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, THOMAS THOMSON, CAROL THOMSON, 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

RESPONSE

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PLAINTIFFS' OBJECTIONS AND RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

NOW COME Petitioners/Plaintiffs CITIZENS FOR HIGGINS LAKE LEGAL LEVELS, STEVE RICKETTS, ROBERT OBRYAN, DRU OBRYAN, THOMAS

THOMSON, CAROL THOMSON, GLENN FAUSZ, JANICE JAMESON TRUST, and ERIC OSTERGREN, by counsel, and opposes the motion for summary disposition.

OBJECTIONS

As an initial matter, Petitioners/Plaintiffs object to the motion for two non-merits reasons. The first is filing a motion pursuant to MCR 2.116(C)(8) while also attaching exhibits. This is wholly improper. When considering a motion under (C)(8), a circuit court "must accept all factual allegations as true, deciding the motion *on the pleadings alone*." *El-Khalil v Oakwood Healthcare Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Second, as to the motion filed pursuant to MCR 2.116(C)(10), it is premature. Summary disposition is generally premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Discovery has not yet even functionally started. As such, the motion is improperly structured and prematurely filed. Petitioners/Plaintiffs object.

INTRODUCTION

This case is simple. On February 24, 1982, this Court established the legal lake levels for Higgins Lake via what is now codified as Part 307 (Inland Lake Levels) of the *Natural Resources and Environmental Protection Act*, Public Act 451 of 1994. **First Am Compl, Exhibit A.** The legal lake level of Higgins Lake is "established at 1154.11 feet above mean sea level." ***Id.*** "After the court determines the normal level of an inland lake in a proceeding initiated by the county, 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). If that were not clear enough, the Legislature said it again—"the delegated authority of the county or counties in which the lake is located *shall* maintain that normal level." MCL 324.30702(3). When the Legislature uses the term "shall," there is no discretion to simply ignore it.

The heart of this matter is Petitioners/Plaintiffs' allegation that the County and its delegated authority "are not properly maintaining and supporting sufficient lake levels in the manner utilizing all known reasonable practices and available technology, and thereby is *intentionally* causing the mid to later summer lake levels to repeatedly drop below the level mandated by the Legal Lake Level Order to the detriment of the users of Higgins Lake, including each Plaintiff." **First Am Compl, ¶19**; see also **Exhibit B, ¶¶1-3.** The question becomes whether the County has properly maintained "that normal level" at 1154.11 feet above mean sea level and has done everything it reasonably can do to fulfill its mandatory public duty. We know the answer is no; Spicer Engineering told the County so. **First Am Compl, Exhibit H, p. 3** ("this study has found that the level of Higgins Lake has averaged below the court established legal lake level during the summer months in

typical years"); see also **Exhibit B, ¶4.** The water level data also confirms the same conclusion as the level is always lower than this should be in the summer months. **First Am Compl, Exhibit E, F, G, M and N**. The sum-and-substance of the County's motion to dismiss is that its half-hearted actions to keep the level at 1154.11 feet above mean sea level in the spring and allow the level to fall is good enough. Petitioners/Plaintiffs assert it is not. See **Exhibit B, ¶4.** That is a material question of fact which precludes summary disposition. And because this mandamus action is the process this Court has directed for this challenge, a motion for dismissal under MCR 2.116(C)(8) is also improper. Summary disposition at this pre-discovery stage should be denied.

FACTS

Petitioners/Plaintiffs rely upon the facts and allegations contained in their First Amended Complaint. On February 24, 1982, this Court established the legal lake levels for Higgins Lake via what is now codified as Part 307 (Inland Lake Levels) of the *Natural Resources and Environmental Protection Act*, Public Act 451 of 1994. **First Am Compl, ¶6.** This Court, by Circuit Court Judge Carl L. Horn, memorialized that order[1] in written form on February 24, 1982 (hereafter "Legal Lake Level Order"). ***Id.*, ¶7.** A copy of said order is attached to the First Amended Complaint.[2] **First Am Compl, Exhibit A**. In addition to establishing legal lake levels on Houghton Lake and Lake St Helen, the Court decreed that the legal lake level of Higgins Lake is "established at 1154.11 feet above mean sea level." **First Am Compl, ¶8.**

[1] Part 307 was formerly the *Inland Lake Level Act.*

[2] Two additional orders were issued since 1982 which temporarily changed the legal lake level but have expired of their own accord. See **First Am Compl, Exhibits B and C.**

For the last several years, Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and/or its delegated authority (the "County") has regularly and systematically failed to abide by the Legal Lake Level Order for huge percentages of the year, particularly during the summer months when Higgins Lake is used the most for various recreational pursuits. ***Id.*****, ¶10.** A review of this compiled and organized data from the United States Geological Survey[3] (**First Am Compl, Exhibits E, F, G, M and N**) shows that the County has been generally compliant with lower winter levels for many years, but been generally non-compliant with the Legal Lake Level Order during the normal (summer) months, especially the period during "Michigan Summer"—that timeframe from Memorial Day to Labor Day when many residents recreationally use Higgins Lake. **First Am Compl, ¶¶12-14**; see also **Exhibit B, ¶5.**

During the desirable and important recreation times of Michigan's summertime (i.e. Memorial Day through Labor Day), the County was in regular violation of (i.e. below) the Legal Lake Level Order two-thirds (2/3) of the time in 2016, over one quarter (1/4) of the time in 2017, and nearly ninety percent (90%) of the time in 2018. **First Am Compl, ¶16**; see also **Exhibit B, ¶6.**

The County not properly maintaining and supporting sufficient lake levels in the matter utilizing all known reasonable practices and available technology, and thereby is intentionally causing the mid to later summer lake levels to repeatedly drop below the level mandated by the Legal Lake Level Order to the detriment of the users of Higgins Lake, including each Plaintiff. **First Am Compl, ¶19**; see also **Exhibit B, ¶¶1-2.** Each

[3] See https://waterdata.usgs.gov/mi/nwis/dv?referred_module=sw&format=gif&period=60&site_no=442805084411001

Petitioner/Plaintiff has suffered adverse, negative, and loss-causing effects by the failure of the County to comply within the Legal Lake Level Order. ***Id.*****, ¶18**; see also **Exhibit B, ¶10.**

In further support of the harm being suffered, Petitioners/Plaintiffs also attach the sworn declarations of 36 other property owners and users on and around Higgins Lake for the harm they are also suffering as a result of the County's failure to comply—as best as possible—with the legal levels mandated by Part 307 and this Court's February 24, 1982 order. **Exhibit A**. Prior public pleas to the County has gone ignored. See **Exhibit C.** The County answered and filed motions pursuant to MCR 2.116(C)(5), (C)(8), and (C)(10). This opposition now follows.

STANDARD OF REVIEW

Under MCR 2.116(C)(5), summary disposition is only proper if "[t]he party asserting the claim lacks the legal capacity to sue." UAW v Central Mich Univ Trustees, 295 Mich App 486, 493; 815 NW2d 132 (2012). In this motion type, courts are to "consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties to determine whether the defendant is entitled to judgment as a matter of law." *Id.* Whether a party has standing to bring an action is a question of law. *Franklin Historic Dist Study Comm v Village of Franklin*, 241 Mich App 184, 187; 614 NW2d 703 (2000).

Under MCR 2.116(C)(8), summary disposition is only proper when a claim is unenforceable as a matter of law and no factual development could lead to the claim's enforceability. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Allegations of the nonmoving party are accepted as true, and facts are taken in the light most

favorable to that party. *Id.* at 119. The trial court may only consider the pleadings in rendering its decision. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). See also *El-Khalil*, 504 Mich at 164 (holding that it was error to evaluate the plaintiff's allegations under MCR 2.116(C)(10) when the motion was brought under MCR 2.116(C)(8)).

Under MCR 2.116(C)(10), summary disposition is only proper when there is no genuine issue of material fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id.* Courts are "liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

The Lake Level Control Structure

The County asserts that the adjustments of Higgins Lake's levels are achieved through the Lake Level Control Structure (the LLCS) on the Cut River. Petitioners/Plaintiffs agree that such control is effectuated by this device. The LLCS is essentially an open-face dam. As the Spicer Report confirms, nearly six inches of water across a nearly 10,000-acre lake is annually lost between July and September. **First Am Compl, Exhibit H**. That is over 1.5 *billion* gallons of water! **Exhibit B, ¶9.** Where Petitioners/Plaintiffs part ways is that the low-flow channel—or what Petitioners/Plaintiffs refer to as the 4.75ft Uncontrolled Opening—is not mandated by law but rather written into a Part 315 order which can be easily changed *if asked*.

The County admits that it paid for and received the Spicer Report but "has not implemented" the corrective actions. **Motion, p. 6.** It claims it has the "discretion" not to do so. ***Id.*** However, Michigan law expressly says otherwise. MCL 324.30708(1); MCL 324.30702(3).

The Spicer Report confirms "[a]lterations are needed to improve LCS operation to enable lake levels to be maintained closer to the legal level." **First Am Compl, Exhibit H, p. 3.** Suggested changes to the structure and operations of the LLCS will cause the County to more correctly maintain the legal lake level—i.e. the banking of water, the seasonal installation of a restrictor plate, scour protection be added to the low flow channel, improvements should be made to the sheet piling portions, stop logs improvements, and the "staff gage" should be replaced. ***Id.*** The County does not dispute this by their motion. Yet, the County has done none of these. Petitioners/Plaintiffs also assert that closing or minimizing the uncontrolled 4.75 opening will also cause the County to become less non-compliant if it sought to make that request with the MI-EGLE. But because a small political faction desires a water level far below the legal level, the County's delegated authority is constantly not "maintain[ing] that normal level" to the harm and detriment of others.[4]

New Lake Level

The County asserts that Petitioners/Plaintiffs are actually trying to obtain a new lake level. Lets be clear—they are not. **Exhibit B, ¶17.** All that is sought is for the County and its delegated authority to comply with the legal lake level established by this Court—

[4] The County also expresses concern that limiting the water will affect fishery stock and wildlife. Petitioners/Plaintiffs dispute that and believe that evidence held by the Michigan Department of Natural Resources will confirm Petitioners/Plaintiffs' position. **Exhibit B, ¶15.**

1154.11 feet above mean sea level—no more, no less. ***Id*., ¶18.** However, Petitioners / Plaintiffs are mindful that absolute perfection may not be achievable. However, the Spicer Report confirms that reasonable steps can be taken to make the County and its delegated authority either far more compliant or at least less non-compliant on a year over year basis.

Compliance Is Required / There Is No Discretion

The crux of the County's argument is that its current incomplete and half-hearted attempts to maintain the water levels—which it is purposely falling to do—is enough, legally, given "the spirit" of the statute. This Court cannot abide by such non-compliance. The statute is clear—twice over. "After the court determines the normal level of an inland lake in a proceeding initiated by the county"—which it did in February 1982—"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). Moreover, "the delegated authority of the county or counties in which the lake is located ***shall*** maintain that normal level." MCL 324.30702(3). Shall means the duty is mandatory, not discretionary. "The Legislature's use of the word 'shall' in a statute generally 'indicates a mandatory and imperative directive." *Costa v Cmty Emergency Med Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006). This Court cannot substitute the word "shall" with "may" or add words like "maintain the level selected in the discretion of the delegated authority."

Petitioners/Plaintiffs should hardly have to remind this Court and the County that we enforce statutes "as written." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013); *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Judicial gloss of statutes is not permitted. *Wayne Co v Hathcock*, 471 Mich 445, 456; 684 NW2d 76

(2004). The County cannot have the judiciary act as a "super legislator" in rewriting a statute in violation of separation of powers. "If courts are free to cast aside a plain statute in the name of equity…, then immeasurable damage [would] be caused to the separation of powers mandated by our Constitution." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 406-407; 738 NW2d 664 (2007).

Where Defendant errors is believing that they have discretion in whether to strictly comply or loosely not comply with the already-established lake level. They lack that discretion. MCL 324.30708(1); MCL 324.30702(3). The use of "may" in Part 307 provides lawful authoritative acts for the County to undertake because otherwise it could not do so. *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 193; 880 NW2d 765 (2016) (Zahra, J., concurring) ("Municipalities have never possessed inherent authority not expressly granted by the Constitution or laws of Michigan.").

ARGUMENT

Perhaps realizing that the statutes under Part 307 cannot be judicially re-written, the County seeks dismissal on various grounds. All fail.

Standing

The County first raises standing. "In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected." *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997). "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." *Lansing Sch Ed Ass'n v Lansing Bd of Ed,* 487 Mich 349, 355; 792 NW2d 686 (2010). Petitioners/Plaintiffs allege that each inhabits, owns, uses, and/or accesses land near or abutting Higgins Lake. **First Am Compl, ¶2**; see also **First Am Compl, Exhibit**

O (property records). They also allege that each "has suffered adverse, negative, and loss-causing effects by the failure of [the County] to comply within the Legal Lake Level Order." **First Am Compl, ¶18.** Moreover, each allege "are not able to enjoy the full extent of recreational and water-based activities due to the failure of [the County] and its delegated authority to actually and/or reasonably meet its legal obligation to keep and maintain the water level of Higgins Lake as required by the Legal Lake Level Order." **First Am Compl, ¶20.**[5] "When a party's standing is contested, the issue becomes whether the proper party is seeking adjudication, not whether the issue is justiciable." *Tennine Corp v Boardwalk Commercial, LLC*, 315 Mich App 1, 7; 888 NW2d 267 (2016). As property owners and residents who inhabit, own, use, and/or access land near or abutting Higgins Lake, they have an undisputed "legally protected interest that is in jeopardy of being adversely affected" by non-compliance with the legal lake levels. See *Foster*, 226 Mich App at 358. Standing is clearly met. Where the County errors is making standing contingent on the merits of the case. By law, it cannot. *Tennine Corp*, 315 Mich App at 7.

Mandamus

Mandamus will issue where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Tuggle v Dep't of State Police*, 269 Mich App 657, 668;

[5] For a motion under MCR 2.116(C)(8), this must be treated as true. For a motion under MCR 2.116(C)(10), the County would first need to provide evidence that such allegation is not true and then (and only then) does the burden shift to Petitioners/Plaintiffs. Until that happens, Petitioners/Plaintiffs may stand on their pleadings. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369-370; 775 NW2d 618 (2009) ("a moving party had the initial burden to come forward with evidence that showed that there was no genuine issue of material fact as to plaintiffs' claims and that it was entitled to judgment as a matter of law").

712 NW2d 750 (2005). Here, Petitioners/Plaintiffs have alleged—which must be treated as true—all of the following—

- The benefit and advantage of the Legal Lake Level Order is the clear legal right of these Petitioners/Plaintiffs and is entitled to specific duty of keeping the summer lake level of Higgins Lake at 1154.11 feet above mean sea level.

- The County has breached that clear legal duty.

- The County and/or its delegated authority has violated that legal obligation by failing to employ reasonable and best practices and available technology to reasonably maintain the actual level of Higgins Lake consistent with the actual ordered summer legal level each and every day of the summer time period.

- The obligation of compliance is ministerial and, in accordance with prior dicta explanations of this Court, no other remedy exists that might achieve the same result.

First Am Compl, ¶¶27-35. All the elements of the mandamus claim have been pled and support by facts. Any motion under MCR 2.116(C)(8) must be denied. *El-Khalil, supra.* As for a motion under MCR 2.116(C)(10), Defendant is first obligated to "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." That is logically difficult given that way the County pumped-and-dumped its briefing. But let's break it down.

For its first argument, the County question what is its duty. That is simple—it "***shall*** provide for and maintain ***that*** normal level, i.e. 1154.11 feet above mean sea level. MCL 324.30708(1); **First Am Compl, Ex A**. So too must its delegated authority. MCL 324.30702(3).

Next, the County asserts whether what has happened to the lake level is actually "seasonal variations and precipitation." **Motion, p. 13.** Petitioners/Plaintiffs dispute that because the County is "***intentionally*** causing the mid to later summer lake levels to repeatedly drop below the level mandated by the Legal Lake Level Order" by not "utilizing

all known reasonable practices and available technology." **First Am Compl, ¶19; Exhibit B.** That questions whether there was a breach of the duty—a question *of fact*. "The court's current task is to review the record evidence, and all reasonable inferences therefrom, [in favor of Plaintiffs] and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Do not fall for Defendant's legal honeytrap—the court cannot "make findings of facts" at this stage of the litigation. *Id*; see also *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). "There is a great difference between an inquiry to determine whether or not there is an issue of fact and a trial to decide a disputed issue of fact." *Skinner*, 445 Mich at 161. "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment." *Id.*

Next, the County confuses what act is ministerial. It is correct that 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." *Solo v. Detroit*, 303 Mich. 672, 677, 7 NW2d 103 (1942). That is what has happened. The February 1982 Lake Level Order, together with modern Part 307, establishes the lake level to be "1154.11 feet above mean sea level." It cannot be more precise or certain at that. There is no discretion to change, set, or alter the legal lake level. While there might be certain tools authorized by the Legislature in the County's lake level toolbox to effectuate that level, the duty to maintain the legal lake level at 1154.11 feet above mean sea level leaves nothing to the exercise of discretion or judgment and thusly is ministerial.[6]

[6] As for the final *Tuggle* element, the County does not identify any other remedy that exists that might achieve the same result. Case law confirms that no private cause of action was created by the Legislature under Part 307. See *In re Van Ettan Lake*, 149 Mich App 517, 525-526; 386 NW2d 572 (1986). That element is unchallenged as to this motion.

Hand Off Is No Longer Viable

Contrary to the County's position, the County is acting illegally—it is not maintaining the legal lake level of 1154.11 feet above mean sea level during the summer months and has the ability to become compliant (or at least less non-compliant). It is simply refusing to fulfill its express and mandatory legal duty. The County has not asserted—because it cannot—that it is doing *the best* possible job in fulfilling its legal duty to keep the waters of Higgins Lake at 1154.11 feet above mean sea level from mid-April through November every year. It is failing and its is harming people. **Exhibits A and B.** The error in the County's thinking is that it has discretion in whether to comply and maintain the legal level. It does not; the Legislature told them so. MCL 324.30708(1); MCL 324.30702(3). It is flouting its legal obligations—and has no justification for its failure to do so other than to say "aw gee, we kinda tried."[7]

Additionally, the County errors in asserting (but not actually believing) that Petitioners/Plaintiffs are seeking to change the legal lake level from 1154.11 feet above mean sea level to something else. Petitioners/Plaintiffs clearly are not. As the County itself acknowledges, Petitioners/Plaintiffs tried to get the County to comply by asking, advocating, begging, and cajoling. The County has ignored all pleas. The only remedy is now with the courts.

[7] It is acknowledged that the legal level is a target and impossible to maintain at an exact level—meaning withing tiny fractions of an inch. **Exhibit B, ¶19. "**Seasonal differences will occur. Sometimes the levels will be *slightly* higher than the legal level and sometime the levels will be *slightly* lower. However, levels *consistently* managed above or below the legal level are not acceptable when tools and technology are available to help maintain them closer to that target level." ***Id.***

The County lastly suggests that it is in compliance with the legal lake level order because it timely acts at the beginning of each season. It is true that Petitioners/Plaintiffs are not saying that the County is ignoring *every* aspect of the February 1982 Lake Level Order. However, it is ignoring the most important part—"maintaining that normal level" at 1154.11 feet above mean sea level from April through November each year. The County's own evidence shows compliance is non-existent and inconsistent during the summer time; Petitioners/Plaintiffs' evidence also confirms the same. See **First Am Compl, Exhibits M and N.** Material questions of fact preclude summary disposition and discovery is needed to further marshal facts to support this case.

Jury Trial

"The right of trial by jury as declared by the constitution must be preserved to the parties inviolate." MCR 2.517(A). Under the Court Rules, "the court may hear the matter or may allow the issues to be tried by a jury." MCR 3.305(F). A perfect question to be resolved by a Roscommon County jury is whether the County is "maintaining that normal level" at 1154.11 feet above mean sea level from April through November each year. The County says it does; Petitioners/Plaintiffs says it does not. Questions of facts are tried to a jury. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses.") This Court can and should do so.

RELIEF REQUESTED

WHEREFORE, the Court is requested to deny the County's motion for summary disposition and open reasonable discovery.

Date: March 11, 2020

RESPECTFULLY SUBMITTED:

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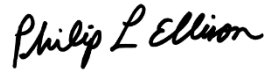
PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by emailing the same to their business emails address(es) as disclosed by the pleadings of record herein on the

11th day of March, 2020.



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