



January 19, 2022

Public Rights in Milwaukee's Fresh Coast Webinar

Michael Cain, Wisconsin's Green Fire: Co-Chair of Public Trust/Wetlands Work Group

Background

About Wisconsin's Green Fire: Wisconsin's Green Fire: Voices for Conservation (WGF) supports the conservation legacy of Wisconsin by promoting science-based management of its natural resources. Our 650 members represent extensive experience in natural resource management, environmental law and policy, scientific research, and education. Our members have backgrounds in government, non-governmental organizations, universities and colleges and the private sector.

Personal Background: I am a Board Member and Co-Chair of WGF's Public Trust/Wetlands Work Group. I received a BS in Biology in 1972 from the University of Wisconsin-Stevens Point, and a JD from the University of Wisconsin Law School in 1976. I was the lead attorney for WDNR for 34 years in the surface water and wetland program, where I was involved in regulations protecting Wisconsin's waters under the Public Trust Doctrine.

Why this Matters: Wisconsin's Green Fire is committed to the preservation and enhancement of public waterways and their associated public trust lands. These areas are important both ecologically and for the open space and recreational uses that all citizens can enjoy. The recent COVID limitations on public activities have helped emphasize why these freely available open spaces are critical to all citizens of Wisconsin. The commercialization or private use of these lands impairs the rights of Wisconsin's citizens. As expressed in the attached Joint Letter from WGF and other organizations concerning developments on the Milwaukee lakebed, "...the current proposals raise social justice concerns since some of the areas affected are currently used by a broad spectrum of Milwaukee County and Wisconsin residents and...these proposals will potentially make these public resources less available to all users." (Attachment 1).

WGF became involved in the issues relating to Milwaukee's public trust lakebed when we became aware of citizen concerns about "commercialization" of portions of the lakebed in Milwaukee. We joined with numerous other groups in asking that Milwaukee County, the



Wisconsin Department of Natural Resources (WDNR), the Board of Commissioners of Public Land, and the Attorney General's office look into these issues (Attachment 1).

Historical Context

The foundation for the State of Wisconsin's authority and responsibility to regulate activities in public navigable waters emanates from the Wisconsin Constitution.

Article IX, Section 1 of the Wisconsin Constitution provides that "...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...." This language provides the basis for the Public Trust Doctrine in navigable waters in Wisconsin.

When Wisconsin and the other states entered the union, they did so on "equal footing" with the original colonies, and the beds of navigable waters, which had been held in trust by the federal government, were transferred to the state as trustee of those public waters.

Over the 174 years Wisconsin has been a state, the state Supreme Court, the Legislature, the Executive Branch (now through WDNR), and the citizens of the state have been responsible for administering this public trust established in the Constitution. The Wisconsin Supreme Court has been very active in upholding the trust doctrine and has broadly construed it. Citizens have routinely brought violations of the Public Trust Doctrine to the court seeking remedies.

These are not new issues. There have been proposals since statehood where various entities have sought to undertake commercial development of public trust lakebed:

The Priewe case- 1899

The Courts have also made it clear that there are limitations on all parties, including the Legislature, in allowing activities to occur in public trust waters without appropriate oversight to assess the impacts on the public trust. When the Legislature enacted a statute in the late 1800's to authorize the draining of Big Muskego Lake in Waukesha County for development purposes, the case went to the WI Supreme Court.

The Court held that the legislative Act was a violation of the public trust doctrine, and that the lake must be restored, stating in Priewe v. Wisconsin State Land and Improvement Co., 103 Wis. 537, 79 N.W. 780 (1899):

"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 the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose."

Similarly, in Muench v. Public Service Commission, 261 Wis. 492(1951), there was a controversy over the placement of a dam on the Namekagon River. The Legislature granted authority to counties to make the final decision on the placement of dams on all waters except those in state parks and state forests under the "county board law", which provided:

"...but in case of a dam or flowage located outside the boundaries of a state park or state forest no permit shall be denied on the ground that the construction of such proposed dam will violate the public right to the enjoyment of fishing, hunting or scenic beauty if the county board.... approves the construction of such dam." Section 31.06(3) 1947.



Figure 1: Namekagon River, photo credit: NPS

The Wisconsin Supreme Court noted that the issue of "public rights of hunting, fishing, and scenic beauty by the erection of a dam on a navigable stream is of statewide concern", and that the statute that precluded findings by the state regulatory agency for public trust issues (then the PSC, now WDNR) was unconstitutional. The Court stated, on re-hearing: "The trust doctrine has become so thoroughly embodied in the jurisprudence of this state that this court should not now repudiate the same, as it applies to the rights of recreational enjoyment of our public waters.... "

It is a well-recognized principle of the law of trusts that a trustee charged with the duty of administering a trust cannot delegate to agents' powers vested in the trustee which involve an exercise of judgment and discretion.... The delegation of power attempted in the "county board law" permits the "public right to the enjoyment of fishing, hunting or natural scenic beauty" in a navigable stream to be seriously impaired or destroyed through the action of a county board and the Public Service Commission is rendered powerless thereby to intervene to protect these public rights. Such an attempted delegation of power by the legislature, involving as it does a complete abdication of the trust, is therefore void. (Emphasis added) Muench at pp. 515-l and 515-m.

Types of Proposals for Lakebed and Riverbed Reviewed While at WDNR

Waterfront properties, both lakebed and riverbed, are valuable as public resources, but are also coveted by development interests due to their high monetary values. During my 34 years at WDNR, we would see an average of approximately one proposal a month for residential or commercial development of these public lands.

1. Use of Lakebed Areas for Commercial or Residential Development

There are routinely efforts to construct condominiums or other residential units on lakebeds in the State of Wisconsin, including on lakebeds that have been granted to municipalities.

On the bed of Lake Superior, a developer placed a six-unit condominium after being told by DNR staff that the area involved was part of the bed of the lake. DNR staff had told them it was on the bed of the lake and couldn't be constructed there. After construction of the condominiums and years litigation which ended at the Wisconsin Supreme Court, the condominiums were removed from the lakebed. State v. Trudeau 139 Wis. 2d. 91, 408 N.W. 2d 337 (1987) (Figures 2 and 3).



Figure 2: Madeline Island condominium removal.
Photo credit: WDNR



Figure 3: Madeline Island condominium removal.
Photo credit: WDNR

2. Legislative Lakebed Grants

The Legislature has given limited grants to municipalities to allow uses of these areas for public trust purposes, such as park, open space, or navigation related purposes. There are many lakebed grants existing on the Great Lakes, especially in Southeast Wisconsin. As was described earlier in this forum, most of Milwaukee's lakefront is a mosaic of lakebed grants.

WDNR, during my tenure there, received inquiries and proposals virtually every month for proposed developments on public trust lakebed or riverbed. They proposed things such as:

- A 56-acre fill for a golf course and residential development in Lake Michigan north of Milwaukee (this was never built) (Figure 4),
- Residential condominiums on lakebed, including at Bayfield; Superior; Kenosha; Racine; Milwaukee, Sheboygan; and Two Rivers,
- Commercial retail proposals (often related to boat sales),
- Restaurant or other private entertainment facilities, and hotels
- Summerfest: I was involved for many years with discussions relating to the Summerfest facilities (which are approved as a public recreational

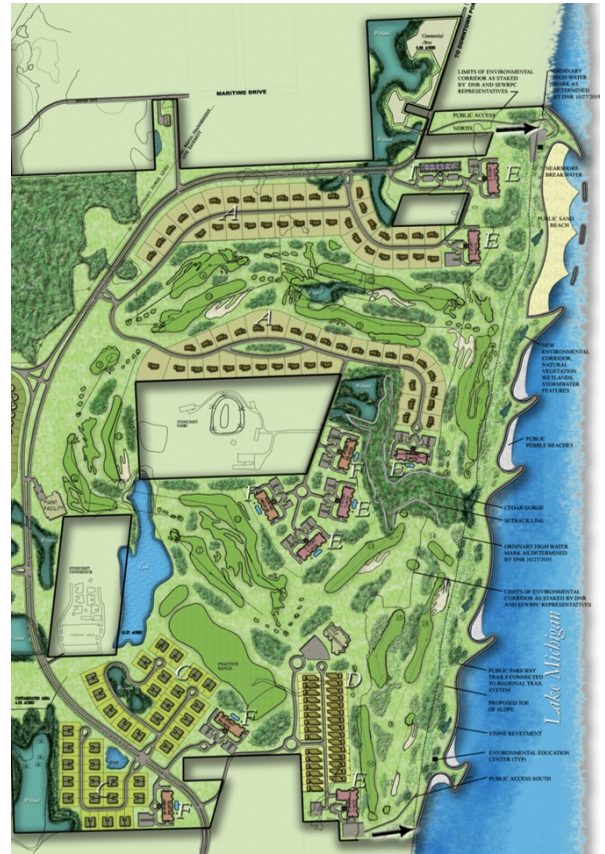


Figure 2: Proposed golf course south of Port Washington.
Photo credit: WDNR



Figure 3: Lakeshore State Park. Photo credit: Virginia Small

facility). They were not allowed to place permanent restaurants and bars on Summerfest grounds and are required to maintain free public access along the shoreline. That is now facilitated by Lakeshore State Park when parts of the Summerfest grounds are closed for festivals (Figure 5).

- I was involved, in Milwaukee, in reviewing the plans for the Milwaukee Art Museum expansion, and the Discovery World Museum. The State of WI routinely works with municipalities in the development of marinas and appropriate public facilities (museums, public performance venues, etc.)

At WGF, we have been involved in current issues relating to operations of food service facilities at Bradford Beach and South Shore Terrace. There have been public complaints that the food and beverage vendors at those locations are precluding the use of areas by the general public unless food and beverages are purchased at the facilities. See the discussion and documents below. Attachment 3 is an article from Shepherd Express on March 3, 2021, discussing some of the issues raised relative to those operations, including the social justice and equity concerns that have been raised by local Milwaukee organizations such as Milwaukee Water Commons.

WGF was also involved in reviewing and objecting to a proposal by the City of Racine in the last Legislative session where they proposed legislation that would ostensibly authorize the placement of a new hotel and restaurant facility on a filled lakebed grant property in the City of Racine. After objections raised by numerous entities, they withdrew that proposal. The hotel site has now been moved to an upland area adjacent to the public lakebed.

What Standards Apply to Use of Lakebed

There are often issues relating to permissible uses of these areas. See Attachment 2 relating to past proposal to undertake commercial development on Milwaukee's lakefront (relating to Pieces of Eight, Coast Guard Station, and WDNR policies relating to acceptable uses, including acceptable ancillary food service facilities).

One of the WI Supreme Court cases which deals with these issues is State v. Public Service Commission (PSC), 275 Wis. 112, 81 N.W. 2d 71(1957).

- Facts: The Legislature authorized, through a lakebed grant, the filling of approximately 4 acres of Lake Wingra in the City of Madison for park purposes. The PSC had to review and approve the proposed project if



satisfied that it would not "materially obstruct navigation nor be detrimental to the public interest."

The PSC approved the project, and the Wisconsin Conservation Commission sought review of the legislation and approval.

- Holding of the Court: The Supreme Court held that "the use of filled lakebed... for park improvement, including a parking area ...as well as alterations which will aid navigation and other enjoyment of the water, does not violate the obligations of the trust...."

Factors to be considered include:

- Public bodies will control use of the area,
 - The area will be devoted to public purposes and open to the public,
 - Diminution of the lake area will be small when compared with the whole lake (320 acres),
 - None of the public uses of the lake will be destroyed or greatly impaired,
 - The disappointment of the public who may desire to boat, fish, etc., is negligible when compared with the convenience afforded to the park users.
- Importance of the decision: This decision affirms the limited basis on which the Legislature may issue grants of public trust waters. This issue continues to be a critical one in our routine administration of the trust. This case still provides the template we use in these decisions.

Role of WDNR for Lakebed Grant Areas

- All new lakebed grant proposals must receive WDNR review under Section 13.097, Stats., adopted in 1989, to assure that the uses proposed are acceptable under the public trust doctrine
- The WDNR and the Board of Commissioners of Public Lands have maps of existing lakebed grants.

- The State of WI has continuing jurisdiction over these filled lands and is routinely involved in reviewing uses and proposed uses for consistency with the lakebed grant and the public trust doctrine. The Department's authority emanates from Section 30.03, Stats. See 78 OAG 107(1989), where the AG opined: "Because of its non-delegable public trust responsibilities, the state acting through the department [of natural resources] retains authority to abate the infringement of public rights in navigable waters when those activities are not authorized by the legislative grant. When activities which infringe public rights in navigable waters are authorized by the grant, the department may investigate, and a court may determine, whether the grant itself violates the public trust doctrine."

3. Riverbed issues

There have been proposals in several municipalities, including Milwaukee, to place commercial facilities (floating restaurants and bars, cantilevered restaurants or buildings) over riverbeds. These are not permissible public trust uses. See Section 30.10, Stats., relating to streams, where it states, "no dam, bridge or other obstruction shall be made in or over the same without the permission of the state."



Figure 6: Milwaukee Riverwalk. Photo credit: Wikimedia

In Milwaukee, after denying approval for proposals to place permanent, moored barges in the Milwaukee River for restaurants and bars, WDNR worked with the City of Milwaukee to develop Riverwalk Guidelines that facilitated the development of the Riverwalk. See information relating to the history and development of those guidelines at:
<https://city.milwaukee.gov/DCD/Projects/RiverWalk>



4. The Role of Citizens

While the State of Wisconsin has continuing regulatory jurisdiction over filled lakebed and riverbed areas, and the municipalities responsible for maintaining lakebed and riverbed areas generally work to maintain compliance with the limitations in their lakebed grants, it is imperative that the public remain vigilant to assure that these public trust lands remain “public”. The citizens of the State of Wisconsin are the “eyes and ears” who can, and must, help assure that these public properties remain open to all citizens.

As my experience working on these issues for almost 50 years has shown me, the high value of these public trust properties along our lakes and rivers invariably leads development interests to try to commercialize these properties and to profit from them.

If the State of Wisconsin, and its citizens, do not work to assure that these public trust areas remain “public”, they will quickly be converted to uses which would limit the public enjoyment of these valuable open spaces.

Thank you for your interest in these issues!

Michael Cain, Co-Chair of Public Trust/Wetlands Work Group, Wisconsin’s Green Fire
cainmic@gmail.com

Attachments

Attachment 1: October 31, 2020 Joint letter to WDNR, WI Attorney General, Milwaukee County, Board of Commissioners of Public Land, Milwaukee LDAC

Attachment 2: Lakebed materials- 1996 Ament Letter, AG letter re: Pieces of Eight, and WDNR Guidelines for Development of Lakebed areas

Attachment 3: March 3, 2021 article in Shepherd Express re: Bradford Beach

October 31, 2020

Dear Department of Natural Resources Secretary Cole, Attorney General Kaul, Board of Commissioners of Public Lands Secretary German, County Executive David Crowley, and Lakefront Development Advisory Commission Chairperson William Lynch:

It has recently come to our attention that there are current development proposals on Public Trust lakebed areas of the Milwaukee waterfront that raise concerns about potentially improper commercial development on these Public Trust lands. It has also been expressed that current proposals raise social justice concerns since some of the areas affected are currently used by a broad spectrum of Milwaukee County and Wisconsin residents and that these proposals will potentially make these public resources less available to all users.

We urge you to investigate the concerns under your respective responsibilities related to these public resources. A number of us have extensive experience dealing with these issues generally, and Milwaukee lakebed development proposals specifically, as will be evident from the attached materials.

The current proposals that have been brought to our attention relate to the development and operation of the Bradford Beach Pavilion and the Roundhouse at McKinley Marina. We attach an article from *The Shepherd Express*, dated September 17, 2020, relating to the Bradford Beach development, and an article from the *Milwaukee BizTimes*, dated April 8, 2019, relating to the operation of the Roundhouse at the McKinley Marina.¹

There has been a long history of proposed commercial developments of Public Trust Lakebed Grant lands in Milwaukee and elsewhere on Wisconsin lakebeds. Due to the significant value of these lakefront lands and their desirability for commercial development, it is not surprising that developers have sought, through time, to use these public lands for restaurants, bars, hotels, condominiums, and retail facilities.

The State of Wisconsin has historically been vigilant in assuring that the “public” nature of these lands is preserved so that the general public reaps the full benefits of these resources. We believe you are all generally aware of this history, and we will not belabor it here. We do provide, as background, letters relating to these issues on the Milwaukee waterfront from June 1996, relating to a number of commercial development proposals that were considered and reviewed in the 1990’s. We also attach an informal Attorney General’s Opinion, dated August 11, 1987, which specifically relates to the development of restaurant facilities on lakebed granted to Milwaukee County. Lastly, we attach internal documents from the Wisconsin Department of Natural Resources (DNR) relating to its review of these types of proposals around the State of Wisconsin.

¹ Virginia Small, WILL BRADFORD BEACH'S PAVILION BE PRIVATIZED? (2020), <https://shepherdexpress.com/news/features/will-bradford-beachs-pavilion-be-privatized/> (last visited Oct 28, 2020); Andrew Weiland, Bartolotta to take over operations of restaurant at McKinley Marina *BizTimes* (2019), <https://biztimes.com/bartolotta-to-take-over-operations-of-restaurant-at-mckinley-marina/> (last visited Oct 28, 2020).

As you will note in the attached letter to then County Executive Ament from the DNR in June 1996, when Milwaukee County had before it a number of proposals for commercializing portions of the lakebed grant areas, the DNR, after conferring with the Attorney General's office, stated: **"We continue to object to the development of "destination" restaurants, bars or similar commercial facilities on lakebed or riverbeds around Wisconsin. These developments are clearly not consistent with the provisions of our Constitution. We have conferred with the Attorney General's office at great length concerning the issues above and they concur in our position relative to these types of developments in our public trust waters...."**²

The issues raised by the current development proposals are similar, and the law on these issues remains unchanged.

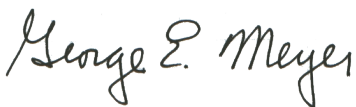
Historically, issues of social justice relating to proposed lakebed developments were not recognized as significant considerations, but we believe social justice considerations are very relevant to the protection and use of these public resources. For many years, beaches in Milwaukee were racially homogenous spaces. As the *Shepherd Express* article notes, "Bradford Beach became a racially integrated space within a mostly segregated Milwaukee." Professor Arijit Sen, quoted in the article, elaborates further, "This happened, in part, after the county closed nearly all the swimming pools that previously served Milwaukee's predominantly African American neighborhoods. The lakefront became the only place for many people to cool off in summer and enjoy water-based recreation." The Public Trust Doctrine protects the public's right to access the lakebed, and the waters of our state more generally. The public means all of us, and, therefore, principles of equity and inclusion should guide how Public Trust lands are used.

Thank you for your attention to these issues. As we indicated above, several members of our respective organizations have extensive history with these issues around the State of Wisconsin, and we would be happy to discuss this if you deem it necessary or useful. We would appreciate it if you could keep us apprised of your reviews of these issues and of any opportunities for public review or input.

Sincerely,



Fred Clark, Executive Director
Wisconsin's Green Fire



George Meyer, Executive Director
Wisconsin Wildlife Federation



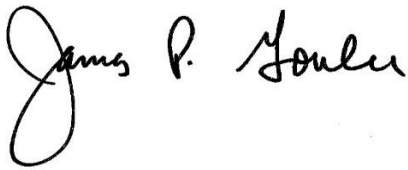
² Letter from DNR Secretary George Meyer to County Executive Thomas Ament, dated June 10, 1996, attached.



Tony Wilkin-Gibart, Executive Director
Midwest Environmental Advocates



Brenda Coley, Kirsten Sheard, Co-Executive
Directors Milwaukee Water Commons.



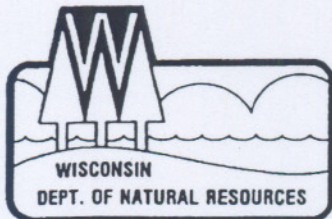
Jim Goulee, President
Preserve Our Parks



Cheryl Nenn, Riverkeeper
Milwaukee Riverkeeper



11500



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Meyer, Secretary

Box 7921
101 South Webster Street
Madison, Wisconsin 53707-7921
TELEPHONE 608-266-2621
FAX 608-267-3579
TDD 608-267-6897

June 10, 1996

IN REPLY REFER TO: 8300

Mr. F. Thomas Ament
County Executive
Milwaukee County Courthouse
901 North 9th Street
Milwaukee, WI 53233

SUBJECT: Development of the Coast Guard Station on Lake Michigan

Dear ^{Tom}Mr. Ament:

We met recently to discuss issues between Milwaukee County and the Department of Natural Resources. One of the issues we discussed related to proposals for the redevelopment of the abandoned Coast Guard Station, which is located on filled lakebed adjacent to Lake Michigan. This letter is in response to your request that I outline the legal limitations which exist for developments in our public trust waters, including filled areas of our Great Lakes.

Under the Wisconsin Constitution, Article IX, Section 1, the State of Wisconsin holds all navigable waters in trust for the people of the State of Wisconsin and the nation. This was a condition of statehood under the Northwest Ordinance of 1787. The State has an affirmative obligation to assure that these public trust lakebed areas, including those that are filled pursuant to state authorization, are maintained and used for appropriate public trust uses.

The Attorney General, in a 1989 opinion dealing with the enforcement authority of the Department of Natural Resources relative to areas filled pursuant to lakebed grants, stated:

As trustee of lakebed lands, "[t]he state has no proprietary interest in them," McLennan v. Prentice, 85 Wis 427, 444 (1893), and thus cannot convey complete title to them. Even though the Legislature may make a grant of land for public trust purposes, "the state is powerless to divest itself of its trusteeship as to submerged lands under navigable waters...." Priewe v. Wisconsin State Land & Improvement Co., 103 Wis. 537, 548 (1899). The state "cannot abdicate its trust in relation to them, and while it may make a grant of them for public purposes, it may not make an irrevocable one...."

In its creation of section 30.03(4)(a), the Legislature has insured that the state retains its paramount authority over all navigable waters, even those whose bed has been granted to municipalities. Using its investigatory and fact finding power... the department [of natural resources] has the mechanism to determine whether the activities causing the infringement are in violation of the lakebed grant, making it subject to revocation or reversion. (78 OAG 107(1989))

Quality Natural Resources Management
Through Excellent Customer Service



In accordance with this opinion and the decisions of the Wisconsin Supreme court, the lakebed grant to Milwaukee County gives the County a measure of control over the use of this land area, but the extent of that control is limited under the public trust doctrine and is subject to continued scrutiny by the State of Wisconsin.

As you are aware, the Department has reviewed, and is supportive of, the "Great Lakes Future" proposal for redevelopment of the Coast Guard Station. We believe it is consistent with the public trust doctrine. This type of specialized educational facility can have significant positive impacts on the public's understanding of and appreciation for our Great Lakes and their associated resources and values.

The Department of Natural Resources has been involved with various proposals for redevelopment of the Coast Guard Station and the McKinley Marina area since 1983. At that time, we reviewed the "Marina Shores" plan which proposed to convert the Coast Guard Station "for restaurant purposes" and to develop other commercial facilities on an eight acre site. The Department appeared at the public hearings on that proposal in July, 1984 and explained why the proposed commercial developments could not take place on lakebed.

A 1989 proposal included the construction of a restaurant and bar facility adjacent to the existing Coast Guard building. There were numerous meetings and discussions concerning that proposal between Milwaukee County staff and Department staff. I will not reiterate all of those discussions and correspondence here, but the Department outlined the legal and practical reasons why such a commercial development is inappropriate on public trust lakebed areas.

During this time period, there were numerous other proposals around the State of Wisconsin for commercial developments in our lakes and rivers. Department staff developed materials for distribution to our District Directors which outlines the basis for our authority and the rationale for our position relative to various development proposals. I have included a copy of the internal memorandum and Attachment 2 to this memorandum, which provides an outline of the types of proposals we have reviewed and the Department's reaction to them. This embodies our position relative to these types of proposed facilities and is based on the decisions of the Wisconsin Supreme Court and Attorney General's letters and opinions dealing with these issues.

As outlined in this document, based on the decisions of the Wisconsin Supreme Court interpreting Article IX, Section 1 of the Wisconsin Constitution, it is clear that developments in our lakes and rivers must be "substantially related to navigation and its incidents." The document goes on to state that:

This means that such development must be connected to commercial navigation or to public recreation associated with the use or enjoyment of the waterway. Even the most "liberal" interpretations of the Constitution have required this linkage to be made. While the kinds of development within waterways is thus limited, the trust doctrine is clearly not an anti-development policy. Instead, it is a confirmation that the uses must be consistent with the purposes for which those waterways are held in trust for the public. This is true whether the development is "commercial" or "public" in nature.

In dealing with these issues around the State, we are often asked how the Pieces of Eight restaurant is allowed to be maintained on filled lakebed in Milwaukee. This facility was developed prior to the formation of this Department and is not a permissible use of lakebed. We requested an opinion from the Attorney General in 1987 concerning the Pieces of Eight and a proposed expansion of that facility. I attach for your review a copy of the

response from Attorney General Hanaway, in which he opined that this restaurant facility "was not lawfully constructed to begin with and its continued presence on lakebed violates the terms of the lakebed grant." He noted that the State would not pursue removal of the Pieces of Eight facility since "it would not seem to be an equitable or reasonable use of the state's prosecutorial discretion to now seek dismantling and removal of the restaurant." He further stated that no expansions of the Pieces of Eight resaurant and bar facilities should be allowed.

In response to numerous proposals we have received to place restaurant facilities on filled lakebed areas around the state, we have developed internal Guidelines for Food Service in Lakebed Areas to assist our staff in reviewing such proposals. We recognize that parks, marinas, museums, and other facilities which are developed on filled lakebed often desire to provide some food service for the public using these facilities. Examples on the Milwaukee waterfront are the park kiosks, the Roundhouse facility at McKinley Marina, and the cafeteria at the War Memorial. These facilities are acceptable because they are "ancillary to, and have the primary purpose of supporting, allowable public trust uses." If the "Great Lakes Future" facility is developed in the Coast Guard Station, we would anticipate that it would provide some food service for the people visiting and using the facility. We believe that would be allowable under the public trust doctrine if such food service facilities are appropriately sized and are operated in such a manner that they are "ancillary" to the primary use of the facility.

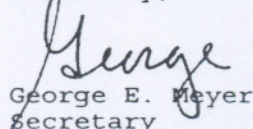
We continue to object to the development of "destination" restaurants, bars, or similar commercial facilities on lakebed or riverbeds around Wisconsin. These types of developments are clearly not consistent with the provisions of our constitution.

We have conferred with the Attorney General's office at great length concerning the issues above and they concur in our position relative to these types of developments in our public trust waters, including, specifically, the restaurant developments which have been proposed historically at the Coast Guard Station.

We recognize the extremely high potential financial return from commercial development on prime sites such as the lakefront. We also understand the fiscal stress experienced by government agencies. This dilemma confronts us in managing our state park system. Milwaukee County has long been considered a leader in preserving open space and providing park facilities. I hope we can share experiences and expertise in seeking creative ways to continue providing attractive public spaces with facilities available to all citizens.

In closing, I would like to reiterate that we stand ready to work with you to assure that the Coast Guard Station and the associated lakebed areas are developed in a manner which fulfills our mutual responsibilities for these public trust lands. If you have questions about these issues or have additional issues which you would like to discuss, please feel free to contact me.

Sincerely,


George E. Meyer
Secretary

cc: Secretary James Klausner
Gloria McCutcheon- SED
Lee Kernan-FH/4
Attachments

Tom - I checked on the "retail" component of the Madison Convention Center. It is limited to a "gift-souvenir shop similar to the War Memorial."

Attorney General James Doyle
Susan Sylvester-AD/5
Michael Cain-LC/5



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Kosen W3/6
RR

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Michael W. Stead
Executive Assistant

Justice Building
P.O. Box 7857
Madison, WI
53707-7857

AUG 13 1987

August 11, 1987

Division of Water
Regulation & Zoning

RECEIVED

AUG 12 1987

OFFICE OF THE
SECRETARY

Mr. Carroll D. Besadny
Secretary
Department of Natural Resources
101 South Webster Street
Madison, Wisconsin 53702

Dear Mr. Besadny:

You have requested guidance on the Department of Natural Resources' duties with respect to legislative grants of state-owned lakebed to municipalities. Although your inquiry focuses on the Pieces of Eight Restaurant situated on the filled bed of Lake Michigan in Milwaukee, you seek clarification of the state's responsibilities to monitor and enforce the Wisconsin constitutional mandate that state-owned lakebed be preserved for public trust purposes.

The lakebed land on which Pieces of Eight is located was legislatively granted to the City of Milwaukee in 1929 on the condition that it be used "in aid of navigation and the fisheries." This conditional grant is consistent with Wisconsin Supreme Court cases defining the constitutional parameters of lakebed grants, State v. Public Service Comm., 275 Wis. 112, 81 N.W.2d 71 (1957). The legislation further provides that land used inconsistently with these stated purposes reverts to the State of Wisconsin's ownership (Chapters 151 and 516, Laws of 1929). By no stretch of the imagination can use of the lakebed for a privately-owned, exclusive dining establishment be deemed "in aid of navigation and fisheries" consistent with the purposes of the lakebed grant. Arguably, a hot-dog stand adjacent to a pier or beach and open to all members of the public could be justified as a use incidental to promoting navigation and fisheries, but Pieces of Eight is no hot-dog stand. Thus, I agree with you that the restaurant was not lawfully constructed to begin with and that its continued presence on lakebed violates the terms of the lakebed grant. This conclusion also applies to the proposed "addition" to the restaurant contemplated in connection with the permanently anchored barge to be used for serving cocktails.

The obvious next question, however, is how or even whether the state should assert its reversionary interest at this late date. You note that the restaurant has been in business for nearly twenty years without objection from the state. Since no

action was taken twenty years ago to prevent its construction, and no attempt has been made since then to assert the state's reversionary interest, it would not seem to be an equitable or reasonable use of the state's prosecutorial discretion to now seek dismantling and removal of the restaurant.

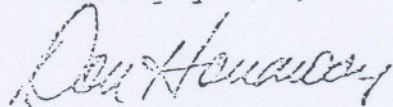
Unfortunately, the practical result is that Pieces of Eight continues to be spotlighted by would-be lakebed developers as an example of the state's inconsistent enforcement stance. I can only suggest that your agency candidly acknowledge that Pieces of Eight cannot be justified as a lakebed use consistent with public trust purposes, but point out that when the department discovers or the state is made aware of potential (or at least recent) lakebed development inconsistent with public trust purposes, it has a constitutional duty to prevent or abate misuse of the state's lakebed.

If such cases are brought to your attention, the appropriate way to assert the state's interest is to obtain the governor's or legislature's request to the attorney general to take legal action under section 165.25(1), Stats. This route is necessary because the attorney general has no independent authority to initiate litigation absent a specific legislative grant of power, Estate of Sharp, 63 Wis. 2d 254, 217 N.W.2d 258 (1974), and no specific statute authorizes the attorney general to take action in these cases.

By separate letter you requested additional advice as to the legality of Pieces of Eight's most recent proposal to permanently anchor a barge in the water next to the restaurant to be used with a portable bar for serving cocktails. This would seem to be no different from your initial inquiry: an anchored barge with portable bar for serving cocktails is no more a permissible use of state-owned lakebed than a restaurant.

I hope this guidance assists your agency in carrying out its public trust responsibilities. These are not easy issues to resolve, since potential developers invariably argue the economic benefits--particularly to urban areas--of their proposals. It must not be forgotten, however, that lakebed is premium real estate granted free of charge to municipalities. It is only reasonable to insist that public trust purposes be preserved so that all citizens of this state can enjoy equal access to the lakes which the state holds in trust for its people.

Sincerely yours,


Donald J. Hanaway
Attorney General

CORRESPONDENCE/MEMORANDUM

STATE OF WISCONSIN

DATE: January 26, 1989

FILE REF: 3500

TO: District Directors

FROM: Robert W. Roden - WZ/6

RWR

SUBJECT: Lakebed/Riverbed Commercial and Public Development

A few months ago, you received a memorandum from the Secretary appointing me as the coordinator of this issue for the Department. Since then, I've been meeting with the Secretary and others and doing some thinking about what needs to be clarified in terms of our policy and how we should carry it out. This memorandum is meant to define the areas of concern and indicate how we should proceed to address them.

What is the Issue?

Over the past two years, a number of proposals have been made for filling, and constructing buildings, in lakes and rivers. We have also seen proposals for permanently anchored "barges" in navigable waters. These development proposals, plus draft legislation relating to legislative lakebed grants that was considered during the 1987-88 Legislature, have focused considerable attention within the Department and elsewhere on the question of what types of development are permissible in navigable waters under Wisconsin Law.

Is this only a "Great Lakes" issue?

The answer is definitely no. While a majority of proposals were located in Lake Michigan, several were located in inland lakes or rivers. The basic limits on allowable development, established in Article IX, Section 1, Wisconsin Constitution, are applicable to all navigable waters. There are provisions of law specific to Lake Michigan (numerous legislative lakebed grants and s. 30.05, Stats.) or to a specific subset of navigable waters [s. 24.39(4), Stats.]. However, aside from these complexities, the issue is one of statewide concern and questions have arisen in districts besides those located on the Great Lakes.

What is the State's policy?

Article IX, Section 1, Wisconsin Constitution, as interpreted by the Wisconsin Supreme Court and the Attorney General, requires that filling of lakes and streams for development purposes be substantially related to navigation and its incidents. This means that such development must be connected to commercial navigation or to public recreation associated with the use or enjoyment of the waterway. Even the most "liberal" interpretations of the Constitution have required this linkage to be made. While the kinds of development within waterways is thus limited, the trust doctrine is clearly not an anti-development policy. Instead, it is a confirmation that the uses of waterways must be consistent with the purposes for which those waterways

are held in trust for the public. This is true whether the development is "commercial" or "public" in nature.

One result is that statutes and other legislative acts need to be interpreted and administered in a manner that is consistent with the public trust doctrine. This means that only public trust-related purposes are allowable or, where the law recognizes other rights (e.g. the rights of riparian property owners), those rights must be exercised in a manner which preserves the trust, i.e. public rights cannot be unreasonably diminished. The clear implication of this is that laws administered by the Department, as well as legislative acts such as lakebed grants, must, where possible, be construed as only allowing what the Constitution itself permits. The most specific Supreme Court guidance we are aware of, and a copy of Attorney General Hanaway's 1987 opinion on the "Pieces of Eight" Restaurant, are attached for your information.

The only "non-public trust" structures which the Statutes clearly state are allowable are dams, bridges and water intakes. Dams were initially treated as a furtherance of the public trust due to the importance of logging and milling in the early economy of the state. Obviously, dams can only be built across waterways. Bridges may not be trust-related in the strict sense, but obviously must go across waterways. The alternative of only allowing ferry crossings is so impractical that it is not worth considering. Water intakes also must be placed on lakebed or riverbed. Utility or pipeline crossings (of streams) are also necessary, although often they are installed beneath the bed of the waterway.

Implications For Water Regulation Program Implementation.

Statutes which the Department administers, relating to the placement of fill or structures in navigable waters, cannot be used as a vehicle to allow activities which the Supreme Court has stated would violate the Constitution. The clear implication is that ss. 30.11 and 30.12(2), Stats., proposals, must be found consistent with the public trust doctrine in order to meet the various statutory public interest standards, and because no law can be interpreted or administered in such an way that the result is unconstitutional. Other statutes relating to structures or filling [ss. 24.39(4), 30.12(3), 30.121, 30.126, and 30.13] are all limited explicitly to trust-related purposes or to the exercise of riparian rights. Sections 30.12(4) and 30.123 deal with bridges which, as indicated above, can hardly be viewed as an unnecessary imposition on the trust. Section 30.21, Stats., addresses water intakes on the bed of the Great Lakes (it only applies to "public utilities", but other water supply intakes would also have to be viewed as constitutionally allowable).

What are the Department's Responsibilities?

In most situations affecting navigable waters, the Department has a regulatory responsibility spelled out by statutes and would be directly involved in permit decisions or enforcement actions relative to fills or structures. In a

few instances in inland waters, the Legislature itself has acted to permit a specific project (a recent example is the authorization of island construction in Delavan Lake, Walworth County) and the Department may or may not have a prescribed role in the oversight of those projects. Legislative approval is most likely where the Department lacks the authority to allow a proposal either because of the involvement of significant filling in the waterway or because of the scale of the project being considerably more than administrative agencies have normally dealt with. In other cases, we have a general responsibility (as outlined by the Attorney General in the "Pieces of Eight" opinion) to insure that legislative authorizations are complied with. If we determine there are problems, we must seek approval by the Governor or the Legislature to request enforcement action by the Attorney General, a departure from the procedure normally used to refer violations of law to the Department of Justice.

The major area where our normal permitting and enforcement authority has not been applicable is within portions of Lake Michigan where title to the lakebed has been granted by the Legislature to a municipality. In these situations, the guidance provided by the Attorney General in the "Pieces of Eight" opinion is applicable and our role, unless otherwise specified by the Legislature, is to monitor ongoing activities to determine if they are consistent with the provisions of the lakebed grant. If we determine that there are any violations, it is our responsibility to bring them to the attention of the Attorney General. We are reviewing the possibility that s. 30.03 may be available to us as an enforcement mechanism. Also, we are still involved in the review of applications for Corps of Engineers permits on lakebed grant areas. Water quality standards are still applicable on these areas and, because the Attorney General has stated we have a continuing (although somewhat limited) authority to monitor lakebed development, we should assert jurisdiction and grant certification if a project meets water quality-related criteria.

Once the Legislature has acted, we are required to presume the legislation to be constitutional unless the courts find otherwise. We must interpret a grant where possible in such a manner that a constitutional result occurs.

How should these responsibilities be carried out?

In general, the districts should take the lead in monitoring development, communicating with project sponsors and obtaining information on which to make approval or enforcement decisions. Central office staff should provide technical help (for example in locating the boundaries of lakebed grants based on their legal descriptions), provide legal analysis of proposed or existing legislation and of Supreme Court decisions, and clarify and explain department policy in light of legislative and court guidance. The Central office should also be responsible for developing public information on the trust doctrine and its significance to the use of our navigable waters.

The Districts should continue to make decisions on "routine" projects which do not raise trust doctrine questions. The Central Office (Bureau of Water

District Directors - January 26, 1989

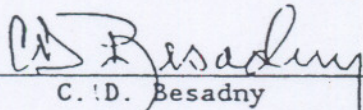
4.

Regulation and Zoning) should be consulted on "non-routine" proposals. The Department's position on major projects of this type should be concurred in by the Secretary.

In closing, I wish to emphasize once more that the public trust doctrine is not "anti-development". In fact, the Constitution promotes forms of public and commercial development which enhance the use of navigable waters for navigation and its incidents. Thus it is more accurate to state that the trust doctrine promotes development which furthers the purpose of the trust, while discouraging development that is contrary to the trust.

If you have questions, please feel free to write or give me a call [(608) 266-8034]. I would be pleased to discuss this in more detail with you or your staff.

APPROVED: _____


C. D. Besadny

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Attachment

cc: Division Administrators - Attachment
Jim Kurtz - LC/5 - Attachment
Paul Heinen - AD/5 - Attachment
Jeff Smoller - IE/4 - Attachment
Shari Eggleston - Justice - Attachment
Maryann Sumi - Justice - Attachment

Attachment 2
Compilation of Department Positions to Date on Specific Types of Development

<u>Development</u>	<u>Acceptable Under Public Trust?</u>	<u>Comments</u>
Restaurant building	No	Limited food service may be allowable where it supports, and clearly is an appurtenance to, a permissible use.
Restaurant ship or barge	Not unless operates as a licensed watercraft.	" " "
Municipal Civic Center	Yes	Must comply with Supreme Court guidelines.
Municipal Convention Center	Yes (meeting/exhibit facility only, not hotel)	" " "
Hotel/Motel	No	
Residences (apartment, condominium, house)	No	
Harbor facilities (see s.30.01, Stats.)	Yes	Can be private or municipal.
Private/public shore protection	Yes	Not trust-related but a generally permissible exercise of riparian rights.
Fish or wildlife habitat management or enhancement projects	Yes	Must comply with Supreme Court Guidelines
Public park, including "festival parks", or recreation area.	Yes	" " "
Park administration building	Possibly if for administration of water front parks(s).	" " "

Marina (and related facilities functionally necessary for operation of the marina).

Yes

" " "

Amphitheater for plays or other "cultural" events.

Yes

" " "

Confined dredged material disposal facility (CDF).

Yes

Ultimate use must be compatible with trust doctrine and Supreme Court guidelines.

Filling to extend private riparian property into water.

No

Parking lot.

Possibly if ancillary to an allowable use.

Must meet Supreme Court guidelines.

Industrial facility

No (except facilities related to ship building or repair which are water-dependent)

Must meet Supreme Court guidelines.

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GUIDELINES FOR FOOD SERVICE IN LAKEBED AREAS

Introduction

These guidelines are intended to be used by Department of Natural Resources staff in the evaluation of proposed food service development in filled areas of navigable lakes and streams in the State of Wisconsin. The guidelines are based on the body of law known as the "public trust doctrine", which has its source in the Wisconsin constitution (Article IX, Section 1) and has been articulated by the Wisconsin Supreme Court in a series of decisions from the mid-19th century to the present.

Guidelines

1. A food service facility must be ancillary to, and have the primary purpose of supporting, allowable public trust uses.

a. "Primary purpose" means a basic purpose which dominates use of the facility; any other use must be clearly secondary and may not conflict with or detract from the primary use.

b. "Supporting" means providing a service to users of the lakebed area which is consistent, in terms of its size, method of operation and "target" clientele, with the type of public trust uses being made. A facility does not "support" public trust uses merely by generating revenue to offset costs of allowable public trust uses.

A facility which is a "separate attraction" that draws individuals not already making "allowable public trust uses" of the area is not a support facility. In other words, if people using the facility are in the area to participate in an "allowable public trust purpose" and use the facility as an adjunct to other activities, the facility is consistent with the trust doctrine if other applicable requirements are met; if people are in the area to use the facility, and participation in "allowable public trust purposes" is an adjunct to using the facility, then the facility is not consistent with the trust doctrine. The amount of, and any charges for, parking may be considered in evaluating the appropriateness of a food service facility. The more obviously the facility is "ancillary to and supportive of allowable public trust uses", the less the concern with the amount of parking provided.

c. "Ancillary to" means a facility must be clearly subordinate to allowable public trust uses. It may not occupy a significant area which otherwise could be devoted to allowable public trust uses. A food service facility which dominates, or is a substantial intrusion into, the use of a lakebed area is not an ancillary facility.

d. "Allowable public trust uses" include the recognized public rights in navigable waters, which consist of navigation and its "incidents", and commercial navigation. The Supreme Court has also recognized "land-based recreation" as an acceptable substitute for water-based activities under certain circumstances (State v. PSC).

d. If allowable public trust uses occur on a year-round basis, the facility may be open year-round.

2. There must be a clear demonstration that the type and size of facility is necessary for the proper comfort of the public, based upon "allowable public trust uses" in the lakebed area.

3. The facility must be under public control. This means that:

a. It must be in public ownership.

b. A public entity must have control over operation and management of the facility, including type of service offered, hours of operation, etc. This may be accomplished through a contractual or leasing arrangement.

c. If the facility is leased by a public entity to a private entity, the lease may only extend for a period of less than 30 years, must provide a clear right to the lessor to terminate the lease at any time for good cause, and must recognize the applicability of state law and the oversight responsibilities and enforcement rights of the State and agencies thereof.

d. Records of the facility, relating to its operation and to the selection of an operator, must be reasonably available for review by the public and by the State.

4. The facility must be open to the public. This means that:

a. A substantial majority (90%?) must be open to the public without charge during normal operating hours, except for "b".

b. A portion (25% maximum?) of the facility may be rented to members of the public on a first-come, first-served basis for special occasions. Such rental cannot cover more than 25% of the normal operating hours.

c. The facility must be designed and operated in such a manner that all members of the public making a "normal", lawful use of the area in which it is located have free and open access to and use of the facility.

The Endangered Public Space of Bradford Beach

BY [VIRGINIA SMALL](#)

MAR. 03, 2021

<https://shepherdexpress.com/news/features/the-endangered-public-space-of-bradford-beach/#/questions>



PHOTO CREDIT: VIRGINIA SMALL

One of Milwaukee County's most valuable public assets, Bradford Beach and its historic Bathhouse, could become devalued as a public space. At least seasonally, it could present more as an exclusive "watering hole" than as a free and open lakefront.

The beach itself is increasingly threatened. Lake Michigan water levels have been rising at unprecedented rates in the past six years. The lake is now up to three feet higher than usual. As a result, Bradford and other lakefront beaches are shrinking. A large swath of Bradford's North Point washed out recently.

Bradford's eroding beach is also beset by other pressures. Beach volleyball has become highly popular, with extensive space dedicated to seasonal courts. McKinley Beach, south of Bradford, will remain closed to swimming for now, after riptides caused three drowning deaths last summer. South Shore Beach is often closed to swimming due to water-quality issues.

Bradford Beach areas that remain equally open to everyone have also been quietly contracting. The Dock, LLC, which provides food-and-beverage concessions for beachgoers, has been consistently barring anyone except patrons from entering a tented area next to one of three tiki-hut bars they operate. The Dock also routinely cordons off other areas and puts signs on picnic tables prohibiting public use. Bradford's Chicago-based vendor casually acknowledged denying public access at a recent hearing of the Lakefront Development Advisory Commission (LDAC).

Since last summer that vendor also has been angling to control much of the Bradford Beach Bathhouse's second floor—by turning it into the beach's fifth bar, [a sit-down destination-restaurant and an event space](#). Public officials and others have raised concerns that the proposal would likely violate Wisconsin's public trust doctrine and [aggravate racial and economic inequities](#).

When [grilled at a February 17th LDAC hearing](#) about how the public would retain access to the ship-like public pavilion, The Dock's owners reluctantly, reversing their prior stand, agreed that "anyone will be able to sit anywhere" on the rooftop, even without ordering. They pledged that no seating would be reserved. However, the promises so far have not been committed to writing, and it was unclear whether they would also apply to proposed private parties. It was also unclear whether the open-seating pledge would apply to proposed private gatherings, such as birthday celebrations and bachelor/bachelorette parties.

Other questions posed by commissioners to the vendors also were not fully answered. The Dock's two owners, Luke Cholodecki and Nick Hynes, made contradictory statements about the planned menu and hedged about their intentions regarding large-scale private events. Hynes demurred when asked to clarify vague and confusing language in a document intended to update their agreement. He said they did not anticipate that they would host more than "five or six big special events with amplified music." When asked whether limits on their "intended" number of such events would be defined in writing, Hynes said, "We would need to spend a great amount of time to actually clarify all those terms." He said it would have to involve "the parks legal department and our legal department."

Wisconsin's Public Trust Doctrine

Milwaukee's waterfront lands that were developed by filling in lakebeds, such as Bradford Beach, are governed by a mosaic of lakebed grants issued by the State of Wisconsin over time, and lasting in perpetuity. These granted lands belong to all citizens of Wisconsin in common, not to the state or any other governmental entity charged with stewarding them.

Wisconsin's Legislature recognized the restraints of the public trust doctrine when it granted former lakebed land to the city and county, said retired DNR attorney Michael Cain of Madison. "These grants generally specified that the granted land was to be used solely for park and parkway purposes. It's easy to imagine what private development would have occurred without the restrictions."

Wisconsin's public trust doctrine forbids the exploitation of public-trust lakebed lands for private developments. DNR's published Guidelines for Food and Beverage Service do allow "limited food

service...where it supports and is clearly an appurtenance to, a permissible use” such as concessions to serve park visitors. It does not allow “destination bars and restaurants” on filled-lakebed grant lands.

Critics say The Dock’s high-end menu and plan of operation to attract diners goes well beyond the DNR guideline mandating that food service simply provide “support” services to beachgoers.

Michael Thompson, director of DNR's waterways bureau, said last week that the agency has “a long history of protecting the state’s navigable waterways and lakebed lands for everyone's use and enjoyment.” He said that the DNR works to “communicate with other governmental entities” to help them to understand and comply with the public trust doctrine.

Thompson anticipates that DNR will provide written comments by March 3 in response to LDAC’s draft hearing minutes, compiled by LDAC chair William Lynch. “The comments will likely summarize DNR’s current assessment and note that DNR and Milwaukee County Parks are tentatively scheduled to meet and further discuss public trust matters on March 16.

Thompson said that the State of Wisconsin has at times obtained court injunctions of projects when they would have violated the public trust.

Milwaukee County Sup. Sheldon Wasserman, who represents the district that includes Bradford Beach and chairs the Parks, Energy & Environment Committee, has repeatedly questioned the relevance of the public trust doctrine regarding the proposed restaurant, which he supports. Nonetheless, he said at a mid-February public meeting of the Historic Water Tower Neighborhood that he thought it possible that “someone might sue” Milwaukee County over the issue.

The Doctrine Helps Avert a Slippery Slope

Cain said that the “restrictions imposed by the public trust doctrine were so well recognized by the state, city and county leaders for so many years that few private projects were proposed for filled-lakebed lands in Milwaukee.”

The public trust doctrine did play a role in defeating the six-lane freeway planned in the 1970s to run along Milwaukee’s northern lakefront. The doctrine also helped nix a “massive restaurant proposed for the old Coast Guard station, as well as a mothballed warship proposed to be docked at Veterans Park.

Nonetheless, during Cain’s 34-year career, “We probably averaged one proposal a month for private commercial facilities to be built on public trust lands around the state.” That included many proposed—and rejected—restaurant and bar facilities, floating bars in the Milwaukee River, and numerous residential condominium and hotel facilities. Other averted projects on filled lakebed have include condominiums, “dockominiums,” and a golf course and housing development that would have been sited partly on lakebed land. A hotel and restaurant/bar, recently proposed for lakebed land in Racine, found a new location nearby [after it was challenged by DNR](#).



PHOTO CREDIT: VIRGINIA SMALL

Whose Beach is it Anyway?

Since early last summer, The Dock's owners have proceeded as if their proposed restaurant was a done deal. They began promoting their intensely-branded "full-service rooftop restaurant" in June, in press releases and social media. Large "Coming Soon" banners draped the pavilion's railings and illustrated flyers were posted on the first floor.

Required permits reportedly have not yet been granted for the restaurant by either the city or county. Milwaukee County's engineering division has not yet determined whether the beach house can structurally withstand the weight of a proposed 2.6-ton shipping container along with bar-and-grille crowds. Compliance with the federal Americans with Disabilities Act and other issues also must still be addressed.

In April 2019 the Chicago-area vendors signed an agreement with Milwaukee County Parks to provide beverages, food and cabanas for people recreating at Bradford Beach. As the sole concessioner allowed to sell alcohol on the beach, the contract grants the vendor seasonal access to several spaces to provide those services.

Nonetheless, a Facebook page for [The Dock at Bradford Beach](#) calls the operation a "seasonal beach bar, rooftop restaurant and event space"—not a concession. A review of The Dock's social media since 2019

reveals that they have hosted special events, including an all-day “Equinox Beach Party” on September 7, 2019, which offered fee-based VIP packages. One post said. “Get your tickets early for the best show on the beach.” It drew interest from 780 people on Facebook.

A promotional post from July 2020 said, “The Dock on Bradford Beach is the perfect destination.” Another said, “Come enjoy a delicious meal with the best view in Milwaukee at The Dock Rooftop! Try our new menu and get a preview of our space while we remodel!” An August post said, “A beachside getaway doesn’t have to be a plane ride away! Head over to The Dock at Bradford Beach for delicious food, tropical drinks and a beautiful view!”

The Dock's website, [linked to Milwaukee County Parks web page](#), has a tab called “Plan a Party.” It shows several dozen people lined up shoulder to shoulder on picnic tables along the lake's edge, with a bean-bag game and bar set-ups in the foreground. (The photo was originally posted on Facebook on July 22, 2019.) Although pricing for private parties at Bradford is not yet listed, the vendors have said that their jointly branded business called The Dock at Montrose Beach in Chicago is the model for their intended Bradford Beach expansion. It offers food-and-beverage packages totaling \$51 to \$76 per person, before taxes and gratuities, with a [25-person minimum per party](#). Milwaukee County Parks officials reportedly sign off on all special events conducted by the Dock.

Protecting Parkland for All

About 280 citizens sent comments to the LDAC regarding the proposed pricey restaurant. William Lynch, the commission's chair, characterized the comments as overwhelmingly opposed to a rooftop bar, grille and private-event space. As of this writing, no Milwaukee County official has publicly acknowledged or responded to specific concerns expressed in writing by citizens about the beach that they collectively own.

Brenda Coley, co-executive director of Milwaukee Water Commons, was among the commenters. She wrote, “We strongly oppose the proposal...Among other things, the Public Trust Doctrine protects the right of members of the public to use our natural waters and shores for recreational purposes. In the midst of the COVID-19 pandemic access to outdoor public spaces is paramount to our community health.”

Coley also said, “The proposed development raises significant equity concerns. Our organization understands our waters to be part of the commons. They belong to all of us, and they need to be actively protected and managed for the good of all. Milwaukee Water Commons is deeply vested in the work of ensuring equitable access to our natural spaces.”

Milwaukee County's own strategic plan offers guidance, wrote Coley, who quoted that plan: “Milwaukee County's approach focuses on addressing the root causes of racial inequities: the power structures, policies and practices of our institution...Addressing the root causes that are contributing to inequities in the community will make sustainable, transformational change...” Coley added that Milwaukee County's Health and Equity Framework asks in regard to living conditions, “Do people have access to safe, quality green spaces and recreation?”

Coley concluded: “As Milwaukee continues to dismantle systemic racism and battle the ills of being one of the most racially segregated cities in the nation, we ask you to listen to what each of us inherently

knows. This development will not broadly improve the quality of life for our communities of color and it will not serve to foster care for our waters by all of those who call Milwaukee home.”

Public Spaces Must Welcome and Serve Everyone

Arijit Sen, an associate professor in the UW-Milwaukee's School of Architecture and Urban Planning, said that it is essential for civil society and democracy that people successfully share and navigate public spaces together. He said that concessions and other commerce can be appropriately placed so they do not encroach on a public space. “However, commerce should not dominate a public space or make that place seem unwelcome to some people,” Sen said. “There definitely should not be hard boundaries, such as roped-off areas. Nonetheless, even softer visual boundaries, such as a row of planters or furniture, can deter people from accessing what is rightfully public space.”

Sen said that a second-floor bar and grille would inevitably appear unwelcoming for general-public use, even if non-patrons are ostensibly “allowed” access to or through the space, adding “Milwaukeeans would do well to use public spaces intentionally to foster more mingling of people from different backgrounds.”

Anne Steinberg, a community advocate with several environmental organizations, said “The biggest problem with this proposed restaurant is that it has proceeded without Milwaukee County ever engaging in meetings in which the public's input was sought or that allowed the public to speak directly. There has been no real democratic process about the future of this valued public space.”

Milwaukee County Parks officials did not respond to requests for comment for this article.



[Virginia Small](#)

Virginia Small is an award-winning journalist and lifelong writer. She has served as a senior editor for a national magazine, a staff reporter and cultural reviewer for several newspapers, and a contributor to many national and regional publications.

[Read more by Virginia Small](#)