

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 CONDRAY,

Intervening Plaintiffs-Appellees,

v

GRATIOT COUNTY DRAIN COMMISSIONER,

Defendant-Appellant.

DOCKET NO. 144166
Court of Appeals: 303211

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MICHIGAN TOWNSHIPS ASSOCIATION'S AMICUS CURIAE BRIEF
IN SUPPORT OF ELBA TOWNSHIP PLAINTIFF-APPELLEE

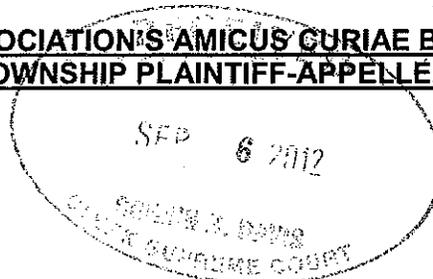


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STATEMENT OF QUESTIONS INVOLVED

1. Was the Court of Appeals Correct in Applying the Rules of Statutory Construction to Drain Code Sections MCL 280.191, MCL 280.194 and MCL 280.441 requiring a Petition be signed by 50 Property Owners for a Proposed Consolidated Drainage District?

Plaintiff-Appellee answers "Yes".
Intervening Plaintiffs-Appellees answers "Yes".
Defendant-Appellant answers "No".
The Court of Appeals answered "Yes".
Amicus Curiae Michigan Townships Association answers "Yes".
2. Was the Court of Appeals Correct in Holding that the Notice of Determination was Inaccurate and Misleading?

Plaintiff-Appellee answers "Yes".
Intervening Plaintiffs-Appellees answers "Yes".
Defendant-Appellant answers "No".
The Court of Appeals answered "Yes".
Amicus Curiae Michigan Townships Association answers "Yes".
3. Was the Court of Appeals Correct in Finding that the Courts have Equity Jurisdiction when the Matter Involves the Validity of Drain Code Proceedings?

Plaintiff-Appellee answers "Yes".
Intervening Plaintiffs-Appellees answers "Yes".
Defendant-Appellant answers "No".
The Court of Appeals answered "Yes".
Amicus Curiae Michigan Townships Association answers "Yes".

AUTHORITY TO FILE AMICUS CURIAE BRIEF

Under Michigan Court Rule 7.306(D)(2), "An association representing a political subdivision" is authorized to file an amicus curiae brief "on behalf of any political subdivision of the state" without obtaining previous authority from the Michigan Supreme Court.

The Michigan Townships Association, filing the within amicus curiae brief, was incorporated in 1953 for the purpose of assisting and educating Michigan township officials in the performance of their statutory obligations, to improve their knowledge of statutory and case law pertinent to township government and to provide amicus curiae support in pending litigation which the board of directors of the Michigan Townships Association believes is of statewide importance to the operation of township government and the citizens represented by township boards of trustees. The Townships Association consists currently of in excess of 1235 Michigan townships out of a potential of 1241 townships within the State of Michigan.

The undersigned firm of Bauckham, Sparks, Lohrstorfer, Thall & Seeber P.C., has been authorized by the Michigan Townships Association to file the within brief on behalf of Elba Township in this Honorable court.

STATEMENT AND BASIS OF JURISDICTION

The Michigan Townships Association Amicus Curiae accepts the basis of jurisdiction as set forth in the Plaintiff-Appellee' Brief.

STATEMENT OF FACTS

Michigan Townships Association Amicus Curiae accepts the Counter-Statement of Facts as set forth in the Plaintiff-Appellee's Brief and the Statement of Facts as set forth in the Court of Appeals decision, *Elba Township v Gratiot County Drain Commissioner*, 294 Mich App 310; 812 NW2d 768 (2012).

LEGAL ARGUMENT I

THE COURT OF APPEALS WAS CORRECT IN APPLYING THE RULES OF STATUTORY CONSTRUCTION TO DRAIN CODE SECTIONS MCL 280.191, MCL 280.194 AND MCL 280.441 REQUIRING A PETITION BE SIGNED BY 50 PROPERTY OWNERS FOR A PROPOSED CONSOLIDATED DRAINAGE DISTRICT

Both Appellant and Appellee agree with the Court of Appeals regarding the rules for interpreting a statute. The Appellant stated in their brief,

“The Court of Appeals correctly observed: ‘When construing a statute courts must read provisions in the context of the entire statute, and the court should avoid a construction that would render any part of the statute surplusage or nugatory.’” (See Appellant’s Brief at pp 9-10; see Appellees Brief, pp 17-18, citing pp 7-8 of *Elba Township v Gratiot County Drain Commissioner*, 294 Mich App 310; 812 NW2d 768 (2012), citing *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

The conflict, however, is that even in recognizing the principles of statutory construction, Appellant and Appellee disagree as to how the Court of Appeals applied the statutory rules of construction.

The three sections under debate in the Drain Code are the following:

MCL 280.441 provides:

“(1) Petition, signers; board of determination, residence, meetings, compensation. Two or more drainage districts located in the same county and in the same drainage basin or in adjoining basins, may consolidate and organize as a single drainage district upon the filing of a petition for consolidation with the drain commissioner of the county setting forth the reason for the proposed consolidation. The consolidation may include land not within an existing drainage district if requested in the petition. **The petition shall be signed by at least 50 property owners within the proposed consolidated drainage district**” (Emphasis added).

MCL 280.191 provides:

“When a drain or portion thereof, which traverses lands wholly in 1 county, and lands only in 1 county which is subject to assessment, needs cleaning

out, relocating, widening, deepening, straightening, tiling, extending, or relocating along a highway, or requires structures or mechanical devices that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relieve the flow of the drain, or needs supplementing by the construction of 1 or more relief drains which may consist of new drains or extensions, enlargements, or connections to existing drains, or needs 1 or more branches added thereto, any 5 or at least 50% of the **freeholders** if there are less than 5 freeholders whose lands shall be liable to an assessment for benefits of such work, **may make petition** in writing to the commissioner setting forth the necessity of the proposed work and the commissioner shall proceed in the same manner provided for the location, establishment, and construction of a drain" (Emphasis added.)

MCL 280.194 provides:

"In any petition filed under this chapter it shall not be necessary for the petitioners to describe said drain other than by its name or to describe its commencement, general route and terminus. For any work necessary to be done in cleaning out, widening, deepening, straightening, consolidating, extending, relocating, tiling or relocating along a highway, or for providing structures or mechanical devices that will properly purify or improve the flow of the drain or pumping equipment necessary to assist or relieve the flow of the drain or needs supplementing by the construction of 1 or more relief drains which may consist of new drains or extensions, enlargements or connections to existing drains, or needs 1 or more branches added thereto, and for any and all such proceedings, only 1 petition and proceeding shall be necessary."

In reviewing these three statutory sections, the Court of Appeals noted that whenever a consolidation was involved which includes lands that were not in the existing drainage district, then the petition must be signed by at least 50 property owners within the proposed consolidated drainage district. (See MCL 280.441.)

The court noted that at MCL 280.191, the word "consolidation" was not included in a petition which required only five freeholders when the purpose was requesting that a drain be cleaned out, relocated, widened, deepened, etc. (MCL 280.191.)

"Therefore, the requirements of MCL 780.191 and MCL 280.441 each apply. Otherwise, the signature requirements of MCL 280.441 will have no effect whenever a person petitions for both maintenance and consolidation of a drain.

Given that MCL 280.441 contains a significantly more onerous signature requirement, thus indicating the legislature's intention that it should be harder to initiate a consolidation proceeding than a proceeding for maintenance, such a result is incongruous. Had the legislature intended this result under MCL 280.441, it could have easily referred to the signature requirements at MCL 280.191. Manifestly, however, it did not." (*Elba, supra*, at 324.)

The Court of Appeals thus was giving effect to Section 441 which otherwise would not have been necessary following the interpretation that the Drain Commissioner (Appellants) are suggesting to this Honorable Court.

The Court of Appeals went on to note that if it followed the Drain Commissioner's argument, then it would mean that it would have to "...read the word 'consolidation' into MCL 280.191. However, we must presume that the omission of the word consolidation at MCL 280.191 and its inclusion in MCL 280.441 was intentional." (*Elba, supra*, at 324.)

The court went on to argue that it was logical to omit that the word consolidation in 191 because,

"...consolidation of drainage districts has the potential to affect a much larger segment of the population than maintenance and improvements to existing drains." (*Elba, supra*, at 324.)

The Court of Appeals also noted that the circuit court misapplied the two sections because its understanding that the Board of Determination's composition would be different under MCL 280.191 and MCL 280.441. (See *Elba, supra*, at 325.) It is the Court of Appeals' opinion that this interpretation was "misstated".

The court then discussed the composition of the Board of Determination referring to MCL 280.72 and noted that .72 and .441 were almost identical in that the Board of Determination had to be composed of "three disinterested property owners" and noted

“the only inconsistency in applying MCL 280.441 and MCL 280.191 is the signature requirement”. (See *Elba, supra*, at 326.)

Next, perhaps the heart of the matter is how to interpret MCL 280.194. When one reviews the statutory language in 194 and 191, one will see that almost all of the descriptions in working on the drain are the same except that in 194 the word “consolidating” is used and that 194 is silent on how many signatures are needed for this “one petition”.

We know from 191 that five signatures are needed for work on a drain and we know that in 441, if you intend to consolidate, you need 50 signatures. 194 provides that you can do this all in one petition. Thus, the Court of Appeals correctly observed in applying the rules of statutory construction to the three parts of the drain code the following:

“In sum, the Drain Code requires 50 signatures for the No. 181-0 drain petition. MCL 280.194 allows the use of a single petition and proceeding “for any work necessary to be done in cleaning out, widening, deepening, straightening, consolidating, extending, relocating, tiling or relocating along a highway....However, the 50-signature requirement of MCL 280.441 still applies to a combined petition. Therefore, the No. 181-0 drain petition was invalid and the drain commissioner was without authority to act upon it.” (*Elba, supra*, at 328, citing *Grand Rapids & I R Co v Round*, 220 Mich 475, 478-479; 190 NW 248 (1922).

Thus, the Court of Appeals, in looking at past case law for assistance and guidance on statutory interpretation and in reviewing the three sections rendered the interpretation which ascertains and gives effect to the intent of the legislature and provides a reasonable construction given due consideration to all sections,

“...so as to produce if possible a harmonious and consistent enactment of the whole. Finally, statutes are to be construed to avoid absurd or unreasonable consequences.” (See *Michigan Humane Society v Natural Resources Comm’n*, 158 Mich App 393, 401; 404 NW2d 757 (1987).

Secondly, "statutes should be construed to prevent absurdity, hardship, injustice or prejudice to the public interest." (See *Franges v General Motors Corp*, 404 Mich 590, 612; 274 NW2d 392 (1979).

As this court can see, the Court of Appeals reviewed each section, considered the sections as a whole and the interpretation does justice to the intent of the legislature and renders all three sections consistent in its application. Therefore, the Court of Appeals decision in this case regarding statutory construction and the implementation of the petitioning process and the number of signatures required should be upheld.

LEGAL ARGUMENT II

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE NOTICE OF DETERMINATION WAS INACCURATE AND MISLEADING

The Notice of Determination that was set for the May 4, 2010 meeting referred to Wolf and Bear Drain, No. 181-10 but was not clear about whether it included all the area within the district or not. (See Notice as listed in Appellant's brief on p16; and Appendix p 13A.)

The Court of Appeals, upon reviewing the notice, cited the case of *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972). (*Elba, supra*, at 330, citing *Alan, supra* at 351.) The *Alan, supra*, decision reviewed what a revenue bond was, how much a project would cost, and why the notice was given. Applying the *Alan, supra* test, the Court of Appeals stated the following:

"Although *Alan* does not deal with drain assessments, we can apply its general principles to this case. The notice here was not as vague or defective of that in *Alan*. The notice here provided the date, time and place of the Board of Determination hearing as MCL 280.72(2) and MCL 280.441(2) require....However, the notice was misleading. In *Alan* the Supreme Court stated that "there must be enough information so the meaningfully informed decision respecting the right can reasonably be made from information supplied in plain language on the face of the notice....In sort, the notice may not be misleading under all the circumstances." (*Elba, supra*, at p 331.)

The court then reviewed the description and commented:

"This description was inaccurate because the project actually involved all the districts contained within No. 181-10, Wolfe and Bear Drain Drainage District. A person not living within the specific sections of the Township mentioned in the notice would not readily understand that the project would affect his or her property as well. Therefore, that person would be unable to make a meaningful and informed decision regarding his or her rights. Thus, we conclude the notice was misleading." (*Elba, supra*, at 332.)

The Court of Appeals rightly rejected the Appellant's position that intervening plaintiffs "had a duty to inquire whether the land would be affected." (*Elba, supra*, at 13.) There is no such requirement or burden that people have to make an inquiry to see whether they are included or not regarding the notice of a drainage district. Appellants try to argue that the notice was not misleading because it was a notice given "to you as a person liable for assessment". (Appellant's brief at p 19.)

Appellant still misses the point. How does a person know whether they are liable for assessment? This is precisely what the Court of Appeals is trying to address. The notice is suppose to give enough information so a person seeing the notice would know that the drain district would encompass their property by way of the description listed in the notice. The Court of Appeals cited *Thayer Lumber Company v City of Muskegon*, 152 Mich 59; 115 NW 957 (1908). In that case, they noted that the special assessment notice for a sewer district had failed to describe the boundary of the district or the lands that would be affected. Citing the Supreme Court in that case, the Court of Appeals stated:

"Where notice is required to be given, it is imperative that such notice when brought to the attention of any person interested shall apprise him of at least the approximate location of the proposed improvement and the property to be assessed therefor. This notice contained no such information. From reading it, no person could ascertain in what part of the city the proposed sewers would be built and much less whether or not his property was liable to be assessed therefor." (*Elba, supra*, at 15, citing *Thayer, supra*, at pp 66-67.)

The court in applying the above principle to the drain district, stated:

"From reading the notice, no person living outside the section specifically mentioned could have ascertained whether his or her property was liable to be assessed. Therefore, we conclude the notice was misleading." (*Elba, supra*, at 335.)

One could certainly see from examining the notice that certain sections of *Elba Township, supra*, were mentioned but not all of the sections. Appellant's response is that they do not have to be included because it would be "cumbersome at best" to do that work. The statute does not say that if something is "cumbersome" you do not have to do it. (See Appellant's Brief at p 19.)

They then tried to argue that doing a correct notice could be "misleading" and that property owners would have an ability to express their concern at future hearings. However, it is not the future hearings that is the concern, it is for all of the "affected parties" to get the original notice and be able to appear and voice either support or opposition to the proposed drain improvements. (See MCL 280.72).

This is particularly illustrated by one of the Intervening-Plaintiffs, David Osborn. In his affidavit, he states that when he received the notice about the May 4, 2010 Board of Determination meeting, the notice indicated that the proposed work was to be located in Sections 18 and 19 of Elba Township. "My property was not involved in the notice of meeting of the Board of Determination". (See Appellee's Appendix, Affidavit p 52.)

He further went on to report that because his property was not involved, he did not attend the meeting. Then, after the May meeting, he found out his property was, in fact, included in a consolidated drain district and was told that because the Board had made its decision, "There was nothing I could do to oppose the project.". (See Appellee's Appendix, Affidavit p 53.) One could certainly see the confusion on the part of the Intervening-Plaintiffs because of the confusing notice and his property was consolidated illegally without his ability to be able to attend and voice his opinion of whether he was in favor of the consolidation.

The fact that after that hearing, the drain board may reduce the project is beside the point. The Court of Appeals recognized that for the apportionment of benefits, another notice is given to all the parties but presumably the parties getting notice should have been noticed the first time around that their property was even under consideration. Appellant is not clear on how this supports ones due process rights if they did not know to be concerned about the project at the first hearing. They certainly would be shocked to receive a notice later that the Board had determined that they are now an “affected party” and how much they were going to pay. Appellant tries to argue that since the May meeting was not about assessments, therefore the Court of Appeals should not be too concerned about whether the notice could be misleading or not properly apprise people of whether their properties were under consideration for the project. But the time for receiving proper notice about whether their properties are affected is at the first notice. Individuals then have an opportunity to appear and find out if their properties are affected or not and even object to having their properties included. This is important so that when the apportionments are mailed to individuals, they may or may not even be included. Once the apportionment notices are mailed, the only rights a person has at that point is to argue over whether the amounts are correct, not whether they should have been included in the assessment to begin with.

LEGAL ARGUMENT III

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE COURTS HAVE EQUITY JURISDICTION WHEN THE MATTER INVOLVES THE VALIDITY OF DRAIN CODE PROCEEDINGS

The Defendant-Appellant argues that the finding of equity jurisdiction by the trial court and the Court of Appeals changes “well-established law” and was misapplied in allowing Plaintiff-Appellee to file a claim challenging jurisdiction. The Court of Appeals dismissed the Drain Commissioner’s assertion that MCL 280.72 and MCL 280.72(A) regarding challenges to the order of determination and the finding of necessity violated the time limitations. However, the Court of Appeals held that these sections do not apply because they were not being challenged. “Rather, they are challenging the validity of the proceedings themselves.” (See *Elba, supra*, at 336.)

The court then examined MCL 280.161 regarding the “proceedings” and the requirement that a writ of certiorari must be issued within ten days of a final order. The Drain Commissioner claimed that the writ of certiorari was the only remedy. Citing *Pere Marquette R. Company v Auditor General*, 226 Mich 491, 494; 198 NW 199 (1924) and *Clinton v Spencer*, 250 Mich 135, 155-156; 229 NW 609 (1930), the Court of Appeals found there were circumstances that certiorari was not an exclusive remedy under the drain law “...when irregularities render drain proceedings void from their inception so they could not be corrected on certiorari, the plaintiffs would not be limited to certiorari.” (See *Elba, supra* at 337, citing *Clinton v Spencer, supra*, at 155-156.)

Defendant-Appellant argues that the holding of the Court of Appeals reverses and goes against “over 100 years of settled law.” (See Defendant-Appellant’s Brief, p 35, citing *Township of Clarence v Dickinson*, 151 Mich 270; 115 NW 57 (1908).)

Dickinson, supra, involved an issue over whether taxpayers were liable for assessments because they had not signed the petition, so relief and equity had to arise from a violation of the constitution. That court held that since there was not a constitutional requirement to the number of people to sign a petition, the requirement was "statutory" and any objections had to be by certiorari. Therefore it was not a denial of "constitutional rights".

The Court of Appeals then reviewed several cases regarding the jurisdiction issue. The court reviewed *Fuller v Cockerill*, 257 Mich 35; 239 NW 293 (1932); *Lake Township v Millar*, 257 Mich 135, 141-142; 241 NW 37 (1932); *Patrick v Shiawassee Drain Commissioner*, 342 Mich 257; 69 NW2d 727 (1955); *Emerick v Saginaw Township*, 104 Mich App 243; 304 NW2d 536 (1981); *Lakely Drain Improvement Drainage District v City of Woodhaven*, 112 Mich App 675; 317 NW2d 220 (1982). These cases all involve whether or not a remedy was in certiorari or a court of equity.

As a result, the court noted that if there are errors or irregularities, then the general rule is addressed by certiorari. However, when there is a question about the "want of jurisdiction", then bringing a case in equity can be taken at any time. In the *Patrick, supra* case, the drain commissioner enlarged the drain area beyond what the Board of determination had determined and the court certainly recognized that a case in equity is the proper procedure because the drain commissioner had no legal jurisdiction or authority over the area in question. While Defendant-Appellant recognized that fraud and lack of jurisdiction invoke equity and that fraud is not being alleged in this case, nevertheless, the Defendant-Appellant continually, in their brief, ignore the fact the court is addressing the "lack of jurisdiction" issue. In other words, this is not a question that

the statute they proceeded on required 5 signatures and they only got 4. Or, that the requirement was 50 and they only got forty.

Defendant-Appellant also continually tries to bootstrap the argument regarding signatures. That is not the basis on which the trial court and the Court of Appeals found that the courts had a right to consider the issue because this went beyond "mere technical defects in the proceedings". (*Elba, supra*, at 341.)

The substantive issue was which statute provision was the correct one for getting any signatures. In order to get jurisdiction, one had to get the right statute. The court concluded that MCL 280.191, which only demanded 5, was not the statute that could be invoked in order for Defendant-Appellant to have jurisdiction. The court concluded that MCL 280.441, which provided you had to have at least 50 property owners within the consolidated district was necessary for the Board of Determination to take jurisdiction.

Thus, the fact the notice was not sufficient to inform people of whether they were included or not, and the fact the petition did not have the requisite signatures, "...the drain commissioner had no authority or jurisdiction to act and the proceedings establishing that the No. 181 Consolidated Drainage District were void." (See *Elba, supra* at 341.)

In conclusion, despite Defendant-Appellant's insistence that equity cannot be invoked, the Court of Appeals spent much of their opinion citing the history of cases referred to above to show that there are situations in which equity and not certiorari is the proper method to address issues involving jurisdiction. Therefore, the Court of Appeals is not changing 100 year old case law, but, in fact, is reaffirming the law through the decades that recognizes certain times when equity is the proper remedy

when the question is whether or not the drain commission has proper authority and jurisdiction on an issue.

CONCLUSION

In conclusion, the Court of Appeals and Elba Township were correct in finding that the Notice of Determination for the May 4, 2010 meeting was inaccurate and misleading. The Intervening-Plaintiffs, such as David Osborn, testified by Affidavit of the result of the confusing and misleading notice.

The Court of Appeals and Elba Township were further correct in finding that, when examining the Drain Code, which involves the validity of jurisdiction by the Drain Board of Determination, that equity jurisdiction is appropriate and not certiorari. It is important that the Drain Board have proper jurisdiction before invoking any pronouncements on the drain district and the individuals and municipalities affected.

Thirdly, when examining three different statutes of MCL 280.191, MCL 280.194 and MCL 280.441, it is important that the three be read in conjunction with one another. The court was correct in holding that in order to obtain jurisdiction when consolidation is one of the issues, a petition signed by 50 property owners is the correct interpretation in order to invoke proper jurisdiction by the Drain Board.

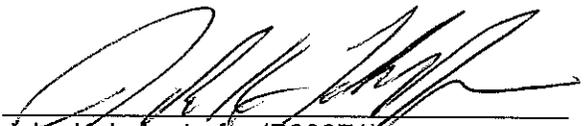
The courts have long recognized that, in the issues of special assessments, the statutory regulations must be properly filed in order to provide due process to all property owners and municipalities that may be involved in the ultimate assessment of benefits to any proposed project.

On behalf of the Michigan Townships Association, this Amicus Curiae Brief, supports the holding of the Court of Appeals and Elba Township and respectfully requests this Supreme uphold the Court of Appeals' decision.

Respectfully Submitted.

DATED: September 5, 2012

BAUCKHAM, SPARKS, LOHRSTORFER,
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