

STATE OF MICHIGAN
COURT OF APPEALS

In re DETERMINATION OF LAKE LEVEL FOR
WATERS EAST LAKE.

MACKINAC COUNTY BOARD OF
COMMISSIONERS,

UNPUBLISHED
June 11, 2013

Plaintiff-Appellee,

v

No. 308021
Mackinac Circuit Court
LC No. 2007-006390-CZ

DEPARTMENT OF NATURAL RESOURCES,

Defendant,

and

PATRICIA KEECH,

Intervenor-Appellant.

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Appellant Patricia Keech appeals as of right the trial court's order denying her motion to intervene and granting appellee's motion to rescind an order establishing a permanent lake level. The trial court properly granted the motion to rescind, and although the trial court should have formally permitted Keech to intervene, any error was harmless. Therefore, we affirm.

East Lake is a naturally-occurring inland lake located in Brevort Township, Mackinac County, with an outlet tributary to the northwest. At one time, beavers maintained a dam at the outlet, and at least for a time, some prior owners of property around East Lake reinforced that dam through their own individual efforts. Much of the waterfront, including the outlet area, is owned by the United States Forest Service (USFS); the surrounding homes are largely seasonal properties. The 1845 General Land Office survey, and subsequent surveys in 1941 and 1982, all consistently showed East Lake to be approximately 990 acres in size. At some point thereafter, the beavers abandoned the area and homeowners apparently ceased shoring the dam up, and water levels in East Lake began to fall.

In 2006, Keech submitted an agenda request form to the Mackinac County Board of Commissioners, requesting the establishment of a water level for East Lake on the basis of a petition signed by more than two-thirds of the abutting property owners, pursuant to MCL 324.30702(1), part of the Inland Lake Level Act (ILLA).¹ The Board of Commissioners duly commenced the instant action by petition in 2007, pursuant to MCL 324.30704, seeking to establish a normal lake level for East Lake. The purpose of doing so, ultimately, was to construct a new dam at East Lake's outlet. The trial court entered an order setting the East Lake level at 4.9 feet according to a gauge in the lake.

Thereafter, a feasibility study was conducted. It was ultimately determined that a substantially more expensive kind of dam than anticipated would be required, and the USFS would contribute no funding to the project. As a consequence, the cost to install a dam and raise the water level in East Lake—which would be borne by a special assessment—was projected to be substantially higher. Many of the landowners lost interest in the project, and in 2011, the Board of Commissioners adopted a resolution to rescind the lake level.² The Board of Commissioners duly petitioned the trial court to rescind the established lake level.

Shortly thereafter, Keech filed an emergency motion to intervene, attempting to stop the court from rescinding the order setting the lake level. The trial court did not formally enter an order permitting her intervention. However, Keech was nonetheless permitted to file briefs, make oral argument at hearings, and call herself as a witness. After a hearing, the circuit court entered an order denying appellant's motion for intervention and additional relief and granting appellee's motion to rescind the lake level. This appeal followed.

Initially, we conclude that although the trial court should have formally granted Keech's motion to intervene, its failure to do so was harmless. We review a trial court's decision on a motion to intervene for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001).

Intervention may be had by right if, among other things, a statute or court rule confers a right to do so or the intervenor has an interest in the subject matter of the action and no practical way to protect his or her interest if intervention is not granted. MCR 2.209(A). The ILLA does not create an individualized, private cause of action to establish a normal lake level. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 397-398; 651 NW2d 756 (2002). As an abutting homeowner, Keech clearly had an interest in the lake level, and an individual has standing to invoke the circuit court's continuing jurisdiction over a matter that is already covered by a previous lake level order. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*,

¹ The Inland Lake Level Act, MCL 324.30701 *et seq.*, is presently Part 307 of the Natural Resource Environmental Protection Act (NREPA), MCL 324.101 *et seq.* Formerly, the ILLA was embodied as MCL 281.61 *et seq.*

² Consequently, the project apparently never moved beyond the stage of determining the lake level to the stage of actually seeking to improve the lake, and consequently no lake board was set up pursuant to MCL 324.30901 *et seq.*

264 Mich App 523, 530-531; 695 NW2d 508 (2004). While the trial court correctly noted that Keech could spearhead another petition effort, we do not believe that satisfies her ability to protect her interest in enforcing the then-existing established lake level. Keech can certainly satisfy the “minimal” burden of showing that none of the other parties would represent her interests. See *D’Agostini v City of Roseville*, 396 Mich 185, 189; 240 NW2d 252 (1976). The trial court should have granted Keech’s motion to intervene.

However, this Court generally does not reverse on the basis of harmless errors. MCR 2.613(A); *In re McBride*, 483 Mich 1095, 1104; 766 NW2d 857 (2009). The trial court delayed the hearing on the motion to rescind to permit Keech to brief the issue, permitted Keech to make arguments and call a witness, and otherwise effectively treated Keech as if she was a party. The trial judge read and considered appellant’s arguments, even commenting on the quality of the parties’ briefs. Appellant filed both a brief in opposition to the motion to rescind and a rebuttal brief, both discussing issues pertaining to the motion to rescind. The trial court considered appellant’s arguments on the motion to rescind and still concluded that it was proper. Even if the trial court improperly denied appellant’s motion to intervene, the denial was harmless because Keech participated in the proceedings as if she had been permitted to intervene.

Keech next argues that she was not given proper notice of the hearing on the motion to rescind the lake level order, in violation of the requirements of the ILLA. Presuming this to be the case, again, any error was harmless.

We review the interpretation of statutes de novo. *In re Complaint of Rovas against SBC Mich*, 482 Mich 90, 97; 754 NW2d 259 (2008). The goal of doing so is to discern the Legislature’s intent. *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 204; 713 NW2d 734 (2006). If the language is clear and its meaning is plain, then no judicial construction is necessary. *Alliance Obstetrics & Gynecology v Dep’t of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009). We review a trial court’s factual findings for clear error. *Herald Co, Inc v Eastern Mich University Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006).

The ILLA explicitly provides for notice to be given to “interested persons” of a variety of possible occasions. It does not *explicitly* mandate notice requirements for continuing court actions. However, a fundamental right of due process is the opportunity to be heard, which includes reasonable notice to interested parties of a proceeding. *Dow v State*, 396 Mich 192, 205-206; 240 NW2d 450 (1976). The trial court properly concluded that Keech, a property owner along East Lake, was an interested person under the ILLA. See MCL 324.30701(g); *Glen Lake-Crystal River Watershed Riparians*, 264 Mich App at 530-531. We extrapolate that, even in the absence of an explicit directive in the ILLA, the Legislature intended that “interested persons” would receive notice of any hearing that may affect their property rights.

However, whether or not Keech was formally issued proper notice, she actually became aware of the proceeding. She moved to intervene and appeared before the trial court for the original hearing on the motion to rescind. The parties were given more time, and the matter was reset for a later date. At a later hearing, the trial court considered both the motion to rescind and the motion to intervene. The trial court gave Keech an opportunity to brief and argue her position on the motion to rescind before the court made a decision. Despite any issues with

notice, Keech had almost two months to prepare and was able to argue at a hearing regarding the motion to rescind. Therefore, any notice error was harmless.

Keech next argues that the Board does not have the authority to seek rescission of the lake level order and the trial court did not have the authority to grant it. We disagree.

The ILLA does not contain any language regarding rescission of a lake level order. See MCL 324.30701-.30723. While nothing in the statute or case law explicitly addresses this kind of rescission, a trial court may generally grant a party relief from a judgment or order if prospective application of the judgment or order is no longer equitable. MCR 2.612(C)(1)(e); *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 76; 463 NW2d 129 (1990). Furthermore, trial courts have the inherent authority to revisit and reconsider their own orders or decisions while the proceedings remain pending and no appeal is presently pending. *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). In the event of an irreconcilable conflict between a court rule and a statute, the court rule prevails in matters involving practice and procedure, because our Supreme Court has exclusive authority over practice and procedure. *Staff v Johnson*, 242 Mich 521, 530-531; 619 NW2d 57 (2000).

The statute does not limit the court's authority or expressly authorize the court to rescind a previous lake level order. See MCL 324.30701-.30723. However, MCR 2.612(C)(1)(e) does allow a court to vacate a previous judgment entered in its court. This court rule is not in conflict with the statute because the statute provides no guidance in this area. See *Staff*, 242 Mich at 530-531. Therefore, the trial court had the power to provide appellee relief from its previous order pursuant to MCR 2.612(C)(1)(e) if it determined that prospective application of the judgment was no longer equitable. *Sylvania Silica*, 186 Mich App at 76. The Board also had the authority to seek relief from the judgment under this provision. *Id.*; MCR 2.612(C)(1)(e).

Keech relies on *Anson v Barry Co Drain Comm'r*, 210 Mich App 322; 533 NW2d 19 (1995), in which this Court overturned a trial court's decision to void a lake level determination that had been ordered 23 years previously. *Anson* is significantly distinguishable and not on point. In *Anson*, the trial court simply determined, sua sponte and apparently without any analysis under any relevant statute, that the prior judgment was inexplicably "too old to be enforced." *Id.* at 325. This Court's reversal was not in any way based on the proposition that trial courts may not rescind lake level orders. Rather, such orders do not simply age out of operation and may not be revisited without considering the effect on the welfare and benefit of the public. *Id.* at 325-327; *In re Van Ettan Lake*, 149 Mich App 517, 525-526; 386 NW2d 572 (1986). The trial court here did not grant rescission on the basis of an analysis divorced from proper considerations under the ILLA, so *Anson* is not relevant.

Keech finally argues that the rescission of the lake level order effectively set a new lake level without the requisite evidentiary support. We disagree.

The ILLA requires a trial court to consider certain factors when setting a normal lake level. MCL 324.30707(4). However, the order from which Keech appeals was not a determination of a new normal lake level. A trial court can vacate a judgment if its prospective application is no longer equitable. MCR 2.612(C)(1)(e). Therefore, at issue is not whether there

was sufficient evidence to set a normal lake level, but whether there was sufficient evidence for the trial court to conclude that the order entering the normal lake level was no longer equitable.

As the trial court observed, courts should be hesitant to interfere with the discretionary actions of a legislative body. *Wayne County Sheriff v Wayne County Bd of Comm'rs*, 148 Mich App 702, 704-705; 385 NW2d 267 (1983). The resolution adopted by the Board of Commissioners set out most of the reasons for seeking to rescind the lake level, including the lack of support and significant cost. Numerous letters from property owners were also received, many of which no longer supported the lake level. Deferring to the decision of the legislative body, the trial court had sufficient reason to believe that the original order setting the lake level was no longer equitable. *Wayne County Sheriff*, 148 Mich App at 704-705. Therefore, the trial court did not commit clear error when it found that the previous lake level order was no longer feasible or necessary. See *In re Bz*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra