Attorney Writes

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THE TOP TEN EXCUSES— ARE YOU KIDDING?!

Are you one of the unlucky riparians who own property on a lake where local officials refuse to do anything to help the lakes? In particular, has your municipality refused to enact anti-funneling/keyholing regulations, road end ordinances or lake preservation zoning techniques because municipal officials have one or more lame excuses for not doing so? Does it frustrate you that the excuses appear to be a smoke screen for municipal officials who do not want to adopt such regulations and do not have the courage to simply say so? If so, this column is dedicated to you and contains the top 10 baseless excuses which some municipal officials use to justify not doing their jobs.

1. Liability.

This is the good old standby excuse. Supposedly, the municipality's attorney has told municipal officials that the adoption of such regulations will cause the municipality to incur damages or liability. There are at least three defects in this reasoning. First, municipalities generally have governmental immunity when it comes to ordinances. While such immunity is not absolute (for example, "takings" cases), it is a formidable barrier to municipal liability. Second, some municipal insurance policies cover some or all of such potential liability. Third, if this is truly a concern, the municipality involved should repeal all of its other ordinances (including the zoning ordinance), sell its parklands, cancel all parades, abolish its fire department and close up shop. Everything which anyone, including a municipality, does in this country involves a liability potential. Nevertheless, matters must be put in perspective. Adoption and enforcement of anti-funneling and road end ordinances involve no greater liability potential than for any other type of zoning provision or ordinance. In fact, based on the case law, a good argument can be made that the liability potential is less than for many other zoning techniques or ordinances.

2. Litigation.

This is a variation of the liability excuse mentioned in Excuse Number 1, above. Some municipal officials will argue that even though it may be unlikely that municipalities will incur liability or have to pay damages if they pass such ordinances, the municipality still could face lawsuits challenging the ordinance, thus incurring considerable expense for the municipality due to legal fees and costs. As previously stated, some (but not all) municipal insurance policies will cover some or all of the municipality's attorney fees and costs if damages are claimed. Even if not covered by insurance, the lawsuit potential should also be kept in perspective. Anti-funneling regulations have been in effect in many municipalities in Michigan for 15 years or longer. In excess of a hundred municipalities have such ordinance provisions today. There has been no rash of litigation regarding such regulations. The favorable decisions of the Michigan Supreme Court regarding such regulations (discussed below) has undoubtedly cut down on such litigation. Finally, there is no evidence whatsoever that anti-funneling and lake regulations will breed any more litigation for municipalities than any other type of zoning provision or ordinance.

3. This is a private matter which the municipality should not get into.

This excuse is particularly perplexing given that zoning ordinances regulate a myriad of other structures, uses and activities which could otherwise be deemed "private." Zoning regulations typically regulate lot size, building height, private roads, setbacks, maximum lot coverage, etc. Regulating lake access and frontage is perfectly consistent with other typical zoning regulations. Zoning regulates a wide range of real property issues, and riparian land and appurtenances are simply another type of real property. Why is it any more of a "private matter" to regulate the lakefront or lake access than to tell someone they cannot place a shed within 10 feet of the side property line or have more than two dogs on their property?

4. We don't have the resources to enforce that type of ordinance.

Again, this argument might be reasonable if the municipality involved had not adopted any other ordinances or is considering repealing all of its other ordinances. Lake-use regulations generally involve no more enforcement expenses (or frequency) than other zoning regulations, junk ordinances, vehicle ordinances or other regulations. In fact, enforcement of ordinances in general over the last half decade has become simpler, quicker and cheaper for municipalities given the advent of municipal civil infractions.

Some municipal officials bemoan how difficult they claim this type of ordinance would be to enforce. The counter-question which should be asked is why lake access regulations are any more difficult to enforce than any other regulation? Determining whether someone is operating an illegal business out of their home or whether a house has

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been built six inches taller than the height limitations in the local zoning ordinance are areas which are potentially difficult to enforce, but that does not stop municipalities from enacting such regulations. There is no legal requirement that once a municipality enacts a lake access regulation (or any other type of regulation) that the municipality is required to hire a boat load (pardon the pun) of zoning enforcement officials. The enforcement of this type of regulation would be done in the same fashion as any other municipal regulation. Obvious and highly visible violations could be discovered by municipal officials, while other violations would be addressed on a complaint basis. As mentioned above, the advent of civil infraction ticket procedures also makes enforcement much easier.

5. It is not clear that we have the authority to regulate lake uses and the courts may not uphold such regulations.

Anyone who would make such an assertion is either ignorant or is willfully misleading the listener. The top court in Michigan, the Michigan Supreme Court, has upheld these types of regulations in *Hess v West Bloomfield Township,* 439 Mich 550 (1992) and *Square Lake Hills Condominium Association v Bloomfield Township,* 437 Mich 310 (1991), so long as the ordinance involved is reasonable. In fact, the legality of anti-funneling and similar ordinances is much more certain than is the case with the overwhelming majority of zoning regulations, since probably 80% (or more) of the typical zoning provisions found in ordinances throughout the state have never been tested in court.

6. We cannot adopt the ordinance provision without doing an expensive lake carrying capacity study first.

Talk about excuses! Admittedly, the chances of having a particular ordinance provision upheld in court are always greater if there is an expensive study or report done first to support the regulation, preferably by an expert. Unfortunately, such studies and reports are often expensive and time-consuming, and the expense is often used as an excuse not to adopt a particular ordinance provision. There is no requirement in law, however, that such a study or report be done as a prerequisite to passing lake-use regulations. Furthermore, probably less than 1% of all zoning regulations out there are based on a particular report or study. If any municipal official ever uses this excuse, ask that person to show you the comprehensive study which they commissioned before they decided to set a 10-foot side yard building setback for their residential zone. Or for their requirement that buildings in a particular district not exceed 35 feet in height or to support listing restaurants and motels as permitted uses in the light commercial zoning district, but not banks. You get the picture.

Indicating that a study or report must be done regarding on-water carrying capacity is odd for two additional reasons. First, there is no universally-recognized method or standard for determining lake carrying capacity. Second, anti-funneling and road end regulations generally have little to do with on-lake boating activities, but are rather a regulation of land uses.

7. Since there does not appear to be a problem at the moment, we should not adopt such an ordinance.

Under this warped logic, municipalities would never adopt an ordinance or ordinance provision until a severe problem already exists. This area is entitled "zoning and planning." Planning means that a municipality should look ahead and try to prevent problems before they happen.

Waiting until a "problem" arises might be too late—if a developer commences to develop a major keyhole development and there are no regulations presently in effect governing such developments, the municipality will not be able to stop that development.

8. It's not our problem—this is best left to some other level of government and it would simply constitute another layer of government regulation.

Some municipal officials will assert that anti-funneling regulations or the regulation of the waterfront is best left to the state of Michigan or the county and that the local municipality should not become involved. Wrong again! Except where county zoning is in effect and where the local municipality has no zoning itself, counties do not have general ordinance powers. Furthermore, regulation by the state of Michigan regarding funneling, road ends, and the lakefront is virtually nonexistent. Theoretically, the Michigan Department of Environmental Quality ("DEQ") does have some jurisdiction under the Michigan Inland Lakes and Streams Act regarding marinas, permanent docks, and similar matters, but as a practical matter, such jurisdiction is limited and the DEQ has been quite permissive in these areas. Accordingly, to assert that someone other than the local municipality should take action is, in actuality, an argument that nothing should be done.

9. It is not needed.

On occasion, a municipal official will assert that existing zoning regulations already protect against anti-funneling. Unfortunately, that is usually not the case. Furthermore, it is also generally best to have very specific regulations tailored to a particular problem in effect, rather than take a chance that existing regulations will not be sufficient.

10. A public access site or existing lake overcrowding makes such regulations useless.

Municipal officials occasionally argue that new lake access regulations would be a waste of time given an existing public access site on a lake or present lake overcrowding. What a goofy argument! Just because a problem exists in some areas of a lake does not mean that you give up on all efforts to prevent similar problems from occurring elsewhere on the lake or on other lakes. This is akin to having a municipality give up on all regulation of commercial uses because a problem with a particular commercial business already exists in one portion of the municipality. Just because one horse has already escaped from the barn does not mean that you don't shut the barn door to keep in the other five horses! ◆