

file 9-3



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Alleged Illegal Pier on the Bed
of Cedar Lake, Town of Schleswig, Manitowoc
County, by Gerald and Nora Heine

Case No. 3-NE-98-538LL

In the Matter of an Alleged Illegal Pier Placed on
the Bed of Cedar Lake, Town of Schleswig,
Manitowoc County, by Doloris Meinert and James
Konen

Case No. 3-NE-98-539LL

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Department of Natural Resources Southeast Region staff conducted field investigations and alleged that Gerald and Nora Heine and Doloris Meinert and James Konen, who are not riparian owners, place and maintain piers on the bed of Cedar Lake at the location of Lots 2 and 3 of Block 5 of the original plat of Klemme's subdivision at Cedar Lake, Town of Schleswig, Manitowoc County, Wisconsin. Sections 30.12 and 30.13, Stats., require that one be a riparian owner in order to place a pier. The piers are also alleged to interfere with the public interest and public rights in Cedar Lake.

It is alleged, therefore, that said actions by the above-named respondents constitute a violation of sec. 30.12, Stats., and constitute a public nuisance pursuant to sec. 30.294, Stats.

On May 14, 1999, a prehearing conference was conducted by telephone, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties agreed this matter could be decided on the basis of briefs without the need for a hearing. The last brief was received July 26, 1999. A second conference call, limited to seeking clarification of certain factual issues relating to the submitted briefs, was held on August 27, 1999.

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

Wisconsin Department of Natural Resources, by

Attorney Michael Lutz
P. O. Box 7921
Madison, WI 53707-7921

James Konen and Doloris Meinert, by

Attorney Steven R. Olson
Radosevich, Mozinski & Cashman
903 Washington Street
P. O. Box 1868
Manitowoc, WI 54221-1868

Gerald Heine
6113 West Stevenson
Milwaukee, WI 53213

Town of Schleswig, by

Attorney Katherine M. Reynolds
Michael, Best & Friedrich, LLP
980 Maritime Drive, Suite B
Manitowoc, WI 54220

Benjamin C. Forsterling
14036 Rokilio Road
Kiel, WI 53042

FINDINGS OF FACT

1. James Konen and Dolores A. Meinert (Konen/Meinert), are husband and wife and are adult residents of Manitowoc County, Wisconsin. Konen/Meinert own an estate in fee simple in Lot 3, Block 5, of the Original Plat of Klemme's subdivision at Cedar Lake, located in the SW ¼ of the NE ¼ of Section 24, Township 17 North, Range 21 East, Town of Schleswig, Manitowoc County, Wisconsin. This property is near Cedar Lake, a navigable water located in Manitowoc County. However, the property as described above is not a riparian parcel directly proximate to Cedar Lake.

2. Gerald and/or Nora Heine (Heine/the Heines) were or are husband and wife adult residents of the State of Wisconsin. Gerald Heine represented to the ALJ that the marriage had been dissolved, and that he was now the sole owner of the property in question in this Order. However, the ALJ does not have sufficient documentation to make a finding one way or the other with respect to this representation. Heine/the Heines own an estate in fee simple in Lot 2, Block 5, of the Original Plat of Klemme's Subdivision at Cedar Lake, located in the SW ¼ of the NE ¼ of Section 24, Township 17 North, Range 21 East, Town of Schleswig, Manitowoc County, Wisconsin. This property is near Cedar Lake, a navigable water located in Manitowoc County. However, the property as described above is not a riparian parcel directly proximate to Cedar Lake.

3. The Town of Schleswig (the Town), located in the County of Manitowoc, State of Wisconsin, is a municipality organized under the laws of the State of Wisconsin; with offices located at 21935 Rockville Road, Kiel, Wisconsin, 53042. The Town owns property proximate to Klemme's Subdivision Lots 2 and 3 as described above, and is the riparian owner at the site.

4. On May 4, 1999, the Manitowoc County Circuit Court, Branch One, entered the following Prescriptive Easement Judgments:

IT IS ADJUDGED THAT

Plaintiffs James Konen and Doloris Meinert are granted prescriptive easement to maintain steps and exercise the riparian rights of installing and maintaining a pier, and for uses incidental to the piers and steps in the location they historically were placed, nunc pro tunc January 1, 1976, appurtenant to Lot 3, Block 5, Plat of Klemme's Subdivision at Cedar Lake and legally described as follows:

A part of Camp Rokolio Road as dedicated on the Plat of Klemme's Subdivision at Cedar Lake, located in the SW ¼ of the NE ¼ of Section 24, Township 17 North, Range 21 East, Town of Schleswig, Manitowoc County, Wisconsin, and described as follows:

Commencing at the Southwest Corner of Lot 3 of Block 5 of the Plat of Klemme's Subdivision at Cedar Lake; thence S. 8° 42' W. a distance of 20.00 feet; thence S. 82° 42' E. a distance of 25.00 feet; thence S. 8° 42' 00" W. a distance of 34.00 feet to the shore of Cedar Lake; thence N. 78° 07' 00" W. a distance of 25.07 feet along the shore of Cedar Lake; thence N. 8° 45' 54" E a distance of 32.00 feet to the point of real beginning.

This judgment shall be binding upon the parties hereto, their heirs, successors and assigns, and shall be covenant running with the land appurtenant to Lot 3, Block 5, Plat of Klemme's Subdivision.

Plaintiffs Gerald and Nora Heine are granted prescriptive easement to maintain steps and exercise the riparian right of installing and maintaining as pier, and for uses incidental to the piers and steps in the location they historically were placed, nunc pro tunc January 1, 1976, appurtenant to Lot, 2, Block 5, Plat of Klemme's Subdivision at Cedar Lake and legally described as follows:

A part of Camp Rokolio Road as dedicated on the Plat of Klemme's Subdivision at Cedar Lake, located in the SW ¼ of the NE ¼ of Section 24, Township 17 North, Range 21 East, Town of Schleswig, Manitowoc County, Wisconsin, and described as follows:

Commencing at the Southwest Corner of Lot 3 of Block 5 of the Plat of Klemme's Subdivision at Cedar Lake; thence S. 08° 42' 00" E. a distance of 32.00 feet; thence S. 82° 11' 00" E. a distance of 25.00 feet to the point of real beginning.

This judgment shall be binding upon the parties hereto, their heirs, successors and assigns, and shall be a covenant running with the land pertinent to Lot 2, Block 5, Plat of Klemme's Subdivision.

5. At the conference call on August 27, 1999, the briefing parties agreed as follows:

- a. The piers as historically placed, and as conscribed by the Prescriptive Easement Judgments above, are of such size that would not ordinarily require a structures permit under sec. 30.12 and 30.13, Stats.;
- b. Further, the parties agreed that Heine/the Heines and Konen/Meinert meet all other provisions of sec. 30.131, Stats., except the parties have a dispute as it relates to the recording provision of sec. 30.131(1)(a), Stats.;
- c. Konen/Meinert agree that if it is found that they do not have a legal right to place the pier, it must be removed.

6. The respondents and their predecessors in interest have continuously maintained a pier at the location described above since at least January 1, 1936. The Circuit Court entered the Judgement for Prescriptive Easement effective January 1, 1976, because that date represented the minimum 40 year period necessary for a finding of a prescriptive right to maintain the piers. There is nothing in the record to indicate that any of the piers have been lengthened or otherwise significantly altered during that period, extending more than six decades.

7. The entry of the Judgment of Prescriptive Easement represents the Circuit Court's determination that the respondents and their predecessors in interest have legally maintained a pier for at least sixty-three years. The Circuit Court's entry of the Judgment of Prescriptive Easement specifically allows for the maintenance of piers by both sets of respondents. The entry of judgment nunc pro tunc to January 1, 1976, has the intent of bringing the pier into compliance with the existing regulatory scheme. Further, entry of the Judgment nunc pro tunc to January 1, 1976, has the effect of recording the easement before December 31, 1986, within the meaning of sec. 30.131(1)(a), Stats.

DISCUSSION

On February 24, 1998, respondents were granted Judgment Prescriptive Easements in Manitowoc Circuit Court. The Easements recognized that the respondents were entitled to the right to maintain piers in the location they were placed on Cedar Lake, nunc pro tunc January 1, 1976.

Nunc pro tunc is a Latin term meaning "now for then." See Blacks Law Dictionary 965 (5th ed. 1979). Nunc pro tunc merely describes the inherent power of the court to make its records speak the truth, i.e., *to record that which is actually but is not recorded.*" (emphasis added) Id. Under these circumstances, it would be putting form over substance, and would be contrary to the intent of the Judgment of the Circuit Court to find that the Prescriptive Easement has not been ". . . recorded before December 31, 1986," within the meaning of sec. 30.131, Stats.

The parties agree that all other provisions of sec. 30.131, Stats., have been met. Accordingly, the enforcement action must be dismissed.

The DNR argues that in entering the Judgment nunc pro tunc, the Circuit Court exceeded its lawful authority. However, the Judgment was not appealed. In any event, the Division lacks jurisdiction to determine the lawfulness of Orders of the Circuit Courts of the State of Wisconsin.

CONCLUSIONS OF LAW

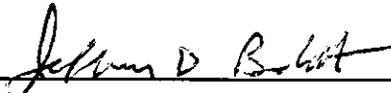
1. The Division of Hearings and Appeals has authority to hear contested cases and to issue necessary Orders in cases under Chapter 30 pursuant to sec. 227.43, Stats.
2. The Division of Hearings and Appeals does not authority to review the lawfulness of Orders of a Circuit Court.
3. The piers at issue meet all provisions of sec. 30.131, Stats., given the Judgment of the Circuit Court described above.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the above-captioned matter be
DISMISSED.

Dated at Madison, Wisconsin on September 3, 1999.

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 sec. 227.48, Stats., 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 secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
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 therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. 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. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.