

**MCKINLEY ANCHORAGE &  
MOORAGE ASSOCIATION, UA,**

**Plaintiff,**

**Case No. 01-CV-003841**

**vs.**

**MILWAUKEE COUNTY,  
F. THOMAS AMENT,  
SUSAN L. BALDWIN,  
GREGORY YOUNGS,**

**Defendants.**

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**PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

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**I. INTRODUCTION**

At issue in this case is whether Milwaukee County has validly imposed a \$300.00 annual charge upon MAMA members who own moorings in the McKinley Anchorage, which has been a designated mooring area for over 100 years. Milwaukee County has responded to MAMA's motion for summary judgment and brief by arguing that there are various statutes under which it might be able to validly impose a charge upon mooring owners. Milwaukee County, however, has made no attempt to demonstrate that it has actually imposed a fee or levied a tax pursuant to any statutory authority. Because the mooring charge has not been duly enacted under any statutory authority, the Plaintiff is

entitled to judgment as a matter of law.

## II. ARGUMENT

### A. Sec. 30.772, Stats.

#### 1. **Mooring Permit Fees**

Milwaukee County initially argues that it could impose a permit fee as part of a regulatory ordinance enacted under Sec. 30.772, Stats. (Defendants' Brief at pp. 2-3). MAMA does not disagree with this general proposition. In fact, as noted in MAMA's principal brief, this is precisely what the City of Milwaukee did when the McKinley Anchorage was under its jurisdiction. (Plaintiff's Brief at pp. 12-13). Clearly a "municipality may regulate the placement and use of moorings within designated mooring areas in the manner provided by s. 30.772(3)." Sec. 30.773(4)(b), Stats. By its express terms, however, sec. 30.772(3), Stats., requires that local regulations relating to the placement and use of moorings be enacted by ordinance. ("[A] municipality ... may, by ordinance, adopt local regulations relative to the placement and use of moorings"). It is undisputed that Milwaukee County has never enacted an ordinance regarding the placement and use of moorings in the McKinley Anchorage. (SOF ¶129). Absent the enactment of any sort of regulatory ordinance, Milwaukee County has no basis to claim that its charge was validly imposed as fee that is part of a regulatory scheme.

Moreover, contrary to Milwaukee County's assertion, there are limits on the amount

that can be charged as a permit fee under Sec. 30.772(3). Like all regulatory fees, the amount of the fee must be related to the cost of the regulation. *Wisconsin Telephone Co. v. City of Milwaukee*, 126 Wis. 1, 104 N.W. 1009, 1013 (1905); *City of Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis.2d 299, 303-08, 94 N.W.2d 584, 587-90 (1959); and *Racine Marina Associates v. City of Racine*, 175 Wis.2d 614, 621, 499 N.W.2d 715, 718 (Ct. App. 1993). The City of Milwaukee enacted a mooring permit fee of \$25.00, which MAMA concedes was reasonably related to the cost of the regulation. (SOF ¶17, Exh. E; Plaintiff's Brief at 12).

Furthermore, like building permits, "once a mooring permit is issued under this section, no subsequent permit may be required unless the mooring location is changed." § 30.772(3)(d)(2). The City of Milwaukee agreed that it could not collect an annual renewal permit fee due to this limitation. (SOF ¶18).

Consequently, although it is theoretically possible for Milwaukee County to enact a mooring ordinance and charge a reasonable one-time permit fee, based upon this record, it is clear that the County has done nothing like this.

## **2. Public's Right To Use a Designated Mooring Area.**

Milwaukee County is also in error when it suggests that unless it enacts a mooring ordinance, MAMA members have no right to use the designated mooring area constituting the McKinley Anchorage. (Defendants' Brief at 2-3). The relevant portion of the sec. 30.772(2)(e), Stats., (including the portion which Milwaukee County failed to quote) reads as follows:

(2) RESTRICTIONS. No mooring may be placed or used in any navigable waters if: . . .

(e) The mooring anchor is placed more than 150 feet from the ordinary high-water mark, or more than 200 feet from the ordinary high-water mark if sub (3)(a)5 applies, unless one of the following occurs:

1. A permit is obtained from the appropriate municipality and approved by the department.
2. A permit is obtained from the department.
3. The mooring is properly located within a designated mooring area.”

[portion deleted by the Defendants is in italics].

Since it is undisputed that the moorings are located within the McKinley Anchorage (a designated mooring area for more than 100 years, recognized by the Regulations of the United States Coast Guard, U.S. Government Chart 14924, and the Ordinances of the City of Milwaukee (SOF ¶¶ 11, 12, 13, 16, 17, Exhs. C, D, & E)),<sup>1</sup> there is no basis for Milwaukee County’s claim that the public is prohibited from using the designated mooring area unless or until the County enacts a regulatory ordinance. In fact, just the opposite is true. Unless there is a municipal ordinance so requiring, there is no permit required to place a mooring in a designated mooring area. See sec. 30.773(4)(a), Stats.<sup>2</sup>

Finally, Milwaukee County has cited sec. 30.12, Stats., for the proposition that “structures and deposits” cannot be placed upon the bed of any navigable water without

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<sup>1</sup>The United States has the authority to designate and establish anchorages and moorages in interstate waters under 33 U.S.C. § 471. It stands to reason that under the supremacy clause of Article VI of the U.S. Constitution, Milwaukee County cannot “un-designate” an anchorage and moorage area established by federal law.

<sup>2</sup>Sec. 30.773(4)(a), Stats., states as follows: “Department permits under s. 30.772(4) or department approval of municipal permits under s. 30.772(3)(c) are not required for moorings placed within a designated mooring area.”

a permit from the DNR where no bulkhead line has been established. This statute is not applicable to the lakebed under the McKinley Anchorage by virtue of sec. 30.05, Stats., which reads as follows:

“Nothing in this chapter relative to the establishment of bulkhead or pierhead lines or the placement of structures or deposits in navigable waters or the removal of materials from the beds of navigable waters is applicable to submerged shorelands in Lake Michigan, the title to which has been granted by the state to a municipality.”

Indeed, in their Answer, the Defendants specifically conceded and alleged that the lakebed under McKinley Marina was not subject to the DNR permit requirements “by virtue of the language contained in sec. 30.05, Stats.” (Defendants’ Answer at ¶35). Since it is undisputed that the McKinley Anchorage is located behind the breakwater near the shore (SOF ¶11) and title to the lakebed under the anchorage has been transferred from the state to Milwaukee County (SOF ¶25), the lakebed under the Anchorage is obviously a “submerged shoreland in Lake Michigan, the title to which has been granted by the state to a municipality.” In addition, as noted previously, under sec. 30.773(4)(a), Stats., no permit from the DNR is required to place a mooring in a designated mooring area. Finally, since it is also undisputed that MAMA members were issued permits by the City of Milwaukee when the anchorage was clearly under its jurisdiction (SOF ¶18) and the County has not challenged the validity of these permits, there is little doubt that the moorings were properly placed in a designated mooring area.

**B. Sec. 30.38(9), Stats.**

Milwaukee County has also suggested that it could impose the \$300.00 charge

under the authority granted by Sec. 30.38(9), Stats. (Defendants' Brief at p. 4). Again, as noted in its principal brief, MAMA agrees that sec. 30.37(7), Stats., granted Milwaukee County certain powers given to boards of harbor commissioners, including the power to set fees under sec. 30.38(9), Stats. But, as the Court of Appeals recognized in *Racine Marina Associates*, 175 Wis.2d 614, 619-621, 499 N.W.2d 715, 717-718 (Ct. App. 1993), these fees can only be imposed for use of publicly-owned facilities and publicly-provided services. In response to MAMA's interrogatories, Milwaukee County failed to identify any publicly-owned facilities or services that were being provided in exchange for this fee. (SOF ¶ 34, Exh. K, Resp. to Interrog. Nos. 6 & 7). According to the interrogatory answers, the only thing being provided in exchange for the fee was use of the water. This is not something for which Milwaukee County can charge a fee under sec. 30.38(9), Stats. *Id.* at 618, n.5, 499 N.W.2d at 717.<sup>3</sup>

Similarly, since it is undisputed that the moorings themselves are all privately owned (SOF ¶14) and the County's "Mooring Rental Contract" attempted to rent to MAMA members the privately-owned moorings (SOF ¶30, Exh. J), the moorings

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<sup>3</sup>The County's assertion that *Racine Marina Associates* stands for the proposition that navigable water can be leased to the public is clearly not a reasonable interpretation of this case. While the Court of Appeals never considered the validity of the language used in the lease between Racine County and Racine Marina Associates since it was not at issue in the case, as described in the facts, the lease in essence rented marina *facilities* and *land* owned by the County to Racine Marina Associates. *Id.* at 616, 499 N.W.2d at 716. The lease also apparently rented out the riparian right to wharf-out from the land adjacent to the water. *Id.* The trial court specifically noted that if the fees at issue were for use of the harbor, the fees were invalid as contrary to WIS. CONST. Art. IX, Sec. 1 and *State v. Jackman*, 60 Wis.2d 700, 706-11, 211 N.W.2d 480, 487 (1973). *Id.* at 618, 499 N.W.2d at 717.

themselves cannot be classified as “publicly owned facilities” or “public provided services.”

Moreover, even if sec. 30.38(9), somehow allowed Milwaukee County to impose a fee for use of the water, Milwaukee County must then charge “equal fees” for “equal services.” As noted by the trial court in *Racine Marina Associates*, this would require that all users of the marina basin be assessed the fee equally. *Id.* at 618, 499 N.W.2d at 717. It is undisputed that Milwaukee County has only imposed the fee upon some of the marina basin users. (SOF ¶15).

Consequently, Milwaukee County has failed to show that the fee was validly imposed under sec. 30.38(9), Stats.

**C. The Lakebed Grant and the Authority to Rent Navigable Water to the Public**

Milwaukee County also argued that the lakebed grant itself gives it the authority to rent navigable water to the public. (Defendants’ Brief at p. 8). In essence, the County argues that since it can lease harbor lands to public organizations, it should be allowed to lease harbor waters to the public. (Defendant’s Brief at pp. 8-9). This argument ignores the critical distinction between rental of land and rental of navigable water under Wisconsin law.

While under sec. 30.38(6), Stats.,<sup>4</sup> a Board of Harbor Commissioners can lease

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<sup>4</sup>Sec. 30.38(6), Stats., provides in pertinent part that a “board of harbor commissioners may lease to any party, either for exclusive or common use, such parcels of publicly-owned harbor lands or such publicly-owned harbor facilities as it deems expedient . . . .”

publicly-owned harbor lands and publicly-owned harbor facilities to any party, there is no statutory provision permitting a board or municipality to lease publicly-owned navigable water to any party. The lease of navigable water for revenue purposes is expressly prohibited by Article IX § 1, Wis. Const.; *City of Madison v. Tolzmann*, 7 Wis. 2d 570, 576, 97 N.W.2d 513, 517 (1959); *State v. Jackman*, 60 Wis.2d 700, 706-011, 211 N.W.2d 480, 484-87 (1973); and *Racine Marina Associates* at 618, 499 N.W.2d at 717; *Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839, 843-844 (1902). Since the only title to the lakebed held by the state is that of public trustee (with equitable title belonging to the public), this is the only title that can be conveyed to a municipality. *McLennan v. Prentice*, 85 Wis. 427, 445, 55 N.W. 764, 770 (1893) (“The state has no proprietary interest in [submerged land under navigable waters], and cannot abdicate its trust in relation to them, and while it may make a grant of them for public purposes, it may not make an irrevocable one; and any attempted grant of the kind would be held, if not absolute void on its face, as subject to revocation.”) A municipality certainly cannot, for revenue purpose, lease to others property in which it holds no proprietary interest. See 78 Wis. Op. Atty. Gen. 107 (1989).

Finally, the state cannot use a lakebed grant or any other means to delegate trust duties to local municipalities that require an exercise of judgment and discretion, although it may delegate duties which are purely ministerial. *Muench v. Public Serv. Comm’n*, 262 Wis. 492, 515m, 55 N.W.2d 40, 46 (1952). A delegation of trust responsibilities to a local unit of government is only valid if (1) the state retains substantial oversight over the delegee’s administration of ministerial duties; (2) the state makes the delegation for the

sole purpose of advancing the paramount interests of the public; and (3) the state has established clear limits and definite standards for the delegee to follow. *Menzer v. Village of Elkhart Lake*, 51 Wis. 2d 70, 81-85, 186 N.W.2d 290, 294-297 (1971); *Muench*, 252 Wis. 2d at 515m, 55 N.W.2d at 46. Assuming *arguendo* that the state could constitutionally lease navigable water to private parties, unless the County can demonstrate the existence of a state statute which specifically authorizes it to enter into such leases and establishes clear limits and definite standards for the County to follow, such a delegation of the state's leasing authority to the County would be invalid. *Id.*

**D. Personal Property Tax.**

Milwaukee County also suggests that its \$300.00 charge might be valid as a tax upon personal property, including the sailboats owned by MAMA's members. (Defendants' Brief at p. 11). Milwaukee County fails to note, however, that "all pleasure watercraft used for recreational purposes" are exempted from any personal property tax under sec. 70.111(3), Stats. Moreover, there is nothing in this record that in any way supports the idea that the County has levied a personal property tax upon individuals whose personal property is located within the County. To levy such a tax, the property must be assessed (secs. 70.06 & 70.34, Stats.), identified and placed on the tax roles (secs. 70.01 & 70.65, Stats), and taxed in accordance with the applicable tax rate (sec. 70.62 & 70.63, Stats.). It is undisputed that no such procedure was followed here. (SOF ¶¶ 27-30). Instead, Milwaukee County proposed to collect the fee in exchange for renting the mooring owners the moorings which they already owned. (SOF ¶30, Exh. G).

**E. Rental Contracts with MAMA Members and the Lease Agreements with MYC and MCSC.**

The final issues concern whether the County Board actually authorized the proposed rental contracts that were sent to MAMA members and whether the right to moor in the Anchorage had been previously conferred upon MAMA members by virtue of their memberships in either the Milwaukee Yacht Club (“MYC”) or the Milwaukee Community Sailing Center and the lease agreements between the County and these organizations. (Defendant’s Brief at pp. 13-14). As MAMA noted in its principal brief, the County attempted to collect the contested charges as part of a separate rental contract with each MAMA member. (SOF ¶ 30, Exhs. I & J, Plaintiff’s Brief at p. 13). Assuming *arguendo* that the County can rent out navigable water, the question becomes whether the County can enter into these contracts without express authorization from the County Board. There is no ordinance or resolution authorizing these contracts and it is quite clear that under sec. 59.02(1), Stats., the powers of a county as a body corporate can only be exercised by the County Board or pursuant to a resolution or ordinance adopted by the Board. Without such a resolution or ordinance, Youngs had no authority to collect the lease payment in the manner that he did. (See Plaintiff’s Brief at pp. 13-14). Milwaukee County has not addressed this point in its brief, but merely argues again that it somehow has the authority to lease out navigable water. (Defendant’s Brief at 13).

The other issue is whether Milwaukee County has already leased to MAMA members the right to use the Anchorage by entering into lease agreements with the MYC

and the MCSC. These lease agreements are in the record (SOF ¶¶ 9 & 10, Exhs. A and B) and it is undisputed that MAMA members access their moorings and the Anchorage from either the MYC property or the MCSC property (SOF ¶13). Milwaukee County does not directly address this issue, but merely states that it is “contrary to the agreed statement of facts and is legally unsupportable.” (Defendant’s Brief at p. 13). The parties, however, only stipulated to the facts, not to the legal conclusions that can be drawn from the facts. Whether the MYC and MCSC leases granted access rights to the Anchorage is a legal conclusion.

From the record, it appears that the MYC and MCSC leases did in fact grant their members the right to use the mooring area. MYC members have been mooring their sailboats in the Anchorage for more than 100 years (SOF ¶6). Similarly, MCSC members have moored their boats in the Anchorage since its creation in 1977 (SOF ¶10). Obviously MYC and MCSC value these properties precisely because they are adjacent to the marina basin and in close proximity to the Anchorage. For the County to claim that it did not grant marina access rights to the MYC and MCSC members when it entered into these lease agreements is simply absurd.

### **III. CONCLUSION**

By their own admission, the Defendants have attempted to extract from the Plaintiff’s members a \$300.00 annual charge for use of the navigable waters of this state. The Wisconsin Constitution simply does not permit the state or its designees to rent out the state’s navigable waters. Wis. Const., Art. IX, Sec. 1. Milwaukee County’s title to the

lakebed underneath the navigable water of Lake Michigan is merely that of trustee for the public, and no pecuniary right to lease the water above the lakebed for revenue purposes attaches to this title. While in theory the County can charge a one-time permit fee to mooring owners as part of a regulatory ordinance, no such ordinance has been enacted and therefore there is no right to charge a fee. Even if the right to charge a permit fee existed, the fee must be related to the cost of regulation. The fiscal note attached to budget resolution makes it clear that the \$300.00 charge to mooring owners was purely for revenue purposes. (SOF Exh. G).

In response to MAMA's challenge to the \$300.00 mooring charge, Milwaukee County has failed to demonstrate that this charge is a valid fee or tax or that it was duly imposed or levied pursuant to statutory authority. For these reasons, the Plaintiff respectfully requests the court to grant its motion for summary judgment and order appropriate relief, including an order declaring the charges invalid, enjoining the Defendants from taking any further action to collect these fees, providing for repayment of any illegally obtained revenue, and awarding the costs of this action to the Plaintiff.

Dated at Milwaukee, Wisconsin this \_\_ day of April, 2002.

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