

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,

Plaintiff-Appellee,

Docket No. 144166

and

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

Intervening Plaintiffs-Appellees,

v

GRATIOT COUNTY DRAIN COMMISSIONER,

Defendant-Appellant.

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The Gratiot County Drain Commissioner (the “Drain Commissioner”) applied for leave to appeal from *Elba Township v Gratiot County Drain Comm’r*, 294 Mich App 310; 812 NW2d 771 (2011), *lv gtd* 812 NW2d 768 (2012) (Appendix 72a-88a). On May 23, 2012, this Court granted leave to appeal (Appendix 89a). This Court has jurisdiction to review the case by appeal. MCR 7.301(A)(2); MCR 7.302(H).

STATEMENT OF QUESTIONS PRESENTED

This Court’s Order granting leave to appeal stated:

1. “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” (Appendix 89a, quoting *Elba Township, supra*, 294 Mich App at 341).

Appellant Drain Commissioner answers: No

Appellees presumably will answer: Yes

The Circuit Court did not decide this issue.

The Court of Appeals answered: Yes

The Court’s question is inter-related to the following issues from the Drain Commissioner’s application for leave to appeal, which are also presented in accordance with MCR 7.302(H)(4)(a):

2. Did the Court of Appeals commit reversible error when it did not give effect to the words of the statute but instead held that a petition for improvement, maintenance and

consolidation of drains under MCL 280.194, i.e. Section 194 of Chapter 8 of the Drain Code, requires more than five signatures from property owners liable for assessment in the drainage district, contrary to the language of Chapter 8?

Appellant Drain Commissioner answers: Yes

Appellees presumably will answer: No

The Circuit Court implicitly answered: Yes

The Court of Appeals answered: No

3. Did the Court of Appeals commit reversible error when it held that timely and adequate notices for a board of determination meeting regarding a drain project, which provided actual notice of the potential for an assessment, did not comply with due process requirements?

Appellant Drain Commissioner answers: Yes

Appellees presumably will answer: No

The Circuit Court implicitly answered: Yes

The Court of Appeals answered: No

4. Did the Court of Appeals commit reversible error when contrary to over one hundred years of settled law, it held that equity jurisdiction can arise from statutory challenges to the number of signatures on a drain petition instead of requiring a showing of fraud or a constitutional violation?

Appellant Drain Commissioner answers: Yes

Appellees presumably will answer: No

The Circuit Court did not decide this issue.

The Court of Appeals answered: No

INTRODUCTION

This case arises from a petition to maintain, improve and consolidate the #181-0 Drain and its tributary drains (the “Petition”), all of which are wholly located in the #181-0 Drain Drainage District in Gratiot County. Plaintiff-Appellee Elba Township filed a complaint against Defendant-Appellant Gratiot County Drain Commissioner (the “Drain Commissioner”) alleging that the Petition lacked the requisite number of signatures under the Drain Code, MCL 280.1 *et seq.* Intervening Plaintiff-Appellee property owners (the “Osborn Plaintiffs”)¹ alleged that the Drain Commissioner violated the Drain Code, and that a Notice of a Board of Determination meeting (the “Notice”) that they received did not satisfy due process. The Gratiot County Circuit Court granted summary disposition in favor of the Drain Commissioner. The Court of Appeals reversed, and this Court granted leave to appeal. *Elba Township v Gratiot County Drain Comm’r*, 294 Mich App 310; 812 NW2d 771 (2011), *lv gtd* 812 NW2d 768 (2012) (Appendix 72a-89a).

The arguments set forth in this brief correspond to the three sections of the Court of Appeals’ legal analysis. Argument I addresses the Court’s conclusion that where one petition is used for both drain maintenance and improvements under Chapter 8 of the Drain Code (requiring 5 signatures) and drainage district consolidation under Chapter 19 of the Drain Code (requiring 50 signatures), the petition must have 50 signatures, and since the Petition did not have 50 signatures, it is completely invalid and void. The Court erred by effectively re-writing the Drain Code, which requires only 5 signatures on a Chapter 8 petition. The Court’s decision is contrary to the Drain Code’s language and well-established rules of statutory construction. Moreover,

¹ To avoid confusion, this brief uses some of the terminology that the Court of Appeals used in its opinion. The “Osborn Plaintiffs” are David L. Osborn, individually and as trustee of the Osborn Trust, Mark Crumbaugh, Cloyd Cordray, and Rita Cordray.

even assuming that the Court was correct that a Chapter 8 petition must have 50 signatures to include consolidation, the Petition remained valid for maintenance and improvements under Chapter 8.

Argument II addresses the Court of Appeals' conclusion that, although the Notice satisfied all notice requirements under the Drain Code, it was somehow misleading and therefore violated the Osborn Plaintiffs' due process rights. The Notice was accurate and not misleading. The Court misinterpreted it, apparently due to a misunderstanding of Drain Code terminology (*i.e.*, the difference between a drain and a drainage district) and procedure. The Notice only concerned a meeting to determine whether the maintenance, improvements and consolidation were necessary. After the decision to proceed with a project, there were further proceedings concerning assessments to pay for it, with notice, an opportunity to be heard, and no complaint.

Argument III addresses the issue presented by this Court's Order granting leave to appeal (which is also partially addressed in Argument I) of "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" (Appendix 89a, quoting *Elba Township, supra*, 294 Mich App at 341). The answer is no. The Court of Appeals changed over a hundred years of settled law that claims challenging Drain Code proceedings are strictly limited by statute, with a narrow equity exception only for claims that arise from fraud (which is not alleged here) or from a violation of the Constitution (which is not satisfied by mere failure to satisfy a statutory signature requirement).

STATEMENT OF FACTS

The #181-0 Drain and Drainage District

The #181-0 Drain is an established drain, with separately-established tributary drains. The Drain Commissioner had jurisdiction over the #181-0 Drain and all of the established tributary drains, since they were all located in Gratiot County.² Each of the tributary drains had a separate drain name and a corresponding separate drainage district prior to the drain consolidation that the Drain Commissioner implemented in connection with the maintenance and improvement of the #181-0 Drain and the tributary drains. The drainage districts for the tributary drains were each located wholly within the boundaries of the #181 Drain Drainage District prior to consolidation (Appendix 21a-27a, Affidavit of Brian Denman; Appendix 36a-40a, Affidavit of Lawrence J. Protasiewicz, P.E.; Appendix 14a-16a, Maps of the #181 Consolidated Drain Drainage District).

The Intervening Plaintiffs-Appellees (the “Osborn Plaintiffs”) (with Elba Township, collectively referred to as “Plaintiffs-Appellees”) owned properties within the boundaries of the #181-0 Drain Drainage District. The properties listed in the Osborn Plaintiffs’ Complaint were each previously assessed for work performed on the #181-0 Drain in 1990 (Appendix 3a-8a, 1990 Apportionment of Benefits). The Osborn Plaintiffs owned these properties at the time of the 1990 assessment.

The Petition

On March 23, 2009, the Drain Commissioner received a “Petition for Consolidating, Cleaning Out, Relocating, Widening, Deepening, Straightening, Tiling, Extending or Relocating Along a Highway” for the #181-0 Drain and its established tributary drains (the “Petition,

² MCL 280.23.

Appendix 11a).³ The Petition was signed by five property owners with lands in the #181-0 Drain Drainage District as required by MCL 280.191, and met all of the requirements under Chapter 8 of the Drain Code.

The Board of Determination

The Drain Commissioner appointed a Board of Determination to hear evidence on whether the actions requested in the Petition were necessary and conducive to the public health, convenience or welfare, including the consolidation of the tributary drains within the #181-0 Drain Drainage District (Appendix 21a-27a, Affidavit of Brian Denman).⁴ All property owners and affected municipalities, including each of the Plaintiffs-Appellees, were sent notification of the Board of Determination meeting (the “Notice”), which began: “**Notice is Hereby Given** to you as a person liable for an assessment. . . .” (Appendix 13a. Emphasis in original). The Court of Appeals observed: “The Osborn plaintiffs do not argue that they did not receive notice.” *Elba Twp, supra*, 294 Mich App at 329 (Appendix 81a). The Court also recognized that the Notice satisfied all statutory requirements under the Drain Code, explained the meeting’s purpose, and advised regarding judicial review:

“The notice here provided the date, time, and place of the board of determination hearing as MCL 280.72(2) require. It also explained that the purpose of the board of determination hearing was to hear all interested parties and take evidence regarding improvements, maintenance, and consolidation of the ‘# 181-10 Wolf & Bear Drain.’ The notice further provided that persons feeling aggrieved of the

³ The Drain Commissioner also received petitions regarding other drains that are tributaries to the #181-0 Drain: the #135-0 Drain (Appendix 9a); the #156-0 Drain (Appendix 10a); and the #192-0 Drain (Appendix 12a). Each of these petitions was for work on established county drains and submitted under Chapter 8 of the Drain Code. MCL 280.191 *et seq.* The Drain Commissioner also received requests for maintenance from property owners on the #181-0 Drain and various other #181-0 tributary drains (Appendix 21a-27a, Affidavit of Brian Denman, ¶ 8). Each of these tributary drains is and has been wholly within the #181-0 Drain Drainage District prior to consolidation.

⁴ This was done pursuant to MCL 280.72, which is referenced by MCL 280.191.

decision could seek judicial reviewing with ten days of the determination” (*Elba Twp, supra*, 294 Mich App at 331; Appendix 81a).

The purpose of a Board of Determination is to determine whether a petition is necessary to the public health, convenience or welfare.⁵ After hearing the evidence, the Board of Determination determined that the drain project (including both the physical improvements and the consolidation of the #181-0 Drain with the tributary drains) was necessary and conducive to the public health, convenience or welfare pursuant to MCL 280.72(3) (Appendix 17a, May 4, 2010 Order of Necessity).

Final Order of Determination, and Assessments

On December 22, 2010, the Drain Commissioner filed a Final Order of Determination for the #181-0 Consolidated Drain in accordance with MCL 280.151 (Appendix 50a-52a).⁶ No writ of certiorari was sought within the statutory 10 days, and the #181-0 Consolidated Drain became a legally established drain.⁷

On January 5, 2011, the Notice of Letting and Day of Review of Apportionments was mailed to property owners in the Drainage District. Each of the property owners was mailed a copy of this notice, and each of the township supervisors and the village president with municipalities in the Drainage District were personally served with this notice. On February 1, 2011, bids were taken for the construction and materials for the Drain Project. The Day of Review was held on February 14, 2011. The appeals period for the apportionment of costs

⁵ MCL 280.72; MCL 280.191.

⁶ MCL 280.151. The Final Order of Determination refers to the #181 Drain as the #181 Consolidated Drain as a result of the consolidation of drains under the Petition.

⁷ MCL 280.161.

reviewed on the Day of Review expired on February 24, 2011.⁸ There were no appeals filed challenging the apportionment of costs.

Procedural History

On November 8, 2010, Elba Township filed its original complaint and a motion for preliminary injunction. On December 14, 2010, the Gratiot County Circuit Court heard Elba Township's motion for preliminary injunction. In that context, the Circuit Court found that it had general equity jurisdiction, the relevant factors weighed against Elba Township's request for a preliminary injunction, and that the best way to resolve the parties' dispute would be pursuant to a motion for summary disposition (Appendix 30a-35a).

On December 21, 2010, Elba Township filed a first amended complaint seeking declaratory judgment (violation of the Drain Code) and injunctive relief, but not including a claim for certiorari under MCL 280.161 (Appendix 41a-49a). On January 19, 2011, the Osborn Plaintiffs filed a motion to intervene (which was later granted) and their complaint, asserting violations of the Drain Code and due process (Appendix 53a-60a).

The parties filed cross motions for summary disposition, which the Gratiot County Circuit Court heard on March 8, 2011. The Court opined from the bench the Petition was sufficient with five signatures because it was governed by Chapter 8, not Chapter 19, of the Drain Code, and due process was satisfied (Appendix 64a-69a). Accordingly, the Circuit Court entered an order granting summary disposition in favor of the Drain Commissioner pursuant to MCR 2.116(C)(10), and dismissed the case (Appendix 70a-71a).

The Court of Appeals reversed, and this Court granted leave to appeal. *Elba Township v Gratiot County Drain Comm'r*, 294 Mich App 310; 812 NW2d 771 (2011), *lv gtd* 812 NW2d

⁸ MCL 280.155.

768 (2012) (Appendix 72a-89a). Additional details will be discussed in the Argument section where they are best understood in context.

STANDARD OF REVIEW

“This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law.”⁹ The Court also reviews legal questions de novo, including issues of statutory interpretation (discussed in Argument I),¹⁰ whether a party has been afforded due process (discussed in Argument II),¹¹ and whether a court has jurisdiction (discussed in Argument III).¹²

Drain proceedings are administrative in nature. The Drain Code codifies all laws pertaining to drains, and provides the procedures controlling Drain Code cases.¹³ “Generally, the courts will presume that the administrative body has acted correctly and that its orders and

⁹ *Maiden v Rozwood*, 461 Mich 109, 118; 461 NW2d 817 (1999).

¹⁰ *Preserve the Dunes, Inc v Dep’t of Environmental Quality*, 471 Mich 506; 684 NW2d 847 (2004); *In re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999); *Cardinal Mooney High School v Michigan High School Athletic Ass’n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

¹¹ *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

¹² *Sierra Club Mackinac Chapter v Dep’t of Environmental Quality*, 277 Mich App 531, 544; 747 NW2d 321 (2008).

¹³ *Toth v Waterford Twp*, 87 Mich App 173, 176; 274 NW2d 7 (1978); *Downriver Plaza Group v City of Southgate*, 444 Mich 656, 661-662; 513 NW2d 807 (1994).

decisions are reasonable and valid.”¹⁴ Courts are “not inclined to reverse proceedings taken under the general drain law absent showing of very substantial faults.”¹⁵

ARGUMENT

I. THE COURT OF APPEALS HAS EFFECTIVELY AND IMPERMISSIBLY RE-WRITTEN PORTIONS OF THE DRAIN CODE.

A. The Court of Appeals did not apply MCL 280.194 as written.

This argument concerns three Drain Code provisions: MCL 280.191, which governs the requirements for a drain maintenance and/or improvement petition under Chapter 8 of the Drain Code;¹⁶ MCL 280.194, which governs the description of a drain in a Chapter 8 petition, and further provides that where the work also includes drain consolidation, “only 1 petition and

¹⁴ *Hitchingham v Washtenaw County Drain Commissioner*, 179 Mich App 154, 159; 445 NW2d 487 (1989), quoting *Battjes Builders v Kent Co Drain Comm’r*, 15 Mich App 618, 623; 167 NW2d 123 (1969).

¹⁵ *In re Fitch Drain No. 129*, 346 Mich 639, 647; 78 NW2d 600 (1956).

¹⁶ MCL 280.191 relevantly provides for a petition with 5 signatures:

“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).

proceeding shall be necessary;”¹⁷ and MCL 280.441, which concerns the consolidation of drainage districts that are located in the same county (as in this case) under Chapter 19 of the Drain Code, but which does not provide for drain work.¹⁸

The Court of Appeals correctly observed: “When construing a statute, courts must read provisions in the context of the entire statute, and the courts should avoid a construction that would render any part of the statute surplusage or nugatory,”¹⁹ and that “MCL 280.194

¹⁷ 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.”

¹⁸ MCL 280.441 relevantly provides for a petition with 50 signatures:

“(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).

¹⁹ This Court recently summarized the rules of statutory construction:

“When interpreting statutes, this Court must ‘ascertain and give effect to the intent of the Legislature.’ The words used in the statute are the most reliable indicator of the Legislature’s intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute. In interpreting a statute, this Court avoids a construction that would render any part

authorizes the use of one petition and one proceeding when maintenance, improvements, and consolidation are being requested.” *Elba Twp, supra*, 294 Mich App at 323 (Appendix 78a).

The Court went on, however, to construe MCL 280.191 and MCL 280.441 so that where there is one petition for drain maintenance/improvements and consolidation, MCL 280.441’s requirement for 50 signatures applies to the petition. The Court reasoned that “if two separate petitions had in fact been made – one for improvements and one for consolidation – no one would question 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” *Elba Twp, supra*, 294 Mich App at 324 (Appendix 78a. Emphasis in original).

The Court’s reasoning is contrary to MCL 280.194, which when read as a whole is plainly designed to provide relaxed petition requirements in Chapter 8 proceedings. MCL 280.194 essentially says: “In any petition filed under this chapter [it is not necessary to describe the drain in detail, and when the work also involves drain consolidation] “only 1 petition and proceeding shall be necessary.” MCL 280.194’s reference to “this chapter” plainly concerns Chapter 8 of the Drain Code (where MCL 280.194 is located).²⁰ Chapter 8’s petition

of the statute surplusage or nugatory. ‘As far as possible, effect should be given to every phrase, clause, and word in the statute.’ Moreover, the statutory language must be read and understood in its grammatical context. When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme.” *Dep’t of Environmental Quality v Worth Twp*, 491 Mich 227; ___ ; ___ Docket No. 141810; May 17, 2012 (Slip opinion at p 9. Footnotes to citations omitted).

²⁰ See also, *Titan Ins Co v Hyten*, ___ Mich ___; ___ NW2d ___ (2012) (June 15, 2012 slip opinion in Docket No. 142774, p10).

requirements are set forth in MCL 280.191, which is the first section of Chapter 8. These statutes should be applied as written²¹ and with due regard to context. The Legislature was well aware of how to cross-reference statutes, and did so elsewhere as well.²² If the Legislature had intended that MCL 280.441's petition requirements for drainage district consolidation to apply to Chapter 8 drain maintenance/improvement projects under MCL 280.194 when drain consolidation is involved, then the Legislature "surely could have said so."²³ Instead, MCL 280.194 does not refer to MCL 280.441 or Chapter 19 of the Drain Code at all. The Court of Appeals also improperly rendered much of MCL 280.194 and MCL 280.191's requirement for just 5 signatures nugatory in this context.²⁴

The Court's misinterpretation appears to be based, at least in part, on a misunderstanding of drain terminology and proceedings. The Court stated, for example: "MCL 280.194 recognizes

²¹ See, for example, *Di Benedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000) ("we presume that the Legislature intended the meaning it clearly expressed - no further judicial construction is required or permitted, and the statute must be enforced as written"); *Hanson v Mecosta Co Road Comm'rs*, 465 Mich 492, 504; 638 NW2d 326 (2002); *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003) ("where the language of a statute is clear, it is not the role of the judiciary to second-guess a legislative policy choice; a court's constitutional obligation is to interpret, not rewrite, the law").

²² For example, MCL 280.191 cross references MCL 280.71; MCL 280.72; and MCL 280.151 through MCL 280.161.

²³ *Lash v Traverse City*, 479 Mich 180, 189; 735 NW2d 628 (2007). See also, *People v McIntire*, 461 Mich 147, 160; 599 NW2d 102 (1999); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there").

²⁴ *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory).

that improvements and maintenance of drains is often ancillary to consolidation projects” *Elba Twp, supra*, 294 Mich App at 323 (Appendix 78a). The Court’s statement is backwards. Instead, drains are physical waterways that often need maintenance and improvements. That is the subject of Chapter 8. Consolidation is simply one of the tools that may be used to resolve drainage issues, similar to the extension of a drain or the addition of a branch.²⁵ As a practical matter, to pay for consolidated drain work, drainage districts (which are set up to finance drain projects) must be consolidated. MCL 280.441 of Chapter 19 concerns the administrative consolidation of drainage districts, which may be incorporated as an ancillary matter in a Chapter 8 proceeding under MCL 280.194.²⁶

The Court’s misinterpretation also appears to be based, at least in part, in an overzealous application of the principle that courts should avoid a construction that would render statutory language nugatory.²⁷ The Court reasoned that absent its interpretation, “the signature requirements of MCL 280.441 would have no effect whenever a person petitions for both maintenance and consolidation of a drain” *Elba Twp, supra*, 294 Mich App at 324 (Appendix 78a). The Court erred in assuming that the Legislature intended MCL 280.441 to have the Court’s desired effect. Instead, MCL 280.441 is fully effective for purposes of consolidating drainage districts. The Legislature intended, as it wrote, that MCL 280.191’s lower signature requirements should apply to begin a Chapter 8 proceeding to bring drainage relief to property

²⁵ See generally, *Patterson v Mead*, 148 Mich 659; 112 NW 742 (1907), which concerned a single proceeding to improve three drains.

²⁶ The Court of Appeals’ apparent misunderstanding of Drain Code terminology and procedure is further discussed in Argument II.

²⁷ Another recent example is *Michigan Properties, LLC v Meridian Twp*, 292 Mich 147, 154; 808 NW2d 506 (2011), *rev’d* ___ Mich ___; ___ NW2d ___ (2012) (June 14, 2012 Opinion in Docket Nos. 143085, 143086 and 143087).

owners (which could include consolidation), and that MCL 280.441's higher signature requirement should apply where property owners simply want less urgent consolidation under Chapter 19.²⁸ This was the Legislature's choice to make, and was presumably made because the public health, safety and welfare are sometimes served by drain projects that directly benefit only a small portion of the public compared to the number of those whose property may contribute to the problem(s).²⁹ The Court of Appeals' imposition of Chapter 19 provisions in Chapter 8 proceedings also threatens further confusion and controversy because, unlike Chapter 8,³⁰ Chapter 19 has no provisions for appeal. Thus, the Court of Appeals' decision is not only contrary to the Drain Code, but also contrary to the public interest.

In partial summary, the Court of Appeals misunderstood, misinterpreted, and therefore misapplied MCL 280.194. When that statute's words are given proper meaning and read in context, a Chapter 8 drain maintenance/improvement petition that also includes drain consolidation is still a Chapter 8 petition that requires only 5 signatures. Therefore, the Court of Appeals' decision should be reversed.

B. Even assuming that the Court of Appeals correctly determined that a combined drain maintenance/improvement and consolidation petition requires 50 signatures, the Petition here would still be valid for drain maintenance and improvements, not totally invalid as the Court of Appeals held.

Based on the reasoning discussed above, and because the combined Petition did not have 50 signatures, the Court of Appeals held that "the #181-0 Drain petition was invalid, and the

²⁸ MCL 280.441 further provides, however: "In place of a petition signed by property owners, a petition may be signed solely by a city or township a portion of which is located within the proposed consolidated drainage district, when authorized by its governing body, or by a combination of municipalities."

²⁹ *Battjes Builders, supra*, 15 Mich App at 621.

³⁰ MCL 280.191 cross references MCL 280.161.

Drain Commissioner was without authority to act on it” *Elba Twp, supra*, 294 Mich App at 328 (Appendix 80a). The Court further stated: “Without 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 were void” *Elba Township, supra*, 294 Mich App at 341 (Appendix 85a).

This Court’s Order granting leave to appeal observed that the Court of Appeals’ latter statement relates to whether the Circuit Court was authorized to exercise equitable jurisdiction (Appendix 89a), so that statement will be addressed in Argument III below. The Court of Appeals’ first statement, however, further indicates that the Petition is completely invalid because it did not have 50 signatures, so it is addressed here.

The Court of Appeals explained why it believed a combined petition required 50 signatures (discussed above), but offered no rationale for its conclusion that a petition that lacks 50 signatures is totally invalid. There is no statutory basis for the Court’s conclusion. Instead, that conclusion is contrary to MCL 280.191, which requires only 5 signatures on a petition for drain maintenance and improvements. The Court’s conclusion is also contrary to MCL 280.194, which provides that where the drain work includes consolidation “only 1 petition and proceeding shall be necessary.” Plainly, the language is designed to avoid the need for multiple petitions. It does not preclude multiple petitions, nor totally invalidate a petition that satisfies statutory requirements for one of its purposes.³¹ By holding that a partially-invalid petition is totally void, the Court of Appeals judicially created a preclusion that the Legislature never enacted, and

³¹ *Bridgeport Twp v Saginaw Co Drain Comm’r*, 118 Mich App 334, 338-39; 324 NW2d 618 (1982) (holding that a petition with 5 signatures satisfied MCL 280.191’s requirements where the nature of the project (inside diameter of the pipe) did not trigger the statute’s higher signature requirements).

which is contrary to the statutory language that the Legislature did enact. This Court should restore the statute so that it functions properly, as this Court unanimously did recently in *Michigan Properties, LLC v Meridian Twp, supra*, (June 14, 2012 slip opinion in Docket Nos. 143085, 143086, and 143087, pp10 n 16, 14, 24).

Further guidance by analogy is provided by *Corning v Potter*, 171 Mich 690; 137 NW 637 (1912), which concerned a petition to extend and clean out drains, including six branch drains. This Court found “that the Legislature, in providing for the extension of an established drain, meant the lengthening of the established drain, and did not mean the extension of a single drain into a system of drains by laterals and branches.” 171 Mich at 698-99. The Court held that the petition was insufficient for this purpose, but otherwise upheld the petition, explaining that “for the purpose of constructing the six lateral, or spur drains, the petition was wholly ineffective. The petition was sufficient for the purpose of improving the existing drain.” 171 Mich at 699.³²

Similarly, it is undisputed that the Petition satisfied MCL 280.191. The Court of Appeals effectively re-wrote the Drain Code to provide that a partial inadequacy renders the petition completely void (contrary to MCL 280.191). Therefore, even if this Court were to uphold the Court of Appeals’ decision that the Petition needed 50 signatures to include consolidation (which the Court should not do), the Court should (1) reverse the Court of Appeals’ further decision that the Petition is completely invalid, (2) hold the Petition is still valid under MCL 280.191 for drain maintenance/improvements; and (3) clarify that while MCL 280.194 provides for proceedings under one petition, it does not preclude additional petitions and proceedings for consolidation.

³² The Legislature has now provided for the addition of branches as a tool under Chapter 8 for drain maintenance and improvements. MCL 280.191; MCL 280.194.

II. THE NOTICE OF THE BOARD OF DETERMINATION MEETING SATISFIED DUE PROCESS.

- A. The Notice of the Board of Determination Meeting was accurate and not misleading; the Court of Appeals misread the Notice due to an apparent misunderstanding of Drain Code terminology and procedure.**

The Court of Appeals found a due process violation, based largely on the Court's misinterpretation of the Notice of the Board of Determination Meeting (the "Notice"), which stated:

"Notice Is Hereby Given to you as a person liable for an assessment that the Board of determination . . . will meet on Tuesday, May 4, 2010 at 10:00 A.M., o'clock in the forenoon, North Star Township Hall located at 2840 E. Buchanan Road, North Star Township, Michigan to hear all interested persons and evidence and to determine whether the drain in Drainage District No. 181-10 Wolf and Bear known as the # 181-10 Wolf & Bear Drain, as prayed for in the Petition for 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, County of Gratiot, State of Michigan. Petition further shows that . . . said consolidating, clearing out, relocating, widening, deepening, straightening, tiling, extending or relocating along a highway of the drains is necessary and conducive to the public health and welfare of Elba, North Star and Washington Township(s). Dated March 23, 2009 in accordance with Sections 72 and 191 of Act No. 40, P.A. 1956, as amended, and for the protection of the public health of the following: Elba, North Star and Washington Township(s).

* * *

"You Are Further Notified, that persons aggrieved by the decisions of the Board of Determination may seek judicial review in the Circuit court for the County of Gratiot within ten (10) days of the determination" (Appendix 13a. Emphasis in original).

The Court of Appeals observed: “The Osborn plaintiffs do not argue that they did not receive notice” *Elba Twp, supra*, 294 Mich App at 329 (Appendix 81a). The Court also recognized that the Notice satisfied all statutory requirements under the Drain Code, explained the meeting’s purpose, and advised regarding judicial review:

“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. It also explained that the purpose of the board of determination hearing was to hear all interested parties and take evidence regarding improvements, maintenance, and consolidation of the ‘# 181-10 Wolf & Bear Drain.’ The notice further provided that persons feeling aggrieved of the decision could seek judicial reviewing with ten days of the determination” *Elba Twp, supra*, 294 Mich App at 331(Appendix 81a).

The Court of Appeals’ analysis should have ended there, with a finding that due process was satisfied. The Court went on, however, to find that the Notice was inaccurate and misleading, reasoning as follows:

“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 that 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 of the districts contained within the ‘#181-10 Wolf & Bear Drain’ Drainage district. 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” *Elba Twp, supra*, 294 Mich App at 332 (Appendix 81a-82a. Emphasis added by Court of Appeals, footnote omitted).

Although the Court of Appeals selectively quotes the Notice, the language is accurate, particularly when read in context (the full quote is set forth at the beginning of this argument).

The Court apparently misunderstood Drain Code terminology, stating, for example: “This description was inaccurate because the **project** actually involved all of the **districts**. . . .” (Emphasis added). Put simply, a drain³³ is a physical watercourse, and a drainage district³⁴ is a legal entity that pays for a drain. A drain “project” under MCL 280.191 concerns the physical watercourse.³⁵ The Notice plainly and accurately stated that the meeting concerned the activities listed in the Petition, and was sent to every property owner in the legally-established drainage district. The Drain Commissioner would decide the specific scope of the contemplated activities after the determination of necessity.³⁶

³³ MCL 280.3 provides:

“The word ‘drain’, whenever used in this act, shall include the main stream or trunk and all tributaries or branches of any creek or river, any watercourse or ditch, either open or closed, any covered drain, any sanitary or any combined sanitary and storm sewer or storm sewer or conduit composed of tile, brick, concrete, or other material, any structures or mechanical devices, that will properly purify the flow of such drains, any pumping equipment necessary to assist or relieve the flow of such drains and any levee, dike, barrier, or a combination of any or all of same constructed, or proposed to be constructed, for the purpose of drainage or for the purification of the flow of such drains, but shall not include any dam and flowage rights used in connection therewith which is used for the generation of power by a public utility subject to regulation by the public service commission.”

³⁴ MCL 280.5 relevantly provides:

“Any drainage district heretofore or hereafter established shall be a body corporate with power to contract, to sue and to be sued, and to hold, manage and dispose of real and personal property, in addition to any other powers conferred upon it by law.”

³⁵ *Bridgeport Twp, supra*, 118 Mich App at 338.

³⁶ In *Grubb Creek Action Comm v Shiawassee County Drain Comm’r*, 218 Mich App 665, 669-70; 554 NW2d 612 (1996), the Court explained:

“The function of the board of determination is to determine whether a problem exists and whether a certain project is necessary. The board does not determine

The Court of Appeals similarly erred in finding that the Notice was misleading because it indicated that only property owners in the township sections listed in the Notice would be assessed. The Notice does not state that. The Court ignored the first words of the Notice, which state with bold emphasis: “*Notice Is Hereby Given* to you as a person liable for an assessment” (Appendix 13a. Emphasis in original). The Notice then proceeded plainly and properly³⁷ to refer to the location of the #181-0 Drain. There is no provision in the Drain Code that would require listing each township section number in a drainage district that could be assessed for contemplated drain work. The Court of Appeals’ suggestion for such a listing would be cumbersome at best, and likely misleading because drainage districts follow topography, not political boundaries. For example, water from properties in one township could flow downhill due to gravity to a drain located in another township, with properties from both townships in the same drainage district because the properties in those townships contribute to the water problem(s) and should pay for remedies, although the drain is actually located in just one of the townships. Moreover, following a determination of necessity at a Board of Determination meeting, a maintenance and improvement project could add extensions or branches into other sections of townships.³⁸ The scope of work could also be reduced from what was contemplated

what is the best solution to the problem. If the board finds that the project is necessary, then the drain commissioner is responsible for assessing possible solutions. In approving the solution to the problem, the commissioner is not restricted to the proposal in the petition or the order of determination” (Citations omitted).

³⁷ MCL 280.194 relevantly 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.”

³⁸ MCL 280.191; *Grubb Creek Action Comm*, *supra*, 218 Mich App at 669-70.

initially.³⁹ If and to the extent drain work proceeds, then there are further proceedings to assess property owners for that work, as the Circuit Court recognized (62a-63a).⁴⁰

The last point bears emphasis, because to fully appreciate how far the Court of Appeals deviated from Drain Code procedure, it is important to keep in mind that the Notice concerned contemplated drain work, and not drainage district assessments, which are addressed in later proceedings. In *Bartnicki v Herrick*, 18 Mich App 200, 204; 170 NW2d 856 (1969), the Court of Appeals set forth the following summary:

“Everyone affected by a drain is notified of the date and place of the determination board’s meeting. At the meeting, affected parties may appear and voice support for or opposition to the drain and improvements. [MCL 280.72]. If the board of determination finds the drain or the proposed work necessary, the per cent of benefits are apportioned to the affected lands by the drain commissioner, [MCL 280.151]. Notice is then given to all parties of a public meeting at which a review will be had of the apportionment of benefits. [MCL 280.154]. Any one aggrieved by the apportionment of benefits may, at the day of review, apply to the probate court for the appointment of a board of review. [MCL 280.155]. The board of review hears all parties and can make such changes in the apportionment as they deem just and equitable. [MCL 280.157]. If an interested party is not satisfied, he may, after the report of the board of review, or at various other times during the proceedings, have the proceedings reviewed by certiorari. [MCL 280.161]” (Citations updated).

³⁹ See, for example, *Hitchingham, supra*, 179 Mich App at 155.

⁴⁰ MCL 280.191 provides (after the portion concerning petition requirements discussed in Argument I, and some additional provisions that are not relevant here):

“After the board of determination determines the necessity for the work, as provided in section 72, the commissioner shall, as soon as practicable after the final order of determination prescribed in section 151 has been filed by him, proceed as provided in sections 151 to 161. If the apportionment is the same as the last recorded apportionments, no day of review is necessary, but in other cases the commissioner shall proceed as provided in sections 151 to 161, including the notice of and the holding of a day of review.”

The Notice of the May 4, 2010 Board of Determination meeting plainly concerned a drain project, and indicated that the property owners may be liable to pay for the proposed drain improvements. The exact nature of the project, and corresponding costs, were unknown and unknowable at the time of the Notice, since the purpose of the meeting was to determine whether it was necessary to proceed with a drain project.⁴¹

To the extent that the Court of Appeals suggests that some additional notice was required due to the consolidation of tributary drainage districts, that suggestion is unfounded for purposes of a due process analysis. The United States and Michigan Constitutions provide: “No person shall be ... deprived of life, liberty or property, without due process of law.”⁴² Consolidation of drainage districts does not involve life or liberty. Nor is there any property interest that could support a due process claim, since consolidation, in itself, is a hold-harmless event financially.⁴³ The only potential property interest that could support a potential due process claim relates to potential assessments, which were not even at issue at the Board of Determination meeting, and which were subject to later proceedings, as indicated above and further discussed below.

The Court of Appeals compounded its misreading of the Notice with heavy reliance on a strained analogy to *Alan v County of Wayne*, 388 Mich 210; 200 NW2d 628 (1972), which involved bonds issued by Wayne County to construct a proposed downtown Detroit stadium. As relevant here, *Alan* presents an extreme case where the notice to the public falsely indicated that

⁴¹ The Drain Code provides that the details of a drain project are not decided until after the Board of Determination takes place. MCL 280.73.

⁴² US Const, Am V; Const 1963, Art 1, § 17.

⁴³ MCL 280.443 (recognition and credit for existing drain); MCL 280.444 (retirement of indebtedness); MCL 280.445 (assumption of bonds and contracts); MCL 280.446 (abandonment or vacation of included drain; proration of moneys).

the stadium would be built by revenue bonds (paid by stadium users), when the bonds actually were to be general obligation bonds of the County (payable by taxes).⁴⁴ This Court held that the Notice of Intent to Issue Bonds was misleading and failed to inform the taxpayers of its purpose, which is to create and determine a method of objecting to a bond issue by petitioning for a vote. 388 Mich at 351.⁴⁵ Therefore, “[t]he bonds are invalid since there has been no valid notice given under s 33 of Act 94.” *Id* at 354.

The Court of Appeals recognized that “*Alan* does not deal with drain assessments,” and that, unlike *Alan*, the Notice here complied with statutory requirements. *Elba Twp, supra*, 294 Mich App at 331 (Appendix 81a). The Court should have stopped there, as discussed above. Instead (and in addition to misreading the Notice), the Court pulled two quotes from *Alan* that it applied as general principles. The Court stated:

“In *Alan*, the Supreme Court stated that ‘there must be enough information so that a meaningfully informed decision respecting the right can reasonably be made from information supplied in the 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.’” *Elba Twp, supra*, 294 Mich App at 331-32 (Appendix 81a, citing *Alan, supra*, 388 Mich at 352-53).

⁴⁴ The Court found that “the taxpayer was never made aware in any official way – that his taxes in unlimited amounts might pay the \$371,000,000 bill for the Stadium. The key language describing the real nature of these bonds is one short paragraph that was neatly excised from notices to taxpayers but prominently displayed in notices to bondholders.” 388 Mich at 332.

⁴⁵ The Court observed that the Revenue Bond Act, section 33 of Act 94, MCL 141.133, stated that a vote must be held “if, within 30 days of the publication of a ‘Notice of Intent to Issue Bonds,’ a petition is filed signed by 10% of the electors of the borrower” (388 Mich at 331); however:

“There is not a single word in the notice suggesting the taxpayers have a right to seek a vote on these bonds. Nothing in the notice says that the whole purpose and reason this notice is required is to trigger a right of referendum” (388 Mich at 342).

To the contrary, the Notice was accurate and not misleading, as discussed above. Thus, even assuming for the sake of argument that the above-quoted standard were applicable here, it has been fully satisfied. The Notice also satisfied due process by being reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.⁴⁶

Moreover, the Court of Appeals improvidently extended *Alan* contrary to the Drain Code and beyond the bounds of proper due process analysis. *Alan* concerned notice of the taxpayers' right to referendum to vote on bonds, and thus the tax obligation to pay for the bonds. The Court of Appeals' selective quotes from *Alan* ignore the context of this Court's statements. The first quote is the end of a long sentence that begins: "To comport with due process any notice respecting petition rights on bonds supported by any pledge of tax power must state. . . ." 388 Mich at 352. The second quote similarly follows a specific reference to context: "In giving notice to taxpayer regarding public securities, to comport with due process the notice must be phrased with the general legal sophistication of its beneficiaries in mind." 388 Mich at 353. The result of the improprieties in *Alan* was that taxpayers lost their only opportunity to pursue a referendum. See, e.g., *Alan, supra*, 388 Mich at 344 ("So finally, 4 months after rights of referendum expired, the real unlimited tax nature of these bonds was placed in an official notice . . .").

In contrast, here the Notice concerned a May 4, 2010 Board of Determination meeting. The rights to challenge assessments remained available. Assessments were not even determined at this stage of the proceedings, as discussed above, and there was a later opportunity to challenge assessments. On December 22, 2010, the Drain Commissioner filed a Final Order of

⁴⁶ See generally, *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).

Determination for the #181 Consolidated Drain (Appendix 50a-52a) pursuant to MCL 280.151. On January 5, 2011, the Notice of Letting and Day of Review of Apportionments was mailed to property owners in the Drainage District. The Day of Review was held on February 14, 2011. The appeals period for the apportionment of costs reviewed on the Day of Review expired on February 24, 2011.⁴⁷ There were no appeals filed challenging the apportionment of costs. Plaintiffs-Appellees did not pursue the opportunity to challenge the assessments, so they are now barred from doing so.⁴⁸

It is well-settled (apart from the Court of Appeals decision under review) that there is no due process violation where, as here, the landowners who may be assessed are given notice and the opportunity to object regarding the assessment itself. Although the Court of Appeals stated that it found no case law directly on point before turning to *Alan* for guidance,⁴⁹ there are numerous cases closely on point. For example, in *Chicago, M. St. P. & P. R. Co v Risty*, 276 US 567, 573-74; 48 S Ct 396; 72 L Ed 703 (1928), the U. S. Supreme Court explained in analogous circumstances:

“The hearing upon this notice is not for the purpose of determining the particular land that may be benefited by the construction of ditch, nor the extent to which any tract of land may be benefited, but to determine whether the proposed drainage or any variation thereof shall be “conducive to the public health, convenience, or welfare, or necessity, or practical for draining agricultural lands.” If the board finds that such drainage will be conducive to the public health,

⁴⁷ MCL 280.155 relevantly provides:

“The owner of any land in the drainage district or any city, township, village, district or county having control of any highway which may feel aggrieved by the apportionment of benefits so made by the commissioner, may, within 10 days after the day of review of such apportionments, appeal therefrom”

⁴⁸ *Bartnicki, supra*, 18 Mich App at 205. See also, Argument III below.

⁴⁹ *Elba Twp, supra*, 294 Mich App at 329 (Appendix 81a).

convenience, or welfare, or necessary or practical for draining agricultural lands, the board may establish the drainage accordingly and proceed to let contracts for the work. It then becomes necessary to determine the particular tracts of land that will be benefited by the drainage and the extent to which it will be benefited.’

“Due process of law does not require notice of a proceeding to determine merely whether an improvement shall be constructed without at the same time establishing the boundaries of the assessment district. It is enough if landowners who may be assessed are later afforded a hearing upon the assessment itself.” (Citing cases including *Goodrich v City of Detroit*, 184 US 432, 437-41; 22 S Ct 397, 46 L Ed 627 (1902); and *Voigt v Detroit*, 184 US 115, 122; 22 S Ct 337; 46 L Ed 459 (1902). Emphasis added).⁵⁰

More recently, Michigan Courts (other than the panel in this case) have repeatedly rejected due process arguments challenging the Drain Code, and attempting to judicially impose additional notice requirements. *See, for example, Barak v Drain Comm’r*, 246 Mich App 591, 601; 633 NW2d 489 (2001) (“plaintiffs do not contest that defendants provided notice pursuant to the Drain Code . . . defendants complied with the statute, which was all that was required of them”); *Eyde v Lansing Twp*, 109 Mich App 641, 651; 311 NW2d 438 (1981), *aff’d* 420 Mich 287; 363 NW2d 277 (1984) (distinguishing between the determination of need for a drain improvement and the allocation of costs, rejecting misplaced reliance on *Alan, supra*, and holding that Drain Code’s notice requirements and time limit for review were constitutionally valid). *See also, Fair Drain Taxation, Inc v City of St. Clair Shores*, 219 F Supp 646, 650 (ED Mich, 1963), *aff’d* 375 US 258 (1963) (upholding the notice provisions of 280.467 and MCL 280.469 as constitutional, with the Court explaining in part: “Not until the proceedings reach the stage where it becomes necessary to decide what proportion of the cost of the proposed

⁵⁰ *See also, OAG, 1962, No 4047, p 434 at 437-41* (June 27, 1962) (opining that the Drain Code’s notice provisions satisfied due process under these and other authorities including 17A Am Jur, § 35, p 465). Currently, 25 Am Jur 2d, Drains and Drainage Districts, § 41, p141 similarly provides: “Due process of law does not require notice of preliminary matters that lead up to but do not directly involve the determination of the amount for which each tract is to be assessed. It is generally sufficient if the persons who must pay the assessments are given notice and an opportunity to be heard on the question of benefits and damages at any stage of the proceeding.”

improvement shall be assessed to the particular parcel of land which each plaintiff owns, must opportunity be given to them as owners to be heard upon that question”); *Clark v City of Royal Oak*, 325 Mich 298, 314; 398 NW2d 413 (1949) (explaining that where there was an opportunity for hearing on the original apportionment of benefits, and the added drainage district assessments are based on the same percentages as the original apportionment, there is no denial of due process in not providing for new hearings).

The Court of Appeals also found that this case is “somewhat analogous” to *Thayer Lumber Co v City of Muskegon*, 152 Mich 59; 115 NW 957 (1908). *Elba Twp, supra*, 294 Mich App at 334 (Appendix 82a). To the contrary, *Thayer* concerned a notice that was “fatally defective in that it fails to set forth either the proposed improvement or the district to be assessed therefor,” in violation of the Muskegon city charter, which required: “Before ordering any public improvement, any part of the expense of which is to be defrayed by special assessment, the council shall give **notice** thereof, and **of the proposed improvement, and of the district to be assessed therefor . . .**” 152 Mich at 66 (Emphasis added). In contrast to *Thayer*, which involved a charter requirement to inform property owners whether they would be liable for an assessment, the Notice here fully complied with the Drain Code, as the Court of Appeals acknowledged earlier. *Elba Twp, supra*, 294 Mich App at 331 (Appendix 81a: “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”). As discussed above, there was no requirement for notice of an assessment, which was a matter for later proceedings, and the Court of Appeals was apparently confused between drains and drainage districts. The Court’s confusion is further revealed by the following quote:

“The Drain Commissioner sent notice to the individual property owners. And the notice apprised the individual property owners of the location of the proposed

drain project. However, the location of the project was erroneous. From reading the notice, no person living outside the sections specifically mentioned could have ascertained whether his or her property was liable to be assessed. Therefore, we conclude that the notice was misleading.” *Elba Twp, supra*, 294 Mich App at 335 (Appendix 82a-83a).

The Court’s first two above-quoted sentences are correct. The Court’s third and fourth sentences are inaccurate and confuse Drain Code terminology and procedure. Instead, the Notice concerned a meeting to determine whether there was necessity to proceed with a drain project. Any assessments were unknown, and there was no requirement to provide notice of speculative assessments. Instead, the assessments were the subject of separate proceedings (about which there is no complaint) following the determination to proceed with a drain project. Nevertheless, property owners were plainly notified of the possibility of assessment by the first words of the Notice, which state with bold emphasis: “*Notice Is Hereby Given* to you as a person liable for an assessment” (Appendix 13a. Emphasis in original). Therefore, the Court of Appeals’ conclusions that the Notice was misleading and violated due process are wrong as a matter of fact and law, and should be reversed.

B. Due process is further satisfied by actual notice.

In addition to the due process discussion above, it also bears emphasis that the lynchpin of a due process claim is an **actual** deprivation.⁵¹ The Court of Appeals did not address the Drain Commissioner’s argument that the Osborn Plaintiffs’ due process claim was properly dismissed pursuant to MCR 2.116(C)(10) because they received actual notice. For example:

⁵¹ *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 356; 745 NW2d 137 (2007) (“fundamental requirements due process are satisfied if a party received actual notice”); *United States v Boudreau*, 564 F3d 431, 438 (CA 6, 2009).

- (1) Notice was mailed to each property owner included within the #181-0 Drain Drainage District, and: “The Osborn plaintiffs do not argue that they did not receive notice.” (*Elba Twp, supra*, 294 Mich App at 329 (Appendix 81a).
- (2) As reflected in the 1990 apportionment of benefits (Appendix 3a-8a), the Osborn Plaintiffs knew that their properties were properly identified with reference to the #181-0 Drain because their properties were subject to assessment for the #181-0 Drain Drainage District in 1990.⁵²

The Drain Commissioner also sent additional notices,⁵³ each of which properly referenced the #181-0 Drain Drainage District and reasonably notified the Osborn Plaintiffs of their interests. All of the drains consolidated and discussed in relation to the #181-0 Drain project are established tributaries to the #181-0 Drain. Each of the drains consolidated fall wholly within the drainage district boundaries of the #181-0 Drain (Appendix 21a-27a, Affidavit of Brian Denman; Appendix 36a-40a, Affidavit of Lawrence J. Protasiewicz, P.E.; Appendix 14a-16a, Maps of the #181 Consolidated Drain Drainage District). Each of the Osborn Plaintiffs was specifically placed on notice (and already know from paying past assessments) that his or her property was within the #181-0 Drain Drainage District. Thus, even if the drain project had gone forward just for work on the #181-0 Drain (without consolidation of the drainage districts

⁵² *Chicago, M. St. P. & P. R. Co, supra*, 276 US at 573 (“No one who, like appellants, had paid assessments for the original construction of the ditch, could have doubted that his lands were within the tract ‘likely to be affected’ by the proposed reconstruction”); *Downriver Plaza Group v City of Southgate*, 444 Mich 656, 669; 513 NW2d 807 (1994) (where the plaintiffs had paid for the construction of drains and had been given notice that there would be usage charges, their conclusion that they would not be charged for drain usage was unreasonable).

⁵³ In addition to the Notice of the Board of Determination meeting, the Osborn plaintiffs also received: (1) notice of the July 20, 2010 informational meeting (Appendix 18a), (2) notice of the November 11, 2010 Reconvened Board of Determination meeting (Appendix 19a), and (3) the Notice of Letting and Day of Review of Apportionments.

or work on the tributary drains), the Notice would still have been accurate, since it was sent to landowners in the #181-0 Drain Drainage District (which contained all of the tributary drainage districts), and they would have to pay for work to the #181-0 Drain (into which all of the tributary drains flowed). Thus, the Osborn Plaintiffs had actual notice and an opportunity to be heard. To the extent that they have any objection, it is merely technical and cannot support the Court of Appeals' decision.⁵⁴

III. THE COURT OF APPEALS CHANGED OVER A HUNDRED YEARS OF SETTLED LAW IN HOLDING THAT THE TRIAL COURT HAD EQUITY JURISDICTION; THIS COURT SHOULD RESTORE THAT PRE-EXISTING LAW.

A. MCL 280.161's limitation period bars the Plaintiffs' claims.

The Court of Appeals recognized that MCL 280.161 applies in this case. *Elba Twp, supra*, 294 Mich App at 336 (Appendix 83a).⁵⁵ It is undisputed that the requirements of MCL

⁵⁴ *In re Fitch Drain No 129, supra*, 346 Mich at 646-47.

⁵⁵ MCL 280.161 provides:

“The proceedings in establishing any drain and levying taxes therefor shall be subject to review on certiorari as herein provided. A writ of certiorari for any error occurring before or in the final order of determination shall be issued within 10 days after a copy of such final order is filed in the office of the drain commissioner as required by section 151 of this act, and for any error occurring after such final order of determination, within 10 days after the day of review, or if an appeal has been taken within 10 days after the filing of the report of the board of review. Notice of such certiorari shall be served upon the commissioner within 10 days after the day of issue in the same manner as notice is required to be given of certiorari for reviewing judgments rendered by justices of the peace, and the writ shall be issued and served, and bond given and approved and the subject matter brought to issue in the same time and manner, as near as may be, as in such cases provided, except that such certiorari may be heard by the court during term, or at chambers, upon 5 days' notice given to the opposite party; and the circuit court of the county shall hear and determine the same without unnecessary delay, and if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside. If issues of fact are raised by the petition for such writ and the return thereto, such

280.161 were not satisfied.⁵⁶ The Court of Appeals further recognized that properly-pled allegations of fraud or a lack of jurisdiction constitute exceptions to the Drain Code's plain language. *Elba Twp, supra*, 294 Mich App at 341 (Appendix 85a). Plaintiffs did not plead fraud. The Court of Appeals, however, erroneously held that a claim alleging that a petition should have had 50 signatures instead of 5 somehow rose to the level of a jurisdictional claim sufficient to provide the trial court with equity jurisdiction. *Elba Twp, supra*, 294 Mich App at 341 (Appendix 85a).

At the conclusion of its discussion regarding equitable jurisdiction, the Court of Appeals stated: "Without 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 were void" *Elba Twp, supra*, 294 Mich

issues shall, on application of either party, be framed and testimony thereon taken under the direction of the court. If the proceedings be sustained, the party bringing the certiorari shall be liable for the costs thereof, and if they be not sustained, the parties making application for the drain shall be liable for the costs. **If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity:** Provided, No court shall allow any certiorari questioning the legality of any drain by any person unless notice has been given to the commissioner in accordance with the provisions of this chapter: Provided further, That when such proceedings are brought the commissioner shall postpone the letting of contracts and all other proceedings until after the determination of the court. And if any error be found in the proceedings, the court shall direct the commissioner to correct such error or errors and then proceed the same as though no error had been made" (Emphasis added).

⁵⁶ The Drain Commissioner filed the Final Order of Determination on December 22, 2010 (Appendix 50a-52a), and thus the limitations period expired on January 1, 2011, prior to the Osborn Plaintiffs' January 14, 2011 motion to intervene. Elba Township filed its complaint and first amended complaint prior to January 1, 2011, but did not seek a writ of certiorari. Further, to the extent that an order of superintending control may be considered to replace a writ of certiorari under these circumstances (MCR 3.302(C)), the consideration is moot here because Elba Township did not seek an order of superintending control (Appendix 41a-49a).

App at 341 (Appendix 85a). This Court's Order granting leave to appeal directed the parties to brief whether, as the Court of Appeals concluded, the Circuit Court was authorized to exercise equitable jurisdiction (Appendix 89a).

As discussed above in Argument I. B, the Court of Appeals was wrong in its conclusion that the Petition was completely invalid. Even assuming for argument's sake that the Petition was not valid for drain consolidation purposes under MCL 280.441, it was still valid for drain maintenance and improvement purposes under MCL 280.191. The discussion below further explains that even assuming that there had been some signature defect in the Petition (which there was not), that defect would not have violated the Constitution, so there was no basis for equity jurisdiction. The Court of Appeals erroneously and improvidently (1) altered well-established law that challenges to the statutorily-required number of signatures on a drain petition do not fall within the equity exception to the Drain Code's plain language; and (2) greatly expanded the equity exception, contrary to well-established policy that the exception must be narrowly construed due to the need for prompt finality in drain proceedings. Therefore, this Court should restore the correct law.

B. The Court of Appeals reversibly erred in changing well-established law that equity jurisdiction may arise only from a proper pleading of fraud (which is not relevant here) or a violation of the Constitution, and is not permissible for statutory challenges to the signatures on a drain petition.

The Court of Appeals presented its discussion and decision as if they were consistent with pre-existing law, but analysis reveals that they are substantial departures that threaten profound effects on public projects throughout the State of Michigan, particularly since the

Court's published opinion is binding precedent that must be followed,⁵⁷ unless it is reversed by this Court.

The Court of Appeals selectively quoted *Fuller v Cockerill*, 257 Mich 35; 239 NW 293 (1932) for the proposition that a complete lack of jurisdiction by the drain commissioner may be challenged in equity. *Elba Twp, supra*, 294 Mich App at 338 (Appendix 84a). The Court's discussion neglects to mention that the lack of jurisdiction that would warrant relief in equity must arise from a violation of the Constitution and not merely a violation of a statutory signature requirement. *Fuller, supra*, 257 Mich at 39, citing *Twp of Clarence v Dickinson*, 151 Mich 270; 115 NW 57 (1908).

The Court of Appeals' omission is crucially important because *Dickinson*, like this case, involved an attempt to bring a suit in equity to challenge whether the signature requirements for a drain petition were satisfied. The Circuit Court dismissed the case, and this Court affirmed based on the Drain Code's statute of limitations. This Court explained that petition-signature defects are purely statutory, and therefore cannot constitute a Constitutional violation that could support equity jurisdiction:

"The question then-and the only question-for our consideration is this: Can the statute have constitutional application to this case? The only reason advanced for saying that it cannot is this, viz.: That equity can afford relief whenever the drain commissioner lacks jurisdiction. It is apparent from the foregoing reasoning that **the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution. The objection to the jurisdiction in such cases must be a valid constitutional objection.** Such objection 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, for he has a constitutional right to such notice, and, if that right is disregarded, the proceedings are as to him a nullity. If, on the other hand, the objections to the jurisdiction are not of a constitutional character, it is obvious that the Legislature has a right to say how they shall be raised, or, in its wisdom, deprive one altogether of the privilege of raising them. The jurisdictional objection raised by complainant is not of a constitutional character.

⁵⁷ MCR 7.215(C)(2); MCR 7.215(J).

The Constitution does not require the petition to be signed by five property owners liable to assessments for benefits. That requirement is purely statutory. The Legislature might have dispensed with it altogether. It therefore possessed ample constitutional authority to declare how objections to its nonobservance should be made. It had authority to declare that objections not so raised should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case, and it prevents complainants maintaining this suit.” *Dickinson, supra*, 151 Mich at 272-73. (Emphasis added).

In *Stellwagen v Dingman*, 229 Mich 159; 200 NW 983 (1924), this Court ordered the dismissal of another analogous, late-filed complaint that alleged that a drain commissioner lacked jurisdiction due to a defective drain application, explaining that *Dickinson* set forth the settled law:

“In *Twp. of Clarence v Dickinson*, 151 Mich 270, 115 N.W. 57 [1908], wherein the objection was based on a claim that the requisite number of taxpayers liable to assessment for benefits had not signed the petition, it was held that ‘the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution.’ It was said that ‘such objection 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,’ but that **there is no constitutional requirement as to the number who shall sign the petition; that the requirement was statutory; that the Legislature might provide that objections should be raised in the manner provided by the statute (by certiorari); and that the denial of other remedy was not a violation of constitutional rights.** This decision has been quoted from with approval in the more recent cases of *Cummings v. Garner*, 213 Mich. 408, 182 N. W. 9 [1921], and *Heliker v. Oakland County*, 216 Mich. 595, 185 N. W. 842 [1921], and must be accepted as the settled law of this state. That it is in line with the weight of authority will be seen by a perusal of the note on page 856 of 9 A. L. R. See also, *Troost v. Fellows*, 169 Mich. 66, 134 N. W. 1011 [1912], and *Toledo, etc., R. Co. v. Shafer*, 190 Mich. 89, 155 N. W. 712 [1916], wherein the earlier cases in this court are collected.” *Stellwagen, supra*, 229 Mich at 161-62 (Emphasis added).⁵⁸

The Court of Appeals also selectively quoted *Lake Twp v Millar*, 257 Mich 135; 241 NW 237 (1932) (*Elba Twp, supra*, 294 Mich App 338-39; Appendix 84a), omitting a prior portion of the opinion that cited *Dickinson, supra; Heliker, supra* (recognizing the importance of the

⁵⁸ See also, *Eyde, supra*, 420 Mich at 293-94 (rejecting the plaintiffs’ argument that the Drain Code deprived them of their due process rights).

Dickinson rule in providing guidance to the profession, and similarly rejecting a defective-petition claim because the statutory remedy by certiorari was exclusive), and *Stellwagen, supra*. The *Lake Twp* Court never said that that the settled law of *Dickinson* was overruled or changed in any way. The *Lake Twp* Court instead indicated that the *Dickinson* rule did not apply in that case because (unlike cases involving a defective petition for a drain commissioner to take action regarding a drain, where the remedy is limited by drain statute), *Lake Twp* involved an attempt to build a sewer, which was completely outside of the drain law's jurisdiction at the time. This is demonstrated by completing the discussion that the Court of Appeals partially quoted:

“The question is presented, whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer; whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to do something which he has no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build. A drain commissioner may not by mere assumption of authority legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but an entire want of jurisdiction may be taken advantage of at any time. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. The proceedings are void for want of jurisdiction.” *Lake Twp, supra*, 257 Mich at 141-42 (Emphasis added to portion omitted by the Court of Appeals).

The other two cases cited by the Court of Appeals for the proposition that equity is available where certiorari is not an adequate remedy similarly can be properly understood only in context. The first of those cases, *Clinton v Spencer*, 250 Mich 135; 229 NW 609 (1930) (cited at

Elba Twp, supra, 294 Mich App at 337; Appendix 83a), involved challenges to a drain commissioner building a sewer, where the Court did “not believe, however, that the drain law in Michigan under which the defendants were acting is sufficiently broad to include sewers.” 250 Mich at 148.⁵⁹ The second case, *Patrick v Shiawassee Co Drain Comm’r*, 342 Mich 257, 264; 69 NW2d 727 (1955) (quoted at *Elba Twp, supra*, 294 Mich App at 339; Appendix 84a), reflected a need for condemnation proceedings.

In sum, before the Court of Appeals’ decision in this case, the equity exception applied only where fraud was properly pled (which is not relevant here) or where there was an actual jurisdictional defect, which as a matter of settled law could not be satisfied by a challenge to the statutory signature requirements under the Drain Code. The Legislature set the signature requirements. It could change and even omit them. Thus, the Legislature’s corresponding statutory remedy was exclusive, and failure to comply with the requirements of that remedy, by failure to file a timely action by certiorari, barred all actions completely. The Court of Appeals changed over a hundred years of settled law (*Dickinson* was decided in 1908). The Court of Appeals should therefore be reversed, and the previously-settled law should be restored.

C. The equity exception must be narrowly construed due to the need for finality in drain construction and financing activities.

The Court of Appeals also disregarded the established policy that the equity exception must be narrowly construed. For example, the Court of Appeals began its analysis with a quote from *Pere Marquette Ry Co v Auditor Gen*, 226 Mich 491; 198 NW2d 199 (1924) (*Elba Twp, supra*, 294 Mich App at 337; Appendix 83a), but cut the quote off at mid-sentence, omitting this

⁵⁹ The present definition of “drain” in MCL 280.3 (quoted above) includes sewers, as further explained in *Eyde Brothers Development Co v Eaton Co Drain Comm’r*, 427 Mich 271, 275 n 1; 398 NW2d 297 (1989).

Court's discussion of "the more serious question" that drove the holding in that case. This Court explained:

"We are unable to accept the proposition that certiorari is an exclusive remedy under the drain law, for this court has held under certain circumstances that equity proceedings to restrain the enforcement of a drain assessment may run collaterally in aid of certiorari to review a drain commissioner's action [citation omitted] and that in a proper case equity has jurisdiction to restrain the return of lands as delinquent for drain taxes where the proceedings are illegal and void [citation omitted], **but the more serious question is that of failure to take any steps for review within the limit of time prescribed in the act for pursuing the method pointed out, when no reason for the delay is shown, and then present piecemeal in succeeding bills plaintiff's grounds of objection against the validity of the proceedings for construction of the drain.**" *Pere Marquette Ry Co, supra*, 226 Mich at 494 (Emphasis added to portion omitted by the Court of Appeals).

The *Pere Marquette* Court answered that more serious question by holding that the equity exception did not apply, explaining:

"This is not a case where the statutory remedy by certiorari was inadequate. No valid excuse for protracting this litigation by successive bills in equity is shown. **The strong expression in the act of a legislative policy, looking to expeditious disposition of this class of legislation, bears distinctly against equity interference under circumstances shown here. No impelling reason appears to justify a court of chancery in taking to itself jurisdiction.**" *Pere Marquette Ry Co., supra*, 226 Mich at 496. (Emphasis added).

After discussing additional cases that were decided before the Drain Code of 1956 was enacted (analyzed above), the Court of Appeals discussed two cases that were decided under the present version of the Drain Code. The Court cited *Emerick v Saginaw*, 104 Mich App 243, 247; 304 NW2d 536 (1981) for the proposition that properly-pled allegations of fraud and a lack of jurisdiction satisfy the equity exception to the Drain Code's statute of limitations (*Elba Twp, supra*, 294 Mich App at 341; Appendix 85a), but neglected to recognize *Emerick's* guiding explanation of why that exception must be narrowly construed:

"While this Court reaffirms the continuing existence of an exception to the Drain Code statute of limitations to be found in equity, it also recognizes that the severe

time limitations incorporated by the Legislature into the Drain Code are not without purpose. The statute provides opportunities for review and protest which are to be invoked prior to the expenditure of any funds for the drain project. . . There must be an end to challenges to the legality of the establishment of a drainage district. The plain language of the Drain Code makes this evident. The judicial exception to the rule, developed over the years under prior versions of the code, remains valid, but it must be narrowly construed.” *Emerick, supra*, 104 Mich App at 248 (Internal citation omitted).

The *Emerick* Court further explained that “mere irregularities in the proceedings [are] to be settled under the statute.” *Id* at 247. The *Emerick* plaintiffs did not plead fraud properly, so their action was barred by the Drain Code’s limitations period. *Id* at 248. *See also, In re Round Marsh Drain*, 76 Mich App 714, 717, 720; 257 NW2d 224 (1977) (“The Drain Code of 1956 is an attempt by the Legislature to codify the laws regarding drains and to provide detailed and specific procedures to be followed so that controversies may be heard and settled swiftly and with finality. . . Of overriding importance is the need for a stopping point in drain controversies”).

The Court of Appeals also relied in part on *Brownstown Creek Drain Improv Drainage Dist v Woodhaven*, 112 Mich App 675; 317 NW2d 220 (1982) (*Elba Twp, supra*, 294 Mich App at 341; Appendix 85a), but again overstated the equity exception by not recognizing that it was narrowly construed and not applicable in that case. The *Woodhaven* Court explained that the Drain Code’s statute of limitations applied in that case because:

“The Drain Code sets forth the remedy to contest the drainage boards’ decision. This remedy was not followed by the defendants, nor did they properly plead fraud on the part of the drainage boards. Hence, they are barred by the statute of limitations from challenging the apportionments or levy of assessments.” *Id.* at 685.

The number of signatures on the Petition – even assuming the Court of Appeals is correct that the number should have been 50 rather than 5 – is a technical defect that must be settled, if at all, under the exclusive remedy and limitations period of MCL 280.161. As discussed above,

the signature number is a statutory creation, so any challenge to it is correspondingly limited by statute. Drain proceedings must be resolved promptly as the Legislature has provided. There is no sound basis for the Court of Appeals' expansion of the equity exception to now allow late, technical challenges in equity.

Moreover, even if equitable jurisdiction were applicable, Plaintiffs-Appellees could not evade the Drain Code's statute of limitations simply by invoking equity, as the Court of Appeals suggests. Instead, laches⁶⁰ would look to the analogous statute of limitations in the Drain Code, and bar Plaintiffs-Appellees' untimely claims. The Drain Commissioner is prejudiced by the passage of time as Plaintiffs-Appellees' claims were made long after the determination of necessity, and significant engineering was performed and paid for. Bids were taken and the review of the drain apportionments held before the Court had an opportunity to rule on the issue. It is too late for Plaintiffs-Appellees to complain, either at law or in equity, as this Court held more than a century ago in *Swan Creek Twp v Brown*, 130 Mich 382, 384-85; 90 NW 38 (1902):

"The statute gives 10 days in which to give notice of such certiorari, and, if such proceeding be not taken within the time prescribed, its legality shall not be questioned in any suit at law or in equity. No such proceedings were instituted, and no objection made, until the filing of this bill on October 22d. Meanwhile the contract had been let, and \$3,589 expended in the construction of the work. Complainants did not act with sufficient promptness, and are guilty of laches which bars their right to review defects either by certiorari or by a bill in equity."

More recently, in *Bartnicki v Herrick*, *supra*, 18 Mich App at 205, the Court of Appeals similarly recognized that MCL 280.161's prompt-finality provisions and policy apply in equity:

"All of these opportunities for review and protest [under the Drain Code] are to be invoked prior to the expenditure of any funds for the drain. However, **there must be an end to any proceedings**, and the section of the drain code that provides for review by certiorari states in part: 'If no certiorari be brought within the time

⁶⁰ Laches is the equitable principle that corresponds to the statute of limitations, but differs in considering the prejudice arising from the delay in addition to the passage of time. *See generally*, *Lothian v City of Detroit*, 414 Mich 160, 165-70; 324 NW2d 9 (1982).

herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity....'

Plaintiffs did not attempt to review their apportionments by any of the statutory methods provided. However, at a later date, they attempted to do what the legislature and the courts prohibit, namely, review drain proceedings other than in the manner provided by the drain statutes. . .

Laches also bars plaintiffs' actions. Estoppel by laches is the failure to do something which should be done or to claim or enforce a right at a proper time. Black's Law Dictionary (4th ed). Plaintiffs' inaction in the pursuit of their statutory remedies effectively bars their dilatory actions here contesting the assessment of the drainage improvement cost." (Emphasis added; internal citations omitted).

D. This Court should reaffirm the correct law.

The Court of Appeals expanded the equity exception in a published opinion that must be followed unless this Court corrects it.⁶¹ The correct view was set forth over a hundred years ago in *Dickinson*. This Court should reaffirm the pre-existing law, much like this Court did with respect to municipalities' constitutionally-reserved authority over roads under Const 1963, Art 7, § 29. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 121, 123; 715 NW2d 28 (2006) (reversing the Court of Appeals; reaffirming this Court's decision in *People v McGraw*, 184 Mich 233, 238; 150 NW 836 (1915), which interpreted the 1908 Constitution's similarly-worded 'reasonable control' predecessor; and overruling a line of Court of Appeals cases that digressed from *McGraw*).

⁶¹ MCR 7.215(C)(2); MCR 7.215(J).

RELIEF REQUESTED

Appellant Gratiot County Drain Commissioner respectfully requests that this Court reverse the Court of Appeals' opinion (Appendix 72a -88a), and reinstate the Gratiot Circuit Court's March 8, 2011 order granting summary disposition in favor of the Drain Commissioner (Appendix 70a-71a).

Respectfully submitted,

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