



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Abatement Action on the
Motion of the Department of Natural Resources to
Remove an Alleged Fixed Houseboat Owned by
Dennis V. Miller and Located on Lake Superior at
the Port Wing Marina in the Town of Port Wing,
Bayfield County, Wisconsin

Case No. INF-NO-2004-04185

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Port Wing, Wisconsin on July 16, 2009, Jeffrey D. Boldt, administrative law judge, presiding. The hearing record was closed on August 7, 2009, when the parties were required to respond to an e-mail submission of photos of the subject houseboat.

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

Department of Natural Resources, by

Attorney Megan E. Correll
DNR
P. O. Box 7921
Madison, WI 53707-7921

Dennis Miller, by

Attorney Gene D. Linehan
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Dale Jardine
Port Wing Marina
7835 State Highway 13
Port Wing, WI 54865

FINDINGS OF FACT

1. On May 5, 2009, the Department of Natural Resources filed a Request for Hearing with the Division of Hearings and Appeals. The Department of Natural Resources (WDNR or Department) is seeking an Order from the Division of Hearings and Appeals directing Mr. Miller to remove the fixed houseboat in its entirety from Lake Superior's Port Wing Marina within 30 days of issuance of such an Order.
2. From approximately 1999 to 2001, Dennis V. Miller (Mr. Miller) constructed a houseboat that was located on upland during this time. He later named the boat the Friar's Mistress ("the Miller houseboat").
3. On or about September 2001, Mr. Miller placed the houseboat on Lake Superior at the Port Wing Marina located in the Town of Port Wing, Bayfield County, Wisconsin.
4. Mr. Miller's houseboat consists of two-levels which sit on four 40-foot pontoons. The houseboat is served with electricity, including electric heat, and contains a fireplace. In addition, the houseboat at one time contained a full sized shower and standard toilet served by a sanitary sewage tank. The houseboat is currently served by a much more modest portable toilet device. On the landward side, the houseboat is attached to a wooden pier which attaches to the shore at the Port Wing Marina. On the lakeward side, the houseboat is connected by ropes tied to steel marina poles placed in the lakebed. Miller testified that it took him a matter of minutes to detach the vessel from shore in preparation for navigation.
5. At one time, Mr. Miller advertised the houseboat as available for weekly lodging rental, listing amenities that did not include navigating the houseboat. Mr. Miller testified that this was because he did not have a Captain's license and so he was not legally authorized to do so. Miller testified that during the period of 2003 to 2005, he rented out the houseboat "six or seven" times. However, Miller now has a co-owner partner and no longer rents the houseboat out as a cabin. He currently uses the boat solely as a personal watercraft that he shares with his business partner, family and friends. (Miller)
6. The houseboat extends into the Port Wing Marina waterway beyond the ordinary high watermark, into the waters around the Port Wing Marina which leads via the channel to Lake Superior, a navigable public waterway. The parties stipulated that the houseboat was placed in navigable waters.
7. Numerous people testified that they had seen the boat navigating in the channel, the bay and Lake Superior proper. Mr. Bruce Notzke said that he had personally been aboard and served as "first mate" and lookout as the houseboat went out "at least" a dozen or more times. This was consistent with Mr. Miller's testimony that he had operated the boat many times, including more than a dozen times with the smaller 35 horsepower motor. Miller testified that only in the very first year in which he placed the boat did he use it as few as a couple of times a year, and that in many years he navigated it as many as 7 or 8 times over the boating season. Robert Burns testified that he had seen the boat navigating at least three times in recent years. Christopher Johnson observed the boat out as well. Miller also provided a photograph of the

houseboat navigating Lake Superior. (Ex. 35) Further, Miller submitted two video DVD's that show the houseboat navigating in the water of Lake Superior. (Exs. 39 and 40) The video of Exhibit 40 clearly shows the The Friar's Mistress navigating on Lake Superior and using the same two-person lookout method described by both Miller and Notzke. This method is necessary because of a poor design that restricts the line of sight of the boat's captain. However, the U.S. Coast Guard has examined the houseboat and confirmed that it meets all applicable Vessel Safety Check standards. (Ex. 33, 7/3/09)

Wis. Stat. § 30.121(2) prohibits a fixed houseboat from being constructed and placed beyond the ordinary high water mark of any navigable waterway, after December 16, 1979. The houseboat in question is not a fixed houseboat within the meaning of that statute or 30.01(1r) because it has "actually been used for navigation" dozens of times in recent years.

8. Any boat that was placed on public waters and then never moved would materially obstruct the ability of the public to navigate or fish in the area of public waters where the boat was permanently placed. (Spangberg) However, as set forth in finding #7 above, the Miller houseboat has actually been used for navigation on numerous occasions in recent years. Public waters are thus available to the public on occasions when the boat is navigating Lake Superior. The DNR did not establish that the Miller houseboat materially obstructs navigation.

9. The houseboat is not "retained in place either by cables to the shoreline or by anchors or spudpoles attached to the bed of the waterway." Rather, the boat is anchored by ropes tied to steel poles that are used by other boats at the Port Wing Marina. (Jardine)

DISCUSSION

The Friar's Mistress is a houseboat that has been regularly used for navigation on the single most challenging public water body in the state, Lake Superior. It is not a fixed houseboat or a watercraft in name only.

In an earlier case, the Division granted the DNR an order revoking a boat registration, where a boat had not been used for navigation for over 15 years. *In the Matter of the Revocation of Boat Registration #WS3463CZ and Wisconsin Boat Title #930265451 Issued to Eugene Hintz of Brookfield, Wisconsin, Case No. IH-07-11* (See also: *Eugene Hintz v. Wisconsin Department of Natural Resources, Waukesha County Case No. 08-CV-2704*, sustaining that determination) While that case was undertaken under a different statute, the facts in that case stands in sharp contrast to facts in this one—where the Miller houseboat has been regularly used for navigation on Lake Superior.

Numerous witnesses testified that they had been on the Miller houseboat as it navigated in public waters over the past five years. (Miller, Notzke, Johnson, Burns) The DVD videos showing the boat tooling around Lake Superior and environs provide ample assurance that their testimony is both credible and corroborated by other evidence.

In fairness to the Department, the fact that Mr. Miller advertised the houseboat as a de facto cabin that had nothing to do with navigation created a strong presumption that the primary purpose of the houseboat was not navigation. The Department has an obligation to keep public waters public and not used as private rental hotels. Pier slips are incidents to navigation—that's the only reason they, and the boats moored at them, are allowed to occupy public waters. (See: Wis. Stat. § 30.12)

However, Mr. Miller has not been advertising the houseboat as a weekend cabin rental for the past few boating seasons. Rather, the Miller houseboat has been “actually used for navigation” within the meaning of § 30.01(1r).

The “Friar’s Mistress” was built as a houseboat and has been regularly used for navigation since—more than a dozen times, according to the credible testimony of Mr. Notzke. On this record, the primary purpose of the Miller houseboat is for navigation.

Accordingly, the DNR has not shown that the Friar’s Mistress is a “fixed houseboat,” nor a public nuisance under Wisconsin law.

At the close of the hearing, both parties agreed that the Division should rule only on the basis of state law, and, accordingly, there is no need to reach Miller’s objection to the jurisdiction of the state on the basis of the federal Certificate of Documentation issued by the U.S. Department of Homeland Security, United States Coast Guard.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has the authority to hear contested cases and issue necessary orders in matters relating to allegations of a public nuisance under Chapter 30.

2. Wisconsin Stat. §§ 30.121(7), 30.15(3) and Wis. Admin. Code § NR 325.13 provide the Department with specific enforcement authority to order removal, upon its own motion, of a fixed houseboat which materially obstructs navigation and further provides for statutory penalties for each offense, with each day the violation exists constituting a separate offense. The DNR did not establish that the boat materially obstructs navigation.

3. Wisconsin Stat. § 30.294 provides that “[e]very violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person.” The Department did not establish that the boat is a public nuisance.

4. "Fixed houseboat" means a structure not actually used for navigation which extends beyond the ordinary high-water mark of a navigable waterway and is retained in place either by cables to the shoreline or by anchors or spudpoles attached to the bed of the waterway. § 30.01(1r) "Not actually used for navigation" means that, while possibly floatable and maneuverable, the primary purpose is not navigation. NR §

325.03(8) The Miller houseboat is primarily used for navigation and has been used for this purpose dozens of times in recent years.

5. "Great Lakes water body" means Lake Superior or Lake Michigan and includes any bay or harbor that is part of Lake Superior or Lake Michigan. § 30.01(2m)

6. The WDNR did not establish that Mr. Miller has placed an illegal fixed houseboat in contravention of the prohibition in Wis. Stat. § 30.121(2) and in violation of Wis. Stat. § 30.121(4).

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the Department's request for an Order to Remove the boat in question is DENIED.

Dated at Madison, Wisconsin on August 11, 2009.

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

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 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 Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
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 therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. 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 and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.