

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Permit Application No.
2003-2090 to Warren Bloomquist

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED DECISION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:30 a.m. on April 8 and April 9, 2004 at the Breezy Point Community Center in Breezy Point, Minnesota. The hearing transcript was received on April 30, 2004. The Applicant filed his initial brief on May 21, 2004. The Department filed its reply brief on June 4, 2004. The Applicant submitted his reply brief on June 11, 2004, on which date the OAH record in this matter closed.

William G. Peterson, Esq., Peterson Law Office, P.A., 3601 Minnesota Drive, Suite 800, Bloomington, MN 55435, appeared representing the Applicant, Warren G. Bloomquist. Stephanie A. Riley, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2130, appeared representing the Department of Natural Resources.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gene Merriam, Commissioner, MN Dept. of Natural Resources, 500 Lafayette Rd., St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

Should the Applicant be granted a permit to clear a channel between a pond on his property and Upper Whitefish Lake?

The Administrative Law Judge recommends that the permit be GRANTED.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Warren G. Bloomquist, age 75, is a Minneapolis resident who has owned 30 acres of land on the east side of Upper Whitefish Lake in Crow Wing County, Minnesota since 1961.^[1] Most of the land is undeveloped. The land contains a pond of approximately 1.2 to 1.8 acres. It is approximately 80 to 95 meters across at various locations.^[2] This pond is located very close to Upper Whitefish Lake. It is 4 ½ to 5 feet deep with a silt bottom of approximately 6 inches.^[3]

2. In his early years of ownership Mr. Bloomquist and his family camped on the property. Eventually they placed a trailer on the land and built a deck. In 1967 they built a dock on the southeast side of the pond^[4] and eventually added a rowboat, a sailboat and then a powerboat.^[5] The boats were moored in the pond.^[6] They reached the lake through a channel created from the pond to the lake.^[7] Mr. Bloomquist and his family generally visited the property from June through October of each summer.^[8] There is presently an old residence on the northerly end of the land adjoining the pond.^[9]

3. Permits were issued by the Department in 1959 and again in 1961 (61-529) to allow creation of a channel between the pond and Upper Whitefish Lake. The 1961 permit was issued to Frank Schram, who operated a resort just north of the Bloomquist property. The permit authorized maintenance of the channel upon approval of the Department.^[10] Until a 2003 survey^[11] it was believed that the channel in question was on the Schram property rather than on Mr. Bloomquist's property.

4. In 1976 Mr. Schram applied to the Department to reopen the channel pursuant to permit 61-529, by removing 50 yards of gravel, rock and muck from the channel.^[12] The request was approved.^[13] In September of 1983 Frank Schram's estate was issued a permit to excavate to a maximum depth of four feet over a 20 feet by 20 feet area in order to maintain the channel entrance to the pond.^[14] The excavation was completed in 1984.^[15]

5. In 1986 John and Suzanne Breen purchased the Schram property on a contract for deed. In July of 1986 they applied to the Department to reopen and maintain the channel at a depth of four feet and a width of no greater than 20 feet.^[16] A permit dated July 24, 1986 was issued to the Breens to excavate for the purpose of maintaining a channel entrance to the pond to a maximum depth of four feet and an area of 20 feet by 20 feet. The permit stated that the bay area had been excavated previously under authority of permits 59-162 and 61-529.^[17] It also authorized the permittee to maintain the channel upon approval by the Department. The letter to the Breens from the Department stated that it transferred the 1983 permit to them and that the maintenance work that was being permitted was authorized under a maintenance provision in the 1983 permit.^[18] The Department subsequently granted the Breens an extension of time to complete the maintenance.^[19]

6. A 1940 aerial photo of the Bloomquist property shows that there was no channel between the pond and Upper Whitefish Lake.^[20] An aerial photo taken in 1969 shows the existence of a channel.^[21] A 1978 aerial photo shows that a channel was in existence.^[22] A photo of the location taken in the fall of 1981 shows the channel open.^[23] In 1989 an aerial photo shows that the channel appears to be closed.^[24] A 1991 aerial photograph apparently shows an open channel.^[25] A 2003 photo shows the channel to be closed.^[26]

7. Mr. Bloomquist has entered into a purchase agreement for the sale of his land to the Northern Lakes Company.^[27] The purchase agreement is contingent upon obtaining the permits necessary to develop the property and the reopening of the channel.^[28] Northern Lakes Company is owned by partners John Zacher and Jay Echtenkamp. They intend to develop the property. Mr. Bloomquist's property is substantially more valuable to developers if a channel is opened from the pond to the lake.^[29]

8. Mr. Zacher originally submitted the application to excavate the channel on February 26, 2003.^[30] The application describes the project as removing an ice ridge which has formed between the pond and the lake, and cleaning out a pre-existing channel to allow boat traffic in and out of the pond. It estimates that 49 cubic yards of sand would be removed to the upland part of the property. The Department's investigation began based upon this application. However, when it determined that Mr. Bloomquist was still the owner of the property, he was required to submit the application.^[31]

9. In a letter dated March 19, 2003, the U.S. Army Corp of Engineers authorized John Zacher of Northern Lakes Co. to remove a blockage from an existing navigable channel in Whitefish Lake on the Bloomquist property.^[32]

10. Ronald Morreim is the Department's area hydrologist responsible for the investigation for the permit application. He did a site inspection of the property on April 23, 2003 and again in late June of 2003. He observed that the channel had filled in creating a berm that separated the pond from the lake. The berm or ridge is 2 to 3 feet

above the water level. He observed small trees and brush on the berm.^[33] The proposed channel area is mostly grass and brush.^[34]

11. There are docks directly on Whitefish Lake nearby (to the north)^[35] as well as a dock on Whitefish on Mr. Bloomquist's property. The Bloomquist's dock is reached by a stairs with 26 steps down a steep bank (over 25 feet) to the lake.^[36] The Bloomquist dock on Whitefish was built in 1988.^[37] There is erosion near the stairs to the dock.^[38] The docks to the north of the Bloomquist property on the lake are on a gently sloping shore.^[39]

12. The site was also inspected by Timothy Brastrup, the area fisheries supervisor for the Department on April 23, 2003. He observed a very soft muck bottom in the pond, floating leaf and submerged plants, and evidence of sunfish.^[40] In an April 28, 2003 memo to Mr. Morreim, Mr. Brastrup listed several grounds for opposing the permit. If the channel were open he believes that rough fish such as bullheads would exploit the habitat for spawning, which would increase the number of bullheads and allow degradation to water quality and clarity due to greater turbidity and algal growth.^[41] He notes that sediment disruption by outboard motors would cause nutrient release and associated water quality degradation. He also expressed a concern that curlyleaf pondweed, a noxious aquatic plant which has been present in Whitefish Lake since at least 1990, would occupy the pond and eliminate most of the current plant community. In a protected bay it can grow to nuisance proportions.^[42] Curlyleaf pondweed is not presently a problem on Whitefish due to the lake's size and sandy bottom.^[43] Mr. Brastrup was also concerned about the effect on sunfish in the pond and the loss of a pristine pond in favor of another eutrophic bay on the Whitefish chain.^[44]

13. Mr. Brastrup also expressed a concern that the channel would create a drain on the water level in the pond that would facilitate anoxia in the winter. However, in recent years the water level of Whitefish at the Pine River Dam has fluctuated only about two feet.^[45] The water levels of the pond and the lake are presently within an inch of each other.^[46] And due to the type of soils, it is likely that the pond and lake will rise and fall together even without a channel.^[47]

14. An August 2000 survey of Whitefish Lake by the DNR^[48] states that:

Whitefish Lake is 7,370 acres in size and is part of the 14,000 acre Whitefish reservoir chain in northern Crow Wing County.^[49] The lake is heavily developed and is a very popular recreational lake with very heavy boat traffic on many summer days. The majority of the lake has a sand bottom and water clarity is good with a secchi disc reading of 10 feet.

The survey found sunfish, northern pike and large mouth bass in high numbers and walleyes in average numbers.^[50] Bullheads are not a problem in Whitefish Lake because of its size and sandy bottom. Bullheads prefer smaller wetlands with a mucky bottom.^[51]

15. The permit was also reviewed by the Crow Wing County Soil and Water Conservation District. Scott Lucas, a technician with the district, visited the site on three occasions.^[52] He observed a 20 foot wide ridge between the pond and the lake that was 2 to 3 feet above the water level with no present indicator of a channel through it.^[53] Mr. Lucas returned a written comment to the Department on March 25, 2003 indicating that this did not appear to be a channel excavation as such since an historic ice ridge had been created with trees growing out of it. An ice ridge is created as ice pushes shore land into a berm.^[54] He commented that the removal of the ice ridge would require a variance from the county and a permit to move dirt in excess of the 30-yard limit.^[55]

16. Mr. Morreim sent a letter to Northern Lakes on May 15, 2003 advising it that Mr. Bloomquist, the owner, would need to apply for the permit. In the letter he also stated that unless Northern could prove that the landowner would be legally entitled to conduct maintenance excavation, the Department intended to not allow the work due to environmental impact, lack of justification for a protected mooring, alternatives available and the long period of time since the channel was used for navigation.^[56]

17. On June 6, 2003, Northern Lakes sent Mr. Morreim a copy of the survey done by Landecker and Assoc., dated April 15, 2003, showing that the channel location was in fact on the Bloomquist property. Northern Lakes noted a difficulty with having multiple boats moored directly on Whitefish Lake on an extremely steep hill with erosion problems. Northern Lakes contemplates multiple building sites on the property.^[57]

18. Mr. Morreim wrote a memo dated June 30, 2003 recommending that the permit be denied. Mr. Morreim noted that the 30-acre parcel had direct shoreline frontage on the lake and concluded that the land bordering the pond was non-riparian. He concluded that protected mooring was not required and observed that conventional docks directly on the lake were common.^[58]

19. On July 2, 2003 Regional Hydrologist Daniel Retka, Mr. Morreim's supervisor, sent a letter to Mr. Bloomquist formally denying his permit application. The denial noted that the channel is now completely filled in with large shrubs and other vegetation present, and is therefore viewed as construction of a new channel. It notes the possibility of introducing undesirable fish and plant species and water level fluctuations in the pond. It suggests that the development of the land would potentially involve a substantial number of watercraft users with significant disturbance to bottom sediments and vegetation as well as waterfowl and other wild life. He concluded that a protected mooring site was not necessary and that conventional dock facilities on Whitefish Lake were adequate.^[59]

20. Richard Osgood is the principal of Osgood Consulting, a firm that provides consulting services for lake and watershed planning and management. He was a limnologist and environmental planner with the Metropolitan Council from 1980 to 1991 and Director of Surface Water Programs for the Freshwater Foundation from 1991 to 1993. He has a B.A. in Biology and an M.S. in Aquatic Ecology/Geology.^[60]

21. Mr. Osgood conducted a site inspection of the pond in question on February 23, 2004. He found that the pond had an average depth of 4.5 feet with an average silt depth of .5 feet. He identified submerged plants of coontail, Canadian waterweed and chara.^[61] He made the following conclusions concerning the objections raised by the Department:

- a. Bullheads: It is likely that bullheads will enter the pond if the channel is opened and possible they will reproduce there but some will be killed in the winter and the impact of this small breeding area in a lake the size of Whitefish is low.^[62]
- b. Curlyleaf pondweed: The plant, which is present in Whitefish, could be introduced by boat traffic to the pond. It could be controlled in the pond by herbicides, however, and likely would be since it is a nuisance growth.
- c. Water level fluctuation: It is extremely unlikely that there would be pronounced water level fluctuations in the pond since there is already a functional hydrological connection between the pond and the lake through the highly porous sandy substrate.^[63]
- d. Disturbance to bottom sediment and vegetation: Boating activity will have the potential for disturbing sediment and disrupting submerged vegetation but would not impact Whitefish Lake.
- e. Disturbance to water fowl and wildlife: Boating activity could disturb these activities, but none have been identified.^[64]

22. Mr. Osgood observed that the curlyleaf pondweed in Whitefish is not in the immediate vicinity of the site and is present in isolated areas apart from the main lake.^[65]

23. Driftwood Resort is located approximately ½ mile south of the Bloomquist property on Whitefish Lake.^[66] On April 5, 1995 it applied to the DNR for a permit to reopen a channel from a pond on its property to Whitefish Lake.^[67] The pond was five feet deep, a fish spawning area and about the same size as the Bloomquist pond.^[68] The channel was open from 1959 to 1970 but then filled in with sand and some trees had started to grow on the sand. There was no use of the channel from 1970 to 1995.^[69] The excavation required to clear the channel was estimated to be 500 cubic yards.^[70] No permit had previously been taken out to excavate a channel at that site.

24. By a letter dated April 28, 1995 the U.S. Army Corp of Engineers approved the maintenance dredging of the channel at the Driftwood Resort.^[71] In a comment dated April 26, 1995 the Crow Wing County Watershed District, after inspecting the project site, stated that it saw no problem with this application.^[72]

25. The Driftwood request was reviewed by Ron Morreim and Dennis Hanson for the DNR. Mr. Hanson noted that since this was a large resort there were no game

species affected but that some loss of non-game bird nesting sites would occur.^[73] Mr. Morreim's August 4, 1995 memo concerning the application notes that an opening clearly existed in the past but was closed from drifted sand since about 1970. The memo describes the purpose of the project as twofold: "one, to provide access to the lake from future docks to be installed (which would serve several cabins) and two, to provide protected mooring for a large excursion paddleboat."^[74] Another factor considered by Mr. Morreim was that Driftwood was an existing commercial resort.^[75] Driftwood Resort was issued a permit dated August 8, 1995 for the purpose of "Restoration of opening into lagoon area" by excavating to a maximum water depth of 4 feet in an area 30 feet wide by 50 feet long.^[76]

26. On July 21, 2003 Mr. Bloomquist requested a hearing under the Minnesota Administrative Procedure Act on the denial of his permit application.^[77]

27. The Department published a Notice of and Order for Hearing in this matter in the Brainerd Daily Dispatch for two successive weeks on March 11 and 18, 2004.^[78]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Natural Resources and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. § § 103G.311, 103G.315 and 14.50.

2. The Department gave proper notice of the hearing and all relevant substantive and procedural requirements of law and rule have been fulfilled.

3. The Commissioner of Natural Resources has general authority to issue permits with or without conditions and to deny issuing permits.^[79]

4. A person must have a public waters permit to make any change in a waterway obstruction on public waters, including excavating in the beds of public waters.^[80]

5. That the proposed project reasonably requires a new permit.

6. The applicant for a permit has the burden of proving that the proposed project is reasonable, practical, and will adequately protect public safety and promote the public welfare.^[81]

7. That the applicant has proved that the channel excavation is reasonable, practical, and will adequately protect public safety and promote the public welfare.

8. Minn. Rule pt. 6115.0200 subpart 1.A. provides that:

Subpart 1. Goals. It is the goal of the department to limit the excavation of materials from the beds of public waters in order to:

A. preserve the natural character of public waters and their shorelands, in order to minimize encroachment, change, or damage to the environment, particularly the ecosystem of the waters;

9. That the proposed project is consistent with the goal of minimizing encroachment, change, or damage to the environment, particularly the ecosystem of the waters.

10. Minn. Rule pt. 6115.0200 subp. 5 generally requires permits for the excavation and removal of any materials from the public waters.

11. Minn. Rule pt. 6115.0200, subp. 5.C. provides that a criterion for issuance of a permit is whether “the proposed project represents the ‘minimal impact’ solution to a specific need with respect to all other reasonable alternatives and does not exceed more than a minimum encroachment, change or damage to the environment, particularly the ecology of the water.”

12. The applicant has demonstrated that its proposed project is the minimal impact solution.

13. Minn. Rule pt. 6115.0200, subp. 5.H. provides that a criterion for issuance of a permit is whether “the proposed excavation is consistent with plans and management programs of local and regional governments... .”

14. The applicant has demonstrated that its proposed excavation is consistent with other government plans and programs.

15. Minn. Rule pt. 6115.0200, subp. 3 prohibits excavation of protected waters in the following cases:

A. where it is intended to gain access to navigable water depths when such access can be reasonably attained by alternate means which would result in less environmental impact;

B. where inland excavation is intended to extend riparian rights to non-riparian lands, or to promote the subdivision and development of non-riparian lands;

C. when the proposed excavation will be detrimental to significant fish and wildlife habitat, or protected vegetation and there are no feasible, practical, or ecologically acceptable means to mitigate the effects;

16. That the proposed excavation does not violate Minn. Rule pt. 6115.0200, subp. 3.

17. An applicant for a permit that files a demand for a public hearing must file a surety bond or equivalent security with the Commissioner conditional upon paying the costs of the hearing if the Commissioner's order denying a permit is affirmed without material modification.^[82]

18. The applicant has posted the required cash bond.^[83]

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDED DECISION

IT IS RESPECTFULLY RECOMMENDED: That the Commissioner grant Permit Application No. 2003-2090 to Warren Bloomquist.

Dated this 2nd day of July 2004.

S/ George A. Beck

GEORGE A. BECK
Administrative Law Judge

Transcript Prepared:
Rapid Reporting
218-255-1548

MEMORANDUM

The initial issue discussed by the parties in their briefs is what status or weight should be accorded to DNR exhibits such as the permit denial or reports filed by DNR staff concerning the application. The applicant appears to be concerned that they may be accorded a prima facie status and also suggests that they should not be considered as substantive evidence. The DNR points out that the exhibits have been received into evidence and are properly considered as substantive evidence in this proceeding. Having been properly admitted under the statute and rule^[84], Exhibits 3, 5, 7 and 8 constitute substantive evidence. They are not, however, accorded a prima facie status. As the applicant points out, all issues of fact and law are determined *de novo* in this proceeding. The exhibits in question are procedurally significant and set out the agency's reasons for its actions. The facts set out in the exhibits should be accorded no greater weight than any other facts in the record although the facts tested by cross-examination may appropriately be accorded greater weight.

The second preliminary question is whether or not this matter is appropriately viewed as a new application for a permit. The applicant contends that this matter is merely a request for channel maintenance and not a request to make a new channel requiring a new permit, with a burden of proof upon the applicant to show compliance with statutory and rule requirements. The DNR points out that because the previous

channel was thought to be on a neighbor's land, this is the first application for a permit submitted by Mr. Bloomquist. More significantly, however, the record indicates that prior permit holders, namely Mr. Schram and the Breens were not authorized to maintain or excavate the channel except with the approval of the Department. So, by the issuance of the permit, the DNR never relinquished the right to approve any excavation in the beds of public waters. And, although the DNR approved the transfer of the permit from Mr. Schram to the Breens, it was not required to do so, and would not be required to transfer it to Mr. Bloomquist. Given these facts, together with the fact that the channel has not been opened since approximately 1991, the DNR appropriately viewed this matter as a new application for a permit by Mr. Bloomquist.

Mr. Bloomquist argues in his brief that because the channel in question was open from his purchase of the property in 1961 until approximately 1991 that he has vested riparian rights. He suggests that either the permit should be granted or the DNR must compensate him for the curtailment of his riparian rights. The matter of compensation must of course be determined in another forum. However, the applicant also argues that the DNR's authority to regulate is subject to the riparian rights of landowners. The applicant cited State v. Kuluvar^[85] to support this proposition. In that case the Supreme Court did reverse the conviction of a resort owner who cleaned out a channel without a permit. The conviction was reversed, however, because there was no proof that the construction of the channel interfered with any navigable use of the waters enjoyed by the public. The Court also stated that riparian rights are subordinate to the rights of the public and subject to reasonable control and regulation by the state.^[86]

The case law cited by the applicant to support his claim that his riparian rights to use Whitefish Lake cannot be denied in this proceeding does not establish that proposition. In Pratt v. State^[87], the Supreme Court held that a new statute regulating the taking of wild rice may create a taking requiring compensation. The case does not establish the denial of riparian rights as a controlling factor in a permit application, however. Although Central Baptist Theological Seminary v. City of New Brighton^[88] did involve a permit application, the question considered was whether the construction of a radio tower would interfere with the riparian rights of other riparian landowners and the permit denial was affirmed. In Lake Mille Lacs Investment v. Payne^[89] the Court observed that landowners may acquire riparian rights in artificial water courses formed by the diversion of an actual channel as against other landowners. But the Court did not apply the theory of riparian rights in that case. The case involved adjoining lot owners tearing down a dock and building over a dock built by a developer in a harbor.

Whatever riparian rights Mr. Bloomquist holds, it appears doubtful that a prescriptive riparian right can be asserted against the State.^[90] Additionally, it appears that a prescriptive right can generally not be established where the use was permissive when created, since the use would not be adverse to the knowledge of the owner.^[91] The original permit issued to Mr. Schram for the channel was permissive and it specifically did not release the permittee from any obligation imposed by law nor provide any property rights.^[92]

The applicant has demonstrated that it is more likely than not that the excavation of the channel will not be detrimental to significant fish and wildlife habitat or protected vegetation. The DNR contended that bullheads would gain access to the pond and become the primary species in the pond. Testimony for the DNR also indicated that boat traffic in the pond could cause curlyleaf pondweed infestation. The agency also contends that increased boat traffic in the pond would disrupt the sediment. The agency agreed, however, that bullheads are not a problem in the Whitefish chain generally and the applicant's expert, Richard Osgood, thought it likely that bullheads were already in the pond since the channel had been opened earlier. At any rate, an increase in the bullhead population in the small area of the pond, in a lake the size of Whitefish, cannot be found to be detrimental to significant fish habitat.

The record also indicates that curly leaf pondweed in the Whitefish chain is not in the immediate vicinity of the applicant's land and is found at present in isolated areas apart from the main lake. Mr. Osgood observed that even if curly leaf pondweed is introduced into the pond it could be controlled by herbicides and likely would be, since it is a nuisance growth. The mere possibility of introduction of curly leaf pondweed in an area the size of the pond is not detrimental to significant fish and wildlife habitat or protected vegetation within the meaning of the DNR rule. Mr. Osgood acknowledged that boating activity will have the potential for disturbing sediment and disrupting submerged vegetation in the pond. This would be unlikely to have an impact on Whitefish Lake, however. It is the usual result of use of a boat dock.

DNR also asserts that Mr. Bloomquist has not met his burden to show that the proposed excavation is consistent with all other applicable management standards and ordinances. Specifically, the DNR points to the testimony of a technician with the Crow Wing County Soil and Water Conservation District who stated that because the excavation would entail the removal of an historic ice ridge it would be prohibited by the County's zoning ordinance. Mr. Bloomquist points out, however, that the technician's testimony does not represent a final decision by Crow Wing County and notes that the applicant has received the approval of the U.S. Army Corp of Engineers, another government body, for the excavation of the channel.

The Department's rule requiring consistency with the plans and management programs of local and regional governments obviously cannot mean that the applicant has been granted approval by all jurisdictions or that the applicant must prove that it meets all other local or regional requirements in this permit proceeding. As the applicant points out, it will have the opportunity to seek the appropriate permits from other governmental bodies and the opportunity to seek a variance under the terms of the Crow Wing County ordinance. The DNR has not identified any requirement of another jurisdiction that the applicant would clearly be unable to meet and therefore it is appropriate to conclude that the applicant has demonstrated that its project is consistent with other government plans and programs.

The DNR staff has also asserted that access to Whitefish can be reasonably attained by the stairs and existing dock built by the Bloomquists directly on the lake. The record shows that it is not a reasonable alternative for the Bloomquists as they age

and that the stairs on the steep slope have themselves caused some environmental damage. Nor is it reasonable to conclude, based upon the facts of this case, that new riparian rights are being created by excavating the channel. The evidence shows that the channel in question was open and maintained for some 30 years to approximately 1991 and that the DNR approved maintenance requests in 1976, 1983 and 1986. While the question of a compensable taking cannot be considered in this administrative proceeding, the facts are sufficient to conclude that the applicant has shown that he is not requesting the extension of riparian rights.

Mr. Bloomquist argues that the present application is for all practical purposes identical to a permit granted to the Driftwood Resort in 1995. The Driftwood Resort pond was the same size as Mr. Bloomquist's pond. A channel had been open from the Driftwood pond to the lake from 1959 to 1970 but then filled in with sand. No permit had ever been granted for the excavation of the channel. The DNR approved a permit for excavating the channel in order to provide access to the lake from future docks to be installed in the pond, and to provide a protected mooring for a large excursion paddleboat that was to be purchased by Driftwood Resort. The DNR Area Hydrologist Ronald Morreim acknowledged that a factor he considered was that Driftwood was an existing commercial resort.

The DNR argues that it reviews and makes decisions on permit applications on a case-by-case basis. It described the Driftwood project as reconnection of a natural bay of Whitefish Lake with a need to provide a protected mooring site for a paddleboat. The DNR must judge each application on its own merits. The facts of the two applications are quite similar, however, and seem to indicate that the motivating factor for the DNR in denying this application is the possibility of Mr. Bloomquist selling his land for development. Mr. Morreim acknowledged that the fact that Driftwood was an existing, rather than a prospective development, was a factor in his decision.

The applicant points out that there are a number of contingencies in his purchase agreement with the developer and it is possible that they may not be met. Mr. Bloomquist and his wife are essentially unable to use the stairs to the dock directly on Whitefish Lake due to their age and physical condition. And, as Mr. Bloomquist points out, any development of the property would be subject to all of the requirements of the DNR and other permitting authorities. Any permit issued to Mr. Bloomquist for excavation of the channel will of course require compliance with all applicable federal, state or local agencies, as it has in the past.

Mr. Bloomquist has demonstrated that he meets the requirements of statute and rule for a permit to excavate the channel from his pond to Whitefish Lake. By proving his compliance with the DNR rules relating to excavation in protected waters, he has shown that his proposed project is reasonable, practical and will adequately protect the public safety and promote the public welfare. He has shown that excavating the channel is consistent with the goal of minimizing encroachment, change or damage to the environment particularly the ecosystem of the waters. Even if Mr. Bloomquist is unable to legally assert riparian rights as a determinative factor in this proceeding, the fact that the channel was open and maintained for 30 years should be considered in

deciding whether the excavation is reasonable and whether any change to the environment is minimized. The prior existence of the channel for a substantial period of time weighs in favor of granting the application.

G.A.B.

^[1] T. 203; Ex. A (with overlay).

^[2] Ex. YY, p. 1.

^[3] Exs. 15, AA, T. 179.

^[4] Ex. PP.

^[5] T. 207, Exs. RR, SS.

^[6] Exs. QQ, VV.

^[7] T. 207.

^[8] Exs. U, BB, CC, DD show the dock in 2003.

^[9] T. 23.

^[10] Ex. 10.

^[11] Ex. NN, T. 180.

^[12] Ex. N.

^[13] Ex. 10.

^[14] Ex. 16.

^[15] Ex. O.

^[16] Ex. 17.

^[17] Ex. K.

^[18] Ex. 18.

^[19] Ex. 20.

^[20] Ex. C.

^[21] Ex. D.

^[22] Ex. E.

^[23] Ex. Y.

^[24] Ex. F.

^[25] Ex. A.

^[26] Ex. 11. See also, T. 130.

^[27] T. 150, 223.

^[28] T. 225.

^[29] T. 198.

^[30] Ex. 10.

^[31] Ex. 4, Ex. 9.

^[32] Ex. H.

^[33] Ex. 13; Ex. JJ.

^[34] Ex. EE, FF, GG, HH, T. 167.

^[35] Ex. 11, T. 39.

^[36] Ex. 14, T. 185, 219.

^[37] T. 219. Ex. KK.

^[38] T. 185, 220.

^[39] T. 69.

^[40] T. 88-89.

^[41] See also, T. 86, 93.

^[42] T. 91-98.

^[43] T. 110.

^[44] Ex. 7.

^[45] Ex. OO, T. 181.

- [\[46\]](#) T. 181.
- [\[47\]](#) T. 182.
- [\[48\]](#) Ex. V.
- [\[49\]](#) Ex. G.
- [\[50\]](#) Ex. V, p. 6.
- [\[51\]](#) T. 86.
- [\[52\]](#) T. 126.
- [\[53\]](#) T. 129.
- [\[54\]](#) T. 133.
- [\[55\]](#) Ex. 8.
- [\[56\]](#) Ex. 9.
- [\[57\]](#) Ex. 6.
- [\[58\]](#) Ex. 5.
- [\[59\]](#) Ex. 3.
- [\[60\]](#) Ex. XX.
- [\[61\]](#) Ex. YY, p. 1.
- [\[62\]](#) See also T. 239.
- [\[63\]](#) See also T. 232.
- [\[64\]](#) Ex. YY, pp. 2-3.
- [\[65\]](#) T. 235.
- [\[66\]](#) T. 63.
- [\[67\]](#) Ex. LL.
- [\[68\]](#) T. 269.
- [\[69\]](#) T. 64.
- [\[70\]](#) Ex. LL, p. 2.
- [\[71\]](#) Ex. LL, p. 8.
- [\[72\]](#) Ex. W.
- [\[73\]](#) Ex. LL, p. 13.
- [\[74\]](#) Ex. T.
- [\[75\]](#) T. p. 258.
- [\[76\]](#) Ex. LL, p. 6.
- [\[77\]](#) Ex. 1.
- [\[78\]](#) Ex. 2.
- [\[79\]](#) Minn. Stat. § 103G.315, subd. 1.
- [\[80\]](#) Minn. Stat. § 103G.245, subd. 1.
- [\[81\]](#) Minn. Stat. § 103G.315, subd. 6.
- [\[82\]](#) Minn. Stat. § 103G.311, subd. 6.
- [\[83\]](#) Ex. 1.
- [\[84\]](#) Minn. Stat. § 14.60, subd. 2; Minn. Rule pt. 1400.7300, subp. 2.
- [\[85\]](#) 123 N.W. 2d 699 (Minn. 1963).
- [\[86\]](#) 123 N.W. 2d at 706.
- [\[87\]](#) 309 N.W. 2d 767 (Minn. 1981).
- [\[88\]](#) 487 N.W. 2d 528 (Minn. App. 1972) rev. denied (Minn. Aug. 27, 1992).
- [\[89\]](#) 401 N.W. 2d 387 (Minn. App. 1987).
- [\[90\]](#) *Heuer v. County of Aitkin*, 645 N.W. 2d 753, 757 (Minn. App. 2002).
- [\[91\]](#) *Ehle v. Prosser*, 197 N.W. 2d 458, 463 (Minn. 1972).
- [\[92\]](#) Ex. 10.