

TOWN OF WINCHESTER
BOARD OF APPEALS

Petition No. 3966
82 Arlington Street

2022 AUG -1 PM 7:00

TOWN OF WINCHESTER

- PETITIONER:** Daniel and Julie Tempesta
- APPLICATION FOR:** Site plan approval under Section 9.5.1(7) of the Winchester Zoning By-Law to change the grade of more than 500 square feet by more than six percent.
- DATE OF HEARING:** Heard and decided on June 16, 2022.
- BOARD OF APPEALS:** David Feigenbaum, Robert Tedesco, and William McGonigle
- VOTE:** David Feigenbaum, Robert Tedesco, and William McGonigle in favor.
- DECISION:** The Site Plan is approved effective as of the date of compliance with the following conditions.
- CONDITIONS:**
1. This site plan approval does not include the proposed optional basketball court or other sports court until the Building Commissioner/Zoning Enforcement Officer has issued a written determination that such use is (in the words of the Zoning By-law) "an accessory use as specifically set forth in the Table of Use Regulations of this Section 3.1 [emphasis added]", and identifying the specifically set forth accessory use.
 2. The completion of the work. All construction, reconstruction, substantial exterior alteration or addition shall be carried on only in conformity with the application and site plan on the basis of which this decision has been made.
 3. Submission to the Building Commissioner/Zoning Enforcement Officer of a signed certificate of the applicant and/or contractors confirming the completion and compliance with these conditions.
 4. All of the conditions set forth in writing by the Engineering Department in its letter of June 16, 2022, including the following:
 - Notifying the Engineering Department a minimum of 48-hours prior to installation of the sub-surface infiltration system.
 - Applicant shall provide an as-built plan and certification by the engineer of record confirming the system was installed per the approved plan prior to final sign off of Building Permit.

• As-built plans and O&M plans shall meet requirements as described in 5.8.d of the Sewer and Storm Drain Regulations <https://www.winchester.us/DocumentCenter/View/136/Public-Sewer-and-Storm-Drain-Regulations-PDF?bidId=>

• Upon completion of work, the engineer of record for the project shall certify that:

"Based on site observations by myself or an employee under my direct supervision and/or based on information provided by a registered land surveyor, I hereby certify that all grading, stormwater management systems, water, sewer and other utilities have been constructed in substantial conformance with the approved plans, except as noted herein. I further certify that the drainage and stormwater management system, as constructed, will operate (1) as designed by the engineer of record and (2) as approved by the Town."

• Applicant shall record the As-Built Plans and O&M Plan at the Middlesex County Registry of Deeds within thirty (30) days of completion of the project.

5. Submission to the Building Commissioner/Zoning Enforcement Officer with the As-Built Plans of an enforceable contract between the applicant and a competent contractor providing for compliance with the O&M Plan for a period of at least 3 years beginning with completion of work.

6. Obtaining a fill permit from the Health Department ahead of the work, if fill is brought in to achieve the grading noted in the application.

**MATERIALS
CONSIDERED:**

The Board received the following documents:

- Form 1 (Zoning Application checklist)
- Form 2 (Application for Zoning Hearing)
- Form 2D (Site Plan Review)
- Drainage/Grading Plan – C-0 dated 4/27/22
- Engineering Drainage Calculations dated 5/3/22
- Existing Conditions Plan - Snelling & Hamel Associates, Inc. dated 1/31/22
- Building Permit Plan – Snelling & Hamel Associates, Inc. dated 3/7/22
- Building Permit Plan – Snelling & Hamel Associates, Inc. dated 3/29/22
- General Notes (S.0) and Retaining Wall Sections & Details (S.1) – Tesla Engineering Associates dated 3/8/22
- Notice of Intent – Tempesta Residence (25 pages)
- Landscape Plan – Lynch Landscaping & Tree (Conceptual Master Plan – C-1) dated 10/26/22

- Assessor Map
- Memo from Beth Rudolph, PE – Town Engineer and Bryan Manter, PE – Assistant Town Engineer dated June 16, 2022
- Design Review Committee – Meeting minutes June 8, 2022
- Planning Board comments 6/15/22
- Historical Commission comments 5/23/22
- Conservation Commission comments dated 5/16/22
- Email from Jennifer Murphy, Board of Health Director dated 5/16/22
- Letter from Earl Rivers - MCA dated 6/10/22
- Photos (29 pages)

THE LAW:

A. Section 9.5.1(7) of the Zoning By-law requires site plan approval from the Board of Appeals before changing the grade of more than 500 square feet by more than six (6) percent.

B. Section 9.5.7 provides that "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.

C. Section 9.5.8 requires that if the Board of Appeals approves a site plan, "any construction, reconstruction, substantial exterior alteration or addition shall be carried on only in conformity with any conditions, modifications and restrictions subject to which the Board shall have made its findings and determination, and only in conformity with the application and site plan on the basis of which the finding and determination are made."

D. Section 3.1.1 of the Zoning By-law provides that:

"In each zoning district, land, buildings and other structures may be used as a principal use or an accessory use as specifically set forth in the Table of Use Regulations of this Section 3.1. Except as provided by law, all existing and future uses of land, buildings and structures not set forth in the Table of Use Regulations are expressly prohibited."

E. The Table of Use Regulations includes the following uses in Group VI – Accessory Uses:

"6. An uncovered swimming pool ...

7. Tennis courts ..."

The Table of Use Regulations does not include any use for a basketball court or for a sports court other than a tennis court.

REPORTS
RECEIVED:

Historical Commission. The Historical Commission found no adverse effect on a historical or cultural resource.

Engineering Department: General comments of the Engineering Department were:

- The Engineering Department shall be notified a minimum of 48-hours prior to installation of the sub-surface infiltration system.
- Applicant shall provide an as-built plan and certification by the engineer of record confirming the system was installed per the approved plan prior to final sign off of Building Permit.
- As-built plans and O&M plans shall meet requirements as described in 5.8.d of the Sewer and Storm Drain Regulations
<https://www.winchester.us/DocumentCenter/View/136/Public-Sewer-and-Storm-Drain-Regulations-PDF?bidId=>
- Upon completion of work, the engineer of record for the project shall certify that:

"Based on site observations by myself or an employee under my direct supervision and/or based on information provided by a registered land

surveyor, I hereby certify that all grading, stormwater management systems, water, sewer and other utilities have been constructed in substantial conformance with the approved plans, except as noted herein. I further certify that the drainage and stormwater management system, as constructed, will operate (1) as designed by the engineer of record and (2) as approved by the Town."

- Applicant shall record the As-Built Plans and O&M Plan at the Middlesex County Registry of Deeds within thirty (30) days of completion of the project.

Design Review Committee. The Design Review Committee recommended favorable action for site plan approval.

Health Department: The Health Department noted that the owner(s) of the property will need to obtain a fill permit from the Health Department ahead of the work, if they intend to bring in fill to achieve the grading noted in the application.

Conservation Commission: The Conservation Commission indicated that it has no jurisdiction.

Planning Board: The Planning Board understood the rationale for wanting to make the lot more level than it currently is, but questioned the volume of fill that would be required. The proposed location for the 2'-3' high south property line retaining wall appears on the drawings to run through the current location of the southern abutter's garden. The petitioner said there has been some small historical encroachment of boundaries, and the petitioner's landscape contractor stated that as part of their work they have committed to restore the abutter's garden at a corrected location. Member Jerius voiced concern regarding the loss of trees and the regrading which requires a significant retaining wall spanning the entire southern property line. The Planning Board voted 4-1 with Mr. Jerius opposing, to recommend favorable action.

DISCUSSION: The applicants propose to regrade more than 500 square feet of the back yard of their property at 82 Arlington Street by more than 6%. The regrading is part of a project that includes building a lower-than-3-foot retaining wall along the southern boundary and filling behind the retaining wall to roughly level the lawn space and control storm water runoff. Patios, a fire pit, an outdoor fireplace, and other outdoor living features are included in the project. A row of arbor vitae is to be planted along the retaining wall at the southern boundary. According to the applicants' landscaping company, an optional part of the work would be a "small basketball court." The proposal also includes demolition of existing retaining walls in the patio area, construction of new walls, and removal of several trees.

Application of criteria: The criteria for granting site plan approval and the Board's analysis (*in italics*) of each of them are as follows:

1. Minimize unreasonable departure from the character, materials, and scale of buildings in the vicinity;

This criterion was not considered.

2. Minimize any adverse effect on any historic resource.

This criterion was not considered.

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;

Two of the members considered this criterion to have been met. One of the members expressed concern whether the proposal would minimize the volume of cut and fill, the number of removed trees six (6) inches in caliper or larger, and the length of removed stone walls.

4. Provide adequate stormwater management and other utilities consistent with the functional requirements of the Planning Board Subdivision Rules and Regulations;

The members considered this criterion to have been met.

5. Maximize pedestrian and vehicular safety, both on the site and egressing from it;

This criterion was not considered.

6. Provide adequate access to each structure for fire and emergency service equipment;

This criterion was not considered.

7. Minimize obstruction of scenic views from publicly accessible locations;

This criterion was not considered.

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;

This criterion was not considered.

9. Minimize glare from headlights and lighting intrusion;

This criterion was not considered.

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;

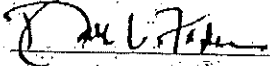
This criterion was not considered.

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

With regard to the proposed optional basketball court or sport court, the Table of Use Regulations does not appear to specifically permit such a use in the RDA Districts. The approval of the site plan in this decision does not include approval of the basketball court or other sport court except under the condition set forth above

Based on its analysis of these factors, the Board approves the Site Plan subject to the conditions recited above.

BOARD OF APPEALS, BY:



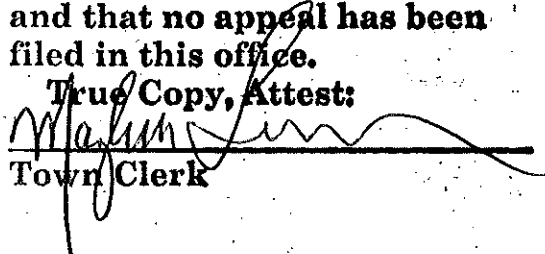
David L. Feigenbaum

DECISION DATED:

8/1/2022

Date 8/23/22
I hereby certify that 20 days
Have elapsed from the dates
This certificate was issued
and that no appeal has been
filed in this office.

True Copy, Attest:


Town Clerk