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BEFORE THE

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

Application of Jack Wagner for a Permit to Construct a Pier on the Bed of Lake Noquebay, Town of Middle Inlet, Marinette County, Wisconsin	))))	Case No. 3-LM-94-351

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Jack Wagner, W153 N7824 Cornflower Court, Menomonee Falls, Wisconsin, 53051, has applied to the Department of Natural Resources for a permit pursuant to sec. 30.12, Stats., to construct a deck for recreational uses in Lake Noquebay. The proposed deck is sixteen feet wide, eighteen and a half feet long, plus a triangular section connected to one corner of the deck that is four and a half feet by five and half feet The proposal is to construct this deck seventy two feet from shore and it is to be connected to the shore by a four foot wide pier. This deck is proposed to be constructed on poles to allow the free flow of water underneath. The proposed project would be located in Government Lot 1 of Section 18, Township 32 North, Range 21 East, Town of Lake, Marinette County, Wisconsin.

On July 13, 1994, a notice was published which stated that unless written objection was received within 30 days the Department might make a decision on the application without a hearing. A timely objection was filed.

Pursuant to due notice, including publication, hearing was held on May 7, 1996 at Marinette, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge.

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

Jack R. Wagner
N64 W14527 Poplar Drive
Menomonee Falls, Wisconsin 53051

Department of Natural Resources, by

Attorney Michael Cain
P. O. Box 7921
Madison, Wisconsin 53701-7921

FINDINGS OF FACT

1. Jack Wagner, W153 N7824 Cornflower Court, Menomonee Falls, Wisconsin 53051, completed filing an application with the Department for a permit under sec. 30.12, Stats , to place a pier and deck structure on the bed of Lake Noquebay, Town of Lake, Marinette County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in Government Lot 1 in Section 18, Township 33 North, Range 21 East, Town of Lake, Marinette County. The above-described property abuts Lake Noquebay which is navigable in fact at the project site.

3. The applicant proposes to place on the bed of Lake Noquebay a pier and deck structure. The proposed "deck" is sixteen feet wide, eighteen and a half feet long, plus a triangular section connected to one corner of the deck that is four and a half feet by five and a half feet. The proposal is to construct this deck seventy two feet from shore and it is to be connected to the shore by a four foot wide pier. The water-depth at the end of the pier is approximately two feet ten inches. The area closest to shore is somewhat rocky but the bed is sandy at the lake-ward end of the pier. The "deck" is proposed to be constructed on poles to allow the free flow of water underneath. The applicant objects to characterizing the pier attachments as a deck, and analogizes his filled in "L-shaped" pier structure to a swimming raft. He notes that a ten foot by ten foot swimming raft would consume approximately the same area of surface water as the pier and deck and that he could place such a structure without a DNR permit. However, it is also true that, if a permit were granted, the applicant could place the pier and deck structure and such a swimming raft in the near-shore area.

4. The purpose of the pier structure is as an aid to navigation. The Department does not object to the 72 foot L-shaped pier structure being placed as an aid to navigation. The application seeks to fill in the "L-section" with the above-described sections to allow a wider area for the loading and unloading of boats, and a safer platform for the numerous small children who frequent the project site. The applicant admits that on successive sunny days, his family has placed a picnic table and chairs on the surface of the deck portion of the pier structure. (See: Ex. #1) Further, the applicant admits that placement of the deck sectionals does not make it any easier for him to moor boats or gain access to the lake, other than for the loading and unloading of water-skiing equipment. Accordingly, the ALJ finds that it is appropriate to characterize a portion of the proposed structure as a deck that is not an aid to navigation.

5. The Department became aware of the structures, including the "deck" sectionals by virtue of a site inspection in June of 1993. The applicant was advised that the DNR considered the deck sections of the pier to be in violation of the public trust doctrine and Department policies. Mr. Wagner has fully cooperated and agreed not to place the deck sectionals in future years. Instead, he filed the instant application.

6. The Department indicated that it would approve an expansion of the existing four-foot wide pier to no more than six feet in width. This is consistent with written DNR policy as expressed in the Pier Planner that the Department makes available to the public. (Ex. 5) The applicant states that he has invested in the existing pier and has placed the deck sectional for many years without complaint of neighboring riparians.

7. DNR Area Water Management Specialist Robert Rosenberger testified that the deck sectionals violate the Department's policy regarding the reasonable use of public waters by an individual riparian because the deck surface area consumes a larger portion of public waterway than a conventional pier. Further, the project would have both direct and cumulative detrimental impacts to the public interest in natural scenic beauty by adding to shoreline clutter. At least one other neighboring riparian in the immediate area of the pier has placed a similar wide, deck-style pier in Lake Noquebay. Approval of this permit, Rosenberger opined, would set a dangerous precedent that riparians were entitled to something more than just piers in aid of navigation.

8. While no neighboring riparians have complained about the deck structure, the Marinette County Land and Conservation Department objected on behalf of the County government. Under County zoning ordinance, no decks are allowed within 75 feet of the lake on upland areas. The existing shoreline area is quite developed. There are numerous piers in the area. Little natural cover remains along the shoreline. At the project site, there is little or no vegetation below the Ordinary High Water Mark (OHWM) and only mowed grass above the OHWM. William Kowalski testified that the County was making an effort to restore near-shore areas in connection with its Lake Noquebay Priority Watershed Project. Kowalski opined that to allow larger areas of near-shore areas to be consumed by pier-related deck structures would have a cumulative detrimental impact on efforts to establish natural vegetation for the purpose of protecting water quality and natural scenic beauty. These efforts are largely voluntary. However, the county zoning ordinance prohibition against decks even on upland near-shore areas reflects the public interest in limiting further clutter of the shoreline. The proposed project would have direct and cumulative detrimental impacts on the public interest in restoring and maintaining natural scenic beauty and preventing shoreline clutter.

9. The proposed structures will not materially obstruct existing navigation on Lake Noquebay. The pier structure with or without the deck is approximately 72 feet long. Accordingly, the structure does not extend into the usual pattern of boat traffic on the lake. However, a larger area of surface water will be unavailable for use by the public as a result of placement of the deck sectionals as opposed to placement of a standard size pier as an aid to navigation. This area would be unavailable for such non-navigational public purposes as fishing or swimming.

10. The public trust doctrine involves the balancing of the rights of riparians with the rights of the public in navigable waters held in public trust. Chapter 30 of Wisconsin

Statutes, sets forth a general prohibition against placement of structures on the beds of navigable waterways, a prohibition which can be overcome if there are no detrimental impacts to the public interest. In this case there are detrimental impacts to the public's interest in preventing shoreline clutter, maintaining natural scenic beauty, and keeping public waterway surface areas open for public use. Accordingly, that portion of the permit application relating to placement of the deck sectionals must be denied. The Department made it clear at hearing that the applicant could place the remaining portion of the pier structure and/or expand its width without a permit.

11. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

12. The proposed structure would not reduce the effective flood flow capacity of Lake Noquebay.

13. The proposed structure would not adversely affect water quality nor will it increase water pollution in Lake Noquebay. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats.

14. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.

2. The proposed facility described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

3. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the construction and maintenance of said structure described above.

4. The project is a type III action under sec. NR 150 03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the request for a permit as described above be DENIED.

Dated at Madison, Wisconsin on May 23, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

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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.