

CITY OF DOVER

ZONING BOARD OF ADJUSTMENT - AGENDA

Meeting Type: Regular Meeting
Meeting Location: McConnell Center, 61 Locust St., Room 306, Dover NH 03820
Meeting Date: **Thursday, September 15, 2022**
Meeting Time: **7:00 pm**

1. ATTENDANCE

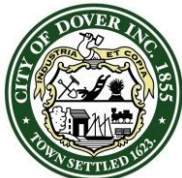
2. OLD BUSINESS

- A. Z22-07R, a Motion for Rehearing of Z22-07, by 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), related to the application of Dana R. and Sherri L. Brown, 126 Emerald Lane, (Tax Map F, Lot 15-48), located in the Rural Residential (R-40) Zoning District, who requested an Equitable Waiver of Dimensional Requirements from **Section 170-12(B) of the Zoning Ordinance** to allow the completion of a 24' x 32' garage on the southwest corner of the subject property approximately 11-12' from the side and rear property lines, where 20' is required. The equitable waiver was granted by the Board on July 21, 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:	Regular Meeting
Meeting Location:	McConnell Center, 61 Locust St., Room 306, Dover, NH 03820
Meeting Date:	Thursday, September 15, 2022
Meeting Time:	7:00 pm

INTENT: This is for a Motion for Rehearing of Z22-07, by 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), related to the application of Dana R. and Sherri L. Brown, 126 Emerald Lane, (Tax Map F, Lot 15-48), located in the Rural Residential (R-40) Zoning District, who requested an Equitable Waiver of Dimensional Requirements from Section 170-12(B) of the Zoning Ordinance to allow the completion of a 24' x 32' garage on the southwest corner of the subject property approximately 11-12' from the side and rear property lines, where 20' is required. The equitable waiver was previously granted by the Board on July 21, 2022.

AGENDA ITEM #: 3-A

ZONING DISTRICT: R-40

FILE: Z22-07R

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)

PREVIOUS ZBA ACTION: May 2022 / Z22-05, Appeal of an Admin. Decision was denied, and the ZA's determination regarding lot coverage within an OSS was upheld.

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 Z22-07.

STAFF RECOMMENDATION

Staff's opinion and view with regard to the subject matter of the Equitable Waiver of Dimensional Requirements remains unchanged, in that:

The subject property is within the Rural Residential (R-40) zoning district and an open space subdivision ("OSS"). As Indian Ridge is an OSS, the provisions in the footnote above the Dimensional Requirements in the Table of Use for R-40 displace the normal dimension requirements in the R-40 district. Therefore, while 10-foot side and rear setbacks apply to outbuilding/accessory use structures in most residential zoning districts, in the case of an OSS (and as directed by the footnote) in accordance with Article IV of Chapter 157 of the Code of Dover, the dimensional requirements shall be as specified in §157-21. As such, the garage is required to meet 20-foot side and rear setbacks as required in the dimensional requirements chart of §157-21.F labeled *Minimum Building Setbacks for Subdivision Lots: Abutting a Lot Line (feet)*.

While the BP was issued by Inspection Services, the rear and side setback issue was apparently not identified. Furthermore, historically, City staff has advised the home owners of lots within residential zoning districts that setbacks for accessory structures (like detached garages and sheds) are generally 10-feet. This case has highlighted the need to be cognizant of and more carefully apply the 20-foot setbacks for such accessory structures existing within OSS subdivisions.

Staff recommends that the Board review the request to consider a Motion for Rehearing of Z22-07, mindful of the statutory standard that the Board need only grant a rehearing should the Board determine its prior determination was in any way "unlawful or unreasonable," RSA 677:3.



Property Information

Property ID F0015-048000
Location 126 EMERALD LN
Owner BROWN DANA R &
Land Use 101
Zoning Code R-40



MAP FOR REFERENCE ONLY NOT A LEGAL DOCUMENT

City of Dover, NH makes no claims and no warranties, expressed or implied, concerning the validity or accuracy of the GIS data presented on this map.

Geometry updated 5/3/2021
 Data updated Daily

Print map scale is approximate.
 Critical layout or measurement
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 this resource.

MOTION FOR REHEARING REGARDING THE JULY 21, 2022 DECISION OF THE ZONING BOARD OF ADJUSTMENT ON THE Application of Dana and Sherri Brown for Equitable Waiver of 20-foot setback requirement

Z-22-07

Property located at 126 Emerald Lane, Dover, NH

Request for rehearing by owners of immediately abutting properties: Ben Brunt, Sarah Brunt, Marcia Lane, Garry Lane

Pursuant to R.S.A. Section 677:2, Ben Brunt, Sarah Brunt (96 Emerald Lane), Marcia Lane and Garry Lane (130 Emerald Lane), as owners of the properties immediately abutting the Brown property located at 126 Emerald Lane, Dover, NH, request a rehearing on the Zoning Board of Adjustment's (ZBA's) decision on July 21, 2022 granting the Browns an equitable waiver purportedly pursuant to RSA Section 674:33-a of the minimum setback requirements for their new, detached garage. This request for rehearing is submitted, as required by statute, in anticipation of an appeal by the Lanes and the Brunts to the Superior Court. In support of this motion, the Lanes/Brunts raise the following issues in support of their motion:

1. For the ZBA to properly grant an equitable waiver, they must reasonably find that each and every requirement of RSA 674:33-a has been met. There are four separate requirements and the applicant for the equitable waiver has the burden of proof on every single requirement. The strength of evidence on one of the prongs cannot be used to replace the requirements of any of the other three statutory prongs.
2. In this case, everyone agrees that the applicable setback for a building in an open space subdivision such as the one in question (Indian Ridge Subdivision) is 20 feet from all lot lines. The Brown detached, partially completed garage, violates that requirement, and sits approximately 12 feet from the lot lines.
3. Subsection (a) of the statute requires that the violation "was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been **substantially completed...**"
4. Regardless of what date is used to determine whether the building is **substantially completed**, the garage is not, and never has been, **substantially completed** and thus, regardless of whether Mr. Brown met his burden of proof on each of the other three prongs, which he did not, the ZBA had no lawful right to issue the equitable waiver.
5. The ZBA members, in reaching their decision, did not state any one standard for when the "structure" would be considered to be **substantially complete**. They cited no legal standard for the position implicit in their ultimate vote to approve the equitable waiver. They had no legal basis for the multiple, inconsistent positions expressed by the ZBA members on what the term

substantially completed meant. The chairperson argued that any construction consists of multiple steps:

1. Removal of trees
2. Site work
3. Removal of rock
4. Foundation
5. Framing
6. Wall sheathing

The chairperson said that whether anything else on a building is complete, for example, roof, a poured cement or other floor, insulation, wiring, windows, doors, plumbing, electrical, etc. is completely irrelevant to whether a building is ***substantially complete***. He had no legal authority for his position and expressed none. The chairperson seemed to suggest that if any one of the above 6 stages of construction is complete, then the “structure” is ***substantially complete*** for purposes of the statute. That interpretation is not in compliance with the statute.

6. Other members suggested similar vague explanations of what constituted ***substantial completion*** and, as a result, we cannot know on what basis the ZBA concluded that the structure was ***substantially complete***. Was it that trees were cleared inside the 20-foot setback area, that some of the foundation hole was dug inside the 20-foot setback? It is very possible that each ZBA member applied some different version of what work must be done for the structure to be ***substantially complete***.
7. While it was improper for the ZBA to apply a critical statutory test without clear articulation of what that standard is (and it appears to have varied from ZBA member to ZBA member), regardless of what definition or definitions of ***substantial completion*** the ZBA applied, each was legally incorrect.
8. ***Substantially complete*** is a two-word requirement. Both words must be considered together. The structure must not just be started or significantly underway. It must be almost complete, ***substantially complete***. In using the term, the legislature should be deemed to know how it defined those two words in RSA Section 508:4-b:

II. The term “substantial completion” means that construction is sufficiently complete so that an improvement may be utilized by its owner or lawful possessor for the purposes intended.

9. The legislature could have chosen to say, instead of ***substantially complete***, but it did not, that the illegal construction is protected, assuming the other requirements of the equitable waiver statute are met, if the construction is “significantly advanced” or if the owner had made a “substantial beginning of construction.” Or the legislature could have said the construction is protected under the equitable waiver statute, but it did not, “if the landowner or developer spent significant money on the work done so far.” It chose none of those things. Instead, it chose two words that had been defined by the legislature in another statute, RSA 508:4-b, to mean the building was ready to be occupied for its intended purpose.

10. The Brown's attorney argued, and the ZBA accepted his unsupported legal argument, that if *any* phase of the construction, especially the walls, was complete and if that phase falls inside the 20-foot setback, then the **substantial completion** requirement is met. That argument is no different than a student arguing to his college professor that the student **substantially completed** his required essay by writing the word "yes" on a piece of paper. The professor might have expected a fully completed essay with sentences, paragraphs, introduction, body, conclusion, and point of view in order for him or her to consider the essay complete. But, applying the Brown's counsel's argument, an essay can be broken down into parts. Yes, there are such things as paragraphs and body and conclusion etc. but if any part of the essay is finished, it is **substantially completed**. Essays could be the whole thing or maybe just a paragraph or maybe just a sentence or, maybe just a single word. If any one of those things is done, the essay is **substantially complete**, so the argument goes. Similarly, what the ZBA has done is to distort the requirement that the construction of the **structure** be "**substantially complete**" to only require that if any slice (or in the case of the essay, any word) of the structure's construction is complete, then the structure is **substantially complete**. In other words, the ZBA through that reasoning, obliterated requirement (a) of the statute.
11. Had the legislature intended that subsection (a) of the statute was satisfied if any part of that construction was complete or substantially complete, the legislature could easily have written the statute that way. It did not. Therefore, it is unreasonable to give the statute such a strained interpretation.
12. In this case, the "structure" is a combine garage and woodworking shop. There is one permit for the entire building. As the Lanes and the Brunts argued in their written submissions, the structure, here a garage, is only **substantially complete** if the work is completed enough that the building could be used for its intended purpose (although there could still be some punch list items to finish). In this case, even using the state of the construction it is in now, the building is not ready to be used for its intended purpose as a car garage and woodworking shop. The roof trusses are not installed, there is no roof planking or sheathing, no shingles, no siding, no windows, no people doors, neither of the two garage doors is installed. The floor is still dirt and the concrete floor has not be poured. Heating has not been installed. The bathroom is not installed, there is no plumbing, no electrical. In short, there is no reasonable basis to conclude that the structure is **substantially complete**.
13. To the extent the ZBA may have mis-relied on the statutory and common law on "vesting" of developments in construction to protect a development from changes in the law while the construction is underway, the legal standard for vesting does not apply a "substantial completion" test and thus is irrelevant to the equitable waiver statute. Instead, RSA 674:39 I and corresponding common law on vesting only require, for vesting, that a developer have "commenced active or substantial construction" within one year of the permit grant to fall within temporary protection from subsequent zoning changes. Then, within the next four years (perhaps now five) the developer must additionally meet the "substantial construction" requirement. The Supreme Court explained that requirement as:

The correct standard for “substantial construction” vesting considers not only construction measured against the whole plan but also whether the amount of completed construction is per se substantial in amount, value or worth.”

AWL Power Inc. v City of Rochester, 148 N.H. 603 (2002).

At least one ZBA member, Mr. Burdin, and the Brown’s attorney, discussed the statutory and common law of vesting as though it might have some relevance to the equitable waiver statute. It has no relevance other than to demonstrate that there was another approach the legislature *could have taken* in adopting the equitable waiver statute but did not. It could have applied a less demanding standard, such as that required for vesting. The legislature did not do that. It adopted a stricter test that requires the construction be **substantially complete**. The ZBA cannot lawfully undo the equitable waiver statute and turn it into a general equity statute where the ZBA can ignore the factors of the statute that do not support the ZBA’s desired outcome.

14. Before the equitable waiver statute was passed, if a landowner violated a setback or other requirement, he or she had no protection from a later complaint or enforcement action even years later. The legislature ultimately decided that it wanted to give some protection from so-called innocent mistakes. But, the legislature, reasonably did not want to make it too easy for someone to violate zoning regulations and get away with it. The legislature could have set up a general equitable statute that in effect left it to a ZBA to grant a landowner relief from a building constructed in violation of a setback (or similar zoning requirement) whenever the ZBA, considering all the equities, decided the fairest outcome was to waive the zoning requirement. The legislature did not choose to enact a general equity statute as it realized that there were competing interests that had to be considered. Thus, the legislature enacted a statute that has four strict tests that must *all* be met. The **substantial completion** test is one of those. As stated above, while not automatically controlling, there is a definition of those two words together in a NH construction law statute of repose, RSA 508:4-b. That definition requires that for the building to be deemed **substantially complete** it must be ready to be occupied for its intended purpose. While that definition, of course, is not automatically controlling in the equitable waiver statute, it is a reasonable definition and one that meets the commonsense purposes of the equitable waiver statute. That is the most reasonable definition of the words **substantially completed**.
15. The unspecified definition or definitions used by the ZBA is/are unreasonable and simply chosen to allow the ZBA to grant the relief it, especially the chairperson, wanted to grant as a matter of equity. The ZBA cannot lawfully avoid the **substantial completion** standard by slicing the construction up into small enough parts that the ZBA can say, “yup, substantially completed.” If that was the legislature’s intent, it could have easily said that. The most reasonable interpretation is the *entire building* in question must be **substantially complete** and **substantial completion** means that, subject to punch list items, the building is ready to be occupied for its intended purpose. It was not, and is not, ready to be occupied for its intended purpose.

16. The Brown's attorney had no legal authority for his position but argued that the ZBA had the legal right to interpret that statute any way the members personally wanted, and that the choice was totally a matter of ZBA's discretion. In other words, whatever the ZBA wanted to do was perfectly lawful. He cited no case law for that position, but the ZBA apparently accepted his argument. That attorney was not totally clear on what his definition was, but suggested that if the footings, the foundation walls and or the side walls were built, that is **substantial completion**. However, contrary to that interpretation, the statute is referring to the structure, as a whole, not some piece of it. As discussed above, the legislature specifically chose the words "**substantially complete**." The legislature did not say that if any part of the structure was substantially complete, that was enough.
17. While the structure/building is not **substantially complete** regardless of what date that test is measured from, the controlling date in this case is when Lane informed the Planning Department officials that the building, as shown on the plans submitted to the City by Mr. Brown, violated the 20-foot setback rule of City code section 157- 21. That notice was on Friday morning February 4th. While we do not have photographic evidence of the state of construction on the morning of February 4th, we have provided the ZBA with a photo from Monday morning February 7th, 2022, before construction started for the day. There was a single roof truss in place. No construction occurred over the weekend, and it took a day of construction on Friday February 4th, after Lane provided clear notice to City of the setback violation, for the building to look like it did in the February 7th photo. Thus, the controlling date for determining substantial completion is Friday morning, February 4th and it was the Brown's and their counsel's burden of proof to establish the state of construction at that time. One ZBA member said that the ZBA did not want to rely on people's memories of what the construction would have looked like on Friday morning. In other words, that ZBA member chose to improperly shift the burden of proof on that issue to the objecting parties (the Lanes and Brunts) rather than to the party that has the burden of proof under the statute, the Browns. Another ZBA member claimed that notice of the violation to the City on the 4th does not control but rather it is the date on which the Brown's were notified of the violation. That conclusion is contrary to the express provisions of the equitable waiver statute that are triggered when either the builder/owner or a municipal official becomes aware of the violation. That occurred on Friday, February 4th. Lane also notified the Brown's in writing on Sunday February 6th.
18. **Substantial completion** must be measured from Friday morning, February 4th and the building was not substantially complete. However, even if the test is the state of construction on Monday morning, February 7th, as shown in the photo in evidence, the building was not substantially complete. However, even if **substantial completion** is measured from the building as it stands now, it is not **substantially complete** for all the reasons stated above.
19. Mr. Brown also did not satisfy subpart (b) of the equitable waiver statute. When Mr. Brown applied for his building permit, he submitted a plan/diagram of the proposed garage that specifically showed the 20-foot setback line and showed the building violating that setback requirement. Considering that, Mr. Brown cannot be treated as an innocent party, even if a city official did not realize the zoning violation. Mr. Brown failed his duty to properly inquire in more

detail in light of the fact he was fully aware of the 20-foot setback line that was drawn onto the plan he submitted to the City. Further, as documented in our written submission, the City forms expressly warned Mr. Brown that it was *his* obligation to comply with the setback requirements.

20. Mr. Brown takes no responsibility for violating the 20-foot setback line and, while he did not even show up at his own hearing to testify (perhaps so he would not have to directly answer any questions), he had to have been aware of that 20-foot line. While Mr. Brown's application for equitable waiver suggests Mr. Maxfield, the building official, did not notice the violation, Mr. Brown submitted nothing in writing to show that he discussed the twenty-foot setback line drawn on the plan and he produced no statements, orally or in writing, allegedly made by Mr. Maxfield confirming that he advised Mr. Brown that the setback requirement was only 10 feet. The ZBA, nevertheless found Mr. Maxfield incorrectly advised Mr. Brown but that was an assumption on their part without evidence submitted on that issue. Perhaps it was the case that Mr. Maxfield misled Mr. Brown; perhaps not. There was no evidence of anything said by Mr. Maxfield mis-advising Mr. Brown of the setback. We are simply told at the July 21st hearing that there were extensive communications and emails between Mr. Brown and Mr. Maxfield. Conveniently, no express evidence was introduced of any misstatement by Mr. Maxfield. A failure of Mr. Maxfield to realize Mr. Brown's mistake does not meet subsection (b) of the statute that the violation was made "by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing the permit over which that official had authority." It was convenient that there is no written statement produced of what Mr. Maxfield said. No testimony of what Mr. Maxfield said. Neither Mr. Brown nor Mr. Maxfield attended the hearing. The ZBA's presumption, without evidence, of Mr. Maxfield's alleged mishandling, is not reasonable.
21. Subsection (c) of the statute placed the burden of proof on Mr. Brown to establish that the placement of the building would not diminish the value of other property. In this case, the sole argument of Mr. Brown's counsel, who introduced no evidence on the issue of valuation at all, was that since the Brown garage cost money and would increase the Brown tax assessment; therefore, he argued, that would automatically make the values of all other properties around the Browns go up too.
22. Initially, one ZBA member, Mr. Burdin, said he did not feel the Browns met the proof requirement on diminution of value. Ultimately, two other ZBA members who said they were realtors, argued, inconsistently that (1) there was really no way to know whether the value would go up or down and that, like a swimming pool, some potential buyers might like the fact there is a large, detached garage on the next-door property, but others might not or (2) it's not something that can be determined. Especially in the case of the Brunts, where this large structure is extremely close to their house, it is nonsensical to assume, without some kind of professional testimony and research by a real estate appraiser (not a real estate agent), that the Brunts could sell their home without any loss of value even with that large structure looming over their property. Further, the Brunts and Lanes, as property owners, are considered qualified to talk about the value of their properties and they have concluded that having the garage

closer to their property lines, will diminish the values of their properties (especially the Brunt property). Additionally, to conclude that setbacks don't matter for value, which is essentially what the ZBA did, means that the City was irrational in the first place in imposing setback requirements. The ZBA conclusion in this case was unreasonable.

23. Because the ZBA made a baseless finding that the large garage, located closer to the property lines than allowed, would have no effect on the value of the Lanes or the Brunts' properties, there can be no fair analysis of the final condition of the statute that the cost of fixing the violation would outweigh the value to others (i.e. the combined loss of property value for the Lanes and the Brunts compared to the cost of moving the garage). If one starts with the unsupported assumption that the Lanes and Brunts suffered no harm, then the test built into subpart (d) of the statute becomes meaningless. The ZBA did not fairly consider or apply the subpart (d) test.

24. The twenty-foot setback requirement became an enforceable right of the neighboring properties under RSA section 674:21-a and not just a zoning ordinance. The ZBA had no right to grant an equitable waiver in light of that statute. Once the 20-foot set back was included in the subdivision approval plans, it was no longer just a zoning dimensional rule. It became an enforceable right of every property owner in the subdivision.

For all the above reasons, the ZBA should reconsider its prior grant of the equitable waiver and issue a denial of the Brown's equitable waiver request.

Submitted by Garry Lane, Marcia Lane, Ben Brunt, Sarah Brunt. (as previously advised, while Garry Lane is a retired lawyer – still licensed) he only represents himself and Marcia Lane.

Submitted by:

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Submitted in person and by email on August 19, 2022