SAVE OUR SHORELINE, INC.

POSITION STATEMENT REGARDING
OWNERSHIP OF GREAT LAKES BEACHFRONT
AND REGULATORY TAKINGS ISSUES

Private Ownership of Great Lakes Beachfront: To the Water's Edge

The private ownership boundary along the Great Lakes shoreline was definitively set by the Michigan Supreme Court in the case of *Hilt* v *Weber*, 252 Mich 198 (1930). That case held that a riparian owner's property along the Great Lakes shoreline extended to the water's edge, thereby confirming the existence of a movable boundary that would follow the water's edge as it existed from time to time.

This fundamental holding of *Hilt* v *Weber* has been uniformly followed in subsequent Michigan decisions. See, for example, *Peterman* v *Department of Natural Resources*, 446 Mich 177, 192 (1994) ("title of the riparian owner follows the shore line under what has been graphically called a 'movable freehold'"); and *Klais* v *Danowski*, 373 Mich 262, 275-76 (1964).

Opinions (both formal and informal) issued by the Attorney General of Michigan have also accepted the "movable freehold" doctrine announced in *Hilt* v *Weber*, and concluded that riparian owners therefore own to the water's edge. See OAG, 1933-1934, p 286 (July 13, 1933) ("the riparian owners along the Great Lakes owns [sic] to the water's edge"); OAG, 1943-1944, No 2249, pp 744-745 (May 12, 1944); and Letter to the Hon. Ken Sikkema from Deputy Attorney General William J. Richards dated March 14, 2001, pp 1-2 ("Riparian owners own to the water's edge, *at whatever stage*," and recognizing that, "*Hilt*, the leading case on the question, concludes that a Great Lakes riparian owner's fee title interest in the land follows the shoreline under what has been called 'a movable freehold'").

There is No Public Trust Interest in Great Lakes Beachfront at Common Law

Some have argued that although the State does not own the property lying between the water's edge and the ordinary high-water mark, that property is somehow subject to the "public trust." This is not accurate. The Michigan Supreme Court found that the State's public trust interest in Great Lakes bottomlands stops at the water's edge in *Hilt* v *Weber*. As a result of this holding, the lone dissenting justice in *Hilt* v *Weber* expressly recognized that, under the majority's decision in that case, a Great Lakes riparian owner possessed fee title to all lands lying between the water's edge and the ordinary high-water mark, free of any public trust. See *Hilt* v *Weber*, at pp 229, 231 (Wiest, J, dissenting).

That Justice Wiest was correct in his observation regarding the absence of a public trust interest in Great Lakes beachfront property above the water's edge is confirmed by the many cases that describe the trust as attaching only to the "submerged lands" of the Great Lakes, including *Hilt* v *Weber* itself. See, for example, *Illinois Central R Co*, 146 US at 452 ("the state holds the title to the lands under the navigable waters of Lake Michigan"); *Hilt* v *Weber*, 252 Mich at 202 ("State has title in fee in trust for the public to the submerged beds of the Great Lakes within its boundaries"); and *People ex rel Director of Conservation* v *Broedell*, 365 Mich 201, 205 (1961) (title of State to "submerged lands" in the Great Lakes is impressed with public trust). Subsequent to the decision in *Hilt* v *Weber*, there has been no Michigan case holding that the public trust applies to dry land above the water's edge.

Improper Claims of Title and/or Public Trust Interests In Great Lakes Beachfront Are Being Made By the State of Michigan

Notwithstanding more than 70 years of Michigan judicial precedent following *Hilt* v *Weber*, officials of the MDEQ have been espousing the contrary position that Great Lakes beachfront between the water's edge and the ordinary high water mark is either owned by the

State outright, or is impressed with the public trust. In so doing, the MDEQ appears to rely on only two authorities: OAG, 1977-1978, No 5327, pp 518-520 (July 6, 1978) and the Great Lakes Submerged Lands Act.

OAG, 1977-1978, No 5327 is simply wrong. It begins correctly, by acknowledging the holding in *Hilt* v *Weber* that "when a purchaser acquires land from the Government on the Great Lakes, he takes title to the water's edge." Unfortunately, the next portion of the opinion fundamentally errs by assuming (without benefit of analysis or authority) that the Great Lakes Submerged Lands Act altered the boundary line of riparian ownership established in *Hilt* v *Weber* and moved it landward, from the water's edge to the ordinary high water mark. This lead the opinion to erroneously conclude that the land between the water's edge and the ordinary high water mark was owned by the State, and therefore impressed with the public trust. In fact, the Great Lakes Submerged Lands Act did no such thing, as is established below.

The Great Lakes Submerged Lands Act Does Not Establish Public Ownership or Existence of the Public Trust In Great Lakes Beachfront

1 The Statute Does Not Divest Private Landowners of Their Ownership "To the Water's Edge.

The legislative history of the Great Lakes Submerged Lands Act (now Part 325 of NREPA), pertinent Michigan Supreme Court cases, and the plain language of the statute itself compel the conclusion that Part 325 neither creates nor affirms any type of public ownership interest in Great Lakes beachfront. The first sentence of Section 32502 of the Act clearly supports this conclusion, stating merely that the lands covered or affected by Part 325 are those portions of the Great Lakes bottomlands "belonging to the State or held in trust by it." No other provision in Part 325 defines or delineates what bottomlands belong to the State or are held in trust by it. Thus, in order to determine what lands belong to the State of Michigan or are in held

in trust by it, one must necessarily look beyond the provisions of Part 325. Before considering what the law of Michigan provides in that regard, it is helpful to briefly review the legislative history of what is now Part 325.

In 1955 PA 247, the Legislature enacted the original version of Part 325, then known as the Great Lakes Submerged Lands Act. The lands which were covered by that Act were "Great Lakes bottomlands belonging to the State of Michigan or held in trust by it which have heretofore have been artificially filled in and developed with valuable improvements." Thus, in its original form, Part 325 applied to a very limited category of lands. The legislation was enacted to authorize the State to sell only artificially filled in and developed bottomlands. Prior to enactment of this statute, the State had begun legal proceedings against persons who had filled in bottomlands in shallow waters along the Great Lakes. This created a substantial uproar among the population, and led directly to this legislation (which was intended to fix the problem by allowing the State to sell the filled-in bottomlands to the persons controlling them). One commentator on the enactment of this provision described it as "a temporary relief measure for a limited class of squatters."

The Great Lakes Submerged Lands Act was subsequently amended in 1958, 1965, twice in 1968, 1982 and 1993. Despite all of the amendments, Section 32502's limited applicability only to lands otherwise belonging to the State or held in trust by it remained intact, and no provisions were added which could in any way be interpreted to create or affirm public ownership of Great Lakes beaches. While language defining the location of the ordinary high-water mark was added in a 1968 amendment, that language did not in any way *create* a State ownership interest in lands lying below that mark. Thus, the available legislative history confirms that this Act does not, and was never intended to, address title to Great Lakes beaches.

2 **The Statute Does Not Burden Great Lakes Beachfront Lying Above the Water's Edge With the Public Trust.**

In regard to the public trust, it must be considered that, when the Great Lakes Submerged Lands Act took effect in 1958, the Michigan regulatory authorities recognized that the Act did not purport to alter the movable boundary of private ownership – being the water's edge – established by the Michigan Supreme Court in *Hilt* v *Weber*. This administrative interpretation is confirmed by *People ex rel Director of Conservation* v *Broedell*, 365 Mich 201 (1961), wherein the court stated that,

> "Plaintiff [Department of Conservation] says that in administering the submerged lands acts, above-mentioned, it follows the 'philosophy' which it says is found in Hilt v Weber, 252 Mich 198 (71 ALR 1238), of 'a movable freehold,' that is to say, that the dividing line between the State's and the riparian owners' land follows the water's edge or shoreline at whatever level it may happen to be from time to time."

An examination of the transcript of the testimony referred to by the court in *Broedell* discloses that the Chief of the Lands Division of the Department of Conservation did indeed so testify. This in turn confirms that the Attorney General's 1978 interpretation of the Great Lakes Submerged Lands Act in OAG, 1977-1978, No 5327 was not only contrary to law, but also contrary to nearly two decades of administrative interpretation.

Great Lakes Beachfront: Regulatory Takings Claim

The ownership claims being advanced by the MDEQ, which are apparently based solely on an erroneous interpretation of the Great Lakes Submerged Lands Act by the Attorney General in 1978, could subject the State to significant liability for the payment of just compensation in a takings action. For example, in *Peterman* v *DNR*, 446 Mich 177 (1994), the Michigan Supreme Court imposed liability for payment of just compensation on the State for the taking of lands lying lakeward of the ordinary high-water mark that were unnecessarily destroyed by the construction of a public boat ramp on adjacent property. The Court in *Peterman* explained that

riparian rights are protected under this State's takings jurisprudence, despite the State's interest in controlling the lakeshores:

> As property, riparian rights are protected by limits of the power of eminent domain. While it may be true that "public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations," the State may do so only "by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation."

Peterman, 446 Mich at 193 (citations omitted, emphasis added). The same conclusion had been reached in *Hilt* v *Weber* more than six decades earlier, when the Supreme Court explained:

> Under Federal law, when he bought, then, the purchaser from the government of public land on the Great Lakes took title to the water's edge. The State law became paramount on the title after it vested in a private person; but the State cannot constitutionally take away a vested title without compensation.

Hilt v *Weber*, 252 Mich at 206 (citations omitted, emphasis added).

If, as the State evidently claims and OAG, 1977-1978, No 5327 erroneously concluded, the 1968 amendment to the Great Lakes Submerged Lands Act defining "lands" in reference to the "ordinary high water mark" altered the boundary line of riparian ownership, then such amendment would have represented a drastic change from the common law rule announced in *Hilt* v *Weber*, and thereby effected an unconstitutional taking of the private property lying between the water's edge and the ordinary high water mark without just compensation.

And while this precise question has not yet been decided in Michigan, there have been rulings in other states that leave little doubt as to the outcome of such a case should one become necessary. See *Purdie* v *Attorney General*, 732 A2d 442, 447 (NH, 1999) (holding that an attempted legislative extension of public trust rights to the highest high water mark, where New Hampshire common law had previously limited the public trust to lands lying below the mean

high water mark, was "unconstitutional because it constitutes a taking of private property without just compensation"); *Bell* v *Town of Wells*, 557 A2d 168, 180 (Me, 1989) (holding that a state statute purporting to expand permissible public trust uses of inter-tidal lands so as to include recreational uses, in addition to fishing, fowling and navigational uses permitted under pre-existing common law, was an unconstitutional taking of private property without just compensation).

Conclusion

The risk to the State is real. The MDEQ must cease claiming that the State of Michigan has title, or even public trust rights, in Great Lakes beachfront lying landward of the water's edge. If it does not, the State will become liable for the payment of just compensation to landowners whose fee title MDEQ seeks to usurp for the State's benefit.