

Minutes of the AOPA Committee of the Natural Resources Commission

January 16, 2007

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn
Bryan Poynter

NRC Staff Present

Sandra Jensen
Stephen Lucas
Jennifer Kane

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 9:00 a.m., EST, on January 16, 2007 in The Garrison, 6002 North Post Road, Fort Harrison State Park, , Indianapolis (Lawrence), Indiana. With all three members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on December 8, 2006.

The Chair observed an error in the caption of the draft minutes. The date referenced in the draft was to the August 23 meeting rather than the December 8 meeting. By acclamation, the date was corrected. The Committee then also approved by acclamation the minutes for the meeting held on December 8, 2006.

Consideration of “Respondent Intervenors’ Notice of Objections to Findings of Fact and Conclusions of Law with Nonfinal Order” and “Findings of Fact and Conclusions of Law and Nonfinal Order” of Administrative Summary Judgment in *Stephen L. Jansing (Claimant) v. Department of Natural Resources (Respondent) and Terry Hawkins, et al. (Respondent Intervenors); Administrative Cause No. 04-009W*. Oral argument was received on December 8, 2006, and the parties subsequently provided post-argument briefs.

The Chair opened the discussion of this item. “If you recall, we received oral argument at our last meeting in December, and then we provided the parties with the opportunity to provide post-argument briefs. We did receive, and have had the opportunity to review, briefs from all three parties.” She said she was opening the item for discussion or for a motion by one of the Committee members.

Jane Ann Stautz reflected, “As I was reviewing it, and continued from our December 8 discussion and the argument before us there, as well as in the briefs, as I look at the matter from its procedural aspects and from administrative review, my review and determination really falls on whether it was a ‘lawful nonconforming use’. In this case, the ALJ found it was a ‘lawful nonconforming use’, and therefore the nonfinal order would provide for the license to go forward with the building of the boathouse within a limited footprint. The nonfinal order does require

information on that with respect to the boathouse, prior to the license being valid for the license holder to go forward. Are there comments, questions or discussions around this matter following the briefs?"

Mark Ahearn observed, "I'm concerned here that we have a license application, and then the State changed some of the terms, but did so in a way that seems to limit the discussion to the parties involved in this proceeding. With that said, and this probably considers both the procedure question and the burden of proof issue that was raised, at the end of the day, the party that disagrees with a government action has the burden of standing up and making the point of at least the burden of going forward and some burden of persuasion that they were aggrieved by the government action in whatever appeals method exists for that. I guess my only concern with this is government doesn't just have to get to the right answer. It has to get to the right answer in the right way, and it has to be seen as getting to the right answer in the right way. I don't want to say here that the agency has to be more thorough because that suggests it was done incorrectly, and I don't think here that's the case. I'm just concerned, and this may be more a policy issue than a legal issue. How do we end up with two parties, one of whom claims they were excluded from the process, and one of whom says the exact opposite that 'you were completely included in the process'? We know there was a change in position on the State's side in terms of coming to a settlement agreement on the permit." Within these expressions of concern, however, Ahearn said he believed the correct result was achieved. "When a motion comes, assuming someone is going to make one to affirm the nonfinal order, I'll support that."

Bryan Poynter said, "The only issue I had was the issue of burden of proof. Having had the benefit of oral argument and then the summation of all the arguments, and you brought up the other issue as well..., and given the facts as I have heard, I would tend to agree.... If you would like to have a motion, I would be open to that.

The Chair responded, "I would be open to that at this point."

Poynter stated, "I would offer a motion that we affirm the findings of fact and conclusions of law with nonfinal order" as the final agency disposition by the Natural Resources Commission.

Ahearn stated, "I'll second that motion."

The Chair stated, "We have a motion to approve and affirm the nonfinal order before us, and a second on that. Any further discussion? If not, we'll call for all those in favor." The motion then passed with three in favor and none opposed.

Consideration of a Design for Training and for a Standard Committee Practice Relative to the Effective and Appropriate Discharge of Responsibilities Regarding Objections.

Jane Stautz called for a discussion of the next item of business. "As the membership of the AOPA Committee transitions and changes, and I appreciate Mark's role and more recently Bryan's role, we talked about some type of training or orientation regarding some of the practices and procedures behind this." She added, "I think there are also questions around the makeup of the AOPA Committee itself. Historically, we've had three members, and ideally it's nice to have all three members to hear objections, because...there have been a couple of circumstances where there have only been two of us that hear it, and you don't have that third to break a tie."

The Chair reflected that Steve Lucas “has participated in a number of seminars on AOPA workings and operations,” as well as describing how the AOPA Committee handles things. “It may be helpful to have a session for us like that.”

Bryan Poynter suggested, “Before we get into training, we need to figure out the form and substance going forward of the AOPA Committee...., really looking at this as a white board, because as I look at the makeup, and as someone who is thrilled to have had the opportunity, and it was very valuable to me to be part of that December process, I understand the value of the professional training that you both bring. It’s very difficult for an outsider to come in who doesn’t have some form of legal training. I wasn’t intimidated by that, but it’s very difficult to address, and it takes time. But as I look at the formation of the remaining members of the Commission, I don’t know that there’re any other lawyers.”

A question was raised as to whether the membership of the AOPA Committee was required to come from the Commission membership. Steve Lucas responded that it either needed to be a Commission member, or, where a member is entitled to appoint a designee. Using this approach, the IDEM Commissioner appointed one person to appear for Commission meetings and one to appear for the AOPA Committee, and the AOPA Committee designee was an attorney.

Mark Ahearn said he believed “with some training and thinking about concepts, as to typically what a case is going to look like when it gets” to the AOPA Committee, a non-lawyer could serve effectively. There are “a number of exits where a case could have gotten off before” it gets to the AOPA Committee, but it did not. With training, “we ought to also say here is the next exit it gets to after it comes to you. It’s going to Superior Court or wherever it’s going.”

Poynter said, “If you look at the makeup of the present Commission, which is all that we can do at this time, and you [Ahearn] have been gracious as a proxy to give your time to the AOPA Committee.” Jane Stautz has given a tremendous amount of time to this task. “I find it not an impassible task for someone to be a part of this Committee, but they have to be consistent over a period of time. If we give synergy and we understand and we add value and balance, and then all of a sudden the participants go off, we have to have a nice balance. My preference is probably to expand the Committee.”

Stautz said, “The other challenge is logistics. Travel and distance is a challenge. The Commission is designed to have membership from throughout the State.”

Poynter agreed. “We have only one person outside of us, who is a citizen member and not a proxy, who lives in Indianapolis. That’s Pat [Early]. All the other citizen appointees are from at least two hours away.” We “need to have a nice balance,” and that “includes a couple of legal minds.”

Poynter said my perception is that the current participants desire to transfer the substantial load of the AOPA Committee elsewhere. “Then maybe we can set forth a schedule by which basic training can be accomplished.”

The Chair reflected, “I think we need training, and everyone agrees about that. We were going to look to an early February date for the next AOPA Committee meeting. With Rick’s resignation and changes there as Chair and Vice Chair, and what the wishes are of the Chair for the AOPA Committee, we held off.” If we are to increase the membership, “I always like odd numbers, and I think seven is too many. It’s kind of like, if you’re thinking through it, we’re either at three or we’re at five. If we’re at five, they need to be people who can show up. We’ve had meetings

sometimes once a month. Sometimes it's three months between meetings. A lot depends upon cases before the Division of Hearings, and right now I understand there are a lot. Right?"

Sandra Jensen, Administrative Law Judge, responded, "I've got three" that will have non-final orders written soon and may require action by the AOPA Committee in the near future.

Lucas added, "I have one where the parties are already awaiting scheduling before the AOPA Committee, and there are three more that are likely to be ready within the next 45 days."

Ahearn said, "I think four is better than three, and five is better than four. I wouldn't preclude four. I'm not that concerned with getting an even number."

Lucas reflected, "I understand what you're saying, Mark. But I would urge you have five rather than four because a quorum for five is three and a quorum for four is three. Having just four increases the chance of not making a quorum as opposed to five."

Jane Stautz then outlined her understanding of the consensus of the AOPA Committee. "We recommend to the Commission that five members be selected to serve on the AOPA Committee. We need to have a Chair for that, and anyone who is interested can gladly take on that responsibility. Once that's established, presumably after elections [during the regular meeting of the Natural Resources Commission] later this morning, the Committee Chair will probably look at a February date.... The new members would hopefully get that training in before the middle of February." Ahearn and Poynter expressed their concurrences with this outline.

Adjournment

The Chair called for adjournment at approximately 9:34 a.m.