Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of the Town of Salem to Discontinue a Public Access to Hooker Lake, Town of Salem, Kenosha County, Wisconsin	Case No.: IH-07-07

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Town of Salem in Kenosha County has completed filing an application with the Department of Natural Resources for a permit pursuant to Wis. Stat. § 66.1006, to discontinue a public access to Hooker Lake located at the intersection of 81st Street and 238th Avenue, in Section 11, Township 1 North, Range 20 East, Town of Salem, Kenosha County, Wisconsin.

The point at which the 81st road right-of-way meets Hooker Lake provides public access to water. The Town of Salem will not replace this road right-of-way with another property.

The Department of Natural Resources issued Notice of Proposal to Abandon a Way to Water which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. Timely objections were received. On March 30, 2007, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice, hearing was held at Bristol, Wisconsin on June 6, 2007. The parties requested an opportunity to submit written closing arguments, and the last was received on June 19, 2007.

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

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FINDINGS OF FACT

1. The Town of Salem, by action of the Town Board, passed Resolution No. 05 10 10 A on October 10, 2005. The Resolution sought to discontinue a public access to Hooker Lake, located at the intersection of 81st Street and 238th Avenue, in Section 11, Township 1 North, Range 20 East, Town of Salem, Kenosha County, Wisconsin.

2. The Town forwarded the Resolution for consideration by the State of Wisconsin, Department of Natural Resources (the DNR) on October 31, 2005.

3. On January 26, 2006, the DNR issued a Notice of Proposal to Abandon a Way to Water, relating to the proposed abandonment of the public road right-of-law at 81st Street where it meets Hooker Lake. (Ex. DNR 5)

4. On February 26, 2006, the Hooker Lake Management District requested a public hearing on the proposed abandonment, and stated that it would appear at hearing to oppose the proposed abandonment. (Ex. DNR 6)

5. On March 30, 2007, the matter was forwarded to the Division of Hearings and Appeals for hearing, which was noticed and held on June 6, 2007.

6. At hearing the DNR did not take a position on whether or not the abandonment should be approved, but did set forth proposed Conditions for Approval of Abandonment and Requirements for Replacement Access. (Ex. DNR 22)

7. Hooker Lake (the Lake) is a drainage lake fed primarily by surface water and groundwater. It is located in Kenosha County, within the Town of Salem and the Village of Paddock Lake. The Lake covers approximately 87 surface acres. The

proposed public access area to be abandoned is a roadway right-of-law owned by the Town of Salem and located on 81st Street where it meets the Lake.

8. The proposed abandonment of the forty foot wide right-of-way would involve the sale of the property by the Town to the neighboring riparian, Gerry Krieger. Mr. Krieger testified that he planned to build a larger home on the site if he is allowed to take possession of the existing fire lane. The site has a lawn that the neighboring riparians apparently cut. There are mature trees. The parcel has a gradual slope to where it meets Lake Hooker. There is a retaining wall at the site, made up of timbers and some mortared material.

9. The Town does not propose any new replacement access, but instead proposes improvements at another public access or Hooker Lake. As set forth by his counsel, Mr. Kreiger has agreed to donate certain specified improvements at the public access "fire lane" located at 80th Street to Hooker Lake, approximately one block north of the public access proposed for abandonment. (Exs. 21-23)

The DNR summarized the proposed Access Improvement Project in its proposed Conditions of Approval of the Abandonment:

- The "Access Improvement Project" plan shall include a handicapped-accessible boarding pier or wharf designed to accommodate launching canoes or kayaks. The Town shall be responsible for funding, design, construction and maintenance of the pier or wharf. The "Access Improvement Project" plan shall include at least 3 vehicle-only parallel parking spaces dedicated for public use along the south side of the fire lane. The parking spaces shall be identified with signs or other markers and at least one space near the pier or wharf shall be designated "disabled permit use only." The Town shall be responsible for funding, design, construction and maintenance of the parking spaces, which may be gravel.

- The Town shall install and maintain signage at the intersection of 80th Street and 238th Avenue and at the parking spaces along the fire lane. The signs shall explain allowable public uses for the site and identify the public parking spaces and parking space reserved for disabled use. The color, size, placement, and wording of the lettering and signs shall be designed to inform and encourage the public to use the access, and shall be submitted to DNR for approval as part of the "Access Improvement Project" plan before placement.

- The Town shall replace the signs when they become illegible or unsafe. The Town shall remove overgrown trees and brush as needed to install the parking spaces and provide access to the pier

> or wharf. The Town shall obtain DNR approval before installing any additional landscaping and/or fencing at the site. The Town shall send photos showing the pier, signs and other improvements within 15 days of installation to: James Ritchie, Public Waterways Access Coordinator, DNR Southeast Region, 2300 North Martin Luther King Jr. Drive, Milwaukee, WI, 53212. All facilities and amenities required by the "Access Improvement Project" plan and these conditions shall be established for the longest period allowed under law. (Ex. 22)

10. Numerous residents located near the proposed Access Improvement Project expressed concerns about the proposed project. These included concerns about whether there was room for the required parking spaces, as well as concerns about the safety of children using the improved access area at 80th Street. These concerns included some that might seem to go beyond the jurisdiction of the Division in this matter, such as problems related to the proposed parking spaces described above. However, because the DNR included the parking spaces as part of the specific conditions required to approve the abandonment, they are properly a part of this review proceeding.

11. The area proposed for abandonment has not been widely known to the public and, as a result, has not seen much public use. There were several disturbing indications that the two adjacent neighbors, Mr. Krieger and his next door neighbor to the north, had been using the public access area as extensions of their own private property. These included a photo indicating that his neighbor had stored a boat at the site, giving passersby the false impression that the public access area was part of his private property. This seems to have been a pattern, as two of the photographs presented by parties to this proceeding depicted personal property stored on the site by the neighboring riparians. (Ex. 26) (*See also* DNR Ex. 19)

Mr. Langel testified that the fire department had made some use of the site proposed to be abandoned, as well as the site selected for the access improvement project, to gain access to the water for fire protection purposes.

12. Several Town of Salem residents and groups testified about their concerns about the loss of this public access to Hooker Lake. As noted, the Hooker Lake Management District formally opposed approval of the abandonment and noted that no replacement public access was being provided. Long-time Salem resident and current municipal judge, Michael Langel, noted that the access to be abandoned provides access to Hooker Lake within walking distance of over 200 homes. He testified that now that he is aware of this public access he intends to use it with his young granddaughters. He also stated that he has not used it in the past because of his perception that the area was private property. Other Town residents also indicated that they would also use the lake, given their new awareness that the site was a public access area. (Schmidt)

13. There are presently five public access sites on the Lake, which consists of 87 surface acres. (Ritchie; Exs. 10-11) The present level of access is considered

"adequate" by the DNR. (Id.) There are three boat launches, a fishing pier, and two roadway right-of-ways. (Ex. 14) Abandonment of the 81st Street right-of-law would reduce the "quantity" of public access sites within the meaning of Wis. Admin. Code § NR 1.92(2)(b).

14. The proposed access improvement project would not provide "equivalent" public access because the number of access sites would be reduced and because some current users of the 80th Street public access might be limited because of safety concerns for small children using the improved site.

DISCUSSION

The Town of Salem proposed to sell the land at the end of a roadway, which is a public access to the Lake, to the neighboring riparian, Mr. Gerald Krieger. The Town has the right to do so, subject to approval by the DNR. The DNR regulations allow such an abandonment of a public access only if the access "does not contribute to the quality or quantity of public access on the body of water." Wis. Admin. Code § NR 1.92(2)(b) Typically, parcels to be abandoned are replaced by another parcel that provides "equivalent or superior replacement public access site." Wis. Admin. Code § NR 1.92(3) The Town does not propose any replacement access in this matter, but instead seeks to "upgrade" a nearby public access under the theory that such an upgrade can constitute "replacement" access. Given the plain language of NR 1.92(2) relating to "quantity", the Division believes it should be the rare case when upgrades to another site can reasonably constitute "replacement" access under the code.

However one views this theory, which apparently has been accepted by the DNR in a few cases in the past, it is clear that the proposed replacement access in this matter does not suffice to authorize abandonment of one of only five public access points on this heavily developed public lake. If the abandonment were approved, 20 percent of existing access sites would be lost. As Mr. Langel noted, filling in the proposed public access abandonment site with a larger personal residence and then placing a pier on 80th Street would result in the loss of both existing fire lanes on this end of the lake. However, the primary reason the abandonment must be denied is the failure to provide a replacement public access. While the proposed improvements may improve public access for certain users at the 80th Street site, many nearby neighbors expressed reasonable concerns that their existing uses, including safely giving small children lake access, would be impaired by the proposed improvements. Such lake users, as well as the fire department, would thus lose two sites which they may lawfully use currently.

The Schmidts argue that the DNR does not have jurisdiction over this matter. They cite *Closser v. Town of Harding*, 212 Wis.2d 561, 574, 569 N.W.2d 338, 343, a circuit court proceeding for vacation of a plat pursuant to Wis. Stat. § 236.43(1).. In *Closser*, the Wisconsin Court of Appeals held that a scenic overlook with minimal improvements did not create lake access and granted the adjacent landowner's petition for judicial vacation of the town's roadway interests in the land. The land dropped off at

the top of a steep grade descending almost vertically to a swampy shoreline. The property had never been developed or used for vehicular or pedestrian access to the lake. The court held that this public overlook was akin to a park, not a street, road or public way and did not create an access to the lake. *Closser* at 575. However, *Closser* is not applicable to this case for several reasons.

First, the Town has submitted to the jurisdiction of the DNR by submitting the ordinance for approval pursuant to Wis. Stat. § 60.1006. As the DNR notes in its brief, the land labeled at the end of 81st Street is a section of the recorded Salem Oaks subdivision map. A platted street that leads to a lake is a public access right-of-way, unless it is clearly not dedicated to public use and is marked. "Private Road. . . Street . . . or Way." Further, as the DNR notes in its brief: "The 2 statutes serve different purposes and regulate overlapping types of land. Wis. Stat. § 236.43 regulates vacation of all platted areas dedicated for several types of public uses – roads, parks, etc., while Wis. Stat. § 66.1006 regulates abandonment by towns and counties of platted and unplatted areas that serve a specific type of public use – access to navigable waters. Under accepted rules of statutory construction a specific statute controls over a more general one and statutes are construed so as not to render any language in them as mere surplusage. Because the 2 statutes have distinct purposes they also have 2 distinct sets of requirements for the approvals each requires." (DNR brief, p. 3) Further, there is absolutely nothing in *Closser* which would extend its holding to an action of a town to abandon a public access pursuant to Wis. Stat. § 60.1006.

Second, this is an administrative review proceeding held pursuant to Wis. Stat. § 60.1006 and Wis. Admin. Code NR 1.92. The Division has only the power given it by the legislature. In this instance the Division has jurisdiction to determine if the proposed abandonment meets the requirements of NR 1.92. The DNR has a statewide interest and mandate given to it by the legislature to ensure that precious public access sites are not abandoned for short term gain unless an equivalent replacement access is provided.

Finally, unlike *Closser*, the property in question here is not a scenic overlook. It is a small park-like lane that leads to Hooker Lake. Unlike the *Closser* property, there is no steep drop off on swampy shoreline. (DNR Ex. 19) There is absolutely no reason this parcel could not be used by the public to safely walk to the lake. It has been used by the public in the past as a fire lane access to the lake. (Langel) Numerous Town residents have indicated their intention to use the existing 81st Street public access now that they are aware of it. It is hoped that the Town will not allow the neighboring riparians to place personal property on this site.

The Wisconsin Supreme Court has stated as follows: "A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential may lead to another, and another, and before long a great body of water may water may be eaten away until it may no longer exist." Hixon v. Public Service Commission, 32 Wis.2d 608, 631-32 (1966) The same logic applies to public access sites. The loss of one site may seem inconsequential, but it would be a disturbing tendency if public access sites were regularly sold to the highest bidder and if those new

owners could shift the demands of living next to a public access to others. At a minimum, such parties have an obligation under the code to provide an equivalent public access. The Town of Salem has not done so, and so this proposal must be denied.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders in review of requests to abandon public right-of-way access to navigable waterways pursuant to Wis. Stat. §§ 66.1006 and 227.43(1)(b).

2. No resolution, ordinance, order or similar action of any town board or county board or committee thereof discontinuing any highway, street, alley or right-of-way that provides public access to any navigable lake or stream shall be effective until such resolution, ordinance, order or similar action is approved by the Department of Natural Resources. Wis. Stat. § 66.1006.

3. The Division may grant the petition to abandon or discontinue the public access only if: a) any sites or part thereof proposed to be abandoned or discontinued is replaced prior to granting the petition; or b) the Department finds that the access proposed to be abandoned does not contribute to the quality or quantity of public access on the body of water. Wis. Admin. Code § NR 1.92(2)(b). The public right-of-way at 81st Street contributes to both the quality and quantity of public access to Hooker Lake. The Town has not offered any "replacement" public access. The proposed improvements of the 80th Street access do not constitute an equivalent replacement access.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the proposed abandonment of the public right-of-way be DENIED because it does not meet the standards of Wis. Admin. Code § NR 1.92(2)(b), IT IS FURTHER ORDERED, that the petition for review be DISMISSED.

Dated at Madison, Wisconsin on July 13, 2007.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By:_____
Jeffrey D. Boldt
Administrative Law Judge

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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 Department of Natural Resources 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.