



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

In the Matter of the Application of the City of
Brookfield for Water Quality Certification to Place
Fill Material in Wetlands for Purposes of a
Pedestrian and Bicycle Pathway

Case No. IP-SE-04-68-0159FX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Brookfield, Wisconsin, on March 14, 2005. The parties submitted written briefs and the last brief was received June 1, 2005.

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

City of Brookfield, by

Karen J. Flaherty, Assistant City Attorney
2000 North Calhoun Road
Brookfield, WI 53005

Wisconsin Department of Natural Resources, by

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

FINDINGS OF FACT

1. On June 5, 2003, the City of Brookfield, 2000 North Calhoun Road, Brookfield, Wisconsin, 53005, filed an application with the Department of Natural Resources for Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act to place fill material in wetlands for the proposed purpose of constructing a pedestrian and bicycle pathway. The proposed project is located in the SW ¼-NW ¼, S21, T7N, R20E, City of Brookfield, Waukesha County, Wisconsin. The Department of Natural Resources issued a Dismissal Order dated December 11, 2003, regarding the June 5, 2003, application.

2. By letter dated February 24, 2004, the City of Brookfield filed a revised permit application with the Department of Natural Resources. The Department of Natural Resources evaluated and denied the revised application for Water Quality Certification as outlined in a letter to the City of Brookfield, c/o Jeffrey Chase dated June 30, 2004. On July 21, 2004, Assistant City Attorney Karen J. Flaherty on behalf of the City of Brookfield, filed a Petition for Hearing pursuant to Wis. Stats. § 227.42. By letter dated August 2, 2004, the Department of Natural Resources granted the request for a contested case hearing pursuant to Wis. Stat. § 227.42.

3. The proposed project is to extend an existing bike path and create a pedestrian pathway for public use along the east side of Brookfield Road from Capone Court to Tamarack Drive in the City of Brookfield. The proposed pedestrian and bicycle path would connect to a previously constructed south segment and a north segment slated for construction in the near future. The project as proposed is being constructed in accordance with the previously adopted City of Brookfield Master Plan. (Ex. 1) However, the DNR retains jurisdiction over wetland water quality certification pursuant to Wis. Stat. ch. 281 and Wis. Admin. Code NR 103 and 299, for activities that result in the discharge of fill into wetlands. The proposed sidewalk would link several residential neighborhoods to a thriving commercial sector in the City. It would also provide a link to and from Wisconsin Hills Middle School and a park, as well as completing an important segment of the City's non-motorized transportation master plan. (Chase) The path is likely to generate year-round traffic.

4. The construction as proposed would require filling of approximately .41 acres of wetland. The wetland complex in question is of a high quality and is located within a "primary environmental corridor" that includes a tributary to Poplar Creek, a navigable waterway. (Radermacher)

5. The proposed activity is not a wetland dependent activity because construction of a bicycle and pedestrian pathway does not require location in a wetland to fulfill its basic purpose.

6. There are "practicable alternatives" to the proposed asphalt sidewalk construction. The DNR has indicated that it would approve the project if the City would build one segment of the path using an elevated boardwalk. The City objects because the cost of elevated boardwalk construction makes the project more expensive and because snow removal would be more difficult on boardwalk segments. Jeffrey Chase from the City of Brookfield compared the estimated cost of the boardwalk alternative at \$349,670.00, with the cost of asphalt construction as proposed by the City which he estimated at \$50,180.00. However, the DNR Area Water Management Specialist, Geri Radermacher testified persuasively that the City's estimate grossly overestimated the cost of boardwalk construction. The City estimates assumed \$50.00 to \$100.00 per foot for asphalt, and \$350.00 for boardwalk. (Ex. 4) However, Radermacher estimated that boardwalk construction costs in the range of \$90.00 to \$150.00 per foot were achievable, so long as lighter-weight snow removal equipment were employed. The City already has such equipment.

This is not too far from other cost estimates presented by the DNR. A February 25, 2005, memorandum from Mike Anderson to Dale Simon provided contractor bid proposals ranging from \$160.00 to \$195.00 per lineal foot. There is no question that boardwalk construction will be somewhat more expensive, but the City's estimate seems grossly high. The cost differential is not great enough to warrant a finding that boardwalk construction is impracticable due to excessive cost.

7. The City established that there is currently a reasonable concern about the safety of bicyclists and others using the busy main high-volume arterial roads along the proposed route. (Ex. 12; Chase) The City determined that 13,600 cars use this area of Brookfield Road on a daily basis. These cars travel at an average rate of 43 to 47 miles per hour. (Chase) However, these concerns would be addressed equally by either sidewalk or boardwalk construction of the path because either construction option would take bicyclists off Brookfield Road. There have been a number of accidents in the area but, fortunately, no car-bike accidents as of this writing. (Ex. 11)

8. The wetlands that would be impacted are high-quality wetlands that are a "special natural resource interest" area because they are in a SEWRPC Primary Environmental Corridor and because they have been listed as "advance identification" of disposal areas (ADID), a planning process used to identify wetlands and their suitability for the discharge of dredged and fill material. (Exs. 25 & 28) Such project areas are not eligible for wetland mitigation plans because they are areas of "significant special natural resource interest." (Wis. Stat. § 281.37) Further, the Brookfield Swamp has also been identified as a "natural area" of local significance. (Ex. 26)

9. There would be adverse environmental impacts to wetland functional values if the project were constructed as proposed. The sidewalk would likely adversely impact floral diversity, wildlife habitat, flood protection, water quality, and groundwater recharge and discharge. (Reed; Radermacher) Specifically, the Brookfield Swamp is considered Class 1 Critical Wildlife Habitat due to its size, quality and linkages to other important habitat corridors. (Reed; Ex.35) The proposed asphalt construction would likely result in habitat fragmentation that would be likely to detrimentally impact species diversity. Further, sidewalks are associated with an increased likelihood of invasive species colonizing on nearby areas. (Id.; Radermacher) Finally, Ms. Radermacher and Dr. Reed were persuasive that there is a strong likelihood of cumulative detrimental impacts to the Brookfield Swamp area as a whole, because other bicycle and pedestrian pathways that could lead to further fragmentation are also being planned by the City. (Ex.17) The City notes that its plan specifically acknowledges the necessity of obtaining DNR permits prior to construction. However, a significant precedent would be set if this portion of the trail is permitted with asphalt rather than boardwalk construction. Dr. Reed testified that there would be detrimental impacts even from elevated boardwalk construction, but that the impacts to floral diversity and groundwater discharge would be significantly less if an elevated boardwalk was constructed.

DISCUSSION

The City of Brookfield has proposed construction of a bike and pedestrian path that will serve City residents well and provide an important link of residential, commercial, school and park areas. However, the path goes through high-quality wetlands that are especially rare in southeast Wisconsin. The DNR has properly denied the current iteration of this plan, because there is a “practicable alternative” to construction of the path as a standard asphalt sidewalk. Specifically, the DNR demonstrated that elevated boardwalk construction will meet the City’s needs and not be as expensive as the City suggests. The DNR has consistently required elevated boardwalks in recent years for similar pathways around the State of Wisconsin. (e.g. Exs. 37 and 42, involving the City of Middleton) There was nothing in this record that suggests the City’s position that such an elevated boardwalk is impracticable in this location. An elevated boardwalk may require some creative use of existing City resources for snow removal. It will likely also be somewhat more expensive to construct. But neither of these concerns is sufficient to support a finding that an elevated boardwalk is impracticable. Rather, an elevated boardwalk would meet the City’s needs with a much less detrimental impact upon this important wetland.

The denial of the instant plan is, therefore, affirmed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases relating to review of water quality certification pursuant to Wis. Stat. § 227.43(1)(b).
2. The placement of fill by the City to maintain a bike path is not a wetland dependent activity within the meaning of Wis. Admin. Code § NR 103.07(2) and NR 103.08(4)(a)(1), because construction of the pedestrian and bike pathway is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.
3. There are currently “practicable alternatives” . . . “available and capable of being implemented” to the reduced fill area and access road, “after taking into consideration cost, available technology and logistics in light of overall project purposes” within the meaning of Wis. Admin. Code § NR 103.07(2). These include but are not limited to placement of an elevated boardwalk or bridge at the site, or use of the alternative access available from the county highway. The Division has considered the increased cost associated with boardwalk construction and does not find that these costs make boardwalk construction “impracticable” within the above definition.
4. The proposed project results in violation of the standards contained in Wis. Admin. code § NR 103.08(3) in that practicable alternatives to the proposed project which will not adversely affect wetlands exist and the proposed project results in significant adverse impact to the functional values of the affected wetlands, significant adverse impacts to water quality and or other significant adverse environmental consequences.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that DNR's decision to deny water quality certification be AFFIRMED, and the petition for review DISMISSED.

Dated at Madison, Wisconsin on July 1, 2005.

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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 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 therefore 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.