

TOWN OF POMFRET
Zoning Board of Adjustment

Memorandum of Decision

Permit Application: ZP24-20
Property Address: 1799 Pomfret Road
Parcel No.: 010B
Parcel Size: 48.89 +/- acres

Property Owner: Joseph T. and Cara L. DeFoor
1799 Pomfret Road
South Pomfret, Vermont 05067

Applicant: Joseph T. and Cara L. DeFoor
1799 Pomfret Road
South Pomfret, Vermont 05067

This Memorandum of Decision (this “Decision”) is issued by the Pomfret Zoning Board of Adjustment (the “ZBA”), in connection with Zoning Permit Application ZP24-20 (the “Application”) by Joseph T. and Cara L. DeFoor (“Applicant”).

The Application seeks to construct a new bridge (the “New Bridge”) and to relocate an existing access road (the “Driveway”) to Applicant’s residence located at 1799 Pomfret Road (the “Property”) through the special flood hazard area of Barnard Brook (collectively, the “Proposed Development”). As such, the Proposed Development is subject to conditional use review under Section IV.C of the Pomfret Flood Hazard Area Regulations (the “Flood Regulations”).¹ The Application also seeks a variance from the requirement in Section VII.B.11 of the Flood Regulations that access roads (including the Driveway) be built at least one foot above the base flood elevation (“BFE”).

For the reasons discussed below, and subject to the conditions and limitations specified below, the ZBA grants conditional use approval of the Application and authorizes a variance from the requirement in Section VII.B.11 of the Flood Regulations. The ZBA directs the Zoning Administrator (the “ZA”) to issue a zoning permit consistent with this Decision.

I. Procedural History

A. Prior Application

The Application proposes substantially identical development to that proposed in a prior Zoning Permit Application ZP24-04 (the “Prior Application”) made by Applicant. The Prior Application sought only conditional use approval and did not address the need for a variance from applicable requirements of the Flood Regulations. Following a site visit and a hearing on March 27, 2024,

¹ Pomfret Flood Hazard Area Regulations, adopted May 2, 2007, *available at* https://pomfretvt.us/index.php/download_file/view/229/225/.

conditional use approval was denied in a written decision (the “Prior Decision”) dated May 8, 2024.² The Prior Decision explained that the proposed development was inconsistent with the Flood Regulations. While a variance was not specifically sought by the Prior Application, the Prior Decision also observed that based on information then available, a variance could not be granted.

Proceedings related to the Prior Application are more particularly described in the Prior Decision and the hearing minutes referenced therein, which are available on the on the ZBA’s page (the “ZBA Webpage”)³ on the Town of Pomfret’s website.

B. Request for Reconsideration and Appeal

On May 25 and June 3, 2024, ZBA member Benjamin Brickner received email messages from Applicant Cara DeFoor that included observations and suggested next steps from Applicant’s civil engineer and a summary of prior structural and safety assessments of the existing covered bridge on the Property (the “Existing Bridge”) that would have been functionally replaced by the New Bridge. This information was shared with the full ZBA, which deemed these communications collectively to be a request for reconsideration of the Prior Decision.

Following deliberation, the ZBA concluded that the information provided did not present new material facts or a substantial change of conditions or circumstances warranting reconsideration pursuant to 24 V.S.A 4470(a) and Section 6.7.1 of the Pomfret Zoning Ordinance.⁴ This conclusion was conveyed to Applicant through their counsel by letter dated June 5, 2024 and transmitted by email the following day.

Also on June 5, 2024, Applicant, by and through their counsel, filed a notice of appeal of the Prior Decision in the Environmental Division of the Superior Court.⁵ As of the date of this Decision, the timeframe for proceedings on this appeal has been extended multiple times to allow time for the ZBA to consider the Application and render this Decision.

C. Application

Applicant seeks to construct the New Bridge to replace the Existing Bridge for vehicular access purposes. The New Bridge is proposed to be located downstream of the Existing Bridge, thus requiring a significant portion of the existing Driveway to Applicant’s residence be rerouted. The new route is located predominantly in the special flood hazard area (Zone A) of Barnard Brook, as depicted on FEMA’s flood insurance rate map (FIRM) 50027C0345E, effective September 28, 2007.

The Application, dated September 20, 2024, was referred by the ZA to the ZBA on October 16, 2024, for conditional use review and approval of a variance from the requirement in Section VII.B.11 of the Flood Regulations. The Application and all supporting documents are on file with the ZA,

² See Memorandum of Decision, approved May 8, 2024, in regard to Permit Application ZP24-04, *available at* https://pomfretvt.us/index.php/download_file/view/2437/242/.

³ Town of Pomfret, Zoning Board of Adjustment, *available at* <https://pomfretvt.us/index.php/dep/planning-zoning/zo>.

⁴ Pomfret Zoning Ordinance, adopted May 6, 2020, *available at* https://pomfretvt.us/index.php/download_file/view/1280/225/.

⁵ See DeFoor Conditional Use Permit Denial, No. 24-ENV-00048 (Vt. Super. Ct.).

including the site plan (the “Site Plan”), revised September 20, 2024, prepared by Harrington Civil Engineers, Inc. (project number 22-32), and provided by Applicant to the ZBA.

On October 24, 2024, notice of a public hearing was posted at the Town Office, North Pomfret Post Office, and Teago General Store. On October 24, 2024, notice of the same was published in *The Vermont Standard*, a newspaper of general circulation in Pomfret. The ZA also timely notified the Property abutters of the site visit and hearing as required by 24 V.S.A. 4464.

D. Site Visit and First Public Hearing

Following a site visit at the Property on November 14, 2024 at 5:00 pm, the ZBA considered the Application at a public hearing (the “First Hearing”) on November 14, 2024 at 6:00 pm at the Town Office. Present at the site visit were ZBA members Benjamin Brickner, Susan Burgess, Kyle Hansen, Lindsay Hyde, Shaun Pickett, Micheal Schmell and Seth Westbrook. Also present were Cara DeFoor, Joseph DeFoor, Jonathan Harrington, Karen Hewitt Osnoe (the ZA) James McLaughlin, David Mears and Beriah Smith.

Near the conclusion of the First Hearing and anticipating that additional information might be needed in order to reach a decision, the ZBA adjourned the public hearing to December 5, 2024 while beginning its deliberations in the meantime.

Proceedings related to the First Hearing are more particularly described in the hearing minutes approved on December 5, 2024, which are available on the ZBA Webpage and are incorporated by reference herein. These minutes identify those persons who participated in the hearing.

E. Second Public Hearing

The ZBA reconvened the public hearing (the “Second Hearing”) on December 5, 2024, at 6:00 pm at the Pomfret Town Office and via Zoom. As the ZBA previously determined that no additional submissions or testimony were needed to reach a decision, no substantive proceedings occurred at the Second Hearing.

Proceedings related to the Second Hearing will be more particularly described in the hearing minutes to be made available on the ZBA Webpage within the applicable statutory timeframe. These minutes will identify those persons who participated in the Second Hearing.

At the conclusion of the Second Hearing, the ZBA closed the public hearing and issued this Decision.

II. Applicable Regulations

A permit is required by Section IV of the Flood Regulations for all proposed development in a special flood hazard area, including filling, grading and excavation.

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 as a result of the proposed development has been minimized.

Of particular relevance here, Section VII.B.11 requires that “any access road to habitable structures . . . be at least one foot above base flood elevations and able to withstand a 100-year flood event without failing.” The ZBA may grant variances under the Flood Regulations in accordance with Section IX thereof. Variances may be granted only if the several stringent criteria of Section IX are met. These criteria are detailed in the Vermont Planning and Development Act and National Flood Insurance Program regulations.⁶ Each criterion is evaluated in Section IV below.

III. Findings of Fact

The ZBA received written submissions and heard testimony from Applicant, Applicant’s attorney, and Applicant’s civil engineer. The ZBA evaluated the parties’ submissions and testimony; the findings of fact described below reflect the evidence the ZBA found most relevant and compelling. All submissions and testimony are available on the ZBA Webpage or are on file with the ZA.

The Existing Bridge is hydraulically inadequate and its substructure is nearly two feet below BFE, which has impeded flood waters and debris during recent significant flooding events. The Existing Bridge is also in physical disrepair. The deck is sagging and no longer securely fastened to its piers. A 2021 analysis by an expert in restoration of historic structures concluded that substantial structural improvements were necessary to address these issues.

The Existing Bridge is also undersized and cannot accommodate large vehicles including utility trucks and full-size fire apparatus. A large vehicle recently attempting to cross the Existing Bridge struck and damaged the superstructure. Applicant also has relocated a propane tank on the Property to allow their fuel company access without driving its truck across the Existing Bridge. For these reasons, Applicant has expressed safety, soundness and reliability concerns regarding the Existing Bridge.

The New Bridge is intended by Applicant to address these concerns. The New Bridge and a significant portion of the relocated Driveway will be located in a special flood hazard area as shown on the Site Plan. The Existing Bridge will be physically blocked to and no longer accessible by vehicular traffic. As such, the relocated Driveway will become the sole vehicular access to Applicant’s residence.

Barnard Brook runs across the entire width of the Property such that there is no access to Applicant’s residence from a town highway without crossing the brook or traversing property owned by third parties. The area surrounding Barnard Brook on Applicant’s property is low-lying, with the special flood hazard area reaching outward from both banks.

While the Site Plan depicts the bottom of the New Bridge at exactly one foot above BFE, it also shows that a significant portion of the relocated Driveway will be below this level, in one location by as much as 1.5 feet. It is the policy of area emergency services organizations not to drive through standing or moving water of any depth.

Applicant considered renovation of the Existing Bridge and alternative locations for the New Bridge before deciding on the Proposed Development. Renovation of the Existing Bridge was deemed infeasible as that bridge is already below BFE and would need to be elevated nearly three feet to comply with the Flood Regulations. Doing so also would require elevating the existing Driveway

⁶ See 24 V.S.A. 4469 and 44 C.F.R. 60.6, respectively.

approach on both sides, entailing placement of significant additional fill in and orthogonal to the floodplain.

Alternative locations for the New Bridge were rejected because placement in most other locations on the Property would also entail adding significant additional fill in the floodplain. The proposed location takes advantage of the existing contours of the Property, including the higher elevation of the land on the south side of the brook. It also reduces the length of Driveway below BFE compared to the existing Driveway alignment. The Proposed Development will remove existing land mass on either side of the relocated Driveway to improve drainage in the floodplain and offset fill required to raise the relocated Driveway as it approaches the New Bridge from the north.

IV. Conclusions of Law

The Proposed Development 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 provisions of the Flood Regulations apply, including the requirement of Section VII.B.11 that the relocated Driveway be at least one foot above BFE, unless a variance is granted therefrom.

In addition to the written submissions and testimony described above, the ZBA received a memorandum from Applicant's counsel arguing that the criteria for a variance from the requirement in Section VII.B.11 of the Flood Regulations have been met. The conclusions of law described below reflect the analysis and conclusions the ZBA found most compelling, in addition to the ZBA's own analysis of the applicable criteria.

A. Vermont Planning and Development Act

Under the Vermont Planning and Development Act (24 V.S.A. 4301 *et seq.*), when a variance from the provisions of a bylaw is requested, a variance may be granted only if all the following facts are found:

(1) There are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to these conditions, and not the circumstances or conditions generally created by the provisions of the bylaw in the neighborhood or district in which the property is located,

(2) Because of these physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the bylaw, and that the authorization of a variance is therefore necessary to enable the reasonable use of the property,

(3) Unnecessary hardship has not been created by the [applicant],

(4) 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, and

(5) The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the bylaw and from the plan.

1. Unique Physical Circumstances Causing Unnecessary Hardship

By effectively cutting off Applicant's residence from the town highway system, Barnard Brook presents a unique physical circumstance on the Property. The alternatives of having no safe, sound and reliable crossing over Barnard Brook, or of having to negotiate with neighboring landowners for entry and egress across their properties would cause unnecessary hardship for Applicant.

2. Impossibility of Conforming Development

There is no possibility that the Property can be developed in strict conformity with the Flood Regulations. The substructure of the Existing Bridge is already nearly two feet below BFE. To bring the Existing Bridge into conformity with the Flood Regulation would require elevating the entire structure to one foot above BFE. This in turn would require raising the driveway approach on both sides of the Existing Bridge, entailing placement of substantial additional fill in and orthogonal to the floodplain. Doing so likely would increase base flood levels in the project area, contrary to the Flood Regulations.

Due to the existing contours of the Property, a new bridge in any other location requires relocating some portion of the driveway below BFE. The relocated Driveway will follow the existing grade as it passes below BFE, in one location as much as 1.5 feet below, contrary to the Flood Regulations. The alternative would be to elevate the relocated driveway to one foot above BFE, but this also would be contrary to the Flood Regulations as it also would entail adding fill in and orthogonal to the floodplain, which is likely to impede flood waters. While the relocated Driveway will require a modest amount of new fill as it approaches the New Bridge from the north, this will be offset by removal of existing land mass on either side of the relocated Driveway to improve drainage in the floodplain.

3. Hardship Not of Applicant's Making

Applicant did not choose the location of their residence on the Property but rather purchased the Property with the residence already in its present location. The need for the variance for the Proposed Development is due to preexisting natural features and development patterns on the Property.

4. Neighborhood Impacts and Public Welfare

The Proposed Development is consistent with other residential bridges and approaches in the neighborhood. The Proposed Development will not impair the use or development of adjacent properties or be detrimental to the public welfare. By maintaining the relocated driveway at the existing grade (rather than elevating it to one foot above BFE as required by the Flood Regulations), the Proposed Development avoids increasing base flood levels and impeding flood waters. The Proposed Development has no discernable impact on renewable energy resources.

5. Minimum Necessary Variance

Subject to the conditions and limitations specified in Section VI below, the variance granted herein is the minimum necessary to afford relief. Applicant has explored and demonstrated that alternatives to the Proposed Development would be inferior from floodplain management and public safety perspectives and would require a greater variance from the Flood Regulations. In

particular, these alternatives' need to place substantial additional fill in the floodplain would have a greater and more widespread impact on the community than the Proposed Development.

The specific land use policies articulated by the Pomfret Town Plan (the "Town Plan") are largely repetitive of the criteria discussed above.⁷ While the Town Plan calls for a prohibition on most development in flood hazard areas, it does so with certain exceptions, including for "modest accessory structures" provided that design and mitigation measures are taken to minimize adverse impacts and avoid increasing flood damage elsewhere.⁸ As discussed above, the Proposed Development incorporates such measures. The Town Plan also calls for "abandoning redundant bridges," which is among the reasons the variance granted herein is subject to the condition described in Section VI.D below.⁹

B. National Flood Insurance Program Regulations

Under the National Flood Insurance Program regulations (44 C.F.R. Parts 59, 60, 65, and 70), variances shall be issued by a community only upon:

- (1) a showing of good and sufficient cause,
- (2) a determination that failure to grant the variance would result in exceptional hardship to the applicant, and
- (3) a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances.

In addition, variances shall be issued only upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief. Most of the criteria set forth in the National Flood Insurance Program regulations are repetitive of the criteria set forth in the Vermont Planning and Development Act, which are analyzed in Section IV.A above.

1. Good and Sufficient Cause

Applicant has shown good and sufficient cause to grant the variance granted herein. See the analysis in Sections IV.A.1, IV.A.2 and IV.A.3 above.

2. Exceptional Hardship

Failure to grant the variance granted herein would result in exceptional hardship to Applicant. See the analysis in Section IV.A.1 above.

3. Increased Flood Heights, Public Safety, etc.

The variance granted herein will not result in increased flood heights, additional threats to public safety, or conflict with existing local laws or ordinances. See the analysis in Sections IV.A.4 and

⁷ Pomfret Town Plan, adopted August 17, 2016, at 39 and 94–97, *available at* https://pomfretvt.us/index.php/download_file/view/418/225/.

⁸ Pomfret Town Plan, at 95–96.

⁹ Pomfret Town Plan, at 96.

IV.A.5 above. The Proposed Development also will not entail extraordinary public expense, create nuisances, nor cause a fraud on or victimization of the public.

4. Minimum Necessary Variance

The variance granted herein is the minimum necessary to afford relief. See the analysis in Section IV.A.5 above.

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, conditional use approval is **granted** for the Proposed Development and a variance from the requirement in Section VII.B.11 of the Flood Regulations is **authorized** for the Proposed Development. The ZA is directed to issue a permit consistent with this Decision.

VI. Conditions and Limitations

To ensure the Proposed Development meets the applicable provisions of the Flood Regulations, as the same have been varied herein, this Decision is subject to the following conditions and limitations:

A. The Proposed Development shall conform in all material respects to the Application materials including Applicant's submissions, plans, written representations to the ZBA and testimony, except as expressly modified herein. Any material change to the foregoing shall require further review and approval by the ZBA under the then-applicable regulations.

B. The Proposed Development shall be constructed consistent with applicable requirements of the Flood Regulations, except as the same have been varied herein. The applicable requirements are described in Section VII.B of the Flood Regulations.

C. From and after completion of the Proposed Development, Applicant shall cause the Existing Bridge to be physically blocked to vehicular traffic and shall refrain from other uses of the Existing Bridge that increase its non-conformity with the Flood Regulations. Such uses include (but are not limited to) those that may cause the Existing Bridge to subside farther below BFE or that may otherwise increase its hydraulic inadequacy.

D. From and after completion of the Proposed Development, whereupon the Existing Bridge will become redundant to the New Bridge contrary to the policy of the Town Plan and the unnecessary hardship and impossibility of development that justify the variance granted herein will have been alleviated, Applicant shall refrain from maintaining, repairing, and/or reconstructing the Existing Bridge in a way that constitutes a "substantial improvement" as that term is defined in the Flood Regulations. In the event that the Existing Bridge suffers "substantial damage" as that term is defined in the Flood Regulations, Applicant and/or its successors and assigns shall remove the Existing Bridge from the special flood hazard area of Barnard Brook.

E. The ZBA observes that Applicant's sole vehicular access to their residence will be the relocated Driveway. During a flooding event, access to and from Applicant's residence will be impaired, including for emergency responders. The ZBA encourages Applicant to consider this possibility in their emergency preparedness planning. By acceptance of this Decision and the

variance granted herein, and in accordance with Section X of the Flood Regulations, 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 a portion of the relocated Driveway being located below BFE in the special flood hazard area of Barnard Brook.

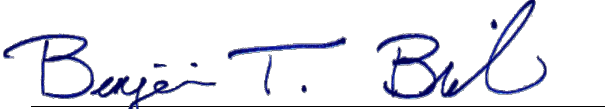
F. The Proposed Development shall conform to all applicable federal, state, and local laws, ordinances, and regulations, whether or not the same have been expressly referenced herein.

G. This Decision applies only to the subject matter contained herein. The conformity of any other structures, uses, or activities with applicable zoning bylaws was not considered by the ZBA and is not addressed by this Decision.

H. By acceptance of this Decision and the permit authorized herein, Applicant for itself, its successors, assigns and affiliates agrees to be bound by this Decision and the conditions and limitations described herein.

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This Decision approved at Pomfret, Vermont, as of this 6th day of December, 2024, and signed by the chair of the Pomfret Zoning Board of Adjustment on its behalf pursuant to 24 V.S.A. 1141.



Benjamin Brickner, chair
Zoning Board of Adjustment

ZBA members Benjamin Brickner, Susan Burgess, Kyle Hansen, Lindsay Hyde, Shaun Pickett, Michael Schmell, and Seth Westbrook voted in the affirmative.

NOTICE: This Decision may be appealed to the Environmental Division of the Superior Court by an interested person who participated in the proceedings 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.