# Lake Parks – A Disappointing Court Decision

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Many of the old plats and subdivisions around lakes throughout Michigan contain dedicated parks. Sometimes those parks appear to be like lakefront lots, while at other times such parks are dedicated as fairly narrow strips of land located between the lake and the first tier of lots (so-called "Park Strips"). For many decades, real estate legal experts have generally been of the opinion that where a relatively narrow strip of land that is dedicated as a park in a plat is located between the lake and the first tier of platted lots (with no intervening land shown between the lake and the park), the first tier lots are riparian or waterfront subject to an easement for a park. That opinion was seemingly confirmed by the Michigan Court of Appeals in the published decision over 20 years ago in *Dobie v Morrison*, 227 Mich App 536 (1998). And, for many years, most realtors, property owners, legal experts and the real estate market have simply assumed that the lots which adjoin such Park Strips are riparian or waterfront. That belief was seemingly validated under similar circumstances for parallel roads at lakes (*2000 Baum Family Trust v Babel*, 488 Mich 136, decided in 2010), for parallel walkways (*Thies v Howland*, 424 Mich 282, decided in 1985), for parallel lakeways (*Bedford v Rogers*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2012; Docket No. 299783), for parks and beaches (*Magician Lake Homeowners Ass'n, Inc v Keeler Twp Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2008; Docket No. 278469), for parallel parks and perpendicular walkways (*Morse v Colitt*i, 317 Mich App 526, decided in 2016), for parallel beaches (*Sullivan v Tillman*, unpublished opinion per curiam of the Court of Appeals, issued June 2, 2009; Docket No. 285195) and again for parallel beaches (*Wojcik v Ficaj*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2011; Docket No. 295850).

There are no exact figures available from any definitive source, but it appears that there are thousands of first tier lots along Park Strips at lakes throughout Michigan. It is conceivable that the number of such lots might even exceed 10,000.

On January 10, 2019, the Michigan Court of Appeals issued its unpublished decision in *Virginia Park Subdivision Association v Brown, et al.* (Case Nos. 339762 and 339808; 2019 WL 165627), which will likely smash the long-held conventional belief that most first tier lots adjacent to Park Strips are riparian. In *Virginia Park Subdivision Association*, the Court of Appeals held that the *Dobie v Morrison* case was narrowly decided (due to unique facts and circumstances) and does not generally apply to all Park Strips. The Court indicated that the first tier lots along Park Strips are generally not riparian or waterfront, but merely share a common easement in the Park Strip with off-lake or backlot property owners. Unfortunately, the Court of Appeals did not indicate which party or parties actually own the property underlying the Park Strip easement in *Virginia Park Subdivision Association*. Based on the Court's reasoning in the case, however, it is likely that the Court considers the original developer or plattor (or their heirs) to be the owner or owners of the land underlying the Park Strip easement.

The Michigan Lake Stewardship Associations ("MLSA") submitted an amicus curiae brief in the *Virginia Park Subdivision Association* case in favor of the first tier lot owners. While MLSA respectfully disagrees with the January 10 decision by the Court of Appeals in the case, MLSA does appreciate having been given the chance to file an amicus brief and the fact that the Court carefully considered MLSA's arguments in favor of the first tier lot owners.

The first tier lot owners are attempting to further appeal the case to the Michigan Supreme Court. Given that the decision will undoubtedly have significant statewide real estate impacts, this is a case whereby hopefully the Michigan Supreme Court will accept the appeal and reverse the Court of Appeals' decision.

Among all of the various areas of the law in Michigan, certainty in real estate law is very important. Longstanding property rights should not be extinguished, changed or increased absent overwhelming reasons. The Michigan Supreme Court said it best in *2000 Baum Family Trust v Babel* when it stated:

> In approaching any case, "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tenn.*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). However, if there is any realm within which the values served by stare decisis—stability, predictability, and continuity—must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance." *Bott v. Natural Resources Comm.*, 415 Mich. 45, 77–78, 327 N.W.2d 838 (1982), citing *Lewis v. Sheldon*, 103 Mich. 102, 61 N.W. 269 (1894); *Hilt*, 252 Mich. at 198, 233 N.W. 159. As we explained in *Bott*:
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> > The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. The judiciary must accept responsibility for its actions. Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital. [*Bott*, 415 Mich. at 78, 327 N.W.2d 838.]
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> We need not expound on this principle, but we nonetheless remain mindful of the respect due to judicial rules of property as we decide this case. *2000 Baum Family Trust* at pp 171-172.

MLSA stated in its amicus curiae brief to the Michigan Court of Appeals in *Virginia Park Subdivision Association* as follows:

"In the end, this Court will determine whether thousands of lots (if not more) in plats throughout Michigan adjacent to a platted dedicated park strip along a lake are riparian or mere non-riparian backlots. If this Court holds that such lots and parcels are not riparian, it will disrupt the reasonable and investment-backed actions and expectations of thousands of property owners over many years throughout Michigan. Such an appellate decision would dramatically devalue those lots and parcels. It would disrupt the real estate market in many areas with lakes throughout Michigan. It would also lead to significant clashes among various backlot property owners, as it would not be clear how land within small common lakefront areas could be allocated for purposes of dockage and boat mooring. Thankfully, the Michigan Supreme Court avoided such disruptions with its decision on platted dedicated parallel roads at lakes in *2000 Baum Family Trust*, 488 Mich 136, as the Supreme Court also did earlier in *Thies*, 424 Mich 282, with regard to dedicated walkways that run parallel along the shore of lakes in Michigan.

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There are few areas of the law where the need for certainty is more important than real property matters. The need for certainty, clarity and easily understandable rules are essential to real property law. That is particularly true in a situation such as this where dedicated park strips are present in numerous plats at lakes throughout Michigan.

By all outward accounts, the area of the law regarding dedicated platted park strips at lakes has been well-settled for at least 30 years or even longer. Based on such case law, most people who are knowledgeable about this area have long believed that where lots in a platted subdivision are separated from a lake (or the shore of a lake) by a dedicated park strip running parallel to the lake and the park was created by the plat, the first tier of lots are deemed to be riparian, subject only to the easement rights of the public or lot owners for park use.

Thousands of such first tier properties at lakes throughout Michigan have long been understood to be riparian properties in such park strip situations, with corresponding private rights of dockage, boat moorage, boat hoists, swim rafts, and similar items and rights of

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usage for the first tier lot owners. Those rights have long been reflected in the real estate market, with such first tier properties being bought and sold for premium prices due to their assumed waterfront and riparian status. Local tax assessments and municipal tax collections for such first tier lots are higher due to the long-believed riparian or waterfront status of such first tier lots. Long-term investments have been made based on the reasonably-assumed lakefront status of those properties, as have expenditures for boats, dockage, shore stations, and similar items.

What would the statewide impact be if the owners of the numerous first tier lots on lakes throughout Michigan were suddenly told that their properties are not riparian or waterfront? What would their reasonable reactions be when they are confronted with a situation whereby there are no longer riparian property owners of waterfront property, but also awaken to the fact that backlot property owners or even members of the general public (depending on whether a private or public park dedication is involved) may install docks, boat hoists, and swim rafts, and permanently moor boats along the lake frontage in front of their first tier lots? Not only would an appellate court decision seemingly overturning *Dobie* destroy the absolutely reasonable distinct investment-backed expectations of all the first tier lot property owners on many lakes throughout Michigan and spark anger and frustration of a magnitude which is almost unthinkable, but there would be many other negative consequences as well. Overturning a long-assumed, widely-held property right would have many far reaching consequences – both intended and unintended, foreseen and unforeseen."

*The Virginia Park Subdivision Association* case is not entirely finished even absent a successful appeal to the Michigan Supreme Court, as the Court of Appeals remanded the case back to the Oakland County Circuit Court to determine how both the first tier lot owners and the backlot owners can use the Park Strip. The trial court would have to answer questions like who (if anyone) can have docks and boat hoists on the park, whose and how many boats can be moored seasonally or overnight, which parties can leave lounge chairs on the beach and similar matters.

If the decision by the Court of Appeals is not reversed, it will likely breed extensive (and expansive) new litigation throughout Michigan. Undoubtedly, many first tier lot owners and backlot owners would be pressed to litigate whether their particular situation falls under *Dobie v Morrison* or the *Virginia Park Subdivision Association* case. If a given Park Strip was dedicated on the plat to lot owners within the plat only (i.e. a private park is involved) and should the *Virginia Park Subdivision Association* case apply to a particular situation, the first tier lot owners will likely assert claims based on adverse possession or prescriptive easement if they have exclusively utilized dockage and boat moorage for 15 years or more at the Park Strip. If a Park Strip was dedicated to the public (i.e. a public park is involved), it is unclear whether first tier lot owners could assert ownership of the Park Strip in front of them by adverse possession or claim exclusive dock and boat moorage rights based upon a prescriptive easement claim.

What if *Virginia Park Subdivision Association* becomes the new widely-accepted law for most Park Strips at lakes throughout Michigan? Unfortunately, there could be many worst case scenarios. For example, will the value of first tier lots along Park Strips throughout Michigan now plummet in the real estate market? Will first tier lot owners be able to have their property taxes lowered (and potentially receive tax refunds for certain past years) due to the property no longer being waterfront or riparian? Will the purchasers of such lots sue sellers, realtors and real estate brokers for misrepresentation? Will buyers with pending purchase agreements for such lots be able to rescind them due to a mutual mistake of fact (i.e. the fact that both the seller and the buyer believed the property to be lakefront or waterfront)? Of course, relevant statute of limitations could prevent some mistake, misrepresentation or fraud claims. The negative impacts that could occur to both the real estate market and property owners as to Park Strips due to the Virginia Park Subdivision Association decision could be staggering.