STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ROSCOMMON

CITIZENS FOR HIGGINS LAKE LEGAL LEVELS, ERIC OSTERGREN, STEVE RICKETTS, THOMAS THOMSON, CAROL THOMSON, GLENN R. FAUSZ, ROBERT OBRYAN, DRU OBRYAN, and JANICE JAMESON as trustee of the JANICE JAMESON TRUST

Petitioners/Plaintiffs,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON,

Respondent/Defendant.

Case No. 19-724711-AW
Hon. Robert W. Bennett

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DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Defendant, ROSCOMMON COUNTY, by and through counsel, ROSATI SCHULTZ JOPPICH & AMTSBUECHLER, PC, move, pursuant to MCR 2.116(B)(1), MCR 2.116(C)(5), (C)(8) and/or (C)(10), for summary disposition of the First Amended Complaint ("Complaint").

In the alternative, Defendant moves, pursuant to MCR 2.116(B)(1) and MCR 2.116(C)(10), for partial judgment/summary disposition with respect to the elements of: 1) the scope of the County's legal duty under this Court's 1982 Order and the Inland Lake Levels Act; 2) the discretionary nature of Plaintiffs' requested relief; and, 3) Plaintiffs' lack of a right to a jury trial.

In support of this Motion, Respondent relies upon the accompanying Brief in Support.

ROSATI, SCHULTZ, JOPPICH, & AMTSBUECHLER, P.C.

MATTHEW J. ZALEWSKI (P72207)
Attorney for Defendant

Dated: January 10, 2020

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Plaintiffs' request for relief in this case can best be described as a solution searching for a problem. Having failed in their quest to hold the Board of Commissioners in contempt of a 37-year old court order establishing the normal level of Higgins Lake, Plaintiffs are now taking a second bite at the apple to try to push their political agenda through the judiciary instead of the legislative process. Plaintiffs make sweeping assertions that the County is not maintaining the normal level of Higgins Lake, but their claimed harm is a mere general recreational harm allegedly arising from natural conditions beyond the County's control. They incorrectly insist that, because the County spent some money on a report in 2010 to make recommendations about potential modifications to the County's lake level management plan, the County is duty-bound to implement those recommendations. In making these arguments, Plaintiffs ignore that the report's recommendations of banking water and obstructing a state-mandated low-flow channel are not legally available, and that a comprehensive ecohydrologic study illustrated the harms that would be inflicted by the report's recommendations.

In seeking to flood Higgins Lake for their recreational enjoyment, Plaintiffs disregard the fact that the statutory scheme regulating inland lake levels requires the County's lake level management to balance recreational rights, property rights, and the environment. Further, Plaintiffs disregard the distinction between the duty to maintain the normal level, and the County's discretion to choose the means of maintaining the level. Under applicable authorities, the County is required to commence draw-down and refilling operations by certain dates, to maintain a

minimum flow during refill, and to perform regular inspections of the lake level control structure ("LLCS"). Plaintiffs do not allege a violation of *any* of these duties. Nor do Plaintiffs allege that the County is intentionally opening gates of the LLCS during the dry season, because it is not.

While Plaintiffs demand modifications to the LLCS or the County's management practices, their arguments are mere policy disagreements over how the County exercises its discretion, which are not properly remedied via a writ of mandamus. Far from ignoring its duty, the County has a well-developed maintenance protocol that has been recognized by an MI-EGLE engineer as consistent with proper management practices. As Plaintiffs cannot demonstrate that the County needs to be compelled to comply with its lake level-related duties or that Plaintiffs are entitled to specific maintenance practices, Plaintiffs' Complaint for a writ of mandamus must be dismissed.

STATEMENT OF FACTS

A. The Inland Lake Levels Statute and 1982 Court Order

Michigan's Natural Resources and Environmental Protection Act (Act 451 of 1994) ("NREPA"), Part 307, Inland Lake Levels (Act) (MCL §324.30701 et. seq.) ("ILLA," Ex 1), sets procedures for establishing and maintaining an inland lake's "normal level," defined as:

> The level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake. A normal level shall be measured and described as an elevation based on national geodetic vertical datum. MCL 324.30701(h).

It is common for property owners and/or the county in which an inland lake is located to have a court establish a normal level to protect property, prevent erosion, promote recreation, protect habitats, and mitigate ice damage. A lake level can be established for the entire year, or seasonally. The Court may exercise continuing jurisdiction to "provide for departure from the normal level as necessary to accomplish the purposes of" the statute. MCL 324.30707(5).

Higgins Lake is among the lakes for which a "normal level" has been established. Orders

of the Roscommon County Circuit Court date back to 1926. The instant action relates to an order entered on February 24, 1982 (*In the Matter of the Water Level of Houghton Lake, Higgins Lake, and Lake St. Helen,* File No. 81-3003-CF ["1982 Order"], Ex 2), which provides, in relevant part:

> IT IS HEREBY ORDERED AND ADJUDGED that the legal level of Higgins Lake, Roscommon County, Michigan, heretofore established at 1154.11 feet above mean sea level, be continued; provided, however that said level be lowered to a level not less than 1153.63 feet, commencing on or about November 1 of each year, and restored to its legal level, commencing on or about April 15, or ice-out, whichever shall first occur, in each year.
>
> * * *
>
> IT IS FURTHER ORDERED AND ADJUDGED that, in adjusting the lake levels as herein provided, the person or persons responsible for such operations shall make every reasonable effort to take into consideration stream flows into the lake and projected snow melt runoff within the water shed, as well as providing a minimum release during refill operations.

B. The Lake Level Control Structure and Low-Flow Channel

Adjustment of Higgins Lake's level is achieved through the operation of a Lake Level Control Structure ("LLCS") – a/k/a the Cut River Dam or Higgins Lake Dam – positioned at the location where Higgins Lake meets and flows into the Cut River. The LLCS's height corresponds to the lake's normal level, and is not designed for holding back higher water. One member of the County Board of Commissioners oversees the LLCS for each of the County's inland lakes. For Higgins Lake, that task has been assigned to Commissioner Ken Melvin since his election in 2008.

In 2007, significant improvements were made to the LLCS, including "the addition of two (2) 17-foot tilting weir gates and the creation of a 4.75-foot-wide low-flow channel in the center of the control structure." (Spicer Report, Ex 3, p. 4.) This low-flow channel is not capable of being closed. It is important to note that the low-flow channel was mandated by the Michigan DEQ (now MI-EGLE) in connection with the County's permit to upgrade the LLCS. The ILLA authorizes the state to "require that a new dam that is proposed to be constructed be equipped with an underspill device for the release of cold bottom waters for the protection of downstream fish

habitats." MCL 324.30719. The state issues permits for dams pursuant to Part 301 of Act 451 of 1994, "Inland Lakes and Streams," (Ex 4), which provides, in part,

> In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which or into which its waters flow and the uses of all such waters, including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. MCL 324.30106.

A person who violates Part 301, or a permit issued under that part, is guilty of a misdemeanor punishable by a fine of up to $10,000 per day. MCL 324.30112(3)-(4).

Reviewing the County's proposed LLCS modifications in 2007, the DEQ required revisions to the plans to provide for a low-flow channel as a condition for issuing a dam permit:

> Move the function of the low flow outlet bay, now located towards the northeast end of the dam, to the five-foot stoop log bay located most northeast. This would allow some minimum flow to continue by design. The new low flow bay would have to be modified to permanently prevent boards from being inserted into the angle iron slots on either side. (1/12/07 Letter, Ex 5.)

The County Board ultimately agreed to the DEQ's condition. (2/14/07 Letter, Ex 6.) The DEQ subsequently issued Permit Number 06-72-0056-P on March 12, 2007. (Permit, Ex 7.)

C. Studies of Higgins Lake and the Cut River Since 2007

Debate over whether water levels are too high or too low has persisted since the 2007 dam modifications. In 2008, prior to Commissioner Melvin's election, the Higgins Lake Property Owners' Association (HLPOA) threatened litigation against the County, arguing that Higgins Lake was being maintained in excess of the 1982 Order's summer level, and was also too high in the winter. (6/20/08 Letter, Ex. 8.) The HLPOA argued that the high water was responsible for "significant shoreline destruction" being experienced by shoreline property owners. (Ex 8.) In 2009, the HLPOA likewise urged that "the current legal summer lake level be adhered to and that at no time should this level be intentionally exceeded." (8/26/09 Letter, Ex 9.)

The Michigan DNR echoed concerns about the water levels. In a 2010 letter to the County,

the DNR expressed concerns with manipulating Higgins Lake's levels as follows:

> Artificial lake levels are one of the primary causes of shoreline erosion from wave energy during ice-free periods and ice scour during winter. Altering natural water fluctuations in lakes affects the establishment of wetland plant communities and nesting and rearing habitat for fish, mammals and water birds. Amphibian and reptiles are also affected by loss of habitat from erosion and construction of seawalls. Water control dams affect seasonal fish movements in the system and stream flows below the structure. We generally recommend against manipulation of lake levels and promote removal of control dams...(9/21/10 Letter, Ex. 10.)

The DNR offered that removing the dam would "significantly reduce shoreline erosion," and opined that "boat mooring and docking should not be affected with the exception that a wider beach area will be present." (Ex 10.)

Yet, by 2010, there had also been discussion that lake levels were too low. (Ex 3, p. 5.) To facilitate the process of sorting out the effect of the LLCS, the County Board commissioned a report from the Spicer Group in 2010 (the "Spicer Report"). Its findings included:

> Prior to 2007, the LCS on Higgins Lake did not have a center low-flow channel allowing constant flow to the Cut River and therefore water exited the lake by either evaporation, wave loss over the LCS, or operation of the LCS. By cutting a hole in the center of the structure, the amount of water leaving the LCS during summer months was calculated to increase by roughly 30 percent over the losses due to evaporation and wave action alone. This finding was corroborated through comparison of lake level trends before and after the lake level control structure was modified. Average lake levels in Higgins Lake have decreased by an average of about 0.20 feet in the past three years. (Ex 3, p. 11.)

The Spicer Report made two key recommendations that are echoed in the Complaint. The first was that "additional water must be retained in the months of May and June . . . to maintain an average level near the summer legal level, approximately 0.2 feet of water above the legal lake level should be achieved in June." (Ex 3, p. 15.) This is commonly referred to as water "banking." Second, it recommended that a flow restriction device should be fabricated and installed to restrain the unobstructed flow through the low-flow channel. (Ex 3, p. 15.) The Spicer Report's recommendations have no binding effect on the Board, and the Board has since exercised its discretion against implementing its recommendations.

The Spicer Report's findings contrast with those of a comprehensive multi-part "Ecohydrologic Evaluation of Removing the Higgins Lake-Level Control Structure" that was conducted in the mid-2010s through a collaboration of Michigan State University, the University of Michigan, the Muskegon River Water Shed Assembly, Huron Pines, the Higgins Lake Foundation, the HLPOA, and Fisheries Division. (Exs 11; 12.) This evaluation was recognized and summarized by the DNR. (3/8/17 DNR Notes, Ex. 13.) The Evaluation's conclusions included "that lake level management does not have significant effects on fishery habitat in Higgins Lake but does have significant effects on shoreline erosion. Lake-level manipulations have significant effects on fisheries habitat in the Cut River." (Exs 11; 13.) The study noted the inadequacy of the low-flow channel for the ecosystem, stating, "the low-flow opening is not large enough to consistently provide even a 33 cfs flow rate into the Cut River, as compared to the 50 cfs "target flow rate to protect Cut River fisheries," and the 100-150 cfs rate "necessary to provide optimal habitat for fish in the Cut River." (Exs 11; 13.)

The Evaluation also hinted at the abnormality of the "normal" lake level by addressing the sustainability of target lake levels under various conditions:

> The probability of achieving the established summer lake level (1154.11 feet) is 15% under current operation and 0% for unmanaged dam scenarios. The probability of achieving an established summer lake level 100% of the time under current operation would occur at 1153.28 feet, and at lower levels (1152.92) for the unmanaged dam scenarios. (Ex 13, p. 2.)

In addition, the report acknowledged that climate warming, evaporation rates, and groundwater inputs are issues that need to be addressed. (Exs 11; 13, p. 2).

D. Public Debate and the March 2019 Board Resolution

Public debate continues to this day, playing out in the press, at County Board meetings, and on social media. Mr. Ostergren has been a vocal critic of the County through the years. His comments in public, and in the materials submitted with the instant Complaint, reflect his belief

that "the main problem with failing to maintain the legal levels is the Lake Level Control Structure or Dam that was modified back in 2007." (Compl. Ex. I, attached as Ex 14, p. 1.) He denies that he is seeking to establish a new "normal level" of Higgins Lake (Ex 14, p. 2), despite the fact that his water "banking" proposal would provide legal authority to keep the lake to a higher level.

Under the ILLA, the process for initiating a determination of the lake level "may" be initiated by motion of the Board, or upon "receipt of a petition to the board of 2/3 of the owners of lands abutting the inland lake" requesting to "initiate action to take the necessary steps to cause to be determined the normal level of the inland lake." MCL 324.30702(1) and (2).

In response to Mr. Ostergren's repeated demands for the Board to take action, but respectful of the fact that community opinion is sharply divided as to whether the normal level of Higgins Lake should be increased, lowered, or kept the same, the Board adopted a resolution on March 27, 2019 establishing a policy that it would require any requests for a review of the lake level to be made via a petition of 2/3 of the riparians. (Ex 15.)

E. The County's Management of Higgins Lake

Attached to this brief are excerpts of the County's log sheets for the Higgins Lake Dam (a.k.a. the LLCS), which are authenticated via the affidavit of Keeper of the Records Alisha Pastell. (Ex 16.) Ms. Pastell's affidavit and the accompanying logs detail a daily process whereby Commissioner Melvin evaluates whether or not a gate of the LLCS needs to be opened or closed, and the actions are taken and recorded. Among other insights, the logs show that all gates and boards are closed in early April to commence refill operations required by the 1982 Order until the point that the lake is at or about the normal level. (Ex 16.) Likewise, the gates are opened in November to commence the draw-down process. (Ex 16.)

Comparing these logs to the charts compiled and interpreted by Petitioners (Compl. Ex. G, attached to this brief as Ex. 17) – and specifically the periods when the lake is below the

normal level – also reveals that the County has not taken intentional acts to lower the lake level beyond the normal level. By way of example, Plaintiffs' charts claim that the lake level was below the normal level from June 9, 2018 through September 4, 2018. (Ex 17.) However, the County's log shows that *all* boards and gates had been closed as of June 4, 2018, and remained closed through October 31, 2018. (Ex 16.) Prior to June 4, 2018, two gates had been open for a total of three days to draw down the lake in light of the fact that it had gone above the normal level. When the gates were closed on June 4, 2018, the lake was still slightly high. Reviewing the County's logs reveals a similar pattern of opening the gates when the level is high, closing them when at or just above the normal level, and keeping them closed during periods of evaporation and low precipitation for as long as the lake is below the normal level.

F. The Contempt and Mandamus Actions

Having failed at achieving their agenda through the legislative or electoral processes, and despite the availability of the petitioning procedure, on May 28, 2019, Plaintiffs obtained an *ex parte* order from this Court requiring the County to show cause as to why it is not in contempt of the 1982 Order. This Court ultimately vacated the May 28, 2019 by Order dated December 2, 2019 because the sole affidavit offered by Plaintiffs in support of their contempt motion was insufficient to confer the court with jurisdiction, and otherwise did not give rise to an inference of contempt. (Ex 18, 12-2-19 Order; Ex. 19, 10-21-19 Transcript.) Plaintiffs have appealed.

Plaintiffs filed their original complaint in this matter on October 21, 2019 – the date of the hearing on the County's motion to set aside the Show Cause order. They filed an Amended Complaint on November 30, 2019 to add Plaintiffs. (Ex 20.) Plaintiffs request an order compelling the County to implement the recommendations of the Spicer Report and/or to have this Court impose a lake level management plan upon the County. The County now moves for summary disposition, as the County is complying with its duties under the 1982 Order and ILLL.

STANDARD OF REVIEW

A. Summary Disposition

MCR 2.116(B)(1) provides that "a party may move for dismissal of or judgment on all or part of a claim in accordance with this rule."

A motion brought under MCR 2.116(C)(5) assesses whether the plaintiff has standing to sue. The Court may consider "the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *McHone v. Sosnowski,* 239 Mich App 674, 676 (2000), citing *Wortelboer v. Benzie Co,* 212 Mich App 208, 213 (1995).

"MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Spiek v. Michigan Department of Transportation*, 456 Mich. 331, 337 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. "The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed with the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Spiek,* at 337, citing *Singerman v. Municipal Service Bureau, Inc.,* 455 Mich 135, 138 (1997). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Corley v. Detroit Board of Educ.,* 470 Mich 274, 278 (2004).

B. Mandamus

A plaintiff seeking mandamus must demonstrate: "1) the plaintiff has a clear legal right to performance of the specific duty sought; 2) the defendant has a clear legal duty to perform; 3) the act is ministerial, and 4) no other legal or equitable remedy exists that might achieve the same result." *Hanlin v. Saugatuck Twp.,* 299 Mich App 233, 248 (2013). Even when these factors

are satisfied, "the granting of the remedy is discretionary with the trial court." *Iron County Board of Supervisors v. City of Crystal Falls,* 23 Mich App 319, 321 (1970). Mandamus is an extraordinary remedy, and while the first two elements of the mandamus analysis – plaintiffs' clear legal right to performance of a duty, and defendants' duty to perform that act – are reviewed by the Court of Appeals *de novo,* this Court's decision on Plaintiffs' petition for writ of mandamus is only reviewable for an abuse of discretion. *Rental Properties Owners Ass'n of Kent County v. Kent County Treasurer,* 308 Mich App 498, 581 (2014).

ARGUMENT

I. The Complaint should be dismissed due to Plaintiffs' lack of standing.

A plaintiff has standing upon demonstrating "a special injury or right, or substantial interest that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Schools Educ Ass'n v. Lansing Bd. of Educ,* 487 Mich 349, 372 (2010).

As defined by the Lake Level Statute, an "interested person" is:

> the department and a person who has a record interest in the title to, right of ingress to, or reversionary right to land that would be affected by a permanent change in the natural or normal level of an inland lake. MCL 324.30701(g).

Even "interested persons" must demonstrate a "legally protected interest that is in jeopardy of being adversely affected." *Wortelboer,* 212 Mich App at 214 (finding that riparians were "interested persons," but that this was not enough, as the "interested person" must show a sufficient personal stake/injury in the case.) The person must have a substantial interest in the enforcement of a statute "that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced." *Lansing Schools, supra,* at 373. Here, the Plaintiffs only allege a generic recreational harm. Compl. ¶20 effectively concedes that Plaintiffs are experiencing Higgins Lake in the same manner as the general citizenry, stating, "Lake users, like

Plaintiffs, are not able to enjoy the full extent of recreational and water-based activities." Accordingly, all the individual Plaintiffs lack standing, and by extension the nonprofit that we know little about should also be found to lack standing.[1] *Trout Unlimited Muskegon White River Chapter v. White Cloud,* 195 Mich App 343, 348 (1992). Accordingly, the Complaint should be dismissed. MCR 2.116(C)(5).

II. The County's duty is limited to generally providing for and maintaining the normal level; it has no duty to implement specific maintenance techniques.

Parts "a" and "b" of Plaintiffs' relief request invoke the "legal duty" component of a mandamus claim, asserting the County is in "breach of the clear legal duty . . . by not maintaining the required 'normal level'," and requesting a writ directing the County to maintain the "level mandated by the Legal lake Level Order throughout the entire year." (Compl. ¶32(a) and (b).)

These requests beg the question of what is the scope of any duty established under the 1982 Order. Whether a mandamus defendant has a clear legal duty to perform and whether plaintiff has a clear legal right to the performance of that duty . . . are questions of law." *Carter v. Ann Arbor City Attorney,* 271 Mich App 425, 438 (2006). Interpretation of a court order is also a question of law. *Silberstein v. Pro-Golf of America, Inc.,* 278 Mich App 446, 456 (2008). Since fact discovery is neither appropriate nor necessary for this Court to interpret its own orders, resolving this matter swiftly will promote efficiency and prevent needless disputes over attempts to conduct discovery with references to a disputed interpretation of the 1982 Order.

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[1] The County alternately advocates that standing should be evaluated only with respect to the Plaintiffs in the Original Complaint (CHLLL and Ostergren), because the Amended Complaint should be stricken as untimely filed. MCR 2.115(B) provides, "on motion by a party or on the court's own initiative, the court . . . may strike all or part of a pleading not drawn in conformity with these rules." MCR 2.118(A)(2) provides, "except as provided in subrule (A)(1), a party may amend pleading only by leave of the court or by written consent of the adverse party." MCR 2.118(A)(1) provides, "a party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading[.]" Here, the County served its Answer on November 8, 2019. Plaintiffs' Amended Complaint was not served until Nov.30, 2019 – more than 14 days later. Lacking conformity with MCR 2.118(A)(2), it should be stricken. The Original Complaint should be dismissed under MCR 2.116(C)(5), as Ostergren lacks neither asserts a record interest qualifying him as an "interested party," nor any other unique harm, and CHLLL should be found to lack standing.

In this case, the County's duties are detailed in the 1982 Order (*See,* Statement of Facts Part A). To the extent that the ILLA provides further guidance, it simply provides:

> After the court determines the normal level . . . the delegated authority of any county or counties in which the inland lake is located shall provide for and maintain that normal level. MCL 324.30708(1).

The ILLA also uses some mandatory language with reference to the duties of a County that has chosen to construct a dam as part of its plan to maintain the normal level. A county "shall cause an inspection to be made of each dam . . . every third year form the date of completion of a new dam or every third year from the determination of a normal level for an existing dam." MCL 324.30722(1). Where an inspection reveals the need for repairs, the county is given responsibility for directing plans to repair the dam. MCL 324.30722(2).

As quoted above, the ILLA broadly defines "normal level" with reference to maximizing public benefit. MCL 324.30701(h). "**The ILLA does not define 'normal level' to include a minimum and a maximum level.**" *Baldwin v. Barry County Drain Com'r,* unpublished opinion *per curiam* of the Court of Appeals issued 12/1/1998, No. 201604, 1998 WL 1988726, at *2 (Ex 21), citing *In re Van Ettan Lake,* 149 Mich App 517, 525 (1986). **The Court may conclude that its lake level order establishes a normal level, "subject to seasonal variations and precipitation."** *Baldwin,* at *1, emphasis added. (*See, also, Glen Lake-Crystal River Watershed Riparians v. Glen Lake Ass'n,* 264 Mich App 523, 538-539 (2004), affirming a trial court decision upholding a county's management practices that accounted for "seasonal fluctuations and . . . a balanced management approach between the lake and river.")

"Read as a whole, **the act essentially authorizes counties to make policy decisions** as to the levels of their inland lakes, and build and finance dams as necessary to maintain the desired lake levels." *Van Ettan Lake,* at 525-526, emphasis added. (*See, also, Glen-Lake,* 264 Mich App at 537, 544, recognizing lake level management as an "overall approach" and citing the

trial court's position that its efforts "are environmental and recreational," and "not motivated to . . . minimize the length of docks.)

Plaintiffs' concept of the County's duty strays far from these objective sources. Plaintiffs assert that the County is in "violation" whenever the lake goes the slightest amount under the normal level. (Compl. ¶16.) They allege a duty to "maintain the actual level . . . each and every day of the summer time period." (Compl. ¶24.) Thus, Plaintiffs appear to allege that the County must keep the lake rising to a point so high as to prevent evaporation from *ever* causing the lake to go below the normal level every day during the period they call "Michigan Summer Time" (Memorial Day-Labor Day). (Comp. ¶16.) However, neither the 1982 Order nor ILLA mandate that the level be exactly achieved on a daily basis. Nor do either define or create duties for a "Michigan Summer Time." And, to the extent that other lakes' normal levels have been treated as a range, it is because the orders in those cases expressly stated a minimum and maximum level. (*See, e.g., Anson v. Barry County Drain Comm'r,* 210 Mich App 322, 323-324 (1995).)

Further, to the extent that Plaintiffs attempt to create a duty to implement specific practices (like the Spicer Report recommendations), they are incorrectly construing discretionary activity as ministerial.[2] A ministerial act is one "where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Keaton v. Village of Beverly Hills,* 202 Mich. App. 681, 683 (1993). By definition, since the 1982 Order and ILLA are devoid of language requiring the County to bank water, or to alter its practices in light of new technology, or to manage the lake level as a range, neither provides the certainty required to elevate such acts to ministerial status.

Moreover, where the word "may" is used in granting authority to a municipal decision-maker, it establishes that the authority is discretionary. *Triomphe Investors v. City of Northwood,*

[2] The Spicer Report postdates the 1982 Order, so clearly is not incorporated within the Order.

49 F3d 198, 203 (6th Cir, 1995). While MCL 324.30708(1) provides that a county "shall provide for and maintain [the] normal level," the *means* of providing for and maintaining the level are within the County's discretion. For example, the statute's section relating to dams provides,

> A county ***may*** acquire . . . an existing dam that may affect the normal level of the inland lake, sites for dams, or rights to land. . . . A county ***may*** enter into a contract . . . A county ***may*** construct and maintain a dam ***that is determined by the delegated authority to be necessary*** for the purpose of maintaining the normal level. MCL 324.30708(2), emphasis added.[3]

Significantly, the means of *paying* for actions taken to maintain the level are discretionary:

> The county board ***may*** determine by resolution that the whole or a part of the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments[.]. MCL 324.30711.[4]

Under the rules of statutory construction, a court "must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *South Dearborn Environmental Improvement Association v. DEQ,* 502 Mich 349, 361 (2018). Thus, the fact that legislature chose to use the word "shall" with respect to the general duty to maintain a lake level, but "may" with respect to the means of maintaining and paying for that level must be given effect. Since the term "may" unambiguously provides discretion, it follows that the County does not have a duty to take any specific actions in relation to the LLCS.

Moreover, the Court of Appeals has held that, even where a court orders compliance with a lake level order, it does not excuse compliance with state permit requirements *Tawas Lake Imp. Ass'n v. Iosco County Bd. of Comm'rs,* unpublished opinion *per curiam* of the Court of Appeals, issued 6/26/2003, No. 237007, 2003 WL 21480712 (Ex 22), *leave to appeal denied,* 470 Mich. 852. And, it is a misdemeanor to violate a state permit. MCL 324.30112(3)-(4). Thus, if the County has any duty regarding the LLCS, it is to leave the low-flow channel undisturbed.

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[3] Similarly, MCL 324.30713: "The delegated authority . . . ***may*** contract with a state or federal government agency or a public or private corporation . . . for the . . . maintenance of a normal level." (Emphasis added.)
[4] See, also, MCL 324.30711(2): "If the revenues raised pursuant to the special assessment are insufficient . . . the special assessment district ***may*** be reassessed without hearing." (Emphasis added.)

Finally, to interpret "banking" as being part of the County's duty would generate a serious imbalance since "banking" could accelerate the effects of a high-precipitation summer to the detriment of property owners who experience flooding and erosion. Even the Spicer Report acknowledged that the Cut River has limits on its capacity to accept water from Higgins Lake (Ex 3, p. 5). Thus, there are scenarios under which the County would be unable to take additional actions in response to flooding, just as it cannot do anything to add water to the lake in times of low precipitation. Plaintiffs, however, do not suggest that the County is under a duty to *lower* the lake to offset a potential high-precipitation summer. Yet, if the County is understood as being under a duty to protect against both high and low water, then the logical result would be a single target level that promotes a balanced approach – in other words, the *normal level.*

Based on these considerations, the County requests summary disposition on the element of the County's legal duty, and an interpretation of the 1982 Order consistent with the following:

1) The normal level of Higgins Lake as established by the 1982 Order is 1154.15 feet, subject to seasonal variations and precipitation.

2) The normal level is a level up to which the lake must be drawn up to. It is neither a minimum, nor a maximum, nor a level that must be achieved on a daily basis since it is subject to seasonal variations and precipitation.

3) On or about November 1 of each year, the County must commence the lowering of the lake level to a level of not less than 1153.63 feet, commencing on or about November 1 of each year.

4) On or about April 15 of each year, or ice out, whichever shall first occur[5], the County must commence refill operations.

5) The County's maintenance of structures intended to maintain the normal level is subject to state permit requirements.

6) Once the normal level is achieved, the County is not under a duty to take preventative measures (e.g. "banking" water) against natural deviations from the normal level (e.g. evaporation and precipitation).

[5] The County requests that the Court clarify this language since it is logically inconsistent. Ice out could occur well before April 15, or more likely could occur after April 15, in which case it would not be possible to commence the refill operation until ice out occurs. The County submits that the language would read more appropriately if the phrase were amended to read, "whichever shall ***later*** occur."

II. Plaintiffs' request to compel discretionary acts is improper in a mandamus action, and violates separation of powers doctrine.

Whereas part "b" of Plaintiffs' request for relief seeks an order generally directing the County to maintain the normal level, part "c" seeks to compel specific *means* of maintaining the level. However, as discussed above, the ILLA gives the County discretion to choose the means of implementation. "[C]ircuit courts may not direct the manner in which an agency exercises its discretion." *Vanzandt v. State Employees Retirement System,* 266 Mich App 579, 585 (2005). **"A writ of mandamus is not appropriate when the act that the plaintiff seeks to compel the defendant to perform is a discretionary one."** *Carter,* 271 Mich App at 441.

Granting Plaintiffs' requested relief would also violate separation of powers doctrine. First, "the judiciary will not involve itself with the truly discretionary appropriations decisions of a county board, unless the action taken is so capricious or arbitrary as to evidence a total failure to exercise discretion," or is illegal. *Cahalan v. Wayne County Bd. of Comm'rs,* 93 Mich App 114, 122-123 (1979); *Debano-Griffin v. Lake County,* 493 Mich 167, 184-185 (2013). In addition,

> Where, as here, a statute empowers a governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency's exercise of that discretion or the judiciary's review of that exercise, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional. *Warda v. City of Flushing,* 472 Mich 326, 336 (2005).

The County has not acted illegally or unconstitutionally, so no judicial review of its discretionary acts is required. Beyond this, part "c" of Plaintiff's request for relief asks this Court "to establish guidance and operational practices for the devices used to control the lake level of Higgins Lake." This improperly asks this Court to invade the County's policymaking authority by creating its own set of "limits" to circumvent the separation of powers principles in *Warda.*

Such relief is also unnecessary. The plain language of the 1982 Order, ILLA, and applicable case law provide all the guidance that is needed to define the County's duties and conclude that those duties are being satisfied. Plaintiffs' request reflects nothing other than their subjective

dissatisfaction with these pre-existing authorities and the manner in which the County is exercising its discretion, which is insufficient to overcome separation of powers doctrine, or to state a cause of action for mandamus under the ILLA. *Warda,* at 336; *Wortelbower v. Benzie County,* 212 Mich App 208, 214 (1995), citing *Van Ettan Lake,* 149 Mich App 517, 525-526 (1986). Part "c" the request for relief must be dismissed. MCR 2.116(C)(8) and/or (C)(10).

III. Plaintiffs have no legal right to performance of the duty requested, and fail to state a claim for mandamus because an alternate legal remedy is available.

While Plaintiffs claim that they are seeking "maintenance" of the normal lake level, their request for an order to "bank" water effectively seeks a determination of a new higher seasonal level. The present situation is akin to that in *Spooner v. Lieder,* unpublished opinion *per curiam* of the Court of Appeals issued 4/25/1997, No. 175965, 1997 WL 33352825 (Ex 23), where plaintiffs claimed that they were seeking mandamus for an order requiring a drain commissioner to engage in a ministerial duty of "maintenance or repair" under the Drain Code, but their request actually involved "cleaning and extension" of the drain, for which a petition of affected landowners was required. In *Spooner,* since a petition process was available but not utilized, the petitioners could not establish a clear legal right to cleaning and extending the drain. *Spooner,* 1997 WL 33352825 at *4. Similarly, here, Plaintiffs have not utilized the process for petitioning the County to determine a new seasonal lake level, so their mandamus claim fails both the requirements that Plaintiffs have clear legal right to performance, and that they lack other legal remedies.

IV. The County is in Compliance with the 1982 Order and ILLA.

If the County's legal duty is defined as set forth in Section I, *supra,* so as to not include discretionary decisions, and such that the normal level is subject to seasonal variations and precipitation, then summary disposition should be granted to the County because there is no genuine issue of material fact that the County is in compliance with the 1982 Order and ILLA.

First, it is important to note that the County *has* complied with each of the following duties,

and the Complaint does not allege otherwise: 1) commencing draw-down and refilling operations within the timeframe required by the 1982 Order; 2) maintaining the lake's winter level; 3) refilling the lake up to its normal level; 4) maintaining minimum flow during the refilling operation; and 5) performing the regular dam inspections. The County's logs, and even Plaintiffs' own graphics[6] establish points 1, 2, and 3. (Exs 16; 17.) The County's maintenance of the low flow channel is consistent with point #4. And, regarding point #5, the County just conducted an inspection the LLCS in July 2019, which found the LLCS to be in good to excellent condition, and thus the County is under no current obligation to repair the LLCS. (Ex 25.)

Moreover, the County's logs and Pastell Affidavit show that the County is engaged in a comprehensive daily management program. They reveal no intentional acts by the County to reduce the lake level during the summer, as any reductions under the normal level have occurred when all gates are closed. Thus, these reductions are consistent with natural evaporation in the same way that brief increases above the normal level are consistent with added precipitation. MI-EGLE Environmental Engineer Lucas Trumble has reviewed the fluctuations in the water level and attested that "it is virtually impossible to maintain a lake level exactly within 1/100th of a foot due to natural fluctuations of lake levels," that the "range of water surface elevations . . . is reasonable and is consistent with the degree of variation that is . . . expected," and that "the operator of the dam at Higgins Lake appears to be doing a reasonable job operating the dam and maintaining the lake near the court-established normal level." (Ex 26, ¶¶7, 8, and 10.)

Ultimately, Plaintiffs simply have a different opinion as to how to manage the lake level, and are upset that the Board has declined to initiate its own review of the lake level without a 2/3 petition of abutting property owners demonstrating support for Plaintiffs' position. Plaintiffs' policy disagreements do not entitle them to a writ of mandamus. Based on the pleadings and

[6] The County does not concede or waive its right to challenge the authenticity and admissibility of the graphics, underlying data, or rounding/presentation of the data.

record already available in this case, and recalling that *this Court's decision in a mandamus case is itself discretionary*, this Court should exercise its discretion to deny the writ of mandamus and enter summary disposition in favor of the County. MCR 2.116(C)(10).

V. Plaintiffs are not entitled to a jury trial in this case.

If any portion of Plaintiffs' Complaint survives this motion, then this Court should enter partial judgment denying the portion of Request for Relief Part "a" that seeks a jury trial. "No more than a hearing is required by" the mandamus court rule, MCR 3.305(F). *Michigan Waste Systems, Inc. v. DNR,* 157 Mich App 746, 758 (1987). Likewise, the Court of Appeals has rejected the notion that hearings under the ILLA require a trial. *Van Ettan Lake,* 149 Mich App at 525.

CONCLUSION

Based on the foregoing, Defendant, ROSCOMMON COUNTY, requests that this Honorable Court grant its Motion for Summary Disposition, dismiss the Complaint, and grant any other relief deemed appropriate, including costs and attorney fees as a sanction, per MCR 1.109(E)(6), for bringing this action without a basis in fact, law, or a good-faith extension of law.

Alternatively, Defendant asks for entry of partial judgment defining the duty imposed by the 1982 Order, rejecting Plaintiffs request to pursue relief request part "c" under a mandamus theory, and rejecting Plaintiffs' jury demand, together with any other relief deemed appropriate. If any portion of this Motion is denied, Defendant requests that it be without prejudice.

Respectfully submitted,

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