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May 8, 2015

By Hand Delivery

Attorney Megan E. Correll
Wisconsin Department of Natural Resources
Bureau of Legal Services
101 S Webster Street
Madison, WI 53703

Attorney Edwina C. Kavanaugh
Wisconsin Department of Natural Resources
Bureau of Legal Services
101 South Webster Street
Madison, WI 53703

RE: City of Sturgeon Bay West Side Waterfront Project
Public Trust Issues

Dear Attorney Kavanaugh and Attorney Correll:

Midwest Environmental Advocates has been engaged in connection with certain regulatory approvals necessary for a proposed hotel development on City-owned property located on the west waterfront of the City of Sturgeon Bay that has historically been used for navigation purposes by the Coast Guard and others.

In connection with our representation, we have reviewed the document entitled "WDNR DETERMINATION OF CONCURRENCE WITH THE APPROXIMATE ORDINARY HIGH WATER MARK FOR THE CITY OF STURGEON BAY WEST SIDE WATERFRONT PROJECT," recorded in the Door County Register of Deeds' office on October 28, 2014, as Document No. 782928. We have also reviewed documents produced by the City in response to an open record request. We are continuing to review the Department's concurrence, as it is unclear whether it represents the best available evidence as to the location of the OHWM.

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In any case, the Department's concurrence document applies to the property at 100 East Maple Street ("Concurrence Parcel"), which is only a portion of the newly created parcel slated for the hotel development. The hotel development parcel is described as Lot One of an as-yet unrecorded certified survey map (copy enclosed), which incorporates both the Concurrence Parcel and a portion of the adjacent property at 92 East Maple Street (collectively the "Hotel Parcel"). It appears that the City's title insurer is unwilling to insure over the rights of the public in the portion of the Hotel Parcel that is filled lakebed. We are concerned that the City's need to clear title to the entire parcel planned for a hotel development will result in pressure on the Department to issue an expanded OHWM determination/concurrence to include additional areas on the Hotel Parcel.

The purpose of this letter is to provide the Department with available evidence of the extension of the natural shoreline of the Hotel Parcel by filling. We believe this evidence incontrovertibly shows that a significant portion of the lands underlying the hotel building footprint were submerged lakebed at the time of Statehood. The City's proposed conveyance of these lands for private development would clearly violate the Public Trust Doctrine.

The evidence reviewed to date includes surveys dating from the 1891 Sanborn fire insurance map (available from the Wisconsin Historical Society Digital Collection, www.wisconsinhistory.org) showing the rectangular shape of extensions of docks or wharves from the natural shoreline, which steadily increased in size as shown by the 1904 and 1919 Sanborn maps. One "wing" of the proposed hotel structure is sited over the Hotel Parcel wharf/fill. Portions of the hotel are sited over what was surveyed as open water in 1891. Enclosed are maps and aerial photographs of the Hotel Parcel overlaid with the shorelines depicted on the Sanborn maps. Also enclosed is an index of maps and other historic sources evidencing the filling of the Hotel Parcel, many of which are available in digital collections.

In addition to the documentary evidence, DNR staff in the Remediation and Redevelopment Program have reviewed a Phase II Environmental Report prepared by the City's consulting engineers, Ayers & Associates, in the context of the City's request for a Voluntary Party Liability Exemption. The Phase II Report discloses physical evidence of filling, and indeed the City is preparing to seek an exemption to § NR 506.085, which prohibits development of structures on waste fill. The Phase II Report includes geographical cross-sections showing 10 or more feet of fill overlaying lake deposits. The site history narrative states:

"Historically, the Subject Property [92-100 East Maple Street, encompassing the hotel development parcel] was developed as industrial/municipal property since at least 1885 and has remained developed in that manner to the present day. Initially, Subject Property development was identified on the western side of the Subject Property. ***Filling activities later expanded the Subject Property to the east into Sturgeon Bay...***"

In the section entitled "Recognized Environmental Concerns," the Phase II report notes the historic presence of aboveground and underground storage tanks and associated concern

with the presence of hydrocarbons, VOCs and heavy metals. The report further notes: ***“Additional concerns include the presence of general fill material across the site in an area that was historically occupied by water (Sturgeon Bay).”*** In terms of physical evidence, the report states: “Some non-native fill materials, consisting of brick, cinders, and wood were encountered in some of the borings advanced at the site.”

The Department is well aware that under Wisconsin law, the filling of submerged lands does not transfer title to the riparian estate. *See, e.g., Menomonee River Lumber Co. v. Seidl*, 149 Wis. 316, 320-321, 135 N.W. 854, 857 (1912) (“ One cannot by building up land or erecting structures in a lake, the title to the bed of which is in the state, thereby extend his possession into the lake and acquire the state’s title.”) Opinions of the Attorney General and guidance documents issued by your agency are clear that the City has an affirmative obligation to ensure that filled lakebed is maintained and used for appropriate public trust purposes.

Thank you for your consideration of this letter. In light of the evidence cited above, I would appreciate your assurance that the Department would refuse any request to supplement its original OHWM concurrence for the Hotel Parcel. I can be reached via email at swilliams@midwestadvocates.org or by phone at 608-251-5047 ext. 5, for any questions.

Sincerely,



Sarah Williams
Staff Attorney
Midwest Environmental Advocates

Enclosures: Index of Maps and Historical Sources
Overlay Map – Historic Shoreline 1891 - 1955
McCarty Proposed CSM dated 3-11-15 (Unrecorded)

cc: Michael Bruhn, WDNR Assistant Deputy
Attorney Timothy A. Andryk, WDNR Chief Legal Counsel
Attorney Tom German, BCPL Deputy Secretary
Attorney Randall Nesbitt, Sturgeon Bay City Attorney
Attorney William P. O’Connor