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THE NECESSITY OF ZONING VARIANCE OR AMENDMENTS NOTICE TO THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES UNDER THE SHORELAND ZONING AND NAVIGABLE WATERS PROTECTION ACTS

CARLYLE H. WHIPPLE*

INTRODUCTION

An important new dimension has been added to zoning variance or amendment applications for all lands either abutting or in the proximity of navigable waters in Wisconsin. A recent landmark decision of the Wisconsin Supreme Court has established the right of the state as trustee of these shorelands to restrict private land use for purposes of wetland and water quality protection. This trusteeship when considered in the light of the Navigable Waters and the Shoreland Protection Acts places the Department of Natural Resources (DNR) in the role of an "interested person" within the mandatory notice provision of the municipal and county zoning statutes. The penalty for failure to give due notice of your client's application for either a variance or an amendment to zoning ordinances affecting shoreland property is to void any action taken by the zoning authority on behalf of your client. It is only too obvious that such a result could be disastrous to both counsel and his client.¹

STATUTORY BACKGROUND

The uses made of land adjacent to water bodies and in flood plains and watersheds are known to directly affect water quality. Therefore, Wisconsin has imposed land use controls which restrict uses which may have either direct or indirect pollution potential in order to protect water quality. These controls are contained in the

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1. See, for example, Milwaukee Journal, August 6, 1973, § 1, at _____, col. 1.

integrated provisions of the Navigable Waters Protection Act² and the Shoreland Zoning Act.³

The Navigable Waters Protection Act was enacted by the 1965 Wisconsin Legislature to aid in the fulfillment of the State's role as trustee of its navigable waters⁴ and to promote public health, safety, convenience and general welfare.⁵ The statute authorized the Department of Natural Resources (DNR) to promulgate regulations⁶ pertaining to lands abutting or lying close to navigable waters for the purpose of furthering the maintenance of safe and healthful conditions; prevention and control of water pollution; protection of spawning grounds, fish and aquatic life; control of building sites, placement of structures and land uses; and preservation of shore cover and natural beauty.⁷ The DNR is specifically required by the legislature to establish standards and criteria for shoreland zoning ordinances to be enacted by counties. Such ordinances must be designed to regulate navigable waters and adjacent shorelands for the preventative control of pollution.⁸ The DNR, counties and municipalities together with all state agencies are required to mutually cooperate for the accomplishment of the objectives of the statute.⁹ The Navigable Waters Protection Act is to be construed together with Shoreland Zoning Act¹⁰ to accomplish these purposes and objectives.¹¹

It was the legislative intent to strengthen the involvement of local governmental units in pollution control through the combined operation of the Acts and to authorize the regulation of pollution incidental to normal drainage basin uses. The composite effect of

2. WIS. STATS. § 144.26 (1971).

3. WIS. STATS. § 59.971 (1971).

4. The term "navigable water" or "navigable waters" includes the following Wisconsin waters:

Lake Superior, Lake Michigan, all natural inland lakes within Wisconsin and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state.

[WIS. STATS. § 144.26(2) (d)].

5. WIS. STATS. § 144.26(1) (1971).

6. Pursuant to the statutory authority given to the DNR to promulgate superintending regulations for shoreland protection under Wis. Stats. §§ 59.971 and 144.26(1), it has enacted Chapter NR 115 of the Wisconsin Administrative Code [hereinafter cited as WAC].

7. WIS. STATS. § 144.26(1) (1971).

8. WIS. STATS. § 144.26(5) (a) (1971).

9. WIS. STATS. § 144.26(7) (1971).

10. WIS. STATS. § 59.971 (1971).

11. WIS. STATS. § 144.26(8) (1971).

the Acts is to acknowledge the interrelationship of land and water uses; authorize land use controls to protect and conserve the water; establish special zoning objectives for water quality maintenance and for preservation of shoreland amenity; create special shoreland strips for county zoning of unincorporated areas along all navigable waters within 1,000 feet of a lake, pond, or flowage and 300 feet from a river or stream, or to the landward side of the flood plain, whichever distance is greater; and require the Department of Natural Resources to promulgate regulations for these areas should a county fail to adopt an ordinance by January 1, 1968, or if a county falls into noncompliance subsequent to adopting its ordinance.¹²

SHORELAND ZONING PROCEDURES

The Shoreland Zoning Act specifically gives the counties authority to zone all shorelands¹³ in their unincorporated areas in order to effect the purpose of the Navigable Waters Protection Act.¹⁴ The general provisions of the county planning and zoning authority statute¹⁵ are superceded by the provision of the Shoreland Zoning Act.¹⁶ Correspondingly, the Navigable Waters Protection Act applies to all cities except first class cities under a special charter within the state.¹⁷

Variances and appeals pertaining to county shoreland zoning¹⁸ are to be processed pursuant to Wis. Stats. section 59.99.¹⁹ The county zoning board of adjustment is empowered to administer, determine and adjudicate the appeals of persons aggrieved by county zoning ordinances and it has the authority to grant variances from or amendments to the county zoning ordinances.²⁰ A

12. WIS. STATS. § 59.971(1) (1971).

13. "Shorelands" as used in the Navigable Waters Protection Act is defined in the Shoreland Zoning Act, to wit: "All lands . . . in their unincorporated areas within the following distances from the normal high-water elevation of navigable waters as defined in § 144.26(2) (d): 1,000 feet from a lake, pond or flowage; 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater. If the navigable water is a glacial pothold lake, the distance shall be measured from the high water mark thereof." [Wis. STATS. § 59.971(1) (1971)].

14. WIS. STATS. § 59.971(1) (1971).

15. WIS. STATS. § 59.97 (1971).

16. WIS. STATS. § 59.971(5) (1971).

17. WIS. STATS. § 144.26(2) (e) (1971); 62.03(1) (1971).

18. WIS. STATS. § 59.971 (1971).

19. WIS. STATS. § 59.971(4) (b) (1971).

20. WIS. STATS. § 59.99(1) (1971).

hearing of an appeal to the county board of adjustment is to be made upon a class 2 publication of notice under Chapter 985 of the Statutes in conjunction with due notice to "the parties in interest".²¹ Any shoreland zoning enacted by the common council of a municipality also must provide for a board of appeals having authority to make special exemptions to the zoning terms and plans.²² When there is an appeal from a city's zoning ordinance to the board of appeals, the board is required to fix a time for the hearing, give public notice and due notice to the "parties in interest".²³

COMPLIANCE WITH THE SHORELAND ZONING ACT

In addition to having been given authority to promulgate superintending regulations for shoreland protection under Wis. Stats. sections 59.971 and 144.26, DNR is charged with the obligation of determining whether or not a county is in initial compliance with the provisions of the statute.²⁴ The DNR's function, however, does not end with a determination of the initial compliance of a county. It is also required to enforce the Shoreland Zoning Act by enacting its own ordinance for a county found to be in noncompliance.²⁵ Also, provisions of the Flood Control Act,²⁶ authorizing flood plain zoning by counties and cities, are applicable so far as possible to the enforcement section of the Shoreland Zoning Act.²⁷ The enforcement and penalties provision of the Flood Plain Zoning Act provides that to the extent any county, city or village does not adopt a reasonable and effective flood plain zoning ordinance the DNR shall adopt such a zoning ordinance. Adding these provisions to the enforcement provisions of the Shoreland Zoning Act, it is therefore clear that any county not complying with the provisions of the Shoreland Zoning Act will be subject to the imposition of an appropriate zoning act upon it by the DNR.²⁸

To assure that there would be compliance with the Shoreland Zoning Act and to discharge its responsibility under the Navigable Waters Protection Act, the DNR promulgated Wisconsin Adminis-

21. WIS. STATS. § 59.99(6) (1971).

22. WIS. STATS. § 62.23(e) (1) (1971).

23. WIS. STATS. § 62.23(7) (e) (6) (1971).

24. WIS. STATS. § 59.971(6) (1971); WAC NR 115.04.

25. WIS. STATS. § 59.971(6) (1971).

26. WIS. STATS. § 87.30 (1971).

27. WIS. STATS. § 59.971(6) (1971).

28. WIS. STATS. § 59.971(6) (1971); 87.30(1) (1971); 144.26(1), (2)(c) and (e) (1971).

trative Code Chapter NR 115.²⁹ Under the provisions of this chapter, the role of the DNR is to review and evaluate the administration of the zoning ordinances of the counties, and, if necessary, to recommend to the Natural Resources Board the adoption of an ordinance for any noncomplying county.³⁰ When the county has enacted conservancy zoning (wetlands)³¹ pursuant to Wis. Stats. section 59.971, the DNR issues a certificate of compliance with the regulation and ordinance.³² Compliance is to be maintained during subsequent reevaluation of the zoning ordinances in order to ascertain their effectiveness in maintaining the quality of Wisconsin water, and a county must keep its regulations current, effective and workable to retain its status of compliance.³³ The failure of a county to keep the zoning regulations current, effective and workable is deemed to be non-compliance.³⁴ Therefore, a county is required to notify the DNR of any changes in its conservancy/shoreland zoning ordinances by means of variances or amendments which may in fact operate or tend to defeat the water protection goals of the Shoreland Zoning and Navigable Waters Protection Acts.

MODEL SHORELAND ZONING ACT

In complying with the requirements of the Shoreland Zoning and the Navigable Waters Protection Acts, the DNR drafted a model zoning ordinance, entitled *Wisconsin Model Shoreland Protection Ordinance*, to be used by the counties as a guide in enacting their own county zoning ordinances.³⁵ The model ordinance has been enacted nearly verbatim by the majority of Wisconsin counties.³⁶ The conservancy district under the model ordinance is intended to describe the physical characteristics and locations of "shorelands" covered by the Act. Such lands may be located within 1,000 feet of the high water mark of a navigable lake, pond or flowage or within 300 feet of a river or stream or to the landward side of a flood plain.³⁷ The Navigable Water Protection Act

29. WAC NR 115.02.

30. WAC NR 115.04(1).

31. See p. *infra*.

32. WAC NR 115.04(2) (b).

33. Wis. STATS. § 59.971(6) (1971).

34. *Id.*

35. KUSLER, *Water Quality Protection For Inland Lakes In Wisconsin: A Comprehensive Approach to Water Pollution*, 1970 Wis. L. Rev. 35, 62, 63.

36. *Id.* at 63.

37. Wis. STATS. § 59.97(1) (1971).

further expands the scope of the Shoreland Zoning Act by stating that ordinances enacted under Wis. Stats. section 59.971 by the counties and section 62.23(7) by cities apply to land subdivision and zoning regulations for the land and land use under, abutting or lying close to navigable waters.³⁸ The definition of "navigable water" or "navigable waters" includes not only the Great Lakes adjacent to the State together with its natural inland lakes, streams and ponds, but extends it to sloughs, flowages and other waters within the territorial limit of the State.³⁹ The concepts of sloughs and other waters under the Act are defined in the DNR's model ordinance for the counties. A conservancy district under the model shoreland ordinance is described as follows:

I. CONSERVANCY DISTRICT (CON)

This district is intended to be used to prevent destruction of natural or man-made resources and to protect water courses including the shorelands of navigable waters, and areas which are not adequately drained, or which are subject to periodic flooding, where development would result in hazards to health or safety, would deplete or destroy resources, or be otherwise incompatible with the public welfare. This district includes all wetland areas designated as swamps or marshes on the United States Geological Survey Quadrangle map sheets. Wetlands are any lands wet enough to support a growth of moisture-loving plants or aquatics and having an accumulation of organic matter, such as peat or muck. Wet soils can be the result of a high water table (as close to the surface as one foot, but frequently no closer than three feet) or of a permeable layer within the soil causing slow seepage. A thick, dark colored topsoil along with a gray or highly mottled subsoil indicates wet soil conditions.

SCOPE OF DNR JURISDICTION

Through the combined provisions of the Shoreland Zoning⁴⁰ and Navigable Waters Protection⁴¹ Acts and the model shoreland zoning ordinances, the DNR has superintending authority over all lands in Wisconsin located within 1000 feet of the normal high water mark of Lakes Michigan and Superior; all other natural and inland lakes; ponds or flowages; within 300 feet of any river or stream; to the landward side of flood plains; or any wetlands,

38. WIS. STATS. § 144.26(2) (e) (1971).

39. WIS. STATS. § 144.26(2) (d) (1971).

40. WIS. STATS. § 59.971(1) (1971).

41. WIS. STATS. § 144.26(2) (d) and (e) (1971).

swamps or marshes. Literally, there are thousands of areas within Wisconsin falling within the purview of this jurisdictional definition. It is indeed difficult to envision any lawyer practicing in Wisconsin in zoning matters whose practice would not inevitably involve some aspect of the DNR's jurisdictional sphere.

CONSTITUTIONALITY OF THE ACTS

The zoning of special districts along waterways for restrictive conservancy purposes pursuant to Wis. Stats. section 59.97 has been declared to be constitutional.⁴² The constitutionality of the Shoreland Zoning Act [and by implication the Navigable Waters Protection Act] was recently challenged and found to be constitutional by the Wisconsin Supreme Court in the case of *Just v. Marinette County*.⁴³

In that case, the Just's real estate was situated adjacent to a navigable lake within Wisconsin and had been zoned by Marinette County into a "conservancy" district. The Justs were in the process of filling in their land which had been designated "wetlands" under the county ordinance without having first obtained a conditional-use permit from the county zoning administrator as required by the ordinance. The county brought an action against the Justs to enforce the ordinance. The real issue in the case before the Wisconsin Supreme Court was ". . . a conflict between the public interest in stopping the despoliation of natural resources . . . and an owner's right to use his property as he wishes."⁴⁴

Just, supra, caused the Court to "reexamine the concepts of public benefit in contrast to public harm and the scope of an owner's right to use of his property".⁴⁵ As a result of this reexamination, the court concluded that a public trust doctrine existed wherein the State was the trustee of swamps, marshes and wetlands for the purpose of eradicating present pollution and to prevent further pollution of its navigable waters. The enabling acts, together with the regulations and ordinances promulgated thereunder were held to constitute valid police-power enactments. It was determined by the Court that there is no taking without the requisite need for compensation since these laws prohibit the changing

42. *Jefferson County v. Timmel*, 261 Wis. 39, 51 N.W.2d 518 (1952).

43. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

44. *Id.* at 14, 15, 201 N.W.2d at 767.

45. *Id.* at 16, 201 N.W.2d at 767.

of the natural character of the land as contrasted to the situation where laws prevent the owner from using his land for natural uses.⁴⁶

NOTICE TO DNR REGARDING VARIANCES

Although the Navigable Waters Protection Act⁴⁷ includes as a direct part of the water protection policy of Wisconsin the Shoreland Zoning Act for counties⁴⁸ and city planning and zoning,⁴⁹ the specific, direct superintending statutory authority of the DNR was given by the Legislature only with respect to counties.⁵⁰ A twofold issue is then raised:

(1) Do counties and/or cities have to give notice of applications for variances or amendments of their ordinances affecting water resources to the DNR?

(2) Does the DNR have superintending authority regarding noncompliance by cities with respect to the Navigable Waters Protection Act as it has under section 59.971(6) regarding non-complying counties?

NOTICE OF COUNTY VARIANCES

The compliance provisions of the Shoreland Zoning Act,⁵¹ to be effective, require counties to notify the DNR as an interested party pursuant to Wis. Stats. section 59.99(6) whenever an application for a variance from or an amendment to its DNR certified zoning ordinance and/or plan has been made to the zoning board of adjustment of the county. However, even absent a specific compliance section of the Shoreland Zoning Act, a county or city is still required to give notice to the DNR of an application for a variance from its wetland, shoreland or navigable waters zoning ordinances by operation of the trusteeship role of the state of Wisconsin with respect to these geographic areas.

Before discussing the state's trusteeship role, a brief analysis of trust law is in order. "An active trust" is defined as "a trust which involves some active duty on the part of the trustee in contradis-

46. *Id.* at 16, 17, 201 N.W.2d at 767, 768.

47. WIS. STATS. § 144.26 (1971).

48. WIS. STATS. §§ 59.971, 144.26(2) (e) (1971).

49. WIS. STATS. §§ 62.23 (1971); 144.26(2) (e) (1971). The intent of § 62.23 is to create city planning through the use of a planning commission, official map and zoning.

50. WIS. STATS. § 59.971 (1971).

51. WIS. STATS. §§ 59.971(6) (1971); 84.30(1) (1971); 144.26(1), (2) (c) and (e) (1971); WAC NR 115.04(2) (b).

inction to one whereby a trustee is merely the depository of the legal title, with no duties to be performed."⁵² The trustee of an active trust has "duties and powers which [are] substantial and important and not merely ministerial, mechanical or nominal."⁵³ The nature of the trust itself is

a fiduciary relationship with respect to the property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. Specifically as to land, a trust is defined as an equitable obligation imposed on the holder of the legal title by reason of a confidence reposed in him, or a duty assumed by him to hold or use and apply the property for the benefit of another.⁵⁴

A sovereign state may be a trustee.⁵⁵

The trustee of an active trust has the affirmative duty of due diligence requiring it to exercise a high degree of vigilance⁵⁶ and to defend the integrity of the trust from such actions as might fully invalidate it or reduce its scope and effect.⁵⁷ Included within the ambit of a duty to protect the trust is the duty to protect the trust property against injury or destruction.⁵⁸

TRUSTEESHIP ROLE OF THE STATE

The State of Wisconsin has long been the trustee of its navigable waters under an active public trust doctrine⁵⁹ requiring the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation and scenic beauty.⁶⁰ The DNR

52. 1 TIFFANY, *THE LAW OF REAL PROPERTY*, § 247 (3d ed. 1939) [hereinafter cited as TIFFANY]; 2 BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, § 207 (2d ed. 1965) [hereinafter cited as BOGERT].

53. 2 BOGERT at § 388, *Grant County Service Bureau, Inc. v. Treeweek*, 19 Wis. 2d 548, 120 N.W.2d 634 (1963); *Holmes v. Walter*, 118 Wis. 409, 95 N.W. 380 (1903).

54. *Upham v. Plankinton*, 152 Wis. 275, 140 N.W. 5 (1913); 1 TIFFANY at § 238, 54 AM. JUR. *Trusts* §§ 300, 306 (1945).

55. *Just v. Marinette County*, 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768 (1972); 1 TIFFANY at § 241.

56. *In re Church's Will*, 221 Wis. 472, 266 N.W. 210 (1936).

57. *Cudahy v. First Wisconsin Trust Company*, 26 Wis. 2d 153, 131 N.W.2d 882 (1965); *Hahn v. Walworth County*, 14 Wis. 2d 147, 109 N.W.2d 653 (1961); *Goodrich v. Milwaukee*, 24 Wis. 422 (1869). *See also*, 2 BOGERT at § 582; 54 AM. JUR. *Trusts* § 548 (1945); *RESTATEMENT OF TRUSTS* § 176 (1935).

58. *Id.*; *In re Strange's Estate*, 7 Wis. 2d 404, 97 N.W.2d 199 (1959).

59. *Just v. Marinette County*, 56 Wis. 2d 7, 18, 201 N.W.2d 761, 768.

60. *Id.* at 18, 201 N.W.2d at 768, *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

is the licensing and enforcement agency with respect to state water pollution protection, entitling it to notice as a condition precedent to its licensing powers in such areas as establishment of bulk headlines,⁶¹ placing structures or deposits in navigable waters,⁶² diversion of water from lakes and streams,⁶³ enlargement of waterways such as dredging, canaling, ditching, lagooning,⁶⁴ changing the course of streams,⁶⁵ removal of materials from beds of lakes and streams,⁶⁶ shoreland zoning,⁶⁷ and navigable waters protection.⁶⁸

The Wisconsin Supreme Court in *Just v. Marinette County*,⁶⁹ expanded the state's active trust duties for the protection of navigable waters and water supplies to include wetlands, swamps and marshes. The Court stated:

The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent future pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of water into such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wastelands, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that the swamps and wetlands serve a vital role in nature, are part of the balance of nature, and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.

TRUSTEE AS A PARTY IN INTEREST ENTITLED TO NOTICE

Any attempt to amend or obtain a variance from either a county zoning ordinance or a city zoning ordinance requires "due

61. WIS. STATS. § 30.11 (1971).

62. WIS. STATS. § 30.12 (1971).

63. WIS. STATS. § 30.18 (1971).

64. WIS. STATS. § 30.19 (1971).

65. WIS. STATS. § 30.195 (1971).

66. WIS. STATS. § 30.20 (1971).

67. WIS. STATS. § 59.971 (1971).

68. WIS. STATS. § 144.26 (1971).

69. 56 Wis. 2d 7, 16, 17, 201 N.W.2d 761, 768 (1972).

notice to parties in interest"⁷⁰ together with class 2 publication under Statutes Chapter 985 for counties and public notice for cities. The Wisconsin Supreme Court has not been called upon to interpret the meaning of or to define the term "parties in interest" under a zoning statute or ordinance. Therefore, assistance must be sought in the decisions of other jurisdictions on this matter. The statement of the general rule is:

Statutes of some jurisdictions require that notice of hearing on an application for a variance or special exception must be given to the "parties in interest" or the "interested parties", and in the few cases in which the question has arisen as to the parties entitled to notice under such a provision, the courts have rather narrowly construed the words "parties in interest" or "interested". . . .⁷¹

These cases, though, primarily deal with the determination of who are not "parties in interest" and shed little light on the determination of the principal question herein which is: Is the DNR an interested party under the statutes and, therefore, entitled to mandatory written notice of any county or city zoning hearing on variances or amendments affecting the Shoreland Zoning or Navigable Waters Protection Acts? None of the cases cited in support of the general rule⁷² were concerned with the superintending authority of a state over county and/or municipal zoning ordinances with the result that these precedents are of no assistance in this research. Therefore, it becomes necessary to turn to general Wisconsin law dealing with interested parties and proper parties in judicial matters in order to attempt to find a definition of the term "parties in interest".

The Wisconsin probate code and procedure, like the zoning statutes, requires notice to be served upon "persons interested".⁷³ Under the probate code, a trustee is an "interested person" in an estate where any part of the corpus of the trust or any legal interest therein is an asset in the estate. Therefore, the trustee, is entitled to notice of the proceedings.⁷⁴

"Parties in interest" are defined elsewhere as those having a

70. WIS. STATS. §§ 59.99(6) (1971); 62.23(e) (6) (1971).

71. Annot., 38 A.L.R.3d 167, 215 (1971).

72. *Id.* at 215-222.

73. WIS. STATS. §§ 856.11, 879.03, .05 [formerly § 324.18(1) (a) (1967)].

74. MACDONALD, WISCONSIN PROBATE LAW, § 281 (7th ed. 1959) at 50. *See also*, note 51 *supra*; WIS. STATS. § 851.21(1) (b); 59 AM. JUR. 2d *Parties* §§ 43, 44 (1971).

legal interest in the outcome of the proceedings.⁷⁵ Parties become necessary parties to litigation where "no determination of the controversy can be made without affecting their rights or interest or title; they must be brought in so that there can be complete adjudication of the rights and interest".⁷⁶ Indispensible parties to a suit are those persons having a property interest in the controversy that will be directly affected by the decree or the enforcement thereof.⁷⁷

In any suit for judicial review of an administrative or a municipal zoning decision, indispensable parties must be joined in the suit.⁷⁸ As a general rule, persons whose rights are affected by a zoning ordinance or regulation or a particular provision thereof may attack its validity.⁷⁹ There is no limitation on attacking a zoning ordinance affecting the trust corpus.⁸⁰

Since the trustee is an appropriate party plaintiff for enforcement of a trust⁸¹ and is an appropriate and necessary party defendant in a suit pertaining to the trust corpus having rights and interests germane to the subject of the trust,⁸² the trustee must therefore, be a necessary party to any action affecting the trust.⁸³

From the above analysis, there can be no question that under the trust doctrine placed upon the state regarding navigable waters, shoreland zoning and marshes and wetlands, the State of Wisconsin is a party in interest having the legal duty as well as authority to sue or be sued in any actions affecting the trust corpus. By

75. *In re Drive In Development Corp.*, 371 F.2d 215 (1966); *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994 (1966); *In re United Button Company*, 137 F. 688 (1904).

76. CALLAHAN, *WISCONSIN PLEADING AND PRACTICE*, § 13.02 (1954) [hereinafter cited as CALLAHAN].

77. *U.S. v. California & S. Pac. RR. Co.*, 157 U.S. 229 (1894); *Kircher v. Pederson*, 117 Wis. 68, 93 N.W. 813 (1903); *Castle v. Madison*, 113 Wis. 346, 89 N.W. 156 (1902).

78. 101 C.J.S. *Zoning* § 352 (1958).

79. *Id.* at § 20.

80. *Id.*, see also, *Jones v. Incorporated Village of Lloyd Harbor*, 302 N.Y. 718, 98 N.E.2d 589 (1951).

81. *Hahn v. Walworth County*, 14 Wis. 2d 147, 109 N.W.2d 653 (1961); *Baker v. Baker Manufacturing Company*, 255 Wis. 198, 38 N.W.2d 477 (1949); *Zimmerman v. Walgreen Company*, 215 Wis. 491, 255 N.W. 234 (1934).

82. CALLAHAN at § 13.26.

83. *Baker v. Baker Manufacturing Company*, 255 Wis. 198, 38 N.W.2d 477 (1949); *Sawtelle v. Ripley*, 85 Wis. 72, 55 N.W. 156 (1893); *Biron v. Scott*, 80 Wis. 206, 49 N.W. 747 (1891); *Hill v. Duran*, 50 Wis. 354, 7 N.W. 243 (1880); 67 C.J.S. *Parties* §§ 11, 32 (1950). See also, *Dickenson Co. v. Hopkins*, 170 Wis. 326, 175 N.W. 93 (1919); *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N.W. 1083 (1907); *Goodrich v. City of Milwaukee*, 24 Wis. 422 (1869); CALLAHAN at § 13.23.

statute it [under the auspices of the DNR] is entitled to notice of applications for variances in or amendments to any county zoning ordinance enacted pursuant to the Shoreland Zoning Act. But even without such enabling legislation, the common law of Wisconsin establishing a trusteeship in the DNR requires both counties and cities not having a special charter to give such due notice to the DNR of any application for variances or amendments to their respective ordinance enacted under either the Shoreland Zoning or the Navigable Waters Protection Acts. This is because the state, as trustee of the water quality as well as waters within its boundaries, is a party most interested in any application for zoning variances or amendments to county or city zoning ordinances which might in any way effect water quality or tend to pollute its water.

EFFECT OF IMPROPER NOTICE

The notice requirement of a zoning statute or ordinance relating to variances or amendments is jurisdictional and thus mandatory. Hence, failure to comply with such requirements is to render void the action of the zoning body or board in granting such a variance or amendment.⁸⁴ Upon the board of adjustment and not the party seeking the variance or amendment, rests the obligation to give notice to the Department of Natural Resources.⁸⁵ However, mindful of the harsh result which will follow failure by the board to so notify the DNR, the prudent attorney would be well advised to insure protection of his clients interests by assuring compliance with the notice requirement by the board. A negligent act of omission on the part of the board to give notice to the DNR, may well provide grounds upon which to base a subsequent suit against the board to recover damages incurred by the client were the DNR to void the amendment or variance by exercise of its inherent power as trustee. Failure of the attorney to oversee the action of the board may supply grounds for a suit based on such negligence as well.

SUMMARY

Notice of any application for a zoning variance or amendment

84. Annot., 38 A.L.R.3d 167, 177, 180 (1971); 3 ANDERSON, AMERICAN LAW OF ZONING, § 16.17 (1968) at 199, 200 [hereinafter cited as ANDERSON]; 2 YOKLEY, ZONING LAW AND PRACTICE, § 13-6 (3d ed. 1965).

85. *Mullane v. Central Hanover Trust Company*, 339 U.S. 306 (1949). *See also*, *Schroeder v. City of New York*, 371 U.S. 208 (1962); 3 ANDERSON at § 16.17; CUTLER, ZONING LAW AND PRACTICE IN WISCONSIN, §§ 6(B), 14(E) (1967) at 19, 57.

for lands falling within the scope of either the navigable Waters Protection Act and the Shoreland Zoning Act of the State of Wisconsin must, as a condition precedent to establishing the jurisdiction of the board of review, be given to the DNR. This is because the DNR is the trustee of the lands within the state which can effect water quality, and as such is a party in interest entitled to notice under the applicable statutes. The failure to give the DNR notice of any zoning variance or amendment hearing will render void any action taken by the board of review.