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

RE: Northshore Development, Inc. by Findings of Fact and
Phillip C. Linton, Esq. Conclusions of Law
P.O. Box 4201 and Order
Burlington, VT 05402 Application #4C0626-5-EB

This decision pertains to an appeal filed with the Environmental Board on May 9, 1988, by the Lake Champlain Committee from Land Use Permit #4C0626-5 issued to Northshore Development, Inc. by the District #4 Environmental Commission on April 7, 1988. That permit authorized Northshore to construct 84 condominium units in four six-story buildings off Derway Drive in Burlington, Vermont.

On June 10, 1988, Board Chairman Leonard U. Wilson convened a prehearing conference and on June 16 a Prehearing Conference Report and Order was issued. The Board conducted a site visit on July 14 and convened a public hearing on July 14, September 14, and September 20. The following parties participated in the hearing:

- Northshore Development, Inc. (Northshore) by Phillip C. Linton, Esq.
- Lake Champlain Committee (LCC) by William E. Roper, Esq.

The hearing was recessed on September 20, 1988, pending the filing of evidentiary objections and a review of the record and deliberation by the Board. On October 5, LCC filed rebuttal testimony of Hubert Vogelmann. On October 7, LCC filed a Motion to Introduce Into Evidence the Date of Enactment of the 35 Foot Height Restriction/Amendment and Evidentiary Objections to Various Portions of Prefiled and Rebuttal Testimony. On October 11, Northshore filed rebuttal testimony of David Batchelder. On October 18, Northshore filed a Memorandum of Law re Admissibility of Evidence of Alternative Plans, Proposed Findings of Fact, Conclusions of Law and Order, and Memorandum of Law and Argument. On October 19, LCC filed a Memorandum on the Issue of Alternatives, Proposed Findings of Fact and Memorandum of Law, and additional rebuttal testimony of Hubert Vogelmann, and on October 28, LCC filed a Supplemental Memorandum. On December 8, Northshore filed a Memorandum of Law in Opposition to Appellant's Objections to Certain Testimony and Exhibits. The Board deliberated on this matter on September 20, October 19, November 29, and December 14, 1988. On December 14, the Board determined the record to be complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record at the hearing. To the extent the Board agreed with and found

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necessary any findings proposed by the parties, they have been incorporated herein; otherwise, said requests to find are hereby denied.

I. ISSUES IN THE APPEAL

A. Preliminary Issues

1. Evidentiary Objections

At the hearing, LCC objected to certain statements contained in the prefiled and rebuttal testimony of Michael Lawrence, the rebuttal testimony of John Caulo, and the rebuttal testimony of Rod Whittier. In order to expedite the hearings, the parties agreed that LCC would submit its objections in writing after the hearings were completed.

During the hearings, the Board ruled that Exhibits #34, 37, 38, 39, and 40 (all pertaining to reviews of the Northshore Midrise project by the City of Burlington and Superior Court) were admitted solely as evidence that reviews were made and conclusions reached and of the existence of a community standard with respect to compliance with Criterion 8 (aesthetics), but not as evidence of the truth of any statements in the exhibits. The Board also ruled that Rodney Barber's prefiled testimony was inadmissible hearsay. LCC objects to the admission of any statements that refer to Mr. Barber's testimony and to any references to decisions made by city boards and commissions or opinions of other people in Exhibits #3, 4, 10, 11, 12, and 13.

The Board has reviewed the testimony and will exclude from the record, because it is hearsay, a) all references to the substance of decisions made by the Burlington Design Review Board, the Burlington Planning Commission, and the Chittenden Superior Court; b) all references to the opinions of Rodney Barber, neighbors, and city planners; and c) all references to studies not otherwise admitted into this record.

2. Thirty-five Foot Height Restriction

LCC filed a motion requesting the Board to take judicial notice of the date that the Burlington Zoning Ordinance was amended to include a requirement that no structure exceed 35 feet in the area of the Northshore project. Included with the motion were an affidavit from James Rader, City Clerk for the City of Burlington, stating that the 35-foot height restriction became effective on August 1, 1987, and a copy of Section 22(A) of the Burlington Zoning Ordinance.

The Board will take official notice of the effective date of the 35-foot height restriction.

3. Herbert Vogelmann and Daniel Batchelder Testimony

Subsequent to the last hearing, LCC filed testimony of Hubert Vogelmann regarding the trees growing to the west of the proposed buildings, and Northshore filed responding testimony of Daniel Batchelder. No party requested a hearing and, after reviewing the testimony, the Board decided to accept the testimony into the record as Exhibits #63 and 71 (Vogelmann) and Exhibit #64 (Batchelder).

B. Substantive Issues

The District #4 Environmental Commission issued a permit to Northshore to construct 84 condominium units in four buildings, each six stories high, at the north end of the City of Burlington approximately 1,000 feet from Lake Champlain. LCC appealed the permit, contending that the project does not comply with Criteria 8 (aesthetics) and 9(K) because of the visibility of the buildings from the lake and surrounding areas.

II. FINDINGS OF FACT

1. Northshore owned a 250-acre tract of land on the west side of North Avenue in the City of Burlington between the Winooski River to the east and Lake Champlain to the west. On a part of this property, Northshore has constructed Phases I and II of its development, known as the Village at Northshore. The proposed project would be Phase III of the Village at Northshore development and is known as the "Midrise." Northshore intends to construct a wildlife sanctuary on approximately 150 acres of this tract located to the north of the **Midrise**.
 2. The **Midrise** site consists of 10 acres located to the north of the Village at Northshore. The **Midrise** buildings will be located on two acres and will be surrounded by eight acres of trees and open lawns.
 3. The area of the site on which the **Midrise** will be built is generally level. The land slopes toward the lake with a 50- to 50-foot drop and a slope of 27 to 33 degrees.
 4. The **Midrise** will consist of four six-story buildings connected by two levels of glass walkways, each nine feet high, between each building at the second and
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fifth stories. The four buildings will be sited in the shape of an arch with its center curved away from the lake.

5. One hundred twenty-six parking spaces will be created. Of these, at least 84 will be constructed beneath the buildings. The entrance and exit to the **Midrise** will be on the southeasterly side of the buildings.
 6. The height of the buildings will be 60 feet from the first floor grade, at an elevation of approximately 217.5 feet. The combined length of the buildings will be 550 feet.
 7. The walls of the buildings will be constructed of "sto," a soft, non-reflective colored stucco-like material. The sto used in the **Midrise** will be colored in earth tones. The roof will be a grey color similar to the roofs of the Village at Northshore townhouses.
 - a. The **Midrise** buildings will have design details similar to the adjacent townhouses: the east side of the building will have gables, while the west side will have a generally flat face with gable facade details. The roofs will be sloping and the top two floors of the east elevation will be truncated and shingled.
 9. The buildings will have three bands of coloring with the darkest shade at the lowest level and the lighter colors above. The color of the roof will match the top band.
 10. Less than one-quarter mile to the north and east of the site is located the Intervale, consisting of approximately 4,000 acres of wetlands and floodplain. The Winooski River, which originates north of the site, meanders through the Intervale. The project is on a bluff above Lake Champlain, approximately 1,000 feet from the shoreline. A public bike path is located directly west of the site. Along the shore is an undeveloped public beach and conservation area approximately 3,000 feet long.
 11. The Burlington sewage treatment plant is located to the north of the project.
 12. The area at the "mouth" of the river contains a neighborhood of converted camps, mobile homes, vehicle repair businesses, and several small marinas, all interspersed with woods on dirt roads in a haphazard layout.
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13. The **Midrise** site is located at the northern end of the "New North End" neighborhood, more than five miles from Burlington's urban center. The neighborhood has a suburban character, consisting of predominantly small, single-family dwellings, most of which are one to one-and-one-half stories high. Two multiple family housing complexes are located in the area: the recently constructed Village at Northshore and the Northgate low income complex which is adjacent to the southern end of the Village at Northshore. The Northshore townhouses are clustered within a wooded setting, and the maximum height of the buildings is 35 feet. The neighborhood also includes several parks, a shopping center, and a school. Some of the buildings at the Starr Farm Nursing Home, located approximately one mile to the southeast of the project and almost one mile from the lake, are three stories in height. These are the tallest buildings in the area.
14. The existing Village at Northshore townhouses are arranged in building clusters of four to six units and are surrounded by pockets of open space. The **two-**and-one-half story buildings, which have gables and varied rooflines, are staggered so that the visual mass of the buildings is broken up. The buildings were sited to be integrated into existing tree cover.
15. The scale of the **Midrise** is of a completely different magnitude from any other buildings in the area. The mass of the **Midrise** will be approximately **1,700,000** cubic feet, while the mass of a 6-unit townhouse is in the range of 150,000 cubic feet and the mass of a single-family home is approximately 25,000 cubic feet. Thus the **Midrise** would be over 11 times as massive as the largest Northshore townhouse and more than 65 times as massive as a single-family house.
16. The project is part of Burlington's Ward 4, which has a density of approximately 5.4 people, or 1.7 units per acre. This is the least densely populated ward in the city. No buildings taller than three stories are located in Ward 4.
17. Near the bottom of the wooded embankment on the west side of the site is the City's bike path. The bike path, built by the City along a former railroad track, runs from the urban core of Burlington five miles south of the Northshore site to the northernmost edge of the **City at the mouth of the Winooski River. Eventually, the bike path will traverse the City's entire water-**front.

18. Foliage will screen the **Midrise** from most points on the bike path during the summer months. Between October and May when the leaves are off the trees, glimpses of the buildings will be visible through gaps in the trees. Northshore plans to plant evergreen trees along the bike path and at the top of the bank to provide a screen. The bike path is most frequently used in the summer, although warm spring and fall weekends see moderate to heavy use, and the path is used in the wintertime by cross-country skiers.
 19. An existing stand of 35 to 50 foot black locust trees will screen the **Midrise** from North Avenue Extension.
 20. North of the site there is a grove of hemlock, white pine, oak, maple, ash, and poplar trees, ranging in height up to 70 feet above grade. Northshore will plant Red Pine trees in the opening in the trees that was created when the City installed a new sewer line.
 21. South of the site is a small grove of Red Pine trees approximately 30 to 40 feet high. Northshore will plant additional Red Pine trees in this area.
 22. The **Midrise** will be barely visible from the houses and streets to the east of the site, and partially visible from some of the townhouses in the Village at Northshore and several homes to the southeast on Hardy Avenue.
 23. The buildings will be screened from the Winooski River and from the Intervale by the trees that grow along the edge of the river.
 24. The trees on the bank toward the lake range in height up to 88 feet, which is an elevation of approximately 212 feet. The top of the buildings will be at an elevation of approximately 217.5 feet. The trees are growing between one-half to three feet per year. Northshore will retain a professional forester to manage the trees to maximize their health and growth potential.
 25. The slope of the bank ranges from 27 to 33 per cent. Soil erosion on the slope is evident, and the roots of some trees are exposed. Trees on the slope are exposed to the westerly winds and broken tops and limbs are evident on some trees. Breakage allows for fungi and bacteria to enter, making the trees vulnerable to infection; some of the trees show signs of disease. **Many** of the older pines and hemlocks are close to the maximum ages that can be expected under these conditions and they will not continue to grow. Some of the deciduous trees are susceptible to diseases such as beech necrosis and pear thrip attacks.
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26. A number of years ago the City of Burlington cut trees and excavated sand on a hillside at the north end of the present location of the Village at Northshore. Trees above that area later blew down in a windstorm.
 27. When viewed from the lake, the site is part of a continuous shoreline running north from Appletree Point to Colchester Point. The buildings that are currently visible along the lakeshore are generally at the scale of a cottage or single-family home tucked well beneath the trees along the shore. The only building that protrudes above the uninterrupted **treeline** along the shoreline is a building belonging to the Catholic diocese located approximately four miles to the south.
 28. Because the spaces between the buildings are so narrow and because they are bridged by enclosed walkways at two levels, the viewer will perceive the **Midrise** as one continuous structure.
 29. The **roofline** of the four buildings is flat. From a distance, the "implied" gable details on the fourth floor will not be discernible.
 30. The elevation of the bluff on which the **Midrise** will be situated creates the appearance of a ridgeline. The Mount Mansfield mountain range visible on clear days in the distance is too far away to create a background for the **Midrise**.
 31. All of the glass in the buildings will be grey to reduce its reflectiveness and it will be recessed into the building either six or nine feet behind walls on both sides and decks on the top and bottom of each building. The southeasterly wall of the **Midrise** that directly faces the lake will contain very little glass. The north end of the buildings that face toward the mouth of the river and up the lake will contain little or no glass. The east side which faces the North Avenue entrance will have very small windows. The westerly and northwesterly side of the building that faces the lake will consist of 34% glass. A waist-high westerly wall on the deck of each of the buildings will shield one-half of the glass on the westerly side.
 32. The setting sun will reflect off the west side of the **Midrise** building for two to six minutes.
 33. The lights from the **Midrise** will be visible at night from the lake as well as from the New York shore.
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34. The upper portions of the **Midrise** building will be visible starting at approximately one-quarter to one-half mile from shore.
 35. If the **Midrise** were standing today, from one mile out on the lake up to approximately 18 feet of the top of the buildings would be visible.
 36. Assuming the most optimistic projected rate of growth of the trees, in 1995 two to three stories of parts of the **Midrise** plus the roof will still be visible from one mile out on the lake, and at least one story and the roof will be visible along the 550-foot side of the buildings. Portions of the buildings will always be visible through the trees.
 37. Only the end of the **Midrise** will be seen at one point on the lake, but as one moves north on the lake the building will "unfold" to its full elevation view and be read as a continuous 550-foot long building.
 38. Fifteen marinas are located on both shores of the lake within 10 or 12 miles north or south of the site.
 39. The heaviest boating traffic occurs on the four-mile stretch of open water between the tip of Colchester Point and Appletree Point, beginning approximately one mile from the shoreline. Travel time within this four mile long corridor can take up to several hours. Approximately one-quarter to one-third of the traffic using this corridor originates from the marinas in Shelburne and **Malletts Bay** and Burlington.
 40. The lake is fairly shallow from the shore to one mile out. Larger boats cannot come into the shallower water, but sailboats, fishing boats, canoes, and other small boats frequent the area.
 41. People in boats on the lake generally would not be moving quickly by the site, and may be exposed to the view of the **Midrise** for as long as an hour.
 42. At the time that Northshore received its zoning permit from the Burlington Board of Aldermen, the Burlington Zoning Ordinance did not include a height restriction. On August 1, 1987, the ordinance was amended to provide that no buildings over 35 feet could be built in the City except in the downtown commercial business district. Northshore filed its application for an Act 250 permit with the District Commission on November 13, 1987.
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43. Lake Champlain is a public resource used for many purposes, including swimming, boating, fishing, and aesthetic enjoyment. Considerable public money has been invested to protect the lake and to enhance the public's understanding of the lake, including approximately one million dollars of federal and state funds for the Lake Champlain Basin Study. Up to 52 million dollars will be spent to reduce pollution in the lake by upgrading the sewage treatment plants that discharge into the lake.

III. CONCLUSIONS OF LAW

A. Criterion 8 (aesthetics)

In its decision Re: Quechee Lakes Corporation, Land Use Permits #3W0411-A-EB and 3W0439-EB (Nov. 4, 1985), the Board set forth a number of objective criteria to apply to a consideration of a project's compliance with Criterion 8 (aesthetics). The first step involves a determination of whether the project will have an adverse impact upon the scenic or natural beauty of the area or upon aesthetics. This involves the identification of a proposed project's context and a determination of whether the project will "fit" into that context. In doing so, the Board evaluates the nature of the project's surroundings, the project's compatibility with its surroundings, the suitability of the colors and materials selected for the project, the visibility of the project, and the project's impact on open space in the area. In addition, special attention is paid to sensitive natural features. In the Quechee decision, the Board stated:

[C]ertain 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 area. In evaluating a project proposed in a sensitive area, the Board and District Commissions should give special attention in assessing whether the scenic qualities of these sites will be maintained.

The parties have done a commendable job of evaluating the project in light of the standards enumerated in the Quechee decision. The Board is clearly able to assess the impact of the project with regard to its context in its surroundings, including existing land uses and structures,

topography, existing and proposed vegetation, the scale and mass of the **Midrise**, the proposed colors and materials of the buildings, the visibility of the project from all possible viewing points, and the impact on open space both in the area and within the project itself.

Based upon such an assessment, the Board concludes that the **Midrise** project will have an adverse effect upon the scenic and natural beauty of the area and upon aesthetics. The **Midrise** site is located in a sensitive area, according to the Board's definition in the Quechee decision. The elevation of the site creates a ridgeline effect in its visibility. Situated only 1,000 feet from the shore of the lake, the **Midrise** must certainly be considered located on a shoreline. The shoreline of the lake is a view enjoyed by many and the Board believes that its scenic qualities merit special protection.

The site is located at the northern fringe of the New North End, a largely residential suburban area that becomes a transition zone between the neighborhoods and the undeveloped expanses of Lake Champlain, the Winooski River, and the Intervale. The majority of the buildings in the area are at most two stories high. The existing buildings visible along the shoreline are predominantly cottage-type dwellings situated well below the treeline. The **treeline** along the shoreline is uninterrupted except for one building located four miles in the direction of the urban downtown area.

Although the project will not be visible from the surrounding streets or most of the neighboring houses, and visibility from the bike path will be minimal, the Board believes that the visual impact from the lake will be profound. The Board agrees with the Applicant that the colors proposed for the buildings are relatively unobtrusive. But the sheer mass of a building 550 feet long, 50 feet wide, and over 60 feet high -- even if partially hidden by trees -- cannot be overcome simply by using earthtone colors. The arched siting of the buildings will not substantially reduce the intrusive visual effect that will be created in the otherwise unbroken **treeline** along the shore; from a distance, the top of the building and the roof will appear as a straight, flat line. At certain times of the day, sunlight reflecting off the glass will enhance the visibility of the building. The Board believes that the **Midrise** as proposed is clearly out of context with its surroundings.

The Applicants contend that the trees on the slope will almost hide the building from view. However, the Board does not believe that the trees adequately mitigate the adverse impact of the buildings for two reasons. One, substantial evidence indicated that it would take a number of years of

benign weather and favorable growing conditions for the trees to grow enough to screen the buildings. Trees growing on the steep slope of the west-facing bluff cannot be depended upon to successfully mitigate the impact of a building that is simply too big for its context. Substantial evidence indicated that the health and continued viability of many of the trees on the slope are questionable, at best, and there is no dispute that a **blowdown** of trees south of the site already occurred.

Two, the Board does not believe that a building that is incompatible with its surroundings can be made compatible by attempting to screen it from view. The mass, scale, and design of the buildings standing alone should be appropriate for their surroundings. Landscaping should be used to help soften the effect of a building or to enhance aesthetic enjoyment. The Board believes the **Midrise** would create an adverse aesthetic impact when viewed from the lake for a number of years, even if the trees thrived. Thus, it is not sufficient to rely solely upon the trees to break up the overwhelming mass of the buildings in the future, without any actual reduction in the size and configuration of the buildings.

Once the Board determines that a proposed project would have an adverse effect upon the aesthetics of an area, it must evaluate whether the adverse effect is "undue." The Quechee decision contains three questions that should be addressed in making this determination: 1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? 2) Does the project offend the sensibilities of the average person? 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? If the answer to any of the questions is positive, the adverse impact is undue.

The Board believes that the amended zoning ordinance that prohibits structures more than 35 feet tall along the shore of the lake in this area is a written community standard intended to preserve the scenic beauty of the view from the lake. The Applicant argues that decisions of the **Burlington** Planning Commission and the Burlington Board of Aldermen approving the project and a Superior Court decision **granting** site plan approval and a certificate of appropriateness should be considered as evidence of a community standard. **All** of these approvals, however, were granted before the **35-foot** height restriction was added to the Zoning Ordinance. The Board believes that the proper consideration of evidence of a community standard is whatever is in effect on the date the application for an Act 250 permit is filed. The 35-foot

height restriction in effect at the time that Northshore filed its application for an Act 250 permit is a clear reflection of the community's standard at that time with regard to building height. The **Midrise** is clearly inconsistent with that standard.

The Board also finds that the **Midrise**, as proposed, offends its sensibilities because the visual effect of the building is so totally out of context when viewed from the lake. The area of the lake from which the **Midrise** would be visible is heavily used by the public for recreation. Depending upon the type of boat and the weather conditions, exposure to the view of the **Midrise** could be as long as several hours. Aesthetic enjoyment is an important aspect of recreational use of the lake. The sight of a massive upper story and unbroken horizontal roof line would be jarring; the harsh effect would be exacerbated when the sun is reflecting off the windows.

Finally, the Board believes the Applicant has not taken all available mitigating steps to improve the harmony of the project with its surroundings. While the Applicant has made some attempts to make the buildings appear less massive, it has made no attempt to actually reduce their mass or site them in a less visually intrusive manner. As discussed above, the Board does not believe that mitigation of a building of inappropriate scale can be achieved by hiding it, particularly when the long-term health of the screening vegetation is questionable.

Based upon the evidence, the Board must find that the **Midrise** project will have an undue adverse effect upon the scenic and natural beauty and aesthetics of the area.

B. Criterion 9(K) (public investment)

Criterion 9(K) requires the Applicant to demonstrate that the development of lands "adjacent to governmental and public utility facilities, services, and lands" will not "unnecessarily or unreasonably endanger the public or **quasi-public** investment in the facility, service, or lands, or materially jeopardize or interfere with the function, **efficiency**, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands."

The Board believes that the Applicant has not met its burden with respect to Criterion 9(K). The bike path and the lake are both considered public lands for purposes of **Criterion 9(K)**, based upon the City's investment in the bike path for public enjoyment and the federal and state **investments** in protecting and enhancing Lake Champlain. The **impact** of the **Midrise** upon the bike path is minimal and the

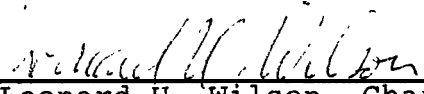
Board does not believe that the project will materially interfere with the public's use or enjoyment of the bike path. However, for all of the reasons stated above with respect to the undue adverse effect of the **Midrise** upon the scenic and natural beauty of the area and upon aesthetics, the Board concludes that the **Midrise** will materially interfere with the public's enjoyment of Lake Champlain.

IV. ORDER

The Board concludes that the **Midrise** project described in Land Use Permit Application #4C0626-5-EB would be detrimental to the public health, safety, and general welfare under 10 V.S.A. § 6086(a)(8) (aesthetics) and 9(K). Land Use Permit #4C0626-5-EB is therefore denied.

Dated at Montpelier, Vermont this 29th day of December, 1988.

ENVIRONMENTAL BOARD


Leonard U. Wilson, Chairman
Ferdinand Bongartz
Lawrence H. Bruce, Jr.
Jan S. Eastman/l/
Arthur Gibb
Samuel Lloyd

/l/ Jan Eastman concurs in part and dissents in part: I agree with the Board that the project would have an adverse effect upon the scenic and natural beauty of the area and upon aesthetics because it would be out of context with its surroundings. I also agree that the adverse effect would be undue because the Applicant **has not** taken all the possible available mitigating steps to improve the harmony of the project with its surroundings. I do not agree with the Board's conclusions that the view of the **Midrise** from the lake would be visually jarring, that the project violates a written community standard, or that the project would materially interfere with the public's enjoyment of Lake Champlain.



Adrian

STATE OF VERMONT
ENVIRONMENTAL BOARD
MONTPELIER, VERMONT 05602
802-828-3309

DATE: January 3, 1989
TO: Parties - Northshore Development, Inc.
Application #4C0626-5-EB
FROM: Pearl Aldrich Houghton, Administrative Secretary
RE: Corrected Order Page

Enclosed is a corrected last page of the Environmental Board's Findings of Fact, Conclusions of Law and Order dated December 29, 1988. Board Member Elizabeth Courtney's name was inadvertently omitted from the list of members participating in this decision.

Enclosure

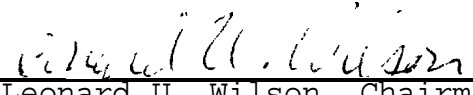
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IV. ORDER

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FF 4C0626-5-EB (19)