

IN THE SUPREME COURT
OF THE STATE OF VERMONT

THE CITY OF MONTPELIER VERMONT,

Plaintiff / Appellee

v.

RICHARD BARNETT, CEDRIC SANBORN
AND LESLIE SANBORN
Defendants / Appellants

SUPREME COURT
Docket No. 2011-067

On Appeal from the
Washington Superior Court
Docket No. 145-3-10 Wncv

BRIEF OF APPELLEE
THE CITY OF MONTPELIER VERMONT

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STATEMENT OF THE CASE.

This action was initiated by the City of Montpelier to confirm its use and control over the City water supply known as Berlin Pond in Berlin, Vermont and to obtain an injunction against Appellants to prevent further trespass at or on the waters of Berlin Pond, contrary to state law, City Charter authority and applicable municipal ordinances.

Appellants are the owners and an employee of a sporting goods store who determined to challenge the City's authority to prohibit recreational activities on its drinking water supply. (Testimony, Cedric Sanborn, Hearing held April 16th 2010, TR p. 228).

Appellants asserted a public right to access and to engage in the recreational use of Berlin Pond, claiming that the City is without authority to prohibit such use. (Tr. 238, 241). To test the legal basis of their claim, Appellants saw, understood the meaning of and elected to ignore the "No Trespassing" signs placed by the City in and around the waters of Berlin Pond. (Richard Barnett, Tr. 63, 65, 79; Sanborn, Tr. 238, 241, 249).

In consequence of Defendants' actions, which consisted of unauthorized boating, fishing and other recreational activities on Berlin Pond during numerous occasions in 2009 and 2010, the City of Montpelier brought this enforcement

action.

At hearing, Appellants relied primarily on the testimony of Fish and Wildlife Wardens to advance their theory that the City actions to regulate access and use to Berlin Pond created a conflict with other law, including authority granted to the Agency of Natural Resources ("ANR") to manage public waters.

Both Wardens conceded under cross examination that their authority to police the waters of Berlin Pond does not extend to health or trespass issues. (Tr., D. LeCours, ppg. 97 - 99; S. Fowler, p. 111). One Warden testified that he was aware the Department of Fish & Wildlife had inadvertently listed Berlin Pond as a fishing site on one occasion, but subsequently withdrew it from the published list, noting the Department had no intention to list a site where fishing was "traditionally prohibited." (D. LaCours, ppg. 99-100; Plaintiff's Exhibit 4).

Appellants also relied on their own interpretation of statutes and rules relating to the ANR and its subordinate entity, the Water Resources Board. (See 10 V.S.A. §§1253, 1258, 1421 and 29 V.S.A §401). Pursuant to 10 V.S.A. §1424 the Agency of Natural Resources asserts its authority to regulate the use of public waters through, *inter alia*, the Water Resources Board. The Board rules acknowledge that "Restrictions adopted by authorities other than the Natural

Resources Board may also apply - for example, restrictions on recreational uses established by the state or a local board of health to protect public water supplies."¹

Accordingly, the Assistant Attorney General appearing on behalf of the State of Vermont argued on behalf of the State that the State takes no issue² with the City's assertion of concurrent jurisdiction and control over the waters of Berlin Pond for its limited, authorized purposes. (Assistant Attorney General Kieth Aten, Tr. pps. 44-45, 47). Attorney Aten pointed out that a State fishing license does not enable the holder to fish where access is prohibited. (Tr. 46).

In support of its claim, the City relied on an extensive Legislative, statutory and regulatory history, including specific City Charter provisions, each of which is a Special Act of the legislature, *infra*, POINT III. It established that Berlin Pond, having been established as Class A-2 waters,³ is the sole drinking water supply for the City of Montpelier. (TL, Tr. pps. 7, 35).

¹ This is the "endnote 1" of which Appellant complains, *Brief of Appellant*, p. 23. P.C. at 50, 97. Appellants admit that this endnote is intended to address Berlin Pond specifically as susceptible to the application of other, more restrictive local regulation. *Brief*, Id.

² Assuming that legislative authority has been granted to the municipality to act. Aten, p. 45.

³ Meaning the water in its natural state is presently so clean as to be suitable for public drinking water, with filtration. *Vermont Water Quality Standards*, Section 4-08.

The City witnesses testified about its concerns as a matter of policy (and as incorporated into its drinking water Source Protection Plan and temporary water system operating permit) about the health hazards that would almost certainly accompany public recreational access to Berlin Pond. (T. Law, Tr. ppg. 117-121). The hazards identified include zebra mussels which can clog drains, general waste found near the water courses, potential criminal contamination of the City's drinking water, (Tr. ppg. 140-141), increased turbidity of the water which contributes to an increase in pathogens, all of which would compromise the City's ability to maintain an uncontaminated water source. (Tr. p. 118).

The City acted generations ago to acquire and post against trespassing all but one parcel of land⁴ surrounding Berlin Pond. It maintains a regular patrol of the area to ensure water supply inlet is free of debris. It prohibits public access and recreational activities, maintains highway ditches to prevent highway runoff into the Pond and manages a filtration and chlorination process for the water. (Tr. p. 117).

The filtration plant eliminates debris, particulate matter and turbidity from the potable water and the chlorination process reduces bacteria. (Tr. p. 117).

Two residences, one apartment house and the Berlin Fire

⁴ Appellee owns all of the shore lands of Berlin Pond, with the exception of one parcel held by the Town of Berlin.

Department access "raw" pond water from the system at points before the water reaches the treatment plant. These connections explain the City's temporary (and not permanent) operating permit and require periodic "boil water" notices to be sent to the four raw water users. (Tr. P. 123).

The City's "No Trespassing" and "Public Water System" warning signs reflect the presence of a Vermont Department of Health Order of 1926 protecting Berlin Pond from public trespass. The signs were refreshed in 2009 with modern statutory references and recite the language of the 1926 Order verbatim.

At hearing Appellants testified that they observed, understood the meaning of and then elected to ignore these explicit prohibitions⁵ and accessed the waters in furtherance of their own private recreational interests. (Barnett, Tr. Ppg. 68-69). The trial court found for the City and entered an injunction. This appeal followed.

⁵ Mr. Barnett had also inquired further, contacting City Officials and the City Attorney, and was specifically warned not to trespass. Tr., p. 64. Mr. Barnett elected to ignore the warning.

STATEMENT OF THE ISSUES

- I. Whether the trial court, having heard the evidence and testimony, properly exercised its discretion in entering Judgment and an Order of Permanent Injunction in favor of Appellee and against Appellants.
- II. Whether the Court's Final Order, which protects the sole public drinking water supply of the City of Montpelier by prohibiting public recreational use on Berlin Pond, complies with the Public Trust Doctrine.
- III. Whether the primacy of Montpelier City Charter provisions as Special Acts of the legislature demonstrates the proper application of Dillon's Rule?
- IV. Whether the State of Vermont was no longer a necessary party under V.R.C.P. 19, following its participation in the case.

ARGUMENT.

I. THE COURT REVIEWS FINDINGS FOR CLEAR ERROR.

This Court reviews⁶ findings of fact under a deferential standard; the trial court's findings will not be disturbed unless clearly erroneous. V.R.C.P. 52(a)(2). Findings of fact will be upheld as long as they are supported by any credible evidence in the record, Siegel v. Misch, 2007 VT 116, ¶ 5, 182 Vt. 623, 939 A.2d 1023 (mem.), Whippie v. O'Connor, 2010 VT 32, ¶ 12, 996 A.2d 1154 (Vt. 2010). Conclusions of law or statutory interpretation are reviewed *de novo*. In re Village Associates Act 250 Land Use Permit, 2010 VT 42A, ¶ 7, 998 A.2d 712, 716. They will also be upheld if supported by any findings of fact and consistent with applicable law. Carpenter v. Central Vermont Medical Center, 170 Vt. 565, 566, 743 A.2d 592 (1999).

Judge Crawford presided over all aspects of each hearing in this matter, from the case inception to the final order upon which this appeal arose. He was present and he heard and observed what the evidence and testimony demonstrated. Absent abuse of discretion, equitable judicial determinations are appropriately accorded deference. The trial court findings withstand plenary review and should be affirmed.

⁶ This portion of Appellee's Argument is submitted pursuant to V.R.A.P. 28(b).

II. THE TRIAL COURT'S DECISION ACCORDS WITH
THE PUBLIC TRUST DOCTRINE.

A. The Trial Court Decision Properly Applied
Vermont's Water Policy.

Vermont's Water Quality Standards (hereafter "Standards") were enacted under the authority of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, commonly known as the Clean Water Act (Act), to implement the Act's principal goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," Id. §1251(a). The Act permits each state, subject to federal approval, to adopt comprehensive water quality standards establishing designated uses and water quality criteria for all navigable intrastate waters. Id. §§ 1311(b)(1)(C), 1313(c)(2)(A); PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 704, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994); In re Town of Sherburne, 154 Vt. 596, 601, 581 A.2d 274, 277 (1990).

In compliance with the Act and its regulations at 40 C.F.R. § 131.10(g), Vermont natural waters are classified according to the increasing purity of the water. Berlin Pond has been established as Class A-2 waters (suitable for drinking water with filtration) in their untreated state, *Vermont Water Quality Standards*, Section 4-08, and provides the sole drinking water source for the City of Montpelier.

**1. State Board of Health Protection of
Berlin Pond Commenced in 1903.**

Predating the modern drinking water classification scheme, the Vermont State Board of Health exercised regulatory jurisdiction over public water supplies. On May 24th 1903, December 4th 1925 and June 8th 1926, the Board of Health entered orders to protect the waters of Berlin Pond from contamination due to public use. In 1903 the Board ordered that:

[n]o sewage of any kind shall be allowed to run into the water of said [Berlin] Pond or streams tributary thereto or into the stream which is the outlet of said Pond. . . . (1903 *Order*, §1.)

In 1925, in response to increasing public access, the Board of Health prohibited "[b]oating, fishing and bathing in the waters of Berlin Pond..." (December 4, 1925 *Order*). The following year, the State Board of Health restated its Order in substantially identical language as follows:

Boating, fishing and bathing in the waters of Berlin Pond, of its tributaries for a distance of one-half mile from their mouths, of the outlet of Berlin Pond to the Montpelier Reservoir, and of the Montpelier Reservoir are hereby prohibited. (*Order*, Vermont State Board of Health, June 8, 1926).

Between 1903 and 1926, this Court decided three important cases that inform its consideration today. The first two were State v. Morse, 84 Vt. 387, 80 A. 189 (1911) (prosecution for swimming in Berlin Pond) and Hazen v. Perkins, 92 Vt. 414, 105 A. 249 (1918) (public trust doctrine first formally recognized in Vermont jurisprudence).

In Morse, this Court upheld a criminal conviction against a defendant for swimming in Berlin Pond in violation of the 1903 Health Order. In so doing, the Court confirmed that the Health Order was a presumptively valid exercise of the State's constitutional police power and it determined that as long as the regulatory measure was reasonable under the circumstances and uniform in application, it would not be disturbed.⁷ That remains the constitutional test today. See, Galanes v. Town of Brattleboro, 136 Vt. 235, 240, 388 A.2d 406, 410 (1978) ("the sanction behind zoning laws is the police power of the state, constitutionally exercised where it is reasonably related to public health, safety, morals or general welfare").

This Court also recognized in Morse that the police power is an inherent attribute of the General Assembly; it may lawfully be delegated to municipalities and when so delegated is no less authority than "that possessed by the Legislature itself." 84 Vt. 393-394. This also remains the law today.

State v. Curley-Egan, 2006 VT 95, 910 A.2d 200, 204 (2006) (legislature may delegate police power to other state or municipal instrumentalities).

Finally, the Court in Morse considered the rights of the

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In 1991, public drinking water supply regulation was moved from the Department of Health to the Agency of Natural Resources by operation of Sec. 9(a) of Act No. 71 of the Acts of 1991, which provides that existing rules and actions adopted by the Department of Health and State Board of Health under Title 18 and its predecessors are to remain in effect unless or until superseded by rules adopted by the Agency.

defendant as weighed against the contrary public interest of the City of Montpelier, a downstream user of the water. It concluded that a reasonable regulation against swimming, boating or trespassing on a public water supply is constitutionally permissible. Moreover, whenever individual rights or interests come into conflict with those of the public, they must yield to the greater public interest. This tension accurately reflects the present day dispute.

2. Vermont Formally Recognized The Public Trust Doctrine in 1918.

Seven years after Morse, the Vermont Supreme Court formally recognized the application of the public trust doctrine in Hazen v. Perkins, 92 Vt. 414 (1918). This doctrine states that navigable rivers, lakes and ponds are held by the State in its sovereign capacity as trustee for the benefit of all the people. The doctrine was first stated in the federal courts in Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892), holding that the State holds title to the lands under the navigable waters in trust for the people of the State.

While the parties do not disagree on the public trust doctrine itself, there is clear disagreement on which uses of Berlin Pond are appropriate under the doctrine. Vermont courts have consistently "invoked the public trust in rejecting claims of private rights with respect to public waters." State

v. Central Vermont Railway, Inc., 153 Vt. 337, 344 (1989) (citations omitted). In the case of Berlin Pond, the drinking water of Berlin Pond is indeed held in trust by the State, which has delegated responsibility for its protection to the Agency of Natural Resources through general statutory authority and to the City of Montpelier through specific Charter provisions addressing the care and preservation of Berlin Pond. Since at least 1903, the State, through the political subdivisions and Agencies to which it delegated its enforcement authority and police power, has carried the burden to protect the Berlin Pond drinking water supply from private interference.

Vermont's Public Trust Doctrine developed with specific reference to Berlin Pond. In State v. Quattropane, 99 Vt. 360 (1926), this Court affirmed a criminal conviction of a trespasser on Berlin Pond and reiterated its earlier holding in Morse that it is "unquestionable" that "public health is a proper subject for police power protection, and that power can be delegated." Id., 99 Vt. at 362. It then observed that "Berlin pond being public, the respondent has no ownership of its waters or of the land beneath them; these belong to the people in their sovereign character, and are held for the public uses for which they are adapted," citing Hazen v. Perkins, 92 Vt. 414, 105 A. 249, 23 A.L.R. 748.

The court also observed:

As is shown by State v. Morse, *supra*, wherein we upheld an order prohibiting bathing in this same pond, it is not necessary to the validity of an order of this kind that the prohibited act must do actual harm. It is enough if, in the circumstances, it is reasonable to apprehend that the act may result, directly or indirectly, in the contamination of the water.

Id., 99 Vt. at 365.

Appellants' reliance on State v. San Luis Obispo Sportsmen's Assoc., 22 Cal. 3d 440, 584 P.2d 1088 (Cal. 1978) where the California court interpreted its own State constitution, is distracting. Berlin Pond was instrumental in Vermont's own development of the Public Trust Doctrine some fifty years prior to the time the California case was decided. See State v. Quattropane, *supra*. Since that time, this Court has consistently rejected claims of private rights with respect to public waters. See Hazen v. Perkins, *supra*, 92 Vt. 414 (Miller's claim of private right to manipulate water levels) in which this Court observed that the legislature cannot grant rights in public trust property for private purposes. *Id.*, *supra*. See also In re Lake Seymour, 117 Vt. 367, 375, 91 A.2d 813, 818 (1952) (no right to control water level of lake can be acquired by or granted to private persons for private purposes); State v. Malmquist, 114 Vt. 96, 106, 40 A.2d 534, 540 (1944) (same).

**3. The Public Trust Doctrine is Reflected
in Vermont's Water Policy.**

This enforcement action was made necessary because Appellants insisted on using Berlin Pond for their private purposes. Their actions intentionally placed their private interests above the public interest of the community in the protection of its drinking water supply. (Barnett, Tr. Ppg. 68-70; 78-79). The trial court's appropriate weighing of these competing interests was not error.

Public drinking water sources are protected under Vermont water policy through, *inter alia*, the establishment of *Source Protection Areas*, within which activities which may pollute the public water supply are regulated pursuant to rules established by ANR. The Agency's policy document on source protection illustrates its position with respect to Berlin Pond. *PROTECTING PUBLIC WATER SOURCES IN VERMONT; A Guidance Document In Reference to Section 1428 of the Federal Safe Drinking Water Act; 10 V.S.A. Chapter 56; and Vermont's Water Supply Rule*, Agency of Natural Resources, Department of Environmental Conservation, Water Supply Division, February 24, 1997 ("Guidance Document").

In the Guidance Document, the reasoning behind source protection is discussed:

Identifying Potential Sources of Contamination (PSOCs) within Public Water Source Protection Areas (SPA) is one of the more critical steps towards protecting water quality at the source. . . .

...[I]solation is a critical factor in protecting drinking water sources, and the reason that the Source Protection Area concept works so well.

Guidance Document, p. 54.

The City's *Drinking Water Source Protection Plan* ("Plan") and Permits, WSID #5272, reflect this policy. The continued protection of Berlin Pond is integral to the *Plan* and to its operating permit for the water system. See *Water Supply Rule*, Chapter 21, section 4.1.1.7(d).

Berlin Pond lies at the center of the Drinking Water Source Protection Area delineated pursuant to the approved Plan, in concert with the temporary operating Permit No. WSID5272. The Plan anticipates that the City continue its practice to prevent contamination of Berlin Pond by prohibiting boating, bathing, or other sources of contamination, incorporating the language of the 1926 Health Order:

This document includes an assessment of the relative risks to water quality imposed by the existing potential sources of contamination...

Boating, fishing and bathing in Berlin Pond and the tributaries within one-half mile of the tributary mouth is prohibited by a State Board of Health order dating back to 1926. Since recreational use is not currently allowed, it has not been defined as an existing POSC [point of source contamination]. However, it should be noted that if recreational use is permitted in the future, it will cause a significant risk to water quality.

Section 3-4, *Source Protection Plan*.

Continued compliance with the 1926 Health Order is a

basic premise upon which the Source Protection Plan was developed. While Appellants assert the Order was overtaken by a recent December, 2010 amendment to the Water Supply Division Rule 16.2.2(c), and argue that the amendment creates tension between the rule and the trial court's earlier findings, *Brief of Appellants* at p. 22, the incorporation of the 1926 Order into the City's *Source Protection Plan* maintains its vitality as arguably the cornerstone of the Plan itself. Even if the fortuitous amendment to subsection (c) might affect future Source Protection Plans, it has no effect on Appellee's pre-existing and completed Plan. It was not error for the trial court to recognize the relationship between the Order and the Plan.

Title 10 Chapter 56 provides for significant penalties for willful interference with the source protection area, the plan, or the integrated permits. For instance, 10 V.S.A. §1682 incorporates the remedies appearing in 18 V.S.A. § 122 for violations. That section in turn provides for a remedy to any person affected by a violation of statute, rule or permit by way of equitable relief or damages. By definition, an impairment of the Source Protection Plan sufficiently serious to trigger a Title 10 violation constitutes a health hazard, which triggers the civil enforcement provisions of Title 18.

**4. The Public Trust Doctrine is Reflected
in City Ordinance Prohibitions.**

City of Montpelier Ordinances Chapter 3, § 3-332 provide in pertinent part that "No person shall ... wade or bathe or fish in ... the water, nor skate on the ice of a public reservoir." In addition, Chapter 13, § 13-1, provides that "It shall be unlawful for any person to trespass upon or injure ... public property or resources owned by or under the control of the City of Montpelier." Appellants' acts of trespass on the shore lands owned by the City or in the water - a "resource ... under the control of" the City, violated the ordinance. The Public Trust Doctrine is reflected in Vermont policy, statute and case law. The trial court did not err in deciding this case in a manner consistent with the doctrine.

III. DILLON'S RULE DEMONSTRATES THE PRIMACY OF THE CITY CHARTER PROVISIONS.

Appellants claim that the City's action is *ultra vires* as inconsistent with the limitations articulated under Dillon's Rule. The argument fails because it contradicts the Rule itself and does not reflect Vermont law.

Dillon's Rule⁸ provides that municipalities exercise authority only as delegated by the legislature. Municipal powers include both those powers granted in express words by statute and those powers necessarily or fairly implied in the powers expressly granted. See Hunters, Anglers & Trappers Ass'n of Vt., Inc. v. Winooski Valley Park Dist., 2006 VT 82, ¶7, 181 Vt. 12, 913 A.2d 391; Gade v. Chittenden Solid Waste District, 2009 VT 107 ¶13, 989 A.2d 491, 495-96 (Vt. 2009). In this instance, those powers have been expressly delegated by statute to the City of Montpelier.

Prior to the enactment in 1945 of 24 V.S.A. §3313, which provides statutory general authority for a municipality to acquire and operate public water systems, the authority was granted by specific legislative grant such as a municipal

⁸ John Forrest Dillon, A Treatise on the Law of Municipal Corporations (1872) (1st ed). Judge Dillon stated the rule as follows: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control." Clinton v Cedar Rapids and the Missouri River Railroad, 24 Iowa 455 (1868). Ironically, Iowa's state constitution was amended in 1968, allowing for Home Rule municipal charters. Iowa Const. art III § 38A.

charter or charter amendment. The Legislature extended specific authority, and conferred a specific duty, upon Appellee to manage and control the waters of Berlin Pond through its enactment and multiple amendments of the City's municipal Charter.

Whether the charter or a general state statute controls is a matter of statutory construction. In Town of Brattleboro v. Garfield, the Court concluded that a charter would be given effect because it was "more specific to the Town of Brattleboro" than the state statute there at issue. 2006 VT 56, ¶ 10, 180 Vt. 90, 904 A.2d 1157. Where two statutes cover the same subject, one being more specific than the other, the court will "harmonize them by giving effect to the more specific provision according to its terms." Our Lady of Ephesus House of Prayer, Inc. v. Town of Jamaica, 2005 VT 16, ¶ 16, 178 Vt. 35, 869 A.2d 145. See, e.g., City of Burlington v. Fairpoint Communications, Inc., 2009 VT 59 ¶ 11, 980 A.2d 226 (Vt. 2009) (specific City charter language trumps more general statute addressing same issue). These principles apply to this case.

In 1870, Act No. 240 amended the original Charter of the Village of Montpelier, empowering it to control its exclusive water source in the neighboring Town of Berlin. Section 1 of authorized the Village to "purchase the right to take water from the outlet of Berlin Pond" for use as its drinking water

supply. In 1884, Section 3 of Act No. 212 vested in a Board of Water Commissioners (now the City Council) virtually all of the administrative and managerial authority for the water system, including regulation of the waters of Berlin Pond.

In Section 3 of the 1894 Charter amendment, Village officials were empowered to enter upon all adjoining property of Berlin Pond and its tributaries to abate unhealthful conditions. The officials were also authorized to "commence ... legal proceedings ... [which] shall prevent any person or persons from adulterating the waters of said reservoir, stream or pond, or rendering the waters thereof unfit for domestic use." Sec. 4, No. 212 of the Acts of 1884.

Montpelier's Charter went through a number of revisions during the nineteenth and twentieth centuries, each enacted as a continuation of the original grant of authority. In 1894, the Village and Town of Montpelier merged to create the City of Montpelier. Among the municipal powers confirmed in the City were the following:

To make all regulations and ordinances for preventing the corruption and for the protection of the water supply of the said City

Sec. 25, No. 166 of the Acts of 1894. This is a reference to Berlin Pond.

The Charter amendment continues previous Town and Village charters. Between 1896 and 1912, legislative enactments amended the Charter with respect to the City's waterworks and

in each instance, the text of Section 25 of the 1894 Charter referenced above was repeated verbatim.⁹

In 1900 the General Assembly confirmed that the City has the power to "construct and maintain such aqueducts and reservoirs as they (sic) may judge best." Sec. 2, No. 134 of the Acts of 1900. In the exercise of that power, the City Council was authorized to "make, alter, amend or repeal any resolutions, by-laws, regulations and ordinances which it may deem necessary and proper for carrying into execution the foregoing [enumerated powers] or for the well-being of the city." Section 61, No. 134 of the Acts of 1900. This authority reappeared in subsequent Charter amendments, such as Section 1, No. 13 of the Acts of 1935.

In 1955, a comprehensive revision of the City Charter reaffirmed the City's powers with respect to the control and regulation of Berlin Pond. Among the enumerated powers are the following provisions:

XXXVIII. To make and enforce all regulations and ordinances for preventing the corruption of and for the protection of the water supply of the City....

XXXIX. To provide a supply of water ... including the distribution and sale of water for public and private purposes to persons and corporations both within and without the City, and to regulate the use of the same; and to establish and maintain reservoirs, aqueducts, water pipes, hydrants, water purification facilities, water towers or any other apparatus and equipment necessary or useful for such

⁹ Section 24 and 25, No. 149 of the Acts of 1896; Section 36 and 37, No. 134 of the Acts of 1900; Section 36 and 37, No. 293 of the Acts of 1912.

purposes, upon, in, and through the lands of individuals and corporations, both within and without the City, on making compensation therefor; and to acquire such land and other property adjoining any source of supply, reservoir or other water system facility as may be necessary to control or to prevent contamination or injury to such water supply, on making compensation therefor.

XLI. In taking land or other property for any of the purposes authorized in (XXXIX), the City Council shall proceed in the same manner as Selectmen of Towns are authorized by law to proceed in taking land for highways, ...

The 1955 Charter revisions reaffirm the legislative delegation of the power of eminent domain over resources located outside of the City limits, and of regulatory police power with respect to the public water supply located in the Town of Berlin.

A 1957 enactment authorized the City to enter into contracts "for the purpose of obtaining a supply of water for the residents and property owners of" the Town of Berlin and its fire districts (Sec. 1, No. 317 of the Acts of 1957).¹⁰

The 1975 Charter revisions were even more specific, authorizing the City to "acquire, construct, and maintain such dams, aqueducts, reservoirs . . .", Title I, Section 2, and "to make public improvements within said city, or upon property or rights of said city outside of its corporate

¹⁰ This eliminated any inconsistency with the general statute authorizing municipalities to enter into water supply agreements. 24 V.S.A. §3305(a). The 1957 enactment is specific to the City of Montpelier and takes precedence over the general statute.

limits..." Title I, Section 5. The necessary authority to protect and maintain the City's water source within the town of Berlin is again repeated in Title VII, Section 1. Finally, the 1975 Charter revision reaffirms the principle of nonrepealer underlying the entire Charter from its inception:

[a]ll the property, rights, franchises . . . belonging or appertaining to the former town and village of Montpelier shall belong and appertain to the City of Montpelier. All rights, privileges, and franchises heretofore granted to the village of Montpelier, by any act of the legislature, or existing under any law, or by virtue of any contract relating to the water works formerly possessed by said village, are hereby confirmed under the City of Montpelier.

Title XIV, Section 6, No. 126 of the Acts of 1975.

Appellants concede that the police power is the practical manifestation of "each individual's agreement, as part of the social compact, to subject his rights to the common good when a conflict arises." Brief of Appellants, 17, citing State v. Curley-Egan, 2006 VT 95 at ¶ 9, 11. Appellants now wish to assert those same rights *against* the common good. For instance, they argue that the City must seek "permission" of the Water Resources Board in order to exercise its delegated Charter authority to regulate the public water supply at Berlin Pond for the common good. Brief of Appellants, 25. Appellants' argument confuses rulemaking authority of the Water Resources Board with an adjudication. Under Appellant's

theory, the legislature must not have meant what it said in passing numerous special acts delegating regulatory authority to the City to protect Berlin Pond. However, both the Charter's meaning and that of 10 V.S.A. § 1424 must be garnered from a reading of the two statutes as a whole, so as not to reach an absurd or irrational result. In re Judy Ann's Inc., 143 Vt. 228, 231-32, 464 A.2d 752, 754-55 (1983).

As the plain meaning of the City Charter provisions do not lead to absurd or irrational results, they must be interpreted according to their terms. In re 66 No. Main St., 145 Vt. 1, 3, 481 A.2d 1053, 1055 (1984).

The City has ample authority, conferred by direct legislative act, to prohibit public, recreational use of Berlin Pond through the devices of Public Notice, of City Board of Health Order, of Ordinance, by virtue of its right of extraordinary judicial relief, and in any other reasonable manner. The trial court's recognition thereof was not error.

IV. APPELLEE'S EVIDENCE EXCEEDED THAT REQUIRED FOR A MUNICIPALITY TO OBTAIN INJUNCTIVE RELIEF.

The standard for a municipality to obtain injunctive relief is set out in Town of Sherburne v. Carpenter, 155 Vt. 126, 582 A.2d 145 (1990) (setting standard in zoning enforcement case). The Supreme Court held in Carpenter that "[i]f the zoning violation is substantial and involves conscious wrongdoing, the [municipality] is entitled to an injunction, including a mandatory injunction to remove an offending structure, as a matter of course." Id.; Fenwick v. City of Burlington, 167 Vt. 425, 435, 708 A.2d 561, 566-67 (1997) (balancing of equities is not necessary, citing Carpenter, 155 Vt. at 131-32, 582 A.2d at 149); see also In re Appeals of Phillip Letourneau, 168 Vt. 539, 726 A.2d 31 (1998) (affirming Carpenter standard for injunctive relief).

A showing of "Conscious wrongdoing" requires only that a defendant make a conscious decision to go forward, in the face of a direction not to from the municipal regulatory body. Carpenter, 155 Vt. at 132. Appellant's testimony confirmed that each of them were aware that their presence on the waters of Berlin Pond was absolutely prohibited by the City of Montpelier. Mindful of that prohibition, they elected to go forward and their violation was clearly substantial. The trial court did not err in awarding injunctive relief to the Appellee under this or any other standard.

The evidence adduced at hearing makes it clear that

Berlin Pond remains under considerable environmental pressures. Its enforcement action is required under its Source Protection Plan and expected under its Temporary Operating Permit. This is relevant not because Berlin Pond is a beautiful place to fish, boat or swim. It is relevant because Berlin Pond continues to be the sole drinking water supply for the City of Montpelier.

V. THE STATE OF VERMONT WAS JOINED PURSUANT TO RULE 19, PARTICIPATED FULLY AND WAS DISMISSED AT ITS REQUEST WITHOUT ERROR.

Appellant argues that somehow the trial court erred in allowing the State of Vermont to be dismissed without prejudice from the matter. If anything, the trial court was arguably overcautious in directing initially that the State be joined as a necessary party pursuant to V.R.C.P. 19(a). It was so joined, participated and sought to be released as it consented¹¹ to Appellee's actions. The trial court then reluctantly dismissed the State.

This was not error because the case involves the State of Vermont indirectly, if at all. The duty and authority to protect the water supply rests on the shoulders first of the water system operator (the City of Montpelier), second on the shoulders of the entity having been given special, specific

¹¹ Specifically, the State took no position on the City's exercise of authority, upon which in the context of Appellant's challenge, one may infer consent. Tr. 46 (argument of Assistant Attorney General Kieth Aten, Esq.).

and repeated delegated authority and responsibility over it (the City of Montpelier) and finally upon the entity whose interest is directly affected by actions violating either the 1926 State Health Permit or its statutory interests under Titles 10 and 18 (the City of Montpelier).

Appellee and the Agency of Natural Resources are in harmony with respect to Appellee's actions in protecting its public water supply. It was not error to dismiss the State.

VI. CONCLUSION

Appellants have demonstrated neither clear error nor abuse of discretion by the trial court in issuing a permanent injunction. The court's decisions amply meet the demands of the Public Trust Doctrine, Dillon's Rule and the appropriate Standard for Injunctive Relief. The trial court included all necessary parties. Its determination should be affirmed.

For THE CITY OF MONTPELIER VERMONT
Appellee

McKEE, GIULIANI & CLEVELAND, P.C.
MONTPELIER

By: _____


GLENN C. HOWLAND

[8881-197]

IN THE SUPREME COURT
OF THE STATE OF VERMONT

THE CITY OF MONTPELIER VERMONT,
Plaintiff / Appellee

v.

RICHARD BARNETT, CEDRIC SANBORN
AND LESLIE SANBORN
Defendants / Appellants

SUPREME COURT
Docket No. 2011-067

On Appeal from the
Washington Superior Court
Docket No. 145-3-10 Wncv

APPENDIX
TO
BRIEF OF APPELLEE

THE CITY OF MONTPELIER VERMONT

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APPENDIX A

EXCERPTS FROM TRANSCRIPT, HEARING ON PRELIMINARY INJUNCTION
FRIDAY APRIL 16TH, 2010

CONTAINING PAGES AS CITED
IN THE BRIEF OF APPELLEE.

STATE OF VERMONT

SUPERIOR COURT

CIVIL DIVISION

Washington Unit

Docket No. 145-3-10 Wncv

City of Montpelier,)
Plaintiff,)

v.)

Richard Barnett, et al.,)
Defendants.)

PRELIMINARY INJUNCTION

As recorded on Friday, April 16, 2010, at

Washington Civil Division
65 State Street
Montpelier, Vermont 05602

Courtroom

Before the Honorable Geoffrey Crawford

TRANSCRIBER: J. Marie Moran

1 April 16, 2010

2 (Tape No. 1)

3 THE COURT OFFICER: This is Docket
4 No. 145-3-10 Wncv. City of Montpelier v. Richard Barnett
5 and others. We have Attorney Glenn Howland here for
6 plaintiffs. We have Attorney Paul Giuliani here for
7 plaintiffs.

8 We have Attorney Keith Aten here for
9 defendants. We have an attorney sitting next to him --

10 MR. ENGLANDER: David Englander.

11 THE COURT OFFICER: Thank you.

12 -- for plaintiffs -- for defendants, I'm
13 sorry. We have Attorney Rusty Valsangiacomo for
14 defendants. And the other gentleman is Mr. Barnett, I
15 believe, and you -- and you, sir, are --

16 MR. SANBORN: Mr. Sanborn.

17 THE COURT OFFICER: -- Mr. Valsangiacomo's
18 client?

19 MR. SANBORN: Right.

20 THE COURT OFFICER: Thank you very much.

21 MR. SANBORN: (Inaudible).

22 THE COURT OFFICER: Thank you.

23 THE COURT: All right. We're here on the
24 motion for preliminary injunction. We'll start with
25 Mr. Howland's presentation.

1 determined by the board, those waters shall be managed
2 under the supervision of the secretary in order to obtain
3 and maintain the classification established."

4 THE COURT: Wait. I lost you. Where are
5 you?

6 MR. VALSANGIACOMO: 1258. I -- I skipped a
7 little bit.

8 THE COURT: (Inaudible).

9 MR. VALSANGIACOMO: It's in the Title 10,
10 Section 1258(a). Did I have that there to --

11 If you don't mind?

12 THE COURT: No. I've got it.

13 MR. VALSANGIACOMO: You've got it?

14 THE COURT: Yup.

15 MR. VALSANGIACOMO: Okay. Now, this is, I
16 think, something that's important. The state has
17 classified Berlin Pond as A(2). I don't think there's any
18 dispute of that. And I put -- I think just ahead of it, I
19 put that in there. "Vermont Water Quality Standards
20 Natural Resources Board, water managed for public water
21 supply purposes that is compatible with the following
22 designated uses, and the designated uses are swimming,
23 fishing, and boating."

24 From our position the state took
25 jurisdiction of Berlin Pond, they classified this A(2) and

1 As we discussed at the last hearing, the
2 Natural Resources Board, pursuant to that authority as
3 promulgated in the APA Rules, regulate the use of public
4 waters including the Berlin Pond. And I gave the Court a
5 copy of those -- those rules on Tuesday.

6 THE COURT: Yup.

7 MR. ATEN: The rules with respect to Berlin
8 Pond as far as the Natural Resources Board is concerned,
9 and that is the sole authority under the statute to
10 regulate those uses, state the limitations to exclude
11 vessels powered by motor should not exceed five miles per
12 hour. Use of personal watercraft is prohibited, like jet
13 skis. No aircraft between May 1 and November 30. And use
14 of internal combustion motors is prohibited.

15 That rule also provides by a footnote of --
16 endnote 1, "Restrictions adopted by authorities other than
17 the Natural Resources Board may also apply."

18 THE COURT: What page are you on? I just
19 want to catch up with you.

20 MR. ATEN: It's 80 -- 84, and it's the last
21 page of the rules that I submitted to the Court on
22 Tuesday.

23 THE COURT: Okay. Which endnote?

24 MR. ATEN: Endnote 1.

25 THE COURT: Is that specific to --

1 MR. ATEN: Berlin Pond.

2 THE COURT: Okay. All right.

3 MR. ATEN: The rules relating to Berlin
4 Pond start on A18 (inaudible).

5 THE COURT: Yup. Okay. Thank you.

6 MR. ATEN: So the state's position is these
7 three limitations -- or four limitations, but also the
8 Natural Resources Board rules provide for the possibility
9 that other restrictions may apply. The state does not
10 have a position on whether the City of Montpelier's
11 restrictions are valid or not.

12 If they are valid, that's consistent with
13 the Natural Resources Board rules, but we have no position
14 on whether or not they are valid.

15 THE COURT: Well, the more -- more
16 immediate problem is you may have no position, but it was
17 only March that your agency issued a permit for a Berlin
18 Pond Fish Out, which would involve dozens or more people
19 ice fishing on the pond. So the state can't have it both
20 ways.

21 MR. ATEN: Fish and Wildlife issues permits
22 pursuant to its rules.

23 THE COURT: Fish and Wildlife is you,
24 right?

25 MR. ATEN: Correct.

1 THE COURT: Okay.

2 MR. ATEN: Fish and Wildlife, however, does
3 not trump the Natural Resources Board's statutory
4 authority to regulate the use of Berlin Pond. Someone
5 applies for a permit, they'll get a permit. That's a
6 ministerial act.

7 THE COURT: Right.

8 MR. ATEN: I have a fishing license. I
9 paid my \$20 to the state --

10 THE COURT: Right.

11 MR. ATEN: -- I get a fishing license; that
12 doesn't authorize me to fish where I'm not allowed to
13 fish. It seems to me, as I understand Mr. Valsangiacomo's
14 argument, he seems to be relying on statements that
15 purportedly were made by state employees regarding whether
16 or not the defendants Sanborn and Barnett could fish at
17 Berlin Pond.

18 THE COURT: Well, I kind of put on my white
19 noise thing when I heard that. I mean, I -- who knows who
20 any unknown people we talk to on the telephone. But if we
21 talk concretely about the permit, that is real.

22 MR. ATEN: It's -- it's a ministerial act.

23 THE COURT: Right.

24 MR. ATEN: It's as real as my fishing
25 license.

1 Q. Did the police officers tell you at that time
2 that you were not supposed to be on the pond?

3 A. They did, yes.

4 Q. Okay. Did they ask you to get off the pond?

5 A. They ordered me to leave. Yeah.

6 Q. Okay. Did the sign that was there at the time,
7 the metal sign, indicate that -- that access to the pond
8 was prohibited by the city?

9 A. Yeah.

10 Q. Okay.

11 A. But again, it was outdated.

12 Q. It is -- the picture which appears on the first
13 paragraph of this affidavit, is that an -- an accurate
14 depiction of what the sign said?

15 A. Uh-huh.

16 Q. Okay. And you saw that sign before you went on
17 the water?

18 A. I did.

19 Q. And you chose to go on the water anyway?

20 A. I did.

21 Q. Okay. Had you --

22 THE COURT: What was the date? I just
23 didn't make a good enough note.

24 THE WITNESS: July 30th.

25 THE COURT: Of --

1 THE WITNESS: 2009.

2 THE COURT: Of last year?

3 MR. HOWLAND: 2009.

4 Q. Had you had any conversations with anybody at
5 the City of Montpelier prior to that date as to whether
6 you were allowed to go -- or authorized to go on water of
7 the pond -- of Berlin Pond?

8 A. I did, yes.

9 Q. And could you tell us about those?

10 A. I did. I spoke with city attorney Paul Giuliani
11 and city manager Bill Fraser. Bill Fraser referred me to
12 Paul Giuliani. In my conversation with Paul Giuliani, he
13 got very mad at me, very threatening. Threatened me with
14 criminal trespass. Threatened me with contempt of court.
15 Told me that the City of Montpelier takes this very, very
16 seriously. In my opinion, he acted very unprofessionally.

17 I asked Attorney Giuliani to specifically
18 quote to me which statute prohibited specifically,
19 kayaking, canoeing, fishing, or public recreation on any
20 water supply in the state of Vermont that was classified
21 as A(2) waters. Attorney Giuliani failed to do so. He
22 simply stated, "Well, it's covered a little bit in Title
23 10 and a little bit in Title 18."

24 I figured that given he's the city attorney
25 and he's been dealing with this issue several years now,

1 that he should be able to readily tell me what statute
2 prohibits me from doing it. Being that he offered no
3 statute that prohibited it, but I'm able to find several
4 statutes that -- that support it and specifically state
5 that it's an allowed and compatible and acceptable use of
6 the body of water, and that, combined with the fact that
7 there's statutes that specifically state that all bodies
8 of water in the State of Vermont, all streams flowages,
9 are property of the inhabitants of the State of Vermont,
10 held in trust, I went kayaking.

11 Q. Did Mr. Giuliani tell you that you -- that
12 the -- the city prohibited you from going on the water?

13 A. Yup.

14 Q. Okay. And you understood his position clearly?

15 A. Nope, I did not. If -- if -- a person telling
16 me that -- that I can't do it is not a good, valid
17 position. A city attorney needs to be able to quote a
18 statute.

19 Q. Maybe (inaudible) the question.

20 A. Burglary is ille- -- excuse me. Burglary is
21 illegal because Title 13, Chapter whatever, Section
22 whatever specifically states that burglary is illegal.
23 Where does it specifically state in any Vermont statute
24 that kayaking, canoeing, public recreation of any kind on
25 any A(2) water is prohibited? And -- and for that matter,

1 THE COURT: No problem.

2 BY MR. HOWLAND:

3 Q. Prior to July 30, 2009, had you gone kayaking on
4 Berlin Pond?

5 A. Prior to July 30th on Berlin Pond?

6 Q. Being this event, were you --

7 A. I think I had gone out once. Yes, I had.

8 Q. After July 30, 2009, after this event where --

9 A. Uh-huh.

10 Q. -- you encountered Chief Facos and -- did you go
11 on Berlin Pond at any time after that?

12 A. Quite a while afterwards, but, yes.

13 Q. How many times?

14 A. After that incident in a kayak, one time.

15 Q. One time?

16 A. Uh-huh.

17 Q. Did you go on Berlin Pond in any other way,
18 either on the ice --

19 A. Uh-huh.

20 Q. -- or in the water or using some other device
21 other than a kayak?

22 A. Uh-huh.

23 Q. And can you tell us how many times.

24 A. Once in a kayak; approximately 17 times ice
25 fishing.

1 Q. Seventeen times ice fishing.

2 A. Uh-huh.

3 Q. Okay. And that is between the winter of 2009,
4 2010?

5 A. December -- December 26th was the first time I
6 ice fished it. I don't know, I think sometime in the
7 beginning of March. I don't know. At the point that the
8 lawsuit was filed, that was -- the last time I went was
9 just prior to that. At the point that the lawsuit was
10 filed, I had not been on the ice after that.

11 Q. Going back to your conversation with
12 Mr. Giuliani.

13 A. Uh-huh.

14 Q. Do you recall any other conversations you had
15 had with him over the telephone after that date?

16 A. No. I don't believe I spoke with Attorney
17 Giuliani afterwards, no. He -- he informed me that I
18 couldn't use it, threatened me and everything, and I
19 have- -- haven't talk to him since that I can recall.

20 Q. Did you talk to him later that day?

21 A. Not that I can recall.

22 Q. So you don't recall a conversation in which you
23 called him back?

24 A. Not that I can recall specifically. I'm not
25 saying that I did not call him back, but I cannot recall

1 that.

2 Q. Okay. So you wouldn't re- -- recall whether,
3 for instance, there was any time that you called him back
4 and apologized for your position earlier?

5 MR. VALSANGIACOMO: Your Honor, I'm going
6 to object. I mean, I understand this is just a
7 preliminary injunction hearing, but we're -- we're getting
8 to a point that I can't sit here and not saying anything.
9 We're kind of getting to a point if Mr. Giuliani's a
10 witness, maybe they should be disqualified, because they
11 can't --

12 THE COURT: Well, he's not a witness yet.
13 And I think Mr. Howland is just trying to jog
14 Mr. Barnett's memory about whether there was a second
15 conversation, and if he can remind him of it, great; if
16 not, we'll move on.

17 MR. VALSANGIACOMO: Object on the relevance
18 grounds, Judge.

19 THE COURT: All right. Well, I don't even
20 know what he -- what the conversation concerned.

21 So let's -- let's -- let's --

22 MR. HOWLAND: Okay. Well, we'll move on,
23 Your Honor.

24 THE COURT: Let's soldier on.

25 MR. HOWLAND: I'll move on, Your Honor.

1 if it was accidentally issued, or if it was the position
2 of Fish and Wildlife. She assured me that, you know, it
3 was discussed. The whole issue was discussed, and -- and
4 it was big news, but no -- no mistake had been made.

5 And she had one of her superiors - I
6 believe his name was Ben - call me, and again, I asked him
7 the same thing. Was a mistake made? And he simply stated
8 that -- and again, I know it's hearsay -- but he simply
9 stated that "we determine whether or not it's a public
10 water of the state, and if it is, we issue the permit."

11 Q. And when you say it was "big news" -- prior to
12 today, where -- where -- you have some knowledge that this
13 big news involving your fishing derby got to the higher
14 levels of government than Fish and Wildlife?

15 A. Well, I'm sure it has. No one specifically has
16 contacted me or pulled the -- pulled the derby or
17 restricted it.

18 MR. HOWLAND: Objection. I think --

19 THE COURT: I would take that as a no.

20 A. No.

21 Q. Okay.

22 MR. HOWLAND: No, I did too.

23 Q. Now, with -- with regard to all your contact
24 with Berlin Pond, as I understand it, you felt and you
25 still feel that you have a right to recreational uses on

1 that pond?

2 A. Yes, I do. The Vermont Constitution Section
3 1670 -- Section 67 specifically states that the
4 inhabitants of the state have the right to boat and fish
5 in navigable waters. Berlin Pond is defined as navigable
6 or public waters of the state. So, yes; I do believe I
7 have that right.

8 Q. So I guess what you're -- but as of right now,
9 you're willing to not do anything until the Court makes a
10 ruling one way or the other?

11 A. Absolutely. I give my word that I'm not going
12 on Berlin Pond or on Montpelier's property whatsoever
13 until this is resolved. You know, my -- my initial
14 interest, you know, was to be able to use the pond. I
15 felt I had a right. When it became a big issue, well,
16 it -- as Mr. Howland stated, this hasn't been in Court
17 since the early 1900s.

18 Well, it -- that may be on the books still,
19 but that pertained to a facility that did not have a water
20 treatment facility. They do now. Times have changed;
21 things have changed.

22 So I went up there to potentially get this
23 in court.

24 Q. Okay.

25 A. Exercising my right, of course.

1 that is within your bailiwick or no?

2 THE WITNESS: We have the enforce- --

3 the -- the authority to enforcement --

4 THE COURT: Right.

5 THE WITNESS: -- but we do not, generally
6 speaking.

7 THE COURT: Because you'd have --

8 THE WITNESS: We would --

9 THE COURT: -- two municipal forces --
10 state and municipal?

11 THE WITNESS: Municipal, yes.

12 THE COURT: Thanks.

13 MR. ATEN: Excuse me, Judge. We've really
14 gotten into the realm of opinion and expert testimony. I
15 think the question that the Court had was why didn't Fish
16 and Wildlife enforce the no-trespass signs at the ponds,
17 and we've gotten the answer to that.

18 Unless there's further questioning that has
19 to do with facts that are relevant to the motion for
20 preliminary injunction, I'm going to object.

21 THE COURT: All right. Well, we'll take it
22 as it comes.

23 MR. HOWLAND: I only have one -- one line
24 with respect to the witness's early testimony.

25 / / / / / / / / / / / / /

1 BY MR. HOWLAND:

2 Q. If I recall correctly, you testified earlier
3 that you were unaware of any -- any policy discussions
4 within the Department of Fish and Wildlife with respect to
5 Montpelier's regulation of access to Berlin Pond; is that
6 correct?

7 A. Correct. Yes.

8 Q. I'd like to show you an exhibit identified as
9 Plaintiff's No. 4 and ask that you take a moment and
10 familiarize yourself with it.

11 A. Okay.

12 Q. Could you -- do you recognize that as a document
13 of Fish and Wildlife?

14 A. It certainly appears to be, yes.

15 MR. ATEN: Judge, can we have a look at the
16 document?

17 THE COURT: Yeah, sure.

18 (Pause in the proceedings.)

19 Q. Could you tell the Court what that exhibit is?

20 A. It appears to be a letter from the Commissioner
21 of Fish and Wildlife from January of 2007. Basically,
22 it's --

23 MR. VALSANGIACOMO: I'm going to object,
24 Your Honor. He --

25 THE COURT: Well, let's at least get it

1 described - I haven't even seen it - and then -- then I'll
2 listen to your objection.

3 MR. VALSANGIACOMO: Okay.

4 THE COURT: Okay?

5 A. I believe it was in response to us printing
6 Berlin Pond as -- as an open body of water for -- well,
7 let me back up. Each and every year in our fishing law
8 digest that we hand out to the public, we have all the
9 rules and regulations that --

10 THE COURT: Yup. The little book.

11 THE WITNESS: Yes.

12 THE COURT: Yup.

13 A. And Berlin Pond was added. Traditionally, we
14 have not -- we didn't place it there.

15 THE COURT: Right.

16 A. Because of a change in the -- the -- we used a
17 different database to obtain the bodies of water' names
18 based on their size, and Berlin Pond was added.

19 THE COURT: Okay. And then this letter was
20 in response to it?

21 A. And this letter -- Montpelier, I believe, raised
22 issue with that as -- because it kind of invited people to
23 go.

24 THE COURT: Okay.

25 A. That was not our intent to do that.

1 foundation.

2 THE COURT: Well, I'll allow the question.

3 A. Yes. The answer is yes.

4 Q. Has that also been conveyed to Mr. Barnett and
5 Mr. Sanborn?

6 A. I don't remember them specifically asking that
7 question, but if they had, I would have given them the
8 same answer.

9 Q. Okay. Thank you.

10 CROSS-EXAMINATION

11 BY MR. HOWLAND:

12 Q. Morning.

13 A. Morning.

14 Q. Do you have a clear working understanding of
15 the -- of the limits of your enforcement authority within
16 your jurisdiction?

17 A. Yes.

18 Q. Okay. Does the fish and game department govern
19 matters of health?

20 A. No.

21 Q. Does the fish and game department have any
22 involvement in the enforcement of municipal ordinances?

23 A. No.

24 Q. Okay. Do you have any authority whatsoever to
25 enforce a health department -- a state health department

1 A. Turbidity is the cloudiness of the water. There
2 are many factors that contribute to turbidity. Turbidity
3 is a -- is a big issue as it deals with water supply. We
4 have wild water, or untreated water that comes from the
5 pond with a level of turbidity, which, as I said before,
6 includes cysts: Cryptosporidium, Giardia, et cetera, that
7 come from human and warm-bodied animals' feces.

8 And there are other contaminants,
9 sediment -- sediment, suspended solids that float in the
10 water, and those all make up what's considered turbidity
11 of the water itself.

12 The plant removes some of that turbidity
13 through the treatment process, through the filtration,
14 through additive of chemicals that help to coagulate or
15 flocculate those bigger particles and to help the
16 filtration plant remove those from the -- the drinking
17 water -- the finished drinking water.

18 Q. Is there a relationship between turbidity and
19 germs or pathogens?

20 A. It -- it is. A portion of the turbidity is the
21 cysts or the contaminant, yes. That's correct.

22 Q. So is it accurate to conclude that the higher
23 the turbidity, the more likely there -- there is to have
24 contaminants present?

25 A. That's -- that's definitely possible. Yes.

1 Q. Now, where does the turbidity come from?

2 A. It comes from a number of different resources.
3 You get turbidity from runoff, anything that -- that is --
4 runs off from the roads -- may have some of the dirt from
5 the roads comes down through the -- the trees may have
6 sediment from there. There is animal feces that would
7 contribute to that turbidity, again, through cysts, the
8 Giardia and Cryptosporidium.

9 And, you know, being a -- a pristine --
10 well, what we consider a pristine water body, you know,
11 there's still those contaminants in there. You know,
12 we -- we do see, especially in the spring during runoff,
13 our turbidity goes up. So this time of the year -- or we
14 just got through the -- the worst time of the year when
15 things are running off because of spring -- spring melt.

16 Q. In a closed -- or you know, in a body of water
17 such as Berlin Pond, does the presence of recreational use
18 affect the turbidity?

19 A. Oh, definitely. Being a licensed diver and
20 taking the source of protection very seriously for the
21 city, we've actually gone out to -- where -- where we take
22 the intake of the bonnet -- myself and two other licensed
23 divers who are also employees of the City of Montpelier,
24 we dove the bonnet to make sure we knew where it was, the
25 condition --

1 THE COURT: What's the bonnet?

2 THE WITNESS: The bonnet is the intake --

3 THE COURT: Okay.

4 THE WITNESS: -- for the -- the water
5 system.

6 A. And we've actually cleaned it two of the last
7 three years, just to make sure that there's nothing around
8 it that could further contaminate the -- the issues.

9 THE COURT: Because it gets slimy like
10 anything that --

11 THE WITNESS: It gets slimy, yeah.

12 A. You get fungi. And -- and not all of them are
13 harmful; some of them actually are helpful, but just to
14 make sure that, you know, there's -- there's nothing
15 around there that could further contaminate the system.

16 The bottom of Berlin Pond is very muddy,
17 very murky, and even getting close to the -- to the bottom
18 of Berlin Pond stirs up a great deal of sediment and
19 suspends everything in the -- in the water.

20 Q. Is there any significant current -- water
21 current through Berlin Pond, or is it a relatively --

22 A. It's --

23 Q. -- a quiescent body of water?

24 A. It's -- it -- no. There's not very much current
25 through there. Everything that goes through the bonnet is

1 actually gravity-fed. But no, it's -- you have the -- the
2 source water is coming in, there's numerous strains that
3 feed that body of water, but as it enters the pond it --
4 it doesn't move a whole lot, no.

5 Q. All right.

6 A. Especially as it deals with the bottom.

7 Q. Now, are fa- -- are you familiar with the --
8 with the concept of a source protection plan?

9 A. I am. Yes.

10 Q. Okay. Could you explain, briefly, what a source
11 protection plan for a community water system is and what
12 its relevance is to Berlin Pond.

13 A. The source water protection is a document that's
14 necessary through our water supply permit to operate,
15 which is part of our water system. The source protection
16 plan gives numerous guidance documents to the city.

17 It addresses and identifies any potential
18 contaminants, and it gives us step-by-step guides that we
19 should utilize that make sure that our -- our source is --
20 is not contaminated by any of these -- these potential
21 sources, some of them being direct -- direct impact from
22 gasoline, especially with the proximity of Interstate 89.
23 And we have in our possession certain remedies for that
24 issue.

25 But it identifies these -- these

1 contaminants, and -- and from that we have to address or
2 lessen the impact from any of those contaminants.

3 Q. So the -- the source protection plan would
4 contain contingency plans for, say, a rollover on the
5 interstate or a toxic spill or something of that nature?

6 A. Correct.

7 Q. Okay. Does a source protection plan provide for
8 an area that's defined as a protected area for the water
9 system?

10 A. It does. It outlines a source protection area
11 or an SPA, which is identified in that source protection
12 plan. And again, it's -- it's the area that surrounds the
13 pond that any drop of water or any drop of anything
14 that -- that hits that portion of land will actually find
15 its way to the pond through gravity means by -- by most.

16 Q. Now, the -- the -- the city has a temporary
17 operating permit; is that correct?

18 A. That's correct.

19 MR. HOWLAND: If I may approach the Court.
20 I believe we filed a copy (inaudible)?

21 THE COURT: Yeah.

22 MR. HOWLAND: (Inaudible) offering --
23 temporary operating permit.

24 THE COURT: Yup.

25 MR. HOWLAND: Thank you.

1 Mark this?

2 THE COURT RECORDER: Yes.

3 What are we up to, Greg? We're up to --
4 let me see.

5 THE COURT: And to save time, I understand
6 this is temporary because of some shortcomings not related
7 to this dispute?

8 THE WITNESS: Correct. That's correct,
9 sir.

10 Q. I'm showing something I marked as Plaintiff's
11 Exhibit No. 5, and is this the water system's -- the
12 city's temporary operating permit for the water system?

13 A. It is. Yes.

14 Q. And the water system includes the water in
15 Berlin Pond?

16 A. It does.

17 Q. Okay.

18 A. That's correct.

19 Q. And its tributary to a certain extent?

20 A. That's correct, yes. It does address them.

21 Q. How -- about how far up each of the tributaries
22 does -- does the source protection area extend, roughly?

23 A. It -- it's typically to the top of any
24 elevation. It's the top of the hills, because, again,
25 from -- from there, gravity will -- will direct it back

1 down towards the ponds. So anything that -- that is
2 higher in elevation and -- and runs towards the pond is
3 part of the source protection area. It extends into
4 Northfield and Williamstown and -- and mostly in Berlin.

5 Q. Okay. Now, the tempor- -- the temporary
6 operating permit makes reference to the concept of raw
7 water users; is that correct?

8 A. That's --

9 Q. Raw water users?

10 A. Correct.

11 Q. Could you explain to the Court what is meant
12 in -- or what your understanding is, based on the permit
13 of -- that permit, what -- what's your understanding of
14 the raw water users issue with respect to the city's water
15 system.

16 A. The raw water users are those -- there are four
17 users between the intake or the pond and the treatment
18 facility. They are receiving untreated water directly
19 from the pond, without any treatment from the City of
20 Montpelier filtration plant. The concern is, again, the
21 cysts that -- and -- and contamination at the -- is --
22 comes through the pipe. There is no filtration. There is
23 no disinfection. And again, the cysts will still be
24 there. The chlorine disinfects those cysts so they're not
25 hazardous to -- to health.

1 MR. HOWLAND: -- earlier.

2 THE COURT: All right. 5 is admitted.

3 Q. Now, you're aware, of course, that the -- the
4 controversy here is -- is whether private individuals have
5 a right or a privilege to conduct recreational activities
6 on the lake, boating or fishing or going on a
7 kayak -- or going on the lake with a kayak, swimming,
8 things of that nature?

9 A. I do.

10 Q. And you've testified as to some of the
11 health-related concerns that are -- that are accompanied
12 by additional recreational use, or recreational use in an
13 area that is for the last century and a half free from
14 recreational use completely. Are there any other concerns
15 other than -- particularly health-related, germicidal and
16 so forth concerns?

17 MR. VALSANGIACOMO: Your Honor --

18 Q. Concerns that the city has with respect to
19 allowing people to come in and go into the water or fish
20 on the water or bringing a -- a boat into the water or a
21 kayak, are there any other contamination issues?

22 A. There are a few that we're concerned about. One
23 of them being invasive species, specifically zebra
24 mussels, which have caused a great deal of -- of issue
25 with drinking water supplies, especially on Lake

1 Champlain. I've been in contact with my counterparts up
2 at Champlain Water District; they say they expend great
3 deals of money just to keep their intake open.

4 There's also other invasive species that
5 are accompanied with recreational vessels. As a boater
6 myself, as you use the state access areas, there are signs
7 up that -- that talk about washing your -- your vessel
8 down so you don't -- don't redistribute these -- these
9 invasive species. Being pristine, it hasn't been
10 subjected to all these other invasive species, so that --
11 that's one of our concerns.

12 Another would be domestic and international
13 terrorism. After September 11, 2001, the EPA, actually,
14 originally mandated that drinking water supplies were --
15 were pretty much, for the most part, gated off. They've
16 come back on that, but that's -- that's still a concern of
17 ours. It's not high on the list, but -- but it is a
18 concern.

19 And again, we -- we do patrol daily. If
20 there are people trespassing, fishing within the -- the
21 waters, we do call the Montpelier Police Department as our
22 municipal enforcement agency. So those are -- those are
23 two concerns of ours.

24 MR. HOWLAND: Your Honor, for the record,
25 I'll draw the Court's attention to -- again, to the city

1 A. Cedric Richard Sanborn.

2 Q. And where do you reside?

3 A. I live in Barre Town.

4 Q. How long have you lived there?

5 A. Twenty-seven years.

6 Q. And you operate a business?

7 A. Yes, I do.

8 Q. And what's that business?

9 A. That's R&L Archery.

10 Q. And just briefly, what is that?

11 A. It's a full-line sporting goods store.

12 Q. And where is that located?

13 A. It's on 70 Smith Street in Barre City.

14 Q. Okay. And how long have you --

15 THE COURT: R&L Archery?

16 THE WITNESS: R&L Archery.

17 THE COURT: Oh, so you're Mr. Barnett's

18 boss, basically?

19 THE WITNESS: I am.

20 THE COURT: Okay. Got it.

21 THE WITNESS: I am the "R" of R&L.

22 THE COURT: Oh, all right.

23 THE WITNESS: And the "L" is the one who's

24 not here today.

25 THE COURT: It's your wife who's on a

1 bright yellow -- the official no-trespassing, hunting,
2 fishing, trapping signs. They're quite prominent all the
3 way around the pond.

4 Q. Do you remember seeing any of those back in --

5 A. Absolutely not.

6 Q. Okay. Now, I'm going to show you Defendant's C.
7 Now, as I understand it, this was the sign that -- that
8 was up when you were there?

9 A. Yes, it is.

10 Q. Why -- and when you saw that sign, did you --
11 did you then know it was outdated, or had you done some
12 research on it?

13 A. We -- we'd done the research on it. Everything
14 at the bottom refers to Title 18, which is the old health
15 department statutes, which were repealed in the mid 1980s.
16 So whatever statutes are -- are given here, are out of
17 date, and secondly - excuse me; I can read better - the
18 penalty on it is -- is for "a person who willfully
19 deposits polluting matter in or upon the banks of a pond,
20 stream, well, or spring used for a domestic water supply."

21 Even if it had been in effect, I wasn't
22 polluting; I wasn't depositing anything on the banks. And
23 then up on top, you know, you've got a public water supply
24 that says "bathing or depositing of sewage or refuse or
25 other polluting matter into these waters or on the banks

1 we got a copy of it.

2 Q. Did you -- I see you mentioned that you saw --
3 and I'm looking at - let's see - Defendant's C, this is
4 the -- the large steel metal sign that --

5 A. That's the outdated sign?

6 Q. That's the sign that was there when you were on
7 the pond, sir, correct?

8 A. Yes, sir.

9 Q. And there were multiple signs?

10 A. I saw that once in the water 20 feet out from
11 the culvert.

12 Q. Did you see that sign before you got in the
13 water?

14 A. Yes.

15 Q. Okay. So you were aware that the City of
16 Montpelier was -- was warning people and indicating
17 that -- that they were prohibiting trespassing in that
18 area?

19 A. That's clearly what the sign says, but what was
20 I trespassing on?

21 Q. So you were aware that the city had taken the
22 position that you shouldn't be there, regardless of
23 whether you agreed with it or not?

24 A. Yes.

25 Q. Yes. Okay.

1 Q. Okay. And the message said, "No trespassing"?

2 A. Let's go back to I wasn't trespassing.

3 Q. No, I didn't ask you that. The message said,
4 "No trespassing"?

5 A. The message says no trespassing, and I didn't.

6 Q. I didn't ask you that.

7 THE COURT: All right. Let's move on to
8 another question.

9 Q. So after having thoroughly read the sign and
10 whatever it has to say, you decided to go on the water
11 anyway?

12 A. Yes, sir.

13 Q. Okay.

14 MR. HOWLAND: I have no further questions.

15 THE COURT: All right.

16 REDIRECT EXAMINATION

17 BY MR. VALSANGIACOMO:

18 Q. You've -- you've read the charter a little bit
19 this morning?

20 A. I have.

21 Q. And your view of it was?

22 A. It -- it very clearly gives Montpelier the
23 authority to -- to go into the Town of Berlin to establish
24 a public water supply, maybe to build -- make a dam or
25 something to enhance the reservoir. It also gives them