

Greetings,

There is a real threat that legislation could up-end our productive efforts in the courts. The Friends of the Sturgeon Bay Public Waterfront are obtaining all the facts that we need during the current legal process of discovery and depositions to win on our key issues of fact through either a summary judgment or at trial. Legislation would take this victory away and deliver the waterfront to a private developer.

Could you send a short polite email to Representative Joel Kitchens? Separate emails to Senator Lasee and Representative Rob Cowles would help as well.

Three quick steps:

1. Short and sweet is all we need. All you need to do is send an email to:
Representative Joel Kitchens: Rep.Kitchens@legis.wisconsin.gov
Senator Frank Lasee: Sen.Lasee@legis.wisconsin.gov
Senator Rob Cowles Sen.Cowles@legis.wisconsin.gov
2. You could say something like “Dear _____, As a (fill in the blank: _____, home owner, land owner, long time resident, conservationist, land trust member, citizen, fisherman) I oppose legislative action to define the Ordinary High Water Mark or any legislative action that might take my public trust rights in Sturgeon Bay.”
3. Pick one or more of the 7 reasons found on the Talking Points Section below. It is better if you can put it in your own words but feel free to cut and paste.
4. Thank him for his consideration, sign it and hit send.
I guess that’s four quick steps, but now you are finished.
--> **THANK YOU!** <--

If we can get 100 emails out on this topic prior to the election we will very likely stop the bill and win!

Background on the legislative action relating to Sturgeon Bay & 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, following the principles of public trust protection in the constitution.

The beds of navigable lakes are public lands that generally cannot be developed for private usage. This is described in 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.

Some of our talking points for Representative Kitchens 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 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 politically connected. If successful, it could upend the existing process of setting the high water mark of simply asking the DNR professionals to follow normal procedure to establish the 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.

“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. 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.
4. 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.
5. 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.
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. Acting legislatively while this local Sturgeon Bay issue is being tried in court by local citizens of standing is an improper use of the legislative process. Let the current trial run its course.