

**TOWN OF POMFRET
Zoning Board of Adjustment**

Minutes and Memorandum of Decision

Permit Application: #ZP20-32
Property Address: 1170 Pomfret Road, South Pomfret
Parcel No.: 0106
Parcel Size: 37.8 acres

Property Owner: Joel and Kimberly Carey
1170 Pomfret Road
Woodstock, Vermont 05091

Applicant: Joel and Kimberly Carey
1170 Pomfret Road
Woodstock, Vermont 05091
Email: [on file]

I. Introduction and Procedural History

A. Application

Joel and Kimberly Carey are seeking approval for a residential access road (Driveway) at 1170 Pomfret Road.

The Application dated October 12, 2020 was referred to the Zoning Board of Adjustment (ZBA) for conditional use review by the Zoning Administrator (ZA) on October 24, 2020. The Application and all supporting documents are on file with the ZA.

On November 1, 2020, notice of a public hearing was posted at the Town Clerk's Office, North Pomfret Post Office and on the Pomfret Vermont website. On November 5, 2020, notice was published in the *Vermont Standard*. The ZA mailed the notice to the following property owners abutting the subject property: Sharon Bry, Joseph & Terri Davis Family Trust, Hunnewell Ogden M Family Irrev Trust, Dean & Sarah Gilbreath, Susan Cross, Stephen & Tanya Oblak, Coleman & Cecilia Hoyt, William A Russell Jr U.T.A., Erik and Breanne Liscinsky, and Windsor Central MUUSD/Prosper Valley School.

B. Site Visit and Public Hearing*

Following a site visit at the property on November 23, 2020 at 4pm, the ZBA considered the

* The notice of public hearing contained a typographical error in the Zoom meeting ID. Despite this error, all ZBA members, the Applicant and multiple Selectboard members were able to obtain the correct Zoom meeting ID from the ZA, whose contact information was included in the public hearing notice. All parties also were able to

Application at a public hearing on November 23, 2020 at 6pm via Zoom Meeting.

- Present at the site visit were the following members of the Zoning Board of Adjustment (ZBA): Alan Blackmer (Chair), Benjamin Brickner, Phil Dechert, Shaun Pickett, Seth Westbrook. Also present were Karen Hewitt Osnoe (ZA), John Peters (Selectboard), Steve Chamberlin (Selectboard), Jim Potter (Road Foreman), Joel Carey (Applicant), Kimberly Carey (Applicant), Cecelia Hoyt (Abutter).
- Present at the hearing were the following members of the ZBA: Alan Blackmer (Chair), Benjamin Brickner, Phil Dechert, Shaun Pickett, Seth Westbrook. Also present were Karen Hewitt Osnoe (ZA), Joel Carey, Kimberly Carey, Emily Grube (Selectboard), and John Peters (Selectboard).
- The meeting was opened at 6:05pm by ZBA chair Alan Blackmer.
- At the outset of the hearing, the ZBA afforded those persons wishing to achieve status as an interested party an opportunity under 24 V.S.A. § 4465(b) to demonstrate that the criteria set forth in that statute could be met. Cecelia Hoyt was granted interested party status based on her verbal request at the site visit and previous request made to the ZA.
- During the hearing the following testimony was heard from Joel and Kimberly Carey:
 - A portion of the Driveway is located in the special flood hazard area (SFHA) of Cloudland Brook.
 - No base flood elevation (BFE) has been determined at the subject location.
 - The Driveway was previously upgraded by laying driveway fiber and hardpack on the preexisting agricultural access.
 - A portion of the Driveway crosses land owned by the Windsor Central MUUSD/Prosper Valley School, for which the Carey's have an access easement that is narrowly drawn around the recently upgraded Driveway.
- During the hearing, it also was observed that raising the Driveway above its present grade would require placing additional material in the SFHA, which could interfere with the culvert under Pomfret Road immediately downstream. The increase in erodible material could also increase flood levels during the occurrence of a base flood.

Join the Zoom meeting within minutes of the scheduled 6pm start time, and neither the ZA nor any member of the ZBA is aware of any other party who wished to join the Zoom meeting but was unable to do so. For these reasons, and despite the typographical error, the ZBA believes this public hearing was duly warned and adequately announced to the public for purposes of the Vermont Open Meeting Law.

II. Findings of Fact

- A portion of the Driveway is located in the SFHA of Cloudland Brook.
- The applicable SFHA is designated “Zone A” (1-percent-annual-chance flood event) as depicted on FEMA’s most recent Flood Insurance Rate Map for the Property, panel 50027C0344E.
- No regulatory floodway has been designated in the Town of Pomfret.

III. Applicable Regulations (the *Pomfret Flood Hazard Area Regulations*)

- A permit is required by the Pomfret Flood Hazard Area Regulations (the Flood Regulations) for all proposed development, including filling, grading and excavation in an SFHA. [Section IV]
- If the proposed development is neither exempt from the Flood Regulations under Section IV.A, nor eligible for an administrative permit from ZA under Section IV.B, conditional use approval by the ZBA is required under Section IV.C, which directs the ZBA to ensure the applicable standards in Section VII have been met and that potential flood damage has been minimized.
- If no regulatory floodway has been designated, the requirements of Section VI.C also apply.
- The ZBA may grant variances under the Flood Regulations in accordance with Section IX.

IV. Conclusions of Law

A. Pomfret Flood Hazard Area Regulations

The Driveway has entailed a man-made change to improved or unimproved real estate and is therefore “development” governed by the Flood Regulations. The Driveway is neither exempt from the Flood Regulations nor eligible for an administrative permit from ZA. Therefore, conditional use approval by the ZBA is required and the applicable standards in Section VII must be met. And because no regulatory floodway has been designated in the Town of Pomfret, the requirements of Section VI.C also apply. In summary, the following standards apply:

- Potential flood damage of the Driveway is minimized;
- The cumulative effect of the Driveway, together with all other existing development and anticipated development will not increase the water surface elevation of the base flood at any point within the community; and
- The Driveway is at least one foot above BFE and able to withstand a 100-year event

without failing.

Based on the Applicant's submissions, plans, and testimony, and observations made during the site visit, the ZBA concludes that the development occurring in the SFHA consists only of a short, unpaved residential access road segment, and that potential flood damage to this development cannot be further minimized without removing the Driveway entirely. For the same reasons, the ZBA also concludes that the effect of the Driveway, together with all other existing development and anticipated development, will not increase the water surface elevation of the base flood at any point within the community.

The ZBA believes it could not reach the above conclusions if the Driveway were raised to one foot above BFE and/or improved to withstand a 100-year event without failing, as required by Section VII.B.11. While the Applicant has not had a BFE determined at the subject location, using the contour interpolation method described in FEMA Publication 265, "Managing Floodplain Development in Approximate Zone A Areas" (1995), a BFE can be estimated. Using this method, the ZBA estimates the BFE where the Driveway intersects Pomfret Road to be 711.5 feet, and where the Driveway makes its closest approach to Cloudland Brook (near the Applicant's parcel boundary with the Prosper Valley School) to be 714.5 feet. According to the Vermont GIS, the elevations at these locations are 710.5 feet and 711.5 feet, respectively. Thus, meeting the requirements of Section VII.B.11 would involve raising the Driveway at these locations by two feet and four feet, respectively. This would entail placing substantial additional material in the SFHA, which could obstruct the nearby culvert under Pomfret Road and exacerbate flooding downstream. For this reason, and as further explained below, the ZBA feels it is in the best interests of the community that a variance from these requirements be granted.

B. Variance Analysis

The ZBA can grant a variance under the Flood Regulations only in accordance with 24 V.S.A. 4469 and 44 C.F.R. 60.6, which are incorporated by reference herein. The requirements for a variance include, among other things, that:

- Unique physical characteristics of the property create an undue hardship beyond the general restrictions of the ordinance;
- Because of these physical circumstances, a variance is necessary to enable reasonable use of the property;
- The undue hardship has not been created by the applicant;
- The variance will not alter the essential character of the neighborhood, impair use of adjacent property or impair the public welfare; and
- The variance represents the minimum necessary to afford relief.

While the requirements for granting a variance are stringent, the ZBA nevertheless concludes they have been met with respect to the Driveway. The only feasible access is from the proposed location. While the subject parcel also abuts Barber Hill Road, the steep topography renders access from that location practically impossible. And even if the access easement across the Prosper Valley School parcel were redrawn to allow the Driveway to be relocated, the presence of water and wastewater systems on that parcel make it unlikely that a meaningful relocation could be achieved. Neither of these circumstances is of the Applicant's making. And the contemplated variance is the minimum necessary to afford relief.

Moreover, as noted above, the ZBA believes a variance from the requirements of Section VII.B.11 is in the best interests of the community, as it will avoid placement of substantial additional material in the SFHA, where it could exacerbate flooding downstream.

C. Failure to Timely Obtain Permit

In the Town of Pomfret, if a use, development or structure is not exempt from both the Pomfret Zoning Ordinance and the Flood Regulations, a permit must be obtained before any such use or development may commence, and before any such structure may be built. Failure to do so is a violation subject to the enforcement actions and penalties described in these ordinances.

Here the Driveway was substantially upgraded and complete before the Application was submitted and a permit issued, in violation of the Flood Regulations. It is regrettable the Applicant was not aware of the need for a permit before undertaking this work. However, as the violation was unintentional and the potential harm to the community negligible, the ZBA concludes that this Decision should not be affected and that no further action should be taken as a result.

V. Decision

Based on information presented to the ZBA, the findings and conclusions described above, and subject to the conditions and limitations specified in Section VI below, the ZBA makes the following decisions:

- A. Conditional use approval is **granted** for the portion of the Driveway in the SFHA and a permit is **authorized** for such use in such location.
- B. A variance is **granted** from the requirements of Section VII.B.11 of the Flood Regulations for the portion of the Driveway in the SFHA.

VI. Conditions and Limitations

This Decision is subject to the following conditions and limitations:


- A. The Driveway and related work shall conform in all material respects with the application materials including the Applicant's submissions, plans, written

representations to the ZBA, and testimony as reflected in the Minutes, except as expressly modified herein. Any material changes to the foregoing shall require further review and approval by the ZBA under the then applicable regulations. As used herein, "material change" includes the placement of additional fill or other erodible material in the SFHA, other than for routine maintenance of the Driveway.

- B. The ZBA observes that the Applicant's sole vehicular access to their residence will be the Driveway. During a flooding event, access to and from the Applicant's residence may be impaired, including for emergency responders. The ZBA encourages the Applicant to consider this possibility in their emergency preparedness planning. By acceptance of this Decision and the variance granted herein, Applicant for itself and its successors and assigns, waives, releases, and discharges the Town of Pomfret from any suit, claim or action, for damages of any kind that Applicant, its successors or assigns may have in connection with this Decision, the variance granted herein, the work to be completed as a result thereof, or as a result of the Driveway being located in the SFHA of Cloudland Brook, in accordance with Section X of the Flood Regulations.
- C. This Decision applies only to the subject matter contained herein. The conformity of any other structures, uses or activities with the applicable zoning bylaws was not considered and is not addressed in this Decision.

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This Decision approved at Pomfret, Vermont, as of this 6th day of December, 2020.



Alan Blackmer, chair
Zoning Board of Adjustment

ZBA members Alan Blackmer, Benjamin Brickner, Phil Dechert, Shaun Pickett and Seth Westbrook voted in the affirmative.

NOTICE: This Decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceeding(s) before the Zoning Board of Adjustment. 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.