STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION
101 East Wilson Street, Madison, Wisconsin

TOMMY G. THOMPSON
GOVERNOR
JAMES R. KLAUSER
SECRETARY

Mailing address:
Post Office Box 7864
Madison, WI 53707-7864

*20

December 29, 1993

Mr. James R. Huntoon
Department of Natural Resources
3911 Fish Hatchery Road
Fitchburg, WI 53711

RE: Monona Terrace Project

Dear Mr. Huntoon:

You are currently reviewing our application for an exemption to build on an abandoned landfill at the proposed site for the Monona Terrace Convention Center project. At a recent meeting you indicated that you needed a letter from us indicating land ownership.

As you know, much of this area is filled lakebed. As such those areas would be trust lands and title would be in the State of Wisconsin. See Madison v. State, 1 Wis. (2d) 252 (1957) (copy enclosed). See also Jackson v. Madison, 12 Wis. 2d, 359 at 366-367 (1961) (copy enclosed). You will also note that the Court refers to previous session laws which establish a dock line and authorize the City of Madison to construct public buildings.

I am also enclosing a plat of right of way which lists other possible ownership interests. The area to be considered for exemption is bounded on the south west by the right of way line of S. Henry St. extended to Lake Monona, on the north east by the right of way line of S. Butler St. extended to Lake Monona, on the north west by the Soo Line Railroad Company lands and on the south east by Lake Monona, all as shown on the attached site plan. All ownership interests needed to construct the project will be acquired by the State of Wisconsin or the City of Madison.

I am also enclosing a copy of the Monona Terrace Project Development Schedule Chart which lays out the lands and interests acquisition schedule. Please advise if anything further is needed.

Sincerely,

Edward Main
Legal Counsel

Enclosures

cc: George Lightbourn
George Austin

CITY OF MADISON, Respondent, *vs.* THE STATE, Appellant.

May 10—June 4, 1957.

Waters and watercourses: Navigable waters: Legislative act authorizing city to construct and maintain on lake, but not beyond established dock line, parks, "public buildings," and other enumerated facilities: Proposed auditorium and civic center on certain filled area as within authority granted: Validity: Interference with navigation: Impairment of other public rights.

1. Together with ch. 485, Laws of 1927, establishing a dock line on Lake Monona along a substantial portion of its boundaries, ch. 301, Laws of 1931, authorizing the city of Madison to construct and maintain on, in, or over such lake, but not beyond the established dock line, parks, playgrounds, bathing beaches, municipal boathouses, piers, wharves, public buildings, highways, streets, pleasure drives, and boulevards, is construed as validly authorizing the city to erect a proposed municipal auditorium and civic center within a certain filled area of about six acres presently devoted to a number of municipal purposes, such as park purposes, park drives, and automobile-parking areas. pp. 257, 258.
2. A building of the type proposed, and constituting in large part a recreational building, is deemed not so unrelated to the public's use and enjoyment of Lake Monona as to be outside the scope of the term "public buildings" as used in the list of purposes in ch. 301, Laws of 1931. p. 258.
3. The enjoyment of scenic beauty, which will be enhanced by the erection of the proposed building, is recognized as one of the public rights in navigable waters. p. 258.
4. The proposed building is not open to objection as unlawfully interfering with public navigation or other public uses of Lake Monona, since the resulting diminution of lake area will be very small when compared with the whole of Lake Monona and no one of the public uses of the lake as a lake will be destroyed or greatly impaired, and the disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who will use the building. pp. 259, 260.
5. The proposed building is not open to objection as serving only a local purpose which would involve an improper use of state property, since the use of the building and the facilities provided will not be limited to residents of the city of Madison but will be open to the public. p. 260.
6. The authority granted to the city of Madison by ch. 301, Laws of 1931, is merely revocable permission to use the property and not a grant of title, and no consideration need be exacted from the city therefor. p. 260.
7. A question raised, as to the authority of the city of Madison to use tax money to build the proposed building in view of the fact that the state would have power to revoke the permission given to the city, is deemed without merit, in that the expenditure of tax money would be a necessary incident to any filling and construction within the area described, and must have been contemplated by the legislature when the authority was given by ch. 301, Laws of 1931. p. 260.

APPEAL from a judgment of the circuit court for Dane county: HELMUTH F. ARPS, Circuit Judge, Presiding. *Affirmed.*

The city of Madison began an action January 19, 1956, against the state of Wisconsin, pursuant to consent of the legislature, seeking a declaration of its right to erect an auditorium and civic center within a filled area in Lake Monona. Judgment was entered September 10, 1956, and the state has appealed.

The circuit court made findings of fact which are not in substantial dispute. In substance the facts are as follows:

Lake Monona lies within the city of Madison, roughly to the southeast of the central portion of the city. Between Pinckney and Carroll streets there is a sharp upward grade from the shore level to the city streets. Tracks of the Milwaukee Road and the North Western Railway lie along the old shore line at that point with the North Western tracks nearer the lake. The old shore line for many years prior to 1931 was approximately 12.5 feet toward the lake from the center line of the outside track of the North Western. The difference in elevation between Monona avenue and the railroad tracks is about 40 feet. There is no access to the shore from Monona avenue and access by way of Carroll street

and Pinckney street is difficult because of the steep grade. The city proposes to construct an auditorium and civic center within an area which extends along the tracks from Carroll street to Pinckney street (about 900 feet) and which extends southeasterly some 300 feet from the tracks. The structure will also extend above the railroad tracks. The area comprises about six acres, the total area of the lake being about 3,300.

As early as 1932 the city commenced filling the bed of the lake between Bassett street on the west and Hancock street on the east. The area filled up to now is devoted to a number of municipal purposes such as park purposes, park drives, and automobile-parking areas. North Shore drive extends over the filled area and the state highway commission has routed Federal Highway 151 over this drive between Broom and Blair streets. The portion of the fill which lies between Carroll and Pinckney streets consists of approximately four acres at present.

The city has issued $4,000,000 of general obligation bonds to erect and equip a municipal auditorium and civic center within the area described. The common council has approved a committee report recommending a theater-type auditorium, a flat-floor exhibition hall, meeting rooms, community center, art gallery, little theater, food-service area, and flat-floor space to contain a refrigeration area. It has also approved the inclusion of boating facilities. None of the contemplated facilities would be limited to residents of the city.

For many years there has been no commercial operation of boats on Lake Monona for the transportation of passengers or freight and the only navigational craft presently consists of rowboats, outboard and inboard motorboats, sailboats, speedboats, and smaller watercraft, and iceboats used in the wintertime. The proposed construction will not materially interfere with the use of such boats or with public navigation on the lake. For many years there have not been

any facilities in aid of navigation on the present shore between Carroll and Pinckney streets. The proposed construction will provide usable access to the lake between these streets by thoroughfares for both pedestrians and vehicles.

Between 1868 and 1885 the predecessor of the Milwaukee Road obtained conveyances of right of way from the owners of lots lying along the shore. In 1883, it conveyed to the North Western the right to maintain the North Western's existing single track and to construct another track nearer the lake and further conveyed "all its right, title, and interest in and to the soil along the shore of said Lake Monona and on the lakeside of said proposed track." In 1944, the North Western conveyed to the city "any and all rights, title, and interest of the parties of the first part in and to land or riparian rights in or adjoining the waters of Lake Monona between the northeasterly line of Hancock street extended southeasterly and the northeasterly line of Bassett street extended southeasterly and lying southeasterly of a line drawn parallel with and distant 12.5 feet southeasterly at a right angle from the center line of the most southeasterly railroad track of the parties of the first part."

Ch. 485, Laws of 1927, established a dock line on Lake Monona along a very substantial portion of its boundaries. Part of the dock line so established forms the outer boundary of the area involved in this lawsuit. Ch. 301, Laws of 1931, created a new section of ch. 485, Laws of 1927, reading as follows:

"Said dock line on Lake Monona established by this chapter, is hereby declared to be so established only for the purpose of authorizing said city of Madison to construct and maintain on, in, or over said Lake Monona, but not beyond said established line, parks, playgrounds, bathing beaches, municipal boathouses, piers, wharves, public buildings, highways, streets, pleasure drives, and boulevards. Said dock line shall in nowise affect or supersede the dock lines on said Lake Monona already existing and established pursuant to

law by the said city of Madison, in so far as riparian owners are concerned, and said dock line so established shall in nowise be construed as being for the benefit of riparian owners. Said city of Madison is hereby granted and given concurrent jurisdiction with the state of Wisconsin of and over said Lake Monona and its lake bed between the low watermark or the dock lines heretofore established by the city of Madison and the dock line established by this chapter and said city may bring any action to restrain, enjoin, or abate any nuisance or purpresture within such limits."

In 1937, the city established a shore line by ordinance between Bassett street and Blount street and this shore line was approved by the public service commission under sec. 30.02 (1) (a), Stats. This 1937 shore line lies approximately 100 feet southeasterly and parallel to the outer property line of the North Western. In 1945, the city of Madison established by ordinance a shore line between Bassett street and Blair street which was also approved by the public service commission on July 11, 1945. This shore line coincides with the dock line established by ch. 485, Laws of 1927, and is approximately 300 feet southeasterly and parallel to the outer property line of the North Western.

Ch. 629, Laws of 1955, gave permission to the city to bring a declaratory action against the state for the purpose of determining the city's rights under ch. 485, Laws of 1927, and ch. 301, Laws of 1931.

The circuit court concluded that the state's trust in respect to land under navigable waters may be administered not only for the purpose of improving navigation but also for other public purposes so long as public rights of navigation therein are not substantially interfered with; that the fill and project herein described will not so interfere and is a lawful public purpose; and that ch. 485, Laws of 1927, as amended by ch. 301, Laws of 1931, is valid and constitutional, in so far as it authorizes the project described. Judgment was entered accordingly, declaring that the city has

the right and authority to construct a municipal auditorium and civic center in the area described.

For the appellant there was a brief by the *Attorney General* and *Roy G. Tulane,* assistant attorney general, and oral argument by *Mr. Tulane.*

For the respondent there was a brief and oral argument by *Harold E. Hanson,* city attorney.

A brief was filed by *Robert D. Sundby* of Madison, counsel for the League of Wisconsin Municipalities, and *Harry G. Slater,* deputy city attorney of Milwaukee, as *amici curiae.*

FAIRCHILD, J. The state contends that the legislature did not intend by the 1927 and 1931 acts to authorize construction of a building of the size and character proposed; that if those acts be construed to authorize the proposed building, they are unconstitutional; that the proposed building would serve a local rather than a state public purpose; that the city should pay adequate consideration for the use of the lake bed; and that the city has no authority to spend its funds to erect a building on land subject to recapture by the state.

Ch. 485, Laws of 1927, purported to establish a "dock line." Sec. 30.02 (1), Stats., authorizes municipalities to establish dock lines. In 1927, the existing form of this section did not prescribe the effect of such dock lines but ever since the enactment of ch. 455, Laws of 1933, it has been clear that dock lines established under sec. 30.02 (1) were a limitation upon the right of a riparian owner to extend a wharf or pier into navigable water. By enactment of ch. 301, Laws of 1931, the legislature made it clear that the dock line it had established in 1927 was not to affect rights of riparian owners. Ch. 301 stated that the 1927 dock line should not supersede dock lines established by the city of Madison in so far as riparian owners are concerned and that the 1927 dock line should in nowise be construed as being for the benefit of riparian owners. It was made plain in 1931 that

the establishment of the dock line in 1927 was to be construed as a grant of authority to the city within the area between the shore and the dock line.

The authority granted is "to construct and maintain on, in, or over said Lake Monona . . . parks, playgrounds, bathing beaches, municipal boathouses, piers, wharves, public buildings, highways, streets, pleasure drives, and boulevards." The state asserts that by the doctrine of *noscitur a sociis* the extent of the meaning of the term "public buildings" must be determined from the words with which it is associated. The state suggests that the other enumerated uses are all related in some degree to the improvement of the use and enjoyment of Lake Monona and that therefore only those public buildings which are related to such improvement of use and enjoyment are authorized.

That the proposed auditorium and civic center is a public building in the broadest sense of the term, is of course, obvious. A municipal office building, fire or police station would also be a public building in the broad sense of the term and might be quite unrelated to the use and enjoyment of the lake. It is unnecessary to decide at this time whether buildings of such purely administrative character could properly be placed on the lake bed by the city and we do not construe the judgment of the circuit court as so deciding. We are of the opinion that a building of the type generally described in the findings of the circuit court is not so unrelated to the use and enjoyment of the lake as to be outside the scope of the term "public buildings" as used in the list of purposes in ch. 301, Laws of 1931. Enjoyment of scenic beauty has been recognized as one of the public rights in navigable waters. *Muench v. Public Service Comm.* (1952), 261 Wis. 492, 515g, 53 N. W. (2d) 514, 55 N. W. (2d) 40. The erection of a substantial public building in the proposed area may reasonably be expected to improve the appeal of the particular area when viewed from the lake

considering the comparatively steep grade and the presence of the railroad tracks at its foot described in the findings. The purposes of the proposed building are in large part recreational and it can reasonably be expected that the building will attract to the site large numbers of people both from Madison and elsewhere who would not otherwise come, and provide a vantage point from which these people may enjoy the natural beauty of Lake Monona. Although one can draw a minor line of distinction between the opportunities for outdoor recreation provided by parks and pleasure drives on the one hand, and the opportunities for indoor recreation afforded by an auditorium, art gallery, and the like, the enjoyment of both types of facilities is enhanced by a naturally beautiful setting. We see no conflict between the purposes for which the proposed building will be used and the purposes of the other facilities enumerated which would be a basis for concluding that the proposed building was not authorized.

We note that in at least two sessions the attention of the legislature has been drawn to the question of the authority of the city to carry out its plans. In 1955, the legislature gave consent to the commencement of this action. It did not then enact any law limiting the authority of the city. The matter is before the current session of the legislature. Bill No. 300, A., prescribing a limitation upon the height of any building erected in this area, has been passed by the assembly and is now under consideration in the senate. No limit of size or cost of a building is expressed in ch. 301, Laws of 1931.

Except for the fact that we are dealing with a recreational building instead of a park area, much of what was said in *State v. Public Service Comm.* (1957), 275 Wis. 112, 81 N. W. (2d) 71, is applicable here to the constitutional issues asserted by the state. A public body will control the use of the proposed building; it will be devoted to public purposes

and open to the public; the diminution of lake area will be very small when compared with the whole of Lake Monona; no one of the public uses of the lake as a lake will be destroyed or greatly impaired; the disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who will use the building. As pointed out with reference to the park involved in the case cited, the purpose to be served is not local in any sense which would involve an improper use of state property; the authority granted to Madison is merely revocable permission to use the property, is not a grant of title, and no consideration need be exacted from the city.

The state questions the authority of the city to use tax money to build the proposed building in view of the fact that the state would have the power to revoke the permit given the city. The expenditure of tax money, however, would be a necessary incident of any filling or construction within the area described and must have been contemplated by the legislature when the authority was given.

The establishment by the city of a shore line in 1937, 100 feet out into the lake and its establishment of a shore line in 1945 which coincides with the dock line established by the legislature in 1927 were both approved by the public service commission under general statutes. No direct challenge has been made in this case to the propriety of those shore lines although the statute requires a shore line to conform as nearly as practicable to existing shores. We do not believe that it is necessary to determine the legal effect of these actions by the city because in our opinion the authority of the city to proceed with its building is sufficiently determined by the acts of 1927 and 1931 referred to.

The state challenges a finding by the court that the city is the owner of riparian rights in the area involved. We do

not deem a finding as to ownership of riparian rights necessary in this action. Upon this point the record would sustain a finding that whatever rights the original owners of block 87 had with respect to the area which the city is filling, were conveyed to the Milwaukee Road; whatever rights the Milwaukee Road had with respect to said area were subsequently conveyed to the North Western Railway; whatever rights the North Western Railway had with respect to said area were conveyed to the city. The record suggests that the state itself is the owner of block 86, and blocks 86 and 87 are the only two involved. The history of the construction of the railroad tracks and the conveyances to the railroads in the same general area is reviewed in *Attorney General ex rel. Askew v. Smith* (1901), 109 Wis. 532, 85 N. W. 512.

By the Court.—Judgment affirmed.

American Motors Corporation, Appellant, *vs.* Industrial Commission and another, Respondents.

May 10—June 4, 1957.

Workmen's compensation: Scope of employment: Injury to employee resting on pile of boxes on employer's premises during lunch period and catching toe in band of wire when climbing down from pile: Performing service growing out of and incidental to employment: Injury arising out of employment: "Personal comfort" doctrine.

1. Notwithstanding that the facts in a workmen's compensation case may be undisputed, nevertheless, questions of fact for determination may arise if different inferences can reasonably be drawn from the evidentiary facts. p. 264.
2. The supreme court is committed to the "personal comfort" doctrine, which is that employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an

tion releasing it from further liability. This it did not do until the city attorney for the city of Janesville entered the case and stipulated the money would be paid into court under sec. 269.06, 31 W. S. A., p. 389.

This opinion might well end here but for several second-line-of-defense arguments which should be answered. The city's contribution to the highway project amounted to 15 per cent of the cost. The city argues that if interest is to be paid, its share of the interest should not exceed that percentage. This argument is untenable and disregards the fact the city of Janesville had in its possession the money deposited by the state to pay the award. The percentage of its contribution has no bearing on the amount of interest it should pay. It is further argued the plaintiff's recovery of interest should be restricted to that part of the award finally determined by the court to belong to him. We see no merit in this argument. The record does not disclose what the plaintiff's share of the award is, but he claims it in its entirety. The amount of interest should be based on the total amount of the award for the benefit of all persons entitled to share in the award. It is a part of the just compensation.

Although the taking was July 1, 1957, the trial court allowed interest of $3,647.84 from August 16, 1957, the date the city received the money from the state, to December 5, 1958, the date it was paid into court. No assignment of error has been made that interest should have run from July 1, 1957.

By the Court.—Judgment affirmed.

JACKSON, Appellant, v. CITY OF MADISON and others, Respondents.

December 2, 1960—January 10, 1961.

Municipal corporations: Navigable waters: Construction of civic auditorium and parking ramp on filled-in land on lake bed owned by state and use of which state has granted to city only revocable permit: Discretion of city council: Effect of access and street-end regulations of statutory provisions.

1. It will not be an abuse of discretion by the Madison city council to spend $5,500,000 of city funds to build a civic auditorium and parking ramp on filled-in land on the bed of Lake Monona, which bed is owned by the state and for the use of which the state has granted to the city only a revocable permit. pp. 362, 363.
2. The city has the right to rely on the good faith of the legislature in making the grant with full knowledge of the city's plans to use the site for a public building. p. 363.
3. The access, street-end, and other regulations contained in sec. 66.073, Stats., as amended by ch. 8, Laws of 1959, do not prohibit the erection of the proposed auditorium and parking ramp at the ends of Monona avenue and South Pinckney street in the city of Madison. pp. 365, 366.
4. The authority granted by the state to the city of Madison is merely a revocable permission to use the property and is not a grant of title. [*Madison v. State,* 1 Wis. (2d) 252, adhered to.] p. 367.
5. As a general rule, concerning the necessity or utility of local improvements, and the extent thereof, the proper municipal authorities, acting in good faith within the limits of the law applicable and solely for the public welfare, may determine without judicial interference the size, kind, or location of a public building, as for a library or memorial edifice, and the necessity for an auditorium and selection of a site for it. p. 363.

APPEAL from a judgment of the circuit court for Dane county: NORRIS E. MALONEY, Circuit Judge. *Affirmed.*

This is a taxpayers' action commenced by Joseph W. Jackson, a taxpayer of the city of Madison, for declaratory judgment on issues involving the city auditorium and parking ramp which the city proposes to build on filled-in land in Lake Monona. The city of Madison and its mayor, Ivan A.

Nestingen, filed a counterclaim for declaration that the city owns the fee-simple title to the portion of the bed of Lake Monona on which the proposed building will be erected. From a judgment dismissing the complaint, plaintiff appeals. The city of Madison and its mayor have moved for a review of that portion of the judgment dismissing their counterclaim.

The facts will be stated in the opinion.

For the appellant there were briefs by *Ela, Christianson, Ela, Esch, Hart & Clark* of Madison, and oral argument by *Walter P. Ela.*

For the respondents there was a brief and oral argument by *Harold E. Hanson,* city attorney, and *Randolph R. Conners* of Madison, for the Frank Lloyd Wright Foundation.

MARTIN, C. J. Two questions are raised by the appellant:

1. Will it be a gross abuse of discretion by the Madison city council to spend $5,500,000 of its taxpayers' money to build a civic auditorium and parking ramp on the bed of Lake Monona which is owned by the state and for the use of which the state has granted to the city only a revocable permit?

2. Does sec. 66.073, Stats., as amended by ch. 8, Laws of 1959, prohibit erection of the proposed parking ramp and auditorium on the ends of Monona avenue and South Pinckney street in the city of Madison?

The city of Madison is in the process of planning and proposes to construct an auditorium, civic center, and parking ramp on the so-called "Monona Terrace" site, which area extends about 900 feet from the west side of South Carroll street across the end of Monona avenue which is now known as "Law Park" to the east side of South Pinckney street. In width it would extend over approximately 300 feet of land reclaimed from Lake Monona to a dock line established

by ch. 485, Laws of 1927, as amended by ch. 301, Laws of 1931.

By ch. 301, Laws of 1931, the legislature stated that the dock line thereby established was "only for the purpose of authorizing said city of Madison to construct and maintain on, in, or over said Lake Monona, but not beyond said established line, parks, playgrounds, bathing beaches, municipal boathouses, piers, wharves, public buildings, highways, streets, pleasure drives, and boulevards," and granted to the city concurrent jurisdiction with the state of Wisconsin of and over the dock lines theretofore established by the city and the dock line established in said chapter.

In 1937 and 1945 the city established certain shore lines which included that along the area here involved, and in each case the public service commission approved the same under sec. 30.02 (1) (a), Stats. Pursuant to permission granted by the legislature in 1955, the city brought a declaratory action against the state to determine the city's rights under ch. 485, Laws of 1927, and ch. 301, Laws of 1931. In that action the circuit court held the enactments constitutional in authorizing the city to construct the auditorium and civic center here described.

Thereafter the city filled in this shore of Lake Monona and built thereon a park, a parking lot, and a public highway.

In 1953 a committee was named by the city council to ascertain, among other things, the feasibility of the proposed auditorium construction and various preliminary studies were made by firms engaged by said committee.

By ordinance in June of 1954, the Madison city council voted to issue its general obligation bonds in an amount not exceeding $4,000,000 to build and equip an auditorium and civic-center building, subject to referendum of the electors. By such referendum on November 2, 1954, the bonds were approved, and were subsequently issued. Two advisory referenda were submitted at the same time, on which the electors

approved the site in question and the employment of Frank Lloyd Wright as architect for the project.

Further surveys and tests were made to determine the suitability of the Monona Terrace site for the structure designed by Frank Lloyd Wright and in 1956, after receiving reports and recommendations from the experts who made the studies, the city entered into a contract for the employment of the Frank Lloyd Wright Foundation as architect for the project.

In November of 1956, the issuance of general obligation bonds in the sum of $2,500,000 by the city for the acquisition of "sites for municipal parking lots and the construction of buildings and other equipment and appurtenances" with respect thereto was approved by the electors on a referendum. The city proposes to use $1,500,000 of the proceeds of these bonds, together with the $4,000,000 previously issued for the auditorium, in constructing said auditorium and a parking ramp.

Pursuant to authorization of the legislature, the city commenced an action for declaratory judgment involving the constitutionality of the 1927 and 1931 laws as they related to this proposed project. That action resulted in *Madison v. State* (1957), 1 Wis. (2d) 252, 83 N. W. (2d) 674, where this court held that those enactments validly authorized the city to erect the proposed structure at the Monona Terrace site.

In 1957 the legislature passed a bill limiting the height of any building erected in this area, which would have prohibited construction of the proposed project. At the next session of the legislature, this law was repealed.

Appellant's first contention is that the expenditure of $5,500,000 by the Madison city council for construction on a site for the use of which the city has only a revocable permit from the state (as held in *Madison v. State, supra*), would constitute a gross abuse of discretion. In *Madison v. State* it was argued that the city has no authority to spend its funds for construction on such land, and this court stated (p. 260):

"The expenditure of tax money, however, would be a necessary incident of any filling or construction within the area described and must have been contemplated by the legislature when the authority was given."

The general rule applicable is stated in 13 McQuillin, Mun. Corp. (3d ed.), Public Improvements, p. 103 *et seq.*, sec. 37.26, as follows:

"Concerning the necessity or utility of local improvements, and the extent thereof, the proper municipal authorities, acting in good faith within the limits of the law applicable, and solely for the public welfare, may determine without judicial interference . . . the size, kind, or location of a building, as for a library or memorial edifice; . . . necessity for auditorium and selection of a site for an auditorium; . . ."

The Madison city council has exercised its discretion in determining that the auditorium project shall be constructed at the Monona Terrace site and it has the state's permission to construct it there. This is not an abuse of its discretion simply because the state could divert the site to another public purpose sometime in the future.

We have held the enactments valid which authorize the construction of the project at the site in question and the expenditure of tax money on such construction was clearly contemplated by the legislature in granting that authority. The Building Height Law of 1957 was frankly publicized as designed to prohibit the construction of this very project, and its repeal at the following session constituted a further invitation to the city to proceed with its plans. The city has the right to rely on the good faith of the legislature in making the grant with full knowledge of the city's plans to use the site for a public building.

Appellant cites no case where a similar grant by the state to a municipality for a public use has been revoked, whereas respondents have called our attention to several instances where the state has permitted such grants to continue for many years. A consideration of what the consequences of a revocation by the state would be is not necessary to a decision here, but the fact that the state has in no similar situation exercised its right to revoke such a grant indicates the city council may rely on the assumption that the state would not do so in this instance.

Since it is in the city council's discretion to determine the necessity, size, kind, and location of a public building, it is not for the courts to label the exercise thereof an abuse merely because they would have exercised it in a different way. As stated in *Wagner v. Milwaukee* (1923), 180 Wis. 640, 644, 645, 192 N. W. 994:

"Assuming, as we are bound to, that the legislative discretion vested in and now exercised by the common council by the enactment of the ordinance in question is the result of its legislative judgment, the courts cannot bring such exercise under their control and substitute something else therefor. The motives which may prompt a legislative body to act in any particular way within its powers is not within the field of judicial scrutiny either as to such subordinate legislative bodies as common councils . . . or the legislature. . . . If the effect of the ordinance be, as claimed by plaintiff, an economic mistake, a municipal extravagance, and an improper burden upon the taxpayers, it can be remedied rather by the ballot than by injunction." See also *Kendall v. Frey* (1889), 74 Wis. 26, 29, 42 N. W. 466.

It was held in *Madison v. State, supra* (pp. 258, 259), that the proposed auditorium and civic center is a "public building" within the scope of that term as used in ch. 301, Laws of 1931. As there indicated, the facilities to be provided by the proposed project will be largely recreational in character and its location at the Monona Terrace site will

enhance the enjoyment of the lake by the public generally. That its functions as an auditorium, art gallery, and other indoor recreational facilities could be served as well if built upon some other site does not indicate a gross abuse of discretion by the city council in locating the building where the enjoyment of its facilities will be enhanced by the naturally beautiful setting. And while the citizens of Madison will no doubt get the most use of such a building, there can be no question but that it will be an attraction to many other people who would not otherwise avail themselves of the opportunity to enjoy the natural beauty of the lake.

A number of appellant's arguments are directed to questions which might arise on a retaking by the state. We cannot now anticipate questions which would be presented in such a situation.

With respect to the second question, appellant contends the proposed building is prohibited by sec. 66.073, Stats., which, prior to its amendment in 1959, provided as follows:

"Any city council may by ordinance establish dock lines, regulate the construction of piers and wharves extending into any lake or navigable waters, prescribe and control the prices to be charged for pierage or wharfage thereon, prescribe and regulate the prices to be charged for dockage and storage in the city, and lease the wharfing privileges of the rivers and navigable waters at the ends of streets, giving preference to owners of adjoining land. No buildings shall be erected on the ends of streets, and a free passage over the same for all persons, with their baggage, shall be reserved."

By ch. 8, Laws of 1959, the following language was added:

". . . but nothing herein shall be construed to prohibit the erection of public buildings by a municipality within a filled-in area of a lake or river where such municipality has been granted specific authority therefor by the legislature, or in conjunction therewith, in any street end or approaches

thereto. No such construction on any street end or approaches shall prevent access to the navigable water."

Both enactments, so far as they relate to street ends, are designed to insure public access to the water. The rule is stated at 64 C. J. S., Municipal Corporations, p. 134, sec. 1717, as follows:

". . . the state legislature has the paramount and plenary power to declare the purposes to which streets may be appropriated."

And at 64 C. J. S., Municipal Corporations, p. 36, sec. 1665:

"Subject to the limitations contained in the constitution of the United States and in its own constitution, the power of a state to vacate streets or other public ways within its borders is plenary and absolute, and this power may be exercised by the state legislature, or may be delegated to a municipal corporation or to a board or commission, notwithstanding a constitutional provision prohibiting the legislature from vacating streets by local or special laws."

There is now no improved roadway to the lake shore from the ends of Pinckney street, Monona avenue, or Carroll street. The proposed project will provide greatly improved access from those street ends to the shore of Lake Monona. Pedestrians will have a complete sidewalk approach either through the structure or over ramps and it will be possible to operate vehicles from Pinckney street and Carroll street over ramps to Law Park and the lake shore. It will be possible to transport boats from those streets down to the edge of the lake for launching. In our opinion the access provided by the proposed project fulfils the purposes intended by the legislature in sec. 66.073, Stats., as amended.

Respondents have moved for review of the judgment in so far as it dismissed the counterclaim for a declaration that the city owns the fee-simple title to the portion of the bed

of Lake Monona on which the proposed project will be erected. Their position is that the actions of the city council on several occasions, establishing the shore lines in the area in question, which actions were approved by the public service commission, had the effect of extending the ownership of the riparian owner out to the newly established shore lines. The facts upon which respondents' argument is based were all before this court in *Madison v. State, supra,* and it was there held (p. 260):

". . . the authority granted to Madison is merely revocable permission to use the property, is not a grant of title, and no consideration need be exacted from the city."

We are still of that opinion.

By the Court.—Judgment affirmed.

KOJIS, by Guardian, Respondent, v. DOCTORS HOSPITAL, Appellant.

December 2, 1960—January 10, 1961.

Charities: Hospitals: Liability of charitable hospital to paying patient for negligence of employees: Courts: Stare decisis.

1. The supreme court will no longer recognize the defense of charitable immunity in cases where a paying patient is seeking recovery from a charitable hospital for the negligent acts of the hospital, its agents, servants, or employees. [Prior decisions, so far as inconsistent herewith, overruled.] p. 372.
2. The rule of *stare decisis,* however desirable from the standpoint of certainty and stability, does not require the supreme court to perpetuate a doctrine that should no longer be applicable in view of recognized changes in present-day charitable hospitals. p. 372.
3. In the interests of justice and fairness to charitable hospitals which may have failed to protect themselves by insurance against liability for negligence, the herein new rule of liability of a charitable hospital to a paying patient for negligence is