

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND**

HERON COVE ASSOCIATION, et al,

Case No. 24-2751-AA

Appellants,

Hon. Stephen P. Carras

v.

MIDLAND COUNTY BOARD OF  
COMMISSIONERS, and GLADWIN  
COUNTY BOARD OF COMMISSIONERS,  
and FOUR LAKES TASK FORCE,

Appellees.

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**APPELLEES' BRIEF IN SUPPORT OF THEIR MOTION FOR EXPEDITED  
APPEAL AND FOR SCHEDULING ORAL ARGUMENT**

## INTRODUCTION

This administrative appeal arises out of the lake level special assessment rolls prepared by the Appellee, Four Lakes Task Force (“FLTF”) and approved by Appellees, Gladwin and Midland County Board of Commissioners (the “Counties”), pursuant to Part 307 “Inland Lakes Levels” of the Michigan Natural Resources and Environmental Protection Act (“Part 307”)<sup>1</sup> to cover the administrative, operation, maintenance, repair, replacement and improvements costs to four high hazard dams required to maintain the lake levels of Smallwood, Secord, Wixom and Sanford Lakes located in Gladwin and Midland Counties (the “Four Lakes”). Appellant, Heron Cove Association and each person listed individually in the caption on appeal (collectively, “Appellants”) filed their Claim of Appeal seeking to set aside the Counties’ decision approving the lake level special assessment rolls.

All four high hazard dams are in dire need of repairs and improvements, and in the case of the Edenville (Wixom Lake) dam and Sanford Dam, require replacement in order to comply with state of Michigan’s dam safety requirements (“Lake Level Project”). The Lake Level Project is being undertaken in phases with the first phases currently being funded using grant moneys received from the state of Michigan and federal government. The grant funding from the state of Michigan covers nearly 45% of the capital project costs, with the remaining 55% of the project capital costs to be defrayed by lake level special assessments. Until the Court’s final determination of Appellants’ appeal, FLTF cannot proceed with financing and completion of the final phase of the Lake Level Project and the current construction affecting each of the Four Lakes will be suspended over the next several months, resulting in significantly higher construction costs due to missed construction seasons, delayed financing, legal fees and additional staff costs. (See, Attached **Exhibit A**, Affidavit David Kepler, FLTF President.)

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<sup>1</sup> 1994 PA 451, as amended, MCL 324.30701 et seq.

Section 30714(4) of Part 307 which provides that the special assessment roll “shall be final and conclusive unless appealed in a court within 15 days after county board approval” signified the legislature’s intent that lake level proceedings, like proceedings under the drain code, requires expeditious resolution. MCL 324.30714(4); *See, Eyde v Charter Twp of Lansing, Drainage Bd*, 109 Mich App 641, 647-648; 311 NW2d 438 (1981) (“[o]nce it is established that a drain is necessary to the public health, it is essential that it be financed and constructed as quickly as possible). As discussed in further detail below, Appellees maintain that it is essential that the Lake Level Project be financed and constructed as quickly as possible. Legal delays will undoubtedly result in loss of construction bids, demobilization of contractors, higher costs and potentially cripple the restoration of the Four Lakes system.

To this end, Appellees request this Court to expedite this appeal and shorten the time for filing the briefs, and further, schedule oral argument. See MCR 7.111(A)(4).

### **STATEMENT OF FACTS**

Secord, Smallwood, Wixom and Sanford Lakes are located in Midland and Gladwin Counties (State of Michigan) and were originally created by the impoundment of the Tittabawassee and Tobacco rivers by four privately-owned hydroelectric dams.

In 2018, and in accordance with Part 307, the Counties adopted resolutions finding that in “order to protect the public’s health, safety and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lakes” that it was necessary to establish the normal (legal) levels for all Four Lakes. (Record, Tab #1, Gladwin County Resolution p5; Midland County Resolution, p12.) In addition, the resolutions provided that all costs in connection with the maintenance of the normal levels of the Four Lakes “shall be defrayed by special assessments for the benefits derived against privately owned parcels of land, political

subdivisions of the state, and state owned lands.” (*Id.*) The FLTF (formerly known as the Sanford Lake Preservation Association), was appointed as the Counties’ delegated authority, and to serve as the counties’ agent to oversee the lake level project, to prepare a special assessment district(s) and special assessment roll(s), and to “take all other actions as necessary and required by the delegated authority as provided in Part 307.” (*Id.*)

In 2019, the Counties filed petitions in the Midland circuit court to establish normal levels of the Four Lakes and confirm the boundaries of the Four Lakes Special Assessment District (“FLSAD”). On May 28, 2019, following notice to all interested parties and hearing, this Court entered a Lake Level Order and confirmed the boundaries and parcels of the FLSAD. (Record, Tab #2, Lake Level Order.) Thereafter, the Counties, through their delegated authority, sought to obtain property rights in the dams and bottomlands from the private dam owner, Boyce Hydro. However, before the transaction could be completed, on May 19, 2020, an embankment failed on the Edenville Dam and several hours later excess water from the Edenville Dam failure caused the Sanford Dam to breach. (Record, Tab #4A, Amendment 1 to County/FLTF Interlocal Agreement, pp2-3.) In addition, the upstream dams at Secord and Smallwood lakes were also damaged. Thousands of homes, properties, businesses and public infrastructure were damaged or destroyed during this catastrophic flood event. The region was declared a national disaster.

In the days following the disaster, a strategy was needed to address the immediate recovery efforts and coordinate with federal, state and local agencies. In addition, until the Counties obtained control and ownership of the dams and related properties, no long-term planning could pursue. Accordingly, in June 2020 the Counties appointed FLTF as the lead local agency in coordinating the funding, administration, design, improvement, repairs and replacement of the dams, including funding with Federal, State and local agencies. (*Id.*) In addition, the Counties

proceeded to condemn and secure Boyce Hydro properties and flowage rights in order to undertake the recovery and restoration of the Four Lakes.

FLTF obtained grants from both the federal and State of Michigan in excess of \$200,000,000 to assist in the design, permitting and construction of the Lake Level Project. (Record, Tab #6, 2022 Public Act 53, p.23.) In accordance with its authority and utilizing federal and state grants, FLTF proceeded to design, obtain necessary permits and construct the Lake Level Project which, due to the complexity and state dam safety requirements, was to be completed in phases over multiple years.

The total cost of the Lake Level Project with contingency is \$399,700,000. (Record Tab #10, p4; #11, p4.) After receiving bids and computing the final costs of the project, FLTF prepared a capital special assessment roll levying approximately 55% of the costs (or \$217,700,000) of the project to the property owners in the Four Lakes Special Assessment District in order to “defray” the capital costs of the Lake Level Project. (Record Tab #10, p4; Tab #11, p4; Tab #12, January 2024 Apportionment Methodology, pp 2-10; Tab #36 Capital Assessment Roll.) The plan of financing called for spreading the lake level capital special assessments via annual installments not to exceed 40 years. (Record Tab #10, p9.) In addition, FLTF prepared a separate operation and maintenance special assessment roll for the years 2025 through 2029 to cover the expenses required to administer, operate and maintain the Four Lakes system during construction. (Record Tab #9 p1-5; Tab #34, 5-Year Operation and Maintenance Special Assessment Roll.)

On January 15, 2024, FLTF held the required public hearing in connection with the lake level special assessment rolls, and the FLTF received objections and comments from property owners within the FLSAD. (Record Tab #17 p1; Tab #18 Minutes pp 1-3; Tab #19 Hearing Transcript; Tab #20, List of Attendees at hearing, and Tab #21, Written Objections). On February 6, in a joint meeting of the Counties’ respective board of commissioners, the Counties approved the lake level operation and

maintenance special assessment roll, and the capital improvement special assessment roll. (Record Tab #9 through Tab #12; Tab #22; Tab #25; Tab #26; Tab #32 through Tab #37.) In addition, the Counties approved the financing plan for the Lake Level Project that will provide long-term financing in the aggregate principal amount not to exceed \$217,700,000 to be secured by and payable from the collection of lake level special assessments against properties in the FLSAD. (Record Tabs #30-31.) The FLSAD consists of 8,170 parcels, with 6,278 parcels having direct waterfront access and 1,892 parcels having deeded private access to the waterfront (backlots). (Record Tab #12, p1).

On February 20, 2024, Appellants filed their original Claim of Appeal, which was amended on February 21.

On February 26, 2024, Appellees filed the Record on Appeal and served Appellants' counsel.

## ARGUMENT

### **This Court Should Expedite Appellants' Claim of Appeal Where Legal Delays To A Valid Lake Level Project Will Result In Lost Construction Bids, Increase Costs, and Delay Financing That Will Result In Higher Assessments to Property Owners**

The purpose of Part 307 is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public, to best preserve the natural resources of the state, and *best preserve and protect the value of property around the lake*. MCL 324.30701(h) (Emphasis added); *see also, In re Matter of Van Etten Lake*, 149 Mich App 517, 525; 386 NW 2d 572 (1986) (The purpose of Part 307 is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public). Part 307 authorizes counties to make policy decisions as to the levels of their inland lakes, and to build and finance dams as necessary to maintain the desired lake levels. *Id.* at 525. In addition, Part 307 authorizes the establishment of a special assessment district to defray the costs in connection with administration, operation, maintenance and improvement of lake level structures, and for the special assessment district to authorize the issuance of municipal

bonds, notes and lake level orders in anticipation of special assessments. MCL 324.307011; MCL 324.30705.

Pursuant to Part 307, “[A]ll proceedings relating to the making, levying, and collection of special assessments authorized by this part and the issuance of bonds, notes, or lake level orders in anticipation of the collection of the special assessments shall conform as nearly as possible to the proceedings for levying special assessments and issuing special assessment bonds *as set forth in the drain code of 1956, 156 PA 40, MCL 280.1 to 280.630.*” MCL 324.30705(3)(Emphasis added). Meaning, the delegated authority is required to follow the Michigan Drain Code when levying lake level special assessments. Other than condemnation proceedings, procedures under the Michigan Drain Code are administrative proceedings subject to the presumption that the “administrative body has acted correctly and that its orders and decisions are reasonable and valid.” *Battjes Builders v Bouma*, 15 Mich App 618, 623; 167 NW2d 123 (1969). However, Part 307 “provides a less elaborate mechanism for review.” *In re Project Costs & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 147; 762 NW2d 192 (2009).

Part 307 guarantees notice and an opportunity to be heard before the determination of a special assessment roll but not a full trial. *See, Id.* at 145-151 (Holding that the drain commissioner’s decision requiring landowners in a special assessment district to pay 95% of dam repair costs was reviewable under Part 307 and did not call for the use of the review procedures set forth in the drain code of 1956, 156 PA 40, MCL 280.1 to 280.630). The role of the trial court in lake level appeal proceedings is limited to reviewing the record for competent, material, and substantial evidence supporting the delegated authority’s decision. *Id.* at 151. For purposes of Part 307, a sufficient hearing is one that (1) allows the circuit court to ensure that the Counties have

considered the varying public interests in reaching its policy decision, and (2) protects the public against arbitrary governmental action. *Id.* at 151.

Section 30714(4) of Part 307 which provides that the special assessment roll “shall be final and conclusive unless appealed in a court within 15 days after county board approval” signified the legislature’s intent that lake level proceedings, like proceedings under the drain code, requires expeditious resolution. MCL 324.30714(4); *See, Eyde v Charter Twp of Lansing, Drainage Bd*, 109 Mich App 641, 647-648; 311 NW2d 438 (1981) (“[o]nce it is established that a drain is necessary to the public health, it is essential that it be financed and constructed as quickly as possible).

As with drain projects under the Michigan Drain Code, there is the need for a speedy resolution of the matter before the Court where, legal delays to a valid lake level project will only create additional costs resulting in a higher assessment to the property owners.

The Lake Level capital improvements to all four dams includes design, permitting and construction and is being undertaken in phases with the first phases currently funded using grant moneys received from the State of Michigan and federal government. The grant funding from the State of Michigan covers nearly 45% of the capital project costs, with the remaining 55% of the project capital costs to be defrayed by lake level special assessments.

The construction bids for the Edenville (Wixom Lake) dam and final phase of the Lake Level Project were received on January 24, 2024, and are valid for 60 days, and the contract requires commitment of financing before the FLTF can provide a notice to proceed. In addition, without a commitment of financing, construction progress on all other dams will need to be suspended. Thus, the need for a speedy resolution is particularly required where, as here, legal delays to a valid lake level project will only create additional construction costs resulting in higher



assessments to property owners due to missed construction seasons, delayed financing, legal fees and additional staff costs.

In the *In re Project Costs & Special Assessment Roll for Chappel Dam*, the Michigan Court of Appeals held that the trial court's decision to shorten the time for brief and hearings, was permissible. *Id.* at 150.

WHEREFORE, for the reasons stated herein, Appellees respectively request this Court expedite this Administrative Appeal set forth in MCR 7.111(A) and shorten the time for filing briefs and schedule oral argument.

Respectfully submitted,

CLARK HILL PLC

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*Attorneys and Co-Counsel for Appellees  
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Gladwin County Board of Commissioners, and  
Four Lakes Task Force*

Dated: March 11, 2024

**Exhibit A**  
Affidavit David Kepler, FLTF President

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**AFFIDAVIT OF DAVID E. KEPLER REGARDING THE FOUR LAKES TASK FORCE  
AND FOUR LAKES LAKE LEVEL PROJECT**

STATE OF MICHIGAN                    )  
  )ss  
COUNTY OF MIDLAND                )

David Kepler, being first duly sworn, deposes and says:

1. I am over the age of eighteen and have personal knowledge of the facts stated in this Affidavit. If sworn as a witness, I am competent to testify to these facts.
  
2. The Four Lakes Task Force (“FLTF”) is a Michigan non-profit IRS 501(c)(3) organization.

3. The FLTF board of directors is comprised of representatives from Midland and Gladwin counties, and property owners from Smallwood Lake, Secord Lake, Wixom Lake and Sanford Lake (the “Four Lakes”).

4. The Four Lakes are located in Midland and Gladwin counties created by the impoundment of the Tittabawassee and Tobacco Rivers by dams previously owned and operated by Boyce Hydro Power, LLC and owned by BHP LLC’s affiliated limited liability companies. (collectively “Boyce Hydro”)

5. The FLTF is organized exclusively for charitable, educational and scientific purposes as described in Section 501(c)(3) of the Internal Revenue Code (the “Code”), including lessening the burdens of government by serving as the county delegated authority under Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act, MCL 324.30701 et seq. (“Part 307”) for the purpose of maintaining the inland lake water levels and dams of the Four Lakes, so as to preserve the environment, promote the welfare and safety of the public, and enhance the recreational and health benefits arising from the Four Lakes; and, to conduct all activities incidental or necessary to accomplishing the foregoing purposes or as otherwise permitted by Section 501(c)(3) of the Internal Revenue Code.

6. In 2019, the Midland and Gladwin county board of commissioners, and in accordance with Part 307 petitioned the Midland and Gladwin Circuit Court to establish the normal (or legal) levels for Wixom, Sanford, Smallwood and Secord Lakes and to establish the Four Lakes Special Assessment District (“FLSAD”) to defray all costs associated with the acquisition, design, construction, improvement, repair, replacement, operation and maintenance of the four dams.

7. On May 28, 2019 following notice to all property owners within the proposed FLSAD and hearing, the Midland County Circuit Court entered an order establishing the lake levels for the Four Lakes and approved confirmed the boundaries of the FLSAD.

8. The FLSAD is a special purpose public body established in accordance with the Lake Level Order and provisions of Part 307 and is comprised of 8,170 parcels, with 6,278 parcels having direct waterfront access and 1,892 parcels having deeded private access to the waterfront (backlots).

9. The primary source of funding the acquisition, operation, maintenance, repair, replacement and improvement of all four dams was from special assessments to all the waterfront properties and backlot properties with dedicated lake access easements within the FLSAD.

10. On May 19, 2020 the Edenville dam failed, which in turn resulted in the failure of the Sanford Lake dam, the loss of both lakes, and catastrophic flooding in Midland and Gladwin counties.

11. In June 2020, the counties of Midland and Gladwin appointed the FLTF as the lead local agency in coordinating the funding, administration, design, improvement, repairs and replacement of the dams, including funding with Federal, State and local agencies.

12. In June 2020, the counties of Midland and Gladwin adopted resolutions to condemn the properties under the control of the prior owner (i.e. Boyce Hydro Power) in order to maintain the lake levels in accordance with Part 307.

13. FLTF obtained grants from both the federal and state of Michigan in excess of \$200,000,000 to assist in the design, permitting and construction of the Lake Level Project.

14. All four high hazard dams are in dire need of repairs and improvements, and in the case of the Edenville (Wixom Lake) dam and Sanford Dam, require replacement in order to comply with state of Michigan's dam safety requirements ("Lake Level Project").

15. In accordance with its authority and utilizing federal and state grants, FLTF proceeded to design, obtain necessary permits and construct the Lake Level Project which, due to the complexity and state dam safety requirements, was to be completed in phases over multiple years.

16. The total cost of the Lake Level Project with contingency is \$399,700,000.

17. After receiving bids and computing the final costs of the project, FLTF prepared a capital special assessment roll levying approximately 55% of the costs (or \$217,700,000) of the project to the property owners in the Four Lakes Special Assessment District in order to "defray" the capital costs of the Lake Level Project.

18. The plan of financing called for spreading the lake level capital special assessments via annual installments not to exceed 40 years.

19. In addition, FLTF prepared a separate operation and maintenance special assessment roll for the years 2025 through 2029 to cover the expenses required to administer, operate and maintain the Four Lakes system during construction.

20. Until the Court's final determination of Appellants' appeal, FLTF cannot proceed with financing and completion of the final phase of the Lake Level Project and the current construction affecting each of the Four Lakes will be suspended over the next several months, resulting in significantly higher construction costs due to missed construction seasons, delayed financing, legal fees and additional staff costs.

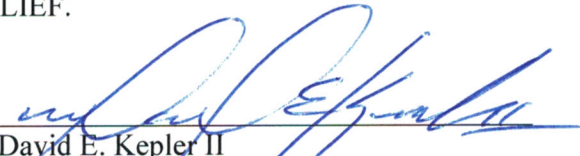
21. Final bids for the construction phase that includes Edenville (Wixom Lake) dam were received and accepted on January 24, 2024 and are valid for 60 days, with an anticipated start date of May, 2024.

22. The table below is the timing of suspensions, and while the construction contracts contemplate that the project phases can be suspended, the consequences are that there will be increase costs and delayed construction schedules:

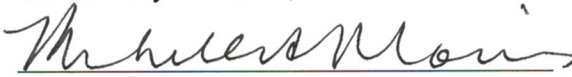
Dam	Suspension Date and Description
Secord	<b>June 2024</b> Shortly after the completion of the auxiliary spillway
Smallwood	<b>August 2024</b> After auxiliary spillway is complete and the low flow outlet is stabilized
Edenville	<b>May 2024</b> The final phase of the Edenville Dam, planned to start by May (pending permit), is now delayed until <u>financing</u> <b>September 2024</b> The completion of the current embankment improvement project
Sanford	<b>December 2024</b> Completion of the current east side work

23. A delay of the final phase of the Lake Level Project will increase costs.

I DECLARE THE ABOVE STATEMENTS TO BE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

  
 David E. Kepler II  
 President and Chairman, Four Lakes Task Force

Subscribed and sworn to before me  
 this 11<sup>th</sup> day of March, 2024.

  
 \_\_\_\_\_, Notary Public  
 \_\_\_\_\_ County, Michigan  
 My Commission expires: \_\_\_\_\_  
 Acting in the county of \_\_\_\_\_

MICHELLE A MORRIS  
 NOTARY PUBLIC - STATE OF MICHIGAN  
 COUNTY OF GRATIOT  
 My Commission Expires December 29, 2029  
 Acting in the County of Midland