

**AOPA COMMITTEE  
OF THE  
NATURAL RESOURCES COMMISSION**  
**January 31, 2017 Meeting Minutes**

**AOPA COMMITTEE MEMBERS PRESENT**

Jane Ann Stautz, Chair  
Jennifer Jansen  
R. T. Green

**NRC, DIVISION OF HEARINGS STAFF PRESENT**

Sandra Jensen  
Dawn Wilson  
Scott Allen

**GUESTS PRESENT**

Andrew Palmison	Brad Beerman
Mark Gorney	Rosemary Gorney
Sean Wooding	Libby Gamboa

**Call to order and introductions**

Jane Ann Stautz, Chair, called the meeting to order at 8:59 a.m., EST, at the Fort Harrison State Park, Garrison, 6002 North Post Road, Lawrence Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum. The Chair, Jennifer Jansen, and R. T. Green introduced themselves.

**Consideration and approval of minutes for meeting held on October 28, 2016**

Jennifer Jansen made a motion to approve, as presented, the minutes of the meeting held on October 28, 2016. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

**Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Gorney v. Beerman and DNR (Intervenor) and Christoules (Third Party)*, Administrative Cause No. 15-075W**

Stautz recognized Andrew Palmison, Counsel for Beerman, who filed objections to the Administrative Law Judge's (ALJ) Nonfinal Order.

Palmison explained that the matter at issue initially arose before the Natural Resources Commission in 2012 through a proceeding that was dismissed after the parties, without the assistance of counsel, executed a mediation agreement. He confirmed that all parties agree that the mediation agreement is binding and enforceable. However, Palmison explained that the

present dispute results from a disagreement regarding “precisely how the piers were supposed to be placed in connection with that mediation agreement.” Palmison noted that the mediation agreement called for the parties to place their piers consistent with a diagram identified as Exhibit 4, which he observed the AOPA Committee members had available to them.

With respect to the objections, Palmison noted that the issue before the AOPA Committee is “very, very narrow” observing that “this case, on paper, looks a lot more complicated than it actually is.” He noted that no one is disputing the location of the riparian boundary lines or that the Gorneys’ pier was encroaching into the riparian zone of Beerman. Palmison advised that the sole issue remaining in dispute is the Nonfinal Order’s conclusion that Beerman’s pier placement is not consistent with Exhibit 4 and the order to move her pier. Palmison noted however, that “we actually don’t even disagree that the pier should be moved, we just disagree with the degree to which the pier should be moved.”

Using Exhibit 4, Palmison explained that everyone is in agreement that the Beerman pier should be located within the blue rectangle depicted as extending from the Beerman shoreline. He added that the blue rectangle, representing Beerman’s pier, as depicted on Exhibit 4 is, according to the scale of Exhibit 4, actually depicted as being 75 feet long and five feet wide. In reality, Beerman’s pier is only three feet wide and 60 feet in length, Palmison noted. He argued that as long as Beerman’s pier is within the dimensions of the blue rectangle her pier placement should be consistent with Exhibit 4 of the mediation agreement. Palmison concluded that the Nonfinal Order requiring the east side of Beerman’s pier to be located 15.69 feet<sup>1</sup> from the eastern riparian zone boundary should be modified to allow her to position the pier so the east side of the pier is between 12.015 and 15 feet from the eastern riparian zone boundary.

Palmison demonstrated using Exhibit 4 at its stated scale, that a 60 foot pier measures “1 and 13/32nds of an inch”. Palmison further provided that at the 60 foot, or 1-13/32nds of an inch, point, the distance between Beerman’s eastern riparian zone boundary and the eastern side of the blue rectangle is 9/32nds of an inch, while the distance between the western riparian zone boundary and the western edge of the blue rectangle is 9/32nds of an inch. Palmison offered that these dimensions are consistent with Judge Jensen’s Order in two respects. First, Judge Jensen’s Order determined that Beerman’s pier is to be located closer to the western riparian zone boundary line than to the eastern riparian zone boundary. Second, Mr. Palmison observed that 8/32nds of a foot equals 10.68 feet, which is the exact distance between the western riparian zone boundary and the western edge of Beerman’s pier that is stated in the Nonfinal Order.

Palmison reiterated that the only difference is that the Nonfinal Order fails to consider the mediation agreement’s allowance of flexibility for Beerman to place her pier at any location as long as it remains within the width of the blue rectangle as depicted on Exhibit 4 of the mediation agreement. This, according to Palmison, should allow the eastern edge of Mrs. Beerman’s pier to be located between 15 feet and 12.015 feet from her eastern riparian zone boundary.

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<sup>1</sup> The Findings of Fact and Conclusions of Law with Nonfinal Order, at Finding 86, rounded this figure to require Beerman to maintain 15 feet at the lakeward end between the east side of the pier and the eastern riparian zone boundary.

Stautz recognized Mr. and Mrs. Gorney.

Mr. Gorney presented a copy of an aerial photo obtained “on the way here” that other parties had not seen and that is not evidence of record in this proceeding. Stautz stated that because the aerial photograph is not evidence presented previously in this case, the AOPA Committee could not accept it as evidence at this juncture. The aerial photograph was used for demonstrative purposes without objection.

Mrs. Gorney explained that the aerial photograph depicts Beerman’s, Mr. Christolous’s, and their pier as placed in the fall of 2016.

Mrs. Gorney offered that after the mediation agreement was entered into they hired a company to construct a special bracket to affix their pier to the seawall while allowing them to relocate the pier to conform to Exhibit 4. According to Mrs. Gorney, Beerman has never moved her pier to conform to Exhibit 4. Mrs. Gorney noted from the aerial photograph that a boat would not fit between the Gorneys’ and Beerman’s pier and observed that unless Beerman relocates her pier consistent with the Judge’s Nonfinal Order it will not be possible to get a boat between the two piers.

Mr. Gorney noted that they own a commercial property that is accessed by their pier and the inability to use one side of the pier “makes it rough.” Mrs. Gorney stated that “going off what he said, it also depicts us as five feet” meaning the blue rectangle representing the Gorneys’ pier also depicts a five foot pier width. She added that their pier is only four feet in width to provide greater water space but the reduced pier width still has not provided sufficient water space.

Stautz asked the Gorneys if they are comfortable with Beerman moving her pier to a location that is within the blue rectangle depicting her pier on Exhibit 4. Mr. Gorney stated that he was not comfortable with that result, once again arguing that the Judge’s Nonfinal Order was correct and should be affirmed.

Mr. Gorney added the neighbor on the opposite side of Beerman has encroached upon her riparian zone but that Beerman does not want to address that situation because they are “life-long friends.”

R.T. Green expressed his understanding that that mediation agreement is based upon Exhibit 4, which depicts five foot wide piers, although the piers actually placed by Beerman and by the Gorneys, are not five feet in width.

All parties agreed with Green’s understanding.

Green asked, “If they want to do something inside the five feet, what’s wrong with that?”

Mrs. Gorney asked since the piers are actually only four feet in width could it be ordered that Beerman keep her pier 14 feet from the eastern riparian zone boundary?

Green concluded, “They’re still going to have to move it... they have to move it within the boundary of the blue rectangle.”

Stautz reiterated that “it was the blue rectangle that was agreed on. As long as their dock, whether it’s three feet or four feet, is within that blue rectangle...”

Green added, “It’s in compliance.”

Green stated, “What I’m hearing is, ‘...we’re going to move within that blue area that the Judge has already indicated on the modification.’ They want to make sure they’re clear, as I understand it, ‘look, we’re going to play with a three foot dock, we may not move it 15 feet, but we’re going to be within the area we all agreed.’ That’s what I understand.”

All parties agreed to Green’s understanding.

Mrs. Gorney stated, “We’re fine with that...as long as they move into the agreed area, we’re fine.”

Mr. Palmison clarified that Beerman’s current pier is only three feet wide, she is not changing from a five foot wide pier to a three foot wide pier.

Stautz recognized Judge Jensen for a point of clarification.

Jensen explained that Finding 86, as currently stated in the Nonfinal Order, is not referencing the distance between eastern side of Beerman’s blue rectangle and Beerman’s eastern riparian zone boundary but is, instead, a requirement that the east side of Beerman’s pier, regardless whether it is three feet in width or five feet in width, must be located 15 feet from her east riparian zone boundary at 60 feet from the shore. Judge Jensen added that in making her determination she had already accounted for the undisputed evidence regarding the actual width of the piers currently in use, which are not five feet wide. Finding 86 established the exact location for the piers in their existing width without accounting for the mediation agreement’s allowance for piers of five foot widths. Jensen concluded that in the Nonfinal Order, “the width of the blue box really didn’t make any difference to the way” the ultimate conclusion was reached.

Jensen referred to Palmison’s initial indication that during the first case involving these parties, neither party was represented by counsel. The mediation agreement, referring to Exhibit 4, was entered but contained no recitation of dimensions or distances, except as might be ascertained from the scale. In reaching this Nonfinal Order, Jensen, explained that she was required to extrapolate data from both the survey and Exhibit 4, and through that, had already accounted for the fact that the piers currently in use are only three (Beerman’s pier) and three and a half (Gorneys’ pier) feet wide.

Jensen summarized that the Nonfinal Order, as written, determined the location of the actual piers in the widths as determined by the survey, but the Nonfinal Order does take into account the boundaries of the five foot wide blue rectangles depicted on Exhibit 4.

Green asked Judge Jensen, "Was it your intent to be able to accommodate passage of boats ten foot between, or was that any part of your consideration?"

Jensen replied, "It truly was not...it is part of the mediation agreement...but that was not any focus of mine. My focus was strictly on the dimensions."

Stautz asked if the Department had anything to offer.

Sean Wooding, Department Counsel, indicated the Department had nothing to add.

Palmison confirmed Beerman's position that Beerman concentrated on the distance between the blue rectangle and the riparian zone to saying, "anything within that blue rectangle we can operate within."

Mrs. Gorney reiterated the Gorneys' position that Judge Jensen's Nonfinal Order should be affirmed.

Stautz inquired as to who drew the blue rectangles on Exhibit 4.

Jensen stated her belief that Exhibit 4 was prepared by the Department for purposes of the mediation conducted in the first case between these parties. Jensen acknowledged that the document was not, to her recollection, ever submitted as part of the record in the first case, but she confirmed that the document, as presented, in this case has never had dimensions or measurements attached to it. Jensen noted that staff from the Department were present although, recognizing that confidential nature of mediation discussions, stated uncertain as to whether the Department had any additional information it could share.

Stautz observed that Finding 86 should possibly be modified to clarify that the width between the east side of the pier and Beerman's east riparian zone boundary is based upon Beerman's pier at 60 feet.

Stautz questioned whether everyone was in agreement that the mediation agreement contemplated the Beerman's pier as being 60 feet in length.

Brad Beerman, the son of Beerman, displayed diagrams of Beerman's pier, at its accurate length of 60 feet, extended lakeward along both the west side of the blue rectangle and along the east side of the blue rectangle. If the pier's west side is placed along the west side of the blue rectangle, the east edge of Beerman's existing three foot pier at its lakeward end will be located approximately 15 feet from her east riparian zone boundary. Mr. Beerman observed that this is consistent with Judge Jensen's Nonfinal Order. However, if the east side of Beerman's pier is placed along the east side of the blue rectangle, the east side of her pier, at its lakeward end, is located approximately 12 feet from Beerman's east riparian zone boundary. Palmison argued that under either diagram, Beerman's pier remains within the five foot width of the blue rectangle as depicted on Exhibit 4.

Stautz suggested that the Nonfinal Order should reference the full terms of the mediation agreement. Stautz recognized the desire to “respect the mediation agreement and be fair to both parties.” Stautz observed that modifying the Nonfinal Order to provide the dimensions of the blue rectangle in terms of its distance from Beerman’s east and west riparian zone boundary lines at the current 60 foot length of Beerman’s pier would be consistent with the mediation agreement. Stautz recognized the need to specifically identify the area of the blue rectangle within which Beerman’s pier must be located.

Jennifer Jansen noted that addressing this case by establishing the dimensions based upon the five foot width of the blue rectangles, instead of the width of the piers currently in use, will provide the future ability for the parties to modify the widths of their pier up to five feet.

Jensen observed that the blue box provided on Exhibit 4 to identify the Gorneys’ pier also depicts a five foot wide pier that is not accounted for in the Nonfinal Order as it is presently written. Jensen observed that revision of the Nonfinal Order, consistent with Beerman’s request, should also allow for the same type revisions with respect to the location within which the Gorneys’ are authorized to place their pier.

Jensen recognized that Findings 85 and 86 of the Nonfinal Order would need to be modified to effect the change. She indicated that additional Findings within the Nonfinal Order may also require revision.

Stautz concurred and suggested that the matter should be remanded back to the ALJ for revision consistent with the discussion.

Green moved to remand the matter for modification. Jansen seconded the motion.

On voice vote, the motion carried.

Upon Jensen’s further inquiry it was agreed that the revised Nonfinal Order would be issued to the parties for further objection if any.

### **Adjournment**

The meeting was adjourned at 9:44 a.m., EST.