

**TOWN OF WINCHESTER**  
**BOARD OF APPEALS**  
**Decision No. 3926**  
**49 Church Street (the "Property")**

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**Name of Petitioners:** Lee Wooten and Jamie Devol

TOWN CLERK

**Respondents:** Boutique Properties, LLC

TOWN OF WINCHESTER

**Application For:** Petitioners seek an appeal under Section 9.3.3 (3) of the Winchester Zoning By-Law and G.L. c. 40A, §§ 8 and 15 from the Building Commissioner/Zoning Enforcement Officer's determination regarding the Property. The Property is located in the RDB (Single Residence) zoning district and contains 0.29 acres.

**Date of Hearing:** January 21, 2021, February 18, 2021 and March 11, 2021

**Board of Appeals:** Mark Regan, Dorothy Simboli and Kevin Sarney

**Decision of the Board:**

The vote was 2-1 (Simboli and Sarney in favor, Regan opposed) on a motion to deny the Petitioners' appeal with respect to their claim that the Respondents' were required to apply for Site Plan Review pursuant to Section 9.5.1.7 because the Respondent changed the slope of the Property by over 6% of existing grade over an area of more than 500 square feet

The vote was 3-0 (unanimous) on a motion to affirm the Zoning Enforcement Officer's determination that the use of the Property as a dental office was a pre-existing non-conforming use as of at least January 24, 1980 and had not lapsed.

**Support:** The following support was supplied for the determination:

1. Form 2 dated December 14, 2020
2. Form 2A (and attachments) dated December 14, 2020
  - a. Copy of the Town of Winchester Assessors Map 76 Church Street, dated May 25, 2006.
  - b. Five pages of 10 Photos A of 49 Church Street -undated
  - c. Certificate of Non-Compliance – Certificate #153 dated January 24, 1980 (stated use Single Family Dwelling and Professional Office established prior to 1950)
  - d. Email string dated December 16, 2020 with Zoning Enforcement Officer's determination regarding alleged grade change and onsite viewing of 1<sup>st</sup> floor dental office and 2<sup>nd</sup> floor apartment.
3. Anderson & Kreiger LLP – Memorandum dated February 2, 2021 regarding lawful continuation of a prior nonconforming use
4. Wooten Devol Memorandum – dated March 9, 2021:

- a. with certified topographic survey dated March 3, 2021 from Edward J. Farrell PLS.
  - b. Petitioner exhibits prepared by Petitioner Lee Wooten P.E. regarding topography survey prepared by Edward J. Farrell on March 3, 2021 (note this work/opinion is not certified by Edward J. Farrell)
5. All representations made by the Petitioners at the public hearing and not memorialized are hereby incorporated into this Decision

**Discussion:**

Respondent owns the Property, a single family 2 story building utilized as a professional office (Dental) on the 1<sup>st</sup> floor and a residential apartment on the 2<sup>nd</sup> floor. The Petitioners, Lee own the property abutting the rear of the Property at 7 Dix Terrace. The Property is located close to the Town Center. The area has been zoned residential for at least forty years, but has historically housed several professional medical offices.

Dr. Seymour Russell was issued a Certificate of Non-Conforming Use for the Property in 1980. The Certificate of Non-Conforming use dated January 24, 1980 (certificate #152) stated the Property was "to be used as "Single Family Dwelling and Professional Office" In his application, Dr. Russell stated that the Property had been used for a dentist's office since 1950 and that the second floor was being used for a single-family dwelling at the time of the application. The certificate confirmed Dr. Russell's right to continue using the Property as a dentist's office and single-family dwelling. The parties dispute when, if ever, the second floor was used as a dentist's office. Dr. Eugene Lawnicki purchased the Property sometime prior to 2019 and continued using it in the same fashion as his predecessors. The Respondent and its principle, Dr. Rahimi, purchased the Property from Dr. Lawnicki in December 2019, along with Dr. Lawnicki's dental practice.

The second floor residential tenant terminated their lease at the start of the COVID-19 pandemic in March 2020. Because the two floors share a heating and air conditioning system, Dr. Rahimi does not plan to find a new tenant "until the COVID 19 emergency has passed." Respondent intends to list the apartment for rent as soon as possible under the circumstances caused by the COVID-19 emergency.

The Petitioners raised two issues in their Petition, asserting that the Zoning Enforcement Officer misapplied two provisions of the Winchester Zoning By-Law;

1. Section 9.5.1 Site Plan Review, Item #7
  - a. " The site work at 49 Church Street involves the change in slope over 6% of existing grade of an area more than 500 square feet" and thus required Site Plan Review.
2. The 1980 Certificate of Nonconforming Use:

Use of the property as both a dental office and single-family dwelling – Petitioner claimed Property is being used only as a dental office, that this use was not permissible, and that the residential portion had been abandon.

**Item #1**

To evaluate Item #1 above, the Board of Appeals asked the petitioners at the January 21, 2021 meeting to hire a professional surveyor to determine whether the slope had been changed by 6% or more over an area of 500 Sq. ft. or more. At the February 18, 2021 Board of Appeals meeting, the Petitioners asked for a continuance to complete the survey due to winter weather. At the March 11 meeting, the Petitioners submitted a topographic survey by Edward Farrell dated March 9, 2021 which did not provide a conclusion regarding the change in slope.

**Conclusion – Item #1:**

The Board deliberated and voted on a motion to deny the Petitioners' appeal due to lack of support regarding the claim by the Petitioners that the Respondent had altered the Property's slope changed by more than 6% in an area over 500 sq. ft. and that Site Plan Review was therefore required. The vote was two in favor, one against. The Petition with respect to the requirement for Site Plan Review is denied, and the decision of the Zoning Enforcement Officer is upheld as being both consistent with the facts and the laws of the Commonwealth and the Zoning By-Law of the Town of Winchester.

**Item #2**

To evaluate item #2 above - The Petitioners sought a determination from the Zoning Enforcement Officer that the alleged existence and expansion of the dental practice was in violation of the Certificate of Nonconforming Use and thus impermissible. The Zoning Enforcement Officer found in a December 16, 2020 email that the Respondent was lawfully using the Property. The Petitioners appealed.

Continuing nonconforming uses are legally protected, to an extent: "a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun . . . before the first publication of notice of the public hearing on such ordinance or by-law . . . but shall apply to any change or substantial extension of such use." G.L. c. 40A, § 6. Whether a nonconforming use has undergone an impermissible change or substantial extension is determined by a three-part test: "(1) whether the proposed use reflects the nature and purpose of the prior use, (2) whether there is a difference in the quality or character, as well as the degree, of use, and (3) whether the proposed use is different in kind in its effect on the neighborhood." *Almeida v. Arruda*, 89 Mass. App. Ct. 241, 244 (2016) (citing *Powers v. Building Inspector of Barnstable*, 363 Mass. 648, 653 (1973); *Bridgewater v. Chuckran*, 351 Mass. 20, 23 (1966)). If the nonconforming use has undergone a change or substantial extension under any of the three questions, it loses its protection under G.L. c. 40A, § 6.

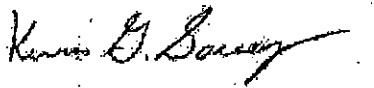
The Board of Appeals finds that there has not been a change or substantial extension of the pre-existing nonconforming use of the Property as a dentist office with an accompanying residential use. First, the proposed use is identical to the preexisting use, and so the nature and purpose are the same. Second, an expansion of a small dentist's office to take up more space

in a building is unlikely to be different "in kind" with respect to effects outside the building under Massachusetts case law, especially, where the Respondent has represented it intends to rent the residential premises as soon as the COVID-emergency has subsided. Further, there has been no allegation that an expanded dentist office will require additional off-street parking, or cause additional noise discernible to neighbors. Respondent claims that only one dentist will use the space at a time, so it is unlikely that any changes inside the Building will be noticeable outside. Even if two dentists were working at once, the difference in degree would likely be minimal.

**Conclusion – Item #2:**

The Board of Appeals affirms the Zoning Enforcement Officer's determination that the property's use as dental office is a pre-existing non-conforming use protected under G.L. c. 40A, § 6. The motion was unanimously accepted by the Zoning Board of Appeals by a vote of 3-0. The decision of the Zoning Enforcement Officer is upheld as being both consistent with the facts and the laws of the Commonwealth and the Zoning By-Law of the Town of Winchester.

**Board of Appeals**



Kevin G. Sarney

**Date of Decision:** March 25, 2021