Attorney Writes

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CURRENT TOPICS OF INTEREST

It has now been confirmed that municipalities can regulate (and potentially even ban) the landings, docking, and takeoffs of seaplanes on inland lakes in Michigan. The validity of such local ordinances has a rather tortured legal history.

The City of Lake Angelus in Michigan long ago banned seaplanes on Lake Angelus by local ordinance. Mr. Robert Gustafson challenged the ability of a Michigan municipality to ban seaplanes on inland lakes by bringing a federal lawsuit. In *Gustafson v City of Lake Angelus*, 76 F3d 778 (CA 6, 1996), the United States Court of Appeals for the Sixth Circuit held that federal law does not preempt or preclude municipalities from regulating seaplanes on inland lakes.

Despite the federal Court of Appeals decision upholding the City of Lake Angelus ordinance, proponents of seaplanes "would not take no for an answer." Rather, they approached the Michigan Aeronautics Commission ("MAC") and requested that the MAC take action to invalidate any local ordinance which regulated or banned seaplanes on inland lakes. The MAC did take action and adopted a formal regulation which purported to preclude or severely limit the ability of Michigan municipalities to regulate seaplane landings and takeoffs on inland lakes. In *City of Lake Angelus v Michigan Aeronautics Comm'n* ___Mich App ____ (2004), the Michigan Court of Appeals held that the MAC has no legal authority to preempt or preclude local ordinance regulations of seaplanes regarding inland lakes. It remains to be seen whether or not seaplane proponents will attempt to push legislation through the Michigan Legislature in their continuing attempt to take away local control from townships, cities and villages to reasonably regulate seaplane landings and takeoffs on urban or crowded lakes.

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In a past issue of the *Riparian*, I reported on the Michigan Court of Appeals' decision in *Dyball v Lennox* from last November. The *Dyball* decision was very "pro-riparian," in that it strictly and narrowly construed a lake access easement to prohibit dockage, permanent boat moorage, sunbathing, lounging and similar activities—the Court of Appeals clearly held that the easement could be used for simple ingress and egress only. That holding was particularly powerful since it appears that a dock and a boat may have been utilized by a backlotter on the easement for many years, and perhaps even before the easement was created.

Initially, the *Dyball* opinion was "unpublished," which meant that although trial courts around Michigan could consider the opinion if they chose to do so, it was not technically binding precedent. However, pursuant to a request to the Court of Appeals by the riparian property owner in the *Dyball* case (as assisted by the Michigan Lake & Stream Associations, Inc.), the Court of Appeals on February 24, 2004, decided to publish the *Dyball* opinion. Accordingly, that opinion is now binding precedent throughout the state of Michigan. A key provision of the opinion states as follows:

> We find that the plain and unambiguous language of the easement in question does not grant defendant riparian rights and, as such, does not grant defendant the rights enjoyed by riparian owners. Defendant's argument that the language 'to the water's edge of Lake Fenton' raises a question of fact as to whether riparian rights were granted is misguided. The plain language of the easement does not suggest that the right to maintain a dock is within the scope of the easement. See *Thom, supra* at 512. The terms ingress and egress to the water's edge do not evidence an intent to grant a right to construct and maintain a dock, a right typically reserved to riparian owners. See *Thies, supra* at 294. Defendant's allowed use of the land, pursuant to the easement, is clearly defined by the terms of the easement and must be confined to the plain and unambiguous terms of said easement. The plain and unambiguous terms of the easement do not grant the dominant estate the right to maintain a dock or permanently moor a boat. The trial court, in coming to its determination, took into account the circumstances existing at the time of the grant and, therefore, erred. See *Id*. Even if the trial court was only interpreting the language of the easement, its findings were clearly erroneous because nothing in the plain and unambiguous language of the easement permits or grants defendant the right to erect and maintain a dock or to permanently moor a boat at the end of the easement. See *Little I, supra* at 507. The easement was created for access or ingress and egress to the lake and cannot be expanded. Consequently, the trial court erred in granting summary disposition to the defendant and denying plaintiffs' motion to have the subject to the easement declared for access, and ingress and egress only (footnotes omitted).

Dyball, Slip Opinion at 6.

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There have been other recent Michigan appellate court decisions which should also be of interest to riparians. In *Kleiner*

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NEWS FROM LAKES AROUND THE STATE

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Data from this project will be used by the Water Quality Committee to contact property owners about possible nutrient sources (septage, fertilizer runoff, etc.). This program will require much preparation and many volunteers to supervise the students. We expect the program will run six hours each week for 10 weeks. If you know of anyone interested in paddling around the lakes with a fine bunch of kids looking for green slime and/or have extra kayaks and canoes for the TLA Armada, please call Tim Hannert at 533-6550.

WALLOON LAKE ASSOCIATION—

Charlevoix County

Charles Hyatt, President

3rd ANNUAL RESTORE THE SHORE CONTEST

Yes, we're serious about this contest and plan to keep it going for years to come. So get on board and send Walloon Lake Association's Water Quality Committee a photo of your shoreline this year. Entries will be accepted from May 1st to September 1st.

A reminder of this important event will follow in the May and June *Wallooners* so you can't miss out.

If you'd like to get an early jump on things with ideas on how to improve your shoreline, call the Walloon Lake Association office for a free rental video called The Living Shore. It's only 16 minutes long and it's superb!

ATTORNEY WRITES

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v Wachowicz, et al (unpublished, Case No. 244053, decided on February 12, 2004), the Michigan Court of Appeals (for what seems like the thousandth time!) reaffirmed its decisions in *Jacobs v Lyon Township*, 199 Mich App 667 (1993) and *Higgins Lake Property Owners Assn v Gerrish Twp*, 255 Mich App 83 (2003) and again held that public road ends at lakes cannot be used for permanent boat moorage, sunbathing lounging, etc.

Coyne v Daneluk (unpublished, Case No. 242875, decided on February 24, 2004) dealt with a legal issue which real estate experts have long puzzled over. That case involved a platted subdivision along Lake Huron. The first tier of lots, while seemingly riparian, clearly did not quite touch the waters of Lake Huron on the plat map. In other words, there was a thin strip of land which ran along the shoreline, between Lake Huron and the first tier of lots. Although there were clearly-marked private roads within the plat which were created by the plat dedication, the plat dedication never mentioned the strip of land along the water. Nor was there any label on the strip of land on the plat map. The owners of the first tier of lots argued that their lots are riparian and that their lots should be deemed to implicitly extend to the waters of Lake Huron unencumbered. The owners of the backlots disagreed and took the position that the strip of land was created pursuant to an implicit dedication and was akin to a park for use by all lot owners within the plat. The Court of Appeals played King Solomon and "split the baby in half." Analogizing to the cases where a road runs parallel along the shoreline of a lake, the Court held that the first tier of lots was indeed riparian, with their property lines implicitly extending to the edge of Lake Huron through or under the land strip. However, the Court also held that the land strip effectively constituted a usage easement for the benefit of all lot owners within the plat. Therefore, the riparian property owners' respective boundary lines do extend to Lake Huron, but they are subject to a usage easement co-extensive with the land strip as shown on the plat map. The case was remanded back to the trial court for a determination of how the owners of the backlots could utilize the land strip/easement.

A decade ago, at the urging of developers, the Michigan Legislature took away almost all authority of cities, villages and townships to regulate wetlands in Michigan (often called "preemption"). The zoning ordinance for Meridian Charter Township did not directly address the issue of altering, destroying, or filling wetlands, but it did implicitly take the presence of wetlands into account for purposes of setbacks. Pursuant to a proposed development, the landowner claimed that the Township was without authority to take wetlands into consideration whatsoever in its zoning regulations. In *Forsberg Family, LLC v Charter Twp of Meridian* (unpublished, Case No. 245413, decided on February 24, 2004), the Michigan Court of Appeals disagreed and held that the state preemption of local control regarding wetlands did not extend to regulations which utilized wetlands as benchmarks for purposes of setbacks.