

## Memorandum

To: Mayor David Ward

Common Council

From: Josh Van Lieshout, City Administrator

Re: May 21, 2019 Common Council Agenda Item 10

Date: May 17, 2019

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As this Common Council has been wrestling with the prior Council's decision to negotiate and stipulate to an OHWM at 92 East Maple Street, it has become apparent that the policy concerning how urban waterfronts interplay with political decisions and the law is subject to significant oscillation. There are other waterfront areas in the City that, at some point in the future, may need to be redeveloped and without clear laws or consistent policy, it could make recycling those lands in the future either unattractive or at worst impractical or impossible.

There are a number of public policy considerations that you may wish to raise with the Governor's Office and leadership at the Wisconsin Department of Natural Resources. Some of those policy considerations include:

- The authority of the DNR to engage in and act upon political compromises between parties. In the matter of the OHWM at 92 East Maple Street, the City, WRA and Friends of Sturgeon Bay were engaged in litigation. The result required a declaratory ruling from DNR. The DNR, for whatever reason, chose to ratify a political compromise, rather than exercise their duty and authority. The central question being, "Is it permissible for a state agency to exercise their legal authority in manner that serves as mediation between otherwise private parties?"
- Other policy considerations that are site specific, but could be anywhere in Wisconsin include how will the DNR deal with urban waterfronts like that of the City which have a long history of industrialization, development, environmental contamination, dereliction and the like.

The Council is aware the City has been working diligently on reinventing its waterfront for nearly 30 years. This reinvention has relied upon a predictable and repeatable position from regulatory agencies, including DNR, that saw redevelopment as a good thing and in keeping with the best interests of the public. However, as in the case of Sturgeon Bay, the DNR no longer seems to be willing to look at all the issues broadly and is willing to abdicate their decision making authority and convey that authority to private parties.

Points that the DNR should be encouraged to look at when examining urban waterfronts where the customary markers of the OHWM have long been washed away might include:

- Benefit to the human environment.
  - Will the redevelopment plan address groundwater and soils contamination?

- Does the plan limit human contact with contaminated ground water and soils?
- How will public access to the waterfront be enhanced?
  - Will access be improved with walks, docks, etc.?
- Will the improvements serve other segments of the public good?
  - Agriculture
  - Transportation
  - Manufacturing
  - Tourism
  - Education
  - Etc.?
- Does the determination in an urban waterfront support other public goals?
  - Other goals may include:
    - Removal of blight
    - Employment
    - Recreation
    - Tax base
    - Remediation of contaminated ground water and soils
    - Re-use of land
    - Efficiency in land use patterns
- Does the declaration prevent the economic feasibility of the opportunity to address other public interests?
  - Will the declaration make it unattractive for redevelopment?
  - Will the declaration harm ability to address soil and ground water concerns?
  - Will the declaration cause the owner to seek other uses that limit or prevent public access or do not address soil and groundwater concerns?
- Does the declaration protect, enhance, or indifferent to, the water resource that the public trust doctrine is designed to protect?
  - Will navigation be harmed or enhanced?
  - Will shoreline habitat be harmed or enhanced?
  - Will fisheries be harmed or enhanced?

Whether raising these issues with Governor Evers, Secretary Cole, or the Legislature will have an impact on matters pertaining to 92 East Maple Street is unknown; however, given the redevelopment patterns in the City of Sturgeon Bay, the issues created by DNR in their dealing with the West Waterfront will undoubtedly come again. The playbook has been written for all to see; there is no reason to believe that DNR wouldn't transfer their decision making responsibilities in the future.

If you as the Council are so inclined, you may wish to send a letter to the Governor's office and Secretary informing them of these policy concerns and request they reconsider their January 2, 2019 declaratory ruling and look again at the issue from a matter of good public policy versus convenience of trying to satisfy litigants.