

MICHIGAN SUPREME COURT REFUSES TO HEAR APPEAL OF HIGGINS LAKE POA v GERRISH TWP CASE

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This past January, the Michigan Court of Appeals' decision in *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83 (2003), upheld and confirmed its earlier opinion in the case of *Jacobs v Lyon Twp*, 199 Mich App 667 (1993). Both *Higgins Lake Property Owners Ass'n* and *Jacobs* stand for the proposition that public road ends at lakes are for travel and access purposes only and cannot be used for activities such as permanent boat mooring, extensive dockage, shorestations, sunbathing, lounging, picnicking, and similar activities. One modest dock can usually be installed by either a governmental unit or a member of the public, but once installed, it becomes public. Only temporary boat mooring is allowed as an incident to access and navigability.

Unfortunately, some backlot owners, particularly in the Higgins Lake area, had refused to comply with the mandates of the 1993 *Jacobs* decision, and continued to

improperly maintain extensive private dockage, shorestations, permanent boat moorage, and similar prohibited activities at some road ends. Given such widespread disregard of *Jacobs*, riparian property owners and a lake association instituted the *Higgins Lake Property Owners Ass'n* litigation, which resulted in the Court of Appeals' decisive decision in that case earlier this year which confirmed *Jacobs*. The backlot defendants in *Higgins Lake Property Owners Ass'n* case did not like the Court of Appeals' decision and asked the Michigan Supreme

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within the system. Finally, while there is no scientific documentation of direct effects of Sonar® treatment on the lake's fishery, anecdotal information from property owners and regular users of the lake suggests that fishing is as good or better than in the years prior to treatment.

Overall, a comprehensive management plan to control EWM and provide a long-term strategy to maintain a healthy and diverse aquatic plant community has been implemented on Houghton Lake. The first stage of this plan—whole-lake control of Eurasian watermilfoil—has been successfully completed. Homeowners and lake users have been provided relief from the problems and issues associated with a widespread EWM infestation. Vigilance against re-infestation by EWM is critical, and an intensive monitoring program is in place to provide for rapid response to further problems with the invasive species. Efforts to reintroduce or expand the current populations of certain desirable native plants will be investigated to promote increased aquatic plant diversity. The focus of all efforts is the long-term health and economic value of the Houghton Lake ecosystem, a priceless freshwater resource for the state of Michigan and the Great Lakes region.

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Court to review the case and take a further appeal of it. Recently, the Michigan Supreme Court refused to hear the appeal, such that the Court of Appeals' decisions in *Higgins Lake Property Owners Ass'n* and *Jacobs* are now final and binding precedent. This decision is a victory not only for riparian property owners around the state, but also members of the public who have been unable to use many of the cluttered-up public road ends for proper purposes due to the effective seizure of these public properties by some backlot property owners.

There is one disappointing aspect of the *Higgins Lake Property Owners Ass'n* decision. At first glance, the Court of Appeals' opinion in that case appears to set the bar rather high in order to obtain injunctive relief (i.e., a court order) ordering violators to comply with *Jacobs* and *Higgins Lake Property Owners Ass'n*. A superficial reading of that opinion would seem to indicate that even though someone could have filed a lawsuit and prevailed in court pursuant to a finding that the road end was being improperly used, the trial court could still refuse to grant injunctive relief—that is, even though a legal wrong has occurred, the victim or prevailing party could still be without a remedy even though the activities being complained about have been deemed illegal by the court. Happily, a close reading of the Court of Appeals' opinion seems to indicate that injunctive relief will be appropriate in many (if not most) cases after the date of the court's January opinion. One can reach that conclusion based on two factors. First, the Court of Appeals seemed to believe that the proof of violations in that case were not compelling. Accordingly, the justification for injunctive relief in future cases could be based upon more significant testimony, pictures and videotapes showing specific and concrete violations. Second, the decision appears to be a "shot across the bow" for anyone improperly using a public road end. The Court of Appeals seemed to indicate that to the extent that backlot owners did not really understand *Jacobs* before, they might have been given a "pass"—but after the decision in the current *Higgins Lake Property Owners Ass'n* case, violating backlot owners should not be shown lenience by the courts. ♦