

State of Vermont

Water Resources Board

Appeal of Barbara Carlo
In re: Proposed Retaining Wall
Lake Bomoseen, Castleton, Vermont

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

Introduction

On November 30, 1988, Barbara Carlo filed an appeal with the Water Resources Board under 29 V.S.A. § 406 from a decision of the Department of Environmental Conservation dated November 23, 1988 to deny her application (#88-103) for a permit to construct encroachments in Lake Bomoseen. The Water Resources Board conducted a public hearing on this appeal on January 4, 1989 at Waterbury, Vermont. In the course of the hearing, the following parties were admitted:

1. Barbara Carlo, represented by Christopher Corsones, 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 of both parties:

1. Exhibit 1: A copy of the Department of Environmental Conservation's file regarding Barbara Carlo's application (#88-103) for a permit under 29 V.S.A. Chapter 11.
2. Exhibit 2: A series of seven color photographs showing the shoreline of Barbara Carlo's property adjacent to Lake Bomoseen in the Town of Castleton.

Findings of Fact

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

1. Barbara Carlo owns property adjacent to Lake Bomoseen (Lake) in the Town of Castleton (Carlo property).
2. The mean water level of the Lake is plus or minus three (3) inches on the gage on the dam.
3. There is an existing retaining wall constructed of cobblestones along the shoreline of a portion of the Carlo property. This retaining wall was constructed approximately four (4) years ago. At the south end of this cobblestone wall is a small semi-circular "cove" in the Lake which at its greatest dimensions is approximately 20 feet in length and seven (7) feet in depth.

4. **The "cove"** has a surface area of approximately 124 square feet. There was conflicting testimony regarding the depth of the water in the "cove" at mean water level. Mrs. Carlo testified that the water was one (1) to two (2) inches deep. Mr. Andre Rouleau, an engineer employed by the Department of Environmental Conservation, testified that the water was at least six (6) inches deep and possibly deeper.
5. The Carlo property behind the cobblestone retaining wall slopes steeply to the shoreline. Surface water run-off from that portion of the Carlo property has caused erosion which has undermined the cobblestone wall as evidenced the partial collapse of the wall into the "cove" and the emergence of holes and the settling of the soils behind the wall.
6. Barbara Carlo proposes to replace the cobblestone **wall** by constructing a concrete retaining wall extending from a second existing retaining wall at the southerly end of the shoreline of her property, northward for a distance of 64 feet. As proposed, the configuration of the new retaining **wall** would permanently fill in the "cove" creating approximately 124 square feet of so-called **"fastland."**
7. The proposed retaining wall and fastland, are encroachments subject to the jurisdiction of 29 V.S.A. Chapter 11.
8. The proposed encroachments would be constructed during a period when the water level of Lake Bomoseen is drawn down sufficiently so that the construction will occur above the actual water level at the time of construction.
9. The Department in its evaluation of the encroachments proposed by Barbara Carlo concluded that, provided that appropriate construction practices were followed, water quality would not be adversely impacted. **The** Department also concluded that it was consistent with municipal shoreland zoning ordinances and applicable state plans (Exhibit 1).
10. The stated purpose of the proposed encroachments is to prevent erosion and to prevent the accumulation of dead fish and weeds which get trapped in the "cove."
11. Eurasian milfoil gets trapped in the "cove" causing more milfoil to accumulate until a large area of the waters near the cove is full of milfoil and other debris including dead fish. This situation is aggravated by the weed harvesting program currently in effect on Lake Bomoseen.
12. The smell of the decaying fish and milfoil creates a nuisance to Mrs. Carlo and to the landowner to the south.

The smell is very strong at times and significantly reduces the enjoyment of the lake to those affected.

13. The application of Mrs. Carlo to build a concrete retaining wall, including a straightening of the shoreline and eliminated the "cove," was denied by the Department of Environmental Conservation for the following reasons:
 - a. Adverse effect on aquatic and shoreline vegetation;
 - b. Adverse effect on navigation and other recreational and public uses, including fishing and swimming;
 - c. Lack of consistency with natural surroundings; and
 - d. The Department of Environmental Conservation's stated policy prohibiting the creation of fastlands in the absence of a substantial erosion problem.

The first three reasons are stated as criteria in 29 V.S.A. § 405(b). The last reason is a policy of the Department of Environmental Conservation and is not a criterion contained in 29 V.S.A. § 405(b).

- .4. Mrs. Carlo testified that there is no aquatic vegetation in the "cove " that there is only ordinary grass on shore, that within the "cove" there is no navigation and no recreational or public use of any kind, and that the proposed straightening of the shoreline would not be inconsistent with the natural surroundings. The Department of Environmental Conservation offered no testimony or evidence on these matters.

Conclusions of Law

1. On the basis of the limited scope of the proposed encroachment and the character of the area below the mean water level which would be affected, the Board concludes that there **would** not be an adverse effect on: aquatic or shoreline vegetation; or navigation and other recreational **and public** uses, including fishing and swimming.
2. The Board concludes that the proposed encroachments would essentially replace one retaining wall with another and **therefore will** not appreciably change the natural surroundings.
3. The Board concludes that the "policy" of the Department of Environmental Conservation limiting the creation of **"fastland"** to those cases of serious erosion problems, is not adopted as part of an applicable state plan and is not otherwise enumerated as a criterion in 29 V.S.A. Chapter 11.

4. The Board concludes that the proposed encroachments will 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.
5. The Board concludes that the encroachments proposed by Barbara Carlo in application #88-103 will not adversely effect the public good for any of the criteria of 29 V.S.A. § 405(b).

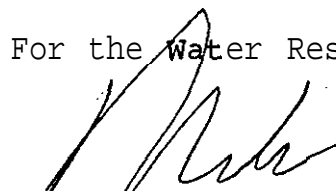
ORDER

The Board orders that the decision of the Department of **Environmental** Conservation be reversed and Mrs. Carlo's permit **be** granted. The Water Quality Division has failed to show any demonstrable harm to the public good and, therefore, as provided in 29 V.S.A. § 405(b), the permit shall be granted subject to the following conditions:

1. The project shall be completed in accordance with the plans and specifications set forth in Exhibit 1.
2. All construction shall be completed by May 15, 1989 and during a period when the water level of the Lake is below the project site at the time of construction.

Done this 31 day of January, 1989 at Montpelier,
Vermont.

For the Water Resources Board



David M. Wilson
Chairman

kgr

Board Members Participating
in this decision:

David M. Wilson
William D. Countryman
Thomas J. Adler
Elaine B. Little

Board Member Not Participating
in this decision:

Sheldon Novick