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# Wisconsin Legislative Council

## ACT MEMO

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**2021 Wisconsin Act 47**  
[2021 Senate Bill 46]

**Presumption of Riparian  
Rightson Navigable Waterways  
and Required Real Estate  
Disclosures**

## BACKGROUND

### The Public Trust Doctrine and Title to Beds of Navigable Waters

Wisconsin’s public trust doctrine provides that navigable waters<sup>1</sup> are held in trust by the state for the benefit of the public. However, ownership of the bed of a navigable water may differ based on the type of waterbody, or based on language in a deed or other conveyance of property rights.

The Wisconsin Supreme Court has held that the title to natural lake beds is vested in the state to be held in trust for the public. [*Illinois Steel Co. v. Bilot*, 109 Wis. 418 (1901).] Conversely, river beds are generally privately owned.<sup>2</sup> Title to the beds of artificially expanded waterbodies, such as flowages,<sup>3</sup> remains privately owned, even if, in practice, the waterbody functions more like a lake than a river. [*Haase v. Kingston Coop. Creamery Ass’n.*, 212 Wis. 585 (1933).]

### Riparian Rights

In Wisconsin, a riparian<sup>4</sup> property owner – i.e., a person who owns the shoreline along a navigable water – is entitled to certain rights as a riparian, limited by the public trust doctrine. Among other rights, Wisconsin courts have recognized riparian owners’ rights to reasonable use of the waters next to their property and the right to construct a pier or similar structure. However, the courts have recognized that such rights may be restricted by statute. [See *R.W. Docks & Slips v. DNR*, 2001 WI 73, ¶ 20.] Chapter 30, Stats., relating to navigable waters, recognizes such riparian property rights by authorizing only riparian owners to apply for various types of permits affecting navigable waters. For

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<sup>1</sup> With limited exceptions, all lakes, streams, sloughs, bayous, and marsh outlets that are wholly or partly within the state, are considered “navigable” for purposes of the public trust doctrine if they are “navigable in fact.” [s. 30.10 (1) and (2), Stats.] The Wisconsin Supreme Court has interpreted “navigable in fact” relatively broadly, to include any waterbody that is “capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.” [*Muench v. Public Service Comm’n*, 261 Wis. 492, 506 (1952).]

<sup>2</sup> However, river bed ownership is “qualified”; title to a river bed is subject to the rights of navigational use and other recognized forms of public use by others. [See *Ashwaubenon v. Public Service Comm’n*, 22 Wis. 2d 38 (1963).]

<sup>3</sup> The term “flowage” is not defined under Wisconsin statutes or administrative rules. In the property law context, the term is typically used in connection with an easement right allowing water to flow over another’s property. The term is commonly understood to indicate a waterbody that may function much like a natural lake in practice but is created by damming a river. Partly for that reason, in some contexts, the term “river” is defined to include flowages. [See, e.g., s. NR 195.03 (12), Wis. Adm. Code.]

<sup>4</sup> In many other contexts, the term “riparian” refers only to land abutting a river or stream, whereas land abutting a lake is referred to as “littoral.” In Wisconsin statutes and case law, however, “riparian” refers interchangeably to both riparian and littoral land, and also to the owners of such land.

example, only riparian owners may apply for general and individual permits to place structures in navigable waters, subject to certain statutory criteria. [s. 30.12 (3) and (3m), Stats.] In some instances, ch. 30, Stats., also authorizes riparian owners to take certain actions without first obtaining a Department of Natural Resources (DNR) permit. [s. 30.12 (1g) and (1k), Stats.] Prior to the *Movrich* decision, discussed below, few published cases specifically addressed riparian rights for property along flowages.

## **The *Movrich v. Lobermeier* Decision**

In *Movrich v. Lobermeier*, 2018 WI 9, the Wisconsin Supreme Court considered how the public trust doctrine, riparian rights, and other private property rights apply to flowages.<sup>5</sup> The case involved a dispute between the owners of part of the bed of a flowage (the Lobermeiers) and the owners of land adjacent to the flowage (the Movriches).

With respect to the Movriches' right to construct a pier, the Court held, in relevant part, that any rights the Movriches enjoy with respect to the flowage must be consistent with the Lobermeiers' private property rights. Relying on past cases holding that a shoreline owner's riparian rights may be limited by a deed, the Court examined the relevant deed and conveyance and found that neither instrument referred to the Movriches' riparian rights. Because the instruments were silent regarding the Movriches' riparian rights, the Court held that the Movriches had "failed to establish that they are entitled to those riparian rights that are incidental to property ownership along a naturally occurring body of water where the lakebed is held in trust by the state or that the public trust doctrine creates an exception to Lobermeiers property rights in the waterbed..." [Id. at ¶ 55.]

## **Real Estate Disclosure Requirements**

Current law generally requires an owner of residential real estate to provide a disclosure form, entitled a "real estate condition report," to a prospective purchaser within 10 days of acceptance of a contract of sale of the property. The real estate condition report must disclose known defects, including certain items specified in statute, and any other "condition that would have a significant adverse effect on the value of the property." A seller of vacant land must also provide a similar disclosure report to a prospective buyer. [ss. 709.02, 709.03, and 709.033, Stats.] Under current law, those real estate disclosure forms do not include a specific disclosure requirement relating to the ownership of beds of adjacent waters.

## **2021 WISCONSIN ACT 47**

### **Presumption of Riparian Rights**

2021 Wisconsin Act 47 apparently overrules the part of the Court's holding in *Movrich* that is summarized above. Specifically, as described below, the act appears to reverse the presumption regarding an adjacent landowner's riparian rights in instances when a deed to land adjacent to a flowage (or any other waterbody to which a Wisconsin court may have applied the *Movrich* decision in the future) is silent with respect to those rights.

The act creates a presumption that an owner of land that abuts a navigable waterway is a riparian owner and is entitled to exercise all rights afforded to a riparian owner, including the right to place a pier, other structures, or deposits, even if the bed of the waterway is owned in whole or in part by another.

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<sup>5</sup> The *Movrich* court did not directly address whether its holding would apply to a situation in which the bed of a river (other than a flowage) was owned by someone other than the adjacent landowner. The concurring opinion also characterized the majority opinion as applying only to flowages.

The exercise of these riparian rights is subject to the requirements of ch. 30, Stats. The presumption does not apply if riparian rights are specifically prohibited by the deed to the land, written agreement, or other recorded instrument.

The act conditions the exercise of riparian rights on reasonable restrictions imposed by an operator of a hydroelectric project regulated by the DNR or the Federal Energy Regulatory Commission (FERC) (“hydroelectric operator”), if the conditions are necessary for the operator to comply with requirements imposed under state or federal law or a FERC license.

Specifically, in situations where the bed of a navigable waterway is owned by the operator of a hydroelectric project regulated by FERC or DNR, the act authorizes a riparian owner to apply to the applicable hydroelectric operator for permission to exercise a riparian right, including the right to place a pier or other structures or deposits and the right to modify an existing structure authorized under an agreement with the hydroelectric operator, within the hydroelectric project boundaries. The act requires a hydroelectric operator who receives such an application in writing to approve or deny the application within 60 days after receiving the application, subject to an appeals process before the Public Service Commission. The act specifies that a hydroelectric operator may deny such an application only if necessary for the hydroelectric operator to comply with requirements imposed under state or federal law or a FERC license, but it authorizes a hydroelectric operator to approve an application subject to certain reasonable and necessary restrictions and to impose a reasonable fee for the hydroelectric operator’s administrative costs.<sup>6</sup>

Under the act, a hydroelectric operator is not liable to any person for any injury or damage arising from a riparian owner’s use of the hydroelectric operator’s property as authorized under the act.

The act specifies that nothing in any of the above provisions invalidates any interest, whether designated as an easement, covenant, equitable servitude, restriction, or otherwise, which is otherwise enforceable under the laws of this state.

## **Real Estate Disclosure Requirements**

Beginning July 1, 2022, the act requires the real estate condition and vacant land disclosure reports to include specific disclosures relating to riparian rights and ownership of a waterbody bed. Specifically, the act requires a prospective seller to disclose: (1) whether the seller is aware of a written agreement affecting riparian rights related to the property; and (2) whether the seller is aware that the property abuts the bed of a navigable waterway that is owned by a hydroelectric operator. The disclosure report must also include a disclaimer that the owner of land abutting the bed of a navigable waterway that is owned by a hydroelectric operator may need to ask permission of the hydroelectric operator to place a structure of the bed of the waterway

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<sup>6</sup> The act limits the authority to impose a fee to proposed new structures, unless a fee was provided for in an existing agreement.