

# Legislative Analysis

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## LAKE ACCESS SITES AT PUBLIC ROAD ENDS

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**House Bill 4576 (Substitute H-3)**

**Sponsor: Rep. John Stakoe**

**Committee: Local Government and Urban Policy**

**First Analysis (6-27-05)**

**BRIEF SUMMARY:** The bill would codify existing case law regarding lawful activities at public road ends that provide access to inland streams and lakes .

**FISCAL IMPACT:** The bill would have no fiscal impact on the state. There would be an indeterminate local impact. Revenue realized through fines would be provided to local libraries.

### **THE APPARENT PROBLEM:**

For over a decade, a war over which activities are appropriate and lawful to engage in at public road ends has been taking place in the state's courts. On one side of the issue are associations of property owners composed mostly of owners of lakefront properties (or "frontlotter"). On the other side are those known as "backlotter" – people who own or rent properties in the subdivisions near the lakes and who, along with those who do not own property near a lake, depend on public road ends to access the water.

Under state law, the surface waters of inland lakes and streams are considered public property and may be used by all for swimming, fishing, and boating. In the early to mid-1900s, as land around lakes was platted for residential use, perpendicular roads ending at the lakes were dedicated for public use. Apparently, most of the dedication language was general in nature. Over the course of time, as shorefront property was sold for private use and available places for the public access decreased, public usage of road ends began to include such activities as sunbathing, picnicking, lounging, and watching fireworks displays on holidays, in addition to using the road ends as access for swimming, wading, fishing, and to launch boats or personal watercraft.

According to some associations representing frontlotter, the expanded use of the road ends for these shore activities has resulted in the virtual commandeering of these public access sites for use by the few. For example, at some road ends, people have built one or more docks, installed boat hoists, moored boats (tied to the docks or anchored to the bottomland adjacent to the road end) for weeks or months at a time, left smaller boats on the shore, built firepits and/or volleyball pits, and engaged in various shore activities such as picnicking, sunbathing, and lounging. The frontlotter maintain that such activities block the access to the lake by other members of the public. In addition, frontlotter say that unattended boats, both on shore and in the water, have been used by trespassers (even for overnight lodging), that the resulting debris and litter left on shore (as well as the absence of toilet facilities) present health hazards, and that adjacent property owners

have been deprived of the enjoyment of their homes due to the noise and congestion caused by such activities.

Backlottery maintain that such problems are in the minority, that most people using the road ends do so in a courteous and safe manner, and that problems can be solved at the local level. They feel that the complaints of frontlottery over safety and overcrowding are a ruse in order to, in effect, privatize the use of the lakes by restricting access to the public.

Some municipalities have responded to the concerns of frontlottery and the pleas of backlottery for reasonable access by adopting ordinances to regulate usage of the road ends. In addition, many have built a single public dock to aid in the public's access to the lake waters. However, a number of court cases have voided many of these ordinances and put frontlottery and backlottery at odds.

*Jacobs v Lyon Township*, 199 Mich App 667; 502 NW2d 382 (1993) addressed the scope of a subdivision plat dedication of streets and alleys to the public as it related to the permissible uses of road ends at Higgins Lake. In that case, the plaintiffs challenged a Lyons Township ordinance that sought to regulate the use of the road ends. The plaintiffs maintained that the ordinance "permitted and encouraged public activities that exceeded the scope of the statutory dedication of the streets . . . ". The court ruled that the intent of the grantor controlled the scope of the dedication and so concluded that the construction of a public boat dock and the use of the surface waters for swimming, wading, fishing, and boating, and to temporarily anchor boats, were within the scope of the dedication, but that "the construction of boat hoists, seasonal boat storage and the use of road-ends for lounging and picnicking exceed the scope and intent of the dedication of property for use as streets."

However, the ruling did not end litigation between frontlottery, backlottery, and local governments and in 2003, the Michigan Court of Appeals applied *Jacobs* and other court decisions to consolidated appeals in a case known as *Higgins Lake Property Owners Association v Gerrish Township*; 255 Mich App 83 (2003). The consolidated cases also centered on the scope of the public's right to use the ends of roads that terminated at the edge of Higgins Lake in several subdivisions around the lake. Backlottery contended in the consolidated cases that for half a century or more, the public had used the road ends for various shore activities and that this historical use was evidence of the dedicatory's intent for public usage.

Once again, however, the court concluded that "members of the public who gain access to a navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming", but that "Lounging, sunbathing, picnicking, and the erection of boat hoists at the road ends are prohibited as beyond the scope of the dedication." The court wrote that "in the absence of evidence that the historical uses of the roads were contemporaneous with the dedication, the road-end activity occurring *after* the dedication are not helpful in determining the dedicatory's intent."

In addition, the court held that one nonexclusive dock could be erected at each road end to facilitate the public's access to the water and that boats could be moored temporarily "as an incident of the public's right of navigation," but that private docks would not be permitted. The erecting of private docks was viewed by the court as effectively appropriating the public road ends for private use and thus impeding the public's access to the lake. The court suggested that "a legislative solution is warranted to control the road end activity in a better manner."

For several years, legislation has been sought to codify the rulings of *Jacobs* and the consolidated cases. Legislation introduced last session failed on the House floor, and so this session a similar bill has been introduced.

### ***THE CONTENT OF THE BILL:***

The bill would add a new section to the Natural Resources and Environmental Protection Act (MCL 324.30111a) regarding the construction of boat hoists or seasonal docks at public road ends that provide access to inland streams and lakes. The bill would apply to public roads under the jurisdiction of a local unit of government.

Beginning September 15, 2006, unless a recorded deed, recorded easement, or other recorded document or evidence regarding the scope of the dedication provided otherwise, the road could not be used for any of the following:

- Construction, installation, or maintenance of boat hoists on the road or in the adjacent water.
- Construction, installation, or maintenance of a seasonal dock larger than a length designated by the Department of Natural Resources (unless the dock would aid in the public access and the dock was authorized under Part 301 of the act or the local unit of government). However, a smaller dock for the purpose of aiding in public access could be installed unless otherwise prohibited by Part 131 or the municipality.
- Obstructing ingress into or egress from the water in any manner.
- Mooring or docking an unoccupied vessel between midnight and sunrise on bottomland directly offshore from the public road.

A violation would be a state civil infraction; a violator could be ordered to pay a civil fine of not more than \$500. A legislative body of a local unit of government could adopt a substantially similar ordinance to regulate the use of road ends within its jurisdiction if the uses authorized under the ordinance did not exceed the scope of the dedication and were otherwise in compliance with law. An ordinance would have to provide for a civil fine of not more than \$500.

The bill would not prohibit a local unit of government, or other person, from applying for a permit under Section 30104 of the act. It also would not alter the rights of the public to use lawfully accessible inland lakes and streams in a manner authorized by law.

***BACKGROUND INFORMATION:***

The bill is similar to House Bill 4141, which was introduced in the 2003-2004 legislative session. That bill received a hearing before the House Conservation and Outdoor Recreation Committee but was not reported by the committee. Subsequently, the bill was discharged from the committee and an H-6 substitute was adopted on the floor; however, a vote on final passage was never taken.

***ARGUMENTS:***

***For:***

House Bill 4576 would address a serious problem in the state. On public road ends at many lakes, individuals and small groups have built docks and boat hoists for their exclusive use. Still others moor their boats just offshore for weeks or months at a time. This practice impedes access to the water by swimmers and other boaters. Boats that are left unattended for any length of time present attraction nuisances, and nearby property owners report trespassers use the boats, whether tied up on land or moored in the water, to party in and even to sleep in overnight. Public road ends do not have toilet facilities or even garbage barrels; therefore, when people loiter, health hazards arise from their litter and from people using the weeds and lake as a bathroom. Noise from people who use the road ends to sunbathe or picnic can prevent adjacent property owners from fully enjoying their own properties.

Case law on the issue makes much of these activities at road ends illegal, yet, without being codified in statute, local municipalities must take each person who builds a dock or boat hoist to court in order to have the structures removed. This results in the same issues being argued in courts hundreds of times over. Codifying current case law would enable local governments to issue fines and force the owners of these structures to remove them in a timely manner. The municipality could also remove them. The result will be that many more people will be able to utilize the road ends to get their boats into the water, to fish, or to swim without impediment.

***For:***

House Bill 4576 would codify the rulings of the Michigan Court of Appeals in the cases *Jacobs v Lyons Township* and *Higgins Lake Property Owners Association v Gerrish Township*. In both of these cases, the court ruled that unless specified in the dedication language, the intent of the plat dedicators was simply to provide public access to the waters of inland lakes and streams. Access was viewed as getting in and getting out of the water. In a nutshell, the rulings of the court in these two cases permit the construction of a public boat dock and the use of the surface waters for swimming, wading, fishing, boating, and to temporarily anchor boats, because these activities are deemed to be within the scope of the dedications. Not allowed are the construction of boat hoists, seasonal

boat storage and the use of road ends for activities such as lounging and picnicking because they exceed the scope and intent of the dedication of property for use as streets. Building docks and erecting boat hoists was considered to be appropriating the public road ends for their own private use, thereby impeding access to the lakes by other members of the public.

House Bill 4576 simply puts the findings of the appeals courts into statutory language. It would not advantage one group (frontlotter) over another group (backlotter). What it would do is to protect the access rights of all members of the public to the road ends. The bill also allows for a case by case determination of allowable activities at a road end; if a dedication so specified, or if evidence was found to support the contention that a particular dedicator did intend for the public to engage in various shore activities on the road end, then those activities would be allowed and local governments could adopt ordinances to allow and regulate those activities.

Further, the bill would grant law enforcement agencies the authority to issue civil fines to violators. This will reduce neighbor to neighbor lawsuits and enable local governments to more quickly and inexpensively force compliance by violators.

***Against:***

In a footnote in the opinion of *Higgins Lake Property Owners Association v Gerrish Township*, after making the point that those who build docks or erect boat hoists at public road ends effectively appropriate the road ends for their own private use, the court suggested that a legislative solution was warranted to control the road end activity in a better manner. Any legislation, therefore, should take a serious look at the road end situation and see it as an opportunity to decide what would be the best public use of the road ends for now and for the future. Instead, House Bill 4576 merely reiterates the appeals court rulings.

Courts are restricted by their duty to interpret law within the earlier interpretations of other laws. The legislature, by comparison, has the authority to create law. Courts have been wrong before. On many occasions this legislature has in effect overruled the courts by enacting legislation to do something other than what the courts decided the law was saying.

At the time that the road ends at Higgins Lake were dedicated, there was plenty of unoccupied land from which to picnic, sunbathe, or sit and look at the lake. The appeals court used that fact to decide that the plat dedicators most likely were thinking (or intending) that the road ends would only be used to access the water. Unless specifically noted otherwise in the plat dedication language, or unless evidence exists to prove otherwise, the court ruled that road ends were to be seen as nothing more than "streets" to take people into and out of the water.

However, the court ignored the possibility that the plat dedicators may have been shortsighted. The dedicators may have assumed that as the plats were sold for private ownership and overall public access to the lake was reduced, that activities the public

engaged in at the lake would simply move to the road ends and be engaged in there. Therefore, they may not have envisioned a need to okay these activities at the road ends.

Did the dedicators really intend for it to be against the law for a grandmother to stand (or sit in a lawn chair) on the shore at a road end and watch her grandchildren swim in the lake? Did they intend that nearby property owners or tourists would be law breakers if they stood (or sat) and watched a sunset from the shore? A strict reading of House Bill 4576 would subject that grandmother or those sunset lovers to a civil fine of up to \$500. Though the bill doesn't explicitly prohibit such activities, they could be interpreted under prevailing case law to obstruct ingress into or egress from the water, especially since the court has repeatedly held such shore activities to be outside the scope of the dedications.

Similarly, boats were heavy wooden things and hauling them any great distance was impracticable. Therefore, it is reasonable to assume that the dedicators accepted as a reasonable practice the mooring of a boat for an entire season. As then, it is not practical or reasonable to expect nearby residents to haul a pontoon or other boat in and out of the water every single day. Few if any problems would arise if people were allowed to moor their boat for a weekend or a few days at a time.

The legislature has a wonderful opportunity to empower local governments to regulate public road ends in their jurisdictions. Such authority would enable local lawmakers to fit ordinances to the unique needs of the community and to the possibilities or limitations afforded by nature at each road end.

***Against:***

The bill represents a land (or more fitting, lake) grab by those with the financial resources to buy lakefront property. They use the argument of keeping road ends "public" as a smoke screen for actually decreasing the public's ability to access and enjoy the lake; therefore, they are in effect "privatizing" a public natural resource. For example, frontloters have long been complaining about too many watercraft on the lakes. The bill's ban on overnight mooring or docking will decrease lake usage because the provision will make it too inconvenient and impractical for weekenders or people who stay one or two weeks to put a boat in and out of the water each and every day (unless they use a kayak). For instance, some senior citizens have adult children or friends help them to put their boats in the water. Then, the adult children may leave for the week to go back to work and the grandparents stay to enjoy the cottage and pontoon or other boat. Now, under the bill, many would be prevented from boating because they lack the physical ability to put the boat in and out alone each day.

Allowing municipalities to regulate the overnight mooring or docking of boats, for instance, through a permit system, will solve the problem of unattended boats being moored for unreasonably long periods of time, but yet allow those who come up for a weekend or for a week or two to put it in once and take it out once without generating problems that frontloters say are a concern.

***Against:***

Subdivisions have sprung up around many of the state's lakes and streams, and there will always be more lots that do not front the water than those that do. However, when many of the developments were established, people were told that they would have unlimited access to the water via the public road ends for a variety of activities. Lots were purchased and homes built on that understanding.

Now, many property owners are finding their homes hard to sell when buyers learn of the restrictions of the court decisions. Many have seen their property values plummet because buyers no longer see value in owning property near a lake that they can only access by boat or by swimming. But, not everyone can afford a boat, and not everyone is capable of operating a boat. An unintended effect of the legislature codifying the court's decisions is that eventually local governments and the state will be affected by lowered property tax values. And local businesses suffer when property owners and tourists stay away or find other vacation destinations because they can only use the access site to go into or out of the water as opposed to being able, for example, to take a book to the water's edge and read awhile.

***POSITIONS:***

A representative of the Michigan Townships Association testified in support of the bill. (6-15-05)

A representative of the Walloon Lake Association testified in support of the bill. (6-15-05)

A representative of the Michigan Waterfront Alliance testified in support for the bill. (6-15-05)

A representative of the Burt Lake Preservation Association indicated support for the bill. (6-15-05)

A representative of the Corey Lake Association indicated support for the bill. (6-15-05)

A representative of the Lake Fenton Property Owners Association indicated support for the bill. (6-15-05)

A representative of the Higgins Lake Property Owners Association indicated support for the bill. (6-15-05)

A representative of the Higgins Lake Civic Association testified in opposition to the bill. (6-15-05)

A representative of Lyon Township indicated opposition to the bill.

A representative of Sovereign Park Association/Higgins Lake indicated opposition to the bill. (6-15-05)

A representative of the Walloon Lake 4<sup>th</sup> Street Association indicated opposition to the bill. (6-15-05)

Legislative Analyst: Susan Stutzky  
Fiscal Analyst: Kirk Lindquist

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.