

STATE OF INDIANA       )  
                                  ) SS:  
COUNTY OF FULTON     )

IN THE FULTON CIRCUIT COURT  
CAUSE NO. 25C01-1706-MI-000355

KEVIN PROSSER               )  
                                  )  
      Petitioner,               )  
                                  )  
      v                         )  
                                  )  
INDIANA DEPARTMENT OF     )  
NATURAL RESOURCES,        )  
      Respondent.            )

**ORDER**

**FACTS AND PRIOR PROCEEDINGS**

Petitioner is the owner of two properties commonly known as 2920 and 2922 Country Club Drive South, Rochester, Indiana (*"Petitioner's Real Estate"*), which fronts on Lake Manitou, a public freshwater lake.

On August 24, 2015, Petitioner filed an application for construction with the Indiana Department of Natural Resources ("DNR"). The application requested the issuance of a permit for the installation of approximately 117 feet of concrete seawall on the lakeside of Petitioner's real estate fronting on Lake Manitou. On February 1, 2016, Petitioner filed his Petition for Administrative Review seeking review of the denial of his permit application.

The Honorable Dawn Wilson, Administrative Law Judge, conducted a hearing on Petitioner's Petition For Administrative Review on February 8, 2017 pursuant to the Administrative Orders and Procedures Act. I.C. 4-21-.5-3 *et seq.* Subsequent to the hearing, Judge Wilson submitted her " Findings of Fact and Conclusions of Law with Non-Final Order" to the AOPA Committee of the Natural Resources Commission.

Petitioner timely filed his objections to the Findings of Fact and Conclusions of Law with Non-Final Order on April 13, 2017. Oral argument on Petitioner's objections was conducted before the AOPA Committee on May 16, 2017 and the Findings of Fact and Conclusions of Law with Final Order was issued by the Committee May 22, 2017. Essentially, the Final Order was identical to the Non-Final Order proposed by Judge Wilson.

The permit was denied on the basis the Petitioner's Real Estate was located in an area of special concern as defined in 312 IAC 11-2-2 and that the materials for construction of a seawall in such area were limited to glacial stone or bioengineered materials. This basis for denial was affirmed by the AOPA Committee in its Final Order. (*id*).

### **STANDARD OF REVIEW**

The standard of review of an agency decision well established. The Administrative Orders and Procedures Act allows a court to set aside an agency's decision if it is:

- (1) Arbitrary, capricious, an abusive discretion, or otherwise not in accordance with law; (2) Contrary to constitutional right, power, privilege, or immunity; (3) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) Without observation of procedure required by law; or (5) Unsupported by substantial evidence.
- I.C. 4-21-5-5-14(d)

A reviewing court will not try the facts *de novo* or substitute its judgment for that of the agency. *Morianity v. IN Dept. of Natural Resources*, 91 NE3rd 642 (Ind.App. 2018). However, reviewing courts review an agency's conclusions of law *de novo*. *Nat. Res. Def. Council v. Poet Biorefining-N. Manchester, Llc*, 15 NE3rd 551 (Ind. 2014).

## **DECISION**

### **THE PETITIONER'S REAL ESTATE IS A DEVELOPED AREA WHICH PERMITS INSTALLATION OF A CONCRETE WALL**

Regulations of the Natural Resources Commission define developed area as follows:

"Developed Area" means the upland side or sides of a manmade channel or an area that does not contain any of the following characteristics: (1) An area of special concern. (2) A significant wetland. (3) A natural shoreline.

A concrete seawall is permitted in a developed area. 312 IAC 11-4-2(d)(4).

312 IAC 11-2-11.8 defines manmade channel as follows:

"Manmade Channel" means a watercourse created by mechanical means that connects to the lake at one (1) or more points and by its construction increases the total length of shoreline around the lake. The term does not include any areas within the lake cleared by either chemical or mechanical means that to not result in an increase in the total length of shoreline around the lake.

There is no dispute in the evidence in this matter that the area lakeward of Petitioner' Real Estate was excavated in late 1947 and early 1948. Even the Deputy Director of the DNR's Division of Water in charge of permitting, James Hebenstreit, testified his initial review of Petitioner's Permit Application indicated that the area lakeward of Petitioner's property had been excavated.

James Hebenstreit clearly stated that if Petitioner's property is a "developed area" then Petitioner's Permit should issue.

Although the excavation took place in 1947-1948, Petitioner presented two witnesses who actually observed the excavation. Joseph K. Mills ("Mills") testified that is was his father who contracted for the excavation along the shoreline of what is now the Prosser Real Estate. Mills observed the excavation during the period from lat 1947 to

early 1948. He observed the crane with a bucket attached being pulled from the lake up to the shoreline removing material from the lake and also removing a portion of the shoreline before the bucket was dumped approximately 10 feet behind the shore. This occurred over 600 feet of the shoreline which included what is now the Prosser property. Mills specifically testified that based on this observation, the shoreline of Lake Manitou was lengthened during the process of the excavation adjacent to the Prosser Real Estate.

Mills also observed Exhibits A-E to his deposition (Exhibits 13-17), aerial photos of the Prosser property prepared by Rodney Neese, a surveyor employed by the DNR. Those aerial photos, which covered various dates between 1940 and 2013, "absolutely" revealed that the location of the shoreline in front of the Prosser property had moved significantly.

In addition to Mills, Douglas V. Sampsel testified that he also observed the excavation that took place in 1947-1948. His father, Homer Sampsel, was the contractor who performed the excavation adjacent to the Prosser Real Estate. Sampsel not only testified that he was present during the excavation, he also described in detail the equipment being used by his father, a Northwest 25, 3/4-yard dragline with a 40-foot boom. Sampsel observed the bucket being thrown approximately 50 feet from the shoreline and then being retrieved full of mud and silt which would then be dumped on the bank. The bottom of the lake adjacent to the Prosser Real Estate was dug to a depth of five or six feet. When the bucket was retrieved by the crane and hit the existing shoreline, it would remove a portion of the shoreline. There was also an effort to "clean up the shoreline" taking additional soil from the shoreline to make it even and straight

and sloped. Sampsel specifically testified that the shoreline of Lake Manitou was longer after the excavation than it was before the excavation began.

Sampsel then reviewed Exhibits A and B to his deposition, aerial photos prepared by Rodney Neese for the DNR and testified that the shoreline adjacent to the Prosser Real Estate was not in the same place in 1957 that it was in 1940.

Mills and Sampsel were the only witnesses who actually observed the excavation take place. Rodney Neese, a surveyor employed by the DNR, prepared Exhibits 13-17 being the same as Exhibits A-E to the depositions of Mills and Sampsel. The preparation of Exhibits 13-17 involved the computer placement of the current shoreline along the Prosser Real Estate on aerial photos taken between 1940 and 2013. Comparing Exhibit 13 and Exhibit 15, Neese testified that the Shoreline shown in the newer aerial photograph could be further north than in the 1940 photograph. Neese also testified that the excavation that occurred in 1947 might increase the length of the shoreline of Lake Manitou. Neese was not able to contest the testimony of Mills and Sampsel but confirmed that based on Exhibits 13-17, their testimony could be correct.

James Hebenstreit, Assistant Director of the DNR Division of Water and in charge of permitting, testified on behalf of the DNR. Hebenstreit described the process within the DNR for review and ultimate approval or denial of a permit. He reviewed the various classifications of shoreline and then specifically stated, in response to a question from DNR Counsel asking what the effect on the permit would be if the Prosser Real Estate was the upland side of a manmade channel. He responded, " That would make it fall into developed area and concrete would be an acceptable material." Hebenstreit testified that he could not determine whether the shoreline adjacent to the

Prosser Real Estate was lengthened or shortened by the excavation. Hebenstreit was unable to contradict the testimony of Mills and Sampsel that the excavation lengthened the shoreline of Lake Manitou.

Hebenstreit also testified concerning what constituted a "developed area" pursuant to 312 IAC 11-2-7. He agreed that if the excavation in front of the Prosser Real Estate constitutes a manmade channel, then the area in front of the Prosser Real Estate would be a developed area and would qualify for installation of a concrete seawall. He also agreed that a manmade channel, pursuant to the definition in 312 IAC 11-2-11.8 could be a water course created by mechanical means that connects to the lake at one or more points or could also be an area of the lake cleared by either chemical or mechanical means that increases the total length of the shoreline around the lake. Hebenstreit also agreed that a channel could be a water course with only one upland side.

It is clear that the uncontradicted testimony, presented by Mills and Sampsel, established a lengthening of the shoreline of Lake Manitou by the dredging of the channel adjacent to the Prosser real estate. Neither James Hebenstreit nor Rodney Neese could refute the testimony of Mills and Sampsel and could only say that based on their examination of aerial photos, they could not determine whether the shoreline had been lengthened by the excavation. The Administrative Law Judge chose to discount the testimony of Mills and Sampsel first because it was a recollection from 70 years prior to their testimony and second, because it was "based on the faulty assumption that the mere removal of any part of the shoreline would increase the total length of the shoreline around the lake". A trial court may not refuse to consider and


weight competent, uncontradicted evidence. *Haynes v Brown*, 88 N.E.2d 795 (Ind. App. 1949). In the *Haynes* case, the Court listed the factors to be considered in determining the credibility of a witness and the weight to be given to the witness's testimony as follows: (1) interest of the witness in the outcome of the trial; (2) the witness's bias and prejudice, if any are shown; (3) the witness's opportunity for knowing and recollecting the facts about which he testifies; (4) the probability or improbability of his testimony; and (5) his demeanor while on the witness stand. *Haynes*, Id. p.797, citing *McKee v Mutual Life Ins. Co. Of New York*, 51 N.E.2d 474 (Ind. 1943). The Court may disregard or disbelieve oral evidence if it is considered unreasonable or inconsistent with facts and circumstances shown by the other credible evidence in the case. *Wright v. Peabody Coal Company*, 77 N.E.2d 116 (Ind. 1948). There was no justification for the Administrative Law Judge's discounting of the Mills' and Sampsel's testimonies based on other evidence presented at trial.

Once it was established that the shoreline of Lake Manitou had been lengthened by the excavation which took place along the Prosser shoreline, it is irrelevant whether the side opposite the Prosser Real Estate constituted an upland bank. Hebenstreit testified that a manmade channel could be a water course with only one upland side. Even more telling is the definition of manmade channel appearing at 312 IAC 11-2-11.8 which includes a water course created by mechanical means but also includes an area within the lake proper cleared by mechanical means that results in an increase in the total length of shoreline around the lake. It is uncontested that excavation along the Prosser shoreline occurred in 1947-1948. The testimony of both Mills and Sampsel was uncontradicted by either Hebenstreit or Neese and as a result, only one logical

conclusion follows and that was that the shoreline of Lake Manitou was lengthened by the excavation. With that determination, the area lakeward of the Prosser Real Estate is clearly a "manmade channel" and a concrete seawall is absolutely permitted pursuant to 312 IAC 11-4-2(d)(4).

The area of Lake Manitou adjacent to the Prosser Real Estate is a developed area as defined in 312 IAC 11-2-7 having been shown to be a manmade channel as defined in 312 IAC 11-2-18. Concrete seawalls are specifically permitted within a developed area without regard to any other factors considered by the Department of Natural Resources. The Findings of Fact and Conclusions of Law with Final Order issued by the AOPA Committee of the Natural Resource Commission on May 22, 2017 is arbitrary and unsupported by substantial evidence and should be reversed. The DNR should be ordered to issue the permit to Prosser as requested in his application.

SO ORDERED this 10-4-2018.

  
Wayne E. Steele, Special Judge  
Fulton Circuit Court

cc: Stephen R. Snyder  
Kelly Thompson