



# Where the **Water** Meets the **Road**

## ACCESS TO THE WATER FROM A PUBLIC ROAD By William L. Carey

As has been frequently observed, Michigan is a water wonderland. Not only is Michigan the Great Lakes State, it also has more than 11,000 inland lakes and countless miles of rivers and streams. It is difficult to identify another state where water-related recreation opportunities are so varied and esteemed by its citizenry. The lake frontage surrounding Michigan's big inland lakes (Torch, Higgins, Houghton, Burt, Mullet, Crystal, and Walloon among them) began to be developed between 1900 and 1925. The virgin pine forests of northern Michigan had been logged, and developers from Detroit and Chicago, already familiar with Michigan's spectacular lakes and streams, began to acquire large tracts of land from the logging companies and then subdivided them into smaller parcels. Often, the subdividing was done via the Plat Act.<sup>1</sup>

The typical turn-of-the-century northern Michigan lakefront subdivision was laid out on a plat with a series of blocks. Each block was then divided into rows of lots and bordered by streets. Additionally, many of these plats also were designed with a lake-side boulevard running the length of the plat. The streets separating the blocks almost invariably terminated at the water's edge. This article will review the current status of the law regarding the extent to which water access opportunities are provided to the public via platted streets and boulevards.

### Public Roads and the Platting Process

The platting process previously referenced was subject to governmental approval and, as part of the process, a developer was required to provide a means of legal access to each lot within the subdivision. Access to subdivision lots was usually created by dedication of streets to the public. A dedication is, in essence, a grant by the developer to a public authority that creates a public way.<sup>2</sup> When a dedication is accepted by the public authority, the street subject to the dedication comes under the jurisdiction of that public authority.<sup>3</sup> In the case of lakefront subdivisions, the dedicated roads not only provide access to the platted lots but also *potential public* access to the adjoining bodies of water. Since the dedicated roads were usually laid out perpendicular to the shoreline, these roads are often referred to as "down roads." The terminus point of a down road is usually called a "road end." The dedicated down roads, after coming under public jurisdiction, are available for all members of the public to use. The public's use typically includes a right to access the water's surface from the road end. Beyond accessing the water's surface, there has been much litigation over what other uses the public may engage in at the road ends.

**FAST FACTS:**

Use of public roads as a means to access the water presents unique challenges to the owners of the land adjacent to these roads.

Down roads generally provide public access to the water, but not for the purpose of sunbathing, picnicking, or lounging.

Lateral roads generally provide the general public with only a scenic view of the water.

## Public Access via Public Road Ends

Since at least 1882, Michigan courts have determined that a platted public road that ends at a navigable body of water presumptively may be used by the public to gain access to the water's surface.<sup>4</sup> Once a member of the public lawfully gains access to the water's surface, he or she is free to navigate the entire water surface under the doctrine of navigational servitude.<sup>5</sup> Members of the public with lawful access to the water's surface may use the water for boating, fishing, swimming, and temporary anchorage.<sup>6</sup>

In *Jacobs v Lyon Twp*, the developer of the Lyon Manor subdivision dedicated the roads in the plat to the use of the public.<sup>7</sup> The subdivision, which was dedicated in 1902, fronts on the south side of Higgins Lake. The platted roads in the subdivision have a width of 66 feet. Many of the dedicated streets in the plat ended at the water. In 1987, Lyon Township enacted a zoning ordinance allowing all members of the public to moor boats, maintain docks, picnic, sunbathe, and lounge at the road ends. The ordinance did not regulate the number of users of a road end or the number of boats allowed to be moored there. The Lyon Township zoning ordinance was challenged by owners of lots in Lyon Manor whose cottages or homes were adjacent to the road ends. They argued that the public's use of the road ends as parks and marinas created a nuisance and devalued their property. More specifically, the plaintiffs argued that the road ends were never intended by the plat to be used for anything more than road purposes. The Michigan Court of Appeals ultimately determined that the developer of the Lyon Manor subdivision did not intend the roads in the plat to be used for recreational activities beyond simply providing access to the water's surface; accordingly, the Court ruled that the portions of the township ordinance that authorized picnicking, sunbathing, lounging, and boat mooring were invalid.<sup>8</sup>

Lyon Manor subdivision is one of 13 lakefront subdivisions located on the shore of Higgins Lake. The other subdivisions were also platted between 1900 and 1925 and each had numerous road ends. After *Jacobs*, a series of 12 lawsuits were filed, each seeking a declaratory ruling that the roads in the subdivision could not be lawfully used as marinas or parks. After trial, the cases were ap-

pealed to the Court, which consolidated them into two groups. Two opinions were ultimately rendered, one of which was published: *Higgins Lake Prop Owners Ass'n v Gerrish Twp*.<sup>9</sup>

In the published decision, the Court undertook an exhaustive analysis of the law related to platted public roads and the allowable uses of the road ends by the public. Following closely the *Jacobs* analysis, the Court recognized that a common public dock located at a road end was within the allowed uses, reasoning, as other courts have, that a dock is a navigational aid to the water's surface. The *Higgins Lake* panel, like the *Jacobs* panel, ruled that the legal presumption is that a road terminating at the water's edge provides public access to the water, but the burden rests on the party attempting to show that anything beyond mere access was intended; accordingly, the Court ruled that absent evidence of the dedicator's intent to the contrary, recreational activities such as sunbathing, picnicking, and lounging are not lawful.<sup>10</sup> The Court also precluded the nontemporary mooring of watercraft as being beyond the dedicator's intent.<sup>11</sup>

Interestingly, neither *Jacobs* nor *Higgins Lake* addressed the issue of who owns the riparian bottom lands as extended from the road terminus. Each court reasoned that a determination of actual ownership of the subaqueous land was unnecessary to

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reach a resolution of the public's usage rights. While the *Jacobs* and *Higgins Lake* panels dealt with public roads, the analysis used in the decisions is equally applicable to private roads and easements. It is the scope of the dedication, as determined by the dedicator's intent, which dictates allowable uses. A legal presumption is imposed preventing general recreational uses, unless a contrary intent can be established.

## Public Access via Public Lateral Roads

The creation of a wide scenic boulevard running along the lakeshore is a common feature of plats on inland lakes in Michigan. The boulevards, often referred to as “lateral roads” by the courts, have widths as great as 100 feet. When the lateral roads run the entire shoreline of a subdivision, none of the lots in the subdivision actually touch the water's edge. The lots that are separated from the water by the lateral roads are commonly called “front tier” lots.

With regard to public lateral roads, two important legal issues present themselves. First, what water-related recreational activities can the public engage in based on the existence of the boulevard? Second, who controls the riparian land adjacent to the lateral

road? Each issue has now been resolved by the Michigan Supreme Court in the matter of *2000 Baum Family Trust v Babel*.<sup>12</sup>

The Baum Trust and other plaintiffs were owners of lots facing Lake Charlevoix, but separated from the water by a road that was dedicated to public use in a subdivision plat that was recorded pursuant to the Plat Act. Plaintiffs brought an action in the Charlevoix Circuit Court against William Babel and other back-lot owners, the Charlevoix County Road Commission, and Charlevoix Township. Plaintiffs moved for partial summary disposition against the road commission only, contending that plaintiffs held riparian rights. The trial court ruled that plaintiffs had no riparian rights, and the Court of Appeals affirmed, holding that the plain and unambiguous language of the Plat Act granted the public fee title to a dedicated roadway and that the road commission was in “no way” limited in the type of use it could make of the road.<sup>13</sup> The Michigan Supreme Court granted plaintiffs’ application for leave to appeal.

Consistent with longstanding rules of property in this state, the Michigan Supreme Court held that the property interest conveyed by a statutory dedication under the Plat Act, in a public road that runs parallel to a body of water or watercourse, did not divest the front-tier property owners of their riparian rights.<sup>14</sup> The Court stated that no Michigan decision has ever held that a dedication of a base fee in a parallel road conveys riparian rights to the receiving government entity, and every Michigan decision that has addressed this issue has concluded that riparian rights rest with the front-lot owners.<sup>15</sup>

Regarding the types of activities that the public could engage in upon the lateral road and adjacent shoreline, the Michigan Supreme Court held that all dedications of land to public use must be considered with reference to the use for which they are intended.<sup>16</sup> In Michigan, riparian rights have never been considered among such rights with respect to the dedication of lateral roads. This is in direct contrast to down roads: public ways that terminate at the edge of navigable waters have been deemed at common law to provide public access to the water. However, no decision in this state has ever held that a dedication of a road that runs parallel to the water conveys riparian rights. Accordingly, the Supreme Court held that the jurisdiction of the road commission did not include riparian rights to the road at issue, precluding the road commission from granting public access to the water, as such uses are incompatible with the underlying dedication.<sup>17</sup> Lateral roads may not, therefore, be used for any recreational purpose and may not be used as water-access points. Further, the owners of land adjacent to and separated from the water by lateral roads hold riparian rights in the adjacent waterfront.

## Summary

Hundreds of platted public road ends throughout the state provide the public with legal and meaningful access to navigable inland waters. However, these access points cannot be used as parks or marinas absent a contrary intent expressed in the dedication. Lakeside boulevards and lateral roads provide the public with a scenic view, but general access to the adjacent waters is not allowed. ■



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## FOOTNOTES

- 1887 PA 309, the Plat Act of 1887. The current version of the law is known as the Land Division Act, MCL 560.101 *et seq.*
- Before 1931, this was either the township or village. In 1931, the McNitt Act, 1931 PA 130, was enacted, which created county road commissions and a countywide system of local roads. Townships and villages then transferred jurisdiction of their local roads to the county road commissions. The McNitt Act was repealed by 1951 PA 51; the current version of the law is MCL 247.651 *et seq.*
- See *Kraus v Dep't of Commerce*, 451 Mich 420, 431; 547 NW2d 870 (1996).
- Backus v Detroit*, 49 Mich 110, 115; 13 NW 380 (1882).
- See *Bott v Nat Resources Comm*, 415 Mich 45, 61; 327 NW2d 838 (1982).
- Thies v Howland*, 424 Mich 282, 294–295; 380 NW2d 463 (1985).
- Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667; 502 NW2d 382 (1993).
- Id.* at 673.
- Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003), and *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, unpublished opinion of the Court of Appeals, issued October 30, 2003 [Docket No. 235418] <[http://coa.courts.mi.gov/documents/opinions/final/coa/20031030\\_235418\\_54\\_235418.opn.pdf](http://coa.courts.mi.gov/documents/opinions/final/coa/20031030_235418_54_235418.opn.pdf)> (accessed March 18, 2011), available at 2003 WL 22462312.
- Id.* at 103–104.
- Id.* at 104.
- 2000 Baum Family Trust v Babel*, 488 Mich 136; 793 NW2d 633 (2010).
- 2000 Baum Family Trust v Babel*, 284 Mich App 544, 561–562; 773 NW2d 44 (2009).
- Baum*, 488 Mich at 173.
- See, e.g., *Thies*, 424 Mich at 293; *McCardel v Smolen*, 71 Mich App 560, 564; 250 NW2d 496 (1976), vacated in part, 404 Mich 89 (1978); *Kempf v Ellixson*, 69 Mich App 339, 341; 244 NW2d 476 (1976).
- Baum*, 488 Mich at 171.
- Id.* at 186.