

TO Robert Burton, President, Castle Park Association **DATE** January 28, 2014
FROM William C. Whitbeck
SUBJECT The Castle Park Beaches and the Implications of the “Public Trust Doctrine”

I. The Public Trust Doctrine

The State of Michigan can only grant property rights to lakefront owners to the extent that their property rights do not conflict with the “public trust doctrine.” This public trust doctrine protects the public’s rights to navigate Michigan’s lakes and streams.

However, the public’s right does not end at the edge of the water. The public has rights to the land bordering Michigan’s lakes and streams up to the “ordinary high water mark.” The high water mark is *not* where the water is at a given time. Rather, it is the land that the water covers at high tide on a regular basis.

In the Great Lakes, finding this mark can be problematic. The water level in the lakes rises and falls depending on rain, snow, and evaporation. The high water mark is not the highest point the water may reach on any given day, but the *typical* high water mark. In the famous beach walker case (*Glass v Goeckel*), the Michigan Supreme court defined the high water mark as “the point on the bank or shore . . . [where the] action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.” Although this means that the debris line that the high tide causes does not necessarily define the edge of the area to which the public has a public trust right, this debris line can be a useful hint.

The purpose of the public trust doctrine is to protect the public’s right to *navigate* public waters. Thus, people are allowed to walk on the beach as part of the public trust doctrine, as long as they stay below the high water mark. The public trust doctrine also allows people to do other activities below the high water mark related to navigation, like fishing, hunting, boating, gathering seaweed, swimming, bathing, and temporarily anchoring boats. However, the public does *not* have the right to sun bathe or permanently anchor boats on the shore, even below the high water mark.¹

Thus, the major public right is the right to pass over the land below the high water mark. The public may not picnic or loiter on the shore below the high water mark, since these activities are not directly related to navigation. In other words, picnicking is closer to sunbathing than it is to walking or boating. However, people are allowed to encroach on the shore by “temporarily” anchoring their boats or SkiDoos, either offshore or onshore below the high water mark. Unfortunately, no cases define just how temporary “temporary anchoring” is.

II. Implications Of The Public Trust Doctrine

¹ Authorities include *Glass v Goeckel*, 473 Mich 667; 703 NW2d 58 (2005), *Thies v Howard*, 424 Mich 282; 380 NW2d 463 (1985), and *Hilt v Weber*, 252 Mich 198; 233 NW2d 159 (1933).

As summarized above, the public trust doctrine gives the public certain rights to Michigan beaches, including the Castle Park and related beaches (for example, the Muzzy property, South Hill, etc.). However, these rights extend only to the high water mark. The difficulty, of course, is defining exactly where the high water mark is at any given time. For a beach walker, this is not terribly complex in practice: walking on damp sand above the water's edge or walking below the debris line will almost certainly be permissible.

For the owner of the beach or beaches, life becomes more difficult. Several points are relevant:

1. Extent of the Public Trust Doctrine. The public trust doctrine extends only to the high water mark and no further. Thus, even activities that are thought to be related to navigation (for example, fishing, hunting, boating, gathering seaweed, and anchoring boats) are not permissible above the high water mark. Persons who engage in such activities above the high water mark are, in fact, trespassing, unless the property is publicly owned, as is the case with public parks and recreation areas. Remedies for trespass on private property range from a friendly reminder that the offender is on private property above the high water mark (if the property owner is reasonably sure where the high water mark actually is) to calling the police (again assuming such reasonable certainty).

2. Activities Below the High Water Mark. Despite the public trust doctrine, not all activities below the high water mark are permissible. Such activities must be, in some way, related to navigation of the body of water. Therefore, activities like sunbathing, permanently anchoring boats, and—I would submit—lighting fires and picnicking are not permissible, even below the high water mark.

3. Determining the High Water Mark. I once asked a Michigan Supreme Court Justice how one could go about determining the high water mark with any degree of accuracy. She told me that the Army Corps of Engineers might be a valuable resource. It might be in the Association's best interest to seek some guidance from the Corps on this question. With the advent of GPS coordinates, it is possible that there could be some degree of specificity on this point.