

DATE POSTED: November 17, 2022

AGENDA
CHARTER TOWNSHIP OF LONG LAKE
PLANNING COMMISSION
LONG LAKE TOWNSHIP HALL
8870 NORTH LONG LAKE ROAD
TRAVERSE CITY, MI 49685

TUESDAY, NOVEMBER 29, 2022
REGULAR MEETING (RESCHEDULED)

1. CALL TO ORDER – 6:00P.M.
2. ROLL CALL
3. APPROVAL OF AGENDA
4. CONFLICT OF INTEREST STATEMENT (Declare and cite agenda item.)
5. BRIEF PUBLIC COMMENT (Any person may speak for up to 3 minutes.)
6. APPROVAL OF MINUTES:
 - A. NOVEMBER 9, 2022 (special meeting)
 - B. OCTOBER 27, 2022 (Shoreline Subcommittee)
 - C. MAY 17, 2022 (study session)
7. POSTPONED BUSINESS: NONE
8. PUBLIC HEARINGS:
 - A. ZOA 09-22-03 A proposal to amend Zoning Ordinance #109, as amended, to (1) Create a new definition for the term “Edge of Water for Altered Shorelines”, to amend several related definitions and to add references for the new term throughout the Ordinance. (2) Create a new SECTION 4.19 PROHIBITION OF UPLAND DREDGING
9. PENDING BUSINESS: NONE
10. NEW BUSINESS: NONE
11. BRIEF PUBLIC COMMENT (Any person may speak for up to 3 minutes.)
12. REPORTS
13. CORRESPONDENCE

Time posted: _____
Signature: _____

14. COMMISSIONERS COMMENTS

15. ADJOURNMENT

IF YOU ARE PLANNING TO ATTEND THE PUBLIC MEETING AND REQUIRE REASONABLE SPECIAL ASSISTANCE, PLEASE CONTACT RONDA ROBINSON, TOWNSHIP CLERK AT (231)946-2249, (T.D.D. 800-649-3777) AT LEAST TWO DAYS PRIOR TO THE SCHEDULED MEETING DATE.

PUBLIC COMMENT/INPUT POLICY

Any person shall be permitted to address a meeting of the Long Lake Township Planning Commission which is required to be open to the public under the provisions of the Michigan Open Meetings Act, as amended. (MCLA 15.261, et. seq.) Public comment shall be carried out in accordance with the following Commission Rules & Procedures:

A person wishing to speak must be acknowledged by the Chair before speaking

The speaker will give their name and address for the record

The speaker will be limited to 3 minutes

The speaker will only address comments to the chair – not the applicant, staff, or others in the audience

The Commission will listen to comments and questions and will not respond, except to clarify.

No speaker may speak twice unless all others who wish to speak have had an opportunity to speak. In the Chair's discretion, a speaker may speak more than once if there are new issues or questions brought forward.

Groups of 10 or more have the option of selecting a spokesperson, who may speak for up to 15 minutes.

Any person may make a video or audio recording of the meeting. Standing equipment, cords, or portable microphones must be located to the right side of the meeting room for safety and so as not to block audience view.

MINUTES

CHARTER TOWNSHIP OF LONG LAKE
PLANNING COMMISSION MEETING
LONG LAKE TOWNSHIP HALL
8870 NORTH LONG LAKE ROAD
TRAVERSE CITY, MI 49685

WEDNESDAY, NOVEMBER 9, 2022
SPECIAL MEETING

1. CALL TO ORDER: By Chairman Craves at 6:00 P.M.
2. ROLL CALL: Board members present were Verschaeve, Wiand, Craves, Witkop, and Rademaker. Doren and Figura were absent and excused. Also present were Leslie Sickterman, Township Planner, Chris Bzdok, Attorney, Stu Kogge, Biologist, and Heidi Mello, Recording Secretary. Several members of the public and Arlene Wright, Court Reporter, was in attendance.
3. APPROVAL OF AGENDA: Motion by Verschaeve and support by Wiand to approve the agenda as presented. All voted in favor, the motion carried.
4. CONFLICT OF INTEREST STATEMENT: NONE.
5. BRIEF PUBLIC COMMENT:
 - Bill Smith, Timbers Trail: No dredging.
 - Chuck Weitz, Timbers Trail: Supports Option 2.
 - Blaze Masserant, Inwood, Interlochen: He is Chair of Northern Michigan Environmental Action Council (NMEAC) and their Board supports Option 2.
 - HT Snowday, South Long Lake Road: Supports Option 2.
 - Anne Morrison-Perry, South Long Lake Road: Supports Option 2 and introduced correspondence that was made part of the record.
 - Brent Schnell, Wintergreen Avenue: He is the President of the Long Lake Association and their Board supports Option 2. He introduced correspondence that was made part of the record.
 - Larry Galehouse, Brandow Woods Drive: He is bothered by a new Zoning Ordinance that has no regard for property owners on other lakes.
 - Len Kline, Crescent Shores: Supports Option 2.

Kevin Severt, Edgewood Avenue: Supports Option 2.

Maureen Kennedy Templeton, Field Road: The Township has always based their decisions on science; the Watershed Project, for example. Supports Option 2.

Joe Quandt, Eastern Sky Drive: Supports Option 4.

Mark Flynn, Tottenham Drive: Supports Option 2.

Peter Zirnhelt, Outer Drive: Wants explanation of why the Chair changed his support from Option 2 to Option 4?

Gregg Armstrong, Timbers Trail: Supports Option 2.

Howard Kitchen, South Long Lake Road: 200' can dredge and 25' cannot? This is only an option if you are rich?

6. APPROVAL OF MINUTES: NONE.
7. POSTPONED BUSINESS: NONE.
8. PUBLIC HEARINGS: NONE.
9. PENDING BUSINESS: NONE.
10. NEW BUSINESS:
 - A. REVIEW OF RECOMMENDED ZONING TEXT FROM SHORELINE SUBCOMMITTEE

Sickterman reviewed the Shoreline process that started in the Spring of 2022. The Township created the Shoreline Steering Committee and dedicated resources to delve deeper into the question of dredging as well as other related shoreline objectives. All riparian property owners were contacted, on all significant bodies of water in the Township, to participate in a steering committee made up of the public at large. 46 people signed up. People were divided into eight groups, each with their own distinct topic and list of questions to be answered. The idea was to come up with language and a policy direction that would become part of the Master Plan. Each group came up with objective statements all relating to shoreline issues.

Group A, tasked with the issue of dredging and drafted two objective statements:

- A1) Create a means to reliably and consistently identify the Ordinary High Water Mark (OHWM) on water bodies throughout the Township, and
- A2) Create a clear regulatory framework governing the activities with a potential for altering the shoreline of inland lakes in Long Lake Township.

All of the Shoreline Steering Committee information came back to a three-member Subcommittee of the Planning Commission that was asked to take a look and provide a recommendation to the full Planning Commission. That Subcommittee requested the Township provide additional technical expertise. This is when Chris Bzdok and Stu Kogge came on board

and helped to sift through all of the complicated issues that came from the questions posed to Group A. The Subcommittee met in July, September and October. In the process of those meetings, Bzdok created a summary of four Options to consider when moving the question forward; two of the Options are more defensible. The Subcommittee recommended going ahead with Option 4, but because it was not unanimous, the Subcommittee asked that information relating to both Options 2 and 4 be sent on to the full Planning Commission.

Sickterman reminded the Board that this Special meeting allowed them to make motions and take action, such as setting a Public Hearing for November 29, 2022 and rescheduling the regular Planning Commission meeting for the same date. In order to make changes to the Zoning Ordinance, the Township is required to hold a Public Hearing to take input directly from the public. After the Public Hearing, the Planning Commission can make recommendations regarding text amendment to the Township Board. The Township Board takes final action on any Zoning Amendment. Any changes to zoning regulations should be in place and taking effect by end of year under this process.

Sickterman reminded the Planning Commission that the Commission's bylaws require that all business be concluded by 8:00 P.M.

Bzdok explained they had evaluated some of the questions the Steering Committee had raised. They noted the OHWM definition is pretty good and consistent with the State. The Township has zoning authority both above the OHWM and below the OHWM. They noted the Township's ability to act in this shoreline area is based on 1) good reasons to do so, and 2) it's not preemptive. In evaluating these two main goals, four Options were presented to answer how to create a clear regulatory framework governing activities with the potential for altering the shoreline of inland lakes in the Township. There are considerations the Township can look at when regulating activities at the shoreline: aesthetics, protecting property values, and protecting natural resources. The Committee asked for Stu Kogge and GEI to assist with resource protection issues; he provided opinions in a technical memo.

Bzdok believes the Township could regulate shoreline activities with either Option 2 or 4. Option 2 says leave lands below the OHWM to EGLE's jurisdiction, but the Township would have the authority and sufficient interest to prohibit excavation of artificial basins and channels above the OHWM based on considerations from Kogge, longtime history of the Township and public input. Option 4 says permit dredging and basins above the OHWM become a Conditional Use. This option would include the general Conditional Use standards in the Ordinance, and would include some special standards and requirements unique to this specialized use, and regulate it that way. Additionally, this Option recommends not treating artificial and natural waters edges differently in the Zoning Ordinance for purposes of setbacks. EGLE has the same approach. Bzdok believes these two Options are legally the most viable.

Craves asked Kogge to summarize. Kogge explained that from a DNR perspective, dredging in the littoral zone, the most productive zone, has potential hazards to habitats. EGLE also believes it should be avoided where possible and alternatives with less impact should be explored first. Minimize impact to protect the shoreline. The key is to protect the littoral zone. Regarding setbacks, buffers and natural shorelines are better than seawalls. Seawalls and vertical walls are not good for littoral zones and cause erosion.

Verschaeve asked if the littoral zone extends around the whole lake? Kogge answered yes, it is zero-to-three feet out and goes around the perimeter of the lake except in front of seawalls.

Wiand asked if dredging or filling in the littoral zone was always bad? Kogge said not always; habitats can be improved. Wiand believes the process is incomplete; we have not seen all of the science. He wants the OHWM definition to stand as it is and to look more at property rights.

Rademaker stated the Township has historically prohibited dredging in setbacks so why adopt additional language or Conditional Uses when we already prohibit it? It is ok to redefine the OHWM to match the State, but the current Ordinance is defensible. Keep the 50' setback and stay with Township history. He believes the key is educating the public on how to apply setbacks rather than changing the ordinance. No to Conditional Land Use; the Ordinance is here to protect public health, property values and aesthetics.

Witkop asked, regarding our Ordinance, are we good with what we have?

Verschaeve believes the Township has strong protections in place already and doesn't agree with surveyors having to certify.

Craves emphasized the need for definitions; the more precise the better.

Rademaker stated that the goal of the Township is to protect the natural systems that support the clean water and healthy habitats that the public depends on for recreation and intrinsic value.

Bzdok stated that if the Township wants to not allow inland excavations to create artificial water bodies, we should use Option 2, make our findings as to why, and be specific. If the Township policy is to measure setbacks from the waters edge; it should say so specifically, even though it is custom and practice.

Craves asked if the water's edge is the starting point? Bzdok explained the Township makes the decision to allow or not allow activities including dredging. He will offer suggestions as to how to reach the decision, bolster the decision and how to be specific.

Wiand asked what the weaknesses are in the Township Ordinance? Bzdok stated he would not list Ordinance weaknesses in a public meeting.

Rademaker reminded the Board it's been the goal of the Township through previous Zoning Ordinances and Amendments, in the past several decades, to prohibit upland dredging and earth excavations in the 50' setbacks. He wants to also add the new section prepared by Sickterman. Bzdok agreed he could have the language tightened prior to the Public Hearing date. Craves wanted to work on the language at the current meeting.

Rademaker liked the waters edge piece to add to the Ordinance. He offered adding A to the Preamble and the rest stays as is? Sickterman recommended that the history preamble becomes Sub A and the rest become B, C, D, E & F.

Wiand didn't think the Township needed to change the Ordinance.

Motion by Rademaker and support by Witkop to recommend an amended Option 2 to be moved forward with a public hearing to be held during the rescheduled regular Planning Commission meeting to be held at 6:00 P.M. on November 29, 2022. Sickterman asked for clarification of the record regarding surveyor certification and additional language addressing retaining walls.

Rademaker withdrew his motion in order to extend the meeting time.

Motion by Witkop and support by Verschaeve to extend the meeting an extra 15 minutes until 8:15 P.M. Carried.

Motion by Rademaker and support by Witkop to recommend an amended Option 2 to the Township Board. Yes: 4, No: 1. Motion carried.

11. PUBLIC COMMENT:

Kevin Severt, Edgewood Avenue: Agrees with preamble and Township history.

Gregg Armstrong, Timbers Trail: Appreciates serious dialogue.

Anne Morrison-Perry, South Long Lake Rd: Thanks for hiring Bzdok & Kogge.

Mark Flynn, Tottenham: Appreciates staying on timeline with the process.

David Stafford, North Long Lake Rd: What happens if the Ordinance is violated?

Ruth Kitchen, South Long Lake Rd: Thanks for tightening up the language.

Bill Smith, Timbers Trail: Feasible and prudent alternatives should be considered first. Good neighbor policies should be followed.

12. ADJOURNMENT: Motion by Witkop and support by Wiand to adjourn. Motion carried.

Craves adjourned the meeting at 8:15 P.M.

RICK CRAVES, SECRETARY

HEIDI MELLO, RECORDING SECRETARY

MINUTES

CHARTER TOWNSHIP OF LONG LAKE PLANNING
COMMISSION SHORELINE SUBCOMMITTEE
8870 NORTH LONG LAKE ROAD
TRAVERSE CITY, MI 49685

THURSDAY, OCTOBER 27, 2022

1. CALL TO ORDER: By Chairman Craves at 6:00 P.M.
2. ROLL CALL: Subcommittee members present were Wiand, Rademaker and Craves. Also present were Leslie Sickterman, Township Planner, Chris Bzdok, Attorney, and Heid Mello, Recording Secretary.
3. APPROVAL OF AGENDA: Motion by Rademaker and support by Wiand to approve the Agenda as presented. All voted in favor, the motion carried.
4. BRIEF PUBLIC COMMENT:

Joseph Quandt, Eastern Sky Drive re: dredging

Bill Smith, Timbers Trail re: dredging
5. APPROVAL OF MINUTES: Motion by Wiand and support by Rademaker to approve as submitted the Minutes of the Subcommittee meeting held on September 22, 2022. All voted in favor, the motion carried.
6. REVIEW & DISCUSSION OF INFORMATION FROM OLSON BZDOK & HOWARD, GEI CONSULTANTS AND STAFF:

Bzdok reviewed the information presented last month 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 Township zoning ordinance. There were four possible options for Township regulation:

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.

Sickterman explained Options 2 and 4 were the most defensible per legal counsel. Option 4 is Conditional Use standards; it is a discretionary use, not a use by right and it does require a public hearing. Other requirements include: setbacks, amount of water frontage, possible buffer strips and an environmental impact statement from the applicant. Option 2 would prohibit upland dredging except for the expansion or improvements of an existing public launch site. Also, edge of water for altered shorelines is new definition for OHWM, and where measurement is taken from.

Rademaker asked why we need to single out "altered" in our definition? Bzdok explained the existing language of the Ordinance is not as tight, with respect to those issues, as might be desirable.

Sickterman explained we still need a definition for that edge even if we don't allow new situations to occur. The Board discussed the Township's history of prohibiting boat basins and dredging.

Rademaker discussed the Ordinance protections that are already in place, including vegetative buffers, five-foot walkways, and a 50 foot setbacks without buildings. He discussed parts of Option 2 and Option 4.

Bzdok explained it sounded like the Township wanted to maintain an existing prohibition, that has been in place in practice, on inland channels and boathouses. Treat all water lines the same for setbacks and buffers, where buffers exist. Bzdok believes this is Option 2, but it needs to be tightened up and supported.

Wiand wondered if the Township could blanket eliminate something from a possibility, for example, a channel? Bzdok answered yes, if there are local objectives that are served. Wiand believes the questions in the memo are negative in nature and were brought about by the Barnes Project. He wondered if the Township should ban this completely. Sickterman feels our Ordinance does not fully speak to these activities. Bzdok agrees, and feels the Township should clearly define its goals.

Rademaker asked if the Township defines the OHWM, and prohibits all else upland, is that enough? Bzdok explained that Option 2, along with a revised definition of OHWM, would codify the Ordinance to the current status quo, but the Ordinance itself should be more specific.

Sickterman asked if Option 2 should include some discussion of past practices and consistency of those practices. Rademaker explained he liked Option 2 but also likes the definitions in Option 4. Sickterman and Bzdok agreed Options 2 and 4 could be combined. Craves agreed with Option 2 and the additional definitions from Option 4, and stated that this recommendation should go before the full Planning Commission. Craves

believes the Township needs to be consistent.

Wiand wants Option 4 with revisions. 200 feet of shoreline is too little; 250-300 feet is more realistic. Not everyone can do it; only six or seven properties like this exist. He wants to be cautious about outright banning and consider property rights. Rademaker wanted clarification; it should be allowed if there is sufficient enough property? Wiand said he understands the concerns, has seen it work, and it can be beneficial for fish habitat. Wiand also stated Option 4 would allow expression without interfering with people nor the natural resources. Craves asked if the Subcommittee should recommend Option 2, Option 4, or a combination, and let the full Planning Commission decide.

Bzdok asked the Subcommittee: Do you allow this conditionally or do you not? You cannot do both. Rademaker stated that the Township historically does not allow this use and the residents do not want this use.

Wiand discussed the effect on other properties. He asked about the relevance of a 50-foot setback other than protecting the view, as buffers are more damaging to the lake. The Subcommittee discussed setbacks and side yard setbacks.

The Subcommittee discussed marinas which are regulated by EGLE and are commercial in nature, versus keyholing, which is private use.

Wiand doesn't like the idea of taking away the ability to regulate and make it Conditional Use and let people be creative. He believes the Township can make a greater impact protecting the lake in smaller ways. The Township is spending a lot of time and is making this issue bigger than it is.

Rademaker asked if channeling and boat basins are allowed under the Conditional Use permit. Craves and Wiand both stated this use should be permitted and this should be the recommendation to the full Planning Commission Board.

The Subcommittee discussed recommendations to the Planning Commission including road frontage, size of parcel, length of shoreline, side yard setbacks, impact on neighboring properties, environmental impact statements and percentage of natural vegetation in waterside setbacks. Sickterman explained as the Ordinance was currently written, there was an assumption this applied only for the Lake Residential District (LRD), not the Natural Lake District. The Subcommittee confirmed.

Motion by Wiand supported by Craves to recommend to the Planning Commission Board Option 4 with the changes discussed in Sec. 19. YES: Wiand, Craves NO: Rademaker. Motion carried.

7. PUBLIC COMMENT:

Pete Springsteen, Cedar Lake re: supports Option 2
HT Snowday, South Long Lake Road re: supports Option 2
Anne Morrison-Perry, South Long Lake Road re: supports Option 2
Kevin Severt, Edgewood Avenue re: supports Option 2
Mark Flynn, Tottenham re: Lack of Foresight
Chuck Weitz, Timbers Trail re: supports Option 2

Barbara Springsteen, Cedar Lake re: dredging
Two additional pieces of correspondence were added to the record.

8. ADJOURNMENT: Motion by Rademaker and support by Wiand to adjourn.
Motion carried.

Craves adjourned the meeting at 8:21 P.M.

RICK CRAVES, SECRETARY

HEIDI MELLO, RECORDING SECRETARY

MINUTES
LONG LAKE TOWNSHIP PLANNING COMMISSION
LONG LAKE TOWNSHIP HALL
8870 NORTH LONG LAKE ROAD
TRAVERSE CITY, MI 49685

TUESDAY, MAY 17, 2022
STUDY SESSION

1. CALL TO ORDER – By Chair Craves at 6:00 P.M.
2. ROLL CALL - Board members present were Craves, Doren, Rademaker, Verschaeve, Wiand and Witkop. Also present were Ron Lemcool, Supervisor, Leslie Sickterman, Township Planner and Victoria Velting, Recording Secretary. Figura, absent. Witkop arrived before pledge.
3. APPROVAL OF AGENDA - Motion by Verschaeve and support by Rademaker to approve the Agenda. All in favor. Carried.
4. BRIEF PUBLIC COMMENT - None
5. HOUSING PRESENTATION FROM YARROW BROWN, HOUSING NORTH
6. MASTER PLAN DISCUSSION

PUD could have Community Benefit by providing ADUs, walking trails (increase interconnectivity), buffer zones and/or address traffic concerns.
7. ADJOURNMENT: Verschaeve moved to adjourn, support by Doren, all in favor, Carried. Craves adjourned the meeting at 6:57 pm.

TIM FIGURA, SECRETARY
LONG LAKE PLANNING COMMISSION

VICTORIA VELTING, RECORDING SECRETARY
LONG LAKE PLANNING COMMISSION

NOTE: THESE MINUTES ARE SUBJECT TO AMENDMENT AND/OR CORRECTION PRIOR TO THEIR ADOPTION.

Charter Township of Long Lake
Grand Traverse County
ZOA 09-22-03
Ordinance #194

AN ORDINANCE TO AMEND ZONING ORDINANCE #109, TO PROHIBIT UPLAND DREDGING AND TO CREATE A DEFINITION FOR EDGE OF WATER FOR ALTERED SHORELINES.

LONG LAKE TOWNSHIP HEREBY ORDAINS:

Section 1: Amend Section 3.6 DEFINITIONS E to add a new definition as follows:

Edge of Water for Altered Shorelines: For a shoreline that has been altered from its natural state, where naturally occurring vegetation has been removed, or where a channel, boat basin, or similar excavation has been excavated or dredged, the edge of water for purposes of this ordinance shall be observed from the uplands side of the alteration. By way of example, the following will be considered the location of the ordinary high water mark: the upland edge of a breakwall/seawall/embankment, the upland edge of riprap, the edge of non-native persistent vegetation, or the edge of an excavated channel or boat basin.

Section 2: Amend Article 3 DEFINITIONS & INTERPRETATIONS to amend the following definitions to read as follows, all other portions of this Article to remain unchanged:

Section 3.13 DEFINITIONS L

Lot Line, Waterside: The ordinary highwater mark or the edge of water for altered shorelines (as this term is defined herein) shall be the waterside lot line.

Section 3.20 DEFINITIONS S

Setback: The minimum horizontal distance measured from a lot line, ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein), or right-of-way line, as applicable, within which this Ordinance may restrict the erection of a building or structure.

Section 3.22 DEFINITIONS U

Upland: The land area which lies above the ordinary highwater mark or the edge of water for altered shorelines (as this term is defined herein).

Section 3.24 DEFINITIONS W

Waterside Property: Any property which has a property boundary, or any portion thereof, abutting the ordinary highwater mark or the edge of water for altered shorelines (as this term is defined herein), of any important water body within Long Lake Township, as herein defined.

Water's Edge: The ordinary highwater mark or the edge of water for altered shorelines (as this term is defined herein), along the shore of a body of water.

Section 3.26 DEFINITIONS Y

Yard: The open space that lies between the principal building or buildings and the nearest lot line, ordinary highwater mark or the edge of water for altered shorelines (as this term is defined herein), or right-of-way line, as applicable. See Figure 3.5.

Yard, Waterside: The open space extending across the full width of a lot between the principal building and the ordinary highwater mark or the edge of water for altered shorelines (as this term is defined herein) of any lake, stream or watercourse and measured to the building at the closest point to the ordinary highwater mark or the edge of water for altered shorelines (as this term is defined herein). If the waterside lot has frontage on more than one water body or water course, the yard with the largest amount of water frontage shall be the waterside yard. If more than fifty percent (50%) of the perimeter of the lot boundary has contiguous water frontage, then the property owner may specify the rear yard.

Section 3: Amend Section 4.6 ACCESSORY BUILDINGS AND USES, Subsection 1.a.1) through 1.a.4) to read as follows, all other portions of this Section to remain unchanged:

1. Accessory buildings shall be subject to the following regulations:

a. General Provisions.

- 1) **Setback Requirements.** All accessory buildings shall be subject to the same setback requirements as the principal building and shall be a minimum of 10 feet from any other building. Within the LR district, major accessory buildings shall not be permitted to be located within fifty (50) feet of the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein). Within the NL district, major accessory buildings shall not be permitted to be located within one hundred (100) feet of the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein).
- 2) **Construction Timing.** No accessory building shall be constructed prior to the principal building except as provided under 4)2. below.
- 3) **Structural Attachment to Principal Building.** If an accessory building becomes structurally attached to a principal building, it shall be deemed to be part of the principal building and shall conform to all the regulations, which apply to principal buildings in the respective Zoning District. See definition “Structurally Attached” in Article 3.
- 4) **Permitted Minor Accessory Buildings.**
 1. **Minor Accessory Buildings in Conjunction with a Primary Building.** In all zoning districts, up to 2 minor accessory buildings, as defined herein, shall be permitted per lot in conjunction with a primary building. Minor accessory buildings shall not be located in the front yard but may be located in the side yard setback five (5) feet from the side lot line and in the rear yard setback ten (10) feet from the rear lot line in the LDR, MDR and HDR Districts. In the LR Lake Residential District, minor accessory buildings may be permitted in the front yard, but not within the required front yard setback and minor accessory buildings may not be located within fifty feet (50’) of the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein). In the NL Natural Lake District, minor accessory buildings may be permitted in the front yard, but not within the required front yard setback and minor accessory buildings may not be located within one hundred feet (100’) of the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein). These buildings will not require a land use permit.

2. **Minor Accessory Buildings without a Primary Building.** In all zoning districts, 1 minor accessory building, as defined herein, shall be permitted without a primary building provided that the following conditions are met
 - a. The minor accessory building must be set back a minimum of 50 feet from any abutting public or private road right-of-way; 5 feet from any side lot line, 10 feet from any rear lot line; and 50 feet from the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein).
 - b. The building shall be locked or reasonably secured to prohibit trespass.
 - c. The building shall not be serviced with water or sewer, but may have electricity.
 - d. Such building shall be used exclusively for storage of personal items customarily associated with a residence, no commercial use or storage shall be permitted.
 - e. Such building shall under no circumstances be used as a temporary or permanent dwelling for human occupancy.
 - f. A land use permit shall be required prior to placement of a minor accessory building without a primary building on any parcel of land in the Township.
 - g. All other requirements of this and other ordinances of Long Lake Township shall be in full effect including, but not limited to, the Junk Ordinance.
 - h. Such building shall be designed and constructed to keep its contents secured from the elements and to be of weather-resistant construction.

Section 4: Amend Section 20.2 LAND USE PERMITS, Subsection 5 to read as follows, all other portions of this Section to remain unchanged:

5. The Zoning Administrator shall require prior to or after issuance of a land use permit:
 - a. Applicant to provide proof of ownership, including an abstract, deed or title insurance commitment or a title history search;
 - b. Applicant shall provide a site report (as detailed in paragraph c below) within 30 days following the placement of building foundation or footings for the following construction types:
 - 1) All new primary or accessory residential structures or additions thereto requiring a land use permit. Such structures shall include (but not be limited to) decks, patios, and fences
 - 2) All new commercial buildings and related structures
 - c. For purposes of this ordinance, a site report shall meet all of the following:
 - 1) Such site report shall be prepared by a professional land surveyor, licensed in the state of Michigan.
 - 2) The site report shall be a drawing of the property certifying to the Township the location of
 1. all lot lines within 25 feet of the required minimum setback line for any proposed or existing structures,

2. the ordinary highwater mark (as it is defined in this ordinance) or the edge of water for altered shorelines (as this term is defined herein) of any adjacent body of water or watercourse,
 3. the closest distance to each lot line of any proposed or existing structures,
 4. required minimum setbacks for the zoning district in which the property is located,
 5. all existing improvements,
 6. the location of adjacent road rights-of-way or access easement
- 3) The Zoning Administrator may waive the requirement for a site report under paragraph b or some of the elements of site report from paragraph c above under the following circumstances
1. A reliable prior survey is provided indicating that all setbacks are clearly met under the proposal
 2. The proposed improvements are located a minimum of 20' from any required setbacks and where there is no question regarding the location of the lot lines or road right-of-way or easement
 3. Similar circumstances as determined by the Zoning Administrator
- 4) The property owner or applicant shall be responsible for any improvements completed in violation of the permit issued as demonstrated by the site report. The property owner or applicant may be required to remove or relocate such improvement found to be in violation, amendment of the land use permit, or other remedies as may be appropriate.

Section 5: Amend Section 7.3 DISTRICT REGULATIONS (CONSERVATION AND RECREATION DISTRICT), Subsection 4.e to read as follows, all other portions of this Section to remain unchanged:

4.e Waterside Setback. No building or structure shall be built closer than fifty (50) feet from the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) of any lake, stream or water course, excepting stairways not more than five (5) feet in width, stairway landings of the same width as the stairway and pump enclosures of no greater size than three (3) feet high, three (3) feet wide and three (3) feet long.

Section 6: Amend Section 8.3 DISTRICT REGULATIONS (AGRICULTURAL DISTRICT), Subsection 4 to read as follows, all other portions of this Subsection to remain unchanged:

6. Minimum Building Setbacks.

- a. Measurement. All setbacks shall be measured to the foundation, or the face of the building, if cantilevered.
- b. Front. Each lot shall have a front setback of not less than fifty (50) feet in depth from the right-of-way line.
- c. Side. All lots shall maintain a fifteen (15) foot side setback along each side lot line.
- d. Rear. Every dwelling or other principal building hereafter erected shall have a rear setback not less than forty (40) feet in depth.

- e. Waterside Setback. No building or structure shall be built closer than fifty (50) feet from the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) of any lake, stream or water course, excepting stairways not more than five (5) feet in width, stairway landings of the same width as the stairway and pump enclosures of no greater size than three (3) feet high, three (3) feet wide and three (3) feet long.

Section 7: Amend Section 9.3 DISTRICT REGULATIONS (NATURAL LAKEFRONT DISTRICT), Subsection 4.d to read as follows, all other portions of this Subsection to remain unchanged:

- 4.d Rear or Waterside. Each waterside lot shall have a waterside setback of not less than one hundred (100) feet from the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) as defined herein. No building or structure shall be built closer than one hundred (100) feet from the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) of any lake, stream or water course, excepting stairways not more than five (5) feet in width, stairway landings of the same width as the stairway and pump enclosures of no greater size than three (3) feet high, three (3) feet wide and three (3) feet long. Each non-waterside lot shall have a rear yard of not less than forty (40) feet from the property line.

Section 8: Amend Section 9.4 SITE PLAN AND PLOT PLAN STANDARDS (NATURAL LAKEFRONT DISTRICT), to read as follows in its entirety:

Any property located in the NL Natural Lakes District shall be required to obtain approval of a Plot Plan, Site Plan or Conditional Land Use prior to the commencement of construction of any structure or use within the zoning district.

1. **Plot Plan Approval.** Plot plan approval pursuant to Section 20.3 is required for the construction of a single-family dwelling, garage, deck, patio, major and minor accessory building, fence or wall and any other accessory structure permitted within the NL District. Plot plans shall contain the information required under Section 20.3 and the additional items listed below:
 - a. A boundary survey,
 - b. Location of all existing and proposed structures dimensioned with their distance to the property lines and other structures noted,
 - c. Location of the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein),
 - d. Easements of record and
 - e. The location and sizes of all existing vegetation and notations as to whether it is to be removed or remain.
2. **Site Plan Approval.** Site plan approval is required for all permitted uses in the NL District except for those listed in Section 9.4, 1, above. All site plan applications shall meet the requirements of Article 24 Site Plan Review and all other applicable articles in this Ordinance.

Section 9: Amend Section 9.5 DEVELOPMENT STANDARDS (NATURAL LAKEFRONT DISTRICT), to read as follows in its entirety:

All property within the NL District shall conform to the applicable provisions of this Ordinance and the standards listed below. In the case of a property located in more than one (1) zoning district, the provisions of this section shall apply only to that portion of the property located in the NL District.

1. **Artificial Beach Areas.** Artificial Beach areas shall be reviewed as provided herein:
 - a. Artificial beaches located below the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein), are regulated by and subject to the conditions and requirements of the Grand Traverse County Drain Commissioner and the Michigan Department of Environmental Quality (MDEQ).
 - b. Artificial beaches located above the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein), are subject to approval of the Grand Traverse County Drain Commissioner and the following restrictions.
 - c. Artificial beaches may not exceed fifteen (15) feet in depth as measured perpendicular to the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein), and equal in width to ten percent (10%) of the length of the water frontage of the lot or ten (10) feet, which ever is greater.
 - d. Any such area used for an artificial beach area shall reduce the total area which may be cleared of native vegetation in the buffer strip as set forth in Section 9.5, 10,
 - e. Said artificial beach area shall be placed above the existing ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein).
 - f. As a condition of plot plan, site plan or conditional land use approval for new development or redevelopment (both as defined in Section 9.5, 9) with an existing artificial beach, that existing artificial beach shall meet all Zoning Ordinance requirements specified in this paragraph for a new artificial beach.
2. **Buildings and Structures.** Except as provided in this section and in Section 9.5.9 of this Ordinance, no buildings or structures, permanent or temporary, shall be erected within one hundred (100) feet of the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) of Bellows and Cedar Lakes. Provided, however, stairways, stairway landings and deck paths not more than five (5) feet in width, and pump houses or enclosures not to exceed three (3) feet in height, three (3) feet in width, and three (3) feet in length shall be permitted within the waterside setback, provided that such stairways, stairway landings and pump houses or enclosures shall comply with all required side and rear yard setbacks.
7. **Docks.** A dock that is removed and replaced either on a seasonal basis or periodically shall be located in conformance with the terms of this paragraph. No structure greater than thirty (30) cubic feet in total volume shall be permitted to be placed on, or affixed to, a dock. Storage of petroleum, gasoline, lubricants or other hazardous or toxic substances on a dock shall be prohibited. No dock shall be constructed within the side setbacks of the property on which it is located.

8. **Fences and Walls.** All fences and walls that generally parallel the side lot lines and are located within the waterside side setback area shall be no more than three (3) feet in height measured from the established grade. Seawalls, abutments and other similar walls or structures which significantly extend or reduce the land area or redefine the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) or the shape of a shoreline, shall be prohibited.
9. **Lighting.** All exterior lighting fixtures shall incorporate full cutoff shielding as defined herein installed to deflect any light away from adjoining properties, properties located on an opposite shoreline, buffer strips, water surfaces and the night sky.
10. **Lot Area Ratio.** All new lots with an area greater than one (1) acre, but less than forty (40) acres shall have a maximum depth to width ratio of four to one (4:1) and lots with an area of one (1) acre or less, shall have a maximum depth to width ratio of three to one (3:1).
11. **Vegetation Removal and Land Grading.** The removal of any vegetation and the grading, filling or balancing of more than three-hundred (300) square feet of land located within fifty (50) feet of the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) shall comply with all applicable articles within this Ordinance and with Section 9.5.1.
12. **Waterside Lots.** All new waterside lots shall have a minimum of two hundred (200) contiguous feet of water frontage.
13. **Non-Conforming Waterside Lots.** On nonconforming waterside lots in the NL District where a reasonable building envelope, as defined herein, cannot be achieved in compliance with the setback regulations of Section 9.3.4, the following setback requirements shall be met:

Front Setback:	The greater of the front setback of the existing dwelling (if any), or ten (10) feet
Side Setback, either or both sides:	The greater of the side setback(s) of the existing dwelling (if any), or ten (10) feet
Waterside Setback:	One hundred (100) feet
Rear Setback (non-waterside lots):	Forty (40) feet

In no event shall the setback standards in this subparagraph result in a setback requirement greater than the standards for lots that meet the minimum district dimensional standards set forth in Section 9.4 of this Ordinance.

10. **Buffer Strip.** In order to protect water quality, preserve sensitive wildlife habitat, and reduce soil erosion and sedimentation, any proposed new development or, as a condition of plot plan, site plan or conditional land use approval, any redevelopment (both as defined in this subsection) shall be separated from any important water body, as defined herein, by a buffer strip a minimum of fifty (50) feet in depth, as described below.

For the purposes of this subsection development or redevelopment shall be defined as any of the following:

- The enlargement of the principal building square footage by more than fifty percent (50%) of the existing building square footage.
- The demolition of an existing principal building and the building of a new principal building.
- The creation of any new lot.
- The construction of any principal building on a vacant lot.

A limited amount of improvement may be permitted within the strip as described below and illustrated in Figure 9-4.

- a. **Buffer Strip.** The depth of the buffer strip shall measure fifty (50) feet from the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein).

Removal of any vegetation within the buffer strip shall be limited to an area equal in width to ten percent (10%) of the length of the water frontage of the lot, or ten (10) feet, which ever is greater to a depth of the 50 foot setback. No contiguous area of clearance shall be wider than thirty (30) feet.

Features permitted in the buffer strip shall include footpaths constructed of permeable materials, stairways, fences and walls that otherwise meet the requirements of the ordinance. The buffer strip may not be used for the dumping of brush, clippings, fill dirt, trash, debris or other materials.

- b. **Vegetative Cover Preservation, Restoration and Clearing Standards.** Selective trimming and maintenance of existing native vegetation shall be permitted as needed for the health of the species and to provide a filtered view of the water. Where natural and native vegetation as defined in this ordinance has been removed in violation of this ordinance, a site or plot plan shall provide for the restoration of as much of the natural and native vegetation as possible within the buffer strip. In the event clearance of natural vegetation is proposed in conformance with 9.5.10.a, above, the following standards shall be used to guide the selective clearance of vegetation within the buffer strip:

- Removal MOST Preferred: Dead, dying, diseased or damaged shrubs or trees constituting a hazard to life, property or healthy vegetation.
- Removal NEXT Preferred: Scrub thickets, brushwood and shrubs as well as various trees with diameter at breast height (DBH) of less than six (6) inches and/or a height of less than six (6) feet.
- Removal LEAST Preferred: Deciduous and conifer trees with a six (6) inch DBH and/or a height of at least six (6) feet, as well as native ground cover species.

Section 10: Amend Section 10.3 DISTRICT REGULATIONS (LOW DENSITY RESIDENTIAL DISTRICT), Subsection 1.c.5) to read as follows, all other portions of this Section to remain unchanged:

- 5) Waterside Setback. No building or structure shall be built closer than fifty (50) feet from the ordinary high water mark or the edge of water for altered shorelines (as this term is defined herein) of any lake, stream or water course, excepting stairways not more than five (5) feet in width, stairway landings of the same width as the stairway and pump enclosures of no greater size than three (3) feet high, three (3) feet wide and three (3) feet long.

Section 11: Amend Section 12.3 DISTRICT REGULATIONS (LAKE RESIDENTIAL DISTRICT), to read as follows, all other portions of this Section to remain unchanged:

1. **Minimum Lot Area.** The minimum net lot size in the LR Lake Residential District shall be one (1) acre.
2. **Minimum Lot Width.** The minimum lot width shall be one hundred (100) feet wide on the waterside and one hundred fifty (150) feet measured at the front setback line.
3. **Maximum Building Height.** The maximum building height of principal structures in the LR-Lake Residential District is thirty-five (35) feet.
4. **Minimum Building Setbacks:**
 - a. **Measurement.** All setbacks shall be measured to the foundation, or the face of the building if cantilevered.
 - b. **Front (Road Side).** Each lot shall have a front setback of not less than fifty (50) feet in depth from the right-of-way line.
 - c. **Side.** Every dwelling or other principal building or accessory structure over one hundred (100) square feet shall have a side setback of fifteen (15) feet.
 - d. **Rear or Waterside.** Each waterside lot shall have a waterside setback of not less than fifty (50) from the ordinary high water mark, or the edge of water for altered shorelines (as these terms are defined herein), subject to Subparagraph 7, hereof. Each non-waterfront lot shall have a rear setback of not less than forty (40) feet from the property line.
5. **Minimum Floor Area.** All dwellings shall contain a minimum of nine hundred sixty (960) square feet of floor area and a minimum core area of living space measuring at least twenty (20) feet by twenty (20) feet.
6. **Maximum Lot Coverage.** As determined by setbacks.
7. **Buildings and Structures Within Waterside Setback.** Except as provided in this section, no buildings or structures, permanent or temporary, shall be erected within fifty (50) feet of the ordinary high water mark, or the edge of water for altered shorelines (as this term is defined herein) on any waterside lot. The following exceptions shall apply:
 - a. Stairways not more than five (5) feet in width, stairway landings the same width as stairways, deck paths no wider than five (5) feet, and pump houses or enclosures not to exceed three (3) feet in height, three (3) feet in width, and three (3) feet in length shall be permitted within the rear or waterside yard, provided that such stairways, stairway landings and pump houses or enclosures shall comply with all required side yard setbacks.
 - b. Waterside decks may be located within fifty (50) feet of the ordinary high water mark, or the edge of water for altered shorelines (as this term is defined herein) under the following conditions:
 - 1) Such waterside deck shall be mounted on pillars or posts with the deck surface placed at an elevation of at least six (6) inches and not more than sixty (60) inches above the mean grade beneath such deck,
 - 2) Such waterside deck shall be located not less than fifteen feet from any side lot line.

- 3) The maximum area of a waterside deck shall be three hundred (300) square feet.
- 4) A waterside deck shall not have a roof or other permanent impervious surface. This section shall not be interpreted to prohibit temporarily affixed roll-up canopies, umbrellas or other temporary shade-providing furnishings.
- 5) A waterside deck may include a railing; however such railing shall not exceed 36 inches above the surface of the deck, or as is consistent with current building codes, and further shall not be of a design and materials that is more than 50% visually obscuring as viewed perpendicular to the railing from any side.
- 6) A lot on which a new waterside deck is proposed shall include and retain in its existing natural state as defined in this ordinance, one or more areas of native vegetation, as defined in this ordinance, including conifer and deciduous trees native to northern Michigan, scrub brush and native ground cover. Such area(s) shall extend at least thirty (30) feet inland from the ordinary high water mark, or the edge of water for altered shorelines (as this term is defined herein) and cover a combined area of at least fifteen hundred (1,500) square feet. On a parcel which does not include existing areas which can fulfill this requirement, the Zoning Administrator may approve a plan for a waterside deck where the applicant provides for such an area as part of a plot plan.
- 7) A proposed waterside deck shall not be constructed until a plot plan meeting the requirements of Section 20.3, has been submitted and a land use permit has been issued therefore by the Zoning Administrator, subject to Section 20.2.

Section 12: Add a new Section 4.14 PROHIBITION OF UPLAND DREDGING, to read as follows in its entirety:

Section 4.14 PROHIBITION OF UPLAND DREDGING

1. **Intent and Findings.** It is the goal of the Township to protect the natural systems that support the clean water and healthy habitats that the public depends on for recreational, scenic, economic, and intrinsic value. Based upon a thorough examination of the preferences of the public and the science relating to shoreline protections, the Township has made the following findings:
 - a. History and past practice in the Township have been to effectively prohibit upland dredging by requiring a minimum of a 50 foot setback for buildings from the edge of water in order to protect scenic, economic, and environmental interests and the public's health, safety, and welfare.
 - b. Interruptions in the natural shoreline contribute to the loss of habitat and threaten interruption of the lifecycle of fish, bird, and reptile populations in inland lake ecosystems
 - c. The presence of structures, including boat houses within a boat basin, next to or over the edge of water of inland lakes may precipitate the introduction of contaminants into adjacent water bodies
 - d. Upland dredging projects to channel or create boat basins connecting to inland lakes have the possibility of impacting adjacent shoreline resources and properties by altering littoral drift (accretion and erosion of bottom substrates).

- e. The cumulative impacts of multiple instances of lost natural shorelines, concentration of contaminants, and interruption of habit resulting from upland dredging and creation of boat basins have the potential to irreparably harm inland lakes
 - f. The cumulative impact of upland dredging within an inland lake has the potential to harm the property values of all riparian owners on such inland lake through impacts on fishing opportunities, loss of natural viewsheds, and the alteration of the character of the lake
2. Based upon the intent and findings relative to upland dredging, the following activities are regulated in the Township:
- a. Lands above the ordinary high water mark or above the edge of water for altered shorelines (as this term is defined herein) adjacent to any significant body of water within Long Lake Township shall not be dredged, excavated, or channeled to connect to the adjacent body of water.
 - b. Activities including dredging, channeling, or excavations to create a boat basin attaching to any inland body of water within Long Lake Township are expressly prohibited
 - c. This prohibition on dredging, excavations, and channeling shall not apply to public entities in the improvement or expansion of existing launches, marinas, or basins upon inland lakes within Long Lake Township
 - d. These prohibitions are not intended to apply to the jurisdictional authority of EGLE or successor agency to regulate and permit the dredging of the bottomlands of inland lakes within Long Lake Township

Section 13: Amend Section 4.5 SPATIAL REGULATIONS, Subsection 1.d. to read as follows:

- d. Structures including, but not limited to the following are not intended to be regulated under this Ordinance and shall not be subject to the provisions of this Ordinance unless specified herein:
 - 1) Play structures
 - 2) Mailboxes
 - 3) Water wells, septic systems, and drainage structures regulated by other State or County authorities
 - 4) Landscaping and related water features
 - 5) Flag poles
 - 6) School bus stop structures
 - 7) Irrigation systems
 - 8) Underground shelters and cellars
 - 9) Break walls and retaining walls, except for activities and structures prohibited under Section 4.28 PROHIBITION OF UPLAND DREDGING
 - 10) Structures similar to those listed above

Section 14: Severability.

If any section, clause, or provision of this Ordinance be declared unconstitutional or otherwise invalid by a

court of competent jurisdiction, said declaration shall not affect the remainder of the Ordinance. The Township Board hereby declares that it would have passed this Ordinance and each part, section, subsection, phrase, sentence and clause irrespective of the fact that any one or more parts, sections, subsections, phrases, sentences or clauses be declared invalid.

Section 15: Effective Date.

This Ordinance shall become effective eight (8) days after publication.

LONG LAKE TOWNSHIP

Date: _____

By: _____
Ron Lemcool, Supervisor

Date: _____

By: _____
Ronda Robinson, Clerk

Published Date:

Effective Date:



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.

Technical Memo

To: Mr. Chris Bzdok, Olson, Bzdok & Howard, P.C.

From: Mr. Stu Kogge, PWS, Sr. Wetland/Aquatic Biologist, GEI Consultants (GEI)

Cc: Leslie Sickterman, Long Lake Township Planner
Ron Lemcool, Long Lake Township Supervisor

Date: October 26, 2022

Subject: Responses to questions from Mr. Chris Bzdok (email dated 10/19/2022) for Long Lake Township

As requested, the following are my professional opinions/responses to your questions in ***italics bold*** below from your 10/19/2022 email at 8:32pm.

- 1. In your opinion, does dredging or excavation of channels inland of the natural water line for artificial channels, boat basins, boat houses, or similar uses have any natural resource impact or pose any risks to natural resources? If yes, please describe.***

Yes, they can pose risks to and have adverse impacts on the natural resources associated with a waterbody (inland lake). The nearshore shallow areas of a lake are commonly referred to as the littoral zone and are typically the most productive area for phytoplankton, zooplankton, reptiles, amphibians, aquatic macroinvertebrates, and fish. The dredging or excavation of the nearshore areas of a lake to deepen them or to expand landward can adversely impact this biota directly and indirectly by removing or altering their habitat(s). Nearshore shallow areas of lakes are used by fish for spawning, rearing of young, and feeding.

Some may argue that dredging or excavation into upland creates additional open surface water area within an inland lake, however, the area and habitat created within these areas (such as that for boat wells and boathouses) are typically not comparable and are of lower quality/habitat. These areas routinely trap oils, gas, and debris due to their lack of circulation. They have been known to foster the growth of nuisance weeds and algae and during times of higher water or movement these can enter into the natural shoreline/open water areas of an inland lake.

There are many inland lakes within Michigan, several I have personal experience with, where artificial channels were constructed, and these areas now harbor greater densities of invasive and non-native species and routinely experience nuisance algal blooms. Increased and concentrated boat traffic, insufficient circulation, and trapping of contaminants have compounded issues in these locations. In some cases however specific areas of these artificial channels do support aquatic biota and are often areas where sportsman fish.

Boathouses have roofs and limit or prevent sunlight from reaching the littoral zones of a lake or the created surface water area –altering characteristics of the aquatic ecosystem. These roofs if constructed of asphalt shingles or metal that oxidize, can leach harmful compounds or metals and , can be long term sources of contaminants into the lake/created open water area (Parks Canada, <https://www.pc.gc.ca/en/docs/r/poli/page06>).

2. ***In your opinion, does allowing the dredging or excavation of channels inland of the natural water line for boat basins, boat houses, or similar uses pose any risk or concern regarding cumulative impacts to natural resources? If yes, please explain.***

Yes - dredging or excavation of channels inland of the natural water line for boat basins, boat houses, or similar uses will pose a risk or concern regarding cumulative impacts to natural resources. The construction of numerous artificial channels would result in a keyholing of more and more boats and watercraft into a lake and would be expected to create an adverse impact on water quality and habitat for aquatic biota. There would be a greater loss of littoral zones, increased turbidity in shallow waters resuspending nutrients into the water column, more locations for nuisance algal growths/blooms. The same holds with boat basins, boat houses, or similar uses, wherein there would be more vectors and surface areas opened up for the discharge of pollutants.

3. ***In your opinion, does allowing the construction of structures (boat houses or other structures) immediately adjacent to an improved or hardened shoreline have any natural resource impact or pose any risks to natural resources? If yes, please describe.***

The construction of a boat house or other structure too close to the lake shore could prevent or limit sunlight from reaching the littoral zone and thus pose risks and have adverse impacts to the natural resources of a lake. It could also be a source of contaminants to the water depending on its location and design. On the other hand, structures that are set back from the shoreline so they don't block sunlight, are not directly connected (e.g., have a surface water connection) to a lake, and that are made of materials that do not leach, weather, or erode contaminants, would pose minimal risks or potential impacts to natural resources.

4. ***In your opinion, do the Part 301/303 permitting criteria take into account aesthetics?***

The word aesthetics does not appear within the rules or statutes for Part 301 nor Part 303 of NREPA, to which EGLE staff are not required to take aesthetics into account in their review of Part 301 and Part 303 permit applications.

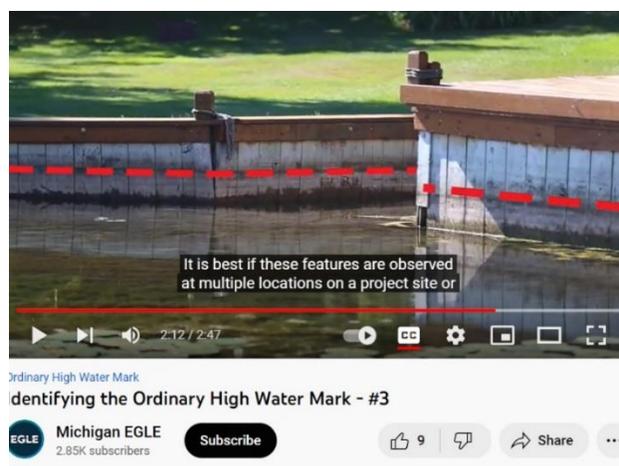
5. ***In your opinion, do the Part 301/303 permitting criteria take into account neighboring property values?***

Assessment of neighboring property values is not spelled out in the permit evaluation criteria of Part 301 nor Part 303, to which EGLE staff are not required to consider neighboring property values into account in their review of Part 301 and Part 303 permit applications.

However, Part 301 does require the agency to consider the impact of a proposed project on an adjacent property, specifically if it impacts their natural resources or that of the public. These can impact property values, especially if a project such as a stone groin or dredged channel obstructs the littoral drift of sand and it reduces the sand deposition to a neighboring property.

6. ***In your experience, does EGLE have any policy, practice, or course of conduct with respect to interpreting the OHWM at an existing artificial, hardened, or improved shoreline?***

Descriptions and examples of OHWM on EGLE websites utilize a natural shoreline (devoid of any structures or hardened material/structure). However, EGLE just recently put out a series of YouTube Videos showing the public how to identify the OHWM. Below is a snapshot of one of their videos showing the OHWM as a stained mark or line on a seawall. This of course is collaborated with the OHWM along a non-hardened area to make sure you are using the correct line on the seawall. Here is a link to the first video of the series



<https://www.youtube.com/watch?v=9Ii40DGxRNE>



To: Long Lake Shoreline Subcommittee
From: Chris Bzdok and Abbie Hawley
Date: September 8, 2022
Re: Legal evaluation and recommendations regarding OHWM and dredging issues.

Introduction

This memo evaluates legal issues related to determination of the Ordinary High-Water Mark (OHWM) under the Long Lake Township zoning ordinance. This memo also evaluates and makes recommendations about local zoning regulation of dredging, structures, and other land use activities at the shoreline of inland water bodies in Long Lake Township. We focus on Objectives A1 and A2 of Goal 6 of the Shoreline Steering Committee. Our topline conclusions are:

1. The Township's definition of the OHWM is consistent with the State law definition. The Township should retain this definition, though with possible minor additions and potential improvements in the process of administering it.
2. The Township's zoning authority extends below the OHWM and is not limited to areas upland of the OHWM.
3. The Township has authority under zoning to regulate structures and activities at and below the shoreline if it chooses to do so, to meet objectives related to (a) protecting natural resources; (b) protecting neighboring property values; and (c) protecting aesthetics.
4. The most significant legal limit on the Township's authority in this regard is the risk of preemption of some forms of local regulation by State law. In this context, preemption creates a maze of potential risks but there are reasonable pathways through those risks.
5. Legal restrictions related to exclusionary zoning should not constrain the Township's exercise of authority at the shoreline in most cases.
6. The most prudent ways in which to exercise local authority at and below the shoreline will regulate structures and activities (a) based at least in part on local concerns different than those already addressed by the State; and (b) in a manner different than the form of regulation already used by the State. We discuss some examples in this memo and would be pleased to discuss these or other options in more detail as a next step.

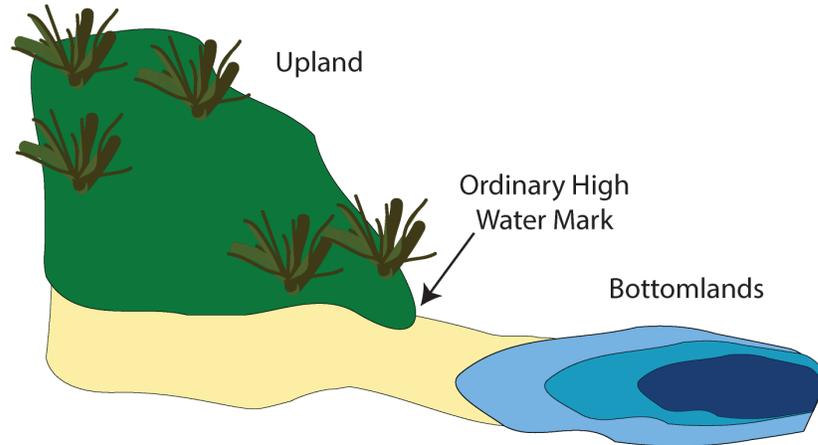
Objective A1: Create a means to reliably and consistently identify the Ordinary Highwater Mark (OHWM) on water bodies throughout the Township.

1. Township, State, and Federal Definitions of the OHWM.

Long Lake Township defines the OHWM in its zoning ordinance:

Ordinary Highwater Mark: The line between upland and bottomland which persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil and the vegetation. See Figure 3-6.¹

Figure 3-6



The State definition of the OWHM is provided in Part 301 of the Natural Resources and Environmental Protection Act (NREPA):

“Ordinary high-water mark” means the line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil, and the vegetation. On an inland lake that has a level established by law, it means the high established level. Where water returns to its natural level as the result of the permanent

¹ Zoning ordinance (ZO), Section 3.16.

removal or abandonment of a dam, it means the natural ordinary high-water mark.²

The Federal definition of the OHWM is provided in a rule promulgated by the Army Corps of Engineers:

Ordinary high water mark. The term ordinary high water mark means the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.³

Not all townships define the OHWM the same way. Local definitions vary from township to township. A summary of illustrative definitions is included in Appendix 1.

2. Legal significance of the OHWM to the Township's zoning ordinance.

Long Lake Township zoning ordinance currently uses the OHWM for several purposes:

- The OHWM is the location where bottomlands begin.⁴
- The OHWM is the line from which setbacks are measured.⁵
- The OHWM is the point from which the 50-foot vegetative buffer strip begins.⁶
- The term also has certain other uses in the ordinance.

a. Is there any legal authority that says setbacks and buffers must only be measured from the natural OHWM?

No. However, if the Township wishes to measure setbacks and buffers from an artificial water's edge in addition to the OHWM, the Township should expressly provide for that in the zoning ordinance.

This issue was discussed in an unpublished Court of Appeals case called *Napoleon Twp. v Nevins*.⁷ An unpublished case is a decision that is not binding precedent, but that courts may still look to for guidance if they find the reasoning of the decision to be persuasive. In the *Napoleon*

² MCL 324.30101(m).

³ 33 CFR § 328.3(7).

⁴ ZO, Section 3.3.

⁵ ZO, Sections 9.5(2), 10.3(1)(c)(5), 12.3(4)(d), 12.3(7), 12.3(7)(b).

⁶ ZO, Section 9.5(10).

⁷ *Napoleon Twp v Nevins*, unreported 2007 WL1263946 (Mich. Ct. App. May 1, 2007).

case, the Court of Appeals overturned a finding by the trial court that a new boat well carved out of the land and filled with the waters from Big Wolf Lake set a new OHWM. The Court stated:

In our opinion the definitions of high water mark as set forth in [*Glass v. Goeckel*] and MCL 324.30101(k) simply do not contemplate or encompass the small, selectively-located manmade channel or boat well created here, which is an aberration from the surrounding, continuous and natural shoreline such that the dredging of the boat well altered the location of the OHWM for purposes of the ordinance...Compliance with the setback requirement in regard to the project would reasonably require consideration of the high water line as it existed before the project was commenced.⁸

Importantly, in the *Napoleon* case, the zoning ordinance did not specifically address the question of whether artificial changes to the shoreline created a new OHWM, and so the Court relied on case precedent regarding the OHWM in general and the definition of OHWM in Part 301. However, the Court did not prevent a local unit of government from determining through the zoning ordinance the effect of human-caused changes in the shoreline on the OHWM.

b. Does Township zoning authority end at the OHWM?

No. As a general proposition, the Township has zoning authority both above and below the OHWM.⁹ In a case called *Hess v. West Bloomfield Twp.*, the Michigan Supreme Court held that the word “land” in the Michigan Zoning Enabling Act’s predecessor statute¹⁰ “includes those rights or interests that attach to the ownership of land, which extends to riparian rights.”¹¹ The Supreme Court held that this zoning authority specifically included the mooring of boats at a dock adjacent to land within the Township.¹²

Likewise, the Court of Appeals in *Twp. of Yankee Springs v. Fox* held that the zoning act “permits townships to regulate riparian rights, such as dockage of boats, as part of their zoning power.”¹³ Because riparian rights are derived from land, “it is the location of the riparian land, and not the location of the lake that abuts the land, that determines the plaintiff’s authority and jurisdiction in this case.”¹⁴ The Court concluded that “because the riparian lot at issue is located within [the township’s] boundaries and because [the township] is authorized by statute to regulate

⁸ *Id.* at *8.

⁹ This authority may be preempted as to certain matters, as discussed further below.

¹⁰ The Township Zoning Act, MCL 125.271 *et seq.*

¹¹ *Hess v. West Bloomfield Twp.*, 439 Mich. 550, 562; 486 N.W.2d 628 (1992).

¹² *Id.*

¹³ *Twp. of Yankee Springs v. Fox*, 264 Mich. App. 604, 606; 692 NW2d 728 (2004).

¹⁴ *Id.*

riparian rights, [the township] has the authority to regulate defendant's riparian rights in this case.”¹⁵

In practice, the Long Lake Township zoning ordinance does assert jurisdiction below the OHWM in some ways. Section 2.1 states:

This Ordinance applies to littoral and riparian bottomlands. Bottomlands shall be in the same zoning district as the corresponding upland parcel to which the bottomland is associated.

Likewise, Section 2.4(6) states:

Boundaries indicated as following the shoreline of a body of water shall be construed as following such shoreline and shall be deemed to include adjoining bottomland. In the event of a change in shoreline, the boundary shall be construed as following the shoreline existing at the time the interpretation is made.

On the other hand, certain sections of the ordinance assert Township authority only above the OHWM. An example is Section 9.5(1), governing Artificial Beach Areas. Based on our analysis, that is a policy choice by the Township and not a legal requirement.

3. Should the Township use the same definition of OHWM as the State and Federal agencies?

a. State definition.

Yes. We recommend maintaining the Township’s current definition, which matches the State’s definition for water bodies that do not have a legally established lake level under Part 307 of NREPA.¹⁶ If the Township has lakes with a legally established level, we recommend amending the definition to mirror that portion of the State’s definition as well. The rationale for our recommendation to mirror the State definition of OHWM is to proactively eliminate one source of legal risk due to the doctrine of preemption. The details concerning the definition and avoiding preemption risk are discussed further under Objective A2, section b.2, below.

b. Federal definition.

No. We do not believe the Federal definition of OHWM is directly relevant to these issues in Long Lake Township. Under Section 10 of the Rivers and Harbors Act, the U.S. Army Corps of Engineers has jurisdiction over construction activities – including dredging and excavation –

¹⁵ *Id.*

¹⁶ MCL 324.30701 *et seq.*

within navigable waters of the United States.¹⁷ In non-tidal waters that do not have adjacent wetlands, the Corps' jurisdiction extends laterally to the OHWM. In non-tidal waters that do have adjacent wetlands, the Corps' jurisdiction extends laterally to the edge of the wetland.

The Corps also has jurisdiction over dredge and fill activities in Waters of the United States under Section 404 of the Federal Clean Water Act.¹⁸ The definition of Waters of the United States is revised from time to time based on U.S. Supreme Court decisions and changes in Presidential administrations. However, in Michigan, EGLE administers a joint permit application for Parts 301 and 303 of NREPA and Section 404 of the Clean Water Act. The Corps only administers a separate Section 404 permit for waterways that are considered navigable under the Rivers and Harbors Act.

It is true that there is a long and winding surface water connection from Long Lake to Lake Michigan, via an outlet stream at the south end of Long Lake that flows to Lake Dubonnet, then via the Platte River through four more lakes and eventually empties into Lake Michigan. However, the Detroit District Office of the Army Corps of Engineers only asserts jurisdiction under the Rivers and Harbors Act starting at the downstream interface of Loon Lake and the Platte River in Lake Township, Benzie County.¹⁹ Because Long Lake Township does not contain any navigable waters of the U.S. under the Rivers and Harbors Act, to our knowledge the Army Corps of Engineers does not assert direct regulatory jurisdiction over any waters in Long Lake Township, and therefore the Federal definition of OHWM is not of legal significance here.

- c. Could the Township use the current definition and require project surveyors to certify that they applied the criteria in an attachment to the survey submitted with a project application?*

Yes. This would be a pragmatic step to improve the uniformity and reliability of applications submitted to the Township for projects on riparian or littoral properties. We see no legal impediment to making this change, but it should be provided for in the zoning ordinance.

Objective A2: Create a clear regulatory framework governing the activities with a potential for altering the shoreline of inland lakes in Long Lake Township.

1. Does the Township have legal authority to regulate shoreline-altering construction activities?

To a large degree, yes. That said, the Township should carefully document the objectives and factual support for any regulation. And as a matter of prudence, the Township should avoid

¹⁷ 33 USC § 403.

¹⁸ 33 USC § 1344.

¹⁹ https://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/Navigable_Waters_List_Jul2022.pdf.

regulating in ways that increase preemption risks if the Township can accomplish its objectives in other ways that reduce those risks.

How much to regulate, and for what objectives, are policy decisions vested in the Township's elected and appointed officials with help from their professional staff. Our role is only to define the boundaries of what the Township can legally do. The outer limits of the Township's zoning authority over a given subject are determined by three factors:

1. A particular zoning regulation must be within the legal authority granted to the Township by the State of Michigan.
2. It must serve some public health, safety, and welfare interest.
3. It must not be prohibited by any external limitation such as preemption or exclusionary zoning.

a. Legal authority.

The Township's legal authority to regulate structures and activities above and below the OHWM is discussed under Objective A1, Section 2b, above. The Township has clear authority to regulate not only activities on uplands but also on bottomlands and in the water, subject to limits created by preemption, as discussed below.

b. Public health, safety, and welfare interests.

The Township can potentially rely on three public health, safety, and welfare (PHSW) interests to support regulation of structures and activities at the shoreline: (1) protection of natural resources; (2) protection of neighboring property values; and (3) protection of aesthetics.

i. Protection of natural resources.

The MZEA requires a zoning ordinance to be based upon a master plan, and specifically authorizes the master plan to provide for the conservation of natural resources.²⁰ In the *Hess* case discussed earlier, the Michigan Supreme Court held:

Thus, by granting townships the authority to promote the public health, safety, and general welfare through enactment of zoning ordinances, the Legislature was complying with this constitutional

²⁰ MCL 125.3203(1).

mandate to protect the environment, including bodies of water, from impairment or destruction.²¹

Therefore, protection of natural resources is a legitimate PHSW objective for zoning regulation of activities at the shoreline.

ii. Protection of neighboring property values.

Similar to natural resources, protecting property values is specifically recognized in the MZEA as a legitimate objective of a master plan that supports a zoning ordinance.²² Protection of neighboring property values could be an important PHSW objective of zoning regulation of activities at the shoreline.

iii. Protection of aesthetics.

Michigan courts have recognized that protection of aesthetics can also be a PHSW basis for zoning regulation – though there is a split of authority as to whether it can be the sole basis. In *Norman Corp. v. City of East Tawas*, the Michigan Court of Appeals held that “protecting and promoting public health, safety, and general welfare are legitimate governmental interests, and protecting aesthetic value is included in the concept of the general welfare.”²³ In *National Used Cars Inc. v. City of Kalamazoo*, the Court of Appeals upheld an ordinance requiring the use of screening fences for junk yards solely on aesthetic grounds.²⁴ More recent unpublished cases reaffirm this view.²⁵

For any potential regulation that will be considered – but especially regulations whose object is to protect natural resources – we recommend that the Township seek assistance from an outside consultant in documenting the factual basis for the regulation. So long as the Township documents its factual determinations in support of a regulation, the courts will presume the ordinance is valid and defer to the Township’s judgment. To successfully challenge the ordinance, a person would need to prove that it is “an arbitrary and unreasonable restriction upon the owner’s use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness.”²⁶

²¹ *Hess, supra*, 439 Mich. 550 (Mich. 1992), 486 N.W.2d 628; relying on Mich. Const., Art. 4 Section 52 and Art. 7 Section 34.

²² MCL 125.3203(1).

²³ *Norman Corp. v. City of East Tawas*, 263 Mich. App. 194, 200-01; 687 NW2d 861 (2004).

²⁴ *National Used Cars Inc. v. City of Kalamazoo*, 61 Mich. App. 520, 522-25; 233 NW2d 64 (1975).

²⁵ See for example, *International Outdoor, Inc. v. City of Livonia*, 2016 WL 3298229; *Billboards by Johnson, Inc. v. Township of Algoma*, 2006 WL 2035591; *Township of Blair v. Grand Lamar OCI North Corp.*, 2011 WL 5108510; *Whitmore Lake 23/LLC v. Ann Arbor Charter Twp.*, 2011 WL 1600507.

²⁶ *Houdek v. Centerville Twp.*, 276 Mich. App. 568, 582-83; 741 NW.2d 587 (2007).

2. Potential Limits on the Township’s Authority to Regulate Structures and Activities at and below the Shoreline.

a. *Preemption.*

The most significant limitation on the Township’s authority to regulate structures and activities at and below the shoreline is preemption. “Generally, local governments may control and regulate matters of local concern when such power is conferred by the state. State law, however, may preempt a local regulation either expressly or by implication.”²⁷ There are two different types of preemption:

- Field preemption occurs “when the state has occupied the entire field of regulation in a certain area.”²⁸
- Conflict preemption occurs when a local regulation directly conflicts with state law.”²⁹ A rule of thumb is that “a direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.”³⁰

We are not aware of any appellate cases that directly address preemption and Part 301 of NREPA, which governs Inland Lakes and Streams. However, there are two cases that address preemption and Part 303 of NREPA, which governs wetlands, in ways that are illustrative for the issues before Long Lake Township.

In *Frericks v. Highland Twp.*, a township ordinance included provisions to protect “natural hazard areas.”³¹ The natural hazard areas included wetlands. The ordinance stated that these natural hazard areas, including wetlands, could not be counted toward the buildable area of a lot. A landowner sued the township, arguing that the regulation was beyond the township’s authority and preempted by Part 303. The Court of Appeals held that the township’s exclusion of environmentally sensitive features such as wetlands from the buildable area of a lot was within the township’s broad power to protect natural resources under zoning. The Court also held that the Part 303 did not preempt the natural hazard area regulation because it did not seek to supplant the State’s decision-making over wetlands:

[T]he zoning ordinance does not operate to regulate construction on state-protected wetlands because this issue is decided at the state level. The zoning ordinance excludes only unbuildable portions of the wetlands in determining the buildable area of lots.

²⁷ *DeRuiter v. Twp. of Byron*, 505 Mich. 130, 140; 949 N.W.2d 91 (2020).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Frericks v. Highland Twp.*, 228 Mich. App. 575; 579 NW2d 441 (1998).

Even if the zoning ordinance could be construed as imposing a more stringent restriction on wetlands than state restrictions, principles of preemption would only preclude Highland Township from determining whether construction on wetlands is permissible. These principles would not preclude Highland Township from excluding wetlands that are unbuildable under the state regulatory scheme and that fall within the definition of a “natural hazard area” in the zoning ordinance.³²

While the Court found the natural hazard area regulation to be within the township’s zoning authority and not preempted by Part 303, the Court did find the township’s definition of wetlands to be problematic because it differed from the state law definition.³³

In the unpublished case of *Divergilio v. Charter Twp. of West Bloomfield*, a township zoning ordinance imposed a building setback from wetlands.³⁴ A landowner claimed that Part 303 preempted the setback. The Court of Appeals held that a local building setback did not intrude on the State’s authority to regulate wetlands under Part 303 and therefore was not preempted.

A more detailed discussion of preemption is included in Confidential Appendix 2. At a high level, the simple fact that the State regulates a subject does not preempt a local government from regulating it. However, abiding by certain principles will reduce the risk that a court will find that the State regulation preempts the local regulation:

- Avoid regulating in ways that directly conflict with Part 301 or the Part 301 Rules (and in the case of wetlands at the shoreline, Part 303 and the Part 303 Rules).
- Where possible, support regulation based on local concerns in addition to concerns such as the protection of natural resources that are also addressed by the State.
- Where possible, regulate different aspects of the subject matter, or the same aspects but in different ways, than the State.
- Where appropriate, use the same definitions as the State for the subjects of regulation.

These takeaways serve as the lens through which we evaluate potential forms of zoning regulation for dredging, structures, and activities at the shoreline in section 3, below.

³² *Id.*, 228 Mich. App. 589.

³³ *Id.* at 591.

³⁴ *Divergilio v. Charter Twp. of West Bloomfield*, 2006 WL 3103012.

b. Exclusionary zoning.

In addition to preemption, another risk to consider is exclusionary zoning. The MZEA states that:

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.³⁵

Therefore, a potential zoning regulation cannot completely prohibit a certain structure or activity in Long Lake Township if there is a demonstrated need for it.

A more detailed discussion of exclusionary zoning is included in Confidential Appendix 2. At a high level, we believe that risks related to exclusionary zoning are much lower in this context than preemption. Among the factors we considered are that Long Lake Township already has boat houses, which supports a finding that there is no total prohibition under existing case law. Further, a demonstrated need for a structure or activity must have a public component to it, and cannot simply be a self-serving private need.

3. Legal options for regulation of shoreline-altering construction activities through zoning.

Here are a few possible options for local regulation of dredging, shoreline alterations, and structures at the land-water interface – along with some observations regarding the legal pros and cons of the different options.

a. A local permitting regime with standards and criteria similar to Parts 301 and 303.

One option that we understand has been considered is establishing a permitting regime in the Township zoning ordinance that would regulate the same or similar activities as Parts 301 and 303 and adopt the same or similar decision-making criteria. This option has the advantage of facially conforming to state law. However, it could pose preemption risks if the Township was to deny approval of a structure or activity for which the State granted approval, where both entities were making decisions regarding the same structure or activity based on the same decision standards.

³⁵ MCL 125.3207.

b. Categorical prohibition of certain uses coupled with the exclusion of certain other uses from regulation.

Based on the case law discussed above and in Confidential Appendix 2, we believe that the Township could defensibly prohibit excavation of artificial channels in areas upland of the OHWM, if there was a factual PHSW basis for doing so. Part 301 only directly regulates bottomland dredging³⁶ – though it indirectly regulates upland dredging by regulating the enlargement of an inland lake or stream.³⁷ The Township could design its zoning provisions as confined to prohibiting the upland activity based on local objectives concerning the upland, assuming the factual basis could be established. While the State’s regulatory focus is the enlargement of the lake, the Township’s focus could be on impacts of the land being removed by the upland dredging – be those impacts to aesthetics, habitat, or otherwise.

Based on the same case law, we would not suggest that the Township attempt to completely prohibit dredging below the OHWM. That type of prohibition risks directly and categorically prohibiting what the State permits.

c. Permitting activities by a public entity while prohibiting the same activities by a private landowner.

Another option that we understand has been considered is to allow certain dredging or shoreline structures or activities when undertaken by a public entity (for a boat ramp, for example) while prohibiting those activities when undertaken by a private landowner. We believe this option could be considered further, but it would not be our first recommendation for two reasons.

First, this option presents the same risk noted above of categorically prohibiting what the State permits, though with the nuance of the public/private distinction. Here it should be noted that the State considers the public benefit of an activity under Part 301, but does not draw a bright line between permissible and prohibited activities on that basis.

Second, this option would have as its primary underpinning the public trust doctrine. However, the case for drawing the public/private distinction with respect to bottomlands dredging is not as strong on inland lakes as on the Great Lakes. This point requires a bit of explanation.

³⁶ R 281.811(c).

³⁷ MCL 324.30102(1)(d).

In Michigan, the public trust doctrine has been applied to the Great Lakes;³⁸ the shores of the Great Lakes;³⁹ inland lakes with public access;⁴⁰ and navigable streams.⁴¹ These are the natural resources for which there is a recognized right of public use under state law. A property owner's use of the water is subordinate to the traditional activities protected by the public trust.⁴² For inland lakes, the traditional activities that are protected by the public trust include boating, swimming, fishing, and the temporary anchoring of boats.⁴³

A key distinction between the public trust doctrine on the Great Lakes versus on inland lakes is that the State of Michigan owns the bottomlands of the Great Lakes;⁴⁴ while the riparian landowners own the bottomlands of inland lakes within their riparian interest area.⁴⁵ Therefore, as to uses of bottomlands that do not occupy or interfere with use of the water surface, the case for allowing those uses of bottomlands by public entities but not private landowners is more difficult on an inland lake than the Great Lakes.

d. Regulating shoreline activities in a manner different than the State and based at least partially on exclusively local objectives.

This category of actions conforms most closely to the regulations upheld in the *Frericks* and *Divergilio* cases discussed above. There are a few options within this category, some of which should be considered in tandem.

- For example, the Township could allow dredging or excavation of areas upland of the OHWM that alter the location of the shoreline as a conditional use under Article 19. 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 billboards, child care centers, drive-throughs, and the like.
- The Township could consider whether to allow dredging or excavation of areas upland of the OHWM that alter the location of the shoreline as a conditional use on some lakes but not others, depending on the zoning classification of properties around the lake.
- If the Township authorized such dredging or excavation of areas upland of the OHWM as a conditional use, the Township should couple that action with ordinance changes that will

³⁸ *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 412-413, 105 N.W.2d 143, 149 (1961).

³⁹ *Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58 (2005).

⁴⁰ *McCardel v. Smolen*, 71 Mich. App. 560, 566, 250 N.W.2d 496 (1977), *aff'd in part and rev'd in part*, 404 Mich. 89, 95-96, 273 N.W.2d 3 (1978).

⁴¹ *Collins v. Gerhardt*, 237 Mich. 38, 45-46, 211 N.W. 115 (1926).

⁴² *Nedtweg v. Wallace*, 237 Mich. 14, 20; 208 N.W. 51 (1926).

⁴³ *Thies v. Howland*, 424 Mich. 282; 380 N.W.2d 463 (1985).

⁴⁴ *Hilt v. Weber*, 252 Mich. 198, 206; 233 N.W.2d 159 (1930).

⁴⁵ *Bauman v. Barendregt*, 251 Mich. 67, 231 N.W. 70 (1930).

apply shoreline setbacks and buffer strips in a uniform and nondiscriminatory way. The Township can continue measure shoreline setbacks and buffer strips from the OHWM for natural shorelines. For areas where the shoreline has been artificially changed, the Township should prescribe in the ordinance that it will measure setbacks and buffers from the actual water's edge, or the edge of the artificial improvement, rather than the location where the OHWM of the natural shoreline used to be. A change of that nature would close a loophole for channeling past the setback and buffer area in order to construct structures at a new artificially-created water's edge.

- The Township could also consider revising the ordinance so that an artificial channel counts against the allowance for vegetation removal within the buffer strip.
- The Township could also consider tightening the width of the area of allowed vegetation removal within the buffer strip for large parcels.

There may be other options along these lines as well. We recommend a discussion of local needs and conditions to consider them further. Staff and legal could also seek an opinion from the Township's environmental consultant regarding the technical pros and cons of some of these options. We welcome further direction from the committee regarding goals based on your local knowledge and public input.

Appendix 1

Other Townships' Approach to OHWM

Most townships surveyed use the OHWM as the point to measure setbacks; however, a few slightly deviate from this practice. Some of the examples provided could be used as a starting point for Long Lake Township if the Township were inclined to use a different standard than the OHWM in its zoning ordinance.

In Torch Lake Township, “[n]o structure may be located within 50 feet of the water’s edge of Torch Lake or within 50 feet of the Ordinary High-Water Mark of Lake Michigan.”¹ The township fails to define or explain what constitutes the water’s edge of Torch Lake, resulting in unwanted ambiguity.

In White Pigeon Township, “[n]o building or structure shall be located closer than 30 feet to the usual and normal summer water’s edge or from the front property line, excluding docks or similar unenclosed structures.”² White Pigeon Township does not directly define the term “water’s edge” but does provide the following definitions, suggesting that it still relies on the OHWM:

Waterfront lot, front means the portion of a single parcel of property which lies between the building line of a dwelling unit and the mean high-water mark of the river, stream, or lake.

Waterfront lot, rear, means the portion of a single parcel of property which lies between the lot line furthest from the water’s edge and the building line of a dwelling unit furthest from the mean high-water mark of the lake, river or stream.³

Leelanau Township defines the water’s edge as “the surveyed property line along the shore of a body of water.”⁴ When establishing setbacks, the Township notes that the term is synonymous with high water and shoreline. The Township also defines the OHWM as:

The point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognizable characteristic. And where the bank or shore at any particular place is of such character that it is impossible or difficult to ascertain where the point of the ordinary high water mark is,

¹ Torch Lake Township Zoning Ordinance, Article 2, Section 2.16(B) General Lot and Yard Area Requirements for All Zone Districts: Front, Site, & Rear Lot Setback Area Uses.

² White Pigeon Township (St. Joseph Co.) Zoning Ordinance, Article 34, Section 24.384(3): Regulations and standards of the R3 waterfront residential district—Yard and setback requirements.

³ *Id.* Article 34, Section 34-4 Definitions.

⁴ Leelanau Township Zoning Ordinance, Article 2, Section 2.2 Definitions, p. 22.

recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below the ordinary high water mark.⁵

Regarding fencing in residential districts, “when the front or rear of the residential lot borders water, no natural fence or fence structure shall be placed closer than 40 feet from the water’s edge...”⁶ However, when it comes to building setbacks, “in no case shall the setback from the waterfront setback datum (WSD) or ordinary high water mark, as applicable, be less than forty (40) feet.”⁷ Therefore, despite using water’s edge for one set of regulations, the Township still relies on the OHWM.

Finally, Elmwood Charter Township includes a definition for the ordinary high water mark but also defines the water’s edge as:

The ordinary high water mark or where an ordinary high water mark has not been established, the line between the upland and bottomland which persists through successive changes in water levels, below which the presence of the action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil and the vegetation. For a stream, river or creek, the top of the bank of the channel. In the case of the presence of bluff, the shoreline setback shall be measured from the edge of the bluff.⁸

This definition reflects the language used in Part 301.

These provide examples of townships deviating from the practice of relying solely upon the state's definition of OHWM. However, as noted above, most townships rely upon the state's definition. This reliance may be due to the historical use of the state’s definition of OHWM in local land use regulations and because it is a standard industry practice for local units of government and surveyors.

⁵ *Id.* p. 17.

⁶ *Id.* Article 17, Section 17.3(I)(2) Landscaping and Fencing—Fencing and screening regulations R1, R2, R3S and R4 Districts.

⁷ *Id.* Article 3, Section 3.5(A) Schedule of Regulations—Table 3.5A Schedule of Regulations fn. 1.

⁸ Elmwood Township Zoning Ordinance, Article 2 Definitions p. 23.

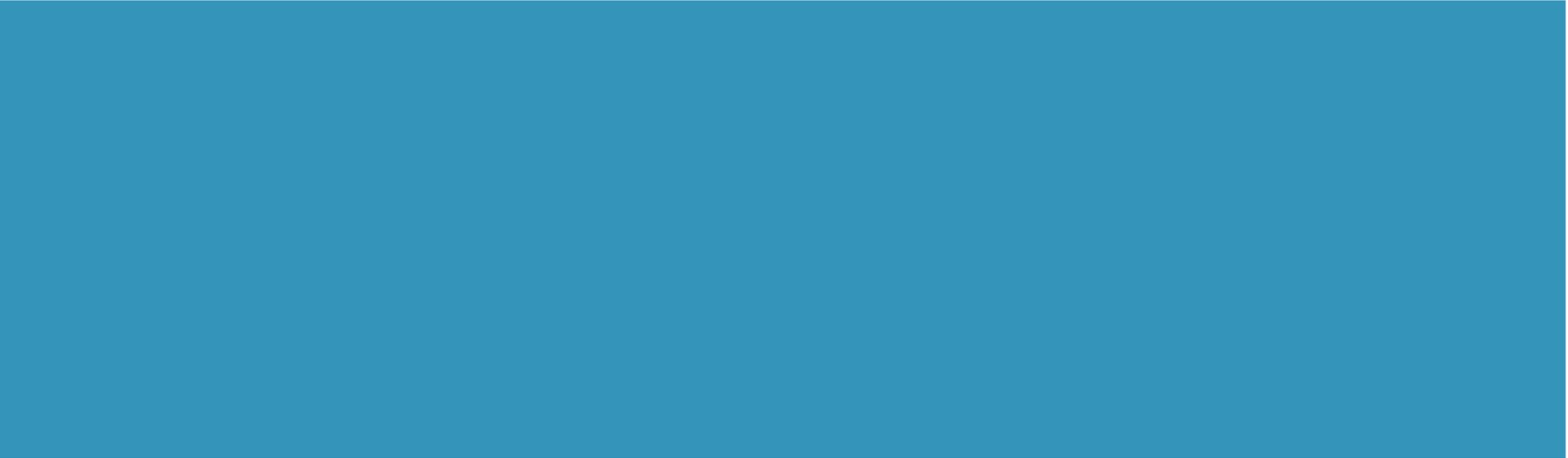
Appendix 2

Confidential Legal Analysis of Preemption and Exclusionary Zoning



LEGAL RECOMMENDATIONS TO LONG LAKE SHORELINE COMMITTEE

September 22, 2022 Meeting



ABOUT US

Chris

- Practicing environmental law for 25 years.
- Former Adjunct Professor at MSU College of Law – taught Environmental Law and Water Law.
- Grad school in limnology.
- Served in TC local government for 5 years.

Abbie

- Practicing environmental law for 3 years.
- Former Director of Conservation Programs for Walloon Lake Conservancy.
- Served on East Jordan City Commission.

More info at www.envlaw.com .



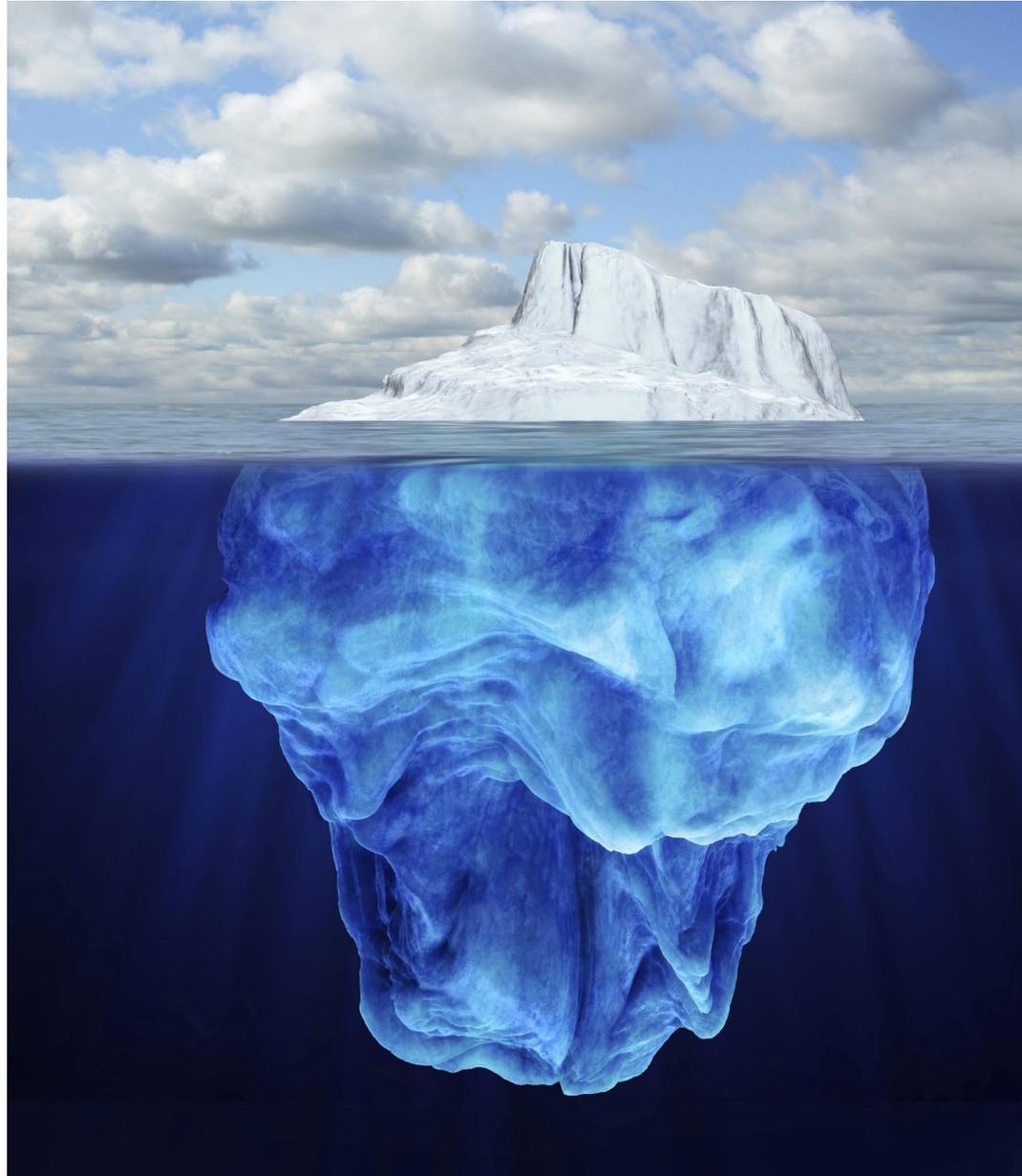
INITIAL OBJECTIVES

Objective A1: Create a means to reliably and consistently identify the Ordinary Highwater Mark (OHWM) on water bodies throughout the Township.

Objective A2: Create a clear regulatory framework governing the activities with a potential for altering the shoreline of inland lakes in Long Lake Township.

**Legal role – tell you what you can do, not what you should do.*

What we will talk about.



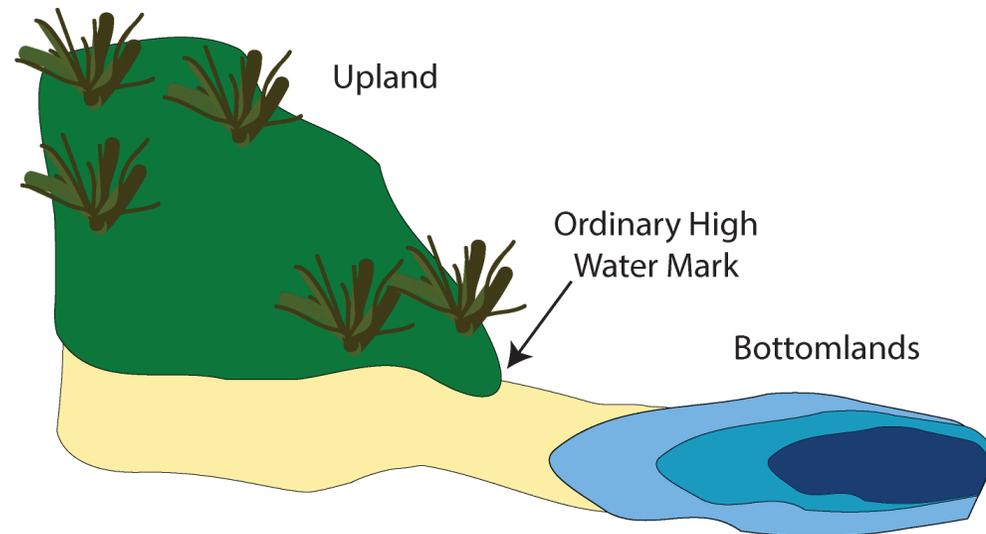
What's underneath what we will talk about.



OBJECTIVE A1: DEFINITION OF OHWM

- Current definition:

“The line between upland and bottomland which persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland and is apparent in the soil itself, the configuration of the surface of the soil and the vegetation. See Figure 3-6.” (Zoning ordinance, Section 3.16.)



OHWM RECOMMENDATION

- Keep this definition, *for the most part*:
 - Mostly consistent with State law definition (Part 30I of NREPA).
 - Federal definition not much different and not relevant in Long Lake Township.
- Consider a couple improvements:
 - If the Township has any lakes with legally established levels, consider adding language from Part 30I for these.
 - Require surveys submitted with a project application on waterfront to certify that the surveyed OHWM meets the Township's definition.

WHAT SIGNIFICANCE DOES THE OHWM HAVE?

- Where bottomlands begin.
- Line from which waterfront setbacks are measured.
 - *Is the Township legally required to measure setbacks exclusively from the OHWM? No.*
- Line from which the 50-foot vegetative buffer strip begins.
 - *Is the Township legally required to measure buffer strips exclusively from the OHWM? No.*
- A few other uses in zoning ordinance.

DOES THE TOWNSHIP'S ZONING AUTHORITY END AT THE OHWM?

- No. Case law says Townships have zoning authority over land and water:
 - Under zoning law, the word land “includes those rights or interests that attach to the ownership of land, which extends to riparian rights.” (*Hess v. West Bloomfield Twp.*)
 - The zoning act “permits townships to regulate riparian rights, such as dockage of boats, as part of their zoning power.” (*Twp. of Yankee Springs v. Fox*)
- Long Lake Township already asserts zoning authority beyond the OHWM:
 - “This Ordinance applies to littoral and riparian bottomlands. Bottomlands shall be in the same zoning district as the corresponding upland parcel to which the bottomland is associated.” (Zoning ordinance, section 2.1.)

OBJECTIVE A2: CREATE A CLEAR REGULATORY FRAMEWORK GOVERNING THE ACTIVITIES WITH A POTENTIAL FOR ALTERING THE SHORELINE OF INLAND LAKES IN LONG LAKE TOWNSHIP.

- The Township has legal authority to regulate shoreline-altering construction activities.
- The outer limits of that authority are set by three factors:
 1. A particular zoning regulation must be within the legal authority granted to the Township by the State of Michigan.
 2. It must serve some public health, safety, and welfare interest.
 3. It must not be prohibited by any external limitation, such as preemption or exclusionary zoning.

LEGAL AUTHORITY

- Already noted earlier: the Township has zoning authority over both land and water.

PUBLIC HEALTH, SAFETY, AND WELFARE INTERESTS

- Recognized public health, safety, and welfare interests that are potentially relevant to shorelines include:
 - Protecting natural resources.
 - Protecting property values.
 - Protecting aesthetics.
- Recommendations:
 - Support shoreline regulations with more than one of these objectives if more than one apply.
 - Document how the regulations support the objectives with technical expertise.

POTENTIAL LIMITS ON THE TOWNSHIP'S AUTHORITY

- Preemption:
 - Field preemption – cannot regulate locally if the State occupies the field.
 - Not likely true for Part 301 (inland lakes & streams) and not true of Part 303 (wetlands).
 - Conflict preemption – ordinance cannot directly conflict with State law.
 - Ordinance cannot expressly prohibit what the State law expressly permits.
 - Ordinance can regulate different aspects of the same subject matter, based on local concerns.
- Exclusionary zoning:
 - Cannot zone out a use if there is a demonstrated need for it.
 - Less risk associated with this one than preemption.

LOCAL SHORELINE REGULATION – OPTION 1

Local permitting regime with standards similar to Parts 301 and 303:

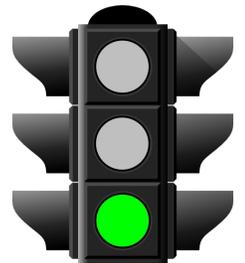
- Facially compliant.
- Risks of preventing what the State permits, based on the same standards.



LOCAL SHORELINE REGULATION – OPTION 2

Categorical prohibition of certain uses coupled with no regulation of other uses.

- For example, prohibit dredging of upland only but do not regulate bottomland dredging at all.
- Need to document local objectives (natural resources, property values, aesthetics).



LOCAL SHORELINE REGULATION – OPTION 3

Permit dredging and related activities by a public entity but not a private party.

- Risks of preventing what the State permits.
- Public trust case is more difficult on inland waterways than Great Lakes.



LOCAL SHORELINE REGULATION – OPTION 4

Regulate shoreline activities differently than the State, based on local objectives.

- Allow dredging or excavation of shoreline as a conditional use, with general and specific standards.
- Could allow on some lakes but not others, if good reason to do so.
- Combine the conditional use regulation with uniform treatment of artificial and natural shorelines, to eliminate loopholes. For example, measure setbacks and buffer strips from the OHWM for natural shorelines and from the edge of the constructed or excavated edge for artificial shorelines.
- Consider additional possible revisions for buffer strip exclusions.
- Must document local objectives.



CONCLUSIONS

1. We recommend the Township retain its definition of the OHWM with small adjustments possible.
2. The Township has authority under zoning to regulate structures and activities at and below the OHWM if it chooses to do so.
3. The Township has authority to meet objectives related to protecting (a) natural resources; (b) property values; and (c) aesthetics.
4. The most significant legal limit on the Township's shoreline authority is the risk of preemption by State law. Preemption creates a maze of potential risks but there are reasonable pathways through.
5. The most prudent ways to exercise local authority at and below the shoreline will regulate (a) based at least in part on local concerns different than those already addressed by the State; and (b) in a manner different than the form of regulation already used by the State.

QUESTIONS?



“There is nothing – absolutely nothing – half so much worth doing as simply messing about in boats.” – Kenneth Grahame