STATE OF MICHIGAN
IN THE SUPREME COURT

HERON COVE ASSOCIATION, et al.

Appellants,

v

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

Appellees.
/

Supreme Court No. 168165

COA No. 371649

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

Appellees, the Midland County Board of Commissioners, the Gladwin County Board of Commissioners, and the Four Lakes Task Force, do not contest the Appellants' statement of jurisdiction.

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 with real properties within the lake-level special-assessment district, a unanimous Court of Appeals affirmed the Midland circuit court's decision holding that the special-assessment roll against proportionality and due-process challenges. The questions presented are:

1. Should this Court grant leave to appeal to decide whether the Court of Appeals and the circuit court err in holding that Appellants failed to overcome the special assessments' presumption of validity and deciding that the Counties' apportionment was both authorized by law and supported by substantial evidence?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Appeals Answer: No.

   Trial court's answer: No.

2. Should this Court grant leave to appeal to decide whether the Court of Appeals and 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?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Court of Appeals Answer: No.

   Trial court's answer: No.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Am 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 AND REASONS FOR DENYING APPLICATION

Appellants' application seeks to radically modify the established procedures for maintaining normal inland lake levels and funding such improvements through lake-level special assessments under Part 307 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.30701 *et seq.* (hereinafter, "Part 307," "the Inland Lake Levels Act," or "the ILLA"). See *In re Project Cost & Special Assessment Roll for Chappell Dam*, 282 Mich App 142; 762 NW2d 192 (2009). In doing so, Appellants threaten to derail the Counties' longstanding efforts to rebuild four high-hazard dams and to 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").[1] Both the Court of Appeals and circuit court upheld the actions of Midland and Gladwin Counties and their Delegated Authority, the Four Lakes Task Force (collectively "Appellees") as authorized by law and, thus, upheld the special assessments.

Though Appellants—and *all* affected property owners—were afforded the opportunity to articulate their objections to the lake-level special assessments at a public hearing and to and present supporting documentation (and, later, on appeal), both the circuit court and the Court of Appeals correctly held that Appellants failed to present *any credible evidence* to rebut the "well-settled principle that municipal decisions regarding special assessments are presumed valid."

[1] Appellants offer a creative portrayal of the facts. Aside from their unsubstantiated claim that the assessment is the "largest single special assessment in Michigan history," it is false that property owners are being "compelled" to pay for the failure of "*public* infrastructure without regard to the benefits conferred on the public at large." (Appellants' App., p 3.) Before the dams' failure in May 2020, the dams were *privately* owned, operated, and maintained. They were not owned or operated by the State, the Counties, or any other public entity. As such, the artificial impoundments creating the Four Lakes were at a risk of loss under *private* ownership, and they were not "public infrastructure."

Kadzban v City of Grandville, 442 Mich 495 502; 502 NW2d 299 (1993) (Emphasis added). Appellants now seek leave to: (1) rehash the *factual* basis of the special-assessment rolls, having relied on just a few cherry-picked assessments from the 8,170 properties in the FLSAD and lobbing a broadside attack without any supporting evidence despite invoking an inherently individualized "proportionality" standard; and (2) challenge the constitutional sufficiency of the ILLA's procedures, which Michigan courts have already upheld. *In re Chappel Dam*, 282 Mich App at 150–51. This Court should deny Appellants' application.

First, special assessments are presumptively valid. 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 that presumption. Though lobbing a disproportionality attack that is inherently fact- and property-specific, Appellants relied on nothing more than generalized statements of the community benefits from the lakes (which were offset through $220.5 million in state-taxpayer funds that Appellants ignore) 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 . . . ." (Appell. Appx., Vol 25, p 2903.) Even now, Appellants offer nothing of substance to overcome that legal presumption. Rather, citing no Michigan precedent, Appellants suggest this Court should upend the 134-year-old presumption of validity for special assessments by requiring the Counties to demonstrate affirmatively the individual proportionality of nearly 8,000 assessments. Appellants' argument lacks merit.

Second, both the COA and circuit court upheld the ILLA's procedures as compliant with Due Process. *Id.* at 150–51. Nothing here changes that conclusion. Appellants do not identify legal or factual support for their claim that this entire process was a sham or "mere formalities"; to the

contrary, the Counties adjusted the assessments of ***over 780 properties*** where property owners provided justifying information. And there were properties in the FLSAD that were determined to have zero benefit based on the methodology utilized. The Counties also gave Appellants *more than twice* the statutorily required notice. 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 of their burden. Consistent with *In re Chappel Dam*, both the circuit court and COA held that Appellants were not entitled to a process that resembles a judicial trial or evidentiary hearing.

In short, there is no merit to Appellants' application. Both special-assessment rolls were presumed valid, and Appellants provided *zero* evidence to demonstrate its disproportionality as to any of the properties. Nor is there any reason this Court should ignore *In Re Chappell Dam* and write procedures not provided for in statute. This Court should deny Appellants' application.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS[2]

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 before 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 ownership and 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

[2] Appellants' Statement of Facts borrows from the Court of Appeal's opinion in *Krieger v Dep't of Environment, Great Lakes, and Energy*, __ Mich App __; __ NW3d __ (Docket No 359895) to provide "context." (Appellants' App, p 8) Importantly, "facts" lifted from *Krieger* have no weight here. As the Court of Appeals explained: "[O]ur appellate posture is a review of defendants' motion for summary disposition under MCR 2.116(C)(8). Therefore, when reciting contested facts, we accept the allegations in plaintiffs' complaints as true and construe those allegations in plaintiffs' favor." *Id*. at *1.

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 "Inland Lake Levels" of the Michigan Natural Resources and Environmental Protection Act

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 … that provide[s] the most benefit to the public; that best protect[s] the public health, safety, and welfare; that best[s] preserve the natural resources of the state; and that best preserve[s] and protect the value of property around the lake . . . ."). Part 307 "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 Van Ettan Lake*, 149 Mich App 517, 525–26; 386 NW2d 572 (1986).

To effectuate that control, Part 307 allows a county to petition the local circuit court and request it establish the appropriate (or normal) lake level for inland lakes in 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 there are costs associated with maintaining the court-ordered lake level, the Legislature sensibly determined 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 324.30701 *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 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. MCL 324.30711(1). And, if the revenues are insufficient to meet the computation costs as provided in Section 30712, the "special assessment district be reassessed without hearing using the same apportioned percentage used for the original assessment." MCL 324.30711(2). Lake-level special assessments (like assessments under the 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. MCL 324.30711(1).

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 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 Ass'n v Oceana Co 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). (Ex. B.)

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

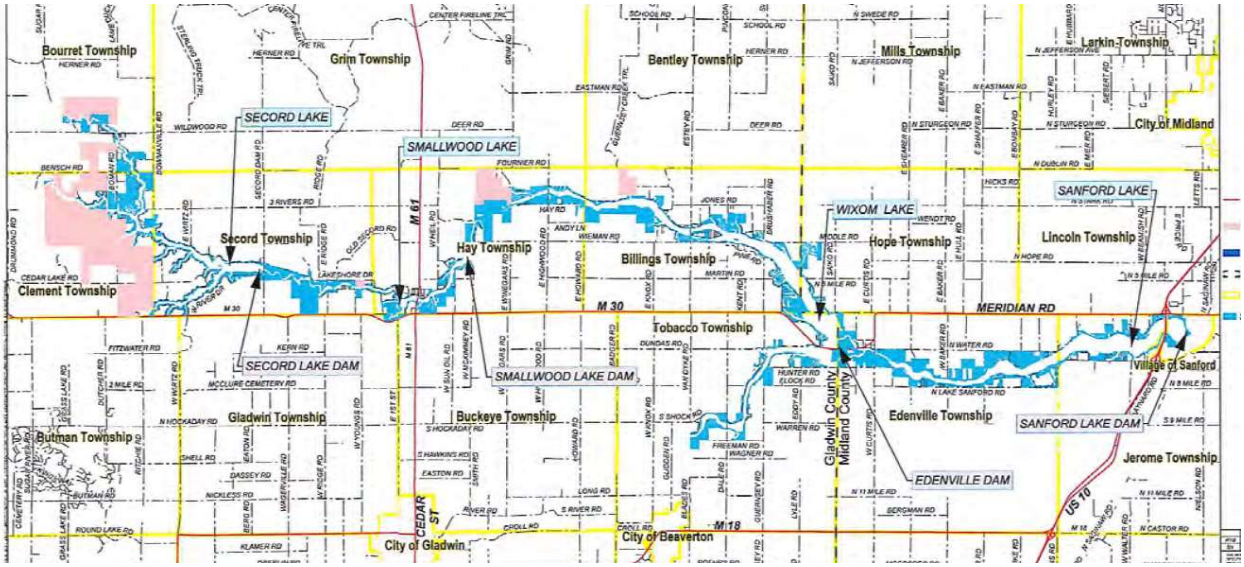
In 2018, the Counties adopted resolutions in accordance with Part 307 finding that in "order to protect the public's health, safety and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lakes" that it was necessary to establish the normal (or legal) lake levels for all Four Lakes. (Appellee's [Apell.] Appx., Vol. 1, p 5; Vol. 1, p 12; County Resolutions.) 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). (Memo., 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, bottomlands and flowage rights 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, Amend. 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, and also needed upgrades. (Appell. Appx., Vol. 2, pp 365–66, EGLE letter dated June 30, 2021.) Thousands of homes, properties, businesses and public infrastructure were damaged or destroyed by this catastrophic flood event. The region was declared a national disaster.[3]

In the days after the disaster, a strategy was needed to address the immediate recovery efforts and coordinate with government agencies. 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.)

[3] 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, Feb. 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 grants 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 impliedly surrendering its prior federal licensing of the Secord, Smallwood, and Sanford dams, regulatory jurisdiction over those dams defaulted to the State of Michigan. (Appell. Appx., Vol. 2, p 403) (in the same way the Edenville Dam (Wixom Lake) had when FERC 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. [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.)[4]

[4] Appellants' application ignores that there were two separate special-assessment rolls appealed: (1) the five-year lake-level O&M special-assessment roll and (2) the lake-level capital improvement special-assessment roll. The O&M roll (which was not subsidized with state grant funding), apportions nearly 10% of the O&M costs to municipal corporations related for their at-

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, FLTF was 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 cost of the Project.[5] While there can be other funding sources, the revenue derived from special assessments to waterfront and backlot properties in the FLSAD is the *primary* funding source to restore and maintain the lake and lake-level structures. (Appell. Appx., Vol. 2, pp 444–45.)[6]

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

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large benefit. Appellants have never addressed this nor ever presented any claims as to why the O&M roll is invalid. For that reason alone, their appeal of the O&M roll should be rejected.

[5] Appellants assert this is "simply untrue." (Appellants' Br., p. 43.) Their claim belies their conflation of the term "*apportioning* cost" with the lake-level assessment itself. "Apportioning" is the method of "dividing" or "sharing" costs. *Merram-Webster.com* <https://www.merriam-webster.com/dictionary/apportion> (accessed Feb. 27, 2025) To get to a lake-level assessment, the delegated authority must first compute the *total* "project costs" per MCL 324.30712. Then the delegated authority uses an "apportionment methodology" to ensure 100% of the assessed costs are "divided" and "shared" per the ILLA.

[6] Appellants' recitations of facts under "Shifting Objectives and Rising Costs" is misleading. (Appl., p. 11–12.) First, contrary to Appellants' claim that FLTF received "$200M for restoration and recovery efforts" *in 2020*, the State did not appropriate funds until 2022. 2022 PA 53. (Appell. Appx., Vol. 2, pp 369–392.) Likewise, Appellants claim that "costs ballooned" is inaccurate. After the 2020 dam failures, cost estimates were provided in public meetings using the information known at that time. But until the Project went out to construction bids, the actual costs could not be known.

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 special assessment 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.[7] This methodology was used for the 2022–2024 operations and maintenance lake-level special assessment (currently be assessed to landowners), which went through and extensive process of review as well. And the 2022–2024 operation and maintenance lake-level special assessment, along with an estimated Capital Project Cost was approved in 2022. (*Id.*) In 2023, the special-assessment methodology was revised reflecting changes due to an increased 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.)

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

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 *dedicated deeded access* to the lakes. Subdivisions or private properties with "public road" access ending at a lakeshore, would either receive a "zero" benefit or would have been excluded from the FLSAD boundaries by court order.[8] The apportionment methodology used the following benefit factors estimate the benefits to property owners:[9]

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, 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,

[8] Appellants seem to claim there was a massive error with the special assessment, pointing to a subdivision plat in a "peninsula in Billings Township, Gladwin County" where the properties received a $0 assessment. (Appells.' App., p. 16.) Appellee reviewed this plat and determined the roads ending at the lake were public roads (not deeded access). Consistent with prior lake improvements assessment rolls established under Part 307, these properties were determined not to receive a benefit derived from the lake. Nonetheless, Appellants proffered this argument for the first time in the Court of Appeals and never raised it in their inital appeal.

[9] 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.)

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 then takes into consideration that not all backlots provide the same quality of access. Research determined there were three primary lake access "types" that exist within the Four Lakes system. Those include: (1) non-developed/unmaintained access where the subdivision allows 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 the assessment is proportional to the benefits derived. 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, but the derived benefit from improvements needed impound rivers creating the Four Lakes. SEV or market value information would actually 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 needed to restore the 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 54% of the project costs** (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 **46% cost** (or $181,175,000) is being subsidized primarily by public funds received from the State. The lake-level capital special assessments are spread over annual installments for up to 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 landowners and the remaining 9.86% of the cost to public corporations and the Michigan Department of Natural Resources (in connection with state-owned lands). (*Id.*, at Vol. 24, p 2234.) The 9.86% apportionment referenced, represents the at-large benefit conferred on the public.

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 water 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 and costs required for operation and maintenance ("O&M").[10] FLTF also created a "virtual map"—posted online—illustrating the estimated capital and O&M lake-level special

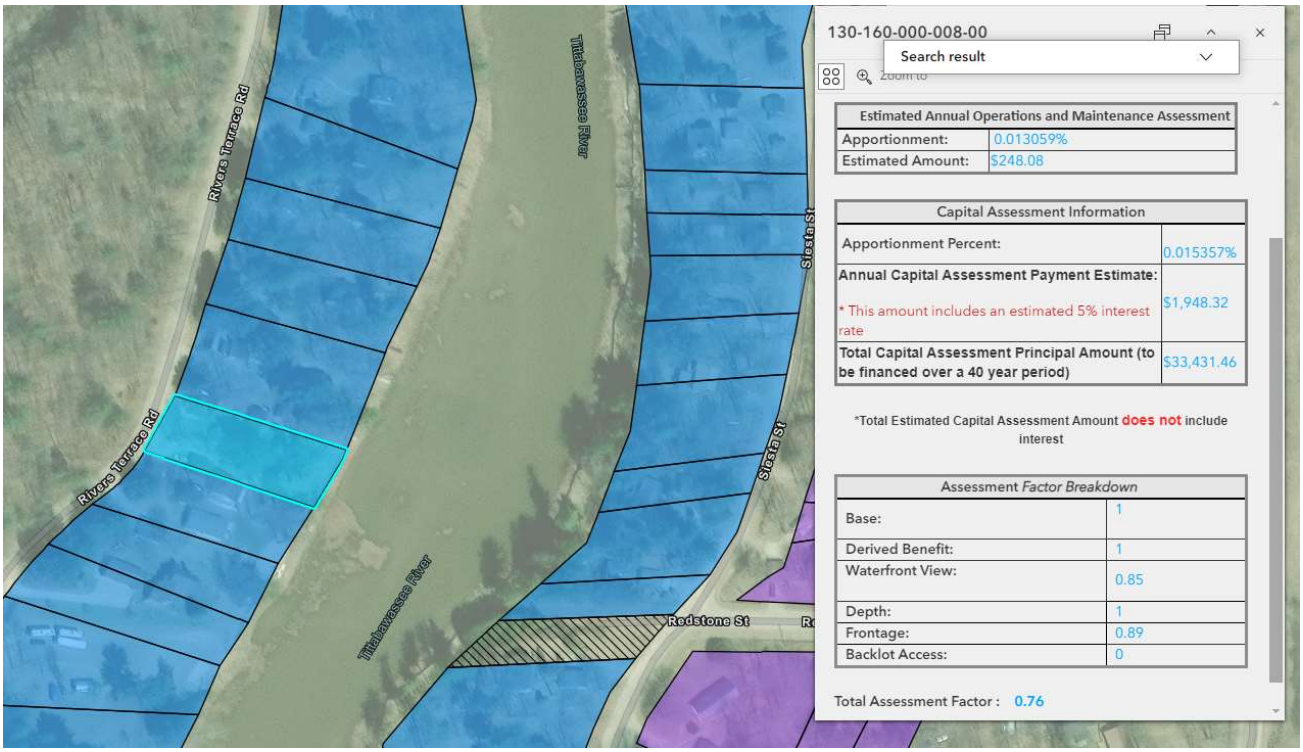
[10] See https://www.four-lakes-taskforce-mi.com/events.html, December 6, 2023, 5:00–7:00 p.m. | Day of Review Process | Webinar | PowerPoint"

assessments to each individual parcel in the FLSAD.[11] (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.*) Moreover, 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 was non-developed or not maintained; (3) minor access (*e.g.*, walkways and paths 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.

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

An example of 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.[12]

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,

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

which includes the notice requirements of Public Act 162. (See Appell. Appx., Vol. 2, pp 457–58.).[13] The notice was mailed to each property owner and published twice in both the *Midland Daily News* and *Gladwin County Record*. (*Id.*; Appell. Appx., Vol. 2, pp 459–60.) The Notice was also posted at both Midland County website on December 22, 2023, and on the Gladwin County website on January 5, 2024.[14] The notice provided that, 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 "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 for the 5-year O&M lake-level special-assessment roll and 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, 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, over 780 properties had adjustments before the hearing after providing information and discussing it with FLTF's consultant. (*Id*. at 20:16–18.) FLTF then opened the hearing to receive objections and comments from property owners in 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

[13]Appellants only quoted a portion of the Notice. (Appell. Br., p. 17.) The full notice is in the record. (Appell. Appx., Vol. 2, pp 457–58.)

[14] Appellants incorrectly assert this posting was "one day before the public hearing," (Appell. App., p. 16), but the public hearing was held on January 15, 2024.

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 both special-assessment rolls in a joint meeting of the Counties' respective boards of commissioners. (Appell. Appx., Vol. 2, pp 403–53; Vol. 24, pp 2187–89; pp 2196–2207; 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 the circuit court. Aside from HCA, the caption listed 992 names of purported property owners in the FLSAD, representing about 685 properties. FLTF determined that only about 248 properties of those formally objected to their assessments. (Appell. Appx., Vol. 25, pp 2619–28.) The remaining 437 properties neither timely objected nor submitted written objections. (*Id*.) And, even among those that objected, these property owners did not submit any evidence to support their objections. Thus, the Counties and FLTF responded in part that many Appellants lacked standing to appeal either due to their lack of objection or lack of property in the FLSAD. The Counties contested Heron Cove's standing as well.

After briefing and argument, the circuit court upheld the special-assessment rolls in total on June 20, 2024. The circuit court rejected the Counties' standing arguments. (Appellee Appx., Vol. 25, pp 2892–2904) The court held that Heron Cove has standing "so long as an individual member does as well." (*Id*. at 2895.) The court also rejected the Appellants assertion that a property owner needed to object at the public hearing to preserve the right to appeal. (*Id*. at 2904.) But the court acknowledged that persons not owning property in the FLSAD had no standing to appeal. (*Id*. at 2894)[15]

On the merits, the court rejected Appellants' due-process claim. (*Id*. at 5–7.) The court explained: "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 due-process violation occurred. (*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*

[15] At the circuit court hearing, opposing counsel promised to review and clean up the Appellants' list of named appellant-property owners by limiting the appeal *only* to those individuals who actually own property in the FLSAD. (Appell. Appx., Vol. 25, 2632:18–22.) Appellants similarly acknowledged in the COA that individuals dropped from the litigation but remain on the caption. (Appell.'s Br., p. 1, fn. 1.) No action has been taken to correct the record.

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 …." (*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, noting the presumption in favor of a special assessment's validity. (*Id*. at 8–11.) And the court held there was no evidence of an unreasonably disproportionality between the amounts assessed and the value of benefits derived from the improvements. (Appell. Appx., Vol 25, pp 2901–02.) Rather, it noted: "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 circuit court noted that a "close examination of these select properties" did not support Appellants' disproportionality claim" and "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, it concluded 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 rolls in whole. (*Id*. at 13.)

H. Court of Appeals.

Appellants timely appealed to the COA. The COA granted Appellees' motion to expedite. Following briefing and oral argument, the COA affirmed. (Appellee Appx., Op and Order, pp 2919–2926.) It first noted that the standard of review was limited and the "underlying special assessment decisions … were made following public hearings" and "not adversarial hearings akin to judicial

proceedings." (Appell. Appx., Vol 26, p 2922.) The COA noted that, because ILLA allows the delegated authority to approve the costs of the project or special-assessment roll at or after a public hearing and because the ILLA does not require the agency to conduct a contested case hearing, its judicial review was limited to whether the "action of the agency was authorized by law." (*Id*. at 2922, c*iting, Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013).) And an agency's action is "not authorized by law if it violates a statute or constitution, exceeded the agency's statutory authority or jurisdiction, materially prejudiced a party as a result of unlawful process, or was arbitrary and capricious.'" *Id.*

On the merits, the COA rejected Appellants' claim that the special assessments were "per se invalid" because Appellee's methodology did not consider the public benefits of the improvements or to ensure that the required proportionality was achieved. Applying *Kadzban* and it observed that Appellants "misinterpret[ed] the presumption of validity that is inherent in municipal special assessments decisions, as detailed in *Kadzban*" and noted that it was Appellants' burden "to provide credible evidence that effectively challenges this presumption prior to the evidentiary burden shifting to appellee." (Appx. 2924, citing *Kadzban,* 442 Mich at 502 ("Municipal decisions regarding special assessments are presumed valid"); *Dixon Road*, 426 Mich at 406; see also *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 335; 802 NW2d 353 (2010)). Accordingly, the COA affirmed that "[t]he trial court correctly held that appellants failed to demonstrate an unreasonable disproportionality between the amounts of their assessments in comparison to the benefits derived to overcome the rebuttable presumption in favor of validity . . . ." (Appx. pp 2921-24.)

Next, the COA rejected Appellants' procedural due-process claim, noting it was addressed *In re Chappell Dam*, which held that ILLA did not require a full trial but is nonetheless due-process compliant. (Appx. p 2925). The COA pointed out that property owners were allowed public

comment and engagement beginning in 2022 and "culminating in a public hearing on January 15, 2024 during which property owner were afforded the opportunity to articulate their objections to the special assessment and present supporting documentation." (*Id*.) Moreover, it noted that a "minimum of 780 adjustment were made to the special-assessment roll based on public input, reflecting the benefits by individual properties." (*Id.*) And it reiterated that Appellants "were not entitled to a process that closely resembles a judicial trial or a comprehensive hearing." (*Id*.) Accordingly, the Court affirmed.

STANDARD OF REVIEW

Administrative agencies' decisions not arising from contested cases are subject to review to under an "authorized by law" standard. Const 1963, art 6, § 28."When the agency's governing statute does not require [a contested-case hearing], the circuit court *may not review the evidentiary support underlying the agency's determination*." *Natural Resources Defense Council*, 300 Mich App at 87. Instead, "[j]udicial review is 'limited . . . to [determining] whether the action . . . was authorized by law." *Ross v Blue Care Network of Mich,* 480 Mich 153, 164; 747 NW2d 828 (2008). Here, the COA determined no evidentiary "hearing" occurred. (Appx. 2924–2926.)[16] Thus, the "substantial evidence" standard is inapplicable. *Natural Resources Defense Council*, 300 Mich App at 84–87.

Appellants incorrectly argue that the substantial evidence standard applies. Yet even if applied, the "substantial evidence" standard is highly deferential. *Vanzandt v State Employees'*

[16] Appellants suggest the Counties conceded the substantial evidence standard applied. But they misread the transcript. Appellees only acknowledged the "article 6, Section 28 standard" applied, (Hrng. Trans., 42:18–22), while still expressly questioning the applicability of the substantial evidence standard. (*Id*., 43:7–11) ("Secondly, *assuming the substantial [evidence] review standard applies*, Appellees did everything that they needed to do . . . .").

Retirement Sys, 266 Mich App 579, 588; 701 NW2d 214 (2005) ("Such review must be undertaken with considerable sensitivity [so] 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 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).

ARGUMENT

I. Neither the circuit court nor the COA erred in holding Appellants failed to meet their burden to rebut the presumption that the special-assessment rolls are valid.

The lower courts did not err in affirming the lake-level special-assessment rolls and holding Appellants failed to overcome the legal presumption of validity. Appellants present no real argument to the contrary. Instead, they seek to flip the presumption of validity upside down, demanding the Counties justify the proportionality of each of more than 8,000 individual assessments. The law requires the opposite: a challenging Appellant must demonstrate the special assessment was disproportional. Because they failed to do so, the lower courts properly upheld the assessment rolls. This Court should deny Appellants' application.

A. There was no legal error in the Appellees' apportionment methodology, which followed the ILLA, and was thus "authorized by law."

Appellees 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 amounting to nearly 46% of the Lake-Level Capital Project—among those who benefit

most from the existence of the lakes: homeowners with lakefront or lake-access properties.[17] The lower courts were right to uphold the validity of the assessments as "authorized by law." Const 1963, art 6, § 28.

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 special assessments to be apportioned per the benefits each parcel derives. MCL 280.152; see also MCL 280.151 & MCL 280.262.

It is well settled that municipal decisions regarding special assessments are **presumed 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 City of*

[17] Appellants state "***100%*** of the *unfunded* cost" has been placed on homeowners. (See Appell. Application., p 5) (emphasis added), suggesting the special-assessment district members bear the full burden for construction and improvement of the dams. This ignores that: (1) nearly 46% of the project was funded by state taxpayers; and (2) Part 307 allows the *whole* project cost to be placed on SAD members. See MCL 324.30711(1).

Royal Oak, 362 Mich 503, 514–16; 108 NW2d 16 (1961). Indeed, since at least 1890, the Michigan Supreme Court has said:

> It is not for this court to set its judgment up in opposition to that of the board of commissioners and the council, and to say that this parcel of land or that is assessed too much or too little. The assessments were to be made according to benefits to each parcel of property, and there is nothing in the record showing that the commissioners did not assess the complainant's lands in accordance with their best judgment.
>
> [*Brown v City of Grand Rapids*, 83 Mich 101, 109; 47 NW 117 (1890); see also *In re Eight and One-Half Mile Relief Drain*, 369 Mich at 649.]

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 at most can only be estimated 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." *Lansing Charter Twp 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. (Ex. D.) "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; 27 S Ct 326 (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) There, landowners contended the drain assessment against their property was unlawful. *Id.*, Slip op. at 1. They claimed 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*. [*Id.* at 1–2 (emphasis added).]

Because the "making, levying, and collection of special assessments" 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 is afforded the same "great deference" given to drain commissioners in apportioning he Lake-Level Capital special-assessment and O&M lake-level special-assessment costs. There was no legal error in the Counties' methodology.

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

Nor did the lower courts err in holding that Appellants failed to rebut the presumption of validity. The assessed properties are those within the SAD—or those which, by law, are acknowledged to benefit from the lakes. See MCL 324.30711(1) (allowing lake-level project costs to be offset by "the following *that are benefitted by the project*") (emphasis added); MCL 324.30701(h) (defining "normal level" as "the level or levels . . . that best preserve[s] and protect[s] *the value of property around the lake*") (emphasis added). The record demonstrates that FLTF exercised its best judgement in preparing the special-assessment rolls, which fairly (*i.e.*, not arbitrarily) 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. But that is not the measure. As indicated by the COA:

> Common sense dictates that … to determine whether the market value of an assessed property has been increased as a *result of* an improvement, the relevant comparison is not between the market value of the assessed property *after* the improvement and the market value of the assessed property *before* the improvement, but rather it is between the market value of the assessed property with the improvement and the market value of the assessed property *without* the improvement. [*Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 496; 597 NW2d 858 (1999); see also *Michigan's Adventure*, 290 Mich App at 335.]

Here, the FLTF appropriately apportioned the costs of the Lake Level Capital Project and the O&M according to the benefits each parcel derived and did not act arbitrarily. 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 public hearing held on 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 provide for assessments based on the parcels' associated derived 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 put a proportionately higher assessment on properties with higher-quality access and greater water frontage 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 that a property owner north of the northernmost dam does not likely benefit at all from the reconstruction of the southernmost dam. (Appl., p 45). Setting aside that no persons or entities appealing ever bothered to present any evidence to support those claims, these arguments are merely an attempt to second-guess the comprehensive process implemented by FLTF to arrive at 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 the property. A parcel with more

lakefront property obviously derives more benefit from the lake than someone who does not have lakefront property (or 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, the FLTF 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. In circuit court, 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' Cir. Ct. Br., pp. 16–17.) The court rightly rejected this effort, saying: "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 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 will not factor into 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 identifies Parcel Identification No. 110-230-000-006-00 owned by named Appellants, Robert and Karen Price. (Appellants' App p 46.) It is true that Parcel Identification No. 110-230-000-006-00 is currently vacant and is on a tributary of the Tittabawassee River. But, contrary HCA's claims, this property *is* waterfront and the apportionment takes into consideration the poor quality of water access. Appellants' reliance on the SEV to suggest that the special assessment is unlawful is similarly misleading. As previously noted, a property's value is influenced by many factors, including property-owner decisions. For Price, they own several lots in 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 Price's 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 2509–2532).

To illustrate, Price's properties are depicted below, pre-2018 as compared today:

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

(Google Earth, 9/2021)

Additionally, analysis of the 12 parcels Appellants cited in the circuit court shows how using SEV is immaterial to the derived benefit. (Appell. Appx., Vol. 25, pp 2633–34.) The value of one's land is influenced by the landowners' decisions, and 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, SEV data is an unreliable determinant of the lake's added value.

Beyond that, even assuming Appellants' reliance on a few, cherry-picked parcels could demonstrate disproportionality for *some* parcels (*i.e.*, those 12 parcels), it would have no bearing on the roughly 400 properties involved here. As the U.S. District Court aptly pointed out in a related inverse-condemnation proceeding filed by Heron Cove and other Appellants (raising 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 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 their 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 the lakes' recovery (*i.e.*, debris removal, shoreline restoration) too. (Appell. Appx., Vol. 2, p 405.) Some of those funds were allocated to work 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 almost 46%***.

Appellants have offered nothing to quantify any benefit to the broader economy or local governments 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.*)

Appellants further ignore or distort the importance of the $200,000,000 in state grant funding and its reduction of property owners' burden, and how those funds address benefit of the public at large. There was and remains no need for a general *ad valorem* tax across each of the counties nor by any other local government that is within the FLSAD to address the benefit of region at large when nearly 46% of the cost of the Project was paid for by taxpayer subsidies from the State. Thus, contrary to Appellants' contentions, the Counties apportionment methodology and both rolls account for the benefits derived by the public at-large and individual property owners. The circuit court did not err in rejecting this critique.

3. There is no basis to flip the presumption of validity and the burden of challenging the special assessment onto the Counties.

Ultimately, Appellants' argument is just an attempt to remove the 134-year old presumption of validity for special assessments, *Kadzban*, 442 Mich at 502; *In re Eight and One-Half Mile Relief Drain*, 369 Mich at 649; *Crampton*, 362 Mich at 514–16; *Brown*, 83 Mich at 109, and thereby to flip the legal burden from one requiring challengers to prove *disproportionality* to one requiring the municipalities to prove *proportionality*. No binding caselaw supports this rule.

Instead, Appellants cite Justices Riley's suggestion in her concurrence in *Kadzaban* that a qualification be placed on that longstanding presumption. 442 Mich at 511 (Riley, J. concurring). That concurrence is not binding. *Tennine Corp v Boardwalk Commercial, LLC*, 315 Mich App 1, 22 n 6; 888 NW2d 267 (2016) (observing that "reliance on a concurring opinion is inappropriate because decisions in which a majority of the participating justices do not agree with the reasoning are not binding interpretations.") Nor is Justice Riley's qualification the state of the law. *Kadzban*, 442 Mich at 502. Moreover, notwithstanding her suggested qualification, Justice Riley agreed that: "*municipalities should enjoy a presumption of validity* and dollar-for-dollar benefits assessed landowners is not required." *Kadzaban*, 442 Mich at 511 (Riley, J. concurring) (emphasis added). In other words, not even Justice Riley agrees with Appellants' efforts flip the burden of demonstrating proportionality onto municipalities.

There is thus no legal support for Appellants' claim that the Counties were required to establish proportionality for each of 8,000 properties at the time of assessment or that the Circuit Court (or COA) erred in failing to require them to do so on review. (Appell.'s COA Br., p 37.) This Court should deny application.

4. Those Appellants who failed to appeal to the Counties are unable to challenge their special assessments now before this Court.

Finally, because each assessment stands on its own merits, Michigan courts have long recognized that a party who never appeared before the assessing authority to request an adjustment cannot then appeal to the courts. Thus, at a minimum, those assessments must be upheld.

Specifically, in *Brown v City of Grand Rapids*, the Michigan Supreme Court rejected consideration of the merits of a challenge to an assessment when the claimant "did not appear"

and "does not pretend that he made any effort to have the assessment corrected before the [city] council." *Brown*, 83 Mich at 109. The Court explained:

> Where provision is made by law for a review of assessment proceedings, and a body appointed with the power to set the assessment aside, or correct the error complained of, and the party wholly fails to appear before such body, or take any steps to have such correction made, he is not in a position to appeal to the courts for redress in the absence of fraud or bad faith. [*Id*. at 109–10.]

The Court has reaffirmed that principle several times since then. See, e.g., *Gates v City of Grand Rapids*, 134 Mich 96, 99; 95 NW 998 (1903) (observing "[t]he law does not permit parties to stand by in silence" and thereafter "appeal to the courts to set [assessments] aside"); see also *Lowrie & Robinson Lumber Co v City of Detroit*, 237 Mich 138, 142; 211 NW 55 (1926); *Campbell v City of Plymouth*, 293 Mich 84, 89–90 (1940).

Applied here, many of the Appellants never even bothered to protest their special assessment in front of either the FLTF hearing or the Counties.[18] Though this fact did not serve as the basis for the circuit court's or COA's affirmance of the special-assessment rolls, it is another reason to denying Appellants' application. See, e.g., *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) (affirming judgments rightly reached "albeit for the wrong reason.").

II. The Court of Appeals did not err in holding that the procedures in the ILLA for an appeal of a special-assessment roll as satisfying due process. And the Appellees gave Appellants all required statutory process—and more.

Appellants' due-process claim also lacks merit. Not only did the Appellees provide all statutorily required procedures (which *In re Chappell Dam* and the COA here affirmed as constitutionally sufficient), but their efforts went beyond what was required. Nor is there any cause

[18] During the circuit-court appeal, the Counties identified 437 persons who never bothered to object to their lake-level special assessment or appear at the hearing.

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 merely requires 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 lower 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 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. There is no due-process violation.

1. The ILLA procedures were previously upheld by the Court of Appeals as compliant with due process.

The ILLA's procedures satisfy the basic due-process minimums. 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.

The Court of Appeals in *In re Chappel Dam* previously blessed the ILLA's statutory procedures as due-process compliant. There, property owners lodged a due-process attack identical to the one made here. 282 Mich App 150–51. The court rejected it. *Id*. at 151. Rather, it 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 COA 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 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.* at https://www.four-lakes-taskforce-mi.com/.) Additionally, from 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 meetings, and through email or written correspondence, landowners could provide additional information and have their parcel reviewed in connection with the apportionment factors 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) (emphasis added).

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.) 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—their appeal to the COA. 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.

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 *In re Chappell Dam* upheld as due-process compliant statutory procedures, but they also gave even more "notice" and a greater "hearing."

The COA similarly pointed out the opportunities afforded to property owners for public commentary and engagement beginning in 2022, and "culminating in a public hearing on January 15, 2024 during which property owner were afforded the opportunity to articulate their objections to the special assessment and present supporting documentation." (*Id*.) Moreover, it noted that the record on appeal demonstrated that a "minimum of 780 adjustment were made to the special assessment roll based on public input, reflecting the benefits by individual properties." (*Id.*) Accordingly, it reiterated that Appellants "were not entitled to a process that closely resembles a judicial trial or a comprehensive hearing." (*Id*.) Appellants' due-process argument is baseless.

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

Appellants submit "this case requires a more detailed process" than what as set forth in the ILLA and *In Re Chappel Dam*. (Appell. Application., p. 50.) 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.

First, Appellants assert the lake-level capital assessments are "more than 100 times the monetary amount of the assessment in Chappel dam, thousands of more properties are involved and there are no at-large assessment to the Counties or local units." (Appellants' App, p. 50.) And they claim that because "construction began before the time to appeal the special assessments was final," the entire process described above was "mere formalities." (Appellants' App., pp. 50–51.) 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 v Int'l Fidelity*, 275 Mich App at 256; 739 NW2d 121 (issues are "waived" if insufficiently briefed and "[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, 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."

Second, Appellants claim "the process afforded … did not allow Appellants sufficient time to obtain further evidence of proportionality so they could challenge their assessments." (Appellant App., p 51.) Their claim is unfounded. Again, *Chappel Dam* approved the ILLA's prescribed process. 282 Mich App at 150–51. That requires just 10 days' notice. 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.) The Counties also did not approve the roll until after the February 6, 2024 hearing (another 22 days later). (Appell. Appx., Vol. 2, pp 403–53.) And Appellants were on notice of the coming assessment since at least early December when virtual meetings were offered—and, realistically, for a long time before then as the circuit court pointed out. (Hrng. Trans., 20:24–21:6.) Appellants had plenty of time to obtain appraisals or other evidence to support their "disproportionality" arguments. They failed to do so. Appellants also argue that the "notice of public hearing did not state that a protest required and appraisal." (Appellant App., p 52.). Appellants cite no authority for a government entity to tell appealing individuals how to support their claims. This claim lacks merit.

Third, Appellants appear to rely on the amount of this assessment to demand *more* than the statutory process. Appellants speculate this is "the largest special assessment in Michigan history" without any effort at factual support for this assertion. (Appellants' App., p. 3.) 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 subsidies of approximately 46% of the needed Capital Improvement funds (and another

nearly $60 million allocated from grants and donations to recovery and pre-construction efforts)—the remaining assessment is also spread over 8,170 properties—some of which have zero assessments. And the Capital Assessment is spread over 40 years.

Moreover, Appellants' 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 ("[T]he 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 here suggests the ILLA's presumptively valid procedures need to be rewritten. *Bonner*, 495 Mich at 240.

Finally, Appellants incorrectly suggest they should be "afforded the right to present evidence to and independent factfinder regarding proportionality and benefit derived." (Appellants' App., p. 55.). Before the COA, Appellants presented no statutory provision for this claim. Appellants now point to the process before the Michigan Tax Tribunal and the Drain Code for the first time in their Application. (*Id.*). But MCL 324.30714(4) provides for an "appea[l]" to the circuit court. See also MCL 324.30701(c) (defining "court" as "a circuit court"); *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) (Ex. C). Nothing in the statute says the circuit court is a 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 their May 2024 reply, Appellants attached numerous additional documents as purported factual support for their disproportionality claim and the Counties' benefits determination. (*Id*.) 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. Accordingly, even though they now ask this Court to remand for "an evidentiary hearing" or other, unspecified "further proceedings," (Appell. Br., p. 46), Appellants made *no showing* to the circuit court or in the COA, months later that the further proceedings they demand would bear fruit.

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 they fell short. (HCA Appx., Ex. A, p. 11–12.) No special circumstances exist 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 rolls, 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 authorized by law, and supported by substantial evidence, and—despite opportunities at both the hearing and circuit

court to present contrary evidence, appellate review—Appellants failed to overcome the presumption of validity in raising a proportionality challenge. There is no legal basis for flipping that presumption onto the Appellees. Nor did the Appellees 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 lower courts in connection with the conformation of confirming the lake level special-assessment rolls. This matter requires finality so the Counties can proceed with the financing and construction of the Project. This Court should deny Appellants' Application for Leave to Appeal.

Respectfully submitted,

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WORD COUNT CERTIFICATION

This document complies with the word volume limitation under MCR 7.212(B)(1). Excluding the parts of the document exempted, this brief contains no more than 16,000 words. This document contains 15,920 words according to the word-processing system used to produce this document.

Respectfully submitted,

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EXHIBIT A

2005 WL 1877778
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Gary L KING, Marla K. King, Robert W. King and Monica M. King, Plaintiffs-Appellants,
v.
Alan F. BUTCHBAKER, Cass County Drain Commissioner, Defendant-Appellant.

No. 254912.
|
Aug. 9, 2005.

Before: MURPHY, P.J., and SAWYER and DONOFRIO, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiffs appeal as of right the circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). This case arises out of a special assessment for the cost of constructing a drain located in the area of Hilltop Road in Cass County (Hilltop Road Drain). The drain project was proposed because water running down from higher elevations, i.e., various parcels owned by plaintiffs, had occasionally caused a roadway to be washed out and had caused the saturation of lower-elevated parcels. The drain would divert rainwater to a nearby lake in such a manner as to alleviate the past drainage problems. Defendant's apportionment of the costs involved in undertaking and completing the project, which costs totaled approximately $84,000, resulted in plaintiffs' property being assessed a little over $17,000, with the remainder of the costs being allocated to the township, the county, and other residents of the township. Plaintiffs' position was and is that, under the principle of benefits derived relative to assessing or apportioning the cost of a drain project, their property would receive no benefit from the construction as necessarily and solely reflected by changes in the market value of the property and that the method used by defendant 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. Therefore, the assessment was unlawful. Plaintiffs also assert that they were entitled to an evidentiary hearing at the circuit court level on the issue of apportionment of costs and benefits pursuant to their complaint for superintending control and applicable law, making summary dismissal improper. A three-member board of review appointed by the probate court upheld the assessment issued by defendant drain commissioner, and the circuit court upheld the ruling of the board of review. We affirm.

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. *Blades v. Genesee Co Drain Dist No 2,* 375 Mich. 683, 695; 135 NW2d 420 (1965). We have no quarrel with plaintiffs' argument that the principle of benefits derived must guide a drain commissioner's apportionment and assessment determinations.

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. Additionally, when the action was presented to the circuit court under MCL 280.161 (certiorari-now superintending control), plaintiffs failed to present documentary evidence regarding market values or benefits derived in the face of a motion for summary disposition brought pursuant to MCR 2.116(C)(10). See MCR 2.116(G)(4)(adverse party to (C)(10) motion may not rest upon allegations in the pleadings but must present documentary evidence establishing a genuine issue of material fact). Plaintiffs contend that such evidence was unnecessary because relevant evidence was to be submitted via a mandatory evidentiary hearing under MCL 280.161, which provides in pertinent part that, "[i]f issues of fact are raised by the petition for such writ and the return thereto, such issues shall, on application of either party, be framed and testimony thereon taken under the direction of the court."

Plaintiffs argue that the complaint for superintending control raised issues of fact and thereby gave rise to their right for an evidentiary hearing under MCL 280.161.

***2** Assuming that the circuit court had the authority to address plaintiffs' specific arguments on appeal from the board of review and that the above-quoted language from MCL 280.161 eradicated the general principles governing summary disposition, a review of the complaint reflects that issues of fact were not sufficiently raised. The complaint, while asserting that there must be an increase in market value to support a finding that property will receive a benefit consistent with the assessment, does not reference or speak of any market appraisal that was actually undertaken and which could have created a factual dispute had an appraisal been inconsistent with defendant's assessment as derived from his mathematical formula. Outside the context of market values, the complaint does not set forth reasons with respect to why plaintiffs' property received no benefit.

To effectively challenge a special assessment, a plaintiff must present credible evidence to rebut the presumption that the assessment is valid and reasonably proportionate to the benefits received. *Kadzban v. City of Grandville,* 442 Mich. 495, 505, 508; 502 NW2d 299 (1993)(Griffin, J.)(Boyle, J.). The decisions of officers regarding special assessments are presumed to be valid and should generally be upheld. *Ahearn v. Bloomfield Charter Twp,* 235 Mich.App 486, 493-494; 597 NW2d 858 (1999). Because plaintiffs failed to overcome the presumption of validity and proportionality at the board of review level and in the circuit court for the reasons stated herein, especially considering plaintiffs' "market value" approach, we conclude that there is no basis for reversal.

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 1877778

EXHIBIT B

2012 WL 832622
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

USL IMPROVEMENT ASSOCIATION, Plaintiff–Appellant,
v.
OCEANA COUNTY DRAIN COMMISSIONER, Oceana County, and Oceana County Board of Commissioners, Defendants–Appellees.

Docket Nos. 297157, 298080.
|
March 13, 2012.

Oceana Circuit Court; LC No. 09–008200–CC.

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

Opinion

PER CURIAM.

***1** In Docket No. 297157, plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition. Plaintiff challenges the portion of the order dismissing its inverse condemnation claims against the Oceana County Drain Commissioner (the "Drain Commissioner"). In Docket 298080, plaintiff appeals by leave granted from the same order, challenging the portion of the order that dismissed its "claim of appeal" from a special assessment for the Holiday Lake Dam in Oceana County, as determined by the Drain Commissioner and approved by the Oceana County Board of Commissioners (the "Board of Commissioners") in November 2009. We affirm.

I. BACKGROUND

Lake Holiday is a private lake located in Oceana County; the lake was created in the 1970s through the construction of a dam to impound water of the Golden Drainage District. The water flows from Lake Holiday into Upper Silver Lake and then to Silver Lake and Lake Michigan. Lake Holiday is regulated pursuant to the Inland Lake Level Act (ILLA), which is contained in current Part 307 of the Natural Resource Environmental Protection Act (NREPA), MCL 324.30701 *et seq.* [1] In addition, the dam is subject to the Dam Safety Act, which is contained in current Part 315 of the NREPA, MCL 324.31501 *et seq.* [2]

Responsibility for maintaining the Holiday Lake Dam rested with certain property owners, including plaintiff, until 1999, when the trial court determined in a prior action that responsibility for the repair and maintenance of the Holiday Lake Dam shall be with "Oceana County through its Lake Holiday Assessment District." Earlier in 1997, the Board of Commissioners petitioned the trial court for a determination of the normal water level for Lake Holiday and a special assessment district to pay for repairs to the dam. The trial court ordered and adjudged the normal height of Lake Holiday to be 637 feet, which level would be allowed to fluctuate and vary seasonally. The trial court also established a special assessment district, which was ordered to include all parcels having frontage on Lake Holiday and plaintiff's parcel, which was described as the "[s]outh side of the dam as one parcel in the district."

In July 2009, the Michigan Department of Environmental Quality issued an emergency order to the Oceana County Drain Commission and dam owners, including plaintiff, requiring that action be taken to address an imminent danger of the Holiday Lake Dam failing. The order required an immediate draw down of the impoundment of the Holiday Lake Dam to the maximum extent possible to minimize leakage, which was contributing to the erosion of the dam. The impoundment was to remain drawn down until the dam was repaired to a point where it was safe to restore water levels within the impoundment.

In October 2009, the Drain Commissioner determined that repair costs would amount to $404,116. The Drain Commissioner also filed a motion in the prior 1997 action to confirm, for purposes of clarification, the specific parcels included in the Lake Holiday Lake Level District. In addition, plaintiff was given notice that a public review of the Drain Commissioner's proposed apportionment of a special assessment for the repairs would be conducted on November 10, 2009.

***2** Plaintiff filed this action on November 30, 2009, and filed a four-count "Amended Complaint and Claim of Appeal" on December 21, 2009. Counts I and II raised challenges to the Board of Commissioners' alleged approval of the special

assessment roll, as determined by the Drain Commissioner in November 2009. Plaintiff relied on Part 307 of the NREPA, MCL 324.30701 *et seq.*, as the basis for its "claim of appeal." In counts III and IV, plaintiff alleged that the Drain Commissioner's entry onto its property and that excavation work involved in the repair of the dam established claims for inverse condemnation and a taking of its property for which it was entitled to compensation.

On March 2, 2010, the trial court entered an order granting defendants' motions for summary disposition and dismissing plaintiff's "Complaint and Claim of Appeal" with prejudice. Thereafter, on March 23, 2010, plaintiff filed a claim of appeal in this Court in Docket No. 297157. On that same day, plaintiff filed a motion for reconsideration of the March 2, 2010, order in the trial court, and also requested an opportunity to amend its "claim of appeal" with respect to the special assessment decision. The trial court denied both motions. Plaintiff subsequently filed an application for leave to appeal, which this Court granted in Docket No. 298080.

II. STANDARD OF REVIEW

We review de novo a trial court's application of legal doctrines, such as res judicata, and its interpretation of court rules and statutes. *Estes v. Titus,* 481 Mich. 573, 578–579; 751 NW2d 493 (2008). A trial court's ruling on a motion for summary disposition is also reviewed de novo. *Coblentz v. City of Novi,* 475 Mich. 558, 567; 719 NW2d 73 (2006). Further, "[i]nterpreting the meaning of a court order involves questions of law that we review de novo on appeal." *Silberstein v. Pro–Golf of America, Inc,* 278 Mich.App 446, 460; 750 NW2d 615 (2008). But decisions concerning the meaning and scope of pleadings are reviewed for an abuse of discretion. *Dacon v. Transue,* 441 Mich. 315, 328; 490 NW2d 369 (1992). "A trial court abuses its discretion only when its decision results in an outcome falling outside the range of principled outcomes." *Lockridge v. Oakwood Hosp,* 285 Mich.App 678, 692; 777 NW2d 511 (2009).

III. DOCKET NO. 297157

Plaintiff argues that the trial court erred in dismissing its inverse condemnation and taking claims, which were based on the Drain Commissioner's entry onto plaintiff's property and the excavation work in connection with the repair and maintenance of the dam. We disagree.

The trial court did not state the subrule under which it granted defendants' motions with respect to the inverse condemnation and taking claims. But because the court considered documentary evidence submitted by the parties and took judicial notice of its files and records from prior actions in granting defendants' motions, we review the trial court's decision under MCR 2.116(C)(10). *Spiek v. Dep't of Transp,* 456 Mich. 331, 338; 572 NW2d 201 (1998); *Healing Place at North Oakland Med Ctr v. Allstate Ins Co,* 277 Mich.App 51, 55; 744 NW2d 174 (2007). A motion under MCR 2.116(C)(10) tests the factual support for a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Maiden v. Rozwood,* 461 Mich. 109, 120–121; 597 NW2d 817 (1999). The motion should be granted if the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Allison v. AEW Capital Mgt, LLP,* 481 Mich. 419, 424–425; 751 NW2d 8 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Id.* at 425.

***3** In an inverse condemnation action, a plaintiff must establish that governmental actions amount to a constitutional "taking" of property. *Dep't of Transp v. Tomkins,* 481 Mich. 184, 203; 749 NW2d 716 (2008). The Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2, prohibit the taking of private property for public use without just compensation. *Cummins v. Robinson Twp,* 283 Mich.App 677, 706; 770 NW2d 421 (2009). Both temporary and permanent takings require compensation. *Id.* at 716–717. But there must be a causal connection between the government's actions and the alleged damages. *Id.* at 708. Although a physical taking is not required, in cases involving physical takings required acquiescence is at the heart of the claim. *Yee v. City of Escondido,* 503 U.S. 519, 527; 112 S Ct 1522; 118 L.Ed.2d 153 (1992). "[T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property." *Id.*

There is no dispute that the Drain Commissioner entered onto plaintiff's property to repair the dam. Nonetheless, plaintiff has failed to establish any basis for disturbing the trial court's determination that its prior May 25, 1999, order relieved various parties, including plaintiff, of any responsibility for repair or maintenance of the dam by transferring that responsibility to Oceana County. While the trial court interpreted the prior order as implying the creation

of an easement for the county's Drain Commissioner to carry out its responsibilities, our determination that summary disposition was appropriate under MCR 2.116(C)(10) is not dependent upon whether the order created an "implied easement" as that phrase is understood in the context of general property law.

"An easement represents the right to use another's land for a specified purpose." *Matthews v. Dep't of Natural Resources,* 288 Mich.App 23; 792 NW2d 40 (2010). In contrast to a license, which constitutes mere permission to do some act or series of acts on property, the easement is a limited property interest. *Dep't of Natural Resources v. Camody–Lahti Real Estate, Inc,* 472 Mich. 359, 378; 699 NW2d 272 (2005); *Kitchen v. Kitchen,* 465 Mich. 654, 659; 641 NW2d 245 (2002). Plaintiff also correctly asserts that an "implied easement" is understood as arising by necessity. In the context of property law, it is understood to arise "only when the land on which the easement is sought was once part of the same parcel that is now landlocked." *Tolksdorf v. Griffith,* 464 Mich. 1, 10; 626 NW2d 163 (2001).

But whether an "easement" in the formal sense could be implied from the trial court's May 25, 1999, order, such as to grant the Drain Commissioner a limited property interest in plaintiff's land to access and repair the dam, is not material in determining whether a compelled physical invasion of plaintiff's property occurred. It is sufficient that the Drain Commissioner was granted permission to enter plaintiff's property to perform certain acts. This is an obvious implication of the trial court's May 25, 1999, order relieving plaintiff of any responsibility for repairing or maintaining the dam, and transferring that responsibility to Oceana County.

***4** If plaintiff did not want to be relieved of that responsibility, it should have appealed the May 25, 1999, order or taken steps to restore that responsibility. Given the lack of evidence that plaintiff did anything to reacquire responsibility for repairs and maintenance, we conclude that plaintiff failed to demonstrate a genuine issue of material fact regarding whether the Drain Commissioner's entry onto its property, or use of the property for repairs and maintenance of the dam, was a compelled physical invasion.

The doctrine of acquiescence relied upon by the Drain Commissioner supports this conclusion. The doctrine, which is a form of estoppel, has been described as follows:

> "It may be stated as a general rule that if a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, it has been said, is the proper sense of the term 'acquiescence,' which, in that sense, may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." [*Sheffield Car Co v. Constantine Hydraulic Co,* 171 Mich. 423, 450; 137 NW 305 (1912), quoting 11 Am. & Eng. Enc. Law (2d ed), p 428.]

The doctrine was applied in *Lenawee Co Bd of Comm'rs v. Abraham,* 93 Mich.App 774; 287 NW2d 371 (1979), to preclude property owners from denying access to their land for repairs and improvements, where they failed to contest or appeal proceedings under the former ILLA to determine and maintain lake levels. We similarly conclude that it is appropriately applied here, given that no genuine issue was shown by plaintiff with respect to its acquiescence to the Oceana County Drain Commissioner taking over responsibility for repair and maintenance of the dam.

In sum, while the trial court might have misused the term "easement" when describing the Drain Commissioner's permission to enter plaintiff's property for maintenance and repairs, as clearly implied in the prior May 25, 1999, order, the court reached the correct result in finding no factual support for plaintiff's inverse condemnation and taking claims involving whether there was a compelled physical invasion. This Court will affirm a trial court's decision where the trial court reaches the right result. *Taylor v.. Laban,* 241 Mich.App 449, 458; 616 NW2d 229 (2000).

The other arguments presented by plaintiff with respect to the inverse condemnation and taking claims also do not establish any basis for relief. Contrary to what plaintiff argues, the record does not indicate that the trial court relied on the doctrine of res judicata to conclude that plaintiff was precluded from challenging the entry onto its property,[3] and that doctrine is immaterial to our determination that the trial court reached the right result in granting defendants' motions for summary disposition. And to the extent that plaintiff suggests that a question of fact existed regarding whether the Drain Commissioner caused a physical taking by exceeding the scope of its responsibilities, we note that MCR 2.116(C)(10) requires the party opposing a motion for

summary disposition to "set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden,* 461 Mich. at 121. Here, plaintiff showed only that the current repair work is greater than past repair work. This was insufficient to establish a genuine issue of material fact with regard to whether the work being performed exceeded the scope of the Drain Commissioner's repair and maintenance responsibilities.

***5** Lastly, we reject plaintiff's argument that summary disposition was premature. Plaintiff failed to show that further discovery stood a fair chance of uncovering factual support for its position. *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club,* 283 Mich.App 264, 292; 769 NW2d 234 (2009); *Davis v. Detroit,* 269 Mich.App 376, 379–380; 711 NW2d 462 (2006); see also MCR 2.116(H); *Coblentz,* 475 Mich. at 570–571. Therefore, we affirm the trial court's summary disposition ruling with respect to both "taking" counts in plaintiff's "Amended Complaint and Claim of Appeal."

IV. DOCKET NO. 298080

In Docket No. 298080, plaintiff challenges the trial court's dismissal of the "claim of appeal" that, according to the allegations in count I of the "Amended Complaint and Claim of Appeal," was based on Part 307 of the NREPA.

Before considering plaintiff's arguments, we briefly consider the joint argument of Oceana County and the Board of Commissioners regarding the trial court's subject-matter jurisdiction to consider the appeal. Defects in subject-matter jurisdiction may be raised at any time. *Electronic Data Sys Corp v. Flint Twp,* 253 Mich.App 538, 544; 656 NW2d 215 (2002). But contrary to the argument of Oceana County and the Board of Commissioners, subject-matter jurisdiction over plaintiff's appeal does not rest with the Michigan Tax Tribunal. MCL 324.30714(4) provides that "[t]he special assessment roll with the assessments listed shall be final and conclusive unless appealed in a court within 15 days after county board approval." "Court" means "a circuit court, and if more than 1 judicial circuit is involved, the circuit court designated by the county board or otherwise authorized by law to preside over an action." MCL 324.30701(c). Because the trial court in this case is the Oceana Circuit Court, it had jurisdiction to consider plaintiff's appeal.

Nonetheless, a court is not bound by a party's choice of labels for its actions because this would place form over substance. *Johnston v. City of Livonia,* 177 Mich.App 200, 208; 441 NW2d 41 (1989). The gravamen of an action is determined by considering the entire claim. *Maiden,* 461 Mich. at 135. As a whole, plaintiff's "Amended Complaint and Claim of Appeal" purports to combine multiple constitutional claims and a claim of appeal from a Board of Commissioners decision in a single action, notwithstanding that a civil action and an appeal each require a filing fee to invoke the trial court's jurisdiction. See MCL 600.2529(1); cf. *McIntosh v. McIntosh,* 282 Mich.App 471, 483; 768 NW2d 325 (2009) (filing of claim of appeal and entry fee is necessary to vest this Court with jurisdiction in an appeal, and merely arguing that a trial court erred in awarding postjudgment attorney fees, which themselves are appealable as of right, in an appeal from the judgment is insufficient to invoke this Court's review of the attorney fees).

***6** Indeed, the "summons and complaint" document filed by plaintiff with the original "Complaint and Claim of Appeal" was based on the rules governing pleadings for civil actions. A claim of appeal is not a "pleading" under the rules governing civil action in MCR 2.101 *et seq.* See MCR 2.110; *Houdini Props, LLC v. City of Romulus,* 480 Mich. 1022; 743 NW2d 198 (2008). The "Amended Complaint and Claim of Appeal" itself contains a demand for "trial by jury on all counts in this matter." Plaintiff made this demand, notwithstanding its allegation that it was claiming an appeal under Part 307 of the NREPA.

Examined as a whole, the trial court did not err in ruling that plaintiff failed to properly file an appeal. We reject plaintiff's argument that dismissal was inappropriate because MCR 7.105 does not apply to an appeal from the Board of Commissioners' approval of the special assessment roll. In reaching this conclusion, we disagree with the Drain Commissioner's argument that plaintiff's concession in its response to defendants' motions that MCR 7.105 applies constitutes a judicial admission. A judicial admission is a formal concession in pleadings or stipulations that have the effect of withdrawing factual issues in a case. *Radtke v. Miller, Canfield, Paddock & Stone,* 453 Mich. 413, 420; 551 NW2d 698 (1996). Here, plaintiff conceded only the applicability of a procedural rule, with the exception of the service requirement for the Attorney General.[4] But while a party is generally precluded from seeking redress in an appellate court "on the basis of a position contrary to that taken in the trial court," *Phinney v. Perlmutter,* 222 Mich.App

513, 544; 564 NW2d 532 (1997), plaintiff has not established any basis for relief even if we were to ignore plaintiff's concession.

We agree with plaintiff that MCR 7.105 is not explicitly applicable to an appeal under Part 307 of the NREPA. But considering that there is no applicable rule in MCR 7.101 *et seq.* and this Court's determination in *In re Project Cost & Special Assessment Roll for Chappel Dam,* 282 Mich.App 142, 149–150; 762 NW2d 192 (2009), that MCR 7.105 is the "most applicable court rule" for an appeal to the circuit court under Part 307 of the NREPA, use of the procedures contained in that rule are appropriate. However, a court should take care in evaluating the applicability of particular provisions of the rule.

We agree with plaintiff that MCR 7.105(D), the provision providing for service on the Attorney General, would not be applicable to an action under Part 307 of the NREPA. Court rules are construed under legal principles applicable to statutes. *In re KH,* 469 Mich. 621, 628; 677 NW2d 800 (2004). "When the language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Id.* Here, the service requirement in MCR 7.105(D) is directed at the specific agencies covered by the rule. MCR 7.105(D) provides, in part, that "[p]romptly after filing the petition for review, the petitioner shall serve true copies of the petition for review on the agency, the Attorney General, and all other parties to the contested case in the manner provided by MCR 2.107, and promptly file proof of service with the court." The required service on the Attorney General is consistent with the Attorney General's duty to provide legal services to the state of Michigan and its agencies, boards, commissions, officials, and employees. See generally *Attorney General v. Pub Serv Comm,* 243 Mich.App 487, 496; 625 NW2d 16 (2000). While the Attorney General is also authorized to intervene in any action necessary to protect the rights or interests of the state under MCL 14.101, *In re Certified Question,* 465 Mich. 537, 544–545; 638 NW2d 409 (2002), because the amount of a special assessment is a matter of local concern under Part 307 of the NREPA and the Attorney General does not provide legal services to the Board of Commissioners, the trial court erred as a matter of law in determining that MCR 7.105(D) should be applied to require service on the Attorney General in an appeal governed by MCL 324.30714(4).

***7** Nonetheless, MCR 7.105(J)(2)(b) provides for dismissal of an appeal when it is not taken or pursued in conformity with the rules, and the deficiencies in plaintiff's "Amended Complaint and Claim of Appeal" go beyond the dispute concerning MCR 7.215(D). Here, plaintiff did not file with its "Complaint and Claim of Appeal" a copy of the Board of Commissioners' decision for which review was sought, or explain why it was not attached. MCR 7.105(C)(3). And given plaintiff's concession during the motion proceedings that MCR 7.105 applies, one could have expected plaintiff to at least attempt to file a petition for review that complied with MCR 7.105, separate and apart from the civil action, with the appropriate filing fee. Plaintiff's presentation of a "claim of appeal" as simply counts of a civil action was insufficient to invoke the trial court's appellate jurisdiction. Therefore, we uphold the trial court's decision to dismiss the "claim of appeal."

We are also not persuaded that plaintiff has established any basis for disturbing the trial court's decision denying plaintiff's motion to amend the "claim of appeal" in order to bifurcate it from the inverse condemnation claims and present it as a separate proposed "petition for review." The trial court relied on multiple grounds to deny the motion, including its lack of jurisdiction to consider the motion in light of the appeal filed in Docket No. 297157. Because plaintiff failed to properly invoke the trial court's appellate jurisdiction and the order appealed in Docket No. 297157 disposed of the entire civil action, we agree with the trial court that it lacked jurisdiction to consider the motion. MCR 7.208(A); *Wiand v. Wiand,* 205 Mich.App 360, 369–370; 522 NW2d 132 (1994). Furthermore, considering plaintiff's failure to file an appeal under any rule, we reject plaintiff's argument that it should have been allowed to "amend an appeal" using the procedure in MCR 7.105(B)(2). Accordingly, even if the trial court had jurisdiction to consider the motion, we find no basis for reversing its decision denying the motion.

Lastly, considering that plaintiff does not argue that it had a cause of action to set aside the special assessment independent of the appeal, we decline to consider plaintiff's argument that it was denied due process. Had plaintiff filed a proper appeal from the Board of Commissioners' approval of the special assessment roll, the trial court could have conducted a formal review of the proceedings, including whether the amount of its assessment was arbitrarily determined. *In re Project Cost & Special Assessment Roll for Chappel Dam,* 282 Mich.App at 151. While the trial court nonetheless gave some consideration to this matter for plaintiff's benefit during the proceedings, absent a proper appeal we have nothing to review.

Affirmed.

All Citations

Not Reported in N.W.2d, 2012 WL 832622

Footnotes

1 The ILLA was repealed in 1994 and reenacted without substantive change as Part 307 of the NREPA. See *In re Project Cost & Special Assessment Roll for Chappel Dam,* 282 Mich.App 142, 145; 762 NW2d 192 (2009).

2 See *Yee v. Shiawassee Co Bd of Comm'rs,* 251 Mich.App 379, 395 n 21; 651 NW2d 756 (2002) (discussing the reenactment of the Dam Safety Act in the NREPA).

3 Res judicata bars a subsequent action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Estes,* 481 Mich. at 585, quoting *Dart v. Dart,* 460 Mich. 573, 586; 597 NW2d 82 (1999).

4 We recognize that plaintiff challenged the applicability of MCR 7.105 in its motion for reconsideration of the trial court's decision to dismiss the "Complaint and Claim of Appeal." Because plaintiff does not address that decision, we shall not consider it. *Prince v. MacDonald,* 237 Mich.App 186, 197; 602 NW2d 834 (1999).

EXHIBIT C

2024 WL 132918
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Robert PRICE and Karen Price, Appellees,
v.
COUNTY OF GLADWIN and County of Midland, Appellants.
Endre Sefcsik, Appellee,
v.
County of Gladwin and County of Midland, Appellants.
Carl Roll and Colette Roll, Appellees,
v.
County of Gladwin and County of Midland, Appellants.
Anthony Bax and Kelly Bax, Appellees,
v.
County of Gladwin and County of Midland, Appellants.

No. 363327, No. 363328, No. 363329, No. 363330
|
January 11, 2024

Gladwin Circuit Court, LC Nos. 22-011448-AA, 22-011449-AA, 22-011450-AA, 22-011451-AA

Before: Letica, P.J., and Borrello and Rick, JJ.

Opinion

Per Curiam.

***1** In these consolidated appeals, the County of Gladwin and the County of Midland (collectively, the counties) appeal by leave granted [1] the order entered by the Gladwin Circuit Court denying the counties' motion seeking summary disposition under MCR 2.116(C)(6) ("Another action has been initiated between the same parties involving the same claim.") or, in the alternative, to have the matter transferred to the Midland Circuit Court. For the reasons set forth in this opinion, we vacate and remand for further proceedings consistent with this opinion.

I. BACKGROUND

These four cases involve special-assessment roll appeals to circuit court stemming from previous petitions the counties filed in both the Gladwin Circuit Court (Case No. 19-9892-PZ) and the Midland Circuit Court (Case No. 19-5980-PZ) to set the lake levels of four inland lakes that are part of an interconnected system spanning portions of both Gladwin County and Midland County [2] and to establish the Four Lakes Special Assessment District. In those proceedings, Midland Circuit Judge Stephen Carras presided over the Midland Circuit action and was also assigned by the State Court Administrative Office (SCAO) to serve as a judge of the Gladwin Circuit Court to "assist with the docket in the matter of Wixom Lake, Sanford Lake, et al, 19-9892-PZ."

On May 28, 2019, Judge Carras entered an order in the Midland Circuit action setting the normal lake levels for the four lakes pursuant to Part 307 of the Natural Resources and Environmental Protection Act, MCL 324.30701 *et seq.*, and confirming the boundaries of the Four Lakes Special Assessment District. This order further provided that "this Order shall also be entered *In the Matter of: Wixom Lake, Sanford Lake, Smallwood Lake, and Secord Lake*, Case No. 19-009892-PZ, pending in the Gladwin County Circuit Court." The order referred to each action separately by its original case number and forum. It appears that the two actions were essentially addressed simultaneously but it does not appear that they were ever formally consolidated. Subsequently, Judge Carras entered an order in the Gladwin Circuit Court action ordering the May 28, 2019 Midland Circuit Court order to be entered in the Gladwin Circuit Court action.

Robert and Karen Price, Endre Sefcsik, Carl and Collette Roll, and Anthony and Kelly Bax (collectively, the property owners) own property within the Four Lakes Special Assessment District. After the special assessment roll for the Four Lakes Special Assessment District was approved by both the Gladwin County Board of Commissioners and the Midland County Board of Commissioners on July 12, 2022, the Prices, the Rolls, the Baxes, and Sefcsik each filed challenges related to the special assessment roll in the Gladwin Circuit Court, the Midland Circuit Court, and the Michigan Tax Tribunal.

***2** The Gladwin Circuit Court cases are the only matters presently before this Court. In the Gladwin Circuit Court,

the counties moved for summary disposition of the property owners' claims under MCR 2.116(C)(6) based on the parallel actions pending in the Midland Circuit Court or, in the alternative, to transfer the Gladwin Circuit actions to the Midland Circuit Court. The Gladwin Circuit Court issued a written opinion and order, addressing simultaneously the counties' motions with respect to all four cases filed by the respective property owners. [3] The court treated the motions as motions to dismiss under MCR 7.110 and MCR 7.211(C)(2), and it denied the motions. The court determined that the counties' arguments were essentially focused on the issue of venue and that the counties had not provided any evidence that the Midland Circuit Court had been designated as the proper venue for purposes of MCL 324.30701(c). The Gladwin Circuit Court determined that it was a proper venue for the appeals and declined to transfer the matters to the Midland Circuit Court.

As previously noted, this Court granted leave to appeal. This Court also consolidated the appeals. [4]

II. ANALYSIS

Here, the property owners filed their appeals related to the special assessment rolls in three different forums. The merits of those appeals are not before us at this juncture. Instead, this Court is only presented with a narrow issue concerning the appropriate forum in which the property owners may pursue their appeals concerning the special assessments at issue. Resolution of this issue presents questions of law that we review de novo. *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 145; 762 NW2d 192 (2009).

In the context of an inland lake level matter under Part 307 of the Natural Resources and Environmental Protection Act where a special assessment roll has been approved to defray the cost of establishing and maintaining a normal lake level, 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(4). For purposes of this statute, "court" means "a circuit court, *and if more than 1 judicial circuit is involved, the circuit court designated by the county board or otherwise authorized by law to preside over an action.*" MCL 324.30701(c).

The Gladwin Circuit Court determined that there was no evidence that the counties designated the Midland Circuit Court to preside over appeals of the special assessment roll, and the Gladwin Circuit Court declined to dismiss the Gladwin Circuit appeal or transfer the matter to the Midland Circuit Court. However, the Gladwin Circuit Court's approach failed to recognize that it effectively authorized the property owners to pursue their appeals of the special assessments in multiple forums simultaneously. It is axiomatic that a litigant cannot pursue a claim against a party in multiple forums simultaneously, thereby potentially subjecting a party to conflicting judgments. See, e.g., *Fast Air, Inc v Knight*, 235 Mich App 541, 546; 599 NW2d 489 (1999) ("The courts quite uniformly agree that parties may not be harassed by new suits brought by the same plaintiff involving the same questions as those in *pending* litigation.") (quotation marks and citation omitted); *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 323-324; 900 NW2d 680 (2017) ("It is a familiar principle that when a court of competent jurisdiction has become possessed of a case its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action.") (quotation marks and citation omitted).

***3** The issue at this juncture is simply a matter of venue, which merely concerns determining "a fair and convenient location where the merits of a dispute can be adjudicated." *Gross v Gen Motors Corp*, 448 Mich 147, 156; 528 NW2d 707 (1995). Prolonged disputes focused solely on venue are disfavored. *Id.* It is the property owners' burden to demonstrate that their choice of venue is proper. *Id.* at 155. We vacate the Gladwin Circuit Court's order and remand this matter for further proceedings not inconsistent with this opinion.

Vacated and remanded. We do not retain jurisdiction. No costs are awarded to either party, a public question being involved. MCR 7.216(A)(7) and MCR 7.219(A). *City of Bay City v Bay County Treasurer*, 292 Mich App 156, 172; 807 NW2d 892 (2011).

All Citations

Not Reported in N.W. Rptr., 2024 WL 132918

Footnotes

1 *Price v Gladwin Co*, unpublished order of the Court of Appeals, entered May 17, 2023 (Docket No. 363327); *Sefcsik v Gladwin Co*, unpublished order of the Court of Appeals, entered May 17, 2023 (Docket No. 363328); *Roll v Gladwin Co*, unpublished order of the Court of Appeals, entered May 17, 2023 (Docket No. 363329); *Bax v Gladwin Co*, unpublished order of the Court of Appeals, entered May 17, 2023 (Docket No. 363330).

2 The four lakes are Sanford Lake, Secord Lake, Smallwood Lake, and Wixom Lake.

3 In doing so, the circuit court recognized that the four cases had not been formally consolidated.

4 *Price v Gladwin Co*, unpublished order of the Court of Appeals, entered May 25, 2023 (Docket Nos. 363327, 363328, 363329, 363330).

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EXHIBIT D

2014 WL 6778948
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

CHARTER TOWNSHIP OF LANSING, Plaintiff–Appellant,
v.
INGHAM COUNTY DRAIN COMMISSIONER, Defendant–Appellee,
and
Groesbeck Park Drain Board of Review, Defendant.
Charter Township of Lansing,
Plaintiff/Petitioner–Appellant,
v.
Ingham County Drain Commissioner,
Defendant/Respondent–Appellee,
and
Drainage District, Intervenor,
and
Granger Waste Management Company, Intervenor–Appellee,
and
Groesbeck Park Drain Board of Review, Intervenor,
and
Lansing Board of Water and Light,
Intervenor/Respondent–Appellee.

Docket Nos. 316870, 318446.
|
Dec. 2, 2014.

Ingham Circuit Court; LC Nos. 13–000388–CE, 13–000732–AS.

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

Opinion

PER CURIAM.

***1** In this consolidated appeal, the Charter Township of Lansing, plaintiff and/or petitioner in the two consolidated cases, appeals by right two separate orders denying it relief regarding a very expensive drain project for which the Township was assessed a substantial portion of responsibility. Generally, the Township contends that it should not be apportioned such a great portion of the project. In LC No. 13–000388–CE/Docket No. 316870, the trial court dismissed for a want of subject-matter jurisdiction the Township's claim that the apportionment constituted a deprivation of property without due process. In LC No. 13–000732–AS/Docket No. 318446, the trial court denied the Township's petition for certiorari review of the Drainage Board of Review's final determination upholding the apportionment. Because the Township has not articulated a legal basis for relief, we must nevertheless affirm.

The Township is essentially the irregularly-shaped, piecemeal, and noncontiguous remains of the northwest corner township of Ingham County left after the City of Lansing began annexing land after its incorporation in 1859. According to the 2012 United States Census, the Township consisted at that time of only 4.93 square miles of land and had a population of 8,126. A portion of the Township lies north of Bancroft Park/Groesbeck Golf Course in the City of Lansing and encompasses a length of Lake Lansing Road, including the Eastwood Towne Center strip-mall next to US–127. The Lansing Board of Water and Light (LBWL) owns property, which it used as a fly ash landfill from 1979 to 1997, within the portion of the Township that lies within the Groesbeck Park Drain district. Granger Waste Management Company (Granger) runs a refuse and recycling operation that is partly located within the portion of the Township that lies within the Groesbeck Park Drain District. The Drain District covers approximately 295 acres, of which 222.77 acres are within the geographical boundaries of Lansing Township, representing approximately 6.6% of the Township's total land area.

The drain at issue, the Groesbeck Park Drain (the Drain), was established by the Ingham County Drain Commissioner in 1985. In 1990, the Township petitioned the Ingham County Drain Commissioner to improve the Drain. In 1999, the Ingham County Road Commission (the Road Commission) petitioned the Ingham County Drain Commissioner to further improve the Drain. Ultimately, the Drain Commissioner held a "day of review" on March 18, 2013, regarding the Drain project. The Drain's estimated cost would be $12.595 million, of which the Township would be apportioned 62%. However, a few days later, the Township's apportionment was reduced to 49.5%. The Township believes that the approximately $6.234 million for which it would be liable under the Drain

assessment is excessive and improper. The Township filed objections on March 28, 2013, and a Board of Review was convened and held over the course of four days in April of 2013.

***2** During the pendency of the Board of Review, the Township filed its initial complaint in LC No 13–000388–CE, which in part sought preliminary injunctive relief. The trial court initially issued an ex parte temporary restraining order against the Drainage Board and the Drain Commissioner, precluding them from taking any further action on the Drain project, which interrupted the Board of Review proceedings for a few days until the restraining order was dissolved. The Township filed an amended complaint in LC No 13–000388–CE, asserting violations of its constitutional rights, including, *inter alia,* that the drain petition filed by the Road Commission had been *ultra vires,* so the Drain Commission lacked jurisdiction and the assessment constituted a deprivation of property without due process. On May 3, 2013, the Township voluntarily dismissed all of its claims in LC No 13–000388–CE except for the noted claim of deprivation of due process based on the allegedly *ultra vires* drain petition.

Meanwhile, on April 24, 2013, the Board of Review, among other minor alterations, reduced the Township's apportionment to 23.5% and increased LBWL's apportionment from 30.00% to 56.0846%. LBWL petitioned the Ingham County Circuit Court for a writ of certiorari to appeal the Board of Review's decision, asserting that it had not received notice of the Board of Review and therefore did not have an opportunity to participate, and the Board of Review had increased LBWL's apportionment on the basis of improper considerations. The trial court agreed and ordered the matter remanded to the Board of Review "because the Board of Review's decision was not based on substantial, material and competent evidence on the entire record." The trial court particularly emphasized that the Board of Review had impermissibly considered LBWL's "responsibility" for having created a fly ash pit and LBWL's relative ability to absorb the cost of the Drain, which the trial court noted were "considerations neither relevant nor consequential to the issue of 'benefits derived' from the drain project, as required by the Michigan Drain Code ..."

On June 4, 2013, the trial court issued an opinion and order in LC No 13–000388–CE, nominally prompted by a motion for reconsideration by the Township regarding the dissolution of the temporary restraining order. The trial court determined that the Township had failed to bring the proper kind of review permitted by the Drain Code after the Drain board's final order of determination, and therefore the trial court lacked jurisdiction to hear the Township's deprivation of due process claim. The trial court recognized that it might have equitable jurisdiction in the event of fraud or a constitutional challenge, and that a deprivation of property without due process was such a challenge. However, the trial court concluded that although the Road Commission's petition did not itself specifically reference highways, the resolution that it incorporated by reference did state a need to provide for drainage involving Lake Lansing Road, so there was no complete lack of authority. The trial court therefore dismissed the Township's amended complaint and closed the case. The appeal in Docket No. 316870 followed.

***3** Thereafter, the Board of Review reconvened for four more days. At the conclusion of the reconvened hearings, the Board of Review reinstated the 49.5% apportionment to the Township and 30.0846% to the LBWL. Thereafter, the Township filed its petition for certiorari in LC No 13–000732–AS. The trial court issued a written opinion and order on August 15, 2013, denying the writ. The trial court noted that it could not substitute its judgment for that of the Board of Review, and the Board of Review's decision appeared to be authorized by law and supported by sufficient evidence. It declined to consider the Township's constitutional arguments because "those claims were previously addressed in Case No. 13–000388–CE and are now pending before the Court of Appeals." The appeal in Docket No. 318446 followed.

Our Supreme Court has recently set forth the relevant standard of review in drain proceeding appeal cases as follows:

> We review de novo a trial court's decision to grant or deny summary disposition. *Debano–Griffin v. Lake Co.,* 493 Mich. 167, 175, 828 NW2d 634 (2013). Whether due process has been afforded is a constitutional issue that is reviewed de novo. *People v. Wilder,* 485 Mich. 35, 40, 780 NW2d 265 (2010). Likewise, whether a court has subject-matter jurisdiction is a question of law reviewed de novo. *Lapeer Co. Clerk v. Lapeer Circuit Judges,* 465 Mich. 559, 566, 640 NW2d 567 (2002). Questions of statutory interpretation are also reviewed de novo. *Detroit v. Ambassador Bridge Co.,* 481 Mich. 29, 35, 748 NW2d 221 (2008). Though our review of the issues presented is thus de novo, we are also mindful of our previous declaration that, in general, "[w]e ... are not inclined to reverse [drain] proceedings ... absent [a] showing of very

> substantial faults." *In re Fitch Drain No. 129,* 346 Mich. 639, 647, 78 NW2d 600 (1956). [*Elba Twp. v. Gratiot Co. Drain Comm'r.,* 493 Mich. 265, 277–278; 831 NW2d 204 (2013).]

Additionally, the board of a county road commission is an administrative board established by law. See MCL 224.9. Consequently, it necessarily exercises some quasi-legislative and quasi-executive powers. See *People ex. rel. Attorney General v. Common Council of Detroit,* 29 Mich. 108, 113 (1874); *In re Macomb Drain Comm'r,* 369 Mich. 641, 647; 120 NW2d 789 (1963). *Civil Service Comm. v. Dep't. of Labor,* 424 Mich. 571, 631; 384 NW2d 728 (1986). Giving the maximum benefit of the doubt to the Township, and thereby presuming the road commission's petition to be in the nature of a legislative act, this Court's review would be de novo as on the rough equivalent of either a statute or a contract.

Drain apportionments made by a drain commissioner may be disturbed by a Board of Review upon a finding of "manifest error or inequality." MCL 280.157. Drain Code proceedings are administrative in nature and are therefore

> reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const.1963, art. 6, § 28; *Ansell v. Dep't. of Commerce (On Remand),* 222 Mich.App 347, 354; 564 NW2d 519 (1997). Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. See *Korzowski v. Pollack Industries,* 213 Mich.App 223, 228; 539 NW2d 741 (1995). This Court's review of the circuit court's decision is limited to determining whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v. Civil Service Comm.,* 220 Mich.App 226, 234; 559 NW2d 342 (1996). In other words, this Court reviews the circuit court's decision for clear error. *Id.* A decision is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235. [*Michigan Ed. Ass'n. Political Action Committee v. Secretary of State,* 241 Mich.App 432, 444; 616 NW2d 234 (2000).]

***4** In 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. *In re Macomb Drain Comm'r.,* 369 Mich. at 649. 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. & Q.R. Co. v. Babcock,* 204 U.S. 585, 598; 27 S Ct 326; 51 L Ed 636 (1907).

The Township argues first that it had established a constitutional claim based on the drain petition's allegedly ultra vires status, so the trial court had subject matter jurisdiction in LC No. 13–000388–CE. We disagree.

Any person aggrieved by the establishment and apportionment of a drain may seek review by either certiorari and, with certain specific and limited exceptions, *only* by certiorari. *Elba Twp .,* 493 Mich. at 271–272, 280,[1] citing MCL 280.161. However, the harshness of such finality is tempered by two traditional exceptions: where the proceedings are alleged to have been contaminated by either fraud or constitutional infirmity. *Id.* at 280–281 and 281 n 11. No fraud has been alleged in the instant proceedings. Rather, the Township asserts that the drain petition was an "ultra vires" act by the Road Commission, and therefore it was constitutionally impermissible for the Drain Commissioner to act on it. The Township concludes that, as a consequence, the proceedings were tainted by constitutional infirmity and reviewable notwithstanding the Township's failure to seek certiorari.

Our Supreme Court has made clear that the kind of "constitutional infirmity" that will give rise to a right to review notwithstanding a failure to seek certiorari will not be found if the relevant Commissioner merely fails to comply with all of the statutory requirements dictated by the Drain Code. *Elba Twp .,* 493 Mich. at 284–285. Significantly, our Supreme Court analogized to the difference between " 'a want of jurisdiction and a mistake in jurisdiction, or an error in the exercise of jurisdiction.' " *Id.* at 285, quoting *Altermatt v. Dillman,* 269 Mich. 177, 182; 256 NW 846 (1934). In *Elba Twp,* our Supreme Court held that a failure to meet a statutorily required minimum number of signatures was a mere statutory failure; in contrast, failure to provide notice

could implicate the Constitution if the notice pertained to "deprivation of life, liberty, or property." *Id.* at 284–288.

In *Blades v. Genesee Co. Drain Dist. No. 2,* 375 Mich. 683, 692–695; 135 NW2d 420 (1965), our Supreme Court held that equity could provide an opportunity for a landowner to contend that their property derives *no* benefit from a proposed drain project. In *Altermatt,* our Supreme Court observed that equity would be available to challenge a drain commissioner's attempt to construct a sewer, because drain commissioners simply do not have jurisdiction to construct sewers. *Altermatt,* 269 Mich. at 184–186. In contrast, a party could not make use of equity to contest proceedings that were irregular or even allegedly invalid, but where they were within the commissioner's jurisdiction. *Id.* at 187–191. In discussing a drain commissioner's attempt to construct a sewer, which was outside the drain commissioner's jurisdiction, our Supreme Court explained that "[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but an entire want of jurisdiction may be taken advantage of at any time." *Lake Twp., Macomb Co. v. Millar,* 257 Mich. 135, 142; 241 NW2d 237 (1932). Similarly, a drain commissioner lacks any authority to take land without condemnation proceedings, so equity may be used to restrain such a taking. *Patrick v. Colby,* 342 Mich. 257, 264; 69 NW2d 727 (1955).

***5** In all of the above cases, a distinction is drawn between a drain commissioner acting *properly* and a drain commissioner acting *outside what a drain commissioner may do.* Whether or not the petition here was proper, the Drain Commissioner is endeavoring to perform actions that drain commissioners are entirely within their jurisdiction to perform. The Township has not alleged that they were denied adequate notice, and its assertion that its due process rights are being violated is based on the alleged impropriety of the petition. The Township further concedes that it will derive some benefit from the Drain; it disputes only how much of a benefit that will be. In short, the Township's assertion amounts only to an allegation of impropriety, not an allegation that the Drain Commissioner is acting outside his jurisdiction. Whether the Road Commission acted properly in submitting the petition is irrelevant.

In any event, we do not find the Road Commission's petition to be "ultra vires." The Township argues that, pursuant to MCL 280.327, road commissioners may petition to drain commissioners for drain projects only if "it becomes necessary for the construction or maintenance of any highway to take the surplus water across adjacent lands." The Township also asserts that road commissions lack the authority to "pursue a drainage project for any other purpose" pursuant to MCL 280.326, but in fact that statute only prohibits road commissions from actually laying out and constructing drains for any other purpose. Even if the Township's interpretation of the relevant provisions of the Drain Code is correct, the Township fails to articulate any legal requirement for road commissions to explicitly say in so many words in their petitions that any such petition is for the purpose of taking surplus water across adjacent lands. The requirement is only that such a need must exist as a prerequisite to making such a petition. The Township only protests that the Road Commission failed to include what amounts to talismanic language in its petition, not that the actual prerequisite did not exist.

We conclude that the trial court properly found no valid constitutional claim asserted in LC No. 13–000388–CE, and it properly concluded that it therefore lacked subject matter jurisdiction.

The Township also argues that its apportioned share of the cost of the Drain is excessive. It must be emphasized at the outset that a considerable portion of the Township's arguments pertain to the absolute dollar amount of the drain assessment and the interplay between that very substantial sum and the unusual physical makeup of the Township, being both geographically small and noncontiguous. The Township points out, reasonably and accurately, that the assessment will have a profound financial effect on the entire Township and that the Drain will physically affect only a small portion thereof. However, none of the above considerations are relevant to the legal issues involved in this matter.

***6** The cost of the Drain is irrelevant, at least insofar as no challenge to that total cost presently exists before this Court. Apportionment of that cost is based on "the principle of benefits derived" and is therefore apportioned "on a percentage basis." *Elba Twp.,* 493 Mich. at 271, citing and quoting MCL 280.151 and MCL 280.152. There is no statutory or other authority dictating that apportionments may be based on whether the benefit derived has a dollar value that matches the apportioned portion of the cost of a given drain. It is therefore irrelevant whether the Drain is actually "worth" approximately $6.234 million, the estimated cost of

the Township's assessment, to the Township. Furthermore, the discontiguous nature of the Township is equally irrelevant and at most an unusual "red herring" in this case. We are aware of no requirement that a drain must physically affect water on the entirety of a township's total land area for that drain to benefit the township itself, irrespective of whether any such township is geographically contiguous. The question is only whether the township benefits, not whether all portions of the entire township benefit.

Consequently, the issue before this Court is quite simple: did the trial court clearly err in finding authorized by law and supported by competent, material, and substantial evidence on the whole record the Board of Review's decision that 49.5% of the benefits of the Drain would be accrued by the Township. The Township concedes that it derives some benefit from the drain, but it asserts that the Township itself owns very little property within the drainage district, the development that has increased the flow of storm water downstream is private, and the drain will do little to alleviate flooding in the Township at large. The Township also argues that it was apportioned 14% after the first drain petition. Even though both petitions pertain to the same Drain, the nature of the work they sought to perform differs, so we do not find the two petitions meaningfully comparable. There does not appear to be any reasonable dispute that the instant drain project is not merely a more-expensive version of the prior project, even if the affected geographic area is the same, so the benefits the Township may or may not have derived from the prior project are not necessarily relevant.

The Township's argument that upstream property owners are entitled to discharge their natural storm water runoff, although no additional waters beyond that, onto downstream property is accurate insofar as it goes. See *Emerald Valley Land Development Co. v. Diefenthaler,* 35 Mich.App 346, 347–348; 192 NW2d 673 (1971). The Township argues that all of the property that has been improved in such a way as to cast off unhistoric amounts of water is privately owned and therefore ought to be individually liable for Drain apportionments in lieu of the Township itself. If the instant matter was a civil tort action brought by servient estate owners seeking private damages or injunctive relief against the Township on the basis of flooding on their individual private lands, the Township's argument would certainly be a highly relevant one. However, unnaturally increasing the historic flow of water onto a lower parcel of property gives right to a cause of action sounding in trespass. See *Wiggins v. City of Burton,* 291 Mich.App 532, 554–557, 563–567; 805 NW2d 517 (2011). No such private lawsuit is apparently contemplated here.

***7** The purpose of the drain is not to relieve any landowner of the threat of such a suit. Rather, "our drain laws have historically served the public purposes of promoting the productive use of the state's land resources and combating the spread of water- and mosquito-borne diseases, such as cholera and malaria." *Elba Twp.,* 493 Mich. at 269. Notably absent from any formally established purpose of public drains is the protection of entities from the civil legal consequences of any alterations they may have made to their properties affecting the natural flow of water. Drain apportionments are based on benefits received, not on responsibility for having created a particular situation.

The Township's argument that the Drain will not alleviate any flooding within the Township "at large" involves some measure of poetic license with the record evidence. The Drain Commissioner tacitly conceded that the Drain would not directly and personally affect water on each and every parcel of property anywhere within the Township. The Township consequently pointed out that "the 94 percent of Lansing Township residents that are not in the Drainage District do not [derive benefit from this drain]." As we have discussed, we find no support in the law or any reasonable extrapolation therefrom for the proposition that the Drain must physically affect the entirety of the Township's land area to "benefit" the Township. The Township erroneously conflates a municipality as a discrete entity unto itself with what appears to be some manner of summary of its component parts. The Drain Commissioner drew a reasonable analogy to Yellowstone National Park. To paraphrase, it is not necessary for each and every citizen of the United States to have a view of the Yellowstone River waterfalls from their back yards for the nation *as a whole* to benefit from expending tax money maintaining the park as a national resource.

The gravamen of the assessment appears based on the Drain Commissioner's testimony on the first day of the Board of Review hearing that flooding "occurs everywhere within the district, with maybe the exception of the, maybe, upper part of the watershed; but it's pretty universally problematic throughout the whole district because of a lack of a unified catchment area and collection system, okay, which is necessary for this drain project." The example flood provided had occurred after a "quite frequent[ ]" rainfall of 2.8 inches. As noted above, 222.77 of the 295 acres of the Drainage District lie within the Township, so approximately 75.5%

of the Drainage District is within the Township. There is nothing *obviously* irrationally or nonsensically harsh about apportioning 49.5% of the benefits of the Drain to 75.5% of the Drainage District's geographic area. For the most part, the Township would have this Court second-guess the Board of Review, which is not appropriate for this Court.

The Township has simply not shown that the trial court clearly erred in finding that the Board of Review's decision was either arbitrary or not based on competent, substantial, and material evidence on the whole record. The fact that there is no precise formula specifying the apportionment is not fatal; a certain amount of subjective "judgment call" is inherent in the operation of a drain commissioner and a board of review. See *In re Macomb Drain Comm'r.,* 369 Mich. at 650. The Township provides no evidence tending to show that it would not be benefitted by the Drain; indeed, it concedes the opposite. Rather, the Township's arguments largely amount to an assertion that the apportionment is disproportionate either because the absolute dollar value is extremely high or because the drain will not directly benefit each individual parcel of property within the Township, neither of which is a valid reason for overturning an apportionment. Courts generally will not reverse drain proceedings "except for very substantial faults." *Dunning v. Drain Comm'r.,* 44 Mich. 518, 519; 7 NW 239 (1880). The Township has not articulated a legally cognizable substantial fault in the apportionment at issue here, so we cannot disturb it, even if the financial burden will be, as seems likely, quite significant.

***8** The Township finally argues that the reconvened Board of Review disobeyed the trial court's remand order. Specifically, the Township asserts that the remand order precluded the Board of Review from basing its apportionment on benefits LBWL would receive from the drain due to the fly ash pit and other conditions created by LBWL, but the Board of Review inappropriately went further and disregarded all evidence regarding LBWL's property. We disagree.

The Township relies on somewhat out-of-context statements made by two of the three Board members on the last day of the Board of Review. One stated that "[a]s per the writ of certiorari—excuse my pronunciation—I have again reviewed the facts and the testimony with a clear conscience to disregard my earlier judgment of these matters and reach an unbiased opinion relating only to the facts as presented after the order of May 20th, 2013." He also stated, however, that he had considered "all the 40–plus hours" of testimony over all eight days and had given considerable attention to LBWL's fly ash pit, which would tend to work in the Township's favor. On balance, we are not persuaded that this board member actually disregarded everything from the first four days of the Board of Review proceeding.

The other Board member stated that his original decision "was based, to large [sic] extent, on that fly ash as it's called ... That troubles me a lot, even today. But that's for other regulatory bodies, the DEQ, and we have—we're under a court order not to consider that." The trial court's remand order did, in fact, state explicitly that "the Board of Water and Light's responsibility for a fly ash pit" was an irrelevant and impermissible consideration. Nothing in this Board member's statement indicates that he totally disregarded any other evidence regarding LBWL's property, and to the extent he disregarded any consideration of the fly ash pit, he appears to have correctly construed and properly followed the trial court's remand order. The Township raises no particular objection to any act or omission of the third member of the Board of Review. The Township has not shown that the Board of Review disregarded the trial court's remand order.

In conclusion, the Township has not shown that the trial court clearly erred in finding the Board of Review's conclusion to have been based on competent, material, and substantial evidence on the whole record and to have not been a product of an incorrect application of the law. Consequently, it must be affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 6778948

Footnotes

1 Superintending control is the functional equivalent, and our Supreme Court treats them as one and the same. See *Elba Twp.,* 493 Mich. at 272 n 4.

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