

**STATE OF WISCONSIN
SUPREME COURT**

APPEAL No. 08-AP-1523

ROCK-KOSHKONONG LAKE DISTRICT,
ROCK RIVER-KOSHKONONG ASSOCIATION, INC. AND
LAKE KOSHKONONG RECREATIONAL ASSOCIATION, INC.,

Petitioner-Appellants,

v.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent-Respondent,

LAKE KOSHKONONG WETLAND ASSOCIATION, INC. AND
THEIBEAU HUNTING CLUB

Intervenors- Respondents.

***JOINT AMICUS CURIAE BRIEF OF THE WISCONSIN REALTORS®
ASSOCIATION AND THE WISCONSIN RESTAURANT ASSOCIATION,
INC., IN SUPPORT OF THE PETITION FOR REVIEW
BY ROCK-KOSHKONONG RECREATIONAL ASSOCIATION, INC.***

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INTRODUCTION

The Wisconsin REALTORS® Association (REALTORS®), on behalf of its approximately 12,500 members, and the Wisconsin Restaurant Association (WRA), on behalf of its thousands of food service businesses, support the Petition for Review filed by the Rock-Koshkonong Lake District. The REALTORS® and WRA are concerned about the impact of the court of appeals' decision on thousands of waterfront properties located adjacent to waterways with water levels controlled by dams that are managed by the Wisconsin Department of Natural Resources (DNR) under Wis. Stat. § 31.02(1)¹. Specifically, we are concerned that the court of appeals' interpretation of Wis. Stat. § 31.02(1) authorizes the DNR to completely ignore any impact on property values in deciding whether to raise or lower water levels of lakes, rivers and other waterways controlled by dams.

If allowed to stand, the court of appeals' decision would be in conflict with well-established state and federal law and would create tremendous uncertainty and hardship for thousands of waterfront property owners throughout Wisconsin.

¹ Unless otherwise noted, all references to the Wisconsin Statutes are to the 2009-10 version.

LAW AND ARGUMENT

- I. THE COURT SHOULD GRANT THE PETITION BECAUSE A DECISION BY THE COURT WILL HELP CLARIFY THE MEANING OF WIS. STAT. § 31.02(1), WHICH WILL HAVE A SIGNIFICANT STATEWIDE IMPACT.

One of the criteria this Court considers when granting a petition for review is whether a decision by the court will help clarify the law and “the question presented is a novel one, the resolution of which will have statewide impact.” Wis. Stat. § 809.62(1r)(c). The Rock-Koshkonong Lake District’s petition in this case satisfies this criterion.

One of the fundamental questions presented in this case is whether the court of appeals erred in interpreting the scope of the DNR’s authority to issue water level orders under Wis. Stat. § 31.02(1). Specifically, whether the obligation to “protect . . . property” under Wis. Stat. § 31.02(1) requires the DNR to consider impacts of adjusting water levels on property values and economic incomes of riparian owners adjacent to the affected waterway.

In 1915, the Wisconsin Legislature enacted Section 31.02(1) of the Wisconsin Statutes, which authorizes the DNR to regulate water levels on

impounded lakes.² *See* Chapter 380, Laws of 1915. The statute requires the DNR to set water levels “in the interest of public rights in navigable waters or to promote safety and protect life, health and property.” Wis. Stat. § 31.02(1). Since this time, the legislature has not amended the language in the statute to further define the DNR’s duty to “protect . . . property,” nor has the Wisconsin Supreme Court had the opportunity to interpret its meaning. This case presents the first opportunity for this Court to do so.

Wisconsin has thousands of homes and businesses located on over 5,000 lakes with water levels controlled by dams. *See Wisconsin Lakes*, Wis. Dep’t. of Nat. Res., PUB-FH-800 (2009) at 11; *see also*, Statewide Dams spreadsheet posted on DNR’s Dam Safety Section webpage at <http://dnr.wi.gov/org/water/wm/dsfm/dams/datacentral.html> (updated as of December 2010). The ability of the DNR to raise and lower the water levels on these lakes has a direct impact upon the use and value of these homes and businesses. If the DNR is able to raise and lower water levels on these lakes without considering these impacts, owners of affected

² In 1915, this statute was numbered § 1596-2.1 and the state Railroad Commission was given the authority to regulate water levels. The legislature later renumbered this statute and gave the DNR this authority.

property will face tremendous uncertainty as to whether property that has access to water today, will have similar access to water tomorrow.

Accordingly, this Court should grant the petition for review because the questions presented in this case are novel, and the resolution of these questions will have a direct impact on waterfront property owners throughout the state.

II. THE ABILITY OF THE DNR TO RAISE AND LOWER WATER LEVELS WITHOUT CONSIDERING THE IMPACT ON THE USE AND VALUE OF PROPERTY COULD RESULT IN REGULATORY TAKINGS.

Another criterion this Court considers when granting a petition for review is whether the question presented is “a real and significant question of federal or state constitutional law.” Wis. Stat. § 809.62(1r)(a). The Rock-Koshkonong Lake District’s petition in this case satisfies this criterion.

The blanket authority given by the court of appeals to the DNR to raise and lower water levels on lakes controlled by dams without regard to the impact on the use and value of affected property raises regulatory takings concerns. If the DNR is not required to consider the impact on the use and value of affected property before lowering the water level of a lake under

any circumstance, affected property owners could experience severe economic hardships warranting the payment of just compensation.

A. A Regulatory Taking May Result When Government Actions Have A Significant Economic Impact On Property Owners And Interfere With Their Reasonable Investment-Backed Expectations.

The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that private property shall not “be taken for public use, without just compensation.” Article I, Section 13 of the Wisconsin Constitution provides that “[t]he property of no person shall be taken for public use without just compensation therefore.”

This Court has recognized two types of regulatory actions that constitute a “categorical taking” without requiring a “case-specific inquiry into the public interest advanced in support of the restraint.” *See R. W. Docks & Slips v. State*, 244 Wis. 2d 497, 507, 628 N.W.2d 781 (2001) (citing *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1015 (1992)). The first category is a “physical taking,” involving “regulatory actions that bring about some form of physical ‘invasion’ of private property.” *Id*; see also *Nollan v. California Coastal Comm’n*, 483 U.S. 825

(1987) (declaring a state-imposed easement across private property to be a ‘permanent physical occupation’ requiring compensation). The second category is a “regulatory taking” which “includes regulatory actions that deny ‘all economically beneficial or productive use of land.’” *Id.*

A third category of “taking” also exists, but is related to those government actions that do not constitute a physical invasion of property and which “fall short of eliminating all economically beneficial use.” *Palazollo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Under this category, a taking may occur upon consideration of a variety of factors including the government action’s “economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” *Id.*

By allowing the DNR to raise or lower lake levels without regard to the impact upon the use or value of adjacent waterfront property, the court of appeals’ interpretation of Wis. Stat. § 31.02(1) could result in the taking of private property without just compensation. While a determination as to whether a taking actually occurred would depend upon a variety of factors including the extent to which the water levels were lowered, the economic

impact on the affected property owners, and the extent to which the lowering of the water interfered with the reasonable investment-backed expectations of the affected property owners, the DNR's failure to even consider the impacts on the use and value of affected waterfront property will likely result in more property owners experiencing significant economic hardships, which will likely lead to more regulatory takings actions.

1. Lowering of water levels can result in significant decreases in property values.

Waterfront property is among the most valuable types of property in Wisconsin. People prefer to own waterfront property for a variety of reasons including the scenic views, recreational opportunities and the investment potential. *See Selecting Lakefront Property*, Wisconsin Association of Lakes Website, <http://www.wisconsinlakes.org/lakeliving.html>; *see also*, Forrest A. Westin, *On the Waterfront: A 25 Year Study of the Relative Risk & Reward of Florida Single-Family Waterfront and Inland Homes (1977-2002)*, (September 2003), at 75. Prices are generally higher for waterfront property because of the unique locational attributes and the scarcity in supply. *See Westin, id.* at 74.

While the value of waterfront property can depend upon a variety of factors, a property's proximity to the water and the depth of the lake can have a direct impact on the value. See Dr. Russell Kashian, *Lake Drawdown: A Debate on the Value of 2 Inches of Water*, Working Paper 06-02, University of Wisconsin-Whitewater (February 18, 2007), at 4. In a study conducted on Lake Koshkonong, the value of property adjacent to the water experienced a significant reduction due to a two-inch reduction in the lake's water levels. *Id.* at 2. Specifically, this study concluded that a two-inch reduction in water depth would increase the distance between homes and the shoreline and reduce the rate of value of appreciation, resulting in average loss of wealth of \$13,435 per household. *Id.* at 13. Other similar studies from around the country reached the same conclusion – the value of a waterfront home decreases the further the property is located from the water, and the smaller the amount of shoreline frontage. *Id.* at 7.

2. Lowering of water levels can interfere with the investment-backed expectations of property owners.

Property owners purchase waterfront property because of the direct access to the water and the recreational opportunities that it provides.

Many families purchase homes on the water so that they can enjoy swimming, fishing and boating on the water directly adjacent to their

property. These homeowners invest thousands of dollars on piers, boats and other recreational vehicles with the expectation that they will be able to use them to aid them in their enjoyment of their property.

Many business owners purchase waterfront property with the expectation that their customers will be able to access their businesses directly from the water. In fact, some businesses such as restaurants, marinas and gas stations rely exclusively on customers who access their businesses from the water. Businesses invest thousands of dollars on piers, decks, retaining walls, and other improvements to their property to attract these boating customers to their businesses.

In addition to affecting the value of adjacent waterfront property, lowering of water levels can directly impact the ability of homeowners and businesses to use their shorelines and access the water. For example, a lowering of the water level in a lake could result in the following: (a) a loss in the functional use of piers for activities such as swimming, fishing and boating; (b) the inability to access the shoreline by boats; (c) a degradation of the shoreline's appearance and the exposure of large, muddy areas; (d) a reduction in the ability of larger boats to access certain areas; and (e) the

exposure of rocks, stumps and other obstacles which create a safety hazard for boaters. *See* Kashian, at 3-4.

Because the DNR's ability to raise and lower lake water levels without considering the impact on the value of adjacent waterfront property could result in a significant economic impact on property owners and interfere with their reasonable investment-backed expectations, this Court should grant the petition for review.

CONCLUSION

This case raises fundamental private property rights questions, which have not been addressed by the legislature or this Court. Therefore, we believe this case is appropriate for review because it provides this Court the opportunity to clarify the scope of the DNR's authority to regulate water levels without regard to the impact on use, enjoyment and value of affected waterfront property.

Accordingly, we respectfully request that this Court grant the Rock-Koshkonong Lake District's Petition for Review and to clarify DNR's responsibility under Wis. Stat. § 31.02(1) to consider the impact on property values in deciding whether to raise or lower water levels of waterways controlled by dams.

Dated this 28th day of September, 2011.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1910 words.

Thomas D. Larson

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the court and served on all parties and counsel of record.

Dated this 28th day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that:

I have caused three true and correct copies of this Joint *Amicus Curiae* Brief in Support of the Petition for Review By the Rock-Koshkonong Lake District to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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