AOPA COMMITTEE OF THE
NATURAL RESOURCES COMMISSION

Meeting Minutes of January 11, 2011

MEMBERS PRESENT

Jane Ann Stautz, Chair
Mark Ahearn
Doug Grant
R. T. Green

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

Call to order and introductions

Jane Ann Stautz called the meeting to order at 8:45 a.m., EST on January 11, 2011 in the Gates Room of The Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of four members, the Chair observed a quorum. The AOPA Committee members briefly introduced themselves.

The Chair explained that the morning portion of today's meeting would be dedicated to hearing oral argument in the matter of *Meyers Subdivision* with a recess at 10:00 a.m. The Chair stated that the AOPA Committee meeting would then reconvene at 1:00 p.m. to hear oral argument in the matter of *Gross*.

Consideration and approval of minutes for meeting held on November 16, 2010

R. T. Green moved to approve the minutes of the meeting held on November 16, 2010 as presented. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Meyers Subdivision v. Department of Natural Resources,* Administrative Cause No. 10-093W

Jere L. Humphrey, Co-counsel for Respondent, Gunther and Carol Kranz, provided a case background. He said the Kranzes's lot is 49 feet in width, with a 15-foot easement granted for

the Meyers Subdivision at least 50 years ago. The Meyers Subdivision filed an application for a permit for a group pier, which the Department denied. "Lt. Shepherd, who has, I think 32 years of experience, goes out and does an extensive investigation and denies the pier." An administrative hearing was conducted and "Judge Lucas essentially overrules the Department and Lt. Shepherd. He does this in order to provide a safe boat corridor. So, he takes 15 feet from the Kranzes'; so they're now down to 20 feet. They also have a 5-foot offset from the other side. So, really they are down to 15 feet".

Mark Ahearn, AOPA Committee Member, asked Mr. Humphrey to whom he was referring when he stated "5-foot offset from the other side".

Humphrey explained he was referring to the side opposite of where the easement is located.

Humphrey stated the Kranzes, according to the nonfinal order, are "down 15 feet within which to get his 5-foot pier and his boat. And the other side then not only gets the 14 feet from Kranzes, but gets seven from the other side. So, the Meyers Subdivision now has gone to 36 feet from what it had before, which was 15 feet." Humphrey said the Judge justifies the nonfinal order in order to provide a safe boat corridor. Humphrey summarized Lt. Shepherd's testimony given at the administrative hearing. "We can't take ten feet from each. He acknowledged the Department's 10-foot rule. We can't apply the 10-foot offsetting from each side, because in this case, the other side doesn't have ten feet to give up." Humphrey stated Lt. Shepherd was referring to a 2010 Natural Resources Commission rule which allows the Department to require an offset of ten feet from each side of a riparian line. "Probably the rule is to prevent one of the arguments we make here, is that there has been an appropriation from lakeside property owners to other lakeside property owners for private purposes. It's a taking from the Kranzes—it's taking from those who have and giving it to those who need. In doing so, the rule was violated requiring ten feet from each side, and that was interpreted by Lt. Shepherd who saw it that way." Humphrey said that for 50 years the Meyers Subdivision had a 15-foot easement, but the easement would then be increased to 36 feet according to the nonfinal order. "This has to be a real bonanza for all the six-foot easement holders."

Humphrey stated that if the Judge's nonfinal order becomes final, those holding six-foot easements along lakeshores could request a safe boat corridor to expand their easements. Humphrey asked that the AOPA Committee not to adopt the nonfinal order, because "we see that it violates the Department's own rule. Lt. Shepherd had it right when he didn't do it, and Judge Lucas got it wrong."

Timothy E. Ochs, Co-counsel for the Kranzes, noted that the statutory framework for this matter is the Lakes Preservation Act. "It says anybody that wants to put a pier on a natural freshwater lake in Indiana—and Bass Lake is one of those—has to go get a license.' …There are guidelines by which you govern how those piers are to be placed; how long they can be; how do you resolve conflicts between competing riparian owners." He said in the instant proceeding, "there was something that was done before you even reach that, and that is a determination as to the scope of the easement—the 15-foot easement—that my Co-counsel referred to." Ochs said that it is the Kranzes' position that the determination of the scope of the easement is beyond the authority of the Department, the AOPA Committee, and the Natural Resources Commission.

Ochs said the issues discussed by Humphrey "are things that you are familiar with. That is what DNR and the Commission are experts in—those fundamental issues related to placement of piers, impacts from the placement of piers, the consideration of the shoreline, fish and wildlife, and public rights to use the lake." The fundamental question is whether a person can place "a pier because that person has the riparian right to do so? They must have a riparian right to do so, or someone has given them the right to use their riparian right. And, there is no distinction here, to do that before it can be done and that's a determination that involves considerations that are beyond the scope of the authority of DNR, beyond the scope of authority of the Commission."

Ochs stated that before a permit is issued there must be a determination by a court of law, such as a declaratory judgment, as to whether a person actually has a right to place a pier within an easement. "You should be uncomfortable looking at that particular issue, because you are dealing with fundamental property rights not the issues that are associated with where a pier can be placed." He urged, "We believe it's inappropriate at this point in time. We are dealing with subject matter jurisdiction, which means it can be raised at any time. Just because there was a similar issue…dealt with in *Adochio* doesn't matter. If you didn't have the authority in the first place, the decision can't hold water. If you lack subject matter jurisdiction, then you can't make that decision in the first place."

Ochs said that if the AOPA Committee believes that the Meyers Subdivision has a riparian right—"which we firmly disagree with"—the nonfinal decision, as drafted, creates significant issues. "It's contrary to the objective standards that the Commission and the Department has adopted." He said the AOPA Committee need not look further than Information Bulletin #56 (Second Amendment). Ochs said that Lt. Shepherd testified the reasons for permit denial were based upon safety issues. "It looks like Judge Lucas viewed this and said, 'Okay, I'm going to craft this so that we give access to everybody along there including 42 lot owners.' You're creating a situation where you can't abide by the typical standard objectives. In order to make this work, you are taking away something from the Kranzes; and that's inappropriate and sets a very dangerous precedent. Lakefront lake owners across the State should be shaking right now if this final decisions stands, because it creates a terrible precedent."

Ochs noted that according to the nonfinal order, the "pier has been pushed within the 15-foot easement even closer to the Kranzes lot. Instead of centering the pier in the Kranzes lot, [Judge Lucas] has pushed it over. That pushes over the location where the Kranzes can place their pier to a point where you can't have boats in-between the Kranzes pier and the pier of the Claimants. Now you are running into a conflict with Lot 50 so that the Kranzes can't have a pier there." Ochs noted that the easement is described as a "foot path" and "suddenly they have superior rights to a lakefront lot owner. That is contrary to existing case law and would set an extremely undesirable precedent. With that, we ask that you uphold the original decision of the Department of Natural Resources and deny the permit."

Christopher Bartoszek stated that he was representing himself and his mother, Maria Bartoszek, the owners of Lot 48. Bartoszek said the subject easement is 15 feet in width and borders the property line between the Bartoszeks and the Kranzes. He noted in Proposed Finding 63 that the phrase "nearer the center' is "very misleading. Any object that is moved anywhere could be considered nearer to the center. Maria has never testified that the pier was at the center of the

lot, nor has the pier ever been in the center of the lot. The pier was never moved over to create a 'human corral', but it was moved over to maximize the efficiency of the property. The placement of the pier was well within the Bartoszek's property lines. It was also over the five feet offset that everyone is mentioning."

Bartoszek said the statement in Finding 69 that Bartoszeks purchased their lot with knowledge of the existence and use of the subject easement "is false. When the lot was purchased in late October 2000, there was no Meyers pier in the water at the time and the RE/MAX real estate agent never mentioned a public easement. Furthermore, there is no mention of any easement or any restriction of the Bartoszeks being able to place their pier anywhere in the paperwork that the Bartoszeks received when they bought the property since the easement is not on their property." Bartoszek said that the RE/MAX real estate agent indicated that the Bartoszeks "have a right like all property owners to place their pier wherever they want as long as it is within the property. This was also reconfirmed by a phone conversation I had with her 1-10-2011."

Bartoszek said the nonfinal order "is unjust. It is forcefully taking away lake frontage from the Bartoszeks. It will also significantly decrease the property value…and will also create a keyhole funneling affect." Bartoszek referenced Indiana Department of Environmental Management Office of Water Quality's *Clear Lakes Program* (Volume 18, Number 1, Spring Issue) which reported Wisconsin, Michigan and other States are adopting laws and rules preventing funneling including Indiana. "The order of Judge Lucas promotes a keyhole environment." Bartoszek said that the placement of the Meyers Subdivision pier according to the nonfinal order will also provide an avenue for loitering and will create a public swimming area. He said the Meyers Subdivision pier is for the use by those living in the subdivision, but "there is no mechanism to ensure that the people that are using are part of the group. There's no way to verify who is using the pier."

Bartoszek said with other group pier situations there are systems in place to verify the users of those piers. He questioned Meyers Subdivision's ability to manage the usage of its pier. He said an incident occurred where a user on the Meyers Subdivision pier "jumped into the water and tried to push Bartoszek's watercrafts off their lifts," and subsequently, "a sheriff was called, but when he got there the person was long gone, and there was no way to know who he was." Bartoszek asked, "Who is accountable for these acts? What recourse do we have, and what rights do we have?" Bartoszek said the Meyers Subdivision pier is a safety concern "as we have no proof who is accessing the pier or what their purpose is for being out there is." Bartoszek said the President of the Meyers Subdivision Homeowner's Association indicated to him that only those living in the Meyers Subdivision and paying association dues are allowed use of the pier.

Bartoszek asked, "Who is the villain here—the owner of the properties that are getting pushed around or Meyers who are trying to manipulate the AOPA Committee and the legal system?" He concluded, "The placement of the pier is only an invitation for pandemonium. The Meyers have a 15-foot area and the DNR refused it three times because there is not enough room and for human safety…. The Judge should not have the right to dictate that we move our pier. Other property owners on the lake can place their pier anywhere within their property. We are being punished and singled out. If this is the new law, then it should apply to every lakefront owner on

the lake or every lakefront owner in Indiana. …I stand behind DNR's decision that the pier should be denied."

John A. Kocher, Counsel for the Meyers Subdivision, stated that he respects opposing Counsels' comments and their argument. "But it's always on cases like this that lawyers like to cherry pick those things that support their position, especially extensive quotations from Lt. Shepherd. Lt. Shepherd also said, but for the fact of Bartoszek and Kranzes moving their piers in, basically adjacent to the Meyers pier, if they hadn't done that Meyers application for a pier would have been approved." Since Bartoszek and the Kranzes were unable to prevail in *Adochio*, "they figure, well, Meyers is going to have to ask for a pier. We'll make it impossible for them to get a pier application, and we'll just move our piers in." Kocher said the Meyers Subdivision has placed its pier in the lake since the 1950s or 1960s. Prior to the Bartoszeks' ownership of Lot 48, the site was a bed and breakfast. "There have always been people down in this area, and there have always been piers there. And, for 40 or 50 years we have never had a problem; nobody has had an accident; and everybody has utilized the lake."

Kocher stated that the Meyers Subdivision does not have riparian rights. He explained that when Mr. and Mrs. Meyers established the Subdivision, the Meyers Subdivision was granted the use of 15 feet of riparian right by Mr. and Mrs. Meyers. "Mr. Kranz used to enjoy those pier rights, but he used to live in our Subdivision. He also helped put the pier in or helped design the pier at the time. To put in your brief that they had no idea that they had this pier and that there is going to be people coming down to the pier is ludicrous. It's nonsense."

Kocher said the Respondents *res judicata* and the jurisdictional arguments were decided 2 ½ years ago by this body, and that decision was not appealed. The Respondents did not exhaust their administrative remedies. "Meyers have the right to the pier. That decision is done with. The only question is get an application. When we were here two years ago, it was brought out that you need to file an application for a pier permit, and they've done that. They have done everything that the DNR has required, and would have had that permit but for the corralling affect. I called it at the hearing a lakeside 'spite pier'. They moved their piers in sort of like a spite fence you build because you don't like your neighbors. They moved their piers in, corralled the Meyers folks in, so it's impossible to get boats in and out of there safely. Nobody denies that. If you put the piers back to where they were to begin with, end of problem. Nobody has taken any property rights from Mr. Kranz. He can put his pier anywhere he wants to subject to this offset on his property—what he has always done." Kocher noted that Bartoszek is free to place a pier on his property, but subject to the offset from the Meyers Subdivision pier.

Kocher stated that his brief sets out the Meyers Subdivision position clearly, and Judge Lucas' decision was exhaustive and should be upheld as written.

Jere Humphrey provided rebuttal. He noted that in previous decades there was no group pier located at the subject property. Humphrey said that the Kranzes previously had a 5-foot offset and according to the nonfinal order, the Kranzes would be subject to a 14-foot offset on the side of the easement. "I don't think [Mr. Kocher] recited the situation as it now exists. To say that we cherry picked, he doesn't even address the rule. He completely ignores the rule, which is sort

of what Judge Lucas did, but Lt. Shepherd did not ignore the rule. We are asking the Commission not to ignore the rule either."

Timothy Ochs provided rebuttal. Citing *Department of Natural Resources v. Town of Syracuse*, Ochs stated that the authority of the State to engage in administrative action is limited to that which is granted by statute. "Nowhere in any of the regulations that the Commission or the DNR deal with does it allow the determination of the scope of an easement. It doesn't allow you to determine property rights between two competing private property owners. It's a fundamental question that must be answered before we get to any of these issues. It's a subject matter question. I don't care if it was decided 2 ½ years ago. I don't care if it was decided ten years ago or two weeks ago. If the authority doesn't exist and the subject matter jurisdiction is lacking, then it's a decision that can't be made."

Ochs said that Meyers Subdivision being "portrayed as a victim—that we are trying to squeeze them out— that's ridiculous. That's not the case here." He said the proposed findings, conclusions, and nonfinal order "squeezes the Kranzes. It makes the placement of their pier extraordinarily difficult. He now has a conflict with his neighbor—Lot 50 on the other side." Ochs said the Judge has expanded the rights "to the extent that someone believes they exist past that which is stated in the documents and regulations that typically guide disputes between riparian owners who want to put in piers. It's unduly restricting the Kranzes regardless of where the pier is put."

Ochs concluded, "Lt. Shepherd got it right. This is a safety issue." He said the Meyers Subdivision pier is 125 feet long and the Kranzes and Bartoszek piers are both over 200 feet long. "In-between there you are creating corridors that are narrower than this room. They are not a single property owner. This is a group pier. You have potentially 42 homes that want to use that pier and you are going to place all that activity in that confined space. That is a powder keg waiting to explode…. So we ask that you deny it."

Bartoszek provided rebuttal. He said that Mr. Kocher incorrectly stated that the Bartoszeks can place their pier anywhere on the property. "It's kind of wrong, because obviously according to what Judge Lucas said we have to move it over seven feet". He said, "Even if no piers are put in, there's not the 32 feet that the Judge is saying is needed for safety…. It doesn't matter where the pier was when the Bartoszeks bought the property, because that's before we bought. Once they became owners they have a right to place pier anywhere they want."

John Kocher responded. "Well, you don't have a right to place your pier any place you want. You have to place it according to DNR's specifications and guidelines. You just can't go and create safety hazards right and left, and that's what they did." He said the Kranzes and Bartoszeks placed their piers and created a safety hazard for the Meyers Subdivision. Kocher reiterated Lt. Shepherd testified at the administrative hearing that "but for the fact of moving the piers in closer to the Meyers, he would have granted the Meyers application. That's in the record. He had no other choice but to look at the facts as they were existed when the application was made. And so that is the reason he came to that determination".

Eric L. Wyndham, Counsel for the Department of Natural Resources, stated that the Department "can live with the decision by Judge Lucas." The Department denied the application originally, "but the reasons for denial have been made clear." Wyndham said the Department is seeking guidance from the Commission "on how to handle these situations. One thing I guess I would disagree with is the jurisdiction question" raised by the Kranzes. He said it was not disputed that Bass Lake is a public freshwater lake, and there is no argument presented regarding the Public Trust Doctrine at IC 14-26-2-5. "There has been no taking whatsoever of anybody's property regarding the placement of these piers." Wyndham said "IC 14-26-2-5 gives the public full control over public freshwater lakes, and Section 23 of the Lakes Preservation Act gives the right for the Department to consider applications for permits for temporary structures and that includes piers. The statute also provides the Commission and the Department shall adopt standards to provide for common use, and, if needed, to accommodate landowners having property rights abutting the public freshwater lake or rights to access the lake."

Wyndham added, "I don't think Judge Lucas was necessarily interpreting the easement itself" in this proceeding. He said the Lakes Preservation Act and the Public Trust Doctrine gives the Department authority to determine whether and where piers should be placed. The administrative law judge, under the Administrative Orders and Procedures Act, "is to hear these cases de novo to make a determination."

Wyndham said, "This case has been decided once before, and there was no court action brought to interpret the easement or water rights. Meyers Subdivision filed its application, it was denied, and it appealed. There has been no stay of any hearing. There has been no court action filed. I guess I have a problem with the Kranzes and the Bartoszeks coming now before this Committee to say the Commission had no jurisdiction, and it should have been filed in court. Well, why didn't they do it?" Wyndham noted the Respondents did not file a Motion to Dismiss under the Trial Rules.

Wyndham concluded, "The Department will live with however the Committee decides to either uphold or reverse Judge Lucas' order regarding the configuration of the piers. I think the Department is concerned—and it is important for us—that I think that Judge Lucas and the Department have jurisdiction over this case to determine where these piers should be granted. I think he had jurisdiction to determine whether that easement gave the Association access to the lake under the Lakes Preservation Act and the Public Trust Doctrine."

Jere Humphrey said that the Department's Counsel did not address the Department's own rule, which requires the 10-foot offset. "They believe in their rule or they don't. It's a rule of the Department. I would think you would defend the rule or drop it all together." He said the rule requires ten feet offset from each property line. "You have to have reciprocity before you take ten from the other. That's what their rule says."

Timothy Ochs stated that the Respondents are present at today's Oral Argument because the Claimants filed the original petition for a pier. "We prefer not to be here. So, I don't understand the comments made by DNR's Counsel." Citing Information Bulletin #56 (Second Amendment), Ochs stated "a person who is not a riparian owner or who was not the recipient of rights conveyed to enjoy riparian ownership is limited to the general rights of the public, such as

recreation or navigation. These rights of the general public do not include the placement of piers or the mooring of boats. So, what he is suggesting is completely wrong. The Public Trust Doctrine doesn't come into play here. It still begs the fundamental question as to whether or not they either have or were given riparian rights to place a pier; and that is beyond your jurisdiction." Ochs said that if the nonfinal order is upheld and a pier is allowed to be placed, "then let's do it and take into consideration the factors you are supposed to take into consideration, which is safety, and not interfering with other riparian owner rights." He said the subject easement was granted for a "foot path. You've got a lot owner who has a 49-foot lakefront lot; paid for that with prices commensurate with a lakefront lot; pays a multiplier on his real estate taxes because it's a lakefront lot. And, yet, he is being pinched down so we can give access to 42 lot owners who have a 15-foot easement for a foot path. That would be a precedent that I would think would be undesirable."

Eric Wyndham said the "Department's rule requires a minimum of five feet set back on each side to a maximum of ten feet. It's not a fixed amount. …If the law is what they say it is, then the Lakes Preservation Act is a nullity, which I don't think that's true at all."

The Chair asked whether the AOPA Committee members had any questions.

Doug Grant, AOPA Member Committee, asked, "Where is it proposed that the pier is placed? I suppose you can park boats on both sides of the pier?"

The Chair responded, "There are no boats moored on the Meyers pier."

Grant then asked, "If we would refuse this, then what happens—there is no pier allowed?

The Chair explained, "Right now the proposed order would allow them the placement of the pier, and we would have the option to approve that, modify that, or we could deny. If we deny, then they would not have the ability to place a pier."

R.T. Green, AOPA Committee member, stated, "My impression from reading this that there has been a pier for the Meyers Addition for some time, and this petition is to extend the length of the pier and perhaps the width?"

Kocher answered, "No."

Green then asked, "If we go back to what the Officer has ordered— so the pier has to be lifted up? Why are we doing this?"

Kocher stated that the Department told Meyers Subdivision to file for an application for a group pier license, which Meyers Subdivision did.

Green said, "If that were denied as the Conservation Officer denied it, would the pier have to be lifted up?"

The Chair answered, "Yes. There would be no placement of a pier. The permit for placement of a pier was denied."

Green asked whether an appropriate governmental body could order a pier to be taken out due to safety concerns.

The Chair answered that under the Lakes Preservation Act, a pier could be ordered removed due to safety concerns.

Green noted that the Respondents argue that the Commission is without subject matter jurisdiction. "Assuming the Commission does not expand the easement as far as getting to the lake, there is subject matter jurisdiction." For the lake within "the shoreline, we can do whatever we want to do, consistent with the rules, right?"

Wyndham stated that Judge Lucas' nonfinal order regarding setbacks does not expand the easement.

Green said he was speaking theoretically. He said that the outcome of today's argument may affect Clear Lake, Lake Wawasee, or any public freshwater lake.

Ochs said he did not agree with AOPA Member Green's approach, because the fundamental first question is whether Meyers Subdivision has a right under its easement to place a pier. "That determination is not appropriately made by the DNR or the Commission".

Mark Ahearn asked whether an individual could, who does not own property, interest, or claim on Bass Lake, place a pier in front of Lot 48.

Humphrey answered, "No."

Ahearn then asked, "Would you expect DNR to deny that application?"

Ochs answered, "I think so."

Ahearn asked, "Why?"

Ochs stated, "The person is not a riparian owner."

Ahearn asked, "Aren't you compelling DNR to make that determination about whether that person has riparian rights in that denial of the permit application?"

Ochs answered, "No. You don't have the authority."

Ahearn stated, "I'm gravely worried that we are suggesting a regulatory scheme that not just every applicant, but every lakefront property owner or easement user, has to go to court to quiet title now so they know whether or not they, in fact, have riparian rights." He asked whether the owner of the Kranzes property prior to the granting of the easement had riparian rights over the

entire 49 ½ feet of the Kranz lot, but "those were expunged somehow in the grant of the easement?"

Humphrey said it is the Respondents' position that a court must decide whether riparian rights were given with granting the easement. But he understood the DNR has to regulate the placement of piers.

Ahearn asked whether it was the Respondents' position that in order to get a group pier permit or a permit for a seawall, the proper procedure would be that the applicant, the landowner, the person making the claim of riparian rights, would have to go to court first, get some sort of clearance, and then file for an application with the DNR?

Humphrey responded that if a person has riparian rights, the person would not need to go to court.

Ahearn asked, "How do you know that they have riparian rights?"

Wyndham said that it is clear that the subject easement extends to the water's edge. "If the easement grantor had riparian rights to those 15 feet on the water's edge, then what's the issue?"

Referencing the diagram in Finding 77, Ahearn asked "if the easement had a four-foot pier on the northeast end of the easement close to Lot 49's easement line, and the Lot 49 owners then built their pier within two feet of that easement line, would the DNR have the authority to tell either of them to either take out or move their pier?"

Humphrey answered that the DNR has authority to regulate the piers.

Ochs stated that the DNR has the authority to regulate piers, but there are rules by which the DNR is required to make that determination.

Ahearn noted that the DNR would exercise some discretion both from testimony of enforcement officers and others. "If this had been a two-foot easement, I think we would be looking at it differently than a 15-foot easement. …Each of these cases rises and falls on the facts."

Humphrey noted that in *Klotz, Bath v. Courts,* and other cases cited the initial determination of riparian rights originated in the courts and were not cases that were decided initially on judicial review. "That sort of shows that the courts are the ones that should be the ones to determine who does and does not have riparian rights."

Ochs stated, "assuming the Claimants have a right to place a pier within the 15-foot easement, there are rules and guidelines to follow for DNR and ultimately the Commission to say where and if a pier can be placed. What is the best spacing for those piers under the existing guidelines? The first determination that was made under those guidelines was made by Lt. Shepherd who said, 'No. There is a safety issue.' But that's not the only issue. This is now a group pier and you've got 42 lot owners coming out there with these very long piers and a very

narrow space." Ochs stated that the Commission is required by statute and regulation to consider adverse impact on other riparian owners. "That's where we have the problem."

The Chair asked, "Is it not correct that Judge Lucas took into account and delineated in Finding 77 the placement of the pier…considering safety, and again, no allowance of mooring of the boats on that pier, and did not allow for the placement of a seating bench to try to address, I believe, some of those concerns that may have been raised during the hearing with regard to some of the gatherings and safety considerations?"

Ochs asked, "Do you think 42 lot owners are not going to bring their boats and equipment in there? I would disagree with that." He agreed Judge Lucas did take safety into consideration, just as the Chair suggests. But the Kranzes now cannot moor any boats on the easement side of their pier and must moor the boats on the other side of the pier. "But they pushed that pier so far over that where they moor their boats now extends into and conflicts with the owner of Lot 50 and their pier. They pushed it too far. They've interfered with an adjacent riparian owner's rights."

The Chair asked whether consideration was made regarding limiting access or allowing access to the pier only by members of the Meyers Subdivision.

John Kocher explained that access was not "touched on, but it would be very simple to do with a wristband of some sort or some identification. There are 22 families, if you will, in the Meyers Subdivision, but not all use the pier. The ones that use it and the ones that do the boating could be identified in some simple way. This is not going to be a difficult task. You don't want the general public there; you just want the Meyers people, which was the intent of Mr. Meyers back in 1950s and '60s when he set up the subdivision."

The Chair inquired of the overall distance between lake frontage of the Kranzes lot with subtraction of the 15 feet of easement.

Ochs explained that beginning with the location of the Meyers pier under Judge Lucas' order and then proceeding down the shoreline towards the Kranzes property, the Meyers Subdivision pier is four feet wide and placed two feet from the easement line. The nonfinal order requires an additional 14 feet from the Kranzes' pier, or 16 feet of separation. The Kranzes' pier is five feet wide, giving the Kranzes 34 feet. "You've taken 14 feet of that so you are down to 20, five feet of width for the pier, you are down to 15." The distance between the boundary of Lot 49 and Lot 50 to the edge of the Kranzes' pier would be 15 feet. If you put the pier five feet off the boundary line would be a grand total of 20 feet."

The Chair referred the AOPA Committee Members to Judge Lucas' Supplemented Findings of Fact and Conclusions of Law with Nonfinal Order dated December 22, 2010. She summarized the Nonfinal Order. The Chair then asked for a motion.

Ahearn stated that he would be concerned if the Commission were to follow the reasoning with respect to the Kranzes' position that the Commission is without authority to determine the riparian rights. "This throws into question whether anyone on any lake, governed by the Lakes

Preservation Act anywhere in Indiana, actually as they sit today, has riparian rights." A court on judicial review may determine that the allocation of space for pier placement was legally incorrect. But "to move into the direction of suggesting that there be a determination of riparian rights by a court prior to DNR making a determination…, strikes me as a regulatory scheme that was not contemplated by the statute. It's completely contrary to the long line of what courts and everybody thought the statute meant." Ahearn said the Commission "makes decisions based on the facts of each case, and there are some principles that come from them, but at the end of the day, each lake, each pier owner, each easement line, and property line orientations get considered for the facts they are. Given these facts, I think Judge Lucas did an adequate, reasonable, and thoughtful job of allocating the lake space among three interests that each have an interest in that lakefront property."

Mark Ahearn moved to adopt the Findings, Conclusions of Law, and the Nonfinal Order, as presented and dated December 22, 2010, as a final order of the Commission. R. T. Green seconded the motion.

R. T. Green said he agreed with Mark Ahearn's analysis of the Respondents' argument that there be an adjudication before any easement holder can make an application for a permit with the DNR. "We may well be wrong, and I appreciate that. But in light of what I have seen, I don't believe that to be so. That is a reason I second the motion."

Green added, "Whether I would have found the same thing as Judge Lucas in some sense is not my concern. My concern is can he do things de novo from the start. My understanding is he can. As long as there are sufficient facts consistent with the rules, regulations, and the law, then he has a right to do that. I can't see anything in the record that shocks me to say that what he is doing is completely arbitrary. It may not be something that I would do, and it may be something that I probably would not promote. But having said that, that's the reason I second the motion."

The Chair asked if there was any further discussion between AOPA Committee members.

Doug Grant said, "I hear the discussion that this is case specific. If I was looking at this from the start, I would not permit a pier to go in there. I am going to oppose the motion."

The Chair then called for a voice vote. Upon a voice vote, the motion carried. The Chair recognized one vote in opposition.

The meeting was recessed at 10:01 a.m.

In Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Gross v. Whitaker Standing Timber*, Administrative Cause No. 10-138F

The Chair reconvened the meeting of the AOPA Committee at 1:01 p.m., EST, on the same day. With three members present, the Chair observed a quorum.

The Chair noted that there were no parties present regarding the matter of *Gross v. Whitaker Standing Timber*. She reported that at the reconvening of the meeting correspondence was delivered from a courier from the Respondent. The Chair summarized the Whitaker correspondence as being a statement he had "no concerns or complaints with the Proposed Findings of Fact and Conclusions of Law, and the Nonfinal Order." The Chair then ordered that the correspondence be filed in the proceeding.

The Chair asked whether there were any questions, comments, or discussion from the AOPA Committee members.

Doug Grant moved to adopt the Findings of Fact and Conclusions of Law with Nonfinal Order, as presented, as the final order of the Natural Resources Commission. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

Adjournment

The meeting adjourned at 1:03 p.m., EST.