

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 23-ENV-00020

Radicioni Denial	MERITS DECISION
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In this matter, Down River Investments, LLC (Down River), through member Walter Radicioni, appeals a decision of the Town of Sharon Development Review Board (DRB) dated February 19, 2023 denying Down River’s application to extend a conditional use permit to rebuild a pole barn at property owned by Down River having an address of 2911 VT Route 14, Sharon, Vermont (the Property).

On May 1, 2024, this Court held a one-day merits hearing at the Costello Courthouse in Burlington, Vermont. Down River received authorization from the Court to be represented by Mr. Radicioni in an April 24, 2024 Entry Order on its motion for non-lawyer representation. See In re Radicioni Denial, No. 23-ENV-00020 (Vt. Super. Ct. Env’tl. Div. Apr. 24, 2024) (Walsh, J.). Mr. Radicioni represents Down River in this matter. The Town of Sharon (Town) is represented by K. Heather Devine, Esq.

Findings of Fact

1. Down River Investments, LLC (previously defined as Down River) owns property having an address of 2911 VT Route 14, Sharon, Vermont (previously defined as the Property).
2. Walter Radicioni is a member of Down River.
3. The Property is within a Fluvial Erosion Hazard (FEH) area and subject to the Town of Sharon Flood Hazard Area Bylaw (the Flood Bylaws).

4. Prior to Down River's ownership of the Property, the Property was improved by a complete pole barn.

5. At some time prior to Down River's ownership of the Property in 2016, the pole barn was partially removed leaving two concrete bunker walls and some other level of infrastructure remained.

6. The roof was removed at that time.

7. When Down River purchased the Property, it began the process of rebuilding the pole barn without a zoning permit.

8. At some point in 2017, Down River was informed that it needed a zoning permit to reconstruct the pole barn.

9. Down River applied for an initial zoning permit at that time, which was denied.

10. On December 24, 2017, Down River received conditional use approval to reconstruct the pole barn on the Property (the 2017 Permit) from the DRB. Town Exhibit 3.

11. The 2017 Permit expired on December 24, 2019.¹ Id.

12. Down River did not complete the reconstruction of the pole barn prior to the expiration of the 2017 Permit.

13. The failure to complete the reconstruction in the permit effective date were largely due to serious personal considerations for Mr. Radicioni and additional work outside of the scope of the pole barn at the Property required by other regulatory bodies and regulations.

14. Despite being partially deconstructed, Down River and its tenant, James Moses, have used the pole barn for various uses over time.

15. Since 2019, James Moses rents another building on the Property where he operates a business.

16. Mr. Moses has used the pole barn regularly during his tenancy for the storage of lumber, cars, building materials, and gravel, as well as housing cattle.

¹ The 2017 Permit itself stated that the permit expired on December 24, 2018. The Town Zoning Administrator testified at trial that this was in error and the permit was not to expire until 2019, two years after its issuance. The Court references the proper expiration date as clarified at trial. In either event, the expiration date of the 2017 Permit is not material to the Court's ultimate conclusion in this matter.

17. Down River similarly used the pole barn for storage of various materials throughout its ownership of the Property.

18. The Property is also improved by a residential unit and a secondary building, rented by Mr. Moses for his business.

19. In 2022, Down River began further reconstruction on the pole barn, including installing rafters for an eventual roof.

20. On or about June 28, 2022, Down River, through Mr. Radicioni, applied for a permit to put a “roof over cement bunker for storage.” Town Exhibit 4.

21. At trial, Mr. Radicioni clarified that the only reconstruction he has sought approval to complete at the Property is put a roof on the existing footprint of the pole barn and maintain the two existing concrete walls to use the barn for dry storage.

22. He has not sought approval to fully enclose the pole barn at this time.

23. The DRB denied the application on February 19, 2023 on the grounds that the site had been abandoned.

24. This appeal followed that denial.

Statement of Questions

There are two Questions before the Court. They state:

1A. Whether the Town Bylaws and Flood Bylaws, as applied to the Property, has resulted in a regulatory taking at the Property due to their incorporation of the FEH maps.

2A. Whether Mr. Radicioni is entitled to an extension of the original conditional use permit relative to the reconstruction of the pole barn at the Property.

See In re Radicioni Denial, No. 23-ENV-00020, slip op. at 6 (Vt. Super. Ct. Env'tl. Div. Nov. 14, 2024) (Walsh, J.).

I. Question 1: Whether There Has Been a Regulatory Taking

Through Question 1A, Down River argues that the applicable regulations, largely the Flood Bylaws, have resulted in a regulatory taking. A regulatory taking applies “to regulations that completely deprive an owner of all economically beneficial use[s] of [their] property.” Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). This has not occurred at the Property. The Property is improved by a residence and a commercial building, which Down River

receives rental income from. It is undisputed that the present appeal does not impact Down River's ability to maintain these structures at this time. Thus, the Property retains economically beneficial use, and no regulatory taking has occurred. Question 1A is therefore answered in the negative.

II. Question 2A: Whether Down River is Entitled to Conditional Use Permit

The sole issue on the merits of the application, and within the DRB's decision presently on appeal, is whether the pole barn was abandoned. See Town Ex. 8. If so, it may not be reconstructed. The DRB "may . . . approve the repair, relocation, replacement, or enlargement of a nonconforming structure within a flood hazard area" if certain conditions are met. Flood Bylaws § 6.7. This is done through conditional use review. Flood Bylaws § 6.4. The Flood Bylaws state that "[n]onconforming structures . . . shall be considered abandoned where such structures or uses have been discontinued for more than 12 months." Flood Bylaws § 6.7.3.

The evidence shows that the pole barn was partially deconstructed in 2016, near the time Down River purchased the Property. The pole barn had no roof at that time, but the footprint retained two concrete bunker walls. Upon purchasing the Property, Down River undertook steps to reconstruct the pole barn, clearly indicating an intent to retain the pole barn at the Property. When made aware of the need to obtain a permit for the reconstruction, Down River sought and received a conditional use permit. While reconstruction was not completed during the effective period of the conditional use permit, the Court received credible evidence that the pole barn was used in a manner consistent with a barn's general usage at this time and through the date of the permit application on appeal. This includes housing livestock and storing building materials and gravel either by Mr. Radicioni or Down River's tenant, Mr. Moses. This use is consistent with a roofed barn's use. The Court did not receive evidence to indicate that the partially deconstructed barn was not used in this manner consistently over the course of Down River's ownership or that there was ever a 12-month period of nonuse during Down River's ownership. This evidence clearly indicates that use of the structure was not actually abandoned during the term of the permit.

The Town argues that, functionally, when the roof was removed from the original pole barn, it was no longer a structure and the nonconforming structure was abandoned. This is based on the definition of “structure” in the Flood Bylaws, which states that a “structure” is “a walled and roofed building, or a manufactured home, and any related built systems, including gas or liquid storage tanks.” Flood Bylaws § 11 (“Structure”). The pole barn retained two walls following its partial deconstruction and since Down River owned the property. Thus, while part of the structural components of the barn were removed, the walls remained and were used in a manner consistent with a barn throughout Down River’s ownership.

Thus, the Court concludes that the pole barn was not abandoned. It is unclear to the Court whether additional review of the application is required by the DRB as abandonment was the sole basis for denying the permit below. See Town Ex. 8. The Court will hold a status conference to discuss whether remand is required or whether the Court may instead issue the permit on appeal. The notice of status conference is issued with this decision.

Electronically signed this 13th day of May 2024 pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized and cursive.

Thomas G. Walsh, Judge
Superior Court, Environmental Division