

NEW LIMITATIONS ON PRESCRIPTIVE EASEMENT CLAIMS AT PRIVATE ROAD ENDS AND SIMILAR LAKE ACCESS SITES

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In Michigan, a prescriptive easement claim can be made where one has used the property of another for more than 15 years continuously and without permission. At the lakefront, there are typically two different types of prescriptive easement claims. First, backlot or off-lake property owners sometimes claim permanent prescriptive easement rights for dockage, boat moorage, lounging, sunbathing, and other lakefront uses across the lakefront property of another where no easement exists whatsoever for the benefit of the backlot property owners. The second type of prescriptive easement claim involves a lake access site created by plat dedication for the benefit of all lot owners within the plat. Many plats dedicate private road ends, parks, walkways, alleys and similar ways adjoining lakes to the use of all lot owners within the plat. In most such instances, the courts have held that dockage and permanent or overnight boat mooring are not allowed on those dedicated properties, and, with the exception of platted parks, non-travel activities, such as lounging, sunbathing, and picnicking are also generally not allowed. Where a backlot property owner has used one of those dedicated common properties beyond the uses allowed (for example, for dockage or boat moorage), they sometimes claim prescriptive easement rights to continue the prohibited uses and activities just as they have in the past for more than 15 years or longer.

This article discusses the second type of prescriptive easement – attempts by backlot owners to expand usage rights for existing lakefront platted common areas or easements.

Recently, the Michigan Court of Appeals has issued opinions in two different cases that indicate off-lake or backlot property owners cannot obtain prescriptive easement rights to engage in uses otherwise not allowed on plat-dedicated and created common areas at the waterfront. On November 20, 2012, the Court of Appeals issued its opinion in *O'Brien v Hicks* (unpublished decision by the Michigan Court of Appeals; Case No. 307332). The plat at issue created various parkways (scenic roads that run to Otsego Lake) that were dedicated to the public. The roads were ultimately determined to be private (only for use by lot owners within the plat) since they were never properly accepted by any governmental unit. Backlot owners used two of the roads for dockage and boat moorage continuously for over 15 years. The Court of Appeals agreed with the trial court that the roads as originally dedicated could not be utilized for dockage, boat moorage, lounging, sunbathing, and similar non-travel activities. However, the Court of Appeals reversed the trial court's decision that the backlot owners could continue to utilize the road ends at the lake for uses such as dockage and boat moorage based on a prescriptive easement. The Court of Appeals stated:

Here, the trial court accepted defendants' claim of a prescriptive easement on the basis that a prescriptive easement had arisen through defendants' historical use of parkway 6-7. A prescriptive easement arises in a manner similar to adverse possession, when there is "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n*, 255 Mich App at 118. We conclude that there is no basis for the establishment of a prescriptive easement because of the absence of the element of adversity. The backlot owners clearly had some right to use parkway 6-7, just not as extensive a use as they believed. Hostile or adverse use cannot be established if the use is permissive, regardless of the length of the use. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Here, a prescriptive easement could not have arisen because defendants and other lot owners used parkway 6-7 for an extended time period openly and without any dispute arising. The use of parkway 6-7 was a permissive and accepted use and cannot be deemed to be hostile. One may not acquire a prescriptive easement to property already subject to an easement for the benefit of an entire subdivision

and created through a private dedication simply because an owner “overuses” the easement. See *Banacki v Howe* (unpublished per curiam opinion, docket No. 302778, rel’d March 20, 2012). Slip opinion at p. 5.

The second relevant Michigan Court of Appeals decision is *Banacki v Howe* (unpublished opinion dated March 20, 2012; Case No. 302778; 2012 WL 943019). In this case, two “courts” ran to the water’s edge and were dedicated to the use of certain lot owners within the plat. The Court of Appeals indicated that a “court” is a short street. The Court of Appeals agreed with the trial court that the backlot owners did not have a right to utilize either of the two short road ends for dockage, boat moorage, sunbathing, lounging or similar uses or activities. Defendants asserted that they had a prescriptive easement to use one of the courts for dockage and boat moorage as they and their predecessors in title had done for 65 years. Both the trial court and the Court of Appeals held that no prescriptive easement could arise based on any “overuse” or misuse of the road end easement:

Defendants contend that even if the dedication itself did not give them the right to use East Court as if they were riparian owners, they have acquired such rights through a prescriptive easement. A prescriptive easement is typically established where an express easement has failed because of a defect and was treated as though it had been properly established. *Plymouth Canton Comm Crier, Inc v. Prose*, 242 Mich App 676, 684-685; 619 NW2d 725 (2000). In addition, a prescriptive easement is also found to arise in a manner similar to adverse possession, when there is “use of another’s property that is open, notorious, adverse, and continuous for a period of fifteen years.” *Higgins Lake Prop Owners Ass’n*, 255 Mich App at 118. In this case, the trial court properly rejected defendants’ claim of a prescriptive easement on the basis that a prescriptive easement cannot arise with respect to property already subject to an easement for the benefit of an entire subdivision that was created through a

private dedication simply because a lot owner “overuses” the easement. There is no basis for the establishment of a prescriptive easement because of the absence of the element of adversity. Hostile or adverse use cannot be established if the use is permissive, regardless of the length of the use. *West Michigan Dock & Market Corp v. Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). Because defendants and other lot owners used East Court for an extended time period openly and without any dispute arising, this permissive and accepted use of the subject property was not adverse or hostile and, therefore, a prescriptive easement could not arise. Slip opinion at p. 4.

Based upon these two recent appellate court decisions, off-lake lot owners may not be able to expand their usage right (particularly for dockage and boat moorage) as to non-public road ends, easements, and parks at lakes via a claim of a prescriptive easement.

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