The *2000 Baum* Case Decision Disaster

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Imagine that five years ago, you purchased a lot on Crystal Lake across the road from the lake. Your lot is in a plat and both your lot and the public road right-of-way between the lot and the lake were created by the same plat. On the original plat, there was no intervening land shown between the lake and the public road right-of-way that runs along the shore.

Before you bought your lot, you were a bit concerned because the lot as shown on both a new survey and the original plat did not "touch" the lake; rather, the lot was shown as fronting on the road but stopping at the edge of the public road right-of-way. You consulted with an excellent real estate attorney who is well-versed in riparian law. She reviewed the plat and rendered an opinion (based on long-standing Michigan appellate case law) indicating that the lot was, in fact, riparian. No fewer than four published Michigan Court of Appeals decisions indicated that the lot was riparian, even though the lot itself was shown as only having frontage on the road—not the lake—and the side lot lines did not expressly extend to the lake on the maps. The four Michigan Court of Appeals decisions which supported your attorney's opinion that the lot was riparian were *McCardel v Smolen*, 71 Mich App 560 (1976), reversed on other grounds, 404 Mich 89 (1978); *Kempf v Ellixson*, 69 Mich App 339 (1976); *Michigan Central Park Assn v Roscommon Co Road Comm*, 2 Mich App 192 (1966); and *Sheridan Drive Assn v Woodlawn Backproperty Owners Assn*, 29 Mich App 64 (1970). In addition, the authoritative land title standards by the State Bar of Michigan also supported this view. (See Standard 24.5, Comment B.)

Based on your attorney's opinion and the long-standing case law, you purchased your lot and paid a premium for it as lakefront property. Since the date when you closed on the purchase of your lot five years ago, your lot has been taxed as riparian or waterfront property (with a slight discount in property taxes due to having to cross the road to get to the lake).

Now, the Michigan Court of Appeals' recent decision in *2000 Baum Family Trust v Babel* (Case No. 284547, issued on June 23, 2009) hits you like a ton of bricks. You are no longer a riparian or lakefront property owner. The value of your property has plummeted by 30%. The county road commission informs you that you must remove your dock and boat hoist from the water permanently. The county road commission has scheduled a hearing in a few weeks so that it can determine whether to install public docks and boat hoists along the lake frontage which was formerly your property. The road commission is also considering whether to allow backlot property owners to install docks and boat hoists there.

In the *2000 Baum* case, the Court of Appeals held that where a platted public road right-of-way was created pursuant to Michigan's 1887 plat statute, there was no intervening property shown on the original plat between the road and the water, and there exists a "first tier" of platted lots along the road opposite the lake, those first-tier lots are not riparian. The Court of Appeals essentially held that under the 1887 plat statute, the local county road commission or other government road authority "owns" the public road right-of-way.

There is another aspect of the opinion by the Michigan Court of Appeals in *2000 Baum* which is problematic. In Michigan, the appellate courts have long held that public road rights-of-way created by plat dedication for street, road, alley and boulevard purposes can be used for travel and road purposes only. And, in a variety of different contexts, it is well-settled case law in Michigan that public road rights-of-way at lakes cannot be used for nontravel purposes such as lounging, sunbathing, picnicking, private dockage, permanent boat moorage, and similar matters. See *Jacobs v Lyon Twp* (after remand), 199 Mich App 667 (1993), and *Higgins Lake Property Owners Assn v Gerrish Twp*, 255 Mich App 83 (2003). However, the Court of Appeals in *2000 Baum* seems to indicate that, given its view that the local road commission (or the equivalent) now owns platted public road rights-of-way along lakes, the uses that can be undertaken or authorized by local road authorities are virtually unlimited. That is directly contrary to long-standing appellate case law. It is possible that such portion of the court's decision could be considered dicta – language that is not essential to a court decision and which is not binding precedent. However, until and unless the Michigan Supreme Court addresses the *2000 Baum* case, look for backlot property owners and their advocates throughout the state to assert that the *2000 Baum* published opinion somehow overturns *Jacobs v Lyon Twp* and dozens of other Michigan Court of Appeals cases which stand for the proposition that public road use is limited and for travel purposes only (i.e., no private docks, permanent boat mooring, lounging, sunbathing, etc.). Furthermore, if the Michigan Supreme Court decides to review the *2000 Baum* decision, it is likely that backlot groups will not only urge the Supreme Court to uphold the *2000 Baum* decision in general, but to also utilize the case to overturn *Jacobs v Lyon Twp* and many other related Michigan Court of Appeals cases.

Is this just a bad dream or nightmare? No. Many people who were formerly riparian property owners are awakening to this very real situation. Unless the Michigan Supreme Court reverses the June 23, 2009 published opinion by the Michigan Court of Appeals in the *2000 Baum* case, this nightmare scenario for many former riparian property owners will become permanent. Until and unless this decision is reversed by the Michigan Supreme Court, it is binding precedent throughout Michigan.

Perhaps the most perplexing matter about the *2000 Baum* decision is the fact that it totally ignores prior long-standing binding Michigan Court of Appeals precedent. At least four prior Michigan Court of Appeals published case decisions were directly on point and held that first-tier

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lot owners in situations virtually identical to the 2000 *Baum* case are riparian/lakefront property owners. Even though the Michigan Waterfront Alliance filed an amicus curiae brief on behalf of the first-tier lot owners before the Michigan Court of Appeals reached its June decision in 2000 *Baum* (and expressly cited the prior cases of McCardel, Kempf, Michigan Central Park Assn, and Sheridan Drive Assn), the Michigan Court of Appeals simply disregarded that prior case precedent and did not even mention or attempt to distinguish those cases in its 2000 *Baum* decision.

It should also be kept in mind that the 2000 *Baum* decision does not just apply to public roads that have actually been utilized or have an existing roadbed (whether of asphalt or gravel). There are hundreds, if not thousands, of "paper plat" public road rights-of-way around the state which run along the shorelines of Michigan lakes that have never been opened, improved or utilized. Nevertheless, they still exist as a public road right-of-way and are subject to the 2000 *Baum* decision if created via the platting process.

If the decision by the Court of Appeals in the 2000 *Baum* case stands, will some first-tier lot owners be able to continue to maintain their docks, boat hoists, and boat moorings by claiming adverse possession or prescriptive easement rights? That is unlikely because dockage and boat moorage rights via adverse possession/prescriptive easement cannot normally occur as against a public road right-of-way.

My column in the May 2009 issue of *The Michigan Riparian* discussed the 2000 *Baum* case just prior to oral arguments before the Michigan Court of Appeals. Please consult with that column for a more in-depth factual review of the 2000 Baum case. At the time that column was written, I believed it was highly likely that the Michigan Court of Appeals would reverse the trial court's decision (which also held that first-tier lot owners were not riparian). The Court of Appeals recent decision in the 2000 *Baum* case greatly surprised me and many other riparian experts.

The 2000 *Baum* decision has the "feel" of two earlier Michigan Court of Appeals published decisions, which were ultimately reversed by the Michigan Supreme Court. First, in *Fox & Associates v Hayes Twp*, 162 Mich App 647 (1987), the Court of Appeals held that local governments cannot adopt zoning regulations which govern new keyhole or funnel developments. The Court of Appeals held that local zoning powers only extended to land, not water. The Michigan Supreme Court easily reversed that decision in *Hess v West Bloomfield Twp*, 439 Mich 550 (1992).

Second, and more recently, the Court of Appeals held in *Tomecek v Bavas*, 276 Mich App 252 (2007), that circuit courts could alter substantive property rights pursuant to plat vacation, alteration and correction lawsuits. Likewise, the Supreme Court reversed that erroneous interpretation by the Court of Appeals. See 482 Mich 484 (2008). Hopefully, the Michigan Supreme Court will hear and also reverse the Court of Appeals decision in 2000 *Baum*.

To find out more about the 2000 *Baum* decision and its dramatic implications, please visit the ML&SA website at www.mlswa.org to review a copy of the 2000 *Baum* decision, the amicus curiae brief submitted by the Michigan Waterfront Alliance to the Court of Appeals before its decision, and related matters.