Order

BEFORE THE

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

Application of Green Lake Venture for a Permit to Construct a Pier on the Bed of Green Lake, City of Green Lake, Green Lake County, Wisconsin	))))	Case No. 3-SD-93-2029

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on August 8-10, 1995 at Green Lake, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge.

The hearing was part of a consolidated hearing relating to three pier permit applications in the Dartford Bay area of Big Green Lake. The parties submitted briefs and the last submittal was received September 11, 1995.

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

Department of Natural Resources, by

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Green Lake Ventures, by

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FINDINGS OF FACT

1. Green Lake Ventures, Inc. (GLV or the applicants), 150 East Gilman Street, Suite 1600, Madison, Wisconsin, 53703, completed filing an application with the Department of Natural Resources (the Department) for a permit under sec. 30.12, Stats., to place two 14-slip pier structures on the bed of Green Lake, Town of Green Lake, Green Lake County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 31.06, Stats.

2. The applicants own real property located on Government Lot 2 in Section 21, Township 16 North, Range 13 East, Green Lake County. The property is triangular -shaped and located at 415 Strauss Avenue in the City of Green Lake. The above-described property abuts Green Lake, a/k/a Big Green Lake, which is navigable in fact at the project site. The applicants own approximately 297 feet of riparian frontage.

3. The applicants final revised proposal is to construct two piers, 124 feet long and 80 feet wide, accommodating a total of 28 boat slips. The piers would be shaped in a "pitch fork" design. No boats will be moored on the outside of the "pitch fork" structure. There would be approximately 40 feet between the two structures. The piers would be constructed of 4" by 4" treated wood posts, with cross braces and 2" by 6" treated wood planks. (See: Exhibit 20). The proposed piers are not solid and will not interrupt the free movement of water at the site.

4. There is currently a small tar-paper cottage and several small sheds on the upland above the riparian frontage. The applicants intend to demolish these upland structures and build an eight-unit apartment complex. Eight pier slips would be dedicated to residents of the apartment units. GLV intends to build a clubhouse with restroom and shower facilities and make these facilities as well as some portion of any permitted pier structures available to users of the Heidel House Resort, which is owned by the same parent company (The Fiore Companies).

5. There is limited public usage of the waters near the proposed project site. The silty, mucky bottom and shallow waters discourage boating and swimming in the area. The public does make use of the area for fishing, especially bluegill and large mouth bass (Miller, Alsteen).

6. The proposed structures would not materially obstruct existing navigation on Green Lake. The piers would be placed in an area of Dartford Bay which is outside the usual navigational pattern on Green Lake. The predominant pattern of navigation in Dartford Bay is to the designated navigation channel some distance from the project site, and from there out of the Bay into the open waters of Big Green Lake. Water-depths are shallow in the area of the proposed project, further discouraging boat traffic. The applicants

demonstrated that the three foot water depth contour occurs approximately 110 from shore at the site. No pierhead line has been established in this area of Dartford Bay.

7. The proposed project site represents one of the last remaining natural areas in the Dartford Bay portion of Green Lake. (See: Exhibit 38). The project site is home to a large stand of emergent, submergent and floating leaf aquatic plants. (See: Exhibit 96). Floating leaf species include an attractive stand of white water lilies. Emergent species include bulrush, cattail, giant burreed and sagittarian. Submergent plants include coontail, curlyleaf pondweed, and buttercup. (See: Exhibit 102 and 107). This area supports a diverse and abundant plant community that is no longer common in developed areas of Green Lake such as Dartford Bay. DNR Area Water Resource Manager Mark Sessing testified that the two proposed 124 foot long piers would have a detrimental impact on plant diversity and quantity in the public waters at the site. Increased boat traffic would result in increased turbidity, and increased sedimentation resulting in degradation of aquatic plants, the loss of the relatively uncommon floating leaf aquatic plants (especially lily pads) and the loss of moderate to low density submerged aquatic plants. (Exhibit 77). The proposal to place two large, 124-foot long piers in this area would have a detrimental impact on the public interest in maintaining the aquatic plant life at the site as a functioning and diverse portion of the Dartford Bay ecosystem.

8. The diverse and abundant plant community in turn provides support and cover for various fish species including large mouth bass and bluegill. The area is a known spawning area for large mouth bass (Miller, Alsteen, Bartz) and bluegill (Miller). A long-time area resident, Mr. Fleetwood Miller, testified that he has recently seen bluegill spawning nests at the project site. DNR Warden Alsteen also testified that the project site was one of the few remaining spawning areas for panfish and large mouth bass in the Dartford Bay area.

DNR Fisheries Biologist David Bartz provided essentially undisputed expert testimony that destruction of aquatic vegetation in the area would have a detrimental impact on fish spawning in the area. The sandy substrate in the area of the proposed pier is suitable for spawning for various centrarchids (sunfish family) species, including bluegill. Scattered patches of macrophytes and tree stumps at the site provide excellent cover and spawning habitat. Further, this area is one of the last in Dartford Bay to provide recreational fishing in the shallow littoral area of the bay. (Exhibit 74). Bartz was convincing that construction of the proposed project would have a detrimental impact on fish habitat by disruption of bottom sediments, removal of stumps and reduction of macrophyte aquatic plant growth. Further, increased motor boat activity in the area would disturb nesting fish species and increase turbulence. Increased turbulence would be likely to cover eggs and fry with sediments, decreasing their chance of survival. (Exhibit 76).

Mr. Lehman testified very generally that piers can provide cover to fish species. Bartz acknowledged this point, but opined persuasively that increased boat traffic "would not allow fish to hide or spawn without being disturbed." (Exhibit 76). The only specific expert testimony offered by the applicant on the fish-spawning issue was the hearsay report (Exhibit 8) of an expert who did not testify or subject himself to cross-examination. The ALJ made clear at the outset of the hearing that he could not base a Finding solely on such hearsay evidence even though it may be admissible. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 610, 412 N.W.2d 505 (Wis. Ct. App. 1987). Further, nothing in this report nor in Lehman's testimony rebut the great weight of the evidence that the proposed project site was a fish-spawning area.

The great weight of the evidence supports a finding that the current proposal would have a detrimental impact upon the public interest in maintaining fishery values and recreational fishing opportunities in the project area.

9. The proposed project site will not have a detrimental impact on the public interest in maintaining habitat for terrestrial wildlife and furbearers. There is intensive development along the shoreline and a dearth of terrestrial vegetative cover along the water. The plant growth and fish habitat in the area do make it an important area for migratory waterfowl, especially during migration periods. (See: Exhibit 80). However, taken as a whole, the record on this issue would not warrant denial of the permit application on the basis of impacts to wildlife.

10. The shoreline around the proposed project site is highly-developed and includes numerous multi-slip piers. There is little remaining natural vegetation along the shoreline. The lot has some mature ash trees and a grass lawn. However, from the water the subject property offers a small patch of green aquatic vegetation and water lillies against this highly-developed background. The proposed project would be somewhat detrimental to the public interest in natural scenic beauty by disrupting the stand of floating leaf vegetation. However, because the shoreline is so highly developed, a preponderance of the evidence would not support denial of the proposed project solely because of its detrimental impact upon natural scenic beauty.

11. A preponderance of the credible evidence supports a Finding that the proposed 2 pier, 28 slip project would be an unreasonable use of the 297 feet of riparian frontage owned by the applicants. Under the common law test, reasonable use is a factual determination subject to a trust doctrine concept that sees all natural resources as impressed with a trust 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). There was no testimony that the property has ever historically supported such large pier structures or that the site was ever used as a public marina. Rather, in recent years, the near shore area has been used as a site for recreational fishing. The extent of the piers, two large 124-foot long and 80 feet

wide structures, seems excessive in relation to the amount of riparian frontage owned by the applicants. Seven (7) slips would be permissible under the DNR's unpromulgated reasonable use guidance document. However, this number seems too low given the numerous multi-slip piers in the very developed area proximate to the proposed project site. Because the instant application must be denied on other grounds, it is not necessary to determine the exact number of slips which would constitute the limits of a reasonable use of its riparian frontage by the applicants. Certainly one pier structure at the site would be a more reasonable usage than two, and some number of slips between 7 and 28 would constitute a reasonable use of this 297 feet of riparian frontage.

12. There would be cumulative detrimental impacts to the public interest in permitting large pier structures on the few remaining natural areas in highly developed Dartford Bay.

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

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

15. The proposed structures would not adversely affect water quality nor will they increase water pollution in Green Lake. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats.

16. 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. The DNR has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code.

DISCUSSION

The DNR experts raised serious concerns about the loss of fish-spawning habitat and diverse and abundant aquatic plant communities as a result of the proposed project. The applicants did not answer the questions on these issues raised by the DNR. Accordingly, the applicant did not meet its burden of proof in showing that the proposed pier structures would be "not detrimental to the public interest" in navigable waters.

The applicant raised genuine issues about the use of the guidance document setting forth the Department's interpretation of the common law notion of the "reasonable use" of near-shore areas by a riparian. The Department has not attempted to enforce its guidance in the instant matter. Rather, the DNR has used its reasonable use criteria as a starting point

for discussion of the issue of when a near-shore area of public waters has become unreasonably burdened by an individual riparian. Mr. Nelson demonstrated an understanding that the guidance document was not an enforceable rule or statute in the Environmental Assessment. (Exhibit 19, p. 4). The ALJ is, however, troubled by Nelson's memorandum to Bartz in which he indicated he intended to "defend (the) reasonable use guidance" without telling the applicant. Nelson appears to have been acting on his own in this approach and the record as a whole does not support a finding that the Department has attempted to improperly enforce its reasonable use guidance. Clearly, the Department can not deny a permit solely on the basis of its reasonable use guidance. However, the record in this matter includes substantial evidence of other lawful public interest concerns which require denial of this permit. The ALJ specifically does not rely upon the guidance in the denial of the proposed project.

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 deny a permit for the construction of a structure on the bed of navigable waters that is detrimental to the public interest in said waters.

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

3. The proposed piers 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 DNR prepared an Environmental Assessment (EA) in connection with this and related pier applications on Green Lake. The EA concluded that the project was not a major state action significantly affecting the quality of the human environment and that no EIS was required. There is no right to a contested case hearing on the issue of whether or not the Department should have prepared an Environmental Impact Statement. North Lake Management District v. DNR, 182 Wis. 2d 500, 513 N.W.2d to 3 (Wis. Ct. App. 1994) (cert den. 7/19/94)

5. The proposed project would be "detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats.

6. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. Muench v. PSC, 261 Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing,

hunting, recreation and scenic beauty. WED, Inc. v. DNR, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978). The proposed project would be detrimental to the public interest in maintaining fish spawning habitat and aquatic plants.

7. 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. Claflin 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.

8. The DNR and the Division must consider the cumulative impacts of permitting structures under Chapter 30, Stats. Hixon v. Public Service Commission, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966).

9. 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 applicant has not carried its burden of showing that the proposed project would be not detrimental to the public interest in navigable waters.

10. 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 proposed project exceeds 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).

ORDER

WHEREFORE, in accordance with the foregoing FINDINGS OF FACT, IT IS HEREBY ORDERED that the application described above be DENIED, and the petition for review DISMISSED.

Dated at Madison, Wisconsin on October 19, 1995.

STATE OF WISCONSIN
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By Jeffrey D. Boldt
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.