

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-0119

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**ABKA LIMITED PARTNERSHIP, AN ILLINOIS LIMITED
PARTNERSHIP, AND THE ABBEY HARBOR CONDOMINIUM
ASSOCIATION, LTD., A WISCONSIN NONPROFIT
CORPORATION,**

PETITIONERS,

**DFS DEVELOPMENT, INC., AN ILLINOIS CORPORATION,
CHARLES E. EKLUND, AND CHICAGO TITLE INSURANCE
COMPANY, A MISSOURI CORPORATION,**

APPELLANTS,

v.

**WISCONSIN DEPARTMENT OF NATURAL RESOURCES, AN
EXECUTIVE DEPARTMENT OF THE STATE OF WISCONSIN,
CREATED BY S. 15.34, STATS., AND GENEVA LAKE
CONSERVANCY, INC.,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. DFS Development, Inc., Charles E. Eklund and Chicago Title Insurance Company appeal from an order denying their motion to intervene in a ch. 227, STATS., review of a Department of Natural Resources permit proceeding. The appellants sought to challenge the order of the Division of Hearings and Appeals that 287 out of 407 boat slips in the Abbey Harbor and Marina on Geneva Lake must be set aside for public rental. We conclude that the circuit court properly exercised its discretion under § 227.53(1)(d), STATS., in denying the motion for intervention. We affirm the order.

ABKA Limited Partnership owns the Abbey Harbor and Marina on Geneva Lake. The marina includes 407 boat slips. ABKA decided to sell ownership rights to the boat slips by a condominium declaration filed February 28, 1995. Any purchaser of a “dockominium” unit was required to become a member of the Abbey Harbor Condominium Association, Ltd. Appellants DFS Development and Eklund each purchased a dockominium unit in April 1995. Chicago Title issued a policy of title insurance for each purchase.

ABKA filed an application with the Department of Natural Resources to authorize the conveyance of the existing marina to a condominium form of ownership. The condominium association later joined in the application. The permit application was objected to by the Geneva Lake Conservancy and was therefore referred to the Division of Hearings and Appeals for a contested case hearing. The matter was heard November 13 to 17 and December 18, 1995. The appellants did not participate in the proceeding.

On July 29, 1996, the administrative law judge issued a decision concluding that to prevent dockominium status from violating the public trust doctrine, 287 boat slips must be set aside for public rental at a reasonable fee. The marina's permit was modified to include this condition. Numerous interested parties timely filed for judicial review of the decision under ch. 227, STATS. On October 17, 1996, the appellants moved to intervene in the review proceeding.

The appellants claim that they are entitled to intervene as a matter of right under § 803.09(1), STATS.¹ The respondents argue that § 227.53(1)(d), STATS.,² is the exclusive provision governing whether the appellants may participate in the review proceeding after their failure to timely file a petition for review.³ If enumerated conditions are met, intervention under § 803.09 is mandatory whereas § 227.53(1)(d) is permissive in providing that interested

¹ Section 803.09(1), STATS., provides:

Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

² Section 227.53(1)(d), STATS., provides:

The agency ... and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. *The court may permit other interested persons to intervene.* Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition. [Emphasis added.]

³ The appellants read the respondents' brief to argue that the motion to intervene was untimely. The respondents, however, merely point out that the appellants missed the thirty-day deadline for filing a petition for review of the ALJ's decision and thus missed their opportunity to participate in the review proceeding as a matter of right. The motion for intervention was timely filed.

persons may be allowed to intervene. The mandatory provision in § 803.09 cannot override the permissive provision in § 227.53(1)(d). *See Wagner v. State Med. Examining Bd.*, 181 Wis.2d 633, 639, 511 N.W.2d 874, 877 (1994) (“[W]hen a conflict occurs between the rules of civil procedure and ch. 227, the dictates of ch. 227 must prevail.”). Thus, whether to allow interested persons to intervene in a ch. 227 review proceeding is discretionary with the circuit court. *See Town of Delavan v. City of Delavan*, 160 Wis.2d 403, 415, 466 N.W.2d 227, 232 (Ct. App. 1991).

In exercising its discretion, the trial court should consider whether the movant has standing and whether the movant’s interest is adequately represented by other parties. *See id.* These considerations mirror the two requirements in § 803.09, STATS.—whether “the disposition of the action may as a practical matter impair or impede the movant’s ability to protect [a property] interest” and whether the “movant’s interest is adequately represented by existing parties.”

The appellants argue that because ABKA has oversold the dockominiums and there are not presently 287 slips available for public rental, they are adversely affected by the ALJ’s decision and the possibility that ABKA will have to buy back the slips they purchased. The permit does not require ABKA to buy or force the appellants to sell their units back. Although the ALJ’s decision makes reference to ABKA’s need to repurchase 65 units in order to be in compliance with the terms of the permit, repurchase it is not required by the

decision.⁴ Potential repurchase was not an issue litigated in the contested case hearing.

The “repurchase expectation” expressed in the decision arose because prior to making its permit application, ABKA entered into a February 2, 1995, letter agreement with the DNR to set aside at least 125 slips for public rental. The agreement provided, “Should the decision of the administrative law judge require more than 125 slips to be set aside for seasonal leasing or licensing, ABKA will repurchase slips to make up the difference.” So it is not the ALJ’s decision but the separate agreement ABKA made with the DNR that creates the potential risk of surrender which the appellants may face. The trial court properly exercised its discretion in denying the appellants’ motion for intervention based on this asserted potential injury. *Cf. Town of Delavan*, 160 Wis.2d at 411, 466 N.W.2d at 230 (for standing, petitioner must demonstrate that it sustained an injury due to an agency decision and it must be an injury in fact, not a hypothetical or conjectural one).

As to the issue litigated in the proceeding—the number of slips to be held open for public rental—the appellants stand in the same position as ABKA and the condominium association. It is untenable to suggest that ABKA and the

⁴ In addressing concerns about the representations in the dockominium marketing scheme, the ALJ’s decision noted, “[B]ecause the permit and Order set forth below will result in the Abbey having to repurchase units previously sold, this issue is not currently necessary for purposes of this decision.” In addressing ABKA’s claim that it relied on an agreement with the DNR about the number of slips to be held back for public rental, the opinion stated:

The record indicated that 185 of the condominium units had been sold as of the date of the hearing. Accordingly, it is expected that ABKA will repurchase 65 units to come into compliance with the terms of the permit set forth below. Any reliance by ABKA was clearly done at its own risk with respect to any claims of reliance or estoppel.

association will not pursue the action with the same diligence as the appellants. Two of the appellants are members of the association. Moreover, ABKA and the association will also bear a financial burden should the permit be sustained on review.

When determining whether a party's representation is deemed adequate we look to see if there is a showing of collusion between the representative and the opposing party; if the representative's interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty.

Armada Broad., Inc. v. Stirn, 183 Wis.2d 463, 476, 516 N.W.2d 357, 361 (1994).

There is no showing on any of these considerations. The trial court correctly noted that the appellants' interests are adequately represented by other parties. For that additional reason, we affirm the denial of the appellants' motion to intervene.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

