VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 21-ENV-00085

14 Liberty Street Permit	DECISION ON THE MERITS

Alison Donovan (Applicant) seeks permission to demolish a shed addition to a historic barn and to relocate the historic barn within her property located at 14 Liberty Street in the City of Montpelier (City). The City's Development Review Board (DRB) granted approval for the project. Courtney Mireielle O'Connor, Amanda Aldridge, and Kevin Coughlin, abutting property owners, appealed the decision to this Court. Ms. Aldridge and Mr. Coughlin later withdrew from the appeal after they sold their home, thereby losing their standing to appear before the Court. Ms. O'Connor (Neighbor) continued with the appeal.

Neighbor is represented by Peter G. Raymond, Esq. Applicant is represented by Nicholas Ae Low, Esq. The City is represented by David W. Rugh, Esq.

Neighbor raised four Questions in her initial Statement of Questions filed on September 23, 2021. Neighbor later amended her Statement of Questions on December 16, 2021 to raise eleven Questions. Applicant requested judgment on the pleadings with respect to Question 1 and portions of Question 2, as it relates to the City's Unified Development Regulations (UDR) §§ 2108(A) and (B)(3), and Questions 10 and 11. Applicant further requested summary judgment for Question 2 as it relates to UDR § 2108(E) and Questions 3 and 5 through 9. Neighbor opposed the motion.

In a decision dated May 23, 2022, the Court granted Applicant's motion for judgment on the pleadings for Question 1, Question 2 as it relates to UDR §§ 2108(A) and (B)(3), and Questions 10 and 11. In re 14 Liberty St. Permit, No. 21-ENV-00085 (Vt. Super. Ct. Envtl. Div. May 23, 2022) (Walsh, J.). The Court concluded that the purpose provisions referenced in

Questions 1 and 2 do not create enforceable regulatory restrictions; that the City is not equitably estopped from granting the permit; and that the setback provisions in the UDR are not unconstitutional. Id.

Additionally, the Court granted Applicant's motion for summary judgment for Question 2 as it relates to UDR § 2108(E) and Questions 3 and 5 through 7. Id. The Court concluded the application is not subject to the architectural standards in UDR § 2108(E) or the standards for development in the Design Review Overlay District in UDR § 2201; that granting Applicant's request for a permit would not create a taking of the property interests of any then-Appellant, including Neighbor, under either a physical or a regulatory takings theory, nor would it violate Appellants' substantive due process; and that the UDR provisions at issue are not unconstitutionally vague or standardless. Id.

Appellant subsequently withdrew Questions 8 and 9 at the outset of trial. Thus, the following two Questions remain for trial:

> 2. Whether the subject application for the historic shed demolition and historic barn relocation complies with . . . all requirements of Sub-Sections 2108.C-[D], and Figure 2-08 of the Montpelier Unified Development Regulations and should be approved or denied?
>
> 4. Whether the subject application for the historic shed demolition and historic barn relocation complies with Section 3[0]04, including Sub-Sections 3004.A–D of the Montpelier Unified Development Regulations and should be approved or denied?

The Court conducted a two-day remote trial on November 1 and 2, 2022, using the WebEx platform.

Findings of Fact

1. Applicant Alison Donovan (Applicant) owns a parcel located at 14 Liberty Street in the City of Montpelier (City) (the Parcel).

2. 14 Liberty Street is in the Residential 1500 Zoning District (Residential 1500).

3. The Parcel is currently improved with a single-family residence with a third-floor apartment (the Home), and a barn (the Barn) with a shed-roofed addition (the Shed).

4. Applicant lives at the Home and she rents an apartment located in the third-floor to a tenant.

5. The Home and the Barn are structures listed on the National Register of Historic Places. The listing for the Barn includes a reference to the Shed.

6. The Barn was constructed in approximately 1908.

7. The Barn was not constructed with a foundation, and there continues to be no foundation at the structure today.

8. The Barn is a carriage barn which would traditionally have been used to house horses and a buggy.

9. The Barn, and carriage barns like it, are regarded as historically important in part because they represent what life was like in a pre-automobile world.

10. Carriage barns such as the Barn are becoming rarer in the City.

11. Applicant uses the Barn for storage associated with her residence and allows her tenant to use a portion of the Barn for storage.

12. After moving the Barn as proposed, Applicant proposes to use it for storage and vehicle parking.

13. The Shed was constructed many years after the Barn, in approximately 1930.

14. The Shed is attached to the northern wall of the Barn.

15. The Shed has limited historical value.

16. The Shed was similarly not constructed with a foundation, and there continues to be no foundation at the addition today.

17. The lack of foundation has resulted in the Shed sinking into the ground, in part due to rotting sill plates.

18. The Shed's roof has failed.

19. The Shed is structurally unsound.

20. The Shed's materials have deteriorated to the point where they could not be reused. Thus, any rehabilitation of the Shed would consist of removing the historical structure and rebuilding with new materials, effectively creating a replica.

21. For these reasons, the Shed cannot be rehabilitated.

22. The Barn first existed without the Shed, which was an addition. The Barn was not originally designed to have the Shed attached.

23. At some point prior to Applicant's ownership of the property, joists were attached to the Barn's exterior wall and to the Shed.

24. The Shed's lack of a foundation and the way the Shed is attached to the Barn, along the roofline and the joists, cause damage to the Barn.

25. As the Shed shifts and sinks into the ground, it pulls at the exterior of the Barn and bows the Barn's wall, resulting in water damage and damage to the wall itself.

26. It is likely that the Barn and Shed began to suffer damage and deterioration from the time that the Shed was attached to the Barn over 90 years ago.

27. The Barn is located within one (1) foot of the neighboring property 16 Liberty Street and may even touch a neighboring structure. The Barn is non-compliant with the applicable setbacks in this regard.

28. The Barn's close proximity to the neighboring structure and to the Home, make maintenance of these portions of the Barn, and the Barn generally, exceedingly difficult because people and materials simply cannot fit between the buildings to perform maintenance.

29. The Barn's proximity to the neighboring structure has negatively impacted Applicant's opportunities to refinance the Parcel. This relates to non-compliant setbacks.

30. Applicant purchased the property in 2004. At that time, the Barn was in fair condition and retained its original features.

31. At that time, the Shed was in deteriorating condition with a cracked wall and rotting sill.

32. Since 2004, Ms. Donovan has repaired barn doors, removed a failing chimney, and painted two (2) sides of the Barn. The two remaining sides are not accessible due to the location to the neighboring structure.

33. While the Barn has been damaged, it can be rehabilitated if the Shed is removed, the Barn is moved from its current location, and it is placed on a foundation.

34. In support of the Project, Applicant provided reports and live testimony from Mr. Eric Gilbertson, a private citizen of the City and historic preservation professional, Mr. Jay White, a licensed architect with expertise in the structural analysis of historic buildings, and Mr. Will Schenbaum, a builder.

35. Mr. Gilbertston, Mr. White, and Mr. Schenbaum each have inspected the Parcel, including the Barn and Shed, and are familiar with the Project.

36. Each of Mr. Gilbertson, Mr. White, and Mr. Schenbaum have testified, and provided a report, that removing the Shed and moving the Barn to a new location on the Parcel will save the Barn.

37. Appellant Courtney Mireille O'Connor resides at 24 Loomis Street in Montpelier.

38. The northern boundary of 14 Liberty Street abuts a portion of the southern boundary of 24 Loomis Street.

39. The structure that Neighbor resides in at 24 Loomis Street is located close to the shared boundary with 14 Liberty Street and has an approximate setback of 5 feet.

40. 24 Loomis Street is taller than the proposed relocated Barn on 14 Liberty Street.

41. Neighbor relies on passive solar heating principles to heat her home. She has also improved her home with roof-top solar panels, which produce electricity equivalent to a substantial portion of her home energy needs, and two batteries which can store surplus electricity generated by the solar panels and release it to the City's grid.

42. When 24 Loomis Street considered adding the roof-top solar project there was no consideration of the right of property owners to build with 10-foot setbacks and structures 35 feet tall.

43. At the time that Neighbor installed her roof-top solar project, 14 Liberty Street had already applied for its barn relocation project, had obtained DRB approval, and the present appeal was pending before the Court.

44. On May 1, 2021, Applicant submitted a zoning application to demolish the Shed and to move the remainder of the Barn onto a new foundation at the rear of her lot (the Project).

45. In the proposed new location, the Barn would be approximately 10 feet from the shared property boundary with Neighbor. The southeastern side of the Barn would be approximately 9 feet from the shared property boundary with former-Appellants Aldridge and Coughlin. These measurements are from the eaves of the building to the property line. The height of the Barn is 26 feet.

46. The Project has been designed to comply with all applicable dimensional standards for the Residential 1500 District.

47. Following moving the Barn, the existing location will be cleaned, filled, and topsoil added and seeded to turn the area into grass surface.

48. Applicant has a stormwater management plan for the Barn in its newly proposed location.

49. This stormwater and drainage plan includes drains along the sides of the Barn to collect stormwater runoff from the Barn's roof and allowing the stormwater to the on-site soils.

50. Benefits of the Barn being relocated during the Project include elimination of the failing Shed, preserving the historic barn, the ability to maintain all sides of the barn, stabilize the Barn in the long term with a new foundation, improved site aesthetics, and improved property use.

51. Should the Shed not be demolished, and the Barn not be rehabilitated and placed on a new foundation, both structures will likely collapse and be destroyed or will be condemned.

52. The estimated cost of relocating the barn alone is approximately $120,000.

53. The estimated cost of relocating the Barn and repairing and relocating the Shed addition is $160,000.

54. Applicant cannot take advantage of the State of Vermont's "barn grant" assistance with respect to the Project, as the Barn is not used for agricultural purposes.

55. Following Barn relocation, 16 Liberty Street will have increased solar exposure while 24 Loomis Street will have slightly less solar exposure, resulting in an approximately 1.78% decrease in production per year.

56. The Barn relocation renovation project has community benefit by preserving a historic structure which are generally declining in numbers. The relocation also reduces risks to 16 Liberty Street.

57. Zoning in Montpelier is governed by the City's Unified Development Regulations (UDR) adopted January 3, 2018. The application vested in the version of the UDR last amended September 25, 2019.

58. In a decision dated July 27, 2021, the DRB approved the application.

59. Appellants subsequently filed this appeal with our court.

Conclusions of Law

I. Question 2: Whether the subject application for the historic shed demolition and historic barn relocation complies with . . . all requirements of Sub-Sections 2108. C-[D], and Figure 2-08 of the Montpelier Unified Development Regulations and should be approved or denied?

14 Liberty Street is in the Residential 1500 District. Question 2 addresses the Project's compliance with applicable use standards, UDR § 2108(C), and dimensional standards, UDR § 2108(D) and Figure 2-08. We address each aspect of the Question in turn.

UDR § 2108(C) states that Figure 2-15 sets forth the allowable uses within the district. Further, while not cited in the Question, UDR § 3003 is also applicable to the Project. Section 3003(A) states that "[a]ccessory structures and uses are allowed in all districts . . . ." UDR § 3003(A). Section 3003(A) "applies to any subordinate use of a structure or land that is clearly incidental to, and customarily found in conjunction with the principal use or structure." Id.

The Barn is a carriage barn which would have traditionally been used to house horses and a buggy. Applicant presently uses it for storage in association with her residence and small portions of the Barn are used by her tenant for storage. After moving the Barn, Applicant proposes to continue to use it for storage and for vehicle parking. While a "barn" use is not expressly listed within the use table set forth in Figure 2-15, the structure and use is clearly incidental and subordinate to the principal use and structure at the Parcel, the residence and its residential uses and is therefore a proper accessory use to the residence.[1] Thus, the Barn is,

[1] This is antidotally supported by Figure 3-07 "Accessory Structures and Uses within Setbacks for Principal Buildings." This figure lists "[g]arages, carports, pole barns, and similar large accessory structures" as being "accessory structures." See UDR Figure 3-07. The Barn has been historically, and will continue to in the future, used as effectively a garage.

and will continue to be when relocated and rehabilitated, incidental and subordinate to the residential use and structure and therefore is an allowable use within the Residential 1500 District.

Having concluded that the application is one for an allowable use, we turn to the dimensional standards set forth in UDR § 2108(D). UDR § 2108(D) states that Figure 2-08 establishes the Residential 1500 District dimensional standards, as aided by definitions in UDR § 3002. UDR § 2108(D). Figure 2-08 sets the following dimensional standards:

Figure 2-08. **Residential 1500 District Dimensional Standards**

PARCELS	SETBACKS	DENSITY	BUILDINGS
Parcel size: 3,000 sf min	**Front:** 10 ft. min	**Residential:** 1 du/1,500 sf max	**Footprint:** 2,500 sf max
Frontage: 45 ft. min	**Side:** 5 ft. min	**Floor Area Ratio:** 1.0 FAR max	**Height:** 35 ft. max
Coverage: 60% max	**Rear:** 10 ft. min		
	Water: 25 ft. min		

Note 1 See Section 3002 for specific information and any exceptions regarding dimensional standards. Accessory structures may have reduced dimensional standards (see Section 3003 for specific details regarding accessory structures).

The Project complies with these dimensional standards. First, the Barn as relocated will be 10 feet away from the rear property line, the shared property boundary with Neighbor's property. This complies with the minimum rear setback of 10 feet. The Barn is further proposed to be 9 feet from the property line on both the southeastern side and northwestern side of the Barn. This complies with the minimum side setback of 5 feet. The Barn, as it is proposed to be many feet behind the main home and front property line, is proposed to be well over 10 feet from the front property line, and therefore complies with the minimum setback of 10 feet. The Barn height will be approximately 26 feet, and this complies with a maximum height of 35 feet. Applicant's builder further credibly testified that the Project would conform with all remaining dimensional standards. The Court concludes the same.

For these reasons, the Court concludes that the Project complies with UDR 2108.C and D, and Figure 2-08.

II. Question 4: Whether the subject application for the historic shed demolition and historic barn relocation complies with Section 3004, including Sub-Sections 3004.A–D of the Montpelier Unified Development Regulations and should be approved or denied?

UDR § 3004 sets forth the standards applicable to demolition. Neighbor's Question 4 addresses the four subparts of § 3004, which the Court addresses in order.[2]

Prior to addressing these provisions, the Court addresses Neighbor's assertions that alternative project locations or scopes are relevant or applicable to the Court's analysis under UDR §§ 3004. Neighbor asserts that there are alternative locations on the Parcel, or scopes of the Project, that would accomplish the same general goals of the Project but be less impactful to her or her property. These alternatives are not relevant to this appeal.

The reach of this Court in a zoning appeal "is as broad as the [appropriate municipal panel], but it is not broader." In re Torres, 154 Vt. 233, 235 (1990). In our de novo review, this Court considers the scope of the application before it in the context of the applicable zoning regulations. Id.; see also In re Poole, 136 Vt. 242, 247 (1978) (citing 24 V.S.A. § 4472(a)).

Applicant applied for a permit to demolish the Shed and to relocate the Barn to its proposed site on a new foundation. Neighbor points to no provision of the UDR that would require the DRB or this Court to consider alternative locations of the Barn or alternative project scopes when conducting an analysis under § 3004. Therefore, this Court's task on appeal is to consider whether the Project as presented complies with the UDR, without consideration to alternatives that Neighbor presents. Thus, we do not consider the potential feasibility of alternatives here and, having concluded that the project as proposed complies with UDR § 3004(D)(3), we conclude such alternatives are irrelevant to the Court's analysis.

Having reached this conclusion, we address the application's compliance with the remainder of § 3004.

[2] To the extent that Neighbor's Question addresses § 3004(D)(6), relevant to hearing recesses to determine for certain documentation and feasibility review, and § 3004(D)(8), noting that § 3004 does not apply to certain orders relevant to health, safety, and welfare concerns, we conclude that neither subsection is applicable herein. Section 3004(D)(7) is a requirement of any approved permit and, therefore, the Court will condition Applicant's approval on compliance with the terms therein.

a. Section 3004(A)

Section 3004(A) states that "a zoning permit is required to demolish a structure or part of a structure." UDR § 3004(A). The application before the Court is one for such a zoning permit, because Applicant seeks to demolish the Shed.

b. Section 3004(B)

Section 3004(B) sets forth the additional application requirements that must be submitted for a permit to demolish a structure. These include:

> [A] demolition and site remediation plan which at a minimum describes the intended use of the site and the manner in which the site shall be returned to grade, surfaced, landscaped and/or screened to minimize adverse visual impacts, and secured to prevent hazards to public safety and adjoining properties.

UDR § 3004(B).

Applicant, through its witnesses, have provided such a plan. Applicant has indicated that the site is generally flat and the relocation, and demolition of the Shed, will not alter the site characteristics. Applicant will seed and mulch any disturbed area, apart from the infiltration drains associated with its stormwater management system and will create a lawn. Neighbor has not indicated any deficiency in the Applicant's compliance with this requirement. We conclude that Applicant complies with the requirements of § 3004(B).

c. Section 3004(C)

Section 3004(C) states that:

> All demolition shall be completed with 60 days of commencement and, at a minimum, completion shall include: (1) All structural materials and debris shall be removed from the site; (2) The site shall be restored to a natural grade; and (3) Groundcover shall be re-established to prevent erosion unless otherwise specified as a condition of approval.

Applicant has indicated that the grade of the Parcel will not change, and that the site will be seeded and mulched once the Barn is relocated and the Shed is demolished. Therefore, Applicant complies with UDR §§ 3004(C)(2) and (3). The Court will condition its approval of this permit on compliance with these provisions, and the requirement that the demolition be

completed within 60 days of commencement. As conditioned, Applicant complies with § 3004(C).

d. Section 3004(D)

Section 3004(D) concerns the demolition or replacement of any structure or portion thereof listed on the Vermont Historic Sites and Structures and the National Register of Historic Places, on which the Barn and Shed listed. Section 3004(D) contains many subparts and standards and is at the crux of the dispute presently before the Court.

First, § 3004(D)(1) sets forth application requirements for the demolition of such a structure. It states:

> (a) A demolition and site restoration plan which, at a minimum, describes the intended use of the site and the manner in which the site is to be restored to grade, surfaced, landscaped or screened to minimize adverse visual impacts, and secured to prevent hazards to public safety and adjoining properties; and
> (b) For historic structures, documentation that the rehabilitation of the structure would cause undue financial hardship to the owner, or that the demolition is part of a site development plan that would provide clear and substantial benefit to the municipality.

UDR § 3004(D)(1)(a)–(b).

For the same reasons as with respect to UDR § 3004(C), Applicant complies with § 3004(D)(1)(a). See Supra, Section C. As noted above, the grade of the Parcel will not change, and the site will be seeded and mulched once the Barn is relocated and the Shed is demolished. Thus, the demolition and site restoration plan describes the intended use of the site and the manner in which the site is to be to minimize adverse visual impacts. Further, upon relocation, the decaying Barn and Shed will no longer present a hazard to public safety and adjoining properties after relocation of the Barn and demolition of the Shed, and after the Barn is relocated, it can be restored, further minimizing risk. Section 3004(D)(1)(a) is satisfied.

For the reasons set forth below, we conclude that Applicant has provided sufficient documentation to allow for a determination that the demolition is part of a site development

plan that would provide clear and substantial benefit to the City and, therefore, complies with UDR § 3004(D)(1)(b).

Section 3004(D)(2) states that the demolition or replacement of a historic structure is prohibited unless the DRB approves the project and:

> (a) The Board finds, pursuant to Paragraphs (3) and (4) below, that rehabilitation of the structure or portion thereof would cause undue financial hardship to the owner; or
> (b) The Board finds that the demolition is part of a site development plan and design plan (if applicable) that would provide clear and substantial benefit to the community.

UDR § 3004(D)(2); cf. UDR § 3004(D)(1)(b) (listing the same disjunctive requirements).

Both § 3004(D)(2) and § 3004(D)(1)(b) are disjunctive, not conjunctive, and the Court interprets that requirement as such. See In re Application of Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 22, 199 Vt. 19 ("We interpret zoning ordinances according to the principles of statutory construction, . . . and adopt an interpretation that implements the legislative purpose. . . . As usual, we start with the plain language and enforce it according to its terms if it is unambiguous.") (internal citations omitted). The plain language of § 3004(D)(2) and § 3004(D)(1)(b) require that an application to demolish a historic structure may be approved if the DRB, or this Court on appeal, find either (1) that the rehabilitation would cause an undue financial hardship, or (2) that the demolition is part of a site development plan and design plan that would provide clear and substantial benefit to the community. See State v. Turner, 2021 VT 30, ¶ 10, 214 Vt. 464 (noting that "the word 'or' is most often used in the disjunctive . . .").[3] An application, therefore, does not need to satisfy both subsections of § 3004(D)(2).

Further, for the following reasons, this Court concludes that the application would provide a clear and substantial benefit to the community and the City, satisfying both § 3004(D)(1)(b) and § 3004(D)(2). The Court further concludes that, while Applicant has not provided sufficient evidence to allow for the Court to conclude that rehabilitation would

[3] While State v. Turner does address instances where a disjunctive clause may be interpreted conjunctively, we conclude that no such instances are applicable here and the plain language of UDR § 3004(D)(2) mandates a disjunctive interpretation.

provide an undue financial hardship, it is irrelevant. Having reached the former conclusion, Applicant need not also satisfy the undue financial hardship prong, and therefore this deficiency is immaterial. The Court concludes Applicant satisfies § 3004(D)(1), as well as § 3004(D)(2) by satisfying § 3004(D)(2)(b). We address the merits of each conclusion in detail below.

The UDR does not provide specific factors that this Court must consider when determining whether a "clear and substantial benefit to the community" exists. When interpreting a zoning regulation, however, we apply the rules of statutory construction. Lathrop P'ship I, 2015 VT at ¶ 22 (citation omitted). We will "construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance." In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. Further, "because zoning ordinances 'are in derogation of private property rights,' they must be construed narrowly in favor of the property owner." Lathrop P'ship I, 2015 VT at ¶ 29 (quoting In re Champlain Oil Co., 2014 VT 19, ¶ 2, 196 Vt. 29)). As such "we must resolve any ambiguity in favor of the landowner." In re Confluence Behavioral Health, LLC, 2017 VT 112, n. 6, 206 Vt. 302.

Demolition of the Shed and the relocation and rehabilitation of the Barn are part of an overall site plan that provides a clear and substantial benefit to the community.

Throughout the UDR and the City's Master Plan, the City has indicated repeatedly the goal of protecting and preserving historic resources. The UDR states that the regulations, generally, "are intended to . . . promote development that protects and conserves . . . historic resources." UDR § 1002(A). The UDR further implements the policies and principles of the City's Master Plan. Id. One of the "specific goals" of the municipal plan is to "identify, protect, and preserve important natural features of the Vermont landscape, including . . . important historic structures, sites, or districts . . .." Montpelier Master Plan, p. 20–21, admitted at trial as Exhibit E.

The Barn itself, constructed over 22 years before the Shed, is a carriage barn that is rare within the City and only stands to become more rare over time. The Barn is in a state of disrepair due to the existence of the Shed. The Shed was constructed after the Barn, is of little historic value, has deteriorated to the point where its materials cannot be repurposed in

rehabilitation, and its existence is threatening the status of the Barn. The Shed began damaging the Barn at the time it was constructed and damage was exacerbated by the fact that neither structure has a foundation, resulting in the structures sinking into the ground and rotting sill plates. Per the credible testimony of Mr. Schebaum, builder, and Mr. White, licensed architect and expert of historical building structural analysis, the Court found that the Barn cannot be rehabilitated while the Shed remains. Further, the Barn cannot be rehabilitated in its present location due to the proximity of the Barn to other structures in the immediate area and the lack of foundation at its current location. Should rehabilitation efforts not move forward, both structures will likely collapse or be condemned, which is contrary to the City's clear goals, as set forth in the Master Plan, and regulatory provisions, as set forth in the UDR, which direct the preservation of such historic places. Based on the provisions of the UDR and the Master Plan, we conclude that the application is part of a development plan that will provide a clear and substantial benefit to the community, protecting and preserving the historic carriage barn.

In reaching this conclusion, we reject Neighbor's argument that impacts to her solar array and heating systems negate the community benefit of historic preservation. In presenting this argument, Neighbor directs us to the City's renewable energy goals, as set forth in the Master Plan. Neighbor argues that City's renewable energy goals are, effectively, superior to the City's historic preservation goals. Section 3004(D)(3) states that an application must provide a clear and substantial community benefit. There may be many different types clear and substantial community benefits that a development project may bring forth or impact. The Master Plan has many goals. While it includes the goal of promoting renewable energy, that is not the sole goal of the Master Plan. As discussed above, historic preservation is also a clear specific goal in the Master Plan. There is nothing within the UDR or the Master Plan that states that renewable energy goals are more valuable to the City than historic preservation goals. We decline to read such a provision into either. Without such provisions, Neighbors effectively ask us to "read over" the City's clear goals of historic preservation. We will not do so. See In re

Jenness, 2008 VT 117, ¶ 24, 185 Vt. 16 ("When possible we construe statutes to avoid rendering one part mere surplusage.") (citations omitted).[4]

For the foregoing reasons, we conclude that the application provides a "clear and substantial benefit to the community and complies § 3004(D)(2)(b). Having reached the conclusion that the application provides a clear and substantial benefit to the community in accordance with UDR § 3004(D)(2)(b) and, therefore, having concluded that the application complies with UDR § 3004(D)(2) generally, we do not need to address whether Applicant has demonstrated that rehabilitation would cause an undue financial hardship.

To the extent, however, that Neighbor raises this issue within her Statement of Questions, we address it here. The test for determining whether there is an "undue financial hardship" is proscribed in UDR § 3004(D)(3). Section 3004(D)(3) states that the DRB, or this Court on appeal, "shall consider" several factors when determining whether there is an "undue financial hardship." UDR § 3004(D)(3).

These factors are:

(a) The applicant's knowledge of the property's historical significance at the time of acquisition, or of its status subsequent to acquisition;
(b) The structural soundness of the building, or any structures on the property and their suitability for rehabilitation;
(c) The economic feasibility of rehabilitation or reuse of the existing property in the case of a proposed demolition;
(d) The current level of economic return on the property as considered in relation to the following:

[4] While there may be a circumstance where the facts of an application would dictate renewable energy goals being the sole "clear and substantial community benefit," such facts are not presented here. The facts show that Neighbor installed this array after Applicant had already received DRB approval for the Project and an appeal of that approval was before this Court. The Project does not eliminate the use of Neighbor's solar panels and any potential impact to the solar is limited. To the extent that Neighbor alleges that there will be impacts to her passive solar and heat retention systems, she provides no analysis as to the scope, if any, of such impacts. We, therefore, decline to conclude that the historic preservation provided for in this application is not a "clear and substantial community benefit."

Additionally, to the extent that Neighbor asserts through evidence presented at trial that an analysis of Applicant's stormwater system is relevant under an analysis in § 3004(D)(2)(b), we conclude that it is not. There is no indication in the UDR that stormwater impacts would be analyzed under § 3004(D)(2)(b), especially because stormwater is regulated in other portions of the UDR. Neighbor has not directed the Court to any provision allowing for such an analysis within the scope of the Question and, therefore, we will not conduct one here.

(i) amount paid for the property, the date of purchase, and party from whom purchased, including a description of the relationship, if any, between the owner of record or applicant, and the person from whom the property was purchased;
(ii) a substantial decrease in the fair market value of the property as a result of the denial of the permit;
(iii) the fair market value of the property at the time the application is filed;
(iv) real estate taxes for the previous three (3) years;
(v) annual gross and net income, if any, from the property for the previous three (3) years; itemized operating and maintenance expenses for the previous three (3) years; and a depreciation deduction and annual cash flow before and after debt service, if any, for the previous three (3) years;
(vi) remaining balance on any mortgage or other financing secured by the property and annual debt service, if any, during the previous three (3) years;
(vii) all appraisals obtained within the previous three (3) years by the owner or applicant in connection with the purchase, financing or ownership of the property;
(viii) any state or federal income tax returns on or relating to the property for the previous three (3) years.

(j) The marketability of the property for sale or lease, considered in relation to any listing of the property for sale or lease, and the price asked and offers received, if any, within the previous two (2) years. This determination can include testimony and relevant documents regarding:
    a. Any real estate broker or firm engaged to sell or lease the property;
    b. the reasonableness of the price or rent sought by the applicant; and
    c. any advertisements placed for the sale or rent of the property by the owner or applicant.
(k) The feasibility of alternative uses that can earn a reasonable economic return for the property as considered in relation to the following:

(i) a report from a licensed engineer or architect with experience in rehabilitation as to the structural soundness of any buildings/structures on the property and their suitability for rehabilitation;
(ii) testimony from a licensed engineer or architect with experience in rehabilitation as to the economic feasibility of

rehabilitation or reuse of existing buildings/structures on the property.

(l) Studies and evaluations conducted at the owner's expense shall identify impact of economic incentives and funding available to the applicant through federal, state, city, or private programs, including tax credits, in relation to a ten (10) year pro forma of projected revenues and expenses for the reasonable uses or revenues that takes into consideration the utilization of incentives programs available.

(m) Input from community organizations, preservation groups, other associations, and private citizens who may wish to evaluate and comment on a submission made under the financial hardship provision.

When considering these factors, however, the UDR states that certain conduct is excluded from review. Section 3004(D)(5) states:

> (5) Conduct to be excluded from review – Demonstration of undue financial hardship by the owner shall not be based on conditions caused by or resulting from the following:
> (a) willful or negligent acts by the owner, agents, tenants, or licensees;
> (b) purchasing the property for substantially more than market value at the time of purchase;
> (c) failure to perform normal maintenance and repairs;
> (d) failure to diligently solicit and retain tenants;
> (e) failure to prescribe a rental amount which is reasonable; or
> (f) failure to provide normal tenant improvements.
> (g) failure to maintain or repair significant architectural features or structural components.

As such, any of this conduct must be excluded from our review, and we address these factors in turn and in exclusion of the conduct addressed in § 3004(D)(5).

With respect to these exclusions, Neighbor argues Applicant has committed "demolition by neglect" or that she has willfully caused damage to the property, see UDR § 3004(D)(5)(a), failed to perform normal maintenance, see UDR § 3004(D)(5)(c), or failed to maintain the

structural components, see UDR § 3004(D)(5)(g). The evidence before the Court does not support this conclusion.

Evidence shows that the structural deficiencies in both buildings are a result of construction deficiencies made during the buildings' construction decades before Applicant purchased the Parcel. Specifically, those buildings were structurally insufficient due to the initial failure to construct the Barn with a foundation or to construct the Barn with heavy framing capable of supporting a shed. Then, when the Shed was subsequently added, that initial construction was deficient because the Shed also lacked a foundation, and the Barn lacked the ability to support both the Barn and the Shed. These deficiencies occurred decades prior to Applicant's purchase and the evidence shows that damage to the Barn from the Shed likely began approximately at the same time the Shed was constructed over 90 years ago. That damage had already occurred to the structures when Applicant purchased the property and, at the time she purchased the property, could not be remedied due to the proximity of the Barn to neighboring structures. Further, Applicant has conducted certain maintenance activities on the Barn, which is the only structure suitable for rehabilitation at this point.

Having reached this conclusion, we conclude that Applicant has failed to provide sufficient evidence with respect to UDR §§ 3004(D)(3)(c)—(g) such that the Court can conclude that the project would result in an "undue financial hardship" as defined by the UDR.

With respect to UDR § 3004(D)(3)(c), Applicant has presented evidence that the proposal, which includes the demolition and rehabilitation of the Barn is economically feasible. While Applicant has provided evidence that rehabilitation of the Shed would cost approximately $40,000, if moved, or $50,000 if rehabilitated in place, she has not provided an understanding as to why this increased cost is economically unfeasible. The Court will note, however, that given the degree of decomposition of the Shed, rehabilitation in this context would consist, effectively, of creating a modern replica of the Shed, which is of little historical significance.

With respect to UDR § 3004(D)(3)(d), Applicant argues that, because Applicant's principal use of the property is as her residence, and the Barn and Shed are accessory to such use, this subsection is not applicable to the Court's analysis. We disagree. Section

3004(D)(5)(d) addresses more than just the economic return of a property in the sense of whether the Parcel is income producing or not. Instead, § 3004(D)(5)(d) appears to address a property's economic return, and the impact approving or denying a permit to demolish would have on such a return, in a more general sense. This can be understood by the provisions referencing the Parcel's property value and applicable real estate taxes. While Applicant has noted that she cannot refinance her property with the Barn in its state, and generally the property will likely be worth less if the Barn and Shed collapse, and she has provided certain appraisal and tax documents, she has failed to provide an understanding as to how the Parcel's economic return will be impacted as set forth in § 3004(D)(5)(d).

Section 3004(D)(5)(e) asks the Court to consider "[t]he marketability of the property for sale or lease, considered in relation to any listing of the property for sale or lease, and the price asked and offers received, if any, within the previous two (2) years . . .." The Parcel has not been listed for sale in the past 2 years, such that a consideration in that regard is irrelevant. The Parcel is, however, partially leased to a tenant. Applicant has not provided information as to whether the Parcel has been offered for lease in the past two years, and as such the Court cannot fully consider the provisions of § 3004(D)(5)(e) or reach any conclusions in this regard.

With respect to UDR § 3004(D)(3)(f), Mr. White, a licensed architect with experience in the rehabilitation of historic structures, testified and reported that the Barn and Shed today are structurally unsound and that while the Shed is not suitable for rehabilitation, the Barn is. This is because of the state of disrepair of the Shed, including the fact that the Shed's materials are deteriorated to the point of being unusable, along with structural deficiencies with how both buildings were constructed. As discussed above, we find this testimony credible and adopt it here.

The estimated cost of relocating the Barn alone is approximately $120,000. The estimated cost of relocating the Barn and repairing and relocating the Shed addition is approximately $160,000. Mr. White has stated that any rehabilitated Shed would be functionally a wholly modern structure because the historic materials are unusable. Mr. White has not, however, testified that the rehabilitation is economically unfeasible. While it may be true that the increase in price is substantial, especially because rehabilitating the Shed would

be functionally a new modern build, we cannot conclude that this factor weighs in Applicant's favor based on the evidence presented.

Finally, with respect to UDR § 3004(D)(3)(g), Applicant's reports have indicated that the Vermont "Barn Grants" are not available to Applicant because the Barn is not agricultural. While Applicant has testified that she investigated available tax credits, she did not produce a study or evaluation in the form addressed in § 3004(D)(5)(g), nor did Applicant produce an analysis of whether any other funding or incentives would, or would not, be available to her for the Project beyond tax incentives and the state "Barn Grants." While it may be the case that such programs may not be available to Applicant for the Project, we are without sufficient facts to decide as to whether any would be applicable here.

Based on the foregoing, we conclude that Applicant has not provided sufficient evidence to allow this Court to determine whether failure to approve this application would result in an undue financial hardship as that term is defined by the UDR. As such, we do not need to analyze the applicability of UDR § 3004(D)(4) as it pertains to this analysis. Even so, Applicant has demonstrated that this application is part of a plan that will provide for a clear and substantial community benefit and, therefore, complies with the provisions of § 3004(D)(2)(b). Thus, we conclude that Applicant is entitled to a permit for the application as conditioned herein.

Conclusion

The Court concludes that the application complies with the relevant use and dimensional standards as set forth in the UDR. Further, we conclude that the Project is part of a plan that provides a clear and substantial community benefit. In so concluding, we find that Applicant complies with the relevant standards set forth in UDR § 3004, including subsections § 3004(D). In reaching this result, we conclude that alternative project scopes and locations are not subject to review in this appeal and that Applicant has not committed "demolition by neglect." Thus, we approve the Project, with the condition that, within 60 days after commencement, all structural materials shall be removed from the site, and the disturbed area

be cleaned, filled, and topsoil added and seeded to turn the area into grass or otherwise landscaped surface.

This matter is remanded to the City of Montpelier for any required permitting in conformance with this decision. This concludes the matter. A Judgment Order is issued concurrently.

Electronically signed January 24, 2023 pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division