

**CONFIDENTIAL LEGAL OPINION:
SUBJECT TO ATTORNEY-CLIENT PRIVILEGE**

April 20, 2023

Attorney-Client Privilege Waived by PLIB - 6/19/2023

Via Email

Pentwater Lake Improvement Board
100 S. State Street, Suite M-11
Hart, MI 49420

Dear PLIB Members:

Re: Pentwater Lake Improvement Board – Dredging and Other Questions

The Pentwater Lake Improvement Board (“Lake Improvement Board”) asked our office a series of questions including those related to the Lake Improvement Board assisting with dredging activities for Pentwater Lake. It is our general understanding that the Lake Improvement Board has long administered a lake improvement project generally encompassing aquatic weed control (but not dredging) and that there is a citizen’s dredging committee (“Dredging Committee”) that is looking for assistance from the Lake Improvement Board, among other entities, for dredging projects.

Relevant Michigan law would allow the Lake Improvement Board to approve dredging projects on Pentwater Lake, but only if the Board followed the necessary process to approve a new lake improvement project, which includes, among other things, holding public hearings. Moreover, as Part 309 only allows dredging projects on a “lake,” it does not authorize dredging projects generally on channels outside of Pentwater Lake. The Lake Improvement Board could also not simply utilize assessments (even surplus assessments) collected for the current on-going aquatic weed control project and “ear-mark” those to permissible dredging activities without completing the process to approve a new lake improvement project. Please see a concise summary to each of the Board’s questions below after a discussion of applicable law.



I. BACKGROUND OF PART 309 “PROJECTS” AND EXPENDITURES OF ASSESSMENTS

The Lake Improvement Board is a lake improvement board that has the power to approve lake improvement projects subject to the provisions of Part 309 of Michigan Natural Resources and Environmental Protection Act. MCL 324.30901 *et seq.* It generally cannot add to the scope of an “approved project” (e.g., add dredging to a weed control project) without formally approving a new project component through the statutory process.

Part 309, among other things, allows lake improvement boards to improve **inland lakes** by funding projects using special assessments. See e.g., MCL 324.30902(1) (plain language of Part 309 only allows for improvements of lakes and not associated watercourses like a channel). Because Part 309 uses the broad terms “improve” and “project,” it is our office’s opinion that Part 309 allows lake improvement boards to undertake any inland lake improvement project other than establishing a lake level (which is addressed in Part 307 of NREPA, MCL 324.30701 *et seq.*). See e.g., MCL 324.30908 (giving lake improvement boards the ability to determine the scope of a lake improvement project).

Once a lake improvement board approves a project, Part 309 generally limits assessments for a project to be limited to the original purposes of the project. For example, MCL 324.30908 requires a lake improvement board to specify the scope of a lake improvement project. Likewise, MCL 324.30912 requires the lake improvement boards to proceed with a specific project (“shall determine to proceed with **the project**”) (emphasis added). MCL 324.30927 requires a lake improvement board to compute the costs for **a project**.

Michigan courts interpret statutes by reviewing their plain language. *Krohn v Home–Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). If the plain language of a statute is unambiguous, then a court must enforce the statute as written. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

There is limited case law interpreting Part 309. Ironically, the case law addresses challenges to dredging projects. In *Crane*, the Court of Appeals held that Part 309’s various references to a singular “project” means that a proper reading of Part 309 only allows lake improvement boards to spend assessments on purposes outlined as part of an approved “project.” *Crane v Director of Assessing for Charter Twp of West Bloomfield*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2012 (Docket No. 301878), 2012 WL 1367692, p *4.

Notably in *Crane*, the Court of Appeals rejected a lake improvement board adding a dredging component to a long-term aquatic weed control project. *Id.* In summary, the Court found that any dredging project would have to be initiated and approved subject to the procedures to approve a “new” lake improvement project as dredging was a distinct improvement from weed control.

A non-exhaustive summary¹ of the procedures to establish a “new” lake improvement project under Part 309 are:

1. **Initiating Resolutions or Property Owner Petition:** Resolution by local unit of governments in which a lake (or part of a lake) are located in requesting a lake improvement board to initiate a project OR a project is initiated upon receipt of a property owner petition containing signatures of 2/3 of property owners abutting a lake.² See MCL 324.30902(1) and MCL 324.30906(2). Note if a requested project from local unit of governments or property owners are not for an inland lake improvement (e.g., an improvement to channels), those projects may not be approved under Part 309. This legal opinion will assume that any dredging project will be for a permissible project (e.g., the lake itself) as dredging channels is not permitted.
2. **Lake Improvement Board Scope:** The Lake Improvement Board would then determine the scope of any new project and must establish a special assessment district. MCL 324.30908.
3. **Report:** Next, the Lake Improvement Board is required under Part 309 to retain a licensed professional engineer to prepare a report with respect to the feasibility of the new project and its cost, among other things. See MCL 324.30909. The Lake Improvement Board would then review any report about the new project. See MCL 324.30910.
4. **Practicability Public Hearing:** The Lake Improvement Board would make a determination based on the engineering report related to the new project of whether it is practicable to conduct the project after a public hearing. See MCL 324.30910.
5. **Approval of New Project and Assessments:** If the new project is found practicable after the public hearing above, the Lake Improvement Board would proceed with the project and approve its plans and estimates of costs. See MCL 324.30912. Next, the Lake Improvement Board would create an assessment roll for the new project and hold a second public hearing to ultimately approve the project and its assessment roll.

¹ This process is summarized for this legal opinion. It may change depending on certain facts or circumstances of a particular situation.

² This assumes Pentwater Lake is a public lake under MCL 324.30901(g) (a lake accessible by the public by publicly owned lands, highways adjacent to publicly owned lands, or by bed of a stream).

II. DIRECT ANSWERS TO QUESTIONS PRESENTED BY THE LAKE IMPROVEMENT BOARD

Below are direct answers to questions asked by the Lake Improvement Board using the law and facts above.

1. Can the Lake Improvement Board contribute \$8,000 towards dredging³ each year based on a request from the Dredging Committee?

Unless the Lake Improvement Board approves a project that authorizes permissible dredging of Pentwater Lake using the Part 309 process above the answer is no. The *Crane* case makes it clear that a lake improvement board cannot add different project activities to approved projects. A lake improvement board cannot use a pre-existing aquatic weed control project (including assessments collected from that project) to then fund a different project activity like dredging. To do this, the Lake Improvement Board would have to approve a permissible dredging project.

2. Upon request of the Dredging Committee, can the Lake Improvement Board assess the Village of Pentwater and Pentwater Township \$20,000 in excess assessments to contribute towards dredging.

Again, the Lake Improvement Board could not do this unless it approved a permissible dredging project (e.g., for the lake) utilizing the “new” lake improvement project approval process above. If a new project were to be approved that authorized dredging, MCL 324.30912 allows assessments being levied against local units of government benefitted by a lake improvement board project.

3. Could the Lake Improvement Board contribute excess assessment funds collected from the prior weed control project to the Dredging Committee for dredging.

No, unless a dredging project was explicitly approved using the new lake improvement process outlined above. Part 309 is not generally clear on the process to utilize (or return) surplus assessments, but we are generally comfortable using surplus assessment after a public hearing process where property owners have the opportunity to provide input on a project.

³ Any dredging activities should be related to improvements to the lake and not other watercourses as Part 309 is a statute for inland lake improvements. See MCL 324.30902(1) (“provide for the improvement of a lake”).

4. Could surplus funds be used to contribute to a watershed committee if proposed at the next budget hearing?

This would depend on the authorized project activities specified in the latest resolution approving the Lake Improvement Board's weed control project and the purpose of the watershed committee. If the watershed committee is involved in aquatic weed control projects on the lake, the answer is possibly yes depending on the language of the project resolution. If the watershed committee's activities are not related to the aquatic weed control project on the lake (or are related to the watershed and not the lake itself), the funds likely cannot be used towards the committee. Because the Lake Improvement Board appears to need to renew assessments in 2023, it may be able to authorize funds for contribute to the watershed committee only if those funds would be used generally for purposes to improve the lake itself and are related to aquatic weed control or similar purposes. Before contributing any funds to the committee, the Lake Improvement Board should enter into a contract with the committee to specify the activities that the funds can be spent on to ensure compliance with the purposes of the lake improvement project.

5. Could the Lake Improvement Board be able to fund any studies or watershed improvement projects conducted by the Friends of Pentwater Watershed Committee and/or the Pentwater Lake Association? Who would be liable if an accident happens?

Similar to the answer above, if the on-going project approved by the Lake Improvement Board encompasses the ability for studies and watershed improvement projects, it may be possible to contribute funds to those entities, but it would require a review of the latest project approval resolutions and/or adding the purposes to new assessment renewals (assuming they relate to or enhance aquatic weed control activities and benefit the lake). Again, we'd strongly recommend an agreement before contributing funds to the Watershed Committee specifying what the funds must be used for and addressing the liability for accidents related to the projects to expressly answer the second question (and make the Watershed Committee responsible for any accidents).

CONCLUSION

I hope the above helps address various questions about how the Lake Improvement Board could contribute to dredging activities for Pentwater Lake. Generally speaking, the Board would have to formally approve a permissible dredging project (one that is for Pentwater Lake) before being able to make any contributions for a dredging project. Moreover, for purposes of questions regarding the Board providing various committees funds to conduct certain activities, those arrangements will only be permitted if they relate to activities of approved lake improvement projects (e.g., weed control). As always, do not hesitate to contact me with any additional questions.

Sincerely,



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