

State of Vermont  
Water Resources Board

Mr. & Mrs. Ronald P. LaFleur  
Lake Dunmore, Town of  
Leicester; Vermont

Appeal 29 V.S.A. §406  
Findings -of Fact,  
Conclusions of Law, and  
Order

Introduction

On April 6, 1984, Mr. & Mrs. Ronald P. LaFleur filed an application under the provisions of 29 V.S.A., Chapter 11 "Management of Lakes and Ponds" for authorization to create an encroachment by placing approximately 150 to 200 cubic yards of gravel and sand beyond the mean water level of Lake Dunmore in Leicester, Vermont., On June 7, 1984, the Department of Water Resources denied this application. On June 25, 1984, the LaFleurs appealed that decision to the Vermont Water Resources Board under the provisions of 29 V.S.A. §406. On July 27, 1984, William Bartlett, Executive-Officer of the Water Resources Board as hearing referee conducted a public hearing on this appeal. Appearances at that hearing were entered by:

- 1.. Mr. & Mrs. Ronald P. LaFleur
2. Agency of Environmental Conservation
3. Lake Dunmore-Fern Lake Association

On September 25, 1984, the Water Resources Board held a second public hearing for the limited purpose of receiving additional evidence and testimony on the cumulative impact on fish habitat in Lake Dunmore of both the encroachment proposed by Mr. & Mrs. LaFleur and existing encroachments.

During the course of this proceeding the following documents were entered into the record:

- Exhibit 1: An application form designated as application #84-7 signed by Ronald LaFleur with three attachments.
- Exhibit 2: A three page document entitled "Investigation and Determination of Public Good with Respect to the LaFleur Application" dated June 7, 1984 signed by David L. Clough on behalf of the Department of Water Resources.
- Exhibit 3: A letter dated June 18, 1984 addressed to Mr. Clough from Mr. & Mrs. Ronald P. LaFleur.
- Exhibit 4: A letter dated April 12, 1984 addressed to the Agency of Environmental Conservation, Department of Water Resources, c/o Donald Manning from Clarence F/French.

- Exhibit 5: A copy of pages 30 through 32 of the "**Vermont Interim Land Capability Plan.**"
- Exhibit 6: Two memoranda **from** David Callum, District Fisheries Biologist addressed to Donald Manning, Department of Water Resources dated April 19, 1984 and July 13, 1984.
- Exhibit 7: A copy of the **LaFleur's** application for the proposed beach area to the **U.S.** Army Corps of Engineers as revised on July 19, 1984 which is pending before the Corps of Engineers.

Findings of Fact

1. Mr. and Mrs. Ronald LaFleur (hereinafter "the applicants") in their initial application to **the Department** of Water Resources proposed to construct a 20' x 20' private beach area in Lake **Dunmore** adjacent to their property which is identified **on the Lake Dunmore Lake Chart as lot #38.** The initial application estimated the quantity of bank run gravel and sand to be approximately 150 to 200 cubic yards; However, the applicants subsequently 'revised their application to reduce the **quantity** of fill to 23 'cubic yards or an average depth of approximately 18 **inches** over **the 20' x 20' area.**  
  
This application was denied by the Department of Water Resources principally because of concerns regarding the cumulative impact on fish habitat of both the proposed encroachment and possible future encroachments which might be encouraged **by the approval** of the LaFleur application.
2. Subsequent to the Department's **denial, the LaFleurs** have, decided to further reduce the size of their proposed beach area to **10' x 20'** and to reduce the amount of fill material correspondingly to 10 cubic yards. The applicants also amended their application to include the installation of a filter **cloth material** on top' of the existing bottom sediment as shown **by exhibit #7.**
3. The LaFleur property is located in North Cove on the east shore of Lake **Dunmore** on the southerly end of the lake. The shoreline in this area **is'** developed by **numerous** private residential structures, many of which are used as summer cottages.
4. The lake bottom along the shoreline adjacent to the LaFleur property is comprised of organic sediment or muck **which has** accumulated due to natural conditions to **depths** of approximately 18 to 24 inches.

5. **Lake Dunmore** is maintained at a **water** level of 570 feet (52" on the gage at the Central Vermont Public Service Corporation dam) during the **summer** months, but is drawn down **by the** Central Vermont Public Corporation approximately two feet during the winter months.
6. With regard to the impact of the proposed encroachment on water quality:
  - a. There will be no dredging or removal of existing bottom materials from the site of the proposed beach area.
  - b. The construction associated with the proposed beach will result in **some turbidity** in a limited portion of North **Cove** for a brief period of time, however, the long term impacts on water quality would not be significant as shown by exhibit #2.
7. With regard to the impact of the proposed encroachment on **fish** and **wildlife habitat**:
  - a. The proposed beach would not adversely affect wildlife habitat as shown by exhibit #2.
  - b. The area directly impacted by the proposed beach represents a very small percentage of the total bottom area of **Lake Dunmore**. However, it is located within the Lake's littoral zone, that area of shallow water adjacent to the shoreline which provides fish spawning sites and important habitat for aquatic biota which are a source of food and shelter for fish.
  - c. Certain **portions** of the littoral zone in North Cove are used for spawning by northern pike and other warm water **species** found in **Lake Dunmore**. However, the area **directly impacted** by the proposed beach is not used for spawning purposes to any significant extent.
  - d. Beach areas such as that proposed by the applicants usually require periodic maintenance typically by adding **additional fill** material. The need to replenish existing beaches can be **due to a variety** of factors' including: the settling of the fill material into the underlying organic sediment, migration of the fill after installation and the deposition of new sediment on top of an established beach.
  - e. The filter cloth now proposed by the applicants will substantially reduce the rate **at which** the fill will settle into the underlying organic sediment.

- f. The fill material **used** to create the proposed beach may migrate to **other portions** of the **Lake due** to the combined effects of shoreline currents, wave action, and ice **action**. The annual fluctuation of approximately two feet in the water level of Lake **Dunmore** will expose essentially one half of the beach area to each of these **effects** at certain times of the year.
  - g. The natural process which has **resulted** in the existing deposition of organic sediment (**i.e.** dead leaves, etc.), in the **area of** the proposed beach will- continue.
  - h. The owner **of** property adjacent to the applicants established a private beach area a number of years ago as shown by exhibit **#4**.
8. With regard to the impact of the proposed encroachment on aquatic and shoreline **vegetation**:
- a. The applicant has proposed a method of transporting the **fill material to the proposed** beach site in a manner **which will not disturb** existing shoreland vegetation as shown by Exhibit **#1**.
  - b. **Aquatic** vegetation will be eliminated from the area occupied by the proposed beach area, **however**, the effect on aquatic vegetation is not substantial as shown by exhibit **#2**.
9. With regard to the impact of **the proposed** encroachment on navigation **and other** recreational and public uses **including fishing and** swimming:
- a. Fishing in Lake **Dunmore** will not be adversely affected.
  - b. 'The proposed beach area will enhance the use of swimming by providing easier access to the lake and a safer area **in which** young children may swim:
10. With regard to 'the proposed **encroachment's** consistency with, **natural** surroundings:
- a. **The** proposed beach represents a man-made modification of a naturally **occurring condition** in Lake Dunmore,, however, it will not be readily visible **and is** quite limited in **scale**.
  - b. **The** natural character of the shoreline of Lake Dunmore in the area **adjacent** to to the **LaFleur property has** been modified to some extent by **the** development of shoreland properties including the **establishment of** one or **more private** beach areas.

11. With regard to **the proposed encroachment's** consistency with municipal shoreland zoning ordinances or applicable state **plans:**

- a. The Town of Leicester does not have a municipal shoreland zoning ordinance.
- b. The state interim capacity and development plan **provides in part:**

Shallow water areas are extremely important to the fisheries of **any water body**. If the shallows were segregated from **the** the remainder of a lake; the quality of fisheries would be greatly impaired. Some types of development activity might, in **fact**, tend to have that effect. For example; supplanting a soft bottom habitat with gravel and, sand in order to provide a swimming beach for cottagers **drastically** changes the ecology of the area **affected** and limits or effectively removes its. value to species once utilizing the area.

Conclusions of Law

1. Section 405(b) of 29 V.S.A. requires **that** inevaluating whether any proposed **encroachment** will adversely affect the public **good**, **the** Department of Water Resources must "consider the affect of **the proposed encroachment** as well as the potential 'cumulative **effect** of existing encroachments" with **regard** to various criteria.
2. The **Department** was concerned **that the** "precedent" of allowing the LaFleur's to construct a private beach by **placing** fill material below the mean water level would prompt **other** shoreland property owners **to** seek permission, for similar encroachments. Accordingly, **the** Department decided to deny this application based almost exclusively on the anticipated cumulative effect on fish habitat of possible future encroachments. Such interpretation of 29 V.S.A. 9405(b) is consistent with **several** previous decision of the Water Resources Board itself when it had primary responsibility for reviewing applications under this statute.'
3. The **Vermont** Water Resources Board in the course of its consideration of this appeal, has reinterpreted the scope of review intended by 29 **V:S.A.** 9405(b), The Board has concluded that this **language requires** an assessment of the impact of 'any **proposed** encroachment both in its own right and **cumulatively** with **all** other existing encroachments. The Board also concludes that, the consideration of the **potential, cumulative** effect of possible future encroachments is neither contemplated nor authorized by 29 V.S.A. 9405(b).

4. The construction of the 10' x 20' private beach area as proposed by Mr. & Mrs. Ronald LaFleur will not adversely affect the public good within the meaning of 29 V.S.A. §405(b).

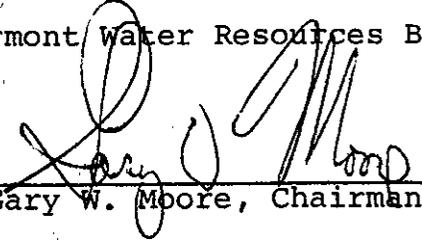
Order

On the basis of the above findings of fact and conclusions of law the Vermont Water Resources Board under the provisions of 29 V.S.A. §408 hereby reverses the decision of the Department of Water Resources to deny Management of Lakes and Ponds application #84-7 and approves, as amended, the application of Mr. & Mrs. Ronald LaFleur to construct a private beach area in Lake Dunmore subject to their compliance with the following conditions:

1. The approved beach area shall be constructed in an area 10 feet by 20 feet using not more than ten cubic yards of washed sand or gravel material placed on top of filter cloth material in a location and configuration as shown on exhibit 7.
2. The fill material shall be placed in accordance with the techniques described in exhibit 1 between June 1st and November 15, 1985.
3. The Department of Water Resources, c/o Donald Manning (802-828-2761) shall be notified not less than 24 hours prior to the placement of the fill material.

Done this 28th day of November, 1984, at Montpelier, Vermont.

Vermont Water Resources Board

By   
Gary W. Moore, Chairman

Board members participating:

i/William D. Countryman  
William Boyd Davies  
i/Catherine B. Rachlin  
W. Byrd LaPrade

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Discussion

Discussion

Having reviewed a number of its own rulings in previous proceedings under 29 V.S.A., Chapter 11, the Board appreciates **the significance** of the change in **statutory interpretation** which its **ruling in the LaFleur appeal** represents., The Board also recognizes that its reinterpretation of the statute may add to the complexity of the Department of Water Resource's task of evaluating applications reviewed under 29 V.S.A., Chapter 11 "**Management of Lakes and Ponds.**" **However, the Board feels that the statutorially mandated standard of review is clear.** Should. the Department or others feel that such a standard of **review is inappropriate, the option to seek legislative action is available.**

The Department's concern with the cumulative effect of encroachment such as the creation of **private beach** areas is **doubtlessly** well founded. The Board, by this decision, is not **suggesting that** these concerns should not be addressed in the review process. However, there is a need to better articulate when and where such encroachments are inconsistent with the 'public good.. In this case **the applicant** ultimately proposed a very modest beach area of a **size** sufficient to meet their needs. Furthermore, the area adjacent to the proposed beach does not represent an important spawning or habitat area for fishes. Clearly under a different set of factual **circumstances a proposal to create a private beach area might well be found to be inconsistent with the public good.,**

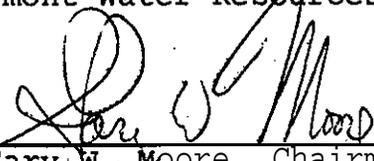
As a means of both educating the general public (particularly those owning **shoreline** property) **and** of identifying a specific basis for making **future decisions,** the Board would **suggest that** the Department of Water Resources give consideration to developing a management plan for those relatively few lakes and ponds which experience the greatest, development pressures. Fully two-thirds of the **Management of Lakes, and Ponds** applications involve encroachments **on** only six lakes. Initially at least such "plans" might be limited in scope to identifying key spawning and habitat areas in much the same manner as, **deeryard** areas have been mapped for **management as well as** regulatory purposes. On a broader scale, such plans could encompass other **factors** relevant to lake -management. They might be done as plans in their'own right or incorporated into the basin planning Process.

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Such an effort could have many benefits, one of which might be to allow the Department to better manage the problem of the cumulative impact of encroachments. The Board is not suggesting the creation of a major new planning effort addressing every aspect of lake management for every lake or pond. Rather the Board sees potential value in a selective effort to identify, in advance, those area were cumulative impacts may become a real concern in the foreseeable future.

Done this 28th day of November, 1984,~ at Montpelier, Vermont.

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