

1997-98 SESSION
COMMITTEE HEARING
RECORDS

Committee Name:

*Joint Committee for
Review of
Administrative Rules
(JCR-AR)*

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR_RCP_pt01a
- 97hrAC-EdR_RCP_pt01b
- 97hrAC-EdR_RCP_pt02

- Appointments ... Appt
-
- Clearinghouse Rules ... CRule
-
- Committee Hearings ... CH
-
- Committee Reports ... CR
-
- Executive Sessions ... ES
-
- Hearing Records ... HR
-
- Miscellaneous ... Misc
- 97hr_JCR-AR_Misc_pt28a_SofC
- Record of Comm. Proceedings ... RCP
-

1996 August and
JCRAR - Service of complaints —
beyond

SENATOR ROBERT WELCH
CO-CHAIRMAN

ROOM 139 SOUTH • STATE CAPITOL
MADISON, WI 53707
(608) 266-0751



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIRMAN

ROOM 125 WEST • STATE CAPITOL
MADISON, WI 53708
(608) 264-8486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

M E M O R A N D U M

To: Members, JCRAR

From: Senator Bob Welch, Co-Chairman
Representative Glenn Grothman, Co-Chairman

Date: March 13, 1996

Re: Service of Lawsuit

Pursuant to s. 227.40(5), Stats, the Joint Committee for Review of Administrative Rules has been served with notice the matter of Charles Douglas Yoder v. Gary McCaughtry. Attached is a copy of the complaint for your review.

Subchapter III of Chapter 227, Stats, establishes an action for declaratory judgment in the circuit court for Dane County to be the primary means for judicial review in a dispute concerning the validity of an administrative rule. Subject to the approval of the Joint Committee on Legislative Organization, the Joint Committee for Review of Administrative Rules may choose to be made a party to the suit, and thereby be entitled to be heard.

If you are interested in a further pursuit of the rights of the JCRAR under this suit, please forward your request in writing to the offices of the co-chairmen of the committee.

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

CHARLES DOUGLAS YODER
WAUPUN CORR. INSTITUTION
P.O. Box 351 (WCCI)
WAUPUN, WISCONSIN, 53963,

MORIA KRUEGER
CIRCUIT COURT, BR. 7

96CV0426

96IP0010

Plaintiff,

CASE NO. _____

- VS -

CASE CLASSIFICATION CODES:

GARY R. M^CCAUGHTRY
WARDEN
WAUPUN CORRECTIONAL INST.
P.O. Box 351
WAUPUN, WISCONSIN, 53963-0351,

Declaratory Judgment Action 30701

Money Judgment 30301

Civil Rights

UNCLASSIFIED 30203

DEFENDANT(S)

And John Does, et al.,

DEFENDANTS,

State of Wisconsin
County of Dane
I hereby certify this is a true
copy of the original Summons
and Complaint, filed in my office

Attest: *[Signature]*
Clerk of Courts
by Deputy Clerk

JURISDICTION

This Courts Jurisdiction Lies under the Civil Rights Act of 1971, Presently codified at 42 U.S.C. section 1983, and plaintiff sues under state tort laws. Plaintiff is a indigent, pro se, personer unlettered in the law who is without legal assistance. Therefore, plaintiff requests the court to utilize its discretion under Haines v. Kerner — U.S. —, — S. Ct. — 1972 to review this instant pleading to first determine if a cause of action has been stated, and, if so, under which avenues, or state or federal statutes, plaintiffs claims are to be heard under-

PARTIES

1). Plaintiff, Charles Douglas Yoder, pro se, a Wisconsin state prisoner is presently confined to the Waupun Correctional Institution (WCCI) located at Waupun, Wisconsin. Plaintiffs Address is: Post office, Box 351, Waupun, Wisconsin, 53963-0351;

DANE COUNTY, WI

JAN 12 11 01 AM '96

CIRCUIT COURT

2). Defendant, Gary R. McCaughtry, is the warden of the Waupun Correctional Institution (WCI). Defendant McCaughtry's Address is: Waupun Correctional Institution, Post Office Box 351, Waupun, Wisconsin. 53983-0351.

3). John Does And et al's Are Named Based upon the Following:
McCaughtry Himself denied MY specific Requests for WCI Policies to be changed regarding MY Rights being violated as detailed herein. From His denial, and from His continuing to allow MY Rights to be violated, McCaughtry Himself is responsible for the continued Rights violations. However, it could be that McCaughtry did not render the decision Himself. Or, perhaps, one of McCaughtry's superiors in the Wisconsin Department of Corrections directed Him to act as He did. Therefore, I reserve MY Right to further sue other Named Defendants unknown to Your Plaintiff at this time. Plaintiff assumes that McCaughtry will forthwith inform the court as to the Following:

- a. Did He act alone;
- b. Did He have the clear legal authority to act as he did;
- c. Whether His Superiors or Subordinates were involved.

If McCaughtry refuses, or otherwise fails, to address the above, Plaintiff will move the court for an order directing the release of such information.

FACTS

- 1) Plaintiff is a long-term prisoner, having served nearly thirteen years in prison in Wisconsin. Plaintiff's mandatory release date is the year 2004.
- 2). This present period of confinement at WCI is Plaintiff's second period of incarceration at WCI. This period of incarceration at WCI to date has been nearly two years in duration.
- 3). Plaintiff is presently confined in the WCI Disciplinary Segregation unit. Having been given a segregation sentence of eight (8) days of adjustment segregation and three hundred and sixty (360) days of program segregation which was imposed upon Plaintiff on November 27, 1995.

- 4). This current period of disciplinary segregation is not the first, nor the only, long-term (three months or more) term of disciplinary segregation which has been imposed upon Plaintiff in 1995.
- 5). Prisoners housed in the WCI Segregation Unit wherein Plaintiff is housed are permitted to make one collect telephone call every seven days for a length of time of approximately fifteen minutes.
- 6). Prisoners at WCI are permitted to receive, purchase, or obtain, U.S. postage stamps from only one source - the WCI Inmate Canteen.
- 7). WCI prisoners can make a canteen purchase once per week.
- 8). WCI and Defendant McCaughtry restrict purchases of U.S. postage stamps to a limit of twenty five stamps.
- 9). WCI and Defendant McCaughtry do not permit WCI prisoners to receive stamps or stamped envelopes from retail out-lets nor from family and friends.
- 10). Numerous prisons within Wisconsin's Department of Corrections - including maximum security prisons (such as WCI is) - allow prisoners confined in those prisons to receive U.S. postage stamps directly in the mail from family and friends. And from retail out-lets.
- 11). The only source Plaintiff has for obtaining U.S. postage stamps is from the WCI Inmate canteen, once per week, a limit of twenty five stamps.
- 12). The Wisconsin Administrative Code which is the Governor's Code sets forth DOC policy does not contain a rule, regulation or stated intention which serves to limit or restrict DOC or WCI prisoners from communicating, corresponding or expressing.
- 13). Wisconsin state law by virtue of the Wisconsin Administrative Code encourages DOC and WCI prisoners to communicate with free citizens to maintain strong family and community ties.

- 4). Plaintiff is a prisoner who routinely receives mail - Letters from at least FIFTY personal friends and family members.
- 5). Plaintiff routinely receives letters and mail from dozens of editors of legal publications, civil rights publications, and other publications, foundations and organizations.
- 6). WCI Business office records will show that Plaintiff submits many orders to the Business office - all which require postage stamps provided by Plaintiff - orders including purchases of books, shoes, clothing, musical cassette tapes, magazines, typing supplies and numerous other purchases by Plaintiff of items and products from vendors and retail out-lets outside the prison.
- 17). From 11-27-1995 to 12-09-1995 Plaintiff received in the U.S. mail fourth three (43) first class letters and correspondences just from family and friends. This fourth three pieces of U.S. mail does not include mail received in the same period of time by Plaintiff consisting of Business mail, Business Reply mail, Legal mail and other miscellaneous mails.
- 18). Plaintiff cannot seek information, i.e., reports of agencies, offices or organizations without having a U.S. postage stamp to send a request for valuable information Plaintiff may need or want.
- 19). Prisoners make purchases of clothing, shoes, books, magazines, electronics equipment, typing supplies and everything else they need almost exclusively from catalog companies and retail out-lets.
- 20). Plaintiff cannot seek or request from retail out-lets or from catalog companies, catalogs of items sold, or brochures or price lists from those companies unless he has a U.S. postage stamp for use in writing to those companies or retail out-lets requesting such information.
- 21). Plaintiff does not have access to a telephone for use in ordering or seeking, via a toll free system, information.
- 22). Because of WCI and Defendant's 25 postage stamp restriction - limit Plaintiff cannot reply to mail he receives.
- 23). Because of WCI and Defendant's 25 postage stamp restriction - limit Plaintiff cannot mail Christmas cards, holiday greetings for Hanukkah or any other occasion.

- 24). More often than not Plaintiff cannot correspond, express himself, seek information or freely associate totally as a direct result of WCI and Defendant McCaughton's policy of 25 stamps which in effect denies Plaintiff the ability to do such.
- 25). Plaintiff wants to but cannot answer just the personal mail he received 11-27-95 through 12-69-95 because Defendant will not allow Plaintiff to have U.S. postage stamps necessary for such responses.
- 26). Plaintiff has Jewish friends he cannot write or send a Greeting or Hanukkah Card to, solely because he has no stamps as a direct result of WCI and Defendant's policies of restricting access to U.S. postage stamps.
- 27). As of the writing of this complaint, Plaintiff would like to order information and catalogs but he cannot do so as a direct result of WCI and Defendant McCaughton's policies restricting Plaintiff's access to U.S. postage stamps.
- 28). As of the writing of this complaint, Plaintiff has an article written for submission to a prisoner rights magazine for publication, but he cannot submit the article due to the restrictions being placed upon his communications by Defendant's restrictive policies on Plaintiff having access to U.S. postage stamps.
- 29). Several times in 1995 and in 1994 Plaintiff wrote directly to Defendant McCaughton concerning the WCI restrictive policy of prohibiting Plaintiff from having access to U.S. postage stamps. Plaintiff did inform McCaughton that the restrictive policy was preventing him from exercising Plaintiff's First Amendment rights, and Plaintiff asked McCaughton to change the policy. Each time, McCaughton refused.
- 30). WCI records will show that several of Plaintiff's friends made in the last two years mailed U.S. postage stamps to Plaintiff, and that the WCI mail room would not permit Plaintiff to have those stamps, and forced Plaintiff to provide additional U.S. postage stamps to use by the mail room at WCI to return said stamps to the sender.
- 31). Before coming to WCI other Wisconsin DOC prisons allowed Plaintiff to receive stamps and stamped envelopes in the mail from family and friends and from retail outlets.

- 32). WCI and Defendant McCaughtry's restriction on Plaintiff's communication, expression and correspondence are contrary to the legislative intent of the Wisconsin Administrative Codes and the U.S. Constitution.
- 33). The WCI restrictions on Plaintiff's communications, associations and expressions are the sole choice of Defendant McCaughtry - the warden of WCI.
- 34). The WCI policy disallowing Plaintiff to receive stamps or stamped envelopes from family or friends and retail outlets is not a Division or Department-wide (DOC) policy.
- 35). After being informed that this policy restricting U.S. stamps to Plaintiff was harming Plaintiff from expressing, communicating and associating, McCaughtry refused to change the policy.
- 36). It is a well established fact at WCI by correctional officers processing mail and delivering mail to prisoners that Plaintiff receives an inordinately high number and amounts of mail - as opposed to other prisoners.

CLAIMS

- 1). McCaughtry's policy of restricting Plaintiff to twenty five stamps per week violates the Wisconsin Administrative Codes intentions;
- 2). McCaughtry's refusal to allow Plaintiff to receive or purchase U.S. postage stamps from family or friends and retail outlets is preventing Plaintiff from freely associating, freely communicating and freely expressing himself and his ideas;
- 3). McCaughtry's restrictive policy of 25 stamps is an exaggerated response to any legitimate penal or security objectives;
- 4). McCaughtry offers no rational relationship between the response and any underlying reasons he has for his restrictive policy;

- 5). m^cCaughtry's restrictive Policy is Not the result of Anti Perceived threats or Misconduct manifested by Plaintiff being allowed to Freely Associate, Freely communicate, or Freely express himself;
- 6). m^cCaughtry's Policy is an unreasonable restriction upon Plaintiff's State and Federal Constitutional Rights to Associate, Give information, Seek information, do Business, and express himself;
- 7). m^cCaughtry offers no reasonable alternatives to Plaintiff which would afford Plaintiff the opportunity to exercise his First Amendment and State-created Rights to Associate, communicate or express himself;
- 8). m^cCaughtry's actions and Policies are both in practice and on their face, as written and enforced, unlawful and unconstitutional.
- 9). Plaintiff has been harmed by m^cCaughtry's actions and Policies, said harm causing emotional and psychological pain and hardship, as a result of Plaintiff being denied his right to Freely Associate, Communicate and express himself.

RELIEF

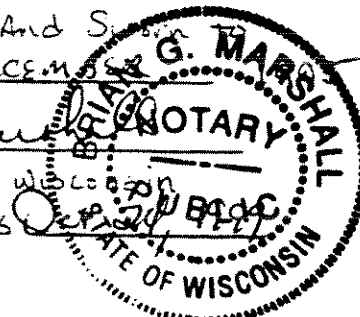
- 1). Declaratory order from this Court holding the 25 U.S. Postage Stamp restriction to be unlawful because it denies Plaintiff his right to Freely Associate, Freely communicate and Freely express himself;
- 2). Declaratory order from this Court holding m^cCaughtry's Personal Policy and Actions of restricting Plaintiff's correspondences, mail, expression, search of information, communication and association to be unlawful;
- 3). Declaratory order from this Court holding that m^cCaughtry has offered no reasonable alternative to the restriction on Plaintiff's rights, which would allow Plaintiff to exercise his rights;

- 4). Declaratory order from this Court holding that the 25 U.S. Postage stamp restriction is invalid;
- 5). Declaratory order from this Court holding that the 25 U.S. Postage stamp restriction must be lifted, or in the alternative, Defendant must offer a meaningful, reasonable alternative which allows Plaintiff reasonable access to U.S. Postage stamps through sources other than the wlt inmate canteen;
- 6). Award of Attorney Fees;
- 7). Award of compensatory damages of Five hundred Dollars for violation of Plaintiff's right to freely associate, freely communicate and freely express;
- 8). Award of one thousand dollars Punitive Damages against the defendants for having and continuing to violate Plaintiff's right to associate, communicate and express both before and after Plaintiff made Defendant aware of the violation and harm caused by it.
- 9). Award of all costs and fees involved herein.

DATED THIS 19/17/95

CD. Yoder
Charles D. Yoder

Subscribed before me And Signed
 This 13th day of December
William G. Marshall
 Notary Public, State of Wisconsin
 My commission expires October 1996



STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

CHARLES D. YODER,

Plaintiff,

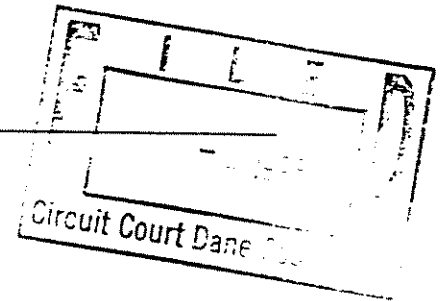
v.

Case No. 96-CV-426

GARY R. Mc CAUGHTRY,

Defendant,

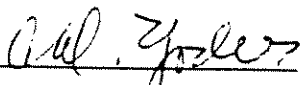
MOTION TO AMEND COMPLAINT AND
TO JOIN MICHAEL SULLIVAN
AND DOC AS DEFENDANT'S



Plaintiff hereby moves the court for an order allowing him to amend the complaint filed in Yoder v. McCaughtry, to add as a defendant Michael Sullivan, the Secretary of the DOC, based upon Michael Sullivan's personal and direct involvement in the actions leading to the claims alleged in plaintiff's complaint.

Attached hereto is plaintiff's amended complaint as to the DOC Secretary Michael Sullivan.

Dated this 29 day of February 1996


CHARLES D. YODER

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

CHARLES D. YODER
WAUPUN CORR. INSTITUTION
POST OFFICE BOX 351
WAUPUN, WI. 53963-0351,

Plaintiff,

V.

Case No. 96-CV-426

Gary R. McCaughtry, Warden
Waupun Corr. Institution, and

MICHAEL SULLIVAN Secretary
Wisconsin Department of Corrections
1 West Wilson (DOC)
P.O. Box 7925
Madison, WI. 53963-0351;

**** SUMMONS ****

Defendant's,

TO: Michael Sullivan, Secretary (DOC)
1 West Wilson Street
P.O. Box 7925
Madison, WI. 53707-7925.

You are hereby notified that the above-named plaintiff has filed a law suit or other legal action against you. The complaint, which is attached, states the nature and basis for the legal action against you.


You have 30 days in which to file a written answer to the court whose address is: Judge Moria Kruger, Branch 7, Dane County Circuit Court, 210 Marint Luther King., Jr., Blvd Madison WI. 53709, and to plaintiff whose address is P.O. Box 351, Waupun, WI. 53963;

If you do not file a written answer to the complaint as that term is defined in the Wisconsin State Statutes, the court may enter Judgement against you, and you may waive your right to dispute anything in the complaint that is, or may be, untrue or incorrect;

A judgement for money may be awarded against you, which may include the seizure or forfeiture of property and/or wages, and you may lose your right to dispute such an action.

You may have a lawyer help represent you.

Dated this 29 day of February 1996


CHARLES D. YODER

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

CHARLES D. YODER
Waupun Corr. Institution
Post Office Box 351
Waupun, Wisconsin. 53963-0351,

Plaintiff,

-VS-

Case No. 96-CV-426

Gary R. McCaughtry, Warden (WCI),

and

Case Code: 30701

MICHAEL SULLIVAN, Secretary of
the Wisconsin Department of Corrections.
1 West Wilson Street
P.O. Box 7925 (DOC)
Madison, WI. 53707-7925,

Defendant's,

JURISDICTION

COMPLAINT AMENDED

This courts jurisdiction lies under the Civil Rights Act of 1871, presently codified at 42 U.S.C. § 1983, and plaintiff sues under State Tort laws. Plaintiff is an indigent, pro se, prisoner unlettered in the law whp is without legal assistance.

PARTIES

1). Plaintiff, P.O. Box 351, Waupun, WI. 53963-0351

- 2). Defendant McCaughtry is the Warden of WCI, P.O. Box 351, Waupun, WI.
- 3). Defendant Sullivan is the Secretary of the DOC, 1 West Wilson, Street, Madison, WI. 53707-7925;
- 4). John Does, et al.

FACTS

- 1). Plaintiff is a long term prisoner, having served thirteen years in the Wisconsin State prison system, and plaintiff's earliest release date is 2004;
- 2). This period of incarceration at WCI is plaintiff's second such period at this prison, with this current period being nearly two years;
- 3). Plaintiff is confined in the WCI segregation unit;
- 4). In the two years plaintiff has been at WCI this time, this is not the first period plaintiff has served in the WCI segregation unit;
- 5). Prisoner's housed in the WCI segregation unit are permitted only one telephone call per week, for 15 minutes maximum; and can only be made to a person on plaintiff's visitors list;
- 6). Prisoner's at WCI are only permitted to receive stamps or stamped envelopes from the WCI canteen, a purchase of once per week of only 25;
- 7). WCI prisoner's can only make a purchase from the WCI inmate canteen once per week;
- 8). WCI and defendant's McCaughtry and Sullivan restrict plaintiff's access to U.S. Postage Stamps to 25 per week;
- 9). WCI and Defendant's McCaughtry and Sullivan do not permit WCI inmate's to receive stamps or stamped envelopes from family, friends or from retail out-lets;
- 10). Numerous times, through letters to McCaughtry, and through Inmate Complaints, and through appeals of INmate Complaint Decisions, plaintiff has asked the two defendant's to change the WCI policy relative to plaintiff having access to stamps and stamped envelopes, because the current WCI policy was preventing plaintiff from expressing himself, associating freely, and communicating with family, friends and organizations;

- 11). The only source that plaintiff has for stamps or stamped envelopes is from the WCI canteen ,and only 25 per week;
- 12). The Wisconsin Administrative Code, DOC 309 clearly states that "limits" cannot be placed upon the "number of letters" or mail that plaintiff mails;
- 13). Plaintiff is a inmate who routinely received a lot of mail, letters, cards, personal letters and mails, business mails and numerous other types of mail;
- 14). From 11-27-1995 to 1-08-1996, a 42 day period, plaintiff received 155 letters from 51 different people;
- 15). The 155 personal letters received by plaintiff was not the only mail plaintiff received, or to which plaintiff had to respond;
- 16). Plaintiff, because of McCaughtry and Sullivan's 25 stamps per week policy only from WCI canteen, has severely limited and restricted plaintiffs ability to express himself, communicate, and associate and seek information from outside the prison sources;
- 17). A result of defendant's policies limiting items mailed by plaintiff because of the 25 stamps per week limit placed upon plaintiff, plaintiff cannot reply to business mail, order property items needed, he cannot seek information from outside the prison sources, agencies, foundations, or any organizations which might have valuable information plaintiff wants or needs;
- 18). Plaintiff does not have any alternative means of seeking information from sources outside of the prison, or for expressing himself , communicating and/or associating;
- 19). Plaintiff has lost friends as a result of the restriction placed upon his access to stamps and stamped envelopes;
- 20). On 12-09-1995, plaintiff filed a inmate complaint at WCI. That complaint was dismissed. The WCI Complaint Investigator stated that WCI had no control over the policy in question, that it "came from Madison" the "DOC";
- 21). On 12-23-1995, plaintiff filed an appeal of that dismissal to the Corrections Complaint Examiner. The CCE forms state that, if I do not receive a decision in 42 days (it has already been 54 days), I should write to the Secretary of the DOC. I have done this, and have received no response.

22). At no time have WCI, or the defendant's offered plaintiff any rational, reasonable reason for the policy restricting plaintiff's rights to use the mail and to freely associate, communicate and express himself and seek information;

claims

23). McCaughtry and Sullivan's policies restricting plaintiff to 25 U.S. Postage Stamps per week violated the Wis. Adm. Code, DOC 309, et seq, .;

24). McCaughtry and Sullivan's disallowing plaintiff to receive stamps and or stamped envelopes in the mail from family, friends, or from retail out-let is discriminatory and is a far different treatment than is afforded other Wisconsin DOC prisoner's similarly situated;

25). The 25 stamps per week is an exaggerated response to any penological goal which could be asserted;

26). The policy is far more restrictive than is necessary to accomodate any valid penal goal;

27). Plaintiff has no alternative available to him for seeking information; freely expressing himself, freely communicating or freely associating;

28). Because plaintiff has informed the defendant's in advance of this suit that their polices are harmful to plaintiff, and because the defendant's have ignored that plea, their actions are intentional and personal.

RELIEF

1). A Declaratory Order from this court holding that the 25 U.S. Postage stamp per week policy is unconstitutional because it denied plaintiff the right to freely seek information from outside the prison, freely associate, freely communicate and freely express himself;

2). A Declaratory Order from this court holding that McCaughtry and Sullivan are acting contrary to both Federal Constitutional Law and contrary to the mandates of the Wis. Adm. Code, DOC 309;

- 3). A Declaratory Order from this court holding that defendant's are treating plaintiff far differently than other Wisconsin DOC inmate's similarly situated by allowing other Wisconsin Maximum Security Inmate's to receive stamps and stamped envelopes from family, friends, and retail out-lets, while denying same to plaintiff;
- 4). A Order declaring that neither defendant has a valid, reasonable penal goal under which they can restrict plaintiff's right to seek information, freely express himself, freely communicate and freely associate;
- 5). A Order holding that the 25 postage stamps per week policy as applied to plaintiff is unlawful;
- 6). Award of Attorney fees;
- 7). Award of nominal damages;
- 8). Award of compensatory damages in the amount of 500 dollars from each of the defendant's for their personal involvement in restricting plaintiff's access to postage stamps and/or stamped envelopes with which plaintiff could freely associate, seek information, express himself, and communicate;
- 9). Award of a thousand dollars against each defendant for restricting plaintiff' rights to seek information; freely express himself, freely associate, freely communicate and to write letters and do business.

DATED THIS 27 day of February 1996


CHARLES D. YODER

gm

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

Charles Douglas Yoder,
Plaintiff,
v.
Gary McCaughtry,
Defendant,

CASE NO. 96CV0426

ORDER WAIVING COSTS AND FEES (Prisoner/Pro-Se)

Upon reading and filing the foregoing affidavit of Charles Douglas Yoder pro se, in the above entitled action, and on motion of the petitioner;

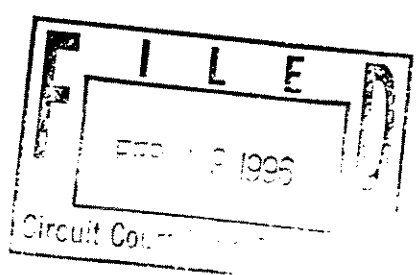
IT IS ORDERED that the petitioner Charles Douglas Yoder pro se, be and hereby is permitted to commence or defend the above entitled action without first posting security for costs, or without first making payment for service and filing fee; and

IT IS FURTHER ORDERED that the Clerk of said Circuit Court accept for filing and so file all pertinent and relative papers without costs therein; and

IT IS FURTHER ORDERED that the Sheriff serve all papers herein without first requesting payment of a service fee; and

IT IS FURTHER ORDERED that should costs be recovered in this action, then costs shall first be applied to any and all costs herein waived.

Dated this 19th day of Feb, 19 96.



BY THE COURT:
Christy Kuegel
Circuit Judge

MEMORANDUM

To: Members, JCRAR
From: Senator Richard Grobschmidt, Co-Chairman
Representative Glenn Grothman, Co-Chairman
Date: June 20, 1996
Re: Service of Lawsuit

Pursuant to s. 227.40(5), Stats, the Joint Committee for Review of Administrative Rules has been served with notice in the matter of *Interstate Permit Services, Inc. V. Wisconsin Department of Transportation, et. al.* A copy of the lawsuit, which is prohibitively large for general distribution, may be obtained upon request.

Subchapter III of Chapter 227, Stats, establishes an action for declaratory judgment in the circuit court for Dane County to be the primary means for judicial review in a dispute concerning the validity of an administrative rule. Subject to the approval of the Joint Committee on Legislative Organization, the Joint Committee for Review of Administrative Rules may choose to be made a party to the suit, and thereby be entitled to be heard.

If you are interested in a further pursuit of the rights of the JCRAR under this suit, please forward your request in writing to the offices of the co-chairmen of the committee.

ABKA Limited Partnership,
an Illinois Limited Partnership
and The Abbey Harbor Condominium
Association, Ltd., a Wisconsin
nonprofit corporation,

FILED
CIRCUIT COURT

HON. JAMES L. CARLSON

AUG 23 1996

Petitioners,
CLERK OF COURTS-WALWORTH CO.
JULIE STRAIT

v.

Case No. 96 CV 00436
Case Classification Code:
30607

Wisconsin Department of Natural
Resources, an executive department
of the State of Wisconsin, created
by sec. 15.34, Stats.,

Respondent.

PETITION FOR JUDICIAL REVIEW

ABKA Limited Partnership ("ABKA") and the Abbey Harbor Condominium Association, Ltd. ("Condominium Association") by their counsel, Oliver, Close, Worden, Winkler, Greenwald & Maier, John L. Maier, Jr., and Quarles & Brady, Anthony S. Earl and Waltraud A. Arts, petition the Circuit Court for Walworth County, pursuant to §§ 227.52, 227.53, 227.57, and 227.40(2)(e), Stats., for judicial review of a decision of the Wisconsin Department of Natural Resources ("DNR") dated July 29, 1996 ("Decision") which adversely affects the substantial interests of ABKA and the Condominium Association.¹ (Copy of Decision attached as Exhibit A). This petition also seeks review of all prior orders and decisions adverse to Petitioners in the administrative proceeding which

¹ ABKA and the Condominium Association are sometimes jointly referred to as "Petitioners."

preceded and was the basis of the Decision, including but not limited to, the denial of a Motion to Dismiss filed by ABKA and denied on September 1, 1995. (Copy of decision attached as Exhibit B.)

The Petitioners state as follows:

1. ABKA is an Illinois limited partnership registered to conduct business in Wisconsin as a limited partnership. ABKA's sole business is the operation of the Abbey Resort located in Fontana, Wisconsin, and ownership of some of the condominium units at issue in this review. A majority interest in ABKA is owned by a Wisconsin resident residing in Fontana, Wisconsin, and ABKA's partners are subject to Wisconsin state income tax based on the business conducted by ABKA. It is currently an owner of over 200 of the 407 condominium units at the Abbey Harbor and Marina located in Fontana, Walworth County, Wisconsin, ("Harbor" or "Marina"), and was formerly the owner of an undivided interest in the Harbor and Marina prior to the change in the form of ownership to a condominium on February 28, 1995. ABKA's corporate offices are in Illinois and its Wisconsin address is 271 Fontana Blvd., Fontana, Wisconsin 53125.

2. The Condominium Association is a nonstock, nonprofit Wisconsin corporation organized under the provisions of ch. 181, Stats., with its principal office at 271 Fontana Boulevard, Village of Fontana, Walworth County, Wisconsin. Under the terms of the Condominium Declaration recorded in the Walworth County Register of Deeds office on February 28, 1995, changing the form of ownership

of the Harbor and Marina to a condominium, the Condominium Association is the legal representative of all the condominium unit owners at the Harbor and Marina and has responsibility for the management and control of the Harbor and Marina.

3. The DNR is an executive agency of the State of Wisconsin created by sec. 15.34, Stats. Its purported authority in regard to the subject of this Petition derives from ch. 30, Stats., which defines DNR's authority to regulate structures in navigable waters of the State of Wisconsin. The DNR is the state agency with authority to issue certain permits under ch. 30, Stats., for placement of structures and deposit of materials in navigable waters. The DNR is an "agency" as defined in § 227.01(1), Stats., with its principal offices located at 101 South Webster Street, Madison, Wisconsin 53703.

4. The Harbor and Marina were first developed by Project Fontana, Inc. when Potawatomi Creek was dredged to create the Harbor in 1962, pursuant to a state permit.

5. The Marina was used to provide mooring for boats using the adjacent Abbey Resort and Restaurant and for boaters using Lake Geneva.

6. ABKA purchased the Harbor and Marina in 1973.

7. DNR has issued a number of permits for structures in the Marina, most recently in 1987. DNR concluded when it evaluated the structures in 1995 that all structures in the Marina were validly permitted. No permit ever issued by DNR or its predecessor

agencies to ABKA or its predecessors in interest contained any condition regarding the use of the structures in the Marina.

8. ABKA, as the owner of the Marina, seasonally licensed or daily rented the boat slips in the Marina since 1973. Holders of slip licenses had the exclusive rights to use their licensed slip.

9. After the Condominium Declaration was recorded, ABKA sold units in the condominium which included the use of an appurtenant boat slip. Unit owners had the exclusive right to use their appurtenant boat slip themselves or they could lease or license the unit and the use of the slip to someone else.

10. The waters of the Harbor, since it was dredged in 1962, have been navigable waters of the State and have been open to any member of the public. The public may gain access to the waters of the Harbor from Lake Geneva through an opening from the Harbor into Lake Geneva. The public has access to the waters of the Harbor via this opening to Lake Geneva and through a public boat launch which is permanently dedicated to public use by the Condominium Declaration. This access was unchanged by the change in the form of ownership of the Marina to a condominium. Members of the public utilized the waters of the Harbor when the slips were licensed and will continue that use on the exact same basis now that the Harbor and Marina are owned as a condominium.

11. When ABKA began preliminary marketing of the condominium units in the Fall of 1995, DNR objected to certain terms in the Condominium Declaration. ABKA made all changes requested by DNR.

12. Even after ABKA had fully cooperated in making all changes requested by DNR in the Condominium Declaration, DNR required that ABKA apply for a permit under sec. 30.12, Stats., to determine if any "set asides" would be required.

13. DNR has permitted marinas in the State of Wisconsin to be held as condominium units or under similar arrangements such as long term leases without any requirement that the marina apply for a permit or "set aside" a certain number of boat slips for short term lease or rental.

14. Despite its past practices in allowing marinas to use the condominium form of ownership or long term leases for boat slips, DNR claims authority to require the Petitioners to apply for a § 30.12, Stats., permit and to impose "set-asides" of a certain number of slips for short term rental, to require advertising of the boat slips, to regulate the rental or lease rates, and to require waiting lists be maintained based only on the change in the form of ownership of the Marina.

15. ABKA and DNR entered into an agreement dated February 2, 1995, wherein DNR stipulated that all structures at the Marina were properly authorized under state law ("Agreement").

16. The Agreement also provided that ABKA could commence sale of condominium units under the terms of the Condominium Declaration and sell up to 292 units pending an administrative hearing. Until this point in time, ABKA had voluntarily refrained from selling any units.

17. The Agreement acknowledged that ABKA and DNR disagreed about whether DNR had any jurisdiction to require an owner of a marina or condominium units at a marina to apply for a § 30.12, Stats., permit merely because the form of ownership of the marina was being changed to a condominium. DNR and ABKA agreed that ABKA could contest the jurisdiction of DNR in the administrative proceeding.

18. On March 13, 1995, ABKA, in accordance with the Agreement, filed an Application with the DNR for a permit under § 30.12, Stats., for a change in the form of ownership of the Marina to a condominium ("Application").

19. Initially, ABKA was the only applicant, but later the Condominium Association became a co-applicant.

20. The Application stated there would be no changes to the Marina, i.e., the number, size, and configuration of structures would remain unchanged. Only the form of ownership was changed from ownership by ABKA of an undivided interest in the Marina including 407 boat slips to ownership by ABKA of 407 condominium units each of which had an appurtenant boat slip.

21. ABKA contested DNR's jurisdiction to require a new Chapter 30, Stats., permit when no change in the number, size and/or configuration and use of validly permitted structures in navigable waters is proposed, and only the form of ownership changes. In filing the Application, ABKA expressly stated that it was not waiving its right to contest the jurisdiction of the DNR to

require the Application under ch. 30, Stats., for change of the Marina and its permitted structures to a condominium.

22. On June 5, 1995, ABKA filed a Motion to Dismiss before the Division of Hearings and Appeals arguing DNR lacked jurisdiction to require a permit proceeding when only the form of ownership of riparian property changed. The Motion was denied on September 1, 1995.

23. DNR's asserted legal basis for jurisdiction is NR 326.04(8), Wis. Adm. Code, which became effective in 1981 and provides as follows:

Piers associated with marinas and other similar mooring facilities shall not extend into the water from the shoreline beyond the line of navigation unless a permit is obtained under s. 30.12(2), Stats. Such marinas shall be open to the public. Use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee.

24. NR 326.04(8), Wis. Adm. Code is invalid as beyond any authority given by the Legislature to the DNR to regulate structures. Alternatively, the rule has been erroneously interpreted by DNR and unlawfully and unconstitutionally applied to the Petitioners.

25. Another asserted basis for DNR's authority is the "reasonable use doctrine" as embodied in various DNR "guidance" documents. The "reasonable use doctrine" determines the amount of berthing space a riparian is permitted to construct by applying a set numerical formula to the amount of shoreline owned by that riparian applicant.

26. The "reasonable use doctrine" is a rule as defined by § 227.01(13), Stats., but DNR has never promulgated it as a rule in accordance with the procedures in ch. 227, Stats. Unless a rule is so promulgated, it has no force and cannot be applied against the Petitioners.

27. Section 30.12, Stats., gives DNR authority to require a permit only when a riparian proposes to place a structure or to deposit materials in navigable waters. The Petitioners are not seeking to place structures or deposit materials in the Harbor and Marina.

28. Pursuant to Ch. 227, Stats., a contested case hearing on the Application was held before the Division of Hearings and Appeals on November 13-17 and December 18, 1995.

29. The Decision was issued by the Division of Hearings and Appeals on July 29, 1996.

30. The Decision determined that DNR had jurisdiction to require a permit application when a marina facility is changed to a condominium, required the Petitioners to "set aside" 287 slips for lease of terms of five years or fewer, and imposed permit conditions regarding advertising, waiting lists and rental rates.

31. The Petitioners are aggrieved by the Decision as unit owners or the representative of unit owners in the Harbor and Marina because:

- (a) their legal rights to own riparian property and to exercise riparian rights are unlawfully limited by the Decision;
- (b) the validity of their legal title to the condominium units is jeopardized by the Decision;

- (c) the Decision has the legal effect of modifying the terms of the Condominium Declaration without the consent of the unit owners;
- (d) the Decision is beyond the legal authority of the DNR and imposes unlawful "set-asides" against unit owners to the financial detriment of the unit owners;
- (e) the Decision is based on a DNR rule, NR 326.04(8), Wis. Adm. Code, which is invalid as beyond the authority of the DNR;
- (f) alternatively, the Decision is an erroneous and retroactive application of a DNR rule, NR 326.04(8), Wis. Adm. Code in violation of Petitioners' legal and constitutional rights;
- (g) the Decision violates Petitioners' right under ch. 703, Stats., to change the form of ownership of property to a condominium and unlawfully discriminates against the condominium form of ownership;
- (h) the Decision departs from the past practices of DNR in violation of Petitioners' right to equal protection;
- (i) the Decision is based on the "reasonable use doctrine" which is a rule under Wisconsin law but has never been promulgated as a rule in violation of Petitioners' rights under ch. 227, Stats.;
- (j) the Decision unconstitutionally takes the property of the Petitioners without just compensation; and
- (k) the Decision is an erroneous interpretation of law, unconstitutional, arbitrary and capricious, and does not constitute an exercise of DNR's lawful discretion.

32. The Decision is:

- (a) issued without jurisdiction;
- (b) arbitrary and capricious;
- (c) unsupported by substantial evidence in the record;
- (d) based on an erroneous interpretation of law;

- (e) inconsistent with prior and present agency rule, policy or practice;
- (f) in violation of agency procedures;
- (g) otherwise not supported by the facts and applicable law;
- (h) unconstitutional; and
- (i) an abuse of the agency's discretion.

33. The Petitioners request reversal of the Decision and a ruling that the Decision should be vacated on some or all of the following grounds:

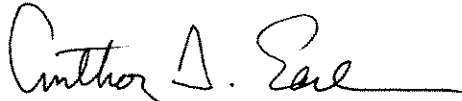
- (a) DNR lacked jurisdiction to require Petitioner to apply for a permit when the Harbor and Marina became a condominium;
- (b) DNR has no authority to require "set asides", impose advertising requirements, require waiting lists, and impose rental rate restrictions on Petitioners based solely on the change in the form of ownership of the Marina;
- (c) Petitioners are entitled to a declaratory ruling that NR 326.04(8), Wis. Adm. Code, is invalid as beyond the authority of DNR and alternatively, cannot be lawfully and constitutionally applied against Petitioners;
- (d) Petitioners are entitled to a declaratory ruling that the "reasonable use doctrine" is invalid as a rule not promulgated in accordance with ch. 227, Stats.;
- (e) DNR's Decision is an erroneous interpretation of law, unsupported by substantial evidence on the record, unconstitutional, arbitrary and capricious and an abuse of agency discretion;
- (f) DNR's Decision is an unconstitutional taking of Petitioner's property without just compensation;
- (g) DNR is estopped from arguing in this judicial review proceeding that more than 200 boat slips should be "set aside" at the Harbor and Marina;

- (h) All of DNR's findings and conclusions in the Decision or administrative proceeding adverse to Petitioners should be reversed; and
- (i) Petitioners are entitled to any additional relief the Court deems appropriate pursuant to § 227.57(9), Stats.

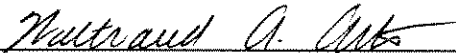
Dated this 23rd day of August, 1996.



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**BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS**

Application of ABKA Limited Partnership)
to Transfer Ownership and Modify the)
Permit for the Abbey Resort Marina,) Case No. 3-SE-95-0080
Potawatomi Creek, Village of Fontana,)
Walworth County, Wisconsin)

Hearing Upon Complaints as to Whether)
Abbey Resort Marina Piers Are or Would) Case No. 3-SE-95-0921
Be in Violation of Section 30.12, Stats.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND PERMIT

On March 13, 1995, ABKA Limited Partnership (the applicant), c/o Anthony Earl, 271 Fontana Blvd., Fontana, Wisconsin, 53125, completed filing an application with the Department of Natural Resources to authorize the conveyance of the existing marina and its permitted structures at the Abbey Resort Marina to a condominium form of ownership and for closure of the marina formerly made available to the public by seasonal boat rentals. The four hundred seven mooring slips would be converted to private "dockominiums," with numerous individual owners holding the riparian lands as a common element under the terms of a Condominium declaration. The current structures, which consist primarily of floating piers built on a polystyrene base, would not be significantly altered except with respect to the form of ownership and availability to the public for seasonal rental.

On April 5, 1995, the Department received an objection to the permit application from The Geneva Lake Conservancy/Committee to Save Geneva Lake, c/o Mr. Peter B. King, Public Resource Committee Chairman. On April 10, 1995, the Department forwarded the file to the Division of Hearings and Appeals (the Division) for hearing.

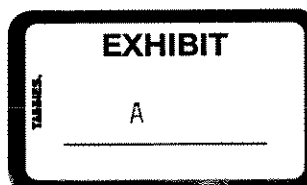
Pursuant to due notice including publication, a prehearing conference was held at Elkhorn, Wisconsin, on May 23, 1995.

At the request of the applicant, a Scheduling Order included a timetable for submission of Dispositive Motions. Essentially following that schedule, a Motion to Dismiss for Lack of Subject Matter Jurisdiction was filed May 23, 1995 and last brief received August 2, 1995. On September 1, 1995, the Division entered a Decision and Order denying the Motion to Dismiss. Further, a schedule was set for submission of any complaints pursuant to sec. 30.14, Stats.

Pursuant to due notice hearing was held on November 13-17 and December 18, 1995 at Elkhorn and Madison, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

A briefing schedule was set and the last submittal was received May 29, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:



ABKA Limited Partnership, by

Waltraud Arts, Attorney
Anthony S. Earl, Attorney
Quarles & Brady
1 South Pinckney Street
Madison, Wisconsin 53701

John L. Maier, Jr., Attorney
645 Main Street
Lake Geneva, Wisconsin 53147

Wisconsin Realtors Association, Inc., by

Winston H. Ostrow, Attorney
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Green Bay, Wisconsin 54301

Wisconsin Association of Lakes, Inc., by

William P. O'Connor, Attorney
25 West Main Street, Suite 801
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Oneida County, by

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Rhineland, Wisconsin 54548-0400

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Fontana, Wisconsin 53125-0374

Wisconsin Department of Natural Resources, by
(the DNR or the Department)

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Delavan, Wisconsin 53115

FINDINGS OF FACT

1. ABKA Limited Partnership (ABKA), c/o Attorney Anthony S. Earl, 271 Fontana Blvd., Fontana, Wisconsin, 53125, completed filing an application with the Department for a permit under sec. 30.12, Stats., to authorize conveyance of existing pier structures on the bed of Geneva Lake, Village of Fontana, Walworth County. The Department and the applicant have fulfilled all procedural requirements of sec. 30.02, Stats., relating to publication of public notice.

2. ABKA asserts that the DNR, and thus the Division, are without jurisdiction in this matter because there will be no changes in the number, size or configuration of the pier structures and because the DNR has recognized that the existing structures are authorized by valid sec. 30.12, Stats. permits. On February 2, 1995, there was an agreement between the DNR Secretary George Meyer and Anthony A. Antoniou, Managing General Partner of ABKA. (Exhibit 16) ABKA agreed to file an application for a permit under sec. 30.12, Stats., to seek approval to transfer ownership under the terms of the Condominium Declaration. Further, ABKA reserved its right to make "arguments concerning the DNR's jurisdiction over the ownership transfer." Both parties agreed to the following language: "Nothing in this agreement limits the authority of the administrative law judge to hear and decide this matter or any legal basis presented at the hearing by any party or raised sua sponte by the administrative law judge." (Id.)

ABKA filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, along with supporting affidavits, on May 23, 1995. On September 1, 1995, the Division entered a Decision and Order denying the Motion to Dismiss. Because the Motion to Dismiss relied "on matters outside the pleadings, i.e., testimony and affidavits," it was treated as a motion for summary judgment. Sec. 802.06(2)(f), Stats. The ALJ held that there were disputed issues of fact as to whether the conversion of the marina to dockominium form of ownership would be "not detrimental to the public interest" within the meaning of sec. 30.12(2), Stats. Specifically, that there were disputed issues of fact as to whether the project would comport with the "reasonable use" of a riparian property under the public trust doctrine. Further, that the express terms of the permits granted the DNR authority to change or revoke the permit if the project obstructs navigation or becomes detrimental to the public interest. Finally, that sec. 30.07(2), Stats. provided the DNR with authority to "modify or rescind any permit," including a sec. 30.12, Stats. structures permit, for "cause." The ALJ held that there were disputed issues of fact relating to all of the above issues, which precluded grant of a summary judgment prior to hearing.

The evidence at the hearing confirmed that the DNR has jurisdiction over this matter given the plain language of the permits ("The Department may change or revoke this permit if the project obstructs navigation or becomes detrimental to the public interest." Exhibit 19-20); the implications of the conversion with respect to the "reasonable use" analysis under the public trust doctrine; the substantial change in use of the marina, which formerly offered seasonal rental of boat slips to the public; the provisions of sec. 30.07, Stats. (TR, pp. 1638-1639); and the requirement that the DNR consider detrimental cumulative impacts of this proposal and reasonably anticipated similar proposals. (See: Finding 85) Further, there was un rebutted testimony that, because the piers in place at the site extended beyond the pierhead line and involved a change in ownership, a review and reauthorization of existing permits was needed under department policy. (TR, p. 796)

3. The applicant, ABKA, owns real property located in part of the West 1/2 in Section 14, Township 1 North, Range 16 East, Walworth County. The above-described property abuts Geneva Lake as part of an enlargement of Potawatomi Creek which is navigable in fact at the project site.

4. ABKA Limited Partnership (ABKA), is an Illinois Limited Partnership and is an owner of certain riparian property described as follows:

PART OF THE WEST 1/2 OF SECTION 14, TOWN 1 NORTH, RANGE 16 EAST.
VILLAGE OF FONTANA-ON-GENEVA, WALWORTH COUNTY, WISCONSIN
DESCRIBED AS FOLLOWS:

COMMENCING AT A CONCRETE MONUMENT FOUND MARKING THE WEST 1/4 CORNER OF SAID SECTION 14; THENCE N 0DEG 21MIN 40SEC W 24.75 FEET; THENCE N 89DEG 38MIN 20SEC E 155.00 FEET TO THE POINT OF BEGINNING; THENCE N 0DEG 21 MIN 40SEC W 1230.85 FEET ALONG THE EAST RIGHT OF WAY OF A PUBLIC HIGHWAY; THENCE S 89DEG 50MIN 20SEC E 1142.63 FEET ALONG THE SOUTH RIGHT OF WAY OF FONTANA BOULEVARD; THENCE N 88DEG 37MIN 15SEC E 218.53 FEET ALONG SAID BOULEVARD; THENCE S 1DEG 26MIN 18SEC THENCE S 4DEG 13 MIN 09SEC W 9.65 FEET; THENCE S 12DEG 40MIN 34SEC E 14.97 FEET; THENCE S 45DEG 21 MIN 19SEC W 8.39 FEET; THENCE S 22DEG 59 MIN 43 SEC E 23.27 FEET TO A POINT HEREINAFTER DESIGNATED "POINT A"; THENCE S 66DEG 36MIN 35SEC W 106.97 FEET; THENCE S 23DEG 23MIN E 64.00 FEET; THENCE S 66DEG 37 MIN W 33.00 FEET; THENCE N 23 DEG 23 MIN W 64.02 FEET; THENCE S 66DEG 54MIN 16SEC W 205.62 FEET; THENCE S 23DEG 37MIN W 33.00 FEET; 16SEC W 205.62 FEET; THENCE S 23DEG 37MIN 14SEC E 82.58 CURVE TO THE LEFT HAVING A RADIUS OF 139.17 FEET ND CHORD S 55DEG 39MIN 46SC E 147.67 FEET; THENCE SOUTHWESTERLY 20.88 FEET ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 29 FEET AND CHORD S 40DEG 09MIN 59SEC W 20.44 FEET; THE LEFT HAVING A RADIUS OF 57 FEET AND CHORD S 23DEG 41 MIN 02SEC W 68.79 FEET; THENCE S 13DEG 25MIN 47SEC E 11.577 FEET; THENCE S 23DEG 02MIN 09SEC E 48.68 FEET; THENCE S 69DEG 36MIN 09SEC E 52.19 FEET TO THE CORNER OF ABBEY VILLA CONDOMINIUM; THENCE ALONG SAID CONDOMINIUM THE FOLLOWING COURSES:

S 24DEG 13MIN W 128.72 FEET; THENCE N 89DEG 20MIN W 63.03 FEET; THENCE S 4DEG 30MIN W 68.48 FEET; THENCE S 67DEG 17 MIN W 253.28 FEET; THENCE S 58DEG 14MIN W 114.30 FEET; THENCE S 48DEG 40MIN E 107.62 FEET; THENCE S 15DEG 21 MIN E 95.02 FEET; THENCE SOUTH 32.00 FEET; THENCE S 10DEG 42 MIN E 85.85 FEET; THENCE S 22DEG E 36.00 FEET; THENCE SOUTHEASTERLY ALONG THE ARC OF A CURVE TO THE LEFT HAVING A RADIUS OF 36 FEET AND CHORD S 78DEG 56MIN E 58.66 FEET; THENCE NORTHEASTERLY 308.26 FEET ALONG THE ARC OF A CURVE TO THE RIGHT HAVING A RADIUS OF 323 FEET AND CHORD N

71DEG 28MIN E 296.70 FEET; THENCE S 75DEG 16MIN E 99.94 FEET;
THENCE EASTERLY 129.45 FEET ALONG THE ARC OF A CURVE TO THE
LEFT HAVING A RADIUS OF 500 FEET AND CHORD S 87DEG 35MIN 30SEC
E 129.12 FEET; THENCE NORTHEASTERLY 10.39 FEET ALONG THE ARC
OF A CURVE TO THE LEFT HAVING A RADIUS OF 110 FEET AND CHORD
N 64DEG 55MIN 53SEC E 10.38 FEET;

THENCE LEAVING SAID CONDOMINIUM S 22DEG 08MIN 06SEC E 59.68
FEET; THENCE N 67DEG 09MIN 19SEC E 30.39 FEET; THENCE S 7DEG
02MIN E 12.53 FEET TO THE NORTHWEST CORNER OF LOT 1 OF
PARTRIDGE COURT SUBDIVISION; THENCE CONTINUE S 7DEG 02MIN E
232.00 FEET ALONG SAID SUBDIVISION TO THE NORTHWEST CORNER OF
LOT 11 OF COUNTRY CLUB ESTATES UNIT 1 SUBDIVISION; THENCE
CONTINUE S 7DEG 02MIN E 140.00 FEET TO THE SOUTHWEST CORNER OF
SAID LOT 11; THENCE S 7DEG 07MIN E 118.85 FEET TO A POINT IN THE
WEST LINE OF LOT 14 OF SAID SUBDIVISION; THENCE S 62DEG 40MIN W
258.47 FEET; THENCE S 32DEG 41MIN E 87.51 FEET TO THE MOST
NORTHERLY CORNER OF LANDS DESCRIBED IN DOCUMENT #661499;
THENCE S 43DEG 49MIN 30SEC W 174.55 FEET; THENCE S 49DEG 17MIN E
182.90 FEET TO THE NORTHWESTERLY RIGHT OF WAY OF SHABBONE
DRIVE; THENCE S 42DEG 33MIN W 61.00 FEET ALONG SAID RIGHT OF
WAY; THENCE N 49DEG 17 MIN W 1189 FEET MORE OR LESS TO THE
MOST SOUTHERLY CORNER OF ABBEY VILLA CONDOMINIUM PARCEL 5;
THENCE ALONG SAID CONDOMINIUM THE FOLLOWING COURSES:

N 50DEG 39 MIN E 441.44 FEET; THENCE N 19DEG 35MIN 10SEC W 135.27
FEET; THENCE N 49DEG 44MIN 15SEC W 27.23 FEET; THENCE N 49DEG
39MIN W 58.29 FEET; THENCE N 57DEG 34MIN 30SESC W 66.48 FEET;
THENCE N 62DEG 30MIN 50SEC W 70.34 FEET; THENCE N 59DEG 25MIN
50SEC W 68.76 FEET; THENCE N 61DEG 18MIN 55SEC W 38.62 FEET;
THENCE N 30DEG 14MIN 20SEC W 27.39 FEET; THENCE N 81DEG 24MIN
35SEC W 40.06 FEET; THENCE N 63DEG 11MIN 30SEC W 68.82 FEET;
THENCE N 56DEG 57MIN 45SEC W 65.41 FEET; THENCE N 51DEG 19MIN
40SEC W 46.04 FEET; THENCE S 27DEG 29MIN W 267.00 FEET; THENCE
SOUTHERLY 39.21 FEET ALONG THE ARC OF A CURVE TO THE LEFT
HAVING A RADIUS OF 80 FEET AND CHORD S 13DEG 33MIN W 38.82
FEET; THENCE S ODEG 21MIN E 106.00 FEET; THENCE S 89DEG 38MIN
20SEC W 35.11 FEET; THENCE LEAVING SAID CONDOMINIUM S 89DEG
38MIN 20SEC W 180.80 FEET TO THE POINT OF BEGINNING, CONTAINING
43.42 ACRES MORE OR LESS. (Exhibit 18)

5. ABKA, on February 28, 1995, filed a Condominium Declaration of the Abbey Harbor Condominium (the Declaration) which changed the form of ownership of the property described in paragraph 1 above to a condominium form of ownership. Immediately after the Filing of the Declaration, ABKA was the owner in fee simple of each one of the 407 condominium units and a tenancy in common interest with respect to the common elements described in the Declaration, while

prior to the Filing ABKA held an undivided interest in the Abbey Harbor and Marina (Harbor or Marina). (Exhibit 18, B)

6. All condominium unit Owners are required to be members of the Abbey Harbor Condominium Association, Ltd. (Association) which is responsible for the management and control of the common elements of the condominium and is a Wisconsin non-profit corporation. (Exhibit 18, B, § 9.1, sec. 703.15, Stats.)

7. The Articles of Incorporation and By-Laws of the Association give the Board of Directors the authority to act on behalf of the Unit owners. (Exhibit 144, §§ 703.10, 703.15(3), Stats.)

8. The "unit" is defined as follows in the Declaration:

A unit is that separate area of the condominium intended for independent, private use, comprised of a cubicle of space defined by a "Lock Box" located within the Harbor House as shown in the Condominium Plat. Each unit shall have outer boundaries formed by the interior surfaces of the respective Lock Box bearing the unit designation, all as shown in the Condominium Plat. The dimensions of each unit shall be approximately four (4) inches in width, five (5) inches in height, and six (6) inches in length. Each unit shall include as an appurtenance, standard riparian rights of owners of waterfront real estate under Wisconsin Law, and the use of an assigned boat slip corresponding to the unit designation as a part of the common elements of **THE ABBEY HARBOR CONDOMINIUM**. (Sec. 5.2)

9. The purpose as stated in the application is as follows:

The purpose, need, and intended use of the Project will be identical before and after the property is subjected to the condominium form of ownership. The purpose is the operation of a marina for the mooring of boats. Four hundred seven boats can be moored currently. The marina does not have facilities for sail boats because of the bridge between the harbor and Lake Geneva. The power boats that are moored in the marina range in size from approximately 16 feet to 43 feet excluding bow pulpits and swim platforms. The water depth needed for mooring these boats range from an average of 16 inches to 40 inches depending on boat size. The marina will continue to be used for the recreational purposes that it is currently. The history of the use of the marina demonstrates that there is a need for mooring facilities for individuals seeking to use the waters of Lake Geneva. . .

10. After five days of hearing, a question arose as to who would be the holder of a permit, if one were issued. On December 11, 1995, the Board of Directors of the Condominium Association met and voted to join ABKA as a co-applicant in this proceeding, Case No. 3-SE-95-0080. (Exhibit 112) The DNR and ABKA stipulated that the Association could be a co-applicant and said stipulation was duly entered in the hearing record. (Exhibit 111) The other parties dispute the legal effect of this stipulation.

11. The DNR's agreement to have the Association be a co-applicant for a sec. 30.12(2), Stats., permit is consistent with its past practice and with its policy guidance regarding permit applications involving multiple ownership of riparian property. (Exhibit 113, TR, Johnson) Accordingly, the Association may hold the permit. (Exhibits 111 and 113)

12. A condominium is a recognized form of property ownership under Wisconsin real property law. (TR, Ouchie, Ch. 703, Stats.) Unlike other condominium units, the lock box itself does not inherently have much value. (TR, Ouchie, p. 327) The value of the "dockominiums", as the Abbey has marketed these unique condominium units, is largely due to the other amenities that are at this location and are part of the individual common area. (Id.)

13. Wisconsin law as expressed in sec. 703.27, Stats., relating to "zoning and building regulations" requires agencies which regulate condominiums to treat them the same as an identical development under a different form of ownership. "No county, city or other jurisdiction may enact any law, ordinance or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subject to a condominium declaration." Sec. 703.27(2), Stats.

No zoning or building regulations are implicated in this decision. Further, even if the language cited above is read more broadly, there is no "discrimination" against the condominium form of ownership in determining that it violates the public trust doctrine for riparians to exceed the reasonable use of riparian lands without offering a compensatory public benefit of making slips available to the public for seasonal rental. The DNR policy, as articulated by Mr. Kenneth Johnson, Assistant Section Chief of the Water Regulation Section, is that condominium developments are entitled to no more and no less than any other riparian with respect to the reasonable use of a riparian tract. (TR, p. 1233) This is consistent with the statement of Department policy expressed in the non-binding December 19, 1991 Guidance Document relating to Riparian Berths and Moorings. (Exhibit 75, p.3)

14. The Declaration filed on February 28, 1995, does not involve easements between or among the unit owners. The property is conveyed in either fee simple or as an undivided interest in a tenancy in common. (Ouchie and Jachna testimony, Exhibit 18, B)

15. A "Unit", under the condominium law, is property that is separately owned by each condominium owner and is intended for independent, private use. (Exhibit 18, B, sec. 5.2, secs. 703.02(15), 703.05, Stats.)

16. There is no requirement in condominium law that a condominium unit have more value than the undivided interest in the common elements of the condominium. (Ouchie testimony)

17. A condominium unit, together with its undivided interest in the common elements, constitutes real property. (Sec. 703.04, Stats.)

18. A condominium unit (unit) under the terms of the Declaration is a cubicle of space defined by a lock box located within the Harbor House at the Marina. State law defines unit as a cubicle of air. (Exhibit 18, B, sec. 5.2, Jachna testimony, sec. 703.02(15), Stats.)

19. Each unit has a number which corresponds with a boat slip at the Marina as indicated on the Condominium Plat. (Exhibit 18, B, secs. 5.2, 5.3, Plat, Jachna testimony, sec. 703.02(16), Stats.)

20. The Declaration purports to transfer to each unit owner the riparian right to use the space beside the pier or piers corresponding to his/her unit number. (Exhibit 18, B, sec. 7.2, sec. 703.02(16), Stats.) However, riparian rights do not obtain from the purchase of the lock-box "unit". Rather, riparian rights that vest in the unit owner derive from their holding as a common element the riparian lands adjacent to the harbor. Further, the rights of each unit holder are limited by the public trust doctrine and the "reasonable use" of riparian property as set forth in this decision.

21. Each unit owner is entitled to sell, lease, sublease, rent or license the unit, and with it the right to use the boat slip appurtenant to the unit. (Exhibit 18, B, sec. 10.1, Jachna testimony)

22. Unit owners are required to keep the structures adjacent to the boat slip they are permitted to use in good repair. (Exhibit 18, B, sec. 11.2, Jachna testimony) Unit owners are not permitted to combine adjacent slips. (Exhibit 18, B, sec. 7.4, Jachna testimony) No personal watercraft, such as jet skis, are permitted to be stored by unit owners in the boat slips they are permitted to use in the marina. (Exhibit 18, B, sec. 15.2.11)

23. The Declaration restricts the size of boats to be moored in the marina to 44 feet, except for slip 1204 which may hold a boat up to 55 feet in length. (Exhibit 18, B, sec. 7.2, Jachna testimony)

24. The right of unit owners to use the boat slips does not exclude members of the public from using the waters of the Harbor but only excludes other unit owners from using boat slips that are not appurtenant to their respective units. (Exhibit 18, B, sec. 7.2, Jachna testimony)

25. The unit owners do not have any ownership interest in the water of the Harbor, but are owners in common of the riparian property adjacent to the Harbor. (Exhibit 18, B, sec. 6) However, the marketing of the pier slips by the applicant could give unit owners a false expectation of a property interest in public waters. (See: Finding 91)

26. The placement of riparian structures in, and the use of, the waters of the Harbor are subject to public rights and to permits issued by the State of Wisconsin. (Exhibit 18, B, sec. 7.2)

27. The unit owners are tenants in common with each other of all of the common elements of the condominium including all of the real estate and improvements such as the Harbor House, seawall, sidewalk, boat launch, parking lots, the docks and piers, and the swimming pool, excluding the units. (Exhibit 18, B, sec. 6, 8.1, secs. 703.02(2), 703.13(1), Stats., Snyder and Jachna testimony)

28. The unit owners are tenants in common in the property described in paragraph 27 above, including approximately 20 acres of riparian property and 4,193 feet of riparian shoreline property. (Exhibit 18, B, Jachna testimony)

29. The rights of a condominium unit owner in the common elements of the Harbor and Marina are no different than the rights of a residential riparian condominium unit owner in the common elements of its condominium. (Ouchie testimony, sec. 703.13(1), Stats.)

30. Certain of the common elements are reserved for the exclusive use of a unit owner and such elements are called limited common elements. (Exhibit 18, B, sec. 7.1)

31. The right of a unit owner to use a boat slip is a limited common element. (Exhibit 18, B, sec. 7.2)

32. The Association has the right to control any alteration of the structures in the marina. Unit owners are not permitted to alter the structures. (Exhibit 18, B, secs. 5.1, 7.5, Jachna testimony)

33. The Association is responsible for the maintenance, repair and replacement of structures at the marina and dredging of the Harbor. (Exhibit 18, B, secs. 9.1, 11.6, Jachna testimony) The Association has the responsibility to maintain the landscaping of the Harbor and Marina. (Exhibit 18, B, sec. 15.2.7, Jachna testimony) The Association has the right to assess the unit owners for the costs associated with the operation, maintenance and repair of the Marina and Harbor. (Exhibit 18, B, secs. 11.6, 14, Jachna testimony) The Association has authority to enforce compliance with the terms of the Declaration. (Exhibit 18, B, sec. 19.1, Jachna testimony) The Association carries insurance covering loss or damage to the common elements. The Association also carries public liability insurance. (Exhibit 18, B, secs. 13.1, 13.2, 13.4, Jachna testimony.)

34. The use of the waters of the Harbor, including the waters in the boat slips, is legally open to members of the public. (Exhibit 18, B, sec. 7.2, Jachna testimony) However, there is an inherent conflict between the public's use of these waters and the expectations of an exclusive property interest in the pier slips. (See: Finding 91)

35. The threshold issue in evaluating this permit application is whether or not the individual dockominium unit owners are riparians under Wisconsin law. A related issue is whether the Condominium Declaration violates sec. 30.133, Stats. That section prohibits an owner of riparian land from conveyance, "by easement or by similar conveyance, any riparian right in the land to another person, except for the right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water." Sec. 30.133, Stats.

Riparian owners are those who have title to the ownership of land on the bank of a body of water. Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 665, 494 N.W.2d 204, 207 (1993). There is no question that the applicant and Condominium Declarant, ABKA, owns land on the bank of navigable waters of the state and is, accordingly, a "riparian" within the meaning of sec. 30.12, Stats.

The individual "condominium unit" owners individually own only a lock-box, similar to a post office box, located in the Harbor House. (Exhibit 18, B, § 5. See: Exhibit 72) The lock-box constitutes "the unit" within the meaning of sec. 703.02(15), Stats. The unit is separately and

independently owned by each condominium owner and is intended for independent, private use. In itself, the lock-box does not confer riparian status on condominium unit owners.

However, the Declaration provides that the unit owners are tenants in common with each other of all of the common elements including all of the riparian real estate and improvements such as the Harbor House, seawall, sidewalk, boat launch, parking lot, docks and piers and swimming pool. (Exhibit 18, B § 6, 8.1) The legal question is whether holding such property in the form of a common element of a Condominium Declaration constitutes "riparian" status under sec. 30.12, Stats. Section 703.04, Stats., provides that: "A unit, together with its undivided interest in the common elements, for all purposes constitutes real property." The individual lock-box condominium unit owners are tenants in common in the property subject to the Declaration, including approximately 20 acres of riparian property and nearly 4200 feet of riparian shoreline property. (Exhibit 18, B, Jachna) Accordingly, riparian status vests from holding these lands in common under the terms of the Declaration.

36. The pier slips themselves are described in the Declaration as a "limited common element," within the meaning of sec. 703.02(10), Stats. The right of a unit owner to use a boat slip is a limited common element. (Exhibit 18, B, § 7.2) "Limited common elements" are those common elements identified "as reserved for the exclusive use of one or more but less than all of the unit owners." Sec. 703.02(10), Stats. Under the Declaration, the Association has the right to control alterations to structures, and has the responsibility to maintain the structures. Designation of individual pier slips as limited common elements relates to the allocation of riparian rights among members of the Association, who are riparians, rather than the conveyance of riparian rights to non-riparians. Accordingly, the Condominium Declaration does not constitute a violation of sec. 30.133, Stats.

At the time of the Condominium Declaration ABKA owned all of the riparian lands adjacent to the marina and harbor. Because it has sold units subject to the terms of the Declaration, ABKA does not exclusively own the riparian lands subject to the Declaration. This land is now owned in common by all of the unit owners. "Each unit owner shall also own an undivided interest in the common elements and facilities and limited common elements as a tenant in common with all other unit owners. . ." (Exhibit 18, § 8.1) Under Wisconsin law it is clear that a person "can not maintain an easement over his own land." Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 667, 494 N.W.2d 204 (1993) The riparian lands are common elements under the Declaration. Such common elements constitute real property "for all purposes" under Wisconsin statutes sec. 703.04, Stats. The Declaration relating to the use of pier slips as limited common elements relates to how the riparians allocate their own property. It is not the conveyance by "easement or similar conveyance" of riparian rights within the meaning of sec. 30.133, Stats.

37. The Harbor and Marina were first developed by Project Fontana, Inc. when Potawatomi Creek was dredged to create the Harbor. (Kneibler testimony, Exhibit 8) The parties have entered a stipulation that the description of the public waters in the Harbor area as "Potawatomi Creek or Lake Geneva" is not necessary for resolution of this matter. Further, the parties stipulated that the Village of Fontana Pierhead Line Ordinance applies to the waters where the Abbey Harbor and Marina are located. . ." (Exhibit 118)

38. Several witnesses testified that the lagoon where the Abbey Resort Marina now resides was previously a wetland complex including the outlet of Potawatomi Creek into Lake Geneva. (Exhibit 2) In 1962, the Public Service Commission (PSC, a predecessor to the Department of Natural Resources) held a public hearing concerning a proposal to dredge the wetland and develop the resulting lagoon into a resort/marina. This proposal, called Project Fontana, was intended to make the area more amenable to development and recreation. (Exhibit 6)

39. From the very outset of the project, it is clear that the proposed marina was to be open to the public. At the 1962 PSC hearing, the testimony of Frederick Gartz, President of Project Fontana, reflects the developers' intentions to construct a marina with 200 boat slips, to be available to the general public. (Exhibit 5, pp 8-9)

40. The PSC held a hearing on January 2, 1962, regarding Project Fontana, Inc.'s Application to dredge the lagoon for the Harbor. During that hearing, a developer of the project was asked the following questions and gave the following answers:

Question: And are you going to have a marina there, too?
Answer: Yes, in the lagoon we intend to have a public boat launching ramp and public slips -- 200 slips.
Question: For that many boats?
Answer: And a parking lot for that many cars.
Question: Will this be available to the general public?
Answer: Yes. (Exhibit 5, pp. 8-9)

This understanding and intention was confirmed in the testimony of one of the project founders, Mr. Arthur Kneibler. Kneibler testified that, after the marina was constructed, slips were regularly offered to the general public. (TR, p. 100) Ms. Liesa Nesta, the DNR Area Water Management Specialist who processed the instant permit application, testified that the Department understood from the above testimony and from the operation of the marina that the Abbey facility has always made boat slips available to the public through seasonal rental.

41. The PSC issued Findings of Fact, a Permit, and an Order dated July 27, 1962, authorizing the dredging of the lagoon which became the Harbor. Nothing in that Permit specifically mentioned boat slips. (Kneibler testimony, Exhibit 8)

42. Subsequent to the 1962 PSC hearing, the hearing examiner issued a permit to authorize the dredging and development plans as stated by Project Fontana. (Exhibit 8) The permit contains the following condition:

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicant, Project Fontana, Inc., a permit to construct an enlargement of Geneva Lake as described herein, subject to the condition that the artificial waterway so constructed shall be a public waterway. Acceptance of this permit shall be deemed acceptance of such condition. (Emphasis added)

(Exhibit 8, p. 2) Further, the related agreement between the Village of Fontana and Project Fontana, Inc. provides that the excavated lagoon and channel "will become the property of the State of Wisconsin as navigable water." (Exhibit 4, p. 295)

43. Project Fontana, Inc. later became Project Fontana Limited Partnership. (Kneibler testimony)

44. In 1973, Project Fontana Limited Partnership sold the Harbor and Marina to ABKA. (Kneibler, Antoniou testimony)

45. Anthony A. Antoniou is General Partner of ABKA and has been General Partner since it purchased the Harbor and Marina in 1973. (Antoniou testimony)

46. ABKA Limited Partnership has paid property taxes on the real and personal property at the Harbor and Marina since it became the owner of the property. (Antoniou testimony) Unit holders are assessed property taxes relating to the percentage of property held in common. (TR, p. 490)

47. In 1987, the DNR issued a permit to ABKA for structures in the Harbor beyond the pierhead line. That permit placed no specific restriction on the use of any boat slips in the Harbor. (Exhibit 20)

48. In 1987, the DNR issued a permit to ABKA to place pier crib structures in the Harbor. That permit placed no specific restrictions on the use of any boat slips in the Harbor. (Exhibit 19)

49. From 1962, when the initial dredging of the Harbor was authorized, through the present, DNR has issued numerous permits to dredge and place structures in the Harbor. None of these permits ever contained any specific conditions regarding how boat slips were required to be used or to be seasonally leased or rented. (Exhibit 106) It would have been a far better practice if the DNR had specifically indicated in the permits that this enormous encroachment on public waters was granted a permit with the understanding that the facility be operated as a marina which regularly made berthing available to non-riparian members of the public in the form of seasonal rentals. However, Ms. Nesta testified that the Department has consistently understood, from the outset, that the marina was initially authorized, allowed to be maintained, and allowed to expand, with the expectation that it would remain a marina offering boat slips to the public for seasonal rental. (TR, pp. 939-940) A reasonable inference from the record is that the Department would never have permitted such a large facility if it were not understood to provide the offsetting public benefit of public mooring facilities.

50. The Department had sufficient "cause" within the meaning of sec. 30.07(2), Stats. to modify or rescind the previously issued permits given the direct and cumulative impacts to the public interest associated with conversion to the condominium form of ownership and the proposed closure of the marina that previously provided seasonal rental of boat slips to non-riparian members of the general public. (TR, pp. 1638-39)

51. The Department of Natural Resources has formulated a non-binding guidance document which attempts to incorporate case law and to provide a threshold for field staff making "reasonable use" determinations. (The 1991 Guidance; Exhibit 75) The DNR has consistently used the 1991 Guidance as an analytical tool to approach difficult issues relating to the "reasonable use" of riparian parcels and the balancing of private and public rights under the public trust doctrine. The Department has not attempted to use this Guidance as a binding non-promulgated code. There is nothing in the record that would indicate that this Guidance document has been used improperly in this matter. The testimony of Mr. Johnson and Ms. Nesta reflected a keen awareness that the Guidance was only an analytical tool and not a rule of law with respect to Chapter 30 permit review. (TR, pp. 1299-1300; TR, p. 813-817) Mr. Johnson testified that the Department considered a September 11, 1992, informal opinion of Attorney General James Doyle in connection with its use of the 1991 Guidance. (Exhibit 97) This informal opinion concluded as follows "In sum, I conclude that the Department of Natural Resources' development of guidelines to help it administer the program relating to structures in navigable waters is consistent with its duties and authority set forth in the statutes." (Exhibit 97, p. 4) The record was clear that the Department did not improperly rely on the 1991 Guidance in making its final determination of what constitutes a "reasonable use" in this case. The Department did use the concepts outlined in the Guidance as part of its initial analysis of the project site, but then proceeded, as outlined in the testimony of Ms. Nesta and Mr. Johnson, to make a "factual analysis" based upon the specific facts of this case, to arrive at its final position.

51. The plain language of the 1991 Guidance does not exempt existing facilities from reasonable use considerations, where, as in the instant application, there is a significant impact on public rights. The 1991 Guidance reads as follows:

Existing berthing facilities which exceed "reasonable use" guidelines may continue to rely on any permit which authorizes specific construction. This remains true unless significantly changed conditions and resulting effects on public rights require permit revision (the Department maintains continuing jurisdiction over such projects) . . .
(Exhibit 75)

Further, it was proper that the Department consider the common law reasonable use doctrine, irrespective of the express terms of the 1991 Guidance, in the context of the instant application given the substantial change in use this project represents.

52. In the 1991 Guidance, the Department attempted to provide staff with a threshold numerical standard relating to the reasonable use of riparian frontage. This threshold figure reflects years of experience at the DNR as to existing practices across the State of Wisconsin. (TR, p. 1235) The threshold number is used by DNR staff to provide a tangible starting point for what constitutes a reasonable use of a given riparian tract. (Exhibit 75, p. 2) The threshold number is obtained by use of the following formula by Department field staff:

REASONABLE USE THRESHOLD

Provided other legal requirements are met [s. 30.13(1) & 30.772, Stats. & NR 326], the "reasonable use" threshold is reached when a property exceeds two berths for the first 50 feet or lesser amount of shoreline and one berth for each additional 50 feet of

shoreline in common ownership. We will define a berth as a space at a pier, wharf, boat hoist, boat shelter, or boathouse (wet or dry) for a single watercraft appropriate for use at the site and commonly in use at similar sites on the waterway. (As an example, a 100 ft. lot with a dry boathouse which has space to berth a single watercraft and a pier which provides space for berthing at either side would provide berths for a total of three watercraft and would not exceed the threshold.) Multiple owner lots such as condominiums, "access lots" or other similar ownership arrangements are not entitled to greater berthing privileges than the shoreline frontage would otherwise provide (2 for the first 50 ft. & 1 for each additional 50 ft.). (Exhibit 75, p. 3)

53. Under a strict application of the reasonable use Guidance, the applicants, owners of approximately 4100 feet of riparian frontage, would be entitled to place no more than 82 or 83 pier slips in public waters at the site. (TR, Nesta, p. 883) Nesta testified that the Department analyzed the instant pier permit application using factors articulated in the Guidance, which itself was an effort to make concrete the evolving concepts of public trust case law. The Guidance recognizes that public marina facilities provide a public benefit, access to public waters for non-riparians, that is not provided by strictly private riparian moorings. (Exhibit 75, p. 4) Under the Guidance and Department policy, to be treated as a "marina or other similar mooring facility" within the meaning of sec. NR 326.04(8)(f), Wis. Admin. Code such facilities must " . . . be open to the general public." Further, "(i)n order to qualify, such facilities must provide all berthing facilities which exceed the 'reasonable use' guidelines to the general public free or for a reasonable fee." (Exhibit 75, p. 4)

54. The record is clear that, prior to conversion to the dockominium form of ownership, the Abbey Marina constituted a "marina" or "other similar mooring facility" within the meaning of sec. NR 326.04(8), Wis Admin. Code. (TR, p. 1328) It is unfortunate that NR 326 does not define these terms. However, if there were ever an obvious marina or similar mooring facility, it would be the Abbey's massive 407 pier slip configuration that has provided seasonal berthing of boats for many years. Significantly, in applying for the instant permit application, ABKA itself characterized the facility as a "marina." (Exhibit 18, p. 1) The evidence was essentially undisputed that the Abbey charged a "reasonable fee" in light of the high-level of demand for pier slips on Geneva Lake. (See: Findings 75-76).

55. Conversion of all 407 slips to ownership in the form of dockominiums would no longer qualify the Abbey piers for treatment as a "marina" entitled to exceed the reasonable use of its riparian parcel. There was testimony that numerous pier slips, owned by purchasers of dockominiums, were now rented out to the general public. (See: Finding 79) However, this is not the same thing as a facility whose central purpose is the rental of pier slips, as the Abbey Marina was prior to conversion. Instead, these dockominium rentals, which the individual owners may choose to use or rent each year, are much more like an individual pier owner who owns riparian property. He may rent out his pier to others on occasion, nonetheless the pier slip is his and cannot be considered to provide a public benefit. ABKA is the holder of valid permits authorizing 407 pier slips on 4100 feet of riparian frontage. Implicit in the issuance of these permits was the fact that the public benefitted from operation of a marina at the site which provided access to Geneva Lake by virtue of the permit holder renting out pier slips to the public. If the applicants wish to continue to maintain structures with so many pier slips on public waters, they must make a substantial number of slips available to the public for seasonal rental.

56. The plain language of the 1991 Guidance reads as follows: ". . . (S)uch facilities must provide all berthing facilities which exceed the "reasonable use" guidelines to the general public free or for a reasonable fee." (Exhibit 75, p. 4) Under the 1991 Guidance, 83 slips constituted the threshold for a reasonable use of 4100 feet of riparian frontage, the remaining 314 slips (407 minus 83) must be held open to the public for the Abbey Marina to maintain the current numbers of pier slips. (TR, Johnson, p. 1348) The applicants argue, somewhat disingenuously, that no piers should be "set aside" for public rental, but, if any are required, it should be no more than the 10 to 20 percent identified in an earlier Department guidance. (Exhibit 86, p. 14) However, the testimony of both Johnson and Nesta was that this guidance, dated July 2, 1990, was superseded by the 1991 Guidance. (Exhibit 75, TR, Johnson, p. 1233 and TR, Nesta, p. 967) There is absolutely no basis in the record for applying the July, 1990 Guidance rather than the 1991 Guidance. However, as noted, the Program Guidance is used only for a threshold determination and is not binding on Department staff or the Division of Hearings and Appeals.

57. Conversion of all 407 slips to dockominium status would violate long-held notions of the reasonable use of public trust waters by a riparian. To comport with a reasonable riparian use, a substantial majority of the pier slips must either be eliminated or must continue to be made available to the public for seasonal rental. Conversion of all 407 slips to the dockominium form of ownership would violate the public trust doctrine and the common law notion of "reasonable use" of public waters by a riparian.

58. Nesta testified that the Department's position was that the applicants should require that 200 slips be set aside for public rental. (TR, Nesta, p. 883) Nesta stated that the Department considered several factors in reaching this determination. First, there is a public launch at the marina; second, the piers were pre-existing structures and not proposed for construction; third, a somewhat vague evolution of Department policy led to this determination. (TR, Nesta, pp. 883-888) This latter may well relate to the agreement of ABKA and the DNR, which is specifically by its own terms not binding on the ALJ. (Exhibit 16) Mr. Johnson testified that the Department's initial position was that all but 82 or 83 slips must be set aside for public use, but that, after a meeting between Mr. Earl and Secretary Meyer, the number allowed for private sale jumped from 82 to 207. (TR, Johnson, p. 1530)

59. Taking into account the factors set forth below, and after considering all of the evidence, the ALJ finds that a reasonable use of this riparian frontage would involve the placement of no more than 120 pier slips exclusively held for private riparian usage. Accordingly, the applicants must set aside 287 slips for public rental to maintain an equivalent public benefit as is gained from the instant configuration. This number is substantially higher than the reasonable use threshold of 82 to 83 exclusively private riparian slips resulting from a strict application of the 1991 Program Guidance threshold. (Exhibit 75) However, the record supports a somewhat higher number because: a) the piers have been in place for an extended period and no new adverse direct environmental consequences would be experienced; b) because the waters in the area of the site are not now regularly used by the public for any purpose other than the ingress and egress of boats out of the facility; and c) there is a public boat launch at the site. These factors justify approval of a number approximately 50 percent higher (120 versus 82 or 83) than the threshold that would be considered a reasonable use of the property based upon years of Department experience with similar facilities across the state. (Exhibit 75)

The record does not support authorizing 207 slips for sale. This number apparently was obtained by an effort at a compromise "deal", that was, on its own terms, not binding on the ALJ. Mr. Johnson testified that his own professional judgment, at least originally, was that the Program Guidance threshold should be followed and that 324 slips should be set aside for public rental. (TR, Johnson, p. 1507) The record supports a number somewhere between 200 and 324. The applicants are placing a substantial number of piers into public waters. This placement is reasonable only if there is a compensating public benefit of offering 287 slips available for public use. If the applicants no longer wish to operate a marina facility which consistently makes public access to the public waters of Geneva Lake possible by the seasonal rental of pier slips, then the size and scale of the massive encroachment on public waters must be reduced to moor no more than 120 boats.

60. The recreational uses of the Harbor will not be changed by the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony) Boating and the mooring of boats will remain the principal use of the marina. However, if all of the pier slips are converted to dockominium status, access to public waters on which the marina is constructed will be denied to persons who can not afford to purchase a condominium unit.

61. There will be no impacts to wildlife due to the change in the form of ownership and closing of the marina formerly made available to the public through seasonal rentals. (Nesta, Bramer testimony)

62. There will be no change in water quality due to the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

63. There is no impact on effective flood flow capacity due to the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

64. There will be no change in the size of boats that will be stored at the Marina as a result of the change in the form of ownership and closing of the marina formerly made available to the public through seasonal rentals. (Bramer testimony, Exhibit 18, B)

65. There will be no change in the fishery as a result of the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

66. There are no public safety issues created by the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

67. There is no impact on natural scenic beauty as a result of the change in the form of ownership and closing of the marina made available to the public. (Nesta testimony)

68. The navigational channels in the Marina comport with standards that are commonly accepted for safe navigation in marinas. (Wentland testimony, Exhibit 51)

69. The Harbor and Marina is a no-wake zone and the no-wake buoys mark the North-South navigational channels in the Harbor. (Whowell testimony)

70. ABKA has not changed the number, size, or configuration of any structure in the

Harbor as a result of the change in the form of ownership. The structures in the Harbor and the physical layout remain the same. (Exhibit 18, Nesta testimony)

71. ABKA did not discriminate in regard to which members of the public could become condominium unit owners. Purchase of a Unit was open to anyone who could afford to do so. (Snyder testimony, sec. 703.10(2m), Stats.)

72. Prior to the filing of the Declaration, the Marina operated a licensing program where boat slips were seasonally rented. The seasonal licenses were for seven months, from April 15 until November 1. License renewals were sent on October 1 of each year. (Snyder testimony)

73. Prior to the filing of the Declaration, the people who rented the boat slips on a seasonal basis often rented the slip year after year. It was not uncommon to have people renting the same slip for ten years or more. (Snyder testimony)

74. Prior to 1995, 85% of renters who had license agreements at the Marina rented for more than one year. Further, 42% of renters who had license agreements at the Marina rented for more than ten years and 20% of renters who had license agreements at the Marina rented for more than fifteen years. (Snyder testimony)

75. The license fee at the Marina from 1990 through 1994 ranged from \$3,850.00 for the largest slips to \$2,743.00 for the smallest. The license fee at the marina in 1995 ranged from \$6,000.00 for the largest slips to \$4,000.00 for the smallest.

76. There was no increase in rental rates at the Marina from 1990-1994. If the increase in rental rates in 1995 were spread over the period of 1990-1995, it would be an annual 6% increase. (Snyder testimony)

77. The occupancy rate in the Marina prior to 1995 was 94% or above. In 1995, the occupancy rate of boat slips in the Marina was 84% due to the uncertainty created by this proceeding, the delay in instituting the licensing program, and the higher rental rates charged in 1995. (Snyder testimony)

78. During the 1995 boating season, 70 persons decided to rent slips under the licensing program rather than purchase a Unit. (Snyder testimony)

79. Of the 185 Units sold, 69 were rented to members of the public other than the Unit owners in the 1995 boating season. (Snyder testimony)

80. One hundred fifteen (115) of the 185 Units sold have been sold to persons who formerly rented under a seasonal license at the Marina. (Snyder testimony)

81. There are persons who were previously able to afford seasonal rental of a boat slip at the Marina facility, who were unable to afford purchase of a dockominium. (Lavitt, Orsinger) As many as 100 former renters were displaced from Geneva Lake to Lake Michigan, in part because they did not believe purchase of a dockominium was a wise investment or affordable. Other reasons articulated included concerns about a lack of flexibility in the dockominium scheme in the event of

occupying a pier slip next to a person one did not like, or relocation due to a transfer or change in employment. There were no other rental slips available to this large group of boaters which would accommodate their large (30-foot, plus) boats.

82. There would be a net loss of public access to the waters of Geneva Lake as a result of the conversion of all slips to dockominium status. (Nesta, Johnson, Bramer, Orsinger)

83. There is a public boat launch facility in the Marina and the access to that boat launch has not changed as a result of the change in the form of ownership. (Bramer testimony)

84. The Abbey Harbor is located in a deep man-made basin that connects Potawatomi Creek and Geneva Lake. The Creek flows in at the southwest and out into Geneva Lake at the southeast end of the basin. Most if not all of existing navigation is related to the ingress and egress of large boats in the waters of Geneva Lake. (TR, pp. 1164-1165) However, Mr. Sherin testified that the Harbor would be an excellent area to teach the sailing of small boats if the current pier configuration were reduced. (TR, pp. 1137-1145) Because boats must pass under a bridge to gain access to the lake, the site is not suitable for fixed keel sailboats. Ms. Nesta testified that the Department considers any structure that extends beyond a lawfully adopted pierhead ordinance to be an obstruction to navigation unless it is authorized by an appropriate permit. (Nesta Depo., p. 50) ABKA has a permit which authorized four piers to extend beyond the 100 foot pierhead Ordinance in effect at the project site. (Exhibit 20) The marina piers are an aid to navigation in so much as they facilitate the ingress and egress of boats to the waters of Geneva Lake. In years past, the operation of the marina has been a benefit to public navigation by virtue of providing mooring access to non-riparians. Under the proposed conversion plan, only private riparians (i.e. condominium unit-owners) would benefit from placement of the structures in public navigable waters. The massive encroachment on public waters beyond the 100 foot pierhead line would be a material obstruction to navigation in the absence of the off-setting public benefit of providing regular seasonal boat rentals to non-riparian members of the public.

The structures will not materially obstruct existing navigation on Geneva Lake and Potawatomi Creek so long as the marina is operated in a manner consistent with the requirements of the permit set forth below. If the marina is operated under the terms and conditions of the permit set forth below, the structures will be an aid to navigation by providing public access to public waters through seasonal boat rentals.

85. The proposed conversion to the dockominium form of ownership will have detrimental cumulative impacts to the administration and maintenance of the public interest in navigable waters. Bruce Haukom, Jefferson County Zoning Administrator testified on behalf of the Wisconsin County Code Administrators. (WCCA) The Executive Committee of the WCCA provided a statement that reflects that the proposed dockominium plan poses issues of statewide concern. WCCA statement concludes as follows:

... We are an association of county employees who work in various departments enforcing a variety of land use, subdivision, and zoning and sanitation codes. We also serve as agents for the state departments in the enforcement of certain administrative codes. WCCA has recently apprised its membership concerning the proposed dockominium concept of ownership involving the Abbey Resort Marina.

WCCA membership was quite alarmed after being advised of the particulars involving this situation. The membership was convinced that this particular matter would have statewide implications. While one can readily see the economic gain from this concept, our perception is that this gain comes at the expense of the resource. The dockominium concept has the potential to negatively impact the water quality, fisheries, and other plant and animal life within this fragile ecosystem. It also is apparent that user conflicts will, in all likelihood, intensify. This will lead to an unhealthy situation for both people and the resource. Some community leaders may see this as a threat to their tax base as there may not be a need to own high-value land along with the ever-increasing property tax bills if the dockominium type ownership is allowed to begin and then proliferates through Wisconsin's lakes and rivers. Another concern of the WCCA involves the total disregard involving the sensitive relationship between man and nature which we feel is absent in this Abbey development. Just as our counties require an ownership interest in land development plans such as subdivisions, planned unit developments, et cetera, along with developmental standards in real estate lands abutting water bodies must be incorporated into the plan. Tangible riparian ownership of lands abutting water bodies establishes a sound basis for resource protection. Other factors along with standards including frontage, size of parcel, lake characteristics, et cetera, must also be incorporated into any development. Cumulatively we believe there are far more negative elements to this concept than positive. Once again, this approach will not be limited to Lake Geneva but may include any of Wisconsin water bodies. (Haukom, TR, pp. 452-453)

Haukom noted that condominium developments in general were not subject to Chapter 236 relating to the platting of land, and that it would be much easier to establish multiple piers under these circumstances.

Ms. Nesta also testified about concerns relating to cumulative detrimental impacts to public waterways. Ms. Nesta summarized her concern in the Water Regulation Investigation Report as follows:

. . . The current proposal converts the public nature of this facility to 407 private owners with a permanent interest in use of public water. This proposal is also anticipated to have adverse cumulative impacts as it may lead to the conversion of other public facilities to private use, or new proposals, for condo-ownership of pier slips by and what is a reasonable use of shoreline. Approval of boat slip use beyond a reasonable use will also compromise the Department's ability to rescind or revoke such a permit if necessary to protect the public interest in the future. (Exhibit 68)

86. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

87. The structures will not reduce the effective flood flow capacity of Geneva Lake as part of the enlargement of Potawatomi Creek.

88. The structures will not adversely affect water quality nor will they increase water pollution in Geneva Lake. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats.

89. The complaints filed on or about September 15, 1995, by the Conservancy and WAL under sec. 30.14, Stats. allege that the structures violate Chapter 30, Stats., the public trust doctrine and the Wisconsin Constitution. There is considerable overlap, as the Conservancy acknowledges in its brief, between the issues relating to the instant permit application and the complaints filed under sec. 30.14, Stats. (Conservancy Brief, p. 1) Accordingly, it is appropriate to deal with these issues in summary fashion.

The Department of Natural Resources has made an investigation of its files and concluded as follows:

"The Department has concluded, based on the history of this project going back to 1962, that the existing slips in the harbor have been authorized by the State of Wisconsin for use as a public marina facility. The Department does not object to the continued maintenance and operation of these slips as a public marina facility. We have concluded, however, that the proposal by the ABKA Limited Partnership to convert these public marina slips to "dockominiums" is a substantial change to the facility requiring review and possible modification of the existing permit."
(Exhibit 15)

The evidence presented at hearing supports both of these conclusions. However, the term "public marina" as used in this context is somewhat misleading. The Abbey has always been held privately. Prior to the dockominium scheme, the Abbey regularly and consistently offered boat slips to the public in the form of seasonal rental. The instant permit application thus involves a substantial change in the implied contract between the public, which has provided ABKA with public waters on which moor boats, and the private operators of the marina. The existing facility represents a massive private encroachment on public waters; the 407 pier slips consume several acres of public waters. Accordingly, the terms of the previously issued permits must be modified to ensure that the marina continues to provide an offsetting public benefit. The prior permits are accordingly modified to ensure that the project is not detrimental to the public interest in navigable waters.

90. The marina has traditionally maintained a boat launch which it has made available to the public. The applicant did not object to the reasonable permit condition proposed by Mr. Johnson that the public boat launch remain available to the public. (TR, p. 1511)

91. There is no question that the initial marketing of the dockominiums sought to blatantly sell public waters for private benefit. (See: Exhibits 56; 57; 58; 59; 105; 119-121) While the language has been less blatant in recent versions, dockominium purchasers may still believe they are purchasing permanent rights in public waters as a result of the purchase of a condominium unit. Section 7.2 of the Declaration states that each boat slip owner will have "as a limited common element appurtenant exclusively to his unit . . . riparian rights to use of the space beside the pier or piers corresponding to his unit number." However, it is clear that riparian rights derive not from the purchase of a unit as such, but from the common elements which include riparian lands.

ABKA argues that this conveyance is consistent with the public trust doctrine because there is language in the Declaration which continues to subject dockominium slip holders to state regulation. However, such language could be rendered meaningless once the expectation of a property interest has been established. The record clearly establishes that the Abbey has marketed the dockominium in a manner which would establish such an expectation. Exhibit 105 and 120 contain the following language:

"individual slips can be owned and transferred by deed", "owning a slip", "ownership of a slip", "slip owners", "price of the slip" and "classes of slips being sold", "high demand for Lake Geneva slips," "limited supply of Lake Geneva slips."

In Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393 (1923) the Wisconsin Supreme Court considered the expectations of property owners and how those expectations can take on the force of law which may outweigh judicial considerations of public interest. The court concluded:

These rights were always considered valuable, and, as a result of such declarations, the doctrines pertaining to riparian rights have become fixed rules of property. Whatever may be our individual inclinations or desires or our views as to propriety or the public welfare, we cannot disturb the interests which have so become vested, at 193 N.W. 393, 398.

Blanket approval of the instant application would likely have the same result. Unit owners would gain vested private rights in public waters which will be largely beyond the control of the DNR or state. Area water management specialist Liesa Nesta testified that the perception of the sale of "permanent" berthing rights was of concern to her as a regulator and would pose a significant burden on the administration of sec. 30.12, Stats., permits. She further testified that although ABKA had made a modification to its original dockominium plan, the current plan is similar in purporting to create permanent rights in an area of public water.

The objectors rely heavily on these concerns with respect to their argument that the dockominium conversion in and of itself violates the public trust doctrine. However, it is not clear that the Division has jurisdiction to order specific limitations on the marketing of "dockominiums." Further, because the permit and Order set forth below will result in the Abbey having to repurchase units previously sold, this issue is not currently necessary for purposes of this decision. All existing unit owners must be made to understand that they have not acquired a permanent interest in public waters, but rather have acquired an ownership interest in lands subject to the Declaration which have certain limited rights as riparians. It is expected at a minimum that all members of the Association, the co-applicant for the instant permit, will be made aware of this decision and any subsequent review decisions bearing on the property rights, perceived and real, of unit-holders.

92. At hearing, the ABKA raised the issue of estoppel and argued that ABKA relied upon the February 2, 1995 agreement between the applicant and the Department in its decision to sell condominium units. (Exhibit 16) However, any reliance was clearly the result of a calculated business gamble, given the plain language of that agreement which contemplated a decision in the instant matter requiring exactly such a buy-back of previously sold slips. ". . . Should the decision of the ALJ require more than 125 slips to be set aside for seasonal leasing or licensing, ABKA will repurchase slips to make up the difference." (Exhibit 16, p. 1) Mr. Antoniou testified that he was

familiar with this provision. (TR, p. 134) The record indicated that 185 of the condominium units had been sold as of the date of the hearing. Accordingly, it is expected that ABKA will repurchase 65 units to come into compliance with the terms of the permit set forth below. Any reliance by ABKA was clearly done at its own risk with respect to any claims of reliance or estoppel.

DISCUSSION OF DECISION

This is a matter of first impression under Wisconsin law. The law is silent on the specific issue of whether the dockominium form of ownership is permissible under the public trust doctrine and Chapter 30, Stats. In the absence of a definitive statement from the legislature, it is necessary to consider these complex issues in light of past precedent under the public trust doctrine. After considering the record as a whole, the briefs of the parties and after an exhaustive review of past precedent relating to the interpretation of the public trust doctrine by Wisconsin appellate courts, the ALJ reaches a decision similar to the initial conclusion of the DNR. The only significant difference is that the record supports making a larger number of slips available to the public for seasonal rental. The decision in this matter relies on two basic principles, which on the surface may appear to be contradictory.

First, that the applicants have not carried their burden of proving that the proposal to convert all of the slips at the marina to "dockominium" status would be "not detrimental to the public interest" in navigable waters within the meaning of sec. 30.12, Stats. Conversion of all slips to dockominium status would be detrimental to the public interest in maintaining public access to the navigable waters of the state, which are held in trust for the public. Further, conversion of all slips to dockominium status would result in significant cumulative detrimental impacts to the maintenance of public access to public waters.

The second fundamental decision in this case is that condominium ownership of the marina does not in itself violate the public trust doctrine. Conversion of all of the pier slips to dockominium status would violate the public trust doctrine and would be detrimental to the public interest in maintaining public access to public waters. However, complete rejection of the proposed dockominium conversion would unfairly discriminate against the condominium form of ownership. Riparian owners in Wisconsin, including riparians who gain such a status by holding land in common through the condominium form of ownership, have the limited right to place a reasonable number of pier slips in public waters to gain access to said waters. The condominium unit-holders in this matter own riparian lands in common with other unit holders including ABKA. (See: Finding 35) Condominium unit-owning riparians are entitled to no more and no less access than other riparians.

The distinction that is central to this case is not the distinction between condominium unit-owners and other riparians. Instead, this case turns on the use to which the riparian owners put the pier slips maintained on public waters. (TR, pp. 1071-72) Prior to the Declaration, ABKA operated a marina that regularly made boat slips available to the public by way of seasonal rental. After the Declaration, and the sale of dockominium units, the pier slips no longer provide the public the benefit of public access to public waters. The Department has consistently allowed larger numbers of pier slips to riparian owners operating marinas, irrespective of the legal form of ownership, because marinas make slips available to the public by seasonal rentals. This practice is appropriate and

comports with the central purpose of the public trust doctrine to balance the rights of private riparian users of public waters with the interests of the public as a whole.

Oneida County cites a Suffolk Law Review article that argues as follows:

Traditional marinas pass the public interest scrutiny by providing access to the waterways for the general public. Typically, marinas offer dockage on a seasonal basis, which is renewable yearly. They often provide launching services to the general boating public, as well as a wide variety of services for both marina slip occupants and transient boaters. A dockominium development, on the other hand, offers a small class of boat owners the exclusive and often permanent right to occupy a portion of the public trust waters. Such long-term, exclusive ownership completely blocks a large portion of the general public, which cannot afford such ownership, from accessing the waterways

Those boat owners who can afford dockominiums are among a group of a privileged few who can enjoy exclusive rights to waters which the state holds for the benefit of all people. Extinguishing public rights for the benefit of private parties serves the interest of a few at the expense of many. When marinas convert to dockominiums, an

exclusive group enjoys the public trust interests which are "so intrinsically important to every citizen"

Dockominiums provide access to the waterways to a select group of the public. Dockominium proponents contend that those boat owners are also members of the public. Proponents also cite ownership turnover as a means of opening public access. Under any kind of public trust scrutiny, however, dockominium ownership that aids an exclusive class of boat owners does not satisfy the crucial public purpose requirement of the doctrine. Dockominiums: In Conflict With the Public Trust Doctrine, 24 Suffolk Univ. Law Review, p. 331, 343-44 (1989)

The record in this matter made this point absolutely clear. Numerous witnesses testified that they had previously gained access to the public waters of Geneva Lake through the Abbey facility, but were subsequently unable to do so because they could not afford to "purchase" a pier slip under the dockominium scheme. Ms. Lillian Lavitt provided compelling testimony that, after fourteen years of renting a pier slip at the Abbey, she and up to 100 of her friends were forced to leave the Abbey because of the high cost (\$46,500) of purchasing a pier slip, paying taxes and meeting condominium assessments. (TR, pp. 1079-88) Similar sentiments, along with a deep sense of regret at being forced off Geneva Lake because of the high costs of purchasing and maintaining a unit, were expressed in the testimony of Ms. Gaillee Orsinger. (TR, pp. 1106-1137) Ms. Lavitt and Ms. Orsinger were both prosperous owners of large boats, but recoiled at the requirement of paying nearly \$50,000, plus taxes and condominium assessments, for the right to moor a boat.

The State of Wisconsin has repeatedly expressed its official policy of maintaining public access to public waters. Sec. NR 1.90, Wis. Admin. Code. Ms. Nesta testified that the Department identified two marked differences between a permanent condominium slip and a rental slip. First, the

condominium unit would require a greater amount of cash up front to gain access to public waters; second, there was no guarantee there would be sufficient turnover of dockminium units to ensure public access. (TR, pp. 888-89) It is clear from the record in this matter that the State's expressed goal of public access would be jeopardized by the elimination of large private marinas which provide mooring space to the public on a regular basis at a reasonable seasonal rental rate. This would result in detrimental impacts in the public interest in navigable waters. (TR, pp. 1266-69)

ABKA argues that purchasers of condominium units are members of the public in the same manner as those seeking seasonal rental. They are not. As noted, condominium unit owners are private riparians. The central purpose of the public trust doctrine is to balance the rights of private riparians with the public as a whole. Both Ms. Nesta and Warden Bramer testified that there are three traditional paths of the public to access public waters: a) by owning riparian lands; b) by using public access; c) or by renting a boat slip at a facility that allows non-riparians to do so. The ABKA dockminium plan increases the number of owners who may share the reasonable use of the riparian parcel at the site. However, as Warden Bramer testified, it reduces the number of slips available to non-riparians for rental by more than half. (TR, pp. 1158-60) The requirement of setting aside a substantial majority of pier slips for rental to non-riparians would remedy concerns about the net loss of public (ie. non-riparian) access. The applicant has not carried its burden of showing that the change in use of the marina reflected in the conversion to condominium status would be "not detrimental to the public interest" within the meaning of sec. 30.12, Stats.

Further, as ABKA concedes in its brief, the DNR must consider reasonably anticipated cumulative detrimental impacts from similar conversions of large private marinas around the state. Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577 (1966). The participation of Oneida County, the Wisconsin County Code Administrators, the Wisconsin Association of Lakes and the Wisconsin Realtors Association speaks volumes as to the state-wide interest the instant application has aroused. Further, Ms. Nesta testified of having received contacts from others interested in converting similar docking facilities around the state to so-called dockminium status. (TR, pp. 840-845) There is no question that a massive shift from seasonal rentals to "ownership" of pier slips would exclude large numbers of people from access to public inland lakes after the manner of the Lavitts and Orsingers. This is not conjecture, as the applicant suggests, but a fact demonstrated by a clear preponderance of largely un rebutted evidence.

Wisconsin has a rich history of protecting the public trust in the navigable waters of the state. Wisconsin courts have "jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them." Delta Fish and Fur Farms v. Pierce, 203 Wis. 519, 523 (1931).

It is well established that riparian rights are qualified, subordinate and subject to the paramount interest of the state and the paramount rights of the public in navigable waters. State v. Bleck, 114 Wis. 2d at 467; Mayer v. Grueber, 29 Wis. 2d 168, 173-74 (1965); Ashwaubenon v. Public Service Comm., 22 Wis. 2d 38, 49, 647 (1963); Att'y Gen. ex rel. Becker v. Bay Boom W.R. & F. Co., 172 Wis. 363, 375 (1920); State ex rel. Thomas Furnace Co. v. Milwaukee, 156 Wis. 549, 553-54 (1914).

The general proposition pertaining to the hierarchical relationship between riparian and public rights specifically applies to the construction of a pier or similar structure in aid of a riparian's navigation. Wisconsin courts have consistently held that a riparian owner's right of access to and

from the water and right to build a pier to effectuate such access are limited and subordinate to public rights. Delaphaine v. C. & N.W. Ry. Co., 42 Wis. 214, 226 (1877) (riparian owner has right to build piers to navigable waters not interfering with the public use). In Cohn v. Wausau Boom Co., 47 Wis. 2d 314, 322 (1879) the Wisconsin Supreme Court held:

"It is settled in the state that a riparian owner on navigable water may construct a front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable waters." (emphasis added)

In Bond v. Wojahn, 269 Wis. 235, 239 (1954) the Wisconsin Supreme Court held:

"In some respects, the rights of riparian owners on navigable streams and navigable or meandered lakes differ, but one of the common rights is the right to build a pier in front of his land a sufficient distance to reach actually navigable water." (emphasis added)

Similarly, "Exclusive use of the apportioned riparian tract only extends so far as to reach the line of navigability." Nosek v. Stryker, 103 Wis. 2d 633, 640 (1981)

Selvin, The Public Trust Doctrine in American Law and Economic Policy, 1789-1920, 6 Wis. Law Rev. 1403 (1980) comments as follows:

The public trust doctrine states that the tidelands and certain other lands and waters are held in a trust by the citizens of the various sovereign states and municipalities to be used only for the benefit of the general public. The doctrine, in its most abstract sense, prohibits the sale or disposition of these resources for exclusively private benefit and dictates that the state or municipality retains the inalienable power to regulate the use of this property even if it is granted into private ownership. (Footnote 4 at p. 1403.)

The public trust doctrine reflects an effort by the law to balance the rights of riparians with rights of the public in waters held in public trust. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource. State ex. rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972). Factors to be taken into account include: ". . . the subject matter of the use, the occasion and manner of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall . . ." Timm v. Bear, 29 Wis. 254, 265 (1871). Both "the subject matter of the use" and "the occasion and manner of its application" at the marina would be changed fundamentally if the entire marina was converted to dockminium status and the boat slips were no longer regularly and consistently made available to the public by way of seasonal rental.

The Department of Natural Resources is charged by the legislature with the protection, maintenance and management of the public waters of this state. Sec. 144.025(1), Stats. The Department has drafted a non-binding Guidance Document which attempts to incorporate case law and provide a threshold for field staff making "reasonable use" determinations. (Exhibit 75) This 1991 Program Guidance represented an attempt by the Department to incorporate its experience, technical competence and specialized knowledge relating to balancing of private riparian rights and the public interest in navigable waters. The issue of the reasonable use of public waters by riparians attempting to gain access to said waters is an issue which has repeatedly presented itself to the Department. The Program Guidance of 1991 is therefore entitled to "great weight" to the extent that it reflects the Department's statutory interpretation of sec. 30.12, Stats. and public trust law. Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 244, 493 N.W.2d 68 (1992).

The Guidance Document has not been used as a defacto rule as the Wisconsin Realtors Association, (WRA) argues. The elements of a rule are:

- (1) a regulation, standard, statement of policy or general order,
- (2) of general application,
- (3) having the effect of law
- (4) issued by an agency
- (5) to implement, interpret or make specific legislation enforced or administered by an agency.

Plumbing Apprenticeship Committee v. DILHR, 172 Wis. 2d 299, 321, 493 N.W.2d 744 (Wis. Ct. App. 1992).

The Department's program guidances clearly do not meet those described elements. In particular, the 1991 program guidance does not purport to be, and is not, a "regulation, standard, statement of policy or general order". The guidance explicitly states that is not intended to be such a standard. The Guidance was "issued by the agency", specifically as an insertion into the Water Regulation Handbook and Law Enforcement Handbook. However, staff were advised not to use the Guidance as a rule "of general application"... "having the effect of law". Mr. George E. Meyer, then Administrator of the Division of Enforcement, in signing off on the Guidance, explicitly advised staff that it was not a rule having the effect of law and could not be used or applied as such.

"... 3) We cannot simply cite the guidelines described below ("reasonable use" threshold, pier width, etc) in denying permit applications. They are not rule or statutory standards. Any objection or permit denial must state how the proposal which exceeds the threshold or guidelines in combination with similar future projects would not comply with statutory requirements by adversely affecting particular public rights and interests in a particular water." (Exhibit 75, p. 3)

As noted, Wisconsin appellate courts have consistently held that balancing of public and private rights is to be done on a case by case basis. State ex. rel. Chain O'Lakes Assoc. op. cit. at p. 582 Accordingly, in the 1991 Guidance, the Department has sought to give its staff an understanding of the common law in this area to provide the necessary analytical tools for field staff to exercise their discretion in their area of expertise. Mr. Johnson, one of the principal drafters of the 1991 Guidance, testified that the Guidance was "background knowledge" and an "analytical tool" for field staff

attempting to make complex judgments regarding the balancing of public and private rights. In its brief, the WRA argues that "...the Department should be reprimanded and condemned for its improper actions in promulgating and using the Guidances as it has." (WRA Brief, p. 57) This argument misses the practical point that there are water management specialists across the state who must process Chapter 30 applications, relying on complex common law principles and individual, case-by-case, site criteria. On the whole, the authors of the Guidance should be praised for getting a coherent body of knowledge into the hands of such staff in the hope that they will utilize a consistent reasoning process in processing such applications. The 1991 Guidance does not purport to "implement, interpret or make specific legislation . . . administered by the agency". Rather, it advised staff of the common law background of the general public interest standards and admonishes them to consider those factors recognized in the common law before making a permit decision.

The only aspect of the 1991 Guidance that comes close to constituting an improper rule-making are the numerical standards which attempt to quantify the common law principle that mooring privileges generally accrue in proportion to the amount of riparian frontage owned. However, the testimony of Mr. Johnson was that the numerical standards were "threshold figures" based upon the expertise of Department water management coordinators as to the existing practice throughout the state of Wisconsin. (TR, p. 1235) The threshold numbers assist staff in determining if a permit is necessary in the first instance, and provide a starting point for a discussion of what constitutes a reasonable use of a given riparian tract. These numbers are not absolutely applied as a rule, but rather "...identify the threshold beyond which there should be a more rigorous evaluation to determine whether a riparian owner may have exceeded reasonable berthing and mooring privileges and whether adverse effects on public rights and interests in navigable waters are significant." (Exhibit 75, p. 2) Under these applications, the numerical standards have not been applied as an illegal rule-making. The applicant, riparian owner of 4100 feet frontage, would be entitled to 82-83 slips under a strict application of the non-binding reasonable use guidance. (TR, p. 883) This number represents a starting place, based upon years of experience and expertise at the Department, as to what would constitute a reasonable use of this riparian parcel. Based upon the record as a whole, a somewhat higher number is appropriate as set forth above. (Finding 59)

To some degree the dockominium concept involves a legal fiction: that ABKA is selling the lock-box condominium units, rather than the pier slips, for nearly \$50,000. However, the ALJ is bound to apply the law as he finds it. This decision attempts to balance the rights of the private riparians and members of the public as a whole. To a much lesser degree, the distinction between "members of the public" and "private riparians", is also a somewhat legalistic concept. The record was clear that some long-time renters have bought condominium units, and thus, rights to a slip. However, it would clearly be unfair to let the unit-owners have it both ways: to be a "private riparian" when it suits them, to gain riparian rights, but to treat them as "members of the public" with respect to concerns about public access to public waters. The Department's reasoning process in this difficult matter was sound, and was in accordance with longstanding DNR practice. Considering the record as a whole, the balancing reflected in this decision shifts slightly toward public rights in the requirement to make a larger number of slips available to the public for seasonal rental. It should be noted that this decision is similar to the position initially articulated by the DNR Water Regulation and Zoning staff prior to the non-binding February 2, 1995 agreement between ABKA and the DNR.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to secs. 227.43(1)(b), sec. 30.07(2) and sec. 30.12, Stats., to hear contested cases and issue necessary Orders relating to the issuance, modification or rescission of permits to place structures on the beds of navigable waters of the State of Wisconsin.

2. Riparian owners are those who have title to the ownership of land on the bank of a body of water. Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 665, 494 N.W.2d 204, 207 (1993).

3. ABKA owns land on the bank of navigable waters of the state and is, accordingly, a riparian within the meaning of sec. 30.12, Stats.

4. The marina pier facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

5. The State of Wisconsin has jurisdiction over all waters within its borders. Under Wis. Const. Art IX § 1, from which the Public Trust Doctrine has evolved, the state also has the responsibility of keeping those waters accessible to the residents of the state:

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

6. The state has maintained its pre-eminence in the control of its navigable waters. DNR v. Clintonville, 53 Wis. 2d 1 (1971).

7. The state of Wisconsin has delegated its trusteeship of the waters of the state to the Department of Natural Resources. Section 144.025, Stats., provides:

(1) **Statement of policy and purpose.** The department of natural resources shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private.

(2) **Powers and duties.** (a) The department shall have general supervision and control over the waters of the state.

8. This delegation is to be interpreted broadly, and the Department's ability to regulate activity consistent with the public trust is comprehensive.

Title to the navigable waters of the state and to the beds of navigable waters is "vested and continues in the state of Wisconsin in trust for the use of the public." This "public trust" duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty. The state's responsibility in the area has long been acknowledged. However, increased leisure time, improved transportation facilities, the consequent growth of Wisconsin's water-centered recreation industry, and the continued deterioration of the quality of the waters of the state have awakened widespread interest in all Wisconsin's waters and have served to underscore the fact that maintaining pure and attractive rivers, lakes and streams is a matter of statewide concern.

In furtherance of the state's affirmative obligations as trustee of navigable waters, the legislature has delegated substantial authority over water management matters to the DNR. The duties of the DNR are comprehensive, and its role in protecting state waters is clearly dominant.

Wisconsin Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 526 (1978) (citations omitted). "The DNR, in carrying out its duties, is dominant in its role in protecting state waters." Public Intervenor v. DNR, 115 Wis. 2d 28, 39 (1983).

The state has the power, as a trustee for the public to regulate public uses of navigable waters to best accomplish and promote the public interest. The unavoidable conclusion that the waters are subject to DNR jurisdiction is necessary to assure the realization of the purposes of the public trust doctrine: to promote navigation and to protect and preserve those waters for fishing, recreation and scenic beauty. Klingeisen v. DNR, 163 Wis. 2d 921, 929 (Wis. Ct. App. 1991).

9. Riparian owners do not have absolute rights to place structures in the waters, or use them in whatever form, especially if those structures interfere with public rights and interests. State v. Bleck, 114 Wis. 2d 454, 467 (1983); Mayer v. Grueber, 29 Wis. 2d 168, 173-74 (1965); Town of Ashwaubenon v. Public Service Commission, 22 Wis. 2d 38, 49 (1963); Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Co., 172 Wis. 363, 375; State ex rel. Thomas Furnace Co. v. Milwaukee, 156 Wis. 549, 553-54 (1914). The terms "public rights" and "public interest" include a broad range of considerations, including navigation and all its incidents, which include fishing, boating, swimming, hunting and enjoyment of scenic beauty. As clearly and repeatedly as the courts have asserted the conditional nature of riparian rights, so too have the courts "jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them." Delta Fish and Fur Farms, Inc. v. Pierce, 203 Wis. 519, 523 (1931).

10. The public trust doctrine reflects an effort by the law to balance the rights of riparians with rights of the public in waters held in public trust. The right of reasonable use of water was one of the rights assured owners adjacent to lakes and streams, others including the right to accretions, relictions, pierages and wharfages. What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource. State ex rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972). Factors to be taken into account include: ". . . the subject matter of the use, the occasion and manner

of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall . . ." Timm v. Bear, 29 Wis. 254, 265 (1871).

Balancing the rights of ABKA and the Condominium Association members, with the rights of the public to "use and enjoy" public waters it is clear that prior to the dockominium scheme, the public previously derived the benefit of the availability of seasonal rental of mooring slips on Geneva Lake. This public benefit offset the clearly excessive placement of 407 pier slips on public waters. If all of the pier slips were converted to private dockominiums, which may or may not be offered to the public for seasonal rental, the new use of public waters would clearly be unreasonable. A "reasonable use" of the riparian frontage would involve the placement of no more than 120 pier slips.

11. The DNR must consider the "cumulative effects" on public rights when considering an application for a Chapter 30, Stats., permit. Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577 (1966). There would be substantial detrimental "cumulative effects" reasonably anticipated from approval of conversion of all existing structures to "dockominium" status.

The blanket approval of such a conversion would detrimentally impact public access to public waters if large marinas which previously offered seasonal rentals to the public instead effectively sold such slips to private parties which may or may not re-rent them. Public access to public waters would also be detrimentally impacted because many individuals could not afford to "buy" a pier slip.

Both of these concerns can be remedied by a permit condition requiring that 287 slips be made available to the public for seasonal rental.

12. The Department, upon application and after proceeding in accordance with sec. 30.02(3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest. Section 30.12(2), Stats.

13. The proposed conversion of all existing pier slips would be detrimental to the public interest in navigable waters.

14. The project as modified by the permit conditions would not be "detrimental to the public interest" within the meaning of sec. 30.12, Stats., so long as it is maintained in a manner consistent with the permit conditions set forth below.

15. There is no express or implied "discrimination" against the condominium form of ownership in requiring that 287 pier slips be made available to the public for seasonal rental. The Department has consistently applied the "reasonable use" concept of the public trust doctrine to all forms of ownership. A marina that no longer regularly offers boat slips available for seasonal rental, regardless of the form of ownership, has undergone a substantial change in use that warrants re-examination of permit terms and conditions.

16. There is no violation of sec. 703.27, Stats., relating to zoning and building regulations. No "zoning or building regulations" are implicated in the instant sec. 30.12, Stats.,

permit proceeding. The instant permit as set forth below imposes no burden or restriction, of any kind, on the permit-holder which would not be applied to a similarly situated marina seeking to end regular seasonal rentals to the public.

17. On its face, sec. 703.27, Stats., does not apply to the State. State ex rel. Martin v. Reis, 230 Wis. 683, 689 (1939). The Attorney General has opined that statutes of general application do not apply to the state unless the state is explicitly included by appropriate language. (69 O.A.G. 103, 1980)

18. An individual condominium unit owner owns the lock-box unit located in the Harbor House. A condominium unit, together with its undivided interest in the common elements, constitutes real property for "all purposes." Sec. 703.04, Stats.

19. Because the unit owners hold the riparian property adjacent to the pier as a common element, they have riparian status within the meaning of sec. 30.12, Stats. Stoesser, op. cit.

20. The provisions of sec. NR 326, Wis. Admin. Code are binding upon the Division for purposes of reaching a decision in this contested case proceeding. Sec. 227.45(4), Stats. The ALJ lacks authority to rule on whether the Department exceeded its lawful authority in promulgating NR 326.

21. The provisions of NR 326 apply to the instant permit application. NR 326.02(1) and (2)(a), Wis. Admin Code.

22. Under NR 326, piers associated with marinas and other similar mooring facilities shall not extend into the waters from the shoreline beyond the line of navigation unless a permit is obtained under sec. 30.12(2), Stats. Such marinas shall be open to the public. Use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee. NR 326.04(8), Wis. Admin. Code.

23. Sec. 30.14(2), Stats. provides as follows:

(2) **HEARINGS BY DEPARTMENT.** Upon complaint by any person to the department that any wharf, pier or other structure exists in navigable water in violation of s. 30.12 or 30.13 or that any wharf, pier or other structure proposed to be built in navigable water will violate s. 30.12 or 30.13, the department shall investigate and may hold a hearing to determine whether the wharf, pier, or other structure is or would be in violation of those sections.

24. The structures as described above will not "violate" sec. 30.12, stats. so long as the facility is operated in accordance with the permit conditions set forth below. The permit conditions set forth below are necessary to preserve and protect the navigable waters held in trust for the public.

25. **NR 1.90 Public access policy for waterways.** (1) It is the goal of the State of Wisconsin to provide, maintain and improve access to the State's navigable lakes, rivers and streams for the public. Public access facilities shall allow for public rights of navigation, related incidental uses and other uses which are appropriate for the

waterway. Waterway uses shall be equally available to all waterway users and include enjoyment of natural scenic beauty and serenity. These public rights and uses may be provided by any combination of publicly and privately owned access facilities which are available to the general public free or for a reasonable fee. The department, alone or in cooperation with local government, shall exercise its management and regulatory responsibilities to achieve this goal and to assure that levels and types of use of navigable waters are consistent with protection of public health, safety and welfare, including protection of natural resources. Wis. Admin. Code.

26. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the co-applicants, ABKA, and the Abbey Harbor Condominium Association, Ltd., a permit under sec. 30.12, Stats., for the maintenance of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or become detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employe of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times and shall be made available to condominium unit-owners upon request.
4. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
5. The boat launch on the premises shall be regularly made available to the public for the launching of boats.
6. If the applicants choose not to regularly offer boat slips for seasonal rental, the total number of boats permanently moored in the marina shall not exceed 120. The applicant shall not allow more than one boat to occupy any slip other than on a temporary basis.
7. If the applicants chose to continue operation of a private marina regularly making boat slips available to the public by offering seasonal rentals, the total number of boats moored shall not exceed 407.

8. A total of 287 slips shall be rented or leased for a term not to exceed five years per rental or lease period. At the expiration of the five year lease or rental period, the rental agreement or lease may be renewed.
9. Availability of slips shall be advertised in the local newspaper of greatest general circulation at least twice each spring.
10. A waiting list of persons interested in renting or leasing a slip shall be maintained by the applicant with the waiting list kept current and updated at least once every two years.
11. The waiting list shall be made available to the Department upon reasonable request during normal business hours and at the normal office location.
12. Fees for slip rental or lease shall be reasonable. "Reasonable fees" means fees which are consistent with fees charged at similar facilities in the area which are available to the general public.

ORDER

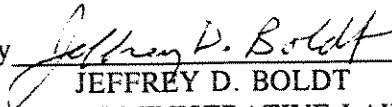
IT IS HEREBY ORDERED, that a permit be granted under the specific terms and conditions described above;

IT IS FURTHER ORDERED, that the Motion for Reconsideration of ABKA, relating to the admission of Exhibits 116 and 117 is DENIED, for the reasons stated at hearing;

IT IS FURTHER ORDERED, that the above-captioned actions be DISMISSED.

Dated at Madison, Wisconsin on July 29, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Madison, Wisconsin 53705
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FAX: (608) 267-2744

By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of ABKA)	
Limited Partnership to Transfer Ownership)	
and Modify the Permit for the Abbey Resort)	Case No. 3-SE-95-0080
Marina, Potawatomi Creek, Village of Fontana,)	
Walworth County, Wisconsin)	

DECISION AND ORDER ON MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER JURISDICTION

The applicant, ABKA Limited Partnership (ABKA), filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on May 23, 1995. ABKA filed numerous supporting affidavits and materials, along with its brief, on June 5, 1995. All parties submitted briefs and opposing affidavits and the last brief was received on August 2, 1995.

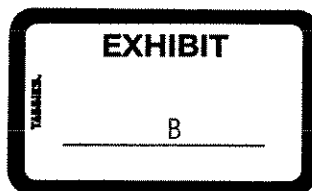
No party challenges the authority of the Division of Hearings and Appeals to rule on a dispositive motion pursuant to sec. 227.46(g), Stats.

Standard of Review

A motion to dismiss, pursuant to sec. 802.06(2)(f), Stats., supported by matters outside the pleadings, i.e., testimony and affidavits, is to be treated as one for summary judgment under sec. 802.02. See: sec. 802.06(2). Section 802.08(2) requires that summary judgment be rendered if ". . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Kania v. Airborne Freight Corp., 99 Wis.2d 746, 760, 300 N.W.2d 63 (1981).

In reaching the decision on the Motion, the Administrative Law Judge (ALJ) has applied the standard methodology recently restated by the Wisconsin Supreme Court.

The first step of the standard methodology used by a trial court when faced with a motion for summary judgment requires the court to examine pleadings to determine whether a claim for relief has been stated and a material issue of fact presented; if a claim for relief has been stated, inquiry then shifts to the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment.



If the moving party has made a prima facie case for summary judgment, the court must examine affidavits and other proof of the opposing party to determine whether there exists disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to trial. Voss v. City of Middleton, 162 Wis.2d 737, 747-748, 470 N.W.2d 625 (1991).

The Motion states that ABKA is the riparian owner of all property surrounding the Abbey Marina (the Marina); that it proposes to convey ownership to a Condominium Association; that there will be no change in the use of the Marina resulting from the change in ownership; and that the Department of Natural Resources (the DNR or the Department) has no express or implied statutory authority to require a Chapter 30, Stats., permit solely for the transfer of ownership of the Marina; and that, therefore, the Division of Hearings and Appeals lacks subject matter jurisdiction for these proceedings.

In support of its motion, ABKA's submission asserts the following:

"After the conversion of the Marina to the condominium form of ownership, The Abbey marina has and will continue to offer 407 boat slips for use by the public-at-large. (PFF 17.) The majority of the units and corresponding boat slips will be available to the public for purchase, and the balance will be available to the public, either directly from the Partnership, or from individual owners offering the boat slips for rental. (PFF 17.)"

ABKA argues that "conversion of Marina structures which have been validly permitted by the department does not implicate any impact on navigable waters which would involve any of the public trust issues which are the basis of Chapter 30, Stats."

In particular, ABKA asserts that there would be little change in use or users of the Marina as a result of the change in ownership. Specifically, that ABKA has sold approximately 172 units. Of those units sold, approximately 30% of the purchasers are not personally using the boat slips appurtenant to the units, but are in fact renting those boat slips to other members of the public. Further, that approximately 62% of the units conveyed have been purchased by individuals who have rented in the Abbey harbor for a consecutive period of years prior to the conversion. (Snyder affidavit, #4 & 5)

It is not clear that ABKA has made out a prima facie case for summary judgment on the issue of the Division's lack of jurisdiction. Clearly, reasonable alternative inferences can be drawn as to whether or not offering the majority of boat slips for purchase constitutes making marina slips available to the public. Availability to the public is a consideration in

whether an application is treated as a marina or an individual riparian (DNR Exhibit 11). However, examining the affidavits and other submissions opposing the motion to dismiss, it is clear that there are disputed issues of fact or undisputed facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing parties to hearing.

The Department argues that it has continuing jurisdiction to review structures permits pursuant to statute and the plain language of the existing permit. With respect to the latter issue, the Nesta affidavit labeled Exhibit 13 establishes that the Department expressly reserved the right "to change or revoke this permit if the project obstructs navigation or becomes detrimental to the public interest." The express language of the permits, DNR Exhibits 14 and 15, clearly establishes the jurisdiction of the Department to review the terms of the existing permits. Further, the plain language of sec. 30.07(2), Stats., provides as follows: "(f)or good cause, the department may modify or rescind any permit or contract issued under secs. 30.01 to 30.29 before its expiration." For purposes of the motion to dismiss, the ALJ finds, based upon the record as it currently stands, that there is a disputed issue of fact as to whether the plan to sell dockominium pier rights represents "good cause" for the Department to "modify or rescind" the sec. 30.12, Stats., permit.

The King and Johnson affidavits raise disputed issues as to whether the proposed dockominium plan violate the common law notion of the reasonable use of riparian property. Johnson states as follows:

"Since March of 1991, the Department has consistently taken the position that residential condominium owners are individual riparians not engaged in the sale or rental of boat slips and not subject to Ch. NR 326, Wis. Adm. Code. They are subject to reasonable use of riparian properties." (Ex. 16)

A reasonable inference of the Johnson affidavit is that a change in ownership could alter whether the application is considered a public marina or whether they are to be treated as a group of individual riparians. Department policy and guidance grants public marina applications greater leeway in the placement of piers than is afforded to individual riparians.(DNR Ex.11). Accordingly, a factual record needs to be developed to determine whether the proposed application would violate "reasonable use" standards. A record also needs to be developed to determine the applicability and effect of sec. 703.27, Stats., prohibiting discrimination against the condominium form of ownership.

The Department and the objectors also argue that "the extent of privatization proposed at the Abbey Resort" is detrimental to the public interest within the meaning of sec. 30.12(2), Stats. and/or violative of the Public Trust Doctrine. King raises the following disputed issues for hearing in DNR Exhibit 16:

Whether the proposed conversion of the public marina to a form of ownership which excludes, in whole or in part, public access violates the permits previously issued for the existing piers and structures; whether without the degree of public access available under the prior use and operation of this marina, the plan, piers and structures placed violate the Reasonable Use Doctrine; whether without the degree of public access available under the prior use and operation of this marina, the piers and other structures violate the department's own rules and guidelines for such piers and structures; whether the proposed change of ownership and operation will invalidate the existing permits and thereby place the existing piers in violation of the pier head line adopted pursuant to local ordinance and Chapter 30, Wis. Stats; whether the proposed form of ownership violates the Public Trust Doctrine embodied in the Wisconsin Constitution and common law; whether the proposed form of ownership and operation violates public rights guaranteed by Chapter 30, Wis. Stats.

Given these disputed issues of fact, jurisdiction in this matter rests upon the provision of sec. 30.12(2), Stats., requiring that a permitted structure be "not detrimental to the public interest." The terms of the existing permits and sec. 30.07(2), Stats. grant the Department authority to review the existing permits and the proposed dockminium conversion plan in light of compliance with the public interest in navigable waters and the common law public trust doctrine. It should also be noted that Chapter 30 allows for public participation in hearings relating to navigable waters of the state. While it may be appropriate under certain circumstances to dismiss a matter for want of jurisdiction prior to a public hearing, any doubts should be resolved in favor of allowing public participation in the hearing process. The motion to dismiss for want of jurisdiction is denied.

Both King and the Department assert jurisdiction under sec. 30.14, Stats., relating to complaints that "a structure exists in navigable waters in violation of sec. 30.12 or 30.13, Stats." ABKA has demonstrated that it has a valid permit pursuant to sec. 30.12, Stats., (DNR Exhibits 14 and 15). DNR has agreed that the existing permits are authorized under Chapter 30, Stats., (DNR Exhibit 10). No affidavits have shown that the existing permits were improperly granted. Accordingly, the only issue under sec. 30.14, Stats., is whether the marina configuration is in violation of its valid sec. 30.12, Stats., permit.

Pursuant to case law and NR 2.13(3)(b), the applicant for a permit has the burden of proof on a sec. 30.12, Stats., application. Village of Menomonee Falls v. DNR, 140 Wis.2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). Complainants have the burden of proof

in hearings under sec. 30.14, Stats., pursuant to Wis. Adm. Code sec. NR 326.06(3). Accordingly, the ABKA shall bear the burden of proof on the issue of whether or not the dockminium ownership conversion application meets the standards for issuance of a new permit under sec. 30.12, Stats. Geneva Lake Conservancy and/or any co-objectors shall bear the burden of proof on the issue of whether the existing configuration of piers is in violation of the existing sec. 30.12, Stats., permits. To facilitate an orderly and fair hearing process the objectors shall state in writing specifically how, if at all, the current configuration of piers violates the terms of the existing sec. 30.12, Stats., permits prior to September 15, 1995. All parties are given Notice that the November hearing shall include a sec. 30.14, Stats. complaint component limited as set forth above if the objectors comply with the Orders set forth below.

ORDER

Wherefore, IT IS HEREBY ORDERED, that the Motion to Dismiss, be DENIED.

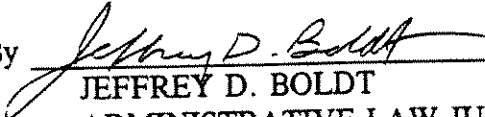
IT IS FURTHER ORDERED, that the burden of proof shall be allocated as described above.

IT IS FURTHER ORDERED, that the applicants shall proceed first with presentation of its case at the hearing set for November 13, 1995.

IT IS FURTHER ORDERED, that the issues be limited in the sec. 30.14, Stats. proceeding to whether the pier configuration violates the validly issued sec. 30.12, Stats. permits and that the objectors shall file in writing by September 15, 1995, a complaint stating specifics of how, if at all, the current configuration of piers exceeds the valid sec. 30.12, Stats., permits held by the applicants.

Dated at Madison, Wisconsin on September 1, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

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