

MEMORANDUM

TO: City Manager Bobkiewicz; Mayor Hagerty; City Council; Michelle Masoncup
FROM: Jeffrey P. Smith
DATE: July 30, 2018
RE: Lincoln Street Beach

It is proper for the City and Northwestern University to have a mutual understanding as to ownership, use, and maintenance of the beach areas east of Campus Drive, south of Lincoln Street, near the north end of campus and the City waterworks. Numerous citizens, however, have asked me to provide input on the 7/20/18 staff memo re-included in the 7/30/18 City Council packet. Negotiations and any MoU should be based on fact. Numerous statements in the 7/20 memo are incorrect. Following are excerpts from the memo, in memo order, with comments.

“Previously known as the Northwestern Beach, beach access prior to 2018 was restricted to Northwestern Students.”

Not quite accurate. First, Lincoln Street Beach and Northwestern Beach aren’t the same. Historically, predating the NU lakefill, narrow beach existed along most of the original shoreline, interrupted by piers and jetties. In the aerial shot below, beach is visible between Lincoln and Colfax, and perhaps east of the waterworks. One reached it by walking down Lincoln.



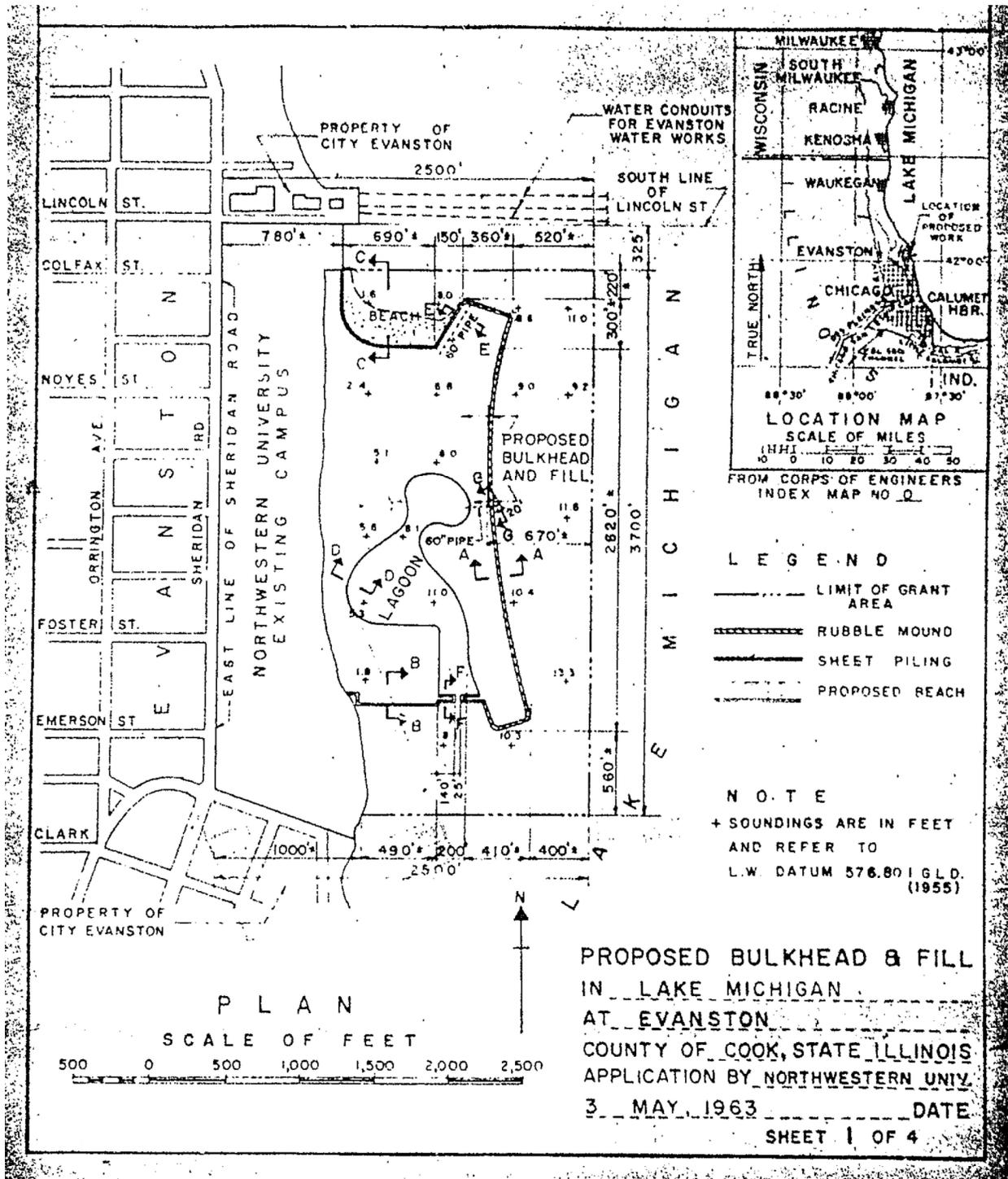
Left: aerial shot of the NU campus taken between 1955 and 1961. The shoreline of beaches adjacent to north campus was well west of the city water plant and the “reservoir parking lot” south of that. One could literally throw a stone from Bobb or McCulloch residence halls (just north of an extension of Dartmouth Pl.) into the water about 100’ away. Note also that the large groin to hold sand for Lighthouse Beach did not exist.



The 1947 postcard above – with buildings such as Bobb, McCulloch, and Sargent not yet built -- shows, similarly, that the natural shoreline was barely past the east side of the Tech institute. The excerpt below from a fanciful 1927 campus map, while not exactly to scale, documents the campus as narrow, the natural shoreline as, again, not far from the row of fraternity houses.



The beach created and known as the Northwestern Beach was part of the original plan for the 1960s lakefill, but was limited in size, and consisted primarily of a crescent of sand extending on its SE end from west-southwest of the peninsula that later hosted the observatory, and terminating on its northwest end at approximately the northern edge of the 1961 "conveyance" line, which the statute purporting to convey set at 325' south of the line of Lincoln Street (roughly an extension of Colfax). See the map below from Northwestern's 1963 application for the original fill.



As to access: through at least the 1970s, there was no large metal fence along Campus Drive as now. A fragile, ungated snow fence existed. Access was relatively unrestricted. Anyone could walk onto the beach, either directly from the parking lot (paved during the 1960s?) due east of Bobb and McCulloch, or by clambering down from the rocks by Lindheimer Observatory. More recently, Northwestern did fence off the area with sturdier metal, but near the two semi-permanent bathroom structures that formerly existed north of the aquatic center and then the parking garage, posted signs indicated that the public could enter by paying a daily fee. A ticket-booth type structure for that purpose existed in 2015. I also believe that the public was permitted on the beach if they had purchased a pass to the sports facility (\$17/day, or \$480/year).

During discussion of the new Ryan football facility built on the beach, it was pointed out to Northwestern that they had fenced off and were exercising control and exclusion over lands that should be public. During that timeframe, NU began discussing the beach with the City.

“Since the landfill, sand has accreted, or aggregated, north of the landfill parcel of land creating the Lincoln Street Beach in the 1960’s. The Lincoln Street Beach has historically been used by NU students throughout the years.”

Again, not quite accurate. The beach north of the landfill was first created not by accretion but by hauling large amounts of sand there, including from the Indiana Dunes, which provoked the ire of at least one Illinois U.S. Senator, and a lawsuit. Second, as seen above in the plans, the beach that was built barely extended up to Lincoln Street.



Left: In this photo taken during 1960s construction, the limited extent of the original lakefill beach, extending only up to about the Colfax line (as per the plans submitted), can be seen.

In this aerial view on a 1972 postcard you can see the first buildings erected east of Campus Drive. The “Northwestern Beach” did not, at its northern tip, even with a decade of accretion, extend as far east as the water works peninsula, but remained a crescent with narrow ends.



Left: In this aerial view found online, dated 1977, accretion and low lake levels create a larger beach. The ineffective fence along the line of the original proposed beach fill is visible.

“In 2015, NU underwent an extensive permitting process with the Illinois Department of Natural Resources (“IDNR”) to construct its new lakefront athletic complex.”

Permitting was a joint process with both IDNR and the U.S. Army Corps of Engineers.

“Throughout the years, various accretions and shifts of the shoreline have resulted in uncertainty as to ownership and title to the Lincoln Street Beach. ...”

The bed of Lake Michigan is public land that is held by the State of Illinois in trust for the people of Illinois. This “public trust doctrine” is fundamental law that predates Illinois statehood and traces back to Roman jurisprudence, if not earlier. It is enshrined in U.S. Supreme Court decisions such as *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) (invalidating, on public trust grounds, legislative conveyance of Lake Michigan submerged lands to railroad company) and Illinois Supreme Court cases such as *People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65 (1976) (invalidating, on public trust grounds, legislative grant of Lake Michigan submerged land to steel company). In more recent times the doctrine has been affirmed in local cases such as *Lake Michigan Federation v. U.S. Army Corps of Engineers*, 742 F.Supp. 441 (N.D. Ill. 1990) and *Friends of the Parks v. Chicago Park District*, 2014 CV 9096 (N.D. Ill.), the Lucas Museum case. The doctrine is also part of Illinois statutory law through laws such as the Rivers, Lakes, and Streams Act, 615 ILCS 5/24, and the Submerged Lands Act, 5 ILCS 605/0.01. Under the public trust doctrine, government does not have the power to give or sell public land to a private entity for primarily private purpose. Nor can such waters or formerly submerged waters become private through neglect or the passage of time.

A riparian owner may under some circumstances acquire additional land that naturally accretes. However, Illinois regulators have long considered artificial accretions of sand along property, on an area that was previously lake bed, to remain in the public trust; this was reflected in standard condition #2 in IDNR’s Office of Water Resources public waters permits, and Condition 6 of IDNR’s General Permit No. 1-LM (1983, as modified 1999) which states that a shoreline construction permit gives the permittee no rights to accretion caused by a project. *See also* Illinois Coastal Management Program, Ch. 5, Shore Access and Recreation (2011), https://www.dnr.illinois.gov/cmp/Documents/5_Access_Recreation.pdf, at 58 (“any beach area that is artificially accreted beach is legally public”). This IDNR position is consistent with Illinois case law, which has long held that a riparian owner is not entitled to accretions which he has caused by artificial means, *Brundage v. Knox*, 117 N.E. 123 (Ill. Sup. Ct. 1917).

As a result, any artificially accreted land north of the northern boundary of the 1961 conveyance, and east of the water’s edge (as it existed prior to the landfill), is clearly public trust land and, like Lake Michigan generally, should be considered property that IDNR controls as trustee for the public benefit.

The above law is clear. It was never possible for any part of the Lincoln Street Beach to become, validly, private property.

“Furthermore, the portion of the beach that is part of the City Water Plant Complex has not

had public access for many years. Cook County records indicate that Lincoln Street Beach falls well within the municipal boundaries of the City of Evanston.”

This is largely correct. Concurrent with State title, riparian municipalities, along with the county, have some police power jurisdiction over their shores and the offshore waters. It was conceivably possible, if public rights were adequately safeguarded and not alienated, for access to either the “Northwestern Beach” or the accreted lands north of that original beach to be limited by the City of Evanston. Some efforts may have been made in that regard. However, it was easy until recently to enter the beach from the water works complex, and the presence of beer cans and extinguished campfires that I’ve personally observed there make me certain that it was so used. Moreover, all of the beach was accessible by water.

“Preliminary research indicates that the Lincoln Street Beach has been viewed as a Northwestern Beach throughout the years from 1962 to 2015.”

By whom? At least part incorrect. As explained above, part of the present “Lincoln Street Beach” – the part north of the Colfax line -- didn’t exist in 1962, and barely existed in 1972. It also waxed and waned over decades depending on water levels. In the last 20 years, during periods of regional drought and low lake levels, significant dunes vegetation grew up in the northern portion east of Campus Drive, as well as in the “corner” nearer the aquatic center.

“Access to the beach was historically restricted to NU students and staff; the university did not offer access to the general public prior to the construction of the athletic complex.”

It is correct that, over time, most patrons were students or NU staff. But my understanding has been that Evanston residents could visit the “Northwestern Beach” and that some did. NU, like most large private research institutions, does not gate or screen visitors to the campus in general; the public is generally able to enter the grounds of the general campus, including the lakefill, as invitees. As noted, frequently it has been possible to enter the beach at either end. At least a decade ago I recall blog accounts touting it as the best beach in Evanston due to low levels of use. The erection of large fences, ticket or token booths, and bathrooms to regulate the public was relatively recent. NU in the 20 years prior to 2014 seemed to take a number of more territorial steps, some subsequently relaxed. Note: at least some of the accreted dunes areas were difficult to enter, and no human at all – NU or non-NU -- seemed to use the vegetated areas.

“To date, the City does not have any documentation providing proof of ownership but will continue to research the ownership of the beach parcel and tentatively plans to return to the City Council with an update in September 2018.”

This statement may be correct as far as it goes. The City should ask for copies of all deeds, receipts, surveys, tax records, minutes, and the like, so that the residents of Evanston have full information as to this public acreage, and should not negotiate without full information.

Some additional illustrative photos follow.



(above): From north of the "conveyance line," looking north to Lincoln St., in 2015; a chain-link fence barred the public from public lands to the east. (below, this page and following): The same fence, looking east in 2015 from Campus Drive between Colfax and Lincoln.



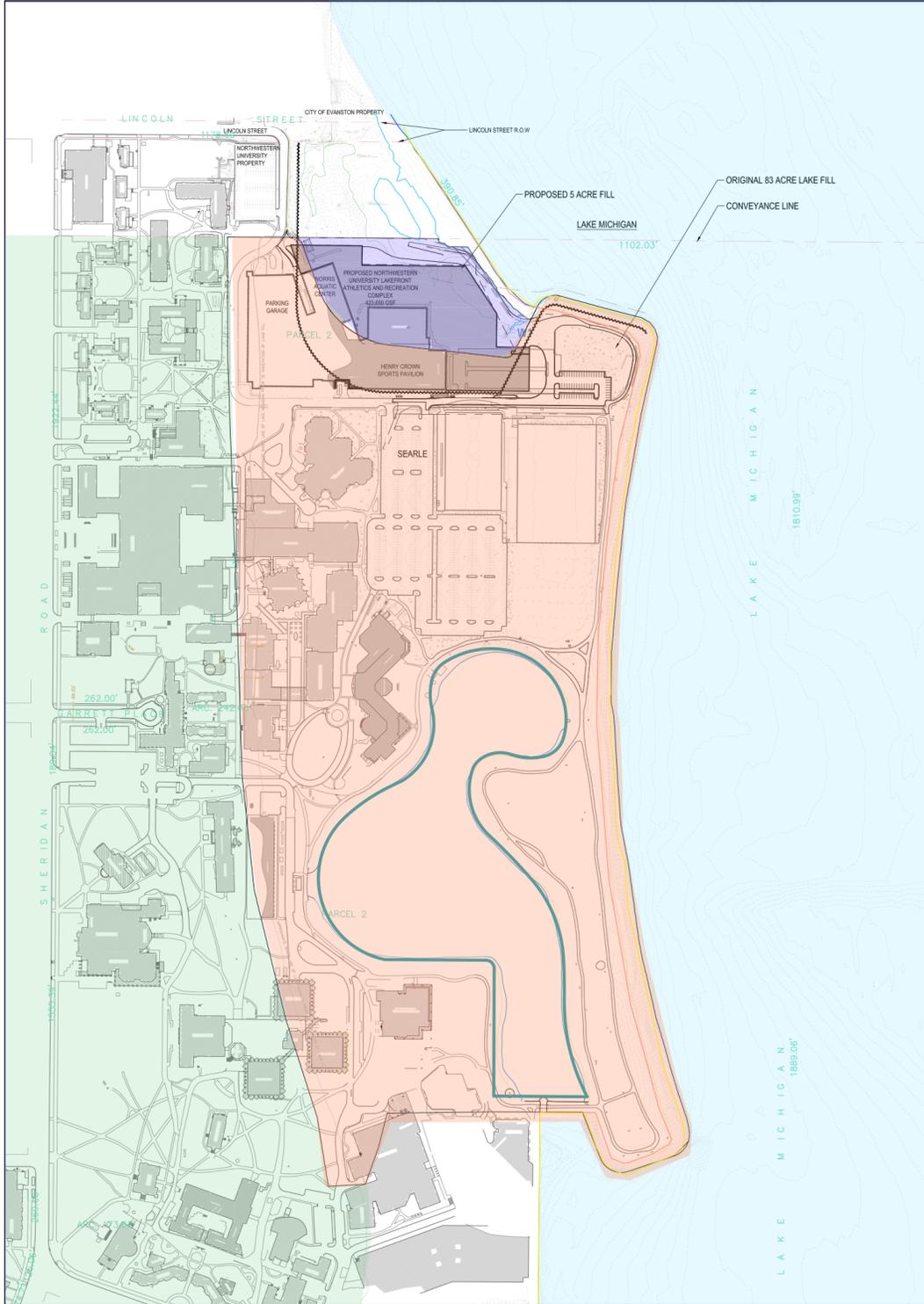


North of the gate stood two constructed bathrooms (*right*).

The following page shows the map that NU submitted with the application for the Ryan indoor practice complex and athletic offices.

At that time, I wrote, “There once was a Lincoln Beach, according to longtime residents, that was a free City beach. The City should not have to negotiate for access to a beach that the public should own, and any such ‘access’ is neither mitigation nor consideration.”





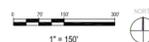
NOTE:

- 577.50 FT IGLD85 = LOW WATER DATUM (LWD) = -0.93 FT ECD
- 0.0 FT ECD = 578.43 FT IGLD85
- 3.07 FT ECD = ORDINARY HIGH WATER MARK (OHWM) = 581.50 FT IGLD85 = 4 FT LWD
- 6.02 FT ECD = 100 YEAR FLOODPLAIN = 584.45 FT IGLD85 = 6.95 FT LWD
- OHWM TO 1961 TOE OF SLOPE = 26,950 SF = 0.62 ACRES
- OHWM TO 1961 OHWM = 217,950 SF = 5.00 ACRES
- OHWM TO 1961 SHEETPILE = 342,750 SF = 7.87 ACRES

- LAKE MICHIGAN 3.07' ORDINARY HIGH WATER MARK
- - - CONVEYANCE LINE
- FEMA 100 YEAR FLOODPLAIN
- WATERLINE EDGE
- SHEETPILE ALIGNMENT FROM 1961 PERMIT DOCUMENTS
- ORDINARY HIGH WATER MARK FROM 1961 PERMIT DOCUMENTS
- - - TOE OF SLOPE FROM 1961 PERMIT DOCUMENTS

- ORIGINAL LAND
- ORIGINAL 83 ACRE LAKE FILL
- PROPOSED 5 ACRES FILL
- LAKE MICHIGAN

IDNR OWR EXHIBIT



In context of the graphics from the previous decades, the schematic of the Ryan center development shows that that recent project essentially swallowed up all of the “Northwestern beach” originally created by the early 1960s lakefill project.

By contrast, the following pictures show the accreted area that was not historically used by NY students – or anyone else – as beach. I took the first photo during an unofficial visit and the others when IDNR made a site visit in 2015.

Below: The dunes area on which the Ryan sports center was eventually constructed.





Above: A view from the middle of the accreted dunes formed east of Campus Drive, looking north toward the City water plant. *Below:* IDNR staff in 2014 were able easily to walk out to a point well east of the easternmost extent of the water plant property. The north end of the accreted area was vegetated dunes, not being used as beach.





Above: View SSW from the same area as last picture, showing the large expanse northeast of the aquatic center (the lower beige building) and parking structure.

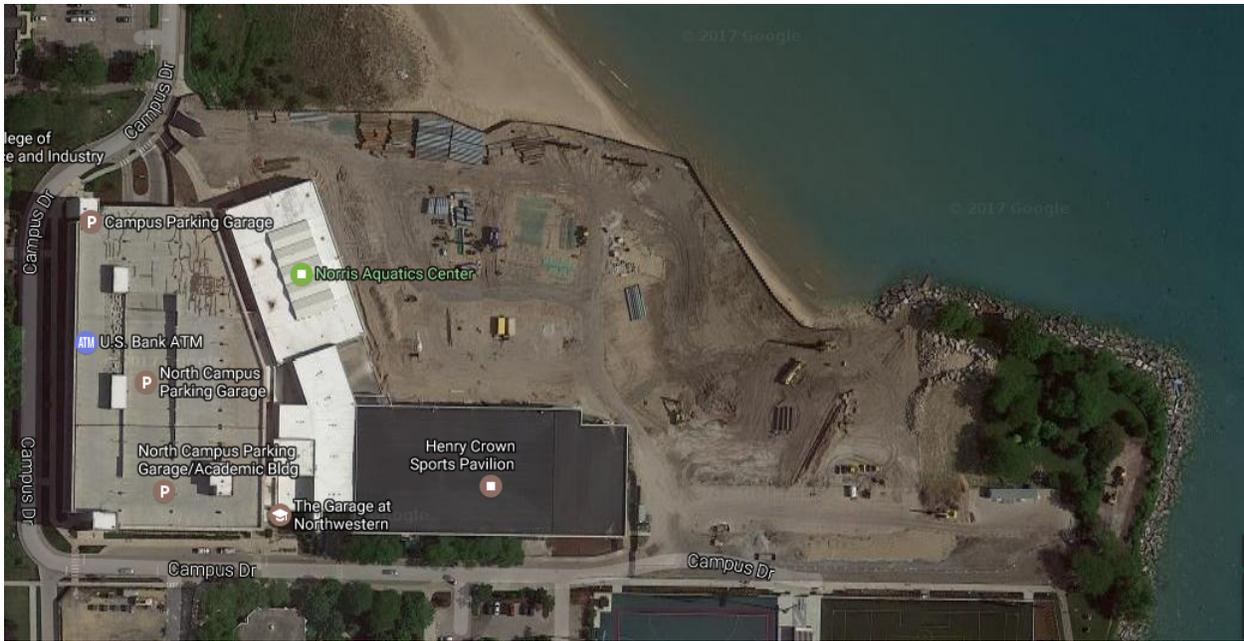


Left: In fall 2014, high water and waves were eating away at what can be seen as many feet of thick dunes. This picture was taken from the water's edge side, facing west.



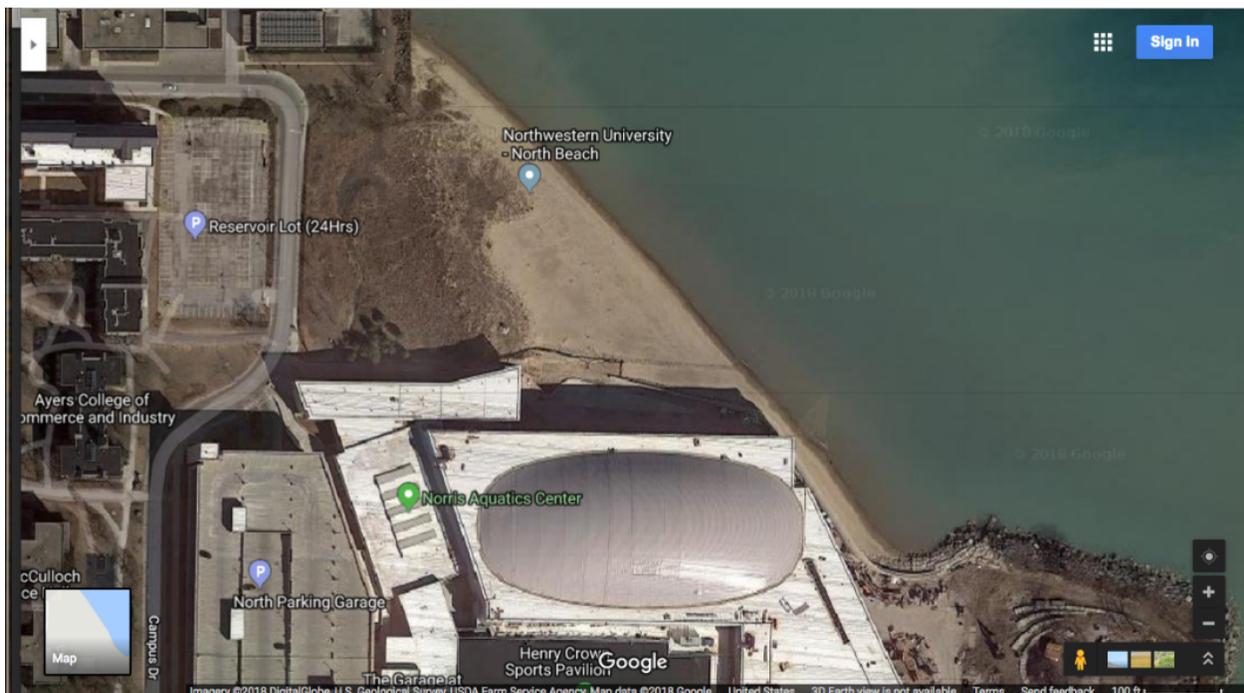
Above: Looking north-northwest toward the City water plant from the then-termination of walkable beach in October 2014. At that point, a considerable amount of sand and dunes extended beyond the water plant at Lincoln. *Below:* Satellite photo, c. 2015, pre-construction.





Above: Satellite photo taken during construction of athletic center, showing former beach converted into construction site and preliminary removal of one building north of sports pavilion.

Below: Satellite photo taken 2018, showing completed center. Note that even with high wave levels, the vegetation has protected much of the sand from washing away. For reference, the 1961 “conveyance line” is approximately where the squiggly path, south of what Google calls the “Reservoir” parking lot, meets Campus Drive. I.e., the “conveyance line” is about where the northernmost “bump” of the steel piling/bulkhead north of the athletic complex reaches.



Flora and fauna issues

Fish swam up to the shoreline before construction of the fill. Obviously, fish can no longer swim in the acreage of lake filled in the 1960s. Construction of the lakefill necessarily deprived aquatic life of roughly 85 acres of habitat and/or water in which to swim, feed, etc.

The creation of new land by accretion further reduced acreage available for fish and for human aquatic activity but did eventually create new shelter, food, and habitat for land-based insects, birds, and animals. Also, NU spent a reported \$1 million in the early 1970s on lakefill landscaping; many of those plantings are now mature (although many have also fallen to the bulldozer as new structures and buildings have taken over green space).

The overall ecological effect of the lakefill is insufficiently studied, at least not in readily searchable online publications. The construction of buildings in flyways, ditto.

The ecological descriptions of the site for the athletic complex in the permit application materials marginalized and never fully conveyed the scope and uniqueness of the dunes area that developed north of the lakefill over the past several decades. As seen in the foregoing pictures and satellite screen shots, significant area of well-developed, well-rooted flora, that supported fauna, occupied what is being referred to as Northwestern Beach and/or Lincoln Street Beach. I do not know how much, if any, of the plants within these areas are opportunistic volunteers as opposed to purposefully planted by NU or others; however, the total effect was an area with few parallels on the North Shore, nor southwards. The dunes at Montrose Beach, many miles to the south, are perhaps the next equivalent.

On multiple visits in summer 2015 I observed at least 100 shorebirds, of several different species, on the beach including the athletic center project site. I saw and heard several different songbirds in the dunes vegetation including red-winged blackbirds and a cedar waxwing atop a conifer. I assumed there were nests among the several acres of vegetation. Numerous species of bees, wasps, and other pollinators were visible; many moths and butterflies were seen, as well as numerous yellow-and-black-winged grasshoppers and many Monarch butterflies, feeding on what looked like a cultivar of butterfly milkweed, and on Joe Pye Weed, and appearing to look for egg-laying sites on host milkweed whose species I could not readily identify. However, the lack of maintenance also was reflected in an abundance of invasive species such as ragweed, Queen Anne's lace, and teasel.

A related issue is whether the City has been properly requesting consultation with IDNR under 17 Ill. Admin. Code §1075.30 to ensure that no threatened or endangered species are impacted by changes to the acreage that formed over the past half-century.

Summary: Ownership of Lincoln Street Beach is not a significant issue, although exact determination of the old shoreline might require better photos and surveys than I have. At minimum, everything east of Campus Drive, north of the "conveyance line," should be considered public. Ownership south of the conveyance line has never been litigated but the public trust doctrine dictates that it is public. Students, true, were main users of Northwestern Beach, but that use should never have been exclusive. The university has now replaced most of Northwestern Beach with a building. An expanded Lincoln Street Beach, a fortunate accident of human activity, is now mature albeit neglected dunes, and should not suffer as a result.

-- JPS