DUEY STROEBEL

STATE SENATOR • 20TH DISTRICT

Testimony on SB 541

November 15, 2023

Thank you Chairman Cowles and committee members for holding a public hearing on Senate Bill 541, a piece of legislation with the aim of creating a framework to provide certainty surrounding legal title of former lakebed and riverbed land. A version on of this bill was passed and vetoed last Session. Stakeholders have continued dialogue with the DNR in hopes of making improvements to secure broader support.

SB 541 allows a municipality to create a waterfront development plan for those parcels of land that might have been below the ordinary water line at the time of statehood. The State of Wisconsin did not comprehensively permit and regulate the use of fill until late 1977, yet the public trust doctrine can attach to any land that was submerged at the time of statehood. The uncertainty of title that comes with lakefront and riverfront properties is a prohibitive challenge for land use and development in many communities. No one is going to put in the resources to do urban development or redevelopment if, at any point in the future, a lawsuit about an unmeasured waterline 150 years ago could destroy chain of title.

SB 541 creates a local government driven process, with public comment and DNR review, to clear up title of lands that might have, at one time before 1977, been underwater. The land must have provisions for public use and get the approval of local leaders. The DNR then reviews the plan to ensure the state interest in natural resource protection is properly considered. SB 541 creates an option. No community needs to pursue this pathway if there isn't local buy-in.

Also testifying today are both representatives from the development community and local leaders who will speak to how this legally technical issue of land title on these water-adjacent properties is causing real problems to communities all around Wisconsin. I will leave the idiosyncratic examples to the witnesses who live them. I hope you will join me in figuring out a way to provide the certainty necessary for these urban renewal plans. Thank you.

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ROBERT WITTKE

STATE REPRESENTATIVE • 62nd ASSEMBLY DISTRICT

Senate Committee on Natural Resources and Energy
November 15, 2023
201 SE, State Capitol

Dear Chair Cowles and Committee Members,

Thank you for holding a public hearing on Senate Bill 541 (SB 541) which would allow for the development of lands along commercial waterways and Great Lake Waters while maintaining a vital review process by the Department of Natural Resources (DNR).

Senate Bill 541 is based off of 2021 SB 900 which passed both houses and was vetoed. Senator Stroebel and I co-authored SB 900 and I'm pleased to join him in co-authoring SB 541. Our partners, the Wisconsin Realtors Association and the League of Wisconsin Municipalities, have worked with the DNR and the executive branch to get us here today and to help us present SB 541 as an even better policy than last session's version. Let me just emphasize a few of the modifications to the concerns we heard:

- The waterfront development plan section authorizes a municipality to develop a plan with parcels that include land that may have been part of the submerged bed of a Great Lakes water since December 9, 1977. The plan will include:
    - A surveyed map showing areas dedicated to the public for public use, and areas that will allow for private uses.
    - A description of proposed public use areas including any restrictions proposed for safety reasons, and a description of public access
    - A plan for the implementing and enforcing the public use areas including appropriate ordinances.
- Plan approval by DNR – following the adoption of the plan by the municipality, the DNR would review the plan and hold a public hearing.
- Other provisions address title to non-riparian parcels and authorization allowing existing uses on historic fill to continue. This bill is permissive – a municipality can use the current process for filled lands or they can follow the proposed development plan in SB 541.

Senate Bill 541 would provide an opportunity for the communities of Ashland, Bayfield, La Crosse, Milwaukee, Oshkosh, Sheboygan, Sturgeon Bay, and Superior in particular to develop land that is no longer submerged, afford public and private use, and drive economic growth.

Thank you once again for holding a public hearing on SB 541 and I hope you will recommend passage of the bill.

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STATE REPRESENTATIVE • 26th ASSEMBLY DISTRICT

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Testimony on SB 541
Senate Committee on Natural Resources and Energy
Wednesday, November 15, 2023

Thank you Chairman Cowles and Senate Natural Resources and Energy Committee members for allowing me to submit testimony in support of Senate Bill 541/Assembly Bill 579 to address historic fill of Great Lakes waters and certain commercial rivers.

First, I want to thank Senator Stroebel and Representative Wittke for their continued leadership to advance this proposal. I have been working with my colleagues on this initiative for several years and believe the updated draft is a workable proposal that can advance through the legislature and be enacted into law.

The Wisconsin Department of Natural Resources, the Wisconsin Realtors Association, and the League of Wisconsin Municipalities have all been part of the process and are in support of this bill. The agency will maintain its ability to evaluate and review future plans.

In my district, the City of Sheboygan has several plots of land that are within an area that was surveyed in 1835 which was prior to Wisconsin's statehood in 1848. The agency had changed its interpretation of the rules of how cities like Sheboygan could pursue development in these areas so the plots remained undeveloped. If passed, this bill would clarify legal issues around this and could spur around $50 million in economic development alone for Sheboygan. It is important to note, the legislation does not impact public trust concerns, impede access to local water ways, or take away stakeholder input into future local plans.

Given its great impact for the future of Sheboygan's vitality, I support Senate Bill 541 and respectfully ask for the committee's support for the measure.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
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Madison WI 53707-7921

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Senate Committee on Natural Resources and Energy

2023 Senate Bill 541
Use of Fill in Commercial Waterways and Great Lakes Waters
November 15, 2023

Good morning, Chair Cowles and members of the Committee. My name is Ann Kipper, and I am the Administrator for the External Services Division at the Wisconsin Department of Natural Resources (DNR). Thank you for this opportunity to testify, for informational purposes, on Senate Bill 541 (SB 541), related to the use of fill in commercial waterways and Great Lakes waters.

The department appreciates the strong legislative, judicial, and public support of the public trust in the waters of Wisconsin. The constitutionally based public trust doctrine protects the rights of our citizens for navigation and recreation in our waterways. The public trust doctrine likewise protects water quality, aquatic habitat, and the natural scenic beauty of our waterways in the interest of all members of the public. An important component of the State of Wisconsin's public trust responsibilities is the ownership of the beds of lakes in trust for the public.

The department recognizes that there are challenges for communities seeking to revitalize prime areas in proximity to public waters. The department believes there is significant policy value in exploring ways to avoid costly legal challenges and to assist communities in developing and maintaining public amenities as a vital component of vibrant waterfronts. However, in seeking to address issues of underutilized public trust lands, it is essential that the public's constitutional interest in these areas be properly served.

Throughout the state's history, tracts of the beds of the Great Lakes and commercial rivers have been filled for a variety of purposes. Where such fill has been authorized by the state, it has generally been authorized only for uses consistent with the public trust such as navigational enhancements, public highways, or public amenities related to the use and enjoyment of the water. Where such fill has not been authorized, the state has maintained an interest to preserve and protect the public's rights to these lands. SB 541 represents a departure from these principles by broadly allowing unrelated private uses in and private ownership of areas historically reserved for the public or for commercial navigation.

SB 541 creates a process whereby DNR may amend legislative grants of filled submerged lands and submerged lands leases entered into by the Board of Commissioners of Public Lands. By and large, legislative grants of submerged lands to municipalities contain specific terms on the allowable uses of these lands to be consistent with the public trust. Under current law, submerged lands leases may only be issued for uses consistent with the public trust. Under this bill, purely private interests unrelated to the public trust may be authorized to use, and in some cases obtain title to, this public trust land without certainty that the public's interest in navigable waters is maintained.

SB 541 also creates a process whereby DNR may approve a municipal plan that recreates the boundary between public trust and private property. The result of this process would be to effectively transfer title

of public trust lands to private interests, thereby removing those lands from the public domain forever. While the bill does incorporate public access and use concepts, the framework does not ensure the provision and continued maintenance of substantial public amenities necessary to protect and promote the public trust.

The department would welcome an opportunity to meet with the bill authors and interested stakeholders to discuss ideas for amendments to the bill that could add clarity and that would more clearly recognize and protect the public rights in these areas, while also addressing the challenges local communities face in revitalizing properties in our public waters.

On behalf of the Department of Natural Resources, we would like to thank you for your time today. We would be happy to answer any questions you may have.

Testimony on AB 579/ SB541
Paul G. Kent, Stafford Rosenbaum LLP
On behalf of the League of Wisconsin Municipalities
Senate Natural Resources and Energy November 15, 2023

My name is Paul Kent, I am here today on behalf of the League of Wisconsin Municipalities speaking in favor of this bill. Most of my 42 years in practice have focused on water law issues in Wisconsin.

I would like to make three points today:

1. This bill addresses a real problem – the uncertainty of title to areas of former lakebed that were filled 45 years ago or more.

2. This proposal is consistent with the public trust doctrine and is designed to enhance public access and use of the Great Lakes shorelines.

3. The bill before you today includes significant changes to address the concerns raised with last session's bill.

The problem

There are many areas of historic fill along Great Lakes shorelines and along commercial rivers tributary to the Great Lakes. This fill typically occurred in the 1800s and 1900s – some have been from natural shoreline processes, others from artificial fill. Let's look at a few examples from Marinette and Sheboygan.

These filled areas have been treated as private land and put to private commercial or residential use for decades. No one suggests the fill should be removed and the area made part of the lake again. However, some insist that the state's title to lakebed at statehood never changes, even when substantial portions are no longer part of the lake. This places a cloud on thousands of parcels of waterfront property in almost every Wisconsin municipality along the Great Lakes, and adjoining harbors and industrial rivers. This problem also effectively thwarts redevelopment of brownfields and other property along shorelines that could otherwise promote public access and use.

For example, in Sturgeon Bay, the City spent money cleaning up a brownfield site along Sturgeon Bay, established a tax incremental district and proposed a mixed public and private development to improve access and draw people to the water. It was opposed based on an assertion that even though this area had been filled since the early 1900s, it was still lakebed and therefore state land. It was nearly impossible to define a lakebed line and it led to years of litigation and uncertainty.

After completion of the steps required under the bill, these property owners will be able to sell their property and transfer title to new buyers without a cloud on title, and they will be able to develop their property subject to all of the same federal, state, and local regulations and approvals required of any economic development project in Wisconsin.

This bill does not change any environmental, land use, or zoning regulations. What it does is provide a tool for municipalities to utilize to develop a plan for the highest and best use of these properties by creating public and private partnerships to attract residents and visitors to the lakeshore.

The Public Trust Doctrine

Here, I want to begin by noting what this bill does not do. It applies to *historic* fill; it does not allow any new fill of lakebed or riverbed. New fill remains subject to the same laws including, Wis. Stat. § 13.097, as before. The City of Madison cases you heard about last session and may hear about again today are from the 1950s. Those cases addressed *new* fill – for Vilas Park and Monona Terrace. They did not address existing historic fill.

As for historic fill, we agree that under the public trust doctrine "The title to the beds of all lakes ...up to the line of ordinary high-water mark..., became vested in [the state] at [statehood]." But while that is the starting place for analysis it is not the ending place. There is also a line of cases that acknowledges over time, the boundaries of water bodies change. That is simply the reality of waterfront property. The land created or lost with the change of boundaries is subject to a special set of common law doctrines known as "accretion and reliction." A number of cases involving quiet title actions have awarded title to riparians of accretions and relictions along lakes.

Therefore, we are not talking about transferring the state's title, we are simply determining where the boundary of the lakebed is at this point in time. The courts and legislature have already done this on an *ad hoc* basis. This is not a new law or a departure from the public trust doctrine. What is new in this bill is a process to resolve these issues that (1) avoids the uncertainty and expense of an ad hoc resolution through quiet title actions or special legislation and (2) has a defined process that allows for public planning and approval by DNR.

Changes from Last Session

In response to the Governor's veto and concerns heard from interested parties, we have met with DNR (a number of times beginning in the summer of 2022) to find a new path forward. The bill has been modified substantially to create the "rigorous review process" called for by the Governor in his veto message.

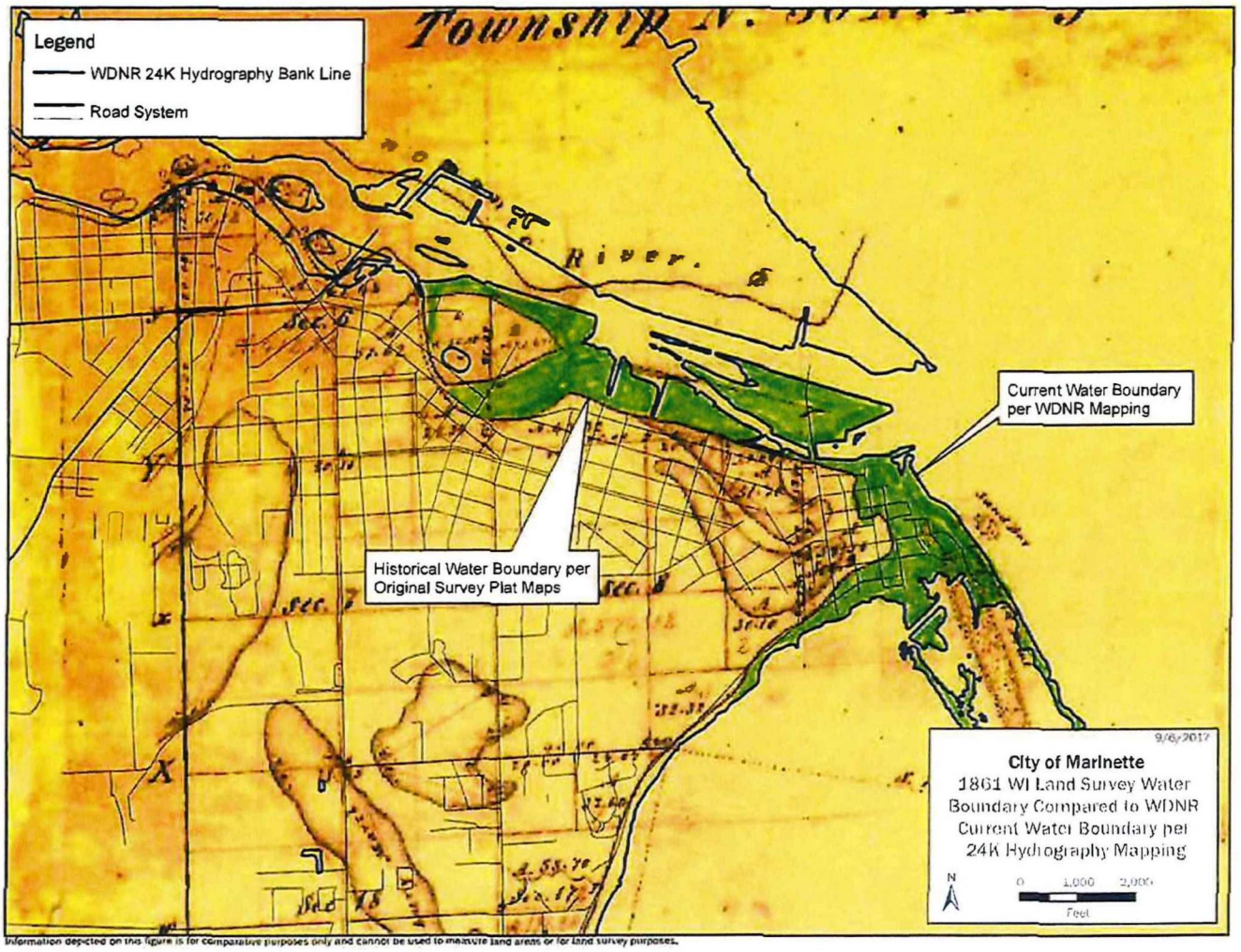
Conclusion

Neither the Public Trust Doctrine nor the public interest generally is well served by the uncertainty of title along Great Lakes shorelines that preserves abandoned sites with no

public access. This bill provides a process for municipalities to facilitate public and private uses that increase public access and draw people to their waterfront properties.

Marinette, WI

Approximate filled area

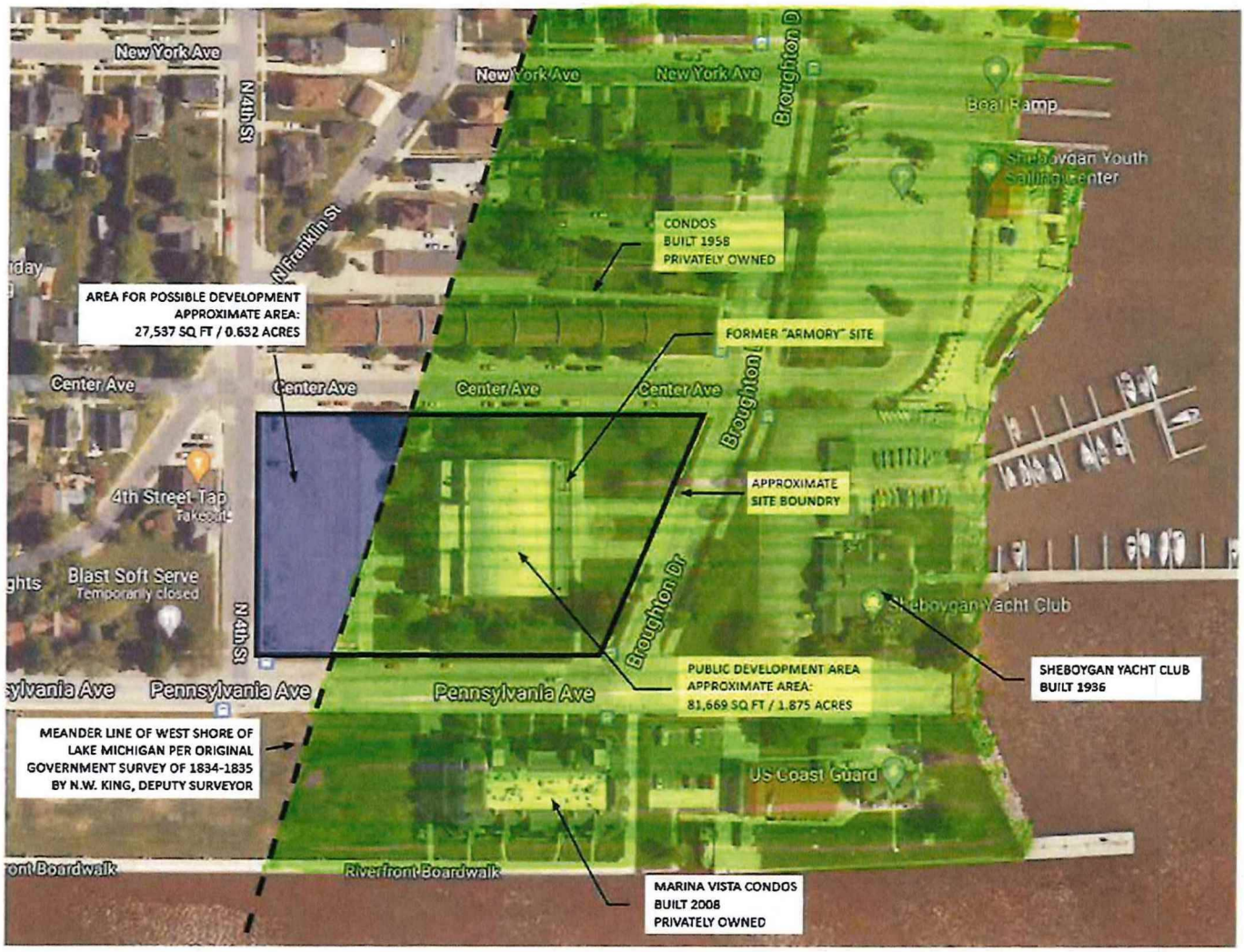


Marinette, WI

Approximate filled area

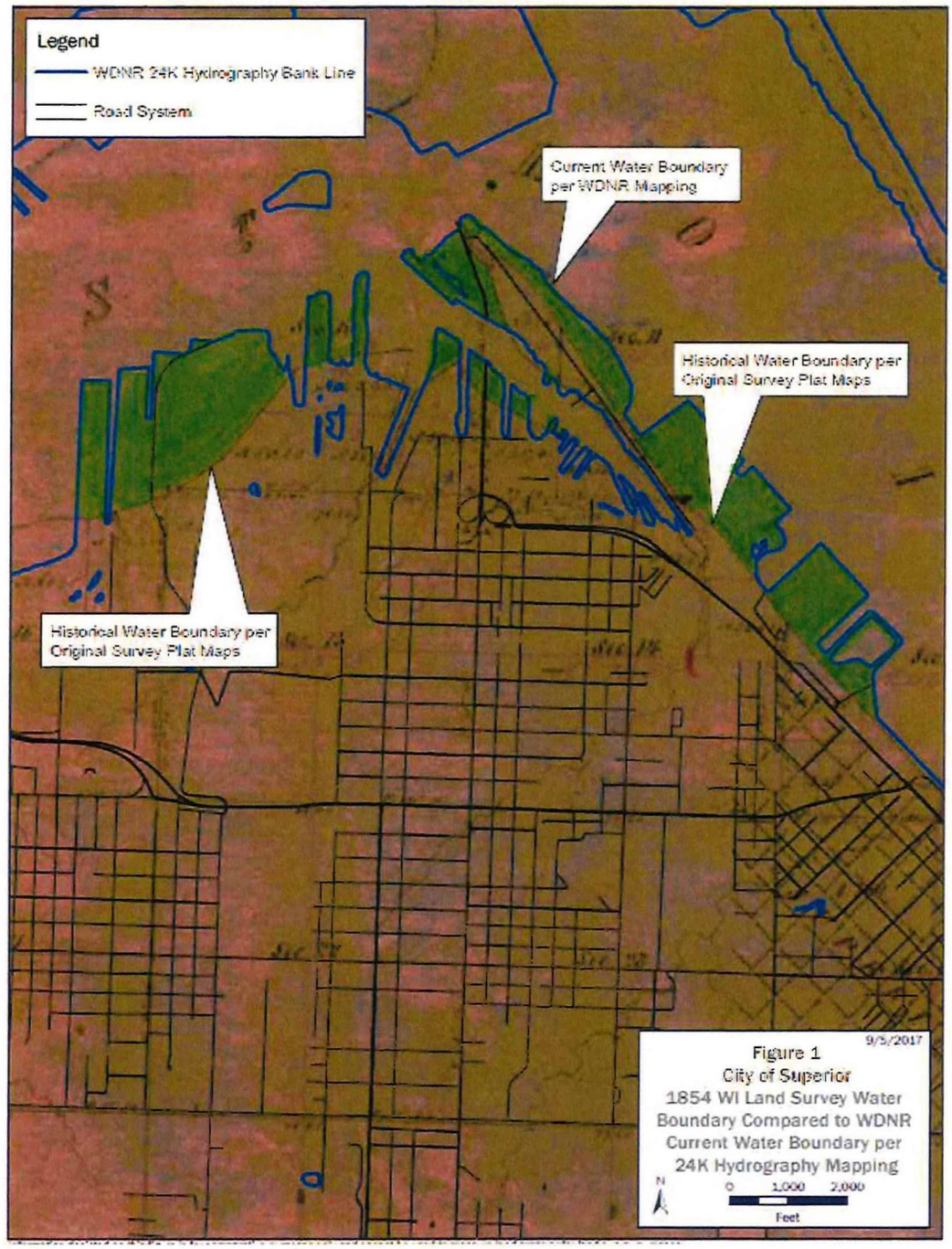
Sheboygan, WI

Approximate filled area



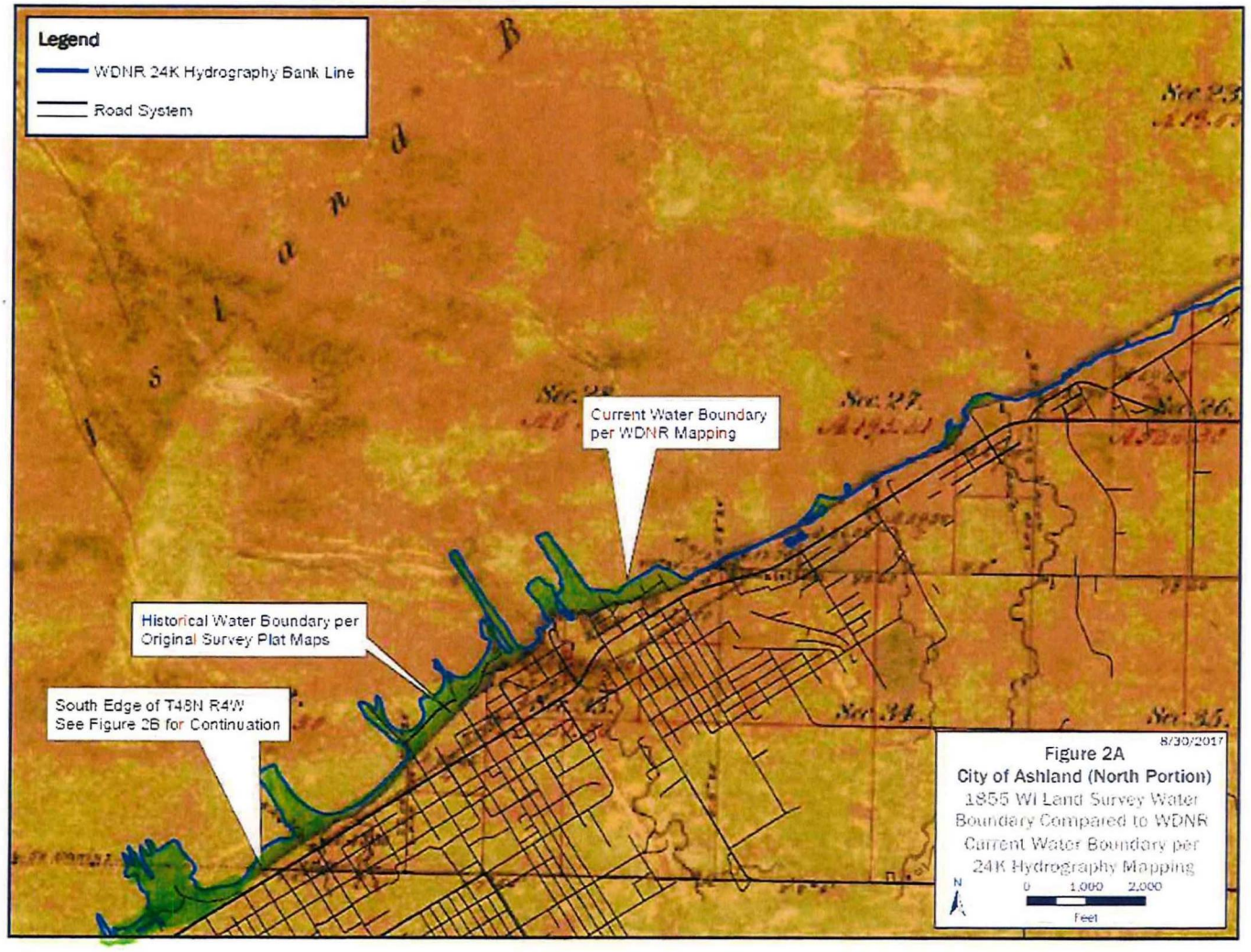
Superior, WI

Approximate filled area



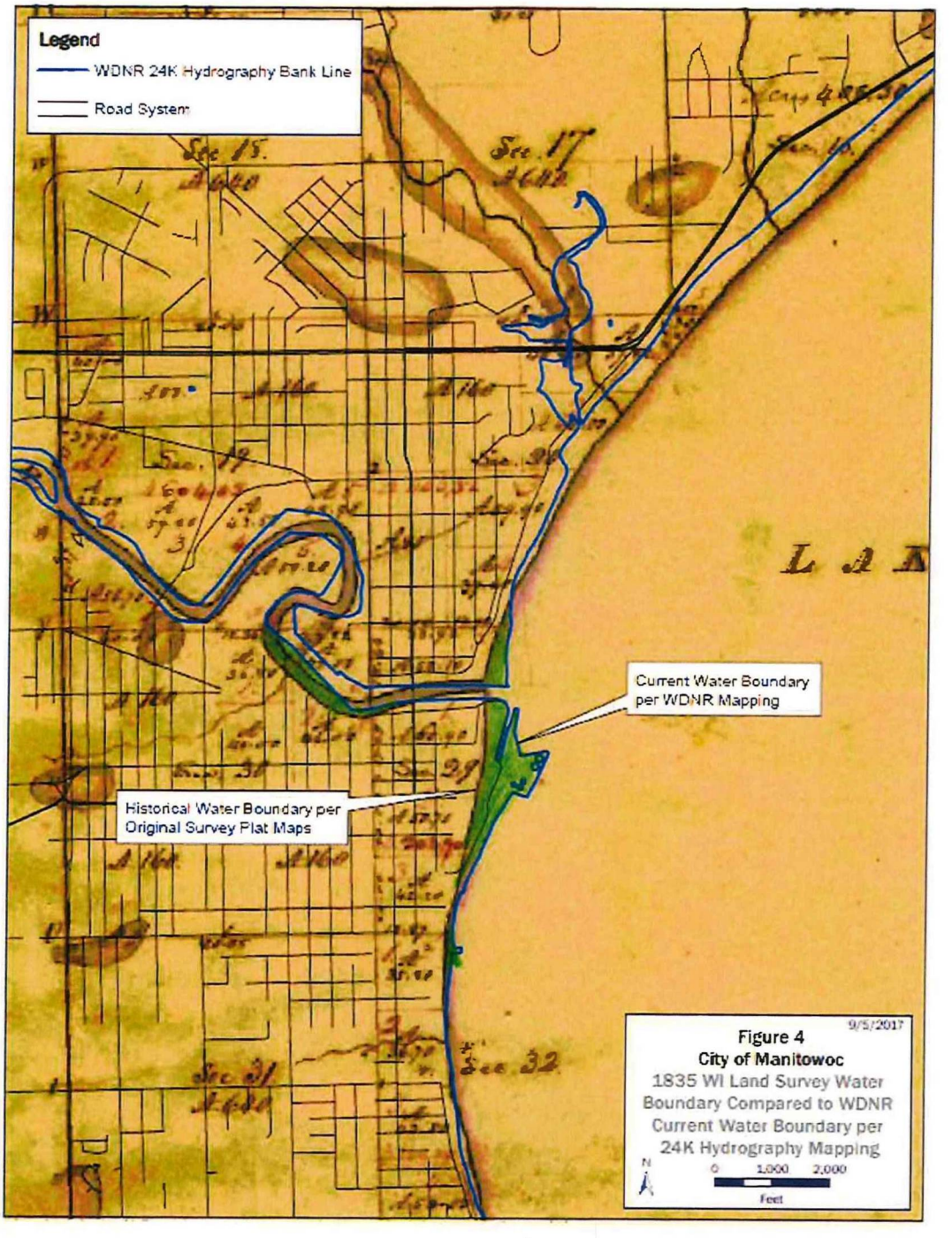
Ashland, WI

Approximate filled area



Manitowoc, WI

Approximate filled area

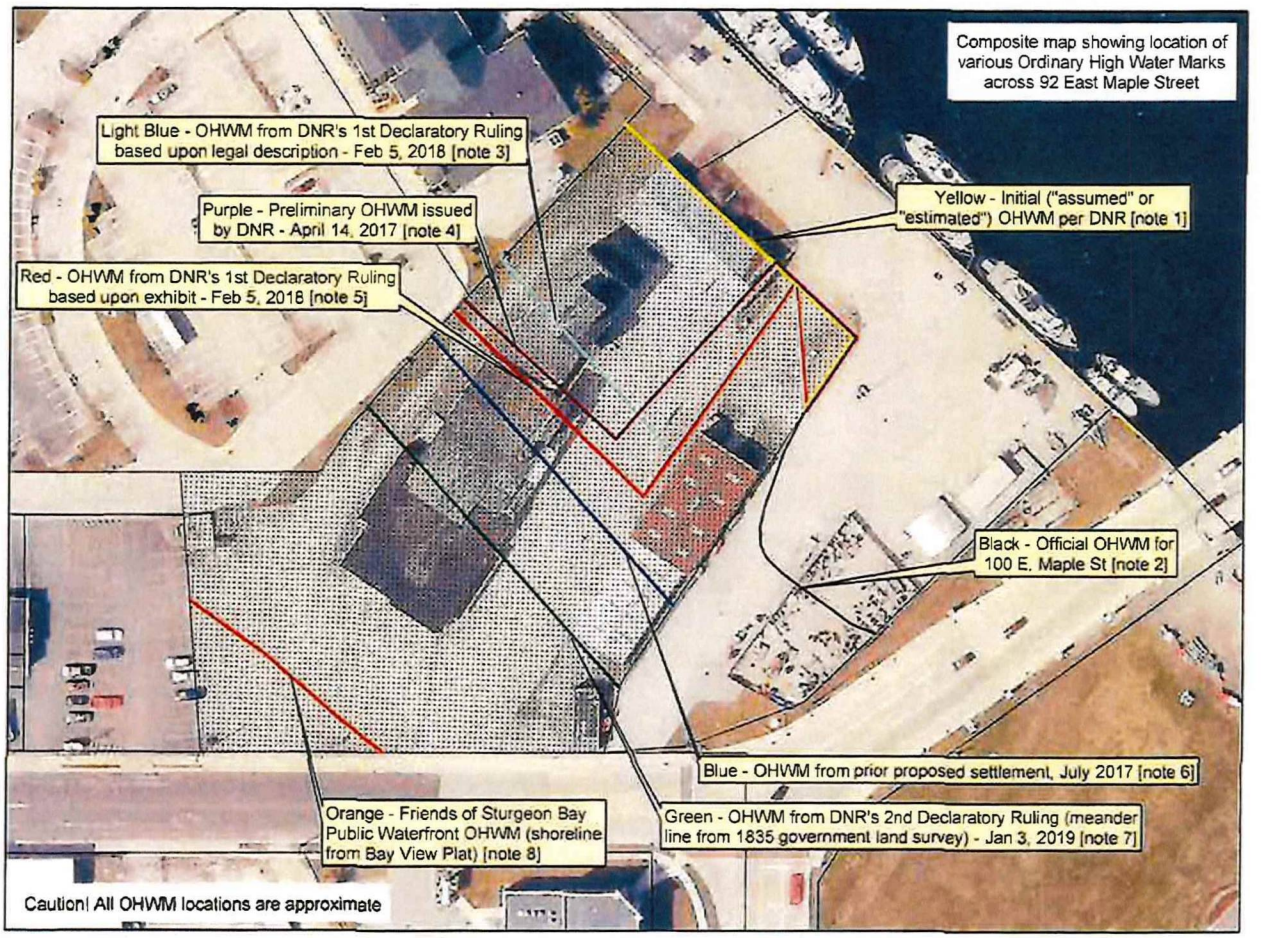


Bayfield, WI

Approximate filled area

Sturgeon Bay, WI

Example ordinary high water mark (OHWM) determination



City of Sheboygan
spirit on the lake

TO: Members of the Wisconsin State Legislature

FROM: City of Sheboygan, Office of the Mayor

RE: SB 541– Relating to use of fill in commercial waterways and Great Lakes waters

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

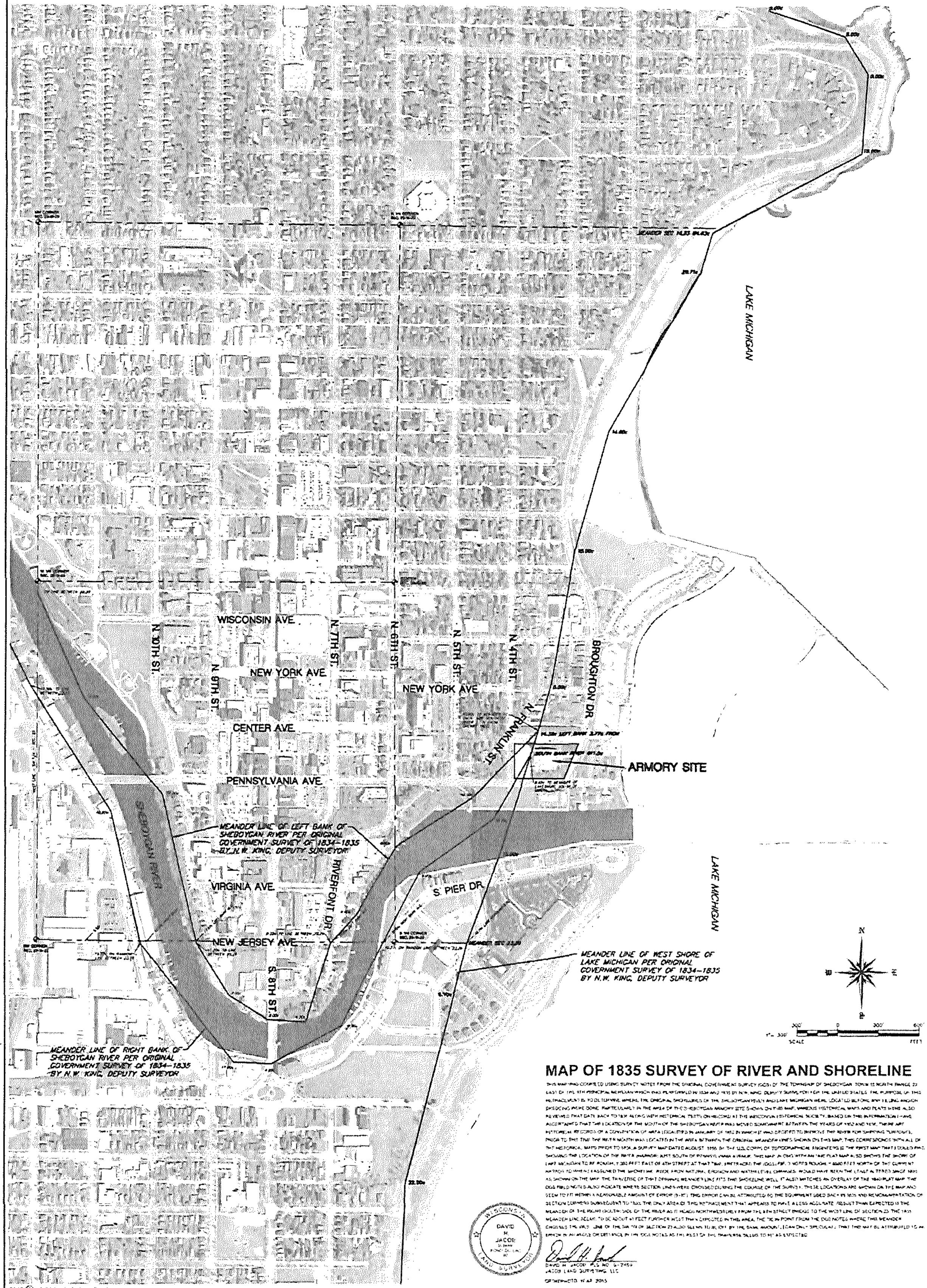
Background: The City of Sheboygan was originally incorporated as a city in 1853, just a few years after Wisconsin became a State in 1848. Before Wisconsin became a State, a survey was conducted in 1835 which outlined the boundaries of the Lake Michigan and Sheboygan River shoreline. Many decades ago,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

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

Office of the Mayor

CITY HALL
828 CENTER AVE.
SHEBOYGAN, WI 53081

920-459-3317
www.sheboyganwi.gov



MAP OF 1835 SURVEY OF RIVER AND SHORELINE

THIS MAP WAS COMPILED USING SURVEY NOTES FROM THE ORIGINAL GOVERNMENT SURVEY (GOS) OF THE TOWNSHIP OF SHEBOYGAN, TOWN 15 NORTH RANGE 23 EAST OF THE 4TH PRINCIPAL MERIDIAN WHICH WAS PERFORMED IN 1834 AND 1835 BY N.W. KING, DEPUTY SURVEYOR FOR THE UNITED STATES. THE PURPOSE OF THIS RETRACEMENT IS TO DETERMINE WHERE THE ORIGINAL SHORELINES OF THE SHEBOYGAN RIVER AND LAKE MICHIGAN WERE LOCATED BEFORE ANY FILLING AND/OR DREDGING WERE DONE, PARTICULARLY IN THE AREA OF THE SHEBOYGAN ARMORY SITE SHOWN ON THIS MAP. VARIOUS HISTORICAL MAPS AND PLATS WERE ALSO REVIEWED THAT DATE BACK TO 1836 ALONG WITH HISTORICAL TEXTS ON RECORD AT THE WISCONSIN HISTORICAL SOCIETY. BASED ON THIS INFORMATION I HAVE ASCERTAINED THAT THE LOCATION OF THE MOUTH OF THE SHEBOYGAN RIVER WAS MOVED SOUTHWARD BETWEEN THE YEARS OF 1852 AND 1856. THERE ARE HISTORICAL RECORDS OF A CONVENTION OF AREA LOCALITIES IN JANUARY OF 1852 IN WHICH IT WAS DECIDED TO IMPROVE THE RIVER FOR SHIPPING PURPOSES. PRIOR TO THIS TIME THE RIVER MOUTH WAS LOCATED IN THE AREA BETWEEN THE ORIGINAL MEANDER LINES SHOWN ON THIS MAP. THIS CORRESPONDS WITH ALL OF THE HISTORICAL MAPS PRIOR TO 1856. A SURVEY MAP DATED AUGUST 1856 BY THE U.S. CORPS OF TOPOGRAPHICAL ENGINEERS IS THE FIRST MAP THAT I COULD FIND SHOWING THE LOCATION OF THE RIVER (HARBOR) JUST SOUTH OF PENNSYLVANIA AVENUE. THIS MAP ALONG WITH AN 1840 PLAT MAP ALSO SHOWS THE SHORE OF LAKE MICHIGAN TO BE ROUGHLY 300 FEET EAST OF 4TH STREET AT THAT TIME. I RETRACED THE GOS FIELD NOTES ROUGHLY 4000 FEET NORTH OF THE CURRENT HARBOR TO WHERE I ASSUMED THE SHORELINE (ASIDE FROM NATURAL EROSION AND WATER LEVEL CHANGES) WOULD HAVE BEEN THE LEAST ALTERED SINCE 1835. AS SHOWN ON THE MAP, THE TRAVERSE OF THAT ORIGINAL MEANDER LINE FITS THE SHORELINE WELL. IT ALSO MATCHES AN OVERLAY OF THE 1840 PLAT MAP. THE GOS FIELD NOTES ALSO INDICATE WHERE SECTION LINES WERE CROSSED DURING THE COURSE OF THE SURVEY. THESE LOCATIONS ARE SHOWN ON THE MAP AND SEEM TO FIT WITHIN A REASONABLE AMOUNT OF ERROR (5-15'). THIS ERROR CAN BE ATTRIBUTED TO THE EQUIPMENT USED BACK IN 1835 AND REMONUMENTATION OF SECTION CORNERS SUBSEQUENT TO 1835. THE ONLY AREA OF THIS RETRACEMENT THAT APPEARS TO HAVE A LESS ACCURATE RESULT THAN EXPECTED IS THE MEANDER OF THE RIGHT (SOUTH) SIDE OF THE RIVER AS IT HEADS NORTHWESTERLY FROM THE 8TH STREET BRIDGE TO THE WEST LINE OF SECTION 23. THE 1835 MEANDER LINE SEEMS TO BE ABOUT 40 FEET FURTHER WEST THAN EXPECTED IN THIS AREA. THE TIE IN POINT FROM THE GOS NOTES WHERE THIS MEANDER CROSSES THE WEST LINE OF THE SW 1/4 OF SECTION 23 ALSO SEEMS TO BE OFF BY THE SAME AMOUNT. I CAN ONLY SPECULATE THAT THIS MAY BE ATTRIBUTED TO AN ERROR IN AN ANGLE OR DISTANCE IN THE GOS NOTES AS THE REST OF THE TRAVERSE SEEMS TO FIT AS EXPECTED.

WISCONSIN DAVID H. JACOB S-2459 FOND DU LAC WI LAND SURVEYOR

DAVID H. JACOB P.L.S. NO. S-2459
JACOB LAND SURVEYING, LLC

ORTHOPHOTO: YEAR 2015

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

Midwest Environmental Advocates

To: Senate Committee on Natural Resources and Energy
From: Dan Gustafson, Midwest Environmental Advocates, Inc.
Date: November 15, 2023
Re: Opposition to Senate Bill 541

Thank you for the opportunity to provide testimony today in opposition to Senate Bill 541. My name is Dan Gustafson, and I am a Senior Staff Attorney with Midwest Environmental Advocates. MEA is a non-profit environmental law center that has a history of defending and enforcing the Public Trust Doctrine enshrined in Wisconsin's State Constitution.

A similar bill (2021 SB 900) was passed in the last legislative session, over objections by Midwest Environmental Advocates and other stakeholders, but was vetoed by the Governor. We opposed that bill, and continue to oppose the current bill, for many of the same reasons we articulated in the last session. The bottom line is that this bill, like the previous bill, would impermissibly allow land currently held in trust by the State, for the benefit of all inhabitants of Wisconsin, to be permanently converted to private, or local public ownership. Either of these types of owner could then sell or change the use of the property with no further state oversight. The public trust protections on these lands would be lost forever, with either no review, or at best, a time-constrained DNR approval process, using subjective criteria that are insufficient to protect the public trust.

While the proponents of the current bill may argue that this version of the bill contains changes intended to protect public interests, we argue below that the bill is fundamentally flawed, as it violates the Public Trust Doctrine as set forth in Article IX, Section 1 of the Wisconsin Constitution, and in many ways, is not significantly better, and possibly even worse than the version that failed in the previous session.

SB 541 includes three main provisions that would allow the conversion of public trust lands to private use, either automatically, or after limited, one-time approval by the DNR.

- Section 4, creating proposed section 30.122(2) of the Statutes, which would automatically remove public trust protections from fill or deposits placed in a "commercial waterway" (i.e., the portions of specifically enumerated rivers located in the Great Lakes basin and within incorporated areas) before December 9, 1977, if specific conditions apply;

- Section 6, creating proposed section 30.2034 of the Statutes, which would authorize municipalities with "fill authorizations" (under specific legislation, lakebed grant, or submerged land lease) to apply for amendments to those existing approvals, including the removal of public trust protections, and limited grants of private ownership and uses; and

- Section 7, creating proposed section 30.2039 of the Statutes, which would create a process for municipal and DNR approval of Waterfront Development Plans for lakefront parcels, including lands with public trust protections, and permitting private ownership and use of lands that were part of the submerged lakebed of a Great Lakes water at the time of statehood.

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

First and foremost, MEA's opposition to Senate Bill 541 is rooted in the text of the State Constitution, which in Article IX, Section 1, 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, without any tax, impost or duty therefor.*

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

SB 541 is fundamentally flawed because it would eliminate enduring constitutional public trust protections, either automatically, or based on a single, time-constrained review of proposed public and private uses, applying the limited and subjective criteria contained in the bill. The effects of the proposed legislation could be sweeping, limiting the public's rights to countless miles of shoreline. In many places, especially in developed areas, the shores of rivers and of Lakes Michigan and Superior are lined with historic fill. Attempting to change these lands from public trust lands to private property could dramatically impact the public's constitutional right to use and enjoy our treasured waterbodies.

The legislature's own agency, the Legislative Reference Bureau (LRB), describes the Public Trust Doctrine as follows:

> *The public trust doctrine, for all the simplicity of its language, is a sweeping protection of public rights that has been jealously guarded by the courts for over 150 years. Time and time again, courts have heeded the call of the Wisconsin Supreme Court, writing in [the 1914] Diana Shooting Club decision: "The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and the free use of the public waters, cannot be questioned. Nor should it be limited or curtailed by narrow construction. It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits."*[1]

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

The LRB goes on to say that the Wisconsin Supreme Court reaffirmed this position in a 2018 decision, when then-Chief Justice Roggensack said that the quoted passage above "remains good law."[2] While lawyers may dispute the exact requirements for lawful use of public trust land under the doctrine, the decision-making criteria found in each of the three main provisions of the bill clearly differ from the applicable constitutional standards.

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

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

There is a direct conflict between the Supreme Court's interpretation of the Public Trust Doctrine as applied to filled waterways, and the private ownership and use of filled areas that may be authorized under SB 541. The standards for granting private ownership, under each of the major provisions in the bill, clash with the constitutional requirements. As a result, each change in boundaries, or approval of amendments and plans under the proposed legislation will invite litigation. The reviewing courts may invalidate the legislation in its entirety, or, at a minimum, individual applications of it, making the legal status of public trust land even more confusing, uncertain, and risky for property owners.

In addition to our overarching concern about the constitutionality of the bill, Midwest Environmental Advocates objects to portions of each of its major provisions, as set forth below.

II. The bill retains a sweeping provision that would automatically extinguish public trust protections on many filled riverways, potentially jeopardizing Milwaukee's RiverWalk and public access to other riverways.

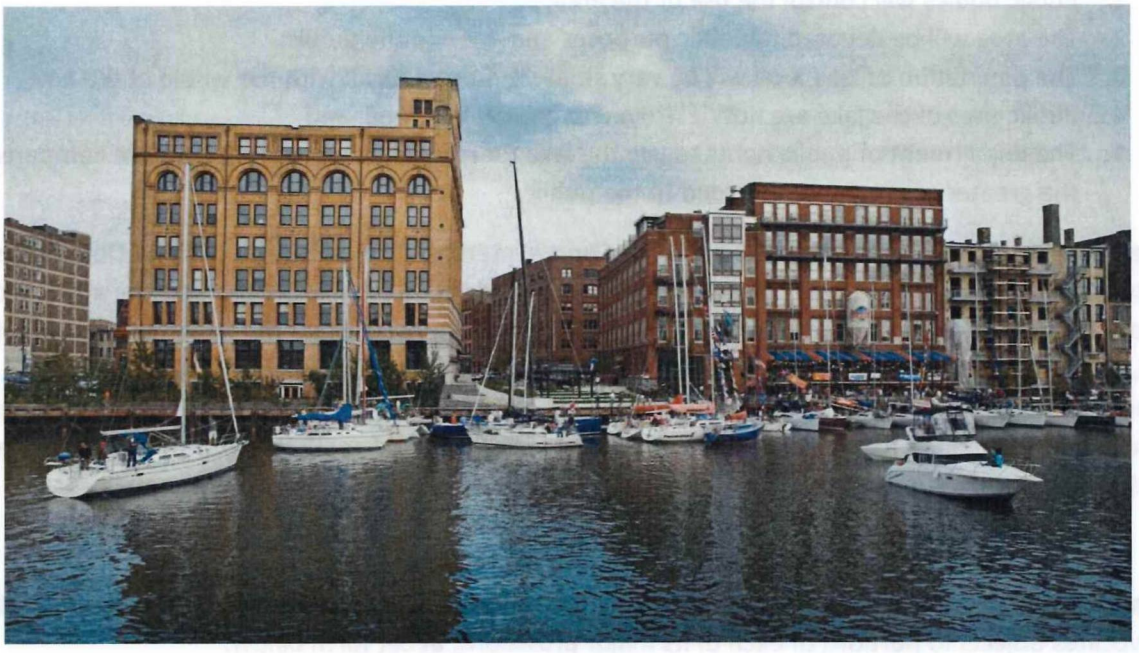
Section 4 of the bill provides that an owner of a fill or deposit placed in a "commercial waterway" before December 9, 1977 may use the land for "any public or private purpose without restrictions," if the fill or deposit is: (a) unauthorized and DNR has not instituted an enforcement action related to the fill or deposit prior to the effective date of the legislation, or (b) within a bulkhead line, and the use of the filled area is not specifically restricted by the terms of a submerged land lease.

For the first of these, the logic appears to be that if DNR has not required removal of the fill, then no restrictions should apply. This is exactly backwards. The most likely reason DNR has not instituted an enforcement action is that the use of the fill has not yet interfered with our constitutionally protected

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

rights of access and navigation. However, under the bill, the fact that the land has been used in a manner consistent with public rights means the public will permanently lose those rights.

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



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

III. The bill's scope has been expanded to include a process to change the terms of lakebed grants and submerged land leases and permit private uses in these public areas, which were specifically exempted in the prior bill.

Section 6 of SB 541, as described above, creates a process for DNR approval of "amendments to existing approvals" of the terms of lakebed grants and submerged land leases, which would permit provide private ownership and uses on these public areas. Milwaukee's lakefront is an example of an area that is governed by a lakebed grant from the legislature. Last session's bill explicitly exempted those iconic public spaces from the proposed changes. Therefore, the proponents of the bill have actually expanded the scope of the proposed legislation, rather than narrowing the scope of the bill.

Section 6 also authorizes the trade of public trust lands along the Great Lakes, including public trust lands subject to lakebed grants, for non-trust, non-littoral, private lands. Though the bill requires that the adjacent private lands – lands acquired by a municipality during an exchange – "be used for public

purposes," there is no requirement that the public's right to access and use navigable waters must be preserved. If a municipality exchanged fill lands for non-littoral lands, the public would presumably lose its water access over the newly privatized filled waterbed. This right – the right to access and enjoy navigable waters – is the core of what the Public Trust Doctrine protects.

In addition, this section of the proposed bill requires the DNR to evaluate applications for such amendments "based solely on whether the uses proposed in the application meet" the subjective criteria enumerated therein, and limits the time for DNR approval to 60 days following public notice or hearing. The statute also shifts the presumption in favor of approval, requiring that the "department shall approve an application submitted...and determine that the proposed uses are consistent with the public interest unless the department determines that the criteria...were not satisfied."

IV. The current bill's requirement that Waterfront Development Plans include a "plan for implementing and enforcing the development of public use areas" is merely window-dressing.

Section 7 of SB 541 proposes to give local cities and villages the authority to create Waterfront Development Plans for public trust lands, including the authority to dedicate areas for public and private use. This provision fails to create durable requirements to ensure the preservation of public trust interests and falsely equates *public use* with *public trust*.

In Section 7 of the current version of the bill, the proponents of the bill have added a requirement, in proposed Statute section 30.2039(2)(b)7., that the municipality's submission of a Waterfront Development Plan to DNR include: "A plan for implementing and enforcing the development of public use areas, including appropriate ordinances." Because last session's bill provided no mention of implementation or enforcement of proposed public and private uses, this change may seem like an improvement, but it is only superficial. The proposed legislation contains no specific standards for implementation or enforcement plans. Consider even the best-case scenario: even if a municipality passes an ordinance to enforce the plan – a step which is permitted, but not required by the bill – the municipality's ordinance could be amended or repealed at any time in the future, with no state oversight. Thus, the statute fails to ensure that the municipality's plan would protect the public interest in submerged lakebed.

Furthermore, while Section 7 requires municipalities to develop a plan for implementing and enforcing the development of public use areas, a similar plan is not required for areas designated for private use. By exempting private uses from municipal oversight, private businesses would be unchecked in their ability to change the intensity or kind of use following approval of the plan, which is inconsistent with the goal of developing a cohesive waterfront that serves public interests. For example, a private party that acquires title to a parcel for a restaurant open to the public could repurpose the property for a country club that excludes the public. In this scenario, municipalities would have no authority to mandate use for the original purpose (e.g., a restaurant open to the public).

V. The bill retains another provision that could remove untold acres of land from the public trust based on something as arbitrary as how parcel lines are drawn, despite the ownership of the land on both sides of the parcel lines.

Another provision in Section 7 of the bill, which would create Wis. Stat. §30.2039(3), provides that:

> A parcel that may include areas that were part of the submerged bed of a Great Lakes water at the time of statehood and that remained separated from a Great Lakes water by one or more other parcels from December 9, 1977, to the effective date of this subsection .... [LRB inserts date], and for which there is a record title holder, is deemed to be not part of the lake bed of a Great Lakes water and to be held in fee title ownership. For land held in fee title ownership as determined under this subsection, this determination operates in the same manner as if a person were granted quiet title to the property by a court under s. 841.10.

Enacting this provision would mean that for any piece of land, regardless of ownership, the historic parcel lines alone could be the sole factor that automatically converts public trust land to private property. Consider this currently landlocked parcel wholly within Lakefront Park in Ashland. Because that specific parcel is separated from the current waterfront by other parcels, it would automatically lose its lakebed status, and could be sold to a private owner, for development.

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

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

VI. Ultimately, the bill is fundamentally flawed because it would eliminate enduring constitutional protections under the Public Trust Doctrine, based on "automatic exemptions" or one-time approvals of amendments or plans for inherently transitory public and private uses.

As discussed above, the framers enshrined the Public Trust Doctrine in our State Constitution, stating that the state's navigable waters "shall be common highways and forever free." The courts have interpreted that guarantee to include submerged lakebeds, and the rights to use rivers. The courts have also held that the state has an ongoing obligation to hold the waters of the state and submerged lakebed in trust for the all the inhabitants of Wisconsin, and cannot abrogate that responsibility.

SB 541, as drafted, would impermissibly relinquish the state's Public Trust obligations as described above. When the drafters of our constitution used the word "forever," they meant it. In fact, this is the only instance in which the framers used the word "forever." Wisconsinites' perpetual right to access and enjoy the waters of Wisconsin will not last forever on its own. Over the years, the public trust has been jealously guarded -- not just by courts, but also by generations of legislators. These perpetual rights will only be available for the next generations if you continue to protect it today. Accordingly, we urge you to reject SB 541.

While we remain opposed to the current bill, we understand that local units of government are sometimes frustrated by certain provisions of existing law, that can make river- and lakefront redevelopment challenging. Accordingly, Midwest Environmental Advocates remains open to dialogue with local leaders to try and resolve these problems, without setting the stage for sweeping conversion of public trust land to private ownership and use, as the current bill would do. In our efforts to find a workable solution for local governments, we maintain the following core principles:

- Public trust protections and state oversight must be ongoing and endure forever.
- Therefore, land must remain in public ownership.
- Any remedial legislation must avoid sweeping and automatic provisions that implement wholesale changes in the status of public trust lands.

Other concepts that might warrant consideration and could be the basis for solutions, include concessionaire models or long-term leases, with state approval and oversight. To the extent there are bona fide concerns about the rights of long-standing, existing non-conforming uses, MEA believes that legislation could be crafted to provide assurances for reasonable existing uses.

Thank you again for the opportunity to provide testimony. I would be happy to answer questions. You are welcome to contact me at dgustafson@midwestadvocates.org or 608-251-5047 x 5.

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TO: Wisconsin State Senate Committee on Natural Resources and Energy

FROM: Mayor Cory Mason, City of Racine

DATE: November 16, 2023

RE: 2023 SB541, the use of fill in commercial waterways and Great Lakes Waters

I want to begin by encouraging the effort of this bill. For too long, communities like Racine and other legacy cities have been left with former industrial and/or blighted waterfront property with no clear path forward on how to redevelop these lands for public improvement, shoreline resiliency, or public access.

I want to point directly to the portion of the bill that addresses lakebed grants. I appreciate what appears to be the intention: to allow communities like mine to present a plan to the DNR for approval. My concern is that the bill will simply lead to the same answer we have seen in the past: no.

My question is this: is it true that unless the bill includes a legislative finding regarding the public trust doctrine along the lines of what is enumerated in the bill, the end results may continue to be the same?

The Legislature is the trustee of these waters. As such, it may be important to create more certainty in law and less agency deference in determining the intent of the bill.

This bill holds enormous potential to improve public access and encourage redevelopment. For the bill to be effective, communities like mine need certainty that proposals are not going to be litigated for years.

Wisconsin REALTORS® Association

Senate Committee on Natural Resources and Energy

November 15, 2023

2023 Senate Bill 541

The Wisconsin REALTORS® Association supports Senate Bill 541 and its companion, Assembly Bill 579. This legislation would resolve title disputes on and clarify allowable uses of property that was once part of a Great Lakes waterway or commercial river where the property was filled decades ago. This would allow Wisconsin municipalities to take steps to promote redevelopment, the cleanup of brownfields, and the elimination of blight along historical commercial and industrial waterways.

This is a redraft of a bill that passed both houses of the Legislature last session on voice votes, then was vetoed by the Governor. In response to the Governor's veto and concerns heard from interested parties, The League of Wisconsin Municipalities and the Wisconsin REALTORS® Association met with the Wisconsin Department of Natural Resources and other groups over the last 18 months to find a new path forward for this legislation. This bill includes several changes to the legislation from last session including the insertion of the "rigorous review process" called for by the Governor in his veto message. This legislation puts the DNR squarely in control of determining whether municipal shoreland development plans are consistent with the public interest.

This legislation is long overdue. The problems caused by the uncertainty surrounding these properties has stifled economic development and the creation of new and better public use opportunities along our state's most special natural resources. Frankly, Wisconsin is being left behind. Wisconsin municipalities are increasingly failing to compete with cities in other states for economic development interest and investment because of these hurdles. Legislators from both political parties and the DNR under various administrations, Democrat and Republican, have identified this as a significant issue and have attempted to find ways to solve the problem. The bill before you today strikes the right balance between private and public rights and would create a path forward that promotes the health of our communities through private and public opportunity.

It is important to note that this bill does not change ANY environmental laws and would free up funding for and remove regulatory and legal hurdles that prevent the cleanup of brownfields and the elimination of blighted areas. This legislation also does not allow ANY new fill of lakes or rivers. The areas addressed by this legislation have been filled for many decades and were generally developed for various purposes many years ago.

The opportunities created under this legislation are also completely voluntary – the processes that would be made available under the bill are just another tool that can be used to address these legacy issues. The bill before you encourages municipalities to be proactive in thinking about how to manage these properties long-term and promotes early and meaningful collaboration with the DNR and the public to address these decades-old problems, while protecting the public interest.

Lastly, and perhaps most importantly, we all need to remember that behind many of the properties that would be affected by this bill there is a property owner that has a deed that says they own the property in fee simple. Their title may have passed through multiple owners over the years, and they faithfully pay taxes on the property every year. The property has likely been developed as it would be by any other property owner. Yet if the property is sold, a mortgage is needed, or redevelopment is proposed, the uncertainty surrounding these properties can create significant obstacles or stop a project dead in its tracks. This bill creates a means to address that uncertainty in a manner that is fair and equitable both to the title property owner and the interests of the public.

We respectfully request your support for SB 541 and its companion, AB 579. If you have questions or need additional information, please contact us.