State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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

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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 ~~Mr.~~ Tom 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 irrepealable 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))

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

George E. Meyer
Secretary

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.

cc: Secretary James Klauser
Gloria McCutcheon- SED
Lee Kernen-FH/4
Attorney General James Doyle
Susan Sylvester-AD/5
Michael Cain-LC/5
Attachments

Koshen 8/16
FR

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
'TTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Michael W. Stead
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P.O. Box 7857
Madison, WI
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AUG 13 1987

August 11, 1987

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,

Don Hanaway

Donald J. Hanaway
Attorney General

DJH:saw

CC: Scott, Mike

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 a 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.

<u>How should these responsibilities be carried out?</u>

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

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 Eggleson - Justice - Attachment
Maryann Sumi - Justice - Attachment

Attachment 2

Compilation of Department Positions to Date on Specific Types of Development

Development	Acceptable Under Public Trust?	Comments
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.