

LAKE ACCESS AND ENJOYMENT OF MICHIGAN BEACHES

A. INTRODUCTION

For many Michigan residents, one of the more significant benefits of living in this State is the use and enjoyment of the Great Lakes and the many inland lakes located throughout the State. For this reason there have been and continue to be numerous cases involving disputes over the right to use our lakes and beaches.

As many REALTORS® are aware, the hot issue in the last year has been whether or not members of the public have the right to walk along the Great Lakes' waters' edge in front of privately owned homes. This article will discuss the outcome of that controversy, which was decided by the Michigan Supreme Court on July 29, 2005, as well as other lake access issues.

At the outset, it is important to understand that the law is different for Great Lakes' access than it is for inland lakes' access. This is primarily because land covered by any of the Great Lakes belongs to the State, while the bottomland of inland lakes is owned by the surrounding property owners. West Michigan Dock & Market Corporation v Lakeland Investments, 210 Mich App 505 (1995).

B. GREAT LAKES ACCESS

Several early Michigan cases held that property owners along Lake Michigan owned only to what had been the water's edge at the time the property was originally

conveyed from the State of Michigan to the first private property owner in the chain of title. Kavanaugh v Rabior, 222 Mich 68 (1923). To the extent that the Great Lakes' shoreline had receded since that time, title to the formerly submerged land continued to be held by the State. These cases assumed further that for this purpose, the "meander lines" established by governmental surveyors back in 1851 marked the then-existing shoreline.

Interestingly, one of these early Michigan cases specifically noted that this analysis was out of line with the law elsewhere. Kavanaugh v Baird, 241 Mich 240 (1928). In that case, the Michigan Supreme Court stated that it was choosing to ignore the law elsewhere because it did not want to "turn over to private ownership hundreds of thousands of acres of land which the recent low waters in the Great Lakes have uncovered and which form a fringe around our great inland seas"

Then in 2004, the Michigan Court of Appeals uncovered a 1930 Michigan Supreme Court case which it believed overruled these earlier decisions but which had apparently been largely ignored. Glass v Goeckel, 262 Mich App 29 (2004). In Goeckel, the Court of Appeals held that, although the State holds title to all land previously submerged, the State's title is subject to the riparian owner's exclusive use of this land. Accordingly, the Court found that property owners along the Great Lakes had the exclusive right to use and enjoy the land along the water's edge and could prohibit

members of the public from walking along the beach. Under the Court of Appeals' decision, members of the public could continue to walk along the Great Lakes' shoreline, so long as they stayed in the water.

In July of 2005, the Michigan Supreme Court issued an over 100-page opinion which, when it is all said and done, allows members of the public walking along the Great Lakes' shoreline to come out of the water so long as they stay below the "ordinary high water mark." Glass v Goeckel, 2005 WL 1793731 (Mich. July 29, 2005). The "ordinary high water mark" is described in the case as "the place where the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction or terrestrial vegetation, or other easily recognized characteristic." The Court found that when the State originally conveyed land along the Great Lakes to private property owners, that conveyance was subject to the "public trust rights" in the Great Lakes. The Court concluded, "[b]ecause walking along the lakeshore is inherent in the exercise of traditionally protected public rights . . . our public trust doctrine permits pedestrian use of our Great Lakes up to and including the land below the ordinary high water mark."

REALTORS® should not take it upon themselves to advise clients or customers about the location of any particular "ordinary high water mark." As pointed out by Justice Young in his concurring opinion in Goeckel, the location of any particular

“ordinary high water mark” will be subject to debate. (Justice Young would allow members of the public to walk along the wet portion of beach only). Finally, it is important to remember that this decision only addresses the public’s right to walk along the Great Lakes’ shoreline and does not discuss any right to sunbathe or picnic in this area. The Court did not consider any additional shore activities but simply made a passing reference that there was not an “unlimited public right” to use the land below the ordinary high water mark.

C. INLAND LAKES

Unlike the controversy with regard to the Great Lakes, it has long been the law in Michigan that private property owners along our inland lakes own to the water’s edge and beyond to the center of the lake. This right is subject to the public’s right to use the lake, assuming that the public has a means of access to that lake. Once the public has gained legal access to the water, the public may then use the water for such activities as boating, swimming and the temporary anchoring of boats. McCardel v Smolen, 404 Mich 89 (1978). Thus, with respect to inland lakes, much of the case law has involved questions of access to a particular lake, whether it be by public or private road or, in many instances, private easement.

1. Public Road Cases

There are a number of reported Michigan cases involving the permissible use of public road ends that are perpendicular to an inland lake. Clearly, the members of the public have a right to use these road ends to access the lake to put their boats in the water. Backus v Detroit, 49 Mich 110 (1882). Decisions have also made clear that a city, on behalf of its citizens, is entitled to build a dock at the end of such road to aid in that access. The dispute in these road end cases typically involves whether members of the public also have a right to use the road ends for “shore activities” such as picnicking and sunbathing.

Reported decisions have consistently held that what constitutes the appropriate use of a public road end depends on the intent of the dedication and that the relevant inquiry is the use of the road end at the time of the dedication (and not subsequent road end activity occurring after the dedication). Higgins Lake Property Owners Ass’n v Gerrish Township, 255 Mich App 83 (2003); Jacobs v Lyon Township, 199 Mich App 667 (1993). An examination of these recent decisions involving the use of public road ends suggests a reluctance on the part of the courts to permit “shore activities” on these road ends.

In the two cases mentioned above, both of which involved road ends at Higgins Lake, the Court of Appeals opined that at the time of the dedication, because of the sparse population around the lake, there would have been no need to provide for

“shore activities” at the road ends. The fact that these road ends were used years later for shore activities was irrelevant in determining the intent of the plattor. Moreover, 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.

In Thies v Howland, 424 Mich 282 (1985), the Michigan Supreme Court opined that the same analysis for public roads would apply to private roads. In that case, the Court stated that where a plat designates a private road or alley to be used for access to the water by back lot owners, there is a presumption that the plattor intended to permit the building of docks to aid in that access. The Court noted further that any dock constructed at the end of such a private road must be available for the use of those to whom the right of way is dedicated.

A rule of law presuming that there is a right to construct a dock or docks at a road end to facilitate access to a lake works much better for public roads than for private roads. A municipality can readily regulate the use of its public dock at a public road end. For private roads benefiting a group of back lot owners, it is not clear how a court is to determine who can construct a dock or docks, how many docks can be built and how the use of such docks will be allocated. Clearly, at some point the installation

of docks by a number of back lot owners will interfere with the access of other back lot owners.

2. Private Easement Cases

On many inland lakes, the back lot owners have been given access to the lake through a recorded private easement – either through a notation on a plat, a grant in a deed, or less often, a separate easement instrument.

As was the custom at the time, the language used in many of the early easement grants was short and simple and did not try to define the scope of the access rights in any way. Accordingly, there have been numerous cases involving disputes between lakefront owners and back lot owners as to the permissible uses of these private easements. Most of these disputes have involved a back lot owner's right to construct a dock and/or sunbathe and picnic within the easement area.

The often cited rule of law in these cases is that courts must look to the language of the particular easement, as well as the circumstances at the time the easement was given, to determine the intent of the grantor. Recently, the Michigan Supreme Court made clear that if the language in the easement is plain and unambiguous, it must be enforced as written – and that if this is the case, a court cannot look beyond the explicit language of the easement and consider the circumstances at the time the easement was given. Little v Kin, 468 Mich 699 (2003).

Language in an easement granting access “for the purpose of ingress and egress to and from the premises to the water’s edge” has been deemed to be so clear on its face as to preclude any additional evidence as to the intent of the grantor. While such an easement gave “access to the water,” it was held that such access included only the right to use the surface of the water for such activities as boating, fishing and swimming. It did not afford the right to construct a dock. Dyball v Lennox, 260 Mich App 698 (2004).

The Dyball holding is difficult to harmonize with the language in a 1985 Michigan Supreme Court case stating that where a private road ran to the water’s edge, and where it was stated on the plat that such alley was “dedicated to the joint use of all owners of the plat,” the presumption was that the plattor intended to permit the construction of a dock at the end of the alley. Thies, supra. One distinction may be in the specific language of the dedication. While the later dedication only referred to “ingress and egress,” the earlier dedication referenced more broadly the “joint use” of the back lot owners. On the other hand, the later holding may be simply due to the fact that in recent years, Michigan courts seem to have become more diligent in their protection of private property rights.

3. Other Access Cases

Occasionally it is at least arguable that front lot owners along an inland lake do not own to the water's edge. For example, a plat may designate some portion of the land directly adjacent to an inland lake as a "park" or "walkway" for the use of the back lot owners. The initial question in these cases is the ownership of this piece of land. Do the back lot owners hold title to this piece of land or do they only hold easement rights? Again, courts have consistently held that the relevant inquiry is the intent of the plattor.

Where the land immediately adjacent to the water is a right of way, such as a walk or alley, the presumption is that the fee belongs to the adjacent lot owners and that the right of way is merely an easement. Thies v Howland, 424 Mich 282 (1985). In Thies, the intervening strip of land was a 12-foot walkway along the lakeshore located between the (otherwise) lakefront lots. A notation on the plat stated that the walk was "dedicated to the joint use of all owners of the plat." The trial court concluded, and the Court of Appeals and Supreme Court affirmed, that the walk was only an easement and that the front lot owners held title to this land. The Court went on to conclude that the back lot owners had no right to construct docks along the walk. The Court noted that the trial court had concluded that there was no evidence that the original plattor intended to grant to the back lot owners the right to construct docks along this walk.

When the intervening land is in fact of significant size, intent can be established by looking at the language in the plat and the circumstances that existed at the time the

plat was recorded. Dobie v Morrison, 227 Mich App 536 (1998). In Dobie, a parcel of land immediately next to the lake was designated as a park which the plat dedicated “to the use of the owners of lots in this plat which have no lake frontage.” The Court said that because of the park’s significant size, it did not look at the park the same way that it looked at the walkway in Thies. Thus, there was no presumption that the plattor intended to convey only an easement.

The Dobie Court went on to determine the actual intent of the grantor in this instance. Evidence at trial had shown that the plattor had retained control of the park after the plat was recorded by supplying the park with electricity, picnic tables and the like. Based on the language of the dedication stating that the park was for “the use of” the back lot owners, and the fact that the plattor had retained control of the park after the dedication, the Dobie Court found that the back lot owners held merely an easement, not fee title, to the park. Looking at the historical use of the park, however, the Court of Appeals affirmed the trial court’s decision that the evidence had established that the back lot owners could use the park for picnicking, swimming, fishing and sunbathing and the construction of docks as they had done “traditionally and historically.”

D. CONCLUSION

The Supreme Court has spoken. Members of the public can walk along the Great Lakes' shoreline as long as they stay below "the ordinary high water mark." The Court did not say that the public can sunbathe and/or otherwise enjoy this beachfront area.

This is not true for the beaches along our inland lakes. Because the front lot owners own to the center of the lake, neither the public nor back lot owners have any right to use the beach unless there is an instrument expressly granting such a right. If, however, someone has a legal means of access to an inland lake, that person has the right to use the lake for boating, swimming and the like.

Where there is access, either by public or private road or easement, the focus becomes to what extent this access area can be used for "shore activities" and whether or not a dock or docks may be installed. The rule of law is that a court must examine the intent of the grantor at the time the dedication was made. If the court finds that the instrument is clear on its face, no further analysis is permitted. If, however, as is often the case, the instrument is not clear on its face, the courts will go back and look at facts at the time of the dedication in an effort to discern the intent of the grantor. An examination of the more recent cases suggests that Michigan's appellate courts have become more reluctant to permit "shore activities" and/or docks in these access areas.

REALTORS® should never attempt to advise clients as to their legal rights under an easement or plat dedication. REALTORS® can pass on information from others as to

what has in the past and is presently occurring in those access areas. If a REALTOR® is aware that there is a dispute, the REALTOR® should pass on that information to his or her client. REALTORS® should not opine as to the enforceability of any rights – because they cannot possibly determine what a particular court may conclude one day about the intent of the grantor many decades ago.