AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
November 14, 2023, Meeting Minutes

AOPA COMMITTEE MEMBERS PRESENT
Jane Ann Stautz, Chair
Jennifer Jansen
Bart Herriman

NRC, DIVISION OF HEARINGS STAFF PRESENT
Elizabeth Gamboa
Aaron Bonar
Scott Allen

GUESTS PRESENT
Rebecca McClain
Jane Dall Wilson
Nicholas Gahl
Daniel McInerny
Gregory Frisinger
Will Gooden
Douglas Johnston
Tyler Rotstein

Call to Order

Jane Ann Stautz, Chair, called the meeting to order at approximately 2:06 p.m., ET, at the Natural Resources Commission, Division of Hearings, Indiana Government Center North, 100 North Senate Avenue, N103, Hearing Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum.

Consideration and approval of minutes for the meeting held on August 9, 2023

Jansen made a motion to approve the minutes of the August 9, 2023, AOPA meeting. The Chair seconded the motion. Upon a voice vote, the motion carried with Herriman abstaining from the vote.

Consideration of Summary Judgment Findings of Fact and Conclusions of Law with Nonfinal Order Granting Respondents' Motion for Summary Judgment in the Matter of *City of New Albany v. Ecosystems Connections Institute LLC & Department of Natural Resources;* Administrative Cause No. 21-027W

The Chair recognized Jane Dall Wilson, counsel for the Petitioner, City of New Albany.

Wilson presented oral arguments, summarized as follows:

> This appeal involves the integrity of the Department of Natural Resources (DNR) permitting process. The Findings of Fact and Conclusions of Law with Nonfinal Order Granting Respondents' Motion for Summary Judgment (Nonfinal Order) purports to permit the destruction of the Silver Creek Dam (Dam) based on a misrepresentation and without identifying, notifying, or compensating the owner. The Nonfinal Order authorizes entry onto and the destruction of someone else's property and, as of July 1, 2023, would violate a statutory amendment to the Flood Control Act.
>
> The City of New Albany (City) holds right -of-way interest granted to it by the State of Indiana and Ecosystems Connections Institute, LLC, (ECI) lacks the authority to remove the Dam. There is no evidence showing that the Navigable Waterways Act requirements were met.
>
> ECI, as a partner of River Heritage Conservancy Group (River Heritage), applied for a permit under the Flood Control Act to remove the Dam to improve the waterway conditions around the Dam. Neither ECI nor River Heritage owns the Dam, has authorization from the owner of the Dam, and/or possesses a legal right to remove the Dam. ECI falsely asserted authority to undertake the project to remove the Dam or to grant DNR the right to enter the location and inspect the project. Dr. Jerry Sweeten testified at the Stay Hearing that ECI lacked the authority to remove the Dam. There was no evidence of safety concerns with the Dam.
>
> The issue of right of entry as a prerequisite to applying for a permit was addressed in *Brown v. Department of Natural Resources and Peabody Coal Co.*, 6 CADDNAR 136 (1993) (*Brown*). *Brown* acknowledged that the permitting process requires a certain demonstration of concern for property interests relative to a permit under the Flood Control Act, specifically whether Peabody had a right of entry into the parcel of property where the proposed activity would take place. Peabody arguably had rights to access Brown's property, but a stranger cannot apply for a permit to conduct activity on a property without authorization from the owner.
>
> Paragraph 100 of the Nonfinal Order acknowledges that when the permit was approved, there was no requirement under I.C. § 14-28-1-22 that the applicant establish ownership of the property on which the project would be undertaken. The footnote in the Nonfinal Order acknowledged the July 1, 2023, legislative changes to I.C. § 14-28-1-22(e) required an applicant to provide ownership documentation or an affidavit from the owner authorizing site work. Paragraph 101 said the Commission does not have the authority to impose an ownership requirement that did not exist when the permit was approved. The amendment does not reflect a change in the law but codifies the requirement that has been implicit and fundamental to the permitting process. Someone applying for the permit should have the authority to apply for the permit and ECI lacked any colorable right of entry recognized in *Brown*.

Neither ECI nor River Heritage can establish that proper notice was given to each person who has a substantial and direct proprietary interest in the subject of the order. The Nonfinal Order would allow a non-owner, ECI, to remove the Dam while the City, a party asserting interest in the Dam, objects.

ECI's Motion for Summary Judgment said that Silver Creek was navigable at the site of the Dam. If Silver Creek is navigable then ECI did not fully comply with the Navigable Waterways Act, which has different permitting requirements. The Administrative Law Judge (ALJ) did not consider the City's navigability argument saying the issue was waived because it was raised too late. The City raised the issue of the Navigable Waterways Act requirements at the first opportunity in response to ECI's Motion for Summary Judgement when it became apparent that ECI was relying on Silver Creek's navigable status.

DNR acknowledges the overlap in the Navigable Waterways Act requirements and the Flood Control Act requirements. The statutory requirements were ignored, and the matter should be remanded for consideration of requirements under the Navigable Waterway Act.

ECI said the state owns the Dam because Silver Creek is navigable, but ECI would still need written permission from the Office of the Governor to remove the Dam.

The errors that invalidate the permit include ECI's perjury saying they had authority and ECI's failure to serve notice to required parties because ownership of the Dam was not established. The recent statutory amendment underscores the defective permitting process and the statutory requirements under the Navigable Waterways Act were ignored.

Herriman questioned how it can be known that the change in the statute was simply a codification and not a change in law without knowing the legislative intent. Wilson answered that there is case law in *Brown*, affirmed by the change in statute, that requires someone with the authority to do the project is applying for the permit.

Herriman asked if there was any retroactive language in the new statute. Wilson replied there was not, the statute was effective July first.

The Chair recognized Dan McInerny, counsel for the Respondent, ECI.

McInerny presented oral arguments, summarized as follows:

The matter is a Flood Control Act case that has three elements: whether the project will adversely affect the efficiency of or unduly restrict the capacity of the floodway; whether the project will result in an unreasonable hazard to the safety of life or property; and whether it will result in unreasonably detrimental effects upon fish, wildlife, or botanical resources. The City conceded the project would not result in an increase in a regulatory flood capacity and would decrease elevations in a 100-year flood event. There is no hazard to the safety of life or property because there is no increased surcharge. The City

presented no expert testimony at the hearing to suggest the Dam removal would have detrimental effects upon fish, wildlife, or botanical resources. The testimony at the hearing was that removal of the Dam will have a positive impact to the ecosystem and improve the richness and habitat of Silver Creek.

ECI complied with all the elements of the Flood Control Act when the application was submitted. The City raises the issue of ECI not being authorized to obtain the permit, but the statute says a "person" may apply and ECI meets the definition of a person. ECI had the authority to apply for the permit when they applied and there was no misrepresentation or perjury on the permit application. There was no requirement that ECI prove ownership of the Dam to apply for the permit. In a previous order, the ALJ noted the State of Indiana owns the Dam if the ownership is unknown and the City failed to provide evidence that the City owned the Dam.

Proper notice was given to the City as required and the City lacks standing to make an argument that an unknown person might not have received notice.

The ALJ correctly ruled the City waived the claim regarding requirements of the Navigable Waterways Act because it was not timely raised. DNR noted in its Concurrence that only one permit was required, and that the conditions of the Navigable Waterways Act would not have been applicable.

ECI does not object to the Nonfinal Order. ECI would like clerical errors corrected in the findings of the Nonfinal Order under I.C. § 4-21.5-3-31 and 312 IAC 3-1-12(b). In Paragraph 43 it is not accurate to state the Dam is in New Albany when the west bank of the Dam is in New Albany and the east bank of the Dam is in Clark County. Paragraph 44 states "Silver Creek is listed as a Navigable Waterway in Floyd County" and Information Bulletin #3 lists Silver Creek as being navigable in both Floyd and Clark Counties. ECI would like the order corrected to state Silver Creek is navigable in both Floyd County and Clark County.

Herriman asked if it was contradictory for the order to say that the Dam was not located in New Albany or to say the Dam was in New Albany and Clark County. McInerny said his suggestion was to say the Dam is located near New Albany, but it could also be accurate to say the Dam is in New Albany and Clark County.

Herriman asked if there was anything in the record stating the Dam is located either wholly or partially in New Albany. McInerny replied "no" and that a generous interpretation is the City's jurisdiction extends only to the center of Silver Creek.

The Chair recognized Rebecca McClain, counsel for the Respondent, DNR.

McClain presented oral arguments, summarized as follows:

The statutory amendments were effective July 1, 2023, and are not retroactive. There were numerous reasons for the amendments, including the fact that multiple permit

applications under the Flood Control Act were filed where there may be multiple property owners that need to consent to construction in a floodway.

Proper notice was provided to all landowners adjacent to where the work on Silver Creek will occur. The City received its notice and cannot assert a claim on behalf of a third party.

Silver Creek is navigable, public property, and held in trust by the state for the citizens of Indiana. The City and adjacent landowners do not have exclusive right to use Silver Creek, meaning anyone could apply for a permit under the Flood Control Act. In the permit review DNR did consider potential navigation and safety concerns.

DNR requests the Non-Final Oder be upheld and made a Final Order with modifications to correct the errors identified by ECI's counsel.

Herriman asked if the Flood Control Act requires a determination of ownership of a dam. McClain said under the Flood Control Act prior to July 1, 2023, any "person" could apply for a flood control permit and ownership was not required.

The Chair recognized Wilson for rebuttal.

Wilson presented rebuttal arguments, summarized as follows:

Fundamentally, a state agency cannot authorize the destruction of someone else's property without some right or authority. If the state were going to exercise eminent domain, the state would need to pay for the property.

There was a 1995 Road Transfer Agreement reflecting the transfer of the State's right-of-way interest on Spring Street to the City. The ALJ did not consider evidence of the transfer agreement at the Stay Hearing because it was produced too late, but the City has property rights in the City's right-of-way. There was evidence submitted that property deeds show ownership to the center of Silver Creek, which falls in the City's jurisdiction.

The City asserts their interest and objects to the removal of the Dam. The City made a substantial investment in the area around the Dam and, once removed, the damage cannot be undone.

Jansen asked what kind of investments were made around the Dam. Wilson said the City invested in the Silver Creek Landing by installing steps and a walkway down to the creek from Spring Street. The area is ADA accessible and provides support for recreation.

Jansen noted the City believes they have ownership rights pursuant to the 1995 Road Transfer Agreement and asked if the City has other ownership rights around the Dam. Wilson referenced an ariel map and said the City does own land around Silver Creek around the Dam.

Jansen asked if the 1995 Road Transfer Agreement was rescinded or transferred back to the state. McInerny replied "correct".

Wilson said she does not agree that the 1995 Road Transfer Agreement and the maintenance obligations were transferred back to the state.

Jansen asked if the City is currently maintaining old State Road 52. Wilson replied affirmatively.

ALJ Gamboa said there was typographical error in paragraph 21 of the Nonfinal Order that says, "a hearing on the Motion was held on November 22, 2023." Paragraph 21 should read "November 22, 2022."

Herriman noted the idea of someone doing work on an adjacent property without determining the owner of the property seems odd, but recognized the legislature has rectified the issue.

Jansen asked if the 1995 Road Transfer Agreement was entered into evidence. Wilson said the ALJ did not accept the 1995 Road Transfer Agreement at the Stay Hearing but there was an offer of proof provided. It was included as part of the summary judgment evidence.

ALJ Gamboa stated the question of property ownership should be determined by a court of competent jurisdiction and not through the administrative process.

Jansen said she did not know the specifics of this 1995 Road Transfer Agreement, but typically transfer agreements do not transfer property interests. Transfer agreements transfer maintenance jurisdiction over the roadway. Jansen added that she would propose modifications to the Nonfinal Order that do not fundamentally change the order. Jansen noted a correction to paragraph 100 where the word "property" was omitted on the first line after "someone else's."

Herriman said the "in" is missing in paragraph 75 and it should say "However, the City argues in the Brief." He also noted paragraph 82 should say "flood plain" not "flood plan."

Jansen noted it is strange to apply for a permit without a property interest or right of entry onto a property.

Jansen moved to accept the Summary Judgment Findings of Fact and Conclusions of Law with Nonfinal Order Granting Respondent's Motion for Summary Judgment, with modification. Herriman seconded the motion.

The Chair called for a vote to accept, with modifications, the Summary Judgment Findings of Fact and Conclusions of Law with Nonfinal Order Granting Respondents' Motion for Summary Judgment in the matter of *City of New Albany v. Ecosystems Connections Institute LLC. & Department of Natural Resources*. On a voice vote, the motion unanimously carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Frisinger v. Fettig*; Administrative Cause No. 22-060W

The Chair recognized the Petitioner, Greg Frisinger.

Frisinger presented oral arguments, summarized as follows:

> The intent in appealing was to offer an alternative to a riparian survey because the Findings of Fact and Conclusions of Law with Nonfinal Order (Nonfinal Order) suggested that a survey may be necessary to determine the property lines. The respective riparian zones start at the landward property lines and go to a central point in the middle of the round bay.
>
> The action was originally initiated to get clarification on the riparian lines because of changes to dock configurations by both neighbors. The neighbors' dock on the south end of the Frisinger property has been changed to the satisfaction of Frisinger.
>
> Frisinger proposed several possible solutions to Todd Fettig on how to draw the riparian line between the properties, but Fettig was not satisfied with the proposals. Frisinger filed so he could have clarification of the riparian lines. Frisinger said it was his understanding a riparian survey would only be needed if one party felt another party was encroaching in their riparian zone.

The Chair noted paragraph 46 of the Nonfinal Order says, "the exact dimensions of the parties' respective riparian zones cannot be determined from the evidence presented at the hearing" and a riparian survey may be needed.

Herriman agreed and said there was not much that could be done by the AOPA Committee as the ALJ outlined what needed to be done in the Nonfinal Order.

Herriman moved to accept the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Frisinger v. Fettig*. Jansen seconded the motion.

The Chair called for a vote to accept the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Frisinger v. Fettig*. On a voice vote, the motion unanimously carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Bruick & Burchardt v. Ohio Consumer Credit Alliance, et al.*; Administrative Cause No. 21-002W

Herriman recused himself from attending discussions and voting in this matter due to a potential conflict.

The Chair recognized Will Gooden, counsel for Bruick and Burchardt, Petitioners, and Mercers, Respondents.

Gooden presented oral arguments, summarized as follows:

> Photographic evidence presented at the administrative hearing demonstrated the use of the easement by the Petitioners and the Mercers was for riparian activities, such as pier placement and mooring boats. The evidence demonstrated the use of the prescriptive easement for almost 70 years by Mercers. Petitioners and Mercers are backlot owners who use the easement. There was no question that Lot 2 was lakefront property with an easement, but the question was if the backlot owners were granted riparian rights. All prescriptive easements had been established prior to Ohio Consumer Credit Alliance, Inc. (OCCA) purchasing Lot 2 in 2018.

Once the requirements for a prescriptive easement have been satisfied, riparian rights are granted within the boundaries of the easement. Petitioners and the Mercers established by clear and convincing evidence that, as the respective owners of Lots 20, 19, 18, 17 and 16, they each have a prescriptive easement over Lot 2, including the rights to place a pier and moor boats at the end of the easement in Snow Lake.

> In the Findings of Fact and Conclusions of Law with Nonfinal Order (Nonfinal Order),ALJ Bonar correctly found the testimony of Richard Roebel to be unreliable and inconsistent. There was no contradictory evidence introduced at the hearing. The Nonfinal Order was based on inferences and weight assigned to the evidence by the ALJ, which conflicts with the clear and convincing evidence in the record. Some of the determinations the ALJ made were not proper based on the evidence introduced at the hearing.
>
> *Whitman v. Denzik*, 882 N.E.2d 260 (Ind. Ct. App. 2008) was an easement case that indicated the burden to establish an easement is "clear and convincing" or "highly probable." The Court of Appeals upheld the trial court's decision that there was a prescriptive easement in that case. If there is no reliable evidence to contradict the existence of the easement, then there is no reason to deny the existence of the prescriptive easement. In the current matter, the ALJ determined the prescriptive easement did not exist. That determination was not proper without evidence to the contrary. The inferences and determinations by the ALJ conflict with the clear and convincing evidence to the contrary in the record. The record contains clear and convincing evidence required to establish a prescriptive easement.
>
> There were photographs and testimony about a seawall being constructed on Lot 2 and on part of the adjoining lot that show a pier extending from the easement in question. Other photographic evidence and witness testimony presented at the hearing highlighted the pier on the easement with various watercrafts or vehicles from the 1930s to the 1990s.
>
> Petitioners and the Mercers object to paragraph 56 of the Nonfinal Order because there is clear and convincing evidence in the record establishing that OCCA did in fact recognize the existence of an easement with riparian rights. The letters referenced the ten-foot width

and the exercise of riparian rights and requested the riparian rights of the easement holder not interfere with the OCCA riparian rights.

In paragraph 58 of the Nonfinal Order the ALJ drew an inference based on the "narrowness of the easement" indicating there was not an intention to grant riparian rights through the easement. This inference is not supported by the evidence and is irrelevant.

The Chair recognized Douglas Johnston, counsel for the Respondents except the Mercers.

Johnston presented oral arguments summarized as follows:

The matter is not an interpretation of the easement, which was waived, but the issue is whether there is substantial evidence to establish an easement by prescription. The evidence presented suggested the long history of ownership and use of a pier created the elements for a prescriptive easement, but the Petitioners and Mercers do not have a prescriptive easement right to place and maintain a pier or to moor watercraft in the easement of Lot 2.

The Mercers previously owned Lot 2 but it is now owned by OCCA. Petitioners and Mercers own back lots 16 through 20. The Mercers no longer have the easement they once had before they sold Lot 2. Pattie Couperwaithe testified that the backlot owners have a walking easement on Lot 2 for ingress and egress. There was no objection to testimony that prior to the sale of Lot 2 to OCCA in 2018, the Petitioners and Mercers placed a pier and moored watercraft at the easement.

Richard Roebel gave confusing testimony; however, he did testify that previously there was a caretaker of Lot 2 that gave permission to place a pier in the water. The standard is "clear and convincing" evidence, so Roebel's testimony, although confusing, cannot be ignored. The ALJ considered Roebel's ownership and testimony.

The four elements to be able to claim adverse possession are: control over the parcel of land in dispute, intent to claim ownership of the parcel, sufficient notice to the legal owner of the parcel of the party's control and use of the land, and control of the parcel for a sufficient duration. The ALJ found the Petitioners and Mercers failed to satisfy by clear and convincing testimony all four elements required to show adverse possession.

Whether there was a merger or permissive use previously does not mean there is a prescriptive easement or exclusive use. After the Bruicks purchased Lot 20, Bruicks and Mercers became friends. Thus, any placement by Bruicks of a pier on the easement property was permissive, or done with the knowledge of Mercers, and thus not eligible to gain prescriptive riparian rights through other mechanisms such as adverse possession.

It is not possible for seven different lot owners to each place piers on the ten-foot strip of waterfront property. The ALJ ruling is correct.

Gooden presented rebuttal arguments, summarized as follows:

> Seven different lot owners can put piers in a lake if they have the right to. The issue of how many people could place a pier in the water is a different question not addressed because the ALJ determined there were not riparian rights obtained by prescriptive easement. The determination of riparian rights might have been appropriate if the ALJ had determined the Petitioners had established adverse possession and possess a prescriptive easement.
>
> There is no requirement that someone "declare" they have the rights to claim adverse possession. Someone can establish adverse possession and show by virtue of the of the exercise of the use of the easement.
>
> Petitioners and Mercers objected to the testimony by Couperwaithe who stated her speculative opinion that the easement was a "walking easement." This should have been clarified by the seller, Mercer. The OCCA understanding of the easement at the time of purchase is not relevant and cannot support an inference. The second letter conceded there were riparian rights, but OCCA was going to allow additional watercraft to be moored at the pier.
>
> There is no finding or conclusion with respect to the caretaker that Roebel testified about. The ALJ disregarded Roebel's testimony even though he was the only witness who provided history on the prescriptive use or the lack of the prescriptive use of the property.
>
> When Mercer owned Lot 2, he did not object to the backlot owners' use of the easement, the installation of a pier, and the mooring of watercraft. The reason Mercer did not object to the use of the easement is because of the belief the backlot owners had riparian rights and the right to place a pier in the water. Petitioners and Mercer request the Nonfinal Order be remanded back to the ALJ for further proceedings consistent with the establishment of a prescriptive easement and riparian rights.

Johnston said recreational use of waterways require more than just the use. There must be apparent adverse use to meet the element requirements for adverse possession.

The Chair commented that the ALJ heard and sifted through the evidence. She noted the elements to establish adverse possession and prescriptive easement are clear.
Jansen moved to accept the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Bruick & Burchardt v. Ohio Consumer Credit Alliance, et al.* The Chair seconded the motion.

The Chair called for a vote to accept the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Bruick & Burchardt v. Ohio Consumer Credit Alliance, et al.* On a voice vote, the motion carried.

Adjournment

The meeting was adjourned at approximately 3:42 p.m. ET.