

ATTORNEY WRITES

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In the Autumn, 2009 issue of *The Michigan Riparian* magazine, Howard Wandell authored an informative article regarding Michigan statutory lake improvement boards. In addition, a very successful conference was held by the Michigan chapter of the North American Lake Management Society (“MCNALMS”) regarding such lake boards in Tustin, Michigan on October 16, 2009. This column will build on Howard’s earlier article and discuss the relationship between special assessment districts and statutory lake boards regarding aquatic weed control.

Quite often, the largest budgetary item for a lake association is aquatic weed treatment costs. Absent a “strong” association (where the association has the ability to levy mandatory dues, annual assessments, or special assessments for aquatic weed treatment purposes) or a statutory lake board, a lake association with its own aquatic weed treatment program must rely on voluntary dues or donations to fund the program. Furthermore, it is often a hassle for lake association officers to have to deal with an aquatic weed treatment company, make payments for such services, and similar matters. Finally, having a lake association run an aquatic weed treatment program poses certain potential liability dangers for the lake association, as well as its members and officers.

There are three ways under Michigan law to shift the costs of aquatic weed treatments from a lake association to some or all of the taxpayers in the township involved. First, a special

assessment district can be created for a lake or lake community pursuant to MCL 41.721 *et seq.* Second, a statutory lake board can be created with a special assessment district component under MCLA 324.30901 *et seq.* Finally, a township is authorized to spend monies from its general fund for aquatic weed treatment purposes on a public lake. See MCL 41.418. With a special assessment district or a statutory lake board (also known as a “lake improvement board”), the costs of administering and implementing an aquatic weed treatment program are placed on the property tax bills of the owners of lands within a specific special assessment district. MCL 41.418 does not involve a special assessment district or statutory lake board, but simply allows a township board (upon petition by 25 township residents) to contribute funds to aquatic weed treatment efforts for a public lake if the township board so chooses.

As an initial matter, it should be made clear that a special assessment district and statutory lake board are both government mechanisms, which are not controlled by a lake association. Once either a special assessment district or statutory lake board is set up, it constitutes a government function. Of course, where a special assessment district has been created, it is fairly typical for a township board to defer (to a certain extent) to the desires of a lake association or professional consultant on issues such as which weed control applicator should be hired, how long the special assessment district should be in effect, how much each property should be assessed, whether chemical treatments or mechanical harvesting should occur, and similar matters. Nevertheless, the township board is not obligated to follow any requests or recommendations by a lake association, consultant, or anyone else. The same is true of a statutory lake board. Typically, a lake association will have a representative member on the statutory lake board, but that certainly is not enough to control such a board.

What is better for a lake association to pursue for aquatic weed treatments, a special assessment district or statutory lake board? That depends. Special assessment districts tend to be easier to set up, are less controversial, and have lower administrative costs. They are of limited duration. Special assessment districts are best used for simple projects such as aquatic weed treatment programs. But special assessment districts are normally only practical where a lake is located in just one township—if a lake is encompassed by more than one township, each township would have to set up its own separate special assessment district.

Statutory lake boards formed under MCL 324.30901 *et seq.* can be utilized regardless of whether a single township or multiple townships encompass a lake. Statutory lake boards tend to work better with complex projects such as dredging, dams, comprehensive watershed management programs, etc. Statutory lake boards can have some disadvantages, however. First, they often have higher costs, as lake boards are often more inclined to hire consultants, engineers, and other professionals to advise them. Second, lake associations tend to “lose control,” as most members of the lake board are normally not from that particular lake community (by statute, the members of a lake board must include one member of the county board of commissioners for each county involved, a representative of each local unit of government covered by the statutory lake board [or two representatives from the local unit of government if there is only one local government involved], the county drain commissioner, and a lake property owner). If the lake involved has a lake association, it can submit up to three names to the statutory lake board, from which the statutory lake board chooses one lake landowner to be on the board. Third, once established, statutory lake boards can be difficult to terminate. See MCL 324.30929. Finally, statutory lake boards tend to be more political than simple special assessment districts.

A statutory lake board is initiated by the governing body of the local unit(s) of government where the lake is located, or by the petition of two-thirds of the landowners owning lands abutting the lake. If a private inland lake is involved, the statutory lake board can only be initiated upon the petition of two-thirds of the property owners owning lands abutting the lake. Should one of these initiatory actions occur, the local governing body or bodies must set up a statutory lake board within 60 days. The resolution initiating a lake board should be carefully drafted, as it will determine the lake board's authority and proper subjects for improvement. A lake board can also initiate a special assessment district to pay for any improvements. Given the complexity of creating, administering, and operating statutory lake boards (as well as "holes" in the authorization legislation), you should consult with an attorney well-versed in the area should you have any questions.

If your lake association wants to commence a special assessment district (rather than a statutory lake board), it really should have its own legal counsel (who is knowledgeable about special assessment districts) draft the citizen petition which will be circulated to prompt the township board to commence the process to create the special assessment district. There is a lot more that should go into a special assessment district petition than simply copying petition language that has been utilized by some other lake association. For example, the petition should deal with such diverse topics as which properties will be included in the proposed special assessment district, how properties will be assessed (whether on a per parcel basis, taxable value basis, lake frontage foot basis, lot size basis, etc.), how long the special assessment district will last, the purpose or purposes for which the district will be created, and similar matters. Although township boards are not obligated to follow all such matters specified in a citizen petition, most

townships are inclined to do so, such that the petition language usually “sets the stage” for the special assessment district which is ultimately adopted.

The lake association should also urge the township to utilize an attorney who is well-versed in special assessment districts to assist the township with the special assessment district creation and implementation process, which is quite complicated. Again, simply copying forms (resolutions and hearing notices) utilized by other townships (and which might not be accurate) is often a recipe for disaster. Keep in mind that not all township attorneys are familiar with special assessment districts. Township officials should not normally be overly concerned about the costs of utilizing the township attorney or special legal counsel to assist township officials with the special assessment district process, as the township attorney’s costs, as well as other administrative costs, can be added to the special assessment district roll if the district is approved.

Typically, special assessment districts to control aquatic weeds are governed by MCL 41.721 *et seq.* in townships. MCL 41.722(1)(l) provides that a township may create a special assessment district for “the eradication or control of aquatic weeds and plants.” A special assessment district for weed control can be initiated by the township board or by a property owner petition. The township board can proceed on its own motion with a special assessment district unless petitions signed by the record owners of land constituting more than 20% of the total land area in the proposed special assessment district are filed in opposition. Should that occur, the township cannot proceed with a special assessment district unless counter-petitions representing more than 50% of the total land area in the proposed special assessment district are filed with the township in favor of the special assessment district. Alternatively, property owners can initiate a special assessment district by filing petitions signed by landowners in the proposed

district. If the township requires that a petition be filed before proceeding with the special assessment district process, the township cannot proceed until it receives a petition signed by more than 50% of the landowners in the proposed district. Accordingly, it is generally best to submit a petition in favor of a special assessment to the township initially with signatures representing the owners of more than 50% of the land area of the proposed special assessment district so as not to waste time with “dueling petitions.”

Normally, the township board must hold three meetings (with the second and third meetings containing a public hearing component) in order to approve a special assessment district. The first meeting of the township board is typically held for the township clerk to report on the verification of the petitions (where petitions are involved) and for the township board to decide whether or not to proceed with the first formal hearing. Thereafter, after proper public notice, the first hearing is held to determine whether or not the special assessment district should be approved. If the special assessment district is approved, a second hearing is held. There are also notice requirements for the second hearing. The purpose of the second hearing is to review and approve the method by which the costs are allocated within the special assessment district (*i.e.*, confirming the assessment roll).

If the township board approves the special assessment district, it must decide how assessments will be levied (whether on a per lot, per lake frontage foot, lot size, or taxable value basis). The township board will also have to determine whether or not to include offlake or backlot properties having access to the lake and the duration of the district (*i.e.*, the number of years it will run). Special assessment districts can be set up for any number of years, normally up to a maximum of 20 years.

One of the most common errors made with regard to setting up a special assessment district for aquatic weed treatment purposes is timing. Specifically, it normally takes at least three to four months to complete the special assessment district process and can even take longer. Accordingly, if your lake association wishes to commence aquatic weed treatments in May, do not expect to commence the special assessment district creation process in February or March and still successfully complete the process by May. Ideally, the process should begin at least six to eight months before the date when the first aquatic weed treatments will occur or a contract will be signed with a professional weed treatment controller.

If payments pursuant to a special assessment district are proposed to be spread over several years or longer, the township will have to look at financing. Possibilities include loans from the township's general fund (although there are legal limits regarding such loans) and financing via bonds. Any property owner who pays on an installment basis over time can expect to pay interest. Of course, if the project involves simple weed treatments and it is done on a year-to-year basis with the special assessment levied during a given year going to that year's weed treatment, there normally would be no need for the township to finance the transaction (*i.e.*, borrow funds).

If a special assessment district is approved, the annual assessment bill for each parcel within the district will usually appear on one of the two yearly property tax bills. Although many property owners deduct the special assessment component of their annual property taxes on their income taxes, that is normally not lawful.

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SUMMARY – SPECIAL ASSESSMENT DISTRICTS

Advantages

- Special assessment districts tend to be less expensive to set up and administer than statutory lake boards.
- The local municipality has full control over the district (including making decisions regarding what type of aquatic weed control to utilize, which independent contractor will do the job, the duration of the district, etc.).
- It tends to be more responsive to the concerns of local property owners and lake associations.
- Generally, there is little need for spending funds on municipal attorneys, engineers or consultants, once the district has been set up.

Disadvantages

- They are often not practical where the lake or body of water involved straddles two or more municipalities (since each municipality would have to set up its own special assessment district).
- While such districts tend to work well for simple projects (such as aquatic weed control), they are less effective for lake problems involving extensive or multiple solutions (*i.e.*, dredging, the installation of a dam, etc.).

SUMMARY -- STATUTORY LAKE BOARDS

Advantages

- Where the lake or body of water involved straddles two or more municipalities, one statutory lake board properly set up can cover the entire lake or body of water, as well as some or all parts of the watershed involved.
- Statutory lake boards tend to work better for extensive projects such as large scale dredging, the installation of a dam, or oxygenation of a lake.

- Statutory lake boards are often more independent and allow for more input by potentially neutral third parties who serve on the lake board.
- A lake board tends to be better-suited for comprehensive watershed management, where multiple bodies of water are involved, studies must be conducted, etc.

Disadvantages

- They tend to increase costs for the property owners who are subject to assessment, since statutory lake boards often utilize engineers, legal counsel, consultants, etc., more than conventional special assessment districts.
- There tends to be a loss of local control, since the statute requires that a county commissioner, the county drain commission, and others serve as members of the statutory lake board.
- Statutory lake boards tend to be difficult to dissolve if they become a rogue board, are no longer needed, etc.
- The governing statute is ambiguous and confusing at times.
- There have been fewer statutory lake boards than special assessment districts and, as a result, there is less precedent and less long-term experience for lake boards.

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MCNALMS has produced a booklet which deals with many aspects of Michigan statutory lake boards. For more information, please contact the ML&SA office at (989) 831-5100 or MCNALMS at www.nalms.org.