STATE OF INDIANA) IN THE MARSHALL CIRCUIT COURT
) SS:
COUNTY OF MARSHALL) CALENDAR TERM: 2009

IN THE MATTER OF THE) Cause No.: 50C01-0309-MI-91
PETITION FOR THE CREATION)
OF MAXINKUCKEE VILLAGE)
CONSERVANCY DISTRICT)

) Administrative Cause
) Number: 09-167C

RECOMMENDED
REPORT OF THE NATURAL RESOURCES COMMISSION WITH RESPECT TO THE PETITION FOR CREATION OF THE MAXINKUCKEE VILLAGE CONSERVANCY DISTRICT

I. PETITION, SUMMARY OF EVIDENCE RECEIVED AT PUBLIC HEARING

A. Petition

On October 12, 2009, the Natural Resources Commission (the "Commission") received a copy of the Petition for the Creation of the Maxinkuckee Village Conservancy District (the "Petition"). The proposed conservancy district contains one "freehold" as defined at Ind. Code § 14-33-2-3, and includes Aker Properties, LLC (the "Petitioner"). A conservancy district may be established for any purpose set forth in Ind. Code §14-33-1-1(a). The Petition lists the sole purpose for which the conservancy district is proposed as follows: to provide for the collection, treatment, and disposal of sewage and other liquid wastes. Petition, p. 3.

On November 12, 2009, Curtis D. Palmer, Judge of the Marshall Circuit Court, ordered, in substantive part as follows:

> The Court, having heard evidence at a hearing legally advertised and after having been given proof of publication of notices, and, now hereby makes the following findings:
> 1. The petition as presented bears the necessary signatures and complies with the requirements as to form and content, all as required by I.C. 14-33-2-3 and I.C. 14-33-2-4; and
> 2. That proper notice of hearing was given as pursuant to I.C. 14-33-2-12; and
> 3. The Court does now hereby refer the petition as filed to the Department of Natural Resources, Division of Water, for further action by said Department. The Clerk of Marshall Circuit Court is further ordered to forward a copy of this Order to:

Division of Hearings
Natural Resources Commission
…

On November 18, 2009, the Commission received the Marshall Circuit Court's Order referring the Petition to the Commission. As a consequence, the Commission, on January 8, 2010, circulated letters to governmental entities for comment.

Pursuant to the Marshall Circuit Court Order and to Ind. Code § 14-33-2-19, public hearings were held as scheduled on February 4 and 5, 2010, in the Vandalia Railroad Depot, 615 East Lakeshore Drive, Culver, Indiana, Marshall County. Notices of the public hearings were published on January 14, 2010 in the *Pilot News* and the Culver *Citizen*, newspapers of general circulation in Marshall County. Notice of the public hearings was also posted on the Commission's Internet site calendar. The notices set forth the conduct of the public hearings as follows:

> …
>
> A petition for the creation of the Maxinkuckee Village Conservancy District (Marshall Circuit Court Cause Number 50C01-0309-MI-91) was referred to the Indiana Natural Resources Commission. The Marshall Circuit Court has ordered the Commission to hold a public hearing and receive evidence under IC 14-33-2.
>
> In order that the required report may fully cover the matter, you are notified that the Commission will hold two public hearings set to begin at 10:00 a.m. on February 4, 2010 and February 5, 2010 at the Vandalia Railroad Depot, 615 East Lakeshore Drive, Culver, Indiana. On February 4, 2010, testimony received will be limited to the petition and expert testimony offered by attorneys for the petitioner or for a remonstrator. On February 5, 2010 comments will be received from interested persons.
>
> …

B. Summary of Evidence Received at Public Hearing held on February 4, 2010

Stephen L. Lucas and Jennifer M. Kane were appointed as the Commission's hearing officers. Lucas opened the public hearing as scheduled in Culver, Indiana on February 4, 2010 to receive comments[1] on the proposed Maxinkuckee Village Conservancy District.

[1] Statements made at the February 4 and February 5, 2010 public hearings that are identified with quotation marks are intended to set off direct quotations. The audio quality of the recording was not always pristine. As a result, the statements should be considered as summaries and not as verbatim.

He outlined the statutory responsibilities of the Commission pertaining to the review of a proposed conservancy district and provided an opportunity for citizens to ask questions concerning the process.

The Petitioner was represented by Plymouth attorney, Fred R. Jones. The Remonstrators, Lake Maxinkuckee Environmental Council (the "LMEC") and William F. Welch and Jean K. Welch, were represented by Syracuse attorney, Stephen R. Snyder, and Indianapolis attorney, Brian W. Welch, respectively. Lucas then called upon Jones to present evidence in support of the petition.

(1) Petitioner and Supporting Evidence

Fred R. Jones admitted, through various witnesses, and without objection[2], the following exhibits:

Petitioner's Exhibit 2: Maxinkuckee Village Drainage Plan, Sheet 2a of Petitioner's Exhibit 18;
Petitioner's Exhibit 3: Detail of Drainage Plan, Sheet 2b of Petitioner's Exhibit 18;
Petitioner's Exhibit 5: Overall Site Plan (Septic), Sheet 11 of Petitioner's Exhibit 18;
Petitioner's Exhibit 7: Cluster Septic System, Field System Details, Sheet 13 of Petitioner's Exhibit 18;
Petitioner's Exhibit 8: Treatment Center Details, Sheet 14 of Petitioner's Exhibit 18;
Petitioner's Exhibit 9: Erosion Control Plan, Sheet 18a of Petitioner's Exhibit 18;
Petitioner's Exhibit 10: Erosion Control Plan, Sheet 18b of Petitioner's Exhibit 18;
Petitioner's Exhibit 11: Erosion Control Plan, Sheet 18c of Petitioner's Exhibit 18;
Petitioner's Exhibit 12: Correspondence dated March 2, 2009, from Scott Matthews, Project manager, Indianapolis Regulatory Office, Department of the Army, U.S. Army Corps of Engineers, Louisville District, to Gary Aker, Aker Properties;
Petitioner's Exhibit 13: Correspondence dated March 24, 2009 from Marylou Poppa Renshaw, Chief, Watershed Planning Branch, Office of Water Quality, Indiana Department of Environmental Management, to Gary Aker, Aker Properties;
Petitioner's Exhibit 14: Correspondence dated September 10, 2009, from Michael Mettler, Director, Environmental Public Health Division, Indiana State Department of Health;
Petitioner's Exhibit 15: 15 signed petitions "in favor of the Maxinkuckee Village";

[2] Petitioner's Exhibit 17 was submitted with an attached "Form 1." Form 1 contained "Page 1 of 5" through "Page 4 of 5". "Page 5 of 5" was not included. Petitioner's Exhibit 17 was admitted without objection, but with a notation that if subsequent review of the original document revealed a "Page 5 of 5", the Petitioner would provide a copy to the Commission and the Remonstrators. No "Page 5 of 5" was subsequently provided.

Petitioner's Exhibit 16: Lake Maxinkuckee Shoreline Revegetation Project–2007, *Introduction and Background*; prepared by V_3 Companies, September 2, 2009, p. 3;
Petitioner's Exhibit 17: Correspondence dated March 18, 2009, from Wanda L. Norris, Marshall Soil and Water Conservation District, to Tim Monaghan, Land, Feeney, and Associates, Inc., with attached Construction/Stormwater Pollution Prevention Plan Technical Review and Comment (Form 1);
Petitioner's Exhibit 18: Maxinkuckee Village Development Plans prepared by Lang, Feeney & Associates, Inc.; prepared for Aker Properties, LLC (Owner), Maxinkuckee Village, LLC (Developer), Revised August 7, 2009, Sheets 1 through 19;
Petitioner's Exhibit 19: Sanitary Sewers and Private Wells, Sheet 7 of Petitioner's Exhibit 18;
Petitioner's Exhibit 20: Evaluation Report: Aero-Tech Aerobic Treatment Units, Model AT-500 Wastewater Treatment System, Under the provisions of NSF/ANSI Standard 40 Residential Wastewater Treatment Systems, Final Report dated March 2009; and
Petitioner's Exhibit 21: Aero-Tech Promotional DVD.

[Opening Remarks by Jones]

Fred. R. Jones provided brief opening remarks, including background regarding the proposed conservancy district. He explained the Petition was filed with the Marshall Circuit Court on September 2009 by Aker Properties, LLC ("Aker Properties"). Jones said Aker Properties is family-owned with Gary Aker as the managing operator. Six years ago Aker Properties purchased Culver Marina and the adjoining property containing about 55.7 acres, with the marina consisting of about 4.5 acres. When purchased, the marina included restroom facilities. A restaurant was added later. He said, "If the conservancy district is approved and the project is able to move forward, the restroom facilities and the restaurant operation would be connected to the conservancy district and would no longer use the currently existing private septic system".

Jones said there is a "fair amount" of undeveloped property within the 55.7-acre tract. "After much consideration, investigation, and deliberation, and after having received comments from several individuals who frequented the marina or live in the Culver Community, or otherwise came in contact with Gary Aker, in particular, but other members of the Aker family, [Aker Properties] decided that it would be appropriate to investigate development of the vacant or undeveloped real estate adjacent to the marina." He said Aker Properties filed a Planned Unit Development District ("the PUD") with the Town of Culver. He explained the Town of Culver's zoning ordinance has a two-step process for creating a PUD, with the preliminary stage designed to give "general or basic" background information to the Culver Plan Commission. The Culver Plan Commission has approved the initial stage of the application for the PUD. "We've not gone to the second step yet, because we need to have the conservancy district established in order to be able to handle the effluent that would be created as a result of the PUD project that is anticipated."

Jones explained the PUD would be constructed in multiple phases, with the first phase consisting of the construction of 31 individually owned villas (the "villas") and four 4-plex condominium buildings, with each building to include four units, for a total of 16 residential units. The initial approval of the PUD by the Culver Plan Commission is not an "automatic guarantee" of final recommendation of approval or approval from the Culver Town Council. He said, "It is my understanding that it is not the function of the [public] hearing today, in its recommendations to the [Marshall Circuit] Court to pass upon the final viability or desirability of the final project, the PUD project, but rather to determine whether or not, at this stage of the proceedings, the conservancy district petition has met the necessary statutory requirements."

Jones said the initial phase of the PUD project would include construction of the 31 single-family villas and the 4-plex condominiums. The PUD project would be developed as a "condominium project rather than individual ownership of the ground within the area." The PUD project would also include a clubhouse with swimming pool, tennis courts, and a field for soccer, baseball, and other similar outdoor recreational activities.

Jones said Aker Properties is "prepared to pay the initial costs" of the creation of the cluster septic system that would serve the conservancy district. With final approval of the PUD by the Town of Culver, Aker Properties would proceed with completion of development. "It is not a situation where we have multiple parcels of real estate with multiple owners involved where we need to create some type of a taxing system to be able to fund the cost of the creation of the conservancy district or to fund the expense of constructing and then maintaining the cluster septic system". Jones concluded by stating, "We think that this is a very desirable project for this particular area of the Culver community, and that the evidence presented this morning will indicate and demonstrate that we have met the statutory requirement with regard to the determination of the establishment of the conservancy district".

Jones then introduced persons to testify in favor of the proposed district. Their sworn testimony on direct and on cross examination is summarized below.

[Direct Examination by Jones]

<u>Gary Aker</u> testified he is a resident of Plymouth, Indiana and owns a private seasonal residence adjacent to Lake Maxinkuckee. In 2004, Aker Properties acquired the Culver Marina on which are located two commercial businesses: the Culver Marine, a wholesale division; and the Culver Marina. The two businesses continue to operate. He said a restaurant was added with the effluent generated from the restaurant and restroom facility treated through a "traditional septic system".

Through conversations with customers who were "looking for economical housing" on Lake Maxinkuckee and "to have their boats in the harbor and have a place there to live where they didn't have to take care of a full residence, Aker Properties "decided to investigate and design a project that would benefit obviously those people that have boats in the harbor." When asked how Aker Properties investigated viability of the proposed

PUD project, he responded comments were received from persons renting boat slips at Culver Marina. He said Aker Properties met with Alan Collins, President of Construction Management & Design, as well as with an engineering firm, Lang, Feeney & Associates, Inc. ("Lang Feeney"), to draft development and septic treatment plans. Lang Feeney also designed the surface water drainage system and erosion control system within the proposed district boundary.

Aker said the estimated construction cost for the cluster septic system is $500,000. Aker Properties would initially cover construction costs for installation of the septic system, and then it would recover the costs through unit sales in the four 4-plex condominiums and the 31 villas. Pricing of the residential units would include a percentage of the construction costs for the septic system and construction of the community center, which includes a pool, tennis courts, and activity field. Aker testified application for the PUD divides the development of the 55.7 acres into separate phases, with Phase 1 to include the construction of the 31 villas and the four 4-plex condominiums.

Jones asked, "Once the cluster system is constructed and after there have been sales of the condo units, how will the system then be maintained?"

Aker answered, "It will be maintained by the association."

Jones continued, "This entire project will be a condominium project, or what used to be called a 'horizontal property regime', whereby each individual unit owner owns their unit, but you have common areas which would consist of the rest of the property?

Aker answered, "Correct."

Jones continued, "And the co-owners association would have responsibility then for the maintenance of the septic cluster system?"

Aker answered, "100%".

Jones continued, "Will the Culver Marina be a part of the first phase of the project for the PUD?"

Aker answered, "Yes."

Jones continued, "Will [Culver Marina] then share their proportionate costs of the maintenance of the cluster septic system?"

Aker answered, "Correct, as a member."

Jones continued, "Now, when people purchase a unit in the horizontal property regime, will they be acquiring any separate independent right of access to Lake Maxinkuckee?"

Aker answered, "Not from me. No."

Jones continued, “Is there any way that you would grant the individual unit owner a right of access to Lake Maxinkuckee just because of their unit ownership?”

Aker answered, “No. They would have to still rent a slip as any other individual could rent a slip.”

Jones continued, “Any person who wanted to gain access to Lake Maxinkuckee through the use of your commercial facility would be able to have access, but they have to participate in the renting of the slip in order to have access?”

Aker answered, “The only other way would be for us to hoist their boat into the water and they pay that fee at the daily fee.”

Referencing Petitioner’s Exhibit 12, Aker testified that on February 23, 2009 Aker Properties filed a permit application under Section 404 of the Clean Water Act with the U.S. Army Corps of Engineers. On March 2, 2009, the Army Corps responded that a permit under Section 404 was not required. Referencing Petitioner’s Exhibit 1, Aker said that an IDEM Regional General Permit Notification Form was also filed with the Indiana Department of Environmental Management (“IDEM”). On March 24, 2009, IDEM responded a Section 401 Water Quality Certification was not required for the planned development. Referencing Petitioner’s Exhibit 14, Aker testified the Indiana State Department of Health (the “ISDH”) approved the construction of the cluster septic system in a letter dated September 10, 2009.

Jones asked, “Is it your opinion that the creation of this conservancy district is necessary in order to allow you to proceed with your request for the creation of the PUD?”

Aker answered, “We have to have municipal septic system, which the conservancy district satisfies that need.”

Jones continued, “But that then makes this creation of a conservancy district necessary?”

Aker answered, “Necessary.”

Jones continued, “Is it your opinion that this project holds the promise of economic and engineering feasibility?”

Aker answered, “Sure.”

Jones continued, “In other words, you’ve investigated enough to know that it can be done?”

Aker answered, “It can be done.”

Jones continued, “Do you believe that the benefits received would exceed the cost of the project?”

Aker answered, “Yes.”

Jones continued, “If the benefits received didn’t exceed the costs of the project, would you be doing it?”

Aker answered, “I don’t think so.

Jones continued, “Is it your opinion that the public health will be served by the establishment of the conservancy district and the creation of the cluster septic system with the Aero-tech pretreatment unit?”

Aker answered, “Without a doubt. The system is far better than individual septic units. It’s just the way to go.”

Jones continued, “And, also, because of the nature of the parcel of real estate that you own, you believe that this particular parcel is the proper area to serve as the conservancy district for your project?”

Aker answered, “Yes.”

Jones continued, “Do you have any doubt that the proposed district could be established and operated in a manner compatible with Lake Maxinkuckee?”

Aker answered, “No, not at all. I have no doubt at all. It will work just fine.”

Jones continued, “What have you done to investigate that particular aspect of the project with regard to the affect on Lake Maxinkuckee?”

Aker answered, “Well, there is no affect on Lake Maxinkuckee. We designed the plan to be 100% contained within our property.”

[Cross Examination by Snyder]

Stephen Snyder asked, “Is there any need for this district other than for the purpose of being a part of the development project for residential uses that you are proposing?”

Aker answered, “No.”

Snyder continued, “Is there an existing septic problem on the marina location that needs to be cured?”

Aker answered, “Not to our knowledge.”

Aker testified the residential units within the PUD can be used as part-time residences or "however an owner would use them." In addressing a question regarding the development timetable, Aker estimated the first phase of the PUD project, including construction and sale of the 47 residential units, would take 36 months to five years. Preliminary plans for Phase 2 and Phase 3 called for added residential units in different locations within the PUD. "There's a provision for Phase 2 and Phase 3, but they have yet to prove themselves yet".

When asked about the monthly costs associated with the cluster septic system, Aker answered he had not prepared a statement of the monthly expenses required to operate and maintain the cluster septic system. The costs would be passed through to the 47 villas and condominium unit owners as well as the Culver Marina, "but those costs are not yet known."

Snyder asked, "You testified that there would be benefits to the creation of this district. What are those benefits?"

Aker answered, "The only benefit that the creation of the district would be is to have the septic treatment plant."

Snyder continued, "So, there's no benefit to anyone at this stage, other than you, for the purpose for allowing the PUD to move forward?"

Aker answered, "Correct."

Snyder continued, "Because there is no correction of any existing sanitary problem that will result?"

Aker answered, "The marina will benefit once it's installed, because it will go online immediately."

Snyder continued, "But you indicated that there are no problems with the disposal system now in place?"

Aker answered, "No, but it only makes sense that if you have something state-of-the-art, to use it."

Snyder asked, "If that development were not to take place, what benefits would exist from the creation of this conservancy district?"

Aker answered, "None."

Snyder asked, "What have you considered as damages that could result from the creation of the district?"

Aker answered, "I have no idea."

When asked whether he was aware studies were conducted to determine impacts of the proposed conservancy district on the Kline Wetland and Lake Maxinkuckee, Aker responded the PUD and planned cluster septic system were "engineered to be within and strictly held, contained" within the conservancy district boundaries. The planned cluster septic system pre-treats the effluent, and effluent leaving the septic system would be "clear water" when entering into the septic field cells.

Aker testified that four retention ponds—constructed to handle a 100-year storm event—would be included to control surface water within the conservancy district boundaries. The storm water would be held within the ponds to percolate into the ground. Aker said weirs are also included within the drainage plans to catch any emergency overflow. The overflow would be directed to the existing wetlands within the conservancy district boundaries. The surface water management plan would also manage the water draining off the impervious areas within the district boundaries. Surface water within the proposed district boundaries "will not get to the Kline Wetland". He testified, however, he had conducted no studies or analyses regarding the impacts of surface water drainage to the Kline wetlands or to the wetlands contained within the proposed district boundaries. When asked about the maintenance of the retention ponds, Aker testified the retention ponds would be seeded and would require periodic cutting, but he had not discussed with an engineer any further maintenance requirement, such as for dredging.

Snyder asked, "At the time that you sell these 47 units, do you then walk away from the project other than as a user for the marina?"

Aker answered, "Correct."

Snyder continued, "You will have no ownership interest remaining after the last unit sells?"

Aker answered, "The only part will be the marina."

Snyder continued, "As a result, your obligation to provide maintenance for the detention areas or any other maintenance of any form would be merely your contribution from the marina, and the remainder of the expenses would be passed on to the condominium owners association?"

Aker answered, "Correct."

Snyder continued, "Are the villas part of the condominium?"

Aker answered, "Yes."

Snyder continued, "So, really you are not subdividing this land?"

Aker answered, "Not at all."

Snyder continued, “You are merely conveying undivided co-ownership interest in it along with the units?”

Aker answered, “Correct.”

Snyder continued, “So, there’s no subdivision of the land taking place, and all of the responsibility for maintenance of any of the facilities within the horizontal property regime would fall on the condominium owners association?”

Aker answered, “Correct.” Aker added that for unsold residential units, Aker Properties would contribute the share of any facility maintenance fee.

Snyder asked, “Because of the sensitive nature of adjacent properties, do you think it is necessary to go beyond Rule 5 compliance and put in additional sedimentation control because of the adjacent wetlands?”

Aker answered, “I would say that if during construction there was a need for any additional controls, then they would be put in place.”

Aker testified Aker Properties would be reimbursed for the $500,000 initial cluster septic system construction costs through sale of residential units, and with 47 units, the individual unit cost would be about $11,000. Construction costs for each residential unit would be about $200,000. Prices for individual units had not been determined.

Snyder asked, “Have you priced the undivided interest in the land as far as conveyances to perspective purchasers?”

Aker answered, “No.”

Snyder continued, “Have you priced the cost– – –?”

Aker answered, “I haven’t priced anything.”

Snyder continued, “So you don’t know if besides passing on this $11,000 per unit the costs are going to be so significant after a unit is constructed that you priced yourself out of the market?”

Aker answered, “I know that it won’t be.”

Snyder continued, “How do you know that?”

Aker responded, “I know what my building costs are, and I know what the market is here.”

Snyder continued, “So, I guess what I’m saying is, you are assuming that this will be economically viable, but without having put the numbers to it yet, you don’t know?”

Aker answered, “That’s all my risk and my gain.” Condominiums in Culver are selling from $300,000 to $500,000. He gave as examples condominiums located in The Cove, Chadwick Shores, Bayside, and The Harbor developments. He conceded, however, the condominiums in those developments offer a boat slip to the unit owner.

Snyder asked, “Have there been any off lake developments that do not provide a form of lake access as part of the ownership in this community that have been economically viable?”

Aker answered, “I don’t know.”

Snyder asked, “So you believe that your project, without lake access, will entitle you to obtain a purchase price for these individual units equivalent to those condominiums developed on [Lake] Maxinkuckee, which have direct pier spaces available?”

Aker answered, “Correct.” Aker testified he has spoken with realtors to verify an equivalent purchase price of the PUD residential units to those obtained for condominiums with lake access, such as a pier or boat slip. The purchase price of a condominium or villa would include costs associated with the construction of the pool, tennis courts, and a physical activity field. The monthly condominium owner association fee would be approximately $250 and would be used to maintain the cluster septic system and other community facilities. The roads within the PUD would be private, and the condominium owners association would be responsible for road maintenance.

Aker testified a boat slip rental fee at the Culver Marina boat is $1,250 per year. The Culver Marina also provides a daily service fee of $50 for putting in and taking out a boat. Residents of the PUD would pay the same boat slip rental fee as anyone else.

Aker testified “at least one” of the 4-plex condominiums and “maybe one, two, or three” of the villas will be constructed on speculation.

[Cross Examination by Welch]

Brian Welch asked, “In order for the conservancy [district] to support itself, you’ve got to sell those condominiums, and you’ve got to sell those villas, right?”

Aker answered, “Correct.”

Welch continued, “Without those sales, it won’t support itself?”

Aker answered, “That is correct.” He testified 20 units would need to be sold for Aker Properties to “break even”. Culver Marina, as a member of the condominium owners association, would “probably have three shares”.

Welch asked, “What is the plan for taking care of the runoff and the sewage in Phases 2 and 3” of the PUD project?

Aker answered, “There are no plans. We haven’t gotten that far. We are here to talk about Phase 1.”

Welch continued, “So, you are not seeking approval for Phases 2 and 3 today?”

Aker answered, “Not at all.”

Welch continued, “Are you seeking to include those phases in the conservancy district?”

Aker answered, “The property is within the PUD. Correct.”

Welch asked, “What separates [the PUD project] from the effort to develop the lots around the golf course, the effort to sell the property over at Gaskill’s property? What separates you from either one of those efforts, which have not been successful?”

Aker answered, “I don’t want to degrade anyone’s project, but go look at the lots at Mystic Hill. Would you buy one? They are huge. You would have to take care of that lot.” The PUD project is “of value” because the location is “within walking distance” to Culver Marina, and “it would serve those harbor customers that we have that would like to have a place at Lake Maxinkuckee. Basically, it would be out of the hustle and bustle of The Cove, where they have transient people. Yes, I think it has a value.” He testified a residential unit in the Maxinkuckee Village PUD would have the “same value” as lakefront property or property with lake access.

Aker explained that Aker Properties represented to the Culver Plan Commission that no development in any part of the PUD would provide for pier ownership or direct lake access, and the condominium owner’s association declarations would also include this limitation.

In referencing Petitioner’s Exhibit 15, Aker testified several of the 15 signed petitions in favor of the proposed conservancy district were from “three or four” employees of Aker Properties or its subsidiaries, from Culver Marina slip renters, and from others.

[Direct Examination by Jones]

Mark Vondra testified he has been a registered land surveyor since 1988 but has been conducting field work since 1976. As requested by Aker Properties, he prepared the topography and the boundary of the proposed conservancy district as depicted on Petitioner’s Exhibit 2, as well as the horizontal design for the roads within the proposed district and placement of the 47 residential units.

Vondra testified after complete build out of the PUD contained within the proposed conservancy district, the impervious land surface, such as roads, driveways, and roofs of each building, was calculated to be 4.85 acres. This area “does not include the impervious land surface on the Culver Marina property.” Impervious land surface

existing in the Culver Marina property is 5.64 acres. Referencing Petitioner's Exhibit 16, Vondra testified the Lake Maxinkuckee Watershed is 8,850 acres.

[Direct Examination by Jones]

Tim Monaghan, a Registered Soil Scientist, testified he holds a Bachelor's of Science and Master's Degrees in Geological Science from Michigan State University. He is a registered soil scientist through the Soil Science Society of America and holds certification through the Indiana Registry of Soil Scientists. He has been employed for 15 years with Lang, Feeney, and Associates ("Lang Feeney"), engineering and surveying firm located in South Bend, Indiana.

Monaghan testified a developer is responsible for erosion control within the proposed conservancy district boundary until construction is complete, which "includes selling the 47 villas and condominiums". The developer is also responsible for the installation and maintenance of any erosion control measures required during construction.

Monaghan testified he became involved in the PUD project in 2009. Lang Feeney contracted to prepare a property wetland delineation which "defines any wetland on the property". The wetland delineation was forwarded to the Army Corps's Indianapolis Office for review and comment. The Corps responded by letter on March 2, 2009 and "concurred with the delineation and a permit was not required, because we were going to do full avoidance of the wetlands onsite." He testified Lang Feeney contracted to provide plans for drainage management, erosion control, and the layout of the cluster septic system for the PUD.

Referencing Petitioner's Exhibit 2, Monaghan explained there are three separate sections, designated as A, B, and C, within the proposed conservancy district drainage plan. The surface water is "directed into specific areas" within the section.

Jones asked, "What is it that controls the configuration of these three specific areas?"

Monaghan answered, "Normally, it's by, for a lack of a better term, a 'watershed area'. The water all drains to a specific area anyway, so we just kind of re-direct it."

Monaghan said in Area A the surface water would be directed from the roadways, driveways, and roof surfaces into a north retention basin or a south retention basin. The retention ponds would be constructed "usually three or four feet deep" to hold water based on drainage calculations. Roadways are usually constructed to include curves, gutters, and piping conveyances, "but since we knew it was an environmentally sensitive area with onsite wetlands, we used roadside ditches with grass waterways which channel the water to the retention areas."

Monaghan testified the drainage plans for Areas B and C would include fore bays. These are retention basins with an overflow weir. If the retention basin reaches maximum water retention capacity, the storm water would overflow and be directed to an armored weir to

provide additional sediment control before the water would enter onsite wetlands. "The purpose of the weir is so that if there is access water from storm events, the water safely goes into the wetland area without impacting the wetlands" located directly south of each of the retention basins in Areas B and C. The existing wetlands would "serve as the final depository of the storm water." The retention basins were designed to hold a 100-year storm event, which in Marshall County would be 5 ½ inches of rain in a 24-hour period.

Jones asked, "Is there any probability then that this wetland area is ever going to become saturated to the point that water will overflow?"

Monaghan answered, "It would be pretty small."

Jones continued, "What would have to happen in order for it to overflow?"

Monaghan answered, "For wetland Area A, there would have to be approximately three feet of extra water. For C, would be, I think we figured out about 4 ½ feet of water. I really didn't look that close at B. We were mainly looking at C to see if the water would leave the site. It doesn't appear like it will leave the site".

Jones continued, "When you say, 'It doesn't leave the site,' what does that mean?"

Monaghan answered, the water "will stay in the site and percolate into the ground."

When asked whether surface water within the proposed conservancy district would be directed to Lake Maxinkuckee or the Kline Wetland area, Monaghan responded the surface water drainage plan would not direct surface water into the lake or into the offsite wetland. All surface water would be contained onsite.

Monaghan testified Petitioner's Exhibit 3 "more clearly" depicted the retention basins, weirs, and the onsite wetlands. The sewage collection pipelines would "for the most part" be located in roadways of the proposed PUD as depicted in Petitioner's Exhibit 5.

Jones asked, "Once the effluent gets to the collection site, what is done with it?"

Monaghan answered, "It's treated."

Jones continued, "In what way?"

Monaghan answered, "With the Aero-tech treatment units."

Jones continued, "And then what happens to the effluent?"

Monaghan answered, "The effluent from the Aero-Tech units goes into a pump chamber, which is pumped up to a central dosing chamber at the top of the hill." The central dosing tank is labeled "11" on Petitioner's Exhibit 5. Monaghan said the dose volume in the central dosing tank is set at approximately 700 gallons. "Every time you get 700

gallons of effluent in that tank, it is pumped into one of the cells and then cycles through each cell." The field cells are designed as a "French drain system". Eight field cells are located in Area B, and two cells are located in Area A.

Monaghan explained Petitioner's Exhibit 7 is a detailed design of the ten field cells. The "trench bottom elevation" of each cell is indicated. Each cell is approximately 2,500 square feet and contains nine trenches that are 95 feet long.

Jones asked, "The cells would be similar to what we might think of as a leach field?"

Monaghan answered, "A conventional drain field. Yes."

Jones continued, "What's the difference between these cells and a conventional drain field?"

Monaghan answered, "Not much."

Jones continued, "What's the difference between the effluent leaving the dosing tank as opposed to the effluent that goes into the conventional leach field?"

Monaghan answered, "It's highly treated."

Jones continued, "What's the result of the treatment?"

Monaghan answered, "The water is basically surface water quality. There are some differences, but it's pretty much surface water quality."

Jones continued, "And, when you say 'surface water quality,' what does that mean?"

Monaghan answered, "With some small modifications to the system, it could be actually pumped into a surface body of water."

Referencing Petitioner's Exhibit 8, Monaghan testified the cluster septic system has eight aerobic treatment units that are designed to handle 3,000 gallons of effluent per day and are located within the aerobic treatment building. Raw sewage from the collection system "goes into the trash area of the 40,000 gallon tank, then there's a surge area of the tank that has individual pumps, which pump effluent" into the aerobic treatment units. "It's set up to be a batch system, so we can bring the treatment units online, one at a time, as it is required." The treatment system is designed to handle a total of 25,000 gallons per day. The sewage is pre-treated in the aerobic units and sent to the pump tank where it is pumped up to the central dose tank. The Indiana State Department of Health approved the cluster septic system plan "subject to the conservancy district being formed".

Monaghan testified Lang Feeney submitted to the Marshall County Soil and Water Conservation District ("Marshall County SWCD") an erosion control plan for the PUD. The Marshall County SWCD approved the erosion control plan in its letter of March 18,

2009.[3] Referencing Petitioner's Exhibit 10, Monaghan explained the drainage plan was a basis for the erosion control plan. To protect wetlands, silt fencing would be installed during construction upstream of the onsite wetland areas. There would be a permanent seeding mix of the grass-lined swales along the roadways, riprap around the outlets into the retention areas, and two construction entrances.

Jones asked, "Does this plan contain all of the sediment transported by water on the 55-acre tract?"

Monaghan answered, "Yes, it does."

Jones continued, "And, what would happen if the plan did not contain all of the sediment transported by water on the tract?"

Monaghan answered, "It would be in violation of the rule."

[Cross Examination by Snyder]

Stephen Snyder asked, "Is there any reason in this case to design an erosion control plan that might be in excess of the requirements of Rule 5?"

Monaghan answered, "The rule actually makes provisions for field modifying structures and practices as needed. So, if something was needed in addition to what was designed, then it could be incorporated into the plan." Modifications could be made during construction. A developer is "supposed to self-inspect and to provide those [modifications] to the governing body."

Snyder asked, "Once construction is concluded in this project is there going to be any continued need for maintenance of the erosion control designed into the project permanently?"

Monaghan answered, "It's normally taken over by the county drainage board."

Snyder continued, "These are not any form of regulated drain, are they?

Monaghan answered, "Usually they are. Usually, once the project is completed, then the drainage board takes it over as a county drain."

Snyder continued, "So you are suggesting that the retention basins, the wetland areas onsite, and the grass side ditches are going to be maintained by the county at some point?"

Monaghan answered, "Yes."

Snyder continued, "Have you verified that in Marshall County?"

[3] Petitioner's Exhibit 17.

Monaghan answered, “I cannot speak to Marshall County, but in St. Joseph County and Elkhart County, that is correct.”

Snyder continued, “So, if you are correct, then Aker Properties, as the developer, and Maxinkuckee Village as a horizontal property regime, has no obligation to maintain these erosion control facilities once they are constructed?”

Monaghan answered, “Once they are constructed and approved by the county.”

Snyder continued, “What type of maintenance would be required once they are constructed?”

Monaghan answered, “Mowing.”

Snyder continued, “Anything besides that?”

Monaghan answered, “Usually, no.”

In response to a question about the difference in construction between the field cells that are a part of planned cluster septic system and a standard drain field for a regular septic system, Monaghan testified a standard septic field is “50% smaller”. The trenches would be constructed 18 inches deep. 80 soil borings were performed, and based on the soil modeling, the ground water table in the area of the planned cluster septic system is “greater than 84 inches”. The Indiana State Department of Health requires either a 30-inch or 24-inch separation from the water table to the bottom of a field cell. The soil modeling indicates the highest water table that would occur in the area.

Monaghan testified the cluster septic system plan does not include an alternative site within the conservancy district boundaries that is set aside to locate a replacement field cell in case of future cell failure. He did not know of an alternative location within the boundaries of the conservancy district where an additional cell could be placed in the event of a cell failure.

Snyder asked, “As a soil scientist, do you have an opinion of what is the best method for treating residential sewage of all the methods that are available?”

Monaghan answered, “This system is probably the best.”

Snyder continued, “Better than a municipal sewer system?”

Monaghan answered, “Yes.”

Snyder continued, “You are saying that the water that’s discharged from the Culver municipal treatment plant would have a lower quality than the water that ultimately is being discharged into these cells?”

Monaghan answered, “I can’t speak to that. I don’t know what the data is at Culver.”

Snyder continued, “If you could design a municipal sewer system that didn’t have combined storm and sanitary sewer, isn’t a municipal system with one treatment plant maintained by a municipality, which has taxing authority, a better method than a condominium association maintaining a sewage treatment facility?”

Monaghan, “That’s not always true. There are many areas in the United States where they are taking housing units off of municipal sewer systems.” But he was not aware of any Indiana communities that were being disconnected from municipal sewer systems.

Monaghan said the maintenance of the planned cluster septic system would consist of occasionally checking the pumps for proper functionality and to “make sure we are feeding the correct amount of liquid to each of the units, which is about 65 gallons every half hour. That’s about it.”

Snyder asked, “Ultimately, after treatment, there is relatively clear water coming out of this treatment facility. What happens to the sludge that’s accumulated by that treatment?”

Monaghan answered, “Of what I have seen of their trials in Texas, for a year, there is no sludge accumulated. The way the system works is that it mixes constantly, re-suspends solids, which are then treated.”

Snyder continued, “So, you’re saying that ultimately it is treated to such an extent that there is clear water coming of the treatment plant and the sludge disappears?”

Monaghan answered, “That’s correct. Well, I should say that there are some solids collected into the trash portion of the collection tank.” He explained the treatment system activates the sludge with oxygen. “Most of these aerobic units do not mix solids and re-suspend them. They are allowed to settle out, and that’s why you get accumulation.”

Snyder asked, “But this one does not allow it to settle—keeps it suspended—keeps re-treating it until there is nothing left?”

Monaghan answered, “Correct.”

Monaghan testified the cluster septic system contains a duplex pump system in the lift stations with individual maximum capacity to pump 40 gallons of effluent per minute. Each pump would cost about $500.

Monaghan testified retention areas are designed as dry basins. The drainage plan includes weirs to direct water to the onsite wetlands if the retention basins overflowed. The retention basins would be used to retain water in order for sediments to settle out. If a rainfall event resulted in overflow into the weir, sediment might deposit into the onsite

wetlands, but "most of it should be dropped in the quiet area and retention area." He added, "If you get enough sediment in a wetland, it can choke off the vegetation."

Snyder referred Monaghan to Petitioner's Exhibit 2, specifically to the southeast wetland area. He observed the elevations immediately adjacent to the wetland are approximately 744 feet and the elevation is approximately 752 feet at the back of three or four of the proposed villas. He suggested it appeared runoff from the villa roofs would not be directed to the retention areas but would drain directly into the wetlands. Snyder asked, "Are there areas where [storm water runoff] doesn't go through the retention area?"

Monaghan answered, "I think the drainage system is mainly for hard surfaces. And, so, if the water is already going that way in that area…that water is going that way anyway".

[Cross Examination by Welch]

Brian Welch asked, "The treatment of the water coming off the roofs has not been designed yet, is that right?"

Monaghan answered, "Yes."

Welch continued, "All the calculations that we have been talking about here do not take into account the water coming off of the roofs of the units, is that right?"

Monaghan answered, "Well, we used the impervious surface that was given to us by the land surveyor."

Welch continued, "There's no design today for how the water coming off the roofs is going to be handled, is that right?"

Monaghan answered, "Most of it is assumed to be going into the grass-lined ditches along the roadways."

[Direct Examination by Jones]

Dan Papczynski testified he is an employee of Aero-Tech, a manufacturer of aerobic wastewater treatment systems. An aerobic treatment system is a sewage treatment system "just like a municipality has. It's just shrunk down into a smaller tank and treats residential wastewater." He testified Petitioner's Exhibit 20 was a wastewater technology report from National Sanitation Foundation (the "NSF®"). NSF® is the "governing body" for Aero-Tech and is an inspection and testing agency for "basically everything that has to do with water." He testified Petitioner's Exhibit 21 is a promotional DVD showing a treatment system treating 500 gallons per day, which is a smaller version of the proposed cluster septic system for the conservancy district.

Papczynski explained that once a commercial sewer treatment unit is installed in Indiana, such as the proposed cluster septic system, the commercial unit would have a licensed

operator under contract with the owner of the treatment system. A licensed operator "carries a Class II operating license. They will also be certified through Aero-Tech, certified in order to work on the aerobic treatment unit. If they are not certified, they cannot get into the unit." Papczynski explained the licensed operator for the proposed cluster septic system would sample the effluent once a month for the first year testing for TSS, which is total suspended solids, the amount of solids that go out in the effluent, and BOD, which is the biological oxygen demand. The samples are tested by a company in South Bend, and the cost per sample is $175. There are licensed operators in Marshall County. After the first year of system operation, testing is required quarterly. Maintenance of the sewer treatment system "can run between $2,000 and $6,000 per year," including the required testing.

Papczynski testified a licensed operator could track the electronics required for the operation of the sewer treatment system through online access. A licensed operator "can get online and actually see [the system] run from virtually anywhere in the country." A cluster treatment system contains "several fail-safe alarms" to notify the licensed operator of high water, malfunctioning pumps, and other notifications. The alarm would sound at the treatment facility complex, as well as through remote reporting or telemetry.

Papczynski testified that after the first year of operation, the frequency of sampling of the effluent would be reduced from monthly to quarterly. Treatment technology introduces air into the sewage resulting in the growth of aerobic bacteria. A typical residential septic system is anaerobic. "It's very slow." Test results would be sent to the treatment facility owner, Aero-Tech, the Marshall County Health Department, and the Indiana State Department of Health. "In order to have a system pass NSF®, the testing agency, it has to be less than 30ml/l TSS and BOD." The TSS and BOD levels in a regular residential septic tank are "in the 120s to 150s." Typical TSS and BOD level requirements for municipal sewer treatment facilities are "less than 10ml/l, and the proposed cluster septic system runs 5ml/l TSS and 6ml/l BOD."

Papczynski testified the electrical expense to run the proposed cluster septic system "will probably be $2 to $3 a day per cell. There are eight of them so it would be $16 a day."

Jones asked, "How many cells do you think will, in fact, be used by the project once the project is completed?"

Papczynski answered, "It's our opinion that at a maximum there will probably be running between five and six cells. The eight cells represent the 25,000 per day. Indiana has a standard that we follow and that's how this was designed, but it is, in our opinion, a little bit extreme on the amount of water that they say we actually use."

Jones continued, "There were also questions about replacement of a leach field if there was a failure. How does your system handle that?"

Papczynski answered, "If you did have a cell that went offline or failed for whatever reason, an existing cell can be retrofitted. I mean, you can go through the permitting to

get that field redone. There are other technologies. There's different ways of disposing of effluent—subsurface drip irrigation, which is real popular in a lot of states."

Jones asked, "So, if there is a failure of a cell, there are multiple ways to address that particular problem?"

Papczynski answered, "Yes, there is."

Papczynski testified the proposed cluster septic system is site specific. "What's unique with this system, and with a lot of lakeside communities that we see, is that the usage is so drastically changed from summer to winter to that they may be only running 3,000 gallons a day. Then come 4th of July they may be up to 20,000 gallons…. Being able to regulate [the system] and bring cells online as usage goes up is the best way of doing it." The cells are designed to treat 3,125 gallons per day. The central dosing tank is able to handle 40,000 gallons, which is "double the requirement", in order to handle surge capacity. He testified the Indiana State Department of Health has approved the application of the proposed cluster septic treatment system subject to the creation of the conservancy district.

Papczynski testified he was aware of several municipal sewage treatment facilities that have had raw sewage overflow into waterways, such as Indianapolis White River Sewer System and South Bend treatment plant. The main reason for overflow is the systems are combined with storm water sewers.

Jones asked, "Can that happen in your system as it is designed in this project?"

Papczynski answered, "There's no way for this [effluent] to get out". He explained the "trash tank" would need to be inspected by the maintenance provider. "In between three and five years, you may have accumulation of non-biodegradables—plastics—so that it may need to be pumped out" at a cost of approximately $500. The planned cluster septic system has a five-year warranty on the pumps and other components, and the cost per pump is about $600. Since Aero-Tech has the NSF® mark, Aero-Tech is certified in Indiana and approximately 45 other states.

Papczynski explained the proposed cluster septic system was designed to treat residential sewage and the effluent produced from commercial operations within the proposed conservancy district, the Culver Marina, and the restaurant. A lift station would be installed to bring the effluent from the restaurant to the collection area, which "the amount at the restaurant is small compared to the overall. So, you will actually be diluting that down before we treat it. So, it's not like we will be treating just the wastewater from the restaurant."

[Cross Examination by Snyder]

Steve Snyder asked, "Did you make any investigation to determine what type solutions, what wastewater, what anything might be coming from the marina operation?"

Papczynski answered, “What we have now with the data is the restrooms.”

Snyder continued, “You are not aware of any other substance other than typical wastewater that would be coming in, such as the accumulation of acid for hull washing or cleaning agents, or anything like that?”

Papczynski answered, “No. I’m not aware of anything.”

Snyder asked, “Did you run any tests on the existing septic system at the marina to determine whether there were floor drains or anything else going into that septic system?”

Papczynski answered, “No.”

Papczynski explained the proposed sewer treatment system has had “a lot added to it for redundancy, like I said, like telemetry so that you can get online. That is also for the State and for the locals. They can take a look at this so that they can understand it also.” For the electrical system “every lift station and the controls are set up for a generator” during power outages.

Snyder asked, “Do you know whether it’s the developer’s intent to install generators on each lift station and on the pretreatment facility?”

Papczynski answered, “He would only need one generator that would be mobile. He can move it, pump the stations down because they have a holding capacity, and then take [the generator] to the treatment facility. It’s not something that needs to run continuous.”

Papczynski stated that the Indiana State Department of Health is the approving authority for Aero-Tech wastewater treatment systems. Aero-Tech has installed 3,000 gallons per day treatment systems in Indiana, but the proposed system is the “first one of this size.”

Snyder asked, “So, the largest of these systems in Indiana is 3,000 gallons per day, and this one is 25,000 gallons per day?”

Papczynski answered, “Made up of 3,000-gallon cells. Correct.”

Snyder asked, “Have you installed a 25,000-gallon per day system in any other state?”

Papczynski answered, “No, we haven’t.”

Snyder asked, “What’s the largest system before this one that you’ve designed and actually installed?”

Papczynski answered, “We’ve got more designed, but actually up and running is the 3,000 gallons a day”.

Snyder asked, “Did you or your company design the layout of the cells in this particular system?”

Papczynski answered, “No, we did not.” Aero-Tech would be onsite when the treatment system was installed. A licensed contractor, certified by Aero-Tech, would be onsite to monitor installation of the pretreatment facility and field cells. “There are licensed and certified contractors in Marshall County—Stone Excavating and Haskins Excavating.”

[Re-Direct Examination by Jones]

Fred Jones asked, “Do power outages also occur at municipal wastewater treatment facilities?”

Papczynski answered, “Yes, they do.”

[Direct Examination by Jones]

Alan Collins testified he is a real estate developer and contractor. He is President of Construction Management & Design, Inc., established 19 years ago. He has been in construction and development for 39 years, mostly in Northern Indiana, but has also been active in Central and Southern Indiana and in other States. Cole testified he is also experienced in the purchase and sale of real estate.

Collins testified, “Over the last two years, to be conservative, we’ve had between the real estate company, the brokers, and myself—meetings that I have personally set in—an estimate of between 35 and 40 genuine discussions with significant interest” in Maxinkuckee Village. No villa or condominium unit has been pre-sold, but “I believe we can have between four and eight pre-sales, once we price the project, very quickly.”

Collins testified Maxinkuckee Village offers “substantially different culture and lifestyle than the comparative projects that have been non-lake projects around the community.” He added, “Between the golf course and the amenities, the lifestyle that the baby boomers want in this kind of development where they don’t have to mow the lawn; they don’t have to take care of the outside of the home; and where they can come and go as they please and enjoy the rest of their life without a lot of maintenance and personal responsibility to do the work.” The planned unit development offers “a lot of advantage because it meets a price point that needs to be met.” Amenities such as the pool, tennis courts, the marina, and restaurant “are going to be very desirable.” Collins said “rapidly rising” property taxes in Culver has caused property to come on the market “simply as a result of the excess cost for real estate taxes.” Another advantage to the planned Maxinkuckee Village is the construction and site development costs and feasibility of the project “certainly worked at that time, but costs in the last 24 months have decreased significantly.”

Collins testified he has participated in developing 13 other condominium projects, as an owner and developer, with three located in Marshall County. He said a developer is

responsible for paying the monthly facility assessments during development of Maxinkuckee Village. "From day one, the discussion was very specific about making sure that we had the ability to make the maintenance, reserve replacement, monthly assessment work" for the PUD within the conservancy district boundaries. Construction Management & Design, Inc. would be the general contractor for Maxinkuckee Village.

Fred Jones asked, "Do you understand…there are a lot of rules and regulations that are imposed by various State agencies that have to be met during the construction process?"

Collins answered, "Yes, I do."

Jones continued, "Are you prepared to comply with and meet those requirements?"

Collins answered, "Yes, we are."

Collins testified Construction Management & Design, Inc. is currently participating in a feasibility study to construct a sewer collection facility for an established LaPorte County conservancy district. The City of LaPorte cannot fund an extension of its sewer facility to the conservancy district boundaries. The conservancy district was formed to cover costs for extension, construction of collection system, and sewer facility impact costs.

Jones asked, "Is municipal wastewater treatment facilities currently available to the Aker Properties site?"

Collins answered, "No, it is not."

[Cross Examination by Snyder]

Stephen Snyder asked, "Have you ever personally developed a condominium project, which, as a part of the owner assessment, common area assessments, would include assessments of operation of a sewage treatment facility?"

Collins answered, "No, sir."

[Cross Examination by Welch]

Brian Welch asked, "What is your relationship to the proposed plan unit development?"

Alan Collins answered, "Strictly a professional relationship, as a contractor-developer, and as a consultant?"

Welch then asked, "You expect to be the general contractor on the project, is that right?"

Collins answered, "Yes."

Welch asked, “If you are going to be the general contractor on the job, how many employees will you have on the site?”

Collins answered, “Well, as of right now, I would estimate at the ground breaking this year I would have between ten and 20, depending on the time of development, what phase it was in.”

Welch asked, “What kind of work will they be doing?”

Collins answered, “My employees can do excavation. They can do electrical. They can do carpentry work. They could do foundation work, flat work…concrete. … Depending on the economy, we can use subcontractors, or we can ramp up with employees.”

Welch asked, “You indicated that your sister is a potential purchaser of a unit in this development?”

Collins answered, “Yes, she is.”

Welch continued, “That you have given her an anticipated price?”

Collins answered, “Yes, I have.”

Welch continued, “What’s that price?”

Collins answered, “Between $450,000 and $500,000” for a villa. The purchase price for a unit in the 4-plex condominium building would range from $340,000 to $390,000.

Collins added that he was involved in the development of Beachview and Bayside Condominiums, which has a pier with access to Lake Maxinkuckee. Pretty View Condominiums is a 43-unit development at the Plymouth Country Club. Pretty View “does not have any lake rights nor lake access.” He has also constructed and remodeled single family dwellings on Lake Maxinkuckee.

Welch asked, “Any litigation or administrative proceedings come out of any of those projects?”

Collins answered, “If you are trying to remember something that happened, and you help me, I will be happy to try to remember it”.

Welch said, “Well, I had understood that on the South Shore that you had built a wall out on a public easement along the east side of the property, and that there was an enforcement proceeding to force you to move the wall back off the public easement. Is that anywhere close to the truth?”

Collins answered, “Mark Aker’s home—some five or six years ago—I had a survey. I built the retaining wall on the east side of his home based on the survey that I had. There

was a discrepancy in the survey, and the county commissioners came out and said they disagreed with the survey. So, we had another survey; and once we had the survey re-done, we were in a disagreement. We solved the disagreement, and I moved a portion of the wall and left rest of the wall in place."

Welch asked, "Did you solve the disagreement through an administrative proceeding? Is that what happened?"

Collins answered, "No. No. I agreed to what the county commissioners asked me to do. The county attorney sent me a memorandum, and I sent one back is all I remember doing. It had to do with where the mailboxes are and where the curve with two intersecting roads, South Shore and Sycamore meet. We took the opinion that because of the survey brought it to a point up by the mailboxes that the line would be a straight line. The county wanted the radius maintained where the street had encroached on the property line. They took the position that because of that radius that we had to maintain that radius that pre-existed. At the same time, negotiated to move my takeoff point about four or five feet plus take that radius off and realign that one piece".

Welch then asked, "Any other enforcement or administrative proceedings like that?"

Collins answered, "The only other thing I was involved in that comes to mind would be on Sycamore Road where what was the Bob Taney Subdivision where the IDEM and I had a disagreement on the way I replaced a 12-inch tile. I was accused of digging out the creek, which I did not do. And, we had a 12-inch clay tile going through behind the home. One could drive down the road and look and see us replacing that tile, and could easily make the assumption that we were digging the creek out largely because that tile, at one point, was a creek. But Army Corps of Engineers and IDEM came out. I had a stop work order put on the job. Within about a two week period we had the approval to go forward, and we did exactly what we had always planned to do."

Welch then asked, "Any others?"

Collins answered, "We had a pier dispute when we built Bayside. That was about the angle of the property lines as they entered into the lake."

Welch then asked, "How did that get resolved?"

Collins answered, "That went to administrative [hearing] and was ruled on by an administrative law judge. And, it resulted in identifying the pier area that was going to be allowed for Bayside and its adjacent neighbors. It was a debate about whether the property line extends into the lake as it starts into the lake or does it go some different angle".

Welch then asked, "Any others?"

Collins answered, "I can't think of anything else.

[Re-Direct Examination by Jones]

Fred Jones asked, "With regard to the Pretty View condo project, how was the effluent treatment handled there?"

Collins answered, "It has a dosing system, which is a conventional septic system as far as the field goes, but it has a several collection tanks. I believe there were three fields there and the fields are alternated with a dosing system. There is no pre-treatment for that; that was done 30 years ago. They just ran municipal sewer right past that area."

Jones then asked, "Did Pretty View connect with the municipal sewer?"

Collins answered, "Pretty View did not connect. I thought they should, but they didn't."

Jones then asked, "You no longer have any control of the Pretty View project?"

Collins answered, "No, I don't."

(2) Remonstrators and Supporting Evidence

Stephen Snyder admitted, through various witnesses, and without objection[4], the following exhibits:

> **Remonstrators' Exhibit A**: Site Assessment Report, Lake Maxinkuckee Environmental Fund – Kline Wetland, Marshall County, Indiana, July 31, 2009;
> **Remonstrators' Exhibit B**: Lake Maxinkuckee Lake and Watershed Management Plan, October 2005;
> **Remonstrators' Exhibit C**[5]: Project Manual, Lake Maxinkuckee, Kline Ditch: Restoration of Maxinkuckee Wetland Conservancy Area (Handwritten date, July 30, 1990);
> **Remonstrators' Exhibit D**: Culver, Indiana, Zoning Ordinance, July 2001; and
> **Remonstrators' Exhibit E**: Petition in Opposition to the Creation of the Proposed Sewer Conservation District to Serve a Planned Unit Development Adjacent to the Culver Marina at the Southeastern End of Lake Maxinkuckee containing 712 signatures; and
> **Remonstrators' Exhibit F**: Lake Maxinkuckee, Google Maps, February 2, 2010.

Snyder then introduced persons to testify in opposition of the proposed conservancy district. Their sworn testimony on direct and on cross examination is summarized below.

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[4] See discussion regarding admission of Remonstrators' Exhibit D on pp. 42-43, of this report. The Petitioner has not supplemented the record.

[5] Remonstrators' Exhibit C, as compared to the electronic version posted to the DNR, Division of Fish and Wildlife's Internet Site (http://www.in.gov/dnr/fishwild/files/Proj_Manual-Kline_Ditch-Maxinkuckee-Marshall.pdf), does not appear to contain the last four pages under the heading "Landscape Construction" (02491-3 through 02491-6), as well as the remaining material as reflected in the "Table of Content" on page TC-1.

[Direct Examination by Snyder]

Scott Namestnick testified he has been employed with JF New in Walkerton, Indiana, since September 1998 and serves as a Botanist and a Senior Ecological Resource Specialist. He graduated in 1998 from Miami University with Bachelor's Degree in Botany and a focus in Environmental Science. He previously worked for The Nature Conservancy and for the Missouri Department of Conservation in a seasonal position. His "largest responsibility" is monitoring mitigation wetlands. He conducts botanical inventories, wetland delineations, and supports the company's native plant nurseries.

Namestnick testified he supervised preparation of the Site Assessment Report[6] for the Kline Wetland (the "Kline Wetland Assessment") The Kline Wetland is adjacent to the proposed conservancy district. The Kline Wetland Assessment described the condition of the wetland "at the times that we were there in 2009". The Kline Wetland was assessed for floristic quality, quality of plant community, plant mapping, and endangered, threatened and rare species. The Ohio Rapid Assessment Method Evaluation was used to determine the functional quality of the wetland. He testified the proposed conservancy district is directly north of the Kline Wetland.

Snyder asked, "What was your conclusion in regard to the quality of the Kline Wetlands?"

Namestnick answered, "Overall, it ranges in quality from some areas that are fairly poor quality and fairly degraded to other portions of the site that are high quality natural communities. Specifically, portions of the sedge meadow community, which is near the middle of the site, are one of the highest quality portions of the site." The emergent marsh, which is located north end of the Kline Wetland, was "of moderately high natural area quality." The Floristic Quality Assessment was examined plant species that are on the wetlands site and ranks the site based on "what those plant species are and the conservatism of each of those plants species how likely that species is to grow in a natural wetlands condition of that type of wetlands." He testified "weedy plants" have low conservatism values, and plant species only found in a certain pre-settlement habitat have higher conservatism values. "Pre-settlement," which pre-dates European settlement of the area, is the basis by which ecologists evaluate wetland systems.

Namestnick explained the Ohio Rapid Assessment method assessed the functional quality of the Kline Wetland. There are six metrics used to score wetlands, which include the wetland area, upland buffers, surrounding land use, hydrology, habitat alteration and development, special wetland situations if there are endangered species, or a special wetland type such as a bog or a fen, community inter-dispersion and microtopography. The scores are tallied, and the final score is put into a category ranging from 1, which is the lowest quality wetland, to 3, which is the highest quality.

Snyder asked, "Overall, what were the results of your assessment of the Kline Wetland?"

[6] Remonstrators' Exhibit A

Namestnick answered, "Overall, it ranked fairly average, I would say, as far as the floristic quality assessment goes. The reason for that was that there are very low quality degraded communities that brought down the overall floristic quality score. Our mean conservatism value was 3.0 on the site…. If we were just to look at the marsh or sedge meadow independently, those, we feel, would have much higher value…, and they would be representative of intact communities" pre-settlement.

When asked to explain the causes of wetland degradation, Namestnick explained that "it's widely thought that anthropogenic" or human disturbances have "led to the degradation of the natural communities" such as development. "Any small impact can have a much larger and longer lasting effect than you would think than just the impact itself". He said that nutrients added to wetlands cause conditions where invasive species are able to invade. Namestnick said changes in the hydrologic regime whether draining or adding water to the wetland can change the natural plant community into "something that's more dominated by invasive species." He added, "When an invasive species takes over, it often creates a monoculture situation, which decreases the overall biodiversity. It affects the habitat that native insects, birds, and other animals survive in."

Namestnick testified the Kline Wetland is included in the Lake Maxinkuckee watershed. Wetlands serve to filter sediment and nutrients, and "currently the Kline Wetlands is doing a very good job of that with Kline Ditch running through it. It's filtering some of those sediments before they reach Lake Maxinkuckee." He testified he believed Kline Ditch was the largest tributary of the lake.

Referencing the Kline Wetland Assessment[7], Snyder asked whether the proposed Maxinkuckee Village development was considered in the assessment.

Namestnick replied JF New was aware of the proposed development, but development plans were not available at the time of the wetland assessment. "We didn't have the plans in front of us so we didn't know how storm water or runoff would be treated before entering the Kline Wetland or if it would enter into the Kline Wetland." Any additional nutrients—salt and oils from road runoff, changes in hydrologic regime or anything like that that would get to the Kline Wetland—would have a "detrimental effect". He testified groundwater may carry nutrients to the wetlands. "There's only so much that a wetland can handle as far as nutrients go. If the Kline Wetland ever exceeds that amount, it's going to lose its capacity to filter nutrients before they get to Lake Maxinkuckee."

Snyder asked, "You have now had an opportunity to review the plans for the Planned Unit Development Mr. Aker is proposing. Do you see those as having a potential negative affect on the Kline Wetland?"

Namestnick answered, "I don't know if I'm necessarily qualified to answer that specifically, but I can say that if groundwater makes it to the Kline Wetland and has nutrients in it, then it would negatively affect the Kline Wetland. Or, if water overflows…and surface water would make it, then that would negatively affect the Kline

[7] Remonstrator's Exhibit A, § 3.8, p. 13.

Wetland as well." Also, the two wetlands within the proposed conservancy district boundaries would be "negatively impacted" by any overflow of water from the retention area. "Water fluctuation is going to affect the plant community. Addition of nutrients or sediment would affect the plant community."

Snyder asked, "If those are affected negatively, what effect does that have on the ability of those wetlands to filter anything that's going through them?"

Namestnick answered, "They may filter the same, but their biodiversity quality would be lower. They may still be able to filter sediments if the plant community changes." If sediment continues to fill in the wetland, the wetland will "likely become a non-wetland at some point."

[Cross Examination by Jones]

Fred Jones asked, "Your site assessment report made several recommendations with regard to maintaining and/or improving the Kline Wetlands as it currently exists, correct?"

Namestnick answered, "Correct."

Jones continued, "With regard to the various areas that you have identified, I think you had eight or nine different communities?"

Namestnick answered, "I think there were ten."

Jones continued, "You have suggested different types of maintenance work that would be necessary for each of those particular communities, right?"

Namestnick answered, "To improve the quality of those communities, yes."

Jones continued, "Now, that suggests to me that the same type of maintenance work on the onsite wetlands on the Aker property could also maintain the viability of the Kline Wetland area?"

Namestnick answered, "To some extent. It depends on how much water fluctuation there is in those systems. If there is a lot of water fluctuation with storm events, then it's going to be difficult to do any kind of control that's going to be useful."

Jones continued, "Does water fluctuation affect the ability to maintain the Kline Wetland area or to improve it?"

Namestnick answered, "It would. I don't know if it does right now. Based on what we saw, that didn't seem to be a large factor."

Jones continued, "Do you know whether or not any of the recommendations contained in your report have been implemented on the Kline Wetland now?"

Namestnick answered, "I don't believe that they have, but I don't know that for sure. We just finished that study this past summer." If nutrients and sediment coming from within the boundaries of the proposed conservancy district, and water fluctuation resulting from runoff from the conservancy district "can be kept out of the Kline Wetland, then the [Kline Wetland] would not be affected" by the proposed planned unit development.

[Re-Direct Examination by Snyder]

Snyder asked, "Are you aware of who the owner of Kline Wetland is and who would have the authority to undertake any of your recommendations?"

Namestnick answered, "I believe that the Department of Natural Resources is the owner of the property."

Snyder asked, "And, you are not aware of whether [the Department of Natural Resources (the "DNR")] has as yet undertaken any of your recommendations or even given consideration to it?"

Namestnick answered, "We just completed the report this past summer, so I don't believe that anything has been done. I don't know that for sure."

[Direct Examination by Snyder]

Chris Kline testified he is employed with JF New as Regional Director, and he manages JFNew's central regional office. "This office has been doing work on the Kline Wetland almost since [JFNew] was established back in 1989". Kline has a Bachelor's of Arts in English, with a minor in Biology, and a Master's in Business Administration from the University of Notre Dame.

Kline provided a brief history of the Kline Wetland. He said several major projects have taken place at the Kline Wetlands which have involved JF New. Water quality sampling has been performed over the past 20 years. In 2005, JF New prepared the Lake Maxinkuckee and Watershed Management Plan (the "Watershed Management Plan")[8]. As a result of projects on the Kline Wetland, JF New has established a timeline of "different activities…. From that timeline, it's clear that pre-settlement there were likely wetlands in place on the southeast corner of the lake. The presence of hydric soils is indicative of that. The earliest maps of the area do also show that there were wetlands present there. That goes back to1876."

Kline testified JF New prepared the Watershed Management Plan in conjunction with the Lake Maxinkuckee Environmental Council (the "LMEC"). The Kline Wetland was "channelized or ditched" during the 1930s, "thus significantly altering the hydrology." In

[8] Remonstrators' Exhibit B.

1976, the DNR purchased the 80-acre Kline Wetland property. Lake Maxinkuckee is "one of the most studied lakes in Indiana", and studies of water quality and habitat began in the late 1900s. "In the mid-1980s, significant additional studies were done and those studies did show the Kline Ditch, which goes into that wetland, was the major nutrient source for phosphorus, particularly."

Kline testified restoration of the Kline Wetland took place between1989 and 1991 with funding from the LMEC and the DNR. The DNR completed a Project Manual[9] for the Maxinkuckee Conservation Area restoration. The restoration consisted "mainly constructing a levee to help retain the water in the wetland to kind of alter the effects of the channelization. It was designed to hold that water in place; and thus, restore some of that wetland functionality." In 1999, additional scientific studies showed "statistically significant improvements in the water quality and the water clarity of water coming out of those wetlands. So, it appears that restoration work that was undertaken 1989 to 1991 did have some very positive effects on the water quality of the lake."

Kline testified additional work was done between 1998 and 2000 to stabilize the levee system. In 2004, water quality studies sampled water entering the wetlands, and the results of that study "has been determined that there is high nutrient load coming into that wetland. So, it's still being stressed, as it were, from agricultural runoff primarily from the nutrient loading that's coming from Kline Ditch." The Kline Wetland is "still stressed," but it "still functions as a filter" for water draining from approximately 2,400 acres entering Lake Maxinkuckee.

[Direct Examination by Snyder]

Andrew Bender testified he is a Professional Engineer and is employed with JF New as the Regional Manager overseeing the Indianapolis and Cincinnati Offices. He has a Bachelor's of Science Degree from Purdue University in Civil Engineering with an Environmental Engineering and Urban Hydrologic focus. He is a licensed engineer with the State of Indiana in Environmental Engineering. During college he was employed with the Army Corps.

Stephen Snyder asked, "Have you reviewed the proposed plans for the cluster septic system that has been discussed here today?"

Bender answered, "I have reviewed the plans that were admitted."

Snyder continued, "Are you familiar with this type of system?"

Bender answered, "I am only familiar in general with this type of system."

Snyder asked, "Is this a system that is currently routinely used in Indiana?"

[9] Remonstrators' Exhibit C.

Bender answered, “I cannot say that I know of any installations, but that’s not certainly a level of any kind of accreditation on how many units are in place.”

Snyder continued, “There’s been testimony that this system at 25,000 gallons per day is a multiple of other systems in the State which have been installed for the purpose of treating 3,000 gallons a day. In your opinion as an engineer, does the fact that a system works at 3,000 gallons a day mean that it will work at 25,000 gallons a day?”

Bender answered, “I don’t think that you can make that direct leap. However, the way it is designed from a modular system, I would say is a correct way to design that. I don’t think you can fault, necessarily, with scaling it from 3,000 to 25,000.”

Snyder continued, “Were there some areas of concern that you had as you reviewed the proposed plans in regard to the location of the individual cells?”

Bender answered, “…I believe in looking at it and looking at the documentation that they have met the minimum level standards—they have their permit through ISDH and they have done what they need to do in that respect. From my professional opinion, it is a good idea and a good practice to have reserve areas set aside; it’s required at the county level on individual homes and as you move up it is certainly encouraged at the state level, although not required by ISDH. It makes sense from a planning standpoint that you have a plan in place that would set aside a reserve area to account for any kind of failure of the system. In particular, the way the cells are located in the middle of the units for sale where there will be occupancy, there is a concern on my part—it’s just a general concern—of if there were to be a failure in the system, there is no place to go and it would directly impact the folks that would be living there.”

Snyder asked, “Is there some requirement in the State in regard to the location of those cells in relation to private water wells?”

Bender answered, “There is a standard setback. Yes.” He said the setback is between 100 feet to 150 feet from the edge of the septic system to the water well.

Snyder continued, “If there were a failure of one of these cells, and it had to be replaced, is there any area you can observe on the plans where another cell can be placed?”

Bender answered, “There does not appear to be any space where they can take cells that would not interfere with setbacks from the edge of properties or existing structures that are in place.”

Snyder continued, “You’ve heard the testimony today about the function of this system, which is essentially a large septic system with a pre-treatment facility, and that the effluent that ultimately comes out of that pre-treatment facility is clear water or nearly clear water. If that type of water is placed into the [cells], I assume that is for the purpose of ultimately eliminating the last bit of effluent in that water”?

Bender answered, “The soil beneath [the cells] ultimately provides the final treatment”.

Snyder continued, “But does that mean that there is some effluent getting into the soil at that point even though it may be a very minimal amount under this system?”

Bender answered, “Yes.”

Snyder continued, “When that effluent reaches the soil is it simply going to stay there or is there a possibility that it would move?”

Bender answered, “They testified earlier and talked about BOD and suspended solids, TSS, and for the most part, those particular items will be removed and should be completely treated within a couple feet of the bottom of the leach fields themselves. Nitrogen or phosphorus in the system does have the potential to migrate in the groundwater depending on the levels and loads through there from a nutrient standpoint. That would entirely depend upon the soils there and the loading rates, and I could not tell you one way or the other whether it will, in fact, move through there.”

Snyder continued, “But if the soil types and the loading rates were conducive to it, it can migrate through the soil?”

Bender answered, “Absolutely. The State Department of Health has made a particular emphasis on nitrogen and its components in terms of soil loading rates and in particular the types of soils and ground water.”

Snyder continued, “Does your experience tell you which direction the ground water is moving?”

Bender answered, “Classically, the groundwater is moving towards the lake…. I’m sure that the groundwater in the immediate vicinity moves towards the lake.”

Snyder continued, “Although you have little experience in regard to this particular design of aerobic system, is it something that is also used by municipalities on a much larger scale?”

Bender answered, “Absolutely.”

Snyder continued, “From the standpoint of developing real estate, do you have an opinion as to whether it is best to have several small systems like this or have a larger collection system going to a larger municipal treatment plant?”

Bender answered, “I would say that the real question becomes—are you going to have a system that, in fact, treats the wastewater and that is maintained properly? A maintained proper system that is in place that will treat the wastewater will suffice and be a good system.”

Snyder continued, “In this case, it has been testified that the maintenance and operation of the system will have to be borne by the condominium owners association, is that correct?”

Bender answered, “That’s correct, as I understand it. And the State typically requires that there is an agreement in place, I believe, with the HOA or condominium association to take over the maintenance of that system as a condition of the permit.”

Snyder continued, “Have you also had an opportunity to review this site design from a storm water standpoint?”

Bender answered, “I have.”

Snyder continued, “Do you have an opinion as to whether what is planned will, in effect, retain all surface water onsite?”

Bender answered, “In reviewing and looking at the calculations—assuming everything is correct with the numbers and things that are presented here—I believe that it will retain the majority of the water that is running off from the streets and driveway areas. There are locations on the site certainly that will runoff due to the contours of sloping away from the streets around the housing units on the outside that certainly will runoff of the property.”

Snyder continued, “Rather than run through the retention areas or the two small wetlands that are onsite?”

Bender answered, “That’s correct.”

Snyder asked, “If the retention areas overflow and the water moves down the weirs as they’re proposed, what affect does that have on the overall water retention plan? From the standpoint of those wetlands, do you have an opinion as to whether that has an effect on those wetlands?”

Bender answered, “Certainly. The wetlands, if you look at the contours around the wetland areas, there will need to be a large volume of water in those wetlands over an extended period of time for them to get up to a point where they can actually overflow. The greater concern for the wetlands is if there are significant flows into those wetlands, it will change the water levels in those wetlands and impact the wetland quality themselves.” He added, “If you look at the importance of the Kline Wetland to the overall 8,000 plus acres of the watershed to Lake Maxinkuckee, if you take that down into a scale looking at individual watersheds, or sub-watersheds within the Maxinkuckee Watershed, each one of the small wetlands, pocket wetlands throughout there form a very vital piece of each of those smaller sub-watersheds. So, across the entire landscape those small wetlands play a very important role in nutrient reducing, sediment reduction, and general attenuation of the water coming through the area.”

Snyder asked, “If the two onsite wetlands are degraded to any extent, then regardless of whether it’s a .1% or 2% effect, it will have some ultimate affect on Maxinkuckee?”

Bender answered, “The Center for Watershed Protection talks about the percent impervious area, the percent developed across a watershed. Currently, [Lake Maxinkuckee Watershed] is roughly just under, I believe, 8%. So, even small movements across the overall landscape start to change things. Now, at 10%, the Center for Watershed Protection says that that is the point of impervious surface across a watershed where the water bodies begin to be considered degraded. At 25%, it becomes severely degraded. And, so, you have a point now where we are within the watershed here starting to verge up towards that 10%. So, even small movements in the development begin to add up, and one of the things you have to take into consideration is not necessarily this individual parcel but across the whole thing.”

Snyder continued, “So, in other words the development, an increase in impervious area from this development, is just a piece of the overall impervious increase in the entire watershed?”

Bender answered, “That would be the overall concern. And, certainly, a recommendation within the Watershed Management Plan itself is to collectively look at anything and everything that’s going into the watershed. And, really make an effort to take a step above what the bare minimum is in terms of protection of storm water, in particular, as it moves.”

Bender indicated that he reviewed the proposed soil erosion protection plan approved by the Marshall County Soil and Water Conservation District. He said, “In general, I would say that [the plan] certainly meets the bare minimum requirements on the site. The major concern that I would have is that during construction if sediment gets and moves through the system, in particular, into the basins, the basin design that’s been presented, I believe, relies heavily on infiltration of that water. My largest concern would be any sediment that gets in there and ongoing sediment during the construction process over a number of years seals the basins. If the basins themselves are sealed by sedimentation, then the ability to infiltrate becomes lost, and then you have complete movement of water into those wetlands and that’s where the concern really starts.”

Snyder continued, “If a soil erosion plan is not sufficient enough to prevent all sediment from going into those [basins] it could possibly form a barrier to that percolation?”

Bender answered, “That’s correct, or if there is not regular maintenance done when sediment gets in there.”

Snyder continued, “What regular maintenance would be required of a retention area?”

Bender answered, “If there is sedimentation, it would be coming in and removing the sedimentation, breaking up any kind of layer that forms across the top of that to prevent infiltration.”

Snyder continued, “Over what period of time would it be possible for that to occur after construction was complete? Let’s assume everything is seeded, sodded, and done.”

Bender answered, “If everything is completed, done—seeded, sodded and vegetated—then there is likely very little sedimentation that will come through the system assuming there are no active erosion points.”

Snyder continued, “But, during construction, it could be a different story?”

Bender answered, “Absolutely.”

Snyder continued, “In your opinion, is Rule 5 compliance alone sufficient in this case to protect the Kline Wetland or the two small wetlands on the site?”

Bender answered, “In short answer, no. In longer answer, certainly the EPA is looking currently at requiring post construction BMPs, or best management practices, on storm water. Cities, such as Indianapolis, which are considered larger Phase I cities according to the EPA, have requirements to put in those post construction where they require you to remove 80% or more of the pollutants in the water column before it leaves the site. Those types of regulations have been mainly focused on Phase I and Phase II cities, according to the EPA. [EPA] is currently looking at requiring that to be a broad across all areas of any development. In fact, [EPA] is undergoing rulemaking right now. That’s a long way to answer the fact that there are a number of techniques that could be used to improve the quality of storm water that leaves any site, including this one, both during construction and post-construction. While [Aker Properties] has met all of the general requirements for the site, they have done so in a manner that, I think, could be improved especially as it relates to the Watershed Management Plan and the overall goal to continue to increase the value and quality of the lake.”

Snyder continued, “Do you believe that if there were to be a 100-year flood event during construction of this project, that the erosion controls that are proposed to be put in place would be adequate to protect the Kline Wetland and ultimately the lake?”

Bender answered, “I don’t know that I can say if it would overflow by any means from the basins there during that event during construction. I can say that if that during that event and in all likelihood if you had a 100-year event during construction you would end up with some significant levels of sedimentation in those basins. If that was not remedied and taken care of inevitably that sediment would move downstream and likely get into the two adjacent wetlands. Whether it gets any farther than that, would probably not be the case.”

[Cross Examination by Jones]

Fred Jones asked, “With regard to the cluster septic system, you indicated that you had some concerns about that system, but the fact is that the system, which you reviewed, was the system that was approved by the [Indiana State Department of Health], correct?”

Bender answered, “That’s correct.”

Jones continued, “Your concerns about the system were not shared by the State Department of Health?”

Bender answered, “I can’t tell you if [it] shared those concerns or not.”

Jones continued, “They were not shared to the extent that it prevented the permit from being issued?”

Bender answered, “That’s correct.”

Jones continued, “With regard to the payment of maintenance and/or other operating expenses, you indicated that the municipal wastewater treatment facility has taxing authority to generate funds to pay for that expense. Who is it that pays for the maintenance and operation expense, if any, of the private septic systems already in existence around the lake?”

Bender answered, “I think the users of those systems.”

Jones continued, “And, that would be the same as the payment of those maintenance and operation expenses with the proposed PUD project?”

Bender answered, “I would say that was correct. Yes.”

Jones said, “We are going to calculate what the percentage area is of the entire 55.7 acres as compared to the 8,850-acre watershed area.”

Bender said, “I would say that it’s very small.”

Jones asked, “Would you agree that it’s about .006%?”

Bender answered, “I will trust your math.”

Jones asked, “If you are at 8% now, if the entire 55 acres were made impervious, we would only go up to 8.006%?”

Bender answered, “Agreed.”

Jones asked, “You indicated that there are currently studies ongoing with regard to consideration of possible Rule 5 compliance requirements…but the fact is that as we are here today those changes have not been made?”

Bender answered, “They have not; and they are not required for this particular area.”

Jones continued, “And, we can only make designs as required by today’s standards?”

Bender answered, “I think you can do designs that would pass by today’s standards. You can certainly do more.”

Jones continued, “You indicated that you thought there were ways in which the erosion plan could be improved. What are those ways?”

Bender answered, “Well, I think you could do, on the actual site itself for during construction. I don’t see any necessarily techniques within the swales themselves—straw bales or anything else—I don’t know if there was another plan that I didn’t see where you were actually removing sediment as it moves through.” He continued, “There are certainly classically some temporary forebays that could be dug where you can remove sediment as it moves through. The big concern with the basins here that I would have in terms of long-term use is making sure that sediment didn’t get into those. So, if there were temporary forebays set up ahead of those to remove the sediment, anything that would move forward, that would be one thing. And, then, the silt fence was only around the actual wetlands themselves; that assumes, of course, that none of the other areas are disturbed and that no water leaves the site off of any of the other sides, which would be a concern for any kind of runoff.”

Jones continued, “I believe Rule 5 compliance allows for modifications of plans if, during construction, circumstances arise that indicate that changes are necessary, correct?”

Bender answered, “Sure, and I would expect them to do that.”

Jones asked, “Almost all of your questions from opposing counsel [Snyder] asked you to assume a bad case scenario. If you assume a good case scenario, there’s not any problem is there?”

Bender answered, “Well, the larger concern I would have even in a good case scenario is water that comes off of the development area that does not go through the basins and the storm water system. So, for instance, water off the houses that would go directly into the wetland or water off the lots presumably—I’m making the assumption of course that there is going to be turf grass around there and you are going to maintain the lawns—classically in development I’m sure there are going to be some nutrients that runoff of those areas. That would be the good end of the range of scenarios.”

Jones continued, “Well, but that good area that you just described is not an area that requires any change in the existing plans; that’s just your definition of what a good position would be?”

Bender answered, “You are correct. It does not require any changes to meet the rules and regulations as they state. My testimony and my professional opinion would be relating to what do we need to do in the overall watershed to meet the goals of the Watershed Plan to protect and improve the Kline Wetland. So, those would be the things that I would have us do, is do more than the minimum.”

Jones continued, “There’s nothing in the plans that prevent that from occurring if that need becomes apparent during the construction phase or even after the completion of the construction phase?”

Bender answered, “There’s nothing here to indicate one way or another.”

Jones continued, “That’s to indicate that there’s nothing that prevents those additional changes from being made if necessary, correct?

Bender answered, “That would be true.”

Stephen Snyder moved to admit Remonstrators’ Exhibit D, a copy of the Culver Zoning Ordinance from July 2001. Snyder explained that Exhibit D was offered for the purpose of showing that the planned unit development within the proposed Maxinkuckee Village Conservancy District is required to have a municipal quality sewer system.

Fred Jones stipulated to the zoning requirement, but noted that Exhibit D, as submitted, “may not be the current zoning code in its entirety.”

Hearing Officer Lucas admitted Remonstrators’ Exhibit D. “Obviously, you both have an opportunity to provide clarity as to its legal significance. In addition, Mr. Jones, if you determine that there has been some amendment to the zoning ordinance that is pertinent, you can augment the record with that amendment as well.”

[Direct Examination by Welch]

Brian Welch, representing William F. Welch and Jean K. Welch, introduced James Sturman to testify in opposition to the proposed conservancy district. Sturman’s sworn testimony on direct and on cross examination is summarized below.

James Sturman testified he is employed as an independent real estate broker, doing business as Sturman Real Estate, located in Indianapolis. He has leased, managed, and owned real estate for 35 years. He has operated as a licensed realtor in Indiana for ten years and is a member of the North Central Indiana Association of Realtors. Since 1985, he has owned lakefront property on Lake Maxinkuckee.

Welch asked, “Have you been involved in any transactions, purchase and sale transactions, in Culver, Indiana over those ten years?”

Sturman answered, “Yes. My primary focus on residential sales has been in Marshall County and Culver, Indiana”. Before the economic downturn, he was involved in about “two or three lakefront” real estate transactions per year, totaling about 20 real estate transactions over the past ten years.

Welch asked, “You indicated that you have had transactions in lakefront property in Culver. Is that sort of your specialty or do you attempt to specialize in that?”

Sturman answered, “It is. That’s what I specialize in.” His most recent lakefront real estate transaction involved a property located on the east shore of Lake Maxinkuckee.

Welch asked, “I believe in conversations that we have had prior to this hearing, Jim, that you indicated to me that you and your wife have signed one of the petitions in opposition to the relief that is being sought here, is that right?”

Sturman answered, “That’s correct.”

Welch asked for information regarding “efforts to sell real estate in Culver, Indiana that does not have lake access.”

Sturman responded, “Early on I was involved with listing the Mystic Hills lots, which were known as Mystic Hill Estates. There were nine lots originally for sale in the market place. We listed them on May 22, 2002. That listing expired April 23, 2003. No sale during our listing period occurred. The lots were then listed with various other real estate companies, and I believe the final listing on those properties expired sometime last year. I don’t believe that they are currently listed. During that seven or eight year period, one of the lots was purchased by, I believe, an employee of the golf course…. To my knowledge, there have been no other sales on those golf course lots.” The golf course lots are separated from the proposed development by Mystic Hills Golf Course. “There’s several hundred feet of road between the lots and the proposed development.”

Welch asked, “When you had [the Mystic Hills] lots listed, can you give a sense of the price points that were being offered to the market?”

Sturman answered, “Those lots were priced at $55,000 to $70,000 depending on the size, and they were 1.2 acres to 1.53 acres per lot…in 2002.”

Welch continued, “There’s other property that I am aware of and I know that you are aware of that is an effort to sell non-lake access property, and you and I have discussed it as the David Gaskill property. Where is that property located and what it consists of?”

Sturman answered, “That property is located at 2255 East Shore Drive. It’s an 11.4-acre property approximately one-half mile from the proposed development. It’s been on the market for nine years. It was originally listed for $1.1 million for the whole thing in December 26, 2000. The property has a similar location to the proposed development. From time to time it has been offered as two separate parcels, and it’s been combined in the most current offering as one parcel with an older house on it, and it’s currently listed at $649,000 and has gone unsold.”

Welch continued, “Are there any other residential developments that you are aware of in Culver that do not have lake access like is proposed for the planned unit development here that have been successful or not successful on the market?”

Sturman answered, "Well, there are actually a couple more. There is a large parcel across from the proposed development located on State Road 117 just east of the entrance to the marina. It was for sale by owner, I believe, for about a year and a half; it's 33.5 acres. It was listed through a realtor in October of 2009 and listed at $990,000. There have been no sales on this particular lot. I'm not aware of any offers."

Welch continued, "Looking at these three properties or these three efforts at development that you have talked about what, in your view, is the reason that there have been no sales?"

Sturman answered, "There's no lake access. Lake access is key to successful development. And, there have been successful condominium developments in Culver. The one that's across the street [from the Vandalia Railroad Depot] was very successful. It takes advantage of the fact that that property is in the Town of Culver, and there is a public beach, docks, restaurants; there's infrastructure around it… The other developments, including The Cove…, are successful because they have piers. People can swim. They can boat. They can look at the lake, so to speak. There have been successful developments, but it's because of lake access. One of the developments that hasn't been quite as successful is The Riggings. It's located on State Road 10 just past [State Road] 17. That development was a development of 19 condo and townhouses, not dissimilar to what the proposed development is…. It was started in 1999, and it was built in various phases over the past eleven years, a few buildings at a time or one building at a time. That development remains incomplete, in that, there is a poured foundation for an additional building that has never been constructed. While that property is not in close proximity to the development in question, it's an example of off lake development that has proved unsuccessful from a developer's standpoint. These units at The Riggings sell between $190,000 and $240,000 on a resale basis… This sort of represents half the list price of the proposed development."

Welch asked, "You sat through Mr. Aker's testimony and Mr. Collins' testimony?"

Sturman answered, "That's correct."

Welch continued, "You heard their testimony about their view of the economic viability of this project?"

Sturman answered, "Yes."

Welch continued, "Do you agree with that testimony?"

Sturman answered, "No, I don't." He added, "There's a significant inventory of condominiums at The Cove and other developments that don't represent new construction, but do represent the inventory in the resale market. Those prices are either significantly less or approximately the same as the development in question. There are obviously much more expensive condominiums available in the market place, but I don't think it is a viable development because of the existing inventory of resale units and the

location of the development…. I think the amenities that people want are certainly a matter of taste, but…I'm not necessarily sure with a lake a few hundred feet away that a swimming pool…would have much demand…. Some of the other amenities that people look for…is a lakefront view, and that's where the value of the real estate and prices this lake demands come from."

Welch asked, "In your capacity as real estate broker in this community, has anyone come to you asking about presales or the availability of the units in this planned unit development?"

Sturman answered, "Not formally. No. I've had some discussions about the development, but no one has expressed genuine interest on their behalf, as far as I'm concerned."

[Cross Examination by Jones]

Fred Jones asked, "You wouldn't expect people to come to talk to you about the Maxinkuckee Village development since you are opposed to it anyway, would you?"

Sturman answered, "…Over the course of the last two years, I developed an opinion. I didn't necessarily have one two years ago. So, the answer to your question is probably, 'No'."

Jones asked, "The golf course lots range in size from 1.2 to 1.5 acres… That's a lot of ground for somebody to take care if they are looking to minimize their responsibility for yard maintenance, isn't it?"

Sturman answered, "If they are looking to minimize their yard, yes, it is a lot of grass to take care of."

Jones continued, "If they were in a condominium project, somebody else would be doing that for them, wouldn't they?"

Sturman, "Yes." He added that the Mystic Hills golf course does not offer a swimming pool, tennis courts, or an athletic field.

Jones asked, "The golf course lots were, I believe, nine in number?

Sturman answered, "Totally, yes."

Jones continued, "Which would not be the community atmosphere that you would find in an area where there were 47 families within a smaller area?"

Sturman answered, "It would be a different development. Yes."

Jones continued, "And, certainly, some people would prefer to have the one to 1 ½-acre size lot, but others might prefer to have a much smaller more community oriented locations?"

Sturman, "They might."

Jones asked, "The lots at Mystic Hills do not have any improvements on them?"

Sturman answered, "No."

Jones continued, "The lots at Mystic Hills were not part of a development project that was going to be managed and controlled by somebody else?"

Sturman answered, "That's correct."

Jones asked, "And, while I agree that you are entitled to your opinion, your opinion has not more value than that of Mr. Aker or Mr. Collins, does it?"

Sturman answered, "No."

C. Summary of Comments Received at Public Hearing held on February 5, 2010

Steve Lucas, Hearing Officer, opened the public hearing in Culver as scheduled on February 5, 2010. He again outlined the Commission's statutory responsibilities pertaining to review of a proposed conservancy district. He then provided an opportunity for citizens to speak. These comments were not under oath or subject to cross-examination. A summary of citizen comments is set forth below:

(1) Comments in Favor of the Petition

Bill Girten stated that he has been "lucky enough to be friends with Gary and Eyvonne [Aker] for over 35 years. I worked with Gary on different projects; I've worked for Gary and Evyonne. They are first-class people, and everything they do is first-class. And, I know if this project is approved, that they will abide by all of the permits and procedures, and it would be a first-class project."

Craig Schrimsher stated that he lives and works in Culver. He said "Jobs are hard to come by, and if somebody proposes something that is going to come and bring up to around 30 jobs in the community—unless there is obvious evidence it's going to harm the environment—I think people should support it."

Craig Gudeman, Marshall County resident, stated, "I'm very much in favor of the project."

Angela Ridenour stated, "I'm in support of the project."

Georgette Rader stated, 'I'm also in support of the project."

Tom Flynn stated that he lives in Plymouth, Indiana, but has boated on Lake Maxinkuckee for 35 years. "I've known the Akers for many of those years. It pains me a lot to hear the environmentalists questioning the Akers. If you were to ask me who is the most environmentally perfect couple I can think of, it would be the Akers and their kids. They would rather lose a limb than hurt this lake."

Mark Aker stated that his brother, Gary Aker, is the developer of the PUD within the proposed conservancy district. He stated, "After hearing yesterday's testimony, I would like just to make one little comment, and that is, whether we are listening to fact or opinion. I believe that if we meet all of the requirements on a project, that we are doing the best job we can". He explained that Allan Collins constructed the seawall as referred to through testimony and comment. "There is a backside to that 'wall' story, but I won't go into that". Aker said Lake Maxinkuckee and the surrounding houses have been in existence "for a long time. As I look at where we come from and what we have as sewage disposal system for the lake and for the town, some places around the lake are, I'm sure, pretty antiquated—some are septic; some may be a 55-gallon drum. We don't know. As time goes on, and new technology arrives—even septic tanks were not available in the 1900s—the technology that we are talking about—I'm one of the owners of the company that is going to build the sewage treatment facility—goes back to the middle '60s and it also goes back to the early '30s. This is no more than a scaled down version of what the town is running through. Yes, they go into a lake or stream with their discharge; we are not attempting to do that."

Aker said he has been in the Aero-Tech business, development, and selling product system for three years. "Indiana is probably one of the last states to acknowledge the fact that there is something different. Until last year, [Indiana] had the oldest septic laws in the whole nation". He said Michigan State University has conducted studies regarding aerobic technology, which "will actually rejuvenate a failed leach field". Aker said that there are water issues across the United States. "We believe we have the technology that can help some of those problems. It's no longer an experiment…. The technology is not new; it's not an experiment". Aker said that the proposed Aero-Tech cluster septic system would be the largest treatment system to be constructed. He said, "Yes, we have not built one this size. Yes, this is an opportunity. It's an opportunity to not just start and stop right here with 25,000 gallons per day. Our intention is to, if it works here, then every lake in the United States could have one of these—not every lake because some are lucky enough to have partial service by a sewage system". He said municipal sewage systems "have their problems; they are not 100%. They don't work every day. And, if you think we are going to take pipe all around this lake, we're all crazy. …It's not going to happen."

Aker said, "'Decentralized', in our belief, is you use the water and you return it to the earth where you use it". He said maintenance of the proposed cluster septic system is an "unknown. We don't know. I mean, I'm going to tell you who knows how long a pump is going to last…. All I know is the design, five to ten years possibly, but we are not

talking about millions of dollars like we are talking downtown. We are talking about $500, $600. We have a warranty and we have availability."

Aker said, "I am for the project, not only because it's my brother, but I think that at some point in time, land use and the use of land and the increase of population we are going to be somewhere. If there's an opportunity for this development, I think it's a good deal."

(2) Comments in Opposition to the Petition

Bill Walsh stated that he has a seasonal residence on Lake Maxinkuckee. Walsh stated that he attended the February 4, 2010 public hearing, and said that "no one knows for sure that this development is needed." He pointed out that testimony given on February 4 indicated that Aero-Tech "has never designed and/or built a system that has serviced more than 3,000 gallons". Walsh said expert testimony indicated that the Kline Wetland are "very important part of filtering water before it enters the lake, and it could be seriously affected by any mistakes during construction and mishaps after construction is completed. Isn't this a major a danger to the lake?"

Lydia Walsh said, "I'm against the project."

Bill Terpstra, part-owner of residence located on Lake Maxinkuckee, stated, "I'm opposed to the project."

James Smith, partial owner of a residence located on Lake Maxinkuckee, stated "I'm against the project also."

Alyssa Nicewater Sytsma indicated that she is a Culver resident and her family has owned a house on Lake Maxinkuckee for "several" generations. She said, "I'm definitely against the project. I can see that it would do no good to the lake whatsoever."

Joe Camerano, Culver resident, stated, "I am seriously against the project."

Sharon Frank, Culver resident, stated "I am also opposed to the project."

Cory Frank, Culver seasonal resident, stated that he was "undecided" regarding the proposed conservancy district. He read the following: (1) Will installing the municipal water system affect the local hydrology of the wetland-lake ecosystem? If so, what are the anticipated changes and how will they be dealt with? (2) The report recommends that herbicides be used to control invasive species. Will the herbicides pose any threat as far as contamination of the water in the area when applied? What safeguards are enacted to make sure that there is no contamination? Are there any other economical methods to control invasive species in a fragile ecosystem such as a wetland? What is the cost to control invasives? It has been shown in the past to have low success rates while still being expensive since it is hard to completely eradicate an invasive species.

(3) In Ohio, a wetland with a rating of 3 on the ORAM is given the most protection. Is there a similar policy in Indiana? High quality natural wetlands offer incredible environmental services that are very hard to replace. It is most likely that building next to the wetland will degrade it to below a 3. How can it be ensured that this will not happen? (4) The smell of sewage was noted in the levee area. The source is unknown, but given that this sewage is apparently there, won't adding municipal water systems add to what is already a problem? Is this current issue being checked on? (5). Is the current loading capacity (of nutrients, suspended solids, and other contaminants known? If not, how can we make a decision on the magnitude of the wetland will be impacted? How will further additions of these contaminants affect the wetland based off of current information?"

Nancy Stimson stated that she and her husband own a residence on Lake Maxinkuckee. She said she attended the February 4 public hearing. "We heard the word 'community' a lot, and who wouldn't like a self-contained community with soccer field, tennis court, club house, and golf course that was affordable, but is it needed? …At times I wasn't sure if this plan just hadn't been thought through thoroughly. We heard a lot that suggested that this plan meets only minimum acceptable standards. I believe the critical location of this development requires that every possible precaution be taken; that this is an instant for meeting the very highest, most conservative standards". Stimson noted that the plans for the proposed cluster septic system "seem okay given the safeguards if you have the normal number of power outages, maybe three to five a year, as do most places. But here at Maxinkuckee, at least at our cottage we get sometimes three to five power outages a week. It's a rare week that goes past without a power outage at least once". She concluded, "While I wish that I could believe that Mr. Aker and Mr. Collins will be genuinely good neighbors who would take every precaution to safeguard this magnificent ecosystem that we are guardians of, even under these best of circumstances, this development seems to me a very risky endeavor."

Deanna Kolosowsky stated that she lives "just southwest of the wetlands area, and we're very strongly against this project."

Mary Thompson stated she was fourth generation lake homeowners, and said, "I am opposed to the project". She questioned the need for the proposed conservancy district.

Debbie Crabtree, part-owner of Lake Maxinkuckee residence stated, "I'm opposed to the project."

Chuck Blazevich stated he owns a condominium at Harbor Condominiums in Culver, "which unfortunately is right next to Bayside Condominiums that Allan Collins built a year ago. I got to know him well through a long litigation process". He said, "My concern here is if this plan is approved…is that basically a lot of what we talked about yesterday there is no control…we are basing this decision based on plans that may or may not be in effect". Blazevich stated that he was involved in a two year litigation involving the construction of the Bayside Condominiums. "Are we going to trust [Collins] to build something that is by the Kline Wetlands area? Sorry. Not".

Blazevich stated that Bayside Condominium project was planned to be and presented as a "mix use" development. "But [Collins] built [Bayside Condominiums] on a promise similar to all the promises we heard here yesterday, and then didn't meet his promises."

Megan Levett indicated that her parents own a home on Lake Maxinkuckee. "I've spent most of my summers growing up here in the community, and I'd like to save it for future generations. I think this project sets a precedent for future projects. We are building more than just 49 condominiums here."

Julia Baxter stated that she has a residence on the East Shore of Lake Maxinkuckee. "Many families got together in the last few years to preserve the lake by creating a private sewer system. So, that's where our heart is, is keeping the lake in good condition. So, we have many doubts. We've put our own private investments in terms of keeping the sewage out of the lake…. We are here to take care of the lake."

Rick Baxter stated that he is the third-generation owner of a residence on the East Shore of Lake Maxinkuckee. "We are opposed to this project. We feel that it sets a bad precedent for future development."

Cathy Clark stated that "for more than" 28 years the Lake Maxinkuckee Environmental Fund and local citizens have worked to protect Lake Maxinkuckee. "Part of our mission was to remove septic systems from the edge of the lake; and now, when we are so close to our goal, someone is proposing to put an experimental 25,000 gallon septic system 100 feet from the lake's edge". She stated, "Unfortunately, this project is not unable to fail, during construction or after, the question is only when it will happen…. Mr. Aker made a comment about how JF New talked in 'what ifs'; that's what ecologists do. I want to tell you now that it is the 'what ifs' that should give you pause. The time to think, to decide if granting him this sewer conservancy district for the sole purpose of his PUD is the right thing to do for this community, and more importantly, for our beautiful Lake Maxinkuckee."

Carol Zeglis said her residence is located on East Shore of Lake Maxinkuckee and is a board member of the Lake Maxinkuckee Environmental Fund (the "LMEF"). She said the "sole" mission of LMEF is to "protect the lake. In the early 80s…the lake was in very bad shape". Zeglis said, "Today is a different story. [The lake] is looking great, and we would like to keep it that way". She noted that JF New is one of the "leading ecological" firms in the United States. Zeglis then quoted from JF New's Site Assessment Report.[10]

Tom Sams stated, "I've been on the lake for over 60 years, and I've owned, with my wife, Suzy, a lovely old, old, old home on the East Shore, which we try to keep pretty much the way it was when it was built in 1907". Sams recalled that as a child and before the dredging at the Culver Marina, that area "we called 'the swamp'. There were a few channels of a natural nature…Any time you would go near it and start to go in it, you heard these birds and other sounds that were just very enchanting as I remember. I

[10] Remonstrators' Exhibit A, § 3.8, p. 13.

remember finding…turtle egg…. It was just a sort of a natural paradise". He said, "I wasn't old enough to appreciate what was happening to that area, but as I grew older I came to realize that if that project, the marina as we know it today were proposed today, there would be no way that it would be allowed because of all of our environmental interests…It would not pass any test—need, or economic value, or whatever. It would be too destructive of a natural wetland". Sams said it would be "difficult to imagine" further development, such as the development within the proposed conservancy district "could be allowed. It just doesn't seem logical that we would be allowed to further develop what was once such a beautiful natural area". Sams indicated that he has had "direct personal experience" with the contractor for the PUD. "I've had many encounters. I was a founding member of the Lake Maxinkuckee Environmental Fund and Council, and organization of which I am very proud; my dealings with Mr. Collins through that organization have not been pleasant."

Anne Greenleaf stated that her family has been "coming [to Lake Maxinkuckee] since 1882". Greenleaf indicated that she was "in agreement" with the comments made by Tom Sams.

Katie Lewallen, Culver resident, stated, "The reason I really wanted to come here is that this is so important. I'm trying to read everything I can on both sides of the issue. I'm concerned about infrastructure studies, or lack thereof, which concerns roads, the wetlands, and all of it, the runoff. I'm here today to just hear and study."

Litt Clark, read aloud a letter written by John Kniesly, a resident of Culver.

> As a long time lake resident (58 summers) I have long observed significant algae (weed) growth in the waters adjacent to what my family always called, "the inlet", now doubling as the canal to the marina in the southeast corner of Lake Maxinkuckee. No matter what past efforts may have been made to control the inflow of farm and, now, golf course related nutrients to the lake from "the inlet", it is clear to me that an algae problem still exists in that part of the lake. Any development with impervious roofs, sidewalks, and streets will direct large quantities of rainwater somewhere, perhaps not always where intended. Adding to the run-off which makes its way quickly to the marina's lagoon will add hydraulic force to the flushing of nutrients farther into the body of Lake Maxinkuckee. I say this impact of forceful water flow from the marina canal's mouth after a heavy downpour during the time the new golf course was under construction. The brown, silt-filled water created a starkly contrasting bloom nearly one half mile from the mouth of the marina canal. I cannot imagine that no ecological harm to Lake Maxinkuckee resulted from this introduction of nutrient laden run-off water far into the lake.
>
> The installation of a private waste treatment plant anywhere in the vicinity of Lake Maxinkuckee gives me a second cause for concern. No matter how well engineered and maintained, a waste treatment system which uses pipes, mechanical devices, and requires a power supply to operate has the potential for failure. Such a system failure could be disastrous for Lake Maxinkuckee. I hold the lake in too high esteem to stand for such a risk. That the current developers are well intentioned, and have waste treatment plant maintenance funding in hand, today, may well be fact. I worry about ten, twenty, thirty years and beyond. Privately run waste treatment plants are subject to the same cash flow pressures which affect any other business or community trust. When cash is tight,

maintenance plans slip. No room for error, here, when the quality of Lake Maxinkuckee's water is in play.

A final concern is the significant addition of watercraft on Lake Maxinkuckee operated by residents of the initial townhome and villa. The stirring of nutrient rich sediment in the area outside the marina brought on by a large increase in boat activity will add to the already existing problem of new nutrient introduction. Deep V inboard-outboard and V-drive inboard watercraft under acceleration easily draft four feet of water or more until they plane off. The prop wash from those powerful boats will stir up the soft lake bottom. Traffic in the area is already very heavy if the winds blow from the south-southeast. A development which is likely to add more powerboat traffic to the lake does not bode well for the safety of boaters or the lake, itself.

With all respect to Mr. Akers and his associates, if any, I believe the granting of a permit for a sewer conservancy district and the resulting development is in conflict with the best interest of Lake Maxinkuckee.

Don Nicholas stated, "I've heard all of these comments regarding the environmental impact, and that makes a lot of sense to me. So, we are opposed."

Nancy Nicholas stated, "I'm opposed as well, and I'm opposed more now than I was before."

John Smitson stated that he and his wife purchased a lakefront home about three years ago; however, "I've been on the lake all my life. Both my brothers each have homes, and my parents have a home. We love the lake. I'm not an environmental scientist by any stretch of the imagination. I take most of my cues from the environmental associations. My family, of each of the four houses we have, are opposed."

Herb Rentschler stated, "I'm opposed to the development. I think one of the findings is supposed to be is there a need or a benefit to the development? I can say, 'No', to both of those. I see no need; I see no benefit. If there is a benefit, it's to put cash in pocket of a few investors, and I don't think that's what the lake owners are really interested in". Rentschler said the proposed development would "lead to funneling into the lake. It's a back door way of doing it, but it's nothing but funneling into the lake". He said the area within the proposed district "has seen an extremely large amount of fill brought in place. Construction on fill is illegal…. To me, a good part of this construction could well be illegal also, as well as not the best thing for the lake residences."

Rich West, stated that he and his family are "opposed to the project. From a risk-benefit analysis, the risks far out weigh whatever the benefits might be. …I think the wetland is way too high and this is not a natural resource we should take any risk with. I think the impact to the lake once the project was actually established and built, in terms of the impact of increased traffic and increased boats, and the sewer on the lake itself would be very negative. ...We are strongly opposed to this project."

Kathleen Berindei stated that she is a "lifelong lake person. I was brought up on the west side of the lake on Long Point. I just bought a home in town with a view of the lake. I absolutely love it here. I kayak and sale, but you can't do that on the weekends, because

the lake is so busy. And, I think adding more people to the lake will just cause more congestion. We have a treasure out here and I can't see jeopardizing that in anyway."

Jim Hahn, resident of Culver, stated, "I think Mr. West said it very, very eloquently. I don't see a whole lot of positives with regard to this proposal…. So I am definitely opposed to this project."

Brenda Constantine stated, "My husband and I are opposed to the project."

Elizabeth Albright stated that she has spent "parts of the last 25 summers on the lake, and my time on the lake as a kid inspired me to a Masters and a Doctorate in Water Resource Management. As proposed, I'm opposed for four reasons. Basically the location and the amount of impervious surfaces near the wetlands. Second, the construction process and erosion that may occur if the best management practices aren't adopted and implemented, which is fairly likely to occur. Third is the precedent for future development. And, fourth is the increase traffic on the lake."

Mack Keety stated that he has summered at Lake Maxinkuckee for the past 40 years. "Tom Sams said it great. …I do realize those of us who have been fortunate enough to be on the lake are really stewards; that's what it is. …It just concerns me especially this close to the water table and to the wetlands. My family has had concerns also with the property across the way…and the funneling that we fear is going to be happening". Keety said the proposed PUD sets a precedent and "to me it's more of a short-term gain than a long-term vision."

Patrick Walsh, lakefront property owner, stated, "I'm close to the project, and I think that somewhere along the line the lake went from people either had a place or inherited from their parents, or bought an existing home on the lake to new developments on the lake, condo developments, and geometric increased pressure on the lake. Now that they want to build over at the wetlands, I just think is just a bad idea as far as what's going to happen. No one is concerned about the wetland. I think the people that want to build there are only concerned about making money; they don't care what happens to the lake in the future". Walsh indicated that Lake Maxinkuckee is "only one size and it can only take so much pressure. At some point it has to stop."

Dick Duggar, lakefront property owner, stated, "I want to say that in the formation of the [Southwest Lake Maxinkuckee Conservancy District] one of the reasons given was the protection of the lake. In doing so in the very beginning we sought out a health officer and raised the question about private treatment. And, the answer at that time was that due to increasing regulations of the government, if you are anywhere near a municipal treatment, don't even think about a private treatment. And, I think that, thus, speaks for itself."

Carol Saft, lakefront property owner, stated that she grew up in the Town of Culver. "I would get on my bike everyday in the summer and come down here to this beach. I hear people speaking about their cottages on the lake. There is also a town here that is

serviced by this lake. …We wouldn't be as diverse as we are if it wasn't for the lake". Saft said the proposed cluster septic system is "untested", noting that the septic system is tested only at 3,000 gallons per day. "You want to take that to 25,000 gallons per day next to a wetland. I think we need to take some serious consideration. I heard yesterday a lot of 'I don't know. I don't know.' Well, I think it is time to step back and figure out what you don't know and find the answer to those questions". Saft also noted concern about future development associated with Phase 2 and Phase 3 of the proposed PUD. "That's a big concern". She said, "There is a developer here that has had litigations on past developments. There's an old adage that says, 'Fool me once, shame on you; fool me twice, well shame on us.' So, I'm definitely against this development."

Joe Schaub stated that he has been visiting Lake Maxinkuckee for about 48 years. "I'm opposed to the project for the reasons that others have stated so far."

Trish Wilson stated that she is third generation of a family that owns lakefront property. "I've seen a lot of change on the lake. And, I'm not opposed to change; however, it appears we have a number of developments on the lake, and private homes are already are for sale. Why do we need to add more to that? …Our lake is so pristine, I would like to see it stay that way."

Melinda Brigel Newtson, stated, "I was thinking about this development; I am against it. I did experience a lake that went bad…in the Wisconsin area in Lake Delevan. …Lake Delevan was having severe problems, and unfortunately I went swimming in that lake. I came out filled with scum. …They ended up having to drain that lake several times. ...It was disgusting and they did not control the development around there; they did not control the usage. I would hate to see something like that happen to our lake. Our family is against it."

Loyal Wilson stated, "My mother's family is from Logansport, Indiana, and we've been coming here for well over 100 years. We own the first house on the lane on East Shore Drive. I've been coming here for 62 years. And, like Tom Sams, I have memories of a pristine lake with turtles—not just down in the wetlands—but turtles would come up literally all around the lake up to shore and they would sun right by your dock. My concern about this project, which I'm opposed to—by they way I share this house with my three sisters who are also in opposition—is for the health of the wetlands that feed this lake and the continued damaged that's being done to it". He noted that the economic health of the Culver community is "irrevocably tied to the health of this lake". Wilson concluded, "Any short-term gain by doing the project is way offset by incredibly economic damage that would be inflicted on this community for the next 100 years."

Bob Frushour, lakefront property owner, stated, "I think if you approve this project, this is really the beginning of the end of Culver that everyone knows about". He said, "I want to guess there are probably under 500" homes around Lake Maxinkuckee. "You add another 100 and increase the population by another 20%, and then I think just having a boat on this lake goes from being risky to down right dangerous". Frushour said that

with the proposed development, "you are going to have to re-build a new highway, or do something about that traffic problem that that's going to create. I'm against the project."

Bill Furry stated he was a fifth generation lakefront property owner. "The only reason I'm against the project is that if something happens to the wetland, there is no way to recover; it's just gone". Furry said, "When the park increased [its] boat slips from 100 or 200 to 400 to 500, there really wasn't much objection to it, including myself… But the wetland is something you cannot repair."

Julienne Gee stated that her family has owned property on the west side of Lake Maxinkuckee for about 40 years. "This lake is so special to all of us, and it's because thank God for the Environmental Council that they have maintained the lake. It is beautiful, but the minute that we start allowing more and more development, it's going to hurt the lake. There is no way it cannot hurt the lake". She concluded, "The community here is wonderful, and I can appreciate any type of development. I'm certainly not against making money, but not at the cost at what ultimately it will do to this lake. The last three gentlemen really spoke on that. It's short-term. The jobs created are going to be short-term, but the damage to the lake will be long-term and eventually that will hurt the community. I definitely, and my family is definitely opposed to it."

Don Burke stated that he and his wife recently retired to the Culver area. "We just want to go on record as saying that we agree with the people that live on the lake. We should oppose this building."

Litt Clark, lakefront homeowner, stated, "My family is against this; I'm against this development. …We talked yesterday about the erosion control the developer. If he sees something happening, could make adjustments. Al Collins has proven his track record in that. …I could talk anecdotally that there were a lot of lawsuits, but I saw what happened down on Sycamore Road—you know, filling in a stream and not taking care of erosion control". Clark said that, "We are trying to get rid of all the septic systems on the lake to connect to sewer systems. If we were allowed to build a new house with a septic field, I think…that the resident would have to make room, and adjustment, on his property in case the one septic system failed. They have no room in their project for any failure; and that goes to the 'unproveness'…. They haven't used this cluster septic system at all on this scale. So, I think it would be a big mistake. We are putting a lot of important land that is so important to this lake in jeopardy by an untested sewer system. I think it would be a tremendous mistake to allow that to happen."

Helen Louk, a lakefront property owner, stated, "I've been here for 77 years. My folks had this little cottage…I go back a long way. I've seen changes; some have been good and some have been bad. And, I'm strictly opposed to this project, and I can't understand how all of these big places that is being built how they get the okay to do it all". Louk concluded, "I'm opposed to this."

Charles Margolis, Culver seasonal resident, stated that he "did not object" to the recreational facilities that will be constructed as part of the development within the

proposed conservancy district. "It is my understanding that … these facilities would be permitted without granting the applicant's request…within the guide lines established by Culver's Comprehensive Plan. I do not believe this request for a new proposed conservancy district should be granted." He said it took "a lot of hard work" by the Lake Maxinkuckee Environmental Council, "including individual financial support … to establish many of the amenities that today could be taken for granted, such as functional wetlands and a sewer system" such as provided by the Southwest Lake Maxinkuckee Conservancy District. Margolis noted that Culver's real estate market is "struggling". He noted that the area encompassed by the proposed conservancy district is "designated as flood hazard plain…. For for the past two years, 2007 and 2008, Culver has experienced flooding that has disabled entire two lane roads for months at a time within a 3-mile radius of the Marina, on Queen Road between 20B and 18B". Margolis said, "This project is ambitious, and is asking for a conservancy district in order to install a sewage system for 31 houses and 16 condos. What worries me is that…Aker Properties has never taken on such a residential development…Mr. Collins by his own testimony has never taken on such a development in an environmentally sensitive area…. Now is not the time to play a game of roulette with Lake Maxinkuckee…. We are talking about the health and the safety of the residents of Culver and the people who enjoy the waters of Lake Maxinkuckee." Margolis stated that malfunctioning septic and sewer systems "can increase probability of contagious diseases in children". Margolis stated that Aero-Tech sewer treatment systems, rated at 1,500 gallons per day, "have received positive feedback; however, I feel that Lake Maxinkuckee and the Kline Wetland are not the place to experiment with unproven tests that risk destroying a very valuable investment that is protected by Culver's Comprehensive Plan, and Indiana's Department of Natural Resources". Margolis then submitted to the hearing officers various documents[11].

II. WRITTEN COMMENTS RECEIVED PRIOR TO PUBLIC HEARINGS

Fredrick A. Karst, Culver, IN (Regular Mail: January 20, 2010)

In my opinion, the proposed Planned Unit Development in an environmentally fragile area adjoining Lake Maxinkuckee, as described recently, could gravely imperil the quality of the lake and prove hazardous to what remains of the natural environment in which the development would be located.

It seems likely, in fact, that it might undo many of the accomplishments the Lake Maxinkuckee Environmental Council has struggled to achieve in the past two decades. These accomplishments have had the support of numerous lake residents, other people in the Culver area and concerned individuals who value the survival and restoration of the pristine quality of Indiana's finest lake.

Much of my concern relates to the location in which the development is proposed, in an area close to the lake itself and at the edge of what early residents called the Norris Outlet, or simply "The Outlet," considered the largest and lowest of the marshes that adjoined the lake.

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[11] Septic System Density and Infectious Diarrhea in a Defined Population of Children, by Mark A. Borchardt, Po-Huang Chyou, Edna O. DeVries and Edward A. Belongia © 2003 The National Institute of Environmental Health Sciences (NIEHS); EPA *Enforcement and Compliance Assurance Priority: Clean Water Act: Municipal Sewer Overflows (Combined Sewer Overflows & Sanitary Sewer*), at http://www.epa.gov/compliance/data/planning/priorities/cwamso.html; and other miscellaneous documents.

This is an area that fascinated early residents with its wetlands vegetation, abundant wildlife and unique beauty. It was there that Indiana impressionist Richard Gruelle, a member of the Hosier Group, found colorful scenes of beauty to capture on canvas in some of his paintings.

The area still is a haven to species that are already under pressure from development, particularly reptiles, amphibians and birds.

Early scientific studies of the lake also revealed that the quality of its water resulted in part from the sandy soils that lay around it in many locations. Rather than eroding into the lake, the soil absorbed moisture. This phenomenon is diminished by additional paving and building in the lake area, a threat the Environmental Council has correctly pointed out.

The lake is the greatest natural asset in this part of the state. I think most people who enjoy it want to protect it from excessive development, so it will remain an asset that future generations can enjoy as much as we do.

Besides having a great appreciation for Lake Maxinkuckee, I have long supported the work of the LMEC. A former publisher of the Culver Citizen, I live on a farm on Queen Road close to the East Shore. I hold a bachelor of science degree in biological sciences from the University of Chicago and am a former employee of the U.S. Forest Service in the Department of Agriculture. I have written about Lake Maxinkuckee for Outdoor Indiana and other publications among many articles about natural science and the environment that I have had published in Outdoor Indiana, Michigan Natural Resources Magazine, Midwest Streams and Trails and various other magazines and newspapers.

III. WRITTEN COMMENTS RECEIVED AFTER PUBLIC HEARING

William F. Welch, Culver, IN (Submitted in person: February 5, 2010)

I am writing this letter to you instead of appearing at the hearing in the above matter, because I was not able to make the trip to Culver this week. My wife, Jean, and I have been summer/fall residents of Culver and Lake Maxinkuckee for more than 50 years. We have rented on the South shore and the East shore and have owned the property at 2348 East Shore Lane since May, 1970. During that period we have watched Lake Maxinkuckee be transformed from a remarkabley quiet place where it was safe to be on the lake at any time to one which carries more boat traffic than we think it safely can accommodate during summer weekends. I understand that your task is to determine whether the conservancy district Gary Aker wants to establish meets the requirements of the Indiana Code and should be recommended for approval t the Marshall Circuit Court, and I will focus my comments on that question.

As I understand it, Mr. Aker seeks to establish the conservancy to enable him to create a waste disposal system to service a planned unit development he wants to develop. His petition says that he seeks to establish the conservancy to protect Lake Maxinkuckee. *See* Petition, ¶¶ 3 and 4. In my view, Mr. Aker does not seek to protect Lake Maxinkuckee; he seeks to exploit it for his own personal gain.

Prior to my retirement, I practiced law in Indianapolis with the law firm of McHale, Cook & Welch, p.c., now Bingham McHale, LLP, commencing in 1948. My review of Indiana Code § 14-33-2-1 *et seq.* indicates that it calls for an assessment of the impact of the proposed conservancy on Lake Maxinkuckee, among other considerations. In my judgment, the proposed conservancy will lead directly to increased boat traffic, increased run-off, and increased pollution into Lake Maxinkuckee. Without direct guaranteed access to Lake Maxinkuckee, I think it very doubtful that any of the structures Mr. Aker proposes to build in the planned unit development are likely to sell. He will need to provide that guaranteed access to prospective purchasers, which will negatively impact the Lake. Lake Maxinkuckee is already a crowded lake on the weekends,

and one already can easily see the increased turbidity from boats churning up the lake bed during the summer.

The petition in opposition to Mr. Aker's proposal signed by Jean and me is, I believe, a matter of record in this proceeding. You have the opportunity to help preserve the character of one of the greatest natural resources in Indiana by recommending to the Marshall Circuit Court that this proposed conservancy does not meet the requirements of the statute. I am convinced that the impact of the proposed conservancy on Lake Maxinkuckee will be decidedly negative, and on that basis, I encourage you to find that the impact of the conservancy on Lake Maxinkuckee is detrimental to the health of the Lake and recommend that Judge Palmer not approve it.

Brent Hord Malarkey, Culver, IN (Email: February 5, 2010)

I have been on Lake Maxinkuckee all of my life during the summers; my Grandmother, Mrs. Francis T. Hord, had a home at 1556 East Lake Shore Dr. It was built for her by her parents in 1901. The home is now jointly owned by my cousin, Eleanor Ray Lee from Terre Haute, my brother, Fred Hord, from Louisville, Ky., and me. I live in San Francisco and the Culver cottage is known as the Hord Cottage.

I understand that there is a possibility that a marina PUD might be built adjacent to the Kline Wetlands. This causes me enormous concern. I am aware that the Lake went from a eutropic state to an oligatrophic condition thanks to 28 years of hard work on behalf of the LMEF and LMEC. This took a time period of 28 years.

I am horrified that all of this good work might be in vain. We must be certain that the final design and installation of this septic system will not harm in ANY WAY the present quality of the water. I remember so well how fast the water quality of the Lake changed from 1935 to its egregious condition in the early 1980's. The fact that the quality of the water could actually improve was only because there were so many people who worked diligently to bring it back. Its excellent state at the present time is remarkable to note. What an ecologic disaster it would be to reverse this.

We must ensure and preserve this water quality. It is of absolute importance that any plan to change an area contiguous to the Lake be screened thoroughly and approved as a safe procedure. We will all watch carefully any upcoming modification. Thank you-

Pam Baker, Culver, IN (Email: February 5, 2010)

Thanks for taking the time today with our community. I do feel as though this project will not be beneficial to our community in Culver. The environmental group has worked so hard to improve the lake and has almost reached their goals....why take this risk at all? We already have many condos for sale that can not be sold as yet in this economy. We already have six empty store fronts downtown Culver, as well as 7 or more business's downtown for sale. Our little community is struggling as it is in this downturn economy. If those remaining business's are affected, because of competition with the Marina's idea of their own private village, I see it as who cares about the lake or the little struggling business owners. Sounds like a wonderful community to in, but what effect would it have on the homes in Culver that aren't new? I see this as also drastically effecting property values of homes in and around Culver as well as on the lake. Many home owners as a whole are already struggling to sell homes, competing with new housing that has been built on the lake. The older cottages are not quite as interesting to the buyers today, because you can build a newer home and sell it for nearly the same money as sellers use to get for the older cottages. Many of the sellers have already experienced drastic price reductions, some several times. This is not just the economy, it is also new development. It seems to me, that Collins Inc. and Ackers Inc. would be the only parties benefiting from this endeavor. If I were a buyer of such a home/community, would I be told that it was all built on the wet lands of the Lake? I feel that many people/buyers may not want to risk soggy yards, possible sewer only guaranteed 5 yrs. etc. What if this development were passed and doesn't get completed? Will the owners out there bare

all the risk and responsibility of the sewer? Concerned about the downtown and our lake, not in favor.

Deborah Moss Kelley, Culver, IN, and James M. Moss, Culver, IN (Email: February 5, 2010)

Thank you for coming to Culver these past two days. I was in attendance today (Friday) at the Public Hearing. I did not speak, but will take the opportunity to do so now.
I drove from Columbus, Ohio, to represent my parents, sisters and our families, totaling 30 people covering four generations with the oldest being 86 and the youngest just one week old. Clearly, it is in all of our very best interest to care conservatively for our precious natural resource that draws us all together, Lake Maxinkuckee. It behooves all nature lovers to make sure this lake is a clean, clear, and living entity for a baby like tiny Monroe who has no voice, save ours, to ensure her future.

I remember my father (the 86 year old) going out some 25 years ago in his Boston Whaler every week to take water samples at varying depths - all part of a vast volunteer effort to assess and then correct our Lake's health. Thank goodness for those early efforts as we are very proud of our near pristine rating today. This same father helped to develop the East Shore Corp. which manages the sewage treatment on the East Shore of Lake Maxinkuckee, again a massive effort to rid our lake of septic tanks to prevent any possible spillage. I am very concerned, actually shocked, to learn today that a future Home Owner's Association, which will be composed of an every changing group, will be "in charge" of the proposed septic system for the PUD. It takes a constant, very knowledgeable and vigilant board to ensure such a system is working correctly. And, to quote Mark Akers this morning, "If the system works" (play back the tape). That was a rather telling, not to mention chilling, remark from the owner of the septic system company. Quite honestly, I view this entire project as a conflict of interests. Please represent my family's sincere desire to preserve our beloved Lake Max's ecosystem from being over-taxed. We urge the Marshall County Court system to VOTE NO to this proposed PUD. Thank you.

Janet Kline, Culver, IN (Email: February 5, 2010)

In a time when we all are concerned about the environment, it seems inappropriate for a developer to come up with a plan that would strain the Lake in Culver and the Kline Wetland adjacent to this project. At this time there are enough huge homes around the lake and many are for sale. The economy is stressed and people are not interested in spending money for second or third homes.

The main reason I am writing though, is my concern about the damage this project will do to this Lake. For years, many have worked to improve the conditions in and around the lake as there were grave problems in the 1980's. We are proud of the advancement and do not wish for more buildings and problems to exist. This land needs to be protected.

Another issue is the wetlands, an environmentally sensitive area whose viability affects the health of the lake. It doesn't need unprotected and unfiltered water to run off into the wetlands and then the lake. We don't need a development that will add more strain to the land as well as the lake. People claim the septic system will provide no harm to the property or lake but false promises like this have be claimed in the past and when there is a tragedy, it is too late.

It is my hope that you will give serious consideration to end this project and let that land remain as it is. Also, the wetlands need the protection so our wild life will not suffer. Please veto the PUD Project.

Janet Sheerin, Culver, IN (Email: February 5, 2010)

I am against allowing this PUD Case #09-167. The lake is beautiful and clean but has its problems. Allowing this development would be a terrible strain on the lake and the environment. Also sewer systems could be a big problem for the lake. In this environmentally conscious world,

we have to do what is best. Any decisions will affect us forever. We have to make the right decisions for our environment and I think Case #09-167 is entirely bad for us. Thank you

Fred and Aubrey Hord, Culver, IN (Email: February 5, 2010)

I have lived in the summers on the shores of Lake Maxinkuckee since 1929 when I was born. My grandmother built the cottage at 1556 East Shore Drive and it still stands. I am now 80 years old. The water in the lake is of great importance to me and my family. Over four generations have fished in it, sailed on it, water skied and have enjoyed the clear water that comes from the springs in the middle of the lake.

We DON'T want to lose that from runoff from another new development. The Kline wetlands provide turtles, young fish and the environment that makes Lake Maxinkuckee so very special. Those would all be gone with a development there. Those people who plan to build it and those people who plan to live there would not be welcome additions. I hope you will consider my thoughts and those of others before you continue.

Patrick Thomas, Culver, IN (Email: February 6, 2010)

I am sorry that I was not able to personally attend the meeting held in Culver earlier this week. Business in Chicago kept me away.

I and my wife have been residents of Culver and boaters on Lake Maxinkuckee for nearly thirteen years. We have watched and assisted in the restoration of this beautiful body of water to its present pristine state. Each year a variety of groups spend countless hours retrieving Lake Max from what was its near disastrous state to today's beauteous state.

The proposed PUD on the southeast corner of the lake will endanger this pristine state and could return Lake Max to a near dead lake.

The PUD will cover with cement and non absorbent surfaces acres of what is now a delicately balanced system that maintains the clear and beautiful waters of Lake Max. The run off from these covered acres caused by heavy rains and storms will have no other choice but to flow into the lake and carry unfiltered pollutants with it. Presently these acres uncovered with the adjacent Kline Wetlands are vital to this balanced system.

The septic field along with these various covered areas threaten to sound the death knell for Indiana's second largest natural and most pristine lake.

I sincerely trust that you and your colleagues view this PUD as major a threat to Lake Max as do we the citizens of Culver who wish to steward this lake for our children, grandchildren and generations to come. Thank you for your time

Beth Wilson, Culver, IN (Email: February 6, 2010)

I am writing with regards to the Administrative Case #09-167. My family have been residents on Lake Maxincuckee for over 75 years, and I have been a part of the Culver community and Lake Maxincuckee for over 20 years. During this time, I have enjoyed the beautiful aspects of the lake and the various ecosystems it supports.

I will be graduating from Marquette University this year with undergraduate degrees in Environmental Sciences and Biology. I have also had experience in a laboratory setting working with a limnologist, who studies lakes and their surrounding ecosystems. Through my work in this field, I have an understanding of the threat a development such as this would pose.

It has come to my attention that a pending development may have considerable detrimental effects on the lake and surrounding Kline wetlands. Please note that these areas are extremely important to the residents of Culver. The health of the wetlands is especially vital to the health of the lake.

With more impervious surfaces like driveways and parking lots, storm water that picks up debris and toxic substances will runoff into the wetlands and lake. Excess nutrients can cause eutrophication due to algal blooms; debris and hazardous waste are dangerous to the marine life

and to the residents of Lake Maxincuckee. Bacteria and other pathogens can wash into the wetland areas as well, creating a hazard for users of the area.

Given my concerns and the concerns of many others, I strongly suggest and would ask that you maintain strict environmental standards in both the planning and implementation of the PUD, should it become a reality.

Craig A. Schrimsher, Culver, IN (Email: February 6, 2010)

The overwhelming sentiment (both publicly and privately) by the majority in opposition to the Maxinkuckee Village Conservancy District has been very clear. The long time lake property owners, who account for nearly all of those who oppose the project virulently, have a sense of entitlement to their exclusive access to a valuable public resource. While I feel that monetary support for an independent environmental council should be applauded and appreciated, it does not give the boosters any legal or justifiable authority to direct public policy. The opposition is incredibly motivated, disproportionately mobilized, and historically very effective in affecting policy that pertains to their own interests; I beg you not to confuse their outcry with majority public opinion. Regarding the few concerns that were legitimately expressed regarding potential for environmental endangerment by the conservancy district, I believe strongly that it should be the sole responsibility of our legally appointed governing bodies to determine their legitimacy and to determine procedure, not the angry mob.

My name is Craig Schrimsher, and I am a lifelong resident of Culver and a homeowner. Like many of those who live, work, and raise a family in this community, I am disappointed that a vocal minority has been able to block progress or anything resembling it at every turn. The PUD will increase our tax base, create an immediate number of jobs, and spur traffic at our local businesses. Being that I do not possess the formal education of an environmental scientist, I must defer to our lawfully appointed governing bodies and trust that the state would not approve a project that endangers the ecology of one of its most precious resources. As far as the concerns of increased lake traffic or compromised community identity, you only have to look as far as the incentives of those objecting to understand their origin.

Marilyn and Jim Bartlett, Culver, IN (Email: February 6, 2010)

My husband and I have spent summers at Lake Maxinkuckee for 25 years and have worked to help keep our lake in pristine condition. Jim was a member of the committee working to get sewers for the south and west shores and we have monitored water quality over time for that endeavor. As more large homes have been developed and more boats launched causing more pressure on our lake, it is imperative that we all work to preserve it. Another large development is not in keeping with that goal.

Nancy Stimson, Culver, IN (Email: February 6, 2010)

We listened to close to 6 hrs. of facts, presentations and questions yesterday. On the surface, it sounded just lovely. We heard the word "community" a lot. Who wouldn't want a self-contained community with soccer field, tennis court, clubhouse and golf course that was "affordable"? Want, yes; but need? Probably not.

But beneath that, we heard things that were troubling. From their answers and the *way* in which they answered, at times I wasn't sure if this plan just hadn't been thought through very thoroughly, or whether Mr. Akers and Collins were trying to shade the truth on certain issues. I certainly didn't feel that I could trust them to do the right thing, when push comes to shove, as it surely will during this process.

We heard a lot yesterday that suggested that this plan only **meets minimum acceptable** standards. I believe that the critical location of this development requires that every possible precaution be taken, that this is an instance for meeting the very highest, most conservative standards. A single day's "oops" could lead to devastating results for Indiana's second largest

and most beautiful lake. This devastation would take years, perhaps generations to reverse, if it could be reversed at all.

One of those minimum standards was the 100 year rainfall. In the last dozen or so years we have experienced several such rains, with flooding. I have a picture of our next door neighbor standing on his bridge over the ditch between two cottages to hold it down as an unbelieveable volume of water came gushing down across Southshore Drive and overflowing the 3-4' ditch that flowed into the lake. When I think about such an event, during construction (or even after construction, with the addition of all that impermeable surface area), right there in such close proximity to the wetland, I shudder!

The other thing I find worrisome is the power outages. The plan sounds okay, if you have a normal number of outages – say 3-5 a year as we do in the city. But here we sometimes have 3-5 a week, and it's a rare week that we don't have at least one. We get so used to them, we just ignore them, as best we can; which is what I'm afraid that a remote operator would begin to do, over time, saying to himself, "Oh, bother, *another* blip from Maxinkuckee." And he might just continue his card game, *this* time…

While I wish that I could believe that Mr. Akers and Mr. Collins are or will become genuinely good neighbors who would take every precaution to safeguard this fragile ecosystem, this seems to me to be a very risky endeavor even under these best of circumstances. Unfortunately, their track record around this lake suggests that corners will likely be cut, that environmental precautionary guidelines will be ignored, and that they themselves will act like an invasive species, threatening this magnificent ecological system (that so many have worked so hard to protect for so many years) with great harm. Apparently they have never heard the story about killing the golden goose.

Rick Baxter, Culver, IN (Email: February 7, 2010)

The entire Baxter Family asks that you decline this proposed development for the following reasons.

The proposed location of this development is very poorly situated ecologically. The owners of the property purchase a marina not a multi-dwelling development site. There just simply is not enough land available without pushing up against a wetland which is important for maintaining the water quality of Lake Maxinkuckee. If the sincere intention was to create economic housing and jobs for the Culver area, then there are many other parcels of land available not so close to an ecologically sensitive area. We believe the true motivation is to create more business for the marina and their restaurant at the expense of the Lake. Of course this doesn't make sense but the short sightedness of developers has been proven over and over again and the reason why we have to have ordinances and zoning laws to prevent these errors in judgment.

Allowing a multi-dwelling development crammed into an inadequate size property will set a precedent that will be hard to stop. Who will be next to take their lake side property and decide to turn it into a multi-dwelling site? Saying "No" now sends the correct message to the many others waiting on their opportunity.

I heard many times at the meeting that the proposed PUD septic system was tested up to 3,000 gals and the proposed development will push up to 25,000 gals. If you want to test this experimental septic system, then do it on a property a mile off the lake front and not near a wetland. It just doesn't make sense to risk Lake Maxinkuckee, one of the few "Natural" treasures of Indiana. The key word here is "Natural". This Natural Lake relies on the care of all the properties around the lake. The East shore residents invested their time and money to remove the septic systems that were leaching into the lake, replacing it with a sewer system that would push the sewage a mile away from the lake into a purifying waste system.

The South shore and West shore residents are pursuing the same thing. Don't send the wrong message to the long time home owners, who are spending their money to save the lake, by allowing an experimental septic system to potentially "UNDO" all their efforts.

We appreciate the due process and allowing the residents to express their opinion. We all hope that you will come to the conclusion that this proposed PUD development has more negatives then positives for the community. Please say no to the project.

Jackson Hazlewood Jr., Culver, IN (Email: February 8, 2010)

The applied for PUD for Maxinkuckee Village should create a separate entity to monitor and maintain the sewer system independent of the developer and eventually the home owners to insure the future quality of the runoff and Lake Maxinkuckee is maintained. The entity should be funded in perpetuity so as to handle emergency situations that neither the developer or future homeowners can not, or are not prepared to address.

The sewer system must be continually monitored and maintained. It is all too easy to think that if it is apparently working that there is no problem. Who determines the sewers viability, that it is working in accordance within it's design and sanitary standards.

Further, if the system is designed to accommodate a certain number of residences and that number of residences is not met, it will be very costly for either the developer or the homeowners in the future. This would be an invitation for neglect and action that would be detrimental to the quality of Lake Maxinkuckee.

Thank you for your thoughtful consideration.

Eleanor Lee Swanke, Culver, IN (Email: February 8, 2010)

I, Eleanor Lee Swanke, am representing my 92 year old mother, Eleanor Ray Lee, an owner of a summer cottage on the East Shore of Lake Maxinkuckee. The cottage was built during 1901 by my great grandmother and has been enjoyed by six generations. The family has watched the water quality of the lake deteriorate since the 1970's, when the Venetian Village destroyed part of the wetlands, inadequate septic systems have been used and the number of boats and jet skis has greatly increased.

Enforcement of lake protection has been non-existent. The protection of the wetlands and watershed is vitally important. The Lake is the most valuable asset of the community and if it is destroyed, the Lake community, Academy and Town of Culver will become a ghost town and area. What a shame!!!!

The Marina PUD developer, Al Collins, has shown the community many times in the past that he has no intentions of protecting the Lake or its surrounding areas. He cannot be trusted.

My mother and her family strongly object to the development of the Marina PUD. It will create more impermeable surfaces harming the Lake; give more and more boats access to the Lake, which in funneling; besides destroying the watershed and wetlands.

I, also, own and live all year round in a home with beautiful views in the Town of Culver, and greatly wish there were more available enforcement of zoning ordinances to protect the Lake and its environment.

Dan Baughman, Lake Maxinkuckee Environmental Council (Email: February 8, 2010)

A. Environmental Issues: Adding concentrated housing into a region where natural runoff leads directly to the lake or the wetlands channel to the lake or, on the northeast corner, to a stream pattern leading indirectly into the lake is certain to increase the lake load of runoff materials regardless of the septic program and runoff containment proposed to be installed. A significant area will change from natural grassland and forest into paved areas and lawn.

A septic plan which collects materials for processing on the slope leading to the wetlands and wetlands channel sets up the future potential for harmful spills and overflow, which could

degrade the wetlands buffer which has been so important in the state recorded improvements in overall lake quality.

B. Local growth issues: Since some degradation of the lake environment is certain to result from a significant development in this area, is the environmental cost worth the possible financial gain? This is always a difficult analysis. I note that, recent efforts to sell property for housing in the immediate area, has been rather unsuccessful. A lot will depend upon availability of boat storage and easy launching which would increase lake load again.

Heavy traffic (foot or cart) in and immediately around the wetlands will create problems maintaining the lake protection capacity of the wetland. The protection capacity is already in question and under study this year by the LMEC.

Should the PUD be implemented and many units occupied, there will be need for restaurants and small shops in the nearby area. These facilities would also need sewer planning and would further decrease natural surface areas for runoff absorption.

I am opposed to this Planned Unit Development. Thank you for considering my input as I was unavailable to attend for job related reasons.

Patricia Wilson, Culver, IN (Email: February 8, 2010)

This email is to voice my opposition to the development close to the Kline Wetlands on Lake Maxinkuckee. Concern for the environmental effect and lack of need for such a development are my reasons behind this opposition.

Suzanne King, Culver, IN (Email: February 9, 2010)

Lake Maxinkuckee is one of Indiana's many attractions. The lake is in a class by itself. Not only is it a beautiful lake, but it also is home to Culver Academies, the town of Culver, fisherman, and people enjoying all kinds of water sports. My concern is the health of the lake and the surrounding environment; therefore, I am writing on behalf of the lake about Administrative Case 09-167.

If there is any uncertainty about the PUD septic system ensuring no harm will come to the lake, then why proceed with the development? If the PUD project could even have a possible detrimental effect on the lake, then let's stop and rethink this potential risk. It is important that we, as caretakers of the lake and the surrounding environment, be alert to possible projects that might have a negative impact on the lake and environment. Maintaining the quality of the water in the lake and preserving the integrity of the Kline Wetlands could be a losing challenge if the PUD project proceeds. After all, which is more important: maintaining the quality of Lake Maxinkuckee and all its enhancements or the PUD development project which will undoubtedly foster the decline of the environment and the lake?

Ted Dunn, Culver, IN (February 8, 2010)

I would like to express my concern for Lake Maxinkukee in regard to Administrative Case# 09-167. My family and I have donated funds for over 20 years to see our lake go from really bad shape to really good shape, and it has been wonderful to see. I fear if this development is okayed we will reverse this trend and it will be very sad for all. I am also concerned about safety on the lake, especially at busy times with the addition of some 100 boats to our small lake.

Thank you for considering my opinion. Our family has had a cottage for 80 years and we truly love the lake.

Jeff Groch, Culver, IN (Email: February 8, 2010)

I am writing this letter concerning the PUD project that is being reviewed. We feel that if this project goes through, our lake will be permanently damaged, due to the runoff water that will inevitably flow into the Kline Wetlands, then into our lake.

The community here has worked really hard to improve our Lake Maxinkuckee from the poor state it was in a decade or so ago. Now, the lake is rich in mineral and organic nutrients that promote plant life, thus increasing aquatic life. This project will possibly ruin all of our efforts, and remove the plant nutrients that are so vital to the health of our lake.

I urge you to consider all of the ramifications of allowing this project to continue. We will do whatever it takes to preserve our lake.

Matt Keedy, Indianapolis, IN (Email: February 8, 2010)

I was at the hearing in Culver, Indiana this morning to voice my concern about the proposed PUD on the southeast corner of Lake Maxinkuckee. I took the day off work and drove 2 hours with a winter storm advisory in effect to be at this meeting, as did many others in the room today. As it has been made very clear from the Lake Maxinkuckee Environmental Council, which has been an integral part of our community and our support dollars from the early 1980s when the health of the lake was in decline, we have worked hard to ensure that this lake - the second largest natural and public lake in the state of Indiana - be saved for future generations. It is with GREAT concern, especially in light of all of the progress we have made in the past 30 years, that a development of 31 houses and 16 condos is being planned adjacent to the Kline Wetlands. I am quite concerned about the impact of this development, should it be allowed to proceed through the granting of a PUD.

I was relieved to find today that I am not alone. I understand over 700 petitions against the PUD were received in December. I think there are a lot of reasons a decision regarding the refusal of a PUD should be considered.

1) First and foremost, I would insist that anyone holding decision powers over this PUD would review the record of Al Collins and the litigations he has against him in the Culver and Lake Maxinkuckee community. His record speaks for itself and I do not find him trustworthy. I have not seen evidence to record that he has any experience developing a community in an environmentally sensitive area and, in fact, his record is quite the opposite as he has used questionable practices in developing land on the South Shore of Lake Maxinkuckee in regards to partially blocking a public access site and damming a ditch for run-off. Since the arrival of Mr. Collins on the shores of Lake Maxinkuckee he has earned a reputation of stepping over the line of the law and then apologizing after the project has finished without much ramifications. As a result, he continuously finds himself in litigation. This is NOT a man who we can TRUST to build ANY kind of development where one mistake can wreck the work of many, started long before his arrival in this town, to protect the lake and its natural resources. At minimum, if any type of PUD is to be approved, there should at least be a requirement that a firm with a proven track record in environmentally sensitive areas (ideally wetlands and lake) be allowed to propose the development. To allow Al Collins and his firm to be responsible for this development would be playing Russian roulette with the future of Lake Maxinkuckee. There is no room for mistakes in this environmentally sensitive area that is so important to the health of Lake Maxinkuckee, one of Indiana's greatest natural resources.

2) I question the need at all for additional development in the Culver community. We have houses, condos and cottages sitting on the market. One house at 20124 117th Road, which sits between Culver Marina and Mystic Hills Golf Course (the two "draws" of Maxinkuckee Village) sat on the market for over 2 years at $110,000 before it was taken off of the market according to sources at the meeting today. That property was amongst vacant lots that have been for sale as part of Mystic Hills Estates; nine lots along the fairways of Mystic Hills Golf Course with no lake access that have been available since 2001. The only lot which has been developed was by David Pugh, of Mystic Hills, as a spec home which did not sell and now serves as a rental. Furthermore, developments like The Riggings, also without lake access, were started in 1999 and continues to remain unfinished with resale of units being between $190,000 and $240,000.

I am concerned I have not been able to find any estimates on what a house or condo in Maxinkuckee Village would cost or rent for and if they would all be owner occupied or if they are all to be rentals. As far as being a mixed use development, we are lacking in storefront occupancy in the town of Culver. Even Al Collins latest commercial development on Main Street sits empty except for one occupant - COLLINS REAL ESTATE. I am concerned that the tax structure has not been defined and there doesn't seem to be any provisions to protect the conservancy district. With all of these questions in the air, I then have to question that even in the best of circumstances, WHO would be responsible if something failed in the PUD and the lake was put at risk? Would it be Gary Akers? Al Collins? The owners of the homes? The renters? An association? Who is in charge and liable???? Furthermore, it was mentioned today that the development does not follow Culver's current density development plan.

3) I was concerned today when I heard that the patent for the septic system developed by Gary Aker's brother was applied for in 2009. I can hardly imagine it has been tested, let alone stood the test of time, even though he said it was "Guaranteed for 10 Years" - 10 years? What happens in 9 years and it breaks? What happens in eleven years? This land to be developed is right next to the Kline Wetlands. There IS NO ROOM FOR MISTAKES - it effects EVERYONE in the community. Property owners, town merchants, the camps at Culver Military Academy and all of their water programs, visitors using the public access sites would all be be affected detrimentally. Furthermore, it was noted today that the EPA has never certified a septic system with more than a 1500 gallon capacity. I am not an expert by any means, but when I hear information like this and after hearing the proposal by Mr. Aker's brother for a septic with a much larger capacity, I lack confidence in its ability to work without problems or without clear evidence of a successfully proven track record.

4) For years it has been the goal of the lake property owners to move off of septic to sewer in an effort to protect the lake and make it cleaner and safer for everyone. The East Shore Owners have recently completed this goal and it is still in process for the West and South Shores. It is a community commitment and has been a goal at property owner's expense for many years. Just as we near the completion of this goal, why would it benefit anyone to allow the creation of a PUD - especially when it is located adjacent to the Kline Wetlands?

5) I am concerned by the precedent this will set. Culver has zoning which, to my understanding, does not allow projects which funnel into the lake. I cannot see how this would not set a new "exception" or would set precedent for more funneling projects. This, of course, leads to concerns about the amount of boat traffic on the lake - which is already becoming a problem. The development plans CLEARLY show an access road from the PUD, through the marina and to the docks. There doesn't seem to be a clear answer as to whether owners or renters in Maxinkuckee village will have boat slips and if so, how many. Considering that it was reported today that Collins development in Bayside came with "2 jet skis and a boat slip" I can't help but think that for every unit sold or rented you can assume an increase of at least 2-3 boats on the lake. Regardless, funneling is not allowed by local ordinance. Furthermore, information in the marketing materials show golf cart garages for use on the golf course being permitted. This is not true. Mystic Hills does not allows private golf carts on their course. Furthermore, a new law passed by the Indiana General Assembly last year affected Culver and prohibits the use of golf carts outside of city limits. It would require building trails very near the Kline Wetlands and would also increase the foot traffic near and potentially through the wetlands which could increase the amount of trash as well as potentially damage protected species.

6) My biggest concern though is if we jump onto this slippery slope, there is no turning back. IF the owner and developer had come forward with a successfully proven track record, with a portfolio of developments that have successfully been built on environmentally sensitive land similar to the project they are proposing for Maxinkuckee Village and details of every aspect of the community and the development, I would have a better sense of security going forward. But they don't and they haven't. I beg that the litigations against Mr. Collins be considered as

testimony to his historic unwillingness to comply and to promise more than can be delivered and then take that in context of the entire lake. It is not safe to put the future of Indiana's second largest natural and public lake in the hands of a developer with no proven track record in developing to environmental guidelines next to Kline Wetlands. Kline Wetlands is the result of nearly 30 years and thousands upon thousands of hours of grass-roots community involvement with the Lake Maxinkuckee Environmental Council - involving everyone from property owners, the DNR, to town officials amongst others - in an effort to save Lake Maxinkuckee from a period of decline. We have made great progress and have worked hard to ensure Lake Maxinkuckee will be around for future generations and we have nearly met our goal. To potentially sacrifice ALL of this would be unconscionable. I am against the PUD.

Joe Schaub, Culver, IN (Email: February 8, 2010)

The LMEF, LMEC and many supporters have worked hard for 28 years to improve the lake from a state bordering on the eutrophic (dead or dying) boundary in the early 1980's to oligatrophic (near pristine) in 2009. Many volunteers have given time and money toward this cause. I am concerned that a development as expansive as this proposed PUD could result in a decline from this current desirable standing. Any miscalculation will harm the wetlands and lake since they are "downhill" from the proposed project.

Seven years ago I was at the Root Beer stand near the public beach in Culver with my 3 kids a their friend all under 10. I noticed a substance running into the street gutter and into a drain. I walked down to the lake at the public beach where it was running into the lake, thru a storm drain. I called the "city" who dispatched an employee who was able to close a valve and stop the flow. Who knows how long this had been occuring? It was May so we were swimming. If it was March would it have been noticed as quickly? My point is, that something will happen, there will be spills, and this can be prevented by not allowing development near the wetlands.

The PUD would be built adjacent to the Kline Wetlands, an environmentally sensitive area whose viability affects the health of the lake. Unless properly contained the substantial amount of impermeable surface covered by the PUD could cause a large amount of unfiltered storm water to runoff into the wetlands and into the lake, whenever it rains hard. It is uncertain whether the design, installation and maintenance of the PUD septic system will be sufficient to ensure no harm will be done to the lake.

Melinda Brigel Newtson, Culver, IN (Email: February 8, 2010)

I am writing as a Culver homeowner to oppose the development of the Culver marina PUD. My family has enjoyed this beautiful lake for 75 years and we are concerned about the detrimental effect the marina PUD could have on the water quality of the lake. We watched the quality of the lake deteriorate in the early 1980s and have been proud of the efforts to restore it to its near pristine quality. Naturally, we are concerned that a development as expansive as this proposed PUD could result in a decline from this current desirable standing.

We are also concerned that the PUD would be built adjacent to the Kline Wetlands, an environmentally sensitive area whose viability affects the health of the lake. Unless properly contained the substantial amount of impermeable surface covered by the PUD could cause a large amount of unfiltered storm water to runoff into the wetlands and into the lake.

We have not been satisfactorily assured that the design, installation and maintenance of the PUD septic system will be sufficient to ensure no harm will be done to the lake. It is our hope that future generations of Culver homeowners and visitors will be able to enjoy Lake Maxinkuckee in all its glory. Please do not approve this development.

Allen Chesser, Culver, IN (Email: February 8, 2010)

We thank you and your staff for the good work and patience during the hearings in Culver on Thursday and Friday of last week.

I am Allen Chesser, Chairman of the LMEC, and would like to share some of my concerns regarding the proposed PUD and associated septic treatment facility. I have for many years had the Kline Wetland as one of my principal responsibilities to the environmental council. Over these last years our group has attempted to stabilize that portion of the watershed that drains into the Kline. While drafting our watershed management plan, studies at that location revealed that this wetland was a major contributor of ecoli bacteria and phosphorous to Lake Maxinkuckee. Several year ago we were able to collaborate with the neighboring golf course in virtually eliminating phosphorous fertilizer in their program and using a State program (CREP) to have filter strips added to farm fields along a major drain for the Kline Wetland. Even with these efforts, the nutrients and bacteria remain very high. We are now working on additional testing to better understand their source.

Along with my efforts on Lake Maxinkuckee, my wife and I work with the Nature Conservancy on the Tippecanoe River Project. Many good things are happening there, but it seems that some problems will be slow to overcome. As your group may know, the sewer plant in Rochester has caused significant damage to portions of the river below the Mill Creek (noted in a study from the US Fish and Wildlife Service FFS ID#3F23). This plant was regulated by State agencies and routine reporting was done showing good efficiency and results. The operator, Mr. Corn, was noted for this good work and recognized as being a steward of our watershed. The reality was very different. The State and Federal agencies in their verification process found that the Rochester septic treatment facility was a significant source of pollution and was destroying the rare and endangered species in the river. Mr. Corn has since been removed and prosecuted for this deception, but remediation may take decades.

I hope you will note that the Kline is still a fragile work in process. We are busy with monitoring and other studies, but we believe that additional pollutants may take the Kline wetland past the tipping point. It is our hope that your group will allow us to continue our efforts to improve this wetland without the potential harm this development and the associated septic treatment facility may cause.

Marjorie Heckel Murphy, Culver, IN (Email: February 8, 2010)

I must add my voice to the concerned property owners around Lake Maxinkuckee regarding the development of property around the Culver Marina, Admin Case #09-167. The Environmental Council, along with the property owners, have worked very hard for years to rescue our lake from becoming a dead body of water. By allowing the additional building to commence, the extra strain on the water system may undo all their hard work.

There are many examples around the lake that can currently serve as an example of poor land management. We don't need any more empty condominiums or rental properties. I have to ask, "What is going to be so different about this one that will make it successful where many others have failed in the past?" On top of this, the plans for the property do not seem to be set in stone. There are no solid answers for waste management and storm water run-off. The proposed pathways could potentially damage existing wetlands (illegal), and the amenities they are claiming to provide conflict with current amenities allowed on, in and around existing developments.

Please consider that the only real benefits to this project appear to be the pockets of the developers and no one and nothing else.
Please do not allow this project to commence.

Elizabeth Schmiedlin, Culver Academies (Emailed February 9, 2010)

Lake Maxinkuckee has been an invaluable amenity to the town of Culver. It's beauty and functionality has draws people from neighboring cities and states for years. The Lake Maxinkuckee Environmental Fund and Council as well as many supporters and admirers such as myself, have worked over 25 years to improve the lake's current near-perfect condition. We do

not want to see the lake regress. The idea of developing the area adjacent to the Kline Wetlands, an environmentally fragile area, is an act of greed and destruction. This area, if tampered with will affect the oligatrophic conditions of our lake. The current design, installation and maintenance of the PUD septic system may not with certainty be sufficient to ensure that no harm will be done to our lake. Without absolute certainty it would be an unconscionable act to allow this PUD clearance. Our town prides itself on our lake and the tangibles and intangibles it generates for the people who enjoy it.

Elanor Swanke Fox, Livonia MI (Email: February 9, 2010)

My name is Eleanor Swanke Fox, and my family is fortunate enough to have a lake cottageo n the east shore of Lake Maxinkuckee in Culver, Indiana. I have spent almost 40 summers on the lake, and I have watched the water quality of the lake improve from the terrible state it was in during the 1970s and 1980s – to its near pristine water quality in the last few years.

I am writing this letter to express my concern regarding the proposed Marina PUD (Administrative Cause #09-167C). I do not support this proposed PUD! I believe that building on or near the wetlands of the south side of the lake directly impacts the viability of Lake Maxinkuckee. This proposed action would disrupt the natural ecosystem that helps cleanse the lake and feed the wildlife. Also, with more residential buildings near the wetlands, comes additional lake traffic (speed boats and jet skies) which negatively impacts the quality of the lake.

In recent years, I have questions the priorities of the Culver Zoning Committee, as they tend to squeeze in more buildings around the lake that pose additional environmental challenges. The proposed Marina PUD is yet another example of a plan that could truly injure Lake Maxinkuckee and the surrounding area. If the plan succeeds, it will create more impermeable surfaces harming the lake, give more boats access to the lake (which in funneling), and will destroying the watershed and wetlands. In addition, there are numerous residential properties near the proposed plan's area that have been for sale for years with no interested parties to purchase these plots of land or buildings. Who's to say that with the current state of the economy that this proposed building project will yield a result that will even cover the building expenses. I could be just another building project that collects dust with no tax revenue, yet it created environmental challenges for the lake.

Lake Maxinkuckee is the most valuable asset of the community and if it is destroyed, the lake community, Culver Academy, and Town of Culver will become a ghost town and area.

Patrick Walsh, Culver, IN (Email: February 9, 2010)

As a homeowner on Lake Maxinkuckee and someone who is very concerned about the future health of that lake, I want to thank you for holding the hearing last Friday in Culver, and for listening to all the comments from concerned homeowners there.

I think it was obvious that a large majority of the residents in the area are against this development and specifically the creation of the PUD near the Kline Wetlands. Without going into great detail, which I know you have heard through our testimony and comments last week, here are a few reasons why I feel your commission should also be completely against the building of this development.

- The PUD, built adjacent to the Kline Wetlands is a completely unknown as to its ability to adequately protect these sensitive wetlands from pollution and runoff from the impermeable surfaces of this development. The long term health of this precious lake, one of the largest inland lakes in Indiana, is thereby at great risk.
- The PUD septic system has not been fully researched as to it's long term ability to control pollution from this development from entering the lake
- Lake Maxinkuckee is already overcrowded with a number of condo developments having been built in recent years. The never ending desire for money by developers has to be checked by your commission. Only the State can protect our lake from "profit takers".

- I am concerned about the reputation of the developer Collins, based on comments I've heard for months leading up to this hearing, and then of course at the hearing. It appears no one really has much good to say about this person's quality of workmanship, or how he keeps his word about maintaining quality and keeping up his projects. From individual homeowners to condo owners, it seems like no one trusts this guy to keep his word and be concerned at all about how this sewage and runoff system will actually perform. To me, he seems to have a "take the money and run" attitude. This is very worrisome for us who hope to enjoy a healthy lake for many years to come.
- The recent failures of other developments off the lake with no lake access (Mystic Hills Estates, The Riggings, etc. tells us that the only way Collins can sell these units is to try and funnel to the lake. That is illegal I'm told.

Mary Anna Swennumson, Culver, IN (Email: February 9, 2010)

Mr. Lucas, I hope you will truly take all the facts into account, as well as the overwhelming opposition to this project by the residents on the lake, and reject this proposal to build this PUD on the lake. We need your help desperately to preserve this great natural resource. Thank you for letting me express my opinion once more.

After two days of listening to the information given during the hearing in Culver, Indiana on February 4 & 5, 2009, I would like to take a moment of the committee's time to discuss **my** concerns about the application for a cluster septic system to be built next to the DNR owned Kline Wetlands that lead into Lake Maxinkuckee. This is your administrative case # 09-167

I have supported the organization of the *Lake Maxinkuckee Environmental Council* who over the past 28 years have worked to bring the Lake Maxinkuckee to the present status of an oligotrophic category. They are always monitoring the lake looking for possible infiltrates that would damage the health and cause havoc in the future. Today we, the community, are facing the possibility of a development called *Maxinkuckee Village* to be built next to the Kline Wetlands, an environmentally sensitive area whose viability affects the health of the lake. In order for the PUD to exist they will need to build a septic system for the use of their homeowners. It is uncertain whether their design, installation and maintenance of the PUD septic system will be sufficient to ensure the DNR that no harm will be done to this lake. *Since this size of the system designed for this project has never been installed and tested, I am more than deeply concerned.*

Furthermore, my concerns go beyond just this system. The builder of this PUD is Al Collins who has a reputation of doing work without thinking of the consequences before he disturbs the land. One citation against him was this past spring, 2009, when he was issued a stop construction work order by IDEM as he was careless about blocking the flow of a natural stream that flows into Lake Maxinkuckee. He has more local residents than not who have a complaint about his work ethics. I strongly feel he is not a good choice for this project or any other projects near the lake.

Last but not least; the economic viability of a PUD includes the ability of the developer to make a net profit, after completion and sale of inventory, in an economically reasonable period of time. I question why with a number of lake properties on the market, the condo-town-home/villas would sell without lake access (which the owner of this land is not able to provide). My concern here is that the community would find 40 out of 47 proposed structures will be empty and left as an eyesore or worse. I fear the developers have not thought this project through and are eager to begin a project that may not bring interested qualified buyers. Past experience with the sale of condos around this lake may repeat itself. Below are some examples of developments in the Culver area that have failed to be economically valuable.

1. Mystic Hills Estates is a Nine hole golf course with several lots that are close to the PUD sight and were originally listed in 2001. To the public knowledge, no lots have sold over the past nine years, other than one that an employee of the golf course bought for. The

owner of that lot built a house, placed a for sale sign on the property without success and has since used the house as a rental property. These golf course lots do not provide no lake access.

2. A lot plus house located at 2255 East Shore Dr. has eleven acres only one-half mile from the PUD. Listed in 2000 for $1,100,000 and has bee on the market since then. Now listed for $649,000, it remains unsold. This property does not provides lake access.
3. The Riggings is a development of 19 condo town homes built on Indiana SR 10. The development was started in 1999 and to this day remains unfinished. Resale of units is $190,000 to $240,000 (approximate). We understand the original developer went bankrupt. This development, like the planned PUD, does not provide lake access.

Other thoughts that are brought to mind: If the PUD lots do include dock access, it may be considered funneling which is not allowed by local ordinance. At this time Aker,Inc. LLC are stating there will not be access to the homeowners and the association for docks unless they pay the Marina rental fees.(Those fees would be set by the owner of the Marina who is also Financing the PUD)

Last but not least. My home is on the East Shore of Lake Maxinkuckee located on highway 117. Over the past years the increase in traffic has hindered those of us who like to walk, ride bikes and push baby strollers along the road. My concern is that the PUD will increase the traffic along this highway which is narrow and busy right now. Increasing the safety of the residents along this road.

My major concern for the lake and it's environment is to be sure that any What If's are never allowed to be tested so close to a watershed that controls the health of this lake. *Mother Nature takes care of her own and we must be responsible to help take care of Mother Nature by protecting her natural wonders.*

Thank you for taking the time to read my concerns. I know you will be thorough with your studies of the total project.

John Nash, Culver, IN (Email: February 10, 2010)

I am sending this note in reference to Administrative Case #09-167. I attended the hearing at Culver on February 5th, but I did not speak at the meeting. After hearing the comments expressed by both sides I have concluded that the proposed PUD project represents a significant risk to the water quality of Lake Maxinkuckee, and should not be allowed to go forward.

Chief among my concerns are:

1. The PUD is adjacent to the Kline Wetlands. Any leakage from the PUD septic system, and increased run off from the impermeable surface would threaten the Wetlands and the Lake.
2. It is uncertain that the sewer system design would be sufficient to handle the load safely. I believe it was stated that the proposed system has been used on projects that handle 3,000 gallons of water daily. I recall this project would have over 20,000 gallons daily. We should not take a chance on an untested and under sized system.
3. Many people who have interest in the quality of Lake Maxinkuckee have worked hard for many years to ensure that the Lake remains the treasure we value so much. I think there are simply too many risks associated with the proposed project.

Carol Zeglis, Culver, IN (Email: February 10, 2010)

First of all, thank you for your very professional job heading the PUD sewer conservancy hearing last week in Culver. You outlined the rules clearly and were very fair in your treatment of everyone, which was appreciated. I wanted to tell you this in person, but missed you before you left the building.

You asked if I would like to submit my talking notes, but with scribbled notes in the margins they were not really presentable on the spot. So, I am taking this opportunity to state in writing my concerns about the proposed PUD.

I have been a board member of the Lake Maxinkuckee Environmental Fund for several years. Since 1983, the sole mission of the organization has been to protect Lake Maxinkuckee and its watershed. The fund was established because of growing concern about the steady decline of the lake from the mid-60's to the early 80's. At that time the status of the lake was bordering on the eutrophic boundary, using EPA standards. With the raising of funds from caring individuals, establishment of a director position, lots of hard work by the council, and the development of a management plan which continues to be our guide today, we can say that the rating of the lake has risen to oligatrophic. We'd like to keep it that way for the thousands of people who enjoy this lake year round.

After we heard of the possibility of development at the marina site in the fall of 2008, we hired JFNew to do a thorough study of the Kline wetland. In the spring and summer of 2009 they performed their study of the area and in a report stated the following about the effect the development could have on the wetland and I quote:

"It appears that the proposed development immediately north of the Kline Wetland will significantly increase the percentage of impermeable surface on the site, thus increasing runoff. The developer has proposed to handle the increased runoff using three storm water basins and grassed roadside ditches. From the information provided, it is impossible for us to know whether or not the proposed system is sufficient to protect the Kline Wetland from degradation. Typical storm water control requirements are designed to control the rate of discharge from a site, not necessarily the quality of the water. A storm water control plan that is designed to address water quality issues is likely very different from one designed to simply meet discharge requirements. Any plan should address nutrient inputs as well as suspended solids, road salt, road oils and other pollutants typical of this type of development. In our opinion, any additional pollutants added to the Kline Wetland from the proposed development will decrease the wetland's ability to address degraded water already entering the wetland from Kline Ditch."

As a part of the study, JFNew conducted an ORAM to give a measure of the functional quality of the wetland. Although designed for use in Ohio, the ORAM has been used by some regulatory agencies in Indiana and is regarded as an acceptable method of accurately assessing wetland systems. Using this method the final score of the wetlands was determined by JFNew to be a Category 3. The report states that "While regulatory agencies in Indiana may view these systems differently, Category 3 wetlands in Ohio are given the greatest regulatory protection. These wetlands cannot be impacted unless the proposed impact 'is necessary to meet a demonstrated public need' (Mack 2001). 'Public need' is defined as 'an activity or project that provides important tangible or intangible gains to society, that satisfies the expressed or observed needs of the public where accrued benefits significantly outweigh reasonably foreseeable detriments' (Mack 2001)." Since Indiana agencies have used ORAM to assess wetlands in this state, I would hope that a wetland with a Category 3 score in this state would also be given the greatest regulatory protection.

I would like also like to cite JFNew witness, Andrew Bender, who stated his opinion at Thursday's session that the PUD plans have not met minimal standards because there is no planned reserve area for effluent to go in the event of a sewer system failure. Secondly, Mr. Bender's opinion on PUD storm water was that a possible overflow of retention areas would result in significant flow into the wetlands. Finally, he stated that the impermeable surface coverage of the watershed currently is 8 %, a number that has already caused concern to LMEF. With the addition of a significant amount of impermeable surface in the proposed PUD, the number would edge closer to 10% at which the quality of the lake would begin to degrade.

Comments during Friday's public input session revealed that Mr. Aker's contractor, Al Collins, has earned a poor reputation in Culver and beyond. It is well known that he has been

sued by individuals for poor construction. He has also been involved in several disputes with IDEM and DNR, most notably his 2009 construction of a home on Sycamore Road which diverted a stream which flowed to the lake. In his testimony at the hearing he acted as though that issue was nothing, and easily resolved, even though for weeks he ignored letters from the state requesting compliance to remediation measures. Finally, at our urging, the town council ordered a stop work order. In the minds of people who know of his questionable business practices, it is difficult to trust Mr. Collins to build this PUD with the utmost care for the environment.

I know that you listened carefully to the other forty plus people who spoke eloquently in opposition to the PUD, because they think there is a possibility that the development could negatively affect the lake. I know that the 700 petitioners and many more people who were not in attendance would have echoed the sentiments that were expressed.

For myself, I just care a lot about Lake Maxinkuckee and hope that many people can continue to enjoy this lake in the years to come. So, in the interest of the future good health of this lake, I respectfully ask that the Natural Resources Commission decline Mr. Aker's request for the sewer conservancy for his PUD.

Terry Wilson Moore, Rochester, IN (Email: February 10, 2010)

As a long time summer resident of Lake Maxinkuckee, I would like to express my concerns about the proposed PUD on the southeast corner of the lake. Our property on South Shore Drive was purchased by my father in the 1940's. Our family has witnessed many changes over the years, always with the hope that the health of Lake Maxinkuckee was the top priority.

My primary concerns are as follows.

#1 An expansive development such as this one could result in a huge decline in the near pristine condition that currently exists in the lake.

#2 The Kline Wetlands, adjacent to the proposed PUD, could be adversely affected by this project. There is a strong possibility that the PUD could cause unfiltered storm water to run off into the wetlands and into the lake.

#3 We have been given no assurances that the PUD septic system will be sufficient to ensure no harm will be done to the lake. In addition, run-off during construction has not even been considered.

#4 I have great concern about the abilities and track record of the owner and developer of this project. We have been shown no records of successful developments in which he has been involved. A project of this size certainly needs a leader who has demonstrated success in such an undertaking.

In summary, many individuals have worked many years to clean up and maintain Lake Maxinkuckee for future generations. My primary goal is to further this cause. Is it truly in the best interests of the lake residents to take a chance on jeopardizing the health and beauty of Lake Maxinkuckee? Please give this your most serious consideration before allowing or not allowing this project.

Sherrill Fujimura, Culver, IN (Email: February 10, 2010)

I am writing in opposition to the Maxinkuckee Village development at the southeast corner of Lake Maxinkuckee. My family has owned our property on the South Shore of Lake Maxinkuckee since 1945 and were year around residents of the lake. I have seen many changes on the lake -- some good, others not. This project does not appear to be one that is "good" for our lake or community.

In the late 1950's and early 1960's Mr. Kline dredged out the marshlands at the east end of the south shore of Lake Maxinkuckee and developed Venetian Village. We were sure the homes would "sink" into the lake! Today, that particular development would probably not happen. But, it did and thus began the decline of the wetland area. The channels build up with

silt and become stagnant. It has caused a decline of the natural habitat..turtles, birds, etc. Then the Culver Marina was built on more of the wildlife area and more of the wetlands were dredged and disturbed. We now have oil and gas permeating into the lake and wetlands. With the development of the Maxinkuckee Village it will add to the destruction of the sensitive area. The next step will be developing the east channels of Venetian Village and then Phase 2 & 3 of Maxinkuckee Village until we have no wetland area left. Developers are good at finding loopholes to make their "project" sound good for the community and no negatives to the environment. But, we should not be fooled for once it happens there is no turning back.

I believe the Aker family loves our lake and has also worked hard at creating a better environment at the Culver Marina. It would behoove them to continue this endeavor and would create better public relations with the Culver and Lake communities.

Please accept this as a letter of opposition to this particular project from the Fujimura and Edgington family.

Marabeth Levett, Columbus, IN (Email: February 10, 2010)

I am writing to you about the proposed Maxinkuckee Village at Lake Maxinkuckee. As all of you are aware a great deal of time and money has been invested in Lake Maxinkuckee over the years to make it a wonderful example in the state of Indiana of what can be done toinsure the health of our lakes, one of our great natural resources. As I understand it, Lake Maxinkuckee has been a leader in this area and an example to other lakes for many years.

Therefore, I am writing to express great concern for the potential environmental damage that could result from granting approval of this project. The entire area naturally drains into the lake, and as you know the proposed project is situated very near a wetland. The immense amount of runoff from concrete surfaces would certainly upset the natural balance. My greatest concern is the septic system. I also note with concern the inexperience of the builder of the septic system. I understand he has had no experience with a system of the size that would be required. We all know that many made structures eventually leak. Any leakage would drain into the wetland and eventually the lake. The whole project is simply in a poor site for development.

I think it would be unconscionable for you go grant approval of this project. I have every confidence that you will do what is environmentally in the best interest of Lake Maxinkuckee, and everyone in the state of Indiana who has the opportunity to use this beautiful public natural resources.

Debbie Crabtree and Heckel Family, Culver, IN (Email: February 10, 2010)

My sister and it were in attendance at last Friday's public hearing regarding the above-referenced matter and voiced our objections to the Project. This letter is a follow-up of that meeting to provide the following written objections:

1. As a fourth generation owner of a lake home, our family has been a longtime supporter of the Lake Maxinkuckee Environmental Council and its efforts to restore and keep Lake Maxinkuckee in its current near pristine condition. The PUD development proposed by Mr. Aker and Mr. Collins is quite ambitious. In my opinion, if not constructed and maintained properly, it could cause a decline in the Lake's water condition. From testimony given at Friday's meeting, the developer, Al Collins, has proven his disregard for following local building laws and lack of attention to detail which would be required for such a large project. In addition, my background includes working for a commercial real estate developer and I am aware of the complications involved in with maintaining storm water drainage ponds and how often these maintenance obligations require bonding by the local municipalities in the event of failure on the part of the land owner. Failure to maintain these particular storm drainage ponds for this Project, however, could be irreparable and bonding wouldn't make a difference.

2. The added use of water craft on Lake Maxinkuckee caused by new residents and their visitors as well as easy access to the Lake could negatively impact the plant life. Visitors' watercraft could bring contaminants as well.
3. The Kline Wetland and Conservation Area is too close to this Project and could very easily be negatively impacted by this Project as a result of possible additional run-off caused by poor maintenance of storm drainage, failure of an unproven water and sewer treatment system and added foot traffic over the wetlands. This in turn could affect the health of the Lake.
4. Last Friday's hearing also made it very evident that the owner, Mr. Aker, and developer, Mr. Collins, of the Project did not provide satisfactory information, knowledge or expertise to guarantee that the design, installation and maintenance of the PUD septic/treatment field system (including water treatment) will not harm Lake Maxinkuckee. There are many ambiguities with their plans.
5. Two additional reasons for not supporting this Project (not environmentally related) are: (a) the Project does not appear to be economically viable as evidenced by other nearby developments such as the vacant lots on Mystic Hills Estates, the eleven acres on 2255 East Shore Drive and the vacant land on SR 117 just north of the Project which have sat on the market for quite some time, and (b) heavier traffic on SR 117 which already has many speed violators.

Our family strongly opposes this Project and we hope that the Natural Resources Commission thoroughly examines the future impact it will have on Lake Maxinkuckee, particularly the irrevocable damage if not constructed and maintained properly.

Dave Franckowiak, Culver IN, (Email: February 11, 2010)

My wife and I own property on Lake Maxinkuckee and are strong supporters of the Lake Maxinkuckee Environmental Council and their efforts to protect our beautiful lake. We are very concerned about the proposed marina PUD and strongly believe that the current proposal will have a detrimental effect on the water quality of the lake.

We, along with many other concerned residents, have worked hard for 28 years to improve the lake from a state bordering on the eutrophic (dead or dying) boundary in the early 1980s to oligatrophic (near pristine) in 2009. We are concerned that a development as expansive as this proposed PUD could result in a decline from this current desirable standing. The PUD would be built adjacent to the Kline Wetlands, an environmentally sensitive area whose viability affects the health of the lake. Unless properly contained the substantial amount of impermeable surface covered by the PUD could cause a large amount of unfiltered storm water to runoff into the wetlands and into the lake.

We are very concerned whether the design, installation and maintenance of the PUD septic system will be sufficient to ensure no harm will be done to the lake. Testimony at the PUD hearing indicated that the developer may not know the true costs of the "cell" septic system, "soft costs" of excavation, road development and other infrastructure. We urge you to protect our lake by prohibiting this PUD from continuing until the developer can prove that the marina PUD will not have a detrimental effect on our lake. Thank you for your time and consideration.

Jim Sturman, Sturman Real Estate Services, Indianapolis, IN (Email: February 11, 2010)

Please consider the following letter as you form your opinion regarding the planned PUD: Maxinkuckee Village

Economic viability of a PUD includes the ability of the developer to make a net profit, after completion and sale of inventory, in a economically reasonable period of time. Examples of developments in the Culver area that failed to be economically viable are:

1. Mystic Hills Estates: Nine golf course lots, close to the planned PUD, originally listed in 2001. To our knowledge, no lots, other than one to an employee of the golf course, have sold over the past nine years. The golf course lots provide no lake access.

2. 2255 East Shore Dr. : Eleven acres only one-half mile from the PUD. Listed in 2000 for $1,100,000. On the market since then. Now listed for $649,000, it remains unsold. This property provides no lake access.

3. The Riggings: Total development of 19 condo town homes on Indiana SR 10. Started in 1999, this develop remains unfinished. Resale of units is $190,000 to $240,000 (approximate). I understand the original developer went bankrupt. This develop, like the planned PUD, provides no lake access.

4. Culver Cove: Condo/hotel with lake access. Significant issues during development. The development went bankrupt before completion.

5. Vacant land on SR 117 just north of PUD. 33.5 acres "for sale by owner" 2008-09. Listed October 2009. No sale has occurred on this property. It provides no lake access.

If the PUD lots do include dock access, it may funneling and not allowed by local ordinance. The plans for the proposed PUD appear to include an "access road" from the PUD through the marina to the docks.

Mystic Hills does not allow golf carts other than their own on the course. The marketing materials indicate that golf cart garages and use of personal golf carts on Mystic Hills golf course is permitted. Current policies and proposed amenities are in conflict.

People using the paths shown on the PUD marketing materials may increase the traffic going through the wetlands causing a high level of damage to protected species, trash, etc.

Testimony at the PUD hearing indicated that the developer does not know true costs of the "cell" septic system, "soft costs" of excavation, road development and other infrastructure. Further, during the hearing, the proposed selling prices of the villas and condo unit were changed from the initial testimony when testimony later in the day was given. The developer, it appears, does not know costs or selling prices. Certainly the historic evidence of "off lake" development, except when it is supported inside the city limits of the town of Culver close to shops, restaurants, the public beach and docks, offering a municipal sewer system, is a unsuccessful one, if the development is truly an "off lake" development with no lake access. This project is priced as if it had piers or a beach for swimming and/or owned boat skip privileges. It does not. The current slips at the marina are largely filled. The developer will be relegated to offer "high and dry" services for owners in this development. By the developers statement, that cost $25 "in" and $25 "out" each day, or more if there are multiple uses. This is economically undesirable for the owners of these units.

Conclusion: There are significant risks to the environment and heath of Lake Maxinkuckee caused by the PUD, especially during the construction phase. Other unsuccessful projects in the past did not threaten wet lands or require large septic systems, as they were connected with the Town of Culver's system. Perhaps they were worth the risk. This project is clearly not. A septic system of this size has never been built, let alone next to a wetlands.

Aside from the environmental impact, there is no positive history for the economic viability of such a prospect, exacerbated by the current economic conditions. It will serve no one's best interest, including the developer, to have a partially completed, ill-conceived planned unit development sitting largely empty for years on the south east corner of Lake Maxinkuckee. I urge you to recommend denial.

Bill Walsh, Culver, IN (Email: February 11, 2010)

Thank you very much for making me feel as though I were a part of the hearings on Feb. 4-5. You did an outstanding job on the expert testimony day by having no interruptions whatsoever from the audience. On Feb. 5, giving everyone the opportunity to speak was exceptional.

As I stated at the hearing, the need for this development has not been established. The opportunities for damage to the Kline Wetlands from the amount of impervious surface, the dangers of excavation during the building of the development and the potential for mishaps if the system is to be maintained by the Home Owners Association would cause irreparable damage to the Kline Wetlands and to the lake.

The short term advantages, if there are any to this development, in my opinion, are far outnumbered by the potential damage to the wetlands, lake and the local economy. I hope you will take this into consideration.

Kathy Berindei, Culver, IN (Email: February 11, 2010)

I attended both hearings in Culver – had to take off work which amounted to one day without pay – but well worth it, especially if this PUD is stopped. I was against the PUD from the beginning but after the hearings I am even more against it and voiced my opinion at the hearing. Too many unknowns have been proposed to even risk jeopardizing our lake. I've been around this lake all my life and have enjoyed all it has to offer - I've also been around Michigan lakes that have been fouled and it's a crime – still nice to look at but can't utilize. One statement from Friday's hearing that still screams at me was from Mark Aker regarding this new cell septic system – when he said "If this works here, we'll install other places" – IF, IF, IF – this is not the place to test! Please protect our lake, my lake.

Susan Nash, Culver, IN (Email: February 14, 2010)

Judge Lucas – I want to express my strong opposition to the proposed PUD project at Lake Maxinkuckee Administrative Case #09-167.

My concerns reflect the concerns of everyone who has been involved in maintaining the environmental quality of Lake Maxinkuckee. To allow a PUD of this magnitude to go forward as condo and apartment developments are failing in areas with larger populations, would put this lake at even greater risk. The proposed use of a sewer system that is untested (the patent just being applied for within the past 6 months) because stimulus money is available, without any real plan, organization or timetable for this property does not appear to be economically feasible and its failure would be devastating to the wetlands and the lake.

IV. STATE AGENCY COMMENTS

Indiana Utility Regulatory Commission

On February 3, 2010, DeAnna L. Brunner, Assistant General Counsel for the Indiana Utility Regulatory Commission, filed the following:

STATE of INDIANA

INDIANA UTILITY REGULATORY COMMISSION
101 WEST WASHINGTON STREET, SUITE 1500 EAST
INDIANAPOLIS, INDIANA 46204-3407

http://www.in.gov/iurc
Office: (317) 232-2701
Facsimile: (317) 232-6758

January 29, 2010

Jennifer M. Kane, Paralegal
Natural Resources Commission
Division of Hearings
100 N Senate Ave., Rm. N501
Indianapolis, IN 46204

Re: Petition for the Creation of the Maxinkuckee Village Conservancy District

Dear Ms. Kane:

The General Counsel' Division of the Indiana Utility Regulatory Commission (the "Commission") has reviewed your letter and the petitions regarding the creation of the Maxinkuckee Village Conservancy District. This proposed conservancy district will, among other things, provide for the public with collection, treatment, and disposal of sewage services. As you know, a district established for the purpose of providing for the collection, treatment and disposal of sewage and other liquid wastes produced outside of the district boundaries must petition the IURC for territorial authority to engage in the services to territory outside of the boundaries of the district. I.C. 14-33-1-2. However, since the petitioners seek to establish the territory of Maxinkuckee Village Conservancy District (and do not propose to collect or treat waste produced outside the district boundaries), it appears that the IURC is without jurisdiction over the petition as it relates to the establishment of the sewer service for this conservancy district.

Please be advised that the Commission's records indicate that the following regulated sewer utility is currently serving Marshall County: East Shore Corp. Other utilities and conservancy districts may provide sewer disposal service near the proposed Maxinkuckee Village area as well. As such, Maxinkuckee Village should be encouraged to fully explore the possibility of connecting to one of the existing sewer utilities, if it has not already done so.

Should you have questions, comments, or require additional information, please do not hesitate to contact me at 232-6735.

Sincerely,

DeAnna L. Brunner
Assistant General Counsel

Cc: Curt Gassert, Director of Water and Sewer Division

Indiana Department of Natural Resources

On March 1, 2010, Michael W. Neyer, Director of the Department of Natural Resources, Division of Water, filed the following:

MEMORANDUM

Indiana Department of Natural Resources, Division of Water

Date: February 26, 2010

To: Steve Lucas
Hearing Officer, Division of Hearings

From: Michael W. Neyer, P.E.
Director, Division of Water

Subject: Establishment of the Maxinkuckee Village Conservancy District

The proposed Maxinkuckee Village Conservancy District is located in Sections 26, 27, and 34 of Township 32 North, and Range 1 East. All of the structures and lots that currently exist or will be created in an area which is north and adjacent to Lake Maxinkuckee in Marshall County will be a part of the proposed conservancy district. A Planned Unit Development (PUD) is being established to provide for the construction of approximately thirty-one (31) new single family villas, four (4) family condominium structures consisting of four (4) units per structure, a community building, a swimming pool and other structures. Other residential units may be built within the territory to be included in the conservancy district which is not part of the current PUD project.

Territory to be included in the district is owned by one (1) freeholder which is Aker Properties, LLC.

Gary Aker purchased the marina property in 2004 which included 55.7 acres. Currently a traditional septic system is utilized for the restroom facilities and a restaurant. The existing septic system is not experiencing any problems. The Maxinkuckee Village Conservancy District proposes to be established for the purpose of providing for the collection, treatment, and disposal of sewage and other liquid wastes.

On September 21, 2009, the Petition for the Establishment of the Maxinkuckee Village Conservancy District was filed in Marshall Circuit Court (Cause Number 50C01-0909-MI-19). A copy of the petition was received by the Department of Natural Resources on September 25, 2009. After hearing evidence that the petition complied with the requirements as to form and content, the Marshall Circuit Court referred the matter on the formation of the Maxinkuckee Village Conservancy District to the Natural Resources

Commission on November 12, 2009.

As directed by Chapter 2, Section 17 of the Indiana Conservancy Act (IC 14-33), and pursuant to the Public Hearing on February 4, 2010 and February 5, 2010, concerning the proposed establishment of the Maxinkuckee Village Conservancy District in Marshall County, the Division of Water offers the following comments.

(1) <u>Appears to be necessary</u>
Providing for the collection, treatment, and disposal of sewage and other liquid wastes

Aker Properties LLC is a family-owned entity that purchased a 55.7 acre tract six (6) years ago that includes the Culver Marina. Since purchasing the marina, the owners have expanded the restroom facilities and added a restaurant. Aker Properties LLC has decided to pursue the development of remaining property and sought the approval of the Town of Culver for a Planned Unit Development (PUD) known as Maxinkuckee Village. The proposed development consists of 31 single family villas, four (4) condominium structures with four (4) units per structure, a community building, and a swimming pool. Tennis courts and a baseball field are also planned. The PUD designation allows for the mix of single family and multi-family dwellings with commercial use on one parcel of land. The first phase of the PUD approval consists of a cursory review of the plans to determine if the project has merit. One of the requirements for final approval of the PUD by the Town of Culver is that a municipal wastewater system be installed. According to opening remarks by the petitioner's attorney at the February 4th public hearing the approval of the PUD hinges on the establishment of a conservancy district.

Aker Properties LLC plans to pursue the installation of a cluster septic system with an Aero-Tech Pre-treatment Unit to service the entire conservancy district and will pay the initial costs associated with the installation. Gary Aker, representing Aker Properties LLC indicated that the proposed development of condominiums and villas will benefit the people who store boats at his marina. Several of his customers have expressed interest in vacation type residences that have minimal maintenance responsibilities. Mr. Aker noted that the proposed development would not have direct lake access. The future residents could rent a slip from the marina or pay the daily fees to have their boat placed in the water.

Mr. Aker indicated at the public hearing that maintenance of the cluster system would be performed by the "Association". At the conclusion of the February 4th hearing, staff asked the Petitioner's attorney for clarification as to the ownership, operation, and maintenance of the wastewater treatment facility. The petitioner's attorney indicated that the Homeowner's Association would be the responsible entity for the facility and that ownership would not be turned over to the conservancy district. It was also mentioned that the conservancy district would not collect user fees or a special benefit tax. In a February 8, 2010 letter, the petitioner's attorney indicated that Aker Properties LLC would grant a permanent easement for construction and maintenance of the cluster septic system to the Maxinkuckee Village Condominiums.

It is not expected that the conservancy district will perform maintenance or collect any fees from the freeholders. Because the district has no role in the ownership, collection, treatment, and disposal of sewage it does not appear that the conservancy district can accomplish their purpose. Establishment of the Maxinkuckee Village Conservancy

District to provide for the collection, treatment, and disposal of sewage and other liquid waste seems necessary only to gain final approval of the PUD from the Town of Culver.

(2) <u>Holds promise of economic and engineering feasibility</u>

Gary Aker, indicated at the public hearing that Aker Properties LLC would like to pursue residential development of their property near the existing Culver Marina. It is Mr. Aker's opinion that many of the people utilizing the marina are interested in condos or villas because of the low maintenance aspects and amenities such as a community center and swimming pool. In order to collect and treat sewage, Aker Properties LLC will pay for the initial installation of a cluster septic system which also includes pre-treatment capabilities. Pricing of the condominiums and villas to the future owners will include their share of the wastewater collection system. The marina which includes restroom facilities and a restaurant will also share in the costs for maintenance of the cluster system. The petition included a copy of an approval letter from the Indiana State Department of Health for the construction of this wastewater collection system and the secondary treatment station. The petitioners indicated that they had received a letter from both the Corps of Engineers and the Indiana Department of Environmental Management indicating that permits would not be required by either agency.

There was significant testimony by witnesses for both the petitioner and remonstrators about the need for this type of development. The petitioner's witness indicated that he had been involved in the construction business for many years and participated in over 35 discussions about the proposed development. He indicated that condominiums and villas would offer a different culture and lifestyle. The amenities and proximity to the golf course and marina would make it successful. However, the witness for the remonstrators was skeptical. This witness indicated that there is a significant inventory of available condominiums in Culver at a much lower price point. He also stated that real estate that does not have lake access is not easily sold in the area.

A registered soil scientist from Lang, Feeney & Associates testified that he performed the wetland delineation. His findings on the wetland delineation had been concurred by the Corps of Engineers.

This witness also discussed how storm water is expected to flow on the Aker's property. It was indicated that the probability of the wetland areas to overflow would be slim because it will percolate into the ground. None of the storm water would be channeled into Lake Maxinkuckee or the Kline wetland.

The representative for the Aero-Tech Pre-treatment Unit testified at the February 4th public hearing about the benefits of this system. This is an aerobic treatment system which will have eight (8) cells capable of handling nearly 25,000 gallons per day (GPD). In lake communities the amount of wastewater fluctuates dramatically between winter and summer and also between weekday and weekend use. This system is designed to have 8 cells and is site specific in order to handle these changes. Many other systems can experience problems if a minimum amount of wastewater is not processed on a regular basis. Another benefit of this system is that cells can be brought into service at different times. Therefore cells can be activated as the construction of the residential units progress which saves on expenses such as electricity. Persons who install these systems must be certified by Aero-Tech. Maintenance of this system requires a licensed operator along with a regular sampling and testing program.

Concern was expressed by the remonstrator's attorney that the Aero-Tech Pre-treatment Unit was typically rated for a throughput of only 3000 GPD while the system proposed for Maxinkuckee Village needs to treat nearly 25,000 GPD. The Aero-Tech representative indicated that the installation of multiple cells would be sufficient to handle the wastewater. Questioning by the remonstrator's attorney at the public hearing revealed that this would be the first treatment system of this size installed by Aero-Tech and many attendees felt the area was too environmentally sensitive for an untested application.

The proposed cluster systems will transport wastewater to the pre-treatment facility followed by soil absorption of the effluent. Concern was expressed by the remonstrators over contaminates leaching into the soils. Because groundwater typically moves toward the lake this could inevitably be harmful to Lake Maxinkuckee and the Kline Wetland. Questions about the ability of the Aero-Tech system to treat wastewater from commercial sources such as the marina and restaurant were also raised by the remonstrator's attorney.

The remonstrators had several witnesses from JF New & Associates who were very familiar with the site and performed an assessment to determine the functional quality of the Kline Wetland in 2009.

The regional office manager for JF New provided a brief history of the area and indicated that the wetlands were in existence prior to European settlement in the 19th century. The Ecological Resource Specialist testified about the importance of the wetlands because of their ability to filter harmful sediments and provide protection to Lake Maxinkuckee. He did however indicate there are limits as to how much of a pollutant a wetland can handle before its ability of function diminishes. A development such as Maxinkuckee Village could allow sediment and nutrients to overload the wetland which would reduce its effectiveness. Finally a licensed civil engineer from JF New was asked his opinion of the proposal to use multiples of the 3000 GPD unit to treat the estimated 25,000 GPD which is expected from this proposed development. The engineer indicated that he could not find fault with the scaling but did have a concern that no reserve areas were available in case of system failure.

Additionally the website for the Aero-Tech lists several items that should not be disposed in the aerobic wastewater treatment system. These items include: coffee grounds, fats, oils, cooking grease, paint thinner or household chemicals as in most cleaning compounds. Other items listed are disinfectants, bleach, or any antibacterial soap or laundry detergent. The website also cautions that garbage disposals should be used at a minimum because food waste will overload the system and cause a malfunction. It appears that there are many assumptions being made by the developers of Maxinkuckee Village that all residents and their guests will be cognizant of what activities adversely effect the operation of their septic system. The promise of engineering success of this septic system seems to rely on the ability of residents who may not understand the system's sensitivity to adapt their lifestyles so that the functionality of a wastewater collection and treatment system is not compromised.

(3) <u>Seems to offer benefits in excess of costs</u>

According to the Indiana Conservancy Act (IC 14-33-2-17c3), the Commission shall make a determination and report to the court whether the proposed district meets the following conditions:

(3) The proposed district seems to offer benefits in excess of costs and damages for the purposes other than the following:
(A) water supply;
(B) storage of water for augmentation of stream flow;
(C) sewage disposal.

Because the purpose for this proposed conservancy district is for sewage disposal benefits in excess of costs and damages do not need to be determined for this purpose.

(4) <u>Whether the public health will be served immediately or prospectively by the establishment of the district</u>

According to the Indiana Conservancy Act (IC 14-33-2-17c4), the Commission shall make a determination and report to the court whether the proposed district meets the following conditions:

(4) Whether the public health will be served immediately or prospectively by the establishment of the district
for any of the following purposes:
(A) water supply;
(B) sewage disposal;
(C) storage of water for augmentation of stream flow;
(D) any combination of these purposes.

Comments provided by Aker Properties LLC indicated that the marina, restaurant and restroom facilities are being served by a septic system that is not experiencing any problems. Installation of the cluster septic system with pre-treatment is not necessary to address any deficiencies with the current system. Final approval of the PUD by the Town of Culver hinges on the establishment of a conservancy district. Testimony at the February 4th hearing indicated that the conservancy district will not assess or have the need to assess a special benefit tax to the stakeholders. The cluster system will be owned, operated, and maintained by the Association not the conservancy district. It is difficult to determine if the public health would be served immediately or prospectively.

(5) <u>Proposes to cover and serve a proper area</u>

Chapter 3 of the Indiana Conservancy Act states "any area may be established as a district if each part of the district is contiguous to another part". The proposed Maxinkuckee Village Conservancy District is located in Sections 26, 27, and 34 of Township 32 North, and Range 1 East of Marshall County. As currently proposed the boundaries of the proposed Maxinkuckee Village Conservancy District appear to be contiguous and will cover and serve a proper area.

(6) <u>Could be established and operated in a manner compatible with established Conservancy Districts, flood control projects, reservoirs, lakes, drains, levees, and other water management or water supply projects</u>

Testimony by the petitioner and their witnesses indicated that this proposed conservancy district could easily co-exist with Lake Maxinkuckee and the surrounding area. Mr. Aker indicated that the proposed project would have no effect on Lake Maxinkuckee because the condos, villas, and wastewater collection/treatment facility would be contained 100% on property owned by Aker Properties LLC.

The Lake Maxinkuckee Environmental Council has been involved in raising funds, acquiring grants and developing partnerships to build wetlands in the area. The Kline Wetland is the largest of the three (3) constructed wetlands on the major inlet ditches which were designed to trap sediment and nutrients from the watershed before flowing into Lake Maxinkuckee. There was concern by the remonstrators about the potential detrimental effects to the Kline Wetland. Should groundwater containing nutrients make it to the Kline Wetland it could cause invasive species to flourish and harm the current bio-diversity. One witness from J.F. New acknowledged that some of the findings from the assessment did show that the wetlands closest to the marina were of fairly high quality. It was noted if proper steps were taken during the construction of Maxinkuckee Village; the wetland might not be affected by the work.

The Indiana Department of Natural Resources purchased nearly 80 acres of wetland area in the 1970's primarily for the water quality aspects and for the benefit of the wildlife. The area is now managed as the Maxinkuckee Wetland Conservation Area by the Division of Fish & Wildlife. A biologist for the Division of Fish & Wildlife indicated any development that would detract from the water quality in the area would definitely be a concern.

Should you have questions concerning the above comments, please contact Terri Curlee Price, Project Development Section at 317-234-1081.

MWN/TCP

V. PROPOSED RECOMMENDATIONS

As the statutory responsibilities of the Commission are applied to the proposed Maxinkuckee Village Conservancy District, the Commission shall make a determination under Ind. Code § 14-33-2-17 and report to the Marshall Circuit Court whether the proposed district, for the purpose of providing for the collection, treatment, and disposal of sewage and other liquid wastes, meets the following conditions:

(1) The proposed district appears to be necessary.
(2) The proposed district holds promise of economic and engineering feasibility.
(3) The public health will be served immediately or prospectively by providing for sewage disposal.
(4) The proposed district proposes to cover and serve a proper area. Included in this condition is whether, under IC 14-33-3-1, each part of the district is contiguous to another part.

(5) The proposed district could be established and operated in a manner compatible with established:

(A) conservancy districts;
(B) flood control projects;
(C) reservoirs;
(D) lakes;
(E) drains;
(F) levees; and
(G) other water management or water supply projects.

Within this statutory structure, the following findings are recommended to the Marshall Circuit Court with respect to the proposed Maxinkuckee Village Conservancy District:

Whether the proposed district appears to be necessary

The impetus for the proposed Maxinkuckee Village Conservancy District is the construction of Maxinkuckee Village, a planned unit development district (PUD), located immediately adjacent to a southeast portion of Lake Maxinkuckee, in Culver, Indiana. According to the Culver Zoning Ordinance[12], a PUD

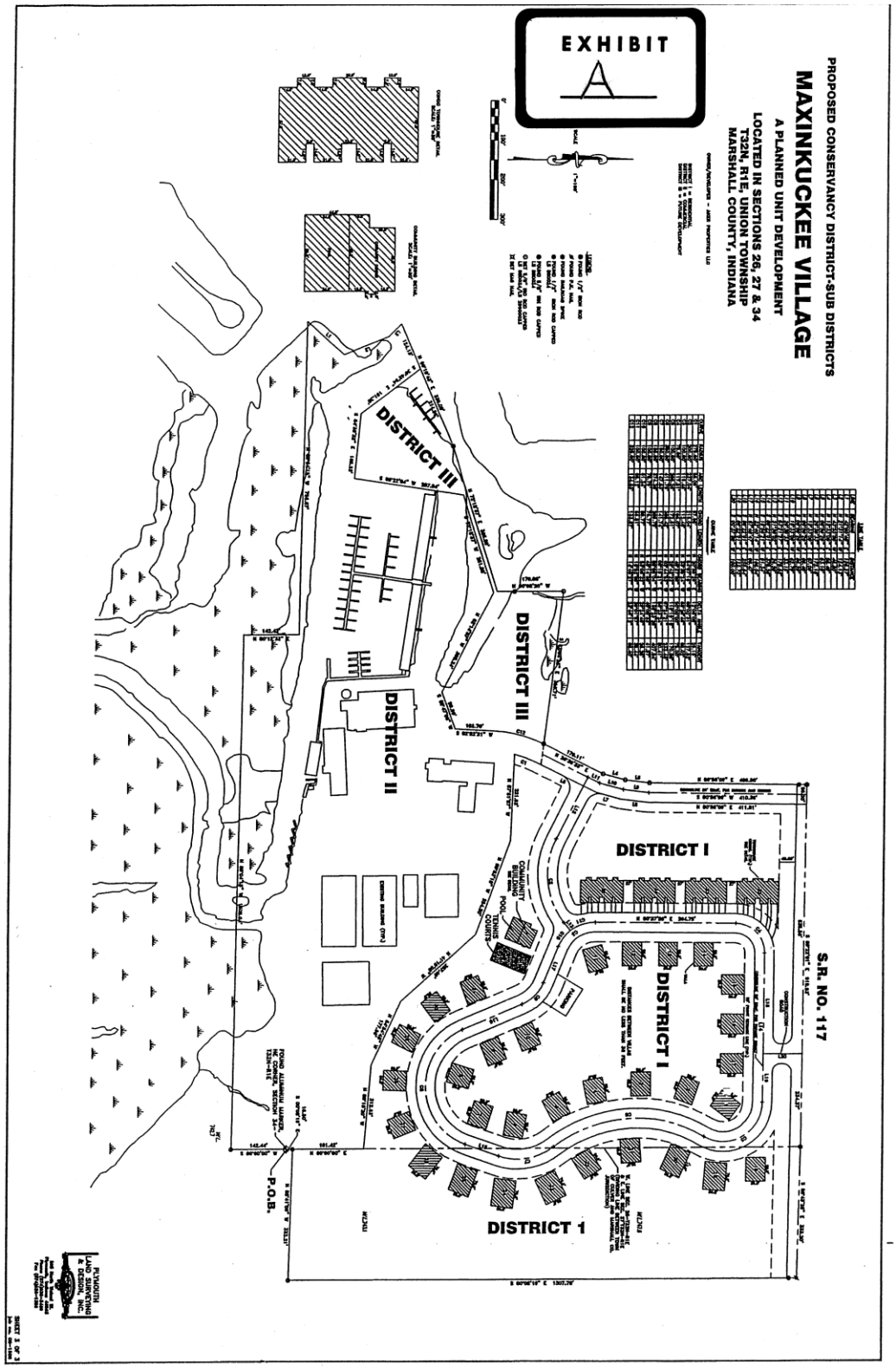
> is designed to permit the establishment of areas in which diverse uses may be brought together as a compatible and unified plan of development which shall be in the interest of the general welfare of the public, and to permit flexibility in the regulation of land development. This district is intended to accommodate developments with mixed or varied uses, sites with unusual topography or unique settings within the community, or on land which exhibits difficult or costly development problems.

Aker Properties, LLC, ("Aker Properties") is the Petitioner and only freeholder within the proposed conservancy district. Also, Aker Properties is the owner and developer of area within the proposed district, and is owner of the two existing commercial businesses, the Culver Marina and Culver Marine within the proposed conservancy district.

Maxinkuckee Village is planned to be developed in phases, with the first phase to include the construction of 31 single family villas, four family condominium structures consisting of four units per structure, for a total of 16 family condominium units, a clubhouse, a swimming pool, tennis court, and a multi-use athletic field. The first phase construction would be located in the area within the proposed conservancy district designated as "DISTRICT I" on Exhibit A[13] inserted on the following page. Also included in Maxinkuckee Village are the two existing commercial businesses: Culver Marina with an associated restaurant and restroom facility; and Culver Marine, a wholesale division of Culver Marina. The existing commercial businesses are located in the area designated as

[12] Remonstrator's Exhibit D, Culver, Indiana Zoning Ordinance, July 2001, p. 16.
[13] Exhibit A is a copy of the Petition's appended Exhibit C.

"DISTRICT II". Future development in Maxinkuckee Village, Phases 2 and 3, would occur in the area designated as "DISTRICT III".



A construction plan has not been developed for Phase 2 and Phase 3.[14] The proposed conservancy district would encompass the entire 55.7 acres owned by Aker Properties, LLC. The solid black line on Exhibit A depicts the proposed conservancy district boundary. The proposed conservancy district boundary and the proposed PUD boundary are identical.

Currently, the effluent from the commercial businesses within the area designated "DISTRICT II", which is approximately 4.5 acres, is treated by a traditional septic system. The existing septic system is not malfunctioning.[15] There is no other development on the remaining 51.2 acres.

The Culver Indiana Zoning Ordinance sets forth a two-step process for approval of a PUD within Culver's territorial limits.[16] The Culver Zoning Ordinance also requires that "[a]ll buildings" within a PUD "be served by a municipal sewer system.[17] The Culver Plan Commission, at its August 19, 2008, meeting, approved the preliminary proposal for Maxinkuckee Village. The Culver Plan Commission's final approval of the PUD is contingent on the formation of a conservancy district. The pertinent minutes state:

> …
> Clark noted that it had taken two years for the South Shore Conservancy District to be approved and questioned if this time frame would impact the development. Commission members reiterated that no permit would be issued until a conservancy district was approved and then the two-year time frame would extend from then, if the PUD were approved in the final stages.
> …

Culver Plan Commission, Meeting Minutes, August 19, 2008, p. 2.

On September 10, 2009, the Indiana State Department of Health (the "ISDH") approved the "plans and specifications for sanitary features" for the Maxinkuckee Village development. ISDH's approval was explicitly made "conditional and subject to the following requirements: "... (2) That documents for the conservancy district be submitted to this office within the next year for review…."[18] On March 10, 2010, Mike Mettler, Director of the ISDH's Environmental Public Health Division, indicated by email that no request for administrative review was received regarding this conditional approval.

On September 21, 2009, the Petitioner filed with the Marshall Circuit Court the Petition for Creation of the Maxinkuckee Village Conservancy District. The Petition states, in part,

> …
> 2. [Legal description of territory of proposed conservancy district.]
> 3. The specific purpose for which the Conservancy District is to be established is to provide for the collection, treatment, and disposal of sewage and other liquid waste from the homes and other properties located or to be constructed within the

[14] *Testimony of Gary Aker*, p. 13 of this report.
[15] *Id.* at p. 9.
[16] Remonstrator's Exhibit D, Culver, Indiana Zoning Ordinance, § 3.10, pp. 43-47.
[17] *Id.* at 43.
[18] Petitioner's Exhibit 14, p. 2

> territory described in Paragraph 2 above all that the waters of Lake Maxinkuckee do not suffer damage from leaking septic systems.
>
> …
>
> 10. That the number of directors to serve on the governing board of said District shall be three (3), which initial directors shall be appointed by your Petitioner and after which time, the election of directors shall be by those individuals legally entitled to vote. The qualifications for and the length of terms for each director shall be determined by the laws of the State of Indiana, as the same exists and as amended from time to time.
>
> 11. The district shall be divided into three (3) areas, for purposes of representation pursuant to IC 14-33-2-27….
>
> …

Petition, pp. 5, 6.

Testimony was presented that indicated the Maxinkuckee Village Condominium Owners Association, which would also include owners of the single family villas, would be responsible for the operation and maintenance of the community's sewer treatment facility, associated infrastructure, roads, drainage system, and other communal facilities within the proposed conservancy district.[19] Testimony was presented indicating that the 55.7 acres, which is owned by the Petitioner, would not be subdivided for individual ownership by those purchasing units within the condominium project.[20]

On February 8, 2010, the Petitioner filed correspondence with the Division of Hearings, which addressed the relationship between the proposed conservancy district and the Maxinkuckee Village Condominium Owners Association:

> Responding to your request on Friday, February 5, 2010, for a letter indicating how the proposed conservancy district will utilize the Cluster Septic System which is not part of the proposed condominium.
>
> Aker Properties, LLC will grant a permanent easement to Maxinkuckee Village Condominiums to enable Maxinkuckee Village Condominiums to have access to the required area of Aker Properties, LLC to provide construction and maintenance as necessary for the construction and maintenance of the Cluster Septic System. There will be no charge to the conservancy district for the granting of the easement. The easement will be of such scope as is necessary to totally allow the condominium to have all necessary access to the areas being utilized by that portion of the Cluster Septic System not within the condominium project.

The Department of Natural Resources, Division of Water (the "DNR") filed its memorandum, inserted beginning on page 78 of this report, regarding the necessity of the proposed conservancy district. The DNR concluded:

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[19] *Testimony of Aker, G.*, pp. 6, 10.
[20] *Id.* at 10, 11.

> It is not expected that the conservancy district will perform maintenance or collect any fees from the freeholders. Because the district has no role in the ownership, collection, treatment, and disposal of sewage it does not appear that the conservancy district can accomplish their purpose. Establishment of the Maxinkuckee Village Conservancy District to provide for the collection, treatment, and disposal of sewage and other liquid waste seems necessary only to gain final approval of the PUD from the Town of Culver.

DNR Memorandum, pp. 79, 80 of this report.

On March 19, 2010, the Petitioner filed "Petitioner's Supplemental Final Comments", which further addressed the roles of the proposed conservancy district, the condominium owners association, and Aker Properties, LLC. These comments stated in part:

> …[T]he marina portion of Aker Properties, LLC, will not be a part of Maxinkuckee Village Condominiums, if approved. Some of the physical aspects of the Conservancy District (sewage collection lines, etc.) will be located on property not owned by Maxinkuckee Village Condominiums but rather owned by Aker Properties, LLC (the continuing marina operation). The marina operation will grant to Maxinkuckee Village Condominiums and the Conservancy District the easement necessary to allow the Conservancy District to have access to that portion of the sewage collection lines, etc., which are physically located on Aker Properties, LLC, real estate and not on condominium real estate. The major portion of the treatment facility will be on real estate owned by the Condominium Project.
>
> …[I]f the PUD is approved and construction begins, Aker Properties, LLC, will have continuing responsibility for the maintenance of the Conservancy District until such time as the condominium association is formed and control of the condominium real estate is turned over to the co-owner's association. Then, and only then, will the co-owner's association have responsibility for the continuing maintenance and operation of the cluster septic system. The conservancy district will be in total control of the ownership, collection, treatment, and disposal of sewage from the entire PUD area. The PUD area will encompass the proposed Maxinkuckee Village Condominium Project and the existing Culver Marina facilities.

As evidenced by testimony and clarified by the Petitioner's supplemental comments, the condominium owners association would be responsible for the operation and maintenance of the proposed cluster septic system. The Petitioner also states the proposed conservancy district would be "in total control". This apparent ambiguity bears upon the necessity of the district and needs to be resolved before a district is formed.

The Indiana Utility Regulatory Commission (the "IURC") reported the East Shore Corporation is a regulated sewer utility serving Marshall County. "Other utilities and conservancy districts may provide sewer disposal service near the proposed Maxinkuckee Village area as well. As such, Maxinkuckee Village should be encouraged to fully explore the possibility of connecting to one of the existing sewer utilities, if it has not

already done so."[21] The East Shore Corporation's southern boundary ends just north of the proposed conservancy district. The sewage produced within East Shore's defined territory is treated with a wastewater wetland treatment system that in 2002 served 85 homes.[22] Evidence was not presented to determine the capability of the East Shore Corporation sewerage to accept and treat effluent that would be produced within the proposed Maxinkuckee Village Conservancy District.

The South-West Lake Maxinkuckee Conservancy District (the "SWLMCD") was established in 2008 to provide sewer service to a south west portion of Lake Maxinkuckee. Exhibit B, inserted below, is a copy of what was the proposed boundary of the SWLMCD (depicted in gray shading) and was attached to the Commission's report in the matter of the Petition for Creation of the SWLMCD filed with the Marshall Circuit Court on November 18, 2004[23]. The SWLMCD's existing boundaries have been amended somewhat from what is depicted below, but Exhibit B illustrates the approximate location of SWLMCD (just south and then extending west of the proposed Maxinkuckee Village Conservancy District).

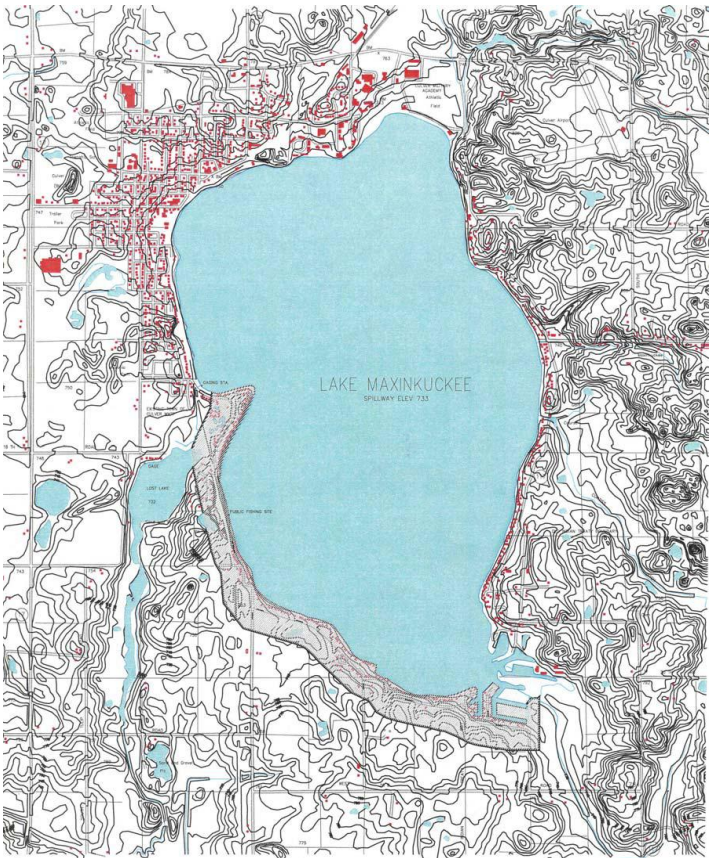

EXHIBIT B

[21] IURC letter filed February 3, 2010, p. 77 of this report.
[22] Remonstrator's Exhibit B, p. 70.
[23] Natural Resources Commission Report, *In Re: Petition for Creation of the South-West Lake Maxinkuckee Conservancy District*, Cause No. 50C01-0309-MI-91, p. 33.

The SWLMCD's most southeastern boundary is in the immediate area of the western boundary of proposed conservancy district. Exhibit C, inserted below, depicts the current SWLMCD's District 1 boundaries shaded in red as posted on the SWLMCD's website at http://swlakemaxcd.com/default.asp. The five parcels adjacent to the cul-de-sac in Exhibit C have not yet been annexed into the SWLMCD, and the SWLMCD is in a formative stage. The effluent produced within the SWLMCD is currently expected to be collected and sent to the Town of Culver's municipal sewer treatment facility.

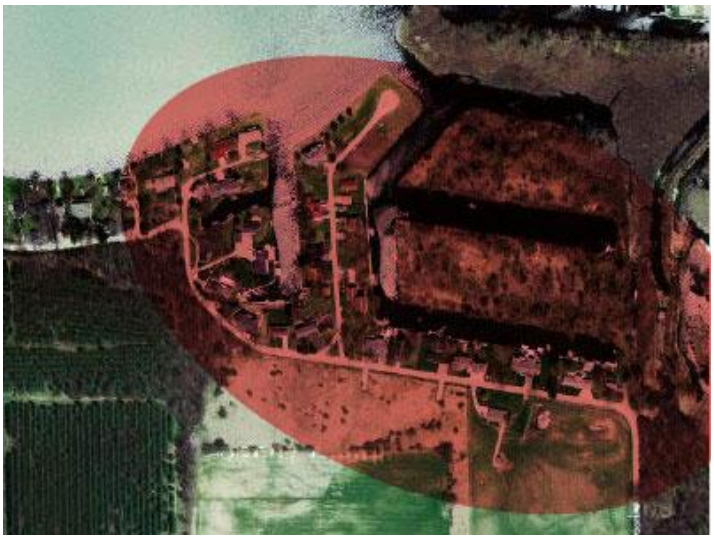

EXHIBIT C

Evidence was not presented to indicate whether the Petitioner explored the possibility of the Town of Culver's municipal sewer facility to receive and treat effluent produced within the proposed conservancy district. Evidence was not presented concerning whether the PUD could be annexed and effectively serviced by the SWLMCD. With this lack of evidence, it cannot be determined whether the proposed Maxinkuckee Village Conservancy District is necessary for the provision of sewage collection and treatment.

If Maxinkuckee Village is to be developed as anticipated by the Petitioners, providing for the collection, treatment, and disposal of sewage and other liquid wastes is essential. The proliferation of multiple conservancy districts or other legal entities to provide wastewater treatment is not. Without a complete and rigorous exploration of opportunities provided by the East Shore Corporation, by the Town of Culver, and perhaps most clearly by the South-West Lake Maxinkuckee Conservancy District, the proposed Maxinkuckee Village Conservancy District has not been shown to be necessary.

Whether the proposed district holds promise of economic and engineering feasibility

The Petitioner is the only freeholder within the proposed conservancy district. The proposed conservancy district is adjacent to Lake Maxinkuckee, and is located directly north of the Kline Wetland, a property owned by the DNR. The Natural Resources

Conservation Service (NRCS) rates the soils surrounding Lake Maxinkuckee in terms of their limitations for septic systems as severe or moderate due to slow or poor percolation.[24] Individual septic systems are not technically feasible because of the nature of the soils and the Maxinkuckee Village community development format. The residences and other facilities that would be constructed would be clustered, limiting space for the absorption fields and buffer zones.

There are two existing commercial businesses within the proposed district boundaries that are currently serviced by a conventional septic system. This existing septic system would be replaced by a cluster septic system with aerobic pre-treatment units to treat the effluent produced by the commercial businesses as well as the 47-unit planned condominium project and associated communal buildings. Testimony indicated development of the area, from construction to sale of the condominium units, would take between 36 months to five years.[25]

The designed sewer treatment system is site specific, allowing the system to accommodate peak demand fluctuations occurring in summer or low demand in winter, which is typical in lakeside communities. [26] Treatment systems with Aero-Tech treatment units designed for a total waste water flow of 3,000 gallons per day (GPD) have been constructed in Indiana and have proven successful. The planned 25,000 GPD cluster septic system would be the largest system constructed in the state.[27] The cluster septic system is designed as a multiple of eight approximate 3,125 GPD Aero-Tech treatment units. The Remonstrator's professional engineer, Andrew Bender, testified that scaling a 3,125 GPD to a 25,000 GPD system, as a modular system, is a viable strategy. But he did not support the extrapolation that a 25,000 GPD treatment system constructed of multiple 3,000 GPD units would directly translate into a properly functioning sewer treatment facility.[28]

Dan Papczynski testified that the planned cluster septic system is similar to a municipal sewage treatment system but on a smaller scale.[29] As planned, the cluster septic system with pre-treatment would be capable of treating a total design wastewater flow of approximately 25,000 GPD. The effluent would be collected and sent to the pre-treatment facility, which includes a trash tank, lift station, eight individual 3,125 GPD aeration units, a central dosing tank, and other appurtenances. The pre-treated effluent would then be sent to the leach fields. Testimony likened an individual leach cell to a "French drain system" or a conventional leach field.[30] As designed, the leach fields would be sited in District 1 with eight leach cells constructed in an area surrounded by 31 single family villas. The remaining two leach cells would be constructed near the 4-plex

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[24] Natural Resources Commission Report, *In re Petition for Creation of the South-West Lake Maxinkuckee Conservancy District*, Marshall Circuit Court Cause No. 50C01-0309-MI-91, p. 27, *citing* Lake Maxinkuckee Water Quality Monitoring 1993, JFNew & Associates, Inc., January 15, 1993, p. 33.
[25] *Testimony of Gary Aker*, p. 9.
[26] *Testimony of Papczynski*, p. 22.
[27] *Testimony of Mark Aker*, p. 46.
[28] *Testimony of Bender*, p. 35.
[29] *Testimony of Papczynski*, p. 20.
[30] *Testimony of Monaghan*, p. 16.

condominium buildings. Papczynski testified that a person holding a Class II operator's license with certification through Aero-Tech would maintain and operate the sewer system.[31] He also testified that an Aero-Tech employee would be onsite during the installation of the sewer treatment system, as well as the licensed contractor installing the treatment facility would need to be certified through Aero-Tech.[32] The cluster septic system contains several "fail safe alarms" to notify the facility operator, through telemetry, of high water, malfunctioning pumps, and other notifications. The alarm system appears to be reasonably directed to purpose.

The Petitioner's contention that the proposed technology is superior to a municipal system is unpersuasive and not supported by the record. No example was provided of an Indiana municipality rejecting its system in favor of the technology proposed by the Petitioner. The failures attributed to municipal systems were based upon the challenges posed by combined sewer overflows. The record does not disclose whether the Town of Culver has a history of combined sewer overflows or even whether it has combined sewers. Even so, the evidence is sufficient to demonstrate that if functioning properly, the wastewater treatment proposal has promise of engineering and economic feasibility.

Tim Monaghan, a registered Soil Scientist, testified the cluster septic system, as designed, does not include an alternative site to locate a replacement field cell in the event of a cell failure. Andrew Bender testified that "it is a good idea and a good practice to have reserve areas set aside".[33] Both Monaghan and Bender testified that there was not an alternative location within the boundaries of the conservancy district where an additional cell could be placed.[34] Bender testified that he had "general concern" regarding the location of the field cells, such that if there were to be a failure in the system and without a reserve location the failure would "directly impact" the condominium residents.[35] Consideration must also be given to the location of the proposed conservancy district, adjacent to a sensitive wetland and near the mouth of the largest tributary to Lake Maxinkuckee. No redundancy is provided if a cell failures during a period of peak demand. The evidence does not demonstrate that the Petitioners have adequately provided for system failure.

The estimated cost for construction of the cluster septic system at $500,000 would be borne by the Petitioner. Those costs would be recovered through the sale of the 47 condominium units by a sewer utility assessment of $11,000 per unit. The monthly costs to operate and maintain the cluster septic system are unknown, but 20 residential units would need to be sold in order for the Petitioner to "break even".[36] No villa or condominium unit has been presold, but a developer of the PUD believes that once the sale price is set, there would be between four and eight pre-sales.[37] The Petitioner would contribute the share of any facility maintenance fee associated with unsold residential

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[31] *Testimony of Papczynski*, p. 21.
[32] *Id.*, at p. 24.
[33] *Testimony of Bender*, p. 34.
[34] *Testimony of Monaghan* and *Bender*, pp. 18 and 34, respectively.
[35] *Testimony of Bender*, p. 34.
[36] *Testimony of Gary Aker*, p 12.
[37] *Testimony of Collins*, p. 24.

units.[38] Costs associated with the maintenance of drainage and sediment control structures were not presented.

The Petitioner provided various other cost estimates associated with the development within the proposed conservancy district. These include:

Residential Unit	$200,000 (construction cost)	p. 11
Condominium Unit	$340,000 –$390,000 (sale price)	p. 26
Single Family Villa	$450,000 – $500,000 (sale price)	*Id.*
Condo Owner's Assoc. Fee	$250 (yearly)	p. 12
Pump (replacement cost)	$500 (ea.) or $600 (ea.)	pp. 19, 22
TSS & BOD Testing	$175/sample	p. 21
Sewer System Maintenance	$2,000 – $6,000 (annual)	*Id.*
Electrical Usage (per cell)	$16/day	*Id.*
Trash Tank Pump Out Fee	$500/pump out	p. 22

Direct access to Lake Maxinkuckee would not be conveyed through ownership of any of the 47 residential units within Maxinkuckee Village.[39] Alan Collins, real estate developer and PUD contractor, testified the projected sale price of the residential units as listed above "meets a price point that needs to be met" and offers "substantially different culture and lifestyle than the comparative projects that have been non-lake [access] projects around the community".[40] Collins also testified the amenities offered, such as a pool, tennis courts, and multi-purpose athletic field, would be desirable.[41]

James Sturman, an independent real estate broker, testified "lake access is key to successful development."[42] For example, The Cove condominium project was successful because of pier access, which is included with condominium unit ownership. An in-town condominium project without direct lake access was "very successful" because "it takes advantage of the fact that the property is in the Town of Culver, and there is a public beach, docks, restaurants; there's infrastructure around it".[43] He testified the proposed Maxinkuckee Village would not be a "viable development" because of its location and the significant inventory of resale condominium units in the Culver area. [44]

Aker testified for the Petitioner that "I haven't priced anything…. I know what my building costs are and I know what the market is here."[45] Even though the development is in its preliminary stage, these testaments do not substitute for an economic feasibility study. The ability to finance current construction costs does not address the ability to satisfy future economic obligations.

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[38] *Testimony of Aker, G.*, p. 11.
[39] *Id.* at 7.
[40] *Testimony of Collins,* p. 24.
[41] *Id.*
[42] *Testimony of Sturman*, p. 43.
[43] *Id.*
[44] *Id.* at 43.
[45] *Testimony of Aker, G.*, p. 11.

Evaluating the economic feasibility of a proposed conservancy district is delicate business. The Petitioner testified that the proposed Maxinkuckee Village development is "all [its] risk and [its] gain".[46] If the development were not pursued as a conservancy district, the statement might be a legal truth. But the Conservancy District Act does require a showing of the promise of economic feasibility before a district is formed. In making its approval of the wastewater treatment system conditional upon the establishment of a conservancy district, the Indiana State Department of Health helped assure risk factors would be considered. The proposed conservancy district is adjacent to Lake Maxinkuckee, which is the primary resource for the community.[47] Potential failures of the sewerage, drainage areas, or erosion control structures within the proposed district would "negatively affect" Lake Maxinkuckee.[48] They would have implications of much greater magnitude than the implications for the Petitioner. Any small impact can have a much larger and longer lasting effect than just the impact itself.[49]

The economic viability of the proposed Maxinkuckee Village is problematical but perhaps meets the threshold of economic feasibility. If functioning properly, the wastewater treatment proposal has promise of promise of engineering and economic feasibility. The proposal does not provide for redundancy or another adequate strategy in the event of a system failure. The potentially adverse consequences from a system failure are magnified by the location of the proposed conservancy district near the Kline Wetlands, at the mouth of Kline Ditch, and adjacent to Lake Maxinkuckee. In this regard, the proposal does not provide for engineering feasibility.

Whether the public health will be served immediately or prospectively

The planned cluster septic system would replace the conventional septic system currently servicing the existing commercial businesses within the proposed conservancy district boundaries. No current failure of the conventional septic system was identified.

The cluster septic system proposed for the Maxinkuckee Village Conservancy District would treat residential sewage from the PUD and would also service the existing commercial businesses. The commercial businesses would be connected to the cluster septic system "immediately" once the planned system "goes online".[50] Without the effluent from the proposed condominium unit diluting the effluent from the commercial businesses, it is unknown whether the planned cluster septic system would be able to treat the concentrated commercial effluent.

If functioning properly, the planned cluster system would prospectively serve the public health by treating residential sewage from the PUD. In this manner, the proposed

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[46] *Testimony of Aker, G.*, p. 12.
[47] Remonstrator's Exhibit B, p. 9.
[48] *Testimony of Namestnick*, p. 30.
[49] *Id.*
[50] *Testimony of Aker, G.*, p. 9

Maxinkuckee Conservancy District would appear to serve the public health prospectively.

Whether the proposed district proposes to cover and serve a proper area

The Petitioner owns the entirety of the 55.7-acre tract to be included in the proposed conservancy district. The proposed conservancy district boundaries are based on the ownership of the parcel of land[51] and are the same as the boundaries that would encompass the PUD, Maxinkuckee Village. The areas within the proposed district are contiguous. Within the proposed conservancy district: District I would include the condominium project. District II would include the existing commercial businesses; and District III would include land with no defined development plans. District III does not include any extension of sewer lines or contain any erosion or sediment control structures.

The PUD at full build out and the sale of units may take up to five years, and no plans "have proven themselves"[52] for development. The Petitioner does not suggest how and when District III would be represented on the proposed conservancy district board. The evidence does not support a finding that the proposed district would properly cover or serve District III.

If the Petitioners are proposing to form the Maxinkuckee Village for a reason other than mandates from the Indiana State Department of Health and the Culver Plan Commission, the reason is not apparent. While an external mandate does not disqualify the formation of a conservancy district, the result here seems a conservancy district that is a façade for a management plan unfettered by the strictures of the Conservancy District Act.

The disconnect between the aspirations of the Petitioner and the formation of a viable conservancy district is illustrated in testimony by Gary Aker. On cross-examination by the Remonstrators, William Welch and Jean Welch, he was asked: "What is the plan for taking care of the runoff and the sewage in Phases 2 and 3" of the PUD project?

Aker answered, "There are no plans. We haven't gotten that far. We are here to talk about Phase 1."

The Remonstrators continued, "So, you are not seeking approval for Phases 2 and 3 today?"

Aker answered, "Not at all."

The Remonstrators continued, "Are you seeking to include those phases in the conservancy district?"

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[51] *Testimony of Aker, G.*, p. 8.
[52] *Id.*

Aker answered, "The property is within the PUD. Correct."

The purpose of this proceeding is not to approve or disapprove the PUD or any other plan. The purpose is to articulate recommendations to the Marshall Circuit Court on five statutory factors for determining whether the Maxinkuckee Village Conservancy District should be formed.

The other Remonstrator, the Lake Maxinkuckee Environmental Council ("LMEC"), makes what may be a first-blush argument in the consideration of formation of conservancy districts based upon Ind. Code § 14-33-2-17(d). [53] This statutory subsection provides in part that "The fact that all the land included in the proposed district is owned by one (1) freeholder…is not a sufficient reason for the [Natural Resources C]omission…to make unfavorable findings on…the question of the establishment of the district", but "it must appear from the evidence that the land is subdivided or intended for subdivision and development …." The LMEC urges:

> It is uncontested that the land which would be covered by this district is to be utilized for a condominium development. Condominiums do not constitute subdivision of land and are nothing more than a change in the form of ownership of land. There are no platted lots nor are there any individual owners of the land which is the subject of the Horizontal Property Regime. Common areas consist of, among other items, "the land on which the building is located." I.C. 32-25-2-4(1). Title to common areas in a condominium is jointly held by all of the owners of units in the condominium and remains undivided. I.C. 32-25-4-3. A subdivision, on the other hand, is defined in Section 1.3, Subdivision Control Ordinance, Town of Culver, Indiana (1983) as follows: "…land, vacant or improved, both residential and nonresidential, which is *divided* for the purpose of sale, lease or development, whether by deed, metes and bounds description, devise, intestacy, lease, maps, plat or other recorded instrument. [Emphasis supplied by Lake Maxinkuckee Environmental Council]
>
> The creation of a Horizontal Property Regime does not result in the subdivision of land. As a result, it does not appear from the evidence in this matter that the Commission is in any way restricted from finding that the district should not be established because of the ownership by only one freeholder.

Whether because not all portion of the district would appear to be served by its stated purpose, because the area to be served is not destined for subdivision, or because the Petitioner has not illuminated reasons for boundaries that are derived from the Conservancy District Act, the proposed Maxinkuckee Village Conservancy District has not been shown to cover and serve a proper area.

Whether the proposed district could be established and operated in a manner compatible with established: (A) conservancy districts; (B) flood control projects;

[53] "Response of Lake Maxinkuckee Environmental Council to Testimony, Exhibits and Agency Comments", p. 6.

(C) reservoirs; (D) lakes; (E) drains; (F) levees; and (G) other water management or water supply projects.

The record before the Commission remarkably lacks evidence to determine whether the proposed Maxinkuckee Village Conservancy District could be established and operated in a manner compatible with wastewater treatment by the East Shore Corporation or the South-West Lake Maxinkuckee Conservancy District. The record must properly be augmented regarding the relationship of the proposed conservancy district with these water management projects, as well as with wastewater treatment by the Town of Culver.

The proposed conservancy district is adjacent to, Lake Maxinkuckee, one of Indiana's most valuable lakes, both in terms of biology and economics. Lake Maxinkuckee is a 1,865-acre lake in Marshall County, Indiana. The lake comprises 21% of its 8,850 acre watershed.[54] The LMEC was established in April 1983 to work "toward the preservation of an ecologically sound Lake Maxinkuckee and its surrounding watershed."[55] In October 2005, JF New prepared the "Lake Maxinkuckee Lake and Watershed Management Plan," Remonstrator's Exhibit B, for the LMEC. The Watershed Plan states in part:

> **1.0 Introduction**
>
> The purpose of a watershed management plan is to identify ways to improve water quality in a lake and conserve and enhance healthy natural resources in the watershed. Through the process of developing the plan, a community identifies issues, proposes solutions and prioritizes actions for future implementation. By working at the watershed level the project area is clearly defined and the connection is made between water quality problems and their sources. In addition, communities with approved plans are eligible to apply for funding from state and federal agencies for soil and water conservation practices.
>
> This Lake and Watershed Management Plan (LWMP) was developed for Lake Maxinkuckee and its watershed. In the Lake Maxinkuckee watershed nonpoint source pollution is the primary water quality issue. The nonpoint source pollution, specifically nutrients, sediments and bacteria, in Lake Maxinkuckee originate from several sources including: the areas that drain into the streams and ditches leading to the lake, the shoreline, the areas draining directly to the lake, and the lake itself. In addition to nonpoint source concerns, this plan also incorporates the social, recreational, and land use concerns stakeholders expressed at the public meetings.
>
> **Culver/Lake Maxinkuckee Community**
>
> The Culver/Lake Maxinkuckee watershed area is several sub-communities existing in one small rural Indiana town. One of the more interesting aspects of the area is the diverse backgrounds of the residents. Some people come to the area because of their association with the Culver Academies, some to buy lake property, some are long-time seasonal residents, some are town residents and local business owners, and some are farmers or

[54] Petitioner's Exhibit 16, p. 3.
[55] Lake Maxinkuckee Environmental Council Internet site, http://culverlmec.com/.

> landowners in the watershed. Despite their various backgrounds or length of time in the area, all need to work together to protect Lake Maxinkuckee. Lake Maxinkuckee is the primary resource of the community and residents have supported the efforts of the local lake and watershed protection group, Lake Maxinkuckee Environmental Council (LMEC) since 1981.
> …

Remonstrator's Exhibit B, p. 9.

The LMEC and the DNR, through the Lake and River Enhancement Program, have funded projects for the improvement and maintenance of the Kline Wetland. Water quality sampling has occurred over the past 20 years.[56] In July 1990, the "Project Manual for Lake Maxinkuckee, Kline Ditch: Restoration of Maxinkuckee Wetland Conservation Area",[57] was completed. The "Lake Maxinkuckee Aquatic Plant Management Plan Update 2006," stated in part:

> These management activities and plant surveys are proposed to improve Lake Maxinkuckee's ecosystem and facilitate the achievement of the overall goals. These overall goals established by the IDNR for all lakes applying for LARE funding are: 1) develop or maintain a stable, diverse aquatic plant community that supports a good balance of predator and prey fish and wildlife species, good water quality, and is resistant to minor habitat disturbances and invasive species; 2) direct efforts to preventing and/or controlling the negative impacts of aquatic invasive species; and 3) provide reasonable public recreational access while minimizing the negative impacts on plant and wildlife resources.
> …

Lake Maxinkuckee Aquatic Plant Management Plan Update 2006, pp. 2, 16.

In 2007, the DNR and the LMEC completed the Lake Maxinkuckee Shoreline Revegetation Project (updated in 2009) manual.[58] It states, in part:

> The Lake Maxinkuckee Environmental Council (LMEC) is a not-for-profit organization created in 1982. The LMEC was formed due to growing concern among lake residents over the declining water quality of Lake Maxinkuckee. Since LMECs formation, many management efforts have been implemented to improve and restore the health of Lake Maxinkuckee. Wetland creation and restoration was a management strategy to reduce the amount of sediment and nutrients entering into the lake. Through fundraising and landowner partnership, LMEC was able to create Wilson, Curtiss and Kline wetlands for a total of 90 acres. A watershed management plan was created in 2005 for Lake Maxinkuckee which is a great resource to better understand the surrounding watershed and potential areas for improvement. The Lake Maxinkuckee Shoreline Revegetation Project is part of LMEC's continuing effort to improve the quality of this valuable resource.

Petitioner's Exhibit 16.

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[56] Testimony of Kline, p. 34.
[57] Remonstrator's Exhibit C.
[58] Lake Maxinkuckee Shoreline Revegetation Project—2007 (2009 updates). To note, page three of this document is Petitioner's Exhibit 16.

The DNR indicated concern for any development that would detract from the water quality in the area.[59] Through cooperation, management plans have been established for Lake Maxinkuckee. The improvement and protection of Lake Maxinkuckee and associated wetlands are a priority of the DNR, the LMEC, and the Culver community.[60]

A properly functioning wastewater treatment facility within Maxinkuckee Village should have no adverse impact upon Lake Maxinkuckee or the Kline Wetland. But Gary Aker testified he had "no idea" as to whether damages could result from the creation of the proposed conservancy district.[61] Aker also testified that he had not conducted any studies or analyses regarding surface water drainage impacts to the Kline Wetland or the wetlands contained within the proposed conservancy district boundaries.[62] The proposed conservancy district is also in close proximity to the South-West Lake Maxinkuckee Conservancy District and the East Shore Corporation, a company providing private sewerage services. Evidence was not presented to indicate whether the Petitioner explored, studied, or analyzed impacts to the existing conservancy district or the private sewerage.

The development within the proposed conservancy district, as planned, would not require a permit under the Section 404 of the Clean Water Act since the development plan does not indicate that placement of dredged or fill material will be required, permanently or temporarily, into any waters of the United States.[63] Because the development activity does not involve a discharge of fill material to or work below the Ordinary High Water Mark of Waters of the State of Indiana, the development activity does not require a Section 401 Water Quality Certification.[64]

The purpose of 327 IAC 15-5 (commonly referred to as "Rule 5") is to "establish requirements for storm water discharges from construction activities of one (1) acre or more so that public health, existing water uses, and aquatic biota are protected." 312 IAC 15-5-1. The Marshall County SWCD reviewed and approved the Maxinkuckee Village development plan, and determined the "plan satisfies the minimum requirements and intent"[65] of Rule 5.

Andrew Bender agreed the PUD's proposed soil erosion protection plan approved by the Marshall SWCD "meets the bare minimum requirements" of Rule 5. But he also testified that during construction compliance with Rule 5 alone is not sufficient to protect the Kline Wetland or the two small wetlands within the proposed conservancy district boundary.[66] The Kline Wetland is included in the Lake Maxinkuckee watershed. The wetland serves to filter sediment and nutrients, particularly those which are associated with the largest tributary of Lake Maxinkuckee, and is "currently doing a very good

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[59] DNR Memorandum, p. 83 of this report.
[60] *See* citizen comments, pp. 47-78.
[61] *Testimony of Aker, G.* p. 9.
[62] *Id.* at 10.
[63] Petitioner's Exhibit 12.
[64] Petitioner's Exhibit 13
[65] Petitioner's Exhibit 17.
[66] *Testimony of Bender*, p. 38.

job."[67] Compliance with Rule 5 is not enough for the Maxinkuckee Village to establish compatibility with the Lake Maxinkuckee Management Plan or to protect the Kline Wetland and Lake Maxinkuckee.

Formation of the Maxinkuckee Village Conservancy District is a preliminary stage. The evidence is not sufficient to conclude that the development would not be compatible with the protection of the Kline Westland and the management of Lake Maxinkuckee. Neither is the evidence sufficient to determine the development would be compatible. Compliance with Rule 5 and with other statutory requirements of the Army Corps, IDEM, and the Culver Plan Commission is a threshold. But the responsibility of the Petitioner is to establish compatibility with the management of Lake Maxinkuckee for purposes of the Conservancy District Act. The evidence is insufficient to determine the Petitioner has satisfied this responsibility.

VI. RECOMMENDATION

The foregoing is approved and adopted as the determination and fact finding report of the Natural Resources Commission under Indiana Code §§ 14-33-2-17, et seq.

Dated: April 8, 2010

Jennifer M. Kane
Hearing Officer

Stephen L. Lucas
Hearing Officer

[67] *Testimony of Namestnick*, p. 30.