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Memorandum

Date: January 5, 2022

To: President Rintz and Village Trustees
Robert Bahan, Village Manager

From: Village Attorney

Re: Lake Michigan Jurisdiction

The public debate relating to the property exchange negotiations between the Winnetka Park District and the owner of the lakefront properties at 195, 203, 205, and 209 Sheridan Road raised numerous questions about the nature and extent of public and private property rights along the portions of the Lake Michigan shoreline within the Village. These issues were raised again in conjunction with the Village's public consideration of the property owner's request to consolidate its lakefront properties into one contiguous lot of record.

In advance of the January 10 Study Session, we have prepared this memorandum to summarize the nature and extent of the public trust doctrine and the Village of Winnetka's jurisdiction over Lake Michigan and adjoining properties, specifically with regard to structures, such as breakwaters, that are built by private property owners into Lake Michigan and residential principal and accessory structures and construction activity in and around the bluffs overlooking the Lake. The memorandum also explains how property boundaries are determined for land abutting Lake Michigan.

State statutes and the Illinois Constitution grant the Village certain powers and jurisdiction with regard to Lake Michigan and adjoining property. With regard to activities in and immediately adjacent to the Lake, these powers are, however, subject to state and federal authority and to the traditional limits on the Village's exercise of its municipal powers. That said, the Village has fairly broad powers as a home rule municipality to regulate the land areas fronting along Lake Michigan and any structures that extend into Lake Michigan.

I. Regulation of Private Construction Within Lake Michigan.

A. Federal Jurisdiction.

The ultimate authority over Lake Michigan waters and the entire bed of the Lake lies with the federal government. The use of navigable waterways, such as Lake Michigan, are subject to the federal navigational servitude.

The dominant power of the federal government, as has been repeatedly held, extends to the entire bed of a navigable stream or lake, which includes the lands below (or lakeward of) the *ordinary high-water mark*. The ordinary high-water mark is the place where lake waves have

noticeably left an impression on the shoreline but where the water as receded back to another area. The Code of Federal Regulations defines ordinary high-water mark as "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(c)(7).

The exercise of the power within these limits is not an invasion of any private property right in these lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream or lake bed, but from the lawful exercise of a power to which that property has always been subject. *United States v. Chicago, M., St. P. & P.R.R.*, 312 U.S. 592 (1941).

Federal power over Lake Michigan and other navigable waters is rooted in the United States Constitution. U.S. Const. art IV, Section 3, Clause 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Federal jurisdiction extends to all of the land and water below the *ordinary high-water mark*. 33 C.F.R. § 329.11. Any structure or work located in or affecting navigable waters of the United States is within the limits of federal jurisdiction. 33 C.F.R. § 322.3(a).

The regulatory framework for federal jurisdiction is set forth in the Rivers and Harbors Appropriations Act of 1899 (33 U.S.C. § 401 *et seq.*) ("***Federal Act***"). Under Section 10 of the Federal Act (33 U.S.C. § 403), no "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States" may be constructed without a permit issued by the Army Corps of Engineers. Since neither Section 10 nor its regulations place a restriction on the Army Corps of Engineers' discretion to issue permits, the Corps is fully entitled to consider pertinent factors other than navigability, such as environmental impact, when deciding whether to issue a particular permit. *United States v. Members of the Estate of Boothby*, 16 F.3d 19 (1st Cir. 1994). Thus, lakefront property owners in the Village must apply for and obtain an Army Corps permit before constructing any breakwater or similar structure within Lake Michigan.

B. State Jurisdiction.

Federal jurisdiction is preeminent, but it is not exclusive. While federal jurisdiction is very broad over Lake Michigan and all navigable waters (including land up to the ordinary high water mark), Section 10 of the Federal Act and the Army Corps permitting powers were not intended to paralyze all state power concerning structures in navigable waters within state borders or to destroy automatically all vested rights. *Gring v. Ives*, 222 U.S. 365 (1912).

Notwithstanding federal *jurisdiction*, States *own* the land under the navigable waters within their boundaries and possess broad power to regulate those waters for the general welfare, even though that power is ultimately subordinate to federal navigational power. *Bowes v. City of Chicago*, 3 Ill. 2d 175, 186-87 (1954), *citing* 43 U.S.C. § 1311; *see also* 15 C.F.R. § 923 (authorizing state coastal zone management programs); 15 C.F.R. §§ 923.30-923.32 (establishing coastal zone boundaries of Great Lakes states). Section 10 of the Federal Act makes no reference to state action or state law. Accordingly, the authority of the State of Illinois to regulate the construction of structures within its navigable waters (such as Lake Michigan) is not superseded by Section 10 of the Federal Act. *Cummings v. Chicago*, 188 U.S. 410 (1903).

While a construction project not affirmatively approved under the Federal Act is prohibited (regardless of whether the state would allow it or not), a state is not required to approve all structures approved by the Army Corps under the Federal Act. *North Shore Boom & Driving Co. v. Nicomen Boom Co.*, 212 U.S. 406 (1909). If state law requires a permit prior to construction within Lake Michigan, it does not matter that the Army Corps has issued a permit for that construction – construction requiring both state and federal permits cannot be undertaken without both, so that if the federal government grants a permit but the State of Illinois denies its permit, the project cannot proceed.

Under a 1911 enactment ("An Act in relation to the regulation of the rivers, lakes and streams of the State of Illinois," now known as the "Rivers, Lakes, and Streams Act"), the Illinois General Assembly long ago prohibited Lake Michigan construction projects without a state permit. Section 18 of that Act provides as follows:

> It is unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind or description or build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, causeway, harbor, or mooring facilities for watercraft, or build or commence the building of any other structure, or do any work of any kind whatsoever in any of the public bodies of water within the State of Illinois, without first submitting the plans, profiles, and specifications therefor, and such other data and information as may be required, to the Department of Natural Resources of the State and receiving a permit therefor signed by the Director of the Department and authenticated by the seal thereof.

615 ILCS 5/18. Under this and related state statutes, lakefront property owners in the Village must apply for and obtain an Illinois Department of Natural Resources ("***IDNR***") permit before constructing any breakwater or similar structure within Lake Michigan. Further, as with federal jurisdiction, state jurisdiction extends to the ordinary high-water mark.

C. Municipal Jurisdiction.

Just as federal jurisdiction does not eliminate state jurisdiction, so too federal and state jurisdictions do not prohibit or eliminate municipal jurisdiction over construction in and around Lake Michigan. *Chicago Park District v. City of Chicago*, 111 Ill. 2d 7 (1986) (existence of statutes regulating harbors does not show legislative intent to establish exclusive statewide dominion over harbors); *Bowes*, 3 Ill. 2d at 204-05 (statute authorizing municipalities to construct water filtration plants on submerged lands permitted that construction without necessity of state permit).

It is important to note that in some circumstances a municipality may have powers (or "jurisdiction") outside its corporate boundaries. For example, municipalities generally have subdivision authority over unincorporated territory within a mile and a half of the corporate boundaries. *See* 65 ILCS 5/11-12-5. This distinction between (i) extraterritorial jurisdiction and (ii) authority over land within a municipality's corporate boundaries comes into play with regard to Lake Michigan, as explained below.

Unlike some of its municipal Lake Michigan neighbors whose corporate boundaries extend only to the water's edge, the Village's corporate boundary extends one-half mile into the water of

Lake Michigan contiguous to the Village (*see* Village of Winnetka Charter § 1.1[1]). Within the area of the Village's corporate boundaries that extend one-half mile into the portions of Lake Michigan contiguous to the Village, the Village enjoys its municipal authorities, including zoning, building, and general home rule powers, all of which are subject to the same standards and limitations as apply to the application of these powers on land. Beyond the one-half mile area (outside its boundaries), the Village can only act pursuant to a specific legislative grant of authority. *Harris Bank of Roselle v. Village of Mettawa*, 243 Ill. App. 3d 103, 114-15 (2d Dist. 1993).

1. Specific Legislative Jurisdiction in Lake Michigan.

The General Assembly has, in fact, specifically granted the Village and other municipalities certain powers (or "jurisdiction") over construction and other activities within the Lake up to three miles out from their respective corporate boundaries.

Specifically, Section 7-4-4 of the Illinois Municipal Code grants all municipalities jurisdiction, but not necessarily zoning power, over waters bordering the municipality:

> The corporate authorities in all municipalities have jurisdiction over all waters within or bordering upon the municipality, *to the extent of 3 miles beyond the corporate limits, but not beyond the limits of the State*. Nothing in this Section shall be construed to authorize a municipality to exercise zoning power or otherwise restrict the use of private property outside of the corporate limits of the municipality.

65 ILCS 5/7-4-4 (*emphasis added*). These three-mile jurisdictional powers could be used to regulate such things as boat registration and safety laws as well as some criminal statutes.

Under Section 7-4-4, the Village has statutory jurisdiction from the water's edge extending out three miles beyond the Village's corporate boundaries, which for Winnetka means that technically the Village's jurisdiction extends out 3.5 miles into the Lake. It also means that within the Village's corporate limits (one half mile into the Lake) the Village enjoys not only its general home rule powers but also a specific statutory grant of jurisdiction. That said, to the extent it ever matters (and we are unable to envision a circumstance where it would), the Village's zoning jurisdiction only extends one-half mile into the Lake because the Village does not have authority to exercise zoning authority outside its corporate limits and its corporate limits extend only one-half mile into the Lake.

In addition to Section 7-4-4, the General Assembly has provided municipalities with various other relevant statutory authorities as described below.

2. Authority to Approve Construction of Certain Structures on Submerged Lands.

Division 123 of the Illinois Municipal Code, 65 ILCS 5/11-123-1 *et seq.*, authorizes all cities and villages to acquire, own, construct, maintain, and operate "utilities" on public waters bordering their corporate limits and to control construction of utilities by other persons or entities. The term "utilities" is defined to include, among other things, harbors, wharves, docks, quay walls,

[1] Village of Winnetka Charter § 1.1 provides, in relevant part, that the Village's corporate boundaries include "the bed and water of Lake Michigan to the width of one-half mile adjoining and contiguous to the territory aforesaid," and that all that territory "shall form, and constitute, and they are hereby constituted a body corporate and politic for municipal purposes under the name and style of "the Village of Winnetka."

breakwaters, and other harbor structures and facilities, which would also include water treatment and intake systems. 65 ILCS 5/11-123-1. Section 11-123-5 specifically authorizes municipalities to approve the construction of any utilities by private parties within public waters bordering the municipality:

> Except as otherwise provided in this Code or in any other law of this state, no person or corporation, private, public, or municipal, other than a city or village, shall hereafter construct a utility over and upon such submerged lands within the limits or jurisdiction of any such city or village, or over or upon any public waters bordering thereon, without first securing the consent of the corporate authorities of such city or village.

65 ILCS 5/11-123-5. Although there are no cases interpreting Section 11-123-5, the plain language of the statute indicates that the Village may enact standards and procedures for reviewing and approving or denying proposed construction of "utilities," including breakwaters, within the portion of Lake Michigan that borders the Village. As explained in Section 5.b of this memo, these statutory authorities are not self-executing and the Village has not to date adopted the necessary specific code provisions and procedures to regulate lakeshore structures.

3. Authority to Establish a Lakefront Protection District on the Land Fronting Lake Michigan.

Section 11-48.2-2 of the Illinois Municipal Code provides another source of statutory authority for the Village to regulate breakwater and similar lakefront construction. This section empowers municipalities to adopt ordinances designating specific areas as "having a special historical, community, or aesthetic interest or value" and to exercise various regulatory controls over such areas, including the following:

> [I]n connection with such areas, . . . so designated by ordinance, whether owned or controlled privately or by any public body, to provide special conditions, to impose regulations governing construction, alteration, demolition and use, and to adopt other additional measures appropriate for their preservation, protection, enhancement, rehabilitation, reconstruction, perpetuation, or use. . . .

65 ILCS 5/11-48.2-2. The City of Chicago has created a "Lakefront Protection District" under its "Lake Michigan and Chicago Lakefront Protection Ordinance" pursuant to Section 11-48.8-2. Within that district, which includes the shoreline and open waters of Lake Michigan, the ordinance grants the Chicago Plan Commission authority to approve or veto any proposed construction project. Chicago Municipal Code, Sections 16-4-010 through 16-4-180; *see also Clement v. O'Malley*, 95 Ill.App.3d 824 (1st Dist. 1981) (applying the Chicago Lake Michigan and Lakefront Protection Ordinance).

Similarly, other lakefront municipalities such as the City of Highland Park and the Village of Glencoe have created Steep Slope Zone or Steep Slope regulations which create specific construction, aesthetic, maintenance, and other requirements for the ravines, bluffs, and costal steep slopes in those municipalities. For example, the City of Highland Park's Steep Slope Zone regulations are meant to ensure that all land use and development in those areas:

1) Protects people and property from the potentially hazardous geological and hydrological conditions characteristic of ravine and bluff areas;

2) Recognizes and furthers maintenance of stable ecological relationships and minimizes environmental degradation of the land and Lake Michigan;
3) Recognizes that construction should not contribute to erosion or slope destabilization; and
4) Utilizes building techniques that adhere to the criteria stipulated in this Article.

Highland Park's Steep Slope Zone regulations provide for the reasonable use of steep slope areas and related lands while attempting to protect the public health, safety, and welfare by:

1) Requiring analysis to determine whether certain types of soil conditions exist (such as loose or easily eroded or rocky soils) and ensuring the utilization of appropriate engineering technology to result in stable slopes during and subsequent to development;
2) Reducing storm water runoff, soil erosion, and mud slides by minimizing grading, encouraging the preservation of Trees and other vegetation and, where necessary, requiring revegetation;
3) Permitting intensity of development compatible with the natural characteristics of steep slope terrain, such as degree of sloping, soil suitability and existing natural and man-made drainage patterns;
4) Preserving the scenic quality of the ravine and bluff environment through the retention of dominant steep slopes and ridges in their natural state;
5) Reducing the physical impact of top of slope and bluff development by encouraging innovative site and architectural design, minimizing grading and requiring restoration of graded areas; and
6) Discouraging development in steeply sloped terrain.

See City of Highland Park Municipal Code Sections 150.1901-150.1915. These and other regulations are further explained and analyzed in the materials prepared for the January 10 Study Session by the Community Development Department.

The Village has authority to create a similar steep slope zone encompassing land fronting Lake Michigan and adopt regulations on construction and related activities within those areas. The Village also likely could apply those regulations to the waters or submerged lands of Lake Michigan that are within the Village's corporate boundaries (within .5 miles of the normal water line). *See* Village Charter § 1.1. The grant of authority in Section 11-48.2-2 has been characterized as "auxiliary to the general zoning power" granted by the Municipal Code. *Rebman v. City of Springfield*, 111 Ill. App. 2d 430, 440 (4th Dist. 1969). But the Village could regulate structures and construction-related activities, such as traffic and transportation and storage of construction materials and equipment, on the land lying along the lakeshore for the purpose of preserving the community and aesthetic value of the lakefront, beaches, and shoreline, subject, of course, to other variables such as whether proposed construction is designed properly to prevent erosion and degradation of the shoreline and adjacent bluffs and complies with federal and state Lake Michigan regulations.

4. Other Statutory Authorities.

The General Assembly has also granted the following additional general statutory authorities that could be relied upon in adopting and enforcing lakefront regulations:

- Regulate construction and alteration of buildings and structures to prevent or lessen impacts of flooding, 65 ILCS 5/11-30-2;

- Regulate the strength and manner of constructing buildings and structures, 65 ILCS 5/11-30-4;
- Regulate grading, draining, retaining walls, and drainage channels, 65 ILCS 5/11-30-8; and
- Regulate boats, harbors, watercraft, and related facilities and structures and regulate, license and prohibit use of watercraft, 65 ILCS 5/11-44-1 *et seq*.[2];
- Designate restricted water areas for fishing, bathing, swimming, or similar uses in which boat use is prohibited, 625 ILCS 45/5-7[3]; and
- Provide for changes to or relocation of natural or artificial water courses in order to properly lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve any streets, sidewalks, or other public ways, 65 ILCS 5/11-87-1 *et seq.*

Given that the Village's Charter has established the Village's territorial boundaries .5 miles into Lake Michigan, the Village has the ability to utilize these authorized powers at least within this half-mile zone.

5. Restrictions on Lake Michigan Authority and Jurisdiction.

Notwithstanding the seemingly broad authority the Village enjoys to regulate various aspects of lakefront construction and activities, there are several principal and practical limitations on the Village's current authority and jurisdiction.

a. Preemption

Although the Village has powers to regulate activities in Lake Michigan, as discussed above, municipal authority can be preempted by the State. *See Pesticide Public Policy Foundation v. Village of Wauconda*, 117 Ill. 2d 107, 109, 114 (1987). For example, it could be argued that that the Village's authority over breakwater construction is preempted because Sections 18 and 26 of the Rivers, Lakes, and Streams Act ("***RLSA***") give IDNR jurisdiction over public bodies of water and authority to issue permits for construction of certain structures, including breakwaters. *See* 615 ILCS 5/18, 5/26. It is our opinion, however, that state law does ***not*** preempt the Village's jurisdiction over construction of breakwaters and other structures in the Lake.

The General Assembly has granted IDNR "full and complete jurisdiction over every public body of water in the State of Illinois," 615 ILCS 5/26, and at the same time has granted all municipalities "jurisdiction over all waters within or bordering upon the municipality, to the extent of 3 miles beyond the corporate limits, but not beyond the limits of the State," 65 ILCS 5/7-4-4. Additionally, the General Assembly has specifically authorized both IDNR and municipalities to issue permits or approvals for various structures in public waters, including breakwaters and harbor structures. 65 ILCS 5/11-123-5 (it is unlawful to construct a breakwater in public waters without the consent of the bordering municipality); 615 ILCS 5/18 (it is unlawful to construct a breakwater in public waters without an IDNR permit). Since the legislature has expressly granted municipalities jurisdiction over public waters within or bordering their corporate limits and

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2 The Boat Registration and Safety Act, 625 ILCS 45/1-1 *et seq.*, regulates the operation and use of watercraft but specifically preserves the authority of municipalities to adopt "any ordinance or local law…relating to operation and equipment of vessels the provisions of which are not inconsistent with the provisions of this Act." 625 ILCS 45/8-1.

3 For example, the Village of Wilmette has established a restricted area extending 600 feet into Lake Michigan "from the south limits of the Village of Wilmette to the south breakwater of the Wilmette Harbor; and from the 500-foot pier north of the harbor to the north Village limits." *See* Wilmette Code of Ordinances, Chapter 8.

authorized municipalities to approve or deny construction of breakwaters and similar structures in those public waters, "it cannot seriously be argued that the General Assembly specifically has declared that the State has the exclusive power to regulate" in these areas. *See T&S Signs, Inc. v. Village of Wadsworth*, 261 Ill. App. 3d 1080, 1086 (2d Dist. 1994), *quoting Scadron v. City of Des Plaines*, 153 Ill. 2d 164, 186 (1992) (discussing regulation of outdoor advertising signs; internal quotations omitted).

This interpretation is also consistent with well-established rules of statutory construction. Courts will construe legislative enactments in an attempt to give meaning to all of the words in statutes. *In re Detention of Lieberman*, 201 Ill. 2d 300, 308 (2002). Additionally, courts will not interpret statutes to give rise to an absurd result. *See Lily Lake Road Defenders v. County of McHenry*, 156 Ill. 2d 1, 15-16 (1993). If Sections 18 and 26 of the RLSA were interpreted to preempt the authority granted to municipalities by the Municipal Code, then Sections 7-4-4 and 11-123-5 would be meaningless. This would be an absurd result. To give meaning to the language of both the RLSA and the Municipal Code, the statutes must be read as concurrent grants of regulatory jurisdiction and permitting authority. *See T&S Signs*, 261 Ill. App. 3d at 1086, 1090-91.

While we are confident that there is no broad preemption of Village lakefront authority, it is also true that in exercising its home rule authority and any other authority granted by the Municipal Code or the Illinois Constitution, the Village may not act in a manner that is inconsistent with or less restrictive than the applicable federal and state regulations. For example, if the Army Corps or IDNR denies a permit for construction of a particular structure, the Village has no authority to grant a permit and allow the project to proceed. At the same time, just because the Army Corps and IDNR grant permits for a construction project, that does not mean that the Village cannot prohibit the structure under properly adopted and enforced Village regulations. *See T&S Signs*, 261 Ill. App. 3d at 1090-91.

b. Implementing Legislation.

Neither the Village's home rule powers nor the various statutory authorities described in this memorandum, including the provisions of Section 7-4-4 or Section 11-48.2-2, are self-executing, and we are not aware of any current provision in the Village Code that specifically regulates Lake Michigan structures. Accordingly, without the adoption of implementing legislation, and thus policy direction, the Village has no real power at this time to regulate or prohibit construction of breakwaters, revetments or other structures that extend into the Lake and receive the otherwise required permits from the Army Corps and IDNR. Likewise, other than generally applicable setback and bulk regulations, the Village has not adopted specific zoning and building rules for construction on lakefront properties, including in and around the bluffs and steep slope areas of these properties. Further, the general public health and safety purposes set forth in various provisions of the Winnetka Municipal Code do not provide the necessary standards and procedures for implementing a regulatory regime to cover lakefront building issues, at least without subjecting the Village to a significant risk of challenge from private property owners.

c. Substantive Limitation.

Finally, as with all municipal regulations, any set of Village Lake Michigan regulations must be reasonable and based on a proper public purpose. The Village must also enforce its regulations in a manner that is not unreasonable, arbitrary, or capricious.

6. Village Zoning Authority Over Park District Property.

The Winnetka Park District owns significant land within the Village and along the shores of Lake Michigan – for example, the properties constituting the Tower Road, Maple Street, Lloyd, Elder Lane, and the Centennial Beaches. We have been asked whether these Park District properties are subject to Village building and zoning regulations, including any bluff and shoreline regulations that the Village may implement in the future. Our opinion is that the Park District is *not* exempt from compliance with Village land use regulations.

Generally, Illinois courts have held that park districts and other governmental agencies must comply with the host municipality's regulations absent a specific legislative grant of immunity. Absent a specific legislative grant of immunity, courts will uphold a municipal regulation against a park district unless the municipal regulation would frustrate the statutory purpose of the unit of local government.

For example, in *Wilmette Park District v. Village of Wilmette*, the Park District sued the Village when Wilmette refused to allow the Park District to install lights along one of its recreational fields. 112 Ill.2d 6, 12 (1986). The Park District argued that it was not subject to the Village's zoning regulations. *Id.* at 14.

The Illinois Supreme Court disagreed and found that the Illinois General Assembly did not grant park districts immunity from a host municipality's zoning regulations. *Id*. In fact, the court stated that "[a]bsent an explicit statutory grant of immunity, the mere fact that the park district, a local unit of government, has a statutory duty to operate its parks cannot be extended to support the inference that it can exercise its authority without regard to the zoning ordinances of its host municipality." *Id*. at 14-15. Since there was no explicit grant of power involved, the Court held that the park district must comply with the host municipality's zoning regulation. *Id*. at 18.

Although the Court recognized that park districts are independent bodies charged with the responsibility of managing parks, the "village's interest in this case does not originate from a desire to 'manage' park land or projects, but rather from its legitimate interest and authority in planning and regulating the use of land within the entire community to minimize the abrasive activities and promote uses consistent with the community character and expectations of the residents." 112 Ill.2d at 18. In this case, the "abrasive activities" were the "potential impact that nighttime open-air sports programming may have on its surrounding neighborhood." *Id.* at 17.

Past practice also supports the applicability of Village building and zoning regulations to Park District construction projects. The Park District sought and obtained special use permit approval related to the improvements to Dwyer Park and most recently the Park District agreed that its Skokie Playfield improvements were subject to compliance with the Village zoning regulations. *See* Village – Park District Stormwater Intergovernmental Agreement, Section III.F.

Further, since there is no explicit statute preempting Village zoning and building regulations, the only other argument that could be made is that applying Village regulations to Park District lakefront properties would somehow frustrate the statutory purpose of the Park District. This argument could only be made if, after going through the Village's zoning process, a Park District project was denied required zoning relief and thus could not proceed as proposed. Even then, if the Village denial was reasonable it would be very difficult for the Park District to successfully argue that they were exempt from the Village zoning regulations.

Accordingly, Park District lakefront properties and projects are subject to Village building and zoning regulations.

7. Conclusion.

It is our opinion that the Village has authority, but not the obligation, to: (i) exercise its home rule municipal powers, including zoning powers, within its corporate boundaries, which pursuant to its Charter extend one-half mile into Lake Michigan; (ii) exercise extraterritorial jurisdiction (excluding zoning powers) over that portion of Lake Michigan that lies beyond the Village's corporate boundaries for an additional three miles; (iii) enact zoning and building regulations applicable to properties bordering Lake Michigan, such as bluff and steep slope regulations and related building and permit requirements; (iv) establish a lakefront protection district or overlay zone to specifically identify the properties and the regulations that will apply to lakefront construction; and (iv) require Village permits for the construction of breakwaters and similar structures within the portion of Lake Michigan bordering the Village. All of these authorities are subject to the requirements that municipal regulations be reasonable and not arbitrary and capricious, and that any permit requirements procedures are fair. Should the Village decide to adopt code amendments and new requirements above and beyond the existing permit requirements and regulations of the Army Corps of Engineers and the IDNR, the Village must ensure that that the Village requirements are rationally based and supported by proper study and fact finding.

II. Ownership of, and Access to, Lake Michigan Shoreline Property – The Public Trust Doctrine.

A. Ownership.

In the seminal case of *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), the United States Supreme Court held that the lands under the navigable waters of Lake Michigan are held by the state in trust for the people of the state. *See* 146 U.S. at 452. This doctrine has since been codified by Illinois statute through the Submerged Lands Act. *See* 5 ILCS 605/1. Because the land under the Lake is held in public trust, the state cannot sell the land to a private party, but may permit the improvement of submerged lands with structures such as wharves, docks, and piers that improve the use of the Lake for public purposes such as navigation and commerce and do not impair the public's interest. *See Illinois Central Railroad*, 146 U.S. at 452, 460; *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 74-75 (1976) (quoting *Illinois Central*).

Illinois courts have held that the boundary between private land and land owned by the state in public trust is "the line where the water usually [stands] when unaffected by storms or other disturbing causes." *Brundage v. Knox*, 279 Ill. 450, 471 (1917); *see also Smith v. City of Greenville*, 115 Ill. App. 3d 39, 42-43 (5th Dist. 1983) ("In a conveyance calling for a lake as a boundary line, the boundary line is that line at which the water usually stands when free from disturbing causes."); and *Hammond v. Shepard*, 186 Ill. 235, 241 (1900) ("The law of this State, as repeatedly announced, is, that shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the State."). This line is variously referred to as the "water's edge," "still water shoreline," "calm waterline," "unaffected waterline," or the "normal waterline."

Illinois courts have explicitly rejected using the "high-water mark" or the "ordinary high-water mark" as the boundary line. *See Brundage*, 279 Ill. at 471-72; *Smith*, 115 Ill. App. 3d at 43.

This differs from some neighboring states, such as Indiana and Michigan, where public land extends up to the ordinary high-water mark. *See Gunderson v. State,* 90 N.E.3d 1171 (2018) (the Indiana Supreme Court held that the boundary separating public land from privately owned land along Lake Michigan is the common-law ordinary high water mark and that, absent an authorized legislative conveyance, the State retains exclusive title up to that boundary); and *Glass v. Goeckel*, 473 Mich. 667, 687 (2005) ("Michigan's courts have adopted the ordinary high water mark as the landward boundary of the public trust.").

Accordingly, in Illinois the boundary between private land and public land is the point at which the water normally stands (the "***Normal Waterline***"). It is well established in Illinois that the Normal Waterline boundary, and the principles that apply to changes in the Normal Waterline as discussed below, determine the separation between private and state property on the shores of Lake Michigan. *See, e.g., Revell v. People*, 177 Ill. 486, 478-79 (1898); *Brundage*, 279 Ill. at 462-63. A rule of thumb that generally applies in Illinois and other jurisdictions that rely on the Normal Waterline for the public-private property demarcation is that if your feet are wet, you are on public property, and if your feet are dry then you are on private property.

Based on these principles, the demarcation line in Illinois between public and private land is the same demarcation line that identifies where land held in trust begins and ends – both lines are the Normal Waterline. This is not the case in all states. For example, in Michigan, the line between public and private property is the Normal Waterline, but the property held in trust for the public extends landward to the ordinary high-water mark. *Glen v. Goeckel*, 473 Mich. 667 694 (2005). This means that the dry land (the beach) between the Normal Waterline and the ordinary high-water mark is protected by the public trust doctrine (and thus available for public use) even though it is privately owned by the littoral property owner. This is not the case in Ohio or Illinois, where the public trust doctrine extends only to the Normal Waterline.

The Illinois Supreme Court has held that the public trust doctrine for Lake Michigan extends "to recreational uses, including bathing, swimming and other shore activities." *People ex rel. Scott v. Chicago Park District*, 66 Ill. 2d 65, 78 (1976). This holding, however, appears to apply only to protected uses that are lakeward of the water's edge when free from disturbing causes (that is, the Normal Waterline). *Schulte v. Warren*, 218 Ill. 108, 124 (1905). As such, Illinois Courts have acknowledged that the ability of the public to freely use Lake Michigan for recreationally uses also ends at the Normal Waterline.

The Normal Waterline may change over time as a result of various processes, including accretion, reliction, and erosion. Accretion is the increase or reclamation of land along the shoreline due to the deposit, by water, of solid material such as mud, sand, or sediment, *Brundage*, 279 Ill. at 462. Reliction is the creation of dry land due to the recession of water. *Hammond*, 186 Ill. at 242. Similarly, dry land may become submerged by the erosion or removal of solid materials from the shoreline. *County of St. Clair v. Lovingston*, 90 U.S. 46, 69 (1874).

Gradual changes to the Normal Waterline over time resulting in either increases or decreases in the amount of dry land are an "inherent and essential attribute of the original property," and the property line changes with the Normal Waterline. *Id.* at 68-69 ("The owner takes the chances of injury and benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his."). However, if the addition or loss of property is sudden (*i.e.,* caused by a violent storm), then the property line does not change. *Comm'rs of Lincoln Park v. Fahrney*, 250 Ill. 256, 265-67 (1911); *Hammond*, 186 Ill. at 242-43. In the case of a sudden loss of land (called an avulsion), the owner may assert control over and reclaim the submerged land. *Comm'rs of Lincoln Park*, 20 Ill. at 266. The test of what change is gradual, as

opposed to sudden, is "that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *County of St. Clair*, 90 U.S. at 68.

Changes to the Normal Waterline (and, consequently, the property line of waterfront parcels) may be caused by both natural and artificial means, provided that the change is gradual. *Id.*; *Brundage*, 279 Ill. at 468. However, if an increase in dry land is caused by artificial means, it must have resulted from actions or improvements of third parties, and not of the owner whose land was increased:

> The authorities are generally agreed that a riparian owner will not be permitted to increase his estate by himself creating an artificial condition for the purpose of effecting such an increase, and that the doctrine of accretion does not apply to land reclaimed by man through filling in land once under water and making it dry. The title to the land thus filled in remains where it was before…But if the accretion is indirectly induced by artificial conditions created by third parties, it would seem that the right of the riparian owner to such accretion would not be affected[.]

Brundage, 279 Ill. at 465.

Thus, although a riparian owner may protect his property from erosion, he has no right to affect an increase of his own land, the result of which is a corresponding loss of land owned by the state in trust for the public. *Revell*, 177 Ill. at 483. But to be barred from claiming title to newly formed land, the owner must have taken some affirmative action to further the accretion and been "more than a mere passive looker-on as to building a pier at the boundary line of his property or the building of other purpresture by public authorities at a location which may aid in causing accretions." *Id.* at 469 (lakefront owner could claim title to accretions even though he was an alderman when a public pier was extended that caused a benefit to his property, and he did not oppose the project).

Under these principles, the owner of real estate fronting on Lake Michigan owns the property to the Normal Waterline, and the land east of the Normal Waterline is owned by the state in trust for the public. The Normal Waterline may change with respect to a lakefront parcel over time and, so long as those changes occurred gradually and imperceptibly, the property line has moved with them and lies at the current Normal Waterline. *County of St. Clair*, 90 U.S. at 68. If, however, a property owner could prove that there had been a sudden or violent loss of his land, then the property owner could assert ownership to the Normal Waterline as it occurred before those sudden events and reclaim the resulting submerged land. *Comm'rs of Lincoln Park*, 20 Ill. at 266.

Moreover, the owner of a lakefront property may construct a breakwater or other structure on the state-owned submerged land offshore (with all required permits and approvals) to prevent further erosion or loss of his property, but that owner will not gain ownership of any new land created by accretion that results from that owner's construction of the breakwater or other structure. *See Revell*, 177 Ill. at 483. Rather, any such land will remain the property of the State of Illinois. *See Brundage*, 279 Ill. at 465.

Although it is clear that a current owner cannot benefit from artificial accretion that they themselves cause, it is less clear whether a property owner may claim title to artificially created accretion caused by a prior owner of the property, assuming that the current owner was not

involved in causing the artificial accretion. We are not aware of an Illinois case that definitively addresses this issue.

The only discussion we have found that addresses whether a current property owner may take title to accreted land caused by a predecessor owner is in a legal treatise, *Brown's Boundary Control and Legal Principles*, Fourth Edition by Curtis M. Brown, Walter G. Robillard and Donald A. Wilson, which states as follows:

> In general, most courts have held that shoreline changes resulting from manmade actions, such as those associated with dredging or groins, do not change title if the upland owner ***or a predecessor in title*** caused the changes, but may change title if the shoreline changes were caused by action beyond the control of the upland owner. An illustration of this is case law in the state of Florida, which generally holds that artificial accretion caused by the upland owner remains the property of the sovereign. However, case law in that state holds that artificial accretion caused by third parties will accrue to the upland owner. This principle does not hold true in all jurisdictions.

(*Emphasis added*) The authors of the treatise do not identify the legal authority for their analysis on accretion caused by a predecessor in title, and the Florida case they reference, *Board of Trustees v. Sand Key Associates*, 512 So. 2d 934, 940 (Fla. 1987), does not concern accretion caused by a predecessor in title. Thus, this issue awaits future ligation that will provide Illinois courts an opportunity to decide the issue.

B. Access.

The other major common law riparian right of landowners with frontage along Lake Michigan is a right of access to and use of the body of water. *See Revell*, 177 Ill. at 483-84; *Hasselbring v. Lizzio*, 332 Ill. App. 3d 700, 705 (3d Dist. 2002). In the event that additional dry land is created by accretion on the land of a property owner resulting from construction by that property owner, and that new property is owned by the State as discussed in Part II.A above, the owner will continue to have a riparian right of access to and use of Lake Michigan.

We have not located any regulations by the IDNR relating to whether it is exercising any control over State-owned accretions of land that is not submerged. We did locate a Draft Coastal Management Program Document that addresses this topic on the IDNR's website. In Chapter 5, entitled "Shore Access and Recreation," the authors provide the following discussion regarding the distinction between public and private beaches:

> According to Illinois Supreme Court (Brundage v. Knox, 1917), coastal sections with riparian ownership, the boundary between public and private ownership is the still-water shoreline. Above (i.e., landward of) the still-water shoreline is private; below (i.e., lakeward of) the still-water shoreline is public. As the lake level fluctuates and the still-water shoreline shifts landward or lakeward, the boundary line shifts accordingly. The submerged part of the beach, the sandy lake bottom lakeward from the still-water shoreline, always remains in public ownership.
>
> Beach accretion of sand or gravel by natural or artificial means for which the riparian owner is not responsible, that accreted above-water beach area belongs to the riparian owner. Case law does not grant private ownership of any beach area resulting from the entrapment or retention of sand caused by construction of

> any type of shore structure. Because of a long history of constructing numerous private groins along the North Shore (Keefe 2002; Shabica et al. 2004), there are many such areas of accreted beach. However, any beach area that is artificially accreted beach is legally public.

ICMP, Chapter 5, page 58. This excerpt shows IDNR's concurrence with the caselaw discussed in Part II.A. above. The owner of a lakefront property will not gain ownership of any new land created by accretion that results from the owner's construction of the breakwater or other structure and any such land will remain the property of the State of Illinois.

It is not always possible to determine where the correct boundary line is between private and public ownership. Therefore, it may be difficult for the IDNR to control any public land that is created because of the difficulty of determining the precise public-private property line at each property and due to the gradual nature of any changes to the land and lake levels along the shore. The Village may want to consider whether there is a need to adopt laws or ordinances governing this area beyond those already in place, and whether for zoning purposes the Village in determining setbacks and related conditions may want to use a line that may not fluctuate as much as the Normal Waterline, such as the ordinary high-water mark, the toe of bluff, or the Army Corps' long-term average annual mean lake level.

III. Applicability of New Regulations on Lakefront Construction.

If the Village Council desires to consider whether to adopt regulations governing construction of structures along or in the Lake, the Village does have authority to adopt a temporary moratorium on certain types of new construction while it studies potential regulations.

Certain procedural steps must be followed to adopt a temporary moratorium. A legally enforceable moratorium is considered to be, and must be treated as, a Zoning Ordinance. *See People ex rel. J.C. Penney Properties, Inc. v. Oak Lawn*, 38 Ill. App. 3d 1016, 1018 (1st Dist. 1976). This means that a moratorium must go through the typical public notice and hearing process in the same manner as a text amendment to the Zoning Ordinance. *Id.* at 1019. A municipality cannot impose an "unofficial" moratorium or adopt a moratorium by a motion or resolution. *Gary-Wheaton Bank v. Lombard*, 84 Ill. App. 3d 125, 128 (2d Dist. 1980). Further, the moratorium must be "temporary" and extend only for a reasonable time and only for so long as is necessary to study, consider, and adopt new regulations, if at all.

There are primarily two limitations on imposing zoning moratoria. The first is that the imposition of the moratorium may not violate the doctrine of vested rights. "The general rule is that a property owner has no vested right in the continuation of a zoning classification." *1350 Lake Shore Assocs. v. Randall*, 401 Ill. App. 3d 96, 102 (1st Dist. 2010). Thus, a property owner is not guaranteed to be able to use their property for uses that are currently allowed under a zoning ordinance simply because they spent money to acquire the property.

However, "[u]nder the vested-right doctrine, a property owner may acquire a vested right in a prior zoning classification where the owner sustained a significant change of position, by either making substantial expenditures or incurring substantial obligations, in good-faith reliance upon the probability of the issuance of a building permit." *Id.* If an owner can establish a vested right, the Village may be required to issue the owner a building permit despite adopting a moratorium or changing the zoning regulations.

The determination as to when the issuance of a building permit becomes "probable" or when an owner has made a substantial enough expenditure based on that probability is a fact-intensive and case-specific inquiry. However, one case found that there is low probability of a permit, and, therefore, expenditures became unreasonable, once a municipality or a local official informs a property owner that the Village is going to consider adopting a moratorium. *See 1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618 (1st Dist. 2003). Accordingly, if the Village Council desires to consider adopting a moratorium on lakefront construction, it should inform property owners that it plans to consider a moratorium as soon as possible to prevent a property owner from claiming that they have a vested right in a building permit and the moratorium cannot be applied to them.

The second limitation is that the moratorium must be a valid exercise of the municipality's zoning authority. To make this determination, the courts would apply the *LaSalle* Factors, named after the seminal Illinois zoning case *LaSalle National Bank v. County of Cook*, 12 Ill. 2d 40 (1957). The eight *LaSalle* Factors – six of which originated from the *LaSalle* case along with two from a later case (*Sinclair Pipe Co. v. Village of Richton Park*, 19 Ill. 2d 370 (1960)) – are used to determine whether a moratorium is: (i) reasonable; (ii) bears a relation to public health, safety, morals or general welfare; and (iii) not arbitrary and capricious. *La Grange State Bank v. County of Cook*, 75 Ill. 2d 301, 307 (1979). The *LaSalle* Factors provide a framework to determine if a zoning decision is fair to the owner of the property in question, the owners of the surrounding properties, and all of the residents of that municipality. *Harvard State Bank v. County of McHenry*, 251 Ill. App. 3d 84 (1993). The eight *LaSalle* Factors are as follows:

(1) The existing uses and zoning of nearby property;

(2) The extent to which property values are diminished by the moratorium;

(3) The extent to which the destruction of the plaintiff's property values promotes the health, safety, morals or welfare of the public;

(4) The relative gain to the public as compared to the hardship imposed on the plaintiff;

(5) The suitability of the plaintiff's property for the zoned purposes that are allowed during the moratorium;

(6) The length of time the plaintiff's property has been vacant as zoned considered in the contest of the land development in the vicinity;

(7) The care that the community has taken to plan land use development; and

(8) The community need for the moratorium.

See *LaSalle*, 12 Ill. 2d at 46-47; *Sinclair Pipe*, 19 Ill. 2d at 378.

The shorter the moratorium is, the less likely it is for a property owner to be able to successfully claim that the moratorium violates the *LaSalle Factors*. Further, the narrower the moratorium is, the less likely a property owner is to prevail on a claim that the moratorium is invalid. For example, it is more likely for a moratorium to withstand a challenge if it only prohibits the construction of certain types of structures (e.g. groins and breakwaters) than if it prohibited all types of construction on any property that borders the Lake.

IV. Specific Questions from Trustees.

At President Rintz's suggestion, the Trustees were invited to provide specific questions for our office and Village staff to address.

1) What is VC jurisdiction and authority over the lakefront and shoreline, including projects on land and projects that extend over the beach and into the water. If any, does our authority extend to both private land and public land (including WPD initiatives). There has been talk of municipalities having jurisdiction on area 3 miles into the lake, but Winnetka's code apparently says .5 mile (so I've been told). True, not true, please explain, and what are the implications of that extension into the water?

   Answer: *See* Section 1.C of this memo. The Village Charter established that the Village's territorial boundaries extend one half mile from the shoreline of Lake Michigan. This means that the Village may exercise its full home rule municipal powers, including zoning powers, up to one-half mile into Lake Michigan. Further, the Illinois Municipal Code provides municipalities with jurisdiction three miles into the lake. This is an extension, not a limitation, of the Village's existing authority over Lake Michigan waters. Pursuant to this authority, the Village may exercise extraterritorial jurisdiction (excluding zoning powers) over that portion of Lake Michigan that lies beyond the Village's corporate boundaries for an additional three miles. Further, the Village zoning and building regulations apply to Park District property and projects.

2) Please define the 'public trust doctrine' that is so often cited. If there is an actual 'doctrine' that should be included?

   Answer: *See* Section II.A of this memo. The United States Supreme Court held that the lands under the navigable waters of Lake Michigan are held by the state in trust for the people of the state. Because the land under the Lake is held in public trust, the state cannot sell the land to a private party, but may permit the improvement of submerged lands with structures such as wharves, docks, and piers that improve the use of the Lake for public purposes such as navigation and commerce and do not impair the public's interest. The Illinois Supreme Court has also said that Lake Michigan public trust land may also be used for recreational uses such as swimming, bathing, and boating, but subject to the Normal Waterline limit.

3) How specifically are neighboring communities overseeing the lakefront and shoreline, including zoning and any other related ordinances/regulations?

   Answer: *See* comparative chart and descriptions of municipal regulations prepared by the Community Development and Engineering Departments.

4) Has VC had this authority all along and not exercised oversight?

   Answer: *See* Section 1.C of this memo. At this time, the Village has not adopted any specific regulations on lakefront construction. The Village may adopt certain zoning or building regulations with respect to lakefront property, subject to the limitations set forth in this memorandum.

5) What if a private landowner has structures along the lakefront that were built but not properly permitted? What recourse is there?

Answer: If a Village permit was required, the Village could require that a permit be obtained and take action, such as the issuance of citations, if any Village Code provisions were violated. The Village could also seek a court order that the structure built without a permit be removed. If a structure was built without the required State or Federal permit, the IDNR or Army Corps of Engineers would be responsible for any enforcement action.

6) How to define the east property line for zoning purposes? How do other communities define it? Is there flexibility through case law on how that line is defined?

   Answer: *See* comparative chart and descriptions of municipal regulations prepared by the Community Development Department. *See also* Section II.A of this memo. In Illinois the boundary between private land and public land is the Normal Waterline – the point at which the water normally stands. The Village has flexibility in setting a line that will be used for zoning purposes. It does not have to be the Normal Waterline. For example, it could be the ordinary high-water mark, the line that represents the toe of the bluff, or the Army Corps' mean lake level determination.

7) Given the work that needs to be done, and its importance, can we put a moratorium on lakefront projects until decisions are made? The 195-205 Sheridan project should fall under any changes made and not be 'grandfathered' because they have a permit submitted. How is that accomplished? That homeowner also has a lakefront permit submitted to IDNR. That should be part of our review process if we have jurisdiction.

   Answer: *See* Section III of this memo.

8) To the extent Peter identifies issues that have nuances or if his judgement could be argued otherwise, he should say so. There seems to be differences of opinion on certain issues, and that is fine, but we should know where the gray areas are and how to navigate.

   Answer: We hope this memo clarifies the issues. The one specific matter that is unresolved under Illinois law is how the eastern demarcation between public and private property is determined when artificial accretion may have been caused by a previous owner of the property in question.

9) Does 'home rule' provide us with any additional flexibility to exercise jurisdiction over lakefront/shoreline projects?

   Answer: Yes. The Village maintains its traditional home rule powers with respect to lakefront construction. The Village can also exercise its home rule municipal powers, including zoning powers, within its corporate boundaries, which pursuant to its Charter extend one-half mile into Lake Michigan. The Village has authority to consider and enact the types of zoning and building regulations that are included in the Community Development Department's survey of lakefront regulations of other nearby municipalities.

10) Over the last 15 to 20 years, the number of unprecedented projects that have been built on the lake and into our bluffs has been remarkable. If you look at Winnetka vs. many other north suburban communities with lake property and responsibility, we appear to have a lack of oversight ordinances and understanding of the complexities involved in lakefront management. In looking at the language in our existing statutes/ordinances regarding protection of the public health and welfare, can we apply them to projects on Winnetka's

most important asset, our lake? Our town logo is a picture of the lake. Can we use these existing codes/ ordinances, to immediately have better oversight of the lake and bluff?

Answer: See Section 1.C of this memo. The Village may adopt zoning and building regulations with respect to lakefront property, subject to the limitations set forth in this memorandum. At this time, the Village has not adopted any specific regulations on lakefront construction.

11) In looking at the stormwater detention requirements for the Village, have we done any recent study to show the effect on lake? Do lakefront residents have to go through the Village for stormwater review? How do we know what affects it has on the bluff? What are best practices in other north shore communities for lakefront properties and stormwater run-off? Why would we allow any homeowner to drain their property directly into the lake?

Answer: See Engineering Department report and further information regarding stormwater detention requirements.

12) What are we doing to understand and address the cumulative effect of all these projects on the lake and bluff? And the effects of these large-scale projects, especially side by side such as Elder Centennial and 250 Sheridan on the surrounding neighborhoods?

Answer: See Engineering Department report and further information regarding these issues.

13) We have zoning, plan, DRB – what can we do to add a lakefront review commission to the application process for projects on the lake?

Answer: The Village may adopt zoning or building regulations with respect to lakefront property, subject to the limitations set forth in this memorandum.

14) Since none of us are experts on water, can we invite an expert to better inform us on such an important topic during our study session? If having a costal engineer on staff is too expensive, perhaps we could share costs with our coastal neighbors?

Answer: Representatives of IDNR and the Army Corps will be at the January 10 Study Session to discuss federal and state jurisdiction and oversight of lakefront construction activities.

15) I have heard of several very recent troubling encounters with the IDNR. I have heard from both WPD and WVC leads that the IDNR will give oversight and protect our lakefront. After getting firsthand accounts of how understaffed and undermotivated the IDNR is in its current state, it is now clear that we will have to step up protection of our own lakefront, for they will not. In fact, they told us that we need to look in the mirror as we have the authority to handle our own business, similar to what Evanston, Wilmette, Kenilworth, Highland Park, Glencoe and Lake Forest are already doing. They do not have the staff and appear not able or willing to represent our interests, at present.

Answer: Representatives of IDNR and the Army Corps will be at the January 10 Study Session to discuss federal and state jurisdiction and oversight of lakefront construction activities. If the Village determines that reliance on federal and state agencies is

insufficient, the Village may adopt certain zoning or building regulations with respect to lakefront property, subject to the limitations set forth in this memorandum. *See* Section 1.C of this memo. Specifically, the Village has authority to consider and enact the types of zoning and building regulations that are included in the Community Development Department's survey of lakefront regulations of other nearby municipalities.

16) I have heard of several examples of case law precedent used with totally different interpretations by those on opposite sides of the issue. The Supreme Court decision in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), reaffirmed that each state in its sovereign capacity holds title to all submerged lands within its borders and holds these lands in public trust. This is a foundational case for the public trust doctrine.

Answer: We are well aware of the *Brundage* and *Illinois Central* cases. *See* Section II.A of this memo. In the seminal case of *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), the United States Supreme Court held that the lands under the navigable waters of Lake Michigan are held by the state in trust for the people of the state. *See* 146 U.S. at 452. This doctrine has since been codified by Illinois statute through the Submerged Lands Act. *See* 5 ILCS 605/1.

17) I'm generally interested in understanding whether and to what extent we can impose zoning restrictions on lakefront properties to protect light, air, views, water quality, and shoreline and bluff integrity. My concern would primarily be focused on any new structures, including fences, piers, etc., that would block views of the lake from neighboring properties or access to the lake by the public while traveling along any land in the public trust. I would want to implement any new restrictions prospectively. For the construction of new residences, I would not want to impose any new restrictions beyond what is already provided in our zoning code, except perhaps to change the eastern lot line for purposes of measuring setbacks to a more stable and definite point - not the waterline - perhaps we could define that line as the land beginning at a specific elevation that is well above the 100 year high water mark (which I think is about 582, so setting the lot line at 587). Finally, I anticipate others may be very concerned about lakefront aesthetics - perhaps there are some design standards that our DRB could use to review applications for any structures along the shoreline or projecting into the lake. I'm wondering if it would not be possible to borrow liberally from whatever Glencoe has in this area.

Answer: *See* Section 1.C of this memo. The Village may adopt certain zoning or building regulations with respect to lakefront property, subject to the limitations set forth in this memorandum. The Village can look at the regulations that other municipalities have adopted, including Glencoe, and use them as a model in adopting its own regulations. Staff has prepared a chart of the different types of regulations that have been adopted by other lakefront municipalities in Illinois. While the 100-year high water mark might not be practical (see additional information provided by the Engineering Department), the Village has the authority to use a line other than the Normal Waterline for setback and zoning purposes. This line could be the ordinary high-water mark, or the line representing the toe of the bluff, or some other reasonable demarcation.

18) [Section 1.04.020] says our code applies to persons and property located within the Village corporate limits. Not just home owners on the lake, but wouldn't this indicate that the Park District has to comply with the overarching objectives of Comp Plan and Zoning--and therefore, don't we have more jurisdiction over what they are a doing than just the issue of the stormwater pipe at Elder/Centennial or specific zoning variations they may request.

Specifically, jurisdiction related to the objectives of the code re: overall land use, character, etc.

Answer: *See* Section I.C.6 of this memo. Illinois courts have held that park districts and certain other governmental agencies must comply with the host municipality's regulations absent a specific legislative grant of immunity. Absent a specific legislative grant of immunity, courts will then look at whether application of a municipal ordinance would frustrate the statutory purpose of the unit of local government. There is no blanket statutory exemption for the Park District with regard to the Village's regulations, and it would be difficult to demonstrate that compliance with reasonable Village zoning or building codes would frustrate the Park District's statutory purposes. Accordingly, we have concluded that the Park District must comply with Village zoning and building regulations, which they have already agreed to do, for example, with regard to Dwyer Park and Skokie playfield stormwater improvements. As we have noted, other than general setback and use requirements, the Village currently does not have in its Code specific zoning or other regulations directly related to construction of structures into the Lake. Even so, with regard to the Park District's Elder/Centennial project, the Park District will need to seek permits from the Village to reroute the stormwater utilities impacted by the project on the Village's behalf. We would anticipate that the Park District and the Village will enter into an intergovernmental agreement to comprehensively set out the various levels of cooperation and regulatory oversight that will be necessary as part of that project. Additionally, depending on the final plans, the Park District may require zoning relief, such a special use permit, related to the construction and location of various amenities that may be part of the project.

19) Specifically, what does [Article 1 Section 1 of the Village Charter] mean? It sounds like we actually DO have jurisdiction over the beach and water of Lake Michigan out to ½ mile. Other communities (and the IDNR) say we have jurisdiction 3 miles out. I realize there are other agencies who also have some (a lot!) of say in certain aspects of lakefront development, but we need to understand exactly what everyone's roles are and what aspects our Village Council has jurisdiction over.

Answer: *See* Section 1.C of this memo. The Village Charter has established the Village's territorial boundaries extend one half mile from the shoreline into Lake Michigan. This means that the Village may exercise its traditional municipal powers, including zoning powers, within these corporate boundaries. The Illinois Municipal Code also provides municipalities with "jurisdiction" three miles into the lake from the applicable municipal boundary (so for Winnetka, this mean a total of 3.5 miles from the Normal Waterline). This is an extension, not a limitation, on the Village's existing authority over Lake Michigan waters. Pursuant to this authority, the Village may exercise extraterritorial jurisdiction (excluding zoning powers) over that portion of Lake Michigan that lies beyond the Village's corporate boundaries for an additional three miles.

20) With respect to Section 15.26.100 of the Village Code:

a. Where are our Public Works and Engineering Guidelines?

Answer: See additional information provided by the Engineering Department.

b. Re: land grading. This is an OR statement. I read this as projects cannot "significantly alter existing drainage patterns" at all--not that they can do so as long

as they mitigate any stormwater runoff to abutting properties. There have been (and I suspect will be) private and public projects in town that had to have altered existing drainage patterns. How are we reviewing/determining/enforcing this?

Answer: See additional information provided by the Engineering Department.

c. These are "Shall" statements and indicate a specific calculation. The code doesn't say "at a minimum" provide storm water detention based on this calculation--it says "shall provide." How are we enforcing this? As we are learning, more than the required stormwater management is not necessarily better.

Answer: See additional information provided by the Engineering Department.

21) I believe in another section in the code, the lakefront is defined as a public street. (Zoning Definitions section R) Have we been treating it as such?

Answer: Section 17.04.030(R)(10) of the Village Code defines Public Street as "the area lying within the described limits of a right-of-way or thoroughfare dedicated for vehicular traffic (excluding an alley), whether or not so used. For purposes of this Zoning Ordinance, Lake Michigan shall be considered a 'public street.'" See additional information provided by the Community Development Department related to how this definition has been enforced or utilized for zoning purposes

22) This term [Direct Discharge] is not used anywhere in this chapter. Why is it here? What would it relate to? Shouldn't we have some control of Direct Discharge? (Isn't this what is being proposed--we introduce the concept, but appear to not have any code related to this.)

Answer: See additional information provided by the Engineering Department

23) Do all the homes along the lake have their own stormwater system and apply for this credit?

Answer: See additional information provided by the Engineering Department.

24) Won't the discharge from a 60" of stormwater pipes impact the pattern and direction of the Village stormwater system.

Answer: See additional information provided by the Engineering Department.

25) Is this right that the only consequence of an owner sending "bad" water into the lake is that they don't receive a credit on their utility bill?!!! How/who would address the bigger issue of impact on the lake? Not living up to our standard of protecting the health and safety of residents in the zoning code. Where in our code is this information?

Answer: See additional information provided by the Engineering Department. If necessary, the Village has the authority to adopt additional regulations relating to stormwater discharge. *See* comparative chart of municipal regulations prepared by the Engineering Development Department. Additionally, there are State and Federal regulations in place with respect to polluting Lake Michigan.

26) Per previous note, the lakefront is defined as a street. Many lakefront properties have accreted sand which is becomes public property/public place. Proposed "planters" will contain trees or shrubs that will be located and grow in a manner to extend over public place and will obstruct/impede or interfere with persons walking on lakefront. Have we enforced this and how can we enforce this?

Answer: The Village has authority to enact and enforce zoning and building regulations regarding structures that are built into the Lake (within the part of the Lake that is within the Village's corporate boundaries -- .5 miles out). *See* additional information provided by Engineering Development Department.