ATTORNEY WRITES

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ASSOCIATIONS – WHAT GOOD ARE THEY?

No, this column does not bash lake associations! What is the truth about lake associations as entities—are they a panacea for all lake issues or, on the other hand, are they powerless shells? Typically, the truth usually lies somewhere in between.

There are generally two types of lake associations in Michigan—some that I call "strong" lake associations, and others which I have termed "weak" associations. Strong lake associations typically fall into one of two categories. First, there are some lakes (particularly artificially-created lakes) whereby all of the lakefront properties are governed by a comprehensive set of deed restrictions or restrictive covenants. In some of those cases, those deed restrictions create a mandatory lake association and give it extensive powers. The second type of strong lake association involves an association created pursuant to one of Michigan's ancient summer resort statutes. Those statutes vest a properly-constituted summer resort association with quasi-municipal powers. Duly-constituted summer resort associations are actually relatively rare. Strong lake associations probably account for less than 5% of the total number of lake associations in Michigan.

Most lake associations in Michigan are "weak" associations. That is, riparian property owners join on a voluntary basis and the only "powers" held by such associations are those which are voluntarily consented to by the members. Voluntary lake associations are of two types—incorporated and unincorporated. Incorporated voluntary lake associations are usually nonprofit corporations set up pursuant to the Michigan Nonprofit Corporation Act, being MCLA 450.2101, *et seq.* A corporate entity actually exists which, theoretically, has a life span and existence in addition to and apart from its membership. If a lake association has not been incorporated, it is simply a voluntary non-entity which essentially exists in name only.

Depending upon how they are set up, strong associations often have dues making and enforcement powers, while weak associations can only collect dues on a voluntary basis. I am frequently asked whether there is any way to make dues paying mandatory in a weak association. The answer is normally "no," unless the voluntary association is able to prompt the creation of a summer resort association or convince all riparian property owners on the lake involved to sign a comprehensive set of new deed restrictions. Either scenario is unlikely. If the bulk of the association's dues goes for aquatic weed treatment purposes, a weak association can help prompt the local municipality to set up a special assessment district for weed treatment purposes. If a special assessment district is created, the municipality collects mandatory assessments which are akin to dues (except that the money is collected and spent by the local municipality).

Although incorporation of a weak association is not mandatory, it is advisable. Incorporation formalizes the existence of a lake association and helps insulate officers and members against potential personal liability (although such a shield is not absolute). Incorporation also has other potential benefits including the ability to obtain liability insurance, making it easier to institute court action should the need arise, and creating "standing" in administrative agency proceedings (like the Michigan DEQ).

For additional information regarding incorporating voluntary lake associations, please see my earlier column entitled "Incorporation" in the February 1997 issue of the *Riparian Magazine* (or on the internet at www.mi-riparian.org)

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As most readers already know, on November 29, 2005, the Michigan Court of Appeals issued its long-awaited opinion in the appeal of the *Nestlé/Ice Mountain* water extraction case. The decision was not a clear cut victory for either *Nestlé* or the riparian property owners who instituted the lawsuit. While the Court of Appeals partially upheld the decision of Judge Lawrence Root from the trial court below (and held that *Nestlé* could not pump as much water as it desired from the ground), it also held that Judge Root applied the wrong test. The Court of Appeals remanded the case back to the trial court for a redetermination of the issues based on the correct standard. Although the Court of Appeals requested that Judge Root come out of retirement to hear the case on remand, he declined to do so and the case on remand was reassigned to a judge from an adjoining county, Kent County Circuit Court Judge Dennis Kolenda. Everyone is awaiting what Judge Kolenda will do on remand. Nevertheless, it is highly likely that regardless of what Judge Kolenda decides, the matter will almost certainly go back up to the Court of Appeals and will eventually reach the Michigan Supreme Court.

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In addition to being on the *Riparian Magazine*'s website, all of the columns and articles I have authored for this magazine over the past decade are also on my website (together with other useful information regarding water law)—just go to www.lwr.com, click on "attorneys," click on my name, and click either "publications" or "Michigan appellate cases."