

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: Raponda Landing Corporation c/o R. Bruce Freeman, Esq. Meth, Woehling & Freeman 50 Elmer Street Westfield, NJ 07090	Findings of Fact, Conclusions of Law and Order Land Use Permit #2W0604-3-EB
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This decision pertains to an appeal of a decision issued by the District #2 Environmental Commission authorizing the Applicant to reconfigure the design of a deck already constructed on Lake Raponda in Wilmington, Vermont, and to add four "risers" leading from the dock to the deck. As is explained below, the Environmental Board has concluded that the proposed **project has an adverse effect with respect to 10 V.S.A. § 6086(a)(8) (aesthetics)**. Accordingly, the Board is issuing an amended permit with conditions to mitigate the adverse effect.

I. SUMMARY OF PROCEEDINGS

On November 24, 1987, the District #2 Environmental Commission issued amended Land Use Permit #2W0604-3 to Raponda Landing Corporation. The permit amendment authorizes the Applicant to reconfigure the "design of the deck approved in Permit #2W0604-2 with the addition of 4 risers leading from the dock to the deck. The project is located on Lake Raponda in Wilmington."

On December 21, 1987, **LeRoy** and Helen Simpson (the Appellants) filed an appeal of the permit amendment with respect to the proposed project's effect on scenic or natural beauty and aesthetics.

On March 11, 1988, Chairman Leonard U. Wilson convened a prehearing conference in Wilmington, Vermont. On April 11, the Board issued a prehearing conference report and order. On October 4, the Board issued a memorandum of decision regarding a preliminary issue which had been briefed by the parties.

The Board's October 4 memorandum set a hearing date of November 3, 1988. This hearing date was cancelled because the dock at issue in the appeal is removed from the lake after Labor Day and its visual impact could therefore not be observed in November. The hearing was deferred until the following summer when the dock would be again placed on the lake.

On September 1, 1989, an administrative hearing panel of the Board convened a public hearing in Wilmington, Vermont, with the following parties participating:

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The Appellants
Christopher Eagen (adjoining landowner)
The Association by Martha Bauer

The Applicant did not attend or send a representative.
During the hearing, the panel took a site visit.

On September 21, 1989, the Board issued a recess memorandum. On September 5, 1990, the panel issued a proposed decision. On September 19, the Applicant filed comments on the proposed decisions; these comments were not served on all parties until October 9. On September 26, the Appellants filed a response to the proposed decision. On October 11, the Board deliberated and decided to allow parties further time to file responses to the Applicant's comments. On November 26, the Appellants filed a response to the Applicant's comments. The Board deliberated on November 29. On **December 24**, the Applicant filed a proposed permit condition with a letter indicating agreement by the Appellants. The proposed permit condition was circulated to and approved by the Board with modifications. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUE

Whether, pursuant to 10 V.S.A. § 6086(a)(8) (Criterion **8**), the proposed project will have an undue adverse affect on aesthetics or scenic or natural beauty.

III. FINDINGS OF FACT

1. On January 29, 1985, the District #2 Environmental Commission issued Land Use Permit #2W0604 (the **permit**), authorizing the construction of a single-family house on Lot #1. The permit was issued to Raponda Landing Corporation. The permit **states**:

Conceptual approval is given for the balance of the project (11 single family houses and 9 condominium units) pending the issuance of a Certification of Compliance. Site work approved at this time, is limited to a 30 'foot diameter around the approved house site on Lot #1 and one vista view line. All other cutting, clearing, site preparation and construction shall commence only after . . . written approval by the District II Environmental Commission and be limited to areas permitted by these approvals.

2. In the findings supporting the permit, the District Commission stated pursuant to Criterion 8:

(e) The aesthetic impact of this project has been a major issue. Parties opposed to the project have offered testimony that substantial tree cutting, shoreline alteration and construction of Beach Area with a deck and dock with 21 boats would cause a major unfavorable and permanent change of the aesthetic appearance of the natural shoreline. . . .

(g) The Commission finds the revised dock plan submitted on October 4, 1984 to be an improvement over the previous plan. ... The new plan clusters the boat tieup rather than allowing for moorings which would extend further out in the lake. The Commission finds the revised dock plan will not unduely [sic] affect aesthetics and is reasonable given the purpose of the development. The Commission, however, finds the dock should be no larger than is necessary to accommodate one boat tie-up per living unit. ... If a Certification of Compliance is not obtained for the full project, the permittee shall be required to submit a new deck and dock plan showing a proportionally lower number of boat tieups. The new plan must be approved by the District II Environmental Commission prior to construction.

(h) Landscaping for the project will consist of maintaining the natural wooded state as much as possible and the addition of flowering shrubs as needed around living unit sites. ... The Beach Area will be landscaped as shown on Exhibit #49. The Applicant has agreed to continually maintain the landscaping as approved.

3. On January 3, 1986, the District Commission issued Land Use Permit Amendment #2W0604-1 (the first permit amendment) to the Applicant. The first permit amendment authorizes:

the Permittee to modify the previously approved site plan for the project to replace nine condominium units and five house sites with twelve single-family home sites, change building and road layout, eliminate the boardwalks from the area previously designated as Lots

8, 9 & 10 and reduce the size of the dock. The project is located off Ballou Hill Road in Wilmington.

4. On April 29, 1987, the District Commission issued Land Use Permit Amendment #2W0604-2 (the second permit amendment) to the Applicant, authorizing "the Permittee to alter the previously approved dock design. The request to alter the location of the deck is specifically denied." In the findings of fact supporting the second permit amendment, the District Commission found that:

[T]he new dock with a wood finish and darkly colored molded polyethylene does not represent significant aesthetic change from the previously approved dock.' . . . The Commission will require the dock and all outdoor equipment to be stored in an unobtrusive location during the off-season.

The District Environmental Commission is, however, dismayed that the Applicants elected to disregard their Land Use Permit and commence construction on a different deck in a different location than the one approved. The Commission and all those involved have spent many hours carefully reviewing and monitoring this project and we clearly expect the Applicants to conform to all permit conditions and to build according to the approved plans without deviations. In this case, the Commission finds the new deck is located at a higher elevation and is further elevated on stilts above a rock out-cropping. This higher elevation makes the deck considerably more visible to abutting property owners. The Commission finds this change to have a negative aesthetic impact and will require the Applicants to build the deck in the originally approved location; also the deck shall be no larger than the originally approved deck. Also, landscaping shown in the originally approved beach plan shall be installed.

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5 . On September 23, 1987, the Applicant filed permit amendment application #2W0604-3. The application states that the Applicant:

requests changes in the two constructed elements of this project ("Elements"):
(1) the stabilizing poles for the approved and constructed dock; (2) the elevation of the **sundeck** at the beach. The Applicant herein seeks an amendment to the permit, if one is required, to conform the permit to the as-build elements.

6. Application #2W0604-3 further states:

The Applicant installed stabilizing poles as part of the construction of the dock. The dock is a floating-type dock and requires stabilizing poles for the safety of the resident using the dock. Without stabilizing poles, the dock would literally float away and would be hazardous to walk on in order to reach designated boat slips.

7. Application #2W0604-3 also states:

The approved plans for a **sundeck** at the beach area call for three risers down to grade from the deck surface nearest to the water. The plans also show a continuous deck surface on grade from west to east, toward the water. These plans were given to Applicant's subcontractor with instructions to strictly follow the plan, without deviation.

The subcontractor constructed a **sundeck** to the approved dimensions, but was required to construct four risers from the dock. This was required because the actual grade slopes from west to east, towards the water. Therefore, by building the **sundeck** on grade at its western limit, four risers were required at the eastern limit in order for the surface of the **sundeck** to be plumb. ...

The as-built construction adapts the approved plan to the grade of the building site

Applicant requests that the stabilizing poles and the **deck risers** be approved as built.

9. On August 18, 1987, former Assistant District #2 Coordinator Jeffrey G. Powers sent a letter to Bruce Freeman, who is associated with Raponda Landing Corporation. The letter states:

On July 14, 1987, I made a site visit at the Raponda Landing Corporation's dock and beach area in Wilmington.. The deck as observed is elevated above the approved level which should be the same height as the dock. In addition, the metal poles on either side of the **dock** walkway must be reduced to no higher than the walkway as shown in the approved plans. Please take immediate action to correct these problems.

The **letter** specifically references Land Use Permit Amendment #2W0604-2.

10. On November 24, 1987, the District **Commission** issued Land Use Permit Amendment #2W0604-3 (the third permit amendment) to the Applicant, authorizing the Applicant:

[T]o reconfigure the design of the deck approved in Permit #2W0604-2 with the addition of- four risers leading from the dock to the deck. The project is located on Lake Raponda in Wilmington.

A deck has been constructed on the shore of Lake Raponda. The deck is several feet higher than the grade of the ground underneath it. The deck is made of wood and colored brown.

12. The deck is rectangular in shape. Two sides of the rectangle are parallel to the Lake Raponda shore, and two sides of the deck are perpendicular to that shore. Wooden railings have been constructed on three sides of the deck. There is no railing on the side of the deck parallel and closest to the shore.

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13. On the side of the deck closest to the shore, a series of four steps leads down to the shore. These steps are parallel to the side of the deck nearest to them. Steps also exist on one of the sides of the deck which is perpendicular to the shore, and there is a gap in the railing on that side to allow entry.
14. During the summer, a floating dock is placed on the Lake Raponda waters in the area of the deck. Those portions of the dock which are visible above the waters are made of wood and colored brown. Tall stabilizing poles, rising several feet above the dock, are placed **at various** points around the dock. These poles are made of metal and colored gray.
15. There is no landscaping around the deck. The railing which exists on the deck is approximately 18 inches higher than the level of the deck.
16. The Lake Raponda development consists of homes and condominiums designed to be integrated with a forest setting in that they are generally surrounded by trees, made of wood, and painted in muted colors. There are a number of homes in the development which surround Lake Raponda. Although the **lake appears** to be natural, it is a small human-made body of water with limited shorelines **which** originally was named Ray's Pond. The dock and deck are visible from many of the homes surrounding the lake, including one owned by **LeRoy** and Helen Simpson. The **Simpsons'** home is on land which **they own** and which adjoins the lake. From the **Simpsons'** home, the deck appears to **be** a wide, open construction in an otherwise largely **natural setting**.
17. The Applicant has proposed a permit condition involving several items, in particular the replacement of steps with a planter box on the lake-side of the deck. The box would be 18 inches deep and 12 inches wide, and made of pressure-treated lumber. The box would be planted with flowers, interspersed with ivy or some other vine. The Applicant is willing to plant permanent shrubbery in the box.

IV. CONCLUSIONS OF LAW

Prior to issuing a permit, the Board must find that a proposed project **"will** not have an undue adverse affect on the scenic or natural beauty of the area, aesthetics" The burden of proof with respect to aesthetics is on the opponent. 10 V.S.A. §6088 (b). The Applicant must

come forward with enough evidence for the Board to reach a positive finding. Re: Pratt's Propane, Application #3R0486-EB, Findings of Fact, Conclusions of Law and Order at 4-6 (January 27, 1987).

A. Burden of Proof

As a matter of law, the Applicant has not met the minimal burden of coming forward which Act 250 places on applicants. The Applicant has in fact submitted no evidence in this proceeding. Instead, the Applicant mailed the Board prefiled testimony for witness George Maloof, did not appear at the September 1, 1989 hearing, and did not send Mr. Maloof to that hearing. Mr. **Maloof's** testimony was therefore ruled inadmissible because he failed to appear. Rule 17(D)(2) states:

Prefiled testimony is intended only to facilitate presentation of a witness's direct **testimony**. The witness must be present at the hearing to present his direct testimony in writing and to affirm its truthfulness.

In view of this evidentiary deficiency, the Board admits the application **in** this matter into evidence. This application is marked as Exhibit #2. The purpose of its admission is to provide the Board with sufficient baseline information on which to judge the adequacy of the proposed project pursuant to Criterion 8.

B. Impact on Aesthetics

In Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-20 (January 13, 1986), the Board established a two-stage analysis for aesthetic evaluations. First, the Board determines whether the proposed project has an adverse affect on aesthetics. Second, the Board determines whether such adverse affect, if any, is undue.

Central to a determination of adverse effect is whether the proposed project fits within the surrounding context. In analyzing the effect of a proposed project on the **context** surrounding the area in which it will be located, the Board pays special attention to sensitive areas, such as ridge lines, steep slopes, shorelines and flood plains. Quechee Lakes at 19.

The context of the proposed project is a shoreline which is viewed by the residents of homes which are located by Lake Raponda. The homes are designed to be integrated with their forested setting in that they are generally surrounded by trees, made of wood, and use muted color tones.

The Board concludes that the project will have an adverse effect on aesthetics and scenic and natural beauty. The dock and deck are large in scale compared to the small size of the lake with its limited shoreline. The elevation of the deck makes the large scale more pronounced by raising the deck to several feet above grade. The scale is also accentuated by the construction of stairs in front of the deck. Thus, the dock and the deck disrupt the natural appearance of the lake and the shoreline. This disruption is visible by viewers in homes surrounding the lake, who see large intrusions into otherwise naturally appearing areas. Further, the size and color of the stabilizing poles around the dock exacerbate this visual intrusion by adding unnatural and unnaturally-colored elements.

Having concluded that the project's effect on aesthetics and scenic and natural beauty is adverse, the Board examines whether this effect is unduly adverse. The Board will conclude that an adverse effect is undue if it reaches a positive conclusion **with regard** to any one of **the following**: (1) the project violates a clear, written community standard intended to preserve aesthetics or scenic and natural beauty; (2) **the** project offends **the** sensibilities of the average person; or (3) the Applicant has failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings. **Id.** at 19-20.

The Board has concluded that the project does not violate a clear, written community standard, and does not offend the sensibilities of the average person. However, the Board has also concluded that the Applicant has failed to take generally available mitigating steps to improve the harmony of the proposed project with its surroundings. Specifically, the Applicant has performed no landscaping around the deck. The Board believes that bushes which reach just below the level of the railing would serve to obscure and mitigate the visual effects of the deck.

Further, the Board believes that elimination of the stairs in front of the deck would help to mitigate the deck's visual effect. Planting and railing (similar to the existing railing on the other sides of the deck) could be placed in front of the deck to make the deck less visually intrusive.

Finally, the Applicant could reduce the size of the stabilizing poles and paint the poles brown or green to blend better with the natural setting.

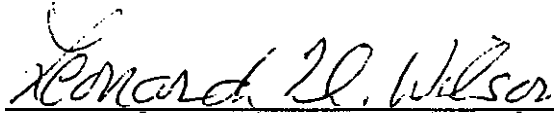
In view of the need for mitigation of the proposed project, the Board will issue an amended permit with conditions regarding planting, extension of the railing, and changes to the stabilizing poles as described above. These conditions will incorporate a modified version of the Applicant's proposal regarding a planter box as described in Finding 17, above. To adequately mitigate the impact of the deck, the proposal must be modified to incorporate planting of permanent evergreen shrubbery. This may be interspersed with flowers. The top of the shrubbery must come to no less than six inches below the height of the railing. The number of shrubs **must be** sufficient to cover at least 50 percent of the area bounded by the railing on the lake-side and **the** floor of the deck. The box must be **on**, and run the length of, the lake-side of the deck. The box must be **no more** than 18 inches high. The Applicant will be required to maintain the box and plantings in good condition and to seek approval of a revised landscaping plan from the District Commission should the shrubs not survive. The District Commission will retain jurisdiction to ensure that the project continues to comply with Criterion 8. On this basis, the Board concludes that the proposed project will not have an undue adverse effect on aesthetics and scenic or natural beauty.

V. ORDER

1. Land Use Permit Amendment #2W0604-3-EB is hereby issued.
2. Jurisdiction over this matter is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 25th day of January, 1991.

ENVIRONMENTAL BOARD



Leonard U. Wilson, Acting Chair
Ferdinand Bongartz
Arthur Gibb
Samuel Lloyd
Charles F. **Storrow**

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