

file

**BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS**

Application of Green Lake Marina, Inc.)
for a Permit to Construct Piers on the) Case No. 3-SD-93-2023
Bed of Green Lake, City of Green Lake,)
Green Lake County, Wisconsin)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on August 7-9, 1995 at Green Lake, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge (the ALJ).

The hearing was part of a consolidated hearing involving three separate applications in the Dartford Bay section of Green Lake. The parties submitted written briefs and the last submittal was received on October 11, 1995.

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

The Department of Natural Resources (DNR or the Department), by

Michael Cain, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

Green Lake Marina, Inc. (the applicants), by

Steven R. Sorenson, Attorney
Sorenson-Wurtz Law Office
P. O. Box 311
Ripon, Wisconsin 54971-0311

Wydham Gary
W3188 County K
Green Lake Township, WI 53946

FINDINGS OF FACT

1. Green Lake Marina, Inc., 485 Park Drive, Green Lake, Wisconsin 54941, completed filing an application with the Department for a permit under sec. 30.12, Stats., to replace and expand existing piers on the bed of Green Lake, City of Green Lake, Green Lake County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in the NE 1/2, SW 1/4 in Section 21, Township 16 North, Range 13 East, in the City of Green Lake, Green Lake County. The above-described property abuts Big Green Lake which is navigable in fact at the project site. The applicants own approximately 410 feet of riparian frontage at the project site.

3. The applicants propose to replace and expand an existing set of pier structures at the Green Lake Marina in the City of Green Lake. The existing wooden pier structures are dilapidated and unsightly. New floating piers that meet Department design standards would be installed at the site, and marina capacity would increase from 76 to 108 boats. The proposal involves five separate pier structures extending variously 127.5 to 172.5 feet waterward into the public waters at the site. Presently, the longest pier extends 175 feet into the waters. The proposed expansion is contingent upon the applicants leaving a ten foot buffer zone on its eastern riparian boundary to prevent interference with the City of Green Lake's riparian rights. The applicants' also agree to not extend piers beyond a navigational safety line proposed by DNR Conservation Warden Cletus Alsteen. (See: Attachment A) Further, the five proposed structures are all designed to extend straight from shore with no long L or T-shaped extensions as in the current configuration.

4. The purpose is to improve and expand the only marina serving the City of Green Lake. The marina has operated continually at the site for approximately 90 years. Pier slips are rented out at a current rate of seven hundred dollars for the boating season. Ten slips would be reserved for transient users. In addition, the marina provides boat accessory and emergency equipment sales, boat rental, and boat and motor repair service.

5. *Four of the proposed structures will not materially obstruct navigation on Big Green Lake and will not be detrimental to the public interest upon compliance with the conditions of this permit. The present pier configuration, to which no one objects, constitutes a greater obstruction to navigation than the reconfiguration proposed by the applicants. At present, the western most piers constitute an obstruction to navigation in the narrow passage area under Lawson Drive bridge. DNR Conservation Warden Alsteen has been on Big Green Lake an average of three days a week for the past eleven boating seasons. He has observed the navigational patterns first-hand. The Warden testified that the existing configuration of the marina piers poses a safety hazard and that these concerns would be*

greatly improved by the reconfiguration of the piers away from the Lawson Drive bridge in the vicinity of the existing boat shed and behind a navigational safety harbor line established by the warden and city officials. Boats regularly travel under the bridge to and from the mill pond into the Bay and out into the open waters of the lake.

The great weight of the evidence demonstrates that the proposed project would improve navigational safety so long as the following conditions are met: that the western most proposed pier not be installed; that the number of boats moored be limited to no more than 88; that no boats be moored on the eastern half of the eastern-most pier; and that no boats be moored beyond the navigational safety line described by Warden Alsteen. (Attachment A) The navigational safety line, indicated as a harbor line, as described on Attachment A does not fully comport with Alsteen's configuration. The surveyor apparently used a different mark on the wingwall under the bridge than Alsteen and City officials had originally intended. Accordingly, the approval of this permit is contingent upon the marina mooring no boats beyond the harbor line to be delineated by the Department.

6. There is some dispute as to the extent of the applicants' riparian ownership at the western boundary of its property near the Lawson Drive bridge. The DNR argues in its brief that this matter be remanded back to the Department until the dispute as to the effect of erosion on the applicants' riparian status relative to the City of Green Lake at the far western boundary of the property. However, there was no question as to the applicants' riparian status as to the eastern-most four proposed piers. (Id.). Further, as noted above, the western most pier as proposed is the closest to the congested boating pattern from the mill pond under South Lawson Drive bridge and the navigation channel along the old seawall into Dartford Bay and out into the open water areas of the lake. The applicants have not proven that the western most pier is entirely within their riparian zone, given erosion along the bank on the boundary of the two properties. Further, the elimination of the western most pier will provide a larger buffer area and improved visibility and navigational safety for boats moving to and from the mill pond and Dartford Bay. Accordingly, the western most proposed pier mooring twenty boats must be denied.

7. Unlike more pristine areas on the eastern shore of Dartford Bay, no significant fish spawning activity occurs in the area in and around Green Lake Marina. (Bartz, Alsteen, Miller) The proposed expansion and replacement of piers is unlikely to have a detrimental impact upon the public interest in maintaining fishery values in the area.

8. No significant adverse impacts to aquatic vegetation are likely to occur as a result of the proposed pier replacement and expansion. There are no emergent or floating leaf plant species in the riparian zone of the proposed project. (Ex. 107) This may well be because the site has supported a large marina facility for many decades. The area does support various submergent species including coontail, Elodea, curlyleaf pond weed, and

wild celery. Some disturbance of aquatic vegetation is likely to occur during construction activities. However, because the DNR does not oppose replacement of the existing piers (so long as they are not expanded), some disturbance of aquatic vegetation in the area is likely to occur even if the proposed expansion is denied. There are no water lilies or other distinctive floating leaf species in the marina area, unlike other more pristine areas along the eastern shore of Dartford Bay. Further, any slight disturbance in aquatic vegetation must be balanced against the public benefit of improved navigation resulting from the reconfiguration of the existing piers. Taken as a whole, a preponderance of the credible evidence does not support denial of the project on the basis of detrimental impacts to aquatic vegetation.

9. The proposed project does not exceed the rights of a riparian to the "reasonable use" of public waters when balanced against the public interest in maintaining Green Lake for "usage and conservation as a state resource." State ex. rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972). The decisive factor in the balancing of public rights with the rights of the riparian is the longstanding historic use of this site as a marina serving the City of Green Lake. As noted, a marina has been operated continually at the site for over ninety years. The DNR opposes granting of any enlargement of the marina. However, even Department witness Warden Alsteen testified that, given the longstanding historic use of the site, some expansion beyond the existing seventy six slips, up to even 100 slips, would constitute a reasonable use of the public waters at the site. Reconfiguration of the marina piers should actually improve navigational safety on the public waters at the site. Further, replacement of the existing dilapidated piers will improve the appearance of the shore from the public waters. The ALJ finds that the public interest in public waters will be protected by the conditions in the permit set forth below.

10. Mr. Gary raised issues relating to potential water quality concerns connected to a lack of toilet facilities at the project site. While it is true that marina users can readily avail themselves of nearby city park facilities, the addition of a toilet at the marina will lessen the likelihood of localized water quality impacts connected with the (illegal) use of poorly-sealed heads by marina patrons. (Nelson, Gary, Sesing)

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

12. The proposed structures will not reduce the effective flood flow capacity of Big Green Lake upon compliance with the conditions in the permit.

13. The proposed structures will not adversely affect water quality nor will they increase water pollution in the Big Green Lake. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats., if the structures are built and maintained in accordance with this permit.

14. The proposed project will not have a detrimental impact upon the public interest in natural scenic beauty. There are few remaining natural features at the present marina site. There is a wooden walkway and a cement retaining wall along most of the shoreline. There are a few mature trees and a grass lawn in front of the Bayside Condominiums, which are set back some distance from the shore. The marina office and store occupies much of the eastern area bordering the City property and Park Drive. Because the existing pier slips are in a state of disrepair, the net impact on aesthetics from the proposed new pier structures would be positive. However, this change would have little to do with natural scenic beauty.

15. The Department of Natural Resources has made an environmental assessment of the proposed project and determined that the grant or denial of the permit requested does not constitute a major state action significantly affecting the quality of the human environment.

CONCLUSIONS OF LAW

1. 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 a permit for the construction and maintenance of said structures subject to the conditions specified.

2. The applicants are riparian owners within the meaning of sec. 30.12, Stats.

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

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. The Department conducted an Environmental Assessment (EA) which complies with the procedural requirements of sec. 1.11, Stats.

5. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats. on the ground that they impair natural beauty. This is a proper basis for denial of a permit. Clafin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would not be detrimental to the public interest in natural scenic beauty.

6. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicants have carried their burden of showing that four of the proposed piers would be not detrimental to the public interest in navigable waters. The applicants have not carried their burden of proof

as to the western most proposed pier.

7. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resources. State ex. rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972).

Factors to be taken into account include: ". . . the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall . . ." Timm v. Bear, (1871), 29 Wis. 254, 265. The decisive factor in the instant application is the historic operation of a marina at the site. Further, several of the proposed improvements will have a beneficial impact upon the ability of the public to navigate public waters at the project site. The project as modified by the conditions set forth below does not exceed the rights of a riparian to the "reasonable use" of public waters when balanced against the public interest in maintaining Green Lake for "usage and conservation as a state resource." State ex. rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972).

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30.12, Stats., for the construction and maintenance of structures as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.
2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employe of the Department of natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction of the structures.
4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.

5. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

6. The permittees shall notify the area Water Management Specialist, not less than 5 working days before starting construction and again not more than 5 days after the project has been completed.

7. Any area disturbed during construction shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.

8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Water management Specialist, at least 5 working days in advance.

9. The total number of boats moored shall not exceed 88. Placement of said piers shall be consistent with Attachment A. The areas highlighted in pink are not approved for the reasons set forth above. The eastern most pier shall not moor boats along the eastern property border as set forth on attachment A. No boats shall be moored past the navigational safety line to be definitively established by Warden Alsteen.

10. The marina shall provide at least one restroom (toilet facility) for use by marina patrons.

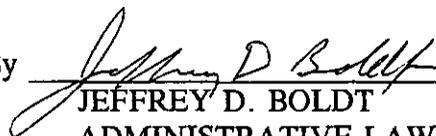
11. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on November 6, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Madison, Wisconsin 53705
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By


JEFFREY D. BOLDT

ADMINISTRATIVE LAW JUDGE

GREEN LAKE MARINA PROPOSED EXPANSION

LOCATED IN THE NORTH 1/2 OF THE SW 1/4 OF
SECTION 21, T16N, R18E, CITY OF GREEN LAKE,
GREEN LAKE COUNTY, WISCONSIN.

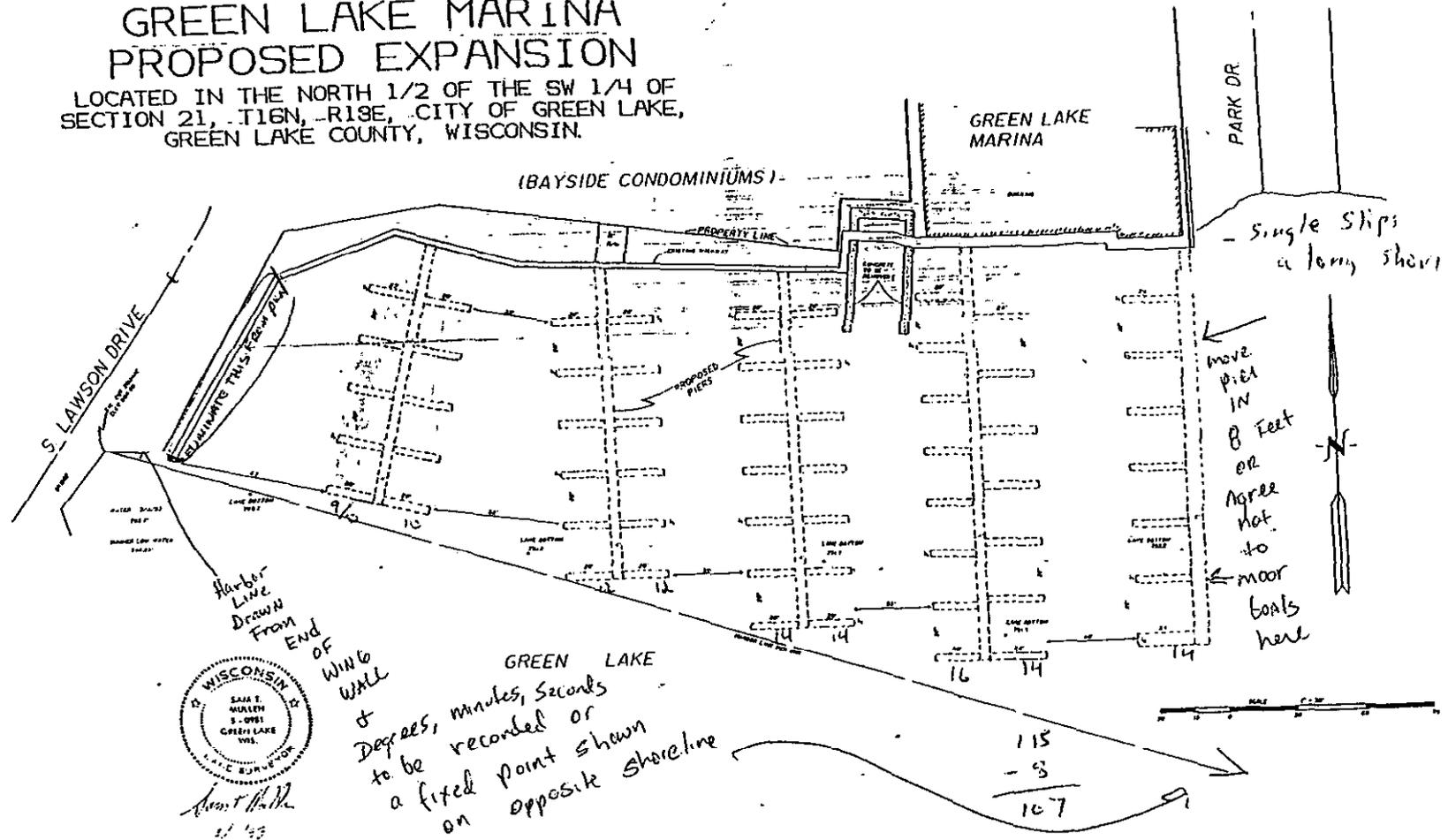


EXHIBIT
13

Pink = NOT Approved

Attachment A

GREEN LAKE SURVEYING			
P.O. BOX 111 GREEN LAKE, WISCONSIN 54601			
GREEN LAKE MARINA PROPOSED EXP			
SECTION	T16N	R18E	S1
SECTION	21	16N	18E
CITY OF	GREEN LAKE COUNTY, WISCONSIN		
SHEET	1	OF	1
SCALE	1 INCH = 20 FEET		

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.