AOPA COMMITTEE OF THE
NATURAL RESOURCES COMMISSION

Meeting Minutes of March 20, 2012

MEMBERS PRESENT

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

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Debbie Freije

Call to order and introductions

Jane Ann Stautz called the meeting to order at 8:37 a.m., EDT on March 20, 2012 in the Lawrence Room of The Garrison, Fort Harrison State Park, 6002 North Post Road, Indianapolis, Indiana. With the presence of five members, the Chair observed a quorum. The AOPA Committee members introduced themselves.

Consideration and approval of minutes for meeting held on January 10, 2012

Doug Grant moved to approve the minutes of the meeting held on January 10, 2012 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 *Melvin Shaul, Sr. and Phyllis Shaul v. DNR and James D. Bailey and Barbara Bailey,* Administrative Cause No. 11-061G [*sic.*, 10-173W]

The Chair said for consideration is administrative review from DNR's denial of a permit sought by the Shauls under IC 14-26-2 and 312 IAC 11 to place fill in a channel of a public freshwater lake. She said the administrative law judge requested the correction of typographical errors to Finding 8, where parentheses were used but brackets should have set off the term of "Bailey", and in Finding 40 where the word should have been "urged".

Phyllis Shaul asked if the AOPA Commission had reviewed a transcript of the hearing and the photographs submitted at the hearing.

Jane Ann Stautz said, "We do not have all of the pictures that were submitted." None of the parties requested that a transcript be prepared.

Shaul said, "First I'd like to say we have never been involved in anything like this before and we're green, and we appreciate them walking through and that we need to be in compliance of these hearings. We would like the DNR, Judge Lucas, and attorney Steve Snyder know that we are not strangers to the Barbee Lake Chain. Our last cottage was 221B61 on Little Barbee, and for 29 years, before we bought the EMS 52, we lived there. We contend that this channel is a private not public channel. Photographs taken years ago and submitted by Steve Snyder show a private pier. A map or survey has never been recorded on these properties. Judge Lucas stated in his final findings and conclusions of law the most persuasive evidence of the circumstances of the channel was by DNR's inspector, Heather Schuler. "But pictures are worth a thousand words. The pictures suggest no water, only muck in most of the channel. Now, do you have that picture?"

The Chair responded, "The picture we have before us is Exhibit A."

Shaul continued, "Okay, that's the pier. You can see the pier in that channel?"

The Chair responded, "Yes".

Shaul said the Claimants offered three photographs into evidence and asked if the AOPA Committee had them.

The Chair commented, "I believe we only have the one picture that I've seen," as well as the plat map. "We can take a look at them, if they've been submitted and reviewed." She asked the DNR's attorney, Eric Wyndham, if he had seen the three photographs.

Wyndham responded, "What exhibit were they admitted as?"

Melvin Shaul interjected, "They were entered in evidence at our previous hearing, and I'm not sure just exactly which one was numbered which."

Phyllis Shaul said Schuler testified to lily pads in the channel, but "there is no lily pads in the channel. There are lily pads in the lake but not in the channel. Do you want to see that?

Stautz asked, "But there's water in the channel, is that correct?"

Phyllis Shaul continued. "Yes, water was to be at the end of the channel, and we have a picture of one of these that even depict there is no water at the end of the channel. There is a sand bar. That's a big picture of Melvin standing on the sandbar. So, everything that she has submitted, we have pictures to prove that we disagree. A person could navigate at the end of the channel, and Melvin has been at the lake in channels for 60 plus years. He was raised around there on the Barbee Chain of Lakes, and it has given him a pretty good insight on what is navigable. Seven times the attorneys prompted the clients on what to say, and I was cautioned three times by not

opening my mouth when he was testifying. I felt that was unfair. I felt that the attorneys were prompting their clients, and I couldn't even prompt him."

Phyllis Shaul continued. James Bailey "testified how things were in 1989 when he bought the property to 2000, not how it is today. Now, for 65 years of not maintaining and using this channel," conditions have changed. "The said channel and our connecting property are in a flood zone. The erosion of our lot toward the channel has decreased our lot size and usefulness. A survey of either party has never been recorded until we recorded it this year. The riparian right may have been a factor in the past, but due to the condition of the channel, it does not exist now. Our contention is to have the useless channel to be filled with proper material and a seawall of glacial stone built to the mouth. It's basically since the evidence there was no permit to dig it in the first channel—the second choice…. We would like our share of the channel filled with proper material and seawall glacial stone to the property line to make it more attractive and usefulness, not to mention a safety factor. The way it is it's not useful for swimming, boating, or fishing. As far as any use, both for man or nature, it's in a sterile area."

Eric Wyndham, attorney for DNR, said on September 30, 2011, Jim Hebenstreit, Assistant Director of DNR's Division of Water, issued a denial of the Shauls' permit application. "The reason for the denial was because placement of fill in the channel would remove the area from public use. The DNR is responsible for regulating construction activity in public freshwater lakes and to hold the lakes in public trust for the use of recreation of the public. Secondly, the placement of fill denies the public use of the lake and would constitute a violation. Basically, IC 14-26-2-5 states a person owning land bordering a public freshwater lake does not have the exclusive rights to use the waters of the lake or any part of the lake. Thirdly, a portion of the area to be filled does not belong to the applicant, and it would adversely affect the riparian interest of adjoining landowner. A survey introduced and entered into evidence by the Shauls shows the property line between the Baileys and the Shauls was basically right down the middle of the channel."

Melvin Shaul said he objected to Wyndham's statement. The Chair informed him he and his wife would have an opportunity for rebuttal.

Wyndham continued, "I said 'basically down the middle' because it splits the channel."

Wyndham continued, "The Shauls wanted to fill in the entire channel, which I think and the Division of Water believes, that would be encroaching upon the rights of the adjoining landowner…. One of the pictures submitted by attorney Snyder shows pier parallels beside the channel. That photograph, I believe, was admitted into evidence. I believe the purpose of that was to show that there had been navigability of the channel in the past and used by the public, and possibly even a tenant of the Shauls or prior owners of that property. They listed the plat map versus the survey. I think the survey shows that there is a division of that channel as far as ownership." He said the Shauls submitted no evidence that there is any barrier or blockage of the water from the lake entering the channel. Photographs submitted by Division of Water "clearly show that the water from the lake enters the channel. There was absolutely no barrier or blockage from the water entering the channel. Schuler testified as to her personal observations while on site and pursuant to the pictures she took. The photos clearly show that the channel is

part of the lake and is fed by the water of the lake. Heather Shuler testified as to what she observed, and she testified clearly what the photos depicted. Those photos clearly show that the channel is part of the public freshwater lake. Her testimony and photos clearly support Judge Lucas's decision."

Wyndham said the Department told the Shauls whether to seek legal representation was their decision. "But I made clear to them if they proceeded in this matter, pro se, that they would be held to the same standard as litigants or parties with attorneys. In the process, nobody here would expect Mr. and Mrs. Shaul to have the legal training that an attorney might have, but that was their choice."

Wyndham added, "I will strongly disagree" with Phyllis Shaul's allegation that he or Steve Snyder prompted a witness. "We asked them questions that any normal attorney would do. We did not interrupt their answering. We did not try to tell them what to answer. Mrs. Shaul interrupted Mr. Shaul's testimony while he was on the witness stand under oath, and she tried to correct him. I'm not faulting her for that. She probably didn't realize it. But Judge Lucas promptly and very properly informed her that Mr. Shaul was testifying." He said she could testify later, but while Mr. Shaul was on the witness stand, Mr. Shaul must be allowed to testify. "The AOPA statute in section 26 basically states that the conduct of any hearing shall be governed by the administrative law judge and provides that all testimony of parties and witnesses must be made under oath or affirmation. That implies or basically states that the administrative hearing held before Judge Lucas was very similar to a court hearing, and he governed how that proceeding was to be held and did that pursuant to state law. I think it's rather clear that when a person is under oath and testifying that that person is testifying to his own personal knowledge, and it is highly improper for an attorney or another party not on the witness stand to interrupt the testimony of a witness and to prompt that person. IC 4-21.5-3-25(b) basically states that the administrative law judge shall regulate the course of the proceedings, and Judge Lucas did that, also. There was absolutely no evidence based on Judge Lucas's conduct or his statements that would show any bias toward the parties with attorneys as opposed to Mr. and Mrs. Shaul."

Wyndham said that at the request of the Shauls, the administrative law judge visited the site before the hearing. "He had first-hand knowledge from his own observations what the channel looked like and was able in his own mind and his own eyes to observe the issues in this case. Based on the site view, testimony, exhibits submitted without objection during the administrative hearing, and based on Heather Shuler's testimony and photographs, he believed the evidence was clear that the denial of the fill permit, which includes part of the Bailey's property, was in order. Judge Lucas's Findings of Fact and Conclusions of Law and Order were within the evidence and proper."

Stephen Snyder spoke as attorney for James and Barbara Bailey. He agreed with what Eric Wyndham said in regard to the process of the hearing. "I think you all know Judge Lucas well enough to know that he will provide every opportunity for any party to present what they need to present in regard to a petition, but they'll be held to an appropriate standard. I don't think that is an issue before us."

Snyder continued, "The situation I think we have here, if we go back far enough, we may or may not find a permit for the construction of this channel sometimes in the 50s. It's very possible that it was constructed long before the Lakes Preservation Act was enacted in 1947. There is no permit for it, or it's in that grey area after 1947 when sometimes you got a permit and sometimes you didn't get a permit. There was no evidence as to whether it was permitted or not. If it happened to be constructed before 1947, when the Lakes Preservation Act was adopted, it became a part of a public freshwater lake and that was the shoreline that was established whatever its depth was at the time that it was created. If it was dug without a permit after 1947, it still became a part of the public freshwater lake, because anytime you change or alter the shoreline, if there's new area added, new shoreline added, it becomes a part of the public freshwater lake. Either way we go, the argument the Shauls have made (that this is a private channel) holds no water. And I say that tongue and cheek. It does hold water, and it held water for a long time. Aerial photos that were presented in the case showed a pier attached to the far end of the channel, which meant that at least you could get out there and put a pier in, and you don't put a pier in for no purpose whatsoever. Either you're walking out on it to fish, or you're docking a boat…. Jim Bailey testified that people would come into the channel to fish. I'm convinced that what we're dealing with here is what we deal with in a lot of public freshwater lakes that have been distorted by the construction of channels, and that is over a period of 40, 50 or 60 years, siltation changes the bottom of those channels from something that was clearly accessible by boats with motors to something that is questionable. "

Snyder reflected, "I think most significant in this case is the fact that Judge Lucas paid a personal visit to the site to look at the shore and the channel. The channel has distinctive boundaries as those are defined as shorelines under the regulations. Those could be seen not only in the photographs, but as you walked along the shore. There were rocks piled in the form of a seawall. There were cement structures along the Bailey's side of the channel, and there were additional rocks on the Shauls' side of the channel showing what that boundary was. In addition, there was a distinct change in the vegetation between onshore vegetation and in-the-water vegetation. Certainly, there were cattails that were starting to grow in the channel. I don't have any doubt that those varied in their intensity depending upon the water level of the lake. The Barbee Chain of Lakes is renowned for having a significant difference in the level of the lake between early spring and the driest season. There may be a point at which that vegetation becomes more visible in the dry season than it does early in the spring when there is a significant flow of water coming into those lakes. Certainly, if the channel is shallow—and there's no doubt that it's shallow—it may have a portion of it exposed in low water times that isn't exposed during high water. When Judge Lucas observed the channel, it had been immediately following rather heavy rains last fall, and the water was high as you could tell by the shoreline, but you could at that stage easily have gotten a boat into the channel and maneuvered around. From the Baileys' standpoint, they have a significant frontage on this channel—approximately 100 feet. The survey clearly shows the original platted lines of the Shauls' and the Baileys' lots, and that dividing line runs in the interior of the channel. I think one thing significant about that survey is the fact that the surveyor could clearly delineate the area of water showing the channel, and he found, apparently, boundaries or shorelines that were shown on that survey clearly enough to actually depict the location of the shoreline on the survey, along with the location of the common property line. The aerial photo, I think, also does justice to showing the exact location of the shoreline, although it's more difficult to see, but it has been outlined in purple. So you can see

that it doesn't look much different than the main body of the lake. The Baileys objected to a loss of a portion of their shoreline and suggested at the hearing that it would be more appropriate to dredge the channel than it would be to fill it in. Even if you can't get a boat into that channel during a significant portion of the season, it still serves as a habitat immediately adjacent to the public freshwater lake and there is no reason to eliminate that merely because the Shauls want additional space on their lot on which they could construct an addition of their residence, an out building, or merely have more yard that they can use. Their predecessor dug this channel. The channel exists. It's a part of the public freshwater lake, and I think Judge Lucas's findings and ruling were exactly on point that you cannot confiscate that for private use once it becomes a part of the public freshwater lake.

The Chair asked if any member of the AOPA Committee had comments or questions.

Mark Ahearn, AOPA Committee Member, asked the Shauls if the boundary lines separating their property from the Baileys extend through the channel.

Phyllis Shaul answered, "Yes, more at the base of the channel. I mean less at the base of the channel and more of the lake."

Ahearn asked Mrs. Shaul if part of the channel is on the Bailey's property and part on their property.

She answered, "Well, that's what the survey says."

The Chair asked if there were any further questions. With no further questions, the Chair called for a motion.

Melvin Shaul asked the Chair if they were allowed to make any further comments. The Chair offered to him a few minutes for rebuttal.

Melvin Shaul said he and his wife were not represented by an attorney because "We came here as a team to present our arguments and our points of view. Earlier on, I talked with Mr. Bailey and explained to him that there were options on what to do about the channel. I said one of them would be to fill it in. We looked over this and talked it out quite thoroughly and decided that the best thing for all around purposes would be to fill it in. I relayed this to Mr. Bailey, and he said 'Good I'm all for that.' A few weeks later he approach me and said that he had talked it over with his wife and said that they were not in favor of it. We offered to buy their portion of the channel, and he said they would talk it over. Later on, he told us that we didn't have enough money to buy that. The reason we don't have counsel here is we were thinking that the funds that we would have to spend for legal representation, we could apply that toward the costs of filling the channel. Because of the condition of the channel, I had not in my furthest dreams or imagination thought this would be refused. I had a one paragraph statement from three of the neighbors that said they had no objection to us filling in the channel. They had comments about that, but I was not allowed to present their comments as being hearsay."

The Chair told Mr. Shaul he needed to stick to the information in the record and in the oral arguments made by the parties.

He continued, "Mrs. Schuler testified that there were lily pads in the channel. I really regret you folks do not have pictures. Have any of you viewed the pictures that we submitted?"

The Chair stated that the AOPA Committee members were comfortable with the pictures provided and asked Mr. Shaul if he had anything specific that would counter any of the parties' positions.

Shaul commented, "In one of the pictures, I'm shown standing at the mouth of the channel, and at the time of the picture, there was a sandbar forming at the mouth of the channel at a slight high water time. Other pictures show that there is nothing in there but weed and muck. There was no way a boat could navigate the channel."

R.T. Green asked Mr. Shaul, "Why do you call it a channel if it's not part of the lake?"

He replied, "I suppose, on the maps and everything we've seen, it was dug as a channel."

Green continued, "So you don't dispute it was at one time a part of the lake?"

He replied, "I don't dispute that it was at one time part of the lake. But we're talking about then and now. This is 2012, and in 2012 the channel is not navigable. You can't fish in it. You can't boat in it. You can't swim in it. And that's a fact."

The Chair responded, "That's not uncommon with the siltation in a lot of these smaller lakes, and the public freshwater lakes, that that may occur. But it still is a part of the public freshwater lake." The Chair asked the Committee members if they had further questions or follow-up.

R.T. Green stated, "I understand where [the Shauls] are coming from. It's very common around the lakes, but I haven't heard anything that changes the law." He then moved to approve the findings of fact and conclusions of law, as amended by the technical corrections to Finding 8 and Finding 40, and the administrative law judge's nonfinal order as the final order of the Commission. Ahearn seconded the motion. Upon a voice vote, the motion carried.

Consideration of "Findings of Fact and Conclusions of Law with Nonfinal Order" and "Objection to Findings of Fact and Conclusions of Law with Non-Final Order" by Robert Paton, as Personal Representative of the Estate of Amelia E. Paton, and Robert Paton, individually in the Matter of *Elizabeth Y. Plymate, Virginia M. Shaffer, Shirley K. Myers Revocable Living Trust, and Kalarama Properties, LLC v. Robert Paton, as Personal Representative of the Estate of Amelia E. Paton, Robert Paton, Gary T. Weir Revocable Trust and DNR*; Administrative Cause No. 11-098W

Stephen Harris, attorney for the Patons, provided a case background. "Since my argument is detailed in my objection, I really don't have anything to add to my argument. In this case, there's no dispute as to the facts. The administrative law judge and I, after applying the same

cases, have reached a different conclusion." He said it is not the first time the Claimants have attempted to remove his clients' pier from Park Avenue. The Patons have maintained their pier for over 50 years. "Prior to the amendments to the Lake Preservation Act in 2000, which added rules to regulate piers and rules to permit lawful nonconforming uses, William and Shirley Meyers, who owned Lot 12 adjacent to Park Avenue, filed a lawsuit in 1995 to determine riparian rights extending from Park Avenue and also to remove the Paton's pier."

Harris said the case had no activity for three years because during that same time the *Abbs v. Town of Syracuse* case, which addressed riparian and pier rights for public rights-of-way, was working its way through the court system. Soon after the decision by the Court of Appeals, and transfer was denied by the Supreme Court in 1998, Myers agreed to voluntarily dismiss the case. In the *Abbs* decision, the court ruled the Town of Syracuse owned the riparian pier rights from a public way and not the adjacent landowner. "I would argue that the reason the Myers dismissed their lawsuit is because they concluded the rational in the *Abbs* case would serve as precedent in our case. I would further argue that as a result of the *Abbs* decision, that prior to the year 2000, my clients were lawfully maintaining their pier. As you know, for a lawful nonconforming use, we have to show it was there prior to the amendments of 2000, which it was. The administrative law judge had no objection to that. Where we differed is [whether it was] lawful at the year 2000. I would contend because of the *Abbs* decision, it was lawful at that time."

Harris said the ALJ's decision relied heavily on a 2010 decision in *Bass v. Salyer.* As you'll note in my objection, I think there's a question whether you can use a 2010 case to decide an issue in the year 2000 whether it's lawful. I didn't want to go down that path because I even believed in using the 2010 case, as you read that closely, they're not in conflict because…one key point they made that wasn't addressed in *Bass* is what the intent of the plat was. I would argue maybe in that case, if that was in a factual determination with respect to the plat, there might have been a different conclusion. But that was the whole thrust of the *Abbs* decision. What was the intent of the plat? I go through that in detail in my objection. I would respectfully request that the Committee reverse the administrative law judge's decision and find that Patons' pier is entitled to designation as a lawful nonconforming use. I believe the purpose of the amendment to the Lakes Preservation Act, to provide for lawful nonconforming uses, is to protect people like the Patons who have maintained a pier over a long period of time."

Stephen Snyder, attorney for the Claimants, stated that "after 41 years in this practice, I can tell you that the law regarding riparian rights has developed more in the last 40 years than it probably did in the 140 years prior. There's a good reason for that. Lake property has become something more than a place to harvest ice and become much more valuable. So the issues are before this body, before the administrative law judge, and before the courts, much more frequently than they ever were before. I think it's crucial to note the objections" which the Patons filed to the administrative law judge's decision "focused on his determination, or failure to determine, that the Paton pier was a lawful nonconforming use in existence on July 1, 2000—the effective date of the amended rules. But I think it's crucial to understand that that designation of a lawful nonconforming use only relates to the relationship of the DNR with Mr. Paton. If he had established that it was a lawful nonconforming use on July 1, 2000, he would not have been required to come in and apply for a permit for a group pier, which this clearly is. If it had been over 150 feet long, he might not have been required to shorten his pier to match current

regulations because he was a pre-existing lawful nonconforming use. That doesn't affect the relationship between Plymate and Myers, on one side, and Kalarama, on the other side. That relationship is governed by property law, not by whether or not this is a lawful nonconforming use. Lawful nonconforming use only establishes the relationship between the DNR and the owner of the pier. Compare it to zoning where nonconforming uses are most prevalent. If you have a nonconforming use under a zoning ordinance, then under most circumstances, it's allowed to remain. But if that nonconforming use also happens to be a violation of the restrictive covenants of the subdivision in which it's located, the fact that it's got the status of a lawful nonconforming use doesn't give it a bye in regard to the restrictive covenants. That's what we're dealing with here. There's no question under Indiana law, that if you have lot owners adjacent to a public way, they own the land under that public street to the centerline. In this particular case, the evidence showed that on the Kalarama side of Park Avenue, Park Avenue had been vacated. That [western] half of Park Avenue was vacated long ago. That left the east half which is immediately adjacent to the Plymate property as the only public way that remained 20 feet in width. The evidence was that that public way was used by the public for the purpose of accessing the lake whether from the lake to the land or the land to the lake."

Snyder continued, "The Paton pier was there. We don't dispute its existence. But there was also another pier there that served the Handi Spot Grocery, which is a little bait store and grocery shop across the street that the public routinely used it. It's public way. My clients on either side of that public way can't do anything to prevent people from walking up and down. It's only been recently determined that the riparian rights underlying the fee simple title to that belonged to the adjacent property owners, in this case the Plymates. We have all these years where there was a pier there, and maybe it could be used and maybe it couldn't be used for that purpose."

Snyder said, "I was an attorney in the *Bass v. Salyer* case. I was the losing attorney at the Court of Appeals. I was also the losing attorney in *Abbs,* having represented the onshore owners. I was involved in the *Meyers v. Paton* case that was dismissed that Mr. Harris recited. I've been involved in all four of those cases, and I can tell you that *Abbs*, in my opinion, is an aberration." In *Abbs*, "the trial judge found 'the public used it for gathering ice back in the 1800s, and that must have meant it was there for the public to use for access to the lake.' But the courts have decided otherwise since then, and *Abbs* merely said that if you have a platted way that goes to the water's edge, then you have to look at the intent of the grantor of the plat to determine the purpose—and not necessarily that the public has riparian rights. But in that case, the Town of Syracuse had been granted by the grantors of the plat the right to use the riparian rights that belonged to the adjacent lot owners. That's what *Abbs* said. There's no evidence before Judge Lucas that the grantor of Kalarama Park ever intended anybody to use the riparian rights that are adjacent to Park Avenue. What we have is a platted way. There was a pier there for a long time, but was it lawful? That's what Mr. Harris is arguing. He's saying, 'Yes, it was lawful.' The administrative law judge found that it couldn't have been lawful because [the Patons] did not have riparian rights. In other words, the Paton family that installed the pier never had riparian rights adjacent to Park Avenue. The issue of prescriptive easement, and Judge Lucas also found the elements were not there, that issue hasn't been appealed. It's only the question of whether it's a lawful nonconforming use. But let's assume it is a lawful nonconforming use. That still doesn't determine the rights between my clients and Mr. Paton as far as placing a pier there. Judge Lucas determined there is no prescriptive easement because the elements necessary, under

the *Cessna* case, aren't present. Therefore you don't have a prescriptive easement. He determined it was not a lawful nonconforming use. But that is not really relevant to the ultimate decision here, which is a fight between the Patons putting out a pier and my clients who say 'We own the riparian rights, and you can't put it there….' With the only issue being whether or not it's a lawful nonconforming use—I agree with the Judge's determination that it was not—but even if you were to reverse that on appeal, it still doesn't change the fact that the Patons have no riparian rights visa vie my clients." The Patons have no legal right to "put a pier out regardless how long it was there. The *Bass v. Salyer* case, which from my standpoint I was successful at the trial court level and reversed on appeal, merely said that you cannot obtain a prescriptive easement to place a pier at the end of a public way. Because the public has a right to use that public way, and, therefore, there can never be notice to the adjacent owners that you're claiming adverse possession. That gets around to another case from Lake Tippecanoe, the *Daisy Farm's* case, which talks about the ability to claim adverse possession in the underlying fee of a public road between lots and the lake, and, ultimately said you can't do that. You simply cannot claim a prescriptive easement in a public way. What I think we have here is misdirection from the standpoint of Paton. He thinks a lawful nonconforming use determination would solve his problem, when in fact, that may avoid the need to apply for a group pier permit, but it doesn't solve the determination that Judge Lucas made, that the pier cannot remain there because there was never any riparian right that went with it. That's the key here."

The Chair asked the AOPA members if they had any questions for either party. She reflected that Park Avenue is not an easement but rather a public street.

Mark Ahearn asked Steve Harris, "In this hearing today, you're not raising the prescriptive easement issue here?"

Harris replied, "No".

Ahearn continued, "Help us understand. Is it your position that the original grant or the intent of the original grant, or the intent of the original plat, as read through the lens of the *Abbs* case, grants to your clients, exclusively, the right to have a pier at the end of the public easement?"

Harris answered, "I don't agree with the characterization of the cases and the findings as Mr. Snyder has indicated. Again, I'm just paraphrasing the *Bass v. Salyer* case. It did not say that an individual couldn't have a prescriptive easement over a public way. In this particular case, it did. *Bass v. Salyer* asked what the intent of the plat was. I just want to address that. But to address your question, at the time, I would say that it was open to the public. There is a 1962 case, which was in the findings of fact, that my clients' family had a pier where they're trying to define the usage of Park Avenue. The court in that case basically said 'Hey, don't mess with the adjacent property line—the owner's property and the adjacent property. Don't interfere with the public use of that right-of-way.' At that particular time, my clients and the Handi Spot were using the same pier. I'm saying prior to 2000, using the *Abbs* rational, that they were entitled to have a pier there. But after the 2000 amendments, since they continued to maintain that pier, they're the only one of the public now that can use it because it was in existence prior to that time. Prior to 2000, it was lawful. One question, too, should this be before the DNR in the first place, or should it go should it go through the court system?" But for the administrative law

judge to make a decision regarding riparian rights in a public freshwater lake, he has to know or determine the property rights.

Ahearn asked Harris, "from the time Paton pier was put in the water up to now, when did it become legal, and what mechanism made it legal? Why was it legal?"

Harris replied, "I guess the mechanism was that, I think, during that time the Paton's thought they had the right to have their pier." In effect, the Kosciusko Circuit Court "in 1962 determined then was it legal. I could have imagined back in 1962, since they were maintaining a pier from Park Avenue and the Court was aware of the usage, I would say using the *Abbs* decision, that there was a reasonable inference by the Patons, because they were a party to that action, they were entitled to place their pier at the end of that drive."

Ahearn asked, "I don't own any property on the lake, could I put a pier in, or my grandparents who don't own any property on the lake, at that location?"

Harris answered, "Well, I can imagine that at that time, yes. If you were one of the first ones to probably put one on, I bet nobody would have said anything for 50 years because that's what that expectation was with a drive going to the edge of the edge of the water. I think the expectation was it wasn't just to walk to end to look at. It was to use the pier, the water and reasonably to place a pier. That's what happened over the years, and then nobody really questioned anything. I wish the court in that time would have defined 'the public', but I guess I would infer that since the Paton's were plaintiffs in that lawsuit, they had their pier there at the time of that lawsuit, that the reasonable inference from that decree was that they were entitled to place their pier at the end of Park Avenue. If that wasn't the case, I would have thought that somebody would have said that someone can have public access, but they better remove their pier. But that never happened. They had the pier before and after that decree, so I would say that they were lawfully maintaining the pier at that time."

The Chair asked if there were any other questions.

R.T. Green asked, "But the issue is not one of prescriptive easement, then, right?"

Ahearn reflected, "No." The Chair concurred.

Green added, "So, if it's not prescriptive easement and that's not the issue, and the only way that those folks could have the pier, legally would have to be through prescriptive easement, right?"

Harris added, "Well, I guess I would go back, in the *Salyer* case, I was arguing about the prescriptive easement. I believe that in the *Salyer* case that [the Court] would analyze the intent of the plat. They said there's an elephant in the room.... So, I would argue that they had a prescriptive easement—whether you want to interpret the *Salyer* case as about a prescriptive easement. I say they had a prescriptive easement over that property because the intent of the plat and what you can reasonably infer since it was a 1906 plat and that a reasonable use of Park Avenue was maintaining the pier. I think you can make a reasonable inference that they could

have riparian rights and maintain a pier. I guess I would argue that, yes, they did have prescriptive rights."

The Chair inquired, "But those are not the objections on today?"

Harris responded, "Well, I know the fact is that you have to determine whether it was lawful and then with that it requires the administrative law judge to make a property right decision. So should we not be here before you?"

The Chair replied, "Well, that's not what was presented before us as far as the objections, and the responses of objections filed was with regard to the lawful nonconforming use issue."

Green asked, "So, in my understanding, the only why the DNR is involved is because of the permit for the pier?"

The Chair replied, "Correct." She then recognized the Administrative Law Judge Steve Lucas.

Administrative Law Judge, Stephen Lucas stated, "First of all, I haven't had a chance to say this and I don't always want to say this because it's not always true, unfortunately. But in this case, I want to compliment counsel before the committee. They were aggressive in the advocacy for their clients, they were also very professional, and the briefing process was very helpful to me. They performed in a manner that was civil, and I want to say that I very much appreciate that from Mr. Harris and Mr. Snyder."

Judge Lucas continued, "The second thing is that I offered a follow-up document that has two parts" for possible modification of the order. In Finding 56, the name "Paton" was misspelled "Payton". "I would ask if you would correct that in Finding 56. That's a clerical error. The other part is I offered additional language about the *Abbs* decision. I thought about *Abbs*, and frankly, I thought about it in a different light than Mr. Snyder thought about it." But I didn't originally reference *Abbs* because of the nature of the parties there and in this case was different. "If the Committee decides to affirm, I don't really have a preference whether you include that second part or you don't include it. I would just ask that you make it clear whether you included it or didn't include it."

Mark Ahearn asked, "By 'it' you mean your analyses in the hand-out?"

Lucas replied, "I'm referencing the discussion in my follow-up document" entered on March 2.

The Chair added, "Just so we're all clear here on the committee that it's the 'Entry with Respect to Oral Argument on Objections to Findings of Fact and Conclusions of Law with Nonfinal Order'. On page 2, see proposed Finding 95 through Finding 99, as it addresses the *Abbs v. The Town of Syracuse* case, which has been brought into the proceeding here for consideration, as well as the correction in Finding 56 of the spelling errors."

Ahearn offered a motion to affirm Judge Lucas's ruling as written. I don't think this reconciles every issue, but I think it provides the form for judicial review.

Green seconded the motion.

The Chair reflected, "It has been moved and seconded to affirm the Findings, and I assume with the correction to Finding 56 for the typographical error, but not adding the supplemental findings?"

Ahearn replied, "I'll defer to your judgment. I would entertain it, but this is an amendable motion. I would consent to the amendment if you want today."

The Chair added, "I think since the *Abbs* case was brought forward, the ALJs March 2 entry does help add to the clarification around the decision, so I would recommend amending that."

Ahearn then clarified his motion to include "the amendments in Judge Lucas's March 2, 2012 entry."

The Chair concluded, "So we have a motion, as amended, to affirm the nonfinal order as the final order of the Commission, with the supplement of Findings 95 through 99 and a renumbering of the remaining Findings in Section G, as well as correction of the typographical errors in Finding 56."

Green seconded the motion, as amended. Upon a voice vote, the motion carried.

RECONVENE

12:30 p.m., EDT (11:30 p.m., CDT)

Consideration of "Nonfinal Order of Partial Summary Judgment with Findings (and Remand to the Department of Natural Resources)", "Objection to Nonfinal Order of Partial Summary Judgment" by Respondent Intervenors, Lee E. Gross, Daniel Jones, Jennifer Jones, Thomas E. Warren and Diana L. Warren; and "Objection to Nonfinal Order of Partial Summary Judgment" by Claimants in the Matter of *Larry J. Howard and Bernadean M. Howard v. DNR; Paul J. Smith, Gail L. Smith, Lee E. Gross, Chad D. Larsh, Daniel Jones, Jennifer Jones, Thomas E. Warren and Diana L. Warren; and Garry W. Barnes, et al.*, Administrative Cause No. 10-206W

Jane Ann Stautz, Chair of the AOPA, reconvened the meeting at approximately 12:30 p.m., EDT. She recognized Melanie Farr, attorney for the Claimants, to begin oral arguments.

Melanie Farr, attorney for the Howards, said at issue was PL-21572 which seeks a DNR permit to place a group pier at Outlot 4 on Yellow Creek Lake, a "public freshwater lake" located in Kosciusko County. The permit was denied by the Department of Natural Resources for failure to notify at least one of the owners of each parcel of real property that was known to be adjacent to the affected real property; the failure to prove that access to the easement was exclusive and not shared; and, if access rights were shared, whether other lot owners had been notified of the permit.

Farr said the parties do not dispute the first reason for denial was resolved in the administrative adjudication that followed permit denial. A list of all the property owners was developed for the various plats for Valentine's Addition which included the First Addition, Second Addition, and Third Addition. The list was approved by counsel of record, notice was provided, and potentially interested parties other than those participating in the current oral argument were defaulted. "We're down to our Claimants which are Mr. and Mrs. Howard; the Respondent Intervenors, Paul and Gail Smith, Lee Gross, Chad Larsh, Daniel and Jennifer Jones and Thomas and Diana Warren; and the DNR."

Farr stated after the notice issues were resolved, the remaining issue for summary judgment was whether the accessed easement on Outlot 4 was exclusive and not shared. "Our contention is that the Howards have the dominant riparian right to install a pier lakeward of Outlot 4. There were two deeds at issue, and the parties agreed the determination was based on clear and unambiguous language. Otto and Nellie Valentine were the original owners of the land that consisted of Valentines' Addition. Outlot 4 is located between Lots 16 and 17, is 15 feet wide, and the plat does not specify any usage for Outlot 4. The Third Addition that's also in place includes the same restrictions in place for the First Addition. Again, no specific usage for Outlot 4 was included in the plat restrictions. On October 1960, the Valentines conveyed Lot 21 which is now owned by the Howards. The language in the Deed provided that Lot 21 was conveyed together with the rights running with the Lot as the dominant tenant to use as a private easement "for a pier, landing and bathing beach facilities." Rights were "granted to be in common with others and not to be exclusive but to be enjoyed by the grantees (who are the Howards) their families and guests and their heirs and assigns. It was then held in common with the Grantors, at that time the Valentines and other licensee of the Grantors or their guests. After Mr. Valentine died, Mrs. Valentine conveyed several tracts, including Outlot 4 which is at issue. These were deeded to James and Rita Groves [in the 1972 Warranty Deed]. It provided for Tract 1, which were all the "Outlots" in the First Addition, which included Outlot 4, and which included certain lots in the Second Addition and certain lots in the Third Addition. The language at issue in the 1972 Warranty Deed provided the conveyance was made subject to all effective restrictions of record. The 1960 Deed had been recorded twelve years prior. It also provided that the 1972 Warranty Deed was conveyed subject to the rights created by the owners of any lot in any plat or subdivision which is executed by the Grantor, again the Valentine's, to use the lots conveyed in Tract 1, which included Outlot 4, for the purpose of ingress and egress to the water channels and/or the lake. The right to use was limited to boating and swimming and purposes in addition to ingress and egress. Mr. and Mrs. Smith own Outlot 4 based on the chain of title. "Outlot 4, again, is in between Lots 16 and 17. The Smiths also own the adjacent Lot 16. Chad Larsh is purchasing these lots on land contract. Judge Lucas correctly found that the Howards addressed sufficiently any deficiency of notice to potentially affected persons. Again, that is not an issue that has been raised by any objections in this matter. The only assertion that has been subjected to summary judgment and still disputed is whether for Outlot 4, the right to install a pier lakeward, is exclusive or whether it's shared."

Farr continued. "Finding 57 provided that the 1960 Warranty Deed granted authority to the owners of Lot 21 (the Howards) for the placement of a pier and for the use of a landing on Outlot 4. This is the current use by the Howards. Finding 61 also provided that the 1960 Warranty

Deed is unambiguous. The owners of Lot 21 hold the dominant estate for placement of a pier to accommodate the enjoyment of a boat landing at Outlot 4, and the Howards are the beneficiaries of that easement. In addition, the Judge found that no other person with a lot in the First Addition Plat or the Third Addition Plat had a legal interest in Outlot 4 pertaining to riparian usage. This was in reference to the other Respondent Intervenors—other than the Smiths and Mr. Larsh as the contract purchaser. So, that included Mr. and Mrs. Jones and Mr. and Mrs. Warren."

Farr said the objections raised by the Howards to Judge Lucas's findings are to the assertion that the fee owners of Outlot 4 (who are Mr. and Mrs. Smith at this time) hold the servient estate created by the 1960 Warranty Deed and are the riparian owners. "It is our objection that based on the clear and unambiguous language in the 1960 Warranty Deed, the Valentines conveyed the dominant riparian rights of Outlot 4 to the owners of Lot 21. We are requesting the findings in regard to that issue be clarified and amended to provide that the Howards have the dominant riparian rights to Outlot 4 based on the language in the 1960 Warranty Deed. The Valentines did not retain any assignable riparian rights based on the clear language. They held those only for themselves, while they were alive, and for their guests or licensees. There was no language included that it went to the heirs and assigns. This would be in regard to Finding 64."

Farr added her clients were requesting that ALJ Finding 67 and Nonfinal Order (1)(B) "be amended and clarified based on the language in the 1960 Warranty Deed that the dominant riparian rights be to the Howards to install the pier and for landing purposes. In reviewing the language, no other lot owner was given the specific rights. There was no other language in the deeds before the Commission—the AOPA Committee—that anybody else was given the right to install a pier or to land a boat. Judge Lucas included many provisions in his final order regarding the definitions of those various purposes, what rights those entail, and those are only for the Howards."

Farr then responded to objections filed by Stephen Snyder on behalf of the Respondent Intervenors. She contended the Respondent Intervenors' "objection is as to the Judge's finding that other than the Smiths and Mr. Larsh, as the contract purchaser, that they do not also have riparian rights to Outlot 4. Again, that is in reference to the 1972 Warranty Deed. The language is very specific. They were only given the right to ingress and egress across Outlot 4. They were given no riparian rights. I would ask Committee to affirm Judge Lucas's finding in that regard, and, again, on behalf of the Howards, ask that Findings 64 and 67, as well as Nonfinal Order (1)(B), be amended and clarified that the Howards have the dominant right to install a pier and land a boat lakeward of Lot 4."

Stephen Snyder urged "what we're dealing with here is a real estate question and the rights that stem from two documents, a 1960 Warranty Deed and a 1972 Warranty Deed, that were issued by…the Howards' predecessors. When the Howards purchased Lot 21, they also received an easement over Outlot 4. The language in that specific deed is crucial." The 1960 Warranty Deed "is important enough I want to read the whole thing."

> Lot 21 in the First Addition Plat, together with the right running with said above described lot as the dominant tenement to use as a private easement of way Outlot 4 in said First Addition Plat, for pier landing and bathing beach facilities. The private

> easement and right of use hereby granted to be in common with others and not to be exclusive but to be enjoyed by the grantees, their families and guests and their heirs and assigned in common with the grantors and other licensees of the grantors.

Snyder argued "the language in the deed is nonexclusive. I don't think anybody is arguing with that. It's a nonexclusive easement. You can't ignore the language. The Howards have attempted to isolate out the word 'dominant' that's contained in the language of that deed, and give to it a meaning that the law does not give it, in regard to the law of easements. The dominant tenement is simply that parcel of land in an appurtenant easement that has rights over another parcel of land which is the servient tenant. But the language of the easement grant controls, and in this particular case, we have language in the easement grant that says its non-exclusive. So, in 1960, the Howards acquired Lot 21 and the easement to go back and forth to Yellow Creek Lake and put a pier out on Outlot 4. The next language that becomes very significant is the language of the 1972 Deed. That language, again, is important enough for me to simply quote. It appears at paragraph 3 of my objections:"

> This conveyance is made subject to all effective legal restrictions of regard. Tract I is conveyed subject to the rights (which are hereby created) of the owners of any lot in any plat or subdivision which was executed by the grantor herein and her now deceased husband, Otto B. Valentine, to use the lots conveyed under Tract I for the purpose of ingress and egress to the water channels and/or the lake, said right to use said lots includes the right to use same for boating and swimming purposes in addition to ingress and egress purposes.

Snyder continued. "I don't think there's much dispute that the Smiths own Outlot 4, sold it on contract to Chad Larsh. Chad just informed me they actually closed on that contract just last week, so he's now the fee title owner. That doesn't show up in the record [before the administrative law judge], and it really doesn't make any difference for the purpose of this argument. When you own a lot, you own all the attributes of that lot, including riparian rights which are a part of that bundle of rights that are included in fee simple title. Your fee simple title may be subject to someone else's rights, as they're created, and they were created in the 1960 Deed. But that doesn't eliminate the rights of fee simple title holder. It merely means you have to share your rights with somebody else who was granted rights under the terms of the easement, in this case a nonexclusive easement. When the easement was created over Outlot 4 by the Valentines, it simply gave the owner of Lot 21 the right to use it, to walk to the lake, to put a pier out to swim, etc., etc. It didn't eliminate the Valentine's rights in Outlot 4. It merely created rights in the owner of Lot 21."

Snyder added. "Nellie Valentine, who is the widow of Otto Valentine, decides she's going to sell off all of the lots she had in these various subdivisions, including Outlots numbered 1 through 5, which appear in the plat. When she owned that, she created a Warranty Deed to the Groves, and the Groves became the title holders of all of those lots. But at the same time she created rights in the owners of lots in the First Addition and Third Addition, to utilize Outlot 4 along with the remainder of the Outlots 1 through 5, for the purpose of access to the channel or the lake, and for the purpose of boating and swimming. That's clear in the 1972 deed. She created something by that 1972 deed that didn't exist before, and that was the rights of owners in these various subdivisions to utilize Outlots 1 through 5, including Outlot 4 for the purpose of access to the

lake, boating purposes and swimming purposes. Now, my clients don't argue with Judge Lucas's findings in regard to the Smith/Larsh interest. They were the fee-title-holders. Now Chad is the fee title holder of Outlot 4. He has the same riparian rights that were created by the easement to the Howards. We're fine with that. But when Judge Lucas determined that no other parties had an interest in Outlot 4, I contend that he ignored the language that was clear on the 1972 Warranty Deed that created those rights."

Snyder continued, "Now, we went through an awful lot of paperwork as we worked our way toward the summary judgment motions in this case to make sure that every owner of a lot in any of the Valentine subdivisions, First and Third Additions, were given notice that this proceeding could affect their rights. So, we don't have any argument that everybody received notice. The three people who responded were Groves, Jones, and Warren who did appear in response to those notices and asserted their rights to utilize Outlot 4 for the purposes described in that 1972 Warranty Deed, which included boating, swimming, and access to the lake. Our contention is that there's no basis for eliminating those rights, and that the findings that eliminated those rights are inappropriate because they were clearly created by the 1972 Deed."

Snyder then referenced the 1960 Deed in regard to the word "dominant" and the significance asserted by the Howards. "Merely because you're dominant doesn't mean that you have rights, to the exclusion to anybody else who have an easement in the real estate, or title to the real estate. It merely means the owner of Outlot 4 can't put a fence across it and prevent you from using it for the purposes described in that easement. That makes you the dominant tenant. It makes the owner of Outlot 4 the servient tenement. It doesn't eliminate rights. It merely restricts the fee simple holder of title to that lot and what he can do to keep the holder of the easement off it. If the holder of the easement wants to put a shed on it, that's not permitted under the language of the easement, and the servient tenement could prevent that from happening. But as long as the owner of the dominant interest is merely doing what's permitted by the easement, that's appropriate. When the dominant tenement says to all of the other people who claim an interest in this easement, 'I'm sorry, you don't have any rights to put a pier out or use it for boating or swimming purposes,' then it goes too far, because the language of the 1960 deed is crystal clear. It is nonexclusive, and it is subject to additional easements being created or licenses being created, which were created by the 1972 Warranty Deed when Nellie Valentine conveyed the property to Groves who ultimately conveyed Outlot 4 to Smith who ultimately conveyed Outlot 4 to Larsh."

Snyder concluded, "What we have is Howards have a right as described in the easement. Larsh has a similar right by virtue of being the fee simple owner of Outlot 4. Groves, Jones and Warren have rights by virtue of the 1972 Warranty Deed. What needs to happen in this case is those five parties are the only parties who raised the issue out of all the subdivision. Those rights need to be determined here by modifying Judge Lucas's decision to indicate a decision that Groves, Jones, and Warren have rights in their establishment of the 1972 Deed. This matter then needs to go back to the Department of Natural Resources so it can give consideration to the issuance or denial of the pier permit requested by Howards in light of the rights of all five of the parties, not just the ones that were described in the original DNR permit. I agree with Judge Lucas that the matter needs to go back to the DNR for consideration, but consideration should include the fact that there are five separate parties who have rights in Outlot 4."

Jane Stautz asked if there were any questions. With no questions, the Chair recognized Eric Wyndham as attorney for the DNR.

Eric Wyndham addressed the Committee. "My comments would probably be brief because I agree with Judge Lucas that the Department needs some guidance regarding the title to the property and who has rights based on the language of the deeds. I guess we like to control what happens in the water, exercise of the riparian rights. So, I guess that's the Department's position. We're looking for guidance regarding interpretation of the language of the deeds. From my personal perspective of the language, I guess I'd have a hard time finding exclusive riparian rights based on the language of all these conveyances. I would ask that once a decision is made, that it be remanded back to the DNR to consider the propriety of the pier application. I'm not going to speak for Division of Water, which will make that decision, but just from the pure facts of it, we're talking about 15 feet of shoreline. We're talking about the potential of three sets of people having pier rights, and that's probably going to be next to impossible to accomplish based on Information Bulletin 56, the rules, navigation safety, and everything else. I've got one concern for all the parties to consider here. Regardless how you decide, and if you do decide that all parties have some rights along the shoreline and riparian rights, in any case it's going to be difficult for anybody to get a pier permit with that little shoreline."

The Chair opened the floor for comments or questions for counsel from the Committee members.

Doug Grant commented, "I can't see you're ever going to get more than one pier in there. And Lawyer Snyder is arguing for two piers or three piers?"

Snyder replied, "No. We're arguing for a remand back to the DNR to evaluate appropriateness of the Howards getting the only pier or anyone getting a pier. It may be this 15 feet is so over-burdened, there's no pier there. If you put a pier on a 15-foot strip, assuming its 3½ feet wide, for boating purposes for Jones, Groves, and Warren, even if they can't use a pier—which is disputed, but even if they can't use a pier, they still can't get to the shoreline and moor their boat or tie their boat to the shore to get to the shoreline. That is a boating purpose. My suggestion is that on remand to the Department, it may simply end up that there is no pier there. The Howards have Outlots 1 through 3 and Outlot 5 that they can utilize for piers, because that's what the Outlots are used for by owners of lots in this subdivision. But in this particular case, it so overburdens this 15-foot strip, there may not be any pier."

Farr urged, "But just remember the 1960 Warranty Deed is the only one that gave them those rights to do that. That's the only language that gives them that specific right to install a pier and land a boat."

Mark Ahearn addressed Farr. "If we adopt, and subsequent deciders decide, that your clients reading of the laws is the way it should be, can you tell us what rights your clients will have and what rights the other folks will have with respect to Outlot 4? Where does that leave us?

Farr responded, "It's our position that the Howards have the right to put out the pier to land a boat. That's based on that specific deed. The Valentines, yes—you have a bundle of rights, a

bundle of sticks when you own property. What the Valentines specifically did is they took out one stick, the riparian right, specifically put in there to whoever was going to own Lot 21. They had that stick. They had that right to install the pier and land their boat. They did retain the right for themselves and their guests to use it. That's what the specific language says. They didn't say their 'heirs and assigns'. They gave that bundle to the owners of Lot 21, and their heirs and assigns, to continue to use that riparian right. When the Valentines died, there's been no evidence of licenses given in this case. That right is now with the owners of Lot 21. They have the right to put out the pier and land a boat."

Ahearn asked, "So, would anyone else, including the Respondents Intervenors, be a trespasser if they walked over" Outlot 4?

Farr answered, "They have the right to access based on that 1972 Deed. We don't dispute what the 1972 Deed did. It gave them the right to walk across it, but it didn't give them the right to put out a pier and land a boat there. We believe that is the difference." She argued the deed language "makes it clear that the Howards have the right to install a pier and land a boat according to the 1960 Deed, which predates the 1972 Deed, and didn't give anybody else the right to do that." She added, "The Valentines made clear what stick of rights they were giving to the Howards for Outlot 4."

Ahearn asked, "Are your clients and the Respondent Intervenors the only entities with any claim to that? The rest of the universe is excluded? They would all be trespassers?"

Farr replied, "Yes, they've been defaulted. We did notice to all the owners of First Addition, Second Addition, and Third Addition. They all received notice. They've all been defaulted. The only defined groups that we're dealing with are the parties that are currently before the AOPA Committee."

The Chair asked, "And that's Groves, Jones and Warren?"

Farr replied, "And Larsh and then Howard. Just so that you know where this is…. Outlot 4 is right next to Lot 62 which is now owned by Mr. Larsh. I mean, he has the right to put a pier out, he has the lakefront. This is the Howards who do not. This is why they were given that specific right in this 1960 Deed. This is where they put out the pier because this is the only place to put out their pier. That right was not given to anybody else in the 1972 Deed when you look at the Outlots 1 through 5. It's this specific language that gives them the right to put out that pier, and it's very crucial. That remains one of their rights as a property owner of Lot 21."

Ahearn asked "the reverse question" to Snyder. "If we go with your read of the law, what are the owners of Lot 21 left with?"

Snyder answered, "They're left with the rights that were conveyed to every other owner of lots in Valentine Subdivisions which is Tract 1 that includes Outlots 1 through 5. And, regard to Outlots 1 through 5, being Tract 1 in that 1972 Deed, said right to use said lots, includes the right to use same for boating and swimming purposes in addition to ingress and egress purposes. So, if we have Outlot 4 overcrowded Lots 1 through 3 and Lot 5, under that 1972 Warranty Deed,

are still available to the Howards for the placement of a pier. Those lots are on a channel and are simply used for piers. The plat appears on page 9 of Judge Lucas's opinion. You can see Outlots 1, 2, and 3, surrounding the channel. Outlot 4 is clear down here and Outlet 5 is up here. All around that channel, the rights that Groves, Jones and Warren are claiming in Outlot 4, are available to the owner of any lot in the Valentine Subdivision. We're not eliminating their right to have a pier somewhere in the subdivision. We're simply saying that the five people who claim rights in Outlot 4 are a number so great it precludes one person having exclusive rights. That's not what the term 'dominant' in 'dominant easement' means—that it's exclusive. That easement is nonexclusive by its very language."

R.T. Green commented, "As this body, we are responsible for administering the laws with respect to public waterways, right?"

The Chair answered, "Riparian rights within public waters, particularly public freshwater lakes."

Green asked, "Are we beyond our charter, if you will, if we declare rights under a deed."

The Chair sought the perspectives of the administrative law judge.

Steve Lucas replied, "I think the answer to that is two-fold. The first part is that the Lakes Preservation Act is unusual in that it specifically talks about the DNR and Commission sorting disputes concerning riparian interests. Second, even if the statute didn't, the DNR and Commission get into licensure problems. A person must either be a riparian owner, or an entity that has a license or easement from a riparian owner, to have legal standing to put structures such as piers in a public freshwater lake. You come to this threshold question of who has the standing."

Green asked about having the courts determine riparian rights before coming to the DNR. "Maybe this is a coward's way out. You hand the dispute back in the courts, have the courts determine whose has the rights, and then based on that finding, then, okay, now it's been established. This is what we're going to do for licensure based on what we've been told by the courts."

Lucas responded the parties didn't seek to have a local court determine property rights. If the parties agree, "Sometimes it's handled that way, but we didn't get into that here. I think the answer to the question is implicit to the doctrine of primary jurisdiction. The DNR is the regulatory agency that has primary jurisdiction for public freshwater lakes. The DNR and Commission should go through all the relevant questions and answer them. The parties can then go to the court, and the court could say, 'Oh no, DNR, you got that all wrong. The riparian interests were the opposite of what you thought they were, and on that basis, we're going to sort and turn it around, remand it, change it, whatever.' You can take that principle even further. The Indiana Supreme Court recently suggested that even when a dispute starts out in a civil court, if there are aspects that are within agency jurisdiction, and others that are not, the circuit or superior court should probably say 'Okay, agency, you answer these questions. We're going to put this civil action on hold until you answer these questions within your expertise." But riparian rights and public rights (including environmental and safety concerns) on public freshwater lakes

are "so intermeshed that DNR can't answer the question until it knows: Is there one riparian owner? Are there three riparian owners? Are there five riparian owners? That's what it needs in order to decide the questions within agency expertise. After the DNR and Commission make a first effort at deciding all the issues, then "there's a full plate when it goes to the court for judicial review."

R.T. Green asked, "What help do you think you the agency needs?"

Lucas replied, "I think Mr. Wyndham said it really well. The agency needs to know the legitimate participants in the licensure process. This then needs to go back to DNR to make a substantive determination regarding pier placement, no pier placement, or conditions of pier placement. DNR would then look at all those things that DNR does have expertise in, such as boating safety, environmental consequences, and those kinds of things. But first there needs to be a determination by this entity (that's still subject to judicial review) as to who the players are. So that's what the DNR needs. Is it one, is it three, or is it five parties? Who are they, and what are their riparian rights? That bears upon what DNR can do in actually applying the agency expertise."

Snyder added, "I think it's a matter of cart-and-horse. We're all mandated with exhausting our administrative remedies before we ever get to the courtroom. This is one of those administrative determinations. We had the denial of a pier permit by the DNR. We have the appeal of that, and we have a contested issue in regard to who has the riparian rights and how that affects others. If we go back to the court now, then what has that accomplished? We still have to come through this process. What we need today is a determination by this Committee as to who has the riparian rights, together with a remand back to the DNR to take that into consideration. Now, somebody, one of the parties may decide, 'We don't like your decision.' That provides the opportunity for judicial review of this decision which then gets us to that stage of a court determination. But to say, 'We're not going to do anything, and you go file suit for declaratory judgment.' We're already at that stage. The parties need you to make your decision now. If we're all happy with it, we're done. If one person is not happy, we're going to have judicial review of the whole process."

Lucas added, "I don't want to speak as to the substance of this case, but I think what Mr. Snyder said is procedurally right. I think that's the general principle, and there is language in the Lakes Preservation Act, more than what we even have as a general principle for exhaustion of administrative remedies….that talks about" a DNR role in the resolution "of riparian rights. It specifically talks about that."

Green said, "What I understand you to say, or I infer is, that we've kind of left-handedly got into declaring property rights pertaining to riparian rights on lakes. It has become part of the process."

Lucas replied, "Right."

Ahearn offered to the Committee, "This issue won't get resolved until someone makes a final determination with respect to what the language in the 1960 Deed means. Wherever you go, we

keep coming back to that language. It's first in time, and I think there's no way around it. Regardless of where we rule in the process, it's ultimately going to come back to some sort of determination of what does that language in the 1960 Deed mean. I would offer this. I tend to agree with Ms. Farr's analysis. In that language on page 2 of the 1960 Deed, including the 'the' that is in 'the dominant estate'—if we read the emphasis on the word 'dominant', that means one thing. If we look at the specific article 'the', it's 'the dominant estate', not 'a dominant estate'. It appears to me that as I read that, there's some language of exclusivity there. That then gets described further in the grant. It's 'the dominant estate' to do the following things, including the right to place a pier."

Ahearn continued, "I think the second word that matters a great deal is the word 'but'. The deed adds 'but to be enjoyed by the grantees, their families and guests and their heirs and assigned in common with the grantors and other licensees of the grantors'. It is to be enjoyed by the grantees, their families and guests forever, and for the grantors it's limited to the Valentines and their guests or licensees. I'm not making a motion, but I think if we instruct Judge Lucas to redraft a final order to modify Finding 64, 67 and [Nonfinal Order] (1)(b) so they're amended to reflect that the dominant tenant means the owners of Lot 21, the Howards have the exclusive right, subject to the granting clause, to do the things that it says regarding the pier, landing and bathing facilities. I feel that's the right resolution of the instant conflict, and then I think it positions it specifically to the issue that needs to be solved if someone does take it up on judicial review from this group. Does that make any sense to any of us?"

The Chair replied in the affirmative and asked Ahearn if he wished to make a motion.

Ahearn asked Ms. Farr, "When you addressed us, you said there was Finding 64, Finding 67, and Part II (1)(b) [in the Nonfinal Order]. Is there something else?"

Farr replied, "No, those were the three items that had that language in it that we were objecting to."

Ahearn moved to return to Judge Lucas his nonfinal order for the purpose of drafting a final order consistent with changing Findings 64 and 67, and Order (1)(b), to reflect that the owners of Lot 21 have exclusive rights, per the 1960 conveyance, to use Outlot 4 for pier landing and bathing facilities, subject to the other provisions of that 1960 grant." Ahearn asked Lucas if this motion covered everything.

Lucas replied, "I think so. I'm probably getting a little ahead of myself now, but it's something to think about. Essentially, I'd be doing a scrivener function that I could give back to the Chair, and the Chair could issue a final order. Or does the Committee want to look at what I draft and decide whether it's okay or not okay? Substantively, I think I understand what you're saying."

Ahearn commented, "I think my position in this motion is that without knowing what's happened in Outlots 1, 2, 3 and 5, as I read the language of the 1960 conveyance, it appears to me that the stick was taken out of the bundle, and Mrs. Valentine didn't have it to convey again. That's what I want to capture."

The Chair asked, "As it relates to the placement of the pier and the riparian rights, right?"

Ahearn replied, "As to placement of the pier, landing, and beach facilities, subject to whatever rights the Grantors retained for themselves, personally, or other licenses.

Green asked, "Your motion, if we adopt it, we send it back to Steve [Lucas], and he does the scrivener thing, and then we adopt it as a final order? That makes it appealable directly to a circuit or superior court. We don't have to go back and forth, back and forth?"

Ahearn replied, "My hope is that it doesn't come back to us—that Steve [Lucas] captures it in his draft."

Green asked, "But, it would have to come back to us for the final order, would it not?"

Lucas reflected, "Sometimes the Committee has made adjustments, and Sandra Jensen or I have incorporated those and given them to the Chair to look at. She has been satisfied and then signs them on behalf of the Committee. Other times the sense has been it's too complicated to do that, so the Committee wants it back to look at. You want to give your blessing to it, or you want to tweak it some more. I'm happy to do that either way. I just want you to tell me how you want me to do it."

Ahearn said, "Well, you said as a 'scrivener function'. I'd say 'clerk'. I guess clerk is higher than scrivener. What I'm aiming for is can you be the draftsman to capture the thoughts? We don't need to see it back, if you capture the thoughts? We include it in the minutes the next meeting, or circulate the minutes early just to make sure we don't have an oh-my-gosh moment. You got it wrong."

Lucas replied, "I think I do understand the motion, but whether I really do or not, it's not for me to say. I believe I understand what you're asking me to do, but am I sure? No."

Robert Wright commented, "Why don't we just circulate?"

Green asked, "Will we still have to be able to put it back on the next agenda?"

Ahearn commented, "We can't just circulate because if we do anything other than say this is it, or this isn't it, now we're deliberating. We need to deliberate in public, I think. I'm trying to hit the bull's eye without having to deliberate in public again."

The Chair concurred with Ahearn.

Lucas replied, "Right, understood. If it's other than I write what I think you told me to do, and give it to the Chair to review and potentially approve it, I think you need reconvene and look at it. I'll look to the three parts of the nonfinal order you and the Howards referenced, but if other changes seem necessary to reconcile parts, I'd to that, too. Right?"

The Chair responded, "Right."

Ahearn said, “The sum of the motion is that the Valentines conveyed an interest to Lot 21 in Outlot 4, which they couldn’t re-convey to another party, when they combined the five Outlots in a single tract. That’s what I think the language of the 1960 Warranty Deed means.”

Green commented, “I plan on seconding, but I want to make sure. I don’t want the parties to come back. I want an appealable order, so if they decide it’s not what they want, they can take it into a court and move forward on what, at this stage, appears to be a purely legal issue on interpreting some deeds. After that and whatever may happen, it would be easier for us as an agency to carry forth, concerning safety or the environment, on what riparian rights are after all is established.”

Ahearn added, “Well, and it could be everyone in the room agrees, and it’s remanded to DNR to make a decision about it.”

Green responded, “My instincts tell me I don’t think everyone will agree. But, nonetheless, the ball is where it needs to be to get this taken care of.”

Ahearn concurred. He said his hope was that the Steve Lucas would give the redraft to the Chair for her review as soon as practicable. If the Chair is satisfied, the modified order would be sent out and included in “the minutes for affirmation next time.”

Green seconded Ahearn’s motion to modify the nonfinal order of the Administrative Law Judge, and to direct the Administrative Law Judge to draft modifications consistent with Committee directions, and to forward the amended document to the Chair for her review, and, upon approval, distribution to the parties as the final agency order. Upon a voice vote, the motion carried.

Adjourn

The meeting adjourned at approximately 1:24 p.m., EDT.