

**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**



In the Matter of the Complaint of Lewis
Borsellino, et al Regarding a Pier Maintained by
Samuel and Marilyn Bonanno on the Bed of Lake
Geneva, Town of Linn, Walworth County,
Wisconsin

Case No. 3-SE-92-376

Application of Samuel and Marilyn Bonanno for
an "After-the-Fact" Permit to Construct a Pier on
the Bed of Lake Geneva, Town of Linn, Walworth
County, Wisconsin

Case No. 3-SE-96-537

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 14, 1996, Lewis S. Borsellino, et al filed a complaint with the Department of Natural Resources pursuant to sec. 30.14(2), Stats. The complaint alleges that a pier maintained on Lake Geneva by Samuel and Marilyn Bonanno exists in violation of secs. 30.12 and 30.13, Stats. Eileen Rothstein may also have an interest in the Bonanno pier. The complaint requests that the Department of Natural Resources conduct an investigation and hold a hearing for the purpose of issuing appropriate enforcement orders. On October 29, 1996, the Department of Natural Resources forwarded this matter to the Division of Hearings and Appeals for hearing.

On November 4, 1996, Samuel and Marilyn Bonanno applied to the Department of Natural Resources for an after-the-fact permit pursuant to sec. 30.12, Stats., to maintain a boat pier with two shore stations on Lake Geneva. On November 20, 1996, the Department of Natural Resources forwarded this matter to the Division of Hearings and Appeals for hearing.

Pursuant to due notice a combined hearing was held May 5, 1997 in Elkhorn, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. Lewis Borsellino filed an initial brief on June 18, 1997, and a reply brief July 21, 1997; Eileen Rothstein filed an initial brief on June 19, 1997, and a reply brief on July 22, 1997; the Department of Natural Resources filed an initial brief on June 19, 1997, and a reply brief on July 21, 1997; Samuel and Marilyn Bonanno filed an initial brief on June 23, 1997, and a letter dated July 21, 1997, stating they did not intend to file a reply brief.

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

Samuel and Marilyn Bonanno, by

Patrick J. Hudec, Attorney
Hudec Law Offices, S.C.
2100 Church Street
P. O. Box 167
East Troy, Wisconsin 53120-0167

Eileen Rothstein, by

John A. Rothstein, Attorney
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4497

Lewis Borsellino, by

Peter B. King, Attorney
157 Third Avenue
P. O. Box 374
Fontana, Wisconsin 53125-0374

Wisconsin Department of Natural Resources, by

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

The schedule for written argument established at the close of the hearing was that the parties would file simultaneous, initial briefs by June 20, 1997 and simultaneous reply briefs by July 21, 1997. On July 24, 1997, Attorney Peter King on behalf of Lewis Borsellino filed a Motion to Disregard the Reply Brief of Eileen Rothstein because it was not timely filed. Mr. King was concerned that Attorney John Rothstein had read Borsellino's reply brief prior to mailing his reply brief. A series of letters on this motion were filed. The last correspondence was received on July 31, 1997.

Although the Rothstein reply brief was filed one day late, after reading the briefs and the correspondence it is apparent that Mr. Rothstein gained no advantage by filing his brief one day late. The Motion to Disregard the Reply Brief of Eileen Rothstein is denied.

APPLICABLE LAW

Section 30.13(1), Stats., provides:

A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

- (a) The wharf or pier does not interfere with public rights in navigable waters.
- (b) The wharf or pier does not interfere with rights of other riparian proprietors.
- (c) The wharf or pier does not extend beyond any pierhead line which is established under sub. (3).
- (d) The wharf or pier does not violate any ordinances enacted under sub. (2).
- (e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

Section 30.13(4)(a), provides:

A wharf or pier which interferes with public rights in navigable waters constitutes an unlawful obstruction of navigable waters unless a permit is issued for the wharf or pier under s. 30.12 or unless authorization for the wharf or pier is expressly provided.

Sections 30.12(1) and (2), Stats., provide in relevant part:

(1) General prohibition. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

- (a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established;

...

(2) Permits to place structures or deposits in navigable waters; generally. The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation . . . and is not detrimental to the public interest.

FINDINGS OF FACT

1. Paul and Catherine Wurtz owned property along the northwest shore of Lake Geneva. In 1966, the Wurtzes subdivided their property and recorded a certified survey map delineating three lots. The three lots are currently owned by Lewis Borsellino (Lot A), Samuel and Marilyn Bonanno (Lot B) and Ralph and Eileen Rothstein (Lot C). On its southern border, Lot A fronts on Lake Geneva. Lot B is directly upland from Lot A. Lot C is also upland from Lot A and directly east of Lot B. The legal description of the subject property is the Southwest 1/4 of Section 4, Township 1 North, Range 17 East, Town of Linn, Walworth County, Wisconsin.

2. The certified survey map of the property also shows a twelve-foot wide "right-of-way," which is made up of a strip of land running the length of the eastern edge of Lots A and B. This right-of-way extends from the lake on the south to the northern edge of Lot B, where it connects with a private road. The access strip provides a means for Lots B and C to access the lake. For the past twenty-eight years, the owners of Lots B and C have placed a shared pier in the lake at this point of access. A pier agreement entered into in 1968 by the then owners of Lots B and C, Wurtz and Thomas Moorhead, documents the shared nature of the pier.

3. Following a dispute between Mr. Borsellino and the Bonannos and the Rothsteins, the Bonannos and Rothsteins commenced an action requesting a declaratory judgment to confirm their riparian rights. The Second District Court of Appeals held in an unpublished opinion that the Bonannos own the access strip in fee simple. Accordingly, the Bonannos are riparian owners on Lake Geneva entitled to place a pier on the bed of Lake Geneva in aid of navigation.

4. The access lot pier has remained essentially unchanged since it was first placed in 1968. The pier is six feet wide and 78.7 feet long. It extends to a water depth of approximately six feet, eight inches and is anchored by a rock filled crib at the lakeward end. Two boatlifts, one on each side, are attached to the pier. Each boatlift is approximately nine feet wide. The total width of the structure is twenty-five feet.

5. Because the access lot pier is anchored to a rock filled crib, it is apparent that the pier has been placed at the same location and at the same angle with respect to the shoreline throughout its existence. The piers along this stretch had been placed relatively parallel to each other throughout the period from 1968 until Mr. Borsellino moved his pier. Subsequent to purchasing Lot A, Mr. Borsellino replaced the existing pier with a larger structure. Mr. Borsellino then became involved in litigation over riparian rights with Louis and Edna Kole, the property owners immediately to the west of Lot A. The Court of Appeals affirmed a circuit court decision that Mr. Borsellino's pier interfered with the Koles' riparian rights. Mr. Borsellino was ordered to move his pier to the east. At the same time, the Court of Appeals held that the appropriate method for determining the riparian zone between the Kole and the Borsellino property was the extended lot line method. Borsellino v. Kole, 168 Wis.2d 611, 484 N.W.2d 564 (1992).

6. After Mr. Borsellino moved his pier further east, it came in conflict with the access lot pier. Mr. Borsellino filed a complaint pursuant to sec. 30.14, Stats., seeking to have

the access lot pier found to be maintained in violation of secs. 30.12 and 30.13, Stats. The Bonannos also filed an application for an after-the-fact permit for the access lot pier.

7. Although an application for an after-the-fact permit for the access lot pier has been filed, an issue remains whether a permit is required for the access lot pier. In his complaint, Borsellino alleges several reasons why the access lot pier can not be maintained without a permit. These reasons include:

- a) The access lot pier and one or more of the attached boat lifts encroach into the Borsellino riparian space;
- b) The access lot pier is not backed away from the common riparian rights line pursuant to sec. NR 326.07(3)(a) or (b), Wis. Adm. Code;
- c) The access lot pier and boat lifts constitute an unreasonable placement of structures in violation of the reasonable use and public trust doctrines;
- d) The access lot pier and boat lifts interfere with private riparian rights and are detrimental to the public interest;
- e) The access lot pier and boatlifts violate public rights, private rights and ordinances adopted by the Town of Linn.

These reasons will be addressed below; however, pursuant to sec. NR 326.05, Wis. Adm. Code, the existence of the rock crib alone requires that a permit is necessary for the access lot pier to be maintained. Section NR 326.02(2)(a), Wis. Adm. Code requires the Department to apply Chapter NR 326, Wis. Adm. Code, in response to a complaint by a riparian that a pier exists in navigable water in violation of secs. 30.12 or 30.13, Stats. Accordingly, even though the access lot pier has been in place for 28 years, it is still subject to the requirements of sec NR 326, Wis. Adm. Code.

8 The appropriate method for determining the riparian zone for the access lot is the extended lot line method. The shoreline at this location is relatively straight. In those situations, the extended lot line is usually the most appropriate method for allocating riparian rights to riparians because it is the simplest method and ensures a proportional division of the riparian zone based upon the amount of shoreline owned by the riparians.

Additionally, the Town of Linn has established the extended lot line method as the appropriate method in this area and the Court of Appeals found that the extended lot line method was the appropriate method for allocating riparian rights on the western boundary of the Borsellino's property. Using any method other than the extended lot line method for determining the riparian zone for the access lot would result in a domino effect along this portion of the Lake Geneva shoreline. Additionally, no method for determining the riparian zone for the access lot would have the result desired by the Bonannos and Rothsteins. All methods of determining riparian zones are based on allocating riparian space on a proportional basis to the amount of shoreline owned by a riparian.

The Bonannos and Rothsteins do not suggest another method for determining the riparian use zone for the access lot, rather they rely on the doctrines of prescriptive rights and laches as the basis for their riparian rights. They also cite case law which holds that riparian rights should be delineated on an equitable basis. The Division of Hearings and Appeals is not a court of equity. The Bonannos and Rothsteins have cited no legal authority holding the Division of Hearings and Appeals has authority to expand or create riparian rights on an equitable basis.

Additionally, even if the Division of Hearings and Appeals had authority to find that a riparian has gained additional riparian rights on an equitable basis, the instant case does not appear to be one where this has occurred. The access lot pier had existed in essentially the same location and configuration for 24 years, at the time the Borsellino complaint and the after-the-fact permit application were filed. The Department will consider historical usage when considering a pier permit application; however, historical usage is considered with respect to the size, configuration, and number of slips permitted within a riparian's riparian use zone, not to permit a riparian to maintain a pier in another riparian's riparian use zone.

More importantly, although the Bonannos and Rothsteins are asking to maintain their pier in Borsellino's riparian use zone, they are actually seeking to place a structure on the bed of Lake Geneva and it is a portion of the bed of Lake Geneva which they claim they have acquired by prescriptive rights or adverse possession. The beds of natural lakes are owned in trust by the State of Wisconsin. The doctrines of prescriptive rights and adverse possession can not be used against the State of Wisconsin to gain use of or title to a natural lake bed.

The access lot pier does not satisfy the requirements of sec. 30.13, Stats., and, therefore, cannot be maintained without a permit.

9. The access lot pier in its present configuration is detrimental to the public interest and cannot be permitted. Specifically, the width of the pier structure, including the boatlifts, exceeds the reasonable use of the public waters for a lot with twelve feet of frontage and the pier interferes with rights of another riparian owner.

10. The Bonannos and the Rothsteins argue that the access lot pier does not interfere with Lewis Borsellino's use of his pier and even if it does it does so only since Mr. Borsellino enlarged the pier structures and moved it to the west side of his lot. Although it is undoubtedly true that Mr. Borsellino could configure and locate his pier to avoid interference from the access lot pier, the fact that Mr. Borsellino could modify his pier to accommodate the access lot pier is immaterial. Similarly, the questions the Bonannos and Rothsteins raise regarding whether the Borsellino pier is properly permitted are also immaterial. The fact remains that the access lot pier extends into Mr. Borsellino's riparian use zone. If the access lot pier was rotated to the west, it would extend into the riparian zone of John Ciciora, the property owner to the west of the access lot. It is simply impossible to maintain a twenty-five foot wide pier adjacent to a twelve foot lot without extending into the riparian use zone of neighboring riparians.

The Bonannos and Rothsteins cite sec. NR 326.055(2)(h), Wis. Adm. Code, which provides that a riparian may have two boat shelters for the first 100 feet or less of shoreline

frontage. The Bonannos and Rothsteins argue by analogy that this same ratio applies to boat slips and that this means they are entitled to two boat slips for their pier. Section 326.055(2)(h), Wis. Adm. Code, is a maximum limit, not an entitlement. Section 326.055(1)(c), Wis. Adm. Code, requires that "[a] boat shelter may not interfere with the rights of other riparians and shall comply with the provisions of sec. NR 326.07." Reading these two provisions together, it is clear that a riparian with 100 feet or less of shoreline frontage may maintain up to two boat shelters as long as the shelters can be placed within the riparian's riparian zone. The access lot pier as presently constructed and as described in the permit application does not do so. The access lot pier can not be permitted as described in the after-the-fact permit application.

The Bonannos and Rothsteins request that if the access lot pier in its present configuration can not be permitted, that a permit be issued for whatever structure could be permitted. Such an action is not appropriate because the Department of Natural Resources has not had an opportunity to investigate any other proposed pier and the public was not given notice that any other pier configuration would be considered at the hearing. Any pier constructed adjacent to the access lot would also have to comply with the Town of Linn ordinances. It is beyond the scope of this hearing to make such a determination.

11. The access lot pier does not extend beyond the established pierhead line and does not constitute an impairment to navigation.

12. The Department of Natural Resources and the Bonannos have complied with the procedural requirements of sec. 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Bonannos are riparian owners within the meaning of sec. 30.12, Stats.

2. The access lot pier described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.

3. The project is a type III action under sec. NR 150.039(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

4. Pursuant to sec. 30.13, Stats., and sec. NR 326.05, Wis. Adm. Code, a permit is required for the access lot pier. The pier was constructed and maintained without a permit. Accordingly, the construction and maintenance of the piers constitutes a violation of secs. 30.12 and 30.13, Stats., and constitutes a public nuisance pursuant to sec. 30.294, Stats.

5. The access lot pier is "detrimental to the public interest in navigable waters" within the meaning of sec. 30.12(2), Stats., as maintained in its configuration at the time of the hearing. An after-the-fact permit cannot be issued for the access lot pier.

7. Pursuant to secs. 30.02, 30.14(2) and 227.43(1)(b), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The application for an after-the-fact permit for the access lot pier filed by Samuel and Marilyn Bonanno is denied. The maintenance of the access lot pier is in violation of secs. 30.12 and 30.13, Stats., and constitutes a public nuisance pursuant to sec. 30.294, Stats. The access lot pier and crib shall be removed within thirty days of the date of this order.

Dated at Madison, Wisconsin on September 30, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 267-2744

By: _____


MARK J. KAISER
ADMINISTRATIVE LAW JUDGE