



Exhibit 11A



Exhibit 11 B



Exhibit 11 C

Affidavit of Mary Beth Peranteau
Exhibit 12

Page 1

1 STATE OF WISCONSIN CIRCUIT COURT DOOR COUNTY
 2 -----
 3 FRIENDS OF THE STURGEON BAY
 4 PUBLIC WATERFRONT,
 5 SHAWN M. FAIRCHILD,
 6 CARRI ANDERSSON, LINDA COCKBURN,
 7 RUSS COCKBURN, KATHLEEN FINNERTY,
 8 and CHRISTIE WEBER,
 9 Plaintiffs,
 10 -vs- Case No.: 16-CV-23
 11 Case Code: 30701
 12 CITY OF STURGEON BAY,
 13 a Wisconsin municipal corporation,
 14 and
 15 WATERFRONT REDEVELOPMENT AUTHORITY
 16 OF THE CITY OF STURGEON BAY,
 17 a municipal redevelopment authority,
 18 Defendants.
 19 -----
 20 DEPOSITION OF: MARTIN J. OLEJNICZAK
 21
 22 DATE: September 26, 2016
 23
 24 TIME: 9:10 a.m. - 11:46 a.m.
 25
 26 LOCATION: CITY OF STURGEON BAY CITY HALL
 27 421 Michigan Street
 28 Sturgeon Bay, Wisconsin
 29
 30 REPORTED BY:
 31 CARRIE S. BOHRER, RPR, RMR, CRR
 32 BAY REPORTING SERVICE, INC.
 33 www.bayreportingservice.com
 34 920-432-5662
 35 800-424-2224

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1 A P P E A R A N C E S
 2 WHEELER, VAN SICKLE & ANDERSON, S.C., by
 3 MARY BETH PERANTEAU, Attorney at Law
 4 44 East Mifflin Street, Suite 1000
 5 Madison, Wisconsin 53703
 6 608-255-7277
 7 mperanteau@wheelerlaw.com
 8 appeared on behalf of the Plaintiffs
 9 ARENZ, MOLTER, MACY, RIFFLE & LARSON, S.C. by
 10 REMZY D. BITAR, Attorney at Law
 11 720 N. East Avenue
 12 Waukesha, Wisconsin 53186
 13 (262) 548-1340
 14 rbitar@ammr.net
 15 appeared on behalf of the Defendants
 16 Also Present: Carri Andersson
 17 Linda Cockburn
 18 * * * * *
 19 I N D E X
 20
 21 EXAMINATION BY: PAGE
 22 Ms. Peranteau 4
 23
 24 EXHIBITS MARKED: PAGE ID'D
 25 Exh. 1 Early plan drawing for redevelopment
 of 92 and 100 East Maple area 15
 Exh. 2 New Parcel Lines - August 2015 25
 Exh. 3 Amendment to Development Contract
 for Hotel for Sturgeon Bay
 Waterfront Redevelopment 26
 Exh. 4 Correspondence with the DNR 33
 Exh. 5 Map from the 1955 bulkhead file 34
 Exh. 6 1/2/14 letter to Matthew Moroney
 from Stephen McNeil and related
 documents 58

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1 EXHIBITS (continued): PAGE ID'D
 2 Exh. 7 7/23/14 email from Tom German to
 Marty Olejniczak and others, and
 attachments 67
 3
 4 Exh. 8 9/18/14 email to Baudhuin Surveying
 from Jim Smith 78
 5
 6 Exh. 9 Job Number 15581 map 79
 7
 8 Exh. 10 NR 716 Investigation Report 83
 9
 10 Exh. 11 NR 716 Investigation Report -
 Addendum 85
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 12 Exh. 12 Series of emails, 9/3/2013, re:
 Confidential Attorney Client
 Communication Issues Related to
 Bulkhead Line 86
 13
 14 Exh. 13 Development at Historic Fill Site
 or Licensed Landfill Exemption
 Application 95
 15
 16 Exh. 14 6/26/13 email to Marty Olejniczak
 from Jim Smith re: Waterfront title
 issue update101
 17
 18 Exh. 15 Email chain re: Lake bed lease103
 19
 20 Exh. 16 11/2014 email exchange between
 Marty Olejniczak and Jim Smith re:
 Use of Public Space by Proposed
 Restaurant107
 21
 22 (Original exhibits were attached to original
 transcript; copies to transcript copies.)
 23
 24 REQUESTED INFORMATION: PAGE
 25 NONE

Page 4

1 TRANSCRIPT OF PROCEEDINGS
 2 MARTIN J. OLEJNICZAK, called as a
 3 witness herein, having been first duly
 4 sworn/affirmed, was examined and testified as
 5 follows:
 6 EXAMINATION
 7 BY MS. PERANTEAU:
 8 Q Will you please state your full name and
 9 business address for the record.
 10 A Martin Joseph Olejniczak, 421 Michigan Street,
 11 Sturgeon Bay, Wisconsin, 54201 -- or 54235.
 12 Q And, Mr. Olejniczak, would you be comfortable
 13 today if I called you Marty because it has less
 14 syllables?
 15 A Sure.
 16 Q Thank you. Please call me Mary Beth.
 17 Have you previously given testimony under
 18 oath?
 19 A Yes.
 20 Q And I understand that you are currently in the
 21 position of the city's community development
 22 director?
 23 A Correct.
 24 Q Was the testimony you previously have given in
 25 that position?

1 right corner "Wisconsin Coastal Management
2 Program," this plan was not adopted in order to
3 get the grant or adopted because there was a
4 grant to prepare it?
5 A We got a grant from Coastal Management to study
6 the feasibility of the -- what we call the four
7 seasons market or the festival market. The fact
8 that that label is on there, although I -- I'm
9 not 100 percent certain, leads me to believe
10 that this came from that document.
11 Q Which document?
12 A The feasibility analysis for the four seasons
13 market.
14 Q Okay. So then back onto Page 3, here's a plan
15 that's got a date of April 17th of 2014. Do you
16 recall whether this was a plan that was approved
17 by the city council or WRA?
18 A I don't believe it was formally adopted by
19 either body.
20 Q Okay. Do you recall what prompted the
21 modifications from Page 2 to Page 3?
22 A Yes, I do.
23 Q And those were?
24 A The Wisconsin Department of Natural Resources
25 determined that we had to build behind what they

1 said was the ordinary high water mark, and that
2 forced the private development to be moved away
3 from the bulkhead line.
4 Q Okay. This particular exhibit does not show any
5 location of an ordinary high water mark, though,
6 correct?
7 A Not on this exhibit.
8 Q And at the point in time that it was created,
9 what information did you have about the location
10 of the ordinary high water mark?
11 A That the location was the shoreline on the 1955
12 bulkhead ordinance approved by the PSC.
13 Q Okay. Did you -- do you recall having any
14 discussions with DNR about whether or not the
15 festival market was a public use that could
16 remain in the public trust area below the
17 ordinary high water mark?
18 A It was discussed somewhat with DNR staff.
19 Q And what was DNR's opinion on that?
20 A Things like restrooms and things could be in the
21 public trust area. If the city owned it, it
22 potentially could be in the public trust area.
23 But any -- any private businesses or private
24 ownership would rule that out.
25 Q And the plan was to have the festival market

1 privately owned and developed?
2 A That's correct.
3 Q Okay. Then the final page of the -- of Exhibit
4 Number 1 shows yet a different version of a plan
5 for the west waterfront. This one's dated
6 August 18th of 2014. What prompted the
7 modifications between Page 3 and Page 4 of
8 Exhibit 1?
9 A The city and the city's consultants tried to find
10 a developer and tenants for the four seasons
11 market. It became apparent that the likelihood
12 of success with that at least in the short-term
13 was not good. Therefore, to try to find some
14 private development, the focus shifted to the
15 lodging component, and a hotel developer was
16 found and -- that wanted the site overlooking
17 the public space there, and therefore the site
18 plan was reworked to show a hotel fitting into
19 the plan.
20 Q But in the previous two iterations in this
21 exhibit, Pages 2 and 3, there's no lodging
22 shown, so how did the idea for lodging sort of
23 reemerge at this time?
24 A The lodging has moved around on the site. In
25 fact, on the -- the April 17th plan where it

1 shows future development, that could have been
2 lodging, that could have been apartments, could
3 have been retail. It -- when we first found out
4 that we couldn't build right up to the bulkhead
5 line and had to push things back, there was some
6 concern that there wouldn't be enough room for
7 lodging and all the other uses and the parking.
8 Q So did the city issue a request for proposals at
9 the point in time that the August 18th plan was
10 being discussed?
11 A A request for proposal was not issued.
12 Q Okay. How did the -- and I understand that the
13 hotel developer was Mr. Papke's LLC Sawyer Hotel
14 Development?
15 A Um-hmm.
16 Q That's never changed?
17 A I don't understand the question.
18 Q There was no other hotel developer besides
19 Papke's company that the city was working with
20 for the site that's indicated as "Hotel" on
21 Page 4 of Exhibit 1?
22 A We had contacted various other hotel chains and
23 developers. There was one other competing
24 proposal that never really made it too far, but
25 the only one that we worked on formally with the

1 A Yes. The issue there is part of getting the
2 VPLE is remediating the site. Part of the
3 remediation of the site is putting a hotel over
4 it to cap any remaining contamination. And
5 therefore, it became apparent that the VPLE and
6 the hotel go hand in hand. And therefore, it --
7 it's not a case of we get the VPLE and then the
8 hotel can get constructed. We're actually going
9 to have the hotel built before the liability
10 exemption is fully executed.
11 Q **And your understanding is that the developer,
12 Papke, is or is not willing to waive that?**
13 A He's willing to waive that.
14 Q **So in other words, he would be willing to close
15 before the site is closed or the hotel is
16 constructed because --**
17 A Correct.
18 Q **-- he would have to own that?**
19 A Right. It's sort of -- it became a -- we can't
20 do one without the other first, so it -- we
21 really needed to move forward on building the
22 hotel in order to get the final liability
23 exemption.
24 Q **And then in terms of title insurance, is it your
25 understanding that the resolution of this**

1 Q **So in your understanding, Peninsula Title is not
2 willing to issue a policy that's acceptable to
3 Mr. Papke?**
4 **MR. BITAR:** Object to form and
5 foundation. Go ahead.
6 A I don't know. I believe not. Otherwise, we
7 probably would be working with him.
8 Q **Are you aware of whether the city has been able
9 to get agreement from a different title company,
10 not Peninsula, to issue a title insurance policy
11 for the hotel parcel?**
12 A I am not aware if we've received any assurances
13 that a different title company will issue a
14 policy.
15 Q **Just going back and looking at Exhibit 2, the
16 outline of the hotel parcel. In discovery in
17 this case the city denied a request to admit
18 that the development contract had no requirement
19 for public access. The city denies that. Can
20 you identify anything in the development contract
21 that requires public access within the outline
22 of the hotel parcel as shown on Exhibit 2?**
23 A There's a public access easement along this edge
24 of the parcel in order for the public to access
25 the remaining public land.

1 **lawsuit will clear any title insurance issues?**
2 A I'm not certain if it will clear all title --
3 certainly it will help. But there -- I -- I'm
4 not an attorney or a title company rep, so I
5 don't know if there's other remaining title
6 issues.
7 Q **Are you aware of a revision to the title
8 commitment from Peninsula Title that was issued
9 in about April of 2016?**
10 A No. I don't believe so.
11 Q **Okay. Never saw that?**
12 A Not to my recollection.
13 Q **Okay. And were you aware that the city's
14 attorney, Mr. Nesbitt, apparently wrote to a
15 different title insurance company requesting
16 issuance of title as late as May of 2016?**
17 A Yes.
18 Q **And what was the purpose for trying to get title
19 from a different title company, if you know?**
20 **MR. BITAR:** Object to form and
21 foundation. Go ahead.
22 A In order to transfer property, we needed to get
23 title insurance for Mr. Papke, and therefore
24 there was attempts to see if other title
25 companies would be willing to issue it.

1 Q **That would be the southeast edge of the parcel?**
2 A Southeast edge, yes.
3 Q **And in your understanding, the easement is
4 within the Lot 1 hotel parcel boundaries?**
5 A Correct.
6 Q **Okay. Any other public access within the parcel
7 aside from what you've just identified?**
8 A I don't believe so.
9 Q **We're going to get into the subject of the city's
10 communications with the officials of state
11 agencies related to the redevelopment parcel,
12 and I apologize for the killing of trees --**
13 A Okay.
14 Q **-- for this part of the deposition.
15 (Exhibit 4 marked for identification.)**
16 Q **Do you recall when the city first made contact
17 with any representative from DNR in connection
18 with the redevelopment parcel, what I've been
19 calling the hotel parcel?**
20 A I think it likely was when we contacted the DNR
21 fisheries about the proposed pier.
22 Q **Okay. Do you recall when that might have been?**
23 A Summer of 2013.
24 Q **Okay. Do you recall your first contact with the
25 DNR specifically with regard to title to 92 and**

1 **100 East Maple?**
 2 A I had a meeting with Carrie Webb in regards to
 3 title to the 100 East Maple Street parcel.
 4 Q **When was that?**
 5 A I'm not 100 percent certain but I think it was
 6 around August of 2013.
 7 Q **Okay. What prompted arranging that meeting with**
 8 **Ms. Webb?**
 9 A **In order to get going on our voluntary party**
 10 **liability exemption, we needed to prove that we**
 11 **had title to the property, and the chain of**
 12 **title apparently was not in order, and so we**
 13 **wanted to meet with the DNR to see if they would**
 14 **stipulate that, yes, we own this Parcel 100.**
 15 Q **So I'll just have you look at Exhibit 4 to get**
 16 **some dates. Page 1 of Exhibit 4 is an email**
 17 **from you to other city representatives dated**
 18 **September 3rd of 2013, correct? Page 1.**
 19 A Yes.
 20 Q **And the email indicates that you had scheduled a**
 21 **meeting with Ms. Webb for 10:00 a.m. on Monday,**
 22 **September 9th. Does that sound like the date you**
 23 **met?**
 24 A Yeah. I said August, so I wasn't too far off.
 25 Q **Do you recall how long that meeting lasted?**

1 **past that, that line.**
 2 Q **Did she give you an explanation for why that was**
 3 **the case?**
 4 A I don't think so.
 5 Q **Did she reference that there was some sort of**
 6 **DNR precedent on that point?**
 7 A I believe she did. I think she explained that
 8 this is what -- how they treat the bulkhead
 9 ordinances and that they were being consistent.
 10 Q **Let me -- just to be perfectly clear, can you**
 11 **just highlight for me on Exhibit 5 what you're**
 12 **calling the shoreline that would be --**
 13 A (Complies.)
 14 Q **Okay. Thank you. And so in your understanding,**
 15 **there could be no development waterward of the**
 16 **yellow highlighted line on Exhibit 5 based on**
 17 **Webb's conversation?**
 18 A **Only public or navigational-related uses.**
 19 Q **Okay. And at this point in time, the city**
 20 **desired to have title to the area between the**
 21 **bulkhead line and the shoreline?**
 22 A Correct.
 23 Q **Do you recall what you personally did next to**
 24 **pursue trying to get title to that area?**
 25 A I informed the city attorney what Ms. Webb

1 A No, I do not.
 2 Q **Do you recall if anyone else was at the meeting?**
 3 A My recollection, it was just Carrie and I.
 4 Q **Okay. Subject matter of that discussion?**
 5 A **The Parcel 100. I went in hoping to get some**
 6 **direction on how we can get assurances that we**
 7 **own the property, and she laid out the 1955**
 8 **bulkhead ordinance map and explained how there**
 9 **can be no development beyond the shoreline from**
 10 **that map.**
 11 Q **Okay. Let's get that marked. Is this what**
 12 **we're talking about, the --**
 13 A Yes.
 14 Q **-- map from the 1955 bulkhead file?**
 15 A **Um-hmm.**
 16 Q **She had a full-scale one, though, at the**
 17 **meeting, not a reduced version like this.**
 18 **(Exhibit 5 marked for identification.)**
 19 Q **So when you say that Ms. Webb explained that**
 20 **there couldn't be any development -- I'm sorry.**
 21 **Can you repeat that? She --**
 22 A **She explained that the -- even though there's an**
 23 **adopted bulkhead line, that the shoreline from**
 24 **that map was still the ordinary high water mark,**
 25 **and therefore private development could not go**

1 relayed to me, and we went -- you know, met with
 2 other DNR officials to see if that -- if Carrie's
 3 position was really accurate and whether or not
 4 the DNR wouldn't allow development all the way
 5 up to the bulkhead line, which was the city's
 6 position at that time.
 7 Q **Did the city want to actually transfer title to**
 8 **all property up to the bulkhead line?**
 9 A No. None of our plans included private
 10 development up to the bulkhead line. All our
 11 plans retained municipal ownership of the
 12 promenade area which was a -- you know,
 13 approximately 75 feet, in some cases wider, from
 14 the actual bulkhead line. But we did -- but our
 15 plans did show private development beyond the
 16 line on that 1955 map.
 17 Q **Meaning waterward of that highlighted line?**
 18 A Correct.
 19 Q **Okay. So just referring again to Exhibit 4, the**
 20 **second page, now, that's an email from you to**
 21 **other city officials dated October 14th of 2013.**
 22 **Does that refresh your recollection at all about**
 23 **what happened next following your meeting with**
 24 **Carrie Webb?**
 25 A Bill Schuster is the director of the Door County

1 Land and Conservation Department. He also sits
2 on the board of the Wisconsin Coastal
3 Management, and therefore he's got knowledge of
4 some of these things. So I -- while I didn't
5 talk to Mr. Schuster, I believe other people did
6 and asked for advice. So apparently he's saying
7 we should talk to Liesa Lehmann.

8 **Q So it appears from your email on Page 2 of**
9 **Exhibit 4 that Bill Schuster also contacted an**
10 **individual at the Coastal Management Program?**

11 **A Correct. Mike Friis.**

12 **Q And so as of this point in time, October of 2013,**
13 **the recommendation was to contact Tom German**
14 **from the Board of Commissioners of Public Lands?**

15 **A Um-hmm. And Ms. Lehmann from DNR.**

16 **Q Okay. Page 3 of Exhibit 4, towards the bottom**
17 **of the page there's another email from you. That**
18 **one's a little bit earlier, dated September 30th,**
19 **and it appears to be a sort of a summary provided**
20 **by you to Bill Schuster. Was that provided so**
21 **that he could go out and make these contacts**
22 **with the state officials as we've just discussed?**

23 **A I need to read it if you don't mind.**

24 **Q Sure.**

25 **A (Reviewing document.) Seems like a very well**

1 that showed the progression of the shoreline.

2 **Q And those old maps were actually included as an**
3 **appendix to your Phase I environmental, true?**

4 **A I don't know.**

5 **Q You had occasion besides the Phase I**
6 **environmental to have reviewed those maps?**

7 **A In my capacity as a -- as a development --**
8 **community development director, occasionally I**
9 **look at old Sanborn maps to see what buildings**
10 **were there at a certain time. We -- when we did**
11 **the park development next door to this, we got a**
12 **grant to do a lot of historical markers on things**
13 **like, you know, history of the Coast Guard and**
14 **stuff, and one of them had to do with Sawyer Park**
15 **and the dock wall and the kind of progression on**
16 **that, and as part of that research we came across**
17 **several maps that, you know, showed the shoreline**
18 **over time.**

19 **Q Did you personally conduct that research?**

20 **A Yes.**

21 **Q And this was for a grant to install historical**
22 **markers?**

23 **A Well, the grant was to improve waterfront**
24 **parkland. But one of the components of the**
25 **project was the installation of some historical**

1 written synopsis of the issue.

2 **Q Okay. So, again, you identified Bill Schuster**
3 **as the director of the Door County --**

4 **A Soil and Water Conservation Department.**

5 **Q Okay. So -- and you believe he had some special**
6 **expertise or contacts to talk about the issue of**
7 **title to lands along the bayfront?**

8 **A Because he sat on the board for the Wisconsin**
9 **Coastal Management Agency, we believed he knew**
10 **the right people that we should talk to.**

11 **Q Okay. Do you know whether Mr. Schuster had**
12 **previously ever dealt with an issue about title**
13 **to lands behind a bulkhead line?**

14 **A I do not.**

15 **Q Okay. Your email says -- advises Bill that the**
16 **area on the west waterfront was gradually filled**
17 **over time. I'm reading the bottom of Page 3.**
18 **"By the 1950s the shoreline wrapped around the**
19 **Door County Co-op parcel, but most of the area**
20 **on either side was still water."**

21 **A Um-hmm.**

22 **Q What was the basis for you to tell Mr. Schuster**
23 **that the area on the west waterfront was**
24 **gradually filled over time?**

25 **A I was aware of old maps dating to the 1800s even**

1 markers.

2 **Q Do you recall what time period the grant project**
3 **was?**

4 **A It was right around the same time that we were**
5 **working on this redevelopment project.**

6 **Q Okay. And so when you are relaying this**
7 **information to Bill Schuster in this email, is**
8 **it your understanding based on that research,**
9 **those maps, that the area behind the bulkhead**
10 **line was land-filled, was artificially filled**
11 **over time?**

12 **A I don't know -- all I can speculate on is in the**
13 **1950s and '60s when the city did a project, that**
14 **was very likely artificially filled. The stuff**
15 **prior to that, I have no knowledge if it was**
16 **natural, if it was artificial, or what.**

17 **Q You never came across any archival material in**
18 **your research that would have nailed that down?**

19 **A Never saw any permits, any -- anything that**
20 **would indicate how it was filled.**

21 **Q Okay. On Page 4 of Exhibit 4, your -- this is**
22 **part of your description for Bill Schuster,**
23 **you -- and the history of the site, you say,**
24 **"The Co-op quit-claimed its rights to any of**
25 **this area to the city." The co-op quit-claimed**

1 **its rights to what area?**
 2 A There's a deed of -- it was -- I -- I believe it
 3 was a swap of property. The city deeded a
 4 sliver of land on one side of the co-op parcel
 5 in exchange for land and a -- and riparian
 6 rights to other parts of the co-op property.
 7 **Q Do you recall what era that would have been?**
 8 **A 1960s.**
 9 **Q And the city has a deed from Freedom Bank for**
 10 **the largest part of the co-op parcel; is that**
 11 **correct?**
 12 A That's correct.
 13 **Q Okay. About 2012?**
 14 A December of 2012.
 15 **Q Okay. And so that was a property that the bank**
 16 **had purchased at a foreclosure?**
 17 A That's correct.
 18 **Q You say, continuing in your email to**
 19 **Bill Schuster, "The dock wall remains right at**
 20 **the bulkhead line and the property was used for**
 21 **docking ships, boat launch ramp, coast guard**
 22 **storage, Maritime Museum, and parking."**
 23 **When you say "the property," is that limited**
 24 **to some parcel or parcels on the west waterfront?**
 25 **A I believe that's talking about the entire dock**

1 wall between the Oregon Street Bridge and the
 2 end of the dock wall by Maritime Museum.
 3 **Q Do you have any information, based on your**
 4 **research for the grant project or otherwise, of**
 5 **other historical uses of this area?**
 6 A No.
 7 **Q So then further down in the same email, last**
 8 **paragraph, you say to Bill Schuster, "It seems**
 9 **the DNR is basing the," ordinary high water**
 10 **mark, "OHWM on the 1955 map so prior filling is**
 11 **not part of the bay."**
 12 **Was it your understanding in talking with**
 13 **Carrie Webb that the DNR was making a distinction**
 14 **between property that was filled after the**
 15 **bulkhead approval and property that was filled**
 16 **before the bulkhead approval?**
 17 A I don't recall Carrie ever distinguishing
 18 between the two.
 19 **Q Okay. So what is the basis for your**
 20 **understanding that it seems the DNR is basing**
 21 **the ordinary high water mark on the 1955 map so**
 22 **prior filling is not part of the bay? What is**
 23 **the basis for that statement?**
 24 A This map and this line and Carrie's statement
 25 that that's the high water mark so we can

1 privately develop behind it but not waterward of
 2 it.
 3 **Q And assuming for purposes of this discussion**
 4 **that some or all of the part landward of the**
 5 **shoreline on the 1955 map was artificially**
 6 **filled, did you understand that the DNR made**
 7 **some kind of a distinction between artificial**
 8 **filling that went on before the 1955 approval**
 9 **and that that went on after?**
 10 A I have never spoken with Carrie Webb about
 11 artificial fill versus natural fill.
 12 **Q Have you spoken with any other DNR**
 13 **representatives about that?**
 14 A No, I have not.
 15 **Q How about Tom German?**
 16 A I have spoken with Tom German, but I don't
 17 believe we ever discussed artificial versus
 18 natural fill.
 19 **Q Okay. So do you recall that there was any**
 20 **movement in the city's goal to get title up to**
 21 **the bulkhead line based on any contacts that**
 22 **Bill Schuster made?**
 23 A Can you repeat the question?
 24 **Q Was there any progress in the city's goal to**
 25 **obtain title up to the bulkhead as a result of**

1 **Mr. Schuster's contacts on behalf of the city?**
 2 A No. We -- we never were able to get the DNR to
 3 agree that we could develop right up to the
 4 bulkhead line.
 5 **Q In any subsequent meetings with the DNR?**
 6 A Correct.
 7 **Q Okay. So just to get a chronology of those**
 8 **subsequent meetings, it appears, based on some**
 9 **of the subsequent email, that there was a**
 10 **meeting between yourself and a DNR staffer named**
 11 **Jean Romback-Bartels?**
 12 A That's correct.
 13 **Q Do you recall when that was?**
 14 A It was after my meeting with Carrie Webb. I
 15 don't know the specific date.
 16 **Q Okay. Do you -- and just flipping to Page 5 of**
 17 **the exhibit, if you see that --**
 18 A Looks like November 7th.
 19 **Q Okay. November 7th of 2013?**
 20 A Um-hmm.
 21 **Q And between the meeting with Carrie Webb in**
 22 **September and the meeting with Ms. Bartels in**
 23 **November, did you have any phone calls or**
 24 **contacts with DNR, aside from setting up the**
 25 **meeting?**

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1 A Okay.

2 Q **That blue crosshatched portion of ordinary high**

3 **water mark line as shown on the**

4 **second-to-the-last page of the map, do you know**

5 **why the surveyor lined that up with the parcel**

6 **boundary?**

7 MR. BITAR: Object to form and

8 foundation. Go ahead.

9 A I do not think it lines up with the parcel

10 boundary.

11 Q **You don't. Okay. You don't think that lines up**

12 **with the boundary between the former 92 and**

13 **100 East Maple?**

14 A Are you referring to the parcel as existed when

15 this was drafted?

16 Q **Yes.**

17 A Then it does not line up. That map you're

18 holding in your hand was created after this.

19 Q **That I understand.**

20 A The CSM lined up with -- with the surveyed

21 ordinary high water mark line, not the other way

22 around.

23 Q **Okay. So it's your position that this map, the**

24 **second-to-the-last page of Exhibit 6, the**

25 **crosshatched portion does not line up with the**

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1 **old parcel boundaries between 92 and**

2 **100 East Maple?**

3 A Correct.

4 Q **Okay. You're aware that the -- that ultimately**

5 **the DNR issued a formal concurrence document that**

6 **used a surveyed ordinary high water mark line as**

7 **an exhibit, correct?**

8 A Correct.

9 Q **You've seen that?**

10 A (Nods head up and down.)

11 Q **Are you aware of whether there were any changes**

12 **made in the location of the surveyed ordinary**

13 **high water mark between the map that's included**

14 **on the second-to-the-last page of Exhibit 6 and**

15 **the plat of survey that's included in the DNR**

16 **concurrence document?**

17 A I can't guarantee that they're exact, but I'm

18 not aware of any material differences.

19 Q **Okay. Are you aware of whether the surveyed**

20 **ordinary high water mark that apparently was**

21 **included with the Moroney letter was adjusted in**

22 **any respect to accommodate a building footprint?**

23 A It was not.

24 Q **Okay. And it's your testimony that it was not**

25 **adjusted to accommodate property boundary lines?**

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1 A That's correct. At the time that we met with

2 Mr. Moroney and the DNR staff and showed him our

3 new -- we had not revised our redevelopment plan

4 at that point. I think one of the prior

5 exhibits --

6 Q **This one?**

7 A Yeah.

8 Q **Exhibit 1?**

9 A No. This -- this may be the revised plan that

10 we shared with them.

11 Q **Okay. And you're showing me Page 3 of**

12 **Exhibit --**

13 A Page 3 of Exhibit Number 1.

14 Q **Okay.**

15 A Either this or something similar to it. This

16 was done after the surveyed line was created.

17 Q **Page 3 of Exhibit 1 was prepared after the**

18 **Moroney letter exhibit map?**

19 A Correct.

20 Q **Okay. Getting back to our chronology of contacts**

21 **with state officials, following that second**

22 **meeting with the secretary's office to discuss**

23 **grant funding, do you recall a subsequent meeting**

24 **with DNR legal staff to discuss the property**

25 **boundaries, the ordinary high water mark?**

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1 A Yes, I recall meeting with Megan Correll

2 regarding the concurrence letter.

3 Q **Okay. Do you recall when that meeting occurred?**

4 A It was likely in the spring of 2014.

5 Q **Okay. So just representing to you that I have**

6 **an email from Mr. German to you dated March 31st**

7 **of 2014 where he states "it was nice to meet you**

8 **all today," that would be consistent with what**

9 **you're testifying, a meeting in spring of 2014?**

10 A He might have been at the meetings with

11 Mr. Moroney's office, now that I think of it.

12 So I'm not sure what -- can I -- do you have an

13 exhibit I can look at?

14 Q **I don't have an exhibit, but you're free to look**

15 **at that.**

16 A (Reviewing document.)

17 Q **Possibly he was at the grant funding discussion?**

18 A I think this might relate to the meeting with

19 the DNR staff, but --

20 Q **Okay. So to the extent that the -- that**

21 **Tom German sends you an email March 31st of 2014,**

22 **says it was nice to meet you today, and he's**

23 **talking about options for grant money, that**

24 **suggests that the second meeting with the**

25 **secretary's office included Mr. German?**

1 A Right. We met with a lot of people, and so it's
2 hard for me to remember exactly who was in each
3 meeting.
4 Q Okay.
5 A But I think he was part of that meeting, and
6 then he followed up with some information on
7 grants and things. Because that was a large
8 part of the meeting was trying to find funding
9 to get this project going.
10 Q Okay. Do you recall at that meeting or any other
11 meeting with Tom German the idea of obtaining a
12 lease from the Board of Commissioners of Public
13 Lands?
14 A Yes. It was made clear to us that, you know,
15 they had no authority to transfer ownership of
16 any property that would be considered public
17 trust lands, but that they do do leases for
18 certain things, and we had some discussions
19 about if we go forward with our redevelopment
20 plan and create this public space down in the
21 area along the dock wall, whether or not we
22 would have to obtain a lease through the Board
23 of Commissioners of Public Lands.
24 Q So did you -- did the city make any determination
25 on that score?

1 Q All right. So this Exhibit 7, Page 1, is an
2 email from Tom German to you and others dated
3 July 23rd of 2014, correct?
4 A Correct.
5 Q And in the email he indicates, "I have attached
6 the summary you requested along with a copy of
7 the composite map I brought to our last
8 meeting."
9 Do you see that?
10 A Yes.
11 Q So does that refresh your recollection concerning
12 a meeting with Tom German?
13 A Yeah, I think it -- I think it was still the
14 meeting that we held on-site.
15 Q Okay. And so flipping to the second page, this
16 appears to be a summary of that meeting?
17 A Second page. Okay.
18 Q Second through fifth pages appear to be a
19 summary of the discussion at that meeting?
20 A Okay.
21 Q Do you recall getting this summary?
22 A Yes.
23 Q Do you recall whether you think it's an accurate
24 reflection of what was stated at that meeting?
25 MR. BITAR: I'll object to form. Go

1 A No. We -- until we -- you know, everything was
2 still in flux in terms of what specifically we
3 were going to do. We hadn't -- we -- you know,
4 we had some nice, you know, kind of pretty maps
5 that Vandewalle had done, but we did not have an
6 actual engineered plan of what the promenade and
7 public space would look like. So until we had
8 that, there was really nothing to take to the
9 Board of Commissioners of Public Lands to obtain
10 a lease for.
11 Q So as we sit here today, is that still an open
12 issue, whether the city would pursue a lease
13 with the Board of Commissioners --
14 A Still an open issue. I don't think we ever
15 resolved if we have to have a lease or not. So
16 we have not applied for anything at this point.
17 Q So then following the meeting that you think
18 Tom German was at with the secretary's office,
19 end of March of 2014, did you have a subsequent
20 meeting with Mr. German?
21 A He may -- we actually had a meeting on the site
22 with Megan Correll, and I think -- I'm pretty
23 sure Tom German was at that meeting as well.
24 Q Okay.
25 (Exhibit 7 marked for identification.)

1 ahead and answer.
2 A Yeah, I don't know. I -- what I --
3 Q You don't recall at the time whether you thought
4 it was inaccurate in any respect?
5 A I don't -- I don't recall sending off responses
6 saying, you know, you really -- you really messed
7 this up, Tom. But I don't recall if everything
8 in here was accepted as accurate or not.
9 Q Okay. So then let's go through that then.
10 Mr. German brought a composite map to the
11 meeting that you had with him?
12 A Yeah. It's the map that's attached.
13 Q To the exhibit?
14 A Yeah.
15 Q Final page of the exhibit?
16 A Correct.
17 Q Okay. And so the meeting was an on-site meeting?
18 A That's my recollection, yes.
19 Q On the site of the redevelopment parcel?
20 A Yes.
21 Q Okay. And who else was there besides yourself
22 and Mr. German?
23 A Oh, Jim Smith and/or Randy Nesbitt,
24 Megan Correll, myself. There may have been
25 others, but those are the ones I remember.

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1 **Q** Okay. What was the purpose of the on-site
2 meeting?
3 **A** I think it was to determine, you know, where
4 specifically the boundary of the ordinary high
5 water mark was going.
6 **Q** Now, the site as it existed then and as it
7 exists today is filled up to the bulkhead, and
8 it's -- there's a steel dock wall, correct?
9 **A** Correct.
10 **Q** So is there anything about the way the site looks
11 that would inform the discussion of where the
12 specific ordinary high water mark boundary would
13 be?
14 **A** It's all asphalt, or was at the time. So it's
15 not like you could go out and find, you know,
16 where vegetation was growing or not growing or
17 anything like that, so --
18 **Q** So given that circumstance, you understand the
19 reason for an on-site meeting?
20 **A** For all I know maybe Tom just wanted to see the
21 site. I'm not sure why it -- why they came up.
22 **Q** Okay. And then on the second page of -- rather
23 the first page of the summary attached to
24 Mr. German's email, under the heading Important
25 Map Disclosures, do you see that?

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1 **A** Yep.
2 **Q** He's got a bullet point talking about the
3 original meander line of the bay noted on the
4 map.
5 **A** Okay.
6 **Q** And that's noted on the map as a light blue
7 thick line, correct?
8 **A** Correct.
9 **Q** Based on the meeting you had with Mr. German or
10 otherwise, do you have any understanding about
11 the significance of the meander line?
12 **A** I don't know what the significance of this
13 original survey shore meander line is other than
14 maybe to indicate what -- you know, approximately
15 where the shore may have been way back at --
16 pre-settlement days.
17 **Q** Okay. You don't know whether the location of
18 the meander line figured in to the ultimate
19 determination of where the ordinary high water
20 mark surveyed line was?
21 **A** I don't believe it did. Because ultimately the
22 surveyed line did not follow or had no basis in
23 the original shore meander line.
24 **Q** Okay. Mr. German's summary next points out that
25 "The 1925 map shows the Teweles & Brandeis Wharf

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1 on which now stands the vacant grain elevator"?
2 **A** Um-hmm.
3 **Q** Do you understand -- and following that, he
4 talks about some of the areas between the docks
5 were dry land and water depths were shallow. Do
6 you see where it says that in the summary?
7 **A** Yes.
8 **Q** He says, "This might be interpreted as 'littoral
9 drift' and accretion between the docks."
10 Did I read that accurately?
11 **A** I think it's pronounced "li-TOR-al," but other
12 than that I think it's accurate.
13 **Q** I always wondered. My expert said "literal."
14 Anyway, do you recall having a discussion on
15 the issue of accretion between docks in this
16 conversation on-site?
17 **A** Yes. I think Tom German was, you know, trying
18 to show how the shoreline could have changed
19 over time.
20 **Q** Okay. So you previously testified that you
21 never had any conversation or understanding
22 about the distinction between artificial fill
23 and accretion? That was your testimony?
24 **A** Yes.
25 **Q** So that was not discussed in this meeting?

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1 **A** It was discussed that the area between the
2 Teweles & Brandeis dock and the -- I guess what
3 is now the Oregon Street Bridge corridor could
4 have filled in over time.
5 **Q** Okay. Did you have any understanding why that
6 would be significant to the ordinary high water
7 mark determination?
8 **A** Yes. If they -- I believe that Tom German wanted
9 to be able to justify that it's possible that the
10 line would have shifted waterward from the 1925
11 map.
12 **Q** What line would have shifted waterward?
13 **A** The shoreline.
14 **Q** The shoreline shown by the meander?
15 **A** No. The shoreline from the 1925 -- the base map
16 underneath this document here.
17 **Q** Okay. So the -- because the base map shows that
18 the land -- that what was shown as land in the
19 1955 bulkhead approval map was water at the point
20 in time of the 1925 map, correct?
21 **A** Yes.
22 **Q** So Tom German was trying to justify why the
23 shoreline could have moved?
24 **A** I can't speak for Tom. I -- but it seemed that
25 he wanted to show how things could have changed

1 between 1925 and 1955.

2 Q Okay. Did you have any conversation about --

3 and I see that the 1925 map has a red outline,

4 "City Parcel." Do you see that?

5 A Right. That's the area of the 100 East Maple

6 that is -- that would have been behind the 1955

7 shoreline.

8 Q Does the red line on the 1925 map line up with

9 the parcel boundaries in your understanding?

10 A That's my understanding, yes.

11 Q Okay. So did -- was there any discussion that

12 you can recall at the on-site meeting about

13 whether the board of commissioners or the

14 department could make any determination of the

15 ordinary high water mark on the adjacent

16 92 East Maple parcel?

17 A I don't believe we discussed the adjacent parcel.

18 Q Was it your understanding that it was due to the

19 presence of a dock structure in 1925 that would

20 have allowed accretion on 100 East Maple?

21 A I'm not sure if I understand the question.

22 Q Okay. So Mr. German is opining in this summary

23 which is apparently a summary of your discussion

24 at the on-site meeting that the creation of land

25 in the red outlined area of the 1925 map could

1 murkier." Next sentence, "The city has not

2 asked for DNR or BCPL assistance on clearing

3 title to the area that now holds the vacant

4 grain elevator as it is my understanding that

5 the city had previously obtained title insurance

6 for such parcel."

7 Did I read that correctly?

8 A You read it correctly.

9 Q Okay. So German is talking there about

10 92 East Maple, the former co-op parcel, correct?

11 A I believe so.

12 Q Okay. Do you have an understanding, based on

13 that meeting or this summary, why he's

14 characterizing the picture as, quote, "a bit

15 murkier"?

16 MR. BITAR: Object to form. Go ahead

17 and answer.

18 A Let me read the whole paragraph. (Reviewing

19 document.) Well, again, I can't get into Tom's

20 head and equivocally state what he meant by

21 that, but I think the fact that on the

22 100 East Maple we were working towards a

23 concurrence document; we weren't on the 92 East

24 parcel. So that may have given him some concern

25 over that.

1 have been due to accretion between 1925 and 1955,

2 true?

3 A Okay. Yep.

4 Q We just went over that. Was there a conversation

5 about the reason why that could have happened as

6 a physical matter was because there was a dock

7 immediately adjacent to it?

8 A I think it was discussed that because it was like

9 a bay, that that would have been more likely that

10 there could have been deposits of sediments and

11 things. I don't think we ever specifically

12 discussed because there was a wharf next to this,

13 that would have triggered the land filling in.

14 Q Okay.

15 A I mean, I -- I know from subsequent, you know,

16 expert testimony that when there's a wharf or a

17 jetty or things of that nature, it sometimes can

18 help sediment accumulate.

19 Q Okay. Just flipping over to the second page of

20 the Tom German summary in that Exhibit 7,

21 towards the bottom of the page, the last bullet

22 point on that page, do you see that, "For the

23 Western part of the proposed lease area"?

24 A Okay.

25 Q Mr. German indicates, "the picture is a bit

1 Q But, in fact, Mr. German did advise you in this

2 summary that there was a very strong likelihood

3 that the adjacent parcel was below the ordinary

4 high water mark, true?

5 A I don't think we ever had the understanding from

6 Tom that that parcel was below the high water

7 mark.

8 Q Okay. So on the third page of the summary at

9 the top, first full sentence -- well, reading

10 the two sentences together for context, the

11 standard title policy exception for areas lying

12 below the ordinary high water mark, quote, "may

13 significantly impair the value of the policy if

14 most or all of such parcel is deemed to be below

15 the ordinary high water mark. From an initial

16 review of the maps and documents covering this

17 area, there is a very strong likelihood that

18 this is the case."

19 Did I read that correctly?

20 A You did.

21 Q Is he telling you that there's a strong

22 likelihood that the adjacent parcel,

23 92 East Maple, is below the ordinary high water

24 mark?

25 MR. BITAR: I'll object to form and

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1 foundation. Go ahead.
2 **A** I think he's telling us that the Parcel 92,
3 based on early maps, may have been water at one
4 time.
5 **Q** Okay.
6 **A** I don't think he's telling us that it's below
7 the high water mark. At the time he wrote this,
8 we had the DNR telling us that there are no
9 ordinary high water mark issues on 92 East Maple.
10 **Q** Okay. And on the final page of the summary,
11 first full paragraph, Mr. German says, "As you
12 can probably tell by my tone above, I remain
13 concerned regarding the status of the area
14 containing the vacant granary as that issue may
15 have the capacity to negatively impact the
16 overall development plans."
17 Did I read that correctly?
18 **A** Yes, you did.
19 **Q** Did that statement cause any concern on the part
20 of the city about title to 92 East Maple, whether
21 that title was actually in the city?
22 **MR. BITAR:** I'll object to form. Go
23 ahead.
24 **A** We believe that on 92 East Maple we were in the
25 clear because of the DNR's statements that it

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1 was -- there was no problems with ordinary high
2 water mark on that parcel.
3 **Q** Well, they didn't actually say that there was no
4 problems, did they? They just said that you
5 have title insurance so they're not going to
6 worry about it?
7 **A** They -- right. They were not going to worry
8 about it.
9 **Q** Okay. Do you --
10 **A** We were -- as far as the DNR was concerned, we
11 did not need to do anything further on that
12 parcel.
13 (Exhibits 8 and 9 marked for
14 identification.)
15 **Q** Taking a look at what -- the email we've marked
16 as Exhibit 8, that is an email dated
17 September 18th of 2014 from Jim Smith to some
18 individual at Baudhuin Surveying Company?
19 **A** Correct.
20 **Q** And you were copied on that email. Do you
21 recall seeing a copy of that email?
22 **A** I'm sure I did.
23 **Q** And Jim Smith was one of the city's attorneys?
24 **A** Correct.
25 **Q** Okay. So Mr. Smith is referring to a map,

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1 Job Number 15581. Do you see that in the middle
2 of the email?
3 **A** Yes, I do.
4 **Q** And taking a look at Exhibit 9, to your
5 understanding this is the Job 15581 referred to
6 in the email?
7 **A** Yes.
8 **Q** Okay. So this email appears to be instructions
9 to the surveyor to redo Job Number 15581,
10 correct?
11 **A** Do you mind if I read it?
12 **Q** Go ahead.
13 **A** (Reviewing document.) That is correct. The
14 city attorney's asking Baudhuin Incorporated to
15 stop the line at -- when it hits the property
16 line of the co-op.
17 **Q** Okay. Can you draw an X on Exhibit 9 where it's
18 supposed to stop according to Mr. Smith's
19 instructions.
20 **A** (Complies.)
21 **Q** Okay. Did you personally participate in any
22 discussions that would have informed this
23 instruction to the city surveying?
24 **A** I don't believe I did.
25 **Q** Okay. Did you have any understanding why the

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1 city attorney is instructing the surveyor to
2 essentially cut off the line of the approximate
3 location of the ordinary high water mark at the
4 point you've marked with an X?
5 **MR. BITAR:** Object to form. Go ahead.
6 **A** I do not know.
7 **Q** Do you understand that that was an instruction
8 from DNR?
9 **A** It may have been, but I don't know.
10 **Q** Okay. And according to Mr. Smith's email, it
11 was based on a conversation with Megan Correll
12 of DNR, correct?
13 **A** That's what it indicates.
14 **Q** But you don't know why that instruction was
15 given?
16 **A** Correct.
17 **Q** And this would have been about a month before
18 DNR issued its formal concurrence, correct?
19 **A** Yes.
20 **Q** So in your understanding, DNR did not issue any
21 determination or concurrence with respect to
22 92 East Maple, correct?
23 **A** I disagree with that statement.
24 **Q** You do?
25 **A** Right.

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1 that are colored yellow and labeled as lake
2 deposits? Do you have any understanding about
3 what the difference is there?
4 A My general understanding is that the -- what's
5 in yellow is more the historic lake bed, and
6 what's above it is stuff that was deposited
7 there in more modern times.
8 Q Deposited how?
9 A I don't know. Fill, wave action, any -- any
10 manner of ways to get fill into a property.
11 Q Okay. And while it may be missing all of the
12 attachments, you understand this to be a true
13 and correct copy of an NR 716 investigation
14 report that was filed with DNR?
15 A I have no reason to doubt that this is not --
16 the accurate report.
17 Q Okay. Similarly, for what we marked as
18 Exhibit 11, this is a -- labeled an
19 NR 716 Investigation Report - Addendum. Do you
20 see that?
21 A Yep.
22 Q Do you have any understanding why there was a
23 need for an addendum?
24 A Is this the entire addendum, --
25 Q No.

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1 A -- just these maps?
2 Q No. The exhibit pulls out one attachment to the
3 addendum. I'm just asking you generally do you
4 understand why there was a reason for the
5 addendum?
6 A It's -- I don't know specifically. I'd have to
7 go back and maybe find out. Could be that the
8 DNR requested more information, which is not
9 uncommon.
10 Q Are you aware that there in fact was an addendum
11 submitted to DNR in June of 2015?
12 A Yes.
13 Q And that was in pursuit of the VPLE?
14 A This had to do with VPLE, correct.
15 Q Do you have any recollection of whether there
16 were any changes in the transect information
17 that's included with Exhibit 11, between the
18 original report and the addendum?
19 A I have no knowledge of any changes.
20 Q I'm getting to the bottom of this thing, so --
21 A That's good.
22 (Exhibit 12 marked for
23 identification.)
24 Q Okay. Showing you what's been marked as
25 Exhibit 12. This is a series of emails between

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1 yourself and counsel dating from early September
2 of 2013, correct?
3 A Yes.
4 Q And just directing your attention to the bottom
5 email from you to Wally Arts and the city
6 attorneys dated September 3rd, do you see that?
7 A Yes, I do.
8 Q Okay. And it says, "Attached is a map showing
9 the shoreline changes over the years."
10 Can you just flip through to the first page
11 after the email chain. Is that the map you're
12 referring to?
13 A Yes.
14 Q Okay. So what you say in this email is: The
15 area the city filled in reliance on the bulkhead
16 line is the area between the green line and the
17 blue line on the map.
18 In your understanding what were the source
19 maps used to create the green and blue lines?
20 A The -- there are some old maps that indicate
21 the -- like an Army Corps of Engineer -- I think
22 it was an Army Corps of Engineers' map from
23 1863, and then there's a -- the 1906 map. I --
24 oh, I'm trying to remember what that was based
25 on. The '43 map is a copy of a map that I have

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1 in my office that showed the entire city as it
2 existed at that time. And the 1906 is the one
3 that I'm not quite remembering what that was
4 based on.
5 Q Okay. And so what you're referring to are the
6 different colored map lines on the third page of
7 Exhibit 12, correct?
8 A Correct.
9 Q And the source maps for all of those lines?
10 A Correct.
11 Q And so the 2013 blue line, do you know the
12 source of that map -- or that line, rather?
13 A That line is -- is the parcel line and the dock
14 wall line as it existed at that time, which is
15 also the way it exists today.
16 Q Okay. So this is a historical marker that is
17 associated with that grant project you were
18 previously --
19 A That's correct, that I referenced earlier.
20 Q Let me just finish my question because we're
21 giving the court reporter a hard time.
22 So -- and this is actually an interpretive
23 marker that's standing at Sawyer Park?
24 A Correct.
25 Q Okay. So the lines that are actually drawn on

1 **this map are -- is that your work product?**
 2 **A That's my work product.**
 3 **Q Okay. And how did you go about taking the lines**
 4 **off the source map and lining them up on this**
 5 **photo?**
 6 **A More or less just, you know, trying to follow**
 7 **like if there were roads and things that were**
 8 **associated with it, sort of basing it off of**
 9 **those or other known points and doing the best I**
 10 **could just to -- you know, it was never meant to**
 11 **be a survey. It was just something kind of**
 12 **interesting, historical fact that the shoreline**
 13 **has changed over time.**
 14 **Q Sure. And then in the -- in the last two --**
 15 **or -- yeah, two pages of that Exhibit 12,**
 16 **there's some narrative interpretation of the**
 17 **map. Do you see that?**
 18 **A Yes.**
 19 **Q Were you the author of this narrative?**
 20 **A I believe so.**
 21 **Q Okay. So in -- and this is actual text that**
 22 **accompanies the sign that's in Sawyer Park?**
 23 **A Yes.**
 24 **Q Okay. So the narrative indicates, "This map**
 25 **shows this progression of the filling of the bay**

1 **A The original dock known as the -- as the**
 2 **Lawrence dock likely was an artificial extension**
 3 **into the bay based on its shape and the fact**
 4 **that it, you know, sort of all of a sudden one**
 5 **year there it is. But I -- I have no knowledge**
 6 **of how the rest of that bay area filled in --**
 7 **Q Do you have any --**
 8 **A -- prior to modern times.**
 9 **Q Okay. And you're talking about the brown**
 10 **outlined shoreline on the map from 1906 as the**
 11 **Lawrence Dock?**
 12 **A What I'm saying is the -- in the 1800's and**
 13 **early 1900's, I have no knowledge of how the**
 14 **shoreline was filled, if that was natural, if it**
 15 **was artificial, if it was a combination of**
 16 **things. But I'm fairly confident that from the**
 17 **later lines that that was artificial.**
 18 **Q Okay. When you say "the later lines," what --**
 19 **A Post 1943.**
 20 **Q Okay. So what about the 1906 line, are you**
 21 **confident that that was artificial -- that**
 22 **creates this oblong squared-off shape?**
 23 **A I have no idea if that was natural, artificial,**
 24 **or a combination thereof.**
 25 **Q So why is it that you're confident that the 1943**

1 **and extension of the dock wall. In the late**
 2 **1800's and early 1900's the dock, which was**
 3 **originally known as the Lawrence Dock and then**
 4 **Washburn Dock, was much smaller. The dock was**
 5 **lengthened during the first half of the 20th**
 6 **century during its heyday as a cargo depot when**
 7 **it was called the Bushman Dock."**
 8 **Did I read all that correctly?**
 9 **A Yes, you did.**
 10 **Q Okay. So in your research, you understood that**
 11 **there was a dock placed in this area where it's**
 12 **shown on the map and that the dock was extended**
 13 **in size over time, correct?**
 14 **A That's correct.**
 15 **Q And based on your research, did you understand**
 16 **that the dock was progressively artificially**
 17 **filled beneath to create a shoreline?**
 18 **A I would have assumed that for the one between**
 19 **the filling of the -- from 1955 to the present.**
 20 **But prior to that, I had no knowledge of how it**
 21 **was filled.**
 22 **Q Does the fact that the outline of the dock is a**
 23 **geometric oblong shape, does that inform your**
 24 **understanding of whether this was artificially**
 25 **filled or naturally filled?**

1 **line, the later line, is artificial filling, but**
 2 **that the 1906, you're not confident about that?**
 3 **A Well, we know that the -- the city sought the**
 4 **1955 bulkhead ordinance in order to further**
 5 **lengthen the Sawyer Dock, and I -- and some of**
 6 **the materials and -- in the file indicate that**
 7 **it was done as a project, so that tells me it**
 8 **was not, you know, gradually filled in over**
 9 **years, that it was done in a short amount of**
 10 **time, which would have been artificial filling.**
 11 **Q But you're -- you've got a map in your office of**
 12 **the entire city dated from 1943, so predating**
 13 **the bulkhead line, --**
 14 **A Um-hmm.**
 15 **Q -- that shows what you're calling the Sawyer**
 16 **Dock, true?**
 17 **A Can you repeat it?**
 18 **Q You indicated that the 1943 map that is the**
 19 **source map for this green line is a map that you**
 20 **have in your office. It predates the bulkhead**
 21 **line approval, is that correct, by several years?**
 22 **A That's correct, by several years.**
 23 **Q So before the bulkhead approval, according to**
 24 **this map and apparently the 1906 map, there was**
 25 **a dock, squared-off dock, placed in the water,**

Page 93

1 **yet is it your testimony that you can't tell**
2 **whether that squared-off shape was artificially**
3 **filled or naturally?**
4 A I think I testified earlier that, given the shape
5 and everything of it, that the original Lawrence
6 **Dock from the 1800s was likely artificial.**
7 Q **Okay. So --**
8 A The shape on the 1906, however, I don't know if
9 that got squared off by man-made processes or
10 art -- or natural processes or combination
11 thereof.
12 Q **Okay. Do you recall what sources you consulted**
13 **for the narrative that appears in the couple of**
14 **pages after the map?**
15 A The Door County Museum had had some old photos.
16 That's where these photos came from. I'm not
17 sure if the captions were written entirely by me
18 or by me with consultation with people from that
19 museum.
20 Q **Did you have consultations with people from the**
21 **museum?**
22 A Yes. Part of -- we had a group that worked on
23 these historical markers. And Ann Jenkins was
24 part of that group.
25 Q **Who's Ann Jenkins?**

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1 A Ann Jenkins is the -- I'm not sure her formal
2 title. I believe she's the curator at the
3 museum, but I'm not positive of that.
4 Q **That's J-e-n-k-i-n-s?**
5 A J-i-n-k-i-n-s.
6 Q **Okay. So on the final page of Exhibit 12, the**
7 **narrative that appears in the lower left starts**
8 **out, "The modern dock known as Sawyer Dock was**
9 **gradually lengthened by filling in the bay."**
10 **Do you see that sentence?**
11 A Yes, I do.
12 Q **And I read that correctly?**
13 A Um-hmm.
14 Q **Do you know whether that was the product of your**
15 **research or something that another researcher**
16 **uncovered?**
17 A I suspect it was just an assumption that was
18 made.
19 Q **And when it states that the Sawyer Dock was**
20 **gradually lengthened by filling in the bay, in**
21 **your understanding that means artificially**
22 **filled, correct?**
23 A **I think to a large degree.** But again, I have no
24 actual knowledge of -- from year to year how the
25 bay got changed.

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1 Q **Okay.**
2 **(Exhibit 13 marked for**
3 **identification.)**
4 Q **Showing you now what's been marked as Exhibit 13,**
5 **on the bottom of Page 2, is that your signature?**
6 A Yes.
7 Q **So this is a Development At Historic Fill Site**
8 **or Licensed Landfill Exemption Application**
9 **submitted on behalf of the city?**
10 A **Yes.**
11 Q **And do you recall whether there was any**
12 **application preceding this? This one is -- the**
13 **date signed is June 30th of 2015.**
14 A I don't. I don't believe there's any other
15 applications.
16 Q **Okay. What is your understanding for the reason**
17 **for the city to apply for this particular**
18 **exemption?**
19 A We were doing a utility project -- a sanitary
20 sewer replacement and a storm sewer relocation
21 project, so that involved having to remove some
22 of the fill where the pipe was going to go. And
23 because this is a site that is under the
24 remediation program of the DNR, it wasn't as
25 simple as just taking that fill and dumping it

Page 96

1 wherever. We had to take it to a licensed
2 landfill.
3 Q **Okay. So in your understanding this was the --**
4 **what necessitated this exemption was the sewer**
5 **project in particular?**
6 A Correct.
7 Q **You did not need this exemption for purposes of**
8 **the hotel construction?**
9 A If and when the hotel would actually get
10 constructed, if there was any fill that had to
11 get removed from the site, I believe it would
12 have -- we would have needed another one of
13 these, either the developer or the city.
14 Q **Are you aware of fill being -- needing to be**
15 **removed from the site for hotel construction?**
16 A Very little. I believe based on their plan
17 where their pool was going, a small amount of
18 existing soil had to get removed, but for the
19 most part they -- you know, they were not doing
20 a basement or anything, actually had to raise
21 the elevation of the site to conform to
22 floodplain code. So it would have been a small
23 amount that would have been needed.
24 Q **Are you familiar with the excavation of the site**
25 **done apparently by the developer's contractors**

1 **in about April of 2015?**
 2 A Yes. To the best of my recollection, that was
 3 done so that their -- whether it was their
 4 engineer or their geopier installer could look
 5 at the soil and determine a plan of attack as to
 6 how to engineer their foundation.
 7 **Q Are you aware of the fact that there were**
 8 **excavations done in areas other than the hotel**
 9 **footprint?**
 10 A I'm not aware of that.
 11 **Q Did anyone on behalf of the city go and observe**
 12 **this excavation?**
 13 A I didn't. I don't know if any -- if -- maybe
 14 the city engineer was out there. I'm not aware
 15 that anybody was.
 16 **Q This excavation was not a city initiative?**
 17 A No. This was -- if you're referring to the --
 18 the April 2015 excavation, that was done by the
 19 hotel developer.
 20 **Q Okay. Would the city -- would the developer**
 21 **have needed permission from the city to excavate**
 22 **in areas other than the surveyed hotel parcel?**
 23 A I believe that we gave him permission to do
 24 excavations in support of his hotel, but I'm not
 25 aware of any -- any pits that were dug beyond

1 **Q Okay. And so where Ayres and Associates, in**
 2 **about the middle of the page, states, "Fill**
 3 **material placed on the site was reported to**
 4 **contain wood chips, charred wood and concrete,"**
 5 **do you see where it says that?**
 6 A Yes.
 7 **Q Do you have any understanding of where that**
 8 **information comes from?**
 9 A I -- they -- like I -- they did a bunch of
 10 borings as part of our Phase II environmental
 11 site assessment. I -- that would be my guess as
 12 to how they got that.
 13 **Q Okay. And is it your testimony that this**
 14 **application that you signed doesn't provide any**
 15 **information about whether the site was**
 16 **artificially filled versus being naturally**
 17 **accreted?**
 18 **MR. BITAR:** Do you understand the
 19 question?
 20 **THE WITNESS:** Yeah, I --
 21 **Q You testified that you've never talked about the**
 22 **difference between artificial fill versus**
 23 **natural accretion, land formed by lake sediments**
 24 **on the site, correct? Is that an accurate**
 25 **statement?**

1 the need for the hotel.
 2 **Q Okay. And the purpose again was to review the**
 3 **site to engineer the foundation?**
 4 A That's my understanding.
 5 **Q For any other purpose that you know?**
 6 A Not that I'm aware of.
 7 **Q Getting back to the licensed landfill exemption**
 8 **application, do you have any understanding from**
 9 **a regulatory perspective what the exemption is**
 10 **from? What law are you being exempt from if you**
 11 **have an -- this type of exemption?**
 12 A All I know is that we needed this to satisfy the
 13 DNR. I believe it has to do with the fact that
 14 there was some contamination in the soil at the
 15 development site, and therefore we needed an
 16 exemption to take that and move it. But I am
 17 not an environmental engineer, so if you need to
 18 know, you're better off talking to our
 19 consultant from Ayres.
 20 **Q Okay. So the narrative that appears beginning**
 21 **on the 7th page of the exhibit, do you see that?**
 22 **Summary of Existing and Potential Impacts?**
 23 A Yes.
 24 **Q Who actually authored this narrative?**
 25 A Ayres and Associates.

1 A That's correct. I've never had ongoing
 2 discussions with DNR staff about that.
 3 **Q Okay. What about with your engineers?**
 4 A No.
 5 **Q So you have no understanding that the very**
 6 **purpose of the exemption that you signed is**
 7 **because this is a landfill site?**
 8 A I didn't -- I didn't say I didn't understand
 9 that. I never had -- I -- we know that there's
 10 some fill on here, some artificial fill. It --
 11 you know, in our mind that is not -- doesn't
 12 change the ordinary high water mark.
 13 **Q Okay.**
 14 **A So because there's artificial fill on there and**
 15 **some contamination of that fill, we needed the**
 16 **exemption.**
 17 **Q Okay. So certainly you knew as of the date of**
 18 **this application, July of 2015, that there was**
 19 **some artificial fill on the site, correct?**
 20 A Correct.
 21 **Q Including 92 East Maple?**
 22 A Correct.
 23 **Q Okay. And then as of the date that you prepared**
 24 **the interpretive map for the grant program, --**
 25 A Um-hmm.

1 Q -- you understood that there was some artificial
 2 fill on the site of the former Door County Co-op,
 3 correct?
 4 A Correct. I -- I couldn't state that with
 5 100 percent certainty, but at -- throughout my
 6 tenure with the City of Sturgeon Bay, I believe
 7 that there's some artificial fill on these sites.
 8 Q Okay.
 9 MR. BITAR: Mary Beth, now a good
 10 time for a quick break?
 11 MS. PERANTEAU: Oh, yeah, sure.
 12 (Break taken.)
 13 (Exhibit 14 marked for
 14 identification.)
 15 Q So I'm showing you what has been marked as
 16 Exhibit 14. Just directing your attention to --
 17 well, it appears that the email at the top of
 18 the exhibit is in response to something that you
 19 forwarded to Attorney Smith asking about
 20 progress on the deed for 100 East Maple. Do you
 21 see that?
 22 A Yes.
 23 Q Okay. And so this is in the time frame of June
 24 of 2013?
 25 A Um-hmm. Yes.

1 A I had no knowledge of the specifics of the
 2 Milwaukee case, you know, where -- you know, if
 3 they had a bulkhead line, if they had, you know,
 4 maps showing areas of fill or anything like
 5 that. I -- no knowledge of the specifics of the
 6 case. We just knew it involved similar issues
 7 of the public trust doctrine.
 8 Q Because of the character of the subsurface land
 9 in the redevelopment area?
 10 A No. No. Just because there was dispute over
 11 where actually private development could occur.
 12 Q And what was your understanding of what -- why
 13 that could be disputed, as of the time of this
 14 email?
 15 A Because of the -- you know, where exactly does
 16 the public trust doctrine start and private
 17 development can occur.
 18 (Exhibit 15 marked for
 19 identification.)
 20 Q So Exhibit 15 is a -- an exchange of email from
 21 end of October of 2014, early November of 2014,
 22 between yourself and Attorney Smith, correct?
 23 A Yes.
 24 Q Okay. And just looking at the -- at your email
 25 to Attorney Smith, looking at Page 2 in

1 Q Attorney Smith responds with regard to the title
 2 issue, "I see in the Journal-Sentinel that they
 3 are having the same issue in downtown Milwaukee
 4 where portions of the lake front were filled and
 5 a developer now wants to build a hotel there,
 6 but cannot move forward because of the public
 7 trust doctrine as it relates to lake bed land
 8 that was filled in years ago."
 9 A Yes.
 10 Q Do you recall having discussion with
 11 Attorney Smith about the Milwaukee Transit
 12 Center case in about June of 2013?
 13 A I'm not sure of the timing, but yes, we did look
 14 at the facts of that case and -- as it related
 15 to Sturgeon Bay and have been kind of following
 16 that case.
 17 Q Why was that significant to you in Sturgeon Bay?
 18 A It seemed to be a similar situation, private
 19 development and -- supported by the county and
 20 city and for that matter DNR, but opposed by a
 21 different group.
 22 Q And -- but just in terms of the land issue, what
 23 was your understanding of the public trust
 24 doctrine as it relates to lake bed land as of
 25 June of 2013?

1 particular, you in this email are reporting on a
 2 discussion you had with Tom German?
 3 A Um-hmm. Yes.
 4 Q And that was in around the end of October of
 5 2014?
 6 A Correct.
 7 Q You're reporting to Attorney Smith that German
 8 did not see a problem with the lease for the
 9 area between the dock wall and the parcel "for
 10 which we just got/getting title (coast guard
 11 parcel)." That's 100 East Maple, correct?
 12 A Where are you reading? Can you --
 13 Q Second and third line on Page 2 of the exhibit.
 14 A Okay.
 15 Q German "did not see a problem with the lease for
 16 the area between the dock wall and parcel for
 17 which we just got/getting title (coast guard
 18 parcel)."
 19 Do you see that --
 20 A Yes.
 21 Q -- sentence? So Tom German didn't have an issue
 22 with leasing the area below the deemed ordinary
 23 high water mark on 100 East Maple, correct?
 24 A That's my understanding, yes.
 25 Q That's what he was telling you?

1 "But," in the following sentence, "he is
2 concerned about the area between the dock wall
3 and the 'co-op parcel' because that also is
4 filled area."
5 A Um-hmm.
6 Q Do you see that?
7 A Yes.
8 Q "If I could have reached through and strangled
9 him, I might have."
10 So why are you frustrated with Mr. German at
11 this point in October 2014?
12 A Because we thought the issue was resolved, that
13 the co-op parcel, there's no issues; the coast
14 guard parcel, they agreed to a concurrence
15 letter based on the -- where the shoreline was
16 at the time of the 1955 bulkhead ordinance. We
17 thought that was end of story, get these
18 documents recorded, we can proceed with that
19 development based on that. And now he's
20 throwing a concern at us regarding the co-op
21 parcel which we thought was a nonissue at that
22 point.
23 Q Okay. So as of October, end of October of 2014,
24 the issue of title to 92 East Maple is still a
25 live issue according to Mr. German, correct?

1 Q Okay.
2 A Possibly others.
3 (Exhibit 16 marked for
4 identification.)
5 Q So showing you Exhibit 16, directing your
6 attention to the bottom of the first page,
7 there's an email from you to Attorney Smith
8 dated November 7th of 2014. Do you see that?
9 A Yes, I do.
10 Q Okay. And so fair to say that this email
11 reflects your understanding at the time that
12 uses of public trust areas below the ordinary
13 high water mark could not include private
14 commercial development?
15 A Can you repeat the question?
16 (Requested portion of record read.)
17 MR. BITAR: Where are we reading
18 from?
19 MS. PERANTEAU: I'm not -- I'm not
20 even paraphrasing. I'm just asking for his
21 understanding based on what this email appears
22 to show.
23 A This email relates to --
24 MR. BITAR: Written by someone else.
25 MS. PERANTEAU: No.

1 A In the eyes of --
2 MR. BITAR: Object to form. Go ahead
3 and answer.
4 THE WITNESS: Okay.
5 A It appears that in the eyes of Tom German, yes,
6 there's an issue there.
7 Q Okay. Did you ever get any assurances after
8 October of 2014 that that was not an issue from
9 DNR's perspective?
10 A I am not aware of any.
11 Q Okay. Now, you testified earlier to your
12 understanding that there are a certain limited
13 set of uses that can be made of property below
14 the ordinary high water mark, correct? Public
15 access-type uses, recreation?
16 A I don't recall testifying today about that, but
17 it is my understanding that there are certain
18 uses that are allowed below the high water mark.
19 Q Okay. Can you describe what set of uses in your
20 understanding would be consistent with what the
21 DNR would allow below an ordinary high water
22 mark?
23 A Cargo depots, marinas, boat storage,
24 shipbuilding, recreation uses. Those would be
25 the ones.

1 A Relates to -- the email from Olejniczak to Smith
2 on November 7th relates to restaurant seating
3 below the high water mark.
4 Q At the time of this email did you have an
5 understanding about the restricted public uses
6 that could be made of land below the ordinary
7 high water mark as you just previously testified?
8 A My understanding of the public trust doctrine
9 and the various things that go along with it has
10 evolved over time and has strengthened. I know
11 a lot more now than I did when this whole
12 development started. So I can't tell you on
13 November 7th if my understanding of it today
14 matches from November 7th.
15 Q So flipping then to the third page of that
16 exhibit, your email to Attorney Smith dated
17 November 6th of 2014, do you see the
18 second-to-the-last line of the first paragraph,
19 "We seem to remember DNR staff discussing
20 scenarios of what uses would qualify as public,
21 but don't recall the specifics."
22 A (Nods head up and down.)
23 Q Do you see that? Did I read that correctly?
24 A Yes, you read it correctly.
25 Q So at that point in time you had had a discussion

1 with DNR staff discussing what scope of uses
2 would qualify as public?

3 A Yeah, that's correct. There has always been
4 talk about what can we do down there? You know,
5 what if we had restrooms, what if we had outdoor
6 seating, things of that nature were always
7 discussed as to what can and cannot occur below
8 that ordinary high water mark.

9 MS. PERANTEAU: I don't have any
10 further questions. Thank you.
11 (Proceedings concluded at 11:46 a.m.)
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1 STATE OF WISCONSIN)
2 COUNTY OF BROWN)
3

4
5 I, CARRIE S. BOHRER, a Notary Public,
6 Registered Professional Reporter, Registered Merit
7 Reporter, and Certified Realtime Reporter, in and for
8 the State of Wisconsin, do hereby certify that the
9 foregoing proceedings were taken at said time and
10 place and is a true and accurate transcript of my
11 original machine shorthand notes.

12 That the appearances were as noted
13 initially.

14 That said witness was first duly
15 sworn/affirmed to testify the truth, the whole truth
16 and nothing but the truth relative to said cause.
17

18 Dated at Green Bay, Wisconsin
19 This 3rd day of October, 2016.
20

21
22 CARRIE S. BOHRER, RPR, RMR, CRR
23 Notary Public, State of Wisconsin
24 My commission expires 10/30/16
25 (fc)

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Sent: Tue 09/03/2013 11:10 AM
From: "Olejniczak, Marty" <MOlejniczak@sturgeonbaywi.org>
To: "Randall J. Nesbitt" <rnesbitt@pinkertlawfirm.com>, Jim Smith <JSmith@pinkertlawfirm.com>, "Waltraud Arts (artswa@charter.net)" <artswa@charter.net>
CC:
Subject: meeting with Carrie Webb
Attachments:

I have scheduled a meeting with Ms. Webb for 10 AM on Monday, Sept 9th. My intention is to present the maps and issue to her with our conclusion that the City owns the land and then ask her for direction on how to get formal DNR concurrence with our assessment. It seems our goal is a written determination that can be submitted to title company and/or recorded. I suspect such a written document may be beyond Ms. Webb's authority but I will try to get her buy-in to take up the ladder as needed.

Marty Olejniczak
 Community Development Director
 City of Sturgeon Bay
 920-746-6908



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Sent: Mon 10/14/2013 10:48 AM
From: "Olejniczak, Marty"
<MOlejniczak@sturgeonbaywi.org>
To: "Randall J. Nesbitt"
<rnesbitt@pinkertlawfirm.com>, Jim Smith
<JSmith@pinkertlawfirm.com>
CC: "McNeil, Stephen"
<smcneil@sturgeonbaywi.org>
Subject: Update regarding title issue
Attachments:

Bill Schuster made contacts on our behalf regarding the title issue for the filled waterfront lands. He suggests we discuss the matter with Liesa Lehmann, section chief for the DNR waterways and wetlands division. She is based in Madison. I believe Bill has discussed the matter with her but am not positive (he is now in China). Ms. Lehmann is also someone that Carrie Webb had suggested as the next contact person during my meeting with her back in Sept.

Bill also contacted Mike Friis from DOA's Wisconsin Coastal Management Program. Friis called me this morning and his suggestion is to contact Tom German from the Board of Commissioners of Public Lands.

I have both persons' contact info and am willing to contact them. But I wanted to touch base with you first to verify that it is appropriate. I know that Attorney Arts suggested a meeting between the mayor and Dep Sec Maroney. Friis also mentioned to me that he is meeting with the DNR sec and deputy secretary on other issues and could be a go between for us.

Thoughts?

Marty Olejniczak
Community Development Director
City of Sturgeon Bay
920-746-6908

From: [Lehmann Kerler, Liesa K - DNR](#)
To: [Webb, Carrie A - DNR](#)
Cc: [Scott, Michelle M - DNR](#)
Subject: FW: Sturgeon Bay bulkhead/title issue
Date: Tuesday, October 15, 2013 10:37:56 AM
Attachments: [1963 Co-op air photo.pdf](#)
[1969 parcel map - Co-op area.pdf](#)
[1954 air photo - Co-op area.pdf](#)
[Sturgeon Bay - Perspective Zoom 2 \(9.5.13\) email size.pdf](#)

Hi Carrie,

Here is the information Bill Schuster forwarded to me. I'll schedule a time we can chat briefly and identify how we can respond to the City.

~Liesa

From: SCHUSTER, BILL [mailto:BSchuster@co.door.wi.us]
Sent: Monday, September 30, 2013 11:24 AM
To: Lehmann Kerler, Liesa K - DNR
Subject: FW: Sturgeon Bay bulkhead/title issue

Liesa,

This is the topic/problem I briefly discussed with you last week. Please review this memo and attachments and give me a call. You suggested that you may be able to assist on this one.

Thanks for attempting to assist on this issue and the good, but brief, conversation!

Schuster

From: Olejniczak, Marty
Sent: Monday, September 30, 2013 8:31 AM
To: SCHUSTER, BILL
Subject: Sturgeon Bay bulkhead/title issue

Bill:

Thanks for offering to assist the city in our quest to prove title to the waterfront area. I think Bill Chaudoir gave you some of the background already, but here is the pertinent info. The area on the west waterfront was gradually filled over time. By the 1950's the shoreline wrapped around the Door County Co-op parcel, but most of the area on either side was still water. The bulkhead ordinance was approved by the city and the Wisconsin Public Service Commission in 1955.

The dock wall was installed and the area filled in behind it. The Co-op quit-claimed its rights to any of this area to the city. The dock wall remains right at the bulkhead line and the property was used for docking ships, boat launch ramp, coast guard storage, Maritime Museum, and parking.

The city's position is that the "land" is owned by the city. But when we commissioned an ALTA survey, the title company refused to issue a title commitment since there was no actual deed. We attempted to resolve this by hiring an attorney to issue a legal opinion, but the title company wants a recorded stipulation from the DNR (successor to the WPSC) that the state claims no right to the area. I met with Carrie Webb and was told that the bulkhead line did not change the ordinary high water mark. So the area between the bulkhead and the shoreline from the 1955 bulkhead line map is still part of the bay.

Obviously, that determination screws up the West Waterfront Redevelopment Plan. While the dockwall area is proposed to remain public, the city planned to create a private development site on the former Coast Guard leased area as well on the former Co-op site. It seems the DNR is basing the OHWM on the 1955 map so prior filling is not part of the bay and the Co-op redevelopment will be OK but not the other area. So we need help to resolve this. I have difficulty believing the DNR is actually opposed to the City's project and am assuming the initial stance by Ms. Webb is simply taking the "company line" or is made out of concern for setting a precedent that will bite them somewhere else.

I would like to talk with you about your understanding of bulkhead lines, etc.

Marty Olejniczak
Community Development Director
City of Sturgeon Bay
920-746-6908

5/15/2016

Archive Mail Information

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Sent: Wed 10/30/2013 07:55 AM
From: "Lutzke, Krista M - DNR"
 <Krista.Lutzke@wisconsin.gov>
To: "Olejniczak, Marty"
 <MOlejniczak@sturgeonbaywi.org>
CC: "Rombach-Bartels, Jean - DNR"
 <Jean.RombachBartels@wisconsin.gov>
Subject: RE: Can you arrange this for me?: glad to
 help: Sturgeon Bay Land Issue
Attachments:

Good morning Mr. Olejniczak,
 I am Jean's Program Assistant and I will be setting up the meeting. Jean currently has availability November 7, any
 time after 12:30 pm to meet in the Green Bay regional office. Please let me know what time works best for you
 and the rest of your party and I will put it in her calendar.

Thanks,
 Krista

Krista Lutzke

Program Assistant
 Wisconsin Department of Natural Resources
 Regional Directors Office, Northeast Region
 2984 Shawano Ave.
 Green Bay, WI 54313
 Office: (920) 662-5436
 Fax: (920) 662-5413

From: Olejniczak, Marty [<mailto:MOlejniczak@sturgeonbaywi.org>]
Sent: Tuesday, October 29, 2013 4:15 PM
To: Rombach-Bartels, Jean - DNR
Cc: McNeil, Stephen
Subject: RE: glad to help: Sturgeon Bay Land Issue

Jean:

Thanks for agreeing to meet. The meeting would involve City Administrator Steve McNeil, myself and Mayor Thad
 Birmingham (if available). We would be happy to travel to your office or if you prefer you can come to Sturgeon
 Bay. Any time on Tuesday, Nov 5th, Thursday, Nov 7th or Friday, Nov 8th work for us.

Marty Olejniczak
 Community Development Director
 City of Sturgeon Bay
 (920) 746-6908

From: Rombach-Bartels, Jean - DNR [<mailto:Jean.RombachBartels@wisconsin.gov>]
Sent: Monday, October 28, 2013 5:07 PM
To: Olejniczak, Marty
Cc: Lutzke, Krista M - DNR
Subject: glad to help: Sturgeon Bay Land Issue

Yes, I'd be happy to meet with you to discuss the land issue. My cell is 920-360-8082 or reply with a date and time to meet if
 you prefer. I have cc'd my assistant who can schedule the meeting for me if I'm out of the office.


I look forward to hearing from you.

Jean
920.662.5114

From: Moroney, Matt S - DNR
Sent: Monday, October 28, 2013 3:18 PM
To: molejniczak@sturgeonbaywi.org; Rombach-Bartels, Jean - DNR
Cc: Lamers, Holly J - DNR
Subject: Sturgeon Bay Land Issue

Marty,

The Mayor indicated that you would like to meet with someone to discuss a land issue on the waterfront. I would suggest that you reach out to contact Jean Rombach-Bartels. You can reach her at (920) 662-5114.

 **Matt Moroney**

Deputy Secretary

Wisconsin Department of Natural Resources

(📞) phone: (608) 264-6266

(📠) fax: (608) 266-6983

(✉️) e-mail: Matt.Moroney@wisconsin.gov

Website: dnr.wi.gov

Find us on Facebook: www.facebook.com/WIDNR

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Sent: Mon 11/18/2013 04:33 PM
From: "Rombach-Bartels, Jean - DNR"
 <Jean.RombachBartels@wisconsin.gov>
To: "McNeil, Stephen"
 <smcneil@sturgeonbaywi.org>, "Olejniczak,
 Marty" <MOlejniczak@sturgeonbaywi.org>
CC: "Lehmann Kerler, Liesa K - DNR"
 <Liesa.LehmannKerler@wisconsin.gov>, "Correll,
 Megan E - DNR"
 <Megan.Correll@wisconsin.gov>, "German, Tom
 - BCPL" <Tom.German@wisconsin.gov>, "Urban,
 Bruce G - DNR"
 <Bruce.Urben@wisconsin.gov>, "Moroney, Matt
 S - DNR" <Matt.Moroney@wisconsin.gov>
Subject: redevelopment of Sturgeon Bay's west shore
 waterfront
Attachments:

Hello gentlemen,

I'm sorry it's been over a week since our last discussion, but here is what I have learned to date.

Regarding the Phase 1&2 clean-up of the old co-op site and the Voluntary Party Liability Exemption:

The Board of Commissioners for Public Land holds the title to those lands along shorelines that are now filled bulkhead lines. As such, the city must work with BCPL to move forward, not the DNR. The city can move forward with the VPLE program after you obtain an access agreement with BCPL and provide copy to WDNR, then the city can go ahead and clean-up the whole site with no exception. This will hopefully allow for the same contractor to continue to work without additional costs associated with leaving the site and coming back.

Regarding the title insurance concern on the bulkhead land:

It is the department's understanding that the BCPL would need to sell the City (with no deed restrictions for development or resale) the land which is now filled bulkhead line and held in the public's trust in order to obtain title insurance through a lending institution for developers. The only way to avoid this issue would be for the developer to finance the development themselves. Perhaps BCPL has other tools and ways to work with the city on this, but DNR has no additional information or help in this area.

Please know that we stand ready to assist you in the clean-up and VPLE, and when it comes time for the fishing pier and docks. The person I have been told to refer you to at BCPL is Tom German. Here is his contact information.

Thomas P. German
 101 E. Wilson St. 2nd floor
 Madison, WI 53703
 608-267-2233
Tom.German@wisconsin.gov

Let me know if there is anything else I can do to help.

Jean Rombach-Bartels

Wisconsin Department of Natural Resources
 2984 Shawano Ave.
 Green Bay, WI 54313-6727
jean.rombackbartels@wisconsin.gov
 Office - 920-662-5114
 Cell - 920-360-8082

Forward Reply Reply all Reply with history Close Search Back

Sent: Tue 11/19/2013 04:30 PM
From: "Smith, Jim R" <JSmith@pinkertlawfirm.com>
To: "Olejniczak, Marty" <MOlejniczak@sturgeonbaywi.org>,"McNeil, Stephen" <smcneil@sturgeonbaywi.org>
CC: "Nesbitt, Randy J" <RNesbitt@pinkertlawfirm.com>,"artswa@charter.net" <artswa@charter.net>
Subject: RE: meeting with DNR
Attachments:

Randy and I (and Ms. Arts if possible) will discuss this and get back to you, hopefully tomorrow.



Attorney James R. Smith
Pinkert Law Firm LLP
454 Kentucky Street, P.O. Box 89
Sturgeon Bay, WI 54235
Phone: 920.743.6505
Fax: 920.743.2041
www.pinkertlawfirm.com



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From: Olejniczak, Marty [mailto:MOlejniczak@sturgeonbaywi.org]
Sent: Tuesday, November 19, 2013 4:24 PM
To: McNeil, Stephen
Cc: Nesbitt, Randy J; Smith, Jim R
Subject: meeting with DNR
Importance: High

I just received a phone call from Denise Danelski of the DNR. This was in regard to our waterfront site. She offered a meeting in Sturgeon Bay on this Friday with Lisa Lehmann, Carrie Webb, Annette Weisbach and herself. Danelski is part of the brownfield section of the DNR (she and Weisbach are working on our Voluntary Party Liability Exemption application that is being held up due to the title issue). It sounds like the DNR staff would be in the same room with us to discuss the issues. This is very confusing since Romback-Bartels told us that we had to talk

5/15/2016

Archive Mail Information

EX. PAGE 9

to the Board of Commissioners of Public Lands.

I told Danelski that I would get back to her about the potential meeting. I suppose it doesn't hurt to meet but want your thoughts on this.

Marty Olejniczak
Community Development Director
City of Sturgeon Bay
920-746-6908

Sent: Thursday, November 21, 2013 4:35 PM
To: Jim Smith; Randall J. Nesbitt; McNeil, Stephen
Subject: conference call with Tom German
Importance: High

I spoke with Tom German from the Board of Commissioners of Public Lands. He was pretty informative of how the Public Trust Doctrine, Lake Bed Grants, Bulkhead Ordinances, etc play into our situation. Basically, while he stopped short of saying we're screwed, I think we're screwed.

He agreed to have a conference call so that the city administrator and city attorney can also *hear his thoughts* (I had originally asked him to email me a time so that we could collectively call him, but he called me direct instead). The call is scheduled for 9:30 AM on Friday. Let me know if you can participate.

Marty Olejniczak
Community Development Director
City of Sturgeon Bay
920-746-6908

Green Team Meeting Notes

Site Name:	West Waterfront Area former Door County Co-op	Date:	November 22, 2013
BRRTS case #:	VPLE 06-15-560738	Time:	10:30 a.m.

Prepared by Annette Weissbach, RR, Carrie Webb, WMS

Attendees:

City of Sturgeon Bay – Tony Depies, Engineer Marty Olejniczak, Community Development Director
DNR – Liesa Lehman (Section Chief, Waterways and Wetlands), Megan Correll, (Attorney, Lakebed and Public Trust Issues), Carrie Webb (Water Management Specialist);
Denise Danelski, Annette Weissbach (Remediation & Redevelopment Program)

Purpose: to discuss remediation and statutorily allowed redevelopment options for two properties that are behind an approved bulkhead line and partially below the ordinary high water mark (ohwm). The City is approved to continue in the Voluntary Party Liability Exemption (VPLE) process for the property at 92 East Maple Street. The city is unable to get title to the 100 East Maple Street property and that has held up entering it into the VPLE process

Properties in question: 92 E. Maple Street (Former Door Co Coop site, BRRTS 03-15-000659) and 100 E. Maple Street ("Filled Land") are in what is referred to as the **West Waterfront Area** that has been targeted for Redevelopment. <http://www.vandewalle.com/selected-projects/sturgeon-bay-west-waterfront-redevelopment-and-implementation/>

Summary outcomes:**DNR Water Program**

1. A bulkhead line approval was issued in 1955, but a bulkhead line does not change the location of the ohwm, so the area of fill waterward of the ohwm is still considered public lakebed. Neither the Department nor the Board of Commissioners of Public Lands has the authority to transfer ownership of public lakebed to anyone.
2. The City was able to obtain title insurance at 92 E. Maple so the Department will assume this entire property is above the ohwm. No further action needed.
3. 100 E. Maple – the City will survey the ohwm shown on the bulkhead line approval survey and create a new deed for the upland portions of the property. The City will plan for all private development landward of the ohwm.

DNR Remediation and Redevelopment

1. Property at 92 E. Maple Street to continue in VPLE process as planned. Kristin DuFresne, RR Project Manager will provide comments to City on recent Phase I and Phase II work efforts.
2. Property boundaries of 100 E. Maple Street to be evaluated by City of Sturgeon Bay and DNR Water Program for conformance to bulkhead ordinance and historic shoreline.
3. Any remaining non-lakebed land can be surveyed and added to deed of property at 92 E. Maple Street and added to VPLE process.
4. Or, any remaining non-lakebed land can be deeded as a new property and entered under a separate application to the VPLE process.
5. City of Sturgeon may request clarification of liability with regard to impacted or contaminated "filled land," i.e., land between bulkhead line and ohwm.
<http://dnr.wi.gov/files/PDF/forms/4400/4400-237.pdf>

Background: Recent Chronology

Sep-12	DNR RR (Chronert, Weissbach, and Klauk) & WEDC attended a Green Team meeting with City to discuss acquisition, liability, and VPLE process.
Dec-12	City applied for and received a Site Assessment Grant (SAG) from WEDC.
Feb-13	City applied for and received a Community Development Block Grant (CDBG) from DOA.
	SAG and SDBG grants were obtained to perform Phase II environmental assessment activities along the West Waterfront Corridor where environmental assessment was incomplete or had not been performed and to eventually demolish existing structures on the former 92 E. Maple St (Former Door Co Coop Site) and 100 E Maple St (Bulkhead) properties.
May-13	City's environmental consultant conducted a PHASE II site assessment on 92 and 100 E Maple St. with funding from WEDC and/or DOA
May-13	DNR RR program received 2 Voluntary Party Liability Exemption (VPLE) Applications with fees from City's consultant, Ayres Associates. One application for 92 E. Maple St (Former Door Co Coop Property) and one application for 100 E. Maple St (Filled Land). DNR RR responded requiring deeds and associated maps. At the time of the VPLE application the DNR RR staff consulted the county GIS Site and thought the City was the owner. VPLE application for 92 E. Maple St indicated that US Coast Guard is the owner.
Jun-Aug 13	DNR RR continues attempts to locate deed for 100 E. Maple property City hired Attorney to resolve ownership issue
<u>July 11</u>	DNR WMS Webb met with the City to discuss proposed plans for waterfront development
<u>Sept. 9</u>	DNR WMS Webb met with the City to discuss the inability to obtain title insurance. Webb informed the City that the ohwn does not change with bulkhead line approvals and that title insurance cannot be obtained because it is public lakebed. Webb advised the City to use that area for public portions of the project.
Sep 13	DNR RR approves 92 E. Maple into VPLE process
Nov 13	DNR WRZ Map showing approximate shoreline in relation to 1955 bulkhead ordinance

Sent: Mon 01/06/2014 09:02 AM
From: "Friis, Michael J - DOA"
<Michael.Friis@wisconsin.gov>
To: "Olejniczak, Marty"
<MOlejniczak@sturgeonbaywi.org>
CC:
Subject: RE: Status of Sturgeon Bay proofs
Attachments:

Thanks for the follow up Marty

Mike

From: Olejniczak, Marty [mailto:MOlejniczak@sturgeonbaywi.org]
Sent: Monday, January 06, 2014 8:59 AM
To: Friis, Michael J - DOA
Subject: RE: Status of Sturgeon Bay proofs

Mike:

We did talk to Tom German and he was helpful in explaining things. BCPL has no jurisdiction in that matter and at best all they can do is grant leases. We also had a meeting with DNR staff. It comes down to their interpretation that the OHWM is still where the old shoreline from the 1955 bulkhead ordinance was, while our interpretation is that the OHWM is the approved bulkhead line. DNR agreed to be a little flexible with the location of the old shoreline since it was never surveyed. So City staff prepared a map (attached) that shows the OHWM/old shoreline liberally construed. But that doesn't resolve the situation. We are hoping to meet with deputy secretary Moroney or Secretary Stepp to see if anything further can be done.

I also am aware that Mary Ann Lippert of the DOA had met with our City administrator last month asking if there were any issues in Sturgeon Bay that DOA could assist with. Of course, the waterfront title issue was mentioned and Mary Ann was going to look into that from DOA perspective. Perhaps that is what your meeting is about.

I hope DOA can assist here. We are not trying to fill wetlands or destroy habitat. We just want to create both private investment and public improvements on land that has been filled for over 50 years and that has generally been not available to the public at all during that time. Personally, I think a good compromise would be for the state to declare that the OHWM runs straight along the old Door County Co-op parcel line extended toward the new bridge. This would allow private ownership of the area where the old shoreline jugged in but still ensure the actual current waterfront zone (~75 feet from bulkhead line) remains owned by the people of the state and used for public purposes only. All departments and entities would achieve their core goals under that scenario.

Marty

From: Friis, Michael J - DOA [mailto:Michael.Friis@wisconsin.gov]
Sent: Friday, January 03, 2014 1:35 PM
To: Olejniczak, Marty
Subject: RE: Status of Sturgeon Bay proofs

Welcome.

Marty is there anything new related to the bulkhead/lake bed issue. I was sent a meeting request on what

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Sent: Wed 01/08/2014 02:41 PM
From: "McNeil, Stephen"
<smcneil@sturgeonbaywi.org>
To: "holly.lamers@wisconsin.gov"
<holly.lamers@wisconsin.gov>
CC: "Olejniczak, Marty"
<MOlejniczak@sturgeonbaywi.org>,"Nesbitt,
Randy J"
<RNesbitt@pinkertlawfirm.com>,"Smith,
Jim R" <JSmith@pinkertlawfirm.com>
Subject: CITY OF STURGEON BAY
Attachments:

Hi Holly-

Thank you for the pleasant conversation this afternoon. As we discussed we welcome the opportunity to meet with Secretary Stepp, Deputy Secretary Moroney and Regional Director Rombach-Bartels on January 21st at your office in Madison. As we discussed, attending for the city will be myself and Community Development Director Marty Olejniczak. If our attorney is available I may ask that he attend also.
Steve

Stephen B. McNeil, City Administrator
City of Sturgeon Bay
421 Michigan Street
Sturgeon Bay, WI 54235
920-746-6905 (voice)
920-746-2905 (fax)

On Jan 13, 2014, at 11:42 AM, "Lamers, Holly J - DNR" <Holly.Lamers@wisconsin.gov> wrote:

Good morning, Steve,

Thank you for the follow up. We are confirmed in our office for Tuesday, January 21. I had suggested the meeting begin at 2:00pm, but I'm now wondering if the meeting can begin at 1:00pm instead.

Following is a list of those attending from our office.

Cathy Stepp, Secretary
Matt Moroney, Deputy Secretary
Ken Johnson, Water Division Administrator
Jean Romback Bartels, Northeast Region Director
One attorney from our Legal Counsel

Our office is located at 101 S Webster Street in Madison. You will be greeted at the first floor front desk receptionist who will check you in, assign Visitor passes and then direct you to the Secretary's Office.

Please click on the link below for parking options close to our office:
<http://www.ci.madison.wi.us/parking/downtownMap.html>

Please contact me should you have any questions.

Thank you,
Holly Lamers
Office of the Secretary
Wisconsin Department of Natural Resources
Madison, WI 53703
608-267-7556
holly.lamers@wisconsin.gov

From: McNeil, Stephen [<mailto:smcneil@sturgeonbaywi.org>]
Sent: Monday, January 13, 2014 10:34 AM
To: Lamers, Holly J - DNR
Subject: FW: CITY OF STURGEON BAY

Holly –
Did you receive this email? Are we still on for 1/21?
Steve

Stephen B. McNeil, City Administrator
City of Sturgeon Bay
421 Michigan Street
Sturgeon Bay, WI 54235
920-746-6905 (voice)
920-746-2905 (fax)

From: McNeil, Stephen
Sent: Wednesday, January 08, 2014 2:41 PM

Forward Reply Reply all Reply with history Close Search Back

Sent: Mon 01/20/2014 02:40 PM
From: "Olejniczak, Marty"
<MOlejniczak@sturgeonbaywi.org>
To: "Randall J. Nesbitt"
<rnesbitt@pinkertlawfirm.com>, Jim Smith
<JSmith@pinkertlawfirm.com>, "McNeil,
Stephen" <smcneil@sturgeonbaywi.org>
CC:
Subject: distance from bulkhead line
Attachments:

For our DNR meeting tomorrow, here are some distances to keep in mind:
52 feet from bulkhead line to landward edge of public sidewalk.
60 feet from bulkhead to Maritime Museum property line.
80 feet from bulkhead line to Co-op property line

Our preferred solution is to make the OHWM equal to the bulkhead line. But if the DNR won't go that far or requires some land to be restricted from private land, we would want that area to be as small as possible.

Marty Olejniczak
Community Development Director
City of Sturgeon Bay
920-746-6908

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Sent: Tue 02/25/2014 08:30 AM
From: "McNeil, Stephen"
<smcneil@sturgeonbaywi.org>
To: "Lamers, Holly J - DNR"
<Holly.Lamers@wisconsin.gov>
CC: "Smith, Jim R"
<JSmith@pinkertlawfirm.com>, "Nesbitt,
Randy J"
<RNesbitt@pinkertlawfirm.com>, "Olejniczak,
Marty" <MOlejniczak@sturgeonbaywi.org>
Subject: RE: CITY OF STURGEON BAY - Tues, Jan 21
Attachments:

Good morning Holly –

Greetings from the constantly frozen Door County!! We would like to schedule our return meeting with Secretary Stepp. The dates that work best with our team are:

- 3/26, 3/27, 3/28
- 3/31, 4/1, 4/2, 4/3
- 4/7, 4/8, 4/9, 4/10-4/11
- 4/14, 4/15, 4/16, 4/17, 4/18
- 4/21, 4/22

Whatever time works best for the Secretary on those days will work for us. If the Secretary has any travel plans to Northeastern Wisconsin on those dates and can fit a visit to Sturgeon Bay in her schedule would be wonderful.

Regards,
Steve

Stephen B. McNeil, City Administrator
City of Sturgeon Bay
421 Michigan Street
Sturgeon Bay, WI 54235
920-746-6905 (voice)
920-746-2905 (fax)

From: Lamers, Holly J - DNR [mailto:Holly.Lamers@wisconsin.gov]
Sent: Wednesday, January 22, 2014 10:15 AM
To: McNeil, Stephen
Subject: RE: CITY OF STURGEON BAY - Tues, Jan 21

Good morning, Steve,

I am usually "behind the scene", but I'm sorry I missed meeting you too. I understand you and I will be working together in the future to schedule a follow up meeting. Please do contact me when you're ready to move forward with scheduling that. With Spring around the corner (seems unlikely with today's weather!) schedules get busier, so please allow at least several weeks' notice for us to determine a mutually convenient date/time for the next meeting to occur.

Thank you,

Forward Reply Reply all Reply with history Close Search Back

Sent: Thu 06/26/2014 03:12 PM
From: "Correll, Megan E - DNR"
 <Megan.Correll@wisconsin.gov>
To: "McNeil, Stephen"
 <smcneil@sturgeonbaywi.org>
CC: "Smith, Jim R"
 <JSmith@pinkertlawfirm.com>, "Olejniczak,
 Marty" <MOlejniczak@sturgeonbaywi.org>
Subject: RE: City of Sturgeon Bay west side
 waterfront redevelopment
Attachments:

Tom and I looked at our calendars and we think we could make the trip up on either Monday July 7th or Tuesday July 8th. My personal preference would be the 8th if either day work on the City's end. We are planning to come up early and get back down to Madison in one day, so we'd be looking at a late morning/mid-day timeframe.

Please let us know if that works.

 *Megan E. Correll*

Attorney
 Bureau of Legal Services
 Wisconsin Department of Natural Resources
 (☎) phone: (608) 266-2132
 (☎) fax: (608) 266-6983
 (✉) e-mail: megan.correll@wisconsin.gov

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From: McNeil, Stephen [mailto:smcneil@sturgeonbaywi.org]
Sent: Wednesday, June 25, 2014 3:28 PM
To: Correll, Megan E - DNR
Cc: 'Smith, Jim R'; Olejniczak, Marty
Subject: FW: City of Sturgeon Bay west side waterfront redevelopment

Hi Megan –
 Please let us know what dates work for you. It will be our pleasure to show you the site and answer any questions that you may have.
 Steve

Stephen B. McNeil, City Administrator
 City of Sturgeon Bay
 421 Michigan Street
 Sturgeon Bay, WI 54235

DATE: 9-26-16
 EXHIBIT NO. 5 RPTR:LSB
 BAY REPORTING SERVICE, INC.

MAP SHOWING SHORE LINE
 ON A PORTION OF THE SHORES OF STURGEON BAY, WIS.
 ESTABLISHED BY ORDINANCE NO 480 AS
 ADOPTED BY THE COMMON COUNCIL DEC. 6, 1955
 SCALE: 1"=100'
 JERRY SLAVIK CITY ENGINEER

APPROVED FOR THE CITY OF STURGEON BAY
 BY THE CITY ENGINEER
 JERRY SLAVIK
 OCT 20 1955
 CITY ENGINEER



Shoreline

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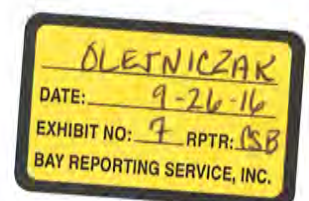
Sent: Wed 07/23/2014 06:47 AM
From: "German, Tom - BCPL"
<Tom.German@wisconsin.gov>
To: "Smith, Jim R"
<JSmith@pinkertlawfirm.com>, "McNeil,
Stephen
(smcneil@sturgeonbaywi.org)"
<smcneil@sturgeonbaywi.org>, "Marty
Olejniczak
(molejniczak@sturgeonbaywi.org)"
<molejniczak@sturgeonbaywi.org>
CC: "Nesbitt, Randy J"
<RNesbitt@pinkertlawfirm.com>, "Correll,
Megan E - DNR"
<Megan.Correll@wisconsin.gov>
Subject: RE: City of Sturgeon Bay west side
waterfront redevelopment
Attachments: SturgeonBayAnalysis-USWarDepartment-MARKUP (4).pdf Meeting Recap 2014 July 8.docx

Dear Jim,

I have attached the summary you requested along with a copy of the composite map I brought to our last meeting.

Sincerely,

Tom German, Deputy Secretary
Board of Commissioners of Public Lands
101 E. Wilson Street, 2nd Floor
P.O. Box 8943
Madison, WI 53708
(608) 267-2233 (direct line)
(608) 267-2787 (fax)



It was good to see all of you again last week. Pursuant to Jim's request, I have attempted to compile a summary of our discussion. I apologize for my wordy letter, but I thought it was important to be thorough enough to keep us all on the same page.

As promised, I have attached an electronic copy of the composite map I brought with me to the meeting. The map was created by our information systems employee by "layering" and coordinating different historical maps onto one consolidated document. The different maps have different degrees of transparency that allow us to see different features from different times on the same map. I do have to include a small disclaimer here. Please note, this map is only an estimate of the exact locations of points. This composite map and some of the underlying maps were created by geographic information systems technology, not by licensed surveyors. That said, I think the map does a decent job of showing the approximate location of different points of interest in that area.

IMPORTANT MAP DISCLOSURES

- The original meander line of the bay noted by the original surveyor in 1835 appears to run through the current location of the intersection of Maple Street and Neenah Avenue. This meander line is marked in pale blue. Please note, the original plat map used in this composite was created in 1836.
- In 1925, The US War Department issued a map depicting the waterfront area of Sturgeon Bay. This map showed the location of the shoreline at that time, the names of certain docks and the depth of the water in the bay. The upland areas from this 1925 map show up as lighter areas on the overlay map. The 1925 map shows the Teweles & Brandeis Wharf on which now stands the vacant grain elevator. The map also shows that some of the areas between the docks were dry land and the water depths between the docks were very shallow (1- 4 feet). This might be interpreted as "littoral drift" and accretion between the docks.
- In December 1955, the City of Sturgeon Bay adopted a bulkhead line ordinance which was approved later that month by the Wisconsin Public Service Commission. The paperwork at that time showed that the shoreline had moved North and East to the broken line marked in light blue on the composite map. The bulkhead line is marked in a darker blue on the composite map.
- The City of Sturgeon Bay is now seeking to acquire merchantable title to a certain area outlined in red on the composite map. This area lies between the original meander line as noted in the 1835 survey and the shoreline as it existed in 1955 prior to the adoption of the bulkhead line and additional filling.

ACTION ITEMS

1. It is my understanding that as of this date, the local title company has declined to issue any title insurance on the parcel outlined in red and described above. It is my understanding that Attorney Smith will set up a conference call with title company officials, City Officials, DNR staff and BCPL staff to determine what documentation the title company requires in order to issue a title commitment and policy for the parcel. (Please note that I will be out of the office for meetings the week of July 21, but may be able to participate by phone). BCPL and DNR staff will work to the best of their abilities (but within their authority and jurisdiction) with the City and title company to provide or acquire the necessary documentation to enable the title company to issue such commitment and policy.
 - a. Please note, if the City intends to be the lessee of the proposed submerged lands lease described below, the City will have to retain a thin strip of ownership on the Northeastern edge of this parcel so that the City remains the riparian owner in that area. You may recall that BCPL may only lease to the riparian owner. If the City conveys all of its interest in this parcel, the new owner would then be considered the riparian and be the only entity eligible to lease in this area.

2. It is further my understanding that the City of Sturgeon Bay is interested in obtaining a submerged lands lease from the State of Wisconsin, Board of Commissioners of Public Lands for the area lying between the shoreline as it existed in 1955 and the bulkhead line. This proposed lease area was filled subsequent to the adoption of the bulkhead line in December 1955.
 - o The City will need to confirm its request for the lease in writing to DNR and BCPL. Megan Correll and Tom German will be the appropriate contacts for such letter.

 - o The City will need to provide some evidence of its status as the riparian owner across the leasing area since BCPL may only lease to the riparian owner.
 - For the Eastern part of proposed lease area, it is my understanding that there is no other entity currently holding any title or interest Northeastward of Maple Avenue. Confirmation of this fact will not only serve as the starting point for Action Item #1 above, but also provide support for leasing authority in this area.

 - For the Western part of the proposed lease area, the picture is a bit murkier. The City has not asked for DNR or BCPL assistance on clearing title to the area that now holds the vacant grain elevator as it is my understanding that the City had previously obtained title insurance for such parcel. However, it is further my understanding that the policy contained the standard exception for areas “lying below the ordinary high water mark.” This exception may significantly impair the value of the policy if most or all of such parcel is deemed to be below

the ordinary high water mark. From an initial review of the maps and documents covering this area, there is a very strong likelihood that this is the case. In any event, it is critical to resolve the ordinary high water mark and ownership issues in this area in order for the City to:

- Determine whether or not it has merchantable title to this parcel;
 - Finalize its development plans for the area,
 - Determine the riparian owner in this area so that the Western waterfront area might be included in the submerged lands lease, and
 - Give proper guidance to the surveyor as to the dimensions of the proposed lease area.
- The City will need to engage a surveyor to survey the boundaries of the proposed lease area.
- In the Eastern part of the proposed lease area, it appears that the Northeastern boundary of the parcel discussed in Action Item #1 above would likely be the same as the Southern boundary of the proposed lease area.
 - The bulkhead line could serve as the Northern boundary of the lease area. However, I do not know where the current dock improvements are located with respect to the bulkhead line. (The City would want to make sure that the fill and dock wall improvements are located within the proposed leased area). The City may want to push the lease area line out a few more feet to give the City some additional room for dock wall improvements or reinforcements if necessary.
 - The location of the Western boundaries of the lease area needs a bit more discussion as there are some significant uncertainties here. There should be another discussion between the parties to confirm the location of the plot points of this survey before the City incurs the cost of the survey.
- A submerged lands lease requires the DNR to make certain findings that the improvements are consistent with the public interest in the navigable waters. Megan Correll will begin work on coordinating the drafting of the findings and provision of the requisite public notice. Megan's work is partially contingent upon her receipt of the completed survey and also the delivery of a detailed description from the City as to the proposed uses of the leased area. (As we discussed, the scope of BCPL's statutory leasing authority is very limited and the proposed uses must fall within that authority)
- Tom German of BCPL will commence work on drafting a submerged lands lease for the City. This work is contingent on the City's and the DNR's responsibilities described

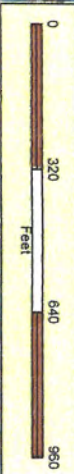
above. However, Tom will begin work while those other matters are in process so as not to delay the project.

I look forward to working with everyone on resolving the challenges we have discussed. I believe that we are on the same page with most of the issues. However, as you can probably tell by my tone above, I remain concerned regarding the status of the area containing the vacant grainery as that issue may have the capacity to negatively impact the overall development plans.

Again, I apologize for the length of the letter. If you have any questions, please do not hesitate to ask. I look forward to our conference call with the title company. My thoughts and prayers are with you and your community in the days ahead as you deal with the aftermath of the recent storm.

Sincerely,

Tom



INTERNAL USE ONLY

Original Survey
Shore Meander

Ordinance 460 Shore
Bulkhead Line

Original Survey
Shore Meander

BCPL I/T
06/04/2014

This map is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.

Forward Reply Reply all Reply with history Close Search Back

Sent: Tue 09/03/2013 05:13 PM
From: Waltraud Arts <artswa@charter.net>
To: "Olejniczak, Marty"
 <MOlejniczak@sturgeonbaywi.org>, "Smith,
 Jim R"
 <JSmith@pinkertlawfirm.com>, "Nesbitt,
 Randy J" <RNesbitt@pinkertlawfirm.com>
CC:
Subject: RE: CONFIDENTIAL ATTORNEY CLIENT
 COMMUNICATION ISSUES RELATED TO
 BULKHEAD LINE

Attachments:

Thanks. That is helpful. In the Two Rivers case there had been filling beyond the bulkhead line.

From: Olejniczak, Marty [mailto:MOlejniczak@sturgeonbaywi.org]
Sent: Tuesday, September 03, 2013 4:57 PM
To: 'Waltraud Arts'; 'Smith, Jim R'; 'Nesbitt, Randy J'
Subject: RE: CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION ISSUES RELATED TO BULKHEAD LINE

The existing bulkhead line matches the current shore (dock wall) line – blue line on map. There has been no filling beyond the established bulkhead line.

From: Waltraud Arts [mailto:artswa@charter.net]
Sent: Tuesday, September 03, 2013 3:52 PM
To: Olejniczak, Marty; 'Smith, Jim R'; 'Nesbitt, Randy J'
Subject: RE: CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION ISSUES RELATED TO BULKHEAD LINE

Marty,

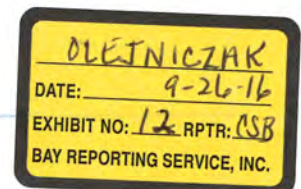
Where is the line created by the bulkhead line? I assume the colored lines show the extent of the fill, but where are they in relation to the existing bulkhead line we are dealing with?

From: Olejniczak, Marty [mailto:MOlejniczak@sturgeonbaywi.org]
Sent: Tuesday, September 03, 2013 2:41 PM
To: 'Waltraud Arts'; 'Smith, Jim R'; 'Nesbitt, Randy J'
Subject: RE: CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION ISSUES RELATED TO BULKHEAD LINE

Attached is a map showing the shoreline changes over the years. This map was prepared for a different project and is a large file so hopefully it goes through. Our subject area is between the two bridges. The area that the city filled in reliance on the bulkhead line is the area between green line and blue line on the map. I hope this clarifies the location and extent of the filling.

Marty

From: Waltraud Arts [mailto:artswa@charter.net]
Sent: Tuesday, September 03, 2013 2:08 PM
To: 'Smith, Jim R'; Olejniczak, Marty; 'Nesbitt, Randy J'



Subject: RE: CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION ISSUES RELATED TO BULKHEAD LINE

Thanks. It is helpful to know how much of the property is actually filled. However, the situation presents a possible compromise position with the DNR. If the City kept ownership, without record title of some of the riparian property and agreed that its use was qualified for public and navigational purposes, would the DNR agree that DNR had record title to the back lot even though part of it is filled? Might work.

Could be the basis of a stipulated declaratory judgment action which might satisfy the title company.

From: Smith, Jim R [<mailto:JSmith@pinkertlawfirm.com>]

Sent: Tuesday, September 03, 2013 2:01 PM

To: Waltraud Arts; Olejniczak, Marty; Nesbitt, Randy J

Subject: RE: CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION ISSUES RELATED TO BULKHEAD LINE

I believe that the title companies will require resolution of the filled-in lands ownership before they will insure title to any of the land. The westerly portion of what is now owned by the city is within the filled-in land and except for the Door County Cooperative title insurance coverage the title company won't insure the land until the issue is resolved to its satisfaction.



Attorney James R. Smith

Pinkert Law Firm LLP

454 Kentucky Street, P.O. Box 89

Sturgeon Bay, WI 54235

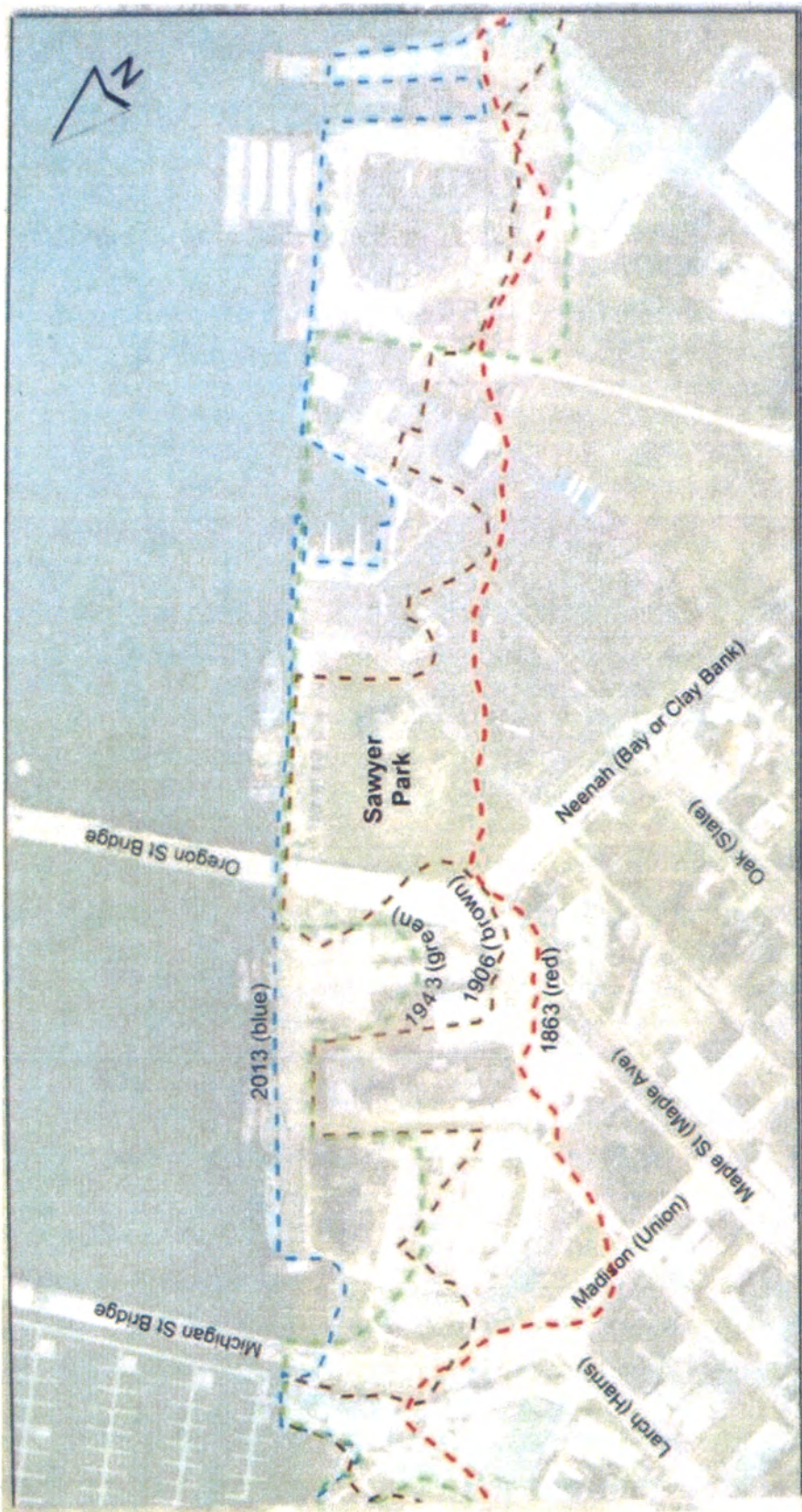
Phone: 920.743.6505

Fax: 920.743.2041

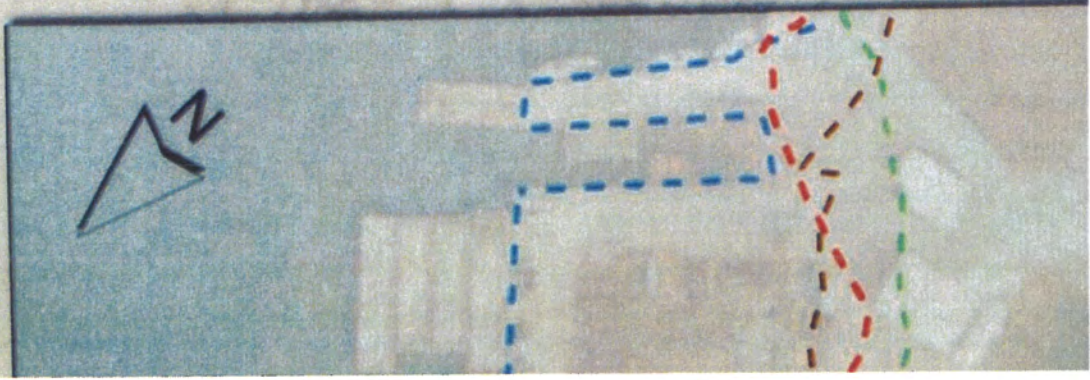
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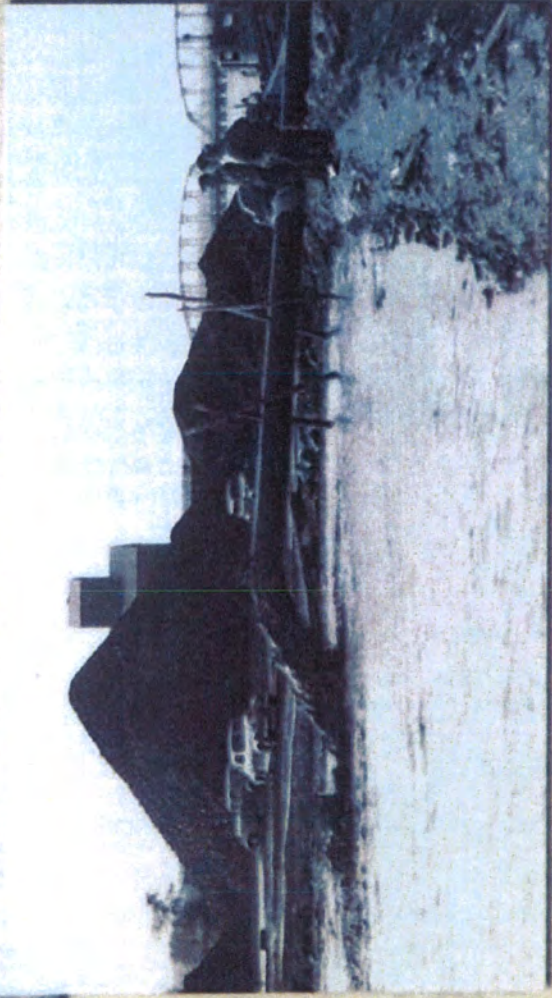
The working waterfront of Sturgeon Bay has changed considerably to accommodate the needs of waterborne commerce. This map shows this progression of the filling of the bay and extension of the dock wall. In the late 1800's and early 1900's the dock, which was originally known as the Lawrence Dock and then Washburn Dock, was much smaller. The dock was lengthened during the first half of the 20th century during its heyday as a cargo depot when it was called the Bushman Dock. By the 1960's the dock had reached its modern extent. The original street names which were used until World War II are listed on the map after the current street names.

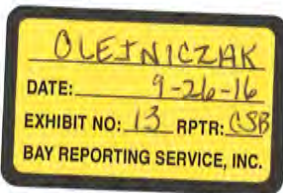


The freighter *George F. Rand* unloads coal at the Bushman Dock in this 1950's photo. The dock dates back to the 1800's and was an international shipping terminal for lumber, grain, coal and other commodities. By the 1970's the site was no longer used as a cargo terminal though ships still moored here. Eventually, the old wooden dock wall deteriorated to the point that even docking was not feasible. The modern steel sheet wall was completed in 2005 and the dock (now called the Sawyer Dock) was reborn as mooring facility.



The modern dock known as Sawyer Dock was gradually lengthened by filling in the bay. Depending upon the era, the fill material may have been sawdust, garbage, or dredged material. This photo shows the dock being extended around 1940 when it was known as the Bushman Dock. Dredged material is being pumped from the shipping channel into the area behind a newly established shoreline. The photo looks northerly with the Michigan Street Bridge in the background.





Development at Historic Fill Site or Licensed Landfill Exemption Application

Form 4400-226 (R 9/14)

Notice: Use of this form is required by the DNR for any application to develop at a historic fill site or licensed landfill pursuant to secs. NR 506.085 and NR 500.08(4), Wis. Adm. Code. The Department will not consider your application unless you provide complete information requested. Personally identifiable information collected will be used to process your application and will also be accessible by request under Wisconsin's Open Records law [ss.19.31 - 19.39, Wis. Stats.]

Instructions: See *Development at Historic Fill Sites and Licensed Landfills: What you need to know* (PUB-RR-683, November 2013) for detailed instructions.

- All Exemption Application materials should be sent to the region where the site is located, as listed on page 6.
- Include \$700 fee payment with this application unless a fee was already paid for the review of the remedial design report under the NR 700 process. If the site is a licensed landfill and the Waste and Materials Management program is doing the review, submit no fee now. You will be sent an invoice upon receipt of this application.
- Determine the appropriate exemption type for the site and check appropriate box below.
- Provide complete information requested for each type of exemption. Include the following attachments:
Required: Summary of Existing and Potential Impacts described in Section V as an attachment, under the seal of a professional engineer or geologist registered to practice in Wisconsin.
Optional: Site Visit Summary Comments (Section IX) including any photos, sketches or site visit notes.

Exemption Type

- Remediation and Redevelopment Program NR 700 Rule Series Process Exemption:** Site with remedial actions conducted in accordance with NR 700 series
Required: Sections I - VI **Optional:** Sections VII - X
- Case-by-Case Evaluation:** Sites with anticipated environmental impacts or wastes of special concerns
Required: Sections I - VI **Optional:** Sections VII - X
- Expedited Exemption:** Site with no expected environmental impact
Required: Sections I - VI and Form 4400-226A Expedited Exemption Application **Optional:** Sections VII - X

I. Applicant Information

Owner - Last Name	First	MI	Phone Number (include area code)	
Olejniczak	Martin			
Contact Name (if different)				
City of Sturgeon Bay				
Street Address	City	State	ZIP Code	
421 Michigan Street	Sturgeon Bay	WI	53718	
Developer - Last Name	First	MI	Phone Number (include area code)	
Street Address	City	State	ZIP Code	

II. Site Name and Location

Site Name	Location / Address		
West Waterfront Redevelopment	92 and 100 E. Maple Street		
Is the site known by another name(s)? <input checked="" type="radio"/> Yes <input type="radio"/> No <input type="radio"/> Unknown	<input checked="" type="radio"/> City <input type="radio"/> Town <input type="radio"/> Village		
If yes, provide name: Door County Coop	of Sturgeon Bay		
Does the site have a license number? <input type="radio"/> Yes <input checked="" type="radio"/> No <input type="radio"/> Unknown	State	ZIP Code	County
If yes, License Number:	WI	54235	Door

A. Attach a map with site location and limits of fill/waste disposal area.

B. Global Positioning System Coordinates

Describe method for collecting GPS Coordinates
 WDNR BRRTS on the Web

Latitude	DEG	MIN	SEC	Longitude	DEG	MIN	SEC
	44	49	46.4800 N		87	22	57.8300 W

Program Lead, Fee Status and Regulatory ID Numbers (This area for DNR use only)

<input type="radio"/> Waste Management Bureau	<input type="checkbox"/> Payment Attached	
<input type="radio"/> Remediation and Redevelopment Bureau - Exemption is part of remedy under NR 700 program	Amount	
<input type="radio"/> Fee already paid for review of remedial design report.	\$	
<input type="radio"/> Review of remedial design report not requested and payment is attached.		
Hazardous Waste Facility License ID #: (5 digits)	DNR FID #: (9 digits)	USEPA ID #: (used for both RCRA & CERCLIS #s) (WI+Alpha+9 digits)
Region	Project Manager	Telephone Number

Development at Historic Fill Site or Licensed Landfill Exemption Application

Form 4400-22b (R 9/14)

Page 2 of 6

III. Site Ownership History

Previous Owner - Last Name		First	MI	Telephone Number	
Freedom Bank					
Street Address		City	State	ZIP Code	
500 E. Leclair Road		Eldridge	IA	52748	
Responsible Municipal / Private Operator - Last Name (if applicable)		First	MI	Telephone Number	
Street Address		City	State	ZIP Code	

IV. Evaluation of Existing and Potential Impacts. See Development at Historic Fill Sites and Licensed Landfill: Guidance for Investigation and Development at Historic Fill Sites and Licensed Landfill: Potential Problems and Considerations.

- A. Analytical data for the following media have been collected and/or examined before completing this application:
- Groundwater: Yes No
 - Soil: Yes No
 - Surface water / sediment: Yes No
 - Air: Yes No
 - Methane or other explosive gases: Yes No
- B. Based on known or suspected sources and wastes, their physical characteristics, containment and geologic environment, do you suspect a release of pollutants to the environment?
- Yes: Groundwater Soil Surface Water / Sediment Methane or Other Explosive Gases
- No
- C. If there is NOT a likelihood of a release of pollutants or evidence of a release, would the impact of the proposed development be likely to cause a release to the environment?
- Yes: If yes, be sure to summarize actions to be taken to prevent adverse environmental impacts in V. Part C below.
- No

V. Summary of Existing and Potential Impacts. See Development at Historic Fill Sites and Licensed Landfill: Guidance for Investigation and Development at Historic Fill Sites and Licensed Landfill: Potential Problems and Considerations.

Describe the following in an attached narrative under the signature of a qualified professional. Organize, label and package as listed below.

- Existing Site Conditions
 - existing site conditions including waste types,
 - potential for impacts, and
 - evaluation of existing impacts.
- Proposed Development Summary. Include explanation for overall site decision.
- Summary of actions to be taken and engineering controls that will prevent or minimize adverse environmental impacts and potential threats to human health and welfare, including worker safety.

VI. Certification of Application Information

I certify that information in this application and all its attachments is true and correct and in conformity with applicable Wis. statutes.

Print / Type Name of Applicant: Martin Olejniczak, Community Development Director, City of Sturgeon Bay

Applicant Signature: *Martin Olejniczak* Date Signed: 6/30/15

Development at Historic Fill Site or Licensed Landfill Exemption Application

Form 4400-226 (R 9/14)

Page 3 of 6

Sections VII - IX are optional for all Applicants.

VII. Current and Historic Type of Waste Disposal Site (Check all that apply)

- | | |
|---|--|
| <input type="checkbox"/> Licensed Landfill | <input type="checkbox"/> One-time Disposal |
| <input type="checkbox"/> Non-approved {See s.289.01(3)}, Wis Stats. | <input type="checkbox"/> Construction / Demolition |
| <input type="checkbox"/> Approved | <input type="checkbox"/> Historic Fill Site |

Liner

- | | |
|--|---------------------------------------|
| <input type="checkbox"/> Unlined | <input type="checkbox"/> Clay Liner |
| <input type="checkbox"/> Lined | <input type="checkbox"/> Unengineered |
| <input type="checkbox"/> Composite Liner | |
| <input type="checkbox"/> Other Liner (Describe): _____ | |

Total Landfill Volume

- < 50,000 yd³
 50,000-500,000 yd³
 > 500,000 yd³

- Does the landfill have a closure plan? Yes No Unknown
- Does the landfill have a groundwater monitoring plan? Yes No Unknown
- Have groundwater monitoring wells been installed? Yes No Unknown

Was a cover installed? Yes: No **If no, go to Past Land Uses.**

- Composite cap
 Layered soil cap with clay barrier
 Clay cap
 Soil cap - not recompacted clay
 Other cover
 Unknown

What is the thickness of the cover? < 6 in 6-12 in 12-24 in > 24 in Unknown

Past Land Uses. (Check all that apply)

- | | | |
|--|--|--|
| <input type="checkbox"/> Agricultural co-op | <input type="checkbox"/> Electroplater | <input type="checkbox"/> Salvage yard |
| <input type="checkbox"/> Brush pile | <input type="checkbox"/> Lagoon | <input type="checkbox"/> Service Station |
| <input type="checkbox"/> Bulk plant | <input type="checkbox"/> Manufacturing Type: _____ | <input type="checkbox"/> Tannery |
| <input type="checkbox"/> Coal gas manufacturer | <input type="checkbox"/> Old burn pit | <input type="checkbox"/> Unknown |
| <input type="checkbox"/> Deer pit | <input type="checkbox"/> Pipeline | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Dry cleaner | <input type="checkbox"/> RCRA generator | |

Date(s) of Site Operation:

From: _____ To: _____ No. of Years: _____ Unknown

VIII. Waste Information & Geologic Environment. See Development at Historic Fill Sites and Licensed Landfills: Guidance for Investigation

A. Known or Suspected Sources/Wastes. (Check all that apply)

- | | | |
|--|---|---|
| <input type="checkbox"/> Abandoned containers | <input type="checkbox"/> Known or suspected hazardous materials | <input type="checkbox"/> Demolition/construction waste |
| <input type="checkbox"/> Above ground pipeline or tank | <input type="checkbox"/> Municipal waste | <input type="checkbox"/> Surface impoundment/lagoons |
| <input type="checkbox"/> Animal carcasses | <input type="checkbox"/> Paper mill sludge | <input type="checkbox"/> Underground pipeline or tank |
| <input type="checkbox"/> Buried drums | <input type="checkbox"/> Transformer | <input type="checkbox"/> Exempted fill [NR 500.08(1) and (2)] |
| <input type="checkbox"/> Burning of materials | <input type="checkbox"/> Trees/brush | <input type="checkbox"/> Unknown |
| <input type="checkbox"/> Foundry sand | <input type="checkbox"/> Surface spills | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Industrial accident | <input type="checkbox"/> Fly ash | |

B. Physical Characteristics of Sources/Wastes

Liquid Solid Liquid & Solid Unknown

VIII. Waste Information & Geologic Environment (continued)

C. Waste Containment Liner Unknown Not applicable

Engineered cover

Maintained Not maintained

Functioning leachate collection & removal system

Functioning & maintained run-off management system

Functioning groundwater monitoring system

D. Soil Type: Estimate distances or determinations based on regional or site specific information.

Regional Site specific

Clay, silt or other fine grained soils present? (lacustrine, tills, etc.) Yes No

At surface? Yes No At depth? Yes No _____ feet

Sand & gravel, coarse grained soils present? Yes No

At surface? Yes No At depth? Yes No _____ feet

E. Depth to Groundwater

Regional Site specific _____ feet

F. Direction of Groundwater Flow

Regional Site specific _____ direction

G. Depth to Bedrock

Regional Site specific _____ direction

H. Bedrock Type

Regional Site specific Sandstone Limestone/Dolomite Metamorphic/Igneous

IX. Site Visit

Conduct a site visit to complete site screening and determine general site conditions, on-site activities and adjacent land use encroachment issues. As appropriate to document the site, take photos, sketch the site and prepare a Site Visit Report.

On-site visit conducted? Yes No

General site conditions: Document any observed releases and note whether or not you were able to walk the site. Examples of things to be aware of include the following:

- leachate seeps or evidence of seeps such as stained soil/vegetation
- stressed vegetation as a sign of gas migration to the surface or of leachate seeps;
- quality and coverage of vegetation on the cap;
- odors which may indicate gas migration to the atmosphere;
- erosion of the cap;
- maintenance of positive drainage over the capped area;
- visual desiccation cracks in the cap.

Attach the following to your application:

Photographs, regular or digital Site sketch Site Visit Report

Name(s) of Person(s) Conducting Site Visit

Date of Site Visit

IX. Site Visit (continued)

A. Adjacent Land Uses. Indicate all directions. (Check all that apply)

<input type="checkbox"/> Agricultural	<input type="checkbox"/> N	<input type="checkbox"/> S	<input type="checkbox"/> E	<input type="checkbox"/> W	<input type="checkbox"/> NE	<input type="checkbox"/> NW	<input type="checkbox"/> SE	<input type="checkbox"/> SW
<input type="checkbox"/> Industrial	<input type="checkbox"/> N	<input type="checkbox"/> S	<input type="checkbox"/> E	<input type="checkbox"/> W	<input type="checkbox"/> NE	<input type="checkbox"/> NW	<input type="checkbox"/> SE	<input type="checkbox"/> SW
<input type="checkbox"/> Recreational	<input type="checkbox"/> N	<input type="checkbox"/> S	<input type="checkbox"/> E	<input type="checkbox"/> W	<input type="checkbox"/> NE	<input type="checkbox"/> NW	<input type="checkbox"/> SE	<input type="checkbox"/> SW
<input type="checkbox"/> Residential	<input type="checkbox"/> N	<input type="checkbox"/> S	<input type="checkbox"/> E	<input type="checkbox"/> W	<input type="checkbox"/> NE	<input type="checkbox"/> NW	<input type="checkbox"/> SE	<input type="checkbox"/> SW
<input type="checkbox"/> Undeveloped	<input type="checkbox"/> N	<input type="checkbox"/> S	<input type="checkbox"/> E	<input type="checkbox"/> W	<input type="checkbox"/> NE	<input type="checkbox"/> NW	<input type="checkbox"/> SE	<input type="checkbox"/> SW
<input type="checkbox"/> Commercial	<input type="checkbox"/> N	<input type="checkbox"/> S	<input type="checkbox"/> E	<input type="checkbox"/> W	<input type="checkbox"/> NE	<input type="checkbox"/> NW	<input type="checkbox"/> SE	<input type="checkbox"/> SW
<input type="checkbox"/> Other:	<input type="checkbox"/> N	<input type="checkbox"/> S	<input type="checkbox"/> E	<input type="checkbox"/> W	<input type="checkbox"/> NE	<input type="checkbox"/> NW	<input type="checkbox"/> SE	<input type="checkbox"/> SW

B. Potential Groundwater Receptors. Estimate distances. (1 mile = 5,280 ft)

Distance to and direction of nearest municipal well: _____ feet > ½ mile from the waste _____ direction

Distance to and direction of nearest other-than-municipal well: _____ feet > ½ mile from the waste _____ direction

Distance to and direction of nearest non-community well: _____ feet > ½ mile from the waste _____ direction

Distance to and direction of nearest private well: _____ feet > ½ mile from the waste _____ direction

Distance to and direction of nearest private well: _____ feet > ½ mile from the waste _____ direction

C. Potential For Gas Migration

_____ No. of homes within 300 feet of waste (gas migration potential)

_____ No. of homes between 300 & 1,000 ft to waste (gas migration potential)

Distance to and direction of nearest building: _____ feet > ½ mile from the waste _____ direction

Type of building: On-site building Municipal Residential Commercial Industrial Unknown

D. Potential Surface Water Receptors. Estimate distances.

Creek _____ feet Drainage ditch: _____ feet Intermittent stream: _____ feet

River _____ feet Lake _____ feet Wetland: _____ feet

E. Based on the site visit, did you visually observe...

1. a release to a surface water body? Yes No Unknown

2. a leachate seep? Yes No Unknown

3. a release to soils? Yes No Unknown

X. Comments: Use this section to provide comments on any aspect of the site visit. Attach any information or explanations labeled with the appropriate section number to which the material applies.

Region Map

NORTHERN REGION

Remediation & Redevelopment
Team Supervisor
Department of Natural Resources
107 Sutliff Avenue
Rhineland, WI 54501
(715) 365-8976

OR

Regional Waste Program Manager
Department of Natural Resources
107 Sutliff Avenue
Rhineland WI 54501
(715) 365-8946

NORTHEAST REGION

Remediation & Redevelopment
Team Supervisor
Department of Natural Resources
2984 Shawano Avenue
Green Bay, WI 54313-6727
(920) 662-5160

OR

Regional Waste Program Manager
Department of Natural Resources
2984 Shawano Avenue
Green Bay, WI 54313-6727
(920) 662-5120

SOUTHEAST REGION

Remediation & Redevelopment
Team Supervisor
Department of Natural Resources
P.O. Box 12436
Milwaukee, WI 53212-0436
(414) 263-8561 or (414) 263-8714

OR

Regional Waste Program Manager
Department of Natural Resources
P.O. Box 12436
Milwaukee, WI 53212-0436
(414) 263-8694 or (414) 263-8697

WEST CENTRAL REGION

Remediation & Redevelopment
Team Supervisor
Department of Natural Resources
1300 West Clairemont Avenue
Eau Claire, WI 54701
(715) 839-3710

OR

Regional Waste Program Manager
Department of Natural Resources
1300 West Clairemont Avenue
Eau Claire, WI 54701
(715) 839-3708

SOUTH CENTRAL REGION

Remediation & Redevelopment
Team Supervisor
Department of Natural Resources
3911 Fish Hatchery Road
Fitchburg, WI 53711
(608) 275-3241

OR

Regional Waste Program Manager
Department of Natural Resources
3911 Fish Hatchery Road
Fitchburg, WI 53711
(608) 275-3466



V. Summary of Existing and Potential Impacts

A. Existing Site Conditions

1. Existing Site Conditions Including Waste Types

Activities outlined in this document represent the remediation phase of the Brownfield development process for the Door County Coop (DNR BRRTS # 03-15-000659), Door County Coop- Fill (DNR BRRTS # 02-15-544253), Former Door County Coop- VPLE (DNR BRRTS # 06-15-560738), Former US Coast Guard- Above OHWM (DNR BRRTS # 02-15-563484), Former US Coast Guard- Above OHWM- VPLE (DNR BRRTS # 06-15-563486) and limited portions of the Former US Coast Guard- Below OHWM (DNR BRRTS #: 02-15-563485) BRRTS cases located at 92 and 100 East Maple Street, Sturgeon Bay, Wisconsin

The property proposed for the West Waterfront Redevelopment, 92 and 100 East Maple Street, Sturgeon Bay was historically developed for industrial and municipal use since at least 1885. Development began on the western portion of the site and later progressed eastward as the shoreline of Sturgeon Bay was filled in. The site was occupied over the years by a dock, grain elevator, seed warehouse, lumberyard planing mill, cement storage and agricultural cooperative. The agricultural cooperative, which was the most recent occupant of the property, ceased operations in 2007. The site has since been vacant and idle. On site structures were demolished in July 2014.

Previous environmental activities conducted on the property have documented the storage of petroleum products in aboveground and underground storage tanks as well as mixing and storage of fertilizer. Fill material placed on the site was reported to contain wood chips, charred wood and concrete. The presence of organic matter in the fill material has the potential to generate methane gas.

In anticipation of proposed mixed use redevelopment of the site, environmental assessment activities were conducted on the property between May 2013 and May 2015 to assess possible soil and groundwater contamination resulting from past use of the site and placement waste fill material. A methane gas assessment was also conducted.

Results of these recent assessment activities indicate that the property is underlain by up to 13 feet of fill material containing bricks, cinders, concrete, and wood debris. Unconsolidated sediments beneath the fill are lacustrine deposits consisting of discontinuous layers of sand and gravel, silty sand and clay to the total depth of exploration at 35 feet bls.

Contaminants of concern in soil/fill at this site are polycyclic aromatic hydrocarbons (PAH) detected above direct contact and groundwater pathway residual contaminant levels (RCL), and heavy metals detected above the groundwater pathway RCL. The elevated PAH and heavy metals concentrations were detected in the fill material beneath the site and are likely the result of the composition of the fill. Groundwater, encountered within five feet of ground surface, indicated isolated areas of PAH, benzene, lead and arsenic concentrations slightly above enforcement standards.

Vapor assessment activities indicate that methane is being generated at this site through the decomposition of organic matter in the fill material. Methane concentrations greater

than the lower explosive limit (LEL) were detected in three of the nine shallow soil vapor probes advanced at the site.

The nature and extent of contamination at this site are described in the NR 716 Site Assessment Report – Addendum for the West Waterfront Redevelopment dated July 2015. Contaminants at this site warranting remediation are as follows:

Soil

- PAH – Concentrations of PAH above NR 720 direct contact and groundwater pathway RCL were detected in fill material across the site. The industrial direct contact RCL was exceeded, primarily for benzo(a)pyrene, in samples of fill material collected.
- Heavy Metals – Concentrations of arsenic and lead were detected above the NR 720 groundwater pathway residual contaminant level (RCL) in fill material across the majority of the site. Barium was detected above the NR 720 groundwater pathway RCL in a single sample collected from probe WGP-1 advanced in the southwest portion of the site. Arsenic was detected below the background threshold value and within the range of naturally occurring concentrations of arsenic for the region. None of the other heavy metals were detected above NR 720 direct contact RCL.

Groundwater

- Isolated areas of PAH, benzene, lead and arsenic were detected at concentrations slightly above their respective enforcement standard. These isolated low level detections do not warrant remediation. However, additional groundwater monitoring is recommended to confirm the presence and trend in concentration of these compounds in groundwater.

Vapor

- Vapor assessment activities indicate that methane gas is being generated beneath the site. Measures should be taken to mitigate accumulation of methane gas in any buildings or underground utilities constructed on site.

2. Potential for Impacts

Contamination at this site consists primarily of PAH at concentrations above direct contact RCL. The proposed redevelopment of the site includes a hotel and public space and, therefore, there is a potential for human health impacts due to direct contact with the soil exposure route. PAH were also detected above the groundwater pathway RCL. However, PAH are relatively immobile due to their low solubility and affinity for adsorption and their potential for impact on groundwater and surface water is low. This is supported by the low levels of PAH detected in groundwater beneath the site.

Arsenic, lead and barium were detected at concentrations above the groundwater pathway RCL. However, groundwater analysis only detected low levels of these metals indicating that the concentrations in soil are having a negligible impact on groundwater. Concentrations of heavy metals in groundwater do not warrant remediation.

Methane gas generation beneath the site has the potential to accumulate within indoor air space or along utility corridors causing an explosion hazard. Currently the site is vacant and methane gas is venting directly through the ground surface and into the atmosphere. However, when buildings are constructed or subsurface utilities installed during site redevelopment, engineered controls should be implemented to mitigate vapor migration and accumulation into enclosed spaces.

3. Evaluation of Existing Impacts

Soil assessment activities including characterization and laboratory analysis of soil samples collected from 15 soil probes and 17 monitoring well boreholes indicates that up to 13 feet of fill comprised of variable amounts of sand, wood, brick, cinders and concrete is present across the majority of the site. The presence of wood waste creates the potential for methane gas generation. Site redevelopment should include construction of an engineered system to mitigate potential accumulation and migration of methane gas.

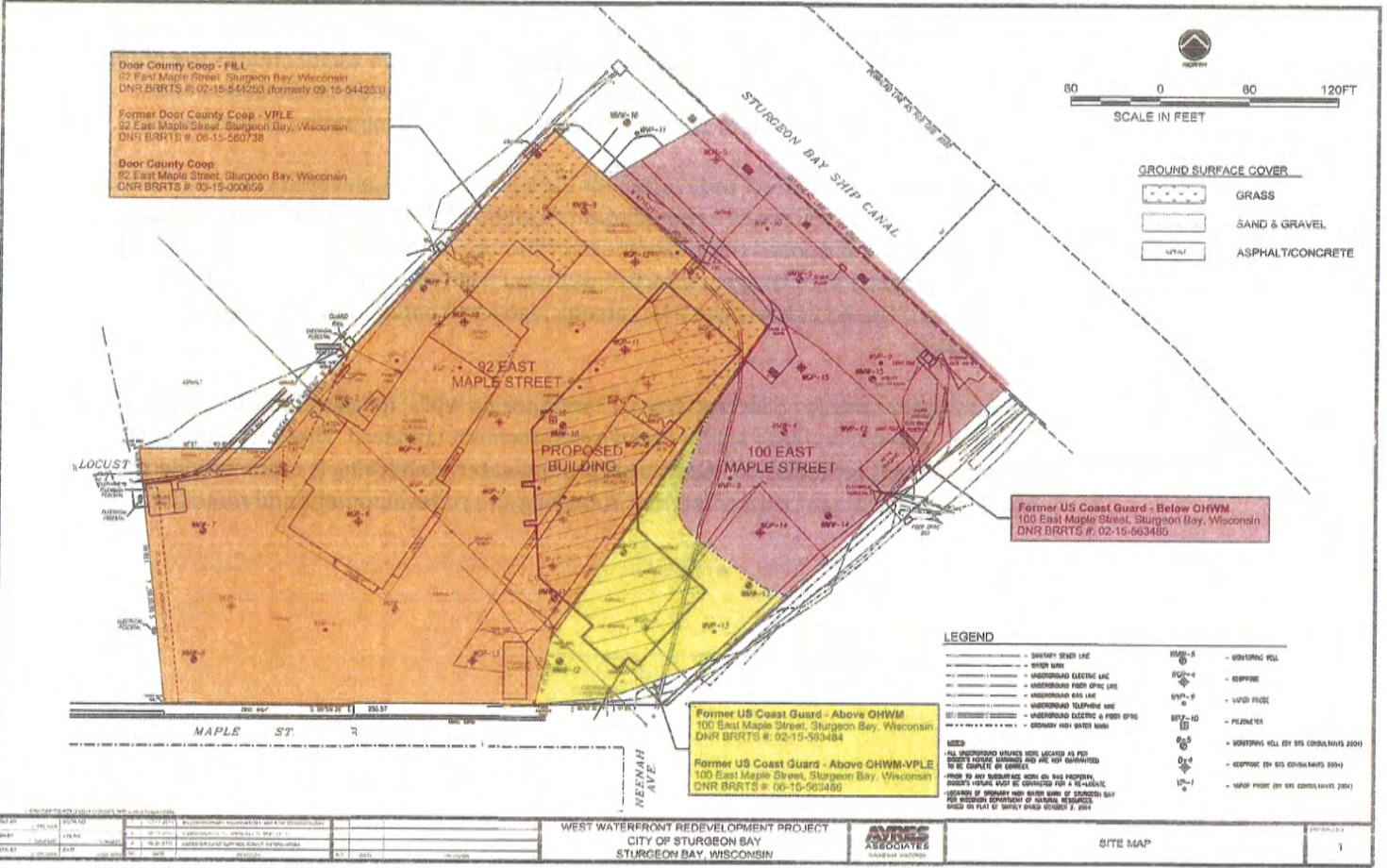
Existing impacts that affect redevelopment are primarily the elevated concentrations of PAH. PAH impacts will require remediation to eliminate the potential direct contact pathway for the proposed redevelopment of the site. Remediation of the site should also consider protection of the groundwater pathway from PAH and low levels of arsenic, lead and barium. Figure 1 shows the PAH, arsenic, lead and barium impacts requiring remediation.

Groundwater samples collected from 17 monitoring wells, indicated low levels of PAH, benzene, arsenic and lead slightly above enforcement standard. These isolated detections do not warrant remediation. Additional groundwater monitoring is recommended to evaluate contaminant concentrations following site redevelopment and remediation.

Door County Coop - FILL
 92 East Maple Street, Sturgeon Bay, Wisconsin
 DNR BRRTS # 02-15-544253 (formerly 09-15-544253)

Former Door County Coop - VPLE
 92 East Maple Street, Sturgeon Bay, Wisconsin
 DNR BRRTS # 06-15-560738

Door County Coop
 82 East Maple Street, Sturgeon Bay, Wisconsin
 DNR BRRTS # 03-15-000059



Former US Coast Guard - Below OHWM
 100 East Maple Street, Sturgeon Bay, Wisconsin
 DNR BRRTS # 02-15-563485

Former US Coast Guard - Above OHWM
 100 East Maple Street, Sturgeon Bay, Wisconsin
 DNR BRRTS # 02-15-593484

Former US Coast Guard - Above OHWM-VPLE
 100 East Maple Street, Sturgeon Bay, Wisconsin
 DNR BRRTS # 06-15-563486

LEGEND

- - - - -	GRAVEL	---	UNDERGROUND ELECTRIC LINE	ST-5	WORKING WELL
- - - - -	UNDERGROUND FIBER OPTIC LINE	---	UNDERGROUND GAS LINE	ST-6	GEOPHIC
- - - - -	UNDERGROUND TELEPHONE LINE	---	UNDERGROUND ELECTRIC & FIBER OPTIC	ST-7	WELL PROBE
- - - - -	ORDINARY HIGH WATER MARK	---		ST-10	PLEISTOCENE
		---		ST-11	WORKING WELL BY SIS CONSULTANTS 2000
		---		ST-12	GEOPHIC (BY SIS CONSULTANTS 2000)
		---		ST-13	WELL PROBE (BY SIS CONSULTANTS 2000)

NOTES
 ALL UNDERGROUND UTILITIES WERE LOCATED AS PER
 THE CITY OF STURGEON BAY AND ARE NOT GUARANTEED
 TO BE COMPLETE OR CORRECT.
 PRIOR TO ANY SUBSEQUENT WORK ON THIS PROJECT,
 PROPERTY HOLDERS MUST BE CONTACTED FOR A RE-LOCATE.
 LOCATIONS OF SHIPWRECK AND OTHER REMAINS OF STURGEON BAY
 FOR HISTORIC DEPARTMENT OF CULTURAL RESOURCES
 BASED ON PLAN OF SURVEY DATED OCTOBER 9, 2004

WEST WATERFRONT REDEVELOPMENT PROJECT
 CITY OF STURGEON BAY
 STURGEON BAY, WISCONSIN



SITE MAP

B. Proposed Development Summary

Sawyer Hotel Development, LLC, and Bayland Buildings, Inc (general contractor) of Green Bay, Wisconsin will be constructing a 4-story hotel, with approximately a 19,420-square-foot (SF) footprint. The building will be located across portions of the 92 and 100 E. Maple Street sites above the ordinary high water mark shown on Figure 2. All currently proposed private development activities (i.e. activities not open to public trust lakebed uses) on the 92 and 100 East Maple Street properties will occur above the OHWM (i.e. landward of the bulkhead area). Development activities associated with the Former US Coast Guard- Below OHWM (DNR BRRTS # 02-15-563485) BRRTS case will be handled separately and at a later point in time. Portions of the development below the ordinary high water mark will be completed with lawn, landscaping, a concrete or asphalt river walk and other appurtenances at a later date.

Based upon current grading plans for the project, clean, structural fill will be imported and placed on the existing ground surface to raise the elevation of the site 4½ feet. The estimated volume of soil to be placed underneath the building is 2,800 cubic yards. The estimated quantity of soil used to backfill around the foundation is 1,390 cubic yards.

Building construction will consist of a concrete slab on poured concrete foundation walls supported on approximately 466, 24-inch diameter aggregate geopiers. It is anticipated that minimal amount of soil will be disturbed during construction and that the majority of soil will remain in place beneath future site structures.

The remedial action objectives for the West Waterfront Redevelopment include preventing direct contact risk to patrons and workers at the proposed hotel and restaurant posed by contamination in near surface fill. This will be accomplished by capping the affected fill beneath four feet of clean fill, impervious concrete building slabs, asphalt parking lots and driveways. Elements of the engineered cap are shown on Figure 3.

There may be some contaminated fill material generated from excavation of foundations or footings that may require removal and on-site relocation. The excavated soil/historic fill will be relocated within the same BRRTS case property limits from which it was generated (i.e. keep soil/historic fill generated from the 92 East Maple Street BRRTS case within the 92 East Maple Street BRRTS case property limits). Contaminated fill that cannot be used on site will be disposed off-site as a solid waste.

The City will also install new sanitary and sewer lines across the property concurrently with site development. The City's engineer estimated that approximately 1,300 cubic yards of soil/fill material will be excavated during utility construction. Excess fill material excavated from the utility trenches cannot be relocated on the hotel development site. Historic fill characterized as solid waste that is suitable for reuse will be used as backfill in the utility trenches. Excavated soil and fill material that is unsuitable for reuse will be removed from the development sites and disposed at a licensed landfill. During this phase of development, any excavated soil/historic fill generated from the Former US Coast Guard- Below OHWM (DNR BRRTS # 02-15-563485) BRRTS case property (i.e. from the bulkhead area) will also be landfilled.

C. Actions to Minimize Impacts

Remedial actions including engineering controls will be implemented during redevelopment activities to minimize adverse environmental impacts and potential threats to human health. The objectives of the remedial actions include the following:

- Prevent direct human contact risk posed by contaminated near-surface fill;
- Minimize exposure to contaminated fill by patrons and workers at the proposed hotel and restaurant and the general public using the proposed public greenspace, and
- Mitigate migration and accumulation of methane gas in enclosed building spaces.

These objectives will be accomplished by capping the site with an estimated four feet of clean fill, and subsequent construction of proposed buildings, paved surfaces and landscaped greenspace. Remedial activities will result in the entire site being capped to eliminate the direct contact risk. Placement of compacted fill along with construction of impervious surface associated with the proposed hotel and restaurant will minimize infiltration of water through the waste and into the underlying groundwater.

Because site grades are being raised with the placement of four feet of clean fill, it is anticipated that only approximately 120 cubic yards of contaminated fill currently situated on the site will be excavated during site redevelopment. The waste will be relocated on-site and covered as discussed in the Environmental Management Plan below. The excavated soil/historic fill will be relocated within the same BRRTS case property limits from which it was generated (i.e. keep soil/historic fill generated from the 92 East Maple Street BRRTS case within the 92 East Maple Street BRRTS case property limits).

Accumulation of methane gas within proposed buildings will be prevented by installing sub slab active vapor mitigation systems. Details of vapor mitigation are discussed below and are included in the Soil Vapor Management Plan, West Waterfront Hotel Development Project – Sturgeon Bay (Ayres Associates, August 2015) submitted under separate cover.

Potential methane migration and accumulation in utility trenches will also be addressed through engineering controls by the engineering consultant installing the utilities for the City. Engineering controls will include clay dams and venting of the trench. Each trench, mainline and laterals will have a clay dam constructed at the high end of the trench to prevent methane to mitigate off-site through the excavation. In addition, at Sanitary Sewer Manhole#100 and Storm Sewer Manhole# 200, a perforated PVC pipe will be installed along the manhole to vent the trenches to the atmosphere. Details of the consultants approach will be submitted to the WDNR under separate cover.

Groundwater dewatering is not anticipated during construction of the hotel given the starting elevation of the land surface after structural fill is imported. Groundwater that is encountered during pier construction, or excavation of the pool that reaches the land surface, or surface water encountered during storm events, will be collected and stored in on-site poly tanks or frac tank. The water will subsequently be analyzed, treated, and discharged to the storm sewer or transferred to the wastewater treatment plant for disposal.

Groundwater dewatering will be required for utility installation that is being performed by the City concurrently with the hotel development. Plans and permit requests for groundwater dewatering during utility construction will be submitted under separate cover by the engineering firm designing the utilities.

Environmental Management Plan

Environmental management will be performed to achieve a technically sound and environmentally acceptable approach to site redevelopment. Environmental management functions include providing independent review and guidance on environmental issues during site redevelopment, monitoring environmental conditions during construction activities, and performing environmental sampling and analysis for waste characterization and disposal, as needed.

The following environmental management activities or practices will be applied to natural soil materials, construction debris, and wastes known to exist at the site. These guidance or management procedures are based upon information obtained from previous investigations and are subject to change as additional information becomes available.

Fill Material Management

Ex-situ remediation at this site may involve limited excavation of impacted soil from the subsurface with beneficial reuse of the material on-site. Site development will necessarily require some modifications to existing site grades (elevations). However, based upon current grading plans for the project, clean, structural fill will be imported and placed on the existing ground surface beneath the building to raise the elevation a minimum of four and one-half (4½) feet. The estimated volume of soil to be placed underneath the building is 2,800 CY. The estimated quantity of soil used to backfill around the foundation is 1,390 CY.

Soil (and fill) at the site, not required for construction, may include excess material from site grading, utility trenching, soil removed during installation of poured concrete foundation walls, installation of 466 drilled aggregate geopiers to a depth of 11 to 18 feet below ground surface, pool excavation, and utility trenches. Limited spoil is anticipated from the geopier installation as a displacement process will be used to advance the borehole and place the aggregate. Material generated from excavations and trenching will be reused on site and incorporated into the final project design. All historic fill that is relocated will remain within the existing limits of fill determined during the site assessment. The excavated soil/historic fill will be kept within the same BRRTS case property limits from which it was generated (i.e. keep soil/historic fill generated from the 92 East Maple Street BRRTS case within the 92 East Maple Street BRRTS case property limits). Any historical fill that is reused on site will be covered with 18-inches of clean soil. The locations and estimated quantity of soil spoil requiring on-site relocation and reuse, and areas of clean imported soil, are shown on Figure 4.

The quantity of soil spoil requiring on-site relocation (estimated at 120 cubic yards) is contingent on final grading elevations, the method of geopier installation, depth and length of utility trenching, size and depth of pool excavation, and length and depth of foundation

structures installed. A contractor will be hired to perform the soil excavation and on-site disposal tasks.

The general project approach and sequencing is outlined below:

- Prepare design plans and specification
 - Prepare bid package and let for bid
 - Select contractor and prepare contracts
 - Perform waste characterization and obtain necessary permits
-
- Perform underground locate/clearance calls
 - Abandon monitoring wells in development area, as necessary
 - Mobilize equipment and personnel
 - Install geopiers within building footprint
 - Excavate target soil and manage excavation water
 - Relocate soil spoil to designated on-site re-location areas (no on-site storage)
 - Collect water entering the excavation and transfer to a poly tank for storage and analysis, pending treatment and final disposal
 - Backfill the excavation with clean fill and compact, as necessary for construction
 - Install vapor barrier underneath building footprint prior to pouring foundation slab
 - Replace monitoring wells removed during excavation, if necessary

Any historic fill excavated from the site that cannot be used on-site for construction will be transported and disposed at Advanced Disposal landfill located at 428 High Street, Chilton, Wisconsin, approximately 82 miles south of the City.

New parking lots will be constructed over existing grades at the locations shown in the attached Figure 5. Final designs are not complete but a typical parking lot profile will consist of 8-inches of crushed stone and 2.5-inches of asphalt. Importation or removal of soil for parking lot construction will be addressed in a separate document at a later date.

Imported Fill

Preliminary grading plans prepared to facilitate redevelopment of the 100 East Maple Street (Hotel) Property indicate that approximately 5,000 cubic yards of soil will be required to be imported to the site to achieve design grades beneath and around the hotel foundation. The estimated volume of soil to be placed underneath the building is 2,800 CY. The estimated quantity of soil used to backfill around the foundation is 1,390 CY. A grading plan showing cut areas and the distribution and thickness of imported clean fill is shown on Figure 5.

The City of Sturgeon Bay is currently constructing a storm water detention pond located at 1030 N. 14th Street. Construction of the Egg Harbor stormwater detention pond is expected to generate approximately 9,500 cubic yards of excess soil. Approximately 5,500 cubic yards of

the excess soil (silty sand) generated from the construction of the storm water pond will be imported to the 100 East Maple Street Property and used as general fill underneath the building footprint and as backfill around the foundation.

The WDNR recently prepared a guidance document proposing a process to document soil, or other material, imported to a VPLE site. According to the draft guidance document (RR-041) the following factors were considered when evaluating the imported fill:

- Past history of the property-where the soil and other filled materials are generated;
- The volume of soil and other fill materials to be used;
- Zoning restrictions on planned end uses of the receiving property;
- Location on the receiving property where the material will be placed, including the locational criteria in Section NR718.12(1), Wis. Adm. Code; and
- Results of sampling and comparison with RCLs established in accordance with Chapter NR720, Wis. Adm. Code.

The borrow source has historically been the site of a private residence and open field and does not have a history of commercial or industrial use. A Phase I Environmental Site Assessment of the property, prepared by Robert E. Lee and Associates, was submitted to the WDNR under separate cover. Based on the past use of the borrow source property, it is our opinion that laboratory analysis of samples of this fill source is not warranted and the imported fill from the storm water pond project does not represent an environmental risk.

The City performed sampling and analysis of the imported soil at the request of the WDNR. Twelve samples were collected from the soil stockpiles temporarily stored on the East Maple Street property. The samples were collected from six stockpiles and placed in sealable plastic baggies. The samples were subsequently screened for the presence of volatile organic compounds (VOCs) using a photoionization detector equipped with a 10.7 electron volt lamp. The 12 samples were submitted to Pace Laboratories in Green Bay, Wisconsin and analyzed for polynuclear aromatic hydrocarbons (PAH) and lead. None of the samples were analyzed for VOCs based on PID screening results and olfactory observations.

The results of the analysis are summarized in Table 1. Laboratory analytical sheets are provided in Appendix B. As expected, low levels of one PAH compound (Benzo(a)pyrene) were detected in four of the twelve soil samples collected. PAHs form from incomplete combustion and are common in the environment due to atmospheric deposition, although they can also occur naturally. Benzo(a)pyrene in particular has a very low soil screening level and is the PAH compound that most commonly exceeds EPA screening levels and NR 720 RCLs, which are based on EPA screening levels. It should be noted that EPA soil screening levels, which NR 720 values are based, are not cleanup standards and do not define "unacceptable" levels of contaminants in the soil. These values are based on very conservative assumptions that may or may not be valid for all sites. They are used to facilitate identification of contaminants and exposure areas of potential concern that may warrant further assessment but not necessarily cleanup.

The low levels of benzo(a)pyrene found in the borrow source soils do not represent a significant concern and should not preclude the use of these soils for fill at the development

site. The predominant exposure concern for benzo(a)pyrene is ingestion, the reason it has such a low soil screening value. The imported soil is being used at the site for fill underneath the building, from the existing ground surface to approximately 4.5 feet above the surface, and will be covered by the building. Therefore, there is no potential direct contact exposure from this material. Furthermore, the potential for PAHs to leach from the soil is negligible due to the low solubility and high partition coefficients of PAHs.

The literature shows that asphalt-based products contain PAHs. Asphalt pavement and sealants produce particulate matter that can contain concentrations of PAHs in the sub-percent range (100s to 1,000s mg/kg total PAHs) that is transported in stormwater runoff. Some studies show that this can cause soil and sediment contamination with total PAH concentrations in the range of 1 to 10 mg/kg. From a remediation perspective, many site cleanups are conducted to remediate the presence of PAHs to cleanup goals below 1 mg/kg or lower. From a risk perspective, remediating sites to low PAH cleanup goals is unwarranted in light of the risk of transportable PAHs produced from paved parking surfaces. It is unreasonable to conduct a cleanup to remediate low PAH concentrations and then redevelop the area with asphalt pavement.

Temporary Stockpiles

Imported soil obtained from storm water detention basin project will be temporally stockpiled on the development site's existing asphalt parking lot for approximately two to three weeks pending completion of the geopiers. The soil will then be relocated on top of the geopiers within the building footprint. The location of the temporary stockpiles is shown on Figure 4.

Contaminated fill from within the historic fill limits is expected to be excavated and relocated in a continuous effort such that temporarily stockpiling this material will not be necessary. However, should it be necessary to place excavated fill material in stockpiles, temporary stockpiles will be maintained in general accordance with s. NR 718.05 (3). Conditions for temporary stockpiles include:

- Placing the soil on an impervious base (e.g., concrete, asphalt, or plastic sheeting)
- Covering the soil when it is not being moved with a cover material sufficient to prevent infiltration of precipitation and inhibit volatilization of contaminants (e.g., plastic sheeting)
- Preventing surface water contact with the stockpiled soil using constructed berms, if necessary, to control surface water movement

If stockpiles are maintained for longer than 15 days, requirements under s. NR 718.05(2) would also apply including stockpile inspections at least once every 30 days, immediately repairing or replacing any base, cover, anchoring, or berm materials, and notification to the WDNR if soil is stored for more than 90 days before final disposition.

The proposed soil handling and placement procedures will meet environmental closure requirements of s. NR 726.13(b) and not pose an unacceptable threat to public health, safety, welfare, or the environment. The site will be placed on the WDNR online Geographic Information System Registry (GIS Registry) for sites with residual soil and/or groundwater

contamination, and will have an approved cap maintenance plan which describes requirements for annual cap inspection and timely repair of any damaged/deteriorated areas.

Water Management

Groundwater dewatering is not anticipated during construction of the hotel given the starting elevation of the land surface after structural fill is imported. Groundwater that is encountered during Geopier construction or utility excavations that reaches the land surface, or surface water encountered during storm events, will be properly managed. The water will be collected and stored in on-site poly tanks, frac tank, or (upon receiving appropriate approvals) discharged directly to the sanitary sewer.

Groundwater dewatering will be required for utility installation that is being performed by the City concurrently with the hotel development. Plans and permit requests for groundwater dewatering during utility construction will be submitted under separate cover by the engineering firm designing the utilities.

Vapor Mitigation

The vapor intrusion mitigation approach for this site will include engineering controls to prevent the entry of vapors into the building by eliminating the vapors beneath the slab and routes of entry. Specific engineering controls incorporated into the construction will consist of the following methods including, 1) an active sub-slab venting system, 2) vapor barrier sheet (geomembrane) installed beneath the slab, and 3) sealing of utility penetrations.

The soil vapor mitigation system (SVMS) design approach utilizes the WDNR-recommended design reference prepared by the United States Navy Alternative Restoration Technology Team titled, *Vapor Intrusion Mitigation in Construction of New Buildings Fact Sheet (2011)*; as well as the United States Environmental Protection Agency (USEPA) Engineering Issue *Indoor Air Vapor Intrusion Mitigation Approaches (2008)*. The design of the SVMS includes the selection of suitable materials, component sizes, and design configurations for the SVMS components. The components include the subbase, aggregate stone venting/concrete subgrade layer (above the subbase and beneath the plastic vapor barrier), ventilation and discharge piping, vapor barrier (above the aggregate), vacuum pump, sub-slab vapor probes, and associated appurtenances.

The SVMS will be designed to utilize the proposed building's aggregate subgrade for the concrete floor of the lower level, which in the areas of the trench laterals will be designed to consist of an 8-inch thick layer of suitably sized aggregate stone, and a vapor barrier, located between the top of the aggregate layer and the building concrete slab. The aggregate stone will collect and allow potential soil vapors to flow away from the area beneath the building to a discharge point located safely above the building. The vapor barrier, together with proper seals of floor penetrations, will prevent soil vapors from migrating upward into the building. Per the WDNR guidance documents, a vapor barrier and passive venting system, if shown effective at managing subsurface vapors, is allowable for new construction. Active and passive systems have been used in many other locations where methane has been encountered from decomposing materials, and has been shown to be an effective remedy in suitably protecting health and environmental concerns. However, an active system will be installed at this site to

provide for additional protection. Details of the SVMS are provided in the Soil Vapor Management Plan, West Waterfront Hotel Development Project – Sturgeon Bay (Ayres Associates, August 2015) submitted under separate cover.

Potential methane migration and accumulation in utility trenches will also be addressed through engineering controls by the engineering consultant installing the utilities for the City. Engineering controls will include clay dams and venting of the trench. Each trench, mainline and laterals will have a clay dam constructed at the high end of the trench to prevent methane to mitigate off-site through the excavation. In addition, at Sanitary Sewer Manhole# 100 and Storm Sewer Manhole #200, a perforated PVC pipe will be installed along the manhole to vent the trenches to the atmosphere. Details of the consultants approach will be submitted to the WDNR under separate cover.

Data Analysis and Reporting

An NR 724 construction documentation report will be submitted within 60 days after the date that construction of the remedial action is completed. The report will document that the completed final remedial action meets or exceeds the design criteria and the plans and specifications developed in accordance with the requirements of NR 724.15. The report will include the following information:

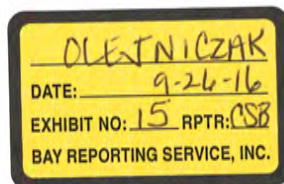
- The regulatory status of the facility.
- As-built maps, plan sheets, drawings, and cross sections.
- A synopsis of the remedial or interim action and a certification that the design and construction was carried out in accordance with the plans and specifications.
- An explanation of any minor changes to the plans and why these were necessary for the project.
- Results of site monitoring conducted during construction.
- A brief description of the public health and environmental laws applicable to the contamination and the interim or remedial action selected, including the physical location where the environmental laws shall be complied with for all media of concern.
- A revised operations and maintenance plan in accordance with s. NR 724.13 (4), unless the cover letter indicates that there are no revisions to the operations and maintenance plan.
- A Cap Maintenance Plan will be prepared for the site in accordance with WDNR guidelines.

Forward Reply Reply all Reply with history Close Search Back

Sent: Tue 11/04/2014 08:26 AM
From: "Smith, Jim R"
 <JSmith@pinkertlawfirm.com>
To: "Olejniczak, Marty"
 <MOlejniczak@sturgeonbaywi.org>
CC: "Nesbitt, Randy J"
 <RNesbitt@pinkertlawfirm.com>
Subject: RE: Lake bed lease
Attachments:

Marty. German has turned out to be a bureaucrat who is interested in one thing and that is to make sure he continues to have a job. He seems to be making things much more difficult and complicated than they need to be in my opinion. Randy and I will take a look at this today and get back to you. German didn't call yesterday. Believe me, I share your frustration.

Attorney James R. Smith
 Pinkert Law Firm LLP
 454 Kentucky Street, P.O. Box 89
 Sturgeon Bay, WI 54235
 Phone: 920.743.6505
 Fax: 920.743.2041
www.pinkertlawfirm.com



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From: Olejniczak, Marty [mailto:MOlejniczak@sturgeonbaywi.org]
Sent: Friday, October 31, 2014 3:15 PM
To: Smith, Jim R
Cc: McNeil, Stephen

Subject: Lake bed lease
Importance: High

Jim:

I talked to Tom German about the process and timing for getting the lake bed lease from Board of Commissioners of Public Lands now that the title issue is about resolved. He stated he did not see a problem with the lease for the area between the dock wall and parcel for which we just got/getting title (coast guard parcel). But he is concerned about the area between the dock wall and the "co-op parcel" because that also is filled area. If I could have reached through and strangled him, I might have. This stupid public trust doctrine continues to haunt us and I am getting fed up. For Christ sake, let's just rip out the sheet pile and turn the whole area into a swamp. Think they'll give us permits for that????

Anyway, German said he would call you on Monday to discuss. He mentioned that even though there is a chain of title on the co-op parcel, it still doesn't mean much if it is filled lake bed. Does the title policy exclude lands below OHWM? That could be a problem.

But didn't the DNR concurrence include the OHWM line all the way to the northerly corner of the co-op parcel. If that is true, isn't the co-op parcel above the agreed upon line and, therefore, no need for lease? We should talk either before or after German calls you.

Marty Olejniczak
Community Development Director
City of Sturgeon Bay
920-746-6908

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Affidavit of Mary Beth Peranteau

Exhibit 13

Deposition of HEIDI KENNEDY 9-20-16 Page 13

1 Q. And how long did you continue in that position?
2 A. Three years in Milwaukee County.
3 Q. And then subsequent to that, did you change from
4 water management specialist to something else or
5 your duties in that role expanded?
6 A. No. No. I switched -- I was water management
7 specialist but for Racine and Kenosha counties for
8 seven years.
9 Q. So that brings us to about 2008?
10 A. 2001 -- three years in Milwaukee.
11 Q. Uh-huh.
12 A. Seven years in Racine and Kenosha.
13 Q. That brings us to 2011?
14 A. Yeah, 2010.
15 Q. Okay.
16 A. 2011, yep.
17 Q. And did you change positions at that point?
18 A. I became the shoreland policy coordinator for the
19 DNR.
20 Q. So let me go back with these water management
21 specialist positions in Milwaukee and then in
22 Racine and Kenosha. Your duties continued to
23 include processing permits?
24 A. Yes.
25 Q. Making ordinary high water mark determinations?

Deposition of HEIDI KENNEDY 9-20-16 Page 14

1 A. Yes.
2 Q. And navigability determinations?
3 A. Yes.
4 Q. Anything else?
5 A. I reviewed many lakebed grant, bulkhead line
6 projects.
7 Q. What would your review of bulkhead line projects
8 entail?
9 A. Where the bulkhead line ordinance was for a
10 particular property, whether they were filling
11 beyond it, and what the use of that property would
12 be post-construction of a new bulkhead line or
13 repair of an existing bulkhead line.
14 Q. Okay. So meaning that in some cases, there was an
15 existing bulkhead line, and the issue had to do
16 with fill being behind the bulkhead or lakeward of
17 the bulkhead or waterward of the bulkhead line, I
18 should say?
19 A. Yes.
20 Q. And is it correct to say that the DNR rules
21 generally prohibit filling waterward of the
22 bulkhead line?
23 A. Generally.
24 Q. Okay. And there are some exceptions?
25 A. No.

Deposition of HEIDI KENNEDY 9-20-16 Page 15

1 Q. Okay. A permit might be required that would allow
2 it?
3 A. Yes.
4 Q. In the bulkhead line aspect of your work, did you
5 ever approve new ordinances for bulkhead lines?
6 A. No.
7 Q. So then returning to your position beginning in
8 2011 as shoreland policy coordinator --
9 A. Yes.
10 Q. -- what did that job entail?
11 A. I was the statewide coordinator for the shoreland
12 program, so I reviewed municipal ordinances. I
13 conducted rulemaking to change NR-115, the
14 Wisconsin Administrative Code. And I provided
15 technical services to municipalities, most
16 specifically counties.
17 Q. Did you continue to make ordinary high water mark
18 determinations in that role as a shoreland policy
19 coordinator?
20 A. Yes.
21 Q. And navigability determinations?
22 A. No.
23 Q. Okay. I should go back for the record and ask:
24 You were formerly known by the name Heidi Hopkins,
25 correct?

Deposition of HEIDI KENNEDY 9-20-16 Page 16

1 A. Yes.
2 Q. And you began -- your name changed to Kennedy at
3 what date?
4 A. March 16th, 2009.
5 Q. So you indicated that you were awarded your J.D.
6 in 2010, correct?
7 A. Yes.
8 Q. And did you have occasion to use your J.D. in your
9 position with DNR after 2010?
10 A. I was not an attorney with the DNR.
11 Q. Okay. Did you take on any functions that you
12 would characterize as legal or quasi-legal
13 functions for the department after 2010?
14 A. Yes.
15 Q. Can you list those functions?
16 A. I would conduct research and assist legal services
17 with developing letters, some preliminary case
18 reviews for contested case hearings, policy
19 development. That's about it.
20 Q. Okay. And were you ever called upon to assist
21 legal services or do any preliminary case review
22 for a contested case regarding an ordinary high
23 water mark determination?
24 A. No.
25 Q. And then you left the department when?

1 A. **October of 2015**, the beginning of October.

2 Q. **Between 2011 and 2015, did you have any other**

3 **position with the department besides shoreland**

4 **policy coordinator?**

5 A. Yes. **I became the waterway -- a waterway and**

6 **wetland policy coordinator in August of 2013.**

7 Q. **And how, if at all, did your role change between**

8 **being shoreland policy coordinator and waterway**

9 **and wetland policy coordinator?**

10 A. I did less shoreland zonings, more waterway and

11 wetland work.

12 Q. **Can you give me an example of waterway and wetland**

13 **work?**

14 A. I developed guidance for the waterway and wetland

15 program, including artificial wetland exemption

16 guidance, the wetland donation guidance. I

17 developed a general permit for the Superior SAMP.

18 Q. **Is that an acronym?**

19 A. Sorry, the special area management plan. That's a

20 general permit for the City of Superior.

21 Q. **Okay.**

22 A. **Other than that, I just developed policy and I --**

23 **policy with landfills and water regulation zoning**

24 **permits, how to coordinate those two. I worked on**

25 **industrial sand mining. So a lot of policy work,**

1 A. Completely, yes.

2 Q. **Okay. Do you have regular contact with folks at**

3 **DNR in your consulting position?**

4 A. Yes. Yes.

5 Q. **Okay. So turning to the subject now of ordinary**

6 **high water mark determinations generally, my**

7 **understanding is that these are typically made in**

8 **connection with a permit decision. Is that**

9 **accurate?**

10 A. Yes.

11 Q. **For example, if somebody needed a Chapter 30**

12 **permit for lakebed filling, you would determine**

13 **the ordinary high water mark to figure out what**

14 **the permit area was below the ordinary high water**

15 **mark?**

16 A. Yes.

17 Q. **Okay. Any other context that you can think of for**

18 **which an ordinary high water mark determination**

19 **would be needed?**

20 A. Shoreland zoning.

21 Q. **Okay. Others?**

22 A. Public trust determinations.

23 Q. **Okay. And what do you mean by that?**

24 A. Lakebed grants, bulkhead line, submerged lands

25 leases. You need to know where the bed of the

1 **just more focused toward waterway and wetlands.**

2 Q. **Any work in connection with voluntary party**

3 **liability exemptions?**

4 A. No.

5 Q. **And what is the name of the bureau or department**

6 **that handles those? I think it goes by the**

7 **acronym RR?**

8 A. Remediation and redevelopment.

9 Q. **Okay. So you never had any role or functions with**

10 **remediation and redevelopment?**

11 A. Only meetings regarding projects here and there.

12 Q. **Meetings where something -- the remediation and**

13 **redevelopment would intersect with your work?**

14 A. Yes.

15 Q. **Okay. And then have we covered all of your**

16 **positions within DNR before your departure?**

17 A. Yes.

18 Q. **Your reason for leaving the department?**

19 A. I had a great offer from SEH.

20 Q. **SEH is a consulting firm?**

21 A. Yes, an engineering firm.

22 Q. **Okay. And what do you currently do at SEH?**

23 A. I'm a natural resources scientist.

24 Q. **Does your work currently overlap with any of the**

25 **functions that you did when you were with DNR?**

1 lake or the river started and where the shoreline

2 is now or where the bulkhead line ends, the

3 lakebed grant ends, or the submerged lands lease

4 has been granted.

5 Q. **And would that be for the purpose of determining**

6 **whether a particular development would be**

7 **consistent with the Public Trust Doctrine?**

8 A. Yes.

9 Q. **And would it be for purposes of determining title,**

10 **the state's title?**

11 A. No, not traditionally.

12 Q. **So would it be accurate to say that this -- this**

13 **would purely be a determination for regulatory**

14 **purposes, what is permitted in a particular area?**

15 A. Yes.

16 Q. **It would be for purposes of determining what kinds**

17 **of development would be permissible in a**

18 **particular area?**

19 A. Yes.

20 Q. **Okay. Are you aware of any published guidance for**

21 **making ordinary high water mark determinations?**

22 A. Can you clarify what you mean by "published"?

23 Q. **Well, something that the DNR -- not a commercial**

24 **publication, but something that the DNR would**

25 **circulate to staff as a guide for making those**

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1 A. Yes.

2 **Q. Can you list some examples of that?**

3 A. The Kenosha waterfront; it was the old Chrysler
4 plant area through litigation, and they came up
5 with a compromise on a line of the form -- of the
6 filled lakebed.

7 **Q. And was that compromise arrived at after the case
8 was in litigation?**

9 A. Yes.

10 **Q. Okay. Any cases that you can think of where the
11 riparian owner presented a line to the DNR and
12 asked, "Please, will you concur that this is the
13 proper ordinary high water mark"?**

14 A. Yes, Milwaukee Transit Center.

15 **Q. And your understanding is that there was actually
16 a concurrence issued by DNR in the
17 Milwaukee Transit Center matter?**

18 A. Yes.

19 **Q. Okay. And was that -- and you're aware that there
20 was legislation specific to that --**

21 A. Yes.

22 **Q. -- area, correct?**

23 Do you know whether the DNR's decision was
24 made before or after the legislature acted?

25 A. Before.

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1 **Q. And other than the Kenosha waterfront case,
2 Milwaukee Transit Center case, any other cases of
3 a concurrence being issued by DNR based on a line
4 drawn by someone else?**

5 A. Not that I can think of.

6 **Q. So I've had marked, and I'll show you, Exhibit 1.
7 Is this a document that you've seen before?**

8 A. No.

9 **Q. Okay. Are you aware or are you familiar with the
10 fact that the DNR's letter of concurrence applies
11 to a portion of the properties here outlined in
12 red?**

13 A. Yes.

14 **Q. Okay. Are you familiar with the fact that there
15 is a proposed hotel redevelopment for a footprint
16 that extends over both of the red outlined
17 properties on this site, Exhibit 1?**

18 A. Yes.

19 **Q. Okay. Were you aware of that -- well, let me back
20 up.
21 And you had some involvement in the decision
22 that was memorialized in the DNR's letter of
23 concurrence, correct?**

24 A. Yes.

25 **Q. Were you aware at the time that the determination**

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1 of concurrence was being developed, that there was
2 going to be a hotel development on a footprint
3 that included both of these properties that are
4 outlined in red on Exhibit 1?

5 A. No.

6 **Q. Okay. At the time that you were considering or
7 the concurrence was being developed, what was your
8 understanding, if any, of the development that was
9 proposed for the red outlined sites?**

10 A. They were planning on doing public access or
11 public waterfront along the water's edge and other
12 -- another type of private development on the
13 private side --

14 **Q. And what --**

15 A. -- above the ordinary high.

16 **Q. Okay. And when you're talking about the "private
17 side," can you delineate on Exhibit 1 what you
18 understand that to be --**

19 A. (Indicating).

20 **Q. -- just approximately?**

21 A. (Drawing).

22 **Q. Okay. And so we've drawn --**

23 A. And then (drawing).

24 **Q. Okay. So now you've drawn a blue line that is
25 sort of like a soup-ladle shape, we'll call it,**

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1 the part of the blue line that is a straight line?

2 A. Yes.

3 **Q. Is that part of the DNR's ordinary high water mark
4 determination?**

5 A. No. The DNR's determination was for this
6 (indicating) curve.

7 **Q. And getting back to your understanding about where
8 the private development was going to occur, did
9 you understand that the private development would
10 be occurring on the parcel that's called
11 92 East Maple Street behind that straight blue
12 line?**

13 A. No.

14 **Q. You were not aware that that -- that that was
15 proposed?**

16 A. The development we looked at, Megan and I, was for
17 100 East Maple and it was occurring behind there.
18 We did not know that it included both parcels.

19 **Q. Okay. Thank you.
20 (Exhibit No. 2 marked
21 for identification)**

22 **Q. So I'm showing you what's been marked as
23 Exhibit 2. This is the document we've previously
24 referred to as the letter of concurrence, correct?**

25 A. Yes.

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1 Q. Okay. And, as I understand your testimony, you
2 assisted Attorney Megan Correll with the
3 development of this letter?
4 A. Yes.
5 Q. Who besides you and Ms. Correll were involved in
6 the drafting of this letter?
7 A. No one.
8 Q. Tom German with Board of Commissioners of Public
9 Lands?
10 A. Megan had discussions with Chris Hess and
11 Tom German.
12 Q. Okay.
13 A. But I drafted it and Megan edited it. I do not
14 know if she shared it with Tom or others --
15 Q. Okay.
16 A. -- prior to us finalizing it.
17 Q. And Chris Hess is a DNR attorney?
18 A. Former DNR attorney.
19 Q. So she was involved in some discussions prior to
20 the issuance of this letter?
21 A. Yes.
22 Q. Okay. And, again, your testimony is that other
23 than those folks you've identified, no one else at
24 DNR had a hand in the preparation of the
25 concurrence letter?

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1 A. None that I know of.
2 Q. Okay. Were you present when Mike Bruhn signed the
3 letter October 20th, 2014?
4 A. No.
5 Q. Can you approximate for me how many hours or days
6 you might have spent all told in the preparation
7 of the concurrence letter, meetings, discussions?
8 A. Probably a combined 20 hours.
9 Q. So what is the difference between an ordinary high
10 water mark determination and a determination of
11 concurrence with the approximate ordinary high
12 water mark?
13 A. I guess could you clarify?
14 Q. Sure. You remember when I asked you what the
15 typical process is for an ordinary high water mark
16 determination and you went through that there was
17 a request --
18 A. Yeah.
19 Q. -- site visit, survey, et cetera.
20 Is that same process followed in the issuance
21 of a determination of concurrence?
22 A. For a filled lakebed or filled riverbed, no.
23 Q. If it was not filled lakebed, it would be the same
24 process?
25 A. Yes.

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1 Q. So how then does the process differ when you have
2 a filled lakebed area?
3 A. When you're dealing with filled lakebed or filled
4 riverbed, you have to rely on historical maps and
5 aerial photos to recreate history and figure out
6 where the shoreline potentially was historically
7 and make a decision based upon your -- those
8 resources where you think the state's jurisdiction
9 and where the public trust begins.
10 Q. Okay. So this -- what resulted in the
11 determination of concurrence in this case, that
12 was initiated at the request of the
13 City of Sturgeon Bay?
14 A. I do not know.
15 Q. Okay. How did the project first come to your
16 attention?
17 A. Megan Correll asked me to come to her office and
18 help her with this determination.
19 Q. Do you recall when that was?
20 A. I do not remember the exact date.
21 Q. Just flipping to Exhibit A of Exhibit 2, the plat
22 of survey --
23 A. Uh-huh.
24 Q. -- where, in your understanding, did the survey
25 come from?

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1 A. Well, it says it was prepared by
2 Baudhuin, Incorporated, and prepared for
3 City of Sturgeon Bay.
4 Q. So at the time that you were considering or
5 drafting the determination of concurrence, you
6 understood that the survey the line was asked to
7 concur with came from the city, correct?
8 A. That's what I believe, yes.
9 Q. Do you have any understanding of whether the
10 department instructed the city or how the city
11 otherwise was given to place this line as the
12 ordinary high water mark on its survey?
13 A. I was not involved in any meetings prior to that.
14 Q. I just want to show you -- this was marked. I'm
15 not going to have this separately marked, but I
16 just want to show you what was marked as Exhibit 1
17 from Mr. Bruhn's deposition. And he had
18 highlighted Exhibit A in yellow highlighter as his
19 understanding of the approximate ordinary high
20 water mark. Is that also your understanding?
21 A. Yes.
22 Q. Okay. Is there any other difference between a
23 straight ordinary high water mark determination on
24 the one hand and a determination of concurrence on
25 the other aside from the fact that, in this

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1 A. I do not know.
2 Q. And what about the reference 1925 U.S. War
3 Department map image? Was that provided by
4 Sturgeon Bay?
5 A. I do not know.
6 Q. Okay. Do you know whether the department or
7 someone working with you selected those two maps
8 as a basis for the analysis in the letter of
9 concurrence?
10 A. Those were two of the maps we relied upon for
11 making our determination.
12 Q. And can you list what other maps were relied upon?
13 A. We look at other aerial photos --
14 Q. Okay.
15 A. -- and any other online resources we can find.
16 Q. In this case, were there other online resources?
17 A. We look at Sanborn maps.
18 Q. So you did indeed look at Sanborn maps in
19 preparing this letter?
20 A. Yes.
21 Q. Can you recall what years?
22 A. Not specifically. There was a number of them.
23 Q. Any other historic maps?
24 A. The original government survey.
25 Q. Okay.

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1 A. Bordner Survey, topos. I think that's about it.
2 Q. How about any archival newspaper articles?
3 A. No. We did not.
4 Q. Were you aware that there was a voluntary party
5 liability exemption application pending from the
6 city at the same time that this concurrence was
7 being drafted?
8 A. No.
9 Q. So you were not aware that there were soil borings
10 available for the site?
11 A. No.
12 Q. But you did look at the Bordner Survey in
13 connection with drafting the letter of
14 concurrence?
15 A. Yep.
16 Q. And that's something that comes from the '30s, I
17 think?
18 A. Yeah, mid-'30s, uh-huh.
19 Q. And specific to the U.S. government survey, you
20 looked at the Sibley Survey of the original
21 meander line?
22 A. Yes.
23 Q. Okay. Who was it that selected out or chose to
24 focus on the 1925 U.S. War Department map and the
25 1955 bulkhead line map as a basis for this

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1 analysis?
2 A. Those were just the two maps that were mentioned
3 in the letter.
4 Q. Okay. So, in your opinion, the concurrence is not
5 based -- certainly not exclusively based on those
6 two maps?
7 A. No.
8 Q. Based primarily on those two maps?
9 A. Yes.
10 Q. I'm going to show you what --
11 MS. PERANTEAU: I'll have this
12 marked.
13 (Exhibit No. 3 marked
14 for identification)
15 Q. I want to show you what I've had marked as
16 Exhibit 3. Does this document look at all
17 familiar to you?
18 A. Yes.
19 Q. In what context did you see this document before?
20 A. I believe this was the first draft they sent us.
21 Q. "They," the City of Sturgeon Bay?
22 A. I believe it was the city sent us this for
23 determination.
24 Q. Okay. And so Exhibit 3 shows the dashed
25 approximate location of the ordinary high water

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1 mark as extending across 92 East Maple as is shown
2 on Exhibit 1, correct?
3 A. Yes.
4 Q. And the department rejected that? It would not
5 concur in that line?
6 A. We rejected this map.
7 Q. Do you know why?
8 A. It had no metes and bounds. I know specifically
9 that was an issue along the west door -- western
10 boundary of the site and we needed metes and
11 bounds along this western edge.
12 Q. Okay. And specifically in contrast to the
13 ordinary high water mark line that the department
14 ultimately concurred with, do you recall why the
15 department rejected the line -- the extension of
16 the line across the top of parcel 92?
17 A. No.
18 Q. Okay. No specific recall?
19 A. No.
20 (Exhibit No. 4 marked
21 for identification)
22 Q. Just taking another look at Exhibit 3. Are you
23 aware of whether the City of Sturgeon Bay
24 specifically requested that the DNR concur in the
25 straight portion of this dashed line which I'm

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1 marking with a straight blue pen?
2 A. I do not know.
3 Q. Okay.
4 MS. PERANTEAU: And, for the
5 record, I've marked with a blue pen the
6 straight blue line that was the subject of my
7 last question.
8 Q. Taking a look at what we've marked as Exhibit 4,
9 is this the map that is referred to at the bottom
10 of the first page of the concurrence letter as the
11 1925 U.S. War Department map image?
12 A. Yes, except for there's been some overlays.
13 Q. Okay. So the version of the map that you have
14 seen previously did not have the red parcel
15 outline on it?
16 A. Yes.
17 Q. Do you recall whether the version of the map that
18 you saw had the thick blue line denoting the
19 original survey shore meander?
20 A. No.
21 Q. It did not have that?
22 A. Did not have that.
23 Q. Okay. How about --
24 A. At least I don't think it did. I can't see what's
25 underneath the blue line.

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1 Q. Okay. And we're talking about the light blue line
2 that's the shore meander, correct?
3 A. Yes.
4 Q. Okay. And did the version of the map that you
5 recall looking at for purposes of your draft of
6 the letter of concurrence, did that have the dark
7 blue bulkhead line overlaid on the map?
8 A. No.
9 Q. Okay. So if I represent to you that this is the
10 document that was produced by the
11 Board of Commissioners of Public Lands, that's not
12 something that you recall either discussing with
13 Mr. German or reviewing in connection with this
14 letter of concurrence?
15 A. No.
16 Q. Okay. I assume, though, that the map that you
17 reviewed did show the abutments labeled
18 "L.M. Washington Dock" and designated as "mill
19 refuse" on the southeastern side and the dock
20 structure labeled "tools and Brandeis" --
21 A. Yes.
22 Q. -- northwestern side, okay.
23 And you understand that the abutment that's
24 labeled "tools and Brandeis" is the same straight
25 line that's reflected on Exhibit 3 in the thick

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1 blue line, correct?
2 A. Yes.
3 Q. In your review in preparation for issuing the
4 letter of concurrence, did you have any
5 discussions concerning the character of the
6 property that's labeled "tools and Brandeis"?
7 A. Can you please restate that?
8 Q. Did you have any discussions in connection with
9 preparing the letter of concurrence about the
10 character or nature of the property that's labeled
11 as "tools and Brandeis" on the 1925 map?
12 A. Yes.
13 Q. Did you talk about the fact that that's a wharf?
14 A. No, not specifically.
15 Q. Did you evaluate that portion of the map to
16 determine whether the land was created by
17 accretion versus artificial fill?
18 A. Yes.
19 Q. And did you have a conclusion about whether the
20 land underlying the tools and Brandeis area of the
21 map was artificial fill or accretion?
22 A. Artificial fill.
23 Q. Okay. And does that trigger any recollection with
24 respect to the city's map, Exhibit 3, in terms of
25 the extended ordinary high water mark line on the

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1 thick blue line shown here?
2 A. No.
3 Q. Okay. So I understand that the primary analysis
4 in the letter of concurrence is that the
5 department concluded that between the time of the
6 1925 map, Exhibit 4, and 1955 when the bulkhead
7 line was approved, that the particular area that
8 is shown sort of in a triangular fashion -- well,
9 let me show you that on Exhibit 2.
10 This triangular parcel that I'm outlining in
11 blue on Exhibit A of Exhibit 2, the department
12 concluded that that was land formed by accretion,
13 true?
14 A. Yes.
15 Q. And the basis for that is because the department
16 concluded that between 1925 and 1955, the water
17 depths in that area, triangular area, were shallow
18 enough so that sediments, lake sediments could
19 have accumulated in that period of time. Is that
20 accurate?
21 A. Yes.
22 Q. Okay. And is that based on the -- a depiction of
23 water depths on the 1925 map?
24 A. In part, yes.
25 Q. Okay. Let me just -- the bottom of page 1 of the

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1 concurrence states, "The parcel area between the
2 two solid structures in the 1925 map appears to
3 have been a shallow bay of two feet water depth."
4 Is that information available on the 1925 map?
5 A. I cannot see it on this map.
6 Q. In your understanding, was that -- in the version
7 of the map that you evaluated, that information
8 was on that copy?
9 A. Yes.
10 Q. And, in your understanding, the water depths that
11 are called out on the map were actual water depths
12 in 1925?
13 A. Yes.
14 Q. Okay. Are you aware of something called the
15 International Great Lakes Datum?
16 A. No.
17 Q. So you're not familiar in particular with the
18 Great Lakes Low Water Datum?
19 A. Are you referencing the Army Corps of Engineers,
20 the information used by the
21 Army Corps of Engineers to determine lake levels?
22 Is that what that is?
23 Q. It's part of that, yes.
24 A. Yes. I know what that is then.
25 Q. Are you aware of whether the map -- strike that.

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1 Did you do any analysis to determine whether
2 the water elevations listed on the map were actual
3 water levels versus targeted to the International
4 Great Lakes Water Datum?
5 A. No.
6 Q. Okay. Are you aware that the International Great
7 Lakes Datum have an elevation for the ordinary
8 high water mark of all of the Great Lakes?
9 A. Yes.
10 Q. Was that information used at all in your analysis
11 of accretion?
12 A. No.
13 MR. ANDERSON: Could we just --
14 could you read the last question back?
15 (Previous questions and answers
16 read)
17 Q. How was the -- how was it determined to use the
18 location of the shoreline in 1925 as a benchmark
19 for determining the ordinary high water mark?
20 A. Megan and I looked at a number of different maps.
21 This map we -- in combination with the other
22 aerial photos we looked at appeared to be the most
23 accurate.
24 Q. How did you make that determination?
25 A. Knowledge of how the maps were created and for

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1 what purposes.
2 Q. And is there any reason why you wouldn't have
3 looked at a war department or army maps from an
4 earlier period closer to statehood to determine
5 the ordinary high water mark?
6 A. We may have. I don't know. I don't remember all
7 the maps we looked at. There was a table like
8 this covered in maps that we spent hours
9 reviewing. I don't remember if there was other
10 maps.
11 Q. Okay. Did the meander line from the original
12 government survey factor into your analysis of
13 accretion in any fashion?
14 A. Of course.
15 Q. How so?
16 A. We review all the maps that are available to us
17 and try to make the best determination we can as
18 to where we believe the ordinary high water mark
19 could have been back historically.
20 Q. And, in particular, how is the meander line used
21 for that analysis?
22 A. It's one piece of the information that we look at.
23 Q. So taking a look at Exhibit 4 where the meander
24 line appears to intersect with the rearmost
25 portion of the concurrence parcel, we'll call it,

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1 is there some -- did that factor into your
2 decision or your analysis with respect to
3 accretion?
4 A. Of course.
5 Q. Based on location of the meander line?
6 A. Yes.
7 Q. Can you be more specific?
8 A. Well, we take into account every map that's out
9 there and look at where the shoreline is,
10 recognizing that just because a line's put on the
11 map where they say where -- where the lake begins
12 or the river begins doesn't necessarily mean it's
13 an ordinary high water mark based upon the
14 characteristics established in case law. So
15 utilizing the case law and how ordinary high water
16 mark is defined by case law, we have to figure out
17 where we think the ordinary high water mark would
18 be based upon state case law.
19 Q. So the ordinary high water mark is not the same
20 thing as the shoreline?
21 A. No.
22 Q. But you did use the shoreline as depicted on the
23 1925 map as a starting point for your analysis?
24 A. One of the pieces, yes, uh-huh.
25 Q. And you used the depiction of the shoreline in the

1 1955 bulkhead line map also for purposes of your
 2 accretion analysis, correct?
 3 A. Yes.
 4 Q. And do you believe that the depiction of the
 5 shoreline on these maps can give you a good
 6 approximation of the location of the ordinary high
 7 water mark?
 8 A. Yes.
 9 Q. Okay. Is there any difference for regulatory
 10 purposes whether the department's determination of
 11 an ordinary high water mark is approximate versus
 12 precise?
 13 A. Well, when you're dealing with filled lakebed, you
 14 can't recreate the wheel. You can't turn back
 15 time and figure out where an ordinary high water
 16 mark was utilizing our typical measures of
 17 determining ordinary high water marks, which is
 18 physical or biological characteristics. So you
 19 either do onsite investigation where you actually
 20 have the characteristics that you can describe or
 21 you're recreating history through the use of maps
 22 or other resources.
 23 Q. If you were -- if you had been aware at the time
 24 that soil borings existed for the parcel in
 25 question, would you have analyzed those as well?

1 where that shoreline was in the past.
 2 Q. Okay.
 3 (Exhibit No. 5 marked
 4 for identification)
 5 Q. I'm showing you what's been marked as Exhibit 5.
 6 I will represent to you that this is an affidavit
 7 signed by Mike Cain that was submitted in support
 8 of a motion for summary judgment by the defendant
 9 in the captioned case.
 10 Drawing your attention to paragraphs 5
 11 through 8, if you could just take the time to
 12 review those paragraphs in particular.
 13 A. (Witness looking at document.)
 14 Q. Just let me know when you've had a chance to
 15 review 5 through 8.
 16 A. I have.
 17 MR. ANDERSON: Hold on a second.
 18 Okay.
 19 Q. So with respect to paragraph 5 in particular, do
 20 you have any basis to dispute any of the
 21 statements Mr. Cain makes in that paragraph?
 22 A. No.
 23 Q. Any basis to dispute any of the statements made in
 24 paragraph 6?
 25 MR. ANDERSON: Well, I'm going to

1 A. Sure.
 2 Q. Did anyone ask the City of Sturgeon Bay whether
 3 soil borings existed for the property?
 4 A. I do not know. I did not.
 5 Q. Do you feel that soil borings are a useful tool
 6 for analyzing the subsurface of property to
 7 distinguish between accretion and artificial fill?
 8 MR. KOWALKOWSKI: I'm going to
 9 object to that on the scope of the testimony.
 10 I think you're asking for an expert opinion
 11 there on the use of those borings.
 12 MS. PERANTEAU: I'm asking for her
 13 analysis as a person who does ordinary high
 14 water mark determinations. Limited to that.
 15 MR. KOWALKOWSKI: You can answer
 16 it.
 17 A. No.
 18 Q. And what's the reason for that response?
 19 A. There are many filled lakebeds and filled
 20 shorelines or graded shorelines that have fill.
 21 You cannot tell -- the sole basis of fill alone is
 22 not going to tell you where the ordinary high
 23 water mark was. Obviously, this shoreline has
 24 been filled over time, which is why we have the
 25 land that we have now. It is not dispositive of

1 object as to the form of the question. It
 2 doesn't indicate this witness has any
 3 familiarity with the lawsuit that you're
 4 referencing here in Milwaukee County. But
 5 subject to that objection, you can go ahead.
 6 A. Number 6, no.
 7 Q. Okay. And as you've testified, the process that
 8 Mr. Cain outlines in paragraph 6 is -- sounds
 9 similar to what you did in the case of the
 10 concurrence, correct?
 11 A. Yes.
 12 Q. Did you have a chance to obtain any documents from
 13 local historical societies or the
 14 Wisconsin Historical Society?
 15 A. I did not seek out documents from the local
 16 historical society.
 17 Q. And with respect to paragraph 7, I think it's your
 18 testimony that you did not obtain or review any
 19 archived newspapers from the prior century of
 20 development in the area?
 21 A. I did not.
 22 Q. And then with respect to paragraph 8, Mr. Cain's
 23 affidavit says, "In some cases, soil borings are
 24 available. In other cases, the department
 25 requires project developers to obtain soil borings

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1 in order to provide physical evidence of the
2 affected areas."
3 That is not something the department required
4 the City of Sturgeon Bay to do in this case,
5 correct?
6 A. Not as part of the ordinary high water mark
7 determination, no.
8 Q. And do you know whether there was any analysis of
9 coastal dynamics, the physics of lake sediment
10 movement in connection with the accretion opinion
11 that is in the concurrence letter?
12 A. We did not require or review any coastal analysis.
13 Q. Do you have a staff person at DNR that is an
14 expert in coastal morphology?
15 A. No.
16 Q. Okay. Did you conduct a site visit in connection
17 with the drafting of the concurrence letter?
18 A. No.
19 Q. Are you familiar at all with the transfer method
20 for ordinary high water mark determination?
21 A. Yes.
22 Q. Can you explain for the record what that is?
23 A. In some cases where we have difficult ordinary
24 high water mark determinations, we conduct -- we
25 make a determination or the DNR makes a

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1 determination on another parcel and then transfers
2 that to an adjacent parcel if it seems
3 appropriate.
4 Q. Transfer the elevation?
5 A. Yes.
6 Q. And do you have an opinion about whether that
7 would have been appropriate in this instance?
8 A. I do not have an opinion on that.
9 Q. It was not attempted?
10 A. No.
11 Q. Has the department ever used International Great
12 Lakes Datum ordinary high water mark data as an
13 elevation for use of the transfer method?
14 A. No.
15 Q. Okay. Do you know why that is?
16 A. We do not agree -- we do not use the same
17 standards for determining ordinary high water mark
18 in the State of Wisconsin as what the Corps does.
19 (Exhibit Nos. 6 and 7
20 marked for identification)
21 Q. Showing you now what's been marked as Exhibit 6.
22 I will represent to you that this is a document
23 that was included in a DNR open records response
24 for this property. Have you seen this document
25 before?

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1 A. No.
2 Q. Okay. And I understand the blue line on this
3 document to be an overlay of the shoreline shown
4 on the 1955 bulkhead line map.
5 MR. ANDERSON: Is that a question?
6 Q. I'll strike that question.
7 You've not seen this before?
8 A. No.
9 Q. You're not aware that the DNR -- whether the DNR
10 prepared this or someone else prepared this?
11 A. No.
12 Q. Did you prepare or review any overlays of the
13 subject property on historic maps, such as the
14 Sanborn maps or the maps that we've reviewed
15 today?
16 A. Yes.
17 Q. Okay. Which maps did you review with an overlay
18 of the subject property boundaries?
19 A. Not -- well, I believe Mr. Collins submitted to
20 the DNR -- Dan Collins submitted to the DNR a map
21 that shows overlays of the Sanborn maps on top of
22 the property boundaries.
23 Q. Are you aware of whether that was reviewed before
24 or after the concurrence was issued?
25 A. After.

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1 Q. Okay. In preparation for issuing the concurrence,
2 did you or anyone you were working with at DNR
3 review overlays of the property boundaries on
4 historic maps?
5 A. No.
6 Q. Showing you now what's been marked as Exhibit 7.
7 This is also a collection of documents received in
8 response to an open records request from DNR. Do
9 you recall reviewing any of these documents in
10 preparation for issuing the letter of concurrence?
11 A. I -- I do not remember reviewing these specific
12 documents or this specific document.
13 Q. The first page of Exhibit 7?
14 A. Or the second page or the other page.
15 Q. And, in particular, you don't recall overlaying
16 the property boundaries on any aerial photos of
17 the property in preparation for issuing the
18 concurrence letter?
19 A. No.
20 Q. Okay. Is there a reason why you wouldn't have
21 evaluated the current property boundaries against
22 historical maps or aerial photos?
23 A. We did review the historical maps and aerial
24 photos. We don't have staff that can overlay maps
25 on top of historical maps on top of others. They

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1 would have to digitize them and overlay
2 everything.

3 Q. Okay. But would you agree that it would have been
4 important to review the current property against
5 the historic maps to understand what particular
6 area you were looking at?

7 A. We did look at property boundaries and historical
8 maps to interpret where we thought the ordinary
9 high should be, but we did not overlay maps on top
10 of maps.

11 Q. Okay. So you can't say whether or not these
12 particular aerial photos that are in Exhibit 7
13 were used in --

14 A. These are -- these aerial photos were used, but we
15 -- I did not create this document or zoom in to
16 this extent. So I did not create this document
17 and I don't know who did.

18 Q. Okay.

19 A. We looked at historical aerial photos, but we
20 looked at it from a much more zoomed-out scope and
21 tried to zoom in as much as we could. But I did
22 not create this document that you have here.

23 Q. And you did not review it in particular?

24 A. Not this document, no.

25 Q. I should say these three documents --

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1 A. Or these three documents, sorry.

2 Q. -- that are Exhibit 7?

3 A. Yes. Thank you.

4 Q. So when you testified that you reviewed Sanborn
5 maps in connection with drafting the letter of
6 concurrence, the department had in its possession
7 Sanborn maps, not the ones that were provided by
8 Mr. Collins --

9 A. Yes.

10 Q. -- in paper form?

11 A. No.

12 Q. Do you know the source of the Sanborn maps the
13 department reviewed?

14 A. I do not remember, no.

15 Q. Getting back to Exhibit 2, the letter of
16 concurrence, there's a discussion in the second to
17 the last paragraph on the first page about the
18 1955 bulkhead line approval and there's a sentence
19 that says, "Despite the 1955 bulkhead approval,
20 the landfill did not conform as nearly as
21 practicable to the shore and was not accompanied
22 by a lakebed lease issued by the
23 Board of Commissioners of Public Lands pursuant to
24 Section 24.39(4) of the statutes. Because the
25 1955 bulkhead line was inconsistent with the

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1 requirements of Section 30.11(2), it did not come
2 into force." Can you explain what that means, "it
3 did not come into force"?

4 A. To create a bulkhead line under 30.11(2), it has
5 to conform -- the bulkhead line must conform as
6 nearly as practicable to the shoreline. That's
7 based on case law and review of the statutory
8 language, which means it did not come into force.
9 It was not a valid bulkhead line under that
10 statute.

11 Q. But the property in the area was subsequently
12 filled up to the bulkhead line. You understand
13 that, right?

14 A. Yes.

15 Q. So how is it that the bulkhead line -- that there
16 could be fill behind the bulkhead line if it -- if
17 it was not valid?

18 A. It happens all over.

19 Q. Okay.

20 A. It was approved. The bulkhead line was approved,
21 as the letter indicates, by the Public Service
22 Commission. So it was filled subsequent to that
23 approval.

24 Q. Okay. I'm trying to understand the difference
25 between approval and not coming into force.

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1 A. The Public Service Commission, or the predecessor
2 to the DNR, reviewed these bulkhead lines. Based
3 upon my experience and training from Mike Cain and
4 Dale Simon and -- many of these bulkhead lines
5 were rubber stamped. They were not reviewed for
6 compliance with the statutes.

7 Q. Okay.

8 A. So there was -- my -- well, even though this one
9 was approved and stamped by the Public Service
10 Commission, it didn't meet the statutory
11 requirements.

12 Q. Okay. So the bulkhead line as it was drawn in
13 1955 was not along the shoreline at that time in
14 your --

15 A. Did not conform as nearly as practicable to the
16 shoreline.

17 Q. Okay. And the bulkhead line would not be
18 considered the ordinary high water mark, true?

19 A. Correct.

20 Q. Are you aware of whether the DNR had a surveyor
21 who independently evaluated the legal description
22 for the ordinary high water mark that appears on
23 the exhibit to the letter of concurrence?

24 A. Not a surveyor, no.

25 Q. Did anyone who independently evaluated it?

Deposition of HEIDI KENNEDY 9-20-16 Page 65

1 A. Chris Hess, who was our real estate attorney,
2 reviewed the -- the description --
3 Q. Okay.
4 A. -- provided in Exhibit B.
5 Q. Okay. After the letter of concurrence was issued,
6 did you have any later discussions with city
7 representatives about the letter?
8 A. No.
9 Q. Were you ever asked to issue another concurrence
10 for any other portion of the city's property?
11 A. No.
12 Q. And at some point, you became aware that there was
13 going to be a hotel development on the adjacent
14 parcel, 92 East Maple?
15 A. Yes.
16 Q. When would you say after the concurrence was
17 issued did you become aware of that?
18 A. I don't remember.
19 Q. And the department becoming aware of that did not
20 trigger a need to make a second ordinary high
21 water mark determination?
22 MR. ANDERSON: I'm going to object
23 to the question. You can answer.
24 THE WITNESS: Okay. So answer it?
25 MR. KOWALKOWSKI: I'm going to

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1 object to that. I think you're asking her to
2 form an opinion based on speculation.
3 MR. ANDERSON: Well, if I heard
4 your question correctly, you said not
5 becoming aware of that, did that cause --
6 MS. PERANTEAU: No. No. I said --
7 I'll restate the question.
8 MR. ANDERSON: Okay.
9 Q. When you became aware, when the department became
10 aware that there was a hotel development proposed
11 for the adjacent property, didn't that trigger the
12 need for another ordinary high water mark
13 determination?
14 A. No.
15 Q. Why not?
16 A. We received a request from Midwest Environmental
17 Advocates to review our decision again -- to
18 re-review our decision again. That was after
19 newspaper articles were published about the
20 potential hotel. If the development -- if the
21 hotel was going to be above the ordinary high,
22 then we wouldn't have had any review anyways. We
23 had no information to say that it wasn't going to
24 comply with the previous determination. The next
25 -- the re-review of the determination was done

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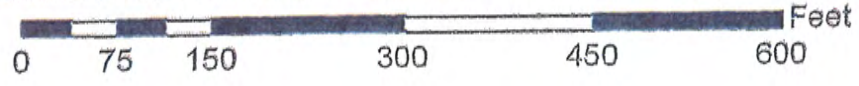
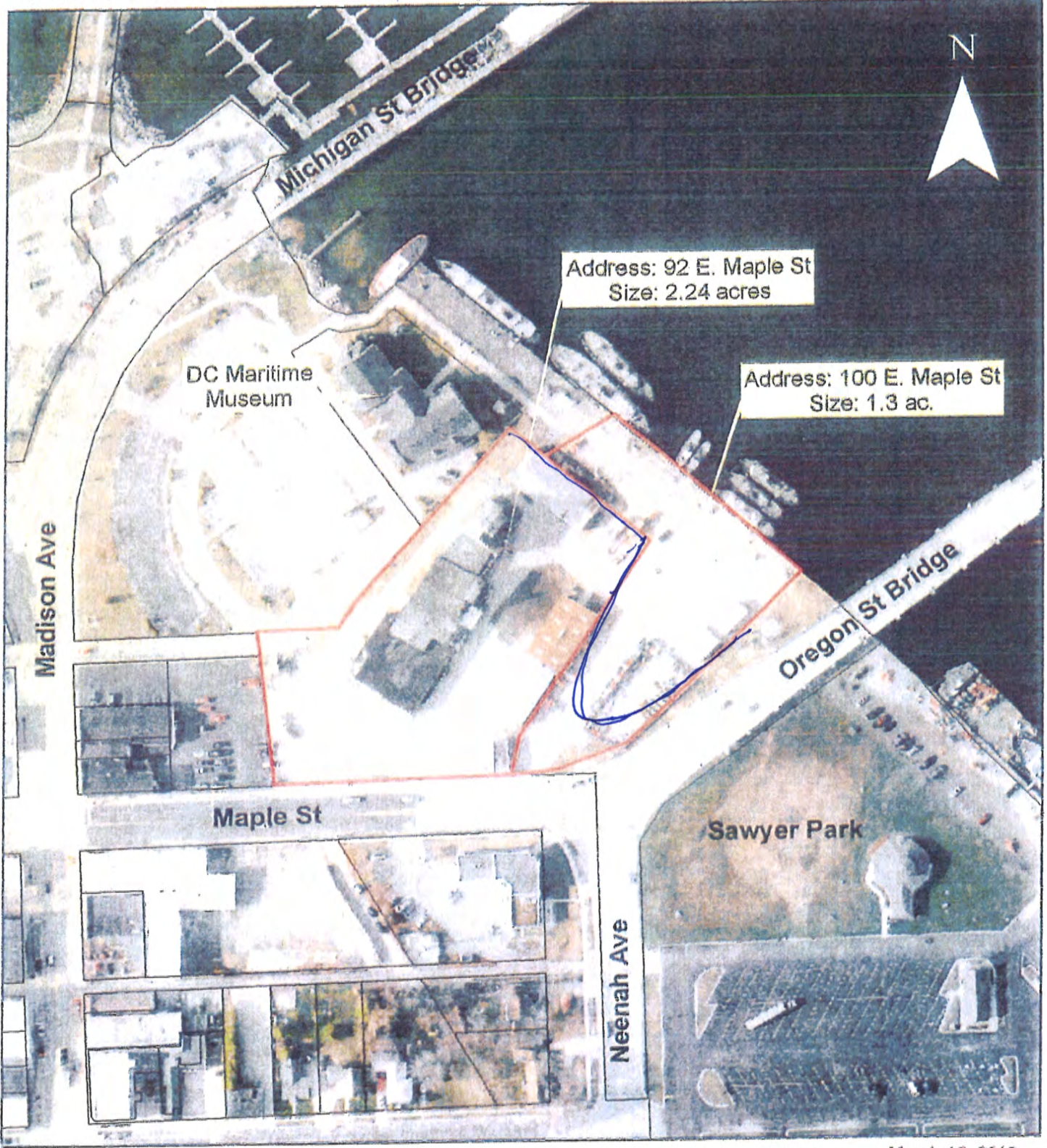
1 only after Midwest Environmental Advocates
2 submitted that request that we re-review it.
3 Q. So there was a review performed of the concurrence
4 letter after Midwest Environmental Advocates --
5 A. Yes.
6 Q. -- submitted that letter?
7 A. Yes. I -- I conducted it.
8 Q. And so what -- what was the process of that
9 review?
10 A. I reviewed the information that we looked at
11 again, some additional information that was
12 provided by Dan Collins regarding the Sanborn
13 maps; talked with Edwina Cavanaugh and Chris Hess
14 about my review of the information again in light
15 of what Dan Collins submitted; and we agreed that
16 we thought the decision shall stand, and my
17 understanding was is that that was conveyed back
18 to Midwest Environmental Advocates.
19 Q. Your understanding is it was conveyed in writing
20 back to Midwest Environmental Advocates?
21 A. I do not know how Edwina or Chris conveyed it back
22 to Midwest Environmental Advocates.
23 Q. Okay. When you conducted the review based on
24 Midwest Environmental Advocates' request, did that
25 review include any other property other than the

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1 property that's legally described in the
2 concurrence letter?
3 A. At that time, it came to light that there was this
4 parcel in 92 East Maple Street. The city did not
5 request us to review 92 East Maple Street. The
6 city only requested us to review
7 100 East Maple Street because they were unable to
8 obtain title to that parcel; but they were able to
9 obtain title apparently to 92 East Maple. So our
10 decision was limited to 100 East Maple Street,
11 which is where we made our determination.
12 Q. Okay. Thank you.
13 MS. PERANTEAU: I have no further
14 questions.
15 (Discussion off the record)
16 EXAMINATION
17 BY MR. ANDERSON:
18 Q. Okay. Heidi, my name is Val Anderson. We
19 represent the defendants in the lawsuit that
20 you're here being deposed on today. I have a few
21 questions on the testimony you gave in response to
22 counsel's questions.
23 Starting off with this 1955 bulkhead line
24 issue, this had to do with Exhibit 7 --
25 A. Okay.

Project Site Map

West Waterfront Redevelopment Project - Sturgeon Bay, WI



March 12, 2013

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 14

MILWAUKEE COUNTY

MILWAUKEE COUNTY, and
CITY OF MILWAUKEE,

Plaintiffs,

Case No. 15-CV-1536

WISCONSIN ATTORNEY GENERAL
BRAD D. SCHIMEL, and THE
WISCONSIN DEPARTMENT OF
TRANSPORTATION,

Case Code: Declaratory
Judgment 30701

Intervenor Plaintiffs,

v.

PRESERVE OUR PARKS, INC.

Defendant.

AFFIDAVIT OF MICHAEL J. CAIN

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, Michael J. Cain, being duly sworn under oath, hereby state:

1. I am a 1976 graduate of the University of Wisconsin Law School and a member of the State Bar of Wisconsin since that date.

2. I began work as a staff attorney with the Wisconsin Department of Natural Resources' Bureau of Legal Services in 1977. In 1978 I was assigned responsibility to serve as the Department's principal lawyer providing counsel to the agency's water regulation program, which administers, among other laws, Chapter 30 of the Wisconsin Statutes (Navigable Waters, Harbors and Navigation).

3. I served as the Department's primary attorney in the area of water regulation until my retirement in 2008. Following my retirement I was hired back by the Department later in 2008 to continue my work in support of the new legal staff and the Water Regulation Program and continued that work with the Department until 2010. Subsequent to 2010, I was periodically called upon by the Department and the staff of the Commissioners of Public Lands to review



documents and historic cases which I had worked on to assure continuity in the administration of these laws.

4. Among other duties under Chapter 30, the Department of Natural Resources is responsible for determining the extent of navigable and public waters in Wisconsin under Section 30.10 of the Wisconsin Statutes. These duties include responsibility to determine the boundaries of lands adjoining waters and the rights of the State and of individuals with respect to all such land and waters.

5. Over the course of my career with the Department, the agency was required to determine the boundaries of filled lakebeds in approximately 3 to 10 cases per year when such navigable waters boundaries were unknown or in dispute. In those cases, the Department undertook to determine such boundaries in conformity with the common law, as required under Wis. Stat. Section 30.10(4)(b). In accord with common law, the Department sought to identify the location of the natural and historical shoreline of the affected lake or stream at the time of statehood. This process was conducted through a review of cartographic, documentary and physical evidence of the location of the natural and historical shoreline.

6. Lakebed boundary determinations were initiated by agency staff who routinely sought and collected available historical maps, surveys, plats and aerial photographs, including the U.S. Public Lands Survey and other cartographic records on file with the U.S. Department of the Army, the Corps of Engineers, the Wisconsin Department of Transportation, the Wisconsin Public Service Commission, the Wisconsin Railroad Commission, the Wisconsin Board of Commissioners of Public Lands, County surveyors, municipalities, the Wisconsin State Historical Society, local historical societies and other sources.

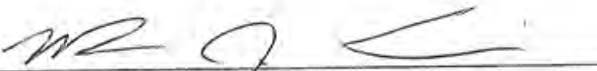
7. In many cases additional documentary evidence pertaining to the location of the natural and historical shoreline and modifications to the shoreline since Statehood was obtained through review of archived newspapers and other historical materials maintained by the Wisconsin Historical Society, local historical societies and other institutions.

8. In some cases, especially in urban areas, soil borings were available, particularly where construction of buildings, roads and other structures had taken place on filled lakebed areas. In other cases, the Department required project developers to obtain soil borings in order to provide physical evidence in an affected area to determine the location of the original and historical shoreline. These soil borings were analyzed by soil scientists, hydrogeologists and other specialists in order to determine the boundary of the natural and historical shoreline and to determine whether filled areas located waterward from that boundary resulted from accretion or as a result of legal or illegal filling. In some cases these analyses included the evaluation of the physics of soil movement including consideration of prevailing currents and other site characteristics.

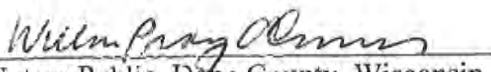
9. I have reviewed certain historical maps of the shoreline of Lake Michigan in the City of Milwaukee, including the following:

- a. The 1837 "Plat of Milwaukee" by M.L. Martin and S. Juneau;
- b. The 1842 "Plat of the Division of 13.30 Acres Off the East End of Lot 3 and 17.10 Acres Off the East End of Lot 4 of Section 28, Town 7 North, Range 22 East, in Town of Milwaukee";
- c. An 1879 Plat of the Southwest Quarter, Section 28, T.7 N., R.22. E in the Quarter Section Atlas of the City of Milwaukee copyrighted by J.V. Dupre; and
- d. An 1884 map of the Milwaukee lakeshore on record in the Offices of the Wisconsin Board of Commissioners of Public Lands that depicts the portion of the shoreline of Lake Michigan in the City of Milwaukee extending northerly from the Milwaukee River to a point near LaFayette Place. This 1884 Map depicts an area of the lakebed of Lake Michigan located easterly of a breakwater identified on that map as a portion of "the bed of Lake Michigan" which a railroad company sought to use for track, depot grounds and terminal facilities.
- e. An ortho-rectified aerial photograph prepared by Chaput Land Surveys, LLC, of the Milwaukee County Transit Center site and adjacent lands, showing the shoreline and breakwater as depicted in the 1879 Plat and 1884 BCPL map and a more easterly breakwater, all crossing the site of the Transit Center.

10. Based on my experience as the primary attorney for the Department's water regulation program and my expertise in locating the natural and historical shores of Wisconsin navigable lakes and streams, it is my opinion that the foregoing documents constitute significant evidence that the natural and historical westerly shoreline of Lake Michigan and the boundary of the lakebed area held by the State of Wisconsin under the Public Trust Doctrine is located significantly west of the line described in 2013 Wisconsin Act 140.


 Michael J. Cain

Subscribed and sworn to before me
 this 11th day of June, 2015.


 Notary Public, Dane County, Wisconsin
 My Commission is perunt.

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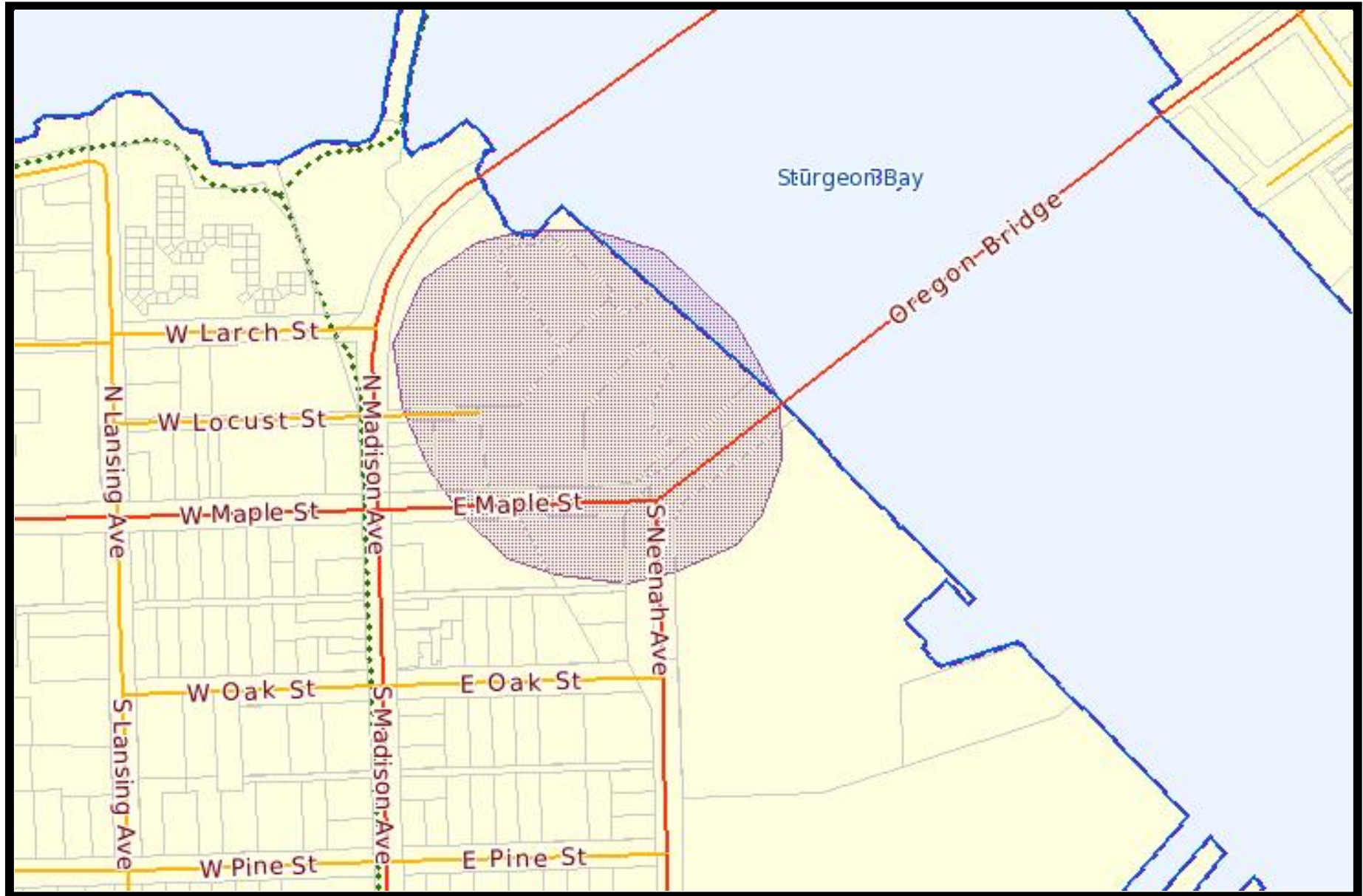
Prior Landfill

Printed 10/06/2016 courtesy of Door County Land Information Office

... from the Web Map of ...
(//www.co.door.wi.gov)



Door County, Wisconsin
... for all seasons!



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