



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

ON WATER—DOES ANYTHING GO?

I am frequently asked whether anything can be done to protect annoyed riparian property owners from pesky bass tournaments on their lake, the anchoring of boats by partying strangers for long periods of time just off shore (so-called “party barges”) and other nuisances which occur on the surface of the water. The answer is—probably.

Theoretically, a riparian property owner can file a civil lawsuit against anyone who creates a nuisance or unsafe condition. Such private civil lawsuits are rarely practical for many reasons, however, when nuisances on the surface of the water are involved. First, such lawsuits tend to be expensive and absent highly unusual circumstances, win, lose or draw, each party pays their own attorney fees. Second, such lawsuits can take anywhere from 8 months to 2 years (or more) to work their way through the court system. Third, it is often difficult to identify who to sue—unless you know the name and address of the troublemaker(s), no lawsuit can be filed. Fourth, there really is no penalty to the other side even if you win the case—at best, the court will normally only enter an order prohibiting the conduct in the future. Finally, many judges are reluctant to issue that type of court order due to the difficulty of enforcement and the somewhat vague nature of such an order. Such judicial reluctance to issue injunctions will likely be reinforced by the recent Michigan Court of Appeals case of *Higgins Lake Property Owners Assoc. v Gerrish Twp*, 255 Mich App 83 (2003).

The better solution is to have the local municipality (city, village or township) enact a police power (non-zoning) ordinance to regulate the nuisance behavior. The advantages of having a local ordinance include relatively easy enforcement by the municipality via civil infraction tickets, the normal respect courts give to municipal ordinances and the fact that the cost of enforcement would be borne by the municipality and not by the individual riparian property owner.

Can a municipality regulate what occurs on the surface of an inland lake in Michigan? In most cases, yes. See *Square Lake Hills Condominium Ass’n v Bloomfield Twp*, 437 Mich 310 (1991), and the various municipal enabling acts for ordinances. Nevertheless, it should be kept in mind that there are a few subject matter areas where municipalities are likely precluded from regulating on-lake activities—

these are situations where Michigan laws either expressly preclude local regulation or give state agencies such pervasive regulatory authority in a particular area that local municipal regulation is precluded or “preempted.”

What are some of the topic areas which can probably be regulated by local ordinance? By ordinance, municipalities can regulate special events involving lakes such as bass tournaments, boat parades and boat races. Such ordinances could include prior permit requirements, limitations upon hours and similar restrictions. Municipalities can also adopt general noise ordinances (except as to stock boat engines), litter regulations and disorderly conduct ordinances which can also be enforced on lakes. Theoretically, a municipality could even adopt an ordinance regulating “party barges,” including how long they can be parked in one spot.

Can municipalities impose speed limits, no wake zones and similar restrictions on inland lakes? There is no clear answer. State officials have argued that the process which the Michigan Department of Natural Resources uses to approve special watercraft rules for inland lakes (found in what was formerly called the Marine Safety Act) “preempts” local ordinances from dealing with the same topics. However, the Michigan Supreme Court cases of *Burt Township v DNR*, 459 Mich 659 (1999), *Square Lake Hills Condominium Ass’n v Bloomfield Twp*, above, and *Miller v Fabius Twp Bd.*, 366 Mich 250 (1962) imply that municipalities might be able to adopt such ordinances without utilizing the special watercraft rules procedures through the DNR. Until the Michigan appellate courts address this issue, the outcome will remain uncertain.

Can local municipalities regulate the drawing of water out of inland lakes and streams for consumptive purposes such as watering lawns and golf courses and for bottled water? Until and unless the state of Michigan adopts comprehensive rules which could preclude such local ordinances, the answer is probably yes. However, the drawing of water for agricultural purposes might be protected against local regulation by the Michigan Right to Farm Act (MCLA 286.471 *et seq.*)

If there are problems with the utilization of houseboats on an inland lake, can a local municipality regulate such use? Probably, although Michigan law is silent regarding the issue.

As always, riparians must constantly be on guard to thwart attempts by the Michigan Legislature to take away local control with new legislation aimed at full or partial preemption of a topic area (i.e., enacting state laws which would prohibit or severely limit a local municipality from regulating a particular area, even if the municipality had such regulatory authority in the past). Some of the activities listed above which municipalities can regulate now could be off limits to local government regulation in the future if special interests get their way with the Michigan Legislature. This is not idle speculation—special interest groups have convinced the Legislature in the past to preclude or severely limit local government regulation in the following areas:

- Wetlands protection
- Oil and gas wells
- Telecommunication towers
- Mobile home parks
- Landfills
- Prisons
- Huge industrial livestock facilities
- Building codes

Unfortunately, when the Legislature takes away local control in a particular area, state agencies often prove themselves lax in their regulatory efforts of that area, and in some cases, there is no state regulation or enforcement whatsoever.

Amicus Curiae Briefs

Over the years, Michigan Lake & Stream Associations, Inc. (“ML&SA”) has filed several amicus curiae briefs with the Michigan appellate courts (i.e., the Michigan Court of Appeals and the Michigan Supreme Court). What is an amicus curiae brief? It is a brief filed by someone who is not a party to the lawsuit, but which supports the position of one of the parties in the litigation. A brief is a legal document submitted to a court that advocates a particular position or positions. Normally, a brief contains both factual and legal arguments. “Amicus curiae” can be roughly translated as “friend of the court.” Theoretically, amicus curiae briefs assist the appellate court in making a final decision.

ML&SA filed an amicus curiae brief in the leading case of *Hess v West Bloomfield Twp*, 439 Mich 550 (1992), a case in which the Michigan Supreme Court upheld anti-funneling/anti-keyholing zoning regulations. Recently, ML&SA filed amicus curiae briefs in

HOUSE BILL 4141 WOULD KEEP PUBLIC ACCESS SITES OPEN FOR USE BY THE PUBLIC

House bill 4141 is a bill to amend 1994 PA 451, entitled, "Natural Resource and environmental protection act."

THE PEOPLE OF THE STATE OF MICHIGAN ENACT: Sec. 301a.

(1) A person shall not use a dedicated public access site except as provided in this section. Unless the dedication recorded with the register of deed specifically provides for other uses, a dedication for public access includes only the right of ingress and egress and does not include use of the public access for any of the following:

a. Boat hoists.

b. Construction of docks unless the purpose of the dock is to aid in the public access and the construction of the dock is authorized by the owner of the riparian land on which the public access is located.

c. Picnicking, sunbathing, or lounging.

(2) If a dock is located at a dedicated public access site, the owner of the riparian land on which the public access site is located shall place a sign at the dedicated public access site that describes the allowable uses of the public access and describes the activities that are prohibited at the public access site.

(3) A person shall not moor a vessel overnight on bottomland directly offshore from a dedicated public access site.

(4) A person who violates this section is guilty of a misdemeanor punishable by a fine of not more than \$500.00 for each day of violation. A peace officer may issue an appearance ticket as described and authorized by sections 9c to 9g of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.0c to 764.9g, to a person who is in violation of this section.

(5) As used in this section, "dedicated public access" means public access to an inland lake or stream dedicated for use by the public by a written instrument recorded with the register of deeds.

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two lake access easement cases—*Little v Kin*, 249 Mich App 502 (2002) (pending in the Michigan Supreme Court) and *Dyball v Lennox* (Court of Appeals Case No. 241296) (pending in the Michigan Court of Appeals).

How does ML&SA decide if it will file an amicus curiae brief? There are two major factors. First, ML&SA scrutinizes whether the case could potentially have a state-wide impact upon riparian issues and related law. The second factor is more practical—it depends upon ML&SA's available funds at the time.

If a riparian property owner or lake association is involved in a case which is about to be appealed to the Michigan Court of Appeals or the Supreme Court and desires to have ML&SA consider filing an amicus curiae brief in support of their position, ML&SA should be contacted as soon as possible. There are strict filing deadlines for all briefs and ML&SA will not be able to consider filing an amicus brief unless it is contacted early enough in the appellate process.

Even if a riparian or lake association engaged in litigation does not pursue an appeal or ML&SA is unable to file an amicus brief in a particular case, it is always helpful for ML&SA to receive copies of any written opinions (or transcripts of a court's oral opinion) by Michigan trial courts involving riparian issues. Accordingly, if you have a copy of any such document, please forward it to Don Winne at ML&SA.

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TOM JERDON EXPRESSES HIS POINT OF VIEW ON HB 4141 TO CONGRESSMAN NEAL NITZ, DISTRICT 78, BERRIEN & CASS COUNTIES

Dear Neal:

As you may know, we are a 53 year old lake real estate firm serving over 75 lakes in Southwest Michigan. I have personally designed and developed several lake projects and have specialized in marketing and selling both lakefront and lake access properties. Obviously, we encourage housing and growth in the lake real estate market as it financially benefits this firm.

However, even though I am a developer and broker, I am in support of HB # 4141, because the environmental integrity of Michigan's inland lakes are at a real risk. Being that inland lakes have only a finite area of water surface, the unregulated and wholesale activities currently taking place at thousands of access sites, is overtaxing our lakes. I support HB # 4141 even though I might financially benefit from expansion of these public sites. The small inland lakes cannot support the massive influx of watercraft and the unsanitary conditions that I have witnessed personally.

Furthermore, local municipalities can do little to regulate, control or provide sanitary conditions at these sites. Some of the public users, who have no personal investment in the lake, use the lake as a public toilet and discard personal rubbish on the upland area. I have personally removed beer cans, trash, and used diapers from public sites on lakes in your district.

HB #4141's time has come because of the continued expansion of environmentally unsound activities found at these sites. Unfortunately, it is so out of control, that legislation is now the only alternative.

Another problem is that dependent upon a given municipality, some lake access sites are promoted as "beach parks" and "marinas" including boat docking, while other municipalities attempt to discourage these activities. Some lakes are located in several municipalities so the activities on the various sites vary according to the municipality it is located within. For example, Diamond Lake is located in four townships, while Magician and Indian lakes are located in two each.

As a real estate broker, we must rely on the whims of local municipal boards to determine what can and cannot happen at access sites.

I hope that since you sit on the Conservation and Outdoor Recreation Committee, that you will support HB # 4141. Thank you for considering my thoughts and I will look forward to seeing you in the district soon.

Sincerely, Thomas F. Jerdon
JERDON REAL ESTATE, INC