

# WINTON LAW OFFICES

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June 7, 2016

Mr. Justin Hall, Chairman  
Town of Bass Lake  
9327 N. Ski Hill Road  
Hayward, WI 54843

Ms. Erica Warshawsky, Clerk  
Town of Bass Lake  
14412 W. County Road K  
Hayward, WI 54843

**Re: Response to letter of December 17, 2015, regarding the Proposed Ordinance affecting the Public Access Strips in Northwoods Beach**

Dear Mr. Hall and Ms. Warshawsky:

This letter is in response to the letter from Erica dated December 17, 2015.

1. Question: *Are the items placed on the public access strip considered to be Town Property?*

Answer: The answer changes, according to the nature of the items and the action taken by the town previously, regarding the particular item.

First, items which are trash, refuse, or which appear to be abandoned by the owner may be cleaned up by the town. The town may consider sending a notice to the landowner to clean up the item and remove it, or the town will proceed under the town nuisance ordinance to remove the item and place the cost of clean up on the owner's tax bill. (This presumes that the Town has a nuisance ordinance and that the item "fits" under the nuisance ordinance.)

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Second, there are items, such as fire pits created by the owner which are on the public strip, but which are very close to the owner's home or other structure. In my opinion, the fire pit could be used by the public. The land where the fire pit is located is owned by the Town. Notice of the offending item could be given to the landowner who could then decide whether to fill in the fire pit or to keep it and allow the public to use it.

Third, there are items, whose removal might be costly, and which the town does not wish to own. These items could include above ground fuel oil tanks, underground storage tanks, and the like. The removal of these items is regulated and supervised either by the Department of Natural Resources or by some other agency. The town would want the item removed, but would want the landowner to pay for the cost, to the extent not covered by PECFA or other superfund reimbursement, and to make sure that the removal complies with all appropriate statutory, administrative and other requirements. Again, if the landowner refuses or fails to remove the item, the town might be able to proceed to a lawsuit under the nuisance ordinance.

Fourth, where the town has reached an agreement with the landowner affecting the item the town has recognized that the ownership of the item is in the landowner, not the town. One example would be, where a septic system drain field is installed into the public access strip, and the town has reached an agreement granting the landowner an easement for the duration of the useful life of the drain field or for a term of years, which requires that the replacement drain field be installed on the landowner's property. The agreement recognizes that the drain field is owned by the landowner even though it is installed on town property. Another example is where the landowner's house is built onto the public access strip, and the town reaches an easement agreement allowing the home to remain until the end of its useful life, when it must be replaced, and the replacement structure must be placed within the owner's property.

Fifth, there are items such as landscaping, fencing, and terracing which has been installed by the landowner on the strip, but which is preventing the steep bank from eroding. The improvements are on the land owned by the town and are essentially town property, but the public interest needs to be determined by the town in deciding what to do with those "items". There might be a town policy to retain the items to prevent further erosion, or there might be a policy to do nothing further and let nature take its course regarding the bank. The town might wish to solicit input from the DNR as to the best course of action from an

environmental standpoint. Compacts which the town may have entered into with other governments and agencies such as the DNR and the Lac Courte Oreilles Tribal Government might affect the policy or course of action chosen by the town on a case-by-case basis.

Sixth, there are items on the strips which are similar to the items discussed in paragraph Fifth, above. There are stairways and some “trolleys” which are erected by the landowner where there is a steep bank, to afford the landowner access to the lake. The town may wish to develop a policy, on a case-by-case basis. The steps do allow public access to the lake, and in my opinion, the public can use the stairs, although the public does not have the right to cross the landowner’s land to utilize the stairs. Secondly, an agreement between the landowner and the town should also deal with the issue of who is in charge of maintaining the steps or trolley, and who bears the cost of that maintenance. Again, it is possible that the town might wish to solicit input from the DNR on this point. There may be a question or issue lurking in the background, which is whether, at some point, does the stairs on the steep bank become a public access point to the lake subject to regulation by the DNR. Certainly, this is not a dedicated access point which is the termination of a road.

*2. Question: Can items placed on the public access strip be used by the public?*

Answer: The answer is generally “Yes”, but again, the answer depends on the nature of the particular item.

First, Stairways, fire pits, viewing platforms, and such items which afford access to the lake or access to the strip and are erected upon the land owned by the town can be used by the public.

Second, there are some items which the Town will intend be removed from the strip as soon as possible, which include fences on the strip restricting access to the property, dead cars, propane tanks on the strip, junk, debris. The question really does not arise about the public using these items, and the town should be working with the landowner to have these items removed in an orderly manner.

Third, if there is an agreement made between the town and the landowner, the agreement may deal with whether the public or only the landowner can use that item, such as a drain field or a portion of a home

built over the strip, or a stairway or trolley. In that case, the agreement may designate whether the item is in private ownership or is owned by the town, and who is responsible for the maintenance of the item or for its ultimate removal.

3. Question: *If the item placed on the public access strip can be used by the public, who is liable for injuries and/or damage to the item?*

*The term “injuries” suggests injury to a person using the item as well as damage to the item.*

*Answer: As regards injury to a person, presumably a member of the public who is using the item, before there is any liability, there must be some type of action or inaction which the law recognizes creates liability.*

Second, Section 895.52, Wisconsin Statutes, is the statute which limits the liability for injury to a person when the land is open for recreational activities. The limitation of liability applies both to the property owner and to the town.

There are cases which have dealt with that statute in the past. There is an excellent summary of those cases in a concurring opinion authored by Justice David T. Prosser, in *Danny R. Peterson v. Midwest Security Insurance Company*, 2001 WI 131, ¶¶25-¶43, 248 Wis. 2d 567, 636 N.W.2d. 727.

That case affirmed that the above statute applied to hold the owner of a deer hunting tree stand immune where the stand was erected upon lands that the tree stand owner did not own, applying the statute to hold immune, anyone who owns, leases, or occupies property for those engaged in recreational activity on the property.

Justice Prosser’s concurring opinion discussed cases where the statute conferred immunity, including a washroom at a campground, a pier on a lake, a beach house at the beach, and a swing in a park.

Under Section 895.52, there is no duty to inspect or to warn for conditions existing on the property, except that the DNR has a duty to warn of conditions on trails on properties under its control and where there is a “malicious act or malicious failure to warn against an unsafe condition which an officer, employee, agent knew, occurring on the

property designated by the DNR or designated by another state agency for a recreational activity.”

Again, the statute applies to both the Town as the owner of the land or the item and the Landowner as the owner of the land or the item.

*Answer: As regards injury to the item,* again, the answer to the question is controlled, in part, by the nature of the item.

As discussed above, there are several classes of items. There are items which might be the subject of an agreement setting a timetable for removal of the item, such as a stairway, trolley, drain field, fence, and so on. That agreement should address whether the town or the landowner is responsible to repair and maintenance of the item, including damage to the item following its use by the public. The type of damage may vary, from the ordinary ‘wear and tear’ on the item such as a stairway, which will occur regardless of who uses the item, versus the damage created by persons who have a rowdy drunken beach party and start to tear up the stairs for firewood. (Where there is a steep bank and no beach, this issue probably does not arise.)

Commonly, between adjoining landowners, where it is discovered that the drain field serving one owner’s property is located on the neighbor’s property, the solution is often a written agreement for an easement giving the landowner the right to use the drain field until it needs to be replaced, and at that time stipulating that the replacement must be rebuilt within the owner’s own lands. Such an agreement might be useful where improvements cannot be removed without substantial financial loss or expense.

If the town or the landowner is the owner of the item and the item is scheduled for eventual removal, then that entity or person must decide whether to repair the item, being aware that the public can use it, or remove the item. Filling in of fire pits and removal of old viewing platforms may fall under this area.

4. Question: *If a fire were to start on the public access strip and spread to an adjacent property, who is liable for the adjacent property owner’s damage/loss?*

Answer: If the fire is the result of a lightning strike or other “act of god” or natural causes, there is no liability for the town as the owner of the public strip.

If the fire is the result of an intentional act, such as the act of an arsonist, then the liability is to the arsonist, not the town.

If the fire is started by a rowdy drunken beach party where the bonfire gets out of control, the recreational use statute, Section 895.52 comes into play to limit the liability of the town.

Also, if the property owner’s property is insured, then the fire damage is covered by the property owner’s fire insurance. If the insurance company for the property owner pays for the loss, it acquires the right of the land owner to seek repayment under a legal doctrine known as “*subrogation*”, and could make a claim against any party (and that party’s insurance carrier) who it believed was liable. However, the insurance company or the party against whom the claim was asserted would have the same defenses to liability as set forth above.

Wisconsin Statutes Section 26.21 addresses liability of parties for who set fires, and allows collection by towns for the cost of suppressing forest fires and also addresses liability to landowners where their property is damaged by forest fires. However, that section of statutes may also be affected by the recreational use statute discussed above, which is a defense to liability for the town as the owner of land and the landowner as owner of land. Also, Section 26.21 seems to be primarily aimed at imposing liability against a person who intentionally or maliciously or negligently sets a fire.

Again, the property owner who suffers a loss due to fire, will make claim under his fire insurance policy. When the insurer pays, it acquires the right to attempt to collect from a party who may be liable for the damage or their insurance company. However, the insurer meets the same defenses as the property owner, as discussed at length above.

5. Question: *If an adjacent property owner prevents a member of the public from accessing the public access strip, what is the Town’s responsibility.*

Answer: The answer to this question is driven by the facts in an individual case, so that there is no “universal” answer.

First, if the town and the landowner have signed an agreement, for example, affecting the use and maintenance of a stairway, which agreement provides that the public can use the stairway, the town could bring a lawsuit against the property owner to enforce the agreement and also to enforce its rights as the owner of the property, including a restraining order prohibiting the owner from interfering with the rights of the public to use the stairway, or, in the alternative, removing the stairway from the strip, thus abolishing both public and private use of that particular stairway.

Second, the public person does not have the right to cross the landowner's property to access the stairway or the public access strip. Hence, access to the stairs may be only possible from the strip itself, or from the lake, in the event that there is no beach along the lake. If the private landowner uses force or violence to prevent the public from using the stairs, then the person or the town should call the Sawyer County Sheriff's Department if it appears that a crime is being or has been committed by the landowner.

In the absence of an agreement, the resistance by a private landowner to the public use of an object may determine what action the town would take with respect to the object which is "trespassing" on the strip. The town could fill in a fire pit, remove the stairs or old decrepit trolley, and so on.

I am not aware of a statute that would require that the town improve the strips by creating walks or passage ways through the strip. The recreational use statute does not require that. Further, the town may well decide that the best interests of the public lie in allowing the strips to continue in a "wild" condition.

This response to the questions raised is a general discussion. If there are questions which are more specific which the town would like to see addressed, please advise.

Sincerely,



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