

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

MATTHEW HARSTON and)	
SANDRA HARSTON,)	ADMINISTRATIVE CAUSE
Petitioners,)	NUMBER: 14-114W
)	
vs.)	
)	
CHAD BORTNER and ERICA BORTNER,)	(Riparian Rights Dispute)
Respondents,)	
)	
DEPARTMENT OF NATURAL RESOURCES,)	
Agency Respondent.)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH INTERLOCUTORY
ORDER ON COMPETING MOTIONS FOR SUMMARY JUDGMENT**

Procedural Background:

1. The Petitioners, Matthew and Sandra Harston (collectively referred to as “the Harstons”), initiated the instant proceeding by filing correspondence with the Natural Resources Commission (“Commission”) on August 4, 2014 with a request for “an order that the pier on [the] east side of Lot # 14 on Hackenberg Lake in LaGrange County be removed.”
2. The pier complained of by the Harstons was placed by the Respondents, Chad and Erica Bortner (collectively referred to as “the Bortners”), in a five foot wide strip located on the easternmost side of Lot #14 that the Harstons maintain they also have authority to use.
3. On September 5, 2014, the Bortners, by counsel, William W. Gooden, filed the “Respondents’ Counter Petition” alleging that they possess riparian rights on Hackenberg Lake by virtue of an easement that includes the right to place a pier and dock boats.
4. The Commission possesses authority to resolve riparian rights disputes between persons with opposing interests on Indiana’s public freshwater lakes. *Indiana Code § 14-26-2-23(e)(3)*.
5. Hackenberg Lake is a public freshwater lake. *Indiana Code § 14-26-2-3, Indiana Code § 14-26-2-24 and Natural Resources Commission, Information Bulletin # 61 (Fourth Amendment) “Listing of Public Freshwater Lakes”, October 1, 2014.*

6. With respect to the subject matter and the parties to this proceeding the Commission serves as the “ultimate authority”. *Indiana Code 4-21.5-1-15 and 312 IAC 3-1-2.*
7. An initial prehearing conference was conducted on September 5, 2014.
8. On November 11, 2015, counsel, Jason M. Kuchmay, entered his appearance on behalf of the Harstons.
9. On September 10, 2014, the Department of Natural Resources (“Department”), filed a motion to intervene that was granted on September 11, 2014.
10. During the prehearing conference the Bortners’ raised the possibility that additional property owners may claim a similar interest in the easement at issue in this proceeding. The Bortners were tasked with identifying those property owners, if any, and on June 16, 2015, the Bortners filed notice that diligent search failed to identify other property owners who may claim an interest in the easement at issue.
11. At a subsequent status conference the schedule was established for filing and responding to summary judgment motions.
12. Following granted extensions of time the parties’ reply briefs were filed on October 26, 2015. Included with the Bortners’ reply was a request for a hearing on the motions, which hearing was conducted on November 6, 2015.

Standard of Review on Summary Judgment:

13. With limited exclusions not at issue here, Indiana Code § 4-21.5-3-23, specifies that motions for summary judgment under Indiana Code §§ 4-21.5 shall be considered under Trial Rule 56 of the Indiana Rules of Trial Procedure.
14. Trial Rule 56 expressly states that a party “against whom a claim, counter-claim or cross-claim has been asserted... may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.”
15. The parties’ motions for summary judgment and responses to motions for summary judgment shall “designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion.” *Trial Rule 56(C).*
16. Trial Rule 56 dictates that;

The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages alone although there is a genuine issue as to damages or liability as the case may be. A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties. The court shall designate the issues or claims upon which it finds no genuine issue as to any material facts. Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court.

Id.

17. "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Philbeck v. Collins & Altman*, 13 CADDNAR 219 (2013), citing *Wells v. Hickman*, 657 N.E.2d 172, 175 (Ind. App. 1995).
18. "Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Girl Scouts v. Vincennes Indiana Girls*, 988 NE 2d 250, 253, (Ind. 2013), citing *Tom-Wat, Inc. v. Fink*, 741 N.E.2d 343, 346 (Ind. 2001).
19. "A party moving for summary judgment has the burden of showing there is no genuine issue of material fact." *Steven T. Gerber v. DNR*, 9 CADDNAR 31, (2001) citing *Marsym Development Corp. v. Winchester Econ. Devel. Comm'n*, 447 N.E.2d 1187 (Ind. App. 1983). See also *Bieda v. B&R Development and DNR*, 9 Caddnar 1 (2000).
20. "A court must construe all designated evidence and reasonable inferences in favor of the non-moving party, and resolve all doubts against the moving party." *Town of Avon v. West Central Conservancy*, 957 NE 2d 598, 602 (Ind. 2011).
21. "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth ..., or if the undisputed facts support conflicting reasonable inferences." *Angel v. Powelson*, 977 NE 2d 434 (Ind Ct. App. 2012) citing *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009).

Findings of Facts Established on Summary Judgment:

The Parties Property Rights:

22. By Warranty Deed executed on May 29, 1954, Vern C. and Mary E. Feller (collectively referred to as "the Fellers") conveyed to Garnet O. and Mabel M. Dunn (collectively referred to as "the Dunns"), the following described real property:

Lot Number Fourteen (14) in the Recorded Plat of Hackenberg Lake Resort in the Southeast Quarter of the Southwest Quarter of Section Twenty Four (24), Township Thirty Six (36) North, Range Nine (9) East, LaGrange County, Indiana.

...

The grantors herein are hereby reserving along the east side of the above described real estate at least five (5) foot right of way running north and south for the purpose of ingress and egress to and from the margin or shore line of Hackenberg Lake, for themselves, the representative agents, heirs and assigns, as well as any subsequent grantees or subsequent owner or owners of real estate now owned by the grantees, and the further right to land and moor their boats.

Harstons' MSJ Exhibit 4.

23. Also referenced in the conveyance from the Fellers to the Dunns is the construction of a channel as follows:

Said grantors hereby, as a part of the consideration for this conveyance, agree and do save the grantees herein harmless from any lawsuit or damage that may result by virtue of their construction of a certain channel which commences on Lot #14, or the above described real estate and through inadvertence and/or surveyor's error encroached upon the lot adjacent to the west, or Lot #13.

Id.

24. The Fellers conveyed additional property, described as follows, to Virgil P. and Virginia R. Jones on July 19, 1954:

Lot Number Four (4) in Feller's Addition to Hackenberg Lake as platted and recorded on the 4 day of October, 1951, in the records of LaGrange County, State of Indiana, in Plat Book #3 at page 7 thereof.

Grantors are also conveying to said grantees as a part of the consideration for this conveyance the right of ingress and egress to a certain lake channel lying between Lots 13 and 14 in said subdivision, for the purpose of mooring their boats, loading and unloading same and taking their boats to and from said Lake.

Harstons' MSJ Exhibit 9.

25. Clearly Lot 4, now owned by the Bortners, was in the ownership of the Fellers, when the easement across the easternmost five feet of Lot 14 was reserved by the Fellers for themselves and their successors in title. *Harstons' MSJ Exhibit 11.*

26. On June 29, 1955 the Dunns executed a Warranty Deed in favor of Virgil F. and Virginia R. Jones (collectively referred to as “the Joneses”) conveying Lot #14 as follows:

Lot Number Fourteen (14) except five (5) feet east side in the Recorded Plat of Hackenberg Lake Resort in the Southeast Quarter of the Southwest Quarter of Section Twenty Four (24), Township Thirty Six (36) North, Range Nine (9) East, LaGrange County, Indiana.

Harstons’ MSJ Exhibit 5.

27. The Harstons hold title to “Lot Number Thirteen (13) and Lot Number Fourteen (14), excepting 5 feet off the East side...in Hackenberg Lake Resort by virtue of a Warranty Deed executed on October 27, 2000 (hereinafter referred to as “the Harston Shoreline Property”).

Harstons’ MSJ Exhibit 2.

28. The current LaGrange County property record card reflects that the Dunns remain the owners of real property under Parcel ID 44-11-24-300-040.034-005, described as “Hackenberg Lake Resort E 5 ft of Lot 14 .03AC This piece has Ingress and Egress for Vern C & Mary E Feller and their heirs, etc. Book 97 Pg 174”. *Bortners’ MSJ Exhibits 1 & 2.*

29. Furthermore, the evidence establishes that the Dunns have failed to remit payment of property taxes on the five foot strip of land off the east side of Lot 14 in Hackenberg Lake Resort and LaGrange County unsuccessfully attempted to sell the property at tax sale in 2015. *Bortners’ Supplemental Designation of Evidence, Exhibit 1.*¹

30. The undisputed evidence supports the conclusion that the Dunns are the current owners of the five foot strip of property off the east side of Lot #14 (hereinafter referred to as “the Dunn Property”).

31. The deed conveying the Harston Shoreline Property makes no reference to the Fellers’ reserved easement across the Dunn Property. *Harstons’ MSJ Exhibit 2.*

32. By Warranty Deed executed on October 24, 2011, the Harstons also own property as follows:

¹ On November 6, 2015, the Bortners, by counsel, filed “The Bortner’s Supplemental Designation and Summary of Legal Argument in Opposition to the Harston’s Motion for Summary Judgment”. Mr. Kuchmay, on behalf of the Harstons, did not object to the summary of legal argument but did object to the supplemental designation of additional evidence in support of the Bortners’ motion for summary judgment on the basis that the evidence was not timely filed. Although the supplemental evidentiary designation was untimely filed, the documents elaborate upon facts already contained within timely filed evidentiary material effectively establishing only that the Dunns have not paid property taxes associated with the five foot strip on the east side of Lot 14 and the property was the subject of a LaGrange County tax sale in 2015. The supplemental designation is admitted over the objection of the Harstons to establish these facts only.

Lots 1 and 2 in the recorded Plat of Feller's First Addition to Hackenberg Lake Resort located in the Southwest Quarter of the Southwest Quarter of Section 24, Township 36 North, Range 9 East.

...

Subject to an easement for ingress/egress over Lot 14 in Fought's Addition to Hackenberg Lake Resort as set out in Deed Instrument No. 84-7-140.

Harstons' MSJ Exhibit 4.

33. The Fellers' warranty deed to the Dunns, referenced in Finding 22, and the Dunns' warranty deed to the Joneses, referenced in Finding 26, make no reference to "*Fought's Addition to Hackenberg Lake Resort*" as the reference is contained in the Harstons' warranty deed to Lots 1 and 2 in Feller's First Addition to Hackenberg Lake. Deed Instrument No. 84-7-140, referenced in the Harstons' deed to Lots 1 and 2 in Feller's First Addition to Hackenberg Lake, is not in evidence.
34. While it might be assumed that the ingress and egress easement over "Lot 14 in *Fought's Addition to Hackenberg Lake*", as cited in the Harstons' warranted deed, is a reference to the Dunn Property, the fact is that the deeds establishing the Dunn Property make no apparent reference to the "*Fought's Addition*". That fact combined with other complexities in the deed records at issue in this proceeding render such assumption ill advised.
35. By a warranty deed executed on June 8, 2012, the evidence establishes the Bortners are the owners of two tracts of property described, as follows:

TRACT 1

Lots Four (4) and Five (5) in Feller's First Addition to Hackenberg Lake as recorded in Plat Book 3, page 7, located in Section 24, Township 36 North, Range 9 East.

TRACT 2

Commencing at the Southwest corner of Lot Five (5) of Feller's Addition to Hackenberg Lake Resort in Section 24, Township 36 North, Range 9 East, and running thence South 50 feet, thence East on a line parallel with the South line of said Lot Five (5), 200 feet, thence north 50 feet to the Southeast corner of Lot Eight (8) in said Addition, thence in a Westerly direction along the South line of said Lots Eight (8), Seven (7), Six (6) and Five (5) to the place of beginning.

SUBJECT to all easements, restrictions, and limitations of record, as well as all applicable zoning ordinances.

Harstons' MSJ Exhibit 11.

36. Separate from the Bortners' warranty deed, and presumed by the Harstons to be a page from the Bortners' title commitment, is a description of two easements purportedly applicable to the Bortners' property. The easement conveyances are:

Subject to right of Ingress and Egress to a certain lake channel lying between Lots 13 and 14 in Feller's Addition to Hackenberg Lake, for the purpose of mooring boats, loading and unloading same and taking boats to and from said lake as recorded in Deed Instrument No. 97 page 260. [Referred to hereafter as "the Bortners' First Easement"]

Subject to Ingress/egress easement as set out in Deed Instrument Number 77-8-66. [Referred to hereafter as "the Bortners' Second Easement"]

Harstons' MSJ Exhibit 12.

37. The Bortners Second Easement relates to rights of ingress and egress over portions of Lot 9 in the Feller's Addition to Hackenberg Lake Resort. This easement is not relevant to the dispute at issue.
38. The channel referenced in the Bortners' First Easement being located between Lots 13 and 14 would have been located on the west side of Lot 14 and the east side of Lot 13. This easement is not in the same location as the Dunn Property, which lies on the east side of Lot 14. The Bortners' First Easement is consistent with references to the construction of a channel contained within the Fellers' conveyance to the Dunns (See Finding 23).
39. The evidence establishes that the Bortners' First Easement existed on August 19, 1988, when a predecessor in title to Lots 4 and 5, William H. and Violet A. Randol, conveyed those lots to Howard E. and Goldean E. Personette (collectively referred to as "the Personettes").

Harstons' MSJ Exhibit 10.

40. However, the Bortners' First Easement was terminated on January 8, 1989, when the Personettes executed a Quitclaim Deed in favor of James and Constance A. LeRoy (collectively referred to as "the LeRoys"), as follows:

Lots Thirteen (13) and Fourteen (14) in the Recorded Plat of Hackenberg Lake Resort in the Southeast Quarter (1/4) of the Southwest Quarter (1/4) of Section 24, Township 36 North, Range 9 East.

This deed is made to terminate any retained interest received from any prior grantor and the platters of Fellers' First Addition in, to and across the conveyed property, including any right of access to waters across Lots 13 and 14.

Grantor George Monroe joins in the execution of this deed as a contract purchaser from the remaining grantors.

*Harstons' MSJ Exhibit 7.*²

41. The Quitclaim Deed executed by the Personettes in favor of the LeRoys would have no impact upon the easement across the Dunn Property.
42. The evidence of record indicates that the Dunn Property remains subject to the easement established by the Fellers that would purportedly benefit the Bortners as well as any other owner of property that was owned by the Fellers on or after May 29, 1954. However, neither the Bortners' warranty deed nor the purported page from their title commitment establishes affirmatively that they hold any rights whatsoever to the use of an easement over the Dunn Property.³

Riparian Zones and Pier Placements:

43. While the evidence does not establish affirmatively that either the Harstons or the Bortners are authorized to use the riparian rights associated with the Dunn Property, the evidence does establish that the Dunn property fronts on Hackenberg Lake along a five foot stretch of shoreline.
44. The only evidence presented with respect to identifying proper riparian zones establishes, without contest from the Bortners, that the Bortners extended a pier into Hackenberg Lake from the Dunn Property and affixed a boat lift to one side of the pier and a Jet Ski lift to the other side of the pier. The pier in that configuration consumes approximately 15 – 20 feet laterally.
45. This evidence would indicate that the Bortners are consuming more space than would ultimately be attributed to a riparian zone based upon a five foot length of shoreline but such determination is not appropriately made based upon the present evidence.

² While the presentations on oral argument are not evidence the discussion along with the aerial photographs that were included in the evidence reveal that subsequent to the execution of this and additional quitclaim deeds, the channel referenced in Finding 23 and the Bortners' title commitment was filled. The channel no longer exists for the purpose of providing access to Hackenberg Lake.

³ The administrative law judge observes the possibility that a previously accepted conclusion stated in the Bortners' "Report to Administrative Law Judge and Other Parties and Request to Set Hearing Date and Pre-Hearing Conference" may be incorrect. The lack of reference to the easement in those owners' deeds is the same as the situation faced by the Bortners. Additionally, John D. Yates, the owner of Lot 3 executed a quitclaim deed in favor of the LeRoys to "terminate any retained rights received from any prior grantor..., including any right to access waters across Lots 13 and 14", that quitclaim deed, exactly like the quitclaim deed executed by the Personettes. The Yates quitclaim deed would also have no impact upon the easement over the Dunn Property. It is not clear which, if any of these properties remained in the ownership of the Fellers on the date they reserved the easement across the Dunn Property on May 29, 1954.

46. The evidence of record does indicate that if the riparian zones associated with the Dunn Property and the Harston Shoreline Property are established by the extension of onshore boundary lines lakeward, the Bortners' pier, in its present configuration and location would likely encroach upon the Harstons' riparian zone. *Harstons MSJ Exhibit A*.

Conclusions of Law Applicable to Facts Established Through Summary Judgment:

47. "A riparian owner along a public freshwater lake typically enjoys rights which include: (1) access to the public water; (2) the placement of a pier to the line of navigability; (3) the use of accretions; and, (4) reasonable use of the water for purposes such as boating and domestic use." *Spaw v. Ashley*, 12 CADDNAR 233, 239 (2010), citing, *Parkison v. McCue*, 831 N.E.2d 118, 128, (Ind.Ct.App. 2005).

48. Only the Dunns have acquired riparian rights associated with the Dunn Property through the ownership of that property. *Brown v. Heidersbach*, 360 N.E.2d 614, 619 (1977).

49. The Bortners, the Harstons, (and possibly others; see footnote 3) may have "acquired the right to 'use the riparian rights of the servient tenant'", the Dunns', by and through the Fellers' easement. *Klotz v. Horn*, 558 N.E.2d 1096 (Ind. 1990) and *Kranz v. Meyers Subdivision Property Owners*, 969 NE 2d 1068, 1079 (Ind. Ct. App. 2012).

50. A determination of parties' rights with respect to riparian easements must consider:

Easements burdening land with riparian rights attached do not necessarily provide the easement holder use of these riparian rights. *Brown v. Heidersbach*, 172 Ind. App. 434, 441, 360 N.E.2d 614, 619-620 (1977). Instead, we first look to the express language of the easement. *Klotz v. Horn*, 558 N.E.2d 1096, 1097-1098 (Ind. 1990). '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.' *Brown*, 172 Ind. App. at 441, 360 N.E.2d at 620. 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. *Gunderson v. Rondenelli*, 677 N.E.2d 601, 603 (Ind.Ct.App. 1997), (citing *Klotz*, 558 N.E.2d at 1098). A deed is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. See *Abbey Villas Dev. Corp. v. Site Contactors, Inc.*, 716 N.E.2d 91, 100 (Ind.Ct.App. 1999) *trans denied*.

Spaw, supra at 241, citing *Parkinson v. McCue*, 831 N.E.2d 118, 128, (Ind.Ct.App. 2005).

51. In this instance the easement, as drafted by the Fellers in 1954 authorizes "ingress and egress to and from the margin or shore line of Hackenberg Lake... and the further right to land and moor their boats."

52. In *Spaw*, lot owners were “entitled to an easement on the Lake Shore six feet in width for a boat landing...”, which the Commission determined “anticipated the opportunity to place piers.” *Spaw*, at 238.

53. At issue in *Gross v. IDNR and Howard*, was an easement containing this conveyance:

...together with the right running with said above described lot as the dominant tenement to use as a private easement of way Outlot Number Four (4) in said [First Addition Plat] for pier, landing and bathing beach facilities...

13 CADDNAR 283, 285 (2014). With respect to that easement language the Commission determined that;

a principle of statutory construction is that words and phrases shall be taken in their plain, or ordinary and usual sense. IC § 1-1-4-1 and *Indiana State Hwy. Comm’n v. Indiana Civil Rights Comm’n*, 424 N.E.2d 1024 (Ind. App. 1981). A “landing” is a “place where a ship or boat takes on or unloads cargo or passengers.” Webster’s Third New International Dictionary of the English Language Unabridged, 1268 (1976 G. and C. Merriam Company, Publishers). A landing is a “[s]tructure providing a place where boats can land people or goods.” U.S. Gazetteer (1991) and WebDictionary.co.uk. *Spaw v. Ashley*, 12 Caddnar 233, 242 (2010). The courts have recognized that a “landing” may exist on realty that is unimproved or improved. “A ‘landing’ is a bank or wharf to or from which persons may go or to some vessel in the contiguous water...” *State v. Louisiana Terminal Co.*, 179 La. 671, 154 S. 731 (La. 1934). A “landing” is a place on a navigable watercourse, for lading and unloading goods, or for the reception and delivery of passengers. “It is either the bank or wharf to or from which persons may go from or to some vessel in the contiguous waters.” *Portland & W.V.R. Co. v. City of Portland*, 14 Or. 188, 12 P. 265 (Or. 1886). A boat landing may be unimproved or improved. A wharf is a type of improved landing. If suitable to the purposes for a public landing, the construction of a wharf on the realty is not inappropriate. *Reighard v. Flinn*, 194 Pa. 352, 44 A. 1080 (Pa. 1900). *Spaw v. Ashley* at 242. A “wharf” is a structure built parallel and contiguous to the shoreline of a body of water and used as a berthing place for boats to unload cargo and passengers. If constructed perpendicular to or at an oblique angle to the shoreline, a “wharf” is considered a “pier”. Wester-Mittan, *Glossary of Water Related Terms*, 5 Waters and Water Rights (LexisNexis 2009). To similar effect is *Jansing v. DNR and Hawkins, et al.*, 11 Caddnar 8, 23 (2007): “‘Pier’ means a long narrow structure extending from the shore into a body of water and used as a landing place for boats or used for recreational purposes. Terms sometimes used synonymously include dock, slip and wharf.” *Spaw v. Ashley* at 242. On its face, the 1960 Warranty Deed is unambiguous. The owners of Lot 21 hold “the dominant tenement” for the placement of a pier to accommodate the enjoyment of a boat landing at Outlot 4...”

Gross at 286 (paragraph identifications omitted).

54. Similarly, the Commission determined that an easement “for the maintenance of a boat and swimming pier” expressed an unambiguous intent to authorize the placement of a pier for the mooring of a boat even though the right-of-way at issue in that case was only three feet wide. *Havel & Stickelmeyer v. Fisher, et al.* at 11 Caddnar 110, 117 (2007).
55. In the *Gross* and *Havel* cases the easements notably referred to piers expressly. However, in *Spaw*, the Commission determined that the easement authorized the placement of piers where the easement referred only to a boat “landing.”
56. The language conveying the easement in this instance bears greater similarity to the language of conveyance in *Spaw*. In *Spaw*, the Commission’s determination was based upon consideration of historic usage by the affected lot owners that the Commission recognized was not “wholly instructive because the evidence demonstrates little regard for the geographic strictures placed in the easement...but a consistent factual element is that lot owners commonly placed piers.” *Id* at 242.
57. It is certain from the express language conveying the easement across the Dunn Property that a right was granted to persons who are presently unknown⁴ to land and moor boats.
58. It is not certain that landing and mooring boats, in this instance, includes the extension of a pier from the Dunn Property.
59. As was the case in *Spaw* consideration of the historic use that has been made of the easement across the Dunn Property is a relevant consideration but that evidence is lacking from the record.
60. If the easement across the Dunn Property includes the authority to extend a pier, such use must not interfere with the legitimate exercise of riparian rights by adjacent riparian owners.

A person may navigate a watercraft within the riparian zone of another person and within the setback areas required by IB #56 [*infra*] for purposes of ingress and egress and the loading and unloading of passengers because a “temporary use of this nature does not unreasonably infringe on the riparian rights” of another person. *Barbee Villa Condominium Owners Assoc. v. Shrock*, 10 CADDNAR 23, 27, (2005); Testimony of Whitaker. However, a boat or other watercraft may not be moored to a pier in such a manner that the boat or watercraft extends beyond the boundary of a riparian zone or within the setback area required by IB #56.

⁴ While it is certain the right was granted it is not certain that the right continues to exist for the benefit of any person.

Skilbred, et al. v. Spaw, et al., 13 CADDNAR 99, 105 (2013) citing *Galbreath v. Griffith*, 11 CADDNAR 224, 232 (2007) and *Barbee Villa Condominium Owners Assoc. v. Schrock*, 10 CADDNAR 23 (2005).

61. The extension of onshore property boundaries lakeward is only one means by which riparian zones may be established. “*Riparian Zones Within Public Freshwater Lakes and Navigable Waters*”, *Information Bulletin #56 (Second Amendment)*, published in the Indiana Register on March 31, 2010, <http://www.in.gov/legislative/iac/20100331-IR-312100175NRA.xml.pdf>, (“IB #56”).
62. The evidence is not sufficiently developed on summary judgment to conclude that the extension of onshore property boundaries lakeward is the proper method of establishing the riparian zone associated with either the Harston Shoreline Property or the Dunn Property.⁵
63. It is accurate to conclude based upon the evidence of record that any holder of easement rights over the Dunn Property would share the use of the correlating riparian rights with the Dunns.
64. While the evidence does not definitively identify all the possible property owners possessing the right to use the riparian rights associated with the Dunn Property, the evidence suggests that there are potentially more than five (5) such property owners.
65. A “group pier” includes “a pier that provides docking space for ...at least five (5) separate property owners...” 312 IAC 11-2-11.5. A person is prohibited from placing “a group pier along or within the shoreline or water line of a public freshwater lake unless the person obtains a written license” under 312 IAC 11-4-8.
66. If five or more property owners (including the Dunns) possess the right to use the riparian rights associated with the Dunn Property, no pier may be extended from that property without a permit first being obtained from the Department.

Matters Established on Summary Judgment:

67. The Dunns are the owners of the Dunn Property, the five foot strip off the east side of Lot 14 as identified in the plat of Hackenberg Lake Resort.

⁵ Particularly notable in this respect is the apparent trend for property owners in the area to place piers as if the riparian zones are established by extending lines lakeward at a perpendicular to the shoreline from the point at which the onshore boundary lines intersect the shoreline. *Harstons' MSJ Exhibit 6*.

68. The Dunn Property is burdened by an easement allowing ingress and egress as well as the landing and mooring of boats by persons to whom the Fellers conveyed property after May 29, 1954⁶.

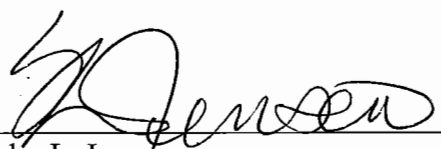
Issues Remaining for Determination Following Summary Judgment:

69. Do the Bortners and/or the Harstons hold the rights under the easement to use the riparian rights associated with the Dunn Property?
70. Are there other property owner(s), in addition to the Dunns, the Bortners and/or the Harstons, who are authorized to exercise riparian rights associated with the Dunn Property?
71. In reserving the easement across the Dunn Property, including the right to land and moor boats, was it the intent of the Fellers to extend a pier from that property?
72. What is the appropriate riparian zone associated with the Dunn Property and the Harston Shoreline Property?
73. If the extension of a pier was contemplated by the easement, will that pier require the issuance of a group pier permit by the Department under 312 IAC 11-4-8.

Additional Observations:

74. A determination as to the use of the Dunn Property is not appropriate absent notice to the Dunns and, in light of the present property tax arrearage, to LaGrange County.

Dated: November 18, 2015



Sandra L. Jensen
Administrative Law Judge
Natural Resources Commission
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(317) 232-4229

A copy of the foregoing was sent to the following:

⁶ It is acknowledged that the language of the deed conveyance and reservation of the easement, as set out at Finding 22, could be interpreted to include successors in interest to property then owned by the Fellers where so ever that property may have been located. It is assumed that the reservation of easement referred only to property owned by the Fellers that was located within the "recorded plat of Hackenberg Lake Resort".

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