



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application of the Town of
Goodman to Discontinue Eight Public Accesses to
Water on Lake Hilbert, Town of Goodman,
Marinette County, Wisconsin

Case No. IH-09-07

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to due notice, hearing was held at Marinette, Wisconsin, on October 21, 2009,
Jeffrey D. Boldt, administrative law judge presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this
proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
DNR
P. O. Box 7921
Madison, WI 53707-7921

Town of Goodman, by

Bill Stankevich
Jim Lachapell
Steve Gostisha
W16212 South Shore Drive
Goodman, WI 54125

FINDINGS OF FACT

1. The Town of Goodman filed an application with the Department of Natural Resources for a permit under Wis. Stat. § 66.1006 to discontinue eight (8) ways to Lake Hilbert, a navigable water. The eight ways proposed to be discontinued are located in Section 6, 7, and 8, T37N, R17E, specifically, between the following parcels in the Town of Goodman, Marinette County, Wisconsin:

South Side:

Between Parcel #012-02372 and 012-01100

Between Parcel #012-02396 and 012-02395

Between Parcel #012-02379 and 012-02380

North Side:

Between Parcel #012-02072 and 012-02129

Between Parcel #012-02118.1 and 012-02117

Between Parcel #012-02100 and 012-2099

Between Parcel #012-02105 and 012-2104 (012-2105.1)

Between Parcel #012-02093.1 and 012-01023.1

2. The Department of Natural Resources issued Notice of a Proposal to Abandon a Way to Water which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. No timely objections were received.

3. On September 9, 2009, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

4. Hilbert Lake is a navigable water of the State approximately 289 surface acres in size and located in Northern Marinette County.

5. The Town was largely unaware that it owned these public access parcels and another public site that it has chosen to exclude from the request for abandonment. (Lachappel) The Town argues that, unlike that ninth site, these eight sites are not being used by the public and the Town lacks the resources to properly police the areas and prevent private encroachment. While it is true that selling the parcels would put the properties on the tax rolls, this is not the Town's primary purpose. (Id.)

6. The Town of Goodman has not presented any plan to replace any of the eight public access parcels which it proposes to abandon. DNR Senior Grants Specialist Susan Kocken testified that she has been involved in the review of public access abandonment applications for twelve years. (Ex. 1a) The Town's proposal was not approved by the Department because the eight sites contribute to the "quantity and the quality" of public access to Lake Hilbert and because the Town has not proposed any replacement access sites.

8. Access site #1 (between Parcel #012-02372 and 012-01100) is well marked and 60 feet wide and 200 feet deep, and provides the only public access to the south shore of the western lobe of the lake. This site is one mile from the Town of Armstrong public access and a half mile from access site #3 described below.

Access site #2 (between Parcel #012-02396 and 012-02395) is also 60 feet wide and 350 feet deep, and provides the only public access on the southern lobe of the lake. It is more than

three miles from the Town of Goodman Park access and nearly a half mile from access site #3 described below.

Access site #3 (between Parcel #012-02379 and 012-02380) is also 60 feet wide and 350 feet deep, and represents the only public access on the south shore of the eastern lobe of the lake. It is just over one half mile from access site #1 and 2250 feet from access site #2.

Access site #4 (between Parcel #012-02072 and 012-02129) is 60 feet wide and 400 feet deep. It is located about a mile from the Town of Armstrong public access site and 875 feet from access site #5.

Access site #5 (between Parcel #012-02118.1 and 012-02117) is 50 feet wide and 500 feet deep. There has been some private encroachment on this site, including placement of a private driveway and of a propane tank, rubbish, and a woodshed on the public property. (Ex. 24-E)

Access site #6 (between Parcel #012-02100 and 012-2099) is 60 feet wide and 250 to 300 feet deep. It is marked and is located just off CHT "H". The neighboring private landowner has placed two out buildings, a propane tank, as well as boats and trailers on the public access site. (24-g) Further, a corner of a privately owned boathouse appears to be placed upon the public access at the shoreline—most likely below the ordinary high watermark. (Id.)

Access site #7 (between Parcel #012-02105 and 012-2104 (012-2105.1) is 25 feet wide and 215 feet deep. A private blacktop driveway goes directly across this site, and the site is difficult to recognize as public because of the driveway and because it is obscured by private lawns in the area. (Ex.11-c) Further, there are woodpiles on the site and a footbridge near the lake that crosses a dug out channel near the lakeshore. (Ex.24-f)

Access site #8 (between Parcel #012-02093.1 and 012-01023.1) is 60 feet wide and 138 feet deep on the west and 183 feet on the east. This public access site has the appearance of a private demolition landfill. Someone has placed piles of boards, railroad ties, metal and dilapidated boat and out building waste across the public access site. (Ex. 24-h)

9. All eight parcels represent quality public access, for a variety of users, to Lake Hilbert. (Kocken) Ms. Kocken noted that even sites that are not suitable for boat trailers are significant for walk-in fishing access, winter recreational activities, enjoyment of natural scenic beauty, and fire department water supply. Several areas residents testified that they felt strongly that these public lake access sites have value both now and for future generations. (Bugie; Marcusen).The sites provide needed and easy access to the lake for fishing, snow-shoe users and cross country skiers. (Marcusen) Mr. Bugie resides next to public access lot 3 described above, and described the site as natural and pristine, featuring 200 foot hemlock trees and a natural shoreline that has logs in the water that contribute to fish habitat. Bugie expressed grave concerns about losing these features, which informed his in-laws decision to purchase their property nearly 40 years ago.

10. DNR Upper Green Bay Area Fish Supervisor Michael Donofrio testified that all of the public access sites have significant value for ongoing fish habitat improvement projects on Lake Hilbert. The public access areas would allow for shoreline tree drops and or other fish habitat improvement efforts. Further, because the lake is highly developed it is important to allow some near-shore areas to be free from the placement of piers and other impacts to the fishery associated with intense human activity. (Ex. 11-c)

11. The eight public access sites proposed to be abandoned contribute to both the quality and quantity of public access to Lake Hilbert. Given the fact that the Town has not proposed any replacement public access, approval of the ordinance must be denied.

12. Ms. Kocken testified that the DNR opposed abandonment of any of the eight sites, but that the least valuable public access sites are numbers five and six described above. If the Town were to present a more detailed proposal that involved making improvements on the seven (1-4, 7-8, plus the ninth site not currently sought to be abandoned), the balancing of such improvements may justify approval of abandoning one or more of sites five and six. However, at the present time, no such ordinance or proposal is before the Division. It is also clear that members of the public in the area would want to have an opportunity to comment on any such new plan, and that a new public notice would therefore be appropriate.

DISCUSSION

The Town of Goodman recently learned that it held the eight public access parcels described above and a ninth site that it is not proposing to be abandoned. On several of the sites, private parties had been making use of and/or encroaching upon them.

Several of the public access sites appear to have become a public nuisance, including one that has the look of demolition landfill. The Town's desire to be rid of the responsibility of policing these areas is understandable. However, that is not the standard for this hearing.

The eight sites contribute to both the "quantity and quality" of access to Lake Hilbert. No replacement access has been proposed by the Town. The Department's denial of approval of the discontinuance of the public access sites must be upheld under these circumstances.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to review Department of Natural Resources approval of a discontinuance of a public access site pursuant to Wis. Stat. §§ 227.43 and 66.1006.

2. The Department of Natural Resources has authority to approve or disapprove of any discontinuance of a public access to public water. No resolution, ordinance, order, or similar action of a town board or county board, or of a committee of a town board or county board,

discontinuing any highway, street, alley, or right-of-way that provides public access to any navigable lake or stream shall be effective until such resolution, ordinance, order, or similar action is approved by the department of natural resources. Wis. Stat. § 66.1006

3. NR 1.92(2) The department may grant the petition to abandon or discontinue the public access only if: (a) Any access sites or part thereof proposed to be abandoned or discontinued is replaced prior to granting the petition; or (b) The department finds that the access proposed to be abandoned does not contribute to the quality or quantity of public access on the body of water. The Town has not met its burden on either sub (a) or sub (b) above, and approval of the abandonment must therefore be denied.

4. There was no evidence that any of the public access sites caused environmental degradation as a result of existing use as a public access and that “abandonment of the access would reduce or eliminate the degradation without reducing public access to that body of water” within the meaning of Wis. Admin. Code NR 1.92(4).

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the DNR’s determination denying the public access abandonments be AFFIRMED.

Dated at Madison, Wisconsin on November 11, 2009.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____

Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.