

City of Montpelier v. Barnett, 2012 VT 32, 191 Vt. 441:

In this case, the City of Montpelier sought a declaratory judgment that boating, fishing, and bathing are prohibited in Berlin Pond. The trial court granted its request, and permanently enjoined defendants from trespassing on the City's property surrounding Berlin Pond and from boating, fishing, or swimming in Berlin Pond. The Supreme Court reversed this decision on appeal, with the exception of the trespass ruling which was not challenged.

The Court explained that the State of Vermont holds Berlin Pond in trust as "a navigable public water," and the scope of the City's authority to regulate Berlin Pond is limited to the authority granted by the State. Id. ¶ 16. The Court concluded that for the City to validly regulate activities on Berlin Pond, there must be "action by the State—either by direct regulation or by delegating such power to the City—and this has not yet occurred." Id. ¶ 2.

The Court first considered whether the State itself had prohibited boating, fishing, and bathing in Berlin Pond. It recognized that for many years, a state health order had prohibited recreational use of Berlin Pond. The Court concluded, however, that that order was no longer valid and that it had not been implicitly adopted by the Agency of Natural Resources. Id. ¶ 23. The Court also rejected the argument that a 1926 state health order lived on through the City's water source protection plan. Id. ¶ 35. It found that the plan itself did not provide the operator any special power to regulate the activities of persons who might use source waters for recreation or other purposes. Id. ¶ 36. This was understandable, the Court reasoned, because the Legislature had created another source of law to regulate activities on the surface of navigable waters. Id. ¶ 37. In 1970, the Water Resources Board, and later the Water Resources Panel of the Natural Resources Board, was authorized to regulate the use of public waters. While the Panel had adopted specific rules for Berlin Pond, those rules did not prohibit boating generally or fishing or swimming. The Court noted that the City had filed a petition with the Panel in 2007 seeking to amend the rules to prohibit swimming, fishing, and boating, but the petition had been rejected as incomplete and it was never resubmitted. The Court thus concluded that the current rules did not prohibit the activities in question.

The Court next considered if the State had delegated authority to the City to prohibit the activities in question either explicitly or implicitly. Id. ¶ 40. The Court rejected the City's argument that, by ratifying the municipal charter and various amendments thereto, the Legislature had authorized the City to regulate the use of Berlin Pond. The Court found nothing in the current City Charter that would authorize such regulation. It specifically rejected the City's assertions that: (1) the current charter provision granting the power to maintain reservoirs, when interpreted in light of the historical charter provisions, should be read to include an authorization to regulate recreational use of the Berlin Pond; (2) that the transfer of the Village of Montpelier's rights to the City transferred the authorization for such regulation; or (3) that the City's ordinances were valid under the charter's savings clause as an exercise of power granted under a prior version of the charter. In sum, as reference above, the Court concluded that the City did not have the power under state law or under its current charter to prohibit swimming, fishing, or boating on Berlin Pond, and that "the recreational use of Berlin Pond is a matter of state concern requiring a resolution at the state level." Id. ¶¶ 62, 64.