ATTORNEY WRITES

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Potpourri

This column deals with three interesting recent Michigan Court of Appeals cases.

A statutory lake improvement board in Michigan is a local government agency created pursuant to the Inland Lake Improvements Act, being MCL 324.30901 *et seq*. (the "Act"). Statutory lake boards can be created by one or more adjoining townships, as well as one or more adjacent counties, within which a particular lake is located. They are semi-independent bodies that are typically created to remedy lake problems, including the control or eradication of aquatic weeds or invasive species, dredging, improving watersheds or similar purposes. Unfortunately, the Act is not a model of clarity.

The Act has two lake classifications – public inland lakes and private inland lakes. A public inland lake under the Act is any lake that "is accessible to the public by publicly owned lands or highways contiguous to publicly owned lands or by the bed of a stream …". All other lakes are "private" for purposes of the Act. With a public lake, there are two ways to create a statutory lake board. First, the governmental unit (or units) within which the lake is located can create a statutory lake board (for example, one or more township boards or one or more county boards of commissioners). Second and alternately, a statutory lake board for a public lake can be created by signed petitions representing two-thirds of the "freeholders owning lands abutting the lake." MCL 324.30902(l). However, a statutory lake board can be created for a private inland

lake only via a two-thirds petition; that is, a lake board for a private lake cannot be created unilaterally by the local government or governments. MCL 324.30904.

In *Crane v Director of Assessing for the Charter Twp of West Bloomfield*, unpublished decision by the Michigan Court of Appeals dated April 19, 2012, 2012 WL 1367692 (Case No. 301878), involved Upper Long Lake, a private inland lake. In 1984, the Upper Long Lake Improvement Board was created via property owner petition to eradicate aquatic lake weeds. In 2005, the two townships involved expanded the lake board authority to include dredging. In 2007, the lake board proceeded to impose a special assessment district for a significant dredging project. A property owner within the district challenged the actions of the lake board in establishing a new special assessment district for dredging without having expanded the lake board's authority by landowner petitions. The Court of Appeals sided with the objecting landowner. The Court held that the lake board could not initiate a new project (here, dredging) on its own or with only local government approval, without a new petition being circulated and signed by two-thirds of the property owners authorizing the new project. Although the Court recognized that a project for a private lake could be for a multi-year duration (as the aquatic weed treatments had occurred for over twenty years), an entirely new project could not be authorized absent new property owner petitions. That limitation does not apply to public inland lakes, as the statute allows the creation of an entirely new statutory lake improvement board (or the expansion of the powers of an existing lake board) pursuant to the approval of the local governmental unit or units. Left unanswered is the question of whether or not a statutory lake improvement board for a public lake originally authorized by a two-thirds property owners' petition can initiate new projects based simply on the approval of the local governmental unit(s),

or whether a new petition would have to be utilized since the property owner petition initiated the original lake board.

Given the number of statutory lake improvement boards which exist in Michigan and the ambiguity of many portions of the Act, it is important for a lake board (or its constituents) to work with an attorney who is knowledgeable about statutory lake improvement boards when questions arise.

2000 Baum Family Trust v Babel, 488 Mich 136 (2010), involved a public road right-of-way created by plat dedication that ran along the shore of Lake Charlevoix. As shown on the original plat map, there was no land intervening between the lake and the public road right-of-way. The Michigan Supreme Court held that the dedication of the road to the public created a glorified road easement in favor of the Charlevoix County Road Commission, but that the first tier of lots adjacent to the public road are deemed to be riparian (and thus run under and "through" the public road easement and to the lake).

What about a similar situation where a road right-of-way is dedicated along an inland lake in Michigan, but the dedication is private and only benefits the owners of lots within the plat? That was the situation in the recent Michigan Court of Appeals decision in *Bedford v Rogers*, unpublished decision by the Michigan Court of Appeals dated April 17, 2012, 2012 WL 1314165 (Case No. 299783). In that case, the plat dedicated a fairly wide private road called "Lakeway" to the owners of lots within the plat. Lakeway ran parallel to Crystal Lake, between the lake and the first tier of lots. The Court of Appeals confirmed that the first tier of lots adjacent to Lakeway are riparian and run to the lake, subject to the private road right-of-way for Lakeway. The main issue in the case was whether the owners of a first tier (riparian) lot could build a boathouse adjacent to the lake (and the owner's lot) but within the private road right-of-

way for Lakeway. In the plat, many boathouses had been built over the years within the Lakeway private road right-of-way for the benefit of adjacent first tier lots. In fact, the first tier lot at issue had long had a boathouse for its benefit within the private road right-of-way. A controversy arose when the owner of that lot tore down the original boathouse and built a larger one within the "footprint" of the first boathouse. The owner of an adjoining first tier lot filed a lawsuit and claimed that while first tier lot owners are riparian, they cannot place or build obstructions within the private road right-of-way for Lakeway. The Court of Appeals held in favor of the lot owner who had built the new boathouse. While the Court recognized that the easement beneficiaries (in this case, each owner of a lot within the plat) have paramount rights of usage with regard to the easement area, the owners of the land under the easement can also make use of that land so long as it does not unreasonably interfere with the use of the easement. The Court did not believe that the construction of the new boathouse significantly interfered with the rights of the other lot owners in the plat to walk up and down Lakeway. It is unclear how the Court of Appeals would have decided the case had Lakeway been dedicated to the public rather than simply to lot owners within the plat as a group.

Finally, the Michigan Court of Appeals issued an important decision in *Banacki v Howe*, unpublished decision dated March 20, 2012, 2012 WL 934019 (Case No. 302778). The plat or subdivision at issue borders Magician Lake. Two lakefront areas approximately 25-foot wide, labeled on the plat as "East Court" and "West Court," are located between other conventional riparian lots. Both East Court and West Court have approximately 25 feet of frontage on the lake and also have frontage on a private road in back. The defendants were off-lake or backlot property owners who installed a dock, boat lift, and decking upon East Court and out into the lake. The dedication on the original plat indicated that the courts were dedicated "to the use of

persons owning land adjacent to said …. courts." The trial court held that the defendants' use of East Court for dockage, boat moorage, and other uses exceeded the scope of the dedication. The trial court found that the backlot property owners could not engage in what essentially amounted to riparian uses on East Court. The trial court also rejected the defendants' claims that they had a prescriptive easement to utilize East Court for dockage, boat moorage, and similar uses. The Court of Appeals upheld the trial court. All parties agreed that the backlot property owners only had an easement for usage across East Court and that they did not co-own that property. The Court of Appeals found that a "court" is not a park, but, rather, a short street. Accordingly, the dedication in the plat implies passage and access, not park uses. The Court of Appeals stated that the burden rested with the defendants to establish that anything other than mere access to the lake was intended by the dedication.

The Court of Appeals indicated that the only evidence the defendants could present to expand the usage rights of the courts would be evidence of expanded usage at the time the plat was created in 1941. Evidence of activities years later is not admissible.

The Court of Appeals also noted that the defendants' interpretation could lead to overcrowding of the two courts and interfere with the proper scope of usage rights. The Court of Appeals stated:

> "There is no indication that the plattors intended, at the time East Court was dedicated, that all lot owners would have essentially unlimited use of East Court or that any individual lot owners could monopolize East Court by permanently mooring boats and installing decks and boat lifts, or by storing such items on East Court, because such use would impair the other lot owners' ability to use East Court. Indeed, as the trial court observed, if a few individuals build their own docks and boat lifts or keep such property on the court, they are effectively appropriating East Court for their own private use, which would impede the other lot owners' use of East Court and access to the lake. A review of the photographs of East Court reveals that the terminus of East Court was, in fact, monopolized by defendants." *Slip op at pp. 5-6.*

Interestingly, the Court of Appeals in *Banacki v Howe* also held that there could be no prescriptive easement right for dockage and boat moorage by the backlot landowners since they already had the use of East Court through the dedication.

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Over the next year, I will be speaking to numerous groups regarding my new book *Buying and Selling Waterfront Property in Michigan*, particularly realtor groups. If you would be interested in attending any of those seminars or if you want to inquire about a presentation before your group, please contact Sharon Wagner at ML&SA at (989) 831-5100 or swagner@mlswa.org.