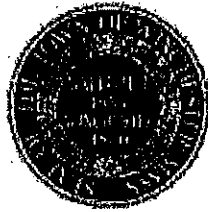


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PUBLIC MEETING NOTICE and AGENDA

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

Board/Committee Name: Board of Appeals
Date: March 25, 2021
Time: 7:00PM
Place: REMOTE PARTICIPATION - Zoom

Join Zoom Meeting

<https://us02web.zoom.us/j/87539575477?pwd=5XA5bGVHbFZlZWQlhoOStObDRIVEJRZz09>

Meeting ID: 875 3957 5477

Passcode: 460294

One tap mobile

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Dial by your location

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+1 669 900 9128 US (San Jose)

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

Meeting ID: 875 3957 5477

Passcode: 460294

Find your local number: <https://us02web.zoom.us/j/87539575477?pwd=5XA5bGVHbFZlZWQlhoOStObDRIVEJRZz09>

Submitted by: Janine Viarella

Email: jviarella@winchester.us

Agenda:

- #3928 – 11 Lorena Road – continued petition
- 416 Cambridge Street-modification of comprehensive permit-request for determination of insubstantial changes.
- Review of draft decisions - #3926 – 49 Church Street and #3931 – 16 Niles Lane
- Rules and Regulations
- New Business

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**REMOTE PARTICIPATION PUBLIC HEARING CONTINUED TO MARCH 25, 2021
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 18, 2021~~ at 7:00 P.M. on the following matter:

PETITION NO. 3928 - That of DAVID and AMY SAWYER concerning the property at 11 LORENA ROAD, WINCHESTER, MA. The petitioners seek Site Plan Review under Section 9.5.1 of the Winchester Zoning By-Law so as to change the slope over 6% of existing grade of an area more than 500 square feet. The property is located in the RDB (Single Residence) zoning district and contains 47,981 +/- square feet.

WINCHESTER BOARD OF APPEALS

Petition may be viewed on the Board of Appeals web page www.winchester.us

Link to the meeting can be found on the Board of Appeals web page and the Government Calendar www.winchester.us

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**TOWN OF WINCHESTER
BOARD OF APPEALS**

**Decision No. 3926
49 Church Street (the "Property")**

DRAFT

Name of Petitioners: Lee Wooten and Jamie Devol

Respondents: Boutique Properties, LLC

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 1st floor dental office and 2nd 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 1st floor and a residential apartment on the 2nd 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:

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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 __, 2021

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TOWN OF WINCHESTER
BOARD OF APPEALS
Decision No. 3931
16 Niles Lane

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TOWN CLERK
Name of Petitioner: Robert and Michelle Atchinson – 16 Niles Lane

Application For: The petitioners are seeking a Special Permit under Section 3.5.7 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 single family dwelling located on a lot which does not meet the lot frontage requirement and construct a new single family dwelling that will meet all setback requirements. In addition, the petitioners are seeking Site Plan Review under Section 9.5.1 (5) of the Winchester Zoning By-Law so as to construct a new single family dwelling where the total floor area of the building will be greater than 5,000 square feet. The petitioners are also seeking Site Plan Review under Section 9.5.1 (7) of the Winchester Zoning By-Law so as to change the slope over 6% of existing grade of an area more than 500 square feet. The property is located in the RDB (Single Residence) zoning district and contains 53,083 +/- square feet.

Date of Hearing: March 18, 2021

Board of Appeal: Mark Regan, Mark Waterbury and Kevin Sarney

Decision (s): Granted

Vote of the Board: Unanimous

Conditions: The following conditions apply to the grant of this Special Permit:

1. Construction of the proposed addition shall be in substantial conformity with the plans submitted with the petition, as follows:
 - a. Form 2 dated January 28, 2021
 - b. Form 2D dated January 28, 2021
 - c. Form 2F dated January 28, 2021
 - d. Letter from Historical Commission dated January 21, 2021, signed and agreed to by petitioners.
 - e. Existing Conditions Plan of Land (three pages) located at 16 Niles Lane in Winchester, MA, Scale: 1" = 20'(unless noted), Dated: January 2021, by Goldsmith, Priest & Ringwall, Inc. Land Surveyors
 - i. Existing Conditions Plan – David J. Debay, PLS
 - ii. Site Layout and Utilities – Nicholas M. Pauling, PE
 - iii. Storm Water Pollution Prevention - Nicholas M. Pauling, PE
 - f. Residential Development ZBA Special Permit & Site Plan Review located at 16 Niles Lane in Winchester, MA, Scale: 1" = 20'(unless noted), Dated: January 2021, by Goldsmith, Priest & Ringwall, Inc. Land Surveyors – David J. Debay, PLS
 - g. Five-page architectural plans by Mellows & Paladino Inc. architects, Titled; Atchinson Residence 16 Niles Lane Winchester MA 01890, Dated February 4, 2021, Scale: 3/16" = 1'-0":
 - i. A-1.0 – Basement/Foundation Plan
 - ii. A-1.1 – 1st Floor Plan
 - iii. A-1.2 – 2nd Floor Plan
 - iv. A-2.1 – Exterior Elevations (Front, South, East)
 - v. A-2.2 – Exterior Elevations (North and Rear)
 - h. Five-page Landscaping plans by Matthew Cunningham Landscape Design, Atchinson Residence 16 Niles Lane Winchester MA 01890, Dated January 13, 2021, Scale: 1/16" = 1'-0" unless noted:
 - i. L-0.0 Masterplan

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- ii. L-0.2 Three Removal Plan
 - iii. L-1.0 Materials Plan
 - iv. L-3.0 Planting Plan
 - v. L-5.0 Site Details
1. Existing conditions photos – eight undated photos
 2. Compliance with Town of Winchester Engineering and Conservation Committee recommendations.
 3. All representations made by the Petitioners at the public hearing and not memorialized are hereby incorporated into this Decision.

Facts:

The proposal is to demolish an existing single family house sheds and tennis court and replace with an approximately 8,226 Sqft. single family dwelling. Due to an existing street frontage condition (non-conforming) the property only has 55.15 +/- LF of frontage. Based on a 1946 "Order of Taking Street Layout No.3 and associated Plan 364 the subject property was established prior to the 80 LF requirement. Other than the existing street frontage issue the new house will be with in all the zoning setbacks. The proposed structure is also subject to Site Plan Review, as the petitioners are seeking to build a house larger than 5,000 Sqft. and propose a change the slope of the property over 6% of the existing grade in an area of more than 500 Sqft.

(from November 15, 2018 Zoning Bylaws)	Requirement	Existing	Proposed
Lot Size	10,000 SF	53,083 SF +/-	unaltered – conforming
Front Setback	25'	Unknown	44.1' – conforming
Rear Setback	15'	Unknown	51.6' – conforming
Left Setback	15'	Unknown	30.3' – conforming
Right Setback	15'	Unknown	16.0' – conforming
Frontage	80'	55.15'	existing nonconformity
Open Space – Min	70%	96.4%	88.6% - conforming
Green Space – Min	35%	77.2%	80.4% - conforming
Hardscape – Max	35%	22.8%	19.6% - conforming
Site Plan Review	Required if > 6% grade change over 500 sqft.	unknown %	Various walls and terraces = 3-4 feet on lake side, 4 ft in front of the house – changes gradual

Discussion:

Pursuant to Section 3.5.7 of the re-codified Zoning By-Law, this Board may grant a Special Permit to exceed the gross floor area of the original non-conforming structure where the proposed modifications "will not be substantially more detrimental than the existing nonconforming structure to the neighborhood." The neighborhood surrounding 16 Niles Lane comprises similar sized lots with similar sized homes, the proposed additions will not be substantially more detrimental to the neighborhood than the existing residence. The current and proposed structure at 16 Niles Lane is situated in an area that is not highly visible from the Niles Lane area.

The Winchester Engineering Department reviewed the application and submitted a letter dated March 8, 2021 stating "The Engineering Department previously reviewed this project through the Notice of Intent process with the Winchester Conservation Commission. Upon conclusion of the Notice of Intent process there were two outstanding items which required additional information/clarification. In the letter referenced above the Applicant satisfactorily addressed the two outstanding comments (Letter from GPR dated March 4, 2021 subject "Residential Development – Zoning Board of Appeals 16 Niles Lane, Winchester, MA"). The two outstanding items were the sewer lateral connection at the manhole in the sewer easement and the location of the outlet for IC-1. The Engineering Department does not have any additional comments on the proposed design."

The Planning Board in its March 11, 2021 memo voted 4-0 (1 absent) to recommend unfavorable action due to negative impact to a Historic Resource by the loss of the historic house due to demolition. The Board reviewed this and felt that the Historical Commissions lifting of the demolition moratorium in a letter dated January 21, 2021 offset the Planning Board's concerns.

The Design Review Committee (DRC) in a memo dated March 10, 2021 noted the following:

- Several DRC members voiced concerns over the adverse impact to an historic resource. A house with documented historic value will be demolished if the project goes forward.
- Members had no negative comments about the architecture and landscape architecture design, and agreed it was a good design.
- DRC voted to recommend unfavorable action (4, 2, 1 abstention)
- Members voting for unfavorable action (4) did so to protect an historic resource, neighborhood character and noted that Winchester is losing many of its small to moderate sized historic homes.
- Members voting against unfavorable action (2) stated that although they recognized the loss of an historic home, the home is not visible from a public way or the Upper Mystic Lake.

The Board reviewed the DRC's recommendation and again felt the Historical Commission addressed the historic nature of the house by allowing it to be demolished and as noted by the DRC the new structure was a "good design" and the current structure being demolished is not visible from the public way on Niles Lane or the Upper Mystic Lake.

The Historical Commission in a memo dated March 8, 2021 noted certain members of the Commission, noting that they had not voted in favor of lifting the demolition delay (January 21, 2021), announced their desire to vote that the current plans had an adverse effect on a historical resource. The petitioner's representatives stated that the decision to vote that the plans had an adverse effect on the historical property would be inconsistent with the Historical Commission's earlier decision to vote in favor of lifting the demolition delay on 16 Niles Lane. The Historical Commission made the following motions;


MOTION: In accordance with Zoning Bylaw Section 9.5.7 and section 9.4 subsection 8, the Historical Commission finds an adverse effect on a historical or cultural resource.

VOTED: 2 in favor, 4 opposed (1 Absent). Motion failed.

MOTION: In accordance with Zoning Bylaw Section 9.5.7 subsection 2 and section 9.4 subsection 8, the Historical Commission finds no adverse effect on a historical or cultural resource.

VOTED: 4 in favor, 2 opposed (1 Absent) Motion passed.

The Board noted the Historical Commission's recommendation and lifting of the demolition delay in the January 21, 2021 agreement with the petitioners.

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The Conservation Committee was okay with the petition as they stated the project had been approved and permitted in a March 4, 2021 email to the ZBA.

Neighbors sent letters favorable to the proposal.

Based on all of the information presented at the hearing, including the submissions of the Petitioner, the Board finds that lot frontage constitutes a condition pre-existing to the applicable requirements of the Zoning By-Law. The Board also finds that the proposal will not be substantially more detrimental to the neighborhood than the existing non-conforming structure.

Under Section 9.4.2, the re-codified By-Law requires that this Board also consider and address how the following criteria have an effect on this petition:

1. Community needs which are served by the proposal;
2. Traffic flow and safety, including parking and loading;
3. Adequacy of utilities and other public services;
4. Impacts on neighborhood character, including the extent to which;
 - a. Building forms and materials are compatible with prevailing scale and character of buildings in the neighborhood;
 - b. Architectural features add visual character to the neighborhood; and
 - c. Patterns and proportions of windows are consistent;
5. Adequacy of proposed screening and buffering;
6. Impacts on the natural environment;
7. Fiscal impacts, including impact on town services, tax base and employment; and
8. Impacts on Historical Resources, as defined in Section 10 of the By-Law.

This Board finds that the proposed new structure will not be substantially more detrimental to the neighborhood than the existing structure on the nonconforming lot due to frontage on Niles Lane. Traffic flow and safety are not relevant to this petition. Existing utilities and public services are sufficient for the proposed structure and use. The Board finds that the neighborhood character is improved by this proposal and is architecturally consistent with the neighboring houses. There is no significant change to the existing impervious ground cover that would impact the natural environment (the Board notes that drainage plans as designed may have less impervious area with-in the 100ft wetland buffer and the entire site) and there is no negative fiscal impact from the proposed project on town services, tax base and employment.

Thus, Petitioners' request for a Special Permit under Section 3.5.7 of the Winchester Zoning By-Law to demolish a pre-existing non-conforming single-family dwelling located on a lot which does not meet the lot frontage requirement and construct a new single family dwelling that will meet all setback requirements is granted, subject to the above-described conditions and limitations.

Pursuant to Section 9.5.7 of the Winchester Zoning By-Law, Site Plan Approval shall be granted only upon determination by the Board of Appeal that the site plan meets the eleven (11) Site Plan Approval standards. The Board finds that these standards have been satisfied by the plans and documents submitted by the petitioner, specifically the following:

- 9.5.7.1 Minimize unreasonable departure from character, materials and scale of buildings in the vicinity (the opening up and significant change in slope would change the character of the neighborhood)
- 9.5.7.2 Minimize any adverse effect on the historical resource – the Historical Commission did a full review of the petition and voted to allow demolition.
- 9.5.7.3 Minimize the volume of cut and fill, the number of removed trees six inches in caliper or larger, and the threat of air and water pollution. (The Board noted the proposed change in

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grades are minimal 4ft or less walls over 20-40 foot areas to accommodate the length of the proposed house on the lot)

- 9.5.7.7 Minimize the obstruction of scenic views from publically accessible location (the project as designed will not be visible from the public ways on Niles Land nor the Upper Mystic Lakes)
- 9.5.7.10 Minimize contamination of the groundwater from on-site waste-water systems or operations on premises (the project as designed may have less impervious area within the 100ft wetland buffer and the entire site)
- 9.5.7.11 Ensure compliance with the provisions of the Zoning Bylaw, as pertaining to environmental standards.

The petitioners request for a Site Plan Review under Section 9.5.1 (5) of the Winchester Zoning By-Law so as to construct a new single-family dwelling where the total floor area of the building will be greater than 5,000 square feet is granted.

The petitioners' request for a Site Plan Review under Section 9.5.1 (7) of the Winchester Zoning By-Law so as to change the slope over 6% of existing grade of an area more than 500 square feet is granted.

Board of Appeals

Kevin G. Sarney

Date of Decision: March ____, 2021

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