State of Wisconsin
2023 - 2024 LEGISLATURE

LRB-2862/1
ZDW:skw

2023 BILL

AN ACT ***to renumber*** 30.122; ***to amend*** 30.122 (title); and ***to create*** 30.01 (1h), 30.122 (2), 30.122 (3), 30.2034, 30.2039 and 885.335 of the statutes; **relating to:** use of fill in commercial waterways and Great Lakes waters.

Analysis by the Legislative Reference Bureau

This bill provides several methods for establishing the lawful public or private use of fill placed on the bed of the Great Lakes and certain rivers and harbors.

Historic fill in commercial waterways

The bill applies, in part, to fill placed prior to 1977 that created land above the ordinary high water mark of a commercial waterway, which is a specified list of rivers. If the fill is unauthorized fill for which the Department of Natural Resources has not initiated an enforcement action or is within an authorized bulkhead line and not specifically restricted by a submerged land lease, the owner of the fill may use the fill for any purpose.

Development of Great Lakes waterfront property

The bill provides that a city or village (municipality) may create a waterfront development plan with respect to parcels that may have been part of the submerged bed of a Great Lakes water at the time of statehood. The municipality must submit required information to DNR, including a map of the parcels and a plan for development of the parcels that details any public and private uses. Following a public notice and comment period, DNR must approve the plan unless DNR determines that 1) the plan does not contain the required elements, 2) proposed private uses are inconsistent with existing lake bed grants or submerged land leases,

3) proposed public use areas are insufficient, or 4) the plan does not contain sufficient provisions to ensure proposed public uses will be implemented.

Amendments to existing approvals

The bill provides that a municipality may apply to DNR to amend the uses allowed within an area of a Great Lakes water that was filled pursuant to a fill authorization granted by the legislature or a submerged land lease. DNR must review the proposed uses based on several criteria that generally consider whether the proposed uses are consistent with the public interest. Following a public notice and comment period, DNR must approve the plan unless DNR determines that the specified criteria were not met.

Claims relating to possession or title

The bill prohibits any claim or counterclaim in an action relating to the possession or title of any real estate if the claim or counterclaim is based on an assertion that the property includes portions of land that may have at one time been submerged beneath a Great Lakes water if 1) the property is upland and the use of the land has not materially changed, 2) the property is held in fee title ownership as determined under a Great Lakes waterfront development plan, 3) the property is held in fee title ownership based on being separated from a Great Lakes water, or 4) use of the property has been approved by DNR as an amended use.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 30.01 (1h) of the statutes is created to read:

30.01 **(1h)** "Commercial waterway" includes the portions of all of the following rivers that are within the Great Lakes basin and within incorporated areas:

(a) Ahnapee River.

(b) East River in Brown County.

(c) Fox River, but excluding Lake Winnebago, Lake Butte des Morts, Lake Winneconne, and Lake Poygan.

(d) Kewaunee River.

(e) Kinnickinnic River.

(f) Manitowoc River.

(g) Menominee River.

(h) Menomonee River.

(i) Milwaukee River.

(j) Root River.

(k) Sheboygan River.

(L) St. Louis River.

(m) West Twin River.

SECTION 2. 30.122 (title) of the statutes is amended to read:

30.122 (title) **Unauthorized structures and fill.**

SECTION 3. 30.122 of the statutes is renumbered 30.122 (1).

SECTION 4. 30.122 (2) of the statutes is created to read:

30.122 **(2)** A fill or deposit placed in a commercial waterway before December 9, 1977, that created land at an elevation above the current ordinary high water mark and that has remained above the current ordinary high water mark since December 9, 1977, may be used by the owner of the fill or deposit for any public or private purpose without restrictions imposed if any of the following apply:

(a) The fill or deposit is unauthorized and the department has not initiated an enforcement action relating to the fill or deposit prior to the effective date of this paragraph .... [LRB inserts date].

(b) The fill or deposit is within an authorized bulkhead line established as provided under s. 30.11 and use of the filled area is not specifically restricted by the terms included in a submerged land lease under s. 24.39 (4).

SECTION 5. 30.122 (3) of the statutes is created to read:

30.122 **(3)** Nothing in this section abridges the riparian rights of riparian owners.

SECTION 6. 30.2034 of the statutes is created to read:

30.2034 Amendments to existing approvals. (1) DEFINITIONS. In this section:

(a) "Fill authorization" means the authorization of fill in an area of a Great Lakes water by the legislature in specific legislation or a lake bed grant or by a submerged land lease under s. 24.39.

(b) "Filled area" means an area in a Great Lakes water filled before August 8, 1989, pursuant to a fill authorization.

(c) "Grantee" means a municipality that has been granted a fill authorization.

(d) "Great Lakes water" means Lake Superior, Lake Michigan, Green Bay, or Sturgeon Bay.

(e) Notwithstanding s. 30.01 (4), "municipality" means a city or village.

(2) APPLICATIONS BY GRANTEES. (a) A grantee may apply to the department to amend the uses allowed within filled areas of a fill authorization.

(b) An application under par. (a) shall include all of the following information:

1. A legal description of the fill authorization and the filled area proposed to be used.

2. A description of the proposed amendment to the existing fill authorization, including a detailed description of the proposed uses consistent with sub. (3).

3. A determination from the governing body of the municipality approving the proposed amendment and requesting authorization from the department.

(3) STANDARDS FOR APPROVAL. Notwithstanding s. 13.097, the department shall evaluate applications submitted under sub. (2) based solely on whether the uses proposed in the application meet the following criteria:

(a) The filled area proposed to be used is used for parking lots, public or private buildings, roads, or railroads on the effective date of this paragraph .... [LRB inserts date].

(b) The filled area proposed to be used does not include any area currently used for public park purposes.

(c) The filled area proposed to be used remains under the ownership and control of the municipality, except as follows:

1. The municipality may grant easements, licenses, or leases to public or private entities.

2. The municipality may convey a filled area to a private entity in possession of adjacent private land that can be exchanged for the filled area and used for public purposes.

3. If the filled area is in use by private entities as of the effective date of this subdivision .... [LRB inserts date], whether under color of title or otherwise, any use may continue.

(d) The application allows reasonably adequate public access to the Great Lakes water and its shoreline.

(e) The application is consistent with any waterfront development plan approved under s. 30.2039 (2) (d).

(f) The application promotes the public interest, which may include the enhancement of navigation or public rights in navigable waters, recreational uses, public facilities, and public transportation, the elimination of blight, the remediation of brownfields, and other private economic development consistent with enhancing public access and use of the waterfront area.

(4) DEPARTMENT APPROVAL OF APPLICATIONS. (a) No later than 30 days after receiving an application under sub. (2), the department shall provide public notice by publishing a class 2 notice under ch. 985 and by posting notice on the department's website. The notice shall provide an opportunity for members of the public to provide comments and request a public hearing. If a public hearing is requested, notice of the public hearing shall be provided by publishing a class 2 notice under ch. 985 and by posting notice on the department's website.

(b) No later than 60 days following public notice under par. (a) or 60 days following a public hearing requested under par. (a), whichever is later, the department shall make a determination under par. (c).

(c) The department shall approve an application submitted under sub. (2) and determine the proposed amended uses are consistent with the public interest unless the department determines that the criteria under sub. (3) were not satisfied.

SECTION 7. 30.2039 of the statutes is created to read:

30.2039 Great Lakes waterfront property. (1) DEFINITIONS. In this section:

(a) "Great Lakes water" means Lake Superior, Lake Michigan, Green Bay, or Sturgeon Bay.

(b) Notwithstanding s. 30.01 (4), "municipality" means a city or village.

(c) "Public use" means public access and use, including access to and use of parkland, trails and roads, and public recreational facilities.

(d) "Record title holder" means a person with a claim of ownership of property based on a recorded conveyance of an ownership interest in the property.

(e) "Upland" means property that remained at an elevation above the current ordinary high water mark from December 9, 1977, to the effective date of this

paragraph .... [LRB inserts date], other than for temporary maintenance activities or because of accretion or reliction.

(2) WATERFRONT DEVELOPMENT PLAN. (a) *Authority.* A municipality may create a waterfront development plan with respect to parcels that include land that may have been part of the submerged bed of a Great Lakes water at the time of statehood.

(b) *Elements of the plan*. A municipality shall include all of the following information in a waterfront development plan under this subsection:

1. A map identifying parcels of land that are subject to the proposed plan area.

2. An approximate delineation of the shoreland at statehood based on existing government survey maps.

3. A delineation of upland areas. In determining whether portions of the proposed plan area are upland, the municipality may use photographs, survey data, publicly available global positioning system mapping, geographic information system mapping, or other documentation.

4. A delineation of any area that is subject to a lake bed grant or a submerged land lease or a shoreline established under s. 30.2038.

5. An overall plan for the development of the proposed plan area, including a map showing areas that will be dedicated to the public for public use and areas that will allow for private uses. The boundary between the proposed public use areas and remaining areas shall be surveyed and delineated on the map under subd. 1.

6. A description of areas and types of proposed public use and any restrictions to be proposed on public use for safety or security reasons. The plan shall describe how the public use areas will be accessible to the public.

7. A plan for implementing and enforcing the development of the public use areas, including appropriate ordinances.

(c) *Plan review.* 1. The municipality shall consult with any record title holders within the plan area proposed under par. (b) prior to approval by the municipality.

2. Upon adoption of the waterfront development plan by the municipality, the municipality shall provide the plan to the department for review and approval.

3. No later than 30 days after receiving a request for review under this paragraph, the department shall provide public notice by publishing a class 2 notice under ch. 985 and by posting notice on the department's website. The notice shall provide an opportunity for members of the public to provide comments and request a public hearing. If a public hearing is requested, notice of the public hearing shall be provided by publishing a class 2 notice under ch. 985 and by posting notice on the department's website.

4. No later than 60 days following public notice under subd. 3. or 60 days following a public hearing requested under subd. 3., whichever is later, the department shall make a determination under par. (d).

(d) *Determinations by the department.* The department shall approve, or approve with conditions, a plan submitted under par. (c) 2. unless the department determines any of the following:

1. The plan does not meet the requirements of par. (b).

2. The plan includes proposed private uses that are inconsistent with existing lake bed grants or submerged land leases.

3. The public use areas are insufficient. In determining the sufficiency of the public use areas, the department shall base its decision on the value of increased public access and use compared to the use existing at the time of the submission of the plan under par. (c) 2., the need for private development to fund and support public

access and use, and the relative amount and quality of public and private use areas in light of the overall site characteristics.

4. The plan does not contain sufficient provisions to ensure that the public uses proposed in the plan will be implemented.

(e) *Effect of determination.* 1. An approval under par. (d) constitutes a determination by the department that the public interest is served by implementation of the plan and the boundary established between land that is held in trust by the state or is otherwise publicly owned and land held in private fee title ownership is in the public interest.

2. Following an approval under par. (d), the applicant shall record the approval with the register of deeds and the department shall post the approval on the department's website. Upon implementation of the plan approved under par. (d), and any conditions imposed in the approval, the boundary between land that is held in trust by the state or is otherwise publicly owned and land held in private fee title ownership shall have the same effect as if the boundary were confirmed in a quiet title action granted by a court under s. 841.10.

3. This section does not alter the right of property owners to seek a quiet title action under common law.

(f) *Boundary amendments.* A municipality may seek to amend a public use boundary approved under par. (d) by preparing and submitting a new plan as provided under pars. (b) and (c).

(3) TITLE TO NONRIPARIAN PARCELS. A parcel that may include areas that were part of the submerged bed of a Great Lakes water at the time of statehood and that remained separated from a Great Lakes water by one or more other parcels from December 9, 1977, to the effective date of this subsection .... [LRB inserts date], and

for which there is a record title holder, is deemed to be not part of the lake bed of a Great Lakes water and to be held in fee title ownership. For land held in fee title ownership as determined under this subsection, this determination operates in the same manner as if a person were granted quiet title to the property by a court under s. 841.10.

(4) EXCEPTION FOR EXISTING USES. The department shall treat upland property adjacent to a Great Lakes water, all or part of which may have been land that was part of the submerged lake bed of the Great Lakes water at the time of statehood, as riparian property and owned by the record title holder for purposes of exercising any regulatory authority, if the property includes portions of land that are upland and the use of such property has not materially changed since the effective date of this subsection .... [LRB inserts date]. In this subsection, "materially changed" means a material modification or termination of an existing use and does not include the maintenance, repair, replacement, restoration, rebuilding, remodeling, or expansion of any part of any existing structure or the transfer of the property.

SECTION 8. 885.335 of the statutes is created to read:

885.335 Actions concerning real estate abutting Great Lakes water. No claim or counterclaim may be made in an action relating to the possession or title of any real estate if the claim or counterclaim is based on an assertion that the property includes portions of land that may have at one time been submerged beneath a Great Lakes water if any of the following apply:

(1) The property is upland, as defined in s. 30.2039 (1) (e), and the use of the property has not materially changed, as defined in s. 30.2039 (4).

(2) The property was designated as land held in fee title ownership by a determination made under s. 30.2039 (2) (d) that establishes the boundary between land held in trust by the state and land held in fee title ownership.

(3) The property is held in fee title ownership as determined under s. 30.2039 (3).

(4) The use of the property is approved under s. 30.2034.

(END)