

State of Vermont
Water Resources Board

Appeal of Joseph & Philippa
Merchand
In re: Proposed Retaining Wall
Lake Bomoseen, Vermont

29 V.S.A. § 406
Findings of Fact,
Conclusions of Law &
Order

Introduction

On July 5, 1988, Joseph and **Philippa** Merchand (hereinafter "the Merchands") filed an application under 29 V.S.A. Chapter 11 for permission to construct a concrete retaining wall adjacent to their property on the shoreline of Lake Bomoseen in the Town of Castleton. On September 16, 1988, the Department of Environmental Conservation (hereinafter "Department") denied the Merchands application.

On September 20, 1988, the Merchands appealed the Department's decision to the Vermont Water Resources Board under the provisions of 29 V.S.A. § 406. The Water Resources Board conducted a public hearing on the appeal on October 25, 1988 at South Burlington, Vermont. Appearances at this hearing were entered by the following parties:

1. Mr. & Mrs. Joseph Merchand, represented by Joseph O'Rourke, Esquire.
2. Department of Environmental Conservation, represented by Anne Whiteley.

During the course of the hearing the following documents were entered into the record by agreement or **both** parties:

Exhibit #1: A copy of the Department of Environmental Conservation's file regarding Merchands application.

Exhibit #2: Four black and **white photographs** dated July 4, 1932 showing the property on Lake Bomoseen now owned by the **Merchands**.

Exhibit X3: A color **photograph** showing the existing shoreline **of** the Merchands property.

Exhibit #4: Two color photographs of the existing shoreline of the Merchands property.

Exhibit #5: A color photograph of the shoreline of the **Merchands** property.

Exhibit #6: A color photograph showing the existing retaining **at** the south end of the shoreline of the Merchands property.

On the basis of its record in this matter the Water Resources Board makes the following findings of fact.

Findings of Fact

1. The Merchands have owned property adjacent to Lake Bomoseen in the Town of Castleton since 1960. The shoreline of the Merchands property has been subject to erosion over a period of years.
2. The mean water level of Lake Bomoseen is ± 3 inches on the gage on the dam at the south end of the Lake.
3. In the application denied by the Department, the Merchands proposed to construct a concrete retaining wall extending from an existing retaining wall at the southerly end of the shoreline of their property, northward for a distance of 108 feet. As originally proposed, the 108 foot retaining wall would have encroached up to 24.5 feet below the mean water level of the Lake. In conjunction with the originally proposed retaining wall the Merchands planned to place approximately 82 cubic yards of fill below the Lake's mean water level. The **height of** the proposed retaining wall would be 16 inches above the Lake's mean lake level.
4. At the hearing on October 25, 1988, the Merchands modified their original proposal. Under the modified proposal, the retaining wall would begin at the southerly end of their shoreline by connecting with a neighbor's existing retaining wall and would extend 82.5 feet to the north. In the modified proposal, the retaining wall would encroach up to 12.6 feet from the existing shoreline. The modified proposal would reduce by approximately 50% the quantity of fill placed below the Lake's mean water level.
5. The purpose of the proposed retaining wall is to stabilize the shoreline of the **Merchands property** which has been subject to erosion over a period of many years as shown by a comparison of the shoreline in 1932 as shown by Exhibit 2 with the shoreline in 1988 as shown by Exhibits 3-6. Previous efforts by the Merchands to control shoreline erosion by the placement of slate rubble was unsuccessful.
6. The proposed encroachment would be constructed during a period when the water level of Lake Bomoseen is drawn down sufficiently so that the **area** where the construction will occur would be above the actual water level at the time of construction.
7. The Department in its evaluation of the encroachment originally proposed by Merchands concluded that, provided appropriate construction practices were followed, water quality would not be adversely impacted. The Department also concluded that as originally proposed the encroachment would not have an adverse affect on aquatic and shoreline vegetation because the shoreline is predominantly rocks and stone and further that it **was** consistent with municipal shoreland zoning ordinances and applicable state plans (Exhibit 1).

8. The area below the mean water level which would be impacted by the modified proposal, although not having any special or unique value, does provide fish and wildlife habitat. The District Fisheries Manager on behalf of the Department of Fish and Wildlife in his review of the initial application recommended denial of the project unless the retaining wall followed the contour of the existing shoreline (Exhibit 1).
9. Portions of the area which would be filled as a result of the modified proposal are navigable under normal water level conditions by canoes and other light craft. The waters in question are **useable** for boating fishing, or swimming although such uses do not currently occur on any regular or consistent basis.
10. With regard to consistency with natural surroundings, most shoreline properties in the general vicinity of the Merchands property have retained the shoreline in its natural configuration. Retaining walls similar to that proposed by the Merchands, such as on the adjacent property to the south, were built prior to the adoption of 29 V.S.A. Chapter 11.
11. There is no engineering, design or other reason why a retaining wall at the **Merchand** property needs to encroach beyond the existing shoreline in order to stabilize the shoreline or control erosion.

Conclusions of Law

1. The modified encroachment proposed by the Merchands on October 25, 1988 would not adversely affect the public good with regard to water quality, aquatic and shoreline vegetation, consistency with municipal shoreland zoning ordinances and applicable state plans.
2. Although the Merchands reduced by approximately 50% the amount of "fast" land that would be created in conjunction with the construction of the proposed retaining wall, they failed to show that an encroachment of the magnitude proposed on October 25, 1988 was necessary for the construction of a retaining wall and the stabilization of the shoreline.
3. The modified encroachment as proposed by Merchands on October 25, 1988 by encroaching below the mean water to an extent greater than is necessary to stabilize the shoreline or control erosion, would adversely affect the public good with regard to: fish and wildlife habitat, navigation and other recreational and public uses, including fishing and swimming and consistency with the natural surroundings.

- 4 . The construction of a retaining wall conforming to the location of the existing shoreline into order to stabilize that shoreline and control erosion, particularly with the water level of Lake Bomoseen drawn down, will not adversely affect the public good as provided for in 29 V.S.A. § 405(b).

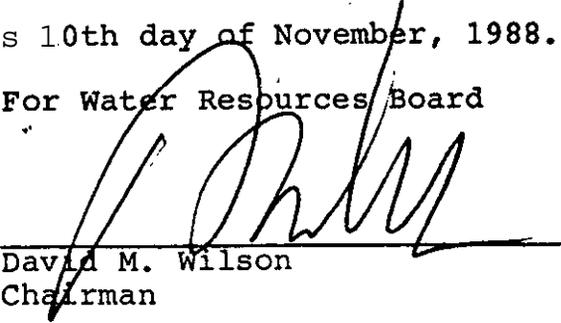
Order

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. §§ 406 and 408 hereby authorizes the construction of a concrete enforced retaining wall extending from the southerly boundary of the shoreline of the **Merchand** property on Lake **Bomoseen**, Town of Castleton northward for a distance not **exceeding** 82.5 feet subject to the following conditions:

1. The retaining wall shall be configured to approximate the existing shoreline in such a manner that there is no appreciable net loss of the lands lying under the public waters of Lake Bomoseen when the lake is at its normal water level.
2. Prior to the commencement of construction, the Merchands, shall submit a set a drawings for the retaining wall which complies with condition 1 above to the Department of Environmental Conservation, c/o Andre Rouleau.
3. The Department shall review the Merchands revised plan in an expedited manner and the certify either compliance or noncompliance with condition 1 within five (5) calendar days of receipt. Failure of the Department to respond within five (5) calendar **days** shall be deemed a certification of compliance with condition 1.
4. All construction authorized by this permit shall be **completed by** January 1, 1989 unless a further extension of **time** is granted by **the Board**.

Dated at Montpelier, Vermont this 10th day of November, 1988.

For Water Resources Board



David M. Wilson
Chairman

Board members in
favor of this decision
David M. Wilson, Chairman
Elaine Little
Thomas J. Adler
Jilliam D. Countryman