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Godfrey & Kahn Victory in Lake Koshkonong Water Law Case

On July 16, 2013, the Wisconsin Supreme Court issued its decision in the *Rock-Koshkonong Lake District v. DNR* case. The decision is a significant victory for our Godfrey & Kahn clients and businesses, municipalities and property owners throughout the state. Godfrey & Kahn and the Wheeler, Van Sickle & Anderson law firms acted as co-counsel in this case on behalf of the Lake District and two business/recreation associations in the area. There were five amicus briefs filed in the case by Wisconsin Manufacturers & Commerce, the Wisconsin Realtors Association, and three environmental groups. Joanne Kloppenburg and Cynthia Hirsch of the Attorney General's office represented the Department of Natural Resources (DNR).

Justice Prosser wrote the majority opinion and was joined by Justices Roggensack, Ziegler and Gableman. Justice Crooks wrote the dissenting opinion and was joined by Chief Justice Abrahamson and Justice Bradley.

The most relevant part of the court's decision from the business and municipal perspectives was its discussion of the public trust doctrine and the relevance of economic testimony in water level cases for DNR decision-making on impounded lakes (there are over 2000 such lakes in Wisconsin). The majority agreed with our clients that the public trust doctrine does NOT extend beyond the ordinary high water mark nor extend to adjacent private, non-navigable wetlands. In reaching its decision the Supreme Court set significant parameters on the public trust doctrine, which will be very helpful going forward in protecting private property.

Some of the excerpts from the majority decision rejecting DNR's and Department of Justice's (DOJ) attempt to greatly expand DNR's regulatory authority through the public trust doctrine include the following:

- "Eliminating the element of 'navigability' from the public trust doctrine would remove one of the prerequisites for the DNR's constitutional basis for regulating and controlling water and land. Applying the public trust doctrine to non-navigable land above the ordinary high water mark (OHWM) would eliminate the rationale for the doctrine. The ramifications for private property owners could be very significant."
- "Contemplating the question of ownership is important because the public trust doctrine implicates state ownership or virtual state ownership—by virtue of its trust responsibility—of land under navigable waters. If the public trust were extended to cover wetlands that are not navigable, it would create significant questions about ownership of and trespass on private land, and it would be difficult to cabin expansion of the state's new constitutionally based jurisdiction over private land."
- "There is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream."

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

- “Article IX, Section 1 [of the Wisconsin Constitution], does not vest the state with constitutional trust powers to ‘protect’ scenic beauty by regulating non-navigable land bordering lakes and rivers. As will be noted, the state may have statutory authority to weigh in on scenic beauty beyond its public trust jurisdiction, but giving the state constitutional trust power to regulate ‘scenic beauty’ would arguably give the state authority to regulate any private land that could be seen from navigable waters.”

In addition to the public trust doctrine issue, the Supreme Court held that the DNR must consider the economic impacts on local businesses, municipalities and property owners on the lake when deciding whether to raise or lower water levels via a dam on the lake. DNR argued that it had no such duty.

The Supreme Court ruled that the economic factors must be considered by the DNR and balanced with other relevant factors when making such a decision.

Overall, this is a significant victory for our clients (the Lake Koshkonong Lake District and two business/recreation associations in the Lake Koshkonong area) as well as municipalities, businesses and property owners in Wisconsin.

Please feel free to contact any member of the Godfrey & Kahn Environmental & Energies Strategies Team if you would like more information about this case.

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