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THE MICHIGAN RIPARIAN

DEVOTED TO THE MANAGEMENT AND WISE USE OF MICHIGAN'S LAKES AND STREAMS

Published Quarterly – February, May, August and November

THE GREAT LAKES—THE LARGEST FRESH WATER SYSTEM ON EARTH

(Map, courtesy U.S. ARMY CORPS OF ENGINEERS, Detroit Office)

THE MICHIGAN RIPARIAN

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EDITORIAL

Don Winne

CONSERVING MICHIGAN'S WATER

The low level of the Great Lakes of Superior, Michigan and Huron this past summer has caused considerable concern among Michigan residents who depend upon surface and groundwater for drinking, industrial and agricultural production and recreational activities.

The flow of water into and out of the Great Lakes is regulated by agreement between Canada and the United States. Veto power is given to the province of Ontario together with the Governors of the 8 Great Lakes states to stop diversion of the Great Lakes waters outside the Great Lakes basin.

What about the regulation of Michigan's groundwater? Approximately 1/2 of the drinking water consumed in this State comes from shallow domestic wells (less than 200 feet deep) which tap groundwater aquifers. Does the State have a water use policy or provision in law which regulates how much water may be withdrawn from an aquifer by an individual or corporation? If not, perhaps this current State legislature should look into this matter or appoint a task force to do so.

Where does the State of Michigan rank among the other states in carrying out the mandate from the United States Congress (1992) that requires that all new residential toilets be low-flow models that require only 1.6 gallons per flush?

Do you have an opinion on this issue? If so, would you send your thoughts to the editor?

Donald E. Winne

The Michigan Riparian welcomes letters to the editor, articles for publication, comments, suggestions, and article ideas. If you wish to write an article or just have an idea for one, it would be best to write us a short note or give us a call to discuss it.

—The Editor

In This Issue:

THE PARADOX OF GREAT LAKES WATER DIVERSION POLICY

by Dr. James P. Hill with assistance from Joseph A. Fivas

In mid-October, 1998, the Great Lakes Commission adopted a united policy position opposing the Nova Group proposal to withdraw Lake Superior water for overseas export. This action reaffirmed the "feel good" position of the basin states that the waters of the Great Lakes belong to the basin states and not to some foreign nation. Indeed, this historical opposition to external diversion threats was the genesis of section 1109 of the Water Resources Development Act (WRDA) of 1986, which requires the governors of each of the Great Lakes states to approve any diversion outside of the Great Lakes basin, effectively granting each governor veto authority in this area.

However, because the political and geographical boundaries of the Great Lakes basin are not coterminous, the region is faced with an equally dangerous internal diversion threat to both the waters of the basin and to its regional unity. For, with the exception of Michigan which is wholly within the basin, a significant portion of every Great Lakes basin state is located outside the basin, making the withdrawal of basin water to the out-of-basin portion of each Great Lakes state a diversion subject to gubernatorial veto. With gubernatorial acceptance of the Pleasant Prairie, Wisconsin, and the more recent Akron, Ohio diversions, it appears that the current "no diversion" policy addresses only the most obvious external and not the internal threats to basin water.

Indeed, there are actually two diversion policies for the Great Lakes: a very strict policy of no diversions whatsoever applied to the export of water to non-basin states and countries, and a more politically accommodating policy for diversions that are proposed for use by the basin states themselves. While this "two policies, one basin" approach has its obvious political advantages to maintain regional unity, it has its perils as well. One peril is the possibility that Congress may very well filnd this policy unacceptable as the nation's demand for fresh water grows, and strip the veto power granted to the basin's governors in 1986. Another peril might result from a type of "Chinese water torture," where the application of the WRDA may be diminished by court interpretation (such as a decision as to the applicability of the WRDA to groundwater diversion from the basin in the pending dispute involving the Crandon Mine in Wisconsin).

Recent studies indicate that at least 5 more diversion projects may be proposed by the Great Lakes states and Canada in the near future. Thus, it is time to develop one policy for all proposed diversion projects in order to provide clear guidance as to how the region will address such proposals from the standpoint of the good of the region, and not just to satisfy the political demands of individual basin states.

Proponents of the current no diversion policy argue that to deviate from current policy will set a precedent for more requests. Yet, does not the 1998 approval of the Akron diversion create such a precedent? Status quo proponents also argue that any politician (especially one from Michigan) who proposes any change in this policy would be committing political suicide. However, even this argument is questionable based on a recent Michigan legislator survey that is the focus of this paper.

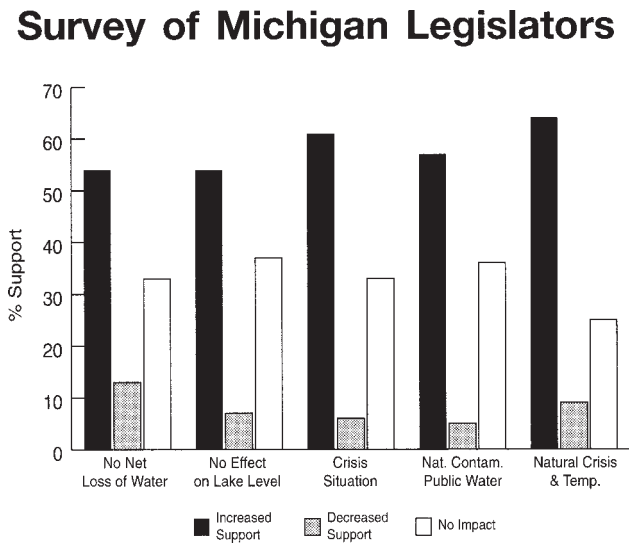
The conventional political wisdom on water diversion issues was simple: Michigan politicians boldly proclaimed that the only water that would be exported out of the state would be in Stroh's bottles (the non-drinking politicians substituted Vernor's ginger ale for the beer). This was simple, safe and avoided addressing the true diversion complexities that have since emerged among the basin states

(Continued on page 10)

themselves. However, as times have changed, isn't it also possible that the attitudes of Great Lakes stakeholders have changed as well? If so, perhaps there is common ground among the Great Lakes stakeholders that could form the basis for a new, consensual policy for addressing all diversion proposals more objectively?

To address this question, the formal and informal records of Great Lakes water diversion hearings, studies, and reports issued by the International Joint Commission and other entities since 1973 were researched in order to compile a list of conditions and criteria that historically have been used to justify proposed water diversions. From this research, a list of 10 conditions and 13 scenarios were developed and incorporated into a survey of key U.S. and Canadian interest groups in the basin. That survey was completed earlier this year and the results will be submitted for publication soon.

However, earlier this year, this same survey instrument was administered to members of the Michigan legislature, as Michigan has the most to gain by maintaining the status quo policy and the most to lose if the veto power is lost or diluted. A total of 75 of the 147 eligible legislators responded to the survey. The purpose of the survey was to determine whether these legislators identified any common ground upon which a new Michigan water diversion policy, and hopefully a basin-wide policy as well, could be developed. Among the conditions and scenarios provided, five were supported positively by more than 50% of respondents. (See bar graph for the results.) Issues associated with temporary crises, contamination, and no net loss of water were key to increasing legislative support for diversion proposals. There was also evidence to indicate that this support is bipartisan and is strongest among legislators who were college educated and held Great Lakes-related committee posts, indicating that educating the public and the media on diversion politics might also have a salutatory effect on public opinion as well.



Of course, development of a single, basin-wide water diversion policy requires more than just approval of Michigan legislators. However, the results of this Michigan survey indicate there is room (even in a state most likely to resist change in the symbolic no diversion policy) to begin a basin-wide dialogue for re-thinking Great Lakes water diversion policy. Certainly any new diversion policy will require the participation of U.S. and Canadian private and public stakeholders as well as elected leaders in order to realize a consensual approach across the region. However, preliminary results from soon-to-be published research of government and non-government interest groups look promising for a new water diversion policy.

To keep policy making in the hands of the basin's governors will require more than continuing the current ad hoc, gubernatorial veto approach for evaluating proposed water diversion projects. Rather, it will require the development of a single, strict set of criteria to judge future water diversion projects from whatever source in order to ensure the basin states maintain the moral and political high ground in the coming battle for water resources. It appears from the results of this survey that some basis for such a single, comprehensive policy may already exist.

Dr. James P. Hill is an attorney and political science professor at Central Michigan University. He has worked on Great Lakes issues in the U.S. Senate and U.S. House of Representatives, and served on the Michigan Natural Resources Commission from 1991 - 1995.

Joseph A. Fivas holds a Master of Public Administration degree from Central Michigan University and is currently pursuing a law degree at Michigan State University.

By Dr. John Gannon
State University of New York At Oswego

WHAT IS GROUNDWATER?

This term refers to water below the earth's surface. The water is present in the pore spaces found within the earth's solid materials. Groundwater is constantly replenished from precipitation and from lakes and streams.

GROUNDWATER AS A RESOURCE

Groundwater is a vital resource where it can be obtained in the desired quantity and acceptable quality. It is available in dug wells, drilled wells, from springs, and as it moves into streams and lakes. It has the advantage of not requiring storage, as in a surface water supply system.

FACTORS THAT AFFECT GROUNDWATER

Solid materials that will dissolve in water will be present in groundwater, as in surface water. Therefore, the dissolved materials found in water are related to the rocks and soils with which the water has been in contact. Like surface water, groundwater sometimes contains small particles of clay or silt-sized materials, however the groundwater storage areas (aquifers) generally filter the water very effectively. When sources of pollution are present where water enters the aquifer, the groundwater also becomes polluted. Due to the slow movement of water underground (as little as a few feet per year), it may take considerable time before the pollution reaches a well and an equally long time to remove pollution from groundwater. The problem of groundwater pollution exists in all industrialized nations.

GROUNDWATER AQUIFER

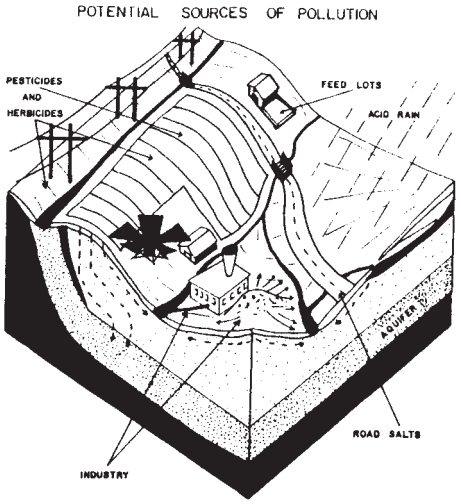
A groundwater aquifer consists of water bearing material within the earth, from which water in usable quantity and acceptable quality can be obtained. The aquifer consists of rock materials with sufficient open space to contain water. Water to replenish aquifers reaches them by moving down through the soil and other overlying material. The land surface above an aquifer, through which the replenishing water moves, is called the recharge area for that aquifer. In glaciated regions, the recharge areas are sometimes quite limited, being restricted to materials such as sand and gravel which can transmit water down to the aquifer.

HOW TO MAINTAIN HIGH QUALITY GROUNDWATER

Land use must be managed so the recharge areas are not exposed to pollutants. If groundwater is contaminated by careless exposure to pollutants, it requires a much greater length of time to clean itself than surface waters. Properly maintained groundwater resources generally supply better quality water than today's surface supplies. Minor problems with hardness (dissolved minerals) or turbidity (sediment) can usually be corrected at small cost by presently available home water treatment equipment.

"Groundwater is a natural resource of enormous value. Three-quarters of United States cities get their water supplies totally or in part from groundwater, and more than half of all Americans rely on it for drinking water. Ninety percent of rural households have no source other than groundwater for drinking water supplies."

This quote is from a book entitled, *Rural Groundwater Contamination* by Dr. Frank D'Itri and Dr. Lois Wolfson, Michigan State University. Published by Lewis Publishers, 1987.



WETLANDS ARE FINALLY GETTING THE RESPECT THEY DESERVE

A bill introduced by Senator Gary Peters in the Michigan Senate (51235) would protect more than 100 tiny public wetlands from drainage and development.

Peters believes state regulators have ignored these small sites despite a 1996 state report, The Critical Non-Contiguous Wetlands of Michigan, that recommended protection because of their unique characteristics and importance to local ecosystems.

More than 350 small wetlands–each less than five acres in size–on both public and private property were identified in the study.

The bill would place 110 of these sites under state Department of Environmental Quality supervision and require local governments, agencies and other units of government that own the land to obtain state permits to construct roads, nature paths, golf courses or anything else on or near the wetlands.

Although the wetlands may be tiny, their cumulative effect on the environment is mighty, according to scientists. These areas play an important role in filtering toxic pollutants, controlling flooding and providing a home for wildlife.

Virginia also has taken action to protect nontidal wetlands. These seasonally saturated fields and forests are located along the Hampton Roads area and have been disappearing since the 1600s due to development, more recently often at a rate of 2,000 acres per year.

Beginning in October 2001, developers and property owners must obtain permits and replace wetlands that are lost due to new construction of homes, roads, and shopping malls. In addition, the state prohibited the unregulated draining of wetlands effective July 1, 2000. The land clearing practice, referred to as Tulloch ditching, has led to the loss of 2,600 acres of nontidal wetlands since 1998. Another 7,500 acres were at risk of bulldozing and development.

By passing the legislation, Virginia joins Maryland and Pennsylvania in protecting the Chesapeake Bay watershed and its water quality.

The wetlands protection bill proved to be the most controversial environmental issue of Virginia's 2000 General Assembly and was 11 years in the making. Although the bill did not have the support of local lawmakers, the cause was championed by others within the watershed.

Getting the measure approved was "the most challenging experience of my years in Richmond," says sponsor Senator Mary Margaret Whipple. Although Governor Jim Gilmore is a strong proponent of property rights, he requested only a minor change in the bill from the legislature. By signing the bill into law, Gilmore is fulfilling a 1997 pledge to increase wetlands during his tenure as governor.

In Minnesota, a St. Paul neighborhood has restored a wetland to its natural state, knocking down an old strip mall that had been built on top of a marshy lake. The redevelopment project is believed to be the first of its kind in the nation. Volunteers are working with school children to plant native vegetation around the lake in what used to be the parking lot.

The project is spawning redevelopment in the area; a state office building and senior citizen apartments will be built nearby.

LAKE SHORE DEVELOPMENT MEANS FEWER FISH

Wisconsin Association of Lakes, Inc.

Cottages on lakes are one of the hottest real estate markets in Wisconsin. A better view of the lake, however, may reduce fish growth and productivity.

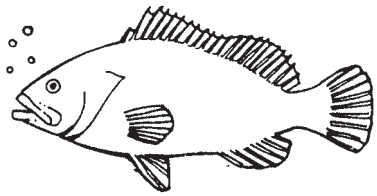
Growth rates of bluegill in lakes surrounded by cottages are slower, by one-third, than growth rates of bluegill in lakes with no cottages. Bluegill populations of undeveloped lakes were more than twice as productive as those surrounded by cottages. University of Wisconsin scientists measured growth and production of fish in 14 lakes near Boulder Junction, Wisconsin. Some of the lakes were completely developed while others had completely forested shorelines. The study appears in the June 2000 issue of the *Scientific Journal "Ecosystems."*

Largemouth bass growth showed similar trends, decreasing by half as cottages became more common on lakeshores. Data for largemouth bass were not as clear-cut as those for bluegill, however.

"These findings are a big surprise," says Daniel Schindler, lead author of the study and now a Professor of Zoology at the University of Washington in Seattle. "We expected growth rates of fish to increase because of nutrient leakage from septic tanks and heavy fishing pressure in lakes with lots of cottages. The results are completely opposite to this expectation."

Decreased fish production in lakes with cottages may be a result of habitat destruction. "Fish like to live around fallen trees, and lakes with cottages have very few fallen trees," according to Steve Carpenter, Professor of Limnology at the University of Wisconsin-Madison. Earlier research from UW Madison showed that fallen trees were up to ten times more common in lakes that lacked cottages around the shoreline." Apparently, homeowners tend to remove trees from lakeshores and from the shallow nearshore waters of lakes," says Carpenter. Fallen trees provide habitat for insects that the fish eat, and shelter fish from predators.

Losses of fish production due to lakeshore development may be a widespread problem throughout North America. "We see the same patterns in Washington lakes," notes Schindler. The remedy is simple, according to Carpenter. "Leave shoreline forest intact, and leave logs in the lake." Let a dead tree lie.



Attorney Writes

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GETTING IN THE ZONE

Although the *Riparian Magazine* has dealt extensively over the years with zoning lake access regulations such as anti-funneling provisions, it has only occasionally discussed other zoning issues which have impacts upon lakes. Following are some of the "hot" zoning issues which can greatly, and sometimes adversely, affect your lake community.

Mineral Extraction Operations

It is not uncommon for commercially valuable sand and gravel deposits to be located near inland lakes. Some mining operations should not be permitted at all due to severe adverse environmental impacts. Other mining operations should be strictly regulated and allowed to occur only with conditions attached which will prevent degradation of watersheds and lakes. Although mining operations are somewhat favored under the Michigan common law due to the need for building materials in our economy and the fact that such resources are found only in certain locations, local municipalities can still extensively control mining through zoning. For example, a zoning ordinance can permit mining only in certain zoning districts and even then, require that a mining operation be approved only as a special use. Zoning regulations normally only cover new mining operations since existing operations are usually deemed to be lawful nonconforming use (*i.e.*, they are grandparented). However, municipalities can also regulate existing mining operations by enactment of police power regulations, which will not be subject to nonconforming rights defenses. Zoning ordinances and police power ordinances can regulate many aspects of mining, including placing time limits on the completion of mining, requiring reclamation, limiting hours of operation, requiring posting of monetary security to ensure compliance with ordinance requirements or reclamation, and many other conditions.

Telecommunication Towers

A proliferation of telecommunication towers near lakes can be aesthetically displeasing. Unfortunately, the federal government has preempted some of this area of the law, such that local control has become more limited. Fortunately, local municipalities still have fairly significant ordinance authority to regulate the siting, height and other characteristics of new telecommunication towers. Given the evolving technology, it is likely that the number of requests for municipal approval of new towers will greatly increase in all areas of the state in the near future.

Intensive Livestock Operations

Despite extensive opposition by municipalities, environmental groups, riparians and other interested citizens, the Michigan Legislature enacted legislation last year (which the Governor signed into law) severely limiting the ability of local governments to regulate huge poultry and livestock operations, often referred to as "intensive livestock operations." Such operations can involve poultry, hogs or cattle, and can produce waste volumes similar to the sewage produced by small cities. It is not clear at this early stage to what extent municipalities can still regulate intensive livestock operations, although it appears that local governments do retain some degree of limited control. At the very least, local governments should review their existing ordinance provisions governing farming in order to remove provisions which are now illegal and to consider whether alternate regulations should be adopted which comply with the new legislation.

Zoning Escrow Fees

In the past, the very modest fees paid by developers for zoning reviews done by local governments rarely covered the true costs of such reviews. If a significant project or development is proposed, local governments have often faced the choice between utilizing the municipal attorney, planner and engineer to assist in such zoning review (and have the cost paid for by the municipality or taxpayers), or alternately, not be able to utilize the assistance of its professionals in the process. If the municipality utilized its professionals, the taxpayers of the township effectively subsidized what many believe should be costs paid for by the developer. Where a municipality is deterred from utilizing its professionals during the zoning process due to the costs involved, that can sometimes lead to the approval of developments which should be denied or the approval of projects without sufficient study or safeguards.

One innovative solution to this problem is the use of so-called zoning escrow fees. In municipalities which have adopted a zoning escrow fee policy, a developer must put a certain amount of money in escrow with the municipality in addition to the normal fixed application fee. Out of that fund, the municipality is able to cover all reasonable costs incurred by its professionals attributable to the particular development involved. The Michigan appellate courts have generally upheld this practice, so long as the amount charged to the developer's escrow account is reasonable.

Open Space Preservation

Zoning techniques such as purchase of development rights (PDRs), transfer of development rights (TDRs) and exaction fees or impact fees (*i.e.*, requiring developers to do off-site improvements) are probably the ultimate answers to controlling urban sprawl. Michigan is light years behind in this area since it does not have much of the necessary state legislation in place to implement such policies. Furthermore, such policies might be too "exotic" (although that is likely to change over time) and expensive for many communities at this time. Accordingly, if a municipality desires to preserve farm and other open space, it will have to utilize more conventional zoning techniques. Such techniques can include increased minimum lot sizes, cluster developments involving mandatory open space set aside and mandatory PUD approval for developments over a certain size. Although one or more of these techniques might not be the long-term

(Continued on page 21)

Information From Lake Associations Around The State...

SAFE BOATING GUIDELINES

From the Cisco Chain of Riparian Owners Association—Gogebic County, Upper Peninsula

1. Persons using the lakes shall observe all Michigan and Wisconsin water safety rules and boating courtesies at all times.

2. Do not exceed an **idle speed** within a 200 foot distance from any shore.

3. Do not exceed an **idle speed** within a 200 foot distance from fishing boats, canoes and sail boats.

4. Do not exceed an **idle speed** when passing other boats in all channels, especially small boats and canoes.

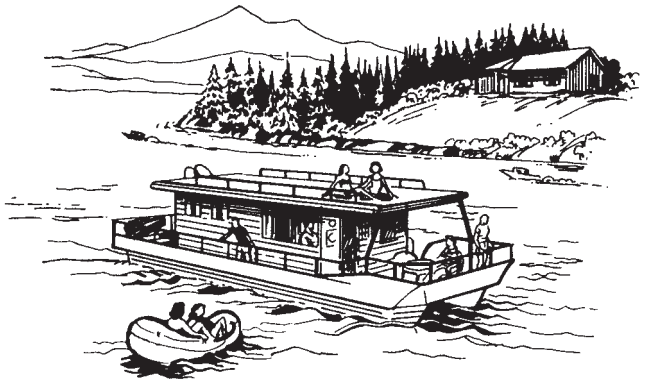
5. Special care must be taken to operate powercraft in a responsible manner so as to protect loons and other waterfowl.

6. At all times be aware of the possibility of swimmers, skiers and tubers in the water. Do not come within 200 feet of anyone in the water.

7. PWC users especially put forth a cooperative effort to observe the above and address the **justified** concerns of our homeowners and those using the Cisco Chain.

8. Remember that slowing down often creates a greater wake than a faster speed and the above references to **idle speed** means idling **slow** enough to create **no wake**.

Remember, voluntary courtesy and common sense eliminate the need for enforceable rules.



IT COULD HAPPEN TO YOU–Village Annexation

by Janet Chutro and Douglas Horstman
Members of the Diamond Lake Assoc. Board

Your property could be ANNEXED to an adjoining village without you or your neighbors having anything to say about it.

Diamond and Stone Lakes are located in Cass County. Four different townships intersect on Diamond Lake. The Village of Cassopolis is located northwest of Diamond Lake and southeast of Stone Lake. These lakes, like many lakes in Michigan, have seen the property values rise quickly in the past 10 to 15 years.

At its July 2000 meeting, the Village of Cassopolis dropped a big surprise on areas of Diamond and Stone Lakes, and the LaGrange and Penn Townships with proposal 2000-8. The village passed a resolution to annex more than 436 acres of land by a 5-2 vote. This annexation would affect some 400 Diamond Lake homeowners and also take in almost 70 lots set for development near Stone Lake. The only thing necessary for this annexation was the approval of the Cass County Commissioners.

The Village Manager reasoned that it was time for the property owners in the proposed annexed area to pay for services the village supplies. Currently, there are no village services supplied to the proposed areas. Services such as road and police are provided through the county, fire and ambulance services are contracted or owned by the townships. This annexation had no justification other than a money grab, in the amount of a 17 mils property tax increase. Many property owners would need to sell because of the increased tax burden.

The Village of Cassopolis is over 150 years old. A 105 year old law exists–(the General Law Village Act 3 of 1895; Section 74.6) that allows village governments to annex property without a vote of the people. In contrast, a city is governed by different rules for annexation–if 100 or more people directly affected by the annexation protest, it must go to a vote by the general population. (An excerpt of this law is available at the Michigan Legislature site: http://www.michigan legislature.org/law/get object.asp?objName=74-6. Contact your Michigan State Representative and tell them you want the outdated law repealed, make the villages operate under the same rules as cities when it comes to annexation. Let the people decide, not a few individuals on a village board.

Unjustified taxation without representation.

Don’t let it happen to you.

JACOBS V LYON TOWNSHIP: THE LAW GOVERNING ROAD ENDS IN MICHIGAN

by Ed Trautz, HLPOA Secretary

At its July, 2000 meeting, township attorney, Gerald Brabant told the Lyon Township Planning Commission, "*Jacob v Lyon Township* is the law governing road end uses in Michigan." Also in April of the year 2000, the Michigan Township Association announced that *Jacobs v Lyon Township* is the law governing road ends. Finally on May 30, 2000, the Michigan Court of Appeals in the case of *HLPOA v Lyon Township et al* (Evergreen Subdivision) reaffirmed *Jacobs v Lyon Township* as the law governing road end use in Michigan. (Actually *Jacobs* is "case law" or that law which results from decisions made by courts of review. In Michigan the courts of review are the Court of Appeals and the Supreme Court.)

The purpose of this article is to explain how *Jacobs v Lyon Township* became the case law in Michigan governing road ends.

It all started in 1986 when Lyon Township passed Ordinance #31 authorizing the public to use road ends for lounging, picnicking, sunbathing, permanent mooring by means of boat hoists and the installation of a non-exclusive dock to aid access to Higgins Lake for boating, fishing and swimming. In 1987 four corner lot owners filed lawsuit, which became known as *Jacobs v Lyon Township*, challenging whether the plattor of Lyon Manor subdivision intended road ends in that plat to be used as public parks, beaches and private marinas. Following a trial in the Roscommon County Circuit Court, that Court ruled that all the road end activities listed in Ordinance #31 were legal.

This decision, which was contrary to existing case law, was appealed to the Michigan Court of Appeals, and in 1993 that court ruled: "The extent to which the right of public access includes the right to erect a dock or boat hoists or the right to sunbathe and lounge at [a] road end depends on the scope of the dedication and the surrounding circumstances."

Using this standard, the Court of Appeals found: 1) Roads within the Lyon Manor plat were dedicated to the use of the public; 2) No one was able to testify to the circumstances surrounding the dedication (the conditions existing at the time the plat was recorded in 1902); and 3) The scope of dedication cannot be established through the testimony of witnesses who had lived in the area for many years.

The Court of Appeals ruled that lounging, picnicking, sunbathing and permanent mooring were not within the scope of dedication of roads in the Lyon Manor plat because streets dedicated to public use are generally deemed to provide public access to navigable waters. The court also ruled that a municipality may install a non-exclusive dock at a road end to aid the public's access to the surface of the water for boating, fishing and swimming and, while engaged in these activities, to moor temporarily.

Lyon Township appealed this decision to the Michigan Supreme Court, but that Court denied "leave to appeal" and "reconsideration" of its denial for leave to appeal. (A person does not have the right to appeal to the Supreme Court; one has to be granted leave to appeal. When leave to appeal is denied, the decision of the Court of Appeals stands and becomes case law. Fewer than 5% of all motions for "leave to appeal" are granted by the Supreme Court, and many of those granted involve criminal cases.)

It is also important to note that in its *Jacobs* decision, in order to make certain Lyon Township understood its obligation to regulate land for the purpose for which it is dedicated, the Court of Appeals cited the following from the 1887 Public Act 309, the Plat Act in effect when the Lyon Manor Plat was recorded:

"The map so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may therein be designated for public uses in the township within the limits which it is included in trust to and for the uses and purposes therein designated and for no other use or purpose whatever."

In plain language this means: When a plat is recorded under the Plat Act of 1887 (all plats bordering Higgins Lake were platted under this statute), an interest in land set aside for public use in the plat is automatically transferred to the township to be held in trust for the purpose it was set aside and for no other use or purpose whatever. Example: Land set aside for use as a public park cannot be used as a road; land set aside for a public road cannot be used as a park.

Some believe *Jacobs* should be overturned by the Michigan Supreme Court because it is bad law (law they don't like). As explained above, the Supreme Court had every opportunity to review the *Jacobs* decision but chose not to, probably for the reason that the Court of Appeals had scrupulously adhered to the legal doctrine of *stare decisis*, a Latin term meaning "let the previous decision stand."

Previous case law cited by the Court of Appeals as the basis for its decision included: *Backus v Detroit* (1882), *Bang v Forman* (1928), *McCardel v Smolen* (1978), *Thom v Rasmussen* (1984), *Thies v Howland* (1985) and a statute, the Plat Act of 1887. *Stare decisis* ensures continuity, consistency and predictability in law, and that is why Jacobs v Lyon Township is the law cited today in cases involving road end use in Michigan.

An abused river — the Hersey

by Jeff Steele, Herald-News Editor, September 21, 2000

REED CITY— "It is still salvageable," said Jim Maturen, local conservationist and Chairman of the Environment, Conservation and Solid Waste Committee of the Osceola Board of Commissioners.

What a way to describe what once was prime trout water.

"I was told that the Hersey River, at one time, was host to the southernmost population of Arctic Grayling," Maturen added.

Between then and now, the river has been severely stressed. Maturen prefers the word abused.

Maturen listed, in chronological order the "abuses" the river has suffered. As he describes the river, one almost feels the life, the living organism, that is Hersey River, draining away.

First, we have the tremendous sediment load dumping into the river," he explained. "This began since the first loggers cut the first trees along the banks of the Hersey. After the loggers came the oil boom and pipe lines across the river and then agriculture moved along the river with agricultural runoff and allowing cattle to wade through the streams. All of this activity caused damage, and in many cases, severe damage to the banks of the river. The tearing away of the natural cover on the banks has allowed sand, silt and soil to wash into the river at a rate that is clogging up the waterway. Some of the tributaries of the Hersey are now lifeless and sand-choked. Where we once had resident brook trout populations, now we have nothing."

Maturen added that agriculture has come a long way from the early days on the river and is now concerned with chemical runoff and pasturing cattle away from the river.

"We have an active Conservation District. I think, now, the farmers in our community are probably doing better than most counties in protecting rivers and streams from harmful practices of the past," he said.

He classifies the logging and farming practices of the past as sins of the past, but added that not all of the past is in the past.

"The creosote problem from the Kopper's site is still with us," he said. "They used creosote (a petroleum based product) to coat telephone poles. Apparently whatever they had left at the end of the day was simply dumped into the ground. From there, it wound up in the river. I remember when I first moved up here in 1967, I was fly fishing on the river and noticed a black, oily covering on my waders. It was creosote. It was still in the river and I'd waded through it. And, if you were in a boat behind the Hersey Dam and stuck a stick into the bottom it would come up with creosote on it."

Although the Department of Environmental Quality spent a great deal of time and money cleaning up the Kopper's site, the residue of their apparent carelessness remains in the river.

A fourth category of abuse suffered by the Hersey River, according to Maturen, was city waste created by a less than efficient waste water treatment plant in Reed City.

"Up until the new waste water treatment plant the city was facing millions of dollars in fines for violating their waste water permit," the commissioner said. "All of that overflow was going into the river. And some days, when the wind is right you can still smell a problem at the new plant. Evidently the city continues to have problems with the intake of Yoplait overload. Two or three days this week (Sept. 18) the wind indicated they continue to have problems."

And an old problem, sedimentation, finishes Maturen's list of abuses along the banks of the Hersey.

"The most current problem continues to be sedimentation," he said. "With any good, hard rain, tons of sediment are washed into the river. There is nothing but sand in some of the feeder creeks."

Maturen had suggestions to reclaim the river, but he warned they would not be inexpensive.

He said, "What needs to be done immediately is the restoration of all eroded banks. We have to stop the erosion."

In a survey done in June, 1991, by Conservation District and the Northwest Michigan RC&D Area Council, more than 91 sites were listed as either minor, moderate or severe in their erosion capabilities. In one site, on the Muskegon River, in Sylvan Township, a site was surveyed and plan of action was derived which annually produced nearly 200 tons of soil. A grant was requested from the DNR and was denied.

It is not for the lack of trying, that the Hersey carries it's load of sand and pollution to the Muskegon River.

"We've tried to get grants to solve these problems," Maturen said. "But all we get is blown off. They (the DNR) tells us to apply for grants and we do and then they get denied. All these years and not one site has been corrected or restored."

According to Maturen, there are more than 600 places on the banks on the Pine and Muskegon river watershed that need to be repaired.

Maturen also believes that the old Hersey Dam needs to be removed. "But not until that stuff that's piled up behind it is removed. The creosote is still in there," he said. "It's moving its way downstream to the Muskegon River."

Maturen is less than pleased at the prospect of paying for the cleanup of a Michigan natural resource. He feels that the problem is a state problem and the state should help with the financial aspect of the solution.

"Money is the issue," he said. "You and I have no knowledge about how to do these things. That's why we have the DNR and the DEQ. You're talking about multi-millions of dollars to take care of these problems. It's a public resource so there should be public money for the work. If the DNR is really serious about the Muskegon River, they'll have to work on the tributaries first, and the Hersey River is the major tributary of the Muskegon. Whatever problems we have, they'll get."

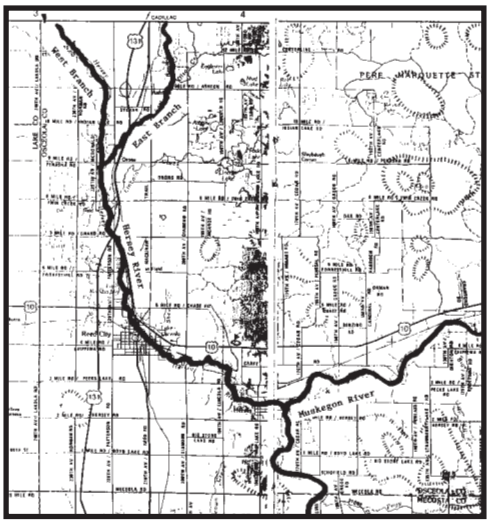
While sand in a river may appear to be a natural situation, it's too much sand. Sand that wasn't intended for the river is a poison that slowly chokes a river to death.

"Sand load in a river changes the complexion of the river," Maturen said. "It brings up the water level, shallowing out the river. That allows the river to become warmer. Instead of a deep, cold-running trout stream we have a shallow, warm bass river. The sand also covers up the gravel on the river bed. This gravel is where the trout spawn. No spawning area, no new fish. The sand also covers the woody debris in the river. The fish use this for cover and protection from their predators. No cover, no more fish."

There is still time, although according to Maturen, the time is measured in short amounts, to help the river.

"The water quality of the river is now marginal trout water, but further upstream (from Reed City) you can catch decent fish –maybe even a few brook trout. But time is running out. We must get the state to take action very soon," he said.

"The problem is that the Muskegon River system has been written off by the DNR," he lamented. "The money seems to go north. I've been on the board for eight years and I've not seen one penny go into this river system. What a shame."



Building Permit/ Nonconforming Use/Deck

Planning & Zoning News©/October 2000

A trial court correctly found a deck constructed without issuance of a building permit to be a nuisance per se and correctly ordered the removal of the deck. *Gerrish Township v J. Doering*, No. 216584. Decided May 26, 2000 (unpublished).

Defendant, John Doering owned land in the Woodlawn Subdivision in plaintiff Gerrish Township. Doering's lot faced the 66-foot wide Sheridan Drive that ran along the shoreline of Higgins Lake. Because Sheridan Drive had never been developed or maintained, the actual width of the driving surface was 12 feet and this resulted in a strip of land between the Higgins Lake shoreline and the edge of the driving surface. Doering's parents constructed a deck on the untraveled water side of Sheridan Drive around 1952. Doering removed the deck and replaced it with another. The Township found Doering in violation of its zoning ordinance that prohibits such construction without a permit. The Township requested a trial court order for Doering to remove the replacement deck he had built without a permit. The trial court found that Doering's new deck did not comply with the provisions of the Township's zoning ordinance and ordered Doering to remove the deck.

On appeal to the Court of Appeals, the Court found that the replacement deck constituted a "structure" and that the Township's zoning ordinance requires a permit prior to the erection of a structure. Doering's construction of the deck without prior issuance of a permit was clearly a violation of the zoning ordinance. The Court disagreed with Doering's claim that his nonconforming use could continue because it predated the Township's zoning ordinance. The ordinance provided that a nonconforming use could not be continued if either one of two things occurred: 1) the use was terminated for more than 180 days; and/or 2) the use was discontinued through vacancy or destruction to an extent of more than 50% of its assessed valuation. While the record was not clear whether the nonconforming use had lapsed for more than 180 days, the Court found that the second condition of protection had not been met:

> *"The parties stipulated that Doering 'removed the sun deck built by his parents and constructed a new one in the same location.' It is beyond dispute, then, that the nonconforming use the old deck represented was discontinued to an extent of more than 50% of its assessed valuation. Under the first component of § 5.4 of the Township Zoning Ordinance, any future use had to conform entirely to the Ordinance. The replacement deck did not so conform. No further construction of the statute is necessary and we therefore uphold the trial court's decision on this issue."*

The Court affirmed the trial court's ruling.

ATTORNEY WRITES—

GETTING IN THE ZONE *(Continued from page 17)*

answer to preserving open space and slowing urban sprawl, they are likely the best short term answers given the triage situation many townships find themselves in today.

Private Road Regulations

It is not uncommon for developers to develop lakefront lots by utilizing cheap private roads. Private road regulations, coupled with strict lot width-to-depth ratio limitations, can promote not only safe road and driveway access to new lakefront lots, but also more comprehensive planning and regulation of new lakefront developments.

Limitation of Development Where Public or Private Community Water and Sewage Systems are Unavailable

A few municipalities are utilizing a two-tier zoning density system. If public water and sewer are available, density can increase. If one or both such public services are unavailable, the land involved can be developed only in a much less dense fashion. Some municipalities will permit densities between these two extremes if a developer installs a private community water system, a community sewer system or both.

Moratoriums

Can a municipality impose a moratorium if a significant development or use appears on the horizon and the municipality does not have the appropriate regulations in effect to deal with it? Unfortunately, Michigan case law is not very clear regarding moratoriums. Nevertheless, it appears that a municipality probably can impose an effective moratorium if it is done for relatively short periods of time (for example, 60 or 90 days) while a municipality diligently works on a new ordinance or ordinance amendment.

Regulating Marinas and Commercial Developments

Obviously, a municipality should carefully scrutinize existing and potential commercial areas on and around lakes. It is much more prudent to plan and deal with these issues ahead of time than to ignore siting and regulation issues until a proposed marina or commercial development occurs near a lake.

Mobile Home Parks

Recently, there seems to be a proliferation in the number of proposals for new mobile home parks at or near lakes and in rural areas. While the mobile home industry succeeded years ago in shielding itself from some local zoning and regulatory powers, municipalities still have fairly extensive authority regarding the zoning and placement of new mobile home parks. Again, it is much better to plan ahead with the appropriate zoning before a mobile home park is proposed than to wait until an application actually occurs. If a municipality is not pro-active regarding this matter, it could be stuck with a court-approved mobile home park in a location which is undesirable. Obviously, a new mobile home park on or near a lake could have potentially huge negative impacts upon the lake and its watershed.

The best advice with regards to zoning and planning is to do all of the following:

- Plan ahead;
- Be pro-active;
- Utilize professional services (legal, planning, engineering);
- Put a high priority on effective zoning and planning;
- Be innovative; and
- Fully involve the community.