



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Abatement Action on Motion
of the Department of Natural Resources to Remove
or Reconfigure the Alleged Illegal Pier Maintained
on the Bed of Pewaukee Lake, Village of
Pewaukee, Waukesha County, by Pewaukee
Shores Condominium Association

Case No.: 3-SE-96-070

Application of Pewaukee Shores Condominium
Association for a Permit for an Existing Pier on the
Bed of Pewaukee Lake, Village of Pewaukee,
Waukesha County, Wisconsin

Case No.: 3-SE-00-0198

FINDINGS OF FACT, CONCLUSIONS OF LAW ORDER AND PERMIT

The Department of Natural Resources staff (Department) alleges that Pewaukee Shores Condominium Association placed a pier on the bed of Pewaukee Lake in violation of Wis. Stat. §§ 30.12, and 30.13. The Department further alleges that the pier interferes with the rights and interests of the public in Pewaukee Lake and constitutes a public nuisance pursuant to Wis. Stat. § 30.294. Pursuant to Wis. Stat. § 30.02(3), the Department requested a public hearing before the Division of Hearings and Appeals. The Department seeks an order directing Pewaukee Shores Condominium Association to either remove the existing pier or reduce it to a size, configuration, and berthing density which will not require a permit under Wis. Stat. § 30.12 (the enforcement action, Case No. 3-SE-96-070).

In March of 1996 Pewaukee Shores Condominium Association applied to the Department of Natural Resources for a permit to maintain the existing pier and to construct a 23-foot extension to the pier. Public notice of the application for a permit was published. On April 16, 1996, the Village of Pewaukee (Village) filed an objection to the application for a permit. The Village objected to the pier extension, citing safety concerns because of the pier's proximity to a public beach and swimming area. Pewaukee Shores Condominium Association subsequently withdrew the request for the 23-foot extension and the Village withdrew its objection. Pursuant to Wis. Stat. § 30.02(3), the Department of Natural Resources also requested a public hearing before the Division of Hearings and Appeals on the application for a permit (Case No.: 3-SE-00-0198).

Pursuant to due notice, a combined hearing was held in Waukesha, Wisconsin on October 4 and November 30, 2001, before Mark J. Kaiser, Administrative Law Judge. The parties filed written arguments after the hearing. The last brief was received on March 2, 2001.

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

Pewaukee Shores Condominium Association, by

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APPLICABLE LAW

Wis. Stat. § 30.13(1), 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.

Wis. Stat. § 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.

Wis. Stat. §§ 30.12(1) and (2), 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. Pewaukee Shore Condominium Association (Pewaukee Shores) is a Wisconsin condominium organized and created under Chapter 703 of the Wisconsin Statutes (Exh. 54). Pewaukee Shores was established pursuant to Wis. Stat. § 703.07, when the Declaration of Condominiums and Condominium Plat were recorded in the Waukesha County Register of Deeds on October 20, 1989.

2. Pewaukee Shores owns real property located at 130 West Wisconsin Avenue in the Village of Pewaukee, Waukesha County. The legal description of the property is in the NW ¼ of the SW ¼ of Section 9, Township 7 North, Range 19 East. The property abuts Pewaukee Lake, which is navigable in fact. Pewaukee Shores has approximately 110 feet of frontage on Pewaukee Lake.¹

3. The Village of Pewaukee (Village) is located on the eastern end of Pewaukee Lake. Pewaukee Lake is a through-flow natural drainage lake that was impounded by a low-head dam in the early 1880s. Pewaukee Lake is a long narrow lake. It has a maximum length of approximately 4.5 miles and maximum width of 1.4 miles. Pewaukee Lake has a surface area of approximately 2,446 acres and a shoreline of 12.8 miles. The maximum depth of Pewaukee Lake is 45 feet and the mean depth is fifteen feet. Pewaukee Lake is the largest lake in Waukesha County (Exh. 62).

¹ The Department alleges that an approximately 25 foot strip of the frontage Pewaukee Shores claims is in dispute and requests as a condition of the permit that Pewaukee Shores furnish proof of ownership of this strip. There is no dispute that Pewaukee Shores has placed the existing pier within its riparian zone regardless of whether it owns the 25 foot strip in question and the number of boat slips the Department has recommended be permitted for Pewaukee Shores far exceeds the number that would be allowed using the Department's reasonable use guidelines with or without the disputed strip of shoreline. Accordingly, for purposes of this decision and the permit issued to Pewaukee Shores, it is unnecessary to resolve the disputed ownership of this strip of shoreline.

4. Pewaukee Shores is located on land zoned B-6 Downtown Multi-Use for a high density use (Exh. 50). Pursuant to the Village's zoning ordinance applicable at the time Pewaukee Shores was being developed in 1980, a conditional use permit was required (Exhs. 50 and 67). On December 8, 1988, the Village Plan Commission approved issuance of the conditional use permit (Exh. 50) and on May 11, 1989, the Village Plan Commission gave final approval to the project (Exh. 51).

5. Pewaukee Shores consists of 27 individual unit owners, each of whom has an individual percentage interest in all common elements and a divided interest in the limited common elements. The limited common elements include a pier that Pewaukee Shores has placed on the bed of Pewaukee Lake adjacent to its property since 1989 (Exh. 54). Each of the 27 condominium unit owners has an assigned boat slip on the existing pier (Exh. 80).

6. The existing pier is 130 feet long and six feet wide. The existing pier has twelve finger piers and berths 27 boats. The water depth at the lakeward end of the pier is between ten and twelve feet. At the site of the pier, the line of navigation (contour line at a three-foot water depth) is approximately twenty feet beyond the ordinary high water mark.

7. The lakebed adjacent to the Pewaukee Shores property has a sandy substrate. Aquatic vegetation present at the site consists of milfoil and pondweed. A concrete sea wall has been constructed along Pewaukee Shore's lake frontage. Department witnesses described the condition of the lake in this area as "severely degraded." Department staff concluded that no ecological reasons, such as negative impacts on fish or wildlife habitat, exist for opposing the application for a pier permit. The Department has issued a permit to Pewaukee Shores allowing it to do some dredging around the pier.

8. The shoreline of Pewaukee Lake within the limits of the Village is highly developed. The riparian to the south of Pewaukee Shores is John Lehman who operates Smokie's Bait Shop at the site. John Lehman maintains three piers and a concrete boat ramp on the lakebed of Pewaukee Lake adjacent to his property. The size and configuration of the three piers placed by Mr. Lehman are an 85 foot long pier with a sixteen foot long "L" on the lakeward end, a 100 foot long pier, and a 56 foot long pier with a fifty foot long "T" section at the lakeward end (Exh. 12a). Smokie's Bait Shop rents out boat slips on its piers. The Department has not issued a permit for any of the Smokie's Bait Shop piers. Immediately south of Smokie's Bait Shop is another riparian, Jay Gregor, who has placed a 72-foot pier with twelve boat slips. Mr. Gregor also rents out slips on his pier. The Department has issued a permit for the Gregor pier.

9. The riparian to the north of Pewaukee Shores is the Village of Pewaukee which maintains a swimming beach on the property. The Pewaukee Lake Patrol has obtained a permit to place roped buoys delineating a designated swim area adjacent to the property. The roped swim area extends approximately 75 feet from the shore and is approximately 300 feet wide. The roped swim area is closest to the existing Pewaukee Shores pier at its southwest corner.

From the southwest corner of the roped swim area to the end of the most lakeward finger pier along the north side of the existing pier is approximately 55 feet (Exh. 53).²

10. The existing pier is detrimental to the public interest in Pewaukee Lake because it constitutes an unreasonable intrusion into a public waterway for a private purpose and deprives the public of the use of the lake area where the pier exists and reduces the available space for incidents of navigation in Pewaukee Lake. The area in which the Pewaukee Shores pier is located can not be used for other incidents of navigation, such as boating, swimming, and wading. No evidence was presented at the hearing that members of the public desire to fish, swim, wade or engage in other incidents of navigation in the nearshore area of Pewaukee Lake in the vicinity of the Pewaukee Shores property. However, Pewaukee Lake is a heavily used lake and the nearshore areas of lakes are the areas of lakes in which most incidents of navigation occur.

It is self evident that allowing Pewaukee Shores to consume an excessive amount of the nearshore area relative to the amount of shoreline it owns unreasonably intensifies the use of nearby nearshore areas for incidents of navigation. The navigable waters of the state and the beds of navigable waters are owned by the State of Wisconsin in trust for the use of the public. “This ‘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.” (citations omitted) *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, at 526 271 N.W.2d 69 (1978). The Pewaukee Shores pier appropriates an unreasonably large area of the public waterway for a private purpose. The size of the pier is detrimental to the public interest in Pewaukee Lake.

11. It would be reasonable to place a 100-foot long pier with eight finger piers (four on each side) and with a maximum of sixteen boat slips at the proposed site. A pier of this length would extend approximately the same distance from the shore as the designated swimming area. Reducing the length of the pier to 100 feet would also decrease the length of the bottleneck between the pier and the swim area and reducing the number of boat slips to sixteen would decrease the boat traffic through the bottleneck. Reducing the length of the pier and the number of boat slips on the pier would alleviate some of the safety concerns with respect to the swimming area. A pier of this size and configuration would not be detrimental to the public interest in Pewaukee Lake if it complies with the conditions set forth in the following permit.

12. The pier as permitted will not adversely affect water quality nor will it increase water pollution in Pewaukee Lake. The pier as permitted will not cause environmental pollution as defined in Wis. Stat. § 299.01(4).

13. The applicant, Pewaukee Shores, is financially capable of constructing, maintaining, monitoring or removing the proposed pier if it should be found in the public interest to do so.

² Exh. 53 was prepared in 1988, before the Department issued the Pewaukee Lake Patrol a permit to place buoys for the swim area (Exh. 47). The configuration of the roped swim area as shown in various aerial photographs of the site (e.g. Exh. 3) is different than the configuration shown in Exh. 53; however, the evidence presented at the hearing was that the shortest distance between the Pewaukee Shores pier and the boundary swim area remains 55 feet.

14. The pier as permitted will not reduce the effective flood low capacity of Pewaukee Lake upon compliance with the conditions in the permit.

15. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150, regarding assessment of environmental impact.

DISCUSSION

Wis. Stat. § 30.13, allows a riparian to construct and maintain a pier on the bed of a navigable waterway without a permit if certain conditions are met. Wis. Admin. Code § NR 326.05 provides that “[r]iparians intending to construct . . . piers not conforming to s. NR 326.04(1) or (9) shall apply for permits under s. 30.12(2), Stats.” Wis. Admin. Code § NR 326.04(1) provides that “piers shall not extend into the water from the shoreline beyond the line of navigation or the length of the boat using the pier.” The existing pier placed by Pewaukee Shores extends beyond the line of navigation at the site at which it is placed. For this reason alone, the pier cannot be maintained without a permit issued pursuant to Wis. Stat. § 30.12. Pewaukee Shores has applied for a permit to maintain the existing pier. The applicant, Pewaukee Shores, has the burden to show that the pier will not be detrimental to the public interest in Pewaukee Lake. To satisfy its burden, the applicant primarily relied on the Department’s witnesses to show that the area where the pier is located is already degraded and that the pier will not negatively impact water quality or adversely affect any fish or wildlife habitat in this area.

The Department concedes that no environmental reasons exist for denying the application for a permit. However, the Department has two concerns related to the public interest in Pewaukee Lake with respect to this pier. The first concern is a safety issue related to the swimming area adjacent to the pier. The Department witnesses testified that they are concerned that the pier at its present size and configuration constitutes a hazard to persons using the designated swimming area maintained by the Village of Pewaukee. The pier has existed in its current size and configuration and at its current location for ten years. Other than anecdotal evidence, there is little evidence that the pier presents any significant safety problems for persons using the designated swimming area. Pewaukee Shores presented evidence that safety concerns could be addressed by imposing appropriate conditions in the permit. Reducing the length of the pier to 100 feet will decrease the length of the bottleneck between the pier and the swimming area and will provide more maneuvering room for boats using the pier. Shortening the length of the pier and reducing the number of boat slips on the pier will decrease the possibility of an accident involving a swimmer in the designated swimming area. Based on the evidence in the record, no conditions related to safety are necessary if the pier is constructed in accordance with the conditions of the permit.

The Department’s second concern is the excessive size of the pier relative to the amount of shoreline owned by the applicant. The Department adopted reasonable use guidelines for evaluating applications for pier permits in 1989 (Exh. 32). The guidelines constitute an attempt

by the Department to clarify for Department staff already existing statutory and common law requirements for the placement of piers by riparians. The reasonable use guidelines are not hard and fast rules, but simply a starting point for evaluating pier permit applications.

The DNR's informal guidelines reconcile the common law "reasonable use" doctrine with the statutory limitations on a riparian owner's right to the use of a navigable water. Both presume "reasonable use" by riparians, but allow for variations based on value and policy considerations. Even though the DNR's guidelines do not have the force and effect of law and are not controlling on the courts, the guidelines illustrate the DNR's experience and expertise in regulating piers under § 30.12, STATS. When an agency has particular competence or expertise on an issue, we will sustain its legal conclusions if they are reasonable. (citation omitted)

Sterlingworth Condominium Ass'n v. DNR, 205 Wis. 2d 710, at 731-32, 556 N.W.2d 791 (Ct. App. 1996)

According to the reasonable use guidelines, Pewaukee Shores may place a pier adjacent to its property with three boat slips without a permit. However, the guidelines expressly provide that the Department in evaluating applications for pier permits "will not hold existing facilities to the same 'reasonable use' guidelines which [it] will apply to new proposals since, to some extent, they may have established some limited interest in use of existing facilities." The reasonable use guidelines provide that historical use should be considered; however, this does not mean that pre-existing piers should be permitted in the same size and configuration as they currently exist. The guidelines simply provide that in balancing the riparians right to place a pier with public interest in a water body, some weight should be given to historical usage. In this case, the Department did so by recommending a 75 foot-long pier with 12 boat slips at the site. This recommended length and number of boat slips is based on the size of a nearby pier which has been permitted. The Department provided no other rationale for this recommendation.

The current 130 foot-long pier does constitute an excessive appropriation of public waters for a private purpose. The size and configuration of the existing pier make it very difficult for the public to access the nearshore area adjacent to the Pewaukee Shores Condominium. The length of the pier also forces boaters in the area further from the shore of Pewaukee Lake. However, a pier slightly longer than the length recommended by the Department is reasonable. A reasonable length for a pier at this site is 100 feet. A 100-foot pier would be the same length as the longest pier placed by Smokie's Bait Shop. It is understood that the Department is considering commencing an enforcement action against the piers now placed by Smokie's Bait Shop and those piers may be reduced in length. However, even if the piers placed by Smokie's Bait Shop are reduced in length, a 100 foot-long pier at the Pewaukee Shores site is still reasonable because it would be roughly in line with the length of the designated swimming area for the Village of Pewaukee swimming beach.³

³ At 100 feet, the pier would extend approximately 25 farther from the shore than the swim area. However, the pier is placed at an angle. Looking at the aerial photographs, it appears that the end of a 100-foot long pier at this site would roughly be in line with the west boundary of the roped swim area.

Pewaukee Shores is seeking to maintain a pier with 27 boat slips because it has 27 condominium units and is seeking to have one slip for each unit.⁴ For marketing of the condominium units, this length of pier makes sense; however, it is an unreasonable number of piers to place on the amount of frontage owned by the Pewaukee Shores Condominium Association. It should be noted that immediately south of the Pewaukee Shores property are four piers placed by two riparians. Both of these riparians rent out slips on the piers to the public. Undoubtedly the demand for slips on these piers is high; however, there does not appear to be a reason why any condominium owners at the Pewaukee Shores are unable to obtain a space on the Pewaukee Shores pier cannot rent a slip on one of these other four piers. Balancing the right of Pewaukee Shores to place a pier adjacent to its property for obtaining access to Pewaukee Lake with the public interest in Pewaukee Lake, a 100 foot-long pier with 16 boat slips is reasonable and a permit for such a pier is issued.

CONCLUSIONS OF LAW

1. Pewaukee Shores Condominium Association is a riparian owner within the meaning of Wis. Stat. § 30.12.
2. The current pier placed by the Pewaukee Shores Condominium Association on the bed of Pewaukee Lake as described in the Findings of Fact constitutes a structure within the meaning of Wis. Stat. § 30.12.
3. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b), and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of a pier of the size and configuration described in the Findings of Fact subject to the conditions specified.
4. Pursuant to Wis. Stat. § 30.12 and Wis. Admin. Code § NR 326.05, a permit is required for the existing pier. The existing pier was constructed and maintained without a permit. Accordingly, the construction and maintenance of the pier constitutes a violation of Wis. Stat. §§ 30.12 and 30.15.

⁴ The applicant argues that each condominium unit buyer had an expectation that he or she would receive a boat slip. However, the drafter of the condominium's Disclosure Materials knew Pewaukee Shores could not guarantee this. Article 2 of the Disclosure Material (Exh. 54) includes the following provision:

Any reference in this Declaration to "boat slips" and/or pier do not constitute a representation or commitment by Declarant that such proposed improvements will be approved and/or constructed at any time or, if constructed, that a boat slip will be available for any particular Unit. All use of the boat slips and pier, if built, shall be subject to applicable law, including but not limited to rules and regulations of the Department of Natural Resources.

5. The construction and maintenance of the existing pier in violation of Wis. Stat. §§ 30.12 and 30.15, constitutes a public nuisance pursuant to Wis. Stat. § 30.294. This violation will be abated by the removal of the existing pier and the placement of a pier in accordance with the conditions of the following permit.

6. The permitted pier will not constitute an impairment to navigation and is not "detrimental to the public interest in navigable waters" within the meaning of Wis. Stat. § 30.12(2), if maintained in accordance with the conditions of the following permit.

7. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

The pier placed by the Pewaukee Shores Condominium Association on the bed of Pewaukee Lake in the size and configuration that existed at the time of the Department's enforcement action was commenced requires a permit. No permit was issued for the existing pier. Pursuant to the motion of the Department, the existing pier structure constructed and maintained by the Pewaukee Shores Condominium Association is found to be a violation of Wis. Stat. § 30.12, and is declared an unlawful obstruction pursuant to Wis. Stat. § 30.13(4)(a), and a public nuisance pursuant to Wis. Stat. § 30.294. The existing pier shall be removed or reduced in size to comply with the following permit within ninety days of this order.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under Wis. Stat. § 30.12, for the construction and maintenance of a pier in aid of navigation adjacent to its property abutting Pewaukee Lake. The permitted pier shall be placed at the same location as the applicant's existing pier, may extend no more than 100 feet beyond the ordinary high water mark of Pewaukee Lake, and moor a maximum of sixteen boats. The main section of the pier shall be no wider than six feet. The applicant may also attach up to eight finger piers (four on each side) to the pier. This permit is issued subject to the following conditions:

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 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 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 permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
5. Any area disturbed during construction shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.
6. The permittee must notify Greg Breese at (414) 229-0821 not more than five days after the project is completed and placed as permitted.
7. The permit granted herein shall expire one year from the date of this decision, if the structure is not completed before then. Pursuant to Wis. Stat. § 30.07(1)(b), for good cause, the Department may extend the time limit for the permit for no longer than two years if the grantee requests an extension prior to expiration of the initial time limit.
8. This permit does not authorize the placement of mooring buoys at this location without modification of this permit.
9. 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 March 28, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Mark J. Kaiser
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 Wis. Stat. § 227.48, 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 Wis. Stat. §§ 227.52 and 227.53.
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 Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
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 Wis. Stat. §§ 227.52 and 227.53. 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 Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.