

STATE OF MICHIGAN
COURT OF APPEALS

HIGGINS LAKE PROPERTY OWNERS
ASSOCIATION,

UNPUBLISHED
May 30, 2000

Plaintiff-Appellant/Cross-Appellee,

v

No. 219768
Roscommon Circuit Court
LC No. 97-008385-CE

LYON TOWNSHIP, ROSCOMMON COUNTY
ROAD COMMISSION, and DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendants-Appellees,

and

ALLAN AYRES, SANDRA AYRES, KARL P.
BAECKER, MARY N. BAECKER, WALTER C.
BAECKER, ANKA BAECKER, LAWRENCE J.
BOCEK, MILDRED BOJAS, MARILYN J. BOYD,
RUSSELL BRUNING, JAN BRUNING, EARL R.
CAPLING, ERNEST D. CHRISTNER, IVA M.
CROSS, MICHAEL J. CURRIER, SUSAN A.
CURRIER, PAUL J. CZAJKA, KATHRYN A.
CZAJKA, THOMAS G. DEWEY, BEVERLY L.
DEWEY, BRUCE T. DIEHL, NANCY L. DIEHL,
CHARLENE E. DORRANCE, ROBERT E.
GENTRY, CHARLES M. GERWIN, KATHLEEN
M. GERWIN, DOROTHY HENEY, DAVID
HINDBAUGH, LINDA HINDBAUGH, JOSEPH E.
ISRAEL, KAREN K. MADILL, PHYLLIS
McINTOSH, TERRY L. McINTOSH, JEANNE M.
MURPHY, BETTY J. NEWMAN, RANDY D.
PARSONS, DAWN M. PARSONS, DURWOOD
SCHULTZ, MICHAEL W. SHEPARD, OURANIA
C. SHEPARD, ROBERT STINSON, SANDRA H.
STINSON, BEATRICE I. TAYLOR, JAMES J.

TIPPNER, THOMAS E. VANWORMER , LAURA
L. VANWORMER, JOHN P. WHITE, DEBORAH
K. WHITE, and GREGORY R. MADILL,

Defendants-Appellees/Cross-
Appellants,

and

RONALD LANIVICH, BRADLEY AYRES,
MICHAEL J. BEARD, MAUREEN BEARD,
SCOTT D. BERKOBIE, SHARON R.
BERKOBIE, THERESA M. BERKOBIE,
IRENE M. BOSWORTH, STEVEN M. DAVIS,
KATHLEEN DAVIS, DONALD T. DIETRICK,
ORVILLE T. DIETRICK, DONALD F. EBEL,
DAVID R. FLEWELLING, JEFFERY D. FOX,
KAREN P. FOX, GAIL A. GILPIN, TERRY L.
GLANCE, HUBERT S. GROSS, SHERRIL L.
GROSS, ROBERT M. HALL, MARILYN J. HALL,
DIANE BABCOCK, STANLEY J. HENSLEY,
KATHRYN HENSLEY, THOMAS HEYBOER,
DENNIS L. WILL, JR., BRUNO KARPINSKAS,
CLAUDIA S. KARPINSKAS, WALLACE M.
KENMUIR, ANGELIKA E. KENMUIR, THOMAS
J. MIKELONIS, JULIE C. MIKELONIS,
RICHARD MOLLICA, LEONE MOLLICA,
WHITE R. NEWMAN, MICHAEL S. PATTON,
LISA G. PATTON, BETTY J. PERRY, JOSEPH A.
PIRICH, EVA PIRICH, JOSEPH M. REISS,
CHARLOTTE M. SOCEY, SANDRA L. WALLS,
RALPH R. WHITE, DENNIS WILL, ARTHUR L.
WILLIAMS, and PATRICIA HARLOW,

Defendants.

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff Higgins Lake Property Owners Association is comprised of owners of lakefront property located in subdivisions on the shores of Higgins Lake in Lyons Township in Roscommon County. The individual defendants¹ own non-lakefront property in Evergreen Park Subdivision on the north shore of Higgins Lake. The plat of Evergreen Park Subdivision, originally recorded in 1903, dedicated the “streets and alleys as shown . . . to the use of the public.” Evergreen Park Subdivision has several avenues running perpendicular to Higgins Lake that terminate at the water. This case involves a dispute over the use of these “road-ends.” Plaintiff filed suit for injunctive relief to prohibit defendants from using the road-ends for picnicking, sunbathing, lounging, seasonal docking of boats, and permanent moorings and hoists.

The trial court found that the uses plaintiff sought to enjoin did not exceed the scope of the dedication intended by the dedicators of the roads. The court also denied plaintiff’s request for an injunction because plaintiff failed to show that the road-end activities were causing anyone significant problems.

Plaintiff first argues that the trial court erroneously concluded that the disputed activities are within the scope of the plat dedication. We agree.

Streets dedicated to public use that terminate at the edge of navigable waters are generally deemed to provide public access to the water. *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667, 671; 502 NW2d 382 (1993), citing *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985). Members of the public who have access to navigable waters have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming. *Thies, supra* at 288. “An incident of the public’s navigation right is the right to anchor boats temporarily.” *Id.*; *Delaney v Pond*, 350 Mich 685, 687-688; 86 NW2d 816 (1957). A municipality may erect a wharf or dock to aid the public’s access to the water from the end of the public street “based on the presumption that the platlor intended to give access to the water and permit the building of structures to aid in that access.” *Thies, supra* at 296; *Jacobs, supra* at 672.

The extent to which the right of public access includes the right to erect a dock or boat hoists or the right to sunbathe and lounge at the road-ends depends on the scope of the dedication. *Jacobs, supra* at 672. The intent of the dedicator is to be determined from the language used in the dedication and surrounding circumstances. *Id.*

In *Jacobs*, the precise dispute concerned the use of the road-ends at the waters of another Higgins Lake subdivision whose roads were similarly dedicated “to the use of the public.” A panel of this Court rejected the defendants’ attempt to establish the scope of the dedication through the testimony of witnesses who lived in the area for many years. The court interpreted the opaque dedication “to the use of the public” to include nothing more than the right to access the lake. We can discern no reason to interpret the similar dedication in the present case differently. Accordingly, we affirm the trial court’ finding that the scope of the dedication permitted the installation of one nonexclusive dock at the end of each of the roads leading to the lake, and that the public was entitled to reasonable use of the water for boating, swimming, and fishing. However, we reverse the portion of the trial court’s order that determined that the erection of boat hoists and the shore activities were within the

scope of the plat dedication because those findings were not supported by the record and were clearly erroneous. Because the trial court's ruling on plaintiff's request for an injunction was premised on its finding that the uses were within the scope of the dedication, we remand this matter to the trial court to reconsider plaintiff's request for an injunction.²

On cross-appeal, defendants argue that plaintiff lacks standing to bring the present action. To avoid involuntary dismissal on this ground, a party must demonstrate that its substantial interest will be detrimentally affected in a manner different from the citizenry at large. *Khun v Sec'y of State*, 228 Mich App 319, 333; 579 NW2d 101 (1998). Generally, an organization has standing if its "members themselves have a sufficient stake or have sufficiently adverse and real interests in the matter being litigated." *Detroit Firefighters Ass'n v Detroit*, 449 Mich 629, 650, 651; 537 NW2d 436 (1995). Here, plaintiff had standing to sue because it asserted a substantial interest in the case. Plaintiff claimed that defendants' alleged misconduct detrimentally affected them in a manner different from the citizenry at large by negatively affecting the value of their riparian ownership along Higgins Lake and by reducing their enjoyment of the lake.

Defendants also assert that the trial court failed to address defendants' affirmative defense of adverse possession or prescriptive easement. Presumably, the trial court did not address these claims because the court concluded that defendants had a right to continue their uses of the road-ends. However, defendants did not raise the issue of the trial court's failure to rule on their defenses after trial, and they did not discuss the matter at the post-trial hearing on plaintiff's motion for clarification. Generally, an issue raised below, but not decided by the trial court, is not preserved for appellate review. *American State Ins Co v Auto Club Ins Ass'n*, 193 Mich App 248, 256; 484 NW2d 1 (1992).

This Court may disregard the issue preservation requirements and grant review if failure to consider the issue would result in manifest injustice. *Herald Co v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). Because defendants have not cited any relevant authority in support of their contention that they may obtain ownership or easement rights in public municipal lands by use,³ we conclude that our failure to review this issue will not result in manifest injustice.

Last, defendants assert that they are entitled to a jury trial on their affirmative defense of adverse possession. We disagree. Defendants' affirmative defense was entirely equitable, and was not in the nature of an ejectment action. There is no right to a jury trial if the relief sought is equitable in nature. *Wolfenden v Burke*, 69 Mich App 394, 399; 245 NW2d 61 (1976).

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

¹ Not all of the individual defendants are named as appellees in this case. Use of the term "defendants" in this opinion refers to the individual defendants-appellees.

² In the alternative, plaintiff argues that the road-end docks are marinas for which a permit is required pursuant to Part 301 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.30102(c); MSA 13A.30102(c). In light of our conclusion, we need not address this issue.

³ All case citations in defendants' brief relate to the establishment of prescriptive rights against *private* land owners.