VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION
Docket No. 21-ENV-00085

14 Liberty Street Permit	DECISION ON MOTIONS

Appellants Courtney Mireille O'Connor, Amanda Aldridge, and Kevin Coughlin (Appellants) challenge the decision of the City of Montpelier Development Review Board to approve their neighbor's application for demolition of a shed addition to a historic barn and relocation of the barn within the subject parcel. Applicant Alison Donovan (Applicant) seeks to have the DRB decision affirmed. Presently before the Court is Applicant's motion for judgment on the pleadings on some of the statement of questions and for summary judgment on others.

Appellants are represented by L. Brooke Dingledine, Esq. Applicant is represented by Nicholas Lowe, Esq. The City of Montpelier, which has not played an active role in the motion practice, is represented by David Rugh, Esq.

Factual and Procedural Background

1. Applicant Alison Donovan owns a lot at 14 Liberty Street in the City of Montpelier (City).
2. The lot is currently improved with a single-family residence with a third-floor apartment (the home), and a barn with a shed-roofed addition (the barn).
3. Both the home and the barn are structures listed on the National Register of Historic Places. The listing for the barn includes mention of the shed-roofed addition.
4. Appellant Courtney Mireille O'Connor resides at 24 Loomis Street in Montpelier. 24 Loomis Street shares a common boundary with 14 Liberty Street.
5. Appellant O'Connor relies on passive solar heating principles to heat her home. She has also improved her home with 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.

6. Appellants Amanda Aldridge and Kevin Coughlin reside at 18 Liberty Street in Montpelier. Their lot shares a common boundary with 14 Liberty Street.
7. On May 1, 2021, Alison Donovan submitted a zoning application to demolish the shed-roofed addition to the barn and to move the remainder of the barn onto a new foundation at the rear of her lot.
8. In the proposed new location for the barn, the northeastern side (the side closest to 24 Loomis Street) would be approximately 10 feet from the shared property boundary with Appellant O'Connor. The southeastern side (the side closest to 18 Liberty Street) would be approximately 9 feet from the shared property boundary with Appellants Aldridge and Coughlin. These measurements are from the eaves of the building to the property line.
9. Appellants Aldridge and Coughlin's home has one wall located directly on or next to this shared property line.
10. 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.
11. 14 Liberty Street is located in the Residential 1500 (Res 1.5) Zoning District.
12. The Montpelier DRB reviewed the application under the use standards and dimensional standards for the Res 1.5 Zoning District, under the standards for demolition of an historic structure (or a portion thereof), and under the general provisions on erosion control and stormwater management resulting from new development.
13. In a decision dated July 27, 2021, the DRB approved the application.
14. Appellants subsequently filed this appeal with our court.

Discussion

Applicant has moved for judgment on the pleadings on some questions and summary judgment on others. "When considering a motion for judgment on the pleadings, this Court must 'take the facts as pleaded by the nonmoving party as true,' and we may only grant the motion if the moving party is entitled to judgment as a matter of law, based only on 'facts as asserted in

the pleadings.'" Town of New Haven v. Clark, No. 25-3-13 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Feb. 14, 2014) (Durkin, J.) (quoting In re Knapp, 152 Vt. 59, 63 (1989); V.R.C.P. 12(c)). In the particular context of a de novo appeal to our Court, which begins not with a complaint but with a statement of questions, the "pleadings" are typically sparse. In effect, this motion is testing the legal sufficiency of Appellants' arguments, much like a 12(b)(6) motion. *See* Hinesburg Hannaford Water Quality Certification, No. 114-8-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Aug. 11, 2015) (Walsh, J.) (noting that review under 12(c) and 12(b)(6) is quite similar and that "a purely legal issue . . . is . . . appropriate for resolution on the pleadings.").

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5. The nonmoving party "receives the benefit of all reasonable doubts and inferences," but must respond with more than unsupported allegations in order to show that material facts are in dispute. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. For the purposes of the motion, the Court "will accept as true the allegations made in opposition to . . . summary judgment, so long as they are supported by affidavits or other evidentiary material." Id. When the non-moving party bears the ultimate burden of persuasion at trial on an issue, the moving party "may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case.... The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." Boulton v. CLD Consulting Engineers, Inc., 2003 VT 72, ¶ 5, 175 Vt. 413 (citation omitted).

I. Question 1

Applicant moves for judgment on the pleadings on Question 1, which asks whether her application complies with Section 1002 of the UDR. Section 1002 is the UDR's purpose provision, and reads in its entirety as follows:

> These regulations implement the policies of the Montpelier Master Plan and the Act. They are intended to:
> (1) Ensure that development protects public health, safety and welfare;
> (2) Promote development that protects and conserves natural, agricultural, scenic and historic resources;
> (3) Promote housing to meet the needs of residents; and

(4) Promote approaches to land use and development that are consistent with smart growth principles.

Applicant argues that this purpose provision expresses non-enforceable aspirations and that compliance with it therefore cannot be a condition of the land-use permit she seeks. Appellants argue that the provision does create enforceable restrictions on land development. They rely heavily on the reference to "implementing the policies of the Montpelier Master Plan and the [Vermont Planning and Development] Act [codified at Title 24 Chapter 117]." The Planning and Development Act requires that Vermont municipalities, if they adopt master plans, do so in furtherance of the Act's goals. It also requires that if those municipalities subsequently adopt zoning regulations, the regulations must be in conformance with the master plans. *See generally* 24 V.S.A. §§ 4302, 4414.

Despite this language in the enabling statute, the Vermont Supreme Court has repeatedly affirmed that "[z]oning is properly conceived of as the partial implementation of a [municipal and/or regional] plan of broader scope. It must reflect the plan, but it need not be controlled by it." Kalakowski v. John A. Russell Corp., 137 Vt. 219, 225 (1979) (internal citations omitted). This is why "only those plan provisions that set forth a 'specific policy' and are 'stated in language that is clear and unqualified, and creates no ambiguity' will be regarded as regulatory instead of aspirational and can therefore be enforceable against an applicant." Saxon Hill Corp. Sand Extraction Application, No. 42-3-11 Vtec, slip op. at 12 (Vt. Super. Ct. Envtl. Div. Sep. 17, 2014) (Durkin, J.) (citing In re John A. Russell Corp., 2003 VT 93, ¶ 16, 176 Vt. 520).

In Regan v. Pomerleau, 2014 VT 99, ¶ 16, 197 Vt. 449 (2014), the Court affirmed our application of this general rule to aspirational purpose statements in zoning bylaws. The Court's holding was *not* that any provision titled "Purpose" may not create a legal obligation. Rather, it was that those provisions were more likely to, and indeed in that case did, express "policy statements phrased as nonregulatory abstractions [which] are not equivalent to enforceable restrictions." Id. As we have stated, "Purpose provisions can, however, include individual mandatory requirements that are enforceable." Missbrenner & Legge SD Approval, No. 80-7-19 Vtec, slip op. at 15 (Vt. Super. Ct. Envtl. Div. Jan. 5, 2021) (Walsh, J.).

Determining whether there is a restriction with regulatory force is therefore a matter of reading the language of the particular provision. As we do so, all of our normal principles of statutory construction apply. We "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. If there is no plain meaning, we will "attempt to discern the intent from other sources without being limited by an isolated sentence." In re Stowe Club Highlands, 164 Vt. 272, 280 (1995). In construing ordinance language, our "paramount goal" is to implement the intent of its drafters. Colwell v. Allstate Ins. Co., 2003 VT 5, ¶ 7, 175 Vt. 61. We therefore "adopt a construction that implements the ordinance's legislative purpose and, in any event, will apply common sense." In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578 (quotations omitted).

None of these four subsections to UDR § 1002 express a specific and obligatory requirement. Three refer to promoting very general goals, without measurable or articulable standards for determining when those goals are met. One uses the word "ensure" but also refers to broad aspirations. Viewed within the context of the entire UDR, it is clear that this purpose provision is meant to establish targets for the rest of the UDR, rather than express regulatory restrictions. This purpose provision may still play a role in deciding whether to grant an application, since "[p]urpose provisions are often non-enforceable, but . . . provide assistance when the interpretation of regulatory provisions comes into question." Missbrenner & Legge SD Approval, No. 80-7-19 Vtec at 14 (Jan. 5, 2021). We may consider Section 1002 when deciding on conformity with other provisions of the Bylaws, as raised through the Statement of Questions. Because Question 1 asks strictly about compliance with Section 1002 as a basis for granting or denying the application, however, we **GRANT** Applicant judgment on Question 1, and conclude that compliance with Section 1002 is not a requirement for approval of the application before the Court.

II. Question 2

a. UDR §§ 2108(A), B(3)

Applicant moves for judgment on the pleadings on the portion of Question 2 that asks whether the application complies with Section 2108(A) and Section 2108(B)(3), for identical reasons as on Question 1.

Section 2108 creates the Residential Neighborhood R1500 District and defines neighborhoods within it. Subsection A expresses the purposes for the R1500 District. Subsection (B)(3) defines the Liberty Street West Neighborhood within the R1500 District.[1] Both subsections generally use broad and non-specific language, although Subsection B(3) goes into a bit more detail than Subsection A. Both express the goal of encouraging or allowing infill residential development while B(3) also mentions the goal of allowing adaptive re-use of historical buildings.

By their plain language, these provisions do not create regulatory restrictions, but rather broadly express the purpose for creating the relevant zoning district and neighborhoods within it. For identical reasons to our analysis under Question 1, we conclude that compliance with these provisions is not a condition of approval for this application.

Appellants' argument that the provisions may be further relevant under a "character of the neighborhood" analysis, which the UDR mandates for conditional use review, is unavailing. *See* UDR § 3304. It is true that we have previously held that "it is permissible to require conditional uses to comply with broad, aspirational purpose statements [under a character of the area analysis], even when those purpose statements are the kind of nongregulatory abstractions we would refuse to enforce directly." Rublee 246 White Birch Lane CU, No. 140-11-15 Vtec, slip op. at 10 (Vt. Super. Ct. Envtl. Div. Aug. 23, 2016) (Walsh, J.) (internal quotation marks omitted).

Appellants' argument presupposes, however, that conditional use review is required for the property. The Montpelier DRB did not conduct conditional use review for this application. Nowhere in the Statement of Questions do Appellants ask whether the project satisfies the conditional use review criteria generally, or the character of the neighborhood criterion

[1] It is undisputed that the properties in question are in the Liberty Street West Neighborhood.

specifically. Appellants have therefore not preserved the issue of whether the application is in keeping with the character of the neighborhood for our review. *See* V.R.E.C.P. 5(f) ("[A]ppellant may not raise any question on the appeal not presented in the statement [of questions]."); In re Garen, 174 Vt. 151, 156, (2002) ("[A]n appeal to the environmental court is confined to the issues raised in the statement of questions filed pursuant to an original notice of appeal."). We **GRANT** judgment to Applicant on Question 2, and conclude that compliance with UDR §§ 2108(A), (B)(3) is not a necessary condition for approving the application before the court.

b. 2108(E)

Applicant moves for summary judgment on the portion of Question 2 that asks whether the project complies with UDR § 2108(E). Section 2108(E) expresses architectural standards for certain developments in the R1500 District. Yet by its plain language, the standards contained in the section only apply to major site plan applications. In turn, section 3201 establishes that parcels used for one or two dwelling units are exempt from site plan review, be it major or minor. It is undisputed that Applicant's property is currently used for at most two dwelling units (and will also be used for at most two units if the application is successful). The property is thus not subject to major site plan review, and Section 2108(E) does not apply. We **GRANT** the motion for partial summary judgment on this Question on that basis.

The portions of Question 2 that ask about compliance with 2108(C)-(D) remain for trial.

III. Question 3

Applicant moves for summary judgment on Question 3, which asks whether the application complies with Section 2201 of the UDR. Section 2201 establishes requirements for development in the Design Review Overlay (DRO) Zoning District. As the name suggests, an overlay district is a district laid on top of traditional zonings districts. It supplements the standards and review criteria of the underlying district, to recognize an additional feature that requires special regulation in the overlay district. The boundaries of the DRO District are defined by the City of Montpelier Zoning Map. *See* UDR § 2201(D). It is undisputed that 14 Liberty Street is not in the DRO District.[2]

[2] While Appellants formally deny this fact in their response to the Statement of Undisputed Material Facts, their justification makes clear that they do not actually dispute that 14 Liberty Street is not in the DRO as drawn; rather,

Appellants argue that the DRO District was erroneously drawn, as it leaves out many properties located in Montpelier's National Register Historic District, which is depicted in the Montpelier Master Plan. Essentially, Appellants would have us re-draw the DRO District through this appeal of their neighbor's permit application. Such an action lies far outside the bounds of our jurisdiction in this de novo appeal. *See* In re Torres, 154 Vt. 233, 235 (1990) ("The reach of the superior court in zoning appeals is as broad as the powers of a zoning board of adjustment or a planning commission, but it is not broader."); *see also* Chioffi v. Winooski Zoning Board, 151 Vt. 9, 13 (1989) ("[T]he court must resist the impulse to view itself as a super planning commission."). Lacking jurisdiction over the claim, we **GRANT** Applicant's motion for judgment on Question 3 and conclude that the application need not comply with Section 2201 of the UDR.

IV. Question 5

Applicant moves for summary judgment on Question 5, which asks whether granting the permit to relocate the barn constitutes a physical taking of Appellants' Property. While the Statement of Questions was filed by all of the Appellants, it does not identify whether all Appellants are alleged to have suffered a physical taking. Appellants' response to the present motion refers exclusively to Ms. O'Connor's property. Regardless, the undisputed material facts support granting Applicant's motion for judgment on this Question as to all Appellants, because the project will not result in a physical taking of any Appellant's property.

A physical taking involves "direct government appropriation or physical appropriation of private property," Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005), including "where government requires an owner to suffer a permanent physical invasion of her property—however minor . . .." Id. at 538; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effectuated a taking and required compensation regardless of how minor an intrusion it might entail).

The Vermont Supreme Court has stated that "the federal and Vermont Constitutions use virtually the same test for takings review," Ondovchik Fam. Ltd. P'ship v. Agency of Transp., 2010

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they argue that the DRO "was erroneously created and is not in accordance with 24 VSA 4414(1)(E), the City of Montpelier's Master Plan, or the National Historic Registry."

VT 35, ¶ 14, 187 Vt. 556 (quoting Conway v. Sorrell, 894 F. Supp. 794, 801 n. 8 (D. Vt. 1995)). The Court explicitly recognized the applicability of Loretto to state, as well as federal constitutional claims, when it found that Loretto constituted good reason for overturning the holding in Timms v. State, 139 Vt. 343 (1981). Ondovchik Farm, 2010 VT at ¶ 15.

The holding of Ondovchik Farm illustrates well why the facts alleged here do not support finding a physical taking. In Ondovchik Farm, the Court found that plowing by the state that regularly threw contaminated snow and water onto the neighboring landowner's property did not constitute a physical taking, overruling Timms. The Court, following Loretto, stated that it was necessary to distinguish between "[c]ases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other." The Court found that such deposits of snow and ice constituted government action outside the property causing consequential damages, and not a taking.

Here, the sole bases for the alleged physical taking are that the barn will be uncomfortably close to the property line for Appellants' tastes, and that it will shade Ms. O'Connor's house and, potentially, her rooftop solar panels, reducing the effectiveness of her designed passive solar heating arrangement as well as the panels' ability to generate electricity. These facts provide even less support for finding a physical taking than those of Ondovchik for two reasons. First, the governmental body here is approving a private landowner's plans, and not taking direct action leading to physical impacts, as it was in Ondovchik. Second, unlike in Ondovchik, there is no allegation of physical substances being deposited on any of Appellants' properties as a result of the permitted activity, but rather at worst a deprivation of sunlight. We note in passing that Vermont, like all other U.S. states and federal government, has rejected the so-called "ancient lights doctrine" of English common law, by which a landowner could obtain a right to light and air passing over neighboring property simply by virtue of sustained occupation. Hubbard v. Town, 33 Vt. 295 (1860) (rejecting the doctrine); *see also* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) ("[T]he English doctrine of 'ancient lights' has been unanimously repudiated in this country.").

While sensitive to the concerns of a landowner who has designed their home with a certain level of solar access in mind, these facts simply do not establish a physical taking, as there is no government-orchestrated or mandated intrusion onto Appellants' property. We **GRANT** the motion for summary judgment on this Question.

V. Question 6

Applicant also moves for summary judgment on Question 6. This Question also alleges a taking of Appellants' property, but not via a direct physical taking or invasion. Instead, it alleges what is often referred to as a "regulatory taking," whereby a regulation deprives those subject to it of the use, and thereby the value, of their property interests.

An ordinary regulatory taking claim (as opposed to a per-se taking discussed in Question 7) is evaluated under the test developed in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). As summarized in Lingle, that test looks at a number of factors to decide whether a taking has occurred, chiefly "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." Lingle, 544 U.S. at 538–39.

Appellants have not alleged facts sufficient to demonstrate a cause of action under a regulatory taking claim, for the simple reason that no regulation here is being directly applied to their properties.

Implicit in the theory of a regulatory taking is that the party raising a regulatory takings claim must do so on the basis of the regulation's direct restriction of her property rights, not based on permission issued to a neighbor to develop under the regulatory scheme, at least absent other facts. This feature of takings law is so well-accepted that most courts analyzing an alleged taking do not even have occasion to mention it; a number of cases, however, directly state the proposition. For example, in Muscarello v. Ogle Cnty. Bd. of Comm'rs, 610 F.3d 416, 421–22 (7th Cir. 2010), a case where a landowner unhappy with the approval of a wind farm on neighboring property brought a regulatory takings challenge to that approval, the court stated,

"[Appellant] would have us turn land-use law on its head by accepting the proposition that a regulatory taking occurs whenever a governmental entity lifts a restriction on someone's use of land. We see no warrant for such a step . . . A party must have a protectable property interest in order to state a claim for a violation of due process based on a regulatory taking. . . . [Appellant] does not have a property interest in the lifting of zoning restrictions on another's property" (citing in part Gagliardi v. Vill. of Pawling, 18 F. 3d 188, 191–93 (2d Cir. 1994) for the proposition that "residential landowners had no property interest in the enforcement of zoning laws on adjacent property.").[3]

Holdings of the U.S. and Vermont Supreme Courts also support this conclusion. For example, in Pennsylvania Coal Co. v. Mahon the case which essentially first recognized the concept of the regulatory taking, the Court famously stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393 (1922). The language of regulation "go[ing] too far" only makes sense when one is challenging a *restrictive* government action applied to one's own property interests, rather than permission granted to a neighbor. Over eighty years later, the same idea appeared in Lingle: "[T]hese three inquiries (reflected in Loretto, Lucas, and Penn Central) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government *directly appropriates private property or ousts the owner from his domain*. Lingle, 544 U.S. at 539 (emphasis added). Finally, the Vermont Supreme Court has analyzed the two-part test for the ripeness of a regulatory takings claim as follows: "The first part requires the plaintiff to have obtained a final decision regarding *the application of the government regulations to plaintiff's property*. . . . The second part tests whether the plaintiff has utilized state procedures for obtaining just compensation." Killington, Ltd. v. State, 164 Vt. 253, 257 (1995). This holding suggests that only where government regulations are "appli[ed] . . . to plaintiff's property" may a takings claim lie.

[3] *See also* Tapio Inv. Co. I v. State by & through the Dep't of Transportation, 196 Wash. App. 528, 541–42 (2016) ("Legal acts that do not interfere, physically *or by regulating use of private property*, are not takings, and neither the Washington nor federal constitutions have been held to require compensation for depreciation in market value caused by such legal acts") (emphasis added); Clifton v. Blanchester, 2012-Ohio-780, ¶ 31 (finding a landowner lacked standing to make a taking claim for the re-zoning of his neighbor's property in part because of the lack of a sufficient causal nexus between the regulatory act of re-zoning and his alleged damages).

Our holding in another decision that approval of a neighbor's application for a septic system or potable water supply permit *may* support a regulatory taking argument is not to the contrary. *See* In re Umpire Mtn., LLC WW & WS Permit, No. 171-12-12 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Feb. 27, 2014) (Walsh, J.) (denying summary judgment to both parties as to whether a regulatory taking had occurred in such a scenario). Our holding in that decision was driven by the fact that the applicable statutes and regulations establish an "isolation distance" from any approved well or septic system (known colloquially as a "well shield" or "septic shield") in which construction of features that might pollute or be polluted by the well or septic system is forbidden. This isolation distance explicitly does not respect property lines. Thus, in approving construction of a water well or septic shield on one property, the regulatory agency may, in effect, be creating legal restrictions on development on a neighboring property. All we determined in Umpire Mountain on summary judgment is that such facts *might* give rise to a successful regulatory taking claim; ultimately we determined that such a claim was not ripe, as there were no immediate plans to develop the portions of the neighboring properties affected by the well shield and septic shield. *See* In re Umpire Mtn., LLC WW & WS Permit, No. 171-12-12 Vtec, slip op. at 3 (Vt. Super. Ct. Envtl. Div. Aug. 27, 2014) (Walsh, J.). In contrast, even viewing the undisputed facts in the light most favorable to Appellants, the alleged reduction in the efficacy of Appellant O'Connor's passive solar heating arrangement and solar panels in this case does not amount to a legal restriction on her use of her property.

We **GRANT** the motion for summary judgment on Question 6 and conclude that no regulatory taking will occur if we ultimately approve the application.

VI. Question 7

Applicant moves for summary judgment on Question 7, which also alleges a regulatory taking, but under a different test from Penn Central. Question 7 asks whether a per-se taking based on the complete deprivation of economic value theory articulated in Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) will occur if the application is granted. This test establishes that there is a taking "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use," unless "the proscribed use interests were not part of [landowner's] title to begin with," id., for example, because "background principles of nuisance and property

law" independently forbade the regulated use of the property. Id. at 1026–1030. It is a "categorical rule," and requires that all economic value of the land subject to the regulations has been destroyed. Lingle, 544 U.S. at 538.

For the same reasons as in Question 6, the undisputed facts do not support this theory, because no regulation will be applied to restrict Appellants' use of their property if we grant the application. A second reason for granting Applicant summary judgment on this Question is because the undisputed material facts establish that there will not be a complete deprivation of the economic value of any of Appellants' property interests if the barn is relocated. Both properties will maintain their viability for residential uses; at worst, there may be a diminishment in value and/or wastage of certain investments in Ms. O'Connor's property. That is not a complete deprivation of economic value as required for a Lucas taking. We **GRANT** the motion for summary judgment on Question 7 and conclude that no regulatory taking under the test developed in Lucas will occur if we approve the application.

VII. Question 8

Applicant moves for summary judgment on Question 8, which asks "[w]hether the granting of the subject application for the historic shed demolition and historic barn relocation violates the Neighbors/Appellants' constitutional rights to substantive due process or equal protection under the Fourteenth Amendment of the US Constitution or Chapter 1, Articles 1 and 4 of the Vermont Constitution."

Appellants' bases for these constitutional arguments are two exclusions whose application to their properties has become apparent through this permit application process. The first stems from the fact mentioned above, that Applicant's property is not located in the Design Review Overlay (DRO) District, and neither are Appellants' properties. Viewing the undisputed facts in the light most favorable to Appellants as the non-moving parties, we assume that if Applicant's property *were* located in the DRO District, the review standards contained in Section 2201 might prove indirectly beneficial to Appellants during this review of the present application, by limiting Applicant's ability to relocate the barn.[4]

[4] To the extent that this argument relies on Appellants' properties also being excluded from the DRO, we would note that under their logic, being in the DRO District confers both benefits and disadvantages. Should Appellants

The second claimed basis for a substantive due process or equal protection violation is Appellants' exclusion from the protection for existing solar access that the UDR grants some property owners in the City. Section 3206 establishes that certain proposed developments must be reviewed for their impacts on existing or potential solar energy projects on neighboring properties. Section 3206(c) creates express restrictions on development in these instances: "Proposed development shall not shade existing yards, walls, or roofs oriented within 15° of true south on abutting parcels to a greater extent than a hypothetical 25-foot high wall constructed on the property line between the hours of 9 a.m. and 3 p.m. on December 21."[5] This restriction clearly creates a benefit for the neighbors to parcels to which Section 3206 applies by protecting their solar access.[6] It is equally clear from the plain text of the UDR that Section 3206 does not apply to Applicant's property. Section 3206(B) states that the standards contained in this Section "apply to any development requiring major site plan review not located within the Urban Center 1, Urban Center 2, Urban Center 3, or Riverfront districts." As we have already discussed, this project is not subject to major site plan review—it is not subject to site plan review at all, as it will occur on a property used for no more than two dwelling units. *See* UDR § 3201. This exclusion from the protections afforded by Section 3206 forms the second basis for Appellants' arguments.

While neither argument is clearly stated, Appellants' substantive due process claim appears to be that these statutory exclusions, as applied through this present application for development, enact an arbitrary and capricious deprivation of their fundamental rights. Their equal protection claim appears to be that the regulations treat similarly situated persons

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wish to develop their own properties, they too would not be subject to certain review only applicable in the DRO. As stated in the very first regulatory taking case, such "an average reciprocity of advantage . . . has been recognized as a justification of various laws." Pennsylvania Coal Co. v. Mahon, 260 U.S. 16 415. In other words, a regulatory taking claim—and perhaps, by extension, the sort of Fourteenth Amendment arguments made here—is less likely to be successful when the claimant is burdened in one instance by the law, but benefited in another instance by it.

[5] Neither party has yet attempted to demonstrate whether the relevant features of Appellant O'Connor's residence are oriented on a line within 15 degrees of true-south. If they are not, that would form a wholly separate basis for exclusion of her property from this protection, which would require its own analysis.

[6] In keeping with our previous discussion, we note that the advantages conferred on neighbors of parcels subject to 3206 are not, strictly speaking, reciprocal. Reciprocity would depend on whether neighbors' own properties must meet the 3206 standards if they wish to develop, and that depends on the characteristics of neighbors' parcels.

differently without a clear connection between the differential treatment and a legitimate government objective. We discuss each argument in turn.

a. Substantive Due Process

The concept of substantive due process is not a simple one. As summarized by the Supreme Court, the U.S. Constitution's Fifth and Fourteenth Amendments' guarantee of "substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." United States v. Salerno, 481 U.S. 739, 746 (1987) (citations omitted). It is true that "The touchstone of due process is protection of the individual against arbitrary action of government," Wolff v. McDonnell, 418 U.S. 539, 558 (1974). The arbitrariness of the government action must reach a certain level, however, to create a substantive due process violation: only "conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority" will suffice. Natale v. Town of Ridgefield, 170 F.3d 258, 262–63 (2d Cir. 1999).

Moreover, we note that as a general matter, zoning restrictions on land-use have been found constitutional so long as there exists a rational relationship between the state action and a permissible government objective and the regulation does not proceed into an area of fundamental rights, such as family and privacy. Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 498–99 (1977), citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Further, in substantive due process challenges based on interference with property rights, as this one alleges to be, there must be an existing and protected property right that is affected by the challenged governmental action. *See* Natale v. Town of Ridgefield, 170 F.3d at 263 ("Before a plaintiff seeks to prove that a state official's denial of a permit deprived him of a property right in the permit in violation of the standards of substantive due process . . . he must first establish that he has a federally protectable property right in the permit.").

Appellants have not met their burden to come forward with some evidence that would support their theory of a substantive due process violation. Notably, they have not identified how their property rights are restricted by the statutory scheme at issue. The same problem that bedevils their takings claims—granting approval for development to a neighbor is not equivalent to creating a legal restriction on appellants' property—haunts their substantive due process

claim. Moreover, they have not alleged any "outrageously arbitrary" actions on the part of the town in adopting or implementing the UDR. We note that "[t]he burden of proving that a legislative classification is essentially arbitrary and rests upon no reasonable basis is upon the party who asserts it . . .." City of Burlington v. Jay Lee Inc., 130 Vt. 212, 216 (1972) (quoting State v. Auclair, 110 Vt. 147 (1939)). In other words, if this case is heard on its merits, the burden will lie with Appellants to establish their substantive due process argument.

As the party moving for summary judgment without the ultimate burden of persuasion at trial, Applicant has met her burden as to this issue by demonstrating the absence of evidence in the record to support Appellants' substantive due process argument. *See* Boulton v. CLD Consulting Engineers, Inc., 2003 VT 72, ¶ 5, 175 Vt. 413. The burden has therefore shifted to Appellants to establish for the court that there exists a triable issue of fact on this argument. Id. Nowhere, in 46 pages of opposition pleadings to the present motion, have they met that burden. We **GRANT** summary judgment to Applicant on this portion of Question 8 and conclude that approval of this application would not violate Appellants' rights to substantive due process under the United States or Vermont Constitutions.

b. Equal Protection

Under the Equal Protection Clause of the Fourteenth Amendment, exclusion from a benefit created by statute may, in and of itself, form a basis for a challenge to that statute. *See, e.g.,* Orr v. Orr, 440 U.S. 268, 291 (1979) ("Clearly, members of the excluded class—those who but for their sex would be entitled to the statute's benefits—have a sufficient 'personal stake' in the outcome of an equal protection challenge to the statute to invoke the power of the federal judiciary."). Especially as to the solar access provision, it is clear that the UDR draws a distinction: Neighbors to development occurring on a parcel that is subject to major site plan review and that is not located in one of the four named districts benefit from the protections of Section 3206. Neighbors to parcels for which one of those two conditions is not met do not benefit from that protection. This distinction forms a prima facie basis for Appellant O'Connor's equal protection argument.[7]

[7] Assuming, for the sake of argument, that the relevant features of Appellant's property are aligned within 15 degrees of true South, and so would be protected by this provision were it not for the exclusions just mentioned.

Our starting point for scrutinizing the constitutionality of this distinction is that, as a general rule, "challenges under the equal protection clause are reviewed by the rational basis test, whereby 'distinctions will be found unconstitutional only if similar persons are treated differently on wholly arbitrary and capricious grounds.'" Smith v. Town of St. Johnsbury, 150 Vt. 351, 357 (1988). Where, however, "a statutory scheme affects fundamental constitutional rights or involves suspect classifications, both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny; the State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective." Brigham v. State, 166 Vt. 246, 265 (1997).[8]

Appellants have not alleged that the relevant provisions of the UDR contain a suspect classification or implicate a fundamental constitutional right. Therefore, the proper standard for evaluating the regulatory scheme under the federal equal protection doctrine is rational basis. All that is required is that the City show some rational connection between how the statute was written and "some conceivable, legitimate government interest." Baker v. State, 170 Vt. 194, 202 n.3 (1999). At this point, however, the City has not come forward to provide the rational basis for how the Design Review Overlay district was drawn or the applicability of the solar shading provisions determined. Nor has Applicant taken on and met the burden of demonstrating that rational basis. Therefore, Applicant's motion for summary judgment on this portion of Question 8 must be **DENIED.**

VIII. Question 9

a. Vagueness and Lack of Standards

Applicant moves for summary judgment on Question 9. In the first part of this Question, Appellants allege that the UDR is essentially standardless and void for vagueness, if the present application is approved under it. We note that "the proponent of a constitutional challenge has a very weighty burden to overcome." Badgley v. Walton, 2010 VT 68, ¶ 20, 188 Vt. 367. Nevertheless, "[z]oning ordinances must specify sufficient conditions and safeguards to guide

[8] Insofar as Baker v State, 170 Vt. 194 (1999) renounced the tiers of scrutiny formula for arguments under the Common Benefits Clause of the Vermont Constitution, the portion of this holding on strict scrutiny by states may no longer be applicable. The Common Benefits Clause is discussed under Question 9 below.

applicants and decisionmakers. We will not uphold a statute that fails to provide adequate guidance, thus leading to unbridled discrimination by the court and the planning board charged with its interpretation." In re Appeal of JAM Golf, LLC, 2008 VT 110, ¶ 13, 185 Vt. 201 (internal quotation marks omitted).

Appellants profess to be perplexed as to how their properties and Applicant's property, all of which are within the town's National Register Historic District, were not included in the DRO Zoning District. They complain of a lack of communication from the City in this regard. Finally, they claim that the exclusion of some properties from the solar access review provisions does not match the City's stated goals in the master plan and specific city ordinances to promote home-scale renewable energy.

Once again, Appellants' dispute is with the City's choices of which properties to include in the DRO District or the protections of the solar access provisions. They do not claim any difficulty understanding the statute's clear language establishing such divisions, nor could they reasonably do so. Most critically, they do not point to a decision that the DRB must make in reviewing this application on which the UDR fails to provide adequate guidance, such that arbitrary or discriminatory decision-making might result. In short, they have not made out the essential elements of a claim to attack the UDR provisions as void for vagueness or essentially standardless. We **GRANT** Applicant's motion for judgment on this portion of Question 9 and conclude that those portions of the UDR under which the DRB reviewed the application are not constitutionally void for vagueness, nor do they lack the necessary standards to guide decision-makers.

b. Common Benefits Clause

In the second part of Question 9, Appellants allege that the UDR, as applied to Applicant's project, violates their rights under the Common Benefits Clause of the Vermont Constitution. This clause dictates, "[t]hat government is, or ought to be, instituted for the common benefits, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Vt. Const. Ch. I, art. 7.

Though long considered a state counterpart to the Equal Protection Clause of the Fourteenth Amendment, the Common Benefits Clause demands its own analysis. Baker v. State,

170 Vt. 194, 202 (1999). As the Court in Baker stated, its "approach [under the Common Benefits Clause] may be described as broadly deferential to the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective." Id. at 203. It thus eschewed the tiers of scrutiny applied under the federal equal protection doctrine in favor of a more uniform approach. Id. at 206.

More precisely, the analysis under the Common Benefits Clause is as follows: "When a statute is challenged under Article 7, we first define that 'part of the community' disadvantaged by the law. . . . We look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others... examin[ing] the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives. . . . Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." Id. at 212–14.

As the Court stated, this is a more searching form of review than rational basis, at least as traditionally defined. Id. at 203–04. The logic that leads us to deny Applicant judgment as a matter of law on Appellants' equal protection arguments applies even more strongly to the common benefits claim. The City or Appellant must put forward a sound basis for the exclusion of certain property owners from the DRO District and the protections of the solar access provisions. We **DENY** the motion for summary judgment on this Question as well.

IX. Question 10

Applicant moves for judgment on the pleadings on Question 10, which asks whether "the City of Montpelier should be equitably estopped from issuing a permit in the interests of justice."

Appellants' sole argument on this point appears to be that the project must undergo "historic preservation and protection review of the detail required under State and Federal Law" which was not done by the DRB here.

There are four elements of equitable estoppel: "1) the party being estopped must know the relevant facts; (2) the party being estopped must intend that his or her conduct be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely to his or her detriment on the estopped party's representations." In re Langlois/Novicki Variance Denial, 2017 VT 76, ¶ 13.

Appellants have not argued that any of these elements are met, much less asserted any facts that would establish them. Therefore, we **GRANT** the motion for judgment on the pleadings on this Question and conclude that there is no equitable estoppel basis to preclude the City's issuance of a permit in this instance.

X. Question 11

Applicant moves for judgment on the pleadings on Question 11, which asks whether the setbacks provision of the UDR is unconstitutional. Appellants' argument appears to be that as applied in this case, the setbacks provision would allow Applicant to relocate the barn closer to their respective property lines than is consistent with their enjoyment of their property. Additionally, they raise doubt as to the precise location of at least one of the property boundaries and assert that as shown on the survey accompanying the application, the barn could cross into their property.

Taking this second point first, we are a court of limited jurisdiction and lack jurisdiction to opine on the precise location of property lines. *See* In re Woodstock Cmty. Tr. & Hous. Vt. PRD, 2012 VT 87, ¶ 40, 192 Vt. 474 ("[T]he Environmental Division does not have jurisdiction to determine private property rights."). We will, however, only approve an application that respects the applicable setbacks as established under the UDR. All Applicant's survey shows is that the relocation of the barn will respect the applicable setbacks from the property lines, wherever those are ultimately determined to be.

As to Appellant's first argument, setback provisions are generally held to be valid as reasonably related to the public health, safety and welfare. In re Letourneau, 168 Vt. 539, 544 (1998) ("The United States Supreme Court long ago determined that as a general proposition setback requirements are valid as reasonably related to the public health, safety and welfare") (citing Gorieb v. Fox, 274 U.S. 603, 608–10 (1927)). In Letourneau, a property owner against

whom a town enforced its bylaws for building within setbacks unsuccessfully challenged the setback provision. Appellants' argument that the Montpelier setbacks as applied in this case violate their constitutional rights is equally without merit. Absent mandatory setbacks and other provisions of zoning law, Applicant could locate this barn right on the property line, as long as doing so was consistent with common law doctrines, such as that of nuisance. There is therefore no connection between the City's setback provision and the harm Appellants allege this relocation would cause. We also note in passing that this neighborhood appears to be one with many very small lots and residences that are pre-existing non-conformities as to setbacks. This includes Appellants Aldridge and Coughlin, whose home is built right on the property line shared with Applicant. Yet Applicant's duty is to respect the setbacks on their own property. We **GRANT** Applicant's motion for judgment and hold that the UDR setbacks provision is not unconstitutional.

Conclusion

For the foregoing reasons, we **GRANT** Applicant's motion for judgment on the pleadings on Question 1, Question 2 (as it relates to UDR §§ 2108(A), (B)(3)), and Questions 10 and 11. We conclude 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. We also **GRANT** Applicant's motion for summary judgment on Questions 2 (as it relates to UDR §2108(E)), 3, 5, 6, and 7, and partially **GRANT** the motion on Questions 8 and 9. We conclude that this 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. We further conclude that granting Applicant's request for a permit would not create a taking of the property interests of either Appellants under either a physical or a regulatory takings theory, nor would it violate Appellants' substantive due process rights, and that the UDR provisions at issue are not unconstitutionally vague or standardless.

We **DENY** the motion for summary judgment on the portion of Question 8 that raises an equal protection argument and the portion of Question 9 that raises a similar argument under the Common Benefits Clause of the Vermont constitution, due to a lack of offer of reasonable basis from the City on the UDR provisions being challenged.

To assist the parties in their preparations for a merits hearing, we note that the following questions from the Statement of Questions remain for trial, preserving the original numbering for clarity's sake:

> 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 3004, including Sub-Sections 3004.A–D of the Montpelier Unified Development Regulations and should be approved or denied?
>
> 8. Whether the granting of the subject application for the historic shed demolition and historic barn relocation violates the Neighbors/Appellants' constitutional rights to . . . equal protection under the Fourteenth Amendment of the US Constitution or Chapter 1, Articles 1 and 4 of the Vermont Constitution?
>
> 9. Whether the granting of the subject application for the historic shed demolition and historic barn relocation under the Montpelier Unified Development Regulations . . . [is] in violation of the Neighbors/Appellants' constitutional rights under the Common Benefits Clause of the . . . Vermont Constitution, Chapter I, Article 7?

Electronically Signed: 5/24/2022 9:29 AM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division