

The New Public Road Ends at Lakes Law

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In March, 2012, Lieutenant Governor Brian Calley signed the House Substitute for Senate Bill 778 into law. This is the so-called "Public Road Ends at Lakes Law." It can be found at MCL 324.30111b (the "New Law").

Of course, the New Law is not perfect. But as the old saying goes, *don't let the perfect be the enemy of the good!* Overall, the New Law is pro-riparian, pro-public lake access, pro-rule of law, and pro-local government. The language for the New Law is contained in the side bar to this article.

As with any new legislation, there will certainly be questions about the reach, interpretation, and enforcement of the New Law. The following are some of the major issues that are likely to arise.

Does the New Law apply to all road ends at lakes? No. First, the New Law applies only to *public* road ends at lakes. It does not apply to private roads, walkways, parks, or private easements. Second, the New Law appears to apply only to public road ends at *inland* lakes and rivers in Michigan. Given that the new legislation is located within the portion of the Michigan environmental code entitled "Inland Lakes and Streams," it does not appear to apply to public road ends at any of the Great Lakes.

Does the New Law prohibit all unlawful activities at public road ends? No. The New Law only applies to three uses or activities at public road ends. First, private docks, piers, boat cradles, and similar items are prohibited. However, a governmental unit can install one dock or pier that is public and for day use only. Second, no boat or watercraft can be kept, stored, or moored at a public road end (or the shoreline or bottomlands thereof) between the hours of midnight and sunrise. Finally, no one can engage in any use or activity at a public road end that would obstruct [lawful] ingress or egress. The New Law does not prohibit lounging, sunbathing, picnicking, or camping, which are activities that are all prohibited civilly (under the common law). Accordingly, there may still be a need for local municipal ordinances regulating those other activities.

What is the penalty for violating the new law? Interestingly, the Michigan Legislature chose to make a violation of the New Law a criminal misdemeanor offense, rather than a municipal civil infraction violation. That is significant. Being convicted of a criminal misdemeanor is no small matter. It gives a person convicted a criminal record. Accordingly, if someone is convicted of this type of criminal misdemeanor, they will have to so indicate on many job, credit, and similar application forms. Municipal civil infraction tickets are similar to speeding tickets.

Upon conviction, a person is also subject to a fine of up to \$500. In the original proposed legislation, jail time was a possibility. The jail time provision was removed from the final bill. Nevertheless, it is possible that the courts could

ultimately decide that jail time is still a potential remedy or penalty in these cases based upon other Michigan statutes and court rules.

Could someone who aids and abets another person in breaking the New Law also be guilty of a criminal misdemeanor? Potentially, yes. It will be interesting to see if the few municipal officials in Michigan who have actively assisted backlot owners with misusing road ends in the past will be prosecuted hereafter if they continue to aid such law-breaking.

Will this eliminate all litigation regarding public road ends? Almost certainly not. Although the New Law is quite good and will probably cover three-quarters or more of the existing public road controversies throughout Michigan, riparians will still likely have to continue to file lawsuits in certain cases to stop misuse of public road ends. Without a local municipal ordinance in place prohibiting lounging, sunbathing, picnicking, and similar uses, adjoining riparians will still have to file private civil lawsuits to abate those uses. In fact, the New Law anticipates private litigation in its subsection 5. Furthermore, the New Law does not apply to private road ends, dedicated parks, walkways, etc. If those lake access devices are misused in a given case, the only remedy will either be a local municipal ordinance or civil litigation.

What does it mean to engage in "any activity that obstructs ingress to and egress from the inland lake or stream," which is unlawful? Unfortunately, the New Law does not define that phrase. Presumably, it means that it is unlawful for any person to physically obstruct or interfere with lawful activities occurring on a public road end at a lake.

The statute protects lawful "ingress and egress." Based on a century of Michigan appellate case law, some generalizations can be made regarding what constitutes permissible "ingress and egress." First, walking to and from the body of water (and into the body of water) would be a protected activity. Presumably, that would also include walking to the lake in the winter to ice fish as well as riding a snowmobile if there is sufficient snow. Second, activities such as temporary mooring or anchoring of boats would normally be lawful, so long as the person owning or controlling the boat is present. Next, when someone gets to the lake, activities such as fishing or swimming on or in the lake are normally protected. If a governmental unit installs a public dock, that dock would normally be for day use only. That is, individuals could temporarily moor their boats to such a public dock during the day, but could not leave their boats overnight at the public road end. Would it be lawful activity for someone to drive a vehicle, motorcycle, ATV, or similar item to the lake? That depends. If the public road end is improved, such vehicle use would normally be lawful. If the public road is unimproved and the vehicle tears up the terrain, that would probably

not be permissible ingress and egress activity. Accordingly, it would be unlawful to "obstruct" any of the prior mentioned lawful activities.

So what does unlawful interference or obstruction mean? Of course, physically preventing someone from properly using a public road end would be unlawful. Individuals placing barriers within the public road could constitute unlawful activity. Leaving items within the public road such as parked vehicles, boats on shore, lawn chairs, and similar items could constitute unlawful interference with permitted ingress and egress. In extreme cases, verbal harassment could potentially even be deemed unlawful interference.

Could unlawful activities at public road ends by backlot owners constitute illegal obstruction to ingress and egress? In some cases, it probably could. For example, if much of the public road end area is covered with loungers and sunbathers (activities prohibited under the common law), a court could conceivably find that such activities constitute unlawful obstructions to ingress and egress (which is essentially travel).

In summary, the prohibition in the New Law prohibiting "any activity that obstructs ingress to and egress from the inland lake or stream" could potentially be used against both nearby riparians (who obstruct proper uses of the public road end) or backlot owners (who engage in unlawful activities on a public road end).

What are some of the defenses that backlot owners are likely to use when being prosecuted for a violation of the New Law? In some cases, they will allege that the public road is really not "public," as they will claim that the plat dedication creating the public road (where a plat is involved) lapsed and was never properly "accepted" within a reasonable period of time of being created. However, that will be a difficult defense upon which to prevail. Beginning in 1978, MCL 560.255b imposed a statutory presumption that such roads are public

and that they are generally conclusively accepted as public. See also *Higgins Lake Property Owners Association v Gerrish Township*, 255 Mich App 83, 114-116 (2003).

Backlot owners might also play games regarding who owns and put in a dock, when a violating boat was actually present, etc. Accordingly, it will be important for adjoining and nearby riparians to document violations by photographs and camcorder (or the equivalent), and also keep detailed written logs (by date, place, time, and violating person).

Who can enforce the New Law? Any police officer. That includes a state police officer, deputy sheriff, local city, village, or township police officer, and potentially even a conservation officer.

How should a riparian or other person report a violation of the New Law? A complaint can be made to either the local police department or the state police. Ideally, it would be best to make the complaint when the offending dock or boat is still present, so the police officer can investigate and testify personally as to the violation. Otherwise, the complaining person can turn over any photographs, videotapes/DVDs, notes, etc., documenting the violation to the police. The more information that the complaining party can provide to the police, the better.

Is there anything that riparians can do to see that the New Law is enforced? Yes, there are several techniques available. First, where a township, city, or village has jurisdiction over one or more lakes with public road ends, riparians or the lake association involved should provide local government officials with a copy of the New Law. That way, local government officials will not unknowingly spread false information, and hopefully will not be sympathetic to any backlot property owners who violate the New Law. Second, it might be helpful for members of a representative group (such as a lake association) to

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324.30111 is Public road end; prohibited use; violation as misdemeanor; fine; civil action; definitions.

Sec. 30111 b.

(1) A public road end shall not be used for any of the following unless a recorded deed, recorded easement, or other recorded dedication expressly provides otherwise:

(a) Construction, installation, maintenance, or use of boat hoists or boat anchorage devices.

(b) Mooring or docking of a vessel between 12 midnight and sunrise.

(c) Any activity that obstructs ingress to or egress from the inland lake or stream.

(2) A public road end shall not be used for the construction, installation, maintenance, or use of a dock or wharf other than a single seasonal public dock or wharf that is authorized by the local unit of government, subject to any permit required under this part. This subsection does not prohibit any use that is expressly authorized by a recorded deed, recorded easement, or other recorded dedication. This subsection does not permit any use that exceeds the uses authorized by a recorded deed, recorded easement, other recorded dedication, or a court order.

(3) The local unit of government may prohibit a use of a public road end that violates this section.

(4) A person who violates subsection (1) or (2) is guilty of a misdemeanor punishable by a fine of not more than \$500.00. Each 24-hour period in which a violation exists constitutes a separate violation of this section. A peace officer may issue an appearance ticket as authorized by sections 9c to 9g of chapter IV of the code of criminal procedure, 1927 PA 175, MCL 764.9c to 764.9g, to a person who violates subsection (1) or (2).

(5) This section does not prohibit a person or agency from commencing a civil action for conduct that violates this section.

(6) As used in this section:

(a) "Local unit of government" means the county, township, city, or village with jurisdiction over a public road.

(b) "Public road" means a county road or a township, city, or village street that is open for use by the public.

(c) "Public road end" means the terminus of a public road at an inland lake or stream.

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meet with the local police chief and county prosecutor to discuss enforcement of the New Law, to educate those law enforcement officials about the New Law, and to help determine how vigorously they will prosecute violations.

Third, as everyone knows, the budgets for local police and prosecutors have been severely cut. Accordingly, a lake association could commence friendly warnings to anyone who is violating the New Law. For example, the lake association could send a relatively "soft" letter to the violating party pointing out that the use they are making of the public road end may be unlawful and enclosing a copy of the new statute. If that does not work, the lake association might want to have its attorney write a separate follow-up letter.

Can a violator obtain a variance or exemption from the New Law? No. If all the elements of a criminal misdemeanor offense are met under the law, there is no mechanism for a violator to obtain an exemption or variance. Furthermore, there is no "grandparent" defense except where a prior court order or plat dedication expressly allowed the private dockage and boat moorage. Those situations will be relatively rare.

The New Law does contain an exemption where a prior court order, plat dedication or deed expressly allows private dockage or overnight boat moorage at a particular public road end. What does that mean? Presumably, if there is a valid court order, plat dedication language, or recorded deed or similar instrument that occurred in the past, that was not merely a sham, and that expressly authorized dockage or boat moorage at a particular road end, such dockage and permanent boat moorage could lawfully continue. Those cases should be relatively rare. Furthermore, such a defense will unlikely be available to a backlotter where it can be proven that the prior court order, plat dedication, deed, or other recorded document was unlawful or invalid. It is reasonable to expect that this exemption will apply to less than five percent (or even less than one percent) of all the public road ends at lakes situations throughout Michigan.

Apart from potential criminal misdemeanor penalties, are there any other reasons why backlotter should refrain from maintaining private dockage or overnight boat moorings at a public road end? Yes. The liability potential for a violator is significant. If a backlotter maintains a private dock or overnight boat mooring at a public road end in violation of the New Law, and someone is injured or killed due to that violation (for example, someone using the dock drowns or dives into shallow water [thus breaking their neck], runs into an unlawfully moored boat with another watercraft, or a similar calamity occurs), the violating party who owned or installed the dock or kept the boat at the public road end overnight unlawfully could be personally liable for significant civil damages, in addition to being prosecuted. In extreme cases, the violating party could potentially be prosecuted for a severe felony such as manslaughter or negligent homicide.

What does it mean when the statute states that "a single seasonal public dock or wharf that is authorized by the local unit of government" can be installed at a public road end? Presumably, it means that a governmental unit or agency (for example, a city, village, township, or county road commission) can place a dock or wharf within the public road end to aid navigability and temporary mooring. However, the dock or wharf must be "seasonal;" that is, it must be taken out for the winter season. In addition, any such government dock or wharf can be used for day use only—no boat or watercraft can be moored or anchored to or adjacent to any such dock or wharf overnight.

Can a local unit of government delegate or grant permission to an individual to install a seasonal dock or wharf as long as it is available for public use? The New Law is vague regarding that point. However, once again, the Michigan appellate case law has indicated that any such dock or wharf must generally be owned and installed by the governmental unit. See *Douglas v Harting* (unpublished decision by the Michigan Court of Appeals dated December 18, 2008 - Case No. 277892). The liability potential for both a governmental unit and an individual installing such a dock could be extreme if a municipality delegates that right to a private individual, even if the dock would be available for all members of the public. I cannot think of any other comparable situation where a governmental unit would allow an individual to install and maintain a fixture or item on a public property—in most cases, municipalities insist on such items not only being owned by the municipality, but also installed by municipal employees or contractors.

Predictably, a few people are unhappy with the New Law. They claim (falsely) that the New Law will "privatize" all of Michigan's inland lakes and streams. Some have claimed that the New Law will "cripple revenue in areas dependent on tourism." One backlotter's group has even claimed that "throwing your anchor over will violate the statute." Those assertions are flat-out false.

The new legislation will not abandon, vacate, or close a single public road end at a lake or river in Michigan. There will be no "privatizing" of any public road end due to the New Law. In fact, one can reasonably argue that public access will be enhanced, as public road ends should no longer be junked up by private docks, extensive boat moorings, and similar unlawful uses and activities that impede public access. The New Law will allow lawful uses of road ends to occur hereafter without interference. As far as being arrested for simply "throwing your anchor over," temporary mooring is not prohibited by the New Law. The New Law only prohibits overnight boat mooring, anchoring, or docking at road ends.

For more information regarding public road ends and similar topics, please go to www.mymlsa.org.