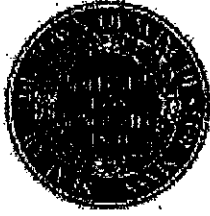


**TOWN OF WINCHESTER**



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TOWN CLERK  
TOWN OF WINCHESTER

**PUBLIC MEETING NOTICE and AGENDA**

**REMOTE PARTICIPATION**  
(Due to State of Emergency COVID-19)

Pursuant to MGL Ch. 30A, Sec. 18-25 All meeting notices and agendas must be filed and time stamped by the Town Clerk's Office and posted at least 48 hours prior to the meeting (excluding Saturdays, Sundays and Holidays) on [www.winchester.us](http://www.winchester.us)

Board/Committee Name: Board of Appeals  
Date: March 3, 2022  
Time: 7:00PM  
Place: REMOTE PARTICIPATION - Zoom

Register in advance for this meeting:  
<https://us02web.zoom.us/meeting/register/tZ0sc-qrpjMrE9PQqRS1MSypoPt53MBOlcge>

After registering, you will receive a confirmation email containing information about joining the meeting.

**Agenda:**

- 21 Laurel Hill Lane – continued from February 17, 2022
- 14-16 Oak Street – continued from February 17, 2022
- Review draft decision – #3950 - 4 Abby Road (Lot 2)



**Due to a lack of a quorum on February 17, 2022, Petition No. 3953 will be continued to March 3, 2022 at 7:00PM.**

BOARD OF APPEALS

NOTICE OF PUBLIC HEARING

The WINCHESTER BOARD OF APPEALS will hold a REMOTE PARTICIPATION PUBLIC HEARING on THURSDAY, FEBRUARY 17, 2022 at 7:00 P.M. on the following matter:

PETITION NO. 3953 - That of MICAELA and DAVID TUELL concerning the property at 21 LAUREL HILL LANE, WINCHESTER, MA. The petitioners are seeking Site Plan Review under Section 9.5.1(7) of the Winchester Zoning By-Law so as to change the grade of more than 500 square feet by more than six (6) percent. The property is located in the RDB (Single Residence) zoning district and contains 12,933 +/- square feet.

WINCHESTER BOARD OF APPEALS

Petition may be viewed at the Building Department during regular office hours or on the Board of Appeals web page [www.winchester.us](http://www.winchester.us)

Link to the meeting can be found on the Board of Appeals web page and the Government Calendar [www.winchester.us](http://www.winchester.us)



**Due to a lack of a quorum on February 17, 2022, Petition No. 3954 will be continued to March 3, 2022 at 7:00PM.**

BOARD OF APPEALS

NOTICE OF PUBLIC HEARING

The WINCHESTER BOARD OF APPEALS will hold a REMOTE PARTICIPATION PUBLIC HEARING on THURSDAY, FEBRUARY 17, 2022 at 7:00 P.M. on the following matter:

PETITION NO. 3954 - That of KEVIN O'DONNELL and BETH STECCHI concerning the property at 14-16 OAK STREET, WINCHESTER, MA. The petitioners are seeking a Special Permit under Section 3.5.5, Section 3.5.7 and Section 9.4 of the Winchester Zoning By-Law in accordance with Chapter 40A, Section 9 of the Massachusetts General Laws so as to be permitted to demolish a pre-existing non-conforming two family dwelling located on a lot which does not meet the lot area, lot frontage and lot width requirements and to construct a new two family dwelling that will be located closer to the front and side property lines than permitted as of right. The property is located in the RG (General Residence) zoning district and contains 8,578 +/- square feet.

WINCHESTER BOARD OF APPEALS

Petition may be viewed at the Building Department during regular office hours or on the Board of Appeals web page [www.winchester.us](http://www.winchester.us)

Link to the meeting can be found on the Government Calendar and the Board of Appeals web page [www.winchester.us](http://www.winchester.us)

TOWN OF WINCHESTER  
BOARD OF APPEALS

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Decision No. \_\_\_\_\_  
4 Abby Rd. (Lot 2)

**Name of Appellant:** Keith Goodwin

**Application For:** Appeal under General Laws Chapter 40A, Section 15, from the Building Commissioner's issuance on July 22, 2021, of Building Permit #663 to Cauley Development, LLC for construction of a single-family residence at 4 Abby Road (also referred to as Lot 2, Abby Road) (the "Property") and related work (the "Project"). The Property is located in an RDB-10 (Single Residence) zoning district and contains 10,023 square feet.

**Date of Hearing:** October 21, November 18, and December 16, 2021, and January 20, 2022

**Board of Appeals:** David Feigenbaum, Robert Tedesco and Dorothy Simboli

**Decision:** Revoke Building Permit #663.

**Vote of the Board:** 3-0.

**Record:** The following documents were submitted in this appeal:

1. 

**Facts:**

In February 2019, the Winchester Planning Board approved Five Points, LLC's definitive plan for a 5-lot residential subdivision off Highland Avenue. Five Points constructed a new way called Abby Road and the associated infrastructure. In June 2020, Cauley Development, LLC (the "Developer") bought Lots 1-3 from Five Points. On July 22, 2021, the Building Commissioner issued Building Permit #663 to Cauley for the construction of a single-family residence on the Property (4 Abby Road; Lot 2 of the subdivision). Abutter Keith Goodwin, who owns and resides at 14 Highland Avenue, has appealed the issuance of that permit.

The proposed house contains two floors of living space and an attic. Below those floors, the lowest level includes 800 s.f. shown on the plans as a "Play Area," an "Office," and a bathroom, along with other space for utilities, storage, and incidental uses. The Play Area is adjacent to an at-grade walkout at the rear left corner of the house.

**Discussion:****1. Site Plan Review re: Grade Changes (Bylaw Section 9.5.1.7)****DRAFT**

Section 9.5.1.7 of the Zoning Bylaw requires site plan approval from the Board of Appeals before the following is commenced: "Changing the grade of more than five hundred (500) square feet by more than six (6) percent."

According to the Developer, the Project would regrade areas of 381, 449, and 456 s.f. by more than 6%.<sup>1</sup> The Board decided that multiple areas where the grade will be changed by more than 6% should be aggregated to determine whether the total exceeds 500 s.f.. That decision reflects the language of Section 9.5.1.7, which simply refers to 500 s.f. rather than to "an area" of 500 s.f. or similar language. It was undisputed that, under such an interpretation of Section 9.5.1.7, the Project requires site plan review.

A different interpretation of the Bylaw, requiring a single area to exceed the 500 s.f. threshold to trigger site plan review, would be inconsistent with the wording of Section 9.5.1.7. It would, as in this case, negate the intent of the Bylaw by allowing multiple areas of nearly 500 s.f. to be regraded significantly without that review, causing significant drainage or other impacts.

However, the Board also determined that the Project requires site plan approval even if a single regraded area must exceed 500 s.f. It compared the Developer's site plan dated November 23, 2021 (which corrected some grades in the building permit plans) with the approved subdivision plans. According to calculations by Sean Malone, P.E. on behalf of the Appellant, that site plan shows grade changes of more than 6% over 1500 s.f. in the patio area, approximately 670 s.f. next to the driveway, and approximately 780 s.f. in the front entry area. (Malone letter dated 12/12/21.) The Board found those calculations credible. Accordingly, whether the three areas are considered in the aggregate or individually, site plan approval is required based on the proposed regrading.

**2. Site Plan Review Re: Floor Area**

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<sup>1</sup> At the October 21 public hearing, the Board asked the Developer to provide (1) a revised site plan showing existing and proposed contours at 1' intervals rather than 2', (2) contours missing from the plans, and (3) calculations of the proposed grade changes. On November 23, 2021, the Developer submitted an updated "Proposed Site Plan", but still omitted much of the requested information. The Developer declined to submit 1' contours, noting that both the Board's regulations for special permits and the Planning Board's Subdivision Regulations require only 2' contours. Although the Board believes that the Developer was obligated to submit a plan with 1' contours, this decision is not based on its failure to submit such a plan or on the difference between 1' and 2' contours.

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Section 9.5.1.5 of the Zoning Bylaw requires site plan approval from the Board for new construction in the RDB-10 zoning district resulting in floor area equal to or greater than 5,000 s.f. "excluding basement". The Bylaw defines the following terms :

**Basement:** That part of a building partly underground but having more than one-half of its entire wall area above the level of the adjoining ground. A basement shall be counted as a floor or story if used for business or dwelling purposes.

**Cellar:** That part of a building having less than one-half of its entire wall area above the level of the adjoining ground.... A cellar shall not be counted as a floor or a story.

**Floor area:** The aggregate horizontal area in square feet of all floors of a building or several buildings on the same lot measured from the exterior faces of walls enclosing each building, exclusive of garages, cellar and attic areas used only for storage or, for service incidental to the operation or maintenance of such building or buildings.

The Developer argued that the lowest level of this house would constitute a cellar. With that characterization, the issue is whether the entire cellar is excluded from floor area under the definition above, or only the areas used "only for storage or for service." If the Bylaw meant to exclude entire cellars, it should say "cellars," perhaps followed by a comma. It would have been a simple matter to use the plural, like the surrounding terms "garages" and "areas." Moreover, it makes more sense to group cellars with attics than with garages, because those areas may be used for living space, whereas garages normally are not. On the other hand, if the Bylaw meant to exclude only cellar areas used for storage and service, it should say "and" before "cellar." The Board concluded that the Bylaw's use of the singular "cellar" is likely what was intended despite the omission of a conjunction. Accordingly, areas of a cellar *not* used for storage or service – playrooms, offices, and the like – count toward floor area.

The Developer argued that, if those areas are included in floor area, the result might be anomalous: parts of a cellar would count as floor area for purposes of site plan review, but a basement above it would not (because Section 9.5.1.5 excludes basements). That argument supposed *two* levels partly or completely belowground. That is not the situation here, and the Board finds it a remote possibility and therefore not applicable to interpreting Section 9.5.1.5.

Accordingly, the Board interprets the Bylaw to exclude from floor area only those areas of a cellar that are used for storage or service. When the 800 square feet shown on the plans as play area, office, and bathroom are included, the floor area of this house is 5580 s.f. Site plan approval is required based on floor area, as well.

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### 3. Stories

In the RDB zoning district, the maximum building height is 2½ stories. Bylaw Section 4.1.4 – Dimensional Table. The Appellant argued that (a) the attic is a full story, rather than a half story, which by itself would make the house 3 stories, and (b) the lowest level is a basement rather than a cellar, which by itself would make the house 3½ stories.

#### (a) The Attic

The Bylaw defines “Half Story” as a “story directly under a sloping roof in which the points of intersection of the bottom of the rafters and the interior faces of the walls are less than three feet above the floor level on at least two exterior walls.” The Appellant argued that interior walls within the attic are more than 3 feet high, making the attic a full story. The Board rejected that argument. The “interior faces of the walls” refers to those faces of the exterior walls of the house, not of any interior walls that may be built within the attic. The attic of this house is a half story.

#### (b) The Lowest Level

In addition to the terms above, the Bylaw defines “Story” as:

That portion of a building contained between any floor and the floor or roof next above it; it does not include ... the lowest portion so contained if more than one-half of such portion vertically is below the mean finished grade of the ground adjoining such building....

This definition is similar to the definition of a Cellar quoted above, though not identical.

The Appellant argued in the alternative regarding the lowest level, as follows:

- if that level is a cellar (as the Developer asserted), then the areas not used for storage or service count toward the 5,000 s.f. threshold for site plan review and such review is required; and
- if that level is a basement, then it counts as a story since it would be used for dwelling purposes.

As discussed in Section 2, above, the Board accepted the Developer’s assertion that the lowest level is a cellar, and agreed with the Appellant that the areas not used for storage or service count toward the 5,000 s.f. threshold for site plan review. However, the Board also recognized an

alternative interpretation of the Bylaw under which the lowest level, or part of it, would constitute a basement. Two members of the Board concluded that that level is a basement because it would be used for dwelling purposes. The third member concluded that, where the part of the lowest level adjacent to the at-grade walkout has more than half of its entire wall area above the adjoining ground, that part is a basement even if the rest of that level is a cellar. Such an interpretation draws some support from the Basement and Cellar definitions, which simply refer to a "part of a building." If the lowest level or any part of it is a basement, it counts as a story based on its use for dwelling purposes.

The Board's task was made more difficult because the evidence of whether the lowest level was more than half aboveground or belowground – the key measurement under the definitions of Basement and Cellar as well as that of Story – was inconclusive. The only evidence submitted to either the Building Commissioner or the Board was a pair of notations on Sheet A3 of the plans stating: "Existing and proposed mean grade 94.3. Midpoint of basement 93.2." Even though the basement-versus-cellar issue was hotly contested, the Developer never described where and how many measurements were taken, explained how those figures were calculated, or submitted any further calculations supporting its assertion that the lowest level is a cellar.

The Board did not rest its decision on the number of stories. Its members had two different rationales for finding that some or all of the lowest level is a basement (as described above) and, given the Board's conclusion that the lowest level is a cellar for site plan review, it would be inconsistent to call part of that level a basement for the stories determination. Accordingly, the Board did not conclude that this house would exceed the Bylaw's maximum number of stories.

However, the Board was troubled by the facts of this appeal, where (1) substantial dwelling space would be mostly aboveground and present a full story's worth of light, noise and other impacts to an abutter and (2) the characterization of the lowest level as a basement or cellar was a close and uncertain call. The rear of this house seems to negate the protection that the Bylaw's limit on the number of stories intends to give abutters and other neighbors. In a future appeal, the Board may require more conclusive evidence of whether a lowest level is mostly aboveground or underground, and it may conclude that that level is wholly or partly a basement and, depending on its use, a story.

#### **4. Winchester Engineering Department approval of additional impervious area**

In approving the subdivision plan for Abby Road, the Planning Board included the following condition (Condition 9):

Prior to the issuance of a building permit for each home within the subdivision, the applicant shall certify that the impervious area coverage proposed on the



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respective lots ... is in accordance with the subdivision plan approved by the Planning Board. If the impervious area coverage is greater than what was shown on the approved plans, the applicant shall be responsible for providing revised drainage calculations for the respective infiltration system(s) to the Town Engineer for review prior to the issuance of the building permit.

It was undisputed that the building permit plans show more impervious surface on Lot 2 than the subdivision plan did. During the public hearing process, the Engineering Department stated that it had no comment on the appeal. However, no evidence was provided to the Board that the Developer had submitted drainage calculations reflecting the additional impervious surface to the Engineering Department, or that Engineering had approved those calculations before the building permit was issued. Based on the condition in the subdivision approval, the building permit should not have issued.

Decision: The Board revoked Building Permit # 663 for each of the reasons described above.

**Board of Appeals**

By: \_\_\_\_\_

Date of Decision: \_\_\_\_\_