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RIPARIAN LANDOWNERS CANNOT WIN - RECEDING WATERS ALSO CREATE PROBLEMS

Up until this spring, many citizens in Michigan were concerned about and faced extreme problems due to the record high water level conditions of the Great Lakes. Those problems stretched over several years given the continually rising lake levels. Happily, the water levels of Lakes Michigan and Huron began dropping significantly this past spring. Although water levels throughout the Great Lakes remain above their traditional historic average levels, the flooding problems have greatly diminished (at least for now).

As with any weather or climatological cycle, arriving at a different phase in the cycle often creates its own new problems. Although the overwhelming number of consequences resulting from dropping Great Lakes water levels are positive, some new problems have been created.

First and foremost, the “after” results of high lake levels and flooding will have to be corrected and repaired in many instances. Many docks, piers, boat ramps, and similar structures will need to be repaired or replaced. Some eroded areas and shorelines will have to be remedied, shored up, or altered. Many flooded structures and buildings will have to be either dried out, repaired and remediated, or torn down. One problem area that has not been discussed much publicly is the negative impacts of emergency erosion control items installed during the last few years along Lake Michigan or Lake Huron shorelines, pursuant to temporary or emergency permits, that now litter some beaches and shorelines of those lakes given the receding lake waters. Those temporary or emergency shoreline protection items include riprap (i.e. rocks) in general, huge boulders, seawalls, sand-filled bag structures, and other erosion control devices (collectively, “Barriers”). Some of those artificial shoreline Barriers are not problematic as they have been buried by beach sand and do not present an obstacle to beach walkers. However, other shoreline protection items such as the large boulders, broken cement, filled sandbags, and other items

either present a safety hazard to beach walkers or constitute barriers blocking the ability of pedestrians to freely walk along the shorelines of the Great Lakes.

Pursuant to the so-called “beach walker” case decided by the Michigan Supreme Court in *Glass v Goeckel*, 473 Mich 667 (2005), members of the public have the legal right to walk between the waters of the Great Lakes and the ordinary high-water mark (the “public trust zone area”) on any given stretch of beach or shoreline along the Great Lakes within Michigan. For several years leading up to this past spring, the *Goeckel* case really did not allow much legal beach walking without permission, as the waters of the Great Lakes were at or above the ordinary high-water mark. In other words, there was no dry strip of land between the ordinary high-water mark and lake waters where pedestrians could lawfully walk. However, now that the lake waters are receding, beach walkers would normally have the legal right to traverse the area between the lake waters and the ordinary high-water mark without permission from the adjoining riparian landowner. Now, in many areas, Barriers installed during the past few years to protect the shoreline impede the ability of beach walkers to walk within the allowed dry area between the lake waters and the ordinary high-water mark.

Unfortunately, it does not appear that the state or federal agencies that issued the emergency or temporary permits for Barriers during the past few years included within the permits the requirement that the Barriers be removed if they represent a safety hazard or block the lawful areas used by beach walkers once the waters recede.

It is likely that lawsuits will begin to emerge by beach walkers or public interest groups that will force riparian property owners along the Great Lakes within Michigan to remove some of the Barriers from the beach that were installed during the high-water emergency if they either

present a safety hazard to beach walkers or block the routes of citizens walking the beach within the public trust zone area. It is also possible that the United States Army Corps of Engineers and the Michigan Department of the Environment, Great Lakes, and Energy (“EGLE”) may require the removal of such items even though the permits that authorized their installation did not require their removal once waters recede. The low water levels may also allow some riparians to replace unsightly, environmentally problematic, or impediment barriers with more reasonable permanent barriers that are safe, less visible, and do not impede pedestrians.

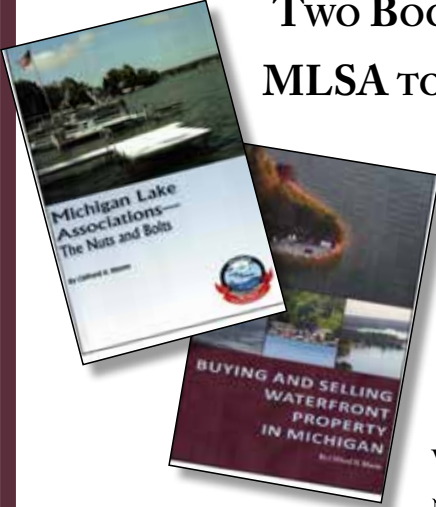
Municipalities along the Great Lakes shores in Michigan (which can include cities, villages, and townships) may have ordinance authority and jurisdiction to require that impediments to lawful beach walking be modified or removed, notwithstanding state or federal emergency permits for those Barriers. In that situation, it is probable that the riparian property owners involved (and even the state or federal government) may argue that the local municipality is “preempted” (i.e. precluded) from enforcing such an ordinance due to the supremacy of state or federal statutes, although it is not clear that such a preemption argument would prevail in court.

What remedy might beach walkers or local municipalities have to require that unreasonable impediment Barriers along the Great Lakes shorelines be modified or removed to allow beach walkers to freely traverse the public trust zone area along the Great Lakes? Generally, there are three possibilities as follows:

- a. File complaints with the Army Corps of Engineers and EGLE.
- b. Petition the local municipality to enact an appropriate ordinance to remedy the situation.
- c. File and pursue a civil lawsuit alleging improper impairment of the public trust zone area along the beach.

Notwithstanding any climate change, one thing is certain: the waters of the Great Lakes will generally rise and fall during various cycles, even if the cycles themselves are somehow interrupted. *R*

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