RECEIVED
08-22-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

APPEAL NO. 17-AP-000800

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

BRIEF OF PLAINTIFFS-RESPONDENTS

On Appeal from the Judgment of the Door County
Circuit court, Honorable Raymond Huber Presiding,
Case No. 16-CV-000023, Dated March 8, 2017

Mary Beth Peranteau, No. 1027037
WHEELER, VAN SICKLE & ANDERSON, S.C.
25 West Main Street, Suite 801
Madison, WI 53703
Tel: (608) 255-7277
Fax: (608) 255-6006
mperanteau@wheelerlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES FOR REVIEW

I. Whether the notice of claim statute, Wis. Stat. § 893.80(1d), applies to actions seeking injunctive relief to prevent a violation of the public trust doctrine.

Answered by the Circuit court: No.

II. Whether Plaintiffs ("Friends") complied with the notice of claim statute, Wis. Stat. § 893.80(1d), as a factual matter.

Issue not reached upon by the Circuit court.

III. Whether the Friends' claim brought on January 28, 2016, to enjoin the Defendant-Appellants' ("City's") sale of property under a development contract dated January 8, 2015 ("Development Contract") is barred under any applicable statute of limitations.

Answered by the Circuit court: No.

IV. Whether Plaintiffs' claim, brought approximately one year after the City's execution of the Development Contract that is the basis for the claim, is barred by laches.

Answered by the Circuit court: No.

V. Whether the Wisconsin Department of Natural Resources ("WDNR") issued a determination with respect to the ordinary high water mark ("OHWM") for 92 East Maple Street in the City of Sturgeon Bay ("Parcel 92") a portion of which was slated to be sold for private development under the Development Contract.

Answered by the Circuit court: No.

VI. Whether Plaintiffs met their burden of proof to prove that the sale contemplated by the Development Contract is a violation of the public trust doctrine with respect to Parcel 92.

Answered by the Circuit court: Yes.

VII. Whether expert testimony and documentary evidence offered by Plaintiffs to support the character of Parcel 92 as filled lakebed was properly admitted at trial.

Answered by the Circuit court: Yes.

VIII. Whether the evidence admitted at trial supported the trial court's judgment enjoining the sale and private use of Parcel 92 under the public trust doctrine, subject to a declaration by WDNR of the location of the OHWM on that parcel.

Answered by the Circuit court: Yes.

STATEMENT ON ORAL ARGUMENT

Plaintiffs-Respondents join in a request for oral argument to to fully present the issues and respond to questions raised by the panel.

STATEMENT ON PUBLICATION

Publication is recommended to expand the Wisconsin courts' jurisprudence under the public trust doctrine.

STATEMENT OF THE CASE

A. Factual Background

This case is an appeal of a judgment enjoining Defendant-Appellants City of Sturgeon Bay and the City's Waterfront Redevelopment Authority (collectively, the "City") from conveying property located at 92 East Maple Street in the City of Sturgeon Bay ("Parcel 92"). The circuit court found that Parcel 92 was created by filling under a historic dock constructed on the lakebed of Lake Michigan, and that the property is therefore owned by the State in trust for the public under Article IX, Section 1 of the

Wisconsin Constitution (the public trust doctrine). *See* Judgment (R.100; A. App. 101)[1]

Plaintiffs-Respondents, a group of Sturgeon Bay residents who are members of an unincorporated Friends group ("Friends"), filed this action seeking to prevent the City from selling public lands for a private hotel development under a Development Contract executed January 8, 2015 between the City and a real estate developer, Sawyer Hotel, LLC. The parcel subject to sale under the Development Contract was platted from portions of Parcel 92 and the adjacent property at 100 East Maple Street ("Parcel 100") *See* Certified Survey Map, Tr. Ex. 2 (R.65:1). The court allowed the sale of City-owned land above the OHWM of Parcel 100, but enjoined the sale of the entirety of Parcel 92.

The evidence received at trial, including historic maps and subdivision plats, aerial photos, documents of title, historic newspaper articles, and geophysical evidence including soil borings, proved that Parcel 92 was submerged lakebed below the ordinary high water mark ("OHWM") of Lake Michigan at the time of Statehood. In the late 1800s and early 1900s, the City's predecessors in title 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. Wisconsin case law interpreting the public trust doctrine, Wis. Const., Art. IX, § 1, establishes that artificial filling of the bed of navigable waters by the adjacent riparian owner does not add to the riparian's title.

Because the property was created by historical filling, the City submitted an application for a "historic fill exemption" to construct structures on Parcels 92-100, which is otherwise prohibited by s. NR 506.085, Wis. Admin. Code. *See* Trial Tr., R.115: 175-76; Tr. Ex. 61 (R.91). The subsurface of the property was found to contain methane and other contaminants. Accordingly, the Development Contract obligated the City to obtain approval from the Wisconsin Department of Natural Resources ("WDNR") for a remediation work plan, a necessary component of a voluntary party liability exemption. *See* Tr. Ex. 42, at pp. 1-3 (R.94). In pursuing these environmental approvals from WDNR, the City was required to

[1] Appellants' and Respondents' Appendix are cited herein as "A. App. XXX" and "R. App. XXX" respectively.

demonstrate its title to Parcel 100. Prior to October 2014, there was no recorded title to that parcel. For Parcel 92, WDNR assumed the City's title on the basis of the City's deed and title insurance.

During the process of clarifying title, WDNR informed the City that portions of Parcel 100 lay below the OHWM of Lake Michigan. WDNR first notified the City in September 2013 that the bulkhead line on the west waterfront of Sturgeon Bay (marked by a steel dock wall at the edge of the water) was not the OHWM of Parcel 100. At that time, local WDNR water management specialist Carrie Webb advised the City that the OHWM was located landward of the bulkhead line, at the shoreline that existed prior to filling. *See* Trial Tr., R.116:150-51 (R. App. 148-149). WDNR's conclusions were eventually summarized in a recorded "Determination of Concurrence With The Approximate Ordinary High Water Mark" issued in October 2014 (the "Concurrence") (Tr. Ex. 6; R.67; A. App. 105-108).

The OHWM for Parcel 100 established in the Concurrence was based on a map dating from 1955, prepared in connection with the City's request for State approval of a bulkhead line. *See* Tr. Ex. 20 (R.94) (R. App. 106). The 1955 map showed that the proposed bulkhead line (labeled "shoreline"—the term originally given to bulkhead lines by statute[2]) was drawn at some distance waterward of the actual shoreline. WDNR's Concurrence concluded that the area of Parcel 100 landward of the "approximate OHWM" was formed by the natural accretion of lake sediments between two historic docks. Under Wisconsin law, naturally accreted areas add to the riparian's title. Thus WDNR concluded that the OHWM for Parcel 100—the boundary of the riparian property—had shifted waterward from the original shoreline.

WDNR's conclusion was based primarily on a comparison of the location of the shoreline in a 1925 Army Corps of Engineers map with the location shown in the 1955 map that accompanied the City's application for bulkhead approval. *See* Trial Tr., R.115:86-92 (R. App. 130-136) (Testimony of Heidi Kennedy); Tr. Exs. 6 (R.67; A. App. 105-109) & 20 (R.94; R. App. 106). The 1925

[2] *See* page 13, *infra*, discussing 1933 law authorizing "shore and dock or pier lines."

map indicated that originally Parcel 100 was under the waters of Sturgeon Bay. *See id.* & Tr. Ex. 17 (R.94).

Upon issuance of the Concurrence, the City quitclaimed to itself the portion of Parcel 100 above the OHWM, according to the legal description in the WDNR Concurrence. *See* Tr. Ex. 6 (R. 67:3-4; A. App. 108-109); Tr. Ex. 7 (R.68). The City did not request and WDNR did not issue any determination or concurrence with respect to the OHWM of Parcel 92.

The City proceeded to survey and establish the boundaries of the parcel to be conveyed under the Development Contract from parts of Parcels 92 and 100, and negotiated the Development Contract for the sale and development of the property that was executed in January 2015. Tr. Ex. 54 (R.84).

B. Procedural History

This declaratory judgment action was filed January 28, 2016. The case was commenced immediately following the dismissal of a federal action alleging identical claims, which was dismissed for lack of subject matter jurisdiction on January 26, 2016. The parties filed cross-motions for summary judgment in October 2016, which were denied after hearing on January 10, 2017. *See* Transcript of Ruling, R.114 (R. App. 111-117); Order Denying Summary Judgment, R.43. A two-day trial to the bench followed on February 9-10, 2017, after which the court entered judgment dated March 8, 2017, finding that the OHWM for Parcel 100 was established by the WDNR's Concurrence, but that WDNR had made no such determination with respect to Parcel 92. Based on the evidence establishing that Parcel 92 is a filled dock on the bed of Lake Michigan, the judgment enjoined the sale of Parcel 92 as well as uses inconsistent with public and navigation-related uses under the public trust doctrine. *See* Judgment, R.100 (A. App. 101).

ARGUMENT

I. PLAINTIFFS' CLAIM WAS NOT BARRED BY THE NOTICE OF CLAIM STATUTE, WIS STAT § 893.80.

On summary judgment, the circuit court rejected the City's argument that the Friends' claim was barred by the notice of claim

statute, Wis. Stat. § 893.80(1d). Relying on *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998), the circuit court concluded that the statute did not apply to the Friends' claim under the public trust doctrine. *See* Tr. of Ruling (R.112:25). In addition, on the undisputed facts offered by the Plaintiffs, the circuit court noted that "arguably there was substantial compliance and notice." (*Id.*) The Circuit court's conclusions should be affirmed as a matter of fact and law.

A. Public Trust Actions Fall Under a Recognized Exception to the Notice of Claim Statute.

In the *Gillen* case, *supra*, the Wisconsin Supreme Court carved out an exception to the notice of claim statute in a case seeking to enjoin the City of Neenah's commercial lease of an area of filled lakebed of Lake Michigan. The *Gillen* plaintiffs alleged among other claims that the lease constituted a statutory public nuisance under Wis. Stat. § 30.294 and was prohibited by the public trust doctrine). The court concluded that while the City of Neenah had actual knowledge of the claims, the plaintiffs had not complied with sec. 893.80(1)(b)[3] which requires an itemized statement of damages. *Id.* at 817, n.6. The Court then determined that sub. (1)(b) did not apply , reasoning:

> [T]he crux of this case is the state public trust doctrine, which recognizes that the state holds beds of navigable waters in trust for all Wisconsin citizens….
>
> The public trust doctrine allows a person to sue on behalf of, and in the name of, the State "for the purpose of vindicating the public trust." It is through the public trust doctrine that the plaintiffs bring their suit under Wis. Stat. § 30.294….The plaintiffs requested the equitable remedy of a permanent injunction in their complaint in this case. While they are no longer seeking that remedy—one specifically allowed by Wis. Stat. § 30.294—the fact that enforcement of the public trust doctrine can be achieved by injunction is significant to our

[3] Wis. Stat. § 893.80(1) was renumbered sec. 893.80(1d) without substantive change by 2011 Wis. Act 162. Cases cited herein interpret the notice of claim statute under the former numbering.

> determination of the applicability of Wis. Stat. § 893.80(1)(b)….
>
> * * *
>
> We conclude that there is an exception to Wis. Stat. § 893.80(1)(b) where the plaintiffs' claims are brought pursuant to the public trust doctrine under Wis. Stat. § 30.294, which provides injunctive relief as a specific enforcement remedy. It is irrelevant that the requested injunction in this case was not against the City of Neenah. Against whom the injunctive relief is sought is not a significant factor. Rather, our conclusion rests upon the fact that the plaintiffs brought this action in the name of the State to stop a violation of the public trust doctrine and that injunctive relief is a specific enforcement remedy available under § 30.294.

Id. at 820-23, 827 (citations and quotations omitted).

The City argues that the exception to the sub. (1d)(b) "itemized statement of damages" requirement created by *Gillen* does not apply here because the Plaintiffs' complaint does not include a statutory nuisance count under sec. 30.294.[4] Brief, at 14. Under the *Gillen* court's reasoning, this is a distinction without a difference. The City agrees that "both counts [of Plaintiffs' complaint] rest on the public trust doctrine, Art. IX, sec. 1 of the Wisconsin Constitution," and that "Plaintiffs seek an order enjoining the conveyance of the properties below the OHWM to any private entity." Brief in Support of Motion for Summary Judgment, R.27:3. *Gillen* supports the circuit court's conclusion that the "itemized statement of damages" of the s. 893.80(1d)(b) does not apply to the Friends' action for declaratory judgment

[4] Section 30.294, Stats., authorizes a cause of action for declaratory and injunctive relief to be brought by any person based on a violation of Ch. 30, Stats. The *Gillen* plaintiffs alleged that the construction of a manufacturing facility on the bed of Lake Michigan required a Ch. 30 permit. By contrast, the approval of Sturgeon Bay's bulkhead ordinance in 1955 authorized fill and structures in lieu of individual permit requirements. *See* Wis. Stat. §§ 30.12(1) and 30.11. Since no construction is proposed for the area waterward of the bulkhead line, structures in connection with the hotel development do not require a Ch. 30 permit and no claim lies under sec. 30.294.

seeking injunctive relief. Regardless of the disposition of that legal issue, however, the Friends substantially complied with the notice of claim statute as a factual matter.

B. As a Factual Matter, Plaintiffs Complied With the Requirements of the Notice of Claim Statute.

The City's argument under the notice of claim statute wholly disregards substantial, undisputed evidence that written notice of the public trust-based defect in the City's title was received by the City within 120 days of the execution of the Development Contract; that this notice clearly sought to stop the sale of public trust land (as plaintiffs would later request in their demand for injunctive relief); and that any prejudice accruing to the City was based on its decision to plow ahead with the development of Parcels 92-100, relying on its policy of title insurance and only partial confirmation of the OHWM from WDNR in the form of the Concurrence.

The City's assertion that the "absence of Plaintiffs' notice" caused the City to "spend such considerable time and monies on the development" (Brief, at 16) is unsupported. The City proceeded in the face of, not in the absence of, timely and specific notice of the public trust claim. Instead of acknowledging the evidence, the City asserts in conclusory fashion that the Friends' notice was untimely by back-dating the event giving rise to the claim to October 2014, when the WDNR issued its Concurrence. That argument is unavailing because the event giving rise to the public trust violation is not an OHWM determination, but rather the contract for the sale and private use of Trust property.

The notice of claim statute has two requirements: (a) notice of circumstances of a claim (also referred to in the case law as "notice of injury") within 120 days of the event giving rise to the claim; and (b) notice of claim including the address of claimant and relief requested, which is denied. *See* Wis. Stat. § 893.80(1d). Two principles guide the courts' analysis of whether notice is sufficient under sec. 893.80(1d). First, the claim must provide the governmental entity with enough information to decide whether to settle the claim. *See Gutter v. Seamandel*, 103 Wis.2d 1, 10, 308 N.W.2d 403 (1981). Second, courts construe claims so as to preserve bona fide claims for judicial adjudication, rather than cutting them off without a trial. *Id.* at 11.

On April 1, 2015, 83 days following the City's execution of the Development Contract, Attorney Frank Kowalkowski of Davis & Kuelthau sent a five-page letter to the City Clerk (Mayor Thad Birmingham and the members of the City Council, the City Plan Commission and WRA were also copied), advising that he had been retained by a group of concerned citizens who opposed the City's approval of a Tax Incremental Finance District "and the developments thereon, particularly the Sawyer Hotel Development." The Davis & Kuelthau letter expressly advised that "The Proposed Hotel Site is Subject to the Public Trust Doctrine Which Restricts the Use of the Property." The letter cited applicable case law and provided copies of many of the same historical maps that were later admitted into evidence at trial in this case. *See* Summary Judgment Affidavit of Linda Cockburn & Ex. A (R.33) (R. App. 1-13).

On April 2, 2015, the City of Sturgeon Bay issued a press release on the subject of "the issues raised in a letter dated April 1, 2015 addressed to the Sturgeon Bay City Clerk." *See* Response Affidavit of Mary Beth Peranteau, Ex. A (R.34:4; R. App. 17). The City's press release states that "the Public Trust issue was vetted over a period of more than 18 months by the City of Sturgeon Bay and its representatives." It further dismisses the assertions made in the Davis & Keulthau letter, stating: "The issues raised in the April, 2015 letter are not new issues. They were issues identified and dealt with by the City of Sturgeon Bay over the last 2 years." The Davis & Kuelthau letter and the City's response were reported in the local news media in a television segment and online article under the header: "Citizens' attorneys: Proposed Sturgeon Bay hotel could violate state law." Peranteau Affidavit, Ex. B (R.34:5-6; R. App. 18-19).

A letter dated June 23, 2016 to the City from Midwest Environmental Associates ("MEA"), co-counsel in this action, reiterated the "potential conflicts between the proposed Sawyer/Lindgren Hotel development and the rights of the public in navigable water and lakebed." *See* Response Affidavit of Sarah Geers (R. 35; R. App. 57-102). The public trust-based objection in both the Davis & Kuelthau and MEA letters to the City's proposed sale satisfy the requirements for notice of circumstances of claim within 120 days and for an itemized statement of damages—in this case an injunction to stop the sale—which was the clear goal of the objection letters.

This conclusion is supported by the holding in *Ecker Bros. v. Calumet County*, 2009 WI App 112, 321 Wis. 2d 51, 772 N.W.2d 240, an analogous action for declaratory judgment to invalidate a wind energy ordinance claimed to be in excess of the County's statutory authority. *Id.*, ¶ 2. In *Ecker Bros.*, the court of appeals reversed the trial court's dismissal of the case based on the language in s. 893.80(1d)(a) which provides: "Failure to give the requisite notice shall not bar action of the claim if the …[political] subdivision …had actual notice of the claim and the claimant shows to the satisfaction of the court that …failure to give the requisite notice has not been prejudicial…" *Id.*, ¶ 7. The court held that the plaintiffs provided actual notice through their correspondence with the County prior to the enactment of the ordinance, where the County responded by adopting the ordinance in lieu of "disallowing" their claim. *Id.* at ¶ 8.

The *Ecker Bros.* court recognized that s. 893.80(1d)(b) required the plaintiffs to (1) identify the claimants' address, (2) itemize the relief sought, (3) be submitted to the property County representative, and (4) disallowed by the County. It noted, however, that "strict compliance with these requirements is not necessary; rather substantial compliance is sufficient." *Id.*, ¶ 9, *citing DNR v. City of Waukesha*, 184 Wis. 2d 178, 197-98, 515 N.W.2d 888 (1994). So too, the Friends substantially complied with Wis. Stat. § 893.80(1d)(b), as evidenced by the undisputed evidence submitted on summary judgment.

The Davis & Kuelthau letter satisfies the 120-day notice of injury requirement of sub. (1d)(a) as well as notice of claim requirements under sub. (1d)(b). The attorney's address is considered the equivalent of the claimant's address for purposes of the notice of claim statute. *City of Waukesha*, 182 Wis. 2d at 198. The facts also show that the claim was effectively if not formally disallowed by the City's subsequent execution of the Development Contract over the objections stated in the letter.

The City fails to show any prejudice as a result of the form of the notice of claim received. Discussions between City officials in meetings following receipt of the MEA letter clearly show that the City intended to rely on the receipt of WDNR's Concurrence for Parcel 100 and its belief that a policy of title insurance protected its claim of title to Parcel 92. At a Waterfront Redevelopment Authority meeting on July 20, 2015, the City Attorney stated with

respect to Parcel 92: "There was never a question as to the title of the property that was purchased from the Door County Co-op…we obtained the title insurance commitment from the bank that it was purchased from. So that's why there's two different properties and two different circumstances…" (R.34:8). The July 20th WRA meeting was reported in the local press in an article entitled "DNR Concurrence Still a Bone of Contention At Sturgeon Bay WRA Meeting." (R.34:7; R. App. 20).

At a meeting of the Common Council on July 21, 2015, a member of the public asked the Council to comment on the statements made in the MEA letter. In response, the Mayor and City Attorney reiterated that there was title insurance for the portion of development parcel not covered by the DNR Concurrence. (R.34:14-16; R. App. 27-29). On this evidence, no reasonable inference arises that the City was deprived of the timely opportunity to comprise and settle the public trust claim, which is the guiding public policy objective underlying Wis. Stat. § 893.80(1d). *See City of Waukesha*, 182 Wis. 2d at 195.

In *City of Waukesha*, the court found substantial compliance with the notice of claim statute although the City did not expressly reject the DNR's claim. *Id.* at 201. The court found that Waukesha's correspondence with the State "make it clear that the city was not interested in resolving its problems prior to litigation." So too in this case, the evidence plainly shows the City gave no credence to the Friends' public trust-based objection and declined to address it. The Common Council proceeded in July 2015 to satisfy the Seller's contingencies in the Development Contract, including approving the final site plans. (R.34:12; R. App. 25).

Finally, specific notice of the plaintiffs' addresses, state law claims and request for relief was provided by the complaint in the Plaintiffs' federal lawsuit filed on September 27, 2015, and served on the City.[5] (R.34:18-27; R. App. 31-40). The federal claim provided the name and address of each plaintiff, alleged exactly the same State claims and requested the same declaratory and

[5] Because the federal complaint included the identical state law claims raised in the instant action, this case is distinguishable from *Probst v. Winnebago County*, 208 Wis. 2d 280, 287-88, 560 N.W.2d 291 (Ct. App. 1997), which held that a prior federal lawsuit alleging a single Section 1983 claim for violation of the plaintiffs' due process rights could not serve as notice of the plaintiff's subsequent state law claims.

injunctive relief as in the instant case. The City and WRA explicitly denied the federal claims. In early October 2015, the Common Council adopted a resolution in to convey the property to Sawyer Hotel Development LLC pursuant to the terms of the Development Contract. (R.34:32; R. App. 45). Shortly thereafter, the City filed an answer generally denying all the allegations of the federal complaint. (R.34:34-41; R. App. 47-54).

The City's notice of claim arguments must be rejected based on the facts established by the undisputed evidence applied to case law precedent.

II. PLAINTIFFS' CAUSE OF ACTION ACCRUED UPON THE CITY'S APPROVAL OF THE DEVELOPMENT CONTRACT IN 2015 AND WAS TIMELY FILED.

The City's appeal next asserts that the Friends' cause of action is time-barred, because "Plaintiffs' theory of liability has been known and available for decades." (Brief, at 17.) But the City's brief is devoid of analysis regarding the date that the elements of Plaintiffs' claim accrued.

As set forth in the Complaint (R.1), the Friends challenged the City's right to sell property for a private commercial development under the terms of a January 8, 2015 Development Contract. Their claim accrued upon the execution of that contract and not before. Plaintiffs do not have a generalized objection to "fill activity" (Brief, at 18), or other unspecified "intrusion into the public trust (*Id.* at 19). The prior riparian use of Parcel 92 by the Door County Co-op and its predecessors in interest as a wharf for access to navigable water for grain shipping and related storage did not offend the public trust doctrine.

A. Historic Filling Was Not a Public Trust Violation Triggering the Running of a Statute of Limitations.

The City asserts that "Plaintiffs' claims rest upon fill activity that occurred more than a century ago…." (Brief, at 17.) Not so. Plaintiffs' claim explicitly rests upon the City's January 2015 Development Contract by which it authorized the sale of public trust lands to a private party for commercial use. Both the conveyance and use are prohibited under the public trust doctrine. By contrast, historical filling, whether before or after the approval

of the 1955 municipal bulkhead line, was not a public trust violation and thus did not commence the running of any statute of limitations nor create a basis for the application of laches.

The circuit court found that Parcel 92 was originally created by extending and filling under a dock in the late 1800s to early 1900s. *See* Tr. Ruling, R.114:4 (R. App. 13) ("Lot 92 was basically the remnants of a dock and operating system started by one of the original riparian owners. . . . From the historical record it's clear he extended the dock. He filled underneath the dock…"). *See also* Phase I environmental site assessment historical use summaries in Tr. Exs. 37 (R.48:20-23) and 38 (R.78:15-17). The original dock on the lakebed was constructed by Henry Harris, as authorized by the legislature in Ch. 82, Laws of 1878. Filling under the dock by Harris and his successors in interest was later grandfathered by statute.

Prior to 1933, the State did not regulate the filling of lakebed. Chapter 455, 1933 Laws of Wisconsin repealed and recreated Wis. Stat. § 30.02(1), which authorized municipalities to establish by ordinance "both a shore and dock or pier line, or either of such lines" along any section of the shore of any navigable waters within its boundaries. The 1933 legislation created s. 30.02(1)(b), Stats., making it unlawful to deposit any material or place any structures on the bed where no shoreline has been established or beyond the shoreline so established. Pre-1933 filling was subsequently grandfathered in 1977 by the legislature's enactment of s. 30.122, Stats., which provided that "all permanent alterations, deposits or structures affecting navigable waters . . . which were constructed before December 9, 1977 and which did not require a permit at the time of construction, shall be presumed to be in conformity with the law…."

As a regulatory matter, filling of lakebed does not establish a public trust violation unless such fill impairs the public right of navigation. The "grandfathering" of historic fill represents the legislature's determination that fill existing prior to 1977 that did not require a permit when deposited does not impair public rights.

It was not the filling of the lakebed, but rather the City's proposed sale for private commercial development that is the basis for this action. The public trust doctrine requires the City to hold

these filled lands in trust and prohibits a conveyance for private development.

B. The Plaintiffs' Claim is Not Time-Barred Because the Prior Uses of the Parcel 92 Were Permissible Riparian Uses Under the Public Trust Doctrine.

The circuit court appropriately denied the City's statute of limitations defenses on summary judgment because there is no evidence to support the conclusion that the Friends' claim accrued at an earlier date. Historic uses of Parcel 92 were not hostile to the State's ownership because they were riparian uses authorized by statute and common law to be exercised below the OHWM. The dock and the Door County Cooperative (originally Teweles & Brandeis) grain elevator which is still standing and warehouse structures previously located on the Parcel 92 are "***harbor facilities***" within the meaning of Wis. Stat. § 30.01(3). "Harbor facilities" are broadly defined by statute to include "every facility useful in the maintenance or operation of a harbor, including transportation facilities of all types, terminal and storage facilities of all types, wharves, piers, slips, basins, ferries, docks, bulkheads and dock walls, and floating and handling equipment, power stations, transmission lines and other facilities necessary for the maintenance and operation of such harbor facilities." (emphasis added). Thus, there was no prior use of Parcel 92 that caused a public trust claim to accrue that would trigger the running of any statute of limitations.

C. The City Fails to Cite Any Applicable Statute of Limitations that Would Bar the Friends' Claims.

In addition to relying on historical filling as the event triggering the running of a statute of limitations, the City cites various statutes of limitations including Wis. Stat. § 893.33(2), apparently to suggest that the 30-year marketable title statute of limitations bars the Friends' claim. (Brief, at 17.) This statute, which the City mistakenly characterizes as an "adverse possession statute of limitations,"[6] by its own terms does not apply "while the record title to real estate or interest in real estate remains in the

[6] The City did not plead adverse possession as an affirmative defense, nor submit affidavit evidence to support such a defense. Accordingly any argument in this regard is waived. *See Anderson v. City of Milwaukee*, 559 N.W.2d 563, 208 Wis.2d 18 (Wis., 1997)

state." Wis. Stat. § 893.33(5); *see also Baraboo National Bank v. State*, 199 Wis. 2d 153, 162, 544 N.W.2d 909 (Ct. App. 1996) (holding State's interest in mineral rights not barred by statute of limitations in s. 893.33 and was not subordinate to bank's mortgage).

The City's citation to cases from other jurisdictions are not on point. In *Capruso v. Village of Kings Point*, 16 N.E.3d 527 (N.Y. Ct. App. 2014), plaintiffs brought a public trust challenge against the Village based on its proposed construction of a public works facility in a wooded park. The *Capruso* court rejected the Village's statute of limitation arguments, finding that the use of the area for nonpark purposes was an ongoing public trust violation, analogous to an ongoing nuisance or trespass. *Id.* at 531. It is unclear how the reasoning in *Capruso* furthers the City's claim that the Friends' action is time barred, which in any case was filed 13 months after the approval of the Development Agreement.

The other cases cited by the City are equally unavailing. *Britton v. Dep't of Conservation*, 974 A.2d 303 (Maine 2009) was a dispute between private property owners that was remanded for a ruling on the defendant's affirmative defense that plaintiff's **riparian rights** were extinguished by adverse possession. *Id.* at 307. The *Britton* court specifically noted that an adverse possession claim against the State was not authorized by statute. *Id.* In *Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc*., 142 Cal. App. 3d 166 (Cal. App. 1983) (withdrawn from publication)[7] the court quoted with approval the Supreme Court of California's ruling in *People v. Kerber*, 152 Cal. 731, 733-34, 93 P. 878 (1908), which established that no claim of adverse possession lies against the State based on possession of public trust property:

> Property thus held by the state in trust for public use cannot be gained by adverse possession, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes not consistent with the public use.... *The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights.* (internal citations omitted; emphasis added)

[7] This case was withdrawn from publication and is not citeable. The cases is cited here solely to refute the City's argument.

The analysis in *Kerber* is especially persuasive in this case because the City, a local unit of government, holds record title and is thus well situated to uphold the State's interest as a fiduciary. The City has a duty to protect the rights of the public, and should not be heard to claim a proprietary interest adverse to the public.

D. There Was No Delay in the Filing of the Friends' Public Trust Claim.

The City asserts that laches applies to bar the Friends' claim because their "theory and evidence place[] them in the shoes of any person allegedly aggrieved by intrusion into the public trust over the past century." (Brief, at 19). The City's laches argument thus restates the false premise that the Friends' claim is a challenge to historical filling of the lakebed. As established above, the claim is based on the Development Contract for the sale to a private party of lands owned in trust for the public.

The City's claim of prejudice based on its expenditure of "significant time, labor, and financial resources" (*Id.*) is not the consequence of Friends alleged "delay" in bringing this action, but rather results from the City's failure to heed repeated objections to the sale, both before and after the execution of the Development Contract. The evidence further shows that the City failed to register the warning from the Deputy Secretary of the Board of Commissioners of Public Lands, six months before the Development Contract was approved, that there was a "strong likelihood" that "most or all of such parcel [Parcel 92] is below the ordinary high water mark." *See* Trial Tr., R.116:109-116; 121-22; Tr. Ex. 57 (R.87:3-4); Tr. Ex. 60 (R.90).

The City fails as a factual matter to establish the three elements for a defense of laches set forth in their brief (p. 18). To the contrary, the evidence wholly refutes the notion that the Friends somehow "acquiesced" and unreasonably delayed in their challenge to the City's plan to sell trust property for private development. *See* Section I.B, *supra*.

III. THERE WAS NO DETERMINATION BY WDNR OF THE OHWM FOR PARCEL 92 FOR THE TRIAL COURT TO REVIEW.

A. The City Mischaracterizes WDNR's Decisions Prior to this Case, Contrary to Findings of Fact Made by the Trial Court Based Upon Substantial Evidence Admitted at Trial.

Sections III and IV of the City's Brief assert that the circuit court was required to grant great weight deference to WDNR's "determination that the Department need not determine an OHWM with respect to Parcel 92." (Brief, at 21.) This argument is premised on the assumption that WDNR in fact made such a determination. The circuit court made express findings rejecting that conclusion. Based on the testimony of the City Planner, Marty Olejniczak, and former and current WDNR water division staff, Heidi Kennedy and Carrie Webb, the trial court found:

> If you look throughout all of the testimony, the records are replete with the DNR saying, "We weren't asked to determine the high water—ordinary high water mark on this parcel. We [DNR] assumed it's good, because the City says it's good and the City has a title policy that says it's good." No one made the determination.

Tr. Ruling, R.114:4-5 (R. App. 114-115). The circuit court's findings of fact are reviewed under the deferential "clearly erroneous" standard. *Noll v. Dimiceli's, Inc*., 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

B. WDNR Made No Determination Concerning the Location of the OHWM on Parcel 92.

The City claims that "taking into consideration that the City had title insurance for Parcel 92, that Parcel 92 was privately owned and used for over 100 years, and the location of Parcel 92 as being landward of the OHWM on Parcel 100, the DNR came to the conclusion that all of Parcel 92 was above the OHWM." (Brief, at 24. This sentence grossly misrepresents the facts and is wholly unsupported by the deposition and trial testimony of WDNR's local water management specialist, Carrie Webb.

According to her testimony and that of City Planner Marty Olejniczak, Webb and Olejniczak had a meeting in September 2013 at time Mr. Olejniczak sought a letter from WDNR confirming the City's title to Parcel 100 up to the bulkhead line. The parties reviewed the 1955 map from the bulkhead file, and Ms. Webb explained that "generally, what we do is, determine that ordinary high water mark is that—where the original bank or shoreline is." Trial Tr., R.116:155 (R. App. 153). As Ms. Webb testified, "[w]hen he had a problem with my answer, I forwarded him to Liesa Lehmann and Megan Correll, our section chief and lawyer." *Id.*

In October 2014, more than a year after that initial discussion with Carrie Webb, WDNR issued a "Determination of Concurrence with Approximate Ordinary High Water Mark for 100 East Maple in the City of Sturgeon Bay" (the "Concurrence"). The City asserts that "DNR relied upon many sources available to it—including property inspections, historical maps, original government surveys and aerial photos and other information." (Brief, at 21-22.) These sources of information were indeed reviewed for purposes of issuing the Concurrence. But the City wholly fails to cite any testimony or documents supporting its contention that WDNR "*made a determination that the Department need not determine an OHWM with respect to Parcel 92*." (*Id.* at 23.)

The evidence at trial is to the contrary. Carrie Webb confirmed that she never issued any OHWM determination for the City and specifically that in her discussion with Mr. Olejniczak the OHWM of Parcel 92 was not discussed. *See* Trial Tr. R.116:151-55 (R. App. 149-153) & Tr. Ex. 105 (R.56) (R. App. 103-104). Heidi Kennedy, WDNR's former waterway and wetland policy coordinator and the primary author of the Concurrence, testified that the Concurrence was limited to Parcel 100 and that the City did not ask for an OHWM determination with respect to Parcel 92. *See* Trial Tr. R.115:80 The evidence at trial further supports the circuit court's finding that the City's position is the result of a misunderstanding. The evidence shows that WDNR merely made an assumption that the City had title to Parcel 92 for regulatory eligibility purposes, in order to pursue a voluntary party liability exemption for contamination on the site. *See* Tr. Ex. 56 (R.86). As evidenced by the testimony of the City Planner, Mr. Olejniczak, the City's reliance on WDNR's "assumption" to establish the City's

title was unreasonable. *See* Trial Tr., R.116:121-23 (testimony of Mr. Olejniczak that the City did not receive written confirmation from WDNR of its title to Parcel 92 and the title company would not insure over the Friends' public trust claims).

The City also claims that the Friends' position is "absurd" because Parcel 92 "sits landward of the OHWM on Parcel 100" and "has no access point to Lake Michigan." (Brief, at 24.) Parcel 100 is L-shaped and the boundaries extend to a strip between Parcel 100 and the water's edge. *See* Tr. Ex. 4 (R.94; R. App. 105). But the OHWM for Parcel 100 as surveyed in the Concurrence results in the strip of land at the water's edge in front of Parcel 92 being owned by the public. This area of Parcel 100 was created by filling between the bulkhead line/dock wall and the end of the historic dock which is Parcel 92. The water can be accessed from Parcel 92 via the public portion of Parcel 100.

C. The City's Adoption of a Bulkhead Line Did Not Affect the Location of the OHWM or the Ownership of the Property.

The City asserts that WDNR's determination of the OHWM for Parcel 100 "rests on further statutory reasons…that is, the DNR considered the importance to be given the shoreline in the 1955 bulkhead line map as a good approximation of the location of the OHWM." (Brief, at 22.) This argument misconstrues the reasoning in the Concurrence as well as the regulatory status that arises upon approval of a bulkhead line.

In 1955, the Public Service Commission approved a municipal bulkhead line for the west side of Sturgeon Bay, and a steel dock wall was constructed at that line. The portion of Parcel 100 below the OHWM identified in the Concurrence was land created by filling formerly submerged lakebed behind the dock wall. *See* Tr. Ex. 6 (R.67; A. App. 105-109). The City was informed by DNR that this area was subject to the public trust doctrine and could not be developed. *See* Trial Tr., R.115:91 (Testimony of Heidi Kennedy) & Tr. Ex. 20 (R.94) ("fill between the surveyed approximate ordinary high water mark that is marked in red on Exhibit 20 and the actual bulkhead line…was determined to not add to the riparian's title."). This is precisely the reason why the City relocated its project behind the OHWM on Parcel 100, as detailed in the City's brief, at 5-6.)

The OHWM of Parcel 100 set forth in the Concurrence is a mapping of the location of the then-existing shoreline shown in a hand-drawn map included with the City's 1955 request for approval of the bulkhead line. The map depicted the approximate location of the shoreline in relation to the location of the proposed bulkhead line. WDNR recognized that the year 1955 has no particular significance for determining the historic OHWM prior to the alteration of the shoreline. Thus, WDNR reviewed maps and other evidence to conclude that the 1955 shoreline on Parcel 100 as depicted on the map was formed by accretion between two historic docks. *See* Tr. Ex. 6 (R.67:2-3; A. App. 106-107). Based on the common law that accretions to the shoreline add to the riparian's title, WDNR concluded that the OHWM (the boundary between the riparian's and the public's property) had shifted to incorporate the accreted area. This conclusion has nothing to do with regulatory approval of the bulkhead line, which is located waterward of the OHWM.

The City confuses the regulatory consequences of bulkhead line approval with the question of title. As the Wisconsin Attorney General has opined:

> [W]ith respect to the bed of the navigable water landward of the established bulkhead line, ownership does not pass to the private riparian. Rather, the riparian obtains the limited right to fill the bed landward of the bulkhead line, and to use it exclusively once he has filled it, unless and until the legislature chooses to revoke that right.

1974 Wisc. AG LEXIS 1111, *9 (emphasis added). The Attorney General's opinion and the Concurrence (R.67) reflect the common law that fill by a riparian does not result in the riparian acquiring title. Instead, s. 24.39, Stats., provides that filled areas behind a bulkhead line are subject to the Board of Commissioners of Public Lands' lease authority. By statute, such leases are limited to public and navigation related uses, including "the improvement of navigation or for the improvement or construction of harbor facilities as defined in s. 30.01."

The statutes and Wisconsin common law affirm that approval of a bulkhead line does not transfer title of filled lands behind the bulkhead to the riparian owner. Instead, use of filled lands behind the bulkhead is restricted to public and navigational purposes consistent with the public trust doctrine.

IV. THE CIRCUIT COURT CORRECTLY APPLIED ESTABLISHED PRECEDENT TO FIND THAT SUCCESSIVE RIPARIAN OWNERS' FILLING OF THE LAKEBED AFTER STATEHOOD, WHICH CREATED PARCEL 92, DID NOT REMOVE THAT PROPERTY FROM THE PUBLIC TRUST.

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 *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 84 N.W. 855 (1915), the Wisconsin Supreme Court held:

> The United States never had title, in the Northwest Territory, out of which this state was carved, to the beds of lakes, ponds and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people.

Over a century of Wisconsin case law also establishes the following:

(1) The boundary between public trust lakebed and riparian upland is the ordinary high water mark ("OHWM"). Title to the bed of the lake below the OHWM is in the State. *Bilot*, 109 Wis. at 425 ("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…").

(2) The OHWM, as the boundary of the riparian's title, may relocate as a consequence of natural accretion or reliction. *Doemel v. Jantz*, 180 Wis. 225, 231, 193 N.W. 393 (1923) ("a riparian owner is entitled to the land formed by gradual accretions and as a result of relictions.")

(3) Artificial filling which creates land from formerly submerged lakebed does not change the location of the OHWM or the ownership of the formerly submerged area as public trust property. *Menomonee River Lumber Co. v. Seidl*, 149 Wis. 316, 320-321, 135 N.W. 854 (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.")

(4) If the riparian owner is not responsible for dredging or fill that creates land from formerly submerged lakebed at the edge of the riparian's property, then those lands add to the riparian's title under the rationale that riparian rights are recognized to include the right to access the water's edge. *DeSimone v. Kramer*, 77 Wis. 2d 188, 199, 252 N.W.2d 653 (1977) ("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.")

* * *

The City argues that there are "several limitations" to the public trust doctrine which "undermine Plaintiffs' argument" (Brief, at 30), including the ability of the legislature to authorize limited encroachments upon lakebeds and the riparian rights of reasonable access and the right to place a pier. While it is true that the legislature can and does authorize encroachments on lakebeds, and riparian owners can and do place piers for access to navigable waters, neither of these actions change the ownership of lakebed.

The City's arguments misconceive the origin of the public trust doctrine and the limited circumstances under which the OHWM *as a property boundary* may be relocated from the original public trust boundary which was established upon Statehood.

The "ordinary high water mark" is a term of art that was originally defined in the context of establishing the boundary within which the public may exercise constitutional rights in navigable water. In *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816 (1914), the court defined the OHWM as "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." That case determined the extent of public use rights in a navigable stream, as to which the court ruled:

> Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks. When so confined it is immaterial what the character of the stream or water is. It may be deep or shallow, clear or covered with aquatic vegetation.

156 Wis. at 272. *Diana Shooting Club* was thus a case about public **use**, not public **ownership**. As to ownership, the court held: "So far as the right of navigation, and the rights incident thereto, are concerned, it is entirely immaterial who holds the title, the state or the riparian owners." *Id.* at 268.

The OHWM of a navigable waterbody is most commonly determined for the purpose of fixing the extent of WDNR's regulatory jurisdiction under Ch. 30, Wis. Stats., and county shoreland zoning authority under s. 59.694, Stats. Because the OHWM also marks the boundary of the bed of a lake (as may be affected by natural accretion or reliction), it is also a property boundary. However, as held in the *Diedrich* and *Menomonee Lumber* cases (Section V.B., *infra*), when property has been created from artificially filling lakebed, the location of the OHWM does not change for title purposes. Thus the regulatory boundary of navigable waters can diverge from the property boundary of the public trust.

V. THE GREAT WEIGHT OF THE EVIDENCE SUPPORTS THE CIRCUIT COURT'S FINDING THAT ALL OR A SUBSTANTIAL PART OF PARCEL 92 IS OWNED BY THE STATE IN TRUST FOR THE PUBLIC .

A. The Evidence at Trial Supports the Trial Court's Finding that Parcel 92 is Formerly Submerged Lakebed That Was Filled by the Riparian Owner.

The trial court's findings of fact must be sustained unless they are clearly erroneous, that is, against the great weight and clear preponderance of the evidence. *Phelps v. Physicians Ins. Co*., 768 N.W.2d 615, 2009 WI 74, ¶ 19, 319 Wis. 2d 1. The undisputed evidence admitted at trial establishes that Parcel 92 was once a dock that extended from the shore onto the lakebed of Sturgeon Bay. Surveyor Donald Chaput testified concerning several maps showing the approximate location of the shoreline prior to and at the time the docks were extended and filling commenced on Parcel 92. These exhibits show the location of the Lake Michigan shoreline in relation to Parcels 92-100 according to several independent sources, including the 1873 plat of survey of the Village of Bay View, the 1888 plat of Harris' First Addition to Bay View, and the 1891 Sanborn fire insurance map. *See* Trial Tr., R.115:24-33 (testimony of Donald Chaput) & Tr. Exs. 8 (R.94); 9 (R.69), 10 (R.94), 11 (R.94) and 12 (R.94). As WDNR's former waterway policy coordinator Heidi Kennedy testified, the shoreline in historic maps is used to approximate the OHWM for filled sites. Trial Tr., R.115:92 (R. App. 136).

The chain of title establishes that no deed or other conveyance with a legal description corresponding to Parcel 92 existed until the 1950s, long after the historic dock was extended and filled beneath. *See* Trial Tr., R.115:36-37 (testimony of Don Chaput) & Tr. Ex. 14 (R.71). Other exhibits show how the boundaries of Parcel 92 as depicted in multiple maps, made at different times, by different companies all tend to align Parcel 92 with the location of a historic dock extended from the shoreline. *See* Tr. Ex. 19 (R.94).

The evidence at trial established and the trial court duly found, that Parcel 92 was filled lakebed. The character of the lands as filled is also established by environmental site assessments identified in the affidavit of Lori Huntoon, as well as the regulatory

status of Parcels 92-100 as a "historic fill site" under Wisconsin's solid waste laws. Further, the fact that Teweles & Brandeis and other riparian owners caused the fill is shown by historic newspaper articles which establish that the docks were filled to support structures and traffic associated with the riparian owners' waterfront commerce. *See* Tr. Exs. 29 & 30 (R.72 & 73).

The City offered no competing evidence to suggest that Parcel 92 is anything other than a historic dock upon which buildings were constructed and fill placed beneath. Instead, the City relies on a theory that because the City itself did not cause the filling, that the filled area is considered "accretion" which adds to its title. (Brief, at 30.) This argument concedes the character of Parcel 92 as filled lakebed.

B. The City's Title is Only as Good as its Predecessors in Interest, Who did not Obtain Title to the Lakebed by Filling.

The City did not acquire title to any more property than that owned by its predecessors it title, whose acts of filling did not add to their riparian estate. Wisconsin case law establishes that a riparian's act of filling of lakebed below (waterward of) the OHWM does not change the character of those formerly submerged lands as constitutionally protected trust property. In *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248 (1877), the plaintiff built an embankment extending 85 feet into Lake Michigan from his riparian shoreland, which the railroad later sought to condemn for tracks along the water. *Id.* at 261. The *Diedrich* court ruled that the plaintiff had no title to the filled embankment and thus no claim against the railroad for compensation based on a taking. *Id.* at 272.

In ruling on Diedrich's takings claim, the court held 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,[8] vesting no title in him who made it.

Id. at 263. *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.")

C. Parcel 92 was Not Created as the Result of Accretion-Whether Natural or Manmade.

The conclusion that Parcel 92 is a filled structure excludes the possibility that it was created via natural accretion. As such, the City turns to the theory of "artificial accretion" articulated in the *DeSimone* and *Pugh Coal* cases.

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 as to whether a purchaser's title included lands formed at the shoreline by deposits of spoils from a federal dredging project. The *DeSimone* court held: "[T]he made land cannot be considered accretion in the classic sense; it was not gradual, not gained 'by small and imperceptible degrees.'" *Id.* at 198. However, this was not dispositive in light the necessity of preserving the purchaser's riparian rights based on ownership of the shore: "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

[8] "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).

199. Accordingly, the *DeSimone* court held that title to the "artificially accreted" lands was conveyed as part of the purchase.

In *W.H. Pugh Coal Co. v. State*, 105 Wis. 2d 123, 312 N.W. 856 (Wis. App. 1981), the court of appeals applied the rule articulated in *DeSimone* in an enforcement action, upon the State's failure to prove that the lands were formed by or on behalf of the riparian owner. In that case, Pugh's predecessor in interest granted an easement to the federal government for access to a lifesaving station on the lakebed between the shore and a remote lighthouse. The grantor and his successors retained ownership of the land. Upon abandonment of the lifesaving station, the easement provided that the government's 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.

These cases establish that riparian rights should be preserved where filling—through no fault of the riparian—results in cutting off access to navigable waters. But fill <u>by the riparian</u> does not add to the riparian's title, because recognition of title under that circumstance would permit riparians to incrementally claim title to vast tracts of public lakebed by filling, thus eviscerating the public trust doctrine.

The trial court ruled that the *DeSimone* and *Pugh Coal* doctrine did not apply, because the evidence established that Parcel 92 was created by prior riparian owners. As in *Diedrich*, the City's predecessors in title deliberately caused the fill. The City's theory that it should benefit from its predecessor riparian owner's acts of filling leads to absurd results. It suggests that a riparian owner can create land from lakebed and transfer it to another who then acquires title simply due to the passage of time, on the theory that as a transferee he is not responsible for the filling. This proposed rule is contrary to the fundamental rule of property that one cannot convey what he does not own.

The City's predecessors in interest who claimed title never acquired ownership of filled lakebed. Accordingly, the City itself does not have title to Parcel 92 in a proprietary capacity. As a subdivision of State government, however, the City is in a unique position to exercise the duties of the State as trustee to preserve Parcel 92 for public access and uses related to navigation and its incidents.

VI. THE SCOPE OF THE INJUNCTION ENTERED BY THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE.

The City argues (Brief, at 25-26) that the Friends are not entitled to an injunction absent proof of the location of the OHWM on Parcel 92. This argument ignores the import of *Diedrich v. Northwestern Union Railway Co*., 42 Wis. 248 (1877), discussed in Section V.B., *supra*, which addresses the burden of proof to establish title to lakebed in the name of the State. The *Diedrich* court held on analogous facts that it was unnecessary to determine the precise location of the OHWM for purposes of declaring title. The *Diedrich* court reversed a condemnation award to the plaintiff, finding that he did not have title to an embankment extending 85 feet from the natural shore in front of his riparian land. The court found that the embankment was an intrusion on the public lakebed "vesting no title in him who made it." *Id.* at 263. In so holding, the court stated: "We have here taken no notice of the exact line of boundary upon lakes or ponds; whether it be high water or low water, or the water's edge; *the exact line of boundary being immaterial in the case of so extended an intrusion.*" *Id.* at 272 (emphasis added).

The circuit court appropriately exercised its discretion to enjoin the sale and commercial use of Parcel 92 with the caveat that the injunction can be modified upon WDNR's determination of an OHWM for the property:

> There may be some portion of that lot which may be above the ordinary high water mark. No one has shown me exactly where the ordinary high water mark will be.... [N]ever has the Department made an actual determination of the ordinary high water mark on Parcel 92. That is a parcel that was filled by the riparian owner. That means that the owner of that property cannot claim title to that dryland. And absent some determination at some

> point in time by the Department where the actual high water mark is, which I certainly don't have sufficient evidence today, it can't be sold…. And I'm going to enjoin the sale of any of 92 waterward of the ordinary high water mark, which has never been established. And, quite frankly, from the evidence that has at least been arguably presented, may be the whole lot….

Tr. Ruling, R.114:4-6 (R. App. 114-116). The scope of the injunction is supported by the evidence at trial and the applicable law. The court of appeals "will not reverse a discretionary decision of the circuit court, when it applies the correct legal standard to a reasonable view of the facts of record and reaches a conclusion a reasonable judge could reach." *Rodak v. Rodak*, 150 Wis. 2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989).

The City's reliance on *State v. McDonald Lumber Co.*, 18 Wis. 2d 173, 118 N.W.2d 152 (1962) is misplaced, because that case concerned the State's burden of proof to be entitled to a remedial injunction for a violation of the State's navigable waters laws. In that case, the State filed a complaint alleging that the defendant unlawfully excavated and filled the bed of Green Bay. The court found that the State failed to meet its burden of proof "with respect to the area within which fill constitutes a nuisance and the area within which the court by way of abatement could require the fill to be removed." *Id.* at 177. Thus, the State was required to prove the location of the OHWM to establish that a violation occurred, and to specify the location in which the injunction would be enforced.

The City's citations to *State v. Trudeau*, 139 Wis. 2d 91, 408 .W.2 337 (1987) and *State v. Kelley*, 2001 WI 84, 244 Wis. 2d 777, 629 N.W.2d 601 (2001) are equally unavailing. In *Trudeau*, the State sought an injunction that would require removal of structures from the bed of Lake Superior, necessitating proof of the OHWM as the boundary of the lakebed. *See Trudeau*, 139 Wis. 2d at 96-97. In *Kelley*, the State similarly sought an injunction for a violation of s. 30.12, Stats., based on the placement of fill on lakebed. Contrary to the City's apparent argument, the court in *Kelley* did not overturn the judgment on the basis the State failed to prove the location of the OHWM. Rather, the court remanded the case for development of the facts and legal analysis, holding: "The issue of whether a property owner is required to obtain a permit before depositing fill on land submerged below navigable water regardless of whether the land is above or below the ordinary high

water mark is a complex question that affects not only the parties to the present lawsuit but the people of the State of Wisconsin." Thus, the issue in *Kelley* was the geographical extent of DNR's regulatory jurisdiction over filling.

VII. THE CITY'S OTHER CLAIMS OF ERROR ARE WITHOUT MERIT.

A. The City's Objection to the Trial Court's Admission of Plaintiffs' Expert Testimony is Based on a Strawman Argument.

The City objects to the admission of testimony from Plaintiffs' experts—surveyor Don Chaput and hydrogeologist Lori Huntoon—on the basis that the testimony of each is "unreliable" under the *Daubert* standards of admissibility. The City's argument should be disregarded for three reasons. First, *Daubert* is a federal rule of evidence, and the City has failed to cite applicable Wisconsin law. Second, the claim that these experts were unqualified to testify is based on a manufactured argument that each offered an opinion as to the location of the OHWM, which they manifestly did not do. *See* Trial Tr., R.115:49 (testimony of Chaput, confirming he has "no opinion as to the location of the ordinary high water mark on lot 100 or lot 92"); R.115:184-85 (similar testimony from Huntoon). Third, Plaintiffs' experts were well qualified to offer the opinions they did, and the City failed to preserve any objection in this regard. The maps, surveys and documents of title offered through Chaput's testimony were admitted to show the approximate location of the original shoreline prior to development, and the chain of title and associated pattern of development that included the extension of docks. The environmental reports and soil boring logs offered through Huntoon were for the most part commissioned by the City itself, and were introduced for the purpose of establishing the character of the subsurface of Parcels 92-100 as artificially filled, not naturally accreted. The respective qualifications of these experts to offer such testimony is undisputed and was not challenged at trial. For these reasons, the City's argument should be summarily rejected.

B. Historic Newspaper Articles Were Properly Admitted Under the Ancient Documents Hearsay Exception.

The Court should reject the City's appeal of the trial court's evidentiary ruling on the ground that its argument is undeveloped. *See State v. Pettit*, 171 Wis.2d 627, 646-47, 492 N.W.2d 633 (Ct.App. 1992). The City made a general objection at trial to the introduction of historic newspapers on the basis of "hearsay that's contained within the actual exhibits themselves." Trial Tr., R.115:129-30. But the City has failed to identify which specific exhibits it contends are "hearsay" not covered by the ancient documents exception. This rule provides for the admission of hearsay statements if the statement is contained in a document that is more than 20 years old and the document is properly authenticated. Wis. Stat. §§ 908.03(16), 909.015(8); *see also Aon Risk Servs., Inc. v. Liebenstein*, 2006 WI App 4, ¶ 23 n.6, 289 Wis. 2d 127, 710 N.W.2d 175. As a matter of law, the trial court appropriately exercised its discretion to admit the Sanborn maps, which fall within the "ancient document" exception to the hearsay rule. The City's objection based on relevance is unsupported. Admission of the ancient newspaper articles and historic maps was well within the trial court's discretion.

CONCLUSION

Defendant-Appellants' arguments on appeal should be rejected as unsupported by the applicable law, the undisputed facts on summary judgment, and the facts developed at trial. The circuit court crafted an injunction tailored to the evidence that appropriately acknowledges that WDNR may in the future make a finding as to the OHWM for Parcel 92, and that such finding may result in a remnant of Parcel 92 being excluded from the public trust.

For the foregoing reasons, Plaintiffs-Respondents respectfully request that this Court AFFIRM.

Dated: August 21, 2017

Respectfully submitted,

/s/ Mary Beth Peranteau

WHEELER, VAN SICKLE & ANDERSON, S.C.
Mary Beth Peranteau, State Bar No. 1027037
44 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703
(608) 255-7277
(608) 255-6006 fax

MIDWEST ENVIRONMENTAL ADVOCATES
612 West Main Street
Madison, Wisconsin 53703
(608) 251-5047
(608) 268-0205 fax

Attorneys for Plaintiffs-Respondents

CERTIFICATION
PURSUANT TO WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief confirms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 10,706 words.

By: /s/ Mary Beth Peranteau
Mary Beth Peranteau, State Bar No. 1027037

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

Attorneys for Plaintiffs-Respondents

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have caused to be filed an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12)(f) and (13)(f).

I hereby further certify that the electronic brief is identical in content and format to the printed form of the brief filed this date.

A copy of this certificate has been served with the paper copies of the brief, filed with the Court and served on opposing parties.

By: /s/ Mary Beth Peranteau
Mary Beth Peranteau, State Bar No. 1027037

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

Attorneys for Plaintiffs-Respondents

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with s. 809.19 (2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the opinion of the court of appeals; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22st day of August, 2017.

By: /s/ Mary Beth Peranteau
Mary Beth Peranteau, State Bar No. 1027037

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

Attorneys for Plaintiffs-Respondents