

STATE OF MICHIGAN

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MICHIGAN NATURAL RESOURCES TRUST FUND: Expenditures from Natural Resources Trust Fund and Michigan Conservation and Recreation Legacy Fund for dredging.

MICHIGAN CONSERVATION AND RECREATION LEGACY FUND, WATERWAYS ACCOUNT:

DEPARTMENT OF NATURAL RESOURCES:  
CONSTITUTIONAL LAW:

CONST 1963, ART 9, § 35:

CONST 1963, ART 9, § 40:

Const 1963, art 9, § 35, authorizes the use of money in the Natural Resources Trust Fund for the development of public recreation facilities. Money from the Natural Resources Trust Fund therefore cannot be used for the maintenance of existing public recreation facilities, such as maintenance dredging of existing harbors.

Const 1963, art 9, § 40, and implementing legislation, Parts 20 and 781 of the Natural Resources and Environmental Protection Act, MCL 324.2001 *et seq.* and MCL 324.78101 *et seq.*, allow the use of funds in the Waterways Account of the Michigan Conservation and Recreation Legacy Fund for operation and maintenance of public recreation facilities, including the dredging of existing harbors. But such expenditures must be directed to public, rather than private, recreation facilities. And, consistent with MCL 324.78110(a)(ix), the primary purpose of the dredging must be to enhance access for recreational watercraft.

Opinion No. 7270

April 22, 2013

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You have asked whether money from the Natural Resources Trust Fund established in Const 1963, art 9, § 35, and the Waterways Account of the Michigan Conservation and Recreation Legacy Fund established in Const 1963, art 9, § 40, may be used for dredging<sup>1</sup> existing public and private harbors and marinas along the Great Lakes that have been affected by low water levels.

### **I. Natural Resources Trust Fund – Const 1963, art 9, § 35**

By way of background,<sup>2</sup> the citizens approved Const 1963, art 9, § 35 as an amendment to the Constitution, and thereby established the Natural Resources Trust Fund (Trust Fund), and prescribed the purposes for which interest and earnings of the Trust Fund shall be expended:

There is hereby established the Michigan Natural Resources Trust Fund. The trust fund shall consist of all bonuses, rentals, delayed rentals, and royalties collected or reserved by the state under provisions of leases for the extraction of nonrenewable resources from state owned lands, except such revenues accruing under leases of state owned lands acquired with money from state or federal game and fish protection funds or revenues accruing from lands purchased with such revenues.

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The interest and earnings of the trust fund *shall be expended for the acquisition of land or rights in land for recreational uses or*

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<sup>1</sup> Dredging is the process of removing naturally occurring rock, sand, gravel, mud or clay from the bottom of waterways to create or maintain a sufficient depth for navigation or other purposes. See US Army Corps of Engineers, Dredging on the Great Lakes, available at [www.lre.usace.army.mil/Portals/69/docs/Navigation/GreatLakesDredging/Introduction%20to%20Dredging%20Methods%20on%20the%20Great%20Lakes.pdf](http://www.lre.usace.army.mil/Portals/69/docs/Navigation/GreatLakesDredging/Introduction%20to%20Dredging%20Methods%20on%20the%20Great%20Lakes.pdf) (accessed March 26, 2013).

<sup>2</sup> This provision was added to the Michigan Constitution in 1984 by Proposal B, a legislative initiative to amend the Constitution under Const 1963, art 12, § 1. The section was later amended by Proposal P in 1994, and Proposal 2 in 2002.

*protection of the land because of its environmental importance or its scenic beauty, for the development of public recreation facilities, and for the administration of the trust fund, which may include payments in lieu of taxes on state owned land purchased through the trust fund. The trust fund may provide grants to units of local government or public authorities which shall be used for the purposes of this section. [Emphasis added.]*

Const 1963, art 9, § 35 also provided for the establishment of a trust fund board to recommend the projects to be funded, a process for the appropriation of money from the Trust Fund, and implementing legislation as follows:

The legislature shall provide by law for the establishment of a trust fund board within the department of natural resources. The trust fund board shall recommend the projects to be funded. The board shall submit its recommendations to the governor who shall submit the board's recommendations to the legislature in an appropriations bill.

The legislature shall provide by law for the implementation of this section.

The Legislature enacted Part 19 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.1901 *et seq.*, to implement Const 1963, art 9, § 35.<sup>3</sup> MCL 324.1903 identifies the purposes for which interest and earnings of the Trust Fund may be expended, mirroring the constitutional language:

(1) Subject to the limitations of this part and of section 35 of article IX of the state constitution of 1963, the interest and earnings of the trust fund in any 1 state fiscal year may be expended in subsequent state fiscal years only for the following purposes:

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<sup>3</sup> Before the 1995 enactment of Part 19 of the NREPA, art 9, § 35 was implemented by the Michigan Natural Resources Trust Fund Act, 1985 PA 101.

*(a) The acquisition of land or rights in land for recreational uses or protection of the land because of its environmental importance or its scenic beauty.*

*(b) The development of public recreation facilities.*

*(c) The administration of the fund, including payments in lieu of taxes on state-owned land purchased through the trust fund. The legislature shall make appropriations from the trust fund each state fiscal year to make full payments in lieu of taxes on state-owned land purchased through the trust fund, as provided in section 2154. [Emphasis added.]*

Michigan is well known for its waterways, and the State has an extensive network of harbors on the Great Lakes that are used by commercial and recreational watercraft.<sup>4</sup> To keep these harbors open to navigation, accumulated sediment must regularly be removed through maintenance dredging.<sup>5</sup> A growing backlog of unfunded federal dredging projects, exacerbated by the significant decline in Great Lakes water levels, has highlighted the need to dredge existing harbors to maintain navigation by recreational watercraft. As a result, some have questioned whether money from the Trust Fund could be spent for dredging and other maintenance purposes. The short answer to that question, as explained below, is no.

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<sup>4</sup> Michigan harbors are listed at: <[www.michigan.gov/dnr/0,4570,7-153-10365\\_10884\\_18317-238175--00.html](http://www.michigan.gov/dnr/0,4570,7-153-10365_10884_18317-238175--00.html)> (accessed March 26, 2013). Federal harbors on the Great Lakes are listed at: <[www.lre.usace.army.mil/Missions/GreatLakesNavigation/GreatLakesHarborFactSheets.aspx](http://www.lre.usace.army.mil/Missions/GreatLakesNavigation/GreatLakesHarborFactSheets.aspx)> (accessed March 26, 2013). The US Army Corps of Engineers has primary responsibility for projects that support commercial and recreational navigation on the Great Lakes. See, e.g. <[www.lre.usace.army.mil/Missions/GreatLakesNavigation.aspx](http://www.lre.usace.army.mil/Missions/GreatLakesNavigation.aspx)> (accessed March 26, 2013). Your question focuses on dredging associated with recreational harbors and marinas in Michigan.

<sup>5</sup> See, e.g. Great Lakes Commission, <[www.glc.org/dredging/documents/brochure\\_dogl\\_11-16.pdf](http://www.glc.org/dredging/documents/brochure_dogl_11-16.pdf)> (accessed April 18, 2013) and n 1, *supra*, US Army Corps of Engineers, Dredging on the Great Lakes.

While the Legislature has the authority to implement Const 1963, art 9, § 35, and has already done so in Part 19, the Legislature cannot substantively change the meaning or scope of the constitutional language adopted by the people. The question thus becomes whether the relevant constitutional language – “development of public recreation facilities” – can be interpreted to include the maintenance dredging of existing harbors for use by recreational watercraft.

Michigan courts apply settled principles of law in interpreting constitutional provisions. “[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law.” *Nat’l Pride At Work, Inc v Governor*, 481 Mich 56, 67; 748 NW2d 524 (2008). See also, *Michigan United Conservation Clubs v Treasury Dep’t*, 239 Mich App 70, 76-82; 608 NW2d 141 (1999) (Interpreting phrase “bonuses, rentals, delayed rentals, and royalties,” in Const 1963, art 9, § 35). The courts “typically discern[ ] the common understanding of constitutional text by applying each term’s plain meaning at the time of ratification.” *Nat’l Pride At Work*, 481 Mich at 67-68, citing *Wayne County v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). Where a constitutional term is undefined, dictionary definitions may be consulted to determine its meaning. *Nat’l Pride At Work*, 481 Mich at 69-76.

Here, the relevant language of Const 1963, art 9, § 35 is “the *development* of public recreation facilities.”(Emphasis added). As used in this context, “development” or “develop” means to: “convert (land) to a new purpose by

constructing buildings or making other use of its resources.” *Oxford Dictionaries* (2013).<sup>6</sup> Thus, the term “development” of public recreation facilities can be understood to mean projects to construct new facilities where there were none before, or to change the purpose or function of existing public recreation facilities. Under this definition, the recurring dredging of existing harbors needed to maintain sufficient depth for navigation does not qualify as the “development” of public recreation facilities. Rather, such dredging constitutes the “maintenance” of previously developed public recreation facilities, i.e. “[t]he work of keeping something in proper condition; upkeep.” *The American Heritage College Dictionary* (1997). In fact, as noted above, this activity is commonly referred to as “maintenance dredging.”<sup>7</sup> The distinction between “development” and “maintenance” of recreation facilities is evidenced by comparing the language of Const 1963, art 9, § 35, to that of other closely related provisions of Michigan’s Constitution. Const 1963, art 9, § 35a, established the Michigan State Parks Endowment Fund (Endowment Fund) and provides that money in the Endowment Fund may be used not only for land acquisition and capital improvements (as in the case of the Trust Fund), but also for maintenance of state park facilities: “Money available for expenditure from the endowment fund as provided in this section shall be expended for operations, *maintenance*, and capital improvements at Michigan state parks and for the acquisition of land or rights in land for Michigan state parks.” (Emphasis added.) Similarly, and as discussed in greater detail below,

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<sup>6</sup> Oxford University Press, available at <<http://oxforddictionaries.com/>> (accessed April 22, 2013).

<sup>7</sup> See n 5, *supra*.

Const 1963, art 9, § 40, which establishes the Michigan Conservation and Recreation Legacy Fund, provides that money in the Waterways Account may be used not only for “construction . . . of recreational boating facilities” and “acquisition and development of harbors,” but also for “maintenance” of those facilities.<sup>8</sup>

Although Const 1963, art 9, § 35, does not use the terms “capital improvement” or “capital outlay,” the implementing legislation, Part 19 of NREPA, as most recently amended by 2012 PA 619, reflects the understanding that an appropriation from the Trust Fund for a recreation development project is a “capital outlay.” It provides that “[f]ollowing the appropriation of money from the trust fund, if the public recreation project changes significantly, the board shall submit the changes to the joint capital outlay subcommittee of the legislature to review whether the proposed changed project is consistent with the purpose of the appropriation.” MCL 324.1907a(2). The Uniform Budgeting and Accounting Act, MCL 141.421 *et seq.*, defines “capital outlay” as “a disbursement of money which results in the *acquisition of, or addition to, fixed assets.*” MCL 141.422b(2) (emphasis added). The Management and Budget Act, MCL 18.1101 *et seq.*, similarly defines “capital outlay” as “a project or facility financed either in whole or in part with state funds, including lease purchase agreements, to demolish, *construct, renovate, or equip a building or facility.*” MCL 18.1113(1) (emphasis added). Thus, a project for the development of public recreation facilities under

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<sup>8</sup> Other provisions of Const 1963, art 9, § 40, pertaining to the Forest Recreation, Game and Fish Protection, Off-Road Vehicle, Snowmobile, and State Park Improvement Accounts, also each authorize the use of the respective funds for, among other purposes, “maintenance.”

Const 1963, art 9, § 35, and Part 19 is properly understood as a one-time expenditure to build or expand facilities for long-term use, as opposed to paying for recurring costs needed to maintain facilities that already exist.

In light of the plain language of Const 1963, art 9, § 35, the common meaning of the term “development,” and the absence of any reference to “maintenance” in that provision, art 9, § 35 does not authorize the use of Trust Fund money for the maintenance of existing recreational facilities, including maintenance dredging of Great Lakes harbors for use by recreational watercraft. As worthy and necessary a purpose dredging may be, particularly in light of present lake levels, such use of Trust Fund money would constitute a misappropriation, contrary to the expressed intent of the Legislature that created the Trust Fund, and as approved by the voters of this State. The Legislature is certainly free to seek to amend art 9, § 35, as it has successfully done in the past, to permit the use of Trust Fund money for this purpose. But until that time, the words of the Constitution prohibit use of the Trust Fund as an expedient source of revenue to solve this pressing public policy concern.

It is my opinion, therefore, that Const 1963, art 9, § 35, authorizes the use of money in the Natural Resources Trust Fund for the development of public recreation facilities. Money from the Natural Resources Trust Fund therefore cannot be used for the maintenance of existing public recreation facilities, such as maintenance dredging of existing harbors.

**II. Michigan Conservation and Recreation Legacy Fund,  
Waterways Account – Const 1963, art 9, § 40**

As noted above, Const 1963, art 9, § 40, established the Michigan Conservation and Recreation Legacy Fund, and within that fund, established and dedicated the Waterways Account for specified purposes related to public waterways and recreational boating.<sup>9</sup> This provision, in contrast to art 9, § 35, regarding the Trust Fund, specifically authorizes the expenditure of the dedicated funds for maintenance of public recreational boating facilities to facilitate public access to state waterways:

The waterways account is established as an account within the legacy fund. The waterways account shall consist of revenue derived from watercraft registration fees assessed on the ownership or operation of watercraft in the state; revenue derived from fees charged for the moorage of watercraft at state-operated mooring facilities; revenue derived from fees charged for the use of state-operated public access sites; transfers from the recreation improvement account; all tax revenue derived from the sale of diesel fuel in this state that is used to generate power for the operation or propulsion of vessels on the waterways of the state; and other revenues as authorized by law. *Money in the waterways account shall be expended only for the following:*

(a) *The construction, operation, and maintenance of recreational boating facilities that provide public access to waterways or moorage of watercraft.*

(b) The acquisition of property for the purpose of paragraph (a).

(c) *Grants to local units of government and state colleges and universities for the provision of public access*

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<sup>9</sup> This provision was added to the Michigan Constitution by Proposal No. 06-1, a legislative initiative under Const 1963, art 12, § 1.

*or moorage of watercraft and law enforcement or boating education to recreational watercraft operators.*

(d) The acquisition and development of harbors and public access sites.

\* \* \*

*(g) Other uses as provided by law as long as the uses are consistent with the development, improvement, operation, promotion, and maintenance of the state's waterways programs.*

\* \* \*

The legislature shall provide by law for the implementation of this section. [Const 1963, art 9, § 40; emphasis added.]

The Legislature has provided for the implementation of this constitutional provision in Part 20, Michigan Conservation and Recreation Legacy Fund, of the NREPA, MCL 324.2001 *et seq.* MCL 324.2035(3) provides:

Money in the waterways account shall be expended, upon appropriation, only as provided in parts 445, 781, 791, and 801 and for the administration of the waterways account, which may include payments in lieu of taxes on state owned lands purchased through the waterways account or through the former Michigan state waterways fund. [Emphasis added.]

The Parts of NREPA relevant to your question are Part 781, Michigan State Waterways Commission, MCL 324.78101 *et seq.* and Part 791, Harbor Development, MCL 324.79101 *et seq.* Of those two, Part 781 is most instructive.

MCL 324.78105(1) broadly empowers the Department of Natural Resources to construct and maintain harbors, channels, and facilities for vessels and, among other things, take actions necessary for dredging of such areas:

(1) The department shall have the following powers and duties:

(a) To acquire, construct, and *maintain harbors, channels, and facilities for vessels in the navigable waters lying within the boundaries of this state.*

\* \* \*

(c) To acquire, by purchase, lease, gift, or condemnation suitable areas on shore for disposal of the material from *dredging*. [Emphasis added.]

MCL 324.78110 comprehensively lists the purposes for which money in the Waterways Account may be used, including, among other things, maintenance associated with recreational boating facilities, and dredging to make a water body accessible for recreational boats:

Money in the waterways account shall be used only for the following:

(a) The construction, operation, and *maintenance of the following that are associated with recreational boating facilities:*

\* \* \*

(ix) *Dredging, stump removal, and aquatic weed control when the activities can be shown to clear lanes to make a water body more accessible primarily for recreational boats as opposed to general navigation.* [Emphasis added.]

Given the express language of Const 1963, art 9 § 40, and of Parts 20 and 781 quoted above, money in the Waterways Account may be used for dredging existing harbors in order to maintain public access to and recreational boating on state waters. But, given the express language of Const 1963, art 9, § 40, focusing on “public access” and “recreational boating” such expenditures must be directed to public, rather than private facilities. And, consistent with MCL 324.78110(a)(ix), the primary purpose of the dredging must be to enhance access for recreational watercraft.

It is my opinion, therefore, that Const 1963, art 9, § 40, and its implementing legislation, Parts 20 and 781 of the NREPA, allow the use of funds in the Waterways Account of the Michigan Conservation and Recreation Legacy Fund for operation and maintenance of public recreation facilities, including the dredging of existing harbors. But such expenditures must be directed to public, rather than private, recreation facilities. And, consistent with MCL 324.78110(a)(ix), the primary purpose of the dredging must be to enhance access for recreational watercraft.



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