ATTORNEY WRITES

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"BUT THE REALTOR TOLD ME…"

"Puffery" normally means describing one's property (whether real or personal) to a prospective purchaser in the most pleasing or alluring fashion. It is not always easy to ascertain where puffery ends, and outright fraud or misrepresentation begins. Unfortunately, there appears to be a significant amount of misinformation (and at times fraud or misrepresentation) involved with the sale of properties near lakes where a lake access is involved. Of course, both the seller and any realtor or real estate agent involved have a financial incentive in puffing up lake access rights for backlots, given the perception that the greater the lake access rights for a given backlot, the more valuable the backlot.

It is rarely prudent or fair to generalize about a group of people. When it comes to realtors and real estate agents, the overwhelming majority of these professionals are hardworking, honest people. Unfortunately, a minority of such professionals do sometimes engage in misstatements or misrepresentations regarding limited rights attached to some backlot properties where lake access devices are involved. Sometimes the problems are caused by a lack of experience and knowledge on the part of the seller or the realtor or real estate agent, while at other times the deceit is purposeful.

By definition, a lakefront or riparian property must have frontage on a lake, river or stream (or comparable body of water). Sometimes that water frontage involves a narrow strip of land, but nevertheless, the property must have frontage on a body of water to be riparian. A non-lakefront or backlot property for which the owners can gain access to a lake by means of an easement, road end, park, alley, walkway or other lake access device is not a lakefront or riparian property. The owners of backlots normally gain access (if at all) to the waters of a nearby lake by means of three general types of lake access devices. First, some backlot properties actually have an easement which is created for or dedicated to that specific backlot for a relatively small number of backlots. Second, lake access devices are sometimes created in plats or other developments which service a significant number of backlots—for example, a private road end, park, private walkway or other common area. Finally, lake access is sometimes gained pursuant to public properties which can be used by any member of the public (not just backlot property owners), such as public road ends at lakes, public parks, public walkways and public alleys.

Sellers of property, realtors and real estate agents often use the phrase "deeded access" to mean that a backlot has access to a nearby body of water. Unfortunately, the phrase "deeded access" is something of a misnomer and is, in my opinion, often a misleading term. "Deeded access" implies that an access site exists for one particular backlot only (or a limited number of backlots) and that the access is granted by deed, which can often imply exclusivity. However, in the overwhelming majority of cases where the phrase "deeded access" is used, that access is not contained simply within the deed of the one backlot

property (but rather, is usually created via a plat dedication or other document to serve many backlots or the public) and the lake access rights are normally very limited.

Different lake access devices accord backlot owners different usage rights. However, the overwhelming number of these lake access devices in Michigan only permit limited usage rights (typically, only ingress and egress—most cannot lawfully be used for installing a dock or shorestation, permanently mooring a boat, and many do not even permit lounging, sunbathing or picnicking). Of course, there are exceptions, but they are less common.

What should a concerned adjoining or nearby riparian landowner do if a backlot property is listed for sale and the seller, realtor or real estate is misrepresenting to prospective purchasers (particularly in sales materials) the scope of usage rights which the purchaser of a particular backlot will have regarding a nearby lake access site? Ideally, the riparian should have his or her attorney send a letter to both the selling property owner and the realtor/real estate agent involved indicating that riparian owner's position as to what can and cannot occur at the lake access site. Both the seller and the realtor/real estate agent have a legal duty not to misrepresent such matters to prospective purchasers and putting them on notice of this issue by a letter prevents them from claiming ignorance later. Of course, having a riparian put such concerns in a letter rather than stating them verbally is superior (particularly if sent by certified mail, return receipt requested), as it is much more difficult for a seller or the seller's agent to deny the existence of a letter later as opposed to an oral statement.