AN ATTORNEY WRITES

By: Clifford H. Bloom

Law, Weathers & Richardson, P.C.

Bridgewater Place

333 Bridge Street, N.W., Suite 800

Grand Rapids, Michigan 49504-5360

(email: CliffBloom@lwr.com)

Date Last Updated: 10/08/98 (Bwb)

One Definition of Chutzpah

"Chutzpah" is a Yiddish word which has been defined as someone having nerve or gall (*Websters New Collegiate Dictionary,* 1979 Edition) or as brazenness (*The American Heritage Dictionary,* 1991 Edition).

In my opinion, a prime example of chutzpah involves some Michigan backlot owners (*i.e.*, people who do not own property with frontage on a lake or stream) who attempt to monopolize and overburden narrow roadways, walkways, alleys and other access strips which provide public access to inland lakes and streams. Where a valid public road, walkway, alley or similar public access ends at a lake, members of the public have a reasonable right of access to the water. Few riparians would dispute that. Nevertheless, both the case law and common sense dictate that such public access is limited and restricted.

What possesses backlot owners (and other members of the public) to believe that they have the same rights of usage on a 10-foot wide lake access walkway as a riparian property owner who owns 70 feet of lake frontage? That belief is irrational to the extreme. The riparian property owner pays much more for the privilege of owning lake front property and also must deal with higher annual property taxes reflecting the value of the lake property, increased insurance bills, higher liability, more maintenance, etc. Backlot owners and members of the general public have chosen not to pay out such sums of money. Additionally, they know full well that their rights to use a narrow public lake access strip are no greater than any other member of the public and that the access must be shared in common with all members of the public. What would make an otherwise rational person believe that he or she has the right to install a private dock and to moor two personal watercraft, one 230-horsepower inboard/outboard ski boat and a 10 x 20 pontoon boat to that private dock, all on a narrow 20 wide public access strip? Why would

such a person think that his or her private toys could be maintained at all on a public property, and further, that such private action can lawfully crowd out other members of the public? Why would a backlot owner believe that he or she could lay claim to public property? Is it "first come first served"? Or, does the "law of the jungle" apply□that is, the biggest bully is able to monopolize the public access strip? Why is it that so many backlot owners cannot comprehend or accept the simple notion that they do not have lakefront property, and hence, their access rights as members of the public are limited? This mystery rivals that of the sphinx.

Is the concept of limited lake access rights merely a plot by elitist riparian property owners? Hardly. First, the Michigan appellate courts have made it clear that such rights of public access are almost always very limited. Second, the small amount of space available demands that the usage be restricted. Typically, roadends are 66 feet, 33 feet, 20 feet or even narrower in width. Public alleys and walkways at lakes are usually 10 feet or less in width. Dockage and overnight mooring at such sites could not possibly accommodate all (or even most) public users. Furthermore, dockage and permanent moorage crowds out other boaters as well as other legitimate public uses such as swimming, wading, fishing, etc. Permitting many motorized boats in such a small area detracts not only from public enjoyment, but also constitutes a dangerous condition. Finally, it is absurd to believe that backlot owners would have the same scope of lake usage rights as riparian property owners.

By analogy, when I purchase tickets for the theater or a concert, there are normally a variety of different seats available at different prices. To be in prime seats up close, I might pay $50 per ticket. Seats further away might cost $30. Finally, seats in the balcony or bleachers might cost $10 per ticket. Could anyone reasonably expect the $10 tickets to be as desirable or close to the stage as the $50 tickets? Of course not. What would happen if the purchaser of a $10 ticket makes a dash for one of the $50 seats and refuses to leave? It is highly likely that the interloper would be removed by the police. Why would any rational backlot property owner believe that he or she would have the full panoply of riparian rights reserved for lakefront property owners? If this is "unfair" or "elitist", then so is the entire structure of property ownership, the arts, business, sports and all other endeavors of life in these United States.

It must always be kept in mind that public roadends, alleys, walkways and parks on lakes are just that, public! No person has a right to appropriate public property for his or her own private or exclusive use. Yet, many backlot owners around the state of Michigan are attempting to do just that by trying to stake claims to these public properties by installing large private docks and shore stations and also permanently mooring boats and affixing other structures to such public property. They are "crowding out" everyone else and other legitimate public uses. With all other public property, government does not allow private individuals to install private structures on public property or monopolize public property without the express permission of the governmental unit involved. Even if such permission is granted, it is usually

very limited or temporary—for instance, I can rent a campsite at a public park for a week or two or do the same with my boat at a municipal marina. Under such circumstances, however, I pay a price for doing so and scarce public spaces are allocated for short periods of time for a fee on a fair basis by lottery or other equitable allocation system. Also, my use of the campgrounds or marina is severely limited by strict rules and regulations.

Clearly, local municipalities (road commissions, cities, villages and townships) have the statutory authority to regulate public road ends, walkways, alleys, parks and similar lake access sites by means of ordinance. See Jacobs v Lyon Township, *after remand*, 199 Mich App 667 (1993); Square Lake Hills Condominium Association v Bloomfield Township, 437 Mich 310 (1991). Due to the huge potential for conflict and safety concerns at public access sites, municipalities should enact reasonable ordinance regulations. Nevertheless, few municipalities have done so, even though municipalities typically regulate virtually every other facet of human behavior. With regard to public properties, I would submit that a responsible municipality should ban the overnight mooring or storing of boats, disallow any docks (unless a municipal dock is installed), set hours of usage and ban picnicking and sunbathing on narrow access strips. Common sense dictates that such regulations are needed to reasonably and safely allocate the limited public access property available.

The meek attitude taken by some circuit court judges around the state regarding "laying down the law" for these narrow public access sites is perplexing, and in some cases even promotes dangerous activities. Many of these judges seem to lose very little sleep over sentencing someone to a long prison term for a criminal offense or presiding over trials involving millions of dollars. Nevertheless, some jurists' knees turn to jelly if confronted with the situation of having to tell voting backlot owners that they can only use limited public access strips for temporary and reasonable uses. The public case law is clear that in most situations, the law demands that such uses be limited. Is it really that difficult for a court to tell a backlot owner that he or she may not monopolize a public access site? Or that a backlot owner cannot put in a private dock on a public property and can only use the site for day mooring purposes only?

A few legislators have even pandered to backlot owners and have attempted to introduce legislation which would effectively appropriate public access strips for the private use of some backlot owners. Are they motivated purely by fear of how backlot owners will vote or are they truly so ignorant that they cannot see the huge safety and practical problems associated with allowing large numbers of backlot owners to stake out claims on narrow access strips, including installing extensive dockage, shore stations and the like and mooring large number of boats thereon until such areas resemble floating marinas or villages? Has such a legislator given any thought whatsoever to the grave problems such narrow sites cause for adjoining riparian property owners and the number of times users of these floating marinas will violate or trespass upon the bottomlands of the adjoining riparians? Has such a

legislator given any thought whatsoever about what he or she will tell a new backlot owner who finds that he or she cannot use the public access strip at all since long-time back lot owners have already "claimed" and monopolized that public property? What will that legislator tell the backlot owner who favors simple pleasures such as swimming, wading and fishing off the shoreline when that backlot owner□s five-year-old daughter cannot swim at the access site due to the large number of personal watercraft and high powered boats constantly moored at or utilizing the area?

Will the present "Wild West" goings on at these narrow public access sites ever stir any judges, legislators, local municipal officials or law enforcement officials to decisive and responsible action? Does it not seem that the unregulated activities going on at such access sites are kin to placing 50 pounds of manure into a 25-pound sack, only instead we are dealing with 2000-pound boats, razor sharp props and the ever constant danger of drowning? Would rangers at a state campground ever permit five trailers to occupy a campsite designed for one trailer? Would the state of Michigan permit me to install my own private dock at the shoreline of Grand Haven State Park or permit traffic on an interstate highway to run five cars abreast where only three lanes are available? Of course not! Why should these narrow public access sites be any different?

Safety, common sense and the Michigan appellate case law seem to point to a clear set of realities for these narrow public access sites. First, docks should not be permitted unless a municipality installs one. If for whatever reason a private dock is permitted to be installed, it becomes fair game for everyone. Shore stations should be absolutely forbidden. Second, no overnight mooring, storing or anchoring of boats or other private items should be permitted□day use only should be the rule. If a backlot owner has to put in or carry in his or her boat in the morning and remove it at night, tough. Third, due to the narrow nature of such access strips, other activities such as sunbathing or picnicking should not be permitted since they interfere with or even prevent others from traveling along the access trip to the lake. Finally, public officials should simply do their jobs. Judges should stop trying to please everyone by "splitting the baby" and should enforce the clear appellate case law. Trial courts should stop ducking the hard decisions. Courts should stop trying to please everyone□there are too many decisions which sound like□"The court will permit one dock not to exceed forty (40) feet in length, with no more than five motorboats moored temporarily." Such decisions are bad enough, but those same courts will not decide at this time what "temporary" means. Municipalities can quickly, easily and cheaply resolve 90% of the problem by enacting clear ordinances regulating the use of these narrow public access strips (i.e., no private docks, no overnight mooring, specifying hours, etc.). Lastly, sheriff and police authorities should stop giving lake enforcement efforts the short end of the stick and begin to vigorously enforce the Michigan Marine Safety Act and existing boating laws.