

MICHIGAN ROAD-ENDS: PROTECTING PRIVATE PROPERTY RIGHTS WHILE PRESERVING PUBLIC ACCESS TO INLAND LAKES

I. INTRODUCTION

The State of Michigan has over 11,000 inland lakes for its residents and visitors to enjoy.¹ In fact, no matter where you are in Michigan, an inland lake is never more than a six mile drive away.² Despite the close proximity, discussion of Michigan's inland lakes reminds many Michiganders of summer trips "Up North," with days spent swimming, fishing, or boating on bodies of water such as Higgins Lake.³ Unfortunately, pristine days of relaxation have been replaced with days of courtroom litigation.

The ability to enjoy the benefits associated with inland lakes is limited by access to the water.⁴ However, many of Michigan's inland

1. LIBRARY OF MICHIGAN, MICHIGAN IN BRIEF (2006), *available at* http://www.michigan.gov/documents/hal_lm_MiB_156795_7.pdf (last visited Nov. 14, 2009).

2. Michigan Historical Center, Department of History, Arts and Libraries, Michigan FAQ, *available at* <http://www.mi.gov> (enter "Michigan FAQ" in search, follow "MHAL – Michigan . . ." hyperlink) (last visited Nov. 14, 2009).

3. Dave Vizard, *Fondest Memories Define Our 'Up North' Boundaries*, THE BAY CITY TIMES, Oct. 31, 2006, at A3. Summertime memories of being "Up North" have even resulted in a hit song. *See* KID ROCK, *All Summer Long*, on ROCK N ROLL JESUS (Atlantic Records 2007) (Michigan native singing about "summertime in Northern Michigan").

4. State, county, and local governments provide public access sites in an attempt to alleviate accessibility problems. Currently, more than 1300 such access sites are maintained in Michigan. State of Michigan, Department of Natural Resources, *available at* <http://www.mcgi.state.mi.us/MRBIS> (last visited Nov. 14, 2009). However, government provided lake access is not always adequate to meet the demands of the public. GERRISH TWP., 2008 RECREATION PLAN 45 (2008), *available at* <http://www.gerrishtownship.org> (follow "Gerrish Township Recreation Plan 2008" hyperlink) (last visited Nov. 14, 2009) (describing "[l]ack of lake access to the general public" as a deficiency in the township's current recreational facilities). Approximately half of the 20.5 miles of shoreline surrounding Higgins Lake is within the boundaries of Gerrish Township. *Id.* at 3. Several factors contribute to the deficiency of public lake access to Higgins Lake. One factor is that there are only three government funded access points on the shores of Higgins Lake. State of Michigan, *supra* (follow "Find an Access Site" hyperlink on left side of page; follow "Waterbody Search" hyperlink; enter "Higgins" in search box and select "Map It!") (last visited Nov. 14, 2009). Another factor contributing to the deficiency is an increase in population surrounding the inland lakes. For example, Gerrish Township's population swelled by 246% over the twenty-year period of 1970-1990. RUSSEL J. MINNERICK, U.S. GEOLOGICAL SURVEY, EFFECTS OF RESIDENTIAL DEVELOPMENT ON THE WATER QUALITY OF HIGGINS LAKE, MICHIGAN 1995-99, WATER-RESOURCES INVESTIGATIONS REPORT 01-4055 1 (2001), *available at* <http://pubs.er.usgs.gov> (enter "01-4055" in search box; select "Go;" follow "More Info"

lakes are accessible to the public via road-ends.⁵ With increasing demand for recreational water access, many boaters have turned to road-ends as an alternative to overwhelmed government run access points.⁶ While beneficial to the water-seeking public, the increased traffic is met with strong resistance from lakefront property owners adjacent to the road-ends.⁷ The adjacent property owners seek to prevent use of the road-ends for anything more than ingress and egress into the water while public users seek to continue to use the road-ends as they traditionally have for sunbathing, lounging, picnicking, mooring boats, and constructing boat hoists.⁸ Legislative and judicial attempts to resolve the conflict are unable to provide an adequate resolution and such disputes continue, resulting in years of litigation.

Part II of this Note explains the context in which these disputes arise and how the Michigan judiciary has responded in attempting to resolve the competing interests.⁹ The responses tip-toe around the heart of the issue which creates a judicial standoff where property owners are unable

hyperlink; follow "View the document as HTML" hyperlink; and follow "Print-Optimized PDF File" hyperlink) (last visited Nov. 14, 2009). Furthermore, the population of Gerrish Township is expected to continue to grow by fifteen to twenty percent between 2008 and 2015. GERRISH TWP., *supra*, at 4. In addition to area residents, recreational activities available at inland lakes draw a significant amount of visitors which further strains access points during the summer. For example, the Higgins Lake area sees an influx of over 100,000 people during the summer. *Id.* at 5. Another factor contributing to the inadequacy of government provided lake access is substantial growth in boat ownership. In 1970, approximately 435,000 boats were registered in Michigan. DNR Says Boat Smart from the Start for Safe and Enjoyable Boating (June 2, 2006), *available at* <http://www.michigan.gov/dnr> (search "Michigan.gov" for "safe boating smart"); then follow "DNR – DNR Says Boat Smart from the Start for Safe and Enjoyable . . ." hyperlink) (last visited Nov. 14, 2009). In 2007, Michigan registered over 830,000 boats, making it the state with fourth highest number of registrations in the United States. RECREATIONAL BOATING STATISTICS 2007, COMMANDANT PUBLICATION P16754.21 63 (June 27, 2008), *available at* http://www.safeboatingcampaign.net/statistics-/boating_statistics_2007.pdf (last visited Nov. 14, 2009).

5. "Road-ends" are unfinished roads leading directly to a body of water. Michael Vatalaro, *End of the Road in Michigan*, BOAT/U.S. MAGAZINE, Sept. 2005, *available at* http://findarticles.com/p/articles/mi_m0BQK/is_5_10/ai_n15393981 (last visited Nov. 14, 2009).

6. *Id.*

7. Doug Guthrie and Amy Lee, *Illegal Docks Spark Lake Access Fight*, THE DETROIT NEWS, Apr. 23, 2006.

8. See Higgins Lake Property Owners Ass'n v. Gerrish Twp., 662 N.W.2d 387, 397 (Mich. Ct. App. 2003) (hereinafter *Higgins Lake*), where lakefront property owners adjacent to road-end alleged defendants' use of road-ends for "lounging, sunbathing, picnicking, and seasonal boat mooring" exceeded the permissible use of such road-ends.

9. See *infra* Part II.

to remedy violations of their property rights as a result of the public's improper use of road-ends.

Part III analyzes various ways property owners can enforce their property rights in relation to road-ends, including: legislative action,¹⁰ working within the bounds of the judiciary,¹¹ using existing statutory law,¹² seeking local government assistance,¹³ and establishing a judicial taking of property rights.¹⁴

II. BACKGROUND

Plats¹⁵ dedicating roads that end at a navigable body of water for "the use of the public"¹⁶ have been the subject of disputes for decades.¹⁷ These disputes involve parties such as lakefront property owners, non-lakefront property owners, property owner's associations and local units of government.¹⁸ Unable to reach an agreeable settlement, the parties have turned to the courts to resolve the property rights in dispute. The seminal Michigan case addressing the public use of such "road-ends" is *Jacobs v. Lyon Township*.¹⁹ *Jacobs* involved a township ordinance that permitted the public to use road-ends for "swimming, fishing, boating, and uses incidental thereto."²⁰ Lakefront property owners challenged the

10. See *infra* Part III.A.

11. See *infra* Part III.B.

12. See *infra* Part III.C.

13. See *infra* Part III.D.

14. See *infra* Part III.E.

15. A plat is "a description of the physical property interests on a particular area of land." *Tomecek v. Bavas*, 759 N.W.2d 178, 186 (Mich. 2008). Plats subdivide property into discrete areas such as "residential lots, dedicated streets, alleys, [and] parks." *Martin v. Beldean*, 677 N.W.2d 312, 314 (Mich. 2004). The requirements for amending, revising, and recording plats are governed by statute. *Id.*; see Land Division Act, MICH. COMP. LAWS ANN. §§ 560.01–.293 (West 2008).

16. *Jacobs v. Lyon Twp.*, 512 N.W.2d 834 (Mich. 1994) (Levin, J., dissenting), *appeal denied*, 502 N.W.2d 382 (Mich. Ct. App. 1993).

17. See *id.* at 836 (noting increased use of road-ends at Lake Higgins likely began after 1976 and became problematic in 1987); *Higgins Lake Shores Lakefront Prop. Owners v. Lyon Twp.*, No. 278894, 2008 WL 5076595 (Mich. Ct. App. 2008) (upholding trial court decision that recreational use of road-end for sunbathing, lounging, and picnicking exceeded scope of dedication, thus not permitted).

18. *Higgins Lake*, 662 N.W.2d 387 (involving more than ninety parties including individual property owners, municipal government, and property owners associations).

19. *Jacobs*, 502 N.W.2d 382.

20. *Id.* at 383. The ordinance originally provided that the public could use the road-ends for "lounging, picnicking, swimming, fishing and boating." *Id.* However, prior to remand by the Michigan Supreme Court, the township revised the ordinance. *Id.* The language no longer explicitly permitted shore activities but referred to them implicitly ("swimming, fishing, boating, and uses incidental thereto"). *Id.*

ordinance by alleging that it permitted and encouraged activities that were beyond the scope of the dedication such as lounging, sunbathing, picnicking, seasonal boat storage and the installation of boat hoists.²¹ After protracted litigation,²² the Michigan Court of Appeals held that the scope of the dedication "to the use of the Public" included reasonable water activities such as boating, swimming, and fishing²³ but "shore activities, such as sunbathing, lounging, or picnicking" were beyond the scope of the dedication.²⁴

In reaching its conclusion, the court cited two well-settled laws of property.²⁵ First, roads dedicated to the public that end at navigable waters are presumed to provide access to the water.²⁶ Second, the scope of a dedication depends on the grantor's intent, as determined from the language of the dedication and circumstances surrounding the dedication.²⁷ The dedication under review by the court occurred many years prior to the case in 1902, which made it next to impossible for the defendant's to present any testimony to establish circumstances surrounding the dedication.²⁸ Witnesses testified that the public used the entire lakefront area to lounge and picnic in the 1920s and also, at that time, the area was sparsely populated.²⁹ In light of the testimony that recreational activity occurred across much of the lakefront, the court concluded that the grantor did not intend to include anything more than access to the water.³⁰

A decade after *Jacobs*, the Michigan Court of Appeals again addressed the scope of "public use" at road-ends in *Higgins Lake Property Owners Ass'n. v. Gerrish Township*.³¹ The plaintiffs in *Higgins Lake*, consisting of a lakefront property owners association and

21. *Id.* at 383.

22. The court of appeals affirmed the district court in part and reversed in part. Upon granting application for leave to appeal, the Michigan Supreme Court vacated the decisions of the trial court and the court of appeals and remanded to the trial court. The trial court was then affirmed in part and reversed in part and the supreme court denied both parties application for leave to appeal. *Jacobs*, 502 N.W.2d at 383.

23. *Id.* at 384.

24. *Id.* at 384-85.

25. *Id.* at 383.

26. *Id.* at 384 (citing *Thies v. Howland*, 380 N.W.2d 463 (Mich. 1985); *McCardel v. Smolen*, 273 N.W.2d 3 (Mich. 1978); *Backus v. Detroit*, 13 N.W. 380 (Mich. 1882)).

27. *Jacobs*, 502 N.W.2d at 384.

28. *Id.*

29. *Id.*

30. *Id.*

31. 662 N.W.2d 387.

individual lakefront property owners, sought a declaratory judgment³² on the permissible uses of road-ends by the public and an injunction to prevent the public from using the road ends for “lounging, sunbathing, and picnicking.”³³ The court of appeals concluded that the reasoning of *Jacobs* was sound and that the defendants had the burden of establishing that the grantor’s dedication intended rights beyond providing access to the lake.³⁴ The defendants failed to provide “any evidence to distinguish them in any meaningful way from *Jacobs*.”³⁵ Accordingly, the court held that the grantor intended nothing more than access to the lake and that lounging, sunbathing, and picnicking “are prohibited as beyond the scope of the dedications.”³⁶ The court then addressed the lakefront property owners’ request for injunctive relief.³⁷

Property owners adjacent to road-ends testified that improper road-end use negatively affected their use and enjoyment of their property and such use decreased the owners’ property values.³⁸ Testimony offered by adjacent property owners also addressed the concern that over-use of the road-ends would damage the shoreline and the lake itself.³⁹ Despite such testimony, the court held the lakefront property owners failed to show a danger of irreparable harm to justify injunctive relief.⁴⁰ The court also cited two concerns that weighed against granting injunctive relief:⁴¹ the difficulty in fashioning and enforcing an injunction,⁴² and the inadequacy

32. A declaratory judgment is a “binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.” BLACK’S LAW DICTIONARY 859 (8th ed. 2004). The Michigan Court of Appeals stated that “the purpose of a declaratory judgment is to permit adjudication of the rights or status of the parties without the necessity of a previous crime or breach.” *Demorest v. DiPentima*, 324 N.W.2d 634, 636 (Mich. Ct. App. 1982).

33. *Higgins Lake*, 662 N.W.2d at 396.

34. *Id.* at 403-04.

35. *Id.* at 405.

36. *Id.* at 404.

37. *Id.* at 405-08.

38. *Id.* at 407.

39. The director of Higgins Lake Property Owners’ Association (HLPOA), William Case, testified that “eventually there will be a much more tremendous impact on the lake and on the shoreline of the lake unless there are limitations of some type put on how much usage can develop at the various road ends.” *Higgins Lake*, 662 N.W.2d at 406. The court characterized such testimony as “speculative” and as addressing “concerns of future impact.” *Id.*

40. *Id.* at 407-08.

41. *Id.*

42. *Id.* at 407. The court of appeals focused on HLPOA president, Robert Frye’s definitions of “sunbathing,” “lounging,” and “picnicking” as prime illustrations of the “problems inherent in ‘framing and enforcing the order or judgment’” *Id.* at 407. The president’s definition of sunbathing as “lying on the ground or in a chair while tanning” or lounging “as passing the time of day in a singular location in a relaxed way

of an injunction as a remedy.⁴³ So as to not preclude any hope of the lakefront property owners from obtaining relief, the court stated that an injunction may be warranted if improper road end use continues.⁴⁴ However, the court backed away from a broad remedy by stating that such relief will require specific facts and that the court will not attempt to address every improper use that could arise.⁴⁵ The court's reluctance in treading between the rights of the public and lakefront property owners is evident from the courts statement that the public "right of access is paramount and should be the guiding principle in resolving future disputes concerning the use of the road ends."⁴⁶

III. ANALYSIS

Higgins Lake attempted to resolve long-standing property disputes but instead, the decision contributes to the mounting tension between lakefront property owners seeking to prevent improper use of road-ends and the public's desire to use such road-ends for recreational purposes beyond those of swimming, fishing, and the launching of boats.⁴⁷ Lakefront property owners "won" but they are left to wonder how they can remedy improper use of road-ends, perhaps a copy of the court's decision in *Higgins* posted at each road end?⁴⁸ Public users of road-ends "lost," but remain free to use road ends in the same manner they have previously used them without the threat of an injunction unless their use leads to "irreparable harm." The judicially created standoff will undoubtedly lead to further litigation between already acrimonious parties as lakefront property owners search for an effective way to enforce their property rights.

for over half an hour" apparently lack definitive substance to allow a court to frame an appropriate order enjoining such activity. *Higgins Lake*, 662 N.W.2d at 407.

43. *Id.* at 408 (asserting that injunctive relief would not prevent other individuals not named as defendants from engaging in improper road-end activities).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Higgins Lake Property Owners Ass'n v. Gerrish Twp.*, No. 262494, 262533, 262717, 2005 WL 2727702, at *1 (Mich. Ct. App. 2005) (holding order permitting property owner's association to post signs at road-ends informing public of restrictions on use to be within discretion of trial court).

A. Legislative Response

The *Higgins Lake* court provided some insight as to what course the parties should pursue by suggesting that the legislature provide a solution to control road-end activity.⁴⁹ In response, several bills have been introduced in the Michigan House of Representatives. One such bill, House Bill 4141 introduced in February 2003, sought to enumerate certain allowable uses of a “dedicated public access site.”⁵⁰ The bill defined a “dedicated public access site” as “public access to an inland lake or stream dedicated for use by the public by a written instrument recorded with the register of deeds.”⁵¹ The bill made it a misdemeanor punishable by fine for the following: the use of boat hoists, construction of docks, picnicking, sunbathing, lounging, and overnight mooring of boats.⁵² A safe harbor included in the bill permitted other uses only if “the dedication recorded with the register of deeds specifically provides for other uses.”⁵³ Unfortunately for lakefront property owners who supported the bill, a vote by the Michigan House of Representatives never occurred.⁵⁴ The most recent bill, House Bill 4464 introduced in March 2007, actively lobbied for by public users of road-ends would create a rebuttable presumption that the dedication of a road terminating at a lake includes the seasonal mooring of boats, sunbathing, and lounging.⁵⁵ A sister bill, House Bill 4463, would permit local municipalities to adopt an ordinance to allow the public to use road-ends for sunbathing and lounging.⁵⁶ The House of Representatives passed both

49. *Higgins Lake*, 662 N.W.2d at 408 n.11.

50. Mich. H.B. 4141, Regular Sess. (2003) (as introduced, Feb. 4, 2003), *available at* <http://www.legislature.mi.gov> (accessed from homepage by selecting “Bills” and then selecting “2003-2004” session and entering bill number “4141”) (last visited Nov. 14, 2009).

51. *Id.*

52. *Id.*

53. *Id.*

54. 89 MICH. HOUSE J. 2670 (2004), *available at* <http://www.legislature.mi.gov> (accessed from homepage by selecting “Journals” hyperlink; then select “2003-2004” session; enter journal date “12/02/04”) (last visited Nov. 14, 2009).

55. Mich. H.B. 4464, Regular Sess. (2007) (as passed by House, June 27, 2007), *available at* <http://www.legislature.mi.gov> (accessed from homepage by selecting “Bills” and then selecting “2007-2008” session and entering bill number “4464”) (last visited Nov. 14, 2009).

56. Mich. H.B. 4463, Regular Sess. (2007) (as passed by House, June 27, 2007), *available at* <http://www.legislature.mi.gov> (accessed from homepage by selecting “Bills” hyperlink; then select “2007-2008” session and entering bill number “4463”) (last visited Nov. 14, 2009).

bills⁵⁷ and the Senate referred the bills to the Committee on Government Reform and Operations.⁵⁸ While such efforts are commendable in their attempt to resolve long-standing disputes through public representatives instead of judicial intervention, the bills, if passed, would overturn a century of common law precedent, adversely affect property owner's rights and expectations, and be subject to constitutional limitations on the taking of property.⁵⁹ In light of this, neither of the bills were ever referred out from the committee, and silently slipped back beneath the water when the clock struck noon on December 30, 2008.⁶⁰

The failed effort to accomplish a legislative end around adverse judicial decisions illustrates the difficulty in fashioning an appropriate remedy. In the meantime, both parties remain adamant in their position.

B. Proving "Danger of Irreparable Harm"

The lakefront property owners in *Higgins Lake* succeeded in obtaining a declaratory judgment that shore activities such as sunbathing, lounging, and picnicking are prohibited at road-ends when such road-

57. 66 MICH. HOUSE J. 1019-23 (2007), available at <http://www.legislature.mi.gov> (accessed from homepage by selecting "Journals" and then selecting "2007-2008" session and entering journal date "06/27/07") (last visited Nov. 14, 2009).

58. 66 MICH. SENATE J., 1003 (2007), available at <http://www.legislature.mi.gov> (accessed from homepage by selecting "Journals" and then selecting "2007-2008" session and entering journal date "06/28/07") (last visited Nov. 14, 2009).

59. In an Opinion authored at the request of House Representative John Stakoe as to whether Michigan Legislature has the ability "to revisit" judicial determinations concerning the scope of permissible uses at road-ends, Michigan Attorney General Mike Cox concluded that:

[w]hile 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.

Mich. Att'y Gen. Op. No. 7211 (Jan. 30, 2008), available at <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10287.htm> (last visited Nov. 14, 2009). However, it is important to note that "Attorney General opinions are not binding on [a court]," but "they can be persuasive authority." *Lysogorski v. Bridgeport Charter Twp.*, 662 N.W.2d 108, 110 (Mich Ct. App. 2003).

60. 95 MICH. SENATE J. 2738 (2008), available at <http://www.legislature.mi.gov> (accessed from homepage by selecting "Journals" and then selecting "2007-2008" session and then entering journal date "12/30/08") (last visited Nov. 14, 2009). A bill pending at the final adjournment of the legislature's regular session does not carry over to the next session in an even numbered year. See MICH. CONST. art. 4, § 13.

ends are dedicated “for public use.”⁶¹ However, the property owner’s inability to prevent those activities from occurring or to obtain a satisfactory remedy when they occur virtually eliminates any value of the declaration obtained.

After considering several factors,⁶² the court denied the lakefront property owners injunctive relief due to a failure to establish the existence of irreparable harm.⁶³ The court appeared to express concern over the availability of a remedy for property owners by stating that, although the current situation did not warrant injunctive relief, such relief “may be warranted if impermissible use of the road ends continues.”⁶⁴ The court continued by stating that “two persons standing at a road end for a short period might not pose a problem, but a group of fifty persons that regularly congregates for hours may be a proper basis for an injunction.”⁶⁵ Accordingly, the court seems to state, albeit in dictum, that such a situation could suffice to establish irreparable harm to the lakefront property owners and justify a grant of injunctive relief.⁶⁶ The judicial proffer is merely for show as it is unlikely that a court faced with the situation supposed by the Michigan Court of Appeals would grant an injunction.⁶⁷

61. *Higgins Lake*, 662 N.W.2d 387.

62. The factors considered in determining the propriety of injunctive relief include:

(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.

Higgins Lake, 662 N.W.2d at 405-06 (citing *Kernen v. Homestead Dev. Co.*, 591 N.W.2d 369, 374 (Mich. Ct. App. 1994)).

63. *Higgins Lake*, 662 N.W.2d at 408. “Injunctive relief is an extraordinary remedy that courts normally grant when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury.” *Id.* at 405 (citations omitted).

64. *Id.* at 408.

65. *Id.*

66. *See id.* This statement further demonstrates the court’s efforts to attempt to carefully wade between the competing interests of the parties. While providing the legal determination that the lakefront property owners sought, the court fails to provide a remedy, thus satisfying the back lot property owners who seek to continue to use the road-end in ways that exceed the scope of the dedication. The court determined that evidence of “overcrowding,” road-end congestion, and use detrimental to the adjacent property owners use, enjoyment and property values did not rise to the level of irreparable harm. *Id.* at 406-07. But, the court suggested that fifty people occupying a road-end could create irreparable harm worthy of injunction. *Id.* at 408.

67. *See Douglas v. Harting*, No. 06-022350-CH, 2008 WL 5273425, at *5 (Mich. Ct. App. 2008) (reversing trial court’s finding of private nuisance by holding that lakefront

The court's judicial tip-toeing is also evident when considered in the context of prior holdings addressing injunctive relief. In addressing an easement dispute, the court of appeals held that "[w]hen an injury is irreparable, the interference is of a permanent or continuous character, or the remedy at law will not afford adequate relief, a bill for an injunction is an appropriate remedy."⁶⁸

The Michigan Supreme Court has also stated that an irreparable injury "need not be such as to render its repair physically [sic] impossible; but it is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages * * * due to the nature of the right or property injured."⁶⁹ Injunctive relief is an appropriate remedy for improper use beyond the scope of a dedication as damages at law would not provide adequate compensation. Furthermore, even if damages would be adequate, the nature of the injury does not readily lend itself to a pecuniary measurement of damages. Accordingly, the lakefront property owners in *Higgins*, per the Michigan Court of Appeals, must not have suffered *any* injury; otherwise, injunctive relief would be appropriate.⁷⁰ Admittedly, enjoining the named defendants from improperly using the road-ends would create a multitude of enforcement problems that weigh against granting such relief,⁷¹ but such difficulties do not justify a complete lack of remedy.

property owners failed to provide sufficient evidence that use of easement beyond scope of dedication resulted in *significant* harm required for private nuisance action).

68. *Schadewald v. Brule*, 570 N.W.2d 788, 796 (Mich. Ct. App. 1997) (citing *Soergel v. Preston*, 367 N.W.2d 366, 368 (Mich. Ct. App. 1985)); *see also* *Thermatool Corp. v. Borzym*, 575 N.W.2d 334, 338-39 (Mich. Ct. App. 1998) (stating that "[i]n order to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty. The injury must be both certain and great, and it must be actual rather than theoretical" (citation omitted)).

69. *Ainsworth v. Munoskong Hunting & Fishing Club*, 116 N.W. 992, 994 (Mich. 1908) (citation omitted).

70. *See Higgins Lake*, 662 N.W.2d at 407. Some lakefront property owners testified as to improper use resulting in lower property values. *Id.* Such claims do not support a showing of irreparable harm required for injunctive relief. *Kernen* 591 N.W.2d at 374 (denying injunction to prevent flow of wastewater over riparian landowner's property by stating that "other than general claims that the value of their property will be lowered in the eyes of prospective purchasers . . . plaintiffs presented no evidence that they will suffer any specific, let alone irreparable, harm to their property").

71. An injunction would only be enforceable against the defendants named in the action and would not enjoin the activities of other individuals not made a party to the litigation. *Higgins Lake*, 662 N.W.2d at 408.

C. Recreational Trespass as a Remedy

Despite the hurdles in obtaining injunctive relief, lakefront property owners have another avenue of relief available to limit improper use of road-ends under Michigan's Natural Resources and Environmental Protection Act (NREPA).⁷² In 1995, the Michigan legislature added Part 731 entitled "Recreational Trespass" to the NREPA.⁷³ The statute provides that "a person shall not enter or remain upon the property of another person . . . to engage in any recreational activity . . . on that property without the consent of the owner"⁷⁴ if "[t]he property is posted in a conspicuous manner against entry."⁷⁵ A person convicted of violating the statute is guilty of a misdemeanor punishable by imprisonment, fine or both.⁷⁶ The possibility of a criminal conviction provides a strong deterrent to help curb recreational use of road-ends that exceeds the scope of the grantor's dedication to the public.⁷⁷ While lakefront property owners adjacent to road-ends can attempt to seek solace through local law enforcement, of even greater interest is that the recreational trespass statute provides a private cause of action for property owners.⁷⁸ The property owner can seek the greater of \$250.00 or actual property damages, as well as actual and reasonable attorney fees.⁷⁹

Michigan's 48th Circuit Court, located in Allegan County, considered the applicability of recreational trespass to a road-end dispute in *Benninghoff v. Tilton*.⁸⁰ The plaintiffs in *Benninghoff*, consisting of

72. MICH. COMP. LAWS ANN. §§ 324.73101-.73111 (West 2008).

73. 1995 Mich. Pub. Acts no. 58 (codified as amended at MICH. COMP. LAWS ANN. §§ 324.73101-.73111).

74. MICH. COMP. LAWS ANN. § 324.73102(1) (West 2008).

75. MICH. COMP. LAWS ANN. § 324.73102(1)(b) (West 2008). The statute further provides that each posting must be at least fifty square inches with letters having a minimum height of one inch, and such signs "shall be spaced to enable a person to observe not less than 1 sign at any point of entry upon the property." *Id.*

76. MICH. COMP. LAWS ANN. § 324.73110(1) (West 2008) (providing for "imprisonment for not more than 90 days or a fine of not less than \$100.00 or more than \$500.00, or both"). The amount of fines can be increased when subsequent violations occur within three years of a previous violation. MICH. COMP. LAWS ANN. § 324.73102(2) (West 2008). The court may also order a convicted violator to pay for the costs of prosecution. MICH. COMP. LAWS ANN. § 324.73110(4) (West 2008).

77. However, criminal enforcement of the statute is at the discretion of local law enforcement and is likely to encounter the same resistance that local municipalities receive in attempting to enforce property rights. *See infra* Part III.D.

78. MICH. COMP. LAWS ANN. § 324.73109 (West 2008).

79. *Id.*

80. No. 06-39595-CH (48th Cir. Ct. May 3, 2007), available at <http://www.allegancounty.org> (accessed by selecting "Calendar" on left side of page;

property owners that lived near the road-end and used it for recreational purposes,⁸¹ sought, inter alia, declaratory relief from the Recreational Trespass Act.⁸² The court dismissed the plaintiff's argument that the act is limited to hunting and fishing on private property and held "[t]he act . . . expressly bars entry onto the land of another for any recreational activity without the consent of the owner."⁸³ Although the road is public, "the act allows the property owners [defendants] to consent to entry, and to place conditions on any consent given."⁸⁴ Accordingly, the court denied the plaintiff's request for declaratory relief with respect to the Recreational Trespassers Act and the property owners adjacent to the road-end would be able to initiate a cause of action against the plaintiffs for damages.⁸⁵ Although not binding precedent, the *Benninghoff* decision

then selecting "2007 Calendar"; then follow "May"; and select "Board of Commissioners" link on May 24, 2007).

81. *Id.* at 3.

82. *Id.* at 5.

83. *Id.*

84. *Id.* (citing MICH. COMP. LAWS ANN. § 324.73101(5) [sic]). The circuit court does not state the authority for its conclusion that the property owner adjacent to the road-end is entitled to the cause of action provided under the Recreational Trespass Act. However the opinion does state that the road was previously declared to be a public road pursuant to Michigan's Highway by User Statute (MICH. COMP. LAWS ANN. § 221.20 (West 2008)). *Benninghoff*, 06-39595-CH at 2. A road deemed to be public by the "highway-by-user statute creates an easement for public use in private property." *Minerva Partners, Ltd. v. First Passage, LLC*, 731 N.W.2d 472, 477 (Mich. Ct. App. 2007). "Easements do not carry title to the land over which they are exercised and do not dispossess the landowner of its property." *Id.* at 478 (citing *Rusk v. Grande*, 52 N.W.2d 548, 550-51 (Mich. 1952)). This fact creates some doubt as to whether a court would be willing to allow a property owner adjacent to a dedicated street to assert a cause of action under the Recreational Trespass Act. The defendant property owners in *Benninghoff* clearly retain title to the fee of the land burdened by the public's easement, but the same would not necessarily be true for the plaintiff property owners in *Higgins Lake* because "[t]he nature of the real property interest passing from the grantor to the government unit depends on the method of dedication." *Minerva*, 731 N.W.2d at 477 (citing *Kalkaska v. Shell Oil Co.*, 446 N.W.2d 91, 93 n.11 (Mich. 1989)). When the road-ends under consideration by the *Higgins Lake* court were dedicated, the Plat Act then in effect provided that such dedications are "deemed a sufficient conveyance to vest the fee" to the appropriate municipality "in trust to and for the uses and purposes therein designated, and for no other use or purpose whatever." *Jacobs*, 502 N.W.2d at 383-84 (citing 1887 Mich. Pub. Acts 309). "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." *Jacobs*, 502 N.W.2d at 384 n.3 (citing *Backus*, 13 N.W. at 384). Although the adjacent property owners do not hold title to the land subject to public use, the rights of the municipality are limited by the extent of the dedication. Accordingly, the Recreational Trespasser Act could provide the adjacent property owners a cause of action to protect the property interest not held by the municipality.

85. *Benninghoff*, 06-39595-CH, at 5.

provides an interesting twist in lakefront property owners' quest to limit improper public use of road-ends.

The Recreational Trespass Act could provide an effective tool to prevent improper recreational use of road-ends. Absent evidence of greater property damage, which has proved to be difficult at best to gather, assemble, and prove, property owners could obtain statutory damages of \$250.00 *and* reasonable attorney fees against any person who violates the statute.⁸⁶ This would provide effective relief and deter potential violators. The judicial concerns raised regarding injunctive relief would dissipate. Property owners would be able to ensure that their property rights remain protected against any and all persons who violate the statute.⁸⁷ Irreparable harm would no longer rule the day and would no longer inhibit lakefront property owners from protecting their valuable property rights. If illegal use results in damages greater than \$250.00, the property owner could recover the excessive amount. Having an effective remedy that provides adequate compensation will allow lakefront property owners to protect their interests in a reasonable manner. If the property owner determines the greater effort required to protect the road-end from improper use under the Recreational Trespass Act is not worthwhile, the proper balance will be struck and the true value of the right to be protected will be ascertained. Failure to pursue the effective remedy would essentially be an acknowledgement that the property rights being asserted were not that valuable, or that the harm resulting was really in fact not that substantial. In either event, the availability of an effective and adequate remedy is instrumental in settling the disputes that have continued for so long.⁸⁸ Perhaps it appears that posting the

86. See MICH. COMP. LAWS ANN. § 324.73109 (West 2008).

87. This obviates the Michigan Court of Appeals' concern that by enjoining named defendants, it would only make it easier for other public users to engage in the same activities and create even greater congestion at the road-ends. See *Higgins Lake*, 662 N.W.2d at 408.

88. See Letter from Clifford Bloom, Attorney for Michigan Waterfront Alliance ("MWA") and Michigan Lake & Stream Associations, Inc. (ML&SA) to Kevin Elsenheimer, Michigan State Representative (Oct. 20, 2006), at 2, *available at* <http://www.mwai.org/Newsletters/2006%20November%20Newsletter-Revision.pdf> (last visited Nov. 14, 2009) (stating that MWA and ML&SA's "desire to allow police officers, sheriff's deputies, and peace officers to enforce the longstanding common law usage rights of public road ends (as confirmed repeatedly by the Michigan appellate courts) by being given the ability to issue simple civil infraction tickets for violations"). MWA is "a nonprofit corporation formed to protect, preserve and promote the wise use of inland waters of the State of Michigan." Michigan Waterfront Alliance, Inc., *available at* <http://www.mwai.org> (last visited Nov. 14, 2009). Michigan Lake & Stream Associations, Inc. was organized in 1961 as "a non-profit corporation comprised of individuals and associations who desire to conserve and improve Michigan's lakes, rivers and streams, and their watersheds, and the Great Lakes, and to protect and promote the

court's decision in *Higgins* at the road-end is a step towards resolving the issue after all.

D. Local Enforcement of Property Rights

Beyond the adjacent lakefront property owners and the public users, local municipalities have played a significant role in the on-going battle over road-ends. Many of the cases involving road-ends include a local municipality as a party due to the municipalities' interest as holders of the fee interest in the road.⁸⁹ *Jacobs*, the seminal case addressing road-end disputes, arose from a township ordinance that permitted the public to use 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."⁹⁰ Such ordinances, in some views, are considered the appropriate manner in which road-end disputes should be handled due to the local concerns involved and the impact such decisions will have on the local community.⁹¹ However, local decision-making can lead to multiple problems.

One issue is that a local municipality may have the best of intentions but may inadvertently disrupt century old property law, upon which its residents have relied on with investment-backed expectations.⁹²

Another potential and actual problem of local regulation is the divisive nature of local politics. Granting control over disputed road-ends to a local municipal board can lead to partisan decision-making. Furthermore, even if a municipality attempts to regulate even-handedly and within the bounds of established property law, they are subject to recall by those who oppose their decision-making. This is exactly what occurred when the Lyons Township Board barred boat moorings at road-ends.⁹³ Upon passing the ordinance, a recall effort was initiated by backlot property owners and the township supervisor, treasurer, and a board

wise use of Michigan's Water resources." Michigan Lake & Stream Associations, Inc., available at <http://www.mlswa.org> (last visited Nov. 14, 2009).

89. See *supra* note 17 (discussing property interests when road dedicated in plat "for the use of the public").

90. *Jacobs v. Lyon Twp.*, 448 N.W.2d 861, 863, *vacated*, 455 N.W.2d 715 (Mich. 1990).

91. See Joel Sheltrown, Michigan State Representative, *Frequently Asked Questions About Road Ends*, available at <http://103.housedems.com/road-ends> (last visited Nov. 14, 2009) (discussing importance of local governments' ability to regulate uses at road-ends because local governments' "know what is needed to maintain economic growth and strength, historical usage, and simply what is best for the majority of their constituents").

92. See Mich. Att'y Gen. Op., *supra* note 59.

93. See Guthrie & Lee, *supra* note 7.

member were successfully recalled.⁹⁴ Such events make it very unlikely that a local municipality will initiate measures to prevent improper use of road-ends by ordinance. Even more unlikely is a local municipality authorizing the resources that would be necessary to enforce violations under the Recreational Trespass Act. Accordingly, local municipalities cannot be expected to protect the rights of lakefront property owners and ensure that road-ends are not used beyond the scope of their dedication.

E. Judicial Taking

In the absence of other avenues available to remedy the public's improper use of road-ends beyond the scope of the dedication, lakefront property owners should seek compensation for the taking of private property. *Higgins* recognizes that public use of road-ends is limited by the scope of the dedication, and in instances where the dedication involves a road terminating at a navigable body of water, there is a presumption that nothing more than access was intended by the grantor.⁹⁵ Despite evidence of the ends being used for impermissible purposes, the court found that injunctive relief was not warranted. The Fifth Amendment of the United States Constitution, applied to the States through the Fourteenth Amendment, provides in part: "nor shall private property be taken for public use, without just compensation."⁹⁶ The Michigan Constitution provides: "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."⁹⁷

Higgins implicates an unconstitutional taking because private property was taken for public use without just compensation. The right to ensure the use of the dedication does not exceed its scope is one right, among many, in the bundle of rights held by owners of property adjacent to a road-end. A property owner's inability to enforce that right or obtain an adequate remedy when it is violated essentially eliminates that right. By holding that property owners are not entitled to injunctive relief for failure to establish irreparable harm, the judiciary is essentially enlarging the scope of the dedication granting the road-end "for the use of the

94. *Id.*

95. *Higgins Lake*, 662 N.W.2d at 402 (citing *Thies*, 380 N.W.2d at 470; *McCardel*, 273 N.W.2d at 6; *Backus*, 13 N.W. at 384).

96. U.S. CONST. amend. V.

97. MICH. CONST. art. 10, § 2.

public.”⁹⁸ The public undoubtedly is the beneficiary of the enlargement of the dedication because despite the declaratory judgment against improper use, the property owner has no means to remedy such use and the public is free to carry on as they previously have. Also without doubt, the lakefront property owners did not receive any compensation for their property rights that were effectively taken by the decision.⁹⁹

There are various analyses courts use to determine whether there has been a taking, but they all have in common one feature: “each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.”¹⁰⁰ The fact that the government entity in this situation is the judiciary should not alter a Takings analysis in any significant way. The essential facts remain that (1) private property rights (2) were taken for public use (3) without just compensation. By seeking compensation under the Takings Clause, lakefront property owners can force the hand of the judiciary to provide an adequate remedy in one form or another.

IV. CONCLUSION

As more people seek to avail themselves of the beauty that Michigan’s inland lakes have to offer, disputes over the proper use of road-ends will continue. Judicial decisions have failed to provide the interested parties with a sufficient solution resulting in continued efforts by both parties to pursue their end. Members of the public that traditionally used road-ends for more than ingress and egress to the adjoining lake will continue to seek what they consider their “rights” despite judiciary holdings to the contrary. Lakefront property owners relying on established property laws will continue to seek avenues of relief to ensure their property rights are not infringed upon by individual members of the public. Only when lakefront property owners are able to secure an adequate remedy for violation of their property rights, whether

98. See *Palazzolo*, 533 U.S. at 617 (stating that in regulatory takings “government actions do not encroach upon or occupy the property [but] affect and limit its use to such an extent that a taking occurs” (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922)); *K & K Constr., Inc. v. Dep’t of Natural Res.*, 575 N.W.2d 531 (Mich 1998), *cert. denied*, 525 U.S. 819 (1998) (holding a “taking” of a person’s property occurs when a government “goes too far” in regulating that property).

99. See *Adams Outdoor Advertising v. City of East Lansing*, 614 N.W.2d 634 (Mich. 2000) (discussing proper analysis for takings under United States Supreme Court precedent).

100. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005).

in the form of an injunction, fines, or compensation, will road-end disputes retreat back into the waters from which they arose.

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