

STATE OF VERMONT
ENVIRONMENTAL COURT

In re: Appeal of Wilson, <u>et al.</u>	} } } } }	Docket No. 170-9-99 Vtec
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In re: Appeal of Burlington Bikeways, Inc. (Murray, <u>et al.</u> , cross-appellants)	} } } } }	Docket No.45-2-00 Vtec
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DECISION and ORDER

In Docket No. 170-9-99 Vtec, Appellants appealed from a decision of the Zoning Board of Adjustment (ZBA) of the Town of Colchester, granting conditional use approval to the Winooski Valley Park District (WVPD) and the Town of Colchester for the improvements related to the operation of a seasonal bicycle ferry across the mouth of the Winooski River at Delta Park. In Docket No.45-2-00 Vtec, Appellants and Cross-Appellants appealed from a decision of the Planning Commission of the Town of Colchester, granting site plan approval to Burlington Bikeways, Inc., the Winooski Valley Park District, and the Town of Colchester for the bicycle ferry and other improvements in Delta Park and signage and bicycle path improvements¹ on Windemere Way, Biscayne Heights, Buckingham Drive and Airport Road (shown as Colchester Point Road on Exhibit 18-2). WVPD seeks approval for the boardwalk, fencing, overlook and informational and educational signage within Delta Park, regardless of whether approval is granted for the

¹ It is not clear to the Court whether or on what basis the improvements within the street right-of-way come within the zoning regulations and hence come before this Court.

operation of the bicycle ferry.

The Appellants in Docket No. 170-9-99 Vtec and the Cross-Appellants in Docket No. 45-2-00 Vtec are represented by Paul S. Gillies, Esq.; the Winooski Valley Park District is represented by Jennifer Ely, who is not an attorney; Burlington Bikeways, Inc. is represented by Gary W. Lange, Esq.; the Town of Colchester is represented by Richard C. Whittlesey, Esq.; and the City of Burlington is represented by Jessica Oski, Esq.

An evidentiary hearing was held in this matter before Merideth Wright, Environmental Judge, who also took a site visit alone, by agreement of the parties. The parties were given the opportunity to submit written requests for findings and memoranda of law. Upon consideration of the evidence, the site visit, and the written memoranda and proposed findings, the Court finds and concludes as follows.

The Winooski Valley Park District (WVPD) is a regional land trust established to acquire and manage parks and natural areas in its seven member municipalities, including the 33-acre Delta Park at the mouth of the Winooski River in Colchester. Delta Park consists of extensive wetlands area and limited wooded and sandy raised areas (including the former railroad bed) containing the present foot trails. It provides an unusually rich habitat for wildlife close to the Burlington urban area. WVPD holds a conditional use permit issued in 1985 to operate Delta Park as a “public recreation park area and wildlife habitat with a three-car parking area.” The 1985 permit limited vehicles to the three-car parking area, established a gate for the management of access to the park’s trails, and provided that park management would be “subject to Zoning Board of Adjustment referral² based on complaints by the neighbors or the Town of Colchester.”

² It is not clear from that permit whether the condition alludes to referral for enforcement proceedings, or to referral to reopen the permit proceedings to impose additional conditions.

Applicants propose to operate the ferry from sunrise to dusk, from as early in the spring as conditions permit (estimated to be June 1) to the end of October. Applicants propose to have a ferry captain and one crew member. None of the applicants proposes to provide staff to stay on the Delta Park shore during the ferry's operation, but they do propose that the ferry staff will patrol the Park at the close of operations and pick up any trash left by the users of the park and the ferry. The capacity of the ferry is six bicycles, making four round-trips per hour, for a maximum of 24 bicycles traveling in each direction in each hour³. During several weekends of trial usage of a bicycle ferry at this location in the 1999 season, two-thirds of the traffic traveled by bicycle on the ferry from Burlington to Colchester, and only one-third from Colchester to Burlington. The causeway to South Hero is more of a destination for bicyclists from Burlington than is Delta Park.

³ While the capacity of the ferry operation has been characterized by both parties as 48 vehicle trips, only half of these trips can go in each direction, given the capacity of the boat and the Coast Guard regulations.

Until this proposal, bicycles had not been permitted on the trails in Delta Park, although no evidence was presented of enforcement of this prohibition. Several areas of the Park's existing trails have become damaged due to foot traffic and the nature of the sandy soils. Several areas of the Park near the existing trails provide habitat for turtles and for characteristic lakeshore shrub vegetation which should be protected from bicycle traffic or excessive foot traffic. The improvements proposed within the park are to construct a wooden ferry landing dock, to allow bicycles to pass along the trails from the ferry landing to Windemere Way, to construct three segments⁴ of wooden boardwalk covering the path in areas subject to erosion or damage from bicycle and pedestrian traffic, to erect low fences to prevent bicycle traffic beyond the permitted paths and to redirect usage from several segments of the existing paths to the new paths, to erect signs to direct pedestrian and bicycle traffic away from fragile areas, and to direct use of the boardwalk and the paths especially in certain areas, including the turtle nesting areas, and to construct an additional eight-foot-square "overlook" structure.

The boardwalk segments are proposed to be raised six inches from the surface of the ground, and to be constructed in six-foot-square⁵ sections to be fastened together by a cable system, without any curbing or railing. The six-inch height is sufficient for most turtles to pass under the boardwalk; turtles will be more likely to pass under a boardwalk if slight gaps between the boards allow for the passage of light and air under the structure.

⁴ Although the proposed plans show boardwalk segments in only three limited portions of the trail, WVPD has stated that it seeks approval to construct a boardwalk the entire length of the park from the ferry landing to Windemere Way if it wishes to do so in the future. However, Applicants have not presented evidence to allow such approval in the present appeal, especially as to the effect of a continuous boardwalk on the passage of turtles and other wildlife from one side of the path to the other. WVPD is free to apply in the future for a permit amendment to allow additional boardwalk segments or a continuous boardwalk, and to support that application with additional evidence.

⁵ The boardwalk from the ferry landing up to the path is proposed to be six feet wide, as its users will be walking their bicycles, but the boardwalk on the path is proposed to be eight feet wide, to allow bicyclists and pedestrians to pass each other. No evidence was presented as to whether the path segments would be eight-foot-square, rather than six.

Turtles will also seek to pass around the boardwalk segments. The boards are proposed to be placed with small gaps between them to allow light, air and drainage to reach the areas beneath them. The evidence characterized the boardwalks as “bicycle-friendly,” which suggests that the boards would be placed across rather than along the line of direction, to avoid bicycle tires being caught in the gaps between the boards.

Adjacent to Delta Park within the first bend of the Winooski River is a state fishing access, providing parking for 65 vehicles with boat trailers. This access is used most heavily in the early summer and in the early fall into the fall, and is very heavily used on weekends of fishing derbies in Lake Champlain. This access is used less in mid-summer, as the water level in the river is not always sufficient for the larger boats to pass into Lake Champlain. On weekends of heavy use, overflow parking from the state fishing access will park along the streets in the adjacent residential neighborhood, especially on the Horizon Way loop and on lower Windemere Way.

Vehicles trailing boats to the state fishing access tend to travel along Airport Road to Windemere Way, and then to travel to the fishing access along Windemere Way. Windemere Way slopes downhill towards the lake, and has several bends in it. Sight distances are adequate at the posted speed limit, but the posted speed limit of 25 miles per hour is frequently exceeded by both local and fishing access traffic. A three-way stop sign recently has been installed at the intersection of Biscayne Heights and Windemere Way, to slow traffic in the area of the state fishing access and in anticipation of the proposed bicycle path. Because it is a recent change in the signage and because there is little warning of the upcoming stop sign for vehicles on either of these streets, vehicles have been observed to go through the stop sign without stopping.

The rights-of-way for Windemere Way, Biscayne Heights, and Buckingham Drive are sixty feet wide. All of the proposed bicycle path improvements and signage fall within the street right-of-way. On Biscayne Heights and on the segment of Buckingham Drive between Biscayne Heights and Airport Road, the existing paved width is 28 feet wide. Applicants propose to allocate the outside four feet of pavement on each side for bicycle path use, set off by striped markings, leaving a twenty-foot width of pavement for two-way vehicular traffic on the street. Applicants propose a single lane southbound bicycle

crossing of Buckingham Drive at the intersection with Windemere Way, and two single lane bicycle crossings at Airport Road.

On Windemere Way below the intersection with Biscayne Heights, the existing paved width is twenty feet wide. The proposal will not reduce the width of paved area available for vehicular traffic. Applicants propose to add an eight-foot-wide paved and slightly raised two-lane bicycle path to one side of the vehicular pavement. Between the state fishing access and Delta Park, that bicycle lane is proposed to be added on the southeast side of the existing pavement, running along the fishing access property. At the first bend in the road, shown as location 1B on Exhibit 18-2, Applicants propose to add a diagonal bicycle crossing of Windemere Way. From that point to the intersection with Biscayne Heights, Applicants propose to place the additional bicycle lane on the northwest side of the existing pavement. In this area, placing the bicycle path within the right-of-way will cause it to pass within eighteen feet of one resident's house. At Biscayne Heights, the bicycle path will split into two lanes, and a single lane bicycle crossing is proposed so that the northwest-bound bicycles can cross to the single lane on the opposite side of Biscayne Heights.

Traffic generated by the residences in the area of the proposed bicycle path on Windemere Way below Biscayne Heights is 23 vehicles per hour in the peak hour, with an average daily volume of 230 vehicles per day. Traffic generated by the residences in the area of the proposed bicycle path on Biscayne Heights between Windemere Way and Buckingham Drive is 20 vehicles per hour in the peak hour, with an average daily volume of 200 vehicles per day. The primary existing traffic problem in the neighborhood consists of vehicles trailing boats to and from the state fishing access, especially on weekends in two peak periods of the year: spring to early summer, and late summer to fall. The problems generated by the state fishing access traffic will not be alleviated nor exacerbated by this proposal. Based on the capacity of the state fishing access parking lot, and assuming a turnover of spaces two times per day, that traffic is estimated at 30 to 40 vehicles per hour in the peak early summer weekend hour, and 260 vehicles per day. The combined residential and fishing access traffic is estimated at 490 vehicles on lower Windemere Way in the peak early summer weekend day, and 63 vehicles in the peak early summer

weekend hour. Based on the evidence of local residents that users of the fishing access park on the street when the lot is full, the fishing access traffic is probably somewhat greater than the estimates. This traffic is within the capacity of the local street system, but is experienced by the residents as excessive, especially on lower Windemere Way and on the Horizon Way loop, and especially with regard to overflow parking from the fishing access.

The character of the neighborhood is residential, including areas in which children play in the streets. The residential character of the area includes local bicycle traffic, but with proximity to a natural area of regional importance, and with proximity to the existing state fishing access which generates substantial seasonal traffic. The proposed improvements to the park and the proposed addition of up to 48 bicycles per hour passing through the local streets along a separated bicycle path, will not adversely affect the essential character of the neighborhood.

Bicycles are permitted on the local streets under existing conditions, and the current width of Biscayne Heights is ample to provide for safe passage of both vehicular and bicycle traffic. If the signage is installed requiring bicycle path/ bicycle ferry vehicular parking in Airport Park only, **and if that requirement is enforced**, the proposed bicycle ferry, proposed improvements in Delta Park, and proposed bicycle path would not increase vehicular traffic on lower Windemere Way or along the route of the proposed bicycle path, and would not cause congestion or unsafe conditions on the roads and highways in the vicinity.

With the conditions imposed by this order, the operation of the proposed bicycle ferry, the proposed improvements within Delta Park, and the proposed bicycle path meet the conditional use criteria in §1804 of the Zoning Regulations, and meet the site plan approval criteria in §1803 of the Zoning Regulations, as follows:

The proposed project will not adversely affect the capacity of existing or planned community facilities. Delta Park can accommodate the addition of up to 48 bicycles per hour using the ferry, as can the proposed bicycle path. §1804.1(a).

The proposed project will not adversely affect the character of the area affected

(§1804.1(b) and §1803.2(k)), or the essential character of the neighborhood and district in which the property is located(§1804.1(e)). That character will remain residential, but recognizing that it also remains adjacent to a park of regional importance and adjacent to the state fishing access with seasonal traffic congestion.

The proposed project will not adversely affect the Town's Municipal Development Plan and all bylaws in effect. §1804.1(d). Rather, the Town Plan encourages public access to the shoreline and both it and regional plans identify as a goal a bicycle path extension from the Burlington bicycle path through this area towards the causeway. While the Town Plan had identified the route only in general as a Class I bicycle path (separated from the street network), the Court cannot find from the evidence that a separated path is feasible in this area, given the current residential development pattern of the area.

The proposed project will not substantially or permanently impair the appropriate use of[r] development of adjacent property. §1804.1(e). Owners of properties adjacent to the street rights-of-way have not demonstrated a basis to prevent municipal use or improvement of the street right-of-way.

The proposed project will have no effect on the utilization of renewable energy resources; §1804.1(f) is inapplicable.

The proposed project will not result in undue water or air pollution (§1803.2(a)) or be detrimental to the public welfare (§1804.1(e)). It will not contribute to air pollution as it will not add internal combustion engines to the streets of Colchester. It will not result in water pollution or a public nuisance detrimental to the public welfare if adequate provision is made for toilet facilities and trash receptacles for users of Delta Park and the bicycle ferry within Delta Park or at the state fishing access. It will not be detrimental to the safety of the bicyclists if adequate consideration is given in the design of the boardwalk segments to provide curbing to minimize the likelihood of a bicycle or pedestrian accidentally going over the edge of the boardwalk.

The proposed project will not require a water source; §1803.2(b) is inapplicable.

The proposed project will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water. §1803.2(c). In fact, the boardwalk segments are designed to reduce the likelihood of soil erosion from the existing use of the park paths, as

well as from the use of the park by bicycles.

The proposed project does not propose traffic circulation or parking on the site of Delta Park. The proposed project will provide for safe and adequate traffic and pedestrian circulation between the site and adjacent streets, §1803.2(d), will not adversely affect traffic on roads and highways in the vicinity (§1804.1(c)), and will not cause unreasonable highway congestion or unsafe conditions with respect to use of the existing highways. §1803.2(e). While existing traffic using the state fishing access may itself cause congestion or unsafe conditions, the proposed improvements for the present project to separate bicycle lanes from vehicular lanes, and to provide a three-way stop at the most congested of the bicycle crossings, will provide for safe and adequate circulation and traffic movement due to the proposed project. Parking for the proposed project is proposed to be at Airport Park, which has ample capacity. Of course, enforcement of the parking, speed limit, and stop sign requirements will be key to meeting this criterion of the Zoning Regulations. No new highways are proposed.

The landscaping, screening and setbacks of the park are adequate with respect to adjacent properties. §1803.2(f). Landscaping, screening and setback requirements have not been argued to apply to improvements to the public streets within the street right-of-way.

The proposed project will not have an undue adverse effect on rare and irreplaceable natural areas. §1803.2(g). Delta Park as a whole is a rare and irreplaceable natural area. The project is designed not to have any adverse effect on Delta Park. Enforcement of the use of the ferry, path and boardwalk within the Park will be key to meeting this criterion of the Zoning Regulations. The additional safeguards imposed by the Court in this order are designed to determine if the operation of the Park as designed with the bicycle ferry has any adverse effect on Delta Park, and, if so, to bring the project back for review to the Planning Commission under this criterion. The project will not affect any historic sites.

The proposed project will not have an undue adverse effect on the scenic or natural beauty of the area or on aesthetics. §1803.2(h). Rather, it is designed to preserve the scenic and natural beauty of the area within the park and to promote public appreciation of

that scenic and natural beauty.

The proposed project will not affect the efficiency of allocation and distribution of street and public facility installation, construction, and maintenance; §1803.2(i) is not applicable.

The proposed project will not place a burden on the ability of the local government to provide municipal or governmental services and facilities. §1803.2(j)

Based on the foregoing, it is hereby ORDERED and ADJUDGED that the conditional use approval and site plan approval are hereby GRANTED to the proposed bicycle ferry, the proposed improvements within Delta Park, and the proposed bicycle path, with the following necessary conditions and safeguards:

1. After the initial two seasons⁶ of operation of the bicycle ferry, park improvements and bicycle path, any party may request ZBA or Planning Commission review of the project under any criterion, to determine whether the project as implemented adequately meets that criterion or whether additional conditions may be necessary to assure that the criterion is met or will continue to be met.

2. Before the bicycle ferry may be placed into operation, all the signage required for the bicycle path within the neighborhood shall be installed, and a traffic enforcement plan shall be proposed by the Town. A revised signage plan, including the enforcement plan, shall be presented to and approved⁶ by the Planning Commission. At a minimum, that revised signage plan shall include:

⁶ This period is anticipated to be the year 2000 and 2001 seasons, ending approximately November 1, 2001. However, if the commencement of the use of these improvements is delayed into the 2000 season, the period will be measured as two years from the commencement of use of the completed improvements.

(A) a sign on the bicycle path at the intersection of Windemere and Biscayne, to the effect that all through bicycle traffic must use the bicycle path, turning on Biscayne and not proceeding up Windemere;

(B) signs on Airport Road in at least the following three locations, one to the east of the Windemere Way intersection and one to the east of the Buckingham Drive intersection, for traffic traveling in a westbound direction, and one to the west of the Buckingham Drive intersection for traffic traveling in an eastbound direction, and stating to the effect of: "Bike Path parking at Airport Park lot ONLY:"

(C) signs at Delta Park and at fishing access stating "No Parking for Bike Path - Use Airport Park" with some statement about the potential fine and some map or directions to the Airport Park lot; and

(D) a yellow blinking light operable sunrise to dusk⁷ at or near location 7 on Exhibit 18-2, warning of the stop sign ahead, and a red blinking light operable sunrise to dusk at location 6 on Exhibit 18-2 (at the three-way stop sign intersection).

3. By November 1, 2000, the Town of Colchester shall develop, and shall discuss with the residents in at least one neighborhood meeting, a plan for a residential on-street parking permit program for the residents on Horizon Way, on Biscayne Heights, and on Windemere Way to some distance above the point marked as 9 on Exhibit 18-2, during the months in which the bicycle ferry and state fishing access are in use, to prohibit and enforce the prohibition of parking on the residential streets by other than the residents and their guests. Implementation of any such program is beyond the scope of this Order, but may be the subject of action by any party, including the Town, under Condition #1 of this

⁷ Note that this proposes a light in operation in the daytime and not at night. This proposed daytime operation would provide the additional warning to traffic when the bicycle ferry and state fishing access are in operation, without creating the visual nuisance of a light blinking all night long for the neighboring residents.

Order.

4. Before installing the boardwalk segments authorized by this decision, WVPD shall consult with experts in the field of bicycle boardwalk design, to determine whether a raised edging on the boardwalk segments would increase the safety of the users of the boardwalk, and to determine the optimal direction of the planking boards on the boardwalk.

Before installing the boardwalk segments authorized by this decision, WVPD shall consult with experts in the field of wildlife interaction with boardwalk installations, to determine the optimal spacing of the boards to encourage wildlife passage beneath the boardwalks.

5. Before the bicycle ferry begins operation, the Applicants⁸ shall

(A) arrange for the presence of an attendant, equipped with a cellular telephone or other emergency communications device, to be present within Delta Park and to walk the paths during all hours of operation of the bicycle ferry within the first year of operation. The attendant's duties shall include to patrol the park to ensure that the users are aware of the restrictions on the passage of bicycles, to ensure that trash is placed in appropriate receptacles, and to provide advice and emergency communication so that users of the Park and the ferry do not seek such advice and telephone access from neighborhood residents, and to observe frequency and patterns of usage of the Park and of the bicycle ferry. After the first year of operation, Applicants may seek amendment of this condition to have an attendant present during more limited hours, if warranted by the data collected in the first year of operation.

(B) install and arrange for the periodic maintenance of a covered trash receptacle within the Park, designed to be protected from and not to attract wildlife;

(C) either install and arrange for the periodic maintenance of a portable toilet within

⁸ That is, the Winooski Valley Park District, the Town of Colchester, and Burlington Bikeways, Inc., who may allocate the responsibility for this condition among themselves as appropriate.

the Park or erect signs advising park users of the presence of such a facility at the state fishing access.

Nothing in this decision and order prevents any of the parties from contracting or making any other arrangements with any of the other parties or with other persons or institutions to allocate the responsibility for carrying out any conditions of this decision and order. The parties to these appeals also may wish to explore a memorandum of understanding between the state and the Town to alleviate some of the burdens on the neighborhood caused by the state fishing access.

Further, the Court encourages the parties to develop and place into operation a committee to oversee the operation of Delta Park, the bicycle ferry and the bicycle path, along the lines of the community committee in operation in Burlington regarding the skateboard park. They may obtain information about that program and assistance in that endeavor from the Environmental Mediation program coordinated by the Woodbury Dispute Resolution Center (toll free number 1-800-820-0442).

Dated at Barre, Vermont, this 3rd day of May, 2000.

Merideth Wright
Environmental Judge