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Mr. Mike Coon
Township Supervisor
Surrey Township
P.O. Box 647
Farwell, Michigan 48622

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SURREY TOWNSHIP

**Re: Lake 13
Public Access Issues**

Dear Supervisor Coon:

A number of issues have arisen with regard to Lake 13 (the "Lake"), which is entirely located within Surrey Township (the "Township"). This letter addresses those issues raised by Township officials:

1. Lake 13 is a public lake.

Apparently, there has been a dispute over the years regarding whether or not Lake 13 is a "public lake" or a "private lake." Unfortunately, there is no universal definition in Michigan statutes or common law regarding what make an inland lake "public" or "private." While a few statutes do contain a definition, it is typically limited solely to the statute involved and the purposes thereof. Interestingly, MCL 324.30901 *et seq.* (previously referred to as the "Michigan Inland Lake Improvement Act") (the "Act"), which governs Michigan statutory lake improvement boards, references and defines "public inland lakes" and "private inland lakes" for purposes of that Act and the creation or modification of a statutory lake board.

Apparently, some Lake 13 property owners over the years have asserted that the lake is private and not public. Presumably, they based their opinion on the fact that there is no formal state, county or township park or boat ramp on the lake.¹

Probably the best indicator of whether a lake is public or private if there are no federal, state, county or township parks, boat ramps, facilities, etc. is whether there are any public road ends, alleys or walkways, parks, etc. ending perpendicular (or nearly so) to the lake. If there are,

¹ Apparently, there is one improved/paved boat ramp on Lake 13 located on public Alley D between Lots 192 and 193 in the 1948 Supervisor's Plat of 13 Lake Subdivision. By all indications, the boat ramp improvements were installed, and are currently maintained, by the Lake 13 Association (the "Association"), a private association. Although the Association and many lake property owners may not consider that a public access, under Michigan law, it likely is public.

then there theoretically can be public access (at least, public pedestrian access) to the lake and the lake involved would be public.

Given the many public road ends, alley ends and walkways at Lake 13, Lake 13 is a public lake.²

2. What are the Platted Ways?

In general, a public road (including a lake road end), walk or walkway, alley and park (collectively and hereinafter, the “Platted Ways”) are easements if platted. That is true in most cases, even though the Platted Ways appear to be separate parcels of land on maps. In general, the adjoining property owners own to the center of Platted Ways at issue, subject to the easement for the road, walkway, etc. involved. See *Loud v Brooks*, 241 Mich 452 (1928), *Morse v Colitti*, 317 Mich App 526 (2016) and *2000 Baum Family Trust v Babel*, 488 Mich 136 (2010).

Platted Ways can be created via plat dedication, deed or by the Highway-by-User Act, being MCL 221.20 *et seq.* (for public roads).

It appears that all or virtually all of the Platted Ways on Lake 13 were created via plat dedication. Those Platted Ways on Lake 13 include:

- Alleys labelled A through F (inclusive).

Developments via plat have been created throughout Michigan for well over 150 years based on various successive plat statutes. Plats often contain “common” or “joint use” areas shown on the map of the plat and are given various names or labels such as a road (sometimes also called a street, drive, boulevard or parkway), alley, park or walkway. Both the various plat statutes and the Michigan appellate case law have indicated that such common use areas shown on the map of an approved plat are permanently fixed for the uses shown and are hence, “dedicated” to either the public or lot owners (i.e. they are private) within the plat, depending upon the express dedication language on the face of the plat. See *Kirchen v Remenga*, 291 Mich 94 (1939) and *Fry v Kaiser*, 60 Mich App 574 (1974). Once a plat dedication occurs and lots are sold, those common use areas normally cannot be altered, vacated, abandoned, extinguished, etc. except pursuant to a formal plat vacation lawsuit under MCL 560.221 *et seq.* (the “Vacation Act”), which is a portion of the Michigan Land Division Act.

3. Do the Platted Ways Make Good Public Lake Access Sites?

² The Supervisor’s Plat of 13 Lake Subdivision of 1948 around Lake 13 recognizes the alleys and drives (and labels them as such), but does not indicate whether they were originally dedicated as public or private ways. Nevertheless, the Clare County Road Commission, Surrey Township and the various lake associations over the years have recognized those drives and alleys as being public. It is also apparently widely acknowledged that the boat ramp located on Alley D is also public. Absent any new evidence to the contrary, it can likely be reasonably assumed that those ways are public.

It can be reasonably argued that such narrow platted ways (particularly the walkways) can be poor public access sites to lakes for multiple reasons. First, they are frequently relatively small and narrow. Narrow lake access sites generally cannot meet all of the public demand for lake access that will likely occur in the future. Second, with many narrow lake access sites, there is no parking available. Unlawful parking in the vicinity of lake access sites will probably increase over time. Third, there are generally no amenities such as bathroom facilities, garbage cans, benches, decks, etc. Fourth, even with potential municipal ordinance provisions in effect, it can be difficult to monitor and police uses and activities occurring at and from narrow lake access sites. Fifth, there can be conflict among the users (and uses) of such lake access sites due to their small and narrow size. Finally, given that the boundary lines of most narrow lake access sites are difficult to mark in a way that is comprehensible to the public (particularly on the shore and along the bottomlands of the lakes), there can be significant public trespasses on the adjoining riparian properties.

These are factors that have been considered elsewhere in Michigan and may be relevant for the Township.

4. Acceptance of Platted Ways by the Township.

Roads, parks, walkways, etc. dedicated in a plat to the public would not be public unless formally “accepted” by the Township years ago within a reasonable period of time after the plat was created. Although a lay person might believe that the simple act of approving the plat (and the signing thereof by the Township) would be sufficient for such acceptance, that generally is not the case. Typically, there needs to be (a) a separate past motion or resolution of acceptance by the Township, or (b) public improvements, to accept dedicated platted public areas within a reasonable period of time from when the plat was created. The Michigan appellate courts have held that such acceptance can occur many decades after the plat was created.

Nevertheless, any Township acceptance of the Platted Ways would be presumed in most cases. MCL 560.255b indicates that:

(1) Ten years after the date the plat is first recorded, land dedicated to the use of the public in or upon the plat shall be presumed to have been accepted on behalf of the public by the municipality within whose boundaries the land lies.

(2) The presumption prescribed in subsection (1) shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court in which the land is located...

The presumption of acceptance for a relevant plat greater than ten years old is, therefore, that the Platted Ways have been accepted by the Township absent competent evidence to the contrary based on a fairly detailed historical and legal analysis that would have to occur for each Platted Way. Ultimately, only the Clare County Circuit Court could definitively determine whether a particular Platted Way was accepted for public use or not.

If it is definitively established that a particular Platted Way was not accepted by the Township within a reasonable period of time of when the plat was created, the Platted Way usually does not simply vanish or become extinguished. Instead, it would still typically exist for the general use for which it was dedicated (i.e. as a road, alley, walkway, etc.), but it would be “private” and could only be used by the lot owners within that plat. See *Nelson v Roscommon County Road Commission*, 117 Mich App 125 (1982).

5. Extinguishing a Platted Way.

There are generally five ways to extinguish a Platted Way:

- (a) Based on some defect in the plat dedication.
- (b) Failure by the Township to accept the Platted Way within a reasonable period of time.
- (c) Abandonment.
- (d) Adverse possession or blockage.
- (e) Via a formal circuit court plat vacation or revision process pursuant to the Vacation Act.

First, in addressing how to potentially extinguish a platted common area, it is unlikely, although possible, that a few could be extinguished by court action if it is determined that the original platting process was defective. The more likely scenario for extinguishing a platted item absent a vacation lawsuit is to demonstrate in court that there was a lack of acceptance by the Township of the public dedication for the platted item involved. Again, however, even if acceptance is not shown, the platted item would likely still remain valid for (and be usable by) lot owners within the plat. Normally, a Platted Way cannot be extinguished by mere nonuse or abandonment. See the Michigan Land Title Standards, Section 14.3; *Feldman v Monroe Township Board*, 51 Mich App 752 (1974); *Kent Furniture Mfg Co v Long*, 111 Mich 383 (1897) and *Ludington & Northern Railroad v Epworth Assembly*, 188 Mich App 25 (1991).

In the past, it was believed that a dedicated platted area could be extinguished by an adjoining property owner blocking use by members of the public or other lot owners in the plat via boulders, a fence or other obstructions for at least 15 consecutive years or longer. Essentially, the adjoining property owner would be “taking” the property comprising the platted item by adverse possession. A platted easement can be terminated by adverse possession, but such termination is difficult to establish. *Nicholls v Healy*, 37 Mich App 348, (1971) (quoting *Greve v Caron*, 233 Mich 261, (1925) (extended use by the owners of underlying land, including planting trees, erecting a privy and bathhouse, and maintaining a gate, is not sufficient to defeat the easement by adverse possession); *Harr v Coolbaugh*, 337 Mich 158, (1953) (maintenance of a gate across an easement, even if continuous, will not constitute an obstruction inconsistent with the

easement if it still permits use of the way); and *Greve v Caron*, 233 Mich 261 (1925). Since the Michigan Court of Appeals rendered its published decision in *Astemborski v Manetta*, 341 Mich App 190 (2022); leave to appeal denied at 979 NW 2d 662 (2022), however, it is now doubtful whether a Platted Way can be extinguished via adverse possession.³

The most effective way of extinguishing a platted area is via a formal vacation lawsuit as discussed below.

6. A Formal Clare County Circuit Court Plat Vacation or Revision Lawsuit.

In general, the only definitive way to completely vacate and extinguish any of the Platted Ways would be through a formal Clare County Circuit Court plat revision or vacation lawsuit or proceeding under MCL 560.221 *et seq.*

It is difficult to accurately estimate the likely costs of a plat vacation or revision lawsuit beforehand. Many lay people and attorneys who are not well-versed in the area believe that these cases should be fairly mechanical and straightforward. However, in many plat vacation or revision cases, unpredictability is the norm.

Unanticipated attorney fees and costs typically arise in these vacation cases from two different sources. First, property owners who oppose a proposed vacation can dramatically increase costs, particularly if they are represented by legal counsel. In a significant number of cases, the plaintiffs (i.e. the vacation proponents) do not anticipate opposition (or at least, not strident opposition), but opposition arises, nevertheless. Second, the Michigan Attorney General's office can often add thousands of dollars to the cost of a plat vacation or revision case due to technicalities that must be met or based on negotiations over the final wording in the judgment of vacation, often based on reviews by the various state agencies.

Whether or not to grant a plat revision or vacation is within the sound discretion of the county circuit court judge. Although most plat vacation or revision cases not involving lakes are successful, once in a while a circuit court judge will deny a non-lake vacation or revision request, particularly if there is significant opposition. Where a lake is involved, plat vacations are often denied by the courts. With a lake access, there are two main obstacles to vacating a Platted Way. First, the court cannot vacate a platted lake access site if there is a "reasonable objection" by anyone to the vacation or closure. See *In re Gondek*, 69 Mich App 73, 76-77 (1976) and *Westveer v Ainsworth*, 279 Mich 580, 585 (1937). And, in almost all cases, shutting off an inland lake public access site would prompt a "reasonable objection." And, in general, judges are loathe to close lake access sites. Second, MCL 560.226(2) *et seq.* indicates that a platted lake access site (such as the Platted Ways) cannot be vacated unless the property is first offered to the Township and the State

³ Although *Astemborski* involved a private platted lake easement, it likely would also apply to public platted lake access easements, including the Platted Ways. In addition, adverse possession and prescriptive easements generally cannot apply to a public road, walkway, etc., although there are a few exceptions to that rule. See MCL 600.5821 and *Higgins Lake Property Owners v Gerrish Twp*, 255 Mich App 83, 118; 662 NW2d 387 (2003).

of Michigan. Only if those governments decline and the court involved orders a vacation will the easement for the former lake platted access site be extinguished.

Before a plat vacation or revision lawsuit is filed in the appropriate county circuit court, the following due diligence matters must generally be done:

- (1) A resolution of support must be obtained from the Township or County Road Commission if a road is involved.
- (2) A limited title search must be done through a title insurance agency for each of the lots in the plat. The plaintiff will need to pay for a last deed of record as well as a copy of any current mortgage or the equivalent. Typically, the cost for such searches runs between \$75 and \$200 per lot, depending on the title company. It is true that the Vacation Act only requires joining the owners of all lots within 300 feet of the property to be vacated or revised. However, the Michigan appellate case law has held that by utilizing the 300-foot rule, only the public nature of the item to be revised or vacated is extinguished – a private easement still remains. In order to completely extinguish all outside interests in the item to be vacated or revised, the owners of all lots within the plat must be joined in the lawsuit. See *Nelson v Roscommon Road Commission*, above.
- (3) The plaintiff should obtain an estimate from a local surveyor or engineer regarding the cost of a replat should the plat vacation or revision be approved by the court. The Michigan Attorney General's office insists upon such a replat and the costs of the replat are often higher than most surveyors or engineers anticipate given the demands by the relevant state agencies.

7. Possible Ordinance Provisions.

As noted above, an alternative to a plat vacation would be to regulate the uses of the Platted Ways. The Township has full authority to regulate the usage of the Platted Ways via a regulatory, police power or non-zoning ordinance. See *Square Lake Hills Condominium Association v Bloomfield Township*, 437 Mich 310 (1991). Since such an ordinance would not be zoning in nature, the draft ordinance need not be addressed by the Township's Planning Commission unless the Township Board desires to have such input. What type of regulations could the Township impose by ordinance? Those include the following:

- (1) Hours of usage.
- (2) No installation of any private dock, pier, boat lift, etc.
- (3) No overnight, seasonal or mooring of any boat, watercraft, kayak, etc.

- (4) No leaving of beach towels, folding chairs, etc. overnight or when the owner is not present.
- (5) No lounging, sunbathing, picnicking, etc.
- (6) Hours of usage.
- (7) Prohibiting trespassing on private property on either side of the public way.
- (8) Noise limits.
- (9) No blocking of the lake access.

There also exists a state statute that regulates public road ends – MCL 324.30111b. That statute applies to public road ends at lakes that are open to the public. It prohibits private docks, boat hoists and similar items from being installed at a public road end, although the municipality can install one “day use” dock for everyone’s use. It also prohibits the mooring, docking, storing, etc. of a boat or watercraft overnight at the public road end.

The Township cannot prohibit members of the public or non-property owners on Lake 13 from utilizing public road ends, alleys, walkways, etc. at the Lake. Generally, equal access would have to apply to such public ways. However, the Township could place usage day and time limits on those public accesses to the Lake via ordinance. For example, if a locked gate were installed at a lake access, a Township ordinance could provide that the gate will only be open for one week in the spring and one week in the fall to facilitate the launching and retrieval of boats. Or, the gate could be open only one day a week (for example, on Tuesdays). Although everyone would have equal access to the Lake on those days, the limited availability would likely limit usage by people who do not have property on the Lake or nearby.

8. Proper Uses of the Platted Ways.

Even apart from any Township ordinance regulating the Platted Ways, there are common law limits of usage for such Platted Ways. In most cases, public or private platted dedicated road ends, walkways, alleys, etc. that are “perpendicular” to an inland lake can only be used for access (i.e. travel) and cannot be utilized for the following:

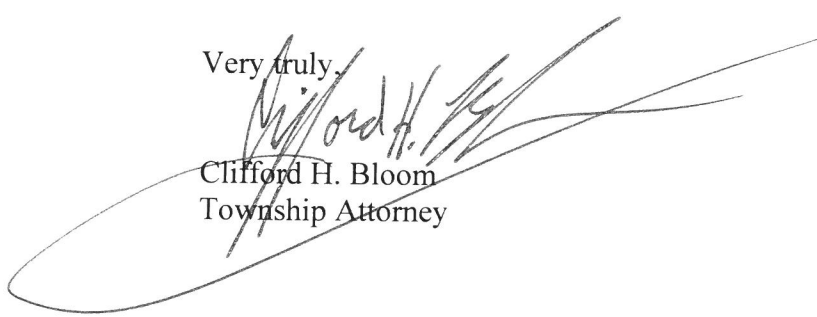
- (a) Non-government docks, piers, boat hoists, etc.
- (b) Seasonal, overnight or permanent boat or watercraft mooring, dockage, etc.
- (c) Lounging, sunbathing, picnicking, etc.

Township officials have also asked whether the Lake 13 Association or any private individual can install or maintain a fence or other barrier across a public or publicly dedicated alley, road end, park or other public property on an inland lake. In general, the answer is “no,” unless the applicable governmental agency with jurisdiction approves any such fence, barrier, etc. Furthermore, the liability potential to the association or individual involved who install a fence, barrier, etc. could be significant if anyone is injured or killed due to the barrier or fence. In addition, it is not clear whether that association or individual’s insurance would even cover such a situation. Of course, there are two general exceptions. First, if the governmental agency that owns or controls the road, alley, park, etc. consents to a private fence or barrier, that may change matters. Second, “parallel roads” along the shore or lake are often treated differently, with the adjoining first-tier lot owners usually being deemed riparian property owners subject to the road right-of-way or easement. See *2000 Baum Family Trust v Babel*, above.

What can an association or an individual do to “police” public road ends, alleys, walkways, etc. that end at a lake? As mentioned above, even though the Road Commission has primary jurisdiction over the public road ends at Lake 13, the Township can enact police power or non-zoning ordinances regulating those road ends. Enforcement could be via municipal civil infraction proceedings. Such an ordinance could apply to both public and private road ends, alleys, walkways, etc. at lakes within the Township. Those regulations could also include restricting access to the lake dam (including specifying certain areas where trespassing is prohibited for Lake 13). An association or individual could also file a civil lawsuit in the Clare County Circuit Court to stop misuse of a Platted Way.

Please do not hesitate to contact us should there be any further questions by Township officials. Thank you.

Very truly,



Clifford H. Bloom
Township Attorney

cc: Township Clerk