

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges Michael J. Kelly, E. Thomas Fitzgerald and William C. Whitbeck

TOWNSHIP OF ELBA, a Michigan
Municipal Corporation

Docket No. 144166

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

BRIAN DENMAN, GRATIOT COUNTY
DRAIN COMMISSIONER,

Defendant/Appellant.

BRIEF ON APPEAL - APPELLEES

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

The TOWNSHIP OF ELBA (“Elba”) and Intervening Plaintiffs from the Gratiot County Circuit Court action, DAVID L. OSBORN (“Osborn”), individually and as Trustee of the Osborn Trust, MARK CRUMBAUGH (“Crumbaugh”), CLOYD CORDRAY and RITA CORDRAY (“the Cordrays”), collectively Plaintiffs/Appellees accept Defendant/Appellant’s statement of jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. PLAINTIFFS/APPELLEES ACCEPT DEFENDANT/APPELLANT'S STATEMENT OF QUESTION PRESENTED #1, WHICH ISSUE THIS HONORABLE COURT DIRECTED THE PARTIES TO BRIEF PURSUANT TO ITS MAY 23, 2012 ORDER.

THIS COURT'S ORDER GRANTING LEAVE TO APPEAL STATED:

'The Parties shall include among the issues to be briefed whether, as the Court of Appeals concluded, "[w]ithout the requisite number of signatures attached to the #180-0 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.' (Appellant's Appendix 89a)

PLAINTIFFS/APPELLEES' ANSWER - "YES"
DEFENDANT/APPELLANT'S ANSWER - "NO"

- II. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT HELD THAT A PETITION JOINING CONSOLIDATION WITH IMPROVEMENTS AND/OR MAINTENANCE UNDER SECTION 194 OF THE DRAIN CODE OF 1956, AS AMENDED, MUST CONFORM WITH THE PETITION SIGNATURE REQUIREMENTS OF SECTION 441 OF THE DRAIN CODE WHEN CONSOLIDATION IS INCLUDED IN THE PROPOSED PROJECT?

PLAINTIFFS/APPELLEES' ANSWER - "NO"
DEFENDANT/APPELLANT'S ANSWER - "YES"

- III. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT HELD THAT THE DESCRIPTIVE LANGUAGE IN THE NOTICE OF THE MAY 4, 2010 MEETING OF THE BOARD OF DETERMINATION WAS MISLEADING, AND THEREFORE, DID NOT COMPLY WITH DUE PROCESS REQUIREMENTS?

PLAINTIFFS/APPELLEES' ANSWER - "NO"
DEFENDANT/APPELLANT'S ANSWER - "YES"

- IV. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT HELD THAT EQUITY JURISDICTION CAN ARISE FROM A LACK OF JURISDICTION OR A CONSTITUTIONAL VIOLATION?

PLAINTIFFS/APPELLEES' ANSWER - "NO"
DEFENDANT/APPELLANT'S ANSWER - "YES"

COUNTER-STATEMENT OF INTRODUCTION

This appeal arises from the actions of Defendant/Appellant Gratiot County Drain Commissioner Brian Denman in pursuing an estimated \$4 million dollar drain project which consolidates 47 drainage districts across seven municipalities, affects over 30,000 acres of land and 84 miles of drain. In support of said project, Defendant/Appellant feigns compliance with the Michigan Drain Code of 1956, as amended, MCL 280.1 *et seq.* (hereafter "Drain Code"), by relying on a single petition signed by five individuals. (*See* Appellant's Appendix hereafter "AA" 11a)

Nature of the Action and Proceedings in the Trial Court

Plaintiff/Appellee TOWNSHIP OF ELBA ("Elba") petitioned the Gratiot County Circuit Court for declaratory and injunctive relief on November 8, 2010¹ with an amended complaint dated December 21, 2010² based on Defendant/Appellant's violation of the Drain Code. Defendant/Appellant failed to observe the petition requirements including the procedural safeguards guaranteed by Section 441 of the Drain Code which requires signatures from at least 50 property owners or at least 50% of the property owners within the proposed consolidated district³.

Intervening Plaintiffs/Appellees DAVID L. OSBORN ("Osborn"), individually and as Trustee of the Osborn Trust, MARK CRUMBAUGH ("Crumbaugh"), CLOYD CORDRAY and RITA CORDRAY ("the Cordrays"), ("Intervening Plaintiffs/Appellees") joined the litigation in January 2011 seeking declaratory relief arising from the Drain Commissioner's violation of the

¹ *See* Appellees' Appendix hereafter "AA" 17b.

² *See* AA 41a.

³ MCLA 280.441.

Drain Code as well as violation of their private due process rights where the Defendant/Appellant provided misleading and defective notice of the drain proceedings⁴.

The Plaintiffs/Appellees' complaints invoked the equitable jurisdiction of the Gratiot County Circuit Court pursuant to Romulus City Treasurer v Wayne County Drain Commissioner, 413 Mich. 728; 322 NW2d 152 (1982), challenging Defendant/Appellant's conduct in violating specific provisions of the Drain Code as well as Intervening Plaintiffs/Appellees' private constitutional due process rights.⁵

The Gratiot County Circuit Court agreed with Plaintiffs/Appellees and exercised jurisdiction.⁶ The Gratiot County Circuit Court heard cross motions for summary disposition on March 8, 2011.⁷ It granted Defendant/Appellant summary disposition pursuant to MCR 2.116(C)(10) finding that Section 194 of the Drain Code permitted Defendant/Appellant to pursue the drain project, including consolidation, with only five signatures.⁸ The trial court also determined that the notice provided met due process requirements.⁹

The Court of Appeals reversed the Gratiot County Circuit Court decision in a published opinion dated October 18, 2011.¹⁰ The Court of Appeals held that a petition for consolidation requires signatures from 50 property owners or at least 50% of the property owners within the proposed consolidated district.¹¹ The Court of Appeals further held that where the petition at issue was only signed by five property owners, the petition was invalid and the

⁴ See AA 53a.

⁵ See AA 17b, AA 41a & AA 53a.

⁶ See AA 30a - (Excerpt from Gratiot County Circuit Court ruling on December 14, 2010 regarding exercise of equity jurisdiction.)

⁷ See AA 61a-69a.

⁸ See AA 68a-69a.

⁹ Id.

¹⁰ Elba Township v Gratiot County Drain Comm'r, 294 Mich App 310; 812 NW2d 771 (2011). (AA 72a-88a).

¹¹ AA 77a. Elba Township, supra, 294 Mich App at 321.

Defendant/Appellant had no authority or jurisdiction to act on the petition such that the proceedings establishing the No. 181 Consolidated Drainage District were void.¹² The Court of Appeals further determined that notice of the initial Board of Determination meeting was confusing and included misleading language such that a person would not readily understand that the proposed project affected his *or* her property or that the person would be subject to an assessment.¹³ The appellate court held that pursuant to well-established law regarding due process requirements, the misleading notice violated Intervening Plaintiffs/Appellees' due process rights.¹⁴ The Court of Appeals affirmed the trial court's ruling regarding equity jurisdiction and determined that the trial court's exercise of equity jurisdiction was proper.¹⁵

On November 29, 2011, Defendant/Appellant filed an application for leave to appeal the Court of Appeals October 18, 2011 published opinion. As will be discussed in the Argument section below, the Court of Appeals' decision is correct and properly supported by Michigan statutory and case law. It should be affirmed.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Facts Pertaining to the Drain Project Proceeding

A. The No. 181 Consolidated Drain Drainage District

The No. 181 Consolidated Drain Drainage District consists of the #181-10 drain *in the township(s) of Elba sections 18 & 19, North Star sections 25, 26, 27, 28, 29, 32 and 36, Washington sections 1, 12, 23 and 24.*¹⁶ It also includes the following drains¹⁷:

¹² *Id.* at 341.

¹³ *See* AA 72a-89a. *Elba Township, supra*, 294 Mich App at 332.

¹⁴ *Id.*

¹⁵ *Id.* at 341.

¹⁶ *See* AA 13a - Notice of May 4, 2010 Board of Determination Meeting.

¹⁷ *See* AA 19a - Notice of November 11, 2010 Reconvened Board of Determination Meeting.

No. 181 Drain	No. 181-249 Drain
No. 181-142 Drain	No. 181-Branch of No. 249 Drain
No. 181-Branch of No. 142 Drain	No. 181-245 Drain
No. 181-182 Drain	No. 181-154 Drain
No. 181-192 Drain	No. 181-139 Drain
No. 181-South Branch of No. 192	No. 181-156 Drain
No. 181-38 Drain	No. 181-South Branch of No. 156 Drain
No. 181-Ball Branch of No. 38 Drain	No. 181-North Branch of No. 156 Drain
No. 181-336 Drain	No. 181-217 Drain
No. 181-214 Drain	No. 181-Branch of No. 217 Drain
No. 181-Branch of No. 214 Drain	No. 181-68 Drain
No. 181-215 Drain	No. 181-Branch of No. 68 Drain
No. 181-87 Drain	No. 181-Waino Pihl Drain
No. 181-449 Drain	No. 181-261 Drain
No. 181-222 Drain	No. 181-262 Drain
No. 181-301 Drain	No. 181-349 Drain
No. 181-35 Drain	No. 181-353 Drain
No. 181-Branch No. 1 of No. 35 Drain	No. 181-410 Drain
No. 181-Branch No. 2 of No. 35 Drain	No. 181-Branch No. 1 of No. 410 Drain
No. 181-375 Drain	No. 181-Branch No. 2 of No. 410 Drain
No. 181-135 Drain	No. 181-422 Drain
No. 181-27 Relief Drain	No. 181-459 Drain
No. 181-197 Drain	No. 181-468 Drain
No. 181-Branch of No. 197 Drain	

In addition to the Townships of Elba, North Star and Washington, the above referenced drains are located in the Townships of Fulton, Hamilton and Newark as well as the Village of Ashley.¹⁸

B. March 23, 2009 Petition

Defendant/Appellant relies on a March 23, 2009 petition, which he prepared for circulation and signature, as the basis for pursuing the proposed drainage project.¹⁹ The petition identifies the project as the #181-0 Drain and all established tributary drains located and established in North Star, Washington and Elba Townships.²⁰

¹⁸ Id.

¹⁹ See AA11a.

²⁰ Id.

Five property owners who collectively own 340 acres of land in North Star Township signed the petition.²¹ However, of the 340 acres represented *only 140 acres are included* in the project based on the affected North Star areas identified in the May 4, 2010 Board of Determination meeting notice.²² 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.

C. Notice of the May 4, 2010 Meeting of the Board of Determination

Defendant/Appellant appointed a Board of Determination to review the March 23, 2009 petition and scheduled the meeting of the Board of Determination for May 4, 2010. Notice of the May 4, 2010 Meeting of the Board of Determination provided:

“Notice is hereby given to you as a person liable for an assessment that the Board of Determination... will meet... to hear all interested persons and evidence and to determine whether the drain and *Drainage District No., 181-10 Wolf & Bear known as the #181-10 Wolf & Bear Drain, ...and all established tributary drains, located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington Sections 1, 12, 23 and 24...*” (Emphasis supplied)²³

The notice references *#181-10 Wolf & Bear Drain* as the subject matter of the Board of Determination meeting. The notice also identifies the affected areas by name: Sections 18 & 19

²¹ *Id.*

²² AA 11a. The May 4, 2010 Board of Determination notice specifically identifies the affected areas of the proposed project as sections 25, 26, 27, 28, 29, 32 and 36 of North Star Township as well as sections 18 & 19 of Elba Township and Sections 1, 12, 23 and 24 of Washington Township. The petitioners collectively own 140 acres in the sections of North Star Township affected by the proposed project (sections 29 and 32). (See AA 2b Certification Regarding Payment of Property Tax of Petitioners to March 23, 2009 petition.) The remaining 200 acres are located in sections 20, 30 and 31 of North Star Township and *are not* directly affected by the proposed project. AA 2b

²³ See AA 13a.

of Elba Township; Sections 25, 26, 27, 28, 29, 32 and 36 of North Star Township; and Sections 1, 12, 23 and 24 of Washington Township.

The Court of Appeals concluded that the notice was misleading.²⁴ Although the notice provided a specific description of the area where the work would be done – *Sections 18 & 19 of Elba Township; Sections 25, 26, 27, 28, 29, 32 and 36 of North Star Township; and Sections 1, 12, 23 and 24 of Washington Township* – the description is inaccurate because the project actually involves all the districts contained in the “#181-10 Wolf & Bear Drain” Drainage District.²⁵ The Court determined:

“A person not living within the specific sections of the townships 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.”²⁶

D. May 4, 2010 Meeting of the Board of Determination

The May 4, 2010 Board of Determination was made up of three members and an alternate: Charles Cary, Howard Poindexter, James Weburg and Rex Crumbaugh (alternate).²⁷ James Weburg, *who voted against the project*, indicated that the Board was presented with information regarding a small drain project.²⁸ He indicated that the 181-10 Wolf & Bear Drain segment which should have been the focal point of the May 4, 2010 meeting gave way to a presentation on the “watershed” and the so-called “consolidated” drain, consisting of

²⁴ AA 81a-82a. Elba Township, supra, 294 Mich App at 332.

²⁵ Id.

²⁶ Id.

²⁷ AA 13a.

²⁸ AA 37b – Affidavit of James Weburg (February 1, 2011).

approximately 47 separate and distinct drainage districts by the Defendant/Appellant's engineer.²⁹

Weburg indicated other problems with the notice of the May 4, 2010 meeting as well as the meeting itself. The information provided in the notice did not match the proposed work contemplated by the Drain Commissioner as presented at the meeting.³⁰ Further, almost all of the attendees of the May 4, 2010 meeting were opposed to the consolidation project.³¹ 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.³² Dennis Kellogg, circulator of the March 23, 2009 petition, told the Board that he had a relatively small area that needed to be cleaned and that he *did not* intend his drain petition to be used as a basis for constructing a watershed project as proposed by the engineer.³³ William Terrell, who circulated the August 13, 2009 petition³⁴, indicated that he circulated the petition because approximately one and one-half miles of his drain needed cleaning.

The attendees requested an adjournment of the May 4, 2010 meeting in order for the Board to engage in additional study regarding the proposed project as presented by the Drain Commissioner's engineer.³⁵ Weburg asked the Drain Commissioner whether there was

²⁹ Id.

³⁰ Id.

³¹ AA 31b – Affidavit of William Terrell (December 10, 2010) and AA 28b – Affidavit of Roger Slavik (December 9, 2010).

³² Id. and AA 37b – Affidavit of James Weburg (February 1, 2011).

³³ AA 37b – Affidavit of James Weburg (February 1, 2011).

³⁴ *See* AA 9a, 10a & 12a. Defendant/Appellant relies on a total of four petitions in support of the proposed drain project. However, only the March 23, 2009 petition was ever reviewed by the Board of Determination. The other petitions are dated: August 18, 2006/November 28, 2006; September 11, 2008; and August 13, 2009.

³⁵ AA 37b – Affidavit of James Weburg (February 1, 2011).

additional support for the proposed drain project.³⁶ However, the Board was never provided anything other than the March 23, 2009 petition.³⁷

E. Board of Determination Order of Necessity

Following the May 4, 2010 Board of Determination meeting, the Board signed an Order of Necessity approving the project by a 2-1 margin.³⁸ The Order of Necessity references the *Gratiot County Drain # 181-10* (not #181-0 or the #181-10 Wolf & Bear Drain) in its caption and provides:

“[A]ll persons owning lands liable to assessment for benefits, or whose lands shall be crossed by said drain and any district or municipality affected having been given an opportunity to appear and be heard on the question being considered of whether the drain in said Drainage District, as set forth in the Petition for consolidating, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, #181-10 drain and all established tributary drains, *located and established located and established in the township(s) of Elba sections 18 & 19, North Star sections 25, 26, 27, 28, 29, 32 and 36, Washington sections 1, 12, 23 and 24*...is necessary and conducive to public health, convenience or welfare...

It Is Hereby Ordered and Determined that the drain set forth in the Petition to replace culverts and tile...is necessary and conducive to public health, convenience or welfare.

It Is Further Ordered and Determined that the drain set forth in the Petition is necessary for the protection of the public health in the following municipalities: Elba, North Star and Washington...” (Emphasis supplied).³⁹

The Board’s ruling is clearly limited to a single drain - the #181-10 drain located and established in the township(s) of Elba sections 18 & 19, North Star sections 25, 26, 27, 28, 29,

³⁶ Id.

³⁷ Id.

³⁸ See AA 17a.

³⁹ Id.

32 and 36, Washington sections 1, 12, 23 and 24. There is no mention of the consolidation of 47 drainage districts across any municipality beyond Elba, North Star and Washington Townships.

F. Post-Board of Determination Meeting

Roger Slavik, Elba Township Supervisor, attended the May 4, 2010 Board of Determination meeting.⁴⁰ After the meeting, Elba through its Township Board of Trustees contacted its municipal attorney (the law firm of Fortino, Plaxton, Moskal and Costanzo of Alma, Michigan) regarding the Drain Code proceedings.⁴¹ Elba was informed that because the firm also represented the County of Gratiot, the law firm could not counsel Elba without first securing consent from Gratiot County.⁴² Elba was subsequently informed that the County would not consent or otherwise waive the apparent conflict, and that Elba needed to find other counsel.⁴³ The Elba Township Board authorized Mr. Slavik to seek alternate counsel at its next meeting.⁴⁴ Elba retained Smith Bovill, P.C. in late August 2010.⁴⁵

Elba sought informal review of the drain proceedings but was denied access to the information requested pursuant to an October 1, 2010 Freedom of Information Act request (FOIA).⁴⁶ The Drain Commissioner responded that the requested documents would cost

⁴⁰ AA 28b - Affidavit of Roger Slavik.

⁴¹ AA 28b – Affidavit of Roger Slavik (December 9, 2010). All Township action is taken pursuant to the direction of the Elba Township Board of Trustees and is carried out by its Supervisor Roger Slavik. In addition to serving as the Township Supervisor, Mr. Slavik is employed full time outside of the Township. Accordingly, his ability to carry out Township duties is limited to part of one day per week and is also restricted by the fact that the Board meets on a monthly basis.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ AA 3b – October 1, 2010 FOIA request.

\$1,694.00 to produce.⁴⁷ Accordingly, a revised FOIA request was filed on October 19, 2010, which yielded a response on October 29, 2010.

At that time Elba learned the Drain Commissioner was relying primarily on the March 23, 2009 petition, and that he did not have the required number of petition signatures pursuant to Section 441, Chapter 19 - Consolidation of the Drain Code, to convene the Board of Determination in May 2010.⁴⁸ Elba contacted the Drain Commissioner to alert him of Elba's concerns regarding the validity of the proceedings in an effort to resolve the matter without court litigation.⁴⁹ The Drain Commissioner refused to stop the proceedings or to take any other action to review or to attempt to ratify (ex post facto) the proposed project. Elba filed legal action in the Gratiot County Circuit Court on November 8, 2010, to enjoin further proceedings on the drain project as well as other declaratory relief.⁵⁰

A hearing on Elba's motion for preliminary injunction was held on December 14, 2010.⁵¹ At that time the trial court denied Elba's motion for preliminary injunction and instructed the parties to file motions for summary disposition determining that the matter could be resolved based on the legal issues.⁵² Shortly after the hearing on the preliminary injunction, Plaintiff amended its complaint.⁵³

G. Intervening Plaintiffs

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

⁴⁷ AA 6b – October 8, 2010 correspondence from Brian Denman.

⁴⁸ AA 28b - Affidavit of Roger Slavik.

⁴⁹ AA 13b – October 27, 2010 correspondence to Brian Denman.

⁵⁰ AA 17b.

⁵¹ AA 28a.

⁵² Id.

⁵³ AA 41a.

Court in January 2011 to intervene as party-plaintiffs seeking declaratory relief under the Drain Code and complaining that the Drain Commissioner's errors in the drain proceedings, including the defective notice, constituted due process violations affecting their rights as private citizens.⁵⁴

The Intervening Plaintiffs complained that upon receiving notice of the May 4, 2010 meeting of the Board of Determination they determined that their lands were not located in the proposed affected areas – *Sections 18 & 19 of Elba, Sections 25, 26, 27, 28, 29, 32 and 36 of North Star, or Sections 1, 12, 23 and 24 of Washington* – and therefore, they did not have an interest in the proposed project and did not attend the May 4, 2010 meeting.⁵⁵ Months later they learned that their drains had been consolidated as part of the large scale project even though their property was not identified in the May 4, 2010 meeting notice.⁵⁶ They were also informed that there was nothing they could do about the consolidation.⁵⁷

In addition to the Intervening Plaintiffs, others have come forward voicing their complaints and objections regarding the Drain Commissioner's actions and the proposed project, indicating that like the Intervening Plaintiffs, their property was included in the consolidated drain project without affording them proper notice of the May 4, 2010 Board of Determination meeting and subsequent intended action.⁵⁸ Other individuals have been threatened that they will

⁵⁴ AA 51b – Affidavit of David Osborn (February 4, 2011); AA 48b – Affidavit of Mark Crumbaugh (February 3, 2011) and AA 45b – Affidavit of Cloyd Cordray (February 3, 2011).

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ AA 34b – Affidavit of Roger M. and Cara J. Evans (January 31, 2011); AA 42b – Affidavit of Carl E. Boog (February 2, 2011); AA 54b – Affidavit of James J. Stehlik (February 15, 2011); AA 57b – Affidavit of Bruce and Connie Andersen (February 16, 2011); AA 60b – Affidavit of Larry and Joanne Walden (February 17, 2011); AA 63b – Affidavit of Darryl and Marcella Thompson (February 17, 2011); AA 66b – Affidavit of Angela Morris (February 17, 2011); AA 69b – Affidavit of Howard C. Andersen, II (February 17, 2011); AA 72b – Affidavit of Laura Crocker (February 17, 2011); AA 75b – Affidavit of Gary L. Schestag (February 17, 2011); AA 78b – Affidavit of Donna and Roland Merignac (February 17, 2011); AA 81b – Affidavit of

be required to pay for the proposed project without realizing any benefit from the work when it is completed.⁵⁹

H. Misleading and Defective Notice –Descriptions of Project Inconsistent and Incorrect

From its inception the proposed project, including the drains and municipalities affected, has been inconsistently and incorrectly described. The notices did not fully indicate what lands or what drains would be affected by the project until the November 11, 2010 re-convened Board of Determination meeting notice.⁶⁰ See the following descriptions set forth on the various notices and orders:

- March 23, 2009 Petition: “#181-0 Drain and all established tributary drains located and established in the Townships of North Star, Washington & Elba...”⁶¹
- Notice of the May 4, 2010 Meeting of the Board of Determination – “the drain in Drainage District No. #181-10 Wolf & Bear known as the #181-10 Wolf & Bear Drain... and tributary drains located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington Sections 1, 12, 23 and 24...”⁶²
- Order of Necessity following the May 4, 2010 Meeting – “Gratiot County Drain # 181-10” and “#181-10 drain... township(s) of Elba sections 18 and 19, North Star sections 25, 26, 27, 28, 29, 32 and 36, Washington sections 1, 12, 23 and 24...” and “the drain set forth in the Petition”⁶³
- Notice of the November 11, 2010 Re-Convened Board of Determination – “The No. 181 Consolidated Drain Drainage District” and “for the consolidation of the following drains:

No. 181 Drain

No. 181-249 Drain

Dave Rattay (February 18, 2011); AA 84b – Affidavit of Joe Gavenda (February 18, 2011); AA 87b – Affidavit of Frank Sourek (February 22, 2011); AA 90b – Affidavit of Patrick Cordray (February 22, 2011); AA 93b – Affidavit of Frances Slavik (February 22, 2011); AA 96b – Affidavit of Mark and Richard Miller (February 24, 2011); AA 99b – Affidavit of Frank Sefl (February 24, 2011).

⁵⁹ AA 33b – January 3, 2011 correspondence to Carl & Ada Boog from Brian Denman.

⁶⁰ AA 19a.

⁶¹ AA 11a.

⁶² AA 13a.

⁶³ AA 17a.

No. 181-142 Drain
No. 181-Branch of No. 142 Drain
No. 181-182 Drain
No. 181-192 Drain
No. 181-South Branch of No. 192
No. 181-38 Drain
No. 181-Ball Branch of No. 38 Drain
No. 181-336 Drain
No. 181-214 Drain
No. 181-Branch of No. 214 Drain
No. 181-215 Drain
No. 181-87 Drain
No. 181-449 Drain
No. 181-222 Drain
No. 181-301 Drain
No. 181-35 Drain
No. 181-Branch No. 1 of No. 35 Drain
No. 181-Branch No. 2 of No. 35 Drain
No. 181-375 Drain
No. 181-135 Drain
No. 181-27 Relief Drain
No. 181-197 Drain
No. 181-Branch of No. 197 Drain

No. 181-Branch of No. 249 Drain
No. 181-245 Drain
No. 181-154 Drain
No. 181-139 Drain
No. 181-156 Drain
No. 181-South Branch of No. 156 Drain
No. 181-North Branch of No. 156 Drain
No. 181-217 Drain
No. 181-Branch of No. 217 Drain
No. 181-68 Drain
No. 181-Branch of No. 68 Drain
No. 181-Waino Pihl Drain
No. 181-261 Drain
No. 181-262 Drain
No. 181-349 Drain
No. 181-353 Drain
No. 181-410 Drain
No. 181-Branch No. 1 of No. 410 Drain
No. 181-Branch No. 2 of No. 410 Drain
No. 181-422 Drain
No. 181-459 Drain
No. 181-468 Drain

Known as the No. 181 Consolidated Drain in the Townships of Elba, Fulton, Hamilton, Newark, North Star and Washington...⁶⁴

- Order of Necessity following the November 11, 2010 Meeting – “Gratiot County Consolidated Drain No. 181” and “the consolidated drains being:

No. 181 Drain
No. 181-142 Drain
No. 181-Branch of No. 142 Drain
No. 181-182 Drain
No. 181-192 Drain
No. 181-South Branch of No. 192
No. 181-38 Drain
No. 181-Ball Branch of No. 38 Drain
No. 181-336 Drain
No. 181-214 Drain
No. 181-Branch of No. 214 Drain
No. 181-215 Drain
No. 181-87 Drain
No. 181-449 Drain

No. 181-249 Drain
No. 181-Branch of No. 249 Drain
No. 181-245 Drain
No. 181-154 Drain
No. 181-139 Drain
No. 181-156 Drain
No. 181-South Branch of No. 156 Drain
No. 181-North Branch of No. 156 Drain
No. 181-217 Drain
No. 181-Branch of No. 217 Drain
No. 181-68 Drain
No. 181-Branch of No. 68 Drain
No. 181-Waino Pihl Drain
No. 181-261 Drain

⁶⁴ AA 19a.

No. 181-222 Drain	No. 181-262 Drain
No. 181-301 Drain	No. 181-349 Drain
No. 181-35 Drain	No. 181-353 Drain
No. 181-Branch No. 1 of No. 35 Drain	No. 181-410 Drain
No. 181-Branch No. 2 of No. 35 Drain	No. 181-Branch No. 1 of No.410 Drain
No. 181-375 Drain	No. 181-Branch No. 2 of No. 410 Drain
No. 181-135 Drain	No. 181-422 Drain
No. 181-27 Relief Drain	No. 181-459 Drain
No. 181-197 Drain	No. 181-468 Drain
No. 181-Brach of No. 197 Drain	

now known as the No. 181 Consolidated Drain in the Townships of Elba, Fulton, Hamilton, Newark, North Star and Washington and the Village of Ashley...”⁶⁵

The various notices are misleading where they provide incomplete, inconsistent and incorrect descriptions of the proposed project and the lands affected by the proposed project.

Gratiot County Circuit Court Ruling and Court of Appeals’ Decision

Pursuant to the trial court’s December 14, 2010 ruling on Plaintiff/Appellee Elba Township’s motion for preliminary injunction, the parties filed cross motions for summary disposition. On March 8, 2011, the Gratiot County Circuit Court heard the parties’ cross motions for summary disposition and granted Defendant’s Motions for Summary Disposition pursuant to MCR 2.116(C)(10).⁶⁶ It issued its ruling from the bench and entered Defendant/Appellant’s prepared order that same day.⁶⁷

Plaintiffs/Appellees’ appealed the Gratiot County Circuit Court decision on March 28, 2011. The Court of Appeals heard oral argument on October 11, 2011 and issued its published opinion reversing the trial court’s ruling on summary disposition and affirming the trial court’s exercise of equitable jurisdiction on October 18, 2011.⁶⁸

⁶⁵ AA 26b Order of Necessity following the November 11, 2010 Meeting

⁶⁶ AA 70-71a

⁶⁷ Id.

⁶⁸ AA 72a.

STANDARD OF REVIEW

Pursuant to MCR 7.212(D)(2), Plaintiffs/Appellees accept Defendant/Appellant's statement of the applicable standard of review, regarding the grant or denial of summary disposition as well as review of legal questions including statutory interpretation, issues regarding due process and review of a court's exercise of jurisdiction, as complete and correct. When and where appropriate, Plaintiffs/Appellees will specifically address the standard of review to be afforded each legal issue as that issue is addressed in the argument section below.

LAW AND ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF THE DRAIN CODE AND SPECIFICALLY CONSTRUCTION OF MCL 280.194 WITH REGARD TO 'COMBINED PETITIONS' FOR IMPROVEMENTS, MAINTENANCE & CONSOLIDATION IN RELATION TO PETITION SIGNATURE REQUIREMENTS SET FORTH AT MCL 280.191 AND MCL 280.441 COMPLIES WITH THE RULES OF STATUTORY INTERPRETATION AND SHOULD BE UPHELD.

A. The Court of Appeals' Interpretation of MCL 280.194 with regard to the 'Combined Petition' for Improvements, Maintenance & Consolidation is Proper.

The Court of Appeals' analysis of the Drain Code, included review and analysis of Sections 191, 194 and 441, based on the *combined petition* for improvements, maintenance and consolidation at issue in Gratiot County. The Court of Appeals' analysis of the three sections correctly acknowledged and incorporated the basic principles of statutory interpretation – “read[ing] provisions in the context of the entire statute... avoid[ing] any construction that would render any part of the statute surplusage or nugatory.”⁶⁹

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. County of Alcona v Wolverine Environmental Production, Inc., 233 Mich. App 238, 246; 590 NW2d 586 (1999). Provisions of a statute are not construed in isolation, but

⁶⁹ AA 78a. Elba Township, *supra*, 294 Mich App at 323.

rather, in the context of other provisions of the same statute to give effect to the purpose of the whole enactment. Id. at 247.

In this appeal, Defendant/Appellant criticizes the Court of Appeals' statutory interpretation analysis claiming that Section 194, when read as a whole, is designed to provide relaxed petition requirements in Chapter 8 proceedings.⁷⁰ Defendant/Appellant further claims that the Court of Appeals did not apply Section 194 as written. Defendant/Appellant's argument lacks legal support. 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.”

Defendant/Appellant claims the Court of Appeals did not give effect to the introductory phrase of Section 194 – “in any petition filed under this chapter” – which Defendant/Appellant argues is an exclusive reference to Chapter 8 and in particular Section 191 regarding petition signature requirements.⁷¹ However, Defendant/Appellant's focus on the introductory phrase of Section 194; is its peril, where Defendant/Appellant's emphasis on – “any petition filed under this chapter” – is taken out of context and given extraordinary emphasis. Parsing Section 194 into its component parts yields two separate sentences.

The opening phrase in the first sentence of Section 194 – “any petition filed under this chapter” – does not stand alone, nor is it separated from the rest of the sentence with any type of

⁷⁰ Appellant's appeal brief p. 10.

⁷¹ Id.

signal or punctuation. This phrase, as part of the whole sentence, continues and provides guidance on the type of description a petitioner is required to provide in order to identify the drain in a proposed project.⁷² It states that a petitioner is not required to describe the subject drain beyond its name or to otherwise describe the drain's commencement, general route or terminus.⁷³ Contrary to Defendant/Appellant's argument, the first sentence of Section 194 does not reference Section 191's petition signature requirements.

Similarly, the second sentence of Section 194 does not reference Section 191 or address petition signature requirements. The second sentence does not include the opening phrase "any petition filed under this chapter." Rather, the second sentence provides that for any type of work enumerated under that section, only one petition and one proceeding are required.⁷⁴ Like the first sentence of Section 194, the second sentence is silent on the issue of petition requirements including signature requirements. The Court of Appeals aptly noted this distinction in its analysis of Section 194:

"[Here,] MCL 280.194 does not act to negate the signature requirements of MCL 280.441. Instead, MCL 280.194 recognizes that improvement and maintenance of drains is often ancillary to consolidation projects. Therefore, MCL 280.194 authorizes the use of one petition and one proceeding when maintenance, improvements, and consolidation are being requested. Otherwise, at least two petitions and two board of determination proceedings would be required.

However, the *use of a single petition does not change the end result, which is both consolidation and improvements*. And if two separate petitions had in fact been made—one for improvements and one for consolidation—no one would have questioned the need for 50 signatures on the petition for consolidation. Therefore, the requirements of MCL 280.191 and MCL 280.441 *each* apply. Otherwise, the signature requirements of MCL 280.441 would 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*

⁷² MCL 280.194

⁷³ Id.

⁷⁴ Id.

to initiate a consolidation proceeding than a proceeding for maintenance, such a result is incongruous. Had the Legislature intended this result under MCL280.441, it could have easily referred to the signature requirements in MCL 280.191. Manifestly, however, it did not.” (Emphasis supplied.)⁷⁵

In addition, the Court of Appeals correctly acknowledged that “Chapter 8... contains no provisions allowing the Drain Commissioner to disregard the signature requirements contained in MCL 280.441”⁷⁶ (and Defendant/Appellant has also failed to identify any such provision). Nevertheless, Defendant/Appellant claims that the Court of Appeals erred by improperly considering Section 441 as part of its statutory interpretation analysis to conclude that the signature requirements of Chapter 8 and Chapter 19 *each apply* any time consolidation is joined with maintenance or improvements in a combined petition under Section 194.

Defendant/Appellant suggests a reading of Section 194 wholly inconsistent with the rules of statutory interpretation and then accuses the appellate court of being overzealous in its application of statutory construction by giving effect to the petition signature requirements of Section 441 when consolidation is included in the proposed project.⁷⁷ However, it is Defendant/Appellant who is in error where his interpretation of Section 194 literally ignores entire provisions of Section 194 by omitting the language occurring immediately after “*In any petition filed under this chapter*” and before “*and for any and all such proceedings, only 1 petition and proceeding shall be necessary.*” Furthermore, Defendant/Appellant’s interpretation of the Drain Code blurs the language of Section 191 and Section 194. In particular, Defendant/Appellant’s interpretation reads the word *consolidation* into Section 191 where it is expressly absent. The Court of Appeals noted this distinction.

⁷⁵ AA 78a-79a. *Elba Township, supra*, 294 Mich App at 323-324.

⁷⁶ AA 80a. *Elba Township*, at 327.

⁷⁷ Appellant’s brief p. 12.

“Further, the Drain Commissioner's argument would essentially read the word “consolidation” into MCL 280.191. However, we must presume that the omission of the word “consolidation” in MCL 280.191, and its inclusion in MCL 280.441, was intentional.^{FN13} It was also logical to omit the word “consolidation” in MCL 280.191 because consolidation of drainage districts has the potential to affect a much larger segment of the population than maintenance and improvements to existing drains.”⁷⁸

The Court of Appeals interpretation of Section 194 as well as Sections 191 and 441 is consistent with the rules of statutory interpretation and should be upheld. The Court of Appeals correctly determined that when a project for improvements and maintenance is joined with a request for consolidation in a single petition, the more onerous petition signature requirements of Section 441 apply.⁷⁹

II. THE COURT OF APPEALS CORRECTLY APPLIED ESTABLISHED DUE PROCESS STANDARDS TO DETERMINE THAT THE NOTICE PROVIDED TO THE INTERVENING PLAINTIFFS/APPELLEES WAS MISLEADING

A. The Court of Appeals' Correctly Determined that Notice of the May 4, 2010 Board of Determination Meeting was Misleading Such that it did not Afford Intervening Plaintiffs/Appellees Due Process.

In reviewing the issue whether Notice of the May 4, 2010 Meeting of the Board of Determination was defective, the Court of Appeals correctly set forth the general due process requirements:

“Generally, due process requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner. Notice must be reasonably calculated to apprise interested parties of the pendency of the action and must afford them an opportunity to present objections. ‘The kind of notice required depends on the circumstances of the case....’”⁸⁰

⁷⁸ AA 78a-79a. Elba Township, *supra*, 294 Mich App at 324.

⁷⁹ Id.

⁸⁰ AA 80a. Elba Township, *supra*, 294 Mich App at 329. Citing Hinky Dinky Supermarket, Inc. v Dep't of Community Health, 261 Mich App 604, 606; 683 NW2d 759 (2004), Dusenbery v United States, 534 US 161, 168, 170; 122 S Ct 694, 700, 701; 151 L Ed 2d 597, 605, 607 (2002), In re Petition by Wayne County Treas 478 Mich 1, 9; 732 NW2d 458 (2007) and Alan v County of Wayne, 388 Mich 210, 351; 200 NW2d 628 (1972).

The Court of Appeals cited Alan v County of Wayne, 388 Mich 210; 200 NW2d 628 (1972), for this Court's due process analysis regarding the issue of when notice is considered misleading and the legal impact of a misleading notice.⁸¹ The Alan case involved a notice for issuance of a revenue bond. Its due process analysis, however, has been equally applied in cases involving assessments.⁸² In Alan, this Court held that notice must be phrased with the general legal sophistication of its beneficiaries in mind. Alan, 388 Mich at 353. The Court of Appeals adopted this Court's analysis:

“ ‘[T]here must be enough information so that a meaningfully informed decision respecting the right can reasonably be made from information supplied in plain language on the face of the notice.’ ‘As phrased it must not make any misleading or untrue statement, or fail to explain, or omit any fact which would be important to the taxpayer or elector in deciding to exercise his right. ***In short, the notice may not be misleading under all the circumstances.***’” (Emphasis supplied.)⁸³

This Court further stated in Alan that it was not sufficient for a defendant to argue that notice was given because it was required, or to state that it conformed to accepted practices where *customary process is not necessarily due process*.⁸⁴ (Emphasis supplied). Finally, this Court noted that misleading notice is not due process, and consequently, where a notice violates due process the proceedings for which the notice was required are **invalid**.⁸⁵ (Emphasis supplied). The Court of Appeals' decision adopted this rationale.

Here, the Court of Appeals acknowledged that the Notice complied with the requirements of Sections 72 and 441 of the Drain Code insofar as providing the date, time and place of the

⁸¹ Id.

⁸² Trussell v Decker, 147 Mich App 312 (1985). See also Karpenko v City of Southfield, 75 Mich App 188 (1977) (The property right to be free from a special assessment, as compared to an increase in general ad valorem taxation, is a qualitatively more compelling interest. Id. at 195).

⁸³ AA 81a-82a. Elba Township, *supra*, 294 Mich App at 331-332.

⁸⁴ Alan, 388 Mich at 351-352.

⁸⁵ Id. at 354.

May 4, 2010 Board of Determination hearing.⁸⁶ The Court of Appeals also noted that the Notice provided a general description of the proposed project including the activities to be conducted.⁸⁷ However, the Court of Appeals determined that the Notice went beyond its statutory requirements by providing a very detailed description including township and section numbers for what was presumptively the area where work was contemplated.⁸⁸ The Court of Appeals determined that by providing the detailed information regarding township and section numbers, the Notice was misleading based on this Court's rationale in Alan:

“While, 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. The notice stated the hearing would be to determine the necessity of consolidating, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway, and all established tributary drains, *located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington, Sections 1, 12, 23 and 24...*

This description was inaccurate because the project actually involved all the districts contained within the “#181-10 Wolf & Bear Drain” Drainage District. A person not living within the specific sections 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.”⁸⁹

Defendant/Appellant claims that the Court of Appeals erred in its decision based on an alleged misunderstanding of Drain Code terminology for *drain*, *drainage district* and *drain project* relying on the appellate court's determination that – “*this description was inaccurate because the project actually involved all the districts contained with the #181-10 Wolf & Bear*

⁸⁶ AA 81a-82a. Elba Township, *supra* at 331.

⁸⁷ Id.

⁸⁸ Id. at 332.

⁸⁹ Id. (Emphasis in original).

*Drain Drainage District.*⁹⁰ Defendant/Appellant suggests that the appellate court's rationale was clearly erroneous due to its alleged improper use of Drain Code terminology. This argument lacks merit; moreover, it is as confusing as the notice itself. Whether the appellate court correctly or incorrectly referenced the *districts* or *drains* within the *project* in its determination that notice was misleading is not fatal to the appellate court's conclusion. The issue for this Court is whether the appellate court correctly determined that notice of the May 4, 2010 Board of Determination Meeting including Defendant/Appellant's specific reference to the various townships and section numbers was misleading.

Defendant/Appellant claims the Court of Appeals' analysis and ultimate decision was flawed because the appellate court allegedly mischaracterized the detailed description of township and section numbers identified in the Notice as implying that only those individuals residing in the sections cited in the Notice would be assessed.⁹¹ Defendant/Appellant claims that the detailed description of township and section numbers in the Notice actually refer to the location of the #181 Drain and contemplated drain work, and not the township sections included in the project.⁹² Defendant/Appellant's criticism proves the point regarding the misleading character of the Notice – it is not clear on the face of the Notice whether the detailed references to the various townships and section numbers within the townships is a reference to contemplated drain work or whether it is a reference to potential areas of assessment.

Even if the Court of Appeals mischaracterized the significance of the detailed description of township and section numbers referenced in the Notice as Defendant/Appellant suggests, it does not absolve the Notice of its misleading character or make the Court of Appeals' finding

⁹⁰ Appellant's brief p. 18.

⁹¹ Appellant's brief p. 19.

⁹² Appellant's brief p. 20.

regarding the misleading character of the Notice reversible error. Further, Defendant/Appellant's argument that the descriptive listing of township and section numbers as the identity of the location, route and course of the #181 Drain is of no moment, where Section 194 of the Drain Code specifically indicates that a petitioner is not required to describe a drain by its commencement, general route or terminus – simply its name. MCL 280.194.

The Court of Appeals correctly determined that the May 4, 2010 Board of Determination Meeting Notice was misleading based on the additional descriptive language regarding township and section numbers as set forth in its decision and in light of the subsequent notice provided for the November 11, 2010 Meeting of Reconvened Board of Determination which specifically identified 47 separate and distinct drains as well as seven municipalities.⁹³

Defendant/Appellant attempts to distinguish the significance of the descriptive language of the Notice regarding the May 4, 2010 Meeting of the Board of Determination, stating that the project involves all the tributary drains; however, Defendant/Appellant's Notice specifically states "*all established tributary drains, located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington Sections 1, 12, 23 and 24.*"⁹⁴ (Emphasis supplied). A plain reading of the Notice and this description would suggest that only the established tributary drains *located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington Sections 1, 12, 23 and 24* are affected.

Here the Court of Appeals did not read additional notice requirements into the Drain Code or otherwise impede on the Drain Commissioner's statutory duty to provide notice under the Drain Code. Moreover, the Court of Appeals' decision does not require a drain

⁹³ AA 19a

⁹⁴ AA 13a

commissioner to specify what lands are affected by a proposed project or to describe the exact location of a proposed project and/or its drains. Rather the rule to be gleaned from the Court of Appeals' decision is that where a drain commissioner provides extra-statutory information in the notice at his discretion, as here, such notice shall not be misleading under all the circumstances. Here, Defendant/Appellant went too far in its Notice by specifying the various township and section numbers. The notice provides:

“Notice is hereby given to you as a person liable for an assessment that the Board of Determination... will meet... to hear all interested persons and evidence and to determine whether the drain in *Drainage District No., 181-10 Wolf & Bear known as the #181-10 Wolf & Bear Drain, ...and all established tributary drains, located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington Sections 1, 12, 23 and 24...* Petition further shows that the said drains need consolidating, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway and replacement of culverts and tile for the reason that flooding and erosion of problems are occurring and the said consolidating...of the drains is necessary and conducive to the public and welfare of Elba, North Star and Washington Township(s).”⁹⁵ (Emphasis supplied)

Had the Drain Commissioner concluded its description after the phrase “and all established tributary drains” by omitting “located and established in the Township(s) of Elba, Sections 18 & 19, North Star Sections 25, 26, 27, 28, 29, 32 and 36, Washington Sections 1, 12, 23 and 24”, there likely would be no question whether the notice was misleading.

Defendant/Appellant conceded in his application filed with this Court, the misleading and confusing nature of the Notice regarding the significance of the township and section numbers.⁹⁶ Defendant/Appellant indicated that he amended the subsequent notice of the November 11, 2010 Reconvened Board of Determination to specify all drains and municipalities impacted by the

⁹⁵ AA 13a.

⁹⁶ Appellant's Application for Leave to Appeal pp. 18-19.

project in an effort to clarify any misconceptions or confusion.⁹⁷ Despite these facts, Defendant/Appellant argues without citing any legal authority in support of his position that the misleading nature of the Notice was cleansed by the Intervening Plaintiffs/Appellees and other landowners' actual receipt of the May 4, 2010 Notice. However, Defendant/Appellant fails to cite a single case which supports the notion that improper or misleading notice is permissible if notice is actually provided to the intended recipients despite its misleading nature. This is not due process.

In an attempt to minimize the misleading language of the Notice, Defendant/Appellant relies on the introductory phrase of the Notice and argues that there was only one reasonable conclusion for the Court of Appeals to draw from the Notice provided: that the recipient was liable for an assessment. However, Defendant/Appellant disregards the evidence in the record including the unrefuted sworn statements of 25 landowners regarding their understanding of the May 4, 2010 Notice upon receiving and reviewing it – that where their property was outside the township and section numbers cited (Sections 18 & 19 of Elba; Star Sections 25, 26, 27, 28, 29, 32 and 36 of North Star; and, Sections 1, 12, 23 and 24 of Washington) they and their property were not affected by the proposed project, and further, they were not subject to assessment.⁹⁸

Defendant/Appellant further argues that given the actual notice provided to the Intervening Plaintiffs/Appellees, irrespective as to whether it was misleading, the Intervening Plaintiffs/Appellees forfeited their right to object to the proposed project by failing to attend the Board of Determination hearing. This argument, like the one presented to the Court of Appeals regarding a notice recipient's alleged affirmative duty to inquire into non-misleading notice

⁹⁷ Id.

⁹⁸ AA 28b-32b & 34b-101b Affidavits of residents of Elba, Washington and the Village of Ashley.

provisions, is a contradiction: had the Notice provided *not been* misleading the Intervening Plaintiffs/Appellees and others *would have* attended the hearing.⁹⁹

The misleading character of the Notice deprived the Intervening Plaintiffs/Appellees of *actual notice* that they may be “liable for an assessment” despite the fact they received the mailed Notice where they reviewed the Notice and concluded that their property was not included in the township sections enumerated.¹⁰⁰ It actually deprived the Intervening Plaintiffs/Appellees the opportunity to exercise their due process rights where they understood the confusing and misleading notice to indicate that they and their lands were not affected.

The Court of Appeals’ decision does not impermissibly require drain commissioners to take extra-statutory measures in providing notice of drain projects nor does it invite putative claims of due process violations. However, when a drain commissioner provides information beyond the statutory requirements he acts at his own peril, if such additional information is misleading. The Court of Appeals correctly applied established due process standards to determine that the May 4, 2010 Notice was misleading. Its decision should be upheld.

B. Inclusion in a 1990 Assessment is Not Evidence of Due Process

To bolster his argument that Intervening Plaintiffs/Appellees should have been on notice that their property was within the 181-0 Drain, Defendant/Appellant referenced a 1990 apportionment of benefits for the #181-0 Drain.¹⁰¹ This is a red herring. The notice of the May 4, 2010 Meeting of the Board of Determination wholly lacks reference to the #181-0 Drain. Defendant/Appellant has given no rational reason why Intervening Plaintiffs/Appellees should have understood that due to the 1990 assessment of the #181-0 Drain, to which they were

⁹⁹ AA 82a. *Elba Township, supra*, 294 Mich App at 333.

¹⁰⁰ AA 28b-32b & 34b-101b Affidavits of residents of Elba, Washington and the Village of Ashley.

¹⁰¹ Defendant/Appellant’s brief filed as Appellee with the Court of Appeals at p. 25.

allegedly a part of the assessment roll, that they should now understand and appreciate that notice of ‘the drain in Drainage District No. 181-10 Wolf & Bear known as the #181-10 Wolf & Bear Drain’ meant that their property was subject to a new assessment based on the 20 year old assessment of the #181-0 Drain. Clearly there is a difference between the description of the #181-0 Drain and the notice description of the *drain in Drainage District No. 181-10 Wolf & Bear known as the #181-10 Wolf & Bear Drain*.

Defendant/Appellant further claims that the Drainage District engineer described the proposed work as including consolidation of the #181-0 Drain with Tributary drains at the May 4, 2010 meeting. However, as set forth above, the notice of the meeting does not reference the #181-0 Drain – it plainly refers to the #181-10 Wolf and Bear Drain. Accordingly, how were Intervening Plaintiffs/Appellees to understand that Defendant/Appellant really meant the #181-0 Drain in the notice? Or that Defendant/Appellant considered the #181-10 Wolf & Bear Drain part of or inclusive in the #181-0 Drain?

Defendant/Appellant acknowledged that the notice of the May 4, 2010 meeting of the Board of Determination was misleading and therefore, problematic. He went great lengths to clarify the confusing notice by providing additional information in the notice of the November 11, 2010 meeting of the re-convened Board of Determination.¹⁰² Notice of the meeting of the re-convened board specifically identifies the 47 separate and distinct drainage districts to be consolidated under the proposed project and further identifies four additional affected municipalities.¹⁰³ Defendant/Appellant offers no explanation for the discrepancy in the townships identified in the notice of the May 4, 2010 meeting with the inclusion of the additional

¹⁰² Defendant/Appellant’s brief filed as Appellee with the Court of Appeals at p. 24.

¹⁰³ AA 19a.

townships and village identified in the notice of the November 11, 2010 meeting or those actually impacted by the project. Clearly there was a significant change in the type of notice provided after Defendant/Appellant's attorney became involved well after Plaintiff/Appellees' claim was made known and litigation was initiated. However, instead of addressing the due process concerns regarding the misleading notice of the May 4, 2010 meeting, Defendant/Appellant attempts to persuade this Court that it is not bound by the notice of the May 4, 2010 meeting of the Board of Determination where subsequent notice was given and further, that Plaintiffs/Appellees are estopped from asserting their due process claims. However, the subsequent revised notice, whether conforming with due process or not, does not sanitize the misleading nature of the notice of the May 4, 2010 meeting of the Board of Determination especially where it was at that meeting that Defendant/Appellant consolidated the districts - hence the due process deprivation occurred. Given the constitutional due process issues involved and the vagaries set forth in the Drain Code, this Court should adopt the Court of Appeals' analysis giving these due process issues *due* consideration.

III. THE COURT OF APPEALS' ANALYSIS OF EQUITY JURISDICTION WAS PROPER AND CONSISTENT WITH ESTABLISHED LAW

A. The Gratiot County Circuit Court and the Michigan Court of Appeals were Authorized to Exercise Equitable Jurisdiction.

Michigan courts are not divested of equity jurisdiction to consider Drain Code challenges. See Romulus City Treasurer v Wayne County Drain Commissioner, 413 Mich. 728; 322 NW2d 152 (1982). In Romulus, several municipalities, together with private landowners, challenged the conduct of the drain commissioner based upon the improper use of a special assessment for a revolving drain fund to pay administrative expenses instead of drain maintenance. The drain commissioner defended the action claiming that the challenge was

untimely and should have been brought in the Michigan Tax Tribunal. The Supreme Court determined that the circuit court had equity jurisdiction.

The Supreme Court stated that the Legislature had not shown a clear intent to abolish the circuit court's equity jurisdiction to grant declaratory and injunctive relief in matters challenged under the Drain Code. Id. at 738. The Court stated that divestiture of jurisdiction is accomplished under clear mandate of law. Id. The Court determined that no clear mandate existed. Id.

Here the Plaintiffs/Appellees' complaints invoked the equitable jurisdiction of the Gratiot County Circuit Court pursuant to Romulus, where they challenged the Defendant/Appellant's conduct in violating the provisions of the Drain Code as well as their private constitutional due process rights. The claims against the Drain Commissioner do not focus on the *decision* of the Board of Determination, rather, the issues are whether the Drain Commissioner could convene a Board of Determination hearing to act on the March 23, 2009 petition to consolidate and whether he provided adequate notice. Pursuant to MCL 280.441, the Drain Commissioner could not convene the Board of Determination to consider consolidation of approximately 47 drain districts until he had the required 50 signatures petitioning for the consolidation project. MCL 280.441. The petition at issue has only 5 signatures.

The Supreme Court in Romulus also addressed the issue of timeliness of plaintiffs' action. Defendant argued that the claim was governed by a 30 day limitation period and that it should be dismissed as untimely where over 30 days had elapsed. The Court considered whether plaintiffs' delay in challenging the assessment should act as a bar to bringing the action in circuit court. The Court stated that the doctrine of laches and not the statute of limitations (a 30 day appeal period) would be considered in determining stale claims. Id. at 748. The Court permitted

the plaintiffs to bring their claim as did the Gratiot County Circuit Court and the Michigan Court of Appeals in the instant action. This Court should affirm.

B. The Court of Appeals' Determination that the Limitation Period of MCL 280.161 is Not the Exclusive Remedy under the Drain Code and that MCL 280.161 Did Not Act as a Bar to Plaintiffs/Appellees' Claims was Correct: It is Further Supported by Case Law and Should be Upheld.

The Court of Appeals cited to several Michigan Supreme Court and Court of Appeals cases of precedential value recognizing that *certiorari* as set forth in MCL 280.161 is not the exclusive remedy under the Drain Code and that lack of jurisdiction constitutes one such exception.¹⁰⁴ 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 noted 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).¹⁰⁵

1. The Court of Appeals' Determination that Equity Jurisdiction May Arise from Due Process Violations as well as a Drain Commissioner's Lack of Jurisdiction Is Supported by Case Law.

Defendant/Appellant suggests that the Court of Appeals misquoted or mischaracterized certain legal cases in its analysis of MCL 280.161 and its findings relative to permissible exercise of equity jurisdiction as set forth in the October 18, 2011 published opinion. However, the appellate court's reliance on the cited cases actually demonstrates precedential authority permitting a court to exercise equitable jurisdiction where *certiorari* is not the exclusive remedy under the Drain Code.

¹⁰⁴ AA 83a. Elba Township, *supra*, 294 Mich App at 337.

¹⁰⁵ AA 76a. Id. at 318

Defendant/Appellant claims that the Court of Appeals reliance on Fuller v Cockerill, 257 Mich 35; 239 NW 293 (1932) and Twp of Clarence v Dickenson, 151 Mich 270; 115 NW 57 (1908) is incorrect. Defendant/Appellant criticizes the Court of Appeals analysis stating that the exception (exercising equitable jurisdiction) applies only when there is a violation of the Constitution and not merely a violation of statutory signature requirement. Defendant/Appellant argues that Fuller v Cockerill, 257 Mich 35; 239 NW 293 (1932) and Twp of Clarence v Dickenson, 151 Mich 270; 115 NW 57 (1908), prohibit a violation of a statutory signature requirement from conferring equity jurisdiction without an additional Constitutional violation. However, in making this argument Defendant/Appellant ignores Intervening Plaintiffs/Appellees' due process violation claim based on misleading notice provisions. Accordingly, even if Defendant/Appellant's reading of Dickenson is accurate, the Court of Appeals' decision is appropriate where equity jurisdiction may be exercised given its finding of the instant due process violation arising from the misleading notice. Unlike the single issue of signature requirements before the Court in Fuller v Cockerill, here, there is a due process issue based on the misleading notice *and* a violation of the statutory signature requirement.

Defendant/Appellant next references this Court's ruling in Stellwagen v Dingman, 229 Mich 159; 200 NW 983 (1924) which also cited Dickenson. Stellwagen acknowledges an exception carved out in Dickenson for due process notice violations as occurring in the present matter: *"It was said that 'such objection [claim that requisite number of taxpayers liable to assessment for benefits had not signed the petition] could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain..."* Stellwagen, 229 Mich at 161. Here, Plaintiffs/Appellees were essentially stripped of their due

process rights where the misleading notice prevented them from understanding the impact of the proposed project and consequently foreclosed their opportunity to be heard on the matter.

Defendant/Appellant suggests that the Court of Appeals selectively quoted Lake Twp v Millar, 257 Mich 135; 241 NW 237 (1932) without giving certain deference to its treatment of Dickenson. However, Lake Twp addresses drain proceedings and specifically provides that while “*errors and irregularities in drain proceedings must be taken advantage of by certiorari... an entire want of jurisdiction make be taken advantage of at any time.*” Lake Twp, 257 Mich at 142. (Emphasis supplied). This is established law.

Defendant/Appellant, likewise, complains that the Court of Appeals reliance on Clinton v Spencer, 250 Mich 135; 229 NW 609 (1930) – *that when irregularities rendered drain proceedings void from their inception, so that they could not be corrected on certiorari, the plaintiffs would not be limited to certiorari* – was taken out of context and is inapplicable to the case at bar where it involved a challenge to the drain commissioner’s authority to build a sewer. However, that is not an entirely accurate summary of Clinton. While, the Clinton Court acknowledged that a *sewer* is not synonymous with a *drain* as Defendant/Appellant indicated, that was not the sole determining factor in the Court’s decision to exercise equitable jurisdiction. Rather, the Clinton Court acknowledged plaintiffs’ timeliness in responding and objecting to the proposed sewer project. The Court stated:

“Plaintiffs acted without delay immediately upon their learning of the proposed sewer, and they are not, therefore, precluded from legally attaching the entire proceedings. Counsel for defendants have termed the building of four independent sewers a *156 ‘slight irregularity,’ but we do not deem it so; nor do we regard the changes as insignificant deviations from the original plan. Were these irregularities such as might be corrected on certiorari, we would relegate plaintiffs to that remedy. We do not believe, however, that they can be so corrected, for they affect the entire proceedings from their inception. Plaintiffs should have had the opportunity to oppose the proceedings at the very beginning.

We are not unmindful of other factors that enter into the consideration of this case, but plaintiffs are in no way accountable for them. They are entitled to the equitable relief prayed for.”¹⁰⁶

Defendant/Appellant similarly criticizes the Court of Appeals reliance on Patrick v Shiawassee Co, Drain Comm’r, 342 Mich 257; 69 NW2d 727 (1955). Patrick involved an issue regarding the drain commissioner’s authority to complete additional work which exceeded what was set forth by the board of determination’s finding of necessity absent the drain commissioner initiating condemnation proceedings. In Patrick, plaintiffs first learned of the additional work to be completed after the contract was advertised for enlargement of the drain. It was only then that they first became aware of the necessity to question the proceedings. Defendant drain commissioner argued that certiorari under the Drain Code was the exclusive remedy to plaintiffs; however, the Court found that plaintiffs were permitted to resort to chancery to restrain the drain commissioner from enlarging the drain or taking their lands without condemnation proceedings. The appellate court reaffirmed the precedent established in Lake Twp and Pere Marquette Ry Co v Auditor Gen, 226 Mich 491; 198 NW2d 199 (1924) where the proceedings were void due to a lack of jurisdiction.

Defendant/Appellant argues that the equity exception only applies where there is fraud or where there is a jurisdictional defect. Defendant/Appellant ignores the Gratiot County Circuit Court’s determination and now the Court of Appeals’ determination that equity jurisdiction is appropriate. Defendant/Appellant insists that equity jurisdiction is not appropriate here and claims that the only possible jurisdictional defect stems from Plaintiffs/Appellees’ challenge to the statutory signature requirements under Sections 191 and 441 of the Drain Code. In making

¹⁰⁶ Clinton v Spencer, 250 Mich 135, 156; 229 NW 609, 616 (1930).

this argument, Defendant/Appellant flatly ignores the due process violations stemming from the misleading notice which as a Constitutional violation permits the exercise of equity jurisdiction.

2. The Court of Appeals' Application of the Equity Exception does not Prolong or Otherwise Burden the Drain Proceedings or Interfere with Drain Construction and Financing Activities

Defendant/Appellant urges this Court to reverse the Court of Appeals October 18, 2011 published opinion citing a need for finality in drain construction and financing activities which he suggests has been untimely addressed in the present matter. In lockstep with his previous criticism that the Court of Appeals misquoted or otherwise mischaracterized the law in its decision, Defendant/Appellant addresses the first case cited by the Court of Appeals in its analysis of equitable jurisdiction: Pere Marquette Ry Co v Auditor Gen, 226 Mich 491; 198 NW2d 199 (1924). Defendant/Appellant contends that the Court of Appeals failed to acknowledge the Pere Marquette Court's emphasis on the importance of timeliness and in doing so, Defendant/Appellant suggest that timing has been an issue in the present matter. Defendant/Appellant mischaracterizes the facts leading up to the Plaintiffs/Appellees' Gratiot County Circuit Court action and their appeal of the Gratiot County Circuit Court decision.

Here, unlike the timeline in Pere Marquette, Plaintiffs/Appellees took action in advance of the statutory remedy of certiorari under MCL 280.161. Plaintiffs/Appellees' filed the circuit court action on November 8, 2010 *prior* to the November 11, 2010 Meeting of the Reconvened Board of Determination and *also prior* to the December 22, 2010 Final Order of Determination. This is not a matter where the Court of Appeals inaccurately applied the law or mistakenly determined that Plaintiffs/Appellees waited to exercise their legal rights. Plaintiffs/Appellees *timely* objected to the drain proceedings including specifically the March 23, 2009 petition and the notice of the May 4, 2010 Board of Determination. Plaintiffs/Appellees objections were

made known at first informally via the October 2010 request under the Freedom of Information Act and then more formally via the November 2010 Gratiot County Circuit Court action – both of which pre-dated the recourse available under MCL 280.161.

Accordingly, the proposed distinctions submitted by Defendant/Appellant in Emerick v Saginaw, 104 MichApp 243; 304 NW2d 536 (1981) and In re Round Marsh Drain, 76 MichApp 714; 257 NW2d 224 (1977) – regarding time limitations for review and protest set forth under MCL 280.161 are inapplicable where Plaintiffs/Appellees acted promptly in seeking review.

Defendant/Appellant cannot be heard to complain about the timeliness of Plaintiffs/Appellees' circuit court action or its alleged forced expenditure of funds in pursuing the project where Defendant/Appellant was placed on notice of Plaintiffs/Appellees' concerns regarding the proposed project as early as October 2010 based on Plaintiffs/Appellees' request for information pursuant to the Freedom of Information Act, and where Plaintiffs/Appellees filed suit on November 8, 2010 well before the December 22, 2010 Final Order of Determination and before the solicitation or acceptance of bids.

Likewise, after Plaintiffs/Appellees pursued the appeal before the Court of Appeals, Defendant/Appellant sought leave for immediate consideration of the appeal which was granted by the appellate court. This Court should take note that the Court of Appeals' appeal was filed on March 25, 2011, oral argument was held on October 11, 2011 and the Court of Appeals' decision was issued on October 18, 2011. Defendant/Appellant has not been prejudiced by the passage of time and to the extent he can be heard to complain about the incurred cost; those wounds, if any, are self-inflicted.

C. Absent the Statutory Petition Signature Requirement of 50 Signatures on the March 23, 2009 Petition, Defendant/Appellant Drain Commissioner had no Authority or Jurisdiction to Act on the Petition, and therefore, the Proceedings Establishing the No. 181 Consolidated Drainage District Are Void.

Defendant/Appellant Drain Commissioner did not have jurisdiction to proceed with the instant project given the defective March 23, 2009 petition, specifically violation of the petition signature requirement of MCL 280.441¹⁰⁷. Arnham v Round et al, 210 Mich 531, 536; 177 NW 985, 987 (1920).¹⁰⁸ The March 23, 2009 petition lacked the statutory required number of signatures pursuant to the specific requirements of Section 441 (MCL 280.441) of the Drain Code, where it contained 5 signatures instead of 50 signatures. Consequently, Defendant/Appellant Drain Commissioner did not have jurisdiction to proceed with the drain project and the proceedings establishing the No. 181 Consolidated Drainage District are void.

The number of petition signatures on the March 23, 2009 petition was not sufficient to authorize Defendant/Appellant Drain Commissioner to proceed with the drain project given the specific requirements of Section 441 (MCL 280.441) of the Drain Code. Further, it was not sufficient given the scale or scope of the proposed project which involves *consolidating, cleaning out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway*. The entire proceedings are invalid for a want of jurisdiction. Nevertheless, the Drain Commissioner would have this Court believe that the petitioning authority of five North Star Township freeholders, owning 340 acres of land (of which only 140 acres or less than ½ percent was included in the propose affected area on the May 4, 2010 meeting notice) is

¹⁰⁷ Pursuant to MCL 280.441 regarding petition signature requirements, "... The petition shall be signed by at least 50 property owners within the proposed consolidated drainage district. If in the proposed consolidated drainage district there are less than 100 property owners, the petition shall be signed by at least 50% of the property owners in the proposed consolidated drainage district..."

¹⁰⁸ Jurisdiction is conferred on drain commissioner by filing of a valid application. Arnham v Round et al, 210 Mich 531, 536; 177 NW 985, 987 (1920).

sufficient to proceed with a \$4 million dollar project affecting 30,000 acres of land and 84 miles of drain across seven municipalities. Clearly, such a situation was not intended by the Legislature or permitted by the specific provisions of the Drain Code. Further, it is not supported by Michigan case law.

Kinnie v Bare Twp Drain Comm'r, 68 Mich 625; 36 NW 672 (1888) petition challenged as insufficient to confer jurisdiction to drain commissioner where it was not signed by five resident freeholders within the township. The Kinnie Court reviewed the challenge based on the alleged violation of statutory petition signature requirements and opined that the applicable law required petitioners to be *freeholders* of the township but not necessarily *resident freeholders*. Kinnie v Bare Twp Drain Comm'r, 68 Mich 625, 627; 36 NW 672 (1888).

Likewise, Hinkley v Bishop, 152 Mich 256; 114 NW 676 (1908), involved a challenge to the authority of drain commissioner stemming from an alleged defective application where the application was not signed by the requisite number of freeholders. The Hinkley Court determined that *the signature by a definite number of freeholders is required*. However, it went on to determine that the application was not void for want of signatures where the application was signed by enough persons and where all the persons signing the application were in fact all freeholders. [Issue arising as to definition of owner and *freeholder*, including whether only one tenant by the entirety (versus both husband and wife) is a freeholder for purposes of signing application.] Despite the factual differences between the present matter and those arising in Kinnie and Hinkley, the Court's treatment of the issues is instructive especially in light of Arnham. Absent the statutory petition signature requirement of 50 signatures on the March 23, 2009 petition, Defendant/Appellant Drain Commissioner lacked jurisdiction to proceed with the

proposed project and the subsequent proceedings establishing the No. 181 Consolidated Drainage District are void.

CONCLUSION/ RELIEF REQUESTED

WHEREFORE, Plaintiffs/Appellees TOWNSHIP OF ELBA (“ELBA”) and Intervening Plaintiffs DAVID L. OSBORN, individually and as Trustee of the Osborn Trust, MARK CRUMBAUGH, CLOYD CORDRAY and RITA CORDRAY, collectively the “Plaintiffs/Appellees”, respectfully request this Honorable Court to affirm the Court of Appeals’ October 18, 2011 Opinion and grant such other relief as this Court deems appropriate under the laws of the State of Michigan.

Dated: August 17, 2012

SMITH BOVILL, P.C.

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