STATE OF WISCONSIN CIRCUIT COURT DOOR COUNTY

FRIENDS OF THE STURGEON
BAY PUBLIC WATERFRONT,
SHAWN M. FAIRCHILD,
CARRI ANDERSSON,
LINDA COCKBURN,
RUSS COCKBURN,
KATHLEEN FINNERTY,
and
CHRISTIE WEBER,

Plaintiffs,

Case No. 16-CV-23
Code: 30701

vs.

CITY OF STURGEON BAY,
a Wisconsin municipal corporation,
and
WATERFRONT REDEVELOPMENT AUTHORITY
OF THE CITY OF STURGEON BAY
a municipal redevelopment authority,

Defendants.

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

TO: Attorney Remzy Bitar
Attorney Val Anderson
Arenz, Molter, Macy, Riffle & Larson, S.C.
720 North East Avenue
Waukesha, WI 53186

**PLEASE TAKE NOTICE** that the above-named Plaintiffs, by their attorneys Wheeler, Van Sickle & Anderson, S.C. and Midwest Environmental Advocates, will appear before the Honorable Raymond S. Huber, at the Door County Courthouse, on January 10, 2017, at 10:30 a.m., and will move pursuant to Wis. Stat. § 802.08 for summary judgment according to the below motion.

## MOTION

Plaintiffs hereby move the Court pursuant to Wis. Stat. § 802.08, for summary judgment declaring that the Development Contract dated January 8, 2015, between Defendants and Sawyer Hotel, LLC is unconstitutional under the public trust doctrine, Wis. Const., Art. IX, § 1, and permanently enjoining the sale of the property that is the subject of Plaintiffs' Complaint.

This motion is based on the file and record herein and the annexed brief and affidavits, on the grounds that there is no dispute of material fact and Plaintiffs are entitled to judgment as a matter of law.

Dated this 7th day of October, 2016.

WHEELER, VAN SICKLE & ANDERSON, S.C.
44 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703
(608) 255-7277
(608) 255-6006 fax

By: _____
Mary Beth Peranteau, State Bar No. 1027037

MIDWEST ENVIRONMENTAL ADVOCATES
Sarah Geers, State Bar No. 1066948
612 West Main Street
Madison, Wisconsin 53703
(608) 251-5047
(608) 268-0205 fax

Attorneys for Plaintiffs

STATE OF WISCONSIN CIRCUIT COURT DOOR COUNTY

FRIENDS OF THE STURGEON BAY PUBLIC WATERFRONT,
SHAWN M. FAIRCHILD,
CARRI ANDERSSON,
LINDA COCKBURN,
RUSS COCKBURN,
KATHLEEN FINNERTY,
and
CHRISTIE WEBER,

Plaintiffs,

vs.

CITY OF STURGEON BAY,
a Wisconsin municipal corporation,
and
WATERFRONT REDEVELOPMENT AUTHORITY
OF THE CITY OF STURGEON BAY
a municipal redevelopment authority,

Defendants.

Case No. 16-CV-23
Code: 30701

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

## *INTRODUCTION*

Plaintiffs, a group of Sturgeon Bay residents and an unincorporated Friends group, filed this action seeking to prevent the City of Sturgeon Bay from selling public lands for a private hotel development according to a Development Contract dated January 2015 between the Defendants and a real estate developer, Sawyer Hotel, LLC. The public trust doctrine enshrined in Article IX, section 1 of the Wisconsin Constitution provides the legal basis for Plaintiffs' claim. The State Constitution establishes that the State holds in trust for the benefit of the public all lands that were submerged lakebed at the time of Wisconsin statehood. The public's

beneficial ownership is not extinguished when lakebed is artificially filled by the adjacent riparian owner, as it was in this case.

The property that is the subject of the Development Contract ("Hotel Parcel") is located at 92-100 East Maple Street, on the City's west waterfront.[1] The evidence shows that the Hotel Parcel was once submerged lakebed below the ordinary high water mark of Lake Michigan, based on early subdivision plats depicting the location of the shoreline.[2] As shown by the affidavits accompanying Plaintiffs' motion, substantial evidence proves that in the late 1800s and early 1900s, the City's predecessors in interest to 92 East Maple Street ("Parcel 92") extended and enlarged a commercial dock from the shoreland into Sturgeon Bay and filled beneath it, creating land that was then conveyed through a succession of deeds to the City.[3] Public trust cases dating back more than a century hold that artificial filling by a riparian owner does not add to his title.

Precisely because this property was created by historical filling, redevelopment of 92-100 East Maple required the City to obtain a "historic fill exemption" to the State's environmental laws, which otherwise prohibit construction on landfilled sites.[4] Because the landfill was contaminated, the Development Contract obligated the City to obtain a voluntary party liability exemption ("VPLE") from the Wisconsin DNR, to protect the buyer from environmental liability.[5] In order to enter the property into the VPLE program, the City in turn was required to demonstrate its title to 100 East Maple ("Parcel 100").[6] It was during the process of clarifying

---

[1] *See* Affidavit of Donald C. Chaput, R.L.S., ¶ 2 & Ex. 4.
[2] *Id.*
[3] *See generally* Affidavit of Mary Beth Peranteau, ¶5-15 & Exs. 2-11.
[4] *See* Affidavit of Lori Huntoon, PG, ¶ 4-6; Peranteau Aff., ¶ 16 & Ex. 12: Oleniczak Tr., p. 95 & Depo. Ex. 13 (Development at Historic Fill Site or Licensed Landfill Exemption Application for 92 & 100 East Maple, City of Sturgeon Bay, dated June 30, 2015).
[5] Complaint, Ex A (Development Contract), at p. 4; Huntoon Aff., ¶¶ 4-5.
[6] Peranteau Aff., Ex. 12: Olejniczak Tr, p. 33-34. *See also* Peranteau Aff. ¶ 3 & Ex. 1.

title that the City was informed by WDNR that portions of Parcel 100 lay below the ordinary high water mark ("OHWM") of Lake Michigan, and that it could not grant title to the City for that area.[7] The OHWM constitutes the legal boundary between lakebed held in the public trust and upland held by the riparian.

In September 2013, WDNR advised the City that the bulkhead line on the west waterfront (bounded by a steel dock wall that marks the edge of the water) was not the OHWM. WDNR's conclusion was based on a 1955 map prepared in connection with the City's request for State approval of a bulkhead line. The map showed that the proposed bulkhead line was drawn at some distance waterward from the 1955 shoreline.[8] In October 2014, WDNR issued a letter "concurring in the approximate location" of the OHWM on Parcel 100, based on a comparison of shorelines in the 1955 bulkhead map and other historic maps.[9]

Upon the issuance of the WDNR Concurrence, the City recorded that document together with a quit claim deed to itself for the portion of Parcel 100 shown above the OHWM line according to the legal description in the WDNR Concurrence.[10] The City did not request and DNR did not issue any determination or concurrence with respect to the OHWM of Parcel 92, despite the fact that the City was warned by the Deputy Secretary of the State's Board of Commissioners of Public Lands that there was almost certainly a problem with its title.[11] Heedlessly, the City proceeded to survey and establish the boundaries of the Hotel Parcel from parts of Parcels 92 and 100, and negotiated the Development Contract for the sale and development of the property.

---

[7] Peranteau Aff., Ex. 12: Olejniczak Tr, pp. 34-35; Chaput Aff., Ex. 3. *See also* Peranteau Aff., ¶ 3 & Ex 1.
[8] Peranteau Aff., Ex. 12: Oleniczak Tr., pp. 34-35 & Depo. Ex. 5.
[9] Peranteau Aff., Ex. 1, at pp. 6-10 (WDNR Concurrence); ¶ 17 & Ex. 13: Kennedy Tr., pp. 32-33, 42-43.
[10] *See* Peranteau Aff., Ex. 1, pp. 6-12.
[11] *See* Section IV, *infra*, and accompanying notes 50 - 62.

The City's effort to convey public trust property to a private party for commercial use is unconstitutional under the public trust doctrine, Wis. Const., Art. IX, § 1. This conveyance would extinguish a beneficial property interest held by the public for a use that is not even remotely related to the enhancement of navigation, public access or any other recognized public trust objective. Even if the development could arguably be said to further an approved public purpose related to navigation, the City lacks the authority to make such a determination. The power to administer public trust property is committed exclusively to the legislature as trustee. For these reasons, the Plaintiffs request that the Court declare the Development Contract legally void and permanently enjoin the sale of the Hotel Parcel.

## *STATEMENT OF UNDISPUTED FACTS*

1. Plaintiffs are a group of Wisconsin citizens and members of the unincorporated Friends of the Sturgeon Bay Public Waterfront organized to oppose the sale by Defendants City of Sturgeon Bay and Waterfront Redevelopment Authority of the City of Sturgeon Bay (collectively "City") of certain real property in Sturgeon Bay, Wisconsin (the "Hotel Parcel") to Sawyer Hotel Development LLC ("Developer") for the development of a privately owned hotel.[12]

2. The City's agreement to convey the Hotel Parcel is set forth in a Development Contract for Hotel for Sturgeon Bay Waterfront Redevelopment dated January 8, 2015, (the "Development Contract") under which the Developer acquired the exclusive right to purchase and develop the Property.[13]

[12] Complaint, ¶¶ 1, 8-14.
[13] *Id.*, ¶ 2 & Ex. A.

3. The Hotel Parcel was created by a certified survey map recorded on July 20, 2015. The Hotel Parcel includes portions of the two former tax parcels located at 92 and 100 East Maple Street in the City of Sturgeon Bay.[14]

4. The City obtained title to 92 East Maple Street ("Parcel 92") in 2012 under a special warranty deed from Freedom Bank, which had in turn purchased the property at a sheriff's sale in a foreclosure action against Fair Oaks Corporation. Fair Oaks Corporation purchased the property in 2007 from its long-term owner, the Door County Cooperative.[15]

5. Parcel 92 is located on the west waterfront of Sturgeon Bay within and northeast of the plat of the Village of Bay View. Joseph Harris platted the Village of Bay View in 1873.[16] The chain of title to Parcel 92 evidences that Harris owned lots in Block 8 of the plat of Bay View and constructed a dock extending from Block 8 into Sturgeon Bay, which is shown on historic maps as the "Harris Dock."[17]

6. In 1891, after Harris' death, his son Henry Harris conveyed the property, "together with the steam boat dock and warehouse thereon and extending therefrom into the waters of Sturgeon Bay" to Charles I. Martin.[18] In 1897, A.W. Lawrence, a creditor of Martin, succeeded to Martin's interest in a foreclosure action and operated a planing mill and built grain warehouses on what was then shown as the "Sawyer Dock" in historic maps.[19]

7. In 1903, the property and dock were sold by Lawrence's son, A.W. Lawrence, Jr., to Arthur Teweles and Isidore Brandeis. The Teweles & Brandeis partnership operated a grain

---

[14] Complaint, ¶ 24 & Ex. E; Chaput Aff., ¶ 4 & Ex. 2 (showing boundaries of Hotel Parcel in relation to former tax parcels at 92-100 East Maple).
[15] Peranteau Aff. , ¶ 6b.-d. & Ex. 2, at pp. 8-16.
[16] Chaput Aff., ¶ 7 & Ex.4. *See also* Chaput Aff. Ex. 10 (1891 Sanborn map showing platted lots of Village of Bay View in relation to shoreline) and Ex.12 (showing Hotel Parcel boundaries in relation to 1891 shoreline).
[17] Peranteau Aff., ¶ 6.k. & Ex. 2, at p. 49; Chaput Aff., ¶¶ 7, 10 & Exs. 4 (plat of Village of Bay View) and 8 (1891 Sanborn map, showing the partially submerged lots of Block 8 of the Village of Bay View and "Harris Dock" extending from fractional Lots 3-4).
[18] Peranteau Aff., ¶ 6.i. & Ex. 2, p. 48.
[19] Peranteau Aff., ¶ 6.j.-k. & Ex. 2, pp. 44-47; Chaput Aff., ¶ 10 & Ex. 8 (1904 and 1919 Sanborn maps).

elevator at the end of the dock for decades, and leased areas of the dock closer to the shore for a lumberyard and other businesses.[20] The property was inherited by Brandeis' son, Stanley Brandeis, and his wife Lucile, whose title was quieted in a 1953 action among several claimants including the heirs of Arthur Teweles.[21] Afterwards the property was sold to the Door County Cooperative, which continued to use the grain elevator.[22]

8. Beginning as early as the 1890s, while owned by Charles Martin, and continuing into the early 1900s under the ownership of Teweles & Brandeis, the dock was successively enlarged and filled underneath.[23] Aerial photographs show that by the 1930s, the dock was a solid, filled rectangular area surrounded on three sides by water, until the approval of a municipal bulkhead line in 1955 and subsequent filling of all of the shoreline behind the steel dock wall constructed at the bulkhead line.[24]

9. The Hotel Parcel is located wholly below the shoreline of Lake Michigan as shown in historic subdivision plats.[25]

10. Soil borings from a Phase II environmental site assessment prepared by the City's engineers, Ayres & Associates, in August 2013 identified ten or more feet of fill overlaying lake deposits under the majority of the Hotel Parcel.[26] Soil borings and analysis from earlier environmental site assessments conducted on behalf of the Door County Cooperative reveal similar findings and a conclusion that contamination of the site was most likely associated with urban fill.[27]

---

[20] Peranteau Aff., ¶ 6.g.-h. & Ex. 2, p.44; ¶ 10 & Ex. 7.
[21] Peranteau Aff., ¶ 6.e.-f. & Ex. 2, pp. 14-43.
[22] Peranteau Aff., ¶ 6.g. & Ex. 2, pp. 14-16.
[23] Chaput Aff., ¶¶ 10-15 & Exs. 7-12; Peranteau Aff., ¶ 15 & Ex. 11
[24] Peranteau Aff., ¶ 15 & Ex. 11; Chaput Aff., ¶ 17 & Ex. 14.
[25] Chaput Aff., ¶¶ 7-9 and Exs. 4-6.
[26] Huntoon Aff., ¶ 12-15 & Ex. 5.
[27] Huntoon Aff., Ex. 2, at 2.

11. The City claims title to 100 East Maple Street ("Parcel 100") under a quit claim deed under which it is both grantor and grantee, recorded in connection with the City's receipt from the Wisconsin Department of Natural Resources ("WDNR") of a letter authored by WDNR's Director of Policy and External Affairs on the subject of "WDNR Determination of Concurrence with the Approximate Ordinary High Water Mark for the City of Sturgeon Bay West Side Waterfront Project," recorded October 28, 2014, in the office of the Door County Register of Deeds as Document No. 782928 (the "WDNR Concurrence").[28]

12. The WDNR Concurrence includes a survey of the approximate location of the OHWM of Lake Michigan along a portion of Parcel 100.[29]

13. WDNR has made no determination of the location of the OHWM on Parcel 92.[30]

## *ARGUMENT*

## I. LAKEBED BELOW THE ORDINARY HIGH WATER MARK IS PROPERTY HELD IN TRUST BY THE STATE FOR PUBLIC PURPOSES

### A. Wisconsin Succeeded the Federal Government as Trustee of the Beds of Navigable Waters at Statehood.

The equal footing doctrine is the principle of federal constitutional law that all states admitted to the Union under the Constitution since 1789 took title to that territory on the same basis as the original thirteen colonies:

> In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, hold the absolute right to all their navigable waters and the soils under them, subject only to rights surrendered and powers granted by the Constitution to the Federal Government. In a series of 19th-century cases, the Court determined that the same principle applied to States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution. These precedents are the basis for the equal-footing doctrine, under which a State's title to [submerged] lands was conferred not by Congress but by the Constitution itself.

[28] Peranteau Aff., ¶ 3 & Ex. 1.
[29] Peranteau Aff. ¶ 17 & Ex. 13: Kennedy Tr., pp. 30-32; 65-68 & Depo. Ex. 1
[30] *Id.*

*PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (citations and quotations omitted). The federal Constitution's reservation of submerged lands to the states does not result in the states having a proprietary interest in those lands. Rather, the state holds title as a trustee on behalf of the public:

> Upon the admission of the state into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, which trusteeship is inviolable, the state being powerless to change the situation by in any way abdicating its trust.

*Pewaukee v. Savoy*, 103 Wis. 271, 274, 79 N.W. 436 (1899).

The essence of the public trust doctrine is that the State may not alienate the public's beneficial interest in navigable waters and their beds, except for the purpose of improving navigation and use of the waters. In the seminal case *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892), the Court determined that the Illinois Legislature lacked authority to make an irrepealable grant of Lake Michigan lakebed to the railroad for Chicago's inner harbor, and that the State was therefore free to revoke its grant after the railroad constructed the harbor facilities. In so holding, the Court declared:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.

*Id.* at 453-54.

B. The Boundary Between Public Lakebed and Private Riparian Land is the Ordinary High Water Mark.

Wisconsin common law establishes that the boundaries of navigable waters and their beds are determined based on the location of the ordinary high water mark ("OHWM") at the time of statehood. *See Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914); *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 4 N.W. 855 (1901) ("title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever…").

As a property boundary, the OHWM is generally not altered by acts of man. The public trust doctrine applies with equal force to filled lakebeds even if, as a result of the fill, the area is no longer a navigable waterway. *See State v. Trudeau*, 139 Wis. 2d 91, 408 N.W.2d 337 (1987) ("An area need not be navigable to be lakebed. If the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant to the state's claim."); *State of Wisconsin v. Public Service Commission*, 275 Wis. 112, 117-19, 81 N.W.2d 71 (1957). Filling of lakebed below (waterward of) the OHWM does not change the character of those formerly submerged lands as constitutionally protected trust property, as was held in *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248 (1877). In that case, the respondent built an embankment extending 85 feet into Lake Michigan, which the railroad later sought to condemn for tracks along the water. *Id.* at 261. In ruling on the respondent's takings claim, the *Diedrich* court explained that the rights of a riparian owner are based upon his title to the shore, not title to the bed of the adjacent water. Riparian rights at common law include the right to protect shorelands from erosion and to extend docks for access to navigable depths, each subject and subordinate to the public right of navigation. *Id.* at 262. However, the court held:

> Without express and competent grant from the public, the rights declared in the foregoing ... are the only rights of a riparian owner, upon navigable water, to extend his possession beyond or intrude within the natural shore of the water. Any other extension or intrusion into the water, beyond the natural shore, whether made by the riparian owner or a stranger, is a pourpresture,[31] vesting no title in him who made it.

*Id.* at 263. Based on these precepts, the *Diedrich* court ruled that the respondent had no title to the filled embankment and thus no claim against the railroad for compensation based on a taking. *Id.* at 272. *See also Menomonee River Lumber Co. v. Seidl*, 149 Wis. 316, 320-321, 135 N.W. 854, 857 (1912) ("One cannot by building up land or erecting structures in a lake, the title to the bed of which is in the state, thereby extend his possession into the lake and acquire the state's title.")

The rule against title vesting in the riparian is the same whether the fill is illegal or approved under a municipal bulkhead ordinance. Section 30.11, Stats., the bulkhead statute, authorizes riparian owners to place solid structures or fill up to a designated bulkhead line, which is to "conform as nearly as practicable to the existing shores," except that:

> "in the case of leases under sub. (5) and s. 24.39(4) bulkhead lines may be approved further from the existing shoreline if they are consistent with and part of any lease executed by the board of commissioners of public lands."

Wis. Stat. § 30.11(2). Under these statutes, the riparian owner does not take title to lands between the OHWM and the bulkhead line. "The establishment of a bulkhead line under sec. 30.11 does not grant full title to the bed landward of the line, but only grants a limited right of use of the bed for the placing of fill up to the bulkhead line. Furthermore, that right, even if it is exercised, is revocable by the legislature." 63 Op. Atty Gen. Wis. 445, 1974 Wisc. AG LEXIS 111, *11. Consistent with the foregoing, when issuing its OWHM concurrence for Parcel 100, the DNR declined to find that the OHWM had shifted waterward to the bulkhead line approved

[31] "Pourpresture" (also spelled "purpresture") is a term from English law meaning an encroachment on property of the crown constituting a nuisance. *See* http://thelawdictionary.org/pourpresture/ (last visited 10/06/16).

in 1955. As to the area of Parcel 100 between the OHWM and bulkhead line, the City had subsequent communications with the Board of Commissioners of Public Lands concerning leasing of the lands for public purposes, as authorized by sec. 24.39, Stats.[32]

As described above, artificial filling or other actions which deliberately create dry land from submerged lakebed do not change the boundary of lands held in the public trust. By contrast, Wisconsin law recognizes "the right of the riparian owner to accretions formed by slow and imperceptible degrees upon or against his land." *Boorman v. Sunnuchs*, 42 Wis. 233, 242. Accretion has been defined as "the increase in land caused by the gradual deposit by water of materials on the shores, which deposit replaces the water at this location with dry land." *Baldwin v. Anderson*, 40 Wis.2d at 44 Ensuring a riparian's owner's access to the water is the cited rationale for the doctrine that land formed by natural accretion belongs to the owner of the upland to which it is contiguous. *See Rondesvedt v. Running*, *supra*, 19 Wis.2d at 620.

The DNR Concurrence, which concludes that the OHWM of Parcel 100 had moved waterward from the originally meandered shoreline of Lake Michigan, is based on a theory of accretion:

> [T]he Parcel area would have filled with sediment slowly over the course of time between the 1925 [ACOE] Map and the 1955 Bulkhead Map. The gradual addition of soil to the shallow area shown in the 1925 Map should be considered accretion and would extend the riparian title out to the OHWM.[33]

WDNR narrowly confined its Concurrence to Parcel 100, aware of the fact that Parcel 92 was created by filling submerged lakebed.[34] Wisconsin cases are clear that historic filling by riparian owners (the City's predecessors in interest) does not relocate the OHWM or remove Parcel 92 from the public trust.

---

[32] Peranteau Aff., ¶ 16 & Ex. 12: Olejniczak Tr., at 65-67 & Depo. Ex. 7.
[33] Peranteau Aff., ¶¶ 2, 3.b. & Ex. 1, pp. 7-8 (WDNR Concurrence, at pp. 1-2).
[34] Peranteau Aff., Ex. 13: Kennedy Tr., p. 47.

## II. THE HOTEL PARCEL IS SITUATED ON THE ARTIFICIALLY FILLED BED OF LAKE MICHIGAN AND REMAINS IN THE PUBLIC TRUST

The City declined to ask and WDNR did not issue a determination concerning the location of the OHWM for Parcel 92. Importantly, however, the Court is not required to make its own determination of the OHWM in order to find for the Plaintiffs on this motion. The Plaintiffs simply ask the Court to find that all or a substantial part of the Hotel Parcel consists of artificially filled lakebed of Lake Michigan. Such a finding is overwhelmingly supported by the evidence. Conversely, there is no evidence, nor any reasonable inference from the evidence, that Parcel 92 (which appears in numerous historic maps as a distinctive rectangular shaped parcel surrounded on three sides by water[35]) was formed by a process of natural accretion.

### A. Parcel 92 is Indisputably Land that was Created in the Late 1800s and early 1900s by Enlarging and Successively Filling Lakebed Underneath a Historic Dock.

Evidence from multiple sources—including the title records, historic maps, archival newspaper sources, Door County land office information, and physical evidence from a multitude of environmental site assessments—confirms that the Hotel Parcel is situated on the filled bed of Sturgeon Bay. These sources are exactly the type of evidence that WDNR itself reviews when making OHWM determinations on filled sites.[36]

Detailed maps beginning with the 1891 Sanborn fire insurance map depict the rectangular shape of extensions of docks from the natural shoreline.[37] What was originally labeled the "Harris Dock" in the 1891 Sanborn map was enlarged and structures incrementally added as shown by the 1904 and 1919 Sanborn maps.[38] The map evidence is consistent with title documents recorded with the Door County Register of Deeds, beginning with the plat of the

[35] Chaput Aff., Exs. 7-16.
[36] Peranteau Aff., ¶ 17 & Ex. 13: Kennedy Tr., pp. 35; 55-56 & Depo. Ex. 5.
[37] Chaput Aff., Ex. 9.
[38] Chaput Aff., Exs. 11-12.

Village of Bay View recorded by Joseph Harris in 1873. The Bay View Plat depicts the shoreline of Sturgeon Bay and shows Lots 1 through 9 of Block 8 as being either partially or entirely submerged.[39] These maps evidence that most of the Hotel Parcel footprint was under water at least until 1873.

Historical newspapers also report the progressive extension of the dock and filling of the lakebed by successive owners, including Charles Martin and Teweles & Brandeis.[40] For example, a newspaper article from January 28, 1892 reported that: "The portion of the [Harris] dock next to the shore is being torn up it being the intention to fill in the whole property with refuse from the shingle mill, thus making the approach to the dock permanent..."[41] On March 21, 1908, the paper reported: "The Sawyer Lumber Co. are rebuilding about one hundred feet of Teweles & Brandeis' dock, which is used by the former firm for unloading lumber from boats. The repairs are temporary as the owners of the property are planning on filling in under the structure with stone in the near future will make a permanent job of it."[42]

In addition to the archived newspaper sources and title evidence, the environmental site assessments prepared for the City provide physical evidence that the Hotel Parcel is situated on filled lakebed. A Phase II Environmental Site Assessment for 92-100 East Maple Street prepared by Ayers & Associates includes geographical cross-sections showing 10 or more feet of fill overlaying lake deposits.[43] This and other environmental site assessments consistently identify the material beneath the site as historic fill, including bricks, cinders, gravel, glass and wood.[44]

---

[39] Chaput Aff., Exs. 2 & 4.
[40] Peranteau Aff., ¶¶ 6-13 & Exs. 3-10.
[41] *Id.*, Ex. 3.
[42] *Id.*, Ex. 7
[43] Huntoon Aff., ¶ 14 & Ex. 5.
[44] Huntoon Aff., ¶ 2 & Ex. 2 (Huntoon Report).

The title record and historic Sanborn maps clearly show that most of the lands underlying the Hotel Parcel were filled by the City's predecessors in title, who successively enlarged and filled beneath a dock that is now claimed by the City as its property. The City, as a governmental entity, has a duty to ensure that future uses of the property conform to the constitutionally imposed limits of the public trust doctrine.

B. The "Artificial Accretion" Rule Recognized in the *DeSimone* and *Pugh Coal* Cases is Not Applicable to the Facts of this Case.

As discussed above, additions of fill to submerged lakebed do not add to a riparian's title, based on the principle that the riparian cannot acquire the State's title by deliberate acts. However, as an extension of the doctrine of accretion, the Wisconsin Supreme Court in *DeSimone v. Kramer*, 77 Wis. 2d 188, 252 N.W.2d 653 (1977), held that a riparian owner may obtain right and title to land formed by "*artificial accretion*" where those lands were not created to benefit the riparian owner. *DeSimone* involved a dispute between buyer and seller as to whether a deed conveyed land only to the extent of the originally platted lots (the seller's position), or whether the sale included additional lands formed at the shoreline by deposits of dredge spoils from the enlargement of the adjacent shipping canal. The *DeSimone* court observed: "Since the fill adjoining lots eleven and twelve was the product of government dredging, the made land cannot be considered accretion in the classic sense; it was not gradual, not gained 'by small and imperceptible degrees.'" *Id.* at 198. Nevertheless, the court held, the artificial nature of the fill should not prevent the doctrine of accretion from applying. "The desirability of protecting a property owner's riparian right of access is not lessened when a government entity causes the made land through artificial means in pursuit of a navigation project, at least when the government does not lay claim to the made land for purposes of navigation, fisheries or other exercises of the police power." *Id.* at 199.

The Wisconsin Court of Appeals in *W.H. Pugh Coal Co. v. State*, 105 Wis. 2d 123, 312 N.W. 856 (Ct. App. 1981), applied the rule articulated in *DeSimone* to allow a riparian owner to claim title to land formed by "artificial accretion" because the State was unable to show that the lands were formed to benefit the riparian owner. In that case, Pugh's predecessor-in-interest had granted an easement to the federal government which gave access to a lifesaving station built on the lakebed between the shore and a more remote lighthouse. The deed provided that the grantor and his successors-in-interest would retain ownership of the land. It also provided that, upon the government's abandonment of the lifesaving station, all of the government's right, title and interest would revert to the grantor or his successors. Over time, the areas between the lighthouse and the shore became filled in, forming a continuous extension of the Pugh property. The original trial court made a finding on summary judgment that the government was responsible for the filling. After remand for trial, a different court found that based on the evidence it could not determine who filled in the area or that the fill between the shore and the lighthouse was deposited to benefit the riparian. The court of appeals "bound by the trial court's conclusion," found that the riparian took title to the "artificially accreted" property. *Id.* at 127.

In contrast to both *DeSimone* and *Pugh Coal*, the property of the former Door County Co-op at 92 East Maple Street was artificially created for the benefit of the riparian owner, to support a dock and commercial structures. As in *Diedrich* and *Menomonee Lumber*, the riparian deliberately caused the fill. Based on the evidence, no reasonable inference arises that the property was either formed by natural accretion or that the fill was deposited by the government or a third party. Thus, the principle articulated in *Menomonee Lumber* applies equally this this case. To apply the "artificial accretion" rule of *DeSimone* and *Pugh Coal* "would be to hold that

a riparian owner could by artificial means acquire title to the bed of a lake far below the shore which belonged to the state." 149 Wis.2d at 320.

It is axiomatic that the City's title is only as good as its predecessors in interest. *See, e.g., Diedrich, supra*, 42 Wis. at 261 ("The title of the respondent, and of all persons under whom he claims, as riparian owners of land bounded by the lake, went to the natural shore of the lake, and was limited by it. To the bed of the lake within its natural shore, neither they nor he took any title as riparian owners.") Because Parcel 92 was created by artificial filling to benefit the riparian owner, the filled lakebed did not add to the riparian's title, and the riparian had no title to convey.

C. It is Unnecessary for the Court to Weight the Evidence Concerning the WDNR Concurrence Because the Portion of the Hotel Parcel Created from Parcel 92 is Filled Lakebed.

Although the great weight of the evidence also supports a finding that Parcel 100 is artificially filled lakebed, it is not necessary for the Court to consider that evidence in order to grant summary judgment in favor of the Plaintiffs. This is because the Hotel Parcel overlays Parcel 92, which is indisputably lakebed that was filled to benefit the riparian owner.[45] Accordingly, a substantial part of the Hotel Parcel is below the OHWM of Lake Michigan and is public trust land.

The validity of the "approximate location of the OHWM" in the WDNR Concurrence is not a material dispute for purposes of summary judgment. That said, the accretion analysis in the WDNR Concurrence is highly suspect because it was based on a selective choice of historic maps and disregarded substantial physical evidence of fill. The Department failed to consult or even request readily available environmental reports that include soil borings evidencing that 92-

[45] *See* text accompanying notes 36-43, *supra*.

100 East Maple was created by landfilling.[46] Nor did the Department seek out documents from local historical societies, review archived newspapers, or overlay the Hotel Parcel property boundaries on historic maps. The Department did not undertake an analysis of coastal processes to determine whether accretion was likely to have occurred to any significant extent in the 30-year period between 1925 and 1955.[47] Aerial photographs evidence that the area remained submerged as late as 1938.[48] The relatively casual process by which WDNR "concurred" in the OHWM instead of making its own determination using the procedures outlined by the former chief counsel for the DNR water program,[49] weighs against granting that opinion any credence.

## III. THE LEGISLATURE HAS NOT AUTHORIZED THE CITY TO SELL PUBLIC TRUST PROPERTY FOR COMMERCIAL DEVELOPMENT

The Supreme Court in *Illinois Central*, *supra*, held that state legislative authority over navigable waters and their beds must be exercised in furtherance of the public interest, and that authority may not be abdicated. Wisconsin Supreme Court decisions set clear boundaries on permissible conveyances of submerged lakebeds and uses of filled lakebed lands. Those cases hold that the conveyance of public lakebeds is permissible only when the resulting restriction of public rights in navigable waters is outweighed by an enhancement of the public's use and enjoyment of the subject lake.

Historically many Wisconsin communities have sought to use public lakebeds for various public purposes, including parks, roads and harbors. In each case, the municipalities involved have been required to win support of special legislation to convey lakebed lands from the State to

[46] Peranteau Aff., ¶ 17 & Ex. 13: Kennedy Tr., pp. 53-54 ; Huntoon Aff., ¶ 14 & Ex. 5.
[47] Peranteau Aff., Ex. 13: Kennedy Tr., p. 56-57
[48] Peranteau Aff., Ex. 11; Chaput Aff., Ex. 14
[49] *Id.* at pp. 55-57 & Depo. Ex. 5 .

the local unit of government. In many of these cases, the affected municipalities also instituted court actions to confirm that the proposed grants were constitutionally valid.

For example, in *State v. Public Serv. Comm'n*, 275 Wis. 112, 81 N.W.2d 71 (1957), the Wisconsin Supreme Court reviewed a lakebed grant to the City of Madison authorized by a 1953 session law. The session law in that case authorized the City to fill a portion of the lakebed of Lake Wingra to develop park-related facilities. The Court explicitly recognized that the public trust doctrine applies to the use of municipal land obtained through legislative lakebed grants:

> . . . The trust is "for public purposes." [Citations omitted] Early decisions frequently spoke of navigation often in a commercial sense, as the purpose of the trust, but all public uses of water have from time to time been recognized, including pleasure boating, sailing, fishing, swimming, hunting, skating, and enjoyment of natural scenic beauty. Certainly the trust doctrine would prevent the state from making any substantial grant of a lake bed for a purely private purpose.

*State v. Public Serv. Comm'n*, 275 Wis. at 118, citing *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 499, 53 N.W.2d 514 (1947).

In *State v. Public Serv. Comm'n*, the Court affirmed the conveyance of a lakebed area to the City of Madison, because the City's proposed uses were public in character and in support of navigation. The Court's determination that the proposed use "did not violate the obligations of the trust subject to which the State owns the lake bed," rested on five key factors:

> 1. Public bodies will control the use of the area. 2. The area will be devoted to public purposes and open to the public. 3. The diminution of lake area will be very small when compared with the whole of Lake Wingra. 4. None of the public uses of the lake will be destroyed or greatly impaired. 5. The disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.

*Id.* at 118. Less than a year after that decision, in *Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674 (1957), the Court considered a second lakebed grant to the City of Madison, this time for a proposed auditorium and civic center. The Court again upheld the proposed public use of the

lakebed grant, because it was closely related to the "use and enjoyment of the lake . . . and would contribute to the public's enjoyment of its scenic beauty." *Id.* at 258. The Court referred to the five factors set forth in *State v. Public Serv. Comm'n*, *supra*, in determining the constitutional issues involved in the City's proposed use of the lakebed grant area. *Madison v. State*, 1 Wis. 2d at 259-60.

The legislature's consideration of lakebed grants is now governed by Section 13.097, Stats., which establishes a procedure designed to ensure that lakebed grants meet constitutional requirements under the public trust doctrine. The legislature's approval of the conveyance of lakebed requires WDNR to prepare a detailed report containing the Department's findings with respect to the location of the lakebed, the purposes of the proposed conveyance, and the effect of the proposed conveyance on public trust purposes, among other details. Wis. Stat. § 13.097(4). The Department must also report "whether any commercial uses of the lake bed area subject to the proposed conveyance are minor and incidental to free public trust purpose uses or whether commercial purposes dominate the proposed use of the lake bed area." Wis. Stat. § 13.097(6)(f). If the proposed grantee is not a governmental unit, the Department's findings must describe "the extent to which the use of the lake bed area subject to the proposed conveyance will be controlled or supervised by a governmental unit, to assure conformity with a public trust purpose." Wis. Stat. § 13.097(4)(f)3. Thus, even where the State makes a grant of submerged lakebed, such grants do not remove lands from the public trust. Rather, they merely delegate the obligations of the trustee to a local unit of government.

The foregoing discussion shows that, while it is extremely doubtful that the sale of public property for private commercial development somehow furthers a public purpose, in any case the City wholly lacks the authority to make such a determination. The authority to grant title to

public trust property, including Parcel 92, resides exclusively with the legislature. Weighing competing values under the public trust doctrine is a decision "which affects the interests of the people of the entire state." *Muench v. Public Service Comm.*, *supra*, 261 Wis. 515g. Legislative grants of lakebed are required to follow the procedure outlined in Wis. Stat. § 13.097 to ensure that the conveyance is for an appropriate public purpose related to navigation. It is indisputable that the City's approval of the Development Contract was not approved by the legislature. Accordingly, the City acted in excess of its authority in approving the sale and must be enjoined from closing on the sale.

## IV. NO LEGAL OR EQUITABLE PRINCIPLES SUPPORT THE DENIAL OF PLAINTIFFS' REQUESTED INJUNCTION

The City's plan to sell filled lakebed to a private party for purely commercial purposes is a violation of the public trust doctrine. Indeed it is clear from the above cited law that if the City had obtained title to the property by a legislative grant, this transaction would be absolutely barred by the terms of the grant. The fact that the City claims title by private deed is no justification for its abdication of its public trust duty as an instrumentality of the State, because the character of the property was well known to the City. The presence of landfill was the very reason the City was required to obtain a "historic fill" exemption from Wis. Admin. Code § NR 506.085 for redevelopment of the site.[50] Indeed, the City itself commissioned a historical marker on the west waterfront that included a map and information researched by the City's Community Development Director explaining the progression of filling under historic docks![51] City officials were also well aware of the limitations on the use of filled lakebed, based on a series of

[50] *See* Huntoon Aff., ¶ 4-6; Peranteau Aff., Ex. 12: Olejniczak Tr., p. 95 & Depo. Ex. 13.
[51] Peranteau Aff., Ex. 12: Olejniczak Tr., pp.86-93 & Depo. Ex. 12.

discussions with representatives of the DNR. By at least April 2014, City understood that filled lands below the OHWM could not be privately owned or used for private businesses.[52]

Not only were City officials aware that the Hotel Parcel was created by artificial filling as a physical fact, they were also specifically cautioned that the filled status of Parcel 92 created a title defect. The City was warned twice by the Deputy Secretary of the State Board of Commissioners of Public Lands of the cloud on its title prior to contracting for the sale of the Hotel Parcel. City officials including Community Development Director Marty Olejniczak and the City Attorney met with Deputy Secretary Tom German at the site of the proposed hotel development in July 2014, prior to the issuance of the WDNR Concurrence. Afterwards the Deputy Secretary forwarded a summary of the meeting and a copy of a 1925 Army Corps of Engineers map—the same map that became the basis for the WDNR Concurrence.[53] Mr. German pointed out that "the 1925 map shows the Teweles & Brandeis Wharf on which now stands the vacant grain elevator," and that the area adjacent to that dock were "areas of 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."[54] That accretion analysis was ultimately incorporated as the basis for the WDNR Concurrence recorded in October 2014.[55] However, the Deputy Secretary warned that from an initial review of the maps and documents, there was a "very strong likelihood" that the area of the vacant grain elevator, comprising the western portion of the City's redevelopment site, was below the OHWM and therefore it would be necessary to confirm whether the City had marketable title to the area.[56]

---

[52] *Id.*, Olejniczak Tr., pp. 21-23, 106.
[53] *See* Peranteau Aff., Ex. 12: Olejniczak Tr., pp. 67-73 & Depo. Ex. 7.
[54] *Id.*, Depo. Ex. 7 at 2.
[55] *See* Peranteau Aff., Ex. 1, at pp. 7-8 (WDNR Concurrence, pp. 2-3).
[56] *Id.*, Depo Ex. 7 at 4.

The DNR Concurrence was deliberately and narrowly focused on clarifying the City's title to Parcel 100. The Concurrence was drafted by Heidi Kennedy, then the DNR's Wetland and Water Policy Coordinator, with assistance from DNR legal staff.[57] Ms. Kennedy testified that she was aware that the adjacent Teweles & Brandeis dock (site of the vacant Door County Coop granary) was filled. Ms. Kennedy testified that when drafting the Concurrence, she was unaware of the City's development plans for Parcel 92.[58] She further testified that no OHWM determination was made for Parcel 92 because the City did not ask for one.[59]

On October 28, 2014, the City recorded the WDNR Concurrence which established the location of the OHWM for Parcel 100, but not for Parcel 92, the area of the vacant grain elevator. The City concurrently recorded a quit claim deed to itself for the landward portion of Parcel 100 deemed to be above the OHWM.[60] Two days later, Mr. Olejniczak had a phone conversation with Deputy Secretary German, who again warned of the cloud on the City's title to Parcel 92 based on that being a "filled area." Mr. Olejniczak reported his frustration to the City Attorney "because we thought the issue was resolved, that the co-op parcel, there's no issues…And now he's throwing a concern at us regarding the co-op parcel that which we thought was a nonissue at that point."[61] When asked whether he received any assurances from DNR after October 2014 that title to Parcel 92 was a "non-issue," Olejniczak testified, "I am not aware of any."[62] This unresolved problem with the title to Parcel 92 was known by the City two months before it executed the Development Contract for the sale of the Hotel Parcel. Based on the City's awareness of the title defect, there is no equitable basis to allow the sale of the Hotel

[57] Peranteau Aff., ¶ 17 & Ex. 13: Kennedy Tr., pp. 17-18; 33-34.
[58] *Id.*, Kennedy Tr., pp. 30-32 & Depo. Ex. 1.
[59] *Id.*, Kennedy Tr., pp. 67-68.
[60] Peranteau Aff., Ex. 1, pp. 11-12.
[61] Peranteau Aff., Ex. 12: Olejniczak Tr., pp. 103-106 & Depo Ex. 15.
[62] *Id.*, Olejniczak Tr., p. 106.

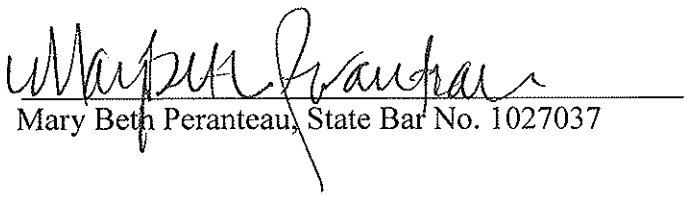
Parcel to go forward. To the contrary, as a government instrumentality, the City should be held to a fiduciary obligation to maintain and protect this public trust property.

## *CONCLUSION*

Defendants' conveyance of the Hotel Parcel according to the Development Contract will wholly divest Plaintiffs and all Wisconsin citizens of their equitable interest in public trust property, and deprive them of the use and enjoyment of the property as a natural resource and as a free and open space for access to and use and enjoyment of navigable waters for fishing, boating, enjoyment of natural scenic beauty and commerce on Lake Michigan. The City's failure to preserve trust property for Plaintiffs and other Wisconsin citizens' use and enjoyment as a natural resource and physical environment and Defendants' authorization of the conveyance of title, transfer of control and construction of a private commercial enterprise will cause Plaintiffs to suffer an irreparable injury to their constitutionally established interest in the Property. For the reasons set forth herein, Court should find that the Development Contract is void as a violation of the Wisconsin Constitution and permanently enjoin the sale of the Hotel Parcel.

Dated this 7th day of October, 2016.

WHEELER, VAN SICKLE & ANDERSON, S.C.
44 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703
(608) 255-7277
(608) 255-6006 fax

By: 
Mary Beth Peranteau, State Bar No. 1027037

MIDWEST ENVIRONMENTAL ADVOCATES
Sarah Geers, State Bar No. 1066948
612 West Main Street
Madison, Wisconsin 53703
(608) 251-5047
(608) 268-0205 fax

Attorneys for Plaintiffs