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REDELLEN ROAD NEIGHBORHOOD
ASSOCIATION, INC., et al.,

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Plaintiffs,

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-vs-

Case No. 10-CV-5341

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THE DEPARTMENT OF NATURAL
RESOURCES,

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COPY

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Defendants.

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May 23, 2013

Honorable J. Mac Davis
Circuit Court Judge, presiding

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JUDGE'S DECISION

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A P P E A R A N C E S:

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WILLIAM C. GLEISNER, WILLIAM H. HARBECK AND J.

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STEVEN TIKALSKY, Attorneys at law, appeared on behalf of

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the Plaintiffs.

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DIANE L. MILLIGAN, Attorney at Law, appeared on

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behalf of the Defendant.

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Lori Boyer

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Official Court Reporter

EXCERPT OF PROCEEDINGS

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2 THE COURT: Anything else from anyone? All
3 right. I'm prepared to rule.

4 Kind of complicated. I realize the Court of
5 Appeals will straighten it out for you both after one
6 side or the other have them review it.

7 I'm going to vacate the DNR permits and
8 override the administrative law decisions in their
9 entirety.

10 At this point I'm consolidating both cases
11 entirely now having been fully informed that they're
12 legally and factually intertwined beyond entanglement
13 and they need to be considered all together.

14 First on the Chapter 30 applicability, Chapter
15 30 obviously applies if it's navigable or a lake bed. I
16 reject the DNR 30 year practice of ignoring Chapter 30
17 if they're applying NR 103.

18 It is a -- They cite the case and it makes
19 common sense if the NR 103 analysis along the way covers
20 all the considerations of Chapter 30 calls for being
21 covered that that could be sufficient. But it's not to
22 be assumed that it would. And the very fact that there
23 are some differences in the purpose of those laws one
24 administrative rule law and another statutory law makes
25 it clear that complying to NR 103 will not in every case

1 automatically mean compliance with Chapter 30 and one of
2 the biggest ones is obstruction of navigation. That's
3 not a criteria or purpose of the cause of having NR 103.
4 That's a large water equality claim rule and it has
5 other impacts. Of course nor is obstruction of
6 navigation. Maybe that avoiding an obstruction of
7 navigation as Chapter 30 calls for may be a very bad
8 thing for the environment and storm water and water flow
9 and the like but Chapter 30 requires consideration of
10 the navigable obstructions.

11 Now, as to the question of navigability or
12 lake bed or the like, the DNR stipulated to
13 navigability. Here now they want a continuation,
14 continuation saying that is navigability in fact which
15 is not the same as Chapter 30. I reject that argument.

16 Navigable waters are defined in 30.01(4m) and
17 it says of course when using the phrase navigable water
18 it means navigable under the law.

19 So once a party stipulates that something is
20 navigable they're stuck with that best definition unless
21 there is some record or proof or retention that they had
22 a more limited definition for purpose.

23 This is a contract law determination kind of
24 issue. There is no showing here that the DNR stipulated
25 this was navigable that they're limiting it to a purpose

1 more narrow than the definition of navigable waters
2 under statute as to what navigable waters are. They
3 don't have a right unless they show as a part of that,
4 their stipulation, their contract with the other side,
5 so to speak, to go back on it unless they demonstrate
6 why I suppose there is a fraud or certain other record.
7 Not every stipulation is unbreakable but it's unbroken
8 until cause. It's clear error for an administrative law
9 judge to ignore the stipulation of the parties without a
10 pretty substantial explanation.

11 No explanation is given here so by stipulation
12 of the parties navigability for Chapter 30 applies.
13 Therefore, Chapter 30 has to be considered and it's not
14 demonstrated that the NR 103 evaluation covered the
15 necessary considerations of a Chapter 30 review if you
16 want to call it that.

17 In the Court's view, the DNR's prior practice
18 is entitled to no deference, no particular weight but in
19 any event it's an unreasonable interpretation of the law
20 and that's why it's being overturned.

21 Now, it's not necessary for my decision that
22 Chapter 30 does apply and has to be evaluated. But I,
23 because of the confusion here about navigability or even
24 maybe confusion about lake bed, it does appear to me
25 that the administrative law decision addresses the,

1 whether the access road is on the lake bed or not.
2 There is substantial evidence on both sides and of
3 course his determination based on substantial evidence
4 would stand but it appears to me that this is confused
5 to the point where it's unsupportable in that record.

6 Now, on the issue of application or the NR 103
7 review storm water permit, it's my view that any
8 necessary consideration, evaluation, investigation,
9 application of judgment and other review required to be
10 made a permit granting process must be made preceding
11 the granting of the permit and that some reasonable,
12 under the circumstances, record needs to be maintained
13 otherwise the right of the citizenry who had meaningful
14 review of government decisions is lost.

15 That's the problem with having somebody think
16 about it and after the permit is granted at some
17 administrative law hearing a year or later or explaining
18 yeah I thought about it, didn't write anything down,
19 didn't collect any paperwork, don't have any file et
20 cetera et cetera. That denies meaningful review.
21 That's the gateway to government tyranny when they can
22 justify things after the fact when the law requires to
23 justify preceding the fact and that's the problem with
24 the NR 103 analysis set forth here.

25 It's not about what the witnesses said at the

1 administrative law hearing that they felt justified the
2 permit in light of NR 103 requirements. The question
3 was what did they have, review, prepare, what judgment
4 did they make before the permit was granted. Largely
5 here the DNR relied on the speculation of one DNR agent,
6 gee, I thought somebody else did it.

7 In some ways that's even worse than saying
8 nothing. It's an admission you don't know if anybody
9 did anything. You don't know anything about it. That's
10 like crossing your fingers or pointing to phrases and
11 paperwork and the like. That's no substitute for
12 showing its proper evaluation was done and that the
13 materials, the records, the thought processes are
14 somehow to some degree reconstructible so they can be
15 properly reviewed.

16 Under those circumstance the administrative
17 law judge finding in this record is largely unsupported
18 because it's based on 20/20 hindsight at the hearing as
19 opposed to the pre permit consideration that's required.

20 Finally the situation about new development or
21 redevelopment. I can't see any way around the
22 requirement to apply some kind of common sense rule and
23 it's obvious had -- if you have the farm track that
24 you're going to redevelop it. At some level everything
25 is new development as soon as you put a new stick, a new

1 stone, you put a dollop of asphalt over the top, that is
2 new, well it's different.

3 So the difference between redevelopment and
4 development involves the application of common sense and
5 the issue here in the Court's view is whether 150 feet
6 of new that's completely off the prior track is that, is
7 the DNR allowed in the context of this case to treat
8 that as redevelopment.

9 The entire project is redevelopment or other
10 subsumed combine, set aside the fact there is 150 feet
11 of new. I mean I guess if you built a 1000 mile long
12 interstate highway, 150 feet is negligible under almost
13 any circumstance but this project is a lot smaller than
14 that. 150 feet is not the primary length of the project
15 but in the Court's view it's a substantial amount and it
16 appears to be in what may be a sensitive area.

17 It's not like anybody told me it's over the
18 top of an old gravel pit or something like that. So it
19 appears to the Court that it's common sense application
20 indicates that that's a strong candidate to be viewed as
21 new development and while the State makes a good
22 argument that they can consider it as a whole, the
23 record doesn't disclose that any assessment was made as
24 to how to determine whether to take it as a whole and
25 common sense doesn't make it evident to me.

1 So I suppose it's possible that the proper
2 demonstration of a proper analysis of how that 150 feet
3 fits into it, that conclusion could be supported, but
4 it's not supported in the record before the Court and
5 therefore it can't stand.

6 I'm not going to remand anything at this
7 point. Of course if -- the property owner is free to
8 resubmit application but things have gotten convoluted
9 enough.

10 So one final comment about the State's
11 argument that the failure to do the pre permit analysis
12 under NR 103 in a demonstrable reviewable fashion is not
13 properly before the Court. The Court has already
14 alluded in my questions or if you want to call them or
15 statements that sometimes even strict rules when they
16 are primarily procedural need to be flexed as long as
17 the substantive rights of one party or another is not
18 improperly compromised.

19 And here it's obvious that the DNR, the
20 State's representative knew that the petitioners were
21 pushing this issue for quite some time. They knew that
22 they were probably going to be pushing it even before
23 the last hearing when they were making public records
24 requests and the like. So this is certainly not an
25 issue about surprise.

1 So when something gets remanded and a newly
2 discovered issue comes up and it's addressed, it's akin
3 to allowing the pleadings to be amended to conform with
4 the evidence and that's, I think, that's really what I'm
5 doing here. An issue had come up, hadn't previously
6 come up. There was a remand hearing going on with the
7 very same subject with the very same parties. An issue
8 did come up in the hearing and it becomes reviewable
9 here and I reviewed it and made a decision about it.

10 Mr. Gleisner, you're the prevailing party.
11 You have to draft the Court's orders.

12 MR. GLEISNER: Yes, Your Honor.

13 THE COURT: Any other questions or points that
14 need to be made from the Petitioner?

15 MR. GLEISNER: No, Your Honor.

16 THE COURT: From the Respondent?

17 MS. MILLIGAN: No, Your Honor.

18 THE COURT: Okay. Thank you.

19 MR. GLEISNER: Thank you, Your Honor.

20 MS. MILLIGAN: Thank you.

21 (Proceedings concluded.)

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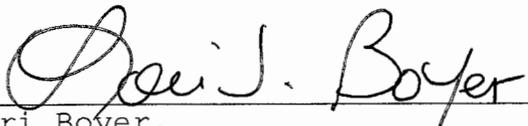
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1 STATE OF WISCONSIN)
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I, Lori Boyer, do hereby certify that I am an Official Court Reporter assigned to report the proceedings herein in Waukesha County, Waukesha, Wisconsin; that the foregoing 10 pages are a true and correct transcript of my stenographic notes taken in the proceedings held on May 23, 2013, and reduced to typewritten form.

Dated this 8th day of July, 2013.



Lori Boyer,
Official Court Reporter