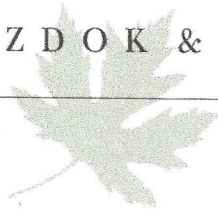

OLSON, BZDOK & HOWARD



To: Long Lake Shoreline Subcommittee
From: Chris Bzdok
Date: October 25, 2022
Re: Follow-up on options for OHWM and dredging amendments.

Introduction

This memo is a follow-up on our last memo and presentation to the Shoreline Subcommittee regarding determination of the Ordinary High-Water Mark (OHWM) and possible local regulation of dredging, structures, and other land use activities at the shoreline of inland water bodies under the Long Lake Township zoning ordinance. It will connect the natural resource-related opinions offered by Stu Kogge of GEI Consultants to the four options outlined in the prior legal memo and presented at the subcommittee's September 24 meeting.

As the subcommittee will recall, we presented four possible options for Township regulation of these issues:

Option 1: Local permitting similar to Parts 301 and 303 of NREPA.

The first option considered is establishing a permitting regime in the Township zoning ordinance that would regulate the same or similar activities as Parts 301 (Inland Lakes and Streams) and 303 (Wetlands) of the Natural Resources and Environmental Protection Act (NREPA); and adopt the same decision-making criteria. GEI opinions #1 (resource impacts), #2 (cumulative impacts), and #3 (adjacent structures) would all support adopting the standards from Parts 301 and 303 by zoning. However, we continue to recommend against this option due to legal risks associated with preemption, as explained in our first memo. Further, GEI opinions #4 (aesthetics) and #5 (property values) indicate that zoning regulation that simply tracked Parts 301 and 303 would not address all local objectives.

Option 2: Do not regulate dredging below OHWM locally but do prohibit excavation of artificial water features into upland areas.

The second option considered is prohibiting excavation of artificial channels in areas upland of the OHWM, but not regulating dredging below the OHWM. The rationale for this approach is that the Township's sphere of interest is strongest and the legal risk of preemption is

the lowest when the Township regulates activity in the upland areas. GEI opinions #1 (resource impacts), #2 (cumulative impacts), and #3 (adjacent structures) would all support this approach from a resource protection perspective.

Option 3: Allow public projects involving upland dredging but not private ones.

The third option considered is to allow certain dredging or shoreline structures and activities when undertaken by a public entity (for a boat ramp or public park, for example) while prohibiting those activities when undertaken by a private landowner. We recommended caution when considering this approach from a legal perspective. However, GEI opinion #2 (cumulative impacts) would support this option from a resource protection standpoint. Allowing these activities only for public projects would limit the cumulative impact of these activities by restricting the number of them that could be undertaken on any given lake in the Township.

Option 4: Regulate shoreline activities based on local considerations and treat natural and artificial shorelines uniformly in setback and area regulations.

The fourth option considered is to allow upland dredging and excavation but to regulate it as a conditional use. The use could be conditionally permitted on some lakes but not others. The Township could apply the general standards for conditional uses in section 19.1(3) and also create specific conditional land use evaluation standards for that activity, similar to what is done for other unique types of conditional uses. This option could be paired with zoning amendments that treat the OHWM and artificial shorelines the same way under the zoning ordinance, including for setbacks and area regulations, and for vegetative buffers in the Natural Lakefront district. The draft amendments prepared by Leslie Sickterman would implement Option 4.

GEI opinions #1 (resource impacts), #2 (cumulative impacts), and #3 (adjacent structures) all support this approach from a resource protection standpoint. GEI opinions #4 (aesthetics) and #5 (property values) indicate that this approach could further local objectives that Parts 301 and 303 of NREPA do not address. GEI opinion #6 (artificial water lines) demonstrates that treating natural and artificial shorelines in a uniform manner would be consistent with EGLE's practice under the state laws.