CURRENT LEGAL ISSUES

CLIFFORD H. BLOOM, ESQ.
BLOOM SLUGGETT, PC
GRAND RAPIDS, MICHIGAN
WWW.BLOOMSLUGGETT.COM

There are several fairly recent legal issue developments which could affect many Michigan riparians. The first is the decision by the Michigan Supreme Court in *Fraser Township v Haney*, _____ Mich ____ (2022). In Haney, the landowner kept pigs in violation of the Fraser Township Zoning Ordinance. The property owner argued that Fraser Township could not enforce its ordinance as the pigs had been continuously on the property for over six years and the Michigan general statute of limitations is six years. The Township argued that the violation was continuing, such that the statute of limitations never commenced to run and certainly had not run out. The Michigan Court of Appeals agreed with the landowner and effectively held that all municipal ordinance prosecution or enforcement efforts in Michigan would be limited to a "hard" six-year statute of limitations. If a violation occurred continuously for over six years, both the municipality and the neighbors would simply have to live with the violations permanently. The Court of Appeals also held that the six-year statute of limitations applies, regardless of whether or not the municipality knew about the violation, and even if the property owner concealed it.

The implications of the decision by the Court of Appeals in *Haney* was profound. There are likely tens of thousands of local municipal regulatory, building code, and safety ordinances that would have been directly affected by the Court of Appeals' decision in the *Haney* case. Those ordinances include, but are not limited to, the following:

a. Zoning ordinances
b. Environmental ordinances
c. The building codes, including the plumbing, mechanical, and electrical codes
d. Handicap access codes
e. Sewer and water ordinances
f. Fire codes
g. Property maintenance codes
h. Safety codes
i. Obnoxious weeds ordinances
j. Sidewalk and snow clearing ordinances
k. Sign ordinances
l. Junk ordinances
m. Blight ordinances
n. Junk and inoperable motor vehicle ordinances
o. Mining ordinances
p. Attractive nuisances ordinances

Applying a "hard" 6-year statute of limitations to ordinance enforcement proceedings, barring the "discovery rule", and abolishing the continuing wrong doctrine would have made those and many other ordinances throughout Michigan "dead letter law" in many circumstances.

What was MLSA's specific interest in the *Haney* case? MLSA and waterfront or riparian property owners throughout Michigan would likely have been adversely affected if the decision by the Michigan Court of Appeals had not been overturned (or modified) for at least five different reasons. First, there are many local municipal ordinances that protect lake communities, riparian rights and waterfront areas. Those include zoning ordinances, dock and boat ordinances, environmental ordinances, junk ordinances, fertilizer regulation ordinances, septic tank ordinances, and building codes. Second, as the Michigan Court of Appeals indicated earlier in *People v Yeo*, 103 Mich App 418; 302 NW2d 883 (1981), applying a relatively short statute of limitations and implying that abolishing the continuing wrong or violation doctrine for ordinance proceedings would effectively grant a "variance" to lawbreakers, who would be treated differently and specially as opposed to their neighbors who have complied or will comply with local ordinance requirements. Or, put another way, no vested right to violate an ordinance should be acquired by continuing violations. Third, allowing lawbreakers to "get away with" ordinance violations would likely breed increased public contempt,

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suspicion, and anger with the law. Fourth, negative impacts upon the neighbors of a violator could be significant, and it is not fair to make the neighbors suffer literally forever if a violator on an adjoining property "beats the system" by concealing an ordinance violation until the 6-year statute of limitations runs out or is able to permanently violate the ordinance because the local municipality did not have the time, resources, or knowledge to prosecute the ordinance violation within six years. Fifth and finally, municipal ordinance violations on one property can decrease property values on an adjoining property. That is often the case with regard to waterfront properties in Michigan.

Applying a 6-year statute of limitations to municipal ordinance and code enforcement proceedings (as held by the Court of Appeals) would likely have led to many unintended and unforeseen negative consequences. The following are just a few examples:

a. A person drives without the state-mandated car insurance (as enacted locally by the Uniform Traffic Code) for over six years and is not caught until the seventh year. The police are simply out of luck.

b. A property owner runs a small machine shop illegally in an out-garage in a residential neighborhood in violation of the local zoning ordinance and is not discovered until the eighth year. The local municipality and the neighbors can do nothing.

c. Out in the country on a parcel with heavy woods, a property owner creates a junkyard (complete with leaking batteries and tire piles) which violates not only the local zoning ordinance, but also the township's junk ordinance, zoning ordinance, and junk tire ordinance, but the operation is not discovered until seven years after it was commenced and just over six years at its present scope or intensity. Nothing can be done by the local municipality or the neighbors.

d. A house addition is built by the homeowner without obtaining a building permit and in violation of the electric and plumbing codes. The construction is unsafe and endangers the occupants. If six years passes without municipal discovery or enforcement, the unsafe condition can last forever.

e. A septic tank leaks or junk batteries stored outdoors leak acid onto the ground, both in violation of a local ordinance. After 6 years, the leaking can continue without sanction.

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Happily, on February 8, 2022, the Michigan Supreme Court reversed the decision by the Court of Appeals below in *Fraser Township v Haney*. In summary, the Supreme Court held that if the violation of a municipal ordinance is continuing, it is not subject to a statute of limitations, and in most cases, the municipality could prosecute or pursue ordinance enforcement efforts as long as the violation continues (even if long past six years). Both the decisions by the Court of Appeals and the Michigan Supreme Court can be found online at the Michigan courts' webpage at www.courts.michigan.gov.

The Michigan Lakes & Streams Association, Inc. ("MLSA") funded an amicus curiae brief in *Haney* asking the Michigan Supreme Court to reverse what appeared to be the erroneous Court of Appeals decision. Ultimately, the Supreme Court's decision in *Fraser Township v Haney* was in accordance with what MLSA had asked for. This decision is not only a big victory for the enforcement of municipal ordinances statewide, but also for Michigan riparian and waterfront property owners in general.

Pursuant to MCL 324.30701 *et seq.* (formerly called the "Michigan Inland Lake Level Act"), a county circuit court can set a lake level (or range of seasonal lake levels) for a lake located within the county involved. Although the statute is fairly clear for the procedures and legal matters related to the initial setting of a lake level by a circuit court, it is not as clear with regard to modifying lake level orders years later. A county circuit court generally has continuing jurisdiction over the earlier court lake level order under MCL 324.30707(5), and can enforce or modify that Order upon the request of an interested party without the initiation of a new action. *Anson v Barry Co Drain Comm'r*, 210 Mich App 322, 325-326; 533 NW2d 19 (1995); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n,* 264 Mich App 523, 530; 695 NW2d 508 (2004) (Once a determination has been made, the circuit court's jurisdiction over a lake's level continues). The recently published decision by the Michigan Court of Appeals in *Citizens for Higgins Lake Legal Levels v Roscommon County Board of Commissioners*, ____ Mich App ____ (2022) dealt with riparian property owners on Higgins Lake trying to enforce a longstanding court-directed lake level order as to the Roscommon County Drain Commissioner. The Michigan Department of Environment, Great Lakes, and Energy ("EGLE") sought to intervene in the court proceeding. The Drain Commissioner vigorously disputed that he was not properly enforcing the circuit court's lake level order. On appeal, the Court of Appeals held that both the riparian property owners and EGLE had "standing" to be able to seek court enforcement against the Drain Commissioner of the circuit court's earlier order setting the lake level. Unfortunately, the legal proceedings for both setting a court-directed lake level initially and modifying or enforcing that order years later can involve complex and contentious legal proceedings given all of the competing interests involved.

In general, the *Citizens for Higgins Lake Legal Levels* decision is likely "pro-riparian" overall. It stands for the proposition that lake associations and even individual riparians or waterfront property owners can file motions or petitions to have the local county circuit court modify a formal lake level order years after it has been entered. The difficulty in the *Citizens for Higgins Lake Legal Levels* case was that the language in the original lake level order was relatively inflexible and set specific seasonal lake level elevations that had to be met. As more than one lake

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level expert has indicated, trying to hit a specific lake level numerical target is not unlike "turning around or stopping an aircraft carrier." Most lake level devices (whether it be a dam or augmentation well) require a significant "lead time" to affect lake levels. And, it is not uncommon for a lake level action taken on one day to "overshoot the target" months later. While many earlier lake level orders set a specific numerical target for lake levels, more modern lake level orders tend to set ranges of lake levels for different seasons (quite often, one range of lake levels for the summer season and the other for the winter season). Allowing lake level orders to be modified by the county circuit court involved often helps minimize negative impacts due to either an inadequate or overly-rigid initial lake level order or changing conditions on the lake involved.

Recently, there were other Michigan Court of Appeals decisions handed down which could also affect waterfront and riparian property owners. The first involved a lake easement situation. The Michigan Court of Appeals issued its published decision in *Astemborski v Manetta* on March 17, 2022 (Case No. 352066, 2022 WL 301296). In that case, the backlot property owners had an express easement to access Higgins Lake. The Court of Appeals confirmed that the easement would normally not allow docks and boats. Nevertheless, after doing a detailed analysis of history of all of the lots involved, the evidence regarding permission (or the lack thereof) and all of the elements for a prescriptive easement, the Court of Appeals confirmed that the backlotters were able to expand their usage rights as to the express easements by prescription. However, the Court of Appeals also seemed to indicate that easements created by plat dedication could not be expanded by prescription. This court decision is a "mixed bag" for riparian and waterfront property owners.

On January 20, 2022, the Michigan Court of Appeals issued its unpublished decision in *Candela v Warren* (Case No. 355423; 2022 WL 188324). In that case, the plat at issue showed an area labeled "Gray Park" along the shore of Bronson Lake. The plat dedication stated that "the streets and alleys as shown on said plat are now being used for such purposes." Plaintiffs owned several off-lake or backlots within the plat that did not border Gray Park. The plaintiffs claimed that they had an easement right for lake access across Gray Park even though the plat dedication never

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mentioned the park. The trial court held summarily against the plaintiffs as backlot owners. The trial court noted that the plaintiffs' deeds did not mention an easement to the lake, there was no plat dedication for Gray Park, and there was no other evidence that the plaintiffs had any easement rights in or to the park. The Court of Appeals reversed the decision of the trial court and remanded the case back to the trial court for further proceedings. The Court of Appeals acknowledged that while there was an area designated as "Gray Park" on the plat, the plat dedication referenced only streets and alleys, and does not mention parks. Therefore, the plat was silent about the intended dedication or use of the park. The Court of Appeals quoted approvingly from a 1938 decision by the Michigan Supreme Court in *Schurtz v Wescott*, 286 Mich 691 (1938). In that case, the dedication did not mention parks either, but the Supreme Court confirmed that the ownership of any lot in the plat carried with it private rights to use the parks in common with other lot owners given that the areas were labeled as "parks." The Court of Appeals found in *Candela* that the plaintiffs (as backlot owners) do have easement rights to use the park to access the lake. However, the Court of Appeals did not determine the scope and extent of the easement, which must be determined by the trial court on remand. Therefore, it was left up to the trial court on remand to determine whether the plaintiffs (as backlot property owners) have any rights of usage for docks, boats, lounging, sunbathing, etc. on Gray Park.

On February 17, 2022, the Michigan Court of Appeals issued an unpublished decision in *Otto v Batdorfer* (Case No. 355936; 2022 WL 496246). That case involved a plat-dedicated park. The Court of Appeals held that the plat dedication created only an easement right as to all of the lot owners in the plat and that such lot owners did not jointly own the disputed park. Instead, the owners of the lots adjoining the park owned to the center of the park subject to the park easement. The Court of Appeals referenced its earlier decisions in *Dobie v Morrison*, 227 Mich App 536 (1998) and *Morse v Colitti*, 317 Mich App 526 (2016).

The Michigan Court of Appeals issued an unpublished decision in *Baughman v Beltz* on March 24, 2022 (Case No. 354909; 2022 WL 879786). In the Lakewoods Beach Plat, there was a certain area running "parallel" along the lake labeled and dedicated as a "Lakeshore Reserve." Such area was dedicated to be used only by the owners of lots within the plat. The Court of Appeals held that Lakeshore Reserve is more in the nature of a right-of-way or road, rather than a park. As such, it is a classical "parallel road" situation as covered by *2000 Baum Family Trust v Babel*, 488 Mich 136 (2010). Therefore, the first tier of lot owners along Lakeshore Reserve own under the road and to the lake subject to the road easement or right-of-way. The Court of Appeals also cited *Thies v Howland*, 424 Mich 282 (1985), *Croucher v Wooster,* 271 Mich 337 (1935) and *Morse v Colitti*, 317 Mich App 526 (2016). The plat also had two narrow dedicated "pathways" which were in dispute. The Court of Appeals agreed with the trial court's holding that the backlot property owners were not allowed to use vehicles on the narrow pathways. Further, the Court of Appeals confirmed that the landowners adjacent to each pathway hold title to the center of the pathway, subject to an easement for all lot owners in the plat. The Court of Appeals noted that the pathways are only 25 feet wide, whereas the streets in the plat are 66 feet wide. The Court of Appeals held that a pathway is not a road or a street.

The Michigan Court of Appeals released an unpublished opinion on April 28, 2022 in *Gunther v Apap* (unpublished decision by the Michigan Court of Appeals; Case No. 354908; 2022 WL 1273442), a case which has wound its way multiple times up to the Michigan Court of Appeals. The relevant portion of this decision reiterates that lake access easements normally do not accord riparian rights, are for travel only, and generally do not allow docks, boats moorage, etc.

A disappointing recent unpublished Michigan Court of Appeals decision for riparians is *Kraus v Link ("Kraus II")* (decided on May 12, 2022; Case No. 356760; 2022 WL 1511661). Ultimately, the Court held that an ambiguous easement did allow backlot property owners to have docks and boats thereon. That probably is not very surprising because the accompanying deed restrictions indicated that the backlot owners did have the right to have docks and other fairly broad language regarding uses. Surprisingly, however, the Court of Appeals rejected the so-called "contemporaneousness rule" followed by so many other panels of the Court of Appeals in the past. Until *Kraus II,* the Michigan appellate courts had almost universally held

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that where a plat dedication, easement, deed, or other real estate document or instrument is ambiguous, evidence could be introduced from the time that the document or instrument was created (or shortly thereafter) to show the intent of the original drafter. Such evidence from years later was not considered reliable. The *Kraus II* Court held that in certain cases, it is possible that evidence of uses, activities, or testimony from years after an ambiguous document or instrument was drafted might be admissible to show the original intent of the drafter from years or even decades earlier. Given that this new decision is unpublished and is contrary to so many other Court of Appeals decisions, it is possible that the *Kraus II* decision will be considered an aberration and may not have much of an impact (unless the Michigan Supreme Court grants leave to appeal and confirms the decision).

All of these Michigan appellate court decisions will likely affect many riparians throughout Michigan for years into the future.