

Order

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of the City of Middleton for a)
Permit to Place a Pier on the Bed of Lake) Case No 3-SD-95-3007
Mendota, City of Middleton, Dane County,)
Wisconsin)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

On January 19, 1995, the City of Middleton, 7426 Hubbard Avenue, Middleton, Wisconsin, 53562, applied to the Department of Natural Resources for a permit to place a pier on the bed of Lake Mendota pursuant to sec. 30 12, Stats. The proposed project will consist of an upgrade of existing small piers to provide mooring capability and better wheelchair accessibility. Two existing piers will be replaced by a thirty foot long launching pier, and a 120 foot long mooring pier. The mooring pier is expected to accommodate ten power or sail boats having a length of twenty feet. The proposed project is located in the City of Middleton, Dane County in the NE 1/4 of the NE 1/4 of Section 12, Township 7 North, Range 8 East, at the Lake Street Boat Launch

The Department of Natural Resources issued a Notice which stated that unless written objection was made within thirty days after publication, the Department might issue a decision on the permit without a hearing. Several timely objections were received.

On February 27, 1996, the file was submitted to the Division of Hearings and Appeals for hearing.

Pursuant to due notice including notice publication hearing was held on April 29-30, 1996, at Madison, Wisconsin before Jeffrey D Boldt, Administrative Law Judge (the ALJ). The parties requested an opportunity to submit written closing arguments, which were received on May 15, 1996.

The hearing record was re-opened for the limited purpose of taking additional testimony on water-depths on May 22, 1996

In accordance with secs. 227.47 and 227 53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1 The City of Middleton, 7426 Hubbard Avenue, Middleton, Wisconsin, 53562, completed filing an application with the Department for a permit under sec. 30.12, Stats., to place two pier structures on the bed of Lake Mendota, City of Middleton, Dane County. The Department and the applicant have fulfilled all procedural requirements of secs 30.12 and 30.02, Stats.

2. The applicant owns real property located in the City of Middleton in the NE 1/4 of NE 1/4 in Section 12, Township 7 North, Range 8 East, Dane County. The above-described property, the City right-of-way at the end of a dead end street, abuts Lake Mendota which is navigable in fact at the project site.

3. The applicant proposes to replace two existing approximately 35 foot launching piers with two new pier structures. Both of the new piers would be placed and removed seasonally. A new 30 foot long launching pier would be placed at the approximate location of the existing south

pier. The north pier would be replaced with a pier extending 120 feet into the lake, with three lateral twenty foot pier extensions, and one ten foot lateral pier extension. This pier would accommodate a total of 12 boats. The two landward slips would be used for the launching of boats and for personal and boating emergency access to shore. The two slips of the southern pier would also be used for launching and retrieving boats and for emergency mooring. The City owns 66 feet of lake frontage. The new piers would be five feet wide, one foot wider than the existing piers. This would facilitate easier access to the piers for people using wheelchairs. The City also intends to re-grade the concrete ramps leading to the piers to a slope better suited for wheelchair use

4. The shoreline is intensely developed near the project site. There are few remaining natural features along the shoreline. Vegetation in the area consists of grass, shrubs and ornamental trees. As noted, there are concrete ramps leading to both of the existing launch piers. Existing private piers in the area in and around the project site extend 50 to 70 feet into the lake. The neighboring riparians to the north are the Century Harbor Condominiums; to the south, the Middleton Boathouse Company. Each have placed multiple pier structures in the lake annually. The condominium owners place 8 piers, on their 244 feet of frontage, extending a maximum of 25 feet into the lake. The boathouse owners place 12 piers, extending a maximum of 70 feet into Lake Mendota on their 305 feet of frontage. Both sets of neighboring piers are privately owned and not made available to the public. The Middleton Boathouse Company is undertaking the filling of the near-shore area with concrete blocks to the bulkhead line. Under these highly developed circumstances, placement of the proposed piers would not have a detrimental impact on natural scenic beauty.

5. Water depths at the site are subject to seasonal variations relating to the controlled water levels on Lake Mendota maintained by the Tenny Park Dam. (Ex. 40) The relevant water depths relate to the boating season. A minimum water level of 849.6 feet mean sea level datum is maintained from the first spring runoff occurring after March 1 to October 30; the maximum water level is 850.1 feet; the average operating range is 849.85 feet. However, DNR employees Amundson and Warden Kuzma recently found higher than maximum water levels (850.28 to 850.30 feet) on May 20, 1996. Under these conditions, the water depth at 120 feet measured from 5.6 to 5.7 feet across the approximate width of the pier. On the same date, water depth at the end of the existing north pier measured from 4.1 to 4.3 feet; and 3.7 for the south pier. The original City plan had put water depths at 120 feet from shore at 4.8 feet, but these reflected winter water levels.

One of the City's objectives is to provide a facility which accommodates fixed keel sailboats requiring four feet of draft, taking into account wave action and submergent vegetation. Even assuming a minimum summer water level, this purpose should be accomplished with the approved modified pier plan.

6. The other stated purposes of the proposed project are to: upgrade the existing pier structures and make them wheelchair accessible (no party objects to this in and of itself but only in connection with their other objections to extending the piers); to provide for temporary mooring spaces that provide access to on-shore services; to create a fishing spot in deeper water at the end of the larger pier.

7. Lake Mendota covers an area of some 9,842 acres. Many boaters use the existing launch piers to gain access to the lake. The proposed piers would not materially obstruct this primary use of the project area because the plan calls for reserving both slips at the smaller launch pier and the two near-shore slips on the launch pier for this purpose. DNR Warden Kuzma noted that waterskiers use an area just south of the site to turn around, due in part to calmer water in the area. Some fishermen and canoeists might have to navigate somewhat farther from shore than they would if the north pier was not expanded. This inconvenience must be balanced against the aid to navigation which would be provided by the larger and improved public piers. Numerous boaters testified that navigation would be enhanced by the proposed temporary mooring spaces which would allow short-term access to such navigation-related services as fuel, hardware, food, medical care and related services. Further, the temporary mooring spaces will increase the capacity of the project site to act as a harbor of refuge during storms. As modified in the permit, the north pier will be twenty-five feet closer to shore. The piers as modified will not materially obstruct existing navigation on Lake Mendota.

8. Neighboring riparians raised numerous objections to pier expansion. Mr. Janus raised concerns that increased boat traffic in the area would result in more boats navigating in the area of the riparian zone of the owners of the Middleton Boathouse Association. Ms. Lisse, on behalf of the Century Harbor Condominium Owners, voiced similar concerns. Ms. Lisse also expressed concerns that the larger pier structure would impede the ability of small sailboat operators to gain access to the lake. Further, she recalled the experience of her late husband having difficulty tacking in to shore around a larger sixty-foot pier that had been installed in recent years. However, several other experienced sailors testified that the piers should have no significant impact on the ability of small sailboat operators to launch or return even from neighboring properties. David Gorwitz and Clinton Chamberlin noted that it is common for sailors to walk, paddle or scull their boats to an area of steady winds.

9. The proposed piers exceed a reasonable use of 66 feet of lake frontage by even a municipal riparian. The proposed plan is accordingly modified to the maximum reasonable use as follows: the north pier shall be reduced in length by twenty-five feet, and the lake-ward most twenty foot lateral extension is eliminated. This eliminates three temporary mooring berths (slips #1, 2 and 9 on Ex. 3) This modification should mitigate to some degree the concerns of neighboring riparians. Reduction of the size of the proposed pier and of the number of temporary mooring spaces should reduce congestion in the area and still accomplish the basic purposes of the City project.

Further, the record was overwhelming that the proposed ten foot extensions (slips 7 and 8 on Ex. 3) are not a good design feature because they would congest traffic attempting to use the launch piers. City of Middleton Assistant Director of Public Works Toby Ginder candidly testified that he believed the pier would be a better design if this finger pier, nearest the shore, were eliminated. Numerous other witnesses, including several otherwise supportive of pier expansion (Chamberlain, Dykman), stated reservations that this finger pier did not allow a sufficient area for the ingress and egress of boats using the launch lanes. Accordingly, this finger pier is not approved and is eliminated by permit condition. Elimination of the ten-foot lateral finger pier (slips #7 and #8) should reduce the stress of boat traffic in and around neighboring properties, the Middleton Boathouse area in particular.

Finally, the record was also clear that use of the facility as a fishing pier would be facilitated by a permit condition restricting the mooring of boats at the most lake-ward eastern end of the pier. The permit as modified reflects the essentially undisputed factual evidence on this point.

10. Department witnesses expressed concerns that authorizing use of the temporary mooring slips at this site would be an unreasonable use by the riparian owner, the City of Middleton, to confer quasi-riparian status on back-lot businesses, especially Captain Bill's restaurant. The proposed donation of the pier by Captain Bill's is not relevant to this proceeding because the donation has not yet occurred and because there was no evidence that it would impose any conditions on the use of the pier. The permit as issued contains a provision that use of the pier must be made available to the public on a first-come, first-serve basis.

The record as a whole reflected that other on-shore services were also in demand by boaters using Lake Mendota. Many boaters testified about the dearth of access to needed boating amenities on Lake Mendota. On this record, some access to on-shore boating-related services constitutes a reasonable public use of the public waters. There is a hardware store, access to gasoline and medical services all within a short walk of the piers. The temporary mooring spaces are to be limited to a period of two hours.

The Department was also concerned that public waters do not become a parking lot for access to private businesses. The permit as modified recognizes that it would be inappropriate to have a large multi-slip pier solely for use as a parking lot. The number of temporary mooring berths has been reduced from 10 to 4. However, the modified permit recognizes that access to on-shore services may indeed be an incident to navigation when such services are in short supply.

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

12. The modified pier plan will not be detrimental to the public interest upon compliance with the conditions of this permit.

13. The proposed structures will not reduce the effective flood flow capacity of Lake Mendota upon compliance with the conditions in the permit.

14. The proposed structures will not adversely affect water quality nor will they increase water pollution in Lake Mendota. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats., if the structures are built and maintained in accordance with this permit.

15. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact. Construction of piers is a Type III action which does not require preparation of a formal environmental impact statement.

DISCUSSION

This case involves numerous conflicts between users of Lake Mendota. The City seeks to establish a much larger pier than any others in the area, but make the same available to the public. The private neighboring riparians, having themselves placed numerous piers for their exclusive use, argue in part that boats will intrude on "their" riparian zone on public waters, increase boat traffic, and make it difficult for users of small sailboats. The DNR is concerned about the precedential effect of permitting 12 pier slips on a dead-end right-of-way consisting of only 66 feet of lake frontage.

The Wisconsin Supreme Court (Justice Robert Hanson), surveying similar user conflicts on Elkhart Lake, observed as follows:

Like the blindmen of Ind in the fable, each of whom described an elephant in terms of the portion of the animal he had encountered, neither is wrong, but neither gives the full picture. Actually a lake is many things to many people. The totality of its preciousness as a public asset or state resource is not caught in the uses to which it is put--swimming, fishing, boating (canoeing, rowboating, sailboating, powerboating), skin diving, resting, relaxing, just looking and enjoying the view. . . . It extends to what is reasonable in the preservation or restoration of a lake as a valuable natural resource of a state and its people Menzer v. Elkhart Lake, 51 Wis 2d 70, 74 (1970)

The public trust doctrine reflects an effort by the law to see the whole lake by balancing 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).

The project site represents the only remaining lake front property owned by the City. The City wants to do something grand. However, a riparian can only do so much with a dead-end street and 66 feet of frontage. The pier as modified below represents the extreme limits of what could be considered a reasonable use by a riparian owning such a small parcel. 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. The applicant, riparian owner of just 66 feet of frontage, would be entitled to just two slips under a strict application of the non-binding reasonable use guidance. However, the record supports a larger pier structure for the following reasons. First,

the structure will be open to the public and will be subject to the control of the municipal government. See, generally, State v. PSC, 275 Wis. 112, 114 N.W.2d 71 (1957) and City of Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674 (1957). Second, the area is already highly developed and the pier expansion will have little or no effect on the environment at the site. Third, use of this area as a boat launching and public pier site dates back many years. The pier expansion, as modified, is consistent with historic uses of the water at the site.

The DNR argues forcefully that providing access to on-shore services is not an "incident to navigation," in part because these businesses are not themselves riparians. The Department is concerned that public waters not become proliferated with piers serving as a "parking lot" for on-shore businesses. However, this project represents much more than short-term boat mooring for back-lot businesses. The existing launching piers will be upgraded and made more accessible. Fishing off the longer pier is likely to occur. More fundamentally, Yahara Lakes counsel notes that the public trust law began as a public effort to secure the basic right of the public to use waterways for transportation. Commerce was at the heart of the original conception of the public trust doctrine. While the public trust doctrine has grown to include wider concerns, there must still be a place for transportation and commerce in the balancing of uses and users of public waters.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
2. The proposed facilities described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.
3. The Division of Hearings and Appeals has authority under secs 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
4. 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 applicant, a permit under sec. 30.12, Stats., for the construction of structures 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 during the construction of the structures.

4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.

5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

6. The permittee shall notify the Water Management Specialist, Clark Amundson, not less than five working days before starting construction and again not more than five days after the project has been completed.

7. Any area disturbed during construction shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.

8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Water Management Specialist, Clark Amundson, at least five working days in advance.

9. No boats shall be moored at the lakeward end of the pier, slip 3 as indicated on Attachment One.

10. Boat mooring slips 1, 2, 9, 7, and 8 as described on the attached Pier Plan are DENIED, for the reasons set forth above.

11. No overnight mooring shall be allowed.

12. Pier slips 11, 12, 13, and 14 shall be reserved for the launching of boats, except in the event of a boating or personal emergency.

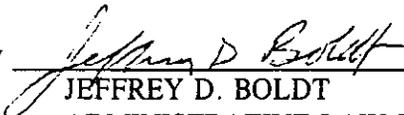
13. Boats may be moored at slips 4, 5, 6 and 10 for a period of no more than two hours, on a first-come, first-served basis. The City of Middleton shall be responsible for enforcement of this provision. It is expected that the City will adopt an ordinance for this purpose.

14. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on June 11, 1996

STATE OF WISCONSIN
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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 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.