

MEMORANDUM

TO: Michael Slavney
Attorney Dale Thorpe
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FROM: William P. O'Connor
Geneva Lake Conservancy

RE: Village of Fontana Ordinance Revision
Riparian Parcels and Structures

DATE: November 23, 2011

The Geneva Lakes Conservancy has asked me to review the Draft revision of the Village of Fontana Zoning Ordinance. As you know, Conservancy representatives have been present at every public meeting during this Zoning Revision process. The Conservancy is particularly interested in a set of related issues that have not been directly discussed so far. These include provisions that regulate the creation, development and use of lots and interests on and near the shore of Geneva Lake.

The Conservancy concurs in the Village's general policy goal of maintaining existing waterfront development, but establishing appropriate restrictions on further development in the lakeshore area. The draft ordinance includes policies to address waterfront development that support that objective, including the creation of the Lakefront Residential (LR-O) and Lakeshore (LS) Overlay Districts. Those Districts include Density, Intensity and Bulk Regulations aimed to prevent high density development, especially on lands within 75 feet of the ordinary high water mark of Geneva Lake. The Ordinance prohibits structures within the Shore Yard setback, with exceptions that include piers and docks placed in compliance with the Pierhead Line and Wharf Regulations in Chapter 54, Article III of the Village code.

These policies are reasonable approaches to protect Geneva Lake's exceptional importance to the Village. But we believe additional language is needed to ensure these policies are effective. In particular, these relate to the creation of lots and interests that include "riparian rights", especially the right to place piers and structures on the bed of Geneva Lake. These are importantly affected by the complex interplay of state statutes and common law and by local zoning, land division and other regulations.

For example, Section 18-99 of the current Zoning Ordinance declares the Village's longstanding "anti-pyramiding" policy, which prohibits certain transactions that assign riparian rights to persons other than "the owner or legal occupant of the lot and his guests." Although this "anti-pyramiding" provision is carried into the draft Zoning Ordinance revision, we believe additional language is needed to clarify its application to

particular circumstances, including a determination of what constitutes an owner's "lot." For example, some Condominium Declarations create condominium "units" that include riparian land. Although state law requires these units to be recognized as parcels of real property, it also makes clear that a declaration of condominium is not a form of land division. The Village ordinance should make it clear that its anti-pyramiding provision is applied to the underlying parcels and not to the condominium units. In the absence of clarifying language, property owners could effectively bypass the Village policy through the use of condominium form of ownership.

The application of this policy may also be affected by the creation of "outlots" under a subdivision plat or CSM, unless the Village's land division or zoning ordinance clearly defines the permitted use of outlots. Although outlots are commonly considered "unbuildable" (except for utility type facilities) state law expressly permits the conveyance and development of outlots "in compliance with restrictions imposed by or under this section." Wis. Stat. Sec. 236.13(6). Since the statutes broadly authorize municipal land division ordinances, the Village should include ordinance language that defines "outlot" in a way that prohibits their use for the placement of piers and other riparian structures. Otherwise, the Village policy to reduce waterfront density by setting minimum waterfront lot widths and areas could be bypassed through the designation of substandard riparian lots designated as "outlots."

Like Fontana, the State has undertaken to prohibit certain transfers of riparian rights by easement and similar conveyances under Wis. Stats. Ch. 30 (Navigable Waters). But, again, the application of this policy to particular circumstances has been inconsistent, particularly where the affected property is subject to a condominium declaration, designation of outlots or where one or more persons are on the title to a parcel of waterfront land and the same owner or a related entity owns adjacent land. This is an area in which state policy is critically affected by local ordinance language.

A very similar problem arises in the application of regulations on piers and other riparian structures. State water law authorizes the placement of certain piers without permits and provides for "general permits" and "individual permits" for certain others. In each case, state law recognizes that riparian rights attach to the ownership of waterfront land and that the extent of riparian structures is proportional to frontage. For example, s. 30.12(1g)(f) authorizes a "riparian owner" to place a pier that meets certain dimensional standards and includes moorings for a number of boats proportional to the "riparian owner's shoreline frontage." The application of these statutes is also affected by lot configuration. Because local governments have primary jurisdiction over the creation and division of lots, the application of state pier regulations will be importantly affected by the way these are handled in the Village's land division and zoning ordinances. This is particularly relevant in circumstances where two or more existing lots are made subject to a condominium declaration, replat or re-survey, including those that include outlots.

Although state pier regulations apply to all navigable waters in Wisconsin, the statutes also authorize local governments (including the Village) to adopt and enforce ordinances regulations on piers, wharves and swimming rafts. Under Sections 84-81, et

seq., the Village of Fontana has established a pierhead line, permit and other pier regulations affecting Geneva Lake. Among other provisions, the ordinance generally requires piers to be placed at least 12 ½ feet from “a riparian proprietor’s property line.” This provision also requires a determination of the relevant parcel boundary, which raises the same set of parcel and lot definition issues. In addition, the Village ordinances should address the interplay of the Village pier ordinance with state pier law. For example, would the Village require that a pier meet the 12 ½ foot setback in the case of a pier that is authorized by a state pier permit under Wis. Stat. 30.12, which does not require a boundary line setback? The Village pier ordinance was apparently adopted in 1989. Since that time, there have been significant revisions to state pier law that warrant review of the Village’s pier placement regulations. The Conservancy would support ordinance language that makes it clear that the Village pier ordinance requirements apply independent of statewide regulations.

In view of the above, the Conservancy urges the Village to include provisions in the revised zoning ordinance, its pier and wharf ordinance and/or its land division ordinances that would: (1) recognize that riparian rights attach to riparian parcels, (2) expressly provide for the regulation of riparian rights based on the boundaries of lawfully created water front lots or parcels, (3) prohibit any re-assignment of riparian rights from a riparian parcel to one or more non-riparian parcels by easement, elements of a condominium or any other means, (4) define and prohibit “pyramiding”, (5) adopt regulations on the placement of piers under the Village’s zoning authority and its authority under the navigable waters statutes, specifying that the regulations are independent of state requirements.