

LAW WEATHERS & RICHARDSON

*Professional Corporation
Attorneys and Counselors*

800 Bridgewater Place, 333 Bridge Street, N.W. • Grand Rapids, Michigan 49504-5320
Phone 616/459-1171 • Fax 616/459-1171 • www.lwr.com

Clifford H. Bloom

Direct Dial (616) 732-1710
Direct Fax (616) 913-1210
E-Mail: CliffBloom@lwr.com

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VIA EMAIL AND MAIL

Mr. Russell P. Anton
President
Alcona-Iosco Cedar Lake Association
6900 Knollwood Court
Oscoda, Michigan 48750

Re: Cedar Lake—The 1954 Court Lake Level Order

Dear Russ:

You have asked us for our legal opinion regarding certain matters relating to the 1954 court order which set the official lake level for Cedar Lake at 608.5 feet above sea level. This letter is in response to your request.

FACTS

Cedar Lake is a relatively shallow body of water located in two Michigan counties, Alcona County and Iosco County. In late 1953 and early 1954, the County Board of Supervisors for the Counties of Alcona and Iosco prepared and filed a statutory lawsuit in the Alcona County Circuit Court with a request that the court set the lake level for Cedar Lake under Public Act No. 194 of 1931. Apparently, although the lawsuit was filed in the Alcona County Circuit Court, Judge Herman Dehnke (of Alcona County) sat as the judge for both Alcona and Iosco Counties in the lawsuit. Pursuant to a court order dated March 16, 1954, Judge Dehnke formally set the lake level for Cedar Lake at 608.5 feet above sea level. Specifically, the order stated in relevant part as follows:

1. That the normal lake level of Cedar Lake, located in Greenbush Township, Alcona County and Oscoda Township, Iosco County, Michigan, shall be established at the normal and legal level, of 608.5 feet above sea level. Said level to be designated as the normal level as provided under Act 194, P.A. 1931 and amendments thereto, and that said level shall be maintained by a suitable dam and spill-way as testified to and established in open court, subject, however, to such amendments and modifications thereof, for cause shown as future developments may justify or require.

From what you can ascertain, during the decades that followed the 1954 court lake level order, minimal efforts were made by the drain commissioner of either county to maintain the lake level of Cedar Lake at the 608.5-foot level. Such limited efforts included Alcona County installing and maintaining two spillways at the northern end of the lake (set at slightly above the 608.5-foot level decreed by the Court).

During the mid-1960s, construction on the Lakewood Shores development began at the southern end of Cedar Lake within Iosco County. The Lakewood Shores development proceeded through a number of phases and included several plats. A stormwater system was installed by the developer. In 1969, the Iosco County Drain Commissioner established a formal drainage district for the Lakewood Shores development called the "Lakewood Shores Drain."

From the beginning of the Lakewood Shores development during the 1960s through the mid-1990s, lots within the various plats experienced a number of flooding and water drainage problems. The Alcona-Iosco Cedar Lake Association (the "Association") has recently surmised that such problems were likely due to the naturally high water level in the area attributable to the presence of Cedar Lake. From the mid-1970s through the mid-1990s, the Iosco County Drain Commissioner sought to alleviate the drainage and flooding problems plaguing the Lakewood Shores development. During the late 1980s and early 1990s, the Lakewood Shores drainage district was either recreated or expanded in order to facilitate Iosco County taking over the drainage system for the Lakewood Shores development and greatly expanding and improving the drainage system. During 1995 and 1996, extensive improvements and expansions to the Lakewood Shores drainage structures were completed. Among other improvements, five large drains were created to drain groundwater from the Lakewood Shores development directly to Lake Huron.

The Association believes that the drain structures and improvements installed during the mid-1990s (whereby a significant amount of groundwater in and around the Lakewood Shores development is drained directly to Lake Huron) has caused the lake level of Cedar Lake to drop dramatically and to remain below the historical lake levels which occurred prior to the mid-1990s. Amazingly, it does not appear that anyone raised (or pursued) the issue of the 1954 lake level order during the process of implementing the improvements to the Lakewood Shores Drain during the mid-1990s. The Association would now like to know whether anything can be done pursuant to the 1954 court order to reduce the flow of water to Lake Huron through the Lakewood Shores Drain.

ISSUE PRESENTED

Specifically, you have asked whether we would recommend a lawsuit to enforce the 1954 lake level order.

DISCUSSION

A. The 1954 Court Order

The statute which governs court-ordered lake levels in effect today is Public Act No. 146 of 1961, as amended, being MCLA 324.30701 *et seq.* The 1954 court order was issued under the

predecessor statute, Public Act No. 194 of 1931. However, the two statutes are virtually identical and the case law is generally the same for both. See *Glen Lake-Crystal River Watershed Riparians v Glen Lake Assn*, 264 Mich App 523, 526 (n-1) (2004).

The 1954 court order establishes the normal and legal lake level for Cedar Lake at “608.5 feet above sea level.” The court order also provides as follows:

... said level shall be maintained by a suitable dam and spill-way as testified to and established in open court, subject, however, to such amendments or modifications thereof, for cause shown as future developments may justify or require.

Interestingly, the court order does not state which public official, body, or entity shall maintain the dam, spillway, or lake level in general.¹ See also MCL 324.30708(1).

B. Enforcing or Modifying a Lake Level Order Issued by a Court

Under both the predecessor lake level statute (in effect in 1954) and the current statute, only certain governmental entities may commence court action to establish a lake level. However, once a lake level has been formally established by a court order, any “interested person” can file an action (usually in the form of a motion) to either enforce the lake level order or to modify the order. See MCL 324.30701(f); *Wortelboer v Benzie County*, 212 Mich App 208, 213-214 (1995); *Glen Lake-Crystal River Watershed Riparians* at 525, 530-531. The inland lake level statute defines an “interested person” as follows:

... 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.

Once a statutory lake level has been set for a particular lake by a circuit court pursuant to the current inland lake level statute (or a predecessor statute), the circuit court involved has continuing jurisdiction over the original lake level order and can enforce or modify the same. See *Anson v Barry County Drain Comm'r*, 210 Mich App 322, 325-326 (1995); *Glen Lake-Crystal River Watershed Riparians* at 537. Accordingly, any “interested person” (which would normally include a riparian property owner on the lake involved or a representative lake association comprised of many riparian property owners on the lake) can file a motion with the circuit court that issued the original lake level order requesting that the lake level order either be enforced or be modified. In general, the current statute does not give a circuit court the authority to simply abolish a prior lake level order. The statute authorizes a departure from the lake level established under a court order only upon a showing that the official lake level is no longer beneficial. *Anson* at 326.

The Michigan appellate courts have also made it clear that in order to enforce or modify a statutory lake level order, a new lake level lawsuit need not be commenced. The current statute allows the circuit court involved to exercise its continuing jurisdiction to decide whether to enforce an existing

¹ The relevant part of the current inland lake level statute (MCL 324.30702(3)) states that if a lake level order is issued, “the delegated authority of the county or counties in which the lake is located shall maintain that normal level.”

lake level order or order a departure from a previously-established lake level if it is necessary for the benefit and welfare of the public. *Anson* at 326.

Based on the above, any riparian property owner on Cedar Lake (as well as likely the Association) could file the appropriate motion with the Alcona County Circuit Court requesting that the 1954 lake level order be enforced or modified. Should that occur, the Boards of Commissioners for both counties (and the county drain commissioners) would automatically be parties to the proceeding. Furthermore, any other interested party (such as any landowners or property owners associations within the Lakewood Shores development) could petition the court to be made parties to the proceeding.

C. What Would Likely Occur if the Association Files an Action in Court to Enforce the 1954 Lake Level Order?

When a circuit court which has issued a lake level order is confronted with a motion to enforce or modify the order, the court should consider the same factors which were applicable in determining the initial lake level. Those factors are found in MCL 324.30707(4), and are as follows:

- (a) Past lake levels, records, including the ordinary high-water mark and season fluctuations.
- (b) The location of septic tanks, drain fields, sea walls, docks, and other pertinent physical features.
- (c) Government surveys and reports.
- (d) The hydrology of the watershed.
- (e) Downstream flow requirements and impacts on downstream riparians.
- (f) Fisheries and wildlife habitat protection and enhancement.
- (g) Upstream drainage.
- (h) Rights of riparians.
- (i) Testimony and evidence offered by all interested persons.
- (j) Other pertinent facts and circumstances.

1. Potential problems due to the running of the statute of limitations or laches

Obviously, with regard to Cedar Lake, the issue will naturally arise regarding whether a lake level order which is over 50 years old is still enforceable or viable. Even if it is, you have inquired about whether the 1954 lake level order could still be enforced against the improvements to the Lakewood Shores drainage system which occurred over a decade ago.

With regard to the first issue, just because a lake level order was entered by a circuit court many years ago, that does not mean it is too old to be enforced. Even a very old lake level order remains enforceable if it is still beneficial to the public. *Anson* at 327.

Also, just because the 1954 court order itself might still be viable in general, that does not mean that the court order could be used to shut down or modify components of Lakewood Shores Drain. The law in Michigan is not well-settled with regard to the applicability of statutes of limitations or laches to court orders which do not involve monetary judgments or conventional matters. It is not even clear which statute of limitations would apply with regard to an improvement, use, or activity which interferes with a lake level order. It could be the general six-year "catchall" Michigan statute of limitations, the ten-year statute of limitations applicable to monetary-type judgments (by analogy), or the longer 15-year statute of limitations with regard to real property. Furthermore, even if no statute of limitations applies or the relevant statute of limitations has not yet run, courts will sometimes use the equitable doctrine of laches to block the enforcement of a court order. Laches bars a party from bringing a delayed enforcement claim where the other party has been prejudiced by the delay. *Dept of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). Laches normally requires a showing of prejudice, the passage of time, and a lack of diligence by the party seeking enforcement. *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992).

2. How an enforcement action would likely unfold

Even though the 1954 lake level order might still be valid or viable in general and assuming for the sake of argument that no statute of limitations or laches applies, can that lake level order be used to require that the drainage system for the Lakewood Shores development (which was installed or modified during the mid-1990s) be shut down or modified? Or put another way, if the Association or one or more riparian property owners on Cedar Lake does file a motion with the Alcona County Circuit Court to enforce the 1954 lake level order, what can reasonably be expected? Unfortunately, the current inland lake level statute (as well as former statutes) is somewhat vague and does not expressly indicate how it "meshes" with other statutes (including the Michigan Drain Code) or individual property rights. Michigan courts have made it clear, however, that the statute is for accruing benefit to the public good and it was not designed to vindicate individual property rights. See *Wortelboer* at 214-215. In the relatively recent Michigan Court of Appeals case of *Glen Lake-Crystal River Watershed Riparians v Glen Lake Association*, 264 Mich App 523 (2004), the Court noted as follows:

Individuals aggrieved by this Court's Lake Level Orders may file petitions to modify them and this Court has continuing authority to revisit the Orders from time to time. However, persons who feel aggrieved by this Court's lake level Orders must understand that they have not and will not be issued in a vacuum. The focus of this court's efforts are environmental and recreational. This Court is not motivated to maximize income to commercial canoe liveries or minimize the length of docks. There are a number of well-established criteria that must play a role in the determination of a lake level and in any subsequent determinations to modify it. These factors would certainly include a consideration of past lake level records and the normal seasonal fluctuations of lake level. In this process, ordinary high and low water marks have been determined and evaluated.

Both the lake and the river have been the subject of substantial development. It is important in determining the levels of each that a consideration be given to septic tanks, drain fields, sea walls, docks and other physical features. [*Glen Lake-Crystal River Watershed Riparians* at 537-538.]

Should the Association file a motion with the Alcona County Circuit Court to enforce the 1954 court order, any court relief requested would have to be in the form of a court order directing the Iosco County Drain Commissioner to do or not do something. Although the issue of whether a court can order structures or conditions interfering with a lake level order to be abated or modified has not been squarely addressed by the Michigan appellate courts, it is unlikely that a circuit court would have the ability to order that the Lakewood Shores development drain be closed, abolished, modified, etc. It is more likely that the court would have the authority to order the drain commissioner to do something else to minimize the adverse impacts of the Lakewood Shores Drain on Cedar Lake (for example, modify an existing dam, install an augmentation well, etc.). However, there is an outside chance that the Michigan appellate courts could ultimately hold that a circuit court does have the authority to directly shut down or modify an instrumentality which is causing water to leave a lake in violation of a court lake level order (here, for example, ordering that the Lakewood Shores Drain be shut down or modified).

If the Association were to file a motion to have the 1954 order enforced, it is likely that the court action would turn into competing motions or requests for relief. That is, should the Association file a motion for enforcement of the 1954 court order, it is likely that the Iosco County Drain Commissioner (and potentially other parties, such as landowners within the Lakewood Shores development) would file a counter-motion to have the 1954 court order modified (to set the lake at a lower level). The court proceeding (which would culminate in a formal hearing and an ultimate decision by the court) would likely involve the proverbial "battle of the experts." That is, the Association would present the testimony of one or more experts indicating that the lake is not and has not been at the court-ordered level of 608.5 feet, that the majority of the water deficiency for the lake below the 608.5-foot level was caused by the modifications to the Lakewood Shores Drain in the mid-1990s, and that the lake level could be raised up to (or closer to) the 608.5-foot level by the court ordering that the drain be modified or by other means. It should also be kept in mind that pursuant to such court action, the Association should always frame its request to enforce the court order as being based on the public good (including protecting the lake and its watershed) rather than primarily to benefit the Association or its members. Presumably, the drain commissioner (and potentially other parties) would present an expert or experts to testify that the lower lake levels are not due primarily to the improvements to the Lakewood Shores Drain of the mid-1990s, that any modification to that drain would have little impact on the low lake level, and that any modification to the drain or other undertakings to raise the lake level would severely damage the properties within the Lakewood Shores development due to increased flooding, water backup, etc. The court would then have to apply the ten factors specified above in MCL 324.30707(4) in reaching a decision.²

² It should also be kept in mind that the 1954 court order itself envisioned the possibility that the court level order could be changed by the court in the future when it stated, "... subject, however, to such amendments or modifications thereof, for cause shown as future developments may justify or require."

In the end, the circuit court would have three general alternatives available to it. First, the court could refuse to modify the 1954 court order and statutory lake level of 608.5 feet. With regard to the remedy, the court could also decline to impose a remedy (and indicate that the 608.5-foot level is simply a goal) or it could order a variety of different remedial efforts. Second, the court could refuse to find anyone in violation or contempt of court of the 1954 order and simply modify the order to reflect the new lower historical lake level without ordering any remedial efforts. Finally, the court could reach a compromise lake level and modify the 1954 order accordingly.³ Should that occur, the court could order the drain commissioner to undertake certain activities to raise the lake level without unduly adversely affecting the properties within the Lakewood Shores development.

Should court action be commenced, it would be important for the Association to hire one or more reputable experts and make sure ahead of time that such expert or experts can come to credible conclusions and testify accordingly.

CONCLUSION

This is not the type of case where the outcome can be predicted ahead of time with any degree of reasonable certainty. And, in fact, given the language in the original 1954 court order and the law regarding enforcement and modifications of such lake level orders, it is highly likely that the Alcona County Circuit Court would attempt to reach some type of a compromise if the Association or any riparian property owners were to file a motion to enforce the lake level order. However, to the extent that no action is brought now and more time passes, the likelihood of court relief will diminish over time. Filing a motion now to enforce the 1954 court order could help bring matters to a head and potentially pressure the Iosco County Drain Commissioner to come up with some type of reasonable compromise. However, it should also be kept in mind that any enforcement action could prove expensive for the Association or any riparian landowners involved.

Please do not hesitate to contact me should you or any other Association official have any questions regarding this opinion letter.

Very truly yours,



Clifford H. Bloom

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14421 (001) 435089.1

³ A circuit court can modify a lake level order to provide that more than one lake level is established. For instance, the court in this case could modify the lake level to provide a maximum and minimum lake level, as well as seasonal lake levels. *Glen Lake-Crystal River Watershed Riparians* at 538; *Wortelboer*; MCL 324.30701(h).