

## ***Lake Level Dispute Spills Over Into Court of Appeals***

The Michigan Court of Appeals has held that Part 307 of the Natural Resources and Environmental Protection Act (Part 307) and its predecessors are the only avenue for legally establishing a “normal level” for an inland lake, and, thus, a lake level established as part of a dam construction permit issued by the Michigan Department of Conservation is not legally enforceable. Additionally, the court found that Part 307 proceedings can only be initiated by county commissioners, not by private parties. The court also held that the initiation of Part 307 proceedings to establish a lake level that would flood a riparian landowner’s property would not be an unconstitutional taking of that property.

Bambi Lake was created in the early 1970s when a dam was constructed along a branch of Spring Hollow Creek in Shiawassee County. The dam was constructed pursuant to a permit issued by the Michigan Department of Conservation under the Dam Construction Approval Act (DCAA), and that permit specified that the “crest elevation” of Bambi Lake would be 799 feet above sea level. The lake level apparently remained stable until 1994, when it began to rise. William Yee, a lakefront property owner, was affected by these rising levels when water encroached onto his land, killing vegetation, and the floor of Yee’s basement began to crack as a result of the increased hydrostatic pressure beneath his home. In an attempt to lower the lake level, Yee removed the top spillway log from the dam, allowing more water to escape from the lake. This attempt was foiled, however, when surrounding property owners replaced the log and padlocked it.

In response to his neighbors’ actions, Yee sued several parties, including his neighbors, alleging that the 1970 dam construction permit established a legally enforceable lake level. Yee asked the court to hold that this level was legally enforceable, and by acting to keep the lake

level above this enforceable limit, the neighbors were guilty of causing a trespass on his property. The trial court ruled that it had no jurisdiction to determine a legal lake level in the absence of an action filed under Part 307, and because no such action had been filed, Yee's suit was dismissed.

Soon after Yee's suit was dismissed, his neighbors petitioned the Shiawassee County Board of Commissioners to establish the current lake level as the "normal" lake level for Bambi Lake under Part 307. Yee responded by filing suit to enjoin the county commissioners from setting such a lake level, on the basis that the 1970 permit set the normal level and the commissioners lacked authority to alter it. Additionally, Yee filed yet another lawsuit, posed as a claim to quiet title and determine interests in land, that requested the same relief: a finding that the 1970 permit established the lake's legal level. These cases were also dismissed because Yee's claims were based on the lake level established by the 1970 permit, which had already been determined to be legally unenforceable in Yee's earlier lawsuit. Yee appealed all three decisions, which were consolidated into one case by the Court of Appeals because they all dealt with essentially the same issues.

The court agreed with the trial court that Part 307 (and its predecessor statutes) was the only avenue by which to establish a legal lake level, and, thus, the level established in the 1970 permit under the DCAA was unenforceable. The court held that the language of the DCAA, combined with the enactment of a predecessor to Part 307, made it clear that the DCAA was not intended as an instrument for setting lake levels:

it is clear that the act's provisions were intended simply to provide for a method of regulating the construction of dams in this state in order to ensure their structural integrity. Although this goal would necessarily require consideration and approval of proposed impoundment surface areas and levels, nothing in the act indicates that these were intended to establish an enforceable lake level. To

the contrary, that a construction permit issued under the DCAA was not intended to establish an enforceable lake level is clearly evinced by the Legislature's amendment of the DCAA in July 1970 (just three months after issuance of the [1970] permit), to require successful permit applicants to petition for the establishment of a legal lake level under the Inland Lake Level Act of 1961.... It is fundamental that the classes of cases over which the circuit courts have subject-matter jurisdiction are defined by this state's constitution and Legislature. By enacting the procedures outlined in Part 307...and its predecessor, the ILLA, the Legislature clearly limited the court's power to determine legal lake levels to those actions initiated by the county commissioners in accordance with the act.

Additionally, on the issue of who can initiate a Part 307 action to determine lake levels, the court found that:

[a]lthough nothing in part 307 specifically excludes initiation of such proceedings by an individual..., we conclude that, by enacting such a comprehensive scheme for the establishment and maintenance of legal lake levels, the Legislature has signified its intent to vest authority to initiate such a proceeding solely within the county board of commissioners or its delegated authority. Accordingly, without such action by these public authorities, a circuit court is powerless to act.

In so holding, the court overruled its 1966 decision in *Arnold v. Ellis*, in which the court had examined a predecessor to Part 307 and had held that the statute did not foreclose a private cause of action to establish lake levels. In rejecting *Arnold*, the court held that:

[t]he panel in *Arnold*...failed to consider the comprehensive nature of the statutory scheme employed by the Legislature or the public purpose in devising that scheme, and we therefore reject its conclusion that suit by an individual is not foreclosed. In any event, because that case was decided prior to November 1, 1990, we are not bound to follow the decision.

Yee also argued that Bambi Lake was beyond the scope of Part 307 because the lake was private, and Part 307 only applies to public lakes. The court rejected this argument, noting that

the statutory definition of “inland lake,” which delimits Part 307 jurisdiction, “does not require that the lake be public in order to be subject to the provisions of Part 307.”

Finally, Yee claimed that the initiation of Part 307 proceedings by a county board of commissioners “would amount to an unconstitutional taking of his property for a non-public purpose.” The court observed, however, that Part 307 was enacted to serve a public purpose, as the preamble to the statute explicitly provides that it is “for the protection of the public health, safety and welfare...[and] the conservation of the natural resources of this state.” Application of Part 307 to Yee’s situation would likewise serve a public purpose, as “regulation of the lake level directly protects not only those private lands fronting the lake, but also those public resources and property interests located downstream from the spillway.” Thus, the initiation of Part 307 proceedings to set the level of Bambi Lake at an elevation that would be detrimental to Yee’s property would not be an unconstitutional taking of that property.

*Yee v. Shiawassee County Board of Commissioners*, N.W.2d —, 2002 WL 1038739 (Mich. App. 2002)

H. Kirk Meadows