

**State of Vermont  
WATER RESOURCES BOARD**

**RE: Sunset Cliff Inc., City of Burlington  
Docket No. WET-03-01**

**MEMORANDUM OF DECISION**

**I. BACKGROUND**

On June 13, 2003, the Sunset Cliff Home Owners Association (Petitioner) filed a wetland reclassification petition (Petition) with the Board seeking 1) a temporary Class Two wetland designation of a wetland owned by the John J. Flynn Estate in the north end of Burlington and; 2) the reclassification from Class Three to Class Two of the same wetland. Class Two wetlands are deemed to be significant wetlands and are afforded a greater degree of protection under the Vermont Wetland Rules (VWR) in that a Conditional Use Determination is required for any activity within the wetland or the wetland 50 foot buffer, other than allowed uses, which are defined in VWR § 6.2 .

On July 22, 2003, at 9:00 a.m., Water Resources Board (Board) Chair David J. Blythe convened a prehearing conference at the Board's Conference Room in Montpelier, Vermont, in the above-captioned matter, pursuant to Board Rule of Procedure (Procedural Rule) 28. Mr. Frank Von Turkovich, Vice President and Secretary of Keystone Development Corp. (Keystone) participated in the Prehearing Conference on behalf of the Lessee of the land where the wetland that is the subject of the Petition reside. Roger Dorwart and Cathy O'Brien represented the Petitioner at the Prehearing.

On August 19, 2003, the Board Chair, David J. Blythe, issued a Prehearing Conference Report and Order (Order) in this matter. The Order, among other things, established September 9, 2003 as the date that a public hearing and site visit on the Petition and the request for a temporary Class Two wetland designation will be held.

On August 8, 2003 the Department of Fish and Wildlife (Department) filed a comment on the Petition. In sum, the Department indicates that based on its review of the Petition and several visits to the site, it believes that the wetland is significant for the functions of wildlife and migratory bird habitat (§5.4) and hydrophytic vegetation (§5.5). The Agency characterizes the wetland as "important habitat and a haven for wetland dependant and non-wetland dependant wildlife in this increasingly developed area of Burlington."

On August 22, 2003, Keystone filed a Motion to Continue and Request for Modification of the Order (Motion). Keystone indicated in its Motion that it needed additional time to

investigate the comments made by the Department and also additional time to consider other issues pertaining to the petition.

The Motion continues Keystone's objection to the request for a temporary Class Two wetland designation. However, Keystone agreed in the Motion to provide the Board and the Petitioner with not less than seven days prior notice of any site maintenance or improvement activities it intends to undertake on the subject parcel that could result in substantial or irreversible harm to the wetland functions and values, if the Board grants the Motion.

The Board deliberated on the Motion at its August 26, 2003 meeting.

## **II. DISCUSSION**

The Board appreciates the fact that Keystone needs more time to evaluate the comments filed by the Department and other issues related to the Petition prior to a public hearing on the requested wetland reclassification. Accordingly, the Board grants Keystone's request to postpone the public hearing.

However, in postponing the public hearing, the Board seeks to ensure that the wetland will not be substantially or irreversibly altered during the delay in making a decision on whether to reclassify the wetland from Class Three to Class Two. The Board finds that to ensure that the wetland is protected and address the comments of the Department regarding the significance of the wetland, a 60 day temporary designation of this wetland to Class Two is warranted under VWR § 7.5.

VWR § 7.5 provides that a temporary designation may be established upon petition by the Agency of Natural Resources (ANR) or by the Board on its own motion if the Board finds that: 1) there is reasonable likelihood that the wetland in question may be significant based on one or more of the ten functions identified in Section 5 and; 2) failure to grant a temporary designation is likely to result in substantial or irreversible harm to one or more of the Section 5 functions.

The Board finds that the Department's August 8, 2003 letter stating that the wetland is significant for the functions of wildlife and migratory bird habitat (§5.4) and hydrophytic vegetation (§5.5) satisfies the first prong of the two part test set forth in VWR § 7.5. Based on the Department's comments the Board finds that there is reasonable likelihood that the wetland in question *may be* significant for the migratory bird habitat (§5.4) and hydrophytic vegetation (§5.5) functions.

With regard to the second prong of the test, the Board is concerned that the delay in the public hearing and decision on the Petition creates a legal opportunity for work to be done in the wetland that could result in substantial or irreversible harm to one or more of the wetland functions while the Petition is pending. The Board finds that it is necessary to adopt the 60 day temporary designation in order to legally protect the wetland while

the petition is pending. The Board further finds that the failure to grant a temporary designation to restrict work that may be done in the wetland is likely to result in substantial or irreversible harm by creating a legal right to significantly disturb the wetland before the Petition can be resolved.

### III. ORDER

1. The **public hearing** scheduled for September 9, 2003 pursuant to the Prehearing Conference Report and Order issued on August 19, 2003 is **postponed**. The hearing will be rescheduled at a date and time to be established in a subsequent order. **However, the public hearing will be scheduled prior to the expiration of the 60 day temporary designation** consistent with item #2 below.
2. The wetland as described in the Petition is temporarily designated as a significant wetland for the migratory bird habitat (§5.4) and hydrophytic vegetation (§5.5) functions for a period of 60 days from the date of this order. Accordingly, the wetland is temporarily designated as a Class Two wetland under the VWR for the 60 day period.
3. All other provisions of the Prehearing Conference Report And Order issued on August 19, 2003 remain in effect. Accordingly, the Board will convene a site visit to the wetland in question on **Tuesday, September 9, 2003 at 4:00 p.m. at the place designated in the joint site visit itinerary.**
4. Any objection(s) to this order shall be filed with the Board **on or before 4:30 p.m. Wednesday, September 3, 2003.** Objections shall indicate whether oral argument on the objection is requested. If the Board decides to grant a request for oral argument, the oral argument will take place on **Tuesday, September 9, 2003 at 7:00 p.m. at Burlington City Hall in the Contois Auditorium. A decision as to whether to convene oral argument, if requested, will be announced prior to the site visit noted in item #3 above.**
5. Any filings related to this petition must be circulated to all individuals and entities listed on the attached certificate of service and a certificate of service must accompany all filings made to the Board in connection with this matter.

Dated at Montpelier, Vermont, this 28th day of August, 2003.

Water Resources Board  
By its Chair

/s/David Blythe  
David J. Blythe

**Concurring:**

Lawrence H. Bruce, Jr., Member  
Michael J. Hebert, Member  
Jane Potvin, Member  
John D.E. Roberts, Vice Chair