

**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 August 28, 2003, the Board issued a Memorandum of Decision (MOD) temporarily reclassifying the wetland in question to Class Two. The Order set a deadline of September 3, 2003 for objections to the MOD. On September 3, 2003, Frank Von Turkovich, Vice President and Secretary of Keystone Development Corp. (Keystone) filed an objection to the MOD and requested a hearing and oral argument.

The Board held a hearing and oral argument on September 9, 2003. The following persons participated in the hearing and oral argument:

1. Frank Von Turkovich on behalf of Keystone;
2. John O'Donnell, Esq., counsel for Keystone;
3. Robert Hemley, Esq., in his capacity as an adjoining landowner and as counsel for Petitioner;
4. Cathy O'Brien, Petitioner's wetlands consultant; and
5. Glen Gross, Esq., General Counsel for the Vermont Department of Environmental Conservation.

The Board deliberated on the objection on September 9, 2003 following the hearing and oral argument.

II. DISCUSSION

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.

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.”

The Board upholds the finding in its August 28, 2003 MOD that ANR’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 the two part test set forth in VWR § 7.5.

With regard to the second prong of the test, the Board granted the temporary designation because it was concerned that the wetland would not be legally protected against activities which could cause substantial or irreversible harm to the wetland or to one or more of the Section 5 functions during the delay in hearing the petition. However, at the hearing Keystone clearly stated that it does not intend to engage in any activity in the wetland at this time. Keystone indicated that it brushed hogged the wetland this summer and it would like to do so in the fall if resources are available, however that would be the extent of work within the wetland until the permitting issues surrounding the property are resolved. The Board takes Mr. VonTurkovich, on behalf of Keystone, at his word.

Based on Keystone’s representations the Board finds at this time that failure to grant a temporary designation is **not** likely to result in substantial or irreversible harm to one or more of the Section 5 functions. If circumstances change or if activities are planned or undertaken which threaten substantial or irreversible harm to the wetland or to one or more of the Section 5 functions, then the temporary designation may be made at another time.

III. ORDER

Accordingly, it is hereby Ordered:

1. The Board's August 28, 2003 decision granting the temporary designation is reversed and the temporary designation is dissolved.
2. An Order will be issued scheduling the public hearing when a date and time is established by the Board.

Dated at Montpelier, Vermont, this 18th day of September, 2003.

Water Resources Board
By its Chair

/s/ David J. Blythe

David J. Blythe

Concurring:

Michael J. Hebert, Member

Jane Potvin, Member

John D.E. Roberts, Vice Chair

Member Lawrence Bruce did not participate in the hearing and oral argument on the objection and did not take part in this decision.

