Minutes of the AOPA Committee of the Natural Resources Commission

July 14, 2008

AOPA Committee Members Present
Jane Ann Stautz, Committee Chair
Mark Ahearn
Doug Grant
Mary Ann Habeeb

NRC Staff Present
Stephen Lucas
Jennifer Kane

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 2:06 p.m., EDT, on July 14, 2008 in Room N501, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana. Jane Stautz, Mark Ahearn, Mary Ann Habeeb and Doug Grant introduced themselves. With four of five Committee members present, the Chair observed a quorum.

Consideration of "Findings of Fact, Conclusions of Law and Nonfinal Order of Administrative Law Judge" in *Adochio, et al. v. Krans, Bartoszek and DNR* with "Motion to Stay Non Final Order" by Adochio, "Objections to Non Final Order and Findings of Fact" by Kranzes, and "Entry Denying Request for Stay of Nonfinal Order" by Administrative Law Judge; Administrative Cause No. 07-204W.

At the request of the Chair, the Administrative Law Judge, Stephen Lucas, introduced this matter. He said John Kocher of Winamac was the attorney for the Claimants. Ronald Gifford of Plymouth was the attorney for Gunther and Carol Kranz. Christopher Bartoszek acted on his own behalf. Ann Knotek was the attorney for the DNR, but the agency did not participate in the hearing which formed the factual bases for the matters currently before the AOPA Committee. The ALJ said only Kocher and Gifford had filed pleadings subsequent to the entry of findings and a nonfinal order, and a presumptive structure for oral argument was that they would each have ten minutes for presentations. Jennifer Kane, the Commission's Paralegal, would assist with timing those arguments. The Chair might also provide Bartoszek and the DNR with an opportunity to make remarks.

The Administrative Law Judge said John Kocher filed with him a "Motion to Stay Non Final Order" essentially to extend the period for compliance with removal of the pier in issue. He said he made an "Entry Denying Request for Stay of Nonfinal Order" on June

27. With convening of today's meeting of the AOPA Committee, the ALJ's perspective was that his entry was mooted, although the relief sought by Kocher was not moot, and the AOPA Committee had clear legislative authority to grant the relief if it determined appropriate.

The Administrative Law Judge said Ron Gifford had filed "Objections to Non Final Order and Findings of Fact". In addition to seeking modifications to the nonfinal order, these objections also opposed the stay relief sought by the Claimants.

The ALJ said before entertaining the oral arguments by the parties, "it's important also to note the nonfinal order does not resolve many of the issues pending among the parties. The nonfinal order does not resolve issues that are outside the jurisdiction of the DNR and the Natural Resources Commission, but even for issues that are within DNR jurisdiction or Commission jurisdiction, there are matters there wasn't evidence on at this point. These would have to be resolved later if the nonfinal order I entered were approved in its direct or a modified version."

ALJ Lucas said "two key issues that were decided are, one, that the terms of an easement, for which the Claimants are the dominant estate and the Kranzes are the servient estate, are ambiguous under standards set forth by the Indiana Supreme Court in *Klotz v. Horn* and that the only direct testimony to construe the terms supports a finding the grantor intended the easement to include the ability to place a pier. Two, that the evidence does not support a prescriptive easement in favor of the Claimants to expand their rights to a pier beyond those in the recorded easement. No person has established a legal right to moor a boat outside the area where the person has riparian rights or where the person has entitlement through an easement to the rights of a riparian owner. With this backdrop, the Claimants would be entitled to seek a DNR license for a group pier with the participation of the Kranzes and Mr. Bartoszek."

John Kocher presented oral argument on behalf of the Claimants. He said this issue began in the 1950s "when a couple by the name of Meyers established the Meyers Subdivision" along Bass Lake in Starke County. They established "28 or 29 lots in the subdivision. Every person who acquired lots in the subdivision received an easement 15 feet wide to the waters of Bass Lake." The ownership of property changed over time, and the easement was relocated by action of Joseph Meyers.

Kocher urged that "in construing the easement in dispute, the language and intention of the grantor controls, not the wishes of Mr. and Mrs. Kranz. The easement grants to the owners of Meyers Subdivision a 15-foot wide easement to the waters of Bass Lake. So then the question is what was the intention of the original grantors? What did the evidence of the witnesses at the hearing establish? I want to address some of the objections first. From the sworn testimonies of many witnesses, the pier had annually been installed to the waters of Bass Lake for well over 40 years." He acknowledged that "a pier has taken different sizes and shapes over the years, but a pier has always been out there." He asked, "Indeed, what would be the purpose of an easement to Bass Lake if it were not implicit that a pier be installed."

Kocher said there were "several Indiana cases which state similar language in grants of easements that they said were ambiguous and required extrinsic or parole evidence to determine the grantor's intent." The controlling case, a Supreme Court case Indiana, is *Klotz v. Horn* which has been alluded to. He distributed a photocopy of the case to the AOPA Committee members. In cases where an easement is provided to give access to water but the purpose is not clearly indicated, the court may resort to extrinsic evidence or parole evidence to determine the intent. "The easement holders do not have riparian rights…, but they use the riparian rights of the servient tenant who has given access to the lake." He said in *Klotz* the Indiana Supreme Court determined access through an easement "only six feet wide" was ambiguous and required extrinsic evidence to determine the intent of the easement grantors. Kocher reflected that *Klotz* and more recently *Metcalf v. Houk* have observed that "generally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been." Kocher continued, "The present easement language, whilst not identical is similar, so as to properly allow extrinsic evidence at the hearing to establish the grantors' intent." He said one of the witnesses, who had been a Meyers Subdivision owner since 1956, "testified as to pier placement and relocation, and, in fact, the pier was relocated" by agreement of the lot owners and the Meyerses to its present location in 1962. "The pier was placed with the knowledge and approval of Mr. and Mrs. Meyers. Again, what would be the purpose of Mr. Meyers selling subdivision lots for lake access if a pier placement were not inferred and, indeed, permitted." Kocher urged that the pier should be allowed consistent with the grantors' intent and the controlling Indiana case law.

Kocher added that the Claimants were requesting until September 2, 2008 to remove the pier. "The pier is always removed shortly after Labor Day. My understanding is the pier was not placed for the 2008 summer season before first obtaining the okay from the DNR Conservation Officer Brian Culbreth who originally, I think, was called to answer a complaint by the servient owners. There will be no harm to the Respondents if the pier remains in place until the end of the summer season 2008. To my knowledge, Meyers Subdivision lot owners do not have a legal entity or a formal association, but they're a group, as I understand, of approximately 29 separate lot owners. I do not know if Officer Culbreth's incident report was received by all those lot owners. That's just an aside. In my view, much of what I heard in the hearing should be with the local police authorities, if the Respondents are concerned about noise, people are trespassing, disorderly conduct, or whatever. To me, those would be a police authority matter not a DNR matter. I think that's where they should better show their interest to get their relief if, in fact, there are problems there."

Kocher said the Claimants "would hope the findings" of the Administrative Law Judge would be made final. Additionally, the Claimants "would ask that the order be stayed to allow the pier to remain in the water there for another 30 days. It's not going to hurt anybody, and if there are problems, call the police. Thank you, very much."

Mary Ann Habeeb asked, “You’re saying your client had the permission this summer of the DNR to put the pier in?”

Kocher answered, “It’s my understanding, after the Judge Lucas hearing, Mrs. Adochio and possibly a couple of other residents of Meyers Subdivision talked to the officer.”

The Chair referenced her understanding there had been email correspondence.

The Administrative Law Judge responded that “following the hearing, I reflected in an email that I had made no entry to modify anything that had come before. I have not since made a modification, and I do not have communications with the DNR [regarding a pending adjudication] so I have had no communications with a Conservation Officer which would give me knowledge” concerning a modification of a DNR order.

Mark Ahearn asked Kocher to respond to the conclusion in the “Entry Denying Request for Stay of Nonfinal Order” by Administrative Law Judge in which he found the Claimants had “unclean hands”. He asked if the Judge accurately characterized the facts. Kocher said he was unclear whether Officer Culbreth entered an order or simply made a report. “I don’t know how that report was disseminated amongst the 29 property owners of Meyers Subdivision. If it was a legal entity, established, and it had by-laws, a real president, and it filed reports down here in Indianapolis, it would not be a problem because you could notify the secretary, a resident agent, or the president or whatever it is, and that would be it.” He added, “It would be nice if it were a little more tight. I agree. But it’s not, it’s a loose association.”

Habeeb asked Kocher, “How many of the 29 do you represent?” He responded, “I represent all of the 29, but I don’t know all the 29.” Habeeb continued, “But I wanted to make it clear, though, that any communication that went out was on behalf of all the 29.” Kocher continued, “I understand that.”

Ahearn asked, “Are we honestly saying that the people who lugged the material for the pier down to the lake were unaware of the order?” Kocher answered, “I honestly don’t know. I don’t know who put the pier in.”

Habeeb continued, “But the pier was put out on behalf of the people of the Meyers Subdivision?” Kocher answered, “Oh, no question about that. As I said, I wish it would have been a lighter tighter.”

Ahearn reflected that in Judge Lucas’s order, he expresses the perspective the pier needs a license. “Do you think that pier needs a license?”

Kocher answered, “No offense to Judge Lucas, but I found that really confusing. Because at one point, it said you don’t need a license. Property owners have called the DNR and they said you don’t really need a license but you might need a license, and there’s no fee for the license.” He concluded “I would guess that you probably ought to file something with the DNR.”

Habeeb asked, “Has anyone applied for an individual license for the boating season?”

Kocher said he had been told the Claimants should “wait until the end of this hearing or until January 1, 2009. My advice would be to get one spokesman and get everybody signed up on one application. Or, those who didn’t get signed up, would then get notified.”

The Chair asked the Administrative Law Judge “to try and clarify it.” He responded, “Every pier must have a license. Many piers have a general license. If it’s a group pier situation, they’re disqualified by rule from having a general license and must get an individual license. In this instance, I think Mr. Kocher has really nailed it that one of the problems is the lack of legal structure for exercise of the dominant estate’s rights. That could be approached in the individual licensure stage in at least a couple of ways, and there may be other ways. We really didn’t get to that beyond saying, ‘If you have a group pier you have to have an individual license. You’re disqualified from having a general license.’ That licensure process would go to DNR for review. We haven’t gotten that far yet.”

The ALJ added, “what has traditionally been done” to sort multiple interests within a dominant estate is “that we go through the adjudicatory process and give notice to anyone who might claim an interest, and if they then don’t come forward and participate, they get defaulted, and in that way we narrow it down.” Additionally, with a statutory change made a couple of years ago and a rule adopted by the Commission approximately a year ago, the Commission may require the various members of the dominant estate to establish a legal entity to manage that estate for purposes of pier placement. “Once the entity is established, the entity becomes the ‘person’ which makes the license application. This person is then responsible for governing the internal relationships of the people with the easement. A ‘person’ could be an association, a partnership, a corporation or another form of entity as chosen by them. The relationships are then determined by the participants, and if there’s a disagreement among them as to the exercise of their rights, those would be determined by a local court. The DNR or the Commission wouldn’t tell the participants how to manage their entity, but the opportunity for licensure would be limited to that entity.”

Kocher reflected that if the easement holders “could get an association, and if that could be established and then get the pier in and have regulations, then also include Mr. Bartoszek and the Kranzes, then I don’t think we would be here today. I would hope that disputes would be resolved that way. Now, it’s loose.”

Chairwoman Stautz asked who oversaw the placement of the pier. Kocher responded that in the past the local fire department did so, “but I don’t know this year.” He said he did “not think the fire department put it in this year, but I’m not positive.” Several persons in the audience then expressed opinions concerning who might have placed the pier.

The Chair called on Ronald Gifford to present argument on behalf of the Kranzes.

Gifford said he raised two issues in the Kranzes' "Objections to Non Final Order and Findings of Fact". The "first of these is that there is no reason for a stay to allow that pier to remain out there any further than the August 1st deadline. Second, we made an argument as to whether or not the instrument creating this easement was, in fact, 'ambiguous', which gives rise to talking to others and doing extrinsic or parole evidence."

Gifford addressed the issue pertaining to the Claimants' request for stay first. He said this aspect "goes back to 2007 when Officer Culbreth did issue an incident report which ultimately resulted in Mrs. Adochio filing something with this body to get this thing started. A full hearing was conducted by Judge Lucas on April 29 with several parties and lots of witnesses providing testimony which took most of the day. The following day Chris [Bartoszek], who lived on the lake, had heard that perhaps the pier was going to go in despite all that had happened at the hearing. He immediately notified Judge Lucas, by email, of that fact, and the following day Judge Lucas did send an email to all the parties and their counsel, in which he stated that nothing had changed, and there should be no pier put out, basically. Despite that warning, sometime in the next seven days, the pier went in. It doesn't matter who put it in or who ordered it in or whatever. Those people had knowledge of the fact that they had been ordered not to do that."

Gifford stated, "This is the first time, sitting here in the last few minutes, that I had heard anything about Officer Culbreth ever giving permission to these folks to do what they did. It wasn't raised in Mr. Kocher's motion to stay the nonfinal order. I never heard it argued anywhere. I would have thought the more proper person to ask that would have been Judge Lucas who presided over the hearing on the 29th of April."

Gifford urged, "As Judge Lucas has indicated in his response to the motion for stay, there is a burden to be met that he found the Claimants had not met. In addition to that, he found that they came to this proceeding with unclean hands. To allow them to have another 30 days to leave this pier out there completely rewards them for ignoring all of the persons who have issued orders in this case to date. The motion to stay the final order says they need it in order to complete the summer boating season and for adequate time to secure necessary documentation for filing permit applications. That doesn't take a pier in the water." He added, "Obviously somebody put this in on a day's notice. I got to believe he can take it out on a day's notice. None of the reasons given to stay this nonfinal order make the least bit of sense to me, and it rewards Claimants' wrongdoing and the total ignoring of those who are in a position to issue orders on this. To the contrary, I'd prefer that you issue an order to say it has to come out tomorrow. But I certainly would hope that you would not extend that time from August 1st. I understand Judge Lucas's reasoning. He was pretty clear of his belief that all or some of us were going to file objections to his nonfinal order no matter what his decision was, and realizing this meeting was coming, I think that's why he did it. I don't have a problem with that, but I certainly don't think this group ought to be rewarded. It's not my fault or the Kranzes' fault that they don't have an association, they don't have an entity, and they don't have any of these things needed for an organization. This is a part of the problem

we have there. There is no organization with that group. As a result, we have chaos every single step with respect to how this is being used, and that is the cause of the problem. But that's their problem, it's not ours. They need to solve that."

Gifford then addressed the Kranzes' objections pertaining to the ALJ findings that the easement was ambiguous. "In order to get to parole or extrinsic evidence, you have to find that the document that creates this easement is somehow ambiguous." He said the easement "was actually created on Lot 40 back in 1952. At that time, skipping all the parts that I don't think are relevant, that said 'a footpath 15 feet in width is hereby dedicated for dwelling owners on said plat as a lake easement.' In 1961, that gets moved to Lot 48 which happens to be the lot that Chris [Bartoszek] now owns which is adjacent to where it is now. The language used to do that was simply 'a footpath used for passageway to the water of Bass Lake.' Significant difference to me in language from one document to the next. In 1962, they moved it from Lot 48 to Lot 49 where the Kranzes now reside, and it used essentially the same language, and it said 'a footpath to the waters of Bass Lake.' No where does it talk about you also have some riparian rights, you have the right to put a pier, a boat down there. It doesn't say any of those things. This guy had three chances to put language like that in and chose not to do so for whatever reason. The last time he moves it from Chris's lot to the Kranzes' lot, he has to have everybody sign a document that lives in that Meyers Subdivision authorizing it to be moved from one place to the next. None of those people apparently asked for or got from him a clarification of what rights they had with respect to that 15 foot footpath. He didn't include any language in there. So, if anything, I'd say the language from the beginning to the end is more restrictive not less restrictive. I don't see an ambiguity there. It's a 15-foot path." He also argued that structures now existing on the property of the Kranzes and Bartoszek made it impracticable to use the easement for more than a footpath.

Gifford responded to Kocher's argument there was no harm in leaving the pier in place. "There is a harm. There is direct harm every single weekend when either Chris [Bartoszek] or the Kranzes come to the property." He said the police were called most recently one week before the AOPA Committee meeting, "once by each side. It's a continuing problem there."

Gifford then summarized. He said the stay should be denied. The nonfinal order should be modified and the easement "read on its four corners" to allow only a footpath and not the placement of a pier. "No pier, no riparian rights, nothing else, just the right to get down to the water."

Mark Ahearn asked Gifford if he believed the 1962 document was controlling. Gifford responded, "Yes."

Ahearn continued, "And you're saying that's access to the lake, that's it?" Gifford responded, "Yes. Watch a sunset at the lake. Somebody wants to pick you up in a boat."

The Chair asked Gifford for his perception of the evidence as to the existence of a docking station or pier in 1962. He responded, "Number one, in 1962, there was no

house constructed on Lot 49 which is the Kranz lot. So there was no one there to complain. Mr. Meyers would have owned it until sometime later. So there may have been a pier. There was testimony that there was, and there was testimony there may have been some years because of drought or whatever that it wasn't the same type of pier, and it was taken out every year. That was the testimony."

The Chair continued, "You're not disagreeing with that testimony?" Gifford responded, "No."

Mary Ann Habeeb asked, "You're not disagreeing with the fact they may have the right to use the lake?" Gifford responded, "I'm not disagreeing with that. It's the manner in which they choose to use it to the detriment of" the Respondents.

Chairwoman Stautz then asked Christopher Bartoszek for his perspectives.

Christopher Bartoszek said he was representing himself and that he owns the lot "right next to the Kranzes. We're here basically because of all that's going on with the lake." He said he reviewed the deeds, and none made reference to the right to place a pier. He said if the AOPA Committee determined to authorize the pier, "then it should be for ingress and egress only. Right now at the end of the pier, they have benches. So pretty much when people come up, they all go out there and sit on the pier for hours and drink and have fun." He said on a "couple of occasions there was racial slurs", and his parents are unable to enjoy his property.

The Chair reflected that conduct which happens on the pier "is outside our jurisdiction. Ours is really as it relates to the placement and rights for access and use of private individuals and the public to the lake."

Bartoszek produced photographs for review by the AOPA Committee. The Chair reflected that the AOPA Committee did not receive new evidence. Bartoszek said the photographs were the same as photographs introduced into evidence. The AOPA Committee asked the Administrative Law Judge if the photographs had been introduced into evidence. The ALJ responded, "Without exhibit identification, I don't know." The Chair suggested Bartoszek "stick to the arguments" that had been presented for consideration in the request for the stay and in the Kranzes' objections.

Bartoszek continued. "With the placement of the pier, as it is in now, when they pull in their boats, they actually hit my pier. They use my pier, to get on and off their boats, which is trespassing on my land. My pier is two feet away from my property line." He said the Claimants also park personal watercraft "so I actually cannot get out or get in without talking at them or screaming and telling them to move. It has become like a marina, like a public swimming pool when there is a public swimming area like a mile down the road."

Mark Ahearn asked Bartoszek how much lake frontage he has. Bartoszek answered that he has 75 feet of frontage.

Mary Ann Habeeb said currently, "I think we're looking here at not how a pier might be placed but the right to place a pier. The actual placement would be something that would be considered in a permit review."

Bartoszek complained that the Claimants placed a pier after the Judge told them not to. "They still put it in, and it actually even got worse. I know this goes back to the cops' fault not your fault, but there is no order. There's no one to complain to. There's no nothing. So anybody goes there. It's a hassle to me. I bought the property to have peace and quiet, and I don't."

Jane Ann Stautz then called on Ann Knotek for the perspectives of the Department of Natural Resources.

Ann Knotek stated, "The Department has not participated in this level of the proceeding because, basically, the Department is waiting to hear if the Claimants have riparian rights, and, if so, what they are. And, the $50,000 question is do they have the right to place a pier. As a representative of the Department, my position is as soon as those rights are established at the end of this process, then it would be appropriate to regulate. And I do believe that a group pier permit is in order, and it is clear from the nonfinal order that there needs to be some sort of entity, not just so the Department knows who it is dealing with, but also so the neighbors know who they're dealing with." She said someone must be "accountable in an official capacity" for the exercise of the easement and for the placement and maintenance of the pier and boat stations in Bass Lake.

The Chair summarized the matters at issue and then called for deliberations by the AOPA Committee. She suggested the discussion begin with a consideration of the pier itself.

Mark Ahearn asked for Committee perspectives as to whether the common law had established a presumption that an easement to the lake created something more than merely the opportunity to get to the lake. Jane Stautz responded, "I would think, especially based on usage, it is proper to consider that continuous usage has been to place a pier." Mary Ann Habeeb added, "Use of the lake as a footpath for the purposes of putting a pier in has been what was recognized as part of the grant."

Ahearn asked whether the presumption favoring the placement of pier was so strong it was unambiguous the Claimants have this right, or whether the easement was ambiguous and parole evidence supports the right to use a pier. Habeeb responded that either way, the Claimants would qualify for the placement of a pier. "Either way the result would be the same." Ahearn continued, "We'd need a subsequent hearing or process to determine the conditions of a pier?" The other Committee members agreed a licensure process or hearing would be required.

Doug Grant asked whether every easement would qualify for the placement of pier. Habeeb responded that upon "the evidence in this case", including the parole evidence, the right to establish a pier would be established. With different facts in another case, an

easement might not support the right to place a pier. For example, "a two-foot wide easement" would not be expected to authorize any more than a footpath. Habeeb said she was "just looking" at the reported "cases as we see them here which have construed similar language with footpaths and giving rights to lakes" being seen as sufficient to support the placement of a pier.

Habeeb observed there were three different easements, but testimony demonstrated that each one allowed for the placement of a pier. Stautz expressed her agreement this evidence supported a finding the grantors intended to allow for a pier. Habeeb continued, "I think I might have felt different if one easement allowed a pier and the others didn't. But all three had the same purpose in mind for that easement and that was to allow the right to a pier. No inconsistency."

Ahearn referenced the argument that the configuration of houses restricted space and made it difficult for anything more than individuals to walk along the landward easement. Habeeb reflected, "Remember, the house was built after the easement was created. That's another little factor." She said even if the house now limits practical usage of the easement, this limitation did not exist when the grantor created the easement and when the easement was first used to place a pier.

Habeeb observed that the nonfinal order did not speak directly to the status of an existing order by the DNR. Rather, it stayed the effectiveness of the ALJ's nonfinal order until August 1, 2008. If approved as written, the stay would apply to the Commission's final order. Also, the Claimants would be prohibited from placing a pier, a boat station, or mooring watercraft after January 1, 2009 unless they first obtained an individual permit for a group pier from the DNR. After some discussion, the members of the AOPA Committee agreed that the Claimants could lawfully act only based upon the terms of an individual permit and not upon a general permit. They also declined to grant the relief sought in the Claimants' request for stay.

Mary Ann Habeeb moved to approve the findings of fact, conclusions of law, and nonfinal order of the Administrative Law Judge, as written, as the final order of the Natural Resources Commission. Doug Grant seconded the motion. The Chair called for a vote. The motion carried 4-0.

Consideration of "Findings of Fact and Conclusions of Law with Nonfinal Order" with "Objections to Findings of Fact and Conclusions of Law with Non-Final Order in Accordance with IC 4-21.5-3-29(d)(1) and (2)" by the Claimants in *Scott Stites, David M. Relue, Mark Pontecorvo and Peter Walters v. RCI Development LLC and Department of Natural Resources*, Administrative Cause No. 06-184W

Chairwoman Jane Stautz asked Steve Lucas, Administrative Law Judge, to introduce this matter. The ALJ said the parties had been informed that they were not entitled to offer additional oral argument. The matter was fully argued during the March 18, 2008 meeting of the AOPA Committee, and each of the parties had also availed themselves of

the opportunity to file post-argument briefs as invited by the AOPA Committee. The ALJ directed attention to a draft modified nonfinal order. He said the modified draft included technical and clerical changes from the original nonfinal order and what he understood was the AOPA Committee consensus amendment to Finding 32. He added, "My assumption is this is an Open Door meeting" and some of the parties have elected to appear and observe. The Administrative Law Judge suggested those observing be allowed to introduce themselves.

David M. Relue and Scott Stites introduced themselves and stated they were Claimants. Steven H. Hazelrigg, with offices in Fort Wayne, stated he was the attorney for the RCI Development, LLC. Also present for RCI was James Wilhelm.

The Chair then opened the matter for deliberations by the AOPA Committee. She thanked the attorneys for providing post-argument briefs.

Mark Ahearn stated, "I first appreciate everyone's vast briefing. It was at my request that we gathered more information." He added, "I read all the briefs," but he said he continued to "struggle with" the Indiana Code provision which says the Natural Resources Commission "shall adopt rules" to assist in the administration and to provide objective standards. His expectation is that the General Assembly was directing the Commission to provide structure, "not so much as to point to what we already do," and not merely rules where necessary. The purpose was seemingly to provide citizens with an understanding of what the evaluation process would be.

Ahearn continued, "That said, the more I looked at this, …I came under the conclusion I don't think the General Assembly intended this language to say 'unless you meet this provision your authority to license piers is no longer existing, and you can no longer issue permits.' If for no other reason than that laws become effective on the 1st of July, and the rule-making process takes six months, if you're lucky [from] when you've got the rule written." He added he thought it was unfortunate the Commission had not advanced beyond where it has with rule adoption pertaining to the Lakes Preservation Act, and he encouraged the agency to promptly adopt rules pertaining directly to group piers. Even so, he had come to the conclusion the current status of the rules did not deprive the agency of regulatory authority.

Doug Grant said he was persuaded by the analysis from Mark Ahearn. He would support approval of the nonfinal order of the Administrative Law Judge.

Mary Ann Habeeb moved to approve the findings of fact and conclusions of law, with nonfinal order, of the Administrative Law Judge (as modified to correct technical and clerical errors and with changes to Finding 32) as the final order of the Natural Resources Commission. Doug Grant seconded the motion.

Jane Ann Stautz observed the DNR has been regulating group piers since amendments to the rules for the Lakes Preservation Act made approximately three years ago. "There are reported cases and precedents that speak to the regulation of piers and group piers. I

support the need of the Department to further clarify, and, from a transparency standpoint, to provide criteria specifically applicable to group piers. Particularly in light of our discussion during the *Adochio* case earlier today, that would serve the citizens of the state very well." She said these cases underlined the growing role of the DNR and the Commission in helping resolve riparian rights disputes.

Mary Ann Habeeb said she "supports the decision as written by the ALJ, keeping in mind that based on my experience, it is impossible to have standards that clearly handle every situation out there on the lakes. Having said that, there may be a way to further define or refine the rules that are in existence to make them more visible in terms of what's needed to get a permit. To the extent that's possible, I would certainly urge that that be given some consideration. Until that time occurs, I believe the Department does have the legal right and responsibility to regulate the situation."

Habeeb continued, "I would also state that in this case it looks to me the record is pretty clear that a lot of review was made by the agency of the circumstances involving this application. A lot of things were taken into consideration."

The Chair observed, "Yes, safety concerns. Navigational concerns."

Habeeb added, "The configuration of the pier" and its effect on aquatic resources.

Ahearn said he wanted to make sure the agency is doing what the legislature intended and not what we might think is important.

Chairwoman Stautz asked if there was further discussion. There was none. She then called for the question on the motion by Habeeb as seconded by Grant. The motion carried 4-0.

Adjournment

At approximately 3:18 p.m., the meeting was adjourned.