



# Town of Underhill

## Development Review Board

### Findings and Decision

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**APPLICATION OF JON HOWARD FOR A CONDITIONAL USE REVIEW - WAIVER/VARIANCE REQUEST TO  
CONSTRUCT A DECK WITHIN THE PROPERTY'S SETBACK REQUIREMENTS**

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

Docket No. DRB-18-10

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

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

This proceeding concerns a conditional use review application for a waiver/variance request that would allow the applicant, Jon Howard, to construct/enlarge a deck within the property's setback requirements, specifically the side setback requirements. 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 April 8, 2018, Jon Howard (the applicant), filed an application for conditional use review 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 site visit was scheduled to commence at the property's location (219 Stevensville Road) at 6:00 PM on June 4, 2018, and the hearing was scheduled for 6:35 PM on June 4, 2018 at Underhill Town Hall, 12 Pleasant Valley Road, Underhill, VT.
- B. On May 16, 2018, notice of the conditional use review – waiver/variance request hearing was mailed via Certified Mail to the following property owners adjoining the property subject to the application:
  1. ML020 – Northern Shire L3C, 663 Guyette Road, Plainfield, VT 05667
  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 May 13, 2018, notice of the public hearing for the proposed conditional use review – waiver/variance request hearing 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 May 19, 2018, notice of public hearing was published in the *Burlington Free Press*.
- E. The site visit at the property's location (219 Stevensville Road, Underhill, Vermont) commenced at 6:00 PM on Monday, June 4, 2018.
- 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, Matt Chapek
  3. Board Member, Daniel Lee
  4. Board Member, Stacey Turkos

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

5. Planning Director & Zoning Administrator, Andrew Strniste
  6. Applicant, Jon Howard (219 Stevensville Road, Underhill, VT 05489)
- G. The conditional use review – waiver/variance request hearing commenced at 6:35 PM on June 4, 2018 at the Town of Underhill Town Hall, 12 Pleasant Valley Road, Underhill Vermont.
- H. Present at the conditional use review – waiver/variance request hearing were the following members of the Development Review Board:
1. Board Member, Charles Van Winkle, Chairperson
  2. Board Member, Matt Chapek
  3. Board Member, Daniel Lee
  4. Board Member, Karen McKnight
  5. 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
- I. At the outset of the hearing, Chair 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. Jon Howard

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

- J. In support of the conditional use review – waiver/variance request application, the following exhibits were submitted to the Development Review Board:
- Exhibit A - DRB-17-11 Waiver & Variance Request Staff Report

Exhibit B - DRB-17-15 Waiver & Variance Request Staff Report  
Exhibit C - ST219 Howard Variance Request Procedures  
Exhibit D - Variance Hearing Request Form  
Exhibit E - Correspondence from Brad Holden  
Exhibit F - Certificate of Service  
Exhibit G - Notice to Burlington Free Press  
Exhibit H - Letter of Support from Elaine Herman  
Exhibit I – ULUDR Section 3.18  
Exhibit J – Photographs of Slope  
Exhibit K – Site Plan Prepared by Brad Holden  
Exhibit L - Waiver & Variance Limitations

No additional exhibits were submitted prior to the hearing, nor were any exhibits submitted into the record during the hearing.

All exhibits are available for public review in the ST219 Waiver/Variance Request file (DRB-18-10) at the Underhill Zoning & Planning office.

## **II. FINDINGS**

The Minutes of the June 4, 2018 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 thru March 6, 2018:

### ***FACTUAL FINDINGS***

The applicant, Jon Howard, record owner of the property located at 219 Stevensville Road (ST219) in Underhill, Vermont, is seeking conditional use review – waiver/variance request approval under Section 5.5.C from the Development Review Board to construct/enlarge a deck immediately to the north of the single-family dwelling (located on the southeastern part of the dwelling).

The property is located in the Water Conservation District as defined in Article II, Table 2.5 and in the Soil & Water Conservation District as defined of Article II, Table 2.7 of the Underhill Unified Land Use & Development Regulations.

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

#### ***ARTICLE II – ZONING DISTRICTS***

##### **A. ARTICLE II, TABLE 2.5 – WATER CONSERVATION DISTRICT**

The Board finds that the existing lot does not meet the following requirements of the Water Conservation District: minimum lot size, minimum frontage, and one of the side setback requirements. The proposed deck enlargement will not be built within the Water Conservation District; however, the Board notes that an 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 2.7 – 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 and proposed deck enlargement fails to conform to the following minimum dimensional requirements: minimum lot size, minimum frontage, and both side setback requirements. The existing single-family dwelling 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 applicant has not obtained a preliminary access permit at direction of Planning & Zoning Staff. The Board notes that per Section 6.5.B.10 of the Underhill Road Ordinance, all Development Review Board proceedings require a preliminary access permit; however, under Section 5.2.B.2, the Board waives this application requirement since the landowner is not proposing any driveway related improvements, nor is the applicant increasing the number of dwellings or residences, which typically require driveway modifications.

**SECTION 3.7 – LOT, YARD & SETBACK REQUIREMENTS**

The Board finds that the existing lot is nonconforming, 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 (the single-family dwelling) 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 single-family dwelling is approximately 200 ft. from the brook. During the last hearing (DRB-17-15) the Board was unable to grant approval of the deck enlargement proposal because the submitted site plan (Exhibit K of the DRB-17-15 application), depicted the dwelling being located 13 feet from the top of the bank, while the proposed deck enlargement project would be located up to, and on, the “top of bank” delineation boundary. The Board found that per Section 3.19.D.1, all structures shall be located 100 feet, as measured horizontally from the top of the bank, from, in this case, Stevensville Brook. However, as discussed below, as part of this application, enough evidence was submitted advising that the “top of bank” depicted on the submitted site plan (Exhibit K of the DRB-17-15 application) is not in reference to Stevensville Brook, but rather in reference to the septic system siting plans. Also note that 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* (Adopted March 1, 2011; Amended thru March 6, 2018), and therefore, per Section 3.8.A, the lot may be developed for the purposes allowed in the district in which it is located even though it does not conform to the minimum lot size requirements.

C. **SECTION 3.9 – NONCONFORMING STRUCTURES**

The Board finds that the existing single-family dwelling 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 is single-family dwelling, and is therefore exempt under Section 3.17.B. 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 any of these areas.

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, since no floodplains are present on the lot, all structures shall be 100 feet, as measured horizontally from the “top of the bank” – in this case Stevensville Brook. During the applicant’s previous hearing (DRB-17-15), the Board was unable to confirm that the depicted “top

of bank” on the submitted site plan (Exhibit G of the DRB-17-15 application) pertained to Stevensville Brook, or if the depicted “top of bank” was in respect to another feature, such as the wastewater system. The applicant submitted sufficient evidence as part of this application informing that the “top of bank” as it relates to Stevensville Brook is not in the vicinity of the proposed project, nor will the proposed project be in the 100-foot buffer as outlined above. In addition, the Board finds that the “top of bank” depicted on the site plan submitted as part of the DRB-17-15 application is in relation to the septic system.

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

**L. SECTION 3.23 – WATER SUPPLY & WASTEWATER SYSTEMS**

The Board finds that the findings of the Board’s previous decisions as it relates to this section (DRB-17-11 and DRB-17-15) remain in effect.

**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 the deck enlargement, a variance is required for the encroachment into the side setback.

Section 5.5.B – Dimensional Waivers: The Board finds that analysis for a dimensional waiver is not required since the proposed deck enlargement necessitates a variance, which entails a higher level of scrutiny/review.

Section 5.5.C – Variances: The Board finds that the applicant has satisfied all of the factors of the variance criteria for the proposed deck expansion (see Section 5.5.C.2 below).

Section 5.5.C.1 (Untitled): The Board finds that the applicant has provided the necessary information to make a determination on the proposed deck expansion.

Section 5.5.C.2 (Untitled): The Board finds that the applicant has satisfied the following factors to obtain a variance for the proposed deck expansion, 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 proposed deck expansion. 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 District's 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 deck expansion, as the unique physical circumstances substantially inhibit the applicant from constructing any new addition or structure on the property due to the narrowness of the lot, as well as the extreme topography that exists.

**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 proposed deck expansion will not alter the essential character of the neighborhood. The current

entryway is located eight (8) feet from the property line. Upon completion, the deck expansion 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 and analysis 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 project will generally conform to the *Underhill Unified Land Use & Development Regulations*.

### **IV. WAIVERS, MODIFICATIONS & SUPPLEMENTATIONS**

The Board grants the following waivers/modifications:

- The side lot line setbacks requirements may be reduced for the proposed deck expansion, 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**

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 2018 *Underhill Land Use & Development Regulations*, and concludes that based on the evidence submitted and the above findings, the proposed subdivision and development generally conforms to the aforementioned Regulations.

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

Conditions:

1. Unless explicitly stated otherwise in this decision, the conditions from the Board's DRB-17-11 & DRB-17-15 decisions remain in effect.
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.
5. Delegation of authority. The Board hereby delegates authority to the Zoning Administrator (ZA) regarding fulfillment of the proposed project. The ZA is empowered to act on behalf of the Board regarding any changes in the approval, or proposed design. These changes are not limited in scope, but are left to the discretion of the ZA on when to defer decisions in this matter to the Board. The delegation of authority will cease upon issuance of an occupancy permit.

Dated at Underhill, Vermont this 19<sup>th</sup> of July 2018.

*Charles Van Winkle*

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Charles Van Winkle, Development Review Board 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 19 August 2018.