Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order on Summary Judgment in the matter of *Oakwood Property Owners Association v. Mekus*; Administrative Cause No. 14-038W

- **Finding of Fact and Conclusions of Law with Nonfinal Order on Summary Judgment (issued on January 26, 2016)**
- **Petitioner's Objections to Findings of Fact and Conclusions of Law with Nonfinal Order on Summary Judgment and Asserted Errors (filed February 15, 2016)**

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

IN THE MATTER OF:

OAKWOOD PROPERTY OWNERS ASSOCIATION, INC. **Petitioner,**	)	**ADMINISTRATIVE CAUSE NUMBER: 15-038W**
vs.	)	
GREG MEKUS, **Respondent.**	)	**(Riparian Rights Dispute)**

FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH NONFINAL ORDER ON SUMMARY JUDGMENT

Statement of the Proceeding and Jurisdiction

1. On March 6, 2015, Oakwood Property Owners Association, Inc. *("the Association")*, by its President, Rachel Cardis *("Cardis")* , filed correspondence with the Natural Resources Commission *("the Commission")* identified as a "Mediation Petition" *("the Petition")*. The Petition sought relief against Greg Mekus *("Mekus")* with respect to his placement of a personal pier, boat lift and pontoon.
2. The Petition avers that the Association is the "successor in interest to the unincorporated association known as 'Village of Oakwood', which previously administered the affairs of the owners" of "the subdivision known as 'Oakwood Place' or the 'Village of Oakwood'" *(hereinafter referred to as "the Subdivision")* existing on Hamilton Lake in Hamilton, Steuben County, Indiana. Cardis further states in the Petition that Mekus, who owns real estate within the Subdivision that does not front on Hamilton Lake, is "maintaining and has maintained a group pier, a boat lift and personal watercraft within the boundaries of and extending from the easement delineated as 'Hill Street'..."
3. The Association requested the following relief,

   a. a declaration that Hill Street... [are easements] dedicated for the use and enjoyment of all lot owners within the herein [reference] subdivision.

b. an order enjoining Mr. Mekus, without prior written consent from the Oakwood Association, from erecting or maintaining any structure or property within or extending from any easement within the herein subdivision; and

c. an order which imposes fines and penalties for Non-Compliance with the subject order and other just and proper relief to [effective] administer 312 IAC.

(Bracketed spelling and grammatical errors as in original).

4. The Petition initiated a proceeding governed by IC § 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act" or "AOPA") and rules adopted by the Commission at 312 IAC 3-1 to assist with its implementation of AOPA.
5. The Lakes Preservation Act places full power over public freshwater lakes in the State of Indiana. The State, through the Department of Natural Resources *(Department)*, is responsible to "hold and control all public freshwater lakes in trust for the use of all the citizens of Indiana for recreational purposes." IC §14-26-2-5(d), *Indiana Dept. of Nat. Res. v. Lake George*, 889 N.E.2d 361 (Ind. App. 2008) and *Lake of the Woods v Ralston*, 748 N.E.2d 396, 401 (Ind. App. 2001).
6. The Commission is responsible for controlling activities occurring "over, along, or lakeward of the shoreline or water line of a public freshwater lake", including the placement and maintenance of temporary structures, including piers. The Commission is also charged with resolving "disputes among persons with competing interests or between a person and the department" with respect to activities associated with a public freshwater lake. *Indiana Code § 14-26-2-23*. The Commission has adopted rules, as authorized, to fulfill these responsibilities at 312 IAC 11.
7. The Petition refers to "Hamilton Lake"; however, Exhibit 2 to the Petition, which is a copy of the Plat of the Subdivision, identifies the body of water as "Fish Lake". It is concluded that Hamilton Lake and Fish Lake are one in the same and the body of water has been identified a "Public Freshwater Lake" as defined at Indiana Code § 14-26-2-3 and 312 IAC 11-2-17. *Snyder, et al. v. Linder, et al.,* 9 CADDNAR 45 (2002) and "*Listing of Public Freshwater Lakes", Information Bulletin #61 (Second Amendment),* Indiana Register, 20110601-IR-312110313NRA (June 1, 2011), pg. 8. *(Within this Order the lake will be referred to as "Hamilton Lake").*
8. The Commission is the "ultimate authority" for determinations under the Lakes Preservation Act. *312 IAC 3-1-2, Indiana Code § 4-21.5-1-15.*

9. The Commission has jurisdiction over the subject matter of this proceeding and over the persons of the parties.
10. Following the issuance of notice to the Association, Mekus and the Department on March 12, 2015, the administrative law judge conducted a prehearing conference on April 6, 2015 in Columbia City, Indiana. The Association appeared by Cardis and Mekus appeared in person. Both appeared without counsel. The Department, a non-party, was present by counsel, Joy M. Grow. During the initial prehearing conference, the parties acknowledged that certain easements within the Addition had been the subject of adjudication before the Commission in the past. The prior decision did not involve the parties to this proceeding but addressed issues regarding easements within the Subdivision. See *Snyder,* supra.
11. A status conference was conducted on May 20, 2015, at which both parties reported having retained counsel, although no counsel appeared. Cardis stated that the Association anticipated filing a motion for summary judgment and the administrative law judge entered a schedule for filing of summary judgment motions, responses and replies that contained the express authority for the parties' respective attorneys to seek revision of the filing schedule no later than June 19, 2015.
12. On June 5, 2015, counsel, Donald Stuckey, filed his appearance on behalf of Mekus and on June 24, 2015, counsel, Michael Andreoli, filed his appearance on behalf of the Association.
13. On June 24, 2015, the Association, by counsel, filed its "Motion for Summary Judgment", "Argument and Brief in support of Motion for Summary Judgment" and "Designation of Documents" *(Collectively referred to as "Association SJM").* Following the approval of an extension of time to file his response, on August 3, 2015, Mekus, by counsel, filed his "Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment", "Argument and Brief in Response to Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment", and "Designation of Facts and Documents". *(Collectively referred to as "Mekus SJ Response").* On August 17, 2015, the Association timely filed its "Reply Brief in Response to Respondent's Response and Motion for Summary Judgment". *("Association Reply Brief").*[1]

[1] On October 16, 2015, the administrative law judge notified Mr. Andreoli that the exhibits attached to the Affidavit of Scott M. Federoff, which was filed as part of the Association SJM, were "out of order to the extent that [she was] not able to reconstitute them correctly" and requested that the documents be provided again to ensure that the

14. Mekus' cross motion for summary judgment was determined to be untimely filed and the administrative law judge limited consideration of the Mekus SJ Response as only a response to the Association SJM[2].

15. On October 16, 2015, the administrative law judge notified Mr. Stuckey by e-mail of her interpretation of a portion of Mekus' designation of evidence as an attempt to designate the entire contents of two Commission administrative proceedings as well as a specified judgment of the Steuben Circuit Court. The administrative law judge noted that the wholesale reference to the prior Commission proceedings was insufficient as a designation of matters upon which Mekus relied as required by Trial Rule 56 and Indiana Code 4-21.5-3-23.[3] Administrative Law Judge Jensen expressed willingness "to consider the orders entered in these proceedings on the condition that Mr. Mekus provide a copy of the orders or correctly identify the proceeding by proper CADDNAR citation..." The administrative law judge also observed that a copy of the referenced Steuben Circuit Court judgment was not provided but would be accepted for consideration if a copy was submitted. Mr. Stuckey was provided until October 23, 2015 to address the administrative law judge's notice.

16. On October 21, 2015, Mr. Stuckey, on behalf of Mekus, submitted documents from the Commission's proceeding in Administrative Cause 08-065W identified as "Amended Petition for Quasi-Declaratory Judgment Under 312 IAC 3-1-15" and "Response to the Amended Petition for Quasi-Declaratory Judgment Under 312 IAC 3-1-15", along with copies of three Commission Final Orders from contested proceedings that are duly indexed in accordance with Indiana Code § 4-21.5-3-32.

17. The Association filed its objection with respect to Mekus' submission of the supplemental documents on October 23, 2015.

18. Administrative Law Judge Jensen observed that while she was willing to consider the final disposition of the Commission proceedings identified in the Mekus SJ Response on the belief

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documents contained in the record were complete. Mr. Andreoli provided the documents as requested on October 19, 2015.

[2] Despite the express authorization to do so, Mekus did not seek to revise the summary judgment filing schedule. In rejecting Mekus' motion as a cross motion for summary judgment, the administrative law judge noted that nothing about the entry "shall be interpreted to nullify the legal principle that upon motion for summary judgment filed by one party a grant of summary judgment upon the issues raised may be granted in favor of any party although no motion for summary judgment is filed by that party." See *Entry with Respect to Respondent's Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment"*

[3] With respect to the prior proceedings before the Commission, Administrative Law Judge Jensen further recognized the absence of any request for the Commission to take official notice as authorized under IC 4-21.5-3-26(f)

that those dispositions would not come as a surprise to the Association, the failure to appropriately designate the specific documents relied upon could not be corrected by the untimely submission of the documents. The pleadings from the Commission's proceeding under Administrative Cause 08-065W provided by Mekus on October 21, 2015 were stricken. However, the contested final orders provided by Mekus were not stricken for the reason that these orders, upon proper indexing in accordance with Indiana Code § 4-21.5-3-32, are properly considered as precedent by the Commission.[4]

19. The administrative law judge further observes that Mekus' SJ Response contains numerous quotations purporting to be taken from the Plat of the Subdivision and from other uncited sources. These quotations are not identified in any piece of evidence properly designated by Mekus and are not presented in a properly verified affidavit. Therefore, these quotations are only considered as evidence in this proceeding to the extent the evidence is identified in other properly designated evidence. *Capital Drywall Supply, Inc. v. Jai Jagdish, Inc.*, 934 N.E.2d 1193 (Ind. Ct. App. 2010).

Summary Judgment Standard

20. Summary Judgment is governed by Indiana Code § 4-21.5-2-23, which specifies, with limited exception, that "...an administrative law judge shall consider a motion filed ... as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure."

21. Trial Rule 56 of the Indiana Rules of Trial Procedure *("TR 56")* provides that summary judgment should be granted if the evidentiary material shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Insurance Co. v. United Farm Bureau Insurance Co.*, 560 N.E.2d 459 (Ind. Ct. App. 1990). "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Wells v. Hickman*, 657 N.E.2d 172, 175 (Ind. Ct. App. 1995).

22. "A fact is 'material' for summary judgment purposes if it helps to prove or disprove an essential element... of" the proceeding. *Graham v Vasil Management Co., Inc.* 618 N.E.2d

[4] In 1988, the Commission established the use of CADDNAR for indexing decisions resulting from contested proceedings. Since that time, CADDNAR has been acknowledged in reported decisions of the Indiana Court of Appeals. *Peabody Coal v. Indiana DNR*, 692 N.E.2d 925 (1994 Ind. App.).

1349 (Ind. Ct. App. 1993). "A factual issue is 'genuine' for purposes of summary judgment if the trier of fact is required to resolve an opposing party's different versions of the underlying facts." *York v. Union Carbide Corp.*, 586 N.E.2d 861 (Ind. Ct. App. 1992).

23. Supporting and opposing summary judgment affidavits must present admissible evidence that follows substantially the same form as though the affiant were giving testimony in court. *Capital Drywall Supply, Inc. v. Jai Jagdish, Inc.,* 934 N.E.2d 1193 (Ind. Ct. App. 2010).
24. Any doubt as to the existence of an issue of material fact, or an inference to be drawn from the facts, must be resolved in favor of the nonmoving party. *Musgrave v. Squaw Creek Coal Co. and DNR*, 12 CADDNAR 192, 197 (2009), citing *Travelers Indem. Co. of America v. Jarrells*, 906 N.E.2d 912, 915 (Ind.Ct.App2009).
25. A party moving for summary judgment has the burden of proof with respect to summary judgment, regardless of whether the party would have the burden in an evidentiary hearing. *Regina Bieda v. B & R Development and DNR*, 9 CADDNAR 1 (2001). See also, *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994). "Once the movant has met this burden, an opposing party is obliged to disgorge sufficient evidence to show the existence of a genuine triable issue." *Cowe by Cowe v. Forum Groups, Inc.,* 575 N.E.2d 630, 633 (Ind. 1991).
26. "When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." *TR 56(B), Simon Prop. Group v. Mich. Sporting Goods*, 837 N.E.2d 1058 (Ind. Ct. App. 2005).

Jurisdictional Limitation of the Commission

27. The parties' evidence and briefs reflect a difference of opinion with respect to the validity of the Association's existence, the authority of the Association, or the ability of the Association to control Subdivision property for the benefit of the Lot Owners.
28. "A state administrative agency has only the powers conferred on it by the Indiana General Assembly. Powers not within the agency's legislative grant of authority may not be assumed by the agency nor implied to exist in its powers. The DNR and the Commission, on administrative review, have only the powers granted to them specifically by the Indiana

General Assembly." *Pratt v. Indianapolis Water Co. & DNR*, 9 CADDNAR 17, 18 (2001) *(Internal citations removed).*

29. Hill Street is one of the street extensions referenced in *Snyder* that reaches the shoreline of Hamilton Lake. *Association SJM, Plat.* Hill Street is 30 feet in width enjoying approximately 30 feet of shoreline abutting Hamilton Lake. *Id. (Hereafter referred to as "the Hill Street Easement")*

30. The Commission's jurisdiction in this proceeding is limited to the determination of the dispute existing between the Association and Mekus with respect to their competing interests in the use of Hamilton Lake along the shoreline of the Hill Street Easement. *Indiana Code § 14-26-2-23(e)(3).* In exercising its lawful jurisdiction, the Commission is empowered to "render a decision concerning property rights to the extent necessary" to fulfill its responsibilities associated with the placement of piers on public freshwater lakes. *Kranz v. Meyers Subdivision Property Owners,* 969 N.E.2d 1068, 1070, (Ind. Ct. App. 2012).

31. The Association maintains that it "administers the affairs on behalf of the owners of property" in the Subdivision. *Association SJM.* The Association, as a representative organization authorized to represent and assert the interests of the Lot Owners in the Subdivision, who are the true and rightful holders of the dominant estate in the common areas of the Subdivision, including riparian rights, may initiate the instant proceeding on behalf of its membership. (See *Hoosier Environmental Council v. DNR and IP&L* Company, 10 CADDNAR 252, 256 (2006), in which the Commission determined "A membership association, such as HEC, may however possess associational standing if certain criteria are successfully met. *Save the Valley v. Indiana-Kentucky Electric Corporation, 820 N.E.2d 677, (Ind. Ct. App. 2005) citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, (1977).* HEC must meet the criteria set forth in the *Hunt Test* to succeed in claiming associational standing. That test includes determinations that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Save the Valley, supra, citing Hunt at 344.*)

32. The Association may initiate and maintain the instant proceeding on behalf of its membership. However, the determination of the Commission is limited to the relief available within its lawful jurisdiction.

Application of *Snyder, et al. v. Linder, et al.*, 9 CADDNAR 45 (2002)

33. The issue presented in *Snyder* focused upon a complaint that Lot owners had "wrongfully placed a pier at the end of an easement known as Dock Street" located within the Subdivision at issue in this proceeding. The Commission's determination focused, in large part, upon the interpretation of the Plat and dedication of property *(hereafter referred to as "the Plat"). Snyder at page 48.*
34. While the instant proceeding involves Hill Street, interpretation of the same Plat considered in *Snyder* is, once again, at the heart of the Commission's consideration of the issues presented.
35. The Commission's findings and conclusions in Snyder offer a historic perspective of the Subdivision. Therein it is discussed that through a quiet title action concluded in 1993 a common area originally identified in the Plat as existing along the shoreline of Hamilton Lake that separated the Lots in closest proximity to the shoreline from Hamilton Lake was vacated. Through that action the land became the individual property of the adjacent lot owners leaving only the streets and alleys as common areas. *Snyder at pg. 49.*
36. The Commission also considered the language of first issued deeds and reflected upon the historic use of the shoreline associated with the Easements identified as "Dock Street", "Water Street" and "Hill Street".
37. The Commission determined in 2002 that "all residents of [the Subdivision] enjoy riparian rights for the placement of docks but not for the placement of boathouses. … These rights are not exclusive to any particular type or class of resident but are rather held in common by all." *At page 51.*
38. The Commission further determined that subsequent to the 1993 quiet title action, "the common areas became restricted to the alleys, the streets, and the extension of the streets to the shoreline of Hamilton Lake." *Snyder at 49.*
39. The Hill Street Easement was identified in *Snyder* as one of the common areas described in the Plat.

40. The Commission's 2002 interpretation of the Plat is binding upon this proceeding.

Matters not in Material Dispute

41. The Plat of the Subdivision dated July 25, 1912 was recorded by the Recorder of Steuben County on April 21, 1913. *Association SJM.*

42. In relevant part the Plat states as follows:

> The said land is platted for the purpose of establishing a place for summer homes and streets, alleys and the shoreline is hereby dedicated to the use of the lot owners of [the Subdivision]. Subject however to the rules and regulations to be hereafter promulgated by said owners and subject to the conditions named in deeds of conveyance hereafter made by the DeKalb Mortgage Co. of Auburn, Indiana to the purchasers of said lots in said [Subdivision].

Id.

43. Mekus is the owner of property within the Subdivision identified as "Bluffpoint S Pt Lots 1, 2, 3, and 4…", which is situated on the north side of and adjacent to Hill Street. *Mekus SJ Response, Affidavit of Greg Mekus; Association SJM, Plat.* Mekus' property is not situated along the shoreline of Hamilton Lake. *Id.*

44. In accordance with the Commission's Final Order in *Snyder*, Mekus is a holder of the dominant estate, in common with all Lot Owners in the Subdivision, with respect to the Subdivision's common areas, including the Hill Street Easement.

45. The Association was established in accordance with Indiana Code §§ 23-17-1, *et seq. ("the Act")* as an Indiana Non-Profit Corporation with Articles of Incorporation filed with the Indiana Secretary of State on July 31, 2006. Following approval by the Association's membership, the Association Board, by consent resolution, adopted Bylaws and Rules on February 1, 2007, which were duly recorded with the Recorder of Steuben County on March 9, 2007. *Association's SJM, Affidavit of Scott Federoff, Exhibit A, E and F.*

46. The Association, as an entity, is not a fee title owner of property within the Subdivision. Consequently, the Association is not, as an entity, the holder of the servient estate associated with the common areas of the Subdivision. Because the Association is not a Lot Owner, the Association is also not, as an entity, a holder of the dominant estate associated with the common areas of the Subdivision, in common with other Lot Owners,.

47. Mekus asserts that he is "not a member of the Association and did not in any way agree to be governed by the Association personally or through the [use my] lot and the rights associated

including the Easement." *Mekus SJ Response, Affidavit of Mekus (Bracketed spelling and grammatical errors as in original).*

48. An "Owner", for purposes of the Association's Articles of Incorporation is "the record owner(s), whether one or more persons or entities, of fee simple title to a Lot, including contract sellers, but excluding those having an interest in a Lot merely as security for the performance of an obligation." A "Lot", by definition in the Association's Articles of Incorporation includes "a platted lot in all platted Sections of the Subdivision." *Association's SJM, Affidavit of Scott Federoff, Exhibit A.*
49. Despite Mekus' protest, under the Association's Articles of Incorporation, Mekus, who owns four Lots within the Subdivision, is considered by the Association to be a Member who is entitled to cast four votes, one vote for each Lot owned.[5]
50. The Association's establishment and authority has not been legally challenged. *Association MSJ.*
51. The Association's self-asserted status as "the successor in interest to the unincorporated association known as the 'Village of Oakwood Association', which previously administered the affairs of the Owners with regard to the Subdivision" is not contested in the evidence. It is also not contested that the Association established its Bylaws and Rules following approval by the Lot Owners who attended the annual meeting at which the Bylaws and Rules were considered for approval. *Association MSJ, Affidavit of Scott M. Federoff; Mekus SJ Response, Affidavit of Mekus.*
52. The Plat specifies that an individual Lot owner's use of the streets, alleys and common areas identified in the Plat are subject to "rules and regulations to be hereafter promulgated by said owners and subject to the conditions named in deeds of conveyance hereafter made by the DeKalb Mortgage Co. of Auburn, Indiana to the purchasers of said lots in said Village of Oakwood." *Association MSJ, the Plat.*
53. The Plat does not specify the means by which the Lot Owners in the Subdivision are required to or may promulgate the rules and regulations.

[5] To the extent Mekus wishes to contest the validity or authority of the Association such contest must be raised before a tribunal with proper jurisdictional authority.

54. The establishment of the Association and the Association's adoption of its Bylaws and Rules may constitute a reasonable mechanism for the governance of the Lot Owners with respect to the common areas in the Subdivision as was contemplated by the Plat.

55. The evidence does not provide an exact number of Lot Owners within the Subdivision; however, over 30 persons attending the Association's annual meeting on June 16, 2007. *Association MSJ, Affidavit of Scott M. Federoff, Exhibit B.* It is reasonable to conclude that all or at least the majority of, the persons in attendance at the annual meeting are Lot Owners. Therefore, the evidence reasonably establishes that there are approximately 30 persons who hold in common the dominant estate associated with the common areas of the Subdivision and who possess riparian rights associated with common areas abutting Hamilton Lake, including the Hill Street Easement.

56. Without submitting an application for approval by the Association's Board as specified in the Association's Rules, Mekus installed a pier and boat lift lakeward of the shoreline associated with the Hill Street Easement. *Association MSJ, Affidavit of Frederica Nodine (Exhibits A & B); Affidavit of Scott M. Federoff (Exhibit F); Mekus SJ Response, Affidavit of Mekus.* Furthermore, Mekus has consistently moored his pontoon boat at the pier overnight. *Id.*

57. The Association objects to Mekus' installation of the pier and boat lift and the mooring of his pontoon boat and has requested that Mekus remove the installations and cease mooring his boat lakeward of the shoreline associated with the Hill Street Easement for the reason that the placement of the pier and boatlift and the mooring of Mekus' boat constitutes a violation of the Association's Bylaws and Rules. *Association MSJ, Affidavit of Frederica Nodine (Exhibits A & B).*

58. Mekus maintains that no other Lot Owner within the Subdivision has expressed an interest in using the waters lakeward of the Hill Street Easement for the placement of a pier or the mooring of watercraft. Mekus further states;

> It is my present intent not to exclude any other lot owner in the Subdivision from using my pier or boat lift as [they currently placed] in the easement area, and as of this date I have not so [exclude] any other lot owner with the Subdivision.

Mekus SJ Response, Affidavit of Mekus (Bracketed spelling and grammatical errors as in original).

59. The Association does not allege that Mekus' extension of a pier and boatlift from the shoreline associated with Hill Street Easement and mooring of his boat has created a dispute with another riparian owner.

Conclusion of Law

60. In *Snyder*, the Commission determined:

> 41. The Court of Appeals of Indiana determined in *Maxwell v. Hahn* that in construing an easement, the intention of the grantor must be given effect. When lands are granted according to a plat, the plat becomes part of the grant by which the land is conveyed so far as the limits of the land are concerned. *Maxwell v. Hahn* citing *Gary Land Co. v. Griesel*, 179 Ind. 204, 209, 100 N.E. 673, 675 (Ind. 1913). In effect, the holder of easements can enjoy riparian rights, if, in reviewing the easement and attendant plat, the fee owner is found to have intended to convey the enjoyment of riparian rights.
> 42. The Indiana Supreme Court stated in *Klotz v. Horn* that even though easement holders are not fee simple owners of real estate that touches the lake, it "does not necessarily mean that they, as easement titleholders, cannot use the riparian rights of the servient tenant." ... Once again, the intent of the grantor controls.
> 43. In identifying "an interest in land sufficient to establish the same legal standing as the owner of land," the Commission included the concepts embodied by *Maxwell v. Hahn* and *Klotz v. Horn* in the definition of "riparian owner." For purposes of 312 IAC 11-2-19, a "riparian owner" includes the holder of an easement if the grantor intended to convey riparian rights. For the purposes of 312 IAC 11-3-1(b)(8), an easement holder would place a temporary structure by or with the acquiescence of a riparian owner if the fee owner had intended to convey the enjoyment of riparian rights.

At 50

61. As noted in *Snyder*, a "riparian owner" is defined at 312 IAC 11-2-19 as "the owner of land, or the owner of an interest in land sufficient to establish the same legal standing as the owner of land, bound by a lake. The term includes a littoral owner."

62. The Association's Bylaws refer to its ownership of property and within its Petition the Association characterizes itself as a riparian owner. However, the Association is not a riparian owner by virtue of holding, in common with other Lot Owners, the dominant estate of any common area within the Subdivision by virtue of the dedication in the Plat. The Association also does not own the riparian rights associated with its fee title ownership of the common areas in the Subdivision. The Association, as an entity, is not a riparian owner.

63. Mekus, as a Lot Owner within the Subdivision, is a holder, in common with the other Lot Owners in the Subdivision, of the dominant estate associated with the common areas

established by the Plat. Mekus is a riparian owner within the definition established at 312 IAC 11-2-19.

64. The Commission declared in *Snyder* that "all residents of [the Subdivision] enjoy riparian rights for the placement of docks but not for the placement of boathouses. ... These rights are not exclusive to any particular type or class of resident but are rather held in common by all." 9 CADDNAR 45, 51 (2002)

65. As a riparian owner Mekus may exercise riparian rights associated with the Hill Street Easement but must do so in a manner consistent with the riparian rights of other Lot Owners with whom his rights are held in common. *Belcher & Belcher v. Yager-Rosales*, 11 CADDNAR 79, 82, (2007) citing *Bath v. Courts*, 459 N.E.2d 72, 76 (Ind. Ct. App. 1984). *Xanders v. Nixon Trust*, 14 CADDNAR 33 (2015).

66. Conversely, just as Mekus must be mindful of the riparian rights of other Lot Owners in the Subdivision, other Lot Owners may also not interfere with the riparian rights granted to Mekus. *Id.*

67. The Plat recognizes that the Lot Owners shall exercise their rights to the common areas, including their riparian rights, subject to established rules and regulations. *Association SJM, The Plat.* As noted previously the means by which those rules and regulations may be established is not specified and the Association's attempts as set forth in this proceeding may be reasonable. However, the Association's efforts are in controversy and the Commission is not the appropriate forum to resolve that controversy.

68. "'Two types of easements exist: (1) an easement is appurtenant if it passes (by conveyance or inheritance) with the dominant tenement; (2) an easement is in gross if it is personal to the owner of the dominant tenement.' An easement 'is never presumed to be in gross when it can be fairly construed to be appurtenant to the land.' *William C. Haak Trust v. Wilusz*, 949 N.E.2d 833, 835, (Ind. Ct. App. 2011) citing *Brown v. Heidersbach*, 360 N.E.2d 614, 618 (1977) and *Sanxay v. Hunger,* 42 Ind. 44, 48 (1873).

69. The Plat has established that the Lot Owners in the Subdivision possess certain rights to the common areas established by the Plat. The Commission, in *Snyder*, expressly determined that the rights granted by the Plat with respect to the streets extending to the shoreline of Hamilton Lake, as relevant here the Hill Street Easement, include riparian rights. In exercising those riparian rights, the Commission concluded that the Lot Owners within the

Subdivision may place and maintain piers and moor boats. Those riparian rights run with the land and are appurtenant to the ownership of a Lot within the Subdivision. Those rights may not be extinguished.

70. The Plat contemplates that the exercise by a Lot Owner, including Mekus, of their rights to the common areas in the Subdivision, including their riparian rights, may be governed by rules and regulations promulgated by the Lot Owners. The rules and regulations may not have the effect of terminating the rights held in common by the Lot Owners within the Subdivision, including riparian rights, as otherwise granted by the Plat and clarified by the Commission's decision in *Snyder*.

71. Because Hamilton Lake is a public freshwater lake any activity lakeward of the shoreline must also be balanced against the interests of the public. *Indiana Code 14-26-2-5, Lake of the Woods v. Ralston*, 748 N.E.2d 396, 401 (Ind.App.2001).

72. With respect to the rights of the public, the State of Indiana "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes." *Indiana Code 14-26-2-5(d)(2)*.

73. Riparian owners, such as Mekus and the other Lot Owners in the Subdivision who possess riparian rights, "continue to possess rights along a public freshwater lake, but the rights are now statutory and must be balanced with the public's rights." *Lake of the Woods,* supra at 401.

74. In relevant part, Indiana Code 14-26-2-23(a) states:

> Sec. 23. (a) Unless a person obtains a permit from the department under this section and conducts the activities according to the terms of the permit, a person may not conduct the following activities:
> (1) Over, along, or lakeward of the shoreline or water line of a public freshwater lake:
> ...
> (C) place, modify, or repair a temporary or permanent structure.

75. Mekus' pier and boat lift may properly be classified as a "temporary structure." *312 IAC 11-2-25.*

76. A "temporary structure" meeting certain criteria may qualify for placement under a "general license" as specified at 312 IAC 11-3-1(b), which states:

> (b) In order for a temporary structure to qualify, the structure must satisfy each of the following:
> (1) Be easily removable.

(2) Not infringe on the access of an adjacent landowner to the public freshwater lake.
(3) Not unduly restrict navigation.
(4) Not be unusually wide or long relative to similar structures within the vicinity on the same public freshwater lake.
(5) Not extend more than one hundred fifty (150) feet from the shoreline or water line.
(6) If a pier, not extend over water that is continuously more than six (6) feet deep to a distance of one hundred fifty (150) feet from the shoreline or water line.
(7) Not be a marina.
(8) Not be a group pier.
(9) Be placed by a riparian owner or with the written approval of a riparian owner.

77. A pier that does not qualify for placement under the general license authority of 312 IAC 11-3-1 must only be placed and maintained under the authority of an individual license issued under 312 IAC 11-3-3.

78. Mekus acknowledges that other Lot Owners may exercise riparian rights associated with the Hill Street Easement and stated his intent not to exclude any holder of riparian rights from the use of his pier. *Mekus SJ Response, Affidavit of Mekus.*

79. Based upon the realization that at least approximately 30 Lot Owners within the Subdivision possess riparian rights the potential exists that a pier extended from the Hill Street Easement, or any other Subdivision easement abutting the shoreline of Hamilton Lake may be appropriately characterized as a "group pier", which may not be placed under the general license authority of 312 IAC 3-1-1(b). *See specifically 312 IAC 3-1-1(b)(8).*

80. As relevant to this proceeding, a "group pier" is:

Sec. 11.5...a pier that provides docking space for any of the following:
(1) At least five (5) separate property owners.
(2) At least five (5) rental units.
(3) An association.
...

312 IAC 11-2-11.5.

81. To the extent Mekus intends the pier and boat lift he placed and maintains lakeward of the Hill Street Easement to be used by at least five separate Lot Owners within the Subdivision, the pier would be considered by the Department and the Commission to constitute a "group pier" for which Mekus would be obligated to obtain an individual license from the Department.

Nonfinal Order of Summary Judgment

1. Matters Determined to be Outside the Jurisdiction of the Commission

   a) The Association's Rules and Bylaws appear to constitute the type of "rules and regulations" that may have been contemplated by the Plat.[6] The Commission declines to opine on the manner in which the Association was created or the method by which its Bylaws and Rules were promulgated. The Commission lacks jurisdiction to determine the validity of the Association or its actions. *See Indiana Code § 23-17-4-4.*

   b) Mekus maintains that he is "not a member of the Association and did not in any way agree to be governed by the Association..." *Mekus SJ Response, Affidavit of Mekus.* Again, the Commission lacks jurisdiction to address contests associated with membership in domestic not for profit corporations. *See Indiana Code § 23-17-7-1.*

   c) Just as the Commission's jurisdiction does not extend to the enforcement of local ordinances[7], the Commission's jurisdiction does not extend to the enforcement of the Association's Bylaws and Rules[8]. Therefore, the Commission is to require Mekus to comply with the Association's Bylaws and Rules or to impose fines and penalties as set forth by the Association for Mekus' failure to comply with those Bylaws and Rules.

2. Matter Determined on Summary Judgment

   a) The determination of the Commission as set forth in *Snyder* is reaffirmed, particularly with respect to all easements within the Subdivision which abut the shoreline of Hamilton Lake, including Hill Street, which is specifically of interest in this proceeding. "All residents of [the Subdivision] enjoy riparian rights for the placement of docks but not for the placement of boathouses. ... These rights are not exclusive to any particular type or class of resident but are rather held in common by all." *Snyder at 51.*

---

[6] In rendering a determination in this proceeding, the Commission does not intend to express an opinion, and the content of this Order shall not be construed to express an opinion with respect to the validity of the Association's incorporation or its establishment of its Articles of Incorporation, Bylaws or Rules. Any contest between the parties regarding those matters should be addressed by a court of proper jurisdiction.

[7] See *DNR and Samuels v. Busch,* 8 CADDNAR 99 (1998)

[8] The Commission's determination is expressly limited to application of state law and administrative rule and this order shall not be interpreted as enforcement of any Association Bylaw or Rule. To the extent this order accomplishes enforcement of any Association Bylaw or Rule, such outcome is coincidental to application of state law and administrative rule that require a similar result.

b) Mekus is a "riparian owner" as defined at 312 IAC 11-2-19 with respect to the Hill Street Easement as well as the other common areas within the Subdivision abutting the shoreline of Hamilton Lake by virtue of the Plat.

c) The Association is not a riparian owner within the definition at 312 IAC 11-2-19.[9]

d) Consistent with the final determination in *Snyder,* Mekus possesses the status necessary to extend a temporary pier into Hamilton Lake from the shoreline associated with the Hill Street Easement or any other common area in the Subdivision abutting the shoreline of Hamilton Lake in accordance with Indiana Code §§ 14-26 and 312 IAC 11-3, under a general license or by an individual license, as may be necessary. [10]

e) Mekus' rights to extend and maintain a pier is subject to the competing interests of other "riparian owners" and Mekus' use must allow for common use by all Lot Owners. *(See specifically Snyder, pg. 51, finding 49 and footnote 5).*

f) To the extent the Association constitutes a valid representative organization to govern the affairs of the Lot Owners with respect to the exercise of rights associated with the common areas within the Subdivision, including the exercise of riparian rights associated with those common areas abutting the shoreline of Hamilton Lake, it may not establish any rule that interferes with the riparian rights of Mekus or any other individual Lot Owner within the Subdivision who by virtue of their Lot Ownership possesses riparian rights as are derived from and guaranteed by the Plat or enforce any rule in such a manner as to have that affect [11].

Dated: January 26, 2016

Sandra L. Jensen
Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2200
(317) 232-4229

[9] See Finding 31, infra. In the right case, the Association may act on behalf of its membership despite the determination that the Association, as an entity, is not a riparian owner.

[10] This authority is determined solely upon law and administrative rule under the jurisdiction of the Commission and should not be construed as an opinion whether Mekus must comply with the Association's Bylaws and Rules.

[11] Conversely, Mekus, or any other individual riparian owner or group of riparian owners within the Subdivision may not interfere with the riparian rights possessed by any other riparian owner or group of riparian owners, whether or not represented by the Association.

A copy of the foregoing was sent to the following:

Michael J. Andreoli
1393 West Oak Street
Zionsville, Indiana 46077

Donald J. Stuckey
128 West Seventh Street
P.O. Box 523
Auburn, Indiana 46706

Sean R. Wooding
Legal Counsel
Department of Natural Resources
Indiana Government Center South, Room W-295
402 West Washington Street
Indianapolis, Indiana 46204

cc: Lori Schnaith, Department of Natural Resources, Division of Water
Linnea Petercheff, Department of Natural Resources, Division of Fish and Wildlife
Lt. Erick Bolt, Department of Natural Resources, Division of Law Enforcement

A copy of the foregoing has also been served upon the following. *The parties need not serve pleadings, motions or other filings upon these persons.*

Donald and Margo Reed
4805 S. 150 W.
Pleasant Lake, Indiana 46779

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE STATE OF INDIANA

FILED
FEB 15 2016
NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

IN THE MATTER OF:	)	
	)	
OAKWOOD PROPERTY OWNERS' ASSOCIATION, INC.,	)	
	)	
Petitioner,	)	**ADMINISTRATIVE CAUSE NUMBER: 15-038W**
	)	
vs.	)	
	)	
GREG MEKUS,	)	
	)	**(Riparian Rights Dispute)**
Respondent.	)	

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH NON-FINAL ORDER ON SUMMARY JUDGMENT AND ASSERTION OF ERRORS

Comes now the Petitioner, Oakwood Property Owners' Association, Inc., by counsel, and for their written Objections to Findings of Fact and Conclusions of Law with Non-Final Order on Summary Judgment and Assertion of Errors would allege and say as follows:

Petitioner objects to and asserts error in Rhetorical Paragraph 1(a) of the Non-Final Order of Summary Judgment as the Commission does have jurisdiction to determine the validity of the Association. The Court's reliance on Indiana Code Sec. 23-17-4-4 to assert lack of jurisdiction is misplaced as said Section provides "Except as provided in Subsection (b), the validity of corporate action may not be challenged on the

grounds that the corporation lacks or lack power to act". Subsection (b) provides that the corporation's power to act may be challenged by a Declaratory Judgment. This Indiana Code Section establishes the validity of the Association. In point of uncontroverted fact, no challenge has been made to the Association and its action should be validated and upheld. Further, this Order is contrary to the Findings in Paragraphs 50-55 asserting in fact the validity of the Association and that per the Rule promulgated by the Association, Mekus is a Member. Further, the Judge fails to find that Mekus actually paid dues as a Member of the Association per the Association's Supplemental Designation of Documents in Response to Respondent's Response to Motion for Summary Judgment.

Petitioner objects to and asserts error in Rhetorical Paragraph 1(b) of the Non-Final Order of Summary Judgment as the Court's reliance on Indiana Code Section 23-17-7-1 to find "Again, the Commission lacks jurisdiction to address contests associated with Membership in Domestic-Not-For-Profit Corporations" to be misplaced and erroneous. There exists no contest as the Court has found in prior Findings to the Association's validity and that Mekus is a Member. Further, the Court confuses Membership and the request that Mekus follow rules and regulations promulgated by a valid Association and contemplated by the original Plat itself. It is important to remember that Mekus' Riparian Rights were established per the original plat but they are not unfettered. His rights, per plat, are "subject however to the Rules and Regulations to

be hereinafter promulgated by said Owners..." (Finding 42). Moreover, Mekus paid dues suggesting, without a doubt, his recognition of the Association's ability to promulgate Rules and Regulations and to collect dues from its Members.

Petitioner objects to and asserts error in Rhetorical Paragraph 1 (c) of the Non-Final Order of Summary Judgment. While the Court correctly Orders Mekus to comply with the Rules and Regulations of the Association, the Court in the same breath states that "The Commission's jurisdiction does not extend to the enforcement of the Association's Bylaws and Rules". This is not only confusing but inconsistent with the facts.

Petitioner objects to and asserts error to Rhetorical Paragraphs 2 (a)(b)(c)(d) and (e) of the Non-Final Order of Summary Judgment as the Judge's determinations are inconsistent with one another and contrary to each and every probative fact which supports Summary Judgment for the Association. Similar to Snyder, which allows for the placement of docks, but not for boathouses, Mekus has placed a private boatlift on which he places his boat and permanently moors his boat overnight. How is this consistent with common usage or how is this consistent with Mekus having the status to extend a temporary pier? He extended more than that with his own private lift and his own boat placed on that lift contrary to the rights of all other Riparian Owners. His private boatlift is more like a boathouse as described in Snyder and not like a pier. The Judge's failure to recognize or distinguish this fact is erroneous on its face. Factually,

one cannot use or moor a boat next to a private boatlift occupied by Mekus' boat any more than next to a boathouse. Neither can Common Owners swim, fish or perform other activities which are common to all Riparian Owners.

Petitioner objects to and asserts error to 2(f) of the Non-Final Order of Summary Judgment as the Judge has totally misconstrued the Association's rights, Rules and efforts to secure the right of common usage for all Riparian Owners. The Association has not attempted to deny Mekus' Riparian Rights but rather the fact that Mekus did not seek the permission of the Association to place a pier, moor his boat, or place a private boatlift in the easement. The Judge cites no Rule promulgated by the Association which in fact violates Mekus' right as a Riparian Owner. To allow Mekus a Temporary or General License to locate a private boatlift in the easement conveys on him greater rights than awarded him by plat. His property came with the written restrictions of the Rules promulgated by the Owners. To find otherwise creates a "race to the water" (our emphasis) on who locates first regardless of the ability of use by all Common Riparian Owners.

WHEREFORE, the Association prays that the Commission reverses the Judge's Ruling that Mekus be allowed to maintain his private boatlift and moor his boat overnight in the Hill Street Easement; to find that Mekus violated the Rules promulgated by the Association; to order him to remove his boatlift and refrain from mooring his boat overnight in the easement and for all other proper relief in the premises.

Respectfully submitted,

Michael J. Andreoli,
Attorney for Petitioner,
Oakwood Property Owner'
Association, Inc.

CERTIFICATE OF SERVICE

Comes now Michael J. Andreoli, Counsel herein for Petitioner, Oakwood Property Owners' Association, Inc., and does hereby certify that he did on the 15th day of February, 2016, mail a copy of the foregoing instrument through the United States Post Office, postage prepaid, to Sean R. Wooding, Edward Harcourt, Legal Counsel, Department of Natural Resources, Indiana Government Center South, Room W-295, 402 West Washington Street, Indianapolis, Indiana 46204 and Donald J. Stuckey, Attorney At Law, 128 West Seventh Street, P.O. Box 523, Auburn, Indiana 46706 and to Donald and Margo Reed, 4805 S. 150 W., Pleasant Lake, Indiana 46779.

Michael J. Andreoli,
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Oakwood Property Owners'
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