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## **Town of Underhill**

### **Development Review Board**

### **Conditional Use Review Findings & Decision**

#### **CONDITIONAL USE REVIEW APPLICATION OF THE BREWSTER RIVER MOUNTAIN BIKE CLUB FOR A CONDITIONAL SURFACE WATER ENCROACHMENT AND A VARIANCE OF THE FRONT PROPERTY LINE SETBACK PERTAINING TO THE CONSTRUCTION OF A BICYCLE BRIDGE OVER THE SETTLEMENT BROOK.**

In re: Brewster River Mountain Bike Club (BRMBC)  
348 Irish Settlement Road (IS348)  
Underhill, VT 05489

Docket No. DRB-21-12

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

#### **I. INTRODUCTION AND PROCEDURAL HISTORY**

This proceeding concerns the conditional use review application of the Brewster River Mountain Bike Club (BRMBC) pertaining to a surface water encroachment and a variance of the front property line setback relating to the construction of a bridge over the Settlement Brook and within the front property line setback on property owned by the Nicole C. W. Ritchie & Elisabeth A. McIntee at 348 Irish Settlement Road (IS348) in Underhill, Vermont. The subject property, 348 Irish Settlement Road, is located on the east side of both Irish Settlement and Fuller Roads and in the Rural Residential zoning district.

- A. On June 24, 2021, the Applicant, Michael Weisel, representing the BRMBC, submitted a conditional use review application for the abovementioned project. The application was accepted and determined to be sufficiently complete on June 25, 2021. A site visit was scheduled for Monday August 2, 2021 at 6:00 PM, while a hearing was scheduled to commence on Monday August 2, 2021 at 6:35 PM.
- B. On July 14, 2021, notice of the conditional use review hearing was mailed via Certified Mail to the following property owners adjoining the property subject to the application (Applicant and landowner were hand delivered copies of the notice on June 11, 2021):
  - 1. **Applicant** – Brewster River Mountain Bike Club, PO Box 73, Underhill Center, VT 05490
  - 2. **IS348** – Nicole C. W. Ritchie & Elisabeth A. McIntee, 348 Irish Settlement Road, Underhill, VT 05490
  - 3. **IS318** – Samuel A. & Leanne M. Estridge, 318 Irish Settlement Road, Underhill, VT 05489
  - 4. **IS351** – Mary Jo Berube, 351 Irish Settlement Road, Underhill, VT 05489
  - 5. **IS368** – Roland J. & Marilyn Dupre & Barbara Mulhern, 368 Irish Settlement Road, Underhill, VT 05489
  - 6. **IS414** – Nikita Charles Salmon, 414 Irish Settlement Road, Underhill, VT 05489
  - 7. **PV421** – Nancy C. Bradford – Life Estate, PO Box 56, Underhill Center, VT 05490
  - 8. **FU011** – Jessica Butler & Jeremy Rector, 11 Fuller Road, Underhill, VT 05489

9. **FU023** – John J. & Tammy L. Viggato, 51 Washington Ave., Natick, MA 01760
10. **FU049** – Ourthore Trust, Jeffery T. & Angela M. Moulton, Trustees, 49 Highland Road, Underhill, VT 05489

C. On July 16, 2021, 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.

D. On July 17, 2021, notice of public hearing was published in the *Burlington Free Press*.

E. The scheduled site visit at the property's location (348 Irish Settlement Road, Underhill, Vermont) commenced at 6:00 PM on August 2, 2021.

F. Present at the site visit were the following members of the Development Review Board:

1. Board Member, Penny Miller, Vice Chairperson
2. Board Member, Matt Chapek
3. Board Member, Mark Green
4. Board Member, Shanie Bartlett
5. Board Member, Karen McKnight
6. Alternate Board Member, Mark Hamelin
7. Alternate Board Member, Brian Bertsch

Municipal representatives and members of the public present during the site visit were:

8. J. Kail Romanoff, Interim Zoning Administrator
9. Applicant: Michael Weisel – BRMBC (626 Irish Settlement Road, Underhill, VT)
10. Landowners: Nicole C. W. Ritchie & Elisabeth A. McIntee (348 Irish Settlement Road, Underhill, VT)
11. Pat Weisel (626 Irish Settlement Road, Underhill, VT)
12. William & Pam Billings (310 Irish Settlement Road)
13. Jeff Moulton (49 Fuller Road, Underhill, VT)
14. Dan Clayton (559 Pleasant Valley Road, Underhill, VT)
15. David Demarest (111 Fuller Road, Underhill, VT)

G. Present at the conditional use review hearing were the following members of the Development Review Board:

1. Board Member, Penny Miller, Vice Chairperson
2. Board Member, Matt Chapek
3. Board Member, Mark Green
4. Board Member, Shanie Bartlett
5. Board Member, Karen McKnight
6. Alternate Board Member, Mark Hamelin
7. Alternate Board Member, Brian Bertsch

Chairperson Charlie Van Winkle, and Board member Dan Lee recused themselves from the

proceeding as they are members of BRMBC.

Also in attendance was Staff Member J. Kail Romanoff, Interim Zoning Administrator.

Others present at the hearing were:

8. Applicant: Michael Weisel – BRMBC (626 Irish Settlement Road, Underhill, VT)
9. Landowners: Nicole C. W. Ritchie & Elisabeth A. McIntee (3348 Irish Settlement Road, Underhill, VT)
10. Pat Weisel (626 Irish Settlement Road, Underhill, VT)
11. William & Pam Billings (310 Irish Settlement Road)
12. Jeff Moulton (49 Fuller Road, Underhill, VT)
13. Dan Clayton – BRMBC (559 Pleasant Valley Road, Underhill, VT)
14. David Demarest (111 Fuller Road, Underhill, VT)

All attending parties were physically in attendance.

H. At the outset of the hearing, Vice Chairperson Penny Miller explained the criteria under 24 V.S.A § 4465(b) for being considered an “interested party.” Those who spoke at the hearing were:

1. Applicant, Michael Weisel – BRMBC (626 Irish Settlement Road, Underhill, VT)
2. Landowners: Nicole C. W. Ritchie & Elisabeth A. McIntee (348 Irish Settlement Road, Underhill, VT)
3. Dan Clayton – BRMBC (559 Pleasant Valley Road, Underhill, VT)
4. Jeff Moulton (49 Fuller Road, Underhill, VT)
5. David Demarest (111 Fuller Road, Underhill, VT)
6. Pam Billings (310 Irish Settlement Road)

I. In support of the conditional use review application, the following exhibits were submitted to the Development Review Board:

- a. Exhibit A – BRMBC Conditional Use Review Staff Report
- b. Exhibit B – BRMBC (IS348) Conditional Use Review Hearing Procedures
- c. Exhibit C – Development Review Application
- d. Exhibit D – BFP Notice
- e. Exhibit F – Certificate of Service
- f. Exhibit G – Staff email correspondence with River Management Engineer

No additional exhibits were distributed to the Board prior to the Monday, June 28, 2021 hearing. Staff member Romanoff entered into the record 3 additional exhibits during the hearing:

- g. Exhibits H - Zoning Permit Application
- h. Exhibit I – Access permit analysis email chain
- i. Exhibit J – Demarest written testimony.

All exhibits are available for public review in the Brewster River Mountain Bike Club Conditional Use Review file (IS348/DRB-21-12) at the Underhill Zoning & Planning office.

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

The Minutes of the August 2, 2021 meeting, written by Interim Zoning Administrator J. Kail Romanoff, are incorporated by reference into this decision. Please refer to those minutes for a summary of the testimony. The recording of the August 2, 2021 Development Review Board meeting can be viewed on the Mt. Mansfield Community Television's website: <https://archive.org/details/underhill-drb-08022021>.

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* (ULUDR), as amended through March 3, 2020:

### ***PROJECT SYNOPSIS***

The Applicant, BRMBC, seeks conditional use approval for a surface water encroachment relating to the construction of a bike bridge within a surface water setback, as well as a variance for the construction of said bridge within the minimum district front setback. The subject property is located at 348 Irish Settlement Road (IS348) in Underhill, Vermont and is owned by Nicole C. W. Ritchie & Elisabeth A. McIntee. A surface water encroachment is subject to conditional use review in accordance with Section 3.19(E)(2) of the ULUDR. A variance is subject to conditional use review in accordance with Section 5.5(C) of the ULUDR. The property is located within the Rural Residential zoning district as defined under Article II, Table 2.4 of the ULUDR.

### ***ARTICLE II, ZONING DISTRICTS***

#### **A. ARTICLE II, TABLE 2.4 – RURAL RESIDENTIAL**

The Board finds that the subject property is located in the Rural Residential District and that the proposed project, a bridge, is consistent with other accessory structures within the district and in the surrounding neighborhood, thus conforming with the traditional development patterns of the zoning district. The proposed bridge will satisfy the side, and rear setback requirements; however, it will fail to satisfy the 30 ft front setback from the Fuller Road right of way, as well as the 100 ft. surface water setback. The bridge encroaches into the front setback by fifteen (15) feet. As a result, the bridge will be setback  $\pm$  15 ft. from the Fuller Road right of way.

The Board notes that a bridge is an allowed use within the district, as it is considered an accessory structure.

### ***ARTICLE III, GENERAL REGULATIONS***

#### **A. SECTION 3.7 – LOT, YARD & SETBACK REQUIREMENTS**

The Board finds that the subject property is located in the Rural Residential zoning district. The proposed, detached accessory structure satisfies the underlying zoning district's rear and side setback requirements (20 ft. side and rear).

The Board finds that the accessory structure fails to conform with the 30 ft. front setback, as the bridge encroaches into the setback by 15 ft. Due to the encroachment, a variance is required in accordance with Section 5.5(C).

The Board also finds that the accessory structure fails to conform to the 100 ft. surface water setback requirement, as the bridge crosses the surface water (Settlement Brook). Due to the encroachment, conditional approval for the encroachment is required in accordance with Section 3.19(E)(2).

Although the bridge fails to meet the zoning district's front setback requirement as well as the surface water setback requirement, because the Applicant has satisfied the requirements of both Section 5.5(C) and Section 3.19(E)(2), as explained below, the Applicant is not prohibited from obtaining approval by this Board.

**B. SECTION 3.19 – SURFACE WATERS & WETLANDS**

The Settlement Brook runs along Fuller Road near the front property line of 348 Irish Settlement Road. The bridge crosses the Settlement Brook, and thus encroaches on the 100 ft. surface water setback.

Section 3.19(E)(2) permits the Development Review Board to reduce the surface water setback requirement for certain authorized encroachments if there are no other practical physical alternatives. Here the Board finds the bridge is an authorized encroachment as a paved or unpaved path, intended for public access and recreation (§ 3.19(E)(2)(b)). Moreover, a conditional § 3.19(E)(2)(b) encroachment for paved or unpaved paths, intended for public access and recreation, allows for a public access point to the surface water. The Board finds that the provision for public access points to the surface water included in § 3.19(E)(2)(b) includes crossings. The Board further finds there is no practical alternative to placing the bridge within the surface water setback due to the need for a stream crossing from the associated trail network.

**ARTICLE V, DEVELOPMENT REVIEW**

**A. SECTION 5.1 – APPLICABILITY**

The Board finds that conditional use review is required per Sections 3.19(E)(2) and 5.5(C). 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 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 Applicant submitted a satisfactory aerial plan depicting the proposed project and was able to ascertain enough information through the submitted aerial plan, site visit and other sources, such as the ANR website, that the bridge does not adversely affect or impact the enumerated resources in this subsection other than surface waters (§ 5.3(A)(1)(iv)). However, as outlined under Section 5.5(C), due to the constraints of the property, avoiding surface water impacts is challenging, if not impossible.

Because the surface water with its associated setback is an identified feature within this subsection, the Board has the authority to apply any of the mitigation measures under Section 5.3(B)(1)(b); however, the Board finds that none of the measures provided within are necessary to apply here.

Section 5.3(B)(2) – Site Layout & Design: The Board finds that the bridge is not contrary to the

purpose and stated goals under Subsection (a), Rural Residential & Water Conservation districts, noting that the bridge is not contrary to the rural character and traditional working landscape.

Section 5.3(B)(3) – Vehicle Access: The Board finds the subject lot is accessed by one curb-cut via Irish Settlement Road. The Applicant does not propose to modify or relocate the existing curb-cut or driveway,

Section 5.3(B)(4) – Parking, Loading & Service Areas: The Board finds that the bridge does not increase the number of parking spaces that are required for the existing use of the property—single-family dwelling, and therefore, the Board DOES NOT require any modification to the existing parking area.

Section 5.3(B)(5) – Site Circulation: The Board finds that the bridge does not alter the site circulation, which is expected to remain consistent with site circulation patterns of a single-family dwelling.

Section 5.3(B)(6) – Landscaping and Screening: The Board finds that the Applicant does not propose any landscaping or screening relative to the project. The bridge will not be visible from Fuller Road, so no additional screening and landscaping is required by the Board.

Section 5.3(B)(7) – Outdoor Lighting: The Board finds that the Applicant does not propose any lighting relative to the project

Section 5.3(B)(8) – Stormwater Management and Erosion Control: The Board finds that the Applicant shall utilize the Vermont DEC Low Risk Site Handbook for Erosion Prevention and Sediment Control for sitework pertaining to the bridge.

#### **C. SECTION 5.4 – CONDITIONAL USE REVIEW**

Section 5.4(A) – Purpose: The Board finds that conditional use review is required per Sections 3.19(E)(2) and 5.5(C) which require conditional use approval for the construction of a structure within a surface water setback and the district minimum dimensional setback respectively. Specifically, a surface water encroachment under Section 3.19(E)(2) is allowed, in enumerated circumstances, if the Board finds there is no practical physical alternative and resulting undue adverse impacts are mitigated. Additionally, a variance, under Section 5.5(C), for an encroachment into the front district setback is allowed if literal enforcement of the regulations results in undue hardship to the applicant and precludes any reasonable use of the property. 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 bridge 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 bridge does not affect the character of the area, as the area is largely single-family dwellings with accessory

structures, surrounded by forests and often also including trails. Furthermore, the Board makes the following findings pertaining to the location, scale, type, density, and intensity of the use (bridge) as it relates to other buildings and uses in the area:

- **Location:** the property is located in the Rural Residential district, specifically in an area where a majority of the development is single-family dwellings with accessory structures.
- **Scale:** the scale of the proposed construction is consistent with the development that currently exists on the property and the surrounding properties.
- **Type:** the proposed bridge is a permitted use within the Rural Residential district.
- **Density:** the proposed bridge will not increase the density in the area affected.
- **Intensity:** the proposed bridge will negligibly change the intensity of the area affected.

Section 5.4(B)(3) – Traffic on Roads and Highways in the Vicinity: The Board finds that the bridge will not result in an increase in motorized traffic on the roads and highways in the vicinity, however, additional bike traffic is to be expected in the vicinity, particularly on Fuller Road. The Board then finds that the bridge will not result in congestion, however the increased bike traffic may cause unsafe conditions, particularly as it relates to bike traffic entering the roadway from the bridge.

Section 5.4(B)(4) – Bylaws in Effect: The Board finds that the bridge, as a result of this approval, complies with the 2020 *Unified Land Use & Development Regulations*.

Section 5.4(B)(5) – The Utilization of Renewable Energy Resources: The Board finds that the bridge 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 Subsections 5.4(D)(1) through 5.4(D)(4) and impose conditions as necessary to reduce or mitigate any identified adverse impacts of the proposed development.

Section 5.4(D)(1) – Conformance with the Town Plan: The Board finds that the bridge is not contrary to the Town Plan.

Section 5.4(D)(2) – Zoning District & Use Standards: The Board finds that the bridge conforms with the zoning district and use standards, as outlined above.

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 Applicant has

specifically asked for a variance from the setback requirement as it relates to the front property line, 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) – Waiver: The Board finds that this Subsection does not apply, and therefore, review and analysis under this Subsection is not required.

Section 5.5(C) – Variances: The Board, in association with Conditional Use Review, finds that it can reduce district minimum setback requirements as long as the following information is obtained and following requirements are met:

Section 5.5(C)(1) – Untitled: The Applicant seeks a variance from the district minimum setback from the front property line (right of way). The Board finds that the Applicant has presented an application illustrating the justification for a variance.

Section 5.5(C)(2) – Untitled: The Board finds that a variance may be granted by the Board only if each of the criteria enumerated under this Section is found to be true.

Section 5.5(C)(2)(a): The Board finds the existence of the Settlement Brook in close proximity to both Fuller Road and Irish Settlement Road is peculiar to the subject property, and that this peculiarity causes the hardship.

Section 5.5(C)(2)(b): The Board finds that because of this hardship, there is no possibility that the property could be developed for trails because the bridge, whether constructed where it is or elsewhere, cannot cross the Settlement Brook without encroaching on the district's minimum front setback.

Section 5.5(C)(2)(c): The Board finds that hardship was not created by the Applicant.

Section 5.5(C)(2)(d): The Board finds that the variance will not alter the essential character of the neighborhood, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, or be detrimental to the public welfare.

Section 5.5(C)(2)(e): The Board finds that the variance represents the least deviation from the Regulations necessary to afford the Applicant the relief sought.

#### **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 the permit issued as part of this decision will remain in effect for one year from the date of issuance. The Applicant must substantially commence construction within one year or the permit will become null and void. "Substantially commence" entails "initial site preparation; the installation of an access; and the installation of a foundation, water and/or wastewater system on-site." (See Article XI for



definition of “Substantially Commenced”)

**SECTION 10.3(D)(2) – DRB APPROVALS:** The Board finds that conditional use approvals 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 Applicant shall establish the use within 12 months of the effective date of the issuance of the zoning permit – to be issued by the Zoning Administrator as a result of this approval.

### **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 to this project 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 (if at all), 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 Conditional Surface Water Encroachment, including an access to the surface water, and a Variance from the front minimum district setback, which permits the Applicant’s bridge to cross the Settlement Brook and encroach upon the front property line setback requirements. The Applicant may only encroach into the front property line setback by fifteen (15) ft. as noted on the Staff Report (see Exhibit A). Any deviation of this project that would result in further encroachment into the setback area may require additional review by this Board.

### **V. DECISIONS AND CONDITIONS OF APPROVAL**

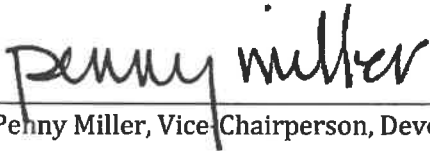
The Board is satisfied with the level of investigation, engineering and evaluation conducted in the application submittal and review process concerning the above-mentioned project. The Board thoroughly reviewed all aspects of the proposal under the evaluation of the *Town of Underhill, VT Unified Land Use & Development Regulations*, adopted March 1, 2011 and amended through March 3, 2020 and concludes that based on the evidence submitted and the above findings, the bridge generally conforms to the aforementioned Regulations.

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 prohibits the bridge to be used by motorized vehicles.
2. The Board requires that a vision triangle from six (6) feet on either side of the trail at its outlet onto Fuller Road, and back six (6) feet toward the bridge be cleared at the intersection of the trail and Fuller Road to allow for increased visibility of bikers exiting the bridge and entering the roadway.

3. The Board requires that a trail stop sign be placed near the intersection of the trail with Fuller Road to direct bicycle traffic that has crossed the bridge to stop before proceeding onto Fuller Road.
4. The Board requires that for any BRMBC event using the bridge (e.g. Tour de Valley), the Applicant shall install signs or cones near the trail outlet on Fuller Road to alert motorists of increased bike traffic.
5. The Board requires that the Applicant shall utilize the Vermont DEC Low Risk Site Handbook for Erosion Prevention and Sediment Control if any remaining sitework needs to be completed.

Dated at Underhill, Vermont this 13<sup>th</sup> day of September, 2021.



Penny Miller, Vice Chairperson, Development Review Board

NOTICE/APPEAL (ZONING): 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.

NOTICE/APPEAL (ACCESS): This permit covers only the Selectboard's (or its designee's) jurisdiction and authority over town highways under 19 V.S.A. § 1111. It does not release the applicant from the requirements of other applicable federal, state or local statutes, ordinances, rules or regulations, including the Underhill Unified Land Use & Development Regulations. This permit addresses issues including access to, work within, and drainage affecting the town highway and its right-of-way, as described in Section 1111 and the Town's Road Ordinance. It does not address all other possible transportation, access (including the use of private access ways) or development issues which, if relevant to a proposed project, must be addressed separately. This permit may be reviewed pursuant to the procedures and time limits set forth in V.R.C.P. 75.