

Minutes of the AOPA Committee of the Natural Resources Commission

March 12, 2007

AOPA Committee Members Present

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

NRC Staff Present

Sandra Jensen
Stephen Lucas
Jennifer Kane
Debbie Michaels

Guests

Donyel Byrd
John Lloyd, IV
Rick Wajda
Larry Coplen
James Walmer
Brad Merryman
Stephen R. Snyder

Karen Belcher
Rob Huey
William J. Ruppel
David Wallsin
Charlotte Werstler
Teresa Oberlin
Robert W. Eherenman

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 12:00 p.m., EDT, on March 12, 2007 in Conference Room 5, Indiana Government Center, 402 West Washington Street, Indianapolis, Indiana. With all five members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on January 16, 2007

The Committee approved by acclamation the minutes for the meeting held on January 16, 2007.

Committee Chair Report

The Committee Chair reported that the Committee had discussed expanding its membership during the January 16 meeting. Consistent with the consensus achieved during that meeting, and following discussions with NRC Chair, Bryan Poynter, the membership was expanded from three to five members. The Committee Chair and Mark Ahearn, Chief Counsel at INDOT, were both

reappointed. In addition, citizen members Robert Wright and Doug Grant were appointed, and Mary Ann Habeeb was appointed as the designee for Thomas Easterly from IDEM. Chairwoman Stautz welcomed the new members and thanked them for their willingness to serve on this important but challenging committee.

Orientation and Discussion Session, including Case Study, for Committee Members and Division of Hearings Staff

Steve Lucas, Director of the NRC's Division of Hearings, opened the discussion. He thanked the members of the Committee for their willingness to serve and noted they were providing an invaluable service to the parties who participate in litigation before the Commission. Lucas introduced the employees of the Division of Hearings. Sandra Jensen serves with him as the NRC's second administrative law judge. Jennifer Kane is the paralegal and also serves as a hearing officer in a variety of non-AOPA hearings. She has developed special expertise in the management of the Commission's website (www.ai.org/nrc/). Debra Michaels is the NRC's court reporter and takes a lead roll in developing the minutes for Commission functions. In addition, she organizes the various adjudicatory and rule-making files.

Lucas then led a dialogue with the members of the Committee concerning its responsibilities under IC 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act" or simply "AOPA"). Subjects included an historic perspective on AOPA, the NRC's delegations of AOPA authority to the administrative law judges and the AOPA Committee, the establishment of the AOPA Committee by rule, and the "adjudication turnpike" that illustrated how cases might progress from inception. There was a discussion of "CADDNAR", the compilation of NRC adjudicatory decisions with a searchable database on the Commission's website, including its importance for identifying NRC precedents. "Burden of proof" and the consequences of "hearing *de novo*" were referenced. AOPA ethics requirements were outlined, including their application to administrative law judges and to members of the AOPA Committee. A case study was identified but not discussed due to time constraints. Lucas expressed the perspective that some or all of these topics may warrant more detailed, in-depth consideration at a future meeting, depending upon the perspectives of the Committee members.

Consideration of "Findings of Fact and Conclusions of Law with Nonfinal Order", "Written Objections to Evidentiary Findings of Facts and Conclusions of Law with Non-Final Order", and "Notice of Intention to Request AOPA Committee to Replace Finding 36" in the matter of *Belcher and Belcher v. Yager-Rosales*, Administrative Cause No. 05-209W

Steve Lucas reported that William Law, attorney for Yager-Rosales, telephoned in the morning to indicate he would be delayed due to automobile problems. Lucas indicated Law either wished a continuance or to cause the issues to be briefed. This information was reported to the AOPA Committee an hour prior to its scheduled consideration of this item, and the members determined to defer action to allow a response from Stephen Snyder, the attorney for the Belchers. The deferral would also allow Law to make a belated appearance. As observed by Robert Wright, it was the Belchers "who would be inconvenienced by a delay."

Doug Grant recused himself from participation in this proceeding.

Ultimately, the item was deferred until the end of the agenda of the AOPA Committee. Law's office telephoned and indicated the automotive problem was resolved, but Law did not

subsequently appear. Stephen Snyder indicated his clients could not agree to a continuance. The season was at hand for the placement of piers, and a final disposition was needed. This proceeding was initiated in November 2005, and already a full boating season had passed without resolution.

The AOPA Committee observed that the members had the benefit of the objections by Yager-Rosales and that they understood the grounds upon which she objected to entry of the administrative law judge's final order. They agreed the objections were unpersuasive.

Mark Ahearn moved to approve the "Findings of Fact and Conclusions of Law with Nonfinal Order", incorporating the modification tendered by the administrative law judge in his "Notice of Intention to Request AOPA Committee to Replace Finding 36". Mary Ann Habeeb seconded the motion. The motion passed 4-0 with Grant abstaining.

Consideration of "Findings of Fact and Conclusions of Law with Nonfinal Order" and "Respondent Wawasee Real Estate and Development, LLC's Objection to Findings of Fact and Conclusion of Law with Non-Final Order" in the matter of *Wawasee Property Owners Association, Inc., et al. v. Wawasee Real Estate and Development, LLC and Department of Natural Resources, Administrative Cause No. 06-020W*

Doug Grant recused himself from participating in this proceeding.

John Lloyd, IV presented oral argument in support of his client's objections to the ALJ's "Findings of Fact and Conclusions of Law with Nonfinal Order" by Wawasee Real Estate and Development, LLC. He introduced Donyel Byrd who is the owner of Wawasee Real Estate. Lloyd indicated that the administrative law judge properly determined his client had done all that was appropriate to having his client's temporary pier structures licensed as a "group pier". Additionally requiring the structures to be licensed as a "marina" was excessive and not what was anticipated by the rule. Lloyd urged that the administrative law judge's interpretation would require virtually every condominium to be licensed as a "marina", and he observed that the evidence was DNR had never required a "marina" license for any piers. He reflected that the administrative law judge had a large number of findings directed to the marina issue, but it was barely referenced in the Claimants' brief.

Stephen Snyder presented a response on behalf of the Claimants. He urged that the language in the rule and the evidence supported the finding that Wawasee Real Estate's arrangement within the condominium provided for an ownership regime that required consideration of the piers as a "marina", in addition to their consideration as a "group pier". Snyder reflected that the marina issue had been central to the Claimants' request for administrative review and was actively pursued throughout the proceeding. He asked that the ALJ's nonfinal order be affirmed.

Ann Knotek provided brief argument on behalf of the Department of Natural Resources. She said her client believed that the license was appropriate as issued, without reference to marinas, but the DNR determined not to file objections to the nonfinal order. She said her client was "essentially neutral" as to what should be the final disposition.

Mark Ahearn reflected that the administrative law judge made a lengthy analysis based upon principles of statutory construction in interpreting the Commission's intent with rule adoption. This analysis was beyond what the Commission realistically would have considered in implementing rules regarding "group piers" and "marinas". The result was that the decision

would define “marina” in a way not consistent with public understanding of the term and would result in a regulatory structure that could not reasonably be anticipated.

Mary Ann Habeeb looked to the rule definition of “marina”, formerly in 310 IAC 6-2-6.7 and now in 312 IAC 11-2-12. She said the definition specifies that a marina is a facility that can “service simultaneously” at least five boats. If “service” is used in the context of providing engine fuel, the definition has an easily understood meaning. What “service” means in the context of providing “docks”, as would be required in this proceeding, is unclear.

The Chair reflected that the “marina” rule presented challenges with respect to implementation. She suggested a rule amendment to clarify the definition might be appropriate.

The AOPA Committee discussed but did not achieve consensus on language directed to the appropriate implementation of “marina” requirements under the Lakes Preservation Act. Mark Ahearn moved to approve the “Findings of Fact and Conclusions of Law with Nonfinal Order” of the administrative law judge, but with the deletion of Finding 113 through Finding 143 and with the deletion of all but the first sentence of the Nonfinal Order. Robert Wright seconded the motion. The motion passed 4-0 with Grant abstaining.

Consideration of “Findings of Fact and Conclusions of Law with Nonfinal Order” and “Count I Objection to Findings of Fact, Conclusions of Law and Final Order [and] Count II Motion to Supplant Record and Testimony with Deed” in *Havel and Stickelmeyer v. Fisher, et al.*, Administrative Cause No. 05-212W

Steve Lucas, Administrative Law Judge, made an explanatory statement concerning this proceeding. He said that numerous issues were presented at hearing regarding two legally unrelated easements on properties adjacent to (generally west and east) the Claimants’ real estate on Winona Lake, a public freshwater lake in Kosciusko County. Several parties were defaulted for neglecting to participate after being served, no objections were filed pertaining to exercise of the western easement, and there were no objections to the delineations of any riparian boundaries into the lake. Also, there were originally three sets of parties who sought to oppose the objections filed on behalf of Charlotte Werstler, but only the Werstler objections and the opposition by the Estate of Malcolm Landis to those objections remained for consideration. Lucas directed the attention of the AOPA Committee to copies of recent email communications from David Kolbe withdrawing the opposition of his clients, the Kauffmans and the Calhouns, to Werstler’s requests for relief. As a consequence, all of the attorneys had been excused from the oral argument on objections except for James Walmer (who now represents Werstler) and Robert Eherenman (who represents the Landis Estate). Additionally, Stephen Snyder who represents the Claimants was present and might offer perspectives.

James Walmer presented objections to the “Findings of Fact and Conclusions of Law with Nonfinal Order” of the administrative law judge as memorialized in the “Count I Objection to Findings of Fact, Conclusions of Law and Final Order [and] Count II Motion to Supplant Record and Testimony with Deed”. He urged that his client, Charlotte Werstler, was similarly situated to the Kauffmans, the Calhouns and the Landis Estate with respect to the eastern easement, referred to in the Findings as the “North Bay Easement”. Walmer said Werstler was unrepresented at hearing and was confused as to her rights and obligations. He said administrative proceedings are informal and citizens could not reasonably be expected to understand that their rights were being adjudicated. He also questioned the jurisdiction of the Commission to determine riparian rights in public freshwater lakes. He said ownership within Winona Lake was the subject of deeds and

within the exclusive jurisdiction of the Kosciusko civil courts. Walmer asked that a Warranty Deed granted in favor of Mrs. Werstler and her late husband, Eldon, be entered into the record. With entry of the Warranty Deed, he said she would demonstrate equivalent standing to the Kauffmans, the Calhouns and the Landis Estate.

Robert Eherenman responded on behalf of the Estate of Malcolm Landis. He reflected that Mrs. Werstler was repeatedly informed of her need to participate in this proceeding. She was served with the pleadings and advised of conferences that were scheduled in preparation for trial. On two separate occasions, other parties moved to default her for lack of participation, and the administrative law judge twice made proposed orders of default. He withdrew the first proposed order at Werstler's request, and she was allowed to participate at the hearing. The administrative law judge regularly inquired of her during the hearing and provided her with an opportunity to ask questions or offer evidence. Ultimately, the administrative law judge did not default Werstler, but neither did she provide testimony or documents upon which a favorable decision to her could be rendered. To now allow Werstler to interject a Warranty Deed, without any testimony to provide context to the Warranty Deed and without an opportunity to inquire of her, would be inequitable to the Landis Estate. Eherenman indicated that the administrative law judge placed strict geographic limitations on use of the North Bay Easement by the Kauffmans, the Calhouns and the Landis Estate. A factual circumstance which supports the sharing of an easement by three dominant estates does not necessarily support an easement by four. Eherenman disagreed with Walmer's contention that the Commission lacked jurisdiction to make a final disposition, and he reflected that while Werstler had not been defaulted, a final order of default had been rendered against other persons who might claim to be in the same posture as her.

The AOPA Committee inquired of the administrative law judge as to the specifics of testimony offered by Werstler. Lucas responded that he could not recall with specificity. Mary Ann Habeeb reflected that the AOPA Committee could only be certain of the testimony if it had a transcript to review.

Robert Wright suggested to him it appeared that but for Werstler's failure to introduce the Warranty Deed, she would have enjoyed the same easement benefits as the Kauffmans, the Calhouns and the Landis Estate. The particular social equities in this proceeding might warrant a remand.

The AOPA Committee expressed a consensus that a remand should be ordered.

Stephen Snyder reflected that the nonfinal order went a long way toward resolving a complex dispute with a multitude of parties or potential parties. He said that the Claimants did not object to a remand to re-examine the rights among easement holders on the North Bay Easement, but the remand should not reopen other aspects of the case. "Otherwise, we've lost everything that we've gained." The administrative law judge also asked that the AOPA Committee provide specificity if it had determined to order a remand.

Mary Ann Habeeb moved to order that the record be supplemented with introduction of the "Warranty Deed" that was attached to Werstler's "Count I Objection to Findings of Fact, Conclusions of Law and Final Order [and] Count II Motion to Supplant Record and Testimony with Deed". In addition, she moved to order the proceeding remanded to the administrative law judge to reconsider whether Werstler had the same entitlement to the North Bay Easement as was found in favor of the Kauffmans, the Calhouns and the Landis Estate in the "Findings of Fact and Conclusions of Law with Nonfinal Order of the Administrative Law Judge" entered in this proceeding on January 29, 2007. Mark Ahearn seconded the motion. The motion carried 5-0.

Information Item: Disposition on Judicial Review in the matter of *Roberts v. Beachview Properties, LLC, Harbour Condominiums, and DNR*, Administrative Cause No. 04-078W (10 Caddnar 125), Marshall Superior Court (50D01-0508-MI-05)

The Committee Chair directed the members' attention to affirmation of the Committee's disposition of a riparian rights dispute (pier configuration) on Lake Maxinkuckee in Marshall County. In response to a question, Steve Lucas indicated he had not been informed whether a party had determined to appeal the decision of the Marshall Superior Court.

Adjournment

The Chair called for adjournment at approximately 3:05 p.m.