

**Department of Natural Resources Report on
2019 Senate Bill 306 and 2019 Assembly Bill 333
Prepared pursuant to Wis. Stat. § 13.097
July 15, 2019**

When legislation proposes to convey lake bed or amend a prior conveyance of lake bed, Wis. Stat. § 13.097(2) requires the Department of Natural Resources to prepare a report on the legislation. Wis. Stat. § 13.097(4) requires the department to provide certain findings in the report; Wis. Stat. § 13.097(6) requires the department to include in the report its conclusion on whether the legislation is consistent with protecting and enhancing a public trust purpose. Wis. Stat. § 13.097(1)(c) defines “Public trust purpose” as “a purpose in furtherance of the public trust in navigable waters that is established under article IX, section 1, of the constitution.”

This report is prepared pursuant to Wis. Stat. § 13.097. The report concerns 2019 Senate Bill 306 and 2019 Assembly Bill 333, which propose to amend the terms of three prior lake bed grants to the City of Racine.

EXECUTIVE SUMMARY:

Under Article IX, § 1 of the Wisconsin Constitution, the State of Wisconsin holds all navigable waters in trust for the benefit of the public¹. This trust responsibility is known as the public trust doctrine, which preserves the public rights and interest in navigable waters for fishing and hunting, boating and swimming, water quality and the enjoyment of natural scenic beauty². These public rights and interest in navigable waters, and the corresponding duty of the State to preserve and promote them, are considered a fundamental tenet of the Wisconsin Constitution and are to be broadly construed³.

As part of the public trust responsibility, the State of Wisconsin holds title to the beds of navigable lakes in trust for the public⁴. Accordingly, the State may not make any substantial lake bed grant for a purely private purpose⁵. The State may however authorize limited encroachments on the beds of navigable waters where the public interest will be served, subject to constitutional limitations⁶. The legislature has previously exercised this authority by granting lake bed to the City of Racine for certain public purposes, including public park and boulevard uses.

¹ *Muench v. Pub. Serv. Comm'n.*, 261 Wis. 492, 501, 53 N.W.2d 514 (Wis. 1952).

² *See Muench v. Pub. Serv. Comm'n.*, 261 Wis. 492, 501, 53 N.W.2d 514 (Wis. 1952).
Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (Wis. 1898), *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (Wis. 1914), *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 228 N.W. 144 (Wis. 1930), *See Reuter v. Dept. of Nat. Resources*, 43 Wis. 2d 272, 168 N.W.2d 860 (Wis. 1969), *Muench v. PSC, Clafin v. Dept. of Nat. Resources*, 58 Wis. 2d 182, 206 N.W.2d 182 (Wis. 1973), Wis. Stat. s. 31.06

³ *See Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (Wis. 1914), *Hilton ex rel. Pages Homeowners Assn. v. DNR*, 2006 WI 84, *Wis. Env'tl. Decade, Inc. v. DNR*, 85 Wis.2d 518, 526, 271 N.W.2d 69 (Wis. 1978).

⁴ *Muench v. Pub. Serv. Comm'n.*, 261 Wis. 492, 501, 53 N.W.2d 514 (Wis. 1952).

⁵ *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820, 826 (Wis. 1927), citing *Illinois Steel Co.*

⁶ *State v. Pub. Serv. Comm'n.*, 275 Wis. 112, 81 N.W.2d 71 (Wis. 1957)

Companion bills 2019 Senate Bill 306 and Assembly Bill 333 alter these grants to the City of Racine by authorizing private development including a hotel and other unspecified uses within the lake bed area. Such private uses have not been held to be consistent with the public interest in navigable waters. The department has reviewed the legislation and has concluded that the legislation is not consistent with protecting and enhancing a public trust purpose. As explained further in this report, the department reaches this conclusion because:

- The legislation would authorize private uses on a substantial portion of the lake bed previously granted to the City of Racine for public purposes. These uses are neither minor nor incidental to free public trust purposes.
- The loss of opportunities for recreation and the enjoyment of natural scenic beauty within the lake bed areas as a result of private development will outweigh the potential enhancement of such uses within a limited portion of the area.
- The department is not aware of any similar lake bed grant that has been found to be consistent with the State's constitutional public trust duty and authority.
- The legislation does not contain restrictions or require management controls that assure that the lake bed area will be used only for public trust purposes.

I. DESCRIPTION OF THE PRIOR CONVEYANCES AND HOW THEY ARE AMENDED

Wis. Stat. § 13.097(2)(b) requires the department's report to describe the prior conveyance and how it is amended by the proposed legislation. The legislation amends the terms of lake bed grants made to the city of Racine in 1917, 1937, and 1963. The original grants of lake bed that are proposed to be amended read as follows:

Chapter 325, laws of 1917, section 1 (amending chapter 383, laws of 1911):

All right, title and interest of the state of Wisconsin in and to the following described submerged lands, to wit: Blocks fifteen, sixteen, twenty-nine and thirty, according to the original plat of Racine, the same being submerged lands lying east of Michigan Street, between the south line of Third street and the north line of Seventh street, and being situated in section nine, township three north, range twenty-three east, is hereby granted and ceded to the city of Racine. *Blocks sixteen, twenty-nine and thirty of the above described land lying between the south line of Fourth street and the north line of Seventh street* to be held and used by said city forever for the purpose of a public park. (amended text emphasized in original)

Chapter 318, laws of 1937, section 1:

All right, title and interest of the state of Wisconsin in and to the following two parcels of land adjacent to the shore of Lake Michigan, and partly submerged, constituting a part of the bed of

Lake Michigan on the eastern boundary of the city of Racine are hereby granted and ceded to said city of Racine, namely :

Parcel No. 1. A strip of partly submerged land, constituting the bed of Lake Michigan, extending from the shore into Lake Michigan to a line parallel to and fifty feet east of the present breakwater and lying between the present harbor entrance of said city, or approximately 5th street extended, and the center line of 10th street extended, to be held and used by said city forever to straighten out the existing irregular shore, to fill in the shallow and unwholesome bed of the lake, to protect the harbor entrance and for the use of public docks, wharves, highways and for public park and boulevard purposes.

... [Parcel No. 2 omitted]

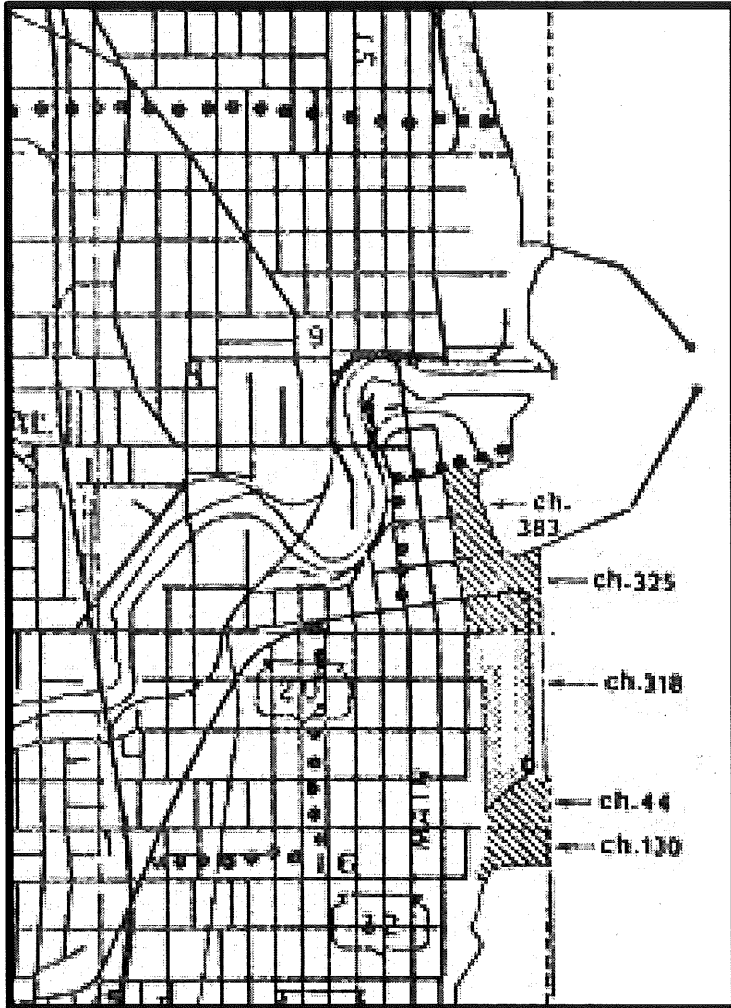
Chapter 44, laws of 1963:

All the right, title and interest of this state in and to the following parcel of land adjacent to the shore of Lake Michigan and partly submerged, constituting a part of the bed of Lake Michigan on the eastern boundary of the city of Racine is hereby granted and ceded to said city of Racine, namely :

A strip of partly submerged land, constituting a part of the bed of Lake Michigan, on the easterly boundary of the city of Racine, the northerly boundary of which is the center line of Tenth Street extended; the westerly boundary of which is the shore; the southerly boundary of which is the center line of Eleventh Street extended; and the easterly boundary of which is a straight line 800 feet east of and parallel to the east line of Lake Avenue, to be held and used by said city forever to straighten out the existing irregular shore, to fill in the shallow and unwholesome bed of the lake, and for public docks, wharves, highways, water recreation, and for public park and boulevard purposes.

The map below includes the locations of the three grants:

- the 1917 grant (chapter 325) to be used for public park purposes;
- the 1937 grant (chapter 318) to be used to straighten out the existing irregular shore, to fill in the shallow and unwholesome bed of the lake, to protect the harbor entrance and for the use of public docks, wharves, highways and for public park and boulevard purposes; and
- the 1963 grant (chapter 44) to be used to straighten out the existing irregular shore, to fill in the shallow and unwholesome bed of the lake, and for public docks, wharves, highways, water recreation, and for public park and boulevard purposes.



Senate Bill 306 and Assembly Bill 333 would amend the conveyances of lake bed made to the City of Racine in 1917, 1937, and 1963 by altering the uses to which the grant areas may be put. The bills authorize the grant areas to be used for any public or “public-private use”, with specific restrictions which include conditions on use of the first 15 vertical feet above the existing surface, control through contractual restrictions on private interests, dedicated property tax revenues, and a limitation on the total area subject to “public-private use.” The bills also authorize the development of a hotel on a specific area within the 1917 grant area (identified on the map as chapter 325), subject to requirements which include operation of an adjacent municipal conference center, conditions on the use of the first 15 vertical feet above the existing surface, and the inclusion of a restaurant and public observation deck.

II. FINDINGS OF THE DEPARTMENT

Wis. Stat § 13.067(4) requires the department's report to include findings on the following matters:

(a) Location and description of the lake bed area.

1. **The name of the lake in which the lake bed area subject to the proposed conveyance is located, the location of the lake bed area in the lake and the name of the county and the town, village or city that is adjacent to the lake bed area.**

The legislation proposes to amend lake bed grants in Lake Michigan previously made by the legislature to the City of Racine, Racine County. The grant areas lie along the shoreline of Lake Michigan in the City of Racine immediately south of the Root River and Racine Harbor.

2. **The approximate dimensions and size of the lake bed area subject to the proposed conveyance.**

The illustrative map above provides approximate size and dimension information of the three lake bed grant areas. The department estimates the combined area of the grants to be between 30 and 35 acres based on GIS information and review of aerial images.

3. **The approximate area of the lake in which the lake bed area subject to the proposed conveyance is located.**

Lake Michigan covers approximately 22,300 square miles.

(b) Purposes of the proposed conveyance.

1. **The purpose of the proposed conveyance, as expressed in the legislation.**

The purposes of the legislation are to authorize the City of Racine to partner with private entities for the development of lake bed areas previously granted to the City and to authorize the development of a hotel on a specific portion of the previously-granted area.

2. **Any additional information on the intended uses of the lake bed area subject to the proposed conveyance.**

The legislation provides a non-specific authorization for "public-private" projects as defined in the legislation. Potential uses of the lake bed area would be determined by authorizing resolution of the common council of the City of Racine.

3. **The extent to which the express language of the legislation will permit the intended uses of the lake bed area subject to the proposed conveyance.**

The express language of the legislation permits the intended uses of the amended conveyance. The legislation permits newly-defined “public-private” uses (including a private hotel and other unspecified private uses) so long as these uses meet the requirements of public-private use, as defined in the legislation.

(c) Use of the lake bed area subject to the proposed conveyance.

1. The size of the area reasonably required for the intended uses under the proposed conveyance, as compared to the size of the lake bed area actually conveyed by the legislation, and a description of the anticipated or potential uses of any excess area.

The legislation authorizes one current intended use of a hotel development on a particular parcel within the lake bed areas. The legislation also creates an authorization for the City of Racine to determine other “public-private” uses in the future for other portions of the lake bed area. The public-private uses authorized by the legislation may permissibly occupy less than a majority of the lake bed area.

2. If the lake bed area subject to the proposed conveyance exceeds the area required for the intended uses, whether the excess area will remain unused for a substantial period.

The areas subject to the proposed conveyance and authorized under the legislation for future development as determined by the City of Racine are currently open to the public under the existing grants. The legislation authorizes continued use for public purposes, including public recreation purposes, on a majority of the lake bed area. Under the legislation, public uses may include public recreation, arts, events, or civic opportunities in or near navigable waters, including public opportunity and convenience to view, enter, navigate, recreate on or near or otherwise enjoy navigable waters.

(d) Effect of the proposed conveyance on public trust purpose uses.

1. Opportunities for navigation, fishing, hunting, swimming, recreation, enjoyment of scenic beauty and other public trust purpose uses that will be lost or obtained when the grantee exercises the rights granted by the proposed conveyance.

Areas of lake bed affected by the legislation were previously conveyed to the City of Racine for public park and boulevard purposes and were filled to create the same. Within the filled area, there is currently no opportunity for navigation, hunting, or swimming. Fishing may occur at the waterward edge of the filled area, and the filled area is available to the public for recreation purposes and the enjoyment of natural scenic beauty.

Opportunities for recreation and the enjoyment of natural scenic beauty may be lost in those portions of the lake bed area developed for private uses under the legislation. Opportunities for navigation, fishing, recreation, and the enjoyment of natural scenic beauty may be gained or enhanced on the lakeward edge of the lake bed area through a provision of the legislation requiring not less than 20 percent of property tax revenues generated as a result of private

development of the lake bed areas to be dedicated to support and improve public trust purpose uses in a defined area along the shoreline.

2. The type of uses that will be made of the lake bed area subject to the proposed conveyance when the grantee exercises the rights granted by the proposed conveyance, and whether those uses are public trust purpose uses.

The legislation authorizes two distinct types of uses of the lake bed area previously granted to the City of Racine.

Section 1 of the legislation authorizes any public or public-private use of the lake bed grant areas. The legislation provides that no portion of a parcel that is within 15 feet of the surface of the lake bed fill and that has previously been designated for public use may be conveyed out of public ownership or converted to an entirely private purpose. "Public-private use" is defined as any use or combination of uses expressly authorized by resolution of the common council that occurs under a public-private partnership and is consistent with a public comprehensive development or redevelopment plan approved by the common council.

While no specific use is contemplated by Section 1 sub. (2) of the legislation, the broad authorization of "public-private use" of the lake bed grant area would allow uses which are not public trust purpose uses. Section 1 would allow a private entity to construct, operate, and lease infrastructure in, on, or above the lake bed and to control air rights and own infrastructure within the space that is more than 15 feet above the surface of the lake bed fill. Section 1 also appears to authorize private use of the area within 15 feet of the surface, as long as the area is not converted entirely to a private use. The legislation contains no limitation on the types of private uses that may be located within the lake bed grant areas. The legislation also contains no specific public trust purpose uses, however the legislation does authorize public use of a portion of the area, which could result in public trust purpose uses of a portion of the lake bed grant area in the event that a public use is developed.

Section 1 sub. (3) of the legislation authorizes the development of a hotel and restaurant on a specific portion the lake bed grant area. These uses are not public trust purposes uses. As a condition of the development, the legislation requires that the hotel have an observation deck or rooftop accessible to the public free of charge. This condition does contemplate a public trust purpose use through the public's enjoyment of natural scenic beauty. This public trust purpose currently exists and may only be enhanced under the legislation if a non-public trust purpose use is developed. The legislation also requires that the majority of the space on the ground floor of the hotel building contains conference and meeting space available for use by events held at the adjacent municipal conference center. This condition could potentially allow public trust purpose uses on part of the ground floor, but there is no specificity in the condition that the space will enhance the public's enjoyment of natural scenic beauty, and there appears to be no limitation or specification of the uses of the remaining space.

3. Proposed restrictions on public access to the lake bed area subject to the proposed conveyance, upon completion of the project, including physical restrictions such as fences, walls or lack of parking, legal restrictions such as hours of operation or conversion to

private property and financial restrictions such as admission fees, licenses, permits or requirements to make purchases.

Much of the area of the existing lake bed grants is currently open to public access as parkland and amenities, athletic fields and public parking. The legislation authorizes private uses that may create physical and legal restrictions on public access to the lake bed area. The legislation authorizes “public-private” uses on slightly less than a majority of the lake bed area. Each development constructed under this provision will create a physical restriction to the lake bed area in the footprint of the development. While the first 15 vertical feet of a structure may not be conveyed out of public ownership, there is no indication that the public will have access to this area or that a public amenity will be located in this area. Additionally, the legislation appears to authorize private use of this area as long as the area is not entirely converted to private use, with no indication that the public will have access to the area authorized for private use. Above 15 vertical feet, the legislation authorizes the transfer of rights and interests to private parties which would constitute a conversion to private property and exclude the general public. The provision of the legislation that authorizes the construction of a hotel requires the inclusion of a restaurant accessible to the public. The restaurant may require minimum purchase which would constitute a financial restriction to public access.

(e) Potential subsequent conveyances.

- 1. The extent to which the proposed conveyance expressly prohibits or permits a subsequent conveyance of all or a part of the lake bed area by the grantee, including a subsequent conveyance by warranty deed, quitclaim deed or lease, or is silent regarding a subsequent conveyance by the grantee.**

The legislation expressly permits a subsequent conveyance of rights and interests in real estate for a period of years of the area not within 15 feet of the lake bed fill. This conveyance must be subject to a contractual mechanism that provides for mandatory transfer of all rights and interests in the real estate to the City upon a material breach by the grantee of any contract, license, or agreement pertaining to the use or ownership of the real estate.

The legislation expressly prohibits conveyance of the portion of the parcel within 15 feet of the lake bed out of public ownership. The legislation is silent as to subsequent transfers of this portion of the lake bed area to another public entity.

- 2. Whether the legislation imposes the same restrictions on grantees of subsequent conveyances as it imposes on the original grantee.**

The legislation requires the City of Racine to impose contractual restrictions on the grantees of subsequent conveyances of rights and interests in the real estate but does not itself impose restrictions on future grantees.

(f) Potential of the grantee to manage the use of lake bed area.

- 1. What management controls are proposed by the grantee to assure that the lake bed area is used only for the public trust purposes authorized by the legislature, including the grantee's internal controls and control exercised by the grantee over a lessee, a grantee of a subsequent conveyance of all or part of the lake bed area or a trespasser.**

The department is aware of no management controls proposed by the grantee which assure that the lake bed area will be used only for public trust purposes. The legislation requires that the grantee maintain certain management controls over lessees and grantees of subsequent conveyances of rights and interests. These controls allow annual inspections and approval of further conveyances by the City of Racine and reversion of interests to the City of Racine for breach of agreements with the City. However, the controls relate to the allowance of certain private uses which have not previously been recognized as public trust purposes.

- 2. Whether the grantee has managed or is managing the use of any other lake bed areas conveyed to the grantee in conformance with the public trust purposes authorized by those conveyances.**

The City of Racine has been managing the majority of the lake bed areas conveyed to it in conformance with the public trust purposes authorized by the conveyances. The lake bed areas consist primarily of a public park and boulevard, as well as public parking to serve these public trust purposes.

- 3. If the grantee of an original or subsequent conveyance or a lessee is not a governmental unit, the extent to which the use of the lake bed area subject to the proposed conveyance will be controlled or supervised by a governmental unit, to assure conformity with a public trust purpose.**

The legislation does not require supervision of any private lessee or grantee of a subsequent conveyance to assure conformity with a public trust purpose. Control or supervision of these interests as specified in the legislation relates to contracts, licenses, or agreements pertaining to use or ownership of the real estate but does not specify public trust purposes for which the real estate must be used.

(g) Additional information. Any other information the department considers relevant.

The department is aware of no similar lake bed grant that has been found to be consistent with the State's constitutional public trust authority.

III. BASIS OF THE DEPARTMENT'S CONCLUSION

Pursuant to Wis Stat. § 13.097(6) and based on the above findings, the department is required to include in its report its conclusion on whether the legislation is consistent with protecting and enhancing a public trust purpose. Wis. Stat. § 13.097(6) requires the department to base its conclusion on the following:

- (a) **Public trust purpose uses. Whether the opportunities for public trust purpose uses upon completion of the project, including opportunities for navigation, fishing, hunting, swimming, recreation and enjoyment of scenic beauty, substantially outweigh any loss of current opportunities for public trust purpose uses in that lake bed area and whether the current opportunities for public trust purpose uses will be enhanced or diminished upon completion of the project.**

The loss of opportunities for public trust purpose uses within the lake bed area (primarily recreation and enjoyment of natural scenic beauty) will substantially outweigh the enhancement to such purposes upon completion of projects authorized by the legislation. The legislation authorizes the development of a hotel and other private structures on substantial lake bed area which is currently reserved in perpetuity for public park and boulevard purposes. These developments are authorized to consume nearly half of the lake bed area currently available for public recreation and the enjoyment of natural scenic beauty without replacement.

The legislation does include potential enhancements of public trust purpose uses within discrete portion of the lake bed areas through the inclusion of a public observation deck associated with a hotel development (enhanced opportunity for enjoyment of natural scenic beauty) and through the inclusion of a minimum of 20 percent of the tax revenues from the development dedicated to support and improve public trust purpose uses within a narrow lakefront strip of the lake bed areas. However, these potential enhancements only arise in conjunction with private development that will result in a diminution of current and future opportunities for public trust purpose uses.

- (b) **Public access. Whether all residents of the state will be able, without restriction, to participate in the uses of the lake bed area subject to the proposed conveyance upon completion of the project.**

Residents of the state will likely be unable to participate without restriction in uses of the lake bed area upon completion of the projects authorized by the legislation. With regard to the hotel development, the majority of the structure is likely to be reserved to paying customers of either the hotel or associated restaurant. With regard to other potential "public-private" developments, it is unlikely that the public will be given open access to the private portions of the structures. While the area within 15 feet of the surface of lake bed fill may not be privately owned and may not be used for an entirely private purpose, it is uncertain whether or how much of any ground floor areas will contain open public space.

- (c) **Purposes of the proposed conveyance. Whether the public trust purposes of the conveyance, as expressed in the legislation, are sufficiently narrow to permit only the specific public trust purpose uses proposed by the grantee.**

The purposes of the legislation are to authorize development of a hotel and other private uses on lake bed area. The legislation allows public uses on a majority of the lake bed; however, these areas are already authorized for public trust purposes under the existing grants. The legislation does not express any specific new public trust purpose use of the conveyance. In addition, while public uses are defined and allowed under the legislation, there is no indication of what, if any, public uses may be developed and when, and whether these uses would constitute public trust purpose uses. The legislation is not sufficiently narrow to permit only specific trust purpose uses.

- (d) **Management by the grantee. Whether the grantee's management of the use of any other lake bed areas conveyed to the grantee conforms with a public trust purpose and whether the grantee's proposals for the use of the lake bed area subject to the proposed conveyance conform with a public trust purpose.**

The City of Racine has substantially managed the lake bed areas granted to the city under Ch. 325, laws of 1917, Ch. 318, laws of 1937, and Ch. 44, laws of 1963. However, the City of Racine's proposed private uses of these areas as expressed in the legislation do not conform with a public trust purpose.

Under Wis. Stat. § 13.097(1)(c), “[p]ublic trust purpose” means “a purpose in furtherance of the public trust in navigable waters that is established under article IX, section 1, of the constitution.” While the original application of the public trust focused on commercial navigation, the Wisconsin Supreme Court has recognized a much broader scope of public rights in public waters. These rights include traditional recreational uses such as hunting, fishing, swimming, and boating⁷. The public also enjoys the right to clean, unpolluted water, as well as natural scenic beauty⁸.

While the legislation requires the use of at least 20 percent of the tax revenue generated by the private development of lake bed areas to enhance public trust uses on the strip of lake bed area adjacent to the lake, and requires that the hotel must have a public observation deck, which could be viewed as a public trust purpose, the authorization of a private hotel and other unspecified private uses is not considered in furtherance of commercial or recreational navigation, public recreation, hunting and fishing, water quality, or the enjoyment of natural scenic beauty.

- (e) **Governmental control. Whether the lake bed area and its proposed public trust purpose uses will be controlled or supervised by a governmental unit.**

⁷ See *Muench v. Pub. Serv. Comm'n.*, 261 Wis. 492, 501, 53 N.W.2d 514 (Wis. 1952), *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (Wis. 1898), *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (Wis. 1914), *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 228 N.W. 144 (Wis. 1930).

⁸ See *Reuter v. Dept. of Nat. Resources*, 43 Wis. 2d 272, 168 N.W.2d 860 (Wis. 1969), *Muench v. PSC*, *Clafin v. Dept. of Nat. Resources*, 58 Wis. 2d 182, 206 N.W.2d 182 (Wis. 1973), Wis. Stat. s. 31.06.

The legislation contains provisions that require control or supervision through contractual mechanisms of the lake bed areas by the City of Racine. However, the legislation contains no proposed public trust purpose uses for the City to control or supervise.

(f) Commercial uses. Whether any commercial uses of the lake bed area subject to the proposed conveyance are minor and incidental to free public trust purpose uses or whether commercial purposes dominate the proposed use of the lake bed area.

The legislation authorizes commercial uses that are neither minor nor incidental to free public trust purpose uses of the area. The provision of the legislation that authorizes the development of a hotel on a specific portion of the lake bed grant area would result in commercial use dominating that area. The hotel is not incidental to a free public trust purpose, as it does not serve to facilitate enjoyment of public trust purpose uses of navigation, fishing, hunting, swimming, recreation or the enjoyment of natural scenic beauty. While a portion of the hotel must be devoted to a public observation deck or rooftop space, this inclusion simply preserves some of the currently existing ability of the public to enjoy natural scenic beauty in the area. Likewise, “public-private uses” authorized under the legislation for the remainder of the lake bed area are not minor in that they may replace currently existing public trust purpose uses on up to half of the area. The legislation does not require these “public-private uses” to be incidental to free public trust purpose uses and does not require any specific public trust purpose use of the area.

IV. CONCLUSION OF THE DEPARTMENT

The State of Wisconsin holds all navigable waters within the territorial jurisdiction of the State in trust for the benefit of the public⁹. This trusteeship, known as the public trust doctrine, is grounded in the Wisconsin Constitution, and has historical roots in Roman law, as well as English and American common law.

Article IX, § 1 of the Wisconsin Constitution, adopted from the Northwest Ordinance when Wisconsin became a state in 1848, provides in relevant part:

“[T]he river Mississippi 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 the citizens of the United States, without any tax, impost or duty therefor.”

The public trust doctrine is considered a fundamental tenet of the Wisconsin Constitution and acts “to preserve to the people forever the enjoyment of the waters of such lakes, ponds and rivers.¹⁰” Public rights and interest in navigable waters, and the corresponding duty of the State to preserve and promote them, are to be broadly construed¹¹.

⁹ *Muench v. Pub. Serv. Comm'n.*, 261 Wis. 492, 501, 53 N.W.2d 514 (Wis. 1952).

¹⁰ *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N.W. 855 (Wis. 1901).

¹¹ *See Diana Shooting Club. v. Husting*, 156 Wis. 261, 145 N.W. 816 (Wis. 1914)

In addition to the water itself, the State holds title to the beds of navigable lakes in trust for the public¹². Accordingly, the State may not make any substantial lake bed grant for a purely private purpose¹³. “The right which the state holds in these lands is in virtue of its sovereignty, and in trust for the public purposes of navigation and fishing. The state has no proprietary interest in them, 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 absolutely void on its face, as subject to revocation.”¹⁴

The legislature has the primary authority to administer the public trust and may make grants of submerged lands for public purposes. However, Art. IX, Sec. 1 of the Wisconsin Constitution provides a limitation on the permissible purposes of lake bed grants¹⁵. To date, legislative authorization for municipalities to fill lake bed has been found to be for public purposes where:

- 1) public bodies will control the area;
- 2) the area will be devoted to public purposes and open to the public;
- 3) the diminution of lake area will be very small when compared with the whole of the lake;
- 4) no one of the public uses of the lake as a lake will be destroyed or greatly impaired; and
- 5) the impairment of public rights is negligible when compared with public benefit created in the filled area¹⁶.

The proposed private uses of lake bed grants areas by the City of Racine under the legislation are not public purposes and open to the public. A hotel development and other future developments as determined by the City of Racine are private developments that do not relate to the public interest in navigable waters and the beds of those waters held in trust for the public by the State of Wisconsin.

While the proposal develops a new concept of a “public-private” use that includes locating private development *above* lake bed areas and dedicating a portion of the tax revenue generated by the development for public uses, these provisions do not change the fundamental character of the private hotel and other unspecified private developments as largely private uses. The impairment to public rights is substantial compared to the limited public benefit that may inure from future improvements to an area already devoted to public access and to the enhancement of the opportunity for the enjoyment of natural scenic beauty through the creation of a public observation deck.

¹² *Muench v. Pub. Serv. Comm'n.*, 261 Wis. 492, 501, 53 N.W.2d 514 (Wis. 1952).

¹³ *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820, 826 (Wis. 1927), citing *Illinois Steel Co.*

¹⁴ *Priewe v. State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918, 920 (Wis. 1896), quoting *McLennan v. Prentice*

¹⁵ *State v. Pub. Serv. Comm'n.*, 275 Wis. 112, 81 N.W.2d 71 (Wis.1957) , *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674 (Wis. 1957).

¹⁶ *Id.*

No new public trust purpose use is proposed in the amended conveyances, and proposed enhancements to public trust purpose uses in limited areas come at the expense of the elimination of public use of substantial portions of the grant area due to private development. For these reasons, although the legislation contains nonstatutory language suggesting the provisions adequately protect public trust purposes, the department concludes that the legislation is not consistent with protecting and enhancing a public trust purpose.