

# Circuit Court Chambers

Branch No. 26

Courthouse

Milwaukee, Wisconsin 53233

Michael P. Sullivan  
Circuit Judge  
414 278-4500

Candace Grossman  
Court Reporter

Patricia J. Roberson  
Deputy Clerk

May 6, 2002

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RE: *McKinley Anchorage & Moorage Assn. v. Milwaukee County et al.*  
Case #01-CV-003841

Dear Counsel,

Please consider this letter the court's **Decision** on the Motion for Summary Judgment heard last Monday. I grant the motion because I agree with the plaintiff on two of its contentions. First, the County's \$300 annual mooring rental fee is nothing other than a revenue intended tax. As such, it runs aground on the Public Trust Doctrine, embodied in the Wisconsin Constitution, Article IX, Sec. 1, and Ch. 30 of the Wisconsin statutes. Second, the County sails a crooked course when it uses a statute (sec. 30.38(9)) authorizing it to regulate publicly owned and operated harbor facilities as a means of imposing an unequal fee on private piers and moorings. See *Racine Marina Associates v. City of Racine*, 175 Wis.2d 614, 499 N.W.2d 715 (Ct. App. 1993).

Article IX, Section I of the Wisconsin Constitution reads in pertinent part:

"The State shall have concurrent jurisdiction on all rivers and lakes bordering this state...and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to citizens of the United States, without any tax, impost, or duty therefor."

The above provision of the Constitution is the basis of the concept known as the Public Trust Doctrine, which means the state holds the beds of navigable waters in trust for public use. See *Borsellino v. DNR*, 232 Wis.2d 430, 443, 606 N.W.2d 255 (Ct. App. 1999). Neither the state, nor any subdivision thereof acting with state granted authority can use its position of trustee to gain a pecuniary advantage by means of revenue. *Rosmiller v. State*, 114 Wis. 169, 89 N.W. 839, 844 (1902), *Racine Marina Associates*, cited above. The owners of the moorings in McKinley Marina had all paid a one-time \$25.00 permit fee when the City of Milwaukee Harbor Commission was the regulatory

agency having control over the area. When the County took over the area, suddenly there was an annual fee of \$300 for the mooring buoys, "...resulting in a revenue increase of \$30,000" according to a line item in the 2001 Milwaukee County Budget. The County argues that the annual fee is justified because the improved breakwater provides the mooring owners "safe water". But the amount of the fee, the fact that it is to be collected annually, and the County's use of the term "revenue" in the fiscal note shows that this "fee" is clearly a tax. As such, it is violative of the "Public Trust Doctrine" because it is an attempt by the County to reap financial gain from the private use of the navigable waters of this state.

To allow the fee would sink the holding in *Racine Marina Associates*, cited above. Under sec. 30.38(9) Wis. Stats., any fees imposed must be imposed equally on all users. The County justifies its fee by citing improvements it has made to the break-walling for the users of the area. But, as pointed out in the stipulation of facts, some other users of the area are not required to pay any fee for that same "safe water" services and so the fee is not imposed "equally". That inequity violates the wording of the statute.

This particular fee is authorized by neither the constitution of this state nor its statutes. The County is enjoined from collecting the fee and must refund any monies collected under it to those who paid. Counsel for the prevailing party shall prepare the appropriate order.

Yours truly,

A handwritten signature in black ink, appearing to read "M. P. Sullivan". The signature is written in a cursive style with a large initial "M".

Michael P. Sullivan  
Circuit Judge