STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

Reddelien Road Neighborhood Association, Inc. ("RRNA"), et al,

Petitioners,

vs. Case No. 10-CV-5341

The Department of Natural Resources ("DNR"),

Respondent.

RRNA BRIEF IN OPPOSITION TO DNR MOTION TO DISMISS

INTRODUCTION

The RRNA commenced this action for judicial review four days after receiving from DNR for the first time the DNR's so-called November 4, 2010 decision granting storm water coverage (the "Storm Water Decision") for its proposed boat launch on North Lake. Nevertheless, the DNR moves to dismiss this petition on the grounds that it was not timely filed. DNR asserts that because the Storm Water Decision was dated November 4, 2010, the deadline for seeking judicial review expired on December 4, 2010, assuming it was timely provided to the petitioners.

DNR's motion should be denied for three reasons. First, under Wis. Stat. §227.53(1)(a)(2m) petitions for judicial review are to be served and filed "within 30 days after *personal service or mailing* of the decision by the agency." The only person who received a copy of the Decision within thirty

days of its issuance was an internal DNR employee. The DNR neither mailed to nor served the decision upon the RRNA or its counsel until December 16, 2010. Because RRNA's petition for judicial review of that Decision was served and filed on December 20, 2010, within four days of DNR's transmission of the decision to the RRNA, the petition was timely. For this reason, the DNR's motion should be dismissed.

Second, the DNR has long known that the RRNA and its counsel have been keenly interested in the storm water issues that are the subject of its petition, having frequently expressed concerns both in a prior lawsuit and at a public hearing last September where a number of citizens discussed potential impacts of storm water runoff because of the DNR's proposal to pave over a large wooded drainage area abutting North Lake to construct a parking lot. To allow DNR to avoid judicial review of a decision by not serving or mailing that decision to the RRNA or its counsel (who was well known to it), a decision which DNR knew the RRNA would care about and had a direct interest in, violates due process and fair play. For this additional reason, the DNR's motion should be dismissed.

Third, the RRNA raised the exact same storm water issues in its December 3, 2010 Petition for Judicial Review (Case No. 5096), the same issues that DNR is now claiming that the RRNA is barred from raising, on timeliness grounds, in its December 20, 2010 Petition (Case No. 5341). Because the RRNA in effect sought judicial review of the storm water issues

in Case No. 5096 within 30 days of the DNR's November 4, 2010 grant of storm water coverage for the project, this Court has the jurisdictional competency to proceed and address those issues. For this additional reason, the DNR's motion should be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

The DNR was made aware on countless occasions that the residents of Reddelien Road were genuinely concerned about the consequences of storm water runoff that would result from the paving over of a large drainage area in the woods to build a large parking lot for the project. For example, the DNR was made aware of these concerns in a lawsuit which was commenced by the RRNA and 40 residents of Reddelien Road on September 3, 2010 (which is on file with this Court in Waukesha County Circuit Court Case No. 10CV3792). According to that September 3, 2010 summons and complaint:

> Based on reports from their experts, the Plaintiffs further aver that the proposed boat launch and parking lot will effectively destroy or block wetlands which now filter large areas of farm field runoff and storm water runoff, thus creating other public nuisances. For example, the creation of a football-field-sized parking lot, eighteen inches above grade, will act as a "stopper," which will cause large amounts of surface water, often contaminated by farm nutrients, gasoline and oils, to run into the streets of the Plaintiffs' neighborhood and from there into North Lake. Runoff caused by the proposed boat launch and parking lot will increase flooding on Reddelien Road north from Becks Road and will surcharge septic systems, which will cause pollution of the Plaintiffs' neighborhood and of North Lake.

September 3, 2010 complaint, ¶66.

One of the RRNA's experts, Neal O'Reilly (a former DNR employee), filed an affidavit in Case No. 10CV3792 (which is also on file with this court) which makes it crystal clear that the RRNA had a deep interest in storm water runoff. According to his September 3, 2010 Affidavit:

> Under Wis. Admin. Code NR 216.42 'construction sites one acre or more of land disturbance' require a permit from the WDNR and must comply with the requirements of Wis. Admin. Code NR 151. Under NR 151.12(5)(a), best management practices shall be designed, installed and maintained to control suspended solids carried in runoff from the post-construction site…. In the September 22, 2009 memo prepared by Kapur & Associates for the WDNR titled 'Storm Water Evaluation for North Lake Boat Launch'… the issue of peak flood discharges is not addressed. As part of the WDNR's 'water resources application for permits' dated November 15, 2009 the issue of compliance with Wis. Admin. NR 151.12(5)(b) is not addressed. As part of the construction of the proposed parking lot for the WDNR boat launch, the agency plans to add 2.5 to 3 feet of fill on the former Kraus property over a 0.65 acre area. To a reasonable degree of scientific certainty the proposed fill will interfere with drainage for residents along Reddelien Road. … To intercept overland drainage from the south of the of parking lot area, WDNR's site plans … show a storm inlet that drains to 4-inch PVC pipe directed to the lake. … WDNR has not conducted a detailed hydraulic analysis on how their proposed fill will impact water level on adjacent neighbors to the south along Reddelien Road. The proposed fill for the parking lot has the potential to raise flood water states on neighboring properties by several feet and sift the current overland flow route on the neighbor to the south.

September 3, 2010 O'Reilly Affidavit, ¶¶4, 5.

The DNR also demonstrated that it understood that the Reddelien Road residents and other North Lake citizens were very concerned about storm water runoff in a public hearing conducted by the DNR on September

30, 2010 (see attached Exhibit A, containing excerpts from a transcript of that hearing). At that hearing, a representative of the DNR (Jim Ritchie) went on at length about how the DNR would handle storm water runoff:

> I want to say a few words about our storm water management plan that we have prepared for this development that will manage runoff from the development that we will be constructing in order to not impact the surrounding properties. It will maintain the existing drainage patterns of the area.… Presently, there are two culverts underneath the existing access road underneath the green segment of the road; however, those culverts are in very poor shape. They are crushed and/or filled with materials. We will replace those two culverts as well as add five additional culverts throughout our length of our roadway in order to, again, maintain the existing drainage patterns of the site.

Ex. A, September 30, 2010 Transcript, pp. 13-16.

In fact, at that public hearing, the RRNA's expert, Neil O'Reilly (someone well known to the DNR because he worked at the agency for over 15 years) again went to great lengths to share his concerns about storm water runoff. Referring to issues very germane to the Storm Water Decision now at issue, Mr. O'Reilly opined as follows:

> In the alternative analysis and environmental assessment, the department did not address impact to the local drainage or the potential flooding of homes, septic systems and roadways…. I feel if the department had conducted a balanced and complete alternative analysis, the proposed boat launch site of State Highway 83 would be the preferred alternative. Under Wisconsin Administrative Code NR 151 it is required that new development treats storm water runoff for water pollutants. Under that code, it states that new development by design reduce the maximum extent practical closest (unintelligible) by 80 percent, and for redevelopment reduce the maximum extent of (unintelligible) by 40 percent. In your own consultant's report dated September 22nd, 2009, they classified

> this site as redevelopment, not as new development. I feel that a 300 percent increase in impervious area is not redevelopment, but should be defined as development under the state code. In your own consultant's report you are meeting only 40 percent (unintelligible) reductions. I feel strongly that the state code requires that you should be 80 percent (unintelligible).

Ex. A, September 30, 2010 Transcript, pp. 22-23.

At that same September 30, 2010 hearing which was attended by RRNA's counsel William Gleisner the DNR could not have missed the fact that the problem of storm runoff was a recurring theme of concern by North Lake residents. (See Ex. A, at the following pages):

- Resident Walter Schaffer: “How are you handling the runoff?” (p. 38)
- Resident James Mathis: “Will the infiltration reductions, the runoff for the project site meet that code?” (p. 41);
- Resident Mark Ruegsegger: “The weeds will change with the runoff.” (p. 43);
- Resident Charles Luebke: “This property was designed many, many years ago as the floodway filter for all of that runoff.”(p.65);
- Resident Ted Rolvs: “I find it ironic that the DNR [is] minimizing the effect of what they want to fill in on a prestigious piece of property which provides an incredible recharge of North Lake incredible runoff support.”(p.68);
- Resident Ted Rolvs: “Where’s that runoff going to go?” (p. 69).

It thus cannot be questioned that the RRNA and the neighborhood residents were "interested parties" when it came to any decision relating to

storm water issues, and that the DNR knew this. And yet, the DNR did not serve the Storm Water Decision on anyone other than one of its own employees, one Lynette Check.

However, even were the DNR to assert that it was then uncertain of the RRNA's interest in the storm water issues and any decision by DNR in that regard, it ought to have awakened to that interest in view of how the RRNA responded to the DNR's November 4, 2010 MC Approval described below.

On November 4, 2010, DNR Water Resource Engineer Bryan Hartsook issued the decision at issue (again, the "Storm Water Decision") granting Storm Water Permit coverage under WPDES General Permit No. WI-S067831-3. See attached Exhibit B. On this very same date, the DNR also issued a permit to itself for the public boat launch located on DNR property (known as the Kraus Site). That permit is referred to as the November 4, 2010 Manual Code 3565.1 Approval (hereafter, "MC Approval"). See attached Exhibit C. While the DNR mailed a copy of the MC Approval to counsel for the RRNA and the NLMD it only sent the Storm Water Decision to one of its own employees. However, both the Storm Water Decision and the MC Approval concern the exact same DNR property and proposed boat launch. Both the Storm Water Decision and the MC Approval were issued on the same day. However, the MC Approval makes no mention of the Storm Water Decision nor is a copy attached to the Approval.

The RRNA wishes to emphasize this point. While the MC Approval mentions storm water Engineer Bryan Hartsook by name (¶5, p. 2, Ex. C) and the MC Approval also notes that citizens from North Lake had raised concerns that storm water runoff from the proposed boat launch could harm North Lake (¶8G, p. 3, Ex. C), it says nothing about the fact that on that very same day the DNR's Mr. Hartsook had issued any decision affecting or relating to storm water runoff.

Eighteen days later, on November 22, 2010, the RRNA served the DNR with a Petition requesting a Chapter 227 contested case hearing on eight different issues arising from the MC Approval.[1] That Petition specifically raised and sought a hearing on storm water issues, although it didn't refer to the Storm Water Decision by name since the RRNA was not then aware of it.[2] On December 3, 2010 the RRNA filed a Petition for

[1] The November 22, 2010 Petition for a Contested Case Hearing is on file with this Court and is attached as an Exhibit to the Petition for Judicial Review in Case No. 5096.

[2] Issues 3, 4, and 5 of the RRNA's November 22, 2010 Petition for a Contested Hearing read as follows:

3. Does the proposed development authorized by the Permit comply with Wis. Admin. Code NR § 151.12(5)(a) ? In particular:
   a) Should the access road proposed in the Permit be considered a new "development" rather than a "redevelopment" under Wis. Admin. Code NR §§151.002(39) and151.12(5)(a)
   b) Does the Permit comply with the TSS Removal standard under NR § 151.12(5)(a)1 or 151.12(5)(a)2?
4. Does the proposed development authorized by the Permit comply with Wis. Admin. Code §NR 151.12(5)(b)? In particular:
   a) Are the culverts proposed in the project plans adequate to handle the volume of water that will flow out of the wetland complex on and adjacent to the Kraus Site? [Continued]

Judicial Review concerning the MC Approval, and attached the November 22, 2010 request to that petition as an exhibit. Again, the RRNA's Petition for Judicial Review in Case No. 5096 raised the same storm water issues (at pp. 12-14). As noted, the December 3, 2010 Petition and the attached November 22, 2010 request are both on file with this Court in Case No. 5096.

Finally, on December 13, 2010, the DNR issued a decision denying RRNA's Petition for a contested case hearing on all issues save one. The December 13, 2010 Decision is attached as Exhibit D. In its December 13, 2010 response, the DNR acknowledges that issues 3, 4, and 5 raised in the RRNA's November 22, 2010 Petition (see attached Exhibit C) deal with storm water and "may be relevant to the issue of whether DNR should have granted coverage to the boat launch project under WPDES General Permit No. WI-S067831-3." Ex. D, p. 1. However, the DNR went on to assert: "[T]he decision to grant Storm Water Permit coverage was not authorized by this MC Approval but a decision issued Nov. 4, 2010 by Water Resources Engineer Bryan Hartsook. That decision was not appealed by you or any

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b) Will the proposed parking lot act as a stopper, preventing water from the wetland complex on and adjacent to the Kraus Site from draining into North Lake via the Kraus Site and instead divert it onto neighbors to the south of the Kraus Site?
c) Will this surcharge septic systems and cause flooding in the Reddelien Road Neighborhood?

5. Does the Permit comply with Wis. Stat. § 281.15 and Wis. Admin. Code NR §§ and 299.04(1)(b)? In particular:
a) Will the storm water treatment system for the roadway remove oils and grease, toxic organic compounds, nitrogen compounds, or de-icing compounds such as salt that are found in roadway runoff? [Continued]

other person and is now final." Ex. D, *Id.*[3] That pronouncement came as a complete shock to the RRNA and its counsel because this was the first time that it had ever heard of the Storm Water Decision.

After receiving the December 13, 2010 decision, counsel for the RRNA checked with counsel for the NLMD and discovered that the NLMD had never heard of it either. RRNA counsel then attempted to locate that decision online, to no avail. Finally, counsel for the RRNA contacted Andrew Hudak of the DNR. Mr. Hudak emailed a copy of that decision to counsel for the RRNA on December 16, 2010. As soon as it was obtained and reviewed, the RRNA commenced this Petition for Judicial Review of the Storm Water Decision on December 20, 2010.

ARGUMENT

I. THE DNR KNEW THAT THE RRNA AND ITS MEMBERS WERE INTERESTED IN STORM WATER ISSUES WHO SHOULD HAVE BEEN SERVED WITH THE STORM WATER DECISION.

The RRNA does not disagree with DNR about the Chapter 227 requirement that petitions for judicial review of decisions are to be "served and filed within 30 days after personal service or mailing of the decision by the agency." Wis. Stat. Sect. 227 53(1)(a)(2m). But the fact that the 30 day deadline commences to run from the "personal service or mailing" of the

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b) Will the failure to do so increase pollution in the Reddelien Road Neighborhood and to North Lake?

[3] The December 13, 2010 Decision cites the Storm Water Decision at a later point as another reason to deny a contested hearing to the RRNA on another issue. See Ex. D, p. 4.

decision necessarily implies that the person whose interests are affected by the decision be given notice of that decision by either being personally served with it or upon DNR's mailing of it to him. While limits on judicial jurisdiction and requirements of judicial efficiency are important, Due Process is no less important. Under Wis. Stat. Section 227.52, administrative decisions that are subject to judicial review must affect the "substantial interests" of the person seeking review. Doesn't due process at the very least require that those whose "substantial interests" may be affected by a decision should be entitled to notice of that decision by either personal service or mailing of the decision?

Here, the RRNA is not asserting that it should have had more than 30 days after receipt of the decision in which to file a Petition for Judicial Review, only that because it did not receive notice of or service of the Storm Water Decision until December 16, 2010 its December 20, 2010 Petition in this case was or should be deemed timely.

The RRNA does not understand why the DNR contends that it did not have an obligation to serve it or the NLMD with its Storm Water Decision. Under Wisconsin law, the RRNA and its members were and are tantamount to parties in the case at bar. The Supreme Court stated in *Wisconsin's Environmental Decade v. PSC*, 84 Wis. 2d 504, 267 N.W.2d 609 (1978) that "the term 'parties' [in administrative parlance] should be construed to mean those persons or entities which affirmatively demonstrate an active interest

in the proceeding…." *Id.* at ¶25. Under Wis. Stats. § 227.53(1)(a)(2m), the thirty day clock for Judicial Review does not begin to run until there has been personal service or mailing of an agency decision. In fact, the Storm Water Decision itself makes that very clear when at its conclusion it specifies that "you have 30 days after the decision is mailed, or otherwise served by the Department to file your petition with the appropriate circuit court…" Ex. B, p. 2. Nowhere in the administrative rules is there any suggestion that a party must guess about the issuance of a decision or intuit that such a decision may someday be handed down and thus be on constant guard that a decision may have issued unbeknownst to the party.

"Service" is a term of art in civil procedure. According to Black's Law Dictionary (West 6th Ed. 1990), "service" means delivering or leaving process "with the party to whom or with whom they ought to be delivered or left… *The service must furnish reasonable notice to a defendant of proceedings to afford him opportunity to appear and be heard* [Emphasis supplied]." Here there was certainly no "service" upon the RRNA of the Storm Water Decision until December 16, 2010, although DNR easily could have done so as it did when it mailed the MC Approval to the RRNA's counsel on the same day.

Maybe the DNR will say that neither the RRNA, the residents of Reddelien Road nor the NLMD had a sufficient interest in the subject matter of the Storm Water Decision to entitle them to a right of appeal. However,

Chapter 227 could not be any clearer. Again, any person "whose substantial interests are adversely affected by an administrative decision may obtain judicial review." Wis. Stat. § 227.53(1); *All Star Rent a Car v. DOT*, 2006 WI 85, ¶21, 292 Wis. 2d 615, 716 N.W.2d 506. Given the oft repeated interest of the Reddelien Road neighbors and RRNA expert concerning storm water runoff, as detailed *supra*, it is hard to understand how the DNR could conclude that the "substantial interests" of the RRNA and Reddelien Road residents were not implicated by the Storm Water Decision.

In addition, in taking the position that the RRNA and its members had to guess the existence of a secret decision, the DNR overlooks a number of significant teachings of the Wisconsin Supreme Court. For example, in the *All Star* case, *supra*, the Supreme Court emphatically stated as follows:

> We have repeatedly exhorted administrative agencies to include with their decisions clear notices explaining the procedures that must be followed to obtain judicial review. *See, e.g.*, Grzelak, 2003 WI 102, 263 Wis. 2d 678, P24, 665 N.W.2d 244; McDonough, 227 Wis. 2d at 283; Peterson, 226 Wis. 2d at 634-35; Sunnyview Village, 104 Wis. 2d at 412. More important, the legislature requires administrative agencies to afford this notice. Wis. Stat. § 227.48(2).

All Star Rent a Car, *id.* at ¶46.

In fact, while the Storm Water Decision does contain the magic language affording notice of the right to judicial review as required in *All Star*, for that notice to be effective it has to be communicated to interested and aggrieved parties, either by mail or service. It is illogical (and as will be

demonstrated *infra* unconstitutional) to foreclose a party's right to appeal a decision of which the party is unaware.

II. IN SUGGESTING THAT THE RRNA AND ITS MEMBERS ARE NOT ENTITLED TO NOTICE OR SERVICE, THE DNR IGNORES ITS CONSTITTUIONAL DUTIES.

The RRNA and its members view the Storm Water Decision as much more than a technical or ministerial administrative exercise. As noted above, one of the central and repeated concerns of the RRNA has been that the construction of a paved parking lot in the middle of a wetlands and drainage area adjacent to the Reddelien Road neighborhood may exacerbate the runoff of storm water and other pollutants into the yards of the neighborhood. This in turn may contribute to an increase in flooding and may also surcharge septic systems and contribute to pollution in North Lake. In fact, as is clear from the September 3, 2010 complaint filed in Case No. 10CV3792 (which was later dismissed without prejudice via stipulation), the RRNA and the Reddelien Road residents sought an injunction to prevent the creation of private nuisances by the DNR.

At this preliminary stage, whether the RRNA will prevail on the merits is beside the point. The DNR has long been well aware of the concerns of the RRNA and its members as to storm water runoff. In fact, the Wisconsin Supreme Court has recognized that where a property owner changes the contours of his property so as to divert storm water and other waters onto another's property, they have committed an actionable

nontresspassory interference with the interest in the private use and enjoyment of land known as a private nuisance. *See Crest Chevrolet-Oldsmobile-Cadillac v. Willemsen,* 129 Wis. 2d 129, 384 N.W.2d 692 (1986) (in Wisconsin, the law "respects a neighboring landowner's status quo and affords a landowner who has developed his land, like Crest, to be free from the … intrusion of surface water on his property which is the result of a defendant's unreasonable conduct and which impairs the use and enjoyment of his land." *Id.* at 147).

Because the RRNA and its members have a reasonable fear of damage to their property resulting from storm water or other runoff arising from the project, at a minimum, it ought to have notice of and an opportunity to a hearing with regard to government action which may cause property damage. After all, there are limits on what government can do to private property. *Cf. Stop the Beach Renourishment v Florida Dept. of Environmental Protection,* ___ U.S. ___, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) ("when the government uses its own property in such a way that it destroys private property, it has taken that property…" *Id.* at 2602). Even if there is no actual physical taking, a right to a hearing should be afforded when property rights are threatened or compromised, "[by] a regulation [that] places limitations on land fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the

landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. " *Penn Central Transit Co. v. New York City,* 430 US 104, 124 (1978). There may be a taking where the government forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960).

When property interests are threatened by the government, a party has a constitutionally protected interest under the Fourteenth Amendment to receive notice of that conduct and challenge that conduct in a hearing. *Cf. Board of Regents v. Roth,* 408 U.S. 564 (1972) (when property interests are implicated "the right to some kind of prior hearing is paramount." *Id.* at 569-570). The Storm Water Decision threatens the property rights of the RRNA and its members and they were clearly entitled to timely notice of that decision so that they could exercise their rights under Ch. 227 to challenge that decision.

It cannot be assumed that the RRNA or its members waived their constitutional rights because waiver of a constitutional right has to be voluntary (*Wendlandt v. Industrial Commission,* 256 Wis. 62, 66, 39 N.W.2d 854 (1949)). Surely, a constitutional right cannot be waived when a party did not know it had that right in the first place. *Thiesen v. State,* 86 Wis. 2d 562, 273 N.W.2d 314 (1979) ("Waiver of a constitutional right requires intentional relinquishment of a known right." *Id.* at 565).

III. THE RRNA IN EFFECT RAISED THE STORM WATER ISSUES WITHIN 30 DAYS OF THE STORM WATER DECISION AND SO ITS PETITON IS TIMELY.

The Storm Water Decision was issued on November 4, 2010. On December 3, 2010, twenty-nine days later, the RRNA filed and served its Petition for Judicial Review of the MC Approval in Case No. 10CV5096. As one can plainly see from pages 12 to 14 of the RRNA's December 3, 2010 Petition on file with this Court in Case No. 10CV5096, the RRNA raised and sought judicial review on the very same storm water issues that the DNR says the RRNA raised too late in its December 20, 2010 Petition at issue here. While the Storm Water Decision is not referenced by name in that December 3, 2010 Petition (because the RRNA did not know of its existence), by raising these issues within 30 days of the Storm Water Decision the RRNA has preserved the ability to seek judicial review on these issues.

CONCLUSION

As noted above, the DNR's motion should be denied for three reasons. First, under Wis. Stat. §227.53(1)(a)(2m) petitions for judicial review are to be served and filed "within 30 days after *personal service or mailing* of the decision by the agency [Emphasis supplied]." Here, the Storm Water Decision was not served on the RRNA or its members until December 16, 2010, and the RRNA's December 20, 2010 Petition was thus timely. Second, the DNR has long known that the RRNA and its members were "interested parties" in the storm water issues that are the subject of the DNR's December

13, 2010 Storm Water Decision, and in the interests of due process and fair play the DNR should not be permitted to avoid judicial review of the Storm Water Decision by deciding to not notify them of or serve them with that decision. Third, the RRNA raised the exact same storm water issues in its December 3, 2010 Petition for Judicial Review (Case No. 5096) that the DNR is now claiming that the RRNA is barred from raising on timeliness grounds. Because the RRNA in effect sought judicial review of the storm water issues in Case No. 5096 within the 30 days of the DNR's November 4, 2010 Storm Water Decision, this Court has the jurisdictional competency to proceed and address those issues.

Dated at Hartland, Wisconsin this 23rd day of May, 2011.

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