Town of Underhill

Development Review Board
Findings and Decision

APPLICATION OF JON HOWARD FOR A WAIVER/VARIANCE TO ENCROACH UPON THE LOT'S SETBACK REQUIREMENT AND THE LOT'S SURFACE WATER SETBACK REQUIREMENT BY EXPANDING THE ENTRYWAY AND EXPANDING A DECK

In re: Jon Howard
219 Stevensville Road (ST219)
Underhill, VT 05489

Docket No. DRB-17-15

Decision: Approved in part and denied in part (see Section V for More Details)

I. INTRODUCTION AND PROCEDURAL HISTORY

This proceeding concerns a waiver/variance request application to allow the applicant, Jon Howard, to expand the entryway to his single-family dwelling on the southeast portion of the dwelling that would inevitably encroach upon his lot's side setback requirements, as well as expand the existing deck on the northwest portion of the dwelling that encroaches upon the lot's surface water setback requirement. The applicant's lot is located at 219 Stevensville Road (ST219) in Underhill, Vermont, and is located in the Water Conservation District and the Soil & Water Conservation District.

A. On September 17, 2017, Jon Howard (the applicant), filed an application for a waiver/variance request hearing for the abovementioned project. The application was accepted and determined to be complete by the Planning & Zoning Administrator, Andrew Strniste, shortly thereafter. A hearing was scheduled for 6:35 PM on October 2, 2017 at Underhill Town Hall, 12 Pleasant Valley Road, Underhill, VT.

B. On September 14, 2017, a copy of the notice of the waiver/variance request hearing was mailed via Certified Mail to the following property owners adjoining the property subject to the application:

1. ML020 – Primmer Piper Eggleston & Cramer, P.C., Attn: Douglas J. Wolinsky, P.O. Box 1489, Burlington, VT 05402
2. ST024 – Jeffrey L. & Karen C. Davis, P.O. Box 229, Underhill Center, VT 05490
3. ST217 – Elaine Herman Trustee, P.O. Box 116, Underhill Center, VT 05490
4. ST221 – Livingston Howard, 199 Bayberry Lane, Westport, CT 06880
5. ST246 – Wheeler Associates c/o Patricia McLaughlin, 37 Foster Road, Essex Junction, VT 05452
6. *[Applicant]* ST219 – Jon Howard, P.O. Box 43, Underhill Center, VT 05490

C. During the week of September 10, 2017, notice of the public hearing for the proposed waiver/variance request was posted at the following locations:

1. The Underhill Town Clerk's office;

2. The Underhill Center Post Office; and
3. The Underhill Flats Post Office.

D. On September 16, 2017, the notice of public hearing was published in the *Burlington Free Press*.

E. The waiver/variance request hearing commenced at 6:35 PM on October 2, 2017 at the Town of Underhill Town Hall.

F. Present at the waiver/variance request hearing were the following members of the Development Review Board:

1. Board Member, Penny Miller, Acting Chairperson
2. Board Member, Matt Chapek
3. Board Member, Daniel Lee
4. Board Member, Karen McKnight
5. Board Member, Penny Miller
6. Board Member, Stacey Turkos

Also in attendance was Staff Member Andrew Strniste, Planning Director & Zoning Administrator.

Others present at the hearing were:

1. *[Applicant]* Jon Howard, 219 Stevensville Road, Underhill, VT 05489
2. *[Abutting Neighbor]* Bob McLaughlin, 37 Foster Road, Essex Junction, VT 05452
3. *[Abutting Neighbor]* Patsy McLaughlin, 37 Foster Road, Essex Junction, VT 05452

G. At the outset of the hearing, Acting Chair 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. Jon Howard
2. Bob McLaughlin
3. Patsy McLaughlin

Also qualifying as an interested party is Elaine Hermann, who did not attend the hearing; however, submitted a letter of support.

H. In support of the final waiver/variance request application, the following exhibits were submitted to the Development Review Board:

Exhibit A – ST219 - Howard Waiver & Variance Request Staff Report
Exhibit B - ST219 Rules of Procedure - Variance & Waiver Request
Exhibit C - Variance Hearing Request Form
Exhibit D - Correspondence from Applicant to Board
Exhibit E - Certificate of Service
Exhibit F - Notice to Burlington Free Press
Exhibit G - Letter of Support from Elaine Herman
Exhibit H - DRB-17-11 Staff Report
Exhibit I - Floor Plans
Exhibit J – Elevations
Exhibit K - Site Plan

Exhibit L - Waiver & Variance Limitations

No additional exhibits were submitted prior to the hearing.

The following exhibit was submitted into the record during the hearing:

Exhibit M – Waiver & Variance Limitations Clarification Site Plan (Update of Exhibit L)

All exhibits are available for public review in the ST219 Waiver/Variance Request file (DRB 17-15) at the Underhill Zoning & Planning office.

II. FINDINGS

The Minutes of the October 2, 2017 meeting, written by Planning & Zoning Administrator, Andrew Strniste, are incorporated by reference into this decision. Please refer to the 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 2011 Underhill Unified Land Use and Development Regulations (ULUDR) as amended March 6, 2012 & March 4, 2014:

FACTUAL FINDINGS

The applicant, Jon Howard, record owner of the property located at 219 Stevensville Road (ST219) in Underhill, Vermont, is seeking a waiver/variance under Section 5.5.C from the Development Review Board to expand/enlarge the entryway to the dwelling (located on the southeastern part of the dwelling), as well as expand and enlarge the deck to the north of the dwelling, both of which would encroach upon the property's setbacks. The proposed deck also potentially encroaches upon the surface water setback, which is explained in more detail in Sections 3.7 & 3.19 below.

The property is located in the Water Conservation District as defined in Article II, Table 2.4 and in the Soil & Water Conservation District as defined of Article II, Table 2.6 of the Underhill Unified Land Use & Development Regulations.

ZONING DISTRICTS, ARTICLE II

ARTICLE II – ZONING DISTRICTS

A. ARTICLE II, TABLE 2.4 – WATER CONSERVATION DISTRICT

The Board finds that the existing lot does not meet the requirements of the Underhill Water Conservation District, which includes minimum lot size, minimum frontage, and one of the side setback requirements. The proposed additions will not be built within the Water Conservation District; however, the Board notes that the existing building (the garage) fails to conform to the minimum dimensional requirements. Since the building is existing, it qualifies as a pre-existing nonconforming structure on a pre-existing nonconforming lot.

B. ARTICLE II, TABLE 2.6 – SOIL & WATER CONSERVATION DISTRICT

The Board finds that the existing lot does not meet the requirements of the Underhill Soil & Water Conservation District, as the existing building fails to conform to minimum dimensional requirements, which include minimum lot size, minimum frontage, and both side setback requirements. The building is therefore a pre-existing nonconforming structure on a pre-existing nonconforming lot.

GENERAL REGULATIONS, ARTICLE III

A. **SECTION 3.2 – ACCESS**

The Board finds that the lot has not received an access permit; however, since the landowner is not proposing to perform any of the actions under Section 3.B of the Underhill Road Ordinance, an access permit is not required as part of this application.

SECTION 3.7 – LOT, YARD & SETBACK REQUIREMENTS

The Board finds that the existing lot is a nonconforming lot, as the lot fails to meet the acreage requirement, the frontage requirement, and the side setback requirements of both the Water Conservation District and the Soil & Water Conservation District. The Lot is ±4.7 acres, failing to meet the 5.0 acreage requirement for the Water Conservation District and failing to meet the 15.0 acreage requirement for the Soil & Water Conservation District. The front lot line is 204 feet, which also fails to meet the requirements of both districts. The primary structure is approximately 396 feet from the front lot line (south), 49 feet from the west side lot line, 9 feet from the east side line, and more than 300 feet from the rear lot line (north).

The Board finds that Stevensville Brook is located to the north, as the existing structure is approximately 200 ft. from the brook. Based on the submitted evidence, specifically the site plan (Exhibit K) the Board finds that the existing dwelling is located 13 feet from the top of the bank, while the existing deck is located approximately 8 feet from the top of the bank. Per Section 3.19.D.1, all structures shall be located 100 feet, as measured horizontally from the top of the bank, from Stevensville Brook. No wetlands were identified in the immediate vicinity of the principal dwelling unit.

Since the Board finds that the applicant has satisfied the requirements of Sections 3.8 and 3.9 below, he will not be prevented from obtaining approval, in part, from the Board under this section.

B. **SECTION 3.8 – NONCONFORMING LOTS**

The Board finds that the lot was legally existing on the effective date of the current Underhill Unified Land Use & Development Regulations (March 1, 2011; Amended March 6, 2012; Amended March 4, 2014), and therefore, per Section 3.8.A, the lot may be developed for the purposes allowed in the district it is located in even though it does not conform to the minimum lot size requirements.

C. **SECTION 3.9 – NONCONFORMING STRUCTURES**

The Board finds that the existing structure was legally in existence as of the effective dates of the current Underhill Unified Land Use & Development Regulations, and therefore, may continue to be occupied or used indefinitely. Since the applicant is proposing to structurally enlarge/expand, modify the building footprint beyond 50% of the setback requirement, a variance is required per Section 3.9.B.

D. **SECTION 3.10 – NONCONFORMING USES**

The Board finds that both the existing use and proposed use conform to the Soil & Water Conservation District if the waiver/variance request is approved, and therefore, this section does not apply.

E. **SECTION 3.11 – OUTDOOR LIGHTING**

Outdoor lighting is a review criteria under site plan review, which is a requirement of conditional

use review. The Board finds that site plan review and conditional use review criteria are implicitly addressed when reviewing the application under the waiver/variance criteria below. Nevertheless, the Board makes no finding regarding outdoor lighting.

F. **SECTION 3.13 – PARKING, LOADING & SERVICE AREAS**
The Board finds that the applicant has satisfied the parking requirement of two parking spaces per dwelling.

G. **ARTICLE III, TABLE 3.1 – MINIMUM OFF-STREET PARKING REQUIREMENTS**
See Section 3.13 – Parking, Loading & Service Areas, directly above.

H. **SECTION 3.14 – PERFORMANCE STANDARDS**
Performance standards are review criteria under site plan review & conditional use review. The Board finds that site plan review and conditional use review criteria are implicitly addressed when reviewing the application under the waiver/variance criteria below. Nevertheless, the Board finds that the applicant will satisfy this subsection, as the proposed construction is consistent with other single-family dwelling projects.

I. **SECTION 3.17 – SOURCE PROTECTION AREAS**
The Board finds the existing lot is located within a source protection area; however, the Board finds that the development directly relates to a single-family dwelling, and is therefore exempt under Section 3.17.A. The Board notes that the water supply is from a drilled well.

J. **SECTION 3.18 – STEEP SLOPES**
The Board finds that there are areas of steep slopes (15-25%) or very steep slopes (>25%) present on the lot, specifically to the north and south of the single-family dwelling. These areas of slope create additional constraints, thus minimizing the possible building envelope of the property. While these areas exist, the applicant is not proposing any construction that will impact slopes.

K. **SECTION 3. 19 – SURFACE WATERS & WETLANDS**
The Board finds that Stevensville Brook is located towards the northern part of the lot. Per Section 3.19.D.1 of the ULUDR, all structures shall be 100 feet, as measured horizontally from the top of the bank, from Stevensville Brook. The applicant is proposing construction of an expanded entryway located at the southeastern portion of the dwelling unit that is approximately 60 feet from the top of the bank as identified on the site plan. The proposed deck expansion, which is to be located to the northwest of the single-family dwelling, will be approximately 0 feet, or possibly exceed the top of the bank. Therefore, the applicant requires a setback waiver for the expanded entryway and a variance for the expanded deck, which would allow for the encroachment of each into a surface water setback.

Class III Wetlands have been identified on the lot, but the proposed expansions will not occur in the vicinity of those identified locations.

L. **SECTION 3.22 – WATER SUPPLY & WASTEWATER SYSTEMS**
The Board finds that the applicant shall submit an updated Wastewater System & Potable Water Supply Permit prior to obtaining the Certificate of Occupancy permit for the proposed additions per Section 10.4.A of the ULUDR.

ARTICLE V, DEVELOPMENT REVIEW

A. ***SECTION 5.1 – APPLICABILITY***
The Board finds that per Sections 5.5.B (regarding waivers) and Section 5.5.C.1 (regarding variances), waiver requests and/or variance requests are to be held concurrently with site plan review under 5.3 or conditional use review under Section 5.4. However, the Board finds that the site plan review and conditional use review criteria are implicitly addressed when reviewing the application under the variance criteria. Therefore, this application is reviewed under the variance review criteria per Section 5.5.C, and a formal analysis under Sections 5.3 and 5.4 is not addressed as part of this decision.

B. ***SECTION 5.3 – SITE PLAN REVIEW***
See Section 5.1 – Applicability, directly above.

C. **SECTION 5.4 – CONDITIONAL USE REVIEW**
See Section 5.1 – Applicability, above.

D. **SECTION 5.5 – WAIVERS & VARIANCES**

Section 5.5.A – Applications & Review Standards:
For the Board to allow expansion of the existing entry: 1) a variance is required for encroachment into the side setback, and 2) a waiver is required for encroachment into the surface water setback.

For the Board to allow expansion of the existing deck: 1) a waiver is required for encroachment into the side setback, and 2) a variance is required for encroachment into the surface water setback.

Section 5.5.B – Dimensional Waivers: The Board finds a dimensional waiver is required for the proposed entryway expansion in relation to the surface water top of the bank boundary.

Section 5.5.B.1 (Untitled): The Board finds that the applicant has submitted a memorandum stating the specific circumstances, need, and justification for the waiver.

Section 5.5.B.2 (Untitled): The Board finds that a waiver can be granted as necessary to allow the land owner to reasonably develop and use a pre-existing nonconforming lot, and allow the landowner to construct additions and/or improvements to a pre-existing nonconforming structure.

Section 5.5.B.3 (Untitled): The Board finds that a waiver can reduce the setback by no more than 50%, or as applied, 50 feet for the surface water setback.

Section 5.5.B.4 (Untitled): In granting the waiver for the expanded entryway, the Board finds based on clear and convincing evidence, of a specific need and circumstances that meets the following Factors:

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

Findings: The Board finds that the location of the expanded entryway cannot be sited in a location outside of the required surface water setback area. Furthermore, the location of the proposed entryway is located the furthest feasibly allowed given the circumstances.

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

Findings: The Board finds that the reduced setback is not contrary to public health, safety and welfare, nor is contrary to the stated objectives and policies of the Underhill Town Plan, or the intent of these regulations. The Board also finds that the abutting landowners, Elaine Herman, Bob McLaughlin & Patsy McLaughlin have expressed their support for the stated project.

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

Findings: The Board finds that, as proposed, the waiver would represent the minimum setback reduction necessary to allow for the proposed development.

Factor 4 (Section 5.5.B.4.d): 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.

Findings: The Board finds that there are no potential adverse impacts resulting by reducing the setbacks for the proposed expanded entryway.

Section 5.5.C – Variances: The Board finds that the applicant has satisfied all of the factors of the variance criteria for the proposed expanded entryway only, and not for the expanded deck (see Section 5.5.C.2 below).

Section 5.5.C.1 (Untitled): The Board finds that the applicant has provided enough information to make a determination on the proposed expanded entryway; however, finds that the applicant has not provided enough reliable information to make a determination on the proposed expanded deck, and therefore, relies on the evidence that was submitted as part of the application.

Section 5.5.C.2 (Untitled): The Board finds that the applicant has satisfied the following factors to obtain a variance for the proposed expanded entryway only, and not for the proposed expanded deck, which is outlined directly below:

Factor 1 (Section 5.5.C.2.a): 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.

Findings: The applicant's lot is extremely narrow and exhibits various topographical constraints, thereby limiting the available locations to construct the two additions. Specifically, an embankment exists to the north of the structure making construction in that direction less feasible. The septic tanks are located to the west of the single-family dwelling, while the driveway is

located directly to the south. Therefore, the Board finds that the totality of all of these features creates an unnecessary hardship for the applicant.

Factor 2 (Section 5.5.C.2.b): 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.

Findings: Given the narrowness of the lot, as well as the existing topography and other constraints outlined directly above in Factor 1, developing in strict conformity with the Regulations is unlikely, if not impossible. The permitted building envelope in the immediate vicinity of the single-family dwelling contains an existing garage. The addition of any other structure within this building envelope would likely encroach upon the Water Conservation setback requirement. The only other area on the lot where topography is not an issue is in an area closer towards Stevensville Road where an existing leach field and Class III Wetlands exist, thus eliminating this area as a feasible location for a workable building envelope.

Factor 3 (Section 5.5.C.2.c): The unnecessary hardship has not been created by the applicant or appellant.

Findings: The Board finds that the applicant is not creating the unnecessary hardship in regards to the proposed expanded entryway, as the unique physical circumstances substantially inhibit the applicant from constructing <u>any</u> new addition or structure on the property due to the narrowness of the lot, as well as the extreme topography that exists.

However, based on the site plan submitted by the applicant, the Board finds that the applicant is creating the unnecessary hardship in regards to the proposed expanded deck (to be located to the northwest of the single-family dwelling) by constructing the addition so that it exceeds the top of the bank boundary.

Factor 4 (Section 5.5.C.2.d): The variance, if authorized, will not substantially 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.

Findings: The Board finds that the variance for the expanded entryway will not alter the essential character of the neighborhood. The current entryway is located eight (8) feet from the property line. Upon completion, the expanded entryway will not encroach upon the setback any further than the current conditions. Furthermore, the Board did not receive any objections from the surrounding neighbors.

Factor 5 (Section 5.5.C.2.e): 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.

> ***Findings:*** The Board finds that the variance approved as part of this decision will represent and afford the least deviation from the Underhill Unified Land Use & Development Regulations possible.

ARTICLE VI, FLOOD HAZARD AREA REVIEW
There are no Flood Hazard Areas present on the lot, and therefore, review under Article VI is not required.

III. CONCLUSION

The Board thoroughly reviewed all aspects of the proposal under the evaluation criteria in the ULUDR, and it was satisfied in part and dissatisfied in part with the level of investigation, engineering, and evaluation conducted in the application submittal and review process concerning the abovementioned project.

Based on the evidence submitted and the above findings, the Board concludes that the proposed entryway expansion project will generally conform to the Underhill Unified Land Use & Development Regulations; however, the proposed deck expansion will not conform with the Underhill Unified Land Use & Development Regulations.

IV. WAIVERS, MODIFICATIONS & SUPPLEMENTATIONS

The Board grants the following waivers/modifications:

- The side lot line setbacks and the surface water setback requirements may be reduced for the proposed entryway only, and shall not encroach upon the setbacks any more than what was proposed and presented as part of this application.
- As explained in Section 5.1 – Applicability above, variance requests outside of the appeal procedures are to be held concurrently with site plan review or conditional use review. As a result, the approval of this variance would also be implicitly approving the application as a site plan or conditional use application. However, the Board finds that the applicant is not required to come before the Board for the construction of any out buildings or ancillary buildings which would typically be required for any projects obtaining site plan review approval; instead the application for a building permit for those ancillary-type buildings can be administratively reviewed and approved by the Zoning Administrator. In addition, the Board makes no specific findings regarding the review criteria under Sections 5.3 and 5.4, and therefore, applications pertaining to those review criteria may be administratively reviewed. However, the abovementioned structures must conform to the Regulations in effect at the time of the proposed projects. Accessory dwellings requiring the construction of an additional structure or the expansion of the proposed single-family dwelling will require additional review.

V. DECISIONS AND CONDITIONS OF APPROVAL

Based upon the findings above, and subject to the conditions below, the Development Review Board grants waiver/variance/conditional use approval in part and denies variance/conditional use approval in part for the submitted application as presented at the hearing with the conditions set out below.

Specifically, the Board approves the side yard setback variance and surface water setback waiver for the proposed entryway expansion only, and denies the surface water setback variance for the proposed deck expansion.

In regards to the proposed deck expansion, the Board finds that it did not have enough reliable information to grant the surface water setback variance, and therefore, as it was forced to depend on the evidence that was submitted as part of the application and could not obtain any additional information. Specifically, since the proposed deck expansion was not brought to the Board's attention until after the hearing, and after the evidentiary portion of the hearing was closed, the Board could not obtain the information it needed to ascertain if the "top of bank" as illustrated on the site plan was intended to mean "top of the bank" as described under Section 3.19.D.1. The Board found that it is not in a position to speculate if the meaning of "top of bank" had a different meaning than what is provided in Section 3.19.D.1. Therefore, without evidence to the contrary, the Board finds the "top of bank" reference on the site plan has the same meaning as the term under Section 3.19.D.1, and denies the construction of the deck expansion without prejudice.

If the applicant can present evidence that demonstrates that the proposed deck expansion will not be within the surface water setbacks (100 feet from Settlement Brook, as measured horizontally from the top of the bank, or 50 feet if measure from top of slope), then the Board encourages the applicant to submit another variance request application for the proposed deck expansion.

Conditions:

1. Unless explicitly stated otherwise in this decision, the conditions from the Board's DRB-17-11 decision remain in place.
2. The Board makes no finding regarding the rooflines of the proposed additions, as the height of the structure shall not exceed 35 feet as permitted by the ULUDR; however, the footprint of the house shall not exceed the limitations as proposed and presented as part of this application.
3. The applicant shall secure all required permits or approvals from the applicable Vermont state agencies. These permits shall be submitted to the Zoning Administrator prior to obtaining a certificate of occupancy as required under Section 10.4.A.2 of the ULUDR.
4. The project shall conform to the submitted application materials and hearing testimony presented by the applicant. Any change to the plans or the proposed use of the property, unless otherwise noted in this decision, shall be brought to the Zoning Administrator's attention prior to its enactment to determine if the above conditions need to be amended.

Dated at Underhill, Vermont this 7 of November 2017.

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Penny Miller, Development Review Board Acting Chair

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 December 7, 2017.