

APR 18 1990

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

DIANE A. LAVALLEE
CLERK

IN RE: WILLIAMS POINT
YACHT CLUB

CHITTENDEN SUPERIOR COURT

DOCKET NO. S213-89CnC

OPINION AND ORDER

Appellants Dianne and Dean Leary have filed an appeal from a decision of the Vermont Water Resources Board ("Board") granting a permit to J. Graham Goldsmith, on behalf of the Williams Point Yacht Club ("Yacht Club"), for the construction of a marina facility in Town Farm Bay, on Lake Champlain adjacent to the Town of Charlotte, Vermont.

The matter was initially argued before this Court on October 5, 1989. On January 25, 1990, the Court permitted further argument in light of the Vermont Supreme Court's decision in State of Vermont and City of Burlington v. Central Vermont Railway, No. 87-607 (Vt. December 22, 1989) ("CVR").

Appellants are represented by Harvey D. Carter, Jr., Esq. The State of Vermont was allowed to intervene and is represented by John H. Hasen, Assistant Attorney General. The Conservation Law Foundation of New England, Inc. was permitted to file an amicus brief, and was joined by the Lake Champlain Committee, Vermont Natural Resources Council, Vermont Public Interest Research Group, and Trout Unlimited (Central Vermont Chapter). The Foundation is represented by Lewis Milford, Esq. and Richard S. Emmet, a Massachusetts attorney. The Appellee, J. Graham Goldsmith, is represented by Carl H. Lisman, Esq., and Michael G. Furlong, Esq.

OPINION

On October 1, 1986, J. Graham Goldsmith, the owner of approximately 128 acres of land in the Town of Charlotte adjacent to Town Farm Bay on Lake Champlain, applied to the Vermont Department of Environmental Conservation ("DEC") for a permit to construct a 150 slip marina in Lake Champlain at Williams Point in the Town of Charlotte pursuant to Chapter 11, Management of Lakes and Ponds, 29 V.S.A. sections 401-410 (1986 and Supp. 1989). Mr. Goldsmith filed a revised application in December of 1987 upgrading the project to a proposed floating dock and breakwater system containing 185 boat slips. After public hearings, the DEC approved the requested permit.

In June of 1988, Appellants appealed the permit to the Board, which conducted a de novo review as required by the Vermont Administrative Procedure Act, 3 V.S.A. Chapter 25. The Board issued findings of fact and conclusions of law, and approved the permit in a slightly modified fashion. In January of 1989, the Learys appealed to the Chittenden Superior Court pursuant to 29 V.S.A. section 407.

In its decision, the Board did not consider it necessary to determine whether the Yacht Club's marina would serve a public purpose within the meaning of the public trust doctrine. The Board adopted the view that the policy for regulating encroachments in public waters is set forth in 29 V.S.A. section 401; that this policy takes into consideration the requirements of the public trust doctrine; that the requirements of the doctrine are met simply by applying the standards specified in Section 405; and that if it is determined that a proposed encroachment will not adversely affect the public good, "the application shall be approved."

Understandably, the Yacht Club supports the Board's analysis. However, the Appellants contend that the Yacht Club's permit is null and void because the Board ignored the distinction between the "public good" and the "public trust" and only considered the public trust doctrine in terms of the marina's "adverse effects" on the "public good" criteria set out in Section 405.

The basic legal issue is whether the Board was required to determine whether the Yacht Club's marina would serve a public purpose within the meaning of the public trust doctrine apart from the Management of Lakes and Ponds statute. This Court concludes it was and will vacate the permit. While the Board was correct in making the findings required by 29 V.S.A. section 405(b), the Board erred in failing to make additional findings and conclusions required by the public trust doctrine.

In the permit granted to the Yacht Club, the Board included a list of terms and conditions for the validity of the permit. Condition Number 7 provides that:

This permit does not convey any title or interest to the lands lying under public waters or waters affected, nor does it deprive the Department or the Board of the right to order the removal and restoration of the area affected.

This language is emphasized by the Yacht Club in its claim that the public trust doctrine does not apply apart from the Management of Lakes and Ponds statute. However, the proposed eight-acre boat slip is not free floating. The DEC's Investigation of the application, which is attached to the Permit, notes that the proposed dock will be secured to the bed of Lake Champlain "with anchors positioned up to an additional 100' from the structure."

Investigation, p. 4. Whether or not the boat slip is occupied, from May to October of each year, the public right to use an eight acre expanse of Lake Champlain has effectively been transferred to private use. The dock will

occupy "approximately 1,887 linear feet of 6' wide floating docks with seventy five 23' long fingers, five 27' long fingers, and six 30' long fingers." Id. While public boaters and fishermen might be able to access the outer fringes of the proposed dock, effective dominion and control over eight acres of the lake will pass to the Yacht Club for a majority of the year.

In its eighth conclusion of law, the Board held that "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." While this may be true in the limited context of 29 V.S.A. Chapter 11, a long line of Vermont Supreme Court cases, defining and interpreting the public trust doctrine, state in unequivocal terms that public or navigable waters may not be used for private purposes.

Lake Champlain falls into the category of navigable waters. State v. Cain & Burnett, 126 Vt. 463, 470 (1967). The beds of navigable waters are distinguished from other publicly held lands by the principle of jus publicum, better known as the public trust doctrine. The public trust doctrine places a duty upon the state to hold the land as trustee for the benefit of all the people of the state. See Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) (recognition of the Doctrine); see also CVR, slip op. at 3-4 ("public trust doctrine retains an undiminished vitality").

Our Supreme Court in CVR underlined the "critical importance" of the public trust doctrine in both Vermont case law and the Vermont Constitution. CVR, slip op. at 5; see Hazen v. Perkins, 92 Vt. 414 (1918); State v. Quattropani, 99 Vt. 360, 363 (1926); State v. Malmquist, 114 Vt. 96, 101 (1954); In re: Water Levels of Lake Seymour, 117 Vt. 367 (1952) (bed or soil of lake held in trust for public purposes). While the CVR Court did not state

categorically that all waters or lands which fell within the doctrine can never be developed by private parties, it did reiterate that "the legislature cannot grant rights in public trust property for private purposes." See CVR, slip op. at 6, citing Hazen, 92 Vt. at 419-420 (" . . . the General Assembly cannot grant to private persons for private purposes . . ." any interest in waters or underlying lands). The law is crystal clear. While the Management of Lakes and Ponds statute does not specifically say that a public purpose must be served in this instance, Vermont case law clearly says so. The Board cannot grant to a private party the right to use property impressed with the public trust for private purposes. CVR, slip op. at 6. The law requires the Board to find affirmatively that the proposed encroachment serves a public purpose before granting a permit.

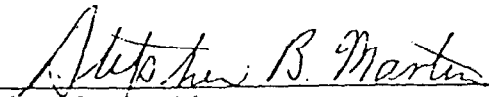
The Court rejects the Yacht Club's contention that the Management of Lakes and Ponds statute was intended by the Legislature to embody and supplant the public trust doctrine. In reaching this conclusion the Court relies on Hazen and CVR to the effect that the General Assembly is powerless to negate the requirements of the public trust doctrine even if it so desired. Hazen, 92 Vt. at 420; CVR, slip op. at 6.

As this Court has concluded that the decision of the Board must be vacated on nonconstitutional grounds, it is unnecessary to reach the arguments raised by appellants that Chapter II, Article 67 of the Vermont Constitution ("The inhabitants of this State shall have liberty . . . to fish in all boatable waters . . .") forbids the approval of the application for the floating marina proposed by appellees. State v. Clarke, 145 Vt. 547, 551 (1985); State v. Patnaude, 140 Vt. 361, 368 (1981) (court will not decide constitutional questions unnecessarily).

ORDER

WHEREFORE, upon consideration of the foregoing, the permit issued by the Vermont Water Resources Board to J. Graham Goldsmith, on behalf of the Williams Point Yacht Club, for the construction of a marina facility in Town Farm Bay is vacated and the cause is remanded.

DATED at Burlington, County of Chittenden and State of Vermont this 16th day of April, 1990.



Stephen B. Martin
Superior Court Judge