

file

BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals



Application of the Village of Pewaukee for a
Permit to Construct a Wharf on the Bed of
Pewaukee Lake, Village of Pewaukee, Waukesha
County, Wisconsin

Case No.: 3-SE-96-439

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

The Village of Pewaukee, c/o Mr. Frank Paulus, 235 Hickory Street, Pewaukee, Wisconsin, 53072, applied to the Department of Natural Resources for a permit to place a pier on the bed of Pewaukee Lake. The project is part of the Village's downtown development plan for the lake shore. The proposed structure is a 210 foot long wharf that will provide 19 boat slips. The slips would be for public use and for day use only. The slips would not be used for overnight mooring and will not be available for slip rental. The project is located in the Village of Pewaukee, Waukesha County in the SW 1/4 of the NW 1/4 of Section 9, Township 7 North, Range 19 East.

The Department of Natural Resources issued a Notice of a Proposed Pier which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. A timely objection was received by the Department.

On July 7, 1997, the Department forwarded the file to the Division of Hearings and Appeals. Pursuant to due notice hearing was held on August 27, 1997, at Waukesha, Wisconsin before Jeffrey D. Boldt, administrative law judge (ALJ).

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

Village of Pewaukee, by

Timothy P. Garrity, Attorney
205 Bishops Way
Brookfield, Wisconsin 53005

Wisconsin Department of Natural Resources, by

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

Edward A. Adolphson
678 Laureate Court
Pewaukee, Wisconsin 53072

FINDINGS OF FACT

1. The Village of Pewaukee (the applicant), c/o Mr. Frank Paulus, 235 Hickory Street, Pewaukee, Wisconsin, 53702, complete filing an application with the Department for a permit under sec. 30.12, Stats., to place a docking wharf on the bed of Pewaukee Lake, Village of Pewaukee, Waukesha 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 the SW 1/4 of the NW 1/4 in Section 9, Township 7 North, Range 19 East, Waukesha, County. The above-described property abuts Pewaukee Lake which is navigable in fact at the project site.

3. The applicant proposes to construct a docking wharf on its 1000 feet of riparian frontage on Pewaukee Lake. The dock would extend approximately 25 feet below the Ordinary Highwater Mark (OHWM) into Pewaukee Lake. The proposed structure, to be placed seasonally, would be approximately 210 feet long. It would provide transient mooring access to the Village of Pewaukee for 19 boats.

4. The purpose is to provide boat mooring access to the Village of Pewaukee to users of Pewaukee Lake. The proposed docks are part of a Southeastern Regional Planning Commission (SWRPC) plan to provide "A Lakefront Recreational Use and Waterway Protection Plan for the Village of Pewaukee." (See: Ex. 1)

5. The proposed structures will not materially obstruct existing navigation on Pewaukee Lake and will not be detrimental to the public interest upon compliance with the conditions of this permit.

6. Ms. Liesa Nesta, the DNR Area Water Management Specialist, testified that the proposed 19 slip pier was consistent with Department policies with respect to the "reasonable use" of 1000 feet of frontage by a riparian. The dock consumes far less than all of the Village's riparian frontage. The wharf would be placed near an existing fishing pier that is wheel chair accessible. A preponderance of the credible evidence indicated that the wharf structure would

not have a detrimental impact on other public uses of the lake, including use of the accessible fishing pier.

7. All of the testimony indicated that the docks, which extend only 25 feet below the OHWM, would not obstruct navigation on Pewaukee Lake. The pier would instead be an aid to navigation in the area, and would allow boaters access to needed on-shore services on a short term basis

8. The project will not have a detrimental impact on the public interest in natural scenic beauty. The area around the proposed wharf expansion is a highly developed area with few remaining natural features. (See: Exhibit 11)

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

10. The proposed structures will not reduce the effective flood flow capacity of Pewaukee Lake.

11. The proposed structures will not adversely affect water quality nor will it increase water pollution in Pewaukee Lake. The structure 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.

Mr. Adolphson expressed a concern about boats idling while dock-users disembarked for the Village. A condition in the permit requiring an ordinance and signage restricting idling at the site should eliminate this concern.

Mr. Adolphson was also concerned that boaters will head to the docks, obtain gasoline at nearby Village gas stations and then spill the same into the public waters at the site. Such a scenario is not unlikely, but the Village presented evidence that it was prepared to deal with large spills and that minor spills were unlikely to have a significant detrimental impact on water quality. The DNR's Nesta provided undisputed expert testimony that such spills would likely have a "negligible" impact on water quality. Nesta further opined that the water depths of nearly six feet at the site would likely protect from stirring up of bottom sediments which might impact water clarity.

A clear preponderance of the credible evidence, including all of the expert testimony, indicates that the project will not have a detrimental impact on water quality.

12. The Department of Natural Resources has complied with the procedural requirements of sec. 1.22, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

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 structure subject to the conditions specified.
2. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
3. The proposed facility described in the Findings of Fact constitutes a structure 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.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.12, Stats., for the construction of a structure 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 structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittee 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 structure.
4. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.
5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. The permittee shall notify the Water Management Specialist, Ms. Liesa Nesta, 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, Ms. Nesta, at least 5 working days in advance.

9. No more than 19 boats shall be moored at the docks at one time. No more than one boat shall be moored at individual berthing stations, with the exception of the lakeward most "T" section at any one time. No more than 3 boats shall be moored at the above-described "T" section at any one time.

10. The Village of Pewaukee shall adopt an ordinance and install signage restricting overnight mooring and the idling of boats at the dock. The Village shall restrict the mooring of boats to such time periods as it determines reasonable and establish signage reflecting said restrictions.

11. The dock structures shall not exceed 6 feet in width, unless the Village provides information to the DNR that an 8 foot width is necessary to comply with the Americans With Disabilities Act, in which case the dock sections shall not exceed 8 feet in width.

12. 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 September 18, 1997.

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

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.