STATE OF MICHIGAN

COURT OF APPEALS

HIGGINS LAKE PROPERTY OWNERS ASSOCIATION, JOHN DOERING, JOHN SMITH, MARY SMITH, JOHN WADE, ELIZABETH WADE, WILLIAM SHARP, ARLEAN SHARP, GARY W. WILSON, JEAN WILSON, TIMOTHY J. PIPKINS, and DORIS PIPKINS,

Plaintiffs-Appellants/Cross-Appellees,

v

GERRISH TOWNSHIP, ROSCOMMON COUNTY ROAD COMMISSION, and DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees,

and

GORDON W. HERMANCE and DONNA L. HERMANCE,

Defendants-Appellees/Cross-Appellants,

and

EUGENE STIEFELMAYER, DAVID M. SCHWARTZ, MARGUERITE SCHWARTZ, LINDA A. CAUZILLO, LYLE D. SCOTT, GRANT A. KATTAU, SALLY E. KATTAU, FRED MILLS, JR., ROGER E. LANGERMAN, and JANICE A. LANGERMAN,

Defendants.

UNPUBLISHED
October 30, 2003

No. 235418
Roscommon Circuit Court
LC No. 95-006959-CE

HIGGINS LAKE PROPERTY OWNERS ASSOCIATION, WILLIAM SHARP, ARLEAN SHARP, TIMOTHY J. PIPKINS, and

DORIS PIPKINS,

Plaintiffs-Appellants/Cross-Appellees,

v

No. 235497
Roscommon Circuit Court
LC No. 95-007232-CE

JOHN DESANTIS, PATRICIA DESANTIS, DENNIS D. DUFORD, and SUSAN K. DUFORD,

Defendants-Appellees/Cross-Appellants,

and

GERRISH TOWNSHIP, ROSCOMMON COUNTY ROAD COMMISSION, and DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees,

and

RAYMOND F. BALCERZAK, CATHERINE A. BALCERZAK, DAVID MILLS, SUSAN C. MILLS, WILLIAM L. ROMANSKI, SR., PAUL SENTELL, ANNELIE SENTELL, and CARLO SERRI,

Defendants.

ROBERT W. PRICE, RUTH A. PRICE, CARROLL BAKER, KIMBERLY ROBERSON, DALLAS B. BROWNSON, JR., DALLAS D. BROWNSON, SUSAN B. RUSSELL, MARY ANN PEYTON, DEBORAH D. YOUNG, EDWIN S. VOSS, SUZANNE E. VOSS, SYLVIA I. RICHMAN, RAYMOND RAPAPORT, and RUTH C. NELSON,

Plaintiffs-Appellants/Cross-Appellees,

v

No. 240087
Roscommon Circuit Court
LC No. 97-007984-CH

MARY FOLEY, ROBERT L. JORDAN, BRENDA J. JORDAN, DAVID V. LORION,

DONNA JOAN LORION, WILMA DEAN SHELBY, ROBERT D. TREZISE, BARBARA S. TREZISE, PHILLIIP WOODWARD, RONALD YOUNG, and MARTAGRACIA YOUNG,

Defendants-Appellees/Cross-Appellants,

and

GERRISH TOWNSHIP, ROSCOMMON COUNTY ROAD COMMISSION, and DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

DELLA HORTON, LOUIS ELLEN DUCHARME, and HIGGINS LAKE CIVIC ASSOCIATION,

Plaintiffs-Appellees/Cross-Appellants,

v

No. 240102
Roscommon Circuit Court
LC No. 97-008110-CH

HENRY Y. LEOPOLD, JOYCE R. LEOPOLD, ROBERT W. PRICE TRUST, RUTH A. PRICE TRUST, CARROLL G. BAKER, KIMBERLY S. ROBERSON, SUSAN B. RUSSELL, MARY ANN PAYTON, DEBORAH D. YOUNG, SYLVIA I. RICHMAN, EDWIN S. VOSS, SUZANNE E. VOSS, RAYMOND N. RAPAPORT, RUTH C. NELSON, JOSEPH H. GROOME III, PAUL HIMELHOCK, MARCIA HIMELHOCK, MILLIE ROBSON, MICHAEL P. REMUS, HIGGINS LAKE SANDY SHORES, JOANN C. VANDENBERG TRUST, KENNETH W. DENNINGS, TERESA DENNINGS, ROBERT W. SMITT, JO R. SMITT, DEBRA S. SMITT, COLIN SMITH, LYNN ROBSON, SHIRLEY A. BROWNSON, W. S. EVANS, PAMELA M. EVANS, P. J. WELLENSICK, ROBERT J. HIRZEL, JOHN BOGOS, and MARY L. BOGOS,

Defendants-Appellants/Cross-Appellees.

HIGGINS LAKE PROPERTY OWNERS ASSOCIATION,

Plaintiff-Appellant/Cross-Appellee,

v

MICHIGAN CENTRAL PARK SUBDIVISION RESIDENT,

Defendant-Appellee/Cross-Appellant,

and

GERRISH TOWNSHIP, ROSCOMMON COUNTY ROAD COMMISSION, and DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

No. 240103
Roscommon Circuit Court
LC No. 95-007262-CE

HIGGINS LAKE PROPERTY OWNERS ASSOCIATION,

Plaintiff-Appellant/Cross-Appellee,

v

MICHAEL WALKER, DARLENE WALKER, STEVEN L. ADAMS, VIRGINIA L. ADAMS, EILEEN C. AMBROSIER, DAVID L. BARLOW, JAMES BEATTIE, RICHARD L. BEECHER, DIANE R. BEECHER, RICHARD W. BENTLEY, ROBERT L. BOBINAC, GORDON BOUREN, KENNTH R. BRANT, JEAN A. BRANT, LAWRENCE L. BROEDELL, MARIE A. BROEDELL, ROBERT E. BROWN, PHYLLIS M. BROWN, JOHN M. BRYCE, MARY LOU BRYCE, JAMES A. BRYSON, SANDRA L. BRYSON, HERMAN T. CALOIA, EDWARD S. CARPENTER, MARY CARPENTER, JOHN G. CHAMPINE, RALPH L. CHRISINSKE, JOSEPH R. CLEWLEY, LORRAINE K. CLEWLEY, WALTER CRAWFORD, BETTY D. CRAWFORD, GARY A. CROSS, NIKKI L. CROSS, RUSSELL J. DAVID, SANDRA K. DAVID, PAUL D. DENN P. E. TRUST, NOLAN

No. 240156
Roscommon Circuit Court
LC No. 95-006979-CZ

DILLSWORTH, DOUGLAS B. DROUILLARD, TIMOTHY R. DYER, ROBERT E. ELLIOTT, MARILYN E. ELLIOTT, JOYCE R. FERGUSON, DUANE L. FILLWOCK, BRIAN A. FINK, EVA M. FINK, ESTHER F. FREDERICKSON, LAWRENCE GARDEL, PAMELA GARDEL, GREGORY GARDEN, LUEL D. GERARD, DENNIS G. GILSON, ANITA L. GILSON, ROBERT J. GRASEL, MARY A. GRASEL, CARL A. HAGAN, ARTHUR HAMPSON, IRENE HAMPSON, ESTHER W. HARSH, JAMES L. HEILMANN, KERREN A. HEILMANN, LEAH H. HERZOG, JOYCE M. HOLMES, ROBERT E. HOLTZ, ANGELIKA HOLTZ, WILLIAM D. HUBBARD, RICHARD JARZYNKA, CELESTINE D. JOHNSON, EVELYN I. JOHNSON, HAROLD KALBFLEISCH, ADELLE KALBFLEISCH, CHARLES N. KAMINSKI, PAMELA KAMINSKI, SYLVESTER KANABY, MARY KANABY, PHILLIPP B. KAUFFMAN, CAROL J. KAUFFMAN, GUY S. KING, GORDON C. KLIER, SHIRLEY P. KLIER, RALPH J. KNOP, JANICE K. KNOP, MICHAEL E. KOMORA, HENRY LASKOS, MARILYN N. LASKOS, ISABELLA T. LEBEAU, KENNETH A. MACHINA, PATRICIA A. MACHINA, JIM MANETTA, CHERYL A. MANETTA, KIM A. METIVA-SHOUP, ROBERT W. METZGER, CASIMER MICHALOWICZ, MARION MICHALOWICZ, FRANCIS J. OSIKA, VERNA OSIKA, DAVID B. PAGE, SHARON ANN PAGE, TRACIE L. PATTISON, JOHN T. PATTISON, DAWN M. PATTISON, ROBERT E. PERKINS, RISA PERKINS, PATRICIA G. PETERS, JOSEPH E. PIASCIK, THOMAS POLLACCIA, MARIANNA POLLACCIA, HOWARD A. POTTER TRUST, DONALD E. REID, LOWELL R. ROBBINS, KATHLEEN L. ROBBINS, IRENE ROSSIE, PAUL K. SCHEIBNER, RONALD R. SCHREIBNER, GREGORY SCHROEDER, DALE E. SMITH, MICHAEL J. SOLAN, JOANNE SOLAN, ERNEST L. STARK, BETTY R. STARK, DAVID G. STOUTENBURG, MARJORIE STOUTENBURG, ROBERT C. SUGDEN, ROBERT SWEET, ELIZABETH R. SWEET,

JAMES A. SWENSON, SALLY SWENSON, ANDREW TARPINIAN, ANNE D. TARPINIAN, CHARLES E. TOMEZAK, BETTY TOMEZAK, GARY VANWYNSBERGHE, CANDICE VANWYNSBERGHE, JOHN C. VERZURA, DEBORAH L. VERZURA, CLARENCE A. WEED, BEVERLY J. WEED, MARY JANE WEIPERT, DUANE WILL, BRENDA WILL, HOWARD L. WILSON, PATRICIA A. WILSON, ELIZABETH H. WOODS, MARTIN DAVID WOODS, and PATRICIA L. WOODS,

Defendants-Appellees/Cross-Appellants,

and

GERRISH TOWNSHIP, ROSCOMMON COUNTY ROAD COMMISSION, DEPARTMENT OF NATURAL RESOURCES, DOUGLAS E. DEROSIA, and VICKY L. DEROSIA,

Defendants-Appellees.

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs sought declaratory and injunctive relief regarding property rights at the ends of roads that terminate at the edge of Higgins Lake and along Michigan Central Park Boulevard, which runs parallel to the lake. These cases involve certain platted avenues that were "dedicated to the use of the public" in four platted areas (subdivisions) abutting Higgins Lake in Gerrish Township. These various actions were initiated by the Higgins Lake Property Owners Association and individual plaintiffs who are residents in the subdivisions of Chicago Beach, Sylvan Beach (Docket Nos. 235418 and 235497), First Addition to Michigan Central Park (Docket Nos. 240087, 240102, and 240103), and Woodlawn (Docket No. 240156).

In Docket Nos. 235418, 235497, 240103, and 240156, plaintiffs sought to enjoin use of the road ends for sunbathing, lounging, and picnicking and to enjoin use of the riparian lands at the ends of the avenues for permanent boat mooring, seasonal docking, and installation of boat hoists. Plaintiffs argued that such uses were outside the scope of the dedication. In Docket No. 240087, plaintiffs argued that the dedication of Michigan Central Park Boulevard was not valid and sought to vacate a portion of the road. And in Docket No. 240102, plaintiffs sought the removal of certain encroachments on Michigan Central Park Boulevard.

In Docket Nos. 235418 (Chicago Beach subdivision) and 235497 (Sylvan subdivision), the trial court denied certain defendants' motion to dismiss Higgins Lake Property Owners Association's claims for lack of standing, and, after a bench trial, the court granted plaintiffs' request for declaratory relief and denied their request for injunctive relief. We affirm.

In Docket No. 240087 (First Addition to Michigan Central Park subdivision), after a bench trial, the trial court granted defendants' motion to involuntarily dismiss plaintiffs' claim that sought to vacate Michigan Central Park Boulevard (recently renamed Grosbeak Boulevard), concluding that the road had been validly dedicated.[1] We affirm. In Docket Nos. 240087, 240102, and 240103 (First Addition to Michigan Central Park subdivision), after a bench trial, the court granted plaintiffs' request for declaratory relief and denied injunctive relief. The court also ordered the removal of certain encroachments on Michigan Central Park Boulevard. We affirm in part, vacate in part, and remand.

In the remaining case, Docket No. 240156 (Woodlawn subdivision), following a bench trial, the trial court granted plaintiffs' request for declaratory relief and denied injunctive relief. We affirm.

I. Background

Higgins Lake has been the subject of much litigation over the years. Most recently, in *Higgins Lake Property Owners Association v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), this Court addressed substantively the same issues as in this appeal, albeit regarding different streets and subdivisions surrounding Higgins Lake.

> The subject of these cases is the scope of the public's right to use the ends of roads that terminate at the edge of Higgins Lake (road ends) in several subdivisions around the lake. Plaintiff Higgins Lake Property Owners Association (HLPOA) is composed of owners of lakefront property on Higgins Lake. The HLPOA and individual plaintiffs brought these actions seeking declaratory judgments regarding the permissible uses of these road ends as controlled by the subdivision plats that dedicated the streets and alleys "to the use of the public." Owners of back lots in the subdivisions, as well as members of the general public, have used the road ends for lounging, sunbathing, and picnicking, and have also moored boats and placed boat hoists at the road ends. Plaintiffs argued that these activities were beyond the scope of each plat dedication and sought to enjoin further use of the road ends for these purposes.
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> The controlling authority is *Jacobs v Lyon Twp*, 181 Mich App 386, 387-388; 448 NW2d 861 (1989), vacated 434 Mich 922 (1990), (*After Remand*), 199 Mich App 667; 502 NW2d 382 (1993), in which this Court addressed the same

[1] The trial court excepted out of its ruling the portion of the boulevard where the "footprint" of the Brownson house is located.

> issue and held that the intent of the grantor controls the scope of the dedication. [*Id*. at 88-89.]

The instant cases were filed in response to the *Jacobs* decision which involved identical dedication language. Once again we are asked to determine the rights of front lot owners, back lot owners, and the general public to access and use Higgins Lake.

II. HLPOA Standing

Docket Nos. 235418 (Chicago Beach), 235497 (Sylvan), 240103 (First Addition to Michigan Central Park), and 240156 (Woodlawn)

In these cases, certain defendants assert that the HLPOA lacks standing to bring these actions requesting interpretations of these subdivision plats. They argue that the HLPOA has no legal interest in the interpretations of the subdivision plats, and that its interest in the outcome of these cases is no different than that of the general public. This issue has already been decided, most recently in *Higgins Lake, supra.* Concluding that the HLPOA does have standing, this Court reasoned:

> The HLPOA is a nonprofit corporation whose members are primarily lakefront property owners. The purpose of the HLPOA is to protect the lake, the watershed, and the interests of its members. The HLPOA asserts that the alleged overuse of, and concentration of persons and watercraft, at the road ends is affecting its members' enjoyment of the lake as well as their property values. Accordingly, the HLPOA has standing to sue as a nonprofit membership organization litigating to vindicate the interest of its members. [*Id*. at 91.]

Therefore, we hold that the trial court properly denied defendants' motion to dismiss the HLPOA's claims for lack of standing.

III. Validity of Michigan Central Park Boulevard's Dedication

Docket No. 240087 (First Addition to Michigan Central Park)

The First Addition to Michigan Central Park subdivision lies adjacent to the shore of Higgins Lake. The subdivision and its streets were platted in 1901. Michigan Central Park Boulevard runs northwest/southeast the length of the subdivision along the shoreline. Plaintiffs (front lot owners) sought to vacate the portion of the boulevard from Hoffman Avenue to the west end of the subdivision. Following the close of plaintiffs' proofs, defendants moved to dismiss count II of plaintiffs' complaint which alleged that the dedication of Michigan Central Park Boulevard was not valid. The trial court concluded that plaintiffs failed to rebut the statutory presumption of acceptance provided for in MCL 560.225b, the 1978 amendment of the

Subdivision Control Act.[2] We review a trial court's findings of fact for clear error. *Christainsen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000).

The applicable law regarding the validity of a dedication was set forth in *Christainsen, supra* at 383-384, another case involving Higgins Lake in which this Court stated:

> The general rule regarding the dedication of land for a public purpose was set forth by the Michigan Supreme Court in *Kraus v Dep't of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996). As stated in *Kraus*, a valid dedication requires two elements: (1) a recorded plat clearly offering the land for public use and (2) a subsequent acceptance of the offer by a public authority. *Id*. The acceptance must be timely, and it must be accomplished by a public act "either formally confirming or accepting the [offer of] dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation." *Id*., quoting *Tillman v People*, 12 Mich 401, 405 (1864).

A court does not have jurisdiction to vacate roads that have been validly offered and accepted for dedication. *Kraus, supra* at 424; MCL 560.226(1).

In this case, plaintiffs assert on appeal that there was not a clear offer because the dedication lacked specificity regarding the boulevard's width. Below, plaintiffs' claim that the dedication was not valid focused mainly on whether the offer had been validly accepted or withdrawn before acceptance. And it was to these arguments regarding the dedication's validity that defendants responded to. The adequacy of the boulevard's description as it pertained to a "clear offering of the land" was not raised by plaintiffs in either their pleadings or their argument in response to defendants' motion to dismiss, nor was the issue decided by the trial court. Plaintiffs did allude to its relevancy in the vacation action, but only to establish that the grantor's intent was that the boulevard be one hundred feet wide, "no more, no less." Plaintiffs did not argue that the entire offer failed because of the description. Under such circumstances, we need not address the issue. *Higgins Lake, supra* at 117.

Nevertheless, it is clear from the record that the description was sufficiently specific. In addition to stating the boulevard's width at its endpoints, the plat map clearly demarcates the lot lines on the boulevard's northeasterly boundary. And the southwesterly boundary of the boulevard is indicated on the plat map by a wavy line running along the water's edge. Plaintiff's expert land surveyor testified that this wavy line is known as a meander line, a line of reference used when a boundary is a shoreline, which moves in accordance with the water's boundary.

Plaintiffs also argue that the offer was never accepted or, if it was, the offer was withdrawn or lapsed before it was timely accepted. Offers of dedication may be accepted: (1) formally by resolution; (2) informally through the expenditure of public money for repair,

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[2] Formerly named the Land Division Act.

improvement and control of the roadway; or (3) informally through public use. *Marx v Dep't of Commerce*, 220 Mich App 66, 74; 558 NW2d 460 (1996).

Defendants contend that the offer was accepted in 1940 through the passage of a resolution under the McNitt Act, MCL 247.1 *et seq.* [repealed], which incorporated the land into the county road system, and the trial court agreed. Plaintiffs assert that the 1940 McNitt resolution standing alone without evidence of public use is insufficient to constitute formal acceptance. However, plaintiffs misunderstand the current state of the law. While a general acceptance standing alone is insufficient, an acceptance through a McNitt resolution that expressly identifies the road at issue or the recorded plat in which the road is located is sufficient to constitute an acceptance of an offer of dedication. *Kraus, supra* at 430; *Christainsen, supra* at 389-390. Here, plaintiffs concede in their appellate brief, and the evidentiary record supports, that the 1940 McNitt resolution specifically named streets within the First Addition to Michigan Central Park subdivision to be taken over, including Michigan Central Park Boulevard, and indicated that the road's length was 2,175 feet, the correct length of the boulevard. Therefore, we conclude that the offer to dedicate Michigan Central Park Boulevard was formally accepted by the county on April 19, 1940, the date of the McNitt resolution.

We next must decide whether the offer was withdrawn before it was formally accepted in 1940. The burden is on plaintiffs to prove that the offer was withdrawn. *Kraus, supra* at 425. "Offers are deemed withdrawn when the proprietors use the property in a way that is inconsistent with public ownership." *Id*. at 431. What qualifies as "inconsistent use" depends on the facts of each case. *Id*. The *Kraus* Court noted, however, that uses which have been considered inconsistent by the Michigan Supreme Court have included erected buildings, planted trees, and fenced-in enclosures. *Id*.[3] Again, we review the trial court's findings of fact for clear error. *Christainsen, supra* at 390.

Plaintiffs argue that the offer was withdrawn as evidenced by certain encroachments built by the lot owners such as houses, sidewalks, and patios. Plaintiffs presented the testimony of five plaintiffs who own front lot property west of Hoffman Avenue in the First Addition to Michigan Central Park (the only portion of the boulevard subject to the vacation action) and have encroachments on Michigan Central Park Boulevard. One of whom, Dallas Brownson, clearly established that certain encroachments, such as the house and boathouse, were built on the property before 1940 and the trial court excepted the Brownson property out of its denial of plaintiffs' claim to vacate the boulevard.

Ruth Nelson, another property owner, testified that the original cottage on her property was built in 1920 by her grandparents and was entirely within the boulevard.[4] Such a use is

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[3] Citing *Vivian v Roscommon Co Bd of Rd Comm'rs*, 433 Mich 511, 520-521; 446 NW2d 161 (1989), *Field v Village of Manchester*, 32 Mich 279, 280 (1875), *Wayne Co v Miller*, 31 Mich 447 (1875), and *Lee v Lake*, 14 Mich 11, 17 (1865).

[4] The original house burnt down in 1966. The new house was constructed outside the boulevard because, in 1959, the Nelsons' received an encroachment notice from the Roscommon County Road Commission regarding the original cottage's location.

certainly "inconsistent with public ownership." However, in 1957, Ruth Nelson and her husband sought to adjudicate their rights in the boulevard where their home was located, arguing that the county had never formally or informally accepted the offer of dedication regarding the boulevard. In 1958, the Roscommon Circuit Court held that Michigan Central Park Boulevard was a public street under the jurisdiction of the Roscommon Road Commission and that the court was without jurisdiction to vacate it. Implicit in the court's decision was a determination that dedication was valid. Because the parties in both actions are the same and this matter was previously decided by a final judgment on the merits, plaintiff Ruth Nelson is barred from re-litigating this claim. *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

Regarding the remaining plaintiffs, we find that plaintiffs failed to carry their burden of proving that the encroachments were built before 1940. Ray Rapaport, Robert Price's predecessor, testified that the house on Price's property was built in 1935. The house does not encroach on the boulevard, but a patio and a walkway leading from the house to the lake do encroach on the boulevard. Rapaport, born in 1950, grew up in the home and stated that he never remembered the patio and walkway not being there and had seen family films from before he was born in which the walkway and patio could be seen. But plaintiffs failed to conclusively establish that these encroachments were there before 1940. Likewise, Suzanne Voss testified that the house on her property, which encroaches slightly on the boulevard, was built in 1940 or 1941. But again plaintiffs failed to establish that the house was built before April 1940. The evidence established that the remaining encroachments were installed after 1940. Accordingly, we conclude that the trial court did not clearly err in determining that plaintiffs failed to prove that the offer had been withdrawn.

If the plat proprietor or his successor took no steps to withdraw the offer to dedicate, then the offer is considered as continuing. *Kraus, supra* at 427; *Christainsen, supra* at 391. However, even if an offer is continuing, it can lapse if the acceptance is untimely, i.e., a considerable number of years passed between the offer and the acceptance. *Kraus, supra* at 427, 435; *Christainsen, supra* at 391. In this case, we find the thirty-nine-year gap between the offer and the acceptance to be reasonable, particularly given that during this time frame the area was sparsely populated.[5] See *Christainsen, supra* at 391 (thirty-seven-year span not unreasonable); *Ackerman v Spring Lake Twp*, 12 Mich App 498, 501; 163 NW2d 230 (1968) (twenty-six-year span not unreasonable), compare to *Kraus, supra* at 435 (eighty-six-year span unreasonable); *Marx, supra* at 78-79 (sixty-eight-year span unreasonable). Accordingly, we hold that the offer of dedication of Michigan Central Park Boulevard was validly accepted by the county, and the trial court did not clearly err in failing to vacate this road west of Hoffman Avenue.

[5] Given this conclusion, it is unnecessary for us to address defendants' contention that withdraw of an offer by lapse (the mere passage of time) is not effectuated unless accompanied by affirmative acts of withdrawal as well. For a discussion of the apparent conflict between the concepts of "lapse" and "continuing offer," see *Steffens v Village of Northport*, 463 Mich 998, 998-1102; 624 NW2d 732 (2001) (Markman, J., dissenting).

IV. Scope of Plat Dedications Regarding Uses at Road Ends

Docket Nos. 235418 (Chicago Beach), 235497 (Sylvan), 240102 and 240103 (First Addition to Michigan Central Park), and 240156 (Woodlawn)

The HLPOA and individual plaintiffs argue that the scope of the plat dedications of these subdivisions do not allow use of the road ends for activities such as boat mooring, the placement of boat hoists, lounging, sunbathing, and picnicking. Defendants argue that the historical and traditional uses of the road ends evidence the dedicators' intent to permit such uses.

As this Court recognized in *Higgins Lake*, *supra* at 88, the controlling authority on this issue is *Jacobs v Lyon Twp*, 181 Mich App 386, 387-388; 448 NW2d 861 (1989)[6], in which this Court held that the intent of the dedicator controls the scope of the dedication. "The intent of the dedicator is to be determined from the language used in the dedication and the surrounding circumstances." *Jacobs (After Remand)*, 199 Mich App 667, 672; 502 NW2d 382 (1993). *Jacobs* also involved streets that ended at Higgins Lake. The subdivision in *Jacobs* was platted in 1902 and the plat dedicated the streets, as in all of the instant cases, "to the use of the Public." *Id*. at 671. At issue was the right of the public to use the road ends for recreational activities such as lounging, sunbathing, picnicking, as well as installing boat hoists and mooring boats. *Id*. at 670.

Regarding the rights of the public to use the road ends, the Court stated:

> Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide public access to the water. 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. 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. 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. [*Id*. at 671-672; footnotes and internal citations omitted.]

The Court considered the circumstances as they existed at the time of the dedication, noting that evidence indicated members of the public had used the area for the disputed uses as far back as the 1920s. *Id*. at 672. Yet the *Jacobs* Court concluded that these activities were not within the scope of the plat dedication, reasoning:

> The testimony of the witnesses also indicated that during the 1920s and 1930s few people lived in the area and that those who did freely used the entire

[6] Vacated 434 Mich 922 (1990), (*After Remand*), 199 Mich App 667; 502 NW2d 382 (1993).

> lakefront area for recreational purposes and for access to the lake. There was no indication that such activity was restricted to the road ends. In fact, because of the small number of people living in the area, there seems to have been no need to provide for or to restrict the activities of the public to the road ends. Thus, it appears likely that there would have been no intent on the part of the platter in 1902 to include, as part of the dedication of the roads to the public, anything more than access to the lake. [*Id*. at 673.]

Similarly, the scope of certain plat dedications was also at issue in *Higgins Lake, supra*, in which the plaintiffs sought to enjoin the public from using other certain road ends around Higgins Lake for sunbathing, lounging, picnicking, seasonal boat mooring, and the placement of boat hoists. The *Higgins Lake* Court rejected the plaintiffs' argument that the interpretation of all Higgins Lake subdivision dedications which contain dedication language identical to that in *Jacobs, supra*, mandates the same result, but noted that "we do not ignore the factual similarities between *Jacobs* and the cases at bar." *Higgins Lake, supra* at 101. Concluding that the disputed uses were not within the scope of the dedications, the Court stated:

> [W]e [] discern no record evidence to distinguish the dedications in a meaningful way from *Jacobs*. The use of the terms "streets" and "alleys" implies passage, and public roads that terminate at the edge of navigable waters are presumed to provide public access to the water. *Thies* [*v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985)]; *McCardel* [*v Smolen*, 404 Mich 89, 96; 273 NW2d 3 (1978); *Backus* [*v Detroit*, 49 Mich 110; 13 NW 380 (1882)]. In light of the case law affirming this presumption, the burden rests with defendants to establish that anything other than mere access to the lake was intended. We note this Court's observation in *Jacobs* that in light of the sparse population in the area at the time these subdivisions were platted, it is reasonable to conclude that the dedication encompassed nothing more than access to the lake. *Jacobs (After Remand), supra* [at 673]. Moreover, contrary to the township's claim that "meaningful access" must necessarily include shore activities, such a broad interpretation of the dedication language could potentially frustrate the purpose of giving the public access to the lake. The public access to the lake is compromised by the appropriation of the road ends to private use by a few individuals. In short, we conclude that this Court's reasoning in *Jacobs* is sound and that the records in the instant cases offer no evidence to show that anything more than access to the lake was intended. [*Id*. at 102-103.]

Likewise, from the proofs presented by defendants in the instant cases, we find no discernable evidence to differentiate these cases from *Jacobs, supra*, and *Higgins Lake, supra*. The dedication language is identical, the plats were dedicated during the same relative time period,[7]

[7] Chicago Beach, Sylvan Beach, First Addition to Michigan Central Park, and Woodlawn subdivisions were dedicated in 1907, 1903, 1902, and 1901, respectively. The plats at issue in *Jacobs, supra*, and *Higgins Lake, supra*, were also dedicated at the beginning of the 1900s.

and no evidence was presented in any of the cases to establish that the dedications of the road ends were intended to provide anything more than access to the lake.

Defendants argue that the historical uses of the road ends for sunbathing, lounging, picnicking, and boat mooring indicate that the dedicator intended such public uses and that plaintiffs presented no evidence to the contrary. Defendants presented evidence of such historical uses dating back to the 1980s in Docket Nos. 235418 (Chicago Beach), 235497 (Sylvan Beach), and 240156 (Woodlawn), and to the 1940s in Docket Nos. 240102 and 240103 (First Addition to Michigan Central Park). But absent "evidence that the historical uses of the road ends were contemporaneous with the dedication, the road-end activity occurring *after* the dedication are not helpful in determining the dedicators' intent." *Higgins Lake*, *supra* at 103; emphasis in original. Also, the burden is on defendants, not plaintiffs, to prove the dedicators' intent. *Id*. at 102.

Defendants further argue that a 1904 newspaper article regarding a discussion with the developer of another Higgins Lake subdivision (Sovereign Park) proves that the dedicators intended for back lot owners to have the same access rights as front lot owners.[8] However, the scope of the dedication regarding Sovereign Park was decided in *Higgns Lake*, *supra*, and this Court determined it did not include the disputed uses. *Higgins Lake*, *supra* at 104.

Therefore, we affirm the trial court's findings of fact and hold that members of the public, which for purposes of this issue include back lot owners, have the right to use the surface water of Higgins Lake in a reasonable manner for activities such as swimming, boating, and fishing. But lounging, sunbathing, picnicking, and installing boat hoists at the road ends subject to this appeal are prohibited as outside the scope of the dedications. One non-exclusive dock may be erected at each road end for public access to Higgins Lake. Having legally gained access to the water at the road ends, members of the public may temporarily moor boats "as an incident of the public's right of navigation," *Higgins Lake*, *supra* at 104, but may not moor boats permanently or seasonally. Additionally, private docks are not permitted at the road ends.

V. Scope of Michigan Central Park Boulevard

Docket Nos. 240087, 240102, and 240103 (First Addition to Michigan Central Park)

Defendants argue that the trial court erred in deciding the scope of the dedication of Michigan Central Park Boulevard because it was not an issue before the trial court. We agree with defendants that the scope of the boulevard was not raised or argued before the trial court, nor was it necessary for the court to address this issue to dispose of the cases before it. In Docket No. 240087, plaintiffs sought to vacate a portion of the boulevard, and thus, the validity of the dedication was at issue. In Docket No. 240102, plaintiffs sought the removal of certain

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[8] It is interesting to note that defendants in each of the instant cases offered the same 1904 newspaper article as evidence of the intent of their respective dedicators, who were admittedly different persons, while simultaneously stressing that *Jacobs*, *supra*, should not be blindly followed because the dedicator in that case was not the same as in their respective cases.

encroachments on the boulevard. Because the respective riparian rights of front lot owners and back lot owners had already been decided in previous cases, the trial court only needed to apply the law to determine which encroachments were permitted, if any.[9] Lastly, in Docket No. 240103, the scope of the road ends in the First Addition to Michigan Central Park subdivision was at issue, not the boulevard itself. Therefore, we vacate the portion of the trial court's opinion that discussed the permissible uses of Michigan Central Park Boulevard.[10] We remand the consolidated cases of Docket Nos. 240087, 240102, and 240103 to allow the trial court to amend its final order.

VI. Injunctive Relief

Docket Nos. 235418 (Chicago Beach), 235497 (Sylvan Beach), 240087, 240102 and 240103 (First Addition to Michigan Central Park), and 240156 (Woodlawn)

In each of the cases involved in this appeal, the trial court denied plaintiffs' request for injunctive relief. A trial court's decision regarding injunctive relief is reviewed for an abuse of discretion. *Higgins Lake, supra* at 105. The decision must not be arbitrary and must be based on the facts of the particular case. *Id*. at 105-106. Injunctive relief is an extraordinary remedy that is normally only granted when (1) justice requires it, (2) there exists no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable harm. *Id.* at 106. When deciding whether to issue an injunction, the court should consider:

> (a) the nature of the interest to be protected,
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
> (c) any unreasonable delay by the plaintiff in bringing suit,
> (d) any related misconduct on the part of the plaintiff,
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
> (f) the interests of third persons and of the public, and
> (g) the practicability of framing and enforcing the order or judgment. [*Id*.]

Here, the evidence presented in each case varied little. Witnesses testified as to the occurrence of boat mooring and recreational activities at the road ends, and nearly all stated that these activities had not created excessive noise, litter, or congestion, did not impede their access to the water at the road ends, and had not damaged Higgins Lake or the front lot owners' property. And those who testified as to conducting these activities stated that if prohibited, they would abide by the ruling without an injunctive order. We find that common to all the cases in this appeal is plaintiffs' failure to prove the prospect of an irreparable harm. Although several property owners were concerned that their property values would decrease, such evidence does

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[9] See *Kempf v Ellixson*, 69 Mich App 339; 244 NW2d 476 (1976); *Sheridan Drive Ass'n v Woodlawn Backproperty Owners Ass'n*, 29 Mich App 64; 185 NW2d 107 (1970); *Michigan Central Park Ass'n v Roscommon Co Rd Comm*, 2 Mich App 192; 139 NW2d 933 (1966).

[10] Specifically, we vacate the portion of the trial court's opinion and order beginning on page 4 with, "The next question . . ." through the first full paragraph on page 5.

not rise to the level of an irreparable harm. See *Higgins Lake, supra* at 108 n 9; *Kernen v Homestead Dev Co*, 232 Mich App 503, 515; 591 NW2d 369 (1998). Additionally, we recognize the difficulty in constructing and enforcing such an injunction, as well as question the adequacy of relief such a judgment would provide given that it would only be enforceable against the named defendants. See *Higgins Lake, supra* at 109-110.

Accordingly, we hold that the trial court did not abuse its discretion in denying plaintiffs' request for injunctive relief. However, having now clarified the scope of these dedications, this decision does not foreclose the possibility of an injunction being issued in the future if impermissible uses of the road ends continue. *Id*. at 111.

VII. Adverse Possession of Road Ends

Docket Nos. 240087, 240102, and 240103 (First Addition to Michigan Central Park), and 240156 (Woodlawn)

Defendants in Docket Nos. 240087, 240102, and 240103 (First Addition to Michigan Central Park), and 240156 (Woodlawn), who are back lot owners, argue that they have acquired rights to the road ends in their respective subdivisions by adverse possession. However, defendants do not claim a right to title, but rather a right by the public to use the road ends for recreational purposes. Thus, despite the label, defendants are actually asserting that they have acquired easements by prescription.[11] A trial court's decision in an equitable action is reviewed de novo by this Court.[12] *Higgins Lake, supra* at 117.

Defendants correctly assert that government entities are immune from such claims under MCL 600.5821(1) if the defendant's rights vested after March 1, 1988, the statute's effective date. *Gorte v Dep't of Transportation*, 202 Mich App 161, 167-168; 507 NW2d 797 (1993). Because defendants contend that their rights vested decades before this date, defendants' claim is viable. Nevertheless, we find that defendants' affirmative defense fails because this Court has held that mere use of property is insufficient to establish a public easement by prescription. *Higgins Lake, supra* at 119, citing *Kempf v Ellixson*, 69 Mich App 339, 343; 244 NW2d 476 (1976). "[E]stablishment of public recreation rights by prescription requires at a minimum governmental action to facilitate and control recreational use. *Kempf, supra* at 343-344. Here, none of the individual defendants presented any evidence that governmental action occurred "to

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[11] An easement represents the right to use another's land for a specified purpose. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 678; 619 NW2d 725 (2000). And an easement by prescription claim requires the same elements as an adverse possession claim, except for exclusivity. *Id*. at 679.

[12] We recognize that we are not required to address this issue because, while listed in defendants' answer as an affirmative defense, defendants failed to argue the defense at trial and the trial court did not explicitly rule on the issue. *Higgins Lake, supra* at 117. But because our review is de novo, the factual record is sufficient to enable us to make a decision, and the continuing litigation involving similar road ends, we believe it is in the public's interest to resolve this issue. MCR 7.216(A)(7); *Detroit v Dep't of Social Services*, 197 Mich App 146, 158; 494 NW2d 805 (1992).

facilitate and control recreational use." *Id*. In fact, defendants continually stressed the lack of governmental involvement regarding the use of the road ends.

Affirmed in part, vacated in part, and remanded for the purpose of amending the trial court's order in Docket Nos. 240087, 240102, and 240103 as this opinion directs. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder