STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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

Petitioners,

vs. Case No. 10CV5096
(Now Consolidated with Case 10CV5085)

The Department of Natural Resources ("DNR"),
Respondent.

FILE

BRIEF IN OPPOSITION TO DNR's MOTION TO DISMISS
THE RRNA SUPPLEMENTAL PETITION FOR JUDICIAL REVIEW

INTRODUCTION

The DNR seeks the severest of results - a dismissal with prejudice - based upon a strained reading of Chapter 227's procedural requirements that do not in fact say what DNR contends they do. DNR's reading not only is contrary to the express statutory provisions relating to service and filing, it is unsupported by the case law, and it runs counter to the well-established principle that leave to file amended or supplemental pleadings is to be freely given.

Based on Chapter 227's literal procedural requirements, the Supplemental Petition was properly served and filed. DNR's argument that the Supplemental Petition should be dismissed (with prejudice) because it was not accompanied by a motion is easily curable should the court deem a motion is necessary.

Finally, nowhere does DNR argue or allege prejudice, surprise, or undue delay. And it would be hard-pressed to do so given that the Supplemental Petition was filed within five weeks of RRNA's initial Petition. DNR further

acknowledges that there would be no additional administrative record beyond that associated with the initial petition.

To dismiss the Supplemental Petition under these circumstances would run counter to the notions of fair play and due process. For the reasons set forth in this Brief, the DNR's motion should be denied.

PROCEDURAL BACKGROUND

Before proceeding to a discussion of the substance of DNR's motion to dismiss the Supplemental Petition, set forth below is the chronology of events surrounding the filing of that Supplemental Petition.

- 11/4/10: DNR issues its Manual Code Approval (hereafter referred to as the "MC Approval") for the North Lake Kraus Site boat launch.
- 11/22/10: RRNA files with the DNR a Petition for a Contested Hearing regarding that MC Approval, listing eight issues it sought to have made the subject of such a hearing.
- 12/3/10: RRNA files with the Circuit Court of Waukesha County a Petition for Judicial Review of the MC Approval and personally serves the DNR with its Petition; attached to that Petition as an exhibit is the RRNA's 11/22/10 Petition for a Contested Hearing as an exhibit. This is the Petition is now pending before this Court in Case No. 5096.
- 12/13/10: DNR issues a decision on RRNA's 11/22/10 Petition, granting a contested hearing on one of the issues raised by the RRNA and denying a hearing as to the other seven issues.
- 1/11/11: RRNA files a Supplemental Petition with the Court in Case No. 5096 seeking review of the DNR's 12/13/10 denial of a hearing concerning the seven issues, and personally serves the DNR with the Supplemental Petition. As will be noted *infra*, the Supplemental Petition can also properly be construed as a *de facto* amendment of the 12/3/10 Petition of the RRNA in Case No. 5096.

The Supplemental Petition is directly related to the primary Petition which was filed in this Court on December 3, 2010. It was made necessary because of

additional events which occurred after the filing of that December 3, 2010 Petition. Namely, the DNR's denial of a contested case hearing on the exact same issues that are the subject of the RRNA's December 3, 2010 initial Petition for Judicial Review currently before this Court.

ARGUMENT

I. THE SUPPLEMENTAL PETITION COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF CHAPTER 227.

Chapter 227's procedural requirements for challenging an agency decision, which DNR accurately sets forth on page 2 of its Brief in support of its Motion to Dismiss the RRNA's Supplemental Petition [hereafter, "DNR Brief"], are straightforward. Chapter 227.53(1) provides that a petition must be:

(1) Served "personally or by certified mail upon the agency" (Wis. Stat. 227.53(1)(a)(1);

(2) Filed "in the office of the clerk of circuit court for the county where the judicial review proceedings are to be held" (*Id.*); and that

(3) Service and filing must occur "within 30 days after personal service or mailing of the decision by the agency." (Wis. Stat. 227.53(1)(a)(2m).[1]

There is no dispute that RRNA complied with each of these procedural requirements. The Supplemental Petition was:

(1) Personally served on the DNR on January 11, 2011 (See attached Exhibit No. 1);

(2) Filed with the clerk of this court on January 11, 2011; and

[1] Chapter 227.53(1)(b) also sets forth certain matters that a petition should address, such as "the nature of the petitioner's interest," "the facts showing that the petitioner is aggrieved by the decision," and the "grounds" for reversal or modification of the petition. DNR does not contend that the Supplemental Petition is deficient in these respects.

(3) Served and filed within 30 days of the DNR's 12/13/10 decision on RRNA's request for contested case review.

The DNR's sole contention is that the Supplemental Petition is somehow flawed because it "was not filed as a *separate and distinct petition* for judicial review, and the time for RRNA to properly file it has passed." (DNR Brief at 5) (emphasis supplied). However, nowhere does the statute enumerate this "separate and distinct" requirement, and DNR cites no authority whatsoever for this assertion.

The DNR asserts that "strict compliance with the procedural requirements in Wis. Stats. 227.53(1) is required" and then cites *Weisensel v. DHSS,* 179 Wis. 2d 637, 508 N.W.2d 33 (Ct. App. 1993). (DNR Brief, p. 4). In fact, *Weisensel* dealt with a failure to properly serve an agency. "The issue [was] whether hand delivery of a copy of the petition in an envelope addressed to an attorney at the Office of Legal Counsel at DHSS constituted sufficient service...." *Id.* at 640. Here, the DNR does not contest that service was improper. As is clear from attached Exhibit No. 1, the Supplemental Petition was properly and timely served on the Office of the Secretary of the DNR on January 11, 2011.

Whatever its label, the Supplemental Petition is a "petition" which was both timely and properly served and filed; that is all that Chapter 227.53(1) requires. There simply is no statutory requirement that a "separate" petition be filed, and to add such a requirement would only lead to the unnecessary consumption of both the parties' and the court's resources.

Here, the original Petition and the Supplemental Petition are intimately interrelated. First, they pertain to the exact same project – i.e., the DNR's proposed construction of a boat launch at the Kraus Site. Second, there is not a separate record for the action taken in connection with DNR's original 11/4/10 MC Approval and its 12/13/10 Decision. In fact, as the DNR itself acknowledges, "[i]t is likely that there is no administrative record for the [12/13/10] hearing denial decision, as it is a letter drafted in response to a hearing request." (DNR Brief at 5) Third, there is significant overlap in the contentions underlying both documents. For example:

- The Petition alleges that DNR improperly assessed the impact to wetlands from the project. (12/3/10 RRNA Petition at Sect. IV.D., pp. 14-16) The Supplemental Petition seeks review of DNR's denial of a hearing on this same issue (1/11/11 RRNA Supplemental Petition Sect. I.A., ¶ 4, and Sect. I.B. 5, Issues 1 (a), (c)-(f) (p. 3)).
- The Petition alleges that DNR did not include a proper "practicable alternatives analysis" in the Permit as required under Wis. Admin. Code NR § 103.08(3) and (4). (12/3/10 RRNA Petition at Sect. IV.F., pp. 18-22). The Supplemental Petition seeks judicial review of DNR's denial of a hearing on the same issue. (1/11/11 RRNA Supplemental Petition, Sect. I.A, ¶ 4, and Sect. I.B., ¶ 5, Issue 1(b).
- The initial Petition alleges that DNR failed to comply with the requirements of Wis. Admin. Code NR § 151 (12/3/10 RRNA

Petition at IV.C, ¶¶ 27-40 (pp. 12-14)). The Supplemental Petition seeks review of DNR's denial of a hearing on this exact same issue (1/11/11 RRNA Supplemental Petition Sect. I.A, ¶ 4 and Sect. I.B ¶ 5, Issues 3-4 (p. 4)).[2]

Had the RRNA filed a separate petition, as DNR evidently asserts is required,[3] the RRNA would then have moved to consolidate. By filing a Supplemental Petition, the RRNA saved the parties and the Court the time and expense of such an additional procedural step.

In short, in filing its Supplemental Petition, the RRNA has complied with Chapter 227's literal procedural requirements pertaining to service and filing of a Petition which was logically and substantively interrelated with its initial Petition.

II. CHAPTER 227 ITSELF ALLOWS FOR AMENDMENTS TO PETITIONS, AND THE SUPPLEMENTAL PETITION AT ISSUE HERE IS EXACTLY LIKE AN AMENDMENT.

The RRNA labeled the filing at issue as a "Supplemental" Petition. But given the interrelationship and overlap between the matters contained in both this petition and its initial petition, including that they both ultimately pertain to the exact same MC Approval for the exact same project, the RRNA could just as easily have entitled its 12/13/10 filing an "Amended" Petition.

---

[2] There is an identical overlap in the remaining issues which are the subject of the original Petition and the Supplemental Petition.

[3] The DNR evidently also would prefer that RRNA pay another filing fee.

To begin with, it may be helpful to understand why the RRNA elected to use the appellation "supplement" instead of "amendment" although either label probably would have fit. According to Grenig, 3 Wisconsin Practice Series – Civil Procedure (Thomson Reuters 2010) §209.5, p. 455: "Amended pleadings relate to matters that occurred before the filing of the original pleading and entirely replace the earlier pleading.... A supplemental pleading may be used to set forth new facts in order to update the earlier pleading...." The RRNA could have repeated all of the allegations contained in its original petition, and then added an additional claim pertaining to the DNR's denial of its request for a contested case hearing on the issues raised in its original petition, thus making the pleading more like an amended pleading and thus labeling it as such. For efficiency purposes, and to avoid the potential of the DNR having to first respond to the original petition, and then again to the amended petition, and because DNR's December 13, 2010 Decision seemed more akin to "new facts," RRNA decided to simply create an additional, non-repetitive filing and denominate it as "supplemental."

However, its 1/11/11 petition could just as correctly be denominated an "amendment." Professor Grenig makes it clear that whatever the name, great liberality should be allowed when a Court is confronted with a "supplemental" pleading. According to Grenig: "Wis. Stats. §802.09(4) is derived from [Federal] Rule 15(d). Although a court has discretion to permit a supplemental pleading, it is an abuse of discretion to deny a supplemental pleading for later events that clearly relate to the original claim." *Id.* at §290.7, pp. 458-459. And in drafting

Chapter 227 the Legislature expressly contemplated that parties might seek to amend petitions after the thirty day time limit on submitting a Petition had run. Thus, §227.53(1)(b) quite clearly specifies that a "petition may be amended, by leave of court, **though the time for serving the same has expired**." [Emphasis supplied].

A rose by any other name smells the same.... The RRNA respectfully submits that it ought to have the opportunity to "amend" or "supplement" its December 3, 2010 Petition pursuant to this statutory provision by adding the additional details and facts asserted in its Supplemental Petition. If the fact that the RRNA has not yet "moved" for leave to do so is a hoop that the DNR wants the RRNA to jump through, in the interests of justice the RRNA requests that the court grant it such leave in connection with this proceeding, or, if necessary, to supplement the record by filing a formal motion.

And at this stage in the proceedings, as is set forth below, the RRNA respectfully submits that it would be contrary to justice and an abuse of discretion to not allow it to convert its "supplement" into an "amendment."

III. WHETHER THE "SUPPLEMENTAL PETITION" IS VIEWED AS EITHER AN AMENDMENT OR A SUPPLEMENT – UNDER THE LAW IT MUST BE LIBERALLY CONSTRUED.

As noted *supra* in Section II, the "Supplemental Petition" can be viewed as the equivalent of ***either*** an amendment ***or*** a supplement. As the DNR recognizes, all Chapter 227 reviews are governed by the non-conflicting procedural rules contained in other statutes, including those set forth in Wis. Stat. 802. [DNR Brief, p. 2, citing Wis. Stat. 227.02, and *State v. Walworth County*

Circuit Court, 167 Wis. 2d 719, 723, 483 N.W.2d 899 (1992)]. Whether the RRNA's Supplemental Petition is considered as a "supplemental" pleading under Wis. Stat. 802.09(4) or an "amended" pleading under section 802.09(1), leave to file it should be freely granted.

If construed as an amendment, the drafters of the Wisconsin Code of Civil Procedure were so convinced that amendments should be treated with great liberality that they decreed that amendments under §802.09(1) should be allowed "once as a matter of course any time within 6 months after the summons and complaint...." In other words, no motion need even accompany its filing. Thus, as an amended pleading there should be no impediment to allowing RRNA's 1/11/11 petition as "a matter of course."

However, even construing it as a supplemental pleading, the drafters of the Code of Civil Procedure made it clear that the same liberality which applies to amendments should be accorded to supplements under §802.09(4).

Since §802.09(4) is based on FRCP 15(d), it is important to take a closer look at the judicial gloss on the federal rule. According to Wright & Miller, Federal Practice & Procedure §1504 (West 3d Edition 2010):

> [E]ven if a supplemental pleading is interposed by a party without leave of court in the mistaken belief it is a Rule 15(a) amendment that may be made as a matter of course, it is doubtful that any prejudice would accrue to the opposing party because the time during which amendments as of right may be filed is relatively short and comes early in the action so that prejudice to any other party is unlikely.

The RRNA submits that the foregoing should apply to where we are in the case at bar. At worst, a supplemental pleading has been interposed without leave

of court in the mistaken belief it should be treated as an amendment as a matter of course. There is no prejudice to the DNR and, if necessary to satisfy the DNR's contention that the RRNA is required to file a motion for leave to file, the RRNA will certainly do so. But it is inconceivable that the potential mislabeling of the 1/11/11 Petition as "supplemental," or the failure to accompany its filing with a motion which can easily be cured, should result in the draconian remedy of dismissal with prejudice as sought by the DNR.[4] Again according to Wright & Miller, "An application for leave to file a supplemental pleading is addressed to the discretion of the court and should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action."[5] *Id.* at §1504.

In the case of *Hertz Corp. v. Enterprise Rent-A-Car Co.*, 557 F. Supp. 2d 185 (D. Mass. 2008), the Court provided an in depth discussion of amendments vs. supplements, concluding as follows:

> There is an open question as to whether an amended complaint asserting a cause of action that arose only after the prior complaint was filed should be regarded as a 'supplemental' rather than an

[4] If the DNR is concerned that the issues raised in the two filings are too distinct, that could be addressed by simply severing the Supplemental Petition pursuant to Wis. Stats. § 803.06, if appropriate.

[5] Here are some of the cases cited by Wright & Miller is support the quoted proposition: *Shooshanian v. Wagner*, 672 P.2d 455, 459 (Alaska 1983); *Hertz Corp. v. Enterprise Rent-A-Car Co.*, 557 F. Supp. 2d 185 (D. Mass. 2008); *Families and Youth Inc. v. Maruca*, 156 F. Supp. 2d 1245 (D.N.M. 2001); *Eison v. Kallstrom*, 75 F. Supp. 2d 113 (S.D. N.Y. 1999); *Bell v. U.S. Dept. of Defense*, 71 F.R.D. 349 (D.N.H. 1976); *Garrison v. Baltimore & O.R. Co.*, 20 F.R.D. 190 (W.D. Pa. 1957); *Federal Telephone & Radio Corp. v. Associated Tel. & Tel. Co.*, 88 F. Supp. 375 (D. Del. 1949); *H F G Co. v. Pioneer Pub. Co.*, 7 F.R.D. 654 (N.D. Ill. 1947); *Vernay Laboratories, Inc. v. Industrial Electronic Rubber Co.*, 234 F. Supp. 161 (N.D. Ohio 1964).

> 'amended' complaint. The difference is modest. An amended complaint filed pursuant to Federal Rule of Civil Procedure 15(a) typically relates to matters that have taken place prior to the date of the pleading that is being amended. A supplemental complaint typically allows the pleader to set forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Id. at 191-192.

The *Hertz* Court concluded "the federal practice is to liberally allow supplemental pleadings.... While Rule 15(d) is less permissive than Rule 15(a), a generous reading of Rule 15(d), at least in the early stages of litigation, is consistent with Rule 15(a)'s mandate that '[l]eave to amend is to be 'freely given' . . . unless it would be futile, or reward, *inter alia,* undue or intended delay.'" *Id.* at 192. In fact, recalling again that §802.09(4) is based on FRCP 15(d), Wright & Miller makes the following philosophical point at §1506:

> One of the basic policies of the [rules of civil procedure] is that a party should be given every opportunity to join in one lawsuit all grievances against another party regardless of when they arose. More in keeping with this philosophy are those decisions that have allowed the joinder of new claims by supplemental pleading. Thus, in several cases courts have ruled that a supplemental pleading may include a new 'cause of action' when it would be convenient to litigate all the claims between the parties in the same action. **Other courts have construed plaintiff's original 'cause' broadly to embrace the claim in the supplemental pleading in order to reach substantially the same result** [Emphasis supplied].

CONCLUSION

The RRNA asks that its Supplemental Petition be allowed to stand either as a §227.53(1) amendment to its original 12/3/10 Petition for Judicial Review or as a §804.09(4) supplement to that same Petition. In either case, the RRNA will

"dot the i" by filing a motion if the court deems it necessary. But a dismissal on the merits is unwarranted. The DNR's motion should be denied.

Dated at Hartland, Wisconsin this 13th day of May, 2011.

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

By: _____
William C. Gleisner, III, Esq.
State Bar No. 1014276
Named Petitioner & Lead Counsel
Email: wgleisner@sbcglobal.net
Matthew W. Surridge, Esq.
State Bar No. 1079807
Email: msurridg@yahoo.com
300 Cottonwood Avenue, Suite No. 3
Hartland, Wisconsin 53029
Telephone: (262) 367-1222
Fax: (262) 367-1236

Of Counsel for the Petitioners
William H. Harbeck, Esq.
State Bar No. 1007004
Quarles & Brady, LLP
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone: 414-277-5853
Fax: 414-978-8853
Email: william.harbeck@quarles.com

EXHIBIT NO. 1

[redacted]

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

RECEIVED
JAN 11 2011
DNR
OFFICE OF THE
SECRETARY
LRP

State ex rel. Reddelien Road Neighborhood Association, Inc. ("RRNA"), F. Robert Moebius, David Draeger, Frederick A. Hanson, Doris Lattos, James Wozniak, Donna Anderson, Brad Barke, Carol Barke, James Baumgartner, Hilda Baumgartner, Douglas Bruch, Linda Bruch, Charlene Cary, Annabelle M. Dorn, Paulette Draeger, William C. Gleisner, III, Margo Hanson, Christine Janssen, Frank Janssen, Brian Kennedy, Mary Lou Kennedy, Mitchell Kohls, Joseph G. Krakora, Marie Krakora, Charles Luebke, Patricia Luebke, Mary Mitchell, David Mirsberger, Patti Mirsberger, Jill Moebius, Gerhard Palmer, Betty Palmer, Aletta Ruesch, Thomas Schwartzburg, Stephanie Smith, William Timmer, Suzanne Timmer, Deborah Wozniak, Daniel Yuhas, and Jennifer Yuhas,

Petitioners,

vs.

Case No. 10CV5096
Case Code: 30607
Administrative Agency Review

11 JAN 11 AM 9:56
CLERK OF CIRCUIT COURT
CIVIL DIVISION

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

FILE

Respondent.

SUPPLEMENTAL PETITION FOR JUDICIAL REVIEW

Petitioners, by counsel, hereby file a Supplemental Petition for Judicial Review supplementing their Petition for Judicial Review filed on December 3, 2010 pursuant to Wis. Stats. §§30.209(3), 227.52, and 227.57. This Supplemental Petition seeks judicial review of DNR's denial, set forth in its December 13, 2010 Response (in attached Appendix 1), of most of the issues upon which Petitioners' sought a contested case hearing in their November 22, 2010 Petition for a Contested Hearing. As described in their initial Petition for Judicial Review, this proceeding, and the Contested Case Petition, arise out of DNR's November 4, 2010 "North Lake Boat Launch Manual Code 3565.1 Approval" (the

Receipt of Copy of the within acknowledged
the 11 day of Jan ,20 11
Time 11:43 am
Angie Sliapp