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VIA ELECTRONIC MAIL TO: jlehrke@legacy-architecture.com

Ms. Jennifer L. Lehrke, President
Armory Community Project, Inc.
605 Erie Avenue, Suite 101
Sheboygan, WI 53081

RE: Redevelopment of the Sheboygan Armory Property

Dear Jennifer:

You have asked for an opinion concerning the redevelopment of the historic Sheboygan Armory property and its potential conflict with the rights of the public in navigable waters and lakebed under the public trust doctrine, Article IX, sec. 1 of the Wisconsin Constitution. The information in this letter is based on my background in water law generally and specifically my experience in public trust matters, primarily those involving the Milwaukee Transit Center and the attempted private development of the Sturgeon Bay west waterfront.

The public trust doctrine establishes that the rights of the public extend not only to navigable waters, but to all submerged lakebed at the time of Statehood. *See Pewaukee v. Savoy*, 103 Wis. 271, 274, 79 N.W. 436 (1899) ("It is the settled law that submerged lands of lakes within the boundaries of the state belong to the state in trust for public use. . . . Upon the admission of the state into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law.")

Based on my review of historic maps and other evidence, it appears highly likely that the Armory property is artificially filled lakebed that was covered by the waters of Lake Michigan at the time of Statehood. Indeed, the available maps—which are numerous—are notable in that they uniformly depict the present site of the Armory as located on former lakebed. It is also significant that the property is not located within a platted lot and block, but rather is legally described by its surrounding streets. For example, it is bounded on the east by Broughton Drive, which did not exist prior to the late 1930s. Both the maps and the legal description are indicative of a filled site.

To the extent the Armory property is filled lakebed, it cannot be sold for private commercial development. Moreover, the public trust doctrine grants broad standing to any citizen of Wisconsin to enforce the rights of the public.

I understand that the City desires to demolish the Armory property and may be considering redevelopment by private commercial interests. However, the City, as a governmental entity, has a duty to ensure that future uses of the property conform to the constitutionally imposed limits of the public trust doctrine. As former DNR Secretary George Meyer advised the Milwaukee County Executive in 1996:

"[D]evelopments on our lakes and rivers must be substantially related to navigation and its incidents. . . . This means that such development must be connected to commercial navigation or to the 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 recognizing "the extremely high potential financial return from commercial development on prime sites such as the lakefront," and "the fiscal stress experienced by government agencies," the Secretary nevertheless cautioned:

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.

Even if its title is not directly challenged in court, it will likely be impossible for the City of Sheboygan to obtain a title commitment that insures over the rights of the public. Standard policy language will invariably except "*title to any filled land*"; "*any part of the insured land falling within the bed of navigable water or unlawfully reclaimed from navigable water*"; and/or "*title to that portion of the insured land lying below the high-water mark.*" These standard exceptions mean that the City cannot insure title to a prospective buyer. In Sturgeon Bay, this circumstance has delayed redevelopment of an underused parcel on the west waterfront for over four years. Recently, the City paid \$360,000 to settle a misrepresentation claim brought by the developer on the basis that the City knew and failed to disclose that it was unable to convey clear title to filled lands slated for redevelopment.

***An Ordinary High Water Mark ("OHWM") Determination
Is Necessary to Provide Clear Title to the Armory Property***

Wisconsin common law establishes that the boundaries of navigable waters and their beds are determined based on the location of the ordinary high water mark ("OHWM") at the time of Statehood. *See Illinois Steel Co. v. Bilot*, 109 Wis. 418, 425, 4 N.W. 855 (1901) ("title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever..."). The OHWM is defined as "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914). Where the physical and biological markers of the historic OHWM have been obliterated by filling, the task is to reconstruct its location as of 1848, when the State took title to the beds of all navigable waters. Maps, surveys, historic articles and physical evidence such as soil borings are all useful to reconstruct the OHWM. In the Sturgeon Bay public trust litigation, the trial court reviewed these categories of evidence and enjoined the sale of the entire west waterfront parcel on the basis that the evidence showed the subject property was located mostly or completely below the historic OHWM.

The public trust doctrine applies with equal force to filled lakebeds even if, as a result of the fill, the area is no longer a navigable waterway. *See State v. Trudeau*, 139 Wis. 2d 91 (1987) ("an area need not be navigable to be lakebed. If the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant to the State's claim.") The establishment of a bulkhead line does not change the location of the OHWM. Wis. Stat. § 30.11, Stats. authorizes riparian owners to place solid structures or fill up to a designated bulkhead line. However, "the establishment of a bulkhead line under sec. 30.11 does not grant full title to the bed landward of the line, but only grants a limited right of use of the bed for the placing of fill up to the bulkhead line. 63 Op. Atty Gen. Wis. 445.

***Readily Available Evidence Shows That the Armory
Property is Filled Lakebed Subject to the Public Trust Doctrine***

I have examined several scaled overlays of the Armory property on early maps and surveys, including the original Sibley U.S. government land survey (1835), the Lapham survey of the mouth of the Sheboygan River (1836), the original plat of the Town of Sheboygan (1847), and Sanborn fire insurance maps dating from 1887, 1891, and 1903. The early surveys show the location of the Armory was submerged lakebed east of the mouth of the Sheboygan River. Prior to filling, Pennsylvania Avenue and Center Avenue which flank the Armory did not extend much further east than 7th Street.

Historic maps and other physical evidence evidence that the Armory property is located below the historic OHWM of Lake Michigan. Significantly, David H. Jacob, the surveyor commissioned by the City to map the location of the original U.S. government meander line, prepared a map that is entirely consistent with the available plats, surveys and Sanborn maps which uniformly show the Armory site to be former lakebed. The location of the meander line is important evidence of the location of the shoreline prior to Statehood. Mr. Jacob's survey map shows the meander of the lake, and depicts most of that property as lying waterward of the meander. While the meander line is not synonymous with the location of the shoreline, its location has been determined to be relevant to establishing the ordinary high water mark of historically filled sites, where biological markers have long since been obliterated.

***Government Records in the National Archive Evidence That
the Shoreline in the Vicinity of the Armory Site Was Being Lost to Erosion
and Was Ripped and Artificially Filled***

In determining the OHWM of former lakebed, a question often arises whether the dry land formerly underwater was created by the process of natural accretion or by artificial fill. Accretion, the formation of land on the shoreline by the deposit of sediments through wind and wave action, is deemed to add to the riparian owner's title. *Doemel v. Jantz*, 180 Wis. 225, 231, 193 N.W. 393 (1923). Conversely, the creation of land by filling lakebed does not add to the riparian landowner's title. See *Menomonee River Lumber Co. v. Seidl*, 149 Wis. 316, 320-321, 135 N.W. 854 (1912) ("One cannot by building up land or erecting structures in a lake, the title to the bed of which is in the state, thereby extend his possession into the lake and acquire the state's title.")

With respect to the Armory site, we have a unique set of government records which establishes the character of the land underneath the Armory as fill. In particular, a 1933 City of Sheboygan resolution of the common council acknowledged that the City "has for a number of years made large deposits of earth and other miscellaneous material on the shore of Lake Michigan immediately north of the Coast Guard Station, and from thence in an irregular line to the North Pier" – an area that includes the Armory property at the site of the original Sheboygan river mouth. The purpose of the 1933 resolution was to seek approval from the federal government to continue the filling. The same year, the United States War Department issued a permit to the City to construct a 700 ft. rubble mound for shore protection and to fill behind it in the harbor along the shore of Lake Michigan, "between the mouth of the [re-routed] Sheboygan River and the United States north breakwater at the foot of Wisconsin Ave., extended." Among the findings made by the Corps of Engineers in support of the permit was that:

The completed portion of the rubble mound and fill between the proposed work and the north breakwater was placed in 1932, while most of the completed portion of the rubble mound and fill south of the work now proposed [i.e., the area of the Armory] has been placed since 1929, both sections being placed without a permit. . . . [T]here has been considerable shifting of the shoreline in the basin since the breakwater was completed in 1915, with the general tendency since 1918 to scour out the beach from the mouth of the river to about 500 feet from the breakwater.

These government records indicate that the construction of a breakwater north of the re-routed river mouth caused erosion. Documentation of erosion in this area would be completely contrary to a finding that the former lakebed in this area became dry land due to a process of accretion.

* * *

Based on the foregoing, if the City attempts to transfer public trust property to a private party for commercial use, that effort could be challenged as a violation of Wis. Const., Art. IX, § 1. Such a sale threatens to extinguish a beneficial property interest held by the public. Litigation becomes more likely due to broad standing conferred under the public trust doctrine. Any person may sue in the name of the State for purposes of vindicating the public trust. *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974). In fact, a citizen has standing to sue even where DNR had authorized activity on filled lakebed as a regulatory matter. *See Gillen v. City of Neenah*, 219 Wis.2d 806, 580 N.W.2d 628 (1998) (public trust doctrine enables a citizen to directly sue a party whom the citizen believes was inadequately regulated by the DNR). The only way to finally resolve the cloud on the City's title is to obtain a declaratory judgment as to the location of the OHWM along the entire Armory parcel.

I hope this information is useful to you. Please contact me if you have any questions or require follow up. Thank you for the opportunity to assist.

Very truly yours,

WHEELER, VAN SICKLE & ANDERSON, S.C.


Mary Beth Peranteau

/mbp