



Town of Underhill

Development Review Board

Reconsideration Request Findings and Decision

RECONSIDERATION REQUEST BY PETER DUVAL PERTAINING TO THE DENIAL DECISION TO CONVERT A SINGLE-FAMILY DWELLING WITH AN ATTACHED ACCESSORY DWELLING TO A FOUR UNIT, MULTI-FAMILY DWELLING

In re: Peter Duval
25 Pine Ridge Road
Underhill, VT 05489

Docket No. DRB-17-16

Decision: Denied (see Section III for More Details)

I. INTRODUCTION AND PROCEDURAL HISTORY

This proceeding concerns the reconsideration request motions of the denied conditional use application pertaining to the conversion of a single-family dwelling with an attached accessory dwelling at 25 Pine Ridge Road in Underhill, Vermont to a four unit, multi-family dwelling. The property is owned by Peter K. & Ellen M. Duval.

- A. On June 29, 2018, the Underhill Development Review Board disseminated its decision pertaining to the aforementioned conditional use review application (DRB-17-16) submitted by the applicant, Peter Duval. The Development Review Board denied the application for various reasons enumerated within that decision (see Development Review Board decision: DRB-17-16).
- B. That same day, June 29, 2018, Planning & Zoning Administrator, Andrew Strniste, sent via United States certified mail, return receipt requested, the decision to the applicant advising him of his right to appeal the decision to the Vermont Environmental Court. The Planning & Zoning Administrator also advised him of his right to submit a request for reconsideration under *Underhill Unified Land Use & Developments*, Section 10.5.C, provided new evidence is submitted.
- C. On July 27, 2018, the applicant emailed two motions for reconsideration (see Attachments A & B) to the Planning & Zoning Administrator advising the following: 1) the motions are identical except that one is in regards to the existing record, 2) the second motion opens up the record for new submissions, and 3) the Board should grant one of them. See email correspondence memorialized in Attachment C.
- D. On August 1, 2018, notice that the Board would be discussing the Requests for Reconsideration at the next regularly scheduled Development Review Board meeting (August 6, 2018) was sent to the applicant and interested parties to the original hearing:
- E. On August 6, 2018, the appellant provided an updated landscaping plane and 67 photographs of the site.

F. The board received an e-mail correspondence regarding the hearing dated 6 August 2018, from:

Cathy McNamara
John M & Nancy Hall

The following recipients received notice via United States first class mail:

1. PR002 – Thomas M. Costello & Chantal D. O'Connor, 2 Pine Ridge Road, Underhill, VT 05489
2. PR007 – John & Catherine McNamara, 7 Pine Ridge Road, Underhill, VT 05489
3. PR015 – John Koier, 15 Pine Ridge Road, Underhill, VT 05489
4. PR016 – Geoffrey & Heidi Duke, 16 Pine Ridge Road, Underhill, VT 05489
5. PR016 – Jamie Duke, 16 Pine Ridge Road, Underhill, VT 05489
6. PR026 – Marilyn O. Hardacre, 26 Pine Ridge Road, Underhill, VT 05489
7. PR027 – David A. Demuynck & Cathy A. Leathersich, 27 Pine Ridge Road, Underhill, VT 05489
8. PR028 – Leslie A. Dee, 28 Pine Ridge Road, Underhill, VT 05489
9. PR031 – Nancy L. Hall, 31 Pine Ridge Road, Underhill, VT 05489
10. PR034 – Dianne Terry, 34 Pine Ridge Road, Underhill, VT 05489
11. PR034 – Steven R. Coddling, 34 Pine Ridge Road, Underhill, VT 05489
12. PR037 – Thomas A. & Susan T. May, P.O. Box 138, Underhill Center, VT 05490
13. Roy C. Towlen, P.O. Box 255, Underhill Center, VT 05490

The following recipient received notice via United States certified mail, return receipt requested:

14. Applicant: PR025 – Peter Duval, 25 Pine Ridge Road, Underhill, VT 05489

In addition, an email providing notice about the Request for Reconsideration discussion was sent to the following recipients:

15. PR002 – Chantal O'Connor: Chantal.OConnor@gmail.com
16. PR002 – Tom Castello: Second2nonecaptc@gmail.com
17. PR007 – John McNamara: cmcnamara_80@comcast.net
18. PR015 – Barbara & John Koier: jbkoier@gmail.com
19. PR016 – Geoff Duke: geoffrey.duke@gmail.com
20. PR016 – Heidi Duke: heidi.j.duke@gmail.com
21. PR016 – Jamie Duke: jdukevt@gmail.com
22. PR026 – John & Marilyn Hardacre: hardacrevt@gmail.com
23. PR027 – Cathy Leathersich: vt.cathode@gmail.com
24. PR027 – David Demuynck: pineridgenewt@gmail.com
25. PR028 – Leslie Dee: LADONAWHIM@gmail.com
26. PR028 – Thad Gembczynski: tgembczynski@gmail.com
27. PR031 – Nancy Hall: hallsvt@gmail.com
28. PR034 – Dianne Terry: dianneterry1029@gmail.com
29. PR034 – Steve Coddling: dbl09lung@gmail.com
30. PR037 – Susan May: mayscafe@comcast.net
31. PR038 – Roy Towlen: rtowlen@comcast.net
32. PV029 – Greg Leech & Amy Golodetz: grammaru@gmail.com
33. [Applicant] PR025 – Peter Duval: pkduval@gmail.com

- G. During the week of July 29, 2018, an updated agenda providing notice of the Requests for Reconsideration was posted at the following locations:
1. The Underhill Town Clerk's office;
 2. The Underhill Center Post Office; and
 3. Jacobs & Son Market.
- H. On Monday, August 6, 2018, the Board received comments pertaining to the reconsideration request motions during the other business part of their regularly scheduled meeting.
- I. Present at the regularly scheduled meeting were the following members of the Development Review Board:
1. Board Member, Charles Van Winkle, Chairperson
 2. Board Member, Matt Chapek
 3. Board Member, Mark Green
 4. Board Member, Daniel Lee
 5. Board Member, Karen McKnight
 6. Board Member, Penny Miller
 7. Board Member, Stacey Turkos

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

Others present at the hearing were:

1. John Koier, Abutting Neighbor (15 Pine Ridge Road, Underhill, VT)
 2. Barbara Koier, Abutting Neighbor (15 Pine Ridge Road, Underhill, VT)
 3. Marilyn Hardacre, Abutting Neighbor (26 Pine Ridge Road, Underhill, VT)
 4. John Hardacre, Abutting Neighbor (26 Pine Ridge Road, Underhill, VT)
 5. Heidi Duke, Pine Ridge Resident (16 Pine Ridge Road, Underhill, VT)
 6. Jamie Duke, Pine Ridge Resident (16 Pine Ridge Road, Underhill, VT)
 7. Geoff Duke, Pine Ridge Resident (16 Pine Ridge Road, Underhill, VT)
 8. Dianne Terry, Pine Ridge Resident (34 Pine Ridge Road, Underhill, VT)
 9. Steve Codding, Pine Ridge Resident (34 Pine Ridge Road, Underhill, VT)
 10. Peter Duval, Applicant (25 Pine Ridge Road, Underhill, VT)
- J. Those who provided comments during the Duval Reconsideration Request discussion were:
1. Peter Duval
 2. Geoff Duke
 3. Leslie Dee
 4. John Koier
 5. Marilyn Hardacre
 6. John Hardacre
 7. Dianne Terry
 8. Jamie Duke
 9. Steve Codding
 10. Heidi Duke

K. In support of the Board's decision, the following items have been referenced as attachments in this decision:

Attachment A – Motion for Reconsideration on the Record

Attachment B – Motion for Reconsideration Upon New Submissions

Attachment C – Email Correspondence From Mr. Duval Regarding Motions for Reconsideration

II. **FACTUAL FINDINGS**

In reviewing the motions for reconsideration, based on the information detailed in those documents, the Development Review Board makes the following findings under the requirements of the 2011 *Underhill Unified Land Use & Development Regulations* (ULUDR) as amended thru March 4, 2014:

A. The Review of Both Requests for Reconsideration

As stated above, the applicant has submitted two motions to the Board requesting reconsideration of his denied application. One of the motions requests reconsideration of the existing record, while the other motion requests that the record be open for future submissions (see Attachments A & B).

Section 10.5.C of the applicable 2011 *Unified Land Use & Development Regulations*, amended through March 4, 2014 states the following in regards to requests for reconsideration:

Reconsiderations. A request for reconsideration of a DRB decision may be submitted to the DRB by an interested party within 30 days of the date of the decision. The request must include new information that the DRB had not previously considered. In accordance with the Act [4470], the DRB may reject the request for reconsideration without hearing and render a decision, including findings of fact, within 10 days of the filing of the application if the DRB determines that the issues raised on appeal have been decided in an earlier appeal, or involve substantially or materially the same facts by or on behalf of the appellant.

In reviewing the two requests, the Board finds that its analysis is limited to the review of new information that was not previously considered. Therefore, the Board finds that it does not have the authority to open the record unless the applicant provides the Board with new information that was not previously considered. In reviewing the motions, the Board finds that the applicant has not satisfied this threshold.

The Board finds that the applicant's motions are more close to identical and are more argumentative rather than providing substantive information needed to grant the request for reconsideration. By his own admission, the applicant has advised that he would submit additional information as it becomes available (see Attachment B, Page 1). The Board finds that they constrained to the language provided in Section 10.5.C, which explicitly requires the request for reconsideration to "include new information that the DRB had not previously considered." Therefore, the Board denies both of the requests for reconsideration.

The Board notes that the applicant has specifically informed that the anticipated obtainment of the Wastewater System & Potable Water Supply *Permit* would be in November of 2018. As discussed below, the obtainment of a Wastewater System & Potable Water Supply Permit was never a requirement of the Board's, but rather the Board requested a wastewater system design.

(The remainder of this decision will be organized and formatted in a similar manner as the applicant's requests for reconsideration motion for simplicity. Therefore, going forward, the headings will be the same as the applicant's.)

B. Procedural History

1. Filing Time

The Board finds that applicant's dissatisfaction with how the application was handled is unrelated to the Requests for Reconsideration submission requirements under Section 10.5.C, as the Board determined that the application was accepted under the Regulations more favorable to the applicant (see directly below). The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board notes that the applicant only became dissatisfied with the date of filing once the issue of 24 V.S.A. § 4449(d) became an issue, which the Board was statutorily required to address. While the issue of whether the *2014 Underhill Unified Land Use & Development Regulations* or the *2018 Underhill Unified Land Use & Development Regulations* applied was a concern of the applicant's, the Board finds this contention to be a moot point, as the Board applied the Regulations more favorably to the applicant in the interest of fairness. In addition, the Board notes that the filing of the application was not at issue, but rather, the date when the application was considered complete, which is a requirement under Section 5.2.A.1.

2. Request for Time

The Board finds that the applicant's dissatisfaction with the denial of his requests for more time unrelated to the Requests for Reconsideration. The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board also finds that the applicant's requests for more time were brought to the Board's attention during public comment periods of regularly scheduled Board meetings where his application was not scheduled as an agenda item on Monday, April 9, 2018 and on Monday, April 16, 2018. As stated under Section 5.2.B.3, "the Board may recess and continue [a] hearing to a date and time specified . . ." The Board notes that they are selected a date and time specified during the Monday, February 5, 2018 hearing for Monday, May 7, 2018. The subsequent requests for more time came during a time where other interested parties to the application were not present including the DRB chairman, and therefore, would not have been aware of any potential sudden change in scheduling. In addition, at both the Monday, April 9, 2018 and Monday, April 16, 2018 Board meetings, only four (4) full-time members of the Board were present. Consequently, the Board was unable to ascertain a different "date and time specified" that would be conducive to each Board member's respective schedule.

The board reaffirms its decision concluding that the applicant used the development review process for his design development and provided him with numerous opportunities for more time.

3. Motion to Stay Proceedings

The Board finds that the lack of action on his proposed stay of the proceedings due to 24 V.S.A. 444(d) is unrelated to the Requests for Reconsideration submission requirements under Section 10.5.C. The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board notes that the consideration of the motion to stay the proceeding was unnecessary since the Board found that the 2014 *Unified Land Use & Development Regulations* applied, which was more favorable to the applicant.

4. Refusal to Take Oral Testimony

The Board finds that the applicant's dissatisfaction with the hearing procedures is unrelated to the Requests for Reconsideration submission requirements under Section 10.5.C. The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board notes that Chair Van Winkle offered the applicant and his representative(s) the opportunity to present more testimony during the continued hearing on Monday, May 7, 2018. In accordance with the Board's Rules of Procedures, Sections VII, I-O, the Board asked the applicant if he had any additional testimony/evidence to present at the Monday, May 7, 2018 hearing. The applicant refused to not present Mr. McCain as a witness to provide testimony at that time. Therefore, the Chair of the Board invited more questions from interested persons and members of the public in accordance with the Board's Rules of Procedures, Section VII.N. Upon redirect, the applicant then wanted to present Mr. McCain as a witness to provide more testimony after gathering questions from interested persons and members of the public, thereby out of order with the Rules of Procedure. The Board notes that Section VII.O provides the applicant and/or his or her representative to provide final comments or questions, not to provide other testimony. In addition, the Board allowed for the submission of additional, written testimony to be submitted into the record until Monday, May 21, 2018. If the applicant wished for additional testimony from Mr. McCain to be submitted into the record, he had the opportunity to do so by having Mr. McCain submit written testimony.

C. Jurisdiction

1. Planning Authority

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board recognizes that the Planning Commission is the body that drafts and promulgates regulations; however, the Board finds that when there are ambiguities in the *Underhill Unified Land Use & Developments Regulations*, it has the authority to read, interpret, and apply the Regulations and Town Plan as it applies to each individual application to their best of its ability. As outlined under Section 5.4.B.2 of the Board's decision (DRB-17-16, Page 17), the Board reminds the applicant that the *Underhill Unified Land Use & Development Regulation* defines the term "Character of the Area" as:

For purposes of these regulations, the “character of the area” or character of a neighborhood is the planned type, density and pattern of development for a particular area or neighborhood, as defined by zoning district purpose statements and clearly-stated goals, policies and objects of the Underhill Town Plan that are specific to the area and/or the physical circumstances of development. *[Emphasis Added]*

The Board finds that the definition gives some clarity in helping the Board define a “character of the area” as it relates to the project’s location. In this case, the Board finds that the definition of “Character of the Area” gives it (the board) authority to relate the project location to the physical circumstances of the development.

Nevertheless, as stated in the Board’s decision (DRB-17-16, Pages 16 & 17), should the Board define the “Character of the Area” as being the entire Water Conservation District, then when reviewing the project in relation to the purpose statement, as suggested by the applicant, the requisite information needed to determine that the project would not be adverse to the “important gravel aquifer recharge area in Underhill Center” was not submitted – specifically a Wastewater System design.

2. Act 250

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

Additionally, the Board notes that on Page 18 of their decision (DRB-17-16), they specifically acknowledged that “the Act 250 Land Use Permit does not have any weight as part of the review.” The Board reaffirms their finding that the Act 250 Land Use Permit helps illustrate the intent of the original uses within the Pine Ridge Road and Evergreen Road Subdivisions.

3. Water/Wastewater and Potable Water Supply Permit

The Board finds that the applicant failed to provide new information pertaining to the water/wastewater design relative to the denied conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board acknowledges that it does not have the power in regulating water and wastewater; however, the Board notes that requesting a wastewater system and potable water supply design is within its authority, as provided under Section 5.2.B.2, which states:

The DRB may waive one or more required application materials if it determines that such information is unnecessary to make findings under applicable criteria of these regulations. The DRB also may request additional information, including independent technical analyses as provided for under Section 10.7, as needed to determine conformance with these regulations. An application will not be considered complete by the DRB until all necessary materials have been submitted. *[Emphasis Added]*

The Board finds that the design of the wastewater system was left to the discretion of the applicant, but notes that the Town has the authority to have ordinances and bylaws that “are not specifically

regulating potable water supplies and/or wastewater systems, but rather regulating development in general (ex: setbacks).” See § 1-501, Statewide Uniform Technical Standards of the 2007 Environmental Protection Rules pertaining to Wastewater System and Potable Water Supply Rules. As a result, due to the lack of a design, and the refusal to submit a design, the Board was unable to confirm that an updated wastewater system would satisfy the Water Conservation District’s purpose statement, various setback requirements, and the impact to steep slopes.

In response to the applicant’s reference to previous applications, the Board finds that they are distinguishable from his application. In the referenced decision, DRB-17-09 – Brewer Conditional Use Review Decision, the Board finds that the submitted, complete application contained a wastewater system and potable water supply design, and that the project location was in the Underhill Village Flats Center District. In the referenced decision, DRB-17-04 – Marias Subdivision Decision, the Board finds that the submitted, complete application contained a wastewater system and potable water supply design for the proposed subdivision, and that the project location was in the Rural Residential District. In addition, the Board finds that a wastewater system & potable water supply design is integral to determining conformance with the Town’s regulations – specifically the purpose statement of the Water Conservation District, whereas the zoning districts’ purpose statements pertaining to the other applications were not integral to determining conformance with the purpose statements.

Also to note, the applicant has advised that Mr. McCain is a professional engineer. The Board finds this to be a misrepresentation of the consultant’s true credentials, as Mr. McCain is a designer, licensed by the state of Vermont to design on site wastewater disposal systems. In regards to the applicant’s assertion about Mr. McCain’s testimony, please refer to Section C.3 above of the applicable zoning district.

4. Villeneuve Subdivision

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

D. Character of the Area

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board notes that while “minimizing impervious surface area, maintaining wooded landscape, constructing infiltration features, and switching from petroleum to solar and electric energy systems” are factors in protecting the “important gravel aquifer recharge area in Underhill Center,” the Board finds that the wastewater system is an integral aspect of the project, which could potentially have a direct effect on the “important gravel aquifer recharge area in Underhill Center” if not designed and sited properly. Therefore, the Board maintains its wastewater system related findings provided in its decision: DRB-17-16.

The Board disagrees with the applicant’s interpretation that the Regulations refer to the 2010 Town Plan. In reviewing the 2014 *Underhill Unified Land Use & Development Regulations*, the term “Conformance with the Plan” is defined as:

A subdivision or development that conforms to or implements specifically stated goals and policies of the Underhill Town Plan *currently in effect; . . . [Emphasis Added]*

In addition, there are various parts of the Regulations that state in some iteration ‘Town Plan, as most recently amended,’ suggesting that references to the Town Plan are to the Town Plan most recently adopted, which would be 2015 Town Plan. In addition, the Board refers to its analysis under Section C.1 above pertaining to “Character of the Area” as defined under Article XI of the 2014 *Underhill Unified Land Use & Development Regulations*.

E. Fair Housing

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

In addition, as advised in Section 3.4 of the Board’s Decision (DRB-17-16, Page 10), the Board has approved two multi-family dwelling projects, thereby repudiating the applicant’s argument that multi-family housing would never be allowed in the Town of Underhill. The Board also finds that the Town Plan reinforces the policy that multi-family dwelling projects should be focused towards the village centers in several places as discussed in the Board’s decision (DRB-17-16, Page 11).

F. Housing

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

In addition, the Board notes that the applicant is referencing the 2010 Town Plan, which is no longer in effect, as discussed under Section D above.

G. Parking

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of the Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board notes that the conditional use application was denied for various reasons – the lack of adhering to the parking standards being one. The applicant contests that the requested 8 spaces match the parking capacity proposed with the original site plan; however, when reviewing Exhibits O & P (the original site plans submitted into the record for the December 4, 2017 hearing), the applicant did not identify any parking spaces, as specifically requested by Staff in an email on November 8, 2017 (memorialized in Exhibit GG, Page 2) and initially questioned by the Board during the December 4, 2017 hearing.

Moreover, the Board finds that they have the authority to request more parking under Section 5.4.D, which states:

The DRB also may consider the following standards and impose conditions as necessary to reduce or mitigate any identified adverse impacts of a proposed development:

Furthermore, suggesting that the Board does not have the authority to increase the desired minimum parking capacity is inconsistent with the applicant informing and suggesting the Board to implement conditions throughout the process.

Lastly, the Board found the review of the parking layout integral to the project location's site circulation and vehicular site patterns, and therefore, implementing the condition the applicant suggests would prevent the Board from viewing a site plan of the project addressing their concerns. In response to the applicant's reference to the Brewer decision, the applicants involved with the Brewer application had a formal, engineered plan. The condition imposed pertained to an agreement between the applicants and a nearby neighbor, and what would occur should that agreement lapse. The Board finds that the applicant's (Mr. Duval) situation at issue here distinguishable.

H. Table of Contents

The Board finds that the applicant failed to provide new information related to the conditional use application, as the information provided in this section of Requests for Reconsideration did not present any substantial change from what was considered and determined by the Development Review Board.

The Board advises that they reviewed the referenced Exhibit during the drafting of their decision.

I. Information presented at the Public Meeting

Screening - The board finds the applicant failed to provide new information that was substantially or materially different regard the screening of the building.

Bank Setback - Regarding the discussion of the hearing setback. The Board finds that the applicant's motions are more argumentative rather than providing substantive information needed to grant the request for reconsideration.

III. DECISION AND RATIONALE OF DENIAL

As explained above, and by the applicant's own admission, the Board finds that the applicant has not submitted any new information related to the conditional use application illustrating that a substantial change of conditions has occurred. The information provided in the request for reconsideration was more argumentative about why the Development Review Board's was wrong, why the Board should have approved the application, and the conditions that the Board should have imposed upon approval.

The applicant failed to submit new information showing a substantial change of circumstances addressing all of the concerns outlined in its decision: DRB-17-16.

Dated at Underhill, Vermont this 6th day of August, 2018.

Charles Van Winkle

Charles Van Winkle, Chairman, 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 5 September 2018.