUND INFORMATION

Per state law (*See* RSA 677:2) and **§170-52.D(1), Appeal from the decision of the ZONING BOARD OF ADJUSTMENT: Rehearing** of the Zoning Ordinance, the appellants have filed a motion for a rehearing of Z22-05.

STAFF RECOMMENDATION

Staff's opinion and view within regard to the subject matter of the Administrative Determination remains unchanged, in that: the plain text of the zoning table indicates that the Dimensional Regulations in the R-40 table are, as a whole, displaced and replaced by the dimensional requirements of Dover Code §157-21, if any. *See* R-40 table at n. 1 ("In the case of an Open Space Subdivision, in accordance with Article IV of Chapter 157 of the Code of Dover, the dimensional requirements shall be as specified in 157-21…").

Furthermore, the movants' rehearing motion generally raises no substantive issue or argument warranting detailed response. In that regard, staff would direct the Board to staff's prior memoranda and remarks, incorporated by reference. However, staff feels it may be helpful to respond briefly to several assertions of the movants.

First, the movants' assertion that the Board somehow held the movants to a higher standard or burden of proof lacks merit. The movants are the appellants in this matter, pursuing an "appeal" of a decision of the Zoning Administrator. <u>See</u> RSA 676:5 (characterizing this proceeding as an "appeal"). Just as with any appeal, it is the burden of the appellants/movants to demonstrate error. <u>See</u>, <u>e.g.</u>, <u>Gallo v. Traina</u>, 166 N.H. 737, 740 (2014) ("As the appealing parties, the [appellants] have the burden of demonstrating reversible error.");. <u>Ltd. Editions Props., Inc. v. Town of Hebron</u>, 162 N.H. 488, 491 (2011) ("The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable."). In substance, the Board plainly applied the normal standard of interpreting ordinances as a matter of law using normal conventions and sources of construction. <u>See</u>, <u>e.g.</u>, <u>Dartmouth Corporation of Alpha Delta v. Town of Hanover</u>, 169 N.H. 743, 754 (2017). Only where an ordinance is ambiguous are other sources of authority consulted. <u>See</u> <u>id</u>. ("When the language of an ordinance is plain and unambiguous, [the Court or ZBA] need not look beyond the ordinance itself for further indications of legislative intent."). Here, the Board correctly found that the zoning ordinance and its footnote #1 in the R-40 zoning table unambiguously displaced, and replaced, the dimensional requirements in the R-40 table (including the lot coverage limitation) with those set forth, if any, in Dover Code 157-21. Thus, the Board did not need to resolve an ambiguity.

And, even assuming <u>arguendo</u> the footnote #1 in the R-40 zoning table of the ordinance were ever regarded as ambiguous (it is not), the long and consistent history of that footnote's administration—without interference by the local legislative body—wholly supports staff's interpretation by way of the administrative gloss doctrine. In paragraph 22 of the movants' rehearing motion, the movants seem to be arguing now against the administrative gloss doctrine (and the weight of the long, consistent history cited and proven by City staff) solely because, according to the movants, the Zoning Administrator did not immediately point out (verbally) disagreement with Mr. Lane on February 3, 2022. Not only does such assertion fail of its own weight, but the movants expressly acknowledge that City staff (Planning Director Donna Benton) replied to Mr. Lane that same day (February 3rd) pointing out the same interpretation here, supported by numerous other properties whose lot coverage exceeds 10% in open space subdivisions (as demonstrated in earlier staff memorandum filed in this matter).

Finally, the Board did not abdicate its role as the appellate body to the City staff, as the Movants urge. The Board simply considered all arguments and then referred to City staff's memorandum discussing the plain text of the ordinance language at issue, just the same as a Judge consulting persuasive points in one party's brief or memorandum in the course of deciding an issue. There is nothing unusual or unlawful about consulting and relying upon a written analysis offered in support of a position in a disputed matter. And, the movants' rehearing motion goes on to discuss the various bases cited during the Board members' deliberation and discussion of this matter, which clearly indicate the Board conducted an independent review of various considerations and arrived at their own decision rejecting the appellants' assertions and affirming the Zoning Administrator's interpretation.

Brunt/Lane Motion for Rehearing to the Dover, NH Board of Adjustment

Case Z22-05-126 Emerald Lane (Tax Map F, Lot 15-48) (Dana and Sherri Brown property)

June 17, 2022

Benjamin Brunt, Sarah Brunt, Garry Lane and Marcia Lane, (the "Appellants") request that the Dover, New Hampshire Zoning Board of Adjustment grant them a rehearing on the ZBA's decision of May 19, 2022 in which the ZBA upheld the decision of the Planning Department that the 10% maximum lot coverage rules of the R40 zoning table do not apply to open space subdivisions. In further support of this motion, the Appellants state as follows:

1. Immediately before the ZBA voted on the issue of whether the 10% maximum lot coverage rules apply to open space subdivisions and specifically to the Indian Ridge subdivision on Emerald Lane in Dover, alternate ZBA member, James Burdine, laid out, in the May 19, 2022 hearing, what was to become the basis of the ZBA's decision, moments later, that night. The other members, in essence, then expressed their agreement with Mr. Burdine's analysis and voted 5-0 to deny the Appellants' appeal.
2. Mr. Burdine said that his analysis came down to three parts or points.
3. <u>Mr. Burdine's first point of analysis</u>. Mr. Burdine stated that he first relied, in reaching his conclusion, on burden of proof. He stated that burden of proof as a decision factor was especially significant/applicable in this case where Garry Lane, a lawyer, simply by being a lawyer, held himself out as an expert. As there are no facts to be weighed or decided in this case, burden of proof is an irrelevant concept and should not have been applied in any way to decide this case. To do so, was error. In essence, not only was Mr. Burdine, and ultimately the whole Board, erroneously applying a burden of proof to this case when one did not apply, the analysis was further flawed by the conclusion that when one of the parties to the case is an attorney, the burden of proof standard is somehow enhanced.[1]
4. However, contrary to Mr. Burdine's analysis, this case was not a factual case. Not a single fact was at issue. The sole issue for the ZBA to decide was the meaning of certain zoning ordinances, of a zoning chart footnote, and of subdivision regulations. The ZBA was not asked to apply its decision to any facts nor did the ZBA need to decide any facts (which is where burdens of proof come into play in civil and criminal matters) in order to make a decision. Thus, imposing a burden of proof, whatever that means, in a case with no facts needing to be decided, is a flawed and erroneous analysis. This flawed analysis is

[1] While a motion for rehearing requires the appellants to detail all the errors they believe the ZBA made in its decision, this motion is made with full respect for the ZBA members, including Mr. Burdine (whose analysis was the basis for the ZBA ruling). While the appellants are very critical, in this document, of the analysis and presumptions used by the ZBA, the appellants recognize that the ZBA members are volunteer public servants acting in total good faith. The appellants simply believe that the Board's actions were incorrect and the appellants attempt to document those errors here, again, with full respect for the Board and its members.

made even worse by the ZBA conclusion that when one of four parties is an attorney (who represented only himself and his wife and not Sarah and Ben Brunt), the burden of proof is somehow heightened.

5. In this case, the ZBA's role was to make a legal interpretation. No facts needed to be decided nor did the ZBA actually make any determination of fact. But, because the ZBA's decision was significantly based on application of a burden of proof, and a heightened one at that, means that its decision process was flawed and, unfair. Even if a burden of proof did apply, it would be wrong to create a heightened burden of proof for a party that was a lawyer. Finally, it would be fundamentally unfair for a decision-making body to apply such heightened "lawyer" standard burden of proof to the other parties who are not lawyers nor represented by lawyers. Specifically, the Brunts are not lawyers and Garry Lane advised the ZBA in writing that he was not acting as counsel to the Brunts. Thus, to the extent burden of proof comes into play at all, to the extent that there is such a thing as a heightened burden of proof applicable to parties who are lawyers, such a standard cannot be fairly applied to the Brunts. To do so, further enlarged the error of applying any burden of proof.
6. By applying a burden of proof and worse, a heightened burden of proof, when there should have been none at all, shows that the ZBA, while well intentioned, did not fairly perform their function, which was simply to interpret the ordinances in question. By raising burden of proof as an element of the ZBA's decision-making in this case, it shows the ZBA somehow tipped the scales in this case against the Appellants – unfairly so.
7. <u>Mr. Burdine's second point of analysis</u>. Mr. Burdine's second point of analysis was to ask whether the ZBA had the authority to make a decision in this case. Mr. Burdine reported that the ZBA met with legal counsel and concluded they the ZBA had the authority to decide this case. The Appellants do not disagree with that conclusion. Also as part of this second point, Mr. Burdine said that he thought that the ZBA should look at the regulations (presumably the subdivision and zoning regulations) as one collective body of regulations. The Appellants have no objection to this point.
8. <u>Mr. Burdine's third point of analysis.</u> Mr. Burdine stated that this related to what is the scope of review the ZBA is allowed to decide. Ultimately, he concluded, the ZBA needs to apply the letter of the law as it is written; the ZBA has to focus on what the text says; the ZBA can only consider other historical record or information outside the language of the text of an ordinance or rule if the text is ambiguous. Mr. Burdine, correctly, stated that something is ambiguous if it is capable of two or more interpretations.
9. Mr. Burdine then said that he understood that many of the comments of the parties and of the Indian Ridge HOA were that the regulations at issue were unclear and he acknowledged that if he were on the Planning Board, rather than the ZBA, he would express some opinions on how to correct that (implying that he acknowledged the regulations were unclear). Immediately after saying all of the above, including that the ZBA should only look to the text of the ordinances in question, Mr. Burdine then said that the next issue is what is the best way to read the language that exists in the ordinances. His answer, surprisingly, and totally contrary to the legal standard he outlined

above the ZBA needed to follow, then said: "for that, I am relying on the staff memo." He stated that in the (Planning Department) staff memo, Ms. Kypfer says over and over that the ordinance is not ambiguous *in her opinion*. This is an abdication by the Board of its responsibility, as decision-makers, to decide whether a provision was ambiguous or not and what the provision means. Essentially, Mr. Burdine, and ultimately the ZBA as a whole, let the party whose decision was being appealed from, decide whether that party made the right decision. This would be the same as a judge in a civil or criminal case saying that instead of deciding, as a judge, which party is right, which party wins the case, the judge is going to ask the defendant to decide if the plaintiff wins or loses the case. Not surprisingly, the defendant would say that the defendant wins, of course. In this case, Mr. Burdine and the ZBA rely on Ms. Kypfer's staff memo to decide a/the central issue in this case. He lets her decide whether footnote 1 to the R40 zoning table is ambiguous and what it means. This is an improper abdication of decision making obligation by Mr. Burdine and ultimately, the ZBA. This was an error by the ZBA.

10. Because Ms. Kypfer concludes that the footnote, in her opinion, is not ambiguous and means that the R40 table is completely replaced by the referenced open space subdivision ordinances, Mr. Burdine and the ZBA essentially made no decision in this case. He and they let the Planning Department staff decide the issue of interpretation and ambiguity. This was an error.
11. Mr. Burdine states that "by putting this footnote reference in the header, the table is superseded by everything it is referring us to in the subdivision regulations."
12. That a number is placed in the header to the R40 table, contrary to what Mr. Burdine is saying, does not mean it replaces everything in the R40 table. Whether a footnote reference is placed at the top of the chart, on the side of the chart of underneath the chart is not a valid analysis of the significance of the footnote. To conclude otherwise, is an error.
13. Mr. Burdine also says that by putting the footnote reference in the header of the R40 chart, it means the table is superseded by "everything it is referring us to in the subdivision regulations." However, the open space subdivision regulations do not include a maximum lot coverage rule. Thus, maximum lot coverage rules are not part of what the footnote "is referring us to." As stated, Mr. Burdine's analysis should actually support the Appellants' interpretation and leads to the opposite result of what the ZBA decided by letting the Planning Department staff, whose very decision was at issue in the appeal, decide the appeal. Appellants agree that if a specific standard were stated in the open space subdivision regulations, it replaces the equivalent provision in the R40 chart but since there is no maximum lot coverage rule[2] in the open space subdivision regulations, footnote 1 is not referring anyone to a maximum lot coverage rule in the open space

[2] Mr. Burdine argued the open space subdivision regulations do include, sort of, a form of maximum lot coverage rule because it references, at least in the case of commercial open space subdivisions, that impervious surface cannot exceed more than fifty percent of the total acreage. Since the Indian Ridge open space subdivision is a purely residential development, that 50 percent rule is irrelevant, and, regardless, it is not a lot coverage rule as to the specific house lots. It is irrelevant.

subdivision regulations. Thus, under Mr. Burdine's logic, footnote 1 clearly does not replace the 10 percent maximum lot coverage rule in the R40 chart because the lot coverage rule is not something footnote 1 refers readers to.

14. Mr. Burdine then said that to agree with Garry Lane's analysis you would have to agree with each of this arguments and specifically, Lane argues three purposes to zoning. Mr. Burdine responds that there are some 12 purposes of zoning listed in NH statutes. However, Lane never argued that there were only three purposes of zoning. The Lane argument was based on the fact that minimum lot coverage rules are just as useful and important (and more so) in open space subdivisions as they are in other types of subdivisions. Thus, Mr. Burdine's argument that there are at least 9 other purposes of zoning, does not undermine Lane's argument that the individual lots in an open space subdivision would benefit from maximum lot coverage rules and that there is no reason to assume that because a development is an open space subdivision makes lot coverage rules unneeded.
15. Mr. Burdine justifies open space subdivisions on the theory that they preserve large areas of wetlands. In fact, they do no such thing. The wetlands were always protected from development. In fact, under the ZBA's ruling that maximum lot coverage rules do not apply to open space subdivisions, it is possible that an open space subdivision will result in more developed land area than in a regular R40 subdivision. Specifically, open space subdivisions allow exactly the same number of individual lots as are allowed in a regular R40 subdivision. In this case, the City calculated that a regular R40 subdivision, after factoring in unusable wetland areas, would be 49 lots. Thus, that is the number of house lots allowed in the Indian Ridge open space subdivision: 49 lots. However, if the lots had been regular lots with a minimum of 40,000 square feet, the wetland portions of the lots could not be developed and only 10% of each lot could be covered by buildings. Applying the ZBA's interpretation (no applicable lot coverage rule in open space subdivisions) means those 49 lots in the Indian Ridge development could have been covered 100% minus the setback area. This could result in less natural land protected without a single square inch more of wetland areas protected. Thus, the ZBA's interpretation that maximum lot coverage rules are not needed for open space subdivisions makes no sense.
16. Mr. Burdine argued that it is clear that open space subdivisions operate with completely different rules from regular R40 subdivisions. However, that some rules are different does not even begin to logically address whether a particular restriction is part of the open space subdivision rules. That would be similar to saying that Fords and Chevy's are different and therefore, Chevy's do not need tires because they are different from Fords. As stated above, the open space subdivision purpose of protecting land areas from development is enhanced by applying maximum lot coverage rules to the individual house lots and there is no reason not to apply those rules.
17. That there are differences, and can be differences, between an R40 general subdivision and an R40 open space subdivision does not mean that any particular rule is or is not part of the open space subdivision rules.

18. Mr. Burdine argued that 157-21 does not ignore lot coverage because Section D provides a density bonus if certain conditions are met. First, that section refers to an open space development with commercial aspects. The open space subdivision at hand is a purely residential open space subdivision. Subsection D is simply not relevant. Second, "density" is not the same as "lot coverage." Lot density simply refers to how many lots will be allowed in a subdivision, not how much of any particular lot can be covered. Unrelated concept.
19. Mr. Burdine argued that setbacks, which are twenty feet in an R40 open space subdivision limit lot development. While that is true, the regular R40 zoning has both setbacks and lot coverage. Thus, to argue that because open space subdivisions have setbacks, therefore, there cannot be, or there is no need for, lot coverage rules, is illogical.
20. Mr. Burdine argues that by not regulating lot coverage, the open space subdivisions are being regulated. Not regulating, he says, is a form of regulation. The appellants would agree that a decision not to regulate something is a choice; however, it is nonsensical to say that not regulating something is regulating something. It is not. While it is true that a municipality, if allowed by state law, could make a decision not impose a particular regulation, that ability to make a choice is irrelevant as to whether certain language does away with maximum lot coverage rules in an open space subdivision or not. Just because municipal authorities arguably might be able to choose not to regulate something does not mean that particular ordinances do or do not regulate that issue. The language of the rules and ordinances at issue, control what is or is not regulated; thus, to say that the authority to regulate or not regulate an issue somehow is indicative of what an ordinance or rule means, is nonsensical.
21. While the other members each briefly spoke, they did not add any substantive analysis on top of Mr. Burdine's analysis. Basically, they agreed with him. Mr. Burdine simply accepted the staff's analysis of whether the staff's decision was right or wrong. The Board then followed Mr. Burdine. That was an error.
22. Staff analysis should never have been accepted as the basis for decision. Beyond that, the staff's stated position, in this case, does not even deserve deference because staff's initial position was that the R40 table did, in fact, apply to open space subdivisions. Ms. Kypfer, in her discussion with Garry Lane explained that the building official, Mr. Maxfield, in fact used the R40 chart as applicable to open space subdivisions (though he had his own special way of applying the chart and calculating maximum lot coverage from the chart). Ms. Kypfer, in explaining that to Garry Lane, around February 3, 2022, did not say "but of course, Mr. Maxfield is wrong because the R40 table does not apply to open space subdivisions." Only *after* Lane's email to Ms. Kypfer of February 3, 2022 saying that Mr. Maxfield's interpretation as explained by Ms. Kypfer (and never challenged by her as wrong) wrongfully applied the lot coverage rule, did the Planning Department staff then take a new tack: suddenly, the R40 table is completely replaced by the open space subdivision regulations. That new position was stated to Garry Lane for the first time by Ms. Donna Benton on February 3, 2022 in response to his February 3, 2022 email to Ms.

Kypfer. This sudden change of interpretation by staff is not some long-held interpretation and thus does not deserve deference.

23. The lot coverage rule of the R40 dimensional table applies because there is no provision in Code section 157-21F replacing it. The ZBA's conclusion to the contrary is error.

24. Footnote one is capable of two interpretations (one is reasonable and one is not). One being, as stated in the new position of the City Planning Department staff as of Thursday February 3, 2022, that footnote 1 means that everything in the R40 dimensional table is replaced by the open space subdivisions regulations whether or not the open space subdivision regulations address the particular restriction (here, lot coverage rules). The other interpretation, the one that is reasonable, is that the dimensional rules in 157-21F apply but where 157-21F does not address a restriction that is in the R40 dimensional chart, the R40 dimensional provision remains in effect. In this case, as 157-21F did not include a maximum lot coverage rules for the house lots, it did not replace the R40 10 % lot coverage rule. Thus, as there were two interpretations, the ZBA should have analyzed which interpretation is more reasonable. By simply accepting staff's interpretation that the footnote was not ambiguous and had a particular meaning, the ZBA abdicated its responsibility to analyze which of the two interpretations made the most sense.
25. The purposes of zoning support that the better interpretation of the footnote is that the maximum lot coverage rules should apply to the individual lots.
26. Code section 170-12, which is critical to the analysis and pointed out to the ZBA, was totally ignored by the ZBA. That was a critical error on the part of the ZBA. Rule 170-7 divides the City into various residential and non-residential districts. One of those is the R40 – the Rural Residential District. Section 170-12 provides:

    a. Uses permitted in zoning districts identified in 170-7 shall be as set forth in the Tables of Dimensional Regulations by District.
    b. The minimum regulations for lot size, lot frontage, building set back standards for front and rear yards, building heights and lot coverage shall be as specified in the Tables of Use and Dimensional Regulations by District.

    The language of the provision is mandatory: "shall be as specified in the Tables of Use and Dimensional Regulations by District." Dover has an R40 dimensional table. It includes a footnote 1 that is poorly written and probably rarely noticed by anyone. If, as the staff (then, the ZBA by deferring to the staff) concludes, footnote 1 is expressly written to replace the entire dimensional chart in the case of open space subdivisions, the language of footnote 1 would very clearly have to state that in order to override, or comply with, the requirements of 170-12. The poorly written footnote did not clearly state that it was intending to replace all requirements of the R40 chart even if the open space subdivision rules 157-21F did not address a particular issue, in this case, maximum lot coverage. Thus, whether the interpretation is by the staff or by the ZBA or both, it is unreasonable to conclude, in the face of 170-12 mandatory language, that footnote 1 is clear enough to override the very clear language of 170-12 and, thereby replace the entire R40 chart (including maximum lot coverage rule). The open space subdivision rules have neither a lot coverage rule nor language saying it is the intent of the open space subdivision rules to completely replace the R40 dimensional chart. Nor do the open space subdivision rules state that the open space subdivision regulations intentionally do not regulate lot coverage.

27. Since 170-12 clearly contemplates that the regulations (specifically, the dimensional chart) *shall* set standards for, among other things, lot coverage, one must first look to the dimensional rules in the R40 table as to what the table dictates. One of those things that chart dictates is maximum lot coverage. Then one should analyze whether that standard (here, maximum lot coverage rule) is expressly and clearly replaced. The footnote 1 at issue does not expressly or clearly state that the maximum lot coverage rule, which 170-12 requires be addressed, is done away with. Thus, it is unreasonable to conclude that the footnote has the meaning that staff gave it or that the ZBA, simply accepted, because staff said so (in its revised position on February 3, 2022).
28. By not analyzing the requirements of 170-7 and 170-12, the ZBA (and staff's) analysis and interpretation of footnote 1 is flawed. The staff and ZBA position essentially starts with the R40 chart and footnote 1 and ignores the language of 170-7 and 170-12. That was error.
29. The ZBA analysis as explained by Mr. Burdine is that the purpose of open space subdivisions is to protect the open space (for example, the wetland) portion of the subdivision and not the lot owners' interests in the individual lots on which their homes sit. The reasoning is flawed in that it suggests that if the municipality wants to protect the open space portion of an open space development, it cannot possible restrict the individual lots or that protections for those individual lots are not important. One, does not preclude the other. The open space subdivision rules can protect the open space area and at the same time recognize that lot owners care about their individual lots and that those individual house lots are entitled to protections.
30. Accepting the ZBA position adopted from the staff position leads to absurd results. As explained in the Lane/Brunt written submissions, if there is no lot coverage rule for lots in open space subdivisions, someone could cover their entire lot (other than the set-back area) with buildings. Buildings on less than half acre lots could be as big as 37,400 square feet. There would be no purpose in allowing such massive homes on such small lots. The ZBA completely ignored the absurd results that would flow from its interpretation.
31. At the heart of the staff's (adopted by the ZBA) analysis is the flawed notion that to protect open space, protections for individual lot owners must be done away with. There is absolutely no reason that the open space subdivision rules and the R40 chart cannot protect both the open space and individual lots. A municipality could have decided that with the smaller lots allowed in open space subdivisions, the maximum lot coverage allowed should be adjusted upward, stay the same, or be adjusted downward. But, the assumption built in the ZBA's entire analysis is that it was necessary to do away with maximum lot coverage rules in order to protect open space. That is simply not true. Thus,

the ZBA is making a presumption that since having lot coverage rules would undermine open space protections, open space subdivisions cannot possibly include maximum lot coverage rules. But, the inferred presumption is simply wrong. Applying maximum lot coverage rules in an open space subdivision does not undermine the ability to protect open space. In fact, applying the maximum lot coverage rule to the individual open space house lots would result in more land are being protected from development. The Board's inferred presumption is simply wrong.

32. To the extent that the ZBA assumes that the zoning rules and open space subdivision rules could not have intended to include maximum lot coverage rules for open space homeowner lots because, as Chris Parker argued, it would be difficult to calculate, that is a flawed analysis as well. If a ten percent lot coverage rule applies to an open space subdivision house lot, simply multiply 10% times the lot area. One could argue that it would be better to have a lower or higher percentage for smaller lots, but that does not change the fact that the calculation is simple math.

For all of the above reasons, the Lanes and the Brunts request that the ZBA rehear the Lane/Brunt appeal of the Planning Department decision not to apply the maximum lot coverage rule to open space subdivisions and request that at such rehearing, the ZBA reverse its decision. The ZBA should rule that the 10% maximum lot coverage rule applies to open space subdivisions.

Respectfully submitted,

Benjamin Brunt

Sarah Brunt

Marcia Lane

Garry Lane

June 17, 2022