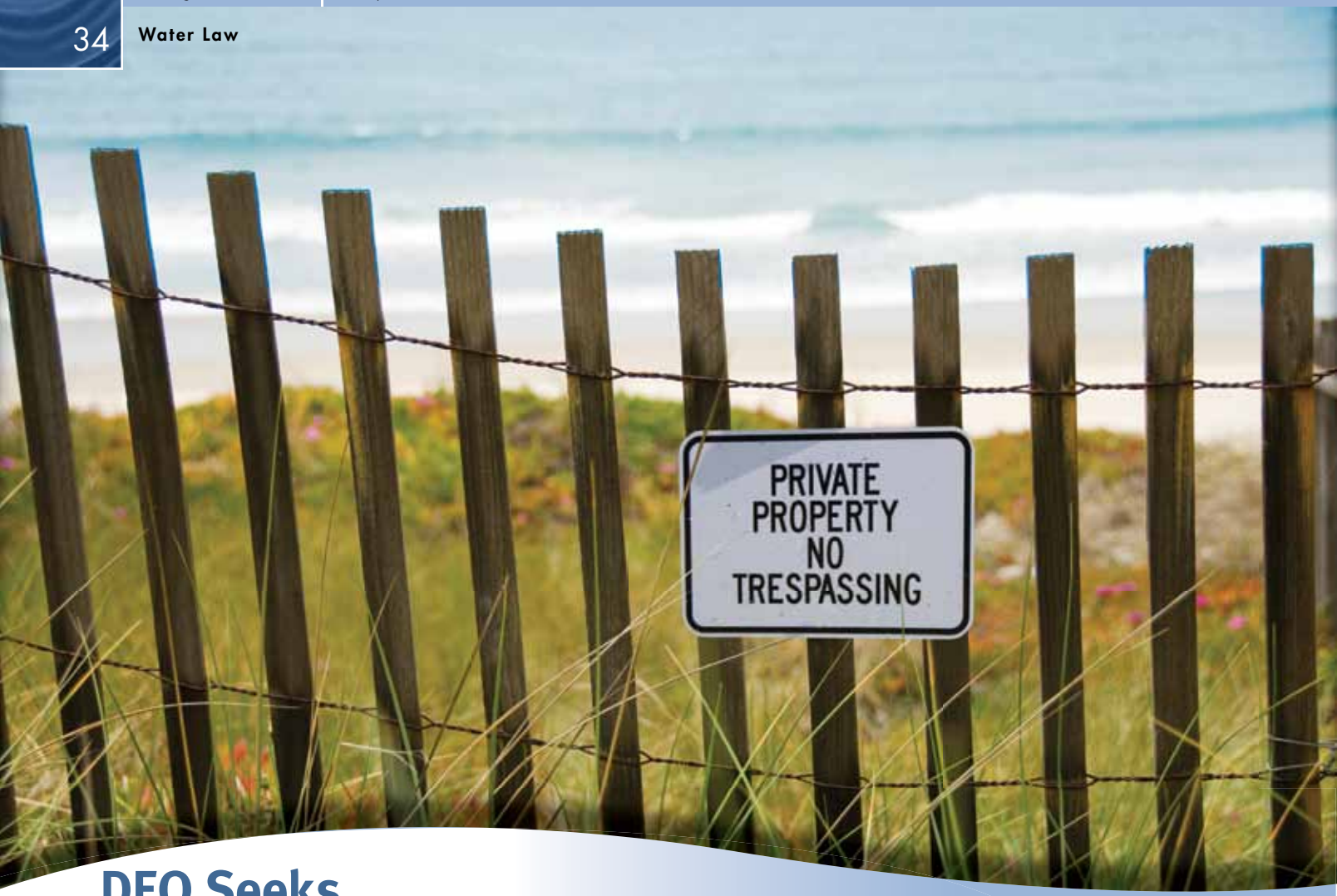

DEQ Seeks New Beachhead in Shoreline Development

By Jeffrey R. Dobson Jr. and Nakisha N. Chaney

"Yet we do not own the freshness of the air or the sparkle of the water. How can you buy them from us?"

—Letter from Chief Sealth of the Duwamish Tribe of the state of Washington to President Franklin Pierce, 1885

As reflected by the above quote, the debate over what constitutes public and private lands is as old as the common-law concept of the state itself. Establishing the line where public and private property rights diverge is particularly difficult with regard to littoral lands, which, under Michigan law, are those lands adjoining the Great Lakes and the other bodies of water directly connected to them.[1] The fact that littoral land boundaries are neither *terra firma* nor truly tidal, but rather in a constant state of flux, presents unique challenges.

In the 2005 case *Glass v Goeckel,* the Michigan Supreme Court commented that "American [common] law has long recognized that large bodies of navigable water, such as the oceans, are natural resources and thoroughfares that belong to the public."[2] Pursuant to the "public trust" doctrine, the state has a duty to protect the public's interests in these natural resources.[3] The public-trust doctrine applies to the Great Lakes, as well as to their related shore lands.[4] Specifically, littoral lands along the Great Lakes are owned by private persons but are subject to specific public rights on the

lake and its shores up to the ordinary high-water mark.[5] The state's judicial, legislative, and executive branches share these protective duties equally.[6]

As one can imagine, there is tension between the state, acting as trustee of the lands within the public trust, and private-lakefront-property owners who generally desire to exercise unfettered dominion over their property. This tension is particularly pronounced when dealing with littoral lands because they are relatively scarce and desirable, which means they are valuable.

In an effort to add clarity in the regulation of these important areas, the legislature enacted the Great Lakes Submerged Lands Act[7] (GLSLA) in 1955, setting the "ordinary high water mark" at a specific elevation for each of the Great Lakes.[8] The legislature also granted the Michigan Department of Environmental Quality (DEQ) certain permitting authority under the GLSLA.[9] Despite the legislature's effort to establish clarity, the seemingly eternal issue of defining the water's edge has resurfaced in Michigan. This article examines a recent DEQ administrative decision by which the DEQ interpreted its authority under the GLSLA, considers whether the DEQ's reach in that decision exceeded its authorized grasp under the GLSLA, and explains the import of the development for owners of littoral lands. Although the DEQ's decision was no doubt well intended and subsequently affirmed by the Ingham County Circuit Court, this matter is far from settled; the Court of Appeals has accepted the case for review.[10] The most salient practical point, for now, is that the DEQ has asserted broad authority, and littoral landowners must prepare to meet new challenges when they develop their land.

FAST FACTS:

Littoral lands are those lands adjoining the Great Lakes and the other bodies of water directly connected to them.

Persons seeking to develop littoral lands must currently look beyond the clear-cut lines established in 1967 by the Great Lakes Submerged Lands Act.

We know where the sidewalk ends, where the streets have no name, and where the wild things are; will we ever know where the water's edge is?

A Word About Public Trust Regulatory Issues

The public-trust doctrine requires the state to protect and preserve the waters of the Great Lakes and their related shore lands for the public.[11] The boundaries of the *waters* subject to the public-trust doctrine can be determined with relative ease; however, the same cannot be said of the *lands*. The determination of what lands are below the ordinary high-water mark and thus subject to the public-trust doctrine has been a consistent source of controversy.

The legislature's enactment of the GLSLA set the ordinary high-water mark at a specific elevation for each of the Great Lakes and empowered the DEQ to regulate the lands lying below these marks. The statute states in relevant part:

> The word "land" or "lands" as used in this part refers to [lands] . . . lying below and lakeward of the natural ordinary high-water mark. . . . For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.[12] [The ordinary high-water mark, as determined by reference to these specific elevations, is referred to in this article as the "fixed-datum ordinary high-water mark."]

In 2005, the Michigan Supreme Court rendered its opinion in *Glass*. In a split decision, which itself reflects the issue's complexity, the majority held that the public-trust doctrine extended to those lands that lay below the ordinary high-water mark, which it defined by reference to the natural indicators of the shoreline:

> "the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic."[13]

The Michigan Supreme Court also expressly rejected the contention that the fixed-datum ordinary high-water mark in the GLSLA determined the scope of the public trust, stating "the GLSLA establishes the scope of the regulatory authority that the legislature exercises, pursuant to the public trust doctrine."[14]

DEQ Denies a Permit and Assumes Broad Statutory Authority

On October 3, 2008, the DEQ denied private landowner Bobby Burleson the right to build a lakefront home on his lot with Lake Michigan frontage even though Mr. Burleson proposed to develop the house above the fixed-datum ordinary high-water mark for Lake Michigan set in the GLSLA.[15] In doing so, the DEQ held that it had the right to regulate those littoral lands above the fixed-datum ordinary high-water mark set forth in the GLSLA.[16] Relying on the definition of "lands" in the GLSLA, the DEQ ruled that all lands lying below the *natural* ordinary high-water mark, regardless of their elevation, are subject to regulation.[17] To determine the *natural* ordinary high-water mark, the DEQ incorporated the definition of ordinary high-water mark from *Glass*.[18] In other words, the DEQ determined that there exists property that lies above the fixed-datum ordinary high-water mark but below the natural ordinary high-water mark and held that this property is subject to the DEQ's regulation under the GLSLA. The DEQ also determined that the location of this natural ordinary high-water mark, and thus the limits of its authority, is a question of fact that is to be made on a case-by-case basis.[19]

The DEQ specifically rejected Mr. Burleson's argument that the "plain language" of the GLSLA required the DEQ to issue the permit because the proposed house was to be built above the fixed-datum ordinary high-water mark.[20] Rather, the DEQ held that it is clear that the natural ordinary high-water mark and the fixed-datum ordinary high-water mark are "two distinct concepts" and the only one that defines which lands are subject to the full range of regulation is the natural ordinary high-water mark.[21] The DEQ relied on its mandate to preserve the public trust and the decision in *Glass* regarding the common-law boundary of the ordinary high-water mark.[22]

Did the DEQ Magnify Its Statutory Authority?

There are several indicators that the DEQ overreached its authority. As an initial matter, the state's caselaw does not recognize a concept of a natural ordinary high-water mark as opposed to an ordinary high-water mark,[23] and the Michigan Supreme Court specifically held that "[t]he [GLSLA] never purports to establish the boundaries of public trust. Rather, [it] establishes the scope of regulatory authority that the legislature exercises, pursuant to the public trust doctrine."[24] Thus, the Michigan Supreme Court appears to have recognized that the GLSLA is a cap on the DEQ's authority.

Furthermore, the legislative history of Part 325 is inconsistent with the DEQ's construction of its regulatory authority.[25] In 1967, Representative Raymond L. Baker introduced House Bill No. 2621, amending the definition of "lands" to define the "ordinary high water mark" based on its elevation above sea level.[26] According to its author, HB 2621 established "'a much-needed, *permanent reference point* for determining public and private rights where the Great Lakes shorelines were involved.'"[27] Representative Baker's press release iterated the new law's purpose, stating:

> [h]eretofore, the location of property lines [was] clouded due to the constantly fluctuating water levels….Among other things, establishment of the ordinary high water mark indicates to a property owner that he may not…build on land which is temporarily exposed below the mark. Any such projects would require a state permit and approval of the local government.[28]

Moreover, in its 2005 amicus brief to the Michigan Supreme Court in *Glass,* the DEQ took a position that was entirely consistent with this legislative intent—contrary to its current position. It stated: "In 1968, the former Submerged Lands Act, MCL 322.702 *et seq,* was amended *to refer to the natural ordinary high water mark and define that line by specific elevations* for each of the lakes."[29] In August 2007, the DEQ, via a publication then available on its website, also acknowledged that "[b]oth state and federal agencies use a *statutorily-defined* line called the Ordinary High Water Mark to delineate the primary landward limit of their permit jurisdiction."[30]

The DEQ has clearly altered its position from just a few years ago. Relying largely on *Glass,* it has assumed authority beyond what may have been intended by the GLSLA. The reliance, while certainly meant to protect the public trust, may be misplaced. *Glass* addresses common-law public rights on lands held subject to the public trust: it did not concern the boundaries of the DEQ's regulatory authority. As articulated by Justice Corrigan, "the GLSLA establishes the scope of the regulatory authority that the legislature exercises, pursuant to the public trust doctrine."[31] Notably, *Glass* stated that it could not allow the lower courts to disrupt a "previously quiet status quo."[32] The DEQ seems to be using *Glass* to do just that.

As previously noted, the Court of Appeals has accepted an appeal from Mr. Burleson. The Michigan Association of Homebuilders and the Michigan Association of Realtors have both filed amicus curiae briefs in support of Mr. Burleson and in general accord with the analysis previously set forth. The Michigan Association of Planning has filed an amicus curiae brief in support of the DEQ's argument. If the DEQ stands firm in its position, and all indications are that it will, the Michigan Supreme Court may be addressing this issue soon.[33]

Littoral lands along the Great Lakes are owned by private persons but are subject to specific public rights on the lake and its shores up to the ordinary high-water mark.

Conclusion and Practical Impact

The GLSLA's language, purpose, and history suggest that the legislature intended to limit the DEQ's regulatory authority of the Great Lakes shorelines to lands lying below the statutorily established fixed-datum ordinary high-water mark. Thus, the DEQ may have overreached its authority when it concluded that it possessed regulatory authority over all lakefront property falling within the definition of public trust property established in *Glass*.

In any event, the practical impact of the DEQ's position is clear. A landowner must develop his or her proofs accordingly when applying for a permit with the DEQ where littoral rights may be at issue. It would be best to do the prudent thing and secure sufficient, professional evidence of the high-water mark, which should include both the fixed-datum and natural marks to be secure vis-à-vis all potential future legal outcomes. ■

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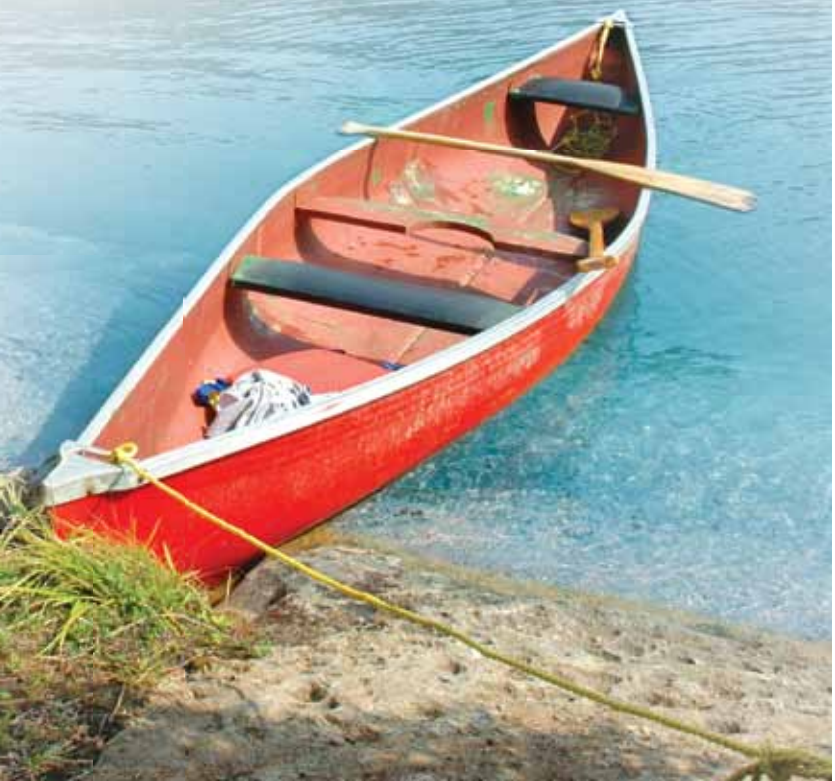

FOOTNOTES

1. *Glass v Goeckel,* 473 Mich 667, 672; 703 NW2d 58, 61 n 1 (2005).
2. *Id.* (determining, among other things, that the public has a right to walk the beaches of the Great Lakes, up to the ordinary high-water mark).
3. *Id.* at 673.
4. *Illinois Central R Co v Illinois,* 146 US 387, 435; 13 S Ct 110; 36 L Ed 1018 (1892); *Obrecht v Nat'l Gypsum Co,* 361 Mich 399, 412; 105 NW2d 143 (1960).
5. *Glass,* 473 Mich at 674.
6. *Obrecht,* 361 Mich at 412.
7. MCL 324.32501, *et seq.*
8. MCL 324.32502.
9. The administrative history of this matter has been a bit confusing. By Executive Order No. 2009-45, the Michigan Department of Environmental Quality merged into the Michigan Department of Natural Resources and Environment, effective January 17, 2010. The Michigan Department of Natural Resources and Environment was subsequently abolished and the Michigan Department of Environmental Quality re-established effective March 13, 2011, by Executive Order 2011-1.
10. *Burleson v Dep't of Environmental Quality,* pending opinion of the Court of Appeals (Docket No. 292916).
11. *Glass,* 473 Mich at 674; *Obrecht,* 361 Mich at 412.
12. MCL 324.32502.
13. *Glass,* 473 Mich at 691, quoting *Diana Shooting Club v Husting,* 156 Wis 261, 272; 145 NW 816 (1914). Justice Young, in dissent, referred to this line as "ill-defined and utterly chimerical" when referring to the Great Lakes. *Glass,* 473 Mich at 705.
14. *Glass,* 473 Mich at 683.
15. *In the Matter of Bobby Burleson,* DEQ declaratory ruling, entered October 3, 2008, at 1–2, 7.
16. *Id.* at 7.
17. *Id.*
18. *Id.* at 5.
19. *Id.* citing *Glass,* 473 Mich at 694.
20. *Id.* at 4.
21. *Id.*
22. *Id.* at 5.
23. See, e.g., *Glass,* 473 Mich at 683–694.
24. *Id.* at 683.
25. *Burleson, supra,* at 3 stating that MCL 324.32502 is ambiguous. If true, it is therefore appropriate to rely on legislative history to ascertain the meaning and intent of the same. See *Deschaine v St Germain,* 256 Mich App 665, 669; 671 NW2d 79 (2003).
26. HR 2621, 72nd Leg Reg Sess (Mich 1967).
27. Press Release, Representative Raymond L. Baker (May 28, 1968), quoting Rep. Baker (emphasis added).
28. *Id.*
29. Brief for the Michigan Departments of Environmental Quality and Natural Resources as Amici Curiae Supporting Respondent, *Glass v Goeckel, supra,* at 23, available at <http://courts.michigan.gov/supremecourt/Clerk/03-05/126409/126409-Amicus-DEQ.pdf> (emphasis added). All websites cited in this article were accessed March 30, 2011.
30. *Along the Shore: A Beach Management Guide for Michigan Coastal Landowners,* previously available at <http://www.deq.state.mi.us/documents/deq-lwm-wetlands-alongtheshore.pdf> (on file with author). The revised publication, which reflects the DEQ's current position, is *Along the Shore: A Shoreline Management Guide for Michigan Coastal Landowners* and is available at <http://www.mi.gov/documents/deq/deq-lwm-wetlands-alongtheshore_339898_7.pdf>.
31. *Glass,* 473 Mich at 683.
32. See *id.* at 673.
33. At the time this article was finished, the parties had argued the case before the Court of Appeals, but no decision had been rendered.