

October 20, 2014

Mr. Michael J. Solomon
Wexford County Drain Commissioner
401 N. Lake Street, Suite 600
Cadillac, Michigan 49601

**Re: The Lake Mitchell Statutory Lake Improvement Board
Issues Regarding the Canal**

Dear Mr. Solomon:

Recently, the Lake Mitchell statutory lake improvement board (the “Lake Board”) asked for our legal opinions on a variety of different issues.¹ This letter is in response to those inquiries.

FACTS

Lake Mitchell is located within Cherry Grove Township, Selma Township and the City of Cadillac. The Lake Board was created pursuant to formal resolutions by Cherry Grove Township, Selma Township and the City of Cadillac in 1989 pursuant to MCL 324.30901, *et seq.* (the “Act”). Pursuant to those resolutions, the functions of the Lake Board include the following:

1. Initiate proceedings as described in the Act to bring about the desired lake improvements, i.e., control of weed growth.
2. Determine the scope of the project.
3. Establish a special assessment district, including all parcels of land and local units which will be benefitted by improvement of the lake, The special assessment district will be limited to properties which abut the lake or back lots which have deeded lake access.

Shortly after the commencement of the Lake Board in 1989, it established a special assessment district to carry out its functions. That district is comprised of the lakefront properties on Lake Mitchell, all of the properties that front on one canal or channel to Lake Mitchell, and back lots with “deeded lake access” to the lake. Over the years, the Lake Board has used the proceeds collected from the special assessment district for the removal, eradication,

¹ Its informal name is the “Lake Mitchell Improvement Board”.

and control of aquatic weeds and algae within Lake Mitchell and one channel or canal that ties into the lake.

The channel or canal commonly known as “the Camp Torenta Canal” (the “Canal”) is within the special assessment district and was excavated and created in approximately the 1960’s. It averages approximately 40 – 45 feet wide and was approximately 7 – 9 feet deep when created. Today, the Canal is very shallow. Thirty one (31) lots or parcels have frontage on the Canal.

Due to the sometimes stagnant nature of the water in the Canal, there has been a growth of aquatic weeds and algae in the Canal over the years. That growth of aquatic plants and algae blooms has led to decaying plant matter (primarily, the algae) and silt filling up the Canal. Accordingly, the Canal may be in need of fairly extensive dredging or, more likely, hydraulic or suction dredging. Over the years, the Lake Board has treated aquatic plants and/or algae within the Canal (and, hence, has effectively considered the Canal to be part of Lake Mitchell), but has not engaged in any type of dredging or silt removal.

Some of the property owners along the Canal believe that the Canal must now be dredged. They are looking to the Lake Board to conduct such dredging. It is unclear based on communication to the Lake Board from Mr. Rex Barker (a lot owner along the Canal) whether those property owners along the Canal believe that all of the proceeds for the dredging of the Canal must be paid for from the proceeds of the Lake Board’s current special assessment district or whether they agree that a new, additional and segregated special assessment can and should be imposed on the owners along the Canal for dredging expenses.

Please let us know if any of the facts mentioned above as they have been passed on to us are incorrect, as that could change one or more of the opinions contained in this letter.

DISCUSSION

1. The Canal is part of Lake Mitchell.

There seems to be little dispute that the Canal is part of Lake Mitchell for purposes of the Lake Board, the existing special assessment district, and special assessments over the years. Boats and watercraft from Lake Mitchell can navigate the Canal. However, both the primary purpose and actual use of the Canal is for lot owners along the Canal to have access to Lake Mitchell. Nevertheless, the Canal has been included in the special assessment district for the Lake Board since the creation of the Lake Board. The Lake Board has regularly treated the aquatic plants and/or algae within the Canal as appropriate.

Initially, the Canal was probably not riparian. The Michigan Supreme Court in *Thompson v Enz*, 379 Mich 667 (1967), held that riparian rights normally cannot be created artificially via a canal or channel. Notwithstanding that case, where a canal or channel has existed and has been utilized as if it were a riparian body of water for more than 15 years (the

longest real estate statute of limitations – see MCL 600.5861(4)), in most cases, the canal or channel involved would become riparian.

Pursuant to the Act, the Canal should be treated proportionately or similarly to other portions of Lake Mitchell. The Act requires that the assessment levied against any lot must roughly equal the benefit to that lot received from the project involved. See MCL 324.30919. Accordingly, the Canal should not receive disproportionate benefits or proceeds from the Lake Board and its special assessment. Conversely, it should not be short-changed by the Lake Board or the special assessment district either. However, Michigan law accords the Lake Board significant discretion in determining proportionality and what is reasonable.

2. Could the Lake Board pay for most or all of the costs of dredging the Canal out of the current special assessment?

Could the Lake Board, if it so chooses, pay for all or substantially all of the dredging costs for the Canal? It is anticipated that it could cost up to approximately \$88,000 to do the necessary dredge work for the Canal. Over the past year, the total amount collected annually from all of the property owners around Mitchell Lake and the Canal by the Lake Board pursuant to the special assessment district was \$207,263.57 (which is likely to be continued for the next two years). The annual sum collected from lot owners along the Canal has been about 4.6% of the total collected from all property owners. Therefore, having the Lake Board pay for all or substantially all of the dredging costs of the Canal could consume approximately 42.5% of the entire proceeds of the special assessment district for one year.

Pursuant to both the Act and special assessment law in Michigan in general, a property subject to a special assessment is supposed to receive a benefit roughly equal to the proceeds of the assessment collected for that lot or parcel. MCL 324.30919. Or, put another way, when reviewing the validity of special assessments, the Tax Tribunal is not required to determine whether there is “a rigid dollar-for-dollar balance between the amount of the special assessment and the amount of the benefit.” *Crampton v Royal Oak*, 362 Mich 503, 514-516; 108 NW2d 16 (1961). A special assessment will be declared invalid only when a party challenging the assessment demonstrates that “there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvements.” *Ibid.* Having the Lake Board spend such significant amounts of the proceeds of the special assessment district only for properties along the Canal (which comprises only a small percentage of all of the properties within the overall special assessment district) would lead to disproportionate benefits to the Canal property owners while lowering the benefits to other property owners around Lake Mitchell to a level substantially lower than those property owners pay in assessments. That would not be permissible under either the Act or Michigan law.

3. Can an additional assessment (or a “piggyback” assessment) be assessed by the Lake Board for dredging only as to the properties along the Canal by the Lake Board?

Unfortunately, the Act does not expressly provide for a Michigan statutory lake improvement board to be able to create more than one special assessment district at a time or to create an additional special assessment district that covers only a subset of the properties for which the lake board was originally created. Given that special assessments are creatures of statute and did not exist at the Michigan common law, express statutory authorization is normally needed to be able to create a particular special assessment district.

If the Lake Board desires to create a second special assessment district for dredging that only applies to the Canal (as well as the waterfront properties along the Canal), there are three possible alternatives that could be used in attempt to satisfy the statutory requirements. First, the Lake Board could create such a special assessment district for just the Canal if the owners of all of the lots or parcels along the Canal consent to such a special assessment in writing. Pursuant to that consent and waiver, those property owners would agree that the second special assessment would be valid and binding on them. Second, the Lake Board could have the governmental units that created the Lake Board (i.e. Cherry Grove Township, Selma Township and the City of Cadillac) adopt a new resolution that expressly authorizes the Lake Board to create a second special assessment district just for the Canal. Currently, the municipal resolutions which created the Lake Board do not provide for either a second special assessment district or dredging. At present, those resolutions only address the “control of weed growth”, which language is probably not broad enough to include dredging. Also, the resolutions only mention “a” special (i.e. one) assessment district. Third and finally, a new statutory lake improvement board could be created by resolution by Cherry Grove Township to conduct the dredging for the Canal and to create a new special assessment district just for the Canal and its adjoining properties.² Unfortunately, given that the Act is of little guidance regarding this matter and there is no applicable Michigan appellate case law, the first alternative (unanimous consent of the property owners) and third alternative (to create a new statutory lake improvement board just for the Canal) are the only certain ways of pursuing a special assessment for dredging just for the Canal and its adjoining properties. Between those two alternatives, I recommend that the Lake Board and Cherry Grove Township primarily consider the third alternative (that is, for Cherry Grove Township to either create a new statutory lake improvement board or utilize a special assessment district for the Canal, pursuant to Public Act No. 188).

4. How long can a special assessment last under the Act?

The Act implies that a special assessment cannot last more than 30 years. See MCL 324.30914. Accordingly, to err on the side of caution, it should be assumed that the longest special assessment that could be levied by the Lake Board is 30 years.

² The other two municipalities would not be involved because the Canal is located entirely within Cherry Grove Township. Alternately, rather than create an entirely new statutory lake improvement board under the Act, Cherry Grove Township could create a simple special assessment district for dredging comprising the properties along the Canal pursuant to Public Act No. 188 of 1954 (specifically, MCL 41.722 (1)(n)).

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Please do not hesitate to contact me should you or any other member or official of the Lake Board have any further questions.

Very truly yours,



Clifford H. Bloom

cc: Lake Board Secretary