

State of Vermont  
Water Resources Board

Appeal of Management of  
Lakes and Ponds Permit  
#87-52 In re: Williams  
Point Club Yacht Club  
Charlotte, Vermont

29 V.S.A. § 406(b)  
Findings of Fact,  
Conclusions of Law and  
Order

Introduction

A hearing regarding the above entitled matter was held by the Water Resources Board on August 30, 1988 at Charlotte, Vermont and on September 27, 1988 and October 25, 1988 at Montpelier, Vermont. During the course of this hearing the 42 exhibits identified in Appendix A were admitted into the record.

Findings of Fact

1. J. Graham Goldsmith (the Permittee) owns approximately 128 acres of land, adjacent to Town Farm Bay on Lake Champlain in the Town of Charlotte, Vermont. Testimony of J.G. Goldsmith.
2. The Permittee proposes to develop approximately 10.8 acres of land on the western shore of Williams Point in Town Farm Bay for the Williams Point Yacht Club. (Yacht Club). Id.
3. By agreement with the Vermont Land Trust, upon receipt of necessary permits for the construction of the Yacht Club, the Permittee will donate the balance of the property, consisting of approximately 118 acres and 6,000 feet of shoreline, to the Vermont Land Trust. Testimony of J.G. Goldsmith; Applicant Exhibit #30.
4. The Vermont Land Trust intends to convey the 118 acres, subject to restrictions on development, to the Town of Charlotte for use as recreation and conservation park land. Applicant Exhibit #30.
5. The Yacht Club project includes construction of an access drive, a parking area, a clubhouse and related construction on the 10.8 acres. Testimony of J.G. Goldsmith; Applicant Exhibits #11, 23 and 24.
6. The clubhouse includes a caretaker's apartment, bathroom facilities and a kitchenette. The wastewater generated by the clubhouse will be treated in an on-site sewage disposal system which has been approved by the Vermont Department of Environmental Conservation. Testimony of K. Pinkham; Applicant Exhibits #3 and 5.

7. In addition to the development described above, the Yacht Club project includes two "encroachments" into Lake Champlain: (a) a water intake pipe to supply a dry hydrant for fire protection; and (b) a seasonal floating breakwater and dock system designed to provide 185 boat slips. Testimony of J.G. Goldsmith; Applicant Exhibits #1 and 2.
8. Water and electricity hookups will be available at some of the boat slips. Such hookups in conjunction with the size of the boats that are anticipated could result in the use of this facility for residential purposes by a substantial number of people. Testimony of J.G. Goldsmith and J. Northup; Teetor Exhibit #4.
9. The Yacht Club will not provide winter boat storage, hauling or launching of boats, or boat repair or maintenance facilities. The Yacht Club will not sell fuel or any other petroleum products, or marine supplies. Testimony of J.G. Goldsmith; Applicant Exhibit #3
10. The waters of Town Farm Bay are designated as Class B waters under the Vermont Water Pollution Control Act 10 V.S.A., Chapter 47. Testimony of R. Binkerd.
11. The water intake pipe will have no impact on water quality if appropriate protective measures are followed during construction to prevent concrete spillage. Testimony of J.G. Goldsmith; Applicant Exhibit #2.
12. Stormwater runoff from the gravel drive and parking area will be managed by sheet overland flow treatment in compliance with applicable Vermont regulations. A Discharge Permit for stormwater runoff has been issued by the Vermont Department of Environmental Conservation. Testimony of K. Pinkham; Applicant Exhibits #3 and 11.
13. The Yacht Club project includes a boat sanitary waste pump-out facility. This facility does not require backflushing, which minimizes the risk of spills. The pump-out facility will be operated by trained personnel of the Yacht Club. Testimony of K. Pinkham; Applicant Exhibits #3 and 5.
14. The wastewater collected by the boat pump-out system will be piped to a holding tank located 110 feet from the lakeshore and thereafter periodically removed to Winooski's Municipal Sewage Treatment Plant. This method for treatment and disposal of the boat pump-out wastewater has been approved by the Vermont Department of Environmental Conservation. Id.

15. The floating breakwater and docks are designed to withstand the forces of a fifty-year storm event on Lake Champlain. The floating docks and breakwater will be removed from Lake Champlain from November 1 through May 1 of each year. The breakwater is designed to produce a 92% reduction in wave action. Testimony of J.G. Goldsmith, D. Sethness.
16. The floating dock and breakwater system allows for continued water circulation through the area that would be occupied by boats during the boating season. Testimony of J.G. Goldsmith, D. Sethness, R. Binkerd; Applicant Exhibit #13.
17. The Yacht Club will maintain absorbent pads and a "sausage boom" to prevent the spread of any accidental petroleum spills into Lake Champlain. Testimony of J.G. Goldsmith; Applicant Exhibit #2.
18. Each boat berthed at the Yacht Club will be equipped with a bilge "pillow" to absorb petroleum residues that may otherwise accumulate. Testimony of J.G. Goldsmith.
19. Vermont and federal laws prohibit the discharge of any wastes including "graywater" into Lake Champlain. Yacht Club regulations will similarly prohibit any discharge of wastes including graywater. Testimony of J.G. Goldsmith, R. Binkerd; Applicant Exhibits #2, 3 and 13.
20. Water quality sampling was performed both at Williams Point and at the nearby Point Bay Marina over a three-year period. Samples were taken on days with calm wind and weather conditions and during high recreational use periods in order to bias the samples toward a worst-case situation. As part of this sampling, a variety of water quality characteristics including pH, turbidity, fecal coliform, hydrocarbons, color, dissolved oxygen, nitrogen, phosphate and temperature were measured. Testimony of R. Binkerd; Applicant Exhibit #13.
21. Point Bay Marina provides slips for 175 boats and moorings for 80 boats. In addition, it provides complete marina services for both resident and transient boats, including sanitary waste pump-out service, gasoline sales, boat hauling and launching, boat repairs, and sale of marine supplies including petroleum products. In addition, the Point Bay Marina maintains a fixed breakwater for wave protection in the form of two sunken barges. This fixed breakwater and Point Bay Marina's location at the northerly tip of Town Farm Bay result in less water circulation than is present at the proposed Yacht Club site. All of these

factors suggest that the proposed Yacht Club will have less impact on water quality than has the existing Point Bay Marina. Testimony of J.G. Goldsmith, R. Binkerd; Applicant Exhibit #13.

22. The results of the water quality sampling indicated no significant difference in water quality throughout the area sampled. All sampling stations showed water quality consistent with the water quality criteria for Class B waters as established by the Vermont Water Quality Standards.
23. Dr. Phillip Downey, an aquatic biologist, performed fish sampling in the area on September 13, 1986. The results of the sampling indicated species typical for this part of Lake Champlain. Testimony of P. Downey; Applicant #13.
24. The shoreline between Williams Point and Thorpe Brook provide habitat for longnose gar which breed in the Thorpe Brook area in May or June. Testimony of Diane Leary.
25. Town Farm Bay provides "good fishing" for a variety of edible fish including perch, walleye, rock bass, small and large mouth bass and northern pike. Testimony of Madeleine Hawley.
26. Town Farm Bay provides habitat for a wide variety of fish and wildlife including lake sturgeon, longnosed gar, common loon, great blue heron, osprey and bald eagles. Testimony of Dean Leary and Diane Leary; Dean Leary Exhibit #23.
27. The heron's natural feeding habitat is in shallow waters along the shoreline and in wetland areas as found at Thorpe Brook, and not in deeper water and rock ledge areas like those at the Yacht Club site. Heron tend to feed primarily at dawn. Testimony of E. Briggs.
28. A rookery for great blue heron exists in the Thorpe Brook area, approximately one-half mile from the Yacht Club site. The rookery is located on a portion of the Williams Point property that will be donated to the Vermont Land Trust. Testimony of E. Briggs; J.G. Goldsmith.
29. Increased human activity at the Yacht Club site will not adversely affect the Thorpe Brook heron rookery because of the Yacht Club's distance from the rookery. Testimony of E. Briggs.
30. Another heron rookery may be located in the northeast corner of Town Farm Bay, north of the Yacht Club site. This area, like the Thorpe Brook area, has substantial shoreline vegetation including soft-stem bush and cattails,

and may be feeding habitat for heron. If another rookery does exist there, it is sufficiently distant from the proposed Yacht Club site that increased human activity at that site will not adversely affect the heron. Testimony of E. Briggs.

31. A pair of nesting osprey are located near the mouth of Little Otter Creek several miles away from the proposed Yacht Club site. Id.
32. The osprey is a fish-eating raptor. Its fishing activities take place over great distances. The fishing habitat for osprey encompasses the littoral zone of a substantial portion of Lake Champlain. Id.
33. Osprey have adapted well to human activity, even to the point of nesting on harbor pilings. Id.
34. Expert testimony concerning the proposed Yacht Club's potential impact on fish and wildlife habitat was presented by four fisheries and wildlife biologists: Philip Downey, Ph.D. and Errol Briggs, both Aquatec consultants; and Steven Weber and Brian Chipman, both biologists with the Vermont Agency of Natural Resources. Both the private consultants and the State's biologists agreed that the proposed Yacht Club will not have an adverse impact on fish or wildlife habitat. Testimony of P. Downey, E. Briggs, S. Weber, B. Chipman; Applicant Exhibits #9 and 13.
35. Mr. Briggs performed an inventory of existing aquatic and shoreline vegetation in the Town Farm Bay area, extending from Point Bay Marina around the perimeter of Town Farm Bay to the Yacht Club site and around the tip of Williams Point to the Thorpe Brook area. Testimony of E. Briggs; Applicant Exhibit #13.
36. Emergent shoreline vegetation, including soft-stem bulrush and cattails, were observed at the area of Point Bay Marina to the northeast corner of Town Farm Bay, and at the Thorpe Brook area of Williams Point. Such emergent vegetation is not present at the Yacht Club site, which consists of a rocky, ledge shoreline and substrate, and a relatively rapid dropoff to deeper water. Id. Applicant Exhibit #2
37. Between the shoreline and the elevation of 130 feet above mean sea level, no trees will be removed except as necessary to construct the access to the docks and to prune dead or diseased branches or trees. Testimony of J.G. Goldsmith; Applicant Exhibit #3.

38. Nuisance aquatic plants including Eurasian milfoil and filamentous algae cause problems for boating, fishing and swimming in various portions of Town Farm Bay. Testimony of E. Briggs, Dean Leary.
39. The surface area of boat hulls, particularly in locations with limited water circulation, can provide a habitat conducive to the growth of filamentous algae. Testimony of Dean Leary.
40. The Yacht Club site has a rocky, ledge shoreline and substrate. Off shore, this site is subject to substantial water circulation because of its location at the point between the two bays facing the prevailing winds of the southwest fetch. The design of the floating breakwater and the dock system will have a negligible effect on water circulation. Testimony of J.G. Goldsmith, D. Sethness; Applicant Exhibit #13.
41. Eurasian milfoil and other nuisance aquatic plants may be transported to new areas by wind, water currents, and boat traffic. In Lake Champlain these nuisance aquatic plants have already become established in all hospitable habitat of the Lake. Applicant Exhibits #2 and 29.
42. The proposed Yacht Club will provide berthing facilities for 185 boats which are expected to be principally sailboats. The Yacht Club will admit members on a nondiscriminatory basis, essentially on a first come, first served basis. Testimony J.G. Goldsmith; Applicant Exhibit #2.
43. The United States Coast Guard has designated that portion of Town Farm Bay, between Hagar Point and Williams Point, as a special anchorage area. Testimony of J.G. Goldsmith; Applicant Exhibits #2 and 3. Dean Leary Exhibit #2.
44. Siting the Yacht Club on the western shore of Williams Point places the project in an area already designated for and substantially devoted to boating activities. The balance of Williams Point, to be donated to the Vermont Land Trust, will preserve and enhance the existing uses in that area of Town Farm Bay, which is generally devoted to more passive recreation. Testimony of J.G. Goldsmith; Applicant Exhibits #2, 3 and 6.
45. The Permittee's 128 acres at Williams Point is currently private property and does not provide lawful public access to Lake Champlain. Testimony of J.G. Goldsmith.

46. The conveyance of approximately 118 acres and 6,000 feet of shoreline on Williams Point to the Vermont Land Trust will create public use of this area and will provide additional public access to Lake Champlain for a variety of recreational purposes including opportunities for on-shore fishing. Testimony of J.G. Goldsmith and Brian Chipman; Applicant Exhibits #3, 6, and 30.
47. The Town Farm Bay area is physically suitable as a site for a yacht club or marina facility because of its protection from north winds, which produce the most damaging storms on Lake Champlain. Testimony of J.G. Goldsmith, R. Affolter; Dean Leary Exhibit #2.
48. The demand for boat slips or moorings on Lake Champlain exceeds the existing capacity of such facilities - waiting lists are maintained at existing facilities. Testimony of J.G. Goldsmith; Applicant Exhibit #2.
49. Since at least 1979, the State of Vermont via the Lake Champlain Basin Study has identified the need for additional boat berthing facilities on Lake Champlain in Franklin and Chittenden Counties, which includes the Town of Charlotte. Teetor Exhibit #5.
50. The floating breakwater and dock system will occupy approximately 8 acres of the surface area of Town Farm Bay. Testimony of J. Northup. Teetor Exhibit #7.
51. In terms of the surface area used, a high density docking system, like that proposed for the Yacht Club, is 8 to 10 times more efficient than are conventional boat moorings. The U.S. Army Corps of Engineers, which also regulates dockage and mooring facilities, has a policy of encouraging high density boat docks as the preferred alternative to individual moorings. Testimony of J.G. Goldsmith, D. Sethness; Applicant Exhibits #2 and 3
52. Town Farm Bay is a popular winter use area for skating, ice sailing and ice fishing. Testimony of Dean Leary.
53. Anchors for seasonal floating docks and breakwaters, such as those proposed here, are commonly marked with floats to facilitate spring installation. Such floats can create a navigational hazard and interfere with winter uses such as skating and ice sailing. Testimony of Dean Leary.
54. Boat traffic leaving Town Farm Bay tends to concentrate in a corridor oriented in a northeast to southwest direction between the Flat Rock area on the south shore of Thompson's Point and the shoals located westerly of Dean Island. Testimony of J. Kenney, Diane Leary; Diane Leary Exhibit #5.

55. On busy weekends boat traffic in this corridor is sufficient to result in occasional navigational problems and conflicts with other recreational uses including swimmers from private beaches along the Flat Rock area. Various informal surveys indicate that peak boat traffic in this area reaches one boat per one (1) minute and 20 seconds. Testimony of J. Kenney and Diane Leary.
56. The entry and exit point for the Yacht Club dock and breakwater facility is oriented to the southeast. Accordingly, boats entering and exiting the docks can pass to the east and south of the shoals located westerly of Dean Island, thereby avoiding the Flat Rock area of Thompsons Point. Testimony of J.G. Goldsmith; D. Sethness; Applicant Exhibits #21, 22, 23 and 24; Dean Leary Exhibit #2.
57. Boating access to Lake Champlain is provided not only by boat slips and moorings on both sides of the Lake, but also by boat launch facilities for trailered boats at many locations both in Vermont and New York. Testimony of R. Affolter.
58. The area from the tip of Williams Point eastward to Thorpe Brook is not presently a developed area, nor is it substantially devoted to boating activities. Instead it is largely a natural area, devoted to more passive forms of recreation. Testimony of J.G. Goldsmith; Applicant Exhibit #6; Testimony of Dean Leary.
59. Siting the Yacht Club on the western shore of Williams Point is consistent with the existing uses of that part of Town Farm Bay. Testimony of J.G. Goldsmith; Exhibit #6
60. The Williams Point property and the Yacht Club site lie within the shoreland district of the Charlotte Zoning Ordinance. Applicant Exhibits #3 and 6.
61. Under the Charlotte Zoning Ordinance, yacht clubs and marina facilities are permitted as conditional uses in the shoreland district. Id.
62. The Charlotte Zoning Board unanimously approved a conditional use permit for the Yacht Club, finding and concluding that it met each of the criteria of the Town's Zoning Ordinance. Applicant Exhibit #6.
63. The Charlotte Planning Commission unanimously granted subdivision and site plan approval for the Yacht Club, finding and concluding that it met each of the criteria under the Town's subdivision and site planning regulations. Applicant Exhibit #8.



64. The Vermont Legislature has mandated (10 V.S.A. § 1423) that the Secretary of the Agency of Natural Resources "make studies, establish policies and make plans for the efficient use, conservation, development and protection of the state's water resources" including Lake Champlain and that such plans be considered in reviewing applications for Management of Lakes and Ponds Permits under 29 V.S.A., Chapter 11 (29 V.S.A. § 405(b)).
65. There is currently no state plan for the management of the waters or shoreline of Lake Champlain despite statutory authority for such a plan (10 V.S.A § 1423). Testimony Katherine Teetor.
66. To the extent that they are not consistent with the foregoing, all proposed findings of fact submitted by the parties to this proceeding are denied.

Conclusions of Law

1. This appeal of Management of Lakes and Ponds Permit #87-52 issued by the Vermont Department of Environmental Conservation was brought pursuant to 29 V.S.A. § 406(b) which requires the Board to conduct a de novo review.
2. Management Lakes and Ponds Permit #87-52, as issued by the Vermont Department of Environmental Conservation, authorizes two encroachments in the public waters of Lake Champlain in conjunction with the proposed Williams Point Yacht Club development located on Town Farm Bay in the Town of Charlotte. These encroachments are: a water intake pipe and a seasonal floating dock and breakwater system.
3. Policy for the regulation of encroachments under the Lakes and Ponds Permit Program is set forth in 29 V.S.A. § 401 which provides:

Lakes and Ponds which are public waters of Vermont and the lands lying thereunder are a public trust, and it is the policy of the state that these waters and lands shall be managed to serve the public good, as defined by Section 405, to the extent authorized by statute. . . .

This policy acknowledges public trust obligations which must be considered in the regulation of encroachments and directs that the standards specified in Section 405 be applied in meeting these obligations.

4. The public trust doctrine as enunciated in the principal case cited in this proceeding Illinois Central Railroad v. Illinois, 146 V.S., 36 L. Ed. 1018 (1892) does not prohibit

all grants of underlying lands, let alone floating encroachments in public waters. In that case the Court held in part that:

It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which lands are held by the State. 146 U.S. at 452, 36 L. Ed. at 1042 (emphasis added).

5. The public trust doctrine doesn't mandate any specific result but rather is a dynamic concept which provides a framework within which regulatory decisions are made. The "substantially impair" test of Illinois Central is essentially the same as the "adversely affect" standard contained in 29 V.S.A. § 405(b).
6. Section 405(b) of Title 29 provides that a determination must be made regarding whether any proposed encroachment, except those exempted by § 403(b) and (d), will adversely affect the public good after considering the following specific criteria:

water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public uses, including fishing and swimming, consistency with natural surroundings and consistency with municipal shoreland zoning ordinances or any applicable state plans.
7. Section 405(b) also provides that if it is determined that a proposed encroachment will not adversely affect the public good, "the application shall be approved."
8. Chapter 11 of 29 V.S.A. makes no distinction regarding the applicable review standard on the basis of whether an encroachment serves a "private" vs. a "public" purpose.
9. On the basis of the above findings of fact and conclusions of law, the Water Resources Board having considered the affect on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public uses, including fishing and swimming, consistency

with natural surroundings and consistency with municipal shoreline zoning ordinances and applicable state plans, concludes that if constructed and operated in accordance with the conditions set forth below, the water intake pipe and the floating, seasonal breakwater and dock system to provide 185 boat slips as proposed by the Permittee in conjunction with the Williams Point Yacht Club, will not adversely affect the public good.

Order

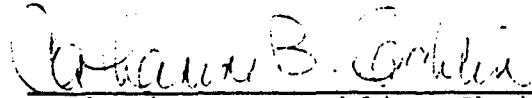
On the basis of the above Findings of Fact and Conclusions of Law, Management of Lakes and Ponds Permit #87-52 is modified as follows:

1. Prior to the commencement of any construction or the placement of any encroachment below the mean water level of Lake Champlain, the permittee shall certify in writing to the Vermont Department of Environmental Conservation that the following requirements have been complied with:
  - a. That title to the 118 acre parcel has been conveyed to the Vermont Land Trust.
  - b. That section 6.1 of Club bylaws has been amended to eliminate the requirement that applicants for Club membership be recommended by a current member of the Club.
  - c. That the Club's bylaws have been amended to require all vessels berthed at the Club's facilities to pass to the east and south of the navigational bouy marking the shoals located westerly of Dean Island whenever entering or exiting the Club's breakwater.
  - d. That a program for monitoring water quality in and near the vicinity of the encroachments authorized by this permit has been approved by the Vermont Department of Environmental Conservation. The purpose of this program shall be to provide data on the actual changes, if any, in water quality which may occur on a regular and on-going basis. Any disputes between the Permittee and the Vermont Department of Environmental Conservation regarding the design of the monitoring program will be resolved by the Board.
2. The Club shall comply with the water quality monitoring program provided for in condition 1(d) above and shall provide copies of all reports required by that program to the Town of Charlotte.

3. The location of anchors for the floating breakwater and dock systems shall be marked between November 1 and May 1 each year in such a manner that potential winter uses of Town Farm Bay for ice boating, skating or any other purpose is not adversely affected.
4. By the second anniversary of the commencement of operations, the number of boats allowed to be berthed at the Yacht Club facility shall be limited to 185 or 110% of the number of Club members who hold a license from the Club to use a boat slip, whichever is less.
5. All other conditions of Lakes and Ponds Permit #87-52 as issued by the Vermont Department of Environmental Conservation remain in effect.

Dated at Burlington, Vermont on this 30<sup>th</sup> day of December,  
1983.

Vermont Water Resources Board



Catharine B. Rachlin, Chairman

Dated at Norwich, Vermont on this 22<sup>nd</sup> day of December,  
1988.

Vermont Water Resources Board

  
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Thomas Adler, Member

Dated at Barton, Vermont on this 23<sup>rd</sup> day of December, 1988.

Vermont Water Resources Board

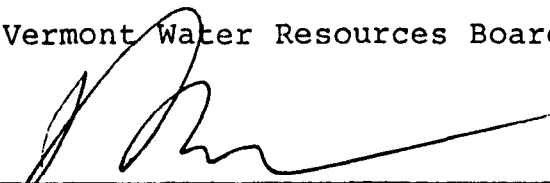


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William Boyd Davies, Member

Dated at Montpelier, Vermont on this 28<sup>th</sup> day of December  
1988.

Vermont Water Resources Board

  
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David M. Wilson, Member