

STATE OF MICHIGAN
COURT OF APPEALS

LYON TOWNSHIP,

Plaintiff/Counter-Defendant-
Appellant,

v

HIGGINS LAKE PROPERTY OWNERS
ASSOCIATION,

Defendant/Counter-Plaintiff-
Appellee,

and

HIGGINS LAKE CIVIC ASSOCIATION,

Defendant.

UNPUBLISHED

April 11, 2006

No. 265152

Roscommon Circuit Court

LC No. 04-724978-CE

Before: Kelly, P.J., Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant Higgins Lake Property Owners Association (HLPOA).¹ HLPOA is an association comprised of Higgins Lake lakefront property owners who oppose certain uses of the road ends, including the seasonal boat hoists sanctioned in the ordinance. This declaratory action arose following the adoption of an ordinance by plaintiff purporting to regulate certain activities at road ends abutting Higgins Lake. Listed among the permitted uses of the road ends in the ordinance is seasonal watercraft mooring on boat hoists from May 1 through September 30 of each year. Lyon Township Ordinance 53, § 3(1)(b)(2). The trial court held that the ordinance was unenforceable and, accordingly, invalidated it. We conclude that only certain portions of the ordinance are invalid. We, therefore, reverse and remand for entry of an order severing the invalid regulations from the remainder.

¹ Defendant Higgins Lake Civic Association (HLCA) joined in plaintiff's brief in opposition to HLPOA's motion for summary disposition, but HLCA has not filed a brief on appeal.

On appeal, plaintiff argues that the trial court erred by invalidating the ordinance because it looked beyond HLPOA's challenge to the boat mooring provisions to invalidate the entire ordinance. Plaintiff also argues that, because it is empowered to regulate the littoral rights associated with road ends, the boat mooring provisions are valid. We agree that the court erred in invalidating the entire ordinance, but disagree that the boat mooring regulations were valid.

Plaintiff asserts that it has the right to reasonable control over its streets and public places pursuant to Const 1963, art 7, §§ 29 and 34. Plaintiff argues because it is the owner of the littoral rights associated with the road ends, its constitutionally granted authority includes the right to authorize and regulate boat mooring at the road ends abutting Higgins Lake. Plaintiff further contends that because none of this Court's previous decisions concerning road end usage at Higgins Lake have addressed the constitutional basis of its arguments, those prior cases are not controlling.

Const 1963, art 7, § 29 states as follows:

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Const 1963, art 7, § 34 states as follows:

The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

By its plain language, Const 1963, art 7, § 29 gives plaintiff the power to regulate usage of its streets and other public places through the exercise of "reasonable control." Plaintiff's interest in the road ends abutting Higgins Lake arises from subdivision plats that dedicated the streets under the authority of the controlling plat act, 1887 PA 309, to public use. "Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide public access to the water." *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667, 671; 502 NW2d 382 (1993). "However, it is not to be inferred that the municipality has the right to appropriate the road ends to any use inconsistent with the dedication." *Id.* at 672 n 3. Rather, the municipality's use of the road ends is limited by the intended scope of the dedication. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 99; 662 NW2d 387 (2003).

Here, the dedication of the streets for public use did not confer an absolute fee in the nature of private ownership on plaintiff. *Kalkaska v Shell Oil Co (After Remand)*, 433 Mich 348,

356-357; 446 NW2d 91 (1989). Instead, the act limited the fee to “the uses and purposes therein designated, and for no other use or purposes whatever.” 1887 PA 309. Plaintiff does not contend that the dedication was intended to provide anything more than public access to the lake. Therefore, plaintiff has the right to reasonable control over the activities associated with public access. This Court has determined that public access does not include the installation of boat hoists and seasonal mooring. *Jacobs (After Remand), supra* at 673. Accordingly, plaintiff is not empowered to authorize that activity, and the provisions of Ordinance 53 purporting to allow seasonal boat moorings are invalid.²

The invalidity of the boat mooring provisions, however, does not mean that the entire ordinance is invalid. Ordinance 53 provides as follows:

The provisions of this Ordinance are hereby declared to be severable and if any clause, sentence, word, section or provision is declared void or unenforceable, for any reason, by a court of competent jurisdiction, it shall not affect the remainder of the ordinance which shall continue in full force and effect.
[Lyon Township Ordinance 53, § 5.]

Accordingly, any of Ordinance 53’s valid regulations can and should be severed from its invalid regulations, if the valid portions of the ordinance can form a complete act within itself that is “reasonable in view of the act as originally drafted.” *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 547; 569 NW2d 841 (1997), quoting *Pletz v Secretary of State*, 125 Mich App 335, 375; 336 NW2d 789 (1983).

The remaining activities enumerated in § 3(1)(b)(1), and (1)(b)(3) through (7) of Ordinance 53³ are consistent with activities already sanctioned by this Court. See *Gerrish Twp, supra* at 103-105. Therefore, only § 3(1)(b)(2) of the ordinance, which sanctions seasonal boat mooring and the erection of boat hoists, and the portions of § 3(3) that pertain to seasonal boat hoists are invalid and should be severed, leaving the valid provisions of the ordinance enforceable. We express no opinion regarding § 3(1)(b)(8), which authorizes other activities “as deemed appropriate by the Lateral Road Use Commission,” because no other activities have been briefed for this Court’s review. See *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

² In *Kalkaska*, our Supreme Court held that the plaintiff could not sell “oil and gas lying beneath streets dedicated for public use pursuant to the plat acts of 1887 and earlier years” because such a proprietary use of the land exceeded the scope of the qualified fee it had acquired pursuant to the statutory dedication. *Kalkaska (After Remand), supra* at 357-358. Just as the plaintiff in *Kalkaska* was not entitled to sell oil and gas beneath roads dedicated for public use because the municipality had only acquired a qualified fee, plaintiff may not grant to others littoral rights that it did not obtain pursuant to the statutory dedication.

³ These subsections permit, at each of the lateral road ends: one non-exclusive dock; a launch ramp; ingress and egress to the water, watercraft, or frozen surface of the water; swimming; fishing; and water access for the fire department.

Reversed and remanded for entry of an order severing the invalid regulations from Ordinance 53. The remainder of the ordinance is valid and enforceable. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Michael J. Talbot