

**Open Letter from Lake Leelanau Landowners to the
Leelanau County Board of Commissioners
Regarding the Creation of a Lake Board**

Everyone agrees we need to eliminate the Eurasian Watermilfoil from Lake Leelanau. No one wants Eurasian Watermilfoil to become in Lake Leelanau what Kudzu is to the southern states or what Asian Carp threatens to be to Lake Michigan. But, given our agreement on this central point, it does not follow that the Leelanau County Board of Commissioners must take the extraordinary step of creating a new government taxing and regulatory authority to address Eurasian Watermilfoil.

There is no disagreement about our common objective. The disagreement concerns the best means by which to achieve this objective. A steamship journey from Liverpool England to New York City is a fine idea. But making the journey aboard the H.M.S. Titanic would prove quite unfortunate. So too here. Our shared desire to eliminate Eurasian Watermilfoil from Lake Leelanau does not mean that we must create a new government taxing authority that may prove worse than even the Eurasian Watermilfoil.

The resolution before the Leelanau County Board of Commissioners proposes that we address the Eurasian Watermilfoil infestation by creating an entirely new government taxing and regulatory authority. The proposal suggests we should create a new government entity, the "Lake Leelanau Preservation Board", under Michigan's Natural Resources and Environmental Protection Act, codified as MCL §324.30901. Creating a "lake board" is the worst way to address Eurasian Watermilfoil. The solution to every problem is not creating a new government program and a new taxing authority.

We begin with the law. In 1994 Michigan adopted the Natural Resources and Environmental Protection Act. This law included part 309 which is called the Inland Lake Improvements Act. (Codified as MCL 324.30901 through 30929). The Inland Lake Improvements Act allows for the creation of a government board, called a "lake board." But the Inland Lake Improvements Act is (unfortunately) not a clearly written statute and the Act creates a lot of ambiguity that will require years of costly litigation to resolve.

Our nation was founded upon the principle that there should be "no taxation without representation." In other words, those who pay a tax must be fairly represented in the assessment of the tax. The Inland Lake Improvement Act provides for the creation of a "lake board" that can impose a tax upon landowners. And, in a nod to this fundamental principal of no taxation without representation, the Act requires two-thirds of the owners of land abutting the lake to petition to create the board. The Act also appears to allow a County to independently petition to establish a lake board. The Inland Lake Improvements Act also says a lake board may be created for the purpose of "protect[ing] the public health, welfare, and safety and the

conservation of natural resources of this state, or to preserve property values around a lake.” The Act further provides a lake board has the limited authority to “take steps necessary to remove and properly dispose of undesirable accumulated materials from the bottom of the lake or wetland by dredging, ditching, digging, or other related work.”

A lake board is composed of (1) a member of the county board of commissioners, (2) one representative of each local unit of government affected by the project (which includes every township, village and other local government body affected by the project), (3) the county drain commissioner (or, if the county does not have a drain commissioner, a member of the county road commission) and (4) a person who has an interest in land abutting the lake and is selected from a list of three names submitted by an organization representing the majority of the lakefront property owners. The composition of a lake board for Lake Leelanau is unclear. The Inland Lake Improvements Act requires the lake board to include “one representative of each local unit of government ... affected by the project”? This would mean that a representative of all the townships and other local government jurisdictions have a member appointed to the lake board. This lake board would be an unwieldy and costly body to create and administer.

It is doubtful that the Leelanau County Board of Commissioners can create a lake board by simply passing a resolution. As noted above, the premise upon which the Inland Lake improvements Act rests is the concept that the creation of this lake board represents the desire and will of at least two-thirds of the owners of the land adjoining the lake. Applied here, the Inland Lake Improvements Act provides for the creation of a lake board, but the legitimacy of this board is premised upon the supposition that a lake board represents the consensus of a super majority (two-thirds) of the owners of Lake Leelanau lakefront property. The Act provides that a lake board may be initiated “only upon petition of 2/3 of the freeholders owning lands abutting the lake.” See, MCL 324.30904. To be legitimate a lake board must reflect the consensus of two-thirds of the owners of property adjoining Lake Leelanau.

Additionally, creating a lake board to govern, tax and regulate privately-owned land adjoining and underlying Lake Leelanau raises significant constitutional issues. The creation of a Lake Board is an imposition of a new servitude or easement upon the riparian owner’s property. This is a compensable taking for which the Fifth Amendment requires the County (or the newly formed Lake Leelanau Preservation Board) to pay compensation to owners whose property is now encumbered by this new servitude. The Supreme Court’s decisions in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), *Nollan v. California Coastal Comm’s*, 483 U.S. 825, (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013), *Knick v Township of Scott*, 588 U.S. ___ (2019) and, most recently, *Cedar Point nursery v. Hassid*, 594 U.S. ___, (2021) and *Pakdel v. City and County of San Francisco* 594 U.S. ___ (2021) make it absolutely clear that, should Leelanau County adopt a resolution encumbering

Lake Leelanau lake front owners' property with a servitude for a lake district, the County would be liable for a compensable taking of lake-front owners' property. This will lead to years of litigation, and, at the end, the County will incur not only its own legal expenses but will be required to also reimburse the landowners for their legal fees and expenses. The prudent course is for the County to avoid these litigation expenses and, instead, devote these resources to eliminating the Eurasian Watermilfoil.

Once a lake board is called into being (assuming the board is lawfully established, and the members of the board are lawfully selected) we then confront the question of the board's authority to levy taxes and the board's authority to regulate owners' use and enjoyment of their private property adjoining Lake Leelanau. The proposed resolution fails to address these serious constitutional and legal concerns.

The Inland Lake Improvement Act grants a lake improvement board the narrow and limited authority to "take steps necessary to remove and properly dispose of undesirable accumulated materials from the bottom of the lake or wetland by dredging, ditching, digging, or other related work." The Inland Lake Improvements Act does not address invasive species. The concept behind the Inland Lake Improvement Act is, as the act states, to enable dredging, ditching and related works. The Inland Lake Improvement Act did not anticipate addressing invasive species such as Eurasian Watermilfoil. Furthermore, the County's proposed resolution does not define or cabin the authority of the lake district just eradicating Eurasian Watermilfoil. The proposed resolution is entirely unclear as to what authority the County would grant the "Lake Leelanau Preservation Board."

And there is another problem. The Inland Lake Improvements Act is a "benefit"-based statute. Assuming the Lake Leelanau Preservation Board is lawfully constituted, the lake board would (purportedly) have the authority to establish a special assessment district that may impose an assessment upon "all parcels of land and local units [of government] which will be benefited by the improvement of the lake." The lake board's authority would include the authority to impose a lien upon adjoining landowner's property.

So how is the "benefit" of the eradication of Eurasian Watermilfoil to be determined? How is the benefit of the eradication of Eurasian Watermilfoil to be apportioned? The Inland Lake Improvements Act distinguishes between "private" lakes and "public" lakes. Lake Leelanau is not a private lake but is a beautiful public lake we all cherish. The entire community, not just those who own land adjoining Lake Leelanau, benefit from Lake Leelanau. So, who benefits from the eradication of the Eurasian Watermilfoil? At a minimum the beneficiaries would be all those in Leelanau County who use or enjoy Lake Leelanau. The beneficiaries are not just those who own land adjoining Lake Leelanau. It should be clear that creating a Lake Leelanau Preservation Board as a new taxing authority will raise a host of legal issues requiring years of costly litigation to resolve.

Creating a new government entity – the Lake Leelanau Preservation Board - with separate (and questionable) taxing authority and poorly defined regulatory authority is the worst possible way to achieve a worthy goal. Creating a Lake Leelanau Preservation Board will almost certainly result in costly litigation. The proper – and much more cost-efficient solution - is for the County, as a whole, to fund the cost of eradicating Eurasian Watermilfoil. Creating an entirely new government entity is unnecessary to achieve this worthy objective.

I love Leland. I love Lake Leelanau. I do not want invasive species to compromise this wonderful paradise we enjoy. I want to preserve Lake Leelanau. And I am deeply concerned by the proposal to create a new government entity to tax lakefront landowners because this will not eradicate the invasive species and will perversely result in costly and needless litigation. Not only that, but this issue may divide our community and divert resources that should be devoted to the eradication of Eurasian Watermilfoil. Let's solve the problem and not create a new government bureaucracy.

Thor Hearne

Thor Hearne is one of the nations' leading civil rights and property rights attorneys. Thor has represented individuals, property owners, political officials, states, and local governments in constitutional and civil right cases before the United States Supreme Court, the Michigan Supreme Court, other state supreme courts and lower federal courts of appeal and federal trial courts. Thor and his family have been residents and summer residents of Leland for more than five generations. Thor and his family own property on Lake Leelanau and Lake Michigan. Thor and his family have a profound love of Leland and desire to preserve this unique and wonderful community and the amazing natural resources we enjoy. Thor's opinion is shared by many other Lake Leelanau property owners.