

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2001

Cir. Ct. No. 2008CV1095

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LAKE GENEVA CLUB,

PLAINTIFF-RESPONDENT,

v.

TOWN OF LINN, WISCONSIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. The Lake Geneva Club (LGC), a condominium association, is a riparian property owner on Geneva Lake in the Town of Linn. The Department of Natural Resources granted LGC a permit to modify its existing

pier and install a new one on the bed of Geneva Lake. Looking to the general municipal authority embodied in its pier placement ordinance, the Town denied LGC a permit to build and modify the piers as the DNR had approved. On certiorari review, the circuit court reversed the Town's decision and ordered it to grant LGC a permit in accordance with the DNR's already-granted permit. The Town moved for relief from the judgment; the court affirmed its original decision. The Town now appeals from the judgment and the order. We agree that the DNR's legislatively bestowed regulatory authority over piers in navigable waters supersedes any local authority the Town has. We affirm.

¶2 LGC has owned riparian property on Geneva Lake since 1938 and maintained a 200-foot multi-slip pier since about 1973. Historically, LGC moored twenty-eight to thirty-six boats in slips on the pier and along the seawall. An unprotected swim area lies between the seawall and slips on the pier's east side.

¶3 In September 2006 LGC applied to the DNR for a permit to modify the existing pier and construct a new 136-foot cribbed pier to create a more protected swim area by relocating existing slips from the seawall to a separate pier. The DNR held a public hearing and took comments, all of which opposed the proposed 136-foot pier.¹ The DNR's findings included a summary of the nature of the objections and that:

8. The [DNR] and the applicant have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Section[s] 1.11 [and] 30.12(1), Wisconsin Statutes and [WIS. ADMIN. CODE chs.] NR 102 [(March 2008)], 103 [(March 2005)], 150

¹ Sometime earlier, the Town established a 100-foot length limit ("pierhead line") on piers.

[(Feb. 2010)], 299 [(Jan. 2003)], and 326 [(April 2005)].²

¶4 The DNR concluded that the cited statutes and administrative code chapters authorized it to issue a permit for construction and maintenance of the project. The permit was subject to twenty-three conditions. They included trimming the length of the new pier to 100 feet, capping the number of moorings at thirty-two and, if necessary, obtaining permits or approval required by local zoning ordinances and the U.S. Army Corps of Engineers. Potential challengers were advised of their WIS. STAT. ch. 227 appeal rights. No one appealed.

¶5 LGC applied to the DNR to amend the original permit to modify the design of the existing and proposed piers in regard to the location of three slips which, according to the DNR's permit, could be "accommodated elsewhere." Finding that the new pier required one less crib than had been approved, that one additional crib and slip would be added to the existing pier, and that the modification would not increase the number of moorings approved, the DNR granted the amendment. LGC then applied to the Town for a building permit pursuant to LINN, WIS., CODE §13-11 (2008) ("the ordinance").³ The Town building inspector determined the permit should issue.

¶6 Before building commenced, however, the Town issued a stop-work order to address concerns raised by the Chicago Club, a neighboring riparian group. In response, LGC filed another permit modification request with the DNR

² All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

³ In the midst of these proceedings, the Town of Linn recodified and renumbered the ordinance. The recodification did not substantively alter code sections relevant here. Like the parties, we use the current numbering.

proposing to change the angle of the new pier to re-apportion riparian rights to quell Chicago Club dissent.⁴ In May 2008, the DNR approved the modification to the new pier; no changes were made to the existing pier.

¶7 The Town required LGC to reapply to the Town Board for a permit. LGC objected but acquiesced. The building inspector determined that LGC had complied with the twelve-and-a-half-foot setback and 100-foot pierhead line requirements of the ordinance and had been granted a DNR permit. He recommended the Board grant the permit. The Town Board met and voted unanimously to deny the permit.⁵ In response to LGC's claim that it had not received notice of the hearing, the Board reconvened. It again denied the permit, reciting the same reasons as for the initial denial.

⁴ The Chicago Club filed for a contested case hearing on both permit modifications. It eventually withdrew its challenges and the contested case was dismissed.

⁵ The Board recited seven reasons for denying LGC's pier permit:

1. Granting the permit is against the DNR formula regarding boat moorings,
2. The [Geneva Lake] Conservancy is not in favor of granting this permit,
3. Existing 200' pier does not have a permit to exceed the pierhead line,
4. Would increase boat density,
5. No hardship found,
6. Safety,
7. If the Board grants this permit, future problems may occur such as the 150' pier in Lake Geneva and other Associations will be watching what we do as they may want to increase density also.

¶8 LGC petitioned the circuit court for certiorari review of the denial. The court found that since LGC’s new pier satisfied the ordinance’s setback and pierhead line requirements the Town could not refuse the permit because, under WIS. STAT. § 30.12, the DNR has preeminent regulatory control over LGC’s pier. Concluding that the Town acted outside its jurisdiction, the circuit court reversed the Town’s decision and remanded the matter to the Town with instructions that it issue the permit consistent with that granted by the DNR.

¶9 The Town filed a Motion for Relief from Judgment. As a springboard to revisiting its earlier arguments, the Town pointed out that the circuit court apparently thought that the DNR permit affected only the existing 200-foot pier. The circuit court conceded that it had not clearly understood whether LGC had one pier or two but concluded that its misapprehension did not go to the heart of the dispute—“whether the Town had the right to effectively negate what the DNR had done.” In a thorough written decision, the court again ruled that the Town did not have that authority. The Town appeals.

¶10 Our role on certiorari is limited. If, as here, a circuit court takes no new evidence when it conducts certiorari review, we apply the traditional common law certiorari standard of review. *Edward Kraemer & Sons, Inc. v. Sauk County Bd. of Adjustment*, 183 Wis. 2d 1, 7, 515 N.W.2d 256 (1994). Depending on the nature of the challenge, we consider one or more of the following: (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Id.* We review the Board’s decision, not the circuit court’s, and we accord it a presumption of validity. *See id.* at 8. Important to our analysis is whether the

Board followed its own rules. *State ex rel. Riley v. DHSS*, 151 Wis. 2d 618, 623, 445 N.W.2d 693 (Ct. App. 1989). Such rules define the boundaries of the Board’s authority, and when it disregards its rules, it acts beyond its authority. *Id.* at 625.

¶11 The parties touch on all four aspects of certiorari review but focus—dispositively, in our view—on whether the Board kept within its jurisdiction. The Town contends that it acted within its jurisdiction because numerous sources imbue a municipality with broad authority to govern matters of local concern—here, to limit structures in Geneva Lake. LGC maintains that the Town Board exceeded its jurisdiction by seeking to second-guess the DNR’s preeminent authority to regulate permits for piers in navigable waters. We agree with LGC that the Town overstates its power in this area.

¶12 WISCONSIN STAT. ch. 30 regulates Wisconsin’s navigable waters pursuant to the public trust doctrine. *ABKA Ltd. P’ship v. DNR*, 2002 WI 106, ¶11, 255 Wis. 2d 486, 648 N.W.2d 854. Under the doctrine, “the state of Wisconsin holds the beds of navigable waters in trust for all its citizens.” *Hilton ex. rel. Pages Homeowners’ Assoc. v. DNR*, 2006 WI 84, ¶18, 293 Wis. 2d 1, 717 N.W.2d 166 (citation omitted). The legislature has the primary authority to administer the public trust. *Id.*, ¶19. It delegated the duty of regulating piers to the DNR under WIS. STAT. §§ 30.12 and 30.13. *See Borsellino v. DNR*, 2000 WI App 27, ¶6, 232 Wis. 2d 430, 606 N.W.2d 255 (Ct. App. 1999).

¶13 The Town contends that WIS. STAT. ch. 30 is replete with express “affirmations of municipal authority.”⁶ True to a degree, local regulation under

⁶ One example the Town offers is WIS. STAT. § 30.11(1), which, according to the Town’s brief, provides: “Any municipality may ... by ordinance establish a bulkhead line.” The ellipsis replaces the critical phrase “subject to the approval of the [DNR].”

WIS. STAT. § 30.13 is appropriate for piers that do not require a DNR permit under WIS. STAT. § 30.12. Section 30.13(3), for instance, authorizes a municipality to establish a pierhead line “in the same manner as it is authorized to establish a bulkhead line”—which is to say, “subject to the approval of the [DNR].” Section 30.11(1). Similarly, under § 30.13(2), a municipality may enact ordinances regarding pier construction and placement that are “not inconsistent with this section”—in other words, when a DNR permit is not required. And once a local ordinance has been enacted, the DNR may, but need not, consider it in making a permit determination under § 30.12(2m). See *Hilton*, 293 Wis. 2d 1, ¶36. Any local control under ch. 30 clearly is subordinate to DNR authority.

¶14 The Town also directs our attention to *Farnum v. Johnson*, 62 Wis. 620, 22 N.W. 751 (1885), a 125-year-old case which, the Town posits, demonstrates that Wisconsin virtually always has “recognized the validity of municipal regulations governing piers and their construction.” True, *Farnum* cited a statute broadly granting village boards the power “by ordinance, resolution, by-law, or vote ... to regulate the location and manner of construction and use of all piers ... on any navigable waters.” *Id.* at 624. As LGC observes, however, “[m]uch has changed since 1885.”

¶15 *Farnum* hales from a time when the legislature regulated the respective rights of riparian owners and of the public. The legislative authority later was vested in the Railroad Commission, then the Public Service Commission and now the DNR. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 603, 412 N.W.2d 505 (Ct. App. 1987). The statute at issue in *Farnum* was a predecessor of current WIS. STAT. § 61.34. The current statute recognizes an authority hierarchy: “*Except as otherwise provided by law*, the village board shall have the management and control of the village ... navigable waters ... and may

carry its powers into effect by license, regulation ... and other necessary or convenient means.” Sec. 61.34 (emphasis added). The Town makes much of the control vested in an entity with village powers.⁷ But as explained above, and unlike 125 years ago in *Farnum*, the authority to regulate piers now is “otherwise provided by law.” See § 61.34. It rests with the DNR under WIS. STAT. § 30.12. The DNR’s role in protecting state waters clearly is dominant. *Wisconsin’s Env’tl. Decade, Inc. v. DNR*, 85 Wis. 2d 518, 527, 271 N.W.2d 69 (1978). A local governing body can neither lawfully forbid what the legislature, through the DNR, has expressly authorized nor authorize what it has expressly forbidden. See *id.* at 529.

¶16 Another critical flaw in the Town’s argument is its failure to explain how its ordinance supports the denial of LGC’s building permit. LINN, WIS., CODE §13-11(D)(3) directs that when a citizen files a pier permit application, the municipal clerk must refer it to the building inspector for investigation and determination that it is in compliance with all requirements of (1) the ordinance section, (2) applicable state laws and (3) applicable DNR rules and orders. Upon doing so, the building inspector files a report with the governing body, recommending whether the permit should be granted or denied. *Id.*

¶17 For its part, the governing body may not grant a permit until it, too, determines compliance with all requirements of the ordinance section and applicable state laws and DNR rules. LINN, WIS., CODE § 13.11(D)(4)(a).

⁷ Pursuant to resolution and WIS. STAT. § 60.22(3), the Town authorized the Board to exercise powers relating to villages and conferred on village boards by WIS. STAT. ch. 61, except where it would conflict with the statutes relating to towns and town boards. See LINN, WIS., CODE §2-2 (1995).

Notably, the only two requirements of the ordinance section are a 100-foot pierhead line and a twelve-and-a-half-foot setback from the riparian rights line. §§13.11(B), (C). The setback provision is not disputed here.

¶18 We also conclude no issue remains as to the pierhead requirement. The DNR conditional permit approved the structural modifications to the existing 200-foot pier and limited the proposed pier to 100 feet. LGC argued its existing 200-foot pier is grandfathered in. Even if it is not, such that the pier required a permit under WIS. STAT. § 30.12, *see Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 151, 588 N.W.2d 667 (Ct. App. 1998), LGC applied for and was granted one. The DNR's approval means that any extension beyond the pierhead line no longer constitutes an unlawful obstruction that the Town would have had the authority to bring an action to remove. *See* WIS. STAT. § 30.13(4)(c). Finally, LINN, WIS., CODE § 13-11(E)(3) provides that a permit the DNR grants pursuant to § 30.12(1) authorizing an otherwise-prohibited structure "shall deem said structure to be in compliance with this section, but only to the extent of the statute or ordinance varied by said permit." Thus, to the extent the DNR permit authorized the existing pier beyond the pierhead line, that variance from the ordinance is expressly deemed to be in compliance.

¶19 The Town also asserts that the DNR permit was conditioned upon the Town's approval. Not so. Rather, the DNR permit was conditioned upon "any permit or approval that may be required for [LGC's] project by local zoning ordinances and by the U.S. Army Corps of Engineers." As the Town's attorney acknowledged to the circuit court, the Town's ordinance is not a zoning ordinance. The Town is subject to county zoning.

¶20 None of the other reasons the Board listed for denying the permit aid us, either, in discerning the legal framework against which the facts were measured. The Board did not explain, for example, how opposition from a local conservancy organization or conjecture about a ripple effect legally supports a permit denial in the context of the ordinance and the relevant statutes. That the Board found no hardship is not germane to the inquiry. “Hardship” is relevant in zoning cases, *see, e.g., State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶2, 269 Wis. 2d 549, 676 N.W.2d 401, which this is not. We simply cannot tell what legal theory informed the Board’s decision. By fashioning a decision in disregard of the rules it promulgated, the Town Board acted beyond its authority. *See State ex rel. Riley*, 151 Wis. 2d at 625.

¶21 The State made a public policy determination when it vested pier permit authority in the DNR. Even if the Town’s ordinance gives it a measure of control over the waters of Geneva Lake, to the extent that it conflicts with WIS. STAT. ch. 30, the local ordinance must yield. *See Pace v. Oneida County*, 212 Wis. 2d 448, 458-59, 569 N.W.2d 311 (Ct. App. 1997). The Town’s remedy was through WIS. STAT. ch. 227.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

