STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN RE HIGGINS LAKE,
LOCATED IN ROSCOMMON
AND CRAWFORD COUNTY, MICHIGAN
_____/

Court of Appeals Case No.: 367805
Circuit Court Case No.: 23-726443-CZ

ROSCOMMON COUNTY and CRAWFORD COUNTIES, through the Roscommon County Administrator/Controller as the delegated authority,
Petitioners/Appellees

v

CHARLENE CORNELL, GREG SEMACK, WAYNE BROOKS, BRUCE CARLETON, and THE HIGGINS LAKE PROPERTY OWNERS ASSOCIATION,
Objectors/Appellants

and

STEVEN RICKETTS; JAMES BROWN JR; MELANIE BROWN; CURTIS DEVOE; CAROLYN DEVOE; BRUCE CORNETT; SALLY CORNETT; RICK CASSIDAY; CHARLOTTE CASSIDAY; KATHLEEN M TROCK, TRUSTEE of the KATHLEEN M TROCK TRUST 08/18/2004; CHARLES DEWEY JR; MARK O'BRIEN; WILLIAM CORNELL JR; CRAIG SABLE; MELISSA JEAN SEITZ as trustee of MELISSA JEAN SEITZ TRUST; JAMES SEITZ; SAM MIGLIORE; TAMMY MIGLIORE; ROBERT and LYNNE FRYE, trustees of the ROBERT AND LYNNE FRYE TRUST; ANN QUINN; CALVIN PHILIPS; DENNIS WOOD; FREDERICK KRAUSS; JOHN TOWNSEND III; DONALD HEYS; FRANK ARAGONA as manager of ARAGONA FAMILY LLC; DONALD BRYANT; ANN DRAPER-BRYANT; and WILLIAM ISENSTEIN
Objectors/Cross-Appellants
_____/

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OBJECTORS-APPELLANTS' BRIEF ON APPEAL

*** ORAL ARGUMENT REQUESTED ***

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear and adjudicate this appeal by MCR 7.203(A)(1).

A copy of the order appealed is attached as **Appendix #177-178**.

STATEMENT OF QUESTION(S) PRESENTED

I. Four issues are subsumed in the one primary question on appeal: did the Circuit Court err in law when granting the Part 307 Petition and confirming the Higgins Lake Special Assessment District as presented by Roscommon and Crawford Counties?

The four issues are as follows:

1. Did the Circuit Court incorrectly fail to sustain the Objectors' objection that any project that is sought to be paid by a special assessment district must be specifically defined as to its scope prior to the Circuit Court's confirmation?

2. Did the Circuit Court incorrectly fail to sustain the Objectors' objection to Petitioners' request for a Special Assessment District regarding Higgins Lake due to statutory untimeliness?

3. Did the Circuit Court incorrectly fail to sustain the Objectors' objection given the lack of any ascertainable proportionality between the amount of the special assessment and the benefits derived therefrom?

4. Did the Circuit Court incorrectly fail to sustain the Objectors' objection to the lack of established reasonable apportionment in the face of no defined project, no suggestion who would benefit, no evidence of the value of the benefit received; and no costs having been calculated?

II. Alternatively, are the special assessment provisions of Part 307 of the *Natural Resources and Environmental Protection Act* unconstitutional?

INTRODUCTION

Special assessments are pecuniary exactions made by a government for a special purpose or local improvement, apportioned according to the benefits received. *In re Petition of Auditor General*, 226 Mich 170, 173-174; 197 NW 552 (1924). To that end, Michigan law has imposed procedural and substantive due process limitations, including a proportionality requirement, to prevent the exercise of such extractions from becoming "akin to the taking of property without due process of law." *Dixon Road Group v Novi*, 426 Mich 390, 403; 395 NW2d 211 (1986). The Circuit Court below did not conduct the required ***substantive*** review on September 15, 2023 regarding Roscommon and Crawford Counties' petition for an undefined, open-ended special assessment on property owners along Higgins Lake and therefore reversal is required.

FACTS

Higgins Lake is an approximately 10,000-acre freshwater lake containing twenty-one miles of shoreline located in Roscommon and Crawford Counties. In Michigan, the levels of inland lakes are controlled after being first "established" by a circuit court judicial order under Part 307 of the *Natural Resources and Environmental Protection Act*.[1] The statute is "clear and unambiguous: once a [local circuit] court has determined the normal level of an inland lake, it shall be maintained at that normal level by the responsible authority." *Citizens for Higgins Lake Legal Levels v Roscommon Cnty Bd of Comm'rs*, 341 Mich App 161, 164; 988 NW2d 841 (2022). That responsible authority is known as the "Delegated Authority" of the local county. MCL 324.30701(e) (the "person designated by the county board to perform duties required under this part").

[1] A copy of Part 307 is attached at **Appendix #326.**

To help pay for these activities to maintain the normal level at establishment, Michigan law authorizes counties having such inland lakes to impose a specific "special assessment" upon property owners within a defined "special assessment district" or "SAD" for lake-related projects. The process is provided by statute—

> The county board may determine by resolution that the whole or a part of the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments against the following that are benefited by the project: privately owned parcels of land, political subdivisions of the state, and state owned lands under the jurisdiction and control of the department.

MCL 324.30711(1).[2] Later, when a "county board determines that a special assessment district is to be established, the [D]elegated [A]uthority shall[3] compute the cost of the project and prepare a special assessment roll." MCL 324.30711(2).

When "comput[ing] of the cost of a normal level project" required of the Delegated Authority when preparing a special assessment roll, it "shall include the cost of all of the following"—the preliminary study; surveys; establishing a special assessment district, including preparation of assessment rolls and levying assessments; acquiring land and other property; locating, constructing, operating, repairing, and maintaining a dam or works of improvement necessary for maintaining the normal level; legal fees, including estimated costs of appeals if assessments are not upheld; court costs; interest on bonds and other financing costs for the first year, if the project is so financed; and any other costs necessary for the project which can be specifically itemized." MCL 324.30712(1).

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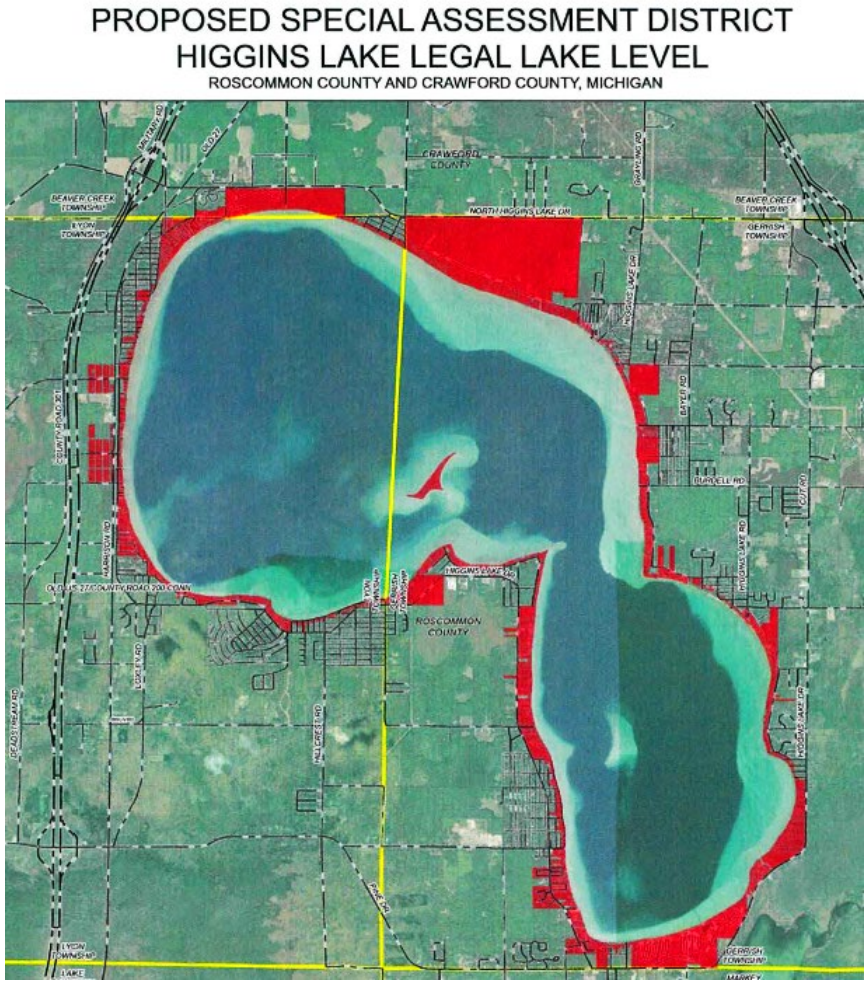
[2] The Circuit Court has established the lake level of Higgins Lake three times. The first was in 1926. **Appendix #1.** The second was in 1982. **Appendix #3**. The third time – which ultimately had a sunset provision – was in January 2009. **Appendix #5, 7-8**. Ironically, one of the attorneys involved on behalf of Roscommon County was Assistant Prosecutor Robert Bennett (**Appendix #6**), who is now Judge Robert Bennett who presided over the hearing on this Petition.

[3] The term "shall" in MCL 324.30711 means the statutory obligation is mandatory, not discretionary. E.g. *Costa v Cmty Emergency Med Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006) ("The Legislature's use of the word 'shall' in a statute generally 'indicates a mandatory and imperative directive.'").

The delegated authority can also include a may add a contingent expense of "not more than 15% of the sum calculated" under MCL 324.30712(1) to cover unexpected costs. MCL 324.30712(2).

On June 12, 2023, Roscommon and Crawford Counties,[4] by its Delegated Authority for Higgins Lake, filed what they label as a petition to establish a lake level special assessment district and confirm the special assessment district boundaries for Higgins Lake. **Appendix #22-25.** The Petition included a map with red-colored highlights of certain properties, not identified by address, that are being sought to be included within the proposed special assessment district—



[4] A tiny portion of the north-end of Higgins Lake crosses into Crawford County.

At the same time, neither the Counties nor the Delegated Authority has provided within the Petition or even contemplated any "comput[ation of] the cost of the project" or even that there is a defined project to begin with. **Appendix #22-25.** There has been repeated demands upon Roscommon County to produce the same and nothing has been provided. **Appendix #28**; see also **Sept 15 Transcript at 119-120** (Appendix #297-298). The lack of this information fully prevents all affected property owners, residents, and even the courts from determining whether the Counties' proposal sought be blessed by the Circuit Court "meet[s] the proportionality requirements that the common law requires in these instances for special assessment districts." **Sept 15 Transcript at 82** (Appendix #260). This missing component is legally fatal and should have precluded the local Circuit Court from ever approving the special assessment district as presented. Yet it erroneously did so.

On September 15, 2023, the Roscommon County Circuit Court held a public hearing on the Petition and objections to the same. Almost immediately, the Circuit Court explained its view—

> I wanna make clear to everybody here, the purpose of this hearing is required by statute. It is not a trial. Due process is satisfied by hearing—at a hearing at which all interested parties may present evidence and arguments allowing the circuit court to ensure that the county has considered the varying public interest in reaching its policy decision and protects the public against arbitrary government action. Thus, *the purpose of this hearing is to appraise the public of the governmental action while providing the opportunity to present opposing viewpoints*.[5] The focus is thus on the public welfare and not on individual riparian rights because the purpose of the special assessment district is to authorize the county to make policy decisions about the inland lake—in this case, Higgins Lake—and its lake levels and the infrastructure necessary to maintain the desired lake level. Part of this process is also for the county, through the county commissioners and their representative today, to explain and answer questions regarding the confirmation of the boundary of the [] Higgins Lake proposed special

[5] Appellants respectfully disagree.

> assessment district. *This hearing is not about potential assessment costs*, methodology to be used in maintaining a lake level, or any dam structure cost related to maintaining the lake level, or additional structure and/or improvements if any, the lake level itself, or whether that legal lake level should be amended in any way. Therefore, questions related to those topics will not be allowed.

***Id.* at 9-10** (Appendix #187-188). The Objectors respectfully objected and asserted that such thinking to be in legal error. ***Id.* at 82-83** (Appendix #260-261).

To support their Petition, the Counties' counsel offered the testimony of a single witness, civil engineer Luke O'Brien from Spicer Engineering, who narrowly testified about his work in locating those who are lake-front property owners. That said, he was handcuffed because there was no defined project calculations or project costs. He thusly limited his work to only finding those properties having deeded "access" to Higgins Lake, not those *who benefit* from any improvement project on Higgins Lake. ***Id.* at 126** (Appendix #304). Specifically, O'Brien expressly confirmed he was not offering any testimony about how the undefined cost of any project should be apportioned based on his identification of the approximate two thousand (2,000) lake-adjacent parcels. ***Id.* at 49** (Appendix #227). Moreover, as the sole provided witness by Petitioners, he offered no testimony or evidence about any increased market value of the various affected property after any proposed improvements.

Later, dozens of citizens appeared at the hearing and spoke against the assessment. ***Id.* at 119** (Appendix #297) (the Circuit Court judge observing that "that the general consensus of the [court]room is in opposition"). This was atop of the hundreds who objected in writing. No one, except the Petitioners and their hired-gun witness, spoke in support of the special assessment district as presented.

The fundamental appellate dispute regards the role and purpose of the objection process. In the Counties' view, they *need not have* a pre-planned understanding of the cost for an assessed project before having the public hearing but is something that can "dealt with" later by the Boards of Commissioners—

> [T]he assessable entities will be all of the properties within the map… [who will ultimately] receive a special assessment on their winter taxes in the event that assessment roll is completed. There will be a separate hearing[6] as to the methodology and cost at the time that the county board moves forward with that; so, that is not going to happen this year. It will be up to the county board as to when that will happen in terms of [] a special assessment roll for Higgins Lake.

***Id.* at 53** (Appendix #231). Via their view going forward, the Counties "have to wait for this order" establishing the boundaries first *and then* be "working with the delegated authority to come up with a proposal [i.e. costs and apportionment] to the board but, ultimately, it's the county board's decision." ***Id.* at 56, 54** (Appendix #234, 232). In other words, "the county makes this decision" later to "approve[] any roll if there is a roll, ultimately." ***Id.* at 54** (Appendix #232). The Objectors strongly disagree. See *infra*. This appeal now follows.

STANDARD OF REVIEW

While governmental decisions on special assessments are presumed to be valid, *Kadzban v Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993), any proposed improvement must be done "in the manner provided by law." *Lake Twp v Millar*, 257 Mich 135, 140; 241 NW 237 (1932). Questions of law are reviewed de novo. *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 429; 670 NW2d 729 (2003). Courts must interpret statutes according to the Legislature's plainly expressed meaning; in other words, courts must apply statutes as written. *People v Gardner*, 482 Mich 41, 50; 753

[6] Later, it was explained there would be no further hearing held by the Circuit Court. **Appendix #262-263**.

NW2d 78 (2008). If the statutory language is clear and unambiguous, judicial construction is neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Statutory schemes must be read as a whole. *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 339; 952 NW2d 384 (2020).

Under our Constitution of 1963, common-law principles remain in effect "until they expire by their own limitations, or are changed, amended or repealed." Const 1963 art III, § 7; see also *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 258-259; 828 NW2d 660 (2013). "With respect to questions involving a statute, this means that this Court must read the statutory language in light of the common law except to the extent that the Legislature has abrogated or modified it." *Al-Hajjaj v Hartford Accident & Indemnity Co*, __ Mich App __, __; __ NW2d __ (2023) (Docket No. 359291), slip op at 3.

When an objector presents evidence rebutting the presumption of validity (i.e. not being in compliance with the law), "the burden of going forward with evidence shifts to the" government. *Kadzban*, 442 Mich at 505 fn5. "At that point," the petitioning government must "present evidence proving that the assessments are reasonably proportionate in order to sustain the assessments." *Id.* While a public hearing is mandated, the process "does not require a full trial." *In re Project Cost & Special Assessment*, 282 Mich App 142, 150; 762 NW2d 192 (2009).

BACKGROUND ON SPECIAL ASSESSMENTS AND PART 307

The power to tax is exclusively vested in the Legislature. Const 1963, art IX, § 1. "A special assessment is a levy upon property within a specified district." *Kadzban*, 442 Mich at 500. There is a "clear distinction" between what are termed "general taxes" versus "special assessments." *Id.*[7] "The former are burdens imposed generally upon property owners for governmental purposes *without regard to any special benefit* which will inure to the taxpayer. *Id.* (emphasis added). Special assessments, on the other hand, "are sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made." *Id.*

Against this legal backdrop, Michigan counties (and others) may not freely levy special assessments regardless of the benefit that inures to the assessed property. *Dixon Road Group*, 426 Mich at 401-403. To be an appropriate special assessment, "there must be some proportionality between the amount of the special assessment and the benefits derived therefrom." *Id.* at 401. Without such established proportionality, the special assessment "would be akin to the taking of property without due process of law." *Id.* at 403.

Part 307 follows this normal convention. First, the county board may "take the necessary steps to cause to be determined the normal level of the inland lake" by its own motion or "within 45 days following receipt of a petition to the board of 2/3 of the owners of lands abutting the inland lake." MCL 324.30702(1). Before proceeding, a preliminary

[7] There is also a third type of money-raising device—a service fee. This "fee" is "exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." *Bolt v City of Lansing*, 459 Mich 152, 161; 587 NW2d 264 (1998). A common example is a storm sewer system. A "tax," on the other hand, is designed to raise revenue. *Id.*

study is conducted by a licensed professional engineer, which "shall include all of the following"—

a) the feasibility of a project to establish and maintain a normal level of the inland lake;

b) the expediency of the normal level project;

c) feasible and prudent alternative methods and designs for controlling the normal level;

d) the estimated costs of construction and maintenance of the normal level project;

e) a method of financing initial costs;

f) the necessity of a special assessment district and the tentative boundaries if a district is necessary; [and]

g) other information that the county board resolves is necessary.

MCL 324.30703(1).

Then, "[i]f the county board, ***based on the preliminary study***, finds it expedient to have and resolves to have determined and established the normal level of an inland lake, the county board shall direct the prosecuting attorney or other legal counsel of the county to initiate a proceeding by proper petition in the court of that county for determination of the normal level for that inland lake and for establishing a special assessment district if the county board determines by resolution that one is necessary as provided in section 30711." MCL 324.30704(1). Should "[t]he county board [] determine… the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments," it may do ultimately do so "against" those who "are benefit[ing] by the project: privately owned parcels of land, political subdivisions of the state, and state owned lands under the jurisdiction and control of the department." MCL 324.30711(1).

When "the county board determines that a special assessment district is to be established," the first step is that "the delegated authority shall compute the cost of the project and prepare a special assessment roll." MCL 324.30711(1). The statute directs what "the computation of the cost" must include—"the cost of ***all*** of the following: (a) the preliminary study; (b) surveys; (c) establishing a special assessment district, including preparation of assessment rolls and levying assessments; (d) acquiring land and other property; (e) locating, constructing, operating, repairing, and maintaining a dam or works of improvement necessary for maintaining the normal level; (f) legal fees, including estimated costs of appeals if assessments are not upheld; (g) court costs; (h) interest on bonds and other financing costs for the first year, if the project is so financed; [and] (i) any other costs necessary for the project which can be specifically itemized." MCL 324.30712(1). When making this computation, "a cost [of] not more than 15% of the sum calculated" may be added "to cover contingent expenses." MCL 324.30712(2). Usually done at the same time is a "descri[ption] the parcels of land to be assessed, the name of the owner of each parcel, if known, and the dollar amount of the assessment against each parcel." MCL 324.30712(2).

With the calculation in hand, due process must be provided to the affected property owners. *Blades v Genesee Cnty Drain Dist*, 375 Mich 683, 692; 135 NW2d 420 (1965) (due process requires an opportunity by those affected by a "proposed local improvement" to object that the proposal "would not specially or otherwise benefit properties owned by them and included in the special assessment district"). Thus, "the delegated authority shall set a time and place for a public hearing or hearings ***on the project cost and the special assessment roll***" with notice by publication and otherwise

provided by statute. MCL 324.30714(2); see also MCL 324.30707(2) (requiring first-class mail three weeks before the date set for the hearing to affected property owners).

At and after the hearing, the Circuit Court confirms or otherwise hears objections on the lack of "some proportionality between the amount of the special assessment and the benefits derived therefrom." *Dixon*, 426 Mich at 401. "A determination of the increased market value of a piece of property after the improvement is necessary in order to determine whether or not the benefits derived from the special assessment are proportional to the cost incurred." *Id.*[8] To be clear, the reviewing circuit court need not fix or rewrite an insufficient proposed special assessment district, but must reject the Petitioners' request for confirmation when the proposal is non-conforming to the constitutional and legal obligations for special assessment districts. A proposed special assessment can be "declared invalid when the 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." *Id.* at 403. On the flip side, "there can be no justification for any proceeding which charges the land with an assessment greater than the benefits." *German Lutheran Church Soc'y v Mt Clemens*, 179 Mich 35, 40; 146 NW 287 (1914). "It is an essential [element] of a special assessment that the improvement concerned should be of value to the property assessed in reasonable relationship to the assessment...." *St Joseph Twp v Municipal Finance Comm'n*, 351 Mich 524, 533; 88 NW2d 543 (1958). While a "rigid dollar-for-dollar balance between the amount of the special assessment

[8] Our Supreme Court also rejected the use of alternative methods of calculating benefits when such does not take into account an increase in the market value of the property assessed. *Dixon*, 426 Mich at 398-401.

and the amount of the benefit" is not required, the courts "will intervene where 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." *Dixon*, 426 Mich at 402-403.

If there is insufficient proportionality (or other legal infirmity), the petition before the reviewing circuit court must be denied as presented. Should the statutorily defined cost calculations for the project being apportioned among "the privately owned parcels of land, political subdivisions of the state, and state-owned lands," MCL 324.30711(1), be legally appropriate and meets the required proportionality, "[t]he court shall confirm the special assessment district boundaries" as proposed in the petition "within 60 days following the lake level determination." MCL 324.30707(5).

As outlined above, this is how a Part 307 special assessment district is supposed to work. But as this appellate challenge presents, the Petitioners and the Roscommon County Circuit Court failed to follow or meet these procedural, constitutional, and legal mandates. Largely, the error hinges on a structural misunderstanding of how a special assessment is to be first drafted, then proposed, later reviewed, and ultimately established (with circuit court approval on confirmation). And for the Circuit Court, it is more than the simple rubber-stamp that it purported itself to be. For any or all the reasons addressed, reversal is required.

THE "SPECIAL ASSESSMENT" PETITION

A careful review of the circumstances leading up to the September 15, 2023 hearing is necessary. On June 12, 2023, Petitioners Roscommon and Crawford Counties petitioned, through their delegated authority, purporting that "MCL 324.30704 allows" these counties "to initiate a petition to establish a lake level special assessment district if the county board[s] of commissioners determines that one is necessary." **Appendix #23**. Included with the petition was a "map" depicting the "tentative recommended special assessment district boundaries" and asked the Roscommon County Circuit Court "fix a date for a public hearing on this Petition pursuant to MCL 324.30707 and, "[f]ollowing the hearing, enter an Order Establishing the Special Assessment District and Confirming the Special Assessment District Boundaries for Higgins Lake." **Appendix #23-24.** Oddly not included (and what is argued to be fatally not included) was any computation of the cost of the project that the special assessment district was supposed to be paying for or any determination of the increased market value of the affected pieces of properties will have after the improvement, which binding case law has explained "is necessary." *Dixon*, 426 Mich at 401. As counsel for the Counties conceded at the hearing—

> [T]he assessable entities will be all of the properties within the map… [who will ultimately] receive a special assessment on their winter taxes in the event that assessment roll is completed. There will be a separate hearing as to the methodology and cost at the time that the county board moves forward with that; so, that is not going to happen this year. It will be up to the county board as to when that will happen in terms of [] a special assessment roll for Higgins Lake.

Sept 15 Transcript at 53 (Appendix #231). From Objectors' view in this appeal, that is backwards. The Circuit Court's hearing by MCL 324.30714(2) was specifically designated by the Legislature to hear and decide objections "on the [proposed] project cost and the [proposed] special assessment roll." Without the any specificity or declaration about what

the project is defined as encompassing; a computation of its costs; or any evidence of what would be increased market value of the pieces of properties affected, there was nothing available for the Circuit Court to use to legally determine whether the benefits (which in this case were not shown) derived from the special assessment are proportional to the [undefined] cost to be incurred. ***Id.* at 84** (Appendix #262). This disconnect was at the heart of nearly every objection made by those who spoke at or submitted a written statement to the Circuit Court. E.g. **Appendix #120**.

If adopting the County Counsel's view, the process is to determine the special assessment district *first* and let the governmental taxing entities figure out later how much money (with no limit) it will impose *later*, coupled with no review by the Circuit Court at the required public hearing. The Circuit Court erroneously bought into this notion by proclaiming itself to be a mere rubber-stamp regarding the process. **Appendix #120** ("[T]his court has no role in assessing the tax. *** Zero. I'm not part of that process at all. I'm not the tax man."). As discussed, Objectors assert such to be in error and reversal is required.

ARGUMENT

I. Lack of Defined Project

For its first assignment of error, a defined "project" is required before a special assessment district can ever be imposed to pay for the same. MCL 324.30711(1) provides that county "may determine by resolution that the whole or a part of the cost <u>of a *project*</u> to establish and maintain a normal level for an inland lake shall be defrayed by special assessments…." The current proposed "project" being sought to be a paid by this proposed special assessment district is completely <u>*unknown*</u>. The lack of such violates the statute. Nothing has been actually proposed publicly as to what the monies sought to

be exacted by this special assessment will pay for in whole or in part. See **Appendix #22-25.**

Even the County Commissioners do not know what the funds to be raised by the proposed special assessment will be used for. Despite many questions to the Commissioners at several public meetings at which the Higgins Lake level control structure and the proposed special assessment district were discussed, neither the Delegated Authority nor any of the Commissioners has been able to provide any evidence of what if anything is wrong or deficient with the existing control structure—

> I [] confirm that repeated requests have been made to the County of Roscommon to provide any project plans or otherwise publicly provide what the monies raised by this special assessment will specifically pay for either in whole or in part. Despite these repeated requests, nothing has been provided. It is my belief that no such project plans (or related cost calculations based on any project plan) have been created by Roscommon County.

Appendix #28 (Declaration of Greg Semack).[9] In the absence of any such evidence, the establishment of the special assessment district is premature as well as being arbitrary and capricious. It also resulted in structural unfairness. See Footnote 12, *infra*.

And even if a project is being later self-formulated via the Delegated Authority, there are unanswered questions on the actual costs and what the "project" will actually or precisely improve. The lack of project definition or general plan defies the ability for the Circuit Court (and this Court too), the local community, and the proposed paying property owners to confirm, as the law requires, whether the benefit from the improvement has been fairly allocated to the properties within the proposed district as well as whether there is substantial or unreasonable disproportionality between the amount assessed and the

[9] Furthermore, no professional engineer or anyone else has said what amount of monies, if any, is needed for the Higgins Lake control structure or if anything needs to be done with or to that structure.

value which accrues to the land as a result of the improvements." *Dixon*, 426 Mich at 401-403. Without an understood project plan and cost calculation, the establishment of a special assessment district to exact monies from property owners violates due process. *Id.* at 403. The missing cost calculations and non-existent project plans belies that the real purpose behind this proposal is to create a permanent slush fund for the Delegated Authority (who is the County Controller, the executive head of Roscommon County). This is improper, illegal, and unconstitutional.

II. Untimely Petition

The Petition seeks relief under MCL 324.30707. **Appendix #25.** That statute's text expressly provides that "special assessment district boundaries" are to be confirmed "*within 60 days* following the lake level determination." MCL 324.30707(5). The latest arguable lake level determination was made on January 16, 2009. **Appendix #5-6**. Because the instant request is not tied to a "lake level determination" or filed within the statutorily required 60 days following the lake level determination issued on January 16, 2009, the Petition to establish the special assessment district's boundaries is untimely. See also **Appendix #11** ("Roscommon County is unaware that a lake level special assessment district exists to fund infrastructure and activities to maintain Higgins Lake's normal lake level").[10]

Reading the text of the statute as a whole, as this Court must under *TOMRA,* 505 Mich at 339, Part 307 confirms the Legislature's intent for applicable timeliness. Section

[10] To aid the Court, Objectors take the view that should an adjustment to the Part 307 obligations (whether a special assessment or lake level) be sought, a petition would be filed, after all costs calculations and proposes rolls are re-prepared, to establish (i.e. reconfirm) the lake level and to establish a special assessment district. Those two processes have to go hand-in-hand. A circuit court has continuing jurisdiction to consider such a joint petition at any time. *Citizens for Higgins Lake Legal Levels*, 341 Mich App at 181.

30711 provides that "the county board may determine by resolution that *the whole or a part of the cost of a project to establish* ***and*** *maintain a normal level* for an inland lake shall be defrayed by special assessments against [certain parties] that are benefited by the project." MCL 324.30711(1). Thus, a county board may not, by resolution, determine it will defray costs by special assessment when only seeking to "maintain" a normal level and not seeking to re-establish one. The operative word is "and" – not "or" – and these terms are not interchangeable. *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, 317 Mich App 1, 14; 894 NW2d 758 (2016) ("the words 'and' and 'or' are not interchangeable and their strict meaning should be followed…"). Reading the statute using the term "and" (as this Court must under *Coalition*), the Counties may not impose a special assessment district when only seeking to "maintain" an established level from years ago (and being excessively more than 60 days from the Court's lake level determination).

III. Proportionality of Cost Versus Benefits

When reviewing a government's request for confirmation of a special assessment district, circuit courts must determine whether there is "some proportionality between the amount of the special assessment and the benefits derived therefrom." *Dixon*, 426 Mich at 401. "The concept of proportionality is not new in Michigan." *Id.* at 401-402. There can be no justification for any proceeding which charges the land with an assessment greater than the benefits." *German Lutheran Church*, 179 Mich at 40.

Hand-in-hand with the lack of any defined project, the Petition also lacks any evidence of what the "amount assessed" will be. **Appendix #49.** Without that evidence, the owners of property within the proposed special assessment district will not and do not know how much their new financial obligations will be. This is always, customarily, and

constitutionally required ***before*** a special assessment district can be imposed. E.g. MCL 41.724(1)-(2). Due process demands it. All the potentially affected property owners know today is that a "public hearing process to consider assessments for repairs to LLCS, study the legal lake level, and develop the scope of repairs and improvements" will supposedly occur in at some unknown time in future with no known plan or proposed outcome. **Appendix #175**.[11] Without knowing the amount to be collected, the *Dixon* obligations in determining whether there is or is not "substantial or unreasonable disproportionality" cannot be established and, by extension, received by the Circuit Court. Reversal is required.

IV. Apportionment

Finally and closely related, there is a serious question on apportionment—how the costs of a project should be apportioned to those who are defined to benefit. There are various methods, including front facing footage, land area, per-lot, land depth, value of property, and more. See *Cummings v Garner*, 213 Mich 408, 433; 182 NW 9 (1921). The method selected is tied to equitable fairness of the cost to be bore equally by those who receive benefits. If a district is too restricted, many who benefit will be unfairly enriched by forcing a small group to pay all the expense. If a district is too broad, it will unfairly force those who receive little or no gain to pay for someone else's received benefit. To solve this problem, some special assessment districts have even created sub-classes and differing rate amounts for those with "direct benefits" versus "remote benefits" versus and "more remote benefits." *Id.* at 434. It results in everyone who benefits to pay their ***fair***

[11] Taken from and available at https://www.roscommonlakelevels.net/post/higgins-lake-lake-level-special-assessment-district.

share. Again, assessments must be levied according to benefits received. *Auditor General*, 226 Mich at 173-174.

Erroneously, the Circuit Court below could not and did not actually begin to determine whether the proposed apportionment is proper because Petitioners have not even defined a proposed project, explained or suggested who would benefit, and if that benefit received by those who are to be pay is properly proportional. When an assessment is arbitrary or unjust, it must be rejected. *Mich C R Co v Baikie*, 249 Mich 138, 146; 228 NW 525 (1930). Moreover, when a special assessment district "include[s] property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation." *Clinton v Spencer,* 250 Mich 135, 153; 229 NW 609 (1930).[12] Thus, on this Petition, apportionment cannot be readily established or confirmed. As a result, the proposed

[12] If, for example, the project to be proposed is to stabilize the water levels of Higgins Lake, more than just the front property owners and those having deeded access benefit from such a project and should bear a proportional expense from such a project. Michigan DNR car counts over the past several years show that hundreds of thousands of people access, use, and benefit from Higgins Lake every year, mostly at the two state parks but also at other public boat launches and beaches and road ends in addition to those counts. Boaters and anglers in particular benefit from a stable, predictable, and controlled water level to allow good access to and from the lake at boat launches and also to allow them to navigate the tricky and potentially dangerous shallows over the two "sunken island" areas at the south and western sections of the lake and at the ends of the island. It would be patently unfair to require property owners with direct or deeded access to Higgins Lake to bear ***all*** the costs associated with maintaining the Higgins Lake water level and control structure, while requiring nothing from the hundreds of thousands of other people who benefit from and use Higgins Lake. *Armstrong v United States*, 364 US 40, 49 (1960) (the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Yet that is precisely what the Counties sought and secured here. That unfair proposal must be rejected.

Similarly, there may be, and likely are, waterfront property owners who do not care about the Higgins Lake water level, maintaining that water level, or maintaining the water level control structure. Those property owners arguably would not benefit at all from the proposed special assessment and therefore arguably should not be included in the special assessment district. Including all of those properties without even an effort to determine whether and to what extent they might benefit is, again, arbitrary and capricious and does not comply with the statute and the legal obligations required of special assessment districts.

special assessment district should have been rejected by the Circuit Court as inadequately presented. Reversal is required.

V. Unconstitutionality of Part 307

Objectors believe that their structural reading of Part 307, as a whole, is the correct one. The September 15, 2023 hearing should have been the time and place for those affected property owners to object to (and the Circuit Court reviews) any alleged lack of legal proportionality and inappropriate apportionment that due process requires for a special assessment district. If this Court reads Part 307, as the Circuit Court does,[13] in resulting in no opportunity for affected property owners to judicially pre-challenge proportionality and apportionment, before implementation, then Part 307 is unconstitutional and/or facially unlawful under *Dixon*[14] and this Court is requested to so declare the same.[15]

CONCLUSION

The Petition seeks relief which must be accomplished "*within 60 days* following the lake level determination." MCL 324.30707(5). Currently the Circuit Court lacks either the jurisdiction or the authority to provide that relief as being untimely. Appellants entitled to the Petition's dismissal. However, even looking past that untimeliness, there is no project defined, no computation of costs, and no apportionment to review. In effect, there is no ability for the Circuit Court (and also this Court) to determine whether there is substantial or unreasonable disproportionality between the amount assessed and the value which

[13] See **Appendix #185-188**.

[14] If a special assessment process results in a failure "to require a reasonable relationship between" the amount of the special assessment and the amount of the benefit, it "would be akin to the taking of property without due process of law" that "def[ies] reason and justice." *Dixon*, 426 Mich at 403.

[15] When a statute is unconstitutional, it "is as inoperative as if it had never been passed." *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144-145; 253 NW2d 114 (1977).

accrues to the beneficiaries because of the improvements. The Petition, as presented, should have been denied as unlawful (or rejected as unconstitutional). Reversal is necessary and, alternatively, dismissal of the Petition is requested until the Legislature can correct the statute.

RELIEF REQUESTED

This Court is requested to reverse the September 15, 2023 order of the Circuit Court and remand for further proceedings consistent with the decision of this Court correcting the errors raised by this appeal.

Date: January 8, 2024

RESPECTFULLY SUBMITTED:

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WORD COUNT STATEMENT

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