

SEP 4 1992

STATE OF VERMONT
LAMOILLE COUNTY, SS.Lamoille Superior Court
Hyde Park, Vermont

In Re: Richard and Alice ANGNEY)	LAMOILLE SUPERIOR COURT
)	DOCKET NO. S96-91 LaCa

OPINION AND ORDER

Richard and Alice Angney (Angneys) applied to the Department of Environmental Conservation (Department) for a permit under 29 V.S.A. s.404 to dredge approximately 300 cubic yards of silt from the shoreline of Lake Elmore where their property abuts the Lake. Solely on the basis of the Angneys' checking of the box "private use" when asked whether the project was private, public or commercial, the Department denied the requested permit.

The Angneys appealed to the Water Resources Board (Board) pursuant to 29 V.S.A. s.406. Their appeal was consolidated by the Board with two other cases involving similar issues. All three cases involved private individuals applying for permits for projects that would encroach upon the waters of the State. The Department denied the application of all three applicants, concluding that the public trust doctrine prohibited any encroachment on state waters by private parties exclusively for private purposes. The Board, in a de novo review, invalidated certain of the procedures promulgated by the Department and concluded that the Department had misinterpreted the public trust doctrine. All three cases were remanded for consideration not inconsistent with the Board's opinion.

The Department then appealed the Board's decision in the Angney's case to this court, obtaining a stay of the Board's order pending the outcome of this appeal. The Board and the Vermont Boat and Marine Association (Association) were granted leave to file amicus curie briefs. While these three entities, the Board, the Department and the Association, filed voluminous memos and reply memos, the Angneys, pro se, simply asked this court "why we[,] as citizens of

the State of Vermont find ourselves having to defend the actions of the Water Resources Board ... If the [Department] feels the Board is in error, ... their argument should be with the Board and not the applicant."

On June 16, 1992, the matter was set for argument before this court. All four interested parties were present and made arguments to the bench. As factual and legal issues were raised at the hearing that had not been previously addressed, the court requested further memoranda. The Board and Department each filed memoranda as requested.

The Department asks the court to vacate the Board's decision and/or to affirm the Department's interpretation of the public trust doctrine as applied in the procedures adopted by the Department. The Board justifies both its striking of the Department's procedures and its interpretation of the public trust doctrine as functions of its appellate duties. The Association argues that the Department failed to apply their own procedures correctly and that the procedures are more intrusive upon private property rights than called for by the public trust doctrine. The Angneys want to, as they have in the past, remove the silt build-up from the dry lake bed in front of their camp when the water level is lowered in the fall by the public utility that controls the lake level.

In an attempt to "resist the impulse to view itself as a super" lakes and ponds trustee, *In Re Maple Tree Place*, 2 Vt. L. Wk. 184, 186 (1991), and in an attempt to further the interest of justice, *Id.*, this court exercises its inherent authority to remand the matter to the Department for reconsideration of the Angneys' application. While the court recognizes the unfortunate added delay and expense such a decision will represent to the Angneys, the laws of the State, and the roles to which the Board and the Department are constricted,

compel this decision.

The public trust doctrine is an ancient legal creation whereby certain lands in the state are held by private citizens in fee but subject to the will of the sovereign for public use. State v. Central Vermont Railway, Inc., 153 Vt. 337, 341 (1989) (Public trust lands are held in trust for the people of the State and the character of this title is distinctive.) "Lands held subject to the public trust may be used only for purposes approved by the legislature as public uses[,] ... subject to judicial review, and this legislative control cannot be delegated to others." Id. at 352. (citations omitted) (emphasis added).

For example, it was deemed to be a public purpose when the legislature granted exclusive use, benefit, and control of wharves built on private property abutting Lake Champlain. Id., at 340 and n.3 at 345. In Central Vermont the legislature made a determination that the public would benefit by encouraging private parties to increase commerce and trade on Lake Champlain, stating "[t]he doctrine is not 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'" Id. at 342 (citations omitted). The court reviewed this exercise of authority, and required the legislature to approve of any substantial changes to the land at issue. The case does not mention any department or agency involvement, and expressly disallows continued judicial jurisdiction. Id., at 352.

The legislature has defined "lakes and ponds which are public waters of Vermont and the lands lying thereunder" as being held subject to the public trust doctrine. 29 V.S.A. s.401. These waters and lands shall be managed to serve the public good. Id. The Department shall manage these waters and lands

in accordance with 29 V.S.A. chapter 11 and the rules of the Board. *Id.*

Encroachment into public trust waters or lands is prohibited, unless the encroachment will not adversely affect the public good. 29 V.S.A. s.403. "Encroach", as it is used in the statute, means to "alter, or cause to be altered, the lands underlying any waters ... beyond the shoreline as established by the mean water level of any lakes and ponds which are public waters under the jurisdiction of the board." *Id.* at s.402(3). A person wishing to "encroach" must file an application for construction with the Department. *Id.* at s.404. The Angneys filed an application under s.404 because removing the silt build-up would alter the lands underlying a public water.

In considering the application, the Department investigates and makes a determination of public good. *Id.* at s.404 and s.405. Section 405(b) outlines the factors to be considered: "In determining whether the encroachment will adversely effect the public good, the department shall consider the effect of the proposed encroachment ... on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, [and] navigation and other recreational and public uses[.]" (Emphasis added). Appeals from the Department's ruling on the construction application are taken to the Board, which hears the case de novo. *Id.* at 406. *Appeals from the Board's order shall be taken to the Superior Court.* *Id.* at s.407.

The Department is a creature of statute. 3 V.S.A. s.2802(a)(5) (creation of the agency of natural resources and its departments); 10 V.S.A. s.905a (creation of department of environmental conservation). In addition to its duties under the management of lakes and ponds statute, (29 V.S.A. chpt. 11, see above), the Department administers the water resources programs (10 V.S.A.

chpt. 37), air pollution control and abatement programs (10 V.S.A. chpt. 23), waste disposal programs (10 V.S.A. chpt. 159), and subdivision and trailer and tent sites (3 V.S.A. chpt. 51). 3 V.S.A. s.2873(a). Among its general duties and powers, the department shall "adopt in accord with the Administrative Procedures Act those rules necessary for the proper administration of its duties[.]" 10 V.S.A. s.905b(17).

The Board is also a creature of statute. 3 V.S.A. s.2878 (creation of independent boards); 10 V.S.A. s.903 (creation of water resources board). The Board shall take such actions as it is authorized by statute to take. 10 V.S.A. s.905; 3 V.S.A. s.2878. Such actions shall be in the form of rules. *Id.* Beyond its role as appellate tribunal, 29 V.S.A. s.406, the Board is given authority to make rules for the Department to follow when administering the public trust law. 29 V.S.A. s.401. (Management of these waters and lands shall be exercised in accord with the rules of the Board).

The legislature has identified which lands are subject to the trust. 29 V.S.A. s.401. Lands which are held subject to the public trust "may be used only for purposes approved by the legislature as public uses." Central Vermont Railway, 153 Vt. at 352. With some enumerated exceptions, the legislature has prohibited encroaching on the public trust lands or waters without a permit. 29 V.S.A. s.403. Pursuant to 29 V.S.A. s.405(b), if the Department determines that the proposed encroachment will not adversely affect the public good, the application shall be approved.

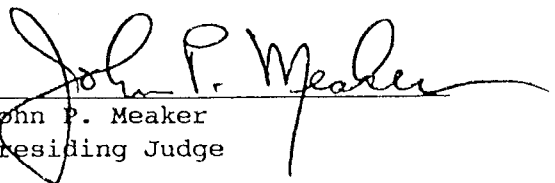
The Department is given general authority to make rules to perform its duties. 10 V.S.A. s.905(b)(17). The Board is given specific authority to make rules which the Department must follow in managing the public trust property. 29 V.S.A. s.401. The Board has not adopted rules which govern the

management, by the Department, of public waters subject to a public trust under 29 V.S.A. s.401. The Department's procedures attempt to adopt substantive law governing the issuance or denial of encroachment permits under 29 V.S.A. chpt.11.

The Department has exceeded its delegated authority in promulgating these "interim procedures". The legislature has told the public which lands are held subject to the public trust. 29 V.S.A. s.401. The legislature has forbidden encroachment on these lands without a permit. 29 V.S.A. s.403. The legislature provided criteria in s.405(b) for the Department to consider to determine if the proposed encroachment adversely affects the public good. If it does not, the application shall be approved. Any further amplification of how to "manage" those criteria must be given to the Department by rules of the Board. The Department may enact generic or general rules to aid in administering its statutory duties, but it may not usurp the Board's authority - even when the Board has not adopted any rules.

Therefore, this court defers to the expertise of the Department charged with implementing a statute and remands the Angneys' application to the Board for further remand to the Department for reconsideration under the criteria passed by the legislature in chapter 11 of title 29 and any rules related thereto passed by the Board.

Dated at Hyde Park Vermont, this th 4 day of September, 1992.


John P. Meaker
Presiding Judge