ATTORNEY WRITES

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NO MORE EXCUSES FOR MUNICIPALITIES!

In the August 2001 issue of *The Riparian*, I wrote a column entitled "The Top Ten Excuses—Are You Kidding?" While some townships, cities, and villages with lakes have been very progressive when it comes to protecting their lakes by adopting reasonable lake access regulations, other municipalities continue to make excuses for doing nothing.

Municipal zoning regulations which limit and regulate the ability of developers to give lake access to new lots and parcels located away from a lake have long been upheld by the courts in Michigan. These zoning regulations are sometimes referred to as "anti-funneling" or "anti-keyhole" regulations. No less an authority than the Michigan Supreme Court in *Hess* v *West Bloomfield Township*, 439 Mich 550 (1992), upheld anti-funneling regulations so long as they are reasonable. Since then, anti-funneling regulations have been upheld against attack from developers by numerous trial courts and on several occasions by the Michigan Court of Appeals.

Recently, the Michigan Court of Appeals issued another landmark case in this area in *Yankee Springs Township* v *Fox*, 264 Mich App 604 (2004). In that case, the Court of Appeals upheld an anti-funneling regulation which required at least 70 feet of frontage on a lake for each new off-lake lot or dwelling unit. The court also obliterated several longstanding myths which are often perpetuated by backlot owners and even some municipalities. Those myths are as follows:

1. Myth —A municipality cannot adopt a valid anti-funneling regulation if the lake being governed is located in more than one municipality.

The Court of Appeals flatly indicated that this is false. Of course, a municipality can only regulate lake frontage located within the municipality involved, but that is often still very helpful. This has always been a particularly silly myth, since if it were true, a municipality could never adopt a zoning ordinance unless all adjoining municipalities also have zoning regulations identical to the first municipality. For example, suppose a main highway traverses two adjoining townships. One township has zoning regulations and the other does not. Just because one of the townships does not have any regulations limiting commercial development on its portion of the highway does not mean that the other township cannot sensibly regulate commercial development along its portion of the same highway.

2. Myth—Anti-funneling regulations cannot or should not be adopted where a lake has a public access site.

This myth was also shattered by the Court of Appeals in *Yankee Springs Township*. Just because a lake might have some existing recreational conflicts or overcrowding problems due to a public access site or existing funnel developments does not mean that the municipality involved cannot or should not adopt anti-funneling regulations to prevent the creation of future keyhole developments which will make the existing problems worse. To believe in this myth is

akin to arguing that zoning regulations should never be adopted (or ever be made more strict) where existing development problems already exist in a community—it is like one throwing up their hands and declaring that since there is already a problem or potential problem with development on the horizon, the horse is already out of the barn and the municipality should just give up.

3. Myth—Anti-funneling regulations constitute a "taking" or violate substantive due process.

In *Yankee Springs Township*, the Court of Appeals held that the ordinance (which required at least 70 feet of frontage for each new dwelling which will access the lake) was reasonable and did not constitute a taking. The court pointed out that protection of natural resources such as lakes is a reasonable governmental interest. Furthermore, the court noted that by limiting the number of dwelling units that have lake access, anti-funneling ordinances curtail lake congestion, pollution and the risk of boating accidents by cutting down on overuse.

4. Myth—Anti-funneling regulations which do not regulate all types of lake access sites and properties are invalid.

The court also rejected this falsehood. Even if only certain types of lake access devices or situations are covered, such regulations are still reasonable and rationally-related to the goals of the ordinance of reducing lake congestion, lowering the risk of accidents on the lake and preserving the lake.

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Anti-funneling zoning regulations were also upheld by the Michigan Court of Appeals in the unpublished case of *Jones* v *Genoa Township* (decided on October 25, 2004 – Case No. 231537). In *Jones*, the Court of Appeals easily affirmed and applied the anti-keyhole regulations contained in the Genoa Township Zoning Ordinance.

In addition to anti-funneling or lake access regulations in municipal zoning ordinances being consistently upheld by the courts in Michigan, the courts have also validated nonzoning or "police power" ordinances which regulate lake structures and activities such as docks, boat launching, the number of boats moored at a property, and similar matters. See *Square Lake Hills Condo Association* v *Bloomfield Township*, 437 Mich 310 (1991). It is not uncommon for a municipality to adopt both anti-funneling regulations in its zoning ordinance and to also enact a complementary police power ordinance regulating docks, boat launching, and similar activities. Michigan municipalities also have full legal authority to adopt ordinances which regulate the use of road ends at lakes, which can include the ability to ban dockage and permanent boat mooring, littering, boisterous activity, and similar matters at road ends. See *Jacobs* v *Lyon Township*, 199 Mich App 667 (1993) and *Robinson Township v Ottawa County Board of Road Commissioners*, 114 Mich App 405 (1982). Finally, now that municipalities can adopt civil infraction procedures for enforcing zoning ordinances and other ordinances by means of simple tickets, it is easier and cheaper for a municipality to enforce these types of ordinances.

For a more in-depth discussion of municipal lakefront legal issues and other riparian matters, please also see the article entitled "*An Overview of Lakefront Development Legal Issues*" by this author which appeared in the October 2003 issue of Michigan Planning & Zoning News. That article is also reprinted on the ML&SA website at www.mlswa.org.

Based on the above, municipalities no longer have any legitimate excuses (not that they ever did!) for not adopting the necessary ordinance provisions to protect lakes within their jurisdiction.