

**Before The
State Of Wisconsin
DEPARTMENT OF NATURAL RESOURCES**

In re: Petition of Friends of the Sturgeon Bay
Public Waterfront, et al., for a Full Hearing and
Declaratory Ruling Determining the Location of
The Ordinary High Water Mark (OHWM)
Along the Shore of Sturgeon Bay on a Parcel
Of Land Located at 92 East Maple Street,
City of Sturgeon Bay, Wisconsin

PETITIONERS' POST-HEARING COMMENTS

INTRODUCTION

These comments are filed on behalf of the Petitioners, Friends of the Sturgeon Bay Public Waterfront, Shawn M. Fairchild, Carri Andersson, Linda Cockburn, Russ Cockburn, Kathleen Finnerty and Christie Weber, by and through their attorneys, Wheeler, Van Sickle & Anderson, S.C. For the following reasons, based on the evidence during and after the public hearing held on September 6, 2017, Petitioners request that the Department find that the approximate Ordinary High Water Mark for 92 East Maple Street in the City of Sturgeon Bay is the mapped shoreline from the 1873 recorded Plat of Bay View, more particularly described in **ATTACHMENT 1**.

FACTUAL AND PROCEDURAL BACKGROUND

1. On March 8, 2017, Petitioners filed their petition with the Department seeking a full hearing and declaratory ruling pursuant to Wis. Stat. § 227.41 to make a finding of the location of the ordinary high water mark ("OHWM") on a parcel of property located at 92 East Maple Street in the City of Sturgeon Bay ("Parcel 92"), for purposes of determining the extent of the State's property rights under the Public Trust Doctrine, Wis. Const., Art. IX, sec. 1.

2. The Petition and the DNR's ruling are intended to complete the record begun with the trial court's judgment in Door County Circuit Court Case No. 16-CV-23, which found in pertinent part:

3. Parcel 92 is largely or wholly owned by the State in trust for the benefit of the public under the public trust doctrine, Wis. Const., Art. IX, sec. 1, and may not be conveyed to a private party. In the course of this litigation, neither party has shown the Court where the ordinary high water mark will be, there may be some portion of Parcel 92 which may be above the ordinary high water mark.
4. The Wisconsin Department of Natural Resources has not made an Ordinary High Water Mark (“OHWM”) determination on Parcel 92.

Judgment dated March 8, 2017, at ¶¶ 3-4. The trial court’s judgment, the trial transcript and exhibits have been accepted as part of the record in this proceeding.

3. A map and legal description of Parcel 92, the parcel for which an OHWM declaration is sought, are included as Exhibit C to the Petition for Declaratory Ruling. This is the same legal description that defines “Parcel 92” in the Circuit Court Judgment, at ¶ 1. The Petition does not seek an OHWM determination for the City’s reconfigured tax parcel at 92 East Maple Street (*see* Carrie Webb Presentation, Slide 4: “Today’s Site”), which resulted from the City’s recording of a certified survey map in July 2015 in connection with the previously proposed hotel development.

4. On April 20, 2017, the Department, by Deputy Secretary Ed Eberle, granted the Petition for Declaratory Ruling.

5. On August 22, 2017, following the Sturgeon Bay Waterfront Redevelopment Authority’s failure to approve a stipulation concerning the location of the approximate OHWM for Parcel 92, the Department issued a notice of public informational hearing to receive evidence relevant to its determination of the OHWM for Parcel 92.

6. The Department held a hearing in Sturgeon Bay on September 6, 2017, at which hearing examiner Daniel Helsel received evidence for the record from members of the Friends of the Sturgeon Bay Public Waterfront, individual plaintiffs, City attorneys and staff, and members of the public.

COMMENTS

- I. THE DEPARTMENT HAS APPLIED ITS EXPERTISE TO ESTABLISH THE TYPES OF RELEVANT INFORMATION TO BE REVIEWED TO MAKE OHWM DETERMINATIONS ON HISTORICALLY FILLED SITES SUCH AS PARCEL 92.

The Petition requests a factual finding from DNR as to the location of the historic OHWM for Parcel 92. The Department’s responsibility under s. 30.10(4)(b), Stats., is to determine the extent of public lakebed on Parcel 92 in conformity with the common law.

According to comments submitted by the Department's former primary water regulatory attorney, Michael Cain (who served in that role from 1978 to 2010), this requires DNR to "identify the location of the natural and historic shoreline of the affected lake or stream at the time of statehood...through a review of cartographic documentary and physical evidence of the location of the natural and historic shoreline." Letter of Michael Cain dated September 1, 2017.

II. ALL OF THE EVIDENCE IN THE HEARING RECORD SUPPORTS A FINDING THAT THE MAPPED SHORELINE ON THE 1873 PLAT OF BAY VIEW IS THE BEST APPROXIMATION OF THE OHWM FOR PARCEL 92.

A. The Cartographic Evidence Uniformly Shows That Parcel 92, Except for the SW Corner Near Maple Street, Was a Historic Dock Constructed on Lakebed.

The hearing record includes a substantial number of historic maps, including the original US government public lands survey (comments of Laurel Hauser); subdivision and assessor's plats (comments of Claire Morkin) Sanborn fire insurance maps (comments of Kathleen Finnerty, Nancy Aten and Carrie Andersson), and US Army Corps of Engineers maps (comments of Kathleen Finnerty and Dan Collins), as well as surveyed overlays of Parcel 92 using the foregoing as base maps, which surveyor Don Chaput's trial testimony states are accurate to within 10-20 feet. There is no conflict in all of this cartographic evidence as to the location of the historical shoreline before dock construction and artificial filling commenced in the late 1800s.

Substantial attention was focused at the hearing on the difference between the width of the Teweles & Brandeis dock in 1953 (the date of the first metes-and-bounds legal description, and when Door County Co-op bought the property) in comparison to 1974 (the date when the City quitclaimed the "little fire dock" property to Door County Co-op, establishing the modern boundary between Parcels 92 and 100).

The hearing record substantiates that there were three conveyances of property along the southeast edge of the Door County Co-op property. The 1953 legal description (T&B to Door County Co-op), the three subsequent deeds, and the corresponding aerial photos and maps of the property combine to show that Door County Co-op expanded the dock on the southeast edge, that the dock edge supported structures, and that there was open water next to modern Parcel 92 on the southeast side for the docking of ships as late as 1965. See **ATTACHMENTS 2 AND 3**. Other boundary adjustments were made to the parcel through conveyances which adjusted the boundary on the west side and near Maple Street for the sidewalk which resulted in the current property line.

B. The Documentary Evidence Establishes that the Historic Dock Was Filled by Successive Riparian Owners.

Evidence confirming that Parcel 92 was extended and filled by successive riparian owners includes historic newspaper articles and the title record (materials submitted by Kathleen Finnerty and Nancy Aten), and aerial photography (presentation by Christie Weber). It is beyond dispute that the T&B dock was filled. However, the dimensions shown in DNR's Preliminary OHWM Determination require greater focus on the 70 foot segment closest to Parcel 100.

In its October 2014 Concurrence with the approximate OHWM for Parcel 100, which shares a boundary with Parcel 92, DNR determined that the location of the OHWM based on a finding that part of the tax parcel was created by natural accretion "*between the two solid structures,*" namely the T&B dock and the L.M. Washburn dock. According to that analysis, lake sediments accreted in a natural u-shape directly adjacent to the solid T&B dock structure, forming the upland portion of Parcel 100. The DNR's analysis, and the shape of the accretion on Parcel 100, refute the suggestion that additional accretion formed in a precise rectangle between the T&B dock and the accreted shoreline of Parcel 100.

The T&B dock is documented to have been 138 feet wide at the time it was conveyed to Door County Co-op, according to the legal description for the property (see Warranty Deed, ATTACHMENT 2, at 4). Thereafter, the dock was expanded in width to support the warehouse on its southeast edge built by Door County Co-op, on land that was quitclaimed by the City to Door County Co-op. Newspaper articles dated 3/3/1953 ("Door Co. Co-Op in Expansion"), 7/28/1953 ("Begin Work on New Feed Mill"); 12/5/1957 (photo depicting Roen barge filling in shoreline in front of Co-op dock); and 2/8/1958 ("Obtain Permit") document the Co-op's expansion including a 60x90 addition and filling on the side of the dock, and enlargement and construction of warehouses. The resulting dimensions of the property are coextensive with the modern boundary of Parcel 92, as depicted in a photograph of the front of the dock dated from 1965 See ATTACHMENT 3. The evidence thus shows that Door County Co-op, the riparian owner, enlarged and filled beneath the southeast edge of Parcel 92.

As set forth below, the City does not dispute as a factual matter that the filling of Parcel 92 was done by its riparian predecessors in title. Instead, the City asks DNR to find that the common law recognized by the Circuit Court¹ should not be applied. This is an argument for DNR to modify existing law, which is not within the scope of DNR's jurisdiction under Wis. Stat. § 30.10.

C. The Physical Evidence Confirms That The Subsurface of Parcel 92 Consists of Artificial Fill.

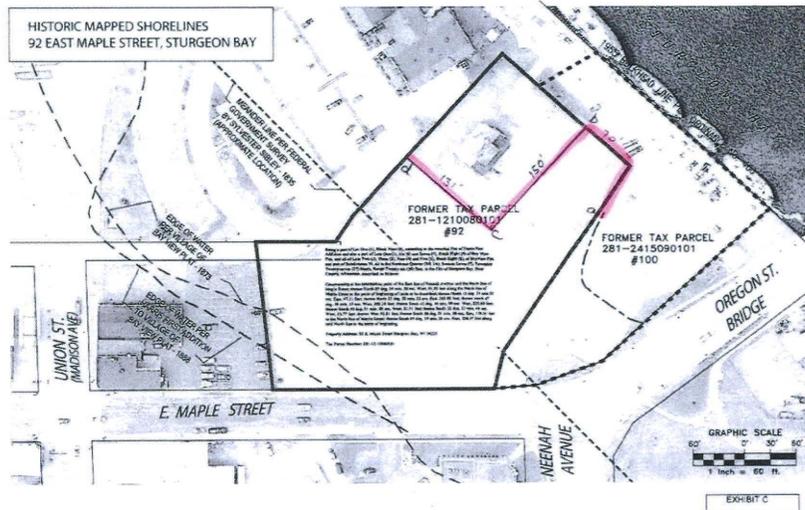
Physical evidence in the form of soil borings and analysis from multiple environmental assessments and remediation plans for Parcel 92, as well as glass and rubber artifacts of filling dating from the early 20th century (Shawn Fairchild presentation) confirm the conclusion of all the other documentary evidence: that Parcel 92 is filled lakebed. In fact, the soil borings very precisely confirm the location of fill and also that the entire width of Parcel 92 is uniformly filled. The only soil borings showing the absence of fill below the Great Lakes high water datum are located at Maple Street, landward of the mapped shoreline on the 1873 plat of Bay View. See **ATTACHMENT 4**, correlating the extent of fill over lake sediments from the soil boring cross sections (Huntoon presentation materials) with the Great Lakes OHWM datum from the Army Corps of Engineers maps (Collins presentation).

III. DNR'S PRELIMINARY OHWM DETERMINATION IS ARBITRARY AND UNSUPPORTED BY ANY REASONABLE VIEW OF THE EVIDENCE.

DNR's Preliminary Determination dated April 14, 2017 describes the OHWM as follows:

From the point of concurrence at the lot line between lot 100 and lot 92 (a) follow the surveyed shoreline from the 1955 bulkhead line map to a point approximately 70 feet from the point where the surveyed shoreline turns to run parallel to the bulkhead line (b). This is the approximate point where the Department believes the edge of the dock and fills starts on this side of lot 92. From this point go landward parallel to the northwest lot line of lot 92 for 150 feet (c). This is the approximate point that the department believes represents where the OHWM existed before the dock was installed. From that point, turn northwest and parallel to the bulkhead line approximately 131 feet to the northwest lot line of lot 92 (d). (Note, the letters in parentheses correspond to the letters on the attached map.)

¹ At trial, the City argued that the rule that the OHWM doesn't change as a result of artificial filling shouldn't apply, because the filling was not done by or for the benefit of the City. The Circuit Court rejected that argument, holding: "The Court is convinced that the law is clear that a riparian owner can't retain title to lakebed property by filling that is done by the riparian owner. And that's what's happened with Lot 92." Tr. Ruling, Case No. 16-CV-23, at 4, ll. 13-17.



The validity of the Preliminary Determination depends on whether there is evidence that the historic filled dock was 131 feet wide (from Point (d) to Point (b) on the Preliminary OHWM map); and that the length of the dock from the historical shoreline to its waterward edge (Point (d) to Point (c) on the map) was 150 feet. These dimensions are not supported by any information in the hearing record, and are refuted by the maps and surveyed overlays which use the Granary, the street grid and the platted lots of Block 8, Bay View, reference points that can be located and surveyed on the ground and that have been perpetuated over time.

The Preliminary OHWM dimension of 150 feet appears to have been based on a misreading of the October 22, 1904 newspaper article from the Door County Democrat describing the T&B dock as having *“a frontage of 140 feet and extends 150 feet out from the shore, the water being deep enough to accommodate the largest craft.”* The Preliminary OHWM Determination ignores the first part of this sentence. As substantiated by scaled maps and the Army Corps maps sounding depth data, the dock was much larger. The 1904 article describes the amount of *“frontage”* available for docking at the side of the dock as 140 feet *“to accommodate the largest craft.”* The *“frontage of 140 feet”* was located 150 out from the shore, the first 150 feet of the dock not being deep enough for large watercraft. According to a recorded agreement between Brandeis and the City of Sturgeon Bay (ATTACHMENT 2, at 3), as of 1944 the Brandeis dock was 395 feet long.

Nor is there evidence to support a conclusion that the filled dock was 131 feet wide. The width of the dock as described in the 1953 deed from Brandeis to the Door County Co-op (ATTACHMENT 2, at 4) was 138 feet. As discussed above, additional property was added on the southeast side of the Door County Co-op dock by filling and those areas were successively quitclaimed by the City to the Co-op, including the “little fire dock” parcel, which collectively enlarged the width of Parcel 92 to its modern boundary.

Because the Preliminary OHWM identifies a strip 70 feet wide that is above the OHWM along the southeast side of Parcel 92, it appears that a preliminary conclusion was made that 70 feet of land was naturally accreted in a rectangular shape, or that this area was filled by someone other than the riparian owners, Door County Co-op or the City. The hearing record does not support either conclusion.

The hearing record refutes the conclusion that the southeast 70 feet of Parcel 92 was formed by accretion. As hydrogeologist Lori Huntoon commented, accreted soils are not adequate to support the structures that were built in this area. Further, the soil boring cross-sections establish that there is 6-11 feet of fill overlaying lake sediments in this area. Finally, as noted above the conclusion that a 70-foot rectangle alongside the historic dock was formed by accretion conflicts with DNR’s earlier OHWM Concurrence for Parcel 100.

The Preliminary OHWM Determination is not substantiated by the hearing record. However, it does foreclose the position put forth by the City’s Community Development Director Martin Olejniczak. Mr. Olejniczak’s comments at the hearing restated his trial testimony that DNR had already made a determination that the OHWM for Parcel 92 is “at the lot line.” The Circuit Court made specific findings rejecting that argument, based on the testimony of Carrie Webb and Heidi Kennedy. In April 2017, in its Preliminary OHWM letter, DNR reiterated that the agency’s earlier OHWM Concurrence was limited to Parcel 100, and further stated:

By letter dated January 24, 2017, the Department advised you we were reluctant to undertake an OHWM determination at 92 E. Maple St. because the original shoreline—altered, extended, and filled for more than 100 years—and the physical or biological indicators typically used to locate the OHWM at a site have been destroyed at this site. We believe that determining the OHWM location at this site will have to be based on reviewing historic maps, photos, news articles, surveys, and other documents available for this site....

Preliminary OHWM Determination letter dated April 14, 2017, at 1. The Department and the Circuit Court have already rejected the City’s assertion that DNR is somehow bound by discussions between the parties in 2013 and 2014, prior to the City entering into a development contract for the Sawyer Hotel.

Mr. Olejniczak's other comments—that the planned redevelopment of the west waterfront has great merit and will enhance public access, and that “the outcome of the declaratory ruling could further jeopardize the City’s efforts to revitalize this region”—are policy arguments that DNR lacks authority to address. See Section IV, below. Whether selling off the property for private development or maintaining it as a public resource would better serve the community is subject to debate and is well outside the scope of DNR’s jurisdiction. Further, Wisconsin case law establishes that the administration of the public trust is not left to the discretion of local governments whose narrow parochial interests do not represent those of the citizens of the State. See Muench v. Public Service Commission, 261 Wis. 492, 55 N.W.2d 40 (Wis. 1952) (striking down statute delegating public trust authority to county boards, holding: “If a particular county is permitted to take action which will lead to the impairment or the destruction of hunting, or fishing, or the right to enjoy scenic beauty on that part of a particular navigable stream lying within the limits of a county, the interests of the people of the entire state may be adversely affected thereby.”)

IV. DNR HAS NO AUTHORITY TO MAKE PUBLIC POLICY, TO OVERTURN THE TRIAL COURT’S JUDGMENT, OR TO APPLY THE EVIDENCE CONTRARY TO COMMON LAW.

Throughout these proceedings, the City of Sturgeon Bay has proclaimed the difficulty and complexity of DNR’s task in determining the OHWM for Parcel 92. But as City Councilwoman Kelly Catarazoli noted, this determination is made difficult only due to political interference in the service of the City’s ill-considered development plans. In reality, DNR has significant experience determining the OHWM for historically filled sites and has now been provided with a wealth of relevant information all pointing to the same conclusion: that the OHWM is almost entirely landward of Parcel 92 except for a small corner by Maple Street.

The City has implicitly acknowledged that this evidence is indisputable, because it has not offered relevant evidence of its own. Instead, the City shifts to legal and policy-based arguments to encourage DNR to ignore that evidence.

One reason the City believes the OHWM should not be determined based on the substantial weight of the undisputed evidence is the “parade of horrors” that might befall the State if title to riparian land is open to question. Thus, the City asks DNR to change its established practice in determining OHWMs –to find “alternative facts”—based on a policy argument. DNR does not have that authority. See Wis. Stat. § 227.10(2m) (“No agency may implement ... any standard, ... unless that standard ...is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter.”) See also United Gas, Coke & Chem. Workers of Am. Local 18, C.I.O. v. Wis. Emp’t Relations Bd., 255 Wis. 154, 38 N.W.2d 692, 694 (Wis. 1949) (“The power to declare whether or not there shall be a law; to determine the general purpose or policy to be

achieved by the law; to fix the limits within which the law shall operate—is a power which is vested by our Constitution in the Legislature, and may not be delegated.”)

Even if DNR were empowered to determine the OHWM based on policy arguments instead of evidentiary facts, the City’s policy argument is also without merit. In the decades that DNR has been administering OHWM determinations for filled lakebed, the feared assault on riparian title has not materialized. Also, the City’s particular circumstances do not present a strong case for departing from DNR precedent for making OHWM determinations on filled sites.

The OHWM should not be manufactured in order to bail the City out of its failures of due diligence. The City was unable to obtain title insurance covering claims based on property located below the OHWM (see Catarazoli presentation, July 2013 email from Don Schenker/First American Title). The City was independently aware of the character of the property as filled lakebed, as described on the interpretive sign the City erected in the adjacent Sawyer Park (see photo, Christie Weber presentation, p. 29). This is a far cry from the “innocent purchaser” who suddenly learns that his house is on former lakebed. Finally, the City’s predicament exists only because of its persistent efforts to deprive the public of a beneficial property interest instead of upholding its constitutional obligation.

In addition to requesting that it disregard Wisconsin Supreme Court precedent, the City asks the Department to determine the City’s ownership (*i.e.*, to find the OHWM “at the lot line”) based on its chain of title to Parcel 92 running from Stanley Brandeis, whose title was quieted in a 1953 circuit court action among several claimants. The judgment from the quiet title action was admitted into evidence at trial. It is only now, in these non-contested administrative proceedings, that the City seeks to establish that the quieting of Brandeis’ title eliminated the State’s public trust interest in Parcel 92. But that judgment has no preclusive effect on either the State or the public, who were not parties to the action.

City Attorney Randall Nesbitt apparently takes the position that the interest of the public in Brandeis’ dock property was adequately represented in the 1953 action based on the naming the City of Sturgeon Bay and Door County as defendants, and appointing a guardian ad litem for “incompetents.” These comments are insufficient to establish that the interest of the State as trustee was represented, or even that the State had notice of the action. No evidence has been submitted to establish that the City or any other party appeared and advocated for the interests of the public in the Brandeis quiet title action. Instead, according to Attorney Nesbitt, “the court reviewed evidence presented by the Brandeis family.” In any case, pursuant to Wis. Stat. § 227.10(2m), DNR does not have jurisdiction to interpret the effect of the 1953 quiet title action, and it is irrelevant to the DNR’s task in this proceeding, which is to apply relevant evidence to map the line of the OHWM on Parcel 92.

CONCLUSION

The DNR's Preliminary OHWM Determination was extensively refuted by the evidence in the hearing record. As a factual matter, the record is clear that the historic OHWM of Parcel 92, prior to dock construction and filling by successive riparian owners, was close to Maple Street at the approximate location of the pre-development shoreline depicted in the 1873 Bay View subdivision plat.

The comments submitted on behalf of the City of Sturgeon Bay are not relevant to the factual determination of the approximate location of the OHWM. Instead, they are a misplaced effort to expand the DNR's jurisdiction in this declaratory ruling proceeding to encompass rulings that the Circuit Court made, or could have made but was not asked to make, which rulings are currently on appeal. The City's invitation for DNR either to assume the powers of the state supreme court to create new legal doctrine (e.g., by pretending the City did not acquire its title from prior riparians who artificially filled the lakebed) or to assume the powers of the legislature, to further a "pro-riparian title" policy, should be rejected out of hand as a violation of the separation of powers.

None of the foregoing arguments is a factual argument with respect to the location of the OHWM utilizing the agency's established procedure for such a declaration. Rather, the City is seeking via this agency declaratory judgment proceeding to create a second path of appeal of its various legal arguments rejected by the Circuit Court. DNR's focus in this proceeding is narrow and the evidence is clear. For all of the foregoing reasons, Petitioners request that the OHWM for Parcel 92 be located at the historic shoreline surveyed in the 1873 plat of Bay View.

Dated this 15th day of September, 2017.

Respectfully submitted,

WHEELER, VAN SICKLE & ANDERSON, S.C.
44 East Mifflin Street, Suite 1000
Madison, WI 53703
(608)255-7277
mperanteau@wheelerlaw.com

By:



Mary Beth Peranteau

Attorneys for Petitioners