

April 1, 2015

Stephanie Reinhardt, City Clerk/Human Resources Director
City of Sturgeon Bay
421 Michigan Street
Sturgeon Bay, WI 54235

Re: Planned Unit Development for Sawyer Hotel Development, LLC, located at the former Door County Co-op Property, 92 E. Maple Street.

Dear Ms. Reinhardt:

Our firm has been retained by a group of concerned citizens to review actions taken by the City of Sturgeon Bay in regard to the formation of Tax Incremental Finance District No. 4 and the developments thereon, particularly the Sawyer Hotel Development. Our initial review has discovered information that warrants additional investigation and review by the City prior to the transfer of the land and the commencement of construction. Our initial concerns are outlined below.

The Proposed Hotel Site Is Subject To The Public Trust Doctrine Which Restricts The Use Of The Property.

The Sawyer Hotel site, which the City proposes to sell to the developer, is on the shores of Sturgeon Bay. The Public Trust Doctrine, rooted in Article IX §1 of the Wisconsin Constitution, requires waterways within the State of Wisconsin to be maintained for a public purpose. All branches of government, including the City, have an affirmative duty to protect and preserve public trust waters. As the Wisconsin Supreme Court stated in *Priewe v. Wisconsin State Land & Improvement Company*, 103 Wis. 539 (1899), the State (and its political subdivisions) has no more authority to transfer the title of navigable waters than it would “to donate...the state capital to a private purpose.”

This doctrine applies with equal force to filled lakebeds even if, as a result of the fill, the area is no longer a navigable waterway. *State of Wisconsin v. Public Service Commission*, 275 Wis. 112, 117-19, 81 N.W.2d 71, 73-81 (Wis. 1957). The State of Wisconsin has previously taken the position that the construction of hotels, on filled areas, is impermissible under the Public Trust Doctrine.

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To determine if a proposed construction site is a filled navigable waterway, and therefore subject to the Public Trust Doctrine, the ordinary high water mark (OHWM) must be determined. The Army Corps of Engineers' jurisdiction over this matter is pursuant to Section 10 of the Rivers and Harbors Act of 1899. Our preliminary review of the records shows no evidence that the City contacted the U.S. Army Corps of Engineers in an attempt to determine the OHWM which would define the limits of this project for federal purposes.

As far as the DNR is concerned, on October 24, 2014, the Wisconsin DNR issued an opinion at the request of the Pinkert Law Firm, regarding the OHWM affecting the parcel. Although the DNR indicated that typically the determination of an OHWM requires a DNR expert to conduct a field analysis of the physical characteristics of the shore, the letter suggests that may not have been done in this case. If that is true, it is not clear why field work was not conducted when the DNR's own publication indicates that it "uses several techniques for complex sites." Wisconsin Dept. of Natural Resources, Waterways and Wetland Permits: Ordinary High Watermark, last revised 10/31/13. The DNR publication goes on to state that "when the OHWM can't be identified at a particular site because the shoreline has been disturbed, the DNR staffer may need to identify the mark at another location on the water body and transfer the elevation level to the site in question." *Id.* The Wisconsin courts have also recognized this as an appropriate technique. Exactly what techniques were or were not utilized in this case, is still under investigation.

The DNR apparently adopted the OHWM "prepared by Baudhuin, Inc. and certified by Wisconsin Land Surveyor, Michael G. McCarty" on behalf of the City. The DNR also reviewed a 1925 map and a 1955 map. Although it is not clear precisely which maps were referenced, the DNR letter suggests the 1925 map showed the parcel as navigable and the 1955 map showed it after being filled. It is significant that both the DNR and the City appear to fully acknowledge the fact that at least up to 1925 "the parcel was not dry land but was actually under the waters of Sturgeon Bay." (10/24/14 DNR letter to Pinkert Law Firm, LLP). Therefore, it appears conceded that the Public Trust Doctrine is implicated.

The DNR's adoption of what appears to be the City's proposed OHWM, even after acknowledging the parcel "was actually under the waters of Sturgeon Bay" was apparently based on the theory of accretion. Accretion has been defined by the courts as "addition to riparian land, *gradually and unperceptively* made by the water to which land is contiguous." *County of St. Clair v. Lovington*, 90 U.S. (23 Wal.) 46, 68 (1874) (emphasis added). Accretion seems very unlikely in this case.

Enclosed you will find the 1891 and 1904 Sanborn Insurance maps for the hotel parcel. Sanborn Maps is an American publisher of historical and current maps of U.S. cities and towns. The maps were initially created to estimate fire insurance risks. The company's maps are frequently used for historical research. These maps show the OHWM highlighted in blue. According to these maps, the proposed Sawyer Hotel is located below the OHWM in the public lakebed, apparently in violation of the Public Trust Doctrine.

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Enclosed you will also find a copy of a colorized photograph showing the proposed hotel site. This photograph shows that the area to the southeast of the granary (the hotel site) is totally submerged and therefore part of Sturgeon Bay. As indicated above, the fact this area was later filled does not change the fact that it is subject to the Public Trust Doctrine and may only be used for public purposes.

Enclosed you will also find a copy of a 1938 aerial map obtained from the Wisconsin Historic Area Image Finder. This photograph also confirms that as late as 1938 the area southeast of the granary, which is precisely where a significant portion of the Sawyer Hotel is to be constructed, is under the waters of Sturgeon Bay. In other words, it appears from this photograph, that at least half of the Sawyer Hotel is to be constructed in an area where construction may not be allowed under the Public Trust Doctrine.

We are also enclosing for your review a copy of the 1904 Sanborn Insurance map with the footprint of the Sawyer Hotel building superimposed. As can be seen, approximately one-half of the building is below the ordinary high water mark. The hash marks on the map denote the OHWM proposed by the City and adopted by the DNR, based upon the limited information it had last October. It is difficult to see how the City's proposed OHWM can be reconciled with the Sanborn maps and the aerial photographs all of which show a significant portion of the proposed hotel site below the OHWM.

It would appear that the DNR, when it adopted the proposed OHWM, did not have the Sanborn maps, the colorized photograph, nor the 1938 aerial photograph in its possession. Furthermore, our review of the records did not discover anything to suggest bores or soil samples were being taken in this area to determine the nature of the fill (natural or manmade) in this area. We also have not located any engineering reports.

Had the DNR had the opportunity to review a more complete set of records, it is hard to imagine how it could have opined that the parcel in question "would have filled with sediment slowly over the course of time between the 1925 map and the 1955 bulkhead map." The Sanborn maps dating back to 1891 along with other maps and photographs up to at least 1938, seem to highly suggest there was no filling with sediment. In the untold years prior to 1891, as well as the forty-seven years from 1891 to 1938, there does not appear to be much, if any, change in the submerged nature of this land. Moreover, it is difficult to understand how in the 17 years from 1938 (aerial photo showing area submerged) to 1955 (bulkhead map referenced by the DNR), that this area could have completely filled with sediment, when in the 47 years from 1891 to 1938, it remained virtually unchanged.

Given that the City has an affirmative duty to protect and preserve public trust waters (which includes filled areas), we highly recommend that the City provide the enclosed maps and photographs to the DNR, request a field survey and request borings be taken.

Potential Legislative Restrictions On The Use Of The Hotel Site.

If it is the City's contention that the filling of the lakebed was done per previously granted authority from the legislature, such authorization frequently is accompanied by restrictions regarding the use of the filled lakebed. The City should confirm whether the property is subject to any legislative restrictions, and, if so, the City must ensure that the proposed use of the property does not violate those legislative restrictions.

Questions Regarding The Procedures Used To Rezone Of The Sawyer Hotel Property.

Our limited review to date indicates that the City acted under Sturgeon Bay Municipal Code §20.28(8) when approving the PUD for the hotel development. That code section states "an official submittal for combined preliminary and final PUD review *must contain all required submittal items* specified in subsection 5(c)(3) and 5(d)(3)." (emphasis added). It appears that at the time of the request to use the combined procedure, final engineering plans, including grading plan, utilities plan and storm water management plan were not submitted to the Plan Commission. The same situation appears to exist for the Common Council.

If the procedures used by the City vary from those prescribed by its own ordinances, there is a serious question as to the validity of the action taken. If "all required submittal items" were timely submitted to the Commission and Council, please provide us with confirmation of that fact. If it is the City's position that this information did not need to be submitted, please provide the legal basis for that position.

It also appears that there were an extremely large number of closed session meetings, limited explanation for those closed sessions, and potential notice issues, relative to this development. Those, as well as other potential concerns, are currently under review.

CONCLUSION

Upon receipt of responses to our public records request to the City and DNR, as well as a Freedom of Information Act request to the Army Corps of Engineers, a more thorough investigation of the Public Trust Doctrine, as well as the procedural matters, will be conducted. However, we deemed it important to raise these initial concerns as soon as possible so the City has an opportunity to address them as soon as possible. If the City's sale of the property and approval of the construction of the hotel is deemed in violation of the Public Trust Doctrine, or procedurally flawed, the repercussions could be devastating. The Wisconsin Supreme Court has halted the construction of a condominium development pending a determination of whether that construction was an unauthorized development on land subject to the Public Trust Doctrine. *State of Wisconsin v. Trudeau*, 139 Wis. 2d 91, 408 N.W.2d 337. This was done even though "six of the units in one building were constructed prior to the commencement of [the] action and substantial sums of money [had] been invested in the project." *Id.* at 96. Eventually, after the

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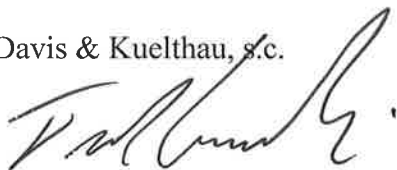
Supreme Court's remand of the case back to the lower court for further proceedings, the project was demolished in its entirety, with the builder suffering a complete loss.

"Private individuals cannot secure title to the property below the ordinary high water mark of Lake Michigan because it belongs to the state." *Bleck*, 114 Wis. 2d at 462, 338 N.W.2d at 496. Consequently, if it is determined that the City did violate the Public Trust Doctrine, losses would not only be suffered by the developer but by any title insurance company and bank involved in financing this project, who may have relied on the City's actions. Most importantly, the citizens of Sturgeon Bay and the Wisconsin public as a whole would be significantly harmed if it was determined the City in any way violated the Public Trust Doctrine by allowing this project to proceed.

Based upon the above, we strongly urge that the City engage in further due diligence including further discussions with the DNR and Army Corps of Engineers, to determine the true OHWM at the proposed Sawyer Hotel site. If the City refuses to take any further action to reconcile its actions with the photographs and maps enclosed with this correspondence, there are legal mechanisms through which such action can be compelled. However, we believe it is in everyone's best interest to avoid lengthy and costly litigation. Additionally, it would be in the City's best interest to avoid any damage claims it could be subject to should it later be judicially determined that any portion of the Sawyer Hotel project is actually below the true OHWM.

Very truly yours,

Davis & Kuelthau, s.c.



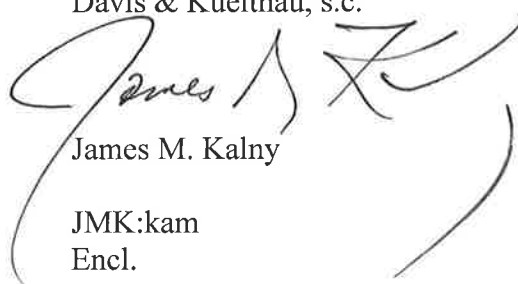
Frank W. Kowalkowski

FWK:kam

Encl.

Very truly yours,

Davis & Kuelthau, s.c.



James M. Kalny

JMK:kam

Encl.

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cc: Michael Bruhn, Wisconsin Dept. of Natural Resources (w/Encl.)
Thad Birmingham, Mayor (w/Encl.)

Council Members:

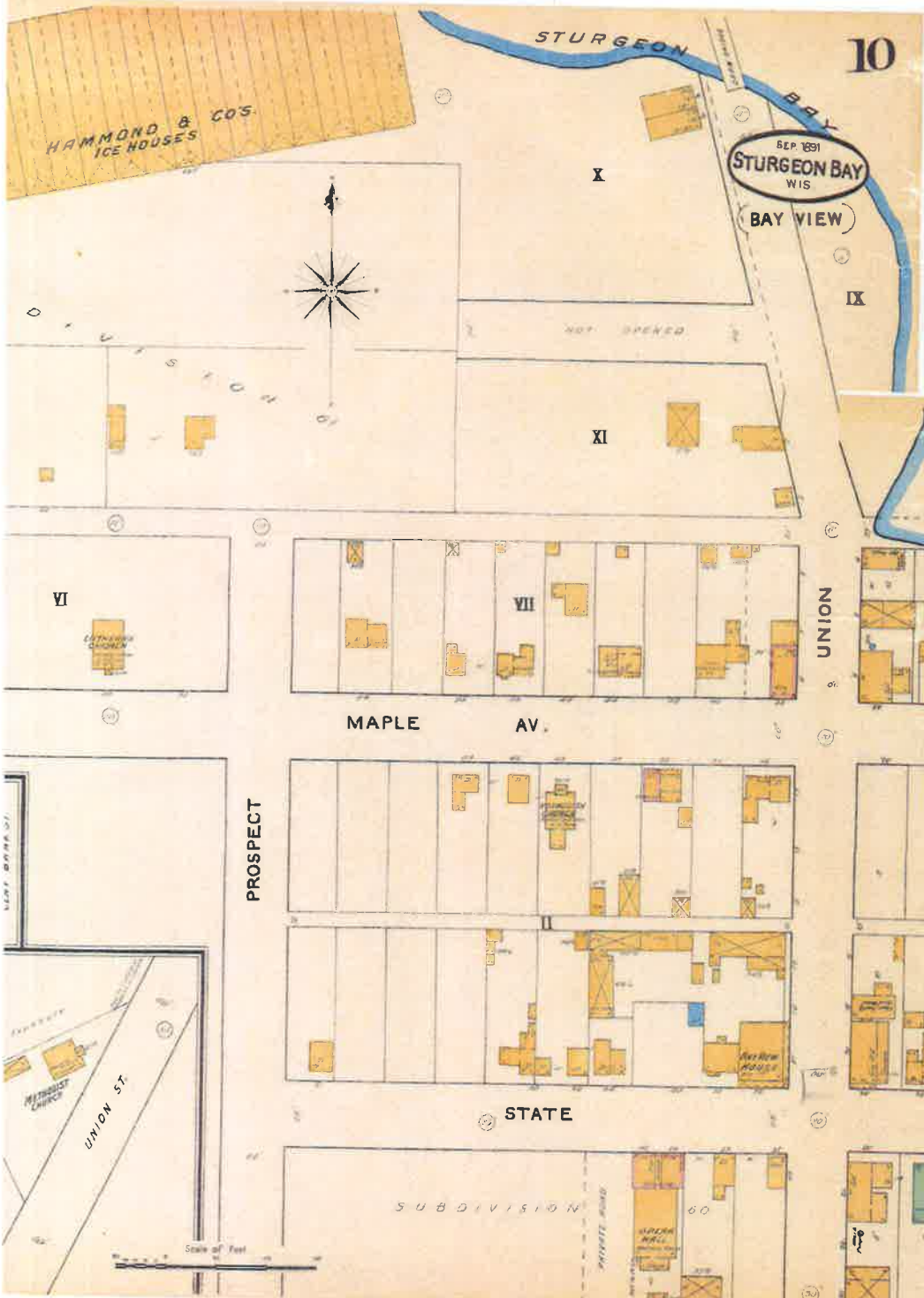
Dan Wiegand(w/Encl.)
Ron Vandertie (w/Encl.)
Ed Ireland (w/Encl.)
Rick Wiesner (w/Encl.)
Jerry Stults (w/Encl.)
Stewart Fett (w/Encl.)
Bob Schlicht (w/Encl.)

City Plan Commission Members

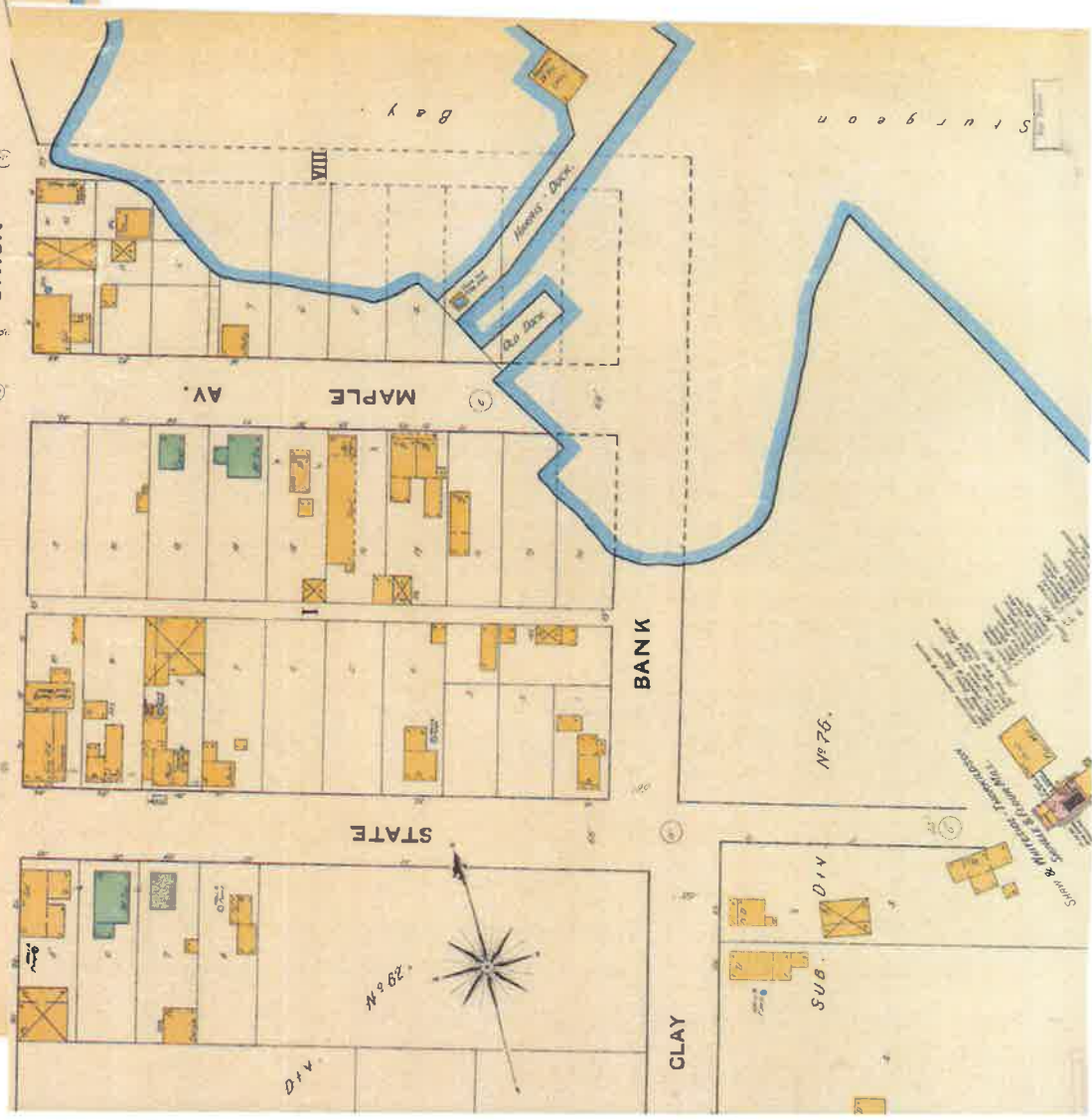
Dan Wiegand (w/Encl.)
Chr., Ed Ireland (w/Encl.)
Michael Gilson (w/Encl.)
Laurel Brooks (w/Encl.)
Jeff Norland (w/Encl.)
Dennis Statz (w/Encl.)
Steven Parent (w/Encl.)

Sturgeon Bay Waterfront Redevelopment Authority:

Rick Wiesner (w/Encl.)
Stewart Fett (w/Encl.)
Ross Schmelzer (w/Encl.)
John Asher (w/Encl.)
Thomas Wulf (w/Encl.)
Thomas Herlache (w/Encl.)
Chairman William Galligan (w/Encl.)



Sturgeon Bay, Door County, Wisconsin September 1891
 Sanborn Map Company
 Date Original 1891
 Wisconsin Historical Society
 Electronic Publication Date 2014
 Stitched by Aten from multiple pages March 2015. For educational nonprofit use only.



Sturgeon Bay, Door County, Wisconsin March 1904

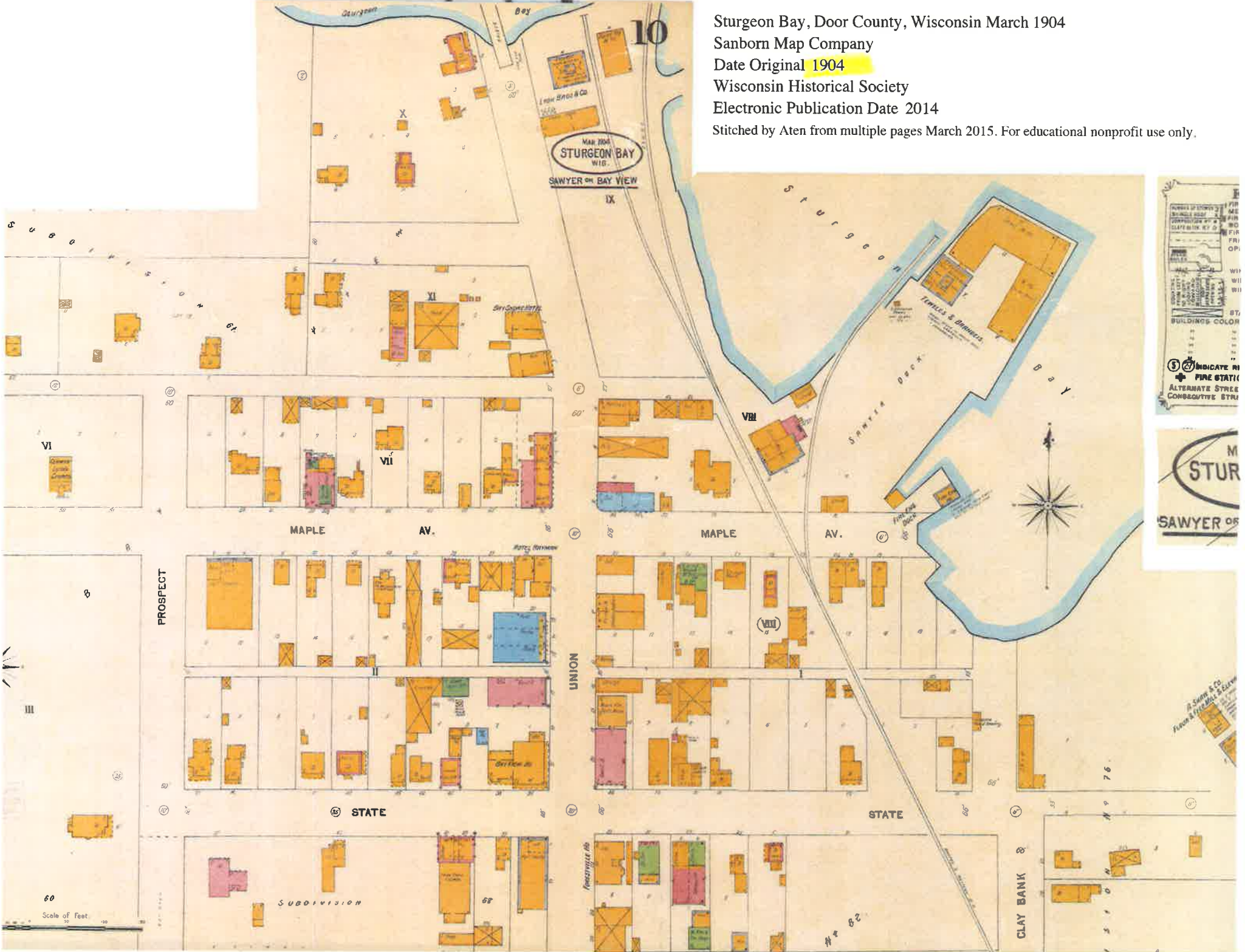
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Proposed site for
Sawyer Hotel

**Sturgeon Bay West Waterfront
Concerns with delineated High Water Line and
proposed private development**

Fine green lines (parcels) and fine blue line (waterfront) are from current parcel data, Door County LIO, accessed March 2015

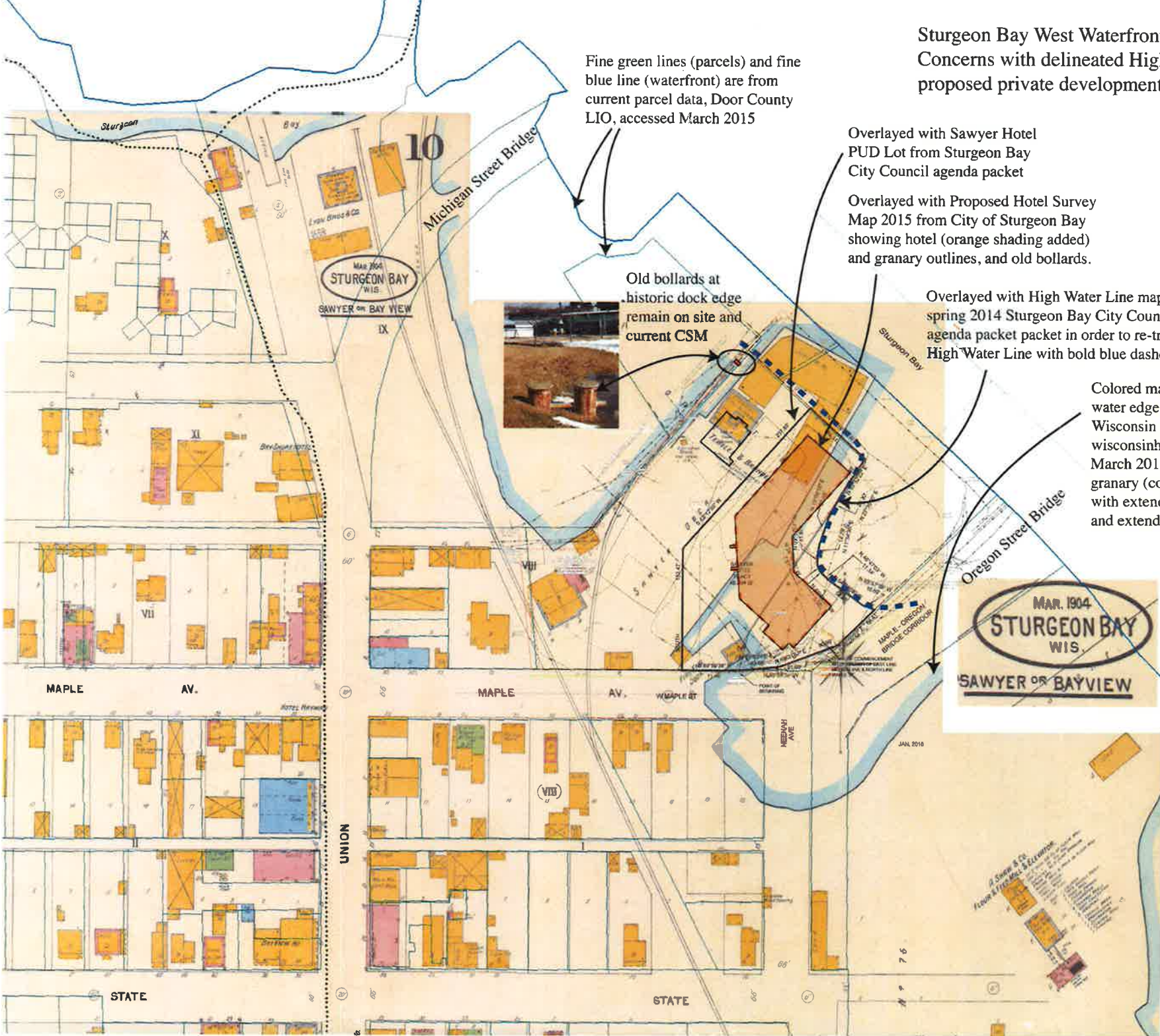
Overlaid with Sawyer Hotel PUD Lot from Sturgeon Bay City Council agenda packet

Overlaid with Proposed Hotel Survey Map 2015 from City of Sturgeon Bay showing hotel (orange shading added) and granary outlines, and old bollards.

Overlaid with High Water Line map from spring 2014 Sturgeon Bay City Council agenda packet in order to re-trace High Water Line with bold blue dashed line.

Colored map including light blue water edge: 1904 Sanborn Map, Wisconsin State Historical Society, wisconsinhistory.org, accessed March 2015. This shows the current granary (constructed 1901-1902) with extended dock, seed warehouse and extended rail spur to granary.

Old bollards at historic dock edge remain on site and current CSM



Overlays by N. Aten
March 2015