

COA Opinion: Under Drain Code, writ of certiorari is not an exclusive remedy for challenging the Drain Commission's authority.

19. October 2011 By Gaetan Gerville-Reache

In *Township of Elba v. Gratiot County Drain Commissioner, No. 303211*, the Michigan Court of Appeals reversed the grant of summary disposition to the Drain Commissioner, concluding that the petition supporting the Commissioner's drain consolidation project lacked sufficient signatures and that the notice of hearing was deficient. In reaching these conclusions, the Court of Appeals resolved three issues: First, the Court concluded the Commissioner lacked authority to consolidate drains without a petition signed by at least 50 property owners under MCL 280.441, even if the petition served a dual purpose of authorizing improvements under MCL 289.144, which requires only five signatures. Second, the Court concluded that the notice of hearing on the petition was deficient for failing to adequately describe the affected districts, misleading certain property owners to believe their districts were unaffected. Third, the Court concluded that, despite provisions in the Drain Code requiring review by certiorari within 10 days of filing the final order, the circuit court had equity jurisdiction to hear the claims that the Drain Commissioner lacked authority to consolidate.

After receiving several petitions to improve, maintain and consolidate drain systems to cure erosional and flooding problems affecting the petitioners, the County Drain Commissioner hired a consultant to survey, inspect and evaluate the drainage issues. The consultant concluded that consolidation of established tributary drains was the most cost-effective way to address the problems. After issuing a notice to all affected property owners, the Board of Determination held a hearing and approved the consultant's proposed consolidation project. After further notice and reconvening to add land to the district, the County Drain Commissioner entered a final order to consolidate on December 22, 2010.

On November 8, 2010, Elba Township filed a complaint against the Drain Commissioner, alleging that the Commissioner's consolidation violated the Drain Code because (1) the supporting petition lacked 50 signatures, and (2) the notice of hearing was deficient for failing to properly refer to the affected districts. The Commissioner filed a motion for summary disposition, arguing that MCL 280.441, which requires 50 signatures for petitions to consolidate, did not apply. The Commissioner reasoned that MCL 280.194 permitted one

petition to be filed for any work to be done, including improving *and* consolidating the drains. Because MCL 280.191 required only 5 signatures for improving drains, petitions to improve *and* consolidate drains need only five signatures. Additionally, the Commissioner argued that MCL 280.72 only required notice of the hearing date, time, and place, and that such notice was provided. The circuit court granted summary disposition to the County Drain Commission.

The Court of Appeals reversed. First, the Court rejected the Drain Commissioner's argument that 50-signature requirement for consolidation petitions in MCL 280.441 did not apply. The Court held that a petition for improving and consolidating drains must comply with *both* MCL 280.191 *and* MCL 289.441. That means a petition requesting consolidation must contain 50 signatures. The court also concluded that the Commissioner's notice did not satisfy due process because it did not apprise interested parties of the nature of the proceedings, i.e., that the proceedings would affect them. The description was misleading in that it suggested the consolidation would only affect certain districts but not others.

Finally, the Court of Appeals concluded that certiorari was not the only remedy under the Drain Code, despite a statutory provision suggesting the contrary. The Drain Code provides:

The proceedings in establishing any drain and levying taxes therefor shall be subject to review on certiorari. 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. . . . 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 in equity.

The Court of Appeals held that under long-standing precedent, this language did not bar the circuit court from exercising equity jurisdiction to hear a challenge to the County Drain Commissioner's authority to act. Here, because the issue was whether the Drain Commissioner had authority to act on a petition lacking the requisite 50 signatures, the Court could exercise equitable jurisdiction over the plaintiffs' claims.