State of Vermont
WATER RESOURCES BOARD

In re: Dean Leary (Appeal of DEC Permit No. 93-29
Point Bay Marina, Charlotte, Vermont)
Docket No. MLP-94-08

MEMORANDUM OF DECISION

Application of the Public Trust Doctrine

This decision pertains to a Motion for Prehearing Determination filed by Point Bay Marina, Inc., (the permittee), and various other motions and responses filed by the parties, all related to the power of the Water Resources Board (Board) to consider the public trust doctrine in an appeal of an encroachment permit. As explained below, the Board concludes that, independent of its authority to make a public good determination under 29 V.S.A. § 405, it has a duty as trustee of the public waters of the state to determine whether an encroachment subject to its review impairs public trust uses and this duty exists whether or not the Board has adopted rules for this purpose. To guide its application of the public trust doctrine on a case-by-case basis, the Board declares that it will rely on common law and constitutional interpretations of the doctrine.

I. BACKGROUND

On June 9, 1994, the Water Resources Board (Board) received a notice of appeal filed by Dean W. Leary of Charlotte, Vermont, seeking review of the June 3, 1994, decision of the Department of Environmental Conservation (DEC), Agency of Natural Resources (ANR), granting MLP Permit No. 93-29. This permit authorizes Point Bay Marina, Inc., to add seven finger docks and relocate two finger docks at its facility on Lake Champlain in Charlotte, Vermont, and authorizes the previous relocation of a service dock and swim docks at that facility. Mr. Leary filed his appeal pursuant to 29 V.S.A. § 406(a).

A prehearing conference was held on July 20, 1994, and a Prehearing Conference Report and Order was issued September 30, 1994, setting forth deadlines for requests for rulings on preliminary matters. On November 15, 1994, the permittee filed a Motion for Pre-hearing Determination, seeking an order concerning the scope of the Board's review with respect to the public trust doctrine. On November 18, 1994, the Conservation Law Foundation (CLF) and the Agency of Natural Resources (ANR) also filed motions concerning the application of the public trust doctrine. All three motions were timely filed.

On December 2, 1994, CLF filed a timely response in opposition to the ANR's Motion for Preliminary Determination on the Public Trust Doctrine. On December 2, 1994, appellant Leary also filed a response to the various motions seeking preliminary rulings on the Board's authority to consider the public trust doctrine in this proceeding.

Oral argument on the permittee's Motion to Dismiss was held on January 24, 1995. Those presenting argument were the permittee, ANR, and CLF, represented by counsel, and the appellant, pro se. The Board deliberated with respect to the parties' filings on January 24, February 14 and March 28, 1995.

II. DISCUSSION

The permittee argues that the Board is a creature of statute, that it may exercise only such powers as are granted to it by the Legislature, and that while the Legislature may have granted the Board authority to consider the public trust doctrine in its administration of 29 V.S.A. ch. 11, the Board is not free to do so absent the adoption of rules to govern its discretion. The permittee relies on the superior court's decisions in In re Angney, Docket No S96-91 LaCa (Lamoille Sup. Ct. Sept. 4, 1992) aff'd on recon., No. S96-91 LaCa (March 8, 1993), and the Board's Memorandum of Decision on Preliminary Issues at 4, In re: Aquatic Nuisance Control Permit #C93-091-Morey, Docket No. WQ-93-04 (Sept. 10, 1993; rev. Sept. 24, 1993).[1]

The ANR concurs with the permittee that the Board cannot consider the public trust doctrine in this proceeding since it

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[1] The permittee cites In re: Aquatic Nuisance Control Permit #C93-01, Docket No. WQ-93-04, for the proposition that the Board has already decided that it lacks authority to consider the public trust doctrine in a contested case proceeding and should therefore affirm its position in this appeal. However, **a review of the** Board's decisions in Docket No. WQ-93-04 reveals that the Board was split (2-to-2) in declining to consider the public trust doctrine in that particular case. Memorandum of Decision on Preliminary Issues at 6 and Dissent (Sept. 10, 1993; rev. Sept. 24, 1993). Moreover, in its final decision, the Board indicated that, in light of the split vote, it might "in subsequent cases revisit the question of its authority to address public trust issues." Findings of Fact, Conclusions of Law and Order at 23 (April 12, 1994).

has not first adopted rules pursuant to 29 V.S.A. § 401 to guide its and the Department of Environmental Conservation's (DEC) discretion in the permitting of encroachments under 29 V.S.A. ch. 11. The ANR relies on both an analysis of the language of the Board's enabling statutes (3 V.S.A. § 2878 and 10 V.S.A. § 905) and the policy section (29 V.S.A. §401) of the Management of Lakes and Ponds statute. The ANR further relies on the superior court's Angney decisions and a series of Vermont Supreme Court decisions addressing the delegation doctrine. Trybulski v. B.F. Hydro-Elec. Corp. 112 Vt. 1 (1941); Gloss v. The Delaware and Hudson Railroad Co., 135 Vt., 419 (1977); In re Agency of Administration, 141 Vt. 68 (1982): Westover v. Village of Barton Electric, 149 Vt. 356 (1988).

The appellant and CLF counter that neither the Board's enabling statute nor the Management of Lakes and Ponds statute requires the adoption of formal rules as a prerequisite for the Board's exercise of its common law trustee responsibility to safeguard public trust property. The Board agrees with their analysis.

First, neither 3 V.S.A. § 2878 nor 10 V.S.A. § 905 definitively describes the duties and powers of the Board. Indeed, the ANR in its memorandum selectively extracted only those portions of 10 V.S.A. § 905 that relate to the Board's rulemaking authority under Title 10, and not its adjudicatory powers with respect to appeals filed from ANR decisions under Title 10 or any other statutory provision.

Second, the language in the policy statement of 29 V.S.A. § 401 provides in relevant part:

> The management of these waters and lands shall be exercised by the department of environmental conservation in accordance with this chapter and the rules of the water resources board.

(Emphasis added by the ANR, Agency of Natural Resources' Motion for Preliminary Determination at 4 (Nov. 18 1994).) While the ANR reads this language to mean that the Board must adopt rules as a prerequisite to the management of public trust resources, the statute on its face does not require the adoption of rules. Rather, the language of 29 V.S.A. § 401 only indicates that the ANR and the Board must render regulatory decisions on proposed encroachment applications in accordance with the requirements of the statute and consistent with any Board rules that may exist to govern the proceeding. In fact, the DEC currently administers a permitting program for encroachments without rules adopted by the Board.

Moreover, the superior court's decisions in Ananey do not stand for the propositions asserted by the permittee and the ANR. The court in Ananev ruled only that the ANR had exceeded its delegated authority in issuing interim procedures that provided "further amplification of how to 'manage' those [statutory Lakes and Pond] criteria...." In re Anqney at 6 (Sept. 4, 1992). The court merely stated that the Board alone may adopt rules that establish substantive law governing the issuance of encroachment permits and that the DEC may not usurp the Board's authority to adopt rules. Id. The Ananev decision does not stand for the proposition that the Board must adopt rules before the DEC and the Board can carry out their common law public trust obligations. In fact, the parties never asked the court to address the Board's or the ANR's common law trustee duty to insure that their actions do not harm protected public trust interests or exclude the public from the "common and public use" of boatable waters. See Hazen v. Perkins, 92 Vt. 414, 419 (1918).[2]

Therefore, the question whether the Board should consider the public trust doctrine in this proceeding turns not on what rulemaking authority has been delegated by the Legislature but whether the Board has a duty, independent of the public good determination under 29 V.S.A. § 405, to assure the protection of public trust uses. The Board believes that it does, consistent with the superior court's ruling in In re Williams Point Yacht Club, Docket No. S213-89Cnc (April 1.6, 1990). Case law from other jurisdictions also supports this position. See, for example United Plainsmen Ass'n v. North Dakota State Water Conservation Comm., 247 N.W. 2d 457 (N. Dak. 1976); National Audubon Society v. Superior Court of Alpine County, 33 Cal.3d 419, 435 (1983); Kootenai Environ- mental Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983).

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[2] The Board has offered in the past to work with the ANR to develop proposed rules with respect to application of the public trust doctrine in the context of the administration of the Management of Lakes and Ponds statute. Letter from Water Resources Board Chair Rocheleau to ANR Secretary Eastman, dated November 1, 1991, re: Public 'Trust Rules for Managment of Lakes and Ponds (29 V.S.A. Chapter 11). However, as indicated above, the Board believes that rulemaking is not a precondition for the exercise of its trustee duty to consider the public trust doctrine in encroachment permit appeals.

As a part of State government, the Board has a fiduciary obligation under the public trust doctrine to determine that encroachments will not have a detrimental effect on public trust uses. Hazen v. Perkins, 92 Vt. 414 (1918); State v. Malmcuist, 114 Vt. 96 (1944); In re Establishment of Water Levels of Lake Sevmour, 117 Vt. 367 (1952); State of Vermont v. Central Vermont Railway, Inc., 153 Vt. 337 (1989). In making this determination, the Board may rely on the guidance provided by case law both from this jurisdiction and other jurisdictions recognizing the public trust doctrine. In many instances, the uses identified in 29 V.S.A. § 405 are identical to the uses protected by the public trust.

III. ORDER

For the forgoing reasons, it is hereby declared that the Board will consider the application of the public trust doctrine in this proceeding.

It is hereby ordered that the parties prepare their cases taking into consideration the Board's position as articulated in this Memorandum of Decision.

Dated at Montpelier, Vermont, this 13th day of April, 1995.

Vermont Water Resources Board
by its Chair

Willia Boyd Davies

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
Gail Osherenko
Jane Potvin