State of Vermont
Water Resources Board

Re: Appeal of Richard and Alice Angney
Docket No.: 89-14

Authority:
29 V.S.A. § 406

Re: Appeal of Robert and Ann Tucker
Docket No.: 89-16

Re: Appeal of Herman LeBlanc
Docket No.: 89-17

Decision and Order

These three appeals all concern the Public Trust Doctrine. In each case, private individuals applied for permits for projects that would encroach in the waters of the state. The Department of Environmental Conservation ("DEC" or "the Department") denied the permits on the ground that the Public Trust Doctrine prohibited any encroachment on state waters by "private parties for exclusively private purposes." On August 30, 1990, we held a consolidated hearing on the validity of the DEC's procedures in these cases. We now find that the DEC's interpretation of the Public Trust Doctrine is not correct, and the procedures it has been following are invalid in certain respects.

The Public Trust Doctrine ensures, among other things, that waters of the state and the lands beneath them will always be available to the public -- to ordinary private persons -- for recreation and other "private purposes." Some private purposes may not be consistent with the public good, but our legislature has never forbidden private activities, as such. The Department's

procedures are invalid to the extent they require it to reject applications from private parties for private purposes, without further review. The Department must ensure, however, that private projects do not adversely affect the waters and submerged lands of the state, and do not adversely affect the use of those resources by other members of the public. We remand these cases to the DEC for further proceedings.

Findings of Fact

1. On September 11, 1989, Richard and Alice Angney (appellant) filed an application with the Department to dredge 300 cubic yards of lakebed in the public waters of Lake Elmore, Elmore, Vermont. The proposed project would consist of removal of lakebed material approximately 2 inches to 1 foot in depth, in an area extending approximately 60 feet out from the applicant's property and 90 feet along the shoreline. The appellant would conduct the excavation over a two day period after the annual drawdown of Lake Elmore. The project encroaches beyond the shoreline of Lake Elmore as delineated by the mean water level of the lake. Lake Elmore falls into the category of "public waters," as defined by 10 V.S.A. Section 402, and therefore the permit application is subject to 29 V.S.A. Chapter 11 "Management of Lakes and Ponds."

2. On October 3, 1989, the Department received an application from Robert and Ann Tucker to construct a new retaining wall in the public waters of Lake Bomoseen, Castleton, Vermont. The proposed project would consist of the construction of a 60 foot long, reinforced concrete wall with a height of 6 feet and with a footing measuring 1 foot by 4 1\2 feet. The retaining wall would include steps leading from the applicant's private property to the lake. The footing of the retaining wall extends beyond the shoreline of Lake Bomoseen as delineated by the mean water level of the lake. Lake Bomoseen is "public waters" of the state of Vermont. The project is subject to the jurisdiction of 29 V.S.A. Chapter 11, "Management of Lakes and Ponds."

3. On July 25, 1989, Herman LeBlanc filed an application with the Department to excavate a boat slip into the shoreline of Lake Memphremagog. The boat slip would be supported by a timber crib, 4 feet wide by 6 feet high. In order to use the boat slip effectively, the applicant proposes to excavate 25 cubic yards of lake-bed material located beyond the mean water level. The boat slip would accommodate two small boats. The excavation of the 25 cubic yards of lakebed materials encroaches beyond the shoreline of Lake Memphremagog as delineated by the mean

water level of the lake. Lake Memphremagog is "public waters" of the state of Vermont. The project is subject to the jurisdiction of 29 V.S.A. Chapter 11, "Management of Lakes and Ponds."

4. In June of 1989, in reaction to several cases pending in the courts involving the public trust doctrine, the DEC initiated a public process to develop "Interim Procedures for the Issuance or Denial of Encroachment Permits" under 29 V.S.A. Chapter 11, in order to clarify the application of the doctrine in implementation of the statute. In August, the DEC provided the public with notice and opportunity to comment on the draft Interim Procedures. All persons with encroachment applications pending before the DEC, including the applicants, were sent a copy of the procedures and were invited to comment. In September of 1989, the DEC held a public meeting to gather comments on the draft procedures. The Interim Procedures were finally adopted on October 6, 1989.

5. All of the appellants received a letter stating that the DEC intended to apply the Interim Procedures to their projects and they were free to amend their applications in reaction to the procedures.

6. Under the Interim Procedures, the DEC must make both a

"public trust" determination and a "public good" determination. Under the "public trust" determination, the DEC must find that there will be some public purpose or benefit associated with the project in order for it to be permitted. If, and only if, the applicant demonstrates that the project serves a public purpose must the DEC then make a "public good" determination. The DEC considers the criteria listed in 29 V.S.A. Section 405(b) in making the "public good" determination.

7. Each of the applications filed with the DEC state that the project is for "private use." Based solely upon the "private use" statements in the applications, the DEC denied the requests for encroachment permits without any further proceedings. The DEC found that because the projects were for "private use" there was "no public purpose or benefit" associated with any of the applicants' projects, and because "the Department cannot issue a permit that would allow a private individual to use the public waters involved for exclusively private purposes," the applications were, therefore, denied. Accordingly, the DEC denied each permit application because it was not in conformity with the "Interim Procedures for the Issuance or Denial of Encroachment Permits."

8. The DEC did not make a "public good" determination and did not conduct a full investigation of the criteria of 29 V.S.A. Section 405(b) for any of the applications.

Conclusions of Law

I. The Interim Procedures

The Public Trust Doctrine, an ancient doctrine of the common law, is made applicable to Vermont's management of lakes and ponds by 29 V.S.A. § 401 ("Policy"), which says:

> Lake 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 of this title. . . .

In Re Williams Point Yacht Club, Docket No. S213-89 CnC (April 18, 1990); 29 V.S.A. § 401.

Section 405 defines the "public good" in negative terms -- a permit is to be denied if an encroachment would adversely affect the public good; and adverse effects are listed. These include adverse effects on the resource itself, and adverse effects on "navigation and other recreational and public uses."

Until recently, the Department and this Board considered that any applicant who could show that his or her project would not have these adverse effects was entitled to a permit, having met the

definition of "public good." However, this negative determination is not adequate. The statute plainly requires the state's resources to be managed as a public trust, for the public good, and therefore the Department must make two determinations. In Re Williams Point Yacht Club, supra. First, it must determine that a project is affirmatively in accord with the purposes of the public trust; and second, it must then determine whether the adverse effects of the project are so great as to make it inconsistent with the public good.

In recognition of this duty the Department established its Interim Procedures, primarily to guide it in making the affirmative, "public trust" determination which they and we had been neglecting. Interim Procedures, Section 3.

The Department understandably had some difficulty in defining the public trust. The definition it arrived at extends over three pages, but appears to have two simple elements. The first is this. The public trust is said to require "some public purpose or public benefit." The Department assumes that what is private is not public, and therefore purely "private" activities are presumed to be inconsistent with the public trust. Interim Procedure 3(a). Second, "state projects" are public projects and are therefore presumed to meet the public trust test, and are not examined to determine if their purpose is consonant with the public trust. Interim Procedures 3(b).*

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* The second branch of this test, exempting state agencies from public trust review, is not at issue in these cases, but we think it important to note that this exemption seems plainly

The applications in these cases were all denied under the first part of the definition, because they were "for purely private purposes." The issue in these cases, and the validity of the Interim Procedures, rests on the question of whether purely private activities may not also have some public benefit recognized by the legislature and consistent with the public trust.

II. Are Private Activities Forbidden?

The Interim Procedures say, "the state is precluded from taking any action that would grant permission to use a public asset (in this case the lakes and ponds of the state) to a private person for exclusively private purposes." Interim Procedures Section 3(a). According to the Interim Procedures, a private project may nevertheless be salvaged, however, if it provides some public benefits. These are not defined, but examples are given; the examples with one exception are "public" facilities -- public access areas, public docks and moorings, public beaches, and so forth. (The single exception is "erosion control measures" which apparently may redeem an otherwise "private" project.) A project that consists entirely of such "public" facilities would, of course, meet the public trust standard without question. Interim

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inconsistent with the statute and with the principles of the public trust. Although a project is sponsored by a state agency it does not follow that its purpose is necessarily consistent with the public trust. That is for the Department, and ultimately this Board, the courts, and the legislature, to determine.

Procedure Sections 3(a)-3(b).

The Department's logic is clear. When a facility is open to the public without charge, it meets the public trust standard, apparently without much regard for the nature of the facility or its purposes, or whether the use of the resource is actually enhanced, or only shifted from one class of users to another.

On the other hand, when a project is built by and for a private individual, it, by these facts alone, fails to meet the public trust standard. All that will save it, apparently, is to append public works to the private project.

The Interim Procedures do not contain any explanation or defense of this doctrine. The assertion appears to rest on purely logical grounds -- on the assumption that "private" and "public" are mutually exclusive states, like good and evil, so that "private" projects by definition cannot serve the public interest.

Only the slenderest legal authority is offered to support this logic. The Department relies on a single phrase from an early case, Hazen v. Perkins, 92 Vt. 414 (1918). In that case, a private mill owner had the right to release water from a dam across the outlet of Lake Morey, to drive his mill. Property owners around the lake asked the Court to enjoin the mill owners from raising and lowering lake levels. The Supreme Court upheld the mill owner, and dismissed the petition. The Court's reasoning was that the mill owner did not own exclusive rights to the lake level, because the lake was held in trust for the public. Id. at 419. However, the mill owner did indeed have his own private right to use the lake's

outflow to drive his mill, raising and lowering the lake level in consequence; but only if his activities did not cause a nuisance for other landowners. Id. at 421.

In the course of the opinion, the Court said,

> . . . the General Assembly cannot grant to private persons for private purposes, the right to control the height of the water of the lake, or the outflow therefrom, by artificial means, for such a grant would not be consistent with the exercise of that trust which requires the State to preserve such waters for the common and public use of all.

Id. at 419.

This sounds compelling, until one realizes that the defendant in this case did have the right to control the "height of the water of the lake, or the outflow therefrom" so long as he didn't create a nuisance. The Court was simply making its case that a private party could not absolutely own waters of the State. The legislature could not grant control of the lake for "private purposes," in this sense. The legislature, in short, may not give up absolute control of a resource to a private party, but there is no doubt that it may grant more limited private rights of various kinds. See State of Vermont v. Central Vermont R. Co., __ Vt. __, 571 A.2d 1128 (1989) (quoting Hazen, supra), in which the right of the legislature to grant limited rights in filled land and wharves for railroads and other private businesses is not questioned, so long as the resource remains subject to the public trust.

We are not aware of any case in which a court has held the

General Assembly (or any other legislature) powerless to grant properly limited private rights in public waters, and of course much of our state's economy rests on such rights.

The Department, in short, has been misled by words taken out of context. Common sense seems a better guide to the meaning of our statute. An ill-conceived public facility, even one to which all the public has free access, may nevertheless be inconsistent with the public trust; while privately owned docks and moorings in some cases may provide exactly the public benefit for which the state's waters are held in trust. The statute says as much. Permits are not even required for private persons to build wooden docks for noncommercial use, mounted on piles or floats; for small water intake pipes, duck blinds, floats, rafts and buoys, and other private uses of state waters, so long as navigation and boating are not unreasonably impeded. 29 V.S.A. § 403. The public is no more than a collection of private individuals, and private recreation is one of the purposes for which the state's resources are being protected. It flies in the face of common sense and Vermont law to say that all private purposes are by definition contrary to the public good.

III. The Public Trust Standard

What then is the public trust standard? The Department argues in its brief that the public trust is a constitutional doctrine. Our authority is limited to carrying out the statutes that govern

our work, however, and we will not consider arguments that the Lakes and Ponds statute is invalid or that we have powers conferred directly by the constitution. Westover v. Village of Barton Electric Department, 149 Vt. 356, 357-359 (1988).

The only question we may decide here is what the phrase "public trust" means in 29 V.S.A. § 401, and what it requires of us and of the Department. The statute itself is not very helpful, and none of the parties have cited legislative history to us. The key passage in Section 401 should be read, "Lakes and ponds . . . are a public trust, and [therefore] 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 of this title."

This reading makes Section 405 the definition of the substantive policy embodied by the public trust. Section 405, unfortunately, however, does not give a very clear definition. It charges the Department with carrying out an investigation to determine what adverse effects a proposed encroachment may have. Adverse effects are listed, and can be described as either damage to environmental values in themselves -- damage to fish and wildlife habitat, or to water quality -- or as adverse effects on "navigation, and other recreational and public uses." A permit is not to be issued when such adverse effects are found. 29 V.S.A. § 403.

Taken all in all, the statute therefore seems to say that both public and private activity serve the public good, so long as there is no adverse effect on resource values, or on the use others may

make of the state's waters and submerged lands.

There is no clear guidance in the statute beyond this, and the cases cited to us seem to go no further. But it would not be surprising if Vermont's public policy simply favors liberty of private action. Even if the phrase "public trust" in the statute must be understood to incorporate an evolving common-law doctrine, it seems to say no more than that permitted activities must not unduly interfere with use of the resource by others, and must not damage the resource itself.

Whether there is a presumption in the statute that commercial activities are more damaging than private, noncommercial activities, we are not called upon to decide at this time.

IV. Must the Department Weigh Adverse Effects?

The second issue before us is whether the Department must weigh the adverse effects of these proposed projects and determine whether they are consistent with the public good under the test of Section 405.

As we have stated above, many projects proposed to the Department will probably meet the threshold requirement of the "public trust doctrine:" they serve some public purpose. This does not mean, of course, that all such projects are necessarily entitled to permits. The Department's Interim Procedures are quite correct in saying that the public benefits of a project must be weighed against their adverse effects, before a permit may be

issued. While most private activity has at least some public benefit, the benefit may be slight, and may justify only the slightest or most temporary appropriation of resources. Once a public trust determination is made, therefore, the Department must proceed to define the adverse effects of the project under Section 405. This adverse impact must then be weighed against the public benefits to be derived from the project (including the benefit to the applicant), to determine whether a permit should be issued.

At the consolidated hearing on these appeals held before the Board on August 30, 1990, the parties presented evidence that would be relevant to both the public benefits and the adverse effects of these projects. As to public benefits, the Angneys testified that their dredging project would improve navigation for other boats as well as for their own; the Tuckers argued that their project would control erosion and improve the appearance of the shoreline; and Mr. LeBlanc testified that the boat slip he proposed to build would be available to summer tenants of his cottages. All of this information, if correct, is relevant to the magnitude of the public benefits yielded by these projects, over and above the benefits to the applicants themselves as members of the public. Although all of these benefits are modest, the appellants presented evidence that the environmental effects of these projects would also be slight. However, the evidence as to both benefits and adverse impacts was sparse, and both the applicants and the Department were operating under invalid procedures; so, we are reluctant to arrive at any conclusion on the record before us.

Therefore, we express no view as to whether permits should be issued in these cases. We believe the Department is better equipped in staff and experience than we to determine the facts and strike the balance. Accordingly, we remand all three appeals.

V. Are These Applications Subject to the Interim Procedures?

At oral argument and in their briefs, the Angney appellants argued that their application was not subject to the Interim Procedures, since their application was submitted before the Interim Procedures had been adopted in final form. See, Smith v. Winhall Planning Commission, 140 Vt. 178 (1980). The Department had announced its intention to adopt the Procedures, but as it did not choose to adopt them through a formal rulemaking procedure, we cannot find that their announcement gave constructive notice to the appellants, and there is no evidence that the appellants had actual notice of the Interim Procedures before submitting their applications. It may be, therefore, that the Interim Procedures do not apply in these cases.

As we find that the Interim Procedures are in any case invalid in pertinent part, this question is moot. But it was also argued that the applications in any case are subject to the public trust doctrine, and with this we agree. The statute under which these applications are submitted has at all pertinent times said that the waters of the state were a public trust, and called for an

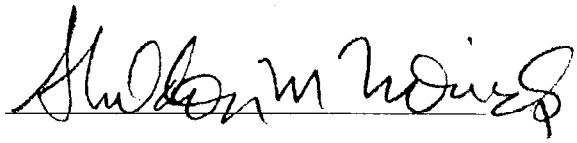
application to meet the test of the public good. There is no suggestion in the record that the applicants relied in any way on any particular interpretation of these words, or that they would be prejudiced by application of the interpretation we give today. See In re McCormack Management Co., 149 Vt. 585 (1988). Accordingly, these applications like all others on which final action has not been taken are subject to the Public Trust Doctrine.

ORDER

The "Interim Procedures for the Issuance or Denial of Encroachment Permits," Section 3, is invalid to the extent inconsistent with this opinion. These cases are remanded to the DEC for final action not inconsistent with this opinion.

Dated at Montpelier, Vermont, this 12th day of February, 1991.

Vermont Water Resources Board



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