

STATE OF VERMONT
WATER RESOURCES BOARD

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

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to (i) whether certain persons have standing to appeal; and (ii) the scope of the issues on appeal. As explained below, the Board concludes that those who are seeking standing to appeal have properly done so, and that the issues on appeal do not include a consideration of possible diminution of private property values.

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 filed 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 Krupywyncyj 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."

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.

John 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 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.

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.

II. STANDING TO APPEAL

A. Appellants other than Mr. Lenge

Presently, Mr. Lenge is joined in the appeal by Thomas and Valerie Hickey, Joseph E. Calabrese, Thomas J. Calabrese, Lucas Krupywynckyj 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. The preliminary issue of standing before the Board pertains to those Appellants other than Mr. Lenge? The Appellants other than Mr. Lenge seek standing to appeal pursuant to Rule 22(A)(7) of the Board's Rules of Procedures ("Rules").

B. Standing to Appeal under 29 V.S.A. § 406(a)

Under 29 V.S.A. § 406(a), any person "aggrieved" by the DEC's decision with respect to an encroachment permit application may appeal to the Board within 10 days from the date of notice of the action. The December 1, 1997 Notice of Appeal states, at paragraph 5:

Thomas and Valerie Hickey, Joseph E. Calabrese, Thomas J. Calabrese,
Lucas Krupywynckyj and Allison Peck, Gilford and Shirley Richardson,

'There has been no challenge to Mr. Lenge's standing to bring this appeal.

Jonathan and Paula Tucker, Paul M. Dorr and Christine M. Baranowski, William and Janice Nacel (sic) and, George and Patricia Hodgdon, all having a substantial interest in the permit and being persons aggrieved, join with the above named Appellant, Nicholas J. Lenge, in appealing the within Decision to the Water Resources Board for the reasons stated in paragraph 4 herein.

The Appellants are not seeking to intervene in this appeal. Rather, the Appellants other than Mr. Lenge seek to appeal Permit 97-26 in their own right. A person who seeks to initiate an appeal under 29 V.S.A. § 406(a) must only demonstrate that they are aggrieved by the issuance of Permit 97-26.

In a prior encroachment permit appeal, the Board ruled on what it means to be "aggrieved" under 29 V.S.A. § 406(a). See In re: Dean Leary, Docket No. MLP-94-08, Preliminary Order at 2 (Dec. 28, 1994). In Leary, the Board denied a permittee's motion to dismiss based on a lack of standing by the appellant. The Board stated:

The permittee argues that the appellant is not an "appropriate" person in that he allegedly lacks a substantial interest, such as an affected property interest, and that the appellant has no interest distinguishable from the general interest of the public in the protection of state waters. The Board rejects the permittee's narrow reading of 29 V.S.A. § 406(a). The permittee seeks approval for encroachments in public waters off Thompson Point at Town Farm Bay, Lake Champlain. The appellant is a resident of Vermont and uses the Bay for boating, swimming, fishing, fowling and other recreational uses. The appellant was on the DEC distribution list for the permit proceeding which authorized MLP Permit No. 93-29, and he was a signatory to a previous agreement between the DEC and the permittee concerning expansion of encroachments at Point Bay Marina. Although the appellant does not own shoreland property within the vicinity of the Point Bay Marina, the Board observes that property ownership is not the sole test for determining whether a person meets the standing requirement of 29 V.S.A. § 406. Appellant's present and historical use of Town Farm Bay, and his participation in previous permitting decisions concerning the expansion of Point Bay Marina, coupled with the allegation that his use and enjoyment of the public waters off Thompsons Point may be adversely affected if Permit MLP No. 93-29 is allowed to stand, give appellant an interest sufficient to support this appeal.

Id.

Thus, in Leary, the appellant only had to demonstrate that he was aggrieved under 29 V.S.A. § 406(a). The Board did not require that the appellant also satisfy the requirements of Rule 22(A)(7).³ Property ownership was not the sole factor for determining whether the appellant met the standing requirement of 29 V.S.A. § 406(a). Rather, the appellant was aggrieved by the encroachment due to its potential negative effect on his use and enjoyment of Lake Champlain.

Accordingly, based on our Leary decision, the Board will consider whether the Appellants other than Mr. Lenge have standing to appeal based solely on whether they are aggrieved under 29 V.S.A. § 406(a). As in Leary, property ownership shall not be the dispositive factor with respect to standing. Rather, property ownership is simply a factor which must be considered along with each person's use and enjoyment of Woodward Reservoir.

The Appellants allege that they have riparian rights and either own property abutting Woodward Reservoir or along associated tributaries, or are easement owners with deeded access rights to Woodward Reservoir. The Appellants all allege that they have appreciated and enjoyed the aesthetic, recreational and natural benefits of Woodward Reservoir for many years such that Woodward Reservoir "is the backyard, frontyard (sic) and playground for these [A]ppellants and their families." See Appellants' Memorandum in Support of Party Status at 4. Regardless of whether the individual Appellants own land adjoining Madden Brook or Woodward Reservoir, they all allege that the encroachment authorized by Permit 97-26 will have a negative effect on their use and enjoyment of Woodward Reservoir. Under our Leary decision, this is sufficient to confer standing.

Accordingly, the Board concludes that Appellants Thomas and Valerie Hickey, Joseph E. Calabrese, Thomas J. Calabrese, Lucas Krupywyncyj 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 are aggrieved by the issuance of Permit 97-26 such that they have standing to appeal under 29 V.S.A. § 406(a).

³In a second appeal by Mr. Leary, the Board Chair ruled that "Leary has standing to appeal under 29 V.S.A. § 406 and [the Conservation Law Foundation] is granted party status to participate in this proceeding under Rule 22(A)(7)." In re: Dean Leary, Docket No. MLP-96-04, Prehearing Conference Report and Order at 2 (March 18, 1997).

C. Standing to Appeal under Rule 22(A)(7)

The Board concludes that the Appellants have standing to appeal under 29 V.S.A. § 406(a). Nevertheless, the Board will consider whether the Appellants may be a party to the appeal filed by Mr. Lenge under Rule 22(A)(7).⁴

Under Rule 22(A)(7), intervention is allowed of right by “any person demonstrating a substantial interest which may be adversely affected by the outcome of the proceeding where the proceeding affords the exclusive means by which that person can protect that interest and where the interest is not adequately represented by existing parties.”

For the reasons stated above in subsection B, the Board concludes that the Appellants have demonstrated that their use of Woodward Reservoir is a substantial interest which may be adversely affected by the issuance of Permit 97-26. Accord In re: Dean Leary, Docket No. MLP-94-08, Preliminary Order at 3 (Dec. 28, 1994)(organization without land adjoining the public waters was granted intervenor party status under Rule 22(A)(7) based on its memberships’ use and enjoyment of Lake Champlain). The only remaining questions are (i) does this proceeding afford the exclusive means by which the Appellants can protect their interests, and (ii) whether their interests are adequately represented by Mr. Lenge.

In addition to the appeal of Permit 97-26, there is pending before the Board the appeal of the Project’s Water Quality Certification (“WQC”) 97-10. There is also an appeal pending before the Environmental Board of the Project’s Act 250 permit. Neither of these other appeals will determine whether the Project will adversely affect the public good as defined in Chapter 11. Therefore, regardless of whether public trust doctrine issues will be adjudicated in the appeal of WQC-97-10, this proceeding affords the

⁴The Board acknowledges that the decision in In re: Kevin Rose and the Champlain Kavak Club, Docket No. MLP-96-0 1, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 7, 1996) may have contributed to the confusion between standing and party status. In Champlain Kavak, the Board ruled that the appellant had standing to bring the appeal “pursuant to 29 V.S.A. §406 and/or Rules 22(A) and (B) of the Rules.” (Emphasis added.) When the right to appeal is statutorily granted the appellant need not also demonstrate standing under the Rules.

exclusive means by which the Appellants can protect their public good interests under Chapter 11.⁵

The final consideration is whether the interests of the Appellants other than Mr. Lenge are adequately represented by Mr. Lenge. Provided the other requirements of Rule 22(A)(7) have been met, intervention is to be allowed unless the representation of the intervenor's interests by existing parties will in fact be adequate. The degree of inadequacy required is minimal. The intervenor bears no burden of proof to demonstrate inadequacy of representation. Accord Vermont Rule of Civil Procedure 24(a)(2); In re Vermont Public Power Supply Authority, 140 Vt. 424,432 (1982). The Appellants have alleged that they each have their own unique interests relative to Woodward Reservoir. The Board concludes that Mr. Lenge cannot adequately represent the unique interests of the other Appellants.

Accordingly, in addition to having standing under 29 V.S.A. § 406(a), the Board hereby allows Thomas and Valerie Hickey, Joseph E. Calabrese, Thomas J. Calabrese, Lucas Krupywyncyj 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 to intervene as a parties in the appeal initiated by Mr. Lenge pursuant to Rule 22(A)(7).

III. NOTICE OF APPEAL AND STATEMENT OF THE ISSUES

A. Appellants' Notice of Appeal

The Appellants' Notice of Appeal contends that the DEC's issuance of Permit 97-26 was in error, in part, because the Project will "result in a diminution of value of properties adjacent to Woodward Reservoir, Reservoir Brook, and Madden Brook." Killington objects to the diminution of property values being an issue in this appeal under the public good or public trust analyses.

B. Public Good

The Board will evaluate the Project's impacts upon the "public good" before

⁵The Board will decide at its March 10, 1998 deliberation whether the public trust doctrine is an otherwise applicable law as part of the appeal of WQC-97-10. If the Board rules that it is not an otherwise applicable law, then this appeal also will afford the Appellants the sole opportunity to protect their public trust interests.

considering the Project in light of the public trust doctrine. In Re: Kevin Rose and the Champlain Kayak Club, Docket No. MLP-96-01, Findings of Fact, Conclusions of Law, and Order at 11 (Nov. 7, 1996). If the Project will have an adverse affect upon the public good, then this statutory analysis is dispositive and the Board will not reach the public trust doctrine. Id at 12.

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.” 29 V.S.A. § 403(a). Under Section 403(a), the Board may reverse the action of DEC and void Permit 97-26 “if the encroachment adversely affects the public good.” Id. The “public good” is “that which shall be for the greatest benefit of the people of the state of Vermont.” 29 V.S.A. §402(6). Section 405(b) specifies certain factors which must be considered to determine the public good:

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 shore land zoning ordinances or any applicable state plans.

29 V.S.A. § 401 specifically states that “[l]akes 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.” (Emphasis added.) Section 405 makes no reference to the diminution of private property values, and the Board declines to imply such a factor into Section 405. Therefore, the Board will not consider the diminution of private property values in making its determination with respect to the public good.

Accordingly, the issue with regard 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.

While the Board must consider the public good factors listed above, 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 Leary, Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order at 15 (Aug. 1, 1997).

C. Public Trust

Under 29 V.S.A. § 401, "[l]akes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust ." The public trust doctrine "is not fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit." State of Vermont v. Central Vermont Railway, Inc., 153 Vt. 337,342 (1989).

The Board has previously ruled that it has a duty, independent of the public good determination, to assure the protection of public trust uses. In re: Dean Leary, Docket No. MLP-94-08, Memorandum of Decision at 4 (April 13, 1995). The Board continued:

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 (19 18); State v. Malmquist, 114 Vt. 96 (1944); In re Establishment of Water Levels of Lake Seymour, 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.

Id at 5.

Generally, "trust uses" relate to uses and activities in the vicinity of the lake, stream, or tidal reach at issue, and may "range from commerce and navigation to swimming and environmental preservation and research." In re: Dean Leary, Docket No. MLP-96-04, Findings of Fact, Conclusions of Law, and Order at 23 (Aug. 1, 1997), citing to National Audubon Society v. Superior court of Alpine County, 658 P.2d 709, 723 (1983). The diminution of private property values is not relevant to determining the

Project's consistency with the public trust doctrine. Accordingly, the issue with regard to the public trust doctrine is as follows:

Whether the Project, after giving due consideration to the cumulative effect of the Project on the waters of the State of Vermont, will have a detrimental effect on public trust uses.

IV. ORDER

1. Appellants Thomas and Valerie Hickey, Joseph E. Calabrese, Thomas J. Calabrese, Lucas Krupywyncyj 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 are aggrieved by the issuance of Permit 97-26 such that they have standing to appeal under 29 V.S.A. § 406(a).

2. In addition, Appellants Thomas and Valerie Hickey, Joseph E. Calabrese: Thomas J. Calabrese, Lucas Krupywyncyj 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 are parties in this appeal pursuant to Rule 22(A)(7).

3. The Board will not consider the diminution of private property values in making its determination with respect to the public good.

4. The issue with regard 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.

5. The Board will not consider the diminution of private property values in making its determination with respect to the Project's consistency with the public trust doctrine.

6. The issue with regard to the public trust doctrine is as follows:

Whether the Project, after giving due consideration to the cumulative effect of the Project on the waters of the State of Vermont, will have a detrimental effect on public trust uses.

Dated at Montpelier, Vermont this 10th day of February, 1998.

WATER RESOURCES BOARD



William Boyd Davies, Chair

Concurring:

Ruth Einstein
Gerry Gossens
Gail Osherenko
Jane Potvin

F:\USERS\DAVIDG\MOD\MLP9709.MOD