

WATER LAW AND LIABILITY ISSUES

Webinar

Michigan Lake & Stream Associations, Inc.

April 29, 2020

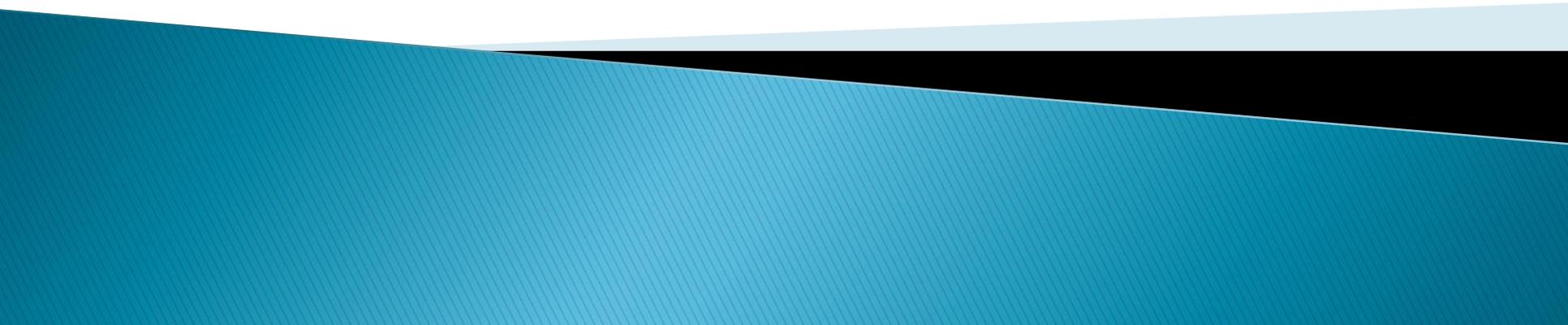
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Clifford H. Bloom, Esq.

Bloom Sluggett, PC

(616) 965-9342

www.bloomsluggett.com



BOTTOMLANDS TRESPASS

- ▶ The problem
- ▶ Michigan law
- ▶ Possible solutions

SHORT TERM RENTALS

- ▶ Recent Michigan Riparian magazine articles
- ▶ The problem
- ▶ Local ordinances
- ▶ Preemption

HIGH LAKE LEVEL

- ▶ The problem
- ▶ Possible solutions

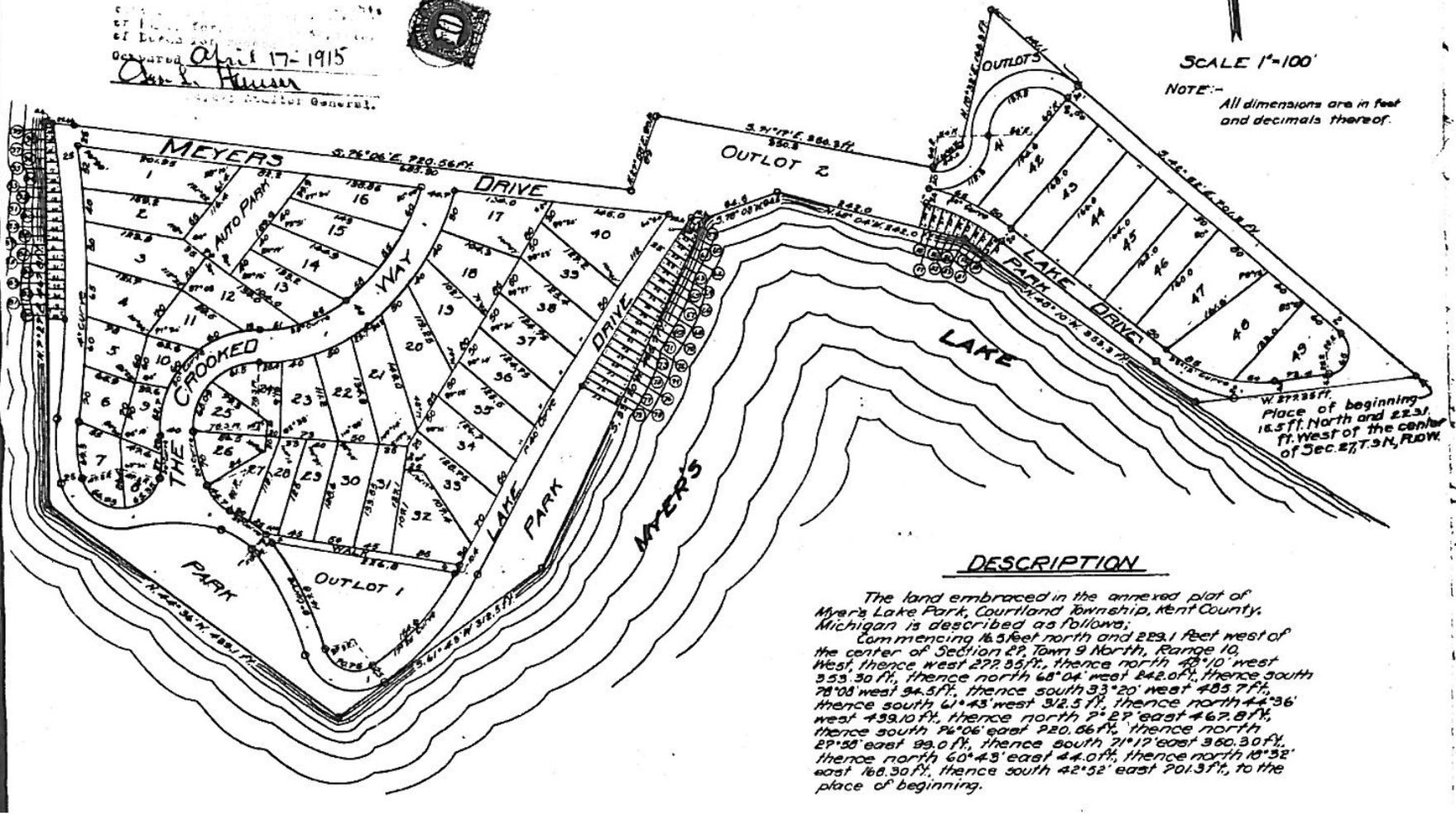
LAKE ACCESS DEVICES – PARKS

OFFICE OF THE
 COUNTY CLERK
 OF KENT COUNTY
 Occupied April 17-1915
 A. L. HUNN
 County Auditor General.



SCALE 1"=100'

NOTE:-
All dimensions are in feet
and decimals thereof.



W. 27.31 FT.
 Place of beginning
 16.5 FT. North and 22.31
 FT. West of the center
 of Sec. 27. 9 N. R. 10 W.

DESCRIPTION

The land embraced in the annexed plat of
 Myers Lake Park, Courtland Township, Kent County,
 Michigan is described as follows:
 Commencing 16.5 feet north and 22.31 feet west of
 the center of Section 27, Town 9 North, Range 10,
 West, thence west 222.55 ft., thence north 48°10' west
 353.30 ft., thence north 68°04' west 242.0 ft., thence south
 78°08' west 94.5 ft., thence south 33°20' west 485.7 ft.,
 thence south 61°43' west 312.5 ft., thence north 44°36'
 west 159.10 ft., thence north 2°27' east 462.8 ft.,
 thence south 76°06' east 220.66 ft., thence north
 27°58' east 89.0 ft., thence south 71°12' east 360.30 ft.,
 thence north 60°43' east 44.0 ft., thence north 10°32'
 east 168.30 ft., thence south 42°52' east 201.3 ft., to the
 place of beginning.

THE MOST RECENT PARK CASE

- ▶ Virginia Park Subdivision Association v Brown

PROPERTY OWNERS ASSOCIATIONS

- ▶ “Strong” associations
- ▶ “Weak” associations



Wake Boats

- ▶ Issues
- ▶ Possible Solutions



LOCAL ORDINANCES

▶ Zoning

- Funneling
- Docks
- Setbacks
- Private roads
- Minimum lot size and width

LOCAL ORDINANCES

- ▶ Police Power
 - Docks and boats
 - Dune protection
 - Wetlands
- ▶ Land Divisions

PRESCRIPTIVE EASEMENTS AND ADVERSE POSSESSION AT THE WATERFRONT

- ▶ Many old plats
- ▶ A significant problem

ENCROACHMENTS AND SURVEYS



SPECIAL ASSESSMENTS

- ▶ What is a special assessment?
- ▶ Types of projects
- ▶ The process
- ▶ “Pros” and “Cons”

STATE STATUTES

- ▶ The Inland Lakes and Streams Act
- ▶ The Dune Protections Act
- ▶ The Wetlands Protection Act
- ▶ The Natural Rivers Act

MLSA – “PUBLIC TRUST DOCTRINE

- ▶ Michigan has a limited common law water-related tradition sometimes referred to as the “public trust doctrine.” Although the phrase “public trust” is used in the context of water rights and navigability, the Michigan courts have also used the phrase in many other areas of the law that are totally unrelated to bodies of water. In addition, the Michigan courts have also shown a lack of precision when discussing the “public trust,” even as to bodies of water. In the past, the courts have vaguely asserted that certain waters and aquatic uses are held “in trust” for the benefit of the public. Thus, private riparian rights in some situations are subject to certain usage rights by the general public. However, the actual reach of the public trust doctrine regarding waters and navigability is somewhat uncertain.

MLSA – “PUBLIC TRUST DOCTRINE

- ▶ Where a river or lake is “navigable,” the courts have indicated that the water (and potentially the lake or river bed) is impressed with or subject to the public trust doctrine. The public trust doctrine seems to stand for the proposition that waters located within the Great Lakes, as well as navigable rivers and even navigable inland lakes, are owned (or co-owned) by the state which “holds” those waters in trust for the public and certain public uses. The public trust doctrine preserves public rights to waters separate from a riparian landowner’s title. Although various groups have urged the Michigan appellate courts to extend the public trust doctrine to non-navigable inland lakes, streams, creeks and even groundwater, the Michigan appellate courts have refused to do so.

MLSA – “PUBLIC TRUST DOCTRINE

- ▶ For some of the Michigan cases that discuss the public trust doctrine, please review
 - *Bott v Comm’n of Natural Resources*, 415 Mich 45 (1982)
 - *Michigan Citizens for Water Conservation v Nestlé Waters North American, Inc*, 269 Mich App 25 (2005)
 - *Glass v Goeckel*, 473 Mich 667 (2005)

MLSA – “PUBLIC TRUST DOCTRINE

- ▶ In *Michigan Citizens for Water Conservation v Nestlé Wates North America, Inc.*, the Michigan Court of Appeals stated:

In *Bott v. Natural Resources Comm.*, 415 Mich. 45, 327 N.W.2d 838 (1982), our Supreme Court was presented with two cases in which riparian property owners along dead-end lakes wanted to exclude the general public from utilizing their lakes for recreational purposes. The Court noted that it was the “established law of this state ... that the title of a riparian or littoral owner includes the bed to the thread or midpoint of the water, subject to a servitude for commercial navigation of ships and logs, and, where the waters are so navigable, for fishing.” *Id.* at 60, 327 N.W.2d 838. The Court further noted that the “public-trust doctrine applies only to navigable waters and not to all waters of the state.” *Id.* at 71, 327 N.W.2d 838 (emphasis in original). Furthermore, the *Bott* Court specifically rejected overtures to adopt a recreational boating test for determining navigability, *Id.* at 71–86, 327 N.W.2d 838, and instead affirmed the log-floatation test stated in *Moore v. Sanborne*, 2 Mich. 519 (1853). See *Bott*, *supra* at 61, 327 N.W.2d 838.

MLSA – “PUBLIC TRUST DOCTRINE

- ▶ The Michigan Court of Appeals in *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.*
Continued:

While Bott did deal with access to dead-end lakes, the primary holding centered on the navigability of the streams that connected the dead-end lakes to other bodies of water. Bott, supra at 60, 327 N.W.2d 838. Indeed, one of the parties in Bott had actually constructed a bridge across the stream that blocked the passage of boats from the larger body of water to the lake. Id. at 58 n. 3, 327 N.W.2d 838. Furthermore, the Court never limited its holding reaffirming Moore to cases involving dead-end lakes and the streams leading into them, but repeatedly referred to lakes, rivers, and streams as well as generally to the property interests of littoral and riparian owners. Bott, supra at 62, 64, 66, 72 n. 27, 73, 79, 81, 327 N.W.2d 838. Hence Bott reaffirmed the rule that the log-floatation test is the only navigability test for determining whether a lake or stream is navigable and, therefore, subject to the public trust doctrine.

MLSA – “PUBLIC TRUST DOCTRINE

- ▶ The Michigan Court of Appeals in *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.*
Continued:

Plaintiffs also cite the Michigan Constitution and several statutes as proof that the state has placed all waters, including groundwater, within this state in trust. Yet the Constitution and the statutes cited merely recognize the importance of natural resources, including water, and exhort the Legislature to exercise its police power to conserve them. The Constitution and the statutes cited do not attempt to claim ownership of water by the state itself. Indeed, this state has long recognized that private persons obtain property rights in water on the basis of their ownership of land. See *Dumont*, supra at 422-424; *Schenk*, supra at 82-84, 163 N.W. 109; *Bott*, supra at 64, 327 N.W.2d 838. Therefore, the trial court properly determined that water, while a resource common to all Michigan citizens, is neither owned by the state nor subject to the public trust absent a determination that the body of water in question is navigable.

MLSA – “PUBLIC TRUST DOCTRINE

- ▶ The Michigan Court of Appeals in *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.* Concluded:

The trial court properly determined that, under Michigan law, water as a general resource is not subject to the public trust and, therefore, that plaintiffs failed to state a claim under count V of their complaint. The trial court also properly determined that the only bodies of water subject to the public trust were those lakes and streams that meet the log–floatation test for navigability first described in Moore and affirmed in Bott. Because the trial court did not err when it determined that the Dead Stream did not meet the log–floatation test, the trial court properly dismissed plaintiffs' public trust claim.

Michigan Citizens for Water Conservation v Nestle Waters North America Inc, 269 Mich App 25, 106; 709 NW2d 174 (2005), aff'd in part, rev'd in part 479 Mich 280; 737 NW2d 447 (2007).

LAKE FRONT LIABILITY

- ▶ The Problem
- ▶ Insurance

Questions?



Helpful Resources

- ▶ View Cliff Bloom's articles at www.bloomsluggett.com (also, coronavirus updates)
- ▶ Visit the Michigan Townships Association at www.michigantownships.org
- ▶ Visit the website for *The Michigan Riparian* magazine at www.mi-riparian.org or contact them at 300 North State Street, Stanton, MI 48888 or (989) 831-5100.
 - The annual subscription rate is currently \$25.00 for four issues.

Helpful Resources (continued)

- ▶ The Michigan Lake & Stream Associations, Inc.'s website can be found at www.mymlsa.org.
- ▶ Also see John Cameron's real property treatise entitled *Michigan Real Property Law*, published by the Michigan State Bar Association, Institute of Continuing Legal Education

Thank you.

Bloom Sluggett, PC
COUNSELORS & ATTORNEYS

Clifford H. Bloom
Cliff@bloomsluggett.com
www.bloomsluggett.com
(616) 965-9342