



Town of Underhill

Development Review Board

Conditional Use Review Findings & Decision

CONDITIONAL USE REVIEW APPLICATION OF SCOTT AND AMELIA TOWER FOR AN AFTER-THE-FACT DIMENSIONAL WAIVER FOR THE CONSTRUCTION OF A DECK ADDITION, WHICH IS WITHIN THE PROPERTY'S SETBACKS

In re: Scott & Amelia Tower
73 River Road (RV073)
Underhill, VT 05489

Docket No. DRB-19-11

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

I. INTRODUCTION AND PROCEDURAL HISTORY

This proceeding concerns the conditional use review application of Scott and Amelia Tower pertaining to an after-the-fact dimensional waiver for a deck addition that is attached to the existing deck and single-family dwelling, which is within the property's setbacks. The property they own is located at 73 River Road (RV073) in Underhill, Vermont.

- A. On August 16, 2019, the Applicants, Scott and Amelia Tower, submitted a conditional use review application for the abovementioned project. The application was accepted and determined to be complete shortly thereafter. A site visit was scheduled for Monday, October 7, 2019 at 6:10 PM, and the hearing was scheduled for Monday, October 7, 2019 at 6:35 PM.
- B. On September 19, 2019, notice of the conditional use review hearing was mailed via Certified Mail to the following property owners adjoining the property subject to the application:
 1. MR012 – Kevin King & Shelby Gillespie, 12 Maple Ridge, Underhill, VT 05489
 2. MR014 – William P. Baldwin & Sally Libby, 14 Maple Ridge, Underhill, VT 05489
 3. MR044 – Peter A. & Marcella Giammanco, 44 Maple Ridge, Underhill, VT 05489
 4. RV058T – Steve G. & Wendy P. Guay, 58 River Road, Underhill, VT 05489
 5. RV079 – Paul R. & Karen G. Millette, P.O. Box 113, Underhill, VT 05489
 6. RV091 – Nate L. Sullivan & Winifred L. Sullivan, 91 River Road, Underhill, VT 05489
 7. Applicant: RV073 – Scott & Amelia Tower, 73 River Road, Underhill, VT 05489
- C. During the week of September 15, 2019, notice of the public hearing for the proposed conditional use review application was posted at the following locations:
 1. The Underhill Town Clerk's office;
 2. The Underhill Center Post Office; and
 3. Jacobs & Son Market.
- D. On September 21, 2019, notice of public hearing was published in the *Burlington Free Press*.

E. The scheduled site visit at the property's location (73 Pleasant Valley Road, Underhill, Vermont) commenced at 6:10 PM on October 7, 2019.

F. Present at the site visit were the following members of the Development Review Board:

1. Board Member, Stacey Turkos, Vice Chairperson
2. Board Member, Matt Chapek
3. Board Member, Mark Green
4. Board Member, Karen McKnight
5. Board Member, Penny Miller

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

6. Applicant: Scott Tower (73 River Road, Underhill, VT)
7. Applicant: Amelia Tower (73 River Road, Underhill, VT)

G. The conditional use review hearing commenced at 6:35 PM on Monday, October 7, 2019 at the Town of Underhill Town Hall, 12 Pleasant Valley Road, Underhill, VT.

H. Present at the conditional use review hearing were the following members of the Development Review Board:

1. Board Member, Stacey Turkos, Vice Chairperson
2. Board Member, Matt Chapek
3. Board Member, Mark Green
4. Board Member, Karen McKnight
5. Board Member, Penny Miller

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

Others present at the hearing were:

1. Applicant, Scott Tower (73 River Road, Underhill, VT)
2. Applicant, Amelia Tower (73 River Road, Underhill, VT)

I. At the outset of the hearing, Vice Chairperson Stacey Turkos explained the criteria under 24 V.S.A § 4465(b) for being considered an "interested party." Those who spoke at the hearing were:

1. Applicant, Scott Tower
2. Applicant, Amelia Tower

J. In support of the conditional use review application, the following exhibits were submitted to the Development Review Board:

1. Exhibit A – Tower Waiver Request Staff Report
2. Exhibit B – Tower (RV073) Conditional Use Review Hearing Procedures
3. Exhibit C - Development Review Application
4. Exhibit D - Responses to Development Review Application Questions
5. Exhibit E - Zoning Permit Application (B-19-31)
6. Exhibit F – BFP Notice

7. Exhibit G - Certificate of Service
8. [Exhibit H - Omitted]
9. Exhibit I - Zoning Board of Adjustment Decision
10. Exhibit J - Site Plan
11. Exhibit K - Site Plan with Waiver & Variance Limitations

No additional exhibits were distributed to the Board prior to the Monday, October 7, 2021 hearing, nor were any additional exhibits submitted into the record during the hearing.

All exhibits are available for public review in the Tower Conditional Use Review file (RV073/DRB-19-11) at the Underhill Zoning & Planning office.

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

The Minutes of the October 7, 2019 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 2011 *Underhill Unified Land Use and Development Regulations* (ULUDR) as amended through March 6, 2018:

PROJECT SYNOPSIS

The Applicants, Scott & Amelia Tower, record owner of the property located at 73 River Road (RV073) in Underhill, Vermont, are seeking conditional use approval for the already constructed a deck addition onto the existing deck and single-family dwelling, which is located within the abovementioned property's setback requirements. Since the Applicants have constructed a structure within the property's setback requirement, an after-the-fact dimensional waiver is required under Section 5.5.B. The property is located within the Rural Residential and Water Conservation zoning districts as defined under Article II, Tables 2.4 and 2.5 of the ULUDR.

ARTICLE II, ZONING DISTRICTS

A. ARTICLE II, TABLE 2.4 - RURAL RESIDENTIAL

The Board finds the completed project meets the applicable dimensional standards under this district with the approval of the after-the-fact dimensional waiver, as explained below. In addition, the deck addition is not contrary to the zoning district's stated purpose of accommodating medium density development on land accessing public roads.

B. ARTICLE II, TABLE 2.5 - WATER CONSERVATION

The Board finds that, although the completed project does not occur within the Water Conservation zoning district contained on the lot, the deck addition does not negatively impact the aquifer recharge area.

ARTICLE III, GENERAL REGULATIONS

A. SECTION 3.2 - ACCESS

The Board finds that the subject property has access to River Road, a Class II Town Highway. While the lot is nonconforming, no modifications to the existing access way were made or are being proposed, nor does the completed project require modifications to the existing access way. Therefore, the Board finds that an access permit is unnecessary and that review under subsection 3.2.D is unnecessary.

The Board notes that the existing driveway is ± 96 ft. from the west, side property line and ± 365 ft. from the rear, north property line, thereby satisfying the 12 ft. setback requirements for driveways.

B. SECTION 3.7 - LOT, YARD & SETBACK REQUIREMENTS

The Board finds that the completed deck addition connects to the existing deck and single-family dwelling, the one principal structure on the lot. The deck addition encroaches upon the west side property setback requirements by 20 ft. The Board notes that attached structures to the primary structure are considered an extension of the principal structure (see Article XI of the ULUDR), which is why the deck addition must satisfy the 50 ft. setback requirement instead of the 20 ft. setback requirement. As a result of this encroachment, an after-the-fact dimensional waiver is required. In accordance with Section 3.7.E.1, the Board finds that the requested waiver will allow for a limited addition to the existing deck of a previously-approved, nonconforming principal structure (see Exhibit I) on a nonconforming lot.

The Board notes the existing lot fails to meet the minimum acreage requirement of 5.00 acres. The lot is approximately 2.5 acres, and therefore, nonconforming. The setbacks as they relate to the completed deck addition will be:

- Front Property Line: ± 97 ft. (South)
- Side 1 Property Line: ± 30 ft. (West)
- Side 2 Property Line: ± 275 ft. (East)
- Rear Property Line: ± 349 ft. (North)

The setback requirements for the deck addition within the Rural Residential District are 30 ft. from the front property line and 50 ft. from the side and rear property lines since the deck addition is considered an extension of the principal structure.

Although the single-family dwelling fails to meet the dimensional requirements, since the Applicants have satisfied the requirements of Section 3.8, 3.9 and 5.5.B, as explained below, they are not prohibited from obtaining approval by this Board.

C. SECTION 3.8 - NONCONFORMING LOTS

The Board finds that the lot being reviewed as part of this application was legally in existence on the effective date of the *Underhill Unified Land Use & Development Regulations* (adopted on March 1, 2011 and amended through March 6, 2018). Therefore, the lot may be developed for the purposes allowed in the district(s) it is located even though the lot does not conform to the minimum lot size requirements.

D. SECTION 3.9 - NONCONFORMING STRUCTURES

The Board finds that the Applicants have constructed a structure that will increase the degree of nonconformance since a portion of the deck addition is in the property's setback requirement (see Exhibit K). Therefore, an after-the-fact dimensional waiver is required per Sections 3.9.B and 5.5.B. See Section 5.5.B below in regard to the waiver analysis.

The Board notes that the existing single-family dwelling is a permitted nonconforming structure that was approved as a variance by the Underhill Zoning Board of Adjustments on October 22, 2002 (see Exhibit I).

E. SECTION 3.11 - OUTDOOR LIGHTING

The Board finds that the Applicants are not proposing to install any additional outdoor lighting. Should the Applicants add any outdoor lighting relating to the project, it shall be downward facing and shielded.

F. SECTION 3.13 - PARKING, LOADING & SERVICE AREAS

The Board finds that the deck addition does not increase the number of parking spaces that are required for the existing use of the property per Table 3.1 – a single-family dwelling (two parking spaces).

G. SECTION 3.14 - PERFORMANCE STANDARDS

The Board finds that the Applicants did not submit the requisite information to make a determination about Section 3.14; however, the Board finds that the completed deck addition is consistent with other uses in the area. Therefore, the Board does not anticipate that the Applicants will cause, create, or result in any of the situations identified in this section.

H. SECTION 3.17 - SOURCE PROTECTION AREAS

The Board finds that the subject lot is in a source protection area; however, since the project is associated with the principal structure – a single-family dwelling – the project is exempt from review under Section 3.17.B.

I. SECTION 3.18 - STEEP SLOPES

The Board finds that there are areas of steep slopes (15-25%) and very steep slopes (>25%) on the subject lot; however, during the site visit, the deck addition was confirmed to be in an area that is under a 15% slope; therefore, review and analysis under this Section is not required.

J. SECTION 3.19 - SURFACE WATERS & WETLANDS

The Board finds that there are no surface waters or wetlands on the lot, and therefore, review and analysis under this Section is not required.

K. SECTION 3.23 - WATER SUPPLY & WASTEWATER SYSTEMS

The Board finds that a wastewater permit is likely not required for the construction of the proposed deck addition; however, the Applicants are responsible for ensuring with the Vermont Department of Conservation that one is not required. The Board notes that the existing water/wastewater systems appear to have been installed prior to 2007, the year the State of Vermont began reviewing water/wastewater systems.

ARTICLE V, DEVELOPMENT REVIEW

A. SECTION 5.1 - APPLICABILITY

The Board finds that conditional use review is required per Sections 3.7.E, 3.8.C, 3.9.B and 5.5.B. As required under Section 5.4.C of the *Unified Land Use & Development Regulations*, when considering conditional use review applications, the Board shall apply all of the site plan review standards under Section 5.3.

B. SECTION 5.3 - SITE PLAN REVIEW

Section 5.3.A – Purpose: The Board finds that site plan review is required as part of conditional use review per Section 5.4.C.

Section 5.3.B – Standards: The Board has considered this section's standards and issues the following comments and/or imposes the following safeguards, modifications, and conditions:

SECTION 5.3.B.1 - Existing Site Features: The Board finds that the Applicants submitted a satisfactory site plan depicting the completed project, and was able to ascertain enough information through the site plan and other sources, such as the ANR Website, that the deck addition does not impact the enumerated resources in this subsection. Other noted resources were not applicable to this application. As a result, the Board determined that the deck addition does not adversely affect those enumerated features, and therefore, no mitigation measures are required under Section 5.3.B.2.

Section 5.3.B.2 – Site Layout & Design: The Board finds that the completed deck addition is not contrary to the purpose and stated goals under Subsection B, Rural Residential and Water Conservation District, noting that the deck addition has no impact on the rural character of the area and traditional working landscape of the Rural Residential and Water Conservation Districts. Additionally, the completed deck addition is located in the rear of the single-family dwelling and is surrounded by hills & woodland, and therefore, not visible from the front, side, or rear yards, thus not altering the aesthetics of the lot.

Section 5.3.B.3 – Vehicle Access: The Board finds the subject lot is accessed by one curb-cut via River Road. The Applicants are not proposing to modify or relocate the existing curb-cut or driveway, and therefore, the Board IS NOT requiring any modification to the existing access way.

Section 5.3.B.4 – Parking, Loading & Service Areas: The Board finds that the completed deck addition does not increase the number of parking spaces that are required for the existing use of the property. See Section 3.13 for more information.

Section 5.3.B.5 – Site Circulation: The Board finds that the completed deck addition does not alter the site circulation, which is expected to remain consistent with site circulation patterns of a residential unit/lot.

Section 5.3.B.6 – Landscaping and Screening: The Board finds that the Applicants did not implement, nor are proposing, any landscaping or screening techniques; however, the site layout and design occurs in a residential area that provides for various techniques of landscaping and screening. Additionally, the completed deck addition is located at the rear of the principal structure – a single-family dwelling, and surrounded by hills and woodland towards the side and rear of the project area. Therefore, the subject development is not seen from River Road, nor is it seen from neighboring properties. As a result no additional screening and landscaping is mandated.

Section 5.3.B.7 – Outdoor Lighting: See Section 3.11 above for more information.

Section 5.3.B.8 – Stormwater Management and Erosion Control: The Board finds that the Applicants shall utilize the Vermont DEC Low Risk Site Handbook for Erosion Prevention and Sediment Control for any uncompleted work pertaining to the deck addition.

C. **SECTION 5.4 – CONDITIONAL USE REVIEW**

Section 5.4.A – Purpose: The Board finds that conditional use review is required per Sections 3.9.B and 5.5.B, which require conditional use approval for the construction of a structure within a property's setback requirements. Specifically, a dimensional waiver under Section 5.5.B is

required if the encroachment is less than 50% of the property's setback requirement. The Board finds that the conditions imposed herein address the identified potential impacts, as well as help reduce, avoid, or mitigate those impacts.

Section 5.4.B – General Standards: The Board finds that the conditions imposed herein will likely mitigate any potential undue adverse effects.

Section 5.4.B.1 – The Capacity of Existing or Planned Community Services or Facilities: The Board finds that the completed deck addition does not result in an increase in demand on community services and facilities.

Section 5.4.B.2 – The Character of the Area Affected: The Board finds that the completed deck addition does not affect the character of the area, as the area is largely, or mostly, single-family dwellings or agriculture. Furthermore, the Board makes the following findings relating to the location, scale, type, density and intensity of the use (deck addition) as it relates to other buildings and uses in the area:

- **Location:** the property is located in the Rural Residential and Water Conservation District, which largely contains medium density development, including single-family dwellings with decks and porches.
- **Scale:** the scale of the completed construction is consistent with the development that currently exists on the property and the surrounding properties.
- **Type:** the completed deck addition is attached to the existing deck and existing single-family dwelling. Decks are permitted uses within the Rural Residential and Water Conservation zoning districts.
- **Density:** the completed deck addition results in no change to the density of the area.
- **Intensity:** the completed deck addition negligibly changes the intensity of the area.

Section 5.4.B.3 – Traffic on Roads and Highways in the Vicinity: The Board finds that the completed deck addition does not result in an increase in traffic on roads and highways in the vicinity, nor does the project create any congestion, since the use is the same.

Section 5.4.B.4 – Bylaws in Effect: The Board finds that the Applicants have already constructed the subject deck addition, and were thereby noncompliant at the time of application. As a result, the approval of this permit will be considered after-the-fact, thereby bringing the completed construction into conformance with 2018 *Unified Land Use & Development Regulations*.

Section 5.4.B.5 – The Utilization of Renewable Energy Resources: The Board finds that the completed deck addition does not interfere with any sustainable use of renewable energy resources.

Section 5.4.C – Site Plan Review Standards: The Board finds that site plan review is required as a part of conditional use review. Analysis can be found under Section 5.3 above.

Section 5.4.D – Specific Standards: The Board finds that it may consider the Subsections 5.4.D.1 through 5.4.D.4 and impose conditions as necessary to reduce or mitigate any identified adverse impacts of a proposed development.

Section 5.4.D.1 – Conformance with the Town Plan: The Board finds that the deck addition is

not contrary to Town Plan.

Section 5.4.D.2 – Zoning District & Use Standards: The Board finds that the deck addition conforms with the zoning district and use standards, as outlined above, and is approved after-the-fact by this Board.

Section 5.4.D.3 – Performance Standards: The Board finds that the project complies with the performance standards set forth in Section 3.14 above.

Section 5.4.D.4 – Legal Documentation: The Board finds that this Section does not apply.

D. SECTION 5.5 - WAIVERS & VARIANCES

Section 5.5.A – Applications & Review Standards: The Board finds that it has the authority to waive application requirements and site plan or conditional use review standards under Sections 5.3 and 5.4 that it determines are not relevant to a particular application. The Applicants have specifically asked for a dimensional waiver, which is approved, as explained below.

Any other conditions that have been waived have been noted in this decision. The Board makes no finding on any provision that was not explicitly waived, and has not been explicitly addressed.

Section 5.5.B – Dimensional Waivers: The Board, in association with Conditional Use Review, finds that it can reduce the minimum district setback requirements so long as the following information is obtained and following requirements are met:

Section 5.5.B.1 – Untitled: The Applicants have constructed a deck addition within the property's setback requirement which is attached to the previously approved nonconforming dwelling. Due to the property's constraints (mainly the property's topography), the Applicants have presented an application illustrating the justification for a dimensional waiver.

Section 5.5.B.2 – Untitled: The Board finds that a waiver may be granted by the Board if one of the criteria enumerated under this Section is found to be true. The Board finds two of the criteria to be true: 1) the waiver is necessary to reasonably develop and use the pre-existing nonconforming lot, and 2) the waiver will allow for additions and/or improvements to a pre-existing nonconforming structure. The Applicants have constructed an addition onto the existing deck, a normally permitted action, if not for the pre-existing nonconformance of the current deck and house.

Section 5.5.B.3 – Untitled: The Board finds that it may reduce the setback by no more than 50%, or in this case 25 feet. The Applicants have presented an application illustrating that the constructed deck addition encroaches upon the setback by 20 ft. and they are not anticipating to exceed this threshold any further.

Section 5.5.B.4 – Untitled: The Board finds based on clear and convincing evidence that the Applicants have satisfied the elements enumerated in this subsection, all of which are required to be satisfied in order to grant a waiver:

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

The Board finds that the Applicants are constrained by the existing topography. Any required grading would be unreasonable, and therefore, the construction of the deck addition within the property's setback is justifiable.

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

The Board finds that the reduced setback is not contrary to the public health, safety and welfare; nor is it contrary to the stated objectives and policies of the *Underhill Town Plan*, or the intent of these regulations.

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

The Board finds that the approved waiver represents the minimum setback reduction necessary to allow for the proposed deck.

Section 5.5.B.4.d – Element 4: Any potential adverse impacts resulting from reduced setbacks on adjoining properties, surface waters or wetlands shall be mitigated through site design, landscaping and screening, or other accepted mitigation measures.

The Board finds that there are no adverse impacts resulting from the reduced setback on adjoining properties, surface waters or wetlands. No mitigation measures are required as part of this decision.

Section 5.5.C – Variances: The Board finds that this Subsection does not apply, and therefore, review and analysis under this Subsection is not required.

ARTICLE VI, FLOOD HAZARD AREA REVIEW

The Board finds that there are no Special Flood Hazard Areas, as illustrated on the requisite Flood Insurance Rate Maps, present on the lot, and therefore, review under Article VI is not required.

ARTICLE X, SPECIFIC USE STANDARDS

A. SECTION 10.3 – ZONING PERMITS

Section 10.3.D – Effective Dates and Permit Renewals:

SECTION 10.3.D.1 – ZONING PERMITS: The Board finds that the permit issued as part of this decision will remain in effect for one year from the date of issuance. The Applicants must substantially commence construction within one year or the permit will become null and void. "Substantially commence" entails "initial site preparation; the installation of an access; and the installation of a foundation, water and/or wastewater system on-site." (See Article XI for definition of "Substantially Commenced")

SECTION 10.3.D.2 – DRB APPROVALS: The Board finds that conditional use approvals expire with the expiration of the zoning permit, and may only be extended as provided under Section 10.3.D.1. Once the approved uses or structures are established, the conditional use approval will remain

in effect and run with the land. The Board finds that the Applicants shall establish the use within 12 months of the effective date of the issuance of the zoning permit – to be issued by the Zoning Administrator as a result of this approval.

III. FACTUAL FINDINGS & CONCLUSIONS RELATING TO THE UNDERHILL ROAD, DRIVEWAY & TRAIL ORDINANCE

The Board finds that the *Underhill Road, Driveway & Trail Ordinance* does not apply since no modifications to the existing driveway and existing curb cut are proposed. Since Board review is unnecessary, an access permit is not required as a part of this decision. In addition, whatever access permit is in place, that approval and any associated conditions of approval, are to remain in place.

IV. WAIVERS, MODIFICATIONS & SUPPLEMENTATIONS

The Board grants the following waivers/modifications:

- The Board approves the dimensional waiver, which therefore permits the Applicants to encroach upon the west (side) property setback requirement. The Applicants may only encroach upon the setback to the limits as portrayed on the submitted site plans (encroach into the setback by 20 ft.) and zoning permit application (see Exhibit K) and as presented during the hearing. Any deviation of this project that would result in further encroachment into the setback areas may require additional review by this Board.
- The Applicants, or subsequent landowner(s), are/is not required to come before the Board for the construction of any out buildings, ancillary buildings, or accessory buildings, which would typically be required for any projects obtaining site plan review approval. Instead, the application for a building permit for those accessory-type buildings can be administratively reviewed and approved. However, the abovementioned structures must conform to the Regulations in effect at the time of the proposed projects.

V. DECISIONS AND CONDITIONS OF APPROVAL

The Board is satisfied with the level of investigation, engineering and evaluation conducted in the application submittal and review process concerning the above-mentioned project. The Board thoroughly reviewed all aspects of the proposal under the evaluation of the *Underhill Land Use & Development Regulations* and concludes that based on the evidence submitted and the above findings, the deck addition generally conforms to the aforementioned Regulations. The Board notes however that the approval of this already constructed deck addition does not ensure approval for subsequent applicants seeking after-the-fact approval for completed projects.

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

1. The Board finds that any outdoor lighting that is added as part of this proposed project shall be downward facing and shielded.
2. The Board finds that the applicants should utilize the Vermont DEC Low Risk Site Handbook for Erosion Prevention and Sediment Control if any remaining work needs to be completed.

Dated at Underhill, Vermont this 25 day of November 2019.



Stacey Turkos, Vice Chairperson, 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 December 24, 2019.