



BRIDGEWATER PLACE • POST OFFICE BOX 352
GRAND RAPIDS, MICHIGAN 49501-0352

TELEPHONE 616/336-6000 • FAX 616/336-7000 • WWW.VARNUMLAW.COM

NYAL D. DEEMS
Admitted in Michigan and Georgia
American College of Mortgage Attorneys
American College of Real Estate Lawyers

DIRECT DIAL 616/336-6712
E-mail nddeems@varnumlaw.com

May 18, 2007

TO: Boardman River Dams Committee

Re: Review of Riparian Rights
Parcel No. 28-05-034-017-20

Ladies and Gentlemen:

At the request of the Boardman River Dams Committee we have reviewed an abstract of title on a parcel of property on Boardman Pond as set forth below.

1. Premises

Parcel No. 28-05-034-017-20

Property Address: 223 Keystone Drive
Traverse City, Michigan 49686

A four sided parcel lying immediately adjacent to on the south side of the "common park" in the Keystone Subdivision.

A part of the Northwest 1/4 of the Southeast 1/4, Section 34, T27N, R11W commencing at the Southwest corner; thence East 250.00 feet; thence North 46°27' West 71.29 feet to the Point of Beginning; thence North 46°27' West 158.99 feet; thence South 06°49' East 151.20 feet; thence North 24°41' East 50.00 feet; thence South 58°39' East 273.76 feet; thence West 290.43 feet to the Point of Beginning in Garfield Township, Grand Traverse County, Michigan (the "**Premises**").

2. Title Search

Our review of title to the Premises is based upon an abstract of title prepared by Petroleum Abstract & Title Service, Inc. of Traverse City, Michigan. It includes a search of title documents from December 1866 to October 5, 2006, but states that it does not include any mortgages, liens, minerals and leasehold matters or associated documents on file at the register of deeds office.

3. Map of the Premises

See attached map.

4. Fee Title Owner of the Premises

Stella S. Berak Trust

5. Assessment Status per Township Records

We contacted the Garfield Township Assessor's office and understand that the information shown on the Assessor's records reflects that little or no added value is attributed to the Premises for its water frontage. All of the maps which we received of the Premises show this property touching the water's edge of Boardman Pond, with water frontage along the Premises' western property line.

6. Title History

The title history of the Premises which we received runs from December 1866 through October 5, 2006. The title history shows the Premises to border the waterfront of Boardman Pond. Title to the Boardman Pond bottomlands adjacent to the Premises is shown to be in Grand Traverse County.

7. Riparian Rights Appurtenant to the Premises

The Premises does not appear to be a riparian parcel of property. The title to the impounded bottomlands was conveyed to a predecessor electric company in two segments, one in 1930 and the other by conveyance made in 1895, and that title is held by Grand Traverse County. A further review of the riparian aspects of the title history is set forth below.

(a) History of Title of Impounded Bottomlands.

The sequence of events which leads to the title of the Boardman Pond impounded bottomlands being held by Grand Traverse County is generally as follows:

1. The early maps we have of Boardman River from the late 1800's and the written entries show the river in Section 34 to be surrounded by wetlands on both sides of the river and a certificate filed in 1880 lists 320 acres of this property as "swamp lands."
2. It appears that the original Boardman Pond dam was constructed in 1893 and 1894 by the Boardman River Electric Light & Power Company. This is the dam that created Boardman Pond. It appears that a second dam was built in 1906 which created Sabin Pond. A series of affidavits were prepared by employees of the Boardman River Electric Light & Power Company referencing the early history of the dams on the

Boardman River in 1928. They reference the history of the dams back to the 1890's. The affidavits were not recorded until 1952.

3. In 1925 Boardman River Electric Light & Power Company conveyed its interests in the dams, and the property interests associated with the dams, to Northern Michigan Public Service Company.

4. In 1928 the Northern Michigan Public Service Company conveyed the dams, and the property interests associated with the dams, to Michigan Public Service Company.

5. In 1930 Michigan Public Service Company had a series of transactions with the owners of the Premises by the name of Emerson, in which the Michigan Public Service Company conveyed any interest it had in the upland of the Premises to the Emersons, and the Emersons conveyed all of their interest in the submerged real property of Boardman Pond bordering the upland of the Premises, to the Michigan Public Service Company.

6. In 1950 Michigan Public Service Company conveyed its interest in the two dams, and the property interests associated with the dams, to Consumers Power Company.

7. In 1969 Consumers Power Company conveyed its interest in the dams, and the real property interests associated with the dams, to the County of Grand Traverse. The recital in the quit claim deed which makes the conveyance states that the age of the dams no longer justify their operation. In addition, it states that the County "...has an interest in the maintenance of said Dams and the preservation of said Dams and Reservoir Property for public recreational purposes, and for such public recreational purposes it desires that First Party convey to it Dam and Reservoir Property." The property interests were conveyed "...in consideration of the proposed use of said Dam and Reservoir Property for public recreational purposes..." for \$1.

8. On July 22, 1980, Grand Traverse County granted an easement for light and power purposes to the Light & Power Board in the name of the City of Traverse City. The interest terminates upon the abandonment of the generating use by the Light & Power Board. As of that date, all of the easement rights and title conveyed by Grand Traverse County will revert to the County.

As a result of the conveyances in 1930 between Michigan Public Service Company and the Emersons, it appears that title to the uplands and the submerged real property of Boardman Pond were separated. That separation places the title to the bottomlands that are currently under the impoundment in the name of Grand Traverse County, subject to the Light and Power Board use. The bottomlands, prior to the impoundment, ran to the water's edge of the Boardman River and therefore, under the common law, it was riparian property.

At the initiation of the title search in 1925, the initial conveyance is shown to have been from Boardman River Electric Light and Power Company to Northern Michigan Public Service

Company. It shows a conveyance of the Premises included as part of a conveyance of the entire north half of the southeast quarter of Section 34. It is not known how or by what method Boardman River Electric Light and Power Company acquired that title. At that time, the impoundment already existed, and no reference is made to riparian rights. The lack of any reference to riparian rights is not informative of the riparian issue as this was a conveyance of title for generating purposes from one power company to another.

(b) Potential Water Rights Claims of the Owner of the Premises.

The current owner of the Premises may claim the Premises still has riparian rights. The Premises still borders on the water's edge and, to our knowledge, has had unrestricted access to the water since the conveyance in 1930. Therefore, it is possible that the Emersons and subsequent owners of the Premises understood, expected, and asserted other riparian rights and intend to continue to do so with regard to Boardman Pond and, if the Pond were reduced to the natural watercourse of the river, along the river. The conveyance documents simply show a warranty deed conveying title without any statement of the conveyance's affect on riparian rights.

It may be that the 1930 conveyance will be found not to have terminated the Premises riparian rights, but that the title of the County is subject to riparian use by the Premises which cannot unreasonably interfere with the County's use of the property. In that event, the access to the water from the Premises will have to be over a limited easement right across the newly exposed upland owned by the County.

This parcel of property has a similar title history to parcel no. 28-05-034-008-00. The same sequence of transfers by the various electric companies is involved, and the same conveyance of the uplands to the Emersons was made in 1930. This lot and the adjacent parcel to the south have an additional title history beginning in 1974, as an offshoot to the creation of the Keystone Subdivision. The Premises goes through a series of conveyances from 1974 to the present as a meets and bounds parcel with a driveway easement across Lots 20 and 21 of the Keystone Subdivision to reach Keystone Drive. The survey establishing this parcel and parcel no. 28-05-034-017-10 is recorded and shows the two parcels of property with a legal description stating that they include "...all riparian rights to the Boardman River." It is not clear the basis upon which this statement is made. However, it does seem to indicate a claim of riparian rights for the two lots. On the survey, Boardman Pond is shown as the "Boardman River" so it is not clear if the riparian rights were simply being claimed to the waters of Boardman Pond or to the waters of the river. On its face the document, of course, states that it was to the Boardman River.

After recording of the survey in June, 1974, there are two conveyances of the Premises recorded from that date to October, 1975, in which reference is made to the Premises possessing riparian rights. Four successive conveyances follow through March, 2005, in which no reference to riparian rights is made. We do not believe any of these conveyances offer conclusive proof that riparian rights either do, or do not, exist for the Premises. The failure to include the reference to riparian rights does not extinguish those rights. Conversely, including the statement

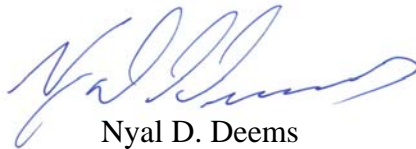
in a conveyance does not create such rights. There is simply no consistent reference as to what the parties involved believed about the riparian rights of the Premises.

(c) **Obligation to Maintain the Dams and Recreation Use.**

A question may arise from the conveyance by Consumers Power Company to Grand Traverse County for the purpose of maintaining the dams and reservoir property for public recreational purposes. There is no indication that the County does not intend to maintain the property which it received in the 1969 conveyance for recreational purposes. However, it is doubtful that the receipt of a deed in this fashion mandates that the County keep the dams in place longer than the County believes is economically justified. It is also doubtful that the County is obligated to maintain the dams on the property for recreational purposes.

Sincerely,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP



Nyal D. Deems

ND/rak