keeping your head...

ABOVE WATER

BY GREG MCCLELLAND

While real estate sales have slowed dramatically in Michigan, based on calls to the MAR Legal Hotline, it would appear that there has been no slowdown in the number of disputes over who has rights to use Michigan inland lakes and, if so, what rights they have. REALTORS® continue to face claims based upon alleged representations they made with respect to a buyer's access and use of an inland lake. This article is not designed to provide information so REALTORS® can properly interpret a buyer's rights, but instead, is designed simply to help REALTORS® spot potential problems and get the buyer to a lawyer who has expertise in inland lake access and use issues.

A point of clarification is necessary from the outset. Many REALTORS® confuse inland lake access and use issues with access and use issues for the Great Lakes. They are two completely different animals. The public's right to use the shoreline of the Great Lakes begins at the "ordinary high water mark" and continues into the water. The Michigan Supreme Court has determined that members of the public have the right to walk along the Great Lakes shoreline. The Michigan Supreme Court has not addressed the public's right to sunbathe, picnic or engage in other activities in the area from the "ordinary high water mark" of the Great Lakes to the water.

It has long been the law of Michigan that persons who own property along Michigan inland lakes own to the water's edge and beyond to the center of the lake. In the hypothetical perfectly round lake, each property owner would own to the water's edge and then beyond in a pie-type wedge to the center of the lake. If there is no public access to a lake, its use is confined to the private property owners who own land abutting the lake. Once however, the public has gained legal access to the water, the public may then use the lake for such activities as boating, swimming and temporary anchoring of boats. This being the case, much of the case law in Michigan has involved questions of access to a particular inland lake, whether it be by public or private road or by a private easement.

There are a number of Michigan cases dealing with the permissible use of public roads that end at the edge of an inland lake. For the past 130 years, Michigan courts have held that members of the public have a right to use these road ends to access the lake in order to put their boats in the water. Further, Michigan courts have determined that a municipality, on behalf of its citizens, is entitled to build a dock at the end of a public road to aid the public in achieving access. The disputes in these public road-end cases typically involve whether members of the public also have the right to use the road-ends for "shore activities" such as picnicking and sunbathing. This issue becomes important to REALTORS® when they sell a parcel of property on a lake which is near a public road access. In many instances, the buyers are painfully surprised to find strangers wandering onto and engaging in activities on what they thought was their private property.

In trying to determine what the scope of the use may be for a public road-end access to a lake, it is important to understand the typical context in which public access was created to the lake. Typically, a developer has platted property adjacent to the lake and, as part of that plat, has dedicated the public road-end access. Michigan courts, in trying to determine what "shore activities" are permissible at a road end, will look at the intent of the platter at the time of the dedication of the road. The relevant inquiry for the courts is the use of the road end at the time of the dedication and not later road-end activity, which may occur decades after the dedication. A review of recent case law indicates reluctance on the part of Michigan courts to permit "shore activities" on these public road ends.

In two recent Michigan Court of Appeals decisions involving road ends at Higgins Lake, the Court of Appeals has noted that at the time of the dedication, there was a very sparse population around Higgins Lake. Thus, the Court has concluded that there would have been no need for the platters to provide for "shore activities" at the public road ends. The Court further determined that the fact that these road ends were used years later for shore activities was irrelevant in determining the intent of the platter. Further, the Court determined that permitting "shore activities" at the road end would interfere with the public's right of access to the lake. The Court concluded in both cases that there was no evidence that anything more than access to the lake was intended by the platter.

The Michigan Supreme Court has used the same analysis to determine permissible "shore activities" at the end of private roads that access a lake. In the leading case, the Supreme Court stated that where a plat designates a private road or alley is to be used for access to the water by back lot owners, there is a presumption that the platter intended to permit the building of docks to aid in that access to back lot owners. Further, any dock constructed at the end of such a private road must be available for the use of those who have the right of way to use the private road. In other words, if a dock is constructed at the end of a private road which is legally accessible by 30 back lot owners, theoretically, all 30 back lot owners would have the right to use the dock.

In addition to public and private road access, on many Michigan inland lakes, the back lot owners have been given access to the lake through a recorded easement. Usually, this private easement has been created through a notation or statement on the plat, a grant in a deed, or by a separate easement instrument.

Most of the disputes regarding private easements arise from plats that were recorded during the first half of the twentieth century. During that period, the custom was to have a platter grant lake access to back lot owners through an easement which was short and simple. The platters did not try to define the scope of the access rights in any way. As an example, many platters would grant "a 10-foot easement between Lots 6 and 7 for the use by all lot owners to access the lake." This type of grant tells us nothing about what the back lot owners can do in that easement, other than put their boats in and out of the water (e.g., can they put a dock within the easement, camp at the water's edge, and/or party at all hours in a very confined area?). Thus, there have been numerous cases involving disputes between lakefront owners and back lot owners as to the permissible uses of these private easements. Again, most of these disputes have involved a back lot owner's claimed right to

construct a dock and/or sunbathe or picnic within the easement area.

When trying to determine the rights of back lot owners to use private easements to a lake, courts will look to the language of the particular easement and the circumstances at the time the easement was granted by the platter in order to again try to determine the intent of the platter. This can be a difficult task, particularly if the plat was dedicated 100 years ago. Nonetheless, the Michigan Supreme Court recently made it clear that if the language in the easement is plain and unambiguous, it must be enforced as written. If that is the case, a court cannot look beyond the express language of the easement to consider the circumstances at the time the easement was given.

In one recent Court of Appeals case, the terms of an easement which granted access "for the purpose of ingress and egress to and from the premises to the water's edge" was deemed to be so clear on its face so as to preclude any additional evidence as to the intent of the grantor. In this case, the Court determined that while the easement gave "access to the water," such access included only a right to use the surface of the water for such activities as boating, fishing and swimming. It did not grant back lot owners the right to construct a dock.

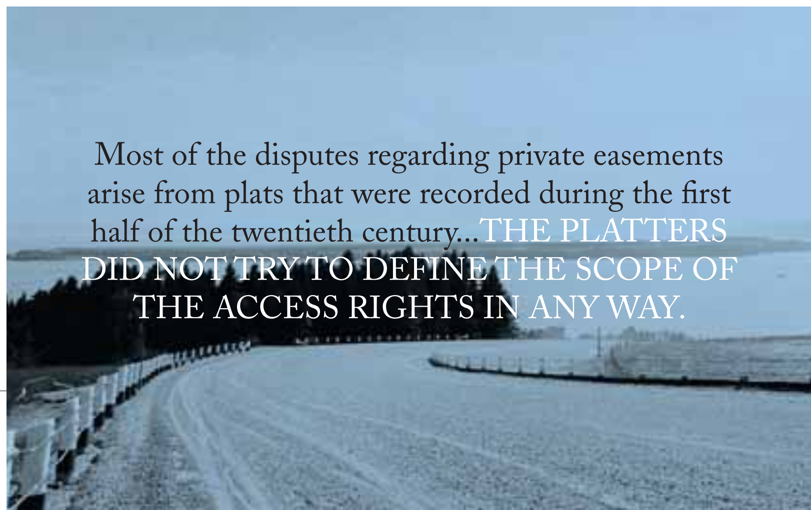
The difficulty for REALTORS® in trying to advise prospective buyers of back lots as to their rights is demonstrated by review of an earlier Michigan Supreme Court case involving very similar facts. In that case, a private road ran to the water's edge. It was stated in the plat that this alley was "dedicated to the joint use of all owners of the plat." The Supreme Court determined that the presumption was that the platter intended to permit the construction of a dock at the end of the alley. In trying to explain these two cases to clients, we try to harmonize them by saying the later case used the words "ingress and egress" and the earlier case used the words "joint use" to explain how one decision ended by prohibiting back lot owners from building a dock and the other decision ended with a finding that the platter intended the back lot owners to be able to build a dock. Needless to say, it is a distinction that is hard for people to grasp.

As a practical matter, REALTORS® should be aware of the fact that there appears to be a greater likelihood of dispute over permissible activities at the end of a private road or easement than in the situation where access is provided through a public road. In the case of a public road, a municipality has the power necessary to regulate the use of its public dock at a public road end. On the other hand, private roads and easements benefiting a group of back lot owners create a situation ripe for dispute. If it is not clear among the back lot owners as to who can construct a dock or docks, how many docks can be built, how the use of such docks will be allocated, then it is equally difficult for a court to make such a decision. Courts do recognize that at some point, the installation of docks by a number of back lot owners will interfere with the access of other back lot owners.

In summary, when REALTORS® are selling lakefront property which is near a public road access, the buyers can look to the municipality to determine what, if any, "shore activities" may occur at the end of the road. However, things can be much more ambiguous when selling lakefront properties near a private road or easement or which have access to a lake via a private road or easement. Remember, looks can be deceiving. Just because back lot owners have built docks in the past at the end of a private road or easement does not necessarily mean that a court will find that they have a continued right to do so. Again, a court will look at the intent of the platter at the time access was provided.

In selling property to lakefront owners or back lot owners, there is one other situation that is an incubator for disputes. This situation occurs where the platted lots in a subdivision do not extend to the edge of the lake. Instead, the plat may designate some portion of the land between the lake and the lot lines as a "park" or "walkway" for the use of the back lot owners. Typically, the back lot owners have used the "park" or "walkway" in peaceful coexistence with the lakefront owners for many years. Then, either a new lakefront owner appears who is more sensitive to activities in the "park" or new back lot owners appear who begin to intensely use the "park," accompanied by highly amplified music and strange-smelling smoke. This situation ultimately ends up with the lakefront owners who are contiguous to the park asking their attorneys to reassess the rights of the back lot owners to use the park.

As REALTORS® are aware, peaceful use of lakefront property and access to a lake from a back lot are issues of critical importance to buyers. If a REALTOR® spots any of the situations described in this article, they should, at a minimum, direct the buyers to an attorney for an opinion as to what their rights may be with respect to access to a lake and activities that can lawfully occur within that access. Again, REALTORS® should remember that just because a dock has been in an access area for a number of years does not necessarily mean that it is lawfully in that area. MAR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