

FINDINGS OF FACT

- 1) This matter is before the Court on the Petitioners' Verified Petition for Judicial Review (the "Lake-View Owners"), appealing the administrative decisions rendered by the Natural Resources Commission (the "NRC") of the State of Indiana. The NRC upheld the approval of four (4) permits (collectively, the "Permits") authorizing the placement of piers (the "Piers") in the water of Big Long Lake.

- 2) The Lake-View Owners contend the decisions were arbitrary and capricious, not in accordance with the law, and unsupported by substantial evidence. Among its allegations, the Lake-View Owners contend:
 - A) The Boat Landing Easements cannot legally be combined without the consent of the owners of the servient tenement.
 - B) The Boat Landing Easements are landward of the shoreline and traverse Indian Trail.
 - C) Common law regarding land-based easements supersedes any powers given the Department of Natural Resources ("the DNR") under the Lakes Preservation Act.

- 3) On March 15, 2013, the NRC, in Administrative Cause Number 12-014W, issued its *Findings of Fact and Conclusions of Law with Final Order along with Order Denying Petitioners' Motion for Stay of Effectiveness* ("12-014W Final Order"). This 12-014W Final Order affirmed the issuance of Permit PL-21897 by the DNR to Gary Ward,

Nadene Ward and Carol Ensley.

- 4) The NRC also issued in Cause Numbers 11-160W, 11-161W, and 11-162W (jointly administered under Cause Number 11-160W), its *Final Order along with Order Denying Petitioners Motion for Stay of Effectiveness* ("11-160W Final Order"), affirming the DNR's issuance of Permits PL-21697, PL-21704, and PL-21717 to the following individuals: Jeffrey A. Spaw, Holly Spaw, David A. Remenschneider, Mary J. Remenschneider, Roger W. Selking, Melissa F. Selking, the Secretary of Housing and Urban Development by and through its Agent, Ofori 7 Associates, Steven G. Ybarra, Karen Ybarra, David W. Jennings, Diana L. Jennings, Alan Macklin, Gregory O. King, Mark A. Lorntz, Patricia Lorntz, Al Ensley, Scott Ensley, and Greg Ensley. Collectively, these Respondents shall be referred to as the "Back-Lot Owners." The NRC issued notice of the 12-014W Final Order and the 11-160W Final Order (together, the "Final Orders") on March 15, 2013.
- 5) On May 3, 2013, Petitioners Michael M. Ashley, Lana S. Ashley, Lloyd A. Bickel, Karen A. Bickel and Debra Ann Cozmas Parkison (Lake-View Owners) filed their *Verified Petition for Judicial Review of Administrative Decision* seeking a judicial review of the Final Orders under Ind. Code §4-21.5-5.
- 6) On October 15, 2013, the Lake-View Owners filed their *Brief in Support of Petition for Judicial Review*. On December 2, 2013, Jeffrey Spaw, Holly Spaw, Mark A. Lorntz,

Patricia A. Lorntz, Carol Ensley and Gary Ward (Back-Lot Owners), by counsel, filed the *Group Respondents' Memorandum in Opposition to Petition for Judicial Review*; on December 2, 2013, David Jennings and Diana Jennings (Back-Lot Owners) filed their *Pro se Response in Opposition to the Petition*; and on December 2, 2013, the State of Indiana, through the DNR, filed *DNR's Brief in Response to Petition for Judicial Review*.

- 7) The Back-Lot Owners are the owners of the following four Permits for the four Piers:
- A) Permit PL-21717. Mark and Patricia Lorntz own Lots 68 and 69, and Al, Greg and Scott Ensley own Lots 65, 66 and 67 in Block 7 of Long Lake Park. Together, they secured Permit PL-21717. Permit PL-21717 authorized the construction of one pier extending into Big Long Lake from a 30-foot strip of shoreline by combining the riparian easements of these lot owners. Use of the pier would be shared by the Lorntzs and Ensleys.
 - B) Permit PL-21697. Permit PL-21697 authorized the construction of a pier extending into Big Long Lake in front of Lots 92-97 owned by Jeffrey and Holly Spaw, David and Mary Remenschneider, Roger and Melissa Selking, and the Secretary of Housing and Urban Development. This pier would extend from a 36-foot strip of shoreline established by combining the riparian easements of these lot owners. Use of the pier would be shared by these lot owners.
 - C) Permit PL-21704. Permit PL-21704 authorized the construction of

one pier extending into Big Long Lake from a 36-foot strip of shoreline in front of Lots 81-86 owned by Steven Ybarra, David Jennings, Gregory King, and Alan Macklin. The 36-foot strip of shoreline was established by combining the riparian easements of these lot owners. Use of the pier would be shared by these lot owners.

- D) Permit PL-21897. Gary and Nadene Ward own a portion of Lot 75 and all of Lot 76. Carol Ensley owns Lots 77, 78 and 79 in Block 7 of Long Lake Park. They agreed to combine their individual 6-foot riparian easements. Together, they secured PL-21897 authorizing the construction of one pier extending into Big Long Lake from a 30-foot strip of shoreline established by combining the 6-foot riparian easements of the Wards and Ensley. Use of the pier would be shared by the Wards and Ensley.

- 8) Many of the same parties to this cause of action have been involved in prior and protracted litigation. Procedurally, the two prior proceedings were:

- A) Ashley v. Spaw, 966 NE2d 790 (Ind. Ct. App. 2012).

- (1) The Lake-View Owners appealed a 2009 agency proceeding, which was initiated before the NRC to determine the nature and extent of the parties' property rights as they related to the ability to place

piers in the water of Big Long Lake.

- (2) The 2009 proceeding resulted in the "Lucas Decision." The Lucas Decision determined the nature and extent of certain easements, created riparian rights (the "Boat Landing Easements"), determined the location of the Boat Landing Easements, and confirmed that the Boat Landing Easements included the right to place a pier in the water.
- (3) The Lake-View Owners filed Objections to the Lucas Decision and argued the matter to the Indiana Administrative Orders and Procedures Act (AOPA) Committee, which Committee affirmed the Lucas Decision.
- (4) The Lake-View Owners appealed the NRC decision by filing their Verified Petition for Judicial Review in the Allen Circuit Court. The Allen Circuit Court affirmed the NRC's decision and denied the Lake-View Owners' Petition.
- (5) The Lake-View Owners appealed the Allen Circuit Court decision, resulting in Ashley v. Spaw, *supra*, where the Indiana Court of Appeals affirmed the Allen Circuit Court.

B) The LaGrange Circuit Court Decision.

- (1) On October 18, 2008, the Lake-View Owners filed a lawsuit in the LaGrange Circuit Court, seeking a declaration that each Lake-View Owner owned that portion of Indian Trail between each one's platted lot and the water's edge of Big Long Lake as a result of adverse possession.
- (2) The LaGrange Circuit Court ruled against the Lake-View Owners on their adverse possession claims.
- (3) The Lake-View Owners appealed, and the Indiana Court of Appeals affirmed the LaGrange Circuit Court in Altevogt v. Brand, 963 NE2d 1146 (Ind. Ct. 2012).
- (4) The parties to this proceeding were all parties in the LaGrange Circuit Court case.

9) Substantively, in Altevogt v. Brand, 963 N.E.2d 1146 (Ind. Ct. App. 2012), Judge Paul Mathias recited the history and facts leading up to Altevogt. The issue before the Court of Appeals stemmed from the Lake-View Owners filing a Complaint in the LaGrange Circuit Court seeking to quiet title to the land situated between the Lake-View Owners' homes and the shoreline of Big Long Lake. The Lake-View Owners all owned lots near Big Long Lake with only Indian Trail separating their lots from the lakeshore. The Back-Lot Owners claimed their access to the lake would be impaired if the Lake-View Owners

prevailed on their claim of adverse possession of those parts of Indian Trail in front of the Lake-View Owners' respective lots. The LaGrange Circuit Court GRANTED the Back-Lot Owners' Motion for Summary Judgment and DENIED the Lake-View Owners' claims of adverse possession to quiet title.

- 10) In addition to Altevogt v. Brand, *supra*, Judge Mathias also authored the unpublished opinion rendered in Ashley v. Spaw, 966 N.E.2d 790 (Ind. Ct. App. 2012) (handed down after Altevogt).
- 11) The recitation of the facts in Ashley v. Spaw is identical to Altevogt.
- 12) The facts established in the judicial review case (Ashley v. Spaw, *supra*) and the LaGrange Circuit Court case (Altevogt v. Brand, *supra*) are:
 - A) The parties involved all own lots in the Long Lake Park LLP Subdivision in LaGrange County. The subdivision was platted in 1932 by Lee Hartzell, who owned land adjacent to Big Long Lake. On June 12, 1932, Hartzell recorded the plat for Long Lake Park which contained the following:

"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."

The plat set out Long Lake Park as a series of blocks, each comprised of several lots. None of the platted lots extend to the shore of Big Long Lake. Instead, located between the blocks and the lakeshore is a strip of land referred to on the plat as "the Indiana Trail." There are also other drives located between the blocks. The plat stated that "all drives, alleys, and walks are for the use of the owners of the lots and their guests." *Id.* at 1148.

- B) The Lake-View Owners all own lots situated near the lake with only Indian Trail separating their lots from the lakeshore. The Back-Lot Owners all own lots that do not have a lake view.
- C) According to the language of the plat, each owner has a six-foot easement in front of their respective block running north-to-south. Over the intervening years, the Lake-View Owners built boat docks and/or piers on the shoreline immediately in front of their lots, and the Back-Lot Owners built their boat docks in the areas of the shoreline that were located near the ends of the drives separating the blocks. *Id.* at 1149.
- D) The Lake-View Owners failed to establish the required elements of adverse possession as a matter of law.
- E) The Back-Lot Owners were entitled to an easement in front of their respective blocks; the Boat Landing Easements were the same for all lot owners; the Boat Landing Easements were located in front of

the lot owners' respective blocks, not at the end of the drives; and owners of adjacent lots were permitted to combine their boat landings into a single riparian zone.

- F) ["each Lot Owner in Block 6, Block 7 and Block 8 has a geographically unique easement on the shoreline or waterline of Big Long Lake that is six feet wide. ... [T]he easement may be used for a boat landing, including the placement of a temporary pier. The easement is in front of the Block in which the Lot is located. Each individual easement shall bear the same number as the Lot it is for and shall be numbered consecutively from north to south."] Ashley v. Spaw, *supra*, at Headnotes 7 and 8.

13) Ashley v. Spaw, *supra*, and this case have traveled the same procedural path. In both, Administrative Law Judges conducted evidentiary hearings, entering Findings of Fact and Conclusions of Law in favor of the Back-Lot Owners. In both, the Lake-View Owners requested further reviews. Following trials before the Commission's AOPA Committee, the Commission issued its Final Findings of Fact and Conclusions of Law ruling in favor of the Back-Lot Owners.

14) As previously stated, this agency proceeding concerned the issuance of Pier Permits, as follows:

- A) Permit PL-21897 authorizing the construction of one pier by combining the six-foot riparian easements for Lots 75 through 79.
- B) Permit PL-21697 authorizing the construction of one pier by combining the six-foot riparian easements for Lots 92 through 97.

- C) Permit PL-21704 authorizing the construction of one pier by combining the six-foot riparian easements for Lots 81 through 86.
 - D) Permit PL-21717 authorizing the construction of one pier by combining the six-foot riparian easements for Lots 65 through 69.
- 15) Notwithstanding the prior rulings permitting the aggregation of easements to create riparian zones, the Lake-View Owners initiated an administrative review of the decisions to issue the Permits for the shared piers.
- 16) During the review process, the NRC first considered whether any of the Lake-View Owners' property interests would be impacted in order to evaluate whether the Back-Lot Owners' use of the Permits would interfere with the Lake-View Owners' use of Indian Trail.
- 17) In determining that the Lake-View Owners were not "aggrieved" under I.C. §4-21.5-3-7(a)(1)(B), the NRC issued the following findings:
- A) Boat Landing Easements were granted to every lot owner in Long Lake Park, Lake-View Owners and Back-Lot Owners alike. The Boat Landing Easements are in front of the blocks, not the drives, and are numbered consecutively from North to South.
 - B) All activity authorized by the Permits occurs entirely within the associated riparian zones.

- C) Each application for the Permits had the consent of all lot owners whose riparian zones were being combined.
 - D) The Lake-View Owners failed to demonstrate they would be aggrieved or adversely affected by the issuance of the Permits.
- 18) The Lake-View Owners now request this Court reverse and remand the Commission's Final Orders with instructions to DENY all four of the approved Permits.

Based upon the above Findings, the Court enters the following Conclusions:

CONCLUSIONS

STANDARD OF REVIEW

- 1) In an appeal involving a decision of an administrative agency, the standard of review is governed by the Administrative Orders and Procedures Act ("AOPA"). AOPA establishes the exclusive means for judicial review of an agency action. I.C. §4-21.5-5-1.
- 2) Although the General Assembly has granted courts the power to review the action of state government agencies taken pursuant to AOPA, the power of judicial review is quite limited. Beaty Constr., Inc. v. Bd. of Safety Review, 912 N.E.2d 824, 828 (Ind. Ct. App. 2009).

- 3) The reviewing court may neither try the case *de novo*, nor substitute its judgment for that of the agency. Dev. Servs. Alternatives, Inc. v. Ind. Family & Soc. Servs. Admin., 915 N.E.2d 169, 176 (Ind. Ct. App. 2009). The court cannot reweigh the evidence, and the court must give deference to the expertise of the administrative body.

- 4) The burden of demonstrating the invalidity of the agency action is on the party asserting its invalidity. I.C. §4-21.5-5-14(a).

- 5) The agency action will be reversed only if the moving party demonstrates that the action is:
 - A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - B) contrary to a constitutional right, power, privilege, or immunity;
 - C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - D) without observance of procedures required by law; or
 - E) unsupported by substantial evidence.I.C. §4-21.5-5-14(d).

- 6) A decision is arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that could lead a reasonable person to make the same decision made by the administrative agency. Dev. Servs., *supra*, 915 N.E.2d.

- 7) Reviewing courts consider only the evidence most favorable to the agency's findings. Zeller Elevator Co. v. Slygh, 796 N.E.2d 1198, 1206 (Ind. Ct. App. 2003). The reviewing court must look at the evidence most favorable to the party who prevailed in the administrative process in order to determine whether there is substantial evidence to support the findings and decision of the agency. Indiana Civil Rights Comm'n v. Holman, 380 N.E.2d 1281 (Ind. Ct. App. 1976).
- 8) 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).
- 9) In other words, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

STANDING

- 10) An individual seeking to obtain a judicial review of an agency action only has standing to pursue a review if:
 - A) the agency action is specifically directed at that person;
 - B) the person was a party to the agency proceedings that led to the agency action;
 - C) the person was eligible for standing under a law applicable to the agency action; or

D) the person was otherwise aggrieved or adversely affected by the agency action. I.C. §4-21.5-5-3.

- 11) The NRC determined that the Lake-View Owners were not "aggrieved or adversely affected" by the agency's actions, finding that the Lake-View Owners could not demonstrate a direct personal injury in order to proceed before the agency. Huffman v. Office of Env. Adjudication, 811 N.E.2d 806 (Ind. 2004).
- 12) As a result of past litigation, certain findings are *res judicata* with respect to the parties in this proceeding. As such, the Lake-View Owners are estopped from asserting old "injuries" previously litigated as a basis for a current "aggrieved" status.
- 13) Specifically, the NRC found that all of the lot owners within Long Lake Park, including the Lake-View Owners, were not owners of the servient estates associated with either the appurtenant riparian easements or the easements in gross to Indian Trail. Consequently, the NRC found that the Lake-View Owners were not "aggrieved or adversely affected" persons qualified under I.C. §4-21.5-3-7(a)(1)(B) to initiate the agency proceeding to address allegations that the Piers authorized by the Permits would increase burdens upon servient estates.
- 14) Since all of the lot owners are authorized to use Indian Trail, all of the lot owners have the authority to traverse Indian Trail without being subjected to interference by any other

lot owner. The Permits approved by the NRC do not authorize any activity landward of the shoreline of Big Long Lake. As a result, the pier construction as approved does, in no way, encroach upon Indian Trail or interfere with any other lot owner's use of Indian Trail.

- 15) Previously, in Ashley v. Spaw, *supra*, 966 N.E.2d 790 (Ind. Ct. App. 2012), the Allen Circuit Court affirmed the NRC's decisions with respect to the issue of boat landings. The Lake-View Owners challenged the administrative ruling regarding the scope of the Boat Landing Easements. The Allen Circuit Court affirmed the NRC's decision, and the Court of Appeals affirmed the Allen Circuit Court.
- 16) The parties are bound by the prior findings and the decision of the NRC as to the scope, use, and aggregation of the boat landings.
- 17) Collateral estoppel bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former proceeding if the same fact or issue is presented in a subsequent suit. The former adjudication is conclusive as to any subsequent action. Musgrave v. Squaw Creek Coal Co., 964 N.E.2d 891, 898 (Ind. Ct. App. 2012).
- 18) The issues previously determined by the NRC, the Allen Circuit Court, and the Indiana Court of Appeals are *res judicata* upon the parties to this action, and the issues decided cannot be challenged or re-litigated.

INDIANA'S LAKE PRESERVATION ACT

- 19) Under the Lake Preservation Act, I.C. §14-26-2, the State has "full power and control of all of the public freshwater lakes in Indiana." I.C. §14-26-2-5(d)(1).
- 20) The Lake Preservation Act establishes that the State of Indiana "holds and controls all public freshwater lakes in trust for the use of all citizens of Indiana for recreational purposes." I.C. §14-26-2-5(d)(2). Therefore, any member of the general public has the right to use a freshwater lake.
- 21) The Lake Preservation Act provides: "a person owning land bordering a public freshwater lake does not have exclusive right to the use of the waters of the lake or any part of the lake." I.C. §14-26-2-5(e). See also Kranze v. Meyers Subdivision Property Owner Assoc., 969 N.E.2d 1068, 1075 (Ind. App. 2012).
- 22) The Lake Preservation Act abrogated common law riparian rights to the extent the common law riparian rights are contrary to the express language of the Act. Kosarko v. Padula, 979 N.E.2d 144, 148 (Ind. 2012).
- 23) The DNR and the NRC have been tasked by the legislature to implement a permit process for placing structures along the shorelines of public freshwater lakes. An individual cannot construct a pier along a public freshwater lake without a permit. I.C. §14-26-2-23.

- 24) To the extent necessary to carry out the process of issuing permits for the placement of piers on public freshwater lakes, the NRC has jurisdiction to "determine the scope of a lake access easement or riparian rights." Kranze, 969 N.E.2d at 1079.
- 25) Under the Lake Preservation Act, the DNR has the authority to issue permits to qualified landowners with appropriate rights to build and maintain structures such as piers, docks, and wharfs on public bodies of water. I.C. §14-26-2-23.

RIPARIAN RIGHTS

- 26) The NRC also examined the riparian zones of the neighboring Boat Landing Easement holders to ensure that the issuance of the Permits would not negatively impact the riparian zones of neighboring Boat Landing Easement holders. Because the adjoining Boat Landing Easement holders have riparian rights, the NRC applied I.C. §14-26-2-23(c)(5) to determine whether the Permits would affect the riparian rights of abutting Boat Landing Easement owners.
- 27) The NRC determined that the Permits would not create any navigational safety concerns or endanger the person or property of any other person. The NRC also found that the Permits would not unnecessarily interfere with the safe and lawful use of public waterways by any other person.
- 28) The NRC decided that the Back-Lot Owners' use of the Permits would not cause an

interference with the Lake-View Owners' use of Indian Trail.

- 29) The Lake-View Owners' argument that the Back-Lot Owners did not have legal authority to aggregate riparian easements has been previously litigated and is *res judicata*.
- 30) Common law riparian rights have been modified by the Lake Preservation Act, and the DNR and the NRC have jurisdiction to interpret and enforce riparian rights.

ORDER AND JUDGMENT

The NRC is the governmental entity established by the laws of the State of Indiana to resolve disputes such as this. The NRC has conducted a fair proceeding and rendered a competent and fair decision within the dispute resolution process. The NRC has considered all evidence raised before it and carefully considered all parties' interests.

The NRC's decisions were supported by substantial evidence. The NRC was not arbitrary or capricious. It did not abuse its discretion. Its decisions were issued in accordance with the law. The decisions were not contrary to any constitutional rights, powers, privileges or immunities. The NRC acted within its statutory jurisdiction.

The Court hereby ORDERS, ADJUDGES AND DECREES that the Natural Resources Commission's decisions approving Permits PL-21897, PL-21687, PL-21704 and PL-21717 are AFFIRMED.

The Court DENIES the Verified Petition for Judicial Review in its entirety. Judgment is entered accordingly. (Court to notify.)

DATED: July 8, 2014



NANCY ESHCOFF BOYER, JUDGE
ALLEN SUPERIOR COURT

NOTICE TO BE GIVEN BY: COURT

PROOF OF NOTICE UNDER TRIAL RULE 72(D)

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:

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Court Packet -- 2

DATE OF NOTICE: July 8, 2014

INITIALS OF PERSON WHO NOTIFIED PARTIES: das COURT