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April 9, 2001

F. Thomas Ament
Milwaukee County Executive
901 N. Ninth Street, Room 306
Milwaukee, WI 53233

Re: McKinley Mooring "Rental" Fee

Dear Mr. Ament:

I have been retained by the McKinley Anchorage and Moorage Association ("MAMA"), which is a recently-formed nonprofit association whose members consist of those who own moorings in the federally-designated anchorage within the McKinley Park area of the Milwaukee Harbor. MAMA currently represents approximately fifty percent of the mooring owners. We anticipate that within the next few weeks the membership will consist of virtually all who own moorings.

At the last meeting of MAMA, by unanimous vote, the members have authorized me to file a lawsuit against the County and its officials which will challenge the legality of the mooring rental fee. After doing considerable research into this matter, I have concluded that the county's mooring rental fee is illegal under the Wisconsin Constitution and various statutory provisions which specifically protect the rights of mooring owners against unlawful municipal actions. I am aware that you have always enjoyed a cordial relationship with the Milwaukee boating community; therefore, in the interest of preserving this relationship and as a personal courtesy to you, I am notifying you of the results of my research in the hope that we can find some way to avoid litigation. I believe that if such litigation is initiated, the County's potential exposure far exceeds any potential revenue it will obtain from the mooring rental scheme.

WISCONSIN LAW PERTAINING TO MOORINGS

Under the Wisconsin Constitution, Article IX, Section 1: "The State shall have concurrent jurisdiction on all rivers and lakes bordering on 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 Wisconsin Supreme Court, and general principles of admiralty law, recognize that the right to free use of navigable waters includes the right to anchor within those waters.

Consistent with this basic constitutional right, the Wisconsin legislature has limited the ability of municipalities to regulate moorings in the navigable waters of the

state. The statutory provisions are located at Secs. 30.77, 30.772, and 30.773, Stats. While a municipality can enact ordinances establishing and regulating a mooring area, these ordinances must first be submitted and approved by the Wisconsin Department of Natural Resources. Secs. 30.77 & 30.773, Stats. The authority to regulate moorings is limited to restrictions which are designed to prevent moorings from being an obstruction or hazard to navigation. For instance, regulations may restrict the location of moorings to a certain area, require certain markings on mooring buoys, require that a certain distance between moorings be maintained, and limit the number of boats that can be attached to a mooring. While a municipality can require a permit for the placement of use of moorings, once a permit is issued, "no subsequent permit may be required unless the mooring location is changed." Sec. 30.772(3)(d)(2), Stats.

In addition, once a mooring permit has been issued, state law guarantees the owner of the mooring some basic due process rights. The only specified condition for revoking a mooring permit is if the mooring subsequently violates any of the regulations designed to prevent the mooring from being an obstruction or hazard to navigation. Moreover, if a municipality denies or revokes a permit, it must follow the Municipal Administrative Procedure Act (Ch. 68, Stats.), Sec. 30.772(3)(d)(4), Stats., or must follow the procedures of Sec. 30.13(5m) before removing an unlawful mooring, Sec. 30.772(f), Stats. Under this procedure, the mooring owner must be formally served with a notice giving him 50 days to comply with the ordinance. A mooring owner so served with such a notice has the right, within 30 days, to seek a temporary restraining order in the circuit court. The court must conduct a hearing on the temporary restraining order within 20 days and "shall give this hearing precedence over other matters on the court's calendar." Sec. 30.13(5m)(c), Stats.

The provisions of Ch. 30, Stats., are enforceable by any person by suit for declaratory and injunctive relief under Sec. 30.294, Stats. In such suits, the provisions of Sec. 893.80, Stats., relating to notice of injury and claim, are inapplicable. Gillen v. City of Neenah, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

To summarize, the Constitution and the statutory provisions relating to moorings establish the following three general principles:

1. A municipality may, by ordinance approved by the DNR, regulate mooring areas and require permits, but the ordinance must be for the purpose of regulating potential hazards to navigation and issued in a manner similar to other building permits. Once a permit is issued, "no subsequent permit may be required unless the mooring location is changed." Sec. 30.772(3)(d)(2), Stats.
2. A mooring owner, whose mooring has been constructed, located, and

permitted in accordance with municipal ordinance, possesses a property right in the mooring and is guaranteed basic due process protections under both state and federal law.

3. Municipalities cannot use the navigable waters of the state as a source of revenue by requiring users to periodically purchase permits.

APPLICATION OF WISCONSIN LAW TO THE COUNTY'S RENTAL SCHEME

Milwaukee County has demanded that mooring owners sign a lease agreement with the County which will rent to the owner his or her own mooring for an annual fee of \$300.00. The owner will receive no services from the county in exchange for the fee. The owners will continue to incur all maintenance expenses regarding the mooring and will still have to pay annual fees to the Milwaukee Community Sailing Center or the Milwaukee Yacht Club in order to obtain access to their mooring by dinghy or by tender. Under the lease, the County obtains the right to move the mooring owner's boat at any time to any other location and requires the mooring owner to release the County from any and all liability.

In essence, the proposed "lease" deprives the mooring owner of the use of his own property unless he pays \$300.00 to the County. Since the County is not providing any special services in exchange for the "rental" payment, the rental scheme is actually a sham transaction designed to disguise a permit fee or a tax. Since each of the moorings in the anchorage were constructed and placed in accordance with permits issued by the Harbor Commission of the City of Milwaukee when it had jurisdiction over the anchorage, no subsequent permit may be required unless the location of the mooring has changed. Validity of the permits are unaffected by the transfer of jurisdiction over the anchorage from the City to the County unless the mooring location is changed, much like the validity of a building permit would be unaffected by a change in jurisdiction absent remodeling or new construction.

Regardless of the validity of the current permits held by the mooring owners, the County has simply failed to exercise its jurisdiction over the anchorage in a manner consistent with state law. Initially, the County has failed to enact a mooring ordinance and has failed submit any proposed ordinance to the DNR for approval. Moreover, the County has failed to enact an ordinance for any of the legal reasons specified by Wisconsin law. The rental payment is being demanded solely for the purpose of increasing revenue and is not part of a regulatory scheme designed to enhance navigation in the waters of Lake Michigan. Finally, the rental scheme that is being implemented ignores the property and due process rights of the mooring owners.

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CONCLUSION

For the reasons indicated above, the County's current effort to extract a \$300.00 payment from mooring owners is simply illegal and subjects the County and its officials to liability under both state and federal law. While the members of MAMA have authorized me to file a lawsuit on their behalf, we are prepared to meet with you and other county officials in an attempt to find a resolution to this matter that could avoid litigation.

At this time, we are suggesting that such a meeting take place on either April 26 or April 27, 2001. We believe that this would give County officials sufficient time to consider these issues and to consult with corporation counsel. We are anxious to obtain a resolution prior to the May 1st date specified in the proposed lease agreements.

In addition to these legal concerns, MAMA does have some deep concerns about the manner in which the fee was enacted and the public policy issues which are involved. For your information, I am also enclosing an information sheet which discusses some of these issues.

If you are interested in meeting with us, please contact me and I will make the necessary arrangements.

I look forward to hearing from you.

Very truly yours,

John D. Uelmen

JDU:dc

cc: Susan L. Baldwin, Director, Dept. of Parks
Gregory Youngs, Deputy Director of Parks (Operations)
John E. Schapekahn, Asst. Corporation Counsel

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bcc: Gene Cramer
Scott G. Kosteretz
Kathleen Marquardt (MYC Board)
Peter Rieck (MCSC)