

**Minutes of the AOPA Committee of the
Natural Resources Commission**

January 13, 2009

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn
Doug Grant
Mary Ann Habeeb
Robert Wright

NRC Staff Present

Sandra Jensen
Stephen Lucas
Jennifer Kane

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 8:40 a.m., EST, on January 13, 2009 in the Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With all five members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on November 18, 2008

Doug Grant moved to approve the minutes for the meeting held on November 18, 2008. Robert Wright seconded the motion. Upon a voice vote, the motion carried.

Findings of Fact and Conclusions of Law with Non-Final Order of Administrative Law Judge and Claimant's Objections to the Non-Final Order in the matter of *Porter v. Swain, et al.*; Administrative Cause No. 04-148W

Sandra Jensen, Administrative Law Judge, introduced this matter. She noted that Stephen Porter and Peter and Angeline Olovich were present at today's meeting.

Stephen Porter, Claimant, said he had three objections to the Administrative Law Judge's nonfinal order. Porter said the administrative hearing was held on May 29, 2008, at which "I started to present my evidence from the Division of Water of how they constructed the seawall and how the water rights were determined. Well, [Judge Jensen] said I didn't have these certified. [Judge Jensen] did grant me time to" certify the documents. Porter said the Division of Water "sent me half of the paperwork. I said, 'Where is the paperwork from the warehouse.' Well the [Division of Water] said they

were misplaced. I've been trying...and still today they are misplaced. I've been in contact at least 30 times on the phone and four trips to Indianapolis to get this information. Still to date they don't have this information. It's vital information that shows what the work that they done to make the shoreline. This doesn't have anything to do with property lines. I'm going on water rights".

The Chair asked if Porter had additional comments.

Porter said he had comments about the deeds and the surveys.

The Chair then asked Mr. Porter to "summarize or state objections" to the nonfinal order as presented by the Judge Jensen.

Porter asked, "Do you have all the other paperwork?"

The Chair said, "We have the information before us here, the proposed nonfinal order and your letter of November 8, 2008 with regard to objections to the nonfinal order. We would appreciate if you had any summary or statement of those objections for the panel."

Porter said "There was no way I could provide the evidence I need if the Division of Water don't have it. I have it with me. It states and shows exactly how this was done. But I can't present it because it wasn't certified. It proves my point. And it shows in all these and in every recording that I have the nine foot and shows how, why, and when." He concluded, "That's all I have."

Peter Olovich said a survey had been completed when he bought the property adjacent to Porter's property. The survey company "messed up. They surveyed [Porter's] property." Olovich said the survey company returned and completed a survey of the Olovich property. "The combined surveys show the property lines giving Mr. Porter seven foot and us 20.75 foot."

Mark Ahearn, Committee member, asked for clarification as to which property lines Olovich referred.

Olovich responded, "Water side of the seawall." He continued, "The information Mr. Porter obtained, and gave us a copy of, stated that the three previous owners that put the seawall in got together and agreed that the portion we have would have 20 plus feet of seawall. This is what we bought, just under 21 foot."

Mark Ahearn asked, "For your property?"

Olovich answered, "Waterside. Yes, on our property. This is what our survey showed, 20.75. We bought just under 21 foot of seawall, which Mr. Porter thinks he's got nine foot instead of seven."

The Chair asked Olovich, “As it relates to the nonfinal order before us, am I correct in understanding that you have no objections to the nonfinal order as presented by Judge Jensen?”

Peter Olovich said, “No. We support it.”

The Chair asked for additional comments from the parties in response to Olovich’s comments.

Olovich noted that the instant administrative case has been “going on for I believe about four years. Now, if he hasn’t obtained the information in four years, I don’t know what more time is going to do. We are just—we are up to here. We just want to get it over with. Get it behind us so we can go on.”

The Chair opened the floor for Committee member discussion.

Mary Ann Habeeb, Committee member, requested clarification regarding the reference to a “pipe” in the nonfinal order. She said the nonfinal order indicates that “everyone seemed to agree that the pipe was the boundary line. Is that still the case?” Olovich answered that the pipe is the boundary line. Habeeb then asked, “So, is there a problem with getting the survey?”

Porter said, “No. The pipes are the shoreline.”

Habeeb said, “Well, I don’t know. I don’t have a picture. I’m just saying the pipe was what was mentioned in the order.”

Olovich said, “The seawall comes like a half of a square, and there is a chip on the waterside of the seawall where the property line is. There are two of them there, one on each side of us. The pipe, I’m assuming, is directly behind it. I don’t think it’s off on an angle, but its right there.”

Habeeb asked, “So, if there was a measurement with regard to the pipe and the property lines, would you both agree that that’s the deal?”

Olovich said, “I would.”

Porter said, “I have no idea about the survey.”

Habeeb continued, “The pipe is the boundary line?”

Porter said, “No. The pipe is the waterline. That’s the reason I need the information from the Division of Water.”

Habeeb said, “I’m confused about the pipe.”

Peter Olovich explained that the pipe is “just a stake indicating where the property is at the seawall, but the pipe is actually on the landside of the seawall, which is a foot or so” from the seawall.

The Chair asked whether Judge Jensen had could clarify the presentation of the findings of fact and nonfinal order.

Judge Jensen said, “The only way that the [evidence] made sense to me was that before the seawall was constructed, this channel was sort of rounded at the end, which of course, when they squared it off to put the seawall in, it modified the property boundaries. In doing that the deeds, the old deeds pre-seawall construction, indicate that Mr. Porter did, in fact, have nine feet of water frontage. However, there is a deed for Mr. Porter’s property prior to Mr. Porter’s ownership that indicates that post-seawall construction those nine feet were now 7.5 feet. That evidence was presented by Mr. Porter, but which actually supported Mr. and Mrs. Olovich’s position, that, in fact, the seawall construction altered the shoreline such that the property lines are the boundaries and the water line area per property had changed.... There is, and I think it is Mr. Porter’s predecessor-in-title who had the survey conducted to indicate [Mr. Porter’s frontage] is now 7.5, which is consistent with the survey conducted by the Oloviches.”

Ahearn asked, “Was that a function of the seawall moving back along property lines, but without reference to the water along angles?”

Judge Jensen said, “I’m not sure. I guess I can draw it better.” She explained that the Olovich property approached the shoreline at a “pie shape”, and when the seawall was constructed the Olovich property was “squared off and that pushed [the boundary line] back slightly, which gave [the Oloviches] a greater width from boundary line to boundary line. In the process of doing that, unfortunately, it shortened that distance for the other two parcels...one being Mr. Porter’s property and the other one Mr. and Mrs. Swain’s property.”

The Chair asked whether the Swains filed objections to the nonfinal order. Judge Jensen responded the Swains did not have objections and had telephone earlier to advise that they did not intend to appear for the oral argument.

Robert Wright, Committee member, said, “I don’t quite understand how you can take a rounded area and square it off and lose space.”

Ahearn said, “Well, didn’t it move farther back into the property? The line chased the property line.”

Judge Jensen said, “Had the property lines been 90° into the end of the channel, this would not have occurred. But the property lines were not 90° into the shoreline.”

Porter noted that he had a copy of the survey with him.

Olovich said, “My attorney gave me some advice, which was to object to any evidence [Mr. Porter] brought here.”

Judge Jensen replied, “That’s why I am checking it to make certain that it’s something that was received in the hearing.”

Porter said, “It’s going to be hard for me to go back and forth like this.”

The Chair said, “Mr. Porter, you can address us. If you have questions or comments, you can address us, and we will give you a minute. Right now we are asking Judge Jensen to try to help us understand the shoreline and the seawall construction.”

Judge Jensen drew a schematic of the property lines involved in the proceeding. She reiterated that if the property lines had approached the shoreline at 90°, the resulting seawall footage would not have changed. It was noted during the continuing discussion that the schematic was not to scale and that the property line between the Olovich property and the Porter property approached the shoreline at a greater angle than what it may appear in the schematic. The shoreline footage for each property was consistent with the surveys conducted by Mr. Porter’s predecessor-in-title and Mr. and Mrs. Olovich’s survey.

Ahearn asked, “Is there any disagreement as to what the real property lines are? What the boundary lines are separating before you get to the riparian rights?”

Peter Olovich answered, “Yes. [Mr. Porter] is saying he’s got nine feet, and I’m saying he’s got seven plus a little bit, because that’s what my survey showed. Going back to the three previous owners that put the seawall in, I’m sure they had to have this okayed by some state agency to put the seawall in. At that time, this is what they agreed to. The three neighbors agreed to put the seawall in. We would have 20 plus feet.”

Porter said, “That isn’t true.”

Ahearn asked, “Does anybody disagree on the angles of those property lines?”

Olovich answered, “No.”

Ahearn, referencing paragraph 73 of the nonfinal order, asked “Do we need a survey, another land survey of the property boundaries to dispose of this issue?”

Porter said, “No.”

Olovich answered, “We are not disputing the lines. What we are disputing is [Mr. Porter] wants nine feet of frontage, which is going to be out in the water.”

Porter asked for clarification regarding the Oloviches’ deed and the amount of lake frontage.

Judge Jensen said the Oloviches' deed was "actually corrected" to reflect the updated 1992 survey.

The Chair asked, "As it reflects the seawall?" Judge Jensen answered in the affirmative.

Ahearn asked, "Are we here resolving anything other than the riparian rights of the owners of what happens once you get on the lakeside of the seawall? I think that is the issue before us. What are the lake rights?"

Habeeb said, "The seawall was not part of the real property, so a new deed would show the seawall as part of the real property as it currently exists." Stautz agreed, and said, "That's why there is the need" for Finding 73.

Judge Jensen noted that Finding 46 references the "exact language" that was changed within the warranty deed where the Mishlers conveyed the property to the Oloviches. She said the warranty deed "reflected the change from direction and distance along the water's edge pre-seawall construction to the distance along the north face, the lake side of the seawall".

Porter reiterated that Oloviches' property is "recorded at 17 feet. All the deeds read the same, nine, 17, 15. You only come up with 41 feet, but the way I was explained when I moved in there, there is a foot in between [lot] three and four and [lot] four and five for navigational purposes and that gives you 43 feet. In other words, no one owned that foot in between." Porter continued, "Every document at the courthouse that I have shows nine foot. There is nothing changed. They wanted to change it. But what they done is they come in there and took a survey by a warranty deed." He said the two one-foot easements were not included in the Olovich survey.

Ahearn asked, "If we were to go along with the dimensions you reference, what would happen to the property lines that appear to be straight that touch the seawall, would they have to curve at the end? What would those property lines look like?"

Olovich agreed that the property lines would curve.

Habeeb said, "To get nine feet, you would have to move the whole seawall out into the water."

Porter said the 1972 survey indicates 43 feet of lakefront across the subject properties. "To this date, it's still recorded at 43-foot."

Judge Jensen responded to Porter's statement. "All the deeds do not read nine, 17, 15 anymore." She referred the Committee to Findings 43 through Finding 46. Judge Jensen said the Olovich's deed was corrected to reflect the seawall dimension of 20.75. She noted that the Oloviches' deed was the "deed certified and presented" at the administrative hearing as Claimant's Exhibit C.

Ahearn asked, “What would be the objections to Judge Jensen’s order that we solve this issue by conducting a survey and seeing where the property lines really are, and where they touch the shore, which would be the seawall? There is a second set of considerations if you see the reference in the nonfinal order to the *Nosek* case, and using those principles, which are settled in Indiana law, to determine who has which water rights? Is that not the process we should use?”

Porter answered, “No. You have to have the Division of Water papers to show when this change was and that was in 1975?”

Habeeb noted that a surveyor would be able to access the information referenced by Porter.

Wright asked Porter, “Do you agree that the Oloviches lost some of their land when the seawall was put in?”

Porter answered, “No, sir, I don’t.

Wright then asked whether a part of Olovich’s property was taken landward when the seawall was constructed.

Porter said, “Yes.”

Grant observed, “This kind of thing happens all the time. Constructing seawalls often has unforeseen consequences.”

Wright said, “So, as a result all that portion on the seaside of the seawall [the Oloviches] lost. Do you agree with that?”

Porter answered in the affirmative, and he added, “Everyone lost.”

The Chair commented, “I think this again represents the need as suggested in the nonfinal order in Finding 73 for a professional surveying of the property necessary for the identification to go forward. I think we understand what [Porter] is trying to explain to us, which again based on discussion of findings leads us to say lets have that professional survey completed to clarify for the record going forward.” She said the information from the surveys required in Finding 73 would be used to “establish riparian zones and the boundaries in the lake.”

Mary Ann Habeeb moved to accept the proposed findings of fact and conclusions of law and nonfinal order as presented by Judge Jensen. Robert Wright seconded the motion.

Ahearn asked, “Would we consider some time limitation for when the survey should be done? This has been going on a long time.” Habeeb agreed.

Angeline Olovich asked, “Why would we need another survey when everything is recorded as is? Everything is recorded. The property line has been defined. Why another survey now? I don’t understand this. Everything is documented.” Peter Olovich added, “We presented a survey.”

Judge Jensen noted that the Oloviches “do have a current survey when they purchased the property.” She said the survey presented by Porter was the survey conducted by Porter’s predecessor-in-title. “So, that’s why I left [Finding 73] open ended. I did not feel it was up to me to order [the parties] to have a survey done or otherwise. This part of the case is more of a boundary line issue.”

Ahearn asked, “Is it really not the case that the burden of persuasion is on Mr. Porter?” Judge Jensen answered in the affirmative.

Ahearn said that Porter “needs to present the survey. The burden of proof hasn’t been met to change our thinking on this.”

The Chair said, “We are reflecting that at Finding 45 that the Mishler survey reflects the revised real estate description reflecting that the parcel contains 20.75 feet running generally east on and along the northerly face of said seawall, which apparently was Claimant’s Exhibit C.” Judge Jensen indicated that the Chair’s statement was correct.

The Chair added, “We are taking that on face value as to the record that was presented.” Judge Jensen said, “The entire warranty deed reflects the old legal description” which indicates “‘to be known as’ and the new legal description that is consistent with the Oloviches’ survey.”

The Chair noted that a motion was before the Committee and asked for additional discussion.

Ahearn said, “Part of the Judge’s order prohibits anyone from putting any structures in the water until this is resolved. I think we ought to look for a way to bring some finality to this.”

The Chair asked when piers are “normally installed” in northern Indiana lakes.

Doug Grant answered, “April, May, or June.”

Olovich clarified that piers located in channels are not removed. “We leave them in all winter.”

Habeeb noted that Finding 75 “actually doesn’t prohibit a structure being placed; it only prohibits one being placed in a manner that is not consistent with the property boundaries.” She asked whether the Oloviches’ 1992 survey “would qualify as a professional survey” as required by Finding 73. “We want to clarify that so no further

survey by the Oloviches would be required, because their 1992 survey qualified as the professional surveying necessary.”

The Chair asked Habeeb whether her statement was intended as an amendment to the motion. Habeeb answered in the affirmative.

Mary Ann Habeeb moved to amend the standing motion to approve the findings of fact, conclusions of law, and nonfinal order with amendment to Finding 73 to reflect that the 1992 survey presented by the Oloviches, as Claimant’s Exhibit C in the administrative hearing, would fulfill the requirement for identifying the Oloviches’ real property boundaries. The Chair seconded the motion. Upon a voice vote, the motion carried.

Adjournment

At approximately 9:31 a.m., the meeting was adjourned.