

STATE OF VERMONT
WATER RESOURCES BOARD

In re: Killington Ltd.
Docket No. WQC-97-10 and
Docket No. MLP-97-09

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a Motion to Alter filed by Killington Ltd. with respect to the statement of the public good issue in the appeal of Management of Lakes and Ponds Permit 97-26. As explained below, the Board denies the motion.

I. BACKGROUND

On November 21, 1997, the Department of Environmental Conservation ("DEC") issued Management of Lakes and Ponds Permit 97-26 ("Permit 97-26") to Killington Ltd. ("Killington") pursuant to 29 V.S.A. §§ 401-409, Management of Lakes and Ponds ("Chapter 11"). Permit 97-26 authorizes Killington to install a water intake system in Woodward Reservoir to withdraw water for snowmaking and a dry hydrant. ("Project").

On December 1, 1997, Nicholas J. Lenge tiled an appeal from Permit 97-26 pursuant to 29 V.S.A. § 406. Mr. Lenge was joined in the appeal by Thomas and Valerie Hickey, Joseph E. Calabrese, Thomas J. Calabrese, Lucas Krupywynckj and Allison Peck, Gilford and Shirley Richardson, Jonathan and Paula Tucker, Paul M. Dorr and Christine M. Baranowski, William and Janice Nacel, and George and Patricia Hodgdon. Mr. Lenge and these individuals shall be collectively referred to as the "Appellants."¹

The Appellants contend that the DEC erred in issuing Permit 97-26 with respect to the Project's compliance with the public good as set forth at 29 V.S.A. § 405(b) and the public trust doctrine.

On December 1, 1997, the Board, by its Executive Officer, docketed the appeal as MLP-97-09 ("MLP-97-09").

On December 19, 1997, William Boyd Davies, Chair of the Water Resources Board, convened a prehearing conference in this appeal.

On December 24, 1997, Chair Davies issued a Memorandum to Parties regarding dates for the filing of memoranda concerning party status and the scope of the issues on appeal.

¹John S. Tidd was named in the Notice of Appeal. Mr. Tidd no longer seeks to be a party in this proceeding and shall not be included as one of the Appellants.

On January 5, 1998, the Appellants filed a Memorandum in Support of Party Status.

On January 6, 1998, Killington filed an Objection to Appellant's Notice of Appeal.

On January 12, 1998, Killington filed a Response to Appellants' Memorandum in Support of Party Status.

On January 12, 1998, the Appellants filed a Response to Killington's Objection to Notice of Appeal.

On February 10, 1998, the Board issued In re: Killington Ltd., Docket No. MLP-97-09, Memorandum of Decision (Feb. 10, 1998).

On February 18, 1998, Killington filed a Motion to Alter with respect to a portion of the Board's February 10, 1998 Memorandum of Decision,

On February 23, 1998, the Appellants filed a response to Killington's Motion to Alter.

On February 27, 1998, the Chair of the Board issued an Order which allowed parties to respond to Killington's Motion to Alter on or before March 9, 1998.

On March 10, 1998, the Board deliberated with respect to the Motion to Alter.

II. DECISION

There can be no more than two issues in an appeal of a permit issued pursuant to Chapter 11: (1) whether a project adversely affects the public good; and (2) whether the project will have a detrimental effect on public trust uses. The Appellants have appealed both of these issues. Killington's Motion to Alter pertains to how the Board's February 10, 1998 Memorandum of Decision has framed the public good issue.

The Board's February 10, 1998 Memorandum of Decision states that the issue with respect to public good is as follows:

Whether, pursuant to 29 V.S.A. §§ 401-409, the Project adversely affects the public good with regard to 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 shore land zoning ordinances or any applicable state plans.

Killington's Motion to Alter seeks a clarification with respect to which public good factors it must address as part of its "case-in-chief."

Because this appeal is de novo, once the issue of public good is appealed, the Board must conduct the same review which 29 V.S.A. § 405(b) commands DEC to do. See 29 V.S.A. § 406(b). That is, the Board "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 uses, including fishing and swimming, consistency with the natural surroundings and consistency with municipal shoreland zoning ordinances or any applicable state plans." 29 V.S.A. § 405(b). Based upon its consideration, the Board may issue an order affirming, modifying or reversing the DEC's action. See § 406(c); In re Dean Leary, Docket No. MLP-96-04, Findings of Fact, Conclusions of Law and Order at 13 (Aug. 1, 1997). The Board has the authority under 29 V.S.A. §§ 407 and 408 to include any permit conditions it considers necessary to protect the public good or the public trust. Id.

The Appellants' Notice of Appeal contends that the Project "will adversely affect the public good." Appellants' Notice of Appeal at 1. The Appellants are not required to identify in their notice of appeal which of the public good factors they seek the Board to review because all of the factors *must* be reviewed once the issue of public good is appealed to the Board. The Appellants' Notice of Appeal complies with Water Resources Board Rule of Procedure 18(A) in that it clearly appeals the issue of public good. Since that issue has been properly appealed, the Board must, in determining whether the Project will adversely affect the public good, consider all of the factors identified in 29 V.S.A. § 405(b). The Board's statement of the public good issue in the February 10, 1998 Memorandum of Decision is consistent with the provision in Water Resources Board Rule of Procedure 18(D) that the scope of any de novo appeal be limited to the issues specified in an appellants' notice of appeal.

Accordingly, Killington, as the permit applicant, bears the burden of proof. The burden of proof consists of the burden of production and persuasion. Under the burden of production, there must be sufficient evidence for the Board to make positive findings with regard to the Project on the public good and public trust issues. Under the burden of persuasion, the Board must be persuaded, by a preponderance of the evidence, that the

weight of the evidence is in favor of the Project, notwithstanding the evidence presented in opposition to the Project. In re Dean Leary, Docket No. MLP-96-04, Findings of Fact, Conclusions of Law and Order at 13 (Aug. 1, 1997). As the Board further stated in its February 10, 1998 Memorandum of Decision:

While the Board must consider the public good factors listed [in 29 V.S.A. § 405(b)], it is not required to make an affirmative finding and conclusion with regard to each public good factor. Rather, 29 V.S.A. § 405(b) sets out the factors to be considered, and no single factor is dispositive of whether the encroachment adversely affects the public good. See In re: Dean Lean, Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order at 15 (Aug. 1, 1997).

Regardless of what evidence Killington provides, the Board will consider all of the public good factors identified in 29 V.S.A. § 405(b) in determining whether the Project adversely affects the public good since such a review is mandated by the statutory provision.

Accordingly, Killington's Motion to Alter is denied to the extent that it seeks to have the public good factors of navigation, swimming, and municipal shoreland zoning and applicable state plans eliminated from the Board's consideration of whether the Project adversely affects the public good.

IV. ORDER

1. Killington's Motion to Alter is denied to the extent that it seeks to have the public good factors of navigation, swimming, and municipal shoreland zoning and applicable state plans eliminated from the Board's consideration of whether the Project adversely affects the public good.

2. As stated in the Board's February 10, 1998 Memorandum of Decision, the issue with regard to public good remains as follows:

Whether, pursuant to 29 V.S.A. §§ 401-409, the Project adversely affects the public good with regard to 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 shore land zoning ordinances or any applicable state plans.

Dated at Montpelier, Vermont this 20th day of March, 1998.

WATER RESOURCES BOARD



William Boyd Davies, Chair

Concurring:

Ruth Einstein
Gerry Gossens
Gail Osherenko
Jane Potvin