

**TOWN OF SOUTH HERO, VERMONT**  
**DEVELOPMENT REVIEW BOARD**  
**DECISION DATED May 8, 2024**

**APPLICANT**

Name: James Preston, et al  
Address: c/o Phelps Holloway, 69 Sunset Beach Rd

**LANDOWNER**

Name: J. Henry Scott  
41 Sunset Beach Rd.

**APPLICATION**

Type: Appeal to a Building Permit for a Replacement Home At 41 Sunset Beach Rd.

Number: 24-53-SB041

**PROPERTY**

Location: At 41 Sunset Beach Rd. / Parcel SB041

**HEARING DATE:** March 27, 2024; continued April 10, 2024

**Introduction**

On February 19, 2024, the Zoning Administrator received an email from James Preston, representing himself and seven other parties, appealing the Zoning Administrator's approval of South Hero Building Application #24-53-SB041 to replace a seasonal home at 41 Sunset Beach Rd. A hearing on the appeal was begun on March 27, 2024, and continued on April 10, 2024.

The landowner, J. Henry Scott, represented by agent Norman Benoit, had previously submitted permit application 24-33-SB041 and an application for a setback waiver that was heard on January 10, 2024 and was denied by the Development Review Board on January 24, 2024. The Board found that the application for the waiver did not represent the least deviation possible from South Hero Development Regulations per Section 305.D(1) (Review Standards) and increased the degree of non-conformity within the setback per Section 505.D(1) (Non-Conforming Structures).

Mr. Benoit has returned to the Board with a new design that the Zoning Administrator determined to be conformant with the Regulations per Section 301(C). The Zoning Administrator consequently granted Building Application #24-53-SB041, which is the subject of this appeal.

### Exhibits

During the hearing, the following exhibits were submitted:

1. Email from James Preston, representing himself and seven other parties, notifying the Zoning Administrator that they are appealing the ZA's approval of South Hero Building Application #24-53-SB041 to replace a seasonal home at 41 Sunset Beach Rd., dated and received February 19, 2024.
2. Application for an Appeal for Building Permit #24-53-SB041 by James Preston, dated and rec'd February 25, 2024.
3. Building permit #24-53-SB041 for a replacement home at 41 Sunset Beach Rd., Applicant Norman Benoit, approved by ZA Martha Taylor-Varney on February 5, 2024, with effective date of February 20, 2024. Application included:
  - a. Existing Conditions Plan by Civil Engineering Associates, Project #23191, Sheet C1.0, date September 29, 2023.
  - b. Proposed Site Plan by NLB Construction Consulting LLC, Project #2340, Sheet SK35, date January 27, 2024.
  - c. South, East, and West Elevations by NLB Construction Consulting LLC, Project 2340, Sheet SK36r, date February 2, 2024.
  - d. First and Second Floor Plans by NLB Construction Consulting LLC, Project 2340, Sheet SK38, date January 31, 2024.
  - e. Third Floor and Basement Floor Plan by NLB Construction Consulting LLC, Sheet SK39, date January 31, 2024.
4. Email response from James Preston outlining objections, referencing related sections of the South Hero Development Regulations, dated and rec'd February 27, 2024.
5. Letter from Pat Corbin, owner of property over which Sunset Beach Rd., a deeded right-of-way, gives access to Sunset Beach residents access to their properties, dated June 14, 2017.
6. "Clean Slate" permit exemptions definition from State of Vermont Wastewater and Potable Water Supply Rules, dated April 12, 2019.
7. Warning Ad, Abutters' Notice, and Hearing Letter for the March 27, 2024 DRB appeal hearing.
8. Shoreland Protection permit #4168-SP for 41 Sunset Beach Rd.
9. Emails of support for approval of building permit from Al Foice (SB079) and Scott Baldwin (SB085)
10. Staff report by Zoning Administrator for March 27, 2024 hearing.



Based on the application, supporting documents and testimony, **the Development Review Board makes the following Findings, Conclusions of Law, and enters the following Decision:**

**Findings of Fact:**

1. 41 Sunset Beach Rd. is a .25-acre non-conforming lot in the Shoreland Zoning District, within the Sunset Beach development created in the early 1940's. The lakefront lot is 75-ft. wide and 146-ft. deep. Sunset Beach Rd. is a private road with a 50-ft. wide right-of-way.
2. There is an existing 1 ½-story, 4BR seasonal home. The home is approx. 9 feet from the south boundary and 59 feet from the mean level of the lake to the south wall of the home. An 8'x8' attached deck on the lake side of the home reduces the lake setback to 51 feet. The home conforms to the north and east (ROW) setbacks.
3. The Zoning Administrator testified that the Listers' cards show the current residence to be a 1 ½-story (2 levels with a smaller 2<sup>nd</sup> floor), 4BR seasonal home well before January 1, 2007, the date of "Clean Slate" permit exemptions allowed by the State.
4. The Applicant proposes to replace the current non-conforming structure with one replicating the current height and footprint within the non-conforming area. The structure also expands into the conforming space on the lot to create a 3701sf home with 3 stories and a finished basement.
5. The Zoning Administrator has received a copy of a Shoreland permit confirming the site plan layout.
6. No parking area is designated on the site plan. However, a parking area was shown on the plan approved by Shoreland. The Zoning Administrator testified that she missed that element, and agreed with the applicant that the parking area could easily be transferred to the Site Plan from the plan submitted to Shoreland to cure the omission.
7. The maximum height allowed by the Development Regulations in the Shoreland District is 35'. The maximum height of the house, reached in the 3<sup>rd</sup> floor in the conforming space, is 31'5".
8. The flat area of the shed roof over the 2-story portion of the house within the non-conforming space is proposed to be used as a deck, accessed from the 3<sup>rd</sup> floor.
9. The original residence was built prior to the initiating of zoning in South Hero in 1972. The Zoning Administrator was unable to find a septic permit for the property in Town records.
10. The Zoning Administrator approved the building permit for seasonal use only, citing the current septic system's seasonal status.
11. The only dimensional standards that apply are those in Table 2.3 of the Development Regulations. There are no design standards for residential structures in South Hero.

**Conclusions of Law:**

#1. Appellants assert that the use of the flat roof as a deck within the non-conforming area increases the non-conformity. Section 505.D.1 (Standards for Making Changes To Nonconformities) authorizes the Zoning Administrator to “*permit the expansion, enlargement, replacement, or reconstruction of a non-conforming structure provided that the changes do not increase the existing degree of nonconformity (i.e. the changes made cannot increase the height of the structure within the setback, increase the footprint within the setback, or increase the overall volume of the structure within the setback.)*” The use of a roof surface as a deck does not increase its dimensionality per se and so does not increase non-conformity.

Railings that may be attached to the deck do not increase the height of the structure per Section 206 (Dimensional Standards) paragraph B (Measuring Height): “*Height shall be measured from the average natural grade abutting the structure to the highest point of a structure with the exception of antennae, chimneys, mechanical systems or other un-occupied architectural elements of a structure.*”

#2. Appellants assert that the rooftop deck constitutes a change of use and therefore requires review by the DRB. Table 2.1 defines Allowed Uses, which includes “Seasonal Dwelling” as a permitted use in the Shoreland District. The original use of the property was defined on the Listers’ records as seasonal, the new proposed use is seasonal, thus there is no “change of use”. Per Table 2.1, “Seasonal Dwelling” is permitted with a zoning permit, therefore there is no requirement for Conditional Use Review by the DRB.

#3. Appellants assert that no project requiring DRB review shall be subject to the criteria of creating no undue adverse impact on the neighborhood. An undue adverse impact assessment is required for conditional use review per Section 302 (Conditional Use) but is not otherwise applicable. Per Conclusion #2 above, a conditional use review is not needed for permitted uses, thus there is no basis in the Development Regulations for an adverse impact assessment.

#4. Appellants assert that the project is a departure from the scale and character of the neighborhood. Section 302 of the Development Regulations specifies that consideration of character of the neighborhood is a requirement for Conditional Use Review. Since per Conclusion #2 above a Conditional Use Review is not required or appropriate, there is no basis in the Development Regulations for consideration of character of the neighborhood.

#5. Appellants assert that there is no parking plan. Table 3.2 (Final Site Plan Requirements) specifies the inclusion of parking as a proposed site improvement.



#6. Appellants assert that the permit does not require the replacement of the septic system. Vermont law removed municipal jurisdiction over wastewater standards in 2007 and without a basis in law, the Town cannot condition a building permit on the replacement of a wastewater system unless the proposed use is to be increased. Wastewater is now regulated by the Agency of Natural Resources' Department of Environmental Conservation.

#7. Appellants assert that the second floor of the existing house was constructed without a permit between 1980 and 1984. Per Finding 3, the structure was a 1 ½-story, 4-bedroom home constructed prior to 2007. Per V.S.A 4454(a), the 15-year Statute of Limitations has expired for any enforcement proceeding regarding a building permit for the alleged infraction.

**Decision:**

**With the Findings of Fact and Conclusions of Law, the Board finds the appellants' complaints without merit with the exception of #5, absence of a parking area on the site plan. The Board finds that the omission of the parking area on the municipal application is an error that can be cured by a condition to this ruling as shown below.**

**Condition:**

**Within 30 days, applicant shall provide an amended site plan to the Zoning Administrator showing a minimum of two parking spaces consistent with the application submitted to Shoreland Protection.**

**On May 8, 2024, Mike Welch moved to deny the Appeal and impose the Condition(s) above; Liza Kilcoyne second. The board voted as follows: T. Maxham – Deny; D. Patterson – Deny; L. Kilcoyne -Deny; M. Welch – Deny; T. Mullen – Deny; J. Brightwell – Deny; and N. Hayward -- Deny.**

***A quorum of the Board voted to deny the appeal and uphold the Zoning Administrator's approval of the permit.***

Dated: May 8, 2024

Signed: \_\_\_\_\_

*Timothy E. Maxham*

For the Development Review Board

*Appeal Rights*

*Any appeal of this decision must be filed with the Superior Court, Environmental Division (located at 2418 Airport Road, Suite 1, Barre, VT 05641-8701) within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must file with the Notice of Appeal the entry fee required by 32 V.S.A. 1431 and the 5% surcharge required by V.S.A. 1434a(a). A copy of this appeal must be filed with the Zoning Administrator or the Town Clerk within thirty (30) days from the date of issuance.*