

## **ATTORNEY WRITES**

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### **Several Additional Favorable Riparian Appellate Cases**

During the past few months, the Michigan Court of Appeals has issued a number of appellate decisions which are favorable to Michigan riparians. Although these decisions are “unpublished” (and hence, are technically not binding precedent), they nevertheless offer guidance for how Michigan courts view the subject matter at issue and are often persuasive to trial court judges.

In *Gee v Howard* (unpublished case decided on November 9, 2006; Case No. 269732), a private road created by a plat ended perpendicular at Lake Lansing. The defendants (backlot owners) installed a dock at the road end and used the dock as a place to moor their pontoon boat. Nearby riparian property owners filed a lawsuit to prohibit the installation of a dock and permanent boat moorage at the private road end. The private road was dedicated on the plat “to the use of the lot owners.” The Court of Appeals held in favor of the riparian property owners. The Court agreed that the private road end could not be used for boat hoists, permanent mooring, sunbathing, lounging or picnicking. The Court also held that the private road end could be used for one non-exclusive dock for temporary mooring only, just as is the case with public road ends. See *Thies v Howland*, 424 Mich 282 (1985); *Higgins Lake Property Owners Ass’n v Gerrish Twp*, 255 Mich App 83 (2003); *Jacobs v Lyon Twp*, 199 Mich App 667 (1993). However, the Court of Appeals made an important distinction. It noted that under *Thies*, only the local governmental unit would have the right to build and install the one nonexclusive dock at a public road end for public use. No individual would have the right to install a private dock. See also *Higgins Lake*. In this case, only the subdivision lot owners as a group or whole had the right to install a dock at the road private end for temporary use, not an individual property owner. Unfortunately, the decision in this case still begs the question as to whether or not 100% of the landowners in a plat such as this must agree to the installation of one common dock, or whether a smaller group or subset of all property owners has the authority to install one dock for common use.

The *Gee* holding is consistent with the 2005 decision by the Michigan Court of Appeals in *Smith v Livingston County Drain Commission* (unpublished decision decided on May 5, 2005; Case No. 251523), which held that for public road ends, only the governmental unit that has been deemed to have accepted the dedication of the road is entitled to install one nonexclusive dock at the road end. The Court also noted that where a private road end is involved, only the subdivision lot owners as a whole have the right to install one nonexclusive dock for common use, not any individual lot owner.

*Koker v Michaels* (unpublished decision dated November 7, 2006; Case No. 270524), involved a private easement which granted plaintiffs (the backlot owners) the right to use

defendants' riparian property "for the purpose of reaching the waters of Joslin Lake for boating, bathing and fishing and also ... for park purposes." The easement language was deemed unambiguous. Interestingly, despite the relatively broad language of the easement ("... for boating, bathing and fishing and also ... for park purposes"), the Court of Appeals found that the backlot beneficiary of the easement did not have the right to install a dock or permanently moor a boat at the easement. Rather, the easement language allowed only access to the lake (*i.e.*, travel). Significantly, the Court also held that the phrase "for park purposes" means recreational activities normally enjoyed at a park and that such activities do not include building docks.

In *Pheasant Ridge Development Co, Inc v Nottawa Twp* (unpublished case decided on December 28, 2006; Case No. 269453), over a dozen families jointly owned a riparian lot (which they used jointly in addition to their back lots). They used 18 docks and 36 boat slips on the jointly-owned lakefront property. The Court of Appeals held that such use of the lakefront lot was a multi-family use which violated the single-family zoning classification of Nottawa Township. The Court also held that the township's anti-funneling regulations did not apply, since it was not an easement situation and the lakefront property was jointly owned by the backlot property owners involved. This case stands for the proposition that anti-funneling regulations should be drafted to cover not only easement, private road, alley and park situations, but also arrangements where a lakefront property is jointly owned by backlot owners or a backlot property owners association.

In the November, 2006 issue of *The Riparian*, there is a brief bulletin about *Chauvette v Owczarek* (an unpublished decision of the Michigan Court of Appeals decided on October 26, 2006; Case No. 262473). In that case, the Court indicated that backlot owners could not utilize a private road for permanent boat mooring. Although the Court of Appeals did not expressly address what constitutes "permanent" boat anchoring or moorage, the trial court below held that any overnight mooring or anchoring would be deemed prohibited permanent watercraft mooring or docking.

Finally, in *Pentz v Schlingen* (unpublished case decided on December 19, 2006; Case No. 258130), the Court of Appeals again confirmed that a right of access generally does not mean the right to dockage or permanent boat moorage. Given the somewhat unusual fact situation in this case (a private road that ended just short of the water, with the dedicated "lake access area" located between the private road and the water), this case will probably not have widespread applicability on its face. Nevertheless, its discussion of what limited rights backlot owners generally have in similar situations is useful.

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