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July 15, 2011

Hand Delivered

Hon. J Mac Davis
Waukesha County Circuit Court
515 W Moreland Blvd
Waukesha, WI 53188-2411

Re: *Reddelien Road Neighborhood Association, et al. v. DNR,* Waukesha County Circuit Court Case No. 10CV5341

Dear Judge Davis,

Following the hearing before this Court on June 17, 2011, Your Honor stated that if the Petitioners wished to file an additional brief or affidavits they should do so by July 15, 2011. *See* Official Transcript of the June 17, 2011 Hearing, p. 43, now on file with this Court. Accordingly, at this time the Petitioners are filing a brief with supporting affidavits and exhibits. A hardcopy of same is today being served upon Assistant Attorney General Milligan by Overnight Mail and a pdf of same is also being emailed to Ms. Milligan today.

We wish to provide the Court and opposing counsel with technical information concerning this filing. In Appendix 1, at Exhibit G, there is a CD containing a video. This video is in the QuickTime format and should play well on any computer running a modern version of either the Windows or Apple Operating System. If your computer does not have QuickTime software, you can download a free copy of Version 7 of QuickTime from **www.apple.com/quicktime**. If either the Court or opposing counsel experience difficulty in playing the video in Exhibit G, please advise Attorney Gleisner and he will furnish any technical assistance necessary to insure that the video can be viewed.

Yours very truly,

William C. Gleisner, III, Esq.
State Bar No. 1014276

William H. Harbeck, Esq., Of Counsel
State Bar No. 1007004

cc: Diane Milligan, Esq.

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

Petitioners,

vs. Case No. 10-CV-5341
Case Code: 30607

The Department of Natural Resources ("DNR"),
an agency of the State of Wisconsin,

Respondent.

RRNA SUPPLEMENTAL BRIEF IN
OPPOSITION TO DNR MOTION TO DISMISS

INTRODUCTION

After the hearing on June 17, 2011, counsel for the RRNA met with one of their experts who pointed out for the first time the unique importance of a fact which is very relevant to the issue now before this Court. As will be discussed at length *infra*, the Hansons are much more than citizens who own property adjacent to the Kraus Site. They in fact are joint owners with the DNR of a vital portion of the Kraus Site.

At the conclusion of the hearing before this Court on June 17, 2011, the issue came down to whether the DNR had an obligation to serve Mr. and Mrs. Hanson with a copy of the November 4, 2010 Hartsook Storm Water decision. At that hearing, RRNA's counsel argued that the DNR had an obligation to at least mail them a copy of that decision because the Hansons are contiguous property owners who are very concerned about storm water accumulation and how the proposed DNR parking lot will exacerbate such accumulations. Further, RRNA counsel argued that the Hansons had made the DNR aware of these

concerns on number occasions and thus were aggrieved parties within the meaning of Wis. Stats. § 227.01(9) who were entitled to seek review of adverse actions of the DNR by virtue of Wis. Stats. § 227.52.

The RRNA strongly reaffirms those arguments and will amplify on them in this brief. However, as will also be demonstrated in this brief, the Hansons and the DNR are as a matter of law joint owners of an important part of the Kraus Site. Based on that fact alone, the RRNA will demonstrate in this brief that it was absolutely incumbent upon the DNR to include the Hansons in their application for a storm water permit and to furnish the Hansons with a copy of the Storm Water decision as soon as it was issued.

THE JUNE 17, 2011 HEARING

This matter came on for a hearing before this Court on the 17th of June, 2011 on the DNR's Motion to Dismiss the RRNA's Petition for Judicial Review of the DNR's November 4, 2010 Hartsook Storm Water decision on the grounds that the RRNA did not timely appeal that decision. As argued in the previous briefs in this matter, it is and was the position of the RRNA that the existence of this decision was concealed from the RRNA until sixteen days after the time limit for an appeal of the decision had expired.

At the hearing on June 17th the Court immediately asked the RRNA's counsel why the DNR was under a legal obligation to serve a copy of the November 4, 2010 Hartsook Storm Water decision on the RRNA. The argument quickly turned to whether the DNR had at least at an obligation to serve the adjacent property owners who were members of the RRNA, Mr. and Mrs. Fritz Hanson. *See* Official Transcript of the 6/17/11 Hearing prepared June 20, 2011 and now on file with this Court (hereafter "6/17/11 Tr."), p. 5.

Based on a large map which RRNA's counsel produced in Court on the 17th of June and which now appears as Exhibit F to the attached Affidavit of Fritz Hanson (in attached Appendix 1) and his wife, Margo Hanson (in attached Appendix 2), RRNA counsel demonstrated during the hearing on June 17th that the Hanson property shared a 275 foot long common boundary with the DNR property where the DNR plans to build a football field-sized parking lot. The RRNA's counsel further asserted that the Hansons had on numerous occasions raised concerns about the storm water problems the DNR parking lot would create for their property and thus the DNR, at the very least, should have served the Hansons (by mail) with a copy of their November 4, 2010 decision regarding storm water. 6/17/11 Tr., pp. 5-7.

RRNA counsel observed during the hearing that under Wis. Stats. § 227.53(1) any person "aggrieved" by a DNR decision has a right to appeal that decision. 6/17/11 Tr., p. 9. Hansons certainly are "aggrieved persons" within the meaning of Wis. Stats. § 227.01(9) in that their substantial interests will be adversely affected by the determination of the DNR to build a parking lot to the north of their property. *Id.* at p. 10. RRNA's counsel then referenced during the hearing then Wis. Stats. § 227.52 which provides in pertinent part: "Administrative decisions which adversely affect the substantial interests of any person… are subject to review as provided in this chapter…" 6/17/11 Tr., 11-12. Mr. Gleisner then asserted that someone whose substantial interests are threatened within the meaning of the previous statutes should at the very minimum receive notice of the threat. *Id.* at 12-13.

RRNA counsel then asserted that it was "disingenuous" of the DNR to assert that Mr. Hanson should have known through a DNR web site that his property rights were in jeopardy. On the contrary, RRNA counsel argued that it was the Hansons who had made

their concerns about storm water known to the DNR for many years. Because of this, RRNA counsel argued that it was the DNR that knew or should have known that they were obligated to serve at least the Hansons with a copy of the November 4, 2010 Hartsook Storm Water decision. 6/17/11 Tr., p. 13.

RRNA's counsel then addressed at some length the unusual service actually made by the DNR in this case. In truth, the only person or entity upon whom DNR actually "served" the decision was itself, and the DNR is asserting that such service started the running of the 30 day clock for an unserved party, the Hansons, to appeal. As RRNA's counsel pointed out at thehearing, the Hansons have for years told the DNR about their concerns regarding storm water. 6/17/11 Tr., p. 27. And as the RRNA's counsel noted it makes no sense that when it came time to render a decision on storm water, instead of serving the Hansons the DNR served itself and then claimed that was sufficient. *Id.* It's like someone who files a motion and then puts it in his desk and claims service. *Id.* at p. 28.

The Court then addressed the issue of due process, stating in part: "What [are the] due process implications [where] the government, being able to apply to itself, grant[s] its application, [notifies] itself, and not tell anybody, especially where the plaintiff here claims that they can prove that the applicant agent of the DNR, Lynette Check, very well knew that Mr. Hanson and this association cared deeply and almost certainly would appeal any grant of anything that advanced this project? Is there a due process problem with the government knowing somebody is interested and doing only self dealing and not telling that a decision was made?" 6/17/11 Tr., pp. 37-38.The Court then set this down for another hearing on July 29, 2011 and stated it would accept affidavits or briefs that might help the

Court determine whether a jurisdiction trial under and pursuant to Wis. Stats. § 801.08 might be necessary.

SUPPLEMENTAL STATEMENT OF FACTS

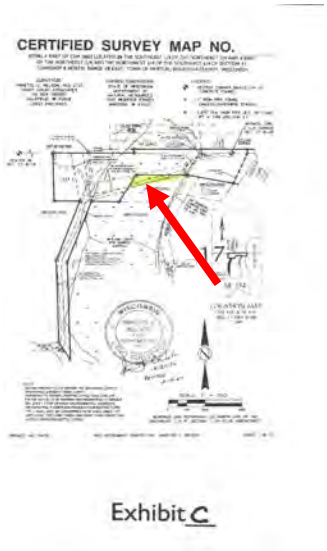
A. The Hansons Jointly Own a Portion of the Kraus Site with the DNR.

At the June 17th hearing, much of the focus was on whether, at a minimum, the DNR should have served the November 4, 2010 Storm Water decision on the adjacent property owner, the Hansons, whose property would be affected by the construction of the football field sized asphalt parking lot right next to their property. Overlooked at that time by counsel was the fact that not only are the Hansons adjacent property owners, they actually own a portion of the site upon which the boat launch project is to be built. That is because the access road which the DNR will build to the parking lot will in fact traverse the Hansons' property via an easement. Appendix 1 (hereafter, "App."), ¶¶ 2 to 5 and App. 2, ¶¶ 2 to 5. Therefore, in effect and in fact, the Hansons own part of the property which is the subject of the November 4, 2010 Hartsook Storm Water Permit.

Several years ago, the DNR sought to expand an easement across the Hanson property which it acquired when it purchased the Kraus Site, changing a dirt road from a small rural trail into a right of way for a two lane paved highway which will be the 2000 foot long "access road" the DNR intends to build to its parking lot. The Hansons lost a court battle with the DNR in 2010 when the Court of Appeals ruled that the DNR had the right to unlimited use of the easement across the Hansons' property to build the DNR's access road. App. 1, ¶¶ 3 & 4, Ex. B. The Hansons were never compensated for this expanded easement. *Id.* As the Court of Appeals recognized in that decision, the Hansons

nevertheless retain title to the servient estate over which the DNR's access road will pass. *Id.* By virtue of this fact alone, the Hansons have an interest in the November 4, 2010 Hartsook Storm Water decision because they are not only contiguous landowners but they are in effect co-owners with the DNR of a portion of the property which is the subject of that decision.

The RRNA has marked the Certified Survey Map at right (App. 1, ¶4, Ex. C), which was prepared by the DNR, so as to show the area in which the DNR has a dominant estate and the Hansons have a servient estate as a solid yellow scalene triangle (located at the tip of the red arrow) with an approximate 200 foot base, and sides of 150 feet and 60 feet. As a matter legal right under the law of easements (see discussion *infra*), the DNR and the Hansons have at a minimum a form of joint title to the area of this scalene triangle. A much larger version of the Certified Survey Map in Exhibit C appears as a subpart of attached App. 1 & App. 2.



B. The DNR Clearly Knew that the Hansons were very Concerned about how the DNR Parking Lot would Affect Storm Water Accumulations.

Storm water has been a problem for the Hansons for many years and in fact there is photographic evidence of this fact dating from the 1950s. App. 2, ¶ 15. Long before the DNR purchased the Kraus Site, the Hansons had to battle storm water on their property. App. 2, ¶6. In fact, in the late 1980s the owners of the adjacent property sought to enlarge a garage and driveway, and that led to serious storm water problems. *Id.* at ¶¶ 6 & 7.

When the Hansons learned that the DNR wanted to purchase the property immediately to their north, they became very concerned because of the threat of storm

water. App. 1, ¶ 8. Fritz Hanson met at least six times with DNR representative Lynette Check and has spoken with her on the phone at least an additional eight times since 2005. App. 1, ¶ 9. In fact, Lynette Check came to the Hanson home and tried to reassure them that there wouldn't be a storm water problem by telling them that the DNR would place a swale between the Hanson property and by installing a four inch drain pipe between their property to North Lake. App. 1, ¶ 10. Lynette Check tried hard to make the Hansons comfortable about the threat of storm water and even gave Fritz a key to the gate to the Kraus Site. App. 1, ¶¶ 12 & 18. Lynette Check began to treat Fritz Hanson like an agent of the DNR, telling him that she would call him when there were any developments on the site and asking him to call her if anything happened on the site. *Id.* at 12. Lynette Check told him that it was important to the DNR that the Hansons and the DNR be "good neighbors."

Exhibit E is discussed in App. 1, ¶ 13 and is so important to an understanding of the Hansons' predicament that it appears at the right for ease of reference. Using maps furnished by the DNR, one of the Petitioners experts (*see* attached Appendix 3) prepared this exhibit. In Exhibit E, the Hansons' property is surrounded with a green line and the DNR's property is surrounded with a black line. The proposed DNR parking lot is in yellow and the 2000 foot access road to the DNR parking lot appears as a red line within an easement marked by a broken white line. The bright blue area is wetlands. Please note that the red access road directly crosses the northwest corner of the Hansons'

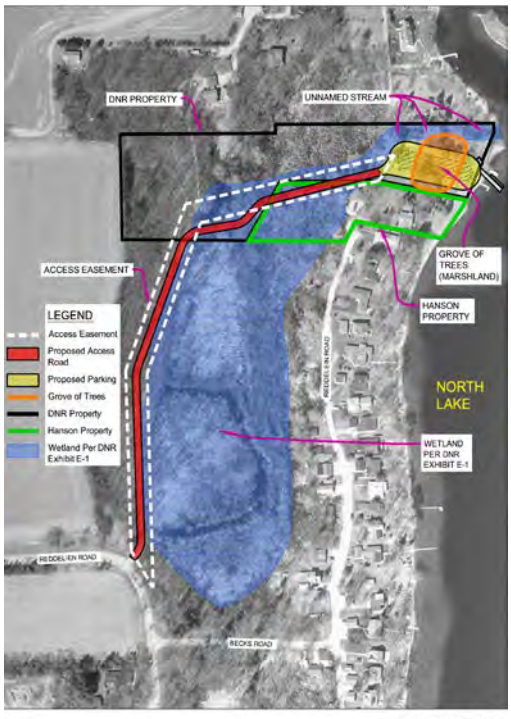


EXHIBIT E

property and that the access road passes through or near wetlands. The orange circle located in the middle of the yellow parking lot in Exhibit E is a marshland which becomes navigable in rainy weather or during spring freshets. Even without the DNR parking lot, rainy weather and spring freshets cause storm water to accumulate on the Kraus Site which then floods the Hansons' property. See App. 1, ¶ 15, Ex. G; App. 2, ¶ 14, Ex. G.

During the June 17, 2010 Court session, the RRNA's counsel used a large exhibit to represent to the Court the location of the DNR asphalt road relative to the Hansons' property. That exhibit is attached to both of the Hansons' affidavits. See App. 1, ¶ 14, Ex. F; and App. 2, ¶ 13, Ex. F. Again because of its importance in understanding the Hanson's predicament Exhibit F is reproduced next to this paragraph for ease of reference. Using the dimensions furnished by the DNR, one of the Petitioners experts (*See* attached Appendix 3) has transposed the proposed DNR parking lot onto an aerial photograph of the northern end of Reddelien Road.

PROPOSED DNR SITE BOAT LAUNCH

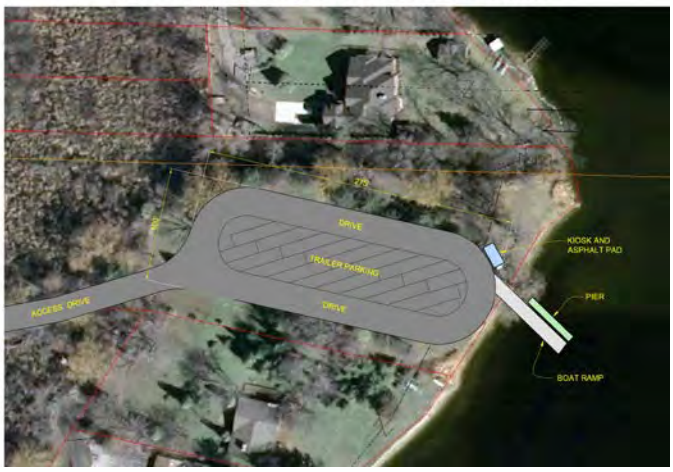


EXHIBIT F

As can be seen in Exhibit F, the DNR proposes to "shoehorn" in a slab of asphalt the size of a football field between two residences. The Hanson home is visible immediately to the south of that slab which will lay across the marshland depicted with an orange circle on Exhibit E from the previous page. The slab will be at least eighteen inches higher than the Hanson property and the Hanson property extends west for the entire length of the slab and several hundred feet beyond that to the point where the DNR access road crosses the

Hanson property. Essentially, the DNR access road and parking lot will border the entire northern part of the Hanson property and actually cross the Hanson property to the far west.

Just how the DNR property relates to the very obviously contiguous property of the Hansons is further shown by some photographs furnished by Fritz Hanson which are appended to his affidavit. See App. 1, ¶ 17, Ex. H. Below we have produced two of those photos for ease of reference.

In Exhibit H1 at right, stakes have been driven into the ground on the DNR property at the approximate location where the DNR parking lot will end. The Hanson property and the Hanson home are visible just beyond those stakes. The orange tape running between the stakes shows how high the asphalt parking lot slab will be compared to the Hanson property. A reasonable inference from the facts portrayed in Exhibit H1 is that storm water accumulations on the parking lot surface will run downhill onto the Hanson property.

In Exhibit H2, at the right, a slightly different perspective of the stakes and the orange tape is presented. The mowed area on the right is the Hanson property, the unmowed area to the left is where the DNR parking lot will end, and it is easy to see how much higher that parking lot is than the Hanson property, and water will naturally seek the lower level.

Storm water accumulation has always been a concern for the Hansons. There are photos from the 1950s showing storm water accumulation at or near the Hansons, and there is one photo from the March, 1975 Waukesha Freeman actually showing Margo Hanson sandbagging her home on Reddelien Road due to storm water accumulation. See App. 2, Ex. K. The idea that storm water accumulation would be increased significantly by the introduction of a huge slab of asphalt next door has made the Hansons sick with worry and their concerns about storm water were made known to the DNR on many occasions. In addition to what Fritz Hanson told the DNR, Margo Hanson states the following in her affidavit:

11. I have over and over again told anyone who will listen about my fears concerning storm water. I have raised my worries about storm water with DNR personnel whenever I have had a chance.

    a. In Madison in 2005 before the DNR purchased the Kraus Site, we were in front of the DNR Board (I think, but I am not a professional), along with Bronson Haase from the North Lake Management District and Attorney Wally Arts. My husband Fritz was talking to Gloria McCutcheon and I walked up and introduced myself. I said to her "I have grave concerns about where all the storm water is going to go. Where will all the storm water go?" Ms. McCutcheon just ignored me and turned away without answering.

    b. In 2005 or 2006 after the DNR bought the property I was at a DNR meeting in Waukesha and I told the DNR's Lynette Check, "I have grave concerns about the asphalt and the storm water," and she ignored me.

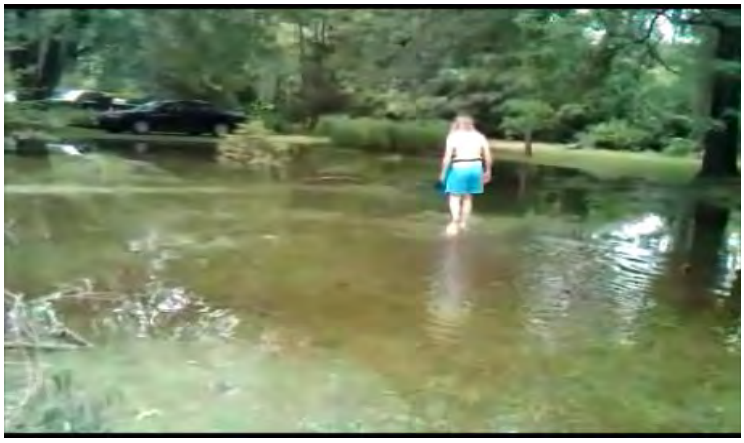
    c. In 2006 or 2007 I was in Waukesha again looking at the DNR plans and I said to a number DNR persons, with Morrissey listening, "I am worried about the water; where's all the water going to go."

    d. Whenever I have talked to my lawyers, the North Lake Manage*me*nt District, even Tom Kraus, my concern is always the same: "Where is all the water going to go." I told Don Murn over and over again how worried I was about storm water. In fact, we were in a meeting at Don Murn's office and the DNR was in the other room in 2007 or 2008 and the issue of storm water came up there.

App. 2, ¶ 11.

As Margo Hanson also said in her affidavit, "ever since I heard about the DNR plans, I have been very scared about what the DNR parking lot could do to my property when there are storm water accumulations and I don't know how the DNR could have missed the concerns that my husband and I have about this. We brought our worries about storm water to the attention of the DNR every chance we got." App. ¶ 15.

In case the Court doubts just how severe the storm water problem is on the Kraus Site and how it affects the Hansons property, the Petitioners respectfully call this Court's attention to a video tape which is attached to Fritz Hanson's affidavit. App. 1, ¶ 15, Ex. G. The Hansons are prepared to testify that storm water accumulations such as those depicted on this video happen anywhere between 1 to 4 times a year and have occurred with regularity over the years.



At right one sees a typical outtake from Exhibit G, which shows the daughter of Fritz and Margo Hanson, Paige Hanson, walking from the Kraus Site onto the Hansons' property. In Exhibit G, the Court will see first Paige Hanson rowing a kayak as she navigates through the grove of trees (marked in orange on Exhibit E *supra*) and then walking from that grove of trees onto her property. The video contains a number of shots of the storm water accumulation on the Kraus Site and its effect on the Hanson property.

ARGUMENT

I. THE PETITIONERS REAFFIRM ALL THEIR PREVIOUS ARGUMENTS AND INCORPORATE THEM HEREIN.

The Petitioners hereby reaffirm all of the arguments they made in their Brief filed before the hearing on June 17, 2011, as well as all the arguments made by RRNA's counsel during that hearing.

II. IT IS NOT REASONABLE TO CONCLUDE THAT THE DNR DID NOT AT LEAST OWE SERVICE OF THE NOVEMBER 4, 2011 HARTSOOK DECISION ON THE HANSONS.

A. The Hansons were joint owners of a portion of the Property which is the Subject of the Hartsook Storm Water Permit and thus were entitled to receive timely service of same.

It is legally significant to the issue of whether the DNR should have served the Hansons that there was a lengthy court battle between the Hansons and the DNR concerning use of an easement across the Hanson property.

The DNR sought to expand an easement across the Hanson property which they acquired when they purchased the Kraus Site from a small rural trail into a right of way for a two lane highway which will be the 2000 foot long "access road" the DNR must build to their parking lot. The Hansons lost a court battle with the DNR in 2010 when the Court of Appeals ruled in Wis. Appeal No. 2009AP1959 that the DNR had the right to unlimited use an easement across their property to build the DNR's access road. App. 1, ¶¶ 3 & 4, Ex. B.

The Hansons were never compensated for this expanded easement. *Id.* In an unpublished decision,[1] the Court of Appeals ruled that the DNR had a dominant estate of

[1] The RRNA is very mindful of Wis. Stats. § 809.23(3)(a). This decision is not being cited as any form of legal precedent but only to establish the fact that to an extent the case at bar is controlled by the "law of the case" from that appeal.

unlimited dimensions across the Hanson property and the *Hansons* retained a subservient estate as to the same property. The Court of Appeals specifically held as follows:

> A right of way is an easement providing a right of passage over another's property. *Klein v. Van Schoyck,* 250 Wis. 2d 413, 418, 27 N.W.2d 490 (1947). An easement creates two separate property interests: the dominant estate, which enjoys the privileges granted by an easement; and the servient estate, which permits the exercise of those privileges. *Atkinson v. Mentzel,* 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997).

App. 1, Ex. B, ¶ 7.

In other words, the DNR and the Hansons are far more than just contiguous landowners. At a minimum they are joint property owners of a portion of the Kraus Site which is subject to the DNR's November 4, 2010 Storm Water decision. It is inconceivable that the DNR concluded that it did not have to share a copy of that decision with its co-owners, especially since the DNR knew from the preceding litigation that the Hansons were very concerned about the effect all aspects of the proposed boat launch would have on their property.

However, the RRNA's expert is of the opinion that the area where the DNR intends to build an access road across the Hanson property is more significant than evidence of joint ownership. The RRNA's expert, Dr. Neal O'Reilly, states that as to the property where the easement is located the true owners of the property are the Hansons and the DNR is a mere easement owner. *See* O'Reilly's Affidavit in attached Appendix 4, ¶ 4.. Because of this fact, the DNR had an obligation to include the Hansons on the application for the storm water permit that was submitted to Mr. Hartsook. *Id.* at ¶¶ 4&5. And in fact, it is Dr. O'Reilly's professional opinion that the DNR had a fiduciary duty to notify the Hansons of permits issued by the DNR to the DNR on property owned by the Hansons. *Id.* at ¶ 6.

B. The DNR was Clearly on Notice that the Hansons were very concerned about Storm Water and would want Service of any decision that might affect Storm Water Accumulation on their land.

Besides the fact of joint ownership, there can be no doubt that the DNR knew or should have known that any decision about storm water accumulation would be something the Hansons would want to know about as soon as possible. Even if the Hansons had never said a word to the DNR (which clearly is not the case), the DNR is the chief environmental agency in Wisconsin and when they became owners of the Kraus Site they knew or should have known about the possible effect a large asphalt slab might have on storm water accumulation on the Hanson property. Putting aside that the DNR is a government agency, it should have occurred to the DNR that at a minimum a decision regarding storm water accumulation ought to have been served on the Hansons.

Beyond that, clearly the DNR's determination to place a huge slab of asphalt directly next door to the Hansons property would render them "aggrieved" within the plain meaning of Wis. Stats. § 227.01(9) because their substantial interests would be adversely effected by that determination. Further, the Legislature could not be clearer when it is said in Wis. Stats. § 227.52 "Administrative decisions which adversely affect the substantial interests of *any person*, whether by action or inaction, whether affirmatively or negatively, *are subject to review as provided in this chapter*… [Emphasis supplied]."

How could the Hansons possibly avail themselves of the rights so obviously afforded to them by their Legislature in §227.01(9) and §227.52 if they were not at least made aware of a decision regarding storm water in a timely manner? How could it be any clearer that such a decision would be of monumental importance to them? Whatever the DNR's duties to the other citizens of North Lake, the DNR most assuredly owed the

Hansons service of its decision about storm water, which could have easily been accomplished by sticking the decision in an envelope and mailing it to them. Instead, the DNR concealed the decision by in effect sticking it in a drawer until after the deadline for seeking the review had expired.

III. EVEN WITHOUT RECOURSE TO CONSIDERATIONS OF DUE PROCESS, THE TIME LIMIT APPLICABLE TO SEEKING REVIEW OF THE DNR'S STORM WATER DECISION SHOULD BE TOLLED AS TO THE HANSONS.

While this isn't a tort case, our Supreme Court as a matter of policy has recognized the fundamental unfairness of depriving a claimant of his or her right to sue before discovering that he or she had a right to sue. *See Tomczak v. Bailey*, 218 Wis. 2d 245, 253, 578 N.W.2d 166 (1998).

The Petitioners submit that this is a case where the Court should allow for an equitable tolling of the 30 day limit as to the Hansons. In fact, equitable tolling appears to have significant relevance under the facts of the case at bar. In *Bowden v. U.S.*, 106 F.3d 433 (D.C. Cir. 1997) the Court of Appeals for the D.C. Circuit stated:

> Like other courts, we have excused parties [from complying with a limitation period] who were misled about the running of a limitations period, whether by an adversary's actions, by a government official's advice upon which they reasonably relied, or by inaccurate or ineffective notice from a government agency required to provide notice of the limitations period, *Wilson*, 79 F.3d at 162; *Williams v. Hidalgo*, 214 U.S. App. D.C. 6, 663 F.2d 183, 187-88 (D.C. Cir. 1980). (internal citations omitted)

Id. at 438.

Our Supreme Court has allowed equitable tolling in a number of cases. In *State ex rel. Griffin v. Smith*, 2004 WI 36, 270 Wis. 2d 235, 677 N.W.2d 259, our Supreme Court concluded as follows:

> [T]his court has required equitable tolling in other contexts where the failure to timely file an appeal was beyond the prisoners' control. See State ex rel. Nichols v. Litscher, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W.2d 292; State ex. rel. Brown v. Bradley, 2003 WI 14, 259 Wis. 2d 630, 658 N.W.2d 427. In Nichols, this court applied equitable tolling in a case where an inmate left his notice of appeal with the corrections officer in the mailroom at the prison, and missed the 30-day filing deadline because the notice was not mailed immediately. 2001 WI 119, 247 Wis. 2d 1013, P4, 635 N.W.2d 292. In Brown, we granted the same relief because we determined that the inmate was "similarly situated." 2003 WI 14, 259 Wis. 2d 630, P37, 658 N.W.2d 427.

Id. at ¶ 37.

In the case at bar, the DNR failed to serve the Hansons with its storm water decision in spite of the fact that they were clearly aggrieved by that decision within the meaning of Wis. Stats. § 227.01(9) and thus entitled to contest that decision under Wis. Stats. § 227.52.

IV. AS A MATTER OF ELEMENTAL DUE PROCESS, THE DNR SHOULD HAVE SERVED THE HANSONS WITH THE STORM WATER DECISION.

Because a Court always seeks to resolve issues by means short of a Constitutional solution, the Petitioners respectfully suggest that the imposition of an equitable tolling of the thirty day time limit as to the Hansons would be a preferable way of doing justice that is consistent with the intent of Chapter 227 and the clear rights of the Hansons.

However, if necessary, the Petitioners are constrained to state the obvious. This is not a dispute between two private parties as to which the DNR issued a neutral decision concerning storm water. This is a dispute in which the Government itself is a disputant and thus it must thus conform its actions to the strictures of the Constitutions of Wisconsin and the United States. In the context of the case at bar, that means the DNR had to accord the Hansons Due Process. In terms of Due Process, We are not dealing with agency rulemaking. The Hartsook decision is much more like an adjudicatory proceeding that

resulted in a fact specific decision. In such a circumstance, a number of courts identify Due Process as equivalent to fundamental fairness. *See Amos v. SEC,* 306 F.2d 260 (D.C. 1962) ("Stated otherwise with respect to agency adjudicatory proceedings, due process might be said to mean at least 'fair play.'" *Id.* at 264).

Due Process has had the same fundamental meaning for decades. Justice Frankfurter wrote eloquently about Due Process in the case of *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123 (1951):

> '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate … respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula… Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id. at 162-163.

In *Buckhanon v. Percy,* 533 F. Supp. 822 (E.D. Wis. 1982) Judge Warren concluded that Due Process is an inherent part of government administrative regulations ("Defendants also contend that the notices were adequate because they met the requirements set forth in the Code of Federal Regulations for conversion notices. The Court will not specifically address this contention because the Court construes the code regulations as requiring compliance with the requirements of due process" *Id.* at 831).

Many of the United States Supreme Court decisions on Due Process in the context of administrative procedure have remained unchanged for many years. An executive agency must be rigorously held to the standards. *Vitarelli v. Seaton,* 359 U.S. 535, 546 (1959). Thus, "regulations validly prescribed by a government administrator are binding

upon him as well as the citizen, … even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 U.S. 363, 372 (1957). In *Hannah v. Lanche*, 363 U.S. 420 (1960), the Court stated:

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

Id. at 442.

What makes the case at bar unique is that the DNR is acting both as Judge and Jury. The agency is both applying for a permit and it is deciding whether to grant that permit. There is definitely the appearance of extreme impropriety when a government agency applies for a permit regarding storm water and then grants that permit to itself, all the while concealing the existence of the permit application and the decision to grant that permit from the very citizens who have made it abundantly clear that they are deeply concerned storm water.

CONCLUSION

The fact that the DNR only served the November 4, 2010 Hartsook decision on itself and did not tell the Hansons about it until it was clearly too late for them to challenge it makes a mockery of the Legislature and the statutes it clearly intended as protections for aggrieved persons under Chapter 227. What the DNR did was fundamentally unfair and certainly has the appearance of extreme impropriety. If the DNR persists with its argument that it did not have a duty to inform the Hansons, or if the DNR disagrees with the proffer of evidence contained in the attached affidavits, then in that event the RRNA hereby

respectfully requests that this Court put this matter down for a jurisdictional trial to the Court under and pursuant to Wis. Stats. § 801.08.

Respectfully submitted this 15th day of July, 2011.

LAW OFFICES OF WILLIAM C. GLEISNER, III
Counsel for the Petitioners

By:_____
William C. Gleisner, III, Esq.
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Named Petitioner & Lead Counsel
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APPENDIX 1

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

Petitioners,

vs.

Case No. 10-CV-5341
Case Code: 30607

The Department of Natural Resources ("DNR").
an agency of the State of Wisconsin,

Respondent.

AFFIDAVIT OF FRITZ HANSON

State of Wisconsin)
)
Waukesha County)

FRITZ HANSON, being sworn on oath, deposes and says as follows:

1. Your affiant, my wife Margo and her brother Thomas Schwartzburg own property on the North end of Reddelien Road which is directly contiguous to the site where the DNR plans to build a public access road and place a large football field-sized asphalt parking lot.

2. On the attached map in Exhibit A, we own the property surrounded by green and the DNR plans to construct a boat launch on the property surrounded in black. The access road to this site (outlined with a broken white line) will pass directly over our property.

3. The DNR sought to expand an easement across our property which they acquired when they purchased the Kraus Site from a small rural trail into a right of way for a two lane highway which will be the 2000 foot long "access road" the DNR must build to their parking lot. We lost a court battle with the DNR in 2010 when the Court of Appeals for District II ruled that the DNR had the right to unlimited use an easement across their property to build the DNR's access road.. See attached Exhibit B which is the unpublished decision June 16, 2010 decision of the Court of Appeals in Case No. 2009AP1959. As the Court of Appeals recognized in that decision, we retain title to the servient estate over which the DNR's access road will

pass. *Id.* at p. 3. In other words, we hold joint title with the DNR to a portion of the access road the DNR will build.

4. The Certified Survey Map in attached Exhibit C (which was prepared by the DNR) shows the area in which the DNR has a dominant estate and we have a servient estate as a solid yellow scalene triangle having a base approximately 200 feet in length, with one side approximately 150 feet in length and another side approximately 60 feet in length. As a matter legal right, the DNR and we have a form of joint title to the area of this scalene triangle.

5. The exact nature of the easement across our property is described in a March 2, 2009 brief filed by the DNR in Waukesha Case No. 07CV3169 (which was the subject of the appeal in ¶ 3 *supra*), which is attached as Exhibit D. According to the DNR at pp. 3-4 of that brief: "The access easement that travels across the [Hansons'] property is for right of way purposes and is not limited in any way... Although [the Hansons] may not be happy about having the public access the lake ... utilizing an easement that travels across a portion of their undeveloped parcel..., there is nothing in the easement to prohibit this use..."

6. Long before the DNR purchased the Kraus Site (upon which they plan to build their boat launch), we had to battle storm water on our property. In fact, in the late 1980s, the owners of the adjacent property to our immediate south (Kendalls) petitioned for a variance so that they could build a three car garage and expand their driveway. We personally resisted this effort before the Waukesha County Park & Planning Board because we knew this planned driveway and garage would cause storm water to accumulate on my low lying land. My wife complained to the Park & Planning Commission and Jay Potter told her they would build a swale to prevent flooding. My wife said "I don't believe that. When it rains hard, the rain will go to the lowest point and that's my yard."

7. As soon as the driveway was built in the late 1980s, flooding occurred on a regular basis because of the driveway. In fact, for years storm water has always been a problem for our property. When the lake is high and the wetlands are filled with storm water, we can't even our house due to storm water accumulation.

8. When your affiant became aware that the DNR wanted to purchase the property immediately to his north, he became very concerned because of the threat of storm water accumulations. Your affiant confirms everything in his wife Margo's affidavit and in addition states that he immediately

raised the threat of storm water on a number of occasions with Lynette Check of the DNR.

9. I met with Lynette Check at least six times and talked with her on the phone eight times between 2005 and today. On a number of occasions, she called me on my cell while I was at work. She was even in my house trying to persuade me that there would be no storm water problems because of the DNR planned use of the Kraus Site.

10. When Lynette Check was at my home she told me that the DNR would handle storm water by putting in a swale and running a 4 inch drain pipe to North Lake along the north side of my property. I told her that would do nothing to prevent storm water accumulation.

11. When we were at a meeting with a Judge in Waukesha, sometime in 2006 or 2007, along with DNR staff person Morrissey, Dick Steffes (DNR real estate agent), Jerry Heine (Chair of the North Lake Management District), Bronson Haase of the North Lake Management District and my lawyer Don Murn, I said "now you're going to put up a fence where your access road will be so I can't get to our back property." The Judge then asked the DNR to give me a key to the gate of the Kraus Property.

12. Lynette Check gave me a key to the gate. Lynette Check began to treat me like an agent of the DNR. First, she said that it was important that the DNR and my family had to be good neighbors. Then she told me to call her whenever anything unusual happened on the Kraus Site. She even gave me her cell phone #. She would call me whenever anyone was coming to the property and we spoke often on the phone about the Kraus Site. Whenever anything came up regarding the Kraus Site I could expect to receive a call from Lynette Check. It became a matter of routine. However, this year I have not heard from Lynette Check at all.

13. On attached Exhibit E, my property is surrounded by a green line. The DNR's property is surrounded by a black line. The area where the DNR's road will cross my property is marked with a broken white line. The blue area is wetlands. The red line represents the access road the DNR will build through the wetlands after it cuts down approximately 400 trees and deposits 7000 cubic yards of fill into a pristine wetlands. The yellow area is where the DNR plans on placing a football field-sized parking lot. This parking lot will be eighteen inches higher than my property, which lies immediately to the south of this proposed parking lot. The eighteen inches will be far higher than my living room floor. The orange area on attached Exhibit E is a grove of trees that contain an area of marshland which floods and becomes navigable following heavy rains or spring freshets.

14. Another view of my property vis-à-vis the proposed parking lot can be seen on the attached map in Exhibit F. My home is visible directly to the south of the football-field sized asphalt parking lot which the DNR plans to build next to my property. In Spring or in rainy weather storm water often floods my property from the area where the asphalt parking lot is located. Storm water runoff is a real concern for me, both during the construction of this asphalt parking lot and at other times throughout the year.

15. I am attaching as Exhibit G a video which was shot following a storm last year. It starts in the grove of trees in orange on Exhibit E. The girl is my 110 pound daughter and the video starts with her paddling a kayak out of the grove of trees. The video then follows my daughter over to our property. You can see that enough storm water has accumulated to make the marshland navigable. You can see from this also that instead of a small area of wetlands, in fact the area where the DNR parking lot will be located is clearly wetland to navigable water. My property and the adjacent Kraus Site is often this flooded, sometimes up to three or four times a year.

16. This storm water problem has always been a huge concern to me and to my wife, who has gotten physically sick worrying about this. This property has been in my wife's family for almost sixty years and is where she grew up. She is very scared about the storm water and talks about it all the time. We brought our worries about storm water to the attention of the DNR every chance we got.

17. Attached Exhibit H1 shows just how close the DNR's proposed asphalt parking will be to my property, and how high it will be above my property. In Exhibit H2, the unmowed area belongs to the DNR and the mowed area approximately marks the beginning of my property. The stakes with the orange tape are a few feet from where the asphalt parking lot will end and the orange tape between the stakes shows how high the DNR parking lot will be above my property.

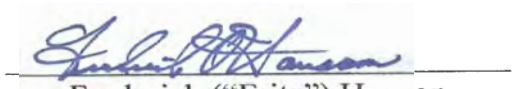
18. Attached Exhibit J1, J2 & J3 show me holding a key and a card I received from Lynette Check for the DNR gate to the DNR Kraus Site, and also shows me opening that gate with the key.

19. Your affiant has been a member of the RRNA for four years. Your affiant has been on the Board of Directors of the Reddelien Road Neighborhood Association ("RRNA") since June of 2010, and was a member in good standing of the Board during November of 2010.

20. Your affiant at no time received a copy of the November 4, 2010 Storm Water decision of Brian Hartsook. If I had, just as I have with every other

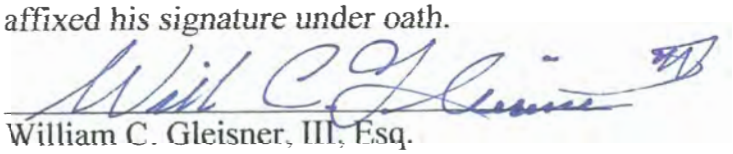
document from the DNR I would immediately have taken it to Attorney Gleisner because he represents the RRNA.

Sworn to by me this 14th day of July, 2011.



Frederick ("Fritz") Hanson

The above named affiant, personally known to me, came before me this 14th day of July, 2011 and affixed his signature under oath.



William C. Gleisner, III, Esq.
Notary Public
State Bar No. 1014276, My Commission is Permanent.


LEGEND
Reddelien Road Neighborhood Association
Hanson Property
DNR Property
Access Easement
Thomas Krause Property
REDDELIEN ROAD
REDDELEIN ROAD
BECKS ROAD
RIVER ROAD
NORTH LAKE
NORTH LAKE

EXHIBIT A

COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1959 Cir. Ct. No. 2007CV3169

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MARGO R. HANSON AND THOMAS J. SCHWARTZBURG,

PLAINTIFFS-APPELLANTS,

V.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Margo R. Hanson and Thomas J. Schwartzburg (Schwartzburg) have appealed from an order granting summary judgment to the Wisconsin Department of Natural Resources (DNR) on the first claim of Schwartzburg's amended complaint. We affirm the order.

Exhibit B

¶2 Schwartzburg commenced this action pursuant to WIS. STAT. § 806.04(2) (2007-08),[1] seeking a declaratory judgment limiting the DNR's use of an access easement across a corner of the Schwartzburg property. The easement over the Schwartzburg property was conveyed to the DNR in 2005 via a deed providing: "Easement for the benefit of Parcel C for right of way purpo[s]es described as follows." The easement, whose precise location is described in the deed, provides access to an adjacent lakefront property (Parcel C) owned by the DNR, upon which the DNR intends to build a boat launch and parking lot for public use.

¶3 In his complaint, Schwartzburg alleged that the DNR's use of its land for a public boat launch would increase traffic on the access easement beyond the scope of the original easement, creating an unreasonable burden on Schwartzburg's property. Schwartzburg sought a declaration limiting the use of the access easement to a use consistent with the original grant.

¶4 The DNR moved for summary judgment on the ground that no material issue of fact existed for trial. It requested an order providing: "That the portion of the plaintiff's property that is subject to the recorded access easement is subject to use for the purpose of right of way by the WDNR and by any members of the public who choose to use it to access the WDNR property for recreational purposes."

¶5 The trial court agreed that no material issue of fact existed for trial and granted the DNR's motion. It held that the access easement provided a right

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

of way to the DNR property over the Schwartzburg property that could be utilized with no restrictions as to the number or types of vehicles using it, the number of times it may be used, or what time of day it may be used. It concluded that, as a matter of law, the easement afforded the people of the state the right to come and go from the DNR's lakefront property without restriction.

¶6 We review a trial court's grant or denial of summary judgment de novo. *See* ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). Upon review, we apply the same standards as those used by the trial court, as set forth in WIS. STAT. § 802.08. ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶7 A right of way is an easement providing a right of passage over another person's property. ***Kleih v. Van Schoyck***, 250 Wis. 413, 418, 27 N.W.2d 490 (1947). "An easement creates two distinct property interests: the dominant estate, which enjoys the privileges granted by an easement; and the servient estate, which permits the exercise of those privileges." ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). When, as here, the easement in question is created by deed, the court must look to that instrument in construing the relative rights of the parties. ***Hunter v. McDonald***, 78 Wis. 2d 338, 342-43, 254 N.W.2d 282 (1977). "The use of the easement must be in accordance with and confined to the terms and purposes of the grant." ***Id.*** When the language of

the deed is not ambiguous or indefinite, parole evidence is inadmissible to explain the terms of the deed, and the acts of the parties are not admissible to show a practical construction. ***Kleih***, 250 Wis. at 419. Construction of the deed to determine the grant's terms and purpose is a question of law unless an ambiguity requires a resort to extrinsic evidence. ***Atkinson***, 211 Wis. 2d at 638. Whether an ambiguity exists is a question of law which this court reviews de novo. ***Id.***

¶8 No ambiguity exists in the terms of the deed granting the DNR an easement over the Schwartzburg property, and no basis therefore exists for admitting extrinsic evidence concerning the purpose of the easement or the history of its use. By its express terms, the easement is a right of way allowing ingress and egress to and from the waterfront property owned by the DNR. The deed set no conditions, restrictions, or qualifications on the DNR's use of the right of way. It contained no limitations on the number or types of vehicles the DNR could permit to traverse the right of way to get to and from the lakefront property.

¶9 Because the easement granted by the deed is clear and unambiguous, the trial court properly determined that no material issue of fact existed for trial and that the DNR was entitled to judgment as a matter of law. Based upon the express language of the easement, the trial court properly determined that the DNR was entitled to summary judgment declaring its right, and the right of members of the public as permitted by the DNR, to have ingress and egress over the Schwartzburg property to the DNR's lakefront property without restriction.

¶10 In reaching this conclusion, we reject Schwartzburg's contention that the trial court implicitly determined that his claim regarding the scope of the easement was not ripe for declaratory judgment and therefore failed to declare the rights of the parties. At the summary judgment hearing, the trial court

acknowledged Schwartzburg's concern about the eventual effect of the use of the easement on the surrounding landowners, and stated "that may be something that we may look at in the future in a different lawsuit." Schwartzburg relies upon this statement to contend that the trial court implicitly found that his declaratory judgment action was not ripe for resolution.

¶11 Schwartzburg's argument reflects a misunderstanding of the trial court's decision. The trial court concluded that no material issues of fact prevented judgment in favor of the DNR, not that issues were not ripe for resolution. It determined and declared that the DNR has the right to allow public access over the land described in the easement for purposes of ingress and egress to and from its lakefront property, without restriction. Acknowledging that facts might arise in the future that would give rise to another lawsuit did not mean that the DNR had not shown a right to summary judgment declaring its right to ingress and egress based upon the plain language of the deed.[2] No basis therefore exists to disturb the trial court's order.

By the Court. — Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] Relying on ***S. S. Kresge Co. of Michigan v. Winkelman Realty Co.***, 260 Wis. 372, 50 N.W.2d 920 (1952), Schwartzburg contends that a material issue of fact existed as to whether the DNR and public use of the easement puts an unreasonable burden on his servient estate. However, in ***Kresge***, the defendant had expanded and changed the use by the dominant estate beyond the use permitted under the easement. *See* ***id.*** at 376-77. No such issue exists here, where the DNR is acting in accordance with the right of access unambiguously granted by the deed creating the easement. Moreover, Schwartzburg's contention that there might be some kind of undue burden on his property in the future was purely speculative, and provided no basis for defeating the DNR's motion for summary judgment.

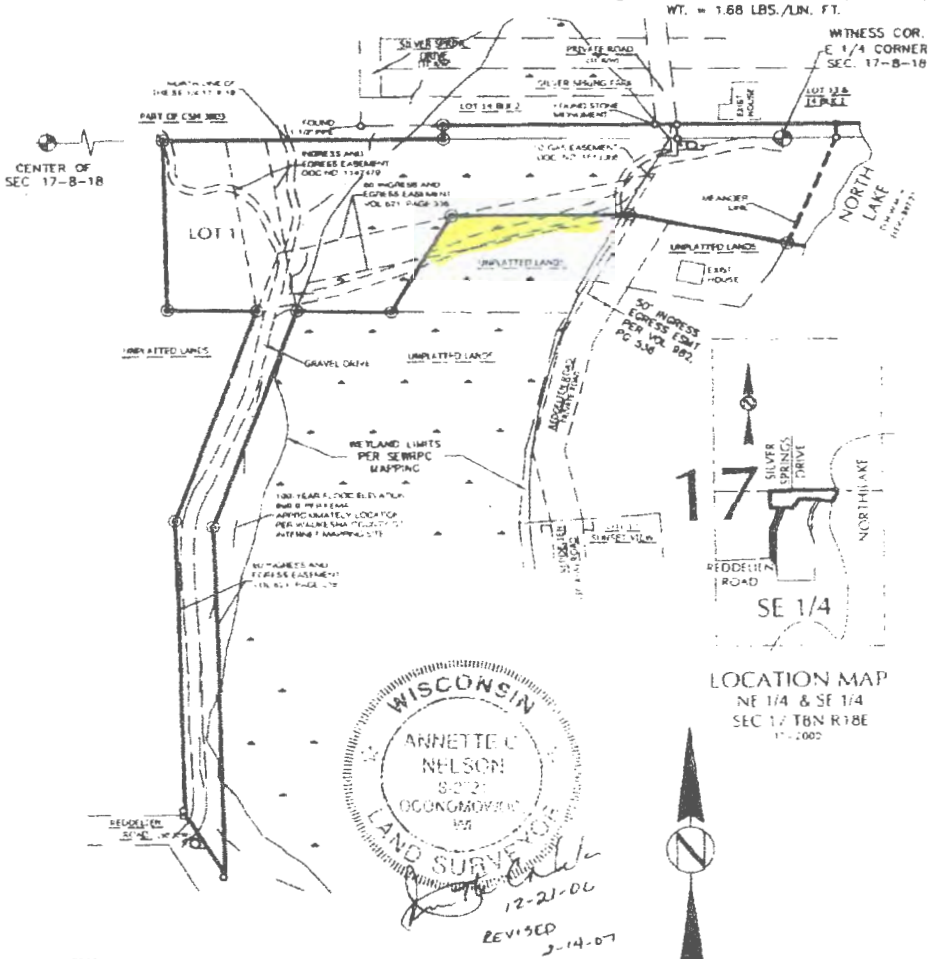
CERTIFIED SURVEY MAP NO.

BEING A PART OF CSM 3803 LOCATED IN THE SOUTHEAST 1/4 OF THE NORTHEAST 1/4 AND A PART OF THE NORTHEAST 1/4 AND THE NORTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SECTION 17, TOWNSHIP 8 NORTH, RANGE 18 EAST, TOWN OF MERTON, WAUKESHA COUNTY, WISCONSIN

SURVEYOR:
ANNETTE C. NELSON, RLS 2721
YAGGY COLBY ASSOCIATES
PO BOX 180500
DELAFIELD, WI 53018
(262) 646-6855

OWNER/SUBDIVIDER:
STATE OF WISCONSIN
DEPARTMENT OF
NATURAL RESOURCES
1015 WEBSTER STREET
MADISON, WI 53707

LEGEND
- ⊕ – SECTION CORNER BRASS CAP IN CONCRETE FOUND
- ○ – 1" IRON PIPE FOUND (UNLESS OTHERWISE STATED)
- ◉ – 1.315" DIA. IRON PIPE SET, 18" LONG, WT. = 1.68 LBS./LIN. FT.



LOCATION MAP
NE 1/4 & SE 1/4
SEC 17 T8N R18E

WISCONSIN
ANNETTE C.
NELSON
S-2721
OCONOMOWOC
WI
LAND SURVEYOR

12-21-06
REVISED
3-14-07

NOTES
- ENTIRE PROPERTY LIES WITHIN THE WAUKESHA COUNTY SHORELAND JURISDICTIONAL LIMITS
- PURSUANT TO SEWRPC MAPPING DATED YEAR 2000 THE ENTIRE PARCEL IS IN PRIMARY ENVIRONMENTAL CORRIDOR SEE SHEET 3 FOR PRIMARY ENVIRONMENTAL CORRIDOR, WETLAND AND FLOODPLAIN PRESERVATION RESTRICTIONS
- LOT 1 SHALL NOT BE CONSIDERED TO BE A BUILDABLE LOT UNTIL SOIL TESTS ARE TAKEN AND PERMITS ARE ISSUED FOR A STATE APPROVED SEPTIC SYSTEM

SCALE: 1" = 200'

0 100 200 400

BEARINGS ARE REFERENCED TO NORTH LINE OF THE SOUTHEAST 1/4 OF SECTION 17-8-18 AS N89°50'00"E.

PROJECT NO. 14219

THIS INSTRUMENT DRAFTED BY ANNETTE C. NELSON

SHEET 1 OF 5

Exhibit C

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

MARGO R. HANSON and
THOMAS J. SCHWARTZBURG,

Plaintiffs,

v. Case No. 07-CV-3169

STATE OF WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES,

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant State of Wisconsin Department of Natural Resources (WDNR) by its counsel, Attorney General J.B. Van Hollen and Assistant Attorney General Lorraine C. Stoltzfus, respectfully submits this brief in support of its motion for partial summary judgment. The WDNR requests that the Court find and order as follows: That the portion of the plaintiff's' property that is subject to the recorded access easement is subject to use for the purpose of right of way by the WDNR and by any members of the public who choose to use it to access the WDNR property for recreational purposes.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

The WDNR owns a lakefront parcel on which it plans to construct a boat launch and parking area to provide recreational opportunities for the public. (See Parcel C on Exhibit C, highlighted Waukesha County GIS Map, attached to the Affidavit of Karl E.

Exhibit D

24

Hansen.) The plaintiffs own Parcels D and D-1 found on that same exhibit. Plaintiff Margo Hanson was involved as one of the plaintiffs in an earlier case against the WDNR filed in Waukesha County Circuit Court, Case No. 05-CV-1715. That case involved the same parcels of land as those involved in the instant case. In the earlier case, the plaintiffs claimed that the WDNR's property interest in the access route to its lakefront parcel (Parcels B and A-1 highlighted in yellow on GIS map) was "properly characterized as a right-of-way or easement interest." Decision on summary judgment, Case No. 05-CV-1715, Page 1. Attachment A to this brief. However, the Court determined on summary judgment that the WDNR owned the access route to its property in fee simple and "there exists no genuine issue of fact under the law as to that issue." *Id.* at page 3. On the Court's subsequent decision on the plaintiffs' Motion for Reconsideration, it denied the plaintiffs' request to deal with other "unresolved" issues because such issues were not raised in the pleadings. Decision on Motion for Reconsideration, Case No. 05-CV-1715, Page 1, Attachment B to this brief.

The plaintiffs appealed that decision to the Court of Appeals, which affirmed the circuit court decision, and added the modification that had already been agreed to by the WDNR, that "[a]ll adjacent parcels may use DNR's access route for ingress and egress to and from any adjacent parcel." Opinion and order dated September 26. 2007, Case No. 2007AP1099-FT, Page 4, Attachment C to this brief. The Court of Appeals noted that the plaintiffs may raise their different, unresolved issues in a separate lawsuit. *Id.* at pages 3-4. The Amended Complaint before this Court now presumably addresses all of the plaintiffs' remaining unresolved property law issues.

In their Amended Complaint at paragraphs 15-19, the plaintiffs request declaratory relief for several issues regarding an access easement that traverses across a corner of the plaintiffs' property shown as Parcel D on the highlighted GIS map (Ex. C to Hansen Affidavit). In their Amended Complaint at paragraphs 20-24, they also request declaratory relief on an issue that they characterize as a "former right-of-way." This motion for summary judgment by the defendant WDNR addresses only the first claim for declaratory relief, that which addresses the access easement across a corner of plaintiffs' Parcel D.

ARGUMENT

THE ACCESS EASEMENT THAT TRAVELS ACROSS A CORNER OF THE PLAINTIFFS' PROPERTY IS FOR RIGHT OF WAY PURPOSES AND IS NOT LIMITED IN ANY WAY, AND THEREFORE IT MUST BE AVAILABLE FOR USE BY THE PUBLIC TO ACCESS THE LAKEFRONT LOT OWNED BY THE WDNR FOR RECREATIONAL PURPOSES.

There is no dispute between the parties that plaintiffs' Parcel D is encumbered by an access easement. The easement was originally reserved across the plaintiffs' property in 1953 via Document No. 390887, stating that "Part of said parcel to be subject to an easement for right-of-way purposes and being described as follows . . . ." Affidavit of Karl E. Hansen, ¶ 6, Exhibit A, Page 1. The easement is also reserved in Document No. 3372183, which conveyed Parcel D from the Estate of Betty Schwartzburg to the plaintiffs, stating "Part of said parcel to be subject to an easement for right-of-way purposes and being described as follows . . . ." *Id.* at ¶ 7, Exhibit B, Page 2. That same

easement was eventually conveyed to the WDNR in 2005 via Document No. 3297434, stating "Parcel D: Easement for the benefit of Parcel C for right of way purpo[s]es described as follows . . . ." *Id.* at ¶ 8, Exhibit D, Page 2.

As shown by these deeds quoted above, the exact language of the easement is that it is for "right-of-way purposes." There is no restriction on who may use the right of way, or how often it may be utilized. The WDNR owns Parcel C for the benefit of the citizens of Wisconsin, not for the benefit of itself or its employees. The parcel was acquired for the purpose of constructing a boat launch and parking area to provide recreational opportunities for the public. That is not a "commercial" use, as alleged in the plaintiffs' complaint, but is a recreational use for the citizens of Wisconsin, for whom the WDNR purchased Parcel C. Although the plaintiffs may not be happy about having the public be able to access the lake from a lot next to theirs, utilizing an easement that travels across a portion of their undeveloped Parcel D, there is nothing whatsoever in the language of the easement to prohibit this use for "right-of-way purposes" to gain access to the lake at Parcel C.

Accordingly, because the language of the easement states that it may be used for right-of-way purposes, and because the WDNR seeks to make use of that right of way by providing recreational opportunities for the public, the defendant WDNR asks that the Court determine that the written access easement is subject to use for the purpose of right

of way by the WDNR and by any members of the public who choose to use it to access the WDNR property for recreational purposes.

Dated this 27th day of February, 2009.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

LORRAINE C. STOLTZFUS
Assistant Attorney General
State Bar #1003676

Attorneys for Defendant State of Wisconsin
Department of Natural Resources

Wisconsin Department of Justice
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(608) 266-9226

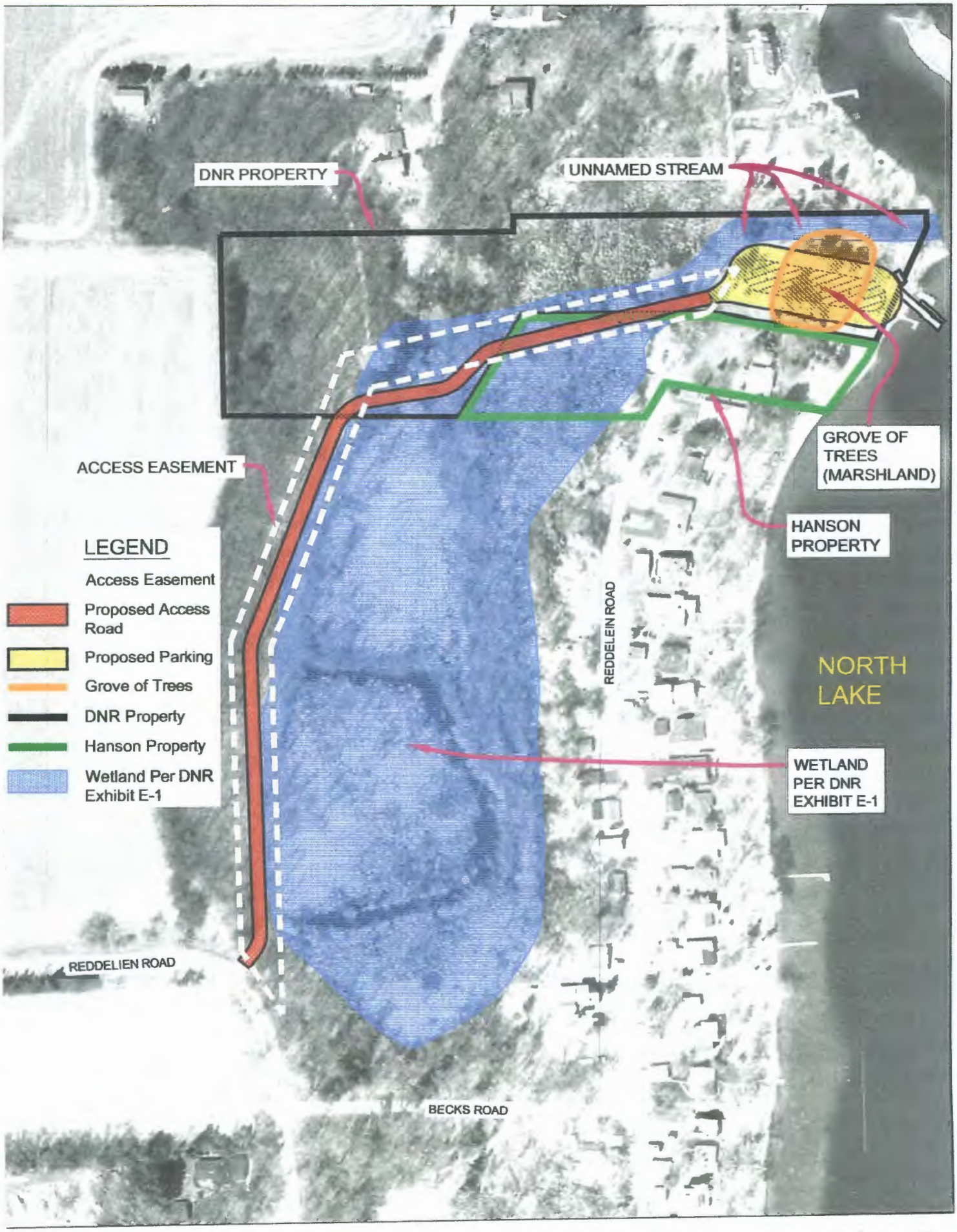
DNR PROPERTY
UNNAMED STREAM
ACCESS EASEMENT
GROVE OF TREES (MARSHLAND)
HANSON PROPERTY
LEGEND
Access Easement
Proposed Access Road
Proposed Parking
Grove of Trees
DNR Property
Hanson Property
Wetland Per DNR Exhibit E-1
REDDELEIN ROAD
NORTH LAKE
WETLAND PER DNR EXHIBIT E-1
REDDELIEN ROAD
BECKS ROAD

EXHIBIT E

PROPOSED DNR SITE BOAT LAUNCH

EXHIBIT F

EXHIBIT G IS A VIDEO CD AND IS NOT INCLUDED IN THE PDF VERSION OF THIS DOCUMENT

Exhibit H1

Exhibit H2


SITE CLOSED
PENDING
DEVELOPMENT
PURSUANT TO
WIS. ADM.
CODE NR. 45
(414) 263-8670
WISCONSIN
DEPT OF NATI

Exhibit 1


FIRST CLASS
WISCONSIN
DEPT. OF NATI
First Class Mail
State of Wisconsin
Department of Natural Resources
LYNETTE CHECK
Natural Resources Engineer
Southeast Region

Exhibit 12

Exhibit J3