



40 Kingsland Terrace Garage & ADU Permit

DECISION ON THE MERITS

Appellants Mark Stephenson and Linda Jones (Appellants) appeal an April 8, 2021 decision issued by the City of Burlington’s Development Review Board (DRB) approving the certificate of appropriateness and conditional use application of Katherine Menson and Kellen Brumsted (Applicants) to replace the existing garage on 40 Kingsland Terrace, Burlington, Vermont with a new structure containing a larger garage space and an accessory dwelling unit (ADU).

Appellants are represented by Attorney Nicholas Low. Applicants are represented by Attorney Liam Murphy. The City of Burlington (City) is represented by Attorney Kimberlee Sturtevant.

In their Statement of Questions, Appellants raise five Questions:

1. Should the application be denied because it proposes an accessory dwelling unit that exceeds maximum square footage allowed under Burlington Comprehensive Development Ordinance (“CDO”) § 5.4.5 and 24 V.S.A. § 4412(1)(E)?
2. Should the Application be denied because it fails to meet standards and guidelines for Historic Buildings and Sites at Burlington CDO § 5.4.8(b)?
3. Should the Application be denied because it fails to meet standards for the demolition of Historic Buildings at CDO § 5.4.8(d)(2)?
4. Should the Application be denied because it would have an undue adverse impact on the character of the area under CDO § 3.5.6(a)(2)?
5. If the Court were to allow the existing historic garage to be demolished, should any replacement structure be limited to one story in height to mitigate the effect of demolishing the historic garage, to conform with the character of the area, and to maintain historical spatial relationships, size, scale, and proportions, and meet other requirements of CDO § 5.4.8 and §3.5.6(a)(2)?

In a pre-trial motion, Appellants sought judgment as a matter of law on Questions 1 and 2. With respect to Question 1, Appellants claimed that the proposed structure's square footage exceeds the 900 square-foot limitation for ADUs. Applicants opposed the motion, offering that the ADU's size totaled 760 square feet and therefore is compliant. In a March 2, 2022 decision, we denied the motion finding a genuine dispute of material fact as to whether the ADU exceeds the allowable 900 square feet. With respect to Question 2, Appellants asserted that the application to demolish the existing historic garage fails to meet the CDO standards; specifically, Sections 5.4.8(b)(1). In our March decision we denied the motion, finding that Appellants failed to establish that the proposal does not meet Section 5.4.8(b)(1).

The Court then conducted a two-day remote trial on May 25 and June 20, 2022 using the WebEx platform. The Court completed a site visit on its own on July 27, 2022. Following trial and prior to the site visit, parties were allowed to file requests for the Court to observe certain aspects of the Project site and surrounding area. The parties filed their requests for specific observations. The Court observed the subject property and the surrounding area generally.

Findings of Fact

1. Applicants propose to demolish an existing garage on their property located at 40 Kingsland Terrace in Burlington, VT (Property), and to replace it with a new structure.
2. Kingsland Terrace is a cul-de-sac, and 40 Kingsland Terrace is at the end of the cul-de-sac.
3. The Property is in the City's Residential Low Density (RL) District.
4. Applicants purchased the Property in December 2019 and live in the primary structure at the Property, which has a gross floor area of 2,686 square feet.
5. An existing detached garage is located behind the primary residence. The existing garage was built in approximately 1926. This garage is a 320 square-foot pyramidal-hip-roofed structure that is listed within the South Union Street Historic District on the National Register of Historic Places, as is the primary residence.
6. The Property has a driveway leading from Kingsland Terrace to the garage.
7. The proposed replacement structure retains the garage's proximity relationship to the primary residence.

8. The design of the proposed structure, with a gabled roof with dormer windows, parallels but does not mimic or create a false sense of duplicating the gambrel-style roof of the primary residence.
9. The proposed structure's garage door is similar to carriage doors historically found on accessory buildings in this neighborhood.
10. The proposed structure would be larger than the existing garage, with a 22' x 30' footprint and two floors. The footprint would substantially overlap with the existing garage's footprint.
11. The proposed structure would be about 23' 2" tall. The height of the existing garage was not put into evidence but, as a single-story structure, is shorter than the proposed structure.
12. The height of the proposed structure is lower than in original plans prepared for Applicants; the final plans reduced the height of the first floor and reduced the outer walls of the second floor beyond the eight feet that is standard in modern construction, compensating with vaulted ceilings.
13. The proposed structure includes a garage bay and a utility room on the first floor and living space on the second floor.
14. The second floor living space includes a single bedroom, bathroom, and kitchen and totals approximately 660 square feet.
15. Access to the second floor is through the entry on the first floor that has an enclosed foyer and staircase. The foyer is approximately 100 square feet.
16. A covered, but unenclosed, entryway outside the exterior door of the first floor provides access to the foyer.
17. There is a separate door for the garage and no indoor connection between the foyer and the garage.
18. Exterior features include an unenclosed balcony on the second-floor western wall of approximately 79 square feet.

19. Applicants propose to share use of the garage area with the occupants of the ADU, however, the garage area is not accessible from the ADU; the spaces have separate entrances.
20. The slab/foundation of the existing garage is on grade without frost walls. It is substantially cracked and subsiding as much as 3 inches in areas.
21. There have been attempts by prior owners to repair the slab by patching and filling the cracks.
22. The current condition of the slab/foundation is beyond repair. A new replacement foundation is required to return the garage to full use.
23. Estimates of the cost to replace the slab range from \$28,000 to \$70,000.
24. Additional improvements to return the structure to full use, including but not limited to lead paint remediation, and siding, roof, trim and door repairs, are estimated to cost up to an additional \$60,000.
25. The framing of the existing garage's walls and roof is leaning to the west.
26. The existing walls are shimmed as much as 4 inches to attempt to level the structure.
27. There is no garage door on the existing garage; a door mentioned in the listing on the National Register has been missing since before Applicants purchased the property.
28. The original siding of the existing garage has been replaced with aluminum siding. This siding is dented, broken, and warped.
29. The existing roof is asphalt that is covered in moss.
30. Applicants currently use the existing garage for general storage; they do not park a vehicle in the garage due to the small size of the structure and its overall condition.
31. Appellants live at 2 Tower Terrace, adjacent to the east and generally uphill of the Property.
32. At present, views from even the ground floor of 2 Tower Terrace to the west are not significantly impeded by the existing garage. Behind the garage, however, is a stand of evergreen trees which does partially impede those views.
33. 2 Tower Terrace is a former carriage house that was converted into a dwelling.
34. 2 Tower Terrace contains an ADU, however, Appellants do not currently rent it out.

35. The City has a goal of expanding housing in the City.
36. The City has approved at least a dozen properties where historic structures have been demolished to accommodate expanded or additional housing. Two of these properties are 362 South Union Street, near the subject property, and 180 North Street, further away but still in Burlington proper.
37. A purpose of the RL District is to support primarily low-density residential development in the form of single detached dwellings and duplexes.
38. The RL District has a character of compact and cohesive residential development.
39. The South Union Street Historic District and Kingsland Terrace area includes many properties with detached accessory structures, including structures containing ADUs.

Conclusions of Law

I. Should the application be denied because it proposes an accessory dwelling unit that exceeds maximum square footage allowed under Burlington CDO § 5.4.5 and 24 V.S.A. § 4412(1)(E)?

An ADU located within or appurtenant to a single-family dwelling is considered a permitted use under § 5.4.5(a) of the Burlington CDO and the enabling state statute, 24 V.S.A. § 4412(1)(E), provided it conforms to certain requirements. See CDO § 5.4.5(a); 24 V.S.A. § 4412(1)(E). As addressed in our March 2, 2022 decision, and as the parties now agree, § 4412(1)(E) supersedes the more restrictive limitation in the Burlington CDO, and thus ADUs may have up to 900 square feet of habitable space or 30% of the area of the principal single-family dwelling, whichever is larger.¹

Appellants offer that the square footage of the proposed structure as a whole exceeds the 900 square-foot limitation on the size of an ADU, or in the alternative, the habitable space itself exceeds 900 square feet.

As analyzed in detail in our March 2, 2022 decision, the Court is not persuaded by Appellants' argument that the ADU consists of the entire proposed structure. Instead, we adopt the more permissive interpretation of 24 V.S.A. § 4412 that favors Applicants by only counting habitable floor-area inside the proposed structure toward the 900 square-foot limitation.

¹ Here, 900 square feet is the larger of the two figures.

The proposed ADU consists of an approximately 660 square-foot living space on the second floor and an approximately 100 square-foot foyer on the first floor, which amounts to a compliant total of 760 square feet. This calculation is supported by the measurements in the floor plans and the undisputed 22' x 30' footprint for the proposed structure with about 660 square feet per floor. The unenclosed balcony on the second floor of approximately 79 square feet and the mechanical room on the first floor are not counted in this calculation, as they are not habitable areas.

The proposed ADU therefore falls well under the maximum square footage permitted by 24 V.S.A. § 4412(1)(E).

II. Should the Application be denied because it fails to meet standards and guidelines for Historic Buildings and Sites at Burlington CDO § 5.4.8(b)?

As a structure listed on the National Register of Historic Places, the existing garage on the Property is subject to the provisions of § 5.4.8 of the Burlington CDO, which has four subsections. See CDO § 5.4.8(a). Subsection (b) sets out a list of ten “standards and guidelines” that apply to the review of all applications involving historic buildings, while subsections (c) and (d) specifically concern demolitions of historic buildings. §§ 5.4.8(b) – (d).

As expressed in our March 2, 2022 decision, it does not make sense for the Court to review whether the application should be denied under § 5.4.8(b) for involving a demolition of a historic structure when § 5.4.8(d) specifically permits the demolition of historic structures in certain circumstances. The standards for review of a demolition in § 5.4.8(d) are therefore controlling in review of the application before the Court. Thus, compliance with § 5.4.8(b) is irrelevant.

III. Should the Application be denied because it fails to meet standards for the demolition of Historic Buildings at Ordinance § 5.4.8(d)(2)?

Section 5.4.8(d)(2) is as follows:

2. Standards for Review of Demolition.

Demolition of a historic structure shall only be approved by the DRB pursuant to the provisions of Art. 3, Part 5 for Conditional Use Review and in accordance with the following standards:

- A. The structure proposed for demolition is structurally unsound despite ongoing efforts by the owner to properly maintain the structure; or,
- B. The structure cannot be rehabilitated or reused on site as part of any

economically beneficial use of the property in conformance with the intent and requirements of the underlying zoning district; and, the structure cannot be practicably moved to another site within the district; or,

C. The proposed redevelopment of the site will provide a substantial community-wide benefit that outweighs the historic or architectural significance of the building proposed for demolition.

And all of the following:

D. The demolition and redevelopment proposal mitigates to the greatest extent practical any impact to the historical importance of other structures located on the property and adjacent properties;

E. All historically and architecturally important design, features, construction techniques, examples of craftsmanship and materials have been properly documented using the applicable standards of the Historic American Building Survey (HABS) and made available to historians, architectural historians and others interested in Burlington's architectural history; and,

F. The applicant has agreed to redevelop the site after demolition pursuant to an approved redevelopment plan which provides for a replacement structure(s).

(i) Such a plan shall be compatible with the historical integrity and enhances the architectural character of the immediate area, neighborhood, and district;

(ii) Such plans must include an acceptable timetable and guarantees which may include performance bonds/letters of credit for demolition and completion of the project; and,

(iii) The time between demolition and commencement of new construction generally shall not exceed six (6) months.

This requirement may be waived if the applicant agrees to deed restrict the property to provide for open space or recreational uses where such a restriction constitutes a greater benefit to the community than the property's redevelopment.

This section first requires us to determine whether the applicant complies with alternative subsections A, B and C: in other words, whether the existing garage is structurally unsound, whether the existing garage can be economically rehabilitated, or whether the replacement structure will provide a substantial community-wide benefit outweighing the historical significance of the existing garage.

A. Is the existing garage structurally unsound?

We find that the existing garage is, on the whole, structurally unsound. Based on photographs and testimony, the condition of the garage today is much as it was in 2019 when Applicants purchased the property. Namely, the slab/foundation of the existing garage is on grade without frost walls and it is substantially cracked and subsiding as much as 3 inches in areas. There are signs that the previous owners attempted to repair the slab by patching and filling the cracks, but the foundation has continued to move and those cracks have widened. All parties agree that in its current condition, the slab/foundation is beyond repair. As a result of the failure of the foundation, the framing of the existing garage's walls and roof is leaning to the west. The existing walls are shimmed as much as 4 inches to attempt to level the structure. As testified to by Applicants' design engineer, a new replacement foundation is required to return the garage to full use.²

Applicants investigated the possibility of rehabilitating the garage beginning shortly after purchasing the property. While a structural engineer hired by the Applicants, in a letter admitted into evidence,³ opined that the wooden superstructure of the building itself was "structurally sound," he also described the above damage to the foundation and recommended a replacement foundation for any use of the garage beyond general storage. This matched the opinion of Applicants' final design engineer Emily Morse, who testified at trial.

With the existing damage to the foundation and warping of the structure, both of which are almost certain to worsen with time unless the foundation is replaced, we conclude that the garage, viewed as a whole, is structurally unsound despite ongoing efforts by the owner to properly maintain it.

B. Can the existing garage be economically rehabilitated or reused?

Applicants and Appellants each presented an engineer as a witness who testified as to their estimated costs to replace the slab/foundation, which, as discussed above, is necessary to return the garage to structural soundness. Those estimates range from \$28,000 to \$70,000.

² Appellants' witness presented a different opinion on the usability of the existing garage, but we find Applicants' offer more credible.

³ Appellants objected to admission of this letter on hearsay grounds, an objection we overruled. We note that this portion of the letter is actually favorable to Appellants.

Additional improvements to the structure, including but not limited to lead paint remediation, siding, roof, trim and door repairs, plus project design and management costs are estimated to cost up to an additional \$60,000.

Even after such costly repairs, given the historic structure's narrow doorway, the owners would have difficulty parking any modern car in the garage, let alone in storing items alongside of it. We do not consider this option to represent an "economically beneficial use" of the property, given the costs of rehabilitation will far exceed any value created or preserved. We therefore conclude in the alternative that the structure cannot be rehabilitated or reused as part of any economically beneficial use of the property.

C. Does the replacement structure provide a community-wide benefit outweighing the historical significance of the existing garage?

As testified to by Mary O'Neill, Principal Planner within the City of Burlington Department of Permitting and Inspections, the City has a goal of expanding housing. In furtherance of that goal, adding even one additional unit of housing to the present supply, especially close to the downtown core, represents a community-wide benefit.

Against that benefit of redevelopment, we must weigh the historical significance of the structure. The building was not listed on the National Register of Historic Places individually, but rather under the South Union Street Historic district. Little to no evidence was provided as to the historic significance of specific features of the building. The original siding of the existing garage has been replaced with aluminum siding and this replacement siding is dented, broken, and warped. The existing roof is asphalt covered in moss. The original garage door with 24 small panels mentioned in the National Register listing is no longer present. All of these facts indicate that the historical significance is very minor. Moreover, the structure is hidden from all but Applicants and one or two neighbors (including Appellants), and so what limited historical significance the structure still has is not available to be viewed or enjoyed by the public.

We therefore conclude in the alternative that the proposed redevelopment of the site will provide a substantial community-wide benefit that outweighs the historic or architectural significance of the building proposed for demolition.

D. Does the proposal mitigate impacts to the historical importance of other structures located on the property and adjacent properties?

While the evidence at trial and arguments in post-trial briefs focused on whether one or more of the three alternative criteria above were met, Appellants' Question 3 asks about compliance with § 5.4.8(d)(2) in its entirety, which includes subsections D, E, and F. Our de novo review therefore extends to compliance with these criteria. The plain language of the statute indicates that each of these criteria must be met for us to approve the demolition of the historic structure.

We find that the proposal does not cause any negative impacts to the historical importance of other structures on the property or at neighboring residences. No changes are proposed to any of those other structures as a consequence of this project, nor should any changes be necessary. Moreover, the proposed ADU/garage retains the existing garage's location relationship to these other structures. While the proposed structure is larger than the existing garage, its scale and proportions remain smaller than the primary residence. As the replacement structure is located behind the primary residence and is at the end of a cul-de-sac, there will be little visual impact on neighboring properties or on the street or historic district taken as a whole.

Further, the topographic difference between the subject property and 2 Tower Terrace reduces impacts on Appellants and their residence at 2 Tower Terrace. While we acknowledge Appellants' views may be affected by the redevelopment, such views are not part of the historical importance of the building at 2 Tower Terrace itself. We find sub-criterion D to be satisfied.

E. Have all historically and architecturally important design, features, construction techniques, examples of craftsmanship and materials been properly documented?

The DRB imposed a condition in its approval that such documentation must occur. Applicant's design engineer indicated at trial her willingness to undertake such documentation. She also indicated her plans to reuse as many materials as feasible from the existing structure and to make the remaining materials available to others who would desire them. We will preserve the DRB's condition and with it consider sub-criterion E to be satisfied.

F. Has the Applicant agreed to redevelop the site after demolition pursuant to an approved redevelopment plan which provides for a replacement structure(s)?

The redevelopment of the site with a replacement structure is part of this application and formed part of the DRB's and our approval.

(i) Is the redevelopment plan compatible with the historical integrity and does it enhance the architectural character of the immediate area, neighborhood, and district?

The design of the proposed structure is compatible with the historical integrity of the immediate area, neighborhood, and district. First, the design parallels the architecture of nearby accessory structures in its use of a gabled roof with dormer windows. This design also largely parallels the gambrel roof of the main residence without falsely mimicking it, and reduces visual bulk compared to other possible roof designs. Second, the design maintains the spatial relationship of the existing garage to the primary residence by being centered on the same location on the property and remaining of a lower height than the residence.

The proposed structure is largely hidden from the street and from neighboring residences and thus has little impact on the architectural character of the neighborhood or district.

(ii) Does the plan include an acceptable timetable and guarantees?

The DRB imposed a condition that "construction must commence within six months of building demolition," and we will preserve that condition. This timeline appears eminently feasible, given the small footprint of the existing garage and slightly larger footprint of the proposed structure. The DRB also elected not to require performance bonds or other guarantees and we see no reason to change that decision.

(iii) Will the time between demolition and commencement of new construction not exceed six (6) months?

Yes, see above. In light of these points, sub-criterion F is satisfied.

IV. Should the Application be denied because it would have an undue adverse impact on the character of the area under Ordinance § 3.5.6(a)(2)?

Section 3.5.6(a)(2) of the CDO states that conditional use approval shall only be granted if it is determined that the proposed project "shall not result in an undue adverse effect on . . . [t]he character of the area affected as defined by the purpose or purposes of the zoning district(s)

within which the project is located, and specifically stated policies and standards of the municipal development plan.”

A. Defining “Character of the Area”

In 2004, the statute empowering towns to regulate zoning was amended. Prior to those amendments, the statute directed municipalities to consider the character of the area as it “currently exists, with all approved uses.” In re LiCausi, No. 203-11-98 Vtec, slip op. at 2 n.2 (Vt. Env'tl. Ct. Nov. 4, 2005) (Wright, J.). The statutory language allowing for conditional use review was updated in 2004 such that it now refers to “the character of the area affected, *as defined by the purpose or purposes of the zoning district within which the project is located, and specifically stated policies and standards of the municipal plan.*” 24 V.S.A. § 4414(3)(A)(ii) (emphasis added). Following those amendments, many municipalities, including Burlington, updated their conditional use standards to reflect this change. Even for those municipalities, however, we have continued to review proposed development for its impact on the character of the area, both as reflected by existing uses, and as defined by the purposes enumerated in the zoning bylaws and municipal plan. *See, e.g., Hettinger Conditional Use and Act 250 Approvals*, Nos. 130-11-18 Vtec, 44-3-19 Vtec, slip op. at 9 (Vt. Super. Ct. Env'tl. Div. Nov. 20, 2019) (Walsh, J.) (“[W]e have looked to existing uses when reviewing conditional uses under bylaws that mimic the post-2004 statutory language”) (citing In re Willowell Found. CU, No. 142-10-12 Vtec, slip op. at 3, 22 (Vt. Super. Ct. Env'tl. Div. July 10, 2014) (Walsh, J.), *aff'd* 2016 VT 12). For this review, we therefore look at the character of the area surrounding 40 Kingsland Terrace, based on existing uses, and as further defined by the expressed purposes for the RL District and any other relevant provisions of the bylaws and municipal plan.

B. Test for “Undue Adverse Effect”

We analyze whether a project has an undue adverse effect on the character of the area using a modified version of the “Quechee” test. *See Re: Quechee Lakes Corp.*, Nos. 3W0411-EB and 3W0439-EB, Findings of Fact, Conclusions of Law and Order at 19–20 (Vt. Env'tl. Bd. Nov. 4, 1985) (explaining the former Environmental Board’s two-step process for determining whether a project has an undue adverse effect on aesthetics under Criterion 8 of Act 250 review); *see also In re Grp. Five Invs. CU Permit*, 2014 VT 14, ¶ 14, 195 Vt. 625 (upholding our use of the two-part

Quechee test to analyze undue adverse effect on specific characteristics listed in a town's zoning ordinance, including character of the area), *overruled on other grounds by In re Confluence Behav. Health, LLC*, 2017 VT 112, ¶ 17, 206 Vt. 302.

We recently explained how this test operates: “In the Quechee approach, we first consider whether the project would cause an adverse effect on the characteristic in question. If it would not, our analysis ends. If it would, we ask whether the effect would be unduly adverse, which it would be if any of three criteria are met: either the project must violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area or offend the sensibilities of the average person, or the applicant must have failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.” In re Shore Acres Conditional Use, No. 21-ENV-00066, slip op. at 10-11 (Vt. Super. Ct. Env'tl. Div. Mar. 17, 2022) (Walsh, J.) (quotation marks omitted).

C. Application: Is There an Adverse Effect?

A stated purpose of the RL District is to support “primarily . . . low-density residential development in the form of single detached dwellings and duplexes.” CDO, § 4.4.5(a)(1). The RL District is “characterized by . . . compact and cohesive residential development.” *Id.* The South Union Street Historic District in general and Kingsland Terrace area in particular include properties with detached structures, some of which contain ADUs. The proposed structure is compatible and in keeping with this character; it is compact and hidden from the street by the taller primary residence, from which it remains detached. While no party submitted the Burlington municipal plan into evidence, we note testimony from the City's planning expert witness that the City has a goal of expanding housing in the City. The City has approved at least a dozen projects where historic structures have been demolished to accommodate expanded or additional housing. This demolition and reconstruction project fits in with that policy.

Appellants live at 2 Tower Terrace, adjacent to the east and generally uphill of the Property. 2 Tower Terrace is a former carriage house that was converted into a dwelling. 2 Tower Terrace has contained an ADU, however, Appellants do not currently rent it out. The proposed project will partially block Appellants' westward views towards Lake Champlain (especially in winter) to a greater degree than the existing structure.

In previous decisions, we have considered views from private residences of a proposed project as relevant to the character of the area. Hettinger Conditional Use and Act 250 Approvals, Nos. 130-11-18 Vtec, 44-3-19 Vtec at 11 (Nov. 20, 2019) (“We find that constructing the [project] will result in adverse effects on the character of the area in that the Project varies from the residential nature of the area and will alter views.”); *see also* Goddard College CU/Goddard College Act 250 Reconsideration, Nos. 175-12-11 Vtec, 173-12-12 Vtec, slip op. at 13, 19 (Vt. Super. Ct. Envtl. Div. Jan. 6, 2014), *aff’d* 2014 VT 124, 198 Vt. 85. The evidence demonstrates that the project will slightly alter existing westward views from the Appellants’ property and that the project therefore has some adverse effects on the character of the area. We do not find those effects to be unduly adverse, however, as explained below.

D. Application: Is that Adverse Effect “Undue”?

Again, to be unduly adverse, an impact must either violate a clear, written community standard intended to preserve the affected characteristic or be shocking or offensive to the sensibilities of the average person, or the applicant must have failed to take generally available steps to mitigate the impact. Shore Acres Conditional Use, No. 21-ENV-00066 at 10–11 (Mar. 17, 2022).

Appellants have not pointed to a clear, written community standard that the project violates. The Burlington CDO does not protect private views, in fact, quite the opposite. *See, e.g.*, CDO 6.2.2(c) (“Distant terminal views of Lake Champlain and the mountains to the east and west, and important public and cultural landmarks, *framed by public rights-of-way or viewed from public spaces* shall be maintained through sensitive siting and design to the extent practicable. *This shall not be construed to include views from exclusively private property.*”). A statement in the National Register that houses in this district are generally sited to take advantage of lake views clearly does not qualify as such a written community standard.

Nor would we consider the project’s impact on neighbors to be of a shocking or offensive nature to the sensibilities of an average person. While Appellants themselves may believe the impacts will be shocking or offensive, the evidence does not suggest an average person would. Applicants’ revised plans include a document titled “Terrain Details” (Exhibit 3, Sheet 11). This document models the proposed structure and its position relative to 2 Tower Terrace, accounting

for differences of elevation. Neighbors also submitted a photograph currently taken from their house with the existing garage in the foreground (Exhibit J, page 1). Combined, these two exhibits suggest that the proposed structure will partially obstruct westward views from certain vantage points on Appellants' property, including potentially of Lake Champlain. They also establish, however, that the view line directly west of the structure to Lake Champlain is already largely blocked year-round at present by evergreen trees, meaning the additional impact of the structure will be small. Moreover, they suggest that the obstruction of views will only be partial—existing views of Lake Champlain to the south and north of the structure will remain, and from the upper floors of 2 Tower Terrace, the views may not be impeded at all.

An average person living in a growing city would expect some changes to the views from their residence over time and would not find these particular changes to be shocking or offensive. Nor do we consider these changes to represent a large enough impact on the character of the area as a whole to find an undue adverse effect on that character.

Finally, Applicants took generally available steps to mitigate the impact on Appellants. Their design engineer testified that they lowered the first floor ceiling to the maximum extent possible and also lowered the outer walls of the second floor beyond the eight feet that is standard in modern construction, compensating with vaulted ceilings.⁴ Combined, these steps allowed Applicants to lower the structure's height by more than two and a half feet over the original plans and represent reasonable steps to mitigate the structure's impacts on the character of the area.

Appellants suggested at trial that Applicants should have pursued only a one-story structure containing an ADU and no garage. The project before us, however, is a combined garage and ADU. We cannot consider wholly different projects during our de novo review, and even if we could, such a drastic alteration to the proposal would not represent a generally available mitigating step. See N.E. Materials Group Amended A250 Permit, No. 35-3-13 Vtec, slip op. at 22 (Vt. Super. Ct. Envtl. Div. Apr. 18, 2016) (Walsh, J.) (“[W]e consider Appellants’

⁴ The engineer also testified that the decision to locate the proposed structure on the site of the existing garage and not further back on the property as original plans called for was also partially to accommodate Appellants' views; the evidence also established, however, that Applicants made this change largely because a variance as to the rear setback was required for the original plans and they were led to understand such a variance would not be granted. We therefore do not consider this change among the steps taken to mitigate impacts.

suggestion of re-siting this project to a different unspecified location to represent such fundamental change to a project design that it is not really a mitigating measure, but a new project entirely”), *aff’d* 2017 VT 43; *see also* In re Rinkers, Inc., No. 302-12-08 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Oct. 20, 2010) (Wright, J.), *aff’d*, 2011 VT 78 (“For a mitigating step to be considered ‘generally available’ it must be reasonably feasible and cannot frustrate either the purpose of the project or the goals of [the statute].”).

In light of the above, CDO § 3.5.6(a)(2) is satisfied.

V. **If the Court were to allow the existing historic garage to be demolished, should any replacement structure be limited to one story in height to mitigate the effect of demolishing the historic garage, to conform with the character of the area, and to maintain historical spatial relationships, size, scale, and proportions, and meet other requirements of Ordinance § 5.4.8 and §3.5.6(a)(2)?**

No. The project as proposed satisfies all of the standards mentioned, as addressed above.

Conclusion

We conclude that the proposed demolition and redevelopment of a garage and addition of an accessory dwelling unit complies with the provisions of the CDO raised by Appellants’ Statement of Questions. Namely: it complies with the maximum square footage of CDO § 5.4.5 as modified by 24 V.S.A. § 4412(1)(E); the standards for demolition of an historic structure contained at § 5.4.8(d)(2); and the character of the area analysis under CDO §§ 3.5.6(a)(2) and 4.4.5(a)(1). CDO § 5.4.8(b) is made irrelevant given the applicability of § 5.4.8(d).

A Judgment Order is issued concurrently with this decision. This concludes the matter before the Court.

Electronically Signed: 8/18/2022 1:26 PM pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink, appearing to read "Tom Walsh", with a stylized flourish at the end.

Thomas G. Walsh, Judge

Superior Court, Environmental Division