

Dear Michigan Waterfront Alliance Members and Friends,

Thanks in part to your communications with your elected officials, the efforts of our Lobbyist, Scofes and Associates and Representative John Stakoe I am glad to report that we have finally received an opinion from Michigan's Attorney General regarding the ill-conceived road end bills.

Although there are dozens of good reasons why the ill-conceived road end bills being pushed by the backlot property owners groups should never become law in Michigan, Michigan Attorney General Mike Cox just weighed in with perhaps the most persuasive argument of all against the road ends bills. In a well-researched and reasoned formal Attorney General Opinion released on January 30, 2008, Attorney General Cox indicates that the legislation, if enacted into law, would likely be unconstitutional, under both the Michigan and U.S. Constitutions. That is, to the extent that the legislation would attempt to expand usage rights at dedicated public road ends, it would probably be unconstitutional. Worse yet, if the courts did not invalidate the legislation outright, the state of Michigan might very well have to pay monetary compensation to all injured parties, which would likely include nearby riparian property owners. Who would foot the bill? Not the backlot property owners who championed this legislation, but the taxpayers of Michigan! Just what Michigan needs in these troubled economic times—allowing a relatively small group of militant backlot owners to prompt all Michigan taxpayers to fund the backlot owners' own private marinas at road ends!

A copy of Attorney General Cox's Opinion follows.

Sincerely,
Bob Frye
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Michigan Waterfront Alliance, President

STATE OF MICHIGAN
MIKE COX, ATTORNEY GENERAL

PLATS:

DEDICATIONS:

CONST 1963, ART 3, § 7:

REAL PROPERTY:

The scope of permissible "public uses" of platted roads ending at the shore of a lake
While the Legislature has the authority to modify the law, any legislative modification of the judicially established rules of property law that have shaped the rights and expectations of property owners regarding the meaning of "public use" in the context of platted roads ending at the shore of a lake has the potential to impact existing property rights and would be subject to the constitutional protections against the taking of property without due process and just compensation.

Opinion No. 7211 January 30, 2008

Honorable John Stakoe
State Representative

The Capitol Lansing, MI 48909

You have asked whether the Legislature has the power "to revisit" determinations made by the Michigan Court of Appeals in court cases concerning the scope of permissible "public uses" of roads that end at the shore of a lake in platted subdivisions. The specific cases underlying your question are *Jacobs v Lyon Twp (Jacobs I)*, 181 Mich App 386, 391; 448 NW2d 861 (1989), *Jacobs v Lyon Twp (After Rem) (Jacobs II)*, 199 Mich App 667; 502 NW2d 382 (1993), and *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), all of which involved evidentiary and legal determinations regarding the scope of permissible uses at particular road ends on Higgins Lake .

Before addressing your question, some background information about plats and the law regarding the dedication of land in plats for public use is helpful.

In the two *Jacobs* cases and the *Higgins Lake Property Owners Ass'n* case, the property at issue fronted on Higgins Lake and had been subdivided and platted, or mapped, by the proprietors of the property in accordance with state statutes that allowed the creation of such plats. "Proprietor" is the term used to describe the owner of the lands that are subdivided by a plat. See, e.g., the Land Division Act, 1967 PA 288, MCL 560.101 *et seq*, at section 102(o), MCL 560.102(o). In addition to creating lots, the proprietors of the plats involved in these cases designated roads on the plats to provide access to the lots and to the shore of Higgins Lake . The roads ran approximately perpendicular to the shore of Higgins Lake and ended there. *Jacobs I*, 181 Mich at 387; *Higgins Lake Property Owners Ass'n*, 255 Mich App at 88.

As part of the platting process, the proprietors set forth words of dedication on the plats, thereby defining who could use certain common areas on the plats, such as roads, alleys, and parks, and how those lands could be used. As to the plats involved in the *Jacobs I* and *Higgins Lake Property Owners Ass'n* cases, the words of dedication simply indicated that the roads in the plats were for "public use." *Jacobs I*, 181 Mich at 389; *Higgins Lake Property Owners Ass'n*, 255 Mich App at 89.

A dedication of land in a plat "for public use" not only describes who may use the land and how it may be used but also serves as an offer of a gift of that land for public use. *Wayne County v Miller*, 31 Mich 447, 448-449 (1875). Under the laws that governed the creation of plats at the time the plats in the *Jacobs I* and *Higgins Lake Property Owners Ass'n* cases were recorded, lands dedicated by plats were deemed to be held in trust by the local unit of government having jurisdiction over that land. The Plat Act, 1839 PA 91, as amended by 1887 PA 309, stated:

The maps so made and recorded in compliance with the provisions of this act shall be deemed a sufficient conveyance to vest the fee of such parcels of land as may be therein designated for public uses in the city or village within the incorporate limits of which the land platted is included, or if not included within the limits of any incorporated city or village, then in the township within the limits of which it is included in trust to and for the uses and purposes therein designated, and for no other use or purposes whatever. This former provision of the then Plat Act is similar to that found currently in section

253(1) and (2) of the Land Division Act, MCL 560.253(1)(2), which states:

(1) When a plat is certified, signed, acknowledged and recorded as prescribed in this act, every dedication, gift or grant to the public or any person, society or corporation marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of

land so marked and noted, and shall be considered a general warranty against the donors, their heirs and assigns to the donees for their use for the purposes therein expressed and no other.

(2) The land intended for the streets, alleys, commons, parks or other public uses as designated on the plat shall be held by the municipality in which the plat is situated in trust to and for such uses and purposes.^[1]

Under the statute by which the plats had been created and case law dealing with dedication, it has become well established that where land has been given for a public use, the permissible uses to which that property may be put are governed by the intent of the person who dedicated that land. In the case of a plat, the intent of the dedicator is determined from the

¹ The same or similar language first appeared in the territorial acts of March 12, 1821, and April 12, 1827, and continued in 1839 PA 91, the Plat Act of 1929, 1929 PA 172, and the Subdivision Control Act of 1967, 1967 PA 288, which is now called the Land Division Act. See *Kirchen v Remenga*, 291 Mich 94, 111; 288 NW 344 (1939), and *West Michigan Park Ass'n v Dep't of Conservation*, 2 Mich App 254, 262; 139 NW2d 758 (1966).

language used in the dedication and the surrounding circumstances. *Jacobs II*, 199 Mich App at 672. The intent of any donor is inherently fact-specific and must be determined on a case-by case basis according to the available evidence. Where the plat simply states that the roads are for public use and are shown on the plat to end at a body of water, the courts have consistently applied the principles reiterated in the *Jacobs* cases regarding the scope of permissible uses of those roads.

In addition to dedications to the public through the recording of a plat, there may also be "dedications" of land for the exclusive private use of persons designated in the dedication. See *Martin v Beldean*, 469 Mich 541, 546-548; 677 NW2d 312 (2004).

Regardless of whether the land has been dedicated for public use or for private use by the recording of the plat, private rights arise in the lot owners who purchase their land in reliance on the words of the plat. As noted in *Pulcifer v Bishop*, 246 Mich 579, 582-583; 225 NW 3 (1929): But it is also the rule in this and other States that the platting and sale of lots constitute a dedication of streets, etc., delineated on the plat, as between the grantors and the purchasers from them.

It is said in *Dillon on Municipal Corporations* (5th Ed.), § 1090:

"In this connection it must be kept in view that the platting and sale create certain rights in the grantees of the original owner, which, as between the grantor and the grantee, are irrevocable in their nature.

* * *

"But other decisions recognize a *clearly defined distinction* between the rights acquired by the *public* through dedication effected by platting and sale, and the *private rights* acquired by the grantees by virtue of the grant or covenant contained in a deed which refers to a plat, or bounds the property upon a street through the grantor's lands. These decisions adopt the view that where lands are platted and sales are made with reference to the plat, the acts of the owner in themselves merely create private rights in the grantees entitling the grantees to the use of the streets and ways laid down on the plat or referred to in the conveyance. But these rights are purely in the nature of private rights founded upon a grant or covenant, and no public rights attach to such streets or lands until there has been an express or implied acceptance of the dedication, evidenced either by general public user, or by the acts of the public authorities. In this view, the making of the plat and the sale of lands with reference thereto are merely evidence of an intent to dedicate, which like every other common law dedication, to be made complete and

carried into effect so as to create public rights, must be accepted and acted upon by the public." Citing *Grandville v. Jenison*, 84 Mich. 54. [Emphasis in original.]

Thus, private rights arise in dedicated or reserved areas of the plat upon the sale of lots within the plat. It is well established that a purchaser of property in a recorded plat receives not only the interest as described in a deed to the property but also whatever rights are described in the plat.

Nelson v Roscommon County Rd Comm, 117 Mich App 125, 132; 323 NW2d 621

(1982). The Court in *Nelson* further explained that lot owners in plats have inherent rights to use the streets laid down in the plat and that those rights are in the nature of easements. The corollary to this principle is that owners within a plat have rights in limiting the use of such areas to their dedicated purposes such as occurred in both *Jacobs* cases and the *Higgins Lake Property Owners Ass'n* case. See also *West Michigan Park Ass'n*, n 1 *supra*, and cases cited therein. *Jacobs II* is regarded as the leading case concerning rights in dedicated streets ending at water, summarized by the Court as follows:

Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide public access to the water. *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985);²*McCardel v Smolen*, 404 Mich 89, 96;

273 NW2d 3(1978); *Backus v Detroit*, 49 Mich 110; 13 NW 380 (1882). The members of the public who are entitled to access to navigable waters have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily. *Thies, supra* at 288. The right of a municipality to build a wharf or dock at the end of a street terminating at the edge of navigable waters is based upon the presumption that the platter intended to give access to the water and permit the building of structures to aid in that access.³ *Thies, supra* at 296. The extent to which the right of public access includes the right to erect a dock or boat hoists or the right to sunbathe and lounge at the road end depends on the scope of the dedication. *McCardel, supra* at 97; *Thom v Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984). The intent of the dedicator is to be determined from the language used in the dedication and the surrounding circumstances. *Thies, supra* at 293; *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). [*Jacobs II*, 199 Mich App at 671-672.]

² In *Thies*, the Court ruled that public ways that terminate at the edge of a navigable body of water are treated differently from those that run parallel to the shore. *Thies*, 424, *supra* at 295.

³ However, it is not to be inferred that the municipality has the right to appropriate the road ends to any use inconsistent with the dedication. *Backus, supra* at 120.

The *Jacobs II* Court held that, where platted streets are dedicated "for the use of the public," a nonexclusive public dock could be erected at the road end, but individuals could not erect boat hoists there or sunbathe or lounge. 199 Mich App at 670, 673.

In the *Jacobs I* case, the Court of Appeals had held that the construction of a public boat dock at the shore of a dedicated, platted road was within the scope of the dedicated public use and that the use of surface waters adjoining the road end for swimming, wading, fishing, and boating and to temporarily anchor boats were also within the scope of the dedicated public use. *Jacobs I*, 181 Mich App at 391. But the Court also held that the "construction of boat hoists, seasonal boat storage and the use of road-ends for lounging and picnicking exceed the scope and intent of the dedication of property for use as streets." *Id.* (Emphasis added.) *Jacobs II* continued these holdings in the subsequent decision on appeal after remand.

Returning to your question regarding whether the Legislature may modify a rule of property law that has been developed regarding the dedication of platted road ends upon which persons have relied when acquiring interests in platted lands, it appears that you are asking whether the Legislature may retrospectively broaden the parameters of what constitutes permissible "public use" when these words have been used in a plat dedication. This issue was addressed in *Jacobs I*. Lyon Township enacted an ordinance that the Court described as follows: In 1987, apparently in response to the ongoing shoreline conflict, defendant township enacted Ordinance 31 which purports to govern public water and land-related activity at lake road-ends. In short, the ordinance provides for the erection of no more than one nonexclusive private dock at each road-end which must be maintained for public use, prohibits overnight mooring, prohibits permanent mooring posts, permits the erection of boat hoists, prohibits parking on the roadway, and prohibits the dry storage of boats, boat hoists, docks, et cetera on the land at the road-end. The ordinance provides that, except as otherwise prohibited, the general public may use the road-ends for "lounging, picnicking, swimming, fishing and boating, provided such activities do not create a safety hazard, cause unreasonable congestion, interfere with the intended use, or otherwise disturb the peace." [181 Mich App at 388-389.]

The lot owners in the plat under review in *Jacobs I* sued the township, claiming that the uses and activities permitted by the ordinance exceeded those contemplated by the dedication of the streets for public use. The Court agreed that certain uses and activities were beyond the scope of the dedication and ruled that the provisions of the ordinance allowing such activities "must be stricken":

In this case, we believe that the construction of boat hoists, seasonal boat storage and the use of road-ends for lounging and picnicking exceed the scope and intent of the dedication of property for use as streets. Those activities are not necessary to either the use and maintenance of the streets, or to provide public access to the water. As our Supreme Court noted in *McCardel [v Smolen]*, 404 Mich 89; 273 NW2d 3 (1978):

Lounging and picnicking on this wide boulevard, activities which need not involve use of the water, are not riparian or littoral rights. We agree with the Court of Appeals that "[t]hose activities are in no way directly related to a true riparian use of the waters of Higgins Lake; even assuming that the defendants choose to lounge and picnic on the boulevard because of the lake's proximity. In that context, the only 'use' of the water is the enjoyment of its scenic presence." . . . The question whether the public has the right to enter and leave the water from the boulevard, like the question whether they may lounge and picnic on the boulevard, depends, rather, on the scope of the dedication. [404 Mich 97.]

Plaintiffs also claim that the public beach and party activities on the roadends created a nuisance and plaintiffs seek abatement of those activities. We need not review the trial court's ruling on plaintiffs' nuisance claim in light of our decision that the *portions of the ordinance permitting those activities beyond the scope of the dedication in this case must be stricken*. [181 Mich App at 391-392; emphasis added.]

In reaching its decision, the Court of Appeals noted the court decisions holding that road ends at lakes are presumed to be intended as a means of access to a lake, and that municipalities could erect docks at the road ends to facilitate public access to a lake or river. *Jacobs*, 181 Mich App at 390. But the Court went on to note that a municipality has no right to appropriate road ends to any use inconsistent with the dedication, citing *Backus v Detroit*, 49 Mich 110, 115; 13 NW 380 (1882).²

The decision in *Jacobs I* is also consistent with *Baldwin Manor, Inc v City of Birmingham*, 341 Mich 423, 428; 67 NW2d 812 (1954), where the Michigan Supreme Court held that the City of Birmingham was precluded from building a road through a park which, if built, would "make impossible, or at least impracticable, the use of parcels No 1 and No 2 for park purposes." The Court relied on the legal encyclopedia Corpus Juris Secundum (CJS) to summarize the law concerning government's ability to alter a dedication: Likewise, in 26 CJS, Dedication, § 65, pp 154, 155, it is said: ² A municipality has no proprietary interest in the dedicated areas. See *Village of Kalkaska v Shell Oil Co*, 433 Mich 348; 446 NW2d 91 (1989), and cases cited therein. "Except as appears below,^[3] if a dedication is made for a specific or defined purpose, *neither the legislature*, a municipality or its successor, nor the general public *has any power to use the property for any other purpose than the one designated*, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication; and this rule is not affected by the fact that the changed use may be advantageous to the public. This can only be done under the right of eminent domain. On the other hand, the municipality cannot impose a more limited and restricted use than the dedication warrants." [341 Mich at 430-431; emphasis added.]

Similarly, statutory changes to property rights created by established rules of property law may not be applied retroactively if that would result in an adverse impact on those rights. In *Gorte v Transportation Dep't*, 202 Mich App 161, 167; 507 NW2d 797 (1993), the Court of Appeals held that a statute precluding a claim of adverse possession against the State did not apply to the plaintiff where application of the statute would result in abrogating or impairing the plaintiff's vested right. The Court of Appeals found that, because plaintiff's right had vested before the effective date of the statute, the plaintiff could successfully assert his claim of adverse possession against the State.

The Court's rulings in *Jacobs I* and *II* and *Higgins Lake* were based on over 100 years of common law precedent, and any alteration of the property interests identified in those decisions must, therefore, be considered in that context. The rights and expectations of property owners are legitimately grounded in long-standing recognition of those rights and expectations. See, e.g., *Bott v Natural Resources Comm*, 415 Mich 45; 327 NW2d 838 (1982). As discussed above, Michigan law prohibits marina-like operations, such as permanent boat mooring or hoists, and sunbathing and lounging, at road ends dedicated "for public use" unless such activities are authorized by the dedication. Thus, a statutory change allowing these activities at road ends in

³ It is not necessary to address the exceptions noted in 26 CJS § 65 to answer your question. already existing plats could have an adverse impact upon the rights of the property owners within the plat, particularly those whose properties are situated next to these road ends.

Const 1963, art 3, § 7 provides that the "common law and the statute laws now in force . . . shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

Thus, the Legislature has the ability to modify the law. *Rusinek v Schultz, Snyder, & Steele Lumber Co*, 411 Mich 502, 506-508; 309 NW2d 163 (1981).

However, the Legislature is subject to constitutional limitations. Both the United States and Michigan Constitutions prohibit the taking of private property without just compensation and due process of law. US Const, Am V; Const 1963, art 10, § 2.

The Fifth Amendment of the United States Constitution provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." This prohibition is applied to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B & Q R*

Co v Chicago, 166 US 226, 234; 17 S Ct 581; 41 L Ed 979 (1897). Similarly, the Michigan Constitution provides:

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record. [Const 1963, art 10, § 2.]

Of course, whether any of these constitutional limitations would be implicated by a particular legislative action seeking to alter the meaning of "public use" is fact-dependent and cannot be answered in the abstract. Generally, however, when property dedicated for a particular purpose is appropriated for an entirely different purpose, this may afford grounds for a court action to enjoin the inconsistent use or secure compensation for the interference with valuable property rights. See *Ford v Detroit*, 273 Mich 449, 452; 263 NW 425 (1935). See also *Austin v VanHorn*, 245 Mich 344, 347; 222 NW 721 (1929); *Sanborn v McClean*, 233 Mich 227; 206 NW 496 (1925); and *Allen v Detroit*, 167 Mich 464, 469-470; 133 NW 317 (1911).

It is my opinion, therefore, that, while the Legislature has the authority to modify the law, any legislative modification of the judicially established rules of property law that have shaped the rights and expectations of property owners regarding the meaning of "public use" in the context of platted roads ending at the shore of a lake has the potential to impact existing property rights and would be subject to the constitutional protections against the taking of property without due process and just compensation.

MIKE COX

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