Attorney Writes

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THE BEACH WALKER CASE

The recent Michigan Supreme Court decision in *Glass* v *Goeckel*, rehearing denied, 473 Mich 667 (2005) has altered the long-standing conventional wisdom regarding the ability of members of the public to walk along the otherwise private beaches of the Great Lakes. Prior to the *Glass* v *Goeckel* decision this past July, it was assumed by the overwhelming majority of lay people and legal experts alike that members of the public could walk along private Great Lakes beaches only if they remained within the water or on the wet sand. In fact, even former Attorney General Frank J. Kelley (himself a proponent of extensive public access) gave a formal legal opinion through the Michigan Attorney General's office which limited public strolling to only the water and wet sand on the Great Lakes. In its 5-2 decision in *Glass*, the Michigan Supreme Court threw out over a century of conventional wisdom and held that the public can walk (even against the wishes of the riparian property owner involved) anywhere on the beaches of any Great Lake all the way up to the "ordinary high water mark."

The Supreme Court adopted a deliberately vague definition of "ordinary high water mark," which is as follows:

"The point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction or terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark."

Unfortunately, no lay person can probably determine or ascertain where the ordinary high water mark is for a given lakefront property. Rather, the Court adopted the above definition so that the precise location of the ordinary high water mark is a "question of fact," which can only be definitively determined pursuant to extensive litigation as to a particular piece of Great Lakes waterfront property. The parties in any such litigation will also have to hire expensive legal experts (likely, hydrologists and engineers) to give opinions and testimony as to where the ordinary high water mark is located for the specific property at issue. While a statute or DNR/DEQ regulation which purports to set the ordinary high water mark (i.e., lake elevation) for a particular Great Lake for regulatory purposes might be part of the evidence considered by the judge in a specific case, such statute or regulation could not definitively determine the ordinary high water mark for any property for public trust doctrine purposes.

The Legal Basis of the Decision

Prior to this past July, there was no dispute that the portion of the bottomlands of the Great Lakes which is always submerged is owned outright by the state of Michigan. All parties to the lawsuit also agreed that some portion of the bottomlands which is periodically exposed is subject to limited public use pursuant to the "public trust doctrine." Furthermore, all parties to the lawsuit pretty much agreed that there was some "overlap" on land between where private ownership of the exposed beach ends at the water and the point upland where the public trust area terminates. In essence, the public trust area acts like a nonexclusive easement for limited public use over a certain portion of the beach owned by the private landowner. Before the Supreme Court decision this past July, however, most members of the public (together with most legal experts) believed that the public trust area only extended beyond the water to the edge of the wet sand (which could be anywhere from a few inches beyond the water on a perfectly calm day to 5 to 10 feet or more beyond the water if it is a windy day with waves). Surprisingly, the Michigan Supreme Court in *Glass* v *Goeckel* said that even where a riparian landowner on the Great Lakes owns the land down to the water's edge, the public trust area (effectively, a public nonexclusive easement) extends beyond the water (and even way beyond the wet sand mark) and all the way to the ordinary high water mark. Depending upon the topography of the beach involved, the distance between the water and the ordinary high water mark can be anywhere from 20-50 feet to several hundred feet or more.

What Does the Decision Really Mean in Everyday Terms?

While the Supreme Court explicitly decided that walking and strolling is permitted by members of the public below or "lakeside" of the ordinary high water mark, it did not expressly address issues such as whether members of the public can pull up a boat and leave it on the shore, drive an ATV or snowmobile, sunbathe, camp, or build bonfires. While the decision implies that members of the public cannot sunbathe, camp or build bonfires, the court opinion did not completely close the door to those activities.

The Supreme Court held that the public trust area can be utilized for "navigability" and activities incidental to or arising out of navigability. Traditionally, navigability meant the ability to temporarily reach shore by boat and to beach boats during an emergency. Furthermore, activities such as swimming, fishing and hunting waterfowl have been deemed incidents of navigability. In the *Glass* v *Goeckel* case, the Supreme Court held (without much discussion) that walking from one point on shore to another is a permitted incident of navigability, but the Court did not explain how walking for purposes unrelated to boating, fishing, swimming or hunting waterfowl could be deemed an incident of navigability. It is anyone's guess whether or not the Court will hold in a future case that taking a break on a beach to rest (*i.e.*, lounging or sunbathing) or to eat lunch is a necessary component of walking and strolling (people get tired and hungry) and, as such, is also a natural incident of navigability and a permitted public activity.

It is most unfortunate that the Supreme Court did not definitively rule out sedentary activities such as sunbathing,

(Continued on page 16)

lounging, camping and bonfires last July in its *Glass* v *Goeckel* decision. It would have been very easy to do so. Unfortunately, appellate courts have an annoying habit of only deciding precisely the specific issues before them, which, while probably a prudent rule in theory, often creates havoc in the real world. Since pursuant to the motion for reconsideration (as discussed below) the Supreme Court chose not to clarify whether or not the public trust rights do or do not include sunbathing, lounging, bonfires, etc., riparians along the Great Lakes will have to wait until a case squarely involving those issues works its way through the trial court, Michigan Court of Appeals and, potentially, Michigan Supreme Court stages. That will likely take at least a few years, and could even take several decades or longer.

Options Regarding the Effects of the *Glass* v *Goeckel* Decision

1. The Motion for Reconsideration — The riparian property owner involved in *Glass* v *Goeckel* filed a motion for reconsideration by the Michigan Supreme Court. During mid-September of 2005, the Court declined to reconsider its July decision in *Glass* v *Goeckel* and also refused to clarify its decision with regard to issues such as sunbathing, picnicking, bonfires, beaching boats, and camping.

2. A Federal Lawsuit — Some riparians have discussed filing a federal lawsuit based on a "takings" claim or other basis. However, it is highly unlikely that those riparians would prevail in a federal lawsuit, since the federal courts look to the real property law in the state of Michigan as absolutely governing real estate issues in Michigan. The Michigan Supreme Court is the ultimate arbiter of real property law in Michigan.

3. Suing for a "Taking" — Some Great Lakes riparians have discussed the idea of filing a state or federal lawsuit claiming that the decision by the Michigan Supreme Court effectively "takes" property away from the riparians without due process of law (including without just compensation being paid by the government). In other words, they assert that the Michigan Supreme Court has now effectively imposed a public easement upon parts of their riparian property. Given how the Supreme Court crafted its decision, it is highly unlikely that a "taking" claim would prevail.

Why would a takings lawsuit probably fail? Quite simply, the Michigan Supreme Court says that it is merely confirming the long-standing common law in the area and that Great Lakes riparian property owners have always received their land titles subject to the public trust area going up to the ordinary high water mark. The majority opinion in *Glass* v *Goeckel* stated that while most riparian landowners on the Great Lakes probably own title all the way to the water (which is a "movable freehold"), any land which they own below the ordinary high water mark has always been subject to the public trust area up to the ordinary high water mark. In other words, riparian property owners cannot complain now about the taking away of property rights which they supposedly never had. Furthermore, as discussed above, the federal courts look to state law regarding real property rights, of which the Michigan Supreme Court is the ultimate referee.

4. Pushing to Have Real Property Tax Assessments Lowered — Some riparians have already argued that because the Supreme Court's decision in *Glass* v *Goeckel* has taken away some of their property rights and, consequently, has lowered their property value, the property tax assessments for lakefront property on the Great Lakes should be dropped dramatically. In this area too there is probably little hope for success. The likely lack of property tax relief in the form of lowered assessments is based on two factors. First, local tax assessors in the state of Michigan will undoubtedly argue that the Supreme Court was merely reaffirming the long-standing case law in this area (which is what the Court itself said). Since supposedly no rights were taken away, the property tax assessments cannot be lowered. Second, property tax assessments are supposedly based on "fair market value" and not mechanical items such as the size of a lot, whether a property is subject to an easement, etc. Although the characteristics of property ownership might be tools used to determine fair market value for taxation purposes, the true value in the market must govern. Accordingly, unless riparians can show that the real estate market actually responds negatively to the *Glass* v *Goeckel* decision in an objective, visible fashion by lowering the property values of Great Lakes lakefront properties, there will likely be no property tax relief via lowered tax assessments.

5. Pursuing Reasonable Regulatory Legislation — The Michigan Legislature has full authority to adopt a statute to regulate what public uses can occur within the public trust area. In fact, by adopting new legislation, the state of Michigan could limit beach walking by the public to within a certain distance of the wet sand (for example, ten feet), ban sunbathing, vehicles, bonfires and camping and impose other regulations on public use. In fact, the majority opinion in *Glass* v *Goeckel* implies in several places that such legislation might be a reasonable compromise. In my opinion, the legislative solution is the only practical way available to soften the adverse impacts of the *Glass* v *Goeckel* decision. Nevertheless, any proposed legislation should be "balanced" so as to be acceptable to all groups.

Possible legislation could include the following provisions:

- The legislation would apply only to private riparian properties and the beach and shoreline adjacent thereto—it would not apply to public property, such as public beaches, public road ends and similar public properties.
- The public would be limited to walking on the beach within, for example, 10 feet of the water or the wet sand, whichever extends further. Any member of the public could go outside of that area only with the express permission of the riparian landowner.
- Members of the public could walk within the area allowed, but would not have the right to lounge, sunbathe, park/moor a boat, drive a motorized vehicle, picnic, build a campfire or do other sedentary activities on any portion of the beach.
- Littering would be subject to a minimum $500 fine. Furthermore, members of the public would have to confine their dogs to the permitted area, and would have to remove and carry out any waste from their dog.
- Any riparian or other person who unlawfully interferes with the rights of the members of the public to walk and stroll would be in violation of the statute. A violation of the statute (with the exception of littering) would be a municipal civil infraction, which permits a Michigan district court to not only impose reasonable fines, but would also give the court the ability to order the person involved not to violate the law again.
- Beef up the exiting statutory prohibition language and penalties where a riparian installs a fence, deck, stairs or other structure lakeward of the ordinary high water mark without all required governmental approvals and permits.
- Increased fines and penalties for any member of the public who vandalizes or damages any property belonging to a riparian. ❖