STATE OF MICHIGAN
IN THE COURT OF APPEALS

HERON COVE ASSOCIATION, et al.

Appellants,

v

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

Appellees.
_______________________________________/

Court of Appeals No. 371651

Midland Circuit Court No. 24-2751-AA

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APPELLEES' BRIEF IN OPPOSITION TO APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction over Appellants' application for leave to appeal under MCL 600.308(2), MCR 7.203(A)(1)(a) & (B)(3) and MCR 7.205—but *only* as an application for leave to appeal. *Id*. Part 307 of the Natural Resources and Environmental Protection Act, MCL 324.30701 *et seq.* ("Part 307," the "Inland Lake Levels Act," or "the ILLA"), allows for an evidence-based hearing that is appealed to the circuit courts under the same processes applicable to appeals from an agency's contested-case proceedings. *In re Chappel Dam*, 282 Mich App 142, 145–46; 762 NW2d 192 (2009); cf. MCR 7.119. And Appellants already "appeal[ed]" from that hearing to circuit court as provided by statute. See MCL 324.30714(2)–(4). Thus, Appellants' further appeal here is by leave only. MCR 7.203(A)(1)(a); *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 85–87; 832 NW2d 288 (2013).

Appellants filed this application within 21 days of the circuit court's entry of its June 20, 2024 Order. Thus, The Counties do not dispute the timeliness of this application. But this Court should reject the application because it does not justify this Court's review.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The ILLA allows a county board to "determine . . . that the whole or part of the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments against" those properties and political subdivisions that benefit from the lake. MCL 324.30711(1). After computing the cost of such a project, MCL 324.30712(1), counties may then create a special-assessment roll of the properties to be assessed and the amounts assessed to each parcel, which affected owners may challenge at a hearing and thereafter appeal. MCL 324.30713(3) & (4). Here, Midland County and Gladwin County through their delegated authority the Four Lakes Task Force (collectively, "the Counties") computed nearly $400 million in costs, offset those costs by $180 million in state taxpayer contributions and approximately $1.175 million of federal and local contributions, then proposed an assessment for the remainder and gave homeowners an opportunity to object or present evidence to contest their individual assessment at a hearing. Following an appeal by a minority of less than 10% of the homeowners, the circuit court affirmed the special-assessment roll against proportionality and due-process challenges. The questions presented are:

1. Did the circuit court err in holding that Appellants failed to overcome the special assessment's presumption of validity and deciding that the Counties' apportionment was both authorized by law and supported by substantial evidence?

   Appellee's answer: No.

   Trial court's answer: No.

   Appellant's answer: Yes.

2. Did the circuit court err in holding that the Counties' procedures, which not only complied with and also went beyond the ILLA's statutory requirements, satisfied due process?

   Appellee's answer: No.

   Trial court's answer: No.

   Appellant's answer: Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Amend XIV.

"No person shall . . . be deprived of life, liberty, or property, without due process of law." Const 1963, art 1, § 17.

"(1) A special assessment roll shall describe the parcels of land to be assessed, the name of the owner of each parcel, if known, and the dollar amount of the assessment against each parcel.
(2) The delegated authority shall set a time and place for a public hearing or hearings on the project cost and the special assessment roll. Notice of a hearing shall be by both of the following:

(a) By publication of notice at least twice prior to the hearing in a newspaper that circulates in the special assessment district, the first publication to be at least 10 days before the hearing.

(b) As provided in Act No. 162 of the Public Acts of 1962, being sections 211.741 to 211.746 of the Michigan Compiled Laws.

(3) At or after a public hearing, the delegated authority may approve or revise the cost of the project or the special assessment roll. Before construction of a project is begun, the county board shall approve the cost and the special assessment roll by resolution.
(4) The special assessment roll with the assessments listed shall be final and conclusive unless appealed in a court within 15 days after county board approval." MCL 324.30714.

INTRODUCTION

This application for leave to appeal threatens to derail the Counties' longstanding efforts to rebuild the Four Lakes that have been a core feature of the Gladwin and Midland communities for decades and prominently factor into the property values and recreational opportunities for every homeowner in the Four Lakes Special Assessment District ("FLSAD"). The lake-level special-assessment rolls were confirmed in accordance with Part 307 procedures, MCL 324.30701 *et seq*., to cover the administrative, operations, maintenance, repair, replacement, and improvement costs to four high-hazard dams required to maintain the lake levels of the Four Lakes. The Midland Circuit Court upheld both the five-year lake-level operation and maintenance special-assessment roll and the capital improvement special-assessment roll against Appellants' due-process and takings arguments. Now, Appellants seek to: (1) rehash the factual basis of the special-assessment roll, relying on just a few cherry-picked assessments from the 8,170 properties in the FLSAD and lobbing a broadside attack using an inherently individualized proportionality standard; and (2) challenge the constitutional sufficiency of the ILLA's procedures, which this Court has already upheld. *Chappel Dam*, 282 Mich App at 150–51. This Court should reject their claims.

First, special assessments carry a presumption of validity. And the Counties followed the ILLA's procedures in establishing the special-assessment roll challenged here. Not only that, but—even after being given an opportunity *before* the Counties' public hearing, *at* the public hearing, and *after* the hearing in this appeal—Appellants offered no serious evidence to overcome the presumption of validity. Though lobbing a disproportionality attack that is inherently fact- and property-specific, Appellants rely on nothing more than generalized statements of the community benefits from the lakes (which were offset through $220.5 million in state-taxpayer funds) and some misleading claims from cherry-picked scenarios that avoid the core factual issue: "gauging the benefit each property will derive from restoration of the lakes . . . ." (HCA Appx., Ex. A, p.

12.) Appellants offer nothing of substance to overcome the legal presumption of validity, and the circuit court rightly upheld the special-assessment roll against their challenge.

<u>*Second*</u>, this Court has already upheld the ILLA's procedures as constitutionally sufficient under the Due Process Clause. *In re Chappel Dam*, 282 Mich App 142, 150–51; 762 NW2d 192 (2009). Nothing here changes that conclusion. Appellants do not identify legal or factual support for their claim that this entire process was sham or "mere formalities"; to the contrary, the Counties adjusted the assessments of over 780 properties where property owners provided information to do so. The Counties also gave Appellants *more than twice* the statutory notice required. Nor does the amount at issue here—which, again, must be reviewed on a property-specific basis not multiplied by the 8,170 properties in the FLSAD—warrant this Court's rewriting of the ILLA. Finally, the circuit court even gave Appellants a second bite at the apple and allowed additional evidence to be presented; Appellants fell short.

In short, there is no merit to Appellants' challenge. Granting their application would throw a wrench in the Counties' ability to operate, maintain, repair, and reconstruct four high-hazard dams as the levying of the special-assessment roll will be tied up pending this case. This Court should deny their application for leave to appeal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. The History of the Four Lakes

The Four Lakes—Secord, Smallwood, Wixom, and Sanford Lakes ("Four Lakes")—are located in Midland and Gladwin counties ("the Counties") and were originally created by the impoundment of the Tittabawassee and Tobacco rivers by privately owned hydroelectric dams. On May 19, 2020, the Edenville Dam (Wixom Lake) and Sanford Dam (Sanford Lake) both failed, resulting in catastrophic flooding leaving many in Midland and Gladwin counties with damaged property, flooding debris, and shoreline devastation. The historic downstream flooding of Midland was a tragedy reaped from the combination of record rainfall and the negligence of the private dam owner, Boyce Hydro, that went too long uncorrected by government officials.

Years prior to the Edenville Dam failure, lake property owners—through the Four Lakes Task Force ("FLTF") (and its predecessor, the Sanford Lake Preservation Association)—raised concerns over Boyce Hydro's operations which threatened the very existence of the Four Lakes. In early 2018, a group of lakefront property owners learned that Boyce Hydro was not in compliance with the terms of its Federal Energy and Regulatory Commission ("FERC") license in connection with the Edenville Dam, and FERC was threatening to revoke the license. The dam operator, Boyce Hydro Power, LLC (and other Boyce entities) (collectively "Boyce Hydro") had complete control over dam operations and ownership of the dams, bottomlands, and flowage rights. Michigan common law does not require a private dam owner to maintain the existence of a dam or the artificial level of a lake. *Goodrich v McMillan*, 217 Mich 630; 187 NW 368 (1922) (ownership of a dam does not impose a duty on the dam owner to maintain the water at an artificial level created by operation of a dam); see also *Drainage Bd v Village of Homer*, 351 Mich 73; 87 NW2d 72 (1957) (riparian landowners were continuously charged with notice that the pond is artificial and that its level may be lowered or returned to natural state at any time by the dam

owner). Concerned with the potential loss of Wixom Lake, and future loss of the other three lakes, the lake associations and property owners sought a public solution and began the process of transitioning the four hydroelectric dams from private ownership to public ownership.

B. Part 307 of the Michigan Natural Resources and Environmental Protection Act ("Inland Lake Levels")

As that public solution, Midland and Gladwin counties formed a citizen task force to explore the process of acquiring, financing, and managing the dams and lake levels in accordance with Part 307 of NREPA, MCL 324.40701 *et seq* ("Part 307" or the "ILLA"). Part 307 provides for the control and maintenance of inland lake levels for the benefit and welfare of the public, that best serves to preserve the natural resources of the state, and that best preserves and protects the value of property around a lake. See, e.g., MCL 324.30701(h) ("'Normal level' means the level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake . . . ."). Part 307 further "authorizes counties to make policy decisions as to the levels of their inland lakes and build and finance dams as necessary to maintain the desired lake levels." *In re Matter of Van Ettan Lake*, 149 Mich App 517, 525–26; 386 NW2d 572 (1986).

As the mechanism for that control, Part 307 allows a county board of commissioners to petition the local circuit court and request that it establish the appropriate (or normal) lake level for inland lakes located within the county. See MCL 324.30702 and MCL 324.30707. Once a lake level is established, Part 307 also grants the circuit court "continuing jurisdiction." (*Id.*) Realizing that there are costs associated with maintaining the court-ordered lake level, the Legislature sensibly determined that the county can petition the circuit courts to establish a lake-level special-assessment district for the express purpose of allowing the county to defray the administration, design, construction, operation, maintenance,

repair, and improvement costs by distributing the costs to those in the judicially established special-assessment district. MCL 324.30704, *et seq.* Those who benefit from the lake, such as the adjacent private property owners (*i.e.*, waterfront) or those with deeded access (*i.e.*, backlots), political subdivisions, and state-owned lands, are typically included in the special-assessment district and are subject to the lake-level special assessments levied by the delegated authority. See MCL 324.30711. Additionally, the special-assessment district may issue municipal bonds, notes, and lake-level orders in anticipation of special assessments. See MCL 324.30705.

In particular, Part 307 requires the "delegated authority" to compute the costs of the lake-level project, and prepare a lake-level special-assessment roll. See MCL 324.30711(1) and MCL 324.30712. In levying lake-level special assessments, the delegated authority prepares a special-assessment roll in accordance with the Michigan Drain Code. See MCL 324.30705(3) ("[A]ll proceedings relating to the making, levying, and collection of special assessments authorized by this part … shall conform as nearly as possible to the proceedings for levying special assessments… as set forth in the drain code of 1956 . . . ."). The lake-level special-assessment roll is based on the delegated authority's apportionment of all costs required to maintain the court-ordered lake level, and if the revenues raised are insufficient to meet the computation costs as provided in Section 30712, the "special assessment district may reassessed without hearing using the same apportioned percentage used for the original assessment." *Id.* Lake-level special assessments (like drain assessments under the Michigan Drain Code) are based on the delegated authority's methodology that apportions the lake-level project costs on the benefits derived to the properties, public corporations and state lands within the lake-level special-assessment district. *Id.*

Before submitting a special-assessment roll to the county board of commissioners for final approval, the ILLA requires a public hearing to discuss the project costs and the special-assessment

roll. See MCL 324.30714(2). A lake-level special-assessment hearing is akin to a "day of review" under the Michigan Drain Code, where property owners may have their apportionment reviewed and object to the special assessment. Part 307 requires mailing the notice of hearing to each property owner in the special-assessment district and publishing the notice of hearing twice in a newspaper that circulates in the special-assessment district beginning "at least 10 days prior to the hearing." *Id.* The notice mailed to each property owner must comply with Public Act 162 of 1962. *Id.* Public Act 162, among other things, similarly requires that the hearing notice be mailed to the assessed property's owner (and whose name appears on the tax records) at least 10 days before the hearing and contain a statement that appearance and protest at the hearing is required in order to appeal the amount of the special assessment or may file an objection in writing, "in which case his or her personal appearance shall not be required." MCL 211.741(1)–(3). Accordingly, before or at the hearing, property owners may review their lake-level assessment, present evidence or other information that may affect the apportionment percentage, and object to their special assessments or to the costs of the project. *Id.*

After the hearing, the costs of the lake-level project and the lake-level special-assessment roll may be approved (or revised) by the delegated authority. MCL 324.30714(3). The final step in the process requires the costs of the project and the special-assessment roll to be approved by the county board of commissioners. *Id.* A property owner subject to the assessment may then challenge the special-assessment roll by appealing to the circuit court within fifteen days after approval by the county board. MCL 324.30714(4); MCL 324.30701(c); see *In re Project Cost and Special Assessment Roll For Chappel Dam*, 282 Mich App 142, 145 & 147; 762 NW2d 192 (2009); see also *USL Improvement Assoc v Oceana County Drain Comm'r*, unpublished per curiam opinion

of the Court of Appeals issued Mar 13, 2012 (Docket Nos 297157 & 298080) (the circuit court—not the Tax Tribunal—has jurisdiction to hear lake-level special assessment appeals).

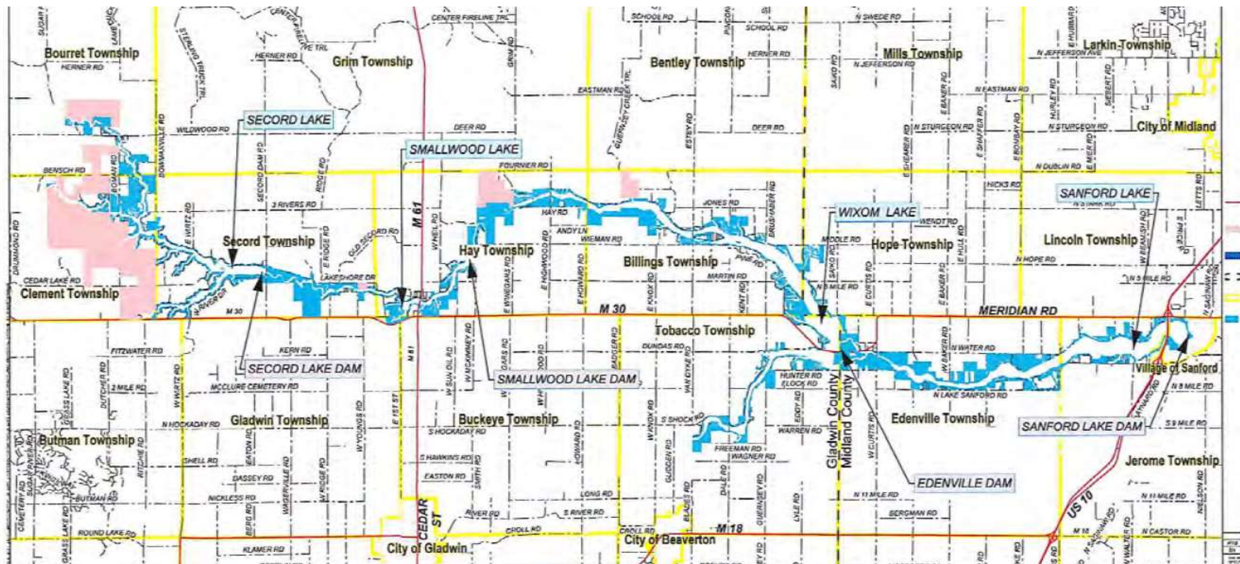
C. The Four Lakes Lake-Level Proceedings and Four Lakes Special-Assessment District

In 2018, the Counties adopted resolutions in accordance with Part 307 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 (or legal) lake levels for all Four Lakes. (Appell. Appx. Vol 1, pp 001–019.) 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 Counties appointed FLTF as their Part 307 delegated authority, and to serve as the counties' agent to oversee the lake-level project, to prepare a special-assessment district and special-assessment rolls, 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 a petition in the Midland Circuit Court to establish normal levels of the Four Lakes and to confirm the boundaries of Four Lakes Special Assessment District ("FLSAD"). The Counties submitted a memorandum in support of that petition, which included a lake-level study that comprehensively detailed information and facts that the Midland Circuit Court adopted in its determination of the normal levels for each of the Four Lakes and boundaries of the lake-level special-assessment district. This information is on record in that matter. See *In the Matter of: Wixom Lake, Sanford Lake, Smallwood Lake and Secord Lake*, Midland Circuit Court Case #19-5980-PZ.

On May 28, 2019, after giving notice to all interested parties, receiving testimony and hearing, and careful consideration, Judge Carras entered the Lake-Level Order confirming the FLSAD. (Appell. Appx. Vol 1, pp 020–162, Lake-Level Order.) In confirming the FLSAD, Judge Carras' accepted the information presented by the Counties and found that all four lakes were hydraulically and hydrologically interrelated, and that the continued operation of the dams were of paramount importance to the environment, recreation, property values of lake residents, and the public and economic health of Gladwin and Midland Counties. *Id.*; see also *In the Matter of: Wixom Lake, Sanford Lake, Smallwood Lake and Secord Lake*, Midland Circuit Court Case #19-5980-PZ, Memorandum In Support of Petitions Pursuant to Part 307 of the Michigan Natural Resources and Environmental Protection Act, p 3 (filed Apr 29, 2019).

No one appealed the Lake-Level Order. The map below depicts the FLSAD as set forth in the Lake-Level Order, which also lists the properties in the FLSAD (see Appell. Appx. Vol 1, pp 026 – 162, Ex. A to Lake-Level Order):



As approved by the court, the FLSAD consists of 8,170 parcels with 6,278 parcels having direct waterfront access and 1,892 parcels having deeded private access (*i.e.*, easement) to the waterfront (*i.e.*, backlots). (Memorandum, at p 1.)

D. The Edenville Dam Failure on May 19, 2020

Thereafter, FLTF as the Counties' delegated authority sought to obtain property rights in the dams and bottomlands from the private dam owner, Boyce Hydro. But, before the transaction could be completed, on May 19, 2020, an embankment failed on the Edenville Dam. (Appell. Appx. Vol 2, pp 354–57, Amendment 1 to County/FLTF Interlocal Agreement.) Several hours later, excess water from the Edenville Dam failure caused the Sanford Dam to breach. (*Id.*) The upstream dams at Secord and Smallwood lakes were also damaged. (Appell. Appx. Vol 2, pp 365–66, EGLE letter dated June 30, 2021.) And thousands of homes, properties, businesses and public infrastructure were damaged or destroyed by this catastrophic flood event. The region was declared a national disaster.[1]

In the days after 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 proceed. 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. (Appell. Appx. Vol 2, pp 365–66.)

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[1] Robert Acosta "*President Trump Oks major disaster declaration for mid-Michigan after severe flooding*," Saginaw and Bay City News, July 9, 2020. See also https://www.mlive.com/news/saginaw-bay-city/2020/07/president-trump-oks-major-disaster-declaration-for-mid-michigan-after-severe-flooding.html

From 2020 through 2023, massive recovery efforts were undertaken. Those included debris removal, shoreline restoration, and dam stabilization as well as planning for the restoration of the dams and lakes. (Appell. Appx. Vol 24, pp 2206–07.) (Four Lakes Restoration Plan, February 2024 Update.) The lake restoration plans included flood studies, design engineering, risk analysis, and environmental assessments. (*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. *Id.* All pre-construction and recovery work (a cost of over $64,000,000) was accomplished using private donations and state and federal grant with no cost to the property owners in the FLSAD. (Appell. Appx. Vol 2, p 404.) (FLTF Memorandum to Board Commissioners Re 2025–29 Operations and Maintenance.)

In May 2021, after FERC's order terminating its prior federal licensing of the Secord, Smallwood, and Sanford dams, those dams reverted to the State of Michigan's regulatory jurisdiction, (Appell. Appx. Vol 2, p 403)—as the Edenville Dam (Wixom Lake) had done when FERC had revoked Boyce Hydro's license before the dam failure. All four dams are now regulated under the jurisdiction of the Michigan Department of Environment, Great Lakes and Energy ("EGLE"), and must be permitted by EGLE before the dam construction and restoration of the Four Lakes. All four dams have been given a "high hazard potential ratings" by EGLE. "[A] high hazard potential rating means that the dam is located in an area where a failure may cause significant potential environmental degradation, or where danger to individuals exists with the potential for loss of life." (Appell. Appx. Vol 2, pp 364–68.) Each dam must comply with dam safety requirements and state regulations and receive state permitting pursuant to Part 315 ("Dam Safety") of the NREPA, MCL 324.31501 *et seq*., as well as Part 31 ("Water Resources Protection"), MCL 324.3101 *et seq*., Part 301 ("Inland Lakes and Streams"), MCL 324.30101 *et*

seq., and Part 303 ("Wetland Protection") of the NREPA, MCL 324.30301 *et seq*. (Appell. Appx. Vol 2, pp 364–68).

FLTF obtained grants from both the federal government and the State of Michigan in excess of $240,000,000. Those funds enabled FLTF to perform the recovery work and to begin the design, dam and environmental permitting, and construction of all four dams ("Lake-Level Capital Project"). (Appell. Appx. Vol 2, p 391.) Under its Part 307 authority and using federal and state grants, FLTF proceeded to design, obtain necessary permits, obtain construction bids, and construct the Lake-Level Capital Project which, due to the complexity and state dam safety requirements, was to be completed in phases over multiple years. Restoration construction began in December 2022 with contracts awarded for the Secord and Smallwood dams using funds from the State of Michigan. (Appell. Appx. Vol 24, pp 2206–07.) All four dams are under construction with the final phase of construction that includes the Edenville Dam to start in May 2024. (*Id.*) The total cost of the Lake-Level Capital Project with contingency is $399,700,000. (See Appell. Appx. Vol 2, pp 406, 412; Vol 24, p 2206.)

In addition, and in accordance with its mandated responsibilities under Part 307, during "recovery and restoration of the dams," FLTF is required to:

> Operate and maintain the dams in a safe manner consistent with current industry standard practices. FLTF should develop an Operation, Maintenance and Surveillance Plan which outlines operational procedures (if any) and type, frequency and reporting of monitoring and maintenance at each dam. Emergency action plans are required to be developed for each dam in coordination with the County Emergency Managers. The plans must be submitted to EGLE for review and should be reviewed annually by FLTF and updated accordingly as modifications are made to the dams. [Appell. Appx. Vol 1, p 367.]

Accordingly, the cost to administer, operate and maintain the FLTF system, was budgeted at $1,775,200 per year, and for the five-year period from 2025 through 2029 the total cost for operation and maintenance is $8,876,600. (Appell. Appx. Vol 2, pp 406–07.)

E. Apportionment Methodology

Per Part 307 (and by resolution), the Counties determined that all costs associated with the administration, construction, operation, maintenance, repair, and improvement of the legal or normal levels of the Four Lakes should be defrayed by special assessments to the properties in the FLSAD. (See Appell. Appx. Vol 1, pp 001–019.) Accordingly, the delegated authority (here, FLTF) is required to distribute or "apportion" project costs to the benefits derived to "privately owned parcels of land, political subdivisions of the state, and state-owned lands." MCL 324.30711(1). The apportionment must equal 100% of the costs. While there can be other sources of funding, the revenue derived from special assessments to waterfront and backlot properties in the FLSAD is the *primary* source of funding to restore and maintain the lake and lake-level structures. (Appell. Appx. Vol 2, pp 444–45.)

The FLSAD consists of waterfront properties and backlot properties that have deeded access to the lakes. (*Id.*, at p 444.) The FLSAD contains 8,170 parcels, with 6,278 parcels that have direct waterfront access, and 1,892 backlot parcels with lake access. (*Id.*) The lake-level special assessments levied on properties within the FLSAD is based on a methodology that uses criteria for determining the benefits derived from the lake-level project. Before the 2020 dam failure, the initial apportionment methodology under consideration was derived from existing weed control districts surrounding the Four Lakes. (*Id.*) The "previous methodology" considered waterfront lots versus backlots (with deeded access to the lakes), location with respect to the dams, and property use. (*Id.*) However, following the dam failure, FLTF determined that further review of the initial methodology was necessary based on input received from property owners and community leaders. (*Id.*)

In May 2021, FLTF established a special assessment work group ("SAD Work Group") led by its consulting engineers, Spicer Group, to discuss, revise and develop an apportionment methodology for apportioning project costs in connection with both the operations and maintenance ("O&M") of the dams, and the capital improvements required to restore the lakes (*i.e.*, Lake Level Capital Project").

(*Id.*) This SAD Work Group consisted of engineers, geographic information system ("GIS") specialists, assessment advisors, individuals familiar with levying special assessments and legal counsel. (*Id.*) FLTF then shared the proposed apportionment methodology with the public in an informational webinar on December 6, 2021.[2] This methodology was used for the 2022–2024 operations and maintenance assessment, which went through and extensive process of review as well, in addition and estimated Project Cost and Capital Assessment estimate was provided in 2022. (*Id.*)

In 2023, the special-assessment methodology was revised reflecting changes due to a larger-than-estimated capital assessment and conditions found in property differences. The final version of the apportionment methodology to apportion the O&M and the Lake-Level Capital Project was approved by FLTF at the special assessment hearing on January 15, 2024. (See Appell. Appx. Vol 2, pp 444–45.)

The FLTF employed a comprehensive apportionment methodology to apportion both the O&M and Lake Level Capital Project costs to property owners in the FLSAD. The methodology apportions costs to lakefront property owners and backlot property owners with deeded access to the lakes. The apportionment methodology used the following benefit factors estimate the benefits to property owners:[3]

1. **Base benefit factor**. All parcels (waterfront and backlots) within the FLSAD were assigned a base factor of either: 0, 0.5 or 1. All parcels which are exempt, such as school properties or cemeteries and properties in the FLSAD that receive no benefit, were assigned a "0" base factor, resulting in no assessment. All "backlot parcels" that are not directly on a body of water but have private access to the lake, received a base factor of "0.5." All other parcels (waterfront) received a base factor of "1."

2. **Derived-Benefit Factor**. The derived-benefit factor applied only to non-residential or limited development or limited use residential development parcels (such as marinas,

[2] https://www.four-lakes-taskforce-mi.com/uploads/1/2/3/1/123199575/dec_6._community_info_session_final_12.6.21.pdf

[3] This section summarizes the methodology, which was more fully explained by FLTF in writing before the hearing. (See Appell. Appx. Vol 2, pp 444–53.)

commercial properties, state land, local parks, trailer parks/campgrounds, and agriculture) within the FLSAD that have various amounts of use. (See Appell. Appx. Vol 2, pp 447–48, Table 1.) It is calculated similar to frontage. (*Id.*)

3. **Frontage Benefit Factor**. The frontage factor is applied *solely* to parcels with direct access to the water. The frontage for all waterfront parcels was determined by three methods: (1) reviewing all subdivision plats; (2) reviewing metes and bounds description for un-platted parcels, and (3) utilizing GIS to manually measure the frontage based on parcel linework and aerial photography. (Appell. Appx., Vol 2, p 448.) Once parcel frontage was determined, parcels were grouped (A through F) according to number of feet of frontage, and then assigned a benefit factor weighted according to number of feet of frontage. (*Id.*) This is shown as follows:

Table 2: Lake frontage bracket

Low (feet)	High (feet)	Group	Factor
0	48	A	0.8
48	134	B	1
134	175	C	1.25
175	220	D	1.5
220	2,000	E	1.75
Greater than 2,000*		F	2

**Changed from 2,000-7,900 in the July 2022 special assessment methodology to 2,000+*

(*Id.*) The Frontage benefit factor is then calculated like a progressive, marginal income tax. For example, if a parcel has 200 feet of frontage, a factor of 0.8 is applied to the first 48 feet. A factor of 1 is applied to the next 86 feet. And so on. The greater the frontage, the higher the aggregate benefit factor. So, a parcel with 200 feet of frontage would be calculated as follows:

Example calculation: parcel with 200 feet of frontage

(1st bracket): 48 feet * 0.8 = 38.4 feet

(2nd bracket): 86 feet * 1 = 86 feet

(3rd bracket): 41 feet * 1.25 = 51.25 feet

(Determine frontage to be applied to 4th bracket): 200 feet – 48 feet – 86 feet – 41 feet = 25 feet.
Step 4 will vary based on total amount of frontage.

(4th bracket): 25 feet * 1.5 = 37.5 feet

(Sum of frontages): 38.4 feet + 86 feet + 51.25 feet + 37.5 feet = 213.15 feet

(Divide total frontage by sum to get weight factor): 213.15 feet/200 feet = 1.07

4. **Waterfront View Benefit Factor**. The waterfront view factor measures the width of the waterway in front of a parcel perpendicular to its frontage and is intended to account for parcels located on canals and tributaries which receives a reduction in benefit as compared to those located directly on a lake.

5. **Water Depth Benefit Factor**. This factor is intended to account for the quality of lake access and opportunity for a property owner to install a dock to achieve greater water depth. The lower the water depth, the lower the benefit factor.

The table below illustrates a calculation of the derived benefit applied to a typical waterfront residential property in a subdivision:

Example Calculation: Typical residential property within a subdivision

Assessable lakefront property – Base Factor (BF) = 1

90 feet of water frontage – Frontage Factor (FF) = 0.893

Greater than 500 feet of waterfront view – Waterfront View Factor (WV) = 1

Water depth of 4 feet or greater – Water Depth Factor (WD) = 1

Residential property – Derived Factor (DF) = 1

Product of factors – BF x FF x WV x WD x DF = 1 x 0.893 x 1 x 1 x 1 = 0.893

Parcel apportionment – parcel's total benefit factor divided by the sum of all factors in SAD* = 0.893/4973 = 0.0001796 or 0.018%

Estimated total O&M Assessment – (Computation of cost amount – at large assessment) x parcel apportionment = (8,876,000 – 798,840) x 0.0180% = $1,450.00

Estimated annual O&M assessment = Total O&M divided by 5 years = $1,450.00/5 years = $290.08/1 year

*The sum of all factors is calculated by adding all the total factors for all parcels together. The sum is subject to change as it is tied to all the factors in the district. If the total factor of one parcel changes, the sum of all factors also changes.

For backlots with deeded access to a lake, the base factor is 0.5, but it then takes into consideration that not all backlots provide the same quality of access. Research determined that there were three primary lake access "types" that exist within the Four Lakes system. Those include: (1) non-developed/unmaintained access where the subdivision allow for backlot access to the lake, but the access location was not developed or maintained as intended. Parcels with low access to the lake will have the lowest total factor in the lake-level special-assessment district; (2) maintained minor access, which provide parcels with walkways, parks or road ends, but were not intended or developed as high-volume access points for a boat launch or dock slip; and (3) maintained major access, where parcels have access to launch boats and or have boat slips, allowing for quality access for backlot property

owners. Backlots with maintained major access will have the highest access benefit factor. The lowest quality backlots have a total apportionment factor of 0.075, while backlots with the higher quality of access are capped at 0.5 base factor. (*Id.*, at Vol 2, p 452.)

The foregoing methodology is designed to ensure that the assessment is proportional to the benefit provided. So, greater costs are borne by properties with greater amounts of and superior frontage. Or, in the case of backlots, properties with the same access—whether improved or unimproved (as in the case vacant backlots)—receive the same derived benefit and they will have the same lake-level special assessments. In other words, the methodology does not look at a property's state equalized value ("SEV") or market value. Such information would result in a disproportional derived benefit based on the property owner's choice of whether or not to improve the property, such as keeping a property vacant, or improving the property with a garage, small or large home. Instead, the assessment is based on the value of the improvements: the restored lakes.

The total cost of the Lake-Level Capital Project with some contingency is $399,700,000. (Appell. Appx. Vol 2, p 412; Vol 24, p 2206.) After receiving bids and computing the final costs of the project, FLTF prepared a capital special-assessment roll levying approximately 55% of the costs of the project (or $217,700,000) to the property owners in the Four Lakes Special Assessment District in order to "defray" the capital costs of the Lake-Level Project using the above-described apportionment methodology. (*Id*. at Vol 2, p 412; Vol 2, pp 445–53; Vol 24, p 2350.) The remaining 45% cost difference (or $181,175,000) is being primarily subsidized by public funds received primarily from the State of Michigan. The plan of financing called for spreading the lake-level capital special assessments via annual installments not to exceed 40 years.

Separately, FLTF prepared an 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 (*i.e.*, $1,775,200 per year). (Appell. Appx. Vol 2, pp 403–407; Vol 24, pp 2234–2344.) The O&M lake-level special-assessment roll allocates 90.14% of these costs to the landowners, and the remaining 9.86% of the cost to public corporations and to the Michigan Department of Natural Resources. (*Id.*, at Vol 24, p 2234.)

The table below lists the annual payment for both the O&M lake-level special assessment and the Lake Level Capital Project special assessments for a range of properties in the FLSAD:

Total Annual Payment for O&M and Capital Assessments				
Benefit Factor Assigned	**2025-2029 O&M Annual Assessment Payment**	**Capital Assessment Annual Payment (Principal + Interest on $217.7M)**	**Total Average Annual Payment (O&M + Capital)**	**Total Principal* Estimate ($217.7M total)** *This is the amount to prepay to pay off the assessment
1 (High Residential Lot)	$ 320	$ 2,560	**$ 2,880**	$ 43,760
0.75 (Typical Front Lot)	$ 240	$ 1,920	**$ 2,160**	$ 32,820
0.5 (Lowest Front Lot)	$ 160	$ 1,280	**$ 1,440**	$ 21,880
0.25 (Typical Backlot)	$ 80	$ 640	**$ 720**	$ 10,940
0.075 (Lowest Backlot)	$ 24	$ 192	**$ 216**	$ 3,282

Currently, these are based on a 5% interest rate and a 40-year term. These are average numbers over the life of the financing term.

Almost all waterfront residential properties have an annual payment between $1,440 to $2,880 per year with a typical waterfront property at $2,160 per year. Most Backlots have a 0.25 benefit factor and will generally pay $720/year, however, backlots range from $216/year to $1,440/year depending on the access quality. (Appell. Appx. Vol 24, pp 2196–2205.)

F. The Four Lakes Lake-Level Special Assessment Hearing and Subsequent Appeal

FLTF held the lake-level special assessment hearing in connection with the O&M and Lake-Level Capital Project special-assessment rolls for January 15, 2024. (Appell. Appx. Vol 2, pp 457–58.) Before the hearing, FLTF held a webinar on December 6, 2023, to inform property owners within the FLSAD of the updated project costs and the estimated special-assessment amounts for the capital

improvements to the lakes and costs required for operation and maintenance ("O&M").[4] Also at that time, FLTF created a "virtual map" that was posted online which illustrated the estimated capital and O&M lake-level special assessment to each individual parcel in the FLSAD.[5] (Appell. Appx. Vol 2, pp 457–58.) This "virtual map" allowed any property owner within the FLSAD to log on and locate their respective property or properties to observe the apportionment benefit factors applied to their property that was used to calculate the lake-level special assessment. (*Id.*) In addition, although not mandatory, throughout December 2023 through January 15, 2024, FLTF conducted "one-on-one" virtual meetings with landowners to review apportionment benefit factors affecting their specific properties. During these virtual meetings, and through email or written correspondence, landowners had the opportunity to provide additional information and have their parcel reviewed in connection with the apportionment factors that were applied to their property, to calculate its derived benefit, and also to submit written objections. (*Id.*) In the course of the "one-on-one" virtual meetings with landowners, "over 780 adjustments" were made to properties where property owners availed themselves of the review process prior to the January 15 lake-level special-assessment hearing. (Appell. Appx. Vol 2, p 488:13–25.)

As described above, the apportionment methodology used to calculate the lake-level special assessments depends first on whether a property is a waterfront or a backlot with deeded access. In the case of a waterfront property, the apportionment methodology for determining the benefits derived considered the following benefit factors: (1) base; (2) derived benefit; (3) frontage; (4) waterfront view; and (5) water depth. The apportionment methodology for determining the benefits derived to backlots (with deeded access to the lake) considered the following benefit factors: (1) base; (2) whether the access

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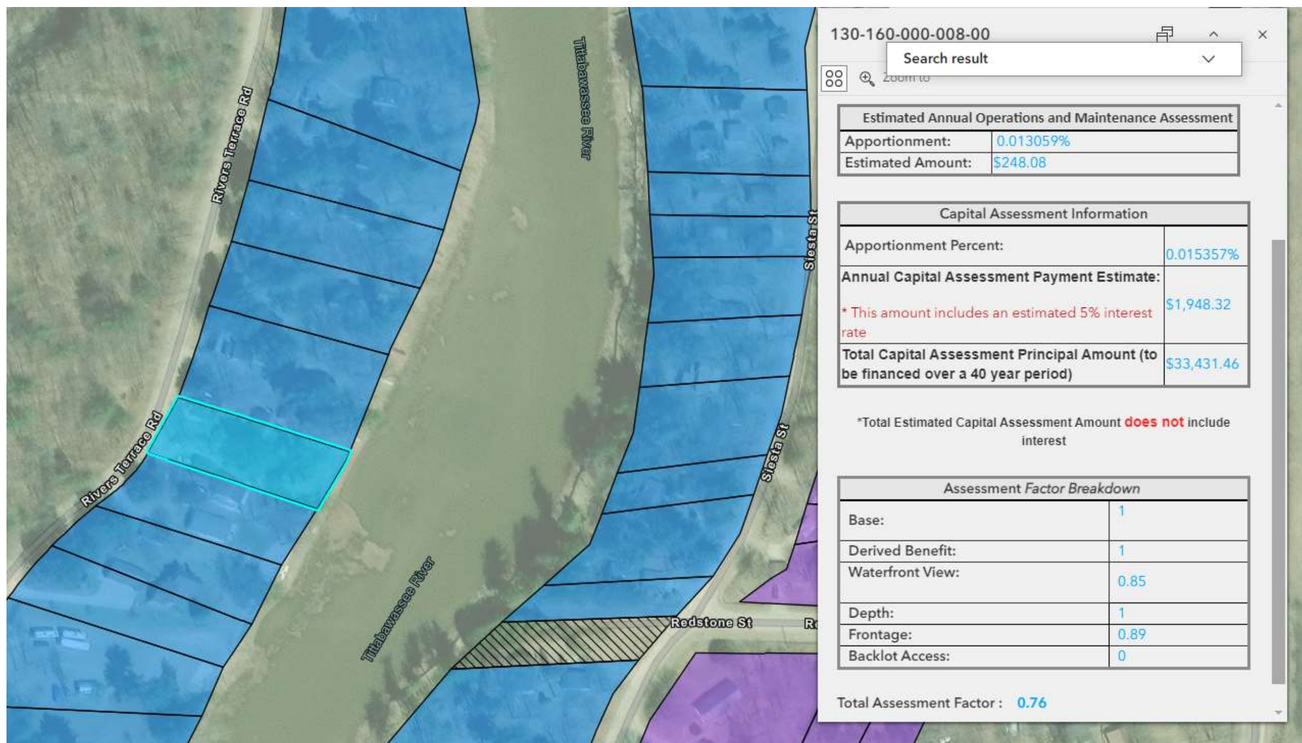
[4] See https://www.four-lakes-taskforce-mi.com/events.html, December 6, 2023, 5:00–7:00 p.m. | Day of Review Process | Webinar | PowerPoint"

[5] https://www.four-lakes-taskforce-mi.com/

was non-developed or not maintained; (3) minor access (*e.g.*, walkways, paths, but not intended as high volume access); or major access (*e.g.*, boat launch). If a change in the factors applied to a specific property were warranted, the lake-level assessment roll was updated, and landowner informed.

The "virtual map" that detailed the location for each property in the FLSAD, the apportionment factor breakdown, and the lake-level special assessment for O&M and the Lake Level Capital Project (as is shown below):



In the above example, the property shown (130-160-000-008-00) displays an assessment factor breakdown, the apportionments and lake-level assessments for both O&M and the Lake Level Capital Project. Here, the annual assessment for O&M for the period of 2025–2029 is $248.08 per year. The total Lake-Level Capital Assessment of $33,431.46, or $1,948.32 per year (which includes 5% estimated interest rate) paid over 40 annual installments.[6]

[6] See, link special assessment maps: https://www.four-lakes-taskforce-mi.com/

On January 15, 2024, FLTF held the required public hearing in connection with the lake-level special-assessment rolls. The notice of hearing was prepared in accordance with MCL 324.30714, which includes the notice requirements of Public Act 162. (See Appell. Appx. Vol 2, pp 457–58.) The notice was mailed to each property owner and published twice in both the *Midland Daily News* and *Gladwin County Record*. (*Id.*) (See also Appell. Appx. Vol 2, pp 459–60.) The notice provided that, in order to appeal the amount of the operation and maintenance assessment and/or capital improvement special assessment, "*any person or entity objecting*" needed to appear at the special-assessment hearing or file a written objection with the FLTF "no later than the close of the public hearing; or any such person or entity may file an appearance and protest by e-mail to with "Objection" in the subject line, or by letter" to the FLTF "in which case, his or her personal appearance at the public hearing shall not be required." (See Appell. Appx. Vol 2, pp 457–58.)

On January 15, FLTF administrative staff presented the computation of costs in connection with the 5-year O&M lake-level special-assessment roll, and the computation of costs for the Lake Level Capital Project special-assessment roll. (Appell. Appx. Vol 2, pp 461–64; Vol 2, pp 482–88. In addition, Ron Hansen, PE, from the Spicer Group, also gave a brief overview of the apportionment methodology and the number of adjustments made to individual properties based on the information provided by landowners relative to the specific conditions of their properties that were affected by the benefit factors. (*Id.*, at pp 487–88.) In all, before the hearing, over 780 properties had adjustments affecting their respective properties after providing information and discussing the same with FLTF's consultant. *Id*. at 20:16–18. FLTF then opened the hearing to receive objections and comments from property owners within the FLSAD. (Appell. Appx. Vol 2, pp 461–777; Vol 3–23, pp 778–2186.) At that time, landowners with questions or concerns about the apportionment factors used to calculate their special assessment were encouraged to and had the opportunity to meet directly with a

representative from FLTF's engineering consultant, the Spicer Group. (Appell. Appx. Vol 2, pp 492:21–25; 493:1–15.) After the January 15 lake-level special-assessment hearing, FLTF revised the special-assessment rolls based on the objections and comments received from landowners. (Appell. Appx. Vol 2, p 463.) The revised lake-level special-assessment rolls were then transmitted to the Counties for consideration.

On February 6, 2024, the Counties approved the lake-level operation and maintenance special-assessment roll and the capital improvement special-assessment roll in a joint meeting of the Counties' respective board of commissioners. (Appell. Appx. Vol 2, pp 403–53; Vol 24, pp 2187–89; Vol 24, pp 2196–2207; Vol 24, pp 2234–2479.) 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 (which includes a contingency of $34,584,150) to be secured by and payable from the collection of lake-level special assessments against properties in the FLSAD. (Appell. Appx. Vol 24, pp 2217–33.)

G. Circuit Court Appeal

Appellants timely appealed to circuit court. Aside from the HCA, the caption listed 992 names purporting to be property owners in the FLSAD, representing about 685 properties. FLTF determined that only about 248 properties belonging to owners in this appeal submitted formal objections to their assessments. (Appell. Appx. Vol 25, pp 2619–28.) The remaining 437 properties of persons listed in the caption did not timely object or submit written objections at or before the lake-level special-assessment hearing. (*Id.*) And, even among those that objected, these property owners did not submit any evidence to support their claims that the assessments were contrary to law or factually unfounded. Thus, The Counties responded in part that many of the Appellants lacked standing to appeal either due to their lack of objection or their lack of property owned inside the FLSAD and the Counties contested Heron Cove's standing as well.

After briefing and argument, the circuit court upheld the special-assessment roll in total on June 20, 2024. The circuit court denied in part the Counties' standing arguments. (HCA Appx., Ex. A, Opinion and Order on Appeal, pp. 3–5.) The court held that Heron Cove has standing "so long as an individual member does as well." (*Id*. at 4.) The court rejected the assertion that a property owner needed to object at the public hearing to preserve the right to appeal. (*Id*. at 4–5.) But the court acknowledged that persons not owning property in the FLSAD had no standing to appeal. (*Id*. at 4.)[7]

On the merits, the court rejected Appellants' due-process claim. (*Id*. at 5–7.) The court explained that "Appellants were afforded all of the protections contained within the ILLA and affirmed by the Court of Appeals in *Chappel Dam*." (*Id*. at 6.) The court observed that "Appellants have not alleged any deficiency" in the statutory process and had "admit[ted] . . . a public hearing was held in which hundreds of people attended and property owners were given an opportunity to talk to an engineer about their property and the special assessment apportioned to it, to 'verbally object to the assessment rolls in front of the FLTF board,' or 'deliver a written objection to the FLTF Board." (*Id*.) And the court concluded that "Appellees *not only followed the procedures enacted by the legislature* to protect the due process rights of Appellants, *but did more* through the holding of public webinars, the creation of the virtual map for property owners to view, and posting notice of hearing in more places than was required, *i.e.*, on the websites for Midland County, Gladwin County, and FLTF." (*Id*.) (emphasis added). Accordingly, it held there was no due-process violation. (*Id*. at 7.)

Similarly, the court rejected any concerns in the apportionment methodology or approval of the rolls. (*Id*. at 7–13.) Outlining the procedural and substantive prescriptions in the ILLA and *Chappel*

[7] At the circuit court hearing, opposing counsel promised to review and clean up the Appellants' list by limiting the appeal *only* to those individuals who actually own property in the FLSAD. (Appell. Appx. Vol 25, 2632:18–22.) It appears that this still has not occurred, because FLTF has identified individual appellants without evidence of such ownership and ostensibly without standing to appeal.

Dam, the court observed "all of these provisions were procedurally complied with." (*Id*. at 7–8.) Thus, "the FLTF's development of the special assessment roll, and the county board's approval of it, were authorized by statutory law and are not presented as an issue for review by this Court . . . ." (*Id*. at 8.) Turning to whether the "apportionment of the costs for the SAD were supported by competent, material, and substantial evidence based on the record," the court held they were. (*Id*. at 8–11.) The court noted the presumption in favor of a special assessment's validity. (*Id*. at 8–9.) And the court held that "Appellants have failed to demonstrate an unreasonable disproportionality between the amounts of their assessments in comparison to the benefit derived to overcome the rebuttable presumption in favor of validity." (*Id*. at 9.) Reviewing Appellants' cherry-picked selection of twelve parcels claimed to be disproportionately assessed, the court noted that a "close examination of these select properties" did not support Appellants' disproportionality claim" and that "Appellant's data, *which presumably is the best they have to offer* . . . is inconclusive and does not show the special assessments are disproportional . . . ." (*Id*. at 9–10.) In short, the court concluded that Appellants did not overcome the presumption of validity. (*Id*. at 10.) And it noted that, despite being given the opportunity to "develop a record to be considered by this Court on appeal," Appellants failed to do so. (*Id*. at 11–12.) The court thus affirmed the special-assessment roll in whole. (*Id*. at 13.)

STANDARD OF REVIEW

Administrative agencies' decisions are subject to judicial review as provided in Michigan's constitution as follows:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; *and, <u>in cases in which a hearing is required</u>, whether the same are supported by*

> *competent, material and substantial evidence on the whole record*. [Const 1963, art 6, § 28 (emphasis added).]

"When the agency's governing statute does not require the agency to conduct a contested case hearing, the circuit court may not review the evidentiary support underlying the agency's determination," and "[j]udicial review is 'limited . . . to a determination whether the action . . . was authorized by law." *Natural Resources Defense Council*, 300 Mich App at 87; *Ross v Blue Care Network of Mich,* 480 Mich 153, 164; 747 NW2d 828 (2008). If a contested case hearing occurs, the Court reviews factual findings under the "substantial evidence" standard. *Id*.[8]

The "substantial evidence" standard is a highly deferential form of review. *Vanzandt v State Employees Ret Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005) ("Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views"), quoting *Michigan Employment Relations Comm'n v Detroit Symphony Orchestra, Inc.,* 393 Mich 116, 124; 223 NW2d 283 (1974). It "is essentially a clearly erroneous standard of review." *Vanzandt*, 266 Mich App at 585. And a court may not substitute its judgment for the administrative body. *Mudel v Great Atl & Pac Tea Co*, 462 Mich 691, 706; 614 NW2d 607 (2000) (noting a court "may not substitute [its] own judgment for" that of the agency).

[8] Significantly, whether this standard of review applies is tied directly to whether jurisdiction exists over Appellants' claim of appeal. If a "hearing" occurred that deprives this Court of jurisdiction over the claim of appeal, then the substantial evidence standard applies. *Natural Resources Defense Council*, 300 Mich App at 84–87; Const 1963, art 6, § 28. If not, then this Court applies *only* the "authorized by law" review. *Natural Resources Defense Council*, 300 Mich App at 87. Ostensibly out of caution, the circuit court undertook review under both standards. (HCA Appx., Ex. A, pp. 8 & 11.)

ISSUE PRESERVATION

Appellants' "mere formalities" due-process argument is undeveloped, and it should be considered waived. *Nat'l Waterworks, Inc v Int'l Fid & Sur, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Further, though critiquing the circuit court's consideration of evidence, Appellants failed to provide support for their claims or offer any additional evidence, and thus, they failed to preserve any such issue. See, e.g., *In re Green Charitable Trust*, 172 Mich App 298, 329; 431 NW2d 492 (1988) (to preserve an issue of excluded or disregarded evidence an offer of proof is necessary). Otherwise, Appellants' arguments are preserved and addressed below.

ARGUMENT

I. The circuit court did not err in holding that Appellants failed to meet their burden to rebut the presumption that the special-assessment roll is valid.

The circuit court did not err in affirming the lake-level special-assessment rolls as valid and holding the Appellants failed to overcome the legal presumption of validity. Confusingly, Appellants present this challenge as two separate issues when it was presented as one to the circuit court. They now label one issue a challenge to the circuit court's holding that Appellants "did not meet their initial burden to overcome the presumption of validity," and they label the other a challenge to the circuit court holding that "competent, material, and substantial evidence" supported the assessment methodology. (Appl., pp. 9–18.) But, really, both issues are subsumed in the same question: is the assessment roll supported by substantial evidence? The circuit court properly held it was. Therefore, this Court should deny leave or affirm.

A. There was no legal error in the circuit court's method of review.

The Counties did everything they needed—and more—to justify the methodology of apportioning the lake-level special-assessment rolls at issue here. And that methodology fairly

apportions the benefit of re-establishing the Four Lakes—after significant state taxpayers' subsidies of nearly 45% of the Lake Level Capital Project—among those who benefit most from the existence of the lakes. The circuit court was right to uphold the validity of the assessment.

As the Counties' "delegated authority," the FLTF is charged with the obligation to maintain the court-ordered lake levels of the Four Lakes. MCL 324.30702(3), 324.30708(1). To fulfill this duty, "[t]he county may enter into a contract for operation and maintenance of an existing dam." MCL 324.30708(2). To "defray" the costs of maintaining the appropriate lake levels and, thus, any costs related to maintaining a dam, Part 307 gives the FLTF the authority to "compute the cost of the project and prepare a special assessment roll," assessing the costs to the property owners in the judicially created special-assessment district. MCL 324.30711. The making, levying, and collection of lake-level special assessments should conform to the mandates of the Drain Code, MCL 280.1 *et seq*. MCL 324.30705(1). Special assessments for drain improvements must be based on the special benefits to the assessed land. *Clark v City of Royal Oak*, 325 Mich 298, 313; 38 NW2d 413 (1949); see also *King v Butchbaker*, unpublished per curiam opinion of the Court of Appeals, issued Aug 9, 2005 (Docket No. 254912) (Ex. A). This approach is reflected in the Drain Code, which requires that a special assessment to be apportioned according to the benefits derived by each parcel. MCL 280.152; see also MCL 280.151 & MCL 280.262.

It is well settled that municipal decisions regarding special assessments are presumed to be valid. *Kadzban v City of Grandville*, 442 Mich 495, 502; 502 NW2d 299 (1993), citing *In re Eight and One-Half Mile Relief Drain*, 369 Mich 641, 649; 120 NW2d 789 (1963); *Crampton v Royal Oak*, 362 Mich 503, 514–16; 108 NW2d 16 (1961). Moreover, "decisions of municipal officers regarding special assessments 'generally should be upheld'" *Id*. at 402, quoting *Dixon Rd Group*

v Novi, 426 Mich 390, 403; 395 NW2d 211 (1986). For example, in *Clark*, the Michigan Supreme Court addressed special assessments in the context of a drain project and stated:

> It is true that special assessments for a public improvement, such as a drain, must be based on the special benefits to the land assessed therefor. Cross-appellants claim that such benefits must be measured by the enhanced value of the land due to the drain as determined many years after the drain was constructed. This is not correct. Drains are not only for the purpose of improving the land, but are also for improving the sanitation and health of the residents and municipalities of the entire district. *The exact and actual monetary benefit to any individual parcel of land would be difficult to measure and <u>at most can only be estimated</u> with a fair degree of exactness.*

Clark, 325 Mich at 313 (emphasis added).

In other words, a drain commissioner is given extensive discretion in preparing the special-assessment roll and determining what benefit each parcel of property receives. *Id.* He or she is not required to apply a precise mathematical formula when preparing the special-assessment roll. See also *In re Eight and One-Half Mile Relief Drain*, 369 Mich at 648 (quoting *Cummings v Garner*, 213 Mich 408, 433; 182 NW 9 (1921) ("Where the rule of apportionment is according to the special benefits received, the application of that rule may be effected by the employment of *any method which will accomplish that purpose*, whether it be by valuation, frontage, superficial area, or any other method which does not lose sight of the fundamental basis of special assessments for local improvements.") (emphasis added).

For those reasons, "[i]n the absence of a readily apparent mistake or abuse of discretion, courts should not attempt to second-guess the administrative board members or municipal officers in whom discretion has been vested and whose expertise inevitably exceeds that of the court." *Charter Twp of Lansing v Ingham Co Drain Comm'r*, unpublished per curiam opinion of the Court of Appeals, issued Dec 2, 2014 (Docket Nos. 316870 and 318446), slip op 4. "There will inherently be a certain amount of arbitrariness in 'many honest and sensible judgments' that 'express an

intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth,' but in the absence of fraud or a clear adoption of wrong principles, '[s]omewhere there must be an end,' so boards are deferred to within their jurisdiction." *Id.* at 650, quoting *Chicago, B & QR Co v Babcock,* 204 US 585, 598 (1907).

King v Butchbaker is illustrative. *King v Butchbaker*, unpublished per curiam opinion of the Court of Appeals, issued Aug 9, 2005 (Docket No. 254912). (Appell. Appx. Vol 25, pp 2882–83.) There, landowners contended that the drain assessment made against their property was unlawful. *Id.*, Slip op. at 1. The landowners asserted that, "under the principle of benefits derived relative to assessing or apportioning the cost of a drain project," their property received no benefit from the construction as necessarily and solely reflected by changes in the market value of the property and, further that the method used by the drain commissioner "improperly focused on property features that contributed to the need for a drain, not the benefits derived or received by way of the drain project." *Id.* at 1. Disagreeing with the property owners, the Court of Appeals explained:

> MCL 280.151 and MCL 280.152 clearly and unambiguously indicate that a drain assessment must be based on an apportionment of benefits and that the apportionment of benefits is based on the principle of benefits derived. The concept underlying special assessments to cover the cost of a public improvement, such as a drain, is that the land upon which an assessment is imposed is peculiarly benefited, and thus the property owner does not pay anything in excess of what the owner receives by reason of such improvement ...
>
> *We find it unnecessary to address plaintiffs' argument that benefits derived must be measured by fluctuation, if any, in the market value of the property that is created when taking into consideration the drain project*. MCL 280.157 provided the board of review the authority 'to hear the proofs and allegations of the parties[,]' yet plaintiffs did not take advantage of the opportunity to submit evidence regarding market value. [*Id.* at 1–2 (emphasis added).]

Because the "making, levying, and collection of special assessment" authorized by Part 307 shall conform as nearly as possible to the proceedings for levying special assessment as set forth in the Drain

Code, MCL 324.30705(3), the FLTF (as the delegated authority) is afforded the same "great deference" given to drain commissioners in apportioning the costs in connection with the Lake-Level Capital special assessments and the O&M lake-level special assessments. There was no legal error in the circuit court's approval of these procedures or in its manner of review.

B. The circuit court rightly determined that Appellants failed to rebut the presumption of validity and that there was substantial evidence supporting the Counties' special-assessment roll apportionment.

Nor did the circuit court err in holding that Appellants failed to rebut the presumption of validity. The record demonstrates that FLTF exercised its best judgement in preparing the special-assessment rolls, which fairly and proportionately distributes the costs of the restoration, and operation and maintenance. And, like a drain project, Appellants' claims that the benefits derived must be measured by fluctuation, if any, in the market value that is created when taking into consideration the Four Lakes project to restore the lakes following the catastrophic dam failures should be disregarded.

In this case, the FLTF appropriately assessed the costs of the Lake-Level Capital Project and the O&M according to the benefit derived by each parcel and did not act arbitrarily and capriciously. The apportionment methodology used in preparing the special assessments rolls to apportion costs to 8,170 parcels involved a comprehensive process over three years and was revised with input received from property owners. The methodology clearly shows that the making and levying the special assessments are proportional and conform to the process under the Drain Code. As Michigan courts have recognized, it is exceedingly difficult to precisely measure the benefit, in monetary terms, that a property owner receives from having property on or near an inland lake. Cf. *Clark*, 325 Mich at 313; see also *In re Van Ettan Lake*, 149 Mich App at 527–28.

As explained at the January 15, 2024, and information presented to FLTF Board and the Counties, FLTF administration and consultants prepared an assessment that was fair and equitable.

(Appell. Appx. Vol 2, pp 444–53.) The special-assessment rolls fairly provides for assessments based on the parcels' associated benefits related to the lake restoration capital improvement project and operations and maintenance of the Four Lakes' system. (Appell. Appx. Vol 2, pp 403–07; *Id.*) The benefit factors established a base (waterfront or backlot). (*Id.*) They then took into consideration frontage, water depth, water view, and—in case of non-residential properties (*i.e.*, commercial marinas, state lands, parks and agriculture)—a calculated derived benefit. (*Id.*) Proportionately, the special-assessment rolls place a higher assessment on properties with greater frontage than those with less frontage. (*Id.*) Moreover, the apportionments factors also calculate the quality of lake frontage. (*Id.*) For backlot properties with deeded access, the benefit factors considered the quality of the lake access, reducing the apportionment to accommodate parcels with poor access (*i.e.*, unmaintained access) or limited quality access (*i.e.*, allows for access but not a boat slip) or to adjust for high-quality access (*i.e.*, allows for boat launching or boat slip). (*Id.*) Again, the special-assessment rolls puts a proportionately higher assessment on properties with higher-quality access than those that do not, placing the greater burden on those with the greater benefit from the lakes.

Appellants claim it is unfair to treat property owners who live upstream of all four dams the same as property owners downstream of all four dams, that the "methodology does not account for the fact that the cost of each dam is different," and they argue that a property owner north of the northernmost dam does not likely benefit at all from the reconstruction of the southernmost dam. (Appl., p 15). Aside from the fact that none of the persons or entities listed in the caption of this appeal ever bothered to present any evidence to support whether the foregoing claims would result in a different apportionment, these arguments are merely an attempt to second-guess the comprehensive process implemented by FLTF to arrive at fair and proportional lake-level assessments. The 2019 Lake-Level Order entered in this matter followed an extensive hearing

before the circuit court. Findings were made that all four lakes and dams were hydraulically and hydrologically interrelated, and the continued operation of the dams were of paramount importance to the environment, recreation, property values of lake. The FLSAD was appropriately drawn, and the Order approving the FLSAD was never appealed nor contested.

Moreover, the apportionment methodology is a common-sense and well-reasoned approach that approximates the value of the improvement to property owners. A parcel with more lakefront property obviously derives more benefit from the lake than someone who does not have lake front property (or who has less). Contrary to Appellants' claims, the quality of the frontage is factored into the benefit calculation through the measurement of lake view distances and lake depth. In addition, it should not be ignored that the Counties secured over $240 Million for the recovery and restoration of the Four Lakes of which $182 Million is dedicated to Lake-Level Capital Project and offsets any public benefit to the Counties and the Four Lakes region. Consequently, Appellants' decision to apportion approximately 55% of the remaining costs to property owners that primarily benefit from the existence of the lakes was not contrary to law nor arbitrary and capricious.

C. Appellants' arguments on appeal lack merit.

1. Appellants presented nothing more than a few scattered assertions and a couple cherry-picked properties without context.

None of the Appellants presented any substantive information, such as property appraisals, at the January 15, 2024 lake-level hearing that would support their claims that the methodology for apportioning benefits was arbitrary and capricious. On appeal, Appellants tried to rehash the facts by "cherry-picking" 12 parcels and using the values on record with the local assessor to illustrate "property values with the improvement (before the Four Lakes retreated), without the improvement (immediately after the Four Lakes retreated), and today" in order to stake a claim that "the loss of the Four Lakes does not appear to have substantially decrease values within the

SAD." (Appellants' Br., pp. 16–17). The circuit court rightly rejected this effort, saying that "Appellant's data, *which presumably is the best they have to offer* . . . is inconclusive and does not show the special assessments are disproportional . . . ." (HCA Appx., Ex. A, 9–10) (emphasis added).

Appellants logical leap is absurd. Many factors affect property value, including but not limited to its location, recent purchases, zoning classification, zoning potential, regional housing supply, environmental aspects (*e.g.*, wetland, floodplain), and whether a parcel is vacant, improved, and, if so, how. Accordingly, it is wrong to suggest that looking at the assessments over a short period of time indicates that proceeding with restoration of the normal level of the Four Lakes does not result in the preservation and protection property values around the lakes or that it will not be a factor in the long-term increase in value of properties around the lake.

Indeed, the information presented by the Appellants is misleading when compared to similarly situated properties in the FLSAD. Why should a waterfront or backlot owner with an improved lot with the same access as a vacant lot of the same size and with the same access, have to pay more? The apportionment methodology is designed to capture the similarities as well as differences. To illustrate, Appellants identify Parcel Identification No. 110-230-000-006-00 owned by named Appellants, Robert and Karen Price. It is true that Parcel Identification No. 110-230-000-006-00 is currently vacant and that it is a tributary of the Tittabawassee River. But, contrary HCA's claims, this property is waterfront and the apportionment takes into consideration the quality of the access to this property (which is poor). What is also misleading is Appellants' reliance on the SEV to suggest that the special assessment is unlawful. As previously noted, a property's value is influenced by many factors, including the property owners' decisions. For Prices, they own several lots within the same subdivision. When you compare the apportionment factors applied to the waterfront vacant lot (*i.e.*, Parcel Identification No. 110-230-000-006-00) to

the Prices' lot with a home on it (Parcel ID No. 110-230-000-013-10), which is conveniently not listed in the appeal (1619 Maple Point Road), you find that the apportionments are consistent and fair as they reflect the same derived benefit. (See Appell. Appx. Vol 24, pp 2509–32).

To illustrate, the Prices' properties are depicted below, pre-2018 as compared today:

(Google Earth, 6-2018)
Compared to this:

(Google Earth, 9/2021)

Additionally, Appell. Appx Vol 25, pp 2633–34, analyzes the 12 parcels cited by Appellants, and further shows how using SEV is immaterial to the derived benefit. The value of one's land is influenced by the landowners' decisions, as well as recent purchases, zoning classification, zoning potential, regional housing supply, environmental aspects (*e.g.*, wetland, floodplain), and whether a parcel is vacant, improved, and type of improvement. In other words, reliance on recent SEV data to suggest that the restoration of the lakes will not result in any appreciable increase in value to waterfront or backlot properties is unreliable.

Beyond that, even assuming that Appellants' reliance on a few, cherry-picked parcels could demonstrate a disproportional assessment for *some* parcels (*i.e.*, those 12 parcels), it would have no bearing on the remaining more than 500 properties in this appeal. As the U.S. District Court for the Eastern District of Michigan has aptly pointed out in a related condemnation proceeding filed by Heron Cove and other Appellants, which raises the *same* arguments, each property must be assessed *individually*. Invalidating a single assessment is a "zero-sum issue" and "if one property owner's special assessment is decreased, other property owner's assessments must increase." (Ex. B, Opinion Disqualifying, p. 13–14 & fn. 11.) In other words, even if they could demonstrate disproportionality in a few cases, it would do nothing for the vast majority of the appealing property owners. Each assessment must stand on its own.

2. Appellants *cannot* establish "disproportionality" from a regional benefit that was accounted for through state-taxpayer funded contributions.

Nor do Appellants establish disproportionality in the assessment based on the criticism that there is a broader benefit to the regional economy or public benefit from the existence of the lakes. The taxpaying public already contributed $240 million dollars to the restoration of the lakes. (Appell. Appx. Vol 1, p 391.) Philanthropic organizations contributed to their restoration, too.

(Appell. Appx. Vol 2, p 405.) Some of that went to work that was performed wholly without any contribution from the FLSAD property owners. (See Appell. Appx. Vol 2, p 408; 412; Vol 24, p 2206.) The remainder—about $182 million in taxpayer funds—has been used to reduce the total assessment on property owners in the FLSAD by about 45%.

Appellants offer nothing to quantify the relative benefit to the broader economy versus the immediate, localized benefit to lakefront and backlot property owners (*i.e.*, those who directly benefit). The latter group are receiving lake access or a "lake view would have a higher property value than property that had been lake front property previously but now has extensive bottomlands to traverse to reach any flowing water, nor the previous level of lake view." (HCA Appx., Ex. A, p. 12.) The benefit to the value of these properties of such access or view is obvious. (*Id.*) The circuit court did not err in upholding the special-assessment roll against this critique.

II. This Court has already upheld the procedures in the ILLA for the appeal of a special-assessment roll as satisfying due process. And the Counties gave Appellants all required statutory process—and more.

Appellants' due-process claim also wholly lacks merit. Not only did the Counties provide all statutorily required procedures (which this Court has affirmed as constitutionally sufficient), but their efforts went beyond what was required. Nor is there any cause for this Court to effectively rewrite the ILLA's legislatively approved processes under these circumstances. The Court should deny leave or affirm.

A. Due process is a flexible concept and requires merely notice and the opportunity for a hearing.

Due process prescribes the constitutional minimum procedures the government must provide before depriving any person of life, liberty, or property. US Const. Am XIV. Due process is a flexible concept. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825, 843 (2005). Its essence is "fundamental fairness." *Id*. The core of procedural due process is simply "constitutionally

sufficient procedures for the protection of life, liberty, and property interests." *Bonner v City of Brighton*, 495 Mich 209, 224; 848 NW2d 380 (2014). And that is generally achieved when "adjudication" is "preceded by notice and opportunity to be heard." *Id.*; *Reed*, 265 Mich App at 159 ("Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker.").

Moreover, in deciding what is constitutionally sufficient process, "substantial weight must be given to the procedures provided for" by the Legislature in statutes, which are given "due deference" as "a deliberate action of a coordinate branch of our State government." *Bonner*, 495 Mich at 240. Generally, those legislatively provided procedures are deemed sufficient if the prescribed procedures "ensur[e] the right to a hearing, as well as to subsequent judicial review" before state action is finalized. *Id.* In short, when the constitutional minimum touchstones of a hearing and judicial review are allowed by law, then courts should shrink from tinkering with and rewriting the process that the Legislature deemed adequate for a particular problem.

B. The Counties more than satisfied due process here.

The Counties satisfied due process by complying with the ILLA's statutory procedures. Those procedures—entitled to "due deference" and "substantial weight," *id.*—have already been held to be constitutionally sufficient. *Chappel Dam*, 282 Mich App at 150–51. Yet, as the circuit court recognized, the Counties went even *beyond* those statutory requirements. FLTF provided webinars to ensure owners were well informed about the nature of the assessment and of their rights to object or appeal their individual assessment. And they met with individuals one-on-one before that hearing to discuss any necessary adjustments. Thus, there is no due-process violation.

1. The ILLA procedures have already been upheld by this Court as compliant with due process.

The ILLA's procedures satisfy the basic due-process minimums (as this Court has already held). Specifically, MCL 324.30714(3) requires the delegated authority to hold a public hearing to approve the special-assessment roll. MCL 324.30714(2) further requires the delegated authority to provide a minimum of 10 days of notice of the hearing through publication in a newspaper in circulation, giving notice in the manner required under MCL 211.741–746. After the public hearing, Part 307 requires that the project cost and lake-level special-assessment roll to be approved by the county board of commissioners. MCL 324.30714(3). And it allows any aggrieved person a right to judicial review as provided for under both MCL 324.30714(4) and Michigan's Constitution. Const 1963, art 6, § 28.

This Court has already blessed the ILLA's statutory procedures as due-process compliant. Indeed, in *In re Chappel Dam* property owners lodged a due-process attack similar to the one made here. 282 Mich App 150–51. This Court rejected it. *Id*. at 151. Rather, this Court observed:

> The ILLA guarantees notice and an opportunity to be heard before the determination of a special assessment roll. The Court has determined that the hearing under the ILLA does not require a full trial. [*Id*. at 150 (citations omitted).]

Instead, "[f]or the purposes of the ILLA, a sufficient hearing is one that (1) allows the circuit court to ensure that the county has considered the varying public interests in reaching its policy decision and (2) protects the public against arbitrary governmental action." *Id*. at 151, citing *In re Van Ettan Lake*, 149 Mich App at 526–27. That was satisfied in *Chappel Dam* where (1) "all interested persons were properly notified of the hearing regarding the special assessment roll," (2) "a hearing was held at which petitioners registered their protests and the reasons for protesting," (3) "the commissioner explained and took questions about her apportionment," (4) "petitioners . . . had an opportunity to be heard at the county commissioners' meeting in which the roll was approved,"

and (5) “petitioners presented their arguments” to the circuit court, which “considered all the evidence and welcomed any pertinent information in the parties’ briefs.” *Id*. In other words, compliance with the statutory procedures met due-process minimum standards.

2. The circuit court rightly held that the Counties went above and beyond the statutory procedures here.

Here, the Counties not only complied with the ILLA—they went above and beyond the statutory requirements. Notice of the Counties’ hearing on the special-assessment roll was mailed to each property owner. (See Appell. Appx. Vol 2, pp 454–56.) It was published twice in both the *Midland Daily News* and the *Gladwin County Record*. (Appell. Appx. Vol 2, 459–60.) That notice informed property owners that to appeal the amount of the operation and maintenance assessment or capital improvement special assessment, “*any person or entity objecting*” needed to appear at the special assessment hearing or file their objection in writing with the FLTF “no later than the close of the public hearing. (Appell. Appx. Vol 2, pp 457–58.) And it informed them that “any such person or entity may file an appearance and protest by e-mail to info@fourlakestaskforce.org with ‘Objection’ in the subject line, or by letter” to the FLTF “in which case, his or her personal appearance at the public hearing shall not be required.” (*Id*.)

On January 15, 2024, FLTF held the lake-level special-assessment hearing for both the O&M and the Lake-Level Capital Project special-assessment rolls. (*Id.*) Over 500 people attended the hearing. (Appell. Appx. Vol 2, pp 493–676.) And 109 property owners spoke and objected to the assessments. (*Id*.) The hearing remained open until there were no additional property owners desiring to speak, submit evidence, or present objections. (*Id*.) Moreover, the FLTF received 577 written objections. (Appell. Appx. Vol 3–23, pp 778–2186.) So, altogether, the FLTF and the Counties addressed nearly 700 objections. (*Id*.)

Further, although not required under Part 307, FLTF also held a webinar *before* the hearing to inform affected property owners of the updated project costs and the estimated special assessment amounts for the capital improvements to the lake and costs required for operation and maintenance ("O&M"). (See https://www.four-lakes-taskforce-mi.com/events.html "December 6, 2023, 5:00–7:00 p.m. | Day of Review Process.") FLTF then also introduced an online "virtual map," which illustrated the estimated capital and O&M lake-level special assessment to each individual parcel in the FLSAD. (*Id.*; see special assessment maps https://www.four-lakes-taskforce-mi.com/.) This "virtual map" allowed any property within the FLSAD to log on and locate their respective property or properties to observe the apportionment benefit factor applied to their property that was used to calculate the lake-level special assessment. (*Id.* at https://www.four-lakes-taskforce-mi.com/.) Additionally, throughout December 2023 through January 15, 2024, FLTF offered and conducted voluntary "one-on-one" virtual meetings with landowners to review apportionment benefit factors affecting their specific properties. During these virtual meetings, and through email or written correspondence, landowners had the opportunity to provide additional information and to have their parcel reviewed in connection with the apportionment factors that were applied to their property, to calculate its derived benefit, and also to submit written objections. (*Id.*) Through these "one-on-one" virtual meetings, the Counties made "over 780 adjustments" to the special-assessment roll prior to the January 15 lake-level special assessment hearing. (See Appell. Appx., Vol 1, p 488:13–25.)

Notwithstanding Appellants' jab that such notice took place "during the holiday season," (Appl., p 22), the Counties gave ***24 days*** prior notice (or more than twice what the ILLA requires). Moreover, as early as October 12, 2023, the FLTF held a webinar open to general public and all property owners in the FLSAD, and at that time, property owners were made aware that that a special assessment hearing in connection with the Lake Level Capital Project would be held in

January 2024 and were also provided updates as to estimated costs of the project and financing. (See https://www.four-lakes-taskforce-mi.com/uploads/1/2/3/1/123199575/october_12_2023_webinar_final.pdf.) (Appell. Appx. Vol 25, p 2650.) Less than two months later, on December 6, 2023, in another webinar again open to the general public and property owners in the FLSAD, property owners were again informed of the special assessment hearing process and specifically, that a special-assessment hearing would be held on January 15, 2024. (See https://www.four-lakes-taskforce-mi.com/uploads/1/2/3/1/123199575/december_6_webinar_slides.pdf p 21.) Indeed, the December 6 webinar comprehensively addressed the costs, benefit factors, and the legal process. Thus, contrary to Appellants' claims, information regarding the timing of the special assessment process was readily available, long before the actual notice of hearing was mailed and published. Only after these processes did the Gladwin and Midland County Board of Commissioners approve the projects costs and lake-level special-assessment rolls on February 6, 2024.

Finally, Appellants received a right to judicial review as provided for under both MCL 324.30714(4) and Michigan's Constitution. Const 1963, art 6, § 28. And they availed themselves of that—here. The idea that such processes are constitutionally deficient is devoid of any legal support. And Appellants effectively cite none, failing to identify any case indicating that such procedures are inadequate and conceding that—for most instances—there is no concern with the statutory procedures themselves. (Appl. for Leave, p 19.)

Accordingly, the circuit court rightly ruled that, in the Counties' following these procedures, "the Appellants were afforded all of the protections contained within the ILLA and affirmed by the Court of Appeals in *Chappel Dam*." (HCA Appx., Ex. A, p 6); *Chappel Dam*, 282 Mich App at 150–51. Not only so, but the circuit court properly recognized that the Counties went

above-and-beyond the statute to ensure fairness to affected property owners. As the court observed: "Appellees [the Counties] not only followed the procedures enacted by the legislature to protect the due process rights of Appellants, *but [the Counties] did more through the holding of public webinars, the creation of the virtual map for property owners to view, and posting notice of the hearing in more place than was required, i.e. on the websites for Midland County, Gladwin County, and FLTF.*" (HCA Appx., Ex. A, pp. 6–7) (emphasis added). In other words, the Counties not only satisfied what this Court has upheld as due-process compliant statutory procedures, but they also gave more "notice" and "hearing" than the minimum necessary. Any claim that the strictures of due process were not met is baseless.

3. Appellants' attack on the Counties' procedures is unsupported.

Notwithstanding the Counties' compliance, and recognizing that "*in ordinary circumstances*, the procedures set forth in the ILLA, and the procedures approved . . . in *Chappel Dam*" would be constitutionally sufficient, (Appl. for Leave, p. 19), Appellants claim "this case requires a more detailed process." (*Id*. at 20.) Effectively, they ask this Court to rewrite the ILLA's procedures. Cf. *Slis v State*, 332 Mich App 312, 336; 956 NW2d 569 (2020) ("[T]his Court may not rewrite the plain statutory language or substitute its own policy decisions for those decisions already made by the Legislature.") Why? They appear to rely on four reasons.

<u>*First*</u>, Appellants claim that because "construction began before the time to appeal the special assessments was final," the entire process described above was "mere formalities." (*Id*. at 21.) Not so. Importantly, Appellants cite no case law nor any legal standard in asking this Court to cast aside objectively valid and constitutionally compliant procedures as "mere formalities" based upon an unfounded assumption that such extensive procedures were a sham and that the Counties had no intention of altering any assessments as a result. That deficiency is dispositive.

Nat'l Waterworks, Inc, 275 Mich App at 265 (considering issues "waived" if insufficiently briefed and explaining that "[a] party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim."), citing *Mudge v Macomb Co,* 458 Mich 87, 104–105; 580 NW2d 845 (1998).

Even more, Appellants' bare assertion that FLTF engaged in a sham process is contrary to the entire administrative record. As noted above, the Counties made "over 780 adjustments" to the special-assessment roll through one-on-one virtual meetings *before* the January 15 lake-level special assessment hearing. (Appell. Appx. Vol 2, pp 493–676.) The Counties then accepted objections and evidence orally or in writing on another nearly 700 properties. (Appell. Appx. Vol 3–23, pp 778–2186.) That is far from a "mere formality."

Nor do they identify anything to the contrary. Further, Appellants' assumption that the Counties engaged in bond sales *before* the special-assessment roll's approval and finalization under MCL 324.30714 is simply that: an unfounded assumption. The Counties were required under grant funding subsidizing this project to make use of certain grant funds or lose them (which would result in a larger assessment to property owners). The Counties thus rationally and cautiously moved forward. But no bonds have been sold. Nor have "vested interests" been granted to third parties. Appellants are merely misinformed. And they cite no record basis for their arguments.

Second, Appellants claim that "the process afforded to Appellants . . . did not allow Appellants sufficient time to obtain further evidence of proportionality so they could challenge their assessments." (Appl., p 22.) Their claim is unfounded. Again, *Chappel Dam* blessed the statutory process under the ILLA. 282 Mich App at 150–51. That requires just 10 days' notice before the hearing. MCL 324.30714(2)(a). Yet FLTF and the Counties gave much more: *24 days' notice* of the public hearing *after* FLTF spent more than a month in webinars and virtual one-on-

one meetings with affected owners. (Appell. Appx. pp 454–60.) Appellants' bare assertion that this extended timeline was constitutionally insufficient lacks merit.

Third, Appellants appear to rely on the amount of this assessment to demand *more* than the statutory process. Appellants speculate that this is "the largest special assessment in Michigan history" without any effort at factual support. (Appl. p. 1.) Moreover, Appellants' attempt to aggrandize this assessment skips an important step: math. Yes, this lake-level project to restore and support the operations of four dams is a significant effort. But—after the State's taxpayer-funded contribution of approximately 45% of the needed Capital Improvement funds (and another nearly $60 million allocated to restoration efforts)—the remaining assessment is also spread over 8,170 properties. And the Capital Assessment is spread over 40 years.

So, when Appellants speak of an overall magnitude of the project's cost, they ignore the fact that an apple-to-apples comparison with other assessments would require comparing per-property impacts on an annual basis (and, for comparisons like *Chappel Dam*, applying over 15 years of inflation). Further, they misleadingly compare 40-year assessments to properties' "SEV" (state-equalized value), which represents approximately half of the property's true-market value. See, e.g., MCL 205.737(2) ("The property's state equalized value shall not exceed 50% of the true cash value of the property on the assessment date."). As just one example, Appellants mention Parcel ID 030-170-000-014-00 and compare an SEV of "$5,400" to a Capital Assessment of "$31,711.55." (Appl., p. 17.) But, more accurately, the unimproved properties' true-market value is around $11,000 and the *annual* assessment is approximately $1,800 based on the benefit derived from the restoration of lake access to that property. In other words, Appellants' "egregious to the naked eye" arguments are more appropriately understood as "egregious only to the intentionally

distorted review" when Appellants compare a less-than 50% property value to a 40-year assessment (*i.e.*, distorting the comparators by a relative factor of 80x).

Moreover, the attempt to require procedures beyond what the Legislature provided ignores a basic fact: the statute contemplates large projects as well as small ones. See, e.g., MCL 324.30712(1)(a)–(i). It is written as a one-size-fits-all prescription of process for *any* lake-level project approved by counties and their delegated authority. *In re Van Ettan Lake*, 149 Mich App at 526–27 ("the act essentially authorizes counties to make policy decisions as to the levels of their inland lakes, and build and finance dams as necessary to maintain the desired lake levels"). Thus, nothing about the numbers involved in this case suggest that the ILLA's presumptively valid procedures need to be rewritten by a court. *Bonner*, 495 Mich at 240.

<u>*Finally*</u>, Appellants incorrectly suggest they were deprived of "the right to present evidence regarding proportionality and benefit derived" and claim "Part 307 reserves that role for the circuit court." (Appl., p. 24.) They cite no statutory provision for this claim. To the contrary, MCL 324.30714(4) provides for an "appea[l]" to circuit court. See also MCL 324.30701(c) (defining "court" as "a circuit court"); and *Price v Gladwin Co*, unpublished per curiam opinion of the Court of Appeals, issued Jan 11, 2024 (Docket Nos 363327, 3633278, 363329, & 36330) (confirming same). Nothing in the statute says the circuit court is the venue for offering evidence. And *Chappel Dam* instead observes that such an appeal is governed by "court rules governing appeals from administrative agencies in contested cases." 282 Mich App at 145–46.

Regardless, Appellants submitted further, non-record evidence to the circuit court. (Appellee Appx. Vol 23, pp 2480–2532; Vol 25, pp 2533–2618; Vol 25, pp 2658–2684.) Indeed, both with their initial brief in March 2024 and with their reply in May 2024, Appellants attached numerous additional documents as purported factual support for their disproportionality claim and

attach on the Counties' benefits determination. (*Id*.) And, to the extent that they did so, the circuit court considered it. (HCA Appx., Ex. A, p. 10) (commenting that "Appellants have failed to present such evidence *either in the hearings before Appellees or to this Court on appeal* to overcome a rebuttable presumption for a valid special assessment apportionment."). Appellants thus may not now blame their failures on the circuit court. Nor is it fair to claim they did not have a chance to present evidence.

In short, the ILLA's constitutionally sufficient statutory procedures were followed. Even more process was given through FLTF's webinars, virtual one-on-one meetings, and more than twice the minimum heads-up under law. Appellants were even allowed to supplement the record but fell short. (HCA Appx., Ex. A, p. 11–12.) No special circumstance exists here that shows this extraordinary effort by FLTF and the Counties was inadequate. There is no error.

CONCLUSION AND RELIEF REQUESTED

The Counties meticulously followed the ILLA in approving the special-assessment roll, fairly apportioning the cost of this project among those who derive a benefit from it and carefully distinguishing in the types of benefits received. The special-assessment roll is supported by substantial evidence, and despite opportunities at both the hearing and circuit court to present contrary evidence, Appellants failed to overcome the presumption of validity in raising a proportionality challenge. Nor did the Counties violate due process as the FLTF went above-and-beyond the ILLA's constitutionally sufficient procedures to ensure that residents understood and could revise or object to their individual assessments.

There is no legal error in the circuit court's confirming the special-assessment roll, nor any basis for this Court to grant an application for leave to appeal. This Court should deny leave and affirm.

Respectfully submitted,

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