

Originally written and submitted to the JPCA on June 14th.

Part 4

I was originally going to write a piece about the recently passed legislation. I am not a big fan of the new law for two primary reasons. First, the language is fraught with legal issues that can be exploited by Soscia Holdings and second, this legislation cannot and will not end your problems with the Soscias. To prove my point, I would have had to write a roadmap for challenging the legislation which I am not interested in doing. However, the conclusion to that piece was going to be: "If anyone thinks the new legislation is going to solve your problems, you are unfortunately wrong." With the recently published "Permit Requirements for Waterfront at Johnson's Pond Residents" asserting the right to charge people to use their existing docks, I suggest that Soscia Holdings has proven me correct, without having to write the article.

But, Soscia Holding's 28 page "Permit Requirements for Waterfront at Johnson's Pond Residents" is definitely worth reviewing.

There are only two ways an entity can possess the power to institute and enforce a fine. Either the entity is the government or an agency of the government, or, you entered into a contract specifically granting the entity such power. The most classic example being a Homeowners Association. If you purchase property regulated by an HOA you contractually grant the association the power to levy and enforce fines if you break the rules. Soscia Holdings is neither a government entity, nor has there ever been a HOA governing the use of Johnson Pond.

As has been mentioned by others, Soscia Holdings copied their "Permit Requirements for Waterfront at Johnson's Pond Residents" from a document published by the Union Electric Company (d/b/a Amerent Missouri) which defines the rules, regulations, fees and potential fines for its control and management of any past, present or future development on the Lake of the Ozarks. Union Electric is the sole owner of the Lake of the Ozarks and all of its 1,150 miles of shoreline. The obvious question becomes, "Well, if this company can do this why can't Soscia Holdings?" The answer is found on the page that Soscia Holdings "forgot" to copy but is included at the end of this article. Page B-4 of the original document explains that Union Electric Company has the power to regulate development under the authority granted to it under its license to operate dams to produce hydroelectric power granted to it by the Federal Energy Regulatory Commission (FERC) (see the highlighted sentence). I'm not one to trust such a declaration of power so I did some research.

First, one needs to understand that under Federal law, FERC has absolute jurisdiction to regulate, manage and control all hydroelectric power production on any water in the United States. This authority includes the power of eminent domain and total control of the lands effected by any impoundment of water used to produce hydroelectric power initiated after 1922. Thus, Union Electric, which operates the Bagnell Dam that created the Lake of the Ozarks must obtain a license from FERC. This license requires Union Electric to regulate any development on any of the lands effected by the impounded water. To comply with that requirement, Union Electric worked with FERC to develop the rules and regulations Soscia Holdings "borrowed". FERC reviewed these rules and regulations, expressly blessed them, and delegated the authority to enforce them onto Union Electric. Union Electric became a de facto arm of the government,

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exercising power and authority on behalf and under the supervision of FERC.¹ The right to transfer and exercise this power was discussed and approved by the Federal Court in Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC, 297 F.3d 771 (8th Cir. 2002).

Soscia Holdings is not a government entity, nor does it hold any license from FERC. It has no power to assess a fine for any reason. I might as well assess a fine against Soscia Holdings, it will be just as enforceable as any fine issued by Soscia Holdings.

Soscia Holdings does have recourse for docks and other structures that intrude onto its land. It is called an action in trespass. Trespass is both a criminal and civil offence. In theory, Soscia Holdings could go to the Coventry Police Department and insist it prosecute someone for their dock encroaching on Soscia Holding's land. As a former prosecutor for the Coventry Police Department, I strongly suspect the Department would say this is civil matter and chose not to get involved. Let me be clear, that I have no current relationship with the Coventry Police Department, I do not speak for them, and this is just my opinion from experience.

Soscia Holdings could bring a civil case for trespass and ejectment. But, as I explained in my first article, the answer for virtually all of you would be to respond with a claim for adverse possession or prescriptive easement. I know many of you have started the process of gathering the information you will need for such a claim. That's awesome!

Section 5.2

I need to address one other section in the "Permit Requirements for Waterfront at Johnson's Pond Residents" put out by Soscia. The first two sentences of Section 5.2 imply that Soscia Holdings is the owner of certain rights created by the R.I. Legislature and bestowed upon the QRC. Soscia Holdings first made this claim in its ill-advised lawsuit against R.I. Department of Environmental Management, (allegations 14 through 18) and they have repeated it here. I assume this language was added to give an appearance of authority to issue this document. I do not believe it is true. From everything I have seen, Soscia Holdings obtained the land under the pond and the riparian rights appurtenant to Johnson Pond, and nothing else.

Maybe in the 1850's the Quidnick Reservoir Company (QRC) was granted a larger basket of rights from the R.I. Legislature to control the Pawtuxet River (and maybe it wasn't) but those greater rights certainly did not transfer with the sale of Johnson Pond. Just because I buy the governor's house does not mean I become the governor. In order to transfer these extended rights, the QRC would have needed a vote from its shareholders expressly identifying and transferring these additional rights. It would be a separate document and if it existed, I'm sure Soscia Holdings would have shown it to everyone by now.

Conclusion

¹ For what it worth, since these rules and regulations are essentially law, they are in the public domain and Soscia Holdings has not violated anyone's rights by copying them.

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This document is ridiculous. Soscia Holdings cannot fine anyone. It cannot lien anyone's property. It can try to remove existing docks through a civil process but will lose virtually every attempt.² Publishing such an unenforceable document demonstrates just how weak Soscia Holding's hand is. Soscia Holdings would not be putting this out if they had any better arguments to make or rights to enforce. Your fight with Soscia Holdings is not over and inevitably this will become a court fight over valuation. Everything else is just fear tactics. Stay the course. The facts, law and history are on your side.

As for the recently enacted legislation: D.E.M. has always had the power to fine and enjoin Soscia Holdings for its environmental transgressions, and to take control of the dam after Soscia Holdings virtually drained the pond last year. D.E.M. did this in 1993 against the Quidnick Reservoir Co. and took control of Pascoag Reservoir in 1997 when the same stunt was pulled there. I could make a very strong argument that things are actually worse with the new law. In brief, while D.E.M.'s historic authority was time tested and settled, its new authority can be challenged in court for years. These are brand new powers based on vague language that is open to interpretation and will be far more difficult to enforce and justify in court than the power it successfully exercised in 1993 and 1997. Explaining this in further detail is a story I do not want to write. I am truly shocked that the obvious answer to your problem (as outlined in my second and third pieces) is not being pursued.

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² Soscia Holdings can prevent new and expanded construction. Sorry.

LAKE OF THE OZARKS PERMIT REQUIREMENTS

A Reference Guide for Property Owners and Builders/Contractors

1.0 INTRODUCTION

Lake of the Ozarks is one of the world's largest reservoirs and a thriving tourist area. Nearly 1,150 miles of resort area shoreline, created by building Bagnell Dam on the Osage River, provide access to water sports for increasing numbers of visitors, residents, and second home owners.

Ameren Missouri, formerly known as Union Electric Company, owns the shoreline (project lands) and owns/operates Bagnell Dam. As the owner, Ameren Missouri is required by its license from FERC to conduct certain shoreline management activities, which include regulating docks, bank stabilization construction, and other structures on the lake. The license also authorizes Ameren Missouri to collect permit fees to cover the cost of these shoreline management activities.

In recent years, development around the shoreline has grown rapidly, and the number of permit applications processed each year has grown from 900 in 1990 to more than 3,000 annually. Both the cost and the complexity of permit processing and shoreline management continue to increase. In the spring of 2003, Ameren Missouri moved its shoreline management office to Lake of the Ozarks to increase its effectiveness in managing the shoreline and its permitting process. The Shoreline Management office is located at 3 Willmore Lane in Lake Ozark, Missouri. This office is open to the public, and representatives are available daily to work through permitting questions and provide shoreline information to visitors.

Ameren Missouri created its permit requirements and fee schedules to ensure Ameren Missouri's compliance with its Federal license and to offset shoreline management costs. The requirements were developed after several months of proposals and revisions that incorporated suggestions from a wide range of organizations and individuals. The permit program helps ensure that docks, bank stabilization construction, and other structures meet standards to prevent them from becoming hazards to navigation, causing pollution of the lake, or interfering with the safe and reliable operation of Bagnell Dam and the Osage Power Plant.

This guideline booklet addresses the requirements for Ameren Missouri permits for installation, modification, or transfer of boat docks, bank stabilization construction (i.e., vegetation, riprap, and seawalls), breakwaters, boat ramps, and any other structures including excavation and fill within the FERC project boundary for the Osage Project.