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Summary

This report analyzes the permit process involved in the construction of the Whistling Straits Golf Course and apparent permit violations by the Kohler Company. It seeks to examine the DNR's performance relative to the enforcement of their own permits as well as the DNR's oversight responsibility for the enforcement of Sheboygan County's Shoreland Zoning Regulations and the Town of Mosel's Conditional Use Permit.

Introduction

In 1995, the Kohler Company began construction of a links-style golf course in the Town of Mosel in Sheboygan County. The site of this course consists of more than 600 acres and includes two miles of Lake Michigan shoreline. After the requisite public meetings, certain permits were granted to the Kohler Company by the Township, the County and the DNR. Almost immediately these Permits began to be violated seriously and systematically. For nearly two years citizens complained to the DNR that Kohler was in violation of every permit they held. George Meyer's response in April of 1997 was that "My staff are not aware of any current violations of the permits issued." 1

One of the preceding statements is patently false. This report will lay out the facts in an attempt to find the truth.

The Purpose of this Report

[This is the fifth](#) in a series of reports discussing Governor Thompson's political control over Wisconsin's Department of Natural Resources.

The Governor has now appointed all seven of the citizen members of the Natural Resources Board, which sets policy for the DNR. In the 1995 state biennial budget, the Governor also made the DNR Secretary a political appointment of the Governor, making the Department the subject of serious political influence. In the same budget, the Governor eliminated the Wisconsin Public Intervenor Office which advocated for public rights in natural resources and served as watchdog over the DNR and other government agencies. Subsequent to the Governor gaining this control in 1995, many negative changes have occurred in the DNR.

Each report in this series explores a specific example of these negative changes.

Discussion

In 1995 Kohler began construction. The Approved Grading Plan allowed for the construction of a number of screening berms around the course. Kohler constructed one berm at the north end of the course which was not on the Approved Plan. The berm in question is 800' long and approximately 15' high and includes a concrete bunker-style toilet building.

Obstructed Public View --- The northern terminus of this berm comes within several feet of the top of a 60' high, actively-eroding bluff on Lake Michigan at a point where Kohler's property adjoins the neighbor to the north and County Highway LS. The purpose of this berm (it's utility) is

to screen the golf course from the highway.(6) This it does. It also obstructs the view of several neighbors as well as obstructing what was one of the most spectacular public vistas on this side of the lake.

Violated Set-Back Rules --- This berm and the construction of beach revetments on the lakeshore appear to violate conditions outlined in the DNR's permit #3-SE-95-0445 which said that "Unless specifically authorized, all buildings and other structures must be set back at least 225' from the OHWM (Ordinary High Water Mark) of the lake. A structure is defined as something with shape, form and utility..." (Emphasis is DNR's).

Altered Work Without Approval ---This same document clearly states "This permit does not authorize any work other than what you specifically describe in your application and plans...If you wish to alter the project or permit conditions, you must first obtain written approval of the Department."

The project was altered substantially without prior written approval being sought or given. In May of 1996, DNR Southeast District Director Gloria McCutcheon wrote that the berm "Was not on Kohler's original plan."

Conditional Use Permit Violated --- The Town of Mosel issued a Conditional Use Permit which also appears to have been violated. This permit "allows construction of only the golf course itself; plans for structures must be approved by the Town Board and a building permit obtained." No such permit was sought or obtained for the building of this berm.

Destabilized Bluff --- This permit also stated that "Kohler will stabilize the lake bank along the northern portion of its property near the curve in County Highway LS where the golf course proper meets the property to the north which is not part of the course itself." Shortly after this berm was built Kohler Company's own engineers declared that the bluff had been destabilized at this location.⁷ In an internal DNR memo by DNR Engineer Lynn Torgerson, she concurs that the bluff "is in the state of impending failure and ... is expected to fail and is unacceptable." ³ A week later, DNR Southeast District Director Gloria McCutcheon writes that "Our staff does not believe that construction of this berm significantly threatens bluff stability..." ⁴

Obstructed Public Beach --- The Town's permit goes on to say that "Kohler Company will not place any obstructions over the now existing beach area along the Lake Michigan shore which would prohibit or impede passage." Kohler almost immediately placed enormous boulders directly on the beach right to the water's edge which made passage impossible.

Violated County Zoning --- Sheboygan County's Chapter 72 is their Shoreland-Floodplain Ordinance. It requires that "All structures...shall be set back...225 feet from the ordinary high water mark." This 800 foot long berm does not meet this setback requirement.

The Town and County permits are mentioned here because the DNR has oversight enforcement authority. No municipality may create a regulation which is less restrictive than Statewide Shoreland Zoning Regulations. And, "The Department is required by law to oversee the Sheboygan County Zoning ordinance implementation." ⁹

When construction of this berm was challenged as being in violation of these permits as well as a possible threat to the stability of the adjacent public highway the DNR required Kohler to do a bluff stability analysis. This was done by Woodward-Clyde Consultants of Middleton, WI and dated 10/18/95. It says in part that the Minimum Factor of Safety (Fs) against shallow slides before berm construction was 1.0 and after berm construction went down to 0.99.

An internal DNR memo dated 11/30/95 written by DNR engineer Lynn Torgerson states in part that “the shallow results may be reason for alarm....Textbooks describe an acceptable Fs as 1.5 or greater, but in the Department’s practice we have been using 2.0 in the evaluation of dams and embankments. Fs=1.0 is a slope in the state of impending failure and anything less than 1.0 is expected to fail and is unacceptable.”

Highway Threatened --- Still the DNR refused to take action against Kohler and on 12/4/95 Gloria McCutcheon, DNR’s Southeast District Director wrote “Our staff does not believe that construction of this berm significantly threatens bluff stability...” 4 The key word here is “significantly”. If you accept Woodward-Clyde’s analysis of a drop from Fs=1.0 to Fs=0.99, the reduction in safety may not seem significant. But when you begin with the fact that the DNR’s benchmark for stability for these structures is 2.0, and the bluff was at half that number to begin with, the issue takes on a different significance entirely. The berm has increased the rate of erosion on Kohler’s property and on the adjacent property to the north to the point of causing fresh slides on both properties in 1998. These slides are hastening the undermining of Highway LS.

Kohler’s defense is that the berm is not a structure and therefore is not covered under the County’s Shoreland Zoning Ordinance. This is an important point and deserves some scrutiny. It has not yet been determined in Wisconsin courts whether or not a berm is a structure, however, ‘structure’ is defined in several places and the definitions seem to be consistent. NR116.07 (45) defines a structure as “...any man-made object with form, shape and utility, either permanently or temporarily attached to or placed upon the ground..”. The DNR’s Permit #3-SE-95-0445 says “A structure is defined as something with shape, form and utility...” (emphasis is DNR’s).

Sheboygan County’s Shoreland Zoning Ordinance defines structure as “Anything constructed, erected, or to be moved from other premises, the use of which requires a permanent or temporary location on or in the ground...”. The Town of Mosel’s Zoning Regulations define a structure as “Anything constructed or erected, the use of which requires a permanent location on the ground or attached to something having a permanent location on the ground.” An Attorney General’s opinion from 1950 says that “a structure is a human-made object with shape, form and utility” and is subject to the regulations in shoreland zoning unless it is specifically exempted in NR 115.

And finally, a fundamental rule of legal interpretation is that words used in statutes and ordinances, if not otherwise defined, are to be given their commonly understood meaning. Structure comes from the Latin root *structus* pp. of *struere* which means “to heap together”. By any of these definitions this berm qualifies as a structure.

However, Sheboygan County Planning Director Mark Leider took it upon himself to determine that this berm is not a structure as that term is described in their ordinance (see above definition).

Furthermore, no municipality may adopt any Shore- land Zoning regulation which is less restrictive than the DNR’s and the DNR’s definition in their permit is clear.

DNR District Director Gloria McCutcheon admits in her letters that the berm “was not on Kohler’s original plan.” Therefore, it is outside the permit. But later she wrote that “Sheboygan County zoning staff ruled that this berm is not a structure, and therefore, is not subject to setback requirements of their ordinance.” and “To date, we believe that the Kohler Company has complied with all permit conditions...” 5

Lack of Enforcement --- The above evidence makes it clear that this berm is an illegal construction. It has never been approved by any government agency. It is forbidden by the permits. It should not be DNR enforcement policy to look the other way when mandatory permit conditions are violated.

Public Beach Access Blocked --- Another flagrant violation of these permits involves the revetments (huge boulder piles) which Kohler placed along the shore of Lake Michigan. Again Kohler and the DNR went through the motions of the approval process. Approval was granted for the construction of numerous revetments separated by stretches of natural beach. 10 One very important condition was that Kohler was allowed to excavate their bluff and place the huge rock revetments landward of the Ordinary High Water Mark (OHWM). The permits also forbid any changes to this plan without prior written approval from the DNR. “The idea behind this shore protection design is not to interfere with the littoral drift process by keeping structural elements landward of the existing toe of the bluff.” 12

The revetments which were built bear no resemblance to the ones which were approved. In fact, instead of revetments separated by segments of natural beach, Kohler piled enormous boulders continuously along the shoreline at the north end of their beach, covering the existing beach and making it impassable to the public. Instead of excavating and placing these revetments landward of the OHWM as required, Kohler placed these huge piles of boulders directly on the public beach. That is to say between the waterline and the OHWM. This was undoubtedly done as a cost saving measure for Kohler, and perhaps to keep spectators off the beach.

The result is the unlawful appropriation of a public beach by a private company. Again the DNR refused to take action to bring Kohler into compliance with the conditions of their permits. The Town of Mosel’s Conditional Use Permit specifically forbids this i.e. “Kohler will not place any obstruction over the now existing beach area along the Lake Michigan shore which would prohibit or impede passage.”

The public has a constitutional right under the Public Trust Doctrine to have access to this public beach. Neither the Town, the County nor the DNR can give this right away to any private citizen or company. The DNR has abrogated it’s responsibility to protect the public’s interest in this matter.

Private Citizens Burdened --- This is an issue custom-made for the former Public Intervenor Office. Without this essential office acting as a watchdog on the DNR it is left to private citizens to sue to regain this public beach. The minimum cost of such a suit has been estimated at \$100,000 and could be twice that amount. If Kohler can use it’s influence so that DNR ignores its permits, then only an individual or group with very deep pockets can challenge them. So far none have stepped forward.

Fishing Access Severely Limited --- Another improper item is included in the Town’s Conditional Use Permit: “Kohler Company will provide access to the mouth of Seven Mile Creek during the smelt fishing season for Town of Mosel residents and immediate family members for the purpose of fishing. Kohler Company will be responsible for monitoring access and may limit the number of people fishing at any time to a reasonable number.”

Is it possible that public fishing rights enjoyed by all citizens since the time of settlement can be parceled out by a township, excluding all members of the public but the ones named? Is it proper to give a private company responsibility for monitoring access? And what is a “reasonable number?” Could the company say to the public that “anglers interfere with golfers, therefore a reasonable fishing access number is zero?”

No Public Access Points --- State law requires that a developer must provide one public access to the shore for every half-mile of shoreline owned. Kohler owns two miles of shoreline but somehow managed to provide only one public access at the southern extremity of it’s property --- which it has now blocked with a chain and a No Trespassing sign. In fact, two previously existing public access roads were abandoned by the Township at Kohler’s request.

DNR Allowed Inexperienced Inspectors --- It may also be of interest to examine how the DNR monitors compliance with its permits. This is spelled out in Permit # 3-SE-95-0445, Condition I: "The Kohler Company is required to hire a DNR-approved independent construction inspector to be on site during construction."... Who was this person? What were this person's professional credentials? Was this person on-site? And did this person allow changes to be made in the field? (This would have been allowed under the Permit.)

DNR Secretary George Meyer wrote in a letter dated 4/28/97 that "Department staff realized the need for intensive construction management and oversight of this project." 1 Consequently the DNR allowed Kohler to hire two college students from the UW-Madison to fill this critical position. These students were not on-site during construction, but did visit the site from time to time. They had no professional credentials at the time they performed this job. Mr. Meyer said in the letter mentioned above that "this arrangement has worked well, and the students derived meaningful educational benefits from being involved..." If this does not violate the letter of the permit, it certainly seems to violate the intent of the permit.

Money Power

The evidence suggests that DNR permit and enforcement decisions at Whistling Straits Golf Course could be linked to the political power of campaign donations from Kohler family members, and officials and employees of interlocking business enterprises owned by the Kohler family in Sheboygan and Kohler, Wisconsin.

The Kohler family alone donated \$67,918 to Wisconsin candidates during an eight year period in the 1990s. When combined with close business associates' donations, the total rises to over \$88,569, with \$27,100 of this total going to election campaigns for Gov. Thompson and Lt. Gov. McCallum specifically.

Gov. Thompson now controls DNR decision-making; therefore, Kohler's financing of Thompson's campaigns and Thompson legislative allies' campaigns is significant.

The law firm Quarles and Brady was included in the legislative totals because one of its lawyers, Anthony Earl, served as lobbyist and legal consultant for the Kohler Company in 1995, during the period when the Whistling Straits project was getting underway and DNR permits were being requested. Earl is a former Wisconsin Governor and former Secretary of the DNR.

The law firm DeWitt, Ross & Stevens was included because one of its lawyers, Peter Peshek, was also hired as a lobbyist for Kohler Company during the same time period. Peshek is a former Wisconsin Public Intervenor, skilled at natural resource law and politics. James Klauser, who for years served as Thompson's most powerful staff as Secretary of the Dept. of Administration, also works now as a private attorney in this same lawfirm --- another link to Thompson.

Both law firms were major contributors to Gov. Thompson's election campaigns, which makes their lobbyists particularly effective.

The Milwaukee Journal Sentinel reported on August 9, 1996 that "Kohler Co. officials and family members have contributed heavily to Gov. Tommy Thompson's campaigns since 1987, donating at least \$35,855." This is a different time period than presented in this report, which shows that the pattern of donations extends back to earlier times.

Terry and Mary Kohler have also been major donors in national politics (which Gov. Thompson is also very interested in). Through Windway Capital Corporation, they were the top national

contributors to Newt Gingrich's re-election campaigns and his political action committee GOPAC, giving \$816,107 over 10 years.¹⁴ In other words, the Kohlers exert significant power in political circles.

Conclusion

The DNR is a government agency. Its job, indeed its reason to exist, is the protection of the environment in defense of the public good.

The permits issued for this project seem to be well written with an eye to protecting the public good. The overarching problem here is not in the content of the permits; it is in the enforcement. The DNR says: "Attached is a copy of your permit which lists the conditions which must be followed."¹¹ These are not suggestions, they are conditions. There are only a handful of citizens in this state who can defy the DNR's authority by accepting these conditions and then ignoring them. The average citizen could go to jail for these infractions or at least be required to come into compliance by undoing an illegal construction. This kind of enforcement on average citizens takes place regularly.

DNR permits have the force of law, however, the DNR is not required by law to enforce them. Citizens may seek to enforce these permits even if the DNR will not. In fact, a 1998 Wisconsin Supreme Court decision held that the Public Trust Doctrine enables a private citizen to bring an action against a private party when the citizen feels that the party was not sufficiently regulated by the DNR (*Gillen v. City of Neenah*). This puts the citizen in the position of doing the DNR's job. Lacking any help from a Public Intervenor, this means that a citizen can buy as much enforcement as he can afford.