



**Meeting Date:** December 8, 2020  
**To:** President Bielinski and Board of Trustees  
**From:** Michael Braiman, Village Manager  
**Subject:** Presentation on Lake Michigan Shoreline Regulation & Protection

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Since the summer, Village Staff and members of the Village Board have received a number of inquiries from residents regarding increased construction activity along the Lake Michigan shoreline. To help the community and Village Board better understand the regulations and permitting concerning such activity, the Village has invited the U.S. Army Corps of Engineers (USACE) to discuss their role in the review and permitting process. To provide additional context, members of the Village Staff will also present on matters concerning lakefront regulations.

The presentations will address the following:

- Clarification of the Public Trust Doctrine (Assistant Village Manager/Corporation Counsel Stein)
- Village of Wilmette zoning regulations (Community Development Director Adler)
- History of lake levels, overview of the lakefront and recent shoreline protection activity, and the Village's local permitting process (Village Engineer Manis)
- USACE's function and role in permitting local projects, typical shoreline protection measures, shoreline permitting process (Soren Hall, USACE Senior Project Manager, Cook County, Lake Michigan and Kaitlyn Pascus, USACE Project Manager, Lake County, IL, Fox Waterway Agency, ComEd, Tribal Affairs)

The presentation materials will be shared with the Village Board prior to, or at the meeting.

**Documents Attached**

1) Memorandum from Assistant Village Manager/Corporation Counsel Stein on the Public Trust Doctrine's applicability at the lakefront



## Law Department

**SUBJECT:** Public Trust Doctrine Applicability at the Lakefront  
**MEETING DATE:** December 8, 2020  
**FROM:** [Jeffrey M. Stein](#), Corporation Counsel

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### **Background**

Over the years there has been some confusion and concerns raised about the application of the Public Trust Doctrine and the rights of the public to access the lakefront. This memorandum is intended to address the Public Trust Doctrine and provide clear direction as to who has the right to access the lake and the beach located adjacent to private property.

There are nearly 40 properties, some of which are single-family homes, in the Village of Wilmette that directly abut Lake Michigan. Most of those single-family homes have or had a walkable area along the Lake Michigan shoreline that permitted individuals to walk from Gillson Beach to Langdon Beach undeterred.

### **Riparian Property and the Public Trust Doctrine**

The Public Trust Doctrine grants the public the right to access the waters of the lake, but not the beach itself. The rule in Illinois is that the boundary of riparian property (for purposes of this memorandum, riparian property means private property that abuts Lake Michigan which is a waterway of the United States of America) along a lake, is the line at which the water usually stands when free from disturbances. Another way of putting it is that private property extends to the undisturbed waterline, and walking on the sand when not submerged at the calm water line is a trespass upon private property.

While there have been movements to change the law in general about allowing the public to access the beaches up to the ordinary high-water mark ("OHWM<sup>1</sup>"), the law remains as it has for almost two centuries – the public's right to access is in the water and not the beach. Illinois law is clear that public access is in the water and stops at the calm water line, and not the OHWM. Since 1842, it has been the law as provided by the United States Supreme Court, that

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<sup>1</sup> The ordinary high-water mark is the place where lake waves have noticeably left an impression on the shoreline but where the water has receded back to another area. A more technical definition is found in the Code of Federal Regulations, which states ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 CFR 328.3(e).

the land beneath the seabed was held by the sovereign in trust for public navigation and fishing. *Martin v. Waddell*, 41 U.S. 367 (1842). The Illinois Supreme Court, in 1860 and thereafter, ruled that they are “clearly of the opinion that the line at which the water usually stands when free from disturbing causes is the boundary of land in a conveyance calling for the lake as a line.” *Seaman v. Smith*, 24 Ill 521, 525 (1860). The ruling concluded that the privately owned land ends at the water’s edge. In 1917, the Illinois Supreme Court reaffirmed its ruling and clarified that it was not the OHWM, but rather, the unaffected water line where private property ends. That court stated, “that it was not the high-water mark that was taken as the true limit of the boundary line, but the line where the water usually stood when unaffected by storms or other disturbing causes.” *Brundage v. Knox*, 279 Ill 450, 471 (1917).

In *Chicago v. Ward*, the Illinois Supreme Court addressed the issue that the property line might move because of changes in the water levels in bodies of water that impact the calm water line. The court determined when waters encroached upon lands, seemingly in a manner more permanent than waves or other disturbances, that those covered lands were no longer private property and rather part of the body of water. However, the inverse was also true, in that when water receded, by either natural or artificial means, its proprietorship returns to the original riparian owner. *Chicago v. Ward*, 48 N.E. 927, 932 (1897). As such, the highest court in Illinois has determined that property rights and ownership may increase or decrease over time depending upon the rising or lowering levels of Lake Michigan.

To date, the caselaw provided above is the controlling law within Illinois. The public has a right to fish, navigate, recreate (such as boating and swimming) and use the waters of Lake Michigan. For the most part, Lake Michigan belongs to the public and can be used by the public even when such use is near private property as long as such activities are conducted within the water. As discussed above, this right to the public does not extend to the land. While some may request that the Village of Wilmette apply the Public Trust Doctrine to the OHWM, the Village does not have authority or power to do so as only the state or federal governments have such power. As such, while the Public Trust Doctrine clearly applies to the Lake itself, it does not extend beyond the line where the water usually stands to the beach or a revetment that is not covered by water and is on land.