

RECENT CASES OF INTEREST *(May 2003 Riparian)*

There has been a flurry of Michigan appellate court proceedings recently which could impact riparian rights, and not all of the news is good for riparian property owners. This issue's column will concentrate on pending and recently-decided Michigan court cases of interest to riparians.

Last year, the Michigan Court of Appeals issued its decision in *Little v Kin*, 249 Mich App 502 (2002). *Little* involved a backlot easement which read "a permanent easement for access to and use of the riparian rights to Pine Lake" The trial court summarily held that the easement was for ingress and egress only, and the backlot property owner could not use the easement for a dock or permanent boat moorage. On appeal, the Michigan Court of Appeals held that the trial court decided the case prematurely without a trial and remanded the case back to the lower court for a trial on the merits. Among other matters, the Court of Appeals indicated that the trial court should look closely at the intent of the original grantor based on the language used and the circumstances existing at the time the easement was created. Late last fall, the Michigan Supreme Court agreed to hear the case and oral arguments were heard last month. It is highly likely that the Michigan Supreme Court will render its decision in the *Little* case within the next month or two. The ultimate decision by the Michigan Supreme Court could have a profound impact upon future cases involving lake access easements, road ends, and riparian issues in general. Michigan Lake & Stream Associations, Inc. submitted an amicus curiae brief to the Michigan Supreme Court in support of the riparian property owner.

In *Higgins Lake Property Owners Ass'n v Gerrish Township, et al*, ___ Mich App ___ (2003), the Michigan Court of Appeals wrote a new chapter in the history of the misuse of public road ends at Higgins Lake. As many riparians know, the Court of Appeals in *Jacobs v Lyon Twp, after remand*, 199 Mich App 667 (1993), held that a public road end can normally be utilized for one public dock under certain circumstances, and that there can be no permanent boat mooring, shorestations, lounging, sunbathing, etc. In *Higgins Lake*, a riparian property owners association and several riparians attempted to enforce *Jacobs* for several road ends at Higgins Lake which were being misused. Backlot owners have fought a fierce litigation battle in this case and it has bobbed up and down between the trial court and the Court of Appeals on more than one occasion. The Court of Appeals' decision in this matter is a "mixed bag"—it generally upheld *Jacobs*, but did cut away at that decision slightly. The Court held that where a conventional public road dedication is involved, *Jacobs* normally applies. The Court did, however, leave the door open a little for backlot owners to argue that additional activities may be allowed at a particular road end if they can show that such activities occurred at or close to the time when the road was first created. The more troublesome aspect of the case involves the remedy available for violations of *Jacobs*. Even though there was significant evidence of activities occurring in violation of *Jacobs*, the Court of Appeals held that no court order (i.e., injunction) would be issued to stop misbehavior unless more significant evidence of public or other harm could be shown. This will present a problem where a riparian property owner, lake association, or other person or group wins a trial court determination that someone is improperly using a road end but the

trial court refuses to order the violating party to stop. In its opinion, the Court of Appeals invited the Michigan Legislature to seek a statutory remedy for infractions at road ends. In fact, the Michigan Waterfront Alliance is presently urging the legislature to adopt statewide legislation to govern public road end activities.

In *Dyball v Lennox*, the Genesee County Circuit Court permitted a backlot owner to continue to maintain a dock and permanent boat mooring at the end of a 16-foot-wide lake access easement. According to the backlot owner, such usage had occurred for many years back to the time the easement was originally created. This case is presently pending before the Michigan Court of Appeals, and ML&SA has filed an amicus curiae brief in support of the riparian property owner.

Even in townships which have no anti-funneling regulations, there has been a widespread assumption that “keyhole” developments and similar devices cannot be created where the property around a lake is zoned for single-family use only under the local zoning regulations. In essence, “funneling” could be considered a prohibited multi-family use. In *City of Au Gres v Walker* (decided February 11, 1993, Case No. 140101), the Court of Appeals essentially held that granting an access easement to a river for two backlot owners constituted a prohibited multi-family use of the riparian property under single-family zoning regulations. Since *Au Gres* is an unpublished case, it is not binding upon trial courts. Nevertheless, unpublished opinions are often considered by trial courts, particularly if they are persuasive. On February 28, 2003, the Court of Appeals issued its opinion in *Soupal, et al v Shady View, Inc.* (unpublished, Case No. 231443). In *Shady View, Inc.*, a group of backlot owners at Higgins Lake formed a nonprofit association which owned and controlled a vacant lake lot on Higgins Lake. Extensive dockage was installed and members of that association moored their boats at such dockage. Riparian property owners sued and claimed that the dockage was both a marina (which required state approval) and constituted a prohibited commercial or multi-family use on property zoned single-family residential. The Court of Appeals held that the lakefront lot commonly used by the backlot owners and their association did not constitute a prohibited commercial or multi-family use under the single-family zoning for the property. Two points should be made regarding this case, however. First, like *Au Gres*, it too is an unpublished case and is not binding precedent. Second, there was some unusual wording in the local zoning ordinance which may have allowed uses normally not permitted in single-family residential zones under other zoning ordinances.

In *Yankee Springs Twp v Veloso, et al*, the Allegan County Circuit Court upheld the township’s anti-funneling regulations. The trial court upheld the ordinance provision against claims that it did not apply, was overbroad, was unconstitutional, was invalid since it could only apply to part of the lake (i.e., parts of the lake are located in four different townships), and the township waited too long to enforce its ordinance.