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State of Vermont
WATER RESOURCES BOARD
29 V.S.A. §§ 401-410

In Re: Kevin Rose and the Champlain Kayak Club
(Appeal of DEC Permit No.: 95-23, Blodgett
Corporation, Lake Champlain, Burlington)
Docket No. MLP-96-01

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In this decision, the Water Resources Board determines that Blodgett Corporation's proposed dock will adversely affect the public good. Consequently, pursuant to 29 V.S.A. § 406 (c), the Board reverses the Department of Environmental Conservation's approval of Blodgett's application for a permit to encroach upon Lake Champlain.

I. PROCEDURAL SUMMARY

On January 29, 1996, the Department of Environmental Conservation ("DEC") issued Management of Lakes and Ponds Permit No. 95-23 ("Permit"). The Permit authorizes the applicant, Blodgett Corporation ("Blodgett"), to locate a 330 foot long post-supported dock in the waters of Lake Champlain from May 15 to September 30 of each year ("Dock").

On February 8, 1996, Kevin Rose filed an appeal with the Water Resources Board ("Board") from the Permit pursuant to 29 V.S.A. § 406 on behalf of himself, in his individual capacity, and as a representative of the Champlain Kayak Club ("Appeal"). On February 12, 1996, the Appeal was deemed complete, and a Notice of Appeal and Prehearing Conference ("Notice") was sent to persons/entities required to receive written notice of the Appeal. On February 16, 1996, the Notice was published in the Burlington Free Press.

On March 13, 1996, George E. H. Gay, Esq., the Board's delegate, convened a prehearing conference ("Conference") in Montpelier. The following persons/entities ("Conference Participants") entered timely appearances and participated: Kevin Rose, pro se; Blodgett, by Christopher Gannon, Esq.; the Champlain Kayak Club ("Club"), by Kevin Rose; the Agency of Natural Resources ("ANR"), by John Kassel, Esq.; and the Conservation Law Foundation ("CLF"), by Frank Wymond. Kristina Bielenberg, Esq., a Board attorney, was also present.

During the Conference, CLF filed a motion to intervene ("CLF Motion") as a matter of right pursuant to Rule 22 (A)(7) of the Board's Rules of Procedure ("Rules") or by permission pursuant to Rule 22 (B) of the Rules. In the alternative, CLF requested permission to participate as amicus curiae. Mr. Rose and the Club did not oppose the

CLF Motion. Both Blodgett and ANR reserved the right to do so.

The Conference Participants each received a Board fact sheet that identifies the Board chair, William Boyd Davies, and Board members. Ms. Bielenberg noted that Board member Potvin once operated a fish and tackle business on Lake Champlain and that Board member Potvin is now a part time employee of the Lake Champlain Basin Program. Mr. Gay advised the Conference Participants that William A. Bartlett, the Board's Executive Officer, is a member of the Club.

Mr. Gay asked the Conference Participants if they had any objection to Chair Davies and any of the other Board members hearing the appeal. He also asked whether any of the Conference Participants objected to Mr. Bartlett staffing the Appeal. Blodgett and ANR objected to Mr. Bartlett's staffing the Appeal. There were no other objections.

On March 19, 1996, a draft Prehearing Conference Report and Order was circulated to the Conference Participants for comment. On March 25, 1996, the Board received comments from Blodgett and CLF.

On March 27, 1996, Blodgett filed a response to the CLF Motion in which it opposed CLF's effort to intervene as a full party. Blodgett did not object to CLF's participation in the Appeal as amicus curiae. No reply was filed to Blodgett's response to the CLF Motion .

On April 4, 1996, Chair Davies issued a final Prehearing Conference Report and Order ("Report") memorializing the agreements reached during the Conference, setting forth the issues in the Appeal, stating the standard of review, noting that Mr. Bartlett had voluntarily recused himself from participating in the Appeal, establishing a filing/hearing schedule, and resolving the outstanding party status questions as follows:

The Board's party status determinations in the Dean Leary case guide the analysis of the CLF Motion. See In re: Dean Leary, Docket No. MLP-94-08, Preliminary Order, Standing and Party Status Issues, December 28, 1994. CLF has demonstrated that it satisfies the requirements of both Rule 22 (A)(7) and Rule 22 (B) of the Rules in the Appeal.

* * *

Blodgett and ANR shall be parties to the Appeal as a matter of right pursuant to 29 V.S.A. § 406 and/or Rule 22(A) of the Rules.

Mr. Rose, the Club and CLF shall be parties as a matter of right and by permission pursuant to 29 V.S.A. § 406 and/or Rules 22(A) and (B) of the Rules.

Report at 7.

On April 10, 1996, Blodgett filed an objection to the Report in which Blodgett contended that Chair Davies erred by granting CLF party status. On May 7, 1996, the Board overruled Blodgett's objection, thereby affirming Chair Davies' decision to grant CLF party status. The Board stated in its Preliminary Memorandum of Decision and Order on Party Status ("Memorandum"):

CLF has demonstrated that it has a substantial interest which may be affected by the outcome of this matter. Its members use and enjoy the waters of Lake Champlain for boating, fishing and other activities. These are substantial interests. If constructed as authorized by Management of Lakes and Ponds Permit No. 95-23, Blodgett's dock will intrude into the waters of Lake Champlain. As a result, the dock may adversely affect CLF's members' use and enjoyment of the waters of lake Champlain for boating, fishing and other activities.

Memorandum at 2.

During May and June, the parties prefiled witness lists, testimony, and exhibits. On June 19, 1996, Blodgett filed objections to certain prefiled testimony ("Blodgett Evidentiary Objections"). On June 26, 1996, CLF filed a response to the Blodgett Evidentiary Objections.

On June 27, 1996, Chair Davies convened a second prehearing conference in Montpelier ("Second Conference"). Blodgett, ANR, Mr. Rose, and the Club participated. On July 3, 1996, Chair Davies ruled on the Blodgett Evidentiary Objections. Chair Davies allowed the parties until July 17, 1996 to object to his rulings. There were no objections.

The Board held a hearing on the merits on July 24, 1996. The following parties participated: Kevin Rose, pro se; Blodgett, by Christopher Gannon, Esq.; the Club, by Kevin Rose; ANR, by Andrew Raubvogel, Esq.; and CLF, by Mark Sinclair. At the outset of the hearing, Blodgett sought to preserve the Blodgett Evidentiary Objections. Chair Davies denied Blodgett's effort to do so. Because Blodgett failed to object to Chair Davies' July 3, 1996 ruling on the Blodgett Evidentiary Objections in a timely manner, the Chair ruled that Blodgett had waived such objections.

During the hearing, Board member Potvin discovered and further disclosed that in the course of her duties at the Lake Champlain Basin Program she served on a committee that had reviewed and approved a small grant for the Club. Chair Davies asked the parties if they had any objection to Ms. Potvin's continued participation in the Appeal in light of her service on the committee in question. There were no objections.

During August, the parties filed proposed findings of fact, conclusions of law, and orders. On October 2 and 23, 1996, the Board reviewed the record and deliberated. This matter is now ready for decision. To the extent that any of the parties' proposed findings of fact are included below, they are granted; otherwise, they are deemed redundant, irrelevant, or inaccurate and are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

II. FINDINGS OF FACT

1. On July 3, 1995, Blodgett filed an application with DEC for a Management of Lakes and Ponds permit authorizing the location of an L shaped, pressure treated, wooden dock, four feet wide by 330 feet long, supported by galvanized steel posts, with footpads in the "public waters" of Lake Champlain ("Dock").
2. The Dock would have a total surface area of approximately 1,320 square feet.
3. The Dock would consist of 33 sections, each of which would measure approximately four feet wide, ten feet long, and seven inches thick. The first few sections would be located above dry land -- gently sloping down an embankment to the water. The remaining sections would be located over the water.
4. No dredging or filling would be required to install the Dock. Freshly treated lumber would not be used. The Dock would not provide or include a sanitary pumpout or gasoline service.
5. The Dock would take approximately two days to install. It would be "in place" from mid-June through mid-September of each year. It would be removed from Lake Champlain and stored on dry land at all other times.
6. The Dock's height above the lake bottom of Lake Champlain would be adjusted in seven inch increments as water levels increased or decreased.

7. The first 204 feet of the Dock would extend roughly in a westerly direction more or less perpendicular to or from the shoreline ("East-West Leg"). At the terminus of the East-West Leg, the Dock would turn at a right angle and extend 126 feet in a southerly direction parallel to the shoreline ("North-South Leg").
8. There are no other similarly sized or configured docks along the shoreline in the vicinity of Burlington.
9. The mean water elevation of Lake Champlain is 95.5 feet National Geodetic Vertical Datum ("NGVD"). The East-West Leg would "cross" this 95.5 foot contour approximately 48 feet from its origin on the Blodgett Property.
10. Approximately 156 feet of the East-West Leg would encroach on the waters of Lake Champlain. The entire North-South Leg, 126 feet, would encroach on the waters of Lake Champlain. The surface area of that portion of the Dock which would encroach on the waters of Lake Champlain would be approximately 1,128 square feet.
11. Lake bottom elevations in the vicinity of the North-South Leg are approximately 94 to 94.5 feet. The median mid-June water depth below the North-South Leg is approximately two to three feet. The median water depth in this same area on August 30 is approximately one-half foot to one foot.
12. An old stone pier comprised of stones and boulders is located just to the north of where the Dock would be located ("Old Stone Pier"). A portion of the Old Stone Pier "runs" for 200-400 feet in a south to north direction, parallel to the shoreline, about 100 feet west of and 40-80 feet north of the northern most part of the North-South Leg ("Outer Arm"). Then the Old Stone Pier turns at a right angle to the shoreline and "runs" in a west to east direction until it abuts the Blodgett beach.
13. The Old Stone Pier is exposed during some of the recreational season -- March thru October.
14. A sandbar is located between a point near the Outer Arm's northern terminus and the shoreline ("Sandbar").
15. With a lake water elevation of 96.5 feet, approximately 40 feet of the Sandbar is exposed. With a lake water elevation of 95.5 feet, approximately 60

feet of the Sandbar is exposed. With a lake water elevation of 94.8 feet, the entire Sandbar is exposed.

16. The Dock's purpose is to improve access to Lake Champlain for Blodgett employees, their family members, and their friends, and to enhance Blodgett's recreation area.

17. The Dock is intended solely for the temporary docking of boats while the boaters use the beach and recreation area, and for dropping off and picking up passengers for lake recreation. No vessel would be allowed to remain at the Dock overnight except in emergencies. The Dock could accommodate from six to ten Boats at one time. It could also serve as a launch site for wind-surfing. The Dock would not be intended for swimming, diving, or fishing.

18. The Dock would extend into the waters of Lake Champlain from real property that is owned by Cloverleaf Properties, Inc., located at 45-50 Lakeside Avenue, Burlington, and approximately 15 acres in size ("Blodgett Property").

19. The Blodgett Property is roughly triangular in shape, with a broad base at the southern end and narrow tip at the northern end. It is bordered to the south by Lakeside Avenue, to the east by railroad tracks of the Vermont Railway, and to the west by Lake Champlain.

20. A manufacturing plant, office building, and mixed use building are located on the southern portion of the Blodgett Property. The Blodgett Property is fenced and closed to the general public. The fence is locked after working hours. All employees have a key to a gate in the fence. After working hours in the summer, a Blodgett security guard is stationed at this gate and monitors use of the Blodgett Property.

21. The northern portion of the Blodgett Property is an employee recreation area which includes a beach, picnic area, and volley ball courts ("Recreation Area").

22. Except for special occasions, such as the fourth of July, the Recreation Area is only open to Blodgett's employees, their families, and their guests. Blodgett employs about 300 people.

23. Blodgett does not know how many user visits take place at the Recreation Area per annum, although Blodgett believes that such use is "steady."

Approximately 300 people visit the Recreation Area on the day of Blodgett's summer picnic, and approximately 1,000 people visit the Recreation Area on the fourth of July. Blodgett has not determined how many of its employees have boats or would be likely to use the Recreation Area after the Dock was installed solely as a result of the Dock.

24. Blodgett has not demonstrated any public need that would be served by the Dock.

25. The Dock would not improve access to Lake Champlain for the public or Blodgett's employees. Blodgett proposes no new launching facility. Any Blodgett employee using the Dock for day-use mooring would already have boat access to Lake Champlain from other areas.

26. Use of the Dock by Blodgett employees would not constitute a "public use" of the same character as a public fishing access, a community boathouse, a marina open to the public with regular berth turnover, or a commercial wharf. While the Dock might benefit those Blodgett employees, family, and friends who wish to gain access to the Blodgett Property by boat, it would not benefit the public at large.

27. DEC, pursuant to 29 V.S.A. § 405 (a), provided notice of the application to state and local officials, abutting property owners, and others having an interest in the proposed encroachment. The notice stated that DEC would entertain comments on the Dock and provide a public informational meeting if such a meeting were requested. DEC did not receive any comments or requests for a public meeting. DEC received no information regarding public use of the Burlington Bay area of Lake Champlain.

28. Based on the information available to it at the time, on January 29, 1996, DEC issued the Permit. DEC did not visit the Blodgett Property before issuing the Permit. DEC was not aware that the public makes frequent use of the area of Lake Champlain in which the Dock would be located.

29. If, during its permitting process, DEC had received the information provided by Mr. Rose during the Board's July 24, 1996 hearing, DEC would have concluded that the Dock would adversely affect the public good under 29 V.S.A. § 405 (b) due to its impact upon navigation and other public recreational uses.

30. ANR now believes that the public frequently uses the area of Lake

Champlain in which the Dock would be located and that the Dock would adversely affect public navigational and recreational use of Lake Champlain.

31. Canoeing and kayaking ("Paddling") are increasingly popular recreational activities on Lake Champlain. The popularity of canoes and kayaks ("Paddle Craft") is demonstrated by the existence of several organized Paddling clubs in Vermont. The Vermont Paddlers Club has over 200 members, and the Club has over 210 members.

32. Paddle Craft need only about three to six inches of water to float. Therefore, they can easily navigate in the shallower waters of Lake Champlain along the shoreline.

33. The lake water elevations in the area of Lake Champlain where the Dock would be located provide navigable conditions for Paddle Craft during most of the recreational season -- from March to October. Lake Champlain's lake water elevations are at their highest from March thru July.

34. When the Old Stone Pier is exposed, canoeists and kayakers ("Paddlers") can get out of their Paddle Craft and walk over the Old Stone Pier and continue paddling.

35. When the Sandbar is exposed, Paddlers must detour to the west of the Old Stone Pier or drag their Paddle Craft over the Sandbar to travel past the Blodgett shoreline.

36. Paddlers use the area of Lake Champlain where the Dock would be located. This area is easily accessible to Paddlers because they can launch their Paddle Craft at nearby Oakledge Park and travel north along the shoreline towards downtown Burlington -- passing along the shoreline of the Blodgett Property.

37. The Club often sponsors evening paddles which leave the Burlington shore from Oakledge Park and travel along the shoreline of the Blodgett Property.

38. The shallower waters in the area where the Dock would be located provide natural protection for Paddlers from conflicts with larger, faster craft.

39. Some Paddlers, particularly beginners, prefer to paddle close to the shoreline in shallower waters because such waters are safer. Additionally, some Paddlers prefer to paddle closer to the shoreline because they believe that the

shoreline is aesthetically more interesting than open water.

40. When boats were tied up at the Dock, Paddlers traveling along the Blodgett shoreline would be compelled to pass at least 250 feet from the shore. This would cause undesirable conflicts with larger, faster craft. The Dock and its related uses would impede the public's ability to pass on and in the water along the Blodgett shoreline.
41. No undue water quality problems would likely result from the installation or use of the Dock.
42. The Dock would not have an adverse effect on fish and wildlife.
43. The Dock would not have an adverse effect on aquatic or shoreline vegetation.
44. The Dock would not have an adverse effect on fishing and swimming.
45. On August 22, 1996, the Dock was "approved" by the Burlington Harbor Commission subject to a requirement that Blodgett mark the remains of the Old Stone Pier as a safety measure for boaters. On September 11, 1995, the Burlington Zoning Board of Adjustment approved the Dock. On January 12, 1996, the Burlington Planning Commission approved the Dock.
46. The Dock would be consistent with municipal shoreland zoning ordinances and applicable regional and state plans. These local review processes did not address the Dock's impact on navigation and public uses of Lake Champlain. Burlington defers to the State of Vermont to determine whether an encroachment is consistent with the Public Trust Doctrine.
47. The 1991 Burlington Municipal Development Plan does not specifically state a policy regarding installation of docks in Lake Champlain.
48. The Board conducted a site visit to the Blodgett Property during the July 24, 1996 hearing. The Board saw the Dock in sections on the Blodgett Property. The Board saw a metal pipe indicating the shoreline location of median water elevation of Lake Champlain, the Sandbar, the Old Stone Pier, a marker indicating the western terminus of the East-West Leg and another marker indicating the southern terminus of the North-South Leg. Two Paddlers paddled past the Blodgett shoreline during the site visit.

49. Blodgett determined that a dock that did not encroach into the waters of Lake Champlain more than 50 feet beyond the median lake water elevation, 95.5 feet NGVD, would not accommodate more than four boats at a time. Therefore, Blodgett did not consider that particular alternative to the Dock further.

50. Blodgett did not consider a mooring area as an alternative to the Dock.

51. Blodgett considered locating the Dock at a more southerly point on the Blodgett Property but rejected that particular alternative to the Dock because of a steep embankment which would prevent easy access to such a dock.

III. CONCLUSIONS OF LAW

1. JURISDICTION

Lake Champlain is considered "public waters" of the State of Vermont. See 29 V.S.A. §§ 402 (4) and (7) and 10 V.S.A. § 1422 (4). The Dock "encroaches" more than 50 feet beyond the shoreline as delineated by the mean water level of Lake Champlain -- 95.5 feet NGVD. See 29 V.S.A. § 402 (3). Consequently, DEC had jurisdiction over Blodgett's application pursuant to 29 V.S.A. § 403, and the Board has jurisdiction to hear the Appeal pursuant to 29 V.S.A. § 406.¹

At the Board's July 24, 1996 hearing, Blodgett suggested that, pursuant to § 403 (b)(1)(A) and (b)(3), it could, without review and/or approval by DEC or the Board, construct a dock extending 50 feet into the waters of Lake Champlain, along with an associated, temporary extension, for a period of six months "if required by low water." Blodgett misinterprets § 403 (b)(1)(A) and (b)(3). While docks of up to fifty feet in length are exempt from the encroachment permit requirements, temporary extensions thereto are not allowed on an annual basis. The clause "if required by low water," contrary to Blodgett's suggestion, refers to low water levels occurring in years when the water levels of Lake Champlain, in its entirety, are unusually low. Thus, the temporary extensions provided for by § 403(b)(3) could be employed only rarely. They could not be a regular, annual occurrence.

2. STANDARD OF REVIEW

¹ *All statutory citations herein shall be to 29 V.S.A. § 401-410 (Chapter 11 -- Management of Lakes and Ponds) unless otherwise noted.*

Review of the Appeal is conducted on a de novo basis pursuant to §406 (b). Blodgett, as the permit applicant, bears the burdens of proof and persuasion. The Board must issue an order affirming, modifying, or reversing the action of DEC pursuant to § 406 (c).

3. THE STATUTE -- IN RELEVANT PART

The Appeal is controlled by §§ 401-410. Section 401 provides in part:

Lakes 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 the lands shall be managed to serve the public good, as defined by section 405 of this title, to the extent authorized by statute.

§ 401. Except under very limited circumstances, "no person shall encroach on any of those waters and lands of lakes and ponds under the jurisdiction of the board without first obtaining a permit under this chapter." § 403 (a). The statute clearly establishes an instance, applicable in the Appeal, when neither the DEC nor the Board may issue a permit. It states: "No person shall be granted a permit if the encroachment adversely affects the public good." Id. (emphasis added). The "public good" is "that which shall be for the greatest benefit of the people of the state of Vermont." § 402 (6). Section 405 explains:

In determining whether the encroachment will adversely affect the public good, the department shall consider the effect of the proposed encroachment as well as the potential cumulative effect of existing encroachments on water quality, fish and wildlife habitat, aquatic and shoreline vegetation, navigation and other recreational and public use, including fishing and swimming, consistency with the natural surroundings and consistency with municipal shoreland zoning ordinances or any applicable state plans.

§ 405 (b).

The Board must evaluate the Dock's impacts upon the "public good" before considering the Dock in light of the Public Trust Doctrine. As stated by the Vermont Supreme Court: "Under longstanding practice and precedent, we must not consider constitutional questions unless the disposition of the case requires it. Statutory claims are to be considered first, and if dispositive, we will not need to reach the constitutional issues." State v. Curtis, 157 Vt. 275, 277 (1991) (citations omitted). Similarly, if the Dock would have an adverse affect upon the "public good," the statute set out above is

dispositive, and the Board will not reach the Public Trust Doctrine. Id.

The Dock would create an impediment to navigation. It would interrupt the use of Paddle Craft in the public waters along the Blodgett Property. Paddlers would be compelled to detour out into the waters of Lake Champlain beyond the Old Stone Pier. This would force some Paddlers into uncomfortably deep waters, away from the shoreline scenery and into power and sail boat traffic lanes. Consequently, the Dock would adversely affect the "public good," and according to § 403 (a), a permit may not issue.

4. PUBLIC TRUST DOCTRINE

Because Blodgett has failed to meet its burden of proof to demonstrate that the Dock would not result in an adverse effect on the public good, the Board will not address whether the Dock would be consistent with the Public Trust Doctrine.

IV. ORDER

Pursuant to 29 V.S.A. § 406 (c), the Department of Environmental Conservation's approval of a Management of Lakes and Ponds permit authorizing the Blodgett Corporation to locate a 330 foot long post-supported dock in the waters of Lake Champlain from May 15 to September 30 of each year is hereby **REVERSED**.

Dated at Montpelier, this 7th day of November, 1996.

WATER RESOURCES BOARD



William Boyd Davies, Chairman

Concurring: William Boyd Davies
Stephen Dycus
Gail Osherenko
Jane Potvin

Not participating: Ruth Einstein

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