

**STATE OF MICHIGAN
IN THE SUPREME COURT**

TOWNSHIP OF ELBA, a Michigan municipal
corporation,

Plaintiff-Appellee,

and

DAVID L. OSBORN, individually and as
Trustee of the Osborn Trust, MARK CRUMBAUGH,
CLOYD CORDRAY, and RITA CORDRAY,

Intervening Plaintiffs-Appellees,

v

GRATIOT COUNTY DRAIN COMMISSIONER,

Defendant-Appellant.

Docket No. 144166

COA Docket No. 303211

Gratiot Circuit Court
File No. 10-011569-CZ

**BRIEF ON APPEAL
ON BEHALF OF AMICUS CURIAE
MICHIGAN ASSOCIATION OF
COUNTY DRAIN COMMISSIONERS**

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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae adopts and incorporates by reference Appellant's Statement of Basis of Jurisdiction.

AMICUS CURIAE'S STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT "WITHOUT THE REQUISITE NUMBER OF SIGNATURES ATTACHED TO THE #181-0 DRAIN PETITION, THE DRAIN COMMISSIONER HAD NO AUTHORITY OR JURISDICTION TO ACT ON THE PETITION, AND THE PROCEEDINGS ESTABLISHING THE NO. 181 CONSOLIDATED DRAINAGE DISTRICT ARE VOID," THUS AUTHORIZING THE CIRCUIT COURT TO EXERCISE EQUITABLE JURISDICTION?

The Court of Appeals answered:	No.
The Circuit Court did not address this issue.	
Defendant-Appellant answers:	Yes.
Plaintiffs-Appellees answer:	No.
<i>Amicus Curiae answers:</i>	<i>Yes.</i>

II. DID THE NOTICE OF THE MAY 4, 2010 BOARD OF DETERMINATION MEETING ACTUALLY RECEIVED BY THE INTERVENING PLAINTIFFS COMPLY WITH APPLICABLE LAW, AND DID ITS INCLUSION OF INFORMATION NOT STATUTORILY REQUIRED OCCASION NO DUE PROCESS VIOLATION JUSTIFYING INVALIDATION OF THAT DRAIN CODE PROCEEDING?

The Court of Appeals answered:	No.
The Circuit Court answered:	Yes.
Defendant-Appellant answers:	Yes.
Plaintiffs-Appellees answer:	No.
<i>Amicus Curiae answers:</i>	<i>Yes.</i>

III. DID THE COURT OF APPEALS' DECISION WITH RESPECT TO PETITION SIGNATURE REQUIREMENTS IMPROPERLY IGNORE THE LEGISLATURE'S DECISION TO INCLUDE DRAIN CONSOLIDATION AS A STATUTORILY AUTHORIZED ACTIVITY IN CHAPTER 8 OF THE MICHIGAN DRAIN CODE AND ELIMINATE THE LEGISLATIVE DETERMINATION THAT FOR "ANY AND ALL" PROCEEDINGS INVOLVING THAT CHAPTER "ONLY 1 PETITION AND PROCEEDING SHALL BE NECESSARY"?

The Court of Appeals answered:	No.
The Circuit Court would answer:	Yes.
Defendant-Appellant answers:	Yes.
Plaintiffs-Appellees answer:	No.
<i>Amicus Curiae answers:</i>	<i>Yes.</i>

STATEMENT OF FACTS

Amicus Curiae adopts and incorporates by reference Appellant's Statement of Facts.

STANDARD OF REVIEW

Amicus Curiae adopts and incorporates by reference Appellant's statement of the applicable Standard of Review.

ARGUMENT

INTRODUCTION

The Michigan Association of County Drain Commissioners (“MACDC”) appreciates the Supreme Court’s invitation to participate as amicus curiae in this appeal and welcomes the opportunity to be heard on issues critical to the maintenance, improvement and management of Michigan’s public drain infrastructure.

Directing its attention first to the issue specified in the Court’s May 23, 2012, Order granting the Gratiot County Drain Commissioner’s Application for Leave to Appeal, the MACDC emphasizes that a county drain commissioner has jurisdiction over all established drains within his or her county. MCL 280.23. Further, if, as in this case, a proceeding under Michigan’s Drain Code is involved, circuit court review by certiorari under MCL 280.161 provides the *exclusive* vehicle for judicial involvement. Appellants never invoked Section 161 and they should not have been permitted to circumvent that statute by resorting to the equitable jurisdiction of the circuit court. It is not surprising that the Court has identified this issue for special attention. A literal reading and application of MCL 280.161 should result in a reversal of the Court of Appeals’ opinion, obviating the need to reach the other issues presented in this case.

With respect to the issue of notice, Appellees’ arguments on appeal are predicated on fundamental errors regarding the substance of, and procedural processes contemplated by, Michigan’s Drain Code. Although erroneous, Appellees’ arguments were effective. The result is a published decision with precedential effect that ignores critical provisions of controlling statutes, judicially rewrites legislation and destabilizes public works projects dependent upon finality to secure necessary financing.

Finally, in addition to adopting all arguments of the Gratiot County Drain Commissioner, with respect to the signature requirements of a petition seeking both drain improvement and district consolidation, MACDC asks the Court to unequivocally reject a major predicate underlying Appellees' argument: that additional conditions need to be judicially imposed upon landowners who execute drain petitions to insure they represent a sufficient quantum of interest to initiate drain proceedings. Any attempt to amend legislatively established qualifications for drain petitions must be directed to that branch of government, not the judiciary.

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT "WITHOUT THE REQUISITE NUMBER OF SIGNATURES ATTACHED TO THE #181-0 DRAIN PETITION, THE DRAIN COMMISSIONER HAD NO AUTHORITY OR JURISDICTION TO ACT ON THE PETITION, AND THE PROCEEDINGS ESTABLISHING THE NO. 181 CONSOLIDATED DRAINAGE DISTRICT ARE VOID," THUS AUTHORIZING THE CIRCUIT COURT TO EXERCISE EQUITABLE JURISDICTION

This Court has made it clear that the judiciary's duty:

... is to apply the language of ... statute[s] as enacted, without addition, subtraction, or modification. We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. In other words, the role of the judiciary is not to engage in legislation. *Lessner v Liquid Disposal Inc*, 466 Mich 95, 101-102; 643 NW2d 553 (2002) (citations omitted).

Courts "[m]ust assume that the thing the Legislature wants is best understood by reading what it said." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 63; 718 NW2d 784 (2006). "It is the legislators who establish the statutory law because the legislative power is exclusively theirs. We cannot revise, amend, deconstruct, or ignore their product and still be true to our responsibilities that give our branch only the judicial power." *Id.* at 65-66. Simply stated, courts are "to declare what the law is, not what it ought to be." *Id.* at 66.

In *Central High School Athletic Ass'n v City of Grand Rapids*, 274 Mich 147, 152; 264 NW 322 (1937), the Court noted that “[w]here... a special statutory method for the determination of the particular type of case has been provided, it is not proper to permit that issue to be tried by declaration.” (Internal citation omitted.) Likewise, “‘equitable relief,’ such as an injunction, ‘may not properly be substituted for a statutory remedy’...” *Scott v Michigan Director of Elections*, 490 Mich 897; 804 NW2d 551 (2011), citing *Atty General v Ingham Circuit Judge*, 347 Mich 579, 584; 81 NW2d 349 (1957). “Courts of equity, as well as of law, must apply legislative enactments in accord with the plain intent of the legislature”; and any argument “that a statute as construed may, in certain instances, work a great hardship is one that should be addressed to the legislature rather than the court.” *City of Lansing v Lansing Twp*, 356 Mich 641, 650; 97 NW2d 804 (1959).

A. Section 161 Applies to *Any* Drain Proceedings, Subject to Narrow Exceptions Not Applicable to the Facts of This Case

It is against the foregoing backdrop that the provisions of MCL 280.161 must be considered. Drain Code Section 161 is the statutory vehicle specifically provided to afford litigants, like Appellees, judicial review of claims predicated on the alleged invalidity of drain proceedings:

The proceedings in establishing any drain and levying taxes therefore shall be subject to review on certiorari as herein provided. A writ of certiorari for any error occurring before or in the final order of determination shall be issued within 10 days after a copy of such final order is filed in the office of the drain commissioner as required by section 151 of this act. . . . [S]uch certiorari may be heard by the court during term, or at chambers, upon 5 days’ notice given to the opposite party; and the circuit court of the county shall hear and determine the same without unnecessary delay, and if any material defect be found in the proceedings for establishing the drain such proceedings shall be set aside. If 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. If the proceedings be sustained, the party bringing the certiorari shall be liable for the costs thereof, and if they be not sustained, the parties making application for the drain shall be liable for the costs. If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefore legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity: Provided, No court shall allow any certiorari questioning the legality of any drain by any person unless notice has been given to the commissioner in accordance with the provisions of this chapter: Provided further, That when such proceedings are brought the commissioner shall postpone the letting of contracts and all other proceedings until after the determination of the court. And if any error be found in the proceedings, the court shall direct the commissioner to correct such error and then proceed the same as though no error had been made.

Appellees chose not to invoke this Section and instead filed their action for injunctive and declaratory relief. Both the circuit court and the Court of Appeals allowed this circumvention, with the latter going so far as to state that only “minor errors and irregularities must be challenged by means of certiorari,” *Elba Twp v Gratiot Co Drain Comm’r*, 294 Mich App 310, 339; 812 NW2d 771 (2011). According to that Court, Section 161 only applies to errors or irregularities that may be corrected by a drain commissioner, but “when an error is so substantial that a drain commissioner cannot correct it, certiorari is an inadequate remedy. Therefore, equity must provide relief.” *Id.* at 339-340.

The Court of Appeals’ conclusions with respect to the scope of MCL 280.161 and its applicability to the facts of this case are wrong. In the very first sentence of Section 161, the Legislature made it clear that this Section applies to all challenges advanced against any Drain Code proceeding: “The proceedings in establishing any drain and levying taxes therefore shall be subject to review on certiorari as herein provided.” The Court of Appeals ignored this plain language and resorted to cases involving fraud, an entire lack of jurisdiction, and a violation of

Constitutional rights outside of drain proceedings (i.e., inverse condemnation). The result is an opinion that erroneously minimizes the statute's reach and introduces an unauthorized level of judicial involvement in drain proceedings.

Indeed, the Legislature is presumed to have meant what it said in the phrase, "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally establish, and the taxes therefor legally levied, and the legality of said drain and taxes therefor shall not thereafter be questioned in an suit at law or equity..." MCL 280.161. Plaintiffs counter with the argument that they brought an action in the circuit court within the prescribed time. What Plaintiffs have not said, and what they cannot say, is that they *ever* sought circuit court review under certiorari, as the statute commands.¹

1. This Case is Not One Involving Allegations of Fraud.

The Court of Appeals cited at length its earlier decision of *Emerick v Saginaw Twp*, 104 Mich App 243, 247; 304 NW2d 536 (1981), for the proposition that only "mere irregularities" in drain proceedings are to be settled under Section 161, and that, beyond such minor matters, equity may provide relief. As the lower court has placed so much reliance on *Emerick*, it bears closer scrutiny. In that case, property owners challenged special assessments levied in connection with the improvement of a drain, and the appellate court prefaced its opinion as follows:

¹ And Plaintiffs cannot argue there is no difference between a review on certiorari and judicial involvement under general equity principles. As discussed in *Wolpert v Newcomb*, 106 Mich 357, 359; 64 NW 326 (1895), "The statute allowing certiorari to these proceedings provides that, 'if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside.' It is nowhere shown or claimed that the plaintiff will be injured by the deepening, widening, and straightening of the ditch. If he is not injured, there is no reason why he should have the proceedings quashed, or be heard to question their validity by the writ of certiorari, which is subject to discretion." (Internal citation omitted.)

Certain allegations of fraud were made in plaintiffs' complaint and will be discussed below. As an initial note, this Court will assume *arguendo* that the circuit court had valid equity jurisdiction based upon those allegations and address a jurisdictional matter not yet raised by the parties at the circuit level or upon appeal. *Emerick, supra* at 245 (emphasis added).

The appellate court later repeated this primary basis of equitable jurisdiction, "If the allegations of fraud are sufficient in the instant case to support equity jurisdiction, the issue pending on appeal is squarely presented to the Court." *Id.* at 246. There have been no allegations of fraud in this case; therefore, this exception to the exclusive certiorari remedy of Section 161 does not apply.

2. The Gratiot County Drain Commissioner has Jurisdiction in this Matter.

The Court of Appeals cited *Clinton v Spencer*, 250 Mich 135; 229 NW 609 (1930), *Lake Twp v Millar*, 257 Mich 135; 241 NW 237 (1932), and *Fuller v Cockerill*, 257 Mich 35; 239 NW 293 (1932), as authority for its finding that "certiorari is not the exclusive remedy under the Drain Code. Although minor errors and irregularities must be challenged by means of certiorari, equity will still provide a remedy with the drain commissioner acts without jurisdiction and there is no adequate remedy at law." *Elba Twp, supra* at 339. None of the cases cited are relevant to the facts at hand.

In both *Clinton* and *Lake Twp*, the "drains" in question were actually found to be sewers. The predecessor statutes to the Drain Code did not allow drain commissioners to construct sewers² any more than it did – or does – allow drain commissioners to construct courthouses. In *Clinton*, the Court explained:

² The statutes were amended after these cases were brought, expanding the definition of drain to now include the term sewer. MCL 280.3.

It is claimed that it would be uneconomical to build a drain in this district that would not be capable of removing within a very short time after a storm all surface water, and at the same time disposing of feculent matter. This is the purpose of a city sewer... But this fact does not authorize them to do something for which the law makes no provision. The legislature has provided a *quasi*-judicial proceeding under which drains are built and all questions relating thereto are settled. This was done so as to provide adequate drainage for farm lands in an inexpensive manner. This court has always insisted that the law be strictly followed. The fact that we have frequently been willing to overlook slight irregularities in drain proceedings is used by defendants as the excuse for gross irregularities, which the record shows took place in many instances. We, however, find no authority whatsoever for the building of a city sewer under the drain law. *Id.* at 146 (emphasis in original).

The later case of *Lake Twp* followed the holding in *Clinton*, and the Court clarified:

The 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. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, which the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. The proceedings are void for want of jurisdiction. *Id.* at 142.

In both *Clinton* and *Lake Twp*, it was not the drain proceedings that were truly at issue. Rather, it was the fact that the drain commissioner had no jurisdiction over the construction of sewers. This case involves no such jurisdiction deficit. The #181 Drain was previously established and located as a county drain. The legislature has plainly stated that a drain commissioner "shall have jurisdiction over all drains within his county, including those heretofore established and now in process of construction." MCL 280.23. Therefore, there was no "entire want of jurisdiction" in the instant drain proceedings.

An “entire want of jurisdiction” was also the case in the third opinion relied upon by the Court of Appeals: *Fuller v Cockerill, supra*. In *Fuller*, the jurisdictional issue pertained to the location of a drain within the Village of Whitehall Township when the law in effect at the time was held to give exclusive jurisdiction to villages for the construction of drains and sewers within their village limits. The *Fuller* Court held:

It may be conceded that if the issue or issues raised by plaintiffs had to do merely with matters of irregularity relative to such proceeding the sole remedy under the statute would be by appeal in the nature of certiorari; but where the officials acting in the drain proceeding are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain.

“If fraud in the proceedings is alleged and pointed out, or jurisdictional defects are specified, such charges may be investigated” in equity. *Id.* at 39 (internal citations omitted).

In contrast to *Fuller*, there is no claim that the Gratiot County Drain Commissioner was attempting to construct a drain outside of Gratiot County. Therefore, the Court of Appeals reliance on this and the other “entire want of jurisdiction” cases is misplaced.³

3. No Constitutional Issue Rendering Section 161 Inapplicable has been Advanced by Appellees.

After discussing the holdings in *Clinton, Lake Twp* and *Fuller*, the Court of Appeals urged that, “[t]wenty years later, the Supreme Court in *Patrick v Shiawassee Co Drain Comm’r* again reaffirmed th[e] precedent” that certiorari is not the exclusive remedy for drain proceedings. *Elba Twp, supra* at 339. But that is not what the Supreme Court did. The case of

³ In this regard, a drain commissioner’s jurisdiction over public drains established in his or her county and the maintenance and improvement of those drains, is similar to a court’s subject matter jurisdiction over a category of cases with regard to which the court has the power to act. In either instance, the drain commissioner or the court may err in the exercise of their power, but such an erroneous exercise does not strip them of jurisdiction over those things statutorily placed under the ambit of their elected office. See *Grubb Creek Action Committee v Shiawassee Co Drain Comm’r*, 218 Mich App 665, 668-669; 554 NW2d 612 (1996).

Patrick v Shiawassee Co Drain Comm'r, 342 Mich 257; 69 NW2d 727 (1955) involved a petitioned project to clean out a drain that went through all proceedings without challenge. However, a property owner brought suit in equity upon learning that the drain commissioner took additional right of way on his land to enlarge the drain without having condemned it.

Paramount among Constitutional protections is this: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. In reviewing the *Patrick* decision, the Court of Appeals missed the point. That case did not concern the drain proceedings, it concerned the taking of private property without just compensation and adherence to the condemnation process. Such an inverse condemnation is what led to the Court's equitable decree prohibiting the taking. It should be noted that, even in this setting, the entire drain proceedings were not set aside, but only the taking of the plaintiff's property:

In the case at bar defendant's authority was limited to cleaning out the drain to its original depth as authorized by the board of determination. He had no legal right to deepen or widen the drain or use plaintiffs' lands without condemnation of the same. Under the circumstances of this case it clearly appears that certiorari was not an adequate remedy. It follows that plaintiffs had a right to resort to chancery to restrain defendant from enlarging the drain or taking plaintiffs' lands without condemnation thereof. *Id.* at 264.

The instant case involves no Constitutional claims regarding the petition's alleged lack of a requisite number of signatures. That Appellees' claims of deficiency in the number of petition signatures are not constitutionally based was settled over 100 years ago in the case of *Clarence Twp v Dickinson*, 151 Mich 271; 115 NW 57 (1908). In *Clarence Twp*, the plaintiffs alleged that a petition did not contain the adequate number of signatures of persons liable for assessment. Like the present action, the plaintiff Township and others claimed that because the petition did not bear the proper amount of signatures, "the drain commissioner had no jurisdiction; the

proceedings are a nullity and can be attacked collaterally.” *Id.* at 271. The Court noted that the plaintiffs attempted to bring their claim for certiorari 26 days after the final order of determination was filed. *Id.* The Court rejected the claim as untimely under the predecessor statute of Section 161, and specifically rejected the plaintiffs’ jurisdictional question similar to the one advanced in this case:

The jurisdictional objection raised by complainant is not of a constitutional character. The Constitution does not require the petition to be signed by five property owners liable to assessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether... It had authority to declare that objections not so raised [by certiorari] should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case and it prevents complainants maintaining this suit. *Id.* at 273.

Likewise, in the case of *Strack v Miller*, 134 Mich 311; 96 NW 452 (1903), the plaintiffs complained that a drain petition did not bear an adequate number of signatures. The lower court heard the claim in equity, found the petition was insufficient, and granted the plaintiffs’ request for an injunction. This Court reversed. It wrote, “We think the disposition of one question should dispose of the case, and that question is, Should the chancery court take jurisdiction under the facts disclosed by the record?” *Id.* at 312. The Court answered in the negative, holding: “This court has repeatedly construed the provision of section [161] which provides for a review of these proceedings upon certiorari. No such case was stated in the bill of complaint or shown by the proofs as to call for the interposition of a court of equity.” *Id.* at 313.

B. In the Absence of Allegations of Fraud, a Complete Lack of Jurisdiction or Constitutionally Based Claim, Section 161 Applies to Any Errors in Drain Proceedings, *Even Non-Correctible Ones*.

Section 161 applies to any errors occurring either before or after the entry of a final order of determination. It contains no language limiting its reach to the correction of “minor” errors and irregularities and the lower court erred in reading such a limitation into it. *Lessner v Liquid Disposal Inc, supra*.

This is not to say that the Court of Appeals’ decision is the first to inject confusion into the otherwise clear and expansive language of Section 161. However, it is the first appellate decision to hold that the present language of Section 161 is not the exclusive remedy when an error is non-correctible. The Court of Appeals opined:

Although minor errors and irregularities must be challenged by means of certiorari, equity will still provide a remedy when the drain commissioner acts without jurisdiction and there is no adequate remedy at law. A plain reading of MCL 280.161 supports such a conclusion. Section 161 provides in relevant part: “And if any error be found in the proceedings, *the court shall direct the commissioner to correct such error* or errors and then proceed the same as though no error had been made.” When an error is so substantial that a drain commissioner cannot correct it, certiorari is an inadequate remedy. Therefore, equity must provide relief. *Elba Twp, supra* at 339-340 (emphasis in original).

Most unsettling about this interpretation is that the Court of Appeals’ “plain reading” of Section 161 wholly ignores an earlier provision of the statute giving circuit courts, under certiorari review, the power to order drain proceedings set aside: “... and the circuit court of the county shall hear and determine same without unnecessary delay, **and if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside.**” MCL 280.161 (emphasis added).

Here, the lower court cited *Emerick* for the proposition that “mere irregularities” in drain proceedings are to be settled under Section 161. Setting aside for a moment that the *Emerick* case was premised on allegations of fraud, the problem with the Court of Appeal’s reliance on *Emerick* is two-fold. First, as the court acknowledged, *Emerick* did not involve Section 161 of the Drain Code. More importantly, the “mere irregularities” language used by the *Emerick* Court is nowhere to be found in the two cases upon which that court relied:

- *Patrick v Shiawassee Co Drain Comm’r, supra*, where the Court found that equitable jurisdiction could be invoked in a factual circumstance where the remedy of certiorari could not provide relief in the case of inverse condemnation, where the Constitution is implicated; and
- *Kinner v Spencer*, 257 Mich 142; 241 NW 240 (1932), where there was a complete absence of jurisdiction on the part of the drain commissioner to construct a sewer, as was found in *Clinton and Lake Twp.*

The present case presents neither of these situations. Had plaintiffs made a timely claim for review on certiorari, the circuit court was enabled by statute to set aside the drain proceedings altogether, or to order corrections in those proceedings. Plaintiffs failed to bring a claim on certiorari and their equitable action should have been disallowed.

C. Section 161 Should be Applied as Written, Despite its Strict – Even Harsh – Time Frames

The language of the statute is absolute: “If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in an suit at law or equity.” The time prescribed by the Legislature is just 10 days from the date of the final order of determination. The Legislature could have replaced its specific

references to certiorari with “if no legal action be brought” or “if no circuit court action is initiated” but it chose to be extremely limiting in the type of action to be filed. Moreover, the Legislature could have said that judicial review must be brought within a reasonable time or not referred to any time constraint whatsoever but, again, it chose a time period that is, admittedly, brief. That 10-day time period has been kept in place for over a century.

In defining the reach of Section 161, the Court of Appeals looked to *Pere Marquette R Co v Auditor General*, 226 Mich 491; 198 NW 199 (1924), and cited the portion of that opinion where the Supreme Court held, “under certain circumstances... equity proceedings to restrain the enforcement of a drain assessment may run collaterally in aid of certiorari to review a drain commissioner’s action... and that in a proper case equity has jurisdiction to restrain the return of lands as delinquent for drain taxes where the proceedings are illegal and void.” *Id.* at 494. What the Court of Appeals apparently failed to consider is subsequent portions of the *Pere Marquette* decision. Indeed, the very next sentence of the opinion (not quoted by the Court of Appeals) reads:

But the more serious question is that of failure to take any steps for review within the limit of time prescribed in the act for pursuing the method pointed out, when no reason for the delay is shown, and then present piece-meal in succeeding bills plaintiff’s grounds of objection against the validity of the proceedings for construction of the drain. *Id.* at 494.

The *Pere Marquette* Court found that this failure was fatal, even though the railway company’s argument that its land was exempt from the assessment had substantial merit.

And this question begs to be asked: ***Why didn’t Elba Township and/or the Intervening Plaintiffs file for review on certiorari?*** As set forth in their Brief and as apparently conceded, Plaintiffs had time to do so, having filed a claim in equity just before the final order of

determination was entered.⁴ It seems readily apparent that Plaintiffs could have filed, or at least attempted to amend their previously filed complaint, for review on certiorari. Yet, they never sought review on certiorari, a fact that should have proven fatal to their case. See *Emerick, supra* at 247 (“Clearly, plaintiffs have not complied with the time limits of the statute. Unless equity will allow, the plaintiffs’ cause of action is barred.”); and *Clarence Twp, supra* at 272-273.

D. Had Plaintiffs Properly Invoked Section 161, the Drain Proceedings Still Should Have Been Allowed to Proceed, as Plaintiffs Alleged, At Most, a Correctable Error

Even if the consolidation portions of the petitions filed with the Gratiot County Drain Commissioner are deemed defective because they lacked the signatures of 50 property owners, there can be no question but that those petitions satisfied the signature requirements imposed by MCL 280.191 for requested drain maintenance and improvement. Thus at most, the petitions’ reference to drain consolidation presented a correctable error within the meaning of MCL 280.161. Correction could have been accomplished by proceeding only on that portion of the petitions seeking cleaning out, relocating, deepening, straightening, extending or any of the other activities expressly permitted by Section 191. If drainage district consolidation were still sought, the addition of a single city or township as a petitioner would have sufficed. MCL 280.441. Either one – or both – of these corrective measures could have been accomplished in the context of a remand issued following a Section 161 circuit court review by certiorari. Contrary to the Court of Appeals decision, this case presented no error incapable of correction by the drain commissioner.

⁴ Plaintiffs argue in their Brief, “The Court of Appeals also acknowledged that Plaintiffs/Appellees timely sought review of the Drain Commissioner’s conduct via the November 8, 2010 filing date of the circuit court complaint seeking declaratory judgment and injunctive relief. The Court of Appeals notes that Plaintiffs/Appellees’ complaint predated the Meeting of the Reconvened Board of Determination (November 11, 2010) and the Final Order of Determination (December 22, 2010).” Appellees’ Brief on Appeal, p 32.

And, as set forth above, this is not a case where the drain commissioner acted without jurisdiction. It must be remembered that the #181-0 Drain is – and for many years previously has been – an *established* county drain. By law, a drain commissioner has “jurisdiction over all drains within his county, including those legally established...” MCL 280.23.

Here, the signatures of five property owners liable for assessment in the #181-0 Drain Drainage District empowered the Gratiot County Drain Commissioner to act. Any deficiency in the petition relating to the consolidation of drains could not operate to strip him of jurisdiction to entertain drain maintenance and improvement. And such absence of requisite signatures could not operate to provide for equitable relief outside of the legislative confines of Section 161. *Clarence Twp, supra; Strack, supra.*

II. THE NOTICE OF THE MAY 4, 2010 BOARD OF DETERMINATION MEETING ACTUALLY RECEIVED BY THE INTERVENING PLAINTIFFS COMPLIED WITH APPLICABLE LAW AND ITS INCLUSION OF INFORMATION NOT STATUTORILY REQUIRED OCCASIONED NO DUE PROCESS VIOLATION JUSTIFYING INVALIDATION OF THAT DRAIN CODE PROCEEDING

Key to the Intervening Plaintiffs’ due process attack on the notices they received advising them of the May 4, 2010, board of determination hearing is their contention that petitions seeking drain improvements, and the hearings convened to address the issue of necessity, are directed at specific drain projects.⁵ They are not. As the Court of Appeals explained in *McGregor v Coggins Drain Bd of Determination*, 179 Mich App 297, 299-300; 445 NW2d 196 (1989):

⁵ See, for example, page 9 of Appellees’ Brief on Appeal: “The information provided in the notice [of the May 4, 2010 Board of Determination hearing] did not match the proposed work contemplated by the Drain Commissioner as presented at the meeting. Further, almost all of the attendees of the May 4, 2010 meeting were opposed to the consolidation project. In fact, the people who were present and who had signed other petitions for drain work indicated that the Drain Commissioner never told them that their petitions would be used to support such a large project.”

The Drain Code provides that before a drain project can proceed, an administrative tribunal consisting of three disinterested persons must be appointed. MCL 280.72; MSA 11.072. This tribunal, the board of determination, then makes a factual determination concerning the necessity of the proposed project. If the board finds that the project is necessary, ***then the drain commissioner establishes the location for commencement, terminus the route and type of construction of the drain...*** In approving the route, [the drain commissioner] is not limited to the proposal in the petition or to the order of determination. If a different route is found to be more efficient and serviceable, he may substitute it. MCL 280.73; MSA 11.1073. (Emphasis added.)

The final location of where work is to be performed in a drain project is never fixed at a board of determination hearing. Indeed, that decision, like decisions involving the character, route and scope of a drain project, can only be made after a board finding of necessity. It is a decision to be made by the drain commissioner and once made it is not a proper subject of judicial intervention. See *Grubb Creek Action Committee v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 670; 554 NW2d 612 (1996).

Because the specific area where work may be done if a drain petition is found necessary is unknown before, and even during, a board of determination hearing, notices of those hearings are broadly directed to “each person whose name appears on the last... tax assessment roll as owning land within the special assessment district.” MCL 280.72.

Here, Appellees concede that the intervening plaintiffs received actual notice of the board of determination hearing. *Elba Twp, supra* at 329. And, the Court of Appeals accurately noted that:

The notice... provided the date, time and place of the board of determination hearing as MCL 280.72(2) and MCL 280.441(2) require. It also explained that the board of determination hearing was to hear all interested parties and take evidence regarding improvements, maintenance, and consolidation of the “#181-10 Wolf & Bear Drain.” *Id.* at 331.

Appellees admit that reference in the notice to the “#181 Wolf & Bear Drain as prayed for in the petition... and all established tributary drains” without the inclusion of Township and section numbers would likely have presented no question whether the notice was misleading. Appellees’ Brief on Appeal, p 26. This admission is appropriate because, as explained by the Drain Commissioner in his circuit court Response to Plaintiff’s Motion for Preliminary Injunction:

All of the drains consolidated and discussed at the Board of Determination meeting are established tributaries of the #181-0 Drain. (Exhibit H, Affidavit of Larry Protasiewicz, P.E.; Exhibit N, Affidavit of Brian Denman). All of the established drainage districts fall wholly within the drainage district boundaries of the #181-0 Drain. (Exhibit H, Affidavit of Larry Protasiewicz, P.E.; Exhibit N, Affidavit of Brian Denman). Defendant’s Response to Plaintiff’s Motion for Preliminary Injunction, p 4.

In adopting Appellees’ argument, the Court of Appeals held that “[w]hile the notice provided only a very general description of the activities sought to be conducted, it provided a specific description of the area where the work would be done.” It concluded:

[T]his description was inaccurate because the projects actually involved all the districts contained within the “#181-10 Wolf & Bear Drain” Drainage District. A person not living within the specific sections of the townships mentioned would not readily understand that the project would affect his or her property as well. Therefore, that person would not be able to make a meaningful and informed decision regarding his or her rights. *Id.* at 332.

Appellees’ arguments and the Court of Appeals’ decision overlook the facts that recipients of the notice were specifically advised they were persons liable for an assessment and

that, as a matter of law, the actual location of where work might be performed in the event a determination of necessity were made was beyond the scope of the proceeding noticed.

In determining that the notice in question was confusing to the point of being constitutionally defective despite containing all information required by statute, the Court of Appeals failed to analyze basic factors typically used to weigh due process claims. The result is an unrestrained ad hoc approach memorialized in a published opinion that is the antithesis of the predictability required to procure financing for public works projects.

Any analysis of what process is due in a particular proceeding must begin with an examination of the nature of the proceedings and the interest which may be affected by it. *Artibee v Cheboygan Circuit Judge*, 397 Mich 54, 56-57; 243 NW2d 248 (1976). Generally, three factors are considered to determine what is required due process: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993).

Notwithstanding literal language in the notice to the contrary, Appellees claim the notice they received deprived them of knowledge they could be liable for an assessment and indicated their properties were not affected by a project that might be undertaken in the event necessity were found. Appellees' Brief on Appeal, p 28. Significantly, the Intervening Plaintiffs never asserted that any drain maintenance and improvement project would be unnecessary. Instead, their Complaint below and Appellees' contentions on appeal have focused only upon the consolidation of drainage districts as opposed to work on the drains serving their properties.

Just as the location and scope of a project is not a proper subject of a board of determination hearing, neither is the question of assessments to be levied on lands within the Drainage District to pay for costs of drain improvements. That assessment process is governed by separate statutory provisions that come into play only after a determination of necessity is made. It includes additional notices to District property owners, an assessment roll subject to inspection, and the opportunity to challenge an assessment before an independent board of review with judicial oversight.⁶ These are the due process protections legislatively provided to address the Intervening Plaintiffs' concerns that their property "will be subject to a special assessment for drainage repairs and construction as a result of the action which was taken at the May 4, 2010 Board of Determination Hearing."⁷

Once Appellees' interests in the Drain Code proceedings conducted thus far are clarified, it is apparent that their due process rights were not violated by the notice they received. Even if that notice lacked clarity, the extent of the government's interest in those proceedings should have weighed heavily against their invalidation.

Michigan's Drain Code is replete with provisions evidencing a legislative intent to facilitate prompt maintenance and improvement of county drains. This comes as little surprise as drains have historically been, and continue to be, essential components of Michigan's public infrastructure. They provide agricultural drainage to maintain productivity of the State's farm land. They provide flood control to protect homes, businesses and recreational facilities. They keep our roads passable in wet weather and spring run-off conditions. In short, public drains are essential to Michigan's economy and the health and welfare of all its citizens.

⁶ See Chapter 7 of the Michigan Drain Code, at MCL 280.154-280.157.

⁷ See Complaint of Intervening Plaintiffs, p 5.

The Michigan Drain Code is the product of the Legislature's effort to provide statutory procedures to be followed so that controversies may be heard and settled swiftly and with finality. *Muskegon Twp v Muskegon Co Drain Comm'r*, 76 Mich App 714, 717; 257 NW2d 224 (1977). Throughout its various chapters, provisions can be found that balance individual due process rights with the public's right to adequate drainage.

By way of example, a board of determination decision regarding necessity may be challenged in circuit court, but only if that challenge is filed within 10 days after the decision is made. MCL 280.72a. Boards of Review can be empanelled at a landowner's request to consider challenges to apportionments, but these assessment appeals are also subject to a 10-day limitation period. MCL 280.155. Further, the challenging landowner must file a bond to cover the whole costs and expenses incurred by the Drainage District in the event the drain commissioner's assessment is sustained on appeal. MCL 280.158. Resort to the judiciary for challenges to drain code proceedings is similarly limited in time, and the judicial review available is limited both in character (i.e., by certiorari only) and remedy. MCL 280.161.

By failing to appreciate the specialized nature of the underlying proceedings, by not identifying the rights of drainage district landowners specifically relevant to board of determination hearings, and by not considering the public's interest in allowing Drain Code proceedings to continue in the absence of a clear violation of those rights, the Court of Appeals committed error. Its published decision should be reversed.

III. THE COURT OF APPEALS' DECISION WITH RESPECT TO PETITION SIGNATURE REQUIREMENTS IMPROPERLY IGNORES THE LEGISLATURE'S DECISION TO INCLUDE DRAIN CONSOLIDATION AS A STATUTORILY AUTHORIZED ACTIVITY IN CHAPTER 8 OF THE MICHIGAN DRAIN CODE AND ELIMINATES THE LEGISLATIVE DETERMINATION THAT FOR "ANY AND ALL" PROCEEDINGS INVOLVING THAT CHAPTER "ONLY 1 PETITION AND PROCEEDING SHALL BE NECESSARY"

In addition to adopting the analysis provided by the Gratiot County Drain Commissioner in his Brief on Appeal, the Michigan Association of County Drain Commissioners is compelled to address one particularly troublesome aspect of Appellees' argument for increasing signature requirements applicable to drain petitions by way of statutory construction. On page 7 of their Brief, Appellees state:

Five property owners who collectively own 340 acres of land in North Star Township signed the [March 23, 2009] petition. However, of the 340 acres represented *only 140 acres are included* in the project based on the affected North Star areas identified in the March 4, 2010 Board of Determination meeting notice. Accordingly, the Drain Commissioner's \$4 million dollar project is based on a petition representing 140 acres of the 30,000 acres to be affected—which is *less than ½ percent* of the total affected area. This simply does not comport with the requirements of the Drain Code. (Emphasis in original.)

The obvious underlying premise is that greater signature requirements should be imposed on petitions to attain a sufficient, albeit unspecified, quantum of interest among those who seek to initiate statutorily authorized drain activities. This argument finds no support in the Drain Code and should be firmly rejected. A drain petition is essentially a request that some action be taken with respect to a drain or drains. The submission of a petition in no way insures that the request it contains will be granted. Absent a determination of necessity made by an independent, three-member board, no drain work or consolidation can take place.

The only private petitioner qualification imposed by Chapter 8 or Chapter 19 of the Drain Code is the ownership of land within the drainage districts involved. The Legislature could have attached additional qualifications, including a threshold amount of land required to be owned, but wisely chose not to. Courts cannot read language into a statute that which is not within the manifest intent of the Legislature as gleaned from the statute itself. *Lessner, supra* at 101-102.

The manifest intent of the Legislature reflected throughout the Drain Code is to avoid imposing any comparative interest qualification upon those seeking a drain project. Note that in addition to only five landowners being required to sign a drain petition without regard to the amount of land they collectively own, such a petition may also be signed solely by a city, village or township liable to assessments at large for a project. MCL 280.191. Here, too, the test is not the *amount* of an at large assessment a petitioning municipality may be subjected to, but the fact it is liable to pay *any* assessment at all. Similarly, MCL 280.327 provides that when necessary for road maintenance, a county road commission may file a drain improvement petition and no other signatures are required. Section 327 imposes no requirement that a specific length or area of road surface under the road commission's jurisdiction needs maintenance, just that a need is present.

As previously explained, Appellees' reference to a purported \$4 million drain project misperceives the current status of the Gratiot County proceedings. But, regardless of the character and scope of the project ultimately undertaken, their invitation to judicially rewrite the Drain Code to impose additional qualifications upon those who sign drain petitions must be declined. For more than 80 years, this Court has recognized that objections of this nature must be

directed to the legislature, not the judiciary. See *Warren Township v Engelbrecht*, 251 Mich 609, 613; 232 NW 346 (1930).

CONCLUSION & RELIEF REQUESTED

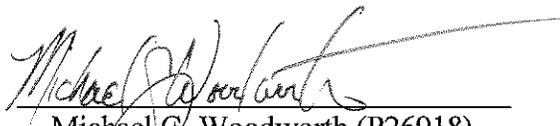
The published decision issued by the Court of Appeals in this case ignores the legislatively imposed limitations regarding the timing, nature and relief available with respect to petitions seeking judicial review of Drain Code proceedings. The exclusive remedy and strict time requirements of MCL 280.161 are vital to maintaining the degree of stability essential to public works projects often dependent for financing on the sale of bonds and governmental pledges of full faith and credit.

The Court of Appeals misread prior cases addressing the very narrow exceptions to Section 161 and Appellees should not have been permitted to avoid its requirements by invoking the trial court's equity jurisdiction.

For these reasons, and those additional reasons set forth in Appellant's Brief on Appeal and this Brief of Amicus Curiae, the Michigan Association of County Drain Commissioners asks that the Court of Appeals' opinion be reversed in its entirety.

Respectfully submitted,

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