

25 October 2016
Letter to the Editor

Oppose flawed legislation that would give away public lands

The City of Sturgeon Bay has informally requested that elected officials from the State enact a law that would impact Sturgeon Bay's public waterfront and permit a sale to a private developer. This is based on multiple sources from an event this fall.

The members of the Friends of the Sturgeon Bay Public Waterfront find this idea flawed in concept and structure.

The conceptual flaw is self-evident. If legislation is needed to sell a filled lakebed to a private developer, then doing so without legislation is outside the law. If the City's proposed sale was within the law, then why change the law? The answer is that the City is attempting to act outside its authority. The Friends see the requested legislation as the City's fundamental admission of its own transgressions.

Structurally this idea is flawed, as well. The beds of navigable lakes are public lands that generally cannot be developed for private usage. This is according to the 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.

The normal body of authority for determining the Ordinary High Water Mark -- or in other words, what land is public -- in Sturgeon Bay is the DNR. Asking for legislation from Madison is an unnecessary overreach. The mechanism is already in place to allow the DNR professionals to make an OHWM determination using appropriate analysis based on local conditions, and they should be allowed to perform their rightful duties in this situation. The City has not asked for, or obtained, an OHWM determination for the hotel parcel at 92 East Maple Street (one of two parcels the hotel plans to build on).

A legislative solution for this type of local and specific question sets a problematic precedent. It is an overreach available to those that are politically connected. If successful, it could upend the existing process of simply asking the DNR professionals to establish the ordinary high water mark location. Once used here in Sturgeon Bay, such legislation could allow developers to build on other lakebeds

here in Door County and throughout the state, lakebeds which should be held in trust for the public.

Legislators are not experts in this topic. Perhaps the legislature could do what the City has not done and ask the DNR to perform its normal OHWM determination on the entire parcel being considered at the West Waterfront.

Using legislation to take public lakebeds 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 and a proud history 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.

The State and its Legislature is charged with not only preventing the endangerment of the public trust, but it must also take affirmative steps to protect the trust. The public trust language in the State Constitution clearly states that any legislation that would alter the provisions of the trust must be done only to enhance or improve the public benefit. The proposed development in Sturgeon Bay's West Waterfront clearly does not meet this constitutional litmus test.

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. The Sturgeon Bay hotel development bears no resemblance to the Milwaukee Transit Center Case. There is no historic agreement that could be recognized as a basis for the legislature to find that the Westside Waterfront property is not part of the public trust. Our property was simply filled and used by successive waterfront owners for the docking of tugboats, coast guard facilities, grain elevator and maritime museum. 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.

Two older situations are also sometimes mentioned: the Milwaukee Harbor case and the Monona Terrace case in Madison. The Sturgeon Bay hotel development bears no resemblance to either. Unlike the legislation in *Milwaukee v. State*, the City of Sturgeon Bay obtains nothing in exchange for the sale of the hotel property that it does not already have based on its title to all of the lands fronting parcels 92-100 East Maple Street. There is no proposal for the hotel developer to convey or grant any rights to the City that would further a public purpose related to navigation.

The Sturgeon Bay hotel development also bears no resemblance to the Monona Terrace case. Unlike the Monona Terrace project, the hotel will not be owned by a public body, will not provide or enhance public access to Sturgeon Bay, and is primarily a for-profit commercial enterprise, not a recreational facility providing public access for enjoyment of natural scenic beauty.

The history of this property clarifies public trust rights. Successive waterfront owners filled the lakebed for docks and for navigation-related and harbor improvements. Filling lakebed does not extinguish the public rights for successive owners, nor enable future private commercial development. Defending public lands at this place matters. The existence of mistakes elsewhere does not mean we should repeat them, when we know better. We have an easy opportunity here to do it right.

The legislature's approval of the Sturgeon Bay private commercial development on filled lakebed would, for the first time, sanction a giveaway of public property for a private purpose with no corresponding benefit to the public. The City's rationale that development is needed to fund a tax increment is completely untethered from any navigation-related public purpose; it is simply a broad "public welfare"-type of argument. If the legislature accepts this "local benefit" rationale, not grounded in recognized public trust purposes, there will be no principled basis to refuse any claim by any municipality that selling public trust lands is necessary for local development objectives.

Finally, another hotel location option that was acceptable to both the Friends group and the developer, was proposed to the City but has since been rejected by the City.

The City's idea that now, while they are on the losing end of a lawsuit, a legislative "fix" is needed is wrong-headed on many levels.

Sincerely,
Dan Collins
Friends of the Sturgeon Bay Public Waterfront