

## ***Huron Circuit Court: Drainage Ditch is Subject to Wetland Regulation if Not Necessary for Agricultural Production***

The Circuit Court for Huron County, Michigan has denied relief for a developer who failed to show that a drainage ditch on its wetland property is a private agricultural drain that is exempt from regulation under Michigan's wetlands laws.

In 1955, Michael C. Marian acquired Tip of the Thumb-Haven Lakeshore Company (TOT), which owned Tip O Thumb Haven, an undeveloped, platted subdivision on the shores of Lake Huron in Port Austin Township, Huron County. Tip O Thumb Haven is mainly comprised of a "dune-swale complex," which is defined as intermittent, slightly elevated dune areas surrounded by seasonally flooded swales (marshy land depressions).

Approximately two-thirds of the Tip O Thumb Haven land area has been classified as wetlands by the Michigan Department of Environmental Quality (MDEQ), subject to the Goemaere-Anderson Wetlands Protection Act (WPA) and the Inland Lakes and Streams Act (ILSA). Between the time he purchased TOT and 1990, Mr. Marian sold many of the Tip O Thumb Haven lots. In 1990, Marian's Niece Lenore Wood inherited TOT.

Few lots sold by TOT contain what MDEQ has classified as regulated wetlands. By 1992, all but one hundred forty-eight lots, most with road access and not requiring fill, were sold. Most of the unsold lots require road development and substantial fill to be marketable.

After 1980 (the effective date of the WPA), TOT developed many platted roads and road segments in Tip O Thumb Haven. The development activities included dredging and filling of wetlands, along with some excavation. In early 1990, after determining that TOT had excavated, dredged, and filled wetlands, the U.S. Army Corps of Engineers (Corps) and the MDEQ each notified TOT by letter that regulated wetlands existed in the Tip O Thumb Haven, and that, any dredging, filling or excavating activities required permits from both the Corps and MDEQ, and suggested that TOT apply for such permits. Despite these warnings, an MDEQ inspector discovered that Ms. Wood intended to excavate a drainage ditch along the eastern boundary of the subdivision, and to build a road to run parallel to the ditch.

TOT did not apply for a permit as instructed, and, in March 1992, the MDEQ formally notified TOT that the MDEQ had determined that construction of the ditch and roads constituted unauthorized dredge-and-fill activities in state-regulated wetlands. The MDEQ demanded that TOT “cease and desist all unauthorized activities immediately” and submit a restoration plan within 30 days. In April 1992, Ms. Woods met with an MDEQ representative and discussed development possibilities in Tip O Thumb Haven. The MDEQ advised Ms. Woods that any development in a state-regulated wetland would require a permit, and that she should retain a wetland consultant to map the existing wetlands.

But in April 1993, MDEQ representatives found that a ditch had been dug along a property boundary of the Subdivision, leading to an existing drainage ditch. Although disputed by MDEQ, TOT argued that it had simply cleaned out a pre-existing drain for nearby farmland. However, because no permit had been applied for or issued for this activity, MDEQ issued a second “cease-and-desist” and restoration order in May, 1993.

Ms. Wood then inquired about obtaining an “after-the-fact” permit regarding excavation of the ditch. She was told that the MDEQ would not accept an after-the-fact permit application if, as in this case, the MDEQ believed that the work performed would not be permitted. In late summer, 1994, Ms. Wood’s wetlands consultant mapped the boundaries of the wetlands. When Woods requested that the MDEQ verify the wetland delineations much later in the year, the field conditions did not permit an MDEQ inspection.

TOT believed that its construction plans were effectively thwarted by the MDEQ’s delays in verifying TOT’s wetlands map and the agency’s refusal to review a dredge-and-fill permit application.

### **TOT’s Claims Against the MDEQ**

TOT sued the MDEQ in Huron County Circuit Court seeking findings that:

- 1) the drain that TOT excavated along the eastern boundary of the Tip O Thumb Haven was a private agricultural drain, the cleaning, maintenance, and improvement of which is exempt from the permit requirements of the WPA and ILSA;
- 2) the roads of the subdivision are public roads and excavation and fill activities in conjunction with their maintenance and improvements are exempt from the permit requirements of the WPA;
- 3) the MDEQ should be prohibited from regulating TOT’s development activities because the MDEQ had failed to perform its statutory duty to prepare an inventory of wetlands in the county; and

- 4) the MDEQ's failure to make a wetland determination or review the wetland delineation made by TOT's consultant has significantly delayed TOT's development of the roadways and sales of properties in Tip O Thumb Haven.

Additionally, TOT sued the MDEQ in the Court of Claims, alleging that MDEQ's action in issuing the cease and desist orders and seeking injunctive relief constituted an unlawful "taking" of TOT's property, because TOT was effectively prevented from engaging in "lawful business use" of its property. At trial, the "takings" suit was combined with the circuit court suit.

MDEQ counter-sued, seeking a court order against TOT halting further dredging and filling of wetlands. The MDEQ also asked the court to impose fines and require TOT to restore the destroyed wetlands.

#### **Agricultural Drain and Public Road Exceptions to Wetlands Regulation**

Both the WPA and ILSA require a permit for any construction in, filling, excavating or dredging in a designated wetland or in an inland lake or stream. In addition, the WPA prohibits the draining of wetlands. However, the ILSA does not require a permit for construction or maintenance of a private agricultural drain. The WPA also does not require a permit for construction or maintenance of a private agricultural drain "*necessary for the production or harvesting of agricultural products.*"

During trial, TOT presented evidence that the drain that it excavated was indeed an agricultural drain. But, based on evidence presented at trial, the court found that the drainage of the agricultural land was in no way "facilitated" or "enhanced" by TOT's excavation.

Because the statutes do not define "private agricultural drain," the court concluded from the WLA's use of the word "necessary" that an agricultural drain is one that is "necessary" for, or at least enhances, agricultural production. The court found that much of the agricultural land supposedly benefiting from the disputed drain was lower in elevation than the disputed drain. Thus, the drain could not have actually drained the farmland. The court concluded that TOT's excavation neither facilitated nor enhanced agricultural drainage, with the result that the agricultural drain exception to the permit requirements did not apply.

The WPA also exempts “maintenance or improvement of public streets, highways, or roads” from wetlands dredge and fill permits. In its lawsuit, TOT asserted that approximately seven miles of road right-of-way within the Tip O Thumb Haven are “public roads” because they were “accepted” by the local municipality. TOT argued that developing the seven miles of road right-of-way into usable roads should be exempt from the permit requirements under the WPA. But the court concluded that it did not matter whether or not the declared rights-of-way in question had been “accepted” as public roads by the local municipality; the roads must be “streets, highways or roads” to qualify for the exemption. Since some of the roads in question were completely undeveloped at the time of trial, the court found that only a limited amount of roadway in Tip O Thumb Haven was exempt from regulation.

#### **Alleged Due Process Violations and “Takings” by MDEQ**

TOT also claimed in its lawsuit that MDEQ’s failure to make an inventory of all wetlands in the county violated TOT’s due process rights, and argued that the MDEQ should, therefore, be barred from regulating TOT’s development activities.

By law, the MDEQ must inventory all of the wetlands in the state. In addition, individuals may request the MDEQ to inspect particular parcels and make wetland determinations “within a reasonable time after the request.” M.C.L. § 324.30321(4). At trial, MDEQ established that completion of the required wetlands inventory was not financially possible, and that, because of “environmental dynamics,” any inventory would quickly become outdated. Also, the court found that, because TOT was notified in 1990 that wetlands existed on the property, there was no violation of TOT’s due process rights. TOT had the opportunity to contest the MDEQ’s assertions that there were wetlands in Tip O Thumb Haven but did not.

Moreover, although TOT showed that a dredge-and-fill permit application for specific roads and the drain would have been futile, it did not show the court that no permits would have been issued for any development in Tip O Thumb Haven. Thus, TOT did not establish that its due process rights had been violated.

#### **TOT’s Takings Claims**

In its takings claim, TOT complained that by refusing to review a dredge-and-fill permit application, the MDEQ deprived TOT of all economic or productive use of the property. TOT asserted that if the MDEQ would not allow TOT to dredge, fill, and drain

the wetlands in Tip O Thumb Haven, the MDEQ was liable to TOT for taking TOT's property without just compensation.

But the MDEQ showed that TOT had never properly registered the subdivided property, as required under Michigan law. Michigan's Land Sales Act requires registration of subdivided lands as a pre-condition to selling subdivision lots. The court found that nothing the MDEQ had done or failed to do had harmed TOT's ability to sell its subdivided lots because the lots could not legally be sold until registered. Thus, the MDEQ was not liable for "taking" TOT's property.

#### **The MDEQ's Counter-Complaint Against TOT**

The MDEQ asked the court to find that TOT violated the WPA and the ILSA for illegally draining, dredging, and filling wetlands. The court found that the MDEQ's allegations were true, noting that there was ample evidence showing a negative environmental impact from TOT's activities. Therefore, the court ordered TOT not to do any further development in Tip O Thumb Haven until it received the proper permits.

Additionally, the court found that the MDEQ was entitled to an order of restoration, which should include re-filling the drainage ditch. The court ordered that a fine be imposed on TOT in the amount \$13,000, the cost to the MDEQ for its wetlands survey and for its trial preparation costs. Finally, the court imposed an additional fine of \$500 per day for each day after October 15, 2000 that the restoration is not completed.

*Tip of the Thumb-Haven Lakeshore Co. v. Michigan Dep't of Environmental Quality*, No. 97-16554 (Huron Cir. Ct., Aug. 31, 2000)

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