



## Long Beach Community Alliance, Inc.

*Long Beach "Beautiful"- Let's Keep It So!*

October 3, 2021

***Via electronic mail and delivery***

Bob LeMay  
John Kocher  
John Wall  
Mary Lou McFadden  
Mike Johnstone  
2400 Oriole Trail  
Long Beach, IN 46360

Re: Section 154.206.1 of the Shoreline Preservation Ordinance

Dear Town of Long Beach Town Council:

The Long Beach Community Alliance (the "LBCA") understands the need to balance the rights of citizens of Indiana to access Public Trust property with the rights of lake front homeowners to protect their private property and access the beach from their property. Indeed, LBCA supports the rights of lake front homeowners to build stairs on their own private property. Unfortunately, the Town officials lost this balance on Monday, September 13, 2021 when the Town Council approved Section 154.206.1 of the Shoreline Preservation Ordinance (the "Stair Amendment"). On its face, the Stair Amendment is a remarkable overreach by the Town, and contrary to Indiana state law. The LBCA believes the Town Council should promptly cure this overreach and this letter is intended to aid in that endeavor.

**A. Indiana Law And the Shoreline Preservation Ordinance:**

The Town Council of the Town of Long Beach first passed an ordinance adopting a boundary separating private property from the state-owned beaches which are held in trust for the public (the "Public Trust") on July 12, 2010 at section 34.03 of the town code of ordinances titled *Enforcement of Public Property Ordinances on Properties Adjacent to Lake Michigan*. The passage of this ordinance planted the seed of a now decade old battle between the Town, the Gundersons, and the Town's inland residents and visitors as to the access and ownership of the shores along Lake Michigan. Litigation initiated by the Gunderson reached the Indiana Supreme Court, which issued the now famous *Gunderson* decision in February 2018. In *Gunderson*, the Indiana Supreme Court held decisively that the shores of Indiana are owned by the State of Indiana and preserved in Public Trust below the Natural Ordinary High Water Mark (the "NOHWM") for the people of the state of Indiana.

In the wake of *Gunderson*, and the Supreme Court of the United States' denial of cert. refusing to review that decision in 2019, a new battle erupted in the Indiana legislature. Specifically, in 2019 the Indiana General Assembly considered a bill that sought to undo the *Gunderson* decision. Instead, the General Assembly passed HB 1387, which codified *Gunderson*, and also set forth parameters authorizing the repair and construction of seawalls and revetments

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on “private property” within a local government’s jurisdiction pursuant to an expedited local government permitting process. See HB 1387, at Section 10.

HB 1387 expressly incorporates the *Gunderson* decision’s holding that the State of Indiana owns the shore of Lake Michigan below the NOHWM as determined by naturally occurring physical characteristics left on the shore by the action of the Lake. (Section 3 and the definitions in Sections 1 and 2). It also expressly defines “private property” as that which is “not owned or leased by the state or a political subdivision.” (Section 8). Finally, HB 1387 makes clear the fundamental legal tenant that a local government’s authority is limited to property that is within its jurisdiction. (Section 10). Indeed, in committee hearings on HB 1387 several legislators expressed deep concern about local governments over-stepping their authority on the Lake Michigan lake front. The legislator’s fears were realized on Monday, September 13, 2021.

**B. Town Council Passes an Ordinance Contrary to Gunderson and HB 1387:**

We, as citizens of the Town of Long Beach, have a right to expect that you, the Town Council, will comply with State law and act within the legal boundaries of your jurisdiction as established by *Gunderson* and as clearly articulated by the Indiana General Assembly.

On Monday, September 13th, the Town Council faced the simple question of whether it had the authority to adopt an ordinance that would permit construction 42 inches lakeward of the NOHWM. Sadly, instead of simply rejecting the adoption of language that would put the Town’s imprimatur on construction lakeward of the NOHWM, an action outside of the Town’s jurisdiction, the Town Council chose to take an illegal, *ultra vires* action. In so doing the Town Council missed an important opportunity to turn the hard-won lessons of this seemingly endless dispute into a final rule that would make uniform the principles of *Gunderson*, HB 1387 and the Shoreline Preservation Ordinance, and instead chose a more expedient path that will have profound effects on the Public Trust along the Lake Michigan shoreline.

We are writing to make a record that the Long Beach Community Alliance, as one of the parties in the *Gunderson* case and a staunch advocate for the protection of the public trust beach adjacent to our Town, stands in opposition to the actions of Town Council or any local governing body purporting to exercise jurisdiction lakeward of the NOHWM. We urge the Town Council to reconsider its position on this matter as soon as possible. We believe the unfortunate action taken by the Town on Monday, September 13, 2021, no matter how much of the public trust beach it affects and no matter that it is ineffective as a matter of law, has the potential to cause confusion as to the boundary of private and public property on the lake front adjacent to the Town and creates a slippery slope for arguments before the Town Building Commission for other greater illegal infringements by the Town on the public trust beach.

The background on this matter is that for six months the Advisory Planning Commission (the “APC”) undertook a great effort, involving multiple public meetings, the consideration of multiple amendments and restatements, and the drafting and revising of a number of provisions, all to insure that the Town’s Shoreline Preservation Ordinance was amended and restated in a manner that complied with both *Gunderson* and HB 1387 and also provided a fair, reasonable and workable approach to shoreline protection. Following that careful, open and very fulsome public process, the Town Council proposed changes to the APC’s proposed amendments that were only raised before the APC at the public hearing and which the APC rightfully rejected because the changes exceeded the Town’s jurisdiction under *Gunderson* and HB 1387. Further the Town Council sent the proposed changes to the APC with a procedural “poison pill” requiring that the changes must be accepted or rejected.

Leaving aside the breach of the Town Council's duty to Town citizens that this action represents, it is absolutely clear that the Town had no authority to authorize construction anywhere below the NOHWM. Neither *Gunderson* nor HB 1387 establish the boundary between private property and Public Trust lands (and thus the Town's jurisdictional boundary) as the NOHWM **plus 42 inches**. The Town Council made-up this concept of "42 inches" out of whole cloth.

Moreover, the language proposed does not even require the applicants to obtain a permit from the DNR or the Army Corps of Engineers in order to build within the Public Trust. It only requires that they be subject to "Department of Natural Resources and/or Army Corps requirements." While legally ineffective, this action will result in the Building Commission continuing to be hamstrung by the language in the ordinance, and applicants will exploit the ambiguity in the language as to what precisely is required before the Town will grant a permit to an applicant to construct stairs lakeward of the NOHWM. Worse, the ordinance signals to the Indiana Department of Natural Resources and the Army Corps of Engineers that the Town Council supports encroachment onto the Public Trust by at least 42 inches.

Again, the LBCA understands the need to balance the rights of lake front property owners with the rights of the citizens of Indiana to access Public Trust property. However, the Stair Amendment does not strike that balance. The Stair Amendment, on its face, exceeds the authority granted to the Town under Indiana law. Indeed, at a meeting of the APC on August 23, 2021, the three members of Town Council who also serve on the APC admitted, on the public record, that neither *Gunderson* nor HB 1387 authorize the Town to issue permits for construction that extends onto Public Trust property and that the concept of approving the construction of stairs beyond the NOHWM would both exceed the Town's jurisdiction and be contrary to *Gunderson* and HB 1387.

Additionally, there is a legitimate concern that the adoption of this *ultra vires* language within the Shoreline Preservation Ordinance could cause the text of the entire ordinance to be overturned by a Court.

For all of these reasons, this error must be corrected. We have attached a proposed amendment to section 154.206.1, which would once again align the Town's Shoreline Preservation Ordinance with *Gunderson* and HB 1387.

We urge you, in the strongest possible terms, to consider our proposed amendment. We believe these amendments clarify the intent of the Town Council and are necessary to avoid confusion before the Building Commission and Department of Natural Resources, as well as confusion for permit applicants and all citizens of the Town.

Respectfully,

*Long Beach Community Alliance*

The Long Beach Community Alliance

### 154.206.1 Stairs and Other Structures Attached to Seawalls

A. The construction of new stairs or the repair or replacement of legally existing permanent stairs are permissible provided that the stairs are constructed or repaired with either sturdy metal, concrete, or heavy landscaping stone.

B. The construction of new or the repair or replacement of legally existing stairs over shore protection structures are allowable, subject to the following restrictions:

- 1) Stairs attached by any means to the lakeside of seawalls located on private property must be parallel to the seawall and shall not extend greater than forty-two inches (42") from the base of the seawall.
- 2) Stairs over revetments located on private property shall be limited to forty-two inches (42") from the lakeside of the base of the revetment.
- 3) Retractable stairs from the top of a shore protection structure shall not project more than forty-two inches (42") from the base of the seawall.
- 4) No other structures shall be built North of the base of a shore protection structure.
- 5) Stairs over dunes on private properties without shore protection structures shall be limited to forty-two inches (42") as these stairs tend to protect the natural dunes that serve as protection for lakeshore properties.

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C. Notwithstanding any other provision in this Section, all construction of new or the repair or replacement of legally existing stairs shall also be subject to the following requirements:

- 1) Permit applications for the construction, repair, or replacement of legally existing stairs which will protrude or encroach from private property onto the Public Trust Property or otherwise are within the jurisdiction of the Indiana Department of National Resources and/or the Army Corps of Engineers will not be considered by the Town unless the property owner first provides the Town with written authorization, permits, and related documentation from the Indiana Department of Natural Resources and/or the Army Corps of Engineers evidencing that the property owner has authority to proceed with construction and that such construction will not unreasonably interfere with the Public Trust Property.
- 2) Wooden stairs are strictly prohibited.
- 3) A property owner must obtain a permit from the Town in order to construct, repair, or replace any stairs regardless of the value of the project or whether authority is required of any other governing authority.

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