

## **BACKLOTTER MANEUVERS AND USE OF LAKE BOTTOMLANDS**

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Recently, a lake association was frustrated that some backlot (*i.e.*, offlake) property owners were becoming increasingly resourceful regarding ways that they could permanently moor their boats on the lake given that the courts have generally held that public road ends (and even private easements) at lakes cannot be utilized for private dockage, boat moorage, and similar activities. Apparently, a few backlot owners decided to keep their boats moored at the docks of friends who are riparian property owners. What could the lake association do?

Of course, there is only a finite amount of total inland lake frontage in Michigan, and each individual lake has a limited amount of water frontage for that lake. On virtually no lake in Michigan can the desire of all backlot owners to permanently moor boats on the lake involved be satisfied. As with almost everything else in our society, the free market generally allocates scarce boat moorage space. Those who want permanent dockage rights pay a premium for riparian properties. Others rent boat slips in a marina. Finally, backlot owners who cannot afford riparian property or a rented marina boat slip (or simply refuse to pay the price for such amenities) are generally limited to “day use” of their boat via a public boat ramp.

The Michigan appellate courts have uniformly held that public road ends at lakes are for travel purposes only and cannot be used for permanent or overnight boat moorage, dockage, or storage, nor for sedentary activities such as sunbathing, lounging, picnicking, or camping. The following Michigan appellate cases confirm the limited usage rights for public road ends:

- *Jacobs v Lyon Twp* (after remand), 199 Mich App 667; 502 NW2d 382 (1993).
- *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 decision issued December 2, 2008; 2008 WL 5076595 (Docket No. 278894).

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

Furthermore, the Michigan courts have also held that private road ends, easements, alleys, and walkways that end at or are perpendicular to a lake also cannot be utilized for dockage, permanent or overnight boat moorage, lounging, sunbathing, and picnicking. Those cases include the following:

- *Delaney v Pond*, 350 Mich 685; 86 NW2d 816 (1957).
- *Miller v Petersen, et al*, unpublished Michigan Court of Appeals decision issued December 27, 1989 (Docket No. 111358) (10-foot-wide lake access easement).
- *Trustdorf v Benson, et al*, unpublished Michigan Court of Appeals decision issued December 21, 1989 (Docket No. 103109) (25-foot-wide lake access easement).
- *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985).
- *Gross v Mills*, unpublished Michigan Court of Appeals decision September 28, 1999; 1999 WL 33435472 (Docket No. 211776) (10-foot-wide lake access easement).
- *Hoisington v Parkes*, unpublished Michigan Court of Appeals decision issued March 12, 1999; 1999 WL 33454008 (Docket No. 204515) (10-foot-wide lake access easement).
- *Dyball v Lennox*, 260 Mich App 698; 680 NW2d 522 (2003) (10-foot-wide lake access easement).
- *Koker v Michaels*, unpublished Michigan Court of Appeals decision issued November 7, 2006; 2006 WL 3208673 (Docket No. 270524) (lake access easement).
- *Pentz v Schlimgen*, unpublished Michigan Court of Appeals decision issued December 19, 2006; 2006 WL 3733236 (Docket No. 258130) (private road and lake access area).
- *Chauvette v Owczarek*, unpublished Michigan Court of Appeals decision issued October 26, 2006; 2006 WL 3039971 (Docket No. 262473) (private road that terminates at Mullett Lake).

- *Gee v Howard*, unpublished Michigan Court of Appeals decision issued November 9, 2006; 2006 WL 3246463 (Docket No. 269732) (several private roadways ending at Lake Lansing).
- *City of Novi v Evers*, unpublished Michigan Court of Appeals decision issued May 6, 2010 (Docket No. 290079) (narrow lake access easement).
- *John Guidobono II Revocable Trust v Jones*, unpublished Michigan Court of Appeals decision issued June 24, 2010 (Docket No. 290589) (lake access easement).
- *Sullivan v Tillman*, unpublished Michigan Court of Appeals decision dated June 2, 2009 (Docket No. 285195) (walk and “beach”).

As for a backlot property owner mooring, docking, or storing his or her boat on the shore or at the dock of a friend who is a riparian property owner on a lake, there are at least three legal obstacles to that practice. First, almost certainly the use violates the local municipal zoning ordinance. If the ordinance contains anti-funneling or anti-keyholing lake access restrictions, the backlotter’s use would normally violate those ordinance provisions. Even if the local municipal zoning ordinance (or other local ordinance) does not contain lake access regulations, having two or more families utilize the lakefront of a property or dock would constitute an impermissible multi-family use in a single family residential zoning district. See *Soupal v Shady View, Inc*, 469 Mich 458 (2003), and *City of Au Gres v Walker*, unpublished Michigan Court of Appeals decision issued February 11, 1993 (Docket No. 140101). Second, the use of a lakefront property by two or more families would normally constitute a “marina” for which a permit would be required from the Michigan Department of Environmental Quality or Natural Resources. Finally, such multi-family use could also constitute an unreasonable interference with the riparian rights of adjoining or nearby riparian property owners. See *Three Lakes Assn v Kessler*, 91 Mich App 371 (1979); *Pierce v Riley*, 35 Mich App 122 (1971) and *Thompson v Enz*, 379 Mich 667 (1967).

For a riparian to allow a backlotter to keep one or more boats on his or her riparian property would normally be ill-advised for a number of reasons. First, the liability potential

should someone be injured is considerable. Second, in some cases, the riparian would be facilitating unlawful conduct under local ordinances, and might also be primarily guilty or responsible for such violations. Finally, it increases the likelihood that the riparian property owner will become involved in litigation, either involving the local municipality or other riparian property owners.

Some lake associations have also asked whether backlotters can simply anchor their boat overnight a considerable distance from shore in an inland lake. Generally, that cannot be done lawfully. Such a practice could violate the local zoning ordinance as discussed above. Furthermore, one cannot normally permanently moor (or anchor overnight) on the bottomlands of another without the permission of the riparian owner of the bottomlands involved.

A riparian owner on an inland lake in Michigan owns certain bottomlands of the lake to the center of the lake. *Hall v Wantz*, 336 Mich 112, 115; 57 NW2d 462 (1953); *Gregory v LaFaive*, 172 Mich App 354; 431 NW2d 511 (1988). As such, the riparian owner has significant property rights to his or her portion of the bottomlands of the lake, including exclusive rights to dockage and permanent boat mooring, as well as general riparian rights such as boating, swimming, water skiing, fishing, ice sports, and general recreation. See *Rice v Naimish*, 8 Mich App 698, 703; 155 NW2d 370 (1967); *Burt v Munger*, 314 Mich 659; 23 NW2d 117 (1946); *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930); *McCardel v Smolen*, 404 Mich 89; 273 NW2d 3 (1978). As with any other real property in Michigan, the bottomlands of another generally cannot be trespassed upon without either the permission of the riparian landowner or pursuant to a common law exception to the rule of non-trespass on the bottomlands of another. *Swartz v Sherston*, 299 Mich 423, 428-429; 300 NW 148 (1941); *Hilt* at 226; *Hall*.

The right of a riparian owner to control his/her bottomlands on an inland lake is not unlimited, however. If a particular inland lake is navigable, the public has certain usage rights due to navigability. Title to the privately-owned bottomlands for a navigable inland lake in Michigan is subject to the public's limited right to make certain uses of the navigable waters if the public has a lawful means of access to the lake. *Collins v Gerhardt*, 237 Mich 38, 42; 57 NW 115 (1926). Recognized public rights associated with navigability include boating, fishing, and swimming. *McCardel v Smolen*, 404 Mich 89, 100; 273 NW2d 3, 12 (1978).<sup>1</sup>

The issue of anchoring on the bottomlands of another on an inland lake is one that has been addressed in only a limited fashion by the Michigan courts. Nonriparian boaters who lawfully gain access to a navigable waterway have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming. *Thies v Howland*, 424 Mich 282, 288; 380 NW2d 463 (1985). An incident of the right to navigate is the right to temporarily anchor boats on the bottomlands of another. *Thies, supra* at 288; *Delaney v Pond*, 350 Mich 685, 688; 86 NW2d 816 (1957); *Hall, supra* at 117. However, that exception to the rule of a riparian landowner's right to control his/her bottomlands is quite limited. The permanent or indefinite anchoring of a boat without the permission of the owner of the bottomlands is a trespass. *Patterson v Dust*, 190 Mich 679,683; 157 NW 353 (1916); *Hall, supra* at 119.

Michigan courts have not defined "temporary" or "indefinite" in this context. The only temporal guidance available from the Michigan appellate courts is limited at best. Both *Patterson* and *Hall* dealt with the anchoring of vessels for extended periods of time. In *Patterson*, the Michigan Supreme Court restrained owners of houseboats from anchoring their vessels in the Detroit River, off

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<sup>1</sup> While the Michigan appellate courts have recognized the ability of fishermen and others to wade on the bottomlands of a navigable watercourse or navigable stream, river or creek in Michigan, the Michigan appellate courts have not yet recognized a right to wade or walk on the bottomlands of another as an incident of permissible navigability for members of the public on a navigable inland lake.

Belle Isle, for the duration of what the Court identified as the “heated season,” presumably, the entire summer. In *Hall*, the defendant was precluded by the Court from keeping a 25-by-40-foot raft “continuously anchored” in White Lake off plaintiffs’ shore. It is highly likely that the Michigan appellate courts if presented with the issue would hold that in order to be considered permissible “temporary” mooring or anchoring, the owner or occupier of a boat or vessel must be physically present with it and cannot simply leave the boat or vessel anchored unattended. It is also likely that mooring a boat or vessel for extended periods of time (for example, many hours), even with people present in the boat, would not be considered temporary, particularly if the activity occurring on or about the boat or vessel involves such activities as partying or lounging.

The question of where, and under what circumstances, the anchoring of a boat ceases to be “temporary” and instead becomes “indefinite” or permanent is a question of fact for the courts to resolve. If a riparian owner believes that a boater has crossed this line and has anchored a boat for more than a temporary period, the landowner may bring a civil cause of action against the alleged trespasser or may file a criminal trespass charge with the appropriate law enforcement agency.

It is important to note that the common law exception to the ability of a riparian owner to keep others off the riparian owner’s bottomlands is limited and has two prongs. First, the use engaged in by the public must involve an incident or right of navigability. Second, the anchoring to or use of the bottomlands must be temporary. If a use or activity by a member of the public on a navigable inland lake does not meet both prongs, it would constitute both a criminal and civil trespass on the bottomlands of another.

The exercise of navigability rights by members of the public must be conducted in a reasonable fashion. *Hall, supra* at 116-117. Just as one riparian owner may not unreasonably infringe on the riparian rights of other riparian landowners, a member of the public who has lawfully

accessed a navigable inland lake may not exercise his or her public navigability rights in a manner that unreasonably interferes with the rights of others, including riparian landowners and other members of the public.

One of the very important points that gets lost in the discussion of backlotter use of road ends, easements, and other lake access sites is the fact that the courts have normally allowed extensive use of such lake access sites save for certain prohibited activities. For example, at a public road end or private easement at a lake, the backlotter can usually use the road or easement for pedestrian use, swimming, fishing, hand-carrying small boats and kayaks to and from the water, and ice fishing in the winter. Most riparians do not object to those types of uses, which are much less intrusive (and even potentially less dangerous) than motor boat storage and usage in small, cramped areas. Most problems arise when a few backlotter insist on being accorded every right of a riparian (including permanent boat moorage space) without having to pay the price for a riparian property.