

ATTORNEY WRITES

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ON WATER—DOES ANYTHING GO?

I am frequently asked whether anything can be done to protect annoyed riparian property owners from pesky bass tournaments on their lake, the anchoring of boats by partying strangers for long periods of time just off shore (so-called “party barges”) and other nuisances which occur on the surface of the water. The answer is—probably.

Theoretically, a riparian property owner can file a civil lawsuit against anyone who creates a nuisance or unsafe condition. Such private civil lawsuits are rarely practical for many reasons, however, when nuisances on the surface of the water are involved. First, such lawsuits tend to be expensive and absent highly unusual circumstances, win, lose or draw, each party pays their own attorney fees. Second, such lawsuits can take anywhere from 8 months to 2 years (or more) to work their way through the court system. Third, it is often difficult to identify who to sue—unless you know the name and address of the troublemaker(s), no lawsuit can be filed. Fourth, there really is no penalty to the other side even if you win the case—at best, the court will normally only enter an order prohibiting the conduct in the future. Finally, many judges are reluctant to issue that type of court order due to the difficulty of enforcement and the somewhat vague nature of such an order. Such judicial reluctance to issue injunctions will likely be reinforced by the recent Michigan Court of Appeals case of *Higgins Lake Property Owners Assoc. v Gerrish Twp*, 255 Mich App 83 (2003).

The better solution is to have the local municipality (city, village or township) enact a police power (non-zoning) ordinance to regulate the nuisance behavior. The advantages of having a local ordinance include relatively easy enforcement by the municipality via civil infraction tickets, the normal respect courts give to municipal ordinances and the fact that the cost of enforcement would be borne by the municipality and not by the individual riparian property owner.

Can a municipality regulate what occurs on the surface of an inland lake in Michigan? In most cases, yes. See *Square Lake Hills Condominium Ass’n v Bloomfield Twp*, 437 Mich 310 (1991), and the various municipal enabling acts for ordinances. Nevertheless, it should be kept in mind that there are a few subject matter areas where municipalities are likely precluded from regulating on-lake activities—these are situations where Michigan laws either expressly preclude local regulation or give state agencies such pervasive regulatory authority in a particular area that local municipal regulation is precluded or “preempted.”

What are some of the topic areas which can probably be regulated by local ordinance? By ordinance, municipalities can regulate special events involving lakes such as bass tournaments, boat parades and boat races. Such ordinances could include prior permit requirements, limitations upon hours and similar restrictions. Municipalities can also adopt general noise ordinances (except as to stock boat engines), litter regulations and disorderly conduct ordinances which can also be enforced on lakes. Theoretically, a municipality could even adopt an ordinance regulating “party barges,” including how long they can be parked in one spot.

Can municipalities impose speed limits, no wake zones and similar restrictions on inland lakes? There is no clear answer. State officials have argued that the process whereby the Michigan Department of Natural Resources uses to approve special watercraft rules for inland lakes (found in what was formerly called the Marine Safety Act) “preempts” local ordinances from dealing with the same topics. However, the Michigan Supreme Court cases of *Burt Township v DNR*, 459 Mich 659 (1999), *Square Lake Hills Condominium Ass’n v Bloomfield Twp*, above, and *Miller v Fabius Twp Bd.*, 366 Mich 250 (1962) imply that municipalities might be able to adopt such ordinances without utilizing the special watercraft rules procedures through the DNR. Until the Michigan appellate courts address this issue, the outcome will remain uncertain.

Can local municipalities regulate the drawing of water out of inland lakes and streams for consumptive purposes such as watering lawns and golf courses and for bottled water? Until and unless the state of Michigan adopts comprehensive rules which could preclude such local ordinances, the answer is probably yes. However, the drawing of water for agricultural purposes might be protected against local regulation by the Michigan Right to Farm Act (MCLA 286.471 *et seq.*)

If there are problems with the utilization of houseboats on an inland lake, can a local municipality regulate such use? Probably, although Michigan law is silent regarding the issue.

As always, riparians must constantly be on guard to thwart attempts by the Michigan Legislature to take away local control with new legislation aimed at full or partial preemption of a topic area (*i.e.*, enacting state laws which would prohibit or severely limit a local municipality from regulating a particular area, even if the municipality had such regulatory authority in the past). Some of the activities listed above which municipalities can regulate now could be off limits to local government regulation in the future if special interests get their way with the Michigan Legislature. This is not idle speculation—special interest groups have convinced the Legislature in the past to preclude or severely limit local government regulation in the following areas:

- Wetlands protection
- Telecommunication towers
- Landfills
- Huge industrial livestock
- Oil and gas wells
- Mobile home parks
- Prisons
- Building codes

facilities

Unfortunately, when the Legislature takes away local control in a particular area, state agencies often prove themselves lax in their regulatory efforts of that area, and in some cases, there is no state regulation or enforcement whatsoever.