

Impact of lakefront public footpaths on landowners' rights

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Introduction

According to federal planning principles, the cantons and municipalities must guarantee free public access to lakesides and riverbanks. However, some cantons have not yet implemented the required legislation, not least because of objections from private landowners. For instance, creating public footpaths along lakefronts can severely affect views of the lake, lakefront landowners' accessibility and construction possibilities and the value and privacy of lakefront properties.

This article outlines the applicable federal legal framework and highlights examples of its implementation by two cantons.

Federal legal framework

The Federal Spatial Planning Act provides for a number of planning principles that planning authorities must take into account. One of these principles holds that lakesides and riverbanks should be kept free and accessible to the public. **(1)**

Such federal planning principles are not directly enforceable against individual landowners. In order for these principles to provide a legal basis in particular cases and directly enforceable rights and obligations, the cantons and municipalities must enact specific regulations.

Accordingly, cantonal and municipal land-use planning instruments, such as land-use laws and utilisation plans, must provide for detailed provisions ensuring that the public can sufficiently reach the concerned water bodies and move freely along certain shores. In this context, cantonal legislature must duly consider all relevant interests and implement an explicit legal basis to enable the construction of public lakeside paths.

Some cantons and municipalities have implemented strict legal regimes to implement the federal requirements, while others have not yet adopted appropriate regulations. However, in certain cases, the legislation process has been slowed by significant resistance from private landowners.

In a recent decision, the Federal Supreme Court held that the free accessibility of lakesides and riverbanks provided for by the federal law does not entail public access to all points and areas of a specific lake shore.

According to the court, additional interests must be considered, including environmental protection and the interests of private landowners. **(2)** Accessibility may also be considered sufficient if certain parts of a path are located behind buildings.

Given the substantial impact that public lakeside paths can have on landowners' privacy, lake access and the stationing of boats on the shore, the cantonal and communal authorities must consider landowners' interests and weigh up conflicting interests on a case-by-case basis. The creation of a public lakeside path is therefore justified only if the public interest in free access to the lake outweighs the private interests of the concerned landowners.

Cantonal implementation

The legislation on public lakeside pathways varies between the cantons. The following examples outline the relevant regulation in the Canton of Vaud and in the Canton of Zurich.

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Canton of Vaud

The Canton of Vaud adopted a cantonal structure plan for the Lake Léman shores located in the canton which aims to create a continuous pathway along the lake.(3)

The plan is not a formal legal instrument and may be considered the cantonal authorities' declaration of intent. In particular, it does not directly apply to individual landowners. This would require adopting appropriate cantonal and communal legislation, whereby the legislators are not legally bound by the plan to enact specific rules.

The Canton of Vaud implemented the planning principle of free accessibility of lakesides and riverbanks to the public by amending the Lakeside and Shoreline Walkway Act.(4)

According to the act, there must on all shores bordering Lake Léman, along the bank and at a width of two metres, be a space free of any construction or obstacles for the towing of boats, the passage or step of boaters and their aids and for all other navigational and fishing needs.

In addition, the canton amended its legislation on the use of lakes and waterways in the public domain(5) in order to cover existing authorisations for nautical constructions. Since 1 September 2014 all previously granted authorisations for certain uses of public water bodies will lapse once a property transfers to a new owner. Unless they remove the construction, new owners will require a new authorisation.

Therefore, depending on the type of construction in such areas, the following authorisation requirements apply:

- New nautical constructions must be authorised – in particular, this applies to ports, piers, defences against erosion, pontoons and boat rails and lifts.
- Existing nautical facilities established before the abovementioned rules entered into force require authorisation to use public lakes if the new owner does not remove the construction concerned.
- New non-nautical constructions also require authorisation.

Such authorisation will be issued only in exchange of granting a public servitude of passage.

Regarding other construction projects on properties adjacent to public water bodies (eg. private villas), communities cannot generally make a construction permit conditional upon receiving a public servitude of passage. The practice of certain communities to do so has no legal basis.

Overall, the cantonal legal framework gives the Canton of Vaud's municipalities an instrument to ensure the free access to public water bodies in certain cases. However, communities may not generally ask landowners to grant public servitudes of passage, even if they have implemented such an obligation in their municipal regulations.

Canton of Zurich

The Canton of Zurich has no regulation providing free public access to lakesides and riverbanks.

In 2013, after a popular initiative promoting public lakeside paths was withdrawn before being voted on, the legislature amended the relevant law. However, the amended provisions prohibited expropriations of land for public lakeside paths which are against the will of concerned landowners. The legislature decided against the right of expropriation without exception – not even where the construction of a public lakeside path would require disproportionate efforts or be entirely impossible without expropriated land.

Two years later, the Federal Supreme Court considered the general exclusion of expropriations a violation of federal law and repealed the regulation.(6) The court held that, pursuant to the abovementioned federal planning principle, the authorities must have the option to expropriate certain properties. The cantonal legislature cannot generally exclude this option.

Another amendment of the relevant law is pending with the cantonal parliament. In practice, the current legal situation is considered unclear and is keenly disputed. Further, pursuant to latest media reports, a new popular initiative to promote public lakeside path is being prepared in the Canton of Zurich.

Comment

While a few cantons have enacted detailed regulations to implement the federal standards and create public lakeside paths, considerable legal uncertainty remains in other cantons. Further, some communities have asked landowners to grant public servitudes of passage without a sufficient legal

basis. Landowners are therefore advised to analyse the regulatory situation before making any concessions.

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Endnotes

- (1) Article 3(2)(c) of the Federal Spatial Planning Act, SR 700.
- (2) Federal Supreme Court 1C_539/2017 of 12 November 2018.
- (3) *Plan directeur cantonal des rives Vaudoises du Lac Léman*.
- (4) *Loi sur le marchepied le long des lacs et sur les plans riverains*, BLV 721.09.
- (5) *Loi sur l'utilisation des lacs et cours d'eau dépendant du domaine public*, BLV 731.01.
- (6) Federal Supreme Court 1C_157/2014 of 4 November 2015.

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