STATE OF MICHIGAN

IN THE COURT OF APPEALS

2000 BAUM FAMILY TRUST, BAUM FAMILY TRUST; JOSEPH BEAUDOIN and SANDRA BEUDOIN, husband and wife, ADELE MEGDALL REVOCABLE TRUST; PAUL NOWAK and JOAN NOWAK TRUST; MARILYN ORMSBEE; MARK SCHWARTZ and WENDY SHWARTZ, husband and wife; and THOMAS THOMASON,

Plaintiffs/Counter-Defendants/ Appellants,

v

WILLIAM and JUDY BABEL, husband and wife; JAMES CAHILL and GLORIA CAHILL, husband and wife; JAMES EHINGER and MARY ANN EHINGER, husband and wife; DANIEL ENGSTROM and PENNY ENGSTROM, husband and wife; THOMAS HELZERMAN and PATSY HELZERMAN, husband and wife; SHAUN MAC MILLAN and RACHEL MAC MILLAN, husband and wife; DAVID OSHABEN and PAMELA OSHABEN, husband and wife; MARION PARKER; SALLY J. SIPPEL, DOUGLAS H. PHILP, JR. and NANCY M. PHILP, husband and wife; ARTHUR A. RANGER, Trustee of the Arthur A. Ranger Trust; PATRICIA L. RANGER, as Trustee of the Patricia L. Ranger Trust; GAYLE SHELDON and SHERRY SHELDON, husband and wife; and CHARLEVOIX COUNTY ROAD COMMISSION,

Defendants/Counter-Plaintiffs/Appellees,

Court of Appeals No. 284547

Charlevoix County Circuit Court
Case No. 07-61121-CH
Honorable Richard M. Pajtas

AMICUS CURIAE BRIEF OF THE MICHIGAN WATERFRONT ALLIANCE AND THE HIGGINS LAKE PROPERTY OWNERS ASSOCIATION

****ORAL ARGUMENT REQUESTED****

and

AL GOOCH and ELIZABETH GOOCH, husband and wife, JESSE HALSTEAD and LINDA HALSTEAD, husband and wife; MICHAEL MAC MILLAN and KAYE MAC MILLAN, husband and wife, ROBERT SCHOFIELD and KATHY SCHOFIELD, husband and wife; RICHARD BERGLUND and LINDA BERGLUND, husband and wife, ROGER NESBURG and ANNETTE NESBURG, husband and wife, THOMAS E. BERGMANN; LOUIS M. SAPPS; ELTON WILKERSON and JUDY WILKERSON, husband and wife; MARY HENSEN; and DAVID NIEWICK and WENDY NIEWICK, husband and wife,

Intervening Defendants/Counter-Plaintiffs/Appellees,

and

CHARLEVOIX TOWNSHIP; EDWARD ENGSTROM; RICHARD SAYWARD, JOHN DOE, and JANE DOE,

Defendants-Appellees.
_____/

Scott T. Beatty (P24202)
Attorney for Plaintiffs
111 State Street, Suite I
Charlevoix, Michigan 49720
(231) 547-4059

Joel D. Wurster (P48708)
JOEL D. WURSTER, PLC
Attorneys for Defendant Charlevoix County Road Commission
P.O. Box 2450
Petoskey, Michigan 49770
(231) 347-4988

Edward F. Engstrom (P42437)
BARRON & ENGSTROM, P.L.C.
Attorneys for Defendants/Counter-Plaintiffs Daniel and Penny Engstrom and Arthur Ranger Trust and Patricia Ranger Trust
309 Petoskey Avenue
P.O. Box 309
Charlevoix, Michigan 49720
(231) 547-9950

Richard E. Joseph (P392240)
Attorney for Defendant Charlevoix Township
203 Mason Street
Charlevoix, Michigan 49720
(231) 547-0099

Allen R. Telgenhof (P43114)
RUNNING, WISE & FORD, PLC
Attorneys for William & Judy Babel, James Cahill & Gloria Cahill, James & Mary Ann Ehinger, Thomas & Patsy Helzerman, Shaun & Rachel Mac Millan, David & Pamela Oshaben, Gayle & Sherry Sheldon, Marion Parker; Sally J. Sippel, Douglas & Nancy Philp, Al & Elizabeth Gooch, Jesse & Linda Halstead, Michael & Kay MacMillan, Robert & Kathy Schofield, Richard & Linda Berglund, Roger & Anisette Newburg, Thomas Bergman, Louis Sape, Elton & Judy Wilkerson, Mary Jensen, and David & Wendy Niewick
201 State Street
P.O. Box 490
Charlevoix, Michigan 49720
(231) 547-8990

Hal O. Carroll (P11668)
VANDVEER GARZIA, P.C.
Attorneys for Plaintiffs-Appellants
1450 West Long Lake Road, Suite 100
Troy, Michigan 48098-6330
(248) 312-2800

Michael C. Levine (P16613)
FRASER TREBILCOCK DAVIS & DUNLAP. P.C.
Attorneys for Amicus Curiae CRAM
124 West Allegan, Suite 1000
Lansing, Michigan 48933
(517) 482-5800

William Carey (P31602)
CAREY & JASKOWSKI, PLLC
Co-Counsel for Amicus Curiae Michigan Waterfront Alliance and Higgins Lake Property Owners Association
2373 S I-75 Business Loop
P.O. Drawer 665
Grayling, Michigan 49738
(989) 348-5232

Clifford H. Bloom (P35610)
LAW, WEATHERS & RICHARDSON, P.C.
Co-Counsel for Amicus Curiae Michigan Waterfront Alliance and Higgins Lake Property Owners Association
800 Bridgewater Place
333 Bridge Street, N.W.
Grand Rapids, Michigan 49504-5320
(616) 459-1171

_____/

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii
STATEMENT OF APPELLATE JURISDICTION iv
AMICUS CURIAE'S STATEMENT OF QUESTIONS PRESENTED v
STATEMENT OF FACTS vi
IDENTITY OF THE AMICUS CURIAE vii
STATEMENT OF THE INTEREST OF THE AMICUS CURIAE ix
I. INTRODUCTION 1
A. The Case Law Regarding this Type of Parallel Road is Well-Settled 1
B. The Impact of any Final Decision by this Court Will Have Statewide Impact and Significance 2
C. The Need for Certainty in Real Property Matters 4
D. "Be Careful What you Wish for … " 6
II. ARGUMENT 7
A. Does a Statutory Dedication of a Road or Public Way Convey a Fee Simple Interest to the Accepting Municipality? 7
1. Standard of review 7
2. A statutory dedication of a public road or way does not convey fee simple title 7
B. Does a Statutory Dedication of a Public Way Create a Determinable Fee? 15
1. Standard of review 15
2. A statutory dedication of a platted public way or road creates a limited determinable fee in favor of the accepting municipality 15
C. Do the Owners of the Platted Lots Fronting on a Public Way or Road Own the Adjacent Riparian Lands? 17
1. Standard of review 17
2. The owners of lots adjacent to a platted lakeside parallel public road or way control the riparian rights opposite their lots 17
D. Attempts by Appellees and Amicus Curiae CRAM to Distinguish Away Existing Controlling Case Law are Unsuccessful 22
E. The First Tier Lots are Riparian Even Though the Legal Descriptions do not Expressly Extend to the Water's Edge 26
F. The Law Allows Two Different Legal Interests to Occupy the Land Comprising Beach Drive at the Same Time—the Charlevoix County Road Commission's Limited Base Fee and the First Tier Lot Owners' Ownership of the Riparian Rights 26
III. CONCLUSION 28

INDEX OF AUTHORITIES

Page

Cases

Backus v City of Detroit, 49 Mich 110; 13 NW 380 (1882) 17
Baker v Johnston, 21 Mich 319; 1 Mich NP Supp SCIV (1887) 13
Bissell v Collins, 28 Mich 277; 446 NW2d 91 (1873) 12
City of Leadville v Bohn Mining Co, 37 Colo 248; 86 P 1038 (1906) 13
County of Wayne v Miller, 31 Mich 447 (1875) 12
Croucher v Wooster, 271 Mich 337; 260 NW 739 (1935) ..... passim
Cuming v Prang, 24 Mich 514 (1872) 11, 12
Detroit v City Railway, 76 Mich 421; 43 NW 447 (1889) 11
Dorothy A Oliver Revocable Trust v Denton Twp (unpublished Michigan Court of Appeals No. 230765 decided August 13, 2002) 22
Douglas v Harting (Michigan Court of Appeals Case No. 277892, 2008 WL 5273425, decided December 18, 2008) 3
Eyde Brothers Development Co v Eaton Co Drain Comm, 427 Mich 271; 398 NW2d 297 (1986) 14
Field v Village of Manchester, 32 Mich 279; (1875) 16
Glass v Goeckel, 473 Mich 667; 703 NW2d 58 (2005) vii
Hall v Hanson, 255 Mich App 271; 664 NW2d 786 (2003) 15
Higgins Lake Property Owners Assn v Gerrish Twp (Michigan Court of Appeals Case Nos. 262494, 262533, and 262717, 2005 WL 2727702, decided October 20, 2005) 3
Higgins Lake Property Owners Assn v Gerrish Twp, 255 Mich App 83; 662 NW2d 387 (2003) 2, 19, 28, 29
Higgins Lake Shores Lakefront Property Owners v Lyon Twp (Michigan Court of Appeals Case No. 278894, 2008 WL 5076595, decided December 2, 2008) 2
In Re Petition of Albers, 113 Mich 640; 71 NW 1110 (1897) 11, 12, 13
Jonkers v Summit Twp, 263 Mich App, 278; 747 NW2d 901 (2008) 8, 14, 26, 28
Kempf v Ellixson, 69 Mich App 339; 244 NW2d 476 (1976) 16, 18, 19, 23
Kirchen v Remenga, 291 Mich 94; 288 NW 344 (1939) 8, 16
Kleiner v Wachowicz (Michigan Court of Appeals Case No. 244053, 244328, 2004 WL 258259, decided February 12, 2004) 3
Krause v Dept of Commerce, 451 Mich 420; 547 NW2d 870 (1996) 15, 16
Loud v Brooks, 241 Mich 452; 217 NW 34 (1928) 13
Magician Lake Homeowners Assn, Inc v Keller Twp Bd of Trustees, Michigan Court of Appeals Case No. 278469, 2008 WL 2938650 (July 31, 2008) ..... vii, 3
Mallory v Taggart, 24 Utah 2d 267; 470 P2d 254 (1970) 13
McCardel v Smolen, 71 Mich App 560; 250 NW2d 496 (1976), affirmed in part, vacated in part, 404 Mich 89; 273 NW2d 3 (1978) ..... passim
Michigan Central Park Assn v Roscommon County Road Comm'n, 2 Mich App 192; 139 NW2d 333 (1966) ..... passim

Mochel v Cleveland, 51 Ida 468; 5 P2d 549 (1930) 13
Neil v Independent Realty Co, 317 Mo 1235; 298 SW 363 (1927) 13
People v LaDuc, 329 Mich 716; 46 NW 442 (1951) 13
Rathbun v State, 284 Mich 521; 280 NW 35 (1938) 10
Scudder v Detroit, 117 Mich 77; 75 NW 286 (1898) 13
Sheridan Drive Assn v Woodlawn Back Property Owners Assn, 29 Mich App 64; 185 NW2d 107 (1970) 19, 23, 26
Thies v Howland, 424 Mich 282; 380 NW2d 463 (1985) ..... passim
Thompson v Enz, 379 Mich 667; 154 NW2d 473 (1967) 17
Twp of Dalton v Muskegon County Bd of Road Comm'rs, 223 Mich App 53; 565 NW2d 692 (1997) 27, 28
Village of Kalkaska v Shell Oil Co, 433 Mich 348 (1989) 14, 16, 17
Wyandott Savings Bank v State Banking Comm'r, 347 Mich 33; 78 NW2d 612 (1956) 10

Statutes

1887 PA 309 ..... passim

Rules

MCR 7.203(B)(1) iv

Other Authorities

Ballentine's Law Dictionary (3rd Ed, 1969) 20
Michigan Land Title Standards (5th Ed), Standard 24.5 22

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to MCR 7.203(B)(1).

AMICUS CURIAE'S STATEMENT OF QUESTIONS PRESENTED

I. Does a statutory plat dedication of a public way or road which runs contiguous/parallel to an inland lake constitute a conveyance of a fee simple interest in the land over which the way is platted, thereby conveying riparian rights to the accepting municipality.

Appellants say "No."
Appellees say "Yes."
The Trial Court says "Yes."
Amicus Curiae MWA and HLPOA say "No."

II. Does a statutory plat dedication of a public way or road convey fee simple title to the land comprising the way or road to the municipality?

Appellants say "No."
Appellees say "Yes."
The Trial Court says "Uncertain."
Amicus Curiae MWA and HLPOA say "No."

III. Does a statutory plat dedication of a public way or road create a very limited base or determinable fee in favor of the accepting municipality?

Appellants say "Yes."
Appellees say "No."
The Trial Court says "No."
Amicus Curiae MWA and HLPOA say "yes."

IV. Do the owners of a platted lot adjacent to a platted lakeside parallel road or way control and own the riparian rights opposite the public way or road adjacent to their respective lots?

Appellants say "Yes."
Appellees say "No."
The Trial Court says "No."
Amicus Curiae MWA and HLPOA say "Yes."

V. Is the Michigan appellate case law in this situation well-settled, such that it is governed by *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976), reversed in part, 404 Mich 89; 273 NW2d 3 (1978), *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), and progeny?

Appellants say "Yes."
Appellees say "No."
The Trial Court says "No."
Amicus Curiae MWA and HLPOA say "Yes."

STATEMENT OF FACTS

The Higgins Lake Property Owners Association and the Michigan Waterfront Alliance adopt the Statement of Facts as set forth in Appellants' Brief.

IDENTITY OF THE AMICUS CURIAE

The Michigan Waterfront Alliance ("MWA") is a Michigan nonprofit corporation. The MWA is a membership organization. It is comprised of both lake associations and individual members. Some of the lake association members of MWA include the following:

Arnold Lake Association
Burt Lake Association
Burt Lake Preservation Association
Clear Lake Property Owners Association
Clifford Lake Association
Corey Lake Association
Crockery Lake Association
Deer Lake Property Owners Association
Derby Lake Cottage Owners Association
Derby Lake Property Owners Association
Diamond Lake Association
Dinner Lake Association
Eagle Lake Improvement Association
Elk-Skegemog Lakes Association
Farwell Lake Association
Fish Lake Association
Higgins Lake Property Owners Association
Hubbard Lake Improvement Association
Indian Lake Association of Vicksburg
Island, Lower Long & Forest Lake Association
Klinger Lake Association
Lake Avalon Association
Lake Avalon Property Owners Association
Lake Fenton Property Owners Association
Lake Lansing Property Owners Association
Lake Lapeer Property Owners Association
Lenawee Lake Preservation League
Long Lake Preservation Association
Lower Herring Lake Association
Magician Lake Improvement Association
North Buckhorn Lake Association
Otsego Lake Association
Oxbow Lake Association
P.B.W.O.A., Inc.
P.J.C. Lakes Association
Paw Paw Lake Association
Payne Lake Association
Pentwater Lake Association
Pinecone Beach Association
Robinson Lake Improvement Association
Sand Lake Association
Shavehead Lake Association
Silver Lake Improvement Association
Three Lakes Association
Torch Lake Property Owners Association
Twin Lakes Improvement Association
Twin Lakes Property Owners Association
Vineyard Lake Association
Walloon Lake Association
West Lake Improvement Association
Windover Lake Property Owners Association

MWA represents, directly and indirectly, thousands of lakefront/riparian property owners throughout Michigan.[1] MWA has actively represented the interests of its members.

[1] As the Court well knows, although property rights associated with a lake are technically deemed "littoral" and rights associated with flowing bodies of water (such as rivers, streams, and creeks) involve "riparian" rights, courts and the general public alike often utilize the word "riparian" to refer to both types of rights. See *Thies v Howland*, 424 Mich 282, 288 (n 2); 380 NW2d 463 (1985); *Glass v Goeckel*, 473 Mich 667, 672; 703 NW2d 58 (n 1) (2005).

The Higgins Lake Property Owners Association ("HLPOA") is a Michigan nonprofit corporation. HLPOA has approximately 800 members, all of whom own lakefront property at Higgins Lake. HLPOA and its membership have devoted decades of effort and tremendous financial resources toward the protection of their riparian interests. See for instance:

Higgins Lake Property Owners Assn v Gerrish Twp, 255 Mich App 83; 662 NW2d 387 (2003)

Higgins Lake Property Owners Assn v Gerrish Twp (Michigan Court of Appeals Case Nos. 262494, 262533, and 262717, 2005 WL 2727702, decided October 20, 2005)

Jacobs v Lyon Twp (after remand), 199 Mich App 667; 502 NW2d 382 (1993)

Krause v Dept of Commerce, 451 Mich 420; 547 NW2d 870 (1996)

McCardel v Smolen, 71 Mich App 560, 562; 250 NW2d 496 (1976), affirmed in part, vacated in part, 404 Mich 89; 273 NW2d 3 (1978)

Kempf v Ellixson, 69 Mich App 339; 244 NW2d 476 (1976)

Michigan Central Park Assn v Roscommon County Road Comm'n, 2 Mich App 192; 139 NW2d 333 (1966)

Sheridan Drive Assn v Woodlawn Back Property Owners Assn, 29 Mich App 64; 185 NW2d 107 (1970)

Accordingly, in this Brief, Amicus Curiae MWA and HLPOA will refer to littoral and lakefront rights as "riparian."

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

Many of the individual members of MWA and HLPOA own lots at lakes in situations which are similar, if not identical, to the Appellants in the current case. A large number of the platted lots at Higgins Lake, as well as many of the other lakes at which members of MWA own property, are separated from the lake by a platted public street which runs parallel to the shoreline, as is the situation in the current case. Such lot owners have long assumed that their respective properties are waterfront/riparian lots. Should this Court uphold the decision of the Charlevoix County Circuit Court below in this case, it will have a devastating impact upon many members of MWA and HLPOA, as well as the owners of countless other "first tier" lots at lakes throughout Michigan. The turmoil (emotional, financial, political, and legal) which would result if this Court upholds the decision of the Trial Court below would be almost unfathomable for the large number of property owners involved statewide.

I. INTRODUCTION

A. The Case Law Regarding this Type of Parallel Road is Well-Settled

The somewhat surprising aspect about this litigation is that the major issue in this case (whether the "first tier" of lots adjacent to a public road right-of-way parallel to a lake are riparian) has long been settled. In a case factually similar to the current situation, this Court in *McCardel v Smolen*, 71 Mich App 560, 562; 250 NW2d 496 (1976), affirmed in part, vacated in part, 404 Mich 89; 273 NW2d 3 (1978) , held that under the Michigan Plat Act of 1887 (1887 PA 309) (the "1887 Plat Act"), where a public right-of-way is created by a plat and constitutes a parallel road along a lake, the first tier of lots adjoining the road is deemed to be waterfront and riparian. This Court stated in relevant part as follows:

> Who owns the riparian rights?
>
> The plaintiff front lot owners also own the riparian rights in the boulevard frontage. That issue was resolved in their favor by three previous decisions of this Court, all of which involved Higgins Lake property. *Michigan Central Park Association v Roscommon County Road Commission*, 2 Mich App 192; 139 NW2d 333 (1966), *Sheridan Drive Association v Woodlawn Backproperty Owners Association*, 29 Mich App 64; 185 NW2d 107 (1970), and *Kempf v Ellixson*, 69 Mich App 33; 224 NW2d 476 (1976). Each of those cases relied on *Croucher v Wooster*, 271 Mich 337 ; 260 NW 739 (1935). The cited cases support the trial judge's ruling that only the plaintiffs have riparian rights in the boulevard frontage.
>
> The defendants ask us to distinguish *Croucher* because the government in that case had only a highway easement, whereas Roscommon County is said to have a fee simple title to the boulevard property involved in this case under the terms of the plat act in effect when the subdivision plat was recorded. 1887 PA 309. Actually, that statute provided that the government would take a fee 'in trust to and for the uses and purposes therein [the plat] designated, and for no other use or purpose whatever.' Even if a distinction is possible we will not adopt it. There are problems with the *Croucher* rule, but an exception vesting the riparian rights in the public would create problems of its own—including the need to precisely define the underlying title in every case. *Croucher* at least offers uniformity, a more attractive feature than any offered by the defendants' proposed distinction. [71 Mich App 560, 565-565 (1976).]

Although other parts of this Court's decision in *McCardel v Smolen* were overturned by the Michigan Supreme Court (404 Mich 89; 94-95; 273 NW2d 3 (1978)), the above-noted portion of this Court's published decision from 1976 remains intact and is binding precedent. As discussed below, despite assertions to the contrary, the Michigan Supreme Court in *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), did not explicitly or implicitly overturn the above.

B. The Impact of any Final Decision by this Court Will Have Statewide Impact and Significance

Generally, there are two types of public roads adjacent to inland lakes in Michigan where lake access and usage controversies have arisen. The first type of public lake road is a so-called lake "road end," whereby a public road right-of-way ends more or less perpendicular to a lake. The second type of public lake road is what is present in the current case—that is, a public road right-of-way runs parallel to the shore of a lake, where there was no intervening land between the lake and the public road right-of-way when the road was created and there exists a first tier of lots fronting on the side of the road opposite the lake ("parallel roads"). The general distinction between such public roads was recognized by *Thies* at 295.

This Court is very familiar with the problems associated with public road ends at lakes, as many such road ends throughout the state have been extensively litigated and the case law is well-developed. The seminal case for public road ends at lakes is *Jacobs v Lyon Twp* (after remand), 199 Mich App 667; 502 NW2d 382 (1993). In addition, this Court has dealt with public road ends á la *Jacobs* in the following cases:

- *Higgins Lake Property Owners Assn v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003) .
- *Higgins Lake Shores Lakefront Property Owners v Lyon Twp* (Michigan Court of Appeals Case No. 278894, 2008 WL 5076595, decided December 2, 2008)

- *Magician Lake Homeowners Assn, Inc v Keller Twp Bd of Trustees*, Michigan Court of Appeals Case No. 278469, 2008 WL 2938650 (July 31, 2008).
- *Higgins Lake Property Owners Assn v Gerrish Twp* (Michigan Court of Appeals Case Nos. 262494, 262533, and 262717, 2005 WL 2727702, decided October 20, 2005).
- *Kleiner v Wachowicz* (Michigan Court of Appeals Case No. 244053, 244328, 2004 WL 258259, decided February 12, 2004).
- *Douglas v Harting* (Michigan Court of Appeals Case No. 277892, 2008 WL 5273425, decided December 18, 2008) .

Road end cases are very important to members of lake communities where road ends are present, but such road ends typically directly affect only a relatively limited number of riparian property owners—the two riparian lots immediately adjacent to a road end and potentially some other nearby riparian lots if the road ends lead to overcrowding in that portion of the lake.

This Court can essentially take judicial notice of the problems frequently associated with lake public road ends and the amount of litigation (and appellate case loads) bred by the use of such roads. However, the potential for an explosion in litigation and emotional controversies is much greater with regard to parallel roads, such as the road in the current case. Why? There are two main reasons. First, there has been limited litigation in the past over parallel roads regarding the riparian status of first tier lot owners since the overwhelming majority of riparian legal experts have considered this area to be well-settled by the case law based on *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935) , *McCardel v Smolen*, 71 Mich App 560 (1976), reversed in part, 404 Mich 89; 273 NW2d 3 (1978), and their progeny. If this Court were to effectively now overturn (or distinguish away) those long-followed cases, there will be a litigation explosion as first tier lot owners statewide who have understood for decades (or longer) that they are riparian property owners will no longer be deemed so and will undoubtedly decide to litigate. Second, there are many more lot owners directly affected by the status of parallel roads than perpendicular road ends at lakes. That is based on two factors. Parallel roads tend to

stretch for longer distances (hence, with many more first tier lots) than road ends (which are typically only 66 feet wide or less, with only one riparian lot on each side of the road). Also, even a cursory review of plats located on or adjacent to Michigan lakes demonstrates that there are many more parallel roads at lakes than perpendicular lake road ends.

C. The Need for Certainty in Real Property Matters

There are few areas of the law where the need for certainty is more important than real property matters. By all outward accounts, the area of the law regarding parallel road ends has been well-settled for at least 30 years or even longer. Based on *Croucher v Wooster* (decided 74 years ago) and *McCardel v Smolen* (decided 33 years ago), most people knowledgeable about this area have long known that where lots in a platted subdivision are separated from a lake (or the shore of a lake) by a public road right-of-way running parallel to the lake and the road was created by the plat, the first tier of lots are deemed waterfront and riparian, subject only to the rights of the public for travel on the public road right-of-way.

Thousands, if not tens of thousands, of first tier properties at lakes throughout Michigan have long been understood to be waterfront or riparian properties in parallel road situations, with corresponding private rights of dockage, boat moorage, boat hoists, swim rafts, and similar items and rights of usage. Those rights have long been reflected in the real estate market, with such first tier properties being bought and sold for premium prices due to their assumed waterfront or riparian status. Local tax assessments and municipal tax collections on such first tier lots are higher due to the long-believed riparian or waterfront status of such first tier lots. Long term investments have been made based on the reasonably-assumed lakefront status of those properties, as have expenditures for boats, dockage, shorestations, and similar items.

What would be the impact statewide if the owners of the numerous first tier lots on lakes throughout Michigan were suddenly told that their properties are not riparian or waterfront? What will their reasonable reactions be when they are confronted with a situation whereby the local county road commission would not only have the authority to prohibit the owners of those first tier lots from utilizing the lakefront adjacent to their respective lots for dockage, boat moorage, etc., but also the fact that the local road commission could, if it so chooses, allow backlot property owners or members of the general public to install docks, boat hoists, and swim rafts, and permanently moor boats along the lake frontage in front of their first tier lots? Not only would an appellate court decision seemingly overturning *McCardel v Smolen* (and perhaps even *Croucher v Wooster* and other published opinions of this Court) destroy the absolutely reasonable distinct investment-backed expectations of all the first tier lot property owners on lakes throughout Michigan and spark anger of a magnitude which is almost unthinkable, but there would be many other negative consequences as well. For example, county road commissions throughout Michigan would be at the epicenter of new political and legal battlefields with regard to any lakes in their jurisdiction with parallel roads, which would not otherwise have been the case. There would undoubtedly be a litigation explosion statewide whereby the owners of first tier lots would challenge every action that a local road commission makes with regard to dockage and boat moorage decisions. In counties where road commissions are elected by the voters, the political pressure regarding local road commission policies as to parallel roads would be extreme and numerous recall elections would be likely. In counties where members of the local road commission are not elected but appointed by the county board of commissioners, the political turmoil would likely engulf the members of the county board of commissioners who appoint the members of the local road commission. Overturning a

long-assumed, widely-held property right would have many far reaching consequences—both intended and unintended, foreseen and unforeseen.

D. "Be Careful What you Wish for … "

Many county road commissions throughout Michigan have long dreaded dealing with public road end situations. Most county road commissions do not have enough funds to adequately upgrade, maintain, or repair normal county roads, let alone being confronted with spending scarce public funds on road end battles at lakes. Should this Court agree with the Charlevoix County Circuit Court that first tier lot owners do not own the riparian or waterfront rights attendant to their respective lots, county road commissions throughout the state will become embroiled in dock and boat moorage disputes along parallel roads, both politically and via expensive litigation.

Both the Michigan Waterfront Alliance and the Higgins Lake Property Owners Association (and presumably other people who have followed this case) are somewhat perplexed as to why the Charlevoix County Road Commission and the County Roads Association of Michigan ("CRAM") are advocating the position which they take in this case—that is, that the county road commission effectively owns the soil located under a parallel public road right-of-way and the owners of the first tier of lots not only do not have any interest in the land underlying the road right-of-way, but are also not lakefront or riparian property owners. Presumably, if that is correct, the local county road commission is the riparian or lakefront property owner. Should the position being advocated by the Charlevoix County Road Commission and CRAM prevail on appeal, then presumably the county road commission in more than one county will be chagrinned at the outcome.

II. ARGUMENT

A. Does a Statutory Dedication of a Road or Public Way Convey a Fee Simple Interest to the Accepting Municipality?

1. Standard of review

This case issue involves a matter of statutory interpretation. Statutory interpretations are questions of law reviewed *de novo* on appeal.

2. A statutory dedication of a public road or way does not convey fee simple title

When ruling on the motion for partial summary disposition, the trial court below ("Trial Court") concluded that the public (via the Charlevoix County Road Commission) holds fee title to the land beneath statutorily-dedicated Beach Drive (the public road at issue).[2] The Trial Court came to the wrong conclusion on this issue, and as a result, ruled incorrectly on the motion.

The question of what kind of interest a statutory public road dedication (*i.e.*, created via plat) creates in favor of the accepting municipality is well-settled in this state. There is no confusion, and no split of authority.

The plat of North Charlevoix (which created Beach Drive) was made and recorded in 1911. Therefore, the 1887 Plat Act applies. The operative statutory language states:

> The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporated city or village, then in the township within the limits of which it is included in trust to and *for the uses and purposes therein designated, and for no other use or purposes whatever*. (Emphasis added.)

[2] At page 3 of the Trial Court decision, Judge Richard M. Pajtas stated, "A threshold issue is whether Beach Drive is an easement with fee residing in the front lot owners or whether the public holds fee title."

The initial question becomes one of statutory interpretation or construction. The principle or cardinal rule is to determine the legislative intent from reference to the statutory language itself, if possible.

Appellees and CRAM argue that a statutory base or determinable fee is indistinguishable from a fee simple title. Their argument that "the fee is the fee" asks this Court to treat all "fees" as if they are identical. This ignores both the 1887 Plat Act and the case law that has applied that statute to dedications.

Again, the 1887 Plat Act provides:

> The map … shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be designated therein for public use ... in trust to and for the uses and purposes therein designated, and for no other use or purposes whatever. [Emphasis added]

If the statute had ended at the words "vest the fee," then there might be some credence to the argument of Appellees and CRAM. But the statute goes on to impose rigid limits on the statutory fee thus created. The concluding phrase "for no other use or purposes whatever" demonstrates that the base or determinable fee is a very limited fee.

As this Court observed most recently in *Jonkers v Summit Twp*, 278 Mich App, 263; 747 NW2d 901 (2008):

> [P]latted public roads convey either a mere public easement or, at most, a "base fee" that amounts to little more than nominal title and no beneficial ownership whatsoever. [*Jonkers* at 278; emphasis added]

It is clear that the Michigan Legislature did not intend that the recordation of a plat under the 1887 Plat Act would constitute a conveyance to the municipality of a public roadway in fee simple absolute because the statute did not so say. The statutory conveyance or fee referred to in the 1887 Plat Act is the conveyance of a very limited "base fee." *Kirchen v Remenga*, 291 Mich 94, 112; 288 NW 344 (1939). It is a statutory fee subject to qualification or a condition

subsequent and is thereupon determinable. That condition or qualification is that the road be continued to be used as such and if such use be abandoned, the fee in the municipality would terminate.

The Legislature continued further and said that the determinable fee was held in trust to be used solely for the purposes stated in the dedication. By such language, the Legislature evidenced a further intent to limit the nature and extent of the interest of the trustee municipality to what was reasonably sufficient to exercise its responsibility for the dedicated item (here, road use only).

After making the estate defeasible and determinable and held in trust subject to such fiduciary responsibility, the Legislature (via the 1887 Plat Act) went on additionally to say that the fee was to be used for no other use or purposes than those designated, whatever. This language ("… for the uses and purposes therein designated, and for no other use or purpose whatsoever") evidences a clear legislative intent that the street or road so designated could not be used for any purpose in addition to or apart from the dedicated purpose (*i.e.*, here, for anything beyond road use). The Legislature was not satisfied that the use of the property received by the public be used for any other public use. If it were used otherwise than as just a road, then the fee in the municipality would terminate. The Legislature went further to state with specificity that such use (here, road use) was the exclusive purpose for which such conveyance would or could be utilized. The addition of this language reflects an intent to preclude the utilization of other uses or purposes in addition to those specifically designated in the plat dedication.

The "metes and bounds" description and drawing of a plat limit the horizontal boundaries of the estate conveyed. The conveyance in trust, subject to the conditions and qualifications and limited only to those uses and purposes, limit the trustee in utilizing the property to the extent

necessary to effect the purposes and uses designated and anything reasonably and necessarily incidental thereto. The dedication, as a practical matter, albeit with less precision, affects, defines, and limits the vertical interest in such property (the interest in the soil) received by the "trustee." The trustee municipality takes whatever fee is reasonably necessary for the maintenance and utilization of the road as a roadway and nothing more (under the language of the 1887 Plat Act, for "no other use or purpose whatever"). The statutory language reflects such legislative intent. Thus, unless the Defendants/Appellees in this case can prove that the riparian interests in the vicinity of Beach Drive were of a reasonable and practical necessity for the use or maintenance of the property as a street or road, the Trial Court was clearly wrong.

The Michigan Supreme Court in *Rathbun v State*, 284 Mich 521, 534; 280 NW 35 (1938), recognized that a statute which required conveyance by the state of "an absolute title and fee" would allow the state to convey less than the fee to the surface rights and to retain all other rights. The Court said that such statutory language did not preclude the reservation of minerals and the severance of the same from the surface.

> The term 'absolute' as used in the statutory language, 'absolute title * * * in fee,' refers to the nature of the title and not to the nature of the property included under such title. [*Rathbun* at 534.]

The last phrase of the 1887 Plat Act "and for no other use or purpose whatever" was intended to have the effect of a reservation of so much of the estate as was not otherwise reasonably necessary for the uses and purposes in the plat dedication (here, road use only). Such language would otherwise be without purpose, and such an interpretation would be contrary to the rule of statutory interpretation which requires that meaning should be given to every word and phrase and that every word and phrase has some purpose. *Wyandott Savings Bank v State Banking Comm'r*, 347 Mich 33; 78 NW2d 612 (1956).

Municipalities have no proprietary interest in the land underlying a road or street, nor does it act as a municipality's own private property. A municipality acquires no beneficial interest in the land dedicated to the public use as a road or street. It has, in the dedicated public road or street, no title or interest of which it can divest itself by deed, lease, or other conveyance. The use of such land has already been determined by the dedication to the public use. By constitution and statute, the supervision and reasonable control of all platted public streets and roads are given to municipalities, but their powers extend no further. *In Re Petition of Albers*, 113 Mich 640; 71 NW 1110 (1897); *Detroit v City Railway*, 76 Mich 421; 43 NW 447 (1889).

Michigan case law clearly supports this interpretation of the statute. In *Cuming v Prang*, 24 Mich 514 (1872), the Court held:

> Lands dedicated to the public as a highway, are by law subject only to the use of the public as such. The fee remains in the owner of the adjacent property of which it was a part, subject to the public easement. It is true that in this state, trees and the soil on a highway may be used in the improvement of it. But I do not understand that the public would have any title to a mine, a bed or peat, or turf, or gravel, found therein.
>
> Therefore I cannot find as a conclusion of law, in the absence of any proof tending to show that the lands within the limits of the alley in question were condemned and taken by the city under the provisions of its charter, that the defendant was justified in taking the 531 yards of gravel found in the alley on the ground or that the gravel was the property of the city of Grand Rapids.
>
> If it was the property of the city, his authority, derived through, and by means of, the arrangement with the people to whom permission was given to grade the alley, would be wholly immaterial in the case, for the plaintiff could in that case have no cause of action against him for removing it. Whether the title to the gravel was in the plaintiff or in the city, is not material in the consideration of the extent of defendant's authority. It would be the same in either case. His authority would extend no further than to justify him in using or removing as much soil or gravel as would be necessary and proper in the execution of the improvement, and I understand that the consent of the plaintiff to the making of the improvement is to the same affect and goes no further. [*Cuming* at 517, 518.]

The Michigan Supreme Court then went on in *Cuming* to rule that because the gravel so removed was not used for the improvement of the alley (rather, the defendants excavated the

gravel and transported it away for construction on another street), the defendants were liable for the removal. The Court held that the defendants' authority was derived from the municipality (the City of Grand Rapids) and that irrespective of who had title to the gravel, it could not be taken and utilized other than for the improvement of the alley even if the title to the same was in Grand Rapids.

In *Bissell v Collins*, 28 Mich 277, 278; 446 NW2d 91 (1873), the Court, in a case dealing with a street that was duly laid out on a plat and recorded as provided by law, followed *Cuming v Prang, supra*, but held that the utilization of the gravel found within the street or highway was not limited to the mere block of the street from which it was taken. It was proper to use the gravel mined on another portion of the street, thereby distinguishing the same from *Cuming*, which dealt only with a block-long alley.

Cuming and *Bissell* are directly precedentially dispositive of the instant case.

In *County of Wayne v Miller*, 31 Mich 447, 448-449 (1875), the Court held:

> It is not very clear what sort of title the act of 1839 designated to vest in the county: whether a fee simple, or only a conditional fee, or possibly a perpetual easement. There are some questions which suggest themselves here which we should be quite indisposed to encounter until it should become absolutely essential. Unquestionably the purpose was to vest in the county such a title as would enable the public authorities to devote the lands to all the public uses contemplated in making the plan, and to charge them with corresponding obligations when the title should vest. It is very clear that no purpose existed to give a title in the nature of a private ownership. This is all we deem it necessary to say on this point in the present case, and further questions must be dealt with when they arise.

The Court in the case of *In Re Petition of Albers, supra*, stated:

> Our understanding is that the city has no proprietary interest in the land, all of its authority over it growing out of its legal duty to maintain the public ways, which are placed in its charge. *City of Detroit v Railway Co*, 76 Mich 421. Such interest in the land is in the abutting proprietors ordinarily, and is apparently so in this instance, and by the express provision of the stature their rights are recognized.

> This statute has been applied in many cases and its constitutionality does not appear to have been questioned. [*In Re Albers* at 641-642.]
>
> The Court said in *Scudder v Detroit*, 117 Mich 77; 75 NW 286 (1898):
>
> Where one conveys land bounding upon a public highway, or lots upon a plat, representing them to be bounded by a street, the grantee takes the land to the center of the highway or street. *Snoddy v Bolen*, 122 Mo. 479 (24 LRA 507), and authorities cited. Under a statute identical with our's, it was held that a conveyance of a lot abutting on the street, without any express limitations, conveyed all the interest to the center of the street or alley. *Tousley v Galena*; etc., *Smelting Co*, 24 Kan. 328. The reservation in the dedication in that case was of 'all the mineral under the surface of such streets and alleys.' The conveyance of the lot contained no reservation. Justice Brewer said: 'If the dedicator may reserve nothing in the street, his conveyance of the lot passes the reservation.' The reservation in this case gave the platter the same interest in the streets that he would have had without the reservation, and his grantees take by virtue of their deeds all the rights he had to the center. [*Scudder* at 79-80.]
>
> In *Loud v Brooks*, 241 Mich 452; 217 NW 34 (1928), , the Court noted:
>
> We hold the correct rule to be that a conveyance of land bounded on a highway, street, or alley carries with it the fee to the center thereof, subject to the easement of public way, provided the grantor at the time of conveyance owned to the center and there are no words in the deed showing a contrary intent, whether the dedication of the highway, street, or alley has been accepted or not, and whether it has been opened or not …. [*Loud* at 456.]

It should be recognized that at the time of the enactment of the 1887 Plat Act, the vast majority of public ways were in the nature of easements. See *Baker v Johnston*, 21 Mich 319, 340; 1 Mich NP Supp SCIV (1887); *People v LaDuc*, 329 Mich 716; 46 NW 442 (1951).

Courts in other jurisdictions have interpreted statutes with similar language in a similar fashion. See *Mallory v Taggart*, 24 Utah 2d 267; 470 P2d 254 (1970); *Mochel v Cleveland*, 51 Ida 468; 5 P2d 549 (1930); *Neil v Independent Realty Co*, 317 Mo 1235; 298 SW 363 (1927): *City of Leadville v Bohn Mining Co*, 37 Colo 248; 86 P 1038 (1906).

The Charlevoix County Road Commission is possessed of nothing as to Beach Drive which it may sell, lease, or transfer. The rights to all interests in the land underlying platted streets, roads, and alley ways which are not reasonably and practically available or reasonably

necessary and incidental to the maintenance and operation of such public ways as a street, road, or alley must be owned in fee by either (a) the owners of undivided fee interests in the adjoining lots, or (b) by those persons or entities which have reserved (in prior conveyances) fee title to the same.

Village of Kalkaska v Shell Oil Co, 433 Mich 348 (1989) is directly on point. The Trial Court's attempt to distinguish *Kalkaska* from the case at bar is ineffective.[3] Perhaps the Trial Court believed that *Eyde Brothers Development Co v Eaton Co Drain Comm*, 427 Mich 271; 398 NW2d 297 (1986) (which held that a "public easement by highway dedicated by user is not limited to surface gravel …") was the guiding law. However, in the case at bar, the road dedication is pursuant to the 1887 Plat Act and a highway-by-user situation is not involved.

Another stubborn case which Appellees and CRAM seek to ignore is this Court's recent opinion in *Jonkers v Summit Twp*, 278 Mich App 263; 747 NW2d 901 (2008). This Court in *Jonkers* stated:

> In the absence of a clearly-expressed contrary intent, 'the conveyance of a parcel of land bordering on a highway contiguous to a lake shore conveys the appurtenant riparian rights.' [*Jonkers* at 269 (citing *Croucher v Wooster*.]

Like the Village of Kalkaska, the Appellees herein claim that a statutory plat dedication conveys an absolute fee. The Michigan Supreme Court in *Village of Kalkaska* rejected that argument. See *Village of Kalkaska*, *supra* at 354-356. This Court should similarly reject that notion.

[3] The Trial Court basically said that mineral interests are different than riparian rights because mineral interests are severable. That misses the point, however. The Charlevoix County Road Commission never received the riparian interest under Beach Drive because it never received fee simple absolute to the property. The base or determinable fee conveyed to it only a limited right to use the surface of the land for a road. The riparian rights were never granted to the municipality.

B. Does a Statutory Dedication of a Public Way Create a Determinable Fee?

1. Standard of review

This case issue involves a matter of statutory interpretation. Statutory interpretation are questions of law are reviewed *de novo* on appeal.

2. A statutory dedication of a platted public way or road creates a limited determinable fee in favor of the accepting municipality

Since the promulgation of the very first plat statutes in Michigan, it has always been true that a municipality which has accepted an offer of dedication receives only a conditional and limited property interest.

In the current case, it is undisputed that the plat of North Charlevoix encompasses a former metes and bounds description which ran to the water's edge. Accordingly, it is undisputed that the proprietor/developer/grantor of the plat held the riparian rights prior to the platting process being completed. No party herein argues that the proprietor/developer/grantor retained the riparian interests after platting.

If the creator of the plat of North Charlevoix had conveyed the area shown on the plat as Beach Drive via an unconditional deed, then the grantee of that deed would have absolute fee simple title (including the riparian interest). Were the Charlevoix County Road Commission to have absolute fee simple title, then it would also hold the adjacent riparian interest. Instead, the Road Commission received only a limited right to use the land for a road. The issue presented herein is *not* one of first impression.

Krause v Dept of Commerce, 451 Mich 420; 547 NW2d 870 (1996), is considered a seminal case in the area of plat law. See *Hall v Hanson,* 255 Mich App 271; 664 NW2d 786 (2003). The *Krause* Court (quoting with authority from *Field v Village of Manchester*, 32 Mich

279; (1875)), opined that when a municipality does not accept a grantor/developer's offer to dedicate a street, the owners of the lands fronting thereon may again take possession of that property and treat it as though, in all respects, no offer of a street dedication had ever been made. See *Krause* at 431. In other words, the fronting land owners hold a reversionary right to the lands dedicated to road use.

In the current case, the "fronting land owners" (or first tier lot owners) are the owners of lots 1-11 of the plat of North Charlevoix. Lots 1-11 front Beach Drive and are only separated from Lake Charlevoix by Beach Drive. The plat showed no land intervening between Beach Drive and the lake at the time of platting. Beach Drive was offered for dedication as a street or road, and for no other purpose whatsoever. See Exhibit D of Appellants' Brief on Appeal.

At least three separate published Michigan Court of Appeals opinions have determined that the owners of platted lots fronting a platted public road at a lake hold the adjacent riparian interest. See *McCardel v Smolen*, 71 Mich App 560, 562; 250 NW2d 496 (1976), reversed in part on other grounds, 404 Mich 89; 273 NW2d 3 (1978); *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); and *Michigan Central Park Assn v Roscommon County Road Comm'n*, 2 Mich App 192; 139 NW2d 333 (1966). Each of these cases will be discussed in detail, below.

The statutory conveyance for Beach Drive in the plat of North Charlevoix is the conveyance of a limited base or determinable fee. *Kirchen v Remenga*, 291 Mich 94, 112; 288 NW 344 (1939). Had the Legislature intended that the statutory dedication would constitute a conveyance in fee simple absolute, the statute would have said so. The Legislature made it clear that the conveyance was a conveyance for a specified purpose only.

Our Supreme Court has indicated that a statutory plat dedication does not transfer all the incidents of ownership that attach to an absolute fee title. In *Kalkaska v Shell Oil Co*, *supra* , the

Village of Kalkaska asserted that a base fee transferred all the incidents of ownership that attach to an absolute fee. See *Kalkaska* at 354. That argument was soundly rejected by the Court.

In *Backus v City of Detroit*, 49 Mich 110; 13 NW 380 (1882), the Michigan Supreme Court said "the purpose of the statute is not to give the county the usual rights of a proprietor, but to preclude questions which might arise respecting the public uses, other than those of mere passage ..." (emphasis added). *Backus* at 115.

Unless the Appellees in this case can definitely prove an intent by the developer of the plat of North Charlevoix to convey something more than the right of "mere passage" for Beach Drive, then the Charlevoix County Road Commission has received nothing more than that right of passage (certainly not the riparian rights). The intent of the dedication is, in fact, stated in the language of the dedication on the plat, which limits it to "streets and alleys."

C. Do the Owners of the Platted Lots Fronting on a Public Way or Road Own the Adjacent Riparian Lands?

1. Standard of review

This case involves a matter of statutory interpretation. Statutory interpretations are reviewed *de novo*.

2. The owners of lots adjacent to a platted lakeside parallel public road or way control the riparian rights opposite their lots

It is axiomatic the riparian lands cannot be severed from the adjacent upland. See *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967). It is equally clear that a statutory dedication of a public way or road conveys no interest beyond mere passage, absent a more specific expansive grant. See *Backus v City of Detroit* and *Kalkaska v Shell Oil Co, supra.* In the case at hand, Appellants assert they are the fee title holders to the lands over which Beach Drive is platted. They further assert that as the fee title holders, they control the adjacent

subaqueous lands to Lake Charlevoix and their lands are riparian. Every published decision in this state supports Appellants' argument herein.[4]

In *Michigan Central Park Assn v Roscommon County Road Comm'n,* 2 Mich App 192; 139 NW2d 333 (1966), this Court decided who owned the riparian rights to submerged lands adjacent to Michigan Central Park Boulevard. In that case, lands were platted in 1902 lying adjacent to the west shore of Higgins Lake. Along the lakeshore, the proprietor dedicated an irregular strip of land and designated it as a boulevard. All the streets, boulevards, and alleys in the subdivision were dedicated to public use. The overall development scheme was very similar to the scheme laid out in the plat of North Charlevoix in this case. The Roscommon County Road Commission argued that since the boulevard was platted and dedicated to public use, the riparian rights were held or shared by the public. The basic issue presented was whether or not the owners of the lots fronting on the boulevard had the exclusive riparian rights to Higgins Lake. The Roscommon County Circuit Court held that they did, *and this Court agreed.*

Several years after *Michigan Central Park Assn,* this Court revisted Higgins Lake and the issue of riparian rights along parallel roads in *Kempf v Ellixson,* 69 Mich App 339; 244 NW2d 476 (1976). In *Kempf,* this Court considered two separate lakeside plats known as Lyon Manor Subdivision and Shoppenagon Lodge. The plats were laid out side by side. Both plats adjoin the south shore of Higgins Lake. A lakeside platted public boulevard, known as Sam-o-Set Boulevard, runs along the lakeshore for the entire width of both plats. Opposite the shore and Sam-o-Set Boulevard are a first tier of lots that are separated from the lake only by Sam-o-Set

[4] It is interesting to note that while Appellees and CRAM seek to distinguish away every Michigan appellate decision which supports the rule that first tier lot owners are riparian and that the Charlevoix County Road Commission is not, Appellees and CRAM can point to no Michigan appellate court decision on point which actually supports their arguments. The Charlevoix County Road Commission and its supporters seek to play defense in this case, as they cannot mount a proper offense.

Boulevard (the same as the lots in the current case). The first tier lots had defined boundaries and were not shown as extending to the water's edge due to the intertwining boulevard (as in the current case). The trial court ruled that the first tier lot owners had the exclusive riparian rights opposite their respective lots, and ordered that so-called "public" docks be removed. *This Court affirmed*.

The Roscommon County Road Commission and various back lot owners in the two plats involved in *Kempf* argued that even though there was no express mention of riparian rights in the plat dedication of the boulevard, the placement of a boulevard immediately adjacent to the shore supposedly indicated an intention to create rights for public waterfront recreation. This Court rejected the backlotters' and Road Commission's argument. This Court held that only an express limitation in the dedication language can prevent riparian right from attaching to lots abutting a public highway. See *Kempf* at 342. This Court went on to say that "appellants have not presented a cogent argument for finding that Sam-o-Set Boulevard is not only a public highway, but also a public recreation area." *Kempf* at 342. See also, *Sheridan Drive Assn v Woodlawn Back Property Owners Assn*, 29 Mich App 64; 185 NW2d 107 (1970) . In the current case, Appellees cannot point to an express limitation in the plat of North Charlevoix which would prevent the adjacent riparian rights from attaching to lots 1-11 of the plat.

Kempf, Sheridan Drive Assn, and *Michigan Central Park Assn,* were all cited for supporting authority in *Higgins Lake Property Owners Assn v Gerrish Twp* (unpublished Michigan Court of Appeals Case No. 235418, decided October 30, 2003) (**Exhibit A**), wherein this Court determined that Michigan Central Park Boulevard, in the plat of Michigan Central Park First Addition, did not give riparian rights to the public. Those subaqueous rights belonged to the lot owners opposite the boulevard.

Finally, in the matter of *McCardel v Smolen*, 71 Mich App 560 (1976), this Court once again addressed riparian ownership adjacent to a public platted road parallel to a lake. In *McCardel*, a developer laid out a lakefront plat on the east shore of Higgins Lake. The plat was created in 1901, also pursuant to the 1887 Plat Act. As part of the development scheme, the developer created a lakeside boulevard, which was over 100 feet in width at some locations.[5] The lakeside boundary of the boulevard was the water's edge. The plaintiffs all owned so-called "front lots," separated from Higgins Lake only by the boulevard. The trial judge ruled that the front lot owners were riparian. *This Court agreed*. This Court specifically held:

> Who owns the riparian rights?
>
> The plaintiff front lot owners also own the riparian rights in the boulevard frontage. That issue was resolved in their favor by three previous decisions of this Court, all of which involved Higgins Lake property. *Michigan Central Park Association v Roscommon County Road Commission*, 2 Mich App 192; 139 NW2d 333 (1966), *Sheridan Drive Association v Woodlawn Backproperty Owners Association*, 29 Mich App 64; 185 NW2d 107 (1970), and *Kempf v Ellixson*, 69 Mich App 33; 224 NW2d 476 (1976). Each of those cases relied on *Croucher v Wooster*, 271 Mich 337 ; 260 NW 739 (1935). The cited cases support the trial judge's ruling that only the plaintiffs have riparian rights in the boulevard frontage.
>
> The defendants ask us to distinguish *Croucher* because the government in that case had only a highway easement, whereas Roscommon County is said to have a fee simple title to the boulevard property involved in this case under the terms of the plat act in effect when the subdivision plat was recorded. 1887 PA 309. Actually, that statute provided that the government would take a fee 'in trust to and for the uses and purposes therein [the plat] designated, and for no other use or purpose whatever.' Even if a distinction is possible we will not adopt it. There are problems with the *Croucher* rule, but an exception vesting the riparian rights in the public would create problems of its own—including the need to precisely define the underlying title in every case. *Croucher* at least offers uniformity, a

[5] A boulevard is a type of road or street. See *Ballentine's Law Dictionary* (3rd Ed, 1969), p 151.

> **Boulevard**. A street or highway more elaborate than the ordinary highway or street in respect both of width, style and manner of construction. 25 Am J Rev ed High § 6. It may be given a parklike appearance by reserving spaces at the sides or center or shade trees, flowers, seats, and the like, and be set apart for pleasure driving rather than the general purposes of traffic. *Haller Sign Works v Physical Culture Training School*, 248 Ill 436; 94 NE 920.

> more attractive feature than any offered by the defendants' proposed distinction. [71 Mich App 560, 565-565 (1976) .]

Much like Appellees herein, the appellees in *McCardel* asked this Court to distinguish *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935), because the government there had only an easement, whereas the Roscommon County Road Commission in *McCardel* had fee title to the boulevard pursuant the plat act 1887 Plat Act. This Court declined to distinguish *Croucher*, *supra* , stating, "Even if a distinction is possible we will not adopt it ...." *McCardel* at 564. This Court was not concerned about holding that the front tier owners owned the riparian rights adjacent to the boulevard without "owning" the boulevard itself.

> But here the plaintiffs own the riparian rights and nothing more. [*McCardel* at 565.]

The case at bar is not distinguishable from *McCardel*. The Appellants herein are exclusively riparian.[6]

As recently as seven years ago, this Court again recognized that the lake parallel platted public road case law was well-settled, such that the owners of the first tier of lots are the riparian landowners. This Court stated:

> In *McCardel v Smolen*, 71 Mich App 560, 562; 250 NW2d 496 (1976), aff'd in part and vacated in part, 404 Mich 89; 273 NW2d 3 (1978), this Court, addressing a dispute between the owners of front lots and back lots in a subdivision located on Higgins Lake, was presented with the following facts:
>
> > Lots in the subdivision are separated from the waters of Higgins Lake by a strip of land designated on the plat as Michigan Central Park Boulevard. The boulevard was dedicated to the county, ostensibly as a public street. But the 'boulevard' is actually

[6] It must be pointed out that this Court's opinion in *McCardel v Smolen* was partially overturned by the Michigan Supreme Court at 404 Mich 89, 94-95; 273 NW2d 3 (1978). However, the Michigan Supreme Court did not overturn the portion of this Court's published opinion in *McCardel v Smolen* which dealt with the riparian status of the first tier lot owners along the public road. In fact, the Michigan Supreme Court expressly recognized that that portion of this Court's *McCardel v Smolen* opinion was not at issue before the Michigan Supreme Court. 404 Mich 89, 94-95.

> nothing more than undeveloped beach property. We are asked to decide who owns the riparian rights in the boulevard frontage and to define those rights.
>
> Roscommon County had a fee simple interest in the strip of land, and this Court held that the plaintiffs, owners of the lots directly abutting the 'boulevard,' held the riparian rights. *Id*. At 564; 250 NW2d 496. The determination that the plaintiffs held the riparian rights was not reviewed by our Supreme Court on leave granted. 404 Mich at 94-95; 273 NW2d 3. [*Dorothy A Oliver Revocable Trust v Denton Twp* (unpublished Michigan Court of Appeals No. 230765 decided August 13, 2002). **Exhibit B**.]

Interestingly, in the *Dorothy A Oliver Revocable Trust* case, the trial court below held that the riparian rights to the platted outlot at issue belonged to the county in fee simple and even that determination was reversed by this Court.

Finally, the authoritative Michigan Land Title Standards (Fifth Edition) published by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan states in Comment B in Standard No. 24.5 as follows:

> A parcel of land separated from a natural watercourse by a highway or walkway, where the highway or walkway is contiguous to the watercourse, is riparian, unless a contrary intention appears in the chain of title. *Croucher v Wooster*, 271 Mich 337; 260 NW 739 (1935); *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985); *Meridian Twp v Palmer*, 279 Mich 586; 273 NW 277 (1937). Where a dedicated highway or walkway parallels and is contiguous to a natural watercourse, the rights (if any) of the public for access to and use of the watercourse from the highway or walkway are determined by the scope of the dedication. *McCardel v Smolen*, 404 Mich 89; 273 NW2d 3 (1978); *Thies*, *supra*; *Meridian*, *supra*. [Michigan Land Title Standards (5th Ed), Standard 24.5, Comment B.]

D. Attempts by Appellees and Amicus Curiae CRAM to Distinguish Away Existing Controlling Case Law are Unsuccessful

Appellees and Amicus Curiae CRAM attempt to distinguish away the mountain of Michigan appellate case law which indicates that the first tier lot owners in this case are riparian based on two main reasons. First, they assert that the Michigan Supreme Court opinion in *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985) indicates that this case should be decided in

favor of the Charlevoix County Road Commission. Second, they claim that many of the appellate parallel road cases involved unimproved roads, whereas Beach Drive is improved. However, neither distinction is persuasive.

Apart from the abandonment or vacation of a road, there is nothing in Michigan appellate case law which indicates that the property rights associated with a road, the ownership of the underlying soil, the rights of abutting landowners, etc., is dependent upon or determined by whether or not the road is fully improved, partially improved, or physically nonexistent. Accordingly, whether Beach Drive in this case is currently paved, gravel, or has not been physically improved at all is irrelevant to the determination of whether or not the first tier lot owners have riparian property rights.

The reliance by Appellees and CRAM on *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), is very misplaced. In fact, *Thies v Howland* actually supports the position of the Appellants and Amicus Curiae MWA and HLPOA in this case. Of course, it should be noted that the Michigan Supreme Court itself in *Thies* cited both *Croucher v Wooster* and *McCardel v Smolen* approvingly. *Thies* at n 6 (p 288), 289, n 5 (p 289), 290-291, n 7 (p 293), 293, 295. In fact, in footnote 6, the *Thies* Court also even mentioned *Kempf*, *Sheridan Drive Assn*, *Michigan Central Park Assn*, and *McCardel*. *Thies* at 290 (n-6). It can hardly be argued that *Thies* implicitly overruled *Croucher*, or this Court's opinions in *McCardel*, *Kempf*, *Sheridan Drive Assn* or *Michigan Central Park Assn.*

Thies involved private platted walks parallel along the shore and private alleys which ran perpendicular to the lake. Accordingly, the dedication in *Thies* was private and the dedication in the current case was public. *Thies* recognized that distinction, but also stated as follows:

> The cases which have applied *Croucher* only involved ways dedicated to public use. Nevertheless, we believe that *Croucher* is equally applicable to ways

dedicated to the private use of a finite number of persons. The relevant inquiry is not who may use the way, but whether the abutting land owner owns the fee in any way which separates his property from the water.

…

> While there is some authority to the contrary, the majority of the courts have followed the rule that land which is separated from water by a highway or street the fee of which is in the public is not riparian land; but where the fee in the land covered by the highway or street is in the owner of the land, riparian rights remain in such owner. 78 Am Jur 2d, Waters, § 273, p 716. (Footnote omitted.)[7]

See also 79 Am Jur 2d, Wharves, § 5, p 179; 1 Farnham, Water & Water Rights, § 144, pp 666-667; Plager & Maloney, *Multiple interests in riparian land, subdivision platting, and the allocation of riparian rights*, 46 U Det J Urb L 41, 50 (1968). [*Thies* at 291.]

The *Thies* Court went on to discuss *Croucher*:

Although there is conflicting authority in other jurisdictions, the issue was settled in this state by *Croucher*. There, the dedication of the plat described the plattors' land as lying south of a public highway that paralleled the lakeshore. The two lots at issue abutted the highway which, at those points, was in direct contact with the water. All of the deeds described the lots only by the lot numbers noted on the plat. The plattors conveyed each lot at issue twice. The question presented was whether the plattors had parted with all of their interest in each lot, including their riparian rights, under the first conveyance. This Court concluded that a fee interest in each lot, which included the adjoining portion of the highway and the appurtenant riparian rights, passed to the first grantees, subject to the public's use of the highway:

> 'Since lot 26 fronted upon the highway at a place where there was no land intervening between the lake and the opposite side of the highway, the conveyance of the lot on the south side carried with it, subject to express limitations appearing therein, the same riparian rights on the opposite side of the highway as it would had the lot itself been contiguous to the shore line.
>
> '"Where a highway is laid off entirely on the owner's land, running along the margin of his tract, and he afterwards conveys the land, the fee in the whole of the soil of the highway vests in his grantee. Likewise, where a street is land out wholly on the owner's land and on the margin of his tract, so that he owns nothing beyond, the

[7] It is this quote which Appellees and CRAM seize upon and quote out of context. It is obvious that this Am Jur 2d quote means "fee simple absolute" when it mentions "the fee."

> whole of the street opposite a lot bounded on the street passes to the grantee of the lot." 8 Consent Judgment p 203. See note citing numerous cases, including *Johnson v Grenell*, 118 NY 407 (81 NE 161, 13 LRA [NS] 551).
>
> 'As bearing upon the acquisition of riparian rights on the opposite side of the highway, we quote from the syllabus of the *Grenell Case*:
>
> '"Where the owner of an island in a navigable river, which has been lad out into lots, with boulevards, streets and roads, according to a map upon which the lots were designated by numbers, sold a lot abutting upon a boulevard running along and extending to the waters of the river, the lot being conveyed as 'Lot numbered 34 as laid out on the map.' … and the deed contains no language from which it can be inferred that the grantor intended to reserve any interest in the fee of the boulevard itself or in the appurtenant riparian rights, the legal title to the whole of the boulevard in front of the lot in question, together with the riparian rights, passed to the grantee of the lot, subject only to the public easement or right of passage over the boulevard." *Johnson v Grenell, supra*.' *Croucher*, 271 Mich 342-343; 260 NW 739. [*Thies* at 291-292.]

In footnote 7, the *Thies* Court noted:

The *Croucher* Court recognized that contrary conclusions had been reached in other jurisdictions. However, it distinguished many of these cases because there was land intervening between the highway and the shore. 271 Mich 344-345. Intervening land owned by another prevents the land on the opposite side of the highway from being deemed riparian. See also, *Fuller v Bilz*, 161 Mich 589; 126 NW 712 (1910); *Michigan Central Park Ass'n*, 2 Mich App 198; 139 NW2d 333. [*Thies* at 293.]

Finally, the *Thies* Court concluded the *Croucher* discussion:

Although *Croucher* and *Johnson v Grenell* discussed only land abutting public ways, the holding of these cases can be stated more broadly: Unless a contrary intention appears, owners of land abutting any right of way which is contiguous to the water are presumed to own the fee in the entire way, subject to an easement. Since the owner's property is deemed to run to the water, it is riparian property. *Id*., p 345; 260 NW 738. See also, *Meridian Twp v Palmer*, 279 Mich 586; 273 NW 277 (1937); Plager & Maloney, 45 U Det J Urb L 59-61. Thus, plaintiffs are presumed to own the fee in the walk running along the front of their lots unless the plattors intended otherwise. [*Thies* at 293.]

E. The First Tier Lots are Riparian Even Though the Legal Descriptions do not Expressly Extend to the Water's Edge

The proverbial "red herring" argument used in this case by Appellees and CRAM is their assertion that the first tier lot owners (the owners of those lots which front on Beach Drive) cannot be riparian because the deeds for those lots do not mention riparian rights and the legal descriptions for the lots do not extend to the water's edge. Of course, that is the case with virtually every platted lot fronting on a parallel public road, and virtually every one of the Michigan appellate cases has deemed those lots to be riparian. See *McCardel*, *Michigan Central Park Assn*, and *Sheridan Drive Assn*. This Court can take judicial notice of the fact that the legal description for very few riparian properties in Michigan (whether a platted lot or unplatted parcel is involved) expressly mention riparian rights. Furthermore, the side lot lines of the first tier of platted lots along a platted parallel road at a lake are deemed to extend under the road (subject to the road right-of-way) to the waters of the lake by operation of law. *Ibid.* Therefore, it is of no consequence that the deeds to the first tier lots in this case do not mention riparian rights and that such lots' legal descriptions do not expressly extend beyond the road to the water's edge.

F. The Law Allows Two Different Legal Interests to Occupy the Land Comprising Beach Drive at the Same Time—the Charlevoix County Road Commission's Limited Base Fee and the First Tier Lot Owners' Ownership of the Riparian Rights

Appellees and CRAM essentially argue that since the 1887 Plat Act gives the Charlevoix County Road Commission the base or determinable fee to Beach Drive, then that fact somehow precludes or crowds out the ability of the first tier lot owners to hold the underlying riparian rights. Of course, Michigan appellate case law does not support that conclusion and in fact indicates that the two rights can and do exist simultaneously. See *McCardel*, *Thies*, and *Jonkers*.

The statutory base or determinable fee held by the Charlevoix County Road Commission pursuant to the 1887 Plat Act is very limited. Pursuant to the case law, such right is more than a mere easement but less than fee simple ownership. It does not contain the full "bundle of sticks" associated with full land ownership rights. Given that the interest held by the Charlevoix County Road Commission to Beach Drive is less than fee simple absolute ownership (and particularly given that the base or determinable fee was created by statute and not by the common law), it is entirely logical that the adjoining platted lot owners can own certain rights of the soil underlying the road (particularly, those soil-based rights not having to do with the road), including the riparian rights. The two ownership interests (that of the Charlevoix County Road Commission and the first tier lot owners) are not mutually exclusive or preclusive.

A base or determinable fee can coexist quite comfortably with a different fee simple title. The holder of the base or determinable fee has the superior right to control the dedicated property "for the uses and purposes therein designated, [but] for no other use or purpose whatever." See the 1887 Plat Act. Note that the limitation is not merely temporal, in that the base or determinable fee ends if the road is abandoned. It is also limited in its "use and purposes" while it exists.

The situation that applies when a road is abandoned demonstrates the relationship between the base or determinable fee and the adjoining landowner. "[W]hen there is an absolute abandonment of a road or right of way, under common law a street or alley that is vacated reverts to the abutting landowner." *Twp of Dalton v Muskegon County Bd of Road Comm'rs*, 223 Mich App 53, 57; 565 NW2d 692 (1997). The abandoned area does not become a separate parcel but instead accrues to the adjacent parcel.

CRAM quotes from the complaint in which one paragraph alleges that the Plaintiffs as riparian owners "own the fee interest of the land lying between their property and Lake Charlevoix." CRAM goes on to argue that "[i]f Appellants had claimed a fee, then under Michigan law the CCRC could have only an easement." CRAM's brief at 5-6. This repeats the erroneous argument that the base or determinable fee is actually a full fee or fee simple absolute title that defeats all other interests. *Jonkers, supra* and *Dalton, supra,* demonstrate that this is not the case. The 1887 Plat Act and the case law (holding that the dedication does not divest the riparian owners of their riparian rights) all treat the base or determinable fee as "little more than nominal title and no beneficial ownership whatsoever." *Jonkers, supra.*

III. CONCLUSION

Amicus Curiae MWA and HLPOA respectfully request that this Court hold that the first tier of lots along Beach Drive are deemed riparian, that the undisturbed portion of this Court's opinion in *McCardel v Smolen*, 71 Mich App 560; 250 NW2d 496 (1976) (as does its progeny cases) applies, and that the decision of the Charlevoix County Circuit Court at issue in this appeal is reversed.

Respectfully submitted,

CAREY & JASKOWSKI, PLLC

Dated:

By _____
William Carey (P31602)
Co-Counsel for Amicus Curiae Michigan Waterfront Alliance and Higgins Lake Property Owners Association

2373 S I-75 Business Loop
P.O. Drawer 665
Grayling, Michigan 49738

LAW, WEATHERS & RICHARDSON, P.C.

Dated:

And by _____
Clifford H. Bloom (P35610)
Co-Counsel for Amicus Curiae Michigan Waterfront Alliance and Higgins Lake Property Owners Association

800 Bridgewater Place
333 Bridge Street, N.W.
Grand Rapids, Michigan 49504-5320
(616) 459-1171