

Greetings,

We are so glad for you, and our vibrant community. We knew that this kind of trouble might be coming from some elected officials and then our community would have to help them recall who they work for. The trouble is here and it is real.

On **Tuesday June 6th, 2017** the Sturgeon Bay Common Council voted 4-3 to ask the State Legislature to reverse the court and define an Ordinary High Water Mark (OHWM) for parcel 92 at the West Waterfront that would convert public trust lands to private development. This unilateral action was taken six days before the Plaintiffs and the City Council are scheduled to meet for a facilitated settlement discussion. Ugh.

Recall that on 10 February 2017, Door County case 16CV23 was adjudicated. The judge ruled immediately following closing arguments, saying that it was **obvious that all, or nearly all, of parcel 92 was artificially filled lakebed [a large historical dock], filled by the riparian and remains in the Public Trust as defined in our States Constitution.** <https://www.friendsofsturgeonbaypublicwaterfront.com/decision>

The OHWM as requested by the Council does not comply with any findings, facts, maps, history, evidence, expert witnesses or evidence presented at Trial or anywhere else relating to either this location or the manner of OHWM determination anywhere or at anytime in Wisconsin. It is a blatant uncompensated taking (**a.k.a. theft**) of the public's waterfront perpetrated by some members of the Sturgeon Bay City government. Requesting that the Legislature take the step to define an invented OHWM which is untethered from any process or fact is a reckless, dangerous precedent for our entire state.

Further, we are told by Representative Kitchens, that this request will be implemented by **“putting it in the budget”** which makes this unprecedented taking not only uncompensated, but **a cowardly attempt to hide the action** from the normal legislative processes. At this time, Joel Kitchens is choosing to abdicate his responsibilities to citizens in Assembly District 1 and has said he will not get involved in either inserting or stopping this item from being in the budget. The City indicated their request would be sent to Senator Lasee and Representative Kitchens.

The requested OHWM made by the City is likely to be unconstitutional. Recall the Mayor has squandered nearly one million dollars of the people's money in a lengthy, bumbling, dirt-piled, unpopular, closed-meeting, fiscally reckless attempt to force a hotel to be located right on the City's Westside waterfront. We also believe that Mr. Papke is

currently negotiating exit of Sawyer Hotel LLC from the Development Agreement, making this an excellent time to re-envision the Westside Waterfront.

You can help right now! We are asking you to help us contest this ridiculous and greedy action by contacting the State Legislature. Please contact your local Representative and Senator and tell them to **“Stop the cowardly, unconstitutional Waterfront grab in Sturgeon Bay.”**

Specifically ask Representative Joel Kitchens and Senator Frank Lasee to not permit the cowardly budget “back door” to be used for this unconstitutional waterfront grab. Ask them to stop the GRAB, and not support any legislative action, but → permit settlement conversations and → permit the normal OHWM process used for a century and affirmed by the Judge.

- Rep. Joel Kitchens – (608) 266-5350, Rep.Kitchens@legis.wisconsin.gov
- Sen. Frank Lasee – (608) 266-3512, Sen.Lasee@legis.wisconsin.gov

For background on more reasons to oppose legislative action, see below.

Thank you for your great work. I know that together, we will not be denied our public waterfront. Thank you for being a part of our vibrant and joyful community!

Keep on,
Dan Collins
414 397 1921

<https://www.friendsofsturgeonbaypublicwaterfront.com/>

-----Background on the legislative action relating to Sturgeon Bay and the Ordinary High Water Mark.

According to the Wisconsin State Constitution, the beds of navigable lakes as they existed at the time of statehood are to be held in trust for the people of Wisconsin. The geographical boundary of public lakebed is the ordinary high water mark (OHWM), which can change if lands are added or removed by natural processes of accretion (addition of soils and sediments) and reliction (erosion), respectively. But the OHWM does not change as the result of artificial filling that creates land out of lakebed. The public trust does permit certain types of public use as well as alterations which will aid navigation and other enjoyment of the water, provided it does not violate the obligations of the state in holding this trust. The legislature may act to change the location of the line defining what is to be held in trust.

The beds of navigable lakes are public lands that generally cannot be developed for private usage in a manner that is consistent with Wisconsin Constitution's public trust doctrine (Article IX, sec. 1). Artificially filled lakebed remains public trust property, regardless of how long ago the fill was placed, and is prohibited from being sold or developed for purely private purposes. This constitutional principle has been upheld by the Wisconsin Supreme Court as well as the federal courts in cases spanning over a century.

Some of our talking points for might include:

1. Legislative solutions from Madison would seem like the wrong way to go about setting a line that should be determined by the standard available means using qualified DNR professionals reviewing local conditions.

The public trust doctrine states that "By statute, the legislature has created a system of permitting procedures that ensure that projects affecting navigable waters do not violate the public trust doctrine as it has developed under common law. The legislature has delegated the authority for administering this trust to the Department of Natural Resources."

"The normal body of authority for determining the OHWM in Sturgeon Bay is the DNR, and that legislating this process from Madison is an unnecessary overreach. The mechanism is already in place to allow the DNR professionals to make such a OHWM determination using appropriate analysis based on local conditions, and they should be allowed to perform their rightful duties in this situation."

2. A legislative solution for this type of local and specific question sets a problematic precedent. It is an overreach available to those that are connected. It could upend the existing process of setting the high water mark of simply asking the DNR professionals to establish the location. Opportunistic developers from around the nation could try to obtain this type of legislative exemption to build on our lakebed which should be held in trust for the public.

"I am always concerned about precedent setting in any legislative action. So it would seem that allowing for a state legislative solution to this local and specific issue does indeed set a far-reaching problematic precedent, one that

would open the way for any developer to seek legislative exemption to build on the lakebed----and consequently undermine the very clear and long-range vision of the public trust doctrine itself.”

3. Legislators are not experts in this topic. Why don't we simply ask the Legislature to do what the City has not, ask the DNR to perform their normal Ordinary High Water Mark determination on the entire parcel being considered at the West waterfront?

4. Using legislation to take public lake beds and filled waterfronts for private development is a conservation issue that will activate significant opposition from Wisconsin's bipartisan conservation community. Conservation of public resources has broad support in Wisconsin. Groups that hunt and fish often join with land trusts and conservation organizations to oppose any overreaching attempts to undermine our natural heritage.

5. The legislature, as part of the state's representative, must not only take action to prevent the endangerment of the trust but it must also take affirmative steps to protect the trust. “ Again, this language clearly states that any legislation that would alter the provisions of the trust much be done only to enhance or improve the public benefit. The proposed development in the Sturgeon Bay west side clearly does not meet this constitutional litmus test.

6. The legislature has acted only once, in the recent past, to redefine the Ordinary High Water Mark. In the Milwaukee Transit Center case the legislature acted to reaffirm a 1913 contract with the railroad, where the historic agreement drew a boundary that the legislature recognized as the OHWM. Other cases of legislative involvement have without exception involved legislative lakebed grants in the pursuit of the public's interests in access and navigability. For example, in the City of Madison/Monona Terrace case the lakebed land was granted for the public benefit, not private benefit. In another notable case, the 1927 City of Milwaukee case, the court approved a “swap” of certain lakebed lands to a private owner in exchange for lands it needed to complete the great Milwaukee Harbor project. Our situation is not analogous to any of this precedent. Such legislation would remove public trust lands at no gain to the public, in areas that have always been devoted to navigation related and harbor improvements, such as docks, coast guard facilities, grain elevator, and maritime museum.

7. Using the budgetary process to take away rights provided in our State Constitution is cowardly.