



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

In the Matter of Whether Land Located in the
Town of Webster, Vernon County, Owned by
Bernard G. Pitsch, and Enrolled Under the
Managed Forest Law Order #63-051-2003 Should
be Withdrawn from the Managed Forest Land
Program

Case No. IH-12-056

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Viroqua, Wisconsin, on December 11, 2012, 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:

Bernard G. Pitsch, by

Attorney Kevin Connelly
201 South Main Street
Westby, WI 54667

Wisconsin Department of Natural Resources, by

Attorney Quinn Williams
Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. On January 1, 2003, Bernard G. Pitsch and Janelle K. Prine by Order No. 63-051-2003, enrolled 19 acres located in Township 13 North, Range 3 West Section 20, NWSE in the Town of Webster, Vernon County in the Managed Forest Land program.
2. On June 12, 2008, the DNR issued a Managed Forest Law – Transfer Order, transferring ownership of the above-described lands from Bernard G. Pitsch and Janelle K. Prine to Bernard G. Pitsch.
3. On May 8, 2012, a relator representing Bernard G. Pitsch visited the DNR Forestry Office in Vernon County to inquire about where Bernard G. Pitsch's house was located in relation to the lands enrolled in the Managed Forest Land Program. The DNR determined that

the house was located on lands enrolled in the Managed Forest Land Program. This was confirmed at hearing by virtue of an overlay of aerial photos and the testimony of DNR Forester Joel Jepson. (Ex. 13)

4. On May 17, 2012, the DNR sent Bernard G. Pitsch a Notice of Investigation informing him that the DNR was investigating the alleged violation of a structure developed for human residence located on Managed Forest Law land in violation of Wis. Stat. § 77.82(1)(b)(3).

5. On July 13, 2012, the DNR issued a Managed Forest Law Withdrawal Order to Bernard G. Pitsch which stated that the DNR intended to withdraw 19 acres of land from the Managed Forest Land Program.

6. On July 25, 2012, the Department received a petition for a contested case hearing from Attorney Kevin M. Connelly, on behalf of Bernard G. Pitsch. The Department reviewed the petition and granted the request for a contested case hearing, objecting to the July 13, 2012, Withdrawal Order.

7. On August 24, 2012, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources.

8. On June 17, 2002, Bernard Pitsch and Janelle Prine were mailed an acknowledgment letter that lands would be enrolled into the Managed Forest Law program, the Stewardship Forestry Plan, and the map of lands to be enrolled. The map of the enrolled lands did not show that a building was present on the land, nor did the map show that an area of land was being left from enrollment into MFL as a future building site. Bernard Pitsch and Janelle Prine were asked in the acknowledgment letter to review the Stewardship Forestry Plan and MFL Map and to report any errors prior to July 1, 2002. The Department of Natural Resources did not receive any documentation that errors were present, therefore the MFL application was sent to the Madison DNR office for further processing.

9. On November 20, 2002, a Managed Forest Law Order of Designation was issued to enroll lands owned by Bernard Pitsch and Janelle Prine into MFL. Acknowledgment letters mailed with the MFL Order of Designation requested that landowners review the documentation and report any errors in writing by a date certain. The Department of Natural Resources did not receive any documentation that errors were present; therefore the MFL Order of Designation issued on November 20, 2002, went into effect on January 1, 2003.

10. DNR Forester Joel Jepsen determined that a house developed for human residence was located on MFL lands owned by Bernard Pitsch. The house contained six of the eight building characteristics in violation of Wis. Admin. Code NR 46.15(9), including electrical service by connection to the lines of a power company; 800 sq. ft. or more in total area, using exterior dimensions of living space; indoor plumbing including water and sewer, piped to a septic system; central heating; telephone service based locally; it was insulated using common insulation products.

11. At hearing, Mr. Pitsch did not dispute either that the house in question was his "domicile," nor that it was "a structure developed for human residence" nor that it was placed on managed forest lands within the meaning of program requirements. Rather, Mr. Pitsch attempted, but failed, to prove that he had been given an oral approval to relocate the house from

its designated location because that former area, outside of the MFL designation, was in a floodplain. However, Mr. Pitsch failed to establish that a specific approval to relocate the property into its present configuration and footprint had ever been given by former DNR Forester William Seybold. Seybold had no memory of such an oral approval. He instead noted a general ability of foresters to approve minor changes in the footprint of an area previously excluded from a MFL parcel as a future building site. It appears likely that Mr. Pitsch misinterpreted this as providing him with more flexibility in locating the house than could be possible to remain consistent with Wisconsin real estate law and MFL program requirements.

12. Ms. Nelson testified that under no circumstances, including the then-existing 50 to 100 foot shifting policy, would a landowner ever be allowed to simply pull out one acre from an MFL parcel after entry for the purpose of building a residence.¹ Any landowner would have to either remove the MFL parcel from the program or remove a previously designated Government Lot of other area within a discreet legal description. (Nelson) As Ms. Nelson testified, it would be fundamentally unfair and would violate the public trust in the program if program participants could escape the burdens of property taxation for years and then later arbitrarily pull out one acre for the purposes of building a residence. Rather, such lands have to be designated as excluded for future building from the date of entry, so that they may be taxed at the same general property rate as other undeveloped one acre lots not in the MFL program.

13. The change in location of the footprint of the home did not comply with the then-existing DNR policy allowing shifting of the site by 50 to 100 feet from a previously identified and excluded future building site within an MFL parcel. (Nelson; Ex. 28, p. 8) Rather, the Mr. Pitsch built his home on the MFL parcel in a new location that had never been designated as a future building site and which was squarely within the MFL parcel area.

14. MFL lands owned by Bernard G. Pitsch fail to meet the eligibility requirements in Wis. Stat. § 77.82(1)(b)3 and must be withdrawn from the MFL program.

15. Bernard G. Pitsch has a building that exceeds four of the eight building characteristics on MFL lands and is in violation of Wis. Stat. § 77.82(1)(b)3.

17. The Department of Natural Resources is required to issue an order withdrawing lands from Managed Forest Law and assess against the owner a withdrawal tax under Wis. Stat. § 77.88(5) and a withdrawal fee under Wis. Stat. § 77.88(5m) for a landowner's failure of the land to conform to an eligibility requirement under Wis. Stat. § 77.82(1).

18. Wisconsin Stat. § 77.88(9) provides that a withdrawal order issued before December 15 of any year takes effect on the January 1 after the date of issuance, while a withdrawal order issued on or after December 15 of any year takes effect on the 2nd January 1 after the date of issuance.

DISCUSSION

It is unfortunate that Mr. Pitsch apparently misinterpreted the DNR policy with respect to allowing minor changes in the footprint of a proposed residence in areas previously identified as

¹ The DNR has since changed this policy in part to eliminate any such confusion or misinterpretation. (See: Ex. 28)

excluded from but within an MFL boundary designation. These changes were limited to shifts of areas excluded in contemplation of building by no more than 50 to 100 feet within the MFL boundary. (See: Ex. 28, pp. 8-11) Mr. Pitsch apparently erroneously interpreted it more broadly to mean that he could relocate his home from an area outside the MFL designated area to one inside the MFL designated area so long as it was less than one acre. The issue came up when he became aware that the area he had hoped to build on was within a floodplain.

However, at hearing Mr. Pitsch did not establish that he had ever been given oral approval to relocate the entire structure from outside the MFL to an area within in it. Such an oral okay would have plainly violated both DNR policy and unambiguous program requirements. It is simply not credible that an experienced forester such as Mr. Seybold would have given such an approval. Nor would it have been reasonable for Mr. Pitsch to rely on an oral statement that did not comport with MFL program requirements nor provide clarity with respect to future real estate transactions. It is no coincidence that this violation of MFL eligibility requirements came up when a realtor reviewed documents and identified that the location did not comport with available real estate records nor the MFL designation.

Further, nothing in this history changes the fact that a structure developed for human residence within the meaning of Wisconsin law exists within the MFL designated lands, and therefore the property must be withdrawn from the program.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders in cases relating to the designation and withdrawal of properties entered into the managed forest land program pursuant to Wis. Stat. § 227.43.

2. A parcel that is developed for a human residence is not eligible for designation as managed forest land. (Wis. Stat. § 77.82 (b)(3)) The department has by rule defined "human residence" to include a residence of the applicant regardless of whether it is the applicant's primary residence. The definition may also include up to one acre surrounding the residence for a residence that is not the applicant's primary residence.

3. "Developed for human residence" means land that contains a building for habitation that is constructed or used as a domicile or that has a minimum of five of the following eight characteristics:

- (a) 800 sq. ft. or more in total area, using exterior dimensions of living space, including each level and not including porches, decks or uninsulated screen porches.
- (b) Indoor plumbing including water and sewer, piped to either municipal or septic system.
- (c) Central heating or cooling, including electric heat, a furnace or heat with a circulation system.
- (d) Full or partial basement, excluding crawl spaces and frost walls.
- (e) Electrical service by connection to the lines of a power company.
- (f) Attached or separate garage, not to include buildings for vehicles used primarily for work or recreation on the property.

- (g) Telephone service based locally.
- (h) Insulated using common insulation products. NR 46.15(9)(a-h)

The Pitsch domicile included all of the above except (d) and (f), and was thus "developed for human residence" within the meaning of Wis. Admin. Code NR 46.15(9)(a-h). Mr. Pitsch stipulated that his residence met the code definition of "developed for human residence."

4. "Domicile" means a place of permanent residence evidenced by voting, personal income tax or driver's license records. (Wis. Admin. Code NR 46.15(12) (12)) The petitioner did not challenge that the house was his permanent residence but rather stipulated that the residence was his domicile.

ORDER

IT IS HEREBY ORDERED that the following lands owned by Bernard G. Pitsch be withdrawn from designation as Managed Forest Law and be assessed as general property beginning January 1, 2014:

Township 13 North, Range 03 West Section 20	NWSE PART OF	Parcel Identification No.	Open Acres	Closed Acres	Total Acres
		038-00463-0001	0.000	19.000	19.000

IT IS FURTHER ORDERED that a Withdrawal Tax to be calculated by the Department of Revenue pursuant to Wis. Stat. §§ 77.10(2) and 77.04(1), is due and payable to the Department of Natural Resources by the last day of January 2014. If unpaid, the taxation district clerk shall enter the delinquent amount on the property tax roll as a special charge.

Dated at Madison, Wisconsin on June 21, 2013.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
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 served and 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.