



# Town of Underhill

## Development Review Board

### Conditional Use Review Findings & Decision

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#### CONDITIONAL USE REVIEW APPLICATION OF UNDERHILL HISTORICAL SOCIETY FOR A DIMENSIONAL WAIVER RELATING TO THE CONSTRUCTION OF A SHED WITHIN A SURFACE WATER SETBACK

In re: Underhill Historical Society  
32 Pleasant Valley Road (PV032X)  
Underhill, VT 05489

Docket No. DRB-21-10

**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 Underhill Historical Society pertaining to a dimensional waiver relating to the construction of a shed within a surface water setback on property owned by the Town of Underhill located at 32 Pleasant Valley Road (PV032X) in Underhill, Vermont. The subject property, 32 Pleasant Valley Road, is located on the east side of Pleasant Valley Road and in the Underhill Center Village zoning district.

- A. On May 21, 2021, the Applicant, Rick Heh, representing the Underhill Historical Society, submitted a conditional use review application for the abovementioned project. The application was accepted and determined to be sufficiently complete on May 21, 2021. A site visit was scheduled for Monday June 28, 2021 at 5:30 PM, while a hearing was scheduled to commence on Monday June 28, 2021 at 6:35 PM.
- B. On June 11, 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. **PV019** – David & Carla Revocable Trust, c/o David & Carla N. Osgood, Trustees, PO Box 81, Underhill Center, VT 05490
  2. **PV020** – Michael K. & Emily E. Diffenderffer, 20 Pleasant Valley Road, Underhill, VT 05489
  3. **PV029** – Gregory M. Leach, 29 Pleasant Valley Road, Underhill, VT 05489
  4. **PV031** – Thomas P. & Sandra C. Gosselin, PO Box 44, Underhill Center, VT 05490
  5. **PV040** – Edward O. & Louise Matthews, 40 Pleasant Valley Road, Underhill, VT 05489
  6. **ST015** – Roger D. Giroux, 4199 Hullcrest Rd., Shelburne, VT 05482
  7. **ST019** – Thomas J. & Susan Spear, 19 Stevensville Road, Underhill, VT 05490
  8. **ST020** – Jeremy A. Francis, 20 Stevensville Road, Underhill, VT 05489
  9. **ST028** – Stephen G. Shuma, 28 Stevensville Road, Underhill, VT 05489
  10. **IS007** – Donald D. & Bernadette Howard, PO Box 133, Underhill Center, VT 05490
- C. On June 11, 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 June 12, 2021, notice of public hearing was published in the *Burlington Free Press*.
- E. The scheduled site visit at the property's location (32 Pleasant Valley Road, Underhill, Vermont) commenced at 5:30 PM on June 28, 2021.
- F. Present at the site visit were the following members of the Development Review Board:
1. Board Member, Charles Van Winkle, Chairperson
  2. Board Member, Penny Miller, Vice Chairperson
  3. Board Member, Shanie Bartlett
  4. Board Member, Matt Chapek
  5. Board Member, Mark Green
  6. Board Member, Karen McKnight

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

7. J. Kail Romanoff, Interim Zoning Administrator
  8. Applicant: Rick Heh (52 Kelley Road, Underhill, VT)
  9. Roger Frey (135 Beartown Road, Underhill, VT)
- G. Present at the conditional use review hearing were the following members of the Development Review Board:
1. Board Member, Charles Van Winkle, Chairperson
  2. Board Member, Penny Miller, Vice Chairperson
  3. Board Member, Shanie Bartlett
  4. Board Member, Matt Chapek
  5. Board Member, Mark Green
  6. Board Member, Karen McKnight

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

Others present at the hearing were:

7. Applicant, Rick Heh (53 Kelley Road, Underhill, VT)
8. Judy Boardman (252 Upper English Settlement Road, Underhill, VT)

All attending parties were physically in attendance.

- H. 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. Applicant, Rick Heh

- I. In support of the conditional use review application, the following exhibits were submitted to the Development Review Board:
  1. Exhibit A – Underhill Historical Society Conditional Use Review Staff Report.
  2. Exhibit B – UHS (PV032X) Conditional Use Review Hearing Procedures
  3. Exhibit C - Development Review Application
  4. Exhibit D – Zoning Permit Application
  5. Exhibit E - BFP Notice
  6. Exhibit F - Certificate of Service
  7. Exhibit G – Approximate 100 ft. Riparian Setback Sketch

No additional exhibits were distributed to the Board prior to the Monday, June 28, 2021 hearing nor were any additional exhibits submitted into the record during the hearing.

All exhibits are available for public review in the Underhill Historical Society Conditional Use Review file (PV032X/DRB-21-10) at the Underhill Zoning & Planning office.

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

The Minutes of the June 28, 2021 meeting, written by 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 June 28, 2021 Development Review Board meeting can be viewed on the Mt. Mansfield Community Television’s website: <https://archive.org/details/underhill-drb-06282021>.

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, Underhill Historical Society, seeks conditional use approval, specifically a dimensional waiver relating to the construction of a shed within a surface water setback. The subject property is located at 32 Pleasant Valley Road (PV032X) in Underhill, Vermont and is owned by the Town of Underhill. A dimensional waiver is subject to conditional use review in accordance with Section 5.5(B). The property is located within the Underhill Center Village zoning district as defined under Article II, Table 2.3 of the ULUDR.

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

#### **A. ARTICLE II, TABLE 2.3 – UNDERHILL CENTER VILLAGE**

The Board finds that the subject property is located in the Underhill Center Village District and that the proposed project, a shed, 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 shed will satisfy the front, side, and rear setback requirements; however, it will fail to satisfy the 100 ft. surface water setback. The proposed shed will encroach into the setback by twenty-five (25) feet. As a result, the proposed shed will be setback  $\pm 75$  ft. from the Browns River (located to the south).

The Board notes that a proposed shed 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 a pre-existing non-conforming lot located in the Underhill Center Village zoning district. The proposed, detached accessory structure satisfies the underlying zoning district’s setback requirements (0 ft. front and 12 ft. side and rear).

The Board finds that the proposed accessory structure fails to conform with the 100 ft. surface water setback requirement., as the shed will encroach into the setback by  $\pm 25$  ft. Due to the encroachment, a dimensional waiver is required in accordance with Sections 3.19(E)(2) and 5.5(B).

Although the shed fails to meet the surface water setback requirement, since the Applicant has satisfied the requirements of Section 3.19, in conjunction with Section 5.5(B), as explained below, the Applicant is not prohibited from obtaining approval by this Board.

**B. SECTION 3.11 – OUTDOOR LIGHTING**

The Board finds that the Applicant proposes no lighting over the entrance door to the shed. Should the Applicant add additional outdoor lighting relating to the project at a later date, it shall be downward facing and shielded.

**C. SECTION 3.14 – PERFORMANCE STANDARDS**

The Board finds that the addition of the proposed shed and the continued use of the structure by the Underhill Historical Society will not create dangerous, injurious, noxious, or otherwise objectional conditions that adversely affect or interfere with the reasonable use of adjoining or nearby properties—provided the restriction that no fuels, oils, solvents, or other possible hazardous substances are stored in the structure is adhered to.

**D. SECTION 3.17 – SOURCE PROTECTION AREAS**

The Board finds that the subject parcel is located in a source protection area, though the proposed shed is not located within 200 ft. of a public water source which is approximately 940 ft. to the north. The Board finds that the shed is consistent with the source protection plan most recently adopted and approved by the State and does not include any prohibited activity.

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

The Browns River forms the southerly boundary of the subject parcel. As dimensioned from the ANR Atlas map, the proposed shed will be located  $\pm 75$  feet from the Browns River, which does not satisfy the 100 ft. setback requirement.

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 proposed shed is an authorized encroachment as the improvement of a public facility. Moreover, the Board finds there is no practical alternative to placing the shed within the surface water setback due to the need to have the shed in close proximity to the back door, the existence of a wet area and a liquified propane tank to the north of proposed shed location, and the near total lot coverage of the one hundred (100) ft. surface water setback. When considered in conjunction with the waiver criteria under Section 5.5(B), the Board finds a setback waiver relating to surface waters applicable to the proposed shed (see rationale

under Section 5.5(B) below).

**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(B). 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 proposed shed 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(B), due to the constraints of the property, avoiding surface water impacts is challenging, if not impossible.

Since 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.

Section 5.3(B)(2) – Site Layout & Design: The Board finds that the proposed shed is not contrary to the purpose and stated goals under Subsection (a), Underhill Flats Village Center and Underhill Center Village Districts, noting that the proposed shed is not contrary to the traditional, compact village settlement pattern.

Section 5.3(B)(3) – Vehicle Access: The Board finds the subject lot is accessed by one curb-cut via Pleasant Valley 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 proposed shed does not increase the number of parking spaces that are required for the existing use of the property—Public Facility, 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 proposed shed does not alter the site circulation, which is expected to remain consistent with site circulation patterns of a public facility.

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. While the proposed shed will be

visible from Pleasant Valley Road, the structure is consistent with other accessory structures in the district and surrounding neighborhood. Therefore, no additional screening and landscaping is mandated by the Board.

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 Applicant shall utilize the Vermont DEC Low Risk Site Handbook for Erosion Prevention and Sediment Control for sitework pertaining to the proposed shed.

#### 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(B) which require conditional use approval for the construction of a structure within a surface water setback. Specifically, a dimensional waiver under Section 5.5(B) is allowed if the encroachment is less than 50% of the surface water setback requirement (§ 5.5(B)(3)). 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 proposed shed 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 proposed shed does not affect the character of the area, as the area is largely single-family dwellings or public facilities with accessory structures, including sheds. Furthermore, the Board makes the following findings pertaining to the location, scale, type, density, and intensity of the use (shed) as it relates to other buildings and uses in the area:

- **Location:** the property is located in the Underhill Center Village zoning district, which largely contains medium density development, including public facilities with accessory structures.
- **Scale:** the scale of the proposed construction is consistent with the development that currently exists on the property and the neighboring properties.
- **Type:** the proposed shed is an accessory structure and is a permitted use within the Underhill Center Village zoning district.
- **Density:** the proposed shed results in no change to the density of the area.
- **Intensity:** the proposed shed 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 proposed shed does not result in an increase in traffic on roads and highways in the vicinity, nor does the project create any congestion, since the use of the property is not altered.

Section 5.4(B)(4) – Bylaws in Effect: The Board finds that the proposed shed, 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 proposed shed 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 proposed shed is not contrary to the Town Plan.

Section 5.4(D)(2) – Zoning District & Use Standards: The Board finds that the proposed shed 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 dimensional waiver to reduce the setback requirement as it relates to the Browns River, 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 surface water setback requirements as long as the following information is obtained and following requirements are met:

Section 5.5(B)(1) – Untitled: The Applicant proposes to construct a shed within a surface water setback. The Board finds that the Applicant has 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 the first criterion to be true: the waiver will allow for the reasonable development and use of a pre-existing nonconforming lot. The Applicant proposes to construct a shed, a normally permitted action if not for the many constraints that exist on the property.

Section 5.5(B)(3) – Untitled: The Board finds that it may reduce the setback by no more than 50%, or in this case 50 feet. The Applicant has presented an application illustrating that the proposed shed encroaches upon the setback by five (25) ft. and does not anticipate exceeding this measurement.

Section 5.5(B)(4) – Untitled: The Board finds based on clear and convincing evidence that the Applicant has 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 siting of the project is restricted by the location of the existing principal structure, the infrastructure, and environmental constraints. In addition, the one hundred (100) ft. surface water setback from the Browns River constrains the siting of any potential development on the property. Thus, any required alteration of the proposed project would be unreasonable, and therefore, the construction of the proposed shed within the surface water setback buffer is justifiable.

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 *Underhill Town Plan*, 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 proposed shed.

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 expected adverse impacts on adjoining properties, surface waters, or wetlands resulting from the reduced setback. Consequently, 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 although Special Flood Hazard Areas are located on the property, the proposed development is not found within the Special Flood Hazard Area, and therefore, review and analysis under this Article is not required.

#### ***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 dimensional waiver which permits the Applicant to encroach upon the surface water setback requirement. The Applicant may only encroach into the setback by twenty-five (25) ft. as noted on the zoning permit application (see Exhibit D). 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 *Underhill Land Use & Development Regulations* and concludes that based on the evidence submitted and the above findings, the proposed shed 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 shed to be used at any time for the storage of hazardous substances, including but not limited to any fuels, oils, solvents, or similar fluids.

2. The Board requires that any outdoor lighting that is added as part of this proposed project shall be downward facing and shielded.
3. 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 2<sup>nd</sup> day of August, 2021.

*Charles Van Winkle*

Charles Van Winkle, 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.