

WHAT RIPARIAN PROPERTY OWNERS CAN DO IF THEIR MUNICIPALITY HAS NO LAKE ACCESS REGULATIONS

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Hopefully, your municipality has comprehensive lake access regulations. Typically, such rules take the form of so-called “anti-keyhole” or “anti-funnel” development regulations contained in the municipal zoning ordinance or, alternately, comprehensive boat launching and mooring regulations adopted in a general police power (i.e., non-zoning) ordinance. If your municipality has not enacted such regulations, the riparian property owner (“riparian”) still does have limited tools available to fight unreasonable proposed funnel developments. Of course, the first thing a riparian should do in such a situation is to band together with other lakefront property owners and urge the local municipal government to enact comprehensive lake access regulations as soon as possible. Until such regulations can be adopted, riparians have the following options:

1. The Riparian Rights Doctrine

Absent lake access regulations or even without a zoning ordinance at all, riparians can sometimes fight lakefront developments by utilizing the “riparian rights” or “reasonable use” doctrine. Michigan common law indicates that a person or entity cannot utilize his or her riparian rights in such a fashion so as to unreasonably interfere with or burden the rights of other riparian property owners. Unfortunately, what constitutes “unreasonable interference” with other riparian property rights is not based on any specific numerical formula, but rather must be tested on a case-by-case basis. Therefore, a single riparian property owner or group of riparians often have to initiate litigation to stop an unreasonable development. Such lawsuits can be very expensive and it is difficult to predict where a particular court will draw the line.

2. Single-Family Residential Zoning Restrictions

One potent weapon which is often overlooked by municipalities and even riparians where funnel developments are involved is the restrictive nature of the single-family zoning district. Many lakes are located in zoning districts labeled as single-family residential, residential, lake residential or similar designations which basically only permit single-family residential uses. In such districts, only the uses listed are allowed “as of right.” In order to commence a use not listed in the zone, a developer would have to obtain a rezoning, a variance or some other type of special approval as designated in the zoning ordinance.

Some riparians in the past have argued that “funneling” the owners of backlots across a single-family residential zoning district and onto a lake does not constitute a single-family use, but rather is akin to a multi-family or even commercial use. The Michigan Court of Appeals in the case of City of Au Gres v Walker, (unpublished - Case No. 140101 - decided on February 11, 1993), held that funneling backlots across a single-family zoning district onto a river violated the single-family residential zoning designation, even though the municipality did not have an anti-funneling ordinance per se. While that case was unpublished and as such does not constitute binding precedent on the Michigan trial courts, it nevertheless offers a strategy for riparians to use and serves as a good indication of how the Michigan courts would probably rule in such a situation. Also, the Michigan Supreme Court, in the case of Edgewood Park Ass'n v Pernar, 350 Mich 204 (1957), held that “funneling” backlot property owners across a property that was deed restricted for single-family residential purposes constituted a violation of those

deed restrictions. While that case involved private deed restrictions and not municipal zoning regulations, the Edgewood Park case could be argued by analogy.

Where a municipality does not have definitive lake access regulations, riparians should pay particularly close attention to the specifically listed permitted uses in the zoning district involved. Michigan courts have held that if a use is not specifically listed as “permitted” in a given zoning district, the zoning ordinance involved normally does not permit that use in that zone. As alluded to above, riparians should argue that funnel developments, marinas, renting of boat docks, boat ramps, etc., are not permitted uses within a single-family zoning district unless specifically listed. It is also sometimes possible to persuasively argue that marinas, boat launches, rental of boats, etc., are not permitted in a commercial zoning district where the zoning district involved does not expressly list those uses as permitted. If the uses are not listed, in theory the applicant will either have to obtain a rezoning, a variance or some other special type of zoning approval, which will normally involve public hearings and considerable citizen input.

If your municipality does not have a zoning ordinance or if the existing zoning ordinance is weak on lake issues (i.e., lack of anti-funneling regulations, zoning districts which expressly permit intensive lake uses or the ordinance is poorly drafted), generally the only way to attempt to stop a funnel development or intensive lake use is to utilize the riparian rights doctrine mentioned above. Riparians can also sometimes use state legislation directly or attempt to enlist the assistance of the Michigan Department of Natural Resources (soon to be split into two agencies—the Department of Natural Resources and the Department of Environmental Quality) with regard to possible side issues such as the Michigan Wetlands Protection Act, the Inland Lakes and Streams Act, and other environmental legislation.