

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HIGGINS LAKE SHORES LAKEFRONT  
PROPERTY OWNERS,

UNPUBLISHED  
December 2, 2008

Plaintiff-Appellee,

v

No. 278894  
Roscommon Circuit Court  
LC No. 05-725543-CH

LYON TOWNSHIP and ROSCOMMON  
COUNTY ROAD COMMISSION,

Defendants,

and

SVEIN K. BJORKLEY, MIKE JONES, MICHAEL  
MAJEWSKI, CAROL MAJEWSKI, BARRY  
SCHMIDT, KELLY SCHMIDT, JAMES  
CONLEY, JEAN CONLEY, JEFFREY CICHON,  
BETH CICHON, NANCY KRAUSE, ROBERT  
YASKE, DONALD DROUILLARD, MICHAEL  
FLEURY, KAREN FLEURY, DANIEL  
CLAYTON, and VICKIE CLAYTON,

Defendants-Appellants.

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Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's grant of declaratory relief to plaintiff in this real property action regarding the scope of the 1941 dedication of road ends along the shore of Higgins Lake in the Higgins Lake Shores subdivision. Because we conclude that plaintiff had standing to sue and the trial court did not clearly err in finding that the dedication of the road ends did not allow for the nontemporary mooring of watercraft or for recreational activities, such as sunbathing, lounging, and picnicking, which are nonincidental uses of the water surface, we affirm.

Plaintiff, a nonprofit corporation,<sup>1</sup> sued Roscommon County Road Commission (Road Commission), Lyon Township, and the back lot property owners of the Higgins Lake Shores subdivision for declaratory relief regarding the scope of the 1941 dedication of road ends along the shore of Higgins Lake. Before trial, Lyon Township consented to the relief sought, the Road Commission allowed a default judgment against it, and many of the back lot property owners either defaulted or consented. The remaining defendants, now appellants, are the back lot property owners that answered and contested the case at trial.

The road ends at issue are East Road, West Road, and Hill Street in Higgins Lake Shores. These roads terminate at the Higgins Lake waterfront. According to the 1941 plat, “the streets as shown on said plat are hereby dedicated, to the use of the public” by Michelson Land and Home Company, the developer of the subdivision. East Road is 66 feet wide, but flares out to 100 feet at the lakeshore. West Road is 44 feet wide, and the road end was flared out to a width of 100 feet during the development of the subdivision.

At trial, the evidence showed that after the dedication of the streets in Higgins Lake Shores, H. M. Seldon, then president of Michelson Land and Home Company, exchanged several letters with the Road Commission regarding access to the lakefront. In the earliest of these letters, dated September 16, 1947, Seldon wished to ascertain “what the prospects are of getting some gravel put on East Road . . . . We do not want to gravel the road from Higgins Road to the lake as we do not want people to drive in there and park their cars. This also applies to West Road in the subdivision.” A second letter, dated August 18, 1952, requested that the Road Commission bring East Road to its full width in accordance with the original dedication because, Seldon wrote, the company had received “numerous complaints” that East Road was being “monopolized by the owners of lots 22 and 23.” In a letter dated September 13, 1952, Seldon discussed “the streets dedicated in [Higgins Lake Shores] running to the lake providing bathing and boating facilities for the owners who do not have front lots,” and indicated that the end of East Road was narrower than the 100 feet that he had dedicated in the plat. He expressed concern that some lakefront owners had built private walks on the dedicated land, and had planted evergreen trees and cobblestone beds that extended into the dedicated street. Concerning West Road, Seldon stated that another property owner had placed signs on the dedicated property, that a cobblestone line had been placed at the end of the street, and that there was a tree in the middle of the road. He also wrote that he had seen a sign blocking “the half street at the West of our subdivision” that said “Private Property, Keep Out.” On April 30, 1953, Seldon wrote to the Road Commission once again asking it to open East and West Roads in compliance with the dedication “for the use of the owners in the subdivision who do not have lake frontage.”

In a June 9, 1953 letter, Seldon requested that the Road Commission show “there is 100 feet at the foot of these streets for bathing purposes, reserved for the people who do not have lake frontage in this subdivision. The owners who purchased the corner lots were given an allowance on the purchase of their lots for this 100 ft. bathing privilege.” Seldon, on August 10, 1955, wrote to the Road Commission again to request that the streets be opened as, “at the foot of East

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<sup>1</sup> There was testimony that plaintiff was formed to protect the road ends of the subdivision.

Road and West Road, 100 feet of lake frontage is reserved for bathing, boating and fishing for the use of owners in the subdivision who do not own frontage.” This letter also states that the “purchasers of Lots 1, 11, 12, 22 and 23 were all informed of these conditions and a reduction in price was made because of the frontage reserved for the use by owners of lots in the subdivision who did not have frontage.” Finally, on July 12, 1956, Seldon wrote to the Road Commission once again urging it to ease access, citing that “at the foot of East and West Street on the lake 100’ was provided for the use of the residents in the subdivision who did not have lake frontage.”

Regarding whether lakefront owners were attempting to obstruct the use of the East Road road end in the 1950s, Marilyn Humphrey testified that she spent entire summers beginning in 1949 at the family’s lakefront house on lot 23 at the end of East Road. Humphrey testified that there were occasional mothers with their children who went swimming at the road end, that there has never been a dock at the road end, that there have never been large groups of picnickers on the shore, and that “nobody was ever prohibited from coming down the road.” However, she did recall that evergreens were removed at the request of the Road Commission, and letters to and from the Humphreys and the Road Commission regarding the Humphreys’ obstruction of public access on East Road between 1950 and 1953 were admitted. Also, as previously noted, in August 1952, Seldon brought to the attention of the Road Commission that there had been “numerous complaints” that East Road was “being monopolized” by the Humphreys.

Kathryn Bangs and Sue Balger, members of plaintiff’s board, testified regarding the current circumstances that led to the filing of the present action. Bangs, a yearly resident on a lot adjacent to one of the road ends, opined that seasonal mooring decreased her property value, and she recounted specific examples of the problems arising from the public’s use of the road end next to her property for boat mooring, picnicking, and sunbathing. Balger recounted her difficulties in owning property adjacent to a road end in Higgins Lake Shores. These difficulties included picking up the trash left behind by groups picnicking on the beach and trespassers using her dock despite no trespassing signs.

The affidavit of Nancy Krause was introduced at trial. Krause averred that she spent time in Higgins Lake Shores beginning in 1954 and that the East and West Road road ends flared out to 100 feet. According to Krause, at that time, there was seasonal mooring of boats, picnicking, sunbathing, and lounging at the road ends in Higgins Lake Shores. In addition, two other witnesses testified that the road end at Minnehaha Street had a dock and a beach area that were used for beach activities in 1940 by owners of back lots in a different subdivision. Minnehaha Street is located about one and a half miles from Higgins Lake Shores.

After hearing the evidence and the arguments of counsel, the trial court decided the case from the bench. The trial court reviewed the evidence, focusing in particular on Seldon’s communications with the Road Commission. Ultimately, the trial court concluded that Seldon’s letters expressed an intent that the dedication for public use was the same use that was awarded in *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667; 502 NW2d 382 (1993). It subsequently entered an order declaring that nontemporary moorings, erecting nontemporary mooring structures for water craft, and recreational activities, such as sunbathing, lounging, and picnicking, which are nonincidental to the use of the water surface, are beyond the scope of the dedication of the at-issue road ends in Higgins Lake Shores.

On appeal, defendants initially assert that plaintiff lacks standing to sue. Specifically, defendants maintain that plaintiff does not have standing because there is no allegation or evidence that they participated in any of the activities that plaintiff seeks to have declared beyond the scope of the dedication. We disagree.

Whether a party has standing is a question of law that this Court reviews de novo. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 89; 662 NW2d 387 (2003).

Standing is established as follows:

“First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”” [*Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (citations omitted).]

Defendants do not dispute that plaintiff has the right to sue to vindicate the rights of its members. See *Higgins Lake supra* at 90-91. Defendants contend, however, that they were not identified as having committed any of the acts objected to by plaintiff and, therefore, plaintiff does not have standing to sue them. Defendants are correct as to the fact that they were not identified at trial as having committed any of the acts complained of by plaintiff. However, plaintiff's witnesses were called not to testify as to certain perpetrators of acts for which the perpetrators should be punished. Rather, the witnesses were called to testify in order to establish that they had been injured by the types of activities that they wished to be declared beyond the scope of the dedication. The witnesses described these activities, such as mooring of boats for long periods of time, lounging on the beach in large parties, creating noise and litter, and trespassing onto private property, as if they were ongoing during the summer. Their testimony demonstrates that the injurious activities were concrete as well as imminent. “[A]lthough the actual controversy requirement precludes a court from deciding hypothetical issues, a court is not precluded from reaching issues before actual injuries or losses have occurred.” *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 126; 693 NW2d 374 (2005) (quotation marks and citation omitted). By requesting that the dedication of the road ends be declared to include certain rights, defendants identified themselves as people who may potentially participate in the activities that cause injury to plaintiff's members. Thus, although defendants have not been identified as those who have engaged in the injurious activities in the past, the injury is fairly traceable to the challenged actions that defendants assert a right to participate in. In addition, it is clear that a declaration in plaintiff's favor would redress its members' injuries because it would prevent anyone, including defendants, from unlawfully using the road ends. Therefore, plaintiff has met the requirements for standing.

### III

Next, defendants argue that the trial court erred by declaring that the scope of the dedication for public use of the road ends in Higgins Lake Shores does not include the nontemporary mooring of boats or recreational uses such as lounging, picnicking, and sunbathing. Specifically, defendants claim that the trial court failed to properly evaluate the evidence as a whole and, thereby, erred in concluding that the dedicator's intent was that back lot property owners are only permitted to use the road ends to access the water. We disagree.

Interpretation of a dedicator's intent is a factual question, which we review for clear error. *Higgins Lake, supra* at 92, 101. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed." *Id.* at 92.

It is presumed that members of the public have the right to access a body of water from a publicly dedicated roadway that ends at the water's edge and to build structures to aid in gaining access to the water. *Higgins Lake, supra* at 95-97, 99. The members of the public who access the water are entitled to use the surface of the water to swim, fish, or boat. *Id.* at 99. The public also has the right to anchor boats temporarily. *Id.* "[T]he burden rests with [the] defendants to establish that anything other than mere access to the lake was intended." *Id.* at 102. Whether the public's rights also include the right to sunbathe and lounge or the right to install docks and boat hoists depends on the scope of the dedication. *Id.* at 99. When discerning the scope of the dedication, if the language of the dedication is plain and unambiguous, it is to be enforced as written and no further inquiry is permitted. See *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). However, if the text of the dedication is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the dedication. *Id.*

Here, neither party argued at trial that the language of the dedication plainly and unambiguously established whether the dedication of the road ends allowed for the nontemporary mooring of boats or for recreational activities, such as swimming, fishing, or boating, which are nonincidental to the use of the water surface. Indeed, the dedication is silent on such uses. And the language in the dedication that flares the road ends to a width of 100 feet at the water's edge possibly suggests that something more than mere access to the lake surface was intended. Consequently, the trial court's consideration of extrinsic evidence to determine the scope of the dedication was proper.

As summarized above, considerable extrinsic evidence was produced at trial pertaining to activities at the road ends. This extrinsic evidence included activities at the road ends following their dedication in 1941 to the present and the activities at another road end near the time when the dedication of the road ends was made. But in making its factual determination, the trial court focused on Seldon's letters to the Road Commission. In those letters, Seldon made requests regarding the road surface and the width of the roads leading to Higgins Lake. Seldon also made specific references regarding the use of the lake for the back lot owners. Notably, as observed by the trial court, these statements only identified the activities of boating, fishing, and bathing, which the trial court concluded only required use of the water, not the beach. The trial court concluded that nothing in the letters supports a finding that other activities, such as sunbathing, picnicking, or lounging, were contemplated by Seldon as being within the scope of the dedication. With respect to nontemporary moorings, the trial court held that Seldon's request that the Road Commission keep the road ends open and unobstructed was inconsistent with

allowing members of the public to maintain nontemporary moorings. Consistent with these findings, the trial court granted plaintiffs the relief it sought.

We find no clear error in the trial court's reliance on Seldon's letters to resolve the issues regarding the nontemporary mooring of boats and activities such as sunbathing, picnicking, and lounging. Seldon's letters are, in our estimation, unusually probative of the dedicator's intent. Seldon, as president of the developing entity, was uniquely positioned to identify the scope of the dedication. Indeed, his purpose in writing the letters was to obtain the Road Commission's cooperation in carrying out how the dedication should benefit the back lot property owners. In the letters, he identified the activities of boating, fishing, and bathing, and addressed the desire to keep the road ends open and unobstructed. For the trial court to construe those expressions of the dedication intent as being consistent with *Jacobs* was not clearly erroneous. Further, we recognize that the trial court did not specifically address the extrinsic evidence regarding the use of the road ends at the time of the dedication, which was evidence properly before the trial court, see *Little, supra* at 700; *Dobie v Morrison*, 227 Mich App 536, 540; 575 NW2d 817 (1998). The fact that the trial court did not specifically address this evidence does not necessarily mean that the trial court did not consider the evidence as a whole. Rather, we conclude that the trial court merely found the letters to be the dispositive factor in determining the scope of the dedication.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck  
/s/ Michael J. Talbot