STATE OF WISCONSIN CIRCUIT COURT DOOR COUNTY

JOHN WIESE,
THOMAS WULF,
FRAN SHEFCHIK,
MARK HOLDRIDGE,
MIKE LANGENHORST,
MARK DEPREY,
CHRIS MOORE,
ROBERT LOSS,
JOHN YOUNT,
STEWART FETT,
DAVID HATCH,
RICHARD JEANQUART,
JIM COLLINS,
PHILLIP GORDON,
JOHN ASHER.
JOHN BAUMGARTNER.
DANIEL NESBITT,
BRIAN PETERSON,
JOAN WAKE,
JON VANDREESE,
ROBERT FISCHER,
and
WILLIAM CHAUDOIR,

Petitioners,

Case No. 2019-CV-13

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Respondent Wisconsin Department of Natural Resources (DNR), by its attorneys, Attorney General Joshua L. Kaul and Assistant Attorney General Jennifer

S. Limbach, submits this Brief in support of Respondent's Motion to Dismiss the Petition for Judicial Review on the grounds that Petitioners do not have standing to challenge the DNR decision at issue in this case.

INTRODUCTION

Petitioners are Sturgeon Bay tax-paying residents who seek to overturn DNR's decision determining the ordinary high-water mark (OHWM) for a parcel of city-owned property known as "Parcel 92." (Petition "Pet." ¶¶1, 3, 16.) The determination of the OHWM, specifically, the OHWM at the time Wisconsin attained statehood in 1848, is significant because it delineates the area that the United States transferred to the state upon statehood to be held in trust for the public as part of the navigable waters of the state. *See Doemel v. Jantz*, 180 Wis. 225, 193 N.W. 393 (1923); *see also Diana Shooting Club v. Hustling*, 156 Wis. 261, 145 N.W. 816 (1914); *see also* Wisconsin Constitution, Article IX, § 1. A private riparian owner has only a qualified title to the land between the OHWM and the water's edge that is "subject to the trust under and pursuant to which the state has title for the benefit of the public for purposes of navigation." *Doemel*, 193 N.W. at 398.

Petitioners' Petition for Judicial Review comes after years of litigation over the development and use of Parcel 92.[1] (Pet. ¶¶10–13.) Petitioners were not parties to the

[1] See *Friends of the Sturgeon Bay Public Waterfront, et al. v. City of Sturgeon Bay, et al.*, Door County Case No. 16CV23, currently stayed on appeal as 17AP800 pending the resolution of administrative proceedings and administrative agency review proceedings (Plaintiffs' suit to enjoin City from selling Parcel 92 to Sawyer Hotel Development, LLC, for private hotel development); *Sawyer Hotel Development, LLC v. City of Sturgeon Bay*, Door County Case No. 17CV167, removed to the Wisconsin Eastern District Court as 1:2017cv01631, dismissed by stipulation on December 26, 2018; *Sawyer Hotel Development, LLC v. City of Sturgeon Bay*, Door County Case No. 17CV194, dismissed by stipulation on December 21, 2018; *City of Sturgeon Bay v. Wisconsin Department of Natural Resources*, Door County Case No. 18CV36, dismissed by stipulation on June 8, 2018 (City of Sturgeon Bay's

earlier litigation.[2] They intervene now on DNR's ruling determining the OHWM for Parcel 92. Petitioners allege standing as tax-paying residents who might benefit from potentially increased city tax revenue if DHR's OHWM determination did not functionally block the private development of a hotel on Parcel 92.[3] (See Pet., ¶¶ 1–2, 9–10, 58–59).

Despite the lengthy history of litigation concerning the potential development of Parcel 92, this Petition for Judicial Review should be dismissed without reaching the merits of the Petition because Petitioners lack standing. Only a "person aggrieved" may file a petition for judicial review of an agency decision. Wis. Stat. § 227.53. Anyone filing a petition for judicial review must satisfy both parts of a two- part test for standing to meet the definition of a person aggrieved. *Wis.'s Envtl. Decade, Inc. v. PSC*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975). The Petitioners have not alleged facts sufficient to satisfy the standing test. Therefore, their Petition should be dismissed.

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petition for judicial review of DNR's February 5, 2018 OHWM determination for Parcel 92); and *Friends of the Sturgeon Bay Public Waterfront, et al. v. Wisconsin Department of Natural Resources*, Door County Case No. 18CV38, dismissed by stipulation on June 8, 2018 (Friends' petition for judicial review of DNR's February 5, 2018 OHWM determination for Parcel 92.)

[2] See Fn. 1

[3] See *Friends of the Sturgeon Bay Public Waterfront, et al. v. City of Sturgeon Bay, et al.,* Door County Case 16CV23; see specifically Defendants-Appellants' Appellate Brief, in which Defendants characterize the Nature of the Case as one to "oppose the sale by [the City of Sturgeon Bay and the Waterfront Redevelopment Authority of the City of Sturgeon Bay of Parcel 92] to Sawyer Hotel Development, LLC for the development of a privately-owned hotel." Brief available publicly at: https://acefiling.wicourts.gov/documents/show_any_doc?appId=wscca&docSource=EFile&p%5bcaseNo%5d=2017AP000800&p%5bdocId%5d=193821&p%5beventSeqNo%5d=12&p%5bsectionNo%5d=1

BACKGROUND FACTS

On January 3, 2019, DNR issued a ruling determining the location of the OHWM on Parcel 92, a parcel of land located at 92 East Maple Street in the City of Sturgeon Bay. (Pet. ¶¶3, 17; Pet. Ex. A.) Parcel 92 is owned by the City of Sturgeon Bay ("City"). (Pet. ¶3.) Parcel 92 does not abut the waterfront but is located near the waterfront. (Pet. ¶8; Pet. Ex. A p.9.) Parcel 92 sits atop fill material that was added to the Sturgeon Bay shoreline beginning in the 1870's and continuing through the early 1900's. (Pet. ¶7.) Since filling the shoreline, Parcel 92 has been used for mills, docks, and warehouses. (Pet. ¶7.) This history of filling and commercial development has largely obscured or even destroyed the biological and physical indicators traditionally relied upon to determine the OHWM. (Pet. ¶¶25–29; Pet. Ex. A p.2.)

Litigation over the use of Parcel 92 began in 2016 after the City sought to sell it for private commercial development. (Pet. ¶¶9–10; *See also* Fns. 1, 3.) The trial court enjoined the sale of Parcel 92 until after an OHWM was determined, leading multiple parties to petition DNR to make this determination. (Pet. ¶¶10–11.) Petitioners were not parties to the litigation or the petitions to determine the OHWM. (*See* Fn. 1); (*see also* Pet. ¶11.)

DNR conducted a public hearing on the petition before it issued its first ruling determining the OHWM on February 5, 2018. (Pet. ¶12.) None of the Petitioners appeared at the public hearing. (Pet. Ex. A p.12-14.) Both the City and the Friends of the Sturgeon Bay Public Waterfront ("Friends") filed petitions for judicial review of this decision. (Pet. ¶13.) After these petitions were filed, DNR determined the

meander line staked and mapped as part of the 1835 original U.S. Government Survey had been inaccurately transposed onto the 2014 base map created by the Board of Commissioners of Public Lands that DNR had relied upon to help determine the location of the OHWM. (Pet. Ex. A p.2–3.) Since the 1835 meander line had been inaccurately transposed onto the 2014 map, and DNR had relied on the inaccurately transposed meander line when mapping the DNR's OHWM, DNR subsequently withdrew its February 5, 2018 ruling. (Pet. ¶14; Pet. Ex. A p.2.) The City and the Friends negotiated and reached an agreement that the OHWM should follow the meander line found on the 1835 map of the area that had been created as part of the original U.S. Government survey. (Pet. ¶15; Pet. Ex. A p.2.) DNR later issued its January 3, 2019 ruling, declaring the OHWM to follow the 1835 meander line. (Pet. ¶¶15, 18.)

Petitioners filed their Petition for Judicial Review pursuant to Wis. Stats. §§ 227.52 and 227.53 on February 1, 2019, seeking review of DNR's January 3, 2019 ruling declaring the location of the OHWM.

LEGAL STANDARD

A motion to dismiss a petition for judicial review generally raises matters outside the record created in the agency proceeding. *State of Wisconsin ex rel. Town of Delevan v. Circuit Court for Walworth County*, 167 Wis. 2d 719, 726, 482 N.W.2d 899 (1992) (quoting *Wis. Environmental Decade v. Public Service Comm.*, 79 Wis. 2d 161, 171–172, 255 N.W.2d 917 (1977)). However, as these matters do not go to the merits of a case, a motion to dismiss a petition for judicial review does not conflict

with Ch. 227, and the circuit court may adjudicate the motion to dismiss. *Id.* at 726–727. The circuit court therefore uses the traditional legal standard to evaluate a motion to dismiss.

Wisconsin follows the legal standard for motions to dismiss articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶¶30–31, 356 Wis. 2d 665, 849 N.W.2d 693. On a motion to dismiss, the court accepts all well-pled facts as true. *Data Key*, 2014 WI at ¶19. Although the court may accept as true reasonable inferences from well-pled facts, the court may not add facts not pled. *Id.* Additionally, courts are not bound to accept as true legal conclusions couched as factual allegations. *Id.* at ¶21. *See also, Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Bare legal conclusions…provide no assistance in warding off a motion to dismiss." *Id.*

Petitioners' allegations concerning their standing to file this Petition are evaluated under this standard. Therefore, the Court should treat their allegations concerning their standing as the court would treat allegations in a complaint on this Motion to Dismiss: the Court should accept well-pled facts and the reasonable inferences that follow. However, the Court may not add facts to the Petition. The Court should also reject any merely conclusory allegations.

DISCUSSION

Only a "person aggrieved" by an administrative decision is authorized to seek judicial review of that decision. Wis. Stats. §§ 227.52 and 227.53; *see also Wis.'s Envtl. Decade, Inc.*, 69 Wis. 2d at 9, (Wis. Stats. §§ 227.15 and 227.16 as cited in that decision

later renumbered to §§ 227.52 and 227.53(1)). A "person aggrieved" is "a person or agency whose substantial interests are adversely affected by a determination of an agency." Wis. Stat. § 227.01(9). Petitioners must show that they are persons aggrieved as defined in Wis. Stat. § 227.01(9) to maintain their action.

Wisconsin courts have established a two-step standing test to determine whether a petitioner is a person aggrieved. *Wis.'s Envtl. Decade,* 69 Wis. 2d at 10. "The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law." *Id*. The petition must on its face demonstrate that Petitioners fulfill each of these steps. *See, e.g.,* Wis. Stat. § 227.56(3) ("[A]ny respondent…may move to dismiss the petition as filed upon the ground that *such petition, upon its face*, does not state facts sufficient to show that the petitioner named therein is a person aggrieved by the decision sought to be reviewed." (emphasis added)); *Wis.'s Envtl. Decade*, 69 Wis. 2d at 14–15 (stating "strong argument" in petitioners' brief was insufficient to raise public trust doctrine for standing when "the petition does not raise the issue on its face.")

Petitioners allege few facts to support their standing. They allege that they are "tax paying adult citizens of the City of Sturgeon Bay." (Pet. ¶1.) Petitioners also allege that DNR's OHWM determination will cause an "immense loss of tax revenue that would benefit the public and the City of Sturgeon Bay…" (Pet. ¶59.) Petitioners do not allege that DNR's determination will cause them a direct pecuniary loss. The only reasonable inference that can be drawn from Petitioners' allegations is that, due

to the OHWM determination, the City stands to gain less tax revenue[4], which could conceivably be used for works and services benefitting all City residents, or at least a subsection of residents that includes Petitioners.

This Court may not consider Petitioners' allegation that they "have standing" because it is strictly a legal conclusion. Petitioners allege: "the taxpayer Petitioners have standing to petition this Honorable Court pursuant to Wis. Stats. § 227.52," followed by a recitation of the statute. This allegation includes no factual assertions; it is clearly conclusory and insufficient to establish standing. This Court must therefore evaluate Petitioners' standing solely on their allegation that they as tax-paying residents might gain fewer city-funded benefits due to DNR's determination.

I. Petitioners cannot satisfy step one of the standing test, the direct injury requirement, because they can only allege a hypothetical or conjectural injury.

Part one of the test for standing, the direct injury requirement, requires petitioners to show an actual injury caused by the agency action. "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical.'" *Los Angeles v. Lyons*, 461 U.S. 95, 101–102 (1983). The Wisconsin Supreme Court echoed this actual injury requirement and further explained the

[4] Petitioners allege that the City will lose tax revenue, but as Petitioners also acknowledge, Parcel 92 is a "blighted" parcel currently owned by the City and, therefore, is not generating any tax revenue (Pet. ¶¶3, 8.) The reasonable interpretation of their allegations is that the City will not lose tax revenue compared to the status quo but could gain less than it might have under an OHWM more favorable to Petitioners' position if and when Parcel 92 is sold to a private, tax-paying owner.

requirement that petitioners show a causal nexus between the official act and alleged injury: "the injury must not be so far removed from the cause as to be merely hypothetical or conjectural." *Fox v. DHSS*, 112 Wis. 2d 514, 532, 334 N.W. 2d 532 (1983). Although the injury alleged may be remote in time or may occur only "as an end result of a sequence of events set in motion by the agency action challenged," that sequence of events "cannot be so 'conjectural or hypothetical' as to strain the imagination." *Id*. at 527 (quoting *Lyons*, 461 U.S. at 101–102).

In *Fox*, the court considered whether petitioners, a Milwaukee County district attorney and relatives of inmates in the Wisconsin prison system, had standing to challenge the adequacy of a Final Environmental Impact Statement (FEIS) completed in association with constructing a new prison in Portage, Wisconsin, which would house inmates then incarcerated in other facilities. *Fox*, 112 Wis. 2d 514. Applying the first step of the test for standing, the court considered "whether the decision of the agency directly cause[d] injury to the interest of the petitioner." *Id*. at 524. The court concluded that the petitioners had not met the direct injury requirement because they failed to show an actual, rather than a hypothetical or conjectural, injury. *Id*. at 526.

The petitioners in *Fox* alleged that DHSS's action would injure them because it would likely increase the crime rate in Milwaukee County. Explaining the sequence of events leading to their injury, they alleged that, "placing a prison in Portage will disrupt the lives of inmates from Milwaukee in the institution because they will be farther away from their families making visitation more difficult." *Id*. at 526. The

disruption to the prisoners' lives would allegedly lead to greater recidivism, which would in turn increase the crime rate in Milwaukee County. *Id.*

The court concluded that these allegations did not meet the direct injury requirement. *Id.* at 527. The court pointed out that the injuries alleged were several steps removed from their supposed cause, an insufficient FEIS. The petitioners' allegations required the court to assume that, after an inadequate FEIS allowed a prison to be built in Portage, those prisoners moved from Milwaukee to Portage would have fewer visits from friends and family. *Id.* at 526. The court next had to assume that those prisoners would consequently suffer such great psychological damage that they would, upon release, return to Milwaukee County and be more likely to return to crime, thereby raising the crime rate in Milwaukee County. *Id.* at 526–527. Petitioners presumed that an increased crime rate constituted an injury, though they did not explain exactly how a higher crime rate would impact their lives. The court acknowledged that a petitioner could allege a sequence of events between cause and injury and still satisfy the direct injury requirement. *Id.* at 526–528. However, because the injuries alleged were so far removed from the agency action as to be conjectural, they were "too remote to be considered 'direct injury.'" *Id.* The court therefore dismissed petitioners' claims. *Id.*

Petitioners to this case cannot satisfy the direct injury requirement. Petitioners allege a merely hypothetical or conjectural injury: the loss of benefits funded by additional tax revenue the City might collect from Parcel 92. Recall first that Petitioners are not alleging a decrease to the City's current tax revenue because

Parcel 92 is a city-owned lot and, therefore, it is not generating any tax revenue. Instead they are claiming that the eventual sale and development of Parcel 92 will yield less city tax revenue than it might if the OHWM did not apply to Parcel 92.

Petitioners' claims, like those in *Fox*, rely on a sequence of increasingly speculative assumptions. Even if the OHWM determination does decrease the additional tax revenue the City someday gains from Parcel 92, this Court will have to assume that the difference in tax revenue will alter City spending decisions in a manner that directly impacts Petitioners.

This is not only a strained assumption, but likely, an erroneous one. Petitioners implicitly ask the Court to assume that each additional dollar of city tax revenue benefits all residents equally. The reality is much more complicated. A city may sponsor public works, such as a park, a library, or children's recreational programs. Although these works may be available to all residents, some simply might not use the park or the library. Residents without children might have no use for child-focused programming. Accordingly, residents who do not use a program are not injured if the city removes a program or, as here, never offers it to begin with. A city might also make spending decisions that have very little, if any, direct impact on residents' lives. If, for example, the difference in tax revenue causes the City to decide to upgrade its vehicle fleet rather than repair a municipal building, Petitioners would have to strain the imagination to argue that each of them has been injured by the deferred building maintenance.

Petitioners' alleged injury can only be conjectural. Petitioners are in no position to predict if or how the City's spending decisions will affect them. Furthermore, the Court would have to strain the imagination to be reasonably assured that these specific residents would all suffer injury due to an unknown difference in future tax revenue. Petitioners cannot, therefore, satisfy the direct injury requirement. Because the two-step standing test requires that Petitioners satisfy both steps, the Court should dismiss the Petition.

II. Petitioners fail to identify a single law that DNR violated, and therefore, the Court cannot find that Petitioners fulfil step two of the standing test.

Step two of the standing test requires that the alleged direct injury be "of a type recognized, regulated, or sought to be protected by the challenged law." *Waste Mgmt. of Wis. Inc. v. DNR*, 144 Wis. 2d 499, 506, 424 N.W.2d 685 (1988). Petitioners fail to identify in their Petition for Judicial Review a specific statute or rule that DNR allegedly violated, and therefore, the Court cannot conduct the analysis required in step two of the standing test. The Court can only conclude that Petitioners lack standing and should dismiss their Petition for Judicial Review.

Step two of the standing test requires the court to determine whether the injuries alleged by the petitioner are within the zone of interests protected by applicable law. *Wis.'s Envtl. Decade*, 69 Wis. 2d at 10. As part of this step, the court must "examine a specific statute to determine standing rather than consider all interests of the petitioner." *MCI Telecomms. Corp. v. PSC*, 164 Wis. 2d 489, 493, 476 N.W.2d 575 (Ct. App. 1991). For example, in *Waste Management*, 144 Wis. 2d at 508–

509, the court held that the alleged economic injuries of a landfill competitor were not within the zone of interests protected by a statute governing landfill siting. The court examined the statute in issue, Wis. Stat. § 144.44, and determined that, "[t]he nature of the statute…make[s] clear that the interest protected, recognized, or regulated by the law is an environmental interest," specifically "the appropriate ultimate disposition of solid waste in a densely populated eight-county corner of the state." *Waste Management*, 144 Wis. 2d at 508. The landfill competitor's alleged economic injuries were not within the zone of environmental interest protected by Wis. Stat. § 144.44 and therefore the landfill competitor did not have standing to challenge DNR's decision as violating Wis. Stat. § 144.44. *Waste Management*, 144 Wis. 2d at 508–509.

Petitioners do not identify a single specific statute or rule in the Petition for Judicial Review that DNR allegedly violated. Their claims that DNR violated procedural requirements contained in Ch. 227 miss the mark. Petitioners allege a violation of only one statute, Wis. Stat. § 227.57(6).[5] Wisconsin Stat. § 227.57(6) does not protect substantive interests like the statute considered in *Waste Management*. It is instead a statute that defines the scope of review of an agency decision. *See* Wis. Stat. §227.57(1)–(12).

[5] Petitioners' header reads "Wis. Stats. § 227.57(1) requires OHWM 2019 to be set aside." (Pet. p.10.) However, this is likely a typographical error because Petitioners later cite and quote Wis. Stat. § 227.57(6). The argument that follows also aligns with Wis. Stat. § 227.57(6) rather than Wis. Stat. § 227.57(1), which merely confines the scope of review to the record except in defined circumstances.

Furthermore, Wis. Stat. § 227.57(6) does not apply to DNR's OHWM determination. The statute only applies to decisions reached in contested case hearings:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Wis. Stat. § 227.57(6) (emphasis added). There was no contested case proceeding in this matter. A contested case proceeding is a specific procedure defined by statute:

> "Contested case" means an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order.

Wis. Stat. § 227.01(3). The only hearing held before DNR issued its ruling was an informational hearing. (Pet. ¶12; Pet. Ex. A p.6–7.) This informational hearing does not meet the definition of a contested case hearing before an administrative law judge. It was not a hearing in which the agency determined interests "denied or controverted by another party." Rather, it was a "public hearing to receive comments, provide information and respond to clarifying questions regarding the location of the OHWM of Sturgeon Bay at…Parcel 92…" (Pet. Ex. A p. 6–7.) DNR, therefore, cannot have committed a violation of Wis. Stat. § 227.57(6), the only statutory violation alleged by Petitioners, and this Court cannot begin to analyze whether this statute would have protected Petitioners' alleged interests. Consequently, Petitioners cannot satisfy step two of the standing test, and their Petition for Judicial Review must be dismissed.

CONCLUSION

Petitioners cannot meet their burden to satisfy both parts of the two-step standing test. Respondent respectfully requests that the Court grant its Motion to Dismiss the Petition for Judicial Review because Petitioners lack standing under Wis. Stat. §§ 227.52 and 227.53(1).

Dated this 22nd day of February, 2019.

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Electronically signed by:

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