ROBERT WITTKE
STATE REPRESENTATIVE • 62nd ASSEMBLY DISTRICT

ASSEMBLY COMMITTEE ON ENVIRONMENT
PUBLIC HEARING – FEBRUARY 16, 2022

Dear Chairman Kitchens and Committee Members,

Thank you for holding a public hearing on Assembly Bill 849 relating to the use of fill in commercial waterways and establishing shorelines of Great Lakes waters. Assembly Bill 849 is a bill that was brought to me by the Wisconsin Realtors Association and the League of Wisconsin Municipalities to fix a title issue for lands adjacent or near to a waterway. In particular, waterways of Ashland, Bayfield, La Crosse, Milwaukee, Oshkosh, Sheboygan, Sturgeon Bay, and Superior have experienced challenges where land was once part of a waterway but was filled decades ago by natural processes or perhaps as part of a legislative or common law authorization. Most of the land at issue is located in the urban areas where land was developed for commercial and industrial use.

Assembly Bill 849 is an important bill to give clarity to an issue that has been of concern to entities looking forward to developing land that is no longer submerged. This is an opportunity to drive economic growth in some parts of Wisconsin where growth has been stalled or even thwarted by titling issues.

The bill includes a "lake section" and a "rivers section" because ownership issues are different for each. The "lake section" allows a municipality to determine the shoreline after the record title holder make application for a determination. Shoreline is considered the boundary between upland and property water-ward in this bill. Once the municipality has approved the shoreline determination, the Department of Natural Resources will have a review period to include public hearing within 30 days after receiving the request from the municipality. The department shall make their determination no later than 60 days following the public notice, and shall adopt the shoreline unless the property is not upland, or is not supported by substantial evidence that the shoreline is within the public interest.

The "rivers section" would allow an owner of filled property – filled since December 9, 1977 and located on one of the 12 designated commercial industrial rivers or harbors listed in the bill – to use the property for any public or private purpose within restrictions of prior river bed designations.

Again, thank you for holding this public hearing. I hope the committee will move forward and pass Assembly Bill 849 out of committee.

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Rep.Wittke@legis.wi.gov

DUEY STROEBEL

STATE SENATOR • 20TH DISTRICT

Testimony on AB 849

February 16, 2022

Good afternoon everyone. Thank you for being here for today's hearing on Assembly Bill 849, a bill I authored with Rep. Wittke with the aim of creating a framework to provide certainty surrounding legal title of former lakebed and riverbed land. This bill has been years in the making, including contributions from other colleagues in prior sessions who worked on it before stakeholders brought it to my attention last year.

AB 849 creates a process for a municipality to review a proposal for the establishment of a Great Lakes shoreline. A title holder who can prove a section of land was upland since December 9, 1977, among other criteria, can apply to the municipality in which the property is located for the ratification of a proposed shoreline. The municipality makes several determinations, including whether the proposed use will promote the interests of the public. If all determinations are made in the affirmative, the municipality submits the plan for DNR approval. If approved by the DNR, that parcel of land would be exempt from the commencement of any action to impair legal title on the basis of the land having been submerged lake bed at some time in the past.

AB 849 also provides clarity on whether landowners can use or build on pre-December 9, 1977 fill along certain commercial river ways. Before December 9, 1977 there was no permit required for permanent alterations, deposits or structures along navigable waters. It is unreasonable and overly burdensome to litigate the legitimacy of fill that occurred over 45 years ago. If the DNR has not initiated an enforcement action by 2022, it is reasonable to provide the legal certainty for the owner that the fill is usable.

At the heart of AB 849 is the desire to bring legal clarity to land ownership so local communities can make decisions about land use for the good of their respective communities. I have been in the legislature a decade now, and I have not always seen the amount of cooperation and agreement between the development community and the League of Municipalities I see on AB 849. Local leaders will be here to testify as to specific examples of how cloudy title that cannot be cleared under current law impacts their communities. I hope you will join me in figuring out a way to provide the certainty necessary for these urban renewal plans. Thank you.

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To: Assembly Environment Committee
From: Toni Herkert, Government Affairs Director, League of Wisconsin Municipalities
Date: February 16, 2022
RE: Assembly Bill 849, relating to Great Lakes and Commercial Rivers Historic Fill

Chairman Kitchens, Vice Chair Tusler, and Committee Members,

My name is Toni Herkert, and I am the League of Wisconsin Municipalities Government Affairs Director. The League represents nearly 600 municipalities, both large and small throughout the state including those communities on the coasts of Lake Michigan and Lake Superior.

You have heard comments from my colleagues on this bill, but I wanted to bring a municipal perspective for you all to think about as you listen to the remainder of the testimony today. Great Lakes coastal communities need this legislation to make it possible to redevelop dilapidated or underutilized waterfront property that hasn't been submerged for nearly half a century. There are areas in our Great Lakes coastal communities where lands have been treated as private land and utilized for private industrial, commercial or residential development for decades. People are or have lived and conducted business on these parcels. They are or have paid property taxes on these parcels. Yet, redevelopment of these parcels may not be possible if they are considered lakebed property subject to the public trust doctrine. Issues often arise with historically filled lands when there is a change in use or a request for redevelopment.

This bill establishes a process for clarifying title to these formerly submerged lands and providing Great Lakes communities with opportunities to improve contaminated and blighted parcels along the shoreline. Under this bill, communities can turn an eye sore into a vibrant public-private partnership that combines private development with public amenities and creates a better and higher use of the property for residents and visitors alike. Creative municipal leaders envision a bustling waterfront welcoming the public with parks, concert venues, walking trails and increased lake access.

To accomplish the goal of revitalizing our Great Lakes' waterfronts requires private development that will help fund the public amenities and the remediation work associated with preparing sites. To secure financing for these projects, title companies and investors need certainty that a project can proceed. Even though it is apparent that historic fill prior to 1977 is not being removed and that the land will stay intact, unfortunately, the certainty necessary cannot be realized today. Creating a process to allow a property to be utilized to produce the best results for the overall community is in the public interest.

Wisconsin's leaders at the municipal level, mayors, city managers or administrators, and village presidents along with their councils and boards work tirelessly to balance competing needs in their communities every day. AB 849 creates a process for municipalities to determine the shoreline at

the current ordinary high-water mark for single parcels or a group of parcels if it is in the public interest. This determination is voluntary by the landowner and subject to review by the DNR.

AB 849 only addresses parcels that have been filled since 1977 on or near Lake Michigan and Lake Superior and the 12 commercial/industrial rivers that are tributaries of the Great Lakes.

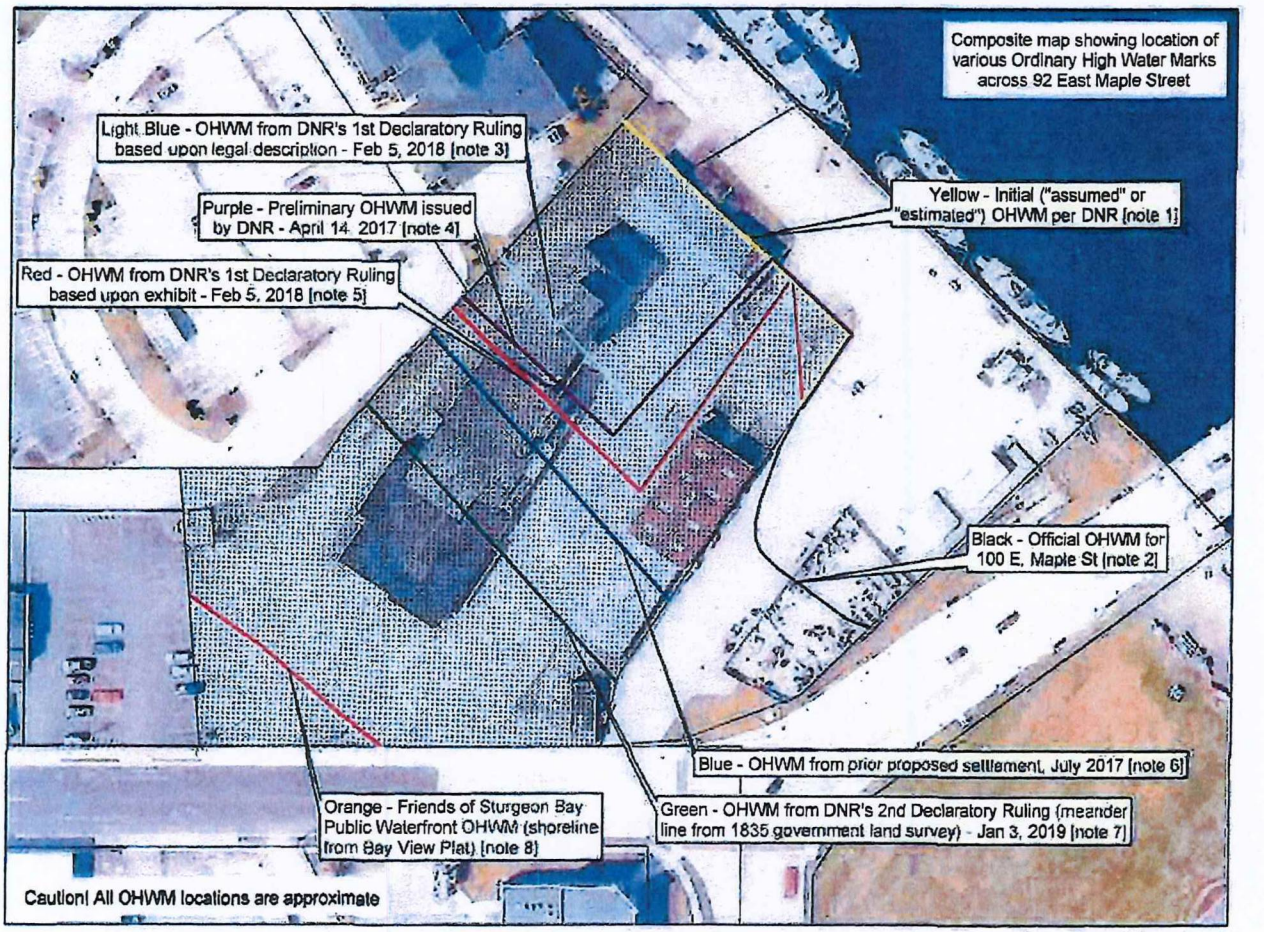
It is important to note that AB 849 does NOT address new fills, any inland lakes, rivers and streams other than the 12 enumerated in the bill, legislative lakebed grants or lake bed leases.

I would like to thank the authors for their work on this bill, the partners the League has worked with over the years to bring us to this point today, and the Department of Natural Resources for being involved in the original scoping of the approach that this bill takes. The legislation is very different than what was contemplated in the past and we believe the constructive conversations led to a better product. We realize there may be additional recommendations that will be discussed today and the League looks forward to working cooperatively to move this bill through the legislative process.

We ask the committee to advance AB 849. Thank you for your consideration. If you have any questions, please contact me at therkert@lwm-info.org.

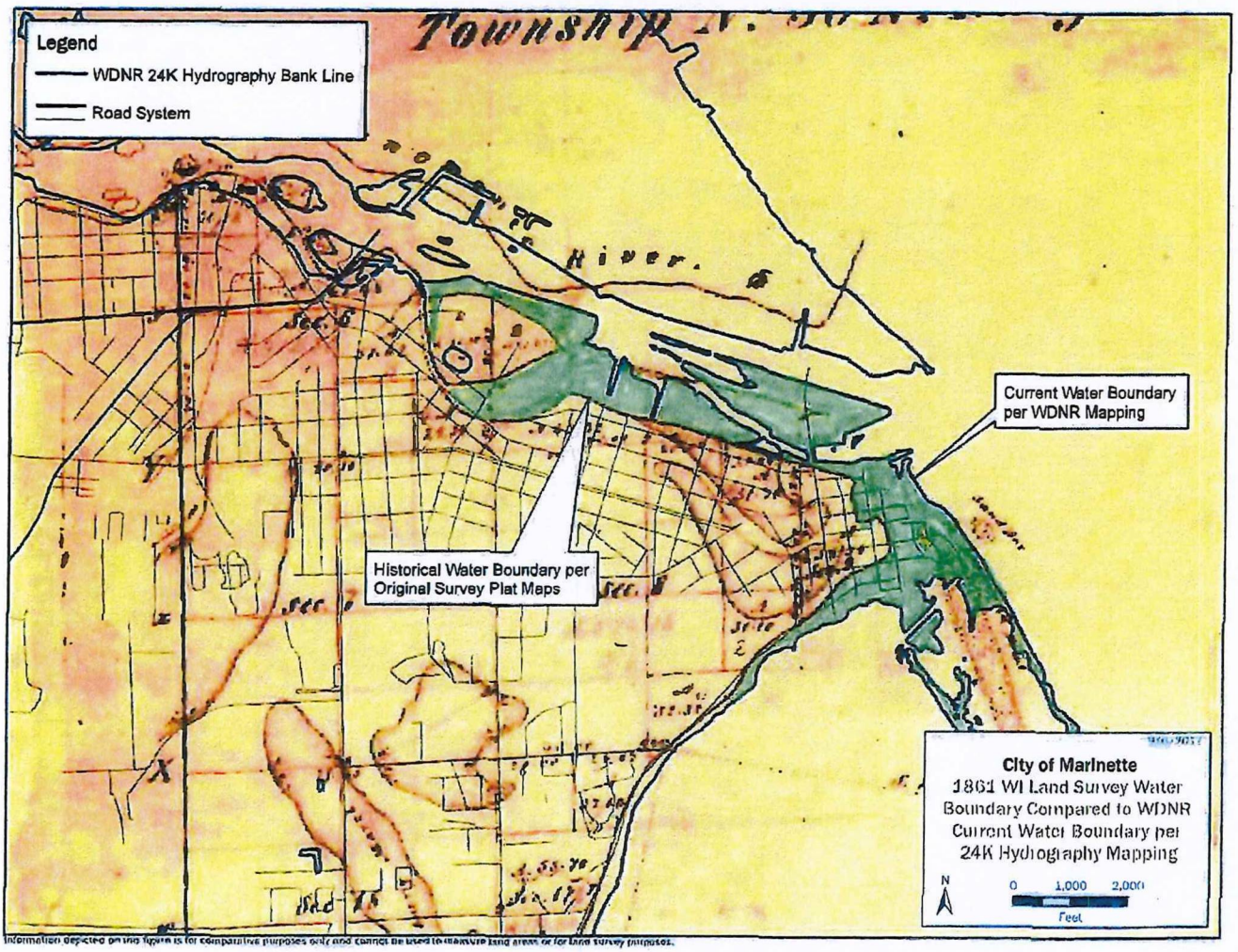
Sturgeon Bay, WI

Example ordinary high water mark (OHWM) determination



Marinette, WI

Approximate filled area

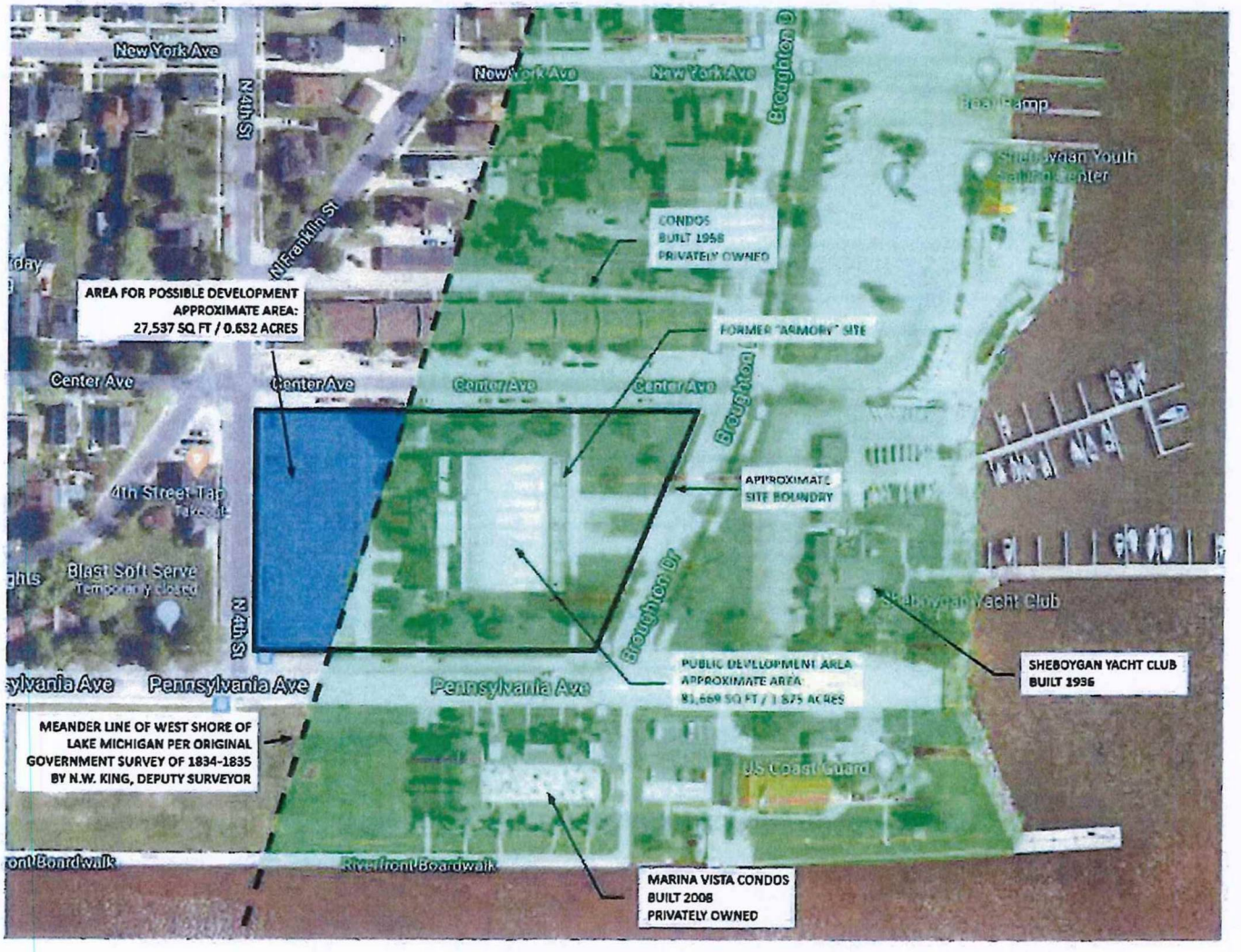


Marinette, WI

Approximate filled area

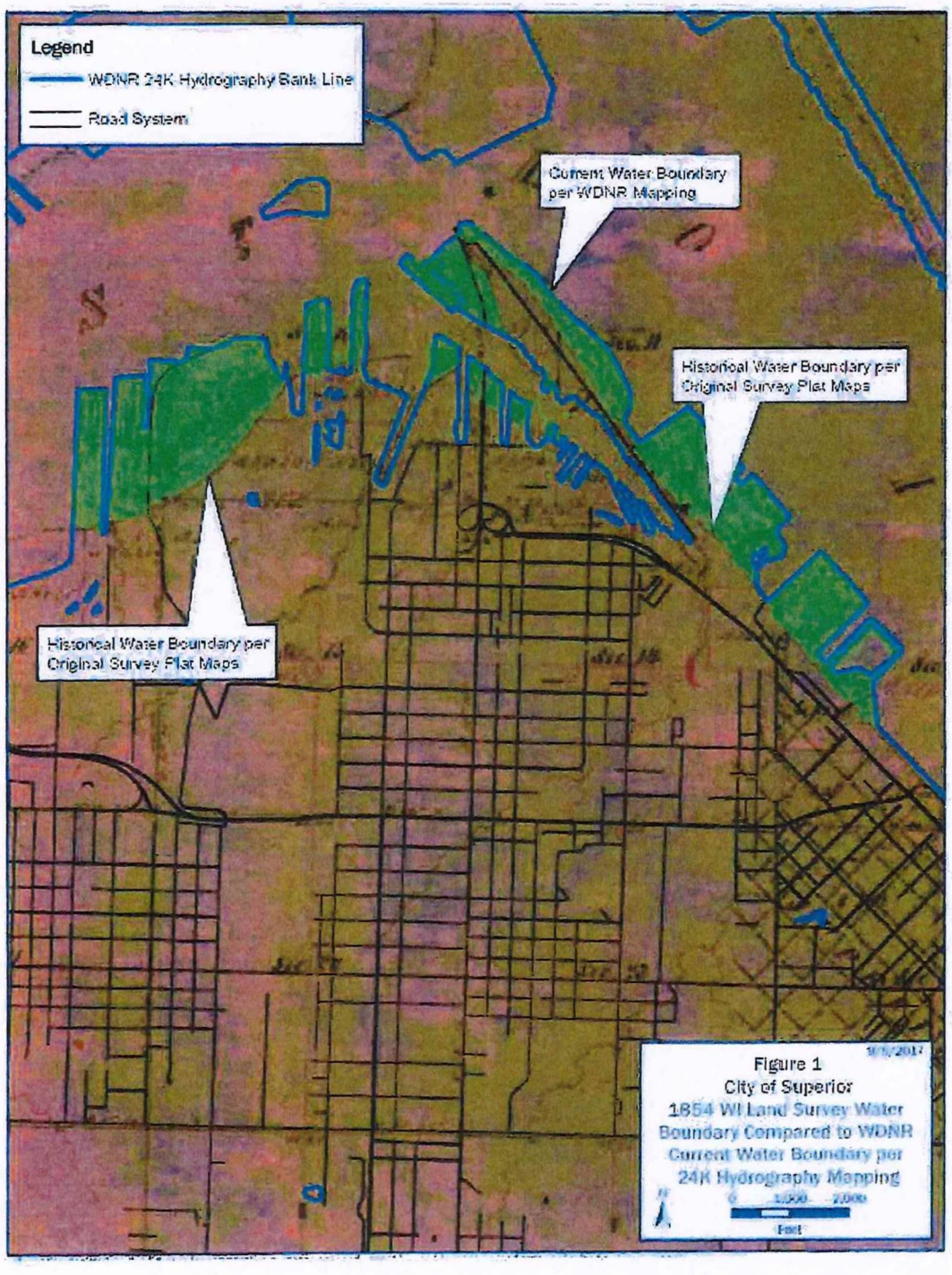
Sheboygan, WI

Approximate filled area



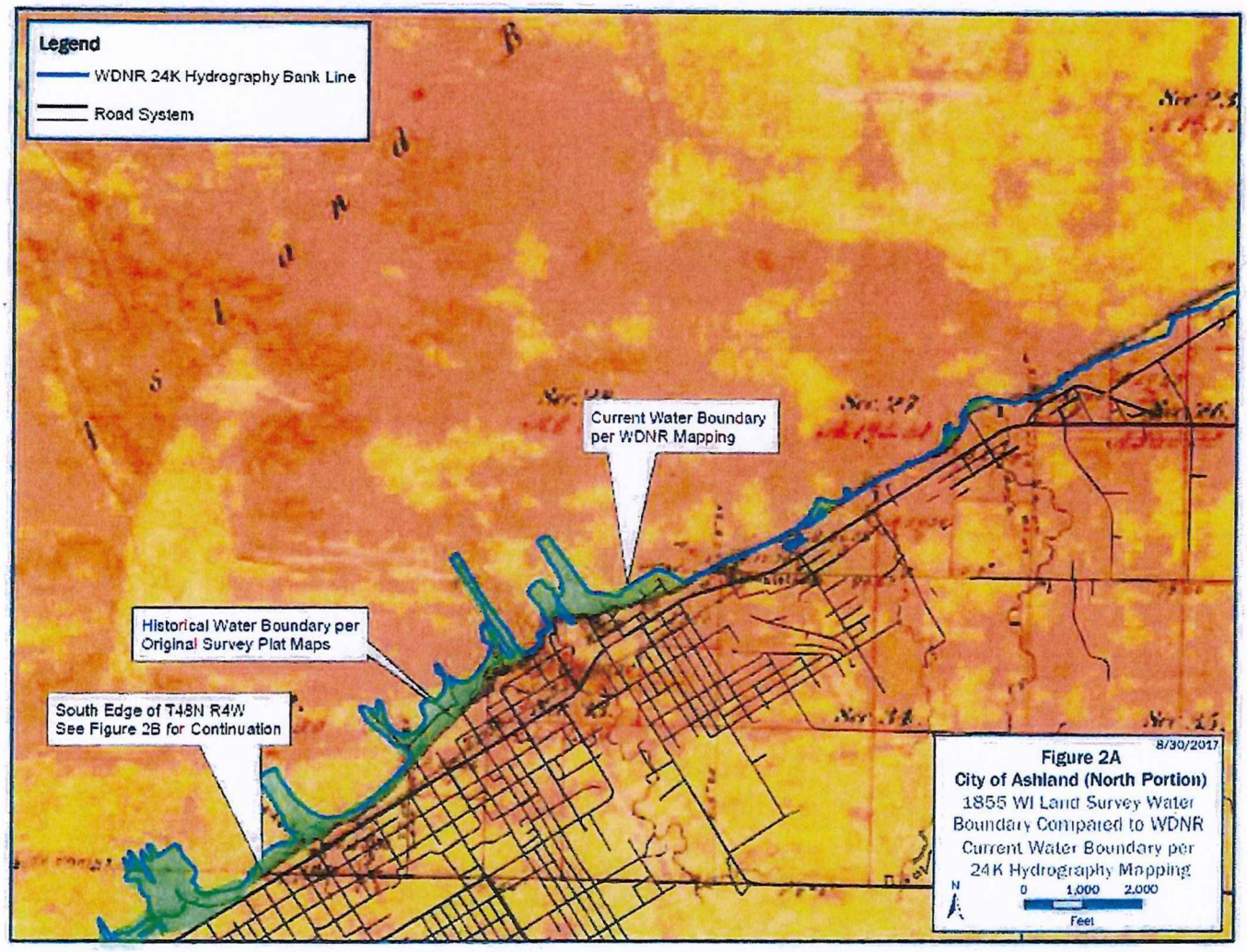
Superior, WI

Approximate filled area



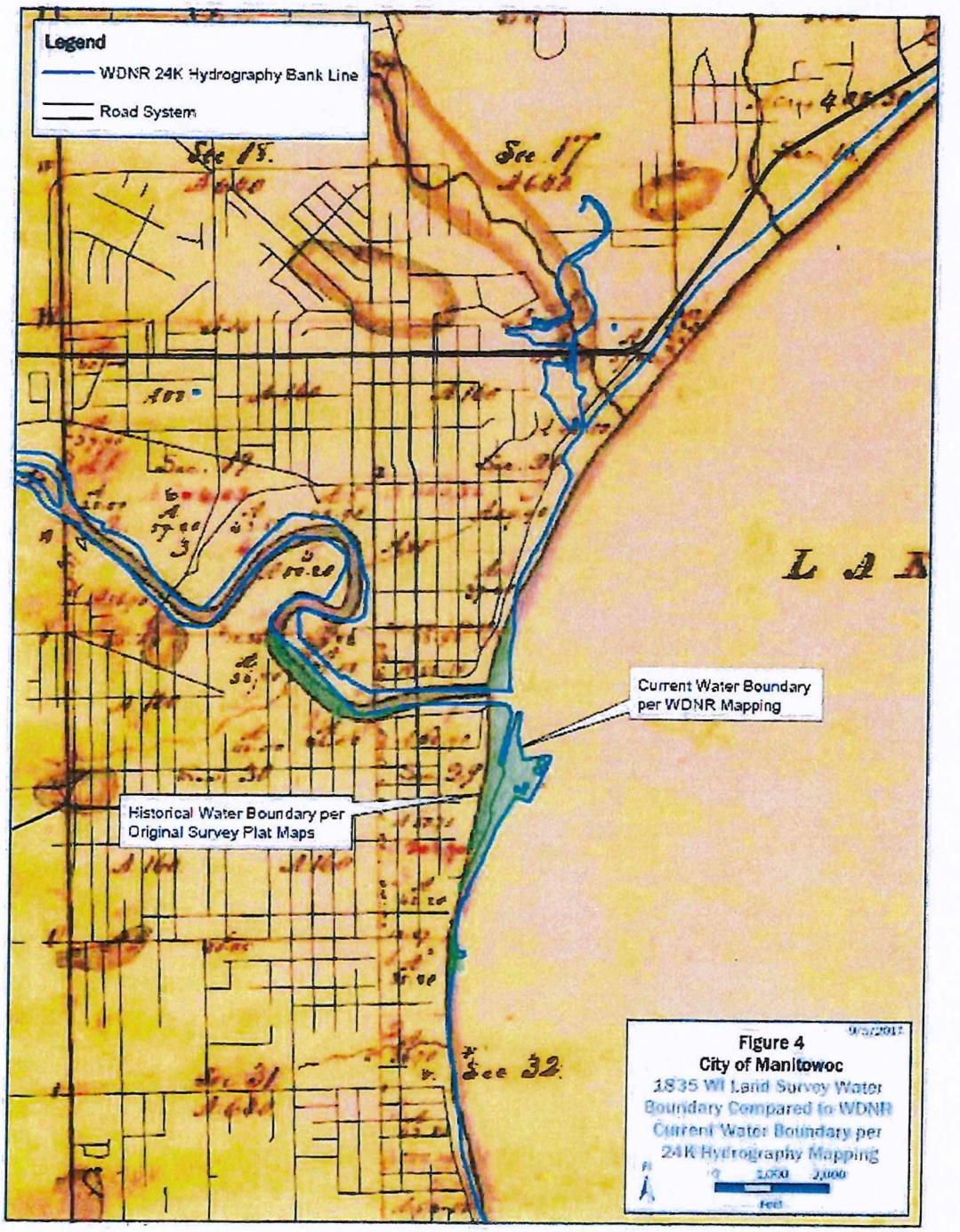
Ashland, WI

Approximate filled area



Manitowoc, WI

Approximate filled area



Bayfield, WI

Approximate filled area

Testimony from Martin Olejniczak

I am Marty Olejniczak. I serve as the Community Development Director for the City of Sturgeon Bay and have extensive experience regarding waterfront redevelopment and its relationship to lakebed and ordinary high water mark issues. I am speaking in support of Assembly Bill 849.

I support the bill because reinvestment in waterfront property by municipalities and developers produces tremendous dividends to Wisconsin residents through removal of blight and contamination, improving public access and recreation, increased economic activity, and a host of other benefits. But uncertainty of title to lakefront property is a deterrent to revitalization.

The City of Sturgeon Bay's ordeal is a perfect example why communities and developers may be hesitant to undertake waterfront improvement projects. Sturgeon Bay desired to redevelop a portion of the waterfront on its west side that was in a dilapidated state with vacant and underutilized buildings. The City and prospective developers spent a great deal of time, money and effort on a redevelopment proposal that included a combination of public and private uses only to have the project thwarted by controversy over the location of the OHWM. Despite the facts that property was behind a state approved bulkhead line, had a chain of title dating to the 1800's, had a quiet title action approved by the circuit court in 1953, and it wasn't even a riparian parcel since the 1960's, a lawsuit was filed to stop the project because the subject property was likely filled lakebed. The court ruled that the DNR needed to make a declaratory ruling regarding the OHWM location. When the DNR was unable to determine a line that satisfied the parties, the issue was finally resolved when the OHWM location was "negotiated" between the group of citizens that filed the lawsuit and a subgroup of those citizens who managed to get elected to the Sturgeon Bay Common Council. That arbitrary line was then ratified by the DNR via declaratory ruling despite the fact that it was much further landward than any previous line put forth by the DNR. The declaratory ruling was accepted by the Court and the OHWM location now makes the majority of that parcel off limits to most private development and use.

While that case only involved one parcel of land, its impact is widespread. No municipality wants to risk going through what Sturgeon Bay did. Developers also are less likely to invest in such projects if there is a cloud over the title. Waterfront lands will thus remain in a blighted state longer and perhaps indefinitely. Even previously redeveloped sites are affected. What happens when those previous developments are ready to sell or redevelop? Do they really have title to the property? By creating a clear legal path to removing that uncertainty, the proposed legislation will help communities continue efforts to improve blighted shorelines, increase public access, and spur economic activity.

I support the bill because trying to establish the OHWM based upon where the shoreline might have been located at the time of statehood or at any historic point in time is pure folly. Given the massive amounts of changes to urban waterfronts that have occurred over the last 175 years, both manmade and natural, it is near impossible to get full agreement on an OHWM based upon an historic location. Lake Michigan, in particular, has about 5.5 feet of cyclical difference in its water elevation. The rise and fall of the lake level leads to natural accretion and reliction, thus compounding the difficulty and advisability of establishing an OHWM at a given point in time.

I support this bill because it is narrowly tailored. It only applies to Great Lakes shorelines within municipalities that have been filled for nearly 45 years or more. It does not apply to areas associated with a lake bed grant or a submerged land lease. The limited areas that are affected often are associated

with environmental contamination, obsolete buildings, and general blight. Getting title to those lands clarified will lead to redevelopment to the benefit of the public. The bill will certainly not lead to some sort of massive land rush to claim title to lake bottom. In fact, the bill doesn't even impact the Sturgeon Bay example cited earlier in my testimony. That land is already under a submerged land lease with the state. Thus, my testimony is not intended to undo that situation, but rather is to prevent that long, expensive and divisive process from happening again elsewhere in Sturgeon Bay or in other Great Lakes municipalities.

I support this bill because it puts the primary decision making in the hands of the municipality. This is in harmony with Wisconsin's long-standing home rule and local control tradition. If a municipality determines that a proposed shoreline is not in the public interest, it is not obligated to approve it. Hence, the city or village can still decide where the OHWM ought to be, just like happened in Sturgeon Bay. It is also important to note that the required DNR approval will prevent any abuses by municipalities in their determination of the location of the shoreline, thereby ensuring protection of the public interest.

Finally, I support the bill because it does not violate the spirit of the Public Trust Doctrine in any way. Navigation is protected, no new filling or encroachment is authorized; shore areas are remediated and revitalized; and public access will be enhanced in most circumstances. Lakefront communities are using waterfront redevelopment to improve public use of and access to the waterfront, not the other way around. But some private development is often necessary as a catalyst for the revitalization.

The legislation only impacts lands that have been dry upland for decades; such lands are simply never going to revert back to lakebed. The affected areas involve Great Lakes communities where the relative impact on previously submerged lakebed is miniscule in relation to the overall public resource. The public trust doctrine can coexist in harmony with the proposed legislation.

In summary this legislation is an elegant and balanced solution to the uncertainty of title for urban waterfronts. Please enact this bill. Thank you for the opportunity to speak to you.

Midwest Environmental Advocates

To: Assembly Committee on Environment
From: Tony Wilkin Gibart, Midwest Environmental Advocates, Inc.
Date: February 16, 2022
Re: Opposition to Assembly Bill 849

Thank you for the opportunity to provide testimony today in opposition to Assembly Bill 849. My name is Tony Wilkin Gibart, and I am executive director of Midwest Environmental Advocates. MEA is a non-profit law center that has a history of defending and enforcing the Public Trust Doctrine enshrined in Wisconsin's State Constitution.

My testimony has two main parts. First, I explain that this legislation would lead to municipalities taking unconstitutional actions by purportedly granting private title to public trust land. Contrary to the goals of the bill, this will lead to litigation, confusion and even more uncertainty for local governments and private property owners. Second, I take a critical look at some of the specific provisions of the bill and claims of the proponents. In various ways, the provisions of the bill provide only superficial standards, leaving wide latitude for privatization of public access to Wisconsin's waters. Moreover, many details of the legislation do not align with the stated goals or justifications. Even if the legislature sought to go beyond constitutional boundaries to allow private title to public trust land, the committee should be aware of the many ways this particular bill goes far further than contemplated.

I. The bill is unconstitutional; it will lead to litigation and even more uncertainty for local governments and private property owners.

MEA's opposition to Assembly Bill 849 is rooted in the text of the State Constitution, which in Article IX, Section 1, says:

> *....the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.*

Under the Public Trust Doctrine, the state holds both the title to lakebeds and right to use rivers in trust for the people of the state. Under longstanding Wisconsin Supreme Court decisions, public trust protections include public use of filled lakebed. The constitution guarantees that the legislature cannot abrogate its trust responsibilities. Our constitutional right to the waters of the state is not theoretical. It is a right that Wisconsinites use and cherish every time we access and enjoy the waters of the state.

The effect of the bill could be sweeping, limiting public rights to countless miles of shoreline. In many places, especially in developed areas, the shores of rivers and of Lakes Michigan and Superior are lined with historic fill. Attempting to change these lands from public trust lands to private property could dramatically impact the public's constitutional right to use and enjoy our treasured waterbodies.

Specifically, this bill creates a process by which a private property owner can gain purported ownership of lakebed land that the state holds in trust for the people of Wisconsin. It does so by granting municipalities the power to change the boundaries between public trust land and private property. This is akin to a law that allows one private property owner to redraw the property line separating them from a neighbor. An objecting neighbor would probably not be satisfied by the justification that nothing was taken because the neighbor still owns everything on their side of the boundary.

Similarly, constitutional rights are not satisfied by this kind of legal fiction. The constitutional boundaries to the public trust were set at statehood when the people of Wisconsin reserved for ourselves title over lakebeds. While the legislature may enact laws that reasonably determine where the boundary between land and water was at statehood, the legislature cannot create a law that redraws the boundary for reasons that have nothing to do with upholding the Public Trust Doctrine, such as "economic development" or "settling uncertain title."[1]

The memo provided by the Wisconsin Realtors Association (WRA) in support of the legislation, references, but understates, the constitutional prohibition against conveying lakebed for private use:

> *There is also some case law that has been interpreted to mean that lakebed is owned by the public and/or protected by the Public Trust Doctrine under Wisconsin's Constitution and thus title cannot be conveyed to private individuals.*[2]

First, this passage should itself give the committee pause. One of the main proponents of the bill admits the state constitution may prohibit the very thing the bill does: give title to lakebed fill to private individuals. The proponents have not explained how a simple act of the legislature can alter the status of our constitutionally protected interest in public trust lands.

Second, the WRA memo's characterization of the Public Trust Doctrine does not do it justice. In contrast, consider that the legislature's own agency, the Legislative Reference Bureau (LRB), says this:

> *The public trust doctrine, for all the simplicity of its language, is a sweeping protection of public rights that has been jealously guarded by the courts for over 150 years. Time and time again, courts have heeded the call of the Wisconsin Supreme Court, writing in [the 1914] Diana Shooting Club decision: "The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved the people the full and the free use of the public waters, cannot be questioned. Nor should it be limited or curtailed by narrow construction. It should be*

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[1] And the same basic constitutional issues apply to the portion of the bill that deals with fill in rivers. Through the Public Trust Doctrine, we, the people of Wisconsin, reserved the right to access all navigable waters, including the specific rivers enumerated in the bill. While riparian owners on rivers have title to the middle of the waterway, that title is qualified by the public's superior right to access the river for public trust purposes.

[2] December 6, 2021 Memo of Tom Larson, WRA Senior Vice President of Legal and Public Affairs and Chief Lobbyist for NAIOP-WI and Toni Herkert, League of Wisconsin Municipalities Government Affairs Director regarding LRB 4719 – Resolving Legal Title Issues Related to Historic Fills of Waterfront Property.

interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits."[3]

The LRB goes on to say that the Wisconsin Supreme Court reaffirmed the vitality of this position in a 2018 decision, when then-Chief Justice Roggensack said the 1914 passage "remains good law."[4]

While admittedly lawyers will quibble about the exact requirements for lawful use of public trust land under the doctrine, the relevant criteria in the bill are wholly unrelated to the applicable constitutional standards. The unconstitutionality of this bill is not a close call.

The leading case on the use of public trust land is *State v. Public Service Commission*, 275 Wis. 112, 81 N.W.2d 71 (1957). In that case, the Wisconsin Supreme Court outlined the following criteria for constitutionally permissible uses of public trust land:

1. Public bodies will control the use of the area;
2. The area will be devoted to public purposes and open to the public;
3. The diminution of lake area will be very small when compared with the whole of the lake;
4. Public uses of the lake are not destroyed or greatly impaired; and
5. The impairment of public rights to use the lake for recreation should be negligible compared to the greater convenience afforded to the public.

As you can see, there is a direct conflict between the Supreme Court's interpretation of the Public Trust Doctrine as applied to filled waterways and private use of fill. Still, the bill creates a "public interest" standard for granting private ownership, a standard that will clash with the constitutional requirements. As a result, under the bill, boundaries can be redrawn in ways that will invite litigation, and it is likely reviewing courts will be required to invalidate the bill entirely or at least many individual applications of it. The law will be more confusing, uncertain and risky for property owners.

II. This bill is more about creating private title to public land than it is about "clearing up" private title.

Proponents of the bill have argued that this bill is needed to give certainty to private entities that have invested in and improved land. The image created, at least in my mind, is of many innocent landowners who have now fallen victim to arcane legalities. However, the provisions of the bill, when examined closely, betray this justification.

A. Under the bill, municipalities can sell off public land.

The only requirement to qualify as a "record title holder" is that the entity claim ownership of property based on a recorded conveyance of an ownership interest in the property. As a result, many entities could initiate the conversion of public trust land to private property – not just those that have a longstanding interest in what has historically been considered private property.

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[3] Zachary Wyatt, The Public Trust Doctrine, Wisconsin Legislative Reference Bureau - Reading the Constitution., Aug. 2020, at 14.

[4] *Id.* (citing *Movrich v. Lobermeier,* 2018 WI 9, 379 Wis. 2d 269, 905 N.W.2d 807).

A likely scenario is that a municipality will sell public land, such as a park, to which it claims title, and the purchaser will then qualify as a "record title holder." That purchaser can then petition the municipality to remove the land from the public trust, giving the purchaser free latitude to develop prime waterfront property. In fact, this is similar to one of the situations that has been brought forward by proponents.

B. The bill allows a municipality to assign property rights without an application by a "record title holder."

Under Section 30.2039(4)(b), the municipality could redraw shoreline *en masse* via ordinance, without any application from a record title holder. The breadth of this power belies the notion that the purpose of the bill is to address title claims of particular owners.

C. The bill grants automatic privatization of prime lakefront public trust land, based solely on how land has been parceled.

Quoting Section 30.2039(5) of the bill:
A parcel that has been separated from the submerged bed of a Great Lakes water by one or more other parcels since December 9, 1977, is deemed to be not part of the lakebed of a Great Lakes water and shall be affected by this section in the same manner as property for which a determination is made that the property is held in fee title ownership and is not held in trust by the state for the public.... Section 30.2039(5)

This provision means that the historic parceling of a piece of land could be the sole factor that automatically converts public trust land to private property. Consider this currently landlocked parcel wholly within Lakefront Park in Ashland.[5]

In red, an example of the kind of parcel that would be automatically removed from the public trust.

[5] This parcel is contained within one of the maps offered by the proponents at the Senate hearing as an example of public trust to which the bill would apply. See https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2021/sb900/sb0900_2022_02_08.pdf#page=17

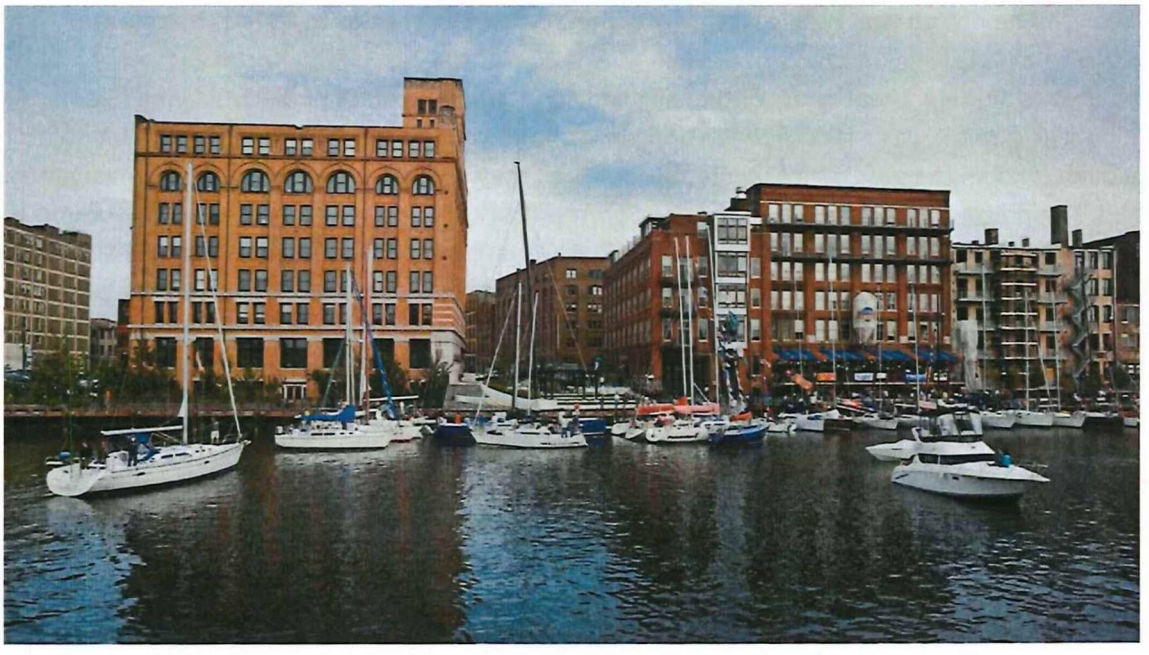
While I have not researched whether these parcel boundaries existed prior to 1977, this is just one example illustrating the impact of the bill. Understanding the true impact of this "automatic" conversion provision would require untold hours of research.

III. The bill automatically removes any restrictions on the use of filled riverbed. This will result in an automatic loss of public rights.

The bill says that an owner of qualifying riverbed fill may use the land for any purpose without restriction if DNR has not instituted an enforcement action related to the fill. The logic appears to be that if DNR has not required removal of the fill, then no restrictions should apply.

This is exactly backwards. The most likely reason DNR has not instituted an enforcement action is that the use of the fill has not interfered with our constitutionally protected rights of access and navigation. However, under the bill, the fact that the land has been used in a manner consistent with public rights means the public will permanently lose those rights. Also note that the bill grants owners *carte blanche* to use the fill for *"any purpose...without restriction."* If the bill is passed, it will only be a matter of time before creative property owners assert this provision supersedes a host of local land use regulations and other provisions of state law.

Milwaukee's Riverwalk is an example of how preserving public rights and access on historic fill has improved economic development. The successful blending of public access and private business occurred only because the state was able to insist, under the Public Trust Doctrine, that public access to the river be integral to the planning. But under the bill, certainly the state and possibly local units of government would lose their ability to ensure public access to waterways.



Milwaukee's Riverwalk: A success story in protecting public access to historic fill on rivers—rights that would be automatically extinguished under this bill.

IV. DNR's review of municipalities' approvals will not result in oversight but will result in DNR being sued no matter what it does.

Under longstanding Supreme Court precedent, the legislature cannot lawfully divest the state's trust responsibilities to local units of government. Still, this bill gives local units of government the ability to convert public trust land to private property with no meaningful oversight from the state. Under the bill, the only reasons DNR may not approve a conversion of public trust land to private property is if, one, the municipality made a mistake in determining whether the land falls within the bill's very broad definition of applicable parcels or, two, the municipality's "public interest" determination is not supported by substantial evidence. This means DNR will be required to approve the conversion of public trust land to private property if the property owner or municipality can point to virtually any facts that relate back to the bill's very vague public interest standard. If DNR does not accept the municipality's determination, DNR will likely be sued for not following the very deferential standard of review under the bill. However, if DNR follows the statute and approves the conversion of the public trust land, the DNR will likely be sued for failure to uphold the state's constitutional public trust obligations.

V. Moreover, the "public interest" determination under the bill is meaningless for all practical purposes.

The legislation does not even attempt to condition future use of a piece of land on the use that a municipality determined was in the "public interest." A person who claims ownership of a piece of public land can propose a purpose that requires the municipality and the state to grant them private ownership, but nothing in the bill requires that the would-be owner follow through on that purpose. Moreover, the bill does not prevent future uses by that owner or subsequent owners that have no relationship to the "public interest."

VI. The notion that public trust protections did not exist prior to 1977 is inaccurate.

At the Senate hearing, proponents of the bill justified the conversion of public trust land filled prior to 1977 by saying there was a lack of regulation prior to that year. The logic is that it would be unfair to individuals who, in the absence of regulation, believed they could use public trust land however they wished. The premise is false. The Wisconsin Supreme Court decision, cited above, which outlines the permissible uses of public trust land is from 1957. As others have pointed out, in the 1950s, when the City of Sturgeon Bay received a bulkhead permit, the permit included a reminder that the lakebed remained in the public trust. In American law, the principle that the state may not entirely divest itself of control of submerged lakebed was articulated as early as 1892 in U.S. Supreme Court case, *Illinois Central Railroad v. Illinois.*

In closing, I would like to go back to the text of the constitution. Underlying the justification for this bill seems to be the idea that, if public rights have their origin from a long time ago, then they are not of much relevance today. But when the drafters of our constitution used the word "forever," they meant it. In fact, this is the only instance in which the framers, creating a document that would guide the state into a distant future, used the word "forever." However, Wisconsinites' perpetual right to access and enjoy the waters of Wisconsin will not last forever on its own. That right is only real for those of us lucky enough to grow up and live here because the public trust has been jealously guarded -- not just by

courts but also -- by generations of legislators. And that perpetual right will only be available for the next generations if we protect it today.

Thank you again for the opportunity to provide testimony. I would be happy to answer questions. You are welcome to contact me at tgibart@midwestadvocates.org or 608-251-5047 x 4.

City of Sheboygan
spirit on the lake

TO: Members of the Wisconsin State Legislature

FROM: City of Sheboygan, Office of the Mayor

RE: AB 849/ SB 900– Resolving Legal Issues Related to Historic Fills by Waterfronts

Overview: The City of Sheboygan has several plots of land that are within an area that was surveyed in 1835 (before Wisconsin became a State in 1848) which prevents us from development. The DNR has moved the goal post and changed the rules on how cities can pursue development in these areas.

Background: The City of Sheboygan was originally incorporated as a city in 1853, just a few years after Wisconsin became a State in 1848. Before Wisconsin became a State, a survey was conducted in 1835 which outlined the boundaries of the Lake Michigan and Sheboygan River shoreline. Many decades ago, the shore line has changed by both natural and human means. Currently, there are many private and publicly owned buildings and lots that are on the infill areas where the original lakebed was many decades ago. Additional entities that are included in this area include several businesses, privately owned homes, a YMCA, a large resort, a coast guard station, and many supporting infrastructure needs.
The undeveloped parcels in the City of Sheboygan that would benefit from this legislation equates to about 5 acres of developable space adjoining Lake Michigan. The city estimates that approximately $10 million of taxable value could be created for each 1 acre of land. The estimated 5 acres of land could equate to about $50 million in new taxable income for the City of Sheboygan. It should also be noted that the larger of the parcels (the 2.44-acre parcel) that falls within these new requirements has been privately owned as lumber company as shown on Sanborn Fire Insurance Maps starting in 1867 to the early 1940's when the property was redeveloped.

Recommendation: We ask for your support on this legislation. This legislation will help our community continue to grow and will allow constructive development to take place. Cities need to grow to survive, and this legislation will help us stay on a positive path forward.

Office of the Mayor

CITY HALL
828 CENTER AVE.
SHEBOYGAN, WI 53081

920-459-3317
www.sheboyganwi.gov

City of Sheboygan
spirit on the lake

Dear Members of the Wisconsin Legislature,

I wanted to reach out to you regarding AB 849/SB 900, the legislation that focuses on resolving legal issues related to historic fills near waterfronts. I just want to come out of the gate and say that the City of Sheboygan is in favor of this bill. This bill is vital to the growth and success of our community.

I want to assure you that this legislation does not impact public trust concerns or impede access to our water ways. Sheboygan is one of the most accessible municipalities to access Lake Michigan and the Sheboygan River. In fact, the current boundary of infill includes; several private homes, a YMCA, a Coast Guard Station, a large resort, and several other private and publicly owned lots. The DNR has changed its interpretation of the rules for how cities can pursue development, which has made planning more difficult.

I ask for your support on AB 849/SB 900. If this bill is passed, Sheboygan will be able to continue to purse responsible development which can have an economic impact of $50 million.
If you have any additional questions please feel free to reach out to my office. I would also like to extend an invite to you and your staff to visit Sheboygan so you can see our situation first hand.
Thank you for your service to our State.

Dutifully,

Ryan Sorenson
Mayor
City of Sheboygan

Office of the Mayor

CITY HALL
828 CENTER AVE.
SHEBOYGAN, WI 53081

920-459-3317
www.sheboyganwi.gov

SHEBOYGAN COUNTY
ECONOMIC DEVELOPMENT
CORPORATION
DO MORE.

508 NEW YORK AVENUE, ROOM 209
SHEBOYGAN, WI 53081
920 452 2479
SHEBOYGANCOUNTYEDC.COM

January 31, 2022

To: Wisconsin Legislators

From: Sheboygan County Economic Development Corporation

RE: AB 849 – Resolving Legal Title Issues Related to Historic Fills of Waterfront Property

The Sheboygan County Economic Development Corporation would appreciate your support of AB 849 in resolving this critical legal matter, so that local parcels which are prime for redevelopment can be advanced. The parcels in question are not greenfield sites but were previously developed and utilized by both private sector businesses and area governments for community functions.

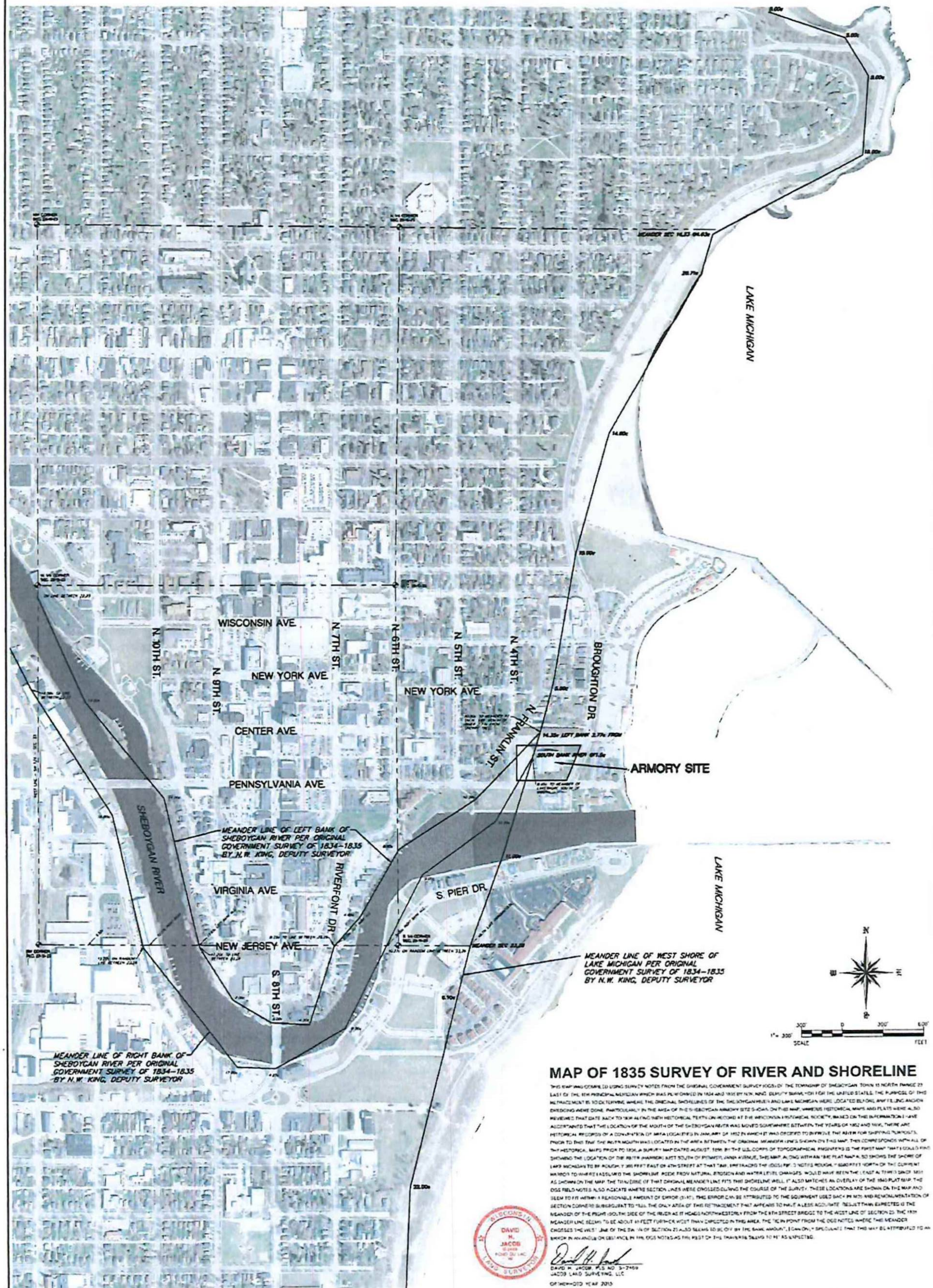
In the City of Sheboygan, the parcels are prime lots near Lake Michigan but not necessarily on the waterway. In previous decades, these lots or similar lots saw the advancement of residential housing units, a Coast Guard station, and a large resort.

With your passage of this legislation, the City of Sheboygan will be able to fully implement a redevelopment strategy that has been over a decade in the making. The passage of this legislation is vital for residents and visitors alike to maximize their enjoyment of the fantastic lakefront access already available in Sheboygan.

Thank you for your consideration.

Sincerely,

Brian Doudna
Executive Director
920-946-9378



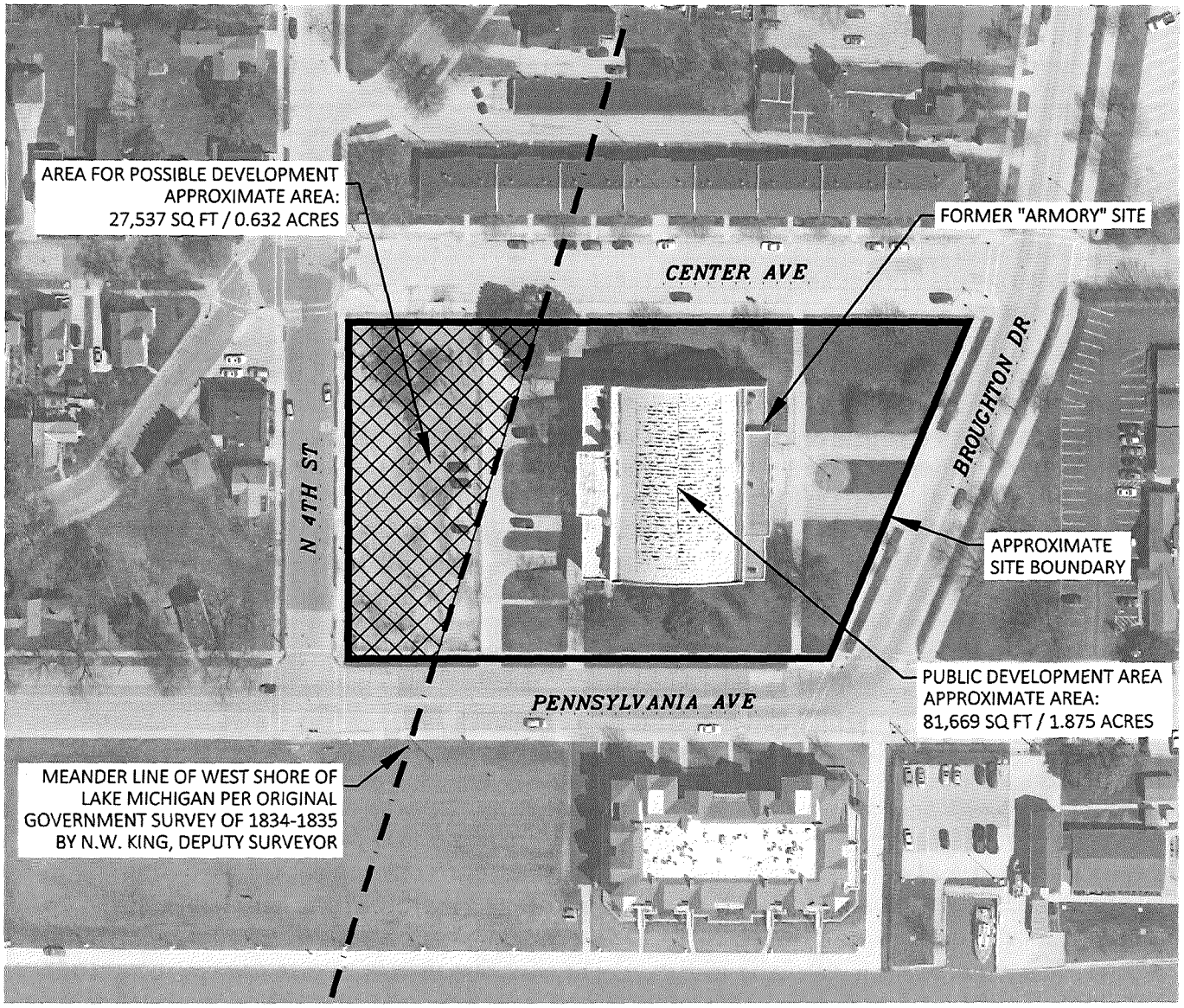
MAP OF 1835 SURVEY OF RIVER AND SHORELINE

DAVID H. JACOB, PLS NO. S-2469
JACOB LAND SURVEYING, LLC
ORTHOPHOTO YEAR 2015

SHEET	DATE:	PROJECT:	OWNER:		REVISIONS:
1/1	02/27/2019 PROJECT NO.: 191053	SHEBOYGAN ARMORY CITY OF SHEBOYGAN, WI	CITY OF SHEBOYGAN	Jacob Land Surveying LLC W8057 Randallwood Lane Fond du Lac, WI 54937 phone: 920-922-2908	

CITY OF SHEBOYGAN

FORMER "SHEBOYGAN MUNICIPAL AUDITORIUM AND ARMORY" SITE



NOTE:
AS OF THE DATE ON THIS MAP, THERE HAS NOT BEEN A BOUNDARY SURVEY OF THE "ARMORY" PROPERTY PERFORMED. THE PROPERTY BOUNDARY AND AREAS SHOWN ARE APPROXIMATIONS ONLY.

THIS MAP WAS PREPARED USING REFERENCE TO A MAP EARLIER PREPARED BY DAVID H. JACOB, P.L.S. OF JACOB LAND SURVEYING, LLC OF FOND DU LAC, WISCONSIN DATED 02/27/2019 AND IS ON FILE WITH THE CITY ENGINEERING DIVISION.

N

GRAPHIC SCALE

0 120 240

(IN FEET)

MAP PREPARED BY: MICHAEL P. BORN, PLS DATED: 07/30/2021

CITY OF SHEBOYGAN
PUBLIC WORKS
Department of Public Works
Engineering Division
City of Sheboygan, Wisconsin
Phone: 920-459-3440
Fax: 920-459-3443

CITY OF SHEBOYGAN

FORMER "SHEBOYGAN MUNICIPAL AUDITORIUM AND ARMORY" SITE

NOTE FROM RETRACEMENT SURVEY PERFORMED BY DAVID H. JACOB, P.L.S.
OF JACOB LAND SURVEYING, LLC - FOND DU LAC, WISCONSIN
DATED: 02/27/2019

MAP OF 1835 SURVEY OF RIVER AND SHORELINE

THIS MAP WAS COMPILED USING SURVEY NOTES FROM THE ORIGINAL GOVERNMENT SURVEY (OGS) OF THE TOWNSHIP OF SHEBOYGAN, TOWN 15 NORTH, RANGE 23 EAST OF THE 4TH PRINCIPAL MERIDIAN WHICH WAS PERFORMED IN 1834 AND 1835 BY N.W. KING, DEPUTY SURVEYOR FOR THE UNITED STATES. THE PURPOSE OF THIS RETRACEMENT IS TO DETERMINE WHERE THE ORIGINAL SHORELINES OF THE SHEBOYGAN RIVER AND LAKE MICHIGAN WERE LOCATED BEFORE ANY FILLING AND/OR DREDGING WERE DONE, PARTICULARLY IN THE AREA OF THE SHEBOYGAN ARMORY SITE SHOWN ON THIS MAP. VARIOUS HISTORICAL MAPS AND PLATS WERE ALSO REVIEWED THAT DATE BACK TO 1836 ALONG WITH HISTORICAL TEXTS ON RECORD AT THE WISCONSIN HISTORICAL SOCIETY. BASED ON THIS INFORMATION I HAVE ASCERTAINED THAT THE LOCATION OF THE MOUTH OF THE SHEBOYGAN RIVER WAS MOVED SOMEWHERE BETWEEN THE YEARS OF 1852 AND 1856. THERE ARE HISTORICAL RECORDS OF A CONVENTION OF AREA LOCALITIES IN JANUARY OF 1852 IN WHICH IT WAS DECIDED TO IMPROVE THE RIVER FOR SHIPPING PURPOSES. PRIOR TO THIS TIME THE RIVER MOUTH WAS LOCATED IN THE AREA BETWEEN THE ORIGINAL MEANDER LINES SHOWN ON THIS MAP. THIS CORRESPONDS WITH ALL OF THE HISTORICAL MAPS PRIOR TO 1856. A SURVEY MAP DATED AUGUST, 1856, BY THE U.S. CORPS OF TOPOGRAPHICAL ENGINEERS IS THE FIRST MAP THAT I COULD FIND SHOWING THE LOCATION OF THE RIVER (HARBOR) JUST SOUTH OF PENNSYLVANIA AVENUE. THIS MAP, ALONG WITH AN 1840 PLAT MAP ALSO SHOWS THE SHORE OF LAKE MICHIGAN TO BE ROUGHLY 300 FEET EAST OF 4TH STREET AT THAT TIME. I RETRACED THE (OGS) FIELD NOTES ROUGHLY 6500 FEET NORTH OF THE CURRENT HARBOR TO WHERE I ASSUMED THE SHORELINE, ASIDE FROM NATURAL EROSION AND WATER LEVEL CHANGES, WOULD HAVE BEEN THE LEAST ALTERED SINCE 1835. AS SHOWN ON THE MAP, THE TRAVERSE OF THAT ORIGINAL MEANDER LINE FITS THIS SHORELINE WELL. IT ALSO MATCHES AN OVERLAY OF THE 1840 PLAT MAP. THE OGS FIELD NOTES ALSO INDICATE WHERE SECTION LINES WERE CROSSED DURING THE COURSE OF THE SURVEY. THESE LOCATIONS ARE SHOWN ON THE MAP AND SEEM TO FIT WITHIN A REASONABLE AMOUNT OF ERROR (5'-10'). THIS ERROR CAN BE ATTRIBUTED TO THE EQUIPMENT USED BACK IN 1835 AND REMONUMENTATION OF SECTION CORNERS SUBSEQUENT TO 1835. THE ONLY AREA OF THIS RETRACEMENT THAT APPEARS TO HAVE A LESS ACCURATE RESULT THAN EXPECTED IS THE MEANDER OF THE RIGHT (SOUTH) SIDE OF THE RIVER AS IT HEADS NORTHWESTERLY FROM THE 8TH STREET BRIDGE TO THE WEST LINE OF SECTION 23. THE 1835 MEANDER LINE SEEMS TO BE ABOUT 40 FEET FURTHER WEST THAN EXPECTED IN THIS AREA. THE TIE IN POINT FROM THE OGS NOTES WHERE THIS MEANDER CROSSES THE WEST LINE OF THE SW 1/4 OF SECTION 23 ALSO SEEMS TO BE OFF BY THE SAME AMOUNT. I CAN ONLY SPECULATE THAT THIS MAY BE ATTRIBUTED TO AN ERROR IN AN ANGLE OR DISTANCE IN THE OGS NOTES AS THE REST OF THE TRAVERSE SEEMS TO FIT AS EXPECTED.

CITY OF SHEBOYGAN
PUBLIC WORKS
Department of Public Works
Engineering Division
City of Sheboygan, Wisconsin
Phone: 920-459-3440
Fax: 920-459-3443

To: Members, Assembly Committee on Environment

From: Tom Larson, WRA Executive Executive Vice President and Chief Lobbyist for NAIOP-WI and Toni Herkert, League of Wisconsin Municipalities Government Affairs Director, Brad Boycks, Wisconsin Builders Association Executive Director, and Michael Welsh, Wisconsin Economic Development Association Vice President of Legislative Affairs and Communications

Date: February 16, 2022

Re: AB 849/SB 900 – Resolving Legal Title Issues Related to Historic Fills of Waterfront Property

The League of Wisconsin Municipalities, Wisconsin REALTORS® Association, NAIOP-WI, Wisconsin Builders Association, and the Wisconsin Economic Development Association support AB 849/SB 900, legislation aimed at resolving legal title disputes on property that has been filled for over 40 years to allow Wisconsin municipalities to redevelop commercial and industrial waterway areas along the Great Lakes and commercial rivers.

Overview -- Numerous Wisconsin municipalities (e.g., Ashland, Bayfield, Milwaukee, Oshkosh, Sheboygan, Sturgeon Bay, Superior) located along the Great Lakes are having difficulty redeveloping and making constructive use of their shorelines because of legal title issues associated with the land adjacent to or near the waterway.

In most cases, this land was once part of the waterway, but was filled several decades ago (generally, prior to 1960) either through natural processes or as part of a legislative or common law authorization. Below are some of the most common ways in which legal title has been conveyed over the years to once-submerged lands:

Regulatory/Legislative Authorizations. There have been several types of legislative grants of title or similar authorizations used with respect to filling of navigable waters:

- Legislative lakebed grants which grant title to local governments for specified public purposes (see e.g., 2015 Wis. Act 11, granting Brown County legal title of certain submerged lands in Green Bay).
- Bulkhead line approvals and submerged land leases (Wis. Stat. §§ 24.39 and 30.11) which allow structures and fills to be placed to a designated line into the water. A bulkhead line is a water boundary established by a municipal ordinance in accordance with Wis. Stat. § 30.11 which approximates the OHWM. Some bulkhead lines require submerged land leases with respect to filled areas executed by the board of commissioners of public lands.
- Wis. Stat. § 30.12 (and its predecessors) authorized fill for specified navigational purposes by permit but did not convey title.

Common Law Authorizations. There are two common law doctrines that have been applied to grant title to filled lakebed without legislative authorization.

- Accretion. The courts regularly addressed changing shorelines from the natural processes of accretion and reliction through the quiet title actions, often with little discussion of public trust concerns.
- Adverse possession. As early as 1878, the statutes authorized adverse possession claims against the state, and made no exception for trust lands. In 1957, the legislature excluded certain categories of state trust lands from the reach of adverse possession but those identified lands did not include lakebed; rather, they were school lands, university lands, swamp lands and the like. In 2016 that exclusion became absolute to all state property.

Some case law has been interpreted to mean that lakebed is owned by the public and/or protected by the Public Trust Doctrine under Wisconsin's Constitution and thus title cannot be conveyed to private individuals. Without a resolution to these title issues, obtaining title insurance and financing necessary for the redevelopment of this property is problematic. (Note – most of the land at issue is located in urban areas, has already been developed and has historically been used for commercial or industrial purposes).

Ownership Issues Are Different for Riverbeds and Lake Beds. The ownership of riverbeds and lake beds has an important legal distinction. In the case of lakes, the title to the beds is held by the state. For riverbeds, the title is held by the riparian owner, but this title is qualified by the rights of the public to use the water for navigation. Accordingly, AB 849/SB 900 contains two separate sectionsto recognize these differences – a Great Lakes section section and a rivers section.

Great Lakes section– Under the Great Lakes section of AB 849/SB 900, a municipality may determine the shoreline (boundary between upland and property waterward) after an application by a record title holder of a Great Lakes property. All of the following conditions must be met for a property to be designated as landward of the shoreline:
- The property includes portions of land that may have been part of the submerged bed of Lake Superior, Lake Michigan, Green Bay or Sturgeon Bay at the time of statehood.
- The property includes portions of land that are at an elevation above the current ordinary high-water mark since December 9, 1977 (except for temporary maintenance activities or because of accretion or reliction),
- The property is within a municipality (city or village),
- The property is not subject to a lake bed grant or a submerged land lease and is not landward of the shoreline established for a portion of the City of Milwaukee under s. 30.2038,
- The approval of the shoreline is in the public interest, and the proposed use will promote the interests of the public, which may include public rights in navigable waters, public use, economic development or redevelopment, the elimination of blight, remediation of brownfields, and settling uncertainty in title.

DNR, with the option of a hearing, will review the municipality's shoreline decision. A final determination under this bill establishes the shoreline for purposes of clarifying the boundary of title between land held in trust by the state and land held in fee title ownership.

Rivers section– Under the industrial rivers section of AB 849/SB 900, an owner of filled property that was once river bed may use the property for any public or private purpose without restrictions imposed as a result of the prior status of the property as river bed if the property is located on one of the designated commercial industrial rivers listed in the bill, the property has been filled since December 9, 1977, and either of the following conditions are met:
- The fill is unauthorized and the DNR has not initiated enforcement action prior to the effective date of the bill,

- If the fill is landward of an authorized bulkhead line the use of the filled area is not specifically restricted by the terms included in a submerged land lease.

We respectfully request your support for AB 849/SB 900. If you have questions or need additional information, please contact us.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Tony Evers, Governor
Preston D. Cole, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711

Assembly Committee on Environment

2021 Assembly Bill 849
Use of Fill in Commercial Waterways and Establishing Shorelines of Great Lakes Waters

February 16, 2022

The Wisconsin Department of Natural Resources (DNR) welcomes the opportunity to provide written testimony on Assembly Bill 849 (AB 849), related to the use of fill in commercial waterways and establishing shorelines of Great Lakes waters.

The department appreciates the strong legislative, judicial, and public support of the public trust in the waters of Wisconsin. The constitutionally based public trust doctrine protects the rights of our citizens for navigation and recreation in our waterways. The public trust doctrine likewise protects water quality, aquatic habitat, and the natural scenic beauty of our waterways.

AB 849 seeks to address a set of similar, yet legally and factually distinct issues related to historic fill of public waterways. The department believes that certain aspects of these issues may be readily addressed by the legislature to provide clarity and certainty. For example, there are properties in some of our coastal communities with portions of the property that is legally and technically lakebed fill without authorization, that are landlocked and not directly adjacent to the current edge of the lake, but have been filled and dry for decades. Cleaning up title on these lands makes sense.

There are also individual homeowners and small business owners in some of our coastal communities with portions of their property that is legally and technically lakebed, for which no legal lakebed grant has ever been issued by the Legislature. These lands are directly adjacent to the current edge of the lake, but have been filled and dry for decades. We have typically relied on enforcement discretion where no expansion or change in use is occurring. Cleaning up title on these lands also makes sense.

The department could support adding more certainty for the DNR, municipalities, and developers for particular areas of the coastline, and perhaps harbors, that are legally and technically lakebed, and therefore public land held in trust by the state, for which no legal lakebed grant has ever been issued by the Legislature. Likewise, there is value in providing certainty regarding the use of filled riverbeds in commercial waterways. These lands are directly adjacent to the current edge of the water, but have been filled and dry for decades. There is value in exploring ways to avoid costly legal challenges and complex permitting for these sites by looking at a process with statutory clarity on where some development could occur, coupled with real incentives for providing meaningful and substantial public use amenities and adequate funding to maintain the public use aspects. The goal could be to devise a way to meet the public trust doctrine requirements by balancing some loss of the public values in the historic lakebed or riverbed, with the allowance of some private development, and including real increases in public use of the coastline.

The department has concerns with how the bill is currently drafted and would welcome an opportunity to sit down with the author and others to discuss ideas for amendments to this bill that could add clarity to some of the proposed definitions. The department would also welcome additional conversation on process elements that would more clearly recognize and enhance the public rights in these areas.

Thank you for the opportunity to provide this written testimony. If you have questions or if there is any further information the department can provide, please feel free to contact Sean Kennedy, DNR Legislative Director, at Seanp.Kennedy@Wisconsin.gov.

WISCONSIN'S greenfire
VOICES FOR CONSERVATION

February 16, 2022

Representative Joel Kitchens

PO Box 8952

Madison, Wisconsin 53707

Dear Chair Kitchens and members of the Assembly Committee on the Environment,

Wisconsin's Green Fire (WGF) appreciates the opportunity to comment on Assembly Bill 849. WGF is an independent and nonpartisan organization, with members who represent extensive experience in natural resource management, environmental law and policy, scientific research, and education. I was an Attorney for the Wisconsin Department of Natural Resources (WDNR) for 34 years and hold extensive experience in public trust issues in Wisconsin. I serve as co-chair for Wisconsin's Green Fire's Public Trust and Wetlands Work Group.

Wisconsin's Green Fire opposes Assembly Bill 849. WGF believes AB 849 would violate the Wisconsin Constitution's "public trust doctrine" by transferring property held in trust by the State for the benefit of the people to private persons for private use.

Wisconsin's water law has been governed by one cardinal principle since long before Wisconsin became a State in 1848. **The State's surface waters -- and the beds of our natural lakes -- are owned by the people.** They are not owned by the State and the State can't give them away for private use.

To protect the public's interest in these assets the State government serves as a Trustee. Trustees are held to a high standard – whether they manage funds for a minor or an incapacitated person or protect the public's rights in the navigable waters of Wisconsin – they must preserve and protect assets owned by another. The Wisconsin Supreme Court has recognized that the Legislature has no power to transfer the Trust property it is charged to manage (including filled lakebeds) to private persons for private use.

When the Legislature proposed to give a private entity title to the bed of a navigable lake for development purposes in the late 1800s, the Wisconsin Supreme Court made this point plainly holding that:

"The Legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of navigable waters within it's boundaries, than it has to donate the school fund or the state capitol to a private purpose."

-Priewe v. Wisconsin State Land and Improvement Company, 103 Wis. 537, 79 N.W. 780 (1899).

WISCONSIN'S greenfire
VOICES FOR CONSERVATION

The problems AB 849 aims to solve are not new. They have been addressed by previous Legislatures in ways consistent with the State's Public Trust duty. For example, Section 30.11 of the statutes authorizes the placement of bulkhead lines and fill on submerged lake and riverbeds under some circumstances. Section 24.39 authorizes long-term leases of some submerged lands. These laws were deliberately drafted to conform with the public trust doctrine. They have provided solutions to some thorny public trust challenges, but do not provide for the permanent transfer of any part of the State's public trust assets for any wholly private purpose.

Wisconsin's existing bulkhead line and submerged lands lease statutes aren't perfect, and they don't solve all the problems presented by sites where lakes or streams were filled in the past or might properly be filled in the future. There is room for legislation in this area and WGF would welcome the opportunity to work with interested members to craft legislation to reform submerged land policy in Wisconsin consistent with the Legislature's duty as public trustee.

However, this bill is too broad and would subject developers and property owners to the potential of years of litigation relating to the title of these properties rather than resolving issues.

Two of our key concerns with AB 849 as it is currently drafted are:

1. **The Legislature cannot abdicate its trust responsibility over these filled lakebeds and riverbeds by granting ownership of them, to private owners for any private purpose**. This foundation principle was firmly established by the US Supreme Court in *Illinois Central v. Illinois* (1892) and has been consistently followed by the Wisconsin Supreme Court ever since.

2. Second, **the Legislature cannot lawfully delegate its trust authority to local units of government**. This is because our public trust waters constitute a matter of statewide concern. The Legislature cannot wash its hands and permit local officials to make critical decisions about their use (Muench vs. Public Service Commission, 1951).

Thank you for allowing WGF to comment on AB 849 . Wisconsin's Green Fire members would be happy to engage with the co-authors and others interested in crafting legislation to address the problems that have prompted the introduction of the bill.

Sincerely,

Michael Cain, Attorney and Chair of WGF's Public Trust and Wetlands Work Group

15 February 2022

To: Wisconsin Assembly Committee on Environment

Chair, Rep.Kitchens@legis.wisconsin.gov

Committee Clerk, Adam.Tobias@legis.wisconsin.gov

Re: Testimony AGAINST AB849/SB900

Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16th.I am unable to attend in person.

Thank you for the opportunity to provide testimony in opposition to AB849.

Dear Representative Kitchens,

I am writing to oppose this bill because it would directly enable municipalities to remove public trust lands on filled lake beds (owned by the state for the people of Wisconsin) and be able to sell for private commercial development.

How can you support a bill that would decrease the public's full waterfront access? Or contemplate writing a law that directly contradicts the constitution.

What about protecting the Public Land Doctrine?

This hits home personally as I live in beautiful Door County in the city of Sturgeon Bay. We have an incredible home for residents and a tourism industry that continues to grow exponentially. A bill of this kind would be disastrous. Same for the many waterfront cities and towns in Wisconsin who rely on vibrant public waterfronts.

The state has the constitutional obligation to protect these lands it owns on behalf of the people of Wisconsin.

Please do not support this bill.

Thank you for giving me the opportunity to provide this testimony.

Signed,

Cathy Grier

Sturgeon Bay, WI 54235

Tobias, Adam

From: Nancy O'Connell <nancy1666@icloud.com>
Sent: Tuesday, February 15, 2022 4:25 PM
To: Tobias, Adam
Subject: Opposition to AB849/SB900

To: Wisconsin Assembly Committee on Environment Chair, Rep.Kitchens I am in opposition to AB849, the public-trust-destroying bill. I'm against AB849 because this bill would enable municipalities to remove public trust lands on filled lakebeds (owned by the state for the people of Wisconsin and sell for private commercial development.
Please confirm receipt of this testimony.
Nancy Hawkins (O'Connell)

Sent from my iPhone

Tobias, Adam

From: Morgan Rusnak <mcrusnak@gmail.com>
Sent: Tuesday, February 15, 2022 5:05 PM
To: Rep.Kitchens
Cc: Tobias, Adam
Subject: AB849/SB900

Follow Up Flag: Follow up
Flag Status: Flagged

Hello -

I've lived within biking distance to Great Lakes water for 32 years, the past 14 within walking distance. I do not support AB849. Door County boasts a unique geological makeup, is home to a diverse & delicate ecosystem of flora and fauna, and is economically-driven by a tourism-economy that is steadily shifting towards outdoor recreation and appreciation. Water fuels it all and that includes the public trust lakebed. As Sturgeon Bay joins communities around the Green Bay region to pursue a NOAA-funded NERR designation, facility, and support, I would hate to see those efforts thwarted. I am not anti-development, but I do not feel that the 'maybe' of future development should not hold more weight than the existing strain on resources and the continued protection of public waterfront.

Thank you for the opportunity to provide testimony - please confirm receipt.

Best,

--
Morgan Rusnak (she/her)
643 N 5th Ave
Sturgeon Bay, WI 54235
262-853-5545 | mcrusnak.com

I acknowledge the First Nations of the Door Peninsula, who have stewarded this land throughout the generations.
I recognize this land and these waters as their home.
I honor their history of resistance and resilience and allow it to better inform my work and actions.

Tobias, Adam

From: Shawn Fairchild <fairchild.shawn@gmail.com>
Sent: Saturday, February 12, 2022 10:02 PM
To: Tobias, Adam
Cc: Rep.Hebl; Rep.Shankland; Rep.Anderson
Subject: Testimony AGAINST AB849/SB900

12 February 2022
To: Wisconsin Assembly Committee on Environment
Chair, Rep.Kitchens@legis.wisconsin.gov
Committee Clerk, Adam.Tobias@legis.wisconsin.gov
Re: Testimony AGAINST AB849/SB900

Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16th. I am unable to attend in person.

Thank you for the opportunity to provide testimony in opposition to AB849.
Quite frankly, I do not understand how a handful of legislators can feel they need to change a precedent laden constitutional law that protects the public's rights to access and use of its waterways, for the politically supported greed of The League of Wisconsin Municipalities, the Wisconsin Realtors Association, the NAIOP Commercial Real Estate Development Association, the Wisconsin Builders Association, and the Wisconsin Economic Development Association. We must have run out of highly sought after waterfront property to exploit and market to the private sector "in the name of, and for the good of" the public itself. "Tax base dollars are being squandered on properties that could be holding title", they say, "creating infrastructure" that benefits the public through TID and TIFF ponzi schemes.

I have been all over this country, been to several places around the world, and the State of Wisconsin is one of the few places that does not place a higher value on open waterfront on public doctrine defined space, than it does the disturbing concept of "develop to the water's edge" with no regard for public use and access, with "the public's interest at heart".

There are isolated examples that are being brought forward, and that is exactly what they are, isolated examples that should be dealt with as such through the cooperation of the Board of Commissioners of Public Lands, the Wisc DNR, and the municipality involved, as has always been the case.
Short of defining the OHWM along every inch of waterfront in the state, each case of issue has been dealt with on an individual level. The law is there and has been for a very long time.

It is absurd to think that the legislature can give the power to the local municipality to change the boundaries to suit their needs and then seek a rubber stamp approval from the DNR. The legislature can not just create a law that makes new boundaries that create a title for a public trust property, so that now it can be transferred into private hands. That is exactly what was tried in Sturgeon Bay by the local municipality, and it failed miserably in court.

The inclination that this bill would remain narrow in effect, addressing the issues that relate to the handful of cases being used as examples, is preposterous. Quite the contrary, it would set a domino like event that would clog the courts from now until eternity.
It is ironic that "municipalities" would be in support of this change in legislation, when those municipality's are given by the law, the responsibility to protect and be the guardians of the public's trust lands.
Please do not support this bill, it is based on greed!
Thank you for the opportunity to provide testimony.
Shawn Fairchild

311 Pennsylvania St
Apt G
Sturgeon Bay, WI 54235

Tobias, Adam

From: Nancy Aten <nancyaten@earthlink.net>
Sent: Tuesday, February 15, 2022 8:20 AM
To: Rep.Kitchens; Tobias, Adam
Subject: Re: AB849 Public Hearing -- Testimony in opposition to AB849

I am re-sending. I received a rejection notice from the first email.

On Feb 12, 2022, at 1:49 PM, Nancy Aten <nancyaten@earthlink.net> wrote:

12 February 2022

To: Wisconsin Assembly Committee on Environment
Chair, Rep.Kitchens@legis.wisconsin.gov
Committee Clerk, Adam.Tobias@legis.wisconsin.gov

Re: Testimony AGAINST AB849/SB900

Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16th. I am unable to attend in person due to work conflicts.

Thank you for the opportunity to provide testimony in opposition to AB849.

This bill would directly enable municipalities, when cash-strapped, on a whim or under pressure from powerful groups, to remove public trust lands on filled lakebeds (owned by the state for the people of Wisconsin) and sell for private commercial development.

There would be essentially no ability for the state to prevent a municipality from privatizing all of its filled lakebed (a quite common condition with bulkheads at municipal shorelines). The state has the constitutional obligation to protect these lands it owns on behalf of the people of Wisconsin — yet this legislation would give municipalities the right to take those lands away from the people of Wisconsin. The state would have no recourse.

Anyone thinking that short-sighted municipalities would not do this, are mistaken. We have quite a history of this bad behavior in Sturgeon Bay. Considering that the City is currently expending significant resources to attract a NOAA-funded National Estuarine Research Reserve with all its ongoing benefits, it is sadly ironic for individuals employed at the City to undermine that effort by lobbying for this removal of public waterfront (as two did, without apparent City authority, in person at the SB900 hearing).

I want to note that in the late 1950s, when the City of Sturgeon Bay received a bulkhead permit to fill the west side waterfront and create the bulkhead, the State of Wisconsin reminded them that this filled lakebed remained in the public trust! And the City confirmed then that it would forever be park land. It's not like the City was unaware of the perpetual public trust doctrine protection for filled lakebed. I like to think that the City, as properly representing its constituents, valued that protection. The waters and filled lakebeds belong to all of us.

It is outrageous to me for anyone to support a bill that would decrease the public's full waterfront access. It is particularly insupportable considering the crucial tourism industry in Sturgeon Bay and Door County — and many other waterfront cities and towns in Wisconsin — who rely on vibrant public waterfronts.

The City of Sturgeon Bay fought to subvert the law in recent years, trying to sell public trust lands for private commercial development — losing decisively in court to a coalition of hundreds of local citizens (including me). That is, at the time, it was actually the City, a municipality, trying to sell state-owned public waterfront on filled lakebed to private interests.

That correct result, protecting the public trust lands, plus changes in elected officials, has allowed Sturgeon Bay to move forward on vibrant public waterfront space plans, and along with historic districts and arts districts, has enabled revitalization of our maritime and tourism economy. It has also given us the public trust credentials to help work hard to attract a NOAA NERR facility that would be game-changing.

(The protection re-affirmed by the lawsuit decision also enabled a changed City to receive a limited-term lakebed lease for this one very small portion of Sturgeon Bay's westside waterfront public space. Thankfully that lakebed lease might protect that one particular very small spot for the term of the lease.)

It's inexplicable to me that legislators can contemplate writing a law that directly contradicts the constitution. The Public Trust Doctrine language may be simple, but it is powerful, and it has been overwhelmingly protected for 170 years. As Wisconsinites we have a constitutional right to the waters of the state, very importantly including filled lakebed. We enjoy that right and we value it greatly.

Please do not support this bill.

Thank you for the opportunity to provide testimony.

Nancy Aten
P.O. Box 534
Sturgeon Bay, Wisconsin 54235

Tobias, Adam

From: John Hauser <johnadamhauser@gmail.com>
Sent: Tuesday, February 15, 2022 5:59 PM
To: Rep.Kitchens; Tobias, Adam
Subject: AB849

Follow Up Flag: Follow up
Flag Status: Flagged

February 15, 2022

To: Wisconsin Assembly Committee on Environment
Chair, Rep.Kitchens@legis.wisconsin.gov
Committee Clerk, Adam.Tobias@legis.wisconsin.gov

Re: Testimony AGAINST AB849/SB900

Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16. Because of my job, I am unable to attend in person.

Thank you for the opportunity to provide testimony in opposition to AB849.

I am opposed to the bill that you are considering because I believe that it is not a just way to address past inadequacies in the enforcement of the Public Trust Doctrine. To select a "do over" sort of approach may be easy operationally, but it ignores the significance of the Doctrine itself and the public's right to access to navigable waterways. The concept was built into the U.S. Constitution and adoption of the concept is one of only two requirements the federal government imposed on states applying for statehood. Public access to lands below the high water mark, natural or filled, is something our ancestors insisted upon. I encourage you to look for other solutions to what I recognize as a difficult problem.

I understand that two employees of the City of Sturgeon Bay have provided testimony regarding the challenges they had with the implementation of a planned development on the waterfront in Sturgeon Bay. I have not read or heard their testimony, but I would concur that there were challenges associated with that plan. Where I would disagree with them, however, is if they pin those challenges on their difficulty conforming that plan to the requirements created through the Public Trust Doctrine. The real challenges came from a community who stood up in opposition to the plan and in favor of continued protection of the public access to the waterway. In the election following the introduction of the plan, every candidate but one who ran in opposition to the plan and in support of protecting public rights to the waterfront was elected. The public strongly supported what the Public Trust Doctrine was designed to do. Public rights to the waterway were maintained, both through the voice of the electors and through conformation to the Public Trust Doctrine.

I know that there are challenges associated with the Public Trust Doctrine because of a history of poor enforcement. I encourage you to look for ways to address those challenges in a bipartisan manner and with the engagement of representatives from all of the affected constituencies. I appreciate your willingness to take on this task and I hope you do so with a full appreciation for the

weight of the responsibility before you and a recognition of the significance it has on the future of our state.

Thank you for the opportunity to provide testimony. Please do not support bill AB849.

John A. Hauser
746 Kentucky Street
Sturgeon Bay, WI 54235
920-495-8991

Sent from Mail for Windows

Tobias, Adam

From: Chesla Anschutz <canschutz99@att.net>
Sent: Monday, February 14, 2022 9:47 AM
To: Rep.Kitchens; Rep.Tusler; Tobias, Adam
Subject: Testimony AGAINST AB849/SB900

Follow Up Flag: Follow up
Flag Status: Completed

14 February 2022
To: Wisconsin Assembly Committee on Environment
Chair, Rep.Kitchens@legis.wisconsin.gov
Vice Chair, Rep.Tusler@legis.wisconsin.gov

Committee Clerk, Adam.Tobias@legis.wisconsin.gov

Re: Testimony AGAINST AB849/SB900

I am unable to attend the February 16th hearing in person due to work conflicts. Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16th. Thank you for the opportunity to provide testimony in opposition to AB849.

How legislators can contemplate writing a law that directly contradicts the constitution, is unfathomable. The Public Trust Doctrine language is powerful but simple, and it has been overwhelmingly protected for 170 years. As Wisconsinites we have a constitutional right to the waters of the state, and very importantly including filled lake beds. We value that right and we appreciate it greatly.

There would be essentially no ability for the state to prevent a municipality from privatizing all of its filled lakebed (a quite common condition with bulkheads at municipal shorelines). The state has the **constitutional obligation to protect these lands it owns on behalf of the people of Wisconsin** — yet this legislation would give municipalities the right to take those lands away from the people of Wisconsin. The state would have no recourse.

Don't even think that greedy or narrow-minded municipalities would not do this. The City of Sturgeon Bay, where we live, has quite a history of this type of poor behavior. AND considering that the City is currently working to attract a NOAA-funded National Estuarine Research Reserve with all its ongoing benefits, it angers us that without City approval or authority, two individuals employed with the City of Sturgeon Bay made a shameful attempt to undermine that effort by lobbying for this removal of public waterfront, in person at the SB900 hearing last week.

It is outrageous to me that anyone would want to support a bill that would decrease the public's full waterfront access. It is particularly insupportable considering the crucial tourism industry in Sturgeon Bay and Door County — and many other waterfront cities and towns in Wisconsin — who rely on vibrant public waterfronts. This bill would also directly enable municipalities, when cash-strapped, on a whim or under pressure from

powerful groups, to remove public trust lands on filled lake beds, which are owned by the state for the people of Wisconsin, and sell for private commercial development.

The waters and filled lake beds belong to all the citizens of Wisconsin.

Please do not support this bill.

Thank you,
Chesla and Paul Anschutz
221 N. 6th Avenue
Sturgeon Bay, WI 54235

Tobias, Adam

From: Laurel Duffin Hauser <lduffinhauser@gmail.com>
Sent: Tuesday, February 15, 2022 7:10 AM
To: Rep.Kitchens; Tobias, Adam
Subject: AB849

February 15, 2022

To: Wisconsin Assembly Committee on Environment
Chair, Rep.Kitchens@legis.wisconsin.gov
Committee Clerk, Adam.Tobias@legis.wisconsin.gov

Re: Testimony AGAINST AB849/SB900

Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16. I am unable to attend in person due to work conflicts.

Thank you for the opportunity to provide testimony in opposition to AB849.

I am opposed to this short-sighted bill. The Public Trust Doctrine has been part of our country since its founding and has roots that go all the way back to the Magna Carta of 1215 and Roman law before that. The concept was built into the U.S. Constitution and adoption of the concept is one of only two requirements the federal government imposed on new states applying for statehood. Public access to lands below the high water mark, natural or filled, is something our ancestors insisted upon and a right that we must defend for ourselves, our children, our grandchildren.

There is an erroneous assumption implied in this bill that economic benefit and public lands are at odds. This is old-school thinking. Everywhere, communities along the water are purchasing and converting land from private use to public use, often at very great expense. Why are voters approving this? Because, over and over again, it makes economic good sense. Communities in Door County that have approved adding public lands include Baileys Harbor, Gills Rock, Sister Bay, Jacksonport and Egg Harbor. Green Bay credits public land benefits like kayak launches and boat docks for increased room tax revenue.

Are there inefficiencies in determining public lands? Could more clarity be provided? Maybe. But don't make changes by diminishing an age-old right. Any changes should be made in the spirit of strengthening the Doctrine.

Ed McMahon, a nationally esteemed urban planner and economic advisor, visited Door County years ago. He shared many thoughts on sustainable planning. His take-away point, lightly paraphrased: "Save the best of what you have – whether it's waterfront or mountain views – for everyone. Economic prosperity follows."

Thank you for the opportunity to provide testimony. Please do not support bill AB849.

Laurel Hauser

Tobias, Adam

From: Katherine Baeten <katherinebaeten@gmail.com>
Sent: Sunday, February 13, 2022 1:49 PM
To: Rep.Kitchens; Tobias, Adam
Cc: Rep.Hebl; Rep.Shankland; Rep.Anderson
Subject: Testimony AGAINST AB849/SB900

14 February 2022

Re: Testimony AGAINST AB849/SB900

Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16th. I am unable to attend in person due to work conflicts.

Thank you for the opportunity to provide testimony in opposition to AB849.

I prefer the progress of balanced ecosystems and equal access to public land over poorly hidden efforts to make waterfront property available for the super-rich.

I urge you to support 170 years of precedence and uphold the Public Trust Doctrine. Please do not support this bill.

Thank you for your time,

--

Katie Baeten
c. 920.379.7256

Tobias, Adam

From: danjcollins@earthlink.net
Sent: Monday, February 14, 2022 9:26 AM
To: Rep.Kitchens; Tobias, Adam
Subject: Testimony in opposition to AB849.

14 February 2022

To: Chair, Wisconsin Assembly Committee on Environment
Rep.Kitchens@legis.wisconsin.gov
Committee Clerk
Adam.Tobias@legis.wisconsin.gov

Re: Testimony AGAINST AB849/SB900

Please confirm receipt of this testimony and that it will be recorded as part of the public hearing of this Committee scheduled for February 16th. I am unable to attend in person due to work conflicts.

Thank you for the opportunity to provide testimony in opposition to AB849.

Open access to the waters of the state is a constitutional right for all people in Wisconsin. The outlines of our state – our lakes and rivers – are figuratively etched deeply in our State's Constitution. A constitutional foundation is not a whim but a statement of what we value now, and have for more than 170 years.

It is a powerful, unifying and romantic idea that the lake bed should be unmanipulated and remain fully accessible. Unfortunately, this bill, if enacted, will further confuse the understanding of what is permissible relating to filled lakebed. This bill will turn filled lakebed into an attractive nuisance ripe for risky development by municipalities, corporations and individuals. A riparian owner might then believe that they can develop filled lakebeds, provided the fill was prior to the arbitrary date in the bill. Most people in Wisconsin understand that Constitution trumps law. Wisconsinites are willing to hold entities accountable to the Constitution. Accountability in the courts has happened in the past relating to this topic, and if this bill becomes law it seems it might happen in the future.

Who will compensate the developer who follows a new law that is not constitutional?

Who will compensate the people of Wisconsin for their loss of riparian rights of way?

This bill generates a quagmire of questions and confusion.

Please do not support this bill.

Thank you for the opportunity to provide testimony.
Dan Collins

6040 Carlsville Road
Sturgeon Bay, Wisconsin 54235