Wheeler, Denise

From: Diane Lehder [dianezlehder@gmail.com]
Sent: Wednesday, January 02, 2013 10:34 PM
To: NRB - Comments
Subject: Comment on Land Use Panel v. Mark and Julie Pernokas

Importance: High

Thank you for expanding your process to allow citizen input regarding Act 250 violations and proposed remedies by the State. In the matter of Land Use Panel of the Natural Resources Board v. Mark and Julie Pernokas, there is a history of violations and disrespect for Vermont State law. As owners of property overlooking the damage to the environment inflicted by the Applicants, we firmly believe this history should be taken into consideration as remedies are considered and penalties imposed.

As the State's records will reflect, we have been concerned with the development on the Applicants' property for many years. It is with a heavy heart that we have watched the wooded bank that has existed on their property for generations be intentionally mismanaged for personal convenience.

We have involved ourselves in the public portions of the permitting process related to the Applicants' proposed development of their property. We have done our part and relied upon local and State government to enforce the existing rules and the development restrictions applicable to this property. It is with palpable disgust that we have watched the Applicants thumb their noses at the regulations applicable to all property owners and the more stringent restrictions specifically applicable to this property. We request the State make an example of the Applicants' clear and obvious disregard for the rule of law and ensure this property is restored to the condition that existed prior to the Applicants' illegal activities. If the State does not impose severe consequences for illegal actions that permanently alter the landscape and jeopardize the lake, we fear similar illegal actions will be repeated.

The Applicants' property was part of a larger tract of land belonging to Songadeewin of Keewaydin, Inc. which was subdivided in 1975 subject to Land Use Permit 7R0226, which imposed certain conditions on development based on the fragile nature of the steep bank down to the lake shore. Condition #8 specifically prohibits construction, including road construction below elevation 1225. The property is also subject to Permit # 7R02226-7 which requires that "The existing wooded buffer along Lake Willoughby shall remain undisturbed except that brush may be cleared to create foot paths to the shoreline. There shall be no earth disturbance within 100 feet of the shoreline."

We believe that the State understood in 1975 that the predictable consequence of a subdivision would be new pressure to cut trees to enhance views of the lake and to facilitate easy access to the shoreline notwithstanding the sensitive condition of the bank. We believe the State thoughtfully enacted these development restrictions in order to strike a careful balance between personal property rights and protection of the lake from over-intensive development activities like those undertaken by the Applicants over the past several years.

There should be no misunderstanding, the Applicants purchased their property with knowledge of these conditions and consciously elected to disregard them. Soon after acquiring the property, without a permit, the Applicants clear cut a significant number of trees from the sensitive slope. These previous illegal activities continue to be a scar on the landscape and to be a threat to the lake.

As a result of this prior violation, the Applicants entered into their first Assurance of Discontinuance with the State to remedy their illegal actions. Unfortunately, the State's penalty did nothing to change the Applicants' continuing disregard for the rule of law or the environmentally sensitive nature of the bank.

In December 2009, the Applicants filed for a permit to construct a 140' long, 10' wide road down the bank to the water for large construction vehicles to be used to restore an existing concrete pier at the shoreline. The application stated the road would not require the clearing of any trees. It did not mention that this was no longer necessary because most of the trees at the top and along the bank had previously been cleared by the Applicants - illegally. As a matter of fact and according to the Act 250 website, at the time that application for the 10' road was first submitted, "(t)he partially constructed project was initiated without required Act 250 permit."

Notwithstanding the fact that they had already started work on the 10' road, in the face of opposition, the Applicants withdrew their application to construct the 10' wide road. In July 2010, the Applicants sought a new permit for a more modest 6' wide gravel access path to within approximately 35' of the shoreline of Lake Willoughby. This application mentioned no use of the path for heavy construction equipment. However, at the site visit, the Applicants did acknowledge they planned to use it for very small construction equipment to repair the concrete pier. The permit was granted, but with conditions – that the 6' wide path would be temporary and closed to 3' as permitted in previous permits, that the path would end a minimum of 35 feet from the water's edge, and "(t)he use for mechanized or motorized equipment is prohibited, with the exception of the short term use of the 6 feet wide path for construction activities."

The work was begun in August 2012. At the request of other property owners around Willoughby Lake, the State was immediately called in to inspect the construction site. As verified by State inspection, the Applicants actually cleared an area 18-20' wide from the top of the bank all the way down and to the water's edge. The area, **over triple in size** from what had been requested and permitted, was used not by small construction vehicles but rather by **large scale hydraulic excavator** construction equipment that required a path of that width to access the lake through this environmentally sensitive area. Again – these were **conscious** infractions of the permitted width and length of the path, and the type of equipment used for restoration purposes.

It is clear the State again struck a careful balance between personal property rights and protection of the lake and determined that a 6' path would afford the Applicants a **reasonable and safe** opportunity to repair the bulkhead and dock on their property. If the Applicants were unwilling to adapt the means and methods for repair that could have been performed safely on the 6' path permitted by the State, then they should have applied to the State for a wider path. Instead, once again, the Applicants elected to avoid public scrutiny that might have prevented them from completing their goals and instead, calculated that it made better sense for them to deal with the public process after they had already accomplished their personal goals at the expense of the natural environment.

This is at least the second significant action taken by the Applicants that threaten the stability of the bank and the lake in violation of clear prohibitions and without required permits. As a penalty for these most recent violations, the State proposes to fine the Applicants $6,500 and requires them to prepare a revegetation restoration plan for the disturbed area. In light of the cost of the total project and the degree to which this property will never be able to be completely restored to its undisturbed condition, this is an extremely minor and relatively inconsequential penalty. Furthermore, we actually believe this modest fine was anticipated by the Applicants and built into the project cost at the expense of the environment. In fact, we have learned that the Applicants have openly discussed the State fine levied after they had initially cut trees on the slope without permits, laughing it off and describing the monetary penalty "insignificant" in light of what was accomplished by the illegal clear cutting.

At this point, the embankment, once naturally forested, has been cleared and **completely** reconfigured. The steep slope is now "improved" with a road, suitable to traverse heavy machinery to the edge of the water. The Applicants have intentionally created this gradual grade change not only for the temporary access of heavy machinery, but to ease their access to the waterfront in perpetuity. Merely replanting the bank will leave the Applicants' property permanently reshaped and entirely inconsistent with the naturally occurring grade on the west side of the lake. As a result, not only does the area need to be replanted, but the former slope and grades must be restored in a manner that secures the natural soils and with replanted vegetation with the same stability that existed prior to the disturbance. Any failure of the State to require the complete restoration of the slope will allow the Applicants exactly what they originally intended - to reshape the naturally protected areas in a manner that is more desirable to them, regardless of the consequences to the natural environment and the community. And all this at a relatively "insignificant" cost in light of their accomplished goal and the cost of the project.

Given the Applicants' prior record of taking actions without permits and contrary to applicable legal requirements, we urge the State to require that future remediation of the damage be performed by the Applicants under the State's direct oversight. We believe the Assurance of Discontinuance should contain clear deadlines for all requirements and significant financial penalties for future noncompliance. In relation thereto, we would propose the State require the Applicant to post an escrow or a bond for the reasonable value of the completion of the restoration and replanting work. If the Applicants fail to perform the restoration activities satisfactorily, the State should step in and have the work performed from that fund and at the Applicants' expense.

Furthermore, given the serial violations of the Applicants and their disregard for the natural landscape, we ask the State expand its oversight and requirements regarding the revegetation restoration plan. We believe the State should require not just native plantings, but **mature** native plantings that will preclude use of the illegally cleared area and **totally** screen it from the water in a short period of time. Further, we request the plan implementation be monitored annually over a period of ten years, assuring such plantings survive transplant, successfully protect the lake from future erosion and completely screen the slope construction from the water. Without these basic components, we trust the required "restoration plan," arguably the most important element of the Assurance of
Discontinuance in relation to the future protection of the lake from the damage caused by the illegal activities, will never be implemented.

When considering the requirements of the Assurance of Discontinuance, we request the State consider our ideas for ensuring the illegal activities on the Applicants' property are remedied and for assessing penalties that will send a strong signal to other property owners who may also be willing to trade the stability of the natural environment to suit matters of personal convenience.

Again, we thank you for your involvement in this matter and for the State's continued efforts to enforce the laws and restrictions intended to protect the lake for generations to come.

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