



Town of Underhill

Development Review Board

Conditional Use Review Findings & Decision

CONDITIONAL USE REVIEW APPLICATION OF LYNN & BRIAN McLAUGHLIN FOR AN AFTER-THE-FACT DIMENSIONAL WAIVER REQUEST FOR, AND AFTER-THE-FACT APPROVAL FOR, THE CONSTRUCTION OF AN ACCESSORY STRUCTURE WITHIN THE PROPERTY'S FRONT SETBACK AND WITHIN A FLOODPLAIN

In re: Lynn & Brian McLaughlin
414 Cilley Hill Road (CH414)
Underhill, VT 05489

Docket No. DRB-20-04

Decision: Approved with Conditions (see Section V for More Details)

I. INTRODUCTION AND PROCEDURAL HISTORY

This proceeding concerns the conditional use review application of Lynn & Brian McLaughlin (hereafter also known as Applicants) pertaining to an after-the-fact dimensional waiver request for, and after-the-fact approval for, the construction of an accessory structure within the property's front setback and within a floodplain. The property subject to this application, which the Applicants own, is located at 414 Cilley Hill Road (CH414) in Underhill, Vermont.

- A. On or before October 18, 2017, Planning Director & Zoning Administrator, Andrew Strniste (hereafter Staff Member Strniste), discovered that the Applicants were in the midst of the construction of an accessory structure (a barn) without having obtained the proper permit from the Town.
- B. On October 18, 2017, Staff Member Strniste sent a "Construction without a Permit Inquiry" letter (Exhibit D, DRB Docket #: DRB-18-02) to the Applicants informing them that they had not received the proper permitting for their project. At that time, Staff Member Strniste informed the Applicants that the structure was potentially in the property's front yard setback. Shortly thereafter, the Applicants informed Staff Member Strniste that the structure was a temporary structure.
- C. On October 23, 2017, Staff Member Strniste received an after-the-fact temporary use/structure permit application for the construction of a temporary accessory structure (Page 3, Exhibit E, DRB Docket #: DRB-18-02). Staff Member Strniste rejected the permit on December 1, 2017, informing the Applicants that the structure had been built within a FEMA identified floodplain (noting that there was some ambiguity at the time whether the structure was built within the property's front setback).
- D. On December 26, 2017, an appeal application pertaining to the rejected after-the-fact temporary use/structure permit was filed with the Town (Exhibit B, DRB Docket #: DRB-18-02). The Development Review Board's (hereafter Board) clerk received the application shortly thereafter.

The appeal hearing was scheduled for Monday, January 22, 2018.

- E. On February 26, 2018, the Board ruled in favor of the Applicants, citing a procedural error by the Zoning Administrator for failing to contact the State's National Flood Insurance Program Coordinator. The Board provided the Applicants a deadline date of February 26, 2019 to resolve the issues surrounding the accessory structure. Due to delays caused by the 2018-2019 federal government shutdown, the Federal Emergency Management Agency (FEMA) was unable to process requests in a timely manner, resulting in an unforeseeable delay for the Applicants in resolving the issue surrounding the accessory structure subject to this application.
- F. On February 11, 2020, the Applicants submitted a conditional use review application for after-the-fact approval for the construction of the accessory dwelling within the property's front setback, as well as within an identified FEMA Zone A floodplain. The application was accepted and determined to be complete on February 27, 2020. No site visit was scheduled, while a hearing was scheduled for Monday, April 6, 2020 at 6:35 PM.
- G. On March 11, 2020, notice of the conditional use review hearing was mailed via Certified Mail to the following property owners adjoining the property subject to the application:
 - 1. **CH350T** – Burton W. & Bonnie M. Rawson Trustees, 350 Cilley Hill Road, Underhill, VT 05489
 - 2. **CH411** – Joseph Szela, 211 East Avenue, Burlington, VT 05401
 - 3. Applicant: **CH414** – Brian & Lynn McLaughlin, 414 Cilley Hill Road, Underhill, VT 05489
- H. During the week of March 8, 2020, notice of the public hearing for the proposed conditional use review application was posted at the following locations:
 - 1. The Underhill Town Clerk's office;
 - 2. The Underhill Center Post Office; and
 - 3. Jacobs & Son Market.
- I. On March 14, 2020, notice of public hearing was published in the *Burlington Free Press*.
- J. The conditional use review hearing commenced at 6:35 PM on Monday, April 6, 2020 at the Town of Underhill Town Hall, 12 Pleasant Valley Road, Underhill, VT.
- K. Present at the conditional use review hearing (April 6, 2020) were the following members of the Development Review Board:
 - 1. Board Member, Charles Van Winkle, Chairperson
 - 2. Board Member, Stacey Turkos, Vice Chairperson
 - 3. Board Member, Matt Chapek
 - 4. Board Member, Mark Green
 - 5. Board Member, Daniel Lee
 - 6. Board Member, Karen McKnight
 - 7. Board Member, Penny Miller

Also in attendance was Staff Member Andrew Strniste, Planning Director & Zoning Administrator. Due to the COVID-19 pandemic, the Board members and the Staff Member attended the meeting remotely via the Zoom platform. No members of the public, nor did the Applicants join the remote

meeting.

- L. The Board continued the hearing to a date and time certain in order to familiarize themselves with the process of conducting public hearings via a remote meeting platform. The hearing was continued to 6:35 PM on Monday, May 4, 2020.
- M. The continued conditional use review hearing commenced at 6:35 PM on Monday, May 4, 2020. Since the previous hearing date (Monday, April 6, 2020), the Vermont legislature enacted a law that permits public hearings to be held remotely (without a public gathering place) as long as the remote meeting can be accessed by the public and the meeting is recorded. As a result, a public gathering place was not established, and all of the Board's Members, as well as Staff Member Strniste and the Applicant, attended remotely.
- N. Present at the continued conditional use review hearing (May 4, 2020) were the following members of the Development Review Board:
 - 1. Board Member, Charles Van Winkle, Chairperson
 - 2. Board Member, Stacey Turkos, Vice Chairperson
 - 3. Board Member, Matt Chapek
 - 4. Board Member, Mark Green
 - 5. Board Member, Daniel Lee
 - 6. Board Member, Karen McKnight
 - 7. Board Member, Penny Miller

Others present at the hearing were:

- 1. Staff Member, Andrew Strniste
- 2. Applicant, Lynn McLaughlin

As noted above, due to the COVID-19 pandemic, the meeting was held remotely using the Go-To-Meeting platform.

- O. At the outset of the hearing, Chairperson Charles Van Winkle explained the criteria under 24 V.S.A § 4465(b) for being considered an "interested party." Those who spoke at the hearing were:
 - 1. Staff Member, Andrew Strniste
 - 2. Applicant, Lynn McLaughlin
- P. In support of the conditional use review application, the following exhibits were submitted to the Development Review Board:
 - 1. Exhibit A – McLaughlin Conditional Use Staff Report
 - 2. Exhibit B – McLaughlin (CH414) Conditional Use Review Hearing Procedures
 - 3. Exhibit C - Development Review Application
 - 4. Exhibit D – Zoning Permit Application (B-20-07)
 - 5. Exhibit E – Project Information
 - 6. Exhibit F – Certificate of Service
 - 7. Exhibit G – BFP Notice
 - 8. Exhibit H – Site Plan
 - 9. Exhibit I – Barn Floor Plan

10. Exhibit J – Pictures of Barn
11. Exhibit K – Pictures of Cilley Hill Road During Flood
12. Exhibit L – Pictures of Barn During Flood
13. Exhibit M – 4-H Information
14. Exhibit N – Correspondence from Brad Holden

The staff report and aforementioned exhibits were not prepared for the Monday, April 6, 2020 hearing, but were prepared for the Monday, May 4, 2020 hearing. No additional exhibits were distributed to the Board prior to the Monday, April 6, 2020 and Monday, May 4, 2020 hearings, nor were any additional exhibits submitted into the record during those hearings.

All exhibits are available for public review in the McLaughlin Conditional Use Review file (CH414/DRB-20-04) at the Underhill Zoning & Planning office.

II. FACTUAL FINDINGS & CONCLUSIONS RELATING TO THE UNDERHILL UNIFIED LAND USE & DEVELOPMENT REGULATIONS

The Minutes of the April 6, 2020 and May 4, 2020 meetings, written by Staff Member, Andrew Strniste, are incorporated by reference into this decision. Please refer to those minutes for a summary of the testimony. The recording of the May 4, 2020 can viewed on the Mt. Mansfield Community Television's website: <http://mtmansfieldctv.org/underhill-drb-5-4-20/>.

Based on the submitted application, testimony, exhibits, and evidence, the Development Review Board makes the following findings under the requirements of the 2011 *Underhill Unified Land Use and Development Regulations* (hereafter "Regulations" or ULUDR) as amended through March 3, 2020:

PROJECT SYNOPSIS

The Applicants, Lynn and Brian McLaughlin, record owner of the property located at 414 Cilley Hill Road (CH414) in Underhill, Vermont, are seeking the after-the-fact conditional use approval for the already constructed accessory structure (a barn), specifically that the structure was built within the abovementioned property's front setback requirement, as well as within an identified FEMA Zone A Floodplain. Since the Applicants have constructed a structure within the property's setback requirement, an after-the-fact dimensional waiver is required under Section 5.5.B. In addition, since the structure has been built within an identified FEMA floodplain, approval under Article VI is required. The property is located within the Rural Residential zoning district, as well as the Flood Hazard Overlay District, as defined under Article II, Tables 2.4 and 2.8 of the ULUDR.

ARTICLE II, ZONING DISTRICTS

A. ARTICLE II, TABLE 2.4 – RURAL RESIDENTIAL

The Board finds the completed project is in violation of the dimensional standards and requires a dimensional waiver. In addition, the accessory structure is consistent with the zoning district's stated purpose of accommodating medium density development on land accessing public roads, and the accessory structure is consistent with other accessory structures and uses (farm-related) in the area.

B. ARTICLE II, TABLE 2.8 – FLOOD HAZARD OVERLAY DISTRICT

The Board finds that the structure conforms with the standards outlined in Article VI of the Regulations. Please see Article VI of this decision below for more details.

ARTICLE III, GENERAL REGULATIONS

A. SECTION 3.2 – ACCESS

The Board finds that the subject property has access to Cilley Hill Road, a Class III Town Highway. No modifications to the existing access way were made or are being proposed, nor does the completed project require modifications to the existing access way. Therefore, the Board finds that an access permit is unnecessary and that review under this section is unnecessary, nor are any further modifications required by this Board.

B. SECTION 3.7 – LOT, YARD & SETBACK REQUIREMENTS

The Board finds that the completed accessory structure, a barn for agricultural-related purposes, will serve as an accessory structure/use to the one principal structure/use on the lot – a single-family dwelling. The accessory structure subject to this application is located 22 ft. from the identified front property boundary, and as such, it encroaches upon the north front property setback requirement by 8 ft. As a result of this encroachment, an after-the-fact dimensional waiver is required.

In accordance with Section 3.7.F.2, the Board finds that the requested waiver is mitigated through existing natural, vegetated screening and is necessary to be sited in the current location to provide for disability access and emergency services, and for the health and safety of one individual living on the premises (see Exhibit E).

The Board notes the completed accessory structure under review conforms to and satisfies the frontage requirement of 250 ft. The setbacks as they relate to the completed accessory structure will be:

- Front Property Line: ±22 ft. (North)
- Side 1 Property Line: ±138 ft. (West)
- Side 2 Property Line: ±340 ft. (East)
- Rear Property Line: ±221 ft. (South)

The structure subject to this application is accessory to the principal use of the lot and therefore, the setback requirements within the Rural Residential District are 30 ft. from the front property line and 20 ft. from the side and rear property lines.

C. SECTION 3.9 – NONCONFORMING STRUCTURES

The Board finds that the Applicants have constructed a structure that is nonconforming to the district's dimensional standards, as the structure encroaches upon the property's front setback requirement by 8 ft. (see Exhibits H & N). Therefore, an after-the-fact dimensional waiver is required per Sections 3.9.B and 5.5.B. See Section 5.5.B below in regard to the waiver analysis.

D. SECTION 3.11 – OUTDOOR LIGHTING

The Board finds that the Applicants testified that the outdoor lighting on the accessory structure is already downward facing and shielded. Should the Applicants add any additional outdoor lighting relating to the project, it shall be downward facing and shielded.

E. SECTION 3.13 – PARKING, LOADING & SERVICE AREAS

The Board finds that the accessory structure does not require an increase in the number of parking spaces provided for the existing use of the property per Table 3.1 – a single-family dwelling (two parking spaces).

F. SECTION 3.14 – PERFORMANCE STANDARDS

The Board finds that the Applicants did not submit the requisite information to make a determination about Section 3.14; however, the Board finds that the completed accessory structure is consistent with other uses in the area. Therefore, the Board does not anticipate that the Applicants will cause, create, or result in any of the situations identified in this section; however, should the use result in one of these situation, enforcement action may be taken by the Zoning Administrator.

G. SECTION 3.17 – SOURCE PROTECTION AREAS

The Board finds that the subject lot is not in a source protection area, nor is the subject lot within the vicinity of any applicable public water sources; therefore, review under this Section is not required.

H. SECTION 3.18 – STEEP SLOPES

The Board finds that the lot does not contain any areas of steep slopes (15-25%), nor does it contain any areas of very steep slopes (>25%); therefore, review and analysis under this Section is not required.

I. SECTION 3.19 – SURFACE WATERS & WETLANDS

The Board finds that there are no surface waters or wetlands on the subject lot, and therefore, review and analysis under this Section is not required. To note, an unnamed stream is located to the north of the property, directly across Cilley Hill Road, while a Class II Wetland is depicted directly to the south of the property (see Page 7, Exhibit A).

J. SECTION 3.23 – WATER SUPPLY & WASTEWATER SYSTEMS

The Board finds that a wastewater permit is likely not required for the construction of the accessory structure; however, the Applicants are responsible for ensuring with the Vermont Department of Conservation that one is not required.

ARTICLE V, DEVELOPMENT REVIEW

A. SECTION 5.1 – APPLICABILITY

The Board finds that conditional use review is required per Sections 3.7.F.2, 3.9.B, 5.5.B and Article VI. As required under Section 5.4.C of the *Unified Land Use & Development Regulations*, when considering conditional use review applications, the Board shall apply all of the site plan review standards under Section 5.3.

B. SECTION 5.3 – SITE PLAN REVIEW

Section 5.3.A – Purpose: The Board finds that site plan review is required as part of conditional use review per Section 5.4.C.

Section 5.3.B – Standards: The Board has considered this section's standards and issues the following comments and/or imposes the following safeguards, modifications, and conditions:

SECTION 5.3.B.1 – Existing Site Features: The Board finds that the Applicants submitted a satisfactory site plan depicting the completed project (see Exhibit H), and was able to ascertain enough information through the site plan and other resources, such as the ANR Website, that the accessory structure does not impact the enumerated resources in this subsection other than the identified FEMA Special Flood Hazard Area – Zone A. Other noted resources with the staff report (Page 7, Exhibit A) were not applicable to this application. As a result, the Board

determined that the accessory structure does not adversely affect those enumerated features, and therefore, no mitigation measures are required under Section 5.3.B.2.

Section 5.3.B.2 – Site Layout & Design: The Board finds that the completed accessory structure is not contrary to the purpose and stated goals under Subsection B, Rural Residential and Water Conservation District, noting that the accessory structure has no adverse impact on the rural character of the area and traditional working landscape of the Rural Residential and Water Conservation Districts. Additionally, the completed accessory structure is agriculturally focused, which conforms with the surrounding area, specifically noting that the lot directly to the south is an agricultural establishment. In addition, the accessory structure is screened by the tree-line between Cilley Hill Road and the subject structure.

Section 5.3.B.3 – Vehicle Access: The Board finds the subject lot is accessed by one curb-cut via Cilley Hill Road. The Applicants do not propose to modify or relocate the existing curb-cut or driveway, and therefore, the Board DOES NOT require any modification to the existing access way.

Section 5.3.B.4 – Parking, Loading & Service Areas: The Board finds that the accessory structure subject to this application does not increase the number of parking spaces that are required for the existing use of the property. See Section 3.13 for more information.

Section 5.3.B.5 – Site Circulation: The Board finds that the completed accessory structure does not alter the site circulation, which is expected to remain consistent with site circulation patterns of a residential unit/lot.

Section 5.3.B.6 – Landscaping and Screening: The Board finds that the Applicants did not implement, nor do they propose, any landscaping or screening techniques; however, the subject lot is screened from Cilley Hill Road via an existing, thick tree-line between Cilley Hill Road and the established development on the lot. As a result, no additional screening and landscaping is mandated.

Section 5.3.B.7 – Outdoor Lighting: See Section 3.11 above for more information.

Section 5.3.B.8 – Stormwater Management and Erosion Control: The Board finds that the Applicants shall utilize the Vermont DEC Low Risk Site Handbook for Erosion Prevention and Sediment Control for any uncompleted work pertaining to the accessory structure under review.

C. SECTION 5.4 – CONDITIONAL USE REVIEW

Section 5.4.A – Purpose: The Board finds that conditional use review is required per Sections 3.7.F.2, 3.9.B, 5.5.B and Article VI, which require conditional use approval for the construction of a structure within a property's setback requirements and within an identified FEMA Special Flood Hazard Area – Zone A. Specifically, a dimensional waiver under Section 5.5.B is required if the encroachment is less than 50% of the property's setback requirement. The Board finds that the conditions imposed herein address the identified potential impacts, as well as help reduce, avoid, or mitigate those impacts.

Section 5.4.B – General Standards: The Board finds that the conditions imposed herein will likely mitigate any potential undue adverse effects.

Section 5.4.B.1 – The Capacity of Existing or Planned Community Services or Facilities: The Board finds that the completed accessory structure does not result in an increase in demand on community services and facilities.

Section 5.4.B.2 – The Character of the Area Affected: The Board finds that the completed accessory structure does not adversely affect the character of the area, as the area is largely populated by single-family dwellings containing accessory structures or by structures related to agriculture uses. Furthermore, the Board makes the following findings concerning location, scale, type, density and intensity of the use as it relates to other buildings and uses in the area:

- **Location:** the property is located in the Rural Residential, a zoning district that largely contains medium density development, including single-family dwellings containing accessory structures, as well as agricultural structures and uses.
- **Scale:** the scale of the completed construction is consistent with the development that currently exists on the property and the surrounding properties.
- **Type:** the completed accessory structure is agriculturally focused and is accessory to a single-family dwelling – the primary use of the lot. Had the Applicants constructed the structure outside of the front setback requirement and the Special Flood Hazard Area, review by the Board would not have been required. Nevertheless, the intended use of the structure conforms to the intent of the existing and proposed Town Plans relating to the underlying zoning district – the Rural Residential District.
- **Density:** the density of the subject lot will remain unchanged, as the number of dwelling units on the lot will not deviate from what currently exists – one dwelling unit.
- **Intensity:** the Board finds that the completed accessory structure negligibly changes the intensity of the area.

Section 5.4.B.3 – Traffic on Roads and Highways in the Vicinity: The Board finds that the completed accessory dwelling does not result in an increase in traffic on roads and highways in the vicinity, nor does the project create any congestion.

Section 5.4.B.4 – Bylaws in Effect: The Board finds that the Applicants had already constructed the subject accessory structure and were thereby noncompliant at the time of application. As a result, the approval of this project will be considered after-the-fact, thereby bringing the completed construction into conformance with the 2020 *Unified Land Use & Development Regulations*.

Section 5.4.B.5 – The Utilization of Renewable Energy Resources: The Board finds that the completed accessory structure does not interfere with any sustainable use of renewable energy resources.

Section 5.4.C – Site Plan Review Standards: The Board finds that site plan review is required as a part of conditional use review. Analysis can be found under Section 5.3 above.

Section 5.4.D – Specific Standards: The Board finds that it may consider the Subsections 5.4.D.1 through 5.4.D.4 and impose conditions as necessary to reduce or mitigate any identified adverse impacts of a proposed development.

Section 5.4.D.1 – Conformance with the Town Plan: The Board finds that the existing and proposed Town Plans encourage and promote agricultural activities within Town – the

intended use of the previously constructed accessory structure.

Section 5.4.D.2 – Zoning District & Use Standards: The Board finds that the accessory structure conforms with the zoning district and use standards, as well as with the Special Flood Hazard Area regulations, as outlined above and below, and is approved after-the-fact by this Board.

Section 5.4.D.3 – Performance Standards: The Board finds that the project complies with the performance standards set forth in Section 3.14 above.

Section 5.4.D.4 – Legal Documentation: The Board finds that this Section does not apply.

D. SECTION 5.5 – WAIVERS & VARIANCES

Section 5.5.A – Applications & Review Standards: The Board finds that it has the authority to waive application requirements and site plan or conditional use review standards under Sections 5.3 and 5.4 that it determines are not relevant to a particular application. The Applicants have specifically asked for a dimensional waiver, which is approved, as explained below.

Any other conditions that have been waived have been noted in this decision. The Board makes no finding on any provision that was not explicitly waived, and has not been explicitly addressed.

Section 5.5.B – Dimensional Waivers: The Board, in association with Conditional Use Review, finds that it can reduce the minimum district setback requirements so long as the following information is obtained and following requirements are met:

Section 5.5.B.1 – Untitled: The Applicants have constructed an accessory structure within the property's front setback requirement. Due to the property's constraints, as well as the identified safety issues, the Applicants have presented an application illustrating the justification for a dimensional waiver.

Section 5.5.B.2 – Untitled: The Board finds that a waiver may be granted by the Board if one of the criteria enumerated under this Section is found to be true. The Board finds one of the criteria to be true: 3) [to ensure compliance] with federal or state public health, safety, access and disability standards.

The Applicants have submitted documentation advising the Board that the siting of the accessory structure was intentional and necessary to provide easy access to emergency services, as well as to be within range of the dwelling's WiFi network used to monitor a family member's disability (Pages 3-5, Exhibit E). If the accessory structure were located further from the single-family dwelling, the monitoring network would fail. In addition, the Applicants testified that the accessory structure could not have been rotated and located closer to the single-family dwelling, complying with the front setback requirement, because the rear of the house would then have been inaccessible to emergency services. Also, the Applicants testified that ledge exists to the west of the single-family dwelling, thereby complicating the placement of the accessory structure. As a result, the Applicants testified to deliberately siting the accessory structure in its current location with consideration of all of the aforementioned factors, as there appeared to be no alternative options.

Section 5.5.B3 – Untitled: The Board finds that it may reduce the setback by no more

than 50%, or in this case 15 feet. The Applicants have presented an application illustrating that the constructed accessory structure encroaches upon the setback by 8 ft., and they are not anticipating to exceed this threshold any further.

Section 5.5.B.4 – Untitled: The Board finds based on clear and convincing evidence that the Applicants have satisfied the elements enumerated in this subsection, all of which are required to be satisfied in order to grant a waiver:

Section 5.5.B.4.a – Element 1: No reasonable alternative exists for siting the structure, addition or improvement outside of the required setback area.

The Board finds that the Applicants were constrained in the original siting of the accessory structure by the following four factors which remain as constraints to-date: 1) ensuring that the accessory structure is within range of the single-family dwelling's WiFi signal, 2) ensuring that the accessory structure is located in an area that is easily accessible for emergency services, 3) avoiding ledge that is immediately to the west of the single-family dwelling, and 4) ensuring that there is enough room between the single-family dwelling and the accessory structure to provide emergency access to the rear portion of the property.

Due to the four factors outlined above, the Applicants intentionally sited the accessory structure in its current location in order to accommodate the numerous constraints. As a result, the Applicants testified that siting the accessory structure in a different area was not feasible. The Board recognizes this to be the case, and therefore, finds that there are not reasonable alternatives for siting the structure outside of the required setback area.

Section 5.5.B.4.b – Element 2: The reduced setback is not contrary to public health, safety and welfare, or stated objectives and policies of the Underhill Town Plan, or the intent of these regulations.

The Board finds that the reduced setback is not contrary to the public health, safety and welfare; nor is it contrary to the stated objectives and policies of the existing and proposed *Underhill Town Plan[s]*, or the intent of these regulations.

Section 5.5.B.4.c – Element 3: The waiver represents the minimum setback reduction necessary to allow for the proposed development.

The Board finds that the approved waiver represents the minimum setback reduction necessary to allow for the accessory structure.

Section 5.5.B.4.d – Element 4: Any potential adverse impacts resulting from reduced setbacks on adjoining properties, surface waters or wetlands shall be mitigated through site design, landscaping and screening, or other accepted mitigation measures.

The Board finds that there are no foreseeable adverse impacts resulting

from the reduced setback on adjoining properties, surface waters or wetlands. No mitigation measures are required as part of this decision.

Section 5.5.C – Variances: The Board finds that this Subsection does not apply, and therefore, review and analysis under this Subsection is not required.

ARTICLE VI, FLOOD HAZARD AREA REVIEW

The Board finds that there is a Special Flood Hazard Area, as illustrated on the requisite Flood Insurance Rate Maps and depicted on Page 12 of Exhibit A (Staff Report), present on the lot. Exhibit H depicts the Special Flood Hazard Area overlapping the location where the accessory structure was constructed, specifically bisecting the accessory structure. As a result, review under this article is required to ensure compliance with the Town’s Flood Hazard Area regulations.

A. SECTION 6.1 – STATUTORY AUTHORIZATION & EFFECT

This Section does not contain any standards to evaluate a project, and therefore, no review in accordance with this Section is required.

B. SECTION 6.2 – PURPOSE

This Section does not contain any standards to evaluate a project, and therefore, no review in accordance with this Section is required.

C. SECTION 6.3 – LANDS TO WHICH THESE REGULATIONS APPLY

The accessory structure was constructed in an identified FEMA Floodplain – Zone A, as depicted on the requisite Flood Insurance Rate Maps. Therefore, these Special Flood Hazard Area regulations apply.

D. SECTION 6.4 – PERMIT REQUIREMENTS

Section 6.4.A – Untitled: The Board finds that the accessory structure subject to the application is considered development as defined under Section 11.3.

Section 6.4.B – Exemptions: The Board finds that the accessory structure subject to the application does not qualify for any of the exemptions contained within this subsection.

Section 6.4.C – Prohibited Uses: The Board finds that the accessory structure subject to the application is not one of the prohibited uses as provided under this subsection.

Section 6.4.D – Permitted Uses: The Board finds that the accessory structure subject to the application is not a permitted use that only requires a permit from the Town’s Zoning Administrator, but rather, requires approval from this Board.

Section 6.4.E – Conditional Uses: The Board finds that conditional use review is required, as the accessory structure conforms with Section 6.4.E.2 – “new structures, including new manufactured (mobile) homes.”

Section 6.4.F – Subdivisions: The Board finds that this section does not apply, as the application does not involve the subdivision of land.

E. SECTION 6.5 – DEVELOPMENT REVIEW PROCEDURES

Section 6.5.A – Development Applications: The Board finds that the Applicants submitted the necessary materials (Exhibits E & H) under this subsection needed to make a determination about the application. While no certifications were provided, nor was a Project Review Sheet from the Agency of Natural Resources provided, the Applicants testified about their correspondence and interactions with the Agency of Natural Resources.

Section 6.5.B – Subdivision Applications: The Board finds that this section does not apply, as the application does not involve the subdivision of land.

Section 6.5.C – Application Referrals: The Board finds that the Zoning Administrator forwarded the application to the State's National Flood Insurance Program (NFIP) Coordinator; however, a response was never received from the State's Coordinator. While Staff was unable to obtain feedback regarding the project, the Applicants testified about their correspondence and interaction with the Coordinator. The Applicants informed the Board that the Coordinator found the project to conform with the Town's Special Flood Hazard Area, specifically noting the safety concerns outlined throughout this decision.

Section 6.5.D – Hearings: The Board finds that it has the authority to conduct Flood Hazard Area Review concurrently with other development review applications relative to the subject property.

F. SECTION 6.6 – DEVELOPMENT REVIEW PROCEDURES

In accordance with Section 6.6.A, the Board finds that the structure cannot be located outside of the Special Flood Hazard Area, or on another lot (see Page 4, Exhibit E), for the reasons outlined under Section 5.5.B above. As outlined in Exhibit E, as well as the given testimony at the public hearing, the Board confirmed that the accessory structure is designed and built to be reasonably safe from flooding (§ 6.6.B.1), minimize flood damage to its structure (§ 6.6.B.2), and provide adequate drainage to reduce exposure to flood hazards (§ 6.6.B.3). Additionally, in conformance with Section 6.6.C, the Board confirmed that the structure is designed, maintained and adequately anchored to prevent flotation, collapse or lateral movement during the occurrence of the base flood; constructed with materials resistant to flood damage; constructed by methods and practices that minimize flood damage; and constructed as to prevent water from entering or accumulating as to damage electrical, heating, ventilation, plumbing and air conditional equipment (see Pages 4-5, Exhibit E).

The Applicants further advised that the applicable watercourse has been corrected by the Town at various locations along Cilley Hill Road over the recent years (§ 6.6.D) (see Page 5, Exhibit E). While § 6.6.G requires the lowest floor of all new buildings to be elevated one foot above the base flood elevation, as documented through the submission of a FEMA elevation certificate, the Applicants have advised that FEMA has not indicated a base flood elevation for the applicable area (see Page 5, Exhibit E). The Applicants further testified that the likelihood that their property would be removed from a Special Flood Hazard Area district upon the remapping of the floodplains in the coming years in this area is high. The Board finds that Sections 6.6.E, 6.6.F, 6.6.H, 6.6.I, 6.6.J, 6.6.L, 6.6.M and 6.6.N do not apply for the reasons provided in the staff report (Exhibit A) and the Applicants narrative (Exhibit E).

In regards to Section 6.6.K, the Board finds that any use reclassification or change of use pertaining to the accessory structure requires additional review by the Board.

G. SECTION 6.7 – PERMIT REQUIREMENTS

The Board finds that the accessory structure subject to this application does not relate to a pre-existing structure that is being repaired, enlarged, replaced or relocated within the Special Flood Hazard Area; nor is the structure a pre-existing structure already in a Special Flood Hazard area that was

substantially damaged or destroyed; nor is the structure a vacated manufactured or mobile home; therefore, this Section does not apply.

H. SECTION 6.8 – VARIANCES

The Board finds that this application does not pertain to a variance, either involving setback dimensions or a request relating to the regulations enumerated within this Article (Article VI) of the Regulations. The subject structure does require a dimensional waiver request, which analysis was provided under Section 5.5.B above. Therefore, review under this Section is unnecessary, as this Section does not apply to this application.

I. SECTION 6.9 – ADMINISTRATOR & ENFORCEMENT

The Board finds that a Certification of Occupancy Permit is required in accordance with Section 6.9.A. Sections 6.9.B and 6.9.C do not apply.

ARTICLE X, SPECIFIC USE STANDARDS

A. SECTION 10.3 – ZONING PERMITS

Section 10.3.D – Effective Dates and Permit Renewals:

SECTION 10.3.D.1 – ZONING PERMITS: The Board finds that typically a permit issued as part of a decision remains in effect for one year from the date of issuance and during that year, construction must substantially commence. Because the permit for the previously constructed accessory dwelling will be issued after-the-fact, the permit is for documentation purposes only. However, a 15-day appeal period must be observed regardless of the after-the-fact status, with the zoning permit posted as per Section 10.3.C.6.

SECTION 10.3.D.2 – DRB APPROVALS: The Board finds that conditional use approvals typically expire with the expiration of the zoning permit and may only be extended as provided under Section 10.3.D.1. Once the approved uses or structures are established, the conditional use approval will remain in effect and run with the land. The Board finds that the Applicants have established the use of the previously constructed structure and, therefore, the conditional use approval per this decision remains in effect and runs with the land.

III. FACTUAL FINDINGS & CONCLUSIONS RELATING TO THE UNDERHILL ROAD, DRIVEWAY & TRAIL ORDINANCE

The Board finds that the *Underhill Road, Driveway & Trail Ordinance* does not apply since no modifications to the existing driveway and existing curb cut are proposed. Since Board review is unnecessary, an access permit is not required as a part of this decision. In addition, whatever access permit is in place, that approval and any associated conditions of approval, are to remain in place.

IV. WAIVERS, MODIFICATIONS & SUPPLEMENTATIONS

The Board grants the following waivers/modifications:

- The Board approves the dimensional waiver, thereby permitting the Applicants to encroach upon the north (front) property setback requirement. The Applicants may only encroach into the setback 8 ft. as indicated on the submitted site plan (Exhibit H) and zoning permit application (see Exhibit D) and as presented during the hearing. Any deviation of this project

that would result in further encroachment into the setback areas may require additional review by this Board.

- The Applicants, or subsequent landowner(s), are/is not required to come before the Board for the construction of any out buildings, ancillary buildings, or accessory buildings, which would typically be required for any projects obtaining site plan review approval. Instead, the application for a building permit for those accessory-type buildings can be administratively reviewed and approved. However, the abovementioned structures must conform to the Regulations and any applicable permits and approvals in effect at the time of the proposed projects.

V. DECISIONS AND CONDITIONS OF APPROVAL

The Board is satisfied with the level of investigation, engineering and evaluation conducted in the application submittal and review process concerning the above-mentioned project. The Board thoroughly reviewed all aspects of the proposal under the evaluation of the *Underhill Land Use & Development Regulations* and concludes that based on the evidence submitted and the above findings, the accessory structure generally conforms to the aforementioned Regulations. The Board notes however that the approval of this already constructed accessory structure does not ensure approval for subsequent applicants seeking after-the-fact approval for completed projects.

Based upon the findings above, and subject to the conditions below, the Development Review Board grants conditional use approval for the project presented in the application and at the hearing with the following conditions:

1. The Board finds that any use reclassification or change of use pertaining to the accessory structure (current classification: agricultural) requires additional review by this Board.
2. The Board finds that, in accordance with Section 6.9.A, a Certificate of Occupancy Permit is required.
3. The Board finds that any outdoor lighting that may be added as part of this project shall be downward facing and shielded.
4. The Board finds that the Applicants should utilize the Vermont DEC Low Risk Site Handbook for Erosion Prevention and Sediment Control if any remaining work needs to be completed.

Dated at Underhill, Vermont this 12 day of JUNE 2020.

*Approved By
the Underhill Development Review Board,
Charles Van Winkle, Chairman,*

Charles Van Winkle, Chairperson, Development Review Board

NOTICE: This decision may be appealed to the Vermont Environment Court by an interested person who participated in the proceedings before the Development Review Board. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 V.S.A § 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings. Appeal period ends 12 JULY, 2020.