AN OVERVIEW OF LAKEFRONT DEVELOPMENT LEGAL ISSUES

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Over the past several decades, water law and municipal regulations involving in land bodies of water in Michigan has gone from an esoteric, sleepy area to a very hot topic. This article will explore both basic private property law in Michigan involving bodies of water, as well as municipal regulation of those rights.

Michigan Riparian Property Law

To begin with, the word *"riparian"* is a misnomer. Technically, properties bordering a lake are "littoral," while lands adjoining a flowing body of water (such as a creek, stream, or river) are "riparian." Over the years, however, both lay people and the courts alike have gradually used the word "riparian" to describe properties fronting on any type of body of water (with the exception of smaller ponds or wetlands). See **Thies v Howland**, 424 Mich 282 (1985).

There are a great many myths and falsehoods associated with riparian law. Some have viewed water rights as being almost mystical and somehow distinct from and alien to conventional dry land property rights. Riparian law has not only been commonly misunderstood by lay people, but also by some courts which have not had many riparian issues arise in the past. In actuality, riparian rights are simply another type of real property right, often akin to common easement rights over the surface of a body of water.

In order to constitute a riparian property, land must touch (i.e., have frontage on) a body of water. **Thompson v Enz**, 379 Mich 667 (1967). One exception to this is where a road right-of-way runs parallel along the shore of a lake and there was no intervening land between the body of water and the road right-of-way when the right-of-way was created—in such cases, the first *"tier"* of lots fronting on the road are normally deemed to be riparian. That is, their lot lines are usually deemed to extend under the road right-of-way and to the lake, subject to uses allowed within the road right-of-way. See **Croucher v Wooster**, 271 Mich 337 (1935); **McCardle v Smolen**, 404 Mich 89 (1978).

With the overwhelming majority of inland lakes in Michigan, the owner of a riparian lot also owns some portion of the adjoining lake bottomlands to the center of the lake. **Hilt v Weber,** 252 Mich 198 (1930); **Hall v Wantz**, 336 Mich 112 (1953). The riparian boundaries on the bottomlands of a lake almost never follow the same angle as the boundary lines of the riparian lot involved on dry land. Rather, riparian boundary lines on the bottomlands radiate toward the center of the lake. If a lake were round, it would be easy to ascertain riparian boundary lines on its bottomlands—they would radiate to a point in the center of the lake like slices of a pie. Unfortunately, there are very few, if any, round lakes in Michigan. Most lakes are oval, kidney bean, or irregularly-shaped. While surveyors and engineers can give nonbinding opinions designating the center of a lake and how riparian bottomlands lines radiate, only a county circuit court can definitively make binding decisions regarding those matters. In the cases of non-round lakes, courts typically utilize *"threadlines"* or mathematical proportions to determine lake centers and the location of bottomland boundary lines. Bottomlands ownership for inland lakes can be important in controversies involving the location of docks and swim rafts, dredging, seawalls, or even oil and gas *"pooling."*

Many lake property owners have heard of the *"riparian rights doctrine"* (also called the "reasonable use doctrine"). A riparian is entitled to make reasonable use of the lake involved for all riparian rights. Typically, riparian rights include the right to utilize dockage, fishing, swimming, consumptive uses and recreation. Riparian uses are normally divided into two classes. The first category is for natural purposes such as bathing and the drawing of water for drinking and household purposes. The second class is for artificial uses, such as commercial activities or recreation. **Thompson v Enz**, 379 Mich 686, 687 (1967). A riparian property owner's rights are subject to the correlative rights of other riparian owners, such that no person can utilize their riparian rights in a way which would unreasonably interfere with the riparian rights of others. See **Thompson v Enz, Opal Lake Assn v Michaywé Limited Partnership**, 47 Mich App 354 (1973), on remand, 63 Mich App 161 (1975); **Pierce v Riley**, 81 Mich App 39 (1978), lv den 403 Mich 818 (1978); **Three Lakes Assn v Kessler**, 91 Mich App 371 (1979).

Lake Access Devices

In Michigan, riparian property owners and their invitees are not the only people who can utilize inland lakes. Members of the public can enjoy usage of the surface of any lake which has a public access site such as a public boat launch, park or campgrounds. Traditionally, the owners of some non-lakefront properties located near lakes (often referred to as a *"backlot"*) can enjoy access to the nearby inland lake by various non-public lake access devices. Such devices include private easements, walkways, private roadends at lakes and private parks. Technically, the owners of such backlots are not riparian property owners since their properties do not touch or front on the lake. See **Thompson v Enz**.

Absent local regulations, the scope of usage rights enjoyed by the owners of backlots for such lake access devices vary dramatically under Michigan case law depending upon what type of lake access device is utilized.

Local Regulation of Riparian Property Rights And Lake Access Devices

Since riparian rights are just another type of real property right, they are subject to reasonable regulation by local municipal ordinance. In the early 1990s, the Michigan Supreme Court confirmed that riparian rights and water access can be regulated by zoning regulations [**Hess v West Bloomfield Township**, 439 Mich 550 (1992)], as well as by police power ordinances [**Square Lake Hills Condominium Assn v Bloomfield Township**, 437 Mich 310 (1991)].

A significant concern to riparians and municipalities alike is the creation of so-called *"keyhole"* or *"funnel"* developments. Pursuant to this development technique, a developer attempts to use a small or modest size frontage property on a lake or river to give water access (and use) to a large number of dwellings located on properties not on the body of water or a significant distance away from the water. In the more recent past, however, the phrases *"keyhole development"* or *"funnel development"* have also been applied to condominium or apartment complexes located on a body of water. Why are riparians and many municipalities concerned about such developments? The major reasons include further overcrowding of bodies of water, conflict not only between users of the multi-family access property and adjoining riparians, but also conflict among the

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multi-family users themselves and negative impacts upon the lake environment.

Techniques which are being utilized by municipalities to regulate development and activities on and near bodies of water include the following:

1. Anti-Funneling Zoning Regulations. Typically, such regulations require a minimum amount of frontage on a body of water for each new lot or dwelling unit which will be able to access or utilize the lake or river. It is also fairly common for such regulations to cover permitted dockage and other waterfront activities and structures. Because such regulations are contained in the zoning ordinance, they are subject to the lawful non-conforming use defense – that is, structures or activities which lawfully occurred before the regulations went into effect can continue at the same intensity and scope. Sometimes, these regulations also prohibit the creation of new canals and regulate the creation and use of boat launches and commonly-used lakefront areas.
2. Dock and Boat Ordinances. These are police power ordinances, not zoning regulations. As such, they theoretically can apply to existing uses, unless the ordinance expressly provides otherwise. Such ordinances generally regulate dockage and how many boats can be utilized per waterfront property, but it is not uncommon for this type of ordinance to also regulate matters such as swim rafts, shorestations and boat launches.
3. Lot Frontage or Width Requirements. Although sometimes overlooked as a means of minimizing adverse impacts on lakes and rivers, specifying minimum lot width or frontage requirements for new parcels on bodies of water can be a significant planning tool.
4. Waterfront Overlay Districts. An increasing number of municipalities are utilizing waterfront overlay districts. In its most common form, a waterfront overlay district is an additional district within a local zoning ordinance which covers all lands located within a certain number of feet from a body of water and constitutes a set of regulations in addition to those contained in the underlying zoning district. (See Figure 1)
5. Shoreline Protection Ordinances. These ordinances vary dramatically, but frequently regulate disturbances and construction at or near the shoreline and can involve shoreline setbacks, fertilizing regulations and buffer areas or greenbelts.
6. Temporary Use or Special Event Regulations. Such regulations can be located in either a zoning ordinance or a separate police power ordinance, and can prove useful in regulating lake events such as bass fishing tournaments, block parties and boat races.
7. Road End Ordinances. Municipalities have the authority through police power ordinances to regulate activities which occur at public road ends terminating at bodies of water. See **Square Lake Hills Condominium Assn v Bloomfield Township**, 437 Mich 310 (1991); **Jacobs v Lyon Twp**, 199 Mich App 667 (1993) appeal denied, 444 Mich 906 (1994); **Robinson Twp v Ottawa County Bd of Road Commissioners**, 114 Mich App 405 (1982) and Article 7, Section 29 of the ***Michigan Constitution of 1963***.
8. Local Wetlands Ordinances. In December 1992, the Michigan Legislature severely limited (*i.e.*, partially preempted) the ability of local municipalities to regulate wetlands. However, municipalities with sufficient resources and dedication can still marginally regulate certain wetlands. See PA 295 and 296 of 1992; now at MCLA 324.30308 and related sections. Also see ***PZN***, June 1993, p. 13-16 and August 1996, p. 13-15.

Enforcement and Litigation Involving Municipal Water-Related Ordinances.

In the past, some municipalities have been reluctant to enact ordinances regulating funnel developments, boats and docks, road ends and other related activities – while in many cases, municipal officials believed that such ordinances are necessary and desirable, they were also concerned about enforcement and possible challenges through litigation.

Enforcement of local ordinances (including water-related ordinances) has become much easier since the mid-1990s with the advent of civil infraction tickets (see ***PZN***, August 1994). Civil infractions have tended to streamline enforcement efforts, as well as generally lowering the costs thereof. The fear by some municipal officials that enforcement officers will become overwhelmed by enforcing water-related ordinances (due to neighbor complaints and private civil wars on lakes) has generally not transpired – the same concerns could be voiced regarding a junk or dinance, barking dog ordinance or even the zoning ordinance itself.

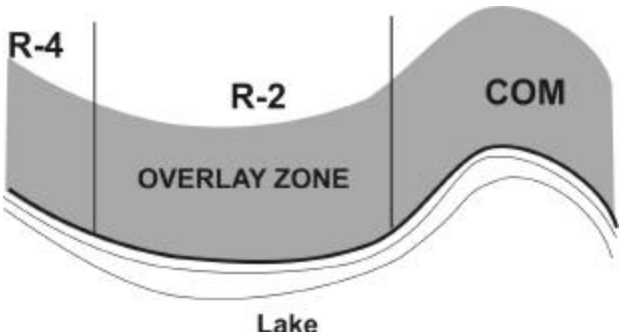
Litigation by developers to challenge anti-funneling regulations in court has also been relatively rare. There are probably at least three factors for this. First, the Michigan Supreme Court clearly established local authority for adopting water-related ordinances a decade ago when the **Hess** and **Square Lake** cases were issued. Second, so long as the ordinance provisions at issue are reasonable, courts will normally presume an ordinance to be valid and enforceable, and the burden is on the property owner or developer to prove otherwise. Third, although local water regulations can limit development on lakes, Michigan courts have not been overly receptive to *"takings"* lawsuits by developers, particularly where reasonable use and development can still occur.

Of course, the best way that a municipality can ensure that a well-drafted water-related ordinance will be upheld in court if challenged is to make sure that the ordinance is reasonable. For example, if the average lot on a lake in the municipality involved has 50 feet of lakefront age and the zoning district which currently covers most of the lakes in the township requires new lots to have 75 feet of frontage, it probably would be unreasonable to require that each new dwelling or lot in a funnel development have at least 300 feet of lakefront age. Similarly, for a police power dock and boat ordinance, if the only lake in a municipality is quite shallow and requires long docks to reach navigable waters, an ordinance provision which only permits docks 20 feet in length would probably also be unreasonable.

The Surface of the Water Versus Land and the Shoreline

Too often, municipal officials fail to distinguish between regulations which directly cover activities on the water's surface (such as high speed boating and fishing) versus regulating activities and structures on dry land or the shoreline (for example, docks, shorestations, access to the water over the land, etc.). Such distinctions can be important for two reasons. First, ordinances

Figure 1
LAKE FRONT OVERLAY ZONE



should clearly express what activities and structures are being regulated. That will not only make ordinance provisions easier to read, understand and follow, but will also help municipalities in court. Second, clearly identifying which areas are being regulated can also help a municipality in court with regards to the justification for such an ordinance. This latter concept can be illustrated in the context of anti-funneling zoning regulations. In actuality, most anti-funneling regulations are primarily regulations of land (i.e., shoreline, the bottomlands and the lands being crossed to access a body of water) rather than of the water or the surface of a lake or river. Anti-funneling regulations are usually most successful in preventing overcrowding and conflicts between users on the land at or near the shoreline. A municipality which seeks to justify its anti-funneling regulations as being primarily intended to prevent or minimize increased boat traffic on the surface of the body of water is making a weak argument. There are no universally accepted *"carrying capacity"* studies or figures for how much boat traffic on the surface of a lake constitutes a safety hazard or nuisance. Nor are there reliable figures or studies available regarding the impact of funnel developments or anti-funneling regulations on boat traffic on the surface of lakes.

It appears that there are some activities on the surface of a body of water which municipalities can regulate, while there are other surface water activities which probably cannot be regulated by local ordinance. Clearly, local ordinance provisions can be utilized to prohibit and prosecute the following activities, which might occur while people are out in a boat on a lake – incidental exposure, general noise, littering and assault and battery. Conversely, certain activities which occur on the surface of the water that are heavily regulated by state law probably cannot be further regulated by local ordinance due to *"preemption."* Examples of this include stock boat engine noise and the number of life preservers required on a boat. Finally, there are some gray areas. It is not clear whether or not a local ordinance can further regulate certain areas already covered by state legislation. A prime example of this involves special watercraft rules. Pursuant to MCLA 324.80101 *et seq*., a municipality can petition the Michigan Department of Natural Resources ("DNR") to initiate the process of setting a special watercraft rule for a lake or portions of a particular lake. If after a hearing the DNR ultimately approves such a special watercraft rule and that rule is further validated by the local municipality, a special watercraft rule goes into effect and has the force of state law. Conversely, if the DNR refuses to approve a rule for a particular lake, the special watercraft rule will not go into effect under the statute, even if the local municipality desires to have such a rule. Special watercraft rules can normally be adopted only to remedy safety problems. Common special watercraft rules which have been applied to certain lakes include speed limits, no wake areas and high speed boating hours. The Michigan appellate courts still have not decided whether a municipality by local ordinance can adopt regulations similar to special watercraft rules (such as speed limits, no wake areas and high speed boating hours) without going through MCLA 324.80101 *et. seq*. Good arguments can be

The Long-Awaited Michigan Supreme Court Decision in *Little* v *Kin*

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On July 9, 2003, the Michigan Supreme Court issued its approximately two-page Memorandum Opinion in **Little v Kin** (468 Mich 699 (2003)), a closely-watched lake access easement case. Although the Supreme Court's decision clarifies some issues, there will likely be continued confusion regarding what activities can occur at lake access easements.

The easement at issue stated that it could be used *"for access to and use of the riparian rights to Pine Lake*." Such language is unusual in that most lake easements only involve travel language, using words or phrases such as ingress, egress, access to and similar wording. The trial court noted that the easement language did not mention dockage or boat moorage rights and that based upon long-standing Michigan case law, such easements could only be used for travel purposes—no dockage or permanent boat moorage. The trial court reached its decision summarily and no trial was held.

On appeal, the Michigan Court of Appeals reversed the decision of the trial court and indicated that a trial would have to be held on the matter. The Court of Appeals did not expressly decide whether or not the easement language at issue allowed dockage and permanent boat moorage; rather, it indicated that a trial would have to be held to resolve the case and attempted to give the trial court guidance through an extensive written opinion. See 249 Mich App 502 (2002).

The Court of Appeals held that where easement language is unambiguous, the courts should look not only at the express language utilized, but also at the actual use of the property at the time the easement was created. On the other hand, if the easement language is ambiguous, the Court of Appeals stated that a trial court should also permit parole or extrinsic evidence (*i.e.*, evidence or testimony beyond the written wording of the easement) which tends to show the grantor's original intent, historical usage and other relevant matters.

In its brief and somewhat terse opinion, the Michigan Supreme Court agreed with the Court of Appeals that the case should be submitted back to the trial court, and corrected the Court of Appeals' written opinion in several areas. The Supreme Court held that where easement language is unambiguous, trial courts must stay with the written language—there should be no examination of what actually occurred on the easement property at the time the easement was created. Nor should a trial court allow extrinsic or parole evidence at trial if the easement language is unambiguous. Only in cases where easement language is ambiguous should trial courts allow introduction of parole or extrinsic evidence regarding historical usage, the subjective intent of the grantor and similar matters.

The Supreme Court appears to have placed a fairly high burden on easement beneficiaries who seek to prove dockage and boat moorage rights where the easement language does not expressly mention such rights. The Supreme Court's opinion seems to bolster long-standing case law in Michigan indicating that easement language which simply utilizes travel wording is unambiguous and does not permit dockage, permanent boat moorage, lounging or similar activities. In fact, the Supreme Court pointed out in its **Little v Kin** opinion that even where a trial court determines that dockage and boat moorage is allowed under the easement (either expressly or after an ambiguous easement is construed to allow such rights), that is not the end of the inquiry—the trial court must then decide two additional issues (before dockage and boat moorage is allowed). First, the trial court must decide whether or not dockage and boat moorage is necessary for the effective use of the easement rights. If not, no dockage or permanent boat mooring can occur, even if originally contemplated by the easement. Second, even if the trial court determines that dockage and boat moorage was originally permitted by the easement and that such usage is reasonably necessary to the enjoyment of the easement rights granted, dockage and boat moorage cannot occur (or will be restricted) if it would unreasonably interfere with or burden the usage rights of the underlying property owner. ❑

made both ways—that is, whether or not the local provisions would be preempted (i.e., precluded) by MCLA 324.80101 *et. seq.*

Miscellaneous Local Regulation Issues

"Bubblers" are devices utilized in winter to prevent ice from forming on lakes. Typically, these devices either create bubbles or circulate warmer bottomlands water in order to protect permanent docks or boats that are left in the water during the winter. These devices can also be very dangerous to people who ice fish, snow mobilers and small children, due to the presence of open water. The safety hazard is exacerbated since visibility in the winter is often low due to blowing snow and nighttime conditions. Although bubblers are much more common on the Great Lakes, they are increasingly being utilized on inland lakes. Can a municipality regulate or even ban bubblers on inland lakes in Michigan? Probably. In **Harbor v Charter Twp of Harrison**, 170 Fed. 3d 553 (6th Cir. 1999), the U.S. Court of Appeals for the Sixth Circuit struck down a local ordinance which regulated the use of bubblers on vagueness grounds. However, the Court implied that such an ordinance would be valid if properly drafted.

Can a local government regulate the landing, take off and storage of sea planes on an inland lake? The Oakland County Circuit Court held that municipalities have such authority, although that case is presently on appeal and pending with the Michigan Court of Appeals. See **City of Lake Angelus v The Michigan Aeronautics Comm'n**, (Oakland County Circuit Court Case No. 01-031671-CZ).

Setting Lake Levels

Low or dramatically varying lake levels on inland lakes in Michigan is becoming a significant problem. Varying lake levels can be caused by many factors, including natural cycles, drought, water diversion, urban sprawl and other artificial impacts on watershed. Many riparian owners desire more consistent lake levels in order to prevent flooding, beach erosion and having to move docks and shorestations frequently. The water level in many inland lakes is controlled by pump, an outlet dam (or control structure) or a combination thereof.

A Michigan statute provides a specific procedure whereby the county circuit court can set a lake level (or range of lake levels), as well as determine what artificial means will be utilized for maintaining a lake level, and specify the special assessment process to be utilized to pay for the improvements. See MCLA 324.30701 *et seq*.

Municipal Weed Treatment and Dredging in Inland Lakes

Aquatic weed control (whether by chemical or mechanical harvesting) occurs in many lakes in Michigan. Quite often, voluntary lake association dues are insufficient to cover the costs of aquatic weed control, such that riparian property owners frequently turn to municipalities to undertake such activities pursuant to a special assessment district. Other lake protection or improvement activities or programs which can be covered by a municipal special assessment district include dredging, dam repair and eradication of exotic species. Utilizing a statutory lake board is an alternative to a special assessment district. See MCLA 324.30901 *et seq.* ❑

Variances and Lake Lots

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There is a huge number of small lakefront lots throughout the state of Michigan, particularly in ancient plats. Many of these lots were originally intended for small cottages and seasonal uses—large year-round residences were rarely envisioned. Given the large number of riparians who desire to build (or rebuild) on these small lake front lots due to urban sprawl and skyrocketing property values, municipalities are receiving an increasing number of variance requests for lakefront properties involving side yard and lake setbacks, building height, and lot coverage.

There appears to be a consensus among planning officials that a significant number of municipal zoning boards of appeals are overly permissive when small lakefront lots are involved. It is not uncommon for members of a zoning board of appeals who are normally *"sticklers"* (and who usually insist that all standards for a variance be met and grant variances only sparingly), to be swayed by emotion and calls for *"common sense"* where small lakefront lots are involved. Such permissiveness is causing significant problems on some lakes in Michigan. Due to variances, construction in many cases is occurring very close to the water's edge, side lot lines or rear roads, such that some lake neighborhoods are beginning to resemble *"canyons"* due to very large (and often tall) new dwellings being built on small lots (see photo on page 10). The old farming analogy of *"trying to put 60 pounds of manure in a 50 pound sack"* comes to mind.

Michigan law makes no distinction between nonuse (dimensional) variance standards in the context of lake front lots as opposed to all other properties. Most experienced zoning board of appeals members realize that the following assertions by a property owner or neighbor do not justify the granting of a variance in general:

- *"It will improve the neighborhood."*
- *"The existing cottage is an eyesore."*
- *"Use your common sense."*
- *"I need a house that size (or that close to the water or property lines) to accommodate my family and guests."*

For some reason, however, board members who would never give such statements any weight at all for non-lakefront lots buy into these assertions in lakefront lot variance cases.

What is a municipality to do with small lake front lots? It is not unusual for municipalities to deal with lakefront lots differently than nonriparian properties in zoning regulations. For instance, it is quite common to permit a lesser side yard setback for lakefront lots (for instance, 10 feet instead of 20 feet) and to be slightly more permissive with regard to maximum lot coverage standards. Ideally, a municipality should strive to set its lake front regulations so as to minimize variance requests. Unfortunately, it is probably impossible in most communities with lakes surrounded by narrow lots to avoid a large number of lake variance requests regardless of the zoning regulations utilized. For example, if a side yard setback is 10 feet for a lake lot, the municipality will likely receive many variance requests for a side yard of only seven or even five feet. If a municipality lowers its ordinance setbacks for side yards at lakes to seven feet, the municipality will start receiving variance requests for side yards of only five or even two or three feet! The same dynamic usually also applies to lake and rear yard road setback requirements for lake lots.

Municipalities should carefully consider the proper setback requirements from a lake for new construction. Most municipalities are aware of the problems which occur when buildings are located too close to the water's edge. Zoning ordinances should normally make it clear that lake setbacks should be measured from the normal high water mark of the lake. Furthermore, many municipal officials believe it is prudent to keep the lakeward yard (i.e., the area between the lake and the dwelling) free of structures and clutter, except perhaps for a small shed or gazebo. An increasing number of municipalities are also prohibiting fencing (particularly solid fences) from being located closer to a lake than the dwelling on the lot involved. This preserves the view of the lake for abutting properties. ❑