

Town of Winchester  
BOARD OF APPEALS  
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Janine L. Viarella, Clerk

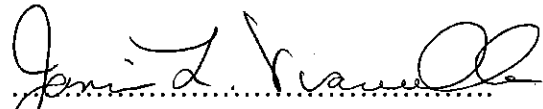
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March 31, 2022

RE: Petition No. 3950 – 4 Abby Road (Lot 2), Winchester, MA  
Petitioner: Keith Goodwin

Pursuant to Chapter 40A, Section 15 of the Massachusetts General Laws, you are hereby notified that the Board of Appeals has voted to overturn the Building Commissioner/Zoning Enforcement Officer's issuance of building permit #663 on July 22, 2021 to construct a new single family dwelling at 4 Abby Road (also referred to as Lot 2, Abby Road).

Appeals from this decision, if any, must be made pursuant to Chapter 40A, Section 17 of the Massachusetts General Laws and must be filed within twenty (20) days after the date of the filing of this decision in the Office of the Town Clerk.

  
Janine L. Viarella  
Clerk, Board of Appeals

/jv

**TOWN OF WINCHESTER  
BOARD OF APPEALS**

**Decision No. 3950**

**4 Abby Rd. (Lot 2)**

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TOWN CLERK  
TOWN OF WINCHESTER

**Name of Appellant** Keith Goodwin

**Application/Appeal** 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(s) 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** 3-0.

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

1. Letter from Jeffrey L. Roelofs - Notice of Appeal dated August 23, 2021
2. Appeal Package (Contents)
3. Form 1 (Zoning Application checklist)
4. Form 2 (Application for Zoning Hearing dated August 23, 2021)
5. Form 2A (Appeal-Supporting Statement Requested Findings dated August 23, 2021)
6. Photos (7 pages)
7. Assessor's Map
8. Grounds for Appeal (Form 2A Supplement)
9. Project Background
10. Building Permit #663 (The permit being appealed)
11. Building Permit application materials (excerpts)
12. 2018 Development Agreement without attachments (the Agreement included the 10/10/2018 Subdivision Plans)
13. 2019 Subdivision Approval without attachments
14. December 20, 2018 Subdivision Plans (excerpts)
15. 2018 Community Impact Statement (excerpts)
16. Letter from Jeffrey L. Roelofs dated October 5, 2021 re: Supplemental Information - Appeal of Building Permit #663

17. Letter from Sean P. Malone, P.E., Oak Consulting Group, LLC dated October 5, 2021 re: New Development, Lot 2, Abby Road, Winchester, MA
18. Memo from Bryan Manter, PE, Assistant Town Engineer dated October 5, 2021
19. Design Review Committee – Meeting minutes October 5, 2021
20. Planning Board – Votes and recommendations from October 5, 2021 meeting
21. Letter from Sally K. Dale dated October 11, 2021
22. Letter from Mark T. Vaughan dated October 19, 2021 re: Notice of Appeal – Appeal of Building Permit #663 (4 Abby Road, a/k/a Lot 2, Winchester, MA)
23. Roelofs Slides (1-9) Lot 2 Abby Road - October 21, 2021
24. Sera Slides (1-52) 4 Abby Road, Lot 2 – October 21, 2021
25. Email from Jeffrey Roelofs dated November 12, 2021 re: Abby Rd, Lot 2 – Continuance Request
26. Email from Mark T. Vaughan dated November 29, 2021 re: Abby Rd, Lot 2 – Contour information (with attachment Lot 2 Abby Road 11-23-21 Original)
27. Letter from Sean P. Malone, P.E., Oak Consulting Group, LLC dated December 8, 2021 re: New Development, Lot 2, Abby Road, Winchester, MA
28. 01-04-21 Abby Road Lot 2 zoning diagram-V1
29. Letter from Fulton L. Harley, flh Architects dated January 12, 2022
30. Letter from Mark T. Vaughan dated January 13, 2022 re: Notice of Appeal – Appeal of Building Permit #663 (4 Abby Road, a/k/a Lot 2, Winchester, MA)
31. Lot 2 Abby Road 01-10-22 Original 2-Foot Contours
32. Letter from Jeffrey L. Roelofs dated January 13, 2022 re: Supplemental Information – Appeal of Building Permit #663
33. Malone Slides (1-6) – January 20, 2022
34. Email from Mark T. Vaughan dated January 20, 2022 re: Lot 2/Abby Road (with attached emails Grading Question (Assistant Town Engineer and Town Planner)

### **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, closest to the Appellant's house.

**Discussion**

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

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, risking 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

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<sup>1</sup> At the October 21, 2021 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.

are considered in the aggregate or individually, site plan approval is required based on the proposed regrading.

## 2. Site Plan Review Re: Floor Area

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 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.

### 3. Stories

In the RDB-10 zoning district, the maximum building height is 2½ stories. Bylaw Section 4.1.4 – Dimensional Table. 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:...

The exclusion in this definition is similar to the definition of a Cellar quoted above, though not identical.

In its initial appeal, the Appellant argued only that the parts of the lowest level not used for storage or service count toward the 5,000 s.f. threshold for site plan review. The Board concluded as much in Section 2, above. However, in its supplemental submissions, the Appellant argued in the alternative that, if the entire lowest level is a basement, it counts as a story since it would be used for dwelling purposes. That result would make the house 3½ stories, exceeding the 2½-story limit. The Appellant has acknowledged that it did not raise this issue in its initial appeal.

All three members of the Board were of the view that at least part of the building is 3½ stories. Two members concluded that at least part of the lowest level is a basement because it would be used for dwelling purposes and therefore is a story. The third member concluded that the part of the lowest level closest to the at-grade walkout has more than half of its entire wall area above the adjoining ground and is therefore a basement under the bylaw definition, even if the rest of the lowest 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 and is used for dwelling purposes, it counts as a story.

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

Board explicitly called for both sides to submit all their evidence on the basement/cellar issue, neither one submitted anything else. The Developer never described where and how many measurements were taken, explained how those two figures were calculated, or submitted any further calculations on the relationship of the full lowest level to the surrounding ground, and the Appellant did not make any argument or submit any evidence on those points, either.

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 for purposes of the number of stories, and that conclusion would be inconsistent with the conclusion that the lowest level is a cellar for site plan review. Accordingly, the Board chose not to rest its decision on a finding that this house would exceed the Bylaw's maximum number of stories.

However, the Board was troubled by the facts of this appeal, in which (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 matter, the Board may require more conclusive evidence of whether an entire 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):

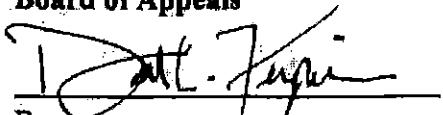
Prior to the issuance of a building permit for each home within the subdivision, the applicant shall certify that the impervious area coverage proposed on the respective lots ... is in accordance with the subdivision plan approved by the Planning Board. If the impervious area coverage is greater than 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 also on the condition in the subdivision approval, the building permit should not have issued.

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

**Board of Appeals**

  
By:

**Date of Decision:** 3/31/2022