

Addressing Water Quality Issues
On a Watershed Basis:
A Comprehensive Approach for
Utilizing Chapter 20 of the Michigan Drain Code

A Proposal by John P. McCulloch
Oakland County Drain Commissioner

There are five major watersheds in Oakland County. They are the Clinton, Flint, Huron, Rouge and Shiawassee. Included in these watersheds are 61 individual cities, villages and townships. Actions taken by one community within the watershed have a significant impact on other communities in the watershed. Consequently, a multi-community approach needs to be identified and utilized to comprehensively address public health and water quality issues.

Some of the issues faced by these communities individually include stormwater management, flooding, drainage, and river and stream management. Failing septic systems, illicit connections causing groundwater contamination, and habitat and wetland degradation are also primary concerns. Finally, wastewater treatment capacity and sanitary sewer service also are regularly dealt with by these communities.

Traditionally, short-term solutions to these often urgent problems required the construction of relief sewers or temporary retention structures. Unfortunately, solving the problem in one area often meant the creation of new problems downstream. Coordinating efforts among these 61 individual communities is difficult. These difficult challenges are best met with a coordinated, comprehensive plan.

Chapter 20 of the Drain Code provides the legal authority to create a public corporation to address stormwater management, sanitary sewer overflows, drainage, flood control, and river and stream management. It also provides the mechanism to study, plan and address water quality and water use issues.

Additionally, Chapter 20 of the Drain Code allows for the construction, acquisition, operation, maintenance and improvements to existing storm drains established under Chapters 4, 18 and 20 of the Drain Code.

Chapter 20 of the Drain Code also provides the apparatus to deal effectively with sanitary and combined sewer facilities established under Public Acts 185 and 342.

Finally, Chapter 20 of the Drain Code can be used to contract with private and public agencies or corporations to deal with, administer and fund all of the foregoing.

Establishing a Chapter 20 drainage district along watershed boundaries requires a comprehensive petition filed by at least two public corporations, i.e. state, county, city, village or township, setting forth the project, or series of projects, within the intra-county portions of the watershed.

The petition must specifically set forth the purpose of the proposed drain project, recognizing issues of public health and necessity, and include those projects to be undertaken, such as watershed management activities, consolidation and listing of existing drainage districts, acquisition of existing drain and sewage facilities, construction of new facilities, and, where applicable, jurisdiction over rivers and streams that are not part of any existing drain.

Funding for the projects is assessed wholly against public corporations benefiting from the projects, including the county and state for roads, and, where possible, through special assessments, fees or other charges. With respect to acquiring and operating existing sewage disposal systems, including the ability to charge fees or rates for operation and maintenance, assignment of existing contracts or obligations to this watershed entity will be necessary.

A brief historical overview of the Drain Code is in order. Found in the Michigan statutes under MCL 280. 1 *et seq.*, the Drain Code of 1956 “represents the Legislature's attempt to codify all laws regarding drains, and to provide for detailed, specific and

exclusive procedures to be followed in proceedings to construct and maintain drains.”
Toth v Waterford Township, 87 Mich App 173, 176 (1978), citing, *Muskegon Twp. v Muskegon County Drain Commissioner*, 76 Mich App 714 (1977). “Absent fraud, all matters pertaining to the locating, constructing, cleaning, extending, etc., of drains are to be determined according to the procedures set forth in the Drain Code.” 87 Mich App at 176; citing *Battjes Builders v Kent County Drain Commissioner*, 15 Mich App 618 (1969).

The Drain Code defines a drain as:

“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 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.”
MCL 280.3.

Section 2 of the Drain Code, provides that:

“drains including branches may be located, established, constructed and maintained, and existing drains, creeks, rivers and watercourses and their branches, or tributaries whether located, established and constructed by a county drain commissioner or drainage board . . . , whenever the same shall be conducive to the public health, convenience and welfare.”

County drain commissioners have jurisdiction over all drains within their respective counties. It is axiomatic that the office of the county drain commissioner is purely statutory and, therefore, its authority is limited to that provided by the Legislature. OAG, No. 6312, 1985-1986, p 145. It has been held that the drain commissioner is not an ordinary local officer, but is an officer acting by virtue of the police power of the State

and exercising its functions for the benefit of the public health. *Attorney General v McClear*, 146 Mich 45 (1906).

The drain commissioner, either acting alone or as a member of a drainage board, is responsible for approving or denying a petition after considering the necessity, practicability and conduciveness to the public health of the proposed project. [see, MCL 280.52, 280.54, 280.192, 280.352, 280.353, 280.356, 280.391, 280.441(3), 280.441a(3), 280.467, 280.519 and 280.557.]

Neither the Drain Code nor Michigan case law clearly define the meaning of public health. Merriam-Webster's Collegiate Dictionary defines the term as "the art and science dealing with the protection and improvement of community health by organized community effort and including preventive medicine and sanitary and social science." Similarly, the Academic Press Dictionary of Science and Technology defines the term as "the branch of medicine dealing with safeguarding and improving community health through organized community effort, involving prevention of disease, control of communicable disease, and health education." Clearly, with respect to drains, it is contemplated that the responsibilities of the drain commissioner include those activities designed to protect, prevent and improve the health of a community.

Chapter 20 of the Drain Code provides a method by which the state, a particular county, and several public corporations in that county, may initiate by petition, drain projects which are necessary for the public health. MCL 280.462; *Fair Drain Taxation, Inc. v City of St. Clair Shores*, 219 F.Supp. 646, 648 (1963); see also, MCL 280.423(3) (an order of determination identifying pollutants within drains issued by the Michigan Department of Environmental Quality and calling for the construction of facilities or

other measures to abate pollution, constitutes a petition and is in lieu of the determination of necessity by a drainage board under Chapter 20).

The type of public improvements contemplated by Chapter 20 of the Drain Code is one involving several public corporations and is designed to be used where it is more efficient and less expensive to incorporate a project into one large public improvement project rather than to have each public corporation build its own separate smaller public improvement. 219 F.Supp at 649.

A drainage district established under Chapter 20 of the Drain Code is "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." MCL 280.5. This corporate existence was explained in *Bloomfield Village Drain District v Keefe*, 119 F.2d 157, 161 (1941):

" . . . [w]hile the drain district has a less measure of corporate life than a city, it exhibits the essential characteristics of a public corporation. It is capable of acting as an entity, *Royal Oak Drain Dist. v Keefe*, 87 F.2d 786,790 (6th Cir. 1937), with an existence independent of its members and capable of being sued as an obligor on its bonds. It acts in a single name fixed by law, and has succession. *Hancock v Louisville & N.R. Co.*, 145 U.S. 409 (1892). . . . The drain district has officers, for the county drain commissioner is an officer representing the drain district. *Brooks v County of Oakland*, 268 Mich 637 (1934). The drain district exercises property rights, and is treated by the Michigan Legislature as an entity for assessment purposes . . . The funds of the drainage district, while in the custody of the county, must be kept separate from other funds and the commissioner must levy an additional assessment to make up deficiencies in the fund as bond installments mature. . . "

The relationship between an intra-county drainage board and the county, is analogous to the relationship of the drain commissioner and the county when the drain commissioner undertakes a drainage project. In *Brooks v County of Oakland*, 268 Mich 637, 639 (1934) the Court stated:

" . . . The drain commissioner, in establishing a project, and the county treasurer, in taking and handling assessments, are not agents of the county nor are the funds received for the use of the county. The officers perform special statutory duties for drainage districts. . . "

Similarly, the drainage board, although comprised of county officials, is not acting on behalf of the county, nor is it an agency of the county. Rather, the board performs special statutory duties on behalf of the intra-county drainage district. In addition, the funding for a drain project is segregated from the county general fund because a drainage district is a separate public entity.

The drain board must clearly contain competent, material and substantial evidence in order for the circuit court to uphold a challenge to a drain board's final order of determination. *Barak v Drain Commissioner for the County of Oakland*, ____ Mich App ____, 2001 WL 748055 (July 3, 2001).

Subsequent to the final order of determination, if applicable, the drain board is required to "secure from a competent engineer, plans, specifications, and estimates of the cost of the proposed drain." MCL 280.468. The drain board then proceeds to tentatively establish the percentage of the cost to be borne by each public corporation to be assessed, i.e. apportioning costs. *Id.* "In making the apportionments . . . there shall be taken into consideration the benefits to accrue to each public corporation and also to the extent to which each public corporation contributes to the conditions which make the drain necessary." *Id.*

Throughout Oakland County there are hundreds of "county drains" that were established and constructed almost a hundred years ago. Many of these drains are simply open ditches, but also include enclosed tiled drains. These drains are commonly referred

to as “Chapter 4” intra-county drains; and were primarily created for agricultural purposes. They were generally paid for by the abutting and benefiting landowners.

Just as these drains vary in design and capacity, they vary as to their adequacy to carry stormwater runoff. In many instances, these drains are no longer adequate to carry the stormwater runoff. This is a cause for flooding and water quality concerns. While this is partly the result of a lack of maintenance and funding, it also is because these drains are affected by a local community’s land use decisions.

Drain commissioners cannot unilaterally undertake improvements to existing drains without first being presented with a petition by either landowners or the municipality in which they lie. In addition, with respect to drains established under Chapter 4 of the Drain Code, drain commissioners are limited to spending not more than \$2,500 per mile of a drain per year for operation and maintenance. They also are prohibited from assessing more than \$1,250 per mile of drain to the beneficial property owners within the drainage district in any one year. MCL 280.196.

The ability to comprehensively address the problems with Chapter 4 drains can be accomplished by consolidation into a new Chapter 20 drainage district. In Chapter 20 of the Drain Code, the definition of a “county drain,” includes drains located, established and constructed by a county drain commissioner or drainage board, city, village or township.” MCL 280.461(d). Thus, references to a “county drain” in Chapter 20 of the Drain Code includes drains constructed pursuant to other chapters in the Drain Code, i.e. Chapters 4 and 18, as well as those drains constructed solely by a city, village or township.

Ordinarily, drains constructed under Chapters 4 and 18 are cleaned out, relocated, widened, deepened, straightened, extended, tiled, interconnected or otherwise improved pursuant to Chapter 8 of the Drain Code. Similarly, Chapter 19 of the Drain Code provides a method for consolidation. However, as an alternative, Chapter 20 authorizes, as part of a drain project, both improving and consolidation of these existing drains. Section 482 has been held to provide a sufficient basis for consolidation of existing drainage districts. *Kramer v City of Dearborn Heights*, 197 Mich App 723, 727 (1993).

In *Kramer*, the plaintiffs challenged the funding of certain drain improvements and the consolidations of three drainage districts. *Id.* at 725. The plaintiffs alleged that the consolidation of the drainage districts should have been sought under Chapter 19 of the Drain Code rather than Chapter 20. The Court disagreed, holding that the defendants were not required to utilize Chapter 19, and indicated that Section 482 provided a sufficient basis for consolidation. Moreover, in *Kramer*, the Court held that consolidation of existing drainage districts does not require or cause abandonment of the existing drains. *Id.* at 728.

Consolidation of existing drains into a new Chapter 20 drainage district will require a complete inventory of these drains and an inspection identifying the basis for consolidation, i.e. public health and necessity. These drains should be recognized in the petition requesting the establishment of a new Chapter 20 drainage district. These improvements would be wholly assessed against the public corporations benefiting from the improvements.

To address water quality and the impact of stormwater runoff into streams, Chapter 20 of the Drain Code also provides a method for assuming jurisdiction over waterways not a part of an existing drain. Section 491 provides:

"A petition meeting the requirements of this chapter as to petitioners, execution and filing may request, for reasons of public health, that jurisdiction be assumed over all or a specified part of the bed, tributaries, banks and flood plains of a river, creek or watercourse, not part of an established drain. The petition shall describe the existing or threatened conditions which cause or increase the danger of flooding, pollution, desecration or obstruction of such river, creek or watercourse, and shall specify, in general terms, the works, property acquisition, actions or procedures deemed necessary to remove or lessen such danger."

With respect to this section of Chapter 20, there are additional requirements of the petitioners. Section 492 provides, in pertinent part:

"The petitioners named in a petition filed pursuant to Section 491, shall include therein an agreement to pay the amount of, or shall accompany the petition with a deposit in the amount of, the estimated cost of the planning and engineering required to describe in recordable form the bed, tributaries, banks and flood plains of the river, creek or watercourse over which jurisdiction is necessary and is to be assumed and the work to be done or property to be acquired according to the petition. Upon the filing of the petition with the agreement or deposit to pay costs, the initial actions and tentative determinations shall be taken and made with respect thereto as described in Sections 466 and 467, and such description shall be obtained and approved and adopted by the drainage board. To assume jurisdiction of the bed, tributaries, banks and flood plains of the river, creek or watercourse and to perform the work proposed to be done thereon, if any, as so described, a meeting to hear objections to the assumption of such jurisdiction, to the petition therefor and to the proposed work or property acquisition shall be held as provided for other drain projects pursuant to this chapter. Notice of the hearing shall contain the description as approved and adopted by the drainage board."

There is no case law interpreting Sections 491 and 492. However, in 1985 Washtenaw County and the cities of Ann Arbor and Ypsilanti petitioned the Washtenaw County Drain Commissioner under these sections to assume jurisdiction over a portion of the Huron River.

That proposed drain project was a five-year undertaking to address and abate chemical and human waste pollution contained in storm drains discharging into the Huron River. It was referred to as the Huron River Pollution Abatement Project.

The Washtenaw County Board of Commissioners passed a resolution requesting the establishment of a drainage district to identify and eliminate sources of pollution to the Huron River and appropriated \$100,000 for the project, with the understanding that it would be reimbursed by the drainage district. The cost of this project also was paid for via a special assessment against property owners befitting from the project. The cost to property owners averaged approximately \$4.50 per year.

It is likely that there are portions of the watersheds located in Oakland County that are not part of any established drain which are nonetheless affected by pollution from different sources, such as Sanitary Sewer Overflows (SSO) and failing septic systems. A tentative determination may be required to assess whether these tributaries are affected by flooding and/or pollution, and if so, whether they also should be included in a petition under Chapter 20 of the Drain Code.

In addition to dealing with water quality and water flow issues, the Oakland County Drain Commissioner, as the county agent under Acts 185 (1957 P.A. 1985) and 342 (1939 P.A. 342), operates and maintains several sewage disposal systems. These systems are operated in accordance with contracts with public corporations. The capital charges, as well as operation and maintenance expenses, are funded by connection fees and charges to the public corporations which then pass on these costs to consumers.

For example, the Evergreen-Farmington Sewage Disposal System is a sanitary sewer system that is affected by significant rain events. Stormwater passing through

footing drains, illegal sump pumps and others causes of inflow and infiltration, affect the capacity of sanitary system, causing basement flooding and illegal sanitary sewage overflows to rivers and streams.

Inasmuch as this system requires extensive capital improvements, it may be preferable to incorporate these sewage system improvements into a comprehensive Chapter 20 drainage district.

That raises two important questions. First, can Chapter 20 of the Drain Code be used to construct, acquire, operate and maintain a sewage disposal system? Second, can the drain board recover costs associated with administration, operation and maintenance of such a system?

The answer to both questions is yes. Chapter 20 of the Drain Code may be utilized to abate pollution resulting from existing, inadequate and aging sewer systems. That's because the word "drain," as used in the Drain Code, includes "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." MCL 280.3.

In addition, Section 423 of Chapter 18 (MCL 280.423), prohibits a person from discharging pollution into any county drain, and authorizes the construction of, as a part of any existing drain, "disposal plants, filtration beds, and other mechanical devices to properly purify the flow of any drain." MCL 280.423(2).

Section 480 (MCL 280.480) provides that the cost of a drain under Chapter 20 of the Drain Code includes "the cost of constructing or acquiring the facilities, structures, devices and equipment required to locate, establish and construct the drain or to improve

or supplement the same.” Consequently, there is sufficient authority to construct and acquire sewage treatment facilities.

The Chapter 20 drain board is responsible for the operation and maintenance of the drain. MCL 280.478. “Any necessary expenses incurred in administration and operation and maintenance of the drain and not covered by contract shall be paid by the several public corporations.” *Id.*

Further, these costs are not limited by the amount established under Section 196 of the Drain Code, i.e. \$2,500 per mile of drain for operation and maintenance. MCL 280.196(12). “[I]f the cost of maintenance and repair includes utility charges or costs to service pumping stations, sewage treatment facilities, or retention basins, the limitation for maintenance and repair shall not apply . . .”

A comprehensive Chapter 20 drainage district, established along watershed boundaries, also is a useful vehicle to deal with environmental regulations established by the Federal Clean Water Act.

Prior to 1987, the EPA did not regulate stormwater discharges. With legislative amendments to the CWA in 1987, the CWA included a phased approach to control pollutants for different categories of stormwater discharges. In 1990-1991, the EPA issued Phase I regulations for stormwater discharges associated with industrial activities and large municipalities. Construction sites over five acres, certain industries and municipalities with a population greater than 100,000 were required to obtain permits. Again, the EPA used the top/down approach to regulating those entities covered under the Phase I stormwater regulations.

In 1997, pursuant to 33 USC 1342(p)(6) the EPA issued final Phase II regulations for stormwater discharges. These regulations address stormwater discharges from sources other than those covered under Phase I. These new regulations require, by the year 2003, NPDES permits for counties, cities and villages that own or operate separate storm sewer systems, i.e. storm drainage systems, located within urbanized areas. An urbanized area is defined as an area where the combined population of a municipality is more than 50,000.

By March, 2003, such municipalities would automatically be designated under the proposed Phase II Stormwater Regulations and, therefore, would be required to obtain an NPDES permit for their separated sewer systems. *Federal Register*, Vol. 63, No. 6, January 9, 1998, pp. 1616-1622.

Michigan's General Stormwater NPDES permit program is derived from 1992 AACS R. 323.2102 *et seq.* Requirements and procedures applicable to all general permits that cover both source discharges and stormwater discharges are contained in 1992 AACS, R. 323.2191 and 323.2192. Further, 1992 AACS, R 323.2191(1) and 1992 AACS R. 323.2161 require that a person who discharges stormwater subject to regulation pursuant to section 402(p) of the Clean Water Act, as amended, 33 USC §342(p), and the corresponding regulations promulgated in 40 C.F.R. §122, is required to obtain a permit for the discharge.

General stormwater permits differ from individually issued NPDES permits since the provisions of a general permit are the same for all applicants and do not require individual determinations based on site-specific conditions. Governmental entities, such as Oakland County, that have ownership and control of separate storm drainage systems,

are eligible for coverage under the Michigan Watershed Based Stormwater General Permit.

In 1996, the Oakland County Drain Commissioner introduced to the cities, villages and townships (CVTs) located in the Rouge Watershed, the “sub-watershed approach” concept for addressing and improving the water quality of the Rouge River. Under this approach, the regulatory agencies, EPA and MDEQ, would issue a “general stormwater permit” to various sub-watersheds of the Rouge River for projects that the communities located in the watershed voluntarily undertook to improve the river.

Despite the drain commissioner’s efforts toward enlightening the various CVTs with regard to planning and implementing the sub-watershed approach, in September, 1997, the Federal Court intimated its concern and impatience with the slow progress toward this goal. The Federal Court proposed to issue a "Show Cause" order against the counties of Wayne, Oakland, and Washtenaw and the CVTs in the Rouge Watershed, as to why a formal organization or watershed-wide authority should not be established to address non-point source pollution problems within the Rouge Watershed.

In response, the county executives from Wayne and Oakland Counties, and the drain commissioners from Oakland and Washtenaw Counties, along with the mayor of Detroit, sent a letter to the Federal Court expressing concerns with the creation of a watershed-wide management authority. They requested that the Court consider rescinding the proposed show cause order to allow additional time for the CVTs within the Rouge Watershed to develop individual proposals for dealing with problems contributing to the pollution of the river.

Since then, the Oakland County Drain Commissioner's Office (OCDC) has been an advocate and facilitator of the sub-watershed approach and the Michigan Watershed Based Stormwater General Permit program. The OCDC staff have initiated and presented multiple workshops, with the assistance of the Rouge Program Office, to Oakland County communities located within the Rouge Watershed. The OCDC staff also participated in a Federal task force created to address remedial efforts to clean up the Rouge River. The Oakland County Board of Commissioners has authorized and designated the drain commissioner to apply, on behalf of Oakland County, for coverage under the Michigan Watershed Based Stormwater General Permit.

Nonetheless, the Federal Court continues to press the counties for the creation of a watershed-wide entity that could administer, operate and maintain a Watershed Based Stormwater Permit Program. Utilizing Chapter 20 of the Drain Code, Oakland County could demonstrate that a watershed entity not only is possible, but also represents a practical and efficient way to administer the Watershed Based Stormwater Permit Program while complying with Phase II Stormwater regulations.

For example, a drainage board is responsible for the administration, operation and maintenance of a drain. This includes inspection and elimination of unauthorized pollution sources such as illicit connections. Ordinarily, a project undertaken under the Drain Code is designed to abate flooding and/or pollution.

However, "prevention activities," such as stormwater management activities under the Watershed Based Stormwater Permit Program of Phase II Stormwater Regulations are legitimate administrative costs that could be financed as "other expenses" under Chapter 20 of the Drain Code. Section 480 (MCL 280.480) provides:

"The cost of any drain project shall include (1) the cost of constructing or acquiring the facilities, structures, devices and equipment required to locate, establish and construct the drain or to improve or supplement the same, including bridges and culverts and any lands or rights of way necessary thereto; (2) the administrative and other expenses of the drainage board including the cost of service and publication of all notices; (3) all engineering, legal and other professional fees; (4) interest on bonds for the first year, if bonds are to be issued, and interest on moneys advanced pursuant to Section 479; and (5) an amount not exceeding 10% of the gross sum to cover contingent expenses."

"County drains, which are necessary for the public health may be located, established and constructed under provisions of Chapter 20 where the cost thereof is to be assessed wholly against public corporations." MCL 280.462.

Chapter 20 defines "public corporation" to include "state, counties, cities, villages, townships, metropolitan districts and authorities created by or pursuant to state statutes." MCL 280.461(b). Assessed corporations have the choice among three ways of financing the assessment: (1) levy an *ad valorem* property tax (MCL 280.474, 280.475); (2) levy a special assessment against individual property receiving a special benefit; and (3) impose fees or connection charges. *Fair Drain Taxation, Inc. v City of St. Clair Shores*, 219 F.Supp. 646, 649; MCL 280.475; 280.490.

In addition, a county may assume a disproportionate cost of the drain where a two-thirds vote of the County Board of Commissioners approve such costs. Thus, projects undertaken pursuant to Chapter 20 are designed to be self-supporting. Costs relating to the construction, administration, operations and maintenance of a drain project are to be borne by the public corporations within the drainage district. See MCL 280.467; 280.468; 280.473; 280.474; 280.476; 280.479; 280.480; 280.490 280.495.

Other funding alternatives are available as well. With respect to *ad valorem* taxation, it has been held that public corporations, other than common law or unchartered

townships, may impose taxes without limitation as to rate or amount to pay assessments. *Township of Southfield et al., v Main*, 357 Mich 59, 77 (1959); see also, *State of Michigan et al., v Allen Park et al.*, 501 F.Supp 1007 (1980).

In *Allen Park*, the Federal District Court held that the city's *ad valorem* tax for a pollution abatement project undertaken pursuant to Chapter 20 was not unconstitutional under the 1963 Michigan Constitution as amended by the Headlee Tax Limitation Amendment. The Court stated:

“Cases prior to the effective date of the Headlee Amendment establish that a general law of the state is part of the charter of a city or a village. . . . Under the 1963 Michigan Constitution prior to the Headlee Amendment, there had been no constitutional tax limitation upon charter authorities, such as Allen Park; the only limitations were those contained in the charters of the governmental unit or in the general law of the State of Michigan enacted by the Legislature . . . The Drain Code and Court Order Bond Act, as general laws of the state, were incorporated in the charters of governmental units, and authorized unlimited taxes for payment of debt incurred for reasons of public health.” [citations omitted]

Another option available pursuant to Sections 489a and 490, are special assessments. These special assessments may be levied against benefiting properties “of a public corporation,” which is subject to assessment.

A special assessment is the payment for a physical improvement yielding a proportionate increase in the value of property. The revenue from special assessments may be used only for the cost of the improvement. *Graham v City of Saginaw*, 317 Mich 427, 431-432 (1947); *Report of the Headlee Blue Ribbon Commission*, 1994, pp 38-39. The rationale for special assessments “are made on the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of the property.” 317 Mich at 432.

In order for a public corporation to specially assess its portion of an assessment, there are detailed requirements which must be satisfied prior to filing a Chapter 20 petition. These requirements are set forth in Section 489a.

By using the term “public corporation” in both Sections 489a and 490, the Legislature intended that counties also could specially assess its portion of the project. There is no case law to the contrary, and, as cited previously, Washtenaw County, along with the cities of Ann Arbor and Ypsilanti, established a Chapter 20 drainage district to establish and construct a pollution abatement project for the Huron River. That special assessment amounted to approximately \$4.50 per year for a period of five years.

Under Chapter 20 of the Drain Code, public corporations may finance their portion of the assessed costs of the drain through special assessment by following the procedures set forth in Sections 489a and 490. However, a public corporation’s ability to utilize special assessments to finance its assessment under Chapter 20 is limited. First, if a community has used another procedure, such as *ad valorem* taxation, to finance the construction of “similar drains and sewers,” a community will not be permitted to use this method to finance a new project under Chapter 20. MCL 280.490(1). Second, because a special assessment must result in a proportionate increase in the value of the property specially benefited, a special assessment could be subject to attack and reduction, thereby leaving the shortfall to be made up by some other method.

Finally, a third method for financing the construction, operation and maintenance of a Chapter 20 drain, is through “user or connection” charges. Section 490 provides, in pertinent part:

“In place of or in addition to levying special assessments, the public corporation, under the same conditions and for the same

purpose, may exact connection, readiness to serve, availability, or service charges to be paid by owners of land directly or indirectly connected with the drain project, or a combination of projects, subject to Section 489a.”

A public corporation, which is subject to assessment under Chapter 20, may legally assess and place on property tax bills of the beneficial users of a drain, user or connection charges to pay the cost of the municipality’s assessment for the operation and maintenance of the drain. *Downriver Plaza Group v City of Southgate*, 444 Mich 656, 663-664 (1994).

A public corporation’s implementation of a user charge, however, must be considered with caution. Tax opponents, relying on the 1998 Supreme Court decision in *Bolt v Lansing*, 459 Mich 152 (1998), may object. They might claim that the implementation of user charge system to the pay for the cost of a Chapter 20 drain project is nothing more than a tax; and therefore, if the “charge” exceeds the municipality’s constitutional tax limitations, it is illegal if not approved by the voters.

However, when the Michigan Supreme Court in *Bolt* struck down, as an illegal tax, the City of Lansing’s stormwater service fee, a fee that was intended to pay the operational cost of a combined sewer overflow project. It set forth three criteria to distinguish a legitimate fee from a tax. 459 Mich at 154-156. In doing so, the Court arguably departed from over 100 years of Michigan precedent. . See, Pettinari, David G., “Michigan’s Latest Tax Limitation Battle: A Tale Of Environmental Regulation, Capital Infrastructure, and the Will of the People,” 77 U. Det. Mercy L. Rev. 83, 150-151 (1999). Accordingly, if public corporations are to successfully implement a user charge to pay the cost of construction, operation and maintenance of a Chapter 20 drain, then it is important to reconcile the *Downriver Plaza Group* case with *Bolt*.

In *Downriver Plaza Group*, the City of Southgate was the recipient of a Federal grant for the construction of a flood and pollution control project. The grant was provided pursuant to the Federal Water & Pollution Control Act Amendment of 1972 and required “grant recipients to adopt a ‘system of charges’ so as to assure the users” would pay their proportionate share of the operation and maintenance (“O & M”) of the drain. 444 Mich at 658. The City chose to utilize Chapter 20 to establish, finance, construct and operate the project. A Chapter 20 drainage district known as the Southgate-Wyandotte Drainage District (SWDD) was established for this purpose.

Initially, Southgate levied an *ad valorem* property tax to finance the construction of the new drainage system. *Id.* at 659. Following construction in 1980, the drainage board began assessing the city for the O & M costs for the drain; however, because there were excess construction funds available, these funds were applied to the city’s portion of the O & M costs for the period from 1980-1987. *Id.*

In 1988, with the excess construction funds depleted, the City proposed to pay the O & M costs with the implementation of a user charge system that it had proposed at the time the City had received the Federal grant in 1975.

The user fee was based on a mathematical formula based on “‘runoff coefficients’ assigned to each category of property, i.e., churches, residences, schools, etc.” *Id.* fn. 6. Following a notice and a public hearing, the City adopted a resolution regarding user charges that allowed for the charges to be placed on the user’s property tax rolls. *Id.* at 660.

The plaintiffs, property owners and users of the drainage system, sued the City claiming that the “user charges” placed on their tax bills were invalid. *Id.* The Michigan

Supreme Court disagreed, holding that the Michigan Drain Code authorized the City to legally assess user charges. *Id.* at 661. The Court stated:

“The Drain Code is the comprehensive authority for drain systems operating in Michigan. As explained in *Toth v Waterford Twp.*, 87 Mich App 173, 176 (1978),

‘The statute represents the Legislature's attempt to codify all laws regarding drains and to provide for detailed, specific and exclusive procedures to be followed in proceedings to construct and maintain drains.... Absent fraud, all matters pertaining to the locating, constructing cleaning, extending, etc., of drains are to be determined according to the procedures set forth in the Drain Code.’

The SWDD is an intracounty drain system governed by Chapter 20 of the Drain Code. Section 490 of Chapter 20 unreservedly authorizes public corporations, such as Southgate, to collect "service charges" from property owners who utilize public drains. ‘In place of or in addition to levying special assessments, the public corporation, under the same conditions and for the same purpose, may exact connection, readiness to serve, availability, or *service charges* to be paid by owners of land directly or indirectly connected with the drain project, or a combination of projects....’: MCL 280.490(4).” (emphasis added). *Id.* at 664.

On the other hand, in the *Bolt* case, the City of Lansing had a combined sanitary and storm sewer system. During periods of heavy rain, the system exceeded its capacity resulting in overflows into streams and rivers causing pollution. 459 Mich at 154-155. The City was ordered to abate the overflows and chose to separate the City’s remaining combined sanitary and storm sewers. *Id.* Initially, the City distributed the cost of the improvements to the system between its Sewage Enterprise Fund and the City’s general fund. 77 U. Det. Mercy L. Rev. at 125; 459 Mich at 155, fn.4. Later, the City proposed and adopted a resolution that established a stormwater enterprise fund that required all property owners using the City’s stormwater system to pay a user fee to support the cost of the stormwater utility. *Id.* at 126; 459 Mich at 155. This fee was based on a formula using run-off coefficients attributed to each parcel of land within the City. 459 Mich at

155-157. The City began assessing the user charge and was sued by a property owner who alleged that the fee was an unconstitutional tax. *Id.* at 158.

The Michigan Supreme Court agreed with the Plaintiffs. The Court said the “stormwater service fee” was not a legitimate fee, but a tax that required voter approval. *Id.* at 154. After briefly discussing the Headlee Amendment, the Court then proceeded to distinguish legitimate fee from a “disguised tax”. *Id.* at 160-161. The Court set forth three criteria for a legitimate fee: (1) the user fee must serve a regulatory purpose as opposed to a revenue-raising purpose; (2) a user fee must be proportionate to the necessary cost of the service funded; and (3) the user fee must be “voluntary,” that is, the user must be able to refuse or limit the use of the commodity or service. *Id.* at 161-162.

In *Bolt*, the Court stated: “[a] true fee, ... is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed.” *Id.* at 165. Second, the stormwater service fee lacked a significant element of regulation. *Id.* at 166. Finally, the Court found that the ordinance establishing the stormwater service fee failed because it lacked “any element of volition.” *Id.* at 167. The *Bolt* majority found that the property owner had “no choice whether to use the service and is unable to control the extent to which the service is used.” *Id.* 167-169.

The decision in *Downriver Plaza Group*, which allowed the city to impose user fees to pay for the O & M of the system, is reconcilable with *Bolt*. In *Bolt*, Lansing tried to impose a user fee on 100 percent of Lansing property owners to pay for capital improvements that were to benefit of 25 percent of the property owners. This course of action is contrary to the Revenue Bond Act and therefore, illegal without voter approval. In *Downriver Plaza Group*, the user fee was designed to pay the O & M costs to the

beneficial users within the drainage district. This was required by the Federal regulations under which Southgate had received Federal funding for the project, and (as noted above) is specifically permitted by the Drain Code.

In addition, these fees served a “regulatory purpose” since they were designed to defray the costs related to operation and maintenance of the system that was designed to abate pollution

To some degree, however, the user fees in *Downriver Plaza Group*, lack the third element: voluntariness. In *Downriver Plaza Group*, the user fees were placed on the tax bills. However, the *Bolt* Court cautioned that the three criteria “are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee.” *Graham v Kochville*, 236 Mich. App. 141, 151 (1999); *citing, Bolt*, at 157, n.16.

In the end, however, it does not matter because the Drain Code was enacted prior to the Headlee Tax Limitation Amendment. Therefore, if a user fee were determined to be a tax, such tax does not require voter approval.

Conclusion

Historically, Oakland County communities petitioned the Drain Commissioner to construct and acquire a new drain to narrowly address a particular problem. For example, to accommodate the public health issues associated with new development or to address flooding and pollution, communities petitioned for the creation of Chapter 20 drainage district to build new drains, retention treatment basins and/or relief drains. However, because of public health and water quality concerns associated with land development,

the forthcoming Phase II mandates, basement flooding and other environmental issues, a program is necessary that will comprehensively address these issues within the county on a watershed basis. Chapter 20 of the Drain Code is a viable vehicle for comprehensively addressing these issues on a watershed basis. It is possible to create a Chapter 20 drain within each of the five Oakland County watersheds to deal with the issues outlined above. Funding for this program can be achieved by charging the users fees, in addition to, or in lieu of, *ad valorem* taxation or special assessments or any combination of the three methods.

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