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STATE OF VERMONT  
SUPERIOR COURT - ENVIRONMENTAL DIVISION

JUL 2 2012

In re Quesnel Waiver Appeal  
(After Remand)

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VERMONT  
SUPERIOR COURT  
ENVIRONMENTAL DIVISION  
Docket No. 13CV10110-WL

Decision on the Merits

The legal question presented in this appeal is whether Randall and Jean Quesnel (the Quesnells), the owners of 34 Creek Road in the Town of Salisbury, Vermont, are entitled to a waiver of the front yard setback required by Section 3.7 of the Town of Salisbury Unified Development Regulations (the Regulations). The Quesnells sought a waiver from the Town of Salisbury Development Review Board (the DRB) to authorize a small porch on the front of their rebuilt, pre-existing, non-conforming, residential house to encroach farther into the front yard setback than their house presently does. The DRB's denial of that application resulted in the present appeal.

The Court conducted a site visit on the morning of the merits hearing. Appearing at the site visit and trial were Mr. Randall Quesnel and Mrs. Jean Quesnel, represented by James C. Foley, Jr., Esq. Also present was the Town of Salisbury Selectboard, represented by James F. Carroll, Esq. Several neighboring property owners also attended the site visit and trial. Two neighbors, Mrs. Patti Romp, owner of the house facing West Salisbury Road across Creek Road from the subject property, and Mr. Bruce Maheu, owner of 72 Creek Road, testified at the trial.

At the outset of the trial the Court addressed the Quesnells' Statement of Questions (SOQ), which, as filed, are drafted as though this is an on-the-record appeal. This is, however, a de novo appeal. Thus, we are not concerned with what the DRB decided below. Instead, we consider the Quesnells' zoning application anew to determine whether it complies with the Regulations. Specifically, we look to whether the Quesnells qualify for a waiver for the front porch located within the front yard setback. The parties acknowledged at trial that, despite the wording of Quesnells' SOQ, they understand that the Court is conducting a de novo review in this matter and that the Court will interpret the Quesnells' SOQ with that in mind.

Based upon the evidence presented at trial, including that which was put into context by the site visit, the Court renders the following Findings of Fact and Conclusions of Law.

### Findings of Fact

1. The subject property, located at 34 Creek Road in the Town of Salisbury, Vermont, is owned by Randal and Jean Quesnel.
2. This property includes an active organic dairy farm which is rented and operated by the Quesnells' sons, Randall, Jr. and Richard Quesnel.
3. The Quesnells own and reside at a second organic dairy farm in Town of Cornwall, Vermont.
4. The subject property also includes a tenant farmhouse owned by L & R Farms, LLC, the farming entity run by the Quesnells. The farmhouse is presently rented to a couple and their two young daughters.
5. The subject property is located in the Low Density Residential District (LDR) as defined and regulated by Section 4.0.5 of the Regulations. The road (front yard) setback for the LDR is 50 feet from the center of the road.
6. Salisbury Town Plan, Map 1, Historic Structures, locates a "House, c. 1920" at the intersection of West Salisbury Road and Creek Road.
7. Salisbury Town Plan, Map 13 locates the subject property in the Rural Land Use Region, several miles from the Village Region.
8. The original farmhouse was located, in part, within the front yard setback, making the house a pre-existing, non-conforming structure.
9. The original farmhouse was destroyed by a fire on or about January 15, 2009. Later that year, the Quesnells built a new farmhouse on approximately the same footprint as the original house. It is this new farmhouse, specifically the front porch of the new farmhouse, which is the subject of the matter currently before us.
10. A 6-foot-deep and 7-foot-wide (42-square-foot) front porch was constructed after the shell of the house was complete but while the inside of the house was still under construction. The prior farmhouse did not have a front porch in the location of the

present porch, although there was testimony regarding a patio area in the southeast section of the former house.

11. The subject porch is located on the south side of the house facing Creek Road.
12. The height of the porch is limited to a single story. The porch has no walls and no windows, but includes a spindle railing along its sides. There are three steps leading to the porch floor, and a simple roof covers the porch.
13. The door leading into the home from the front porch is 3 feet wide. Thus, the porch extends 2 feet beyond each side of the front door. The side rails occupy about 6 inches on each side, leaving 1.5 feet of passable space on each side of the door. The porch has an open design and is in clear view of Creek Road.
14. The roof on the porch increases the safe entry and exit from the house, as it facilitates entry and exit from the front door.
15. The porch is located 41 feet from the center line of Creek Road and thus encroaches farther into the 50-foot front yard setback than the farmhouse. The Quesnels are seeking a waiver to permit this additional encroachment.
16. There is a second entrance to the house on the north side. This back door opens into a mud room. There is no porch or porch roof associated with this back door.
17. At times it is difficult to park cars on the east side of the house in the driveway due to the milk trucks entering and exiting the property. If, however, an occupant or visitor parks on the east side of the subject house, entering the house via the front door is easiest.
18. There are five neighboring houses in the immediate vicinity of the Quesnel farmhouse. Each of these five neighboring houses has a covered front porch that encroaches into the 50-foot front yard setback:
  - a. Coleman: parcel I.D. number 5-1-006 located on Creek Road. Front porch: 20' x 7' (140 square feet) located 42 feet from the center of Creek Road.
  - b. Maheu: parcel I.D. number 5-1-004 located on Creek Road. Front porch: 23' x 6.5' (149.5 square feet) located 46.5 feet from the center of Creek Road.

- c. Dalton: parcel I.D. number 5-1-002 located on Creek Road. Front porch: 28' x 8' (two stories high, 448 square feet) located 46 feet from the center of Creek Road.
- d. Anderson: parcel I.D. number 5-1-008 located on West Salisbury Road. Front porch: 26' x 8' (208 square feet) located 37 feet from the center of West Salisbury Road.
- e. Romp: parcel I.D. number 5-14-001 located on West Salisbury Road. Front porch: 13' x 6' (78 square feet) located 46.5 feet from the center of West Salisbury Road.

19. Patti Romp's house, located across Creek Road from the subject property and facing West Salisbury Road, has a front porch similar to the Quesnel porch.

20. The testimony at trial from nearby homeowners indicates that the Quesnel porch matches and maintains the character of the area, is an improvement to the design of the house and the aesthetics of the neighborhood, and has no adverse effect on neighboring houses or on the neighborhood.

21. The Quesnels were told by the Town of Salisbury clerk that if they re-built the house in the same footprint as the prior house within a year, no permits would be required. As the Quesnels started to clean up the burned house, the Zoning Administrator performed a site visit and told Mr. Quesnel that a permit was necessary to rebuild.

22. Mr. Quesnel completed a zoning application the same day as the Zoning Administrator's site visit, and the DRB granted the Quesnels a zoning permit 15 days later.

23. As the house was being constructed, the Quesnels realized that the house was tall and square and that some type of platform was needed at the front door. Because all of the surrounding houses had covered front porches, they added a similar one to keep with the character of the neighborhood.

24. After the porch was constructed, the Zoning Administrator performed a second site visit and told the Quesnels that they needed a permit for their porch.

Approximately two to three weeks later, the Quesnels received a letter from the Zoning Administrator expressing the same. The Quesnels then filed a series of zoning applications for approval of the porch.

25. In an October 2, 2010 decision, the DRB denied approval of the porch under both the variance and waiver provisions of the Regulations. The Quesnels appealed that decision to this Court (Docket Number 178-10-10 Vtec) and, following preliminary motions and mediation, the parties entered into a Joint Stipulation for Remand. This Court incorporated that Joint Stipulation into an Order on May 19, 2011.

26. The DRB reconvened a hearing and, in a September 28, 2011 Decision, the DRB denied the Quesnels' application for a waiver from the front yard setback encroachment. The Quesnels then appealed that decision to this Court.

### Conclusions of Law

In the appeal now before us, the parties do not dispute that the subject porch is located within the front yard setback. The parties' legal dispute instead centers on whether the rebuilt, non-conforming house, and specifically the new front porch which further encroaches into the front yard setback, satisfies the waiver provisions of the Regulations.

Section 3.7 of the Regulations governs waivers. The DRB may grant a waiver approving of a reduced dimensional requirement upon satisfaction of the following standards:

1. The waiver requested is for a use permitted within the district in question as by right use (as opposed to a conditional use); and
2. The waiver requested is in conformance with the [Salisbury] Town Plan and the goals set for in 24 V. S.A. 4302; and
3. The waiver requested is designed to conform to the character of the land use area in which it lies as defined in the Plan and further designed to reasonably limit impact or the potential for impact upon ones neighbors; and either
4. The design used incorporates design techniques (restricted height, lack of windows) screening (fence or plantings) or other remedies to reasonably limit impact or the potential for impact upon ones neighbors, or

5. The waiver requested accommodates structures providing for disability accessibility, fire safety and other requirements of land or energy conservation or renewable energy structures.

Regulations § 3.7.3. Thus, to determine whether the Quesnels' application for a waiver to further encroach into the front yard setback is permissible, we analyze each of the above standards in turn.

**I. Permitted use within the district (Section 3.7.3(1))**

The Quesnels' house is located in the LDR zoning district as defined and regulated by Section 2.4.3 of the Regulations. Permitted uses within the LDR include one-family dwellings. As the Quesnels' house is a one-family dwelling, we conclude that the waiver requested is for a use permitted within the district, thus satisfying the first waiver criteria.

**II. Conformance with the town plan and the goals set forth in 24 V.S.A. § 4302 (Section 3.7.3(2))**

The second waiver criteria requires the Quesnels' porch to be "in conformance with the [Salisbury] Town Plan and the goals set for in 24 V. S.A. 4302." Regulations § 3.7.3. The Regulations' broad reference to compliance with the whole of the Salisbury Town Plan (Town Plan) is analogous to the comprehensive nature of Criterion 10 of 10 V.S.A., Chapter 151 (or, Act 250), which requires a proposed development to be "in conformance with any duly adopted local or regional plan." 10 V.S.A. § 6086(a)(10). While this Court has not often encountered this type of regulatory provision in the context of a municipal permitting decision, considerable jurisprudence exists establishing a framework for analyzing proposed developments under Act 250 Criterion 10. That framework is largely based on the principle that a municipal plan serves as a guidance document that is implemented through the municipality's formally adopted regulations. See In re John A. Russell Corp., 2003 VT 93, ¶16, 176 Vt. 520; Kalakowski v. Russell Corp., 137 Vt. 219, 225-26 (1979) (explaining the relationship between municipal plans and regulations).

We have previously looked to the Act 250 Criterion 10 framework where a municipal regulation required compliance with the "intent of the Town Plan." In re

Blakeman Site Plan (Appeal of Blakeman), No. 274-11-06 Vtec, slip op. at 7 (Vt. Env'tl. Ct. July 30, 2007) (Wright, J.). We find the framework equally applicable in this matter, where the municipal provision tracks even more closely with the language of Criterion 10.

Under Criterion 10, when the Court is determining whether a project complies with a local plan, we review only "'specific policy' set forth in the plan." In re Cetrangolo and DeFelice Act 250 Permit Application, Docket No. 66-3-06 Vtec, slip op. at 7 (Vt. Env'tl. Ct. April 11, 2007) (quoting John A. Russell Corp., 2003 VT 93, ¶16). That "specific policy" acts as a standard against which the Court can gauge compliance with the plan. The policy must be stated "in language that 'is clear and unqualified, and creates no ambiguity.'" John A. Russell Corp., 2003 VT 93, ¶ 16 (quoting In re MBL Assocs., 166 Vt. 606, 607 (1997) (mem.)).

There are two steps that this Court must take to identify the specific policy in a town plan to which a project must comply. Our first determination is to identify relevant language that is mandatory rather than aspirational. Re: J. Flynn Estate and Keystone Dev. Corp., #4C0790-2-EB, Findings of Fact, Concl. of Law, and Order, at 27-28 (Vt. Env'tl. Bd. May 4, 2004). Mandatory language is depicted by words such as "shall be protected" Id. at 28 (citing Re: Sw. Vt. Health Care Corp., #8B0537-EB, Findings of Fact, Concl. of Law, and Order, at 54 (Vt. Env'tl. Bd. Feb. 22, 2001)). Aspirational language such as "encourage" or "promote" merely state a town's desires, and, without more specificity, such language cannot be read as restricting specific activities. Id. at 27. Thus, aspirations alone cannot be the basis for a permit denial.

If we find mandatory language within a town plan, we move on to the next step of the analysis. In this second step, we must determine whether the relevant, mandatory provisions are truly specific, or, conversely, whether they are "general in nature or ambiguous." John J. Flynn Estate and Keystone Dev. Corp., #4C0790-2-EB, Findings of Fact, Concl. of Law, and Order, at 27-28. If the identified provisions are specific, they "evinced a specific policy" and are applied to the project without any reference to the zoning regulations. Id. at 28. A town plan provision is considered to

“evince a specific policy” if it “(a) pertains to the area or district in which the project is located; (b) is intended to guide or proscribe conduct or land use within [that area or district]; and (c) is sufficiently clear to guide the conduct of an average person, using common sense and understanding.” *Id.*; see also In re Times and Seasons, LLC and Hubert K. Benoit, #3W0839-2-EB, Findings of Fact, Concl. of Law, and Order (Altered), at 59–60 (Vt. Env'tl. Bd. Nov. 4, 2005). If the town plan’s provisions are ambiguous, the Court must examine the zoning regulations in order to resolve the ambiguity. John J. Flynn Estate and Keystone Dev. Corp., #4C0790-2-EB, Findings of Fact, Concl. of Law, and Order, at 28.

Our analysis of whether the Quesnels’ porch complies with the Town Plan necessarily begins with a determination of what provisions must be used to test such compliance. The Town Plan is divided into sections focused on different policies, and, in each policy section, the Town Plan establishes a general goal or goals as well as narrower objectives under each goal. As discussed above, in the context of the second waiver criteria, we need only consider those goals and objectives which are mandatory and specific in nature and relate to the proposed development: goals and objectives which apply to and are intended to regulate conduct in the area in which the porch is located, which contain terms such as “should” or “provide for,” and which are sufficiently clear to guide an average person’s conduct. If no goal or objective in the Town Plan presents mandatory language, our analysis ends.

The Town of Salisbury did not provide any evidence or testimony suggesting that the porch does not comply with the Town Plan. Our own review of the Town Plan reveals that of the many policies within it, only two are directed at topics applying to the front porch at issue in this appeal: the historic preservation policy and the housing policy. We now determine whether, in either of these policy sections, the Town Plan establishes mandatory, specific goals or objectives to which the Quesnel porch must conform.

The goal of the historic preservation policy is to “[e]xplore ways to maintain the quality of rural life enjoyed by the residents of Salisbury in the face of growth



pressures.” Town Plan, Quesnel’s Exhibit 5, at 11. Objectives A and B require the identification and protection of significant historic structures, sites, districts and archaeological sites. The next objective under this goal, Objective C, is to “[e]ncourage efforts to preserve and maintain historic sites and buildings, and enhance the appearance of historic districts.” Id. Objective D is to “[s]upport the preservation, maintenance and adaptive reuse of historic structures.” Id.

The parties did not testify as to whether either the former or the current farmhouse was or is a historic structure or site or whether this neighborhood is a historic district. Our review of the Town Plan, Map 1, Historic Structures, however, indicates that a “House, c. 1920” is located at the intersection of West Salisbury Road and Creek Road. Thus, it is possible that the farmhouse is or was a historic structure. It does not appear that the area in which the subject porch is located is a historic district.

Assuming that the farmhouse is or was a historic structure, we question whether the goal or Objectives C and D included in the historic preservation policy section are mandatory. The use of the word “encourage” in Objective C is aspirational, while the use of “support” in Objective D leans toward mandatory language. Thus, we move to the second step of our analysis and evaluate whether Objective D is specific or general.

We conclude that Objective D is specific because it: (a) pertains to specific locations—historic structures or sites and historic districts; (b) is intended to guide conduct in those locations because it seeks to preserve, maintain and enhance historic structures, sites and districts; and (c) is sufficiently clear to guide the average person. Accordingly, assuming that the Quesnel farmhouse is a historic structure, it must comply with this objective.

We conclude that the Quesnel porch does in fact comply with Objective D, and, consequently, the Town Plan’s historic preservation policy. According to the testimony of other homeowners in the neighborhood, the porch is an improvement to the house and adds to the neighborhood, and it would be a detriment to the neighborhood if the porch were removed. The other houses in the neighborhood have front porches, and the neighbors testified that the porch has no adverse effect on their own houses or on

the neighborhood. Lastly, the neighbors testified that the house would look like it is missing something if it did not have the porch. Thus, the Quesnel porch complies with Objective D in that it enhances the appearance of the rebuilt farmhouse specifically and the area generally.

The only other policy section in the Town Plan which is directed at a topic that applies to the front porch at issue in this appeal is the housing policy. This policy expresses three goals, only one of which is pertinent here. Goal 3 of this policy is to “[s]trengthen the sense of community among Salisbury residents and revitalize its village with homes, businesses and public spaces that promote public gathering and interaction among people.” Town Plan, Quesnel’s Exhibit 5, at 22.

As we indicated above, we have no testimony from the parties as to the applicability of this policy, including whether the rebuilt farmhouse is located within the Village Region, a specific region denoted in the Town Plan. Based upon a review of the Town Plan, the Court concludes that the subject porch is not within the Village Region, and, therefore, this policy is not applicable. See Town Plan, Quesnel’s Exhibit 5, Map 13 (indicating that the subject property is located in the Rural Region, several miles from the Village Region).

Our review of the Town Plan does not reveal any other policy sections or provisions that apply to the front porch at issue in this appeal. Although on cross-examination Mrs. Quesnel agreed that the rebuilt house would comply with the Town Plan without the front porch, there was nothing to suggest that the house with the front porch would fail to comply.

Thus, as discussed above, we conclude that the Town Plan does not specifically prohibit the porch even if it is located within the front yard setback. Based upon the limited evidence before us, we conclude that the porch conforms to the Town Plan.

We also find that the porch complies with the goals set forth in 24 V. S.A. § 4302. That provision expresses the purpose and goals of municipal development generally. Section 4302(a) sets forth several general purposes, including, in pertinent part, “encourage[ing] appropriate architectural design . . . ; protect[ing] residential . . . areas

from overcrowding of land and buildings . . . ; [and] facilitate[ing] the growth of . . . neighborhoods so as to create an optimum environment . . . .” 24 V. S.A. § 4302(a). As discussed above, nearby homeowners testified at trial that the addition of the porch improves the design of the house and the aesthetics of the neighborhood. There is no indication that the porch results in an overcrowding of land or buildings in the neighborhood.

Section 4302(c) sets forth a variety of goals for municipal development. As noted above, the porch is a very limited project, and, as such, a majority of Section 4302(c) is inapplicable to it. Section 4302(c)(11), however, applies here. That section requires efforts to ensure the availability of safe and affordable housing, specifically requiring that new and rehabilitated housing should be safe, sanitary, and located conveniently to employment and commercial centers. 24 V.S.A. § 4302(c)(11)(B). There was limited testimony from Mrs. Quesnel that the roof on the porch increases the safe entry and exit from the house. Moreover, the porch is attached to a home with a tenant who works in downtown Middlebury and who may use the porch to enter and exit his residence on his way to and from work. The porch thus complies with the statutory goal of Section 4302(c)(11)(B).

Accordingly, the porch complies with the Town Plan as well as the goals set forth in 24 V.S.A. § 4302. The Quesnels have thus satisfied Section 3.7.3(2) of the Regulations.

**III. Character of the land use area as defined in the Town Plan and designed to limit impact upon neighbors (Section 3.7.3(3))**

The Town Plan divides the Town of Salisbury into several land use regions. Town Plan, Applicant’s Exhibit 5, Map 13. The subject property is located within the Town Plan’s Rural Region. *Id.* The Rural Region is generally described as including a significant portion of the Town of Salisbury’s agricultural land. Town Plan, Applicant’s Exhibit 5, at 87. Within the Rural Region’s description of “future uses,” the Town Plan states, in pertinent part, that homes should be located near existing roads while maintaining agriculturally viable land.

By encroaching into the setback, the porch remains close to Creek Road, an existing road, and therefore permits the maintenance of agricultural land. Thus, the

porch's encroachment into the setback conforms to the character of the Rural Region. Furthermore, the uncontradicted testimony of the Quesnels and their neighbors indicates that the house and its porch maintain the characteristics of their neighborhood.

The porch is also designed so as to limit its impact upon the surrounding neighbors. Again, the neighboring homeowners testified that they like the porch and believe that there would be a negative visual impact on the area without it. Thus, there is virtually no impact on the neighbors, and any impact that does exist is positive. Furthermore, the parties do not dispute that all of the surrounding properties in the vicinity of the subject property include homes with attached front porches that also encroach into the front yard setback.

Accordingly, the porch complies with the character\* of the land use area as defined in the Town Plan and is designed so as to limit its impact on surrounding neighbors. The Quesnel porch thus complies with Section 3.7.3(3).

#### **IV. Design techniques limiting impact upon neighbors (Section 3.7.3(4))**

The design of the porch limits the impact on neighbors. The porch is reasonably small. At approximately 6 feet deep by 7 feet wide (42 square feet), it is significantly smaller than the other front porches in the area. The size of the porch only accommodates entering and exiting the house; there is not enough room for gatherings or porch furniture. The height of the porch is limited to a single story. The porch has no walls and no windows, although there is a spindle railing on each side. Three steps lead to the porch floor from the front yard. A simple roof, which matches the house roof, covers the porch, and all other front porches in the neighborhood are also covered.

The simple design of the porch limits the impacts of the porch to the neighbors, and the design is in fact very similar to the design of other porches in the neighborhood. Furthermore, the neighbors testified that they would prefer that the porch remain a part of the house because the impact of the porch on the neighborhood is positive. Thus, the porch's impact on neighbors is limited.

V. Disability accessibility, fire safety, and energy conservation (Section 3.7.3(5))

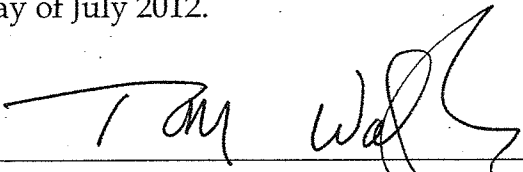
The parties provided no evidence at trial with respect to this subsection. Because Sections 3.7.3(4) and 3.7.3(5) are alternatives to each other, however, failing to satisfy either is not fatal as long as one is satisfied. As discussed above, the porch satisfies Section 3.7.3(4), and therefore an analysis of Section 3.7.3(5) is unnecessary.

Conclusion

For the reasons discussed above, we conclude that the Quesnels are entitled to a waiver pursuant to Section 3.7 of the Regulations permitting the encroachment of their small front porch into the front yard setback. Consequently, the Quesnels' application for approval of the front porch encroaching into the front yard setback is approved.<sup>1</sup>

A Judgment Order accompanies this Decision. This completes the current proceedings before this Court.

Done at Berlin, Vermont, this 2nd day of July 2012.

  
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Thomas G. Walsh, Environmental Judge

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<sup>1</sup> Although the parties did not discuss the issue at trial, this decision also approves of the three steps leading to the porch. The steps are de minimus, and our analysis above remains the same whether the porch is considered with the steps or without them.

