ATTORNEY WRITES

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Occasionally, legislators will attempt to bury nongermane or even disastrous provisions in a larger bill which would otherwise be good legislation. That appears to be the case with Senate Bill No. 767, which is presently pending in the Michigan Legislature. For some time, there has been a general consensus in Michigan that the state trespass laws should be strengthened. This matter came to a head in the November, 1996 state elections where there were two proposals on the ballot regarding bear hunting, which was in part a reaction to alleged trespassing by some bear hunters in the Upper Peninsula.

Senate Bill No. 767 is being sold by MUCC and some state legislators as legislation to "crack down" on trespassing and to increase the penalties for criminal trespass. Unfortunately, the drafters of SB 767 have inserted an extreme provision in the bill, which could be a ticking time bomb for property owners along creeks, streams and rivers in the state of Michigan. Some might call this provision a Trojan horse. A new definition has been inserted into the legislation which defines a "navigable public stream" (i.e., one that can be used by members of the public without fear of trespassing) as "a naturally occurring river, stream or creek … and on which a person can float in a vessel of the lightest nature during any period that ordinarily recurs from year-to-year."

If this legislation is enacted into law, it will change over 100 years of property law and traditionally recognized definitions of "navigability." The proposed definition of "navigable public stream" in SB 767 is so broad as to be breathtaking. A river, stream or creek could be so small, shallow or narrow that it would not even have to flow year around and it would still be "navigable" so long as it ordinarily recurs at some season or portion of a season from year-to-year. Additionally, a flowing body of water would deemed "navigable" if a person could float "in a vessel of the lightest nature" at any time of the year—such a definition would not even require a canoe or boat to float, but rather it would boot strap the definition of navigability to make public any flowing body of water where a person can float even in blow-up watercraft or a nylon floating vessel!

Pursuant to SB 767, once a flowing body of water is deemed "navigable," members of the public can use it for more than simply wading, fishing or floating in the water. A member of the public could also engage in virtually any recreational activity or trapping without the consent of the adjoining riparian property owners and could enter upon private property within the clearly defined banks of the body of water when necessary to avoid a natural or artificial hazard or obstruction in the water. Finally, this greatly expanded definition of navigability could also make many heretofore private lakes, which only have one inlet or outlet, "public."

Strengthening the penalties for trespassing is certainly an admirable goal. Nevertheless, legislation which waters down the definition of trespassing and attempts to trample upon private property rights would involve a "cure" which is worse than the problem of trespassing itself. Any riparian property owner who is concerned about these issues should contact his or her legislator immediately regarding SB 767. Remember, if this can happen to rivers, creeks and streams, similar legislation could be introduced later to infringe upon the rights of lakefront property owners.

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Some riparian property owners might get sick of hearing about "anti-funnel" or "anti-keyhole" regulations, but it never ceases to amaze me how few municipalities (particularly townships) have adopted or enacted lake

or river access regulations for new developments. There are generally two types of such regulations. First, anti-funnel/anti-keyhole regulations are typically added to a municipality's zoning ordinance as an amendment. The Michigan Supreme Court in Hess v West Bloomfield Twp, 439 Mich 550 (1992) established the general validity of such regulations. Nevertheless, such regulations must still be properly enacted and reasonable in application. Second, some municipalities have also enacted a separate and parallel police power ordinance which regulates docks, boat launching and related activities. The Michigan Supreme Court in Square Lake Hills Condominium Assoc v Bloomfield Twp, 437 Mich 310 (1991) also held that such ordinances are generally valid.

Typically, anti-keyhole regulations apply only to developments or uses which occur after the regulations are adopted—existing uses are "grandparented" or are deemed lawfully nonconforming. Such regulations normally require that each new dwelling unit have "x" feet of frontage on the lake or river. It is also fairly common to regulate the number of docks and even boats which will be utilized per dwelling unit or per foot of lake or river frontage. Finally, some anti-keyhole regulations also require discretionary municipal approvals (i.e., special use permits, planned unit development approval, etc.) for commonly shared access sites (such as easements, common properties or private parks) and marinas.

The most common mistake for riparians is to put off lobbying the local municipality to enact lake access regulations or to wait until a crisis occurs to begin such lobbying. Absent local municipal lake access controls, riparians and municipalities usually have little control over "funnel" developments or multiple—family lakefront uses. Common law riparian rights lawsuits are expensive, and the outcomes vary from court to court. Riparians who rely upon the DNR or DEQ to fight their battles are almost universally disappointed. Do not wait—push for local water access regulations now!

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If there are any water related issues you would like to see addressed in a future Attorney Writes column, please send me a note at the above-mentioned address.