

STATE OF INDIANA)
) SS:
COUNTY OF STEUBEN) CAUSE NO. 76C01-1410-MI-335

LUCY V. CRESS,)
 Petitioner,)
)
 vs.)
)
INDIANA DEPARTMENT of NATURAL)
RESOURCES, JOHN BYRER, SHERI)
BYRER, BARBARA J. SCHULTZ, and))
ROBERT A. SCHULTZ)
 Respondents.)

ORDER FOLLOWING JUDICIAL REVIEW

Petitioner Lucy V. Cress ("Cress") appears in person, and by co-counsel, Jonathan O. Cress and Stephen R. Snyder. Respondents John Byrer and Sheri Byrer ("Byrer") fail to appear in person, but do appear by counsel, John M. Kuchmay. Respondent Indiana Department of Natural Resources ("DNR") fails to appear by counsel. Respondents Barbara J. Schultz and Robert A. Schultz appear in person and without counsel. Oral argument was conducted in this case on the Petition for Judicial Review of Agency Decision filed by Cress on October 1, 2014. At the conclusion of oral argument, the Court took all matters under advisement. The Court at this time having carefully considered the agency record, the briefs of counsel, and the oral arguments of counsel, now finds and orders as follows:

14-7556
TJS DGI

A. FINDINGS OF FACT -

1. Cress owns Lot 23 in the Plat of Wilder's Addition to Spring Bank in Jamestown Township, Steuben County, Indiana.
2. Lot 23 has approximately 66 feet of lake frontage on Lake George.
3. Schultz owns Lot 24 which lies directly to the north of and is adjacent to Cress's Lot 23.
4. The Schultz's Lot 24 has lake frontage on Lake George.
5. Byrer owns Lot 38.
6. Lot 38 lies across Lane 130A east of Cress's Lot 23 and Schultz's Lot 24 and is without lake frontage on Lake George.
7. Until May 19, 1942, Alline B. Bender ("Bender") owned both Lot 23 and Lot 38.
8. On May 19, 1942, Bender conveyed a part of Lot 23 to H. Poast by Warranty Deed by use of the following words of conveyance:

"This Indenture Witnesseth: That Alline Buck Bender, an unmarried woman, over the age of 21 years, of Steuben County in the State of Indiana Convey and Warrant to H. Poast of Williams County in the State of

Ohio for the sum of ----One thousand three hundred
fifty and no/100----Dollars, the following Real
Estate, in Steuben County, in the State of Indiana,
to-wit:

The east 65 feet, east and west, off the entire east
end of Lot numbered 23 of the recorded plat of
Wilder's Addition to Spring Bank, a resort in
Jamestown Township, said county and state, according
to the recorded plat thereof, excepting an easement or
passway six feet in width off the north side of the
above described premises for the use of owners or
tenants of cottage on the west portion of said Lot #23
and the owners or tenants of cottage on Lot #38 of
said Plat. Also conveying an easement or passway 6
feet in width off the north side of the west part of
said Lot #23 extending from the land above described
to the water front of Lake George; also docking
privileges for two boats at the northwest part of said
Lot #23.

Also reserving parking space for two autos or vehicles
in the northeast corner of the land above described
for the use of owners or tenants of the cottage

located on the west portion of said Lot #23....."

(Emphasis added)

9. On May 19, 1942, Bender conveyed a part of Lot 23 to Phil S. Morse and Mildred Morse by Warranty Deed by the use of the following words of conveyance:

"This Indenture Witnesseth: That Alline Buck Bender, an unmarried woman, over the age of 21 years, of Steuben County in the State of Indiana Convey and Warrant to Phil S. Morse and Mildred Morse, husband and wife, as tenants by entireties, of Steuben County in the State of Indiana for the sum of ----Eighteen hundred and thirty-five and no/100----Dollars, the following Real Estate, in Steuben County, in the State of Indiana, to-wit:

Lot numbered 23 in the recorded plat of Wilder's Addition to Spring Bank, a resort in Jamestown Township, said county and state, excepting 65 feet east and west off the entire east end of said Lot. Also conveying an easement or passway 6 feet in width off the north side of the east part of said Lot #23 extending from the land above described to the street or roadway along the east side of said Lot #23. Also

conveying an auto parking space for two automobiles or vehicles in the northeast corner of said Lot #23 for the use of owners or tenants of the cottage located on the west portion of said Lot #23.

Excepting an easement or passway 6 feet in width off the north side of the above described premises extending from the east 65 feet of said Lot to the water front of Lake George for the use of the owners or tenants of the cottages located on the east part of said Lot #23 and on Lot #38 of said Plat.

Also reserving the docking privileges for two boats at the northwest part of said Lot #23 for the owners or tenants of the east part of said Lot #23 and for two boats for the owners or tenants of Lot #38 of said Plat....." (Emphasis added)

10. On May 19, 1942, Bender conveyed Lot 38 to Arthur Sanders and Bertha Sanders by Warranty Deed by use of the following words of conveyance:

"This Indenture Witnesseth: That Alline Buck Bender, an unmarried woman, over the age of 21 years, of Steuben County in the State of Indiana Convey and Warrant to Arthur Sanders and Bertha Sanders, husband

and wife, as tenants by the entireties, of Steuben County in the State of Indiana for the sum of ---- Seven hundred and no/100 (\$700.00)----Dollars, the following Real Estate, in Steuben County, in the State of Indiana, to-wit:

Lot numbered thirty-eight (38) in the recorded plat of Wilder's Addition to Spring Bank, a resort in Jamestown Township, said county and state, according to the recorded plat thereof.

Also, an easement or passway six feet in width extending from the street or road on the west side of said Lot #38 to the water front of Lake George, said easement or passway being off the north side of Lot #23 in said Wilder's Addition to Spring Bank.

Also conveying a dock privilege for two boats off the northwest part of Lot #23 in said Addition for the owner or tenant of the cottage located on said Lot #38...." (Emphasis added)

11. Without reserving an easement or passway along the entire north side of Lot 23, the owners of the west part of Lot 23 would have no access to the roadway, and the owners of the east part of Lot 23, along with

the owners of Lot 38, would have no access to Lake George.

12. Through subsequent conveyances the entirety of Lot 23 is now owned by Cress and is burdened by a six (6) foot easement or passway along its entire northern border extending from the roadway on the east, to the water's edge of Lake George on the west, for the use and benefit of the current owner of Lot 38 - Byrer.
13. A dispute arose between Cress and Byrer regarding where in Cress's riparian zone Byrer should be permitted to exercise his docking privileges, and the width of those docking privileges.
14. On October 30, 2012, Cress filed her Complaint with the Natural Resources Commission ("NRC") seeking to have these issues resolved.
15. On September 4, 2014, the NRC handed down its Final Order which provided, in relevant part, as follows:

"The following orders are effective October 1, 2014. The orders apply to Lucy V. Cress, Robert A. Schultz, Barbara J. Schultz, John Byrer, Sheri Byrer, and their heirs and assigns, and upon recordation with the Recorder of Steuben County, would apply to

subsequent owners of Lot 23, Lot 24, and Lot 38 of Wilder's Addition to Spring Bank. The orders also apply to the Department of Natural Resources with respect to implementation of IC § 14-26-2, 312 IAC § 11, and to statutes or rules that may be subsequently derived from them:

- (A) John Byrer and Sheri Byrer must not place a structure or moor a boat in Lake George adjacent to Lot 23 or Lot 24 unless consistent with the following: The Byrers shall not encroach on the riparian zone of the Schultz's as identified in Finding 13. The Byrers may place a pier, boat lift, or similar structure used in the exercise of dock privileges a reasonable distance into Lake George that is no less than one foot south of the common riparian line between Lot 23 and Lot 24. The Byrers must not place a structure north of this structure. The Byrers may moor two boats on the south side (or one on the south side and one on the lakeward side) of a single straight pier that is not more than three feet wide. The Byrers must not place or authorize a pier or another structure and must not moor or authorize the mooring of a boat more than 15 feet south of the common riparian line between Lot 23 and Lot 24.
- (B) Robert A. Schultz and Barbara Schultz must not place a structure or moor a boat within five feet north of the common riparian line between Lot 23 and Lot 24.
- (C) Lucy V. Cress must not place or authorize a pier or another structure or moor or authorize the mooring of a boat within 25 feet south of the common riparian line between Lot 23 and Lot 24."

16. Additional facts will be set forth hereinafter as deemed necessary by the Court.
17. Prior to specifically addressing the issues presented to this Court for review it is worth remembering the standard of review which must be applied when reviewing an agency order. A reviewing court is not bound by an agency's legal conclusions, and a reviewing court should determine whether the agency correctly interpreted and applied the law. A reviewing court, however, cannot reweigh conflicting evidence, and must view the agency record in a light most favorable to the decision arrived at by the agency. A reviewing court does not determine questions regarding witness credibility. This responsibility rests upon the shoulders of the appointed hearing officer.

B. Issue One -

18. Was it the intention of Bender, as manifested by her real estate transfers of May 19, 1942, to limit the docking privileges granted to the owner of Lot 38 to a width of but six (6) feet? The hearing officer determined that such was not the intention of Bender.

Rather, it was the intention of Bender to maintain the six (6) foot passageway off the north side of Lot 23, and to create a separate easement for docking privileges for the benefit of Lot 38 off the northwest part of Lot 23. See, NRC Findings #24 and #25.

19. In the case of Parkison v. McCue, 831 N.E.2d 118 (Ind.App. 2005) the court observed at page 128:

".....An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from an examination of all its material parts...

Courts may resort to extrinsic evidence to ascertain the intent of the grantors creating the easement only where the language establishing the easement is ambiguous...

A deed is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning....." (Citations omitted; Quotation marks omitted)

20. If Bender had intended to limit the docking privileges granted to Sanders to a width of no more than six (6) feet at the end of the passageway off the north side of Lot 23 as argued by Cress, she could easily have said so in her Warranty Deed to Sanders, or for that matter, said nothing at all. Rather, in a separate paragraph of the Warranty Deed, Bender granted to Sanders docking privileges the location and width of

which being identified only as "off the northwest part of Lot 23."

21. Viewing the entirety of the Bender to Sanders Warranty Deed set forth above at paragraph 10, it cannot be said that the words selected by Bender in granting an easement for docking privileges for the benefit of the owner of Lot 38 are clear and unambiguous as they pertain to the location and width of those docking privileges.

22. The Court concludes that the decision of the NRC on this issue is not contrary to law.

C. Issue Two -

23. Did the hearing officer commit error by permitting the introduction of parol evidence to contradict the unambiguous intention of Bender when she granted to Sanders docking privileges?

24. This argument as put forth by Cress assumes that the exact location and width of the docking privileges granted to the owner of Lot 38 by Bender were, in fact, clear and unambiguous.

25. This Court has heretofore concluded that the hearing officer did not err in finding that the grant of

docking privileges from Bender to Sanders regarding the location and width of same were ambiguous.

26. The Court, therefore, concludes that the hearing officer did not err in permitting the introduction of parol evidence. See, McCue, supra.

D. Issue 3 -

27. Did the hearing officer err in expanding the riparian area in which Byrer could exercise his docking privileges beyond that necessary for this purpose?
28. Cress contends that by expanding the riparian area from six (6) feet to fifteen (15) feet for the benefit of the dominant estate holder (Lot 38), the hearing officer unnecessarily burdened the servient estate holder (Lot 23) to an extent greater than was necessary to provide docking privileges for the benefit of Lot 38 as were contemplated by Bender on May 19, 1942.
29. In the case of Brock v B&M Moster Farms, Inc., 481 N.E.2d 1106 (Ind.App. 1985), the court held at page 1108:

"In construing an instrument creating an easement, the trial court must ascertain and give effect to the intention of the parties, which is determined by a proper construction of the language in the instrument

from an examination of all the material parts thereof. Where the provision is ambiguous, the court may consider the situation of the property and the parties, and the surrounding circumstances at the time the instrument was executed to determine intent..." (Emphasis added; Citations omitted)

30. Further, the Brock court at page 1109 cited with approval the case of Brown v Heidersbach, 360 N.E.2d 614 (Ind.App. 1977) for the rule that:
- "...The servient estate [may only be] burdened to the extent necessary to accomplish the end for which the dominant estate was created. The titleholder of the dominant estate cannot subject the servient estate to extra burdens, any more than the holder of the servient estate can materially impair or unreasonably interfere with the use of the easement..."
31. As the Final Order of the NRC makes clear, Byrer is permitted to exercise his docking privileges on Lake George commencing a distance of one (1) foot south of the common riparian line between Lot 23 and Lot 24, and ending fifteen (15) feet south of the common riparian line between Lot 23 and Lot 24.
32. The evidence before the hearing officer was that in the year 1942, the year Bender granted docking privileges to Sanders, piers were typically two (2) feet wide on Lake George and doubleboats commonly in use on Lake George were between four (4) feet and five (5) feet in width. Also, there were some motorized

watercraft in use on Lake George that were five (5) feet in width.

33. These facts would have certainly justified the hearing officer awarding to Byrer seven (7) feet for docking privileges off of the northwest part of Lot 23.

34. The hearing officer, however, awarded to Byrer fourteen (14) feet for docking privileges off of the northwest part of Lot 23.

35. It appears to this Court as a reviewing court that the hearing officer failed to base his decision solely upon the size of piers and boats typically in use on Lake George on or about the date (1942) Bender granted docking privileges to Sanders off the northwest part of Lot 23. Rather, the hearing officer based his decision on the size of piers and boats not only in use on Lake George in 1942, but in use on Lake George up to and including the date of hearing.

36. This is clearly reflected by NRC Finding #34 which stated in part:

"John Byrer testified at hearing that he could exercise the boating rights derived from the dominant estate for Lot 23 with a shoreline width of 13 or 14 feet....."

37. The hearing officer awarded to Byrer the fourteen (14) feet of shoreline that he requested.
38. The Court wishes to emphasis that it is not reweighing the evidence which was before the hearing officer. This Court has found no evidence in the record that on or about the date Bender granted docking privileges to Sanders it was customary on Lake George for the placement of a pier and the mooring of a boat(s) to the pier, to encompass a width of fourteen (14) feet.
39. The Court concludes the decision of the hearing officer providing to Byrer the right within which to exercise docking privileges off the northwest part of Cress's Lot 23 of a width of up to fourteen (14) feet is contrary to law and not supported by substantial evidence.

E. Issue 4 -

40. Did the hearing officer commit error by creating an additional ten (10) foot buffer zone within which neither Cress nor Byrer could place a boat or structure of any kind?

41. The manner by which piers are placed into Indiana public freshwater lakes is regulated by the NRC through the Lakes Preservation Act.
42. The placement of a pier into an Indiana public freshwater lake must not unduly restrict the safe navigation of watercraft upon the lake. See, 312 Ind. Admin. Code 11-3-1(b)(3).
43. Both Cress and Byrer will, in their enjoyment of Lake George, be coming and going from their respective piers.
44. A reasonable buffer zone between adjacent piers located in a single riparian zone is one way in which to assure their safety, and that of the general public, and is within the power of the DNR to mandate.
45. The Court concludes that the decision of the hearing officer requiring a ten (10) foot buffer zone is not contrary to law.

F. Issue 5 -

46. Did the hearing officer commit error by admitting into evidence, over Cress's objection, the affidavit of Nancy L. Vinson?

47. Vinson owned Lot 38 from 1985 until 1992. Her affidavit spoke to her use of a pier and the docking of her boat or boats off of the shoreline of Lot 23. More specifically, she stated therein, that she did exceed a width of six (6) feet by the use of her pier and boats.
48. As previously concluded by the Court, so much of the decision of the hearing officer which permitted Byrer to use fourteen (14) feet of shoreline off of the northwest part of Lot 23, exclusive of the ten (10) foot buffer zone, for boat docking privileges was not supported by substantial evidence.
49. Therefore, the issue presented to the Court by Cress regarding the admissibility of the Vinson affidavit has been rendered moot and will not be further addressed by the Court.

G. Issue 6 -

50. Byrer contends that even if the hearing officer committed error in his decision, Cress has failed to show she was prejudiced in any manner by the error and, therefore, the decision of the hearing officer must be affirmed.

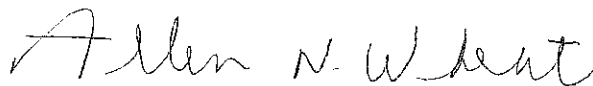
51. Byrer's argument continues that Cress still has a riparian zone within which to exercise her boat docking privileges of forty-one (41) feet.
52. Byrer's contention fails to recognize the great value assigned to lakefront lots in Steuben County, Indiana. Lakefront lots in Steuben County, Indiana are valued, in no small part, by determining the amount of lake frontage feet. Listing brokers want to know the number of lake frontage feet. Prospective buyers want to know the number of lake frontage feet. The loss of a single foot of lakefront property can translate into the loss of thousands of dollars.
53. The Court concludes that the decision of the hearing officer, which has resulted in the reduction in the size of Cress's usable riparian rights, is inherently prejudicial to Cress.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Pursuant to IC 4-21.5-5-15 the Court now remands this case to the DNR for further proceedings not inconsistent with the order of the Court entered this date.

2. On June 5, 2015, Cress filed with this Court her Motion to Tax Record Preparation Expenses as Costs.
3. Total transcript costs paid by Cress were in the amount of \$1,093.25.
4. Pursuant to IC 34-52-3-1 and Ind. Trial Rule 54(D) total transcript preparation costs of \$1,093.25 shall be taxed one-half (1/2) to Cress and one-half (1/2) to Byrer.

Dated this 17th day of June, 2015.



Allen N. Wheat, Judge
Steuben Circuit Court

Distribution to:

____ RJO
____ Cress
____ Snyder
____ Kuchmay
____ Junk
____ Gore
____ Barbara J. and Robert A. Schultz
____ Wyndham

CIVIL NOTICE
STEUBEN CIRCUIT COURT

Lucy Cress, V vs. Indiana Department of Natural Resources, John
Byrer, Robert Schultz et al

76C01-1410-MI-000335

To: Daniel Gore
Office of the Attorney General
302 West Washington Street
Fifth Floor
Indianapolis IN 46204

ATTORNEYS	PARTIES
	PLAINTIFF / PETITIONER
Jonathan Orlando Cress; Stephen Ray Snyder	Lucy Cress, V
	DEFENDANT / RESPONDENT
Eric L Wyndham; Timothy Jay Junk; Daniel Gore; Jason Michael Kuchmay; Jason Michael Kuchmay	Indiana Department of Natural Resources; John Byrer; Robert A Schultz; Sheri Byrer; Barbara J Schultz

EVENTS:

Entry Date	File Stamp/ Order Signed/ Hearing Date	Event and Comments
06/17/2015	06/10/2015	Notice Filed (Respondent, by counsel, files Notice as to Petitioner's Cost Request. (Notice to all counsel of record)
06/17/2015	06/12/2015	Memorandum/Brief Filed (Respondents, by counsel, file Memorandum in Opposition of Motion to Tax Record Preparation as Costs. (Notice to all counsel of record)
06/17/2015	06/17/2015	Order Issued (The Court having heretofore taken all matters under advisement, and at this time being duly advised in the premises, enters Order affirming decision of the Natural Resources Commission. (Notice to RJO, Cress, Snyder, Kuchmay, Junk, Gore, Wyndham, B. Schultz, R. Schultz)

Distribution: Jonathan Orlando Cress
Robert A Schultz
Barbara J Schultz
Jason Michael Kuchmay
Stephen Ray Snyder
Timothy Jay Junk
Eric L Wyndham

CIVIL NOTICE
STEUBEN CIRCUIT COURT

Lucy Cress, V vs. Indiana Department of Natural Resources, John
Byrer, Robert Schultz et al

76C01-1410-MI-000335

To: Timothy Jay Junk
Office of Indiana Attorney General
Indiana Government Center South 5th Floor
302 W Washington Street
Indianapolis IN 46204-2770

ATTORNEYS	PARTIES
	PLAINTIFF / PETITIONER
Jonathan Orlando Cress; Stephen Ray Snyder	Lucy Cress, V
	DEFENDANT / RESPONDENT
Eric L Wyndham; Timothy Jay Junk; Daniel Gore; Jason Michael Kuchmay; Jason Michael Kuchmay	Indiana Department of Natural Resources; John Byrer; Robert A Schultz; Sheri Byrer; Barbara J Schultz

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