

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_pt28c_SofC
- Record of Comm. Proceedings ... RCP
-

1996 August and
JCRAR - Service of complaints —
beyond

SENATOR RICHARD GROBSCHMIDT
CO-CHAIRMAN

Room 404 • Hamilton
Madison, WI 53707
Phone: 608-266-7505



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIRMAN

Room 125 West • State Capitol
Madison, WI 53703
Phone: 608-264-8486

JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES

MEMORANDUM

To: Members, JCRAR
From: Senator Richard Grobschmidt, Co-Chairman
Representative Glenn Grothman, Co-Chairman
Date: September 11, 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 *Thomas W. Reimann v. Michael L. Sullivan & Stephen Puckett*. A copy of the lawsuit is attached 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 : D A N E County

Name: THOMAS W. REIMANN
Address: POST OFFICE BOX 351
WAUPUN WIS 53963
City, State, Zip:

Plaintiff,

vs.

Name: MICHAEL L. SULLIVAN
& STEPHEN PUCKETT
Address: 149 EAST WILSON STREET
MADISON WIS 53707-7925
City, State, Zip:

Defendant.

96CV1807

96IP0140

File No.

SUMMONS

DECLARATORY JUDGMENT

(Case Classification Type)

30701

(Code No.)

THE STATE OF WISCONSIN

To each person named above as a defendant:

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

Within (45) days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is:

Clerk of Circuit Court

DANE

County Courthouse

210 MARTIN LUTHER KING BOULEVARD

MADISON WISCONSIN 53709

and to THOMAS W. REIMANN
plaintiff's attorney, whose address is:

POST OFFICE BOX 351

WAUPUN WISCONSIN 53963

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:

Clerk of Courts
by Deputy Clerk

You may have an attorney help or represent you.

If you do not provide a proper answer within (45) days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 29th day of April, 19

Thomas Reimann
Plaintiff

or

Plaintiff's Attorney's

State Bar No.

Address: POST OFFICE BOX 351
WAUPUN WIS 53963

Phone:

DANE COUNTY, WI

MAY 14 3 49 PM '96

CIRCUIT COURT

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

THOMAS W. REIMANN
POST OFFICE BOX 351
WAUPUN, WISCONSIN 53963,

96CV1807
96IP0140

Plaintiff,

-v-

Case No. _____

MICHAEL L. SULLIVAN
& STEPHEN PUCKETT
149 EAST WILSON STREET
MADISON, WISCONSIN 53707-7925

DECLARATORY JUDGMENT
30701

SECRETARY & DIRECTOR OF
THE OFFICE OF OFFENDER
CLASSIFICATION, WISCONSIN
DEPARTMENT OF CORRECTIONS,

IN THEIR OFFICIAL AND
INDIVIDUAL CAPACITIES,

Defendants,

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW the plaintiff, Thomas W. Reimann, and as for
a cause of action, alleges and shows to this court as follows:

JURISDICTION

This action is commenced pursuant to § 227.40(1), Wis.
Stats. Plaintiff seeks declaratory and injunctive relief.

PARTIES

1. Plaintiff Thomas W. Reimann is a State of Wis-
consin prisoner currently confined at the Waupun Correction-
al Institution. (hereinafter "WCI"). His address is: Post
Office Box 351, Waupun, Wisconsin 53963;

DANE COUNTY, WI

MAY 14 3 49 PM '96

CIRCUIT COURT

2. Defendant Michael L. Sullivan, (hereinafter "Sullivan") is employed by the State of Wisconsin, Department of Corrections, (hereinafter "DOC") as the Secretary of the DOC. His address is: 149 East Wilson Street, Madison, Wisconsin 53707-7925;

3. Defendant Stephen Pucket is employed by the State of Wisconsin, DOC, as the Director of the Office of Offender Classification. His address is also: 149 East Wilson Street, Madison, Wisconsin 53707-7925;

4. Defendants' acted within the scope of their employment at all times herein mentioned;

5. Defendants' are sued in their official and individual capacities;

F A C T S

COUNT ONE

6. Plaintiff is serving an aggregate sentence of 36 years and is rated as "maximum security" at present time;

7. Plaintiff is eligible for parole after serving $\frac{1}{4}$ of his sentence, (cf. § 304.06(1)(b), Stats.)

8. Plaintiff's initial parole eligibility date is April 13, 1999;

9. Plaintiff has been incarcerated since 1990 and has maintained an exemplary conduct record;

10. Despite plaintiff's exemplary record, he is retained in maximum security due to his "sentence structure";

11. As DOC Secretary, Sullivan has implemented the "DOC Risk Rating Guide" to determine when a prisoner should be considered for reduction in custody level;

12. The "DOC Risk Rating Guide" mandates that all prisoner's serving sentences in excess of 15 years are now required to serve one half of their sentences in a maximum security prison;

13. The "DOC Risk Rating Guide" has not been promulgated and adopted in compliance with § 227.40(4)(a), Stats., and is therefore invalid;

14. If Plaintiff was serving a life sentence for murder, he could be considered for reduction in custody as much as 7 full years prior to his initial parole eligibility date; (cf. § DOC 302.14(3)(b)3);

15. The WCI Program Review Committee utilizes the "DOC Risk Rating Guide" as the primary criteria when considering a reduction in custody rating;

16. The "DOC Risk Rating Guide" has in fact, made the WCI Program Review Committee the de facto parole board;

17. Plaintiff has exhausted his administrative remedies via the ICRS, to no avail (See ICI GB 1411-94);

COUNT TWO

18. § 301.048 Stats., as related to eligibility for the DOC's Intensive Sanctions Program mandates that to be DIS eligible, the prisoner must "be serving a felony sentence not punishable by life imprisonment";

19. The plaintiff is serving a "felony sentence" not punishable by life imprisonment;

20. The WCI Program Review Committee refuses to consider plaintiff for entrance into the DIS Program because he was convicted of delivery of a controlled substance;

21. On February 7, 1996, plaintiff submitted an Open Records request to Deputy DIS Administrator for copies of any/all valid administrative rules utilized to determine DIS eligibility;

22. On April 8, 1996, Mickey Thompson made an untimely response to plaintiff's Open Records request, and provided him with a "MEMO" from Puckett related to "screening criteria" for the DIS Program, dated March 7, 1994;

24. Puckett's March 7, 1994 "MEMO" mandates that anyone imprisoned for a "drug dealing offense" is ineligible for the DIS Program;

25. Puckett's "MEMO" was not promulgated and adopted in compliance with § 227.40(4)(a), Stats., and is invalid;

26. § DOC 333.04 related to "Eligibility for MS/DIS classification" makes no reference to drug offenders being precluded from DIS eligibility;

27. § DOC 333.02 states in relevant part:

"...This chapter and other administrative rules referenced in this chapter are the **only** administrative rules of the department that apply to inmates in the intensive sanctions program" (emphasis added);

28. Plaintiff has exhausted his administrative remedies via the ICRS, to no avail. (See ICI GB 1511-94);

DEMAND FOR RELIEF

WHEREFORE, the plaintiff requests that this court grant him the following relief:

- a. Issue a declaratory judgment rendering the aforementioned "rules" null and void;
- b. Issue a permanent injunction enjoining the DOC from utilizing the aforementioned invalid "rules" to retain plaintiff and all other prisoners similarly situated in maximum security and to deny them entry into the DIS Program;
- c. Plaintiff further demands a hearing to contest the validity of these "rules" as mandated by § 227.42(1) Wis. Stats.;

Respectfully Submitted,

Thomas Reimann

Thomas Reimann pro-se
Post Office Box 351
Waupun, Wisconsin 53963

DATED: This 29th day of April, 1996;

SERVED ~~PERSONAL~~ SUBSTITUTE AT 9:10 A.M.
THIS 27 DAY OF AUGUST 19 86
AT THE CITY OF MADISON
RICHARD F. FREMISON
BY Richard H. Hays
Deputy Sheriff

John

Sebastian, Julie

From: Krieser, Steve
Sent: Monday, September 23, 1996 4:38 PM
To: Amy Burke; Beth Rozman; Daniel Schooff; Georgia Maxwell; John Sumi; Kelly Rindfleisch; Les Wakefield; Martha Paskey; Rep.Grothman; Rep.Gunderson; Rep.Olsen; Rep.Plale; Rep.Wirch; Rich Judge; Sen.Darling; Sen.Grobschmidt; Sen.Shibilski; Sen.Welch; Sen.Wineke
Subject: Dockominium Lawsuit

Dear Membership, JCRAR:

You recently received notice that the JCRAR had been served in the matter of ABKA v. Department of Natural Resources. You will shortly receive notice of service on another, related suit. The DNR has prepared a general response to the lawsuits in question. Attached, please find this response. As always, please feel free to contact Steve Krieser in Rep. Grothman's office with questions.



Dockominium.doc

CORRESPONDENCE/MEMORANDUM**State of Wisconsin**

DATE: August 23, 1996 FILE REF: 8300

TO: Governor Tommy G. Thompson
Wisconsin State Legislators
Natural Resources Board
Regional Directors
Division Administrators

FROM: George E. Meyer, Secretary *George*

SUBJECT: Recent Decision Concerning Dockominiums and Public Marinas

The purpose of this memorandum is to provide information to you concerning a recent decision from an Administrative Law Judge which will have significant impacts on the future development of Wisconsin's waterways. In recent years, there has been a significant interest in the legality of converting existing public marinas to a "dockominium" form of ownership or developing new "dockominiums" in our waterways. The "dockominium" concept involves the "sale" of the right to use a boat slip under the Wisconsin condominium laws (Chapter 703, Stats.). Unlike a residential condominium development, "dockominiums" do not involve residential living units but, rather, usually involves the sale of limited amounts of shoreline to individuals along with either the sale or guaranteed right to use a pier slip.

This issue has been intensely controversial, with proponents of such sales asserting that the development of "dockominiums" is not different from other public marinas where pier slips are rented on a seasonal or longer basis. Opponents of this concept assert that such developments are tantamount to sale of Wisconsin's public trust waters and is precluded by Wisconsin's Constitution, which provides in Article IX, Section 1 that all "navigable waters... shall be common highways and forever free [to the citizens of the state and the United States]." There is a large body of judicial decisions, known as the "public trust doctrine", which interprets this Constitutional provision.

On July 29, 1996, an Administrative Law Judge of the Division of Hearings and Appeals of the Department of Administration issued a decision regarding the Abbey Resort Marina in the Village of Fontana, Walworth County. The Abbey had proposed to convert its 407 previously existing marina slips from seasonal rentals to dockominiums. The Abbey proposed to sell a "lock box" on the upland, which then granted the right to use one of the slips, for \$30,000 to \$50,000 per unit.

After a six day contested case hearing, which included participation by the Department of Natural Resources, the Wisconsin Realtors Association, the Wisconsin Association of Lakes, the Geneva Lake Conservancy, Oneida County, the Wisconsin County Code Administrators, the applicant, and numerous citizen participants, the judge ruled that there is a limited right



to market dockominium units, but that the conversion of the entire 407 public marina slips would be "detrimental to the public interest" in our navigable waters. The most significant points of the decision include:

1. The conversion of the entire marina to the condominium form of ownership would be detrimental to the public interest in navigable waters. The ALJ ruled that 120 of the 407 slips could be treated as "dockominiums" (for reasons outlined below), but held that the conversion of all the slips 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." He further ruled that there would be "significant cumulative detrimental impacts to the maintenance of public access to public waters." if this proposal, and similar proposals were allowed.

2. The condominium form of ownership itself does not violate the public trust, but the rights of the condominium developer are limited by the "public trust doctrine and the common law principle of "reasonable riparian use". The ALJ noted that any entity owning property adjacent to navigable waters, whether they acquire the ownership through fee simple or through a condominium form of ownership, has "the limited right to place a reasonable number of pier slips in public waters to gain access to said waters." To determine what is "reasonable" must be determined on a case by case basis. The ALJ stated:

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 was one of the rights assured owners adjacent to lakes and streams... 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(1972). (ALJ Decision at p 25).

The ALJ determined that under all the circumstances here, the "reasonable use" for the applicant, which held 4100 feet of frontage, was 120 slips. He determined that any slips beyond that number were beyond the "reasonable use" of the riparian owner and must be leased on a seasonal or short term basis (as other public marinas are) or removed from the public waterway.

3. It is appropriate, under proper circumstances, to allow more intense development of shorelines for public marina purposes. The ALJ noted that, under proper circumstances, it is appropriate to allow more intense development of shorelines where the facilities will not adversely impact public rights in the waterways and where the facilities are truly "public". He stated:

Prior to the [condominium] 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.

4. The Department of Natural Resources has been charged with the protection, management and maintenance of public trust waters in this state. It is appropriate for the Department to distribute Guidance Documents to its staff to assist them in understanding and applying the complex common law in the consideration of "reasonable use" and "public interest" issues. The Department has distributed Guidance Documents to its field staff in order to educate them in these complex common law issues and to assist in making threshold determinations concerning "reasonable use" and "public interest" issues. Some of the parties strenuously objected to the Department's distribution and use of such "Guidance" and asserted that it constituted improper rulemaking. They asserted that "the Department should be reprimanded and condemned for these actions." The ALJ ruled that it was not improper to provide such guidance to staff, stating:

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 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.

SUMMARY

I believe the decision of the ALJ is a sound one and appropriately balances the rights of private property owners and the public in our navigable waters consistent with the long standing "Public Trust Doctrine". By precluding the wholesale conversion of public marinas to dockominiums, and by defining the limits of future "dockominium" developments under the principle of reasonable use, it is my view that our navigable waters will continue to be truly public.

The Department will continue to apply the common law reasonable use concept as articulated in this decision in making its permitting decisions. These concepts, which require the

application of criteria to each specific fact situation, are sound, and are necessary to allow the Department to deal with the range of resource and public interest issues which routinely arise when dealing with the myriad of individual fact situations around the state.

Copies of this decision, which is 33 pages long, can be made available upon request.

There is a high likelihood this decision will be appealed to the courts. We will keep you apprised of any subsequent judicial decisions on this issue.

If you have any questions, please contact either Attorney Michael Lutz at 608-267-7456 or Attorney Michael Cain at 608-266-2177, who are the Department staff attorneys who worked on this case.

cc: Ken Johnson-SCR
Liesa Nesta-SED
Warden Robert Bramer-SED-Elkhorn
Lee Kernen-FH/4
Jim Kurtz-LS/5

SENATOR RICHARD GROBSCHMIDT
CO-CHAIRMAN

Room 404 • Hamilton
Madison, WI 53707
Phone: 608-266-7505



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIRMAN

Room 125 West, • State Capitol
Madison, WI 53703
Phone: 608-264-8486

SEP 25 1996

JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES

MEMORANDUM

John

To: Members, JCRAR
From: Senator Richard Grobschmidt, Co-Chairman
Representative Glenn Grothman, Co-Chairman
Date: September 23, 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 *Wisconsin Realtors Association V. Wisconsin Department of Natural Resources*. The case was filed in the Walworth County Court on August 27, 1996, and the case number is 96-CV-00438. A copy of the Petition for Judicial Review is attached.

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.

JAMES L. CARLSON

SEP 2 9 RECD

STATE OF WISCONSIN

CIRCUIT COURT

WALWORTH COUNTY

WISCONSIN REALTORS
ASSOCIATION, INC.

Petitioners,

Administrative Agency

Review Code: 30607

v.

95 CV 00438

THE DEPARTMENT OF
NATURAL RESOURCES,
STATE OF WISCONSIN,

Case No. 96-CV-_____

Respondent.

FILED
WALWORTH COUNTY CIRCUIT COURT

PETITION FOR JUDICIAL REVIEW

AUG 27 1996

TO: The Circuit Court for Walworth County

By: ILA McERLEAN

COMES NOW, the above-named Petitioner, Wisconsin Realtors Association, Inc., by its attorneys, Godfrey & Kahn, S.C., and petitions the Circuit Court for Walworth County for judicial review of an administrative Decision of the Department of Natural Resources under §§227.52 and 227.53, Wis. Stat., as follows:

1. Petitioner, Wisconsin Realtors Association, Inc., is a corporation organized under Chapter 181 of the Wisconsin Statutes, having approximately 11,000 members consisting of licensed real estate agents and other real estate professionals located in the State of Wisconsin with its home office and principal place of business located at 4801 Forest Run Road, Suite 201, Madison, Wisconsin 53704-7337.

2. Respondent, the Department of Natural Resources ("DNR" hereinafter) is an agency of the State of Wisconsin, as defined in §227.01, Wis. Stats., having its principal offices at

101 South Webster Street, P. O. Box 7921, Madison, Wisconsin
53707.

3. On or about March 13, 1995, ABKA Limited Partnership completed filing an application with DNR to authorize conveyance of an existing marina and its permitted structures at the Abbey Resort Marina at Fontana, Wisconsin, to a condominium form of ownership.

4. The said application of ABKA Limited Partnership was the subject of a proceeding before the State of Wisconsin Division of Hearings and Appeals styled "Application of ABKA Limited Partnership to Transfer Ownership and Modify the Permit for the Abbey Resort Marina, Potawatomi Creek, Village of Fontana, Walworth County, Wisconsin, as Case No. 3-SE-95-0080 (the "Proceeding" hereinafter).

5. Wisconsin Realtors Association, Inc. petitioned to intervene in the Proceeding on or about September 7, 1995. A copy of the Petition of Wisconsin Realtors Association, Inc. to intervene in the Proceeding is attached hereto as Exhibit A and incorporated here by this reference as though set out here at length.

6. On October 5, 1995, Jeffrey D. Boldt, Administrative Law Judge ("ALJ"), entered an order permitting Wisconsin Realtors Association, Inc. to intervene and participate in the Proceeding in accordance with §NR 2.08, Wis. Adm. Code.

7. On November 2, 1995 all of the parties to the

Proceeding including ABKA Limited Partnership, Geneva Lake Conservancy, Wisconsin Association of Lakes, Inc., Wisconsin Realtors Association, Inc., Richard J. Wooley, and DNR entered into a written stipulation, which, among other things, provided that, "No evidence will be offered at the hearing regarding whether any of the parties to this Stipulation have a substantial interest in the outcome of this proceeding. The parties to the stipulation specifically waive any right to challenge the standing of any of the stipulating parties to participate in the hearing or to appeal any decision issued as a result of the hearing."

8. The hearing in the Proceeding was held on November 13-17, 1995 and December 18, 1995 at Elkhorn and Madison, Wisconsin, with Jeffrey D. Boldt, Administrative Law Judge, presiding.

9. Wisconsin Realtors Association participated fully in the hearing, including the filing of prehearing motions and submission of hearing briefs.

10. On July 29, 1996, ALJ Boldt issued Findings of Fact, Conclusions of Law, Order and Permit, a copy of which is attached hereto as Exhibit B and the same is referred to hereinafter as the "Decision."

11. Wisconsin Realtors Association, Inc. is a trade association engaged in the promotion of the quality of the real estate industry including efforts to promote the interests of

that industry and the private property rights of Wisconsin citizens. Petitioner's members are involved in the ownership and transfer of properties subject to permits under Chapter 30, Wisconsin Statutes, and subject to water regulations affecting property rights including the Water Regulation Handbook produced by the DNR including Chapter 75 thereof titled, "Program Guidance - Riparian Berths and Moorings" and other statements of the policies or practices of the DNR in regard to the "reasonable use rule." For that reason, Petitioner and its members have a substantial interest in actions of the DNR affecting the creation, regulation, exercise and conveyance of property rights in and to structures permitted under Chapter 30, Wisconsin Statutes.

12. Wisconsin Realtors Association and its members are aggrieved by the Decision because:

a. The right to own, exercise and convey riparian rights are unlawfully limited by the Decision;

b. The Decision imposes and authorizes without legal authority the imposition of unlawful "set asides" by riparian owners seeking transfer of permitted structures under Chapter 30, Wis. Stat., or, by implication, seeking original permits for such structures.

c. The Decision is based on §NR 326.04(8) Wis. Adm. Code, which, as interpreted and applied in the Decision, is invalid and beyond the authority of the DNR,

and so construed and applied the rule creates an unreasonable, unauthorized and unconstitutional encumbrance upon the rights of all riparian owners in the State of Wisconsin;

d. The Decision discriminates against the condominium form of ownership;

e. The Decision is based on the "reasonable use doctrine" as interpreted by the DNR which is a rule under Wisconsin common law but which has never been promulgated as a rule by the DNR in accordance with Chapter 227, Wis. Stat.;

f. The Decision is based on guidances in the Water Regulation Handbook produced by the DNR including Chapter 75 thereof titled "Program Guidance - Riparian Berths and Moorings", which guidance constitutes an illegal rule in violation of Chapter 227, Wis. Stat.;

g. The Decision unconstitutionally requires the public dedication of property and authorizes the taking of property without just compensation;

h. The Decision is an erroneous interpretation of law, unconstitutional, arbitrary and capricious, and does not constitute an exercise of the DNR's lawful discretion; and

i. Other grounds not enumerated.

13. 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 procedure;
 - g. Otherwise not supported by the facts and applicable law;
 - h. Unconstitutional; and
 - i. An abuse of the agency's discretion, all within the scope of §227.57, Wis. Stat.

14. Wisconsin Realtors Association, Inc. requests 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 application for a permit for structures previously permitted under Chapter 30, Wis. Stat., simply because of a change in the form of ownership of the structures, namely, to a condominium form of ownership;
- b. DNR has no authority to require "set asides", impose advertising requirements, require waiting lists, and

impose rental rate restrictions on riparian owners of structures permitted under Chapter 30, Wis. Stat.;

c. Section NR 326.04(8), Wis. Adm. Code, is inapplicable to the structures involved in the Proceeding or, in the alternative, is invalid as beyond the authority of DNR;

d. The reasonable use doctrine as interpreted by the DNR is invalid as a rule not promulgated in accordance with Chapter 227, Wis. Stat.;

e. The DNR's Guidances regarding the reasonable use rule including Chapter 75 of the Water Regulation Handbook titled "Program Guidance - Riparian Berths and Moorings" and any other statement of the policies or practices of DNR in regard to the "reasonable use rule" are invalid as rules not promulgated in accordance with Chapter 227, Stats.;

f. 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;

g. DNR's Decision and the authority and policy it articulates is an invalid imposition of a public dedication requirement and an unconstitutional taking of property without just compensation.

15. Grounds upon which Wisconsin Realtors Association contend that the Decision should be reversed, modified or remanded are as follows:

a. The fairness of the proceeding and the correctness of the action has been impaired by a material error in procedure and a failure to follow prescribed procedure;

b. The DNR has erroneously interpreted a provision of law and a correct interpretation compels a particular action;

c. The Findings of Fact and Conclusions of Law in the Decision are not supported by substantial evidence in view of the entire record as submitted;

d. The Decision is outside the range of discretion delegated to the DNR by law;

e. The Decision is inconsistent with an agency rule and an officially stated agency policy and the deviation is not satisfactorily explained in the Decision;

f. The Decision is in violation of constitutional and statutory provisions; and

g. Other grounds not enumerated.

WHEREFORE, Petitioners request judicial review of said actions of DNR in accordance with Chapter 227, Wis. Stat., determining that the Decision is null, void, *ultra vires*, and of no effect, or reversing same, or modifying same in whole or in

part, or remanding same to DNR for further action in accordance with law.

Dated this 26th day of August, 1996.

GODFREY & KAHN, S.C.
Attorneys for Wisconsin
Realtors Association, Inc.

By: Kelly B. Servais
Winston J. Ostrow
1016942
Kelly Bogart Servais
1016254

POST OFFICE ADDRESS:

Godfrey & Kahn, S.C.
P. O. Box 13067
Green Bay, Wisconsin 54307-3067
(414) 432-9300
Fax: (414) 436-7988

COPY

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

PETITION OF WISCONSIN REALTORS ASSOCIATION, INC.
TO INTERVENE

COMES NOW the Wisconsin Realtors Association, Inc., by
its attorneys, Godfrey & Kahn, S.C., by Winston A. Ostrow, and
respectfully shows the following:

1. Petitioner, Wisconsin Realtors Association, Inc.,
is a corporation organized under Chapter 181 of the Wisconsin
Statutes, having approximately 11,000 members consisting of
licensed real estate agents and other real estate professionals
located in the State of Wisconsin with its home office and
principal place of business located at 4801 Forest Run Road,
Suite 201, Madison, Wisconsin 53704-7337.
2. Petitioner is a trade association engaged in the
promotion of the quality of the real estate industry including
efforts to promote the interests of that industry and the private
property rights of Wisconsin's citizens. Petitioner's members
are involved in the ownership and transfer of properties subject
to permits under Chapter 30, Wisconsin Statutes, as well as water
regulations affecting property rights including the Water
Regulation Handbook produced by the Wisconsin Department of

EXHIBIT

Natural Resources including Chapter 75 thereof titled, "Program Guidance - Riparian Berths and Moorings" or any other statement of the policies or practices of the Department of Natural Resources in regard to the "reasonable use rule." For that reason, Petitioner submits that it and its members have substantial interests which are likely to be effected by any decision made in respect to the contested case hearing in the above-entitled matter.

3. Petitioner is aware of the Pre-hearing Conference Report and Scheduling Order entered in the above matter on May 30, 1995, and agrees to abide by the same.

4. Therefore, Petitioner requests permission to intervene and participate in the above-entitled contested case hearing in accordance with NR2.08 of the Wisconsin Administrative Code.

Dated this 7th day of September, 1995.

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Intervenor, Wisconsin
Realtors Association, Inc.

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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 ODEG 21MIN 40SEC W 24.75 FEET; THENCE N 89DEG 38MIN 20SEC E 155.00 FEET TO THE POINT OF BEGINNING; THENCE N ODEG 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 dockminium 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 dockminium 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 dockminium 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 dockminiums 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 dockminiums, an

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

Dockminiums provide access to the waterways to a select group of the public. Dockminium 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, dockminium ownership that aids an exclusive class of boat owners does not satisfy the crucial public purpose requirement of the doctrine. Dockminiums: 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 dockminium 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 dockominium 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 dockominium 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 dockominium 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 unrebutted 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; Maver 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. R'y. 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 dockminium 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 boats 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
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE



NOTICE

See attached for 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.

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