

STATE OF VERMONT
Environmental Board
10 V.S.A., Chapter 151

Re: Quechee Lakes Corporation by Findings of Fact and
C. Daniel Hershenson, Esq. Conclusions of Law
Hershenson, Carter & Scott and Order
P.O. Box 909 Application #3W0364-1A-EB
Norwich, VT 05055-0909 ("Ridge Condominiums")

This decision pertains to an appeal filed with the Environmental Board (Board) on October 25, 1984, by the Quechee Lakes Corporation (QLC) from the August 31 and October 4 decisions of the District #3 Environmental Commission in respect to Land Use Permit Amendment Application #3W0364-1A. QLC had made certain revisions to the 28 unit Ridge Condominium project originally approved in March, 1981. The amendment application seeks approval of changes in building design and location to conform with "as built" plans.

The following parties participated in this appeal:

Applicant Quechee Lakes Corporation (QLC) by C. Daniel Hershenson, Esq. and James Anderson, Esq.
Ridge Condominiums, Inc. (RCI) by Richard Darby, Esq.
Town of Hartford Planning Commission by Raymond Belair.
Agency of Environmental Conservation by Gordon Gebauer, Esq.
Quechee Lakes Landowners Association (QLLA) by Alfred Guarino, Esq.
Beverly and Burton Foster (Fosters) by Robert J. O'Donnell, Esq.
Bernard Grossman
James Lightburn

The appeal of the Commission's decision has followed a tortuous route. At the request of QLC, the appeal was removed to the Windsor Superior Court on October 26, 1984. Cross-appeals were filed by Beverly and Burton Foster on November 9 and by RCI on November 1, 1984, and April 29, 1985. On April 2, 1985, the Windsor Superior Court remanded the appeal to the Board for further proceedings. On May 6, the Board held its first prehearing conference on this and two other appeals involving QLC projects/1/. On May 15, the Board

/1/ See Land Use Permit Applications #3W0411-EB (Murphy Farm) and #3W0439-EB (Newton Farm). The Board issued its decision in these cases on November 4, 1985, and a Memorandum of Decision on several motions for reconsideration on January 8, 1986. In these decisions, the Board articulated the process which the District Commissions and Board would follow in evaluating aesthetic impacts under Criterion 8 of Act 250.

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convened a public hearing in the three appeals for the purpose of hearing oral argument on a number of preliminary procedural issues identified at the prehearing conference and in the pleadings filed by the parties. The Board issued a Memorandum of Decision deciding these preliminary issues on May 23, 1985.

The first hearing on the merits of this and the two companion appeals was held on May 29, for the purpose of hearing testimony from a variety of expert witnesses on how professional building and landscape architects approach the issue of aesthetics. The Board also conducted the first of two site visits on that day. Following the May 29 hearing and by agreement of the parties, the Board recessed the proceedings in the Ridge Condominium case until the other two QLC appeals had been disposed of. A second prehearing conference was held on October 25. Hearings in the Ridge case resumed on January 4, 1986, and continued on March 26, June 4, and August 4. The Board conducted a second site visit on June 4. The proceedings were again recessed pending the submission of proposed findings of fact and conclusions of law by the parties. The deadline for submission of the proposals was extended several times as the parties attempted to reach a stipulated settlement. Another prehearing conference was held on November 10 to review the parties' progress toward settlement. When prospects for settlement did not appear imminent, the Board set a deadline of November 26 for submission of the proposed findings and conclusions.

On January 7 and 21, 1987, the Board held initial deliberative sessions on the merits of the appeal. On February 3, the Board determined that the record was complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon **the** record developed at the hearing and upon the Board's observation during the two site visits. To the extent that the Board agrees with and found necessary any findings prepared by the parties, they are incorporated herein; otherwise, the requests to find are hereby denied.

I. ISSUES IN THE APPEAL

A. Procedural Issues.

In its May 23, 1985 Memorandum of Decision, the Board decided a number of **preliminary** issues which had been **identified** at the initial prehearing conference. Those issues involved questions of the party status of RCI, the Fosters and Dr. Grossman, the Fosters' motion to dismiss the RCI cross-appeal, **QLC's** motion to dismiss the Fosters' appeal of Land Use Permit Amendment #3W0364-1A and cross-appeal of Amendment #3W0364-1A, and the relevance of evidence on the

"Quechee Concept" in the appeal proceedings. These issues were fully discussed in the Board's May 23 Memorandum of Decision, which is incorporated in full by reference and need not be repeated here. In summary, the Board decided:

1. RCI was admitted as a co-applicant pursuant to Board Rule 10 (A), and the Fosters and Dr. Grossman were granted party status under Board Rule 14(B).
2. QLC's motion to dismiss the Fosters' appeal of Permit #3W0364-1 issued on June 7, 1984, by the District #3 Environmental Commission was granted.
3. QLC's motion to dismiss the Fosters' appeal of Permit #3W0364-1A was denied.
4. The Board made a preliminary judgment that testimony on the "Quechee Concept" may be relevant to the extent that it is descriptive of the existing conditions in the Quechee Lakes development. The Board pointed out, however, that it is not empowered to decide whether QLC had violated some promise which QLC may have made to area residents at the time they purchased their properties.

B. Substantive Issues.

Application #3W0364-1A, which is the subject of this appeal, seeks approval for the following modifications to some or all of the six Ridge Condominium buildings which were originally approved in February 1981: elimination of lofts, addition of four-foot overhangs, addition of entry-level bedrooms, reduction of roof pitches, addition of skylights, addition of "clerestory windows," elimination of split-entry design, addition of wrap-around decks, extension of living room areas, elimination of full-height crawl spaces and access doors, enlargement of sliding glass doors, addition of side doors on decks, addition of windows and sliding doors, alterations to the locations of some buildings, and construction of a rear access road for Building 6.

The District Environmental Commission approved most of the changes requested by the Applicant in Permit #3W0364-1A. However, by permit condition, the Commission required the implementation of additional landscaping (Conditions #4, 5, 6, and 7 of Permit #3W0364-1A), the installation of non-glare glass in "downslope" windows (Condition #9), removal of skylights (Condition #10), and the installation of a barrier on the access road behind Building 6 (Condition #11).

In its Notice of Appeal dated October 25, 1984, QLC objected only to Condition #10 requiring the elimination of the skylights. In their cross-appeal filed on November 9, the

Fosters argued that Building 6 should be torn down. In its cross-appeal filed on April 23, 1985, RCI objected to the inclusion of Conditions #4-11 as issues in the appeal. The parties agreed that Criterion 8 (aesthetics) was the sole criterion of Act 250 at issue in this appeal.

II. FINDINGS OF FACT

1. Quechee Lakes is a four-season second home and recreation development located in a picturesque valley in the southwest corner of Hartford, Vermont. Established in 1970, the Quechee Lakes development plans eventually to build up to 2,500 housing units on 3,000 acres of land, including 500 or more condominium units and the balance as detached residences. Another 2,500 - 3,000 acres will be maintained as permanent open space, greenbelt and wildlife areas. Among its amenities, the resort offers two golf courses, a clubhouse, an artificial lake (Lake Pineo) with beach facilities, tennis courts, restaurants, and a small ski area with a ski lift, all within a 20-minute drive of Hanover, New Hampshire, and White River and Woodstock, Vermont./2/

2. Land Use Permit #3W0364 authorizing the construction of the Ridge project was issued to QLC on February 4, 1981. The Ridge project is located on a ridgeline which overlooks the Quechee valley from the east. The project consists of twenty-eight condominium units in six buildings, plus an access road, utilities and swimming pool. The buildings are located approximately 280 feet above the floor of the Quechee valley, and approximately 50 feet above the top of the ski hill. The project area is approximately 8.6 acres.

3. Four of the buildings (1, 2, 5 and 6) contain five condominium units. Each building is approximately 125 feet wide (when viewed from the west). Buildings 3 and 4 contain four units each, and are approximately 100 feet wide. The buildings are approximately 42 feet deep, and the west elevations are approximately 30 to 40 feet high.

4. The Ridge project is generally visible from throughout the Quechee valley. Among the viewpoints where the project may be seen by the greatest number of people are the Quechee Lakes Landowners Association clubhouse, golf course, Lake Pineo and beach, and the ski area. It is also visible at various points to persons travelling easterly on River Road and, to a lesser

/2/ For a more detailed description of the Quechee valley and the changes which have occurred since 1970, see the Board's decision in the "Newton Inn" and "Murphy Farm" appeals (#3W0411-EB and #3W0439-EB) dated November 4, 1985.

degree, on Route 4. While the colors of the buildings (brown with light trim) were selected to make the buildings less noticeable, the scale, mass and location of the building on the ridgeline tend to make them one of the most visually prominent features in the valley.

5. The visual impact of the buildings varies somewhat with the time of day and the season. During the summer months, when the hardwood trees are in leaf, the buildings tend to be less prominent. At night, lights from the windows, sliding glass doors and skylights are visible from many points throughout the valley. During the day, and especially in the late afternoon, light is reflected off the glass on the western facade of the buildings. While the testimony of architect Eric Davis and Exhibits 842-46 tended to show that direct reflection of the sun's rays to a particular viewing point occurs only a minimal number of times per year, and then only for a period of 3-3½ minutes (assuming that all windows and sliding doors had been constructed in a perfectly plumb and true position), reflection of sunlight occurs far more frequently because the glass will reflect diffuse light as well as **spectural** (direct) light. As the photographs in Exhibits #39, 40, 51, 53, 68, 77 and 78 show, reflective glare from the Ridge Condominiums results in a significant visual impact, even on cloudy days.

6. Buildings #1-5 are constructed end to end and form a gentle arc near the top of the steep portion of the ridge wall. Measured from the northern wall of Building 1 to the southern wall of Building 5, the five buildings together extend approximately 675 feet. Building 6 is located behind the others and somewhat higher on the ridge. When viewed from the valley floor, the roof of Building 6 appears to be approximately even with the tops of the trees growing on the crest of the ridge. The roofs of Buildings 1-5 appear to be somewhat below the crest **from** most viewing angles.

7. Construction of the Ridge project was completed in the fall of 1984. Landscaping was completed the following spring. As outlined briefly above, QLC made a number of changes while constructing the project. Some of these changes are described more fully below:

A. Building footprints. The "footprints" of Buildings 1, 2 and 4 as built are almost identical to the approved locations (Exhibit #5). Building 3 was rotated slightly downhill (in a westerly direction). Building 5 was rotated in the same direction, but to a greater degree.

The southwestern corner of Building 6 was rotated 25 feet toward the east, as is evident when comparing the approved plans with the as-built plan (Exhibit #5). While installing the sewerage line and access road to the project, the

contractor had to undertake a significant amount of blasting. In doing so, he fractured **the** ledge which would have supported the southwest corner of the building. The building was rotated toward the southwest in order to avoid this fracture.

B. Building Height. The height of the buildings was modified only slightly during construction. The ridgeline heights of Buildings 1-5 were lowered between one foot and six feet, as can be seen when compared to the approved plans. The height of Building 6 was raised 1.5 feet.

C. Glazing. Because the other facades are either not visible or barely visible from the valley, the Board generally examined only the changes to the glazing on the western facades of Buildings 1-6. The Commission originally approved 109.3 square feet of glazing for each building. Buildings 1-5 as built each have 155.2 square feet of glass, an increase of 45.9 square feet or 42%. Building 6 has 159.8 square feet, an increase of 50.6 square feet or 46%. This increase is due principally to the installation of wider sliding glass doors, longer and wider windows, and, in the case of Building 6, the addition of a third tier of clerestory windows (see Exhibit #29).

D. Skylights. The original approved plans for the Ridge project approved skylights on the eastern roof pitches but did not include skylights on the western roof pitches. During construction, 20 skylights were added to the western roof pitches of Buildings 1-4, and 18 skylights were added to Building 5. Each skylight measures 22" x 46", or 7 square feet, although because the skylights are mounted on an **incline**, they actually "read" only an additional 2.5 square feet. If this addition is combined with the additional glazing described in the preceding paragraph, the amount of "new" glass in the as-built units for Buildings 1-5 (with one exception) increased by 73.9 square feet, or 67.6% over the approved plans.

In order to reduce the reflected glare from the skylights, QLC coated the skylights in 1984 with a lacquer which is often used to reduce glare into the cockpit from the nose of an aircraft. The coating still allows light to pass in during the day, and out during the night.

E. Width, Depth and Mass. The width of the buildings as built (as viewed from the west) is essentially unchanged from the approved plans. However, depth of the buildings was increased from 28 feet to 42 feet. In addition, the roof pitch was reduced from **7:12** to **5:12**. The latter change allowed QLC to increase the amount of floor space within each unit without increasing the overall height of the buildings. In the case of Building 6, it allowed the addition of the top tier of clerestory windows.

Another change that was made to the architectural design of the buildings after their approval which has had an impact on their perceived mass was the reduction in the number of levels upon which the windows, balconies and roof lines were constructed. As Exhibits #28-30 reveal, the buildings as constructed show considerably less diversity in the levels of windows, balconies and roof lines than do the buildings as originally proposed. These changes, when coupled with the additional glazing, increase the perceived mass of the buildings.

8. Views of the Ridge project from the Quechee valley tend to be long, putting the project in the middleground or even the back of the middleground. The beach on Pineo Lake is 2,800 feet away, the clubhouse 4,000 feet, Route 4 one mile, ski hill 5,500 feet, Dutton Hill 7,000 feet, and the golf course 1,500 - 7,000 feet. Because of these distances, some of these changes are not perceptible. The modification in the footprints of Buildings 3 and 5, for example, have no perceptible visual impact. Some of the other changes discussed above, however, are clearly perceptible, and, when viewed cumulatively, contribute significantly to the visual impact of the Ridge project on the Quechee valley.

9. QLC's own expert witnesses agreed that the Ridge Condominiums have a significant impact on the Quechee valley. Peter Bourgois, a landscape architect appearing on behalf of QLC, admitted that the Ridge project has a profound visual impact, that it is located in a sensitive area, and that it is not in context with its surroundings. Paul Buff, QLC President and himself a **landscape architect**, admitted that by and large he agreed with Bourgois that the Ridge is in a visually sensitive area and may be out of context.

10. QLC filed Land Use Permit Application #3W0364-1A-EB on August 1, 1984, after the changes discussed above had already been constructed.

III. CONCLUSIONS OF LAW

A. Evaluation Under Criterion 8.

The criterion at issue in this appeal is Criterion 8, which states that the Board must find that the project (in this case, the amendments) will not have "an undue adverse effect on the scenic or natural beauty of the area [or on] aesthetics" 10 V.S.A. § 6086(a)(8). The Board explained its **interpretation** of this provision at considerable length in its decision in the "Newton Inn" and "Murphy Farm" projects at Quechee Lakes (Permit #3W0411-EB/3W0439-EB). In that decision, the Board described a two step process by which to evaluate the aesthetic impacts of a project. The first step is to determine whether the impact is "adverse"; the second step is to

determine whether the adverse impact is "undue." Because of the significance of the aesthetic issues in this case, portions of that earlier decision are repeated here:

In judging the impact of a proposed project on the values described in Criterion 8, the cornerstone is the question: Will the proposed project be in harmony with its surroundings--will it "fit" the context within which it will be located? Several specific features must be evaluated in answering this question:

- 1) What is the nature of the project's surroundings? Is the project to be located in an urban, suburban, village, rural or recreational resort area? What land uses presently exist? What is the topography like? What structures exist in the area? What vegetation is prevalent? Does the area have particular scenic values?
- 2) Is the project's design compatible with its surroundings? Is the architectural style of the buildings compatible with other buildings in the area? Is the scale of the project appropriate to its surroundings? Is the mass of structures proposed for the site consistent with land use and density patterns in the vicinity?
- 3) Are the colors and materials selected for the project suitable for the context within which the project will be located?
- 4) Where can the project **be seen** from? Will the project be in the viewer's foreground, middleground or background? Is the viewer likely to be stationary so that the view is of long duration, or will the viewer be moving quickly by the site so that the length of view is short?

- 5) What is the project's impact on open space in the area? Will it maintain existing open areas, or will it contribute to a loss of open space?

All of these factors must be weighed collectively in deciding whether the proposed project is in harmony with--that is, whether it "fits"--its surroundings. The nature of the land uses which surround a project are crucial to the analysis. The same building which may add to the aesthetic qualities of an urban area may detract from those qualities in a rural setting, because the context is different. The visual impact of a single large building may be lessened if its mass is broken up into several smaller structures. A building which may project itself toward the viewer because it is painted white or red, may tend to recede into the background if it were painted in darker tones. Loss of open space areas tends to be "adverse" from a strictly aesthetic standpoint, because open space is an important feature in the scenic beauty of Vermont.

The expert witnesses agreed that certain types of land forms are especially sensitive to change, because these land forms tend to be visible from a wide area or they are seen by large numbers of people. These sensitive areas include ridgelines, steep slopes, shorelines and floodplains. Other features are sensitive because they are aesthetically unique: examples may include historic structures, wetlands and natural areas. In evaluating a project proposed in a sensitive area, the Board and District Commissions should give special attention to assessing whether the scenic qualities of these sites will be maintained.

If after a collective analysis of these factors, we conclude that the proposed project would have an adverse impact on the aesthetics or scenic or natural beauty of the area, the next step is to determine whether the adverse impact is "undue." We conclude that an adverse impact is undue, and therefore violates Criterion 8, if we reach a positive conclusion with regard to any one of the following:

- 1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? Such standards may, for example, be set forth in the local or regional **plan**, or be adopted in the creation of an historic design district, or be incorporated into a municipal or State scenic road designation. If the Board or Commissions find that such standards do exist, and that the project as designed would violate those standards, the adverse impact would be undue.

- 2) Does the project offend the sensibilities of the average person? The Legislature has directed the Commissions and this Board, composed of lay people from many different communities within Vermont, to determine what is acceptable in terms of new developments' impact on aesthetics and scenic and natural beauty. If our sensibilities are, collectively, offended by a project, its impact under Criterion 8 is undue. It is not enough that we might prefer to see a different design or style of building, or that we might prefer a different type of land use, but that the project, **when** viewed as a whole, is offensive or shocking, because it is out of character with its surroundings, or significantly diminishes the scenic qualities of the area.

- 3) Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings? Such steps may,, include selection of less obtrusive colors and building materials, implementation of a landscaping plan, selection of a less obtrusive building site within the project area, or reduction of the mass or

density of a project. If there are reasonable alternatives available to the Applicant that would mitigate the adverse impact of the project, failure to take advantage of those alternatives may, in some circumstances, render undue an otherwise acceptable aesthetic impact.

In summary, we approach the Criterion 8 evaluation of the Quechee projects by first deciding whether or not those projects are in harmony with their surroundings. In performing this analysis, special scrutiny must be given to sensitive natural features. If we determine that a project's impact on its surroundings would be adverse in some manner, we then must determine whether the impact is "undue" because the project would violate an express community standard pertaining to aesthetics, would be offensive or shocking to the sensibilities of the average person, or has failed to incorporate reasonable mitigating steps which would improve its harmony with its surroundings.

The question to be decided in the Ridge appeal is whether the changes QLC made after the District Commission had issued the original land use permit for the Ridge project result in an "undue adverse effect." Although the original permit is not now on appeal, and QLC has a vested right to build the project described in Land Use Permit #3W0364, it is not possible for the Board to judge these changes without first considering the context within which they occur, which is the Ridge project itself.

There is little doubt that the visual impact of the Ridge Condominiums is "adverse," as that term has been defined above. Due to its location at the top of a steep valley wall near the crest of the ridge, the virtually unrelieved mass of Buildings 1-5 when viewed from the west, and its general lack of vegetative screening, the Ridge project tends visually to dominate the Quechee valley. Far from blending harmoniously into its surroundings, the Ridge tugs at the eyes of visitors, including the members of this Board. In summer or winter, on clear days or cloudy, during daylight or at night, the Ridge project makes its presence known. No other development in the valley has as much of an intrusive effect.

Nor is there much disagreement that the project is located in a visually sensitive area. QLC's own experts agreed that the site is aesthetically sensitive. As the Board pointed out in the Quechee Lakes decision quoted above, the Board and

Commissions must give special attention in evaluating projects proposed in a sensitive area to determine whether the scenic qualities of these areas will be maintained.

If the Board were evaluating the Ridge project today, it would find that the project's impact on the scenic and natural beauty of the Quechee valley is "adverse." The Board members shared a strong negative reaction to the visual impact of the project which extended far beyond a matter of personal taste. The question to be decided in this appeal is not whether the Ridge project itself should be denied an Act 250 permit because it causes an "undue adverse effect," but whether the changes constructed by QLC, when coupled with the original project, have such an effect. The position that QLC and RCI urge upon this Board is that the impact **of** the changes is virtually indistinguishable from the impact of the original project, and therefore should be approved. For example, they argue that because the District Commission gave its blessing to the reflective glare from 109.3 square feet of glazing in each building when it issued **Land Use Permit #3W0364** in 1981, the additional glare reflected from 155.2 square feet should not be much worse.

This argument misses the point. The Board need not engage in a speculation over whether a 5% or 10% change would have been a "material change" under Board Rule 2(P) and would thus have triggered the need for a permit amendment. The fact remains that a **42-46%** increase in glass area, plus the other changes made after the original permit was issued, do have a significant visual impact, especially when the project is located in a sensitive area.

Some of the changes installed by QLC have de **minimus** impact and do not result in a "material change" that would require a permit amendment. The changes which fall into this category include the slight rotation of Buildings 3 and 5, the elimination of lofts in units **1A** through SD, the addition of side doors on units **1E, 2E, 3A, and 5E**, and the construction of a "drop-off" road at the rear of Building 6. These changes are not visible from the Quechee valley, and do not affect, negatively or positively, the visual impact of the Ridge project.

The other changes, either singly or cumulatively, do contribute to the overall negative visual impact of the Ridge project, and therefore result, within the context of this amendment application, in an undue adverse effect on the scenic and natural beauty and aesthetics of the Quechee valley. The Board will therefore require in its Order that the Applicant QLC and Co-applicant RCI take certain remedial steps to either eliminate or substantially mitigate the adverse effect of the changes.

Based on the foregoing Findings of Fact, it is the conclusion of the Environmental Board that unless the remedial steps set forth in the Order below are implemented, the project amendments described in the application #3W0364-1A will create an undue adverse effect on the scenic and natural beauty of the area, and aesthetics, and therefore it will result in a detriment to public health, safety or general welfare under Criterion 8 described in 10 V.S.A. § 6086(a).

B. RCI's Rights as Assignee.

QLC and RCI are correct in asserting that the Board is without authority to review the original permit. QLC's rights to build the Ridge Condominium project vested when Land Use Permit #3W0364 was issued and the appeal period expired.^{/3/} However, the rights which were vested are only those rights which were given under the permit. Conditions 1 and 2 of Permit #3W0364 required the applicant to complete the project as depicted in the approved plans, prohibited project changes without prior Commission approval, and rendered permit conditions binding upon the permittee and its successors and assigns if no appeal is filed. In short, once the permittee exercises rights under a permit, he must accept the burdens as well as the benefits of the permit, unless he appeals or seeks a permit amendment.

The fact that QLC has sold a number of the Ridge units to third parties, and that RCI has assumed the management of the project, does not change the obligation of the permit holder to comply, nor of the Board to ensure compliance, with permit conditions. In a recent revocation proceeding in which the Board revoked a permit because a successor in interest willfully and repeatedly violated the limits of an Act 250 permit, the Board stated that the assignee of a permit gains no more rights than those granted to the original permittee. (See Re: Crushed Rock, Inc., revocation of Permits #1R0489 and #1R0489-1, decision issued October 17, 1986.) RCI and the owners of the Ridge units are entitled to use the benefits granted under Permit #3W0364, but they are also bound by its limitations.

C. Amendments to Correct Permit Violations.

The Board is deeply concerned that the amendment procedures provided in Board Rule 34 have been used by permittees who choose to ignore the requirements of the permit, construct whatever changes they believe are necessary or desirable at the

^{/3/}The original permit was in fact appealed. However, the issue on appeal involved a matter of wildlife habitat, and was eventually resolved without altering the Commission's decision or permit.

time, and then simply file an amendment application when the changes are discovered. As the Board explained in Knight Point State Park, Declaratory Ruling 77 issued on September 7, 1976, the Act 250 process is premised upon the concept that the parties to a permit application and the District Commission reviewing that application are entitled to rely upon an applicant's representations concerning the scope of the proposed project. As the Board stated in Knight Point:

Parties to an application for a permit have a right to rely upon material representations made by an applicant in the application as defining the nature and scope of the development during construction and term of operation: and once a permit has been issued it is reasonable to expect the permittee to adhere to those representations unless circumstances or some intervening factor justify an amendment.

To allow unbridled changes without advance review would render the Commission's review meaningless. It would also result in a deprivation of due process to other parties: the extent to which a person may participate as a party is dependent upon the nature of the project which the applicant has proposed. To allow permittees to make unapproved changes after a permit has been issued would be to deprive the statutory parties and other persons affected by the project of the right to a fair hearing.

The use of Rule 34 for the purpose of correcting violations undermines the integrity of the Act 250 process by encouraging applicants to use the amendment process as a device to renege on promises and representations made during the original application process. Furthermore, as the Ridge case illustrates, using Rule 34 to attempt to obtain approval of "as built" plans puts the Commission or Board in the difficult position of trying to guess whether a particular project change would have been approved, had it been included in the original plans.

IV. DECISION

The Board concludes, on the basis of the testimony presented, that the elimination of the lofts, the rotation of Buildings, 3 and 4, the addition of the side doors and the installation of the rear access to Building 6 have no measurable impact on any of the values sought to be protected by the Act 250 criteria.

The Board further concludes that the other changes listed in the amendment application, either singly or when considered together, have an undue adverse impact on the scenic, natural beauty and aesthetics of the area and that there were no unanticipated circumstances or other mitigating factors justifying the changes. Since the Board is persuaded that the impacts resulting from the unauthorized changes can be substantially mitigated, the Board will require QLC and RCI to undertake a series of mitigative actions, as set forth in the Order below. In the event such actions are implemented in a timely and effective fashion, the Board will issue an amended permit approving the balance of the changes.

V. ORDER

1. The changes which were approved by the District #3 Environmental Commission in Permit Amendment #3W0364-1A which were not challenged in the appeal to the Board are hereby approved. In addition, the Board hereby approves the elimination of the lofts, the rotation of Buildings 3 and 5, the addition of the side doors on Units 1E, 2E, 3A and 5E, and the addition of the rear entrance to Building 6. A revised permit will be issued confirming these approvals when the other conditions of this Order have been fulfilled.

2. The skylights which have been installed on the western roof slope of Buildings 1-5 shall be removed. Removal shall occur as soon as possible, but in any event by no later than June 1, 1987.

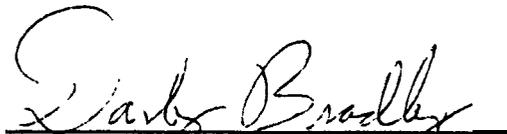
3. QLC and RCI shall prepare plans for review and approval by the Board to limit the total projected glass area on the western facades of each of the Buildings 1-6 to not more than 109.3 square feet. This modification may be accomplished by constructing solid balcony railings, replacing windows or sliding doors with smaller units, eliminating the clerestory windows in Building 6, or such similar construction device that will achieve the intended result. Vegetative screening alone shall not be sufficient to satisfy this condition. The plans shall be submitted to the Board and the other parties by no later than April 1, 1987. Upon approval by the Board, the plans shall be implemented as soon as possible, but in any event no later than September 1, 1987.

4. QLC and RCI shall prepare planting plans for review and approval by the Board to break up the mass of Buildings 1-6 when viewed from the Quechee valley and restore the screening required in the original permit. In general, the plans shall follow the recommendations of Terrence Boyle as set forth in Exhibit #66. The plans shall be submitted to the Board and the other parties by no later than April 1, 1987. Upon approval by the Board, the plans shall be implemented as soon as possible, but in any event no later than September 1, 1987.

5. QLC and RCI shall fund the hiring of an independent architectural and/or landscape architectural consultant, to be approved by the Board, to review the plans submitted by QLC and RCI, and to submit his or her evaluation of the adequacy of the plans to accomplish the objectives set forth in this Order.

Dated in Montpelier, Vermont, this 3rd day of February, 1987.

ENVIRONMENTAL BOARD



Darby Bradley, Chairman
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Jan S. Eastman
Samuel Lloyd III
Roger N. Miller

Member dissenting:
Lawrence H. Bruce, Jr./1/

/1/ Dissenting Opinion of Member Bruce.

It is not sufficient to consider only the effects of the changes made by the permittee in a case such as this. While the applicant has the right to construct the project in conformance with the original permit, it has no right to deviate from the permit terms and conditions. Perhaps minor variations could be overlooked, but the Board's findings contain numerous examples of QLC's ignoring permit conditions and do not show justification for such deviations. Any one of these variances (even taken alone) might have tipped the scale and resulted in a denial to the original permit. The Applicant could have built the approved project, or it **could have** applied for an amendment, prior to construction. It did neither. It built a different project.

I would find that the project as built, under our prior Quechee Analysis, creates "an undue adverse effect on the scenic or natural beauty of the area ...," and I would deny the amendment and require the Applicant to complete the project in conformance with the terms and condition of the original permit.