Minutes of the AOPA Committee of the
Natural Resources Commission
July 19, 2005

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Michael J. Kiley
Linda Runkle

NRC Staff Present

Stephen L. Lucas
Debbie Michaels

Others Present

Mary Davidsen
Fred R. Jones
Andrea Roberts
Ann Z. Knotek
R. William Jonas
Glen Roberts
Martha Roberts

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 12:34 p.m., EST, on July 19, 2005 at the Park Office Training Room, Fort Harrison State Park, 5753 Glenn Road, Indianapolis (Lawrence), Indiana. With all three members of the Committee present, the Committee Chair observed a quorum.

Michael Kiley and Linda Runkle introduced themselves.

Approval of Minutes for Meeting Held on May 17, 2005.

The Committee discussed and approved by acclamation the minutes for the meeting held on May 17, 2005.

Consideration of Oral Argument with Respect to Objections by Multiple Parties to Findings of Fact, Conclusions of Law, and Nonfinal Order in *Glen Roberts and Martha Roberts v. Beachview Properties, LLC; Department of Natural Resources; and Harbour Condominiums;* Administrative Cause Nos. 04-078W.

Jane Ann Stautz called for consideration the objections by Glen Roberts and Martha Roberts and by Beach Properties, LLC to the nonfinal order of Mary Davidsen, Special Administrative Law Judge. "Pursuant to the 'Notice of Oral Argument on Objections' entered on behalf of the AOPA Committee on July 11, 2005, the oral argument will be conducted" so that each of the four sets of parties will have six minutes for oral argument and two minutes to respond. "The order for argument" is that "first off, it will be Glen and Martha Roberts," represented by their attorney, R. William Jonas, Jr. "With that, let's go ahead and get started."

William Jonas rose and said, "Thank you very much. My name is Bill Jonas, and I am happy to represent Glen and Martha Roberts in this case. I am going to take probably about two minutes of introduction to this" to help make the presentations "understandable."

Jonas said, "We are dealing with a property that is essentially in the northwest quadrant of Lake Maxinkuckee, our second largest natural lake." He referred to a projected slide and identified the subject properties as they "appeared a couple of years ago." He said the parties stipulated his clients own 100.3 feet of frontage, Beachview Properties owns 54.5 feet, and Harbour Condominiums owns 245.3 feet. He said the key issues for consideration by Administrative Law Judge, Mary Davidsen, was "where are the boundaries of the riparian zones of these owners located." A second question dealt with "what setback from the riparian boundary is appropriate to preserve boating and water safety for the occupants."

Jonas added, "There were a lot of other issues that fed into these issues. Judge Davidsen did a very fine job of parrying those out and sorting them out. We think she found the facts accurately. We think that, with regard to the issue of location of the riparian boundaries, she made two errors. The first error that we think was made was that there was a request in this case to add, to this action, parties on the northern side of the properties. Judge Davidsen, in the exercise of her discretion, decided not to do that. When coupled with the decision that is actually made, which fails to locate and identify the northern boundary the Harbour property and the southern boundary of the Roberts property, we think it resulted in an inequitable apportionment of the riparian zones among the three parties to this action." With the Administrative Law Judge's decision, at 175 feet into the lake where the riparian zones terminate, "this results in a length for Harbour of 276 feet, that the length for Beachview results in 39 1/2 feet, and the length for Roberts results in 82 feet. We don't believe that those bear an actual relation to the shorefront amounts and that the result is not an equitable apportionment of the lake space that's there."

Jonas said, "The Judge correctly found that *Nosek v. Stryker*, a Wisconsin case, is the case that the Indiana Courts have looked to to determine issues with regard to the location

and delineation of riparian boundaries. *Nosek v. Stryker* sets up three options. It asks first to determine what the property boundaries are, perpendicular to the shore, if the shore is a relatively straight line. That is not the case here. Everyone agrees that that is not the case here and that the first prong of *Nosek v. Stryker* does not apply. The second prong of *Nosek v. Stryker* says if the shoreline is relatively straight, and the lines of the properties are not perpendicular, that you should extend perpendicular to the boundaries into the lake. There was a considerable amount of discussion about that. Ultimately, Judge Davidsen said she used that approach in the decision. The problem is that, due to the natural curvature of the shore here, when you lay perpendiculars from the boundaries, you end up with overlapping areas that are in dispute. This was illustrated in the trial by Exhibit 19. I don't know if anyone is going to illustrate to you Exhibit 19 today."

Jonas said Judge Davidsen's solution to that problem was to call a line "perpendicular, but I'm going to split that angle. I'm going to divide that among the parties. Now, it's our position, that in looking at the progressive tests that are set up by *Nosek v. Stryker* decision," that once you cannot use the second prong, you must go to the third prong. The third prong says, "if you can't do it the first two ways, then you should endeavor to equitably apportion the lake space. That's what we are asking you to do. It's to change the Judge's conclusion, on the basis of these facts. Saying instead of using a splitting of those angles to determine these properties, that, in fact, the appropriate way to decide would be to determine the distance involved in the lake at the riparian boundaries. In this case, that's 175 feet in. And divide that space proportionally to the shoreline of each party. That way, each party loses or gains, …and it would typically be less because of the oval nature of a lake. What we're saying is the parties should share along that boundary in direct proportion with the frontage that they own." With this approach, the "Roberts would end up, instead of with 82 feet, …somewhere between 90 and 95 feet. Beachview, instead of having 39 1/2 feet, would have somewhere between 50 and 54 feet. Harbour, instead of having an amount greater than its length of shore frontage, would end up with approximately 230 feet. We think that that is the correct, legal conclusion for apportionment of the lake-ward boundary of the riparian zones. That's what we're asking the Court to conclude instead of Judge Davidsen's conclusions."

Jonas continued. "With regard to the second issue of safety setback, Judge Davidsen determined that unless there is an agreement of the parties otherwise, no part of any dock or boat could be within ten feet of the riparian boundary. In other words, a ten-foot setback along the riparian boundary is necessary to preserve safety. We think that was an absolutely correct decision."

Michael Kiley said, "Let me ask you a question, if I might. How old is that aerial?"

Jonas responded, "This aerial is probably six or seven years old."

Andrea Roberts, attorney for Harbour Condominiums Association, interposed that the aerial photograph was taken in 2003.

Kiley observed that Beachview Properties, LLC has "an umbilical access to the lake because they're set back from the lake. That, of course, has been a problem we've

experienced many times by developers attempting to gain access to their properties that are not on the lake." Does Beachview Properties have "a pier out there now?"

Jonas responded, "There is not a pier in this picture. I cannot tell you today. I know that Harbour has some piers." He said one of the problems is that a pier that was placed by Beachview "that they believe complies with the order, that, in fact, the portion of the pier from the seawall to the shoreline actually runs over Glen and Martha Roberts' property."

Kiley said, "Sure, I can see that. Have Mr. and Mrs. Roberts been obliged to move the angle of their pier in order to avoid the overlap?"

Jonas replied, "They have been told to move it. The question is how much do they move it. From where it appears here, they have been told it would probably be, I would guess, 25 feet."

Kiley asked, "By virtue of the angle and not by virtue of moving the foundation of the pier?"

Jonas answered, "Yes, the base of the pier would remain where it's setting. We're talking about swinging the end of the pier."

Kiley said, "That's always a problem that we experience in the public freshwater lakes, especially with a lake like Maxinkuckee which is saucer shaped. I served on the Board at Culver for the Academy for 15 years, and I'm familiar with that body of water. Tell me, what side of the lake is this on?"

Jonas answered, "This is at the northwest corner of the lake in the Town of Culver." He reflected that Culver Cove was located on the opposite side of Roberts' property from the other parties to the dispute.

Jane Stautz asked Jonas to wrap up with his argument. She reminded him he would later have two minutes for rebuttal. "I want to have some semblance of time here, or we'll be here all afternoon."

Jonas continued. "I understand. The last thing I want to tell you is there is one peculiar aspect about *Nosek v. Stryker* that I think helps understand what it does. *Nosek v. Stryker* is a Wisconsin decision, and the lake involved is Lake Superior, a Great Lake. When you talk about a relatively straight shoreline and perpendicular property lines, they make more sense when you talk about a Great Lake, such as Superior or Lake Michigan, than they do when you are talking about a freshwater lake. We believe that the approach that we're suggesting is an approach the Commission can use on a uniform basis, for how to resolve these disputes, because in each instance, you are to decide how far into the water the riparian zone needs to be. You then can decide how much space is available then divide it proportionately to the lakeshore of each of the riparian owners. It seems to me to be easy to administer, and the most equitable, not just an equitable solution. That solves the problem, I think."

Chairwoman Stautz said, "Thank you. We next will hear from Beachview Properties" who is represented by Fred R. Jones. "Welcome."

Fred R. Jones began his argument on behalf of Beachview Properties, LLC. He thanked the AOPA Committee and said, "I think that I may be somewhat responsible for what appears to have resulted in some confusion as this case moved forward. First of all, I want to publicly recognize that Judge Davidsen was most cordial and receptive to hearing all of the arguments that we wanted to make and to consider all of the evidence that we wanted to present. As I was preparing for the hearing today, and looking back at what had occurred, I believe that I created some questions and some problems that, perhaps, don't have to be addressed."

Jones continued. "First of all, I want to respond…to the paper filed by Harbour in response to our objections and acknowledge that, at the hearing, Beachview did not advocate the perpendicular or right-angle method. Be that as it may, since the Court has determined that that is the correct way to decide the case, then we do have the right to attempt to have the second method correctly implemented. That's where we find fault with the proposed nonfinal order of Judge Davidsen. We thank her for her terrific effort in going through the evidence in this case, as is apparent by the proposed findings. She considered a lot of issues and a lot of factual matters. I also want to compliment opposing counsel, because while we have differences of opinion, we've always been cordial in addressing each other and in allowing each other to have their opportunities to say what it is they want to say."

Jones added, "So this is what I want to say. *Nosek v. Stryker* really does allow for a simple resolution of this dispute when you examine *Nosek v. Stryker* rightly. When you look at the language of the case, rather than listen to the argument of the counsel, and the words of the counsel used in arguing the case, it becomes clear. Mr. Jonas has correctly pointed out that *Nosek v. Stryker* addresses three different options or methods for solving this issue. Mrs. Davidsen attempted to adopt the second option. But when you review that case, it's always using the term 'right angle to the shoreline'. In that case, the word 'perpendicular' never appears except in Footnote 3, and Footnote 3 is referred to a 1904 case." The 1904 case "basically is paraphrasing an approach that we did attempt to introduce, the long lake approach, pointing out that in certain circumstances you can use multiple points toward the center of the lake. I have to abandon that now because that just further complicates the matter. *Nosek* says you use a right angle. A right angle is 90 degrees. A right angle is not 91.5 degrees. It's not 88.3. It's 90 degrees."

Jones said, "We all know that Lake Maxinkuckee is a lake of significant size. It's the second largest natural lake in the state. An extension of 175 feet into this lake that is over two miles in diameter, while mathematically result in a narrowing, does not in application have to result in a narrowing. You can go into the lake 175 feet and not have any narrowing occur as a result of that. Each of the parties here could, during that distance, have the same amount of width of their riparian zone into the lake as they enjoy right at the shoreline, or, as Mr. Jonas has suggested, a reduction that is, in effect, miniscule and does not have any significant negative impact on any of the parties."

Jones said, "The Court found in Finding 35 that the 'shorelines of the Roberts, Beachview, and Harbour are not irregular and are approximately straight.' *Nosek* says when 'the boundary lines on land are not at right angles with shore but approach the shore at obtuse or acute angles,' which we have, 'it is inappropriate to apportion the riparian tract by extending the onshore boundaries. Instead, the division lines should always be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries.'"

Jones then distributed to the AOPA Committee the two diagrams that were published in *Nosek v. Stryker*, 103 Wis.2d 633, 309 N.W. 868 (Wis. 1981) at pages 871 and 873. He observed the shoreline along the Nosek and Stryker properties was "not perfectly straight but it's approximately straight as noted in the case. It's approximately straight as noted in Finding 35 of Judge Davidsen." In *Nosek v. Stryker*, the Wisconsin Supreme Court determined that "it was appropriate to extend at a right angle. The Court doesn't say that you extend it perpendicular or that perpendicular is defined as something other than a right angle. The Court says it extends at a right angle. Nowhere in *Nosek* is the concept of splitting the angle discussed, except if you want to use that phrase, to apply to the third method (or the proportional method)."

Jones urged the *Nosek* "case also says that it is incumbent upon the courts to avoid an inequitable result. As Mr. Jonas has pointed out, under the proposed nonfinal order, Habour gains approximately 30 feet of riparian zone by an expansion of its riparian zone property. Roberts suffers a loss of approximately 20%, and the Beachview Property suffers a loss of approximately 30%. There is no way that that can be fair, reasonable, just, or equitable. We believe that the decision should be revised to provide that the piers ought to be extended at a 90-degree angle, that they be running parallel with each other. We have no problems with the spacing of the distance of the piers from one another as proposed by Judge Davidsen." He urged the nonfinal order to be modified to accomplish this result.

Jones said that, as written, the nonfinal order "really, in analysis, creates a fourth option, which is a hybrid between option two and option three of *Nosek*. Just as some people have pointed out that *Nosek* does not adopt the long lake method of solving a problem, neither does *Nosek* stand for a splitting of the angle method for solving the problem. Thank you."

Linda Runkle asked whether she might ask Fred Jones a question that "doesn't count against his time." Applying the two diagrams from *Nosek v. Stryker*, "Which is where the piers were and which is the outcome where the Court ended up with?"

Jones responded that the Nosek parcel is lot 18, and the Stryker parcel is lot 17 on Diagram 1 (page 871). "The body of the case addresses the proposed riparian zones. If you look at the lines that basically extend from the shore at right angles, that's the second approach. The dotted lines are the extension of property lines, which is the first option. In Diagram 2, they show where the Nosek pier, which basically runs with the property lines extended, and they show how that extended across the riparian zone of Stryker as established by the case. And then, in Diagram 2, if you look at the pier that has the 'G'

next to it, they say Nosek can put its pier configured in that angle, and it will not cross the riparian zone of Stryker, and basically has it running out at a right angle from the shoreline, rather than parallel to the property line extended. Does that answer your question?"

Runkle responded, "Definitely."

The Chair said, "Thank you. With that we'll move on to hear from Harbour Condominiums who is represented by Andrea Roberts."

Andrea Roberts began her argument. "Thank you." She said she wished to make "a couple of preliminary points regarding the objections in Harbour's briefing that I won't dwell on."

Roberts said, "The first is the timing specific to Roberts' objections. As the Judge's order made clear, the objections were due on June 24th, and the objections were not timely filed, so we would ask the Commission that the objections be stricken."

Roberts indicated, "Second, in addition as we made clear in our papers, before the Commission there is a limited body of evidence. 'Limited' is really not a good word for it, but as you saw from Judge Davidsen's very lengthy order, there is quite a bit of evidence before the Commission in terms of the findings of fact. That's the evidence that's before the Commission. The statistics that you've been given in the papers that have been filed by Mr. Roberts and by Beachview, about the narrowing or widening of various riparian zones, are just statistics that were not before Judge Davidsen. No evidence was admitted on those facts whatsoever. We believe that arguments with respect to that issue have been waived as a result and that there's no evidence before the Commission on which to make a decision with respect to those arguments. But, just in case there's any doubt in your minds whatsoever because these statistics have been presented, let me be clear that we believe these statistics are inaccurate." She urged that the statistics were based on two lines she highlighted from Exhibit 19. "Instead of calculating the Harbour's riparian zones, by looking at the northern and southern riparian boundaries," she said Roberts and Beachview "have calculated those statistics using the northern property line of Harbour and the southern riparian zone that the Harbour shares with Beachview. There is no northern riparian zone on Exhibit 19, and that's for a couple of reasons. One is that the northern parties were not added to the dispute. We tried to add them and to add Culver Cove as the property south of Mr. Roberts. Actually, Beachview objected to their addition. Based on that objection, Judge Davidsen entered her finding that they were not necessary parties. Those parties were not added, so those riparian zones could not be determined. We couldn't send surveyors to their properties to determine where the angle of their property lines at the lake would end, and, as a result of that, could not calculate their riparian zones or their shared riparian lines, north of Harbour and south of Mr. Roberts. But, frankly, it doesn't matter. Those parties don't have any dispute with Harbour or with Mr. Roberts. They had an opportunity to object and be part of this proceeding, and they choose not to do that. We placed our northern pier in exactly the same location that it has been for the last decade, and our neighbors have no problem with respect to that and have not objected to it. The same can be said on

Culver Cove. They don't object to this order. They've been informed of all the orders that have been issued by Judge Davidsen and copied on each of those and have made not objection."

Roberts urged, "*Nosek* does not require that Judge Davidsen or this Commission determine the riparian boundaries both north and south for all of the parties. Rather, it advocated that there are three methods of fairly and equitably determining what riparian lines exist for parties. Both of counsel for Roberts and Beachview have done a nice job of explaining that decision, but a couple of points with respect to that. *Nosek* advocates, as Mr. Jones explains, that there should be a right angle brought to the shoreline."

Roberts continued. "In this particular configuration that you have before you, as Judge Davidsen found, it was important that we defined what does that mean. On a large body of water like Lake Superior, when you're not dealing with a tight highly congested area, maybe it's possible to simply tell the parties, 'right angles to the shoreline,' and if there's a little bit of difference between the parties as to what that means, that's okay. There's room to absorb it. But it's not okay here. The reason that it's not okay here is that you have funneling on Lake Maxinkuckee. Beachview bought a strip of property that's 55 feet in width. They've asked the Department of Natural Resources to allow them to place ten large watercraft and ten small watercraft in this 55-foot strip of land. You can see the problem that has created. When you have one party who owns 250 feet, another party who owns 100 feet, it's a highly congested area, and then you try and add 20 more watercraft on a very narrow piece of land, there's not much margin for error, frankly. This is a highly contested case. As you see from the Judge's order, things began back in 1996, they went on until 1998, they cooled down for a few years, and the parties have been litigating back for several years. All of the parties collectively asked Judge Davidsen for definition in the order, and I think we all agree that it's important for these parties that the placement of riparian lines be defined clearly so that there's no dispute in the future. I think I can speak for everyone when I say we all want this dispute to be clearly defined and over."

Roberts urged, "Judge Davidsen's order fairly and equitably determined the riparian lines that were at issue in the dispute. That is the two boundaries of the riparian zone of Beachview. It was fair and equitable for a couple of reasons. First, it's important that you know Judge Davidsen conducted a two-day hearing at which each of the parties presented a variety of evidence, including expert evidence, to determine what would be the most fair and most equitable approach, and how does that approach impact the Public Trust Doctrine and how is impacted by the Reasonableness Doctrine. One expert, Ralph Taylor, was, in fact, the only expert at the hearing to be designated on riparian law, riparian zones, and pier placement. As Mr. Taylor explained, the method that Harbour advocates is, in fact, the most fair and most equitable method for determining the riparian boundaries. Let me explain to you why that is the most equitable or fair method. This is the problem that's created when you leave perpendicular undefined, as Beachview and Roberts have suggested you should do. The parties pour seawalls, and then those piers wind up being place perpendicular to the seawalls. The result is when piers are placed close to the shoreline, in fact, that they cross. What's more, if you literally follow this in at right angle to a shoreline, how do you define the 'shoreline'? Shorelines change if you

have a lot of rain or a little rain, if you measure it in the fall versus the spring. Judge Davidsen found in the findings of fact that shorelines change, and that's why it's important to define it clearly here, and none of the parties have objected to that."

Roberts continued. "The way that this is calculated is there is a survey that was Exhibit 1 at the hearing, and it became part of Exhibit 19. All the parties stipulated that it was accurate. A professional surveyor goes out and defines the property line at the lakefront side, and it's defined by the points that are on each end of the property as straight lines drawn between them. Those boundaries are ones that all the parties have stipulated to. All lakes are curved. They're all oval. The result is that no party will have a riparian zone that is as wide lake-ward as it is at its base. When you look at this line that's created here, the line that's created where the properties are joined, it's not a 180 degree angle. It's not perfectly straight. It will be something less than that [such as] 170 degrees, 175 degrees. What Ralph Taylor, the expert at the hearing explained, and what Judge Davidsen decided, was that it is fair and equitable, in that circumstance, to take the angle and divide it in half. It's hard to argue with the notion that it is equitable to take that angle and divide it equally, and that's all Harbour had here. The result of doing this in this particular case, in fact, explains why Judge Davidsen's decision is fair and equitable. Beachview has a variety of options for placing piers when you apply Exhibit 19 as Judge Davidsen did. Some of those options were explained at the hearing." She said, "one option was to place a pier with a perpendicular extension. Another option would be to place a pier that has a square end. A third option would be to drive a straight line here down the middle of the riparian zone for Beachview."

Andrea Roberts concluded her argument. "Whatever the configuration, it really doesn't make a lot of difference. In fact, as a result of the temporary order that was entered that told the parties that they could place their piers, Beachview, in fact, has placed a perpendicular pier that allows them to accommodate ten large watercraft. As a result of where the piers are today, it is pretty clear that, in fact, the parties can place the watercraft that they need to place and can do so in a way that's appropriate for the lake, that's in the best interests of the Public Trust Doctrine, and, at the same time, is, in fact, fair and equitable. Thank you."

The Chair responded, "Thank you. With that, we'll hear from the Department of Natural Resources with Ann Knotek."

Ann Knotek, attorney for the Department of Natural Resources, began her argument. "Good afternoon. One of the good things about going last is that my fellow counsel have made all of the pertinent arguments, and I don't have to say much. I think probably the most important thing that I can offer to the Committee is that the Department has a slightly different perspective in this dispute than the three riparian owners." The Department of Natural Resources seeks a reasonable principle or approach "such that it affords a just apportionment between the riparian owners, with due regard given to the Public Trust." Among all principles, "the Public Trust is probably of paramount importance to the Department. The key things that we were looking for as a result of this case were, first of all, the proper rule to be applied to the case. The Department's position is that the rule that Judge Davidsen chose to apply in *Nosek v. Stryker* is the

proper rule. Also, the Department has an important concern that there is enough room between the structures as they're placed in the lake for navigational safety. Basically, what that boils down to is that one of our Conservation Officers needs to have enough room…to get a boat in between. In this case, the Department's witness, Lt. John Sullivan, testified that he felt ten feet was an appropriate amount of room between structures." He testified "that the Department would prefer more space, but given the circumstances, ten feet was sufficient. That was what was in the order, and that is what we propose should be adopted."

Knotek continued. "One of the points I wanted to make about *Nosek v. Stryker* is that, if, in fact, a proportional method were applied to this case, one element that has not been discussed, and for which I do not believe that any evidence has been submitted, is a finding of the 'line of navigation' which is necessary in order to apply the proportional method. In Wisconsin law, the 'line of navigation' is, I think, set at three feet of depth. That zone of navigation might change, and would change, from lake to lake and along the shoreline, depending on the depth. We do not have anything in Indiana law, or any of the cases that I'm aware of, that explore the 'line of navigation'. That would be total departure for us if that rule were adopted."

Knotek added, "The Department's perspective in these pier dispute cases is that, if we had our preference, every homeowner would put their pier straight down the middle of their property so that we could avoid the problems with elbow room and the problems with having enough navigational space between. Obviously, this case is one in which these three property owners seek to maximize their riparian area to either put in as many boats as they want or else to have enough elbow room, swing space, etc. While the Department is aware of that situation and totally understands the squeeze that is happening on our lakes, that is the concern of the private property owners."

Knotek concluded, "The Department's concern is that there be a reasonable and just apportionment between the owners and that there is proper regard for the Public Trust. In that sense, we're asking the AOPA Committee to confirm Judge Davidsen's nonfinal order. We feel that the proper standard has been met in her nonfinal order and that it achieves equity. As the Department, it gives us a lot of helpful guidance in how to approach, not just this case, but other cases as they come up in the future. Thank you."

Chairwoman Stautz stated, "Thank you, also. Any questions before we move forward to hear rebuttal?"

Linda Runkle responded, "Yes, I have a couple of questions. It's my understanding the Department of Natural Resources is, in fact, the body that makes the determination as to how many boats can be on a pier?"

Knotek began. "At this point…."

Runkle continued. "Somebody said at that Beachview Properties has approval for 20 watercraft off of 54.5 feet of shoreline?"

Knotek responded. "I think they said that they have applied for approval of that amount of boats. One of the details that is mixed in with this case is that along the way each of the three parties made submissions to the Department of Natural Resources, Division of Water, for various layouts on how they wanted those piers to be placed. In fact, those applications are pending with the Division of Water. Now, I have instructed the Division of Water not to act on those in a final way until this case has a lasting decision. We're not going to tell them to do one thing, then find out that there's a different result, and they have to do something else."

Runkle asked, "The Division of Water has criteria as to the appropriate number of boats to be allocated in relationship to lake frontage?"

Knotek continued, "Well, no, we don't. It's something that has come up with the Lakes Management Workgroup. It's something that will be revisited as that group reconvenes, but what I think might be the most helpful thing to say is that what the Department is looking for is this definition of 'riparian zone' of exclusive use. Once you get that zone, you can say, 'Well, there needs to be at least ten feet between structures placed into the lake,' and that's mainly a concern of [the Division of] Law Enforcement. There's also a Public Trust element there so that there's ingress and egress to the shoreline. Beyond that, we don't have any hard and set rules. A reality of this case is that the three parties want to maximize their frontage in different ways. For example, Beachview in the middle wants to get a certain about of boats out. The Roberts want to preserve privacy on swimming area. The Harbour wants to maybe accomplish a different goal. Frankly, the Department's interest is not so much in what they do inside their zone as just making sure that there is an appropriate zone defined for the Department and for the public. I guess there could be different issues and there could be different results in terms of what layout is ultimately approved of by the Division of Water, but the Division of Water cannot determine that with finality until there is a specific order that is final."

Chair Jane Ann Stautz observed, "That is also Finding 150 of the nonfinal order. 'The parties shall submit amended plans consistent' with the nonfinal order to the DNR within 14 days or so."

Michael Kiley said the legislation concerning pier placement on public freshwater lakes was designed "to give the Conservation Officers, whose obligation it is to enforce these rules, sufficient leeway so that folks who have piers, they can make a decision that everybody needs a permit. It hasn't gotten to that point yet, although it seems it's getting there."

Kiley continued, "I have been on this Commission almost 30 years. My interest in public freshwater lakes applies to pier rights. Two things have created this problem. Number one is, of course, the funneling issue. That is where developers with smaller, what I call 'umbilical strips' that run over to the lake, have larger developments that require more boat space. Also, the increased size of boats and boat lifts have contributed to it. The second issue is the irregular shoreline."

Kiley observed that riparian owners "want to protect their own territories, of course. In my opinion, counsel for the Department makes the most realistic comment about how this could be equitably handled when she says that we'd be better off if the parties would attempt to locate their piers, as much as they possibly could, to the center of their properties." That would help "preclude boundary issues on each side. Well, that ain't gonna happen. That's just not human nature."

Kiley said he was "impressed" by Judge Davidsen's nonfinal order. "At this junction, unless I can be made to see otherwise, and I'm impressed additionally by now retired Lt. Taylor, who had 30 years of experience, as well as Lt. John Sullivan whom I've worked with for many years. Those are my preliminary comments, and you can tell where I'm coming from. I don't want to preclude the rebuttal arguments. I don't want folks to think their comments will be falling on deaf ears because I am still listening to what the parties might have to say. I can tell you the funneling issue is going to come to a head with the legislature in this next go-around."

The Chair said, "Bill, you have a couple of minutes for additional comments in rebuttal."

R. William Jonas, Jr. then began rebuttal arguments. "Thank you. There are a couple of things. I just don't believe that you can equitably apportion the area from here to here without determining what the boundaries are in here and here. That wasn't done. You can't decide. What Ms. Roberts is asking you to is decide it doesn't matter what the boundaries are out here and out here because all we need to do is determine the ones in the middle. But you can't determine the ones in the middle without knowing where the ones on the outside are because you don't know how things should be apportioned among the parties. That's part of the problem."

Jonas continued, "The other thing the evidence was in the case that this pier crosses the property line extended on the north boundary at about twelve feet out from the shore. Now, the order finds that this property line and Roberts's south property line are roughly perpendicular to the lake and roughly parallel to each other. So what we've got is a situation where what I read the order to say is that those are the boundaries. What you've got is part of Harbour's boundary is being used for this pier, and that's one of the reasons that we thought the northern neighbors should have been added. The result of that is, and that issue is before you because the question of whether they should be parties was a part of what's going on here. Ms. Roberts on behalf of Harbour asked for them to be added, and they weren't added. The result of this is that it has caused this to come down and this to come down. That comes out of the hides of Mr. Jones's client, Beachview, and of my clients, the Roberts. That's what we're saying is unfair."

Jonas added, "Mr. Roberts has grandchildren. He would like to keep them safe, to the extent that it is possible to do. That and the fact that placing the pier here makes his entry to his fishing boat invisible to his wife. They're concerned about getting to see if there's a slip and fall. The evidence before Judge Davidsen was that the Roberts pier needs to be here because that is the area that can be viewed by Mrs. Roberts when she is in the kitchen."

Jonas observed, "Harbour has two piers. The fact that Harbour has two piers makes it impossible for them to put one in the middle. Their usage is a more intensive use."

Jonas concluded, "We ask you to simply look at the conclusion. What we've done is we've changed what we mean as a right angle, as a perpendicular, to mean something else. To mean, well, kind of sort of in the middle of what the lines would be. What you're really then doing is, in *Nosek v. Stryker*, you've gone past the second prong. You've gone in the third prong. The third prong is equitable apportionment. We believe that you cannot decide how to equitably apportion without determining what the outer boundaries are. We're asking you, in order to make a fair and equitable conclusion, to consider all of the space that's available and how all of the space should be allocated. You can't do that without determining the outer boundaries."

The Chair said, "Thank you, very much. With that, we'll hear from Beachview Properties again. Mr. Jones.

Fred R. Jones then offered the rebuttal of Beachview Properties, LLC. "Thank you, again. Mr. Jonas has pointed out that Harbour currently has, and has had for some time, two piers. It also had pending an alternative request to add a third pier to the property. If we're going to discuss density, I think we have to consider all the information that would be appropriate to properly resolve that particular issue."

Jones said, "I also want to point out that Judge Davidsen, in paragraph 121 of her proposed nonfinal order, says: 'A complete resolution of issues may require a professional survey and the application of legal principles to precisely delineate the boundaries of riparian rights lakeward of the shoreline.' The reason that Beachview objected to adding Culver Cove to the south and properties to the north is that their interests does not have to be affected by the decision here because there's plenty of space within the shoreline of the parties that are already in this dispute to resolve this issue. You do, however, have to know what the northern riparian line of Harbour is and what the south riparian line of Roberts is to make that fair and equitable determination. There's just no other way to do it."

Linda Runkle said, "I need to interrupt, because I almost" made the same comment to William Jonas. "If you do that, if you say, 'Well, we have to know the northern zone on this end and the southern'" zone on the other end, "then you've got the next property owner involved and the next. You're talking about the whole lake."

Jones reflected, "We don't know that to be the case."

Runkle asked, "How can you not make that argument?"

Jones responded, "I'm not saying you can't make that argument. I'm saying that you don't know that that's a valid argument until you have that line determined. You can determine that line without making the next party a party to the dispute. It may turn out that there isn't any additional party that needs to be added, if you're going to follow the *Nosek* decision which says you're basically going to go out at right angles. What has

happened here is that *Harbour* has expanded out like this. Mr. Jonas said that, under his interpretation of the proposed order, what is 245 feet at the shore becomes 276 feet. That's a gain of 21 feet, excuse me, 31 feet. Somebody loses 31 feet if Harbour gains Who do you think that is? You think that's fair or just or reasonable to them. You can order that the survey be done here and here. You can determine what lines you want to have surveyed just to establish what the riparian zones should be, then you can go out and fix those lines, then you'll know is there a problem with Culver Cove to the south or is there a problem with Mr. Martindale to the north. I'm not sure that there will be."

Chairwoman Jane Ann Stautz said, "Thank you, Mr. Jones."

Michael Kiley reflected upon challenges pertaining to excessive pier length and noted "that doesn't appear to be an issue here, other than possible at Culver Cove."

Ann Knotek stated, "That has been taken care of."

Kiley responded, "All right. I'm sorry.

The Chair continued, "That's okay. Thank you. For Harbour Condominiums, Ms. Roberts."

Andrea Roberts then provided the rebuttal for Harbour Condominiums. "I need to make a couple of points. I need to begin again by dispelling this notion with 276 feet. There is no evidence before the Commission on that. There is no evidence before Judge Davidsen on that either, and it's just dead wrong. If you use these lines, as I've highlighted on Exhibit 19, you see how that calculation comes about. We don't advocate using those lines in any way, shape, or form. I think, in fact, today our northern pier is placed in exactly the same position that it is on Exhibit 19. If you use the bearings of this pier, in comparison to the riparian zone, which we believe is more accurate if we're going to stand here and hypothesize about what that riparian line might be. If you use that, in fact, the calculations from this survey are that our riparian zone goes down 13 feet. All of the riparian zones go down. They have to because, in fact, the lake is round. There is no two ways about that. But, none of that is before you because there was no evidence on that at the hearing, and there is no finding of fact with respect to that in the judge's order."

Roberts continued, "Beachview and the Roberts seem to advocate today a proportional approach from *Nosek*. Let me just address that in a couple of ways. First, no party advocated that at trial. Judge Davidsen explicitly found that in her order. No party advocated it, and Lt. Sullivan and Lt. Taylor both said it won't work here, and it's not the correct approach. On top of that, there was no evidence before Judge Davidsen to determine how these things compare proportionally. Lt. Taylor best explained it when he said in his direct testimony that that occurs when you're talking about rivers with irregular shorelines. That's not our situation. If you look at *Nosek*, this notion that *Nosek*'s second approach cannot apply here because somehow our shoreline is too unusual, it just doesn't bear out." She referred to the illustrations from *Nosek v. Stryker* that were previously presented to the AOPA Committee by Fred Jones. "This is the

shoreline of the water at issue in the *Nosek* case. It's curved. It's round just like Lake Maxinkuckee. Just like every lake that your rulings are going to be applied to."

Roberts urged, "*Nosek* doesn't require that you define the riparian zones. Rather it puts out in issue the riparian lines. That's what Judge Davidsen defined. The proportional approach, in fact, would require Judge Davidsen and other judges to determine both riparian boundaries, to look at the total square footage of water, and then to compare those between property owners. You're correct that a domino effect results from that. On top of that, it means that in every case that is before the Department and the Commission from this point forward, every lake where it is oval as is Lake Maxinkuckee, this body will need to be allocated to fully determine the proportional approach. Every party will come before you and will say, 'You have to determine all of these riparian boundaries, and you have to compare them in total to one another.' I submit that that's just not workable. Frankly, it's not in the overall interests of justice and equity."

Roberts continued, "Judge Davidsen took the *Nosek* general rule, that second approach with the right angles to the shoreline. She didn't change Indiana law. Instead, all she did was further define it. In fact, it's necessary to further define it in this case because of the very narrow strip of property that we're talking about that's between these parties, and the high use that is at issue."

Roberts added. "Just a couple of last points. You're correct in saying that it's not before this body whether the northern and southern neighbors should be added. The objections lay out what portions of Judge Davidsen's order are in issue. The addition of those parties was not in issue in either Mr. Roberts's objection or Beachview's objection." She said when Harbour Condominiums moved to add riparian parcels north and south of three riparian parcels, whose owners are parties in this proceeding, "Beachview objected, and Roberts took no position on it. Judge Davidsen correctly or incorrectly found that this issue could be resolved, and it wasn't necessary to add those parties. That decision has not been appealed to this body. In fact, we believe at the end of the day she was correct."

Roberts concluded, "Ultimately, each of the parties presents a compelling argument. Beachview has a condominium complex where all of the condominiums have been sold, and each of those owners wants to place watercraft. Mr. and Mrs. Roberts have grandchildren, and they want to maximize the swimming area and want to place their pier in a particular location." She said, "the Harbour has the same position that it has occupied for many years. It owns a certain amount of lake frontage, and there are 20 condominium units on there. Each of the parties has a compelling interest, but at the end of the day, you have the opportunity and the obligation to establish a rule that equitably applies the lake frontage for these parties and for future parties who look at your decision. We believe the Commission should follow the general rule that it has, and that's *Nosek*'s second method that's perpendicular to the shoreline. In fact, you should affirm what Judge Davidsen did, which was to go the step further to define exactly what that means, especially in a high traffic and small area like is present before this body. Thank you."

Ann Knotek stated as attorney for the Department of Natural Resources, "I don't have anything further to add."

Jane Ann Stautz asked the members of the Committee if they had any questions.

Linda Runkle responded, "Yes, I do. I know this isn't part of anything, but I'm just curious. How many watercraft are you guys able to accommodate at Harbour Condominiums?"

Roberts responded, "It was stated in the Judge's order that there is a large watercraft for each of the property owners and at least one, possibly two small watercraft." She said the Judge defined these in her order as 20 large watercraft at approximately 25 feet long "and 30 small watercraft which are less than 16 feet. That could be sailboats." Others were personal watercraft or fishing boats. She added that Harbour Condominiums bought 245 feet of frontage "so there would be room to place that many watercraft."

Fred Jones interposed. "Conversely," Beachview Properties "can accommodate the requirements that we need for boats, also. We're not asking for any more than what we've acquired. We're just asking that we not be the ones suffering from the squeeze."

Michael Kiley said, "I'm prepared to make a motion at this time."

The Chair responded, "Okay."

Kiley continued, "What we have created for ourselves is a monster. It's not going to get better until the Indiana Legislature tries to define, a little more explicitly, the proper extent of the placement of piers." He continued, "In view of the evidence that I see that's in the record, and the evidence that's before us from Lt. Sullivan, given the evidence, I'm going to move that the Committee adopt the nonfinal order of Judge Davidsen. In effect, this would make the Respondent Harbour Condominium's motion to strike moot. I ask that that be placed of record before this Committee."

Linda Runkle said, "I'll second the motion."

Jane Stautz asked if there was "any discussion or comments on that motion? I understand the difficulty of the varying positions in this dispute, and we appreciate the parties' time and deliberation this afternoon. With that, I'm going to call for the question."

Upon a voice vote, the motion carried unanimously.

Stautz addressed the attorneys and their clients. "Thank you."

Information Item and Brief Discussion of SB 619; Administrative Cause No. 05-137J

Jane Ann Stautz called for consideration this information and discussion item.

Stephen Lucas, Director of the Division of Hearings, directed the attention of the members of the AOPA Committee to Senate Enrolled Act 619 that was enacted by the

most recent session of the Indiana General Assembly. "I know the hour is late, and I don't wish to take a lot of the Committee's time with SEA 619, but if we might talk for just a moment. There are a lot of things that we could talk about in that bill, but the thing we are looking for some guidance on is the part that's on the bottom of page 2 of the bill. These are amendments to IC 14-10-2-2." The end result of this and prior legislation is that "the ALJs in our office, and the ELJs in Judge Davidsen's office" can be disciplined for violating the "applicable provisions of the code of judicial conduct." He said, "I certainly have no quarrel with that concept, and it wouldn't matter if I did because the Indiana General Assembly said that's how it is. It makes sense except that we don't know what 'the applicable provisions' are, and what Judge Davidsen's office and ours are looking for is your informal endorsement to work together and get some assistance from the Disciplinary Commission in helping us define what's applicable and what's not applicable. Maybe we would then come forward with two separate but parallel rule adoptions to say these are the applicable provisions of the Code of Judicial Conduct, unless you have different thoughts."

Chairwoman Jane Stautz responded, "I was not aware" of the legislation "until you sent it to us with the agenda in our packet. With all the bills, I wasn't aware of the changes here. I do think that clarity for the boundaries of what you're operating under and what you're to be held accountable for is appropriate. I think that's a good approach."

Linda Runkle said she agreed and that this aspect of SEA 619 presented fewer challenges than other aspects, particularly some that have application exclusively to the Office of Environmental Adjudication. She identified particularly amendments to IC 4-21.5-7-5 that authorized OEA to consider "challenges to rulemaking actions by a board described in IC 13-14-9-1 made pursuant to IC 4-22-2-44 or IC 4-22-2-45."

Mary Davidsen, Chief Environmental Law Judge for the Office of Environmental Adjudication, said when this aspect of SEA 619 "was being discussed before the House Committee," the amendment followed a lot of analysis in pending cases "saying we don't have jurisdiction" to consider these challenges. The reasoning was that Indiana "should have a one-stop process. I think that was the original intent" of the amendments to IC 4-21.5-7-5.

Judge Davidsen said that, with respect to the issue raised by Judge Lucas, she agreed with his approach. She was looking forward to attempting to craft joint rules for OEA and for NRC to clarify what are the applicable provisions of the Code of Judicial Conduct.

Steve Lucas thanked the AOPA Committee for its comments and said the Division of Hearings would work with the Office of Environmental Adjudication in this effort. He said he would periodically update the Committee on any significant progress.

Adjournment

Jane Ann Stautz called for adjournment at approximately 2:06 p.m.