

TOWN OF WILMINGTON
DEVELOPMENT REVIEW BOARD
FINDINGS OF FACT AND STATEMENT OF FINDINGS
WILMINGTON, VERMONT 05363

A request for a permit was made to the Board by: **Dan and Mary Borsari**

Owner/Applicant(s) Mailing Address: **33 Red Fox Drive, Feeding Hills, MA 01030**

Address of the subject property: **29 Smith Road, Wilmington, VT 05363**

Tax Map #**03-01-048.000**

A copy of the request is filed in the office of the Board and is referred to as:
Case #: 2014-075

Description of Case per Public Notice:

Application # 2014-075: Owners; Daniel R & Mary Ellen Borsari. Application is being made to construct a single family residence within the front and rear setbacks on a pre-existing, non-conforming small lot in the Residential zoning district; Section 512, F & Section 513: location: 29 Smith Road

Notice for a public hearing was published in the Valley News on: **August 21, 2014**

Notice was posted in three public places on: **August 22, 2014**

A copy of the notice was mailed to the applicant on: **August 22, 2014**

A copy of the notice was mailed to the abutters on: **August 22, 2014**

The public hearing was held on: **September 8, 2014, on October 6, 2014 and on October 20, 2014**

Action taken on this application may be appealed by anyone identified as an interested party, pursuant to Vermont Statutes Annotated. Said appeal shall be made to the Vermont Environment Court.

Appeal period for this Case expires on: _____

Approval expires on: _____

In *addition* to the Applicant / Agent the following persons were heard by the Board in connection with this request: (Copies were mailed to those persons listed below as having been heard.)

Craig Ohlson	Zoning Administrator	
Susie Haughwout	Interested Party	Participated in Hearing
Kevin & Debra Gray	Abutter	Participated in Hearing

I. The Board FINDS:

The following are the circumstances which give rise to the request, and the following are facts and opinions presented to the Board at the hearing and developed by the Board in independent evaluation.

EXHIBITS:

Application (4pages, not numbered)

1st Hearing:

- A Applicant Letter requesting a Variance (dated August 25, 2014)
- B Survey prepared by Tom Wagener (dated June 16, 2014) (dimensional Annotations by Craig Ohlson, ZA and applicant)
- C Applicant Floor Plan Sketches of 1st and 2nd floors (2 pages)
- D Applicant Photograph (north face, no snow)
- E Applicant Photograph (north face, snow)
- F Applicant Photograph (temporary approved structure)
- G Tax Map
- H Borsari / and then ZA, Alice Herrick Emails (dated October 25, 2013- November 7, 2013)
- I Interested Party Status Request for Susie Haughwout (Ten signatures)
- J Photos of new structure (3 pages) North, East and West Elevations

2nd Hearing Continuation from the 1st Hearing:

- K Incomplete Survey Sketch by Merrill Mundell, Jr. (not dated, but done between the two hearings)
- L Memorandum from Robert M. Fisher & Michael S. McGillion of Fisher & Fisher Law Offices P.C. Re: Zoning Permit Application – Problems. Dated October 6, 2014.

3rd Hearing Continuation from the 2nd Hearing:

- M Complete Survey signed by Merrill Mundell Jr., P.E. dated October 16, 2014
- N Highlighted Guidance Related to the Wastewater System and Potable Water Supply Rules. Effective September 29, 2007. Guidance Document 2007-03.
- O Highlighted “Purpose (b) The basic performance criteria for the design, construction and maintenance of wastewater systems are that...”

- P Highlighted “Permit Required 1-304 (a)(17) Exemptions
Q Highlighted Zoning Amendment Article V Section 513 Waiver Criteria 7a
R North Photo repeated from 1st hearing
S Heritage Home Inspection Report for Dan Bosari by Bob Jack (no date) with images of Previous Structure and details of the roof (3 pages)
1. Susie Haughwout presented the Board with a request for interested party status supported by the required 10 supporting Wilmington property owners’ signatures and addresses. Susie Haughwout disclosed that she had previous interaction with the applicants in her position as Town Clerk for the Town of Wilmington.
 2. The subject property is a pre-existing non-conforming lot and structure estimated to have been built in 1965, when there was no zoning. It was built prior to current zoning bylaws in the Residential District of the Town of Wilmington. The property is 0.2+/- acres with 95+/- feet of frontage (per Exhibit M) abutting the south side of Smith Road and the east side of private road Bunnell Lane. There is a 20-foot right-of-way that crosses the western side of the property for Bunnell Lane.
 3. There was a single-family house of approximately 725 square feet of interior space with a deck on the front located on the property (Exhibits M, D & E). The property is identified as Tax Map 003-01-048.000 with street address of 29 Smith Road.
 4. Applicant purchased the property on October 20, 2012. Emails between Dan Borsari and Alice Herrick (Exhibit H) indicate discussion on rebuilding in the Town right-of-way and the need for DRB review. The emails are dated October 25, 2013 to November 7, 2013. In addition, the applicant was asked to provide a site survey. The zoning administrator also informed the applicant “the Selectboard are the ones who have the authority to approve rebuilding in the Town ROW.” Susan Haughwout, Town Clerk, also testified that on more than one occasion she referred Dan Bosari to the Zoning Administrator for information on required reviews and permits.
 5. On or about November of 2013, the applicant built a temporary structure (Exhibit F) to replace a rotting portion of the existing structure. Testimony was given that the Zoning Administrator approved this temporary structure at that time since it was considered to be within the footprint of the original structure. The applicant had no physical evidence of this communication. The only evidence of communication between the applicant and the previous ZA was the recommendation by the ZA in an email (Exhibit H) dated November 7, 2013 that the applicant reach out to the Town Manager requesting the Selectboard review his case. The temporary structure has subsequently been removed. There was no evidence of further communication between the applicant and the Town.
 6. On or about July 2014, the applicant began construction of an approximately 2,100 square foot structure on the property without 1) a Town building permit 2) Selectboard approval to build in the ROW or 3) DRB approval. Application indicates the “as built” structure to be 1,421 square feet and applicant testimony at the hearing indicated the structure to be approximately 2,100 square feet. Applicant also testified he did not know the height of the structure. It was clarified that the new square footage of 1,421 plus the previous square footage of 725 equaled a total area of approximately 2,146 sf.

7. The 1st hearing was continued due to an inadequate survey and legal questions regarding the Right-of-Way, which the board determined they could not make any decision without further information. The board requested the applicant to provide an accurate survey by a Vermont Licensed engineer containing information on the original footprint of the building and the property lines. The board also requested permission from the town to seek legal counsel to answer the following questions:
 - a. If applicant can prove the original location in the ROW and the setback, does the applicant retain “grandfathering” rights even though the applicant removed the evidence of where the prior structure stood?
 - b. Is it lawful for the DRB to approve a permit on property (ROW) the applicant does not own?
 - c. Is the only recourse for the applicant a negotiated easement or boundary line adjustment?

The hearing was recessed to October 6, 2014.

8. At the 2nd hearing, the applicant provided a partial survey by a Vermont Licensed engineer, Merrill Mundell, and the Board determined that a complete professional survey would be required before the Board could issue any decisions. It was also clarified for the Board that the applicant did own the land to the center of the road, but it was all part of the Town’s ROW. The two surveys that were provided in both the first and second hearings were considered not to be accurate. The applicant was informed the complete survey was necessary 1) to accurately determine whether the new construction is within the setbacks and ROW, and 2) to determine if the new construction is within the pre-existing building’s footprint to allow the Board to make a decision. The previous footprint is “grandfathered” and therefore was essential to the case to determine the allowable building area and location within the setbacks. The Development Review Board expressed the opinion that neither the annotated survey nor the partial survey adequately displayed the location of the footings and pre existing encroachment of the original structure. The Board asked the applicant to provide a more detailed survey complete with a Vermont licensed professional engineering (P.E.) certification as to the location of the original footings and the A- frame roof drip line. The Hearing was continued to October 20, 2014.
9. The survey presented at the final hearing date of October 20th (Exhibit M), indicates as built construction with zero set back on the north property line and further construction of approximately 5 feet into the Town of Wilmington ROW. Applicant testified that they would be willing to remove a 30” x 30” triangle from the Northwest corner of the building that extends beyond the previous structure’s footprint to bring them into compliance with staying within the ‘grandfathered’ footprint. Mr. Bosari testified the roof was to remain as built, extending beyond the original footprint and into the Right-of-Way.
10. The survey also indicates as built construction with an approximate 5-foot encroachment into the southeast setback for which the applicant originally testified in his letter (Exhibit A) that he is requesting a variance.
11. The applicant is also requesting a waiver approval for an as built, cantilevered deck (14 feet by 5 feet) at a height of 15.5 feet. The deck extends approximately 3 feet beyond the encroachment of the pre-existing A-frame roof, which extended

beyond the original deck.

12. Since the pre-existing structure was intentionally demolished and has been gone for over a year, testimony was given by Merrill Mundell, that in his professional opinion the pre-existing structure as is drawn in his survey is accurate to the best of his knowledge within several inches based on scaled photographs, counting dimensional lumber, a detailed site analysis and his professional experience.
13. Applicant testified that the leach field is the original but that the septic holding tank was replaced approximately 3 years ago. Septic and leach field are located in the northeast corner of the property. Applicant further testified that the house prior to demolition had two bedrooms. Interested party applicant remembers the original house as being one bedroom plus loft. As built construction sketches (Exhibit C) indicates two (2) bedrooms (12feet x 12feet). Applicant said he has plans to install an additional composting toilet.
14. A memorandum by Bob Fisher and Michael McGillion of Fisher & Fisher Law Firm answered the following questions compiled by the board:
 - a. If applicant can prove the original location in the ROW and the setback, does the applicant retain “grandfathering” rights even though the applicant removed the evidence of where the prior structure stood?
Answer: The DRB cannot approve a permit that would increase the non-conformity of a structure on a lot, especially when such a non-conformity was created by the applicant failing to timely apply for, and to receive, a permit before commencing construction. See Wilmington Bylaw, Section 233(a) (“...a Nonconforming Structure, may be altered, renovated, changed, or enhanced in any direction for any reason, including routine maintenance and repair, so long as it will not increase the degree of nonconformity”). Additionally, at Section 233(c), states that “[n]o cantilevering can extend beyond the original footprint.” Applicant must bring the structure into conformity with the Wilmington Zoning Bylaw.
 - b. Is it lawful for the DRB to approve a permit on property (ROW) the applicant does not own?
Answer: DRB can only approve an application for construction on property that the Applicant actually owns.
 - c. Is the only recourse for the applicant a negotiated easement or boundary line adjustment?
Answer: “...Wilmington Zoning Ordinance, Section 305 addresses the ‘Boundary Line Adjustments.’ There are conditions to be met in order to be able [to] facilitate permit approval for a boundary line adjustment. A quick review of the sketch submitted [Exhibit B] with the application shows that Applicant cannot meet the preconditions for this section, as the property in question cannot conform with 315(A)(iii) which requires that the boundary line to be adjusted is at least 500 feet from the footprint of the building. Here, the lot line that would need to be adjusted is well within 500’ of the building footprint; indeed, it is the footprint that his in fact caused the need for the lot line to be adjusted. As the criteria for the Town Zoning Administrator to adjust the lot line must all be met, a permit

*for lot line adjustment could not be issued
As to the rear setback, it is conceivable that the property owner to the rear could grant an easement to Applicant for the portion of the structure that encroaches into the setback area, however, there is another, superseding issue. Applicant has increased the size of the structure, beyond the original footprint of the legal, 'grandfathered' structure which created the non-conformity with the setback requirement. Therefore, the Zoning Administrator and the DRB cannot approve an application that would increase the non-conformity of the structure, even were Applicant to have easement in hand. It is our understanding that Applicant would be seeking approval for an increased sized structure, which would increase the non-conformity of the structure.*

14. Applicant testified that the neighboring property owners verbally agreed to issue an easement on their shared property to reduce the rear setback non-compliance. The Review Board informed the applicant that an easement from the neighbor did not appear to resolve the issue of rear set-back non-compliance as the applicant had intentionally increased the degree of non-conformity. The above statement from Fisher & Fisher Law Firm was reviewed with the applicant.
15. Testimony was given that the Applicant had started the permit process in October of 2013, but did not have the required survey for a hearing to be scheduled. As a result of not having obtained the needed survey, the applicant did not proceed with scheduling a hearing. The Applicant testified he went forward with construction based on his builder's schedule without a hearing or a permit being issued.
16. The previous Zoning Administrator recommended the applicant seek out the advice from the Selectboard regarding the ROW, this also was never done.

II. The Board CONCLUDES:

With regards to the roof overhang extending beyond the original footprint but NOT within the Right-of-Way, the Board Approves a waiver for the 10" overhang not in the Right-of-Way.

Regarding the 'reconstruction' of the previously non-conforming structure into the Right-of-Way, any construction within a Right-of-Way is not approvable by the Board and is, therefore, Not Approved/Permitted. As recommended to Mr. Bosari in emails dated October 25, 2013 to November 7, 2013 from the Zoning Administrator, the Board recommends the Applicant speak with the Selectboard regarding Right-of-Way issues.

With regards to the criteria for a waiver or a variance for the encroachment of the rear setback, the board concludes that this proposal does not conform to the requirements of the Wilmington Zoning Ordinance or Article V, Section 513 waiver criteria nor does this proposal conform to the requirements of Article V, Section 512 variance

criteria. The Board therefore does **not approve** any encroachment into the rear setback.

Section 513 requires that the Board *consider all* of the waiver criteria. Specifically the Board finds the newly constructed structure does not meet the following criteria in Section 513:

(2) “The waiver is the minimum reduction in the dimensional requirement that will enable the reasonable use of the property”. With regards to the cantilevered deck on the East, The board concludes that the deck may not cantilever beyond the line of the pre-existing roofline of the A-frame building.”

The applicant could have built the new structure further away from the ROW and improved the non-conformance of the previous structure instead of increasing the non-conformance.

(3) No front setback shall be reduced to less than two (2) feet.

The pre-existing structure had a zero setback and therefore the reconstructed building could also be built up to a zero setback within the pre-existing footprint. Under no circumstances should additional area be constructed within two (2) feet of the setback.

(4) The proposed project will not have an undue adverse effect on the following:

(b) The character and aesthetics of the neighborhood

The new construction is over three times larger than the previous structure. It does not fit into the existing neighborhood of small camp buildings, and does not fit with the proportions of a building so close to a road.

(5) The need for a waiver was not self-created by past decisions of the applicant

The need for a waiver was very much caused by recent past decisions by the Applicant, which could have been avoided, had the Applicant gone through the permitting process correctly.

With regards to a variance as requested in the first hearing for both the southeast corner setback encroachment and the 5’ by 14’ cantilevered deck, Section 512 requires that ALL of the variance criteria be satisfied. Specifically the Board finds the newly constructed structure does not meet the following criteria in Section 512:

b) Because of these physical circumstances or 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.

The applicant built a new foundation for the new structure, and at that time could have built a structure within the buildable area of the lot, but chose not to. The original structure was developed and in reasonable use for many years.

c) Unnecessary hardship has not been created by the appellant.

The appellant chose not to continue communication with the Town to get approval to build within the ROW. The appellant was warned about both issues regarding building within the ROW and

building within the setback in the rear. Both required a permit, and yet the appellant chose to continue construction without obtaining any permits.

d) The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, or be detrimental to the public welfare.

The new construction is over three times larger than the original structure. It does not fit into the existing neighborhood of small camp buildings, and does not fit within the proportions a building so close to the road.

e) The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from these regulations and from the Town Plan.

The appellant increased the degree of non-conformity in both the front and back of the building rather than trying to use the buildable area on the site to the east and west. The cantilevered deck further increases the degree of non-conformity going beyond the original footprint of the roof, and, it is not considered to be essential to the minimum that would afford relief to the appellant.

III. CONDITIONS:

The applicant is **approved and permitted** to retain the existing non-permitted structure, subject to the following restrictions, requirements, limitations or specifications.

1. Applicant remove all structure that extend into the Right-of-Way.
2. Applicant remove all structure within the rear setback.
3. Applicant remove any cantilevered deck that extends beyond the pre-existing footprint and increases the non-conformity of the structure.

The Development Review Board does **Not Approve** the application for construction within the front and rear setbacks that does not fall within the footprint of the pre-existing structure **in the Residential District subject to the conditions in III above.**

If the applicant does not bring the structure into conformance with the Wilmington Zoning Bylaws and the conditions of this document within nine (9) months from the date of issue penalty fines will begin to be issued. A request for extension may be made in writing to the Development Review Board before the expiration date. Such request shall be in the form of an APPLICATION FOR EXTENSION.

There is a thirty (30) day appeal period from the date of signature before this Approval becomes final. In addition, all fees must be paid and a Zoning Permit *must* be issued prior to the commencement of any work requested in this application. When a Zoning Permit is issued, there is an additional fifteen (15) day appeal period before the Permit becomes

final. Work may commence when the Permit has been issued and all Appeal periods have ended.

This approval *does not relieve you*, as applicant, from obtaining any and ALL applicable State and other local permits.

Town of Wilmington, Zoning Administrator reserves the right to monitor compliance with this decision and all decisions issued by the Development Review Board

IN FAVOR of DENYING the above referenced application, with whatever restrictions, requirements, limitations or specifications are contained herein:

Paul Tonon
Peter Wallace
Wendy Manners
Sybil Idelkope

OPPOSED:

None

ABSTAINING:

None

For the Board: Peter Wallace, Chairperson

Date: _____

Appeal Rights: An interested person may appeal this decision to the Vermont Superior Court, Environmental Division, pursuant to 24 VSA 4471 and VRECP Rule 5, in writing, within 30 days from the date this decision is issued. If you fail to appeal this decision, your right to challenge this decision at some future time may be lost because you waited too long. You will be bound by the decision, pursuant to 24 VSA 4472(d) (exclusivity of remedy; finality).

This approval does not relieve the Applicant of the responsibility to obtain all other applicable approvals that may be required by Federal, State, and local laws and ordinances.