

MAINTAIN, IMPROVE AND DEVELOP LAKE MITCHELL

The intent of this paper is to assist the Lake Mitchell Improvement Board (Board) to understand that the Camp Torenta Canal (Canal) is an **inherent part** of Lake Mitchell. Further, that the Board is not fulfilling its obligation to the public if the Board considers or treats the Canal the same as the Board treated Franke Cove (Cove). This paper does not intend to address how the Board should consider or treat the Cove.

ISSUE: Should the fabricated creation of the Canal have **any** influence on how the Board considers or treats the Canal? No, the fabricated aspect is not relevant.

The Canal is an integral part of Lake Mitchell. The Canal is publically navigable water abutted by both public and private landowners. The Public's unrestricted water and land access to and ability to navigate the Canal are the deciding facts which mandate that the Canal be considered and treated as an integral and inherent part of the public inland lake known as Lake Mitchell.

The Canal's diverse nature of abutting land owners that are both public and private adds stability to the Canal's status as an integral part of Lake Mitchell (the Lake) and as being public water.

THE BOARD HAS STATUTORY AUTHORITY:

The Board received its authority and obligation from Act No. 59 of the Public Acts of 1995; MSA 324.30901 etseq. (the Act).

RELEVANT PROVISIONS OF ACT NO. 59 OF THE PUBLIC ACTS OF 1995:

Sec. 30901. As used in this part:

- (a) "Benefit" or "benefits" means . . . benefits that result from elimination of pollution . . . and . . . elimination of water conditions that jeopardize the public health or safety; increase of the value or use of lands and property arising from improving a lake or lakes as a result of the lake project and the improvement or development of a lake for conservation of fish and wildlife and the use, improvement, or development of a lake for fishing, wildlife and the use, improvement, or development of a lake for fishing, wildlife, boating, swimming, or any other recreational, agricultural, or conservation uses.
- (b) "Inland lake" means a public inland lake or a private inland lake.
- (c) "Interested person" means a person who has a record interest in the title to, right of ingress to . . . a piece or parcel of land that would be affected by a permanent change in the bottomland of a natural or artificial, public or private inland lake . . .
- (d) "Local governing body" means the legislative body of a local unit of government.

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(g) "Public inland lake" means a lake that is accessible to the public by publicly owned lands or highways contiguous to publicly owned lands or by the bed of a stream . . .

Sec. 30902. (1) The local governing body . . . upon its own motion . . . for the protection of the public health, welfare, and safety and the conservation of the natural resources of this state or to preserve property values around a lake, may provide for the improvement of a lake, or

adjacent wetland, and may take steps necessary to remove and properly dispose of undesirable accumulated materials from the bottom of the lake or wetland by dredging, ditching, digging, or other related work.

(2) . . . the local governing body . . . shall set up a lake board . . . that shall proceed with the necessary steps for improving the lake . . .

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Sec. 30908. The lake board . . . shall determine the scope of the project and shall establish a special assessment district, including within the special assessment district all parcels of land and local units which will be benefited by the improvement of the lake. . . .

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Sec. 30911. The county board of commissions may provide up to 25% of the cost of a lake improvement project on any public inland lake.

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Sec. 30914. . . . the lake board may provide that the assessments be payable in 1 or more approximately equal annual installments, not exceeding 30. . . . installments shall be due at intervals of 12 months from the due date of the first installment

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Sec. 30921. The governing body of any . . . municipalities, school districts, townships, or counties, whose lands are exempt by law, may by resolution agree to pay the special assessments against the lands . . . (Added to enlighten Mr. Solomon concerning one of his responses to Rex Barker at the June 28, 2014 Board meeting.)

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Sec. 30924. (1)

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(2) The lake board may contract or make agreement with the federal government or any agency of the federal government whereby the federal government will pay the whole or any part of the costs of a project or will perform all or any part of the work connected with the project. . . .

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FACTS:

The origination of the canal connecting Lake Mitchell to Lake Cadillac and the origination of the Camp Torenta Canal are nearly identical. The Mitchell to Cadillac connecting canal started as a stream of water flowing between those two lakes. Man fabricated that stream of water into a canal. Some people believe the Camp Torenta Canal started as a stream of water flowing from wetlands at the dead-end of the Canal towards the Big Cove of Lake Mitchell. Leo Dunbar fabricated that stream of water into the Canal on the exact course of that original stream. The origination of the Canal stream logically concludes from at least six facts. (1) The culvert under Elm Boulevard next to Roy Nichol's property is evidence of the continued flow of wetlands water into the Canal. (2) Lot lines of the Manistee National

Forest and Cadillac School District properties about one-half of the North side of the Canal, these public property lot lines existed before Mr. Dunbar fabricated the Canal, and for obvious reasons Mr. Dunbar could not either dredge or dump upon those public properties. (3) A conversation between Rex Barker and Mel Parker before his death informed Barker that Parker and his wife (Deloris) were the first property owners in the Hide-Away-Subdivision. (4) Mr. Parker also advised that he and his wife (who still resides on West Lake Drive) were the original owners of Barker's lot 40 and that lot 40 was a wetland filled in by Mr. Dunbar's dirt from digging the Canal. (5) When digging on lot 40 it is obvious that black dirt of some depth is on top of gravel and dirt. (6) Lots 39 and 40 are the lowest existing pieces of property in the Hide-Away-Subdivision.

Leo Dunbar dredged the Canal to a depth of 7 to 9 feet deep. In 1990, fishing boat sonar revealed the Canal's springtime depth in front of 311 W. Lake Drive was 5 feet deep. In early June 2014, fishing boat sonar showed that depth was only one and a half feet deep. Most of the Canal has not filled in with dirt, sand, wood, rock, or other solid material. The Canal is filling with decayed vegetation. A person can stand up in the Canal only near its edges. The middle is silt where a person sinks rapidly without any footing as if standing in quick sand.

The Canal and Hide-Away-Subdivision existed for approximately 30 years before the Board received its authority and obligation by enactment of Act No. 59 of the Public Acts of 1995. Mr. Dunbar's dredging was at least 50 years ago and its effect lasted 50 years.

The public has unlimited access to the Canal without trespassing upon any private land. The public has used the Lake's public boat launches for fishing, boating, swimming, or other recreational use of the Canal. The public has crossed the Manistee National Forest's and the Cadillac School District's Canal property both on foot and by motorized vehicles to use and enjoy the Canal.

Both the creation of the Canal and the public and private mixture of its abutting landowners are substantially different from that of Franke Cove. Likewise, the dredging of solid material from the Cove is not the same in the Canal where the problem is decaying vegetation.

Fish from Michigan fish hatcheries are in the Lake at public expense. In the past, the Canal provided bedding for walleye. Every year, Bob Lothian, who owned property on the Canal in the early and mid-1990, caught one or two legal size walleye directly from the shore of his Canal property on the last Saturday and Sunday in May. The public has the right to continue to fish for walleye in the Canal. It has been many years since a person has caught a legal size or any walleye in the Canal.

The public uses the Canal. Bass tournaments use the Canal. Sightseers use the Canal because it is a unique attraction of the Lake. The public use the Canal to canoe, kayak, and fish, or for other recreational uses. Many Lake Frontage owners use and enjoy each other's areas of the Lake.

The loss of access out of or into the Canal's navigable public waters now occurs every August. By early or mid-August, the public has experienced jeopardy to the health, welfare and safety of their boat motors and therefore the health, welfare and safety of the boat's passengers because of the increasing unnavigable waters of the Canal from its accumulation of decaying vegetation.

The natural result of not treating all frontage of the Lake fairly and equally will result in the loss of Canal access and a reduction in Canal property values. Canal private property owners have already been thinking and talking about how their property values will decrease if the Board continues to ignore

the navigability of the Canal. When a property owner accepts a buyer's fair market offer for his or her property and that offer is less than an earlier year's assessed value of that property, the result is a subsequent lower property assessment by the township assessor. Lower assessments cause both the relevant township and county to receive less revenue.

The Board is learning that weeds are not the only thing that interferes with or prevent the public's fishing, boating, swimming, or other recreational use of the Lake.

Further, long before enactment of the Act, Mr. Dunbar dredged and enlarged the small cove of the Lake by eliminating wet lands unsuited for housing structures. Mr. Dunbar's dredging helped create some of the current lake front properties along the west shore of the Peninsula. He also dredged to create certain properties around the Brandy Creek outlet into small cove. In fact, an old map of the Lake shows a considerable amount of the Lake's original wet-land-lake-frontage is now solid fabricated lake-frontage to support the housing structures that currently exist on those frontages.

There are more fabricated public inland lakes and waterways in this State than just the Canal. Along with the canal between our two lakes is the Hodenpyl Dam Pond by Mesick, the Hardy Dam Pond, and Sessions Lake west of Lansing, and Lake Isabella west of Mount Pleasant as examples.

LAW:

The law of this State and our Country concerning what is or is not public water settled many years ago and seems to be common knowledge in many communities. The law is distinctly stated in State ex rel. State Game Commission v Red River Valley Co., 182 P. 2d 421, N.M. 207, 1945, on page 215 as follows:

"So far as non-navigable streams are concerned, the common law rule, seemingly without exception, is that the one owning both banks of a stream likewise owns the entire bed thereof, the waters are private waters, and the owner has the exclusive right to fish therein. The same rule is sometimes applied to navigable streams, but it is conceded that the weight of authority is, rather, that the bed and waters of a navigable stream are the property of the public with adjoining land owner's having no exclusive right to fish therein. See Kinney on Irrigation and Water Rights, 2d Ed., Vol 1, where it is said:

'In fact, under a strict construction of the common law rule, the right to fish in, or to hunt on certain water, in the absence of grants or prescription, is in harmony with the ownership of the soil under those waters; if the title to the soil is in the State, the right to fish or hunt is in the public; but upon the other hand, if the title to the soil is in the riparian owner, he has this right.'

"See also 36 C.J.S., Fish, sec 4, p 833; 22 Am Jur., page 378; Millsbaugh v Northern Indiana Public Service Co., 104 Ind. App. 540, 12 N.E. 2d 396; Griffith v Holman, 23 Wash. 347, 63 P. 239, 54 L.R.A. 178, 83 Am. St. Rep. 821; Herrin v Sutherland, 241 P. 328, 42 A.L.R. 937; Hood v Murphy, 231 Ala. 408, 165 So. 219; People v Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am. St. Rep. 183; Winans v Willetts, 197 Mich. 512, 163 N.W. 993."

The State ex rel. State Game Commission Court, on page 216 of its opinion, also said:

"As a general rule, the test as to the public right of fowling, hunting, and trapping is the public or private ownership of the soil beneath the waters.' 24 Am. Jur. 378."

DISCUSSION:

The Canal is a public inland lake resource of the Lake. The liquid or frozen waters of the Canal are clearly navigable from a public boat ramp or by crossing public land. The Canal shoreline is both public and private. This access and mixture of ownership mandates that the State of Michigan owns the soil under the Canal. The Act regulates the soil under the water in the Canal. The Board has the authority and obligation to maintain the Canal under the Act. In fact, the Board also has the authority and obligation under the Act to develop and improve the Canal.

The Board is obligated under the Act to protect the public's health, welfare, and safety regarding the Lake. The Board is to conserve the natural resources of this state found in the Lake or to preserve property values around the Lake.

The Board fulfills part of its obligation by attempting to eradicate the milfoil in the Lake. Milfoil causes the public's navigable, fishing, and recreational use of the Lake to become extinct or at least problematical in parts of the Lake. The silt in the Canal also causes the public's navigable, fishing, and recreational use of the Canal to become extinct or at least problematical in most of the Canal. The fact that the Canal's problem is the accumulation of decaying vegetation instead of milfoil is not relevant. The benefits to the public's health, welfare and safety are identical regardless whether it is milfoil or decaying vegetation that causes the loss of the public's right to navigate, fish, or have recreational use of the Lake's water resources.

The Board has suggested that the Canal frontage property owners dredge the Canal at their own expense. This suggestion ignores the crucial facts that the Canal frontage property owners do not have exclusive rights to use and enjoy the Canal and have no authority to dredge the Canal since it is the navigable public water of an inland lake. The Canal frontage owners have no intention to violate the law, to infringe upon public rights, to usurp the authority or obligation of the Board, or to acquire the experience or right to assess property owners for the money needed to maintain the Canal's navigability. See Bott v Natural Resources Commission, 415 Mich 45 (1982), where the Michigan Supreme Court reasoned that although the public has the right to the reasonable use of a navigable stream, **the public has no authority to improve a stream to make it more navigable since this would be an unlawful act of usurping government power and authority**. Although the Board has this power and authority, the people living on the Canal lack this power and authority.

A huge example of the Canal's situation, which helps to understand this paper, is the Hoover Dam. That dam turned part of a river into a large reservoir called Lake Mead. Lake Mead is a navigable public inland lake. There are many fabricated bodies of public waters. The crucial issue between what is a public or private water is the public's access to that water by public routes of travel and the public's ability to navigate that water.

The Board can authorize annual installments over 30-years for a special assessment under the Act.

CONCLUSION:

Fabricated frontage has been the Board's argument against maintaining the canal. That argument is not relevant under the Act.

The law of this land regarding the ownership and control of either the water in or the soil under the Canal is well settled. The Canal contains navigable liquid or frozen waters and the public has unrestricted access to navigate those liquid or frozen waters through either public boat ramps or public land.

A single private owner fails to own or control the water in or the soil under the Canal such as is required for the Board to mandate that the maintenance of the Canal is a private matter for the Canal owners alone to address.

The Canal's water and soil are public property. Further, with the history of the Lake and the Canal, and under the law of the land, the Canal is a public part of the Lake known as Lake Mitchell.

In the past, the Board was ill advised, misled or uninformed and is currently under the belief that how they may have mishandled the Franke Cove situation is how they should treat the Canal situation. There are substantial differences in those two situations. However, two wrongs do not make a right and never will. The Board still has time to act on its own to do what is just, honorable and right. The Board is obligated to stand up fairly and equally for all abutting landowners of the Lake.

The Board cannot expect the property owners affected by the loss of lake access and lower property values to continue to pay for lake maintenance when their benefits are lost to the accumulation of silt. Can the law or a Court order the Board to lower or eliminate the lake improvement assessments levied against those property owners as the county and townships also lose revenue?

Only the Board's failure to fulfill its obligation under the Act to maintain the navigable public waters of the Canal can ever eliminate the public's fishing, boating, swimming, or other recreational use of the Canal or lower the property values of the abutting Canal property.

RECOMMENDATION:

The Board needs to function better. The Board could educate relevant federal, state and local government agencies and the public about the Board's need to eliminate problematical Lake Water conditions. The public health, welfare or safety is in jeopardy by certain water conditions. The Board should increase its efforts to maintain or increase the value or the use of the Lake by improving the Canal and the Lake. The Board needs to institute a project or projects to maintain **all** of the Lake. Moreover, as provided in the Act, the Board needs to institute projects to improve or develop the Lake for the conservation of fish and wildlife and improve or develop the Lake for fishing, wildlife, boating, swimming, or any other recreational, agricultural, or conservation uses. The Board's efforts may take years but it is time to begin or commence to renew and increase past attempts.

The Board needs to raise special assessments to appropriate levels. The Board can spread assessments over a 5, or 10 to 30-year period. The Board needs to request that relevant federal, state and local government agencies assist in paying for eliminating water conditions that jeopardize the public health, welfare or safety. Those agencies may be necessary to help maintain or develop the value of the Lake's property owners, or to help conserve the fish and wildlife and the use, improvement, or development of the Lake for fishing, wildlife and other uses of the public.

A goal of the Board should be to make Lake Mitchell a bigger jewel of this State than the Lake is at the present. To maintain, improve and develop the Lake, the Board must develop the resources at its

disposal. The Board can encourage community involvement by doing more than just removing obstructions and killing milfoil in the Lake. The public perception of the Board would increase if the Board allowed complete discussions of public comments and not abruptly cut off a speaker as if only the Board understands the situation. The Board should keep government oversight or involvement to a minimum by its activities. The Board needs to encourage the old type of American work ethic to maintain, develop and improve the Lake. The Board should endeavor to make it an honor to attend Board meetings by the Board's over-whelming activity to maintain, improve and develop the Lake and compassion towards public input.

It may be helpful to understand that the Board lacks the authority to compensate public members for a violation of the law that any members may have committed in the past, present or future.

If the Board has questions or concerns regarding the content of this paper, please list this paper on its agenda as an item for discussion.

Rex Barker prepared this paper to assist Tom Talluto in his representation of the Camp Torenta Canal owner's interests.

Please forgive any format issues since this paper is from a new computer without secretarial or computer expertise assistance.

Respectfully submitted, signed and dated by:

Rex A. Barker

Date: August 1, 2014