

1-1-2003

## Eberhard Lake Ass'n v. Walters, No. 234586, 2002 Mich. App. LEXIS 2256 (Mich. Ct. App. Dec. 20, 2002)

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James Parrot, Court Report, Eberhard Lake Ass'n v. Walters, No. 234586, 2002 Mich. App. LEXIS 2256 (Mich. Ct. App. Dec. 20, 2002), 6 U. Denv. Water L. Rev. 622 (2003).

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governmental purposes and have only a negligible effect on its operations.” The court ruled that whether the conditions the Town imposed passed this test was a factual issue to be resolved on remand.

The court then turned to whether the Department’s regulatory authority preempted the Town from imposing conditions on water and air quality. The Department has broad authority to regulate water and air quality, particularly that of the facilities. The court concluded the Department’s regulatory authority did not preempt but restricted municipal regulation. Specifically, the Town may impose conditions consistent with the Department’s regulations. The court held the question of whether the conditions were inconsistent with the Department’s regulations was a factual issue to be resolved on remand.

The court then addressed the Town’s claim that it had statutory authority to issue the conditions. The court noted the Town issued the conditions as part of the Final MOU based on contractual authority from the Initial MOU. The court further noted that the Town relied on this contractual authority at trial and held the record was incomplete to resolve the question of whether the Town had such statutory authority. The court held this question to be an issue for resolution upon remand.

The court finally turned to the issue of the building permit fee. GLSD claimed that because the trial court found the Department preempted the Town from regulating GLSD, the Town should refund the full \$200,000 fee. The court noted the premise of GLSD’s claim—preemption—was incorrect. The court further noted state statutes specifically charged the local building inspector with enforcement of the state building code as to any “building or structure within the city or Town . . . including any building or structure owned by any authority established by the legislature but not owned by the Commonwealth.” The court noted GLSD was such an authority, that nothing in its enabling statute or the building code exempted GLSD from local inspection, and that local inspection did not interfere with GLSD’s essential government function. The court held, therefore, that GLSD must “obtain a building permit, in compliance with the State Building Code, as enforced by the local inspector.” The court held the issue of the Town’s contractual obligation to refund the fee under the initial MOU was an issue for resolution on remand.

*James Parrot*

## MICHIGAN

**Eberhard Lake Ass’n v. Walters, No. 234586, 2002 Mich. App. LEXIS 2256 (Mich. Ct. App. Dec. 20, 2002)** (holding that to survive a motion for summary judgment, the party opposing the motion must present evidence that the riparian owner’s use of water is unreasonable).

Eberhard Lake Association and multiple riparian property owners (“Landowners”) whose property abutted Lake Eberhard (“Lake”) sued Walters, another riparian owner, in St. Joseph Circuit Court seeking injunctive relief to prevent Walters from using the Lake to irrigate non-riparian farmland. Walters owned riparian property abutting the Lake, and used the Lake to irrigate crops on his riparian farmland and his non-riparian farmland. The Landowners alleged that Walters’ use of the Lake to irrigate his non-riparian farmland was unreasonable. The Landowners further alleged that Walters’ unreasonable use of the water caused the lake to drop below its “normal” level as established by the St. Joseph Circuit Court in a separate proceeding, and as a result, the Landowners were unable to use the Lake for “recreational purposes such as boating, swimming, and fishing.”

Walters filed a motion for summary judgment, arguing that he had established a prescriptive right to use the Lake for all his irrigation, and such right precluded a lawsuit alleging unreasonable use. The trial court granted the motion on two bases: (1) Walters had established a prescriptive right which precluded the Landowners’ suit; and (2) the Landowners had not introduced enough evidence to create a genuine issue of material fact supporting their claim of unreasonable use. The Landowners appealed the summary judgment on both the prescriptive rights basis as well as the issue of material fact basis. The Michigan Third District Court of Appeals reviewed the trial court’s decision *de novo*.

The court recognized that multiple riparian owners on an inland lake have a duty to use the waters in such a way so as to not interfere with the reasonable use of the waters by the other riparian owners. However, the court agreed with the trial court that the Landowners failed to present evidence beyond their pleadings that a material issue of fact existed as to whether Walters’ use of the Lake was reasonable. The court noted that a party could not survive a motion for summary judgment based on mere pleadings.

The court further agreed with the trial court that Walters had established a prescriptive easement to use the Lake for irrigation purposes by “open, notorious, adverse, and continuous” use for more than twenty years, where the statutory period for adverse possession was only fifteen years. The court disagreed with the Landowners that Walters’ seed corn contract provided enough evidence to create a genuine issue of material fact supporting the Landowners’ assertion that Walters had increased his use beyond his prescriptive easement. Thus, the court affirmed the trial court’s judgment.

*James Parrot*