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MEMORANDUM

TO: Dodge County Board of Supervisors

FROM: Kimberly A. Nass
Dodge County Corporation Counsel *KAN*

DATE: March 17, 2020

RE: Resolution No. 19-63 – Resolution Ordering the Establishment
of the Beaver Dam Lake District

The above Resolution came before the Dodge County Board for its consideration on February 25, 2020. At that time, the Resolution was introduced, and an amendment offered by Supervisor Schmitt. Subsequently, Supervisor Glewen motioned to postpone action on the Resolution to the next meeting. This Resolution will be the first order of business (unfinished business) on March 17, 2020. It belongs to the body with a pending amendment. Unless a ranking motion is made, the Board will first act on the pending amendment.

This Memo is not intended as advocacy regarding the Resolution or the amendment. Instead, the purpose is to inform the County Board as to its statutory role and authority upon receipt of a petition for the formation of a lake district.

For context, the Wisconsin Legislature declared its findings and intent at §33.001, Wis. Stats., as follows:

“(1)The legislature finds environmental values, wildlife, public rights in navigable waters, and the public welfare are threatened by the deterioration of public lakes; that the protection and rehabilitation of the public inland lakes of this state are in the best interest of the citizens of this state; that the public health and welfare will be benefited thereby; that the current state effort to abate water pollution will not undo the eutrophic and other deteriorated conditions of many lakes; that current efforts to protect and rehabilitate the water quality of the navigable waters in Dane County, which receive intense urban, recreational and agricultural usage, are seriously handicapped by the fact that numerous governmental bodies have jurisdiction over the management of the watersheds in Dane County; that lakes form an important basis of the state's recreation industry; that the increasing recreational usage of the waters of this state justifies state action to enhance and restore the potential of our inland lakes to satisfy the needs of the citizenry; and that the positive public duty of this state as trustee of waters requires affirmative steps to protect and enhance this resource and protect environmental values.

(2) In accordance with sub. (1), the legislature declares all the following:

(a) It is necessary to embark upon a program of lake protection and rehabilitation, to authorize a conjunctive state and local program of lake protection and rehabilitation to fulfill the positive duty of the state as trustee of navigable waters, and protect environmental values.

(b) A state effort of research, analysis, planning and financing, and a local effort undertaken by districts, the Dane County Lakes and Watershed Commission and the Southeastern Wisconsin Fox River Commission of Planning and Plan Implementation are necessary and desirable and that the districts should be formed by persons directly affected by the deteriorated condition of inland waters and willing to assist financially, or through other means, in remedying lake problems.

(c) State efforts are needed to aid and assist local efforts, to ensure that projects are undertaken only if they promote the public rights in navigable waters, environmental values and the public welfare.

(d) State efforts are needed to administer a program of financial aids to support protection and rehabilitation projects with benefits to all state citizens.”

Prior to the March 17, 2020 meeting, and in preparation for your consideration of the Resolution and pending amendment, I would recommend your review of Report No. 2, dated December 17, 2019, submitted by the Land Resources and Parks Committee. The Report is based, in part, on the testimony received at the public hearing, which was conducted on October 3, 2019. It summarizes the testimony as well as the process undertaken by County staff. The Report outlines the findings the County Board must make if it orders the formation of the district. The Report also provides a recommendation. To reiterate, the County Board shall consider “. . . the committee’s report and any other evidence submitted. . .”, deliberate and issue an order based on the following four criteria:

1. The petition is signed by the requisite number of owners.
2. The district is necessary.
3. The public health, comfort, convenience, necessity or public welfare will be promoted by the establishment of the district.
4. The property included in the district will be benefited by the establishment of the district.

Section 33.26 (3), Wis. Stats.

If the County Board finds that the criteria above are met, it shall issue an order establishing the district (adopt the resolution). If the Board finds that the criteria are not met, it shall issue an order denying the petition (defeat the resolution), stating the reasons why the lake district should not be formed.

As a legislative body, pursuant to § 33.24, Wis. Stats., the County Board is vested with the authority to order the establishment of a lake district, which involves a legislative determination of the best interest of the community as a whole and is a matter of public policy. As indicated above, two of the four criteria are whether the district is “necessary” and whether the lands will “benefit”. Two Wisconsin Supreme Court decisions may assist in the County Board.

The Wisconsin Supreme Court in *Fort Howard Paper Company v. Town of Ashwaubenon*, 250 Wis. 145, 26 N.W.2d 6, was asked to review a challenge to the organization of a sanitary sewer district. Chapter 33 (Public Inland Waters), of the Wisconsin Statutes, was modeled on the sanitary district legislation. So, even though the *Fort Howard Paper Company* case involves the creation of a sanitary district, it provides insight as to the definition of “benefit” and how a legislative body (town board) should determine “benefit”. The Wisconsin Supreme Court opined:

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If the town board finds that the property within the boundaries of the proposed district as a whole will be benefited then the district is to be organized The organization of a sanitary sewer district is in the interest of the public health. Such a district cannot be organized unless the town board finds from the evidence that the public health, comfort, convenience, necessity, and public welfare will be promoted thereby. That is the benefit that is meant by the statute.

Fort Howard Paper Company v. Town of Ashwaubenon, 250 Wis. 145, 152, 26 N.W.2d 661 (1947)

A second case that may be helpful is *Donaldson v. Bd. of Comm'rs*, 2004 WI 67, 272 Wis. 2d 146, 680 N.W.2d 762. In *Donaldson*, the Wisconsin Supreme Court was asked to reverse an order detaching two parcels of land from a lake district. In *Donaldson*, detachment of the parcels was a determination made by the lake district itself per §33.33(3), Wis. Stats. This case examines the difference between "benefit" as used in §33.26(3), Wis. Stats., (county board formation procedure) and §33.33(3), Wis. Stats. (lake district detachment procedure).

In *Donaldson*, the Wisconsin Supreme Court, referring to the *Fort Howard* case, opined:

. . . courts are prohibited from substituting judicial judgment as to good public policy for legislative judgment. *Id.* at 150. In the *Fort Howard* circumstances, "Fixing the limits of the proposed district is within the discretion of the town board, which discretion the court has no power to review. As a general principle, whether a particular unit of government should be created involves the best interest of the community and is therefore a matter of "public policy and statecraft." *Donaldson* at p. 52.

We are constrained to believe that the same principles apply when a court reviews the action of a county board in creating a lake district. The dynamics of lake district creation are such that a county board is likely to look at the big picture, that is, whether the proposed lake district will serve the public interest as a whole and whether the properties to be included in the district will be benefited as a whole. *Donaldson* at p. 53.

Second, the "benefited" language in § 33.26(3) is not the same as the "benefited" language in § 33.33(3). A county board determines "that the property to be included in the district will be benefited by the establishment" of the district. *Wis. Stat. § 33.26(3)* (emphasis added). This finding is both general and predictive. *Donaldson* at p. 58.

Thank you.

KAN:kl

cc: Jim Mielke, Dodge County Administrator
Karen Gibson, Dodge County Clerk