

## **THE COUTURE AND THE PUBLIC TRUST DOCTRINE: PRESERVE OUR PARKS' POSITION**

The proposed sale of the Transit Center to a private party for the 44-story Couture has been in the news for some time. Preserve Our Parks has gathered conclusive evidence that most of the Transit Center site was at one time part of Lake Michigan, and thus, under the public trust doctrine, can not be sold for a private development. We, as a non-profit organization concerned with protecting the public's interest in parks, park land, and land in the public domain, can not ignore the threat to the public rights to our lakefront.

The public trust in Wisconsin's navigable waters stems from provisions in the Northwest Ordinance of 1787 and the Wisconsin Constitution. The large body of law based on these provisions, known as the public trust doctrine, requires that all navigable rivers and lakes remain free and open to the public. Land created by filling in navigable waters remains subject to the doctrine. Only developments in aid of navigation or for public use and enjoyment are permitted, and private uses are prohibited. The public trust doctrine, which has been in effect in Wisconsin for over two centuries, is clearly applicable to this site. Responsibility for administering the public trust doctrine rests with the Department of Natural Resources, but it can also be enforced by members of the public.

An offspring of the City of Milwaukee's Downtown Comprehensive Plan of October, 2010, was the formation of a Long-Range Lakefront Committee, chaired by Sue Black and consisting of representatives of the City, County, and public entities located near the lakefront. The study was limited to the area in the immediate vicinity of downtown. Incorporated within that area are two structures owned by Milwaukee County and managed by the County Parks Department: O'Donnell Park, and the adjacent Transit Center.

The committee met over a period of four months and discussion focused on the two County properties. Most agreed the Transit Center was not meeting expectations and should be replaced. The Black Committee was aware of potential application of the trust doctrine to the site and asked DNR for its opinion. In July, 2011, DNR advised the Committee that the Transit Center was not on lakebed and is therefore not subject to the public trust doctrine.<sup>1</sup>

On August 24, 2011, the Committee's report, signed by all Committee members, was issued. The first recommendation in the Executive Summary is:

*"The redevelopment of the Downtown Transit Center site into a multi-story, high-value use more appropriate to its location at the lakefront."*

At several points in the report public access to the lakefront is discussed, including pathways through any structure built on the site. The report also includes the following:

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<sup>1</sup> DNR's advice in July, 2011, was based on its review of legislative grants of submerged lakebed to the City of Milwaukee, not on any investigation of the shoreline as it existed before the grants. The first such grant of lakebed south of Mason Street was in 1909.

*“There should be at least an equivalent amount of green space in the new development as what currently exists outside the Harbor Lights Room [a facility located atop the Transit Center]. The development for this site should include a landscape plan, providing access to parks and green spaces that are connected with the surrounding area and the lakefront.”*

The County Executive then selected a high-rise development, the Couture, thus preempting the County Board’s Economic Development Committee shortly before its scheduled hearing in closed session of presentations from competing developers. The public had no opportunity for comment. The Supervisors, aware of Preserve Our Parks’ questioning of the DNR ruling, then passed a resolution authorizing negotiations subject to the sale satisfying the public trust doctrine.

Preserve Our Parks engaged a surveyor to verify that the Transit Center was located on filled lakebed. His findings showed that most of the Transit Center site was once Lake Michigan. We presented these findings to the DNR and the agency undertook to study the issue. On September 28, 2012, DNR published a long memorandum on the history of the area occupied by the Transit Center and issued a press release stating “the Department has concluded that the parcel will not be subject to the public trust doctrine.”

DNR’s memorandum referred to a 1915 act of the state legislature granting the City of Milwaukee the right to fill and use submerged lakebed lying east of the breakwater of the Chicago and Northwestern Railway Company. The memorandum pointed to the fact that the grant specified the railroad’s breakwater as the upland, western boundary of the lakebed area being granted the City and concluded:

*“It stands to reason that the legislature of the time knew what it was doing... and they would not establish the western boundary of Lake Michigan as described in the submerged land grants... if that boundary line was truly further to the west....”*

But by 1915, the railroad had filled in the area west of its breakwater. The legislature did not grant the City the right to fill and use the area that had already been filled by the railroad and was being used by it.<sup>2</sup>

The 1915 grant to the City has no bearing on the location of the historic shoreline, as DNR now recognizes. DNR initially said our maps predate statehood so were not pertinent; then when presented with an 1884 map from the records of the Wisconsin Board of Commissioners of Public Lands, DNR said in a May 16, 2013 letter “it is still the opinion of the Department that the exact location of the historic shore of Lake Michigan cannot definitively be determined....” But DNR’s press release of September 28, 2012 stated flatly that the Transit Center parcel “will not be subject to the Public Trust Doctrine.” Now DNR claims it doesn’t know the location of the historic shoreline but it still has not, despite our request, corrected the erroneous impression created by its unequivocal press release. DNR in this case has done a serious disservice to the

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<sup>2</sup> The railroad's filling and occupancy of the area west of its breakwater is documented by newspaper reports and the railroad's corporate records.

public and to the developer, who has been led to believe that the Couture development was lawful.

Preserve Our Parks has engaged Bill O'Connor, a well-regarded lawyer specializing in public trust issues, to represent us if the County continues to pursue the sale for private development of lakebed lands subject to the public trust doctrine.<sup>3</sup> Our actions may be hindering the County's ability to provide title insurance for the developer. This may be why the County Board authorized special counsel to bring a quiet title action to resolve the issue. However, such action was not taken. Instead, representatives of the County Executive arranged for a late amendment to the recent budget bill, declaring the shoreline to be "fixed and established" along a line specified in an agreement between the City and the railroad. That line is east of the Transit Center and well east of the shoreline shown in the many maps we have gathered.<sup>4</sup>

The budget bill's attempt to alter reality was adopted without notice, hearing or debate. Both the manner in which it was enacted, and the result it claims, are unconstitutional, and should be of grave concern to all citizens.

If left unchallenged, the state legislature could declare any waters non-navigable and thus deny the public rights with respect to them. If a mine operator or riparian owner wants to fill in a river or a portion of the lake, he can do so if he can have his senator or representative push through a bill declaring the water non-navigable or declaring a fictional shoreline to be "fixed and established."

Preserve Our Parks is determined to protect the public rights to Milwaukee's lakefront. We are not against development. We funded an architectural model showing what the lakefront could become if the Couture was moved to uncontested ground. We would like to see it built, but not on land that the Wisconsin Constitution requires to be held by a public body for the use and enjoyment of the public.

If you would like more information, please contact our president, John Lunz, at [Lunz65@att.net](mailto:Lunz65@att.net).

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<sup>3</sup> Approximately two-thirds of the area occupied by the Transit Center is filled lakebed land. Preserve Our Parks does not oppose private development of the western third of the site.

<sup>4</sup> The maps, many of which are official public records, were found at the office of Milwaukee's City Engineer, the Register of Deeds, Office of Public Land Commissioners, Milwaukee County Historical Society, in commercial plat books and in the Map Collection at UWM Library's Digital Collection.