

Riparianism and the Great Lakes

by Clifford H. Bloom
Law, Weathers & Richardson, P.C.

In Michigan, bottomlands ownership is different for inland lakes than it is for the four Great Lakes that border the state (Michigan, Superior, Huron and a small portion of Erie). Accordingly, many of the commonly enunciated rules of riparian ownership floating about do not apply to riparian landowners on the Great Lakes.

With most inland lakes, a riparian property owner owns the attendant bottomlands to the center of the lake. A riparian property owner can make various uses of his or her bottomlands and riparian rights, including the ability to draw water for lawns and utilize dockage, shorestations, and rafts. Such uses by riparians are limited only by the reasonableness doctrine and applicable governmental regulations. While members of the public can swim, fish, water ski, and boat over the entire surface of an inland lake (and even temporarily anchor on another's bottomlands as an incident of navigability) without the consent of any bottomlands owner, members of the public cannot permanently moor, trespass, or wade on the bottomlands of another without permission. Furthermore, riparians on inland lakes generally do not have to worry about members of the public being able to lawfully walk on their bottomlands or along their shoreline (absent an unusual situation such as a parallel public road right-of-way at the lake, access easement, dedicated park, or similar lake access device designed for use by backlot property owners or members of the public).

Unlike the bottomlands under inland lakes, the bottomlands under the waters of the Great Lakes are not owned by the adjoining riparian landowners. Rather, the bottomlands are owned by the State of Michigan and are held in trust for the public. Thus, unlike riparian ownership associated with most inland lakes (where land and bottomlands ownership is normally "fixed" and runs to the center of the lake), riparians on the Great Lakes generally own what is considered to be a "movable freehold." That is, their property line varies depending upon where the edge of the water is at any given time. Great Lakes riparians also have to contend with a public easement on or along their shoreline and beach. This easement, which is based on the public trust doctrine, allows members of the public to walk in certain

lakefront areas without the permission of the riparian owners. Prior to 2005, it was unclear whether members of the public could lawfully walk on the dry shoreland of the Great Lakes without the permission of the riparian landowners or whether the public had to stay in the water or on the wet sand. In *Glass v Goeckel*, 473 Mich 667 (2005), the Michigan Supreme Court definitively decided the issue. In *Glass*, the court held that the public has an easement based on the public trust doctrine that extends all the way to the ordinary high water mark of the Great Lakes. Thus, lakeward of the ordinary high water mark, members of the public can walk anywhere they wish, at any time, without the permission of the adjoining riparian landowner (even over the objection of the riparian landowner). It remains unclear, however, whether the rights of the public to use the dry shoreland is limited to walking, or whether members of the public can engage in other activities such as driving snowmobiles or four-wheelers on the beach, picnicking or resting.

In determining where the public easement begins under the *Glass* decision, it is necessary to locate the "ordinary high water mark" on each specific piece of Great Lakes waterfront property. Unfortunately, this is not always an easy task given the Michigan Supreme Court's confusing and ambiguous definition of "ordinary high water mark." In *Glass*, the Court defined "ordinary high water mark" 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 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.* [*Glass* at p. 691]. In most cases, for any given stretch of Great Lakes shoreline, one could have three different expert limnologists or hydrologists inspect the property and there would likely be three different opinions regarding the location of the ordinary high water mark!

In light of the *Glass* decision and other concerns related to the ownership of riparian property in Michigan, if you are

considering purchasing Great Lakes lakefront property, you should have your attorney review a survey, the title history, and other appropriate matters prior to entering into a binding purchase agreement. It is possible that issues may arise concerning title and ownership. For example, describing a lakeward boundary line for a property with frontage on the Great Lakes presents some interesting challenges. Given that the lake levels fluctuate dramatically over time, the location of the water's edge for many existing properties is nowhere near where the water's edge was years ago when the legal description for the parcel or lot was created. Sometimes, a legal description includes a "meander line" near the water. In addition, it is very common for property descriptions and deeds for Great Lakes properties to describe land that ends some distance from the current water's edge, but to also indicate or imply that the property is riparian and that the title actually ends at the water's edge, wherever that might be at a given time. This can be a complicated legal area for a particular property and may result in "gaps" in ownership between what appears to be a riparian property and the actual water's edge.

Apart from title and ownership issues, owning Great Lakes riparian property can present other unique challenges, which differ from those associated with inland lake riparian property. Great Lakes riparians rarely have to worry about conflicts arising over docks, shorestations, or boat moorings. However, they often have to contend with erosion, receding lake levels (and the long walks between the ordinary high water mark and the location of the water's edge that may result), trash floating onto the shoreline, and unwelcome (sometimes belligerent) members of the public who walk along the beach. In addition, Great Lakes riparians generally cannot install stairs, platforms, erosion control structures, or other items at or near the waterfront without the appropriate permits from both the U.S. Army Corps of Engineers and the Michigan Department of Environmental Quality. Finally, Great Lakes riparians must be prepared to address issues that may arise under the Michigan Dunes Protection and Management Act (MCL 324.35301 et seq.).