

ATTORNEY WRITES

Welcome to the **ATTORNEY WRITES** column. This is a regular feature in *The Riparian* that address current legal topics of interest to riparian property owners.

PRO-RIPARIAN MICHIGAN APPELLATE COURT CASES REGARDING LAKE ACCESS EASEMENTS

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Recently, the Michigan Court of Appeals issued its unpublished opinion in *Dyball v Lennox* (decided November 18, 2003—Case No. 241296). That case involved a 16-foot wide ingress and egress easement for backlot owners to Fenton Lake. Even though a dock and boat may have been utilized on the shore of the easement at the lake for many years (and potentially even at the time the easement was created), the Court of Appeals reaffirmed long-standing case law indicating that where a simple lake access easement is involved, it normally cannot be used for dockage, permanent boat moorage, sunbathing, lounging, etc. In other words, such lake access easements can only be used for travel purposes. Michigan Lake & Stream Associations, Inc. filed an *amicus curie* brief on behalf of the riparian property owner in this appeal.

Dyball is just the latest in a series of Michigan appellate court decisions over the years which have held that absent express language in an

easement permitting dockage or permanent boat moorage (or the presence of prescriptive rights), lake access easements with the following language (or similar wording) are for travel purposes only—that is, no dockage, shorestations, permanent boat moorage, sunbathing, lounging, etc. can occur:

- “Ingress and egress to the lake”
- “An easement to the lake”
- “A right-of-way to the lake”
- “For access to the lake”

The two key cases in this area are *Delaney v Pond*, 350 Mich 685 (1957) and *Thies v Howland*, 424 Mich 282 (1985). See also, *Schofield v Dingman*, 261 Mich 611 (1933). Additionally, the following unpublished Michigan Court of Appeals cases are also helpful to riparian property owners:

Gross v Mills (unpublished Michigan Court of Appeals decision No. 21176, decided September 28, 1999)

Hoisington v Parkes (unpublished Michigan Court of Appeals decision No. 204515, decided March 12, 1999)

Krause v Keeler Twp (unpublished Michigan Court of Appeals decision No. 220692, decided July 28, 2000)

Miller v Peterson, et al (unpublished Michigan Court of Appeals decision No. 111358, decided December 27, 1989)

Trustdorf v Benson, et al (unpublished Michigan Court of Appeals decision No. 103109, decided December 21, 1989).

Although an unpublished Michigan Court of Appeals decision is not technically binding precedent, it can be utilized by both trial and appellate courts for insight and as a guide if considered persuasive.

While some backlot owners will attempt to “spin” the decisions by the Michigan Supreme Court and Court of Appeals in *Little v Kin*, 249 Mich App 502 (2002); modified in ____ Mich ____ (2003), the Michigan Supreme

Court's opinion in that case is actually fairly pro-riparian property owner. Pursuant to that decision, unless a lake access easement has express dockage or boat moorage language (or a prescriptive right expanding the usage rights can be proven), the easement can almost never be used for dockage or permanent boat moorage, even if there is a long history of such use. The final Michigan Supreme Court decision in *Little v Kin* puts a heavy burden on backlot owners to prove that a lake access easement can be used for anything other than travel.

Occasionally, backlot owners will cite one or two other Michigan appellate court decisions for the proposition that simple lake access easements can be used for dockage, permanent boat moorage, sunbathing, etc. However, if one carefully studies those few cases, they either do not stand for that proposition or contain highly unusual fact situations which are rarely applicable.

The case law involving public roads which end perpendicular at lakes is slightly different than that involving private lake access easements. The Michigan appellate courts have also held that permanent boat mooring, private dockage, sunbathing, lounging, and similar activities cannot occur on road ends at lakes. However, the presence of one public dock is permitted for temporary mooring to aid navigation. Accordingly, if a private individual places a dock at a public road end, it becomes public and can be utilized by anyone for temporary mooring only. *Jacobs v Lyon Twp*, 199 Mich 667 (1993),

is the key case in this area. *Jacobs* was recently reaffirmed by the Michigan Court of Appeals in *Higgins Lake Property Owners Assn' v Gerrish Twp*, 255 Mich App 83 (2003); *lv den* ____ Mich ____ (2003). See also *Higgins Lake Property Owners Ass'n v Gerrish Twp* (unpublished Michigan Court of Appeals decision No. 235418, decided October 30, 2003).

It should be noted that even activities which might normally be allowed on lake access easements and at public road ends can be further regulated (or even prohibited) by local ordinance. Furthermore, dockage and permanent boat moorage at private lake easements or public road ends still normally require a marina permit from the Michigan Department of Environmental Quality.

If there are any legal issues pertaining to lakes or streams which you would like to see discussed in future columns, please send a letter request to *The Riparian*. Or to

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