

ATTORNEY WRITES

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“On-Lake Regulations”

Riparians frequently ask me whether a local municipality can regulate problematic boating behavior on inland lakes in Michigan. More specifically, the issue is whether a local government (i.e., a city, village or township) can, by ordinance, impose water skiing and high-speed boating hours limitations, create no wake zones, designate certain times of the week as “quiet times” (i.e. no high-speed boating) or impose similar regulations.

A portion of the Michigan Marine Safety Act (MCL 324.80109 *et seq.*) (the “Act”) does contain a procedure for enacting “special watercraft rules”. Pursuant to that statute, a group of riparian property owners or the local government requests that the Michigan Department of Natural Resources (“DNR”) consider a special watercraft rule for a particular inland lake or a portion of the lake. The DNR then holds a public hearing regarding the special watercraft rule request. If the DNR decides not to impose such a rule or regulation, the matter ends. If the DNR approves the special watercraft rule, it cannot be effective until and unless the local municipality also enacts the special watercraft rule without any changes. Once a special watercraft rule is adopted for an inland lake, it has the force of law. Any qualified police officer can issue tickets or citations for the violation of a special watercraft rule.

There are two major problems with the special watercraft rule process. First, the DNR will normally only approve such a rule if there is a demonstrated existing safety problem on the lake involved (or a portion of the lake) which can be remedied by the proposed special watercraft

rule. It is the DNR's position that no factor apart from an existing safety problem can be considered by it when deciding whether to adopt the special watercraft rule. Even if almost every property owner on a lake were to indicate their support for a special watercraft rule, the DNR would still deny the rule if the DNR does not find an existing substantial safety problem.

A second problem with the state's special watercraft rule process is the limited types of rules available. Typically, the DNR will only consider several different types of special watercraft rules as follows:

1. A no-wake lake.
2. No wake areas.
3. More strict waterskiing and high-speed boating hours than are normally allowed by state statute.
4. Greater setback distances for high-speed boating.
5. Electric motors only.
6. Towing limits.
7. Special speed limits.

In light of the limited utility of the special watercraft rule process under the Act, can a local municipality adopt and enforce its own ordinance provisions for an inland lake located within its jurisdiction? Unfortunately, the law is not clear.

In general, Michigan municipalities have broad authority to enact and enforce police power ordinances (i.e., ordinances other than zoning regulations). See MCL 41.181 *et seq.*, MCL 117.1 *et seq.* and MCL 61.1 *et seq.* Also, in general, the Michigan courts have held that local governments in Michigan can regulate at least some lake uses and activities. See *Square Lake Hills Condominium Association v. Bloomfield Township*, 437 Mich 310 (1991).

Accordingly, in the abstract, it is highly likely that the Michigan courts would uphold the validity and enforceability of a local government ordinance that regulates on-water uses and activities. However, that cannot be the end of the inquiry.

A Michigan municipality may not enforce an ordinance, however, that conflicts with or is preempted by a state statute that governs the same subject matter or topic. The issue is whether an ordinance adopted by a local governmental unit regulating boat speeds, waterskiing or high-speed boating activities by hours, designating a lake as a no-wake lake and similar restrictions would either be precluded or preempted by the Act (and the DNR special watercraft rule proceedings contained therein).

Unfortunately, determining whether a particular state statute preempts or precludes a local government ordinance is not always easy. There are generally two types of state preemption. The first type is an express preemption, where the state statute specifically indicates that no local government ordinance governing the same subject matter can be enforced. The second type of preemption is more subtle. Nothing in the state statute involved expressly declares that it should have preemptory effect. Instead, a court must carefully review the statute to determine whether the statute seemingly “occupies the field” and evidences a general intent that the Michigan Legislature intended the state statute to be exclusive (i.e., to the preclusion of a local government ordinance provision governing the same subject matter).

Whether or not the Act preempts local ordinances governing on-water uses and activities is likely a 50/50 proposition. However, a 1962 decision by the Michigan Supreme Court could give riparians hope that local lake uses and activities ordinances could be determined not to be preempted by the Act and thus, be valid and enforceable. In *Miller v Fabius Township Board*,

366 Mich 250 (1962), Fabius Township enacted special limited high-speed boating and waterskiing hours on Pleasant Lake. Several riparian property owners challenged the validity of the ordinance, based on whether the township had the authority to enact the ordinance in the first place and whether the ordinance was preempted by two state statutes. First, the Supreme Court held that Fabius Township had ample authority under the general law township ordinance statute, being MCL 41.181 *et seq.*, to enact the ordinance. That statute is still in effect today. Second and with regard to the preemption argument, the Supreme Court held that the local ordinance was not preempted or precluded by two then-applicable state statutes (MCL 752.401, which was a penal statute regulating motor boat mufflers and reckless or excessive boat speeds, or Public Act 310 of 1957 which regulated waterskiing, including hours). The Supreme Court did not expressly address the statute that allows the DNR to set special watercraft rules for particular lakes, but such a statute was in effect in 1962 (MCL 281.1014 *et seq.*). Nevertheless, *Miller v. Fabius Township Board* presents a pretty fair argument as to why local ordinances regulating on-lake use on inland lakes should not be preempted by the Marine Safety Act (and specifically, MCL 324.80109 *et seq.* regarding DNR special watercraft rules).

One of these days, an ordinance enacted by a local municipality governing on-water uses or activities that was not adopted under the Act will likely be challenged in a trial court, with a decision on appeal following thereafter. It is only then that riparians will have a clear picture of whether a local municipality can not only enact, but also enforce, an ordinance regulation regarding on-water activities or uses on an inland lake in Michigan.