

State of Vermont
WATER RESOURCES BOARD

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

DISMISSAL ORDER

I. Procedural Background and Jurisdictional Statement

On June 3, 1994, the Department of Environmental Conservation, Agency of Natural Resources (ANR), issued a Management of Lakes and Ponds Permit (DEC Permit No. 93-29) to Point Bay Marina, Inc. (the permittee) for the addition of seven finger docks, the proposed relocation of two finger docks, and the prior relocation of a service and swim dock at the permittee's marina on Lake Champlain in Charlotte, Vermont. On June 7, 1994, Dean Leary of Charlotte, Vermont (the appellant) filed a notice of appeal with the Water Resources Board (Board), seeking de novo review of the permit decision pursuant to 29 V.S.A. ch. 11, the Public Trust Doctrine, and applicable provisions of the Vermont Constitution. The Board has jurisdiction over this matter for the reasons that the proposed finger docks and the service and swim facilities are encroachments upon public waters requiring permit approval within the meaning of 29 V.S.A. §§ 402(3) and 403(a), and a permit was issued by the ANR for these encroachments from which an appeal was duly filed pursuant 29 V.S.A. §406(a) .

This appeal was noticed on July 1, 1994, with publication in the Burlington Free Press occurring July 6, 1994. A prehearing conference was held on July 15, 1994, in Montpelier, Vermont. On September 30, 1994, a Prehearing Conference Report and Order was issued, establishing a schedule for the filing of intervention petitions and requests for preliminary rulings. On April 14, 1995, the Board issued a Memorandum of Decision on the Application of the Public Trust Doctrine in this proceeding. A Supplemental Prehearing Order governing the pre-filing of evidence was issued on September 5, 1995. A Second Supplemental Prehearing Order was issued on December 11, 1995.

Persons granted party status in this proceeding were the appellant, the permittee, ANR, and the Conservation Law Foundation (CLF). Additionally, the Vermont Boat and Marina Association (VBMA) was granted leave to participate as amicus curiae.

On December 6, 1995, the permittee filed with the Board a letter indicating that it would propose withdrawal of its permit application with respect to the finger docks, but would seek approval of the swim and service dock as relocated. Following a teleconference amongst the parties on December 8, the permittee filed with the Board on December 12, 1995, a written notice of its intention to withdraw its entire application for DEC permit No. 93-29 without prejudice to its right to re-apply. In the same filing, it also moved for dismissal of this appeal.

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The parties were provided with an opportunity to file written responses to the permittee's filing and to request oral argument. The permittee and CLF filed their responses in opposition on January 5, 1996. The permittee filed a memorandum in rebuttal on January 19, 1996. The ANR filed its written comments on January 19, 1996. No filings were received from the VBMA. On January 26, 1996, the appellant filed a request for oral argument.

Oral argument was noticed on January 29, 1996, and held on February 13, 1996, at 1:00 p.m., in Berlin, Vermont. Those participating were: the permittee, represented by Donald R. Powers, Esq.; the appellant, pro se; CLF, represented by Mark Sinclair, Esq.; and ANR, represented by James A. Caffry, Esq.

Following oral argument, the Board deliberated in open session and decided to grant the permittee's requested relief.

II. Discussion

In its letter of December 12, 1995, the permittee states that it "withdraws its application for Permit No. 93-29 without prejudice to its right to re-apply in the future" and "moves for dismissal of this appeal." Although 29 V.S.A. § 406(b) requires the Board to hear an encroachment permit appeal de novo (as though it were asked to review an application anew), the Board is directed by 29 V.S.A. § 406(c) to affirm, modify, or reverse the permit decision on appeal. In this case, because the ANR issued a decision authorizing the proposed and existing facilities under the terms of DEC Permit No. 93-29, the permittee's December 12 request as a notice of intent to abandon its interests in that permit and a motion for dismissal of the above-captioned appeal based on mootness. See Dismissal Order, In re: Herbert N. Lackshin, Docket No. CUD-94-14 (May 10, 1995).

The appellant urges the Board to reject the permittee's request. He argues that the Board should proceed with review of the specific encroachments authorized by DEC Permit No. 93-29 in accordance with the statutory standards of 29 V.S.A. § 405(b) and for their impacts on public trust uses. See Memorandum of Decision, Application of the Public Trust Doctrine, In re: Dean Leary, Docket No. MLP-94-08 (April 13, 1995). Moreover, the appellant argues that the proceeding should be expanded to encompass public trust review of the entire marina and its operations, based on the appellant's interpretation of the marina's prior permit, Permit No. 85-83, as amended by an agreement of June 22, 1990, between the appellant, permittee, and ANR.

CLF and the ANR support the permittee's decision to withdraw its request for approval of the new and relocated finger docks, but argue that the Board should retain jurisdiction to

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conduct a public trust review of the swim and service dock. whether or not these facilities remain in the location authorized by the ANR under DEC Permit No. 93-29, since these facilities have never been reviewed for their impacts under the public trust doctrine. CLF further argues that under the terms of the 1990 agreement, review of the swim and service dock should trigger public trust review of the entire marina.

The Board concludes that there is no legal basis for retention of jurisdiction over the present appeal. Once the permittee unconditionally relinquished its interests in DEC Permit No. 93-29, the subject matter of this appeal, there was no longer a jurisdictional basis for the Board's de novo review. The Environmental Board cases cited by CLF are not on point. See Re: Geoffrey Wilcock and Judith Burns, DR #224, Memorandum of Decision (September 17, 1990) and Re: H. A. Manosh Corp., DR #247, Memorandum of Decision (July 30, 1993) cited in Opposition of CLF to Point Bay Marina's Motion for Dismissal of Appeal at 9 (January 5, 1996). They stand for the proposition that the Environmental Board need not accept withdrawal of a request for a jurisdictional ruling where Act 250 jurisdiction already exists by virtue of previous development or the occurrence of substantial changes in the operations of a pre-existing project.

Even if the permittee had decided to retain its interests in that part of DEC Permit No. 93-29 authorizing the relocation of the swim and service dock (as proposed in the permittee's December 6, 1995, letter), and relinquished its interest with respect to the finger docks, the Board could not expand the scope of its review to encompass Public Trust review of the permittee's entire marina and its operations, even if the 1990 agreement could be read to suggest such a result. This is because the Board is limited to considering the permit immediately before it; its jurisdiction cannot be expanded by agreement of the parties.

Finally, the Board rejects the ANR's recommendation that the Board retain jurisdiction over the swim and service dock, and approve the relocation of these facilities as authorized in DEC Permit No. 93-29, on the asserted grounds that the present location best serves the public interest. If the permittee wishes to abandon its interest in DEC Permit No. 93-29, the Board will not stand in the permittee's way of doing so. If the permittee elects to move its swim and service dock to the previously unauthorized location, it will need a new permit or permit amendment allowing such a relocation or it may face enforcement by the ANR. However, if the permittee elects to remove the swim and service dock altogether or to re-apply for approval of the facility at the location authorized by DEC Permit No. 93-29, this is within its prerogative. The ANR is capable of conducting an original jurisdiction review for project conformance with both the statutory standards of 29 V.S.A. §405(b) and for conflicts with Public Trust uses.

For the foregoing reasons, the Board grants the permittee's dismissal request.

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III. ORDER

It is hereby ordered that:

1. DEC Permit No. 93-29, Management of Lakes and Ponds Program, is declared null and void; and
2. The above-captioned appeal is hereby dismissed without prejudice for lack of jurisdiction.

Dated at Montpelier, Vermont, this 11th day of March, 1996.

Vermont Water Resources Board



William Boyd Davies, Chair

Concurring:

William Boyd Davies
Stephen Dycus
Ruth Einstein
Gail Osherenko
Jane Potvin