

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

Plaintiff,

Case No. 01-CV-003841

vs.

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

Defendants.

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

I. Introduction

This case is before the court on Plaintiff's Motion for Summary Judgment. Since the Parties have entered into a Stipulation of Facts ("SOF"), there are no issues of material fact to be decided and the court may proceed to determine the legal issues. *See Millen v. Thomas*, 201 Wis.2d 675, 682, 550 N.W.2d 134, 137 (Ct.App.1996). Summary Judgment is available to the party establishing an entitlement to judgment as matter of law. Section 802.08(2), Stats.

II. Statement of Facts

The Plaintiff is an organization composed of members owning private sailboat

moorings in McKinley Marina, a marina located in the City and County of Milwaukee. (SOF ¶1). The Defendants are Milwaukee County and various Milwaukee County officials. (SOF ¶¶2-5). At issue is the validity of a \$300.00 annual fee which the County has imposed upon the mooring owners. (SOF ¶30, Exhs. I & J). The County officials maintain that the collection of the fee was authorized by the County Board of Supervisors when it enacted the 2001 budget, which contained a provision authorizing the fee schedule for county parks. (SOF ¶28, Exh. H). The fee schedule listed a new \$300.00 annual fee for “mooring buoys” located in McKinley Marina. (SOF Exh. I). The Defendants maintain that they can impose this fee by virtue of authority granted by the State when it passed 97 Wis. Act 70. (SOF ¶¶23-25, Exh. F). In pertinent part, the Act ceded to the County of Milwaukee title to certain property in and around McKinley Marina which had previously been titled to the City of Milwaukee. (SOF ¶25). This property included the lakebed under McKinley Marina. (SOF ¶25, Exh. F). Act 70 of the Laws of 1997 also created §30.37(7), Stats., which states:

“Milwaukee County, with respect to the land ceded or granted to Milwaukee County, section 3, may directly exercise all of the powers and perform all of the duties conferred on a board of harbor commissioners under ss. 30.34, 30.35, and 30.38, but Milwaukee County may not create a board of harbor commissioners if sub (1)(b) applies. Milwaukee County shall have exclusive jurisdiction over the operation, administration, maintenance, improvement, alteration and repair of any marina facility or marina related anchorage located on this land.”

(SOF Exh. F; 97 Act 70, Sec. 2).

The Plaintiff maintains that the moorings owned by its members were properly

located in a designated public mooring area pursuant to permits issued by the Harbor Commission of the City of Milwaukee when the marina was clearly under its jurisdiction (SOF ¶¶16-18, Exh. E), that the County has failed to enact any ordinance regulating the moorage (SOF ¶29), that the actions taken by County officials are not authorized by municipal or state law, and that imposition of the fee conflicts with the public's constitutional right to free use of the navigable waters of this state under the Public Trust Doctrine.

III. Applicable Procedural Law

The Plaintiff's Complaint states a cause of action for declaratory and injunctive relief under § 30.294, Stats. (Complaint ¶¶ 1 & 2). The Plaintiff has alleged that the Defendants acted in violation of the Public Trust Doctrine embodied in Wis. Const. Art. IX, Sec. 1, and Ch. 30, Stats. Any person can commence an action requesting injunctive relief to abate a violation of the Public Trust Doctrine under § 30.294, Stats. *Gillen v. City of Neenah*, 291 Wis. 2d 806, 820, 580 N.W.2d 628, 633 (1998). The Plaintiff prosecuting such an action against a municipal defendant need not comply with the notice provisions of § 893.80, Stats. *Id.* at 826, 580 N.W.2d at 635.

The Plaintiff has also alleged the elements of a cause of action under 42 U.S.C. § 1983. (Complaint ¶¶ 28 & 29).¹ Section 1983 is not a source of substantive rights but rather

¹Section 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

the principal civil remedy for the private enforcement of the federal constitution against state and local governments and their employees. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). Actions under § 1983 may be brought in state court. *Riedy v. Sperry*, 83 Wis.2d 158, 160, 265 N.W.2d 475, 477 (1978). To establish a claim cognizable under § 1983, a party must show that a person acting under color of state law deprived him or her of a federal constitutional right. *Id.* Local governmental units are "persons" within the meaning of § 1983. See *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A municipality is subject to liability under § 1983 if "the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*

If a complaint alleges that a person acting under color of any state statute, ordinance, regulation, custom or usage has deprived the plaintiff of a right secured by the federal constitution, it is not necessary that the complaint expressly state that it is brought under § 1983. *Thorp v. Town of Lisbon*, 2000 WI 60 ¶20, 235 Wis. 2d 610,624, 612 N.W.2d 59, 68. To be actionable under § 1983, the complaint must simply allege that a person acting under color of state law deprived the plaintiff of a right under federal law or the federal constitution. *Id.* A plaintiff filing an action under § 1983 need not comply with the notice provisions of § 893.80, Stats. *Id.*, *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"

(1988).

The rights guaranteed under the taking clause of the Fifth Amendment and the equal-protection and due-process clauses of the Fourteenth Amendment to the United States Constitution can constitute bases under § 1983 for challenging actions by municipalities and their officers which deprive a person of the right to free use of the navigable waters of this state. *Gillen* at 819 n. 8, 580 N.W.2d at 632 n. 8; *Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839, 844 (1902); also *see, e.g., Thorp* at ¶¶ 37-50.

IV. Applicable Substantive Law.

A. The Wisconsin Constitution and the Public Trust Doctrine.

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.***” [Emphasis added].

This provision of the Constitution embodies a concept known as the Public Trust Doctrine. Under the Public Trust Doctrine “the state holds the beds of navigable waters in trust for public use.” *Borsellino v. DNR*, 232 Wis.2d 430, 443, 606 N.W.2d 255 (Ct. App. 1999). In fact, the Public Trust Doctrine precedes our state constitution and can be traced back to Article IV of the Northwest Ordinance of 1787. *ABKA Limited Partnership v.*

Wisconsin D.N.R., 2001 WI APP 223 ¶29 n.4, 247 Wis.2d 793, 635 N.W.2d 168, 177. For more than one-hundred years, the supreme court of this state has recognized that under this doctrine “the navigable waters of the state have substantially the incidents of tidal waters at common law; that the title to the beds of such waters was reserved for the state by the ordinance of 1787, and vested in it at the instant it was admitted into the Union, to preserve the public character of such waters with all such incidents; and that the state never has and never can constitutionally impair the trust.” *Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839, 843-844 (1902) (and cases cited therein).

As the trustee of lakebed lands, “[t]he state has no proprietary interest in them,” *McLennan v. Prentice*, 85 Wis. 427, 444, 55 N.W. 764 (1893), and cannot use its position of trustee for revenue purposes to its own pecuniary advantage, *Rosmiller*, 89 N.W. at 843 (to allow such conduct “would be a very demoralizing example of how the subject of a trust may be converted to the private benefit of the trustee.”).

Although the public trust doctrine was originally designed to protect commercial navigation, it has been expanded to protect the public's use of navigable waters for purely recreational and nonmonetary purposes. *Gillen* at ¶24; *ABKA Limited Partnership* at ¶30. The public's right to free use of navigable waters includes such recreational uses as “sailing, rowing, canoeing, bathing, fishing, hunting, skating, and other public purposes.” *Nekoosa Edwards Paper Co. v. Railroad Commission*, 201 Wis. 40, 228 N.W. 144, 147 (1929). Generally, the right to navigate by sailing includes the right to anchor. *See e.g., Milwaukee Gas Light Co. v. Schooner “Gamecock,”* 23 Wis. 144, 99 Am.Dec. 138 (1868).

B. The Lakebed Grant.

The Defendants have taken the position that the County is free to impose any fee it desires upon private mooring owners because the legislature ceded full control of the area to the County by granting it title to the lakebed under the marina. (Answer ¶¶ 35, 38, & 40). The position taken by the Defendants demonstrates a profound misunderstanding of the nature of a lakebed grant and the limited title which has been conveyed.

While under the Wisconsin Constitution the state nominally holds title to the lakebeds underneath all navigable waters, the title it holds is merely one of public trustee, with equitable title belonging to the public. *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820, 830 (1927); *McLennan v. Prentice*, 85 Wis. 427, 444, 55 N.W. 764, 770 (1893). While the Legislature can nominally convey title to these lands in furtherance of the public trust, under the Wisconsin Constitution, “the state is powerless to divest itself of its trusteeship as to the submerged lands under navigable waters.” *Priewe v. Wisconsin State Land & Imp. Co.*, 103 Wis. 537, 548, 79 N.W. 780, 781 (1899). The state “cannot abdicate its trust in relation to them, and while it may make a grant for 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.” *McLennan* at 445, 55 N.W. at 770. A lakebed grant does not actually divest the state of title to the land, but merely permits the grantee to use the land for a public purpose. *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674, 678 (1957). Also see, e.g., *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 454 (1892) (submerged lands can never “be placed entirely beyond the direction and control of the State.”). While

the legislature can delegate its trust responsibilities to other units of government, such a delegation must “be in furtherance of the trust” and must not “block the advancement of paramount interests.” *Wisconsin’s Env’tl. Decade, Inc. v. Department of Natural Resources*, 85 Wis. 2d 518, 534, 271 N.W.2d 69, 76 (Wis. 1978); *Muench v. Public Serv. Comm’n*, 262 Wis. 492, 515m, 55 N.W.2d 40, 46 (Wis. 1952) (holding that legislature’s delegation of trust responsibilities to county boards was unconstitutional); *City of Madison v. Tolzmann*, 7 Wis. 2d 570, 575, 97 N.W.2d 513, 516 (Wis. 1959) (holding Madison’s licensing of boats unconstitutional because the use of navigable waters is a matter of statewide concern and can only be regulated by a trustee for all of the people).

Consistent with the law of trusts, the state cannot delegate to local municipalities trust duties requiring an exercise of judgment and discretion, although it may delegate duties which are purely ministerial. *Muench*, 261 Wis. at 515m, 97 N.W.2d at 516. 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.

The Wisconsin legislature has established the Department of Natural Resources as “the central unit of state government’ in water . . . management matters” and, under this mandate, the “state must maintain pre-eminence in the control of navigable waters in the

state.” *Wisconsin’s Env’tl. Decade* at 529, 271 N.W.2d at 74. Although the legislature can also delegate its trust responsibilities to local governments, it cannot give local governments the opportunity to impact the use of trust resources in a way that favors localized interests. *See, e.g., City of Madison v. Tolzmann*, 7 Wis. 2d at 576, 97 N.W. 2d at 517.

C. The Limited Authority Granted to Milwaukee County.

Sec. 30.37(7), Stats., permits Milwaukee County to “directly exercise all of the powers and perform all of the duties conferred on a board of harbor commissioners under §§ 30.34, 30.35 30.38.” This is a limited grant of authority required by the Wisconsin Constitution whenever the State delegates public trust duties to a local unit of government. *Menzer* at 81-85, 186 N.W.2d at 294-97; *Muench* at 515m, 55 N.W.2d at 46.

Under Sec. 30.37(7), Milwaukee County was granted the limited authority to create a harbor fund financed through notes, bonds or assignments of net profits (Sec. 30.34, Stats.); to issue bonds or notes authorized by ordinance for the harbor fund (Sec. 30.35, Stats.); and to exercise other specific powers and duties conferred upon boards of harbor commissioners, including the power to fix fees (Sec. 30.38(9), Stats.). In pertinent part, Sec. 30.38(9), Stats. reads as follows:

“A board of harbor commissioners shall fix and regulate all fees and charges for use of the publicly owned and operated harbor facilities and for other services rendered....Equal fees shall be charged for equal services.”

Whether a municipality can use the authority under Sec. 30.38(9), Stats., to impose a fee upon private piers and moorings was specifically addressed by the Wisconsin Court of Appeals in *Racine Marina Associates v. City of Racine*, 175 Wis.2d 614, 499 N.W.2d 715 (Ct.

App. 1993). In *Racine Marina Associates*, the Court considered the validity of annual fees imposed by the City of Racine’s Harbor Commission upon owners of private slips and moorings. 174 Wis.2d at 617, n. 3, 499 N.W.2d at 717, n. 3. The Court rejected the Commission’s argument that the fee was validly imposed upon the users of public harbor facilities and determined that it was actually an illegal tax upon private property which the Commission was not authorized to levy. 174 Wis. 2d at 620-621; 499 N.W.2d. at 718.

The County’s mooring fee here is virtually identical to the fee rejected by the court in *Racine Marina Associates*. Like Racine’s fees, Milwaukee County’s fees are not imposed upon users of public services or facilities, but upon owners of private property. (SOF ¶14). In response to interrogatories posed by the Plaintiff, the County failed to identify any public facilities that were being provided to mooring owners in exchange for the \$300.00 fee. (SOF ¶134, Exh. M, Responses 6 & 7).² According to the Defendants’ Interrogatory Responses, the fee is assessed for the use of “safe water” protected by “interior and

²“**Interrogatory No. 6.** Describe in Detail what Milwaukee County is renting to those persons who have signed a Mooring Rental Contract in the form identified as Exhibit C to Plaintiff’s First Set of Requests for Admission.

Response: They are securing a position in and on Lake Michigan, absent which they would be considered trespassers since they are not shoreline property owners, protected by interior and exterior break-walling.

Interrogatory No. 7. To the extent that it is different than your answer to the previous Interrogatory, describe what Milwaukee County provided to boat owners in exchange for payment of the \$300.00 mooring fee.

Response: A prime location of safe water, safe harbor protected by interior and exterior break-walling that no-other non-boating residents of Milwaukee have the right to interfere with.”

exterior break-wallings.” If, as the Defendants contend, the fee is for use of navigable waters, the fee is constitutionally invalid. Article IX § 1, Wis. Const.; *City of Madison*, 7 Wis. 2d at 576; 97 N.W.2d at 517. If the fee is for providing exterior and interior break-wallings, it is not a fee for public services or facilities authorized by Sec. 30.38(9) and is therefore invalid. *Racine Marina Associates* at 620, 499 N.W.2d at 718.

In *Racine Marina Associates*, the Court of Appeals rejected the City of Racine’s position that the public services or facilities referenced in Sec. 30.38(9), Stats., could include services or facilities relating to the public break wall. Initially, the City argued that fees were imposed for the upkeep, repair and maintenance expenses of facilities such as “the north and south breakwaters.” 175 Wis. 2d at 619, n.5, 499 N.W.2d at 718. The court rejected this position and held that: “‘Services rendered,’ as used in sec. 30.38(9), Stats., does not contemplate the general upkeep, maintenance and repair of public facilities. The phrase encompasses services directly rendered for which the recipient could pay on a per job or per hour basis. Examples could be towing for disabled boats or pier removal.” *Id.* at 620. Similarly, the Court rejected the City’s argument that it could assess the fee because private slip owners were users of public facilities such as breakwaters. The court determined that the private property *owners* were not necessarily the *users* of the facilities and, that since the fee authorized by statute can only be imposed upon users, the fee was in actuality a tax upon private property which was not authorized by statute. *Id.* at 620-621; 499 N.W.2d at 717.

Having determined that Racine’s fee was not imposed upon users of harbor

facilities, the Court of Appeals did not consider the third basis upon which the trial court had originally declared the fees invalid: the fee structure did not impose equal fees for all boaters who have equal use of the facilities, as required by Sec. 30.38(9), Stats. *Id.* at 618, 499 N.W.2d at 717. Nevertheless, this is yet another reason why the fee imposed by Milwaukee County is not authorized by Sec. 30.38(9), Stats. The boaters who “use” the break-walling include those who: (1) rent publicly owned slips from the County; (2) rent privately owned slips from the Milwaukee Yacht Club; (3) launch boats from ramps located throughout the County; (4) launch boats from hoisting cranes located at the Milwaukee Yacht Club, the Milwaukee Sailing Center, and privately owned boat yards; and (5) enter the break-walled area from the surrounding waters of Lake Michigan. (SOF ¶15). Moreover, the County has exempted the owners of 30 moorings from the payment of any fee. (SOF ¶32). Since the fee is not imposed on any of these users, it is not imposed “equally ” and is therefore not a fee authorized by Sec. 30.38(9), Stats.

D. The City Permits Issued to Mooring Owners.

It is undisputed that the mooring owners were issued permits to locate and place their moorings in the designated mooring area by the Harbor Commission of the City of Milwaukee at a time when the City clearly had jurisdiction over McKinley Marina. (SOF ¶¶ 16-18). The mooring permits were issued pursuant to Sec. 81-075 of the Milwaukee Code of Ordinances, which was enacted by the City under the authority of § 30.772(3), Stats. (SOF ¶17 Exh. E). Permits under § 30.772(3) are issued much like building permits, and “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 designated public mooring area is specified in the Regulations of the United States Coast Guard enacted pursuant to the federal Ports and Waterways Safety Act. 33 C.F.R. Sec. 110.80.³ (SOF ¶11, Exh. C). The designated mooring area is also depicted on U.S. Gov. Chart No. 14924. (SOF ¶12, Exh. D).

The permit fee charged by the City of Milwaukee was \$25.00. (SOF ¶¶ 17-18, Exh. E). This fee was set pursuant to a regulatory ordinance and consistent with state law requiring that the amount of the fee 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* at 621, 498 N.W.2d at 718. The Defendants’ scheme imposes a \$300.00 annual rental fee upon private mooring owners for use of “safe water.” The amount of this fee, the manner of its collection (by rental contract), and the lack of any regulatory ordinance are all demonstrative of a fee imposed solely for revenue purposes. The fiscal note attached to the budget supports this conclusion. (SOF ¶28, Exh. G: fee will result in a “revenue increase of \$30,000”). This is clearly a tax, not a fee. Since the Wisconsin Statutes do not authorize Milwaukee County to levy such a tax, the so-called fee is illegal. *Racine Marina Associates* at 621, 498 N.W.2d at 718; also see *Rosmiller*, 89 N.W.

³The mooring area is defined “as the water area east of McKinley Park enclosed by a line beginning at McKinley Park Jetty Light, thence 090 deg., 500 feet to a point on the United States breakwater; thence northerly and northwesterly following the breakwater, piers, jetty and natural shoreline to the point of beginning.”

at 843.

E. The Unauthorized Rental Agreements.

Finally, assuming for the sake of argument that it would be constitutionally possible for the County to lease navigable water to the mooring owners, the last issue posed by the County's rental scheme is whether the budget resolution approving the "mooring buoy" fee actually authorized County officials to enter into leases with the mooring owners. Youngs demanded that each mooring owner sign a "Mooring Rental Contract." (SOF ¶ 30, Exhs. I & J). The contract restricts usage of the mooring to certain times of the year (SOF Exh. J ¶5), grants the Marina Manager authority to move any vessel to any other slip, mooring or dry mooring (SOF Exh. J ¶6), requires the owners to treat their own property as if they were tenants (SOF Exh. J ¶4) and absolves the Marina of any liability for any claim and for any action (SOF Exh. J ¶¶ 4, 8, & 10).

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. Section 59.02(1), Stats. The County has never enacted a resolution or ordinance authorizing or accepting any leases between the County and the mooring owners. Without such an enabling ordinance or resolution, County officials simply do not have the authority to force the mooring owner to enter into the "rental contracts." Moreover, the County has created two riparian leaseholders when it entered into leases with the Milwaukee Yacht Club and the Milwaukee Community Sailing Center. (SOF ¶¶ 9-10, Exhs. A & B). The County obviously entered into these leases knowing that these leaseholders and their members used the

property to obtain access to the Anchorage and that these riparian rights were what made the property valuable to them. The mooring owners are all members of one or both of these organizations and obtain shore access to their moorings through property leased by these organizations from the County. (SOF ¶13). Having granted them these riparian rights by lease, the County simply cannot force the same people to rent them again through the use of a sham rental scheme.

IV. CONCLUSION

By their own admission, the Defendants have attempted to extract from the Plaintiff's members a \$300.00 annual fee 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. The state's title to navigable waters, and the beds underneath those waters, is merely that of trustee. The state has no proprietary interest in the navigable waters and therefore cannot transfer a proprietary interest to its municipalities. A lakebed grant merely delegates certain ministerial duties of the public trustee to a municipality and such a grant is only valid if the state retains substantial oversight over the municipality's administration of the ministerial duties. The County's authority to impose fees upon users of the marina is expressly limited by Sec. 30.38(9), Stats. The fees are not authorized by this statute and are actually an illegal tax upon personal property. Finally, even if it was theoretically possible for the County to extract these fees as "rent," the County has failed to enact an enabling ordinance or resolution and has already granted the mooring owners the riparian right to use the

Anchorage when it leased property abetting the Anchorage to the Milwaukee Yacht Club and the Milwaukee Community Sailing Center.

For these reasons, the Plaintiff respectfully requests the court to grant its motion for summary judgment by declaring the fees invalid and by enjoining the Defendants from taking any further action to collect these fees.

Dated at Milwaukee, Wisconsin this __ day of January, 2002.

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