

STATE OF INDIANA )  
 ) SS:  
COUNTY OF ALLEN )

IN THE ALLEN CIRCUIT COURT  
CAUSE NO. 02C01-1008-MI-1178

IN THE MATTER OF:

MICHAEL M. ASHLEY, LANA S. ASHLEY, )  
LLOYD A. BICKEL, KAREN A. BICKEL, CARL )  
MOSSER, MARGARET MOSSER, PHILLIP E. )  
LAKE, KAREN M. LAKE, DEBRA ANN COZMAS )  
PARKISON, KATHLEEN R. SMITH as TRUSTEE )  
for the KATHLEEN R. SMITH TRUST, ROGER N. )  
MEYER, BEVERLY A. MEYER, PAGE LIGGETT )  
as TRUSTEE of the PAGE AND CAROL )  
LIGGETT 2005 TRUST, and BRIAN SMITH, )

Petitioners, )

v. )

JEFREY SPAW, and HOLLY SPAW, DAVID )  
JENNINGS, DIANA JENNINGS, MARK A. )  
LORNTZ, PATRICIA A. LORNTZ, DAVID A. )  
REMENSCHNEIDER, MARY J. )  
REMENSCHNEIDER, CAROL J. ENSLEY, )  
JENNIFER H. MILLER, ZACHARY A. MILLER, )  
SUZANNE L. WOLPERT, GARY WARD, STEVEN )  
G. YBARRA, KAREN S. YBARRA, THOMAS )  
STUCK, JENNIFER STUCK, KAREN S. NORDEN, )  
SCOTT ENSLEY as REPRESENTATIVE of the )  
VELMA M. ENSLEY ESTATE, RYAN BURTCH, )  
SARAH BURTCH, ROGER W. SELKING, )  
MELISSA F. SELKING, PAUL ZAWADZKE and )  
MARY A. ZAWADZKE, L. DEAN RODENBECK, )  
EDITH RODENBECK, JOHN D. GROSS, SYLVIA )  
S. GROSS, LYNN E. FISHER AND BETTY J. )  
FISHER as TRUSTEES for BETTY J. FISHER )  
REVOCABLE TRUST, DENNIS R. ALLIS, KARA )  
D. ALLIS, PAMELA ANN MEEKS, KAREN S. )  
POTTS, ALAN L. MACKLIN, GREGORY O. KING, )  
and INDIANA DEPARTMENT OF NATURAL )  
RESOURCES, )

Respondents. )

**ORDER**

On April 21, 2011, Petitioners, Michael Ashley, et al., (collectively, the "Lake View Owners"), appeared by counsel, Patrick Murphy, and Respondents, Jeffrey Spaw, Holley Spaw, David Jennings, Diana Jennings, Mark A. Lorntz, Patricia A. Lorntz, David A. Remenschneider, Mary J. Remendschneider, Carol Ensley, Gary Ward, Steven G. Ybarra, and Karen S. Ybarra, appeared by counsel, Jason Kuchmay, and Paul Zawadzke and Mary A. Zawadzke appeared pro se, for oral arguments before the Court on the Lake View Owners Verified Petition for Judicial Review. The other Respondents did not appear. (The Respondents are hereinafter referred to collectively as the "Backlot Owners.") In this cause, the Lake View Owners are appealing an administrative decision rendered by the Indiana Natural Resources Commission (the "NRC"), regarding the exercise of riparian rights in Big Long Lake, in LaGrange County, Indiana.

## **BACKGROUND**

1. This matter is before the Court on the Lake View Owners' Verified Petition for Judicial Review, seeking an appeal of an administrative decision rendered by the NRC regarding the exercise of riparian rights in Big Long Lake.

2. The underlying action before the NRC, the challenge that is the subject of this proceeding, was initiated by the Backlot Owners in an effort to seek a declaration regarding the nature of their riparian rights vis-à-vis the Lake View Owners. All parties are owners of real estate located in Long Lake Park at Big Long Lake. That requested relief included a declaration of the specific location of all boat landing easements afforded to the owners of lots in Long Lake Park. The boat landing easements arise from certain recorded restrictions to which all deeds for lots in Long Lake Park are

subject, regardless of where the lots are situated. Long Lake Park is an addition on Big Long Lake in LaGrange County, Indiana, and is divided into several blocks separated by drives.

3. The Lake View Owners are the owners of Lots 71-74 in Block 7, and Lots 87-90 in Block 8. These lots do not extend to the water's edge of Big Long Lake. Instead, these platted lots are separated from the water by a strip of land known as the Indian Trail. The Backlot Owners are some, but not all, of the owners of back lots in Long Lake Park.

4. Every lot in Long Lake Park, including all lake view lots and back lots in Blocks 7 and 8, are subject to certain recorded restrictions, which were recorded in 1923 (the "Restrictions"). The relevant language in the recorded Restrictions provides:

Each lot owner shall be entitled to an easement on the Lake Shore six feet in width for a boat landing which easement shall be in front of the block in which the lot is located and the easement shall bear the same number as the lot it is for and the easements shall be numbered consecutively from North to South.

5. The NRC's findings of fact include a finding that the Long Lake Park shoreline usage has generally been consistent with the Restrictions to the extent that the Backlot Owners and the Lake View Owners typically placed piers in front of the block where a lot was located or in front of a drive located adjacent to the block. The usage was inconsistent in that the Lake View Owners, with relatively unimpeded views and which had only to cross Indian Trail to reach Big Long Lake, typically placed piers and boats in front of their lots. The Backlot Owners, with impeded views and whose most direct access to Big Long Lake was via streets other than Indiana Trail (such as

Juanita Drive, Shawnee Drive, Sioux Drive and Miami Drive), typically placed piers at the end of the same drive which they used for access.

6. The dispute arose in the spring of 2009, when certain of the Lake View Owners sought to prohibit the Backlot Owners from placing piers in front of the Lake View Owners' lots by asserting exclusive control of the right to place piers in the water of Big Long Lake in front of the lake view lot lines, extended to the water's edge. As a result, the Backlot Owners filed an action with the NRC so that a determination of their rights would be issued.

7. On September 25, 2009, the Backlot Owners filed a motion for summary judgment in the proceedings pending before Administrative Law Judge Stephen L. Lucas of the NRC. In that motion, the Backlot Owners sought a declaration that the boat landing easement contained in the Restrictions grants the Backlot Owners an easement in the Indian Trail, which easement also conveys riparian rights (including the right to place a pier in Big Long Lake). The Backlot Owners also then sought an Order establishing riparian zones in the manner argued in connection with the summary judgment motion.

8. On January 22, 2010, the NRC issued its "Interlocutory Order of Partial Summary Judgment" in a 17-page decision that included detailed findings (the "Interlocutory Order"). The Interlocutory Order concluded that the boat landing easement permitted the placement of piers by lot owners. That Order also determined that according to the Restrictions, each Backlot Owner was entitled to an easement in front of their respective blocks, that the boat landing easements were the same for all

owners of lots, and that the boat landing easements were in front of the respective lots in the blocks, and not in front of the drives.

9. The Interlocutory Order provided that the issue of the specific location of the boat landing easements was reserved for administrative trial. Likewise, the affirmative defenses raising the issues of whether the Backlot Owners' easements were lost pursuant to the doctrines of laches or abandonment were also reserved for trial.

10. After consideration of all testimony and evidence, on June 18, 2010, Administrative Law Judge Lucas entered his Findings of Fact, Conclusions of Law and Non-Final Order. Following the issuance of that decision, the Lake View Owners filed certain objections to the decision, and requested further review by the Administrative Orders and Procedures Act ("AOPA") Committee of the NRC. Following oral argument, the AOPA Committee held that Administrative Law Judge Lucas' determination that lot owners could combine easements to create a larger riparian zone was not ripe for consideration, and the Committee required amendment of certain scrivener's errors found in the Administrative Law Judge's Order. Otherwise, the decision rendered by Administrative Law Judge Lucas was affirmed by the AOPA Committee in all respects and, on July 28, 2010, the final decision was rendered in the "Findings of Fact and Conclusions of Law with Final Order of the Natural Resources Commission" (the "NRC Decision"). That forty-five (45) page July 28, 2010 NRC Decision is the subject of this proceeding.

11. The three issues raised by the Lake View Owners before this Court<sup>1</sup> in support of their Verified Petition for Judicial Review of the NRC Decision are:

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<sup>1</sup> Prior to the commencement of this proceeding, a civil action was commenced in the LaGrange Circuit Court in which some of the Lake View Owners asserted a claim of adverse possession to real estate located along the

1. Whether the Backlot Owners lost their boat landing easements as a result of the equitable doctrine of abandonment;
  2. Whether the Backlot Owners lost their boat landing easements as the result of the equitable doctrine of laches; and
  3. Whether the determination that the boat landing easement allows the placement of piers was correct.
12. Oral argument was held before this Court on April 21, 2011, and all parties were given the opportunity to file written briefs in advance of the argument.
13. The Court, having reviewed the NRC Decision, the administrative record filed with the Court, the briefs filed by the parties, and the oral arguments of the parties, now Concludes and Orders as follows:

#### **STANDARD OF REVIEW**

14. The role of a court in judicial review of an agency action is limited by the Indiana Administrative Orders and Procedures Act ("AOPA"). Indiana Code § 4-21.5-5-14. Under AOPA, the burden of demonstrating the invalidity of an agency action is on the party that is challenging the agency action, and permits the court only to grant relief when the moving party demonstrates that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* "A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency." *Ind. Dep't of Env'tl. Mgmt. v. Schnippel Constr., Inc.*, 778 N.E.2d 407, 412 (Ind. Ct. App. 2002), *trans. denied* (2003).
15. The reviewing court must look at the evidence most favorable to the party that prevailed in the administrative process to determine whether there exists

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shoreline of Big Long Lake and adjacent to Block 6, Block 7, and Block 8. (Essentially, this concerned ownership of Indian Trail.) As of the oral argument herein, the civil litigation in the LaGrange Circuit Court was pending. The parties stipulated that the LaGrange Circuit Court has exclusive jurisdiction to consider that claim of adverse possession.

substantial evidence supporting the findings and decision of the agency. *Indiana Civil Rights Comm'n v. Holman*, 380 N.E.2d 1281 (Ind. Ct. App. 1976). "Substantial evidence" is more than a scintilla, but less than a preponderance of the evidence. *Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County North Bd. Of Zoning Appeals*, 677 N.E.2d 544, 549 (Ind. Ct. App. 1997).

16. A reviewing court is not required to accept erroneous conclusions of law made by administrative agencies. *Indiana Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 465 (Ind. 1993). However, the court may not reweigh conflicting evidence or judge the creditability of the witnesses, nor may the court substitute its judgment for that of the agency. *Indiana Alcoholic Beverage Comm'n v. River Road Lounge, Inc.*, 590 N.E.2d 656, 658 (Ind. Ct. App. 1992). The court is bound by the agency's findings of fact if those findings are supported by evidence. *Hamilton County Dep't of Public Welfare v. Smith*, 567 N.E.2d 165, 168 (Ind. Ct. App. 1991).

### **ABANDONMENT**

17. The Lake View Owners asserted the affirmative defense of abandonment. The Lake View Owners assert this defense based on the allegation that the Backlot Owners failed to use the easements.

18. Easements can be abandoned by the person with the dominant estate. *Chicamanga Properties, Inc. v. Barnard*, 853 N.E.2d 148, 154 (Ind. Ct. App. 2006). Intent is a necessary element of abandonment. Mere proof of non-use of an easement is insufficient, by itself, to show an intention to abandon. *Southern Ry. Co. v. Board of Commissioners of Vanderburgh County*, 426 N.E.2d 445, 448 (Ind. Ct. App. 1981); see

also *Schwartz v. Castleton Christian Church, Inc.* 594 N.E.2d 473 (Ind. Ct. App. 1992)(“the axiom that the law does not favor forfeitures applies to easements”).

19. To abandon an easement means to relinquish it with the intent of never again resuming or claiming a right or interest and to relinquish all connection with or concern in the easement. 25 Am. Jur. 2d, Easements and Licenses § 98.

20. The Court concludes that the NRC Decision correctly set forth the law regarding abandonment.

21. The finding of fact that the Backlot Owners never intended to abandon the boat landing easement is supported by substantial evidence. This Court cannot reweigh the evidence or substitute its own judgment for that of the NRC.

22. The Court concludes that the NRC Decision's determination that the Backlot Owners did not abandon their easement is not contrary to law, is not arbitrary and capricious, and is supported by substantial evidence. That decision is thus affirmed.

### **LACHES**

23. The Lake View Owners also assert the affirmative defense of laches. The Lake View Owners asserted this defense based on the fact that for many years the Backlot Owners never objected to the Lake View Owners' placement of piers in front of the Lake View Owners' homes, that the Backlot Owners did not object when the Lake View Owners built seawalls, mowed the grass, constructed sidewalks, placed firepits, and took control of the Indian Trail in front of the Lake View Owners' respective lots.

24. Laches is an equitable doctrine that may be raised to prevent another person from asserting a claim the other person would normally be entitled to assert.



25. Whether considered as “elements” or “factors,” there are three inquiries made by a court when considering whether a claim is barred by laches. As applied here, these include: (i) whether the Backlot Owners committed an inexcusable delay in asserting a right; (ii) whether there is an implied waiver from the Backlot Owners acquiescing in an existing condition; and (iii) whether the Lake View Owners were prejudiced due to the delay. See *Huff v. Huff*, 895 N.E.2d 407 (Ind. Ct. App. 2008). Proof each of these three “elements” or “factors” does not necessarily constitute the existence of laches. *Summerlot v. Summerlot*, 408 N.E.2d 820, 827 (Ind. Ct. App. 1980).

26. The Court concludes that the NRC Decision properly set forth the law regarding laches.

27. The Court concludes that the NRC’s determination that the Lake View Owners’ laches defense failed is not contrary to law, is not arbitrary and capricious, and is supported by substantial evidence. That decision is thus affirmed.

### **BOAT LANDING**

28. The Backlot Owners also sought an administrative ruling regarding the scope of the boat landing easement. As to this matter, the NRC also ruled in favor of the Backlot Owners. The Lake View Owners take issue with that decision in this review. The Lake View Owners assert that the NRC ignored legal authority that distinguishes between a “pier” and a “boat landing.”

29. The NRC’s decision regarding the scope of the granting of the boat landing easement is not a *de novo* review, and deserves deference from this Court. See *Department of Waterworks*, 933 N.E.2d 880, 885 (Ind. Ct. App. 2010).

30. Issues involving the placement of piers and the exercise of riparian rights are within the expertise of the NRC.

31. The NRC properly determined that if the language of the boat landing easement is unambiguous, the NRC is obligated to implement the language. The Court agrees this is a proper conclusion of law.

32. The NRC Decision with respect to the scope of the boat landing easement is not contrary to law, is not arbitrary and capricious, and is supported by substantial evidence. That decision is thus affirmed.

### **CONCLUSION**

The Indiana National Resources Commission is the governmental entity established by the laws of this State to resolve disputes such as this. That entity has conducted a fair proceeding and rendered a competent and fair decision in their dispute resolution process. To deny the relief sought by the Backlot Owners in the underlying administrative action would be for the Lake View Owners to receive a windfall, contrary to the rights of all Backlot Owners as was outlined in the easements appurtenant to the real estate interests of all, as set forth in the 1923 Restrictions. Such a windfall will not be granted by this Court.

The Court therefore **ORDERS, ADJUDGES, and DECREES** that the NRC Decision properly ruled upon the Lake View Owners' abandonment and laches defenses. The Court further **ORDERS, ADJUDGES, and DECREES** that the NRC Decision properly determined the rights of the parties as set forth in the 1923 Restrictions, and consistent therewith, determined the proper placement of piers in Long

Lake Park, Big Long Lake, Indiana. Thus, the Court denies the relief sought by Petitioners, and affirms the NRC Decision. Costs to Petitioners. Costs paid.

July 8, 2011

  
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**MAGISTRATE CRAIG J. BOBAY**

The above entry of the Magistrate is approved and adopted this same date as the Order of the Court.

  
\_\_\_\_\_  
**JUDGE THOMAS J. FELTS**

Notice to be given by:  Court  Clerk  Other:

#### PROOF OF NOTICE

A copy of the entry was served either by mail to the address of record, deposited in the attorney's distribution box, or personally distributed to the following persons:

Patrick G. Murphy/Anne E. Simerman/Michael H. Michmerhuizen, Courthouse Mail #3

Jason M. Kuchmay, 10445 Illinois Road, Fort Wayne, IN 46814

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Bryan Poynter, Chair, Natural Resources Commission, Indiana Government

Center-North, 100 North Senate Avenue, Room N501, Indianapolis, IN 46204

Natural Resources Commission, Division of Hearing, Indiana Government Center-North, 100 North Senate Ave., Room N501, Indianapolis, IN 46204

Date of notice: 7-8-11

Initial of person who notified parties: KW Court  Clerk  Other