

File #

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

Application of Amarjit S. Sidhu and Jaswinder K. Sidhu for a Permit to Construct a 14-Slip Pier on the Bed of Middle Lake, Town of LaGrange, Walworth County, Wisconsin

Case No. 3-SE-95-682

Investigation on Motion of the Department of Natural Resources of an Alleged Unlawful Construction and Maintenance of a Pier on the Bed of Middle Lake, Town of LaGrange, Walworth County, Wisconsin, by Amarjit S. Sidhu and Jaswinder K. Sidhu

Case No. 3-SE-96-544

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, including publication, hearing was held on December 17, 1996, at Elkhorn, Wisconsin. Jeffrey D. Boldt, Administrative Law Judge (the ALJ) presided. The parties requested an opportunity to submit written closing arguments, which were filed on January 13, 1997.

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

Amarjit S. Sidhu and Jaswinder K. Sidhu, by

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Lauderdale Lake Property Owners Association, by

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Town of LaGrange, by

David Heilmeier, Supervisor
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Department of Natural Resources, by

Attorney Michael J. Cain
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David Armiger
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FINDINGS OF FACT

1. Amarjit S. Sidhu and Jaswinder K. Sidhu, 2207 Greenview Road, Northbrook, Illinois, 60062, applied to the Department of Natural Resources (the Department) for a permit to authorize an existing 14 slip pier on the bed of Middle Lake (Lauderdale chain). The project is located at the shoreline end of the platted Lake Road in the Cooper's Midlake subdivision. The pier is attached to the shoreline at Lot 1, Block 3 of the subdivision, and extends across Lake Road and Lots 1 and 2, Block 3. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own certain real property located in the NW 1/4 of the NW 1/4 in Section 35, Township 4 North, Range 18 East, Town of LaGrange, Walworth County. The above-described property abuts Middle Lake, which is navigable in fact at the project site.

3. The applicants seek permit authority to authorize an existing permanent 14-slip pier. The pier extends approximately 70 feet below the ordinary highwater mark. The applicants propose to add catwalks and side extensions to the existing pier structure, to create a 14-slip pier for use by residents of Cooper's Mid-Lake Subdivision.

4. The Department on its own motion alleges that the pier has been unlawfully constructed and maintained. This is the factual basis of case number 3-SE-96-544.

5. The water depth is approximately 3.5 feet at the edge of the existing pier. Middle Lake, on the Lauderdale Lakes chain of lakes, is approximately 259 surface acres. The project site is on the northern shore of the western half of Middle Lake. The shoreline area includes some emergent wetland vegetation. The applicants claim riparian ownership of approximately 160 feet of lake frontage along the three lots described above.

6. The project area has been designated as an NR 102, Wis. Admin. Code "sensitive area", due to the presence of sensitive aquatic plants. These include the most diverse populations of emergent, submergent and floating plants on Lauderdale Lake, including wild rice. (See: Exhibit 31 for a full list of plant communities in the area.)

7. The applicants have demonstrated some riparian ownership by a bare preponderance of the evidence. The applicants submitted a copy of a title commitment insuring their interest in real estate. The legal description of property owned by the Sidhus includes a portion of the roadway extending to the lake. Mr. Sidhu testified that he and his wife have been paying taxes on the "roadway" parcel since acquiring the property in 1977.

There remains a legal question as to the roadway portion of the parcel because there was no record of a road vacation on record at the Walworth County Zoning Office. This raises a serious question of ownership with respect to the roadway.

On this record, it is difficult to find that the Sidhus own a portion of platted Lake Road. There is no record of a vacation of Lake Road. Section 80.41, Stats. requires that the DNR approve any discontinuance of a street which provides public access to a navigable stream. Further, sec. 236.16, Stats. requires a public access of at least 60 feet wide which is connected to an existing public road. There is nothing in the record sufficient to overcome the legal presumption of a requirement of vacation. Accordingly, the applicant has not carried his burden of proof as to the roadway portion of his property.

However, the applicant has shown riparian status as to the remaining approximately 90 feet of riparian frontage.

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

9. The proposed structure will not reduce the effective flood flow capacity of Middle Lake.

10. A pier permit is required for the existing structure because in its present form it extends past the line of navigation as represented by the three foot water depth contour. (See: sec. NR 326.04-05, Wis. Admin. Code) Ms. Liesa Nesta, the DNR Area Water Management Specialist, testified that she had reviewed the Department's files and found no record of a sec. 30.12, Stats., pier permit ever being issued by the Department. No permit was produced at hearing to contradict the testimony of Ms. Nesta.

Nesta testified that the Town of LaGrange has adopted an approved pierhead ordinance, which restricts piers extending beyond 35 feet lakeward of the ordinary high water mark (OHWM). Further, the DNR had no record that any portion of the existing structure had been installed prior to adoption of this ordinance. Accordingly, with respect to the sec. 30.14, Stats. complaint, Nesta recommended that the existing structure be reduced to bring it in compliance with the local pierhead ordinance.

Based upon all of the evidence, and considering that the project site is in a "sensitive area" environmentally, the Administrative Law Judge finds that the existing pier should be reduced to extend no more than 35 feet below the OHWM and shall moor no more than three boats.

11. The Department presented un rebutted expert testimony that the project area is in an environmentally sensitive area (Exhibit 31) and is also a spawning and nursery area for a variety of fish, including largemouth bass, bluegill, yellow perch and northern pike. Mr. Douglas Welch testified that the increased boating activity associated with an expanded pier structure would have a detrimental impact on fish spawning, especially for species which spawn during the boating season. Increased boating activity would likely lead to an increase of water turbidity given the silty substrate in the area. Resuspended sediments are likely to reduce aquatic plant growth. Further, heavy boat traffic inherently disturbs nest building, spawning and the prospects for eggs to survive.

A clear preponderance of the evidence, including all of the expert testimony, indicates that there would be detrimental impacts to water quality and maintenance of fishery values.

12. The proposed structure will adversely affect water quality and will increase water pollution in Middle Lake. The structure will cause environmental pollution as defined in sec. 144.01(3), Stats. (Nesta, Welch)

13. Ms. Nesta testified that a 14-slip pier on the proposed site would violate Department policy on reasonable use of a riparian zone as represented in the nonpromulgated Guidance Document, Exhibit 22. Under the Department Guidance, the reasonable use threshold is reached when a property exceeds two berths for the first 50

feet or lesser amount of shoreline and one berth each for each additional 50 feet of shoreline in common ownership". (Exhibit 22) Accordingly, under the Department Guidance, Sidhu would be entitled to no more than 2-4 berthing slips; two, given his failure to prove ownership of the roadway portion of his parcel. While the Department Guidance is not binding because it does not have the effect of law, it is owed deference as it represents a statement of Department expertise. Sterlingworth Condo Ass'n v. DNR, 205 Wis. 2d 702, 723-724, ___ N.W.2d ___, (Wis. Ct. App. 1996).

The proposed 14-slip project exceeds the "reasonable use" of the riparian zone by the applicant. Further, Nesta stated concerns that the over-sized pier, if approved, would be made use of by nonriparian back-lot owners.

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 applicants are riparian owners within the meaning of sec. 30.12, Stats.
2. The proposed facility described in the Findings of Fact constitutes a structure 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 deny issuance of a permit which does not meet statutory standards.
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 application for a permit be DENIED, for the reasons set forth above.

IT IS FURTHER ORDERED, that the existing structure be reduced to comply with the pierhead ordinance as described above in Finding #10.

Dated at Madison, Wisconsin on February 28, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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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.