



**Town of Underhill  
Development Review Board  
Final Findings and Decision**

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**APPLICATION OF STEPHEN McCLELLAN FOR AN APPEAL/VARIANCE REQUEST TO INCREASE THE  
HEIGHT OF A NONCONFORMING STRUCTURE ON A NONCONFORMING LOT**

In re: Stephen McClellan and Armand Morel  
284 River Road (RV284)  
Underhill, VT 05489

Docket No. DRB 16-09

**Decision:** Approved with conditions (see Section IV – Decisions and Conditionals of Approval)

**I. INTRODUCTION AND PROCEDURAL HISTORY**

This proceeding concerns the hearing for an appeal/variance request submitted by Armand Morel on behalf of Stephen McClellan. The applicant proposes to increase the height and volume of a nonconforming structure on a nonconforming lot.

A. On September 14<sup>th</sup>, 2016, Stephen McClellan and Armand Morel submitted an application for a variance for the abovementioned project.

B. On September 16<sup>th</sup>, 2016, a copy of the notice of an appeal/variance hearing was mailed via Certified Mail to the following owners of properties adjoining the property subject to the application:

1. Cedric P. and Laura Wells (278 River Road)
2. Brennen Korie Life Estate (281 River Road)
3. Patrick F. and Louise Lamphere (285 River Road)
4. Underhill Center Post Office (286 River Road) – Hand Delivered to Town Administrator
5. Catherine Gillespie and John Romanoff (288 River Road)

C. During the week of September 11<sup>th</sup>, 2016, notice of the public hearing for the proposed appeal/variance was posted at the following places:

1. The Underhill Town Clerk's office;
2. The Underhill Center Post Office; and
3. The Underhill Flats Post Office

D. On September 17<sup>th</sup>, 2016, the notice of public hearing was published in the *Burlington Free Press*.

- E. A site visit was held prior to the hearing at 6:00 PM on October 3<sup>rd</sup>, 2016.
- F. Present at the site visit were the following individuals:
1. Charles Van Winkle, Chairperson
  2. Will Towle, Board Member
  3. Matt Chapek, Board Member
  4. Mark Hamelin, Board Member
  5. Shanie Bartlett, Board Member
  6. Karen McKnight, Board Member
  7. Stephen McClean, Land Owner
  8. Chuck Bolton, Real Estate Agent
  9. Catherine Gillespie, Abutting Property Owner (RV288 – 288 River Road)
  10. John Romanoff, Abutting Property Owner (RV288 – 288 River Road)
- G. The appeal/variance hearing began at 8:15 PM on October 3<sup>rd</sup>, 2016.
- H. Present at the appeal/variance hearing were the following members of the Development Review Board:
1. Charles Van Winkle, Chairperson
  2. Will Towle
  3. Matt Chapek
  4. Mark Hamelin
  5. Shanie Bartlett
  6. Karen McKnight
  7. Andrew Strniste, the Town's Planning Director
- I. At the outset of the hearing, Chair 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. Stephen McClean, Land Owner & Applicant
  2. Armand Morel, Perspective Buyer & Applicant
  3. Chuck Bolton, Real Estate Owner
  4. Laura Wells, Abutting Neighbor (278 River Road)
- J. In support of the appeal/variance application, the following exhibits were submitted to the Development Review Board:
- Exhibit A – Variance Hearing Request Application  
Exhibit B – Authorizing Agent Letter  
Exhibit C – Burlington Free Press Notice  
Exhibit D – Abutting Neighbors  
Exhibit E – Letter to Abutting Neighbors  
Exhibit F – Purchase & Sale Contract  
Exhibit G – Letter Stating the Need for a Variance  
Exhibit H – Assessment Card  
Exhibit I – Engineering Drawing of Existing Lot

- Exhibit J – Sketch of Lot (Setbacks)
- Exhibit K – ANR Stream & Waterbodies Map
- Exhibit L – ANR Floodplain Map
- Exhibit M – Staff Map of Building Envelope
- Exhibit N – Building Elevations
- Exhibit O – A Copy of the Staff Report
- Exhibit P – Wastewater System and Potable Water Supply Permit (Permit #: WW-4-4654)

All exhibits are available for public review in the McClellan (RV284) appeal/variance file (DRB Docket #: 16-09) at the Underhill Planning & Zoning office.

## **II. FACTS/SUMMARY**

The current structure at 284 River Road is a nonconforming structure on a nonconforming lot. The structure is considered unsightly and poses a risk to the public safety and welfare. The applicant wishes to demolish the current dwelling and reconstruct a new dwelling in the same footprint; however, he wishes to increase the height of the pre-existing structural dimensions, which would increase the degree of nonconformance. Due to the dimensions of the lot, as well as some additional constraints, building a conforming structure is cumbersome, if existent. State permits stipulate that a new dwelling must remain on the same footprint as the existing building. Part of the wastewater system is located within the building envelope. And lastly, the building envelope also contains a designated floodplain, which further complicates the siting of a new conforming structure.

## **III. FINDINGS**

The Minutes of the October 3<sup>rd</sup>, 2016 meeting, written by Andrew Strniste, are incorporated by reference into this decision. Please refer to those Minutes for a summary of the testimony.

Based on the submitted application, testimony, exhibits, and evidence, the Development Review Board makes the following findings under the requirements of the Underhill Unified Land Use Regulations (ULUDR):

### **A. ARTICLE II, TABLE 2.4 WATER CONSERVATION DISTRICT**

The Board finds that the lot is located within the Water Conservation zoning district, which has a front setback requirement of thirty (30) feet, side setback requirements of fifty (50) feet, and a rear setback requirement of fifty (50) feet.

### **B. ARTICLE XI – DEFINITION OF DEGREE OF NONCONFORMANCE**

Degree of Nonconformance is defined as “the degree to which a structure, or portion thereof, does not meet required dimensional standards . . . as specified in these regulations . . . [which include] any enlargement or other structural alteration which extends the footprint, height or volume of a structure within a required setback distance . . . .”

Since the applicant proposes to enlarge the building height of the existing structure, which currently encroaches upon the setback (see below), the Board finds that the applicant will be increasing the degree of nonconformance.

**C. ABANDONED & DAMAGED STRUCTURES, SECTION 3.1**

A structure may be repaired or reconstructed without a zoning permit provided that there are no changes to the pre-existing structural dimensions (§ 3.1.B.2). “Any repair or restoration of a nonconforming structure that increases the degree of nonconformance is subject to review by the Development Review Board under Section 3.9 (§ 3.1.B.3).”

The Board finds that a building permit, subject to the conditions of this decision, must be issued prior to the reconstruction of the structure since the applicant is increasing the degree of nonconformance.

**D. NONCONFORMING STRUCTURES, SECTION 3.9**

The structure is located twenty-eight feet from the front lot line (west) and fourteen feet from the side lot line (north). A nonconforming structure may be structurally enlarged or expanded with the issuance of a zoning permit provided that it does not increase the degree of nonconformance (§ 3.9.A.3). The Board may grant a waiver for a structural enlargement or expansion of a nonconforming structure provided that the waiver does not reduce the minimum district requirements more than fifty percent (50%) of the original requirement (§ 3.9.B). For any reduction of the setback greater than fifty percent (50%) of the original requirement, a variance issued by the Board under § 5.5 of the ULUDR is required (§ 3.9.B).

The Board finds that the current structure is a nonconforming because it encroaches upon the front and side setback requirements. Since the current building footprint resides fourteen (14) feet from the side lot line, the applicant is not eligible for a waiver since the setback would be reduced by sixty-eight percent (68%). Therefore, the Board finds that the issuance of a variance is required prior to the issuance of a building permit.

**E. WAIVERS & VARIANCES, SECTION 5.5**

The Development Review Board may grant a variance “only if literal enforcement of these regulations results in undue hardship to the appellant that precludes any reasonable use of the property” (§ 5.5.C).” Under § 5.5.C.2, a decision in favor of the applicant shall be rendered, and thus a variance granted, if the Board determines that the following facts are found to be true:

1. There are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to these conditions and not the circumstances or conditions generally created by the provisions of these regulations in the neighborhood or district in which the property is located. § 5.5.C.2.a.
2. Because of such physical circumstances and conditions, there is no possibility that the property can be developed in strict conformity with the provisions of these regulations and that the authorization of a variance is necessary to enable the reasonable use of the property. § 5.5.C.2.b.
3. The unnecessary hardship has not been created by the applicant or appellant. § 5.5.C.2.c.
4. The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, 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. § 5.5.C.2.d.

5. The variance, if authorized, will represent the minimum that will afford relief and will represent the least deviation possible from these regulations and from the plan. § 5.5C.2.e.

In response to § 5.5.C.2.a, the Board finds that there are unique physical circumstances or conditions. The lot is a nonconforming lot (approximately 0.5 acres in a 5-acre zoning district). Approximately one-third of the lot is located within a floodplain. The building envelope is approximately 3,320 square feet of the building envelope (approximately fifteen percent of the lot); however, approximately 600 square feet (approximately eighteen percent) is located within the floodplain (Exhibit M). Furthermore, part of the wastewater system is required to be within the building envelope, narrowing the feasibility of locating a new structure with the building envelope even more (Exhibit I & Exhibit M).

In regards to § 5.5.C.2.b, the Board finds that there are physical circumstances and conditions preventing the possibility of developing the property in strict conformity with the provisions of the ULUDR, and therefore, a variance is necessary to enable the reasonable use of the property. In addition to the unique physical circumstances/conditions above, the State has stipulated that any wastewater and potable water permitting approval requires the proposed structure to remain in the same footprint. Therefore, the Board finds that the relocation of the structure is not feasible since the relocation of the structure would make it ineligible to receive the requisite permits.

The Board finds that the applicant did not create the hardship under § 5.5.C.2.c. The applicant wishes to reconstruct the structure; however, he wishes to increase the height of the structure to make it better suited for living. In most cases, to achieve this goal, the applicant would move the building footprint into the allowed building envelope. However, in this situation, the following constraints have been identified that are preventing him from moving the building footprint: The State of Vermont has mandated that the newly proposed structure remain in the same footprint in order to receive the requisite permits (Exhibit P); the wastewater system will be located within the building envelope; and a floodplain is located within the building envelope.

In response to § 5.5.C.2.d, the Board finds that the granting of a variance will not alter the essential character of the neighborhood. As evidenced in the building elevations (Exhibit N), the new structure will be consistent with the surrounding neighborhood, and will not substantially or permanently impair the appropriate use or development of adjacent properties.

In regards to § 5.5.C.2.e, the Board finds that the proposed increase in building height is consistent with providing the least deviation from the Regulations as possible.

#### **IV. CONCLUSION**

The lot is in the village center and the decaying residential building is an eye sore and potential safety risk. Literal enforcement of these regulations would preclude any reasonable use of the property and would be an undue burden per § 5.5.C. This variance allows an updated residence to be constructed with the least deviation possible from the regulations.”

Therefore, the Board is satisfied with the level of investigation, engineering and evaluation conducted in the application submittal and review process concerning the abovementioned project. The Board

thoroughly reviewed all aspects of the proposal under the evaluation criteria in the ULUDR.

The Board concludes that the level of detail requested was met, and as a result, there will be no undue adverse impact to the Town from the proposed project.

**V. DECISION AND CONDITIONS OF APPROVAL**

Based upon the findings above, and subject to the conditions below, the Development Review Board finds that the applicant has satisfied the requirements under § 5.5.C, and therefore, grants approval for a variance as presented at the October 3<sup>rd</sup>, 2016 hearing with the following conditions:

1. The proposed structure shall conform with the information and designs presented at the October 3<sup>rd</sup>, 2016 hearing, and submitted into evidence. Specifically, the building design shall conform to Exhibit N – Building Elevations, which were presented as the proposed.
2. If the State permits a modification to the existing building footprint or for a nonexempt building, the applicant must meet the requirements of the ULUDR in effect at the time of the request. Any proposed modifications to the building footprint shall occur within the approved building enveloped (Exhibit M).

Dated at Underhill, Vermont this 11<sup>th</sup> day of October 2016 .

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Charles Van Winkle, Chair, 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 November 2016 .