

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

RE: **Marylou Saldi** by MEMORANDUM OF DECISION  
M. Jerome Diamond, Esq. Land Use Permit #5W0902-EB  
P.O. Drawer D  
Montpelier, VT **05602**

On March 4, 1987, **Marylou Saldi** (Applicant) filed an appeal with the Environmental Board (Board) from Land Use Permit #5W0902 (Reconsideration) issued by District #5 Environmental Commission on February 10, 1987. A prehearing conference was held on March 16. At the prehearing, Chairman Darby Bradley raised the issue of whether the Board has jurisdiction over this appeal. The Applicant agreed that the issue of jurisdiction should be resolved prior to a hearing on the merits and a schedule for filing briefs was established. On April 16, the Applicant filed a Memorandum Concerning Jurisdiction. On April 22, the Board convened a hearing and heard oral argument from M. Jerome Diamond, Esq. on behalf of the Applicant. The Board conducted a deliberative session following the hearing on April 22.

PROCEDURAL HISTORY

On September 16, 1986, **Marylou Saldi** filed an application for an Act 250 permit for the conversion of a farmhouse in Williamstown, Vermont, to an inn and restaurant. On November 18, 1986, after the public hearing, the District #5 Environmental Commission (Commission) denied the application based upon a finding that the project failed to meet criteria 9(F) and 9(J) because a 13 room addition proposed as part of the project would be heated with "uncontrolled" electric baseboard units. The Commission used a life-cycle cost analysis in making its finding, but excluded the cost of financing as an element of the life-cycle cost.

On December 1, 1986, the Applicant filed a request for reconsideration pursuant to 10 V.S.A. § 6086(c), together with an affidavit setting forth a proposal to correct the deficiencies in the project as found by the Commission by installing electric heat storage units. On December 4, 1986, the Commission held a public hearing on the Applicant's motion for reconsideration. At this hearing, the Commission accepted evidence regarding the life-cycle cost analysis at issue in the original application as well as testimony on the new proposal for heat storage units. Following the hearing, the Commission permitted the Public Service Department to respond in writing to the Applicant's points concerning the life-cycle cost issues, and permitted the Applicant to file a further response addressing those questions.

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On February 10, 1987, the Commission issued a decision on the Applicant's motion for reconsideration. First, the Commission found that the additional evidence submitted by the Applicant on the issue of life-cycle cost was not sufficient to alter its finding of fact issued on November 18, 1986. Second, the Commission approved the Applicant's amended proposal incorporating electric heat storage units. Pursuant to its decision, the Commission issued Land Use Permit #5W0902 (Reconsideration), which requires the use of electric heat storage units as condition #9.

On March 4, 1987, the Applicant appealed the imposition of condition #9, and requested that the Environmental Board review the Commission's findings under criteria 9(F) and 9(J). The Applicant's position was that condition #9 is without foundation under the relevant criteria, and that the installation of electric baseboard heating should be permitted under a proper life-cycle cost analysis.

#### DECISION

The Applicant filed her December 1 motion to reconsider pursuant to 10 V.S.A. § 6087(c), which provides that a person whose application has been denied may apply to the Commission for reconsideration within six months. This section requires that a motion for reconsideration must include an affidavit that the deficiencies that formed the basis for the denial have been corrected. Ordinarily, a review of a reconsideration motion filed under § 6087(c) is confined to the new proposal as submitted in the affidavit required by that section. Board Rule 31(B), which defines the scope of review for a motion for reconsideration of a permit denial, provides that the findings that relate to criteria other than those that are the subject of the proposed modifications are entitled to a presumption of validity, but may be reopened upon a showing that the circumstances of the application have changed or upon the presentation of new evidence. This section does not include any provision for a reconsideration of new evidence relating to the subject matter of the reconsideration request. Its purpose is solely to provide an opportunity for an applicant to correct the deficiencies in its project so that a permit may be issued. The Legislature included this section in Act 250 so that if an application has been denied, an applicant may modify the proposed project within the six-month period without having to file a completely new application.

The purpose of a § 6087(c) motion for reconsideration is not, however, to provide a forum for reopening an issue on the basis of an applicant's wish to present additional

evidence that he failed to present during the Commission's review of his application. Rule 31(A) provides 15 days for filing a motion to alter the decision. Applicants have the opportunity within that time to request the Commission to reopen the hearing. A Rule 31(A) motion is not limited solely to the reconsideration of permit denials, nor is it limited to the consideration of a proposal to modify the project. Once the 15 days has elapsed, however, applicants, within six months, may file for reconsideration of permit denials only upon submission of an affidavit that the proposal has been modified to correct the deficiencies on which the permit was denied.

The Board does not agree that the Applicant has a right to appeal to the Board from the Commission's denial of consideration of the new evidence presented at the hearing, solely because the Commission agreed to accept the evidence. As explained above, in hearing a motion for reconsideration of permit denial under Rule 31(B), a commission is limited to (1) a consideration of the proposed modifications of those areas which were the subject of the denial, and (2) any other findings of the Commission that do not relate to the proposed modification if their presumption of validity is rebutted or if new evidence is presented.

The language in Rule 31(B) does not provide for the presentation of new evidence for the purpose of convincing the Commission that it was wrong to deny the permit. It would be inefficient to allow applicants to continue to relitigate the same issues and there is a need for finality of decisions in the hearing process. The Board believes the Commission had no jurisdiction to consider new evidence pursuant to a Rule 31(B) motion and that the Board also does not have jurisdiction in such a case.

The Board believes, however, that it was appropriate for the Commission to reconsider its previous decision when a motion to reconsider was filed within 15 days, even though the wrong rule was cited in the motion. Under Rule 31(A), the Applicant may file a motion to alter the decision with the Commission within 15 days. In this case, the Applicant's motion was filed within the 15 day period. Therefore, since the appeal to the Board from the Commission's denial of reconsideration was also filed in a timely manner, the Board will accept jurisdiction over this appeal.

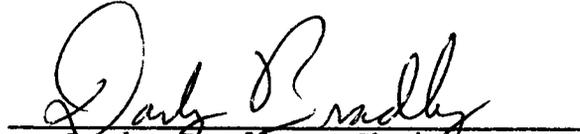
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ORDER

The Board hereby accepts jurisdiction over this appeal. A hearing on the merits will be scheduled as soon as possible.

Dated at Montpelier, Vermont this 8th day of June, 1987.

VERMONT ENVIRONMENTAL BOARD



Darby Bradley, Chairman  
Ferdinand Bongartz  
Elizabeth Courtney  
Jan S. Eastman  
Arthur Gibb

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