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**TOWN OF WINCHESTER  
BOARD OF APPEALS**

**Decision No. 3935  
2 Abby Road (Lot 1)**

**Petitioner:** Keith Goodwin

**Application/Appeal:** The Petitioner appealed the building permit issued to Cauley Development, LLC (the "Permit-holder") for a proposed single-family dwelling at 2 Abby Road.

**Date(s) of Hearing:** April 15 and May 13, 2021

**Board Members:** Mark Waterbury (Chair), Dorothy Simboli, and Robert Tedesco

**Decision:** Building permit overturned because the house would exceed the maximum number of stories under the Zoning By-law.

**Vote:** 3-0.

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**Procedural History**

On January 8, 2019, the Winchester Planning Board approved the definitive plan submitted by Five Points Development, LLC, for a five-lot subdivision of land off Highland Avenue. The lot at 2 Abby Road (the "Site") is Lot 1 of that subdivision. Five Points regraded the land and built the road pursuant to that plan. Because of the topography and other site constraints, Five Points located some of the drainage infrastructure on the lots rather than under the road, which the Planning Board approved in its subdivision approval.

On January 19, 2021, the Building Commissioner issued building permit #22 to the Permit-holder for a new single-family house at the Site. The Site is located in the RDB (Single Residence) zoning district and contains 10,023+/- square feet.

The Petitioner lives at 14 Highland Avenue, abutting the rear of the Site. On February 18, 2021, he timely appealed that permit to this Board.<sup>1</sup>

The Board held a duly-noticed public hearing on this appeal on April 15 and May 13, 2021. Both the Petitioner and the Applicant were represented by counsel, who submitted several written memoranda or letters and presented their arguments at the hearing. Several residents of the Dana Road and other residents supported the appeal and opposed the building permit in writing and orally at the hearing. No one besides the Permit-holder and its team supported the building permit at the hearing.

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<sup>1</sup> As an abutter, the Petitioner has a presumption of standing to bring this appeal. That standing was not challenged.

The Board received the following documents regarding this appeal:

- Letter from Jeffrey L. Roelofs - Notice of Appeal dated February 18, 2021
- Form 1 (Zoning Application checklist)
- Form 2 (Application for Zoning Hearing dated February 18, 2021)
- Form 2A (Appeal-Supporting Statement Requested Findings dated February 18, 2021)
- Assessor's Map
- Building Permit #22 (The permit being appealed)
- Building Permit application materials (excerpts only)
- 2018 Development Agreement with excerpts from attachments (which included the 10/10/2018 Subdivision Plans).
- 2019 Subdivision Approval without attachments
- December 20, 2018 Subdivision Plans
- Annotated Aerials, Tables and Figures – highlighting the details and significance of noncompliance.
- Photographs – depicting the proximity of the approved residence to Mr. Goodwin's residence.
- Memo from Beth Rudolph, PE – Town Engineer dated March 8, 2021
- Historical Commission – Board of Appeals Findings dated April 5, 2021
- Design Review Committee – Meeting minutes April 7, 2021
- Planning Board – Votes and recommendations from April 6, 2021 meeting.
- Letter from Mark T. Vaughan dated April 13, 2021 re: Notice of Appeal - Appeal of Building Permit No. 22 (Lot 1 Abby Rd, Winchester, MA) with two attachments (Memo from Brian Szekely dated December 2, 2020 – Subject: Abby Road and Letter from FLH Architects dated March 26, 2021 – re: Lot 1 Abby Rd, Winchester, MA)
- Letter from Ann Sera dated April 13, 2021 re: Abby Road
- Memo from Ann Sera dated April 14, 2021 re: Abby Road Appeal Lot 1, Dormers and Plans
- Letter from Jeffrey L. Roelofs dated April 15, 2021 re: Supplemental Submittal by Petitioner – Lot 1 Abby Rd. Appeal
- Letter from Mark T. Vaughan dated May 11, 2021 re: Notice of Appeal – Appeal of Building Permit No. 22 (Lot 1 Abby Road, Winchester, MA)
- Email from Jeffrey Roelofs dated May 11, 2021 re: Abby Rd, Lot 1 – Petitioner Summary of Appeal Grounds with attachment: Outline of Grounds for Appeal – By Petitioner's Counsel
- Email from Ann Sera dated May 12, 2021 – ViewsForZBA.pptx
- Email from Ann Sera dated May 12, 2021 – ViewsForZBA.pdf
- Email from Ann Sera dated May 13, 2021 - ViewsForZBA.pptx
- Email from Ann Sera dated May 13, 2021 - ViewsForZBA.pdf

The Board closed the public hearing and began its deliberations on May 13. It concluded those deliberations and voted on the appeal on June 3.

### **Issues and Discussion**

The Petitioner has raised seven sets of issues. This decision addresses them in the order in which they were presented at the hearing.

#### ***Height***

The Petitioner argues that the house will exceed the 40' height limit under Section 4.1.1 – Table of Dimensional Regulations of the By-law. Section 10 of the By-law defines "Height of a Building" as (emphasis added):

the vertical distance measured from the mean grade of the **existing ground level** adjoining the building at each exterior wall to the highest point of the roof. Mean grade is to be determined by measuring the elevation at the **major exterior corners** of a structure and then dividing the total elevation by the number of points of measurement.

The Petitioner makes two arguments regarding height. First, he argues that the "existing ground level" means the ground level before the property was re-graded pursuant to the subdivision approval, whereas the Building Commissioner agreed with the Permit-holder that the appropriate starting point is the ground level shown on the subdivision plan. Second, he argues that the house has four "major exterior corners", whereas the Applicant measured the height of the house at six points.

The purpose of the By-Law's reference to "existing ground level" is to prevent a builder from increasing the absolute height of a house by raising the ground around it before or during construction. Based on that purpose, the Board agrees with the Building Commissioner that the term means the ground level before construction of the house, not the historic or naturally-occurring ground level, which may be impossible to determine. In this case, the grades before construction are the ones shown on the approved subdivision plans. The Petitioner conceded that, if those grades are the starting point for the calculation, the house will comply with the height limit in the By-law.

Nevertheless, the Board also finds that the proposed house will have four major exterior corners. The other two corners shown on the plans are minor jogs in the walls. Treating them as "major" and "exterior" would deprive those qualifiers of any significance. As noted above, this finding and the resulting calculation of height does not, by itself, result in a violation of the height limit of the By-law. However, the number of measurement points may be relevant to the calculation of stories, as discussed below.

#### ***Stories***

The By-law defines a "story" as:

[t]hat portion of a building contained between any floor and the floor or roof next above it; it does not include either 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, or the uppermost portion so contained if under a sloping roof and not designed or intended to be used for human occupancy.

A "Half Story" is: "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."

A "Basement" is: 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.

In the RDB zoning district, the By-law limits a house to 2½ stories. The Petitioner argues that the top level of the house will constitute a story, not a half-story, and that the bottom level also will constitute a story. He concludes that the house will be 4 stories, not 2½.

The Board finds that, in the area under the sloping roof, the bottoms of the rafters will intersect the interior faces of the walls less than three feet above the floor level on at least two exterior walls. The top level is a half story, as the Building Commissioner concluded.

When the Board determined in its deliberations that the height of the house should be measured at 4 points, not 6, the Permit-holder stated that that recalculation would make the lowest level a story, resulting in a 3-story house. It conceded that it will have to revise its plans to keep that level from being a story and re-apply to the Building Commissioner for a building permit.<sup>2</sup>

### *Dormers*

The By-law defines a "Dormer" as a "projecting structure on a pitched roof with a window or windows set vertically." Dormers above the second story may not exceed 50% of the width of that roof plane without a special permit under § 4.2.5.

The house has a complex roof. However, the Board finds that at least one of what the Petitioner calls dormers on the front elevation is a gable end, not a dormer. The dormers do not exceed 50% of the front-facing roof plane.

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<sup>2</sup> Both the Petitioner and the Permit-holder appear to assume that whether the lowest level is a story is measured at the same points – whether 4 or 6 – as the height of the house. Because the Permit-holder conceded that the house will violate the stories limit and agreed to revise its plan and re-apply to the Building Commissioner, the Board did not have to decide that issue.

*Site Plan Review*

Section 9.5.1 of the By-law requires site plan approval by this Board before any of the following is commenced:

1. New construction, a change of use in an existing building, a new use on vacant land, or expansion of floor space of an existing building of 25 percent or more [in certain Limited Light Industrial (LL) Districts];
2. Any construction or expansion of a structure on a parcel or a change of use [in General Business Districts on lots of at least 7,500 s.f.];
3. New construction, a change of use in an existing building, a new use on vacant land, or expansion of floor space of an existing building of 25 percent or more, all in any district where the total number of parking spaces required will be 20 or more;
4. New construction or expansion of one (1) or more buildings [with floor area of at least 6,000 s.f. in the RDA-20 district];
5. New construction or expansion of one (1) or more buildings [with floor area of at least 5,000 s.f. in the RDA-10 district];
6. New construction or expansion of one (1) or more buildings [with floor area of at least 3,600 s.f. in the RG-6.5 district]; or
7. Changing the grade of more than 500 square feet by more than six (6) percent.

It was undisputed that Five Points re-graded more than 500 s.f. by more than 6% in constructing the Abby Road subdivision. The Petitioner's consultant, Oak Consulting Group, calculated that the Site alone was regraded to that extent (OGC letter dated April 13, 2001), and the Board assumes that that is the case. The Petitioner argues that site plan review was required under Section 9.5.1.7 based on the re-grading for the subdivision, and that the building permit should be overturned because that review did not take place.<sup>3</sup>

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<sup>3</sup> This argument involves only the grading that was done pursuant to the approved subdivision plan. The Petitioner does not argue that subsequent grading for the construction of the house on the Site also triggered site plan review.

Unlike Sections 9.5.1.1 - 9.5.1.6, some or all of which are triggered by construction, Section 9.5.1.7 is triggered by grading even without any construction. It does not explicitly exclude grading for a subdivision. Nevertheless, where this argument involves the interplay of zoning with the Subdivision Control Law, this Board addresses whether that section was intended to apply to a subdivision.

#### *The Subdivision Control Law*

The Subdivision Control Law, G.L. Chapter 41, Sections 81L-81BB, establishes a comprehensive scheme for the laying out and construction of ways in subdivisions. It requires that a planning board exercise its powers with due regard for "insuring compliance with the applicable zoning ... by-laws", among other factors. Section 81L. It requires a board to approve a subdivision plan if the plan "conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land." Section 81M; *Wall Street Dev. Corp. v. Planning Bd. of Westwood*, 72 Mass. App. Ct. 844, 854 (2008), *review denied*, 453 Mass. 1103 (2009).

The Planning Board's Rules and Regulations Governing the Subdivision of Land (the "Regulations") paraphrase the statutory statement of purpose, including to ensure compliance with "applicable" provisions of the Zoning By-law. Section 1.4. The Regulations then specify which provisions are applicable. They state that all the lots shown on the subdivision plan must "comply with the Zoning By-Law with regard to size, shape, width, and frontage." Section 3.5. They do not mention site plan review.

The Regulations require that a subdivision "shall minimize, to the extent reasonably practicable", various impacts of the alteration of drainage patterns. Section 7.1.1. They address drainage comprehensively and in detail for nearly eight pages. Section 7.15.

#### *Site Plan Review Under the Zoning By-Law*

Until the Spring 2016 Town Meeting, Section 9.5.1 was limited to versions of subsections 1-3 similar to the current ones. That year, Town Meeting added subsections 4-7. The Planning Board's report to Town Meeting stated that the Board had several articles related to site plan review "reflecting the difficulty of developing certain locations due to topography as well as the close proximity of neighbors." That report did not describe those articles or issues.

The Background for this article in the Motions Book for Town Meeting did not address subsection 7. It focused on construction, stating that: "Site Plan Review consists of potentially putting conditions on a building permit that relate to: the removal of trees, stormwater infrastructure, parking, obstruction of scenic views, and neighborhood character." The Powerpoint slide addressing subsection 7 (also shown by the neighbors at the Board's hearing on May 13) showed a new house towering over the abutting one, with a retaining wall facing that neighbor. It stated: "Excessive amount of retaining walls and stormwater runoff are the main

issues with grade changing. Stormwater is clearly an issue in Winchester, and an increased level of review to put the most appropriate drainage pattern for the site is warranted.”

None of these publicly-available documents regarding the 2016 amendment addressed the Subdivision Control Law or the application of site plan review to a subdivision. As described above, the entire focus was on the construction of large individual houses, including the grading and retaining walls they might involve. This appeal is the first time the Board has been asked to consider the application of site plan review to the grading for a subdivision.

The criteria for site plan approval are as follows:

New building construction and other site alterations shall be designed, after considering the qualities of the specific location, the proposed land use, the design of the buildings, grading, egress points, and other aspects of the development, so as to:

1. Minimize unreasonable departure from the character, materials, and scale of buildings in the vicinity;
2. Minimize any adverse effect on any historic resource;
3. Minimize the volume of cut and fill, the number of removed trees six (6) inches in caliper or larger, the length of removed stone walls, the area of wetland vegetation displaced, soil erosion;
4. Provide adequate stormwater management and other utilities consistent with the functional requirements of the Planning Board Subdivision Rules and Regulations;
5. Maximize pedestrian and vehicular safety, both on the site and egressing from it;
6. Provide adequate access to each structure for fire and emergency service equipment;
7. Minimize obstruction of scenic views from publicly accessible locations;
8. Minimize visual intrusion by controlling the visibility of parking, storage, utilities such as HVAC systems and transformers, or other outdoor service areas viewed from public ways or premises residentially used or zoned;
9. Minimize glare from headlights and lighting intrusion;
10. Minimize contamination of groundwater from on-site wastewater disposal systems or operations on the premises involving the use, storage, handling, or containment of hazardous substances; and

11. Ensure compliance with the provisions of this Zoning Bylaw, including parking, signs, landscaping, and environmental standards.

By-law, Section 9.5.7. Most of these criteria apply to a building. Only subsections 3, 4 and 11 refer to issues related to the grading of a site, and subsection 4, regarding stormwater management, essentially incorporates the Planning Board's Subdivision Regulations.

#### *Analysis*

A majority of the Board is uncertain whether the 2016 Town Meeting intended to apply site plan review under Section 9.5.1.7 to a subdivision; a minority of the Board believes that Town Meeting did not intend that. The Board is not aware of any opinion by then-Town Counsel on whether site plan review can be applied to a subdivision, as would have been expected if such a novel and significant application of site plan review was intended.

Applying Section 9.5.1.7 to a subdivision would raise several problems. The Subdivision Control Law is a comprehensive statutory scheme, implemented through extensive Planning Board Regulations. The Regulations require compliance with the Zoning By-Law regarding size, shape, width and frontage of the lots, but say nothing about site plan review or other zoning requirements. Where the approved subdivision plan for Abby Road complied with the Regulations (and Board of Health recommendations were not an issue), the Planning Board was required to approve that plan. It would subvert that statutory scheme to subject that plan to an additional requirement of the Zoning By-law – site plan approval.

The appellant correctly notes that, unlike a special permit, site plan approval cannot be denied, but only result in the imposition of reasonable conditions. That point may reduce the conflict with the Subdivision Control Law, but it does not eliminate it. Applying site plan review to a subdivision still would add a separate review by a different board under criteria not addressed in the Regulations. It is contradictory to say that the Planning Board is required to approve a subdivision plan as long as it complies with its Regulations, but that the applicant may then have to modify the approved plan to comply with site plan review. Even if the applicant obtains site plan approval during the subdivision review process rather than afterwards, the fact remains that the Planning Board then be reviewing a plan that reflects the site plan review, not only its Regulations. Even if the conditions imposed in the site plan review are reasonable, that process would impermissibly interfere with the Planning Board's authority over subdivision plans.

Section 9.5.2 of the By-law states:

When site plan approval is required, no building permit shall be issued and no area for roadways, parking, loading or open space shall be established or changed on land developed except in conformity with a site plan bearing the endorsement of approval of the Board of Appeals....



The Board acknowledges that the reference to "roadways" may be read to suggest that site plan review applies to subdivisions, because other projects do not typically include roadways. However, that inference does not overcome the conflict described above. Nor, as far as this Board knows, was that section discussed when Section 9.5.1.7 was added in 2016.

Notwithstanding the above analysis, the Board does not need to decide whether site plan review under Section 9.5.1.7 was intended to apply, and can be validly applied, to grading shown on an approved subdivision plan. For the reasons described below, even if site plan review is required for a subdivision in general, the building permit should not be overturned in this case.

If site plan review was required in this case, it was required before the excavation for the Abby Road subdivision commenced under the terms of Section 9.5.1. Any argument that it was required should have been brought at the time of the grading. In addition, any such review would have primarily addressed storm water management and drainage, consistent with what Town Meeting heard was the primary reason for Section 9.5.1.7. That review would not have addressed the proposed house on the Site.

The petitioner's primary concern regarding site plan review appears to be the removal of trees that would have screened the new house. It is unclear what purpose would be served by site plan review now, where the trees have already been removed and the Site regraded. Nor it is clear that the site plan review requirement can be imposed on the Permit-holder, rather than Five Points, the developer of the subdivision and the entity that graded the Site pursuant to the approved subdivision plan. Site plan review triggered by grading also would not address the Petitioner's primary objections to the building permit: the height, proximity and visibility of the proposed house.

The Board concludes that, even if site plan review under Section 9.5.1.7 applies to the grading shown on a subdivision plan, the building permit should not be overturned on that basis.

#### ***Development Agreement***

In November 2018, the Select Board and Five Points executed a Development Agreement. The Petitioner argues that the proposed house on the Site will violate that Agreement because it is larger than the house presented to the Select Board.

The Agreement was accompanied by a five-lot Definitive Plan that had been submitted to the Planning Board. That plan showed the outline of a house on each lot. However, nothing in the Agreement limited the house to that outline. Section I.A. states: "The Parties intend that ... Five Points will own the parcels shown as ... [Lots 1-5] shown on the Plan and to [sic] build five market-rate single-family homes and a private way on those lots...." This provision refers to the parcels shown on the Definitive Plan, but not the houses shown on that plan. Similarly, Section II.A. states that "Five Points has applied to the Planning Board for approval ... to subdivide the ... Parcel into Lots 1-5 and to construct the road shown on the Plan...." That provision refers to approval of the lots and the road, but not the houses.

The Board finds that the houses are not limited to the outlines shown on the plans presented to the Select Board. The Development Agreement provides not basis to overturn the building permit. In addition, even if the proposed house violated the Agreement, the remedy lies with the Select Board, not this Board.

***Subdivision Approval (rear setback, footprint, drainage and tree removal)***

The Petitioner argues that the proposed house violates the subdivision approval regarding rear setback, footprint, drainage, and tree removal.

Five Points submitted to the Planning Board a Definitive Subdivision Plan Narrative & Environmental/ Community Impact Statement to the Planning Board dated October 10, 2018. The Narrative stated:

The outlines of potential homes are for discussion purposes only and the eventual footprint size would be in conformance with the Town of Winchester standards regarding size of structure.

Regarding massing, the intent of the footprints shown on our Definitive Subdivision submission is to illustrate a how a sample home footprint might be sited on the proposed lot. Final home sizes will be determined by the project upon future application for building permits.

Consistent with those disclaimers, the Planning Board's subdivision approval on January 8, 2019 did not address the location, size, or any other aspect of the houses. In fact, under the Zoning By-Law, at least some of the houses could not be built where they were shown on the plans. And Condition 9 of the decision explicitly contemplated that the impervious surface might exceed that shown on the plans as long as the drainage was sufficient, suggesting that larger houses were not precluded.

The Board finds that this proposed house does not violate the subdivision approval regarding the rear setback or footprint. If the drainage is inadequate, that is for the Planning Board to address. Similarly, if the Permit-holder (or his predecessor) removed trees in violation of the subdivision approval, the remedy is enforcement by the Planning Board, not the annulment of the building permit.

***Order of Conditions***

Finally, the Petitioner argues that the building permit should be overturned because the removal of trees violated the Conservation Commission's Order of Conditions for the Site. However, if there is such a violation, the remedy is enforcement by the Commission.

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### Conclusion

The Board overturns the building permit because the Permit-holder conceded that the proposed house will be 3 stories, exceeding the maximum of 2½ stories under the By-law. It upholds the building permit with respect to the other issues raised in this appeal.

### Zoning Board of Appeals

mark waterbury  
By: Mark Waterbury  
Its: Chair  
Dated: June 29, 2021